

National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries

Advisory Group Report

March 29, 2007

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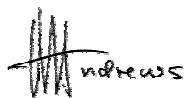
Preface

The content of this report reflects a diverse range of views provided to the four National Roundtables on Corporate Social Responsibility (CSR) from both the public and from governmental and non-governmental experts. Over the course of the Roundtables, 156 oral presentations were heard and 104 written submissions were received (see Annex 5). Of these oral presentations, 61 were from civil society, 33 from industry, 15 from labour organisations, 31 from academics and research institutes, and 16 from members of the public without a stated affiliation. The Roundtables benefited greatly from the participation of 57 invited prominent Canadian and international experts (see Annex 4). Annex 2 shows a list of people the Advisory Group would like to thank in particular for their substantive contribution to the process. All Roundtable events were facilitated by Daniel Johnston (see Annex 1).

The Roundtables were organized by a Steering Committee of Government of Canada officials working closely with an Advisory Group comprising persons drawn from industry, labour, the socially responsible investment community, civil society and academia (see Annex 1 for names and bios). Members of the Steering Committee participated in the Roundtables to provide technical information in their expert capacity, not in their official capacity as representatives of the Government of Canada. The Advisory Group members also participated in their expert capacity and not as designated representatives of the sectors or organisations for which they work.

Except where specifically identified to the contrary, this report reflects general agreement on the part of the Advisory Group on the outcomes of the National CSR Roundtables. It also includes a set of recommendations on steps that the Advisory Group believe the Government of Canada, industry, financial institutions, the investment community, pension funds, and civil society should take to enhance the CSR performance of Canadian extractive-sector companies working in developing countries.

The recommendations in this report are the result of extensive discussions between all members of the Advisory Group. The recommendations contained in this report are intended to be read as a comprehensive package, each element building on the others. Neither the organisations that the Advisory Group members work for, nor the sectors whose perspective they represent have specifically endorsed or agreed to any or all of these recommendations.



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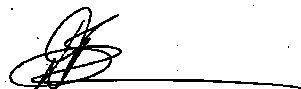
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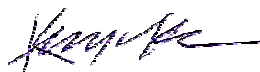
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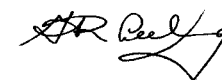
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Executive Summary

This report was prepared by the Advisory Group to the Roundtable process. The Advisory Group included representatives from industry associations; individuals currently or formerly employed by extractive-sector companies active overseas; civil society organisations; labour; academics; and the responsible investment sector. The report reflects agreement on the part of the Advisory Group on a set of recommendations for adoption by the Government of Canada. The report also includes recommendations for the consideration of industry, financial institutions, the investment community, pension funds, and civil society and as means to enhance the CSR performance of the Canadian international extractive sector working in developing countries.

The central recommendation in the report concerns the development of a Canadian CSR Framework. Advisory Group members urge the Government of Canada, in cooperation with key stakeholders, to adopt a set of CSR Standards that Canadian extractive-sector companies operating abroad are expected to meet and that is reinforced through appropriate reporting, compliance and other mechanisms.

The main components of the Canadian CSR Framework and their key attributes, as recommended in the report, are:

- The Canadian CSR Standards, for initial application, based on existing international standards that are supported by ongoing multi-stakeholder and multilateral dialogue.
- CSR reporting obligations based on the Global Reporting Initiative, or its equivalent during an initial phase-in period, at a level that reflects the size of the operation. The Global Reporting Initiative relies on an international multi-stakeholder process for its development and continued improvement and applies universally-applicable reporting principles, guidance and indicators for organisations of all sizes and sectors.
- An independent ombudsman office to provide advisory services, fact finding and reporting regarding complaints with respect to the operations in developing countries of Canadian extractive companies.
- A tripartite Compliance Review Committee to determine the nature and degree of company non-compliance with the Canadian CSR Standards, based upon findings of the ombudsman with respect to complaints, and to make recommendations regarding appropriate responses in such cases.
- The development of policies and guidelines for measuring serious failure by a company to meet the Canadian CSR Standards, including findings by the Compliance Review Committee. In the event of a serious failure and when steps to bring the company into compliance have also failed, government support for the company should be withdrawn.
- A multi-stakeholder Canadian Extractive Sector Advisory Group to advise government on the implementation and further development of the Canadian CSR Framework.

The report also recognizes that in many instances, Canadian extractive companies are operating in countries where governance capacity is weak, where there is corruption and, in some cases, armed conflict. In these circumstances, human rights protections and the

enforcement of environmental regulations are often weak or non-existent. It is therefore recommended that the Government of Canada: work with those developing countries that seek to promote economic and social development through investment in the extractive sectors to develop strategies to optimize the social and economic benefits of extractive projects; exercise influence in multilateral and regional fora to advance the rights of indigenous peoples with relation to extractive-sector issues; enhance revenue transparency; build capacity for host country judicial systems; and work with like-minded countries to strengthen CSR requirements at the World Bank Group and the regional development banks related to lending and support to private sector clients.

In making these recommendations, the Advisory Group recognizes that the transformation of the ideas and concepts which underlie them into practical, workable measures will require additional work beyond that which was achievable during the Roundtable process. The Advisory Group further acknowledges that the CSR standards and reporting frameworks recommended for initial application fall short of addressing the full range of issues of concern regarding the extractive industry, particularly with regard to human rights. As a result, an ongoing process has been recommended to ensure that the standards and overall framework are improved over time.

The Advisory Group believes that, taken together, the recommendations contained in this report will drive significant progress towards achieving the high performance levels that Canadians expect of the Canadian extractive industry operating abroad. The Advisory Group commends the Government of Canada for providing the opportunity afforded by the Roundtables to develop these recommendations and urges all parties to work together on their implementation.

This report includes a background discussion and recommendations for each substantive area of the text. However, for the convenience of the reader, the complete set of Advisory Group recommendations are also found below.

Advisory Group Recommendations

2.1.2.1. The Canadian CSR Framework

It is recommended that the Government of Canada, building on its support for the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises, establish and promote a Canadian CSR Framework for all Canadian extractive-sector companies operating in developing countries. This Framework will include an initial set of standards, as well as the CSR incentives, reporting and compliance mechanisms contained within this report.

2.2.2.1. Canadian CSR Standards

It is recommended that the Government of Canada, over the short term (one–three years), include as the standards component of the Canadian CSR Framework:

- The International Finance Corporation (IFC) Performance Standards and the Voluntary Principles on Security and Human Rights ("Voluntary Principles") as the initial standards for the Framework;

- IFC Guidance Notes and the IFC EHS Guidelines; and
- Guidance notes to be developed for the Canadian CSR Standards to clarify and augment the interpretation and application of these standards in particular areas. As discussed in the background, these include but are not limited to: mine closure, reclamation and economic transition; resettlement and provision of fair and appropriate compensation; biodiversity conservation; definition of broad community support for a project; use of forced or child labour through supply chain relationships; and environmental and social assessments and management systems.

The application and interpretation of these standards shall observe and enhance respect for principles of the Universal Declaration of Human Rights and other related instruments¹ that are within the sphere of control of companies. Specific guidelines related to the application and interpretation of human rights principles will be developed.

It is recommended that the Government of Canada, over the medium term (three–five years),

- Support multi-stakeholder efforts to implement this CSR Framework;
- Support the further evolution of principles, guidelines, best practices and measurable performance criteria, within the context of the Canadian CSR Framework, and within the context of international multi-stakeholder initiatives as appropriate; and
- Provide international leadership within the IFC and Voluntary Principles regimes. This will include the review and dissemination of best practices relevant to the effective implementation of the Canadian CSR Framework as well as other leading CSR performance frameworks.

It is recommended that the Government of Canada, over the longer term (five–ten years), support and participate in multi-stakeholder efforts to provide leadership in the development of an enhanced international CSR framework that incorporates best practices developed through the Canadian CSR Framework.

2.3.2.1. Global Reporting Initiative

It is recommended that the Government of Canada endorse the use of the Global Reporting Initiative (GRI) as the reporting component of the Canadian CSR Framework and expect that all Canadian extractive companies report using GRI, or its equivalent² during an initial phase-in period, at a level that reflects the size of the operation. With a goal of realizing sector-wide GRI coverage, it is recommended that the Government of Canada:

- Include GRI or GRI-equivalent reporting as a fundamental component of the Canadian CSR Framework, which will be considered as one factor in the determination of compliance with the Framework;

¹ For example, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

² The reference to a “GRI-equivalent” is in acknowledgment of the fact that some companies may already fulfill all relevant reporting requirements outlined in the Canadian CSR Framework, but not in a GRI format.

- Support the development of GRI sector supplements for the oil and gas sector as well as junior mining and exploration companies, and support junior and exploration companies in the extractive industry in the implementation of GRI reporting requirements through workshops and promotional materials;
- Establish a scheme within the *Income Tax Act* that provides refundable tax credits for CSR reporting using GRI Guidelines or their equivalent; and
- Collaborate with securities regulators and exchanges on adopting GRI reporting for the overseas operations of Canadian extractive-sector companies as a requirement for listing.

It is recommended that extractive-sector associations promote GRI reporting among their membership.

It is also recommended that financial institutions, investors, insurers, and other market actors promote GRI reporting by extractive-sector companies and use such reports in assessing investment risk.

2.3.2.2. Canada Investment Fund for Africa Reporting

It is recommended that the Canadian International Development Agency (CIDA) make known the standards regarding social, environmental, human rights and development impacts that are being used by the Canada Investment Fund for Africa (CIFA) in screening investments—and what measures exist to ensure adherence to these standards. CIDA should monitor and report annually to Parliament on CIFA's activities and how they conform to the objectives of the fund, and on development impacts achieved through CIFA.

2.3.2.3. Export Development Canada Disclosure Requirements

It is recommended that Export Development Canada (EDC) improve its disclosure policy. Subject to bona fide commercial confidentiality concerns, EDC should publicly release:

- Project classification rationales;
- Project assessments (undertaken during EDC due diligence);
- Modifications and mitigation measures required by EDC; and
- Project monitoring and evaluation documents generated by EDC, project proponents and consultants throughout project implementation.

2.4.2.1. Independent Ombudsman and Tripartite Compliance Review Committee

It is recommended that the Government of Canada fund as the compliance component of the Canadian CSR Framework the establishment of an independent ombudsman office, mandated to provide advisory, fact-finding and reporting functions, including:

- The provision of general information related to the implementation of the Canadian CSR Standards through an advisory role;
- Initial screening of complaints against Canadian companies to determine whether the complaint should be dismissed on the grounds that the nature of the complaint is spurious, and/or whether the complaint is relevant to the Canadian CSR Standards;
- For cases that merit additional consideration, secondary investigation and fact-finding efforts to assess in more detail the material facts related to complaints;
- The publication of the results of the fact-finding process; and
- Public reporting on an annual basis on:
 - Complaints that have been dismissed, and why;
 - Complaints that have been dealt with and have reached conclusion; and
 - Complaints that have not been resolved.

The ombudsman should develop rules of procedure that govern investigations, including the treatment of confidential information.

Complaints submitted to the ombudsman by both Canadians and non-Canadians will be expected to include: a clear description of the complaint; an indication of those aspects of the Canadian CSR Standards that the complainant believes have not been met; and the proposed remedy the complainant wishes should flow from the complaint.

It is further recommended that the Government of Canada establish a standing tripartite Compliance Review Committee that shall determine the nature and degree of any company non-compliance with the Canadian CSR Standards and may make recommendations with regard to:

- A referral to external dispute-resolution processes;
- Measures to be taken by the company to return to compliance and the monitoring of those measures; and
- A determination that no further action is required.

This determination of compliance—or the nature and degree of non-compliance with regard to the specific aspects of the complaint—and any recommendations will be made public.

In cases of serious non-compliance where the Compliance Review Committee determines that remedial steps have not been or are unlikely to be successful, the Compliance Review Committee will make recommendations with regard to the withdrawal of financial and/or non-financial services by the Government of Canada.

The compliance mechanism would apply to all Canadian companies, i.e., those incorporated in Canada and those that have their principal place of management (*siège social*) in Canada.

3.1.2.1. Government CSR Centre of Excellence

It is recommended that the Government of Canada enhance its existing internal CSR capacity (within the Department of Foreign Affairs and International Trade, Industry Canada, Natural Resources Canada, Environment Canada, the Canadian International Development Agency, etc.) through the establishment of a dedicated unit. The expertise, tools, research and support developed should be housed in a CSR Centre of Excellence that can provide CSR information and advice to Canadian missions, Canadian companies, NGOs, affected communities, host governments and indigenous communities. The CSR Centre of Excellence would also serve to promote Canada as a country committed to CSR and to the sustainable economic and social development of the countries in which the Canadian extractive industry operates.

The CSR Centre of Excellence will actively engage, on an ongoing basis, with civil society and industry for input and expertise. It will be a clearinghouse for CSR information, drawing on expertise across government departments and within civil society and the industry, and a source of information on government-wide activities related to CSR.

3.1.2.2. Industry Association Tools

It is recommended that industry associations, together with the Government of Canada and other stakeholders, develop and distribute information tools and targeted educational programmes to support the continuous improvement of CSR performance among Canadian companies, including the facilitation of information sharing and development of best practices and reporting on CSR performance.

It is recommended that industry associations develop guidance and tools and support capacity building (e.g., human rights assessments) to assist companies in the areas of environmental stewardship, community engagement and human rights. These efforts could build upon existing CSR initiatives, which may include:

- The Prospectors and Developers Association of Canada's Environmental Excellence in Exploration guidelines;
- The Canadian Association of Petroleum Producers' Stewardship Initiative; and
- The Mining Association of Canada's Towards Sustainable Mining initiative.

It is recommended that industry look at ways to enhance the CSR capacity of Canadian companies operating overseas. This could include extending the reach and mandate of Canadian industry associations or strengthening linkages with other international groups. The Government of Canada could support these efforts through the sponsorship of workshops, conferences and other fora involving domestic and international stakeholders.

3.1.2.3. Tools to Support Small-Scale Mining

It is recommended that the Government of Canada contribute to efforts to enhance the safety and environmental performance of artisanal, small-scale mining, as well as the benefits derived through this activity. This would include, in particular, support for the Association for Responsible Mining in its efforts to prevent and reduce conflict between artisanal miners and

Canadian mining companies, and to address the environmental, social, health and safety risk of small-scale mining.

3.1.2.4. Tools and Capacity Building to Support Civil Society

It is recommended that the Government of Canada, civil society and other stakeholders support Canadian civil society organisations (CSOs):

- To build partnerships with CSOs in developing countries, through exchanges and joint projects; and
- To develop and apply tools related to responsible extractive-sector management and CSR monitoring, based on transparent and legitimate development objectives.

These efforts could build on existing CSR initiatives such as the Framework for Responsible Mining and Through Indigenous Eyes.³ The objective of this support is to:

- Improve the capacity of host country environmental, indigenous, human rights, development CSOs and labour organisations to advocate responsibly and transparently for the rights of host communities and peoples; and
- Enable host country CSOs to choose to engage responsibly with extractive companies and host country governments from a position of improved capacity, independence and knowledge.

This support will realize these objectives through:

- Improving access to objective information;
- Fostering critical and informed analysis; and
- Promoting the development and/or strengthening of effective organisational structures and processes.

The Government of Canada could support these efforts through the sponsorship of workshops, conferences, and other fora involving domestic and international stakeholders.

To facilitate and ensure the integrity of this process, a Canadian CSO advisory group will be established made up of civil society representatives with expertise and experience working with communities affected by extractive activity. Together with government, the advisory group will develop criteria to guide decision-making regarding the provision of support to Canadian CSOs. Government will consult with the advisory group on an on-going basis regarding decision-making in this area.

³ For more information on the Framework for Responsible Mining, see <http://www.frameworkforresponsiblemining.org/>. For more information on the Through Indigenous Eyes research project, see <http://www.nsi-ins.ca/english/pdf/synerfinal.pdf>.

3.1.2.5. Civil Society Transparency and Accountability

With respect to support for civil society organisations (CSOs) discussed in 3.1.2.4, Canadian CSOs should employ governance codes and practices that ensure sound financial and institutional management, responsible public communications, accountability and transparency in their operations. Several CSO codes of conduct, including the Canadian Council for International Co-operation's Code of Ethics, have been developed to guide CSOs in this area. The adoption and application of such codes and practices should be used as a condition for Canadian CSOs gaining access to support by the Government of Canada described under 3.1.2.4. and the recommended ombudsman services described under 2.4.2.1.

3.2.2.1. Institutional Investor Disclosure

It is recommended that the Government of Canada increase the social, environmental and governance disclosure requirements for federally-governed pension funds by:

- Amending the *Pension Benefits Standards Act, 1985* to require federally-registered pension funds and pension plans created by federal statute to disclose annually the extent to which environmental, social and governance considerations are taken into account in proxy voting activities and the selection, retention and management of investments; and require pension funds to annually disclose their proxy voting guidelines and voting records;
- Amending section 48 (annual report) of the *Public Sector Pension Investment Board Act, 1999* and section 9 (statement of investment policies, standards and procedures) of the Public Sector Pension Investment Board Regulations, 1999 to implement the recommendation above;
- Encouraging, through the Office of the Superintendent of Financial Institutions (OSFI), the adoption of a similar regulation by other members of the Canadian Association of Pension Supervisory Authorities;
- Amending trustee legislation and/or make public statements to clarify that the consideration of social, environmental and governance issues for the purpose of risk minimization and/or long-term value maximization is not in conflict with established trustee fiduciary duty;
- Endorsing and promoting the UN Principles for Responsible Investment (UN PRI) as a preferred framework for guiding Canadian investor behaviour; and
- Initiating a review of Government of Canada funds invested in public markets to determine their suitability and feasibility for investment in accordance with the UN PRI.

In addition, it is recommended that the Government of Canada collaborate with its provincial and territorial counterparts to encourage similar policy changes and legislative amendments at the provincial and territorial levels in relation to pension funds, mutual funds, insurance and other institutional investors.

3.2.2.2. Canada Pension Plan

It is recommended that the Canada Pension Plan Investment Board (CPPIB) establish and report on a process for benchmarking the implementation/impact of its *Policy on Responsible Investing* in comparison to the performance of other signatories to the UN Principles for Responsible Investment in this regard.

It is recommended that the CPPIB publicly report on an annual basis on the implementation of its *Policy on Responsible Investing*.

The proposed roundtable follow-up process (see section 5.0) should consider periodically whether Canada should amend the CPPIB Act and/or related regulations to overcome obstacles to the further development and implementation of CPPIB's responsible investment policies and practices.

3.2.2.3. Definition of Materiality

It is recommended that the Government of Canada seek cooperation from the Canadian Securities Administrators, provincial securities regulators, and the Canadian Institute of Chartered Accountants to clarify that "material information" necessary for disclosure by publicly-traded companies includes environmental, social, and governance performance information where such issues have a potential bearing on business risks. Business risks include potential impact on financial condition, reputation, brand, liability long-term value, and key stakeholder relationships. These risks should be disclosed in each company's Management Discussion & Analysis and the Annual Information Form.

As a complementary effort, it is recommended that the Government of Canada support the development and dissemination of research and further guidance on the materiality of environmental, social and governance issues, including in corporate financial statements, Management Discussion and Analysis reports and the Annual Information Form.⁴

3.2.2.4. Investor Engagement

It is recommended that the Government of Canada engage, facilitate, and encourage business, the financial sector and other stakeholders to identify and develop the link between environmental, social and governance performance and financial value and to help make this link more relevant to financial sector decisions.

It is recommended that the Government of Canada encourage and support the Canadian stock exchanges to promote the development and implementation of an international code of practice for stock exchanges that supports the improvement of the public disclosure of CSR performance of listed companies.

⁴ See for example: The Canadian Institute of Chartered Accountants (CICA), "Financial Reporting Disclosures about Social, Environmental and Ethical (SEE) Issues," (2004). http://www.nrtee-trnee.ca/eng/programs/current_programs/Capital-Markets/Documents/CICA-SEE-Issues/CICA-SEE-Issues-Contents_E.htm

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3.3.2.1. Extraterritorial Criminal Law

It is recommended that the Government of Canada continue to work with relevant law enforcement authorities to identify and remedy legal and other barriers to the extraterritorial application of Canadian criminal law to ensure this law is being used as effectively as it can be.

3.3.2.2. *Corruption of Foreign Public Officials Act*

In the interest of harmonizing Canadian law with the best practices of other Organisation for Economic Co-operation and Development (OECD) countries, reducing uncertainty as to the scope of that law and to address recent criticism by the OECD, it is recommended that the Government of Canada:

- Amend the *Corruption of Foreign Public Officials Act* to clarify that it applies extraterritorially to Canadian nationals;
- Review the record of enforcement of the Act to determine whether there is room for improvement; and
- Work with relevant law enforcement authorities to raise awareness of the Act and its applicability to Canadian nationals.

3.3.2.3. *Income Tax Act*

It is recommended that the Government of Canada establish a scheme within the *Income Tax Act* that eliminates double tax relief in Canada for tax paid by a company to a foreign government where there is serious non-compliance with the Canadian CSR Standards in that country (where permissible under tax treaties). Among other things, in deciding whether there has been such serious non-compliance, the Government of Canada should take into account a finding by the Compliance Review Committee that the company is not in compliance with the Canadian CSR Standards and any accompanying relevant recommendations.

