

HUMAN RIGHTS PROTECTIONS
AND THE PRIVATE SECTOR:
THE CASE STUDY
OF THE MARLIN MINE

A Thesis Submitted to the College of
Graduate Studies and Research
In Partial Fulfillment of the Requirements
For the Degree of Master of Arts
In the Department of Political Studies
University of Saskatchewan
Saskatoon

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Abstract

Human rights violations are becoming a matter of growing concern in areas where extractive industry development is occurring. The problem is especially acute in the Global South, particularly in Latin America where there has been a mining boom occurring since the late 1990s, and is leading to escalating conflicts between mines and the communities hosting them. Corporate social responsibility (CSR) has become an increasingly applied norm in the extractive industry in recent years as companies have faced growing criticisms regarding human rights violations. The thesis will examine one tool of CSR – a human rights impact assessment (HRIA) and examine the effectiveness of the HRIA conducted by Goldcorp to address the communities' allegations of human rights violations at its Marlin mine in Guatemala.

Acknowledgements

Thank you to my supervisor, Dr. Kalowatie Deonandan, for her encouragement and support during the graduate studies program. I am truly grateful to have had such a wonderful supervisor guide me through the process. Thank you also to my committee members, Dr. Neil Hibbert and Dr. Charles Smith, and my external examiner, Dr. Bram Noble, for their insight, guidance, and commentary.

I would also like to thank the members of my cohort, particularly Erin Lashta, Megan Ross, Mike Roche, and Bryn Rees for their efforts and motivation during the program. Special thanks to LaVina Watts and Dr. Jeffrey Steeves for their assistance in the program.

I would also like to thank Denzel and Alex, my parents, Sheila and Kerry Morgan, and my amazing boyfriend, Jeff Harvey, for all the love, support, and endless patience during the last couple years.

Dedication

Lovingly dedicated to my grandmother, Helen “Bubs” Coleman

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Chapter 1: Introduction

Human rights violations are becoming a matter of growing concern in areas where extractive industry development is occurring. The problem is especially acute in the Global South, particularly in Latin America where there has been a mining boom occurring since the late 1990s, and is leading to escalating conflicts between mines and the communities hosting them. According to the Observatory of Mining Conflicts in Latin America (OCMAL), there are 312 communities in conflict with 218 mining operations as of April 2015.¹ Mining companies operating in the region, many of them Canadian, have been accused of lax worker safety, poor environmental performance and human rights violations, among other transgressions, and these have fuelled discontent and conflict and have made for worried investors.²

Canada is a major player in the resource sector globally. There are more mining corporations listed on its stock exchanges than any other country and the exchange is said to hold “the world’s largest source of equity capital for mining, exploration and production both in Canada and abroad.”³ Its size, however, seems to be matched only by the criticism which it has attracted. As Dhir noted: “United Nations treaty monitoring bodies, academics, civil society groups, and parliamentarians have all impugned the Canadian extractive sector for the deleterious human rights–related repercussions of its overseas operations.”⁴

¹ Observatorio de Conflictos Mineros de América Latina, “Mapa de conflictos mineros, proyectos y empresas mineras en América Latina,” Observatorio de Conflictos Mineros de América Latina, 2015, Retrieved April 26, 2015 from http://basedatos.conflictosmineros.net/ocmal_db/

² Alejandra Martin, “Mining in Latin America: Navigating the Divide Between National Policies and Local Opinion,” *Business for Social Responsibility*, March 11, 2013, Retrieved November 15, 2013, from <http://www.bsr.org/en/our-insights/bsr-insight-article/mining-in-latin-america-national-policies-local-opinion>

³ Aaron Dhir, “Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights, and TWAIL Discourse,” *Business Ethics Quarterly* 22 (2012): 104.

⁴ Dhir, “Shareholder Engagement,” 104.

One of the companies facing such allegations is Montana Exploradora, S.A., a subsidiary of Canada's mining giant, Goldcorp Inc., the world's second largest gold producer.⁵ The charges stem in particular from developments at the company's Marlin mine which is located in Guatemala's western highlands, an area steeped in poverty and which is populated primarily by indigenous Mayans, a group historically marginalized in the country. Marlin is the first large scale mining investment in over 20 years in the country and also the first open pit mine. Since its construction in 2004, there have been a series of continuous charges against the mine's operators and owners, including allegations of human rights abuses and violence against community members who oppose the operation.

As tension and protest mounted, so too the concern of Goldcorp's shareholders, in particular its ethical investors amongst whom were the major pension funds in Canada and elsewhere.⁶ Fearing the impact of the escalating tensions on the mine's economic performance, shareholders eventually demanded that the company adopt corrective measures to address the situation. Specifically, they called on the company to conduct an evaluation of the mine's impact on the human rights of the communities. In compliance, Goldcorp commissioned an independent human rights impact assessment (HRIA) in 2008 to determine the operations impact on community rights and to devise strategies to address any harms done. This response is seen as part of the company's commitment to corporate social responsibility (CSR) –a voluntary commitment by companies to behave in a responsible manner towards society and the environment.⁷

⁵ Goldcorp, "Students & New Grads," Goldcorp, Retrieved July 16, 2015, from <http://www.goldcorp.com/English/Careers/Students-and-New-Grads/>

⁶ On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine* (Vancouver: On Common Ground, 2010), 8.

⁷ Ramon Mullerat, "The Global Responsibility of Business," in in *Corporate Social Responsibility: The Corporate Governance of the 21st Century*, edited by Ramon Mullerat, (The Hague: Kluwer Law International and International Bar Association, 2005): 3.

In response to demands from shareholders, Goldcorp commissioned the consulting firm On Common Ground to undertake an independent HRIA of the mine to determine how the operation has affected the human rights of the communities near the operation and to how address any violations.⁸ An HRIA is a relatively new tool to “systematically identify, predict and respond to the potential human rights impacts of a business project.”⁹ This background sets the context for this investigation.

Research Statement

The purpose of this thesis is to examine the effectiveness of the HRIA conducted by Goldcorp to address the communities’ allegations of human rights violations at its Marlin mine in Guatemala. The thesis argues that the Goldcorp HRIA did little to deal with community concerns over rights violations but instead served the interest of the company and its shareholders.

Methodology

The methodology selected for this thesis is primarily qualitative and involves engagement with a range of sources. This project utilizes primary materials as well as secondary sources. Primary materials include government policy reports on CSR and the extractive industry, government statements (both Canadian and Guatemalan), international human rights frameworks for businesses, United Nations (UN) reports, publications by non-governmental organizations (NGOs), the On Common Ground’s HRIA report of the Marlin Mine, and Goldcorp’s public records regarding its CSR practices.

⁸ On Common Ground, *Human Rights Assessment of Goldcorp’s Marlin Mine: Executive Summary* (Vancouver: On Common Ground, 2010), 4.

⁹ Dhir, “Shareholder Engagement,” 100.

Secondary sources employed consist of newspapers, refereed journal articles, books and published interviews with mining activists and corporate representatives. The inclusion of responses from multiple stakeholders allows for a broad and diverse representation of views.

Ethics approval was sought, but because no direct interviews were conducted, ethics approval was waived. However, I did have to be mindful of certain ethical considerations while conducting my research, such as avoiding biases and maintaining transparency in my claims. In order to mitigate bias, I examined a wide variety of sources that incorporated a range of interests. Ethically, it was important to keep out personal bias regarding any stakeholders involved in the process.

Significance of the Thesis

The implementation of an HRIA is a relatively new practice. The HRIA at the Marlin mine by Goldcorp is the first of its kind by a corporate entity. As such, there are only a handful of academic, peer reviewed publications on HRIAs and none written specifically on the HRIA at the Marlin mine. This thesis therefore represents a contribution to the field in that it is a case study of the Marlin HRIA and its findings have implications for future HRIAs by the private sector.

Organizational Structure

The thesis is organized into seven chapters. Chapter one is the introduction which presents the research statement, the methodology, and structure of the thesis.

Chapter two is the theoretical framework which draws heavily on Neil Brenner, Jamie Peck, and Nik Theodore's "After Neoliberalization?,"¹⁰ Jamie Peck and Adam Tickell's "Neoliberalizing Space,"¹¹ and, to a lesser extent on Jamie Peck's *Constructions of Neoliberal*

¹⁰ Neil Brenner, Jamie Peck, and Nik Theodore, "After Neoliberalization?," *Globalizations*, 7, no.3 (2010): 327-345.

¹¹ Jamie Peck and Adam Tickell, "Neoliberalizing Space," *Antipode* (2002): 380-404.

Reason,¹² and employs their concept of “neoliberalization.” Their articulation of the concept helps to explain how human rights protections, previously the responsibility solely of states, are now also becoming a private responsibility—that is a responsibility of corporations—and what the consequences of this development are.

Chapter three is an overview of the various rules regimes governing corporate conduct and that paved the way for the emergence of HRIAs.

Chapter four presents the literature review. Given that the HRIA is considered a variant of CSR, this chapter surveys the literature on CSR and presents the arguments of its supporters and detractors.

Chapter five provides key background information leading the call for the HRIA. This chapter sets the request for the HRIA within the country’s historical, political climate.

Chapter six presents the case study of the HRIA conducted by On Common Ground for the Marlin mine. It is the core chapter of the thesis and it provides the analysis on the effectiveness of the Goldcorp HRIA in responding to the concerns of the communities affected by the mine.

Lastly, chapter seven is the conclusion and offers suggestions of possible research for the future.

¹² Jamie Peck, *Constructions of Neoliberal Reason*, (Oxford: Oxford University Press, 2010).

Chapter 2: Theoretical Framework

Human rights impact assessments¹³ are a relatively new phenomena and as such have not been studied extensively. The few analyses that have been conducted thus far have been of a technical nature dealing primarily with methodological issues, as the various articles which appeared in a recent issue (2013) of the journal *Impact Assessment and Project Appraisal*¹⁴ demonstrate. Thus this chapter will address this gap in the analyses by presenting a theoretical framework for understanding this new development. As noted in Chapter 1, the framework draws from Brenner, Peck, and Theodore's "After Neoliberalization?,"¹⁵ Peck and Tickell's "Neoliberalizing Space,"¹⁶ and Peck's *Constructions of Neoliberal Reason*,¹⁷ and utilizes in particular their concept of "neoliberalization" which goes beyond a traditional understanding of neoliberalism as discussed below.

Brenner, Peck, and Theodore write that they conceptualize "neoliberalization" (their term) as a form of regulatory restructuring that began in the 1970s...[and that] prioritizes market-based, market-oriented, or market-disciplinary responses to regulatory problems...[and that] strives to intensify commodification in all realms of social life..."¹⁸ It is generally associated with ideas of the Washington Consensus which emphasized market-based solutions such as deregulation, privatization and liberalization to deal to deal with economic crises. The authors also assert that "neoliberalization represents *an historically specific, unevenly developed,*

¹³ HRIAs differ from Social Impact Assessments (SIAs) in that HRIAs look at individual and group rights, while SIAs tend to examine a macro-level of rights. See NOMOGAIA and World Resources Institutes' "The IFC's 'Social Impact Assessment' Process: Adequate to Respect Human Rights?" (August 5, 2010) for a discussion about the differences between HRIAs and SIAs.

¹⁴ See the journal *Impact Assessment and Project Appraisal* 31, no. 2 (2013).

¹⁵ Brenner, Peck, and Theodore, "After Neoliberalization?"

¹⁶ Peck and Tickell, "Neoliberalizing Space."

¹⁷ Peck, *Constructions of Neoliberal Reason*.

¹⁸ Brenner, Peck, and Theodore, "After Neoliberalization?," 331.

hybrid, patterned tendency of market-disciplinary regulatory restructuring.”¹⁹ In other words, while they see it as a historically specific process that began in the 1970s (with ideological roots in the mid-nineteenth century), they do not see it as a “regime-like” homogenous process but rather one that has been implemented unevenly and which is “constantly evolving,” and which takes into account the context or “inherited politico-institutional arrangements.”²⁰

“Neoliberalization, according to Peck, “refers to a qualitatively differentiated process, rather than to a developmental stage or quantitative threshold; it denotes the *form* [italics in original] of state/economy relations, not a linear path towards a purely free-market state.”²¹ However, despite its being “unevenly develop[ed]” and “hybrid” in nature, Brenner, Peck and Theodore claim that the process is also “patterned” in that each wave of regulatory restructuring lays the foundations for the next, taking into consideration the institutional framework within which it is being implemented.²²

While the above would seem to indicate that “neoliberalization” is not significantly different from neoliberalism, what makes Brenner, Peck and Theodore’s conceptualization of “neoliberalization” different is that it incorporates three analytical components which they label: regulatory experiments, transnational rule-regimes, and systems of inter-jurisdictional policy transfer.²³ It is these which provide insights into understanding the emergence of HRIAs as part of corporate behaviour, as will be discussed later.

