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CANADA-GHANA ENGAGEMENTS IN THE MINING SECTOR: PROTECTING HUMAN RIGHTS OR BUSINESS AS USUAL?

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Abstract

While states have traditionally had the responsibility to protect human rights, multinational corporations (MNCs) are now increasingly expected to also respect human rights in their pursuit of profitability. However, the increased incidence of human rights violations associated with the activities of MNCs in developing countries has led to various efforts to promote the corporate duty to respect human rights. This article seeks to examine the extent to which Canada's national Corporate Social Responsibility (CSR) strategy can contribute to the prevention or amelioration of incidences of human rights violation associated with the activities of Canadian mining companies operating in Ghana. The article suggests that while Canada's national CSR strategy does present some opportunities, its ability to ameliorate incidence of human rights violations remains limited. The article concludes by considering the theoretical and practical implications for Canada-Ghana engagements in the mining sector.

1. FOR DECADES, it was a common practice for scholars to treat business and human rights as two distinct entities – this was in part because states were established as the main actors that could be held accountable for human rights violations. Wesley Cragg, Denis Arnold, and Peter Muchlinski noted that discussions on the human rights duties of corporations were generally confined to their indirect legal responsibilities.¹ With the rising social and economic influence of multinational corporations and the relative disempowerment of governments caused by neoliberal globalisation,² there has been a shift towards acknowledging the human rights obligations of multinational corporations (MNCs). At the international level, there is a growing

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¹ Wesley Cragg, Denis G Arnold & Peter Muchlinski, "Guest Editors' Introduction: Human Rights and Business" (2012) 22:1 Bus Ethics Q 1.

² David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44:4 Va J Intl L 931.

recognition among diplomats, policy makers, business strategists, and social activists about the need for mechanisms to pursue remedies for victims of corporate-related human rights abuses, particularly for transnational claims that cannot or will not be processed by local legal institutions. At the national level, we are witnessing varying degrees of effort to implement the 2011 United Nations (UN) Guiding Principles on Business and Human Rights among states, with a number of states yet to produce a National Action Plan and commence the implementation process.³ Central to these debates and recent developments in the business human rights arena is the quest for more corporate accountability.

According to Peter Utting, corporate accountability focuses on issues of power and advocates for the need to countervail the interests of big businesses.⁴ He notes that corporate accountability emphasises questions of corporate obligations, the role of public policy and law, the enforcement of penalties in cases of corporate misdemeanours, the right of victims to seek redress, and imbalances in power relations. Similarly, Niamh Garvey and Peter Newell link accountability to the concepts of answerability – that is, an obligation to provide an account of one’s action and inaction – and enforceability – which refers to a mechanism for ensuring obligations – ensuring that these are met and sanctions are imposed in the case of non-compliance.⁵

A number of civil society organisations have been at the forefront of drawing attention to issues of corporate misconduct since the late 1990s, holding businesses to account for their

³ Jolyon Ford, *Briefing: Business and Human Rights: Emerging Challenges to Consensus and Coherence* (London: Chatham House, The Royal Institute of International Affairs, 2015), online: <www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150226BusinessHumanRightsFord.pdf>.

⁴ Peter Utting, “The Struggle for Corporate Accountability” (2008) 39:6 *Development & Change* 959 at 965.

⁵ Peter Newell, “Civil Society, Corporate Accountability and the Politics of Climate Change” (2008) 8:3 *Global Environmental Pol* 122. See also Niamh Garvey & Peter Newell, “Corporate Accountability to the Poor? Assessing the Effectiveness of Community-Based Strategies” (2005) 15:3/4 *Development in Prac* 389.

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actions.⁶ For example, Utting pointed out that grave human rights violations by transnational corporations, including the issues of sweatshops and child labour (such as in the case of Nike), sent a wave of shock among Western citizens and consumers and provoked different forms of activism (e.g. protests, campaigns etc.).⁷ Extractive companies like Eron in India, Unocal in Burma, and ExxonMobile in Indonesia have been implicated in human rights violations committed by hired security forces and accused of colluding with governments to violently stifle protests.⁸ However, it was events like the arbitrary execution of Ken Saro-Wiwa and eight other Ogonis by the Nigerian government in November 1995 that partly catalysed calls for change in corporate human rights obligations and gave rise to the emergence of a number of voluntary codes of conducts among key transnational businesses and industry associations.⁹ These kinds of incidences have meant that multinational corporations have faced social pressure aimed at regulating business social responsibility and their human rights obligations.

Against this backdrop, this article seeks to address the following objectives:

- (a) Critically examine the historical and current debates in the evolving literature on business and human rights;
- (b) Analyse the extent to which the Canadian national CSR Strategy is able to promote a corporate duty to respect human rights in Ghana.

Part II reviews the literature on business and human rights and indicates how the field has evolved over time. Part III offers brief insight into the Ghanaian gold mining industry and outlines some of the developments in the industry in the wake of macroeconomic policy changes

⁶ Cragg, Arnold & Muchlinski, *supra* note 1.

⁷ Utting, *supra* note 4.

⁸ Florian Wettstein, "CSR and the Debate on Business and Human Rights: Bridging the Great Divide" (2012) 22:4 Bus Ethics Q 739.

⁹ Cragg, Arnold & Muchlinski, *supra* note 1; Idemudia Uwafiokun & Ite Uwem "Demystifying the Niger Delta conflict: towards an integrated explanation" (2006) 33:109 Rev of African Poli Econ 391.

in the 1980s, whereas Part IV examines sources of corporate-community conflicts in Ghana's mining sector. Part V discusses some human rights-related issues with regards to Canadian mining companies in Ghana and the emergence of Canada's national CSR Strategy. Part VI looks at the extent to which the Canadian national CSR Strategy is able to promote the respect of human rights among Canadian-based mining companies doing business overseas. The article concludes in Part VII with some remarks on the potential implications of the Canadian government's CSR Strategy on human rights and business in an African context.

