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Transnational Corporate Regulation through Sustainability Reporting: A Case Study of the Canadian Extractive Sector

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TRANSNATIONAL CORPORATE REGULATION THROUGH SUSTAINABILITY REPORTING: A CASE STUDY OF THE CANADIAN EXTRACTIVE SECTOR

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by

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Abstract

Despite the benefits transnational corporations (TNCs) offer, they remain largely unregulated entities, enabling environmental, social, and human rights violations to be overlooked. Canadian extractive sector TNCs operating internationally are frequently cited as major perpetrators of such violations. Literature on new governance and self-regulation as well as global corporate social responsibility (CSR) increasingly offers disclosure and reporting as a solution for TNC regulation. This study examines disclosure in international CSR frameworks, and the reflexive law and new governance theories explaining the role of such disclosure and reporting. Mirroring international CSR initiatives, Canadian jurisdictions are increasingly recommending disclosure for its extractive sector TNCs, including through its securities laws. Securities law provides a promising foundation for sustainability reporting because of its existing disclosure framework and its ability to compel disclosure. This potential of Canadian securities law also provides a basis for comparison with the Global Reporting Initiative, the leading sustainability reporting standard.

Key Words

Sustainability Reporting, Extractive Sector, Reflexive Law, New Governance, Transnational Corporation, Disclosure, Transparency, Stakeholder, Global Reporting Initiative (GRI), Corporate Social Responsibility (CSR), Regulation

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List of Abbreviations

AIF	Annual Information Form
ASM	Artisanal and Small-Scale Mining
BC	British Columbia
BCSC	British Columbia Securities Commission
CICA	Canadian Institute of Chartered Accountants
CSA	Canadian Securities Administrators
CLT	Corporate Law Tools
CP	Companion Policy
COP	Communication on Progress
CSR	Corporate Social Responsibility
CSR Counsellor	CSR Counsellor for the Extractive Sector
ESG	Environmental, Social, and Corporate Governance
EU	European Union
FSA	Financial Services Act
GC	Global Compact
GP	Guiding Principle
GRI	Global Reporting Initiative
HRC	Human Rights Council
IACHR	Inter-American Commission of Human Rights
IBA	Impact Benefit Assessment
ICME	International Council on Mining and Environment
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
IFRS	International Financial Reporting Standards
IG7	Industry Guide 7
ILO	International Labour Organization
IP	Indicator Protocols
ISO	International Standard Organization
JSE	Johannesburg Stock Exchange

LSE-AIM	London Stock Exchange-Alternative Investment Market
MD&A	Management Discussion and Analysis
MNC	Multinational Corporation
MMSS	Mining and Metals Sector Supplement
MNE	Multinational Enterprise
NI	National Instrument
NGO	Non-Government Organization
OECD	Organization of Economic Cooperation and Development
OM	Offering Memorandum
OSC	Ontario Securities Commission
PDAC	Prospectors and Developers Association of Canada
PI	Performance Indicator
PRI	Principles for Responsible Investment
PWYP	Publish What You Pay
RBA	Rights-Based Approach
SCFAIT	Standing Committee on Foreign Affairs and International Trade
SEC	Securities Exchange Commission
SME	Small and Medium Enterprise
SN	Staff Notice
SR	Sustainability Reporting
SRI	Socially Responsible Investment
SRSG	Special Representative of the Secretary-General, John Ruggie
TNC	Transnational Corporation
TRI	Toxic Release Inventory and Emissions Reductions
TMX	Combination of TSX and the TSX-V
TSX	Toronto Stock Exchange
TSXV	Toronto Stock Exchange – Venture Exchange
UN	United Nations

Introduction

I Introduction to the Research Problem

The globalization of business and its operations, particularly through transnational corporations (TNCs), has the potential to promote increased global trade and development,[1] the creation of jobs, and the reduction of poverty.[2] However, another side effect of such expansion is that environmental, social, and human rights violations go unaddressed, as TNCs remain largely unregulated. Host states are responsible for regulating corporations within their borders. However, adequate regulation is often challenging for host state developing countries that suffer from a lack of resources, capacity or political will. TNC regulation has also proven challenging for home states, since TNCs primarily operate outside of the country of incorporation. This difficulty is complicated by the issue of state sovereignty, according to which no state has the right to exercise its power in another state's territory.[3]

The complexity of regulating TNCs has resulted in and permitted negative impacts on environmental and human rights.[4] These impacts flow from the inherently intrusive nature of

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[1] *See generally* Eric Rugraff, Diego Sanchez-Ancochea, and Andre Sumner, *Transnational Corporations and Development Policy: Critical Perspectives (Rethinking International Development)* (Basingstoke, Hampshire: Palgrave MacMillan, 2008); Anthony Elson, *Globalization and Development: Why East Asia Surged Ahead and Latin America Fell Behind* (Basingstoke, Hampshire: Palgrave MacMillan, 2013); Theodore H. Moran and John H. Dunning, *United Nations Conference on Trade and Development Governments and Transnational Corporations Part 7* (London: Routledge, 1993); Michael Blowfield and Catherine S. Dolan, "Business as a development agent: evidence of possibility and improbability" (2014) 35 Third World Quarterly 1:22.

[2] *See generally* Michael Blowfield, "Business, Corporate Responsibility, Poverty Reduction" (2010) in Peter Utting and Jose Carlos Marques, *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development* (Basingstoke, Hampshire: Palgrave MacMillan 2009); John Madely, *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor* (New York: Zed Books 1999).

[3] *See generally* Elisa Morgera, *Corporate Accountability in International Environmental Law* (New York: Oxford University Press Inc., 2009). Ch 3 Shortcomings of Traditional Legal Solutions (25, 31, 34); Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, (UK: Cambridge University Press, 2006). Ch 1 Multinationals and corporate social responsibility: a new regulatory agenda, Ch 3 Multinationals under National Law: The Problem of Jurisdiction, Ch 4 New Directions in extraterritorial regulation of CSR Standards, and Ch 7 Multinationals and CSR: Limitations and opportunities in International law; Michael Kerr, Richard Janda, and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham: LexisNexis Canada, 2009) ff 8.2.1 to 8.2.4, 9.5. [KJP].

[4] Sara L. Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 Can Y B Int'l L 139 at 196. [Seck, Environment]; Canada, Department of Foreign Affairs and International Trade (DFAIT), *Government Response to the Fourteenth Report of the SCFAIT: Mining in Developing Countries – Corporate Social Responsibility* (October

extractive sector operations, which impose on environmental, social, and human rights of local stakeholders.[5] Notably, the world's largest sources of equity capital for the extractive sector are the Toronto and Vancouver financial markets.[6] These markets have helped develop and support Canadian and non-Canadian extractive sector companies.[7] However, this success has also resulted in a corresponding trail of negative impacts, as discussed in Chapter 3.

International frameworks have been developed to address problems associated with TNC regulation. The United Nations (U.N.) Draft Code of Conduct on TNCs and the U.N. Global Compact are just two examples.[8] Unlike domestic laws, these international efforts lack the legal authority and enforcement mechanisms necessary to ensure compliance. This lack of legal authority, the concept of state sovereignty, and the continued growth and globalization of TNC businesses has created a governance gap between global TNC operations and their regulation.[9]

2005); Human Rights Council, *Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu*, HRC, 21st Sess, Agenda item 3, UN Doc A/HRC/21/48 (2012), online: wecf.eu <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/annual.aspx> (Accessed 5 August 2013). [*Georgescu* Report].

[5] Seck, *Environment*, *supra* note at 4 179-181; *Georgescu* Report, *supra* note 4 at 7 – 12.

[6] Canada, Foreign Affairs and International Trade Canada, *Corporate Social Responsibility: Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* (26 March 2009), at Introduction and Overview, online: Int'l CSR <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (Accessed 5 August 2013). [*Extractive Intro*]. As of 2008, over 75 percent of the world's exploration and mining companies have headquartered in Canada, and 43 percent of all global exploration expenditures have come from mining and exploration companies based in Canada.

[7] Foreign Affairs, Trade and Development Canada, News Release, "Canada's World-Class Mining Sector Creates Jobs and Growth and Shows the Benefits of Trade, Says International Trade Minister" (5 March 2012) online: Canada DFAIT <http://www.international.gc.ca/media_commerce/comm/news-communiques/2012/02/05a.aspx?lang=eng> (5 August 2013); TSX, "Global Leaders in Mining" (31 May 2013), online: TMX.com <http://www.tmx.com/en/listings/sector_profiles/mining.html> (Accessed 5 August 2013).

[8] United Nations ESC Commission on Transnational Corporations, *Report of the Secretariat of the Outstanding Issues in the Draft Code of Conduct on Transnational Corporations*, UNCTC 23 ILM 626 (1984); United Nations Global Compact, *The Ten Principles*, online: unglobalcompact.org <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (Accessed 5 August 2013).

[9] John Ruggie, *April 2008: Protect, Respect and Remedy: a Framework for Business and Human Rights (2008 Report)*, at ¶ 3 of A/HRC/8/5 online: SRSG Portal, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil> (Accessed 5 August 2013). [2008 Report].

Efforts to address the gap in regulating TNCs have included voluntary industry efforts;[10] international multi-stakeholder efforts;[11] as well as domestic efforts.[12] The main focus of this study is on the potential use of sustainability reporting as a means of regulating Canadian extractive sector TNCs operating in foreign jurisdictions. Disclosure as a regulatory tool is designed to increase the level of transparency and awareness. In theory, increased transparency and the dissemination of, and accessibility to, information have the potential to increase corporate accountability. This process operates as a result of stakeholders being armed with information and then influencing post-disclosure TNC decision-making and actions.

In the process of gathering and reporting on environmental, social, and human rights information, a sustainability reporting disclosure requirement may also compel TNCs to engage in due diligence. The significance of due diligence is that it serves as a risk management mechanism to educate the disclosing organization. As a whole, disclosure through sustainability reporting has the potential to not only inform stakeholders and increase the level of transparency and accountability, but also develop good corporate governance practices and decision-making.[13]

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[10] *See for example* O. Bomsel, P. Borkey, M. Glachant, F. Leveque, "Is There Room for Environmental Self-Regulation in the Mining Sector?" (2009) 22 Resources Policy 79 at 84. The authors argue there is room for self-regulation from the International Council on Metals and the Environment (ICME), whose mandate includes diffusing good environmental practices and information and to raise industry standards. The ICME is now the International Council on Mining and Metals (ICMM). ICMM, *Sustainability Development Framework*, online: ICMM.com <http://www.icmm.com/our-work/sustainable-development-framework> (Accessed 5 August 2013).

[11] *See for example* Extractive Industries Transparency Initiative, *About Us*, online: EITI <http://eiti.org/about> (Accessed 5 August 2013). The Extractive Industry Transparency Initiative (EITI) "aims to increase transparency in transactions between governments and companies within extractive industries" by requiring extractive sector companies to disclose revenue payments to governments and for governments to provide receipts; Voluntary Principles on Security and Human Rights, *The Principles*, online: <http://www.voluntaryprinciples.org/principles/introduction> (Accessed 5 August 2013). The Voluntary Principles outline non-binding principles to help the extractive sector balance security with human rights; Global Reporting Initiative, *About GRI*, online: globalreporting.org <https://www.globalreporting.org/information/about-gri/Pages/default.aspx> (Accessed 5 August 2013).

[12] *See for example* the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor. Foreign Affairs, Trade and Development, *Welcome to the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor*, online: international.gc.ca <http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx> (Accessed 5 August 2013). The mandate of this Canadian effort includes an Extractive Sector CSR Counsellor, which promotes performance standards, including the GRI. *See further in* chapter 3.

[13] *See* chapter 1 for more on due diligence and chapter 2 for the relationship between disclosure and stakeholders; David Hess, "Social Reporting and New Governance Regulation: The Prospects of Achieving Stakeholder Accountability through Transparency" (2007) 17:3 Business Ethics Quarterly 453 at 455. [Hess, New Governance].The importance of stakeholder feedback is illuminated through the theories of reflexive law and new governance, which are discussed in depth in chapter two. Disclosure and feedback is intended to inform a continuous reinforcing relationship.

II What is Social Disclosure/Sustainability Reporting?

Similar to the traditional reporting of financial information by public corporations under securities laws, the disclosure of information revealing legal compliance, "policies, practices, and business impacts as they relate to issues such as environment, labour, and human rights" is often referred to as social disclosure.[14] Sustainability reporting (SR) is a term used in the same context and for the purpose of this study will be used interchangeably with social disclosure. In addition to business practices and impacts, SR also discloses whether or not business is operating in a sustainable manner. This means whether a firm's business activity can be continued and endured by its surrounding environment and communities during and after the completion of a project in a healthy manner.[15] Cynthia Williams articulates the potential content of SR to generally include

> information on the products a company produces and the countries in which it does business; on the company's law compliance structure; on its domestic labor practices; on its global labor practices and supplier/vendor standards; and on its domestic and global environmental effects. Other types of social disclosure could include information on corporate charitable contributions, political contributions, or the effects of using a company's products on consumer health and safety.[16]

The Global Reporting Initiative (GRI) uses the term SR and defines it as a process for publicly disclosing an organization's economic, environmental, and social performance in association with its business activities. This GRI disclosure also includes information on whether or not business activities can be continued for a prolonged period of time, and endured in a manner that is healthy for its surroundings for the duration of the project.[17] For the purpose of this study SR

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[14] Aaron Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights" (2009) 47 Osgoode Hall Law Journal 47 at 50. [Dhir, Politics].

[15] Global Reporting Initiative, *Sustainability Reporting Guidelines Version 3.1*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/G3.1-Guidelines-Incl-Technical-Protocol.pdf> at 3 (Accessed July 31, 2013). [SR Guidelines]; *See generally* William R. Blackburn, *The Sustainability Handbook: The Complete Management Guide to Achieving Social, Economic and Environmental Responsibility* (Washington, DC: Cromwell Press, 2007). *See* chapter 1 and chapter 3.

[16] Cynthia Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1999) 112 *Harvard Law Review*, 1197 at 1201. [Williams].

[17] Global Reporting Initiative, *About Sustainability*, online: globalreporting.org <https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx> (Accessed July 31, 2013). Sustainability is a broad term "considered synonymous with other terms for non-financial reporting; triple bottom line reporting, corporate social responsibility (CSR) reporting" to describe reporting on economic,

is similarly defined, and will also be deemed to display the level of corporate social responsibility (CSR) of an organization.[18] The work of the U.N. on business and human rights identifies that extractive sector companies have a significant impact on human rights.[19] As a result, the definition of SR in this study will also reference the broad spectrum of human rights that may be impacted by extractive sector TNC activity.[20]

III Why Sustainability Reporting?

Industry Canada acknowledges that CSR is "ultimately about performance" and that reporting combined with verification provides important tools in measuring whether CSR performance has actually taken place.[21] This builds on the understanding that transparency leads to greater accountability. The development of integrated or triple bottom line reporting[22] similarly suggests that the traditional and current means of disclosure under securities and other laws may not, or may not adequately, be providing guidance on SR or non-financial disclosure. The triple bottom line model fuses the factors of "people, planet, and profit"[23] and looks to report on short-term

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environmental, and social impacts. The G3.1 Guidelines were updated to include reporting on human rights, local community impacts, and gender. *See further* the GRI discussion in chapter 1.

[18] KJP, *supra* note 3 at 242-243. KJP note the many ways the practice of CSR reporting is defined. The terms they identify include CSR Reporting, SR, triple-bottom-line reporting, stakeholder reporting, citizenship reporting, and corporate responsibility reporting. They also conclude that the differences between the terms reporting and disclosure is "purely academic" and are terms commonly used interchangeably, as will be the case in this study.

[19] *Georgescu* Report, *supra* note 4; John G. Ruggie, United National Human Rights Council, 4th Sess, *Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries*, UN Doc A/HRC/4/35/Add 1 at ¶ 18, 23, 32, 74, online: ohchr.org <http://ap.ohchr.org/Documents/dpage_e.aspx?si=A/HRC/4/35/Add.1> (Accessed July 31, 2013). [Addendum 1 for 2007 Report]. The former Special Representative of the Secretary-General (SRSG), John Ruggie, identifies that treaty body commentaries single out the extractive sector as an industry that has had and will have a major impact on ESG and human rights.

[20] 2008 Report, *supra* note 9 at ¶ 6. The SRSG references a broad spectrum of human rights to avoid justifying one particular human right over another or attempting to declare one more important than the other; John Ruggie, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Addendum, Summary of the Five Multi-Stakeholder Consultations*, A/HRC/8/5/Add 1 (2008), online: SRSG Portal <http://www.reports-and-materials.org/Ruggie-1-addendum-23-April-2008.pdf> (Accessed July 31, 2013).

[21] Industry Canada, *Corporate Social Responsibility: Task 5 Verify and Report on Progress*, online: Industry Canada <http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/rs00136.html> (Accessed July 31, 2013).

[22] Timothy F. Slaper and Tanya J. Hall, "The Triple Bottom Line: What Is It and How Does It Work?" (2011) 86 *Indiana Business Review* 1 at 4 online: <http://www.ibrc.indiana.edu/ibr/2011/spring/article2.html> (Accessed July 31, 2013).

[23] *Ibid*.

economics, environmental sustainability, and human rights concepts.[24] This combination of SR and financial disclosure is naturally inclined to use existing securities disclosure regulations. Such an inclination towards existing mechanisms is important, as Williams points out, since it is unlikely that "people are either pure economic investors or pure social investors as a company's financial position can be affected by both its social and environmental performance."[25] Overall, the turn towards environmental, social (human rights), and corporate governance (ESG) disclosure is considered to have the potential to educate stakeholders; increase TNC accountability to stakeholders, investors, and non-government organizations; and satisfy a growing need for more information arising from socially-conscious investors.[26]

The purpose of examining non-financial disclosure arises from the attention transparency has received in the field of CSR. As Janda et al. point out, some of the strongest regulatory advances in the area of CSR have been reporting and disclosure measures.[27] In response to the argument that disclosure is costly, it is said that the costs are increasingly justified, especially since SR is becoming more and more relevant and not just to a select group of investors.[28] SR has the growing potential to yield financial benefits as well.[29] This can occur from gains arising from strengthened ties with stakeholders, such as end purchasers, suppliers and workers; an increased understanding of liabilities;[30] a decrease in insurance, risk, and debt financing costs;[31] less price fluctuation;[32] as well as a justification of a social license and reputational capital.[33]

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[24] Williams, *supra* note 16 at 1277.
[25] *Ibid*.
[26] *Ibid*.
[27] KJP, *supra* note 3 at 241.
[28] Aaron Dhir, "Shadows and Light: Addressing Information Asymmetries Through Enhanced Social Disclosure in Canadian Securities Law" (2009) 47 Canadian Business Law Journal 435 at 466. [Dhir, "Shadows"]
[29] *Ibid*.
[30] David Hess, "Social Reporting: A Reflexive law Approach to Social Responsiveness" (1999) 25 Iowa Journal of Corporation law 41 at 81.
[31] Gil Yaron, Memorandum to OSC Continuous Disclosure Advisory Committee titled "Corporate Disclosure of Material Social and Environmental Information" (June 28, 2005) at 6 cited in Dhir, "Shadows", *supra* note 28 at 466.
[32] Allen L. White, "New Wine, New Bottles: The Rise of Non-Financial Reporting" (June 20, 2005), online: businesswire.com <http://www.businesswire.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/services/ir_and_pr/ir_resource_center/editorials/2005/BSR.pdf> at 3 (Accessed July 31, 2013).
[33] Dhir, "Shadows", *supra* note 28 at 466.

SR promotes the dissemination of information to the public. This information is geared towards a broad range of stakeholders and contrasts with traditional disclosure which is shareholder or investor oriented and reveals mostly financial information.[34] Some see this shift towards greater disclosure and SR as a form of regulation by disclosure, where disclosure of information potentially sets in motion a method of market monitoring that influences the behaviour of corporations.[35] This process is argued by some to be more effective than command-and-control or, traditional, top-down regulation.[36] The movement of transparency as a form of soft law into the regulatory sphere is evidence of the growing recognition of the benefits transparency provides.[37] These benefits include improved decision-making, legitimacy and trust; the formation of business advantages; increased accountability and reputational concerns; and overall the prevention of violations and destructive corporate behaviour.[38] Moreover, there is not one mode, medium, or method of reporting that is considered the most effective in achieving the above benefits. Disclosure can take many different forms, "including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports."[39] Online updates of formal reporting methods, annual reports, SR, and integrated financial and non-financial reports also provide a method of reporting and disclosing information.[40]

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[34] KJP, *supra* note 3 at 241.
[35] *Ibid* at 242.
[36] *See further* in chapter 2. *See* also Anne Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) at 187; Heledd Jenkins and Natalia Yakovleva, "Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure" (2006) Journal of Cleaner Production 271 at 272, 282.
[37] *See for example* KJP, *supra* note 3 at 281; U.S. Securities Exchange, *Specialized Corporate Disclosure: Background on Title XV of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, online: <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml> (Accessed July 31, 2013); US, HR Res 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Cong, 2010. [Dodd-Frank Act]. This Act mandates the disclosure of conflict minerals from the Democratic Republic of the Congo because such sales finance "conflict characterized by extreme levels of violence in the eastern [DRC]".
[38] Virginia Haufler, "Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World" (2010) 10 Global Environmental Politics 3:53 at 55, 57, 70. Haufler argues revenue disclosure has the potential to provide greater accountability and help reduce corruption in global extractive projects. Like the EITI, legitimizing disclosure and delegitimizing secrecy with regards to resource management also helps to increase the level of TNC accountability.
[39] *See* United Nations Human Rights Office of the High Commissioner, *New Guiding Principles on Business and Human Rights Endorsed by the Human Rights Council*, News Release, (16 June 2011), online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf> (Accessed July 31, 2013).
[40] *Ibid*.

Another rationale for focusing on disclosure is that Canadian securities laws already have a system of disclosure in place.[41] Although this system largely targets financial information disclosure, it provides a potential platform on which to formulate or integrate a system of SR. Although the concept of regulation-through-disclosure may not fit the traditional command-and-control form of regulation many academics have pointed out that the

> classic state centered model of corporate regulation is, in the modern global context, ineffective at best and counterproductive at worst, and that national governments have recognized this and are currently experimenting with alternative forms of regulation, including 'self-regulation, use of incentives, awards and accreditation systems, market-based initiatives, disclosure obligations... and education campaigns.'[42]

This view reinforces the call for greater disclosure and SR.[43] At the same time, compelling TNC SR, domestically, avoids violating host state sovereignty since it relies on home state jurisdictional authority targeting extractive sector TNCs headquartered in its jurisdiction and subject to securities laws and regulations.[44]

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[41] *See generally* John Ruggie, Human Rights Council, 17th Sess, *Addendum: Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative*, UN Doc A/HRC/17/31/Add 2 (2011), online: business-humanrights.org <http://www.business-humanrights.org/media/documents/ruggie/report-human-rights-and-corporate-law-23-may-2011.pdf> (Accessed July 31, 2013).

[42] Larry Cata Backer, "Multinational Corporations as Objects and Sources of Transnational Regulation", (2008) 14 ILSA Journal of International & Comparative Law 499 at 500. Agreeing with Jennifer Zerk, Backer feels traditional state-centered regulation is fairly ineffective at the international level in regulating TNCs/MNCs; Jennifer Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge, England: Cambridge University Press, 2006) at 37; John Ruggie, "Business and Human Rights: The Evolving International Agenda" (2007) 101: 4 American Journal of International Law at 819 at 820. Ruggie identifies "[t]he state-based system of global governance has struggled for more than a generation to adjust to the expanding reach and growing influence of [TNCs]"; Larry Cata Backer, "From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations", (2007-2008) 39:4 Georgetown Journal of International Law 591 at 594 [LCB, Global Disclosure]. Academics argue there is a "failure" of the state-centered model and promote an alternative form of regulation.

[43] LCB, *Global Disclosure*, *supra* note 42 at 594. Backer argues disclosure informs and establishes a framework where stakeholders are able to adjust their relationships based on the information or behaviour disclosed.

[44] National Roundtable Steering Committee and the National Roundtable Advisory Group, *National Roundtables on CSR and the Canadian Extractive Sector in Developing Countries: Final Draft Discussion Paper*, at 18 Table 2, cited in Sara Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rights & development L J 177. There are two different approaches here. In addition to being a *Canadian company* domiciled in Canada, a company may also, by simply listing on a domestic stock exchange be considered to be a "Type 4" *Canadian company*, according to the typology determined by the Canadian government. This introduces the different possible typologies of Canadian corporations [Corporate Nationality].

IV Objective

The objective of this study is to assess Canadian disclosure and SR efforts relating to environmental, social, and human rights issues and information applicable to the Canadian extractive sector operating internationally. This entails examining Canadian SR efforts generally applicable to the Canadian extractive sector and then exploring disclosure obligations under Canadian securities laws. The research will then determine how well securities disclosure obligations measure up against international best practices, such as the Global Reporting Initiative (GRI), and its possible theoretical underpinnings for SR. The goal is to demonstrate where Canada stands in the potential formation of a SR-based regulatory framework for its extractive sector.

V Research Questions

1. What is sustainability reporting? Specifically, what is environmental, social and human rights disclosure, and to what extent is such disclosure promoted through international initiatives as a tool for addressing the global governance gap?

2. Why is disclosure promoted as a useful tool? What theories inform the trend in chapter 1? Additional related questions are: What role do these theories suggest exist for the state as a regulator of corporate conduct? To whom is such disclosure targeted? What are the critiques leveled towards disclosure as a regulatory tool?

3. What specific steps has the Canadian federal government taken to implement the disclosure and reporting of environmental, social, and human rights impacts of Canadian extractive sector TNCs operating abroad?

4. What steps have Canadian securities regulators taken to implement the disclosure and reporting of non-financial topics, such as environmental, social, and human rights impacts of TNCs operating abroad, through Canadian securities regulations? Overall, how do the Canadian efforts and initiatives compare with leading International Standards, such as the GRI, and the theories of reflexive law and new governance?

VI Brief Overview

Chapter 1 will provide a descriptive overview of global CSR initiatives, revealing an international trend for transparency and environmental, social, and human rights disclosure.

Chapter 2 introduces the concept of global legal pluralism and focuses on the theories of reflexive law and new governance regulation as a potential justification for the emerging disclosure trend identified in Chapter 1. The theories reveal a corporate governance framework that promotes stakeholder input and TNC self-reflection, which rationalizes the SR-based regulatory framework for extractive sector TNCs operating abroad. Chapter 3 provides a Canadian extractive sector case study. This includes an examination of how Canada has promoted SR and CSR in the extractive sector and the steps it has taken to ensure Canadian extractive sector TNCs consider and disclose environmental, social, governance, and human rights issues. This case study is then reinforced by Chapter 4 which explores non-financial disclosure obligations through the lens of state mandated Canadian securities laws. This includes an examination of how well the Canadian securities non-financial disclosure regulations measure up against the GRI and the ideals of the reflexive law and new governance approaches. The conclusion will briefly summarize the findings of this study in relation to each research question identified above.

Chapter 1

1 International Support for Disclosure

This chapter provides a descriptive analysis of international corporate social responsibility (CSR) and sustainability reporting (SR) initiatives. The chapter will identify an international disclosure trend that promotes SR through environmental, social, governance (ESG), and human rights disclosure. Reinforcing this trend is the use of disclosure and transparency as a means of regulating transnational corporations (TNCs) and their global operations.[45] The formation of early disclosure initiatives led the 1990s to be labeled as the transparency decade,[46] and since then, a number of international initiatives have emerged addressing SR, ESG, human rights, and due diligence. As a result, this chapter will review the following initiatives: the Global Reporting Initiative (GRI), the United Nations (U.N.) Principles for Responsible Investment (PRI), the U.N. Global Compact (U.N. GC), the U.N. Protect, Respect and Remedy Framework and its related Guiding Principles, the Organization of Economic Cooperation and Development (OECD) and its Guidelines for Multinational Enterprises (MNEs), and other initiatives that illustrate the global disclosure trend and promote SR. Lastly, in order to provide a more complete discussion of SR this chapter will review some of the primary arguments made against SR.

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[45] International Institute for Sustainable Development, *Corporate Social Responsibility*, online: IISD.org <http://www.iisd.org/business/issues/sr.aspx> (Accessed July 31, 2013); Michael Kerr, Richard Janda, and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham: LexisNexis Canada, 2009) at 241. Kerr Janda, and Pitts identify that some of the strongest regulatory advances in the area of CSR have been reporting and disclosure measures. [KJP].

[46] SustainAbility and UN Environment Programme, "Trust Us: The Global Reporters 2002 Survey of Corporate Sustainability Reporting" (2002) online: kommunikationsforum.dk <http://www.kommunikationsforum.dk/log/Trust_Us_indledning.pdf> at 6 (Accessed December 13, 2013). After labelling the 90's as the "transparency decade", SustainAbility argued for the 21st Century to possibly bring the "Trust Decade" as a result of the trend for transparency, accountability, and reporting, and growth in the number of reporting companies, the shift from environmental to integrated SR and the rapid increase in the volume of information"; For example: EPA, *Toxics Release Inventory*, online: U.S. Environmental Protection Agency <http://www.epa.gov/tri/> (Accessed July 31, 2013). "TRI is a database containing date on disposal and other releases of over 659 toxic chemicals"; Ceres, *About Ceres*, online: Ceres.org <http://www.ceres.org/flash/vision-and-accomplishments/2020_view> (Accessed July 31, 2013). These principles stem from the 1989 Exxon Valdez Oil Spill; Science and Technology Division November 1992; The Rio Earth Summit: Summary of the United Nations Conference on Environment and Development by Stephanie Meakin, online: publications.gc.ca <http://publications.gc.ca/collections/Collection-R/LoPBdP/BP/bp317-e.htm> (Accessed July 31, 2013).

1.1 International Mechanisms Promoting Disclosure

1.1.1 The Global Reporting Initiative

Established in 1997, the GRI is a multi-stakeholder, network-based organization that provides reporting and sector guidelines, as well as a global standard and benchmarks.[47] Forming the largest SR framework worldwide,[48] the GRI provides guidance for "all companies and organizations", such as corporations, governments, and non-government organizations (NGOs), who have an interest in sustainability performance.[49] The primary goal of the GRI is to mainstream SR by promoting SR through guidance and support, and making SR "as commonplace and comparable as financial reporting, and just as important to [a firm's] organizational success."[50]

The GRI is a constantly evolving framework that continuously develops through a consensus-seeking, multi-stakeholder process. This includes different actors representing a variety of views from "corporations, governments, NGOs, consultancies, accountancy organizations, business associations, rating organizations, universities, and research institutes."[51] This constant evolution and multi-stakeholder involvement is said to allow the GRI to react to and address new issues as

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[47] Global Reporting Initiative, *What is GRI*, online: globalreporting.org <https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx> (Accessed August 25, 2013). [What is GRI]; *KJP*, *supra* note 45 at 11, 203.

[48] Global Reporting Initiative, *'Next Step' in sustainability reporting to be unveiled in May, says GRI*, online: globalreporting.org <https://www.globalreporting.org/information/news-and-press-center/Pages/Next-step-in-sustainability-reporting-to-be-unveiled-in-May-says-GRI.aspx> (Accessed August 12, 2013); *KJP*, *supra* note 45 at 279. In 1999, only 20 companies issued GRI sustainability reports. In 2010, approximately 1800 companies issued SRs.

[49] Global Reporting Initiative, *FAQS: About GRI – Who Participates in GRI?*, online: globalreporting.org <https://www.globalreporting.org/information/FAQs/Pages/About-GRI.aspx> (Accessed August 16, 2013); Global Reporting Initiative, *About GRI*, online: globalreporting.org <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx> at Vision and Mission (Accessed August 12, 2013). [About the GRI].

[50] Global Reporting Initiative, *Year in Review 2009/10 Global Reporting Initiative*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/GRI-Year-in-Review-2009-2010.pdf> at 2 (Accessed August 16, 2013); About the GRI, *supra* note 49 at Vision and Mission; Global Reporting Initiative, *About Sustainability Reporting*, online: globalreporting.org <https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx> (Accessed August 21, 2013); Global Reporting Initiative, *Reporting Framework Overview*, online: globalreporting.org <https://www.globalreporting.org/reporting/reporting-framework-overview/Pages/default.aspx> at "the Sustainability Reporting Guidelines" (Accessed August 15, 2013). [Framework Overview].

[51] GRI, *Who Participates in GRI?*, online: globalreporting.org <https://www.globalreporting.org/information/FAQs/Pages/About-GRI.aspx> (Accessed August 15, 2013).

they emerge.[52] In May 2013, the GRI framework was updated to the G4 Guidelines, from the previous version of G3.1.[53]

The foundation of the GRI framework is its reporting guidelines, which are set out in two parts.[54] Part 1 refers to "Reporting Principles and Guidance" and includes "principles to define report content, such as materiality, stakeholder inclusiveness, sustainability context, and completeness."[55] The guidance from Part 1 helps inform Part 2, which refers to Standard Disclosures and includes "principles to define report quality [, such as] balance, comparability, accuracy, timeliness, reliability, and clarity", with further guidance given on how to set the report boundary.[56] In other words, Part 2 outlines guidance on the content to appear in the report. This includes disclosing the organization strategy and profile; how the organization addresses topics; and the performance indicators (PIs), which disclose "information on the economic, environmental, and social performance of the organization".[57] The PIs in essence provide the basic disclosure requirements, which are also further broken down into more specific indicator protocols (IPs).[58] The technical protocols further complement GRI SR. Specifically, the technical protocols help reporting organizations determine the "scope of a report, the range of topics

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[52] *Framework Overview*, *supra* note 50. The G3.1 Guidelines were expanded to include guidance on local community, human rights, and gender.
[53] GRI, "G4 Sustainability Guidelines", online: globalreporting.org <https://www.globalreporting.org/reporting/g4/Pages/default.aspx> (Accessed August 15, 2013).
[54] GRI, *G3 Guidelines*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/G3.1-Guidelines-Incl-Technical-Protocol.pdf> at 5 (Accessed August 15, 2013). [G3 Guidelines].
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid*; GRI, *Application Levels Guidance*, online: GRI <https://www.globalreporting.org/reporting/report-services/external-assurance/Pages/default.aspx> (Accessed August 15, 2013). [Application Levels]; GRI, *Defining Report Content*, online: globalreporting.org <https://www.globalreporting.org/reporting/guidelines-online/G3Online/DefiningReportContentQualityAndBoundary/Pages/DefiningReportContent.aspx> (Accessed August 15, 2013); Global Reporting Initiative, *Reporting Guidelines*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/G3.1-Sustainability-Reporting-Guidelines.pdf> at 20-24.
[58] GRI, *Part 2: Standard Disclosures*, online: globalreporting.org <https://www.globalreporting.org/reporting/G3andG3-1/guidelines-online/G3Online/StandardDisclosures/Pages/default.aspx> (Accessed August 15, 2013). The performance indicators are categorized into Economic, Environment, and Social, which are broken down into indicator protocols and elaborated by technical protocols. Each category includes guidance for disclosure through a Management Approach and additional IPs; GRI, "Technical Protocol Applying the Report Content Principles" (2011), online: GlobalReporting.org <https://www.globalreporting.org/resourcelibrary/GRI-Technical-Protocol.pdf> at 11 (Accessed August 12, 2013). [Technical Protocol].

covered, each topic's relative reporting priority and level of coverage, and what to disclose in the report about the process for defining its content."[59]

The basic disclosure guidance above is further reinforced through sector supplements, which act as "tailored versions of the GRI Guidelines" providing more focused and specific guidance on issues relevant to their industry.[60] These supplements provide guidance not found in the GRI Guidelines because they focus on sector/industry specific factors and accordingly include new performance indicators for that sector's key issues and concerns.[61] The relevant supplements to this study are the Mining and Metals Sector Supplement (MMSS) and Oil and Gas Sector Supplements (OGSS), with both outlining IPs to guide reports on Economic, Environmental, Labor, Human Rights, Society, and Product Responsibility.[62]

Another feature of the GRI is the external assurances component that allows prepared reports to be verified and receive a "+" on a reporting level represented by a letter grade of A, B, or C, indicating external verification.[63] Since there is no obligation to comply with the voluntary GRI system, each reporter chooses the level and minimum requirements to be met under each letter grade. This indicates the extent of the GRI Guidelines applied, and not an opinion on SR performance of the reporting organization. The flexibility of this system is intended to guide and assist small and medium-sized enterprises (SMEs) in creating and providing SR. Targeting

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[59] Technical Protocol, *supra* note 58 at 2.
[60] Global Reporting Initiative, *G3/G3.1 Sector Supplements*, online: globalreporting.org <https://www.globalreporting.org/reporting/sector-guidance/Pages/default.aspx> (Accessed August 15, 2013). [Sector Supplements]. Sector supplements provide industry specific guidance.
[61] *Ibid.*
[62] Global Reporting Initiative, *Mining and Metals: Who Developed This Guidance and How?*, online: globalreporting.org <https://www.globalreporting.org/reporting/sector-guidance/sector-guidance/mining-and-metals/Pages/who-developed-this-guidance-and-how.aspx> (Accessed August 15, 2013); Global Reporting Initiative, *Oil and Gas: Who Developed This Guidance and How?*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/OGSS-G3.1-Complete.pdf> (Accessed August 15, 2013).
[63] Global Reporting Initiative, *Application Levels Checks*, online: globalreporting.org <https://www.globalreporting.org/reporting/report-services/application-levels/Pages/default.aspx> (Accessed August 15, 2013); Global Reporting Initiative, *Application Level Table*, online: globalreporting.org <https://www.globalreporting.org/SiteCollectionDocuments/ALTable_En.pdf> (Accessed August 15, 2013); Global Reporting Initiative, *Application Level Information*, online: globalreporting.org <https://www.globalreporting.org/reporting/G3andG3-1/application-level-information/Pages/default.aspx> (Accessed August 15, 2013). After a report is made the next step involves a declaration of one of the GRI Application Levels, which must accompany GRI SR. In order to qualify for level C+, B+, or A+ the report must include each of the criteria for the relevant grade. The "+" indicates verification of meeting the minimum disclosure.

SMEs reveals an effort to extend SR to a more complete list of TNCs. The GRI also sets up a support system by providing tools, training, and publications and undertakes projects to make ESG and human rights SR easier and more possible for SMEs.[64]

The GRI's Report or Explain Campaign Forum is another program promoting ESG respect and disclosure of human rights from TNCs and SMEs.[65] This Forum is designed for those who believe SR is "necessary and beneficial – that companies should reveal their performance or the reasons why they don't".[66] The Forum promotes transparency and looks at how "sustainability disclosure can become standard practice".[67] This involves encouraging companies to report on ESG and human rights issues or else explain why they are not providing such SR.[68] Although companies are "free to choose what information to disclose",[69] what this hopes to establish is minimum disclosure requirements and the development of a level playing field between organizations.[70] At the same, 'Report or Explain' hopes to avoid the formation of a rigid regulatory framework, which some argue stifles reporting innovation and the flexibility of the more experienced reporters.[71] Another premise of the Campaign Forum is that having basic requirements brings clear benefits for a broad range of stakeholders.[72] This is because "[m]easuring sustainability performance enables organizations to identify opportunities to improve operations, and avoid risks to the long-term value of [the] organization";[73] "[t]he ability to manage sustainability impacts helps organizations preserve and increase their value";[74]

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[64] Global Reporting Initiative, *Support for First Time Reporters*, online: globalreporting.org <https://www.globalreporting.org/reporting/reporting-support/support/Pages/default.aspx> (Accessed August 15, 2013); Global Reporting Initiative, *GRI Business Transparency Program*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/Business-Transparency-Program-Overview-Information-Sheet.pdf> (Accessed August 15, 2013). *See further in* Chapter 2, which suggests the use of mandatory and non-mandatory means of regulation. This combination could be useful for SMEs who do not have the funds or manpower to follow a SR requirement.

[65] Global Reporting Initiative, *Report or Explain Campaign Forum*, online: globalreporting.org <https://www.globalreporting.org/network/report-or-explain/Pages/default.aspx> (Accessed August 15, 2013). [Explain].

[66] *Ibid*.

[67] *Ibid*.

[68] *Ibid*.

[69] *Ibid*.

[70] *Ibid*.

[71] *Ibid*.

[72] *Ibid.*

[73] *Ibid*.

[74] *Ibid*.

"[i]nvestors and analysts gain vital insight into organizational performance, and optimal investment potential";[75] "[t]ransparency increases trust [at which point] stakeholders and civil society can respond to comparable and standardized information";[76] and "[o]rganizations can mitigate negative impacts."[77] These benefits serve the business organization, investors, and civil society by proactively working towards increasing transparency and corporate accountability.[78]

Since GRI reports do not contain mandatory evaluation for compliance accuracy with GRI guidelines,[79] it has attracted criticism from those who feel voluntary systems are not very effective without an enforced verification system. Critics argue that any positive impact of GRI reporting is, at best, limited.[80] Where factors necessary for the optimal use and process of SR are missing, the corporate sector is then able to ""tame" transparency policies, reduce their transformative threat, and be able to tailor the instrument to suit their own needs."[81] For example, with no authority to ensure compliance, the GRI has received criticism for being weak and ineffective, and being viewed simply as a public relations opportunity.[82] Still, as often argued by proponents of voluntary and self-regulatory initiatives, voluntary initiatives begin where legislative efforts end, and, as claimed by Kerr, Janda, and Pitts, the GRI "often plays an important role in supporting corporate efforts to comply with regulatory reporting mechanisms," effectively clouding the distinction between regulatory and voluntary rules.[83] This is further

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[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid*.
[78] *Ibid*.
[79] *KJP*, *supra* note 45 at 280. There is no obligation for a company to adhere to or even verify a GRI report.
[80] *Ibid* at 281; Alison Maitland, "Survey of Sustainable Business: Companies Start to Detail What on Earth Is Going On", *The Financial Times*, (23 August, 2002); Dickinson, D., Leeson, R., Ivers, J. and Karic, J., "Sustainability Reporting by Public Agencies: International Uptake, Forms and Practice", (2005) The Centre for Public Agency Sustainability Reporting, online: <http://sd-cite.iisd.org/cgi-bin/koha/opac-detail.pl?biblionumber=34051> (Accessed August 15, 2013). The GRI is been argued to be more of a public relations tool than for sustainability and accountability; Rob Gray, "Social, Environmental and Sustainability Reporting and Organisational Value Creation? Whose Value? Whose Creation?" (2006) 19:6 Accounting, Auditing & Accountability Journal 793 at 798, 803, 807, 808-10.
[81] Klaus Dingwerth and Margot Eichinger, "Tamed Transparency: How Information Disclosure under the Global Reporting Initiative Fails to Empower" (2010) 10:3 Global Environmental Politics 74 at 76.
[82] Abdallah Simaika, "The Value of Information: Alternatives to Liability in influencing Corporate Behaviour Overseas" (2005) 38 Columbia Journal of Legal & Social Problems 321 at 361-362.
[83] *KJP*, *supra* note 45 at 281; Steve Lydenberg, Jean Rogers, and David Wood, "From Transparency to Performance Industry-Based Sustainability Reporting on Key Issues" (2010) at 57, online: hausercentre.org

reinforced by Hohn as she identifies the existence of a communication gap between junior companies and shareholders; junior companies and community stakeholders; and junior companies and CSR practitioners as primarily being the result of a lack of guidance, as well as funds and manpower to address CSR Reporting.[84]

Despite the above arguments, there are means of endorsing and advancing international frameworks and standards like the GRI. For example, Sweden now requires all state-owned corporations to comply with the GRI.[85] Similarly, Denmark provides incentives to its largest corporations and requires SR, unless a company has adopted and adheres to the U.N. Global Compact or the U.N. Principles for Responsible Investment.[86] Overall, the GRI provides a standardized disclosure system on how to incrementally increase the level of disclosure and transparency regarding company performance in sustainability.[87] Current Canadian companies viewed as GRI compliant include Yamana Gold,[88] Barrick Gold,[89] Goldcorp Inc.,[90] and even Avalon Rare Metals, which is a private SME.[91]

<http://hausercenter.org/iri/wp-content/uploads/2010/05/IRI_Transparency-to-Performance.pdf> at 57 (Accessed August 15, 2013).

[84] Michelle Hohn, "Investing in Community: Canadian Junior Mining Companies, Corporate Social Responsibility, and the Communication Gap" (M Arts thesis, Royal Roads University, 2009) at 13, 38, 49-51.

[85] Government of Sweden, "Guidelines for external reporting by state-owned companies", (1 January 2008), online: www.sweden.gov.se/ <http://www.regeringen.se/content/1/c6/09/41/25/56b7ebd4.pdf> (Accessed August 15, 2013).

[86] John Ruggie, Human Rights Council, *Addendum: Human Rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative*, UN Doc A/HRC/17/31/Add 2 (2011), online: business-humanrights.org <http://www.business-humanrights.org/media/documents/ruggie/report-human-rights-and-corporate-law-23-may-2011.pdf> (Accessed August 15, 2013). [CLT ADD]; United Nations, Corporate Law Project, *Overarching Trends and Observations July 2010*, online: SRSG Portal <http://www.reports-and-materials.org/Ruggie-corporate-law-project-Jul-2010.pdf> at 1 (Accessed August 15, 2013). [CLT overarching].

[87] *Framework Overview*, *supra* note 50.

[88] Yamana Gold, *Corporate Social Responsibility Report 2011*, online: www.yamana.com <http://www.yamana.com/CorporateResponsibility/CorporateResponsibilityOverview/default.aspx> at 48 (Accessed August 15, 2013). The 2010 Report is the 4th Report to be published based on GRI Sustainability Reporting Guidelines using G3.

[89] Barrick Gold, *Barrick Responsible Mining: Global Commitment Local Engagement*, online: www.Barrick.com <http://www.barrick.com/files/responsibility-report/2010/Barrick-2010-Responsibility-Report.pdf> (Accessed August 15, 2013). Since 2005, Barrick has referenced the GRI in reporting.

[90] Goldcorp Inc., *Memberships and Commitments*, online: Goldcorp <http://www.goldcorp.com/English/Responsible-Mining/Memberships-and-Commitments/default.aspx> (Accessed August 15, 2013).

[91] Avalon Rare Metals, *Corporate Sustainability Report 2011 & 2012*, online: Avalon Rare Metals <http://avalonraremetals.com/sustainability/csr_report/> (Accessed August 15, 2013). In 2011 and 2012, Avalon complied with the G3.1 guidelines. Avalon is also a Canadian SME; Global Reporting Initiative, *Database Search*, online: globalreporting.org <http://database.globalreporting.org/search> (Accessed August 15, 2013). Canadian extractive sector GRI member-companies were found by searching in the GRI database, in the Mining sector under

1.1.2 United Nations Principles for Responsible Investment

In 2006, the U.N. PRI was created by the global investment community to draw attention to the fact that ESG issues "can affect the performance of investment portfolios", and should be given "appropriate consideration by investors if they are to fulfill their fiduciary (or equivalent) duty."[92] Developed for larger, highly diversified, investors with large stakes in companies where "divestment or avoidance is often impractical", the U.N. PRI contains six standing principles that operate as a system of best practice sharing and collaboration.[93]

The six principles are specifically "designed to be compatible with the investment styles of large and often diversified institutional investors that operate within a traditional fiduciary framework."[94] The U.N. PRI encourages the principles to be applied across the entire investment business spectrum and to the business organization as well, not just to a specific asset or product of a specific investment.[95] "Promoting the active ownership and integration of ESG issues into investment analysis" does not suggest a policy of exclusion, or of screening companies or sectors, based on ESG measures.[96] Rather, the goal is to promote ESG standards and principles.[97] Overall, the PRI requires a commitment to the following principles:

- "**Principle 1:** We will incorporate ESG issues into investment analysis and decision-making processes"
- "**Principle 2:** We will be active owners and incorporate ESG issues into our ownership policies and practices."
- "**Principle 3:** We will seek appropriate disclosure on ESG issues by the entities in which we invest."
- "**Principle 4:** We will promote acceptance and implementation of the Principles within the investment industry."
- "**Principle 5:** We will work together to enhance our effectiveness in implementing the Principles."

"Canada"; SRI Monitor, *GRI Reporters: Growing but still a minority*, (7 August 2009), online: SRI Monitor <http://srimonitor.blogspot.ca/2009/08/gri-reporters-growing-but-still.html> (Accessed August 15, 2013). As of 2009, the number of companies complying with the GRI ranked Canada 10th globally.

[92] Principles for Responsible Investment (PRI), *About Us*, online: UNPRI.org <http://www.unpri.org/about/> (Accessed August 15, 2013). [PRI About].

[93] PRI, FAQs, online: UNPRI.org <http://www.unpri.org/faqs/> (Accessed August 15, 2013). [PRI FAQ].

[94] *Ibid*.

[95] *Ibid*.

[96] *Ibid*.

[97] *Ibid*.

- "**Principle 6:** We will each report on our activities and progress towards implementing the Principles."[98]

Becoming a signatory to the PRI is said to assist large and institutional investors in meeting their fiduciary duties by promoting a dialogue that includes ESG issues. This dialogue arises from companies seeking to attract PRI investors and capital and institutional investors looking to invest in businesses that follow principles shared by the PRI. This encourages the disclosure of ESG issues from those businesses that large and institutional investors and organizations are looking to invest in.[99] This system, in turn, provides a framework for investors to incorporate ESG information "into decision-making and ownership practices."[100] Arguably, the process of ESG disclosure may provide a form of due diligence and risk management for subsequent corporate ESG, and sustainability, decision-making.

As of April 2013, the U.N. PRI has been signed onto by 1188 signatories and includes assets under management standing at more than $32 trillion (or more than 15% or the world's investable assets).[101] The U.N. PRI principle most relevant to SR and to Canadian extractive sector companies operating abroad is Principle three. This principle focuses on disclosure from the corporation seeking investment from an institutional investor, and explicitly outlines that PRI investors and signatories require from corporations "standardized reporting on ESG issues"; the integration of ESG issues into annual financial reports; the inclusion of current best practices, norms, and codes of conduct; and support for shareholder ESG disclosure initiatives and resolutions.[102]

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[98] PRI, *The Six Principles*, online: UNPRI.org <http://www.unpri.org/about-pri/the-six-principles/> (Accessed August 15, 2013). [Principles].
[99] PRI About, *supra* note 92.
[100] PRI FAQ, *supra* note 93.
[101] PRI, *Signatories*, online: UNPRI.org <http://www.unpri.org/signatories/> (Accessed August 15, 2013); PRI, *PRI Fact Sheet: Key Achievements*, online: UNPRI.org <http://www.unpri.org/news/pri-fact-sheet/> (Accessed August 15, 2013). [PRI Fact Sheet].
[102] Principles, *supra* note 98.

Principle six also promotes disclosure, but from the perspective of the institutional investor. This principle requires the reporting of progress and implementation of the U.N. PRI.[103] Specifically, it allows an institutional investor to:

- "Disclose how ESG issues are integrated within investment practices";
- "Disclose active ownership activities (voting, engagement, and/or policy dialogue)";
- "Disclose what is required from service providers in relation to the principles";[104]
- "Communicate with beneficiaries about ESG issues and the principles";[105]
- "Report on progress and/or achievements relating to the principles using a "Comply or Explain"[106] approach";
- "Seek to determine the impact of the principles";
- "Make use of reporting to raise awareness among a broader group of stakeholders."[107]

As of 2011, the number of signatories that report on their progress has increased every year and stood at nearly 550; this represents 44 percent of the total signatory base choosing to disclose voluntarily.[108]

Despite the PRI being a "voluntary and aspirational framework," once a signatory reaches a one-year period of subscribing to the PRI, the signatory becomes obligated to disclose and report on their assessment of their own performance of the PRI principles.[109] This is done through the Reporting and Assessment survey,[110] a learning tool allowing institutional investors to monitor their implementation of PRI Principles by providing a comparison over time and with other

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[103] PRI, *Principles*, online: UNPRI.org <http://www.unpri.org/principles/> (Accessed August 15, 2013). [PRI Principles].
[104] PRI, "5 Years of PRI Annual Report of the PRI Initiative 2011", (2011) at 3, online: UNPRI.org <http://www.unpri.org/viewer/?file=wp-content/uploads/annual_report2011.pdf> at 3 (Accessed August 15, 2013). "Service providers" refers to the institutional investors who are signatories to the UN PRI. [2011 Annual Report].
[105] The disclosure of information and communication with beneficiaries regarding ESG issues and Principles potentially differentiates itself from the other elements under Principle six by suggesting that signatories may need to seek information from "beneficiaries", a term that may encompass a variety of stakeholders.
[106] The Comply or Explain process "requires signatories to report on how they implement the Principles, or provide an explanation where they do not comply with them."
[107] *PRI Principles*, *supra* note 103.
[108] 2011 Annual Report, *supra* note 104 at 3; OSC, *OSC corporate sustainability reporting initiative: Report to Minister of Finance*, online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20091218_51-717_mof-rpt.pdf> at 5, 14 (Accessed August 15, 2013). [OSC Final Report]; PRI Fact Sheet, *supra* note 101.
[109] Taylor Gray, "Investing for Environment? The Limits of the UN Principles of Responsible Investment" (June 2009) at 9 University of Oxford, School of Geography.
[110] PRI, *Reporting*, online: UNPRI.org <http://www.unpri.org/reporting/> (Accessed August 15, 2013). [PRI reporting].

investors.[111] The survey allows signatories to measure their own performance; ensure the accountability of the PRI and its signatories; and encourage signatory transparency on responsible investment.[112] This process is said to provide an "off the shelf" reporting framework informing a range of stakeholders, from clients and beneficiaries to customers and the broader public.[113] Informing a broad spectrum of stakeholders also allows the PRI to serve as an accountability mechanism. This is reinforced by the fact that the survey becomes mandatory for each new participating signatory after its one year grace period.[114] The survey is also designed for the PRI Secretariat to identify "best practices, interesting developments and practical implementation ideas" and to incorporate this knowledge into the signatory body to develop rolling-best standards.[115] These reasons reveal why so much importance is placed on the survey, and why failure to comply with it leads to a possible public delisting of that member.[116]

According to the PRI, a common theme associated with greater disclosure is that of increased accountability.[117] Keeping with this theme, in May 2011, the PRI Advisory Council agreed to develop a new Reporting Framework to become a better "accountability tool for the PRI and its signatories", "to provide a standardized transparency tool", "to enable the assessment of signatories' progress and capabilities on [responsible investment]."[118] As of 2013, the new Reporting and Assessment framework plans on disclosing to the public the responses from the surveys and making such disclosure mandatory, without the one-year grace period.[119] The new revised framework adds flexibility and freedom to allow signatories "to share details about their activities with their clients and the public at a time that suits them" while providing a consistent

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[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.* The monitoring of individual progress helps reveal the level of compliance with the Principles.
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid*; UN PRI, "PRI Reporting Framework 2013/14 Overview and Guidance" (October 2013), online: <http://www.unpri.org/viewer/?file=wp-content/uploads/2013-14_PRI_RF_overviewandguidance.pdf> (Accessed April 28, 2014). One of the objectives of the UN PRI is to be an accountability tool.
[118] PRI, "PRI Reporting Framework: Objectives, Feedback and Next Steps", (October 2012) online: <http://www.unpri.org/viewer/?file=files/2012.10.25%20PRI%20Reporting%20Framework%20Pilot%20Feedback.pdf> (Accessed March 21, 2014).
[119] PRI, *Reporting Framework Consultation*, online: UNPRI.org <http://www.unpri.org/consultation/> or <http://www.unpri.org/viewer/?file=files/2012.04.30%20New%20Reporting%20Framework%20at%20a%20glance.pdf> (Both accessed August 15, 2013).

"baseline of information".[120] The new framework includes mandatory elements of public disclosure, outlining 12 modules. Each module contains mandatory and voluntary indicators.[121] There are two mandatory types of disclosure, one that is mandatory to report and one that is mandatory to disclose, and not all information reported is disclosed publicly.[122] This process intends to help PRI signatories, and other users,[123]

- "provide a clear and coherent account of their responsible investment activities, thereby enabling them to showcase areas of strength and best practice";
- "generate the data (indicators) that enable the PRI to produce its annual report on progress and to track the implementation of responsible investment across PRI signatories";
- "help stakeholders to make a meaningful assessment of performance across PRI signatories".
- "simplify reporting by, where appropriate, reducing the indicators to be reported against and, more importantly, aligning reporting with the way in which investors implement their responsible investment activities."[124]

The upgraded framework includes targeting investors, customers, members and beneficiaries of funds,[125] along with other stakeholders, such as "media, consumers and industry groups, and NGOs" who play an intermediary role to further disseminate information to consumers and others.[126] This inclusiveness leads to a greater number of meaningful assessments from different stakeholders.

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[120] PRI Fact Sheet, *supra* note 101; U.N. PRI, *PRI Reporting Assessment: Overview, Objectives, Process and Outputs*, online: unpri.org <http://www.unpri.org/viewer/?file=wp-content/uploads/2013_PRI_RA_OverviewObjectives.pdf> at 2, 4. (Accessed February 28, 2014). [New PRI Framework]. Signatories are not required to respond to the voluntary indicators if they do not wish to.