3.4.2.1. Financial and Insurance Support

It is recommended that Export Development Canada (EDC) utilize the Canadian CSR Standards in the development of their policies, practices and in the assessment of proposed extractive-sector projects. It is recommended that EDC ask project proponents to undertake peace and conflict impact assessments or equivalent tools when operating in conflict zones.

During the course of the project, EDC should apply a compliance management process that includes, at a minimum, the following elements:

- Enhanced efforts to make companies more aware of their human rights and environmental considerations; and
- Efforts to bring non-compliant companies back into compliance through active engagement with the companies.

EDC's contracts should provide that serious failure by extractive-sector companies to meet the Canadian CSR Standards should lead to the withdrawal of financial and insurance support when reasonable efforts by EDC and the Government of Canada to bring the company back into compliance have failed. EDC should develop and publicly release policies and guidelines for measuring "serious failure," reflecting the Government of Canada's work in this area. Among other things, in deciding whether there has been such a serious failure, EDC should take into account a finding by the Compliance Review Committee that the company is not in compliance with the Canadian CSR Standards and any accompanying relevant recommendations.

3.4.2.2. Conditioning of Government Support

The government may provide Canadian extractive-sector companies with support in their foreign operations, including, for example, through trade missions, that goes beyond ordinary consular services (meaning those consular services that are routinely provided to Canadian citizens). When such support seeks to promote a Canadian company or its interests in a foreign country, it is recommended that the Government of Canada condition this support on compliance with the Canadian CSR Standards, according to the following procedure:

In deciding to provide these services, the government shall take into account any information concerning the performance of a company under the Canadian CSR Standards. When the Government of Canada receives information on possible non-compliance by a company with these Standards, it should:

- Raise these issues with the company; and
- Where it appears that there has been possible non-compliance, enhance efforts to make the company more aware of their human rights and environmental considerations and encourage it to comply with the Canadian CSR Standards.

Determination by the Government of Canada of a serious failure by a company to meet the Canadian CSR Standards should lead to the withdrawal of this additional support. The Government of Canada should develop policies and guidelines for measuring serious failure. Among other things, in deciding whether there has been such a serious failure, the government shall take into account a finding by the Compliance Review Committee that the company is not in compliance with the Canadian CSR Standards and any accompanying relevant recommendations.

4.1.2.1. Contributions of the Extractive Sector to Host Government Development Priorities

In those developing countries that seek to promote economic and social development through investment in the extractive sector, it is recommended that the Government of Canada, while respecting the national sovereignty of these countries, work with their governments to develop strategies consistent with optimizing benefits of extractive projects so that national, regional and local economies benefit from the revenue flows, economic linkages and other spin-offs from the extractive industry. Mechanisms to achieve this may include support for the integration of extractive-sector issues into national development plans, including Poverty Reduction Strategy Papers and support for multi-stakeholder development partnerships that encourage meaningful

participation of host governments, affected communities, civil society and industry in local, regional and national development processes and programmes.

4.1.2.2. Building Capacity for Judicial Systems in Host Countries

Enhance the ability of organisations such as the National Judicial Institute (NJI) and the Canadian Bar Association to promote judicial reform and judicial capacity building in host countries, concentrating in particular on areas of weak governance (for example with respect to human rights promotion and protection and the enforcement of contracts) and employing mechanisms such as in-country seminars and programmes designed to bring developing country judges to Canada to gain direct experience of our legal system in action.

4.1.2.3. Exercising Influence in Regional and Multilateral Fora

It is recommended that the Government of Canada make use of its position within relevant regional and multilateral fora to optimize the positive contribution of the extractive sector to the social and economic development of the countries in which it operates, to support and promote CSR capacity building within the extractive sector and with other appropriate stakeholders, and to advance the rights of indigenous peoples with regard to extractive-sector issues, where applicable.

Particularly, it is recommended that the Government of Canada support the ongoing work within the UN system to advance the inclusion of human rights within the context of business sector activity. In this regard, Canada should maintain support for the mandate of the UN Special Representative on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, support follow-up within the UN framework and explore how Canada will follow up on the conclusions.

4.1.2.4. Join the Extractive Industries Transparency Initiative

It is recommended that the Government of Canada formally participate in the Extractive Industries Transparency Initiative (EITI) as a supporting country and encourage Canadian extractive companies to consider participation in the EITI.

Canada should take a leadership role in further developing and strengthening the application of the EITI with respect to the mining sector.

As a supporting country participant, Canada should encourage the development and introduction of an EITI template for the sub-national level in those countries that have already implemented EITI at the national level.

4.1.2.5. Voluntary Principles on Security and Human Rights

It is recommended that the Government of Canada endorse the Voluntary Principles on Security and Human Rights by becoming a participant country.

4.1.2.6. Multilateral Fora (Financial)

It is recommended that the Government of Canada work with like-minded countries to strengthen CSR requirements at the World Bank Group and regional development banks related to lending and support to private sector clients. In particular, it is recommended that the Government of Canada encourage the banks to:

- Initiate a transparent, participatory process to identify extractive industry-specific governance indicators that include such aspects as rule of law, absence or risk of conflict, respect of human rights, etc. and apply these indicators in decision-making around extractive industry project support and publicly report the assessments they undertake on the basis of these indicators;
- Enhance their disclosure requirements. In particular, clients should be required to publicly disclose their contracts (e.g., tax and royalty payments and including “stability agreements”) with host governments and all payments made to public officials when appropriate and subject to confidentiality requirements;
- Publicly disclose their evaluations of project-level development impacts on a project (non-aggregated) basis; and
- Continue progress toward initiating a transparent, participatory process to develop human rights policies that ensure that their private sector clients are in compliance with universal human rights standards. To this end, it is recommended that the Government of Canada provide support and financial assistance to the Office of the High Commissioner for Human Rights to channel its human rights expertise to the banks in support of the development and application of such policies. The banks should publicly disclose these policies.

5.1.2.1. Canadian Extractive Sector Advisory Group

It is recommended that the Government of Canada establish a multi-stakeholder (government, industry, indigenous representatives, socially responsible investors, academics, labour and civil society) Canadian Extractive Sector Advisory Group, meeting on a regular basis (minimum annually), to advise the government on the implementation and further development of both the Canadian CSR Framework and the other recommendations contained in this report. Within six months of the release of the government response to this report, a meeting shall be scheduled to establish the Terms of Reference for the Canadian Extractive Sector Advisory Group, including its activities and membership. Participants in this initial meeting will include members from the Advisory Group for the National Roundtables on CSR and the Canadian Extractive Sector in Developing Countries.

As discussed in section 5.1.1, the general functions of the Canadian Extractive Sector Advisory Group are to:

- Provide guidance on the establishment of the outstanding elements of the Canadian CSR Framework;
- Monitor and assess the development and implementation of the Canadian CSR Framework;

- Advise on the continuous improvement of the Canadian CSR Framework;
- Monitor the implementation of all other recommendations in this report;
- Identify outstanding gaps and identify strategies to address these gaps; and
- Advise on continuous learning and improvement within the sector and by other actors, with particular attention to international CSR standards and best practices.

Specific tasks identified in this report for the consideration of the Canadian Extractive Sector Advisory Group include:

- Provide advice on the development of Guidance Notes for the Canadian CSR Standards (section 2.2.2.1.);
- Discuss and provide advice on outstanding issues identified by the Advisory Group (section 2.2.1.);
- Advise on the further evolution of principles, guidelines, best practices and measurable performance criteria, within the context of the Canadian CSR Framework, and within the context of international multi-stakeholder initiatives (section 2.2.2.1.);
- Advise on the development of principles to guide the application and interpretation of human rights principles within the context of the Canadian CSR Standards (section 2.2.2.1.);
- Review the merits of an industry reporting requirement under the *Canada Business Corporations Act* (section 2.3.1.);
- Advise on the development of Global Reporting Initiative sector supplements for the oil and gas sector as well as for junior mining and exploration companies (section 2.3.2.1.);
- Advise on whether Canada should amend the *Canada Pension Plan Investment Board Act* and/or related regulations to overcome obstacles to the further development and implementation of the Canada Pension Plan Investment Board's responsible investment policies and practices (section 3.2.2.2.); and
- Monitor and support multi-stakeholder work on Canadian and international approaches to human rights impact assessments for extractive industry projects in host countries with significant problems related to human rights and/or weak capacities to fulfil international human rights obligations (sections 3.1.2.2, 4.1.).

Other areas that were identified in this report as requiring further attention by the Government of Canada and upon which the Canadian Extractive Sector Advisory Group could provide advice include:

- Constitutional and other implications of federal legislation facilitating civil suits in Canada concerning the activities of Canadian extractive companies operating abroad;
- The coherence of Canadian investment, trade and aid policies. Attention should be paid to whether these policies contribute to the social and economic development of the countries in which Canadian extractive companies operate;

- The policies and positions advanced by Canada in international fora (World Bank Group, UN agencies, etc.) with a view to ensuring that they contribute to the social and economic development of the countries in which Canadian extractive companies operate;
- Initiatives and projects undertaken by other countries (such as Norway and Finland) in the area of reinforcing institutional capacity for governance in the extractive sector of developing countries with a view to supporting and implementing similar innovative projects; and
- The establishment of a multi-stakeholder forum to discuss the implications of the Government of Canada providing bilateral capacity-building support in the area of host government regulation.

1.0. Introduction

1.1. Background

In June 2005, the 38th Parliament's Standing Committee on Foreign Affairs and International Trade (SCFAIT) issued its report, *Mining in Developing Countries—Corporate Social Responsibility*, which called on the federal government to “put in place a process involving relevant industry associations, non-governmental organisations and experts, which will lead to the strengthening of existing programmes and policies in this area, and, where necessary, to the establishment of new ones.”⁵

In response to this parliamentary report, the government held four National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Sector in Developing Countries (“The Roundtables”) between June and November 2006 in Vancouver, Toronto, Calgary and Montreal. Flowing from the SCFAIT report, five themes were selected to guide the Roundtable process. These themes were: CSR Standards and Best Practices; Incentives Supportive of the Implementation of CSR Standards; Assistance to Companies to Implement CSR Standards and Best Practices; CSR Monitoring and Dispute Resolution; and Capacity Building for Resource Governance in Developing Countries. These themes have been re-conceptualized in this report according to synergies identified in the Roundtable process.

Summary reports were generated for each of the above-mentioned Roundtable meetings. The objective of each report was to reflect, as a stand-alone document, the discussions that took place during the Open Sessions and Issue Focus Sessions. This Advisory Group report is intended to summarize the input received across all of the Roundtables as well as incorporate the input from 104 written submissions received on the topic of CSR and the Canadian extractive sector operating abroad. This report includes a review of the mandate and management of the process, summarizes the key messages communicated for all of the major themes, and provides recommendations to the Government of Canada from the Advisory Group.

The present report was authored by the National Roundtables Advisory Group, drawing upon a broad range of expertise represented at the 2006 National CSR Roundtables. It was developed as a core contribution to the government's initiative to review the challenges associated with Canadian extractive-sector companies operating in developing countries and to generate a response to Parliament presenting recommendations for government, civil society, the investment community and the extractive industry on ways to strengthen the CSR performance of the extractive sector in developing countries.

While there is no conclusive definition of corporate social responsibility, throughout the Roundtable process the term has been understood to refer to “the way firms integrate social, environmental and economic concerns into their values, culture, decision-making, strategy and operations in a transparent and accountable manner and thereby establish better practices within the firm, create wealth and improve society.”⁶ This definition was furnished in the National

⁵ Standing Committee on Foreign Affairs and International Trade (SCFAIT), *Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility*, 38th Parliament, 1st Session, (June 2005), 2.

<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=8979&Lang=1&SourceId=178650>

⁶ See *Corporate Social Responsibility: An Implementation Guide for Canadian Business*, (Government of Canada: 2006), 5. This definition notes that CSR “builds on a base of compliance with legislation and regulation, and typically includes “beyond law”

Roundtables Discussion Paper⁷ and assisted in framing the discussions at all of the Roundtables. The concrete focus of discussions throughout the Roundtable process was on the environmental, social and human rights performance and impacts of Canadian extractive companies on the communities and states in which they operate.

The issues addressed by the Roundtables are clearly on the public's mind. Each Roundtable provided an opportunity to gather input from the engaged public through Open Sessions and to foster an in-depth, policy-relevant discussion with invited participants in closed Issue Focus Sessions. Every Roundtable participant, both at the Open Sessions and the Issue Focus Sessions, was reminded that the focus of the process was on developing potentially actionable ideas to be carried out by government, industry and civil society to enhance the CSR performance of the Canadian extractive sector operating in developing countries.

1.2. Description of the Roundtable Process

Government leadership in organizing the National Roundtables was provided by an inter-departmental Steering Committee, chaired by the Department of Foreign Affairs and International Trade. The Steering Committee also included representatives from Natural Resources Canada, Industry Canada, Environment Canada, the Canadian International Development Agency, Indian and Northern Affairs Canada, the Department of Justice, Export Development Canada, and the Privy Council Office.

The Steering Committee worked in close cooperation with an Advisory Group made up of experts drawn from across stakeholder groups. The Advisory Group included representatives from industry associations, individuals currently within or recently retired from extractive-sector companies active overseas, civil society organisations, labour, academics, and the financial sector. The Advisory Group attended all of the Roundtable meetings, listening to Open Session presentations and participating as subject-matter experts in the Issue Focus Sessions. In addition, civil society and mining sector focal points were established to act as a channel for input from their stakeholders and to contribute to the selection of participants and the drafting of reports.

In collaboration, the Steering Committee and Advisory Group established the parameters for the National Roundtables process, including the selection of invited experts and the agendas for each of the Roundtables. This collaborative and transparent approach to the design and implementation of the Roundtable process fostered an environment conducive to a productive exchange of ideas.

The Roundtable sessions included 31 hours of time dedicated to hearing oral presentations from the public. In total, 156 presenters participated (61 from civil society, 33 from industry, 15 from labour organisations, 31 from academics and research institutes, and 16 from members of the public having no specified affiliation). One hundred and four written submissions were

commitments pertaining to a wide range of topics, including corporate governance and ethics; health and safety; environmental stewardship; human rights (including core labour rights); human resource management; community involvement development and investment; involvement of and respect for Aboriginal peoples; corporate philanthropy and employee volunteering; customer satisfaction and adherence to principles of fair competition; anti-bribery and anti-corruption measures; accountability, transparency and performance reporting, and supplier relations, for both domestic and international supply chains." Ibid.

⁷ See Department of Foreign Affairs and International Trade, *National Roundtables on Corporate Social Responsibility and the Canadian Extractive Sector in Developing Countries: Discussion Paper* (Government of Canada: 2006).

[http://geo.international.gc.ca/cip-pic/library/CSR%20Roundtables%20Discussion%20Paper%20\(English\).pdf](http://geo.international.gc.ca/cip-pic/library/CSR%20Roundtables%20Discussion%20Paper%20(English).pdf)

forwarded to the Steering Committee and Advisory Group and posted on the National Roundtables website.

In addition, the Advisory Group and Steering Committee spent 70 hours hearing from invited experts during Issue Focus Sessions dedicated to in-depth, face-to-face discussion on each theme. The Roundtables benefited greatly from the participation of 57 prominent experts from around the world. Participants included industry representatives from companies, financial sector and investment experts, lawyers, academics, and representatives from both civil society and members of communities affected by Canadian extractive-sector activities.

1.3. Description of the Extractive Sector

The Canadian mining sector (including pits, quarries and mineral fuels) is made up of exploration companies (many of which are small enterprises), some of which operate exclusively abroad; junior companies which operate or are developing one or two mines, often with no operations in Canada; and major companies which own and operate several mines, generally both within Canada and abroad. There are more than 1,000 mining companies listed on Canadian stock exchanges, more than any other country, and the vast majority of these are exploration or junior companies.⁸ Canadian stock exchanges are the world's largest source of equity capital for mining exploration and production both in Canada and abroad.⁹

The mining sector is active in every province and territory of Canada and makes a major contribution to the country's economy.¹⁰ In 2005, the mining, mineral processing and metal manufacturing industries contributed \$50.7 billion to the Canadian economy, which represented 4.0% of the gross domestic product (GDP).¹¹ Furthermore, in 2005, these industries directly employed 388,000 Canadians. Over the last five years, minerals and mineral projects have accounted for approximately 38% of the volume handled at Canada's ports and about 54% of rail revenue freight.

Among Canada's goods-producing sectors, Canadian mining companies listed on Canadian stock exchanges are the largest outward investors, with interests in more than 8,000 exploration and mining properties in over 100 countries around the world.¹² These Canadian projects include over 200 mines, smelters, refineries, plants under construction, and other advanced mineral projects. Canadian-based companies conduct around 40% of all mineral exploration undertaken in the world.¹³ Canada's minerals and metals industry accounts for approximately \$50 billion, or about 12%, of all Canadian direct investment abroad.¹⁴

Energy (all sectors) contributed \$75.2 billion, or 5.9%, to the GDP in 2005, of which crude oil and natural gas accounted for \$27.9 billion.¹⁵ The Canadian oil and gas industry is traditionally

⁸ Natural Resources Canada, "Canada's Minerals and Metals, Key Facts." http://www.nrcan.gc.ca/mms/video/keyfacts_e.htm

⁹ See Natural Resources Canada "Important Facts on Canada's Natural Resources (as of September 2006)." <http://www.nrcan.gc.ca/statistics/factsheet.htm>

¹⁰ In this paragraph, the mining sector refers to both Canadian and non-Canadian mining companies operating in Canada, as do the related statistics.

¹¹ GDP at basic prices (1997 constant dollars). See Natural Resources Canada "Important Facts on Canada's Natural Resources (as of September 2006)." <http://www.nrcan.gc.ca/statistics/factsheet.htm>

¹² Natural Resources Canada, "Canada's Minerals and Metals, Key Facts." http://www.nrcan.gc.ca/mms/video/keyfacts_e.htm

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Natural Resources Canada, "Important Facts on Canada's Natural Resources (as of September 2006)." <http://www.nrcan.gc.ca/statistics/factsheet.htm>

divided into three categories: upstream (exploration), midstream (processing, storage and transportation) and downstream (refining, marketing, distribution). The upstream sector is the largest single private sector investor in Canada. In 2005, new investment in the Canadian oil and gas industry was valued at \$45.3 billion.¹⁶

Most of Canada's petroleum production is exported. In 2005, 1.58 million barrels per day of crude oil, 0.44 million barrels per day of refined petroleum products and 3.8 trillion cubic feet of natural gas were exported, mainly to the U.S.¹⁷ Seventy-five Canadian oil and gas exploration and production companies have land holdings in 69 countries and areas of the world.¹⁸ Five of Canada's most prominent petroleum companies operate in over a dozen developing countries, including China, Algeria, Peru and off the coast of North Africa.¹⁹

Extractive-sector industries directly employ more than 638,000 Canadians and sustain a substantial domestic cluster of mainly small and medium-sized companies engaged in equipment manufacture and supply, engineering, consulting and geo-science services.²⁰ The energy and metallic minerals industry is the second largest component of Canadian direct investment abroad (an estimated \$104.1 billion in direct investment) behind the financial services sector.²¹

1.4. CSR Challenges related to the Canadian Extractive Sector in Developing Countries

Extractive activities can only be undertaken where economically viable deposits are found. However, economic viability is only one consideration to take into account in deciding whether to proceed with an extractive project. Others include site-specific environmental, social and political risks. Canadian extractive companies are increasingly investing in developing countries. This trend is accelerated by the high prices that all mineral and petroleum commodities currently command, regulatory revisions that have occurred in many countries, and support from international financial institutions. Greater investment in developing countries presents a range of social and environmental challenges for Canadian companies, for the Canadian government, for host country governments and for affected communities; many developing countries have weak or non-existent resource governance capacities and many remote communities lack the resources and competencies to engage effectively with foreign extractive-sector companies. In addition, companies themselves can lack the experience and skills demanded of such complex and challenging circumstances.

Given their economic size and potential environmental, social and human rights impacts, extractive-sector activities must be undertaken with a high degree of sensitivity to these potential impacts, as well as to the legislative, regulatory and bureaucratic capacities of host governments. Issues related to the nature of the extractive industry, as well as to the resource-governance capacities of host countries include: environmental concerns; community relations; human rights; security and armed conflict; labour relations; indigenous peoples' rights;

¹⁶ See Canadian Association of Petroleum Producers, "Industry Facts and Information."

http://www.capp.ca/default.asp?V_DOC_ID=603

¹⁷ Natural Resources Canada, "Important Facts on Canada's Natural Resources (as of September 2006)."

<http://www.nrcan.gc.ca/statistics/factsheet.htm>

¹⁸ Doig's Digest, Canadian Energy Ventures Abroad Annual Report (13th Edition), July 2006.

¹⁹ Nexen, Husky, Talisman, PetroCanada, Canadian Natural Resources.

²⁰ See Natural Resources Canada, "Important Facts on Canada's Natural Resources (as of September 2006)."

<http://www.nrcan.gc.ca/statistics/factsheet.htm> GDP in current dollars.

²¹ Statistics Canada, Canada's International Investment Position (Fourth Quarter, 2006).

compatibility of resource development with national and local economic priorities; benefit sharing with local communities; ineffective legal systems and the potential for corruption. In many countries, challenges associated with the lack of effective rights legislation or enforcement of this legislation may be particularly problematic when dealing with the resettlement of populations.

