RIGHTING THE WRONGS

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Introduction

The seeming invincibility of transnational corporations operating around the world in general and Canadian mining companies in particular necessitates an examination of the current standards and measures being implemented in the host countries and communities. As the discourses on corporate responsibility and corporate accountability become more sophisticated, the situation of each and every community that hosts these transnational companies get left behind in the dialogue.

There are two cases featured in this paper – the first one was nominated for the 2004 Davos awards as an *Outstanding Human Rights Violator* and as a *Socially and Environmentally Irresponsible Corporation* (special prize). The second one should have been nominated during its time for the scorn and disrespect shown to its host communities. These cases are chosen to show that Canadian mining companies were, and still are, involved in the commission of abuses ranging from violations of human rights to environmental degradation.

The first part will be devoted to examining the history of the engagement of Canadian mining companies in the Philippines. It will look at how TVI Pacific and Placer Dome, both Canadian mining companies, abused the trust and authority given to them in Canatuan and Marinduque in the Philippines, respectively.

In Part II, the current discourses happening at the state level will be discussed in Section A. In expanding on the concept of primacy of state law, two of the more important national laws, the indigenous peoples rights and environmental rights, will be discussed to argue that since they have more protective standards, the Canadian mining companies operating in the Philippines will be bound by the conditions of these laws.

Then, in Section B, the regional and international initiatives that are currently looking at the issue of whether transnational corporations have obligations and duties under international law so that they are bound to comply with international human rights norms will be examined. The OECD Guidelines will be discussed briefly and the UN Human Rights Norms for Business more extensively to see whether the actions of TVI Pacific and Placer Dome constituted violations of their international human rights obligations. Lastly, in Section C, the mechanisms currently available in making transnational corporations legally and directly accountable to their host countries and communities will be described.

PART I

The cases discussed below are chosen to illustrate how the Canadian mining companies behave in both pre- and post-mining activities in their chosen areas in the Philippines. It is interesting to note that there are no significant differences with the behaviors of the mining companies discussed below whatever the phase they were in. They both treated their host state and communities with scorn. It is indeed a sad state of affairs for the affected communities and peoples in the Philippines when these companies started digging up their earth.

Sitio[1] Canatuan, Siocon

Siocon is a town located in the southern part of the province of Zamboanga del Norte, in Mindanao. It covers an area of 50,320 hectares, 80.34 percent of which is forestland. The area is primarily agricultural with farming as a major source of livelihood. Deep sea or sustenance fishing is the secondary source. The

[1] 'Sitio' is a unit smaller than a village.

residents are composed of three groups of peoples – the *Christians*, who live on the lowland area to manage their farms, the *Subanons* who settled in the hinterlands and developed upland farming as their main source of livelihood, and the *Muslims* who live mostly on the coastal areas.

However, even while Siocon is a primarily agricultural area, small-scale mining started in the area from 1986 to the 1990s. It is during this time that Ramon Bosque applied for a Prospecting Permit over an area of 486 hectares in Siocon. Subsequently, a Royalty Agreement was executed between Ramon Bosque and Benguet Corporation over the area covered by the Prospecting Permit plus an additional 81 hectares through a mineral claim. Thereafter Bosque and Benguet Corporation jointly applied for a Mineral Production Sharing Agreement[2] (MPSA) on April 10, 1992 over 1,695 hectares which was later reduced to 508 hectares. The application was approved on October 23, 1996.[3] The area includes Mount Canatuan.

TVI Pacific, Incorporated

TVI Pacific was incorporated on January 12, 1987 and has its principal office in Alberta, Canada.[4] In 1993, it established its presence in the Philippines by creating the TVI Resource Development Phils (Inc) and registering it with the Philippine Securities and Exchange Commission.[5] TVI Resource is a subsidiary of TVI International Marketing Limited (Hongkong), which in turn is a wholly owned subsidiary of TVI Pacific, Incorporated[6]. TVI Hongkong owns 40% of TVI Resource while the remaining 60% is distributed among several corporations like Alberta Resource Development Corporation, Southeast Gold Resources Corporation and CMJ Minerals, Incorporated.[7] After the corporate entity was set up, TVI Pacific, through its wholly owned subsidiary, conducted mineral prospecting in Canatuan.

On October 6, 1994, TVI Resource and Benguet Corporation executed an Exploration Agreement with Option to Purchase in connection with the MPSA application filed by Bosque and Benguet Corporation. The MPSA was approved. Pending the approval, TVI Pacific, Inc. applied for an Environmental Compliance Certificate (ECC) for the Canatuan Mining Project and it was approved on June 8, 1997. Thereafter, a Deed of Assignment dated June 16, 1997 over the MPSA area was executed between Ramon Bosque/Benguet Corporation and TVI Resource "to assign, transfer and convey to the latter all the rights, interests and obligations under the MPSA." Under the terms, TVI holds 100% interest in the MPSA subject to a 1% royalty interest to Ramon Bosque, with a provision that Benguet Corporation could buy back in for 12.5% participating interest, by paying 12.5% of costs to date plus interest.[8] The Department of Environment and Natural Resources (DENR) approved the Deed of Assignment on May 14, 1998 and it subsequently ordered the issuance of the MPSA in the name of TVI Resources Development (Phils.) Incorporated but with the annotation, *"assignment from Ramon B. Bosque/Benguet Corporation."*[9]

The Indigenous Peoples of Siocon

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[2] Rep. Act. No. 7942 § 26(a) (1997) (defining a mineral production sharing agreement).
[3] MPSA No. 054-96-IX was issued to Benguet Corporation and Ramon Bosque over an area of 508 hectares located at Canatuan, Barangay Tabayo, Siocon, Zamboanga del Norte; on file.
[4] TVI Pacific, Inc., Annual Information Form (2005), at www.tvipacific.com/updates/31dec04AIF.pdf.
[5] *Id*. at 2, 39.
[6] TVI Pacific, Incorporated has the biggest mining claim area in the Philippines, with a total claimed area of up to 1,256,302 hectares. Considered to be a neophyte company, in terms of its assets, it is at present aggressively expanding its investments in the country.
[7] TVI Pacific, Inc., *supra* note 4 at iv (referring to the complete list of subsidiaries).
[8] *Id*. at 27.
[9] Complete List of Approved MPSA (March 31, 2004) available at www.mgb.gov.ph (last visited on 1 August 2005).

The story of the Subanons in Siocon could be traced to as far back as the pre-Spanish period. As part of their traditional practice, they would offer their prayers from the top of the highest peak, which in Siocon is, Mount Canatuan. During Timuay[10] Manglang's leadership, an epidemic struck the community. To spare the people, he offered the highest kind of ritual at Mt. Canatuan. It was believed that the prayer done in Mt. Canatuan was what saved the tribe. From then on, the Subanons considered the mountain as their traditional prayer and worship area and as the sacred burial grounds of their ancestors.

In 1987 the Philippine Constitution was enacted and with it the rights of the indigenous people were articulated. In 1989, the Subanons in Siocon organized themselves into the Siocon Subanon Association, Incorporated (SSAI) and they applied for a Forest Stewardship Management Agreement (FSMA) for the recognition of their right to manage their own forests, which they received in 1991.[11] Subsequently, the SSAI filed an application for a Certificate of Ancestral Domain Claim (CADC) in 1993.[12] Finally, on October 21, 1997, in recognition of the Subanons' native and time immemorial possession[13], the Philippine Government awarded the Certificate of Ancestral Domain[14] Claim (CADC) to the *Subanon Indigenous Cultural Community* over 6,522.684 hectares in Siocon. The claim was subsequently converted to a Certificate of Ancestral Domain Title[15] (CADT) on June 2003.