Regulatory experiments, they explain, are “place-, territory-, and scale-specific projects designed to impose...market-disciplinary modalities of governance” and they comprise of both

¹⁹ Brenner, Peck and Theodore, “After Neoliberalization?,” 330.

²⁰ Brenner, Peck, and Theodore, “After Neoliberalization?,” 331.

²¹ Peck, *Constructions of Neoliberal Reason*, 10.

²² Brenner, Peck, and Theodore, “After Neoliberalization?,” 330.

²³ Brenner, Peck, and Theodore, “After Neoliberalization?,” 335.

“destructive” and “creative” moments.²⁴ In the destructive moments, a process of “roll-back” occurs whereby regulatory frameworks which are detrimental to the market are eliminated or rolled back. Manifestations of the destructive moments in Latin America and elsewhere, for example, can be seen during neoliberalizing period in the 1980s and early 1990s as statist policies were eliminated to clear the way for the implementation of more market-friendly policies. To attract foreign capital and to take advantage of their natural endowments such as natural resources, states were urged to become more competitive by cutting or eliminating policies and regulations, such as high taxes or royalties and restrictive environmental legislations which are deemed restrictive to investments, in particular to foreign direct investments. International financial institutions such as the World Bank and IMF were leaders in directing state policies. Across the globe, and particularly in the developing world, “roll-back” neoliberalism was instituted in the name of development.²⁵ Peck and Tickell view “roll-back” neoliberalism as the pattern of deregulation and dismantlement which brought about the destruction of the Keynesian-welfarist institutions.²⁶ Deregulation, devolution, market liberalization, and the retreat of the state from economic and social governance occur when the existing economic and social policies are rolled back because they are deemed to be a barrier to the circulation of capital.²⁷ This led to politics that were asymmetrical under neoliberalism. Local

²⁴ Brenner, Peck, and Theodore, “After Neoliberalization?,” 335.

²⁵ For examples, please see: Steven J. Klees, A “Quarter Century of Neoliberal Thinking in Education: Misleading Analyses and Failed Policies,” *Globalisation, Societies and Education*, 6, no.4 (2008): 311-348; Jolie Demmers, Alex E Fernández Jilberto, and Barbara Hogenboom, *Good Governance in the Era of Global Neoliberalism: Conflict and Depolitisation in Latin America, Eastern Europe, Asia, and Africa*. London: Routledge, 2004; and Kalim Siddiqui, “Developing Countries’ Experience with Neoliberalism and Globalisation,” *Research in Applied Economics*, 4, no. 4 (2012): 12-37.

²⁶ Peck and Tickell, “Neoliberalizing Space,” 384; Peck, *Constructions of Neoliberal Reason*, 22.

²⁷ Nicole Marie Lindsay, “Mining Industry Associations and CSR Discourse: Mapping the Terrain of Sustainable Development Strategies,” in *Governance Ecosystems: CSR in the Latin American Mining Sector*, edited by Julia Sagebien and Nicole Marie Lindsay (Basingstoke: Palgrave Macmillan Pages, 2011), 137-138; Peck, *Constructions of Neoliberal Reason*, 22.

institutions and actors were given responsibility (decentralization), devoid of power while international institutions and actors gained power without responsibility, resulting in a form of regulatory dumping which occurred at the local scale, while international macro-rule regimes were recreated in regressive and marketized ways.²⁸ It is assumed in neoliberalism, according to Peck, that the social and market forces will fill the void left by the retrenched state institutions at the local level.²⁹

In contrast to “roll-back” neoliberalism, “roll-out” neoliberalism focuses on active state-building, governance building, the re-regulation and “purposeful construction and consolidation of neoliberalized state forms, modes of governance, and regulatory relations.”³⁰ This phase essentially involves building new structures and foundations that protect the market but also does so in a manner that incorporates, at least theoretically, the concerns of progressive forces such as environmentalists, and human rights activists amongst others. Part of this “roll-out” neoliberalism, Peck adds, is the “selective empowerment of community organizations and NGOs as (flexible, low-cost, non-state) service providers, through management by audit and devolved governance, to the embrace of public–private partnership,” selective in that the process could weed out partners and processes that would could be seen as hindering market forces.³¹ This would, for example, include institutionalizing social and environmental policies in corporate operations and establishing CSR programs to deal with the negative impacts of market-led development.³² It is in this context that human rights governance regimes, and the resulting HRIA can be located.

²⁸ Peck and Tickell, “Neoliberalizing Space,” 386.

²⁹ Peck, *Constructions of Neoliberal Reason*, 22.

³⁰ Peck and Tickell, “Neoliberalizing Space,” 384.

³¹ Peck, *Constructions of Neoliberal Reason*, 23.

³² Lindsay, “Mining Industry Associations and CSR Discourse,” 138.

In “roll-out” neoliberalism, corporations and governments create new mechanisms to address “challenges and contradictions of governance in a malmarketized world.”³³ In other words, they embarked on a process of “regulatory reinvention.”³⁴ This is ironic, as advocates of the free-market are foes of corporate regulation, and this begs the question of why they would then endorse any restrictions on corporate conduct. Wacquant provides an answer:

[the] same parties, politicians, pundits and professors who yesterday mobilized, with readily observable success, in support of “less government” as concerns the prerogatives of capital and the utilization of labour, are now demanding with every bit as much fervor, “*more* [emphasis in original] government” to mask and contain the deleterious consequences, in the lower regions of social space, of the deregulation of wage labor and the deterioration of social protection.³⁵

This reinvention is evident in the second dimension of “neoliberalization” as discussed by Brenner, Peck, and Theodore -- that of transnational rule-regimes creation.³⁶ What is interesting about this, is that it involves the regulation of private sector conduct, a market strategy to deal with challenges. As they note, these regimes are characterized by the perpetual reanimation of regulatory restructuring.³⁷ The strategy is creative in that while the rules regimes purport to corporate behaviour, compliance is voluntary—as is consistent with CSR practices. This explains why corporations and market advocates would endorse them and why Wacquant so cynically dismiss the market pundits who now call for “more government.”

As discussed in chapter three, the extractive industry has many examples of these rule-regimes, including the Voluntary Principles on Security and Human Rights, the International Council on Mining and Metals (ICMM), the Equator Principles, and the Extractive Industry

³³ Peck, *Constructions of Neoliberal Reason*, 24.

³⁴ Peck and Tickell, “Neoliberalizing Space,” 392.

³⁵ L. Wacquant, “How Penal Common Sense Comes to Europeans: Notes on the Transatlantic Diffusion of the neoliberal *doxa*,” *European Societies* 1 (1999): 323, quoted in Peck and Tickell, “Neoliberalizing Space,” 392.

³⁶ Peck and Tickell, “Neoliberalizing Space,” 392.

³⁷ Peck and Tickell, “Neoliberalizing Space,” 392.

Transparency Initiative (EITI). While the stated goal of these international frameworks is to promote good corporate citizenship, all are voluntary in nature so as to ensure private sector freedom in the implementation of them. The HRIA, which is at the centre of this analysis, is part of the new wave of rule-regimes being created.

The third dimension of neoliberalization is systems of inter-jurisdictional policy transfer. As Brenner, Peck and Theodore argue, “By establishing certain types of regulatory strategies as ‘prototypical’, such networks enhance the ideological legitimacy of neoliberal policy templates while extending their availability as readily accessible, all-purpose ‘solutions’ to contextually specific regulatory problems and crises.”³⁸ The HRIA process is an example of a system of inter-jurisdictional policy transfer, with it being a tool that can transcend both geographic and industrial space. HRIAs are being used in other sectors as a tool of CSR, as a template that can be promoted and transferred to other corporations in other sectors.

This thesis will utilize the theoretical framework of neoliberalization put forth by Brenner, Peck, and Theodore, Peck and Tickell, and Peck to argue HRIAs have evolved as a tool of CSR to respond to crises facing markets, such as conflict and controversy surrounding the Marlin mine.

³⁸ Brenner, Peck, and Theodore, “After Neoliberalization?,” 335.

Chapter 3: The Global Rules Regimes for Corporations: The Path to the HRIA

In this section, the regulatory re-invention that characterizes neoliberalization will be discussed through a presentation of the various governance regimes that have been created to enhance CSR practices in order to address challenges in the extractive sector. This is necessary to show the trajectory that led to the implementation of Goldcorp's HRIA.

What these norms reveal is the gradual and growing emphasis on making private entities responsible for human rights protections while at the same time ensuring that they maintain their market freedoms. This development reinforces the arguments proposed by Brenner, Peck, and Theodore and also Wacquant, that the proliferation of regulations under neoliberalism was, in essence, an attempt to give the illusion of oversight of corporate conduct, while ensuring that the corporations remain free to operate. Eleven international governance frameworks to guide corporate behaviours predated the HRIA: 1) the United Nations (UN) Code of Conduct, 2) the Global Compact, 3) the Voluntary Principles on Security and Human Rights, 4) the ICMM Principles, 5) the Kimberley Process, 6) the United Nations Norms, 7) the Protect, Respect and Remedy Framework, 8) the Guiding Principles, 9) the Equator Principles, 10) the American Convention on Human Rights, and 11) the Extractive Industry Transparency Initiative. Many corporations have adopted a majority, if not all, of these and have incorporated them as part of their CSR programs to demonstrate their commitment to dealing with human rights and other concerns over their operations by host communities and others.

Prior to the 2000s, most of the governance mechanisms that emerged came in response to environmental crises in the extractive sector. As Coumans argued, the 1990s were characterized by a focus on environmental impacts and shifted in the 2000s to an array of social

impacts.³⁹ By 2000, new charges were levelled against the sector, this time, its links to poverty, underdevelopment and human rights violations were highlighted.⁴⁰ As with the earlier phase of regime roll-out, the new codes now showcased the industry's commitment to respecting human rights. These codes were what paved the way for human rights protections falling under the auspices of the private sector, with the Goldcorp HRIA being an example of how this is operationalized at the level of the firm. However, as this thesis argues, using the case of the Goldcorp HRIA, there has been little change substantively in reality, in terms of dealing with the human rights violations of the mining communities concerned.

Below a few of these agreements, particularly those pertaining to human rights and businesses are explained so as to demonstrate the trend towards making corporations responsible for human rights. The first framework, the United Nations (UN) Code of Conduct for Transnational Corporations" (UN Code of Conduct hereafter) was proposed in the 1970s. It called for corporations to respect human rights and fundamental freedoms in countries in which they operate. The Code specified that corporations are not to discriminate on basis of sex, race, colour, language, and religion, social, national or ethnic origin.⁴¹ It also explicitly stated that transnational corporations shall disclose to the public all information regarding possible hazardous effects of the products they are producing, by means such as proper labelling and accurate advertising of goods.⁴² However, there was much disagreement over this framework;

³⁹ Catherine Coumans, "Whose Development? Mining, Local Resistance, and Development Agendas," in *Governance Ecosystems: CSR in the Latin American Mining Sector*, edited by Julia Sagebien and Nicole Marie Lindsay (Basingstoke: Palgrave Macmillan Pages, 2011), 116.

⁴⁰ Coumans, "Whose Development?," 116.

⁴¹ United Nations Commission on Transnational Corporations, "United Nations Commission on Transnational Corporations: Draft U.N. Code of Conduct on Transnational Corporations," *International Legal Materials* 22, no. 1 (January 1983): 195.

⁴² United Nations Commission on Transnational Corporations, "United Nations Commission on Transnational Corporations," 199.

negotiations slowed after more than a decade of disagreement between the Soviet Bloc that largely supported the initiative and the industrialized countries who opposed the initiative, and the process was officially abandoned in 1992.⁴³ In the context of the times, the Cold War and North-South conflict, the project to create an overarching system that would regulate the activities of transnational corporations and their relationships with host governments proved too ambitious.

However the efforts to regulate corporate behaviour did not end with the failure of the Code. Later in the decade, in 1999, at the Annual meeting of the World Economic Forum, UN Secretary-General Kofi Annan proposed a new set of norms, the UN Global Compact.⁴⁴ Bringing together civil society and corporations, including a large number from the global south, the Global Compact called for environmental protections, the implementation of labour standards, and the protection of human rights.⁴⁵ Two of the ten principles reference human rights: businesses should support and respect the protection of internationally proclaimed human rights; and businesses should ensure that they are not complicit in human rights abuses.⁴⁶

The Global Compact is one of the earliest codes on corporate governance to introduce the idea that human rights protections are not solely the responsibility of states and governments, but involves the actions of individuals and thus corporations. The logic is that businesses and corporations are created by individuals who are bound to respect human rights; therefore

⁴³ John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda," *American Journal of International Law* 101, no.4 (2007): 819.

⁴⁴ Carolin F. Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *German Law Journal*, 4 no.10 (2003): 1066.

⁴⁵ United Nations Global Compact, "After the Signature: A Guide to Engagement in the United Nations Global Compact," United National Global Compact Office, January 2012, Retrieved October 19, 2013, from http://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf, 13.