Extractive projects may be the only significant economic activity in a country or municipality and companies may be under pressure to provide services, such as water, electricity, medical and education services, to local populations. Companies are also called upon to ensure that projects will not result in significant and lasting negative social and environmental effects.

Oil, natural gas and mining developments face the additional challenge of having direct and, at times, significant environmental impacts that must be managed. While the physical footprint can often be reclaimed, in other cases environmental issues, such as acid rock drainage from mine tailings' impoundments, can extend well beyond a project's life. Further, there remains a large inventory of mining sites where reclamation has not been implemented. Mines may not only leave behind physical but also social legacy issues that may not have been fully addressed.

Some developing countries see oil and natural gas, in particular, as a strategic resource. This can sometimes lead to governments implementing restrictive measures on oil and gas projects, justifying these measures as a means of capturing the maximum benefit for the state, and preventing foreign dominance of such a vital part of the national economy. In some cases, non-energy minerals have similarly been viewed by governments as strategic resources, leading to a large state role in the industry.

Mineral, oil and natural gas deposits are finite, non-renewable resources. Every ore body, and oil and natural gas deposit exploited will be depleted. This raises challenges regarding the sustainable distribution of benefits to key stakeholders throughout the project's life and to future generations, especially when the country's government has weak institutions. Further, there are issues of project closure and of assisting workers and communities in preparing for the disappearance of a major economic activity.

There have been increasing concerns about the human rights impact of Canadian extractive companies with respect to their operations abroad. Open Session participants and civil society members of the Advisory Group pointed out that communities affected by Canadian extractive operations have lodged a number of human rights-related complaints with national and international bodies, including Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, the World Bank Group's Compliance Advisor/Ombudsman, and the Inter-American Commission on Human Rights.

Industry participants expressed the view that due to a general lack of reliable information, except of an anecdotal nature, concerns about the human rights impact of extractive operations and the challenges underlying them are difficult to assess in quantitative terms with respect to their scope and frequency, and there is no consensus as to whether human rights abuses or other types of infractions are rare or widespread.

However, there is general agreement by industry, government and civil society that continual improvement of CSR performance by the extractive sector is of fundamental importance. A proposal was discussed that the Government of Canada adopt legislation to establish CSR standards for Canadian companies operating abroad. While such legislation must not interfere with a host country's sovereignty, in cases of serious human rights violations, Canadian laws prohibiting such activities would usually be consistent with the host state's existing international human rights obligations (and often its domestic laws); that is, companies would be expected to

comply with standards that already should be observed and enforced in the host state (but which may not be for various reasons).

Canadian extractive companies face particular challenges when they operate in conflict zones in developing countries or in areas where they perceive the need to protect their operations through the employment of armed security forces. There is a role for the Government of Canada to play in recommending the use of tools and best practices such as human rights and peace and conflict impact assessments, and adherence to the Voluntary Principles on Security and Human Rights to minimize human rights abuses.

Recognition of shared CSR responsibilities with respect to the extractive sector implies the need for partnerships among industry, host governments, communities and civil society organisations to optimize the contribution of the extractive sector to host country and local community development objectives.

Further, there is a need to ensure the coherence of Canadian investment, trade and aid policies to ensure that they contribute to the social and economic development of the countries in which Canadian extractive companies operate. This includes the policies and positions that are advanced by Canada in its capacity as a donor, both through multilateral financial institutions and bilaterally. Particular attention must also be paid to the fact that legislation in resource-rich developing countries that is aimed at promoting foreign investment may do so at a cost to social and economic development and the protection of the environment. There is a need to enhance the capacity of host governments to regulate the extractive sector and they should be encouraged to work with local governments, civil society and industry. In the long term, such measures will allow states to significantly enhance the security and development of their people.

2.0. CSR Standards, Reporting and Compliance

The Advisory Group was informed that the Government of Canada expects Canadian companies to abide by local laws and internationally agreed-upon principles in their operations abroad, including those applying to human rights and the environment. The government is committed to the promotion of CSR standards and international human rights norms, as demonstrated by its adherence to and promotion of the OECD Guidelines for Multinational Enterprises. However, there is a need to strengthen the capacity of extractive-sector companies with respect to human and material resources, knowledge, and incentives to adequately address the challenges of operating in a developing country context.

To this end, the SCFAIT report recommended that the Government of Canada work with like-minded countries to define clearly the responsibilities of multinational enterprises with regard to human rights and develop specific rules for companies operating in conflict zones.²² Furthermore, the SCFAIT report recommended strengthening or developing new mechanisms to monitor the activities of Canadian extractive-sector companies operating in developing countries and to address complaints alleging socially and environmentally irresponsible conduct and human rights violations.²³

It is increasingly the case that the extractive industry needs to demonstrate good corporate conduct in order to obtain access to resources. While there has been a distinct emphasis on minimizing the negative environmental impacts of extractive-sector activities, in recent years the sector has begun addressing social issues. A number of companies have started referring to their need for a “social licence” to operate. Moreover, the reputation of meeting or even exceeding CSR standards can offer extractive companies a competitive advantage and increase their overall economic success. The social and environmental performance of Canadian extractive companies can also reflect positively on the long-term success of Canadian business as a whole.

²² Standing Committee on Foreign Affairs and International Trade (SCFAIT), *Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility*, 38th Parliament, 1st Session, (June 2005).

²³ Ibid.

2.1. Canadian CSR Framework

2.1.1. Background

According to a recent World Bank Group study, there are four principal roles the public sector can play to enable corporate uptake of CSR: mandating, facilitating, partnering, and endorsing.²⁴ In a “mandating” role, governments define minimum standards for business performance and embed the standards within a legal framework. In their “facilitating” role, governments and their agencies enable or incentivize companies’ inclusion of CSR principles in their business practices. As “partners,” governments may participate, convene or facilitate strategic partnerships between the private sector, civil society and the public sector. Finally, governments can “endorse” CSR-related initiatives through political and public policy support of the concept of CSR. The public sector often engages in all four of these functions, effectively creating a CSR framework.

During the course of the Roundtables, a variety of framework models were debated, which included establishing or endorsing a set of internationally recognized CSR standards, enhanced reporting on corporate performance and project impacts, and a compliance mechanism combining a monitoring and advisory function. With regard to how a framework could be implemented, two proposals stood out as appropriate in the Canadian context.

In the first approach, corporations with foreign operations voluntarily sign up to a framework that outlines the desired standard of behaviour. These corporate members then become subject to a mandatory reporting and compliance scheme that supports the standards. There are examples of this model internationally, including the UN Global Compact initiative, which now involves around 3,000 participants, including 2,500 business participants in 90 countries around the world, all of whom report on their performance annually.

The second approach involves a statement from the Government of Canada that all Canadian extractive-sector companies operating abroad are expected to comply with a set of CSR standards. It was recognized that there is a need for measurable performance criteria and incentives linked to these standards in order to achieve acceptability and credibility among a broad range of stakeholders. In this approach, the implementation of these requirements will be phased in and the reporting requirements will also be scaled to reflect size variations between companies. Moreover, the development of a separate CSR reporting and monitoring system was seen as crucial to the creation of a comprehensive CSR framework. This model enjoyed widespread support among civil society and industry Advisory Group members and forms the basis of the recommendation that follows.

²⁴ Tom Fox, Halina Ward, and Bruce Howard. *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study*. International Institute for Environment and Development, October 2002.
[http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-CSR_interior.pdf/\\$FILE/CSR-CSR_interior.pdf](http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-CSR_interior.pdf/$FILE/CSR-CSR_interior.pdf)

2.1.2. Recommendation

2.1.2.1. The Canadian CSR Framework

It is recommended that the Government of Canada, building on its support for the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises, establish and promote a Canadian CSR Framework for all Canadian extractive-sector companies operating in developing countries. This Framework will include an initial set of standards, as well as the CSR incentives, reporting and compliance mechanisms contained within this report.

2.2. Standards

2.2.1. Background

The international community has been creating sets of standards to define CSR for over a decade and is currently refining some of these sets of standards to include appropriate performance benchmarks. The National Roundtables process committed to formulating CSR standards that would draw upon lessons from domestic and international norms and best practices.

Industry associations and a number of Canadian extractive companies have been proactive in developing and implementing voluntary CSR policies and practices, particularly in the areas of environmental stewardship, health and safety, community engagement, habitat conservation, education and training of local populations and financial contributions. Examples of specific policy initiatives undertaken by industry associations include the Mining Association of Canada's Towards Sustainable Mining (TSM) initiative, the Canadian Association of Petroleum Producers' Stewardship Initiative, and the Prospector and Developers Association of Canada's Environmental Excellence in Exploration (e3) guidelines. Some companies in the Canadian extractive industry have also engaged in a variety of voluntary CSR practices in their operations in Canada and abroad.

Open Session presenters speaking on the issue of standards strongly endorsed the need for CSR standards to guide the activities of Canadian extractive-sector companies operating overseas. Many argued that Canadians need clarity on what is expected of Canadian companies operating abroad. They also argued that meeting or exceeding good CSR standards with respect to human rights and the environment could be a competitive advantage for Canadian extractive-sector companies overseas.

Many presenters supported mandatory and enforceable CSR standards. They argued that voluntary standards result in high rates of non-compliance and have been insufficient to protect communities, workers, and the environment in developing countries. They emphasized that binding norms are required that reward best practices and deny Canadian public financial and political support for poor performers. It was also noted by some that there will always be laggards in any sector, willing to use unethical practices that in effect will undermine any voluntary system. These speakers stated that legislation must be drafted that can hold all Canadian extractive corporations accountable for non-compliance with established CSR standards or violations of human rights or environmental obligations.

On the other hand, several speakers noted that introducing more regulations, even if they can be legally enforced abroad, will not address all of the problems that were referenced by many of the Open Session participants. For example, companies may simply transfer and adjust their corporate identities to avoid Canadian oversight. Heavy-handed regulation may discourage responsible Canadian companies—some of which already think they are well-regulated—from operating in sensitive areas, thereby reducing the positive contribution that extractive industries can provide for the communities and developing countries in which they operate. While it was recognized that there is a need for an actionable strategy to affirm that Canadian values are upheld by Canadian companies operating overseas, several speakers encouraged the use of voluntary standards and self-regulation to achieve this goal, noting that it would be in the company's best interest—both financially and reputationally—to abide by a strong and cohesive

set of voluntary standards on CSR. Some of the participants in favour of voluntary measures saw a role for government in supporting innovation and research on CSR, such as the development of indicators. It was noted that a common indicator framework would facilitate measuring the effectiveness of voluntary standards.

Whichever model is followed, many speakers thought that a consistent and internationally comprehensive approach is required to ensure meaningful change with respect to CSR performance on the ground.

The Issue Focus Session discussions on CSR standards and best practices identified a number of principles that should underlie an appropriate set of standards for the Canadian extractive industry, including scope, usability, credibility, and appropriateness for Canada. It was noted that the process of implementation, monitoring, reporting, compliance assurance and dispute resolution is directly related to the application of standards that provide specific performance criteria. Effectiveness also fosters a culture of learning and a commitment to improvement in CSR performance from within industry. It was proposed that standards need to be both specific and adaptable to allow companies to operate under varying social, environmental and political conditions, that they be scalable to the nature, type and size of the company and that they set achievable outcomes. Other participants emphasized that standards need to be enforceable to be credible, and need to be acceptable to a broad range of stakeholders.

Overall, there was general agreement that the development of a Canadian CSR framework should be based on existing national and international standards. As no one set of standards was seen to meet all the principles and criteria under discussion, emphasis has been placed on exploring ways in which different sets of standards could be implemented together.

The established international standards and principles taken under consideration included: the International Finance Corporation Performance Standards; the Voluntary Principles on Security and Human Rights; the Principles and Criteria of the Mining Certification Evaluation Project; the UN Global Compact; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Universal Declaration of Human Rights; the OECD Guidelines for Multinational Enterprises; the OECD Convention on Combating Bribery; the ILO Tripartite Declaration; the ILO core labour standards; and ILO Convention 169. Civil society members of the Advisory Group also referenced the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,²⁵ and the UN Declaration on the Rights of Indigenous Peoples, as adopted by the UN Human Rights Council on 29 June 2006.²⁶

A new set of Policy and Performance Standards on Social and Environmental Sustainability were adopted by the World Bank Group's International Finance Corporation (IFC) in April 2006, following approval by the Board of the World Bank Group. Together, the eight standards set expectations of conduct for corporations and investors with regard to the following issue areas: Social and Environmental Assessment and Management Systems; Labour and Working Conditions; Pollution Prevention and Abatement; Community Health, Safety and Security; Land Acquisition and Involuntary Resettlement; Biodiversity Conservation and Sustainable Natural

²⁵ The UN Sub-Commission on the Promotion and Protection of Human Rights approved the Norms on 13 August 2003. However, the UN Commission on Human Rights, to which the Norms were referred, has not adopted the Norms.

²⁶ It should be noted that Canada voted against the adoption of this specific text.

Resource Management; Indigenous Peoples; and Cultural Heritage. The IFC publicly reports that it reviews all projects proposed for direct financing against these standards.²⁷

The Voluntary Principles on Security and Human Rights (“Voluntary Principles”) were developed in 2000 through a multi-stakeholder process involving the U.S. and U.K. governments, companies operating in the extractive and energy sectors, and non-governmental organisations. The Voluntary Principles are designed to assist companies in maintaining the safety and security of their operations within a framework that ensures respect for human rights. They provide guidance for companies and host country governments on identifying human rights and security risks, as well as providing guidance for companies on engaging and collaborating with state and private security forces. Since 2000, the governments of Norway and the Netherlands have become participants in the initiative, as well as several other companies and NGOs.

The debate in the Issue Focus Sessions over standards focussed on whether Canada’s set of standards for the extractive sector should be based on the IFC Performance Standards or on UN principles reflected in the globally-endorsed treaties represented by the International Bill of Rights and ILO core labour standards. The debate was framed by civil society as one between rights-based principles rooted in the UN and endorsed by most governments around the world and risk-based principles developed by a financial institution and accepted by corporations seeking IFC funding.

The debate also centered on the need for practical and detailed performance criteria against which Canadian extractive-sector companies could be held to account. In the case of a standard set based on UN human rights principles, these detailed performance criteria for corporate behaviour would need to be developed. The Roundtable process itself did not provide an opportunity for this work to be done. In the case of the IFC Performance Standards, there is a great deal of detail provided to guide corporate behaviour. However, there was general acceptance among Advisory Group members that the IFC Performance Standards fall short in reflecting the human rights obligations held by Canada and international governments. For this reason the recommendation on the IFC Performance Standards as outlined under 2.2.2.1. is prefaced with the expectation that they will achieve outcomes, within the sphere of control of companies, consistent with the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. The IFC Performance Standards have also been augmented by the Voluntary Principles in the Advisory Group’s recommendation.

Based on international social and environmental best practice, the Advisory Group discussed gaps in the IFC Performance Standards and identified a number of provisions which, if added to the IFC Performance Standards, would address these gaps.

In terms of responding to these gaps, the following issue areas were notable for their degree of convergence, including: the need for additional detail on mine closure, reclamation and economic transition; the need for resettlement insurance, fair and appropriate resettlement compensation and compensation for those whose land tenure is well-established; not siting projects in UNESCO world heritage areas; the need for a definition of ‘broad community support’; not benefiting from forced or child labour through supply chain relationships; and, with respect to implementation of Performance Standard 1, the need to define how company

²⁷ According to the IFC website, in order to be eligible for IFC funding, a project must: be located in a developing country that is a member of IFC; be in the private sector; be technically sound; have good prospects of being profitable; benefit the local economy; and be environmentally and socially sound, satisfying IFC environmental and social standards as well as those of the host country. See http://www.ifc.org/ifcext/about.nsf/Content/How_Apply_Financing

obligations with respect to Social and Environmental Assessment, Management Programmes and Actions Plans with respect to mitigation measures will be carried out.

A number of significant issues were discussed at length by the Advisory Group on which there was less convergence. These issues will require further discussion and include: disposal of mine waste in natural water bodies; free, prior and informed consent (FPIC) of indigenous peoples;²⁸ siting projects on land that has not experienced prior conversion;²⁹ use of the precautionary principle in the initial stages of project design and implementation;³⁰ damage or loss to critical cultural heritage; and, not siting projects in areas classified as International Union for Conservation of Nature (IUCN) categories I-IV.

The Advisory Group believed that all of the above issues should be considered as priorities in the ongoing discussion of the development of the Canadian CSR Guidance Notes.

2.2.2. Recommendation

2.2.2.1. Canadian CSR Standards

It is recommended that the Government of Canada, over the short term (one–three years), include as the standards component of the Canadian CSR Framework:

- The International Finance Corporation (IFC) Performance Standards and the Voluntary Principles on Security and Human Rights (“Voluntary Principles”) as the initial standards for the Framework;
- IFC Guidance Notes and the IFC EHS Guidelines; and
- Guidance notes to be developed for the Canadian CSR Standards to clarify and augment the interpretation and application of these standards in particular areas. As discussed in the background, these include but are not limited to: mine closure, reclamation and economic transition; resettlement and provision of fair and appropriate compensation; biodiversity conservation; definition of broad community support for a project; use of forced or child labour through supply chain relationships; and, environmental and social assessments and management systems.

The application and interpretation of these standards shall observe and enhance respect for principles of the Universal Declaration of Human Rights and other related instruments³¹ that are

²⁸ For example, *The Golden Rules* developed by the No Dirty Gold campaign support FPIC for all mining affected communities. <http://www.nodirtygold.org/goldenrules.cfm>. The FPIC requirement is also supported in cases involving indigenous peoples by: The World Commission on Dams (WCD 2000), the World Bank Group Extractive Industries Review (2003), UNDP, the Convention on Biological Diversity (1992) and the World Conservation Union (IUCN), among others.

²⁹ This criterion existed in the World Bank Group Safeguard Policies but was dropped in the newly adopted Performance Standards.

³⁰ Ibid. Canada and 178 other nations endorsed the precautionary principle at the 1992 United Nations Conference on Environment and Development. This definition of the precautionary principle is currently enshrined in the 1999 *Canadian Environmental Protection Act* (CEPA 1999): “Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

³¹ For example, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

within the sphere of control of companies. Specific guidelines related to the application and interpretation of human rights principles will be developed.

It is recommended that the Government of Canada, over the medium term (three–five years),

- Support multi-stakeholder efforts to implement this CSR Framework;
- Support the further evolution of principles, guidelines, best practices and measurable performance criteria, within the context of the Canadian CSR Framework, and within the context of international multi-stakeholder initiatives as appropriate; and
- Provide international leadership within the IFC and Voluntary Principles regimes. This will include the review and dissemination of best practices relevant to the effective implementation of the Canadian CSR Framework as well as other leading CSR performance frameworks.

It is recommended that the Government of Canada, over the longer term (five–ten years), support and participate in multi-stakeholder efforts to provide leadership in the development of an enhanced international CSR framework that incorporates best practices developed through the Canadian CSR Framework.

2.3. Reporting

2.3.1. Background

Investors, insurers, consumers and other market actors are increasingly seeking reliable information on how companies—including extractive-sector companies—manage their environmental and social impacts. This suggests that some segments of the market are willing to reward good CSR performers and/or are concerned about the risks associated with poor CSR practices. A growing number of companies are responding to this demand for increased transparency by reporting on their CSR practices and performance. Canadian companies, including extractive companies, are no exception. For example, the number of companies listed on the Toronto Stock Exchange that report at least some CSR information in their annual or stand-alone reports has grown from 35% to 70% between 2001 and 2005.³² Moreover, surveys conducted by Ottawa-based sustainability consultancy Stratos noted that the number of mining companies providing sustainability reporting had increased from seven companies in 2001 to 16 companies in 2005, and from seven companies in the oil and gas industry to 10 companies over the same period.³³ Among extractive-sector companies, transparency and disclosure have also become key components of voluntary CSR initiatives, including the Mining Association of Canada's Towards Sustainable Mining initiative.

Evidence suggests that reporting can help companies understand the value of CSR for their business and to manage CSR issues more openly and systematically.³⁴ More importantly, credible, comparable and comprehensive CSR reporting in the corporate sector can help investors, consumers, communities and other stakeholders recognize and reward CSR leadership, thereby providing a market incentive for companies to continuously improve on their CSR performance. Currently, the effectiveness of reporting is hampered by a lack of consistency in the way in which companies disclose their CSR information. This makes it harder for CSR leaders to clearly differentiate themselves from laggards and also makes it more difficult for market actors, local communities and other stakeholders to adequately take into account CSR performance in decisions about their involvement with specific companies.