[121] New PRI Framework, *supra* note 120. It is only "mandatory to complete a module if you have more than 10% of your assets under management in that asset class"; PRI, *Reporting Framework*, online: UNPRI.org <http://www.unpri.org/areas-of-work/reporting-and-assessment/reporting-framework/ > (Accessed August 15, 2013); *PRI FAQ*, *supra* note 93; PRI reporting, *supra* note 110. This is done by providing a set of standardized, mandatory and voluntary, indicators, as guidance for investors and then requiring the disclosure of the data gathered from these indicators.

[122]New PRI Framework, *supra* note 120. "Not all indicators that are 'mandatory to report' will be 'mandatory to disclose".

[123] 2011 Annual Report, *supra* note 104 at 9. Other potential users can use the Clearinghouse of collaborative shareholder engagement.

[124] *Ibid* at 8, 21.

[125] *Ibid* at 1. Readers of reports, such as asset owners and beneficiaries can use this information to help them choose their investment managers, and to assess the degree of responsible investment of their pension schemes.

[126] *Ibid*.

The significance of including ESG issues into corporate investment and decision-making and disclosing the impacts of such decision-making is, according to the PRI, that it informs investors and stakeholders, compels decision-makers to meet fiduciary duties, and reinforces the competitiveness of the firm by addressing and managing risks.[127] For instance, the PRI claims that companies with high ESG scores proved more resilient during the 2008-2009 economic slowdown.[128] This resilience may be attributed to firms becoming aware of trends, tools, practices, and issues, and engaging and learning through different stakeholder dialogue.[129]

1.1.3 United Nations Global Compact

Similar to the PRI, the U.N. Global Compact is a framework that also contains a set of principles looking to provide guidance and global benchmarks. However, the GC is focused towards businesses, not institutional investors.[130] Introduced in 1999 by then-U.N. Secretary-General Kofi Annan and officially unveiled in 2000, the U.N. GC outlines ten principles that elaborate on human rights, labour, environmental protection, and anti-corruption.[131] Serving as a multi-stakeholder learning forum,[132] the GC relies on reporting and self-regulation to bring together a

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[127] PRI, *Become a Signatory*, online: UNPRI.org <http://www.unpri.org/sign/> (Accessed August 15, 2013).
[128] *Ibid*.
[129] *Ibid*.
[130] UNGC, *Overview of the UN Global Compact*, online: UNGC <http://www.unglobalcompact.org/AboutTheGC/index.html> (Accessed August 15, 2013). [About the GC].
[131] United Nations, Press Release, SG/SM/6881, "Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos" (1 February 1999) online: UN Meetings Coverage & Press Releases <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html> (Accessed August 15, 2013); UNGC, "After the Signature A guide to Engagement in the United Nations Global Compact" (2010) online: UNGC <http://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf> at 10-13 (Accessed August 15, 2013); UNGC, *About the GC ten Principles*, online: UNGC <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (Accessed August 15, 2013). The ten principles are derived from: the United Nations General Assembly, *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, UN Doc A/810 (December 10 1948); the International Labour Organization's (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*; 18 June 1998, (Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva); the *Rio Declaration on Environment and Development*, 12 August 1992, A/CONF151/26 (Vol I), online UN.org <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (Accessed March 1, 2014); and the UN General Assembly, *UN Convention Against Corruption*, UN DOC A/58/422, online un.org <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> (Accessed March 1, 2014).
[132] Tracy James, *Teaching Private Governance: A Critical Analysis of the UN Global Compact* (M of Arts Thesis, University of British Columbia Political Science, 2006) [unpublished] at 52 online: <https://circle.ubc.ca/bitstream/handle/2429/17655/ubc_2006-0206.pdf?sequence=1> (Accessed August 15, 2013). [James]; John Ruggie, Global_Governance.net: The Global Compact as a Learning Tool, (2001) 7 Global

variety of stakeholders for the purpose of discussing and advancing issues of corporate conduct.[133]

The GC principles are designed to serve the purpose of encouraging and providing benchmarks and strategies for businesses to advance markets, commerce, and technology in a beneficial manner for societies and communities worldwide.[134] The recognition of social, political, and economic challenges and opportunities, both locally and abroad, has resulted in companies joining the U.N. GC to develop collaborative partnerships with governments, civil society and the U.N.[135] The GC contains a growing number of participants (10 000) that includes over 7000 businesses and stakeholders from more than 145 countries who have signed on to the GC, making it the "largest voluntary corporate responsibility initiative in the world".[136] In addition to advancing sustainable business models and markets, the GC also incorporates a transparency and accountability policy known as the Communication on Progress (COP). The COP is a disclosure process that requires participants to post information on the U.N. GC website.[137]

The COP reports to stakeholders (identified as investors, consumers, civil society, governments, among others) the business' progress achieved in implementing the GC principles.[138] Besides advancing transparency and accountability, COP disclosure also helps to drive continuous

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Governance 371 at 372-373. Companies submit case studies of the implementation of the GC principles in practice, in a forum style.

[133] James, *supra* note 132at 7, 36; About the GC, *supra* note 130.

[134] About the GC, *supra* note 130; UN High Commission for Human Rights, *Forward by the UN High Commission for Human Rights*, online: UN Global Compact <http://human-rights-and-business-learning-tool.unglobalcompact.org/> (Accessed August 15, 2013); UNGC, "Embedding Human Rights in Business Practice II" (2007) online: UNGC <http://www.unglobalcompact.org/docs/news_events/8.1/EHRBPII_Final.pdf> at 11, 14 (Accessed August 15, 2013) [UNGC Collaboration]; Office of the High Commission on Human Rights, *Human Rights and Business Learning Tool*, online: <http://www2.ohchr.org/english/HR_Learning.htm> (Accessed August 15, 2013). The UN GC implemented a web-based learning tool on human rights and business applicable to principles one and two. This tool serves as an entry level interactive course for managers and CSR professionals signed on to the GC, and those who have not to help them understand what human rights are and how they are part of their business operations.

[135] UNGC Collaboration, *supra* note 134. .

[136] UNGC, *Participants and Stakeholders*, online: UNGlobalcompact.org <http://www.unglobalcompact.org/ParticipantsAndStakeholders/> (Accessed August 15, 2013).

[137] *Ibid*; UNGC, *What is COP?*, online: UNGC <http://www.unglobalcompact.org/COP/index.html> (Accessed August 15, 2013). The GC requires the disclosure of information and implementation of the principles online, allowing for easy access by stakeholders. [GC, COP].

[138] *Ibid.* Disclosure is intended provide information in support of the broad UN development goals. Disclosing progress and implementation of the GC principles is an important part of the GC and seen as critical to its success.

performance improvement; safeguard the integrity of the GC and the U.N.; and grow a repository of corporate practices to promote dialogue and learning.[139] As a result, the COP is a critical component of the GC revealing participating entities' expression and commitment to the GC and its principles.[140] Due to the importance attributed to the COP, any violation of its policy, such as failing to issue disclosure reports, results in that participant being labeled as non-communicative or facing the possibility of expulsion from the U.N. GC.[141]

The COP policy requires annual disclosure of each signatory's progress in implementing the GC principles through a statement by the reporting participant's chief executive. This includes a description of practical action, such as the disclosure of relevant policies and procedures, activities completed or planned to be completed, and a measurement of outcomes, in essence a report card on how well targets and goals were met in implementing the principles.[142] A reporting participant is also required to provide an explanation of why they failed to address any of the ten principles, if relevant, similar to the GRI's Report or Explain Campaign Forum.[143]

The Basic Online COP Template is mainly designed for smaller and less experienced companies.[144] The template provides examples and reference points on different reporting areas and allows users and stakeholders to compare different COP disclosures as well as track their own progress.[145] In addition to a step-by-step guide on how to submit a COP report,[146] the

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[139] GC, COP, *supra* note 137.
[140] *Ibid*.
[141] *Ibid*; UNGC, *Expelled Participants*, online: UNGC <http://www.unglobalcompact.org/COP/analyzing_progress/expelled_participants.html> (Accessed August 15, 2013).
[142] UNGC, *Communication on Progress: What is Required*, online: UNGC <http://www.unglobalcompact.org/COP/communicating_progress/cop_policy.html> (Accessed August 15, 2013). Failing to satisfy the COP policy elements results in a "one-time, 12-month "Learner" grace period to submit a new COP" satisfying the COP requirements. Failing to submit the COP disclosure within the required time, or more than once failing to satisfy the COP requirements, the business participant is designated as "non-communicating", faces expulsion, and is then forced to reapply to the GC in order to re-join.
[143] *Ibid*.
[144] UNGC, *Basic Online COP Template*, online: UNGC <http://www.unglobalcompact.org/COP/communicating_progress/basic_cop_template.html> (Accessed August 15, 2013). [Basic Tools].
[145] *Ibid*; UNGC, "Communication on Progress Basic Template", online: UNGC <http://www.unglobalcompact.org/docs/communication_on_progress/templates/Basic/Basic_COP_EN.pdf> (Accessed August 15, 2013). [Basic Tools Template].

template also includes GRI indicators to help participants implement the GC principles and other U.N. goals.[147] The GC's advanced reporting tools also use the GRI, specifically the G3 Guidelines.[148] This connection between the G3 Guidelines and the COP is intended to bridge any gaps between the COP and other SR mechanisms.[149] Thus, the GRI helps implement the GC and the GC provides the overarching goals to be met.[150] This reveals that the aim of the advanced tools is for greater integrated reporting.[151] An example of this arises from the issue-specific reporting component of the GC. The primary focus here is on the environment and human rights, with the GC referencing pre-existing frameworks, such as the Carbon Disclosure Project[152] and the Corporate Water Accounting initiatives.[153] Current Canadian GC participants include extractive sector companies Barrick Gold and Goldcorp.[154]

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[146] UNGC, *Submitting a Communication on Progress (COP): A Step-by-step Guide*, online: UNGC <http://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_posting_doc_eng.pdf> (Accessed August 15, 2013).
[147] *Basic Tools*, *supra* note 144.
[148] UNGC, *Advanced Reporting Resources*, online: UNGC <http://www.unglobalcompact.org/COP/communicating_progress/advanced_reporting_tools.html> (Accessed August 15, 2013). [Advanced GC].
[149] UNGC, *Making the Connection: The GRI Guidelines and the UNGC Communication on Progress*, online: UNGC <http://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/Making_the_Connection_Final.PDF> (Accessed August 15, 2013). The GC is argued to lead to leadership and innovation in translating key corporate responsibility commitments into organizational vision and action through its principles. The GRI's SR Guidelines provide a means for measuring progress and communicating performance against the GC principles. Thus, the two initiatives are reinforcing and provide a platform to implement sustainability practices.
[150] *Ibid* at 6. "As both the [GC] and the GRI are based on the concept of encouraging continuous improvement, there is significant alignment in approaches to quality and scope of reporting." Executive director of the U.N. GC, George Kell, stresses companies participating in both initiatives understand the GRI is a practical expression of the GC.
[151]Advanced GC, *supra* note 148. The International Integrated Reporting Committee promotes the inclusion of financial, environmental, social and governance information in an easy and accessibly manner.
[152] Carbon Disclosure Project, *About Us*, online: Carbon Disclosure Project <https://www.cdproject.net/en-US/Pages/HomePage.aspx> (Accessed August 15, 2013). This project targets climate change by injecting relevant information into business operations, policy and investment decisions. It requires measurement, disclosure and management of greenhouse gas emissions and strategies to be made available to a broad scope of stakeholders.
[153] UNEP, "Corporate Water Accounting an Analysis of Methods and Tools for Measuring Water Use and Its Impacts" (2010) online: UNEP.fr <http://www.unep.fr/scp/publications/details.asp?id=WEB/0164/PA> (Accessed August 15, 2013). This initiative assesses existing and emerging water accounting methods that address sustainability and scarcity issues; UNGC, "Reporting Guidance on the 10th Principle Against Corruption" (2009) UNGC online: UNGC <http://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/UNGC_AntiCorruptionReporting.pdf> (Accessed August 15, 2013). The GC also partners up with Transparency International to target corruption.
[154] UNGC, *Participant Search*, online: UN Global Compact <http://www.unglobalcompact.org/participants/search?business_type=all&commit=Search&cop_status=all&country%5B%5D=30&joined_after=&joined_before=&keyword=&listing_status_id=all&organization_type_id=&page=1&per_page=100&sector_id=all&sort_by=sector_name&direction=ASC> (Accessed August 15, 2013).

1.1.4 The U.N. Protect, Respect, Remedy Framework and Guiding Principles [155]

The U.N. GC is not the only U.N. initiative that targets businesses.[156] In 2003, the U.N. Human Rights Commission also created the Norms on Transnational Corporations and Other Business Enterprises (the Norms).[157] The Norms imposed on TNCs a requirement to secure, ensure the respect of, and to "protect human rights recognized in international [and] national law", obligations traditionally required of nation states.[158] This ultimately led to a clash between the business/private sector, who strongly opposed the Norms, and human rights advocacy groups, who strongly endorsed them.[159] Consequently, the Norms, and their divisive nature, were quickly rejected. Following in 2005, John Ruggie was appointed as the Special Representative to the

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[155] John Ruggie, *February 2006: Interim Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN4/2006/97 at ¶ 1, online: Business and Human Rights Resource Center, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil> (Accessed August 15, 2013). [2006 Report]; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (2011). [Endorsed Guiding Principles].

[156] About the GC, *supra* note 130 at "Core UN Agencies". The U.N. GC is supported by 7 core UN agencies, including the "Office of the High Commissioner for Human Rights". It was the old Commission on Human Rights (U.N. CHR), in 2003, which proposed the Norms. The U.N. CHR was replaced by the U.N. Human Rights Council (U.N. HRC) on March 15, 2006. *See* BBC News, "UN creates new human rights body", *BBC News* (15 March 2006) online: BBC.co.uk <http://news.bbc.co.uk/2/hi/europe/4810538.stm> (Accessed December 13, 2013). The old U.N. CHR appointed John Ruggie as the SRSG.

[157] ECOSOC Sub-Commission, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev2, online: UNHCHR <http://www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?OpenDocument> (Accessed August 15, 2013); Larry Cata Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" (2006) 37:2 Columbia Human Rights Law Review 102 at 104; *2006 Report*, *supra* note 155 at ¶ 55-61; *Promotion and Protection of 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*, UNCHR, 62nd Sess, UN Doc E/CH 4/2006/97 (22 February 2006) at 6.

[158] Endorsed Guiding Principles, *supra* note 155 at ¶ 3; UN Sub-Commission on the Promotion and Protection of Hunan Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ESC August 2008, UNESCOR, 2008, E/CN4/Sub2/2003/12/Rev2 available at <http://www.refworld.org/docid/403f46ec4.html> (Accessed November 25, 2013).

[159] The rejection of imposing human rights duties on corporations traditionally viewed as part of the state's duty is one perspective, and the perspective of John Ruggie. *See* Global Policy Forum and Miseror, "Problematic Pragmatism: The Ruggie Report 2008: Background, Analysis and Perspectives" (June 2008), online: wdev.eu <http://www.wdev.eu/downloads/martensstrohscheidt.pdf> at 2, 4. (Accessed February 25, 2014); There is a perspective that contests Ruggie's view of the Norms. *See* Surya Deva and David Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

U.N. Secretary-General (now the former SRSG) "on the issue of human rights and [TNCs] and other business enterprises" to address and make recommendations regarding operations of the growing TNC sector in developing countries and its impact on human rights.[160] In 2008, the former SRSG developed the Protect, Respect, and Remedy Framework (the U.N. Framework).[161] This Framework consists of the state duty to protect human rights abuses by third parties (the state duty to protect); the corporate responsibility to respect human rights; and the access to remedy for violations of human rights.[162] Unanimously adopted by the Human Rights Council, the U.N. Framework has been described as providing "the authoritative focal point" missing at the international level.[163] In 2011, the Guiding Principles on Business and Human Rights for Implementing the U.N. Protect, Respect, and Remedy Framework (the Guiding Principles) were released for the purpose of "operationalizing" the U.N. Framework, which was endorsed in June 2011 by the U.N. Human Rights Council.

The significance of the U.N. Framework and the Guiding Principles is that they distinguish the duty and role of states from that of TNCs, and provide normative and legal reinforcement for the potential of SR as a means of TNC regulation. This helps promote polycentric governance, focusing on communication and suggesting a mixture of mandatory and voluntary as well as global and domestic measures.[164] For example the discussion below outlines that a) the U.N. Framework and the Guiding Principles includes flexibility for the state in putting into practice a SR requirement through appropriate policies and regulations; b) that state enforced SR, through corporate and securities laws, offers a useful tool in risk assessment, and promotes the inclusion of stakeholders; and lastly, c) that SR is reinforced by corporate or business due diligence

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[160] 2006 Report, *supra* note 155 at ¶ 1; John Ruggie, *April 2008: Protect, Respect and Remedy: a Framework for Business and Human Rights (2008 Report)*, A/HRC/8/5 at ¶ 2, ¶ 17, online: SRSG Portal, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil> (Accessed August 15, 2013). [2008 Report]

[161] 2008 Report, *supra* note 160 at 5-6.

[162] *Ibid* at 7-9.

[163] Endorsed Guiding Principles, *supra* note 155 at ¶ 5. The Human rights Council adopted the framework in its 8/7 resolution; John Ruggie, *Guiding Principles Draft for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework,* at ¶ 10, online: SRSG Portal, <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf> (Accessed August 15, 2013). [Draft Guiding Principles].

[164] Endorsed Guiding Principles, *supra* note 155 at Guiding Principle 3.

processes, which like SR look to influence corporate decision-making and subsequent corporate actions.

A. State Duty to Protect

The state duty to protect arises out of the core U.N. human rights treaties and customary international law, and requires "states to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication."[165] A key component of this pillar is the requirement of states to cultivate and put into operation corporate cultures respectful of human rights.[166] This culture involves implementing, at home and abroad, any available mechanisms open to the state to respect and protect human rights.[167] The SR process is discussed under the "corporate culture" of the State Duty to Protect pillar and is explicitly identified as a useful process valuable for stakeholders to examine and compare ESG and human rights performance.[168] This highlights that SR could certainly fall within the options available to the state as a mechanism to regulate TNCs.

Although the state duty to protect arises from the core U.N. human rights treaties, these treaties do not articulate a specific state responsibility for human rights violations by private actors, such as business enterprises.[169] Nonetheless, states are required to prevent such violations. Given the

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[165] John Ruggie, *February 2007: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/35 at ¶ 10, 18 online: SRSG Portal, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil> (Accessed August 15, 2013). [2007 Report]; John G. Ruggie, United National Human Rights Council, 4th Sess, *Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries*, UN Doc A/HRC/4/35/Add 1, online: ohchr.org <http://ap.ohchr.org/Documents/dpage_e.aspx?si=A/HRC/4/35/Add.1> at 2 (Accessed August 15, 2013). [Addendum 1 for 2007 Report]; 2008 report, *supra* note 161 at ¶ 6. The SRSG does not refer to a list of human rights because "business can affect virtually all internationally recognized rights, [and a] limited list would certainly miss one or more right that may turn out to be significant in a particular instance."

[166] 2008 report, *supra* note 161 at ¶ 27.

[167] *Ibid*.

[168] *Ibid* at ¶ 30.

[169] Addendum 1 for 2007 Report, *supra* note 165 at 2, 7 FN 3, ¶ 42. This is where the treaty body commentaries of the above core human rights conventions become important. The commentaries expand the scope of the state duty to protect human rights to include violations by private actors, in particular business enterprises. If a state fails to take the appropriate measures to prevent, investigate, punish, and redress human rights violations by a private actor, such as a business, it may indirectly permit the violation and so breach its own obligation to protect the enumerated right. Most treaties impose an obligation to adopt legislative measures as a means to ensure the enjoyment of human rights, but do not specify the exact criteria to be included in such legislation.

flexibility and freedom states enjoy in developing, enforcing, and putting into operation provisions protecting human rights,[170] such legislation could include variations of mandatory or voluntary requirements, or a mixture of both. Such a flexible approach is important because it serves as a reminder of the unique authority a state government has to exercise in meeting its duty to protect. This provides an opportunity to promote SR as a tool to regulate TNCs with regard to ESG and human rights.

B. Disclosure/Reporting under the State Duty to Protect

"[F]oster[ing] corporate cultures respectful of rights both at home and abroad", through corporate and securities law and policy, is an important component of the state duty to protect.[171] When SR is included in the corporate culture, the culture becomes more mindful of human rights.[172] As a result, SR offers a potential means of regulating corporate activity, "at home and abroad", through the disclosure of business operations respecting human rights.[173] By implementing SR, "governments can support and strengthen market pressures on companies to respect rights" and reinforce compliance systems by informing and enabling stakeholders to evaluate "rights-related performance."[174] In this view, a SR obligation indirectly compels good corporate behavior.

To clarify the potential of corporate and securities law and the role of SR, including human rights due diligence, the former SRSG launched the Corporate Law Tools (CLT) Project.[175] This project involved more than 20 leading global corporate law firms to outline "whether and how corporate and securities law in 39 jurisdictions encourages or impedes companies' respect for

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[170] *Ibid* at ¶ 43.
[171] CLT ADD, *supra* note 86 at 1.
[172] 2008 report, *supra* note 161 at ¶ 29-32.
[173] John Ruggie, *April 2010: Business and Human Rights: Further Steps toward the Operationalization of the "protect, respect and remedy"* framework, UN Doc A/HRC/14/27 at 6, 8 ¶ 33, online: Business and Human Rights Resource Center, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil> (Accessed August 15, 2013). [2010 Report].
[174] 2008 report, *supra* note 161 at ¶ 30.
[175] CLT ADD, *supra* note 86 at 1.

human rights".[176] Directly shaping what companies do and how they act, corporate and securities law play a major role in the actions and operations of corporate entities.[177] The CLT project revealed that corporate/securities laws and human rights issues are viewed as divergent paradigms but that human rights are recognized to limited extent.[178] Integrating human rights concerns into corporate/securities law has the potential to influence corporate decision-making to consider human rights issues. According to the Protect, Respect, Remedy Framework, by requiring businesses to implement a disclosure requirement there is potential to not only provide stakeholders with information to "better engage with businesses [and to] assess risk and compare performance within and across industries," this would also compel businesses to integrate human rights into their core business interests and operations.[179]

Guiding Principle 3 (GP3), of the 2011 Guiding Principles on Business and Human Rights for implementing the U.N. Framework, is relevant to a SR requirement under the state duty to protect because it reinforces the idea of disclosure.[180] GP3 particularly recognizes that corporate and securities laws have a direct impact on shaping business behavior, but at the same human rights within these laws are not very well, if at all, understood.[181] One solution offered by GP3, is for increased state guidance to promote more respect for human rights within the current system.[182] State encouragement of SR and disclosure is deemed key in fostering respect for human rights from business enterprises, especially if the business is engaged in activities likely to impact human rights, such as the extractive sector.[183] Specifically, state encouragement could include guidance and communication on human rights,[184] such as the disclosure of the impact of human rights issues on economic performance and its relationship with materiality in financial

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[176] *Ibid*; *Osgoode Hall Law School convenes Expert Consultation in Support of Corporate Law Tools Project of UN Special Representative on Business and Human Rights – Toronto 2009*. (Toronto: Nov 5-6, 2009 Osgoode Hall, 2009). In 2009, the SRSG established the Corporate Law Tools (CLT) Project, said to be the first in-depth and multi-jurisdictional study looking to the relationship between corporate and securities law and human rights; CLT overarching, *supra* note 86 at 1.
[177] *Ibid*.
[178] CLT ADD, *supra* note 86 at ¶ 12.
[179] 2008 report, *supra* note 161 at ¶ 36.
[180] Endorsed Guiding Principles, *supra* note 155 at Guiding Principle 3.
[181] *Ibid* at Guiding Principle 3 commentary.
[182] *Ibid*.
[183] *Ibid*.
[184] *Ibid*.

reporting.[185] In addition to state guidance, GP3 also looks to other important actors for guidance, since it no longer views the state as the sole regulator, but as one whose role is now complemented by other important actors.[186] This view supports the notion of a dialogue between businesses and other actors, and of SR as the means of stimulating dialogue.

The next principle relevant to SR is GP4. This principle claims business enterprises owned or controlled by the state or receiving support from the state should only receive support in exchange for conducting human rights due diligence.[187] The implication here is that any violation by a business enterprise receiving significant support or service from the state may be attributed directly to that state, because the state is viewed as the "primary duty-bearer" of protecting human rights. By providing continuous support, financial or otherwise, the state implicitly displays support for the actions and activities of the entity, whether good or bad.[188]

C. Human Rights Due Diligence

SR includes gathering and examining data in the process of reporting information. This early phase in preparing SR may be compared to the process of due diligence as both play a role in educating the business entity. Explicitly outlined under the corporate responsibility to respect pillar is a due diligence process. By falling under this pillar, it becomes evident that human rights due diligence is to be performed by corporate and business entities.[189] Such due diligence is intended to aid in risk management and the prevention of corporate misconduct.[190] This occurs through a "process whereby companies not only ensure compliance with national laws but also manage risk of human rights harm with a view to avoiding it."[191] By helping companies address their responsibilities to communities, individuals, and shareholders offers an opportunity to

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[185] *Ibid* at 9. Incentives may be another factor, such as using tax credits or giving weight to reporting in judicial or administrative proceedings.
[186] Endorsed Guiding Principles, *supra* note 155 at Guiding Principle 3 at ¶ 4, 14; Mark Taylor, "The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility" (2011) 5:1 Nordic Journal of Applied Ethics 9 at 21.
[187] Endorsed Guiding Principles, *supra* note 155 at Guiding Principle 4.
[188] *Ibid*.
[189] *Ibid* at ¶ 6 of Intro, Guiding Principle 17.
[190] *Ibid*.
[191] *Ibid*; 2008 report, *supra* note 161 at ¶ 25, 58.

"protect both values and value."[192] Similar to SR, corporate and business due diligence allows companies to become "aware of, prevent and address adverse human rights impacts," permitting a company to "know and show" it is meeting the responsibility to respect.[193] This collected information, like SR, can be relayed through a variety of forms of communication to investors, consumers, and other stakeholders. The process of collecting information and addressing "potential and actual human rights impacts from a company's business activities and the relationships connected to those activities" helps companies prevent complicity in human rights violations and promotes risk management.[194]

Corporate due diligence processes, and SR, are frequently questioned in terms of how far in scope the process should examine without becoming costly and overly burdensome. The former SRSG responds to this critique by providing guidance in the 2008 Protect, Respect and Remedy Framework. This guidance includes inductive and fact-based limitations within certain factors and the use of existing frameworks, such as, as a minimum, the international bill of rights and the core conventions of the International Labour Organization.[195] The 2008 Framework also outlines the adoption of certain processes. Such as the formation of human rights policies that include detailed guidance where necessary,[196] followed by impact assessments to consider the impact of activities on human rights.[197] The third element includes integrating information from impact assessments into business plans and operations to address and avoid future impacts on human rights, [198] and lastly implementing performance monitoring and auditing processes.[199]

GP13 outlines the use and implementation of corporate human rights due diligence as a way to help prevent and mitigate adverse business impacts on human rights.[200] After GP13, the

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[192] 2010 Report, *supra* note 173 at ¶ 79.
[193] 2008 report, *supra* note 161 at ¶ 56.
[194] *Ibid* at ¶ 73. Complicity refers to "indirect involvement by companies in human rights abuses - where the actual harm is committed by another party, including governments and non-state actors."
[195] *Ibid at* ¶ 57-63. The length of this corporate/business human rights due diligence procedure will ultimately "depend on the circumstances".
[196] *Ibid* at ¶ 60.
[197] *Ibid* at ¶ 61. This includes specific references to internationally recognized human rights.
[198] *Ibid* at ¶ 62.
[199] *Ibid* at ¶ 63. This step involves keeping track of developments and human rights impacts to address and respond to issues and importantly the creation of incentives and disincentives to ensure improvement in operations.
[200] *Ibid* at Guiding Principle 13.

requirements of corporate due diligence are further expanded under GP16 through GP22. This includes the formation, and implementation, of corporate due diligence polices and processes, the gauging of risks, and engagement of stakeholders;[201] the preventing, mitigating, and addressing of issues and integrating information into internal processes;[202] and the formation of a system of verification and performance tracking to ensure impacts are being addressed.[203] Overall, the GPs reveal corporate human rights due diligence aims to prevent and remediate cases where violations were unforeseen or unable to be quickly addressed.[204] The shared goals of prevention, engagement, risk assessment, and feedback illustrate parallels between due diligence and SR. This allows SR to share in the global acceptance and normative significance of the U.N. Framework. This normative significance has also allowed the GPs to influence other CSR frameworks as well, as discussed below.[205]

D. Company-level Non-judicial Grievance Mechanism

The access to remedy pillar of the U.N. Framework also contains components that illustrate the emerging disclosure trend. In particular, company-level non-judicial grievance mechanisms[206] have the potential to promote goals similar to those of SR, such as corporate due diligence,

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[201] *Ibid* at 16,17 at Guiding Principle #17-18

[202] *Ibid* at 18 at Guiding Principle #19.

[203] *Ibid* at 19 at Guiding Principle #20; *Ibid* at 20 Guiding Principle #21. This includes tracking the effectiveness of responses and drawing on feedback from internal and external sources to verify if impacts are being addressed.

[204] *Ibid* at 14, 20 at Guiding Principle #22, #14 Commentary. GP 22 provides guidance on remediation where the business enterprise has caused or contributed to adverse impacts. GP 14 claims all business entities must respect human rights, regardless of their size. The SRSG understands human rights impacts "will be proportional to, among other factors, its size" and really its capital. Still, the GPs recognize that SMEs can have serious impacts and "the responsibility to respect applies fully and equally to all business enterprises."

[205]An example of this normative significance can be seen by a Goldcorp commissioned human rights assessment which used the Framework as an appraisal model. *See further in Chapter* 3 for a discussion on GoldCorp. On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine*, at 5 online: csr.goldcorp.com <http://csr.goldcorp.com/2011/docs/2010_human_full_en.pdf> (Accessed August 15, 2013); Barrick Gold, *CSR Advisory Board*, online: <http://www.barrick.com/responsibility/csr-advisory-board/default.aspx> (Accessed August 15, 2013). Providing implicit support for the work of the former SRSG and the GPs, Barrick Gold formed a CSR Advisory Board and included the former SRSG, John Ruggie, as a special consultant.

[206] 2008 report, *supra* note 161 at ¶ 92. In order to be effective, all non-judicial grievance mechanisms should, at a minimum, "be legitimate; accessible; predictable; equitable; rights-compatible; and" transparent; Endorsed Guiding Principles, *supra* note 155 at Guiding Principle 31, adds another element to the suggested elements of a "operational-level" non-judicial grievance mechanism, which is to provide "a source of continuous learning" and be "based on engagement and dialogue".

disclosure, and stakeholder dialogue. This could occur at the operational-level,[207] where "grievance mechanisms are [directly] accessible [by] individuals and communities who may be adversely impacted", or through an external expert or body.[208] Under GP29, operational-level grievance mechanisms are said to perform two key functions with regard to the corporate responsibility to respect human rights.[209] The first is identify "adverse human rights impacts as a part of an enterprise's on-going human rights due diligence",[210] and then "analyzing trends and patterns in complaints", to pinpoint systemic problems and to adjust practices accordingly.[211] The second key function is that once identified, the business entity can address the grievance and remediate it, preventing it from escalating.[212] These functions aid in corporate due diligence, risk management, and also stimulate a conversation with stakeholders. In addition to voicing concerns, stakeholders can also be included in the decision-making role of grievance mechanisms. The inclusion of stakeholders helps to ensure impartiality of the mechanism, furthers the potential for disclosure, and "redress[es] imbalances in information and expertise between parties" enabling a dialogue and the creation of "sustainable solutions".[213] Overall, providing such access to a remedial process, GP29 commentary elaborates that consistent communication can be essential to retaining confidence in the grievance mechanism, and that providing transparency to stakeholders also demonstrates legitimacy and trustworthiness.[214]

Although the work of the former SRSG and the work of the United Nations Human Rights Council (UNHRC) leading to the GPs focuses on human rights related business impacts, the guidance in the GPs and the U.N. Framework can also apply to social and environmental issues. This is important because the PRI, the U.N. GC and the GRI explicitly address environmental, social, and human rights issues.[215] This scope of issues is similarly included in the Organization

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[207] Endorsed Guiding Principles, *supra* note 155 at ¶ 6
[208] *Ibid* at Guiding Principle 29.
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid.*
[212] *Ibid.*
[213] 2008 report, *supra* note 161 at ¶ 95.
[214] Endorsed Guiding Principles, *supra* note 155 at Guiding Principle 31
[215] Endorsed Guiding Principles, *supra* note 155 at 17.

for Economic Co-operation and Development (OECD) and its Guidelines on Multinational Enterprises (MNEs), another framework reinforcing the growing disclosure trend.

1.2 OECD Guidelines for MNEs

The earlier version of the OECD, referred to as the Organization for European Economic Cooperation (OEEC) initially consisted of only industrialized countries and was constructed to implement the United States (U.S.)-financed U.S. Marshall Plan for the reconstruction of Europe after World War II.[216] After its success and the recognition of its potential, Canada and the U.S. joined the OEEC members, by signing the OECD Convention.[217] The OECD is an institute in which state governments work together towards the goal of improving the economic and social well-being of people around the world[218] through international standards and policies on products, practices, and MNEs.[219] Janda et. al argue the OECD Guidelines "constitute one of the most influential voluntary initiatives for [TNCs] (the overwhelming majority of which are based in the rich countries making up the OECD)".[220] These Guidelines for MNEs do not stand alone and form a part of the larger Declaration on International Investment and Multinational Enterprises.[221] This declaration is a policy commitment that was signed on to in 1976 by the original governments of OECD Member countries.[222] It requires "governments to provide an open and transparent environment for international investment and to encourage the positive contribution multinational enterprises can make to economic and social progress".[223] The OECD

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[216] OECD, *List of OECD Member Countries – Ratification of the Convention*, online: oecd.org <http://www.oecd.org/general/listofoecdmembercountries-ratificationoftheconventionontheoecd.htm> (Accessed August 15, 2013).
[217] OECD, *History*, online: oecd.org <http://www.oecd.org/about/history/> (Accessed August 15, 2013).
[218] Organization for Economic Cooperation and Development (OECD), *About Us*, online: OECD.org <http://www.oecd.org/about/> (Accessed August 15, 2013) [About OECD].
[219] *Ibid*; OECD, *OECD Guidelines for Multinational Enterprises 2011 Edition*, online: OECD.org <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> (Accessed August 15, 2013). [2011 Guidelines].
[220] KJP, *supra* note 45 at 447-448.
[221] OECD, *OECD Declaration and Decisions on International Investment and Multinational Enterprises*, online: oecd.org <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm> (Accessed August 15, 2013).
[222] *Ibid*.
[223] *Ibid*.

Guidelines for MNEs, in particular, were developed in 1976,[224] and since have undergone many revisions,[225] the most significant of which were in 2000 and 2011.[226] The 2000 Review is seen as the most "far-reaching" for a number of reasons.[227] First, because it changed the focus of the Guidelines from MNE compliance with national laws to a range of international standards",[228] and second, the review promoted self-regulatory practices and management systems to foster stable and trusting relationships between corporations and societies.[229] It is important to note the Guidelines are directed toward corporations, and the "implementation and dispute resolution procedures are directed towards governments."[230]

The recent 2011 revision sought the inclusion of greater guidance on disclosure.[231] This disclosure refers to "[TNC] activities, structure, financial situation and performance," ownership and governance,[232] codes of conduct, risks, stakeholder relationships, and environmental and social reporting.[233] It also includes disclosure of supply chain relationships such as subcontractors, suppliers, and joint venture partners, which is considered important as it goes well beyond the scope of the GRI, the largest SR framework.[234] Only recently has the GRI

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[224] 2011 Guidelines, *supra* note 219; OECD Policy Brief, *The OECD Guidelines for Multinational Enterprises June 2001*, online: <http://www.oecd.org/investment/mne/1903291.pdf> (Accessed August 15, 2013). [Policy Brief]. After its launch, the OECD Guidelines for MNEs underwent reviews in 1979, a "mid-term review" in 1982, 1984, 1991, 2000, and its recent review in 2011.
[225] *Ibid*.
[226] *Ibid*.
[227] *Ibid*. *Also see* Jennifer Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law (Cambridge, England: Cambridge University Press, 2006) for more information.
[228] Jill Murray, "A New Phase in the Regulation of Multinational Enterprises: The Role of the OECD", (Sept 2001) 30 Industrial Law Journal 255 at 262. [Murray]
[229] *Ibid* at 265; Policy Brief, *supra* note 224; Murray, *supra* note 228 at 264-265. *See* OECD, *OECD Guidelines for Multinational Enterprises 2000 Edition*, online: OECD.org <http://www.oecd.org/investment/mne/1922428.pdf> at Preface, II. General Policies ¶ 7, III. Disclosure (Accessed March 22, 2014). The 2000 Review also promotes, among other topics and processes, disclosure of "material" financial and non-financial information, which reflects the OECD Principles on Corporate Governance and a process to enhance a firms' social and environmental accountability; respect for human rights; the development of environmental management systems, disclosure and precaution; and more generally, "the contribution to sustainable development".
[230] KJP, *supra* note 45 at 448. 90 percent of the world's largest 100 TNCs are from OECD countries is a "significant measure of the Guidelines' normative importance. *See* UNCTAD, "Research Note: World Investment Report 2005: Transnational Corporation and the Internationalization of R&D" (2005) 14 Trans'l Corps 101 at 114.
[231] *Ibid*; 2011 Guidelines, *supra* note 219. Updated in May 2011.
[232] 2011 Guidelines, *supra* note 219 at 27 under "Disclosure".
[233] *Ibid*; OECD, 2011 Update for OECD Guidelines for Multinational Enterprises: Commentaries, online: Business-HumanRights.org <http://www.business-humanrights.org/media/documents/oecd-guidelines-update-commentaries-3-may-2011.pdf> at ¶ 34 (Accessed August 15, 2013). [OECD Update].
[234] OECD Update, *supra* note 233.

outlined guidance that extends past the subsidiary/affiliate companies to include contractual connections in the supply chain to the enterprise.[235]

Under this process, determining what information to disclose is governed by the concept of materiality, defined as "information whose omission or misstatement could influence the economic decisions taken by users of information."[236] Although this implies a focus on shareholder primacy and profit, the OECD Guidelines on Corporate Governance do promote recognition of rights and active co-operation with stakeholders.[237] The relationship between the OECD Guidelines on Corporate Governance and disclosure under OECD Guidelines for MNEs is that both share similar disclosure recommendations and an implicit focus on stakeholder engagement,[238] underlining the disclosure process, promoting cooperation, and looking to influence subsequent corporate activity.[239] Similar to SR and its focus on stakeholders, the above guidelines also reveal a focus on a variety of stakeholders. This includes a focus on shareholders, workers, "local communities, special interest groups, governments, and society" in general, reinforcing the trend towards transparency and public interaction and dialogue.[240]

The 2011 revised OECD Guidelines for MNEs also include a disclosure requirement under its Human Rights section. This disclosure requirement is adopted from the Guiding Principles'

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[235] GRI, *Streamlining sustainability: Increased focus on supply chain management and disclosure* (12 June 2013), online: globalreporting.org <https://www.globalreporting.org/information/news-and-press-center/Pages/Streamlining-sustainability-Increased-focus-on-supply-chain-management-and-disclosure.aspx> (Accessed August 15, 2013).

[236] *Ibid*.

[237] OECD, *OECD Principles of Corporate Governance*, online: OECD.org <http://www.oecd.org/daf/corporateaffairs/corporategovernanceprinciples/31557724.pdf> (Accessed August 15, 2013). Principle five also promotes transparency and disclosure. [OECD Governance].

[238] 2011 Guidelines, *supra* note 219 at ¶ 28. The related annotations provide a wider scope of guidance; OECD Governance, *supra* note 237 at 21, 24, 49

[239] *Ibid*. Principle four "encourage[s] active cooperation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises," and Principle six instructs boards to consider stakeholder interests.

[240] OECD Update, *supra note* 233 at ¶ 28, 30, 36; The Guidelines for MNEs also focus on human rights by adopting the U.N. Framework; 2011 Guidelines, *supra* note 219 at table of contents. The Guidelines for MNEs similarly envision that enterprises too are expected to respect human rights by ensuring Employment and Industrial Relations, respecting compliance with local and international laws, practices and standards; focusing on the Environment with sustainable development and protecting local public health and safety; avoiding Bribery; protecting Consumer Interests through fair and ethical business practices and quality and reliable products; spreading Science and Technology; following fair Competition and avoiding anti-competitive agreements; and engaging fairly in Taxation to foster the development of host countries.

corporate due diligence approach under the corporate responsibility to respect pillar of the U.N. Framework.[241] The OECD Guidelines for MNEs view as integral the due diligence process of business decision-making and risk management systems. As a result, these Guidelines recommend that businesses carry out human rights due diligence by assessing and integrating risks, tracking responses, and communicating how risks and impacts are addressed.[242] Also adopted after the 2011 review was the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, which is designed to help mining "companies respect human rights and avoid contributing to conflict through their sourcing practices."[243] Overall, this guidance intends to foster transparency with supply chains and sustainable corporate engagement in the mineral sector as a whole.[244]

One method of OECD enforcement of the Guidelines for MNEs is through national contact points (NCPs). NCP agencies hear inquiries and complaints related to the Guidelines for MNEs and are established by state governments that have adopted the Guidelines to promote, protect, and implement them.[245] NCPs assist enterprises and their stakeholders to take appropriate measures to promote compliance and observance with the Guidelines.[246] This observance does not imply that NCPs monitor or engage in investigative or quasi-judicial roles to determine whether or not companies are following the Guidelines.[247] Instead NCPs are only intended "to facilitate a constructive dialogue between MNEs and those affected by their operations with a

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[241] OECD, *OECD Due Diligence Guidance for Responsible Supply Chain Minerals from Conflict-Affected and High-Risk Areas Second Edition*, online: oecd.org <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf> at section IV (Accessed August 15, 2013) [Supply Chain DD]; OECD, *The OECD Guidelines for Multinational Enterprises Policy Brief*, online: <http://www.oecd.org/dataoecd/12/21/1903291.pdf> (Accessed August 15, 2013).
[242] *OECD Update*, *supra* note 233 at ¶ 45.
[243] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, online: oecd.org <http://www.oecd.org/daf/inv/mne/mining.htm> (Accessed August 15, 2013). [OECD Due Diligence]; Supply Chain DD, *supra* note 241 at 3.
[244] *Ibid*. The underlying goal of such disclosure is prevent the mineral trade from fueling conflict.
[245] OECD, *National Contact Points for OECD Guidelines for Multinational Enterprises*, online: OECD.org <http://www.oecd.org/daf/inv/mne/ncps.htm> (Accessed August 15, 2013); Department of Foreign Affairs and Trade and Development Canada, *Canada's National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)*, online: international.gc.ca <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R> (Accessed March 6, 2014). [OECD NCP].
[246] OECD NCP, *supra* note 245; OECD Watch, *NCPs*, online: OECDWATCH.org <http://oecdwatch.org/oecd-guidelines/ncps> (Accessed August 15, 2013). [OECD Watch]; Access, *OECD National Contact Points*, online: accessfacility <http://www.accessfacility.org/oecd-national-contact-points> (Accessed March 22, 2014).
[247] OECD Watch, *supra* note 246.

view to finding solutions."[248] When MNE compliance is in question it is brought forward in the form of a "specific instance", also known as a complaint.[249] The significance of this complaint process is that, according to Janda et. al, "the hybrid and interactive nature of the OECD Guidelines' complaint mechanism nicely illustrates the constructive potential of the regulatory model of corporate accountability in the shadow of the law".[250]

1.3 Other SR Initiatives

Beyond the OECD Guidelines for MNEs, the International Council on Mining and Metals (ICMM) also adopts a human rights due diligence process. Specifically, the ICMM integrates corporate human rights due diligence into corporate risk management processes to influence mining corporate governance.[251] Historically, the ICMM is a product of the Global Mining Initiative (GMI).[252] The GMI was formed to promote "policy learning through the accumulation of scientific knowledge about sustainable mining practices and through the dissemination of information about best practices in the mining sector".[253] The GMI eventually established the ICMM in 2001 for the purpose of improving sustainable development performance in the mining and metals sectors, serving "as an agent for change and continual improvement relating to mining and sustainable development".[254]

After companies integrate a due diligence process and the appropriate actions in response to learned information, the ICMM proceeds to track responses and communicate externally, an idea drawn from GP21 of the Guiding Principles on Business and Human Rights for Implementing

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[248] Canada, Department of Foreign Affairs and International Trade (DFAIT), *Government Response to the Fourteenth Report of the SCFAIT: Mining in Developing Countries – Corporate Social Responsibility* (October 2005) at 7.
[249] OECD Watch, *supra* note 246.
[250] KJP, *supra* note 45 at 448.
[251] ICMM, "Human Rights in the Mining and Metals Industry: Integrating human rights due diligence into corporate risk management processes" (March 2012) at 28, 30, online: icmm.org <http://www.icmm.com/page/75929/human-rights-in-the-mining-and-metals-industry-integrating-human-rights-due-diligence-into-corporate-risk-management-processes> (Accessed August 15, 2013). [ICMM HRs].
[252] Hevina S. Dashwood, "Canadian Mining Companies and the Shaping of Global Norms of Corporate Responsibility", (2005) 60 International Journal 4: 977 at 995.
[253] *Ibid.*
[254] Int'l Council on Mining & Metals, *About Us*, online: ICMM <http://www.icmm.com/about-us/about-us> (Accessed August 15, 2013); Business Action for Sustainable Development, *Global Mining Initiative*, online : <http://basd.free.fr/initiatives/viewproject.php.243.html> (Accessed August 15, 2013). At the conclusion of the GMI in 2002, the ICMM "assumed industry leadership on sustainable development".

the U.N. Framework.[255] The objective of tracking is to ensure the due diligence system is effective in achieving its goals and is providing effective responses, an objective similar to the goals of SR and stakeholder engagement. The ICMM's Sustainable Development Framework also has a transparency principle,[256] which broadly applies to sustainability and requires "implementation of effective and transparent engagement, communication and [independent verification of] reporting arrangements with" stakeholders.[257]

Similarly, the International Standard Organization (ISO) has also incorporated the Guiding Principles' due diligence mechanism through ISO 26000. ISO is the largest developer of voluntary international standards which are intended to make industry practices and processes more efficient and effective.[258] ISO has developed a number of voluntary standards directly relevant to SR. For example, ISO 26000 applies to Social Responsibility; ISO 31000 applies to Risk Management; and ISO 14000 applies to Environmental Management.[259] Although ISO 26000 is not a sustainability disclosure framework, it still provides guidance and information for organizations on how to address sustainability issues. ISO 26000 specifically makes an effort to align with the GRI and explicitly promote sustainability disclosure.[260] ISO 31000 and ISO 14000 are also significant because they include topics intended to be encompassed in SR. These standards aim to promote sustainable development in the society in which it operates,[261] address its organizational impact on the environment,[262] use a multi-faceted approach to meet the needs of different stakeholders,[263] and promote the benefit of gaining a competitive advantage and creation of a positive reputation.[264] Experts participating in the upgrade of ISO standards

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[255] ICMM HRs, *supra* note 251.
[256] ICMM, *Sustainable Development Framework: 10 Principles*, online: ICMM.com <http://www.icmm.com/our-work/sustainable-development-framework/10-principles> (Accessed August 15, 2013).
[257] *Ibid* at Principle 10.
[258] ISO, *About ISO*, online: iso.org <http://www.iso.org/iso/home/about.htm> (Accessed August 15, 2013).
[259] ISO, *Standards*, online: iso.org <http://www.iso.org/iso/home/standards.htm> (Accessed August 15, 2013).
[260] Global Reporting Initiative, *GRI and ISO 26000: How to use the GRI Guidelines with ISO 260000*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/How-To-Use-the-GRI-Guidelines-In-Conjunction-With-ISO26000.pdf> (Accessed August 15, 2013).
[261] ISO, *ISO 26000 Social Responsibility*: *Discovering ISO 26000*, online: iso.org <http://www.iso.org/iso/discovering_iso_26000.pdf> (Accessed August 15, 2013). [ISO 26000].
[262] *Ibid*.
[263] ISO, *Environmental Management: The ISO 14000 Family of International Standards*, online: iso.org, <http://www.iso.org/iso/theiso14000family_2009.pdf> (Accessed August 15, 2013).
[264] ISO 26000, *supra* note 261

believed due diligence was the most important contribution from the former SRSG. [265] One expert claimed that:

> [a]nother result [of the "Ruggie framework"] is that due diligence has become not only an issue within the Human Rights core subject, but also a process step in the process of integrating social responsibility into an organization … After the discussions at the 7th conference in Quebec we realized the value of exercising due diligence regarding all core subjects. So a new sub clause (7.3.1) was accepted at the 8th and final Conference in Copenhagen on due diligence as a process step.[266]

1.4 State SR Efforts

In addition to international CSR frameworks, the growing international transparency and reporting trend has also been promoted and displayed by many different countries. For example, in 2007 the Swedish government became the first country to require state-owned companies to publish sustainability reports based on the GRI,[267] and as of 2012 Spain does as well.[268] In 2009, Denmark began requiring CSR sections to be included in annual reports of the largest companies, mandating companies to promote human rights and a sustainable environment.[269] Notably, Denmark excludes companies from this CSR reporting obligation if the company is a member of the U.N. GC or U.N. PRI.[270] China has also made strides in SR. As of 2008, China has implemented the Environmental Information Disclosure Act and Guidelines for State-owned Enterprises on fulfilling Corporate Social Responsibilities.[271] The Stock Exchange of Hong Kong

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[265] Sandra Atler, "The Impact of the United Nations Secretary-General's Special Representative & The UN Framework on the Development of the Human Rights Components of ISO 26000" (2011) 64 Report of the Corporate Social Responsibility Initiative Mossavar-Rahmani Center for Business and Government at 16 ¶ 2.4 online: <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_64_atler_june%202011.pdf> (Accessed August 15, 2013). ISO standard experts wanted to expand the scope and definition of due diligence from just human rights to a "social responsibility due diligence" to better encompass broader social responsibility issues.

[266] *Ibid*.

[267] Global Reporting Initiative, *Sweden and Denmark lead the way in Sustainability Reporting*, online: globalreporting.org <https://www.globalreporting.org/information/news-and-press-center/Pages/Sweden-and-Denmark-lead-the-way-in-Sustainability-Reporting.aspx> (Accessed August 5, 2013).

[268] Global Reporting Initiative, *Spain enacts legislation on sustainability reporting following in the footsteps of Sweden, the Netherlands and China*, online: globalreporting.org <https://www.globalreporting.org/information/news-and-press-center/Pages/Spain-enacts-legislation-on-sustainability-reporting-following-in-the-footsteps-of-Sweden,-the-Netherlands-and-China.aspx> (Accessed August 15, 2013). [Spain].

[269] CLT ADD, *supra* note 86 at ¶ 130.

[270] *Ibid*.

[271] Global Reporting Initiative, *Focal Point: China*, online: globalreporting.org <https://www.globalreporting.org/information/policy/initiatives-worldwide/Pages/China.aspx> (Accessed August 5,

Limited has also decided to move towards recommending a 'comply or explain' basis of ESG Reporting by 2015.[272] In 2008, the Australia Stock Exchange (ASX) released Corporate Governance Principles and Recommendations. This outlined non-mandatory obligations in relation to environmental and sustainability risks, which required an explanation in its corporate governance statement disclosing the reason for the lack of environmental and sustainability disclosure.[273] South Africa, in September 2009, published its third report on corporate governance (referred to as the King III Code).[274] This code applies to all South African companies, including private companies, and includes an "apply or explain" system that was adopted by the Johannesburg Stock Exchange (JSE) as part of its listing requirements.[275] Though the King III Code is self-regulated and not enforceable in a court of law, the listings requirements help ensure that listed companies are contractually bound to adopt the code, with any failure to do so amounting to a breach of listing requirements.[276] More recently, South

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2013); Ministry of Environmental Protection The People's Republic of China, *Policies and Regulations*, online: mep.gov.cn <http://english.mep.gov.cn/Policies_Regulations/> (Accessed August 5, 2013); State-owned Assets Supervision and Administration Commission of the State Council (SASAC): the People's Republic of China, *Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities*, online: sasac.gov.cn <http://www.sasac.gov.cn/n2963340/n2964712/4891623.html> (Accessed August 5, 2013).

[272] Hong Kong Exchange HKEx, News Release, "The Exchange publishes Consultation Conclusions on Environmental, Social and Governance Reporting Guide", online: hkex.com.hk <http://www.hkex.com.hk/eng/newsconsul/hkexnews/2012/120831news.htm> (Accessed August 5, 2013).

[273] ASX, "Corporate Governance Principles and Recommendation with 2010 Amendments" online: ASX <http://www.asx.com.au/documents/asx-compliance/cg_principles_recommendations_with_2010_amendments.pdf> at 3, 5, 33, 34, 40 (Accessed April 28, 2014); Harvard University Initiative for Responsible Investment, *Global CSR Disclosure Requirements*, online: Hauser Center <http://hausercenter.org/iri/about/global-csr-disclosure-requirements> (Accessed April 28, 2014).

[274] Dimitri Peter Cavvadas, David Kriel and Deenan Pillay, *South Africa: A Sophisticated Securities and M&A Regime*, online: CBA <http://www.cba.org/CBA/PracticeLink/06-10-BC/PrintHTML.aspx?DocId=41532> (Accessed August 20, 2013). [Cavvadas et. al].

[275] *Ibid*; SustainAbility, *Sustainability*, online: Sustainability <http://www.sustainabilitysa.org/About.aspx> (Accessed August 20, 2013); Johannesburg Stock Exchange, *King III reporting in terms of the JSE Listings Requirements*, online: JSE.co.za <http://www.jse.co.za/Libraries/JSE_Listing_Requirements_-_Guidance_Letters/King_III_Reporting_in_terms_of_the_JSE_Listings_Requirements.sflb.ashx> (Accessed August 20, 2013); GRI, *Report or Explain: Why all big companies should report their sustainability performance, or explain why they don't*, online: globalreporting.org <https://www.globalreporting.org/SiteCollectionDocuments/ReportOrExplainBrochure.pdf> at 2 (Accessed March 22, 2014).

[276] Cavvadas et. al, *supra* note 274; Francois Le Roux, *The Applicability of the Third King report on Corporate Governance to Small and Medium Enterprises* (MBA Thesis, University of Stellenbosch, 2010) [unpublished]; The South African Institute of CAs, "The King Report on Corporate Governance" (12 July 2010) online: SAICA <https://www.saica.co.za/TechnicalInformation/LegalandGovernance/King/tabid/626/language/en-ZA/Default.aspx> (Accessed August 20, 2013).

Africa, together with Brazil, Denmark, and France formed the Group of Friends of Paragraph 47 in June 2012. This initiative is based on paragraph 47 of the 2012 U.N. Conference on Sustainable Development outcome document, acknowledging the importance of corporate SR.[277] Next, the U.K. Companies Act explicitly requires the disclosure of social and community issues,[278] and likewise, the United States (U.S.) Dodd-Frank Act also requires the disclosure of social information in order to directly address social and human rights issues in the Democratic Republic of Congo.[279] After congress adopted the Cardin-Lugar amendment,[280] the U.S. Securities and Exchange Commission (SEC) put into practice 13(q) of Section 1504 of the Dodd-Frank Act.[281] This section requires "resource extraction issuers to disclose payments made to governments if the issuer is required to file an annual report with the SEC or if the issuer engages in the commercial development of oil, natural gas, or minerals."[282] Although a United States District Court invalidated Rule 13(q)-1 under the Securities Exchange Act of 1934 on July 2, 2013,[283] some commentators suggest the invalidation is not permanent as the SEC may change

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[277] United Nations Environmental Programme, *Group of Friends of Paragraph 47*, online: unep.org <http://www.unep.org/resourceefficiency/Business/SustainableandResponsibleBusiness/Reporting/FriendsofParagraph47/tabid/105011/Default.aspx> (Accessed August 5 2013).

[278] *Companies Act 2006* (UK), c 5, s 417. This section states "to the extent necessary for an understanding of the development, performance or position of the company's business, include…social and community issues, including information about any policies of the company in relation to these matters."

[279] U.S. Securities Exchange, *Specialized Corporate Disclosure: Background on Title XV of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, online: <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml> (Accessed August 5, 2013); US, HR Res 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Cong, 2010. This amendment applies to those that purchase minerals through supply chains. This regulation targets U.S. Securities Exchange issuers who use minerals to disclose the source of minerals to avoid using conflict minerals and to stop the support of armed groups in the DRC. [Dodd-Frank Act]. *See* Galit Sarfaty, "Human Rights Meets Securities Regulation" (2013) 54 Virginia Journal of International Law 97.