It is important to note that the title and right of the Subanons over their ancestral domain, which includes Mt. Canatuan, was settled and recognized with the awarding of the CADT and, therefore, the area of Siocon should have been taken out of the ambit of public property that the State has the right to alienate.

But, irrespective of the overlap between the ancestral domain and the MPSA area, TVI Pacific continued with its mining operations while intimidating and harassing the Subanons. TVI has desecrated their burial grounds and violated their religious right to worship by continuing to conduct mining activities on Mt. Canatuan. Families were displaced by the construction of the mine plant, office buildings, barracks and the warehouses. The continuous bulldozing forced other families to relocate to some other area.[16]

On August 30, 1999, the SSAI staged a human barricade to prevent and protest against the entry of large drilling equipment. For them, it symbolized the start of the end.

The heavy hand

TVI Pacific employs a paramilitary force known as the Special Civil Armed Auxiliaries (SCAA) whose members are armed and trained by the military but who operate and are paid as employees of the mining company. By 1996, there were more than 100 SCAA members. The SCAA barred access to the community, built road blocks, blocked the entry of food, harassed community leaders and residents, confiscated goods intended for the members of the tribe, burned houses and fired rifles at anti-mining community members.[17] In one testimony, the SCAA forced a tribal leader off his motorcycle and into taking by foot the abandoned, rough and dangerous road to reach home. A Subanon female was also asked to get off the motorcycle she hired and was forced to walk home for more than 3 kilometers, in the

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[10] *Timuay* is the Subanon term for 'heriditary leader'.
[11] Carl Cesar Rebuta, Public Eye for Davos Awards on Toronto Ventures, Incorporated as a Socially and Environmentally Irresponsible Corporation (2004), available at www.business-humanrights.org/Categories/Individualcompanies.
[12] *See id*.
[13] Rep. Act No. 8371 § 3(p) (1997) (defining time immemorial possession).
[14] *Id*., at § 3(a) (defining what is an ancestral domain).
[15] *Id.,* at § 3(c) (defining what is a certificate of ancestral domain title).
[16] Rebuta, *supra* note 12.
[17] *Id*.

dead of the night, despite being 8 months pregnant. From 1999, the SCAA has become increasingly forceful in dispersing the barricades and protests. The attacks on the Subanons and other residents in the Canatuan area are well documented.[18]

On March 17, 2004, a human barricade was formed composed of Subanons, Muslims, Christians and other supporters. The protesters had organized themselves into the group *Save Siocon Watershed Paradise Movement* (SSWPM). They were trying to block the entry of heavy equipment owned by ALNOR construction, a subcontractor of TVI. A number of SCAA members surrounded the protesters and shot at them. Four people were injured by shrapnel and were rushed to the hospital.[19] We could only assume under whose orders the SCAA were acting. According to various reports, TVI never admitted to giving the orders to install checkpoints and harass the Subanons.

These are just some of the testimonies of the people of Siocon who have been tireless in their opposition against the mining activities of TVI. These are just some of the experiences of the Subanon community who merely want a peaceful existence on their own land, despite the heavy had of TVI.

It is important to note at this point that acquiring a mining permit through an assignment of rights was not the process envisioned and mandated by the Philippine Mining Act. TVI Pacific circumvented the requirements to undergo an actual application and to obtain the community's consent prior to any exploration or any mining activity. There are still pending issues as regards the validity of the transfer but no challenge has been formally offered.[20] The TVI Annual Information Reutrn states: "mining operations and exploration activities are subject to governmental regulations… Amendments to current laws and regulations governing operations and activities of mining companies or more stringent implementation thereof could have an adverse impact on the [c]orporation and to obtain the required permits from applicable regulatory agencies may be more onerous and time consuming than originally anticipated by the [c]orporation."[21]

Given the condition described above, there is obviously a problem with the following: *first*, the inability to control/regulate TVI Pacific to respect domestic mining legislations; and *second*, the corporations' unwillingness to recognize the rights of indigenous peoples, among which are the rights not to be displaced and their right to their cultural integrity. Although the issue of whether human rights have attained the status of jus cogens or customary law is beyond the scope of this article, a preliminary discussion of how these rights may be enforceable against transnational corporation will be covered below.

Marinduque Island

The island has been besieged with misfortunes since large-scale mining activities were commenced in 1969. To be sure, human rights were violated quite regularly during more than three decades of intensive mining operation. The mines were abandoned; the open pit dams hosting contaminated tailings were laid bare; the rivers were wasted by continuous mine tailings seepage from the dams. The Marinduque tragedies were called the worst disaster ever. I call it the worst violation ever done to humans.

Placer Dome, International

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[18] *See, e.g.,* Samad Saeedy, *Spotlight on Mining Abues in the Philippines*, Peace and Environment News, December 1999-January 2000, *at* www.perc.ca/PEN/1999-12-01/sueedy.html.
[19] Nettleton et al., *supra* note 10 at 40.
[20] Geoff Nettleton *et al*., Breaking Promises, Making Profits: Mining in the Philippines 30 (December 2004).
[21] TVI Annual Information, *supra* note 4, at 42-43.

The mine operation in the Marinduque Island started in 1969, with the partnership of Marcopper Mining Corporation, President Ferdinand Marcos and Placer Development Limited, a Canadian mining company. The latter was then renamed Placer Dome, International. For the duration of its involvement, Placer Dome owned 39.9% of the mine while Marcos owned 50%. During this time, Placer Dome provided the financial and technical aspects of the mining operation.[22] The operation progressed satisfactorily until disaster struck one after the other.

At the beginning of the mining operation, Marcopper maintained two copper mines and at least three tailings dams to receive mine tailings and wastes from the mine. These dams ran across the island. The mining activities started on the Tapian Pit. The first plan was to dispose of the mine tailings from Tapian into two dams but the first dam, the Makulapnit Dam, was never fully constructed so Marcopper decided to dump the wastes from the Tapian mine directly unto Calancan Bay.

This is how it started …

Between 1975 and 1991, the Placer Dome Management dumped some 200 million tones of mine wastes into the bay via a 14 km. pipeline.[23] The heavy metals that appeared to be leaching from the mine tailings include lead, molybdenum, arsenic, aluminum, cadmium, zinc, copper, selenium, manganese, silver and iron.[24] Reports of severe mental and physical retardation, various skin diseases and lesions, lead poisoning, death from heavy metal poisoning and severe arsenic infection evinced just some of the more rampant impacts on the health of the residents of Calancan Bay.