The need for a consistent CSR reporting standard has led to the development of the Global Reporting Initiative (GRI) Sustainability Framework. Launched in 1997, the GRI Framework was developed (and continues to evolve) via a multi-stakeholder process involving industry, investors, civil society and labour, and has emerged as the de facto standard for CSR reporting. It comprises universally-applicable reporting principles, guidance and indicators for organisations of all sizes and sectors. The GRI has also developed sector supplements, including for the mining and metals sector—but not for the oil and gas sector or junior extractive companies—to help standardize reporting criteria and indicators to the operational context of specific industries. Currently, over 900 companies spread throughout 50 countries report on the basis of the GRI Guidelines. GRI indicates that in 2006, 52 company reports were in full accordance with the Guidelines. In Canada, 35% of companies voluntarily reporting CSR

³² Stratos Inc., *Gaining Momentum: Corporate Sustainability Reporting in Canada*, 2005. http://www.stratos-sts.com/sts_files/Gaining%20Momentum%202005.pdf

³³ Ibid and Stratos Inc., *Stepping Forward: Corporate Sustainability Reporting in Canada*, 2001. http://www.stratos-sts.com/sts_files/stratos.full.report.pdf

³⁴ Stratos Inc., *Gaining Momentum: Corporate Sustainability Reporting in Canada*, 2005.

information use the GRI Guidelines to varying levels in preparing their reports. This represents a 10% increase between 2003 and 2005.³⁵

Notwithstanding the growth in reporting and the success of the GRI, the goal of universal CSR reporting to a common standard is far from being achieved. Reporting, particularly to a comprehensive framework like the GRI, is expensive and a challenge for new reporters—particularly for small and medium enterprises—though the recently released third generation (G-3) GRI Guidelines build in some flexibility allowing for incremental reporting requirements according to the size and resources of the company. There were also concerns expressed that GRI reporting responds only to some audiences' information needs and in other instances does not provide information that is meaningful.

Among Roundtable participants in both the Open and Issue Focus Sessions, there was widespread agreement that universal CSR reporting by the Canadian extractive sector should be achieved in the medium-term. Though concerns were expressed about the effectiveness of GRI reporting as a performance driver, the GRI was generally acknowledged as the most credible, comprehensive and accepted CSR reporting standard, and participants agreed that initiatives to promote greater transparency and reporting by Canadian extractive companies should be based on the GRI Framework.

Participants put forward a variety of options on how the GRI and reporting in general should be integrated into a Canadian CSR framework for the extractive sector. Civil society participants pointed to the recent adoption of mandatory CSR reporting requirements in France and the U.K. and the addition of GRI reporting as a listing requirement for the Johannesburg Stock Exchange as models that Canada should follow. They noted that the current voluntary approach in Canada has failed to elicit more than a handful of comprehensive reports from Canada's largest companies and even fewer reports based on the GRI. Industry participants generally thought that a voluntary approach with enhanced incentives was the best approach, raising the concern that mandatory requirements would place a significant financial burden on companies, particularly junior extractive companies. Industry participants also thought that mandatory reporting may lead to a "box-ticking" approach to reporting and stymie existing voluntary efforts within the sector to develop reporting systems more closely tied to performance objectives.

Some participants noted that one federal mechanism to mandate reporting for Canadian companies is the *Canada Business Corporations Act* (CBCA). These participants based their view on the observation that a significant number of the larger and more senior mining companies operating in developing countries where human rights issues are a concern are incorporated under the CBCA. It was proposed that such action could influence the provinces to similarly strengthen their provincial legislation relating to incorporation.

Other participants noted that only a minority of mining companies overall are incorporated under the CBCA, thus limiting the reach of the CBCA as a mechanism for mandating CSR reporting. It was further noted that the CBCA is a law of general application for all industry sectors except the financial services sector and that it could not selectively target and influence the behaviour of a specific industry sector such as the extractives industry. Further, there is uncertainty as to how a CBCA reporting requirement would apply to subsidiaries incorporated abroad and operating in developing countries.

³⁵ Ibid.

Given the varying perspectives, it is suggested that a review of the merits of a CBCA reporting requirement be included in the work programme of the Canadian International Extractive Sector Advisory Group (see section 5.1.2.).

There was also discussion regarding the role of securities regulators in calling for enhanced CSR disclosure (where relevant and material to a reasonable investor's investment decision-making). (See section 3.2.).

Despite opposing views on the merits of voluntary and mandatory approaches, participants identified much common ground. For example, participants agreed that reporting standards for extractive-sector companies should be scalable to the size and resources of the company's operations, implementation should be incremental, and support and training should be provided to companies to boost their capacity for effective reporting. It was also agreed that Canada's dominant position in the extractive sector means that it has a unique responsibility to support the implementation of CSR reporting among Canadian companies, as well as to further the development of reporting standards for the extractive sector. The development of GRI sector supplements for oil and gas and junior extractive companies were identified as key opportunities for Canada to demonstrate leadership. Participants also underscored the importance of enhancing CSR information uptake from stakeholders and market players—several recommendations for institutional investors and securities regulators in the Socially Responsible Investment section (see section 3.2.) of this report address these concerns.

While GRI is widely considered to be the most comprehensive CSR reporting framework, other forms of reporting are also recognized as drivers for improved CSR performance. For instance, experience with pollutants-release reporting (often implemented through national Pollutants Release Transfer Inventories) suggests that public access to pollution information motivates industry to prevent and reduce pollutants releases, leading to better environmental performance. While the Government of Canada requires companies operating in its jurisdiction to report on a range of pollutants emissions and makes this information available to Canadians through the National Pollutants Release Inventory and other mechanisms, developing countries generally lack the institutional capacity and resources to require and manage pollutants-emissions reporting from companies operating in their jurisdictions. As a result, Canadian companies operating in developing countries are often not subject to any pollutant-reporting requirements.

Roundtable participants explored the idea raised by a member of the Government Steering Committee to extend Canada's pollutants-release reporting requirements under the *Canadian Environmental Protection Act* ("CEPA 1999") to the operations of Canadian extractive companies abroad. While civil society expressed interest in extending Canada's pollution release reporting requirements, industry raised concerns regarding the appropriateness and legality of applying CEPA 1999 extraterritorially.

It was noted that the Canada Investment Fund for Africa (CIFA), a \$200 million public-private sector fund designed to provide risk capital for private investments in Africa—including in the extractive sector—has not publicly reported on its activities. Approximately 25% of CIFA investments are currently in four extractive-sector projects, three of which are operated by Canadian companies. CIFA is jointly managed by Actis (London, U.K.) and Cordiant (Montreal, Canada), whose investment guidelines and practices reportedly address CSR issues such as environment, health and safety, and reference World Bank Group standards, OECD Guidelines for Multinational Enterprises and the UN Global Compact. Roundtable participants expressed support for greater transparency on the criteria that are used when investment decisions are made and for ensuring that CIFA standards be consistent with the recommended Canadian

CSR Framework for extractive industries. Participants also highlighted the need for CIFA to report on an annual basis to Parliament and to clearly communicate whether and how the fund meets the objectives laid out in the G8 Africa Action Plan.

Roundtable participants also discussed other types of information that could be subject to greater disclosure, including the results of environmental, social, human rights, and other types of impact assessments and corporate and government payment and receipt of taxes and royalties. A specific proposal for Canada to model leadership by joining the Extractive Industries Transparency Initiative (EITI) as a supporting nation can be found in section 4.1.2.

Participants also called for increased transparency at Export Development Canada (EDC). Disclosure of EDC project classification rationales and project assessments and monitoring reports would provide valuable information to the Canadian taxpayer and to stakeholders in the countries where EDC clients invest regarding both EDC decision-making processes and proposed projects. As stated in the document, “Principles Governing EDC Disclosure,” “[d]isclosure of relevant information is a critical element in allowing EDC to demonstrate accountability by building public awareness of and confidence in EDC’s execution of its mandate.”³⁶ While the recommendation regarding EDC disclosure focuses on documents generated by EDC in the evaluation of proposed projects and in the monitoring of approved projects, it also calls for the disclosure of monitoring reports generated by the client. This builds on the EDC requirement that private sector clients publicly release environmental impact information that they have generated for Category A projects.³⁷

Based on a review of existing domestic and international reporting mechanisms applicable to the extractive sector, and in particular the effectiveness of the GRI, the Advisory Group developed the recommendations listed below.

2.3.2. Recommendations

2.3.2.1. Global Reporting Initiative

It is recommended that the Government of Canada endorse the use of the Global Reporting Initiative (GRI) as the reporting component of the Canadian CSR Framework and expect that all Canadian extractive companies report using GRI, or its equivalent³⁸ during an initial phase-in period, at a level that reflects the size of the operation. With a goal of realizing sector-wide GRI coverage, it is recommended that the Government of Canada:

- Include GRI or GRI-equivalent reporting as a fundamental component of the Canadian CSR Framework, which will be considered as one factor in the determination of compliance with the Framework;
- Support the development of GRI sector supplements for the oil and gas sector as well as junior mining and exploration companies, and support junior and exploration companies

³⁶ See http://www.edc.ca/english/disclosure_governing_principles.htm

³⁷ According to the EDC website, “EDC will categorize a project in Category A if it considers that the project is likely to have significant adverse environmental effects that are sensitive, diverse, or unprecedented. These effects may affect an area broader than the sites or facilities subject to the physical works, and may be irreversible.” See http://www.edc.ca/english/social_9697.htm

³⁸ The reference to a “GRI-equivalent” is in acknowledgment of the fact that some companies may already fulfill all relevant reporting requirements outlined in the Canadian CSR Framework, but not in a GRI format.

in the extractive industry in the implementation of GRI reporting requirements through workshops and promotional materials;

- Establish a scheme within the *Income Tax Act* that provides refundable tax credits for CSR reporting using GRI Guidelines or their equivalent; and
- Collaborate with securities regulators and exchanges on adopting GRI reporting for the overseas operations of Canadian extractive-sector companies as a requirement for listing.

It is recommended that extractive-sector associations promote GRI reporting among their membership.

It is also recommended that financial institutions, investors, insurers, and other market actors promote GRI reporting by extractive-sector companies and use such reports in assessing investment risk.

2.3.2.2. Canada Investment Fund for Africa Reporting

It is recommended that the Canadian International Development Agency (CIDA) make known the standards regarding social, environmental, human rights and development impacts that are being used by the Canada Investment Fund for Africa (CIFA) in screening investments—and what measures exist to ensure adherence to these standards. CIDA should monitor and report annually to Parliament on CIFA's activities and how they conform to the objectives of the fund, and on development impacts achieved through CIFA.

2.3.2.3. Export Development Canada Disclosure Requirements

It is recommended that Export Development Canada (EDC) improve its disclosure policy. Subject to bona fide commercial confidentiality concerns, EDC should publicly release:

- Project classification rationales;
- Project assessments (undertaken during EDC due diligence);
- Modifications and mitigation measures required by EDC; and
- Project monitoring and evaluation documents generated by EDC, project proponents and consultants throughout project implementation.

2.4. Compliance

2.4.1. Background

The third dimension to the Canadian CSR Framework is the assessment of compliance. The Advisory Group was informed that the Government of Canada expects Canadian multinational enterprises to respect the laws and policies of the countries in which they operate, recognizing that the primary responsibility for monitoring company compliance with local laws rests with host governments themselves. The Advisory Group recommends that, in addition, Canadian extractive-sector companies operating in developing countries be expected to comply with the Canadian CSR Standards set out in section 2.2.

In Canada, there are currently two main complaints mechanisms applicable to the extractive sector that allow for inquiry and dispute resolution in a CSR context: the National Contact Point for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and Export Development Canada's Compliance Officer.

During the Open Sessions, there was support from many speakers for an effective and efficient Canadian-based monitoring and enforcement system for CSR standards. Effective and creative dispute-resolution and arbitration processes were viewed by some as an essential element in the Canadian CSR Framework. Support was expressed for the establishment of an ombudsman or independent investigative body to address and/or investigate complaints regarding the activities of the Canadian extractive industry in developing countries.

In the Issue Focus Sessions, strong support was expressed by many participants for the development of a dispute-resolution mechanism to address potential challenges associated with Canadian extractive-sector companies operating in developing countries. Some general features of a dispute-resolution mechanism were discussed, including:

Clarity: It was observed that the dispute-resolution process must be clear, including the steps that complainants and companies will have to follow.

Transparency: Several participants noted that the process must provide a safe place for people to engage, recognizing that tension exists between transparency and confidentiality. It was argued that companies expect the principle of commercial confidentiality to be considered and respected within any dispute-resolution mechanism.

Timeliness: Some participants emphasized that there is a need to ensure that the mechanism will operate in a timely manner. It was noted that many of the issues are urgent and may be critical to the viability of the communities affected, with some believing justice delayed is justice denied.

Inclusion: It was stated that all stakeholders must be involved, including local and indigenous peoples. One participant noted that engaging local people (former company employees, the general community and elders) has resulted in better relationships and more effective dispute resolution.

Rigour: It was remarked that the process should be rigorous, but not too onerous. Some participants recommended that "simpler is better."

Many participants supported the establishment of an ombudsman to manage complaints and disputes arising from Canadian extractive-sector companies operating overseas.

Many participants remarked that there are clear precedents for an independent ombudsman office within the Government of Canada. The National Contact Point (NCP), which is part of the OECD Guidelines for Multinational Enterprises, was seen as a clear recognition of the need for dispute-resolution mechanisms to support CSR standards frameworks. The NCP is discussed further below. While some participants thought that it would be worth strengthening the role of the Export Development Canada (EDC) Compliance Officer to perform a dispute-resolution function, it was noted that EDC only reaches a small percentage of extractive projects and does not have the necessary independence to serve an ombudsman role.

There was considerable discussion around complementary processes to reinforce the dispute-resolution mechanism. All parties agreed that independent monitoring and fact-finding systems were essential. There was also discussion about linking the provision of government financial and non-financial services to the findings of an ombudsman office.

A range of possible functions were discussed for the ombudsman, including:

Advisory: The ombudsman role should focus on conflict prevention and not only post-conflict resolution. In this regard, it was proposed that the ombudsman play an advisory role to mitigate the risk of conflict.

Fact-Finding: There was general convergence around the importance of having an independent investigative function to promote transparency and to produce impartial evidence.

Mediation: It was proposed that the ombudsman take on a mediator function tasked with bringing all parties to the table, though some argued that the fact-finding and mediation roles should be separate, and that the mediation function might be better addressed by an enhanced NCP. Again, the issue of confidentiality was raised, with one participant stating that the option for a confidential process should be available.

Reporting: It was widely agreed that the ombudsman should have a reporting role, and three different reporting functions were identified:

- Reporting on complaints that have not been accepted for formal investigation, including rationales;
- Reporting on complaints that have been investigated, including conclusions reached; and
- Reporting to Parliament on an annual basis on ombudsman activities.

Some participants stressed that it is important to companies that the ombudsman's statement of findings include a clear, definitive outcome. Another participant stated that in cases where agreement is not reached, the ombudsman should issue recommendations to the parties.

Follow-Up: It was suggested that the ombudsman monitor progress made on cases that have been addressed and be authorized to follow up on whether a company has implemented its recommendations.

Sanctions: Some participants proposed that the ombudsman's mandate include the ability to impose sanctions, including the withdrawal of public support, 'naming and shaming' and redress

options. Others commented that this would have to be tied to a rigorous due diligence process and that legal challenges could arise. One participant stated that sanctions beyond public naming were feasible, but would require a legislative change.

There was general agreement that the ombudsman should have the required skills and knowledge to perform its duties, as well as having legal and mediation training. In addition, it was proposed that the ombudsman should ideally be an eminent person who can lend the office authority and credibility. Several participants also stressed that the ombudsman must be adequately funded. Finally, some participants emphasized that the ombudsman should be independent of government, civil society and industry influence. It was also suggested that a multi-stakeholder steering committee be created to oversee the ombudsman office and process.

There was general support for housing the ombudsman outside of government in an independent, arms-length organisation. Fears were expressed by some that housing the office within government would impair its ability to operate independently if confronted with potentially competing government policy objectives. Further, an entity housed within government would be perceived as an agent of the Government of Canada, raising concerns about the diplomatic impact of reviewing conflicts arising in other states.

There was limited support expressed for housing the ombudsman within a non-governmental organisation.

Another option put forward was to create a new office under an Act of Parliament. One participant noted that the mandate of Rights and Democracy, the International Institute for Sustainable Development or the International Development Research Centre could be expanded to include the ombudsman. Other participants in the Open and Issue Focus Sessions noted that the office of the ombudsman could be housed in the office of the Auditor General of Canada, recognizing its independence from government.

Some Roundtable participants noted that Canada is already part of the OECD and committed to promoting the OECD Guidelines and its related NCP functions. Thus, the NCP already exists within the federal government and it was proposed that enhancing its functions could be more feasible in terms of time and effort than developing a new independent ombudsman. Others disagreed and felt that it would be useful to have a fact-finding and dispute-resolution mechanism that is specific to the extractive industry.

While the NCP is not intended to play a quasi-judicial role, some participants questioned whether the government's current interpretation of the NCP role is too restrictive, and whether the government could revise the NCP's mandate to include fact finding, investigative and dispute-resolution roles, in line with the approach utilized by several other OECD countries.

With regard to the NCP, SCFAIT called on the government to "clarify, formalize and strengthen the rules and the mandate of the Canadian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, and increase the resources available to the NCP to enable it to respond to complaints promptly, to undertake proper investigations, and to recommend appropriate measures against companies found to be acting in violation of the OECD Guidelines."³⁹

³⁹ Standing Committee on Foreign Affairs and International Trade (SCFAIT), *Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility*, 38th Parliament, 1st Session, (June 2005), 2-3.

In light of the alignment between civil society and industry participants on the need for an ombudsman to be established, the Advisory Group has focused its recommendations on the creation of this office. The Advisory Group was strongly of the view that the ombudsman model discussed in the recommendation was the best way to advance CSR compliance in the extractive sector. Because the NCP issue was raised by participants at the Roundtables, the Advisory Group decided to comment on the need for an enhanced NCP—one that would provide in a timely manner greater capacity to address existing core NCP functions related to the OECD Guidelines. The Advisory Group believed that an enhanced NCP could play an important mediation role, a function that should not be assigned to the ombudsman office. Thus, the NCP should be charged with:

- Referring all complaints involving Canadian extractive companies where facts are disputed to the ombudsman for fact-finding;
- Offering mediation/good offices functions to companies and organisations that have lodged complaints on a confidential basis to see if the complaint can be resolved;
- Following up to review adherence to any agreements reached during mediation, or any recommendations made by the NCP;
- Providing clear recommendations (where complaints are not mediated or mediation fails) to the parties and government to resolve outstanding complaints, including on the referral of extractive-sector cases to the Compliance Review Committee discussed in the recommendation below; and
- Reporting on an annual basis on complaints that were dismissed, including the rationale for their dismissal; and complaints that have been accepted, including both those that have reached conclusion and those that have not been resolved.

However, to perform this mediation role effectively, the NCP must have adequate financial and human resources, which are currently lacking. It should also have an active role in the promotion of the OECD Guidelines.

2.4.2. Recommendation

2.4.2.1. Independent Ombudsman and Tripartite Compliance Review Committee

It is recommended that the Government of Canada fund as the compliance component of the Canadian CSR Framework the establishment of an independent ombudsman office, mandated to provide advisory, fact-finding and reporting functions, including:

- The provision of general information related to the implementation of Canadian CSR Standards through an advisory role;
- Initial screening of complaints against Canadian companies to determine whether the complaint should be dismissed on the grounds that the nature of the complaint is spurious, and/or whether the complaint is relevant to the Canadian CSR Standards;

- For cases that merit additional consideration, secondary investigation and fact-finding efforts to assess in more detail the material facts related to complaints;
- The publication of the results of the fact-finding process; and
- Public reporting on an annual basis on:
 - Complaints that have been dismissed, and why;
 - Complaints that have been dealt with and have reached conclusion; and
 - Complaints that have not been resolved.

The ombudsman should develop rules of procedure that govern investigations, including the treatment of confidential information.

Complaints submitted to the ombudsman by both Canadians and non-Canadians will be expected to include: a clear description of the complaint; an indication of those aspects of the Canadian CSR Standards that the complainant believes have not been met; and the proposed remedy the complainant wishes should flow from the complaint.

It is further recommended that the Government of Canada establish a standing tripartite Compliance Review Committee that shall determine the nature and degree of any company non-compliance with the Canadian CSR Standards, and may make recommendations with regard to:

- A referral to external dispute-resolution processes;
- Measures to be taken by the company to return to compliance and the monitoring of those measures; and
- A determination that no further action is required.

This determination of compliance—or the nature and degree of non-compliance with regard to the specific aspects of the complaint—and any recommendations will be made public.

In cases of serious non-compliance where the Compliance Review Committee determines that remedial steps have not been or are unlikely to be successful, the Compliance Review Committee will make recommendations with regard to the withdrawal of financial and/or non-financial services by the Government of Canada.

The compliance mechanism would apply to all Canadian companies, i.e., those incorporated in Canada and those that have their principal place of management (*siège social*) in Canada.

3.0. Tools and Incentives

In order to be truly effective, CSR standards and best practices must be integrated into the daily operations and decision-making processes of Canadian extractive-sector companies. This section discusses two elements that are essential to the process of operationalizing CSR: Tools and Incentives.

The SCFAIT report recommended an “increase and improve[ment in the] services offered to Canadian mining companies operating in developing countries,” with a view to ensuring three objectives: awareness of their obligations, awareness of the local context in which they intend to operate, and possession of the capacity to conduct their activities in a socially and environmentally responsible manner.⁴⁰ In connection with the last objective, the SCFAIT report proposed the development and promotion of a “specific toolkit to help Canadian companies evaluate the social, environmental and human rights impact of their operations.”⁴¹

While some general tools have already been developed by civil society, industry and government, few exist that are specific to Canadian extractive-sector companies operating in developing countries. The recommendations emerging from the Roundtables target two key areas requiring improvement: enhanced knowledge and capacity among extractive companies operating in developing countries regarding the implementation of CSR principles and practices, and the provision of adequate services to Canadian extractive-sector companies to ensure that they are aware of their social and environmental impacts and related CSR obligations.