[280] Luis A. Aguilar, "Facilitating Transparency of Resource Revenue Payments to Protect Investors", online: sec.gov <http://www.sec.gov/news/speech/2012/spch082212laa-extraction.htm> (Accessed August 5, 2013).

[281] Revenue Watch Institute, "SEC Final Rules: Disclosure of Oil, Gas and Mining Payments" (22 August 2012) online: Revenuewatch.org <http://www.revenuewatch.org/training/resource_center/sec-final-rules-disclosure-payments-resource-extraction-issuers> (Accessed August 5, 2013).

[282] *Ibid*; This amendment applies to domestic and foreign issuers, subsidiaries, and smaller reporting companies that meet the definition of resource extraction issuer; Foley Hoag, *Federal Court Strikes Down SEC Resource Extraction Rule*, (17 July 2013), Foley Hoag Securities Alert, online: foleyhoag.com <http://www.foleyhoag.com/publications/alerts-and-updates/2013/july/federal-court-strikes-down-sec-resource-extraction-rule> (Accessed August 5, 2013). Any payments or collections of $100,000 USD or more to foreign and U.S. government entities relating to the issuer's activities is required to be disclosed on EDGAR. [Rule Invalidated].

[283] *American Petroleum Institute* v *Securities and Exchange Commission* and *Oxfam America, Inc*, No 12-1668, (D.D.C. July 2, 2013); American Petroleum Institute v. SEC, 714 E3d 1329 (D.C. Cir. 2013); Rule Invalidated, *supra* note 282; Drew Hasselback, *Canadian Mining industry embraces transparency initiative*, online: nationalpost.com <http://business.financialpost.com/2013/07/31/canadian-mining-industry-embraces-transparency-initiative/> (Accessed August 5, 2013). [Canadian PWYP].

the way it enforces the section in question.[284] In contrast to the U.S. court decision invalidating Rule 13(q)-1, the European Parliament in June 2013 voted on legislation similar to the Cardin-Lugar Amendment, the European Accounting and Transparency Directives, and approved the new disclosure initiative applicable to oil, gas, mineral and logging firms.[285] Similar to the U.S. initiative, the European legislation requires oil, gas, mineral and logging firms to provide details and the publication of all payments over €100,000 to federal, national and regional governments.[286]

1.5 Why Not Sustainability Reporting?

The above trend for greater transparency and SR may provide a useful contribution to the problem of ESG and human rights violations attributed to Canadian extractive sector TNCs operating outside of Canada. However, any implementation of a SR process will first need to overcome certain hurdles. For example, although transparency is intended to "empower the powerless," it can also reinforce the powerful and inequality.[287] For example, this can be seen through various public and private international agreements that call for "sophisticated procedures, measurements, auditing and verification arrangements, and reporting."[288] Provisions that require particular processes, measurements, and auditing may be relatively easily fulfilled by

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[284] Canadian PWYP, *supra* note 283; Oxfam, *SEC Urged to re-issue strong oil transparency rules*, online: Oxfam America <http://www.oxfamamerica.org/press/sec-urged-to-re-issue-strong-oil-transparency-rules/> (Accessed February 26, 2014); Nick Snow, "API offers ideas for SEC's rewrite of Dodd Frank disclosure rule" *Oil & Gas Journal* (8 December 2013), online: OGJ<http://www.ogj.com/articles/2013/11/api-offers-ideas-for-sec-s-rewrite-of-dodd-frank-disclosure-rule.html> (Accessed February 26, 2014); Letter from 44 international investors (28 August 2013) online: pwypusa <http://pwypusa.org/sites/default/files/SEC%20investor%20letter%20-%20Press%20Release%20-%20US%20-%20FINAL%20082713%20pdf.pdf> (Accessed February 26, 2014); Letter from Benjamin Cardin, Patrick Leahy, Richard G. Lugar, Carl Levin, Edward J. Markoy (2 August 2013) online: pwypusa <http://pwypusa.org/sites/default/files/Senate%20letter%20to%20SEC%20to%20re-issue%201504%20rules_2Aug2013.pdf> (Accessed February 26, 2014).

[285] PWYP-International, "New PWYP and Friends of the Earth Europe transparency advert launches across Europe" (13 November 2012) online: publishwhatyoupay.org <http://www.publishwhatyoupay.org/resources/new-pwyp-and-friends-earth-europe-transparency-advert-launches-across-europe> (Accessed August 5, 2013); European Parliament, Press Release, 20130607IPR11387, "Oil, gas, mineral and logging firms obliged to disclose payments to governments" (12 June 2013) online: europarl.europa.eu <http://www.europarl.europa.eu/news/en/pressroom/content/20130607IPR11387/html/Oil-gas-mineral-and-logging-firms-obliged-to-disclose-payments-to-governments> (Accessed August 5, 2013). [Euro Initiative].

[286] Euro Initiative, *supra* note 285.

[287] Arthur P. J. Mol, "The Future of Transparency: Power, Pitfalls and Promises", (2010) 10:3 Global Environmental Politics 132 at 137. [Mol 2010].

[288] *Ibid.*

"richer and more developed states and *market parties*," whereas lesser developed, smaller, and weakly financed nations and companies will have a harder time meeting such reporting or SR requirements.[289] The subsequent result is the continued empowerment of strong international actors and "their position in international politics."[290]

According to Mol, the increase in transparency is argued to only work when users of disclosure have access to and the required literacy to understand disclosed information.[291] For example, adversely impacted communities may not be competent enough to decipher reports and so rely on "western NGOs" to access, understand, assess, and use such information.[292] There is also a risk that stakeholders may "drown in disclosure."[293] Secondly, there is a concern that disclosers will not be receptive or vulnerable to accusations of poor performance.[294] Moreover, the potential complexity associated with distinguishing information that is true and useful from that which is false and not as useful together with a lack of quality assurance and reliability has the potential to hinder transparency initiatives.[295] Lastly, there is the ultimate question of whether or not transparency will actually influence or improve corporate performance, and even if there is such a potential the ideal elements may not always be available to compel compliance.[296]

In addition to the above hurdles, some of the initial difficulties involved in implementing a disclosure system can include the cost, overall complexity, training of staff, development of new processes, changes to older bureaucratic procedures, and the need for continual support to ensure

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[289] *Ibid*. The identified hurdles are further exacerbated when complemented with "sanctions or restrictions in market access", which could include labeling or other marketing or disclosure requirements. [Emphasis added].
[290] *Ibid*.
[291] *Ibid*; Klaus Dingwerth and Margot Eichinger, "Tamed Transparency: How Information Disclosure under the Global Reporting Initiative Fails to Empower" (2010) 10:3 Global Environmental Politics 74 at 91 [Tamed Transparency]. A variety of indicators and high quality data require a greater level of literacy for users.
[292] Mol 2010, *supra* note 287 at 137.
[293] *Ibid* at 138; Aarti Gupta, "Transparency as Contested Political Terrain: Who Knows What About the Global GMO Trade and Why Does it Matter?" (2010) *Global Environmental Politics* 10 (3):
[294] Mol 2010, *supra* note 287 at 136-137.TNCs may not be receptive to reputational damage when poorly connected to the global economy; Arthur Mol, "Environmental Governance through Information: China and Vietnam" (2009) Singapore Journal of Tropical Geography 30 (1): 114–129.
[295] Mol 2010, *supra* note 287 at 138-139.
[296] *Ibid*; Tamed Transparency, *supra* note 291 at 92. A weak civil society or one lacking incentives to make use of social disclosure information may "tame" transparency policies, reduce their transformative threat, and allow TNCs to tailor the instrument to its own needs; Paula J. Dalley, "The Use and Misuse of Disclosure as a Regulatory System", (2007) 34 Florida State University Law Review 1089 at 1108-09. How recipients of disclosure will process, dissect and react are viewed as potential impediments to disclosure based systems.

smooth financial and non-financial operations.[297] The GRI also faces hurdles in its goal of mainstreaming disclosure. Corpwatch[298] argues "it is difficult [for NGOs] to accept transparency at face value if [corporations] believe corporate profitability and social responsibility are mutually exclusive"[299]. This reveals the scepticism of NGOs towards GRI reports because they believe that information disclosed is not likely to reveal the true social and environmental cost of TNC business activity.[300] Dingwerth and Eichinger claim that the "GRI has had little impact in shifting the balance of power in corporate governance toward civil society"[301] and that the anticipated and expected results associated with transparency, or SR, policies are "unrealistically high."[302] Some academics argue, because of the many obstacles and difficulties disclosure "will become a disappearing management fad or a public relations tool unless" stakeholder participation and the power they wield is "somehow institutionaliz[ed in corporate] governance."[303] The suggestion that stakeholder participation be institutionalized raises another potential hurdle for disclosure and SR, which is the need for state support to compel SR and include stakeholder participation. Further, if a state mandates but fails to enforce, then any disclosure or SR measure may lose its credibility. This highlights the fact that the state, specifically its unique authoritative capacity, is critical for the success of SR, mandating SR and reinforcing SR with stakeholder participation.

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[297] Neuman, Laura, and Richard Calland, *Making the Law Work: The Challenges of Implementation* in *The Right to Know: Transparency for an Open World,* (New York: Columbia University Press, 2007) at 179.
[298] CorpWatch, *About CorpWatch*, online: CorpWatch <http://www.corpwatch.org/> (Accessed August 15, 2013)
[299] Rebecca Meyer, "USA: Seeing Through 'Transparency'" *Daily Californian University* (10 July 2001), online: corpwatch.org <http://www.corpwatch.org/article.php?id=1455> (Accessed August 15, 2013).
[300] *Ibid.*
[301] Tamed Transparency, *supra* note 291 at 91; David L. Levy, Halina S. Brown, and Martin de Jong, "The contested politics of corporate governance: the case of the global reporting initiative" (2010) 49 Business and society: A journal of Interdisciplinary exploration 88 at 90.
[302] Tamed Transparency, *supra* note 291 at 91; David Hess, "Social Reporting and New Governance Regulation: The Prospects of Achieving Stakeholder Accountability through Transparency" (2007) 17:3 Business Ethics Quarterly 453 at 457. Critics argue corporations will not really disclose accountable information. [Hess, Prospsects].
[303] Hess Prospects, *supra* note 302 at 458; Robin Roberts, "Determinants of Corporate Social Responsibility Disclosure: An Application of Stakeholder Theory" (1992) 17 Accounting, Organizations and Society 595 at 597-8, 610. The opinion that disclosure is just a fad is shared by: David L. Owen, Tracey Swift, Christopher Humphrey, and Mary Bowerman, "The New Social Audits: Accountability, Managerial Capture or the Agenda of Social Champions?" (2000) 9:1 European Accounting Review 81 at 94-5; David L. Owen, Tracy Swift, and Karen Hunt, "Questioning the Role of Stakeholder Engagement in Social and Ethical Accounting, Auditing, and Reporting" (2001) 25:3 Accounting Forum 264 at 267-9.

The importance of state support in mandating disclosure and SR is highlighted in a number of studies. The nature, scope, and potential of SR is determined by the country in which a corporation is headquartered or listed,[304] with Chen and Bouvain concluding the role of the state is an important component of a non-financial disclosure framework.[305] For example, Burchell et al. reveal that the increase and decrease of reporting in the U.K. is heavily influenced by the political agenda of the time, and political factors are often linked with social and cultural factors.[306] Aguilera and Cuervo-Cazurra note that differences in CSR can be linked to differences in governance systems,[307] a conclusion reinforced by Aguilera et al. who conclude pluralism at the national and transnational levels can influence CSR in a country.[308] As a whole, these conclusions support the view that the state and state governance systems can have a major impact on SR and its level of disclosure, while also lending support to the view that SR is deemed to have a greater chance to thrive with, than without, the support of the state.

Conclusion

In summary, various international frameworks, and states, are pushing for the disclosure of ESG and human rights information and evolving their frameworks to promote greater transparency. The question remains how information disclosure should be used by stakeholders to prevent TNCs from engaging in negative behavior and how to hold them accountable. The reflexive law and new governance theories discussed next provide a potential rationale for SR and aim to provide a justification for the SR and transparency trend.

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[304] Ans Kolk, Seb Walhain and Susanne Van de Wateringen, "Environmental Reporting by the Fortune Global 250: Exploring the Influence of Nationality and Sector" (2001) 10 Business Strategy and the Environment 15 at 17-18. Being listed refers to listing on a stock exchanged in that country.

[305] Stephen Chen and Petra Bouvain, "Is Corporate Responsibility Converging? A Comparison of Corporate Responsibility Reporting in the USA, UK, Australia and Germany" (2008) 87 Journal of Business Ethics 299 at 302.

[306] Stuart Burchell, Colin Clubb and Anthony G. Hopwood, "Accounting in Its Social Context: Towards a History of Value Added in the United Kingdom" (1985) 10:4 Accounting, Organizations and Society 381 at 390, 392, 408.

[307] Ruth Aguilera and Alvaro Cuervo-Cazurra, "Codes of Good Governance Worldwide: What is the Trigger?" (2004) 25:3 Organization Studies 417at 418-9, 426-7, 434, 437-8.

[308] Ruth Aguilera, Cynthia A. Williams, John M. Conley and Deborah E. Rupp, "Corporate Governance and Social Responsibility: A Comparative Analysis of theU.K.and the US" (2006) 14:3 Corporate Governance: An International Review 147 at 153-154. [Aguilera et. al.]. Examples of actors that make up the pluralism at the national and transnational levels include "employees, top management teams, owners, consumers, governments, and NGOs."

Chapter 2

2 Reflexive law, New Governance and Sustainability Reporting

The purpose of this chapter is to document theoretical approaches that have emerged to explain the rise of disclosure practices outlined in Chapter 1. It will introduce the idea of global legal pluralism and outline the theories of reflexive law and new governance regulation. The chapter will further examine sustainability reporting (SR), the potential use of such disclosure, and its relationship with corporate governance, defined as "as the process and structure used to direct and manage the business and affairs of the corporation".[309] Lastly, this chapter will highlight the relationship between the above theories, SR, stakeholders and corporate governance to provide a foundation for states to build a state enforced SR-based framework that targets Canadian extractive sector TNCs operating abroad.

2.1 Global Legal Pluralism

Those in favour of regulated corporate social responsibility (CSR) may point to the traditional method of creating and enforcing rules and regulations, that is, through a state's legal framework. Legal pluralism, however, argues there are a number of sources of "laws", or standards, to provide guidance or oversight for CSR. Understanding global legal pluralism is useful as a background introduction to the reflexive and new governance theories because of the importance placed on stakeholders and the role they play in the formation of principles and practices.

Traditionally, the study of public international law concerned itself with the interaction between states.[310] From this perspective two themes were evident, first that law was mainly considered to be the creation of "acts of official state-sanctioned entities [, and s]econd, law was seen as an

[309] Toronto Stock Exchange, *Where Were The Directors?*, (December 1994) at 7 cited in Michael Kerr, Richard Janda, and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham: LexisNexis Canada, 2009) at 20. Kerr, Janda and Pitts (KJP) reveal that how broadly or narrowly corporate governance is defined determines the relationship between the management of a corporation, its shareholders, providers of capital, and other stakeholders, a view that has received acceptance at the international level. For example, Principle 4 and 6 of the OECD Guidelines of Corporate Governance explicitly refer to stakeholders and their interests. [KJP].

[310] Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060. The primary sources of international law are treaties, conventions, customary practices accepted as law, and general common principles.

exclusive function of state sovereignty."[311] However, the view that the state is the sole creator of laws has begun to wear away.[312] As Sally Falk Moore describes her idea of the semiautonomous social field she explains that one can:

> generate rules and customs and symbols internally [domestically], but that . . . is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.[313]

Jurgen Habermas[314], Paul Berman[315], and Brian Tamanaha[316] all make a case for global legal pluralism. Habermas and Berman share the view of Tamanaha that;

> Legal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level. There are village, town, or municipal laws of various types; there are state, district or regional laws of various types; there are national, transnational and international laws of various types.[317]

With the introduction of new rule-making actors it is important to note the role of the state does not diminish but shifts from being "the primary or exclusive author of binding norms...to being one among [many] other highly influential actors involved in the collaborative, experimental, direct and indirect production of norms relevant to particular areas of market activity."[318] For example, Melvin Einsenberg observes that the essential parts of corporate law include statutory

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[311] Paul Schiff Berman, "Global Legal Pluralism", (2007) 80 Southern California Law Review 1155 at 1174. [Berman, Legal Pluralism].
[312] *Ibid* at 1175.
[313] Sally Falk Moore, "Law and Social Change: the semi-autonomous field as an appropriate subject of study" (1973) 7 Law & Society Review 719 at 720.
[314] Jürgen Habermas, *The Postnational Constellation: Political Essays* (Cambridge, UK: Polity Press, 2001) at Chapter 4 cited in Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", (2008) 30 Sydney Law Review 375 at 386. [Tamanaha].
[315] Berman, *Legal Pluralism*, *supra* note 311.
[316] *Tamanaha*, *supra* note 314 at 375.
[317] *Ibid*.
[318] Peer Zumbansen, "Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective", (2010) 6:5 CLPE Research Paper Series 1 at 24. [Zumbansen]; Also see Colin Scott, "Regulating Everything" (2008) Inaugural Lecture, University College Dublin, School of Law, 2622008 online: Dublin Geary Institute <http://geary.ucd.ie/mapping/images/Documents/RegEverything.pdf> (Accessed March 22, 2012); KJP, *supra* note 309 at 550.

law, state judge made law, federal law, and notably, private ordering through soft law.[319] Similarly, according to Zumbansen, the inclusion of soft law elements reveals that it is "no longer possible to limit our perspectives to either traditional (hard-law oriented) or national processes of rule creation."[320] "Instead, rules and standards as developed and disseminated by transnational actors such as [TNCs], stock exchanges ... or international organizations," like the Organization of Economic Cooperation and Development (OECD), the United Nations (UN), and the International Labour Organization (ILO) are now seen as important components of the transnational law of corporate governance.[321]

Since the end of the Cold War, many international scholars have argued that the "narrow view of how law operates transnationally is inadequate."[322] As a result, more focus has been given to the processes of international norm development. Norm development "consider[s] overlapping transnational jurisdictional assertions by nation-states, norms articulated by international bodies, nongovernmental organizations (NGOs), multinational corporations (MNCs), industry groups, indigenous communities," and other networks of activists.[323] For example, under the Third World Approach to International Law, Utting has argued the CSR framework has to become more "south-centered" in order to include a broad scope of stakeholders and prevent CSR from being used to defend corporate activity instead of to promote higher standards.[324] Arguing the "CSR agenda tends to be somewhat northern driven" and focuses on a narrow set of issues,

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[319] Melvin Eisenberg, "The Architecture of American Corporate Law: Facilitation and Regulation" (2005) 2 Berkeley Business Law Journal 167 at 176.
[320] Zumbansen, *supra* note 318 at 12.
[321] *Ibid*; *KJP*, *supra* note 309 at 20-21. Although corporate governance traditionally aligns corporate management to investors and shareholders, the more modern approach reveals an acceptance of the broader term of "stakeholders". This modern view complements the method of regulating TNC activity internationally through SR.
[322] John W. Meyer et al., "World Society and the Nation-State", (1997) 103 Am J Soc 144 at 145. "Worldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life."
[323] *Berman, Legal Pluralism*, *supra* note 311 at 1175.
[324] Julia Sagebien and Melissa Whellams, "CSR and Development: Seeing the Forest for the Trees" (2010) 31 Canadian Journal of Developmental Studies ¾:483, 506. The CSR agenda is viewed to be largely written by corporations without significant input from those actually impacted. Instead the focus should be to enhance the interactions between the relevant actors to ensure ethical and responsible behaviour of the firm to achieve optimum development results. [Sagebien and Whellams, CSR Development]; Peter Utting, "Promoting development through corporate social responsibility—Does it work?", *Global Future, Third Quarter* (1 September 2003) online: UNRISD <www.unrisd.org/unrisd/website/newsview.nsf/0/B163470112831808C1256DA90041ECC5?OpenDocument> (Accessed August 15, 2013). Stakeholders provide more accuracy and input into analysis and discussion. This helps inform actors to make decisions they are not qualified to make [Utting].

sectors and companies, Utting sees this view from the "north" as potentially reducing the focus on social and environmental issues, the business activities of the "south", and the input and concern of workers and communities in developing countries.[325]

For Teubner the "theory of "global legal pluralism" is required to explain new forms of emerging 'global law'," in which case the new forms of law "grow mainly from the social peripheries, not from the political centres of nation-states and international institutions."[326] The state, now in a decentred position, should take on an indirect role in governing complex social and economic matters and facilitate and motivate the production of norms by non-state actors.[327] For example, the opposition to mining projects has forced TNCs to engage with Indigenous people as a political and reputational imperative.[328] This opposition is compounded by the increased capacity and organizational functionality of NGOs and International NGOs.[329] One example of influence from non-state actors/stakeholders was displayed by Barrick Gold's operations in Tanzania.[330] In this case, after inheriting the North Mara mine from the purchase of a competitor, Canadian mining company Placer Dome, Barrick's initial efforts to "engage" local stakeholders and communities was deemed transactional and "one-way".[331] Consequently, Barrick faced a backlash from local stakeholders preventing any subsequent meaningful dealings and dialogue

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[325] Utting, *supra* note 324. Sara L. Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations" (2011) 3:1 Trade, Law and Development 164.
[326] Gunther Teubner, Global Law without a State in Gunther Teubner ed "'Global Bukowina': Legal Pluralism in the World Society" (Brookfield: Dartmouth Publishing, 1997) at 7.
[327] David J. Doorey, "Who Made That?: Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation" (2005) 43 Osgoode Hall L J 353 at 364; Heledd Jenkins and Natalia Yakovleva, "Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure", (2006) 14 Journal of Cleaner Production 271 at 275-76. Emphasis is put on forming partnerships between business and government to achieve goals in a socially, ethically, and environmentally accepted manner. This is related to corporate governance in that it "helps business leaders maintain sustainable, accountable organizations" and develop and "preserv[e] marketplace trust, reputation, investor confidence, access to capital and employee satisfaction" [Jenkins and Yakovleva].
[328] Jenkins and Yakovleva, *supra* note 327.
[329] *Ibid.*
[330] Aloysius Marcus Newenham-Kahindi, "A Global Mining Corporation and Local Communities in the Lake Victoria Zone: The Case of Barrick Gold Multinational in Tanzania", (2011) 99 Journal of Business Ethics 2:253 at 268-69, 276-77. The goal is to engage and learn from local communities to mitigate and prevent risks. This includes a "deep understanding" of, and integration with, local communities. This views local resources capitalizing TNC activity and integrating local needs into the core business strategy, and state support as a necessary element. This is intended to justify a "social license" by legitimizing business activities with stakeholders locally and in home states.
[331] *Ibid* at 269.

with stakeholders.[332] In contrast, Placer Dome, in South Africa, taking careful consideration of relevant stakeholder concerns was able to dictate its actions accordingly and develop a "partnership" arrangement with locals.[333] By taking note of the local stakeholder concerns, Placer Dome was successful in avoiding adverse criticism being imposed on its business and operations.[334]

The above synopsis of transnational and global legal pluralism reveals the increasing consideration of more stakeholders and the principles and practices these non-state actors contribute to the field of CSR. The process in which non-state actors produce and promote principles and practices "radicalises their semi-autonomous nature."[335] This radicalization[336] is exemplified in the tension between traditional law and policy making and the "spontaneous evolving informal development of norms and principles" from non-state actors in a regulatory position. The spontaneity of non-state actors stems from the capability of non-state actors to quickly react to issues and propose and establish norms and practices.[337] Zumbansen illustrates this relationship by drawing upon democratic theory and highlighting the tension "between a functionally reduced, rubberstamping parliament on the one hand and a fast moving, hardly

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[332] *Ibid*; Geoffrey York, "Barrick's Tanzanian project tests ethical mining policies" *The Globe and Mail* (29 September 2011), online: theglobeandmail <http://www.theglobeandmail.com/report-on-business/rob-magazine/barricks-tanzanian-project-tests-ethical-mining-policies/article559188/?page=all> (Accessed February 26, 2014). As part of Barrick Gold's purchase of the Placer Dome, Barrick also inherited the North Mara mine in Tanzania; Barrick Gold, Press Release, "Barrick Acquires 81% of Placer Dome and Extends Offer to February 3, 2006" (20 January 2006) <http://www.barrick.com/files/docs_pressrelease/PRel_2006_01_20.pdf> (Accessed February 26, 2014).

[333] Frederick Bird, "Project CARE: Placer Dome's Efforts to Help Laid-off South African Miners Find Remunerative Work", (2009) 89 Journal of Business Ethics 2:183.

[334] *Ibid*. Placer Dome addressed issues of education and jobs.

[335] *Zumbansen*, *supra* note 318 at 17. Semi-autonomous is referenced in the view elicited by S.F. Moore.

[336] Peer Zumbansen, "Post-Regulatory law: Chronical of a Career Foretold", (Faculty Seminar, delivered at the McGill University Faculty of Law, 18 February 2009) [unpublished]. <http://www.mcgill.ca/files/legal-theory-workshop/PZumbansen_Post-Regulatory-Law.pdf> at 11 (Accessed April 22, 2014). Zumbansen refers to "radicalization" as a fundamental change in nature of "law's functional orientation", referring to the shift from "official institutions authoritatively [and independently] creating state-originating laws" to one that receives "impulses [and] 'irritations [yet still] relying on its autopoeitic nature [to formulate] legal responses, i.e. continu[ing] its systematic operation", "asserting itself in a highly diversified complex environments". The radicalization of the "semi-autonomous" non-state actors views a similar shift referring to a change in position from one of powerlessness to one of greater authority or capacity to influence, or of one moving towards parity of authority with the traditional law making institution of the state.

[337] *Zumbansen*, *supra* note 318 at 17, 25.

controllable administration in close contact and interaction with private actors on the other,"[338] emphasizing stakeholder input from those closer to corporate operations and impacts.[339] According to Zumbansen, the creation of international corporate governance codes and standards have revealed comparable "characteristics of law making processes that have been undergoing dramatic changes with regards to the actors involved and the nature of the norms generated."[340] This includes a "wider inclusion of private actors" in the rule making process.[341] Tuebner[342], Hess[343], and others[344] reinforce Zumbansen's idea and further identify a failure of the "traditional state-based legal-political intervention into [MNCs]".[345] This failure "has long served as an illustration of the need to develop either distinctly 'post-national', institutionalized governance forms, or self-regulatory soft instruments of voluntary binding."[346] This leads to reflexive law and new governance theories, discussed below.

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[338] *Ibid* at 25.
[339] *Ibid*. Nigel Bankes, "International Human Rights Law and Natural Resources Projects Within the Traditional Territories of Indigenous Peoples", (2010) 47:2 Alberta Law Review 457 at 466, 488-90. Greater democratic participation by reforming the investment arbitration process and increasing transparency is just one way.
[340] *Ibid*; Zumbansen references: European Corporate Governance Institute, *Index of Codes*, online: ECGI <http://www.ecgi.org/codes/all_codes.php> (Accessed August 15, 2013).
[341] *Zumbansen*, *supra* note 318 at 25.
[342] Gunther Teubner, "Substantive and Reflexive Elements in Modern Law", (1983) 17:2 Law & Society Review 239 at 242. [Teubner, *Reflexive Elements*]. Reflexive law "becomes a system for the coordination of action within and between semi-autonomous social subsystems."
[343] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (New York, Oxford University Press, 1992) cited in David Hess, "Social Reporting: A Reflexive law Approach to Social Responsiveness" (1999) 25 Iowa Journal of Corporation law 41 at 42. [Hess, Reflexive law]. Referring to Ayres and Braithwaite, Hess believes the debate over how to control corporate behaviour must move beyond the dichotomous choice between omnipresent state regulation and a *laissez-faire* system" towards one of "responsive regulation" and "collaborative governance," because there is a need for being more experimental and flexible in finding what regulatory system works best to achieve the desired outcome."
[344] Cristine Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45:1 American Business Law Journal 1 at 5. [Ford, BC]. *See further* discussion on Bill 38 at footnote 418; Aaron Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights" (2009) 47 Osgoode Hall Law Journal 47 at 58-60. [Dhir, Politics]. *See further* discussion on Reflexive law below; Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89 Minn L Rev 262 at 263-264. For Lobel there is a shift away from traditional legal regulation to a focus on issues of governance. This focuses on practices that "dislocate traditional state-produced regulation from its privileged place, while maintaining the cohesion and large-scale goals of an integrated legal system" [Lobel, Renew].
[345] Zumbansen, *supra* note 318 at 17.
[346] *Ibid.*

2.2 Reflexive Law

From the evolution of formal law[347] to substantive law[348] and the subsequent advancement of substantive law arises reflexive law. Under formal law, "private actors are free to act in any way within a set boundary."[349] This contributes to individualism and autonomous activity where "substantive value judgments" are made freely by the private actors,[350] but within a boundary of rules.[351] When the state begins to increase the amount of intervention and regulation the subsequent level of regulation is referred to as substantive law.[352] Normally, substantive law is associated with the growth of the welfare state and increased state intervention,[353] with laws being used "as an instrument for purposive, goal-oriented intervention."[354] In comparison to formal law, substantive law aspires to achieve predetermined targets through the development of regulations and standards for actors to follow.[355] The justification of substantive law arises from the need of the state to regulate economic and social activities and balance inadequacies of the market.[356] This entails moving away from defining "spheres for autonomous private action", to one where the law "directly regulates social behaviour by defining substantive prescriptions".[357]

Reflexive law emerges when "substantive legal rationality" reaches the tipping point and causes "crisis of the interventionist state."[358] This crisis results from the welfare states' inability to satisfy the needs and demands of multiple and "differentiated" components of society.[359] Describing this tipping point, Teubner refers to Niklas Luhmann's systems theory, which refers to the transition of a stratified society to functionally differentiated societies[360] and demands a

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[347] Teubner, *Reflexive Elements*, *supra* note 342 at 257.
[348] *Ibid*.
[349] *Ibid* at 252-253.
[350] *Ibid* at 252.
[351] Hess, *Reflexive law*, *supra* note 343 at 48.
[352] *Ibid*.
[353] Teubner, *Reflexive Elements*, *supra* note 342 at 253.
[354] *Ibid* at 240.
[355] *Ibid* at 253-254.
[356] *Ibid* at 253.
[357] *Ibid* at 253-254.
[358] *Ibid* at 267.
[359] Eric W. Orts, "Reflexive Environmental Law", (1995) 89 NW U L Rev 1227 at 1260. [Orts, Reflexive Environmental Law].
[360] Niklas Luhmann, *The Differentiation of Society*, (New York: Columbia University Press, 1982) as cited by Teubner, *Reflexive Elements*, *supra* note 342 at 244-45.

parallel transition to a differentiated legal order.[361] This crisis may implicitly include the inability to regulate TNC activity abroad.

The view from systems theory is that as societies develop and become more complex, society separates into distinct subsystems based on function, such as science, religion, education, politics, law, etc., and each of these subsystems has their own particular world view and manner of discourse.[362] The separate views and distinct rationality of each subsystem displays a movement away from formal law or a stratified society[363] to a "functionally differentiated society" with a number of "relatively autonomous" subsystems.[364] As illustrated by the global legal pluralism view, "law" itself forms a subsystem amongst various other subsystems.[365] Although these subsystems are mutually independent they all perform at the same level.[366] The role of the law is not necessarily diminished but takes a de-centered position from its original arrangement in society.[367] Teubner states the problem is "[l]egal and bureaucratic structures cannot incorporate models of social reality that are sufficiently rich to allow them to cope effectively with the crises of economic management."[368]

The problems that force the progression of substantive law to reflexive regulation are twofold. First, is increased regulation over the various subsystems, which Teubner refers to as "juridification" of social spheres.[369] Hess refers to the same problem as cognitive limitation and elaborates that this problem, or tipping point, is reached when society, with many subsystems, becomes too complex to be effectively regulated by state intervention.[370] The pitfall of regulating a complex society with various subsystems is that substantive law can lead to an accumulation of

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[361] *Ibid*.
[362] Hess, *Reflexive law*, *supra* note 343 at 49.
[363] Orts, *Reflexive Environmental Law*, *supra* note 359 at 1260. Orts describes the stratified society as one that is hierarchically ordered between the rulers and the ruled.
[364] Hess, *Reflexive law*, *supra* note 343 at 49.
[365] *Ibid* at 42. Subsystems such as economic, political, international soft-law, international institutional, and science.
[366] *Ibid*.
[367] Orts, *Reflexive Environmental Law*, *supra* note 359 at 1260.
[368] Teubner, *Reflexive Elements*, *supra* note 342 at 268.
[369] Gunther Teubner, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law ed.*, (New York: de Gruyter, 1987) at 3-4. Chapter 1 discusses juridification cited in Hess, *Reflexive law*, *supra* note 343 at 50.
[370] *Ibid* at 50.

laws beyond reasonable comprehension.[371] An example of this accumulation may be found in the area of human rights and "[t]he more than 2,500 bilateral investment treaties currently in effect".[372] According to the former SRSG, the increase in legal rights of TNCs is beneficial for globalization, investment and trade, but has created "imbalances" between TNCs and states, negatively impacting human rights.[373] One such example of a lack of coherence is evident from a European mining company in South Africa that challenged black empowerment laws under an investment treaty.[374] The example of national policy incoherency identified by the work of the United Nations Human Rights Council (UNHRC) also reveals problems of over-accumulation, lack of clarity, and ultimately inconsistency through vertical and horizontal incoherence.[375] Specifically, vertical incoherence occurs where governments attempt to address "human rights without regard to implementation", and horizontal incoherence occurs where national or sub-national government agencies "work at cross purposes with the state's human rights obligations and the agencies charged with implementing them."[376]

The second problem that leads to the crisis of the welfare state is that of normative legitimacy. This problem refers to the traditional state procedure of lawmaking being separated from democratic measures that underline the legitimacy of state and public institutions.[377] Hess elaborates that this scenario arises when legislators become overwhelmed with the proliferation of substantive laws[378] and become unable to adequately coordinate and reconcile statutes that

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[371] Orts, *Reflexive Environmental Law*, *supra* note 359 at 1259.
[372] John Ruggie, *April 2008: Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5 at ¶ 12, online: SRSG Portal, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil> (Accessed August 15, 2013). [2008 Report]. States enter into bilateral treaties to attract investment and also to protect themselves. These treaties also permit investors to take host states to binding international arbitration for potential damages any host state implementation of legislation to improve social and environmental standards may cause to the goals of the bilateral treaties.
[373] *Ibid.*
[374] *Piero Foresti, Laura De Carli and others v. Republic of South Africa* (International Centre for Settlement of Investment Disputes, Case No. ARB (AF)/07/01).
[375] Addendum 1 to 2008 Report, Special Representative of the Secretary-General, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Addendum, Summary of the Five Multi-Stakeholder Consultations*, A/HRC/8/5/Add 1 at ¶ 26, online: SRSG Portal <http://www.reports-and-materials.org/Ruggie-1-addendum-23-April-2008.pdf> (Accessed August 15, 2013).
[376] *Ibid.*
[377] Orts, *Reflexive Environmental Law*, *supra* note 359 at 1258.
[378] Substantive laws are essentially purposive laws that are goal-oriented.

regulate the same behaviour, in different ways.[379] The example of black empowerment laws above is only one example. Excessive regulation clutters the regulatory scope and fails to reflect policy goals. State agencies may also contribute to this issue by being given greater discretion in enforcing and interpreting the law.[380] Normally, state agencies will provide a convenient and less bureaucratic method of dealing with a particular subsystem, instead of going through a long formal procedure of decision and law making. However, the threat is that government agencies will make interpretations of regulations and act without public consultation or discussion.[381]

The above problems discussed give rise to the crisis of the interventionist state, and lead to the creation of reflexive law. Reflexive law "shares with substantive law the notion that focused intervention in social processes is within the domain of law but [then] retreats from taking full responsibility for substantive outcomes."[382] The justification Teubner provides for reflexive law arises from the middle ground between formal and substantive law, in liberal and neo-liberal concepts, or a free market role of law, since "it relies on invisible hand mechanisms" with regards to a corporation's social autonomy.[383] Reflexive law allows private actors the autonomy of formal law to freely make their own decisions and outcomes, but intervenes in social processes by creating procedures to guide the behaviour of actors.[384] In other words, reflexive law creates a "regulated autonomy" that includes a self-regulated social system responding to stakeholder, or "regulator", feedback. [385] This results in a decentralized integration of society, promoting integrative systems within autonomous subsystems.[386] This promotes societal integration of the various subsystems "without losing the benefits they offer".[387] In this new differentiated society the role of law recognizes its limits as a subsystem attempting to regulate

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[379] Hess, *Reflexive law*, *supra* note 343 at 50.
[380] Jody Freeman, "Collaborative Governance in the Administrative State", (1997) 45 UCLA L Rev 1 at 9-10. Another issue is that agencies increasingly rely on regulatory instruments, such as "interpretive rules, policy statements, guidance documents, enforcement discretion, and even press releases, which do not require notice and comment, as a way of avoiding the relatively demanding procedural requirements of informal rule-making." This is argued to undermine the legitimacy of rules "by removing even the pre-tense of public access and participation."
[381] *Ibid.*
[382] Teubner, *Reflexive Elements*, *supra* note 342 at 254.
[383] *Ibid.*
[384] Hess, *Reflexive law*, *supra* note 343 at 50.
[385] *Ibid.*
[386] *Ibid.*
[387] Hess, *Reflexive law*, *supra* note 343 at 50-51.

other subsystems,[388] and looks to control social action indirectly by determining organizational and procedural principles for future action.[389]

Promoting individual decision-making and self-regulation through "required procedures,[390] reflexive law promotes a self-reflective process encouraging corporations to continuously re-examine and reform their practices based on most current information from stakeholder feedback and experiences.[391] New information compels corporations to react, build on, and learn from impacts to society and stakeholders.[392] This results in a conscious and self-scrutinizing institutional culture with regard to the consequences of a business' practices.[393] Dhir points out reflexive law along with new governance theory are not focused on "directly regulating corporate behaviour – as through traditional command-and-control models" but instead look to affect how corporations are governed.[394] These theories look to focus on the actor and not the act and to "transcend traditional punitive/deterrence-based measures",[395] focusing on norm generation and development of "internal self-regulatory capacities".[396]

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[388] Teubner, *Reflexive Elements*, *supra* note 342 at 255.
[389] *Ibid*.
[390] Eric Bregman & Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, in The Concept and Practice of Ecological Self-Organization 211 (Gunther Teubner et al eds, 1994) cited in Hess, *Reflexive law*, *supra* note 343 at 42-43, 51.
[391] *Ibid*; Orts, *Reflexive Environmental Law*, *supra* note 359 at 1231-32; Hess, *Reflexive law*, *supra* note 343 at 48-49; Teubner, *Reflexive Elements*, *supra* note 342 at 255-56. The evolution from formal law to reflexive law is seen with an example of contract law. In a contractual dispute under formal law, the law will only look to see whether the elements of establishing a valid contract have been met, that of offer and acceptance and a "meeting of the minds." Under substantive law, the law has the option to alter the terms of the contract between the parties in order to ensure the public interest or other socially-desired outcomes are upheld. Finally, in comparing reflexive law to the above views, where formal law looks to prior distributions between contracting parties as a means to settle a contractual dispute, reflexive law "seeks to structure the bargaining relations so as to equalize bargaining power." Where substantive law seeks to resolve a contractual dispute with a view of maintaining the public interest or policy goal, reflexive law "attempts to subject contracting parties to mechanisms of "public responsibility" that are designed to ensure that bargaining processes will take account of various externalities."
[392] Hess, *Reflexive law*, *supra* note 343 at 46.
[393] Eric W. Orts, "A Reflexive Model of Environmental Regulation" (1995) 5:4 Bus Ethics Q 779 at 780.
[394] Dhir, *Politics*, *supra* note 344 at 60; David Hess, "Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development" (2007) 2:2 Va L and Bus Rev 221 at 232. [Hess, Public Pension].
[395] David Hess, "Social Reporting and New Governance Regulation: The Prospects of Achieving Stakeholder Accountability through Transparency" (2007) 17:3 Business Ethics Quarterly 453 at 453. [Hess, New Governance].
[396] Lobel, *Renew*, *supra* note 344 at 365.

2.3 New Governance Theory

New governance theory works along the same lines as reflexive law by including more actors and focusing on forming normative systems respectful of human rights and CSR. Many academics have treated both reflexive law and new governance theories as the same and this dissertation will as well.[397] The common approach between the two models is seen from the fact that new governance theory arises from a combination of theories and even encompasses the reflexive law approach.[398] This confluence of theories, under new governance, reflects a move away from traditional command-and-control regulation towards a collaborative governance based legal regime closer to self-regulation.[399] The new governance model is normally "described as a process-oriented, participatory, and experimental approach."[400] As a form of regulation, the new governance approach operates by setting boundaries and outlining processes to "allow experimentation to occur at a more local level and allowing the lessons from those experiences to update standards and transfer best practices to other areas."[401] "Rolling best-practices rulemaking"[402] is a process whereby minimal standards gradually evolve based on new knowledge and experiences. This is an example of experimentalism where results are incorporated into a self-regulatory process,[403] encouraging the evolution of standards and practices. The participatory aspect of new governance includes the different sectors of society, such as the state, market, and civil society forming relationships with one another and playing their role in developing and enforcing regulations.[404] These relationships aim to emphasize the democratic process of the new governance model and make the formation of policy more

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[397] Dhir's, *Politics*, *supra* note 344 at 59. Because of the similarities in the operation of reflexive law and new governance theories, Dhir refers to both as similar methods since Lobel has "convincingly demonstrated "[s]trikingly similar patterns of explanation" between democratic experimentalism (a form of new governance) and reflexive law, and Teubner connects his research to New Governance theory as well; Orly Lobel, "Setting the Agenda for New Governance Research" (2004) 89 Minn L Rev 498 at 504.

[398] Dhir's, *Politics*, *supra* note 344 at 59; Bradley C. Karkkainen, ""New Governance" In Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping" (2004) 89 Minn L Rev 471 at 481 [Karkkainen]; Lobel, *Renew*, *supra* note 344 at 266-267.

[399] Hess, *New Governance*, *supra* note 395 at 453; The confluence of theories includes: reflexive law, "democratic experimentalism", responsive regulation, collaborative governance, and meta-regulation among others.

[400] *Ibid* at 454-455.

[401] *Ibid* at 455.

[402] Dorf, Michael C, and Charles F. Sabel, "A Constitution of Democratic Experimentalism", (1998) 98 Columbia Law Review 267 at 287-89.

[403] Hess, *New Governance*, *supra* note 395 at 455.

[404] *Ibid*.

dynamic between different actors/subsystems who are viewed as regulators and corporations as the regulated or self-regulating.[405] This relationship works through procedures and processes promoting the production of norms that focus on the actor, as opposed to goal-oriented legislation, which focuses more on the act.[406]

Generally, the reflexive and new governance theories arise from the limitations associated with command-and-control, top-down regulation.[407] These theories help alleviate the limitations by focusing on stakeholders, and their knowledge and experience, and their ability to help create norms and standards. The role of SR in this case is to stimulate dialogue by informing these stakeholders who then look to influence subsequent corporate behavior, a process aided by corporate self-reflection and self-regulation. In addition to rule-making and aiding in corporate self-reflection, the reflexive and new governance theories also suggest a role for stakeholders as enforcement mechanisms, as discussed below.

2.4 Neo-Liberalism and Governance

According to Adam Smith "it is not on the generosity of the butcher, brewer or baker that we depend for our dinner, but on their self-interest".[408] Very early on the market failed to take into account socio-moral considerations as side-effects of economic actions, such as labour exploitation and environmental degradation.[409] One reason for this lack of moral sense from economic actors and enterprises is because of the existence of other social mechanisms, such as state governments who "assumed the task of 'managing populations and things' according to the logic of welfare and security."[410] In other words, the welfare state came to act in the public interest as a socio-moral agent addressing negative social externalities of business enterprises.[411]

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[405] *Ibid*.
[406] *Ibid*.
[407] The limitations refer to those that emerge when comparing reflexive law to substantive and formal law.
[408] Adam Smith, An Inquiry into The Nature and Causes of The Wealth of Nations 14 (Methuen & Co 1904) (1776) cited in Ronen Shamir, "Corporate Social Responsibility: Towards a New Market Embedded Morality?" (2008) 9 Theoretical Inquiries in Law 2:371 at 375. [Shamir].
[409] Shamir, *supra* note 408.
[410] *Ibid*; Michael Foucault, *The Foucault Effect: Studies in Governmentality* 87 (London, Harvester Wheatsheaf, 1991) cited in Shamir, *supra* note 408 at 375.
[411] Thomas Lemke, "The Birth of Bio-Politics: Michel Foucault's Lecture at the College de France on Neo-Liberal Governmentality", (2001) 30 Econ & Soc'y 190 at 200 cited in Shamir, *supra* note 408 at 376.

In contrast, the neo-liberal approach overthrows the distinction between the market and society causing the "economization of the social [domain]",[412] resulting in significant side-effects.[413] At this point, the "widely discredited top-down command-and-control form of authority" shifts towards a view of governance.

> Through schemes of governance, governments relinquish some of their privileged authoritative positions and are reconfigured as one source of authority among many, in fact re-conceptualized as if they operate within a horizontal "*market of authorities*," placing governments on a par with private sources of authority and changing their function from regulators to facilitators.[414]

The focus of governance is on the facilitation of private forms of authority supplementing, not replacing, traditional rule making with a mixture of guidelines, principles, standards, and codes of conduct that are not necessarily enforced by the state.[415] Fundamentally, the formation and enforcement of laws and standards "becomes a shared problem-solving process" consisting of multiple actors, dialogue, consultation, and democratic participation.[416] Therefore, governance looks to facilitate flexible and efficient best practices leaving "the greatest possible amount of control in the hands of those closest to the problems."[417] This approach outlines self-regulation, rule making, and enforcement by including private actors such as TNCs, industry associations, and standard-setting organizations.[418] The eventual result of industry learning and evolving standards may be termed as the "responsibilization" of corporate actors. This concept is defined by Shamir as

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[412] Shamir, *supra* note 408 at 377.

[413] Hevina S. Dashwood, "Canadian Mining Companies and the Shaping of Global Norms of Corporate Responsibility", (2005) 60 International Journal 4: 977 at 979. The neoliberal context of globalization is argued to be a reflection of a political consensus that the role of the state should be minimized with a greater role given to the private sector. A large and growing portion of literature has begun recognizing the private sector in advancing CSR.

[414] Shamir, *supra* note 408 at 377.

[415] *Ibid* at 377-78; Michael Blowfield, "Corporate Social Responsibility: Reinventing the Meaning of Development" (2005) 81 International Affairs 515 at 516. "If companies shake off the legacy of certain economists, and admit that they have always needed to manage their relationship with wider society, and if others acknowledge the limits to what can be expected of business and its contribution to the public good, then it will be easier to see in CSR the moral vision of capitalism." Therefore, it is not necessary for CSR to only originate from the state. [Blowfield].

[416] Blowfield, *supra* note 415 at 378.

[417] Lobel, *Renew*, *supra* note 344 at 362.

[418] One example that is cited by many academics is the case of the U.S. Toxics Release Inventory (TRI). This system provides disclosure to educate, inform and eventually empower stakeholders by providing information to rank businesses; Ann Florini, "National Context for Transparency – based Global Environmental Governance", (2010) 10:3 Global Environmental Politics 120 at 124 [Florini 2010]. Instead of requiring targets of regulation to achieve specific behavioral standards, regulators require those targets to provide information about the behavioral standards they are achieving. Such disclosure intends to compel those targets to behave in socially desirable ways.

the expectation and assumption that various actors will have reflexive moral capacities,[419] and it links new governance regulation to corporate actors who are subject to such regulation.[420] SR reinforces responsibilization by providing a medium of stakeholder feedback and compelling reflexive moral capacities. This potential for self-reflection is further discussed below.

2.5 The Moral Corporation

Shamir clarifies the new governance position by reasoning socio-legal scholars do not "naively assume the supremacy of governance and of private and self-regulation."[421] Studies criticizing the new governance/reflexive approaches have normally focused on the efficacy, feasibility, and functionality of the theories but not on capitalist interests.[422] Analyzing CSR as the capitalist response to criticism and as a product of a "capitalist crisis of legitimacy",[423] Shamir examines the "business case" argument. This argument "stipulates that the pursuit and adoption of CSR policies is not simply the morally right thing to do but a sound business strategy on its own account".[424] Consequently, it becomes one way of injecting TNCs with a moral capacity, simultaneously supporting the idea of corporate self-reflection and the concept of responsibilization.[425] The business case also supports SR through the sharing of similar goals, particularly of stakeholder, or market, feedback and corporate self-reflection.

As "governance becomes the new orthodoxy" the influx of different actors and standards lead to an emphasis on "dialogue and persuasion rather than sanctions and adversarial methods" as a

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[419] Shamir, *supra* note 408 at 379.
[420] *Ibid*.
[421] Ronen Shamir, "Capitalism, Governance and Authority: The Case of Corporate Social Responsibility" (2010) 6 Annu Rev Law Soc Sci 531 at 533 [Shamir, *Capitalism*]; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy*, (Cambridge, UK: Cambridge Univ Press, 2002) at 197. [Parker].
[422] Jennifer A. Howard-Grenville, "Explaining shades of green: Why do companies act differently on similar environmental issues?" (2005) 30:3 Law Soc Inq 551 at 551-55 cited in Shamir, *Capitalism, supra* note 421; Karin Jonnergard and Ulf Larsson, "Developing codes of conduct: regulator conversations as means for detecting institutional change" (2007) 29:4 Law Policy 460 at 480-81 cited in Shamir, *Capitalism, supra* note 421; Vibeke Lehmann Nielsen, "Are regulators responsive?" (2006) 28:3 Law Policy 395 at 398, 413 cited in Shamir, *Capitalism, supra* note 421. [Neilsen].
[423] Shamir, *Capitalism, supra* note 421 at 533. This crisis surfaced when TNCs "achieved unprecedented economic and political powers" operating in a "no man's land where legal and ethical rules did not apply".
[424] *Ibid* at 543.
[425] *Ibid*; Hevina S. Dashwood, "Canadian Mining Companies and Corporate Social Responsibility: Weighing the Impact of Global Norms", (2007) 40 Canadian Journal of Political Science 129 at 129.

means of compliance.[426] Shamir calls this spread of authority between different actors and the moral corporation the "economization of authority",[427] meaning that governments now are one source among many.[428] This economization of authority helps legitimize the moralization of corporations through the concept of an open corporation.[429] Open corporations act in response to norms instead of formal prescriptive rules.[430] This is because corporate management understands and adheres to the "business case for social responsibility" and so "integrat[es] social values with [its own] commercial practices".[431] This awareness of a commercial add-on value and of external stakeholder values and concerns leads to the development of a "corporate conscience",[432] reinforcing self-regulation and providing a "moral justification for capitalism's drive to profitability".[433] This process helps verify the moral undertaking by an "open" TNC.[434] Canadian extractive sector companies Placer Dome and Noranda and their adoption of CSR policies provide a case in point. Through their senior management both Placer Dome and Noranda recognized multiple influences in their initial adoption of CSR policies.[435] This included institutional factors recognizing growing public awareness, the concept of sustainable development, tightening of government regulations, effectiveness of NGOs in raising awareness, and with Placer Dome in particular, experience with its environmental accident in the Philippines

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[426] Shamir, *Capitalism*, *supra* note 421 at 534. Shamir cites Valerie Braithwaite, "Responsive regulation and taxation" (2007) 29 (Special Issue) Law Policy 3 at 6-10; Neilsen, *supra* note 422; Christine Parker, "The 'compliance' trap: the moral message in responsive regulatory enforcement" (2006) 40:3 Law Soc Rev 591 at 592-3 598-602, 604, 614.

[427] Shamir, *Capitalism*, *supra* note 421 at 534.

[428] *Ibid* at 536.

[429] *Ibid*; Parker, *supra* note 421 at 245-6. "Parker's analysis rests on the concept of meta-regulation: a process whereby the new regulatory state withdraws as a direct agent of regulation in favor of being an indirect regulator of internal control systems." These control systems, "using persuasive and educational tactics of in-house compliance officers, are designed to enhance the permeability of the corporation to the external values and concerns of stakeholders."

[430] Formal prescriptive rules refer to laws and regulations".

[431] Shamir, *Capitalism*, *supra* note 421 at 536.

[432] Philip Selznick, *The Communitarian Persuasion*, (Baltimore, MD: Johns Hopkins Univ Press, 2002) at 101.

[433] *Ibid*.

[434] Shamir, *Capitalism*, *supra* note 421 at 536; Hevina S. Dashwood, "Towards Sustainable Mining: The Corporate Role in the Construction of Global Standards", (2007) 15 Multinational Business Review 47 at 50-52, 55-58. [Dashwood]. External and internal environmental factors pushed Placer Dome and Noranda to respond to other stimuli, such as societal influences and pressures and internal realizations. Internal variables include the role of corporate management and leadership and their attitudes towards CSR.

[435] Dashwood, *supra* note 434 at 123. This CSR adoption was a process essentially driven by the concept of due diligence and the idea that doing "good" is good for business.

and its personal experiences with Indigenous peoples.[436] In addition to being influenced by global CSR norms, both of these companies also engaged in efforts to influence and shape global CSR norms as well, as co-founders of the International Council on Mining and the Environment (ICME).[437] The ICME encouraged mining companies to engage with NGOs, to "exert influence on global governance processes affecting mining", to use a "strategic approach to [address] environmental and social issues in a *unified manner*", and to counter mining's bad public image.[438] As a whole, this "forward-thinking" process revealed an evolving global normative context with mining companies responding to and contributing to the evolution of norms in a "bottom-up process", as described by Dashwood.[439] SR fits in this process by providing information leading to stakeholder feedback and dialogue in the eventual creation of ensuing principles, practices, and corporate governance decision-making.

In making the argument for the moral corporation, simultaneously providing justification for SR and disclosure within the new governance process, Shamir adheres to "the new spirit of capitalism" theory.[440] A central tenet of this theory is "that capitalism relies on critiques in order to alert itself to threats, to neutralize opposition, and to develop new moral justifications for the increase of profitability."[441] In addressing critiques and justifying actions it "incorporates some of the values in whose name it was criticized".[442] For example, TNC's operate abroad in an unregulated manner, where home state rules and regulations do not apply, and where many host states are weak or unable to govern. This has given rise to criticisms of culpable and immoral

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[436] *Ibid* at 125.
[437] *Ibid*; ICMM, *About Us*, online: ICMM.com <http://www.icmm.com/about-us/about-us> (Accessed August 15, 2013). The GMI was the precursor to the International Council on Mining and Metals (ICMM), an organization serving "as an agent for change and continual improvement on issues related to mining and sustainable development." Acting as the board of the metal industry's representative organization, the ICME broadened "the group's mandate and transform[ed] itself into the [ICMM]."
[438] Dashwood, *supra* note 434 at 132.
[439] *Ibid* at 136.
[440] Shamir, *Capitalism*, *supra* note 421 at 537; Luc Boltanski L and Eve Chiapello, *The New Spirit of Capitalism* (London: Verso, 2005) at 58. Under the new spirit of capitalism concept, capitalism will rely "on a certain spirit" that has the ability "to permeate the whole set of mental representations specific to a given era" in order to justify and establish its moral foundations. [Boltanski].
[441] Shamir, *Capitalism*, *supra* note 421 at 537.
[442] Boltanski, *supra* note 440 at 28.

