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INTERNATIONAL LAWYERS

Toronto *Washington DC*

Legal Memorandum on International Law and CSR Regulation

for
Prospectors & Developers Association of Canada

November 9, 2006

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MEMORANDUM

To: Tony Andrews, Ph.D., Executive Director
Prospectors & Developers Association of Canada

From: Robert Wisner
Appleton & Associates International Lawyers

Subject: **International Law and the Regulation of the Corporate Social Responsibility of the Canadian Extractive Sector in Developing Countries**

Date: November 9, 2006

I. Introduction

In June 2005, the 38th Parliament's Standing Committee on Foreign Affairs and International Trade ("SCFAIT") issued its Report, *Mining in Developing Countries and Corporate Social Responsibility*. In response to the SCFAIT Report, the Government of Canada has hosted National Roundtables on Corporate Social Responsibility and the Canadian Extractive Sector in Developing Countries.

The SCFAIT Report and certain submissions to National Roundtables held to date in Vancouver, Calgary and Toronto have recommended that the Government of Canada establish legal norms to ensure that Canadian companies are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining

companies.[1] In particular, the submission to the National Roundtable by the Canadian Network on Corporate Accountability ("CNCA") has recommended the creation of a civil cause of action for violation of the *Crimes against Humanity and War Crimes Act*, the imposition of disclosure and governance obligations on Canadian parent companies and the direct regulation of the environmental standards applicable to Canadian mining companies in developing countries.[2]

In light of these recommendations and submissions, the Prospectors & Developers Association of Canada ("PDAC") has asked us to consider the relevant rules of international law that would apply to these proposals. In addition, PDAC has asked us to discuss available options to increase compliance with existing Corporate Social Responsibility ("CSR") guidelines in a manner that is consistent with Canada's obligations under international law.

A. Executive Summary

In our view, the Government of Canada would violate basic rules of international law by enacting legislation as recommended in the SCFAIT Report and the CNCA submission. Such legislation would violate the sovereignty of developing countries by prescribing rules that have no substantial and genuine connection to events occurring on Canadian territory. Alternative grounds for extraterritorial jurisdiction, such as the nationality principle and the universality principle, do not apply in this case. Foreign subsidiaries of Canadian companies do not have Canadian nationality. Canada and other countries have vigorously objected to efforts by the United States to regulate the extraterritorial activities of the foreign subsidiaries of American companies. While Canada has adopted universal criminal jurisdiction over crimes against humanity, war crimes and genocide, Canadian and international courts have denied the existence of universal civil jurisdiction. Canada and other countries have objected to the exercise of universal civil jurisdiction

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[1] Standing Committee on Foreign Affairs and International Trade, *Fourteenth Report: Mining in Developing Countries*, 38th Parliament, 1st Session, (June 2005) [hereinafter: SCFAIT Report], Recommendation 4.

[2] See C. Forcese, "Debunking the Myths on the Feasibility of CSR Regulatory Reform in Canada" [hereinafter: "Debunking the Myths of CSR"], submitted on behalf of the Canadian Network of Corporate Accountability, (September 2006).

by the United States. Canada's violation of the international law prohibition against extraterritoriality will subject it to retaliation by other states and make it more difficult for Canada to oppose the extraterritorial exercise of jurisdiction by the United States.

All apart from issues of extraterritoriality, there are strong cautionary lessons to be drawn from the U.S. experience with civil actions based on alleged violations of international criminal law. The U.S. *Alien Tort Statute*, which permits such claims, has led to an explosion of litigation against multinational companies operating in developing countries. The expansive interpretations of international criminal law by U.S. courts have generated substantial uncertainty. This uncertainty creates both political and economic costs, including interference with foreign policy, judicial imperialism and damage to international trade and investment.

The Government of Canada may improve compliance with CSR principles without resorting to legislation that violates international law and repeats the errors of the American experience. It may do so by identifying which of the many voluntary CSR initiatives are worthy of support and by clarifying their practical application. In this memorandum, we survey some of the many international CSR guidelines, including both guidelines of general application and those that are specific to the mining industry. As shown in this survey, many of these guidelines contain unduly vague principles that provide little guidance to multinational enterprises or unduly burdensome requirements that are not sufficiently flexible for smaller companies. Indeed, it is precisely for these reasons that the guidelines are voluntary rather than legally binding.

The Government of Canada should work with industry to identify a subset of existing guidelines that offer the best balance of certainty and flexibility. Mechanisms to improve compliance with these guidelines include developing existing National Contact Points, an ombudsman's office or an inspection panel capable of issuing interpretations and non-binding recommendations.

B. Issues Addressed

At the outset, it is important to clarify that this memorandum is limited to issues of international law raised by the SCFAIT's Report's recommendations and prior National Roundtable submissions. As these reports and submissions recognize, CSR issues arise primarily where existing regulations in developing countries are weak or non-existent. In such circumstances, transnational forms of regulation are inherently a second-best solution compared to capacity-building and governance improvements in host countries. This memorandum does not discuss policies to foster international development nor does it address market-based incentives for compliance with CSR standards such as conditions on government financing.[3]

In addition, in order to focus the scope of the enquiry, this memorandum does not address "federalism" issues relating to the division of powers between the federal and provincial governments. Some of the submissions to the National Roundtable address matters that are clearly within the provinces' exclusive jurisdiction, such as rules relating to when courts will refuse to hear disputes that are best resolved in other countries (*forum non conveniens*).[4] These rules derive from well established common law doctrines or, in the case of Quebec, from the Quebec *Code of Civil Procedure*. Any changes to these rules would be squarely within the provinces' exclusive jurisdiction over property and civil rights.

Other proposals, such as the creation of federal civil actions or disclosure requirements, involve more complex federalism questions that are beyond the scope of this memorandum. It is important to note, however, that rules limiting extraterritorial regulation apply to the provinces as

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[3] Export Development Canada has already adopted a number of guidelines vis-a-vis corporate social responsibility, in particular on matters relating to anti-corruption and environmental protection. It is also important to note that government procurement incentives, are not material in the mining sector. To the extent that such procurement incentives are considered, the provisions of NAFTA Chapter 10 and the WTO Agreement on Government Procurement would likely prohibit their application to non-Canadian companies.

[4] See, for example, the submission of Sara L. Seck at the Toronto Roundtable discussion series, (13 Sept. 2006), available online: <http://geo.international.gc.ca/cip-pic/library/CSR_Toronto_Submission_Sara_Seck.doc> (date accessed: 30 October 2006).

well as the federal government, both as a matter of Canadian constitutional law[5] and as a matter of international law.[6]

C. Our Qualifications to Provide This Memorandum

This memorandum considers rules of customary international law addressing the extraterritorial exercise of jurisdiction by states and the content of international norms applicable to multinational corporations. It also addresses some of the policy aspects of these issues. My qualifications to discuss these matters are set out in my *curriculum vitae*, a copy of which is attached as Appendix A.

II. Extraterritorial Regulation of Canadian Mining Companies Would Violate Basic Rules of International Law

The SCFAIT Report and submissions to the National Roundtable propose that the Government of Canada adopt laws and regulations relating to the activities of mining companies in developing countries. Any such proposal raises concerns that it violates rules of international law prohibiting states from exercising jurisdiction outside of their own territory. This memorandum begins by describing the nature of these rules and their importance to Canadians.

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[5] See, for example, *Constitution Act , 1867* (U.K.), R.S.C. 1985, App. II, No. 5, §92, in which most of the powers of the Provincial Legislatures are clearly limited to matters within the territory of each respective Province.

[6] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998) at 310: "The governing principle [in international law] is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter."

A. The Customary International Law Rule Against Extraterritorial Regulation

It is a bedrock principle of international law that each sovereign state is equal and entitled to prescribe laws within its territory.[7] One of the principal consequences of the sovereignty and equality of states is that each state must respect the area of exclusive jurisdiction of other states.[8]

Territoriality is universally recognized in international law as the primary ground for asserting jurisdiction. Where a transaction involves facts that occur in more than one territory, international law requires a "substantial and genuine" connection between the subject-matter of the transaction and the territory of the state that seeks to exercise jurisdiction.[9]

Proposals that seek to create legal obligations on Canadian companies for actions of their subsidiaries in developing countries have no connection with events that occur within Canadian territory. They are based solely on the nationality of the shareholders (and, in some cases, management) of corporations operating in developing countries. As a result, they violate the sovereign rights of developing countries to determine the legal standards applicable to mining projects in their territories.