II. BUSINESS AND HUMAN RIGHTS: A HISTORICAL AND CONTEMPORARY PERSPECTIVE

Few would deny that transnational corporations (TNCs) constitute powerful actors in the global economy with the capacity to create employment, generate wealth, and contribute to poverty alleviation.¹⁰ Yet, as Arnold observed, TNCs are also known to commit human rights infringements such as paying low wages to workers, providing inhumane working environments, contributing to environmental degradation, and disregarding host communities' rights.¹¹ These cases of corporate human rights abuses have been publicised in the media through the advocacy work of NGOs and activists.¹² In particular, companies in the oil, gas, and mining industries have been reported to be the most complicit in business-related human rights violations, followed by the food and beverage industry, apparel and footwear industry, and information technology industry.¹³

¹⁰ John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights" (2008) 3:2 *Innovations* 189.

¹¹ Denis G Arnold, "Transnational Corporations and the Duty to Respect Basic Human Rights" (2010) 20:3 *Bus Ethics Q* 371.

¹² Peter T Muchlinski, "Human Rights and Multinationals: Is there a Problem?" (2001) 77:1 *Intl Affairs* 31.

¹³ Arnold, *supra* note 11.

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While egregious corporate misconduct is not a new concern, the context in which these corporate human rights violations are being debated has evolved. According to Christiana Ochoa, the field of business and human rights can be categorised into three eras: the era of impunity, the era of civil society and self-regulation, and the era of law and legal institutions.¹⁴ During the era of impunity, businesses committed human rights violations in different jurisdictions, causing much harm to several individuals and communities across the globe. While these victims of corporate human rights abuses documented their experiences, no institution was willing to consider their business-related rights claims. What followed was the era of corporate accountability, led by civil society organisations that built up immense pressure and demanded laws that would make corporations liable for their misdemeanours. Traditionally, states were the primary institutions to develop and enact laws but, unfortunately, states were ignoring these demands. Instead, response to such organised civil society manifested in the form of increased corporate self-regulation and the initiation of global dialogues on business and human rights facilitated by international financial organisations and the United Nations (UN). One such notable effort came from the International Labor Organization (ILO), the Organization for Economic Co-operation and Development (OECD), and the UN in the form of the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (the “Norms”). Carolin Hillemanns explained that the report drafted by the UN Sub-Commission for the Promotion and Protection of Human Rights in 2003 was an attempt to make businesses amenable to international law; that is, the report was calling for a radical rethinking for allocating responsibilities for protecting and promoting human rights to the state.¹⁵

¹⁴ Christiana Ochoa, “The Future of Corporate Accountability for Violations of Human Rights” (2009) 103 *Proceedings of the 103rd Annual Meeting (Am Soc for Intl L)* 281 at 291-293.

¹⁵ Carolin F Hillemanns: “UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights” (2003) 4:10 *German LJ* 1065.

The report was naturally met with fierce resistance by members of the business community.¹⁶ Although the *Norms* did not gain immense support, it gave reason to believe that the era of civil society and self-regulation could potentially lead to the formation of concrete legal instruments.

More importantly, this led to the appointment of special representative John Ruggie in 2005 by the UN, who produced one of the most significant works within the discourse of business and human rights. This marked the beginning of the era of law and legal institutions.¹⁷ In part, this era emerged out of the need for greater clarity and consensus on the substantive legal obligations directly applicable to business and/or the state with jurisdiction over them.¹⁸ Legal scholars became fundamentally interested in determining whether the private business sector, which has been enjoying the protection of certain human rights, should also be given human responsibilities or duties.¹⁹ Some business ethics scholars argued that multinationals have direct human rights responsibilities on contractualist grounds²⁰ and on an agent-based conception of human rights.²¹ Some similarly advocated for the use of human rights as potentially enforceable norms for business behaviour.²² In contrast, Strudler contends the notion of human rights obligations in a non-Western context.²³

In 2011, the UN Human Rights Council adopted Ruggie's "Protect, Respect and Remedy" framework, which has received both praises and critiques within academic circles. Under this framework, (1) the government has the responsibility to protect against human rights

¹⁶ Arnold, *supra* note 11.

¹⁷ Ochoa, *supra* note 14.

¹⁸ Ford, *supra* note 3.

¹⁹ Cragg, Arnold & Muchlinski, *supra* note 1.

²⁰ Thomas Donaldson, *The Ethics of International Business* (Oxford: Oxford University Press, 1991).

See also Wesley Cragg, "Human Rights and Business Ethics: Fashioning a New Social Contract" (2000) 27:1 J Bus Ethics 205.

²¹ Arnold, *supra* note 11.

²² Stephen J Kobrin, "Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights" (2009) 19:3 Bus Ethics Q 349.

²³ Alan Strudler, "Confucian Skepticism about Workplace Rights" (2008) 18:1 Business Ethics Quarterly 67.

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abuses by third parties, including corporations, (2) businesses are expected to respect human rights through due diligence, and (3) the need for greater access to effective remedies for victims is also recognised.

According to this framework, companies have an obligation to obey the law even in circumstances where the formulation and enforcement of national laws are limited or nonexistent.²⁴ Furthermore, multinationals are called up to exercise due diligence by identifying, preventing, and adequately handling human rights issues. In specific terms, companies are expected to adopt human rights policies, undertake human rights impact assessments, create an internal corporate culture that is based on a commitment to human rights, and track and report on performance.