After a series of cease and desist orders[25], probably in recognition of the error in their ways and of the threat posed to those living in and around the tailings, direct dumping was eventually stopped when Marcopper developed the old mine, the Tapian pit, as an alternative location for its waste.[26]

How it went on …

After the Tapian Pit was exhausted, Marcopper and Placer Dome then turned to the San Antonio Pit where the new ore was but which was previously intended as a tailings pond. Not knowing where to dump the wastes and tailings from the San Antonio mine, the Maguila-guila creek was diverted and an earthen dam was constructed in the Mogpog River to contain the waste materials from San Antonio.[27] So, the Maguila-guila dam was constructed to contain 354 million tons of waste rock from the San Antonio mine. During the building of the dam, community protests, through petitions and letters, were incessant for they doubted the integrity of the dam and feared that it would burst one day.[28] It didn't happen immediately but eventually the catastrophe happened.

On December 6, 1993, in the dead of the night, the Maguilaguila dam was breached, bringing with it an overwhelming amount of silted water, which flooded almost all the barangays (villages) in Mogpog. The nearest barangay (village) went completely underwater. Residents only had enough time to hustle their families out of the house and unto a higher place. The clear Mogpog River was replaced with

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[22] Catherine Coumans & Geoff Nettleton, *The Philippines: Centuries of Mining*, in Undermining The Forests 59 (Sarah Sexton ed., 2000).
[23] *Id*., at 60.
[24] Ingrid Macdonald & Katy Southall, Mining Ombudsman Case Report: Marinduque Island 16 (Sarah Lowe & Lisa Vettori, eds., 2005).
[25] *Id*., at 15.
[26] Macdonald & Southall, *supra* note 23.
[27] Coumans & Nettleton, *supra* note 21 at 62.
[28] *Id*.

brownish/bluish/greenish water that emitted a foul smell. The severe flood submerged houses, destroyed their farm crops, killed their farm animals and caused the death of two children who were swept away by the flood.

Marcopper and Placer Dome refused to acknowledge their responsibility and be held accountable for the damage to the river and to the residents. They blamed it on *force majeure* and refused to compensate the claimants and to take on the rehabilitation of the river. They only allowed the payment of one thousand pesos per family. The rehabilitation of the Mogpog river consisted of simple remediation procedures like raising the banks of the river by placing sacks along the river, but this was just to control flooding whenever it would rain. Placer Dome and Marcopper never touched the dam except for one time when the dam was re-engineered and an overflow was added.[29]

Pleas from the residents and resolutions from the local government units to rehabilitate the river were consistently ignored. To date, with the absence of remediation work to prevent or limit erosion and drainage from the waste rock dump, the dam has filled with sediment and liquid and is currently, still, slowly and surely seeping into the river.[30]

Recently, a study funded by Oxfam Australia, showed that the Mogpog River continues to be polluted as a result of continued mine run-off and siltation. The waste rock dump of the San Antonio Pit continues to generate acid mine drainage and introduce it into the river system. The acid and metal levels are sufficiently high to kill most aquatic animals and, at various points, continue to present a potential hazard to human health.[31] It was recommended that, contrary to the direction government-funded studies are proceeding, and as regards the Mogpog River, "the priority for community and environmental protection must be remedial works on the dam and associated mine drainage rather than further study of the effects on the river"[32]. It was also concluded that:

> "[T]he levels of cadmium, copper, lead, manganese, nickel and sulfate at various locations in the Mogpog River at times present a potential hazard to human health…. [so] human contact with the river should be avoided as a precaution given the levels of toxicants that have been found … to date."[33]

And how it came crashing down …

On March 24, 1996, an estimated 2 to 3 million cubic meters of tailings started to spill into the Makulapnit and Boac Rivers. The bursting of a badly sealed drainage tunnel caused the tailings spill.[34] The tailings had begun to leak in August 1995 and did not stop until June 1996.[35] The tunnel linked the Tapian mine pit to the Boac River[36]. Residents living near the river had to be evacuated. The toxic spills caused flash floods and the water sources were contaminated.[37]

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[29] Coumans & Nettleton, *supra* note 21 at 63.
[30] A & S R Tingay Pty Limited, Water Quality in the Mogpog River, Marinduque Island, Republic of the Philippines 12 (2004).
[31] Macdonald & Southall, *supra* note 23 at 26
[32] A & S R Tingay PTY, *supra* note 29 at 54.
[33] *Id*., at 51-52 (comprehensively explaining the findings).
[34] Catherine Coumans, *The Struggle Against Destructive Mining in Marinduque, Philippines* (2002) *at* www.miningwatch.ca (last visited on August 3, 2005).
[35] Macdonald & Southall, *supra* note 23 at 29.
[36] Coumans & Nettleton, *supra* note 21 at 64.
[37] *See supra* notes 23, 34.

Then Philippine President Ramos had to declare a State of Calamity for the areas in the town of Boac and other affected areas. Experts subsequently declared the Boac river system as so significantly degraded as to be considered an environmental disaster.[38] "The government (of the Philippines) estimate[d] that this toxic waste killed 1.8 million peso worth of mature freshwater and marine life and 5 million peso worth of bangus fry. The 27 kilometre Boac River, which [wa]s the main source of livelihood… has been declared dead by government officials."[39]

Unlike the Mogpog spill and the degradation of Calancan Bay, Placer Dome stepped up and admitted responsibility for the rehabilitation of the Boac River and payment of compensation to those affected by the spill. But after the tragedy, Placer Dome International immediately packed up its bags, closed down its offices and divested themselves of the Marcopper stocks. By all appearances, it had left the Philippines, leaving behind millions' worth of damages and decade-long rehabilitation measures. It set up, in its place, Placer Dome Technical Services (Phils.) Limited, a subsidiary of Placer Dome Technical Services (Canada) apparently to oversee the rehabilitation and the payment of compensation to Boac claimants. Finally, the mines were closed down. We could only imagine the costs of remediating them.

Calling in the Debts

After the 1997 spill, the Asian Development Bank called in the debts. Allegedly, when the debts were called, Placer Dome paid almost US$ 40 millions' worth of debts through MR Holdings, a Placer Dome subsidiary corporation incorporated in the Cayman Islands. It assumed ADB's mortgage on the mine and in turn, the latter assigned all its properties, mining rights, equipments and land to MR Holdings.[1] Lawyers in the Philippines have had little success so far in establishing a connection that can be admissible in court, between Placer Dome and MR Holdings because of the inaccessibility of documents and other corporate records.

Local Initiatives

Now, the people of Marinduque are picking up the pieces. Most of them, especially those living near the Calancan Bay and Mogpog River are affected by the poison that comes from the mine tailings. Although studies funded by the government refuse to conclude that the tailings and mine wastes cause thehuman health problems, people are getting sick with skin diseases and lead poisoning,and other ailments. Because of the lack of compensation from the companies and lack of local government funds, the affected people have to get themselves to the hospital, at their own expense, for medicines and for some, to be detoxified. Some children, who have lived near the contaminated rivers, have died from heavy metal poisoning.[40] There are reports of physical and mental retardation in children especially those who live in the area around Calancan Bay.

There's no doubt in their minds that the mines are responsible for their sufferings. After years of silent agony, they are asserting their rights to compensation and rehabilitation by pursuing available legal and campaign options.