TNC activity.[443] As such, CSR has emerged as the capitalist, or corporate, response to criticisms, also becoming an argument against government regulation of TNCs.[444]

2.6 The Voluntary Nature of CSR

The stakeholder "battle cry"[445], or criticism, represents the views of stakeholders that TNCs respond to. This criticism is also recognized by national governments and international organizations.[446] Despite government recognition of stakeholder concerns, the TNC, or capitalist, response to criticism looks to establish CSR as a voluntary, instead of a regulatory, initiative.[447] The defeat of Bill C-300, Canada's most recent attempt to hold accountable Canadian extractive sector TNCs, is one example.[448] Shamir focuses on the early stages in the institutionalization process to reveal "the ability of corporations to shift the terrain of contest and debate from the arena of state or international binding regulation" to a voluntary or private regulatory framework.[449] Using this model Shamir identifies a movement by TNCs to "vigorously" promote a voluntary and self-regulatory nature of CSR, simultaneously developing opposition to governmental legalization of CSR and regulation of business at the national and international

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[443] Shamir, *Capitalism*, *supra* note 421 at 537.
[444] *Ibid*. Shamir reviewed the Brent Spar incident with Shell, CBS News exposing Nike's sweatshops in Vietnam, and the creation of Corporate Watch as incidents that have helped push and promote CSR.
[445] *Ibid*.
[446] *Ibid*.
[447] *Ibid* at 539; Ronen Shamir, "Between self-regulation and the Alien Tort Claims Act: on the contested concept of corporate social responsibility" (2004) 38:4 Law Soc Rev 635 at 649-59 [Shamir, ATCA].
[448] Shamir, *Capitalism*, *supra* note 421 at 540; Canada has seen a good example of the push away from government regulation and pull towards voluntary, private and self-regulation. John McKay, *Corporate Accountability the Focus of John McKay's New Private Members' Bill C-300*, online: Liberal MP John McKay <http://www.johnmckaymp.on.ca/newsshow.asp?int_id=80484> (Accessed August 15, 2013). In February 2009, Liberal MP John McKay introduced a Private Member's Bill C-300 to the House of Commons titled An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries [McKay]; MiningWatch Canada, "Bill C-300 a High Water Mark for Mining and Government Accountability" (15 November 2010), online: MiningWatch Canada <http://www.miningwatch.ca/article/bill-c-300-high-water-mark-mining-and-government-accountability> (Accessed August 15, 2013). The Prospectors and Development Association of Canada (PDAC) and the Mining Association of Canada developed a campaign to lobby against Bill C-300, which was "ramped up considerably in the spring of 2010 when the annual international mining convention hosted in Toronto by the PDAC became a launching pad for PDAC's efforts against Bill C-300." This included printing and distribution anti Bill C-300 buttons, bill boards and posters, a press conference, an anti-Bill C-300 web site, and encouragement for PDAC members and others to 'write to Ottawa' in protest. [MiningWatch, "c-300"].
[449] Shamir, *Capitalism*, *supra* note 421 at 539. Here, Shamir references the "political contestation" model; Tim Bartley, "Institutional Emergence in an Era of Globalization: The Rise Of Transnational Private Regulation Of Labor And Environmental Conditions" (2007) 113:2 *Am J Sociol* 297 at 300. The early stages reveal the rise of private, or voluntary, regulatory bodies reflected by "negotiated settlements" and "compromised outcomes" of struggles between NGOs, businesses, stakeholders, and the imbalances of power.

levels.[450] Although the corporate effort to prevent regulation of CSR has been fairly successful, there remains persistent pressure to formulate compulsory CSR requirements, as legislative examples from Europe and the U.S. demonstrate.[451] This "push and pull of regulatory pressures...and voluntary displays of good citizenship" give rise to a "comprehensive[, yet] fragmented, CSR industry",[452] consisting of a variety stakeholders, such as NGOs, corporations, governments, international and financial institutions and organizations, consultants, "CSR standard-setting organizations, social and environmental auditing firms, and CSR reporting, accreditation, and certification agencies".[453]

Despite TNC efforts against legalizing CSR, stakeholders identified in the CSR industry above offer an opportunity to become a part of a new governance regulatory approach, similar to the multi-stakeholder process underlying the voluntary Global Reporting Initiative.[454] Such a stakeholder regulatory approach has the potential to help "facilitate, directly or indirectly, corporate compliance with various standards."[455] Even critics such as Crowther, Laufner, and Vogel argue that "new regulatory tools", such as stakeholder governance and SR, when properly deployed reinforce new governance and its idea of democratic governance.[456] In relation to the

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[450] Shamir, *Capitalism*, *supra* note 421 at 541; MiningWatch, "c-300", *supra* note 448. The defeat and the lobby against of Bill C-300 also reveals this point; Shamir, *ATCA*, *supra* note 447. Shamir provides a U.S. example of a trend towards the Alien Tort Claims Act (ATCA) to enforce human rights abroad on corporations receiving "fierce resistance outside the courtroom" from businesses lobbying for the abolition of the ATCA; Commission of the European Communities, "Green Paper: Promoting A European Framework For Corporate Social Responsibility" (Paper delivered at the Commission of European Communities, Brussels, 18 June, 2001) at 3, 6, 9, 21 online: <http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf> (Accessed August 15, 2013).
[451] *See* Chapter 1 for a discussion of state CSR efforts.
[452] Shamir, *Capitalism*, *supra* note 421 at 540; Doreen McBarnet, "The New Corporate Accountability: Corporate Social Responsibility Beyond Law, Through Law, For Law" (2007) U of Edinburgh School of Law Working Paper No 2009/03 at 9-15.
[453] Shamir, *Capitalism*, *supra* note 421 at 540-41. Shamir points out the GRI and sustainability indices, such as the British "FTSE4Good" index in the U.K. and the Dow Jones index in the U.S. where stock exchange listed companies are ranked based on CSR criteria, as examples since they incorporate input from different sources.
[454] *Ibid* at 541. Shamir identifies the GRI as an example because it supports new governance and democratic governance ideas through its design, evolution, and incorporation of a multi-stakeholder participatory approach.
[455] *Ibid*. Stakeholders can help "with compliance with guidelines, indices, principles, best performance benchmarks, labeling criteria, soft law accreditation and certification schemes that promote social responsibility and public welfare"; Halina Ward, "Legal Issues in Corporate Citizenship", *International Institute for Environment and Development* (February 2003) at 3-4, 31, online: IIED <http://www.iied.org/pubs/pdfs/16000IIED.pdf> (Accessed August 15, 2013).
[456] Shamir, *Capitalism*, *supra* note 421 at 541; David Crowther, "Corporate social reporting: genuine action or window dressing?" In *Perspectives on Corporate Social Responsibility*, ed. D Crowther, L Rayman-Bacchus, at

capitalist response, these "tools" present business an opportunity to bridge the gap between profit and moral decision-making by promoting efficient and due diligent corporate behavior.

The crux of Shamir's argument entails the use of the business case for influencing TNC corporate governance. The business case[457] helps "wed corporate conscience to corporate financial concerns", forming a moral corporation.[458] This also provides an argument that CSR policies can improve a corporation's reputation; attract consumers and investors;[459] strengthen relationships between stakeholders;[460] and, importantly, aid in risk-management strategies.[461] Although studies question the link between CSR and profitability, the business case provides value in its risk management,[462] like corporate human rights due diligence and SR.[463]

The formulation of the business case argument as a commercial instrument and risk-management tool reveals important theoretical benefits, in addition to those associated with SR cited in chapter 1. First, the business case idea replaces an "idealistic or altruistic" face of CSR with a more utilitarian one,[464] a view justified by the fact it does not run contrary to shareholder

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151-3 (London: Ashgate Pushing Limited, 2004); David Vogel, "Private global business regulation" (2008) 11 Annu Rev Polit Sci 261at 266-9.

[457] Shamir, *Capitalism*, *supra* note 421 at 543; KJP, *supra* note 309 at 41 to 46. The "Business Case" is one of the major drivers of CSR and includes cost savings, productivity, and operational efficiency; risk management; the recognition of other actors, such as employees and their recruitment, retention, and motivation; and consumers too.

[458] Shamir, *Capitalism*, *supra* note 421 at 543.

[459] Karen E. Schnietz, Marc J. Epstein, "Exploring the financial value of a reputation for corporate social responsibility during a crisis" (2005) 7 Corp Reput Rev 327 at 327-8, 340-41.

[460] Luo Xueming and C.B. Bhattacharya, "Corporate social responsibility, customer satisfaction, and market value" (2006) 70:4 J of Marketing 1 at 3-5, 13, 15.

[461] Brian W. Husted, "Risk management, real options, corporate social responsibility" (2005) 60:2 J Bus Ethics 175 at 175-6, 177-183; KJP, *supra* note 309 at 347-8. The Precautionary Principle states that in the "absence of conclusive scientific evidence that serious and irreversible environmental harm will occur within their sphere of influence must not deter corporations from taking cost-effective precautionary measures [, and that] corporations bear the burden of proof of socially acceptable safety when they advocate harmful projects."

[462] Shamir, *Capitalism*, *supra* note 421 at 544; Irene Sosa and Karyn Keenan, "Canadian Environmental Law Association, Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada", (October 2001) at 1, 16-7 online: <http://cela.ca/uploads/f8e04c51a8e04041f6f7faa046b03a7c/IBAeng.pdf> (Accessed August 15, 2013). IBAs help establish relationships between Indigenous peoples and mining companies, secure economic benefits for affected communities, and reduce the impacts on mining projects. [IBA]; *See* Chapter 1 for discussion on ICMM and due diligence.

[463] IBA, *supra* note 462. Impact Benefit Agreements are also viewed in a positive light and even promoted as possible means of formulating better dialogue, trust and relationships between Indigenous peoples and the extractive sector.

[464] Shamir, *Capitalism*, *supra* note 421 at 544.

interests when it provides the potential benefits mentioned above, such as risk management. Second, the business case provides an argument against government regulation. Businesses and industries argue this ensures corporations are incentivized "to self-regulate to avoid risks that come with irresponsible behaviour," motivating firms to "perform better than competitors" whereas state regulation "may stifle such competition."[465] Lastly, the business case "recodes a political context of pressure as a business opportunity",[466] which provides a short-term solution in getting TNCs to engage in CSR activity, and in the long-term de-politicizes the pressure to be socially conscious by co-opting TNCs with civil society and the state in a market-embedded system.[467]

Similar to the business case and moral corporation, the new governance perspective looks to strengthen the relationship between corporations and stakeholders, "improve the reputation of the corporation", and overall influence corporate decision-making. Like new governance regulation, Shamir insists that the "emergence of a commercial and civic CSR-related regulatory industry by no means suggests that formal law is external to the field,"[468] implying the state plays an important role in a self-regulating stakeholder inclusive regulatory framework.

2.7 The Need for State Authority

Overall, in the operation of a reflexive law and new governance framework and in the CSR industry as discussed above, the role of the state remains a necessary component. Dhir,[469] Karkkainen,[470] and Seck[471] all make the argument that the state government should not risk

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[465] *Ibid.*
[466] *Ibid.*
[467] *Ibid.* Shamir refers to the co-optation as "consolidating the process of marketization" in a depoliticized system. This last point also raises another issue. Which is the complexity that arises when a business opportunity does not materialize or seems unlikely and the decision is still made that the risk is worth taking; for example, because the risk or harm may be externalized to the affected community or environment. Increasing the level of risk naturally increases the level of complexity in the environment in which the business operates. Although a risk may be deemed remote, this does not abdicate the "corporate responsibility to respect" within the scope and reach of the operations of the business. *See discussion in Chapter 1* on the Global Reporting Initiative and the United Nations Protect, Respect and Remedy Framework for a discussion on the scope of SR and due diligence.
[468] Shamir, *Capitalism*, *supra* note 421 at 542.
[469] Dhir, Politics, *supra* note 344 at 69.
[470] Karkkainen, *supra* note 398 at 488-89.
[471] Sara Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rights & development L.J. 177 at 179, 184. Seck notes that Governments cannot abdicate their unique

abdicating its role and its governmental responsibilities.[472] For example, Dhir does not support soft-law tools and voluntary actions and does not simply believe the process of disclosure or SR will automatically "result in self-correcting behaviour modification of corporate decision-makers."[473] Dhir uses the state duty to protect, as defined in the U.N. Framework,[474] to suggest the state is indeed a critical component when requiring social disclosure.[475] The blueprint of SR legislation discussed by Hess also clarifies any misconception that new governance and reflexive approaches can only be based on voluntary or soft law frameworks.[476]

Critics similarly view the reflexive and new governance approaches by themselves as not enough to induce an ethical or CSR reaction from for-profit corporations. They see factors such as lax government regulations,[477] a strong industry lobby[478], the belief that the market will adjust prices and actions accurately, and the basic view that for-profit corporations are accountable only to its stockholders as some of the reasons why reflexive law and new governance regulation is unable to alter the corporate governance.[479] For example, these factors contribute to Leo Strine's strong scepticism towards a self-regulatory approach on behalf of for-profit corporations. Strine also cites state regulatory authority as a mandatory, and vital, component for there to be any change

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authority and duty [Seck]. Sara L. Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 Can Y B Int'l L 139 at 196. Direct and vicarious liability and domestic criminal law, under the territoriality principle, also provide a route in which to attach to state authority in enforcement.

[472] Florini 2010, *supra* note 418 at 125, 128. For Florini the role of the state is a required component for a transparency system to work efficiently and effectively. To attract "green" investors, the state's capacity to mandate a certain level of data will be vital.

[473] Dhir, Politics, *supra* note 344 at 73.

[474] *See* Chapter 1 for a discussion on the U.N. Framework and the state duty to protect.

[475] Dhir, Politics, *supra* note 344 at 77; John Burchill, "Out of the Heart of Darkness: A New Regime for Controlling Resource Extraction in the Congo" (2010) 10 Asper Review of International Business and Trade Law 99 at 119, 122-126, 128-32. Burchill views the role of the Home and Host state as vitally important.

[476] Hess, *Reflexive law*, *supra* note 343 at 64; Hess, *Public Pension*, *supra* note 394 at 232. Hess also demonstrates how state support is critical to the implementation of a SR framework for it to successfully meet its goals.

[477] Leo Strine, "Bailed Out Bankers, Oil Spills, Online Classifieds, Dairy Milk, and Potash: Our Continuing Struggle with the Idea that For-Profit Firms Seek Profit" (The University of Western Ontario The Beattie Family Lecture in Business Law, Delivered at the University of Western Ontario, 8 March 2011) [unpublished], online: <https://www.law.uwo.ca/News/News_Documents/Leo_Strine_lecture.pdf> at 3, 4, and 11 (Accessed February 13, 2012). *See also*: Leo Strine, *Bailed out bankers, Oil Spills and Potash*, online: <http://www.youtube.com/watch?v=TzGx3WsKZcE> (Accessed August 15, 2013). [Strine]; Jeremy P Jacobs, "Federal Oil Spill Probe Finds U.S. Regulations Lacking" *The New York Times* (29 September 2011) online: NYT Energy & Environment <http://www.nytimes.com/gwire/2011/09/29/29greenwire-federal-oil-spill-probe-finds-us-regulations-l-88637.html?pagewanted=all> (Accessed August 15, 2013).

[478] Strine, *supra* note 477 at 4.

[479] *Ibid*.

in traditional for-profit corporate governance.[480] Reinforcing the importance of state authority, Strine argues that in order for the public interest to even be considered, on top of shareholder interest, it will "depend on protection by the public's elected representatives in the form of law."[481]

According to Dhir those sceptical of disclosure still "concede the importance of the dissemination of information".[482] For example, Joel Bakan, like Strine, disregards the possibility of self-correcting behaviour by TNCs and dismisses shareholder activism as capable of facilitating corporate accountability.[483] Similar to Strine, Bakan implies that these changes to corporate governance may be possible with the unique strength of the domestic democratic state, again providing reinforcement to the need and role of the state and its unique authoritative power to compel a new governance regulatory system, particularly a system motivated by SR.[484]

2.8 Sustainability Reporting and the Reflexive and New Governance Theories

The "goal is to create a regulatory system that encourages corporations to be socially responsive. To accomplish this, corporations must have an understanding of what society expects of them and be stimulated to behave in a way that is responsive to those demands."[485] This clarifies that SR is not based on one-way communication. Disclosure lacking feedback is not enough for SR to fulfill its potential of providing subsequently meaningful output.[486] Without stakeholder input a TNC may not be able to completely learn, mitigate and prevent risks.[487] Similar to the process of

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[480] *Ibid* at 42.
[481] *Ibid* at 25. Home state regulation may be able to prevent policy battles and the "race to the bottom" between developing countries seeking to attract foreign investment. Extractive sector TNCs go where resources are located, and this is where home state regulation can help ensure home state incorporated or listed TNCs follow regulations.
[482] *Ibid* at 69.
[483] Strine, *supra* note 477 at 69; Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* 4 (Toronto: Penguin, 2004) at 159. [Bakan].
[484] Bakan, *supra* note 483.
[485] Hess, *Reflexive law*, *supra* note 351 at 58.
[486] Newenham-Kahindi, *supra* note 330 at 268-269, 276-277. Barrick Gold's operation in Tanzania, discussed above, provides an example of failing to justify its social license to operate. Barrick was accused of being "one-way" and "transactional" rather than responsive to stakeholder concerns.
[487] *Ibid*. "Embedded, engagement strategy based on two-way communication, consultation, and collaboration" with those affected should be the norm and include "sustainable dialog and critical reflectivity with communities."

securing a "social license" to operate, SR, among other TNC efforts, must engage in a "deep understanding" of, and integration with, local communities.[488]

As mentioned above, SR fits well with the reflexive and new governance models.[489] SR shares similar goals and looks to take advantage of the benefits of a differentiated society. This includes holding corporations accountable to the multiple actors and stakeholders through a SR and corporate self-scrutinizing process.[490] For Hess, SR, as a governance mechanism, has two goals: first, of organizational transparency and second, of stakeholder engagement.[491] Citing the GRI, Hess identifies "[a] primary goal of reporting is to contribute to an ongoing stakeholder dialogue. Reports alone provide little value if they fail to inform stakeholders or support a dialogue that influences the decisions and behaviour of both the reporting organization and it stakeholders".[492]

"If corporations were required to disclose information about their actions affecting [stakeholders], then pressure would mount to justify those acts; and justifying one's acts is the first step toward improving one's behaviour."[493] The act of providing environmental, social and corporate governance (ESG) and human rights disclosure to stakeholders provides them with information and promotes increased TNC accountability. This process is intended to do what financial reporting does for investors; it allows investors to determine the level of non-financial risk associated with an investment. SR, together with the new governance and reflexive theories, promotes transparency, stakeholder enlightenment, feedback, and subsequently TNC accountability.

Academics have referred to information regulation,[494] or regulation by information,[495] in understanding the "significance of reputational capital of companies"; the increased role,

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[488] *Ibid*.
[489] KJP, *supra* note 309 at 595. Mandatory reporting is identified as being the most widely embraced by lawmakers.
[490] Teubner, *Reflexive Elements*, *supra* note 342 at 255.
[491] *Ibid*.
[492] Global Reporting Initiative, "Sustainability Reporting Guidelines", (2002) at 9 online: UNEP.fr <http://www.unep.fr/scp/gri/pdf/gri_2002_guidelines.pdf> cited in Hess, New Governance, *supra* note 395 at 455.
[493] Thomas Donaldson, *Corporations & Morality*, (Englewood Cliffs, NJ: Prentice-Hall1982) at 204.
[494] Arthur Mol, *Environmental Reform in the Information Age. The Contours of Informational Governance* (Cambridge: Cambridge University Press, 2008) at 81-3.
[495] Ann Florini, "The End of Secrecy" (1998) 111 Summer Foreign Policy 50 at 53 online: <http://webcache.googleusercontent.com/search?q=cache:http://derechoasaber.org.mx/documentos/pdf0043.pdf>

importance and "vulnerability of legitimatory capital of" NGOs; the emergence of multiple actors; as well as "the power and influence of accountability, transparency and disclosure" in governance.[496] This information regulation has moved from a right-to-know towards a struggle for knowledge, access and control of information.[497] This has become a vital component in environmental regulation, since many "environmental controversies and struggles are [locating] within the "information scape"", according to Mol.[498] This study views social, human rights, and corporate governance issues in a similar light. SR provides greater transparency and "transparency relates directly to power as it aims to democratize information and empower the powerless with access to and control over information and knowledge."[499]

2.9 Disclosure for Whom

The chapter so far has addressed how SR may be utilized and why. The discussion of global legal pluralism, the review of reflexive law and new governance, and the explanation and justification provided by Shamir demonstrates that a broad scope of stakeholders is to be considered. In the context of TNCs, "stakeholders" is a term that has evolved to include a variety of investors, consumers, business industries, suppliers and partners, NGOs, international organizations like the UN, state governments, and those directly impacted. With companies becoming more concerned about their social image, non-financial factors are now a greater concern, as evident in a number of examples, such as corporate sponsors pulling out of endorsements with celebrities to TNCs distancing themselves from unethical and human rights violations.[500] Even those state governments that have the political capacity to implement socially

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(Accessed August 15, 2013); Tom Tietenberg, "Disclosure Strategies for Pollution Control" (1998) 11 ¾ Environmental and Resource Economics 587 at 588-9, 599-600; David W. Case, "The Law and Economics of Environmental Information as Regulation" (2001) 31:7 Environmental Law Reporter 10773 at 10773-6, 10789.

[496] Arthur P. J. Mol, "The Future of Transparency: Power, Pitfalls and Promises", (2010) 10:3 Global Environmental Politics 132 at 135. [Mol 2010].

[497] *Ibid*. Mol specifically refers to the "struggles for *environmental* quality and knowledge".

[498] *Ibid* at 136.

[499] *Ibid*.

[500] Matt Lawton, "Is this the end for Brand Rooney? Wantaway United star faces losing millions on sponsorship deals", *DailyMail.co.uk* (22 October 2010) online: Daily Mail <http://www.dailymail.co.uk/sport/football/article-1322693/Wayne-Rooney-faces-losing-millions-sponsorship-deals.html> (Accessed August 15, 2013); Human Rights Watch, "Sudan, Oil, and Human Rights" *Human Rights Watch* (25 November 2003) online: <http://www.hrw.org/en/node/12243/section/34> (Accessed August 15, 2013).

conscious legislation have begun to enact such legislation to prevent and eliminate the potential of ESG and human rights misconduct.[501]

Targeting a broad scope of stakeholders increases the potential to hold those TNCs engaging in misconduct accountable.[502] Mol argues the current pluralism and the stakeholder participatory approach, together with a forceful and independent civil society, along with technological and media enhancements create a strong potential for disclosure initiatives and policies.[503] The role of civil society is particularly emphasized because of its determination to disseminate and translate information for others.[504] This allows stakeholders to comprehend disclosure and react to destructive ESG and human rights performance.[505] In other words, civil society, and other, organizations can act as middle-men.[506] This is important because although a variety of stakeholders are targeted the majority of these stakeholders do not necessarily have a direct and efficient system to best make use of such empowerment to hold TNCs accountable.[507] Overall,

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[501] *See* PWYP-International, "New PWYP and Friends of the Earth Europe transparency advert launches across Europe" (13 November 2012) online: publishwhatyoupay.org <http://www.publishwhatyoupay.org/resources/new-pwyp-and-friends-earth-europe-transparency-advert-launches-across-europe> (Accessed August 5, 2013); European Parliament, Press Release, 20130607IPR11387, "Oil, gas, mineral and logging firms obliged to disclose payments to governments" (12 June 2013) online: europarl.europa.eu <http://www.europarl.europa.eu/news/en/pressroom/content/20130607IPR11387/html/Oil-gas-mineral-and-logging-firms-obliged-to-disclose-payments-to-governments> (Accessed August 5, 2013); U.S. Securities Exchange, *Specialized Corporate Disclosure: Background on Title XV of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, online: <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml> (Accessed July 31, 2013); US, HR Res 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Cong, 2010. [Dodd-Frank Act]. This Act mandates the disclosure of conflict minerals from the Democratic Republic of the Congo because sales of such minerals finance "conflict characterized by extreme levels of violence in the eastern [DRC]".

[502] Jakob Kirkemann Boesen and Tomas Martin, "Applying a Rights-Based Approach: An Inspirational Guide for Civil Society", (2007) at 9-11, online: The Danish Institute for Human Rights <http://www.gsdrc.org/go/display&type=Document&id=3780> (Accessed March 22, 2014). This view is similar to the rights-based approach (RBA), where individuals and groups impacted are given power to claim their rights and ensure they are included in any consultations. The RBA views every person as a rights-holder entitled to rights. Although focused on human rights, the RBA approach is not prevented from applying to ESG issues impacting human rights.

[503] Mol 2010, *supra* note at 496.

[504] Klaus Dingwerth and Margot Eichinger, "Tamed Transparency: How Information Disclosure under the Global Reporting Initiative Fails to Empower" (2010) 10:3 Global Environmental Politics 74 at 88-89.

[505] *Ibid*.

[506] *Ibid*; Paula J. Dalley, "The Use and Misuse of Disclosure as a Regulatory System", (2007) 34 Fl State Univ L R 1089 at 1125. Intermediaries inform the unsophisticated and uninformed, and special interest groups and the media digest information into usable signals. However, there is still the potential danger of bias that may attach to an intermediary's translation.

[507] Fung, Archon, Mary Graham, and David Weil. *Full Disclosure: The Perils and Promise of Transparency*. (2007 New York: Cambridge University Press) at 41; Florini 2010, *supra* note 418 at 124: Three conditions are identified

despite the cited examples and arguments revealing a trend towards SR and new governance, Williams argues more examples are needed and ultimately "the future will provide a test of the new governance paradigm."[508] Williams summarizes this movement as

> [f]rom theory to practice, then, the new governance paradigm provides an excellent account of the CSR movement. The inadequacy of traditional regulation at the national level has provided the stimulus for the collection of actions that comprise the movement. As the model would predict, the result to date has been a template that blurs traditional public/private and state/market boundaries and introduces new categories of actors into the regulatory process.[509]

Conclusion

Global legal pluralism and the theories of reflexive law and new governance help explain the purpose and role of disclosure, justifying the growing SR and transparency trend identified in chapter 1. The research established these theories promote and provide benefits similar to those associated with SR. Critics, however, are quick to argue that without state enforcement SR and new governance elements will remain weak and malleable subject to corporate campaigns. The role of the state and its unique authoritative capacity is not intended to be absent from new governance theories by any means, and in fact many argue the state is a necessary component to compel stakeholder participation, SR, and corporate self-reflection. For this reason, the next chapter will examine the Canadian government's efforts to promote SR and address negative extractive sector TNC impacts on ESG and human rights issues.

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to allow disclosure-based regulation systems to work near optimal in regulating targets: First, an audience of disclosure, who lack information. Second, the receivers of information have the ability to, and would, react if given the appropriate information. Third, the reaction from the recipients of disclosure causes disclosers, in sequence, to act in way desired by regulators. Intermediaries are also deemed critical in translating reactions and responses.

[508] John M. Conley & Cynthia A. Williams, "Engage, Embed, and Embellish: Theory versus Practice in the Corporate Social Responsibility Movement" (2005) 31 J Corp L 1 at 58. [Theory versus Practice].

[509] *Ibid* at 59.

Chapter 3

3 Case Study of the Canadian Extractive sector, its Impacts, and the Push for Sustainability Reporting in Canada

This chapter will examine the global impact of Canadian extractive sector transnational corporations (TNCs) and related Canadian efforts to promote Sustainability Reporting (SR). Section one will introduce and justify the focus on the Canadian extractive sector. Section two will describe the push for disclosure and SR, and section three will then examine the role of SR in the structure of the Canadian Extractive Sector Corporate Social Responsibility Counsellor (CSR Counsellor).

3.1 Why Focus on the Canadian Extractive Sector?

"Extractive industries (mining and oil and gas) make a major contribution to Canadian prosperity."[510] In 2007, mining, oil and gas extraction was the "third largest component of Canadian direct investment", in stocks, abroad; and it rose to number two in 2010.[511] The Toronto and Vancouver financial markets also serve as the world's primary source of equity capital for the extractive sector in exploration and development.[512] As of 2008, "over 75% of the world's exploration and mining companies and 43% of all global exploration expenditures came from mining and exploration companies based in Canada.[513] Roughly $60 billion has been invested abroad by Canadian extractive companies; mostly in developing countries, with $41 billion in Latin America and nearly $15 billion in Africa alone.[514]

Toronto is seen as the mining finance capital of the world, and when combined with Vancouver, forms part of the global economic hub for the extractive sector.[515] In 2012, the Toronto Stock

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[510] Canada, DFAIT, Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector (26 March 2009) at 6, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (Accessed August 15, 2013). [Extractive Intro].
[511] *Ibid.*
[512] *Ibid* at Introduction and Overview.
[513] *Ibid.*
[514] *Ibid.*
[515] The Mining Association of Canada, "A Report on the State of the Canadian Mining Industry Facts+ Figures 2010", (2010) at 12 online: Mining.ca

Exchange (TSX)[516] housed 57% of the world's public mining companies,[517] which as of January 2014 amounted to 326 mining issuers.[518] This is complemented by 259 listed oil and gas[519] issuers as well. To illustrate the concentration of mining financing and value on the TSX and TSX Venture Exchange (TSXV)[520], in 2012 the TSX and TSXV had 1700 financings or 70.5% of all global mining equity financings,[521] the Australian Securities Exchange[522] was second with 559 financings making 23% of the global total, and the London Stock Exchange Alternative Investment Market (LSE-AIM)[523] had 147 financings and 6.09% of the global total.[524] The TSXV normally houses new, smaller, and growing companies. Even so, the TSXV together with the TSX (part of the TMX group)[525] is a global leader in the extractive industry. The global reach

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<http://www.mining.ca/sites/default/files/documents/FactsandFigures2010.pdf> at 35 (Accessed August 15, 2013). In 2010, the TSX housed 59% of the world's public mining companies, amounting to 1434 listed issuers; TMX, *Global Leader in Oil & Gas*, online: tmx.com <http://www.tmx.com/en/pdf/OilGas_Sector_Profile.pdf> (Accessed March 6, 2014). The TSX and the TSX Venture Exchange together make up the world's largest oil & gas public market. With 369 listed oil & gas companies, the next closest public market is the New York Stock Exchange (NYSE) with 167, and the Australian Stock Exchange (ASX) at 147 listed companies [Oil & gas]; Natural Resources Canada, "Mineral Exploration Information Bulletin Canada: A Success Story in Sustainable Mining and Exploration: A Competitive mining sector sustained by expertise, knowledge and innovation", (February 2011) online: NRCAN <http://publications.gc.ca/collections/collection_2011/rncan-nrcan/M34-9-2011-eng.pdf> (Accessed August 15, 2013). Between 2006 and 2011, the TSX has handled 81% of worldwide mining equity transactions.

[516] George Gao, "An Exchange of Opportunity" (2008) at 1, online: tmx.com <http://www.tmx.com/en/pdf/Factsheet.pdf> (Accessed August 15, 2013). [Gao, Exchange]. The TMX Group owns the TSX, Canada's senior equities market and the TSX Venture Exchange (TSXV), a venture capital marketplace for new, small, and emerging companies.

[517] The Mining Association, *Facts and Figures 2013*, online: mining.ca <http://www.mining.ca/sites/default/files/documents/FactsandFigures2013.pdf> at 32 and 38 Figure 16 (Accessed March 6, 2014). [Mac 2012].

[518] TMX, *Global Leaders in Mining - Mining at a Glance – YTD January 31, 2014*, online: tmx.com <http://www.tmx.com/en/listings/sector_profiles/mining.html> (Accessed March 6, 2014). As of January 2014, the TSX-Venture Exchange included 1,286 listed issuers.

[519] Oil & gas, *supra* note 515.

[520] Gao, Exchange, *supra* note 516 at 1. The TSXV is a public venture capital marketplace for emerging companies.

[521] Mac 2012, *supra* note 517 at 38.

[522] Australian Securities Exchange, *About ASX*, online: asx.com <http://www.asx.com.au/> (Accessed March 6, 2014).

[523] Justin Crann, "TSX-LSE Merger killed following underwhelming shareholder support" *The Digital Journal* (29 June 2011), online: The Digital Journal <http://www.digitaljournal.com/article/308530> (Accessed August 15, 2013). AIM is the name for the LSE's international market for smaller growing companies; Canada.com, "London Stock Exchange Re-affirms TSX Merger Plans", *Canada.com* (16 May 2011), online: Canada <http://www.canada.com/business/London+Stock+Exchange+affirms+merger+plans/4789301/story.html> (Accessed August 15, 2013). As of June 29, 2011, the proposed merger between the LSE and TSX was terminated because it failed to meet the required two-thirds vote from TMX shareholders.

[524] Mac 2012, *supra* note 517 at 38. The amount of capital raised on the TSX/TSXV was $10.3 billion, the ASX $2.1 billion, and the LSE-AIM $ 0.954 billion.

[525] TSX, *About the TSX*, online: TSX <http://www.tmx.com/en/about_tsx/> (Accessed August 15, 2013).

of TMX mining companies is evident as nearly 50% of the 9000 mining exploration projects by TSX and TSXV companies, as of December 2013, were outside of Canada.[526]

With the increase in globalization and the spread of the Canadian extractive sector, the Canadian government has recognized that this "sector faces many social and environmental challenges, [especially] when operating in developing countries."[527] Extractive sector businesses operate where economically viable deposits are found, and many such sites are found in developing countries.[528] This has the potential to lead to greater environmental, social, political, and human rights issues because policies on risk in these countries are either "developing," "weak, or non-existent".[529] In addition, many local communities in developing countries also do not have the resources to "engage effectively with foreign extractive sector companies, and companies themselves lack experience in these complex and challenging [, environmental, social and human rights] circumstances."[530] Overall, the size and power of the Canadian extractive sector and the inherently intrusive nature of its operations creates a delicate relationship between extractive sector TNCs, developing countries, and local interests.[531]

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[526] TMX, *Global Leader in Mining (2011)* online: TMX <http://www.tmx.com/en/pdf/Mining_Sector_Sheet.pdf> (Accessed August 15, 2013).
[527] Extractive Intro, *supra* note 510 at Introduction and Overview.
[528] *See generally* Peter Muchlinski, "Social And Human Rights Implications Of TNC Activities In The Extractive Industries" (2009) 18:1 Trans'l Corps 93; Advisory Group Report, "National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries: Advisory Group Report" (March 29, 2007) at 4, online: <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/RT_Advisory_Group_Report_0.pdf> (Accessed August 15, 2013). [AG Report].
[529] Canada, Standing Committee on Foreign Affairs and International Trade, *Fourteenth Report: Mining in Developing Countries*, 38th Parl. 1st sess. (June 2005) at 1 [*SCFAIT Report*].
[530] AG Report, *supra* note 528. It is at this point, where possible, that governments and civil society represent local community interests.
[531] Whether or not these issues also arise within *developed* countries is a separate question, and beyond the scope of this study to examine in detail; UN Comm on the Elimination of Racial Discrimination (CERD), *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the Committee on Elimination of Racial Discrimination*, at ¶ 17, UN Doc CERD/C/CAN/CO/18 (March 5, 2007). The concluding observations of this report encourages states to "take appropriate legislative or administrative measures to prevent acts of [TNCs] registered in Canada which negatively impact on the enjoyment of rights of indigenous [peoples] in territories outside Canada", and also explore ways to hold those TNCs accountable; Sara Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rights & development L.J. 177 at 202. The CERD conclusion highlights that the delicate relationship between Indigenous/local interests and Canadian extractive sector TNCs is not so clear, regardless of whether based in a developed or developing state.

Even though the Canadian extractive industry is seen as a global leader, it has not been immune from allegations of culpable activity. These allegations range from direct and indirect complicity in human rights violations,[532] environmental pollution[533] and disregard for social issues, norms, and development.[534] Here, social issues are broadly construed to include human rights and local

[532] US, *Presbyterian Church of Sudan v Talisman Energy*, Opening Brief for Plaintiffs-Appellants, 07-0016 in the United States Court of Appeals for the Second Circuit (26 February 2007), online: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TalismanlawsuitreSudan > (Accessed August 15, 2013). [Plaintiffs-Appellants Brief]. A case was brought against Talisman in the U.S. for their complicity in Government of Sudan (GOS) human rights violations. Violations listed in court documents included: indiscriminate aerial attacks by helicopter gunships and bombings, sometimes in unison with ground attacks by GOS military or militias; "government soldiers" shot at, forcibly displaced, bull-dozed villages and built roads and wells; and churches were burned and destroyed. In October 2009, the U.S. Court of Appeals for the Second Circuit affirmed the decision to dismiss the suit against Talisman, as did the U.S. Supreme Court in October 2010. In the end, Talisman was not held liable for any violations; Sally Neighbour, "The Kilwa Incident Transcript" ABC: Four Corners, (June 6, 2005) online: ABC <http://www.abc.net.au/4corners/content/2005/s1386467.htm> (Accessed August 15, 2013); "Australian Mining Company Implicated in Deaths of DRC Villagers" *ABC TV*, (6 June 2005) online: Mines and Communities <http://www.minesandcommunities.org/article.php?a=275> (Accessed August 15, 2013). Anvil Mining allegedly provided logistical support to the Democratic Republic of Congo (DRC) military in its quelling of "[a] small group [that] took over the police station at Kilwa, looting trucks and stealing fuel and food from the Anvil depot, about 50 kilometres from the company's mine". African Association for the Defence of Human Rights, Katanga (Asadho/Katanga), "Report on Human Rights Violations Committed in Kilwa in the Month of October 2004" (January 2005) at 8, 14-17, online <http://www.abc.net.au/4corners/content/2005/asadho_report_oct2004.pdf> (Accessed August 15, 2013). The DRC military responded by bombarding Kilwa, destroying houses, conducting house-to-house searches for insurgents and their sympathizers. They are also alleged to have looted homes, shooting and killing those fleeing, engaging in rape, and summarily executing roughy100 people; Business & Human Rights, *Case Profile: Anvil Mining lawsuit (Re Dem Rep of Congo*, online: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/AnvilMininglawsuitreDRC> (Accessed August 15, 2013). In November 2010, a civil class action against Anvil Mining in the Quebec Superior Court was launched. In January 2012 the Quebec Court of Appeals reversed and dismissed the decision to hear the case. The appeal to the Supreme Court of Canada was also refused, failing to hold the Anvil accountable for its participation in the Kilwa incident; Jen Moore, "Corporate Rights over Human Rights: Canadian Mining in Central America", (January 2011) online: MiningWatch Canada <http://www.miningwatch.ca/article/corporate-rights-over-human-rights-canadian-mining-central-america> (Accessed August 15, 2013). The Phoenix nickel project near Lake Izabal, Guatemala revealed incidents of "forced eviction[s], rape and sexual violations". A HudBay Minerals subsidiary was named in a civil law suit for the death of a known critic of the proposed mine who was allegedly hacked and shot to death by HudBay's private security force; Choc v. Hudbay Minerals Inc. & Caal v. Hudbay Minerals Inc., *About*, online: ChocversusHudbay <http://www.chocversushudbay.com/> (Accessed August 15, 2013).

[533] Sara L. Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) Can Y B Int'l L 139. Seck reveals a number of serious environmental issues directly caused by Canadian extractive sector TNC operations, ranging from Kyrgystan, the Philippines, Guyana and Spain; Ana Isla, "A Struggle for Clean Water and Livelihood: Canadian Mining in Costa Rica in the Era of Globalization", (2002) 21:4 Canadian Woman Studies 148 at Interview with Sonia Torres; *Recherches Internationales Quebec v Cambior Inc*., [1998] QJ No 2554 (QL).

[534] Aloysius Marcus Newenham-Kahindi, "A Global Mining Corporation and Local Communities in the Lake Victoria Zone: The Case of Barrick Gold Multinational in Tanzania", (2011) 99 Journal of Business Ethics 2:253 at 268-69. 276-77; Frederick Bird, "Project CARE: Placer Dome's Efforts to Help Laid-off South African Miners Find

and national concerns that occur before, during, and after the completion of extractive projects.[535] For example, many proposed extractive projects threaten to significantly influence and harm the traditional economic and cultural means of local populations, who also face the fear of, or actually suffer, the displacement of their community. Social and human rights violations and environmental destruction are further aggravated when those for and against extractive projects turn to threats, intimidation, and violence to promote their views.[536]

Mentioned above, many extractive projects take place in developing countries. As a result, these projects face issues and risks associated with weak and corrupt governments and rural economies of local communities.[537] For example, since extractive projects provide a critical source of host country revenue, weak and corrupt governments look to strongly safeguard their interest in such revenue. Therefore, these extractive projects undergo a "securitization"[538] process to protect the project and capital. Due to the, often, close proximity of such projects to Indigenous communities, which usually have weak and rural economies that rely on local land and resources, extractive projects require security to prevent theft and sabotage from those opposed

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Remunerative Work", (2009) 89 Journal of Business Ethics 2:183; Heledd Jenkins and Natalia Yakovleva, "Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure", (2006) 14 Journal of Cleaner Production 271 at 275-76.

[535] Shin Imai, Ladan Mehranvar, and Jennifer Sander, "Breaching Indigenous Law: Canadian Mining in Guatemala", (2007) 6 Indigenous Law Journal 101 at 110.

[536] Johanna Carstens and Gavin Hilson, "Mining, grievance and conflict in rural Tanzania", 31 IDPR 3 (2009) at 302 [Carsten and Hilson]; Matthew Smith, "Environmental Militarism: Burma's Extractive Industries" (October 2007) 52 Greener Management International Issue 47 at 49, online: Greenleaf-publishing <http://www.greenleaf-publishing.com/content/pdfs/gmi52smit.pdf> (Accessed August 15, 2013); Human Rights Watch, "Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Nine" (2010) at 5 online: Hrw.org <http://www.hrw.org/reports/2011/02/01/gold-s-costly-dividend-0> (Accessed August 15, 2013). In February 2011, allegations of violence, human rights abuse, corruption and environmental damage in Papua New Guinea were attributed to, Canadian and TSX listed, Barrick Gold Corp. [Gold's Cost].

[537] John Ruggie, *February 2007: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/35 at ¶ 3, online: SRSG Portal, <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil> (Accessed August 15, 2013); AG Report, *supra* note 528.

[538] "Securitization" refers to the use of security personnel to guard extractive projects against sabotage, theft, and violence. *See generally* Fund For Peace, *About*, online: FFP <http://global.fundforpeace.org/aboutus> (Accessed April 16, 2014); J.J. Messner, "Human Rights Training for Security Forces in the Extractive Industry" (18 October 2013), online: Fund for Peace <http://library.fundforpeace.org/20131018-cameroon> (Accessed April 16, 2014); Gold's Cost, *supra* note 533.

to the project.[539] This also usually entails protection from protests, illegal mining, and trespassing, among other concerns.[540]

This security normally consists of either local police or national military personnel.[541] These forces often clash with, control, and suppress opposition and thieves and, importantly, are duty-bound to deal with the backlash arising from adverse impacts of the project on local community life, environment, and human rights.[542] The variety and complexity of issues that can arise and the lack of adequately trained and equipped security forces to deal with such complexity can result in serious social side effects.[543] Some of these side effects can, and allegedly already has, subjected locals to rape,[544] violence,[545] torture[546], and forced displacement,[547] among other serious violations.[548] The Standing Committee on Foreign Affairs and International Trade

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[539] Lee Godden, Marcia Langdon, Odette Mazel and Maureen Tehan, "Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability" (2008) 26 Journal of Energy & Natural Resources Law 1 (2008) at 2. [Accommodating Interests]; Rachel Davis and Daniel Franks, "The costs of conflict with local communities in the extractive industry" (Paper delivered at the First International Seminar on Social Responsibility in Mining, 19-21 October 2011 Santiago, Chile) at 4, 11, online: <http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf> (Accessed August 15, 2013).

[540] Carsten and Hilson, *supra* note 536 at 304-6.

[541] *Ibid*.

[542] *Ibid*.

[543] Romina Maurino, "Lawsuits over alleged gang rapes will proceed", *TheStar*, (24 July 2013); *Choc v Hudbay Minerals Inc. and Compania Guatemalteca de Niquel S.A.*, 2012 ONSC 1414 at paras 86-87; Carole J. Brown J. online: chocversushudbay.com <http://www.chocversushudbay.com/wp-content/uploads/2010/10/Judgment-July-22-2013-Hudbays-motion-to-strike.pdf> (Accessed August 15, 2013). In July 2013, a Superior Court decision allowed three lawsuits against Canadian mining firm HudBay Minerals Inc. to proceed where security personnel, local police and military allegedly attacked, forcibly removed; gang raped 11 women in 2007; and killed a community leader at the Guatemalan Fenix mining project.

[544] Anvil in the DRC provides one example; Carsten and Hilson, *supra* note 536 at 302 also cite Sierra Leone and the use of diamonds in funding civil war as another example allegedly leading to rape of local women. Two more recent examples include allegations in the case against Hudbay and HMI Nickel, brought in an Ontario Superior Court of Justice. *Choc v Hudbay Minerals Inc et al*., Amended statement of claim at para 1 and 2; Rob Annandale, "Barrick Gold's Offer to Rape Victims Slammed by NGOs" *The Tyee* (2 February 2013), online: TheTyee.ca <http://thetyee.ca/News/2013/02/02/Barrick-Gold-Offer/> (Accessed August 15, 2013).

[545] Examples of alleged violence include those cited above from: Papua New Guinea, Sudan, DRC, the Philippines; House of Commons, Standing Committee on Foreign Affairs and International Trade, *Evidence for Mining in Developing Countries and Corporate Social Responsibility*, (June 2005), online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1714445&Language=E&Mode=1&Parl=38&Ses=1> (Accessed August 15, 2013). TVI provides another alleged example of where violence has occurred. [SRID Hearings].

[546] Anvil in the DRC provides an example of torture allegedly used against those captured in Kilwa; *supra* note 532.

[547] Talisman and TVI faced allegations of forced displacement; Carsten and Hilson, *supra* note 536 at 314.

[548] Carsten and Hilson, *supra note* 536 at 311, 322. The authors cite allegations in Ghana, the DRC, Tanzania, sub-Saharan Africa, Papua New Guinea, among others and referring to the deployment of security or private militaries,

Report, discussed below, highlighted the negative impacts of the Canadian extractive sector and proposes mechanisms to address such misconduct.

A. Standing Committee on Foreign Affairs and International Trade Report (SCFAIT Report).

Released in June 2005, the SCFAIT Report brought to the attention of the Canadian government the adverse impacts associated with its unregulated extractive sector operating internationally. Just as important, the SCFAIT Report proposed one of the first Canadian efforts to regulate the Canadian extractive sector. After identifying impacts on the environment, local communities and residents, and their economic and social well being, particularly in developing countries,[549] the SCFAIT proposed a set of recommendations to regulate the extractive sector, as follows. First, SCFAIT recommended forming a multi-stakeholder process to create new, and strengthen existing, programs and policies.[550] These included monitoring mechanisms dealing with irresponsible social and environmental activity and human rights violations by Canadian mining companies abroad.[551] Second, the SCFAIT Report proposed the need for "clear legal norms" to create accountability for social and environmental corporate misconduct and human rights violations.[552] The third recommendation identified the need to inform, and improve the knowledge of, mining companies operating in developing countries on Canadian and international CSR and human rights standards and obligations, as well as the political, social, and

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issues in relation to artisanal mining such as employment, land disputes, and displacement. *Also see* Daniel Franks, *Avoiding mine-community conflict: from dialogue to shared futures*, (Enviromine 2009 International Seminar on Environmental Issues in the Mining Industry, 2009); Deanna Kemp, "Mining, water and human rights: making the connection" (2010) 18 Journal of Cleaner Production 15:1553.

[549] *SCFAIT Report*, *supra* note 529 at 1.

[550] *SCFAIT Report*, *supra* note 529 at recommendation 1. The *SCFAIT Report* also proposes creating stronger incentives to entice Canadian mining companies operating abroad to "conduct their activities outside of Canada in a socially and environmentally responsible manner" and to adhere to CSR and international human rights standards. This recommendation suggests making government export, project financing and services conditional in return for meeting and practicing defined CSR and human rights standards and providing disclosure.

[551] *Ibid* at recommendation 3. The SCFAIT Report wants to "clarify and formalize and strengthen the rules and the mandate of the Canadian National Contact Point under the OECD Guidelines for MNEs, and to increase resources available to the NCP" to permit prompt investigations and the ability to recommend measures for violators. The Government Response reveals the NCP is not an investigative or quasi-judicial actor, only a facilitator of "positive and constructive dialogue between MNEs and those affected by their operations with a view to finding solutions."

[552] *Ibid* at recommendation 4.

cultural contexts in which companies operate.[553] Although the SCFAIT Report did not propose disclosure or SR, it did provide momentum in the creation of further Canadian efforts.

B. Prospectors and Developers Association of Canada[554] (PDAC) Report

Before discussing the Government response to the SCFAIT recommendations, it is useful to discuss the PDAC Report. The October 2009 PDAC Report plays a similar role to the SCFAIT Report in that it identifies adverse side effects attributed to the extractive sector and proposes solutions to mitigate and prevent misconduct in the future. PDAC, an extractive industry association, commissioned the report to discuss the accountability and transparency of mining and exploration firms in developing countries.[555] This involved examining extractive sector incidents between 1999 and 2009, highlighting the extractive sector relationship with social, environmental, and human rights issues.[556] The Report was also, notably, used to determine whether CSR was evolving and helping to prevent mining and exploration companies from causing adverse impacts.[557]

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[553] *Ibid* at recommendation 5. Recommendation 7, 8, and 9, respectively request Canada to work with like-minded countries to strengthen the OECD guidelines for MNEs by enforcing and mainstreaming human rights standards; clarify rules of international financial institutions; and increase CSR corporate governance in developing states.

[554] Prospectors and Developers Association of Canada (PDAC), About PDAC, online: PDAC.ca <http://www.pdac.ca/pdac/about/index.html> (Accessed August 15, 2013). Established in 1932, PDAC represents the interests of the Canadian mineral exploration and development industry.

[555] *Ibid*.

[556] PDAC Commissioned Report, The Canadian Centre for the Study of Resource Conflict, "CSR: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World" (2009) at 3, 13-14, online: <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/CSR_Movements_and_Footprints.pdf> (Accessed August 15, 2013). This report was not published, but leaked by MiningWatch Canada. The report argues for the most part, reporting and auditing remains voluntary. Accurate measurement requires more than simple adherence to a guideline, there must be a "willing and engaged in a "process of evaluation, review and auditing." [PDAC Report].

[557] MiningWatch Canada, *Suppressed Report Confirms International Violations by Canadian Mining Companies*, online: MiningWatch.com <http://www.miningwatch.ca/news/suppressed-report-confirms-international-violations-canadian-mining-companies> (Accessed August 15, 2013); PDAC issued a disclaimer to this report highlighting certain facts and downplaying others suggesting the report was not a complete or a final draft; PDAC, *Corporate Social Responsibility: PDAC responds to media coverage of leaked report*, (20 October 2010) online: Canadian Mining Journal <http://www.canadianminingjournal.com/news/corporate-social-responsibility-pdac-responds-to-media-coverage-of-leaked-report/1000389375/> (Accessed August 15, 2013); Marilyn Scales, "Leaked PDAC Sponsored Corporate Social Responsibility Report Flawed", *Republic of Mining* (20 October 2010) online: <http://www.republicofmining.com/2010/10/20/leaked-pdac-sponsored-corporate-social-responsibility-report-flawed-by-marilyn-scales/> (Accessed August 15, 2013).

What the PDAC Report revealed was that the Canadian extractive sector was involved in roughly 56 of the total 171 incidents examined.[558] As a result, the report called on the Canadian extractive sector to shift its current CSR strategy.[559] This outlined a need to improve its image and relationships with local communities, governments, and civil society in order to avoid further misconduct.[560] One suggestion was for a form of measurement, review, and evaluation of CSR performance,[561] with reporting and auditing suggested as possible solutions.[562] As a whole, the PDAC Report deemed reporting and auditing to be central to CSR evaluation and for "increasing CSR's clout within industry and with civil society."[563] The Report concluded

> "voluntary uptake of global CSR norms needs to be instituted in tandem with appropriate government accountability mechanisms in order to ensure that Canadian companies improve their practices in the developing world. Government regulation, stiff accountability mechanisms and CSR frameworks cannot stand alone. Regulation must not be divisive and unilateral, but should come from collaborative dialogue.[564]

In other words, the PDAC Report envisioned a combination of hard law with soft law obligations and processes, reinforced with stakeholder input and knowledge, supporting the notion of SR to inform and stimulate a dialogue with stakeholders.

3.2 Disclosure

A. The Government Response to the SCFAIT Report

The Government Response to the SCFAIT report (Government Response) was issued in October 2005 and it rejected many of its recommendations. The Government did, however, "agree that more could be done to ensure" Canadian businesses abroad have the "necessary knowledge,

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[558] PDAC Report, *supra* note 556 at 6, 10. 63% of companies involved in the 171 incidents were head quartered in 5 countries, Canada, the US, India, Australia, and the U.K. Canada made up 33%, and was involved in four times as many incidents ranging from community conflict, human rights abuses, illegal or unethical practices, or environmental degradation in developing countries. The Report deems NGOs as an invaluable source of information because of their potential to draw attention to an incident, to alert governments, the media, the judiciary, and communities.
[559] *Ibid* at 16.
[560] *Ibid.*
[561] *Ibid* at 12.
[562] *Ibid* at 13. The report's interviewees agreed reporting and auditing is central to evaluation and increasing CSR's clout with industry and civil society.
[563] *Ibid.*
[564] *Ibid* at 16.

support and incentives to achieve positive financial, social and environmental results" in their business operations.[565] For example, the government proposed increasing "corporate transparency and reporting on social and environmental performance" by supporting and participating in international reporting initiatives, monitoring the approaches and models of other states, and increasing dialogue with stakeholders.[566] This proposal was intended to be in direct response to the SCFAIT recommendation of making government financial support conditional upon the satisfaction of defined CSR practices. However, such a conditional support mechanism was impractical because Canada clearly lacked the required CSR standards to begin with.[567] The Government also noted that the majority of Canadian investment abroad occurs without government support,[568] and therefore, a strict focus on conditional government services would significantly limit any implemented measures to those in need of government financial support. Consequently, the Government identified CSR efforts needed to mainly target the private sector.[569] The private sector can include TNCs incorporated or headquartered in Canada or listed on a Canadian stock exchange, each with varying citizenship consequences.[570]

The Government Response also revealed that stakeholders are increasingly considering financial risks and opportunities associated with environmental and social issues.[571] Greater investor demand for more information encourages the private sector to engage in CSR disclosure and reporting.[572] This investor need for information was supported by the Government Response which pledged support for the integration of CSR and due diligence issues into Canadian business operations.[573] For example, the Government Response highlighted the need for greater guidance and promised to take active steps to provide informational toolkits, packages, and

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[565] House of Commons, *Government Response to the Fourteenth Report of the SCFAIT: Mining in Developing Countries – Corporate Social Responsibility* (Oct 2005) at Response to Recommendation 2, online: parl.gc.ca <http://www2.parl.gc.ca/committeebusiness/ReportsResponses.aspx?Cmte=FAAE&Language=E&Mode=1&Parl=38&Ses=1> (Accessed August 15, 2013). [Government Response].
[566] *Ibid*.
[567] *Ibid*. The requirement to comply with conditionality-based financial support would have been made difficult and ambiguous for Canadian extractive sector TNCs without clear CSR guidance, practices and rules.
[568] *Ibid*.
[569] *Ibid*. "[T]he bulk of Canadian investment abroad takes place without the assistance of government services."
[570] Being classified as a distinctly incorporated, headquartered, or stock exchange listed entity in Canada may have specific consequences with regard to "citizenship" or loci issues. *Also see infra* note *609*.
[571] *Government Response*, *supra* note 565 at Recommendation #2.
[572] *Ibid* at Introduction.
[573] *Ibid* at Recommendation #2.

training modules to educate and better prepare Canadian businesses operating abroad to manage and evaluate risks.[574] This anticipates a form of regulation where "market-based demands reward corporate leadership, while [receiving encouragement] to meet market expectations."[575] Disclosure and reporting creates a similar process in which stakeholders, and the market, create greater market accountability, through information disclosure.