The corporate duty to respect human rights constitutes the baseline responsibility of companies in addition to complying with national laws.²⁵ Ruggie asserted that social expectation or social license to operate (SLO) should form the basis for outlining the exact scope of corporate human rights responsibility.²⁶ Because it is a minimum requirement, companies cannot compensate for human rights abuses by ‘doing good’ elsewhere. Beyond respecting human rights, which constitutes a negative moral duty to do no harm, companies are encouraged to proactively take positive steps towards the promotion of human rights. This is because companies can impact almost all internationally recognised rights (see Table 1). Thus, the concept of a “sphere of influence”²⁷ remains a helpful construct for companies in considering the impact their business activities may have on their employees, host communities, supply chain, consumers, and other stakeholders.

²⁴ Ruggie, *supra* note 10.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

Table 1: Business Impact on Human Rights²⁸

Area of Law	Rights Impacted by Businesses
Labor Rights	<ul style="list-style-type: none"> • Freedom of association • Right to work • Right to family life • Right to rest and leisure • Right to a safe work environment • Right to equality at work • Right to equal pay for equal work • Right to non-discrimination • Abolition of child labour • Abolition of slavery and forced labour • Right to organise and participate in collective bargaining • Right to just and favourable remuneration
Non-Labor Rights	<ul style="list-style-type: none"> • Rights to life, liberty and security of a person • Right to marry and form a family • Right to political life • Right to privacy • Right to self-determination • Freedom of movement • Right to social security • Equal recognition and protection under the law • Right to education • Right to adequate standard of living • Right to physical and mental health; access to medical services • Right to participate in cultural life, the benefits of scientific progress, and protection of authorial interests • Freedom from torture or cruel, inhuman and degrading treatment • Right to a fair trial

The adoption of Ruggie's framework also induced a shift from pursuing legally binding instruments to establishing norms and duties with emphasis on promoting national-level awareness. Ruggie himself precluded the possibility of drafting a multilateral treaty as a viable solution for effective and legitimate remedies for business-related human rights abuses.²⁹ This,

²⁸ John Ruggie: This table is based on a study of 320 cases (from all regions and sectors) of alleged corporate-related human rights abuse reported on the Business and Human Rights Resource Centre website from February 2005 to December 2007.

²⁹ Ford, *supra* note 3.

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however, did not put an end to the debate about a treaty. In fact, by mid-2013 it became increasingly evident that treaty proponents never abandoned the idea and were willing to revive discussions about a legal document binding multinationals to their human rights obligations. To put it in the words of Ford, “from this perspective, GPs [Guiding Principles] were a parallel development and are not substitute for moving towards a treaty.”³⁰ In contrast, opponents of the treaty path argued that a legally binding agreement would not necessarily result in greater protection of human rights. While consensus between the two camps – that is, voluntary industry schemes versus international legal instruments – is not in sight, it is clear that ‘soft norms’ are presently being privileged.³¹ Nonetheless, the present era of law and legal institutions represents a considerable leap forward considering that global norms, or global “soft” laws, have been established, laying the foundation for a possible transition to hard laws. At the moment, the responsibilities ascribed to businesses remain non-binding under international law. However, Ruggie’s work has considerably contributed to altering the conventional perspective on the allocation of human rights responsibilities between the public and private sector. More importantly, it has initiated a discussion on the human rights responsibilities of transnational corporations operating in fragile states where conflicts, weak institutions, and gaps in governance are prevalent.³²

³⁰ *Ibid* at 3.

³¹ Ford, *supra* note 3.

³² Cragg, Arnold & Muchlinski, *supra* note 1.

III. GHANA'S MINING SECTOR IN CONTEXT

Mining in Ghana has a long history that can be traced back to the fifteenth century³³ In fact, the country's former colonial name was Gold Coast. Ghana is richly endowed with gold, diamonds, manganese, oil, and bauxite, with gold as the largest contributor to the national economy.³⁴ In fact, Benjamin Aryee estimates that gold accounts for 38% of total merchandise and 95% of total mineral export. According to Ghana's Minerals Commission, gold has made up 90% of all mineral revenue over the past two decades.³⁵

There are two types of gold mining in Ghana: small-scale and large-scale. Within the small-scale mining sector is a practice known as *galamsey*, which refers to individuals who make a living through illegal mining activities, *i.e.* gathering and selling minerals at or just below the soil surface without possessing the necessary license.³⁶ Despite being illegal, *galamsey* is said to dominate the small-scale gold mining sector, with an estimated 60,000 people involved in these practices.³⁷ On the other hand, large-scale mining operations are predominantly undertaken by foreign multinationals with access to more resources, greater capacity, heavier equipment, and up-to-date technology and this sector employs approximately 20,000 Ghanaians. While fewer people are employed in the large-scale mining sector, it contributes to about 45% of the country's foreign currency, making the sector crucial to the Ghanaian economy.³⁸ Generally, the distribution of mining benefits is disproportionate. Due to their low level of education and skills,

³³ Ghana Minerals Commission, *Minerals and Mining Policy of Ghana* (Accra, Ghana: Ministry of Land and Natural Resources, 2014).

³⁴ Theresa Garvin et al, "Community-company relations in gold mining in Ghana" (2009) 90:1 J Environmental Management 571.

³⁵ Benjamin NA Aryee: "Ghana's mining sector: its contribution to the national economy" (2001) 27:2 Resources Pol'y 61.

³⁶ Anthony Aubynn, "Sustainable solution or a marriage of inconvenience? The coexistence of large-scale mining and artisanal and small-scale mining on Abooso Goldfields concession in Western Ghana" (2009) 34:1/2 Resources Pol'y 64.

³⁷ *Ibid.*

³⁸ Garvin et al, *supra* note 34.