The SCFAIT report also urged the Government to “put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside Canada in a socially and environmentally responsible manner and in conformity with international human rights standards.”⁴² The Report recommended “making Canadian government support—such as export and project financing and services offered by Canadian missions abroad—conditional on companies meeting clearly defined corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments.”⁴³

Three broad categories of incentives supportive of the implementation of CSR standards by Canadian extractive sector companies were identified for the purposes of the Roundtables, including:

- (1) Market-based incentives;
- (2) Conditions for access to public/government credit, insurance and other political and financial services; and
- (3) Legal norms and liability.⁴⁴

⁴⁰ Standing Committee on Foreign Affairs and International Trade (SCFAIT), *Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility*, 38th Parliament, 1st Session, (June 2005), 3.

⁴¹ Ibid.

⁴² Ibid, 2.

⁴³ Ibid.

⁴⁴ Incentives are understood here to include measures that reward compliance and discourage non-compliance with standards.

In total, 28 hours of Issue Focus Session discussion was devoted to evaluating various tools and incentives. The remainder of this section reviews the recommendations developed in the areas of Tools, Socially Responsible Investment/Disclosure, Legal Incentives, and Access to Government Services.

3.1. Tools

3.1.1. Background

In light of the recommendations contained in the SCFAIT report, the Roundtables considered the major challenges and opportunities for further developing and more effectively applying meaningful CSR tools by extractive industries operating in developing countries. While a wide range of challenges and opportunities were considered, several salient messages were identified by Open Sessions presenters and participants in the related Issue Focus Sessions.

While recognizing that a number of Canadian extractive companies have emerged as global CSR leaders, there appeared to be some convergence among participants that key challenges faced by extractive industry companies with respect to CSR tools frequently include:

- Limited knowledge of and access to information on CSR;
- Inadequate capacity to integrate and implement CSR practices within their decision-making (e.g., many junior companies do not have or have not dedicated human or financial resources to deal with CSR issues);
- Variability of the nature and complexity of CSR-related factors from one site to another;
- Complexity of aligning different tools at the corporate, local and sector levels while avoiding re-creating tools that already exist;
- Diverse needs in industry operations based on factors such as enterprise size (major, junior), nature of the activity (exploration, extraction, processing, closure) and type of resources exploited (mining, oil and gas);
- Methodological complexity and lack of experience with tools (e.g., some tools, such as human rights assessments, are newly-developed and untested);
- Constraints on resources and time;
- Obtaining real benefits from the use of CSR tools, such as recognition from stakeholders and win-win situations for industry and key stakeholders; and
- Insufficient recognition by companies that applying CSR tools will help them avoid human rights abuses and unacceptable environmental impacts and help them achieve a social licence to operate while avoiding social, political and environmental risk.

There also was general agreement that key practical opportunities for deepening and broadening CSR tool application exist on three general fronts:

First, there is a general sense that meaningful benefits could be produced for extractive industries, as well as for Canada, if a Government of Canada CSR Centre of Excellence were created to fulfill the following functions:

- Act as a clearinghouse for existing expertise and information on CSR tools;

- Promote greater transparency regarding government CSR initiatives;
- Promote enhanced collaboration and consistency between government departments and among diverse stakeholders on CSR initiatives; and
- Facilitate the use of CSR tools and the adoption of CSR practices by industry.

Second, there is a view that Canadian industry associations in the extractive sector could do more to enhance the use of CSR tools by their members and others through collaboration with governments and industry associations in developing countries.

Third, a view emerged that Canadian civil society organisations and industry could play an important and constructive role by remaining engaged in the development and dissemination of new CSR tools for the extractive sector. The Association for Responsible Mining (ARM) and the Diamonds for Development Initiative (DDI) were noted by civil society members of the Advisory Group as positive examples that warrant further financial support for their efforts to encourage small-scale mining that is responsible and contributes to sustainable economic development. ARM was highlighted as a pioneer initiative as it proposes the development of 'fair trade' standards for gold and precious metal by-products. The Initiative for Responsible Mining Assurance (IRMA) was acknowledged by all Roundtable participants as having the potential to make a positive contribution, as were innovative initiatives involving governments, such as the Kimberley Process Certification Scheme.

It was also thought that conflicts between industrial and artisanal mining and host governments could be avoided or mitigated by supporting efforts to enhance the environmental, health and safety practices of the artisanal mining sector in developing countries. Civil society members of the Advisory Group cited the ARM initiative in this regard.

Government CSR Centre of Excellence

Roundtable participants supported the view that a need exists to better inform and educate members of the extractive sector with respect to their obligations to meet CSR standards and best practices.

While recognizing that the responsibility for developing and promoting expertise on CSR rests with the private sector, it was argued that a government CSR Centre of Excellence that more effectively employs and enhances the government's existing internal capacity (within the Department of Foreign Affairs and International Trade (DFAIT), Industry Canada, Natural Resources Canada, Environment Canada, the Canadian International Development Agency, etc.) to provide clear guidance to extractive companies could help address some of the challenges that have been identified. By drawing on expertise from government, civil society and industry, the Centre would act as a clearing house for CSR information available to relevant stakeholders. The Centre would collaborate with Canadian embassies and regional DFAIT offices in Canada to provide stakeholders with valuable information. A dedicated website could also be created. The Centre could be developed incrementally over time (i.e., the Centre could prioritize areas that require immediate attention and gradually increase the Centre's capacity to address other areas.) The mandate of the CSR Centre of Excellence will clearly set out that it will actively engage, on an ongoing basis, with civil society and industry for input and expertise.

Industry Association Tools

Given the challenges faced by some Canadian extractive companies operating in developing countries, there was convergence among Roundtable participants that relevant industry associations could reinforce their efforts by enhancing, further developing and promoting CSR tools to their members operating outside of Canada. This could include training and information dissemination with a view to extending good CSR practice and knowledge among the associations' members, especially with regard to international operations in conflict and weak governance zones. This approach could take time and would likely require relevant industry associations to expand their current mandates in an effort to assist their members that operate abroad.

Industry-specific CSR experts could develop course and educational material on CSR standards, incentives, reporting tools, stakeholder engagement and other areas. Capacity for proper, robust, informative and meaningful reporting can be developed with companies to ensure that the results of the reports are useful to decision-makers, investors and community stakeholders.

These goals could be pursued by building on existing CSR initiatives such as the Prospectors and Developers Association of Canada's Environmental Excellence in Exploration (e3) initiative, the Mining Association of Canada's Towards Sustainable Mining initiative, and the Canadian Association of Petroleum Producers' Stewardship Initiative. CSR capacity could be supported by extending the reach of these initiatives to extractive-sector companies operating in developing countries, developing targeted programmes focused on priority issues such as human rights, and by collaborating with host countries. The view was also advanced that the Government of Canada could support these efforts by sponsoring workshops, conferences, and training initiatives for Canadian extractive-sector companies operating in developing countries.

Engaging Civil Society in CSR Tool Development and Application

Civil society organisations (CSOs) can bring important insights and information into business operations and government policy decision-making. Such organisations can contribute to sounder decisions involving environmental protection, community development, human resource management practices, stakeholder engagement practices, human rights and other CSR fronts. This could be pursued by building on existing CSR tools developed by CSOs, solely or in partnerships, such as the Framework for Responsible Mining, the Mining Certification Evaluation Project (MCEP), human rights impact assessment methodology, and Through Indigenous Eyes.⁴⁵ The enhanced exchange of information, knowledge and expertise between CSOs, the Government of Canada, developing country governments, and the industry was identified as an area that could contribute positively to the resolution of various challenges (e.g., potential conflict situations). The Government of Canada can facilitate the integration of CSO insight and information into decision-making by supporting meetings and exchanges of information between decision-makers in developing countries and Canadian and host country CSOs working on extractive-industry issues.

⁴⁵ Marta Miranda, David Chambers and Catherine Coumans, *Framework for Responsible Mining: A Guide to Evolving Standards*, 2005. www.frameworkforresponsiblemining.org

For more information on human rights impact assessment methodologies see for example the Website of Rights and Democracy: http://www.dd-rd.ca/site/what_we_do/index.php?lang=en&subsection=documents&id=1489&page=1&tag=&keyword

For more information on the Mining Certification Evaluation Project see: http://www.minerals.csiro.au/sd/SD_MCEP.htm
Viviane Weitzner, *Through Indigenous Eyes: Toward Appropriate Decision-Making Regarding Mining On or Near Ancestral Lands* (Ottawa, ON: The North-South Institute), 2002. <http://www.nsi-ins.ca/english/pdf/synenfinal.pdf>

It was noted that, in some circumstances, civil society and industry-led initiatives can operate with a higher degree of flexibility, and may be able to move more quickly than those that operate in partnership with government. There was a view that governments can play an important role in fostering the conditions that would allow such initiatives to flourish. Some members of the Advisory Group pointed out that these initiatives are not a replacement for regulation. The Government of Canada can facilitate these activities by, for example, supporting the IRMA. Governments, businesses and CSOs need to explore, identify and act upon more effective ways of integrating their decision-making processes, as these initiatives promise a range of benefits.

In particular, more effort needs to be made to engage indigenous peoples and their unique perspectives in these discussions. It has been generally agreed that the lack of active indigenous participation on the Advisory Group has diminished the degree to which indigenous perspectives have been integrated. Indigenous peoples are actively engaging with these issues internationally and can contribute important insight and information.⁴⁶

There was debate concerning the advocacy function played by some civil society organisations. Some participants thought that advocacy organisations, which perform a “watchdog” function through public campaigns regarding extractive-sector projects, affect positive change in the CSR performance of the private sector. These participants called for government support to such activities. Other participants thought that such campaigns can be unproductive, create disincentives for investors to publicly disclose project information, and contribute to social conflict around extractive projects. Participants of this view argued that public funds should not be used to support advocacy work, at least not without corollary support for increased responsibility, transparency and accountability in CSOs.

It was noted that many initiatives, some long-standing, are underway to put in place accountability standards for CSOs. For example, the Canadian Council for International Cooperation (CCIC) has a code of ethics for its members that includes approaches to governance as well as partnerships, organisational integrity, finances, communications to the public, management practices, and human resources. Civil society participants expressed enthusiasm for such initiatives, arguing that responsible organisations will readily adopt such guidelines.

Based on a review of existing tools available to support CSR in the extractive sector, and in recognition of the tools and assistance required, the Advisory Group developed the recommendations listed below.

3.1.2. Recommendations

3.1.2.1. Government CSR Centre of Excellence

It is recommended that the Government of Canada enhance its existing internal CSR capacity (within the Department of Foreign Affairs and International Trade, Industry Canada, Natural Resources Canada, Environment Canada, the Canadian International Development Agency, etc.) through the establishment of a dedicated unit. The expertise, tools, research and support developed should be housed in a CSR Centre of Excellence that can provide CSR information

⁴⁶ See for example: Forest Peoples Programme and Tebtebba Foundation, “Indigenous Peoples’ Rights, Extractive Industries and Transnational and Other Business Enterprises: A Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises,” December 29, 2006. <http://www.business-humanrights.org/Documents/Forest-Peoples-Tebtebba-submission-to-SRSG-re-indigenous-rights-29-Dec-2006.pdf>

and advice to Canadian missions, Canadian companies, NGOs, affected communities, host governments and indigenous communities. The CSR Centre of Excellence would also serve to promote Canada as a country committed to CSR and to the sustainable economic and social development of the countries in which the Canadian extractive industry operates.

The CSR Centre of Excellence will actively engage, on an ongoing basis, with civil society and industry for input and expertise. It will be a clearinghouse for CSR information, drawing on expertise across government departments and within civil society and the industry, and a source of information on government-wide activities related to CSR.

3.1.2.2. Industry Association Tools

It is recommended that industry associations, together with the Government of Canada and other stakeholders, develop and distribute information tools and targeted educational programmes to support the continuous improvement of CSR performance among Canadian companies, including the facilitation of information sharing and development of best practices and reporting on CSR performance.

It is recommended that industry associations develop guidance and tools and support capacity building (e.g., human rights assessments) to assist companies in the areas of environmental stewardship, community engagement and human rights. These efforts could build upon existing CSR initiatives, which may include:

- The Prospectors and Developers Association of Canada's Environmental Excellence in Exploration guidelines;
- The Canadian Association of Petroleum Producers' Stewardship Initiative; and,
- The Mining Association of Canada's Towards Sustainable Mining initiative.

It is recommended that industry look at ways to enhance the CSR capacity of Canadian companies operating overseas. This could include extending the reach and mandate of Canadian industry associations or strengthening linkages with other international groups. The Government of Canada could support these efforts through the sponsorship of workshops, conferences and other fora involving domestic and international stakeholders.

3.1.2.3. Tools to Support Small-Scale Mining

It is recommended that the Government of Canada contribute to efforts to enhance the safety and environmental performance of artisanal, small-scale mining, as well as the benefits derived through this activity. This would include, in particular, support for the Association for Responsible Mining in its efforts to prevent and reduce conflict between artisanal miners and Canadian mining companies, and to address the environmental, social, health and safety risk of small-scale mining.

3.1.2.4. Tools and Capacity Building to Support Civil Society

It is recommended that the Government of Canada, civil society and other stakeholders support Canadian civil society organisations (CSOs):

- To build partnerships with CSOs in developing countries, through exchanges and joint projects; and
- To develop and apply tools related to responsible extractive-sector management and CSR monitoring, based on transparent and legitimate development objectives.

These efforts could build on existing CSR initiatives such as the Framework for Responsible Mining and Through Indigenous Eyes.⁴⁷ The objective of this support is to:

- Improve the capacity of host country environmental, indigenous, human rights, development CSOs and labour organisations to advocate responsibly and transparently for the rights of host communities and peoples; and
- Enable host country CSOs to choose to engage responsibly with extractive companies and host country governments from a position of improved capacity, independence and knowledge.

This support will realize these objectives through:

- Improving access to objective information;
- Fostering critical and informed analysis; and
- Promoting the development and/or strengthening of effective organisational structures and processes.

The Government of Canada could support these efforts through the sponsorship of workshops, conferences, and other fora involving domestic and international stakeholders.

To facilitate and ensure the integrity of this process, a Canadian CSO advisory group will be established made up of civil society representatives with expertise and experience working with communities affected by extractive activity. Together with government, the advisory group will develop criteria to guide decision-making regarding the provision of support to Canadian CSOs. Government will consult with the advisory group on an on-going basis regarding decision-making in this area.

3.1.2.5. Civil Society Transparency and Accountability

With respect to support for civil society organisations (CSOs) discussed in 3.1.2.4, Canadian CSOs should employ governance codes and practices that ensure sound financial and institutional management, responsible public communications, accountability and transparency in their operations. Several CSO codes of conduct, including the Canadian Council for International Co-operation's Code of Ethics, have been developed to guide CSOs in this area.

⁴⁷ For more information on the Framework for Responsible Mining, see: <http://www.frameworkforresponsiblemining.org/>.

The adoption and application of such codes and practices should be used as a condition for CSOs gaining access to support by the Government of Canada described under 3.1.2.4. and the recommended ombudsman services described under 2.4.2.1.

3.2. Socially Responsible Investment/Disclosure

3.2.1. Background

Socially Responsible Investment (SRI) refers to the integration of CSR considerations into traditional investment decision-making and ownership processes. It may be motivated by strict financial reasons (to reduce financial risk and enhance profits) or by moral considerations (for example, in the case of socially responsible investment funds). SRI helps investors identify and, in effect, reward companies that manage social and environmental challenges well and put pressure on companies that do not.

While SRI is yet to become a mainstream practice in the capital markets, its influence in the marketplace is growing rapidly, particularly in relation to investments in high social and/or environmental impact sectors. In Europe, this market is an estimated C\$1.5 trillion as of December 2005, representing approximately 10–15% of total funds under management in Europe.⁴⁸ In the U.S., this market is an estimated C\$2.7 trillion as of December 2005, representing approximately 10% of total funds under management in the U.S.⁴⁹ In Canada, this market is an estimated \$503.61 billion as of June 2006, representing approximately 19.6% of total funds under management in Canada.⁵⁰ This represents a significant increase in SRI in Canada and is due to the addition of assets from large public pension funds, many of which have adopted SRI policies and practices in the last two years.

SRI is also playing an increasingly prominent role in the mainstream investment community by helping investors account for the financial risks and opportunities associated with the environmental, social and governance (ESG) performance of their investments. Among mainstream investors, the integration of SRI principles is growing most rapidly among larger institutional investors such as pension funds, which account for over one-third of the world's invested assets. This is in part because pension funds make long-term investments across the entire economy, meaning their investment portfolios have the greatest potential financial exposure to the economic impacts of environmental and social externalities. Large pension funds from around the globe have therefore engaged in a variety of initiatives to better understand and manage these risks and opportunities. For example, leading pension funds have:

- **Begun to adopt responsible investment policies** and build research and corporate engagement capacity around environmental, social and governance issues. The Norwegian Government Pension Fund has gone even further by establishing an independent Council on Ethics that makes recommendations to the Minister of Finance on whether a company should be excluded from the Fund based on egregious social, environmental or governance violations.

⁴⁸ European Social Investment Forum, *European SRI Study 2006*. http://www.forum-ng.de/upload/pdf/pdf-Studien-extern/Eurosif_SRIStudy_2006_complete.pdf

⁴⁹ Social Investment Forum, *2005 Report on Socially Responsible Investing Trends in the United States*, January 2006. http://www.socialinvest.org/areas/research/trends/sri_trends_report_2005.pdf

⁵⁰ Social Investment Organization, *Canadian Socially Responsible Investment Review 2006*, March 2007. <http://www.socialinvestment.ca/documents/SRIReview.pdf>

- **Organized around key issues**, such as climate change. Initiatives such as the Investor Network on Climate Risk, are investing in research (e.g., the Enhanced Analytics Initiative) that systematically analyzes the impact of CSR factors on long-term financial performance and investment returns.
- **Supported the development of international guidance** through the UN Principles for Responsible Investment (UN PRI)—a set of voluntary principles to promote and facilitate active ownership practices and the integration of social, environmental and governance issues into investment decision-making. As of December 2006, asset owners and investment managers representing approximately US\$5 trillion have endorsed the UN PRI.

Some of Canada's largest pension funds have also taken an interest in SRI approaches.⁵¹

Among participants in the Open and Issue Focus Sessions, there was a strong level of awareness that SRI, particularly among institutional investors, is a key consideration in meeting the National Roundtables' objectives. Participants recognized that because pension funds are often major owners of the companies in which they invest, they can play a strong role in influencing corporate direction through shareholder resolutions and engagement. The importance of this role in the context of the Canadian extractive sector was also highlighted. Energy and materials companies comprise approximately 43% of the S&P/TSX Composite Index, a list of the largest companies on the Toronto Stock Exchange as measured by market capitalization. As a result of this, mining and oil and gas companies are highly represented in the investment portfolios of Canadian institutional investors and significantly influence the financial risks, returns and opportunities institutional investors face.

Participants identified a role for public policy to support the interest and ability of large institutional investors to account for the ESG performance of the extractive sector. Despite the leadership demonstrated by a few prominent Canadian institutional investors, such as the Canada Pension Plan Investment Board (CPPIB), some participants remarked that the Canadian policy environment has fallen behind that of other Organisation for Economic Co-operation and Development (OECD) countries in supporting the role of institutional investors in promoting CSR. Participants discussed initiatives by other OECD governments to strengthen the accountability of institutional investors to unit holders and beneficiaries. For example, in Germany, Belgium, Australia and the U.K., pension funds are required to disclose the extent to which social, environmental and governance considerations are taken into account in their investment policies. These initiatives were generally perceived as an effective means to create CSR incentives for companies since they rely, to some extent, on investment capital from pension funds. In Canada, the trend towards transparency has progressed (as exemplified by recent proxy voting requirements for mutual funds) and many participants thought that extending this trend to other institutional investors is a logical next step.

Particular attention was paid to the role of the CPPIB, which many participants viewed as having unique responsibilities as a government fund. Participants were encouraged by the CPPIB's recent adoption of its *Policy on Responsible Investing*, its public support for SRI initiatives such as the UN PRI, and the divestiture of securities in firms producing land mines to reflect Canada's international commitments. However, it was also pointed out that the CPPIB still holds

⁵¹ For example, the Canada Pension Plan Investment Board (CPPIB) and the Caisse de dépôt et placement du Québec (CDP) both recently adopted Responsible Investing policies; CPPIB along with four other pension funds and investment managers are signatories to the UN Principles for Responsible Investment (UN PRI); twelve Canadian institutional investors are signatories to the Carbon Disclosure Project; and CPPIB and Batirente are members of the Enhanced Analytics Initiative.

securities in extractive companies doing business in countries, such as Burma, the governments of which are particularly abusive of human rights and which are already subject to economic sanction in Canada. Many thought that the Government of Canada should support this new direction and ensure that the CPPIB lives up to its commitments as a UN PRI signatory, and determine how the CPPIB could go further if sufficient progress is not made.