⁴⁶ United Nations Global Compact, "After the Signature."

businesses and corporations are also bound to respect human rights.⁴⁷ However, one of the major criticisms of the Global Compact is that participation in it is merely voluntary and this has resulted in only a few companies accepting the framework, ultimately making it ineffective for realizing change.⁴⁸ The Compact is described as “more like a guide dog than a watch dog,” focused on dialogue and partnerships rather than having any binding enforcement.⁴⁹ The Joint Inspection Unit of the United Nations System, an independent system-wide evaluation, inspection, and investigation unit, stated the Global Compact “has been less successful in making business participants translate their commitment into real policy change...in substance it has been more output- than impact-oriented.”⁵⁰ A similar criticism can be made of all the subsequent governance regimes also.

In 2000, the Voluntary Principles on Security and Human Rights were established by the United Kingdom, the United States, Norway, the Netherlands, non-governmental organizations (NGOs), and companies in the extractive and energy sectors. The goal was to ensure the security of corporate operations and also respect for human rights by corporations.⁵¹ Corporations that were signatories committed to incorporating human rights protections within the framework of their CSR policies and they were guided by the set of voluntary principles contained in the agreement.⁵² Interestingly, while Canada has signed on to the agreement, as have many Canadian

⁴⁷ United Nations Global Compact, “After the Signature.”

⁴⁸ Hillemanns, “UN Norms,” 1066; Ruggie, “Business and Human Rights,” 819-820.

⁴⁹ United Nations Global Compact, “About the UN Global Compact: Frequently Asked Questions,” United Nations Global Compact Office, Retrieved September 24, 2015, from <https://www.unglobalcompact.org/about/faq>

⁵⁰ Papa Louis Fall and Mohamed Mounir Zahran, “United Nations Corporate Partnerships: The Role and Functioning of the Global Compact,” United Nations Joint Inspection Unit, 2010, Retrieved September 24, 2015, from [https://www.unjiu.org/en/reports-notes/archive/United Nations corporate partnerships -The role and functioning of the Global Compact.pdf](https://www.unjiu.org/en/reports-notes/archive/United%20Nations%20corporate%20partnerships%20-%20The%20role%20and%20functioning%20of%20the%20Global%20Compact.pdf), 27.

⁵¹ Voluntary Principles on Security and Human Rights, “Introduction,” Voluntary Principles on Security and Human Rights, 2013, Retrieved October 19, 2013, from <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>

⁵² Voluntary Principles on Security and Human Rights, “Introduction.”

companies, one notable absence is Goldcorp, the owner of the Marlin mine, though the company claims it is abiding by these principles at its Marlin site.⁵³ While this framework is voluntary in nature (and in name), Goldcorp is able to avoid adhering its principles and reporting mechanisms and still publicly state on its website that the company is in compliance with it, despite not being a signatory.

Following the Voluntary Principles was the International Council on Mining and Metals (ICMM) which was established in 2001 to represent mining and mineral companies committed to sustainable development,⁵⁴ and Goldcorp is a signatory to this framework. In 2003, the ICMM implemented ten principles which were benchmarked against other global initiatives such as the UN Global Compact, the Voluntary Principles on Security and Human Rights, and the 1992 Rio Declaration on the Environment and Development.⁵⁵ Beginning in 2010, the ICMM has conducted annual member performance assessments to evaluate how closely members align business decisions within the framework of the ten principles, and members are required to provide third-party verifications that their corporations are committed to the principles.⁵⁶ Finding a credible, independent assurance process has been an issue with this framework, particularly a verification process that is recognized as legitimate by external stakeholders.⁵⁷ While companies

⁵³ Please see <http://www.goldcorp.com/English/Responsible-Mining/Human-Rights/Case-Study-The-Voluntary-Principles-at-Marlin/default.aspx>

⁵⁴ International Council on Mining and Metals, "Our History," International Council on Mining and Metals, 2013, Retrieved October 19, 2013, from <http://www.icmm.com/about-us/our-history>

⁵⁵ International Council on Mining and Metals, "10 Principles," International Council on Mining and Metals, 2013, Retrieved October 19, 2013, from <http://www.icmm.com/our-work/sustainable-development-framework/10-principles>

⁵⁶ International Council on Mining and Metals, "Our History."

⁵⁷ Hevina S. Dashwood, *The Rise of Global Corporate Social Responsibility: Mining and the Spread of Global Norms*, (Cambridge: Cambridge University Press, 2012), 239.

have to use third-party verification, they get to select the external assurance provider, disclosure is limited, and there are no sanctions or repercussions for poor performance.⁵⁸

The next governance regime relevant to the issue of human rights is the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (also referred to as the Norms) established in 2003 by the UN Sub-Commission for the Promotion and Protection of Human Rights.⁵⁹ Hillemans argues the Norms establish an authoritative guide on how CSR should be conducted and she stated that the framework is the “first set of comprehensive international human rights norms specifically aimed at and applying to transnational corporations and other entities (businesses)” as it makes companies explicitly responsible for to human rights and labour rights.⁶⁰ This framework is different from previous ones discussed as “the Norms were drafted in mandatory language and were designed as a basis from which a treaty could be negotiated. Had they been adopted, they would have imposed binding international human rights obligations directly on corporate actors.”⁶¹ The business community, represented by the International Organization of Employers and the International Chamber of Commerce, opposed the Norms and claimed that it had no legal standing, while NGOs welcomed it for recognizing the importance of respecting human rights in the business domain.⁶² Despite the fact “the Norms are in draft form, and were brought before the international community with the intention that they would be the subject of amendment, debate

⁵⁸ Lindsay, 144-149.

⁵⁹ Also after the ICMM, the Kimberley Process Certification Scheme (KPCS) was introduced. This was to deal with the initiative. See Kimberley Process, “Kimberley Process Certification Scheme,” Kimberley Process, 2002, Retrieved October 18, 2013, from <http://www.kimberleyprocess.com/en/kpcs-core-document>; Ruggie, “Business and Human Rights,” 835; and Hillemanns, “UN Norms,” 1065.

⁶⁰ Hillemanns, “UN Norms,” 1065.

⁶¹ Penelope Simons, “The Governance Gap: Multistakeholder and Intergovernmental Initiatives,” in *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, edited by Penelope Simons and Audrey Macklin (New York: Routledge, 2014), 83.

⁶² Ruggie, “Business and Human Rights,” 838. See footnote 99.

and reform,” the framework became quite polarizing, creating two camps: those for human rights regulation of business and those against human rights regulation of business.⁶³ They were officially abandoned at the UN Commission on Human Rights’ 61st session in 2005.⁶⁴

The disagreement over the Norms resulted in the Commission requesting UN Secretary-General Kofi Annan to appoint a special representative to identify and clarify international standards and policies pertaining to business and human rights.⁶⁵ In July 2005, John Ruggie was appointed to the position of Special Representative of the Secretary-General (SRSG) on human rights and transnational corporations and other business enterprises for a two-year term to address the issue, but his tenure was eventually extended to 2011. As SRSG, he proposed the “Protect, Respect and Remedy” Framework to the UN Human Rights Council (UNHRC). This framework is centred on three pillars:

the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial.⁶⁶

Annan later tasked Ruggie with operationalizing and promoting the framework. The project culminated with the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (Guiding Principles), which was endorsed by the UN Human Rights Council. The Guiding Principles framework has been endorsed by civil society and workers’ organizations, governments, national human rights

⁶³ David Kinley, Justine Nolan and Natalie Zerial, “The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations,” *Companies and Securities Law Journal* (2007): 34.

⁶⁴ Pini Pavel Miretski and Sascha-Dominik Bachmann, “The UN “Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”: A Requiem,” *Deakin Law Review* 17, no.1 (2012): 34.

⁶⁵ Ruggie, “Business and Human Rights,” 821.

⁶⁶ United Nations, “The UN ‘Protect, Respect and Remedy’ Framework for Business and Human Rights,” September 2010, Retrieved September 17, 2015, from <http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf>, 1.

institutions, investors, and business enterprises and associations.⁶⁷ The Guiding Principles has established an analytical framework of human rights for business, which specifies the responsibilities of corporations to respect a broad range of international human rights.⁶⁸ Key to this framework is the process of corporate due diligence, which allows corporations to identify and deal with negative human rights impacts from their operations through such mechanisms as a HRIA.⁶⁹ The Guiding Principles differentiate between obligation and responsibility, with the latter indicating that businesses should act with due diligence in avoiding infringing on rights, or in other words, it imposes on businesses a moral obligation to respect human rights.⁷⁰ In contrast, having a duty suggests an actor (in this case the state) is legally bound to abide by a certain code of conduct.⁷¹ The framework has become a foundational document for business and human rights and was cited by On Common Ground as one of the global norms that guided its HRIA at Marlin.

However, despite the laudable nature of the framework, adherence to it rests on voluntarism. As noted above, the document maintains that states have a “duty” to protect human

⁶⁷ United Nations Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” A/HRC/17/31 Advance Edited Version, United Nations Human Rights Council Seventeenth Session, March 21, 2011, Retrieved October 10, 2013, from <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

⁶⁸ Yousuf Aftab, “The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies” *Rocky Mountain Mineral Law Institute Annual Proceedings* 60, (2014): 19-8.

⁶⁹ Dhir, “Shareholder Engagement,” 111-112. Also, see United Nations Human Rights Council, “Guiding Principles,” 17, where Ruggie states: “While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights. Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.” While not stating an HRIA, Ruggie implicitly refers to assessments of human rights impacts.

⁷⁰ Robert C. Blitt, “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting and Embracing Approach to Corporate Human Rights Compliance,” *Texas International Law Journal* 48, no.1 (2012): 44. See Blitt’s note 65.

⁷¹ Blitt, “Beyond Ruggie’s Guiding Principles,” 44. See Blitt’s note 65.

rights, whereas corporations only have a responsibility. This requirement is less binding or less onerous than that of “duty”, as Human Rights Watch noted.⁷²

The Equator Principles (EPs) are another set of international norms, with the third iteration of the principles launched June 2013.⁷³ This a risk management framework for determining, assessing and managing social and environmental risk in projects.⁷⁴ The framework has 81 financial institutions from 36 countries officially adopting the framework.⁷⁵ These members strive to ensure all loans they finance abide by “their internal environmental and social policies, procedures and standards for financing projects and will not provide Project Finance or Project-Related Corporate Loans to projects where the client will not, or is unable to, comply with the EP.”⁷⁶ The EPs state they “have greatly increased the attention and focus on social/community standards and responsibility, including robust standards for indigenous peoples, labour standards, and consultation with locally affected communities within the Project Finance market.”⁷⁷ The norms have been criticized for their voluntary nature and have questioned whether signatories “are simply paying lip service to the Principles.”⁷⁸ There is a lack of information on the efficacy of the framework, and whether projects negotiated under the EPs

⁷² Quoted in Blitt, “Beyond Ruggie’s Guiding Principles,” 53. See also Blitt’s note 65, p. 65.

⁷³ After the Equator Principles initiated a strategic review of the framework in in 2006 and 2010, recommendations came forth regarding scope, human rights, stakeholder engagement, governance, reporting, and transparency. During the initial launch of the framework in 2003 and the last update, there have been significant changes in environmental and social risk management practices, and the financial crisis in 2009. The number of framework adopters also rose from 10 to 80 financial institutions. The newest version is Equator Principles III. See Equator Principles, “About the Equator Principles (EP III) Update Process and Timeline,” Equator Principles, 2011, Retrieved September 17, 2015, from <http://www.equator-principles.com/index.php/process-and-timeline>; Equator Principles, “About the Equator Principles,” Equator Principles, 2011, Retrieved October 19, 2013, from <http://www.equator-principles.com/index.php/about-ep/about-ep>

⁷⁴ Equator Principles, “About the Equator Principles.”

⁷⁵ Equator Principles, “About the Equator Principles

⁷⁶ Equator Principles, “About the Equator Principles.”

⁷⁷ Equator Principles, “About the Equator Principles.”

⁷⁸ Allen Goss, “Corporate Social Responsibility in the Extractive Industries: The Role of Finance,” in *Governance Ecosystems: CSR in the Latin American Mining Sector*, edited by Julia Sagebien and Nicole Marie Lindsay (Basingstoke: Palgrave Macmillan Pages, 2011), 197. See also Simons, “Multistakeholder and Intergovernmental Initiatives,” 147.

have experienced lower levels of conflict.⁷⁹ The EPs have also been criticized for a lack of transparency and lack of accountability in the implementation of the framework, which is a criticism that transcends the EPs and is applicable to other frameworks presented in this section.⁸⁰

The next important norm for the purposes of understanding the genesis of the Goldcorp HRIA is the Extractive Industry Transparency Initiative (EITI), which resulted from a call from civil society, industry and a global coalition of governments “to improve openness and accountable management of revenues from natural resources.”⁸¹ It recognizes that resources belong to a country’s citizens and poorly managed resource extraction can lead to conflicts. Openness and transparency throughout the extraction process can be beneficial to all citizens and may mitigate the potential negative effects of resource conflict by strengthening good governance and accountability.⁸²

The EITI is implemented by countries and extractive companies operating in those countries and demands that the latter must report how much is paid to governments. The terms of the Transparency Initiative stipulate that all extractive companies operating in a country, whether they are supporters of the initiative or not, must disclose how much they pay.⁸³ Companies have to report what they transfer to governments such as taxes and royalties, while implementing countries are required to disclose and publish revenues they receive from the extractive sector. These numbers are then to be reconciled by an independent administrator and then published in

⁷⁹ Goss, “Corporate Social Responsibility,” 199.