Developing countries have pressing needs for the jobs, capital and technology transfer that are associated with foreign investment in their natural resources sectors. In exercising their sovereign rights, such countries may make different trade-offs between economic development and environmental protection or labour standards than those that are made in wealthier countries.

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[7] See, for example, *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Art.2, para. 1.

[8] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998) at 289.

[9] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998) at 301, where he states: "The starting point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial." He then elaborates by clarifying that this territorial theory has been refined by the notion that there must be a "substantial and genuine connection between the subject-matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised..."

Imposition of legal standards by the Government of Canada on mining projects that are exclusively in the territories of developing countries would violate the sovereignty of such states.

Contrary to the statements made in the CNCA submission to the National Roundtable, the prohibition against the exercise of extraterritorial jurisdiction is not simply a political concern or a diplomatic nicety.[10] It is a legally binding rule of international law. Although the rule is not codified in a treaty, it is customary international law, i.e. a widespread practice of states that is followed out of a sense of legal obligation. Canada's violation of this rule may be punished by other states through diplomatic protests, retaliation or, with Canada's permission, submission of the dispute to the International Court of Justice. Canada's failure to observe this rule will also weaken Canada's ability to invoke it defensively against large powers, such as the United States, who have sought to exercise extraterritorial jurisdiction against Canada's wishes.

B. Alternatives To the Territoriality Principle Do Not Apply

Recognizing the limits that international law places on the exercise of extraterritorial jurisdiction, the CNCA submission claims that Canada may prescribe regulations on legal grounds other than territoriality, such as the nationality principle or the universality principle.[11] As shown below, neither of these principles apply to any of the proposed forms of CSR regulation.

1. Nationality-based Jurisdiction Does Not Extend To Foreign Subsidiaries

In some cases, international law permits states to exercise jurisdiction on the basis of nationality rather than on the basis of territory. The CNCA submission notes that Canada exercises jurisdiction over its nationals who commit sexual crimes against children outside of Canada. It then observes, correctly, that international law generally defines the nationality of a corporation by its place of incorporation (or, in the alternative, by the place of its registered office). The CNCA

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[10] See Forcese, "Debunking the Myths of CSR" at 4.

[11] Forcese, "Debunking the Myths of CSR" at 4. Two other permissive grounds for jurisdiction in international law, the passive personality principle and the protective principle, are not relevant in these circumstances as they apply to the protection of Canadian nationals. Here, rules are being proposed for the alleged benefit of non-Canadians.

submission then incorrectly extrapolates from these principles to argue that Canada may regulate the overseas activities of Canadian mining companies on the basis of nationality.[12]

The fundamental flaw in the CNCA's submission on this point is its disregard for the separate legal personalities of the foreign subsidiaries of Canadian companies. Most foreign investment, in the mining sector or elsewhere, is carried out through the establishment of subsidiaries incorporated under the law of the host state. By definition, these foreign subsidiaries are not Canadian nationals. International law does not permit the "lifting of the corporate veil" of these foreign subsidiaries except in exceptional circumstances, such as fraud.[13]

CNCA seeks to circumvent this difficulty by arguing that the Government of Canada should impose obligations on Canadian parent companies to compel adherence to applicable standards by their subsidiaries. Another proposal would involve the creation of a federal securities law to require disclosure of the activities of foreign subsidiaries even where these are not material information for shareholders of Canadian companies.[14] International law does not permit states to exercise extraterritorial jurisdiction in such an indirect manner. Canada and other countries have vigorously protested similar actions by the United States.

For example, in 1992, the United States expanded its economic sanctions against Cuba to include the activities of all foreign subsidiaries of American corporations. Most countries, including Canada, objected to the extraterritorial aspects of this legislation. Canada even enacted a blocking order under the *Foreign Extraterritorial Measures Act* requiring Canadian subsidiaries of American corporations to disregard instructions not to trade with Cuba. Similar measures followed the passage of the Helms-Burton Act in 1996.[15]

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[12] See generally Forcese, "Debunking the Myths of CSR", Part III.

[13] See *Case Concerning the Barcelona Traction, Light & Power Co.*, [1970] I.C.J. Rep. 3 at paras. 55-63. Although some international treaties modify the customary rules on nationality of foreign subsidiaries, these are exceptions that reinforce the general rule. See, for example, *Convention on the Settlement of Investment Disputes Convention between States and Nationals of Other States*, Article 25(2)(b).

[14] Forcese, "Debunking the Myths of CSR" at 19.

[15] See Foreign Affairs and International Trade Canada, "The United States Embargo on Cuba" (September 2006), online: <http://www.infoexport.gc.ca/ie-en/DisplayDocument.jsp?did=65615> (date accessed: 17 Oct. 2006).

The position of the European Commission is the same. It has declared that:

> U.S. claims to jurisdiction over European subsidiaries of U.S. companies and over goods and technology of U.S. origin located outside the U.S. are contrary to the principles of international law and can only lead to clashes of both a political and legal nature. These subsidiaries, goods and technology must be subject to the laws of the country where they are located.[16]

Just as U.S. disapproval of the human rights record and the internal policies of the Cuban government does not justify attempts to regulate the activities of the foreign subsidiaries of American companies, so too Canadian disapproval of the human rights records or environmental laws of other developing countries does not justify regulation of the subsidiaries of Canadian companies.

2. Universal Civil Jurisdiction Is Not Legitimate

Pursuant to the principle of universal jurisdiction, some international wrongs are deemed so offensive that every state is entitled to criminalize these acts. The typical examples of crimes of universal jurisdiction are crimes against humanity, war crimes and genocide. The CNCA observes that Canada has accepted the principle of universal criminal jurisdiction by enacting the *Crimes against Humanity and War Crimes Act* ("CAHWCA").[17] It then argues that the government of Canada is entitled to create a civil cause of action for breach of the CAHWCA or other international crimes.[18]

The CNCA submission ignores the distinction between universal criminal jurisdiction and universal civil jurisdiction. While universal criminal jurisdiction is not without controversy, the

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[16] European Community letter to the U.S. Congress (March 1984), cited in M. Shaw, *International Law*, 5th Ed. (New York: Cambridge University Press, 2003) at 617-618.

[17] *Crimes Against Humanity and War Crimes Act*, R.S.C. 2000, c. 24.

[18] Forcese, "Debunking the Myths of CSR" at 17.

assertion of universal civil jurisdiction is generally acknowledged to be a violation of customary international law rules against extraterritoriality.

Canadian courts have categorically rejected the expansion of universal jurisdiction to civil actions, even in cases involving torture. Thus, the Ontario Court of Appeal has declared that:

> ... there is no basis for departing from the real and substantial connection test in this kind of case. There is nothing in the [*State Immunity Act*] nor in any treaty by which Canada is bound that would require Ontario to apply a rule of universal jurisdiction, ..., to a civil action for torture abroad by a foreign state. Nor does there appear to be any norm of customary international law to that effect. There is no wide-spread legal acknowledgment by states that civil jurisdiction is to be accorded on this basis for an action based on torture.[19]

The best known exercise of universal civil jurisdiction is the *Alien Tort Statute*, also known as the *Alien Tort Claims Act* ("ATCA"), which gives U.S. federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[20] The U.S. experience with ATCA and the policy controversies surrounding it are discussed at length below. However, it is important to note at the outset that this statute is generally regarded as a violation of customary international law rules against extraterritoriality.

Thus, the International Court of Justice has observed that the United States' unilateral exercise through the ATCA of the function of guardian of international values "has not attracted the approbation of States generally".[21] Further evidence of this disapproval is the intervention in ATCA cases by various middle powers that are heavily dependent on international trade and investment, such as the governments of Canada, Australia, Switzerland and the United Kingdom. These governments have voiced strong opposition to the purported exercise of universal civil

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[19] *Bouzari* v. *Islamic Republic of Iran*, [2004] 243 D.L.R. (4th) 406 at para. 28 (Ont. C.A.).