Participants also acknowledged that common interpretations of fiduciary duty may discourage fiduciaries from considering environmental, social and governance factors in their investment analysis. Participants pointed to an emerging body of research and guidance that has challenged this position with mounting evidence that positive corporate environmental and social performance can impact long-term shareholder value. This debate advanced in 2005 when Freshfields, Bruckhaus, Deringer, a leading international law firm conducted a review of the largest capital market jurisdictions, including Canada, and found that in all cases the law permits the integration of ESG issues. More significantly, the study found that in certain cases failure to consider ESG issues may in fact constitute a breach of fiduciary duty. Participants agreed that there was a role for the Government of Canada in disseminating relevant research in this regard.⁵² There was a general consensus that Canada should follow the lead of jurisdictions (e.g., Australia and the U.K.) that have implemented legislative frameworks that explicitly state that the consideration of social and environmental issues for the purpose of risk minimization and/or long-term value maximization is not in conflict with established fiduciary duties.

Participants also discussed existing mandatory disclosure requirements by the U.S. Securities and Exchange Commission that address environmental information. Participants pointed to the recent collaboration between the U.S. Environmental Protection Agency (EPA) and the U.S. Securities and Exchange Commission (SEC) on monitoring the environmental disclosure of federally-regulated companies as a model worthy of examination in Canada. When the EPA issues a notice of compliance to a corporation, the government agency includes a “Notice of SEC Registrants’ Duty to Disclose Environmental Legal Proceedings.” This notice advises each recipient to consider the applicability of the SEC’s requirements. Determining the materiality of EPA compliance notices remains the responsibility of the company.

The EPA also administers an online database entitled “Enforcement and Compliance History Online,” or ECHO. ECHO, which is updated monthly, allows users to find permit, inspection, violation, enforcement action, and penalty information covering the past two years. One of the identified uses of ECHO is to assist the investment community in factoring environmental performance into decisions. ECHO can also assist investors and the SEC in monitoring company compliance with SEC environmental disclosure requirements. Additionally, the EPA publishes an “Enforcement Alert” on its activities to educate parties to environmental enforcement actions about the SEC’s Environmental Disclosure Requirements. The publication discusses the SEC’s Environmental Disclosure requirements and lists additional informational resources.

⁵² See in particular: Freshfields Bruckhaus Deringer, “A legal framework for the integration of environmental, social and governance issues into institutional investment,” 2005.

http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf

The Canadian Institute of Chartered Accountants (CICA), “MD&A Disclosure about the Financial Impact of Climate Change and other Environmental Issues,” 2005. http://www.cica.ca/index.cfm/ci_id/35203/la_id/1/document/1/re_id/0

Gil Yaron, “Fiduciary Duties, Investment Screening and Economically Targeted Investing: A Flexible Approach for Changing Times,” (2005). http://www.pensionsatwork.ca/english/pdfs/yaron_fiduciary_duties.pdf

S. Prakash Sethi. “Investing in Socially Responsible Companies is a Must for Public Pension Funds—Because There is No Better Alternative” *Journal of Business Ethics* 56 (2005):99-129. http://www.tbli.org/featurearticles/sri_jobse_012005.pdf

Within this context it is also important to note that the SEC includes three regulatory provisions for disclosure of environmental information. SEC Regulation Item 103 requires disclosure of environmental legal proceedings as noted above. SEC Regulation Item 101, concerning the Description of Business, requires companies to disclose the material effects of complying or failing to comply with environmental requirements on the capital expenditures, earnings and competitive position of the company and its subsidiaries. SEC Regulation Item 303, concerning Management Discussion and Analysis, requires companies to disclose environmental contingencies that may reasonably have a material impact on net sales, revenue, or income from continuing operations. Finally, the SEC also provides a publicly-available phone line to address any questions related to environmental disclosure issues.

In connection with growing investor interest in ESG performance data, there is a demand for enhanced performance disclosure on these issues. Within this context, participants discussed the broadening definition of materiality for companies to consider in preparing regulatory filings and other disclosure documents for investors. It is worth noting that there is existing guidance and, in some cases, regulatory requirements for such non-financial disclosures. For example, a recent interpretive release from the Chartered Accountants of Canada (CICA), “MD&A Disclosure about the Financial Impact of Climate Change and Other Environmental Issues,” highlights how and to what extent companies must disclose information on environmental issues such as energy use, releases to land and water, greenhouse gas emissions, and use of land, flora, fauna and related impacts on biodiversity among other issues.

There was discussion about tests to determine the materiality of non-financial information. The CICA has adopted the “reasonable investor” test for materiality whereby information is material if “[...] its omission or misstatement could influence or change the decision of a reasonable investor to invest or continue to invest in the company.”⁵³ In other words, according to the CICA, information should be disclosed if it is reasonably likely to have “[...] a current or future effect, direct or indirect, on the entity’s financial condition [or] changes in financial condition [...]”⁵⁴ Materiality is a matter of professional judgment in the particular circumstances. More specifically, the CICA states that environmental issues should be disclosed and discussed if they either have, or are reasonably likely to have, a current or future effect, direct or indirect, on the entity’s financial condition, changes in financial condition, results of operation or may impact intangibles such as corporate reputation, brand loyalty, and key stakeholder relationships. Finally, the CICA MD&A Guidance states that issuers should resolve any doubt about materiality in favour of disclosure, but omit unnecessary information.

Securities regulation is not so clear. For example, the *Ontario Securities Act* provides a definition that encompasses the “market impact” standard: information should be disclosed only if it has the potential to move share price specifically up or down. Other pieces of securities legislation contradict this standard. Form 51-102F2, for example, the instructions for Annual Information Form disclosures, a core document under civil liability provisions, uses the CICA Handbook reasonable investor standard. The same is true under National Instrument 51-101, Standards of Disclosure for Oil and Gas Activities. The reasonable investor standard is used in the U.S. and in the province of Quebec. In sum, issuers and investors alike need consistency and clarification on the definition of materiality.

Finally, participants discussed the role of securities regulators and stock exchanges in promoting CSR practice among Canadian extractive companies overseas. It was observed that harmonized Canadian securities regulators’ requirements for MD&A and Annual Information

⁵³ CICA, “MD&A Disclosure,” 9.

⁵⁴ *Ibid.*

Form reporting already include provisions regarding the disclosure of environmental and social issues, but there were questions as to whether these provisions are being monitored or enforced. In the U.S., institutional investors have been active in asking securities regulators to address these matters, especially regarding climate-change disclosures. Participants noted that some international exchanges have adopted CSR reporting requirements as a condition of listing. For example, the Johannesburg Securities Exchange requires listed companies to adhere to the Global Reporting Initiative Guidelines. Participants also pointed to the success of recent securities exchange reforms in Canada, such as National Instrument 43-101,⁵⁵ as a model for integrating CSR instruments into securities legislation. There was recognition that the development of a national securities regulatory body (as is currently under debate in Canada) would better enable coherent application of CSR standards within the securities regulation context. Some concern was expressed that exchanges in Canada would be reluctant to unilaterally pursue CSR listing requirements out of fear that this would drive extractive companies to list elsewhere and that an international process similar to the UN PRI may be required to promote CSR in a way that maintains a level playing field. However, it should also be noted that there are many incentives for companies to list on Canadian exchanges, such as graduated listing requirements and a community of analysts in Canada committed to the junior mining sector. As well, there are barriers for Canadian companies to list on foreign exchanges, such as tax implications and limited analyst interest in junior mining companies.

It should be noted that these recommendations were developed in the context of the extractive sector operating in developing countries. However, in most cases these recommendations are of general application and would apply to all economic sectors.

Based on a review of the potential for socially responsible investment as an incentive, the Advisory Group developed the recommendations listed below.

3.2.2. Recommendations

3.2.2.1. Institutional Investor Disclosure

It is recommended that the Government of Canada increase the social, environmental and governance disclosure requirements for federally-governed pension funds by:

- Amending the *Pension Benefits Standards Act, 1985* to require federally-registered pension funds and pension plans created by federal statute to disclose annually the extent to which environmental, social and governance considerations are taken into account in proxy voting activities and the selection, retention and management of investments; and require pension funds to annually disclose their proxy voting guidelines and voting records;
- Amending section 48 (annual report) of the *Public Sector Pension Investment Board Act, 1999* and section 9 (statement of investment policies, standards and procedures) of the *Public Sector Pension Investment Board Regulations, 1999* to implement the recommendation above;

⁵⁵ National Instrument 43-101 (NI 43-101) is a rule developed by the Canadian Securities Administrators (CSA) and administered by the provincial securities commissions that governs how issuers disclose scientific and technical information about their mineral projects to the public.

- Encouraging, through the Office of the Superintendent of Financial Institutions (OSFI), the adoption of a similar regulation by other members of the Canadian Association of Pension Supervisory Authorities;
- Amending trustee legislation and/or make public statements to clarify that the consideration of social, environmental and governance issues for the purpose of risk minimization and/or long-term value maximization is not in conflict with established trustee fiduciary duty;
- Endorsing and promoting the UN Principles for Responsible Investment (UN PRI) as a preferred framework for guiding Canadian investor behaviour; and
- Initiating a review of Government of Canada funds invested in public markets to determine their suitability and feasibility for investment in accordance with the UN PRI.

In addition, it is recommended that the Government of Canada collaborate with its provincial and territorial counterparts to encourage similar policy changes and legislative amendments at the provincial and territorial levels in relation to pension funds, mutual funds, insurance and other institutional investors.

3.2.2.2. Canada Pension Plan

It is recommended that the Canada Pension Plan Investment Board (CPPIB) establish and report on a process for benchmarking the implementation/impact of its *Policy on Responsible Investing* in comparison to the performance of other signatories to the UN Principles for Responsible Investment in this regard.

It is recommended that the CPPIB publicly report on an annual basis on the implementation of its *Policy on Responsible Investing*.

The proposed Roundtable follow-up process (see section 5.0) should consider periodically whether Canada should amend the CPPIB Act and/or related regulations to overcome obstacles to the further development and implementation of CPPIB's responsible investment policies and practices.

3.2.2.3. Definition of Materiality

It is recommended that the Government of Canada seek cooperation from the Canadian Securities Administrators, provincial securities regulators, and the Canadian Institute of Chartered Accountants to clarify that "material information" necessary for disclosure by publicly-traded companies includes environmental, social, and governance performance information where such issues have a potential bearing on business risks. Business risks include potential impact on financial condition, reputation, brand, liability long-term value, and key stakeholder relationships. These risks should be disclosed in each company's Management Discussion & Analysis and the Annual Information Form.

As a complementary effort, it is recommended that the Government of Canada support the development and dissemination of research and further guidance on the materiality of

environmental, social and governance issues, including in corporate financial statements, Management Discussion and Analysis reports and the Annual Information Form.⁵⁶

3.2.2.4. Investor Engagement

It is recommended that the Government of Canada engage, facilitate, and encourage business, the financial sector and other stakeholders to identify and develop the link between environmental, social and governance performance and financial value and to help make this link more relevant to financial sector decisions.

It is recommended that the Government of Canada encourage and support the Canadian stock exchanges to promote the development and implementation of an international code of practice for stock exchanges that supports the improvement of the public disclosure of CSR performance of listed companies.

⁵⁶ See for example: The Canadian Institute of Chartered Accountants (CICA), "Financial Reporting Disclosures about Social, Environmental and Ethical (SEE) Issues," 2004. http://www.nrtee-trnee.ca/eng/programs/current_programs/Capital-Markets/Documents/CICA-SEE-Issues/CICA-SEE-Issues-Contents_E.htm

CICA, "MD&A Disclosure about the Financial Impact of Climate Change and other Environmental Issues," 2004. http://www.cica.ca/index.cfm/ci_id/35203/la_id/1/document/1/re_id/0

Freshfields Bruckhaus Deringer, "A legal framework for the integration of environmental, social and governance issues into institutional investment," 2005. http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf

3.3. Legal Incentives

3.3.1. Background

The SCFAIT report called on 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.”⁵⁷ The context for this recommendation was that some countries in which Canadian extractive companies operate are unable or unwilling to enact and enforce laws that ensure compliance with fundamental human rights and basic environmental protection.

This creates a conflict. On the one hand, it is a principle of international law that sovereign states are equal and possess jurisdiction to make and enforce laws within their own territory. Laws that purport to have effect outside the territory of the state enacting them (extraterritorial laws) are generally discouraged because they may impinge on the jurisdiction of another state. On the other hand, certain human rights are so fundamental that no person (legal or natural) ought to violate them with impunity simply because the host state lacks the will or capacity to hold the actor accountable. This is the argument used to justify having certain laws from an actor’s ‘home state’ follow the actor extraterritorially to wherever that actor operates.

Industry and civil society agree that Canada generally does not engage in the most expansive form of extraterritoriality, which would hold non-Canadian (and non-resident) actors legally accountable in Canada for conduct outside Canada. This form of universal jurisdiction exists for certain heinous crimes such as genocide, war crimes and crimes against humanity. Beyond these extreme abuses and certain other international crimes, the Advisory Group acknowledges that liability under Canadian law for present purposes remains limited to Canadian actors with a meaningful enough connection to Canadian territory to be an appropriate subject of Canadian law. For the purposes of this discussion, Advisory Group members defined “Canadian corporations” according to the public international law standard. International law generally defines the nationality of a corporation by the place of its incorporation or, in some cases, by its principal place of management (*siège social*).⁵⁸

The Advisory Group was sensitive to the concern that Canadian legislation not conflict with the sovereignty of host countries, including with respect to the development of their natural resources. However, given that the issues raised by participants at the Roundtables related to serious human rights violations and serious environmental damage, the Advisory Group takes as given that Canadian laws prohibiting such activities would not directly conflict with laws of the host state.

There exist at least three mechanisms for creating legal accountability: government regulation; civil liability; and criminal liability.

⁵⁷ Standing Committee on Foreign Affairs and International Trade (SCFAIT), *Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility*, 38th Parliament, 1st Session, (June 2005), 3.

⁵⁸ Echoing her other writings, Sara Seck, PhD candidate at Osgood Hall Law School, presenting at the Open Session at the Toronto Roundtable, reminded the audience that the legal personality of corporations is set out in Canadian “corporate law statutes that define the precise conditions under which they may exist” and that these statutes can be amended, if need be, to facilitate greater corporate accountability. See http://geo.international.gc.ca/cip-pic/current_discussions/csr-roundtables-en.asp

Regulation

Government regulation takes many forms. Most commonly, it consists of a set of rules, a means of monitoring and determining non-compliance, and a series of escalating consequences for non-compliance. These may include fines, loss of existing benefits, licenses to operate, sanctions, etc. Regulatory regimes aim to secure compliance with legal standards rather than punish wrongful behaviour. Competition laws, occupational health and safety rules, food inspection requirements, and domestic environmental laws all represent variations on legal accountability through government regulation. Applying a regulatory model to corporate social responsibility would involve legislating standards for extractive companies operating abroad, and setting up a mechanism for monitoring and enforcement by government.

The Roundtables received many submissions addressing the merits of a new regulatory regime that would prescribe human rights and environmental standards for Canadian corporations operating in developing countries. Civil society members of the Advisory Group recommended that the Government of Canada adopt federal legislation to regulate the foreign operations of Canadian extractive companies. The legislation would incorporate the Canadian CSR Standards outlined in section 2.2 of this report, creating the legal obligation that all Canadian companies comply with these provisions in their operations in developing countries. This regulatory regime would be linked to a civil liability system, discussed below.

Industry participants argued that the existing criminal and civil liability regime (discussed below) together with voluntary industry guidelines were sufficient to ensure compliance with basic human rights and environmental standards. They also expressed concerns that new regulations would violate rules against extraterritorial legislation, interfere with Canada's foreign policy objectives and damage international trade and investment.

Civil society and industry participants also could not agree on whether or not Canada's economic sanctions law—not least, a clarified *Special Economic Measures Act*—ought to be viewed as a tool for addressing human rights and environmental concerns associated with the operations of Canadian companies in developing countries. However, a more moderate legal compliance mechanism can be crafted from the *Income Tax Act*. Canadian tax law allows Canadian companies to deduct a portion of their foreign business income tax from their Canadian taxes, even in the absence of a formal tax treaty between Canada and the foreign jurisdiction. The Advisory Group agreed that serious non-compliance with the CSR standards presented in this report would justify removal of this benefit, and has proposed a recommendation to this effect (see Recommendation 3.3.2.3.).

Civil Liability

Civil liability relies on private actors to bring lawsuits against companies that plaintiffs believe have caused them injury. Lawsuits in the sphere of CSR typically involve claims of complicity in wrongful behaviour by others (usually state actors), a failure to take reasonable steps to avoid foreseeable and grave harm to persons or to the environment or, in the most extreme circumstances, deliberate commission of wrongful acts. A defendant who is found liable must pay monetary damages.

Canada's law of civil liability can reach beyond Canada's borders. Indeed, there is a long history of such litigation, albeit not involving alleged human rights or environmental wrongs by Canadian companies. The Roundtables were made aware of only one example in which civil litigation for alleged corporate wrongs abroad in the human rights or environmental area was pursued in a Canadian court. This case was dismissed on the grounds that there existed

another more appropriate country in whose courts the case could be heard; that is, it was dismissed under the *forum non conveniens* rule discussed below.

This common law rule (that also exists in Quebec) permits a Canadian court to dismiss a lawsuit if it thinks there is a court in another country with a closer connection to the matter and that is therefore better placed to hear the case (typically the host state). Some civil society representatives believe that the current application of this doctrine of *forum non conveniens* is an obstacle to pursuing civil remedies. The Advisory Group heard evidence about variation in the interpretation and application of this doctrine by other countries. In Australia, for example, courts will only refuse to hear a case where it can be established that the Australian court is the “clearly inappropriate forum.”

The Canadian record was also repeatedly contrasted by presenters with the burgeoning number of lawsuits brought in the U.S. against companies—some of them Canadian—claiming violations of human rights and environmental standards by companies operating in Africa, Latin America and Asia. Most of these lawsuits are brought under the U.S. *Alien Tort Claims Act* (ATCA), a statute that allows foreigners to sue defendants in the U.S. for violations of international law committed abroad. In some cases, the allegations are also pursued as violations of U.S. state tort law.

The ATCA’s assertion of subject-matter jurisdiction over events occurring entirely outside the territory of the U.S. has generated controversy, as has the willingness of the U.S. courts to assert personal jurisdiction over defendants whose connection to the U.S. is arguably tenuous. Industry participants felt quite strongly that U.S. assertion of subject matter and personal jurisdiction in these cases is inappropriate and should continue to be contested by the Government of Canada.

These discussions led the Advisory Group to questions about whether the current legal regime strikes the appropriate balance between access to justice in Canada and respect for the jurisdiction of foreign courts. Certainly, more domestic litigation would further develop Canadian jurisprudence on the extraterritorial civil liability of corporations for alleged CSR-related wrongs abroad, and clarify the jurisdiction of Canadian courts in such cases. The absence of such litigation prompted a number of questions from the Advisory Group:

- Does it reflect an absence of meritorious cases against Canadian corporations; the presence of impediments to civil litigation in Canada (such as the application of the *forum non conveniens* test); the financial cost of bringing these cases and the prospect of cost awards against unsuccessful plaintiffs; or possibly all of the above?
- What impact will recent changes in provincial civil procedure rules (e.g., in relation to class actions and contingency fees) have on the willingness of plaintiffs to bring cases relating to CSR before Canadian courts?
- If it were clear that Canadian courts were ready to exercise jurisdiction to hear cases alleging corporate CSR-related wrongs abroad, would this assist the Government of Canada in its interventions before U.S. courts, and would U.S. courts be slower to exercise jurisdiction in these matters?
- Does the constitutional division of powers between the federal and provincial governments (sections 91 and 92 of the *Constitution Act 1867*) constrain the jurisdiction of the federal government to create a cause of action and/or legislate with respect to the doctrine of *forum non conveniens*?

Advisory Group members did not propose replicating the U.S. model under ATCA. However, they did not agree on whether the status quo strikes the appropriate balance between access to justice in Canada and deference to the jurisdiction of foreign courts. Industry participants were not persuaded that the Canadian approach differs in effect from that of other common law jurisdictions, or that it presents a serious obstacle to pursuing meritorious claims. All Advisory Group members recognized that rules governing *forum non conveniens* are traditionally a matter of provincial jurisdiction.

While recognizing that constitutional issues warrant attention here, civil society members of the Advisory Group were not persuaded that the division of powers poses insurmountable hurdles to federal action in this field. In particular, the constitutional implications of federal legislation facilitating international lawsuits have not been explored.

Civil society participants believe that options exist. Parliament could create a cause of action with respect to Canadian actors operating abroad in developing countries. The cause of action could be free-standing, or, as civil society prefers, it could be linked to breaches of standards of conduct set out in CSR regulatory legislation (see above). The latter would include a cause of action in negligence for both nationals and non-nationals who suffer alleged damages as a result of the foreign operations of Canadian extractive companies. Violation of the legislated standards would demonstrate a breach of the standard of care required of a reasonable corporate actor. This regime would ensure access to the Canadian judicial system for those interested in pursuing remedies in this country.

However, industry participants believe that new legislation would not achieve greater clarity and would simply foster further litigation.