⁸⁰ Goss, “Corporate Social Responsibility,” 197.

⁸¹ Extractive Industries Transparency Initiative, “What is the EITI?” Extractive Industries Transparency Initiative, Retrieved June 13, 2014, from <http://eiti.org/eiti>

⁸² Extractive Industries Transparency Initiative, “Benefits from Implementing EITI,” Extractive Industries Transparency Initiative. Retrieved June 13, 2014, from <http://eiti.org/eiti/benefits>

⁸³ Extractive Industries Transparency Initiative, “Frequently Asked Questions (FAQ),” Extractive Industries Transparency Initiative, Retrieved June 13, 2014, from <http://eiti.org/faqs#Standard>

an EITI Report.⁸⁴ Once a country has met the sign-up requirements, they have 2.5 years to meet the rest of the compliance requirements before the EITI Board assesses whether they have successfully met the full requirements. As the EITI's states on its website: "To be EITI Compliant does not necessarily mean a country's extractive sector is fully transparent, but it means there are satisfactory levels of disclosure and openness in the management of the natural resources, as well as a functioning process to oversee and improve disclosure."⁸⁵ Since 2004, more than 40 countries have adopted EITI, with Guatemala becoming an EITI Compliant Country on March 19, 2014.⁸⁶ Goldcorp is a Supporting Company through their membership of the ICMM, as all ICMM member companies are also EITI supporting companies.⁸⁷ EITI Supporting Companies "must merely publicly express their support on their website. They are also requested, not required, to make a financial contribution to EITI. There are no requirements on companies to report in order to attain or maintain the status of Support Company."⁸⁸ Companies can laud themselves as a responsible corporation, a Supporting Company, by simply stating their support for the initiative on their website with no repercussions.

While the stated goals of the EITI are laudable, the implementation of them is not guaranteed. In countries such as Guatemala, where corruption is rampant, impunity pervasive and state institutions are notorious for their weak or non-existent oversight capacity, it is highly doubtful whether revenues, for example, will be reported in a transparent manner. As Deonandan

⁸⁴ Extractive Industries Transparency Initiative, "Frequently Asked Questions (FAQ)."

⁸⁵ Extractive Industries Transparency Initiative, "Frequently Asked Questions (FAQ)."

⁸⁶ Extractive Industries Transparency Initiative, "Guatemala," Extractive Industries Transparency Initiative, Retrieved June 13, 2014, from <http://eiti.org/Guatemala>

⁸⁷ International Council on Mining and Metals, "Extractive Industries Transparency Initiative," International Council on Mining and Metals, 2015, Retrieved February 15, 2015, from <http://www.icmm.com/page/84051/extractive-industries-transparency-initiative>

⁸⁸ Simon, "Multistakeholder and Intergovernmental Initiatives," 156.

and Ortiz have argued, the reporting practices of the Guatemalan state are opaque.⁸⁹ Revenues from resources are aggregated and as such, it is impossible to determine what revenues were received from which operation.⁹⁰

Having presented a brief overview of some of the relevant governance regimes that apply to the extractive sector and human rights protections, the next chapter turns to surveying the literature on CSR, of which these regimes are a part.

⁸⁹ Kalowatie Deonandan and Paola Ortiz Loaiza, “Mining and Development: The Tax Tale and the Marlin Mine,” *Latin American Policy* (Forthcoming, 2016).

⁹⁰ Deonandan and Ortiz Loaiza, “Mining and Development.”

Chapter 4: Literature Review: Examining the Debate on Corporate Social Responsibility

Human Rights Impact Assessments are considered part of the strategy of companies' CSR programs. As such, this chapter represents a review of the literature on CSR in order to better understand what scholars have to say about the merits and demerits of CSR.

Ramon Mullerat, former president of the Council of the Bars and Law Societies of the European Union's defines CSR as a voluntary commitment by companies:

to respect and protect the interest of a broad range of stakeholders and to contribute to a cleaner environment and a better society through active interaction with all. CSR is the voluntary commitment by business to manage its role in society in a responsible way. CSR is the commitment of business to contribute to sustainable development working with employees, their families, the local communities in societies at large to improve their quality of life. CSR is cooperation between government, civil society and business (as quoted in Shestack, 2005).⁹¹

Cochran traces the development of CSR from the 1930s, long before the establishment of any global governance regimes for corporations.⁹² The Vietnam War, in particular, ushered in an era of activism by groups and non-governmental organizations (NGOs) that were concerned with unethical business behaviour. The ability of these groups to bring media attention to business practises they deem irresponsible or unethical can tarnish a company's reputation and affect its profit margins, and hence many businesses were motivated to adopt CSR practices. Cochran suggests that companies that engage in CSR may not be successful economically solely because of their adoption of CSR principles; however, they should adopt socially responsible activities that can advance economic interests and that all their economic decisions should be screened for their social utility.⁹³

⁹¹ Jerome J. Shestack, "Corporate Social Responsibility in a Changing Corporate World," in *Corporate Social Responsibility: The Corporate Governance of the 21st Century*, edited by Ramon Mullerat, (The Hague: Kluwer Law International and International Bar Association, 2005): 97.

⁹² Philip L. Cochran, "The Evolution of Corporate Social Responsibility," *Business Horizons* 50 (2007): 449.

⁹³ Cochran, "The Evolution of Corporate Social Responsibility," 453.

CSR policies have increased and become more prevalent across different industries with neoliberalism and globalization, and they are particularly prominent in the resource sector. Luning argues that with neoliberalism and the needs of developing states to attract foreign direct investment, MNCs' have increased their authority over the nation-states in the developing world in particular.⁹⁴ This is due to the fact that developing countries' governments need to court companies with favourable policies, such as reductions in taxes and royalties and more lenient environmental regulations. In return, it is now expected that transnational corporations take some responsibility for community development.⁹⁵

Mining companies that were only responsible for the safety and social welfare of their employees, are now viewed as having increasing responsibilities that extend into local communities. Dashwood, who analyzes CSR from a position of support, reinforces this point in a discussion regarding stakeholder theory, which states that companies have responsibilities towards a range of stakeholders, including: shareholders, customers, local communities, employees, and the environment.⁹⁶ She suggests that CSR can be understood as being part of the obligations that corporations have to their shareholders, which moves away from the traditional view of companies only being responsible to their employees.⁹⁷

Dashwood also argues since the 1970s it has become increasingly difficult for mining companies to treat environmental damage as an externality of the market.⁹⁸ She contends that mining companies themselves have actually shaped global norms with voluntary initiatives such

⁹⁴ Sabine Luning, "Corporate Social Responsibility (CSR) for Exploration: Consultants, Companies and Communities in Processes of Engagements," *Resources Policy* 37 (2012): 206.

⁹⁵ Luning, "Corporate Social Responsibility (CSR) for Exploration: Consultants, Companies and Communities in Processes of Engagements," 206.

⁹⁶ Hevina S. Dashwood, "Canadian Mining Companies and Corporate Social Responsibility: Weighing the Impact of Global Norms," *Canadian Journal of Political Science* 40, no.1 (2007): 134.

⁹⁷ Dashwood, "Canadian Mining Companies and Corporate Social Responsibility," 134-135.

⁹⁸ Dashwood, "Canadian Mining Companies and Corporate Social Responsibility," 142.

as ICMM. However, she does admit that with voluntary guidelines like the ICMM comes the challenge of enforcement. Rarely are there mechanisms set in place to punish non-compliance.⁹⁹ Nevertheless, she is a strong supporter of the benefits of CSR practices.

Burke and Logsdon suggest companies are not only adhering to CSR norms but they may even exceed minimum standards prescribed by CSR measures when this offers strategic payoffs for the company. By going above the minimum standards, corporations can also increase their visibility in the market in a positive way and this will produce economic or strategic benefits for them.¹⁰⁰ In a similar vein, Hilson argues that corporations then were solely focused on the profit motive, and it was not until to the 1980s that the rhetoric of corporate social responsibility was embraced by MNCs.¹⁰¹ According to Hilson, the motivations for this move to CSR, especially for firms in the resource sector were that: consumer preferences will favour products and services that are socially responsible, investors would prefer socially responsible and transparent firms, and corporations would be at reduced risk from potential boycotts and safety issues from deteriorated company reputation.¹⁰²

Other scholars, such as Sagebien, Lindsay, Campbell, Cameron and Smith, contend CSR is a response to address social issues that have been historically externalized by private firms. Rather than being bound solely to shareholder profit demands, CSR represents a shift to larger obligations of responsibility to society and the environment. In order to gain a social license to operate, corporations, especially firms in the extractive sector, employ CSR measures to uphold

⁹⁹ Dashwood, "Canadian Mining Companies and Corporate Social Responsibility," 150.

¹⁰⁰ Lee Burke and Jeanne M. Logsdon, "How Corporate Social Responsibility Pays Off," *Long Range Planning* 29, no. 4 (1996): 498.

¹⁰¹ Gavin Hilson, "Corporate Social Responsibility in the Extractive Industries: Experiences from Developing Countries," *Resources Policy* 37 (2012): 131.

¹⁰² Hilson, "Corporate Social Responsibility," 132.

obligations towards stakeholders and shareholders in exchange for doing business in the area.¹⁰³

The degree of the impact or successes of such initiatives targeting affected stakeholders depends on the interactions of actors outside of the firm as well, including home-state governance systems, host-state policies, financial institutions, advocacy NGOs, and host communities.¹⁰⁴

While scholars such as Dashwood and Burke and Logsdon are CSR advocates, there is a large body of the scholarly writing on CSR that is quite critical. In this strand of the literature, corporations are largely vilified as profit-maximizers rather than entities whose practices are socially responsible, and their CSR policies are seen largely as facades to respond to government, community and shareholder concerns. Among those critical of CSR are Maassarani, Drakos and Pajkowska who contend that companies are not choosing to adopt CSR measures purely voluntarily, but rather are acting in response to demands from shareholders, civil society, academia, the human rights community and the public for improved corporate behaviour.¹⁰⁵ They recognize that states, as underwriters of international treaties, have assumed primary responsibility for the protection and promotion of human rights. Human rights laws have been in the domestic domain of courts and legislatures. However, the authors argue, human rights violations that are of greatest concern occur largely in developing states where regulatory capacity of the state institutions is weak compared to countries in the Global North.¹⁰⁶ Hence, to appease critics, corporations have begun to initiate CSR measures to promote human rights in the states with fragile institutions. This is problematic for the authors because although corporations

¹⁰³ Julia Sagebien, Nicole Lindsay, Peter Campbell, Rob Cameron, and Naomi Smith, "The Corporate Social Responsibility of Canadian Mining Companies in Latin America: A Systems Perspective," *Canadian Foreign Policy Journal* 14, no. 3 (2008): 113.

¹⁰⁴ Sagebien, Lindsay, Campbell, Cameron, and Smith, "The Corporate Social Responsibility of Canadian Mining Companies in Latin America," 118.

¹⁰⁵ Tarek F. Maassarani, Margo Tatgenhorst Drakostt, and Joanna Pajkowskat, 2007, "Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment," *Cornell International Law Journal* 40 (2007): 136.

¹⁰⁶ Maassarani, Drakostt, and Pajkowskat, "Extracting Corporate Responsibility," 140-141.

commonly speak of CSR, there is often a gap between words and actions.¹⁰⁷ As CSR adoption is voluntary, the authors allege that some firms may be adopting unenforceable CSR measures to improve their “reputation without being bound to their commitments.”¹⁰⁸

Similarly, Slack identifies a gap between companies’ rhetoric and actions regarding implementing CSR practices. He suggests that companies have not integrated CSR into business models but have merely pledged support for the ideals serving largely as public relations ploy to appease shareholders and the general public.¹⁰⁹ While it costs companies very little to voice support for CSR, their adoption of it creates the illusion that they are making an effort to take into account possible abuses, whether relating to human rights or to the environment or any other potentially detrimental impacts.¹¹⁰ In a brief reference to Goldcorp’s Marlin operation in Guatemala, the author argues that Goldcorp has failed to uphold CSR principles in its actions. While the onus is on the Guatemalan Government to hold Goldcorp responsible while operating within its borders, the company’s use of CSR has allowed the government to ignore the situation while saving face with the international community.¹¹¹ This case provides an example of a corporation’s rhetoric being inconsistent with its actions and this thesis will explore this further in its examination of the HRIA done by the company.