[20] *Alien Tort Claims Act*, 28 U.S.C. §1350 (2000).

[21] *Arrest Warrant of 11 April 2000*, [2002] I.C.J. Rep. 77 at para. 47.

jurisdiction.[22] The European Commission has also expressed reservations about the extraterritorial application of the ATCA.[23]

C. Canada's Reliance on International Law Rules Against Extraterritoriality

Adoption of the recommendations of the SCFAIT Report or the CNCA National Roundtable submission would constitute a dramatic departure from Canada's past practices. As the CNCA submission observes, "Canada has been quite conservative in extending its statute law beyond its border."[24] In our opinion, this practice follows from Canada's acknowledgment and respect for the limits that international law places on the exercise of extraterritorial jurisdiction rather than ignorance of its legal authorization to do so.

Canadian courts have also demonstrated their respect for these rules of international law. They have construed Canadian statutes as requiring a "real and substantial link" with Canada and have required a "real and substantial connection" before assuming adjudicatory jurisdiction or recognizing foreign judgments.[25] At the same time, Canada's *Foreign Extraterritorial Measures Act* ("FEMA") has sought to prohibit compliance with American attempts to exercise extraterritorial jurisdiction.

If Canada were to abandon its traditional respect for the jurisdiction of other states, it would open itself up to the same sorts of retaliatory measures as Canada itself has adopted in FEMA. In addition, Canada would find it more difficult to protect its own jurisdiction in its advocacy before

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[22] Canada's opposition was expressed in a diplomatic note regarding the ATCA claim against Talisman Energy. See *The Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 2005 WL 2082846. See also Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Petitioner in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004).

[23] Brief of *Amicus Curiae* by the European Commission in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004).

[24] Forcese, "Debunking the Myths of CSR" at iii.

[25] *Libman* v. *The Queen*, [1985] 2 SCR 178; *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 SCR 1077; and *Beals* v. *Saldanha*, [2003] 3 SCR 146.

U.S. courts. For example, Canada's intervention before the U.S. Supreme Court was instrumental in persuading that court to limit the extraterritorial reach of U.S. antitrust law.[26] Canada has also intervened to protect the leading Canadian company, Research in Motion Ltd., from the extraterritorial application of U.S. patent law.[27]

III. Cautionary Lessons from the U.S. Alien Tort Claims Experience

The CNCA submission argues that the enactment of a Canadian *International Crimes Compensation Act* would be a permissible and desirable means of holding Canadian companies accountable for serious violations of international law.[28] As we have seen, such a statute would not be permissible due to its violation of restrictions against extraterritorial regulation. We now consider whether, all apart from issues of extraterritoriality, such a statute would be desirable.

The U.S. experience with similar litigation under the ATCA creates good reason to doubt the desirability of a Canadian *International Crimes Compensation Act*. Although the creation of such a civil cause of action would appear relatively innocuous, the substantial uncertainty regarding the scope of liability for Canadian companies could generate an explosion of litigation that would deter international trade and investment and interfere with the government's conduct of foreign policy.

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[26] Brief for the Government of Canada as *Amicus Curiae* in *F. Hoffman-LaRoche, Ltd.* v. *Empagran, S.A.*, 125 U.S.S.C. 2359 (2004).

[27] Brief for the Government of Canada as *Amicus Curiae* in *Research in Motion Ltd.* v. *NTP, Inc.*, 542 U.S. 155 (2004).

[28] Forcese, "Debunking the Myths of CSR" at 14.

A. The U.S. Experience with ATCA Litigation

1. The ATCA Litigation Explosion

The ATCA gives U.S. courts jurisdiction over claims by foreigners for torts breaching international law.[29] Although passed by the first U.S. Congress in 1789, it was largely ignored until 1980, when a Paraguayan successfully invoked the statute to win over U.S.$10 million from a Paraguayan Inspector General of Police for torturing the plaintiff's son to death.[30] Since then, claims have expanded beyond such "state actor" cases to include claims against corporations investing in countries whose governments were alleged to breach international law.

A 2003 study estimated that, by that time, more than 50 claims had been brought against multinational corporations and that the damages sought exceed U.S.$200 billion. Plaintiffs regularly take advantage of class action rules, impose significant discovery costs and can tarnish corporate reputations through press releases that are protected from defamation suits.[31] Natural resource companies are among the most frequent corporate defendants in ATCA claims. Most of these companies are not lesser known, disreputable players, but prominent industry members such as mining companies Rio Tinto and Freeport-McMoran.[32] Although none of these claims has yet been successful on the merits, there are reports of some substantial settlements.[33]

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[29] The entire ATCA reads as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." See *Alien Tort Statute*, 28 U.S.C. §1350 (2000).

[30] *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[31] G.C. Hufbauer and N. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, (Institute for International Economics: 2003) at 7.

[32] See G.C. Hufbauer and N. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, (Institute for International Economics: 2003), Appendix A.

[33] P. Magnusson, "A Milestone for Human Rights" *Business Week* (24 January 2005) 63.

2. Expansive and Ambiguous Interpretations of International Criminal Law by U.S. Courts

The CNCA submission correctly observes that, since the ATCA permits claims for any breach of vaguely defined rules of customary international law, its scope is unclear and unpredictable.[34] It is wrong to assume, however, that a Canadian statute limiting civil actions to breaches of international criminal law would not suffer from the same flaws. Many ATCA claims against corporations are based on international criminal law (which is now a subset of customary international law). The U.S. courts' consideration of these claims should serve as an illustration of the uncertain scope of liability that would follow from the enactment of a Canadian *International Crimes Compensation Act*.

In U.S. ATCA cases based on international criminal law, plaintiffs have alleged that private firms:

a) aided and abetted the foreign government that committed the alleged criminal act ; or
b) were acting "under color of law" or were "joint actors" with the foreign government.

Under these theories, foreign state conduct is attributed to private firms in order to impose liability.[35]

The case law to date suggests that there is substantial uncertainty about the scope of liability for actions based on international criminal law. For example, in the *Unocal* case,[36]

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[34] Forcese, "Debunking the Myths of CSR" at 14.

[35] See G.C. Hufbauer and N. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* (Institute for International Economics: 2003) at 5.

[36] *Doe* v. *Unocal Corp*., 963 F. Supp. 880 (C.D. Cal. 1997).

Burmese plaintiffs claimed that an oil company breached the ATCA through the company's role in the construction of a pipeline in Burma. The plaintiffs alleged that the Burmese military used forced labour to build the pipeline.

The court accepted that the company would breach the ATCA if the company "aided and abetted" any breach of international law by the Burmese military. It then defined the scope of aiding and abetting in broad, vague terms as giving "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."[37] The court also left open the possibility that it would find the company breached the ATCA through providing "moral support" alone.[38] In response to this decision, the oil company settled out of court, reportedly for U.S. $30 million.[39]

A similar "aiding and abetting" claim against Canadian company Talisman Energy arising from its exploration activities in Sudan was ultimately dismissed for lack of evidence.[40] However, this dismissal was only after years of costly, complex litigation. The adverse publicity from the litigation ultimately led Talisman to sell its interests to an Indian company.[41]

The second strand of cases, based on "color of law" or "joint actor" theories, is especially problematic for companies operating in the natural resources sector. An example of such a claim is *Sarei* v. *Rio Tinto*, which involved a 10 year civil conflict that followed an uprising at Rio Tinto's mine in Papua New Guinea.[42] Plaintiffs were permitted to proceed with allegations that Rio Tinto was liable for war crimes and crimes against humanity committed by the government of Papua

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[37] *Doe* v. *Unocal Corp*., 963 F. Supp. 880 (C.D. Cal. 1997) at 947.

[38] *Doe* v. *Unocal Corp*., 963 F. Supp. 880 (C.D. Cal. 1997) at 951.

[39] P. Magnusson, "A Milestone for Human Rights" *Business Week* (24 January 2005) 63.

[40] *The Presbyterian Church of Sudan* v. *Talisman Energy, Inc.,*2006 WL 2062145 at 26.

[41] *The Presbyterian Church of Sudan* v. *Talisman Energy, Inc.,*2006 WL 2062145 at 21.

[42] *Sarei* v. *Rio Tinto*, 456 F. 3rd 1069 (9th Cir. 2006).