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the labour of residents from the smaller towns and rural areas where mines tend to be located are not particularly sought after.³⁹ Consequently, Anthony Aubynn has argued that large-scale mining does not significantly contribute to promoting local economies.⁴⁰

During the 1980s and 1990s, Ghana adopted the World Bank and International Monetary Funds' Structural Adjustment Program (SAP) to supposedly promote socio-economic development. Like other developing countries in Africa, Latin America, and Asia, Ghana was expected to implement certain economic and social policies to qualify for funding and debt-relief from these lending agencies. Among others, Ghana was forced to devalue its currency, adopt a flexible exchange rate, decrease inflation, reduce public services and government spending (especially on education, health, and welfare), eliminate trade barriers, privatise public enterprises, and stimulate economic growth through export.⁴¹ While the benefits and drawbacks of SAPs have been widely debated,⁴² there is no doubt that the mining industry witnessed immense growth between 1983 and 1998, particularly with rising export earnings from gold and diamonds.

In an attempt to provide a stable policy environment, the Government of Ghana created the Minerals Commission in 1986 and enacted its first mining-specific legislation called PNDC

³⁹ Thomas Akabzaa & Abdulai Darimani "The Impact of Mining Sector Investment: a Study of the Tarkwa Mining Region" Structural Adjustment Participatory Review International Network (SAPRIN) (2001), Accra Ghana

⁴⁰ Aubynn, *supra* note 36.

⁴¹ *Ibid*; Aryee, *supra* note 35. See also; Government of Ghana: "Economic Recovery Program", *Government Printer* (1984) Accra, Ghana; John Brohman, *Popular Development: Rethinking the Theory and Practice of Development* (London: Blackwell Publishers, 1996); Alejandro Portes, "Neoliberalism and the Sociology of Development: Emerging Trends and Unanticipated Facts" in J Timmons Roberts and Amy B Hite, eds, *From Modernization to Globalization: Perspectives on Development and Social Change* (Oxford: Blackwell Publishers, 2000) 353; Kwadwo Konadu-Agyemang: "The Best of Times and Worst of Times: Structural Adjustment Program and Uneven Development in Africa: The Case of Ghana" (2000) 52:3 *The Professional Geographer* 469.

⁴² See Daniel Tetteh Osabu-Kle, "The politics of one-sided adjustment in Africa" (2000) 30:4 *J Black Stud* 515; E. Osei Kwadwo Prempeh, "The politics of one-sided adjustment in Africa: A response to Professor Osabu-Kle" (2001) 31:5 *J Black Stud* 563.

Law 153.⁴³ To further encourage foreign direct investment (FDI) through the provision of financial incentives, the Ghanaian government revised the mining code to the *Mining and Minerals Act* (Act 703) in 2006, with technical assistance from the World Bank.⁴⁴ The establishment of a regulatory institution and the introduction of a new legal framework created an enabling environment for large-scale mining as they offered foreign transnational corporations general tax allowances, exemption from customs duties, a rebate on royalties, and fewer foreign ownership restrictions.⁴⁵ Ultimately, these factors made Ghana an attractive destination for many foreign mining companies seeking lucrative business opportunities in a politically stable environment. Not surprisingly, the increase in FDI in Ghana's mining sector had various implications for different stakeholders. For mining communities in particular, the increased presence of foreign multinationals has given rise to human rights violations, environmental degradation, and loss of traditional sources of livelihood, among others.⁴⁶

IV. MINING, CONFLICTS AND HUMAN RIGHTS IN GHANA

Corporate-community conflicts regarding the use of land and control over natural resources have persisted since the inception of gold mine production in Ghana.⁴⁷ Given the near absence of government in these communities and the lack of legal instruments to protect community rights, foreign multinationals, including Canadian mining companies (see Table 2), are expected to be

⁴³ Lucas Rutherford & Michael Ofori-Mensah, "Ghana's Mining Code: In Whose Interest?" (2011) 17:4 Governance Newsletter 1, online: <dspace.africaportal.org/jspui/bitstream/123456789/36049/1/gov-v17-n4.pdf?1>.

⁴⁴ *Ibid.*

⁴⁵ Akabzaa & Darimani, *supra* note 39. See also Aryee, *supra* note 35; Aubynn, "Liberalism and Economic Adjustment in Resource Frontiers", *supra* note 36; and Ghana Minerals Commission, *Production and Revenue Statistics for the Mineral Sector, the Second Quarter* (Accra, Ghana: The Minerals Commission, 2001).

⁴⁶ Garvin et al, *supra* note 34.

⁴⁷ Gavin Hilson & Frank Nyame, "Gold mining in Ghana's forest reserves: a report on the current Debate" (2006) 38:2 Area 175.

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profitable, protect the environment,⁴⁸ and respect human rights.⁴⁹ In addition to this, mining companies are expected to function as a surrogate to the government by contributing to sustainable development in the host community where they do business.⁵⁰ In practice, community expectations do not always align with mining companies' strategic priorities of increasing production while minimizing operational costs. Indeed, demand for community investments and mining companies' pursuit of profitability continue to form a source of tension in the Ghanaian mining sector.

For example, Gavin Hilson and Frank Nyame inform us that thousands of Ghanaian subsistence farmers and small-scale miners have been forcibly displaced in the quest to expand the operation of large-scale gold mining, without having received adequate compensation.⁵¹ In and around the town of Tarkwa particularly, a foreign mining company unlawfully destroyed houses, schools, and religious institutions to commence mine production.⁵² Additionally, private security personnel contracted by mining companies and, with the help of armed police and soldiers, have used extreme violence aimed at stopping illegal miners. These actions have sometimes resulted in severe injuries to community members, and in other instances have even led to deaths of community members.⁵³

In response to these incidences of human rights violations, host communities have adopted community-based strategies to secure corporate accountability and/or demand for appropriate remedies for corporate-related human rights abuses. In the case of Ghana, a number

⁴⁸ Uwafiokun Idemudia, "Corporate Social Responsibility and Development in Africa: Issues and Possibilities" (2014) 8:7 *Geography Compass* 421 [Idemudia, "Corporate Social Responsibility and Development in Africa"].