In addition to transparency, the Government Response raises the idea of greater TNC accountability to stakeholders. This is important because one SCFAIT recommendation the Government Response did accept was to convene a consultation to strengthen current programs and develop new ones. This multi-stakeholder consultation was referred to as the National Roundtables on CSR and the Canadian Extractive Industry in Developing Countries (the Roundtables).[576] The outcome document of the roundtables was a multi-stakeholder advisory group report, which explicitly makes references greater reporting, discussed below.[577]

B. Advisory Group Report

The Advisory Group Report (AG Report) made many recommendations applicable to the Canadian extractive sector. Of the many recommendations, the proposal for reporting is the most relevant for this study.[578] The AG Report argued that reporting can assist companies to understand the value of CSR for their business and help manage environmental and social issues openly and systematically.[579] If such reporting is "credible, comparable and comprehensive" it permits investors, consumers, communities, and other stakeholders to recognize and voice

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[574] *Ibid* at Response to Recommendation #2, #5. This proposal was in response to the SCFAIT recommendation of increasing and improving services offered to Canadian extractive sector TNCs operating in developing countries.
[575] *Ibid*.
[576] *Ibid*. The multi-stakeholder consultation process included five roundtables across Canada. Halifax Initiative, *Event: 2006 National Roundtables – June 14 – November 16, 2006*, online: Halifax Initiative Halifax Initiative 2006 national roundtables <http://halifaxinitiative.org/content/2006-national-roundtables> (Accessed August 15, 2013); MiningWatch Canada, "MiningWatch Participants in Roundtables on Corporate Social Responsibility, Canadian Extractive Sector in Developing Countries" (19 July 2006) at 33, online: MiningWatch Canada <http://www.miningwatch.ca/en/miningwatch-participates-roundtables-corporate-social-responsibility-canadian-extractive-sector-deve> (Accessed August 15, 2013). [MiningWatch Participation].
[577] AG Report, *supra* note 528 at 15, 18.
[578] *Ibid* at iv-v.
[579] *Ibid* at 15.

concerns, and ultimately to reward or punish.[580] Supporting such a relationship incentivizes companies to build and improve on reporting and transparency.[581] Despite this potential, there is no systematic CSR or SR framework in Canada. As a result, the AG Report recommended for the Government of Canada to endorse and expect the Canadian extractive sector, including junior, exploration, and senior companies to use the Global Reporting Initiative (GRI) or a similar system.[582] This recommendation similarly outlined for financial institutions, investors, insurers, and other market actors to promote the use of the GRI when considering investment risks.[583] Collaboration with securities regulators to make GRI reporting a prerequisite for extractive companies to list on a stock exchange was also suggested to further infuse the concept of reporting as a norm.[584] Tax incentives and credits, or an equivalent, were also proposed to entice compliance with the reporting obligation.[585]

The concept of materiality under Canadian securities disclosure regulations and its relationship with ESG and human rights issues was also discussed,[586] and it was concluded that in practice, ESG issues are not normally considered to be "material".[587] The ensuing recommendation was for the Government of Canada to work with securities regulators to consider ESG and human rights issues as material information, and to increase ESG disclosure for federally regulated pension funds.[588] It was also recommended for the government to "engage, facilitate, and encourage the business and financial sectors along with other stakeholders to identify and develop the link between ESG performance and financial value to help make this more relevant

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[580] *Ibid.*
[581] *Ibid.*
[582] *Ibid* at iv, 15, 19. The report references "a similar system" or a "GRI-equivalent" because some companies may already fulfil reporting requirements outlined in the Canadian CSR Framework, but not the GRI. The report also requests government support for the GRI sector supplements such as the oil and gas sector and junior mining and exploration companies.
[583] *Ibid* at 19.
[584] *Ibid* at 18-19.
[585] *Ibid.*
[586] *See Chapter 4* for a discussion of "materiality" under Canadian securities laws. Materiality helps corporations determine whether or not information needs to be disclosed.
[587] AG Report, *supra* note 528 at 36-37, 39; Mary Condon, Anita I. Anand, and Janice P. Sarra, Securities Law in Canada Cases and Commentary second edition (Emond Montgomery Publications Toronto, Canada) (2010) at 425. [Condon, Anand, Sarra]. Environmental issues have been broadly construed to include energy use, release to land and water, green house gas emissions, use of land, etc.
[588] AG Report, *supra* note 528 at 38-39.

to financial sector decisions."[589] Along the same lines, the AG Report also promoted the concept of Socially Responsible Investment (SRI). The SRI shares goals similar to SR by suggesting investors consider financial and non-financial risks and opportunities associated with the environmental, social, and corporate governance (ESG) performance of investments.[590] Similar to the proposal for reporting, the SRI's consideration of ESG issues in institutional investments looks to provide more information for investors and to introduce integrity and accountability into business operations.[591]

Lastly, it is important to note the Roundtables failed to continue the promotion of "binding and enforceable criminal and civil legislation",[592] a recommendation originally proposed in the SCFAIT Report. [593] The corresponding recommendation in the AG Report was for the development of a voluntary CSR Framework,[594] which clearly fell short of requiring any legal

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[589] *Ibid* at 40.

[590] *Ibid* at 34, 36. The integration of SRI principles grew the most with institutional investors. The AG Report reveals that fiduciary duties permit and in some cases require ESG considerations to be taken into account when making investment decisions. This highlights that ESG requirements are not well known, justifying participant consensus during the Roundtables that Canada should look to follow best practices implemented in other jurisdictions, such as the U.K. (assuming reference to the *Companies Act 2006* (U.K.), 2006, c 46 s 417, which requires the consideration of a range of environmental and social risks, opportunities for their shareholders, and risks down supply chains to be reported by publicly listed companies as part of its mandatory "business review" of the annual financial reporting. However, this disclosure is subject to exceptions) and Australia (assuming reference to the Corporations Act 2001, S299(1)(f), which requires providing details of breaches of environmental laws and licenses in the annual report; and ss1013(A) to (F), which requires providers of financial products with investment components to disclose the extent of labour standards, environmental, social or ethical considerations in investment decision making) and their social and environmental laws targeting value maximization and risk reduction.

[591] *Ibid* at 37. Requesting investment to provide ESG and human rights disclosure compels research into those areas of concern in order to provide such disclosure.

[592] Grahame Russell, "Canadian Round-Table Process Ensures Continuation of Impunity for Global Mining Companies" (April 2007), online: rightsaction.org <http://intercontinentalcry.org/canadian-round-table-process-ensures-continuation-of-impunity/> (Accessed March 20, 2013).

[593] House of Commons, Standing Committee on Foreign Affairs and International Trade, *Evidence for Mining in Developing Countries and Corporate Social Responsibility*, (June 2005), online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1714445&Language=E&Mode=1&Parl=38&Ses=1> (Accessed August 15, 2013).

[594] AG Report, *supra* note 528 at iii, 6, 23-24, 40, 60-63. This voluntary framework includes using "existing international standards supported by ongoing multi-stakeholder and multilateral dialogue"; CSR reporting obligations based on the GRI; an independent ombudsman office focused on operations of Canadian extractive companies abroad; a tripartite Compliance Review Committee to review compliance with the Framework; and lastly the development of policies and guidelines to measure "serious failure by a company to meet the Canadian CSR Standards". The Independent Ombudsman and the Tripartite Compliance Review Committee make up the compliance aspect of the Canadian CSR Framework.

disclosure obligation.[595] Despite the failure to create binding "legal norms", this voluntary CSR Framework ultimately became the focus of a new government policy document, continuing Canada's promotion of CSR and SR, discussed below.[596]

3.3 Building the Canadian Advantage[597]

In March 2009, two years after the AG Report, the "Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector" was introduced.[598] This initiative aims to increase the competitive advantage of Canadian extractive sector companies operating in developing countries by informing and advising them on how to meet their social and environmental responsibilities. [599] This includes providing a set of standards and indirectly pressuring those companies lacking the commitment to manage their social and environmental risks to meet the proposed standards or otherwise risk "underminin[g] the competitive position of other Canadian companies."[600]

For the Canadian Advantage initiative "transparency and accountability *in* developing countries is critical" for the extractive sector to help alleviate poverty and contribute "to a business and investment environment conducive to responsible corporate conduct."[601] In addition to transparency within developing countries, investors, insurers, consumers and other market actors outside of the host state also seek a greater amount of reliable information.[602] This includes information on extractive sector investments, business operations, and the management of social and environmental impacts.[603] This perspective was outlined by the CSR Centre of Excellence, a

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[595] *Ibid* at iv.
[596] *Ibid* at iii, 6, 23-24, 40.
[597] Government of Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* (March 2009), online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (Accessed August 15, 2013). [Building the Canadian Advantage].
[598] *Ibid*.
[599] *Ibid*.
[600] *Ibid*.
[601] *Ibid*. [Emphasis added].
[602] *Ibid* at CSR Performance Guidelines and Reporting.
[603] *Ibid*.

component under the Canadian Advantage initiative.[604] Although the Canadian Advantage recognizes that companies are increasingly responding to this demand for greater disclosure, this does not mean companies are providing quality or consistent disclosure.[605] This is partially due to the lack of an overarching, in-depth disclosure framework regarding social, environmental, and human rights issues in Canada. This may offer an explanation of the Office of the Extractive Sector CSR Counsellor and its adoption of the GRI.

A. The Office of the Extractive Sector CSR Counsellor

A key element of the Canadian Advantage is on the Office of the Extractive Sector CSR Counsellor (CSR Counsellor).[606] Essentially the sum product of the Advisory Group and SCFAIT reports, the CSR Counsellor only targets Canadian extractive sector TNCs.[607] The order-in-council setting out the scope and authority of the CSR Counsellor elaborates that a Canadian extractive sector company specifically means "an oil, gas or mining company that has

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[604] CSR Centre of Excellence, *Home*, online: cim.org <http://web.cim.org/csr/menuPage.cfm?menu=48> (Accessed August 15, 2013). The Centre of Excellence references the 'Toward Sustainable Mining' (TSM) strategy, which includes Crisis Management, or due diligence, indicators; Mining Association of Canada, *Towards Sustainable Mining*, online: mining.ca <http://www.mining.ca/site/index.php/en/towards-sustainable-mining.html> (Accessed August 15, 2013); The Centre also references Industry Canada and its CSR initiative. This includes an Implementation Guide for Canadian Business, notably providing guidance for small business, in addition to 'all businesses'. Industry Canada, *Corporate Social Responsibility: An Implementation Guide For Canadian Business*, online: ic.gc.ca <http://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/rs00126.html> (Accessed August 15, 2013); The Centre also references 'Transparency International', which is a guide for Business Principles for Countering Bribery. The CSR Centre of Excellence, *Additional CSR Frameworks*, online: <http://web.cim.org/csr/MenuPage.cfm?sections=48,136&menu=138> (Accessed August 15, 2013).

[605] Extractive Intro, *supra* note 510 at CSR Performance Guidelines and Reporting.

[606] The Office of the Extractive Sector CSR Counsellor is referred to as the "Counsellor" or the "CSR Counsellor"

[607] House of Commons, Standing Committee on Foreign Affairs and International Trade, *Evidence for Mining in Developing Countries and Corporate Social Responsibility*, (June 2005), online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1714445&Language=E&Mode=1&Parl=38&Ses=1> at section I. (Accessed August 15, 2013). There is a disconnect between the SCFAIT and the CSR Counsellor. The SCFAIT focuses on developing countries, whereas the CSR Counsellor includes a much broader, less restrictive, focuses on TNCs operating anywhere in developed or developing countries; Access, *Office of the Extractive Sector*, online: accessfacility.org <http://accessfacility.org/office-extractive-sector-csr-counsellor> (Accessed March 22, 2014). [CSR Counsellor Backgrounder]. The CSR Counsellor officially opened to undertake complaints in Toronto in March 2010. Dr. Marketa Evans was appointed in an order-in-council in October 2009, who resigned on October 18, 2013; Trinh Theresa Do, "Ottawa's responsible mining review awaited by NGOs", *CBC News* (26 February 2014) online: cbc.ca <http://www.cbc.ca/m/touch/canada/story/1.2543080> (Accessed March 22, 2014). The CSR Counsellor resigned, without providing a reason, on October 18, 2013; AG Report, *supra* note 528 at 6, 40; Appointment of Marketa Evans as CSR Counsellor, PC 2009-1678, (2009) C Gaz, 1625. Marketa Evans was appointed under the Public Service Employment Act and Order in Council PC 2009-422 of March 25, 2009. [Order-in-Council].

been incorporated in Canada or that has its head office in Canada."[608] It is important to point out that TSX and TSXV listed companies are permitted to list on an exchange without having to incorporate or have any other relationship to Canada.[609] This is significant because the world's largest source of equity capital for extractive sector companies in exploration and development are the Toronto and Vancouver markets.[610] Evidently, the CSR Counsellor potentially fails to target foreign incorporated or headquartered extractive sector companies listed on and benefitting from the TSX and TSXV markets.

The CSR Counsellor's mandate involves reviewing the CSR practices of Canadian extractive sector companies operating outside Canada and also advising stakeholders on the implementation of performance guidelines.[611] The review portion of the mandate involves the CSR Counsellor acting as an "impartial advisor and facilitator [and] … honest broker that brings parties together to help address problems and disputes."[612] The rationale for this approach is to form a credible, impartial, and transparent process for "win/win options to resolve disputes."[613] With regards to advising stakeholders, the Counsellor's role entails promoting and informing TNCs of performance guidelines, which include the International Finance Corporation (IFC) Performance Standards on Social & Environmental Sustainability;[614] the Voluntary Principles on

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[608] Order-in-Council, *supra* note 607 at section 1. Canadian extractive sector company means an oil, gas or mining company incorporated in Canada or has its head office in Canada; CSR Counsellor Background, *supra* note 607 at 5.
[609] Order-in-Council, *supra* note 607 at section 1, 4 (a), 6(1)(a)(i) -(b), 8. The CSR Counsellor's mandate includes a duty to address CSR issues of "Canadian extractive sector TNCs operating outside Canada" in both developing and developed countries only if that TNC is incorporated or headquartered in Canada. If this is the case, it has the potential to identify CSR issues wherever a Canadian extractive sector TNC is located worldwide. However, the likelihood of the CSR Counsellor highlighting a problem in a developed, or other, country may depend on political and international factors and issues; Corporate Nationality, *supra* note 44 at 18 Table 2. A related issue is that the typology of Canadian Mining Companies developed by the Federal inter-departmental National Roundtable Steering Committee of what is considered a Canadian company is fairly broad although "actual affiliation with Canada [may] vary considerably". This introduces a grey area in which a company may or may not be considered a company incorporated or headquartered in Canada.
[610] Extractive Intro, *supra* note 510 at Introduction and Overview.
[611] Order-in-council, *supra* note 607 at section 4.
[612] *Ibid* at 1.
[613] *Ibid* at 24.
[614] International Finance Corporation, *Environmental and Social Standards: Managing Environmental and Social Risks*, online: ifc.org <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Risk+Management/> (Accessed August 15, 2013).

Security and Human Rights;[615] and the GRI.[616] The Organization of Economic Cooperation and Development (OECD) and its Guidelines for Multinational Enterprises (MNEs) are also referenced by the CSR Counsellor as part of the performance guidelines.[617] These standards are the benchmarks Canadian extractive companies operating abroad are requested to meet.[618]

B. Review Process

Recognizing the Office cannot realistically offer a "solution to all troubles", the Counsellor simply focuses on being voluntary, low-cost, and easy-to-access.[619] Included in the review process is a dispute resolution mechanism that aims to "foster dialogue and to create constructive paths forward" for the parties involved in an alleged dispute.[620] The Review Process is administered by rules of procedure (Rules),[621] which provide the parties with guidance on what

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[615] Voluntary Principles.org, *The Voluntary Principles on Security & Human Rights*, online: The Voluntary Principles on Security + Human Rights <http://www.voluntaryprinciples.org/> (Accessed August 15, 2013).
[616] CSR Counsellor Background, *supra* note 607 at 5.
[617] Foreign Affairs and International Trade Canada, *Corporate Social Responsibility*, online: international.gc.ca <http://www.international.gc.ca/csr_counsellor-conseiller_rse/About-us-A-propos-du-bureau.aspx> (Accessed August 15, 2013); Order-in-council, *supra* note 607 at section 5 (2) to (4); OECD NCP, *supra* note 245. The OECD Guidelines for MNEs are significant because they include an explicit disclosure component. If a concern raises an issue from the OECD Guidelines for MNEs, the OECD NCP is the body that automatically has the authority to deal with that issue.
[618] Order-in-council, *supra* note 607 at section 7(1)-(2). In executing its mandate the Counsellor reports directly , and is held accountable, to the Minister of International Trade. The Counsellor is obligated to submit an annual report on the activities of the Office to the Minister of International Trade, the Minister of Natural Resources, and the Minister of International Cooperation, which is then tabled in Parliament by the Minister of International Trade.
[619] MiningWatch Canada, *Concerns with regard to the Mandate and review procedure of the Office of the Corporate Social Responsibility Counsellor for Government of Canada*, online: miningwatch <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/MiningWatch_Brief_on_CSR_Counsellor.pdf> (Accessed March 22, 2014); Letter from Marketa Evans, "Response by Extractive Sector CSR Counsellor to MiningWatch Canada brief on the review process of the Office of the CSR Counsellor" (28 March 2011), online: miningwatch <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Response_to_MiningWatch_Canada_brief_on_the_mandate_of.pdf> (Accessed March 22, 2014).
[620] Department of Foreign Affairs and Trade, *Corporate Social Responsibility Counsellor*, online: <http://www.international.gc.ca/csr_counsellor-conseiller_rse/review_process-processus_examen.aspx?lang=eng> (Accessed August 15, 2013); Government of Canada, *CSR Counsellor: About Us* (March 2009), at section 6, online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/review_process-processus_examen.aspx?lang=eng#howdoes> (Accessed August 15, 2013). [Review Process].
[621] Order-in-council, *supra* note 607 at section 6(4) under "Requests for Review". The Review Process includes: the initial assessment; the informal mediation; fact-finding; access to formal mediation; and reporting.

to expect and clarification that an individual or organization may aid or assist an individual, group, or community in making a request to the CSR Counsellor.[622]

In order for the CSR Counsellor to hear a Request for Review, it must first be reviewed to ensure it relates to the performance standards outlined under the Counsellor's mandate.[623] The request must be received from an individual, group, or community "that reasonably believes it is adversely affected by the activities of a Canadian extractive sector company operating outside Canada" and considered inconsistent with the performance guidelines.[624] The next step aspires to cultivate a dialogue. The party submitting the request must be willing to enter into a constructive dialogue with the responding party and the CSR Counsellor.[625] This pre-condition is important because building dialogue and trust underpins the dispute resolution framework and moves the review process along. Failing to commit undermines the purpose and authority of the CSR Counsellor and highlights a weakness of the review process; that it is entirely voluntary in nature. In this way, a review may only be permitted with the express written consent of all of parties involved,[626] and under no circumstances reviewed on the Counsellor's own initiative.[627] Although limited in its scope, the Review Process has the potential to provide stakeholders with a mechanism to provide feedback and compel corporations to justify their actions and impacts.

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[622] Government of Canada, "Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor" (20 October 2010), online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/rules_procedure-regles_procedure.aspx?lang=eng> (Accessed August 15, 2013). An individual or organization may only aid or assist the complainant if proof of the authorization to aid or assist the complainant is provided to the Counsellor. The Rules of Procedure are no longer valid. They expired in October 2012. [Rules of Procedure].

[623] Order-in-council, *supra* note 607 at section 6(1). Under section 6 of the Order-in-Council, the Counsellor may review an issue after: (i) "receiving a request from an individual, group, or community that reasonably believes it is being adversely affected by the activities of a Canadian extractive sector company in its operations outside Canada; and also (ii) believes that the activities referred to in (i) are inconsistent with the performance guidelines". The Counsellor may also undertake a review on behalf of a Canadian extractive sector company "if [the company] believes it is the subject of unfounded allegations concerning its corporate conduct outside Canada in relation to the performance guidelines." *See* also notes 600 and 607; CSR Counsellor Backgrounder, *supra* note 607 at 28. If the request does not relate to the performance standards, the Counsellor is not permitted to move forward with the Request; Review Process, *supra* note 620.

[624] *Rules of Procedure*, *supra* note 601; Review Process, *supra* note 620.

[625] *Ibid*.

[626] Order-in-council, *supra* note 607 at section 6(5). Order of Council appointment under the section "Information about the CSR Counsellor and staff of the Office".

[627] *Ibid* at section 6(2). Section 6(2) allows the Counsellor to "informally" contact a company under the belief that initiating early dialogue may prevent a dispute from arising or escalating.

Such a review mechanism, similar to SR, looks to ultimately influence subsequent corporate decision-making and prevent misconduct in the future.

C. The CSR Counsellor and the GRI

SR under the CSR Counsellor's mandate is evident in the GRI.[628] The GRI is included in the performance guidelines to increase CSR reporting from the extractive sector and "to enhance transparency and encourage market-based rewards for good CSR performance."[629] Since the majority of extractive sector projects occur in developing countries, many of the rules and regulations governing extractive projects are still developing, weak, or non-existent.[630] Moreover, the creation and implementation of non-legal extractive sector strategies and CSR policies that include ESG sustainability and human rights responsibilities are also part of the challenges developing countries face. Rather than address these challenges, many developing states, understandably, opt to focus on the potential revenue extractive projects can bring.[631] The GRI as a "proactive disclosure" mechanism addresses the lack of sustainability by host states in which TNCs operate. As a development assistance program, the GRI provides greater transparency, accountability, and efficiency of business operations, and improves relationships with stakeholders. This provides a potential means to help countries address ESG and human rights related challenges and reduce unethical and negative side-effects attributed to the Canadian extractive sector.[632] In particular, the GRI and its multi-stakeholder input process also

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[628] *Building the Canadian Advantage*, *supra* note 599 at *CSR Counsellor* section. The GRI is intended to also be promoted through the Department of Foreign Affairs and International Trade (DFAIT) and Natural Resources Canada.; CSR Centre for Excellence, *Home Page*, online: <http://www.cim.org/csr/> (Accessed August 15, 2013).
[629] *Ibid.*
[630] Extractive Intro, *supra* note 510 at Introduction and Overview; *SCFAIT Report*, *supra* note 529 at 1.
[631] *Building the Canadian Advantage*, *supra* note 599 at *Host Country Capacity Building*.
[632] *Ibid* at *Transparency and Disclosure*. Reinforcing a focus on disclosure and transparency the Canadian Advantage initiative discusses that Export Development Canada (EDC) has also adopted a Disclosure Policy to help make social and environmental information public, among other issues regarding transactions it supports; OECD, *Recommendation on Common Approaches on the Environment and Officially Supported Export Credits* online: OECD.org <http://www.oecd.org/dataoecd/26/33/21684464.pdf> (Accessed August 15, 2013). Similarly, the Organization of Economic Cooperation and Development (OECD) Export Credit Group, which Canada is a member of, adopted in 2003 the *Common Approaches on the Environment and Officially Supported Export Credits* mandating an increase in transparency in the 2007 version; OECD Export Credit Group, *Working Party on Expert Credits and Credit Guarantees*, Doc No TAD/ECG (2007)9 (2007).

allows it to address new problems as they emerge,[633] putting pressure on Canadian extractive sector TNCs to continuously improve, report, and disclose information.[634]

The inclusion of the GRI in the CSR Counsellor's mandate may imply that new or more disclosure rules and regulations are needed or on the other hand imply a need for the GRI's normative significance. A follow up question the GRI raises is whether its guidance contradicts, supplements, or reinforces the disclosure of ESG and human rights rules and regulations currently outlined in Canada. In any case, GRI guidance works towards satisfying stakeholders' need for greater information and provides guidance where Canadian legislative efforts end.[635]

The GRI provides guidance for SR through economic, social, environmental, human rights, sector specific,[636] and materiality threshold guidance. Similar to the role played by materiality under Canadian securities laws, materiality under the GRI correspondingly provides direction on disclosing information that satisfies the GRI material threshold.[637] GRI materiality covers topics and indicators[638] reflecting the business "organization's economic, environmental, and social impacts that would substantively influence the assessments and decisions of *stakeholders*."[639]

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[633] Order-in-council, *supra* note 607 at section 6(2).
[634] What is GRI, *supra* note 47.
[635] KJP, *supra* note 3 at 281; CSR Performance Guidelines, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector, online: international.gc.ca <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (Accessed August 15, 2013). "[I]nvestors, insurers, consumers and other market actors are increasingly seeking reliable information on how extractive sector companies are managing their social and environmental impacts [and a] growing number of companies are responding to this demand for increased transparency by reporting on their CSR practices and performance."
[636] SR Guidelines, *supra* note 15.
[637] *See* chapter 4 for the discussion on the Canadian securities and GRI materiality thresholds.
[638] Technical Protocol, *supra* note 58 at 13. Indicator Protocols (IPs) exist under the Performance Indicators (which are: economic, environmental, and social categories [the social category is further broken down into: Labor, Human Rights, Society, and Product Responsibility]). Each category has disclosure guidance through a Management Approach and additional IPs. IPs include definitions, compilation guidance, and other information.
[639] GRI, *Materiality*, online: globalreporting.org <https://www.globalreporting.org/reporting/G3andg3-1/guidelines-online/G3Online/DefiningReportContentQualityAndBoundary/Pages/DefiningReportContent.aspx> (Accessed August 15, 2013) [emphasis added]; OSC, *OSC corporate sustainability reporting initiative: Report to Minister of Finance*, at 17 online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20091218_51-717_mof-rpt.pdf> (Accessed August 15, 2013). [OSC Final Report]. "Effective corporate management and best practices at the international level call for a broader view with respect to the materiality of corporate social disclosure".

The multi-faceted guidance and reference to stakeholders, not shareholders, reveals a broader definition of materiality than in Canadian securities laws.[640]

The importance of the GRI cannot be underestimated because it provides useful guidance to better manage risks and avoid violations. Since its inclusion in the CSR Counsellor's mandate, the role of the GRI has seemingly become more relevant in Canada, especially with regard to the Canadian extractive sector. For example, the review by the Ontario Securities Commission (OSC) reveals a "disclosure gap" arising when there is a deficiency from what is expected from what is actually disclosed.[641] Initiatives such as the GRI help mend this gap.[642] Moreover, the GRI is a comprehensive and continuously evolving disclosure framework that includes the benefits of up-to-date information.[643] In comparison to the other performance standards, which are useful for their intended purposes, the GRI, along with the OECD Guidelines for MNEs and its explicit disclosure obligations, discussed in Chapter 1, help promote the awareness and consideration of ESG, human rights, and stakeholder enlightenment. This transparency is designed to increase the integrity, and accountability, of the Canadian extractive sector TNCs.[644]

Overall, the relationship and the mechanics between the CSR Counsellor, its dispute resolution and Review Process, and the adoption of the GRI remain unclear for a couple of reasons. The first question that arises is whether the adoption of the GRI and the creation of the review process allows those local to, or impacted by, the business activities of Canadian extractive sector TNC to bring forward a request to review. This could possibly include a Request to Review for the failure of a TNC to report accurately and truthfully; for providing intentionally misleading reports; or for failing to report at all under the GRI. The next question is whether the review process permits investors the option to bring a Request to Review the business activity of

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[640] Global Reporting Initiative, *Sustainability Reporting Guidelines*, online: globalreporting.org <http://www.globalreporting.org/ReportingFrameowrk/ReportingFrameworkDownloads/> at 8 cited in Hennick Report, *supra* note 642 at 17. The GRI refers to stakeholders and not simply shareholders. This reveals a broader and more contemporary focus; SR Guidelines, *supra* note 15 at 10; *See supra* note 634.
[641] OSC Final Report, *supra* note 639 at 12.
[642] The Hennick Centre for Business and Law and Jantzi-Sustainalytics, *Corporate Social Reporting Initiative: Report to Minister of Finance*, (2009) at 12, online: Hennick Centre <http://www.hennickcentre.ca/documents/FINALREPORT.pdf> (Accessed August 15, 2013). [Hennick Report]; KJP, *supra* note 3 at 281.
[643] OSC Final Report, *supra* note 639 at 24, 26.
[644] Extractive Intro, *supra* note 510.

a company in which they are investing. The potential reasons for an investor to request a review could range from ensuring accuracy of disclosure documents; disclosure of environmental, social or human rights issues; increasing transparency generally; or simply to increase the level of accountability of a company. Looking at the cases submitted to the CSR Counsellor, there have been a total of six Requests for Review.[645] Out of these six Requests, only one referenced the GRI.[646] This particular Request to Review was raised by two non-government organizations on issues related to the GRI, as well as other performance standards. However, the closing and interim reports on the CSR Counsellor's website failed to elaborate on details on the applicability of the GRI.[647]

3.4 Extractive Sector Payment Disclosure

This recently proposed disclosure initiative directly targets Canadian extractive sector TNCs and their financial disclosure, further revealing the level of Canadian disclosure efforts. This new initiative, if and when implemented, is designed to create a mandatory reporting standard that provides transparency of payments from the Canadian extractive sector to foreign governments.[648] A draft "mandatory" reporting regime applicable to Canadian extractive sector payments to

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[645] Foreign Affairs, Trade and Development Canada, *Registry of Requests for Review*, online: international.gc.ca <http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx> (Accessed December 19, 2013).

[646] CSR Counsellor, *Closing Report: Request for Review File Number 2013-03-ARG*, online: international.gc.ca <http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2012-03-ARG_closing_report-rapport_final.aspx?lang=eng> (Accessed December 19, 2013).

[647] *Ibid*; CSR Counsellor, *Interim Report: Request for Review #2012-03-ARG*, online: international.gc.ca <http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications/2012-03-ARG_interim_rep_01-rap_provisoir_01.aspx?lang=eng> (Accessed December 19, 2013).

[648] PWYP – Canada, "Canada's Mining Industry Joins Forces with NGOs to Improve Transparency" (6 September 2012), online: revenuewatch.org <http://www.revenuewatch.org/news/press_releases/canada's-mining-industry-joins-forces-ngos-improve-transparency> (Accessed August 15, 2013). This initiative is headed by PDAC, the Mining Association of Canada, Publish What you Pay Canada, and Revenue Watch Institute; Paul Waldie and Brent Jang, "Canada signs on to tighter rules on companies' foreign payments" *The Globe and Mail* (12 June 2012), online: theglobeandmail <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/ottawa-plans-mandatory-disclosure-rules-for-energy-mining-companies/article12489049/> (Accessed August 15, 2013). [Waldie, Canada]; Stella Dawson, "Canada's mining industry steps towards publishing what it pays" *Thomson Reuters* (11 June 2013), online: trust.org <http://www.trust.org/item/20130611052148-9nm4s/?source=hptop> (Accessed August 15, 2013); Revenue Watch, "Mining Industry Association and Civil Society Release Draft Recommendations to Improve Mining Transparency" *Revenue Watch Institute* (14 June 2013), online: revenuewatch <http://www.revenuewatch.org/news/press_releases/mining-industry-associations-and-civil-society-release-draft-recommendations-imp> (Accessed August 15, 2013). [Transparency draft].

foreign governments was released in June 2013.[649] This draft was followed up by Canadian Prime Minister Stephen Harper's public declaration that Canada will enhance its reputation as a world leader in promoting transparency and accountability in the extractive sector, at home and around the world.[650] The premise of this initiative "is to ensure wherever you have material expenditures, there [is] transparency so citizens [in oil, gas and mineral producing countries] can see where this money is going".[651] The importance of this initiative is that it is outlines a mandatory reporting requirement and mirrors similar initiatives in the U.S. and the European Union (E.U.). Like the U.S. and E.U. initiatives, the draft Canadian framework aims to mandate extractive sector companies disclose payment information through the securities disclosure framework. Overall, like the initiatives examined above this framework highlights the growing use of disclosure and SR in Canada in relation to Canadian extractive sector TNCs operating internationally.[652]

3.5 Broten Resolution[653]

The Ontario Broten Resolution and the subsequent review of corporate disclosure requirements by the OSC and the Hennick Centre for Business and Law further reveal Canada's effort to outline greater disclosure of environmental, social, and human rights information. In March 2009, the Canadian Advantage initiative was tabled in the Canadian parliament. One month later, Member of Provincial Parliament Laurel Broten called for a review of Ontario's corporate

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[649] Transparency draft, *supra* note 648 at 4; Waldie, Canada, *supra* note 648. The draft views the most appropriate venue, or "home" for Canadian disclosure requirements through mandatory disclosure in the securities regime.
[650] Prime Minister of Canada Stephen Harper, News Release, "Canada commits to enhancing transparency in the extractive sector", (12 June 2013), online: pm.gc.ca <http://pm.gc.ca/eng/media.asp?category=1&featureId=6&pageId=26&id=5525> (Accessed August 5, 2013); Canadian Press, "Harper announces mining, oil and gas companies to face tougher rules on payments to foreign governments" *National Post* (13 June 2013), online: news.nationalpost.com <http://news.nationalpost.com/2013/06/12/harper-announces-mining-oil-and-gas-companies-to-face-tougher-rules-on-payments-to-foreign-governments/> (Accessed August 15, 2013). "By establishing new mandatory reporting standards for Canadian companies operating in [the extractive] sector." Prime Minister Harper made this announcement in London, England ahead of a G8 meeting in June 2013. [Harper Announcement].
[651] Harper Announcement, *supra* note 650.
[652] *See further* chapter 1 re U.S. and E.U. initiatives; Publish What You Pay, *Draft Framework for Consultation*, online: Publish What You Pay <http://www.pwyp.ca/images/documents/Working_Group/RRTWG_-_Draft_for_Consultation_-_June_14th_2013.pdf> at 3 – context for framework. (Accessed August 5, 2013).
[653] Hennick Centre for Business and Law at York University and Jantzi-Sustainanalytics, *Corporate Social Performance: Reporting Roundtable Consutltation Paper*, online: Hennick Centre <http://hennickcentre.ca/documents/discussionpaper.pdf> at Appendix A (Accessed August 15, 2013).

disclosure reporting requirements and the level of compliance with these requirements (the Resolution).[654] Following the approval of this resolution, the Ministry of Finance and the OSC agreed to undertake the review and make recommendations (OSC Review).[655] One of the motivating factors for this review entailed "institutional and retail investors not hav[ing] access to a sufficient level of ESG information",[656] and therefore seeking more information through shareholder proposals and other means.[657] The OSC Review also focused on corporate decision-makers and "the need for better information, incentives and institutions to encourage decision-makers to take a broad, long-term view to identify and confront risks in an integrated manner before they erupt systemically."[658] This reveals an effort to address corporate governance practices and due diligence to prevent future incidents and allegations of misconduct; goals shared with the process of SR as well.

The OSC Review included a consultation on CSR and ESG standards focusing on disclosure requirements for reporting issuers under the Ontario securities legislation.[659] The eventual recommendations arising from the OSC Review looked to provide greater transparency for investors and the Canadian market place in general.[660] The recommendations focused on the nature and extent of environmental risks and issues as well as nature and adequacy of an issuers' corporate governance practice.[661] Some participants in the review argued that ESG disclosure is not necessarily complete, reliable, verified, or audited and the lack of consistency among issuers fails to allow comparisons to past performance or with other issuers.[662] A related view was that

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[654] OSC Final Report, *supra* note *supra* note 639 at 5, 14.
[655] *Ibid*.
[656] *Ibid* at 2 of Schedule 2 – Summary of roundtable discussion September 18, 2009.
[657] *Ibid* at 37; Aaron Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights" (2009) 47 Osgoode Hall Law Journal 47 at 67. There is a growing use of shareholder proposals as a method of gaining more information and to influence corporate behaviour.
[658] OSC Final Report, *supra* note 639 at 9.
[659] *Ibid* at 5.
[660] *Ibid* at 9.
[661] *Ibid* at 9, and 2, 5, 9-10 of Schedule 2 – Summary of roundtable discussion held on September 18, 2009. Participants in the consultation also argued that social matters may just as likely as environmental issues equate to material information for investors and stakeholders, which are "inextricably linked," so it is inappropriate to strictly consider environmental issues, which the review focused on, without considering social issues.
[662] *Ibid* at 14. The UN PRI and its principles were created due to a "growing view among investment professionals that ESG issues can affect the performance of investment portfolios and that investors fulfilling their fiduciary (or equivalent) duty therefore need to give appropriate consideration to these issues"; CFA Institute, "Environmental, Social and Governance Factors at Listed Companies: A Manual for Investors" (2008) at 3, online: cfapubs.org

consistency and quality issues could be resolved by the adoption or creation of universal standards and requirements or sector specific performance indicators.[663] The need for increased monitoring to ensure compliance with disclosure obligations and to continue and improve educational outreach to issuers was also recommended. For example, one view suggested for the OSC to work together with the TSX to provide guidance to reporting issuers[664] through workshops and direction and to ensure regulators are adequately equipped to provide guidance. Ultimately, the OSC Review and its recommendations did not propose major changes with regard to the disclosure of non-financial information under Canadian securities laws.[665] This was a view shared by the majority of participants who felt that although amendments were not necessarily required issuers would benefit from greater guidance.[666]

Conclusion

Despite the negative impacts of the Canadian extractive sector operating abroad, Canada, and its leading extractive sector, is not void of CSR efforts to address extractive sector misconduct. The research illustrates that there is a growing movement promoting greater CSR and SR. This was seen by the many requests for disclosure and transparency in the AG and PDAC Reports, the adoption of the GRI under the CSR Counsellor, the OECD Guidelines for MNEs and its disclosure obligations, the draft foreign payments disclosure initiative, as well as the proposal to ensure the level of compliance with non-financial disclosure under Canadian securities laws. This movement supports the potential for Canada to build a framework capable of regulating Canadian extractive sector TNCs with SR. Currently, the GRI under the CSR Counsellor is part

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<http://www.cfapubs.org/toc/ccb/2008/2008/2> (Accessed August 15, 2013). "A growing number of investors have begun to focus on ESG factors to arrive at a more thorough understanding of the risks and opportunities that face the companies" they invest in," because they believe such factors can have an impact on investment performance.

[663] OSC Final Report, *supra* note 639 at 4.

[664] *Securities Act* (Ontario), R.S.O. 1990, c S 5, s 1(1) "reporting issuer". Discussed further in Chapter 4.

[665] OSC Final Report, *supra* note 639 at 18. One conclusion reached by the OSC Review is that Canadian disclosure requirements are comparable to those in other jurisdictions.

[666] *Ibid* at Summary of Roundtable discussion at 7. The OSC Report reveals investors have been requesting environmental issues directly from issuers in addition to the information already provided through regulations. The OSC Report revealed that of the 101 shareholder proposals and resolutions filed in 2009 12 "covered topics such as monitoring of greenhouse gas emissions, participation in the Carbon Disclosure Project and reporting on the effect of, or exposure to risks relating to climate change"; OSC Final Report, *supra* note 639 at 15. Poor compliance with the existing disclosure obligations was expressed by the participating stakeholders as the primary reason for inadequate disclosure, a view that was supported by previous OSC, CSA and third party reviews as well.

of a voluntary mechanism. This offers a reminder of the role of the state and its unique authoritative power. The proposition of a state-backed SR framework that focuses on ESG and human rights disclosure is appealing because it attaches to the notion of state authority to compel disclosure. This subsequently suggests investigating the role for state involvement. As a result, the next chapter will examine disclosure obligations under securities laws and regulations in order to ascertain whether the securities regulatory framework could indeed offer a foundation on which to establish SR.

Chapter 4

4 Canadian Securities Disclosure and the Global Reporting Initiative

The basis for examining Canadian securities regulations arises from the pre-existing disclosure framework embedded within the unique regulatory power of the state.[667] As a result, this chapter explores the mandatory disclosure requirements and the concept of materiality under Canadian securities law. This inquiry is intended to reveal the level of state mandated environmental, social and human rights disclosure. In the process, this examination sets up a comparison with the Global Reporting Initiative (GRI), and ultimately leads to a determination of how capable Canada is in developing a sustainability reporting-based framework in line with the reflexive and new governance theories.

4.1 Canadian Securities Laws and Regulations

This section will first provide an overview of securities regulation in Canada, and then briefly examine exemptions to disclosure requirements under Ontario securities law. This overview is followed by an examination of one of the main securities disclosure obligations in Canada, national instrument 51-102 – continuous disclosure obligations, and the related threshold concept of materiality.[668]

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[667] Cynthia Williams, "The Securities and Exchange Commission and Corporate Social Transparency" (1999) 112 Harv L Rev 1197 at 1211-1223. A further justification arises from the fact that sustainability reporting may also be linked with securities regulations through the intellectual background of the United States (U.S.) securities laws in the early 1900s. This is because leading academics "championed disclosure as a regulatory method to increase accountability to shareholders and the general public arguing for greater corporate social transparency." This is notable because U.S. securities laws serve as model for Canadian securities regulations. [Williams]; Ontario Securities Commission, *OSC corporate sustainability reporting initiative: Report to Minister of Finance*, at 10 online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20091218_51-717_mof-rpt.pdf> (Accessed August 15, 2013). Another reason why examining the Canadian securities framework is important is because investors "would welcome regulatory action" in the disclosure of governance practices of corporations and non-financial risks, such as environmental and related risks. This coincides with the "disclosure trend" identified in chapter 1. [OSC Final Report].

[668] The process of disclosing "relevant" information entails excluding "non-relevant" information. Issues then arise when environmental, social, and human rights issues do not consistently meet this threshold. Materiality is discussed in greater detail below.

A. Securities Regulation

The largest securities regulators in Canada are Ontario, British Columbia (B.C.), Alberta, and Quebec.[669] The trading of securities of public corporations, such as the shares of a corporation, normally takes place on stock exchanges. The Toronto Stock Exchange (TSX) is Canada's senior equities market,[670] and the TSX Venture Exchange (TSXV) is Canada's junior listings market.[671] The Canadian National Stock Exchange (CNSX), recently renamed as the Canadian Securities Exchange (CSE), is another Canadian stock exchange.[672] The CSE offers a "full service, national stock exchange" as an alternative equities[673] market to the TSXV by targeting emerging, small capital companies.[674]

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[669] Stikeman Elliot LLP, *Canada*: *Corporate Law Tools*, at ¶ 1, online: SRSG Portal <http://198.170.85.29/Corp-law-tools-Canada-Stikeman-Elliott-for-Ruggie-Sep-2009.pdf> (Accessed August 15, 2013). These are the primary securities regulators, based on the size and sophistication of the particular markets. [CLT Report]; Maxime-Olivier Thibodeau, "Proposed Federal Securities Regulator" in Economics and Finance (30 April 2012), online: Parliamentary Library <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-28-e.htm> (Accessed August 15, 2013). In 1999, the major exchanges agreed the Toronto Stock Exchange would become the sole exchange for trading senior equities, the Montreal Exchange assuming responsibility for the trading of derivatives, and the Canadian Venture Exchange, formed through a merger between the Vancouver, Alberta (and later Winnipeg) stock exchanges to handle the trading of junior equities.

[670] *Ibid;* TSX, *About the TSX*, online: TSX <http://www.tmx.com/en/about_tsx/> (Accessed August 15, 2013). The TSX provides senior issuers with access to public equity. [TSX About].

[671] TSX About, *supra* note 670. The TSX Venture Exchange provides companies in their early stages of growth funding opportunities. The TSXV formed with the merger between the B.C. and Alberta stock exchanges.

[672] Barbara Shehter, "Yes, Canada has another stock exchange, and it's called the CSE" *Financial Post* (6 January 2014), online: business.financialpost.com <http://business.financialpost.com/2014/01/06/yes-canada-has-another-stock-exchange-and-its-called-the-cse/> (Accessed January 9, 2014). In addition to the TSX, the TSXV, and the CSE, there is also the Montreal exchange (MX), known as the Bourse de Montréal, owned by the TMX group, and the ICE Futures Canada. TMX, *Montreal Exchange Canadian Derivative Exchange*, online: m-x.ca <http://www.m-x.ca/accueil_en.php> (Accessed January 10, 2014); ICE, *About ICE*, online: theice.com <https://www.theice.com/about.jhtml> (Accessed January 10, 2014).

[673] Equities are usually referred to as stocks or shares.

[674] Canadian Securities Exchange, *About CSE*, online: cnsx.ca <http://www.cnsx.ca/CNSX/About-CSE/Who-We-Are/Default.aspx> at "Who We Are" (Accessed January 9, 2014); Canadian Securities Exchange, *CNQ re-launches as CNSX, the Canadian National Stock Exchange, offering faster and cheaper competition in Canada's securities markets*, online: CNSX markets <http://cnsxmarkets.ca/News/2008/11/06/CNQ-re-launches-as-CNSX.aspx> (Accessed January 9, 2014). The CSE is designed to "facilitate an easier, faster and less expensive listing for Canadian issuers without the red tape associated with exchanges built on older market structures"; Letter from Timothy Baikie, "Re: Application to Amend the Recognition Order of Canadian Trading and Quotation System Inc. ("CNQ")" (29 July 2005), online: OSC <https://www.osc.gov.on.ca/en/Marketplaces_cnq_20051007_application.jsp> (Accessed January 10, 2014); CSE, *Rule 1: Interpretation and General Provisions*, online: cnsx.ca <http://www.cnsx.ca/cmsAssets/docs/Trading%20Rules/Rule%201%20-%20Intepretation%20and%20General%20Provisions.pdf> (Accessed January 10, 2014) at 6 "securities act". The CSE complies with similar national instruments and definitions as those outlined under the Ontario Securities Act.

Securities in Canada are regulated at the provincial level.[675] If securities are sold in a specific jurisdiction, the securities regulations of that provincial jurisdiction govern.[676] As an "umbrella organization" of provincial securities regulators the Canadian Securities Administrators (CSA) is also a relevant organization. The purpose of the CSA is to promote consistency, harmonization, and streamlining of the regulatory process,[677] and the sharing of ideas and policies across Canada in order for the securities industry to operate as smoothly as possible.[678] One method in which this streamlining occurs is through the creation of national and multilateral instruments. These are the CSA's attempts to eradicate duplicate regulations for businesses dealing in more than one province.[679] Securities regulations are not formed or enforced by the CSA. Instead, the rule-making, adoption, and enforcement process is the responsibility of the provincial securities regulator. In this case, securities commissions will first publish and then allow interested persons and companies to comment on proposed rules.[680] After commissions review the comments, the final step of the rule making process requires approval from the finance minster.[681] This comment process is intended to provide feedback on financial rules and regulations.[682] In

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[675] Mary G. Condon, Anita I. Anand & Janis P. Sarra, *Securities Law in Canada: Cases and Commentary, 2d ed* (Toronto: Emond Montgomery Publications, 2010) at 151. [Condon, Anand, Sarra]; Ontario *Securities Act*, RSO 1990, c S 5 at s 21(5). [OSA].

[676] Condon, Anand, Sarra, *supra* note 675 at 1; Reference re Securities Act, 2011 SCC 66. The Supreme Court of Canada (SCC) considered the constitutionality of a new proposed Securities Act that would allow the federal government to regulate the securities industry in Canada; The SCC held this "Securities Act as "not valid under the general branch of the federal power to regulate trade and commerce under s. 91(2) of the Constitution Act, 1867".

[677] Canadian Securities Administrators, *About CSA Overview*, online: securities-administrators.ca <http://www.securities-administrators.ca/aboutcsa.aspx?id=45&linkidentifier=id&itemid=45> (Accessed January 10, 2014).

[678] Canadian Securities Administrators, *Who we are*, online: CSA/ACVM <http://www.securities-administrators.ca/aboutcsa.aspx?id=77> (Accessed August 15, 2013); Condon, Anand, Sarra, *supra* note 675 at 21. The CSA was formed by securities regulators in each of the 10 provinces and 3 territories.

[679] Condon, Anand, Sarra, *supra* note 675 at 22. A national instruments (NIs) is adopted by all provinces and territories, whereas a multilateral Instruments (MIs) is an instrument adopted by some but not all provinces. A province is required to enact the instruments in order for it to be binding and enforceable in that province.

[680] Ontario Securities Commission, *Rule-Making in Ontario*, online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category0/backgrounder_rule_making.pdf> (Accessed January 24, 2014). [OSC Rule making]; OSA, *supra* note 675 at s 143(1); Alta Reg 115/1995, online: canlii.org <http://www.canlii.org/en/ab/laws/regu/alta-reg-115-1995/latest/alta-reg-115-1995.html> (Accessed January 24, 2014); BC Reg 195/1997, online: bclaws.ca <http://www.bclaws.ca/Recon/document/ID/freeside/57_195_97> (Accessed January 24, 2014).

[681] OSC Rule making, *supra* note 680.

[682] The comment process could potentially provide a process in which stakeholders provide non-financial feedback from SR. At the same time, the comment process may not provide a suitable prospect for non-financial input from

addition to rule-making and the adoption of regulations and policies, provincial securities regulators also enforce. Private stakeholders can also play a role in enforcement of securities laws, and therefore, private enforcement can supplement public (provincial) securities regulation.[683]

One particularly relevant national instrument (NI) is NI 51-102 - Continuous Disclosure Obligations. NI 51-102 outlines the disclosure obligations and documents that must be disclosed by companies that are reporting issuers. A reporting issuer is not determined by whether or not the company is listed on a stock exchange.[684] In Ontario, a company can become a reporting issuer by filing a prospectus and receiving a receipt from the Director;[685] by filing a securities exchange take-over bid circular; by listing and posting securities in Ontario on any Ontario securities commission (OSC) recognized exchange; by offering its securities to the public and being the subject of the Business Corporations Act; by amalgamation, arrangement or other statutory procedure "where one of the amalgamating or merger companies or the continuing company has been a reporting issuer for at least twelve months; or by designation if the OSC "considers that it is in the public interest" and makes such an order.[686] Reporting issuers are required to provide NI 51-102 disclosure through different documents, such as the quarterly and annual financial statements, the management discussion and analysis (MD&A), and the annual information forms (AIF).[687]

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stakeholders simply because of the financial nature of the provincial securities regulator, its governing legislation, and the interest in the pertinent financial rules and regulations.

[683] Christopher C. Nicholls, "Civil Enforcement in Canadian Securities Law" (2009) 9:2 Journal of Corporate Law Studies 367 at 401, 407-8. Nicholls also identifies that despite the development of a Canadian statutory civil remedy for securities law enforcement for investors, it is not very robust. This is due to judicial aversion and existing enforcement mechanisms. The use of the civil remedy process, however, has not been completely undermined. As of January 2009, 12 proceedings have been commended under the new provisions. The private enforcement process contributes to the feedback and enforcement dimension of SR.

[684] OSA, *supra* note 675 at s 1(1) "reporting issuer".

[685] *Ibid*. Director refers to the "Executive Director of the [OSC], a Director or Deputy Director of the [OSC] or a person employed by the [OSC] in a position designated by the Executive Director".

[686] *Ibid* at (1) "reporting issuer", 1(11). A company can become a reporting issuer in British Columbia under similar circumstances, *see* Securities Act, RSBC 1996, c 418, s 1.

[687] *Continuous Disclosure Obligations*, OSC NI 51-102 (2011) online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20111031_51-102_unofficial-consolidation-post-ifrs.pdf> (Accessed August 15, 2013). [NI 51-102]; *Securities Law*, *supra* note 698 at 141

It is important to distinguish between companies listed on the TSX and TSXV. This is because of the particular mandatory disclosure obligations associated with listing on a particular exchange.[688] Without consistency and a similar level of guidance to disclose non-financial information on both the TSX and TSXV, different extractive sector companies face different disclosure requirements. This is particularly relevant as private placement investment is a significant source of capital for extractive sector companies listed on the TSXV.[689] This necessitates examining the level of non-financial disclosure from non-reporting issuers who rely on a prospectus exemption[690] (through private placements[691]) and public investments (through prospectus disclosure and the continuous disclosure obligations)[692], in addition to non-financial disclosure required in both private and public settings (specific disclosure applicable to extractive sector companies)[693].

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[688] TMX, *Global Leader in Mining*, online: tmx.com <http://www.tmx.com/en/listings/sector_profiles/mining.html> (Accessed November 28, 2013). There were 1290 mining issuers on the TSXV and 338 mining issuers on the TSX. [TMX mining]; <http://www.tmx.com/en/listings/sector_profiles/energy.html> (Accessed November 28, 2013). There were 264 oil & gas issuers on the TSXV and 110 oil & gas issuers on the TSX. [TMX oil].

[689] OSC Notice - *Exempt Market Review* OSC Notice 45-712, (2012) at 14 online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category4/sn_20130828_45-712_progress-report-c-capital-raising-canada.pdf> at 2. (Accessed November 22, 2013). [OSC Notice 45-712]. "Private placements are an important method through which listed issuers, especially those listed on the TSXV, raise capital"; Douglas Cumming, "Private Equity: Fund Types, Risks and Returns, and Regulation" (New Jersey: Wiley Publishing, 2010) at 131. In 2004, more than 50% of all private placement financing was by the resources and oil and gas sectors. [Cumming]; Letter from Ross Gallinger PDAC Executive Director to The Secretary of the Ontario Securities Commission (27 September 2013) Re: OSC staff notice and request for comment regarding proposed structure of trading facilities of a new exchange proposed to be established by Aequitas Innovations, online: OSC <http://www.osc.gov.on.ca/documents/en/Marketplaces/com_20130927_aequitas_pdac.pdf> (Accessed April 24, 2014). "A major portion of the capital raised by the mining and exploration industry is done by selling of such securities through the private placement mechanism."

[690] Although reporting issuers who have filed a prospectus may rely on a prospectus exemption to raise additional capital, the focus here is on examining disclosure from non-reporting issuers who have relied on a prospectus exemption and reporting issuers who are required to comply with the continuous disclosure obligations.

[691] Private placement investment occurs when an issuer relies on a prospectus exemption.

[692] *See section B* for discussion on Prospectus disclosure and *section C* for discussion on NI 51-102.

[693]("[S]ecurities laws apply to all entities that distribute/trade securities, whether the company or issuer is a listed entity or not. Private companies should ensure that when distributing securities, they comply with an available exemption to the prospectus requirement"). British Columbia Continuing Legal Education Society, *Securities for Junior Lawyers and Legal Support Staff: A Basic Overview of Securities Regulation in British Columbia*, online: cle.bc.ca <http://www.cle.bc.ca/PracticePoints/BUS/securities%20overview.pdf> at 1.1.6 (Accessed December 2, 2013). [BC CLE]; *See section 4.2* for discussion on extractive sector specific disclosure.

B. Prospectus Disclosure and Exemptions

All companies seeking to raise capital from the general public must normally provide prospective investors with a prospectus disclosure document that has been vetted by securities regulators.[694] The prospectus is one document that includes not only financial disclosure but also a level of non-financial information to which prospective investors are entitled.[695] The purpose of such disclosure is to inform potential investors of relevant information regarding an impending investment opportunity in the primary market, meaning securities are being directly offered by the issuing company.[696] To avoid the prospectus requirement it may be possible for companies raising capital to rely on a prospectus exemption. For example, instead of offering securities to the public, a company may instead rely on a select group of investors to raise capital.[697] The prospectus requirement therefore looks to provide greater protection through greater disclosure when a company wishes to access the general market of public investors.

For the purpose of this discussion, the prospectus mandates an expansive view of non-financial information disclosure. Under Form 41-101F1, section 5.1(4) requires the disclosure of implemented social or environmental policies that are fundamental to the issuer's operations.[698]

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[694] OSA, *supra* note 675 at s 1(1), Part XV section 56(1). A prospectus is a detailed disclosure document that provides information about the company issuing securities. It gives potential investors information needed to make informed decisions. Without a prospectus an issuer is unable to offer securities to the general public. The prospectus includes financial statements and a certificate verifying the prospectus contains full, true and plain disclosure of all the material facts relating to the securities proposed to be distributed or already issued by the reporting issuer. Before a company is obligated to comply with NI 51-102, it must provide a prospectus document to enter into the securities market; Janis Sarra, "Disclosure as a Public Policy Instrument in Global Capital Markets", (2006) 42 Texas International Law Journal 875 at 882. [Sarra, Public Policy].

[695] Jeffrey G. MacIntosh and Christopher C. Nicholls, *Securities Law* (Toronto: Irwin Law, 2002) at 139. The prospectus document is normally not read by the general public investors, it is read by financial analysts and their lawyers of those investment banks and securities dealers, and others who then distribute securities on a commission. [*Securities Law*].

[696] *Securities Law*, *supra* note 695 at 139. Condon, Anand, Sarra, *supra* note 675 at 146-7. The secondary market is essentially the stock market, where the public has access to purchase and sell stocks on the stock exchange.

[697] OSA, *supra* note 675 at section 73.4. This is known as the private issuer exemption, and is one of many prospectus exemptions, as displayed in Part XVII and *Prospectus and Registration Exemptions*, OSC NI 45-106 (18 September 2009), online: OSC <https://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20090918_45-106_3238-supplement.pdf> (Accessed November 24, 2013). [NI 45-106].

[698] *General Prospectus Requirements*, OSC NI 41-101 (22 December 2006), online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20061222_41-101_gen-pro-requirements.pdf> at Item 5, s 5.1(4). (Accessed August 15, 2013). [41-101F1]; *Securities Law*, *supra* note 695 at 139; Janis Sarra, *Modernizing Disclosure in Canadian Securities Law: An Assessment of Recent Developments in Canada and*

This includes anything related to the issuer's relationship with the environment, to communities in which the issuer does business, or to any of its human rights policies.[699] Section 21.1(1) of Form 41-101F1[700] lists risk factors to be disclosed. This includes risks to the issuer and its business, "such as… the general risks inherent in the business carried on by the issuer, environmental and health risks, … regulatory constraints, economic or political conditions… and any other matter that would be likely to influence an investor's decision to purchase securities of the issuer."[701] Similarly, subsection (3) of 21.1 outlines a requirement to disclose risks, not otherwise outlined in 21.1(1) "that a reasonable investor would consider relevant to an investment" and likely to influence the investor's decision.[702] Despite the explicit reference to non-financial disclosure and the relevance to sustainability reporting (SR), as mentioned above, there are exemptions that exist from the prospectus requirement, meaning the above non-financial disclosure provisions are not always required.[703]

Certain exemptions are permitted where it is deemed the protection offered by a prospectus is not needed due to the nature of the security or the purchaser's sophistication, knowledge or financial position.[704] The main categories of prospectus exemptions are the Capital Raising Exemptions and Transaction Exemptions.[705] When relying on a prospectus exemption, the initial level of disclosure from a company therefore will not necessarily be equivalent to the disclosure required when distributing securities to public investors. Securities distributions under such exemptions

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Selected Jurisdiction, (May 29, 2006) at 57 online: tfmsl.ca <http://www.tfmsl.ca/docs/V2(1A)%20Sarra.pdf> (Accessed August 15, 2013). [Sarra, Modernizing Disclosure].

[699] 41-101F1, *supra* note 698 at Item 5 s 5.1(4).

[700] Form 41-101F1 sets out specific disclosure requirements in addition "to the general requirement under securities legislation to provide full, true and plain disclosure of all material facts relating to the securities to be distributed. Certain rules of specific application impose prospectus disclosure obligations in addition to those described in Form 41-101F1."