Criminal Liability

Criminal liability creates offences and imposes penal consequences (fines or imprisonment) for violations. The prohibitions are set out in the *Criminal Code* or other penal legislation, such as the *War Crimes and Crimes Against Humanity Act*, and the *Corruption of Foreign Public Officials Act*.

Canadian criminal law already reaches into foreign jurisdictions. First, all of Canada's criminal law applies abroad where there is a "real and substantial" link between events in Canada and those that occur overseas. A chain of activity commenced in Canada and culminating abroad could be penalized—for example, a directive from a Canadian head office to an overseas subsidiary directing a wrongful action.

Second, there are also criminal offences where the "real and substantial link" is not required. Some allow prosecution against anyone within Canada who has committed one of these special offences abroad, while others apply more narrowly to Canadian nationals. These offences have a truly 'extraterritorial' reach and are contained in instruments like the *Criminal Code* and the *War Crimes and Crimes Against Humanity Act*.⁵⁹ This list may also include the bribery crimes created by the *Corruption of Foreign Public Officials Act*, although there is substantial ambiguity on this point.⁶⁰

⁵⁹ Examples include sex crimes against children outside of Canada, war crimes, crimes against humanity, genocide and terrorism.

⁶⁰ To cure this ambiguity, the Advisory Group has made specific recommendations on the *Corruption of Foreign Public Officials Act*. It believes that this legislation should be amended (in keeping with the recommendations of the Organisation for Economic Co-operation and Development (OECD)) to apply expressly to all Canadian nationals. The OECD has identified Canada as the only state party to the Convention on Combating Bribery of Foreign Public Officials that has not made such changes.

These extraterritorial offences in Canada's criminal law were generally (although not always) enacted in order to implement Canada's international legal obligations into domestic law.

Taken together, the "real and substantial link" concept and the pure extraterritorial crimes give Canada's criminal law a reasonably long arm. The historical absence of prosecutions applying these doctrines may have less to do with the law and more to do with the practical difficulty of bringing such cases and proving guilt beyond a reasonable doubt; not least, the expense of mounting potentially complicated police investigations in sometimes unstable (and potentially uncooperative) foreign states. It may also mean that Canadian corporations are complying with criminal law in their operations in developing countries.

3.3.2. Recommendations

3.3.2.1. Extraterritorial Criminal Law

It is recommended that the Government of Canada continue to work with relevant law enforcement authorities to identify and remedy legal and other barriers to the extraterritorial application of Canadian criminal law to ensure this law is being used as effectively as it can be.

3.3.2.2. *Corruption of Foreign Public Officials Act*

In the interest of harmonizing Canadian law with the best practices of other Organisation for Economic Co-operation and Development (OECD) countries, reducing uncertainty as to the scope of that law and to address recent criticism by the OECD, it is recommended that the Government of Canada:

- Amend the *Corruption of Foreign Public Officials Act* to clarify that it applies extraterritorially to Canadian nationals;
- Review the record of enforcement of the Act to determine whether there is room for improvement; and
- Work with relevant law enforcement authorities to raise awareness of the Act and its applicability to Canadian nationals.

3.3.2.3. *Income Tax Act*

It is recommended that the Government of Canada establish a scheme within the *Income Tax Act* that eliminates double tax relief in Canada for tax paid by a company to a foreign government where there is serious non-compliance with the Canadian CSR Standards in that country (where permissible under tax treaties). Among other things, in deciding whether there has been such serious non-compliance, the Government of Canada should take into account a finding by the Compliance Review Committee that the company is not in compliance with the Canadian CSR Standards and any accompanying relevant recommendations.

3.4. Access to Government Services

3.4.1. Background

The SCFAIT report called on the Government of Canada to put in place measures that “mak[e] Canadian government support—such as export and project financing and services offered by Canadian missions abroad—conditional on companies meeting clearly defined corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments.”⁶¹

Participants in the Issue Focus Session discussions generally agreed that government departments and Crown corporations play a relatively small direct role in global financing and insurance markets. However, some participants identified a number of government institutions and initiatives that provide financing and insurance or supply political services to extractive companies, such as Export Development Canada, the Canada Fund for Local Initiatives, the Canada Investment Fund for Africa,⁶² CIDA Inc., and through trade missions⁶³ and Canadian embassies. In addition, the Government of Canada supports Canadian extractive-sector companies through the multilateral development banks, such as the World Bank Group. Finally, the Government of Canada has made submissions regarding foreign judicial proceedings involving Canadian companies. Some participants pointed out that, in addition to the financing and services provided, government backing can provide companies with credibility and help them to leverage private financing.

A number of Open Session speakers recommended that the provision of financial and political assistance by the Government of Canada be linked to CSR performance, based on international human rights and environmental standards, and subjected to robust Canadian-based monitoring. Many of these speakers also called on the Government of Canada to withdraw all support, including support from Canadian missions, from companies that have violated laws or undermined human rights in host countries. These participants argued that the government should condition its services on compliance with CSR standards. They felt that the government has a responsibility to have its ‘house in order’ to ensure that public funds are being used in ways that are consistent with the universal values that Canada upholds and are in line with stated policies. The conditioning of government support was seen by some as an opportunity to create a Canadian CSR ‘brand.’ It was also argued that such action would send an important signal to industry and others and set a precedent that could be emulated by non-government credit and insurance providers.

Other participants argued that instead of conditioning the provision of support on compliance with a set of CSR standards, the government should establish a rigorous complaints and investigation mechanism to evaluate whether support should be withdrawn if evidence of non-compliance is found. Others emphasized that ongoing engagement with the company is the most effective means to change behaviour.

Regardless of the approach taken, many Roundtable participants called for increased transparency regarding public support for the extractive sector. For example, participants

⁶¹ Standing Committee on Foreign Affairs and International Trade (SCFAIT), *Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility*, 38th Parliament, 1st Session, (June 2005), 2.

⁶² For more information and a recommendation on CIFA see section 2.3.

⁶³ For example through “Team Canada” missions and through trade commissioner support through the embassies.

mentioned that financial support through the Canada Fund for Local Initiatives (CFLI) has been provided to Canadian extractive-sector companies to implement development projects—in apparent contradiction to CFLI guidelines—and that there is little transparency regarding how decisions are made regarding the use of this Fund. It was argued that enhanced transparency would improve government accountability and would create opportunities for constructive dialogue among stakeholders on how government services fulfill stated policy objectives.

For example, Export Development Canada (EDC) supports the overseas investments of extractive companies. In Roundtable discussions, EDC reported that it considers the potential environmental, social, and human rights effects of projects for which its financing and risk management services are sought and, following signing, discloses the type of environmental information reviewed for Category A projects. However, some participants argued that EDC does not publicly disclose information regarding its assessments of potential project impacts, the specific standards it uses to gauge the acceptability of identified impacts or any required project modifications or mitigation measures.

A recommendation was made that EDC ensure that clients' proposed operations comply with the Canadian CSR Standards identified in section 2.1. of this report. Civil society participants expressed the view that this requirement could be incorporated into EDC contracts and that this would provide EDC with the legal basis to withdraw support in cases of non-compliance without the risk of breach of contract. Contracts that exist when the CSR standards come into effect would be grandfathered.

With regard to services provided by Canadian missions, participants made a distinction between the provision of basic consular services and the active promotion of extractive investments by embassies. Civil society participants argued that a minimal level of due diligence should be undertaken before Canadian missions become involved in the latter, especially in cases where Canadian investments have been associated with local conflict. They argued that it would be feasible and preferable to conduct basic due diligence and screening at the outset of a project to prevent problems from occurring. It was also noted that it is possible to continue to engage with a company with the goal of bringing it back into compliance while not actively promoting it. It was pointed out by a member of the government Steering Committee, however, that missions do not currently have the mandate, expertise and capacity to engage in due diligence activities for the purposes of implementing conditionality.

Industry participants expressed concern that the withdrawal of political assistance by missions, for example, would abandon the companies that need help the most. Indeed, trade officials noted that, often, the first time company representatives approached missions for political assistance was when problems had arisen. These participants questioned the feasibility of applying conditions in order to access government credit and services that specifically target the extractive sector. Industry participants in both the Open and Issue Focus Sessions stressed the importance of embassy support to secure mining concessions and operations, while others expressed concern about the provision of such support in countries where Canadian investments have been associated with local conflict.

After a considered review of the issues surrounding the conditioning of support, services and credit provided by the Government of Canada, the Advisory Group developed the following recommendations.

3.4.2. Recommendations

3.4.2.1. Financial and Insurance Support

It is recommended that Export Development Canada (EDC) utilize the Canadian CSR Standards in the development of their policies, practices and in the assessment of proposed extractive-sector projects. It is recommended that EDC ask project proponents to undertake peace and conflict impact assessments or equivalent tools when operating in conflict zones.

During the course of the project, EDC should apply a compliance management process that includes, at a minimum, the following elements:

- Enhanced efforts to make companies more aware of their human rights and environmental considerations; and,
- Efforts to bring non-compliant companies back into compliance through active engagement with the companies.

EDC's contracts should provide that serious failure by extractive-sector companies to meet the Canadian CSR Standards should lead to the withdrawal of financial and insurance support when reasonable efforts by EDC and the Government of Canada to bring the company back into compliance have failed. EDC should develop and publicly release policies and guidelines for measuring "serious failure," reflecting the Government of Canada's work in this area. Among other things, in deciding whether there has been such a serious failure, EDC should take into account a finding by the Compliance Review Committee that the company is not in compliance with the Canadian CSR Standards and any accompanying relevant recommendations.

3.4.2.2. Conditioning of Government Support

The government may provide Canadian extractive-sector companies with support in their foreign operations, including, for example, through trade missions, that goes beyond ordinary consular services (meaning those consular services that are routinely provided to Canadian citizens). When such support seeks to promote a Canadian company or its interests in a foreign country, it is recommended that the Government of Canada condition this support on compliance with the Canadian CSR Standards, according to the following procedure:

In deciding to provide these services, the government shall take into account any information concerning the performance of a company under the Canadian CSR Standards. When the Government of Canada receives information on possible non-compliance by a company with these Standards, it should:

- Raise these issues with the company; and
- Where it appears that there has been possible non-compliance, enhance efforts to make the company more aware of their human rights and environmental considerations and encourage it to comply with the Canadian CSR Standards.

Determination by the Government of Canada of a serious failure by a company to meet the Canadian CSR Standards should lead to the withdrawal of this additional support. The

Government of Canada should develop policies and guidelines for measuring serious failure. Among other things, in deciding whether there has been such a serious failure, the government shall take into account a finding by the Compliance Review Committee that the company is not in compliance with the Canadian CSR Standards and any accompanying relevant recommendations.

4.0. Resource Governance

The SCFAIT report recommended that priority be given to building “governance capacity in the area of corporate social responsibility” as part of the government’s “efforts to promote good governance and private sector development in developing countries.”⁶⁴ It also recommended working towards the integration and mainstreaming of international “human rights standards in the work of international financial institutions (IFIs) such as the World Bank and the International Monetary Fund—as outlined, for example, in the final report of the Extractive Industries Review (December 2003)—to ensure that projects and investments funded by IFIs conform to international human rights standards.”⁶⁵

Developing countries face considerable challenges in the effective regulation of the extractive sector to ensure that extractive operations are socially and environmentally responsible, that human rights are protected and promoted, and that sustainable social and economic benefits are generated for communities, governments and industry. In some countries, corruption is a major impediment to development, and creates a difficult playing field for Canadian companies that seek to act responsibly. Many Roundtable participants agreed that resource extraction projects, even when undertaken in a responsible manner, do not necessarily lead to development and poverty alleviation. In fact, reference was made to a substantial body of literature describing the “resource curse.”⁶⁶ These studies reveal that in certain circumstances—primarily those of poor or weak governance—resource extraction may heighten, rather than lessen, national- and local-level impoverishment, corruption and conflict. A recent study by the International Council on Mining and Metals (ICMM) has identified conditions that have enabled countries to benefit from resource extraction as distinct from those which have not, and ICMM has also developed a best practice guidance tool for host country governments, industry and NGOs in achieving the former.⁶⁷

Roundtable participants agreed that working to improve resource governance, transparency and accountability in developing countries is critical to ensure that extractive-sector activities contribute to strengthening economies and achieving poverty reduction, and to create a business and investment environment conducive to responsible corporate conduct in countries where Canadians operate.

During Open Session presentations, public speakers called on the Government of Canada to play a stronger role in protecting human and environmental rights abroad, especially in areas where the existing legal and judicial frameworks are weak or corrupt, in conflict zones, in occupied territories, and in countries under military dictatorship. Some civil society and invited expert speakers pointed out that Canadian support for the liberalization of developing countries’

⁶⁴ Standing Committee on Foreign Affairs and International Trade (SCFAIT), *Fourteenth Report: Mining in Developing Countries—Corporate Social Responsibility*, 38th Parliament, 1st Session, (June 2005), 3.

⁶⁵ Ibid.

⁶⁶ The World Bank Group Extractive Industries Review, which includes references to this literature, states that “[m]ost academic studies of what is known as the resource curse suggests that between 1970 and 2000, the number of states with disappointing outcomes was larger than the number with successful outcomes.” Volume 1, 2.

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20306686~menuPK:592071~pagePK:148956~piPK:216618~theSitePK:336930,00.html>

⁶⁷ The International Council on Mining and Metals’ (ICMM) *Resource Endowment Initiative* consisted of four case studies—Ghana, Tanzania, Peru and Chile—that showed that there is strong evidence that mining can provide an important, and sometimes critical, contribution to economic development and poverty reduction in developing countries, provided the underlying conditions are right. http://www.icmm.com/library_pub_detail.php?rcd=189

legal frameworks (including mining acts) to promote foreign investment has in some cases diminished or undermined efforts to improve the CSR performance of extractive companies operating in those countries.

Open Session civil society public speakers made a number of recommendations to the Government of Canada. For example, it was suggested that:

- Canada require extractive companies to conduct human rights impact assessments and peace and conflict impact assessments. While some speakers recommended that these assessments be conducted for projects in conflict zones and for those that receive Canadian government support, others suggested that the assessments be applied more broadly.
- International “no-go” zones for Canadian extractive companies be established, including countries with serious and widespread human rights abuses, such as Burma and Tibet. Others called on the Canadian Foreign Service to shift its focus from the promotion of Canadian investment to the promotion of sustainable development.
- Canada support developing countries in their efforts to fulfill their international legal obligations.

Some industry presenters illustrated the often difficult circumstances in which they can find themselves, the steps they undertake to mitigate them, and that support from other parties would be beneficial.

In the Issue Focus sessions, participants discussed the factors that may be contributing to and perpetuating the governance challenges experienced in many developing countries. Examples put forward by civil society included:

- Conditions imposed under the International Monetary Fund’s structural adjustment programmes;
- Conditions attached to many other IFI lending instruments;
- Aspects of international trade law;
- The private sector lending policies of the IFIs;
- Stability or security contracts between resource extraction companies and host governments; and
- Some bilateral lending practices.

Civil society participants asserted that, to be successful, efforts to resolve current governance challenges must address the factors that have generated these challenges. They argued that the Government of Canada has a responsibility to work in multilateral fora to address these issues and to ensure that its bilateral assistance to developing countries contributes to, and does not undermine, good governance.

4.1.1. Background

Bilateral

In the Issue Focus sessions, there was general agreement on the importance of coherence in Canada's aid, trade and investment programmes as they relate to the extractive sector. Advisory Group members requested a thorough examination of the Government of Canada's programmes and policies related to the Canadian extractive sector in developing countries, and asked that civil society and industry be made more aware of such programmes and policies.

Members of the government Steering Committee reported that the Canadian International Development Agency (CIDA) does not have a major presence in the mining, oil and gas sectors. They explained that CIDA supports some programmes, particularly in the Americas, that help developing countries integrate social or environmental considerations into laws, policies or regulations, as well as programmes and partnerships aimed at generally advancing CSR. Resource governance issues are not reflected in many country development programme frameworks at CIDA. This is because to date such issues have not been identified as a priority area for official development assistance by developing countries. In many countries, development policies and strategies exist in isolation from policies and strategies related to mining, oil or gas, and thus extractive-sector issues are not effectively mainstreamed into national poverty reduction plans, including Poverty Reduction Strategy Papers.

While some participants suggested that CIDA become more active in the extractive sector, several invited experts from developing countries expressed concern about CIDA's work in this area. Concerns were raised about changes made to mining legislation that, with the support of CIDA, undermined a number of existing legal provisions, including those that were protective of indigenous rights. In addition, attention was drawn to an apparent shift in CIDA's priorities with respect to the mining sector. In the past, CIDA has partnered with civil society organisations that provided support to communities affected by mining operations. This work sought to strengthen communities' capacity to effectively engage in decision-making processes regarding mining investments, thereby reducing the risk of conflict. It was reported that CIDA no longer supports this type of work.

Many participants agreed that Canada could play a role in helping developing countries create strategies to gauge when extractive investments are consistent with their developmental goals and, when this is the case, optimize the developmental impact of extractive activities. This could be achieved by ensuring that the plans of private investors reinforce local development strategies, encouraging the use of local inputs, and stimulating income, employment and training opportunities for nationals, as well as local processing and transformation of minerals. Some participants cautioned that Canada continue to bear in mind that prevailing approaches to extractive-sector development may not always be the best route to poverty reduction, and that any such efforts must be sensitive to and remain open to alternative development strategies.

Participants also debated the role that the extractive sector can play in promoting sustainable development. Some participants noted that in many countries, companies are initiating or supporting development programmes in communities affected by extractive projects, often partnering with civil society, private foundations, governments or aid agencies. It was pointed out by industry participants that companies can and do contribute financial and human capital, including management expertise, to community initiatives. Industry participants also identified economic development (including agriculture and supply chains) as important issues that could

be addressed by such partnerships. Some participants suggested that Canada could play a role in helping companies to engage effectively with key stakeholders, including local communities, to achieve developmental outcomes.

However, Advisory Group members agreed that the pressure on extractive companies to supply social services when these are not readily available due to public spending cutbacks should not obscure the legitimate and essential role of governments to supply social services to their people. The provision of social services by governments is necessary to ensure the availability of these services beyond the life of a particular extractive project. It is also in this way that social cohesion, accountable states and social stability will be created in the countries where extractive companies are operating. A more sustainable and appropriate approach would be for Canada to use its official development assistance to strengthen host government capacity so that host governments are better placed to ensure that private sector development initiatives are consistent with their development goals.

Participants discussed appropriate approaches for offering support in the development of resource governance capacity. It was suggested that the Government of Canada introduce bilateral programmes that reinforce institutional capacity for resource governance, such as the Norwegian Oil for Development initiative,⁶⁸ or the Finnish initiative in support of the Sustainable Management of Mineral Resources Project with the Government of Uganda.

Civil society participants suggested that Canada should ensure that the bilateral investment treaties it signs with developing countries contain protections for human rights, ensure that countries are not penalized if they adopt environmental or social safeguards, and strike an appropriate balance between the interests of foreign investors and host governments, preserving host governments' legislative competencies.

Participants generally agreed that civil society organisations (CSOs) can play an important role in helping to build local capacity among their civil society counterparts in developing countries. This enhanced capacity would allow host country CSOs to promote effective monitoring of the extractive sector and appropriate engagement with affected communities. It would also facilitate equitable negotiations with investors, when desired by affected communities, towards positive developmental outcomes. Participants agreed that there is a role for government to support international civil society partnerships. Some participants expressed support for comparative benchmarking between Canadian practitioners and their counterparts in developing countries.

It was noted by members of the government Steering Committee that CIDA's Canadian Partnership Branch and the Indigenous Peoples Partnership Programme offer appropriate mechanisms to support such partnerships on a responsive basis. However, it was also noted by civil society participants that concern had been raised, particularly by indigenous partner organisations in developing countries, that there is a lack of transparency around the criteria being used to determine how Canadian individuals and organisations are selected for exchanges and whether these individuals and organisations represent a diversity of indigenous perspectives on extractive industry development.

Multilateral

Many civil society members of the public that participated in the Open Sessions called on the Government of Canada to use its position on the board of the World Bank Group to advocate for the inclusion of human rights considerations in World Bank Group policies related to extractive-

⁶⁸ For more information see: http://www.norad.no/default.asp?V_ITEM_ID=3556

sector development. Canada was also asked to encourage the IFIs to ensure that their policies, programmes and investments related to the extractive sector are consistent with the social, environmental and economic development goals of the host country. Finally, Canada was asked to show leadership in the protection and promotion of international indigenous rights.

Government Steering Committee members in the Issue Focus sessions identified various regional and multilateral fora in which Canada could exercise influence to promote CSR performance in the extractive sector. Some notable examples are: the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development; the World Mines Ministries Forum; the Mines Ministries of the Americas; the African Mining Partnership; and the Global Gas Flaring Reduction Partnership. Globally, participants noted also that Canada could advance CSR through participation in, or relationships with, the Organisation for Economic Co-operation and Development, the Asia Pacific Economic Forum, the Organization of American States, as well as with the World Bank Group and the UN. In this regard, participants agreed that the work of the UN Special Representative on Business and Human Rights and the Office of the High Commissioner for Human Rights are particularly promising, warranting strong support from Canada.

Issues related to the extractive sector and indigenous peoples were a recurring theme in Roundtable discussions. Canada was encouraged to continue to engage in multilateral fora that seek to promote indigenous rights. Reflecting presentations made by Open Session presenters and by invited indigenous experts, civil society members of the Advisory Group recommended that the Government of Canada change its position and vote for the adoption of the UN Declaration on the Rights of Indigenous Peoples by the 61st Session of the UN General Assembly.