New Guinea on the theory that its comments encouraged a military response by the government.[43] Given the degree of co-operation between foreign investors and governments in any mining development, disproving such allegations requires defendants to expend substantial resources in the collection of evidence relating to communications with government officials over extended periods of time.

B. Costs of Adopting the U.S. Approach

While the attractions of civil claims for breaches of international criminal law are understandable, knowledgeable commentators have identified a number of negative political and economic consequences of U.S. ATCA litigation.[44] These include:

a. Interference With Foreign Policy: ATCA litigation has created a form of "plaintiff's diplomacy" that has shifted responsibility for the sanctioning of foreign governments away from elected officials to private plaintiffs and courts. The balancing of the benefits of economic engagement with countries with poor human rights records versus the merits of economic sanctions is inherently political. In ATCA litigation, the delicate political choices of elected officials are replaced by purely legalistic considerations. For example, in the *Talisman* case, the U.S. court assumed jurisdiction over the objections of the government of Canada. The Canadian government had determined that peaceful resolution of Sudan's internal disputes was best achieved through a "carrot and stick" approach that mixed humanitarian aid, economic development and the granting and denial of trade support services;[45]

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[43] *Sarei* v. *Rio Tinto*, 456 F. 3rd 1069 (9th Cir. 2006) at para. 5.

[44] C.A. Bradley, "The Costs of International Human Rights Litigation" (2001) 2 Chi. J. Int'l L. 457; G.C. Hufbauer and N. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* (Institute for International Economics: 2003).

[45] C.A. Bradley, "The Costs of International Human Rights Litigation" (2001) 2 Chi. J. Int'l L. 457 at 460-461; *The Presbyterian Church of Sudan* v. *Talisman Energy, Inc*., 2005 WL 2082846.

b. Judicial Imperialism: Decisions of a foreign court with no genuine connection to the dispute lack the legitimacy of local courts, truth commissions or international bodies such as the International Criminal Court.[46] In addition, a civil right of action for international crimes entails the possibility of suits against foreign governments and their representatives. Foreign governments may then retaliate by allowing claims against Canadian government officials;

c. Costs to the Canadian Economy: The risks of substantial civil liability may deter Canadian investment in developing countries, as well as deterring foreign investors considering Canada as a base for their global mining operations. Given the importance of the natural resource sector to the Canadian economy, these costs could be substantial. A study by the well-respected Institute for International Economics estimated that the dampening effect of ATCA claims on U.S. international trade and investment implied that 180,000 export-related jobs could be at risk, as well as a further 130,000 jobs dependent on inbound investment. While dislocated workers may eventually find new jobs, the impact to such dislocated workers would be an average of U.S.$4,000 per year per job lost;[47] and

d. Costs to Developing Countries: By increasing the already substantial risks of investment in developing countries, a Canadian civil liability regime could damage the ability of these countries to pursue economic development through international trade, investment and access to credit. Attracting foreign direct investment is widely seen by developing countries as an essential basis for economic growth and development, as evidenced by the more than 2,300 bilateral investment treaties that they have signed. The Institute for International Economics has estimated that the

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[46] C.A. Bradley, "The Costs of International Human Rights Litigation" (2001) 2 Chi. J. Int'l L. 457 at 469-470.

[47] G.C. Hufbauer and N. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, (Institute for International Economics: 2003) at 38.

costs of U.S. ATCA litigation to developing countries could reduce their GDP by as much as U.S.$20 billion and put 1.9 million jobs at risk.[48]

While the potential costs of an *International Crimes Compensation Act* could be significant, the benefits are uncertain. The potential for civil liability is unlikely to deter the worst human rights offenders beyond whatever deterrence is already achieved through criminal liability under the *Crimes Against Humanity and War Crimes Act*.

Furthermore, contrary to the CNCA submission, a Canadian civil liability regime is also unlikely to remove ATCA cases from the U.S. courts to Canada. Plaintiffs will be able to point to remaining juridical advantages of the ATCA over Canadian legislation, such as the ability to bring claims for breaches of other branches of customary international law rather than just crimes against humanity and war crimes.[49] Only in cases where ATCA claims are based solely on international criminal law will removal to Canadian courts be likely. Such victories will be obtained at the cost of importing all the remaining difficulties of the U.S. approach into Canada.

IV. Summary of Key International CSR Initiatives

The Government of Canada may improve compliance with CSR principles without resorting to legislation that violates international law and repeats the errors of the American experience. It may do so by identifying which of the many voluntary CSR initiatives are worthy of support and by clarifying their practical application.

There is an abundance – indeed a surfeit – of CSR initiatives that may be relevant to Canadian mining companies operating overseas. For this reason, it would be impossible to

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[48] G.C. Hufbauer and N. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, (Institute for International Economics: 2003) at 39.

[49] In the Rio Tinto case, for example, the plaintiffs were allowed to proceed with alleged violations of customary international law based on racial discrimination and international environmental law in addition to war crimes and crimes against humanity. See *Sarei* v. *Rio Tinto*, 456 F. 3rd 1069 (9th Cir. 2006).

conduct an exhaustive review of all of them. As a result, the present section will review only a sampling of those international initiatives that are the most prominent. After reviewing international initiatives of general application, we will consider those that are specific to the extractive resources sector.

A. CSR Initiatives of General Application

1. The OECD Guidelines for Multinational Enterprises

Initially drafted in 1976, the OECD Guidelines for Multinational Enterprises ("OECD Guidelines")[50] were the first intergovernmental CSR initiative of general application aimed at multinational enterprises ("MNEs"). Updated in 2000,[51] the OECD Guidelines are extremely broad in scope. Incorporating the 1999 OECD Principles of Corporate Governance, the OECD Guidelines purport to apply to "all major areas of business ethics, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation."[52]

The OECD Guidelines are directed primarily towards OECD member-states – including Canada – and provide guidance as to how national policies ought to contemplate the regulation of MNEs that are nationals of such states. Their most distinctive feature is that they are the only international CSR initiative that obliges member-states to monitor their implementation. This is done through what are called National Contact Points. These are government offices charged with promoting the OECD Guidelines and handling enquiries and complaints at the domestic level.

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[50] OECD, *Declaration on International Investment and Multinational Enterprise*, 15 I.L.M. 967 (21 June 1976) .

[51] For the 2000 update, see OECD, online: <http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html>, [hereinafter 2000 Guidelines], (date accessed: 22 October 2006).

[52] OECD, "About the Guidelines for Multinational Enterprises", online: <http://www.oecd.org/about/0,2337,en_2649_34889_1_1_1_1_1,00.html>, (date accessed: 22 October 2006).

Given their broad scope, the OECD Guidelines are also generally seen by industry as too generic to be of much practical value.[53] For example, in their section dealing with environmental concerns, the OECD Guidelines call upon MNEs to "establish and maintain a system of environmental management appropriate to [their specific circumstances],"[54] and to "provide adequate education and training to employees in environmental health and safety matters."[55] As it would be impossible for such a document to detail exactly what would be an "appropriate" environmental management system for all MNEs, or similarly what level of environmental training would be "adequate", it is equally impossible for the Guidelines to be translated directly into practical directions for MNEs on how to conduct their operations, let alone into legally binding rules.

2. *The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy & the ILO Declaration on Fundamental Principles and Rights at Work*

Stemming as it does from an organization with a more narrow mandate, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ("Tripartite Declaration")[56] is somewhat more focused than the OECD Guidelines. Developed in 1977, the Tripartite Declaration focuses exclusively on issues pertaining to employment and industrial relations. Like the OECD Guidelines, the Tripartite Declaration – together with its supplement, the 1998 Declaration on Fundamental Principles and Rights at Work[57] – is directed first-and-foremost

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[53] OECD, "The Relevance of the OECD Guidelines for Multinational Enterprises to the Mining Sector and the Promotion of Sustainable Development", online: <http://www.oecd.org/dataoecd/45/4/1819638.pdf>, (date accessed: October 22, 2006).

[54] 2000 Guidelines, Art.V(1).

[55] 2000 Guidelines, Art.V(7).

[56] ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422 (16 November 1977).