[701] 41-101F1, *supra* note 698 at 21.1(1) Item 21: Risk Factors of Form 41-101F1.

[702] *Ibid* at (3).

[703] Condon, Anand, Sarra, *supra* note 675 at 318, 320-321, 326-329; For a complete list of available prospectus exemptions refer to OSA, *supra* note 675 at Part XVII and NI 45-106, *supra* note 697 at Part 2; *Ontario Prospectus and Registration Exemptions*, OSC Rule 45-501, (28 September 2011), online: OSC <https://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20110928_45-501_amend-restated.pdf> (Accessed April 16, 2014). [OSC Rule 45-501].

[704] Condon, Anand, Sarra, *supra* note 675 at 317.

[705] NI 45-106, *supra* note 697. The other categories of exemptions include: Investment Fund Exemptions; Employee, Executive Officer, Director and Consultant Exemptions; and Miscellaneous Exemptions.

are known as private placements.[706] A private placement "occurs when an Issuer issues securities from treasury for cash in reliance upon exemption from the Prospectus and registration requirements" under securities laws."[707] For example, under the Ontario Securities Act this would refer to the "Exemptions From the Prospectus Requirement" under Part XVII[708] and the Ontario specific OSC Rule 45-501 – Ontario Prospectus and Registration Exemptions, as well as, NI 45-106 – Prospectus and Registration Exemptions would apply.[709]

In order to use a prospectus exemption an issuer must first meet the conditions of that exemption, and this can be done by issuers on the TSX and TSXV. For example, when using the Offering Memorandum (OM) Exemption an OM must be prepared.[710] The OM exemption is unique because the only jurisdiction in which it remains unavailable is Ontario.[711] When NI 45-106 was introduced, Ontario rejected OM exemption considering the lack of disclosure associated with the exemption to not provide enough protection to investors and thus "too risky for retail investors".[712] As such, the OM exemption represents a prospectus exemption not fitting into the

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[706] Ontario Securities Commission, *Information for: Companies – Private Placements*, online: OSC <http://www.osc.gov.on.ca/en/Companies_private-placements_index.htm> (Accessed November 22, 2013). [OSC Private Placement].

[707] TMX Venture Exchange Corporate Finance Manual, *Policy 4.1 – Private* Placements, online: tmx.com <http://www.tmx.com/en/pdf/Policy4-1.pdf> at Policy 4.1 (Accessed December 2, 2013); Under the TSX Company Manual a private placement is "an issuance of treasury securities for cash consideration or in payment of an outstanding debt of the listed issuer without prospectus disclosure, in reliance on an exemption from the prospectus requirements under applicable securities laws." TMX, *TSX Company Manual - Section 607 Private Placements*, online: tmx.com <http://tmx.complinet.com/en/display/display_main.html?rbid=2072&element_id=274> (Accessed December 2, 2013).

[708] OSA, *supra* note 675 at Part XVII; OSC Private Placement, *supra* note 706. "[R]egistration and prospectus exemptions are available for companies that, subject to certain conditions, distribute securities to "accredited investors" or their own employees, or in connection with a business combination or reorganization"; NI 45-106, *supra* note 697.

[709] OSC Rule 45-501, *supra* note 703; BC CLE, *supra* note 693. "National Instrument 45-106 Prospectus and Registration Requirements contains most of the commonly used exemptions"; NI 45-106, *supra* note 697. As a NI, NI 45-106 is also applicable is Ontario. However, OSC Rule 45-501 was introduced in 1998 and includes those "local exemptions that have not been included in NI 45-106". *See* Ontario Securities Commission, *National and Ontario Prospectus and Registration Exemptions Notice: Request for Comments*, online: OSC <https://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20041217_45-106_prspcts-reg-exempt.pdf> (Accessed April 25, 2014). [NI 45-106 2004 Proposal]. and Ontario Securities Commission, *Notice of Proposed Rule, Policy and Forms under the Securities Act Rule 45-501*, online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_19971017_45-501_n_pr_pcp.htm> (Accessed April 25, 2014).

[710] NI 45-106, *supra* note 697 at Part 2, s 2.9.

[711] NI 45-106 2004 Proposal, supra note 709 at section 4(a), "Ontario carve-outs". When NI 45-106 was published for comments Ontario had taken the position of not adopting the offering memorandum exemption.

[712] *Ibid*; FairCanada, *Proposed OM exemption not supported by the facts*, online: faircanada.ca <http://faircanada.ca/top-news/proposed-om-exemption-not-supported-by-the-facts/> (Accessed April 16, 2014).

general rationale for providing exemptions, which normally arise due to the purchaser's sophistication, knowledge or financial position.[713] The OM exemption is intended to allow "an issuer to sell its securities to anyone, regardless of their relationship, wealth or the amount of securities purchased".[714] The justification for offering this freedom to target "anyone" in raising capital is to encourage the growth of private and early stage businesses and "facilitate access to capital by small businesses.[715] Therefore, in order to use the OM exemption an issuer is required to disclose information as outlined by the OM.[716] The disclosure of information is outlined in two forms of OMs, Form 45-106F3, which may be used by qualifying issuers, and Form 45-

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"The rationale for regulatory exemptions is that some investors are sophisticated and not in need of protection." Since the OM exemption is permitted to apply to all investors, not just sophisticated investors or those in a strong financial position, the OSC deemed the lack of disclosure for the majority of investors as "too risky"; Ontario Securities Commission, *Exempt Market Review Backgrounder* (March 20, 2014), online: OSC <http://www.osc.gov.on.ca/documents/en/News/nr_20140320_osc-proposes-four-capital-raising-backgrounder.pdf> (Accessed April 16, 2014). [2014 OM Proposal]; Letter from Borden Ladner Gervais LLP (21 March 2005) BLG Comments on Proposed NI 45-106 Prospectus and Registration Exemptions, online: OSC <https://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20050321_45-106_com_blg.pdf> (Accessed April 16, 2014).

[713] Condon, Anand, Sarra, *supra* note 675 at 317.

[714] British Columbia Securities Commission, *Private & Early Stage Business*, online: BCSC <http://www.bcsc.bc.ca/privateplacements.asp?id=2004#OM> (Accessed April 16, 2014).

[715] *Ibid*; Alberta Securities Commission, *Multilateral CSA Notice 45-311- Exemptions from Certain Financial Statement-Related Requirements in the Offering Memorandum Exemption to Facilitate Access to Capital by Small Businesses*, online: Alberta Securities <http://www.albertasecurities.com/Regulatory%20Instruments/4392270-v9-CSA_Multilateral_Notice_45-311_re_OM_blanket_order.pdf> (Accessed April 16, 2014). "The OM exemption was intended to provide a variety of issuers, including early stage businesses and other SMEs, with a cost-effective capital-raising option"; NI 45-106 2004 Proposal, supra note 709 at 4(a) "Summary of NI 45-106 Materials – Ontario "carve-outs". The OM exemption is implemented in all jurisdictions in Canada, except Ontario, and there are two primary models "the BC model" and "the Alberta model". The BC model is viewed as the most liberal and the Alberta model is viewed as not as flexible; OSC, *Introduction of Proposed Prospectus Exemptions and Proposed Reports of Exempt Distribution in Ontario Supplement to the OSC Bulletin*, (March 20, 2014) Volume 37, Issue 12 (Supp-3), online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category4/csa_20140320_45-106_rfc-prospectus-exemptions.pdf> (Accessed April 16, 2014) at Appendix A, A-2. Ontario compares its current OM proposal to the Alberta model; NI 45-106, *supra* note 697 at 2.9(1) and (2). The Alberta model is more restrictive because it requires purchasers to be "eligible investors" and be limited to an acquisition cost of $10 000. The BC model does not have similar restrictions. Since western Canada, B.C. and Alberta, regulate and form part of the TSX-V, which generally consists of new, smaller and medium sized entities, this could offer an explanation for B.C.'s and Alberta's adoption of the OM exemption. This view is supported by the policy rationale to prevent and avoid "burdens" to growth for the TSX-V listed issuers; Letter from John Stevenson, (March 8, 2013) re: OSC Staff Consultation Paper 45-710, online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category4-Comments/com_20130308_45-710_skaugec_pettipasc.pdf> (Accessed April 16, 2014). The National Exempt Market Association (NEMA) also offers support for current Ontario proposal to introduce the OM prospectus exemption because it "enhances the ability to raise capital for Small & Medium Enterprises (SMEs)."

[716] NI 45-106, *supra* note 697 at 3.9 (1) – (2), Companion Policy 45-106CP s 3.8 (1) – (2). Alberta, Manitoba, Northwest Territories, Nunavut, P.E.I, Québec, Saskatchewan, and Yukon give OM exemptions if certain conditions are met.

106F2, which must be used by all other issuers.[717] Qualifying issuers are those issuers who have filed an AIF under NI 51-102 and non-qualifying issuers are those who have not.[718] In any case, an oil and gas issuer, even if relying on the OM exemption, would still be required to disclose information about their oil and gas activities, as would a mining issuer. These extractive sector disclosure obligations are outlined in NI 51-101 – Standards of Disclosure for Oil and Gas Activities and NI 43-101 – Standards of Disclosure for Mineral Projects.[719] Both NI 43-101 and NI 51-101 illustrate that these relevant disclosure obligations apply regardless of whether an issuer on the TSX or TSXV relies on a prospectus exemption.

The importance of the extractive sector-specific disclosure from NI 43-101 and NI 51-101 is highlighted by the fact that TSXV extractive sector companies not only have the option to rely on a prospectus exemption, they are also not obligated to provide AIF disclosure, a disclosure document which also explicitly requires environmental, social, and human rights disclosure.[720] A large majority of extractive sector companies are listed on the TSXV. This includes 1290 mining issuers and 264 oil and gas issuers.[721] By the end of 2004, more than 50% of all private placements originated from the resources and oil and gas sectors.[722] Though the proportion of

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[717] NI 45-106, *supra* note 697 at "qualifying issuer", Form 45-16F2 and Form 45-106F3. A qualifying issuer is a "reporting issuer in a jurisdiction of Canada that" is a SEDAR filer; one who has filed "all documents required to be filed under the securities legislation of that jurisdiction, and"; filed an AIF, even if not required to file an AIF, for its most recently completed financial year "and copies of all material incorporated by reference in the AIF not previously filed".

[718] NI 45-106, *supra* note 697 at Form 45-106F3 Item 2 (2.1), A.2, A.5, D.1(i), D.1(j), D.2; *Also see* 45-106, *supra* note 697 at Companion Policy 45-106CP s 3.8(3) of 45-106CP. Material Change Reports, discussed below, also apply to Form 45-106F2 and 45-106F3. *See section* D Materiality for more on Material Change Reports; (No continuous disclosure obligations apply when relying on the OM exemption) Saskatchewan Legal Education Society, *Continuous Disclosure for Saskatchewan Issuers*, online: redengine.lawsociety.sk.ca <http://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/ac4668.pdf> at 21 (Accessed December 2, 2013). However, to use Form 45-106F3, a venture issuer would be required to file an AIF (and NI 43-101 or NI 51-101, if applicable), or otherwise use Form 45-106F2.

[719] NI 45-106, *supra* note 697 at Form 45-106F2 and F3; *Standards of Disclosure for Mineral Projects*, OSC NI 43-101 (24 June 2011), online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20110624_43-101_mineral-projects.htm> at Part 2 (Accessed August 5, 2013). Non-financial information mainly refers to: environmental, social and human rights. [NI 43-101]; *Standards of Disclosure for Oil and Gas Activities*, OSC NI 51-101 (15 October 2010), at Part 5, online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/noa_20101015_51-101_disc-oil-gas.pdf> (Accessed August 5, 2013). [NI 51-101].

[720] *See* section C for a further discussion of the AIF. NI 51-102 – Continuous Disclosure Obligations.

[721] TMX mining, *supra* note 688. There were 338 mining issuers on the TSX; TMX oil, *supra* note 688. There were 110 oil and gas issuers on the TSX.

[722] Cumming, *supra* note 689 at 131.

capital raised through private placements listed on the TSXV declined from 88% in 2007 to 67% in 2012, there was still an increase in the total capital raised through private placements.[723] In any case, TSXV issuers "rarely conduct prospectus offerings or use the prospectus exemptions intended for sales to retail investors."[724] This is attributed to the time and cost involved in arranging the necessary offering documents normally applicable when selling to the public retail investors.[725] Another impediment associated with prospectus disclosure is that in practice, "[the] complexity of prospectuses make them virtually inaccessible to anyone other than financial analysts and their lawyers."[726] This means, from the perspective of different stakeholders, the prospectus disclosure document cannot be easily deciphered by the majority of shareholders, and other stakeholders. As such, the prospectus intrinsically fails to meet the goals of SR, which is to inform stakeholders.

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[723] OSC Notice 45-712, *supra* note 689 at 2, 6, 12. Since 2009, the overall "capital raised in the exempt market has consistently increased" in the TSXV, and this includes a 20% increase from 2011 equating to approximately $104 billion in 2012. In 2012, 22% of the total capital raised by listed issuers (on the TSXV and TSX) was through private placements. The 21% decrease of capital raised by TSXV issuers may help explain the recent Canadian securities proposal for the loosening of private placement rules. *See* Allison Martell, "UPDATE 1 – Canadian exchanges push to relax private placement rules", online: reuters.com <http://www.reuters.com/article/2013/09/20/canada-venture-financing-idUSL2N0HG1FH20130920> (Accessed November 22, 2013)

[724] British Columbia Securities Commission, *Proposed Prospectus Exemption for Distributions to Existing Security Holders*, BCSC CSA Notice 45-312 (21 November, 2013), at 1, online: bcsc.bc.ca <http://www.bcsc.bc.ca/uploadedFiles/securitieslaw/policy4/45-312_%5BMultilateral_CSA_Notice%5D.pdf> (Accessed November 22, 2013).

[725] *Ibid*. These difficulties of a lack of time and significant cost eventually resulted in a proposal from the majority of Canadian securities regulators, except Ontario and Newfoundland, seeking to allow TSXV issuers to raise capital by targeting retail investors through a new prospectus exemption. The comment period for the 45-312 proposal to expand the private placement rule only recently ended on January 20, 2014. In order to meet this new proposed prospectus exemption the TSXV issuer is required to have (i) "a class of equity securities listed on the TSX-V"; (ii) "filed all required timely and periodic disclosure documents"; (iii) "the offering consists only of the class of equity securities listed on the TSX-V or units consisting of the listed security and a warrant to acquire the listed security"; (iv) "issue a news release disclosing the proposed offering", including details of the use of proceeds; (v) "each investor confirms in writing to the issuer that, as at the record date, the investor held the type of listed security that the investor is acquiring under the exemption"; in this exemption (vi) investors would be limited to a maximum $15,000 investment annually under the exemption unless advised by a registered investment dealer; and (vii) investors would be notified of certain rights of action in the event of a misrepresentation in an issuer's continuous disclosure record, even if the issuer voluntarily provides an offering document.

[726] *Securities Law*, *supra* note 695 at 139.

C. NI 51-102 - Continuous Disclosure Obligations

Condon et al. recognize that "the concept of a reporting issuer carries an enormous amount of regulatory weight."[727] Once a company becomes a "reporting issuer" securities regulators require that issuer "to continuously disclose information to investors."[728] This continuous disclosure obligation is only applicable in the secondary market for securities,[729] where the majority of capital market activity occurs.[730] The purpose of this disclosure is to allow investors to make educated investment decisions.[731] This disclosure takes place through financial statements, the MD&A, the AIF, and material change reports (MCRs).[732]

To be subject to the continuous disclosure obligations, a corporation must be a reporting issuer, which as discussed above is a status that can be achieved in a number of ways.[733] Listing on a stock exchange is not, however, necessary for a company to become a reporting issuer.[734] It is also important to note that as long as companies remain as private issuers,[735] by initially relying on a prospectus exemption, they are not obligated to comply with the continuous reporting obligations in NI 51-102. Listed on an exchange or not, since a "trade"[736] is broadly defined, privately held companies may become subject to certain securities obligations. This means if a private issuer/company distributes securities, then in order to remain a private issuer and to avoid

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[727] Condon, Anand, Sarra, *supra* note 675 at 68; TMX, "Filing Guide: TSX Venture Exchange, Q2 2012", online: tmx.com <http://www.tmx.com/en/pdf/TSXV_FilingGuide_2012.pdf> (Accessed November 25, 2013). "Each listed issuer on TSXV ("Issuer") automatically becomes a reporting issuer under the securities laws of Alberta and British Columbia."

[728] Condon, Anand, Sarra, *supra* note 675 at 68.

[729] *Securities Law*, *supra* note 695 at 141; Condon, Anand, Sarra, *supra* note 675 at 146-7.

[730] Sarra, *Modernizing Disclosure*, *supra* note 698 at 73. In 2006, roughly 95% of all capital market activity in Canada was in the secondary market; Condon, Anand, Sarra, *supra* note 675 at 146-7, 355. In 2009-2010 about 94 percent of all capital market activity was in the secondary market.

[731] *Securities Law*, *supra* note 695 at 254-255.

[732] NI 51-102, *supra* note 687. The disclosure documents listed in NI 51-102 include: financial statements; MD&A's; AIFs; MCRs; Proxy Solicitation and Information Circulars; Restricted Security Disclosure; other "Certain Documents" listed in Part 12; and Material Contracts.

[733] Condon, Anand, Sarra, *supra* note 675 at 68; OSA, *supra* note 675 at s 1(1) "reporting issuer", 1(11).

[734] OSA, *supra* note 675 at s 1(1) "reporting issuer", 1(11).

[735] NI 45-106, *supra* note 697 at 2.4 (1) "Private Issuer" is an issuer, in part, "that is not a reporting issuer or an investment fund". The exemptions set out in the OSA are largely superseded by NI 45-106, which refers to "the corporation" as a "private issuer"; (Discussion of how to define a private issuer *See* Law Society of Upper Canada, *How to Structure the Share Provisions of a Corporation*, online: lsuc.on.ca <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Business-Law/How-to-Structure-the-Share-Provisions-of-a-Corporation/> at Appendix D (Accessed January 11, 2014)).

[736] OSA, *supra* note 675 at 1.1 at "trade".

the prospectus disclosure obligation the private issuer must only distribute securities to those principal purchasers outlined by the particular prospectus exemption.[737] Of course, nothing prevents a company that is already a reporting issuer from issuing additional securities on a prospectus-exempt basis,[738] in reliance on a prospectus exemption. If an issuer loses its private issuer status, it does not automatically become a reporting issuer and so obligated to file a prospectus and meet the continuous reporting obligations. [739]

In contrast to prospectus disclosure, the ongoing disclosure obligations under NI 51-102 play a critical and more functional role not just for investors and issuers but possibly for a greater number of other stakeholders by providing a foundation on which to base SR.[740] The goal of the continuous disclosure obligations is to inform, educate, and protect potential investors. SR shares in these goals as well, but also looks to take advantage of operating under a regulatory authority capable of disciplining non-compliance. An important distinguishing factor from prospectus disclosure is that the continuous disclosure obligations inform and protect investors without the complexity normally associated with the prospectus, making it easier for stakeholders to understand. Greater comprehension supports the underlying purpose of SR, which is to inform

[737] NI 45-106, *supra* note 697 at 2.4 (2), 2.10. Certain exemptions only permit selling to certain purchasers who purchase as principals. For example, 2.4(2) of Part 2, the Private Issuer exemption only allows the sale of securities to those who are "non-members of the general public", a friend or relative of a director, officer, employee, founder, control person, security holder, accredited investor, or majority owner of voting shares. Whereas, the Minimum amount investment exemption, only permits the distribution of securities to persons who purchase as the principal not less than $150 000 in securities, paid in cash.

[738] NI 45-106, *supra* note 697. NI 45-106 has constant reference to reporting issuers who are permitted to use the prospectus exemptions; OSC Rule 45-501, *supra* note 703 at Form 45-501F1, Item 2. The OSC Ontario specific prospectus exemptions also permit both reporting and non-reporting issuers to rely on the prospectus exemptions

[739] British Columbia Securities Commission, *Private & Early Stage Businesses*, online: BCSC <http://www.bcsc.bc.ca/privateplacements.asp?id=2004> (Accessed January 28, 2014). An issuer can lose its private issuer status by not complying with the elements to become a private issuer. Once lost, it cannot be regained. The issuer can, however, rely on another prospectus exemption.

[740] OSA, *supra* note 675 at s 1.1(a) – "Purposes of Act". Securities acts are intended to protect investors from "unfair, improper or fraudulent practices". Keeping a focus on investors avoids the possibility of SR under provincial securities laws being *ultra vires*. Investors would either want more information to help indicate problems, interpret information, and protect themselves and their financial preferences or to identify whether or not an issuer is acting as a responsible citizen, which may be more important for some investors regardless of financial performance.

and stimulate a dialogue and feedback.[741] This suggests NI 51-102 can serve as a foundation on which to base SR, with the added benefit of enforcement.

Every reporting issuer is required to file an MD&A.[742] This disclosure document conveys information related to annual and quarterly financial statements.[743] Since financial statements "do not provide investors or prospective investors with the subjective insights about an issuer's business that managers possess," the MD&A provides a clear, accurate, and understandable depiction of corporate information from the perspective of corporate management.[744] Similar to a corporation's financial statements, the annual MD&A must be approved by the board of directors and the interim MD&A by an audit committee before being filed with a securities regulator.[745] Laying out "reflective" and "prospective" elements, the MD&A intends to provide readers with a narrative from corporate management of the historical and prospective analysis of the "material information," such as contingent liabilities, of the business.[746] As well as providing an explanation of the difficult to read financial statements, which are normally out of date by the time investors receive them, the MD&A allows investors to see current and future prospects through the "eyes of management"[747]

Currently, only Part 2 of section 1.4(d) of the MD&A, Form 51-102F1 of NI 51-102, mandates discussion of social or environmental information.[748] The instruction in section 1.4 elaborates that subsection (d) should specifically include "any factors that have affected the value of the project(s) such as change in commodity prices, land use," and political or environmental issues.[749] Although section 1.4 is the lone reference to any social, environmental, or political disclosure, an argument can be made that the instructions of section 1.4 could easily be applied

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[741] Condon, Anand, Sarra, *supra* note 675 at 355. The continuous reporting obligations normally provide information on the issuer, its operations, and finances. Without issuers providing ongoing disclosure "there would be a disincentive for investors to provide capital," and this does not bode well for issuers.
[742] NI 51-102, *supra* note 687 at NI 51-102 Part 5 s 5.1(1) – Filing of MD&A.
[743] *Ibid*.
[744] *Securities Law*, *supra* note 695 at 258.
[745] *Ibid* at 256; NI 51-102, *supra* note 687 at NI 51-102 Part 5 s 5.5 – Approval of MD&A.
[746] Condon, Anand, Sarra, *supra* note 675 at 385.
[747] *Ibid* at 362-63; NI 51-102, *supra* note 687 at Form 51-102F1 Part 1 (a).
[748] NI 51-102, *supra* note 687 at Form 51-102F1 Part 2, section 1.4(d). This section applies to issuers that have major projects underway but have not begun generating operating revenue.
[749] *Ibid* at Part 2, section 1.4, instructions (ii).

to other general provisions listed under Part 2 of Form 51-102F1.[750] The Canadian Institute of Chartered Accountants (CICA) also provides guidance on MD&A disclosure,[751] which the four major securities regulators in Canada have endorsed and advised reporting issuers to use when preparing MD&As.[752]

CICA outlines that the MD&A is meant to be transparent and should "discuss the complete range of possibilities and possible outcomes" and explicitly report both bad and good news.[753] CICA MD&A guidance includes key performance drivers, which are deemed essential factors for the "successful implementation of the entity's strategy and achievement of its goals."[754] The key performance drivers are divided into internal and external performance drivers.[755] The internal performance drivers include, among others, workforce, customer satisfaction, leadership and governance, innovation, reputation and brand equity, safety, and environmental responsibility.[756] External performance drivers are those factors that are normally outside the control of the reporting issuer.[757] Despite the lack of explicit reference to social and human rights issues under the drivers, these concerns could, arguably, fall under a risk management component of MD&A

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[750] Aaron Dhir, "Shadows and Light: Addressing Information Asymmetries Through Enhanced Social Disclosure in Canadian Securities Law" (2009) 47 Canadian Business Law Journal 435 at 444. [Dhir, *shadows*]; NI 51-102, *supra* note 687 at Form 51-102F1 Part 2 section 1.2 and 1.4(b), (g), (j). In section 1.2, under overall performance, any trends, events or uncertainties that are "reasonably likely to have an effect on your company's business," may be said to incorporate social and environmental factors. Section 1.4(b) refers to "other significant factors" that caused changes in revenue; (g) refers to "commitments, events, risks or uncertainties" reasonably believed to materially affect your company's future performance; and section (j), refers to "unusual or infrequent events".

[751] Canadian Institute of Chartered Accountants, "Financial Reporting Disclosures about Social, Environmental and Ethical (SEE) Issues" (November 2004), online: worldcat.org <http://www.worldcat.org/title/financial-reporting-disclosures-about-social-environmental-and-ethical-see-issues-background-paper-for-the-capital-markets-and-sustainablity-program-of-the-national-round-table-on-the-environment-and-the-economy/oclc/70718028> at 15 (Accessed August 15, 2013). [CICA 2004 Report].

[752] *Ibid*; CLT Reporting, *supra* note 669 at 6 ¶ 4.1. The four major securities regulators in Canada are: the Ontario, Alberta, Quebec and B.C. stock exchanges; These four are also members of the International Organization of Securities Commissions (IOSCO); Mary Condon, "Canada's Role in Expanded IOSCO Principles" (July 9, 2012) <https://www.osc.gov.on.ca/documents/en/News/sp_20120709_canada-role-iosco-principles.pdf> at 3 (Accessed January 12, 2014).

[753] Canadian Institute of Chartered Accountants, "Management's Discussion and Analysis: Guidance on Preparation and Disclosure Comprehensive Revision – July 2009 Update #3" (July 2009) Canadian Performance Board, online: CICA <http://www.cica.ca/publications/list-of-publications/manual/item29637.pdf> at p 25 s 2.3. (Accessed August 15, 2013). [CICA 2009 Report].

[754] *Ibid* at 35. Section 3.3 Key Performance Drivers.

[755] *Ibid*.

[756] *Ibid* at 35-36. Environmental responsibility includes greenhouse gas emissions.

[757] *Ibid* at 35. External performance indicators include: raw material prices, foreign exchange rates, and interest rates

disclosure.[758] A risk management approach would incline entities to disclose their primary "risks and related risk management strategies to [allow] MD&A readers to understand and [assess] the risks" associated with the reporting issuer and its decision-making regarding those risks.[759] This is outlined to include risks the entity faces to its core businesses, the strategies undertaken to manage those risks, and the potential and actual impact on the results and capabilities, capital resources, and liquidity.[760] CICA also suggests the MD&A include information even if such information is disclosed and discussed elsewhere.[761]

For fiscal years beginning on or after January 1, 2011, financial statements are to be prepared and filed in accordance with the International Financial Reporting Standards (IFRS).[762] Considered to be a "principles-based" set of standards,[763] the IFRS intends to bring stability, standardization, and overcome obscure accounting comparisons.[764] Although the IFRS may share similarities with Canadian GAAP, there are many differences as well. For example, the IFRS does not provide sector-specific reporting guidance. This is relevant because the Canadian GAAP framework outlined specific standards applicable to oil and gas companies.[765] Also relevant is that under the IFRS, unlike the GAAP, all subsidiaries controlled by a parent are

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[758] *Ibid* at 46 section 3.6 Risk.
[759] *Ibid*.
[760] *Ibid*. This includes looking to the depth of a risk, its likelihood, and potential impact on finance and operations.
[761] *Ibid* at 46-7. Specifically, the guidance outlines that even if information is discussed in financial statements or corporate governance disclosure, the MD&A should still discuss that piece of information.
[762] Canadian Institute of Chartered Accountants, *Environmental, Social and Governance (ESG) Issues in Institutional Investor Decision Making*¸ (July 2010) online: CICA <http://www.cica.ca/publications/list-of-publications/manual/item41881.pdf> at 16 (Accessed August 15, 2013). [CICA ESG]; Deloitte, *GAAP IFRS: Which standards to choose*, (January 2010) online: Deloitte GAAP IFRS <http://www.fmi.ca/uploads/1/Deloitte_David_GAAP_IFRS.PDF> at 8 (Accessed August 15, 2013). Adopting the IFRS is largely explained by the increased pressure from a connected and smaller global community that has since made it easier for cross-border mergers to occur, for investors to seek investment opportunities worldwide, and to list on foreign stock exchanges, which has begun making up a large percentage of corporate capitalization.
[763] Government of Scotland, *International Financial Reporting Standards*, online: Scotland.gov.uk <http://www.scotland.gov.uk/Topics/Government/Finance/ifrs> (Accessed August 15, 2013); Chartered Accountants of Canada, *IFRS – FAQs*, online: cica.ca <http://www.cica.ca/ifrs/faqs/item2423.aspx> (Accessed August 15, 2013).
[764] CICA ESG, *supra* note 762 at 16.
[765] Deloitte, IFRS 6, online: iasplus.com <http://www.iasplus.com/en/standards/standard46> (Accessed August 15, 2013). The IFRS addresses Exploration and Evaluation phases of a project under IFRS 6, but there are no oil and gas related standards.

"consolidated"; [766] meaning parent corporations must disclose information of any subsidiary along with that of the parent company.[767]

Previously under GAAP principles, CICA recommended that ethical, social, and environmental factors be integrated into financial statements in certain circumstances. This included the integration of current financial or future obligations that are either known or can be accurately estimated (for example, clean up and reclamation).[768] Under the IFRS, reporting issuers may now be obligated to recognize greater environmental liabilities in higher amounts than the GAAP, and thus provide more disclosure regarding certain liabilities in financial statements.[769] For extractive sector corporations in particular, the IFRS has been said to "have a material effect on the total amount of environmental liabilities reported and the way in which they are expensed over time."[770] However, the potential for increased disclosure of environmental liabilities and how they are expensed are envisioned to be offset by mitigating factors.[771] A related, and notable, similarity between the GAAP and the IFRS is that where financial obligations are unable to be quantified or estimated and where the exclusion of such information would provide an inaccurate and misleading picture, the GAAP recommended alternative is for information to be disclosed in

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[766] International Account Standard 27, *Consolidated and Separate Financial Statements*, online: ec.europa.eu <http://ec.europa.eu/internal_market/accounting/docs/arc/2009-01-30_ias27_annex_en.pdf> at ¶ 12 (Accessed August 20, 2013).

[767] *Ibid*; CA magazine, *Analysis of certain key Canadian GAAP-IFRS differences*, (June 2009), online: <http://www.camagazine.com/images/2009/jun/camagazine41017.jpg> (Accessed August 15, 2013). Another difference between Canadian GAAP and the IFRS is that the GAAP fails to discuss expense presentation. The IFRS, IAS1 outlines "expenses can be presented according to either their nature or their function". This means that when presenting an income statement by function, there must be supporting documentation regarding the nature of the expenses within that function. Though expenses may be presented by function in Canada, Canadian GAAP does not have an equivalent rule. This rule may be satisfied by providing additional disclosures in notes to the financial statements.

[768] CICA 2004 Report, *supra* note 751 at 11-12.

[769] CICA ESG, *supra* note 762 at 16.

[770] Thomas Schneider, "Accounting for Environmental Liabilities under International Financial Reporting Standards" (2011) Oil Sands Research and Information Network, OSRIN Report No. TR-9 at 1.

[771] *Ibid* at iv, 1.

> "The actual settling of these liabilities will occur in the coming decades. Under old Canadian GAAP and IFRS, these liabilities are recognised in the financial statements based on their present value. This is typically done by using a discount rate and the usual methods of calculating the present value of a future obligation. The new IFRS rules are very sensitive to the discount rate used and there is some debate as to exactly how the new discount rate should be calculated. Thus, although the new accounting standards under IFRS dictate that more specific environmental liabilities be recognised in the financial statements, this may be offset by changes in the way that they are quantified.".

notes supplemental to the financial statements, if not in the MD&A.[772] The IFRS includes a parallel provision under International Accounting Standards (IAS) 1 and 37.[773]

In addition to the MD&A, the AIF, Form 51-102F2 of NI 51-102, is another important disclosure document providing material information about the reporting issuer, its past business and possible future development.[774] Similar to the prospectus, the AIF requires disclosure of the issuer and its history, operations, financial affairs, prospects, risks, and other external factors impacting the company.[775] Except for venture issuers, all publicly listed corporations are obligated to file an AIF.[776] Venture issuers are normally newer or smaller, or "emerging companies".[777] Therefore, in order to encourage the growth of venture issuers and to prevent "burdens" that would hinder their growth, venture issuers are exempted from providing AIF disclosure.[778] This omission of TSXV venture issuers is key because a significant number of

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[772] *CICA 2004 Report*, *supra* note 768 at 11. Canadian Institute of Chartered Accountants, "The CICA's Guide to IFRS in Canada" at 26 (October 1, 2007) online: cica.ca <http://ocaq.qc.ca/pdf/ang/6_presse/infoca/2007/InfoCA1185_Guide_EN.pdf> (Accessed August 15, 2013).
[773] *Ibid* at 12.
[774] NI 51-102, *supra* note 687 at 51-102 s 6.1, NI 51-102F2 part 1(a).
[775] Condon, Anand, Sarra, *supra* note 675 at 387.
[776] NI 51-102, *supra* note 687 at 51-102 s 6.1 and 1, 1.1 at "venture issuer". "Venture issuers" are those reporting issuers that did not have, "at the applicable time", any of its securities listed or quoted on the TSX, any U.S. marketplace, or any other market place outside of the U.S. and Canada. The definition of "venture issuer" includes those issuers listed on the TSXV, the LSE-AIM, and the PLUS markets; ICAP, *Further re. Acquisition of PLUS Stock Exchange Plc*, online: ICAP.com <http://www.icap.com/news/2012/further-re-acquisition-of-plus-stock-exchange-plc.aspx> (Accessed August 15, 2013).
[777] TMX, *"A Capital Opportunity": Guide to Listing*, online: TMX <http://www.tmx.com/en/pdf/Guide_to_Listing.pdf> at 12 (Accessed February 12, 2014).
[778] *Proposed National Instrument: NI 51-102 – Continuous Disclosure Obligations*, OSC (21 June 2002), online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20020621_51-102.pdf> at Part 5 s 5.1(1), (2) (Accessed February 12, 2014). The original proposal for NI 51-102 and its continuous disclosure obligations display the intent of the OSC to avoid the burden of AIF disclosure by outlining an exemption for a "small business" that "has an aggregate market value of less than $75 million". By the time NI 51-102 received ministerial approval, this section read as "[a] reporting issuer that is not a venture issuer must file an AIF" [Proposed NI 51-102]. *See Request for Comments National Instrument 51-102 – Continuous Disclosure Obligations*, OSC (20 June, 2003), online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20030620_51-102_continuous-disclosure.pdf> at s 5.1 (Accessed February 12, 2014); *Notice of Request for Comment: NI 51-102 Continuous Disclosure Obligations*, OSC (21 June 2002), online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20020621_51-102_roc.htm> at "Summary of the Rule and Anticipated Costs and Benefits" ¶ 6, "Request for Comment" ¶ 9, 10 (Accessed February 12, 2014). In 2002 from the initial NI 51-102 proposal, the view of the OSC was that "[w]e believe that the costs and other restrictions on the activities of reporting issuers that will result from [NI 51-102] are proportionate to the goal of timely, accurate and efficient disclosure of information about reporting issuers". This cost/benefit analysis was not deemed proportional for "small businesses", later referred to as "venture issuers". The cost/benefit was viewed by the OSC as to not provide more benefit than the cost of providing AIF disclosure. *See also Notice and Request for Comment: NI 51-*

extractive companies are listed on the TSXV, and the AIF requires greater non-financial disclosure than the MD&A.[779] Unlike the MD&A and the corporation's financial statements, there is no requirement of any approval from the board of directors or any audit committee prior to the filing of an AIF with a securities regulator.[780] Although the AIF is disclosed on the System for Electronic Document Analysis and Retrieval, there is no obligation to distribute such information to securities holders.[781]

The AIF explicitly outlines the disclosure of social and environmental information.[782] For example, section 5.1(1)(k) of 51-102F2 requires disclosure relating to "[t]he financial and operational effects of environmental protection requirements on capital expenditures, earnings and competitive position of [a corporation] in the current" and future financial years.[783] Section 5.1(4) requires that the social, environmental, and human rights policies a company has actually implemented, which are fundamental to its operations, are revealed.[784] Moreover, section 5.2 also requires the disclosure of risk factors that relate to the corporation and its business.[785] Item 5 of section 5.2 includes disclosing "environmental and health risks, regulatory constraints, economic or political conditions, and any other risk that would likely have an impact on an investor's decision to purchase securities of a particular company."[786] Section 5.4(1)(d), (e), and (f) focus on companies involved in mineral projects and mandates disclosure of all

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102 – Continuous Disclosure Obligations, OSC (20 June 2003), online: <http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20030620_51-102_notice-roc.htm> at Appendix B – Summary of Comments and CSA Responses ¶ 10 (Accessed February 12, 2014).

[779] TMX mining, *supra* note 688; TMX oil, *supra* note 688.

[780] NI 51-102, *supra* note 687 at 51-102 s 6.1; 51-102F2 at 1(a).

[781] SEDAR, *Background Information on SEDAR*, online: sedar.com <http://www.sedar.com/sedar/background_on_sedar_en.htm> (Accessed August 15, 2013). "SEDAR (the System for Electronic Document Analysis and Retrieval) is the system used for electronically filing most securities related information with the Canadian securities regulatory authorities. Filing with SEDAR is mandatory for most reporting issuers in Canada."

[782] NI 51-102, *supra* note 687 at 51-102F2 Part 2, Item 5, sections 5.1(1)(k), 5.1(4), and 5.2; BCSC, *Companion Policy 51-102CP – Continuous Disclosure Obligations*, online: BCSC <https://www.bcsc.bc.ca/uploadedFiles/51-102CP.pdf> (Accessed March 2014). The companion policy does not elaborate on non-financial disclosure.

[783] NI 51-102, *supra* note 687 at 5.1(1)(k).

[784] *Ibid* at 5.1(4). Section 5.1(4) asks companies to describe the policies and the steps taken to implement policies.

[785] *Ibid* at 5.2. Section 5.2 requires disclosure in order of seriousness to the business and the company.

[786] *Ibid*. Section 12 outlines a requirement to disclose any legal proceedings the reporting issuer is a party to or whether any of its property is the subject of, or may be contemplated by the issuer, and to include all the parties involved, the location, nature, and amount of the claim. Disclosure is not needed if a claim for damages, besides interest and cost, does not exceed 10% of its total assets.

"environmental liabilities to which the project is subject; the location of existing tailing ponds, waste deposits", as well as natural features; and the permits acquired or still needed, or still needed to work in the specific location.[787] Section 5.4(2) requires the disclosure of the proximity of the project to the population centre, as well as the disclosure of surface rights, "sources of power, water, mining personnel," and potential tailings storage areas.[788] Section 5.4 further outlines the disclosure of the history of ownership; the development of land and changes in ownership; environmental conditions; and applicable taxes during operations.[789]

As a whole, the above summary of the MD&A and the AIF reveal the extent of environmental, social, and human rights disclosure under NI 51-102. It is important to note, however, that environmental disclosure guidance under the MD&A and AIF, as of late 2009, at which time the Ontario Securities Commission (OSC) undertook a corporate SR review, was deemed comparable to other jurisdictions.[790]

D. Materiality

The concept of materiality arises from recognition that issuers cannot realistically reveal every single piece of information that a stakeholder may find interesting or significant in their decision-making process.[791] Materiality allows issuers to determine what information, financial or non-financial, is material and therefore required to be disclosed. This explains why the concept of materiality is the threshold test used to determine the information to disclose.

Under NI 51-102, material change is defined as "a change in the business, operations, or capital of the reporting issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the reporting issuer."[792] This definition includes any decision to apply a change made by the board of directors or by senior management of the reporting issuer where management believes that confirmation of the decision by the board of

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[787] *Ibid* at s 5.4(1)(d), (e) and (f).
[788] *Ibid* at s 5.4(2)(b) and (d).
[789] *Ibid* at s 5.4(5), 5.4(11).
[790] OSC Final Report, *supra* note 667 at 18.
[791] Condon, Anand, Sarra, *supra* note 675 at 74.
[792] NI 51-102, *supra* note 687 at s1.1 – "material change" (a)(i).

directors is probable.[793] The occurrence of a "material change" also triggers the obligation to file a MCR, under Form 51-102F3.[794] Although NI 51-102 includes many different disclosure documents, the primary documents examined here are the MD&A, the AIF, and MCRs.[795]

Under Part 7 of NI 51-102, a reporting issuer must issue and file a news release, as well as file Form 51-102F3 (MCR) when a material change occurs that satisfies the above definition of material change.[796] MCR disclosure is mandatory unless the reporting issuer can meet the exception in section 7.1(2).[797] It is important to note that materiality associated with MCRs focuses on "a significant effect on the market price or value of any of the securities" of the issuer.[798] In contrast to this definition of "material change", the MD&A depicts a different materiality threshold. The goal of the MD&A is to discuss and focus on "material information".[799] What is considered material information is determined by asking "[w]ould a reasonable investor's decision whether or not to buy, sell or hold securities in [the reporting issuer's] company likely be influenced or changed if the information in question was omitted or misstated."[800] Here, materiality is not determined solely by its impact on the value or price of securities of the issuer, but rather by whether or not a "reasonable investor's" decision to buy, sell or hold securities would be influenced. The AIF, sharing a similar definition of materiality with the MD&A, focuses on providing "*material information* about the reporting issuer's company and its business at a point in time in the context of its historical and possible future development," among other objectives.[801]

The definition of "material change" under NI 51-102, cited above with regards to MCRs, is similarly defined under the Ontario Securities Act (OSA), as it is in most other provincial

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[793] *Ibid* at (a)(ii).
[794] Condon, Anand, Sarra, *supra* note 675 at 360; NI 51-102, *supra* note 687 sec 1.1, Form 51-102F3; *See Section I below for the discussion* of this definition of "material change" in reference to prospectus amendments.
[795] In addition to the MD&A, AIF, and MCRs, NI 51-102 includes NI 51-102F4 – Business Acquisition Reports; NI 51-102F5 - Information Circulars; and NI 51-102F6 – Statement of Executive Compensation.
[796] NI 51-102, *supra* note 687 at Section 7.1 of Part 7 of NI 51-102 – Publication of Material Change.
[797] *Ibid* at 7.1(2).
[798] *Ibid* at s 1.1 – "material change"
[799] *Ibid* at Form 51-102F1 Part 1(e).
[800] *Ibid* at Part 1 (f).
[801] *Ibid* at Form 51-102F2 Part 1(a). [Emphasis added].

securities legislation.[802] In addition to the concept of material change, provincial securities legislation also includes the concept of "material fact", which is relevant in a number of other disclosure contexts. A "material fact" is defined as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities."[803]

Material change and material fact both define materiality with regards to market price or value of the reporting issuer's securities, a standard referred to as the "market impact" test.[804] This means that materiality in this case must be determined with reference to how the change would be expected to affect the price or value of the company's securities.[805] In contrast, the MD&A and the AIF define materiality with reference to the "reasonable investor" test. [806]

Although the market impact test at first glance seems to represent a narrow threshold, because of its focus on market price and value, there is a potential for overlap with the reasonable investor test. This is because if information has the potential of affecting the security's value, under the market impact test, it is considered material, and what is material in this sense will always be information a "reasonable investor" will want in considering whether or not to buy, sell or hold securities.[807] This view is supported by *Cornish* v *Ontario Securities Commission* and its reference to National Policy (NP) 51-201 – Disclosure Standards.[808] According to NP 51-201, "[d]espite [the] differences [between the market impact and the reasonable investor tests], the two materiality standards are likely to converge, for practical purposes, in most cases."[809]

Although there is a relationship between the two materiality standards they are unique concepts. The market impact test applies to issues of "misrepresentation", "material fact", and "material

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[802] OSA, *supra* note 675 at s 1.1.
[803] *Ibid*.
[804] Janis Sarra, "Disclosure as a Public Policy Instrument in Global Capital Markets" (2006-7) 42 Tex Int'l Law Journal 875 at 890. [Sarra, Public Policy].
[805] *Re Coventree Inc*,(2011), 24 OSCB 11374, online: canlii.org <http://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20111223_coventree.pdf> (Accessed December 6, 2013). [Coventree].
[806] NI 51-102, *supra* note 687 at Form 51-102F1 at Part 1(f) and Form 51-102F2 at Part 1(e).
[807] Sarra, Public Policy, *supra* note 694at 889.
[808] *Cornish v Ontario Securities Commission*, 2013 ONSC 1310 at ¶ 79; Helen Burnett, "Full Disclosure: Share Price is Not Enough", online: canadianappeals.com <http://www.canadianappeals.com/2013/04/08/full-disclosure-share-price-is-not-enough/> (Accessed August 15, 2013).
[809] *Disclosure Standards*, OSC NP 51-201 (12 July 2002), s 4.1 of Part IV, online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_pol_20020712_51-201.jsp> (Accessed August 5, 2013). [NP 51-201].

change", as well as civil litigation arising from those causes of action outlined in securities legislation and certain regulatory allegations.[810] On the other hand, the reasonable investor threshold test is "a standard relevant to whether disclosure was "misleading" for the purpose of regulatory liability."[811] The Canadian approach, which uses both the market impact and the reasonable investor test, differs from the approach taken under U.S. securities law which uses only the reasonable investor test.[812]

I. Material Fact vs. Material Change

The distinction between material fact and material change is important, especially in the primary market.[813] This distinction first becomes evident with the prospectus document, which requires "full, true and plain disclosure of all *material facts*".[814] Once an issuer receives a receipt for its prospectus the disclosure obligation ends, at which point updates of material facts are no longer required during the offering period.[815] In contrast, the obligation to disclose a material change continues.[816] It is important to note there is no explicit uniform definition of material fact in Canada within the different provincial securities statutes.[817] In Ontario, the definition of a material fact refers to a forward-looking, rather than a retrospective, process that considers "any fact reasonably expected" to significantly affect a securities value.[818]

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[810] BCSC, "NIN97/42 Proposed Changes to the Definition of Material Fact and Material Change and Proposed Introduction of a "Loser-Pays" Cost Rule Under Securities Legislation [NIN Rescinded]" (31 October 1997), online: BCSC <http://www.bcsc.bc.ca/histpolicy.aspx?id=3660&cat=> (Accessed April 26, 2014). One example of a regulatory allegation may include failure to make timely disclosure of a material change in a MCR.

[811] *Ibid*.

[812] Condon, Anand, Sarra, *supra* note 675 at 74; Environmental Law Centre and Leo Lane, "Securities Disclosure Requirements for Canadian Mining Interests" (December 2002), online: elc.uvic.ca <http://www.elc.uvic.ca/projects/2002-03/2002-03-03.pdf> at 10 (Accessed August 15, 2013) [Lane].

[813] Sarra, *Modernizing Disclosure*, *supra* note 698 at 52.

[814] *Ibid*. [Emphasis added].

[815] Sarra, *supra* note 813 at 52; *Kerr* v. *Danier Leather Inc.*, 2007 SCC 44 at ¶ 38 [*Kerr v Danier Leather*].

[816] Sarra, *supra* note 813 at 52; *See also Kerr v Danier Leather*, *supra* note 815.

[817] Sarra, *Modernizing Disclosure*, *supra* note 698 at 51; Condon, Anand, Sarra, *supra* note 675 at 74. The Alberta, Saskatchewan, and Newfoundland and Labrador definitions are similar but they have both a prospective and retrospective requirement to disclose any "fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of the securities." Alberta *Securities Act*, s. 1 (gg); Saskatchewan *Securities Act*, s 2(1)(z); Newfoundland and Labrador *Securities Act* s 2(1)(x).

[818] OSA, *supra* note 675 at s 1.1 "*material fact*"; The significance of the "retrospective" aspect of the definition of material fact that includes "significantly affects" may be to provide a more accurate depiction of the impact caused by the material fact; The Toronto Stock Exchange Committee on Corporate Disclosure Final Report cited in the Five

Material fact is also relevant to the concept of "misrepresentation" when linked to "an untrue statement of material fact" or "an omission to state a material fact" necessary to make a statement not misleading.[819] The concept of misrepresentation is also relevant in secondary market disclosure for liability purposes. For example, under section 138.3(1) of the OSA, any documents released by a responsible issuer or a "person or company with actual, implied or apparent authority" acting on the responsible issuer's behalf may expose the issuer to liability in an action for damages should those documents contain a misrepresentation.[820] This is also the case under 138.3(2), where a responsible issuer, person or company "with actual, implied or apparent authority" makes public oral statements.[821] Section 138.3 in its entirety applies to the core documents in the secondary market, such as the AIF, the MD&A, financial statements, and shareholder meeting materials.[822]

In comparison to material fact, material change is a narrow concept. This is because unlike material change, not all material facts are a product of a "change in the business, operations or capital of the issuer."[823] Under the continuous disclosure obligations there are two fundamental components. The first is periodic disclosure, which consists of quarterly and annual financial statements, MD&A's, AIFs, and shareholder meeting materials.[824] The second component is to

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Year Review Committee Final Report, *Reviewing the Securities Act (Ontario)*, (21 March 2003), online: fin.gov.on.ca <http://www.fin.gov.on.ca/en/publications/2003/5yrsecuritiesreview.pdf> at 2, 142 footnote 288 (Accessed January 25, 2014). The recommendation to eliminate the retrospective aspect of "significantly affects" under material fact in Ontario was made by the Allen Committee because it believed "it would be inappropriate to expose issuers to liability for materiality determinations after the fact". This recommendation was made in the Allen Committee's Draft Report, and adopted by the Government of Ontario in the 2002 Amendment (formerly Bill 198); Scott Bell, *Canada: Securities Act Amendments Coming into Force on April 7, 2003*, online: mondaq <http://www.mondaq.com/canada/x/20545/charges+mortgages+indemnities/Securities+Act+Amendments+Coming+Into+Force+on+April+7+2003> (Accessed January 25, 2014). Some of these amendments were also partially a result of the OSC's and Ontario Governments' response to the passing of the Sarbanes-Oxley Act in the United States, with the underlying goal of increasing investor protection and confidence; Bill 198, *An Act to implement Budget measures and other initiatives of the Government*, 3rd Sess, 37th Les, Ontario, 2002 (Assented to 9 December 2002), c 22. The short title of this bill was "*Keeping the Promise for a Strong Economy Act (Budget Measures, 2002"* (the "Budget Measures Act").

[819] OSA, *supra* note 675 at s 1.1 "*misrepresentation*".

[820] *Ibid* at s138.3 (1).

[821] *Ibid* at s 138.3 (2).

[822] *Ibid* at s 138.3.

[823] OSA, *supra* note 675 at s 1.1 "*material change*". A *material change* occurs when there is "a change in the business, operations or capital of an 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".

[824] Condon, Anand, Sarra, *supra* note 675 at 365; Lane, *supra* note 812 at 3.

provide timely and accurate disclosure of "material changes" experienced by the issuer.[825] "Material change", then, is primarily of importance in the context of a reporting issuer's timely disclosure obligations.[826] The concept of material change then is particularly relevant to MCRs. Section 75 of the OSA outlines that subject to one exception, once a material change occurs in the affairs of a reporting issuer the only way for such an issuer to disclose the material change is for that reporting issuer to "forthwith" issue and file a news release along with a MCR.[827] In comparison to periodic disclosure, the timing of which is mandated by national instruments, securities legislation, and regulation, MCRs are subject to timely disclosure, which normally means "forthwith", "as soon as practicable", or in other cases "no later than ten days".[828] This timely disclosure also includes the obligation to "immediately issue and file a news release."[829]

The role of MCRs is to promote an active capital market and enhance investor protection.[830] At the same time, MCRs also provide issuers with limited relief for any material change disclosure that is "unduly detrimental" to their interests.[831] In such a case, the issuer has the option to keep the MCR confidential.[832] When deciding to keep a MCR confidential the issuer is obligated to report this decision to the securities regulator in writing, and in any event within ten days of the material change.[833] The reporting issuer must also comply with an ongoing obligation to report to the securities regulator and explain why the report should remain confidential "every ten days thereafter until the material change is generally disclosed in" the preferred manner.[834] This ongoing obligation to report and explain helps counteract the ability of the issuer to unreasonably withhold information it deems "unduly detrimental".

The extent of the MCR disclosure requirement is outlined in Part 2 of Form 51-102F3. This includes providing a level of information that enables a reader to appreciate the "significance and

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[825] Condon, Anand, Sarra, *supra* note 675 at 355.
[826] *Ibid* at 365.
[827] OSA, *supra* note 675 at s 75 (1), (2).
[828] *Ibid*; Condon, Anand, Sarra, *supra* note 675 at 365; NI 51-102, *supra* note 687 at Part 7, 7.1(1)(a).
[829] *Ibid*; Condon, Anand, Sarra, *supra* note 675 at 365; NI 51-102, *supra* note 687 at Part 7, 7.1(1)(a).
[830] *Ibid* at 399.
[831] *Ibid* at 401; OSA, *supra* note 675 at s 75 (3). The determination that a material change disclosure would be "unduly detrimental" must be made in a reasonable manner.
[832] Condon, Anand, Sarra, *supra* note 675 at 401; OSA, *supra* note 675 at s 75 (3).
[833] OSA, *supra* note 675 at s 75 (2).
[834] Condon, Anand, Sarra, *supra* note 675 at 401.

impact of the material change" without having to reference other material.[835] The type of material required to be disclosed includes "dates, parties, terms and conditions, description of any assets, liabilities or capital affected, purpose, financial or dollar values, reasons for the change," as well as comments on any likely impact on the issuer or its subsidiaries.[836] Despite these explicit examples of types of data, the guidance fails to include non-financial disclosure guidance. The *Kapusta* decision from the Alberta Securities Commission and the *Coventree* decision from the OSC,[837] do however suggest external events outside the control of an issuer can indeed trigger a material change in the issuer's business.[838]

A comparison of the definitions of material fact and material change reveals the differences between these two concepts. However, according to Sarra, a "blurring" of the above distinction emerges with the concept of "material information" in regards to regulatory compliance.[839] For example, in practice TSX listed issuers already comply with a material information standard through the TSX listing requirements.[840] This is important to note because for these issuers the distinction between material fact and material change only becomes a concern where there are allegations of failing to satisfy statutory requirements or a civil liability claim.[841] More specifically, since material change is narrower than material fact, [842] an issuer alleged to have breached its continuous disclosure obligations may try to characterize a change that was not originally disclosed as a material fact, rather than a material change.[843]

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[835] Ontario Securities Commission, "Notice of Amendments to NI 51-102 National Instrument 51-102 Continuous Disclosure Obligations: Supplement to the OSC Bulletin", online: <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20061013_51-102_supplement.pdf> (Accessed August 15, 2013).
[836] *Ibid.*
[837] *Kapusta*, Re, 2011 ABASC 521; Coventree, *supra* note 805.
[838] NP 51-201, *supra* note 809 at s 4.4. Section 4.4 outlines "[c]ompanies are *not generally* required to interpret the impact of external political, economic and social developments on their affairs." [emphasis added]. At the same time, if the "external development" has or will have a direct effect on a company's business and affairs that is "material and uncharacteristic" of the effects normally experienced by other companies in the same business/industry, that company is "urged to explain, *where practical*, the particular impact on them".
[839] Sarra, *Modernizing Disclosure*, *supra* note 698 at 54;
[840] *Ibid.*
[841] *Ibid.*
[842] *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, at 597. Iacobucci J articulates that ""material fact" is broader than "material change"; [since] it encompasses any fact that can "reasonably be expected to significantly affect" the market price or value of the securities of an issuer, *and not only changes in the* "business, operation, assets or ownership of the issuer" reasonably expected to have such an effect. [emphasis added].
[843] *Ibid.*

The reason for ensuring a clear delineation between material change and material fact and the market impact and reasonable investor test is because each concept and test results in important, and different, consequences.[844] For example, the market impact test seems less likely, than the reasonable investor test, to require disclosure of non-financial environmental, social, and human rights concerns. This would be due to the financial focus of the market impact test.[845] Unless environmental, social, or human rights concerns were deemed to have a negative or positive impact on the issuer's market value, then these non-financial topics would not necessarily require disclosure under the market impact test. This financial impact from non-financial events, issues, or concerns could occur because of litigation, protests, and environmental issues. In any case, even absent litigation or other non-financial issues or concerns, an adverse impact on an issuer's securities could arise if a significant number of investors were to object to holding shares in a corporation that is engaged in certain practices.[846] This discussion helps illustrate how the reasonable investor test has the potential to accommodate SR and to help disseminate non-financial, environmental, social, and human rights impacts and information attributed to Canadian extractive sector TNCs. The reasonable investor test sets itself apart because it is considered a broader definition and capable of capturing a wider scope of information not directly linked with market value.[847] This distinction is evident from section 2.1 in CSA Staff Notice 51-333 – Environmental Reporting Guidance. Under this staff notice environmental matters are included in the definition of the reasonable investor test, suggesting non-financial concerns can be relevant.[848] Cynthia Williams proposed a similar argument, in relation to the United States (U.S.). Williams argues that a legislative intent exists not just for consideration of financial concerns in securities disclosure for investor protection but a broader public interest

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[844] Condon, Anand, Sarra, *supra* note 675 at 282.