As noted in section 2.2.1, the Voluntary Principles on Security and Human Rights form an integral part of the standards under the recommended Canadian CSR Framework. For this reason, the Advisory Group recommends that the Government of Canada endorse the Voluntary Principles by becoming a participant country.

There was also general agreement that Canada should join the Extractive Industries Transparency Initiative (EITI), a multilateral approach to address revenue transparency and to promote accountability in the extractive sector in developing countries, and take every opportunity to play a leadership role in the initiative, with special attention paid to the development and expansion of the EITI in the mining sector. Several participants suggested that Canada advance the EITI agenda to include impacts and revenue flows at the local and sub-national levels, as well as to promote understanding of the economics of the mining industry in host countries. It was also suggested that Canada take a lead in introducing the EITI in countries in which Canadian mining companies play a significant role, encourage Canadian mining companies to join the EITI, provide capacity building to foreign finance departments, and consider supporting a future conference on the EITI and the mining sector.

Civil society members of the Advisory Group supported a recommendation for Canada to show global leadership by joining the EITI as an implementing nation, as is being considered by Norway. To do so would respond to requests from some developing countries that developed countries also implement the EITI. The implementation of the EITI by Canada could possibly provide greater transparency around revenues from mining, oil and gas activity in this country. Some of the data currently provided to the public by Statistics Canada is aggregated in such a way that does not readily lend itself to rigorous evaluation. The oil and gas sector, for example, is sometimes included in the total value of mineral production. As discussions between civil society and Statistics Canada have not led to disaggregated reporting, civil society noted that

the EITI would provide greater transparency in Canada. The involvement of the provinces, recipients of extractive industry payments, would be required for this to take place.

Civil society members of the Advisory Group thought that, subject to bona fide commercial confidentiality restrictions, contracts pertaining to extractive-sector investments with host governments and all payments made by extractive companies to government agencies and officials should be made public. This disclosure would provide a host country's citizenry with greater information about foreign investments and would act to discourage corruption. Concerns were raised specifically about tax payments, royalties and the financial stipulations set out in stability/security contracts that may override host country legislative or constitutional provisions. It was argued that IFIs should adopt transparency requirements regarding payments that extractive companies make to host government agencies and officials and regarding security or stability contracts.

Civil society members of the Advisory Group thought that Canada should be a stronger advocate for the adoption of human rights policies by the IFIs. It was specifically suggested that the IFIs adopt human rights, and peace and conflict, impact assessments in their due diligence and project monitoring procedures. Several participants noted that Canada's support to the Office for the High Commissioner for Human Rights could be directed towards encouraging collaboration between that office and the IFIs in the development of effective rights-based policies, procedures and indicators.

It was also argued by civil society that Canada should push the World Bank Group to fulfill recommendations made in the Extractive Industries Review to assess governance risks when deciding whether and how to support the extractive industries; to establish clear, extractive-industry-specific governance indicators; and to publicly disseminate the rationale for decisions made in support of extractive-industry investments.

Civil society participants also argued that the World Bank Group should provide more rigorous public accounting of the developmental impact of the extractive industry projects that it supports, as recommended in the Extractive Industries Review and in keeping with its mandate to alleviate poverty. It was recommended that Canada play a role in encouraging greater transparency at the World Bank Group regarding assessments of the expected and realized developmental impacts of extractive-sector investments. Currently, development results for individual projects are not released publicly and development impact data is reported in the aggregate.

Based on a review of Canada's participation in bilateral and multilateral initiatives, the Advisory Group developed the recommendations listed below.

4.1.2. Recommendations

4.1.2.1. Contributions of the Extractive Sector to Host Government Development Priorities

In those developing countries that seek to promote economic and social development through investment in the extractive sector, it is recommended that the Government of Canada, while respecting the national sovereignty of these countries, work with their governments to develop strategies consistent with optimizing benefits of extractive projects so that national, regional and local economies benefit from the revenue flows, economic linkages and other spin-offs from the

extractive industry. Mechanisms to achieve this may include support for the integration of extractive-sector issues into national development plans, including Poverty Reduction Strategy Papers, and support for multi-stakeholder development partnerships that encourage meaningful participation of host governments, affected communities, civil society and industry in local, regional and national development processes and programmes.

4.1.2.2. Building Capacity for Judicial Systems in Host Countries

Enhance the ability of organisations such as the National Judicial Institute (NJI) and the Canadian Bar Association to promote judicial reform and judicial capacity building in host countries, concentrating in particular on areas of weak governance (for example with respect to human rights promotion and protection and the enforcement of contracts) and employing mechanisms such as in-country seminars and programmes designed to bring developing country judges to Canada to gain direct experience of our legal system in action.

4.1.2.3. Exercising Influence in Regional and Multilateral Fora

It is recommended that the Government of Canada make use of its position within relevant regional and multilateral fora to optimize the positive contribution of the extractive sector to the social and economic development of the countries in which it operates, to support and promote CSR capacity building within the extractive sector and with other appropriate stakeholders, and to advance the rights of indigenous peoples with regard to extractive-sector issues, where applicable.

Particularly, it is recommended that the Government of Canada support the ongoing work within the UN system to advance the inclusion of human rights within the context of business sector activity. In this regard, Canada should maintain support for the mandate of the UN Special Representative on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, support follow-up within the UN framework and explore how Canada will follow up on the conclusions.

4.1.2.4. Join the Extractive Industries Transparency Initiative

It is recommended that the Government of Canada formally participate in the Extractive Industries Transparency Initiative (EITI) as a supporting country and encourage Canadian extractive companies to consider participation in the EITI.

Canada should take a leadership role in further developing and strengthening the application of the EITI with respect to the mining sector.

As a supporting country participant, Canada should encourage the development and introduction of an EITI template for the sub-national level in those countries that have already implemented EITI at the national level.

4.1.2.5. Voluntary Principles on Security and Human Rights

It is recommended that the Government of Canada endorse the Voluntary Principles on Security and Human Rights by becoming a participant country.

4.1.2.6. Multilateral Fora (Financial)

It is recommended that the Government of Canada work with like-minded countries to strengthen CSR requirements at the World Bank Group and regional development banks related to lending and support to private sector clients. In particular, it is recommended that the Government of Canada encourage the banks to:

- Initiate a transparent, participatory process to identify extractive industry-specific governance indicators that include such aspects as rule of law, absence or risk of conflict, respect of human rights, etc. and apply these indicators in decision-making around extractive industry project support and publicly report the assessments they undertake on the basis of these indicators;
- Enhance their disclosure requirements. In particular, clients should be required to publicly disclose their contracts (e.g., tax and royalty payments and including “stability agreements”) with host governments and all payments made to public officials when appropriate and subject to confidentiality requirements;
- Publicly disclose their evaluations of project-level development impacts on a project (non-aggregated) basis; and
- Continue progress toward initiating a transparent, participatory process to develop human rights policies that ensure that their private sector clients are in compliance with universal human rights standards. To this end, it is recommended that the Government of Canada provide support and financial assistance to the Office of the High Commissioner for Human Rights to channel its human rights expertise to the banks in support of the development and application of such policies. The banks should publicly disclose these policies.

5.0. Implementation and Continuous Improvement

At the National Roundtable meetings all members of the Advisory Group strongly supported continued dialogue across stakeholder groups as a means to build on and improve the Canadian CSR Framework over time. Moreover, the implementation of certain elements of the Canadian CSR Framework, as well as some of the other recommendations in this report, would benefit from ongoing multi-stakeholder collaboration. For example, there is an immediate need to develop guidance notes for the proposed Canadian CSR Standards.

The Advisory Group also believes that a coordinated approach will be the most effective way to ensure that Canadian extractive-sector companies operating abroad conduct their activities in a socially and environmentally responsible manner and in conformity with international human rights standards. Extractive-sector activity is rapidly expanding in the developing world and environmental best practices are continually developing. Moreover, there is increased focus by consumers, investors, affected communities and others on the need for business practices to respect human rights internationally. Given this context, it is important for Canada to remain engaged in the evolving dialogue on CSR as it implements the Canadian CSR Framework and the recommendations in this report, and to ensure that its actions are consistent with its international development strategy, including the Millennium Development Goals.

5.1.1. Medium and Longer Term Vision

Ongoing multi-stakeholder engagement will be critical to the effective implementation of recommendations emerging from the Roundtables. Ongoing stakeholder engagement will also be needed to identify and address areas of weakness within the Canadian CSR Framework and develop new areas of cooperative work to further enhance the sector's CSR performance.

It was generally agreed that the establishment of a multi-stakeholder (government, industry, indigenous representatives, socially responsible investors, academics, labour and civil society) body, meeting on a regular basis, could greatly assist with the implementation and continuous improvement of CSR in Canada by engaging in the following:

- Advising on the outstanding elements that are needed to commence implementation of the Canadian CSR Framework;
- Monitoring and assessing the development and implementation of the Canadian CSR Framework;
- Advising on an approach to ensure the continuous improvement of the Canadian CSR Framework, including the identification and prioritization of specific aspects that need to be improved;
- Monitoring the implementation of all other recommendations in this report;
- Identifying outstanding gaps and making recommendations to address such gaps; and
- Reviewing and advising on continuous learning and improvement within the extractive sector, stock exchanges, governmental agencies and departments and by other relevant actors with respect to the Canadian CSR Framework, with particular attention to the

review, adoption and dissemination of emerging and widely-accepted international CSR standards and best practices.

5.1.2. Recommendation

5.1.2.1. Canadian Extractive Sector Advisory Group

It is recommended that the Government of Canada establish a multi-stakeholder (government, industry, indigenous representatives, socially responsible investors, academics, labour and civil society) Canadian Extractive Sector Advisory Group, meeting on a regular basis (minimum annually), to advise the government on the implementation and further development of both the Canadian CSR Framework and the other recommendations contained in this report. Within six months of the release of the government response to this report, a meeting shall be scheduled to establish the Terms of Reference for the Canadian Extractive Sector Advisory Group, including its activities and membership. Participants in this initial meeting will include members from the Advisory Group for the National Roundtables on CSR and the Canadian Extractive Sector in Developing Countries.

As discussed in section 5.1.1, the general functions of the Canadian Extractive Sector Advisory Group are to:

- Provide guidance on the establishment of the outstanding elements of the Canadian CSR Framework;
- Monitor and assess the development and implementation of the Canadian CSR Framework;
- Advise on the continuous improvement of the Canadian CSR Framework;
- Monitor the implementation of all other recommendations in this report;
- Identify outstanding gaps and identify strategies to address these gaps; and
- Advise on continuous learning and improvement within the sector and by other actors, with particular attention to international CSR standards and best practices.

Specific tasks identified in this report for the consideration of the Canadian Extractive Sector Advisory Group include:

- Provide advice on the development of Guidance Notes for the Canadian CSR Standards (section 2.2.2.1.);
- Discuss and provide advice on outstanding issues identified by the Advisory Group (section 2.2.1.);
- Advise on the further evolution of principles, guidelines, best practices and measurable performance criteria, within the context of the Canadian CSR Framework, and within the context of international multi-stakeholder initiatives (section 2.2.2.1.);

- Advise on the development of principles to guide the application and interpretation of human rights principles within the context of the Canadian CSR Standards (section 2.2.2.1.);
- Review the merits of an industry reporting requirement under the *Canada Business Corporations Act* (section 2.3.1.);
- Advise on the development of Global Reporting Initiative sector supplements for the oil and gas sector as well as for junior mining and exploration companies (section 2.3.2.1.);
- Advise on whether Canada should amend the *Canada Pension Plan Investment Board Act* and/or related regulations to overcome obstacles to the further development and implementation of the Canada Pension Plan Investment Board's responsible investment policies and practices (section 3.2.2.2.); and
- Monitor and support multi-stakeholder work on Canadian and international approaches to human rights impact assessments for extractive industry projects in host countries with significant problems related to human rights and/or weak capacities to fulfill international human rights obligations (sections 3.1.2.2, 4.1.).

Other areas that were identified in this report as requiring further attention by the Government of Canada and upon which the Canadian Extractive Sector Advisory Group could provide advice include:

- Constitutional and other implications of federal legislation facilitating civil suits in Canada concerning the activities of Canadian extractive companies operating abroad;
- The coherence of Canadian investment, trade and aid policies. Attention should be paid to whether these policies contribute to the social and economic development of the countries in which Canadian extractive companies operate;
- The policies and positions advanced by Canada in international fora (World Bank Group, UN agencies, etc.) with a view to ensuring that they contribute to the social and economic development of the countries in which Canadian extractive companies operate;
- Initiatives and projects undertaken by other countries (such as Norway and Finland) in the area of reinforcing institutional capacity for governance in the extractive sector of developing countries with a view to supporting and implementing similar innovative projects; and
- The establishment of a multi-stakeholder forum to discuss the implications of the Government of Canada providing bilateral capacity-building support in the area of host government regulation.

Annex 1 – National Roundtable Advisory Group

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Tony Andrews is Executive Director of the Prospectors and Developers Association of Canada (PDAC), a position he has held since 1987. He is a geologist by training and graduated with a PhD from the University of Western Ontario, followed by a Postdoctoral Fellowship at the Scripps Institute of Oceanography. His 30 year career has involved positions held in the academic, industry and government sectors. Since joining the PDAC he has focused his efforts on building the capacity of the organization to provide leadership, information and support for the exploration sector both in Canada and internationally.

ANDREA BOTTO

Andrea Botto holds a Law degree from the University of Buenos Aires and a Master's degree in Sociology of Economics from the National University of San Martin, Argentina. She is also a graduate from the International Development and Cooperation Institute at the University of Ottawa. For the past 15 years, she has worked as a policy officer in various NGOs both in Latin America and in Canada. During her years at the Canadian Council for International Cooperation, she coordinated the CCIC Learning Circle on Corporate Engagement and the development of the Canadian NGOs' policy views paper on Corporate Accountability.

DIANA BRONSON

Diana Bronson has degrees in political science and sociology from the Université de Québec à Montréal. She has a background in research and communications and worked for fifteen years at Rights & Democracy (International Centre for Human Rights and Democratic Development), most recently as coordinator of the globalisation and human rights programme. She has worked on international and regional trade and investment agreements as well as on issues of corporate accountability for several years, most recently by developing a community based methodology for human rights impact assessments.

GERRY BARR

Gerry Barr is the President-CEO of the Canadian Council for International Co-operation (CCIC) a coalition representing about 100 leading Canadian non-governmental organizations engaged in international development. Gerry Barr is a Member of the Order of Canada. He was awarded the Pearson Peace Medal in 1996 for his personal contribution to aid to the developing world, mediation in conflict, and peaceful change through international cooperation. Before joining CCIC in January of 2001, Gerry Barr was the Executive Director of the Steelworkers Humanity Fund.

HENRY BREHAUT

Henry Brehaut is the President of Global Sustainability Services, Inc. He has spent all his working life in the mining industry where he has gained experience from exploration through to closure, including having executive level responsibilities for mine development, operations, closure and corporate sustainable development programs. He has had extensive international experience and has been actively involved in and provided leadership on a wide range of sustainability initiatives within the Canadian and international mining industry.

BONNIE CAMPBELL

Bonnie Campbell is a Professor in the Department of Political Science at the Université de Québec à Montréal, Research Chair on Governance and Aid for Development, and Director of the Groupe de Recherche sur les Activités Minières en Afrique (GRAMA). She received her doctorate in Development Studies from Sussex University and has carried out research on the policies of multilateral financial institutions on the issues of governance and poverty reduction strategies. Bonnie has written extensively on international development, governance and mining.

JIM COONEY

Jim Cooney retired as Vice President, International Government Affairs for Placer Dome Inc. in May 2006. He held positions at Placer Dome from 1982 to 2006 in the areas of social and political risk management, government relations, sustainable development and strategic planning. With Placer Dome he was involved in exploration and mining projects in many countries in Africa, Latin America, Southeast Asia and Central Asia. He holds degrees in philosophy and political science, in East Asian Studies and in theology, for which his thesis was on Christian ethics and corporations.

CRAIG FORCESE

Craig Forcese is Associate Professor at the University of Ottawa's Faculty of Law. His past and current academic and public policy work with groups such as Rights & Democracy and Amnesty International has focused on issues of business and international human rights, especially in conflict zones. He holds degrees in Anthropology/Geography, International Affairs and Law (LLB and LLM), and is a member of the bar in Ontario, New York and the District of Columbia. In 2001, he served as research director for the Canadian Democracy and Corporate Accountability Commission co-chaired by the Honourable Ed Broadbent and Mr. Avie Bennett.

DENNIS JONES

Dennis Jones is a geologist who recently retired from the position of VP Exploration for Iamgold Corporation after working in the minerals industry for almost forty years. His career has included working with exploration and mining companies, consulting firms, governments and the United Nations. Dennis is a director of the Prospectors and Developers Association of Canada and is Chair of its "Environmental Excellence in Exploration" (e3) committee and of its steering committee dealing with CSR in the exploration industry.

CATHERINE COUMANS

Catherine Coumans is Research Coordinator and responsible for the Asia-Pacific Program at MiningWatch Canada. Her work in the region has focused on indigenous peoples affected by Canadian mining companies. Most recently she co-authored *Framework for Responsible Mining: A Guide to Evolving Standards* (2005). She has provided expert testimony on mining in two congressional inquiries in the Philippines, before the Constitutional Court in Indonesia and before the Sub-Committee on Human Rights and International Development in Canada. She holds an MSc (London School of Economics) and a PhD (McMaster University) in Cultural Anthropology. She has taught at McMaster and Cornell universities.

PIERRE GRATTON

Pierre Gratton is Vice President, Sustainable Development and Public Affairs, with the Mining Association of Canada (MAC). Among his responsibilities at MAC, he plays a key role in the development and implementation of the Towards Sustainable Mining (TSM) initiative. His responsibilities with MAC cover corporate social responsibility, media relations, communications, sustainable development, Aboriginal affairs, social issues and land access related environmental issues. He holds an MA degree in political science and a BA from McGill University.

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Karyn Keenan is Program Officer at the Halifax Initiative, a civil society coalition engaged in advocacy work on public financial institutions. She holds degrees in biology, law and environmental studies. Karyn has ten years' experience working for environmental and social justice non-governmental organizations, both in Canada and Latin America. Her work has focused on the social and environmental impacts of mining, oil and gas operations.

DAVID MACKENZIE

David Mackenzie is an independent consultant to labour and civil society organizations, having served for over 26 years on the staff of the United Steelworkers – the largest union in Canada's mining sector. He was executive director of the Steelworkers Humanity Fund from 2000 to 2004, a development Fund working on human rights and anti-poverty projects throughout Africa, Asia, and Latin America.

REG MANHAS

Reg Manhas is Senior Manager, Corporate Responsibility and Government Affairs at Talisman Energy Inc. He has led the development of the Company's corporate responsibility program, including its implementation of the Voluntary Principles on Security and Human Rights and participation in the UN Global Compact and the Extractive Industries Transparency Initiative (EITI), as well as its annual corporate responsibility report. Prior to 2000, he was legal counsel at Talisman and previous to that practiced law with McCarthy Tétrault. Earlier in his career he worked as an engineer in the upstream energy industry with Petro-Canada. He holds degrees in law and chemical engineering.

ROBERT WALKER

Robert Walker is Vice President, Sustainability for The Ethical Funds Company, Canada's largest family of socially responsible investment funds. At The Ethical Funds Company, he heads a department of six sustainable investing specialists, evaluating and engaging companies on environmental, social, and governance performance. He holds degrees in Economics, Political Science, and Planning and has 17 years experience in the socially responsible investing industry, focusing much of his work on the environmental and social impacts of extractives sectors.

AUDREY MACKLIN

Professor Audrey Macklin teaches at the Faculty of Law, University of Toronto. Her areas of expertise include migration and citizenship law, administrative law and international human rights. In 1999, she was a member of a fact-finding mission appointed by then Foreign Minister Lloyd Axworthy to investigate the actions of Talisman Energy in Sudan. She is presently co-authoring a book on home-state regulation of transnational corporations operating in conflict zones.

GORDON PEELING

Gordon Peeling is President-CEO of The Mining Association of Canada (MAC). He has over 30 years of mining policy experience in both the private and public sectors. Most recently, he held the position of Vice President, Communications and Public Policy with the International Council on Metals and the Environment where he developed responses to social, economic and public policy issues that interface with the environment. Previously, he held various positions at Natural Resources Canada. He is a member of the Federal Government's Mining Sector Sustainability Table, and a Council Member of the ICMM.

National Roundtables Facilitator DANIEL JOHNSTON

Lawyer Daniel Johnston, of Counsel to Gowling La Fleur Henderson and a Director of Pacific Resolutions, provides mediation, facilitation, and strategic engagement services related to interactions involving governments, aboriginal people, corporations and NGOs. He has had a central role and ongoing mediation role in successfully resolving the decade long dispute regarding the Great Bear Rainforest of coastal BC and various issues associated with open net-cage salmon farming in BC's Broughton Archipelago. His current activities include mediating discussions associated with resolving an ENGO market campaign, and facilitating a stakeholder advisory committee on electricity conservation and efficiency for BC's largest power producer.

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