[57] ILO, Declaration of Fundamental Principles and Rights at Work, 37 I.L.M. 1237 (18 June 1998) [hereinafter: Tripartite Declaration].

towards member-states, and focuses on how their policies ought to contemplate the regulation of MNEs to better respect the interests of labour. Also like the OECD Guidelines, the Tripartite Declaration is a largely hortatory document that espouses broad-sweeping and general principles – principles that provide little by way of concrete guidance to MNEs on how to conduct their business overseas.

For example, the Tripartite Declaration states as follows: "Multinational enterprises, particularly when operating in developing countries, should endeavour to increase employment opportunities and standards, taking into account the employment policies and objectives of the governments, as well as security of employment and long-term development of the enterprise."[58] While laudable in intent, the ambiguity of such statements does little to clarify the concrete steps that MNEs might take to achieve this goal. Unfortunately, such ambiguity is an inherent and inescapable aspect of all international Declarations. Indeed, this is in part why such instruments are not intended to be legally binding in the first place.

3. The U.N. Global Compact

In contrast to the OECD Guidelines and the ILO Tripartite Declaration, rather than addressing MNEs only through the intermediary mechanisms of nation-states, the U.N. Global Compact purports to apply to MNEs directly. Launched at the behest of U.N. Secretary General Kofi Annan in 2000, the Global Compact draws from the aforementioned declarations – together with the Rio Declaration on Environment and Development[59] – and invites MNEs to observe ten guiding principles ranging from matters concerning human rights, environmental protection, labour rights and anti-corruption within their respective "spheres of influence". The Global Compact further invites MNEs to use its institutional framework to engage in constructive dialogue and interactive learning with governments and NGOs.

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[58] Tripartite Declaration, para. 16.

[59] Rio Declaration on Environment and Development, 31 I.L.M. 876 (14 June 1992).

Like the OECD Guidelines and ILO Tripartite Declaration, the Global Compact provides little by way of ready-made and concrete guidance to MNEs in terms of what specifically they can do to render their operations more sustainable. Indeed, the text of the Global Compact is so minimalist that – without any further elaboration – it simply calls upon MNEs to, for example, "support and respect the protection of internationally proclaimed human rights"[60] and "undertake initiatives to promote greater environmental responsibility."[61] The intent is clearly not to provide detailed guidelines as to how MNEs might accomplish these goals; rather, it is simply to invite them to engage in a wider process by which they might learn how to translate for themselves such general principles into more specific programs of action.

4. The U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("U.N. Norms") is a recent and extremely controversial document drafted by the U.N. Sub-Commission on the Promotion and Protection of Human Rights.[62] While much of their content echoes and consolidates wide-ranging principles espoused by already existing international human rights documents, the U.N. Norms also go well beyond established international human rights law. They do so by outlining an incredibly broad set of the rights MNEs are called upon to safeguard; indeed, it might be argued that they stretch the boundaries of what constitutes a 'human right' beyond all recognition. This is perhaps best captured in the following provision:

> Transnational corporations and other business enterprises shall respect economic, social and cultural rights, as well as civil and political rights that contribute to their realization, in particular the rights to

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[60] Global Compact, Principle 1.

[61] Global Compact, Principle 8.

[62] ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 2003, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 [hereinafter UN Norms].

> development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience and religion, and freedom of opinion and expression.[63]

As with all other international CSR initiatives, the U.N. Norms make ample room for such generalities, yet are considerably more parsimonious when it comes to specifics on how to put them into practice.

While the U.N. Norms are replete with substantive provisions such as these, their most controversial feature is a procedural one: specifically, the U.N. Norms attempt to force MNEs to incorporate their terms into their contractual undertakings with one another – in effect bypassing the traditional primacy of state sovereignty in international law. This represents an unprecedented innovation in international law – one that has generated a significant amount of controversy.

Due to such expansive and controversial provisions, it is important to note that the U.N. Norms remain only a draft document, and one with a seemingly bleak future at that. Indeed, it would appear that they will neither be endorsed by the U.N. Commission on Human Rights ("UNCHR"), nor by consequence by the U.N. Economic and Social Council, at least not in their current form. Not only has the UNCHR expressly refused to grant the U.N. Norms its approval,[64] but it has asked that they undergo further review.[65] This is a task it assigned to Special Representative John Ruggie. In his first report – issued in February 2006 – Special Representative Ruggie detailed a tempered yet clearly damning account of the U.N. Norms.[66] While a final report is not expected until 2007, this interim report does not bode well for the future of the U.N. Norms, at least as currently formulated.

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[63] UN Norms, para. 12.

[64] ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights, 2005, UN Doc. E/CN.4/2005/91.

[65] ECOSOC, Commission on Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises, Res. 2005/69, UN Doc. E/CN.4/2005/L.10/Add.17 (20 April 2005).

[66] ECOSOC, Commission on Human Rights, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 2006, UN Doc. E/CN.4/2006/97.

5. The International Finance Corporation's Performance Standards on Social and Environmental Sustainability

A still more recent approach to the regulation of MNEs may be found in the IFC's Performance Standards on Social and Environmental Sustainability ('Performance Standards'), which were updated on April 30, 2006.[67] These are standards the IFC applies to all the projects it finances – projects aimed at promoting sustainable private sector investment in developing countries.

Central to the Performance Standards is the requirement for those companies that receive financing from the IFC to develop a "social and environmental assessment and management system" ("EMS"). This EMS must be "appropriate to the nature and scale of the project and commensurate with the level of social and environmental risks and impacts."[68] While this is reminiscent of similarly vague provisions in the OECD Guidelines, the Performance Standards go into considerably greater detail as to what such systems might entail. For example, they must include a consideration of risks and impacts of a particular project.[69] Furthermore, such considerations must accord to the project's "area of influence"[70] over "key stages of the project cycle, including preconstruction, construction, operations, and decommissioning or closure."[71] The Performance Requirements also call for client companies to prepare an "Action Plan", and specifically detail the various components thereof.[72]

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[67] IFC, *Performance Standards on Social & Environmental Sustainability*, (30 April, 2006), online: <http://www.ifc.org/ifcext/enviro.nsf/Content/PerformanceStandards> (date accessed: 22 October, 2003), [hereinafter: IFC Performance Standards].

[68] IFC Performance Standards, Performance Standard 1, para. 3.

[69] IFC Performance Standards, Performance Standard 1, para. 4.

[70] IFC Performance Standards, Performance Standard 1, para. 5.

[71] IFC Performance Standards, Performance Standard 1, para. 6.

[72] IFC Performance Standards, Performance Standard 1, para. 16.

The EMS prescribed by the Performance Standards is then meant to be applied to seven main areas of concern:

i) labour and working conditions;
ii) pollution prevention and abatement;
iii) biodiversity conservation and sustainable natural resource management;
iv) indigenous peoples; and
v) cultural heritage.

Each of these areas again goes into significantly more detail. For example, in calling upon companies to adopt measures for pollution prevention and abatement, the Performance Standards specify that this involves efforts "to minimize the generation of hazardous and non-hazardous waste materials as far as practicable."[73] Recognizing that efforts to minimize these two categories of waste need to be differentiated, the Performance Standards then go on to outline particular considerations to be applied to each.[74]

Insofar as the Performance Standards go into this level of detail, and to the extent that they are actually in use, they represent an unprecedented innovation at the international level in guiding the operations of MNEs. Yet, to the extent that the Performance Standards go into such detail, they appear to be best suited for the largest MNEs whose projects are large enough to bear the compliance burden of such detailed standards. The Performance Standards may not be suitable for smaller companies working on smaller projects.

[73] IFC Performance Standards, Performance Standard 3, para. 5.

[74] IFC Performance Standards, Performance Standard 3, paras. 5 & 6.

B. International CSR Initiatives Specific to the Extractive Resources Sector

The common element to most of the aforementioned CSR initiatives is that they espouse rather general principles of conduct that are difficult to translate into concrete guidance for MNEs. This is due to the broad scope such initiatives are meant to cover. Where the principles espoused start to be filled in with greater detail, the applicability and feasibility of the initiative becomes significantly narrowed. As a result, it is necessary to look to international CSR initiatives that are more specifically designed with the mining industry in mind.