[845] *Ibid*. The "market impact" test relates to disclosure of information deemed material because it is reasonably expected to have an effect on the market price or value of an issuer's securities.

[846] If corporate management reasonably believes a considerable number of investors would object to holding shares in a corporation engaged in certain practices, this would relevantly entail the disclosure of the event, issue, or concern.

[847] Sarra, "Public Policy", *supra* note 694 at 889; Dhir, *shadows*, *supra* note 750 at 462.

[848] *Environmental Reporting Guidance*, OSC CSA Staff Notice 51-333 (27 October 2010), s 2.1, online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101027_51-333_environmental-reporting.pdf> at 5-7 s 2.1 (Accessed August 15, 2013). [SN 51-333]. The staff notice also reviews CICA publications and the U.S. Securities and Exchange Commission's guidance on disclosure related to climate change. The SN states it is not meant as legal or other advice on whether a particular environmental matter is material.

goal as well.[849] This view would allow investors to make decisions on financial and non-financial issues.[850] The caveat with this argument is that it is based on the U.S. securities disclosure framework, which generally uses the reasonable investor test. Although U.S. securities laws often serve as a model for the Canadian provincial securities administrations, the U.S. reasonable investor test contrasts with the market impact test used for many purposes in Canadian provincial securities legislation. As discussed above, the market impact test is much more challenging as it strictly focuses on material factors expected to have an effect on the security's market value, and more likely to prevent the consideration of a wider scope of issues by investors.

II. Other Concerns with Materiality

In addition to the regulatory and practical issues[851] and the constraints discussed above, a lack of guidance, poor compliance, and weak enforcement are also issues associated with the concept of materiality. One problem is that events that should be considered material are not being classified as such by issuers, and so are left undisclosed. This may be the result of a lack of guidance and clarity in initially determining whether certain environmental, social, and human rights issues need to be disclosed, as this type of information may not fit common conceptions of what is deemed material. A lack of disclosure may also be attributed to issuers "simply following the letter of the law," instead of its spirit and intent, or due to a deliberate ignorance. These concerns highlight issues of compliance and the need for guidance for issuers to understand whether environmental, social, and human rights issues meet the material threshold; issues that

[849] Williams, *supra* note 667 at 1204, 1229-30, 1236-7. Williams describes the public interest grant of power in the Exchange Act, in light of the regulatory purposes, as fairly broad and capable of considering not just financial issues. Some of these issues may include protection from fraud, inefficiency, low standards of ethics, and preventing uninformed shareholders by ensuring disclosure of facts that may have a material impact on the value of securities.
[850] *Ibid* at 1239, 1263, 1268, 1272. Williams argues that the explicit intent of the Congress in the U.S. Securities Act of 1933 was to focus not only on financial disclosure but also on operational disclosure. A number of administrative proceedings, public hearings, and a rule-making petition examined a number of topics determining the Securities and Exchange Commission (SEC) holds broad authority to promulgate disclosure regulation "in the public interest or for the protection of investors" and flexibility to tailor securities disclosure. In recognition of its broad authority to require disclosure "necessary or appropriate in the public interest" the SEC interpreted its public interest authorization to require disclosure be limited by the social goals underlying the Securities Exchange Act of 1934 and the Securities Act of 1933. Williams argues this does not constrain the SEC from requiring expanded disclosure.
[851] Some practical issues include private issuers not being obligated to provide AIF or MD&A disclosure. The materiality threshold also acts as a practical hurdle because it does not allow the disclosure of all information, only the information meeting the threshold of "material".

are also highlighted at the international level. The corporate law tools (CLT) project of the Special Representative of the Secretary-General (SRSG), now the former SRSG, was designed to identify "whether and how corporate and securities principles and practices" encourage companies to respect human rights.[852] The project revealed that most of the 39 national jurisdictions it surveyed, including Canada, agreed "that human rights impacts may in some cases reach the materiality thresholds applicable to ordinary financial reporting, which would make it compulsory for companies to disclose such human rights impacts to their shareholders."[853] However, a lack of guidance "on how and when to make [such] determinations" prevents such inclusion in corporate reporting.[854] This lack of guidance increases the probability of failing to comply with disclosure obligations, misrepresentation and, potentially, liability.[855]

The timeframe in which issues of materiality are considered is another concern. As evidenced in the review by the OSC, part of the problem is that the reporting issuer may have a short-term financial focus instead of long-term sustainability.[856] This provides a glaring contrast to SR and its inherently long-term focus. The OSC consultation and review suggested that reporting issuers disclose the method used to determine the definition of materiality when providing disclosure.[857] This would inform users whether a narrow or broad definition, or interpretation, of materiality leads to the disclosure of a certain level and type of information.[858] Other suggestions included revealing the definition of materiality used and the time perspective to provide standardized

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[852] UN Secretary-General's Special Representative on business & human rights, *Corporate* Law, online: SRSG Portal<http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools> (Accessed March 8, 2014).
[853] John Ruggie, Human Rights Council, *Addendum: Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative*, UN Doc A/HRC/17/31/Add 2 (2011), online: business-humanrights.org <http://www.business-humanrights.org/media/documents/ruggie/report-human-rights-and-corporate-law-23-may-2011.pdf> (Accessed August 15, 2013). This project assessed how well corporate and securities law of different jurisdictions shape and guide company behaviour [CLT Overarching Trends].
[854] *Ibid*.
[855] *Ibid*; *CLT Report*, *supra* note 669 at 15. ""[M]isrepresentation" meaning an untrue statement of material fact, or an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made."
[856] OSC Final Report, *supra* note 667 at page 2 of Schedule 2 – Summary of discussion held on September 18, 2009.
[857] *Ibid* at 3.
[858] *Ibid*.

disclosure.[859] These ideas arise from the view that an issue may appear not to be material in the short term, but is in the long term.[860] Alternatively, uniform regulatory direction on a particular issue is another solution. For example, unlike Staff Notice 51-333 – Environmental Reporting Guidance, discussed below, the U.S. federal Securities and Exchange Commission (SEC) released interpretative guidance requiring companies "to disclose impacts that business or legal developments related to climate change would have on its business."[861] These suggestions guide and help address the problem of determining whether or not a non-financial event is material.

E. Implications of the Lack of Clarity regarding Materiality

Condon, Anand, and Sarra argue that disclosure provides "sufficient warning" of corporate activity that has potential to adversely affect an investor and the subsequent option to exit the investment or voice one's concern.[862] Inaccurate or incomplete disclosure of environmental, social, and human rights information eliminates the communicative value of disclosure as an adequate warning system. The analysis of securities disclosure obligations by the OSC (OSC Review) and the Hennick Center[863] revealed that although no new rules are necessarily needed,[864] guidance and enforcement were still recognized as major concerns.[865] For example,

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[859] *Ibid*. Standardized disclosure would help reporting issuers provide the same level of disclosure as similar firms; Jenkins, H. & Yakovleva, N. "Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure" (2006) Journal of Cleaner Production 271 at 282. The authors identify that a lack of uniformity is very evident, and it prevents a standard comparison with regard to the sophistication of reporting, policy development, and the variables used in different reports, promoting the hindrance of CSR performance.
[860] OSC Final Report, *supra* note 667 at page 2. Some participants in the OSC consultation argued that climate change has moved from a long-term to a short term issue as a result of regulatory incorporation.
[861] Securities Exchange Commission, *Interpretative Commission Guidance Regarding Disclosure Related to Climate Change*, at 21-29, online: sec.gov <www.sec.gov/rules/interp/2010/33-9106.pdf> (Accessed August 15, 2013). The significance of this interpretative release is that it provides an example of regulatory guidance. However, it also reveals a failure on the part of the CSA Staff Notice (SN) 51-333 to discuss climate change disclosure guidance and social disclosure guidance; Patricia Leeson, "Climate Change Disclosure and Staff Notice 51-333 environmental reporting guidance", (31 December 2010), online: lexology.com <http://www.lexology.com/library/detail.aspx?g=de6c3083-5193-4029-9889-976fe7220b91> (Accessed August 15, 2013). The failure to discuss climate change is important because SN 51-333 was released in October 2010 after the SEC interpretative guidance, which was released in February 2010. The SN in its Appendix does provide disclosure examples under "regulatory risk" for an issuer that is subject to greenhouse gas emission regulation.
[862] Condon, Anand, Sarra, *supra* note 675 at 424.
[863] The Hennick Centre for Business and Law and Jantzi-Sustainalytics, *Corporate Social Reporting Initiative: Report to Minister of Finance*, (2009) online: Hennick Centre <http://www.hennickcentre.ca/documents/FINALREPORT.pdf> (Accessed August 15, 2013). [Hennick Centre Report].
[864] *See Chapter 3* for a discussion of the Broten Resolution.

any "short-term advantage gained from a liberal interpretation of non-material", would fail to include as complete information as possible.[866] Condon et al. also argue that by following the "letter of the law" of continuous disclosure obligations without meeting its "spirit and intent", issuers may not be providing investors with complete and accurate information to allow for informed decisions.[867] This potentially leads to a loss in investor and market confidence with negative impacts for the investor and issuer.[868]

Failing to explicitly require and enforce the disclosure of material environmental, social, or human rights events, decisions, or transactions creates, arguably, "*ex ante* incentives on the part of corporate officers to externalize the costs of some activities, [resulting] in the activity either not being reported or reported as benefits to the issuer."[869] This may be evident where there is a purchase of, or expansion on to, previously occupied land over a mineral/oil reserve without taking into consideration social or political information.[870] Without requiring such non-financial disclosure a company is unlikely to provide an accurate explanation of the atmosphere in which business operations are conducted.[871] Consequently this also fails to compel issuers to engage in due diligence of environmental, social, political, and human rights issues, while also potentially externalizing the cost of the event or transaction. Condon et al. reason this "externalization of the cost" occurs because certain harms are considered before hand to not be relevant. Since materiality primarily "refers to events or transactions that may affect share or property value",[872] when harms are "externalized" they "need not be costed on the issuer's balance sheet and are not required to be reported as material because they allegedly do not have a material impact on

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[865] OSC Final Report, *supra* note 667 at 9-10, and 7 of Schedule 2; Hennick Centre Report, *supra* note 863 at 9, 17. The mandate of the Hennick Centre's parallel review argues "[s]uccess in addressing challenges as diverse, *in today's tightly inter-connected environment*, as climate change, fiscal crises (and their social and political implications) or chronic disease will depend on the ability of corporations and capital markets to integrate sustainability considerations into business strategy." This mandate explicitly views a connection between economic and non-economic concerns and outlines that environmental concerns cannot be adequately addressed without discussing direct and subsequent social impacts. Overall, participants in both reviews felt aggrieved because there was no review of social disclosure requirements, arguing this sends the wrong message to investors, issuers, and other stakeholders that social matters are not as relevant as others.
[866] Condon, Anand, Sarra, *supra* note 675 at 424.
[867] *Ibid.*
[868] *Ibid.*
[869] *Ibid* at 425.
[870] *Ibid.*
[871] *Ibid.*
[872] *Ibid.*

shareholder value".[873] Similarly, harms considered part of the realm of public law, such as violations of labour, environmental law, or international human rights standards are also argued by Condon et al. to end up classified outside of the securities sphere, unless the event, decision, or transaction is deemed to have a material impact on share value.[874] Under this view investors are less likely to be provided with disclosure of environmental, social or human rights costs of the issuer,[875] as was discussed earlier above.

Another issue that may arise is when an event does not meet the materiality threshold, and therefore does not impact the market price or value of securities, yet investors still want and seek relevant non-financial information. An example of such a scenario was illustrated by Goldcorps' investors and its activities in Guatemala, discussed later below. Despite making the argument that environmental, social and human rights issues can and should be understood as meeting the materiality thresholds, the above obstacles are likely to re-emerge when investors seek non-material non-financial information. Consequently, similar to the lack of clarity with material non-financial information, the impetus for corporations to provide non-material disclosure is likely to be minimal or decrease in comparison. This request for non-material non-financial information may suggest a reconsideration of who the "reasonable investor" might be and what kind of information the reasonable investor would want to know.

4.2 Canadian Securities Disclosure and Extractive Sector-Specific Disclosure Guidance

The above section identified that not all disclosure obligations are applicable all the time or to all listed or non-listed issuers. For those TSX issuers required to comply with the AIF, and its social and environmental disclosure, Dhir argues that the AIF terms should be read in-sync with NI 43-

[873] *Ibid.* Once events, decisions, transactions, or "harms" are externalized, they are not required to be taken into account on financial statements, or MD&A's, and so are not required to be reported as material, because they allegedly do not have a material impact on shareholder value.
[874] *Ibid.*
[875] *Ibid.* Due to the financial focus of the Market Impact test, and its impact on "share or property value" Condon, Anand, Sarra argue "investors are frequently not exposed to the social and economic costs of other harms being perpetrated by the issuer unless they are likely to influence the bottom line". A view Condon et al. consider to be geared towards "short-term financial results" rather than "long-term sustainability of the issuer". The authors also note the AIF does has the potential to incorporate non-financial information with its more expansive definition of materiality, and requirements to disclose social, environmental, and human rights policies.

101.[876] Even if AIF disclosure is not required from a reporting issuer, for example because a reporting issuer is listed on the TSXV, that issuer is still obligated to comply with NI 43-101 if engaged in a mineral project.[877] It is worth mentioning that oil & gas activities, governed by NI 51-101, do not have the same reporting obligations as NI 43-101.[878] Unlike NI 51-102 and its continuous reporting obligations, NI 43-101 and NI 51-101 apply consistently to any issuer engaged in mineral and oil and gas projects, regardless of whether an issuer is a venture or non-venture or reporting or non-reporting issuer.[879] Just as important, the consistent application of these instruments also provides support to the notion of SR by identifying a foundation on which base the reporting requirement.

NI 43-101 provides mineral mining project guidance and sets out the standards of disclosure for such projects.[880] For example, section 4.1(1) of Form 43-101F1 of NI 43-101 requires a reporting

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[876] Dhir, *shadows*, *supra* note 750 at 446; Ontario Securities Commission, *Repeal and Replacement of NI 43-101 Standards for Disclosure for Mineral Projects*, online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20110408_43-101_repeal-replacement.htm> (Accessed August 5, 2013). The new version of 43-101 came into effect on June 30, 2011. [Repealed]; CIM Home, *About Us*, online: web.cim.org <http://web.cim.org/standards/MenuPage.cfm?sections=185,331&menu=348> (Accessed August 5, 2013). The new version of NI 43-101 maintains investor protection while making compliance easier and less costly for mining issuers, and preserves the core principles of NI 43-101 while eliminating or reducing the scope of certain requirements. The newer version does not include many changes but does include more clarity than the previous version. The changes were intended to: 1) eliminate or narrow the scope of some requirements; 2) "provide more flexibility to mining issuers and qualified persons in certain areas"; 3) "provide more flexibility to accept foreign professional associations, designations and reporting codes"; 4) "reflect changes in the mining industry; 5) clarify or correct areas where the previous rules was not having its intended effect; NI 43-101, *supra* note 719. Non-financial information primarily refers to: environmental, social and human rights.

[877] NI 43-101, *supra* note 719 at Part 4 – Obligation to File a Technical Report Upon Becoming a Reporting Issuer. An issuer "must file in that jurisdiction a technical report for each mineral property material to the issuer".

[878] NI 51-101, *supra* note 719 at 1.3 Part 1.Neither NI 51-101 or section 5.5 of NI 51-102F2 , which discuss Companies with Oil and Gas Activities, make any reference to environmental, social, or human rights issues. Although section 1.3 of NI 51-101 outlines "this Instrument applies only to reporting issuers engaged, directly or indirectly, in oil and gas activities", compliance with Part 4 and 5 of NI 51-101 is still required when relying on a private placement exemption through NI 45-106.

[879] NI 45-106, *supra* note 697 at Form 45-106F2 A.8-9 and Form 45-106F3 A.8-9. If relying on a private placement exemption an issuer is not a reporting issuer. If an issuer is engaged in a mineral mining, (or an oil and gas) project, then that issuer is required to comply with NI 43-101 (and NI 51-101, with regard to oil & gas) reporting obligations.

[880] NI 43-101, *supra* note 719; Christopher C. Nicholls, "The Bre-X Hoax: A South East Asian Bubble" (1999) 32:2 The Canadian Business Law Journal 173 at 180 – 189; Joseph Groia, Jennifer Badley and Alexandrea Jones, "The Aftermath of Bre-X: The Industry's Reaction to the Decision and the Lessons we have all Learned", online: groiaco.com <http://www.groiaco.com/pdf/The_Aftermath_of_Bre-X_Mar_4-08.pdf> (Accessed October 30, 2013). Canadian company Bre-X Minerals fraudulently claimed to have found a deposit of gold containing much more than it actually contained, deceiving investors into investing into Bre-X, and resulting in large losses. At its peak, Bre-X shares were valued at $6 billion and ultimately became worthless as a result of more tests and investigations;

issuer to file a technical report for "each mineral property material to the issuer"[881] and section 14(d) of the same Form requires "a general discussion on the extent to which the estimate of mineral resources and mineral reserves may be materially affected by any known environmental… legal… socio-economic… political or other relevant issues…"[882] With the recent repeal and replacement of NI 43-101, Item 20 of Form 43-101F1 now requires reporting issuers to discuss and disclose "reasonably available information" on environmental studies and known environmental issues that could have a material impact; plans for waste, tailings disposal, monitoring, and water management during and post project; permitting requirements; any potential social or community related requirements and plans for the project; and lastly mine closure (remediation and reclamation) requirements and costs.[883] Another relevant change entailed the elimination of "the requirement to disclose the results of relevant market studies and similar analyses" in Item 19 of Form 43-101F1.[884] This section was replaced with an obligation for the "qualified person to discuss the general nature of the studies, and to confirm they have reviewed the studies and that the results support the assumptions made in the technical report."[885] One observation of this change is that a discussion of the general nature of the studies runs the risk of overlooking relevant information, particularly as the qualified person may not be familiar with environmental, social, and human rights concerns. Similarly, the repeal of the requirement to disclose the results of a market study potentially disregards details on risks, potential, and other non-financial factors prior to undertaking a project. Despite the potential to reinforce a SR mechanism by raising awareness, informing, and guiding subsequent concerns, as well as its consistent application, the selective highlights from a "qualified person" unqualified in

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Alexander Pizale, "Canada Sets the World Standard for Mining Disclosure", online: casselbrock.com <http://www.casselsbrock.com/files/file/docs/MiningDisclosure.pdf> (Accessed October 29, 2013); NI 43-101 was a direct result of the Bre-X scandal. *See* TMX, Mining Standards Task Force Final Report, Setting New Standards (Toronto, TSE Publications, 1999).

[881] NI 43-101, *supra* note 719 at s 4.1(1) of Form 43-101F1

[882] *Ibid* at Form 43-101F1, "Technical Report", at section 14(d).

[883] Repealed, *supra* note 876 at Item 21.

[884] *Ibid* at Item 19.

[885] *Ibid* at Item 19 [emphasis added]. Other than the change in Item 19, there was no other change that had a potential impact on the process of SR.

environmental, social and human rights issues outlines a process that is seemingly counter-intuitive to the goal of disseminating information and informing stakeholders.[886]

In those cases where there is no "scientific or technical information" relating "to a mineral project on a property material to the issuer", there does not appear to be a requirement to provide a technical report.[887] Evidently, NI 43-101 reveals a focus mainly on mineral resources or mineral reserves. This omits the disclosure of any relevant environmental and social side effects of carrying on a mineral mining project. Another pitfall recognized by the revised NI 43-101 is that business operations, or more specifically a "production decision", may still be undertaken without feasibility or technical reports.[888] Historically, according to companion policy (CP) 43-101, projects failing to create a feasibility or technical report have had a significantly higher risk of economic or technical failure.[889] To avoid misleading or inaccurate disclosure, CP 43-101 claims that an issuer "*should* disclose that it is not basing its production decision on a feasibility study... and *should* provide adequate disclosure of the increased uncertainty and specific economic and technical risks of failure associated with its production design."[890] However, failing to include obligatory language to compel compliance reintroduces issues of enforcement and compliance, issues that are further highlighted in Staff Notice (SN) 43-705.

SN 43-705 outlines the results of an OSC conducted review of disclosure concerns with Technical Reports. The OSC examined 50 out of 460 Technical Reports filed by 238 Ontario mining issuers filed on SEDAR, and discovered these reports are not consistently satisfying its intended goals.[891] From the Technical Reports examined, 40% displayed at least one major non-

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[886] NI 43-101, *supra* note 719 at Part 1 section 1.1. A "qualified person" is defined to be an engineer or geoscientist. Although the focus of a technical report is on minerals, it provides a potential avenue in which related environmental, social and human rights issues may also be disclosed.
[887] *Ibid* at 4.2(1).
[888] National Instrument 43-101 "Companion Policy", in NI 43-101 at 4.2(6). [CP 43-101].
[889] *Ibid.*
[890] *Ibid.* [Emphasis added].
[891] *CSA Staff Notice – 43-705 Report on Staff's Review of Technical Reports by Ontario Mining Issuers*, OSC CSA Notice, (27 June 2013), online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20130627_43-705_rpt-tech-rpt-mining-issuers.htm> at s 2.1 (Accessed August 5, 2013). [Staff Notice 43-705]. 27 of the Technical Reports were by issuers listed on the TSX and 16 were from the TSXV. The remaining were issuers either listed on the Canadian National Stock Exchange or unlisted; Brian E. Abraham, "Canada: OSC Staff Notice 43 705 Review of Technical Reports by Ontario Mining Issuers" *Mondaq* (3 July 2013), online: mondaq

compliance concern, another 40% had some concerns, with only the last 20% adequately complying with Form 43-101F1.[892] The topics with significant deficiencies included environmental studies, permitting, social or community impacts, economic analysis, and interpretation and conclusions.[893] Regarding "advanced properties"[894], 32% of the reports failed to address, at all, environmental studies; permitting, social, and community impacts; and remediation and reclamation matters.[895] 37% of the reports on advanced properties also failed to disclose the impact of taxes on projects[896] and 36% "did not disclose specific project risks on potential outcomes and mitigating factors."[897] Overall, SN 43-705 supports the view there exists a lack of guidance, compliance and enforcement in Canadian securities disclosure regulations.

CP 43-101 and NI 43-101 do however provide constructive guidance with the underlying goal of informing and protecting investors through disclosure of non-financial issues. Canadian companies engaged in mineral mining are legally obligated to comply with NI 43-101 because it is mandated by regulators, and reinforced by the threat of penalties. Penalties may include "staff requests for re-filings, additional disclosure, or other staff action, where appropriate."[898] Moreover, a failure to file or a deficient technical report may also result in a delay of the issuance of a prospectus receipt, and in severe circumstances the possibility of facing cease trade orders.[899] This authority and the non-financial focus of NI 43-101, nonetheless, provide support

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<http://www.mondaq.com/canada/x/248348/Securities/OSC+Staff+Notice+43+705+Review+Of+Technical+Reports+By+Ontario+Mining+Issuers&email_access=on> (Accessed August 5, 2013). [Summary 43-705].

[892] Staff Notice 43-705, *supra* note 891 . Of the 50 reports reviewed, 59% of the issuers were at the mineral resources stage, 26% at the development of productions stage and 15% at the exploration stage.

[893] *Ibid*.

[894] NI 43-101, *supra* note 719 at Part 1, 1.1 definition of "advanced property". An advanced property is a property that has (a) mineral reserves or (b) "mineral resources the potential economic viability of which is supported by a preliminary economic assessment, a pre-feasibility study or a feasibility study."

[895] Staff Notice 43-705, *supra* note 891.The remaining 68% of reporting issuers are not necessarily deemed to be providing adequate disclosure.

[896] Summary 43-705, *supra* note 891.

[897] *Ibid*; Staff Notice 43-705, *supra* note 891 at Item 25. Item 25 explicitly requires a Technical Report to "[d]iscuss any significant risks and uncertainties that could reasonably be expected to affect the reliability or confidence in the exploration information, mineral resource or mineral reserve estimates, or projected economic outcomes."

[898] Staff Notice 43-705, *supra* note 891 at Summary of results and future action, s 6. These penalties arise "if an issuer and qualified person have not fully met the requirements of Form 43-101F1 and NI 43-101."

[899] OSA, *supra* note 675 at section 70(1) and 61(2); OSC, *OSC Proceedings*, online: OSC<http://www.osc.gov.on.ca/en/Proceedings_index.htm> (Accessed December 7, 2013); OSC, *Guide to Enforcement Proceedings*, online: OSC <http://www.osc.gov.on.ca/documents/en/Proceedings/osc_20120210_guide-enf-proceedings.pdf> (Accessed

to the idea of using the securities disclosure framework as a foundation on which to base the SR process. This power to compel compliance under NI 43-101 is uniquely placed in comparison to similar instruments globally.

The U.S. and Australian frameworks similar to Canada's NI 43-101 lack a similar level of modern guidance and the state support that NI 43-101 enjoys. For example, the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code),[900] which sets out minimum standards for reporting exploration results, mineral resources and ore reserves, is compulsory for listed companies in Australia and New Zealand.[901] Although the stock exchange listing rules are not deemed to be part of the law in Australia,[902] the JORC Code is still given some status as an official standard as the Australian Securities and Investment Commission can require compliance with the Code.[903] The U.S. version of the JORC is the Society for Mining, Metallurgy, and Exploration, Inc., (SME) Guide for Reporting Exploration Results, Mineral Resources and Mineral Reserves, 2007 edition (SME Guide).[904] However, the U.S. SEC does not recognize the SME Guide or any other standard from the international Committee for Mineral Reserves International Reporting Standards (CRIRSCO).[905] Instead the

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December 7, 2013). Overall, the OSC and BCSC have broad powers to enforce their respective securities acts. For example, if an issuer fails to file a technical report a securities commission could allow extra time to comply or be subject to a cease trade order. If a technical report contains deficiencies or a misrepresentation, the issuer may be asked to revise the technical report. If a technical report has been filed on SEDAR and the technical report omits material information or includes a misrepresentation, the issuer and the qualified person who signs off on the report may be subject to civil liability to investors; OSA, *supra* note 675 at s127(1). S 127 lists the orders a commission may make; Kevin J. Thomson, Melanie A. Shishler, and Richard Fridman, "Ontario Securities Commission Staff Releases Report on Mining Technical Reports" (28 June 2013), online: dwpv.com <http://www.dwpv.com/en/Resources/Publications/2013/Ontario-Securities-Commission-Staff-Releases-Report-on-Mining-Technical-Reports> (Accessed December 7, 2013);

[900] Joint Ore Reserves Committee, *Australasian Code for Reporting of Exploration Results, Minerals Resources and Ore Reserves*, online: jorc.org <http://www.jorc.org/docs/jorc_code2012.pdf> at 2 (Accessed October 30, 2013). The JORC was established in 1971 and the first edition of the Code was released in 1989. Later versions were released in 1992, 1996, 2004, and the 2012 version is the more recent version taking effect in Dec 2013.

[901] The CSR Centre for Excellence, "Standards & Guidelines for Resources and Reserves" online: web.cim.org <http://web.cim.org/standards/MenuPage.cfm?sections=185,188&menu=202> (Accessed October 30, 2013). [CIM].

[902] *Ibid.*

[903] *Ibid.*

[904] CRIRSCO, *The SME Guide for Reporting Exploration Results, Mineral Resources, and Mineral Reserves*, online: crirsco.com <http://www.crirsco.com/usa_sme_guide_2007.pdf> at 2. (Accessed October 30, 2013); CIM, *supra* note 901. Industry Guide 7 was published more than 25 years ago and has since not undergone revisions or received updates, and is deemed to "significantly" differ from CRIRSCO-style reporting standards.

[905] CRIRSCO , *About CRIRSCO*, online: crirsco.com <http://www.crirsco.com/background.asp> (Accessed October 30, 2013)

SEC promotes Industry Guide 7 (IG7), which requires a Description of Property by Issuers Engaged or to Be Engaged in Significant Mining Operations, and compliance with SEC interpretations of the guide.[906] At the same time, IG7 is argued by the SME[907] to lack the disclosure required by similar mechanisms, such as NI 43-101 and the JORC Code, and to be outdated, since it has remained the same as when it was originally brought into force in 1982.[908] The IG7 does, however, contain an exception, permitting Canadian companies listed in the U.S. and engaged in mineral projects to offer NI 43-101, rather than IG7, disclosure.[909] Overall, despite the advantages of NI 43-101, this does not mean the U.S. and Australian mechanisms are weaker or stronger than NI 43-101. Prior to 1999, before NI 43-101 was implemented, the JORC Code was recognized as an "international standard in mineral resource and ore reserve reporting."[910] This is notable because NI 43-101 permits a JORC report in certain circumstances, instead of a 43-101 technical report.[911] Taken as a whole then, in comparison to similar standards, NI 43-101 can be considered cutting edge by its disclosure of relevant information under the auspices of the state's, in Canada's case provincial, enforcement authority. With the securities disclosure instruments examined above, Canada appears to have a foundation on which to put into force a regulatory SR mechanism.

Similar to NI 43-101, which targets mineral resource disclosure, is NI 51-101, the oil and gas equivalent. The provision of NI 51-101 most comparable to the non-financial disclosure of NI

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[906] U.S. Securities Exchange Commission, *Industry Guides*, online: sec.gov <http://www.sec.gov/about/forms/industryguides.pdf> at 34. (Accessed October 30, 2013). This includes Industry Guide 2, in addition to Industry Guide 7.

[907] Society for Mining, Metallurgy & Exploration, *About SME*, online: SMEnet.org <http://www.smenet.org/about/> (Accessed April 16, 2014).

[908] *List of Industry Guides*, 17 CFR § 229.801 (1982).

[909] Society for Mining, Metallurgy & Exploration, *SME/SEC Meeting on Mineral Resources and Reserves Reporting Washington, DC* (16 December 2011) online: smenet.org <http://www.smenet.org/docs/public/SEC_Meeting_Minutes2011-12.pdf> (Accessed April 16, 2014); United States Securities and Exchange Commission, *Form 20-F*, online: SEC.gov <https://www.sec.gov/about/forms/form20-f.pdf> at 1(b) of instructions to Item 4.D. (Accessed April 16, 2014). The instructions specifically outline to ensure that documents "do not disclose estimates of reserves unless the reserves are proven or probable and do not give estimated values of those reserves, unless foreign law requires you to disclose the information".

[910] Canadian Institute of Mining, Metallurgy and Petroleum, "Standards & Guidelines for Resources & Reserves" online: web.cim.org <http://web.cim.org/standards/MenuPage.cfm?sections=185,188&menu=199> (Accessed December 9, 2013).

[911] NI 43-101, *supra* note 719 at 1(1), Part 7 Use of Foreign Code section 7.1, 43-101CP section 2.4 and 7.1. In addition to the JORC Code other foreign codes are also accepted if they are "based on or consistent with the International Reporting Template, published by CRIRSCO.

43-101 is a requirement for geologists and engineers to comply with their professional standards and ethics.[912] Despite requiring these professional standards, NI 51-101 fails to require any form of sustainability reporting or other non-financial disclosure.[913] This "limitation" of NI 51-101, in relation to oil and gas SR and its environmental, social, and human rights impacts, is somewhat balanced by the OSC Emerging Markets Issuer Review (EMIR) in SN 51-719.[914] Reinforcing the concept of non-financial disclosure in Canada, the EMIR focused on risks and investor concerns with the ultimate goal of improving "disclosure and governance practices, due diligence requirements, audits and listing processes."[915] The significance of this review is that an "emerging market" issuer is defined to include a reporting issuer "whose mind and management are largely outside of Canada and whose principal active operations are outside of Canada, in regions such as Asia, Africa, South America and Eastern Europe."[916] These regions coincide with locations largely occupied by Canadian extractive sector TNCs.[917] Ultimately, the recommendations from the EMIR refused to promote the creation of new policies or rules and instead called for the development of greater guidance, best practices, "or enhanced vigilance to support compliance," coinciding with the conclusions of the OSC Review.[918] The result of the

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[912] NI 51-101, *supra* note 719 at Part 1, 1.1 (s).
[913] *Ibid*.
[914] *OSC Staff Notice 51-719 - Emerging Markets Issuer Review*, OSC Notice, (March 2012), online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20120320_51-719_emerging-markets.htm> (Accessed August 5, 2013). [SN 51-719]. Prompted by the "notable concerns", "increasingly globalized marketplace", "investor protection", and the threat to "the integrity of our [Canadian] markets", the purpose of the EMIR was to assess the quality and adequacy of EM issuers' disclosure and corporate governance practices, and overall investor protection in Ontario. The identified concern of the EMIR was an apparent "form over substance approach to compliance with standards of disclosure, governance, audit, and due diligence practices."
[915] Ontario Securities Commission, "2012 OSC Annual Report: Emerging Markets Issuer Review", online: OSC <http://www.osc.gov.on.ca/static/_/AnnualReports/2012/year_in_review/emerging_markets.html> (Accessed August 5, 2013).
[916] *Ibid*; The "mind and management" of a corporation refers to the "common law test of where central management and control of the corporation are located". CCH: International Master Tax Guide, 2009/10, 6th ed, at 369 (Accessed August 5, 2013).
[917] TMX, "Global Leader in Mining" (2011) online: TMX <http://www.tmx.com/en/pdf/Mining_Sector_Sheet.pdf> (Accessed August 5, 2013).
[918] *Ibid*. The EMIR reiterated the duty of board and audit committees to have a thorough understanding of the business and operating environment of the issuer, a deficiency identified with some EM issuers. In some situations, the board was not aware of environmental factors; the review found an unnecessary use of complex corporate structures in EMs, which tended to increase the risk profile of an issuer; the facilitation of inappropriate activity, like fraud or misappropriation; and questioned the level of transparency. There was also a lack of risk identification and understanding found in relation to political factors, such as government instability; property and asset title; the legal framework; among other categories, when there was an expectation to see internal controls associated with political, legal and cultural factors. Other concerns cited a lack of professional scepticism by auditors when auditing

EMIR was the creation of a guide for emerging markets reporting issuers set out in OSC Staff Notice 51-720.[919] Although SN 51-720 outlined extra guidance, such as risks typical in an emerging market (legal, regulatory, political and culture), it failed to elaborate on environmental, social or human rights issues.[920]

An additional policy, briefly discussed above, which offers further insights, is NP 51-201.[921] This policy instrument adds to the disclosure regulations discussed in NI 51-102 and NI 43-101, by providing "guidance on "best disclosure" practices in a difficult area involving competing business pressures and legislative requirements".[922] The intent of NP 51-201 is to prevent selective disclosure and insider trading and to ensure equal access to information for everyone investing in securities.[923] NP 51-201 is relevant because it provides guidance and standards on materiality and best disclosure practices. In particular, section 4.3 of NP 51-201 provides examples of potentially material information, ranging from changes in corporate structure, capital structure, business and operations, and others issues.[924] Section 4.4 references non-financial concerns, such as "External Political, Economic and Social Developments".[925] Under section 4.4, if an "external [political, economic, and social] development will have or has had a direct effect on the business and affairs of a company that is both material and uncharacteristic of the effect generally experienced by other companies engaged in the same business or industry,"

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information; unverified/unanalyzed conclusions with no proof; and lack of clarity and transparency displaying efforts to understand cultural and business practices.

[919] *OSC Staff Notice - Issuer Guide for Companies Operating in Emerging Markets*, OSC Notice 51-720, (November 2012), online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20121109_51-720_issuer-guide.htm> (Accessed August 5, 2013). This guidance outlined the disclosure of risks and characteristics unique to operating in the EM; the factual and analytical description of the identified issues, risks and characteristics and how they affect operations; and to assess the quality of risk management processes by developing, reviewing, maintaining risk management and exposure policies. The guide also outlined avoiding boilerplate disclosure and explaining risks and investors' statutory rights and remedies. [SN 51-720].

[920] *Ibid*. The guidance outlines that "[r]egardless of the location of a company's operations, Canadian reporting issuers, their management and board are reminded that they are required to adhere to Canadian regulatory requirements." Eight areas of consideration are outlined and discussed. Risk management and disclosure was one area, which offers guidance through National Policy 58-201. *See* OSC, *National Policy 58-201 Corporate Governance Guidelines*, online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20050617_58-201_corp-gov-guidelines.pdf> (Accessed March 23, 2014).

[921] NP 51-201, *supra* note 809.

[922] *Ibid*.

[923] *Ibid* at 1.1.

[924] *Ibid* at 4.3.

[925] *Ibid* at 4.4.

then that company is "urged to explain, where practical," the impact on them.[926] The problem with this provision is it potentially omits information simply because it is generally applicable to the majority of similarly placed companies. For example, government policy affecting most companies is not required to be disclosed, and this rationale could be applied to other factors such as wide spread environmental, social, and other political issues.[927] Despite this flaw, NP 51-201 remains relevant outlining Best Disclosure Practices and guidance that is very much applicable to environmental, social and human rights disclosure.[928] Section 6.2, in particular, insists on the creation of a written corporate disclosure policy that is reviewed by the board of directors, practical enough to implement, and leads to consistent disclosure.[929] Section 6.3 outlines the creation of a committee to oversee and coordinate disclosure, with 6.4 further adding that a Board and Audit Committee Review certain disclosure prior to its release to the public.[930] Overall, this policy provides a level of guidance and detail not discussed elsewhere, and potential of being applied to extractive sector TNC SR disclosure.

Further reinforcing the idea of SR and engaging in dialogue with stakeholders within the Canadian securities disclosure framework is OSC Staff Notice 15-704. The proposed enforcement initiatives in SN 15-704 add support to the growth of disclosure in Canada and the notion of SR by revealing self-reporting processes that is certainly applicable to Canadian extractive sector TNCs.[931] This notice looks to resolve enforcement matters quickly and effectively through disclosure mechanisms.[932] It includes a proposal for an explicit No-Enforcement Action Agreement, whereby a party would make itself no longer subject to OSC

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[926] *Ibid*.
[927] *Ibid*. Section 4.4 gives an example of a change in government policy affecting most companies in a particular "industry that does not require an announcement, but if it affects only one or a few companies in a material way, such companies should make an announcement."
[928] *Ibid* at Part VI.
[929] *Ibid* at 6.2(2), 6.2(3).
[930] *Ibid* at 6.3, 6.4.
[931] *OSC Staff Notice 15-704 - Request for Comments on Proposed Enforcement Initiatives*, OSC Notice 15-704, (21 October 2011) online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category1/sn_20111021_15-704_rfc-enforcement-initiatives.pdf> (Accessed January 25, 2014) [SN 15-704]; OSC, *Policy Hearing on Proposed Enforcement Initiatives OSC Staff Notice 15-704*, (17 June 2013), online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category1/oth_20130617_15-704_transcript-policy-hearing.pdf> (Accessed November 6, 2013). On June 17, 2013, the OSC held a policy and discussion hearing on SN 15-704 and its proposed enforcement initiatives. This is the current status of SN 15-704, as the panel outlined it will take the "issues [discussed] back to the [OSC] for a full discussion".
[932] SN 15-704, *supra* note 931.

enforcement in exchange for implementing self-reporting on matters that may breach Ontario securities laws or "activities that would be considered contrary to the public interest".[933] It includes a proposed "New No-Contest Settlement program", whereby the OSC could make a protective order in the absence of a specific admission of a breach of Securities Act violation; a clarified process for self-reporting, through a cooperative approach to ensure that all parties are informed on how best to self-report and come forward with information; and a proposal for enhanced public disclosure of credit granted for cooperation.[934] Staff Notice 15-704 also proposes a whistleblower program for those who provide the OSC with information of "misconduct in the marketplace," a form of information dissemination "to support enforcement activity."[935] Although these remedies may arise after the fact, through the inducement of corrective behavior SR can help ensure the continuation of corrective actions with subsequent disclosure. [936]

A. Case Study 1: Copper Mesa in Ecuador

Copper Mesa, previously known as Ascendant Copper, a junior Canadian copper mining company, provides an example of the potential consequences that can arise from the lack of disclosure and the corporate failure to provide warning on the condition of growing non-financial

[933] *Ibid.*
[934] *Ibid.*
[935] *Ibid* at 1.
[936] Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (New York, Oxford University Press, 1992) at 54–100 cited in Ford, Cristie. "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45:1 American Business Law Journal 1 at 55. Similar to the idea of SR are the concepts of tripartism and monitorships. Tripartism promotes third party participation in three ways: (1) "giving third parties access to all information the regulator possesses"; (2) providing "a seat at the negotiating table"; and (3) "giving stakeholders the same standing to sue or prosecute as the regulator"; It is noteworthy that the conditions that give rise to reform undertakings/monitorships from deferred prosecution agreements in the U.S. are not impractical under the organizational sentencing provisions of the Criminal Code. Criminal Code of Canada, Part XXIII: Sentencing: Probation. §732.1 (3.1). This section states a court may prescribe one or more of the following: "(b) establish policies, principles and procedures to reduce the likelihood of" re-committing; (c) communicating those policies, standards and procedures; and (d) reporting to the court on the implementation made in section (a); *Also see* Todd L. Archibald, Kenneth E. Jull and Kent W. Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Canada: Canada Law Book, 2005) [Archibald] cited in Ford, BC, *supra* note 344. (Todd Archibald, Kenneth Jull, and Kent Roach make a case for "embedded auditors" as an element of sentencing corporate actors under the Canadian Criminal Code. This includes embedding auditors and regulatory inspectors under court order and through a statutory basis to the site of a corporation's breach to monitor compliance for a set period of time. The significance of this approach is that it is a remedial approach to be implemented in Canada).

risks.[937] Before operations began in Ecuador, Copper Mesa and its wholly-owned Ecuadorian subsidiary, Barbadian, faced heavy opposition to its proposed project.[938] Copper Mesa claimed that "[a]s a public company traded on the Toronto Stock Exchange, [it is] committed to upholding the highest standards in the areas of transparency and anti-corruption, promotion of local sustainable development, environmental protection, and human rights."[939] On the other hand, letters and documents from a local mayor and civil society group Defensa y Conservacion Ecologica de Intag (DECOIN) made a strong case for concern and community opposition to the proposed project.[940] Aware of alleged violations and violence, Copper Mesa revealed in its prospectus "in detail the history of the conflict between [Copper Mesa] and the local community" and "the potential for future violence" and indicated "various allegations of human rights abuses and physical threats."[941] After the October 2005 publication of the prospectus by Ascendant Copper subsequent continuous disclosure documents failed to further discuss and elaborate on the history and tension between the local community and the mining operations.[942]

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[937] *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191 at ¶2.[Piedra]. Copper Mesa headquartered in B.C.
[938] Ramirez v. Copper Mesa, *Why Sue the TSX*, online: Ramirez v. Copper Mesa <http://www.ramirezversuscoppermesa.com/why-sue-tsx.html> (Accessed August 15, 2013).
[939] Letter from Mr. Gregory Regaignon (6 November 2006) re: allegations from DECOIN, online: Business and Human Rights <http://www.reports-and-materials.org/Ascendant-response-Carlos-Zorrilla-6-Nov-2006.pdf> at 4 (Accessed August 15, 2013).
[940] Letter from Auki Tituana (19 September, 2005), letter to the BC securities commission re: opposition to the Junin mining project, online: MiningWatch Canada <http://www.miningwatch.ca/letter-auki-titua-mayor-cotacachi-county-ecuador-british-columbia-securities-commission> (Accessed August 15, 2013); Letter from Heller Ehrman, (13 April 2005) re: Ascendant's Exploration activities in Intag, online: MiningWatch <http://www.miningwatch.ca/letter-heller-ehrman-ascendant-holdings> (Accessed August 15, 2013); Letter from Auki Tituaña Males (8 March 2005) the local mayor to the TSX finance and audit committee: the issues and problems arising as a result of the mining project in Junin, online: MiningWatch <http://www.miningwatch.ca/letter-mayor-cotacachi-cant-n-ecuador-toronto-stock-exchange-unofficial-translation> (Accessed August 15, 2013).
[941] Piedra, *supra* note 937 at ¶ 25.
[942] *Ibid* at ¶ 1-4, 11, 25, 51. The defendants are Copper Mesa, its board, and the TSX. The plaintiff's appeal was denied for a failure to state a cause of action; Ascendant Copper Corporation, *Prospectus*, (Accessed Dec. 5, 2013). The prospectus is dated October 14, 2005; Copper Mesa Corporation, *Initial Annual Information Form for the financial year ended Dec 31, 2008*, at 15 (Accessed Dec. 5, 2013). Only this AIF mentioned anti-mining opposition, information originally reported in the prospectus. Copper Mesa also acknowledged the statement of claim naming Copper Mesa and two of its directors (for negligence) by members of an environmental activist group and to "vigorously defend its position that the claim is false and entirely without merit"; AIFs for years ending 2005, 2006, and 2007 did not elaborate on the tension identified in the prospectus. Similarly, the Material Change Reports (MCRs) also failed to discuss the violence and conflict and an Organization of Economic Cooperation and Development (OECD) complaint regarding violations of the OECD Guidelines for Multinational Enterprises to the Canadian National Contact Point; Ascendant Copper and Copper Mesa's MD&A's made reference to the "the large amount of civil unrest" but did not elaborate more. Ascendant Copper Corporation, *Management's Discussion and Analysis for the Nine Months Ended September 30, 2005*, at 2, 5. (Accessed Dec 6, 2013); Ascendant Copper Corporation, *Management's Discussion and Analysis for the Twelve Months Ended December 31, 2005*, at 12

There was, however, reference to adopted human rights policies as required by Section 5.1(4) of the AIF.[943] The lack of further detailed disclosure is noteworthy because Copper Mesa legally owned the mining concession for three years after publishing its prospectus and was so obligated to provide relevant disclosure containing environmental, social and human rights disclosure as discussed above under NI 51-102.[944] Arguably, there were a number of non-financial allegations that could have been considered material. These allegations touched upon the tension and opposition to the mining project and included allegations of conflict, as outlined by the plaintiffs in their case against Copper Mesa and the TSX.[945] Though the tension between anti- and pro-mining groups ultimately led to a lawsuit, this suit was eventually dismissed.[946]

According to MiningWatch Canada, the estimated $40 million Copper Mesa raised from selling its shares in its public listing was, allegedly, used to create subsidiaries, hire security forces, and "business and political consultants" to begin its mining project in Junín.[947] Before the decision to dismiss the suit against Copper Mesa, its directors, and the TSX was reached, the TSX delisted Copper Mesa for failing to meet its "continued listing requirements of TSX".[948] In the end investors failed to see any return and lost their investment.[949]

(Accessed Dec 6, 2013). Reference is made to a small but very vocal and violent group, referring to a group that set fire to and destroyed the company's clinic and farm buildings; Ascendant Copper Corporation, *Management's Discussion and Analysis for the Three Months Ended March 31, 2007*, at 5 (Accessed Dec 6, 2013). A March 20, 2007 meeting was referenced, in which stakeholders "[s]tated an interest in restoring law and order, reducing tensions, and respecting the rights of all involved." This information was replicated in later MD&A's in 2009; MiningWatch Canada, *Ascendant ordered to stop community relations at Junin Project, loses major investor*, (23 July 2007) online: MiningWatch <http://www.miningwatch.ca/ascendant-ordered-stop-community-relations-junin-project-loses-major-investor> (Accessed August 15, 2013). Copper Mesa was then delisted from the TSX in Jan 2010. [Stop Order].

[943] The AIFs explicitly made reference to the UN Global Compact and Voluntary Principles on Security and Human Rights.

[944] Stop Order, *supra* note 942. The MiningWatch argues Copper Mesa owned the concession for more than 3 years.

[945] Ramirez v Copper Mesa, *Statement of Claim*, online: RamirezvsCopperMesa <http://www.ramirezversuscoppermesa.com/statement-of-claim.pdf> at ¶45, 49, 55, 60, 76. (Accessed Jan12, 2014).

[946] Piedra, *supra* note 937 at ¶ 71, 92, 98-100.

[947] Carlos Zorilla, "Canada-Ecuador: When Stock Exchanges Fuel Human Rights Violations" *Upside Down World* (24 December 2009) online: MiningWatch <http://www.miningwatch.ca/canada-ecuador-when-stock-exchanges-fuel-human-rights-violations> (Accessed August 15, 2013). [Zorilla].

[948] TMX, News Release, "TSX Delisting Review – Copper Mesa Mining Corporation (CUX)" (19 Jan 2010) online: News & Events Exchange Bulletin <http://www.tmx.com/en/news_events/exchange_bulletins/bulletins/1-19-2010_TSX-ReviewCUX.html> (Accessed August 15, 2013). [TSX Bulletin]; TMX, *TSX Company Manual*, online: tmx <http://tmx.complinet.com/en/display/display_viewall.html?rbid=2072&element_id=103&record_id=103> (Accessed Aug 5, 2013) at Part IV-Appendix B. These requirements are in addition to the general listing disclosure

Copper Mesa also faced further accusations from DECOIN of, allegedly, failing to submit an acceptable terms of reference for its Environmental Impact Assessment and to comply with Article 88 of Ecuador's Constitution, which requires community consultation prior to undertaking an activity that would potentially impact its natural environment.[950] This is the type of information SR is designed to provide. Similarly, under the reasonable investor test, it is not unreasonable to assume some investors would deem non-compliance with local laws, such as Article 88, important and material.[951] MiningWatch has also argued that "[i]n light of official recognition of the longstanding problems surrounding [Copper Mesa's] operations in Ecuador, it is clear that due diligence simply is not being exercised by [Canadian] brokers," by investors in Copper Mesa, or by Canadian regulatory authorities."[952] This may be attributed to a combination of lack of guidance and enforcement and corporate hesitation to provide complete disclosure. This combination allows corporations to operate in an unregulated environment, potentially

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requirements; Robert Todd, "Doing it Right" Canadian Lawyer Magazine (June 2010), online: Canadianlawyer <http://www.canadianlawyermag.com/942/Doing-it-right.html> (Accessed August 5, 2013).

[949] TSX Bulletin, *supra* note 948; Carlos Zorilla, "Copper Mesa Delisted From Toronto Stock Exchange" *Decoin* (23 February, 2010), online: Decoin.org <http://www.decoin.org/2010/02/copper-mesa-delisted-from-the-toronto-stock-exchange/> (Accessed August 5, 2013).

[950] Stop Order, *supra* note 942. MiningWatch Canada and DECOIN argue Copper Mesa failed to follow regulations. This began with a failure to comply with previous agreements with the Ecuadorian government by not submitting "an acceptable terms of reference for its Environmental Impact Assessment," or complying with Article 88 of the Ecuadorian Constitution.

[951] SN 51-333, *supra* note 848 at s 2.1 . Section 2.1 identifies that although materiality determinations may limit what is actually disclosed by the issuer, this does not mean that reporting issuers should be limiting the information management considers in the making of its materiality determinations; Zorilla, *supra* note 947; Ramirez versus Copper Mesa, *Ecuadorians Mountain Villagers Sue A Canadian Mining Company and the Toronto Stock Exchange to Demand Social and Environmental Accountability*, online: Ramirez versus Copper Mesa <http://www.ramirezversuscoppermesa.com/summary.html> (Accessed August 5, 2013). [Ramirez].

[952] Stop Order, *supra* note 942; Ramirez, *supra* note 951; Piedra, *supra* note 937 at ¶ 1-3, 9-26, 55, 99. A law suit against the TSX was brought to prevent it from listing corporations and providing financial assistance to companies that were aware of potential harm, foreseeable and unreasonable risk, and where funds raised would be used to harm individuals. This lawsuit argued where directors "have personal knowledge of a real and unreasonable risk of harm to individuals, or the risk is plain to see, they are under a duty to not act in a way that perpetuates or increases this risk". Although the Court of Appeal dismissed the lawsuit against the defendants, E.A. Cronk J.A. elaborates, when discussing the TSX, "in a proper case, the risk of future tortious wrongdoings against third parties by a company whose shares are proposed to be listed on the [TSX] might be found to be reasonably foreseeable to entities like the TSX" if such an entity receives "specific advance notice of the risk of specific harm", based on sufficient material facts, on the public securities offering; Klippensteins, *Ecuadorians Lose Appeal in Lawsuit Against Canadian Mining Company and TSX Canadian law continues to fail communities harmed by Canadian mining overseas*, (14 March 2011), online: Ramirez vs. Copper Mesa <http://www.ramirezversuscoppermesa.com/public-announcement-mar-14-2011.pdf> (Accessed August 5, 2013).

leading to consequences for local stakeholders, in environmental and social destruction, and investors, with lost investments.

B. Case Study 2: Goldcorp in Guatemala

An example of investors seeking information not deemed material by a company is found in the activities of Goldcorp Inc. and its wholly-owned subsidiary, Montana Exploradora de Guatemala S.A., in Guatemala.[953] In 2008, persuaded by claims of human rights abuse and violence,[954] a group of shareholders[955] requested, through a shareholder proposal, that Goldcorp implement an independent human rights impact assessment (HRIA) of its Marlin Mine project.[956] The eventual commissioned HRIA found, among other things, the Marlin Mine to be "affecting the full spectrum of internationally recognized human rights," and so recommended all exploration and mine expansion to cease until consultation with state-involved and locally affected stakeholders took place.[957] This example demonstrates Goldcorp had not itself chosen to conduct a HRIA and release such information, and was only compelled to do so at the insistence of shareholders who wanted to be informed of the situation surrounding Goldcorp's operations at the Marlin Mine.

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[953] On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine* (May 2010), online: www.hria-guatemala.com <www.hria-guatemala.com/en/MarlinHumanRights.htm> at 8 (Accessed August 5, 2013). [On Common Ground]; *Also see* Dawn Paley, "Goldcorp: Occupation and Resistance in Guatemala (and Beyond)", *The Dominion*, (21 June 2008), online: Dominion Paper <http://www.dominionpaper.ca/weblogs/dawn/1887> (Accessed August 5, 2013). Goldcorp also faced allegations of lack of compliance with local laws.

[954] Shin Imai, Ladan Mehranvar and Jennifer Sander, "Breaching Indigenous Law: Canadian Mining in Guatemala" (2007) 6 Indigenous Law Journal 101; International Labour Organization, *Report of the Committee of Experts on the Application of Conventions and Recommendations,* International Labour Conference (98th Session, 2009), online: ilo.org <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_103484.pdf> at 680 (Accessed August 15, 2013). [ILO Report]. In 2009, the International Labour Organization examined Montana's extractive activities and asked the Guatemalan government to "neither grant nor renew any license for the exploration and exploitation of natural resources" without stakeholder participation and consultation; MiningWatch, *Sources for Shareholder resolution submitted to Goldcorp Inc.*, online: miningwatch.ca <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Sources_accompanying_resolution_and_release_21-03-2011.pdf> (Accessed March 10, 2014).

[955] Aaron Dhir, "Investment Activism, Hunan Rights, and TWAIL Discourse" (2012) 22:1 Business Ethics Quarterly 99 at 100. [Dhir BEQ].

[956] On Common Ground, *supra* note 953 at 4, 8. An independent report by On Common Ground identified continuing claims of human rights violations, violence, and a weakness in the documentation provided by Montana, which limited the assessment regarding stakeholder concerns and verification of Montana's responses to impacts.

[957] Dhir BEQ, *supra* note 955 at 100; On Common Ground, *supra* note 953 at 22, 32.

After the consortium of investors successfully advanced its goals and Goldcorp agreed to implement the HRIA, the shareholder proposal was withdrawn.[958] The withdrawal was preceded by a memorandum of understanding (MOU) between Goldcorp and the shareholders that introduced the proposal.[959] Although the shareholders that put forward the proposal represented a fringe group of Goldcorp investors,[960] it was within this MOU that Goldcorp agreed to implement the HRIA.[961] Goldcorp had not originally considered the circumstances surrounding the Marlin Mine to be material, and therefore, the agreement to undertake the HRIA suggests Goldcorp would now deem those issues as relevant, or possibly material, to investors. This is supported by the fact the HRIA recommended Goldcorp cease all exploration and mine expansion, information likely considered relevant to an investment by investors.[962] This reintroduces the lack of clarity with the concept of materiality. If social and human rights issues are deemed material then the concerns highlighted at the Marlin Mine are likely to be disclosed.

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[958] Shareholder Association for Research and Education, *Shareholder Resolution Database,* online: <http://www.share.ca/en/node/1461> cited in Dhir BEQ, *supra* note 955 at 104.