⁴⁹ Ruggie, *supra* note 10.

⁵⁰ Garvin et al, *supra* note 34.

⁵¹ Garvin and Nyame, *supra* note 47.

⁵² Jerry Mensah-Pah, "Demolished Ghanaian village wins court decision" *Oxfam America* (11 July 2008), online: <www.oxfamamerica.org/explore/stories//demolished-ghanaian-village-wins-court-decision/>.

⁵³ Richard Ellimah: "Stained Gold: A Story of Human Rights Violations in Ghana's Mining Industry" *Amphibious Accounts: Human Rights Stories from the Global South* (14 July 2015), online: <www.amphibiousaccounts.org/#!/publicacion/27>.

of civil society organizations such as WACAM, Third World Network, and CEPIL have been involved in the civil regulations of corporations and have utilized negotiations, dialogue and mediation, litigation, out of court settlement, campaigns, as well as training and education on community rights to hold mining companies accountable. One such example includes the out of court settlement between a group of landlords called the Lawyer Group and the South African mining company Gold Fields Ghana Limited (GFGL). WACAM, Third World Network, and CEPIL supported the group of landlords in rejecting the resettlement package offered by GFGL. Through a series of discussions, individual members of the Lawyer Group received compensations ranging from 16 million cedis (about US \$2,500) to 18 million cedis (about US \$2,800) and payments of 2 million cedis (about US \$312) as inconvenience allowance. The new resettlement package also included a community clinic for New Atuabo and three boreholes.⁵⁴

As Theresa Garvin et al explain, differences in expectations about the roles and responsibilities of companies and host communities contribute to misunderstanding, mistrust, and disagreements. On one hand, local residents are concerned about the negative social, economic, and ecological impacts of mining projects and attribute the loss of livelihoods, farmlands, and of crops, as well as environmental pollution, to mining activities. Hence, mining companies that fail to adequately address these concerns and meet the developmental expectations of their host communities are likely to encounter hostile actions and behaviors from members of those communities. On the other hand, foreign mining multinationals consider the worldview of host communities to be a challenge and point to negative externalities caused by larger national and global forces over which they have little control.⁵⁵ Bridging these inconsistent

⁵⁴ Boteng Clement, "A decade of community-based mining advocacy in Ghana – WACAM's story. *Modern Ghana* (1 November 2008), online: <www.modernghana.com/news/190303/1/a-decade-of-community-based-mining-advocacy-in-gha.html>.

⁵⁵ Garvin et al, *supra* note 34.

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perceptions and associated expectations have consistently proven to be difficult. As a result, conflicts surrounding mining projects remain prevalent in Ghana.

Table 2: List of Canadian mining companies operating in Ghana

Golden Star Resources Ltd.	Gold	Toronto, Ontario	Wassa & Prestea	Toronto Stock Exchange
Kinross Gold Corporation	Gold	Toronto, Ontario	Chirano	Toronto Stock Exchange
Mindland Minerals Ghana Ltd. (subsidiary of Rosita Mining Corporation)	Gold	Toronto, Ontario	Kaniogo & Kwahu Praso	TSX Venture Exchange
Moydow Mines International	Gold	Toronto, Ontario	Hwidiem & Agyakusu	No information provided
Pelangio Exploration Inc.	Gold	Toronto, Ontario	Obuasi, Manfo, Akroma	TSX Venture Exchange
Xtra Gold Resources Corp.	Gold	Toronto, Ontario	Kyebi/ Kibi	Toronto Stock Exchange
African Gold Group, Inc.	Gold	Toronto, Ontario	Asankrangwa & Nyankumasi	Toronto Stock Exchange
African Queen Mines Ltd.	Gold	Vancouver, British Columbia	No information	TSX Venture Exchange
AMI Resources Inc.	Gold	Vancouver, British Columbia	Beposo	TSX Venture Exchange
Asanko Gold Inc.	Gold	Vancouver, British Columbia	Asankragwa & Asumura	Toronto Stock Exchange New York Stock Exchange
Asante Gold Corporation	Gold	Vancouver, British Columbia	Betanase & Fahiakoba	Athens Stock Exchange Frankfurt Stock Exchange
Ashanti Gold Corp.	Gold	Vancouver, British Columbia	Anunso & Kossanto	Toronto Stock Exchange
Birim Goldfields Inc.	Gold	Montreal, Quebec	Bui District	No information provided
Buccaneer Gold Inc.		Toronto, Ontario	No information	Toronto Stock Exchange
Castle Peak Mining Ltd.	Gold	Port Coquitlam, British	Apankrah	Toronto Stock Exchange

		Columbia		
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V. CANADA–GHANA ENGAGEMENTS: CANADIAN MINING COMPANIES IN GHANA

Ghana's mining sector is dominated by foreign multinationals (e.g. USA, Australia, South Africa, UK etc.), with Canadian-based mining companies as one of the major actors that possess significant mining assets in the country (see Table 2). According to MiningWatch Canada, Canadian businesses have invested more than \$200 million in Ghana's gold and bauxite mining sectors since the late 1980s and over half of the 200 active concessions in Ghana are reported to be part-owned by Canadian-based mining corporations.⁵⁶ Some of the Canadian mining multinationals that operate in Ghana and that are listed on the Toronto Stock Exchange (TSX) include Golden Star Resources, Kinross Gold, and Asanko Gold.⁵⁷ Notably, Canada's Kinross Gold was named the fifth top-producing company in the world in 2015 by Thomas Reuters GFMS.⁵⁸ Whilst these companies have proven to be profitable and are globally competitive, their business activities often generate negative environmental and social externalities for their host communities. According to a report by the Canadian Centre for the Study of Resource Conflict (CCSRC), over 30% of reported cases of community conflict, human rights violations, and

⁵⁶ Asad Ismi, "Canadian Mining Companies Destroy Environment and Community Resources in Ghana" *Mining Watch Canada* (25 August 2005), online: <miningwatch.ca/blog/2005/8/25/canadian-mining-companies-destroy-environment-and-community-resources-ghana#_edn3>>.