1. The Kimberley Process Certification Scheme

The Kimberley Process Certification Scheme ("KPCS") is an initiative developed jointly by national governments, the diamond industry, and NGOs in order to stem trade in "conflict diamonds". It is a voluntary initiative that calls upon participating states to require that shipments of rough diamonds across their borders be accompanied by documentation certifying that they have been appropriately procured. As a participating state, Canada has committed itself to support and apply the KPCS within its borders. On January 1, 2003 legislation was introduced in Canada that implemented the KPCS as part of domestic law.[75]

2. The Global Reporting Initiative

The Global Reporting Initiative ("GRI") was launched in 1997 by the Coalition for Environmentally Responsible Economies ("CERES") – an NGO comprised of environmental activists and institutional investors banded together to "push for higher standards of corporate

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[75] Natural Resources Canada, "Important Notice on the Kimberley Process Certification Scheme for International Trade in Rough Diamonds", online: <http://mmsd1.mms.nrcan.gc.ca/kimberleyprocess/note_e.asp>, (date accessed: 22 October 2006).

environmental performance and disclosure."[76] With the proliferation of other similar initiatives in the 1990s, one of the key initial aims behind the GRI was to develop and disseminate a single global reporting standard. The intention was to reduce the confusion resulting from an overabundance of different standards, and provide clear and credible benchmarks for organizations to measure their performance in terms of sustainability.[77] The GRI has undergone several stages of revision and refinement since its inception. Its third generation was released as recently as September 19, 2006.

The aim of the GRI is to facilitate for companies the process of developing "sustainability reports". These reports are meant to be informed by the core principles of the GRI – principles such as information "materiality", "completeness", "accuracy" and "comparability".[78] Together, these are intended to enhance the goal of report auditability. This is achieved by applying these principles to various types of "performance indicators." Such performance indicators exist for the following areas:

i) economic performance;
ii) environmental sensitivity;
iii) labour practices;
iv) respect for human rights;
v) sensitivity to society and culture; and
vi) product responsibility.[79]

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[76] Coalition for Environmentally Responsible Economies, "About Us", online: <http://www.ceres.org/ceres>, (date accessed: 22 October 2006).

[77] D.W. Case, "Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective" (2005) 76 U. Colo. L. Rev. 379 at 396.

[78] Global Reporting Initiative, "Sustainability Reporting Guidelines", Part I.

[79] Global Reporting Initiative, "Sustainability Reporting Guidelines", Part II, §5.

At the core of the GRI framework is a document entitled the "GRI Sustainability Reporting Guidelines" ("GRI Guidelines"). This general document is added to by so-called "sector supplements", which include special considerations for sustainability reporting that are applicable to particular industrial sectors.

One such supplement has been developed for the mining and metals sectors by the GRI and the International Council on Mining and Metals.[80] This supplement was released in February 2005. Where greater clarity is required on how to apply a performance indicator to any given area in an accurate and consistent fashion, the GRI Guidelines also include "indicator protocols". These are the 'recipes' behind each given performance indicator, and definitions for key terms, compilation methodologies, as well as the intended scope of the indicator. The GRI is currently working on supplementing these with "national annexes", which will contain reporting guidance that accounts for the unique circumstances or issues found at the national or regional levels.

Despite the comprehensive nature of the GRI Guidelines, they also attempt to achieve some flexibility. An organization may choose to apply a portion of the GRI Guidelines, and work towards fuller reporting over time. Alternatively, reporting may occur over a set of cycles which are appropriate to the operational exigencies of each particular company. The GRI Guidelines should be carefully reviewed to ensure that this intended flexibility is achieved in practice, especially for smaller companies.

3. The Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative ("EITI") is an international CSR initiative designed to increase transparency over payments and revenues in the extractive sector in countries heavily dependent on these resources – otherwise known as countries afflicted by the "resource curse". Launched at the Johannesburg World Summit for Sustainable Development in 2002 by UK

[80] See Global Reporting Initiative, "GRI Mining and Metals Sector Supplement: Pilot Version 1.0".

Prime Minister Tony Blair, the EITI is a voluntary initiative supported by a broad array of companies, governments and NGOs.

With the aim of improving governance in under-developed yet resource-rich countries, the EITI seeks to improve the transparency and accountability of both companies and governments in their dealings with one another in natural resource exploitation.[81] It does so through a framework process designed to help host-state governments develop the institutional capacity necessary to effect the reforms required by the disclosure, publication and dissemination of relevant information.[82] Thus, while the main focus of the EITI is on governments at the national level, its success also hinges upon the active involvement of other partners from society at large.

The EITI is supported by an International Secretariat based in the UK's Department for International Development. The Secretariat works closely with the IMF and the World Bank. Much of its support comes from private donors – including natural resource extraction companies. It also receives substantial support from a number of donor countries.[83]

V. Alternatives for Improving Compliance with CSR Principles

The Government of Canada may improve compliance with CSR principles without costly regulation that is contrary to basic rules of international law. It can do so by identifying which of the many initiatives are most worthy of support and by establishing procedures that can improve compliance without the application of legal sanctions.

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[81] Extractive Industries Transparency Initiative, "About EITI", online: <http://www.eitransparency.org/section/abouteiti> (date accessed: 30 October 2006).

[82] Extractive Industries Transparency Initiative, *Source Book*, (UK: EITI, 2005) at 7-9.

[83] Extractive Industries Transparency Initiative, "Supporters", online: <http://www.eitransparency.org/section/supporters> (date accessed: 30 October 2006).

A. The Government Should Identify a Small Subset of CSR Initiatives

From the foregoing review, it is clear that there is a limit to the level of detail that can be inscribed into any international CSR initiative. On the one hand, where an initiative is overly vague it can be construed in any number of ways, reduced to an empty litany of platitudes that provide MNEs with little-to-no guidance on how to implement their objectives. On the other hand, as an initiative becomes increasingly detailed, it runs the risk of being unduly onerous, applicable only to a relatively narrow subset of MNEs.

The Government of Canada may improve compliance with CSR initiatives by identifying which of the many competing sets of guidelines are most deserving of support. It is impossible for any company to familiarize itself with the provisions of all of the CSR guidelines that purport to apply to its activities. In addition, as demonstrated above, many guidelines set out unduly vague norms that are difficult to implement or unduly burdensome requirements whose implementation would reduce beneficial foreign investment by smaller companies.

While it may not be possible to identify only one set of guidelines that is best in all circumstances, the Government of Canada may provide some guidance by endorsing a limited subset of guidelines that offer the most careful balance between certainty and flexibility. For example, although both the OECD Guidelines and the IFC Performance Standards suffer from weaknesses identified above, they are more promising general application guidelines than the UN Norms.

Once a relevant sub-set of CSR guidelines is identified, further efforts should focus on clarifying the interpretation and application of those guidelines in specific circumstances. For example, for more detailed guidelines such as the IFC Performance Standards, it would be helpful to have clearer indications regarding the size of the projects that such relatively burdensome standards would apply to. For the vaguer and more general guidelines, such as those of the OECD,

it would be useful to have a neutral body issue authoritative interpretations as to how they apply in specific circumstances.

B. The Government Should Promote Compliance Mechanisms That Do Not Entail Legal Sanctions

There are a number of possible mechanisms that could be used to encourage Canadian mining companies with overseas operations to adhere to the CSR standards that may be expected of them. The following is a discussion of some possibilities – and what they might entail – arranged in ascending order of formality.

1. Support the Establishment of a Non-Governmental Extractive Sector Ombudsperson

One approach to fostering greater compliance by some Canadian mining companies with CSR principles would be to establish a reputable, even-handed, non-governmental "Canadian Extractive Industries Ombudsperson" ("CEIO"). The Government of Canada could do so by funding an already existing NGO, or alternatively by sponsoring a new non-governmental structure especially constituted for this role.

Due to its non-governmental nature, the procedures of such a CEIO would necessarily be relatively informal. The CEIO would not be able to compel any party to participate in any process. After initially assessing a claim through consultation and – where appropriate – investigation, the CEIO would determine whether the claim was sufficiently meritorious to warrant a continuation of the process. Where the CEIO decided to proceed, it would then approach the company in question to relay the concerns that had been raised, convey any evidence in support thereof, and request its participation with the aggrieved party to resolve the matter.