In Calancan Bay, affected residents, including members of the Calancan Bay Fisherfolks Federation (CBFF), filed a class suit against Marcopper and Placer Dome in the Regional Trial Court. The action is pending. In Mogpog, residents of Barangays Bocboc and Magapua filed an action for damages and rehabilitation in the Regional Trial Court of Boac in April 2001 against Marcopper Mining Corporation and Placer Dome International. The case is still ongoing. Immediately after the spill in Boac, criminal

[38] *See infra* p. 29 and note 23.
[39] Victoria Tauli-Corpuz, *The Marcopper toxic mine disaster – Philippines' biggest industrial accident* (undated), *at* www.twnside.org.sg/title/toxic-ch.htm (last visited on August 10, 2005).
[40] Macdonald & Southall, *supra* note 23 at 18.

cases were filed against John Loney of Placer Dome and Steve Reid, the resident manager. The cases remain unresolved.

In March and April, Oxfam Community Aid Abroad (Australia), Mining Watch Canada and the Legal Rights and Natural Resources Center/FoE-Philippines, with Marinduque Council for Environmental Concerns, launched the *FACE UP, CLEAN UP, PAY UP* campaign in Australia, Canada and the Philippines. The objective of the campaign is to call on Placer Dome and Marcopper to (a) recognize and apologize for the damages they wreaked over the island, (b) compensate the people for the damage and (c) cause the rehabilitation of the rivers and the lands. It will remain the crying call of the communities, unfortunately, for years to come. The legislature, however, in a surprising show of concern, issued House Resolution (HR00730) entitled *"Resolution Directing the Committees on Ecology and Natural Resources to Conduct a Joint Inquiry, in aid of legislation, on the Situation of the Affected Residents of Marinduque in Relation to the Severe Lack of Rehabilitation and Reparation Efforts to Counter the Continuing Adverse Effects of the 1993 and 1996 Marinduque Mine Tailings Disaster on their Environment, Health and Livelihood"*. The House Resolution was filed on April 14, 2005 and has then been referred to and adopted by the Committee on Rules.[41]

There are several issues from the Marinduque experience that have to be highlighted:

First, the problem of flooding and tailings siltation will continue as long as the dam remains. No amount of sand and gravel will control the seepage that continues to destroy the river and the health of the people residing near it.

There are no effective prevention and rehabilitation procedures laid down in the mining law. For instance, there's nothing in the Philippine Mining Act and its implementing regulations with regard to guidelines in decommissioning dams. When the mine operation started, Marcopper was not required to produce an Environmental Impact Assessment. The fact that the operation predates the 1987 Constitution and the Mining Act of 1995, where the so-called safeguards were first pronounced, made it difficult to monitor the progress and the disposal of wastes. Furthermore, the participation of President Marcos more or less assured its exemption from complying with prerequisites of submitting pre-mining reportorial requirements, impact statements[42] and rehabilitation[43].

Secondly, the free and prior informed consent of the communities affected should have been obtained. When the Marcopper operation started, the law only required that a prior notice be given to surface owners and occupants. In fact, the general rule was that there had to be entry upon private land, before there could be a determination of fact about expropriation or payment of compensation.[44] Using the concept of "prior notice" as a bar, Marcos prohibited the courts from issuing restraining orders and writs of preliminary injunction against the mining operation, even when there was a dispute or controversy.[45]

There has been no profound improvement as regards the rules for consent in current mining law.[46] The only difference has been the requirement to obtain the free and prior informed consent of the indigenous peoples that will be affected by future large-scale development projects.[47]

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[41] For latest updates on the status of HR00730, please visit http://www.congress.gov.ph/bis/qry_show.php (last visited on 2 August 2005).
[42] Rep. Act No. 7942 § 70 (1995) (requiring submission of an environmental impact assessment)
[43] *See, id. at* § 71.
[44] Pres. Decree No. 512 § 2 (1974).
[45] Pres. Decree No. 1818 (1981).
[46] Rep. Act No. 7942 § 76 (1995).
[47] *See id*. at § 4; *see* also DENR Adm. O. No. 96-40 § 16 (1996).

Thirdly, Placer Dome never admitted responsibility for the damages it caused in Marinduque. By the time it packed and left, the succeeding rehabilitation measures conducted by PDTS, and later the government, were grossly inadequate to assume the role that Placer Dome and Marcopper had played before they abandoned the mines.

As this case illustrates, enforcing accountability becomes especially difficult if the foreign corporation leaves the host country and divests the domestic corporation's stocks. The question now is, considering responsibility has been established, how do we now enforce accountability?

Finally, the threat posed by the Canadian mining industry goes beyond just the Philippines. In a report written for the Globe and Mail, the author says that Canada "was home to 85 percent of the mining deals done in 2004."[48] We're talking about an industry worth at least $170 billion. To regulate Canadian mining companies individually will be close to impossible. The only option available is to draw up a set of minimum standards of corporate behaviour that will bind all foreign and transnational corporations operating beyond their home states.

A note on rehabilitation

The San Antonio Project is included in the 23 priority mining projects of the government as part of its' policy to revitalize the mining industry after determining that the pit still has an 18-year mine life. In the revitalization, the government will allow, nay persuade, 100 percent foreign participation in mining projects. The only precondition given for the reopening is the complete rehabilitation of waterways and communities affected by the spill, in accordance with the recommendation of the US Geological Survey (USGS) Team that already conducted two studies to date. The Department of Environment and Natural Resources (DENR) gave an ultimatum to Marcopper in that it should be done with the rehabilitation by the end of the year. That was in February. After four months, in June, the DENR issued a Provisional Environmental Compliance Certificate (PECC) for the sole purpose of undertaking remediation and rehabilitation, not as permit to conduct any mining operation. Under the terms of the PECC, Marcopper should submit its remediation plan, fifteen days after its issuance. The deadline passed without hearing anything from the DENR. The government then decided to take over the rehabilitation in Marinduque. The DENR would work with the Chamber of Mines on this matter and has set aside seven hundred thousand pesos for the initial remediation plans.

The question now is, what if complete rehabilitation is not possible any longer? How does the DENR define rehabilitation? Is the government aiming to bring back the three major rivers to their original state? Does rehabilitation include paying for detoxification of children and compensation for lost properties? Will the government pay for continued medication for lead poisoning and skin diseases and if yes, until when?

Shouldn't the issue now be -- how the dams will be removed since they pose actual and potential threats with the mere fact that they still exist? How will the government go about the decommissioning of the dams? Will it not be to its best interest to let the dams remain since Marcopper and other investors are seeing dollars while looking at the remaining ore in San Antonio? Is the government in even considering the reopening of the dam thereby ignoring the threat to life and property already acting with negligence?

These are the questions that the government, Marcopper and Placer Dome have to answer, and quickly. The dams are ticking time bombs, ready to burst any time, to bring a new slew of poison from the mine tailings, carrying with it lives and dreams. The issue is not whether 18 more years of mining in Marinduque will bring prosperity and joy to the people. The issue is they want to abuse, still, the already defeated people in that small island.

[48] Andrew Willis, *9: Striking it Rich* (July 5, 2005), *available at* http://www.theglobeandmail.com/servlet/story/LAC.20050705.FINANCING05/TPStory/TPNational/.

PART II
HOW THE WRONGS CAN BE RIGHTED

The discussions on human rights and transnational corporations are moving at an exciting pace. Several options are being looked at as regards how human rights can be a corporate concern and whether non-state actors, like the corporations, can be subjects of international human rights law. Furthermore, there is also the issue of enforcing international human rights and standards within the very private sphere of profit and enterprise. The only settled issue in this current debate is that somehow transnational corporations or multinational enterprises should have responsibilities and duties toward their hosts if only because of the power they hold to dictate the areas of development and the pace of economic prosperity of developing and less developed countries.