⁵⁷ Kristen Moran, "Gold-producing Countries: Gold Mining in Ghana" *Gold Investing News* (18 September 2016), online: <investingnews.com/daily/resource-investing/precious-metals-investing/gold-investing/gold-mining-in-ghana/>.

⁵⁸ Investing News Network, "10 Top Gold-producing Companies" *Gold Investing News* (21 November 2016), online: <investingnews.com/daily/resource-investing/precious-metals-investing/gold-investing/barrick-newmont-anglogold-goldcorp-kinross-newcrest/>

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environmental degradation in developing countries were associated with business activities of Canadian mining companies.⁵⁹

Indeed, complaints from Canadian civil society groups (*e.g.* The Council of Canadians)⁶⁰ and host communities about the egregious behavior of Canadian mining corporations in developing countries (*e.g.* disregard and violations of community rights, displacement of local communities, perpetuation of poverty and inequalities, etc.) prompted the Government of Canada to launch a national Corporate Social Responsibility (CSR) Strategy in 2009, which was later revised in 2014. Former Special Representative of the UN Secretary-General on Business and Human Rights, Ruggie praised the Canadian government for taking the initiative to voluntarily devise a national strategy on what it means to be a good corporate citizen. In his report, he states the following:

Furthermore, with one single exception, no government has publicly stated that non-cooperation by a company with an NCP or a negative finding against a company will have any material consequences imposed by a government. Forty years of pure voluntarism should be a long enough period of time to conclude that it cannot be counted on to do the job by itself. The one exception is Canada, which in November 2014 announced a CSR new strategy, “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad.” The strategy references both the Guidelines and the UN Guiding Principles. [...] Surely this example deserves to be emulated more widely within the NCP community.⁶¹

As the only North American country to have designed a national CSR strategy without being urged to do so by global institutions, the Canadian case seems to support the idea that the field of business and human rights is undergoing transformation and has evolved from what was once a

⁵⁹ The Canadian Centre for the Study of Resource Conflict, *Corporate Social Responsibility & the Canadian International Extractive Sector: A Survey*, by Ashraf Hassanein et al (Revelstoke, BC: The Canadian Centre for the Study of Resource Conflict, 2009).

⁶⁰ The Council of Canadian, “ACTION ALERT: Show your support for Canadian corporate accountability for human rights violations and environmental degradation” (12 November 2010), online: <canadians.org/node/3381>

⁶¹ John Ruggie & Tamaryn Nelson, “Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges” (2015) Corporate Social Responsibility Initiative Working Paper No 66, online: <www.hks.harvard.edu/index.php/content/download/76202/1711396/version/1/file/workingpaper66.pdf>.

period of corporate decriminalization to a period of heightened civic regulations by governments, non-governmental organizations (NGOs), and international organizations.

A. REGULATING CANADIAN MINING COMPANIES THROUGH THE NATIONAL CORPORATE SOCIAL RESPONSIBILITY STRATEGY

The unwillingness or inability of host governments to guarantee justice for corporate-related human rights violations has caused host communities to approach the home state of mining companies to enact laws that will govern the behavior of mining MNCs overseas. In fact, the Canadian Parliamentary Subcommittee on Human Rights and International Development of the Standing Committee on Foreign Affairs and International Trade (SCFAIT) has been hearing evidence from delegations of community members on the adverse environmental and human rights impacts of Canadian mining companies operating in developing countries for several years. In 2005, the Subcommittee produced a report in which it developed ten recommendations, emphasizing the need for compliance with international human rights standards and the importance of monitoring and complaint mechanisms.⁶² The Government responded to the Subcommittee's call for "clear legal norm" by rejecting several of the recommendations in the SCFAIT Report.⁶³ Although the response recognized the state's responsibility to protect and promote human rights, it also stated that Canadian law does not encompass "extraterritorial application."⁶⁴ The Government explained that the recommendations in the SCFAIT Report could raise issues relating to "conflict with the sovereignty of foreign states; conflicts where states have legislation that differs from that of Canada; and difficulties with Canadian officials

⁶² Parliament of Canada, Subcommittee on Human Rights and International Development of the Standing Committee on Foreign Affairs and International Trade, *Fourteenth Report* (June 2005) (Chair: Bernard Patry), online:

<www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=38&Ses=1&DocId=1961949>

⁶³ Parliament of Canada, *Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade: Mining in Developing Countries – Corporate Social Responsibility*, online: <www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2030362&Language=E&Mode=1>.

⁶⁴ *Ibid.*

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taking enforcement action in foreign states." Hence, their commitment would be confined to best practices of other states. Under international law, a state cannot exercise jurisdiction over any circumstances it chooses, as this may impinge upon the sovereign interests of other states.⁶⁵ While home state regulation is assumed to require the extraterritorial jurisdiction, Sara Seck argues that in the environmental and human rights context, home state regulation is permissible as such regulations promote shared international norms and do not stand in conflict with home state jurisdiction.⁶⁶ Jennifer Zerk points out that the traditional understanding of home state jurisdiction under public international law tends to equate regulations with "command and control" regulation.⁶⁷ For Zerk, extraterritoriality in relation to home state regulation should instead be conceptualized as alternative forms of home state practices that impose extraterritorial responsibilities, warrant extraterritorial rights, or provide extraterritorial benefits.