Where the respondent to a CEIO request opts to engage with the complainant in the matter, the CEIO would then proceed to facilitate informal dialogue between the parties, simply for the purposes of information exchange. This dialogue might take the form of a mediation, whereby the resolution of the dispute would be entirely up to the good will of the parties, facilitated by the intermediary skill of the CEIO. The CEIO would have no capacity to resolve the dispute in any judicial or quasi-judicial capacity. Where the parties were to be able to come to an amicable agreement, the CEIO would help them draft up a written understanding. If the parties agree, this written understanding could take the form of a legally binding agreement. If not, it could take the form of a non-binding joint statement of intentions.

The use of an ombudsperson for such purposes is an idea that has not been well tested. However, a similar project has been undertaken by Oxfam Australia, which established an ombudsperson to deal with complaints against Australian mining companies operating in developing countries. Accordingly, in order to keep the costs down, the Oxfam Australia process may serve as a model for a CEIO, subject to amendments as appropriate (see Appendix B – Flowchart).

2. Expand the Mandate of the Existing OECD Guidelines National Contact Point

Some – though not all – of a CEIO's function would represent a duplification of the role played by the already existing Canadian National Contact Point ("NCP") of the OECD Guidelines for Multinational Enterprises ("OECD Guidelines").

The main focus of the NCP is to resolve disputes pertaining to the operations of MNEs within Canada. Within this context, when a case is brought to its attention, it conducts a preliminary assessment as to whether the issue of concern merits further examination. This involves a determination as to whether the issue is:

i) bona fide; and

ii) relevant to the implementation of the OECD Guidelines themselves.[84]

In this regard, the NCP will take into account the following matters:

i) the identity of the party filing the complaint and its interest in the matter;

ii) whether the issue is material and substantiated;

iii) the relevance of the applicable law and procedures;

iv) how similar issues have been, or are being, treated in other domestic or international proceedings; and

v) whether the consideration of the specific issue would contribute to the purposes and effectiveness of the OECD Guidelines.[85]

Should the NCP decide that the matter is one that merits further consideration, it will discuss the issue further with the parties involved and offer its "good offices" to facilitate an informal resolution of the issue. Such procedures are to be conducted in private. Moreover, any resolution to the dispute is ultimately voluntary and not legally enforceable (unless the parties agree to a binding contract). While such proceedings are generally considered confidential, where the parties are not able to come to terms with one another, they are free to communicate and discuss their concerns in public. They are not free, however, to discuss information and views provided by the other party. The NCP may only make publicly available the results of the procedures after consultation with the parties. In such situations, the NCP will make a statement, and recommendations, as appropriate, on the implementation of the OECD Guidelines.[86]

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[84] Canadian National Contact Point for the OECD Guidelines, "OECD Guidelines for Multinational Enterprises: The Role of the National Contact Point in Helping to Resolve Issues" [hereinafter: "The Role of the Canadian NCP"], online: <http://www.ncp-pcn.gc.ca/resolve-en.asp> (date accessed: 30 October 2006).

[85] Canadian National Contact Point for the OECD Guidelines, "The Role of the Canadian NCP".

[86] Canadian National Contact Point for the OECD Guidelines, "The Role of the Canadian NCP".

Where the impugned activity is alleged to have taken place in an OECD member-state, then the matter will be left to be handled by the NCP of that particular state. However, where the impugned activity is alleged to have taken place in a non-OECD member-state (ie. any developing country), then there will be no host-state NCP in existence, and the Canadian NCP will assume some responsibility. In such circumstances, the NCP will hear the complaint, and take steps to develop an understanding of the issues involved. In so doing, it will follow the same procedures as for a domestic matter, where relevant and practicable.[87]

Where many of the facts involved will have occurred in a foreign country, the investigative activities of the NCP become more complicated. Accordingly, while the NCP recognizes that it "may have to become involved in obtaining information to determine the validity of a case," it must also take care to be "respectful of the sovereignty concerns of the host country."[88] This has led it to note that "fact finding activities *could* include contacting officials of the MNE in the home country and, if appropriate, government officials in the host country."[89] Moreover, as the OECD Guidelines are directed primarily towards member-states – and only secondarily towards MNEs – the Canadian NCP would not issue any statements or recommendations on the implementation of the OECD Guidelines to the host-state in such a situation.

The June 2005 report by the Standing Committee on Foreign Affairs and International Trade ("SCFAIT Report") specifically mentioned the NCP as a body that could be improved upon. In its third recommendation, the SCFAIT Report called upon the Government of Canada to:

> ...clarify, formalize and strengthen the rules and the mandate of the Canadian NCP and increase the resources available to the NCP to enable it to respond to complaints promptly, to undertake proper investigations, and to recommend appropriate measures against companies found to be acting in violation of the OECD Guidelines."[90]

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[87] Canadian National Contact Point for the OECD Guidelines, "The Role of the Canadian NCP".

[88] Canadian National Contact Point for the OECD Guidelines, "The Role of the Canadian NCP".

[89] Canadian National Contact Point for the OECD Guidelines, "The Role of the Canadian NCP".

[90] SCFAIT Report at 2.

In its response, the Government of Canada stated that it:

> ...agrees that more can be done in Canada to strengthen the implementation of the OECD Guidelines for MNEs. Strategies under consideration include establishing a mechanism to consult more formally with stakeholders, more systematic and frequent promotion of the Guidelines with the business community, and clarifying the rules and mandate of the NCP.[91]

In this regard, the Government of Canada may wish to consider expanding the mandate of the NCP in any number of ways. At the outset, however, it should be recognized that insofar as these changes may include clarifying and formalizing the rules by which the NCP acts to facilitate the resolution of disputes, the more formal the procedures become, the further away from the facilitative model the process would become. Indeed, this was a concern the Government of Canada expressed in its response to the SCFAIT Report.[92]

One of the areas where the procedural mandate of the NCP might be constructively expanded would be to allow it to issue statements and recommendations to the Government of Canada, respondent MNEs or the general public about particular Canadian MNEs that appear to be violating the OECD Guidelines in a non-OECD country. OECD Guidelines are, by their very nature, insufficiently precise to afford Canadian MNEs enough direction on how to conduct their operations in many circumstances. By expanding the mandate of the NCP to interpret the OECD Guidelines and make specific recommendations, the Government of Canada would help to alleviate the uncertainties of Canadian MNEs in how to translate a broadly stated text into their day-to-day operations. Any public recommendations of the NCP would serve as a form of "jurisprudence" that could be consulted by Canadian MNEs faced with similar difficulties.

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[91] Department of Foreign Affairs and International Trade, *Mining in Developing Countries - Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade*, (October, 2005).

[92] Department of Foreign Affairs and International Trade, *Mining in Developing Countries - Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade*, (October, 2005).

Although complainants to the NCP would typically be NGOs or members of the public, companies that have been the target of unsubstantiated allegations should also be free to initiate the complaints process. The process would then allow the targets of such allegations an opportunity to vindicate themselves through a neutral, independent evaluation of their activities. Such a process would provide both companies and NGOs with an alternative to costly defamation suits.

In the event, that the Government of Canada were to pursue this path, care would need be taken of the form any NCP recommendation would take. While any recommendations would not be legally binding, to the extent that they take the form of a written report – particularly one that might be made publicly available – this would militate in favour of more onerous procedural requirements. Moreover, it should be clear that such recommendations could not be admissible evidence in any related legal proceeding against the respondent company.

3. Establish a Federal Agency to Administer International CSR Initiatives Generally

As the previous discussion dealt specifically with the NCP, it was necessarily restricted to the subject matter of only one international CSR initiative, namely the OECD Guidelines. However, as we have seen, there are a many international CSR initiatives that purport to apply to Canadian MNEs operating in developing countries. As we have also seen, most of these initiatives are broad in scope, and provide little by way of concrete guidance to MNEs on exactly what they need to do to be in compliance with their terms in particular circumstances. While most such initiatives are housed by administrative bodies that can be of some assistance in this regard, such bodies do not sufficiently account for the Canadian perspective. In order to ensure this perspective is better recognized, the Government of Canada might consider establishing a federal agency to facilitate the resolution of disputes between complainants and Canadian MNEs with operations in developing countries in the context of other international CSR initiatives.