To be sure, what we are seeing now is an impact of globalization on host states and communities. Globalization "refers primarily to the progressive elimination of barriers to trade and investment and the growing mobility of capital."[49] It has become critical that transnational corporations, the very nature of which demands statelessness, are regularized to ensure respect for and recognition of human rights given that they have created a space removed from the effective authority of any State[50] even from their home states.

Several questions have been raised in the current debate of corporations and human rights. *First*, do home states, as it were, have a direct obligation to regulate corporations operating outside their territories as regards their compliance with human rights norms under international law? *Second*, can home states be held accountable for human rights violations committed by transnational corporations in the host states? *Third*, can transnational corporations become subjects of international law? *Fourth*, is there a way for transnational corporations to incur direct legal liability for violations of international human rights law, to which only States are bound as of the moment? *Lastly*, can these direct obligations under human rights law be enforceable against corporations?

This article will not presume to give the answers to these questions. Rather, these questions are posed as benchmarks for discussing the particular issue of Canadian mining companies' behaviour in the Philippines. They are posed with the hope that answers are already forthcoming.

This part is divided into three parts – the first is on the home and host country dialogue which explains that although the home states are charged with the responsibility to govern the transnational corporations domiciled and registered in said states, it is ultimately still the host states that have the mandate to protect their citizens from abuse and aggression; the second part deals with a discussion on corporate responsibility as articulated in regional documents and international law. The initiatives in the regional and international level are examined and discussed to see whether openings are given and intervention points available that will allow the host communities, like Canatuan and Marinduque, to forward their issues and achieve redress; the last part surveys the available enforcement mechanisms and what else can be done to facilitate the demand for direct legal accountability of corporations.

The Home and Host Country Dialogue

The debate on the international subjectivity of transnational corporations notwithstanding, States have the ultimate responsibility for the protection and respect for human rights of its peoples under international

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[49] Silvia Danailov, *The Accountability of Non-State Actors for Human Rights Violations: the Special Case of Transnational Corporations* (1998), *at* http://www.humanrights.ch/cms/pdf/000303_danailov_studie.pdf at 4.
[50] *Id.* at 12. *See also* David Kinley & Junko Tadaki, *From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations at International Law*, 44:4 Virginia Journal of International Law 935 (2004).

law. Given this, the Norms (see discussion below), for instance, explicitly recognize the continued primacy of the national laws of the host states.[51]

But, what if the host state refuses to maximize its leverages for fear of turning away investments that are thought to be the solution to poverty? In this study, I will not shy away from the truth that the Philippine government, rather than focus on asserting and implementing safeguards to protect the human rights of its communities, is instead all too ready to accede to the demands of the transnational mining companies operating in the Philippines.[52] The government will not presume to negotiate for its constituents. Given the premise, that to lobby the Philippine government for more stringent measures and conditions in all its dealings with transnational corporations is futile, there is a need to look for new "dutyholders[53]". One such dutyholder may be, in this instance, Canada as home state of TVI Pacific and Placer Dome.

Canada as the home state has, as Silvia Danailov puts it, "the means, by exercising its sovereign powers within its jurisdiction, to influence the conduct of the transnational corporation abroad and even direct it."[54] The Subcommittee Report breaks ground for heeding the call. It --

> "urges the government to establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies."[55]

Given now that there is recognition and admission that Canada, as home state, may have the power and the mandate to regulate the transnational corporations incorporated and domiciled there, the next issue therefore is whether Canada has affirmative obligations to ensure that the corporations operating outside its territory respect the international human right norms and the particular human rights of peoples in host states.

Recently, the Standing Committee on Foreign Affairs and International Trade submitted and presented its Fourteenth Report to the House of Commons regarding the issue of corporate responsibility of Canadian mining companies.[56] The report breaks ground as being the first to explicitly admit and assert that Canada is bound by international human rights norms and soft laws, even though most of them like environmental rights and indigenous peoples' rights are yet to develop into jus cogens norms[57]. The Report states that the Subcommittee "acknowledges that the Government of Canada has a stated commitment to corporate social responsibility standards and international human rights norms"[58] and that "particular attention should be paid to the rights of indigenous peoples as currently specified in the United Nations Draft Declaration on the Rights of the Indigenous Peoples"[59]. Another example is the statement as regards

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[51] *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, U.N. Commission on Human Rights, 55th Sess., Agenda Item 4, ¶ 12, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (2003) [hereinafter *Norms*].
[52] Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 The Yale Law Journal 462. *See also* Kinley & Tadaki, *supra* note 52 at 938 (explaining the phenomenon of the race to the bottom principle.)
[53] *Id,* at 469.
[54] Danailov, *supra* note 51 at 23.
[55] *See Subcommittee Report, supra* note 57.
[56] *Id.*
[57] International Council on Human Rights Policy, Beyond Voluntarism 62 (2002) [hereinafter *Beyond Voluntarism*]. *See also,* Kinley & Tadaki, *supra* note 52 at 947.
[58] *See Subcommittee Report, supra* note 57.
[59] *Id*.

"making compliance with international human rights standards obligatory"[60] rather than just recommendatory.

Canada moves forward by explicitly acknowledging that it is bound by human rights norms, even if most of them have not yet become customary international law. From the trend of the responses from both the home and host states, it is obvious that they are not equipped to address all issues arising from the inability or refusal of transnational corporations to respect and protect international human rights norms, like what happened in Siocon and Marinduque. Although Canada recently proactively subscribes to and imposes upon itself international direct obligations, the subscription happened almost a decade after the Marinduque disasters. A shift from a State-centered vision is becoming necessary and inescapable.[61]

The premise for the search for options with which to regulate transnational corporations through international law is what Silvia Danailov calls, the "domestic accountability deficit".[62] Do States then get left out of the equation? Danailov proposes to harmonize the roles of States and international institutions in that "accountability should then be enhanced and controlled on the international level, while still continuing to hold States responsible for the implementation of their international obligations."[63]

Corporate Responsibility

In this section, the OECD Guidelines for Multinational Enterprises will be examined as to whether Canada, as an OECD member-state, takes on the mandate to compel its industries, especially those involved in large-scale extraction in other countries, to observe and respect the human rights of peoples affected by their operations. Then, there will be a discussion about the UN Human Rights Norms for Business and their implications and merits. Important provisions that are relevant in addressing the human rights issues will be highlighted. These documents clearly demonstrate that there is more than an admission of responsibility and instead seek to govern the compliance of transnational corporations with their responsibilities under international law to their hosts.

OECD: a look at a possible intervention avenue

There might be a possible avenue in the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (Guidelines) through which violators of the human rights of peoples in Marinduque and Canatuan can be called for reparations.