Other CSR critics are Blowfield and Lund-Thomsen who argue that both companies and governments have made significant claims about the benefits of CSR, but there are limitations as to what it is actually being achieved. Blowfield dismisses CSR as merely a public relations tool

¹⁰⁷ Maassarani, Drakostt, and Pajkowskat, “Extracting Corporate Responsibility,” 142.

¹⁰⁸ Maassarani, Drakostt, and Pajkowskat, “Extracting Corporate Responsibility,” 142.

¹⁰⁹ Keith Slack, “Mission Impossible?: Adopting a CSR-based Business Model for Extractive Industries in Developing Countries,” *Resources Policy* 37 (2012): 179.

¹¹⁰ Slack, “Mission Impossible?” 180.

¹¹¹ Slack, “Mission Impossible?” 182-183.

and contends there is not enough data on some of the claims being made regarding CSR.¹¹² Some of the shortcomings include: mixed methodologies by companies which makes it difficult to find aggregate data; organizations that make judgments without fully collecting case-study specific data; and corporate reports using heterogeneous methods making it difficult to make generalizations or identify trends.¹¹³

For his part by Lund-Thomsen questions whether CSR should be viewed as an ideal and if so, whether it should be widespread through the developing world.¹¹⁴ In other words, he questions whether its norms can be universally applicable. For example, if a corporation limits the work week to 40-hours in a country in which it would be necessary to work 60 hours to provide for your family, is that social responsibility?¹¹⁵ To whom are businesses responsible: citizens in the host country or those shareholders in the home country? One can see these questions debated throughout the literature, with little consensus reached.

These debates about the effectiveness and applicability notwithstanding, the promotion of CSR has gained widespread momentum as now international organizations, including the United Nations and international business organizations such as the ICMC that are now promoting them. Of particular relevance to this thesis are those agreements being promoted to enhance human rights protections and more specifically, to place human rights protections under the corporate umbrella. This development has occurred as a result of the growing conflicts between corporations, particularly in the resource sector and the communities which host them.

¹¹² Michael Blowfield, "Reasons to be Cheerful? What We Know about CSR's Impact," *Third World Quarterly*, 28, no. 4 (2007): 683.

¹¹³ Blowfield, "Reasons to be Cheerful?" 687.

¹¹⁴ Peter Lund-Thomsen, "The Global Sourcing and Codes of Conduct Debate: Five Myths and Five Recommendations," *Development and Change* 39, no.6 (2008): 1006.

¹¹⁵ Lund-Thomsen, "The Global Sourcing and Codes of Conduct Debate," 1010.

While there has been a proliferation in CSR norms, especially when it comes to human rights protections, there has been no movement towards a consensus. Like CSR generally, human rights-related CSR is similarly contentious. While adherents view them as protecting human rights, detractors dismiss the new norms as being driven by the profit motive, as tools to “mask the singular profit maximization ethos of corporations by manufacturing the image of the vigilant, corporate, human rights campaigner.”¹¹⁶ Or as Graetz and Franks argue, the emerging norms of corporations respecting human rights is in contrast to neoliberalism, the dominant ideology of the day and which emphasizes market freedoms.¹¹⁷ According to this philosophy, whether a corporation is employing CSR due to social expectation, legal obligation or corporate voluntarism, its primary responsibility is to its shareholders.

For his part, Harrison acknowledges HRIAs are a relatively new tool employed by corporations and notes that they lack standardization across the field, that there is often inadequacy in consultation and participation of stakeholders which then threatens the credibility of the assessment.¹¹⁸

Moving to a more narrowed focus, Sagebien, Lindsay, Campbell, Cameron and Smith tie CSR to SGSR Ruggie’s efforts as well as to the Marlin Mine, questioning the actions taken by the Canadian subsidiary of Goldcorp, Glamis Gold.¹¹⁹ In the authors’ analysis, they argue that while the act of developing and implementing CSR initiatives rests within the domain of the

¹¹⁶ Tony Evans, *Human Rights in the Global Political Economy: Critical Processes*, (Boulder, CO: Lynne Rienner Publishers, 2011): 90.

¹¹⁷ Geordan Graetz and Daniel M. Franks, “Incorporating Human Rights into the Corporate Domain: Due Diligence, Impact Assessment and Integrated Risk Management,” *Impact Assessment and Project Appraisal* 31, no.2 (2013): 102-103.

¹¹⁸ James Harrison, “Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment,” *Impact Assessment and Project Appraisal* 31, no.2 (2013): 110.

¹¹⁹ Sagebien, Lindsay, Campbell, Cameron, and Smith, “The Corporate Social Responsibility of Canadian Mining Companies in Latin America,” 119.

corporation, the principal intent is to advance corporate interests and the degree of the impact or successes of such initiatives targeting other stakeholders depends on interactions of actors outside of the firm as well.¹²⁰ The authors put forth that CSR can be thought of as forming part of an ecosystem [their term] of relations between different actors, like a spider web, where multiple lines can be drawn between different participants, with the corporation making up only one relationship.¹²¹ There is not necessarily a two-way relationship between each member but multiple relationships spanning across the sphere of interactions. In this context, the success or failure at of HRIA at the Marlin mine can be attributed not just to the company but also to other actors, including the Guatemalan state and international organizations.

In conclusion, corporations are increasingly viewed as having a role in maintaining and protecting human rights; what that role represents is contested throughout academia, business and NGOs. This review has surveyed the evolution of several of those relevant to the HRIA such as the UN Code of Conduct, the Voluntary Principles on Security and Human Rights, and the Guiding Principles. It has also offered a summary of the dominant views in the academic debate concerning CSR. As the evaluation of the HRIA will demonstrate, the findings would situate this analysis within the literature that criticizes CSR as, in the end, the Goldcorp HRIA benefitted the company and the shareholders rather than the communities it was supposedly designed to protect.

¹²⁰ Sagebien, Lindsay, Campbell, Cameron, and Smith, “The Corporate Social Responsibility of Canadian Mining Companies in Latin America,” 118.

¹²¹ Sagebien, Lindsay, Campbell, Cameron, and Smith, “The Corporate Social Responsibility of Canadian Mining Companies in Latin America,” 119.

Chapter 5: Community Tensions and the Steps that led to the Authorization of the HRIA

In order to understand the motivations that led to the HRIA, it is first necessary to present a brief background to Guatemala and the problems that communities have with the Marlin mine that led to the authorization of the HRIA.

Guatemala is a nation with a brutal history of civil war and conflict. The victims have historically been the country's indigenous populations, and they continue to be so under the new forms of development which are being implemented. Located on the Central American isthmus, Guatemala has a population of 14,920,000, with a large percentage being indigenous.¹²² According to data collected from the *CIA World Factbook*, the country's indigenous peoples account for more than 0% of the population.¹²³ The country is very poor, with more than half of the population living below the national poverty line and it has one of the highest malnutrition rates in the world.¹²⁴ The indigenous population is heavily affected, with 73% living below the poverty line, and 22% living in extreme poverty.¹²⁵ Guatemala has an unequal distribution of wealth, with the wealthiest 20% of the population accounting for more than 50% of the country's overall consumption.¹²⁶ Guatemala's chief exports include sugar, coffee, petroleum, and precious stones and metals.¹²⁷

Until 1996, the country was mired in a civil war between the government and the left-wing guerrillas of the Guatemalan National Revolutionary Unity (URNG). The roots of this conflict dated to the 1950s, when the then-progressive military leader Jacobo Arbenz, who was

¹²² Central Intelligence Agency (CIA), "The World Factbook: Guatemala," Central Intelligence Agency, 2015, Retrieved August 16, 2015, from <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html>.

¹²³ According to the CIA, "Factbook" the indigenous population of Guatemala is K'iche 9.1%, Kaqchikel 8.4%, Mam 7.9%, Q'eqchi 6.3%, other Mayan 8.6%, and indigenous non-Mayan 0.2%.

¹²⁴ CIA, "Factbook."

¹²⁵ CIA, "Factbook"

¹²⁶ CIA, "Factbook"

¹²⁷ CIA, "Factbook"

elected President, began the process of implementing land reforms to increase economic growth and address the impoverishment of the peasantry. His policies incited the wrath of the country's landed elite as well as the US government and together these two groups orchestrated a brutal coup against Arbenz in 1954, and this laid the foundations for the military's near total domination of Guatemala's civil and political society for decades to come. Military rule was what set the stage for the emergence of the URNG guerilla movement in the 1960s and the onset of 36-year long brutal civil war.

The most brutal phase of this campaign began in 1982, when the military regime commenced an unprecedented counterinsurgency program targeting their opponents, including urban intellectuals, labour activists, and of course the guerrillas and the indigenous (the latter was believed to be their support base). Up to 150,000 civilians were killed or "disappeared," over one million people displaced, and 200,000 sent into exile.¹²⁸ More than 440 indigenous villages were entirely annihilated with a scorched earth policy which destroyed the traditional peasant economy and forms of organization in the process.¹²⁹ The conflict only came to an end as a result of the Peace Accords signed in 1996 by the warring factions, and which was brokered by the United Nations.

The signing of Accords, which took place under a newly elected President, Alvaro Arzu (elected in 1995) ended Guatemala's international pariah status (a result of the brutality of the military campaign and the concomitant instability which meant that it was avoided by foreign investors). The Peace Accords, therefore, led to the opening up of the economy to foreign investors.¹³⁰ It also led to what Peck and Tickell called "roll-back" neoliberalism. That is,

¹²⁸ William Robinson, *Transnational Conflicts; Central America, Social Change and Globalization* (London: Verso, 2003), 105.

¹²⁹ Robinson, *Transnational Conflicts*, 104-105.

¹³⁰ CIA, "Factbook"

policies and practices detrimental to the operations of the free market were rolled back or eliminated. Statist policies, for example, which protected the old agro-export model of development, and the landed oligarchy, were abolished and were replaced by strategies that promoted a free market model which emphasized development based on financial speculation, free trade, the privatization of strategic services and the promotion of mega-projects in such areas as palm oil production and natural resource exploitation.¹³¹

In this new model of development, power is held by the technocracy and a New Right group of free market supporters, of which Arzu, a wealthy businessman was the representative. This group pushed for new policies to ensure the success of the market. The new strategies are what Peck and Tickell would call “roll-out” neoliberalism. Therefore under Arzu a series of liberalization and deregulation measures were adopted. For example, free trade zones for *maquila* production were created, export incentives and tax breaks were granted, and capital controls and import restrictions were lifted.¹³² This economic openness was reflected in the resource sector.

To attract foreign capital to Guatemala’s mining sector, Arzu implemented a new mining legislation that granted significant concessions to mining companies. The new *Ley de la Minería* (1997 Mining Law) lowered royalty payments from 6% to 1% with half of this going to the state, and half going to municipalities, inscribed vague and contradictory environmental regulations, granted 10 year tax holiday to investors, allowed a host of exemptions for products imported for the mining process as well as 100% foreign ownership of the enterprise and guaranteed the right

¹³¹ Robinson, *Transnational Conflicts*, 102

¹³² Robinson, *Transnational Conflicts*, 112.

of corporations to repatriate profits.¹³³ The new law also failed to include consultation of indigenous communities whose land was selected for mining operations as a requirement for projects to proceed.¹³⁴ One of the first companies to benefit from these changes was Canada's Glamis Gold, owner of the Marlin mine—the case study of this analysis.

In 2006, Glamis Gold was bought by Canada's mining giant Goldcorp Inc. With this purchase Goldcorp acquired the Marlin mine and did so in the year the mine came into production. From the onset, however, Marlin has been a source of conflict between the company and the communities. The mine has led to conflicts over several issues: water, consultation, security, and the land acquisition process. Firstly, a major reason for resistance to mining relates to water, fear of water contamination and competition for water. Communities fear the risk of water-related environmental degradation due related to mining activities as gold extraction requires the use of cyanide which is environmentally destructive. Goldcorp has estimated in the lifespan of Marlin, the mine will generate 14 million tons of tailings discharge¹³⁵ and communities are concerned about the effects of the tailings discharge on the local river systems, their water supply, their environment and their health.

¹³³ Vincent Castagnino, "Metal Mining and Human Rights in Guatemala: The Marlin Mine in San Marcos," Peace Brigades International, 2006, Retrieved August 15, 2015, from www.peacebrigades.org/fileadmin/user_files/projects/guatemala/files/english/PBI-mining-human-rights-guate.pdf, 14; Cordaid, "Briefing Note: Extractives Guatemala," Cordaid, 2013, Retrieved August 15, 2015, from https://www.cordaid.org/media/publications/Briefing_Note_Extractives_Guatemala.pdf, 1; Goldcorp, "New Voluntary Royalty Agreement to Benefit Stakeholders of Goldcorp's Marlin Mine," Goldcorp, January 27, 2012, Retrieved August 15, 2015, from <http://www.goldcorp.com/Investor-Resources/News/News-Details/2012/New-Voluntary-Royalty-Agreement-to-Benefit-Stakeholders-of-Goldcorps-Marlin-Mine1128070/default.aspx>; Kalowatie Deonandan, "Evaluating the Effectiveness of the Anti-Mining Movement in Guatemala: The Role of Political Opportunities and Message Framing," *Canadian Journal of Latin American and Caribbean Studies* 40 (1) (2015): 36.