In line with this interpretation of home state regulation, the Government of Canada launched its first national CSR Strategy, titled *Building the Canadian Advantage: A Corporate Social Responsibility CSR Strategy for Canadian International Extractive Industries* in 2009, later revised in 2014 to *Doing Business the Canadian way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*. Both strategies constitute a national effort by the Canadian government to respond to criticisms from corporate accountability advocates demanding that the government ensure that Canadian mining companies adopt best CSR practices and respect human rights.⁶⁸ Initially, the Office of the Extractive Sector CSR

⁶⁵ Lassa Oppenheim, Robert Jennings & Arthur Watts, eds, *Oppenheim's International Law*, 9th ed (Longman, 1992) at 457.

⁶⁶ Sara L Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11:1 Yale Hum Rts & Dev LJ 177.

⁶⁷ Jennifer A Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" (2010) Corporate Social Responsibility Initiative Working Paper No 59, online: <www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf>.

⁶⁸ Uwafiokun Idemudia, "Canadian Government and Corporate Social Responsibility: Implications for Sustainable Development in Africa (Paper delivered at the Corporate Social Responsibility, Governance Frameworks, Human

Counsellor and the OECD National Contact Point (NCP) were established to mitigate corporate-community conflicts.⁶⁹ However, because the CSR Counsellor's power was limited to facilitating rather than arbitrating complaints made by the local communities where Canadian extractive businesses operate, pressure from stakeholders continued to grow.⁷⁰

In particular, Canadian civil society organizations (e.g. MiningWatch Canada and Canadian Network on Corporate Accountability) mobilized support for C-Bill 300 (a private member's bill) that was intended to (1) put in place minimum mandatory human rights, labor and environmental standards; (2) create a complaint mechanism that would allow communities in developing countries that have been injured by Canadian companies to file complaints against them in Canada; and (3) create sanctions for companies that are non-compliant with those standards, in the form of loss of governmental financial and political support.⁷¹ While the bill narrowly failed to pass, the Government of Canada revised the 2009 national CSR strategy to address some of the concerns raised by this corporate accountability movement. Accordingly, in the enhanced CSR strategy, companies refusing to voluntarily partake in dispute resolution led

Security: Examining Canada's Role in Africa's Natural Resource Sectors Workshop at Queen's University, 3-4 May 2016) [unpublished] [Idemudia, "Canadian Government and Corporate Social Responsibility"]. See also Global Affairs Canada, *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector*, online: "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf> [Global Affairs Canada, "Doing Business the Canadian Way"]; Global Affairs Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng> [Global Affairs Canada, *Building the Canadian Advantage*].

⁶⁹ Global Affairs Canada, *Building the Canadian Advantage*, *supra* note 68.

⁷⁰ Idemudia, "Canadian Government and Corporate Social Responsibility", *supra* note 68.

⁷¹ Jamie Kneen, "Canada's Subsidies to the Mining Industry Don't Stop at Aid: Political Support Betrays Government Claims of Corporate Social Responsibility" *MiningWatch Canada* (15 June 2012), online: <miningwatch.ca/blog/2012/6/15/canada-s-subsidies-mining-industry-don-t-stop-aid-political-support-betrays>.

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by the CSR Counsellor are penalized through the withdrawal of political and financial support by the Government of Canada.⁷²

VI. CANADIAN NATIONAL CSR STRATEGY AND THE RESPECT OF HUMAN RIGHTS IN GHANA: CHALLENGES AND OPPORTUNITIES

Canada's CSR strategy was supposedly designed to promote respect for human rights among Canadian mining companies operating overseas. However, a close examination of the CSR strategy suggests that its actual ability to promote this corporate duty to respect human rights is limited.

First, the respect and promotion of human rights are treated as a subset of mining companies' voluntary CSR activities because the national CSR strategy is underpinned by an economic rationality. Canadian extractive companies are encouraged to handle human rights-related issues in a manner that will allow them to continue operations. For instance, the document states: "Canadian Trade Commissioners can provide contacts and advice related to identifying, managing and mitigating environmental and social risks, including those related to human rights".⁷³ According to Elisa Giuliani, Grazia Santangelo, and Florian Wettstein, one of the challenges with CSR is that it has largely emerged from a business and management scholarship where the debate has been "scattered in terms of targets, instruments [and] audiences."⁷⁴ Companies set their own CSR standards and choose which issues to give prominence. In contrast, the business and human rights debate is predominantly rooted in legal scholarship, with the *International Bill of Human Rights* as the main frame of reference. Accordingly, the business and human rights approach offers little flexibility with regard to the

⁷² Idemudia, "Canadian Government and Corporate Social Responsibility", *supra* note 68. See also Global Affairs Canada, "Doing Business the Canadian Way", *supra* note 68.

⁷³ Global Affairs Canada, "Doing Business the Canadian Way", *supra* note 68 at 5.

⁷⁴ Elisa Giuliani, Grazia D Santangelo, & Florian Wettstein, "Human Rights and International Business Research: A Call for Studying Emerging Market Multinationals" (2016) 12:3 *Management & Organization Rev* 631 at 633.

concrete human rights obligations that companies have towards their stakeholders.⁷⁵ Yet, within Canada's national CSR strategy, the corporate duty to respect human rights is phrased as a voluntary code rather than an obligation that Canadian mining companies must adhere to at all times, without compromise. The Canadian government abstains from using legal language that unequivocally instructs corporations to take their ethical obligations seriously. At present, the national CSR strategy thus appears to prioritize the needs of Canadian mining companies over host communities' enjoyment of human rights in Ghana's mining sector.