[959] On Common Ground, *supra* note 953 at 4, footnote 1; Goldcorp Steering Committee, *Memorandum of Understanding between Goldcorp Inc and the Shareholder Group*, online: hria-guatemala.com <http://www.hria-guatemala.com/en/docs/Steering%20Committee/Memorandum_of_Understanding_03_19_08.pdf> (Accessed March 10, 2014); Catherine Coumans, "Mining, human rights and the socially responsible investment industry: considering community opposition to the shareholder resolutions and implications of collaboration" (2012) 2:1 Journal of Sustainable Finance & Investment 44 at 44-45. Despite getting Goldcorp to conduct a HRIA, the Public Service Alliance of Canada (PSAC), which was one of the shareholders bringing forward the proposal, withdrew its involvement. This was due to its concern of failing to include local communities in conducting an HRIA that is suppose to address those local stakeholders' concerns. [Coumans].

[960] Coumans, *supra* note 959. The consortium introducing the shareholder proposal included: the Public Service Alliance of Canada (PSAC) Staff Pension Fund, the Ethical Funds Company, the First and Fourth Swedish National Pension Funds. Shareholder Association for Research & Education, *Goldcorp: Produce a human rights impact assessment*, online: share.ca <http://www.share.ca/shareholderdb/proposal/Produce-a-human-rights-impact-assessment/771> (Accessed January 18, 2014); Irene Sosa, "Responsible Investment Case Studies: Newmont and Goldcorp" in Julia Sagabien and Nicole Marie Lindsay, eds, *Governance Ecosystems: CSR in the Latin American Mining Sector,* (Toronto: Palgrave, 2011) 201 at 208. The First and Fourth, together with the Second and Third Swedish Pension Funds, as of Ethical Fund's 2010 Annual Report, held 0.11% of the share capital; Ethical Funds, *Ethical Growth Fund*, online: fondsethique.com <http://fondsethique.com/NEIFiles/PDFs/FundFeatureSheets/en-CA/ET60.pdf> (Accessed January 22, 2014). As of December 31, 2010, the total holdings in Goldcorp by Ethical Funds equated to $9433827; Goldcorp, *2010 Annual Report: Building out Future*, online: Goldcorp <http://www.goldcorp.com/files/doc_financial/Goldcorp_2010AnnualReport_FINAL_FullBook.pdf> at 1 (Accessed January 22, 2014). On December 31, 2010, Goldcorp had 735 million outstanding common shares; Nasdaq.com, *Results for 6 Years, for historical stock price & volume*, online: nasdaq.com <http://www.nasdaq.com/symbol/cnq/historical> (Accessed January 22, 2014). Shares of Goldcorp closed at $44.42 on December 31, 2010. Therefore, Ethical Funds would have holdings of approximately ($9 433 827 capital at $44.42 a share to equate to) 212 378 shares in Goldcorp on December 31, 2010, roughly 2.89% of share capital.

[961] On Common Ground, *supra* note 953 at 4, footnote 1; SHARE, *What is a Shareholder Proposal*, online: Share.ca <http://www.share.ca/shareholderdb/what-is-a-shareholder-proposal/> (Accessed April 16, 2014).

[962] On Common Ground, *supra* note 953 at 22.

One week after the Goldcorp commissioned independent HRIA was published,[963] the Inter-American Commission of Human Rights[964] (IACHR), in an interim-decision,[965] granted precautionary measures on Goldcorp and the Marlin Mine, calling for the government of Guatemala to suspend Goldcorp's mining operations and to address the alleged harms.[966] Although this interim decision was later modified and reversed,[967] the negative impact of Goldcorp's operations at the Marlin Mine were again highlighted by a Guatemalan Health Tribunal.[968] Organized by non-government organizations and composed of experts and academics, the Tribunal's declaratory verdict found Goldcorp guilty of "seriously damaging the health and quality of life," environment, and the right to self-determination of the affected indigenous and campesino communities.[969] The significance of this tribunal was outlined in its objectives, which looked to "engage in a process for greater transparency and accountability of Goldcorp's actions", highlight community concerns, to provide a stage for consultation, and lastly, to promote respect for Indigenous peoples, the environment, health, and human rights in

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[963] *Ibid*. The report was released May 17, 2010; IACHR interim-decision, *supra* note 965. The interim-decision was made May 24, 2010.

[964] Organization of American States Inter-American Commission on Human Rights, *Precautionary Measures*, online: OAS.org <http://www.oas.org/en/iachr/decisions/precautionary.asp> (Accessed August 15, 2013). The Inter-American Commission on Human Rights is an independent body of the Organization of American States.

[965] MiningWatch, "The OAS Human Rights Commission Urges Suspension of Mining Activity at Goldcorp's Marlin Mine in Guatemala" *MiningWatch* (24 May 2010), online: MiningWatch Canada <http://www.miningwatch.ca/oas-human-rights-commission-urges-suspension-mining-activity-goldcorps-marlin-mine-guatemala> (Accessed August 15, 2013). [IACHR interim-decision]. Goldcorp, News Release, "IACHR modifies Marlin Mine precautionary measures; Request to suspend mine operations removed" (19 Dec 2011), online: Goldcorp.com <http://www.goldcorp.com/Investor-Resources/News/News-Details/2011/IACHR-modifies-Marlin-Mine-precautionary-measures-Request-to-suspend-mine-operations-removed1127698/default.aspx> (Accessed March 12, 2014). [IACHR final-decision].

[966] Dhir BEQ, *supra* note 955 at 103-4; IACHR interim-decision, *supra* note 965.

[967] IACHR final-decision, *supra* note 965. "[A]fter reviewing the extensive information provided by the parties" the IACHR decided to reverse its original decision; Goldcorp, *Marlin Mine – Interamerican Commission on Human Rights*, online: Goldcorp <http://www.goldcorp.com/English/Unrivalled-Assets/Mines-and-Projects/Central-and-South-America/Operations/Marlin/Interamerican-Commission-on-Human-Rights/default.aspx> (Accessed August 5, 2013). The government of Guatemala issued a resolution insisting the Marlin mine operations were in compliance with the law and argued there was no basis for a suspension, undertaking an investigation and countering earlier opposing studies to demonstrate the Marlin mine has not damaged the environment or health of communities in the mine vicinity.

[968] Health Tribunal, *In the case of Gold Corp versus mining affected Communities*, online: healthtribunal.org <http://healthtribunal.org/about/the-organizers/> (Accessed August 5, 2013). The tribunal was carried out by different civil society groups and academics. [Health Tribunal].

[969] *Ibid* at Final Verdict. The tribunal, as a result, made recommendations to the communities to continue exercising their rights peacefully and for state agencies and Goldcorp to remediate damages and losses.

relation to mining practices.[970] Similar objectives are promoted by SR, which looks to meet the growing need for greater information and stakeholder engagement. The IACHR decisions and the Goldcorp shareholder proposal also highlight the relevance of SR as a due diligence mechanism, to become aware of relevant issues, and reporting process, to inform stakeholders that the company knows about relevant issues and the business impacts on these issues.

Overall, whether or not the lack of disclosure stems from intentional or unintentional corporate ignorance, the failure to disclose may lead to relevant environmental, social or human rights information that potentially has a significant effect on a corporation or its shareholders simply not being reported or addressed. In this case with Goldcorp, the risk associated with the investment increased as calls were made for the Marlin Mine to be suspended.[971] Although Goldcorp was not de-listed, the shareholder proposal, the Health Tribunal, the final IACHR decision illustrate that greater SR information is sought by a variety of stakeholders, who want to be better informed and to understand the issues surrounding mining practices and their investment.[972]

C. Corporate Governance

GoldCorp and Copper Mesa reveal that a lack of environmental, social and human rights disclosure guidance, ambiguity with the materiality thresholds, coupled with weak compliance and enforcement can certainly impact a project. The OSC Review made similar conclusions and as a result recommended increasing the level of "transparency for investors and the Canadian marketplace regarding the nature and extent of environmental risks and other environmental

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[970] *Ibid* at Event Objectives.

[971] Not only do the calls for suspension increase the risk for investors it forgoes the benefits and due diligence associated with SR and the potential to minimize non-financial risks to the company and stakeholders; Chris Hufstader, *Marlin Mine: Violence and Pollution lead to call for Suspension*, online: oxfamAmerica <http://www.oxfamamerica.org/explore/stories/marlin-mine-violence-and-pollution-lead-to-call-for-suspension/> (Accessed March 10, 2014). The calls for suspension came from a variety of sources. Such as the HRIA commissioned by Goldcorp, *see* On Common Ground, *supra* note 953; calls were also made by locals (by the community of Sipakapa); the Inter-American Commission for Human Rights, *see* IACHR interim-decision, *supra* note 965; and members of the U.S. Congress.

[972] Dhir BEQ, *supra* note 955 at 100.

matters affecting issuers."[973] This recommendation set in motion the creation of Staff Notice 51-333 (SN 51-333), which was released in October 2010. SN 51-333 provides environmental reporting guidance, clarification that the test for materiality is analyzed objectively, and a non-exhaustive list of factors to consider in determining materiality. This informs issuers there is no bright-line test, and so to consider both quantitative and qualitative factors.[974] This includes considering the context of issues and an assessment of the matter in its "big picture"; considering and assessing the probability and impact of trends, demands, commitments, and uncertainties; and if unable to determine whether or not an event or issue meets the threshold to "[e]rr on the side of materiality – and [to] disclose the information."[975] These factors necessitate an adjustment of corporate governance practices.

Corporate governance is defined to generally mean board governance, and includes guidelines on how a company can be directed or controlled.[976] The rules, processes, and relationships that direct and control the actions of the highest level of management and the mechanisms for holding issuers, boards of directors, and management accountable form one aspect of corporate governance.[977] Like the guidance from SN 51-333, SR also influences the development of corporate governance practices and processes. This involves the process of reporting; rules to compel reporting; the due diligence associated with SR; and an emphasis on relationships with stakeholders, which looks to influence the corporate decision-makers. The dialogue SR is

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[973] OSC Final Report, *supra* note 667 at 10, 29. SN 51-333 is the result of the OSC Review, which aims to provide more environmental guidance.
[974] SN 51-333, *supra* note 848 at 7-8 s 2.1.
[975] *Ibid* at 8; Price WaterHouse Cooper, *CSA Administrators Staff Notice 51-333: Environmental Reporting Guidance Summary of Key Points*, online: PWC <http://www.pwc.com/ca/en/sustainability/publications/staff-notice-51-333-environmental-reporting-guidance-2010-11-en.pdf> (Accessed August 5, 2013).
[976] Lisa Mary Thomson, "What is Corporate Governance" *Economic Times* (Jan 18, 2009), online: ET <http://articles.economictimes.indiatimes.com/2009-01-18/news/28462497_1_corporate-governance-satyam-books-fraud-by-satyam-founder> (Accessed August 5, 2013).
[977] OSC Final Report, *supra* note 667 at 40. The OSC Review did not include shareholder communications or their rights within the scope of their definition of corporate governance; *CSA Notice - Corporate Governance Disclosure Compliance Review*, OSC CSA Staff Notice 58-306, (2 December 2010), at 3, 5, 13-16. This review revealed 55% of the issuers reviewed were required to make prospective enhancements to their corporate governance disclosure, compared to 36% in a 2007 review. Continuing education and ethical business conduct was two areas identified for frequent disclosure deficiency. [SN 58-306]

intended to stimulate can offer insight on relevant issues and become an embedded process within the decision-making and overall corporate governance process.[978]

There is also a "comply or explain" disclosure obligation in Canadian securities regulations.[979] Comply or explain, like SR, has the potential to dictate and influence corporate decision-makers and corporate governing processes. Under NI 58-101 - Disclosure of Corporate Governance Practices, comply or explain requires TSX-listed corporations to disclose whether or not the corporate board of directors has adopted a written code for ethical business conduct, how the board monitors compliance, and if they do not monitor compliance, to "explain whether and how the board satisfies itself regarding compliance with its code".[980] In comparison, venture issuers do not have any similar comply or explain requirements, and instead are only obligated to provide a description of "what steps, *if any*, the board takes to encourage and promote a culture of ethical business conduct."[981] This again highlights the different treatment between venture and non-venture issuers.[982] This difference was also evident in NI 51-103 – Ongoing Governance and Disclosure Requirements for Venture Issuers, a proposal that looked to tailor and streamline the disclosure and governance requirements specifically of venture issuers.[983] Although NI 51-103 was not implemented because of the deemed burden it would pose, it was designed to address the ongoing governance and disclosure requirements for venture issuers.[984] The purpose NI 51-103 intended to serve, and NI 58-101 does serve, is to reveal the process of corporate governance decision-making and what guides such governance and decision-making. SR supports corporate

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[978] The Hon. Peter de C. Cory and Marilyn Pilkington, "Critical Issues in Enforcement", online: <www.tfmsl.ca/docs/V6(4)%20CoryPilkington.pdf> at 171, 187-8 (Accessed August 15, 2013). Canadian securities laws currently lack an environmental, social, and human rights stakeholder input process. This prevents corporate decision-makers to take into account stakeholder experiences or form a shared enforcement capacity with regulators.
[979] *Disclosure of Corporate Governance Practices*, OSC NI 58-101 (17 June 2005), s 5 (a)(ii), (iii) – Ethical Business Conduct, online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20050617_58-101_disc-corp-gov-pract.pdf> (Accessed August 5, 2013).The "explanation" component, of comply or explain, requires reporting issuers to provide the most recent cross-reference to any MCR filed that relates to "any conduct of a director or executive officer that constitutes a departure from the code".
[980] *Ibid*.
[981] *Ibid* at Form 58-101F2 section 4. [Emphasis added].
[982] *See supra* note 777 and *supra* note 778.
[983] *Proposed Ongoing Governance and Disclosure Requirements for Venture Issuers and Related Amendments*, OSC NI 51-103 (29 July 2011). NI 51-103 disclosure requires a "summary of" "the reasonably available information on environmental, permitting, and social or community factors related to the project."
[984] *Ibid*.

governance decision-making by providing feedback to inform such decision-making and at the same time also looks to become embedded within the governance process of a company.[985]

GRI corporate governance disclosure, like Canadian governance disclosure, seeks to influence corporate governance processes through the disclosure of "internally developed statements of mission or values, codes of conduct, and principles"; the disclosure of how far they are applied across the organization and regions; and how well they relate to international standards.[986]

The GRI does, however, distinguish itself from the Canadian standards. In particular, the GRI outlines and emphasizes a dialogue with not just shareholders and employees but stakeholders and other external sources.[987] This includes outlining those stakeholders engaged, the basis for their identification, frequency, as well as concerns raised.[988] Despite this difference between Canadian and GRI corporate governance disclosure, it is important to note the OSC Review concluded "Canadian corporate governance disclosure requirements are comparable in many respects to those in other jurisdictions (Australia, South Africa, and the U.K.)".[989] This parity of corporate governance disclosure practices does not, however, prevent the use of the GRI as a model for Canada to refer to in the formation of a SR-based regulatory system.

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[985] Peer Zumbansen, "'New Governance' in European Corporate Law Regulation as Transnational Legal Pluralism" (2008) CLPE Research Paper 15/2008 at 13, 47-48. Zumbansen identifies that an increasing amount of production and dissemination of corporate governance rules are taking on the view of "migrating standards" and engaging in a cross-fertilization of norms. This "border-crossing" by corporate governance systems arises from its soft law nature. The German corporate reform in 1998 is an example of this "border crossing" of norms.

[986] Global Reporting Initiative, *Reporting Guidelines*, online: GRI <https://www.globalreporting.org/resourcelibrary/G3.1-Sustainability-Reporting-Guidelines.pdf> at 23 sections 4.7-4.9 (Accessed August 5, 2013). [GRI RG]. The GRI also requires disclosure of the process used for determining the qualifications and expertise of the members to be assigned in the highest governance body for an organization, in addition to disclosing procedures developed for identifying and monitoring economic, environmental and social performance, risks and opportunities, as well as compliance with international standards of the highest governance body.

[987] *Ibid* at 22-23 at section 4.4, 4.11 – 4.17.

[988] *Ibid*.

[989] OSC Final Report, *supra* note 667 at 18.

4.3 GRI vs. Canadian Securities Regulations

A. The GRI and Materiality

Materiality under the GRI avoids many of the materiality problems cited above under Canadian securities law. The GRI definition includes "information [covering] topics and Indicators that reflect the organization's significant economic, environmental, and social impacts or that would substantively influence the assessments and decisions of stakeholders."[990] This definition explicitly includes a range of information that has the potential to impact different stakeholders.[991] The GRI definition is therefore broader than the market impact and reasonable investor tests, and is reinforced with guidance to prevent uncertainty in considering non-financial topics. Moreover, GRI materiality reveals specific markers referred to as performance indicators (PIs) that elaborate on how to accurately and thoroughly disclose information in the economic, environmental and social areas. PIs are further broken down into greater detail through indicator protocols (IPs), which provide "definitions, compilation guidance, and other information to assist report preparers and to ensure consistency in the interpretation of the" PIs.[992] As part of the GRI framework, IPs provide guidance on content, quality, and boundaries for SR.[993]

The GRI recognizes that not all businesses may be capable of implementing or complying with its definition of material, and has therefore developed the Report or Explain Campaign Forum.[994] Designed with small and medium-sized entities (SMEs) in mind, Report or Explain encourages an explanation of why environmental, social, governance (ESG), and human rights issues are not

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[990] GRI, *Defining Report Content*, online: globalreporting.org <https://www.globalreporting.org/reporting/guidelines-online/G3Online/DefiningReportContentQualityAndBoundary/Pages/DefiningReportContent.aspx> (Accessed August 5, 2013).
[991] The broader GRI definition of materiality aids in proactive, instead of reactive, risk management.
[992] GRI RG, *supra* note 986 at 4, 24, 40.
[993] *Ibid* at 7, 20. *See Chapter 1 for further discussion on GRI*; GRI, *Environmental Performance Indicator*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/G3.1-Environment-Indicator-Protocols.pdf> at 3, 6, 8, 10, 12, 33 (Accessed August 15, 2013). The IPs elaborate on the indicator and on the source(s) from where it is taken. [IPs].
[994] GRI, *Report or Explain*, online: globalreporting.org <https://www.globalreporting.org/network/report-or-explain/Pages/default.aspx> (Accessed August 5, 2013). *See* Chapter 1 for a further discussion on the GRI's Report or Explain Campaign Forum.

being disclosed in sustainability reports.[995] This Forum demonstrates the GRI's flexibility in accommodating large, small, or new organizations. In contrast to Canadian securities laws, the GRI definition of materiality offers clarity and a comprehensive system of disclosure with different available factors and variables to be considered and addressed. This flexibility also prevents the "burden" of disclosing on smaller companies but at the same stimulates a dialogue.

B. GRI Extractive Sector-Specific Guidance

Another contrast emerges when comparing the level of extractive sector-specific disclosure guidance between the GRI and the applicable Canadian securities disclosure requirements under the MD&A, the AIF, NI 43-101, and SN 51-333. The GRI has developed many "[t]ailored versions of the GRI Guidelines", for example the Mining and Metals and Oil and Gas Sector Supplements.[996] The Mining and Metal Sector Supplement (MMSS) offers in-depth guidance "for measuring and reporting on the economic, environmental, social, and governance dimensions of [organizational] activities, products, and services".[997] This is accomplished by requiring the disclosure of governance mechanisms designed to manage risks and opportunities.[998] If these mechanisms do not exist, the MMSS indirectly forces their development by calling for their disclosure from the highest corporate governance body.[999] Similar sustainability goals are outlined in the OGSS as well.[1000]

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[995] *Ibid*.
[996] Global Reporting Initiative, *Mining and Metals Sector Supplement*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/MMSS-Complete.pdf> (Accessed August 15, 2013). [MMSS]; Global Reporting Initiative, *Oil and Gas: Who Developed This Guidance and How?*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/OGSS-G3.1-Complete.pdf> (Accessed August 15, 2013). [OGSS].
[997] MMSS, *supra* note 996;
[998] *Ibid* at s 1.2; GRI, *MMSS – Reference Sheet*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/MMSS-Quick-Reference-Sheet.pdf> (Accessed August 15, 2013). Risk disclosure should include "the most important risks and opportunities arising from sustainability trends"; GRI, *Oil and Gas Sector Supplement Summary Guide*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/OGSS-Summary-Guide-Quick-Ref-Sheet.pdf> (Accessed March 23, 2014).
[999] MMSS, *supra* note 996 at s 4.11. The development of governance mechanisms refers to due diligence and risk management, in other words the precautionary approach in Article 15 of the Rio Principles. It also refers to policy formation regarding: due diligence and risk management, opportunities, and compliance with international standards, principles, and codes of conduct.
[1000] OGSS, *supra* note 996 at 9-10. The OGSS outlines a similar goal of meeting "the needs of the present without compromising the ability of future generations to meet their own needs," especially because sustainability issues "are encountered more frequently or in greater measure than in other sectors."

The MMSS and OGSS also outline guidance on extractive sector related environmental disclosure. This includes disclosure on the impacts of activities on biodiversity and protected areas, land identified as requiring protection and management, amount of land owned, "total weight of waste by type and disposal method, number and volume of significant spills", as well as strategies for engaging with different stakeholder groups.[1001] MMSS guidance also helps firms recognize important areas of concern and how to implement policies to address those concerns.[1002] GRI environmental disclosure guidance includes a list of PIs that cover a spectrum of environmental sustainability factors, such as guidance on materials used, energy consumption, water usage, biodiversity, waste and effluents, products and services, compliance, transportation, and overall expenditures and investments.[1003] Each PI includes thirty IPs, which outline and discuss how the PIs can be targeted.[1004]

In contrast to the MMSS and OGSS, SN 51-333, which, as noted above, discusses environmental reporting guidance, broadly outlines that the MD&A should look to examine trends and uncertainties;[1005] provide "big picture" disclosure for the long-term in hopes of disclosing emerging trends and risks not identifiable in the short-term; disclose the quantification of costs and anticipated trends; and, in addition to disclosing the existence of social and environmental policies, also disclose the efficiency and success of such policies,[1006] in particular their impact, potential, and effectiveness.[1007] The SN also outlines the disclosure of issues in relation to litigation, physical, regulatory, reputation, and other risks relating to the business model.[1008] For

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[1001] MMSS, *supra* note 996 at 78, 82 section: Environmental IPs. This includes the percentage of recycled materials used; OGSS, *supra* note 996 at Environmental IPs.
[1002] MMSS, *supra* note 996 at 79.
[1003] *Ibid* at Environmental IPs.
[1004] IPs, *supra* note 993.
[1005] SN 51-333, *supra* note 848 at 7-8. SN 51-333 is discussed in depth at *supra* note 848.
[1006] *Ibid* at 11-14.
[1007] *Ibid* at 16. Discussing environmental disclosure, an argument could be made that since 5.1(4) is titled Social or Environmental Policies, the environmental guidance could be extrapolated to social policies as well. Without mandated requirements stating SN 51-333 guidance is applicable to social policies, laggards and those looking for loop holes may be able to undermine the intended "spirit" of the guidance outlined; Lindsay M. Tedds et al., "Learning to Play by the Disclosure Rules: Accuracy of Insider Reports in Canada, 1996-2010" (2012) at 32 online: <http://mpra.ub.uni-muenchen.de/39793/> (Accessed August 15, 2013). In relation to insider disclosure, the author's recommendations include providing greater education for insiders regarding their obligations, revealing the importance of clarifying responsibilities as part of the process to greater compliance. This recommendation could be applied to ensure non-financial disclosure obligations as well.
[1008] *Ibid* at 9-10.

example, environmental liabilities are discussed and elaborated to include disclosure consisting of remediation obligations; civil, administrative, and criminal fines and penalties; personal injury; and property damage and economic loss, including damage to natural resources.[1009] Finally, SN 51-333 argues for such disclosure to be given the same level of rigor as financial disclosure to ensure its reliability.[1010]

Although SN 51-333 specifically provides practical guidance and direction on environmental issues for corporations, there are a couple of limitations evident. The first is that SN 51-333 fails to address social and human rights consequences arising from environmental issues, and second, it also lacks the in-depth guidance demonstrated by the GRI.[1011] A similar lack of guidance is also characteristic of the extractive sector-specific disclosure obligations in NI 43-101 and NI 51-101.[1012] Even collectively, the above instruments fail to establish an equivalent level of environmental, social, or human rights guidance for SR or due diligence. This contrast becomes evident as the GRI guidelines, as discussed in Chapter 1, include guiding principles on materiality, stakeholder inclusiveness, sustainability context, and completeness, along with tests to determine what information is to be categorized into the above principles.[1013] These principles outline the necessary Standard Disclosure in their sustainability reports, that is, the most relevant and material information to the organization and of interest to most stakeholders.[1014] This is complemented by the GRI and the sector supplements providing guidance on the scope of information disclosure as well. Meaning, the GRI and the sector supplements outline guidance on a variety of topics, such as impacts on living and non-living natural systems;[1015] impacts on economic IPs;[1016] and certain sector-specific issues, such as artisanal and small-scale mining (ASM), which is a form of subsistence mining for over 100 million people in the developing

[1009] *Ibid* at 13.
[1010] *Ibid* at 22-23.
[1011] These shortcomings are highlighted by comparing SN 51-333 to the MMSS, OGSS, and the general GRI reporting guidance.
[1012] *See* discussion below for examination of NI 43-101 and NI 51-101.
[1013] MMSS, *supra* note 996 at 9-10. *See* Chapter 1 for further discussion on GRI.
[1014] *Ibid* at 10. *See* Chapter 1 for further discussion on GRI and standard disclosure.
[1015] MMSS, *supra* note 996 at 31.
[1016] *Ibid* at 30.

world;[1017] resettlement and Indigenous rights, which references the displacement of roughly fifteen million people annually who are economically, socially, and culturally integrated with their land;[1018] and community, which the GRI outlines to include local engagement processes, land use, land rights, and grievance mechanisms.[1019] The importance of targeting communities as a whole was seen in Guatemala where Goldcorp's Environmental and Social Impact Assessment failed to consider the Sipacapa, a smaller neighboring community directly impacted by a Goldcorp's subsidiary and mining project.[1020] Closure planning; [1021] labor;[1022] and materials are also addressed.[1023]

Discussed above with NI 43-101, companion policy 43-101 was seen to lack the authority to compel greater disclosure of risks and uncertainty associated with production decisions not based on feasibility studies.[1024] Similarly, SN 51-333, as a staff notice, suffers from a similar lack of regulatory authority to compel compliance. Even so, SN 51-333 still offers constructive and progressive guidance for disclosing environmental topics and issues. Through the reflexive and new governance approaches this notice also reasonably offer a level of guidance and awareness for a TNC to pay attention to other issues, topics, and trends, as nothing prevents SN 51-333 from being extrapolated to social and human rights issues and concerns. Such extrapolation is, however, unlikely especially without state compulsion. Therefore, not only does SN 51-333 outline the extent of environmental disclosure in Canada, which includes a failure to address

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[1017] ICMM, *Artisanal and Small Scale Mining*, online: icmm.com <http://www.icmm.com/page/84136/our-work/projects/articles/artisanal-and-small-scale-mining> (Accessed August 15, 2013).
[1018] MMSS, *supra* note 996 at 38, 40; Global Reporting Initiative, *Indicator Protocols Set Society (SO)*, online globalreporting.org <https://www.globalreporting.org/resourcelibrary/MMSS-Complete.pdf> at 8 of Society indicator protocol set, at 1, 12 of Human Rights Indicator Protocols Set (Accessed August 15, 2013); M.M. Cernea, "Development-induced and conflict-induced IDPs: bridging the research divide", Forced Migration Review, 2006 cited in Bogumil Terminski, "Mining-Induced Displacement and Resettlement: Social Problem and Human Rights Issue (A Global Perspective)" (University of Geneva, 2012) at 5, online: dlib.indiana.edu <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8836/Bogumil%20Terminski,%20Mining-Induced%20Displacement%20and%20Resettlement.%20Social%20problem%20and%20human%20rights%20issue.pdf?sequence=1> (Accessed August 15, 2013).
[1019] MMSS, *supra* note 996 at 5, 40.
[1020] On Common Ground, *supra* note 953 at 8.
[1021] MMSS, *supra* note 996 at 39.
[1022] *Ibid* at 34.
[1023] *Ibid* at 31, 41.
[1024] CP 43-101, *supra* note 888.

successive social and human rights issues related to environmental concerns, it also introduces the lack of a GRI equivalent social and human rights disclosure guidance policy.[1025]

The MMSS and OGSS specifically outline direction on Human Rights and Society issues. For example, the MMSS outlines different aspects on which disclosure should be made. This includes disclosure of "Investment and Procurement Practices; Non-discrimination; Freedom of Association and Collective Bargaining; Abolition of Child Labor; Prevention of Forced and Compulsory Labor; Complaints and Grievance Practices; Securities Practices; and Indigenous Rights."[1026] The most recent version of the GRI Reporting Guidelines adds disclosure of human rights assessment of the reporting organization's supply chain and Human Rights Grievance Mechanisms.[1027] The Societal elements include disclosure on Artisanal and Small-Scale Mining; Resettlement; Community; Closure Planning; Grievance Mechanisms and Procedures; Emergency Preparedness; Corruption; Public Policy; Anti-Competitive Behaviour; and Compliance.[1028] Supply chain assessment is also included in this aspect.[1029]

When comparing GRI social and human rights disclosure with Canadian securities laws, another disparity arises in the level of detail and scope of guidance. The extent of social and human rights guidance and disclosure is limited to NI 51-102, in the AIF, NI 41-101, and potentially NI 43-101.[1030] NI 41-101 clearly refers to the disclosure of any implemented human rights policies,[1031] as is the case with the AIF, which also explicitly outlines a requirement to disclose

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[1025] David Hess, "Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency" (2007) 17 Business Ethics Quarterly 3 at 469-70. Simply disclosing the development of policies without providing their impact and success does not ensure regulatory performance objectives are being met. Hess stipulates that where performance outcome requirements are not developed or required, or are costly to make "then reporting on the existence of policies is the best we can hope for".
[1026] MMSS, *supra* note 996 at 37; OGSS, *supra* note 996. The OGSS outlines similar Performance Indicators.
[1027] Global Reporting Initiative, *Sustainability Reporting Guidelines*, online: globalreporting.org <https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf> at 23 (Accessed August 21, 2013). [G4 Framework].
[1028] MMSS, *supra* note 996 at 37. OGSS, *supra* note 996.
[1029] G4 Framework, *supra* note 1027 at 23.
[1030] NI 51-102, *supra* note 687 at 51-102F2 Part 2, Item 5, section 5.1(4); NI 51-102, *supra* note 687 at Form 51-102F1 Part 2, section 1.4(d), and section 5.2 of 51-102F2; 41-101F1, *supra* note 698 at Item 5, s 5.1(4); NI 43-101, *supra* note 719 at Form 43-101F1, "Technical Report", at section 14(d).
[1031] *General Prospectus Requirements*, OSC NI 41-101 (22 December 2006), at Form 41-101F1 s 5.1(4), online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category4/rule_20061222_41-101_gen-pro-requirements.pdf> (Accessed August 15, 2013).

any implemented human rights policies fundamental to the operations of the business.[1032] Dhir makes the argument that the AIF should be read in sync with NI 43-101.[1033] This is partially due to the fact that section 5.4 of the AIF (Form 51-102F2) refers to "Companies with Mineral Projects", which NI 43-101 is primary targeted towards. Through this connection NI 43-101 may require the disclosure of any implemented human rights policies. For this reason, it is also reasonable to conclude NI 43-101 would similarly include human rights considerations, possibly under its "socio-economic" or "political or other relevant factors" topics.[1034] Though the level of disclosure guidance in Form 43-101F1 is not broken down into further detail, as it is in the GRI, Canadian securities disclosure obligations do not prevent companies to determine, or extrapolate, on their own the scope of detail, and so the level disclosure.

The lack of a corresponding instrument or policy specifically designated for social or human rights, similar to what SN 51-333 is for environmental reporting guidance, is also noticeably absent in Canadian securities disclosure obligations. The AIF does offer some help as it generally requires the disclosure of risk factors that relate to the corporation and its business,[1035] which includes the disclosure of health and environmental risks and political conditions.[1036] In relation to mining projects, NI 43-101 may also offer some relief since it outlines broad reference to legal, political or "other" issues.[1037] Despite focusing primarily on mineral reserves and resources and lacking an explicit reference to human rights, NI 43-101 is still unique as it offers a foundation for SR, and this is because it consistently applies to mineral projects regardless of whether an issuer is a public or private issuer listed on the TSX or TSXV.

The above comparison suggests that the GRI is capable of offering useful and detailed guidance on a variety of issues and topics. Even with its voluntary nature, the GRI can provide guidance where legislative and regulatory efforts end, offering valuable direction. As mentioned in

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[1032] NI 51-102, *supra* note 687 at 51-102F2 Part 2, Item 5, section 5.1(4).
[1033] Dhir, *shadows*, *supra* note 750 at 446.
[1034] NI 43-101, *supra* note 719 at Form 43-101F1, "Technical Report", s 14(d).
[1035] NI 51-102, *supra* note 687 at 5.2. Section 5.2 requires disclosure in order of seriousness to the business and the company.
[1036] *Ibid* at Item 5 of section 5.2.
[1037] NI 43-101, *supra* note 719 at Form 43-101F1, "Technical Report", at section 14(d); NI 51-101, *supra* note 719. NI 51-101 lacks a non-financial disclosure obligation, despite it focusing on oil and gas projects, similar to mineral projects.

Chapter 1, the GRI provides a source of information and guidance on issues founded and substantiated by stakeholder input. This operates similar to the SR process, and the reason why it is used as a standard of comparison. This view coincides with the conclusion from the OSC Review, that although no major overhaul of securities disclosure is needed,[1038] an argument can still be made there is a need for greater guidance with regard to ESG disclosure obligations.[1039]

4.4 Summary Conclusions

One conclusion identified in this chapter is that the current Canadian securities framework permits the consideration of a broad scope of issues without restricting the scope. In practice, however, environmental, social, corporate governance, and human rights disclosure under Canadian securities laws and regulations suffer from issues of weak enforcement and a lack detail and depth of guidance; also failing to provide an equivalent level of guidance as the GRI. This reveals Canada lacks a substantive, and authoritative, system of non-financial disclosure for Canadian extractive sector TNCs that are subject to the securities laws and regulations.[1040] At the same time, the current securities framework does not prevent the securities disclosure obligations from providing a platform on which to develop the SR process.

There are a number of instruments and efforts in which Canadian securities laws and regulations outline environmental, social and human rights disclosure. For instance, the prospectus disclosure document offered the disclosure of implemented social or environmental policies fundamental to the business as well as due diligence in risk disclosure. The limitation with the prospectus document was the complexity of the document and the difficulty for the majority stakeholders to comprehensively interpret it. The materiality thresholds, which played the important role of determining issues and events to disclose, were also an area of concern, particularly because of the uncertainty associated with whether or not environmental, social, and human rights issues were to be deemed material. This lack of clarity with the market impact and

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[1038] OSC Final Report, *supra* note 667 at Schedule 2 - summary of the round tables at 5.
[1039] *Ibid* at 7, 10, 96. Most participants agreed that the "basic role of the securities regulator is to set disclosure standards and ensure that issuers disseminate information to investors and other stakeholders" and "to ensure Canadian markets remain fair and efficient." A majority also claimed they would "like to see the OSC take a greater role in advancing and promoting ESG disclosure."
[1040] *See* Chapter 1 for a discussion of other state SR initiatives.

reasonable investor tests influences the type of disclosure in certain documents, such as the AIF, MD&A and MCRs. The AIF and MD&A are documents that broadly outlined environmental, social, and human rights topics. The AIF in particular requires the disclosure of environmental liabilities for those issuers engaged in mineral projects, which are also repeated in NI 43-101. Another instrument which focused on environmental issues was SN 51-333. This notice offered clarification on the test for materiality in addition to environmental disclosure and governance structures. The "deficit" with SN 51-333 was that it fell short of addressing secondary consequences, such as social and human rights concerns.

Part of the "shortcomings" identified above is also partially explained by the fact that venture issuers are not required to provide AIF disclosure. Despite explicitly outlining environmental, social, and human rights disclosure requirements, the OSC reasoned that the benefit received from AIF disclosure is less than the cost of imposing a disclosure requirement on venture issuers.[1041] This AIF exemption is attributed to the policy rationale of preventing "burdens" to the development of venture issuers.[1042] Another notable exemption is that private issuers are also not obligated to comply with the continuous disclosure obligations. Since the majority of extractive sector companies are listed on the TSXV, and a majority of the capital raised through private placements by issuers listed on the TSXV, a majority of which is by the extractive sector,[1043] this potentially classifies private extractive sector companies on the TSXV as not having to provide as much disclosure information as an extractive sector company on the TSX. In any case, whether listed on the TSX or TSXV all issuers engaged in mining and oil and gas projects are required to provide disclosure as required by NI 43-101 and NI 51-101. Overall, with the above exemptions, this suggests TSXV issuers provide less environmental and human rights information than TSX reporting issuers, and in general, that both TSX and TSXV entities are not given adequate guidance, or compelled, to provide a level of non-financial disclosure equivalent to the GRI.

[1041] *See supra* note 778; *CSA Notice 51-340 – Update on proposed National Instrument 51-103 Ongoing Governance and Disclosure Requirements for Venture Issuers*, OSC (25 July 2013), online: OSC <http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20130725_51-340_update-ni51-103.htm> (Accessed February 13, 2014). This instrument proposed the creation of disclosure requirements to help venture issuers, however it was not enacted because of the deemed burden it would impose. *See also supra* note 777 and 778.

[1042] *See supra* note 777 and *supra* note 778.

[1043] OSC Notice 45-712, *supra* note 689 at 2, 14.

The GRI explicitly covers "all main activities in the [extractive] sector" from exploration to processing and recycling to the closure and post-closure of projects, providing a detailed approach to reporting.[1044] This guidance includes a variety of topics and depth in guidance, at the same time it helps form a standardized system of disclosure as well as consistency that permits comparisons, whether through its disclosure framework or its Report or Explain Campaign Forum. In contrast, section 21.1(1) of Form 41-101F1, regarding prospectus disclosure, requires the disclosure of risk factors relating to the issuer's business, general risks inherent in the business carried on by the issuer, environmental and health risks, economic or political conditions, "and any other matter that would be likely to influence an investor's decision to purchase securities of the issuer"[1045]; Item 20 of Form 43-101F1 requires reporting issuers to discuss and disclose "reasonably available information" on environmental studies and "known environmental issues that could materially impact the issuer's ability to extract" resources or reserves, and any potential social or community related requirements and plans for the project; the MD&A instruction in section 1.4(d) of Form 51-102F1 of NI 51-102 explains that reporting issuers should specifically include "any factors that have affected the value of the project(s) such as change in commodity prices, land use or political or environmental issues;"[1046] CICA MD&A guidance requires disclosure to be "transparent and discuss the complete range of possibilities and possible outcomes," both good and bad;[1047] section 5.1(4) of the AIF, Form 51-102F2, requires the disclosure of "implemented" and "fundamental" policies to a company's operations;[1048] and section 5.2 of the AIF requires the disclosure of risks related to environmental, health, and political conditions along with any other risk likely to have an impact on an investor's decision to purchase the company's securities.[1049] The above guidance and rules provide another conclusion, that is, Canadian securities rules and regulations fail to outline consistent guidance for disclosure to achieve consistent reporting. In addition, the disclosure required from these rules and regulations is not necessarily intended for the purposes of SR. Unless explicitly requiring non-financial disclosure for SR, such information may not provide a

[1044] MMSS, *supra* note 996 at "What is the Mining and Metals Sector Supplement?".
[1045] 41-101F1, *supra* note 698 at Item 21: Risk Factors of Form 41-101F1.
[1046] NI 51-102, *supra* note 687 at Part 2, section 1.4, instructions (ii).
[1047] CICA 2009 Report, *supra* note 753 at 25.
[1048] NI 51-102, *supra* note 687 at Form 51-102F2 s 5.1(4).
[1049] *Ibid* at Form 51-102F2 s 5.2.

clear picture or be easily linked back to greater environmental, social, or human rights risks. Therefore, extractive sector TNCs may not disclose information or concerns when it may be obvious it should. One thought is to integrate GRI SR guidance into securities disclosure obligations. The summary of the disclosure obligations, despite their "limitations" offer a potential platform where SR can be implemented, within a state mandated framework with the capability to require compliance, stimulate dialogue, and eventually promote corporate self-reflection.

The GRI does not, however, represent an easy solution to a complex scenario of implementing SR and stakeholder engagement. According to Sarfaty, though the GRI's indicators "are normative tools that embed certain values and shape behavior according to a standard", they have the potential to result in certain costs.[1050] This risks a "box ticking approach" providing superficial, rather than any substantive effects on behavior; a focus on accuracy rather than relevance, risking public interests for business interests; and a movement away from "multi-stakeholder consensus building" towards one focused on companies.[1051] Since indicators rely on numerical data, stakeholders are potentially left out of the process of standard and indicator formation.[1052] This reliance on numerical data potentially distorts public values into numbers, preventing the use of indicators as regulatory tools.[1053] Another side effect is that those risks that are easier to quantify will be measured accurately and feature prominently (for example greenhouse gases), whereas other issues, such as human rights and other social impacts are "subordinated or even diluted".[1054] Integrated reporting, the concept of merging non-financial with financial reporting, arguably, translates "public values into financial terms" and therefore into business risks.[1055] This potentially transforms "value-laden" issues into "financial risks".[1056] Despite these risks, the GRI still offers to fill a void by outlining guidance on topics lacking

[1050] Galit A. Sarfaty, "Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting", (2013) 53 Virginia Journal of International Law 574 at 606-609, 614-621.
[1051] *Ibid* at 606- 607. This focus on companies shifts its aim from empowering stakeholders to holding corporations accountable.
[1052] *Ibid* at 609.
[1053] *Ibid* at 611.
[1054] *Ibid*. Relying on quantitative measures also fails to provide information about the seriousness of the violations.
[1055] *Ibid* at 613.
[1056] *Ibid*.

direction. Sarfaty warns to not treat GRI indicators "as ends in and of themselves" and instead to use GRI indicator guidance as a means to evaluate performance and improve behaviour.[1057]

Conclusion

This chapter reveals two overarching conclusions. First, the disclosure trend identified in chapter 1 is growing in Canada, and second, in comparison to the best practices of the GRI, Canadian securities disclosure obligations reveal shortcomings. These shortcomings include disproportionate and ambiguous guidance and detail, and fragile enforcement and compliance. The consequences of these weaknesses in comparison to the GRI is that they identify Canadian securities disclosure can benefit from GRI guidance, and help prevent TNCs from consistently being linked with allegations and involvement in environmental, social and human rights misconduct. An argument can still be made that the primary components of SR, stakeholder participation and dialogue, and state enforcement operating together as required by the reflexive law and new governance regulation theories are still developing in Canada. Environmental, social, and human rights reporting and transparency is not completely omitted from the Canadian securities regulations, and is actually growing. This view is shared by stakeholders in the OSC Review who felt that more guidance, reviews and stricter enforcement is needed rather than an expansion of existing disclosure requirements; from the development of SN 51-333 and its Environmental Reporting Guidance; OSC SN 15-704 and its promotion of greater transparency initiatives; and the adoption of the GRI in the mandate of the Extractive Sector CSR Counsellor. With regard to stakeholder engagement, the GRI does not, however, outline a process of providing stakeholder feedback to TNCs. Nonetheless, the GRI and its stakeholder infused knowledge-base have the potential to support Canadian securities non-financial disclosure

[1057] *Ibid* at 614, 616, 617, 619, 621. *See* text above accompanying footnote 987. The solutions Sarfaty offers in response to the above criticisms include "designing meaningful indicators that are outcome-oriented" and by measuring "information that is relevant to stakeholders, can be reasonably collected, and addresses issues on which change is most needed." "Avoiding a data overload", is the second suggestion offered, which looks to moderate the level of incoming information. Third, is "requiring third-party verification." This may be a role played by intermediaries, stakeholders such as civil society and industry organizations; actors under the new governance theory considered to play part of the rule-making role. Lastly, Sarfaty suggests "expanding participation by citizens and a broad group of experts". This last proposal looks to inform, involve and learn from different stakeholders. This last solution, like the solutions overall, epitomize the role of SR under the reflexive law and new governance theories, which includes informing stakeholders and then seeking feedback on issues that directly impact those stakeholders.

obligations, and move in the direction of formulating a SR-based regulatory framework. In addition to Canada and its CSR Counsellor, the endorsement and adoption of the GRI by other states supports the view that the GRI is viewed as a best practice capable of providing constructive, regulatory, guidance in the eventual formation of a SR-based regulatory framework.

Conclusion

The objective of this research study was to assess Canadian efforts relating to the disclosure of environmental, social, and human rights issues and information. This entailed examining the Canadian extractive sector operating internationally, and examining Canadian securities disclosure obligations with regard to environmental, social and human rights information. The study focused on the potential of disclosure as a regulatory tool to increase the level of transparency, self-awareness, and accountability of Canadian extractive sector transnational corporations (TNCs). This included identifying disclosure and reporting as an international best practice; the theoretical underpinnings of disclosure and reporting; the Canadian efforts promoting non-financial disclosure with regard to its extractive sector; and the extent to which non-financial disclosure is currently required under Canadian securities rules and regulations, and comparing these rules and regulations to the Global Reporting Initiative (GRI).

Research Question 1:

What is sustainability reporting? Specifically, what is environmental, social and human rights disclosure, and to what extent is such disclosure promoted through international initiatives as a tool for addressing the global governance gap?

Sustainability Reporting (SR) is the public disclosure of impacts of an organization's business activities on environmental, social, and human rights issues. SR also reveals whether or not business activities and impacts can be continued for a period of time and endured in a healthy manner for the duration of the project. SR, or environmental, social, and human rights disclosure, can consist of disclosure on a number of related issues and is usually limited in scope to the operations of the organization. SR is increasingly being promoted in a number of current international soft-law initiatives and the extent and depth of such disclosure is growing as well. This is reflected in the GRI, the United Nations (U.N.) Protect, Respect and Remedy Framework and its Guiding Principles, the U.N. Principles for Responsible Investment, the U.N. Global Compact, the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises, and the International Standards Organization, among others.

Research Question 2:

Why is disclosure promoted as a useful tool? What theories inform the trend in chapter 1? Additional related questions are: What role do these theories suggest exist for the state as a regulator of corporate conduct? To whom is such disclosure targeted? What are the critiques leveled towards disclosure as a regulatory tool?

Disclosure is a useful tool because corporate transparency compels corporate organizations to justify their actions, to educate stakeholders, and to allow stakeholders to hold corporate organizations accountable for their actions. The usefulness of disclosure was discussed in Chapter 1, and the theories informing the identified international disclosure, reporting and transparency trend are legal pluralism, reflexive law, and new governance regulation. New governance theory arises from a combination of theories and encompasses the reflexive law approach. Reflexive law permits indirect regulation by outlining the organizational principle of SR. SR informs stakeholders and allows stakeholders to provide relevant feedback. This feedback guides subsequent organizational behavior through self-reflective tendencies of the organization. New governance regulation, as a whole, outlines a process-oriented (through SR), participatory (through multi-stakeholders), and experimental (self-regulatory and constantly evolving) approach to regulation. This includes the state setting boundaries and allowing TNC self-regulation to develop and set standards.

A number of critiques are raised against disclosure as a regulatory tool. This includes the cost and complexity associated with implementing SR from the perspective of extractive sector TNCs. Another critique outlines the lack of state-mandated SR, its enforcement, and stakeholder feedback and input. These are normally explained by the argument that there is a strong corporate lobby against any such regulation. In addition, the required literacy to understand disclosed information, especially by Indigenous peoples and local communities in developing countries who are largely impacted by extractive sector operations is also a cause for concern, as is the fear of failing to empower the powerless and reinforcing the powerful, risking the furthering of pre-existing inequalities. The latter critique stems from the fact that SR and the institutionalization of any stakeholder participation is understandably more easily fulfilled by

richer more "developed state and market parties" than lesser developed and smaller companies, who will have a harder time satisfying these requirements.[1058]

As the critiques identify, the role for the state is a necessary component in the creation and operation of a reflexive law and new governance SR-based framework. These theories view the role of rule making by state governments on par with, and as one source of authority among, other private sources of authority. At the same time, this view sees the role of the state, and its unique authoritative power, as critically important in compelling and facilitating the enforcement of SR and its goals.

SR targets a broad scope of stakeholders. This is evident from the perspective of new governance theory and the evolution of the term stakeholders. "Stakeholder" previously only considered shareholders but now includes shareholders together with a wide variety of other actors. The consideration of a broad spectrum of groups, individuals, and organizations ensures corporate social responsibility (CSR) efforts accurately focus on relevant issues and actors rather than being employed to defend corporate activity, such as a means to avoid regulation and the creation of private, rather than public, functions and mechanisms. Overall, the process of SR and feedback is intended to take advantage of the stakeholder knowledge-base.

Research Question 3:

What specific steps has the Canadian federal government taken to implement the disclosure and reporting of environmental, social, and human rights impacts of Canadian extractive sector TNCs operating abroad?

Despite many calls for rules, laws and regulations, the most current established Canadian effort is the "Building the Canadian Advantage" initiative.[1059] The primary disclosure initiative of the voluntary Canadian Advantage is included in the Office of the Extractive Sector Corporate

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[1058] *See* section 1.5 in chapter 1.

[1059] Government of Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* (March 2009), online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx> (Accessed August 25, 2013).

Social Responsibility (CSR) Counsellor. The CSR Counsellor is relevantly tasked with promoting certain performance standards, which includes promoting the GRI and the OECD Guidelines for Multinational Enterprises (MNEs) and their respective disclosure initiatives. Canada is also in the draft stage of implementing an initiative that looks to improve transparency of payments from Canadian extractive sector companies to foreign governments, mirroring initiatives implemented in other states.

Research Question 4:

What steps have Canadian securities regulators taken to implement the disclosure and reporting of non-financial topics, such as environmental, social, and human rights impacts of TNCs operating abroad, through Canadian securities regulations? Overall, how do the Canadian efforts and initiatives compare with leading International Standards, such as the GRI, and the theories of reflexive law and new governance?

The steps Canada has taken to implement the disclosure of environmental, social, and human rights issues is reflected, although to a limited extent, in a number of instruments and efforts in Canadian securities laws. The Management's Discussion and Analysis (MD&A) and the Annual Information Form (AIF) under the continuous disclosure documents in National Instrument (NI) 51-102 outline a limited level of environmental, social and human rights disclosure guidance. The Canadian Institute of Chartered Accountants also outlines guidelines in order to clarify the level and type of disclosure expected in the MD&A. Other sources of environmental, social, and human rights disclosure in Canadian securities laws are outlined, again to a limited extent, in NI 41-101, which outlines information required in a prospectus; NI 43-101, which outlines standards for disclosure for mineral projects; and SN 51-333, which outlines environmental reporting guidance. As discussed in chapter 3, this includes the newly proposed initiative to provide transparency of payments from the Canadian extractive sector to foreign governments, which is envisioned to operate within the securities framework.

The limitations generally associated with environmental, social, and human rights disclosure within Canadian securities regulations includes ambiguous guidance and weak enforcement and

compliance. This includes a lack of consistent disclosure, an absence of detailed social and human rights disclosure, and a failure to include stakeholder integration and dialogue. Relevant exemptions from disclosure obligations are also identified, such as the TSXV issuer exemption from AIF disclosure and the "comply or explain" corporate governance practice disclosure requirements under NI 58-101. Another important exemption entails a private issuer exemption from the prospectus and continuous disclosure obligations. Limited disclosure guidance is also seen in the materiality thresholds under the market impact and reasonable investor tests. The lack of clarity with materiality makes it difficult for issuers to accurately determine whether or not environmental, social and human rights issues or events are to be outlined in disclosure documents.

Despite the claim that Canadian securities disclosure suffers from shortcomings this does not mean the current securities disclosure system is inadequate with regard to SR. An argument can still be made that SR, stakeholder participation and dialogue, and state enforcement operating together as required by the reflexive law and new governance theories are still developing in Canada. This is seen from the existence and development of the number of securities instruments, such as SN 51-333, the OSC Review, National Policy 51-201, NI 58-101, OSC SN 15-704, and the adoption of the GRI under the CSR Counsellor's mandate. For example, whether or not an issuer is listed on the Toronto Stock Exchange (TSX) or TSX-Venture Exchange, NI 43-101 will always require the relevant mining project disclosure. NI 43-101, together with the above mentioned instruments, offer a potential platform on which to base the SR requirement. Since current securities disclosure obligations often broadly outline concerns, such as social, or economic or environmental issues, this allows issuers the option to explore related issues touching upon those concerns. In comparison to initiatives from other states, discussed in chapter 1, Canada is not falling behind in promoting the disclosure of environmental, social, and human rights through securities laws. Together with the Canadian efforts examined in chapter 3 and 4 there is a growing inclination in Canada towards the use of disclosure and transparency in standards, rules, and regulations, which generally operates at a pace and on par with other states.

Though critics argue the state is a necessary component in the successful implementation of a new governance SR-based regulatory framework, state-backed securities regulations do not

always ensure adequate compliance. The GRI requires similar attention, because GRI guidance and indicators face the risk of being reduced to a simple means to an end, or box-ticking approach, rather than as a mechanism to evaluate performance and improve behavior. However, this behavior changing potential of the GRI can offer the current Canadian securities disclosure obligations guidance to develop a SR process, along with business due diligence and stakeholder dialogue. Overall, chapter 4 concludes environmental, social, and human rights disclosure in Canadian securities regulations is slowly rising, but at the same time suffers from shortcomings, particularly in comparison to the best practices of the GRI. The stakeholder infused guidance of the GRI can help Canada, and its securities regulations, develop a SR-based framework capable of regulating Canadian TNCs operating internationally.

Areas for Future Research

The research in this study concludes that despite Canada lacking elements of the reflexive law and new governance theories and a level of guidance similar to the GRI, Canada is slowly situating itself in a position to use and promote greater disclosure and reporting of environmental, social, and human rights information. As a result, Canada has the potential to form a SR-based framework, consisting of reflexive and new governance elements, capable of regulating Canadian extractive sector TNCs. Although Canada is not a leader in SR, the proposal that Canada should refer to the GRI helps solve some of the pitfalls associated with the current lack of SR guidance in Canadian provincial securities disclosure obligations.

What the above research leaves uncertain is the ways in which the SR obligation can actually be implemented and used to promote the reflexive and new governance theories. The details of how SR is to logistically operate would be valuable in furthering the goal of this research paper. Additional topics worthy of further research and discussion touch upon the interpretation of information from SR. The complexity of disclosure, the logistics of disseminating information, and the standardization of disclosure to ensure even and comparable disclosure also need further elaboration and guidance. Since the reflexive and new governance approaches allow a flexible free-market approach to address stakeholder concerns, establishing a standardized SR process raises the question of how much disclosure from businesses is optimal. For example, this could

mean disclosing too much information, whether or not out of fear of not disclosing enough, which has the potential of undermining the benefits of disclosure. There is also the potential of intentionally omitting disclosure, for example of human rights violating behavior. This as a result, prevents optimal disclosure to shareholders, locals, and other stakeholders. This suggests another area of future research: the process of determining what level and depth of disclosure is adequate to permit the optimal operation of a SR-based new governance system. Other factors of SR logistics include the creation of a verification system to ensure the accuracy and truth of information; the development of forums or modes of communication for subsequent feedback and dialogue from stakeholders in regulatory or non-regulatory situations; and eventually the issue of standardized disclosure to ensure SR comparisons. In addition to reporting logistics, the issues of cost also suggest an area of future research. This relates to the costs associated with reporting for business and the costs of non-disclosure to stakeholders. Ford has argued that "[w]hether principles-based systems really do impose greater ex post costs on private actors is an empirical unknown."[1060] There will inevitably be arguments for and against the proposition that new governance regulatory systems entail greater costs or savings for businesses, but, regardless, it identifies a point of further research because if there are greater costs than benefits then the chance of implementing a SR-based new governance system will likely meet greater resistance. With regard to stakeholders, failing to inform and consider the stakeholder perspective, potentially contradicts the reasonable investor test and neglects a valuable and accurate source of information. Despite research on the effectiveness of the GRI and securities commission reviews of compliance with the disclosure obligations, greater research into the use, value, and potential of informing stakeholders may also prove insightful.

[1060] Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, (2005) 103 Mich Law Review 2073 at 2131–34 cited in Ford, New Governance, *supra* note 936 at 39. Ford mentions that an accurate measurement of greater costs would have to consider the difference between ex ante costs with regard to prescriptive rule-making and principles-based regulation. Such an examination would consider the ex ante drafting costs and ex post costs of inappropriate, overly broad or narrow application of rules to unanticipated circumstances. Ford argues that it is not reasonable to incur ex ante costs of prescriptive rule-making when the regulator is operating under a serious information deficit. In comparison, Rubin argues that "open-ended, learning systems are preferred" because in this case the regulator "knows the result it is trying to achieve but does not know the means for achieving it". A regulator cannot perfectly achieve corporate compliance, "[i]t is the business of the regulator to try to ensure good compliance with law," with corporations being better situated "to determine appropriate means [to] reach that end."

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