Such an agency could be modeled on the NCP for the OECD Guidelines. However, to the extent that it would not be tied directly to any single multilateral instrument at the international

level, the Government of Canada would enjoy greater freedom to alter the design as it sees fit. Thus, while the mandate of such an agency ought to be to facilitate (as opposed to adjudicate) the resolution of disputes involving Canadian MNEs in particular contexts, and to lend its assistance in clarifying the content of any given international CSR instrument, the Government of Canada would be free to make the proceedings as formal or informal as it wishes.

4. Establish an Inspection Panel to Hear Complaints

In the alternative – or in addition – to the forgoing possibilities, the Government of Canada could also establish an inspection panel to hear complaints against or from Canadian MNEs with operations in developing countries. The Government of Canada might consider modeling this process on related institutional designs developed by the World Bank ("the Bank").

The World Bank Inspections Panel is "a non-judicial, fact-finding body that acts independently and objectively in evaluating the process followed by the Bank in the design, appraisal, and implementation of specific projects."[93] It "does not investigate projects unless it receives a formal request for inspection. Investigations do not seek to place guilt on individuals, but rather to ensure that the Bank as an institution follows its policies and procedures..."[94] There is a fairly formal and detailed body of procedural rules according to which such inspections are required to abide.[95] However, because the aim of the process is not to determine any level of legal culpability, but is rather to improve the Bank as an institution, the findings of the Panel are conveyed only as recommendations to the Bank's Board of Directors.

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[93] World Bank Inspection Panel, "Frequently Asked Questions" [hereinafter: "Inspection Panel FAQs"], online: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173267~menuPK:64129479~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (date accessed: 30 October 2006).

[94] World Bank Inspection Panel, "Inspection Panel FAQs".

[95] See World Bank Inspection Panel, "Operating Procedures", online: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20175161~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (date accessed: 30 October 2006).

VI. Conclusions and Recommendations

As this survey has demonstrated, there are a number of options available to the Government of Canada to foster greater respect for CSR principles while complying with its international obligations. The less formal measures, such as establishing a non-governmental ombudsperson, have the advantage of facilitating the resolution of disputes between NGOs and mining companies at lower costs. Informal dispute resolution procedures, however, do not present adequate opportunities for the issuance of authoritative interpretations of CSR guidelines and the making of public recommendations. Such interpretations and recommendations require more formal and costly procedures that would allow for reliable fact-finding and protection of the reputation of the parties.

By fostering public debate on the delicate tradeoffs that are inherent in selecting applicable CSR guidelines and by developing dispute resolution mechanisms under such guidelines, the Government of Canada may help to increase compliance with CSR principles. We believe that such efforts would be more productive and more consistent with Canada's long-term interests than the regulations proposed in the SCFAIT Report and certain submissions to the National Roundtables.

Accordingly, we recommend that the Government of Canada:

i) refrain from extraterritorial regulation that violates its international obligations, threatens to undermine Canada's foreign policy objectives and may interfere with the benefits of international trade and investment;

ii) facilitate compliance with existing voluntary CSR initiatives by identifying which of the many existing CSR guidelines are most worthy of support and development. For example, although they are not appropriate in all situations, the OECD Guidelines and the IFC Performance Standards are more promising general application guidelines than the UN Norms; and

iii) establish a body that would facilitate the resolution of disputes relating to the interpretation of the relevant sub-set of CSR initiatives. This body may be a non-governmental ombudsperson or a governmental agency that builds on the existing OECD National Contract Point. While CSR guidelines are either too vague or too burdensome to be made legally binding, alternative dispute resolution procedures should be considered. These procedures may range from informal mediation to public recommendations from formal inspection panels. Public recommendations could provide useful guidance to Canadian businesses seeking to apply very general CSR principles in concrete circumstances.

APPENDIX A

CV OF ROBERT WISNER

CURRICULUM VITAE

Robert Wisner

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Key Qualifications:

- Robert Wisner is Counsel at Appleton & Associates International Lawyers where his practice focuses on international dispute resolution, including arbitrations under international investment treaties and free trade agreements as well as under international commercial contracts. He has substantial experience in international arbitration and litigation, international trade law and competition law. He has appeared before a number of international arbitral tribunals and at all levels of the Ontario and Federal Courts. Robert also advises clients on foreign investment protection, market access and government procurement issues arising under NAFTA, bilateral investment treaties, the Energy Charter Treaty and the WTO agreements. Prior to joining Appleton & Associates, he was a partner in the Litigation and Competition groups of a major Toronto business law firm and served in the Investment Policy Division of Canada's Department of International Trade. Robert is recognized in the 2006 edition of *Best Lawyers in Canada* in the area of international arbitration.

Education:

- Harvard Law School, Program of Instruction for Lawyers, Cambridge, Mass., June 2000

- Bachelor of Laws, University of Toronto, Toronto, Ontario, September 1991-April 1994.

- Master of Arts (Economics), Queen's University, Kingston, Ontario, September 1989-August 1990.

- Bachelor of Social Sciences (Economics), University of Ottawa. Ottawa, Ontario, September 1985-April 1989.

Employment:

February 2003 to present
Counsel, Appleton & Associates International Lawyers
Toronto, Ontario

August 1994 to January 2003
Litigation & Competition Law Groups, McMillan Binch LLP
Toronto, Ontario

September 1990 to August 1991
Economist, Investment Canada (now International Trade Canada)
Ottawa, Ontario

Representative Publications and Presentations:

- Associate Editor, *Appleton's International Investment Law & Arbitration News* (published by Thomson/West).

- "Enforcement Options for Investment Treaty Awards" presentation to the International Law Association panel on Emerging Trends in the Enforcement of Arbitral Awards (June 2006)

- "International Commercial Dispute Resolution" *International Lawyer* (June 2006)

- "Arbitration with Foreign States and State Entities: A Primer for Commercial Lawyers" *Canadian International Lawyer* (December 2005) (also presented to conferences of the Arbitration Roundtable of Toronto and the Canadian Corporate Counsel Association in November 2005 and October 2006)

- Co-Chair, "Cross-border Business Disputes" Ontario Bar Association Conference (December 2005)

- Moderator, "Drafting the Arbitration Clause" Canadian Bar Association Conference (October 2005)

- "Derivative Actions and Indirect Claims" (forthcoming) Investment Treaty Law (also presented to the Investment Treaty Forum of the British Institute of International and Comparative Law, May 2005)

- "The Future of NAFTA Chapter 11" presentation to the Twelfth Annual Canadian International Law Students' Conference (February 2005)

- "The Internationalization of Government Procurement", presentation to Canadian Institute conference on Public Procurement (January 2005)

- "Nationality Requirements in Investor-State Arbitration" (2004) *Journal of World Investment & Trade* (with N. Gallus) (also presented to the 2004 annual conference of the International Law Association – American Branch)

- "Judicial Review of NAFTA Arbitrations" (2004) *International Litigation Quarterly*

- "The Emergence of WTO Competition Law" (2004) *International Trade Law & Regulation*

- "Investment Treaties and the Natural Resources Sector" presentation to the Ontario Bar Association, Natural Resources Section (November 2003)

- "Northern Exposure: Prosecution of Non-Residents for *Competition Act* Offences" (March 1999) *Competition Law* (with D.W. Kent and S. Walker)

- "Uniformity, Diversity and Provincial Extraterritoriality: *Hunt v. T&N plc*" (1995) 40 McGill L.J. 759

Memberships and Recognition:

- Member of the Ontario Bar since 1996.

- Listed in *The Best Lawyers in Canada* (2006) in international arbitration.

- Founding Member, Arbitration Roundtable of Toronto.

- Invited Member, Canada-U.S. Advisory Task Force, International Centre for Dispute Resolution.

- Executive Committee of the Ontario Bar Association - International Law Section

- International Trade and Investment Committee and International Dispute Resolution Committee of the Canadian Bar Association - International Law Section;

- American Bar Association – International and Litigation Sections.

- London Court of International Arbitration - Young International Arbitration Group

- Young Canadian Arbitration Practitioners

Languages:

English (native); French (fluent); Spanish (working knowledge)

APPENDIX B

OXFAM AUSTRALIA
MINING OMBUDSMAN FLOWCHART

The Mining Ombudsman process