The OECD Guidelines are a set of principles on corporate responsibility and standards and they are voluntarily entered into by member-states. A complaint mechanism was institutionalized through the creation of National Contact Points, the main responsibilities of which are promoting awareness of the Guidelines, handling inquiries and handling initial discussions between parties in case of disputes.[64]

However, the farthest the OECD Guidelines ever went was to give general statements about the need for multinational enterprises to take due account of the need to protect the environment, public health and safety, and, generally, to conduct their activities in a manner contributing to the wider goal of sustainable development[65] and the need to prepare an appropriate environmental impact assessment where the

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[60] *See Subcommittee Report, supra* note 57.
[61] Danailov, *supra* note 51 at 38.
[62] *Id.* at 25.
[63] *Id.*
[64] *Beyond Voluntarism, supra* note 69 at 99.
[65] *See* OECD Guidelines for Multinational Enterprises (2000), *available at* http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)15-final [hereinafter *OECD Guidelines*]

proposed activities may have significant environmental, health, or safety impacts[66]. The decisions of the National Contact Points are to be used as clarification of rules for future reference and are recommendatory at best.

Several other criticisms were lobbed at the Guidelines but the main one is that --

> "the OECD guidelines are non-binding, the monitoring bodies do not function as judicial or quasi-judicial bodies, but rather their roles are limited to clarification of the interpretation of the instruments. They do not make specific findings of misconduct by individual companies and their identities are kept confidential, thereby shielding them from public scrutiny and potential embarrassment."[67]

It also remains to be seen if the standards set in this agreement can be pushed to accommodate extraterritorial jurisdiction for causes of actions involving responsibility for maintaining environmental integrity of host countries.

Most recently, a complaint against Ascendant Copper Corporation (ACC) was filed with the Department of International Trade. The complainant alleged ACC's violations of the OECD Guidelines for Multinational Enterprise as the cause of action.[68] It will be interesting to keep track of the developments of the case for its immense doctrinal value.

UN Norms for Business: the corporations and their spheres of influence

The Sub-Commission on the Promotion and Protection of Human Rights during its 22nd meeting on August 13, 2003 adopted the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (Norms).

The debate as regards the international subjectivity of TNCs in international law is still raging. Has the drafting of the norms put that issue to rest? Has the UN conceded the argument that non-State actors, more particularly the TNCs, are indeed subjects of international law? The drafting and the subsequent adoption of the Business Norms and the Commentaries respond to the lot of questions posed by scholars of international law.

Transnational corporations were defined at the beginning of this section in reference to their nature and the legal vacuum they created. Under the Norms, TNCs are defined as that referring to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.[69]

The answer to the questions raised might be seen in the General Obligations, which state that --

> "States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including

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[66] *See id*.
[67] Kinley & Tadako, *supra* note 52, at 950. *See* Ratner, *supra* note 64, at 536 and *Beyond Voluntarism, supra* note 69, at 99-100 *and* OECD WATCH, FIVE YEARS ON: A Review of the OECD Guidelines and National Contact Points 43 (Patricia Feeney ed. 2005).
[68] Press Release, DECOIN, et al., International Investment Complaint Filed Against Canadian Mining Company (May 18, 2005) (copy on file with author).
[69] *See Norms*, *supra* note 53, ¶ 20.

> ensuring that transnational corporations and other business enterprises respect human rights. Within their respective *spheres of activity and influence,* transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."[70]

The test is still *due diligence* in ensuring that transnational corporations and other business enterprises do not directly/indirectly contribute to the commission of the violation and they do not directly/indirectly benefit from the abuses.[71]

Can this motherhood statement already insure against violations of human rights of peoples affected by mining? It is significant that the drafters saw it imperative to include within the coverage of the definition of transnational corporations not just its form or *situs* of operation but also the other spheres of their activity and influence. The implication here is that there already is recognition of the power that TNCs wield not just over their territory of operation but also over other areas where their presence is felt. The Norms in fact seek to address the legal vacuum that the TNCs have created thereby allowing them to elude any one state's regulation.

The Norms highlight the respect for and protection of the same rights that were compromised in Canatuan and Marinduque. The Norms specify the right to equal opportunity and non-discriminatory treatment, right to security of persons and rights of workers. Within this cluster of human rights norms, the affected peoples in the Philippines, like the Subanons of Canatuan or the communities in Marinduque, may find relief for human rights violations carried out by the Canadian mining companies and their agents. For instance --

(a) The Norms mandate the establishment of policies to prohibit the hiring of individuals, **private militias and paramilitary groups**, or working with units of State security forces or contact security firms that are known to have been responsible for human rights or humanitarian law violations[72]. The provision should be read to mean that prohibition against hiring paramilitary groups is absolute. TVI is maintaining a paramilitary group to bar access to the community, harass the Subanon leaders and residents. Given the absoluteness of the prohibition, TVI is obviously violating the norm.

(b) The Norms give due emphasis to respecting the rights of indigenous peoples being affected by the companies' activities. It is mandated that corporations respect their rights over their ancestral domains and lands and that their **free, prior and informed consent** (FPIC) on development projects affecting them be obtained. Displacement from their ancestral domains and lands is also disallowed.[73] Putting up roadblocks, preventing the entry of food, confiscating goods and burning houses to scare off the Subanons from their ancestral land reek of violation. Their consent was also not obtained before TVI started its exploration activities since it used Benguet Corporation and Ramon Bosque to file the MPSA and it is obviously to circumvent the FPIC requirement.

(c) The Norms also referred to environmental rights of the peoples in the country where the transnational corporations operate, in that, "transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the **preservation of the environment** of the

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[70] *See Norms*, *supra* note 53, ¶ 1.
[71] *Id.*at ¶1(b).
[72] *Id.*at ¶ 4(d).
[73] *See Norms, supra* note 53, at ¶ 10(c).

countries in which they operate..."[74] (emphasis added). It identified the minimum as 'a clean and healthy environment'[75] and recognized the importance of environment and health impact assessment[76]. Given the disregard and irresponsibility shown by Placer Dome in conducting its mining activities, there is no question that it has violated the condition of achieving a clean and healthy environment and it continues to ignore the mandate of preserving the environment in its continued refusal to undertake rehabilitation and recompense the affected people who are becoming sicker everyday due to exposure to the tailings in the river and lead poisoning, among others.

These are just some examples of how the acts of TVI and Placer Dome violate the Norms based on how they are currently articulated. Incidentally, aside from the safeguards offered by the Norms, there is a savings clause where it says that if more protective standards are recognized or emerge in international or State law or in industry or business practices, those more protective standards shall be pursued.[77] Below is a discussion of two domestic laws that give more protective standards than that of the home state.

Respect for rights of the indigenous peoples

Regardless of the fact that the rights of the indigenous peoples have been recognized in international conventions and have been articulated through the Indigenous Peoples' Rights Act (IPRA)[78], there is no Canadian legislation that compels Canadian companies to respect and recognize indigenous peoples' rights. The Subcommittee Report therefore offers a glimmer of hope that the international recognition given to indigenous peoples' rights will be taken seriously now by foreign corporations operating in the Philippines and encroaching unto ancestral domains and lands.

The IPRA institutionalized the free and prior informed consent mechanism. It states that for all exploration, utilization, and development of the Philippine's natural resources, the consent of the affected indigenous community should be first obtained.

In the case of the Subanons of Siocon, the mining activities of TVI Pacific commenced even without their free and prior informed consent. During the application for an MPSA, it was Benguet Corporation and Ramon Bosque who applied in their name thereby excusing TVI from complying with the FPIC requirement. The issue worsened because the mining area overlapped with the Subanon ancestral domain. The awarding of the CADT is enough to take the property outside the ambit of public property and should not be qualified for sale by the Philippine government. But, rather than concede humbly, TVI hired a paramilitary group to prevent the Subanons from occupying and possessing their domain.