¹³⁴ Joris Van de Sandt, "Mining Conflicts and Indigenous Peoples in Guatemala," Cordaid, (The Hague: Cordaid, October 2009): 11.

¹³⁵ Van de Sandt, "Mining Conflicts and Indigenous Peoples in Guatemala," 29.

Another reason for resistance deals with the issue of consultation. Many communities claimed that they learned of the arrival of the mine after the mine began construction in 2004 and this violated their rights as indigenous peoples as guaranteed them under international standards, in particular the International Labour Convention's (ILO) 169. This Convention stipulates that indigenous populations must be consulted over any development on their territory.¹³⁶ This obligation is reinforced by the fact that Guatemala is a signatory to ILO 169.¹³⁷ However, in its Environmental and Social Impact Assessment (ESIA), which by law was conducted before construction of the mine, Montana declared that local communities had been consulted regarding mining activities.¹³⁸ This dispute has led to a wave of *consultas* across the region, where community members are holding their own local referendum to vote on whether mining is acceptable to them. In almost all these cases, they have voted to reject mining, though their vote has no impact in law.¹³⁹

Despite the signing of the 1996 Peace Accords, a culture of insecurity and violence persist throughout the country, including in the area surrounding Marlin.¹⁴⁰ It should be noted that the area in which the Marlin mine is located is also one of the regions that experienced horrific violence during the civil war. The indigenous communities living here were the target for some of the military's most violent human rights abuses, and thus they are highly sensitive to the presence of military or security forces, such as that which guards the mine. This insecurity has been exacerbated by the fact that there have been a number of violent incidents involving

¹³⁶ Amanda M. Fulmer, Angelina Snodgrass Godoy, and Philip Neff, "Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine," *Latin American Politics and Society* 50, no.4 (Winter, 2008): 99.

¹³⁷ Van de Sandt, "Mining Conflicts and Indigenous Peoples in Guatemala," 51.

¹³⁸ Van de Sandt, "Mining Conflicts and Indigenous Peoples in Guatemala," 30.

¹³⁹ Shin Imai, Ladan Mehranvar, and Jennifer Sander, "Breaching Indigenous Law: Canadian Mining in Guatemala," *Indigenous Law Journal* 6, no.1 (2007): 114.

¹⁴⁰ On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine*, 158.

community members opposed to the mine and the latter's security forces. These incidents include violent confrontations during a blockade that saw two mine security managers injured, several incidents of violence against community members, including shooting of mine opponents by mine security personnel, and intimidation and harassment.¹⁴¹

In addition since the mine arrived, there has been an increase in alcohol abuse, drug use, domestic abuse, prostitution, and an overall increased sense of insecurity.¹⁴² One of the reasons for the increased social problems is the fact the local men employed at the mine site, now spend their income at the local bars and prostitution houses that have opened up near the mine site. This in turn has led to increased domestic abuse and other kinds of domestic problems.¹⁴³

One of the most contentious issues deals with land. The On Common Ground assessors found local stakeholders interviewed in the HRIA process "expressed the opinion that issues associated with land acquisition are at the heart of conflicts related to the mine."¹⁴⁴ Concerns regarding the land issue stem from several factors, including that Montana did not provide fair compensation to those who sold their land to the mine, that mine personnel used false pretences to convince villagers to sell their lands, and that they are threatening, harassing or using violence and intimidation against those that are refusing to sell their lands.

As these conflicts and concerns escalated, and as they were brought to an international audience with the support of several NGOs such as Rights Action and MiningWatch Canada, they reached the ear of Goldcorp shareholders, particularly the large institutional shareholders

¹⁴¹ Imai, Mehranvar, and Sander, "Breaching Indigenous Law Imai," 123-124; Amnesty International, "Guatemala: Mining in Guatemala – Rights at Risk," Retrieved October 13, 2014, from <http://www.amnesty.ca/sites/default/files/mining-in-guatemala-rights-at-risk-eng.pdf>, 11; Van de Sandt, "Mining Conflicts and Indigenous Peoples in Guatemala," 54.

¹⁴² On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine*, 159.

¹⁴³ Van de Sandt, "Mining Conflicts and Indigenous Peoples in Guatemala," 38-42.

¹⁴⁴ On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine*, 111.

such as the pension funds which belong to the socially responsible investing (SRI) group. The latter became very concerned as it needed to assure the investors in its funds that the companies in which it is invested are ethical in their conduct.

Their concern led to their calling on the company to conduct an HRIA. In the following section, the process by which the HRIA was authorized will be presented.

Background to the HRIA

In February 2008, in the wake of global publicity about the conflict at the Marlin Mine, representatives of Goldcorp's SRI ¹⁴⁵ independently organized a trip to the mine to gain an on-the-ground perspective of what was happening. The group included representatives from the Ethical Funds Company, the Public Service Alliance of Canada (PSAC) Staff Pension Fund, the First Swedish National Pension Fund and the Fourth Swedish National Pension Fund. This trip arguably began the process that started Goldcorp's HRIA implementation.

Findings from the trip led the shareholder representatives to call on Goldcorp to address their human rights concerns. In particular, they called on the company to commission a human rights impact assessment of the operations in Guatemala.¹⁴⁶ Goldcorp's Executive Director for Central and South America, Eduardo Villacorta, resisted, arguing that the company was not consulted, nor contacted when shareholders were in Guatemala and as such the company had no

¹⁴⁵ See Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 269.

¹⁴⁶ Shareholders filed a Shareholder Proposal March 2, 2008, calling for Goldcorp to complete an HRIA, as noted by Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 254. See Shareholder Association for Research and Education, "Produce a Human Rights Impact Assessment," *Shareholder Association for Research and Education*, Retrieved August 14, 2015, from <http://www.share.ca/shareholderdb/proposal/Produce-a-human-rights-impact-assessment/771> for the drafting of the shareholder proposal.

input into the investigation.¹⁴⁷ In the face of this resistance, Goldcorp SRI shareholders drafted a proposal to be presented to the company's annual general meeting (AGM) in May of 2008 to force the company to act. This move was possible under the stipulations of Canadian corporate law.

There is a shareholder proposal mechanism which grants equity holders the ability to compel corporate management to hold a shareholder vote on significant issues. This mechanism is not meant to undermine the authority of the boards of directors or corporate management, but to allow shareholders an opportunity to hold management accountable to express their views on corporate behaviour.¹⁴⁸ A shareholder proposal is tool that can be used when "ethical investors are becoming nervous" of the actions of their investments.¹⁴⁹

Goldcorp responded to this move by offering to do an HRIA if the shareholder proposal was left off the 2008 annual meeting agenda. The SRI group and Goldcorp went through extensive discussions over the conditions under which the shareholder proposal resolution would be removed from the agenda. The result was a Memorandum of Understanding (MOU), signed on March 19, 2008 by Goldcorp, members of the SRI group who had filed the resolution and SHARE (Shareholder Association for Research and Education - a representative organization of the SRI group), describing the terms of the proposed assessments and creating a Steering Committee for the process.¹⁵⁰ As Goldcorp had agreed to undertake an HRIA, the shareholder proposal was withdrawn. The latter signatories worked together with Goldcorp to design a

¹⁴⁷ Juan Fernando Estrada, "Mining Company Condemned on Socio-Environmental Grounds," Network in Solidarity with the People of Guatemala, June 14, 2009, Retrieved November 7, 2013, from http://www.nisgua.org/news_analysis/index.asp?id=3457

¹⁴⁸ Dhir, "Shareholder Engagement," 101.

¹⁴⁹ Bill Law, "Unease over Guatemalan Gold Rush," *BBC News*, August 21, 2008, Retrieved November 7, 2013, from http://news.bbc.co.uk/2/hi/programmes/crossing_continents/7569810.stm

¹⁵⁰ Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 253-255.

procedure to address the allegations of human rights abuses at the Marlin mine in Guatemala. In the next chapter, the paper analyzes the effectiveness of the HRIA.

Chapter 6: Analysis of the HRIA

The previous chapter described the events that led to Goldcorp's decision to implement an HRIA. This chapter is an evaluation of the HRIA through an analysis of the a) process, b) implementation and c) outcome.

A) Process

From the outset, the HRIA process was deemed by the communities to be flawed and this led to their rejection of assessment. The first criticism of the process concerns a shift in the focus. The assessment began as a human rights impact assessment (HRIA) and was completed as a human rights compliance assessment (HRCA), but is still popularly referred to as an HRIA (a practice followed in this thesis despite the change). While the HRIA was to review the impact of the mine on the human rights of the communities, the shift to an HRCA meant that the assessment would only look at how the company's existing policies and procedures affect human rights. In other words, there was a shift in emphasis from the impact on communities to a focus on the company and the extent to which it was adhering to recognized human rights standards.

The shift was due to several problems. One was the lack of participation of the mining affected communities in the whole HRIA design process. They declined to participate in the HRIA because they argued that they, nor their representatives, nor any organization in Guatemala were consulted about the shareholder visit to their communities, about the plan to propose an HRIA or about the design of the HRIA structure and format.¹⁵¹ The entities that raised concerns about the HRIA, once there was an announcement was made that an agreement had been reached between Goldcorp and the SRI groups, came from sources such as NGOs such

¹⁵¹ Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 254.

as Rights Action, MiningWatch Canada, and the Breaking the Silence (BTS) Network.¹⁵² Rights Action was the first organization to organize a public response to the arrangement in an open letter to both Goldcorp and shareholders on May 1, 2008, suggesting that shareholder statements, in particular those issued in their press releases of April 24, 2008 and which praised Goldcorp, were unsubstantiated; the organization was joined by a chorus coming from others groups reiterating this same point.¹⁵³ Coumans elaborated on the Rights Action position, writing that,

Rights Action questioned a statement in the press release that found by agreeing to take on the HRIA ‘Goldcorp was behaving responsibly and responding to local concerns raised by local stakeholders in Guatemala.’ Rights Action questioned how the SRI group could come to this conclusion when they had not asked local people if they wanted a HRIA. There is no evidence that local communities had ever included such a demand in their various public statements. Rights Action also noted that the SRI group had failed to address the ‘clear and authoritative recommendations’ local community members were in fact expressing with regard to the mining operations.¹⁵⁴

Similarly, the BTS Network was also critical of the assessment due to the lack of consultation and participation from local communities’ members in the development of the HRIA process.¹⁵⁵ One BTS member, also a shareholder in Goldcorp, filed another shareholder resolution, in light of ongoing conflicts at Marlin in 2008.¹⁵⁶ Goldcorp refused to circulate this second proposal that called for the suspension of the expansion of the mines in San Miguel and Sipacapa without obtaining free, prior, and informed consent of the local communities. Goldcorp avoided giving the proposal to the shareholders for voting because the company argued that the

¹⁵² Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 255-257.

¹⁵³ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 256.

¹⁵⁴ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 256.

¹⁵⁵ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry: Considering Community Opposition to Shareholder Resolutions and Implications of Collaboration,” 256; Fredericton Peace Coalition, “Maritime Human Rights Group Seeks Answers from Goldcorp,” May 16, 2008, Retrieved February 25, 2015, from <http://frederictonpeace.org/?p=1218>

¹⁵⁶ Fredericton Peace Coalition, “Maritime Human Rights Group Seeks Answers from Goldcorp.”

proposal “does not relate in a significant way to the business or affairs of the corporation.”¹⁵⁷

Jantzi-Sustainalytics, an organization which ranks corporations based on their performance in several categories, including human rights, commented that the decision to omit the resolution from voting as “not reflect[ing] a willingness on the part of the company to engage effectively and responsibly with affected communities.”¹⁵⁸ In effect, the company’s decision to strike down the resolution helped create further distance between the company and the communities by the former’s argument that the complaint was not related to the affairs of the company. This deflected attention away from the communities and onto the shareholders.

As the communities did not believe that they were adequately consulted about the HRIA process, they declined to participate in it. This had consequences for the focus of the assessment. As the assessors argued that “without the inclusion of key stakeholder groups, identification of impacts would not be complete and that carrying out the impact assessment as initially designed was not feasible.”¹⁵⁹ Hence the process shifted from an HRIA to an HRCA.

The shift to the HRCA meant that the recommendations in the final report reflected the assessors’ opinions rather than that of the affected communities. It also effectively gave control to the company because the objective became “to review the potential impact of the presence and operation of the Marlin Mine on human rights, relying on a review of company policies, practices, and procedures, secondary data analysis and expert sources.”¹⁶⁰ In other words, it did not include the views of community stakeholders, specifically those opposed to the mine as they were the ones who refused to participate in the process. Assessors were mandated to use an HRCA tool designed by the Danish Institute for Human Rights (DIHR) and which measured

¹⁵⁷ Dhir, “Shareholder Engagement,” 106.