Second, while Canada's national CSR strategy makes explicit reference to the *UN Guiding Principles on Business and Human Rights*, respecting human rights is understood as a social risk that companies must mitigate in order to improve their CSR performance and create a competitive advantage. For example, the document mentions that "[c]ompanies must operate responsibly in a conscious and consistent way to mitigate environmental and social risks, including those related to human rights."⁷⁶ Moreover, the Canadian government explains that "[m]anaging social risks, including through conscious efforts to respect human rights, is increasingly important to companies' success abroad."⁷⁷ Essentially, the corporate duty to respect is couched as a business case whereby the respect and promotion of human rights becomes a tool to advance the business agendas as opposed to becoming a vehicle for addressing the social problems of mining communities in Ghana.

Third, given that the concerns of host communities were not initially taken into consideration, the Canadian government has been forced to shift focus from capacity building within host country institutions to conflict prevention, as captured by this statement:

⁷⁵ *Ibid.*

⁷⁶ Global Affairs Canada, "Doing Business the Canadian Way", *supra* note 68 at 3.

⁷⁷ *Ibid* at 4.

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[...] the Government is stepping up efforts to support engagement between companies and communities, including at the exploration stage. Meaningful and regular dialogue between companies and communities, local communities, civil society and host country governments [...] can be of critical importance to addressing potential conflicts [...]⁷⁸

In particular, emphasis is being placed on “prevention of disputes at their early detection” and “understand[ing] local customs, culture and expectations.”⁷⁹ The neglect of community concerns has meant that the Canadian government must devise solutions that treat the symptoms rather than addressing the sources of corporate-community conflicts. This is because the government conceptualized CSR challenges as issues *within* host countries and failed to recognize the ways in which Canadian corporations, directly and indirectly, contribute to undermining local institutions, thereby causing or becoming complicit in human rights violations.⁸⁰

While there are reasons to believe that the national CSR strategy may not be the most effective method for guaranteeing the respect and promotion of host communities’ human rights, some elements of the revised CSR strategy may prove essential in encouraging mining companies to fulfil their human rights obligations. For example, the enhanced CSR strategy now includes mechanisms that both the government and civil society can utilize to potentially hold Canadian companies accountable. In essence, Canadian mining companies are expected to adopt industry best practices and participate in dispute resolution if they are to benefit from the government’s economic diplomacy and avoid penalties:

In line with Government of Canada’s ‘economic diplomacy’ approach, the Government of Canada’s services include the issuance of letters of support, advocacy efforts in foreign markets and participation in Government of Canada’s trade missions. Canadian companies found not to be embodying CSR best practices and who refuse to participate in dispute resolution processes contained in the CSR Strategy will no longer benefit from economic diplomacy of this nature. Furthermore, such a designation will be taken into

⁷⁸ *Ibid* at 9.

⁷⁹ *Ibid* at 11, 3.

⁸⁰ Idemudia, “Canadian Government and Corporate Social Responsibility”, *supra* note 68.

account in the CSR-related evaluation and due diligence conducted by the Government of Canada's financing crown corporation, Export Development Canada (EDC), in its consideration of the availability of financing or other support.⁸¹

It is important to note that the accountability mechanisms adopted in the revised national CSR strategy are predominantly efficient when corporations are considerably dependent on government funding. Nevertheless, the introduction of an accountability instrument is vital and signifies the government's willingness to resort to soft economic penalties (*i.e.* withdrawal of governmental diplomatic and financial support) as a way of incentivizing Canadian companies to respect human rights.

VII. CONCLUSION AND EMERGING TRENDS

The literature on business and human rights is still largely emerging⁸² and it has largely been driven by efforts to hold transnational corporations accountable by ensuring that their business practices do not involve human rights abuses. While a significant amount of effort has been directed at exploring the nature of human rights obligations upon MNCs, little effort so far has been geared towards understanding the extent to which MNCs are enabled by states to meet such obligations. Consequently, based on the *UN Guiding Principles on Business and Human Rights*, this article has explored the extent to which the Government of Canada's national CSR strategy can promote the corporate duty to respect human rights in Ghana's mining sector within the context of Canada-Ghana engagements.

As a major player in the global mining sector, the launch of Canada's initial and revised national CSR strategies represents an attempt by the Canadian government to respond to the call for some form of social control over the behavior of Canadian mining companies abroad. This is

⁸¹ Global Affairs Canada, "Doing Business the Canadian Way", *supra* note 68 at 12-13.

⁸² Idemudia, "Corporate Social Responsibility and Development in Africa", *supra* note 48.

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partly because the activities of Canadian mining companies have been known to generate negative social and environmental externalities for local communities and contribute to incidences of corporate-community conflicts that often form the context for human rights abuses. However, while Canada's national CSR strategy does widen the space for the demand for corporate accountability with regards to human rights abuses, its focus on securing competitive advantage for Canadian mining companies and its inability to clearly stipulate enforceable accountability mechanisms that are open to local communities in Ghana means that the extent to which the national strategy can promote a corporate duty to respect human rights is limited. This problem is further accentuated by the fact that social problems associated with the mining activities of Canadian companies are essentially framed within a risk-based paradigm, rather than seen as an opportunity to contribute to sustainable development within these communities.

The implications of this study suggest that while interest in the human rights obligations of business continue to garner greater international support, the extent to which such support translates into concrete change on the ground remains unclear. In addition, given that the Canadian national strategy was designed to respond to domestic pressure, it has paid limited attention to the priorities of developing countries.⁸³ Consequently, Canada-Ghana engagement in the mining sector might not necessarily translate into better human rights outcomes for members of local communities where Canadian mining companies undertake their activities. There is thus a need for future research to examine empirically the ways in which human rights indicators within local communities in Ghana have either improved or deteriorated since the launch of Canada's national CSR strategy.

⁸³ Idemudia, "Canadian Government and Corporate Social Responsibility", *supra* note 68.