Conversely, Canadian jurisprudence has started recognizing the role of indigenous peoples in natural resource development. In the case of Union of Nova Scotia Indians versus Canada (Attorney General)[79], the court talked about the fiduciary duty the country owes the Aboriginal peoples. Even though the case involved the failure of the Ministers to act upon the opposition posed by the applicants, the court went into the duty and the responsibility of the Ministers to address the Aboriginal interest. Their failure to consider responsibility constituted a breach of the country's fiduciary duty. It is interesting though that given the doctrine in the Nova Scotia case, Canadian mining laws do not consciously take into account potential issues concerning indigenous land. For instance, in the Canadian Mining Regulations, there is no

[74] *Id.* at ¶ 14.
[75] *Id.* at ¶ 14(a).
[76] *Id.* at ¶ 14(c).
[77] *Norms, supra* note 53, ¶ 19(a).
[78] Rep. Act No. 8371 (1997).
[79] Union of Nova Scotia Indians v. Canada, 22 C.E.L.R. (N.S.) 293 (F.T.C.D.) (1997).

distinction as to whether in section 70 the possessor is a surface owner or an Aboriginal owner. For non-Aboriginal owners, expropriation of private property, with its consequent payment of compensation, may be entirely possible. But for Aboriginal owners, the possession of the indigenous group of an area should be enough to disallow entry of development projects.

More importantly, however, in its report[80], the subcommittee emphasized the binding effect of the United Nations Draft Declaration on the Rights of Indigenous Peoples and in the case of TVI, it recommended that (1) an investigation be conducted as regards the impact of TVI's mining project on the indigenous rights and the human rights of people in the area, and (2) that TVI not be promoted pending the outcome of the investigation.[81] This development may be indicative of the move towards more than just substantial compliance with the international human rights norms and standards.

Environmental Impact Assessment

Environmental rights are somewhere down the line of the list of rights that may soon develop into customary international law. Although the trend in pursuing direct legal liability against corporations for violations occurring in host states/communities, there is no doctrine yet that may indicate that environmental rights are slowly moving towards the front of the pack. The problem with environmental rights is that they should always be referred to in conjunction with other human rights; the wording may be something like 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights'[82].

In this respect, there is one particular feature of the interrelationship between human rights and environmental protection that deserves special attention: that is, the essentially procedural form of consultation and participation that binds them. This entails guaranteeing procedural environmental rights, which include access to environmental information, participation in environmental decision-making, and remedies for environmental harm. Importantly, these are premised on the notion that "sustainable development cannot be achieved by governments alone, but requires an open society in which citizens can access pertinent environmental information, as well as relevant decision-making processes and institutions, both to influence decisions on the environment and to correct, and obtain redress for, environmental harm"[83].

Barring that, it is wise to persuade Canada, as the home state of several mining companies operating in the Philippines, to compel the corporations to comply with the pre-requisites under domestic laws. One such prerequisite is to undergo an environmental impact assessment with the mining applications.

Environmental impact assessment, as defined, is a planning tool that requires early identification and evaluation of all potential environmental consequences of a proposed developmental undertaking and its alternatives, combined with a decision making process that attempts to reconcile any approval of the proposed development with environmental protection and preservation.[84] The Canadian environmental impact assessment (EIA) process has been imbued with the principles of self-assessment, discretionary power of the mining proponent whether or not to adhere to the recommendations of the Ministers and

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[80] See Report 14 – Mining in Developing Countries – Corporate Social Responsibility at www.parl.gc.ca/committee/CommitteePublication (last visited on 2 August 2005) [hereinafter *Subcommittee Report*].
[81] *Id.*
[82] Kinley & Tadako, *supra* note 52 at 983.
[83] *Id.* at 985.
[84] Joseph F. Castrilli, *Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements* 15 (1999), *at* http://www.gordonfn.ca/resfiles/enviro-mining.pdf.

autonomy despite findings of environmental impacts to continue with the project.[85] Experts have described the Canadian EIA process as following the precautionary principle but it is not clear how these laws can be precautionary in nature when all they do is give the mining proponent room for the identification and articulation of possible environmental hazards without being forced to do anything about minimizing, or better yet, rendering them improbable. Most commentators are of the opinion that the EIA process is not working and has not achieved its maximum potential of making the process work for the affected communities.

In the Philippines, the environmental impact assessment is one of the requirements before a mining permit issues to a proponent. It covers environmental risks, possible impact to humans, livelihood, and properties, and the ways through which these threats may be minimized or eradicated. The application for a mining permit may be denied on the basis of the environmental impact statement alone. There is nothing in this article that testifies to the effectiveness of the EIA process in the Philippines but the framework in itself is enough to discourage others from proceeding with their mining applications.

The point of the comparison is to emphasize that while Canada is still developing more stringent measures as regards the issues of indigenous peoples and environmental protection, the Philippines already has these laws that can be implemented to protect the host communities from aggression caused by the large-scale (foreign) mining industry.

In the Subcommittee Report, it is recommended that stronger incentives be put in place "to encourage Canadian mining companies to conduct their activities outside of Canada in a **socially and environmentally responsible manner and in conformity with international human rights standards**"[86] (emphasis added). There is no definition yet of what is socially and environmentally responsible mining but this statement pressures the home state to enforce and impose international obligations on the transnational corporations.

In both the OECD Guidelines and the UN Human Rights Norms for Business, there is an articulation that transnational corporations and the spheres of their activity and influence are indeed bound by international human rights norms and international standards. The only problem is that, especially with the Norms, they are **prospective** in nature. They set the minimum standards by which the transnational corporations should conduct their business in their areas of operation, which more often than not are different from their area of incorporation. What about in situations like in Marinduque where the extensive damage, that continues to threaten life and property, was already wrought over the impact areas? There is no question that from hereon, TVI and Placer Dome will have to comply with the human rights obligations and standards identified in the Norms but can someone from Marinduque pursue a legal action for compensation on the basis of violation of environmental rights and right to health[87]? For that matter, can the fisherfolks of Siocon claim redress against TVI for the fishkills that happen as a result of tailings seepage into the river, based on their right to adequate food[88]?

There is obviously a consensus that transnational corporations have to be covered by a minimum set of standards by which they operate their businesses. Some human rights, even those that are *jus cogens*, have been identified as so vital as to oblige not just states but also corporations to recognize and respect them.

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[85] *See id*.
[86] *See Subcommittee Report, supra* note 57.
[87] *Id*. at ¶ 12.
[88] *See id*.

Enforcing Corporate Accountabilities

Now, to be able to assess the efficacy and worth of these international obligations to communities, it is not enough that we know what these duties are and what specific human rights are included in the cluster. After establishing that transnational corporations have responsibilities and duties to protect, preserve and secure the fulfillment of human rights, we now turn to whether these obligations create a corollary direct legal accountability. The necessity of ensuring legal accountability is premised on the fact that TNCs as 'global economic actors'[89] are able to avoid answering for legal liabilities in the countries where they operate. As a concrete example, in the case of Marinduque, lawyers representing the affected residents are having a hard time serving summons to Placer Dome, International for the reason that it no longer has any presence in the Philippines. The substituted service to its subsidiary Placer Dome Technical Services also failed because it denied any connection to Placer Dome International, though the facts belie such denial.