¹⁵⁸ Fredericton Peace Coalition, “Maritime Human Rights Group Seeks Answers from Goldcorp.”

¹⁵⁹ On Common Ground, Human Rights Assessment of Goldcorp’s Marlin Mine, 8-9.

¹⁶⁰ On Common Ground, Human Rights Assessment of Goldcorp’s Marlin Mine, 9.

compliance rather than impacts. What this meant was that the objective now was to assess Goldcorp's compliance with human rights standards as per the various human rights norms governing the industry. In essence, the company gained greater control because it could decide what documents and information to share with the assessors and when.

Another problem with the shift to the HRCA, as the assessors acknowledged, was that the report's findings regarding the mine's impacts on human rights would only be partial due to the lack of participation from some stakeholders.¹⁶¹ On Common Ground recognized the implications of the absence of community participation and the shift to the HRCA and called on the company to undertake greater consultation in the future, stating that:

due to the shift in focus during the assessment, recommendations for Montana and Goldcorp reflect the judgments of the assessment team, rather than affected communities, and therefore may not be viewed as appropriate responses. This creates a requirement for the company to engage and consult, to the extent that those in the affected communities and other stakeholders are willing, before moving forward with an action plan.¹⁶²

While the process in fact was an HRCA, it is still popularly referred to as an HRIA and Goldcorp claims it as such, which is a misrepresentation of the reality, but which benefits the company. On Goldcorp's website the process is referred to as a human rights assessment (HRA) though the Steering Committee's title is "the Steering Committee for the Human Rights Impact Assessment of the Marlin Mine."¹⁶³

Problematic too is the fact that the shareholders agreed to an HRIA, but the framework used was an HRCA, a process not approved by the shareholders. In essence, the Steering

¹⁶¹ On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine: Executive Summary*, 8.

¹⁶² On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine: Executive Summary*, 8.

¹⁶³ Goldcorp, "Marlin – Human Rights Assessment," Goldcorp, Retrieved February 25, 2015, from <http://www.goldcorp.com/English/Unrivalled-Assets/Mines-and-Projects/Latin-America/Operations/Marlin/Human-Rights-Assessment/default.aspx>; On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine*, title page.

Committee which authorized the HRCA and which had oversight of the process failed to adhere to the agreement. As Goldcorp was present on the Steering Committee, the company was able to be present in the process of changing the assessment type and therefore the outcomes of that assessment. It demonstrates that the company had control of the assessment outcome from the beginning of the HRIA process.

Another problem with the process of the assessment was the composition of the Steering Committee. The Committee consisted of a company representative, David Deisley, the Vice-President and Legal Director of Goldcorp, a delegate from the shareholder group, Bob Walker from the Ethical Fund (he replaced another SRI member, Bill Brassington, who withdrew), and a member, Manfredo Marroquin, from Guatemalan civil society, the NGO *Accion Ciudadana* (Citizen Action). What is glaring in this Committee is the absence of representation from the affected communities. Problematic with the Committee too was the fact that it included a company executive. This caused serious concerns amongst community members who charged that this brought into question the independence of the assessment and that it gave the company significant influence over the process.¹⁶⁴ According to Coumans, Deisley's participation on the Steering Committee "cost the project trust."¹⁶⁵

Aside from composition of the Steering Committee, was the control exerted by Goldcorp from the start. The company was involved in drafting the initial MOU outlining the "goals for the HRIA process [and] that included the mine's continued operation, which alienated many community members who saw it as predetermining outcomes and as a setback for their expressed

¹⁶⁴ Coumans, "Fundamental Concerns with the Goldcorp Human Rights Impact Assessment and Erosion of Trust in Canada's Responsible Investment Community's Shareholder Proposal Process," 1-3.

¹⁶⁵ Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 262

desire to see the mine cease operations.”¹⁶⁶ Catherine Coumans, from MiningWatch Canada, argues that the only consultants who would accept the conditions laid out by the company would be those interested in the contract for the HRIA, but their work would lack of credibility and trust amongst the affected communities due to former’s concession to the conditions set by Goldcorp.¹⁶⁷ Furthermore, since Goldcorp was paying the cost of the HRIA, “it is unlikely that consultants would have been hired with which the company was not comfortable.”¹⁶⁸ While the HRIA process met the company’s and the SRI group’s goals, the communities affected were largely left out of the process.¹⁶⁹

Another problem noted with the HRIA was that the process was paternalistic in many ways. To begin, the majority of the members involved in the oversight process were outsiders, not familiar with the community.¹⁷⁰ This is significant because those physically removed from the situation were making decisions for locals, a fact noted by transnational NGOs, some of which are based in Canada. The Maritimes-Guatemala BTS also contacted the SRI group regarding their concern of the “lack of input from, agreement by and participation of the affected communities in the development of the HRIA, in membership on the Steering Committee and in the selection of the group or individual that will carry out this study.”¹⁷¹ Also concerned with the process was MiningWatch Canada. The organization met with SHARE, the representative of the SRI group to state their concern the shareholder resolution did not reflect community demands. Dhir affirmed the exclusionary nature of the HRIA process writing that,

¹⁶⁶ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 262.

¹⁶⁷ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 262.

¹⁶⁸ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 262.

¹⁶⁹ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 262.

¹⁷⁰ Guatemala Human Rights Commission/USA, “Goldcorp’s Mining in San Miguel Ixtahuacán,” Guatemala Human Rights Commission/USA. Retrieved December 3, 2013, from <http://www.ghrc-usa.org/AboutGuatemala/Goldcorp.htm#ImpactAssess>

¹⁷¹ As quoted in Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 257.

unlike the foreign corporation and foreign investors, [the local communities], those whose rights were actually at stake and would be most impacted had ‘no direct role in setting the scope and the timelines of the assessment process, nor in selecting assessors and peer reviewers, nor in managing the assessment process.’¹⁷²

This exclusion was viewed by communities in San Miguel where the mine is located, as both discriminatory and racist, and they also argued that the shareholder proposals to Goldcorp failed to reflect the reality of life in the communities, and that shareholders concerns stopped at the level of concern, rather than resulting in action.¹⁷³

Recognizing the weaknesses in the HRIA process, one of the SRI member, the PSAC Staff Pension Fund that had participated in conducting the on-site investigation and in drafting the shareholder resolution, withdrew from the HRIA process. PSAC cited concerns “about the lack of prior consent... [from] the communities regarding the HRIA, and the fact that Goldcorp's interests are put before those of the local population.”¹⁷⁴ Because of PSAC’s withdrawal, its representative on the Steering Committee, Bill Brassington, was replaced with Bob Walker from the Ethical Fund.

Paternalism in the HRIA process was also reflected in the Steering Committee make-up which was discussed above. The composition of this body conveyed a top-down approach to the assessment process as it excluded community involvement. Also, paternalism in the process was evident by shareholders asking the company to undertake actions and activities with their own experts, and by their neglecting to include the local population.¹⁷⁵ In fact, the clear divergence

¹⁷² Dhir quoting Coumans, “Shareholder Engagement,” 105.

¹⁷³ Dhir, “Shareholder Engagement,” 106; Rights Action, “Goldcorp in Guatemala, and the ‘Independent’ Human Rights Assessment,” September 4, 2008 email.

¹⁷⁴ Estrada, “Mining Company Condemned on Socio-Environmental Grounds,” http://www.nisgua.org/news_analysis/index.asp?id=3457

¹⁷⁵ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 265; Julie Sagebien and Nicole Marie Lindsay, “Systemic Causes, Systemic Solutions,” in *Governance Ecosystems: CSR in the Latin American Mining Sector*, edited by Julia Sagebien and Nicole Marie Lindsay (Basingstoke: Palgrave Macmillan Pages, 2011), 19.

between the requests made in the shareholder resolutions and the aims of the community indicate a disregard for community input. As Coumans argues, the shareholders, and those working on their behalf with the SRI companies “did not appear to have considered whether the resolutions, if acted on by a company, may place additional burdens on a community in struggle and even compromise its own efforts to achieve environmental, economic, and social goals.”¹⁷⁶ For example, she noted that the assessment process “appeared to be escalating tensions and increasing polarization both among and between the communities and [thus was] undermining the conditions for carrying out a participatory human rights impact assessment as intended.”¹⁷⁷ Nevertheless, the process continued thus demonstrating a paternalistic attitude towards community concerns by shareholders.

Comments by one of the Steering Committee members strengthen the arguments of those who view the HRIA process as paternalistic. Bill Brassington (the former shareholder Steering Committee member from PSAC) was dismissive of community concerns regarding the process. He stated, “In the judgement of the responsible investor group that visited the area in February 2008 the most appropriate means to address those impacts - the real issues the people and communities are experiencing every day - is a human rights impact assessment.”¹⁷⁸ While at face value his statement may seem well-intentioned, others note the paternalism inherent in it.

For some scholars, this paternalism is even entrenched in Western corporate law. Aaron A. Dhir notes that the effects of Western corporate law may be felt beyond national borders, especially when it comes to transnational or multinational corporations from the developed West

¹⁷⁶ Catherine Coumans, “Occupying Spaces Created by Conflict: Anthropologists, Development NGOs, Responsible Investment, and Mining,” In *Current Anthropology, Corporate Lives: New Perspectives on the Social Life of the Corporate Form* 52 (suppl. 3 2011): S38.

¹⁷⁷ On Common Ground, *Human Rights Assessment of Goldcorp’s Marlin Mine: Executive Summary*, 8.

¹⁷⁸ Bill Brassington, “A Summary of Issues Relevant to the Human Rights Impact Assessment (HRIA) of Marlin Mine, Guatemala,” February 2009, Retrieved December 3, 2013, from <http://cule.ca/wp-content/uploads/2009/02/hitting-back-feb-09-revised-pdf.pdf>

operating in the Global South.¹⁷⁹ The actions of shareholders in Canada and Sweden may be felt in the communities surrounding Marlin, be that through submitting a shareholder proposal or a MOU to carry out an HRIA that does not guarantee representation from affected local communities. Dhir advocates an inclusive approach that is mindful of affected communities' interests. Any action taken must be viewed as a credible response from those affected, be mindful of its own constraints and not exploit the power dynamics present in the relationship between shareholders, the corporation, local communities, and other stakeholders, in order to avoid it becoming a "civilizing mission" to those in Guatemala.¹⁸⁰

Aside from critiques about paternalism, other charges relate to the ethics of the HRIA process that is, utilizing a shareholder proposal that might have negative consequences for vulnerable populations. The Canadian NGO, Rights Action, argued even though the shareholder proposal may have been put forward with good intentions, it may result in a "whitewashing public relations exercise" that may undermine and harm local indigenous communities' positions and interests while benefiting Goldcorp, their shareholders, and investors. Similarly, the NGO, MiningWatch Canada argued the shareholder proposal "reveals a lack [of] understanding of the ethical responsibility to assure that shareholder resolutions that directly impact on locally affected communities do not undermine the efforts these communities are engaged in to protect their own rights."¹⁸¹

¹⁷⁹ Dhir, "Shareholder Engagement," 106.

¹⁸⁰ Dhir, "Shareholder Engagement," 109.

¹⁸¹ Both as quoted in Dhir, "Shareholder Engagement," 105.

B) Implementation

This thesis will now shift to an analysis of the implementation of the HRIA. Here two significant problems are identified and discussed: the lack of complete baseline studies and the problematic reporting by Goldcorp on its compliance.

First, part of the problem surrounding the lack of baseline information relates to the acquisition process. As Goldcorp acquired Marlin after purchasing Montana Exploradora from Glamis Gold, Goldcorp was not involved with the initial project assessments. When acquiring a mine in the exploratory phase, a company will assess the profitability of a project. To hedge against market volatility mining companies will seek strategic relationships and financial resources from a variety of sources, including commercial banks, export development agencies, multilateral organizations, and stock and bond markets.¹⁸² While social considerations are subordinate to those above, such as fiscal feasibility, the company's actions are dictated by the technical and productive requirements of the project and often include (and this is frequently a legal requirement) an environmental and social impact assessment.¹⁸³ These assessments help provide baseline studies for future impact assessments.

Marlin did have an environmental and social impact assessment (ESIA) completed to identify baseline markers, but did not have a HRIA done so there were no human rights baseline indicators. The EISA proceeded rapidly, beginning in July 2002 and ending in March 2003. It was submitted to the Guatemalan Ministry of Environment and Natural Resources in June 2003 and was approved in September 2003, three years prior to Goldcorp's acquisition of Glamis Gold

¹⁸² Jose De Echave, "Mining and Communities in Peru: Constructing a Framework for Decision-Making," in *Community Rights and Corporate Responsibility: Canadian Mining and Oil Companies in Latin America*, edited by Liisa North, Timothy David Clark, and Viviana Patroni. (Toronto: Between the Lines, 2006): 30.