To avoid rendering the human rights obligations and responsibilities futile, the duties as incorporated in different codes and conventions should be enforceable as direct legal accountability. For instance, a monitoring body in the UN can be authorized to accept complaints and adjudicate the cases regarding violations that a State is unable to control.[90] In *Beyond Voluntarism*, criteria are forwarded as regards assessing enforcement procedures for their effectiveness and the considerations should be (1) accessibility, (2) speed in resolving cases/conflicts, (3) mandate/jurisdiction, (4) independence/expertise, (5) remedies available and (6) legitimacy and transparency.[91]

Below is a discussion of what is the available implementing mechanism under the Norms and a suggestion of what Canada can do as part of its commitment to enforce its international obligations.

General provisions on implementation of the Norms

Currently, the Norms offer the following mechanisms[92] to implement the norms:

a. Adopt, disseminate and implement internal rules of operation;
b. Institutionalize a reportorial mechanism; and,
c. Incorporate into contracts and other arrangements or dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

Admittedly, the enforcement mechanisms are not much to look at but the restraint may come from avoiding making the process too contentious, from the states' point of view, than if the United Nations imposes more specific methods of implementing the Norms. In fact, the Norms, rather than just give a tedious reiteration that corporations should respect human rights, dealt with the challenging task, considering its limited enforcement mechanisms, of identifying what particular human rights need to be emphasized, thereby implying that these are the rights that are more susceptible to abuse by transnational corporations. For now, we should be satisfied by the promise that the implementation mechanisms are just initial steps[93] toward the full implementation of the norms.

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[89] Danailov, *supra* note 51, at 53.
[90] *Id.* at 55.
[91] *Beyond Voluntarism, supra* note 69, at 118-119.
[92] *See Norms*, *supra* note 53, at ¶ 15.
[93] *See Norms, supra* note 53, at ¶ 15.

What can Canada do in the meantime that legal norms have not been identified and while legal liability for violation of the Norms is not yet in place? It can look at the possibilities offered by tort law.

Expanding the Coverage of Torts: Nationality versus Territoriality

The issue of nationality versus territoriality comes about with the realization that (1) TNCs have created a new transnational economic space that transcends traditional legal territorial boundaries[94] and (2) no State is capable of controlling adequately the TNC phenomenon on its own[95]. Territoriality is a principle whereby a State can make and apply law that covers acts committed within its borders/territories while the principle of nationality gives a State jurisdiction over a business incorporated there, regardless of the site of its conduct/operations.[96]

Canada does not have an equivalent of the Alien Torts Claims Act (ATCA). The importance of ATCA, though rendered inadvertent, is that it allows the filing of tort (civil) cases for violations committed abroad in the United States, the home state. The Act, as interpreted in several cases, empowers U.S. district courts to hear civil (torts) claims of foreign citizens for injuries and certain human rights violations caused by corporations committed in the United States or abroad.[97] Conversely, there's no piece of legislation that disallows filing based on subject matter jurisdiction and, should the corporation be incorporated in Canada, there will be no problem on personal jurisdiction. Right now, nationality of corporations is enough for the district courts to acquire jurisdiction over them. It is for cases of human rights violations committed by Canadian companies abroad that the problem of acquiring jurisdiction arises because, most probably, the Canadian courts will demur to take cognizance of the case when a more proper forum, outside the territory, is identified.

Extraterritorial jurisdiction may be defined as the power of the home country to acquire jurisdiction over a corporation incorporated or domiciled in the home state to answer for liability for environmental destruction and human rights violations in the country of operation or in the host state. Canadian courts will have to take cognizance of the case without reverting the case back to the country where the injury happened. This will be consistent with the affirmative obligations of host states to promote and protect international human rights norms.

Extraterritorial jurisdiction, or a law like ATCA, is critical because it accords direct legal liability to the mother corporation -- the transnational corporation registered and incorporated in the home country like Canada – so as to prevent defeating personal jurisdiction.

However, foreign mining companies have developed an expertise in hiding themselves behind both parallel and subsidiary companies making it close to impossible for lawyers who have no access to their corporate documents to pin down the real corporate identity. There's nothing much that the Philippine government can do when the TNC leaves the country. It becomes hopeless when the TNC which divested from the country immediately creates another entity, a subsidiary corporation, to keep the money far away from the claimants (see discussion above).

As Steven Ratner puts it, if both the state of nationality and the territorial state choose to regulate the activity, the result may well be an effective regime if the two states did not place different demands on corporations.[98] Currently, the legislative gaps in Philippine laws sanction, or in worst cases, legitimize

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[94] Danailov, *supra* note 51, at 12
[95] *Id.* at 25.
[96] Ratner, *supra* note 64 at 534.
[97] Kinley and & Tadaki, *supra* note 52 at 939.
[98] Ratner, *supra* note 64, at 535.

corporate evasions of accountabilities. There is no way, at the moment and in our current legislative framework, to acquire jurisdiction over foreign corporations' pre-, during and post- mining operations. This then becomes a responsibility of the home country and the foreign corporation in the bigger scheme of profit-making and transatlantic business.

Conclusions

The cases of Siocon and Marinduque are not unique. They happen time and again, in more industries aside from mining. The sufferings being borne by the people affected by mining resonate in more places than we can imagine.

But the real issue goes beyond legislative gaps and enforceability of human right laws. From what happened in Siocon and Marinduque, it is obvious that the cause of the violation, and hence the destruction, is the lack of real resolve to do what is right and what is just. We have seen here what happens when the response from the Canadian mining companies and the host state is absent.

From the discussion above, it is seen that even though the debate regarding corporate responsibility and accountability has moved beyond the states involved, the primacy of the host's national laws is upheld. The Philippines, as host state, should fill in the gaps in implementation but so far, the Philippine government has a dismal record in human rights' protection and promotion. Industries in the Philippines have in fact gained expertise in looking for and abusing the gaps in legislation.

Indeed, at this point, only half of the work is done, which is, the identification of the direct international obligations of TNCs as regards respect for human rights and recognition of duties and responsibilities vis-à-vis the host state and the host communities. The other half has to do with making these obligations legally enforceable against transnational corporations. Silvia Danailov puts it perfectly in saying that "to ascertain that there is only a moral obligation incumbent on TNCs to respect human rights does not enable individuals to seek reparations from courts or from international institutions"[99]. This is not to say that the efforts so far have been for naught. Instead, these developments afford us the luxury of space to consider more ways of making corporations legally and directly accountable.

A lot of problems are plaguing the communities that have been devastated by mining, from environmental degradation to poverty. The legacy of destruction is too unbearable to be suffered silently and at the same time be ignored. Both the host country and the transnational corporations are mandated to protect the communities that suffer the transnational corporations' presence in their area. While we talk about corporations and international law, actual violations are happening in some parts of the world. There is an urgency to look for answers to their more basic needs and demands.

With the birth of the Norms and the acceptance that transnational companies are charged with the obligation to recognize and respect the human rights of peoples they come across, it is with hope that more consideration will be shown. It might really be too much to hope for care to be shown to peoples all over the Philippines who suffer in silence and poverty after the looming shadows of mining-gone-mad finally leave.

[99] Danailov, *supra* note 51, at 15.

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