¹⁸³ De Echave, "Mining and Communities in Peru," 30.

and Montana Exploradora.¹⁸⁴ E-tech, an NGO that provides environmental technical support to communities on environmental impacts of large development projects,¹⁸⁵ found the initial ESIA had major shortcomings.¹⁸⁶ These include a monitoring period too short in duration, not enough monitoring locations used, not enough ground water levels used, and a lack of information on geochemical testing included in main body.¹⁸⁷

The primary problem relating to a lack of baseline studies for the HRIA is the absence of baseline human rights indicators. As there were no human rights indicators collected prior to the mine's operations, it is impossible to adequately measure the impacts of Goldcorp on the local communities. The use of a baseline assessment tool in this instance is problematic as once a mining project, as in the case of Goldcorp's Marlin Mine, has already been started it is difficult to receive a baseline report of conditions prior to corporate activity or to correct an insufficient or incomplete report. The HRIA was meant to address the challenge of having no previous HRIA done at Marlin, though it should be recognized that some of the challenges that were faced during the process relate to the fact that this is an "ex post" assessment in an ongoing conflict situation.¹⁸⁸

¹⁸⁴ E-tech International, "Evaluation of Predicted and Actual Water Quality Conditions at the Marlin Mine, Guatemala," E-Tech International, August 2010, Retrieved March 12, 2015 from <https://static1.squarespace.com/static/52d71403e4b06286127a1d48/t/530d2ca6e4b0238c30f90539/1393372326990/Evaluation+of+Predicted+and+Actual+Water+Quality+Conditions+at+the+Marlin+Mine,+Guatemala+August+2010.pdf>, 12-13.

¹⁸⁵ E-Tech International, "E-Tech International," E-Tech International, Retrieved March 12, 2015, from <http://www.etechninternational.org/>

¹⁸⁶ E-tech International, "Evaluation of Predicted and Actual Water Quality Conditions at the Marlin Mine, Guatemala," 5.

¹⁸⁷ E-tech International, "Evaluation of Predicted and Actual Water Quality Conditions at the Marlin Mine, Guatemala," 5-7.

¹⁸⁸ On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine: Executive Summary*, 34.

Overall, the lack of human rights baseline indicators available to the assessors made it difficult to determine the true effects of the mine on the local communities.¹⁸⁹ This included baseline indicators for environmental conditions. Thus when “complaints began in 2006, Montana has denied any potential for responsibility for impacts [and there was no evidence to prove otherwise]. While recent studies do not definitively establish that the mine has caused the damage, they eliminate all other reasonable explanations.”¹⁹⁰ The lack of complete baseline studies reinforced Goldcorp’s control as the company could claim whatever it wanted. To be fair, the communities could also do the same in their claims against the company. However, physical evidence of ailments and the increased potentially toxic metals present in blood and urine add credence to community claims.¹⁹¹

Claims by both the company and communities cannot adequately be addressed because of a lack of information available to corroborate their divergent account of events. A 2009 study¹⁹² of individuals living in the area found that there was a higher concentration of mercury, copper, arsenic, and zinc in urine and lead in the blood of residents who live closer to the mine than those further from the mine.¹⁹³ However, with no baseline study having been completed

¹⁸⁹ On Common Ground, *Human Rights Assessment of Goldcorp’s Marlin Mine: Executive Summary*, 8.

¹⁹⁰ On Common Ground, *Human Rights Assessment of Goldcorp’s Marlin Mine: Executive Summary*, 15.

¹⁹¹ Tracy L. Barnett, “Goldcorp’s Marlin mine: ‘Development for Death,’” *Huffington Post*, July 1, 2010. Retrieved March 17, 2015, from http://www.huffingtonpost.com/tracy-l-barnett/goldcorps-marlin-mine-dev_b_629452.html; Physicians for Human Rights, “Scientists Find Elevated Levels of Potentially Toxic Metals in Some Guatemalans Living Near Canadian-owned Mine, Recommend Further Studies,” Physicians for Human Rights, May 18, 2010, Retrieved March 15, 2015, from <http://physiciansforhumanrights.org/press/press-releases/news-2010-05-18-english.html>

¹⁹² Physicians for Human Rights, a New York- based advocacy organization, visited community members with environmental health scientists from the University of Michigan in August 2009. They did not take samples from complainants with skin rashes or respiratory effects, consistent with exposure to cyanide, because cyanide was not analyzed in their study. Samples were also not taken from children because of the University of Michigan’s informed consent protocol from the university’s Institutional Review Board.

¹⁹³ Physicians for Human Rights, “Scientists Find Elevated Levels of Potentially Toxic Metals in Some Guatemalans Living Near Canadian-owned Mine, Recommend Further Studies,” <http://physiciansforhumanrights.org/press/press-releases/news-2010-05-18-english.html>; Mining Watch Canada, “OAS Human Rights Commission Urges Suspension of Mining Activity at Goldcorp’s Marlin Mine in Guatemala,” MiningWatch Canada, May 24, 2010, Retrieved March 17, 2015, from <http://www.miningwatch.ca/oas-human-rights-commission-urges-suspension-mining-activity-goldcorps-marlin-mine-guatemala>

prior to the mine's operation neither the communities nor the mine can speak with absolute certainty about the mine's health and environmental impacts. The communities cannot attribute blame to the mine with certainty and the mine cannot deny the charges with certainty.

Also problematic in the implementation phase is the company's reporting following the release of the HRIA. On Common Ground recommended that Goldcorp provide independent assurance of its performance in future reports and to continue to provide Annual Monitoring Reports for Marlin regarding its consultation with the communities and the remedies it undertakes to address any negative impacts.¹⁹⁴ The assessors conclude:

The assessment is an important step in the development of a system of ongoing due diligence for human rights at the Marlin Mine. Some of the next steps are relatively straightforward, particularly when an issue is fully within the company's control. Others steps will be more complicated and perseverance will be required to expand consultation practices with the project-affected communities, participate in multi-stakeholder processes at the national level, and support access to remedies. A significant shift must take place in Montana's openness to consider stakeholder concerns, resolve legacy issues and investigate allegations.¹⁹⁵

While the assessment team did not include a specific schedule to release updates, they did request Annual Monitoring Reports.

In the first update in October 2010, Goldcorp states, "Goldcorp presents the first in a series of regular updates describing the process, challenges, and future expectations as Goldcorp implements the recommendations presented in the HRA."¹⁹⁶ However, very soon after, the company issued a second report on the HRIA would be the last as it had met its obligations under the HRIA.

¹⁹⁴ On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine: Executive Summary*, 37.

¹⁹⁵ On Common Ground, *Human Rights Assessment of Goldcorp's Marlin Mine: Executive Summary*, 37.

¹⁹⁶ Goldcorp's First Update to the Marlin Mine Human Rights Assessment Report, October 18, 2010, 1.

In the second update, in April 2011, the company stated: “Goldcorp does not intend to publish further reports on the entirety of the original HRIA.”¹⁹⁷ The company went on to say that it has “reached the stage in this ongoing undertaking where regular reporting on all of the issues raised in the HRA is no longer necessary” but it committed to “continue to report on significant initiatives that are underway or in the process of being implemented.”¹⁹⁸ Goldcorp asserted that “many of the recommendations have been met and are integrated” into Goldcorp’s processes, rationalizing Goldcorp’s decision to not continue with regular reporting.¹⁹⁹ However, the phrase “commits to” appears 65 times in the second update. While declining further updates, Goldcorp “strongly reiterate[s their] commitment to always provide open lines of communication to all parties who have genuine interest in refining and implementing the many recommendations contained in the HRA,” while not giving any concrete examples of what their intentions may be.²⁰⁰

Goldcorp was able to decide how, what, and when to give updates on the HRIA process without any enforcement. Arguing that a series of updates would be released, then changing to only two releases is problematic as it creates a false impression in their disclosure practices. The first update indicated that multiple reports would be released, and yet the second shut down the process with little oversight. The company was able to dictate the process and remained in control over the implementation of the HRIA.

¹⁹⁷ Goldcorp’s Second Update to the Marlin Mine Human Rights Assessment Report, April 29, 2011, 2.

¹⁹⁸ Goldcorp, “April 29, 2011,” Goldcorp. “April 29, 2011.” April 29, 2011. Retrieved December 3, 2013, from http://www.goldcorp.com/files/docs_operations/Goldcorp_Response_to_Marlin_Mine_HRA_Report_Update_04_29_2011English.pdf

¹⁹⁹ Goldcorp’s Second Update, 2.

²⁰⁰ Goldcorp’s Second Update, 3.

C) Outcomes

The final sub-section of the HRIA to be analyzed relates to the outcomes of the assessment. In the following pages, three criticisms will be discussed to show how Goldcorp benefitted from or controlled the HRIA process: the lack of enforcement mechanism for the HRIA, the positive publicity garnered by Goldcorp for carrying out the HRIA, and the disregard by the company for the recommendations of the assessment team.

First, at the macro level, the history of companies protecting human rights is problematic because of a lack of an enforcement mechanism. As discussed previously, a corporation can implement a framework such as the Voluntary Principles on Security and Human Rights without formally adopting the measures. This allows the company to benefit from positive press without being bound to uphold certain processes. The benefits also extend to the HRIA. Being a relatively new tool in the human rights field, only few have such assessments have been done (and this is the first by a company) and thus its limitations have yet to be addressed. One problem is the lack of enforcement that results before, during, or upon completion of a HRIA process.

This lack of enforcement of human rights standards is even entrenched at the international level and permeates downwards. As argued earlier in this thesis, there is no overarching authority to ensure compliance with the global human rights norms at the global level, and the HRIA is an offshoot of these norms. Not surprisingly, the tool lacks teeth when it comes to enforcement authority. Consequently, Goldcorp is free to implement whichever recommendations it wishes, if any, from the report. It is not legally bound to carrying out the recommendations and there is no one to enforce the recommendations.

Aside from being part of the global human rights norms, the HRIA is also considered to be a part of the company's CSR practices. But, CSR policies, as with the rights norms, are also built on voluntary compliance. Thus the gap between the intended outcomes and the actual outcomes of CSR are vast. Companies are accused of promoting CSR as a means for gaining a "social license to operate"²⁰¹, that is, to earn legitimacy in certain contexts, particularly areas where they may face greater scrutiny,²⁰² as CSR practices in essence, give them control. However, as CSR measures are voluntary, they too are "not sufficient to address the social and environmental impacts related to mining"²⁰³ as the profit motive is likely to override concerns about community well-being.

While the HRIA, like global human rights norms and CSR practices, is plagued with the problem of voluntarism, this has not detracted from Goldcorp receiving positive publicity for undertaking the assessment. Goldcorp is now seen as an industry leader when it comes to human rights promotions. It is marketing its implementation of the HRIA to promote itself as the industry leader when it comes to human rights protections as it was "the first mining company to conduct an independent human rights assessment (HRA)...and to make the assessment and its recommendations public." This despite the fact that its fulfilment of the recommendations are fairly shallow—as it issued only two follow up reports. Also, the fact that conflicts with the communities are still raging, is an indication of little progress.

²⁰¹ The Australian Centre for Corporate Social Responsibility defines 'social license to operate' as "the level of acceptance or approval continually granted to an organisation's operations or project by local community and other stakeholders," <http://accsr.com.au/news/defining-the-elusive-and-essential-social-licence-to-operate/>, Retrieved December 3, 2015.

²⁰² Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 246; Sagebien and Lindsay, "Systemic Causes, Systemic Solutions," 20.

²⁰³ Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 246.

The company also promotes itself as a human rights leader by asserting its commitments to international human rights norms, such as the Global Compact and the ICMM Sustainability Development Framework, discussed earlier, as part of its public relations campaign. This despite the fact that it is not a signatory to these. However, as the HRIA is rooted in these norms, Goldcorp can argue that it is in compliance with the standards they embody. Keep in mind that even becoming a signatory to these, still means that compliance is under the company's control, and despite this fact, Goldcorp still has not signed on to them.

Goldcorp also gained high praise for engaging with SRI firms. Coumans writes that,

The relationship Goldcorp entered into with the SRI group in 2008 has been protective of the company's interest in a number of ways. It has provided immediate praise for the company's willingness to undertake the HRIA at a time that the company was experiencing a lot of international criticism over the Marlin mine. It provided a response to ongoing criticism for the duration of the HRIA process, even in the face of increased local tensions and conflict associated with the HRIA itself."²⁰⁴

Following the release of the HRIA, Goldcorp has been able to use the SRI as an ally to speak on its behalf and "to actively thwart efforts by the companies' critics to further community demands."²⁰⁵

For their part, the SRI group aligned itself with and defended Goldcorp, a process which began soon after the company agreed to the HRIA. Bill Brassington (originally on the Steering Committee) stated, "by taking on a Human Rights Impact Assessment (HRIA), Goldcorp is behaving responsibly and responding to the concerns raised by local stakeholders in Guatemala. Goldcorp is also setting a standard for others in the mining industry - for which they should be commended." Brassington's replacement on the Steering Committee said, "We laud Goldcorp

²⁰⁴ Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 261.

²⁰⁵ Coumans, "Mining, Human Rights and the Socially Responsible Investment Industry," 261.

for embracing this tool as a foundation for protecting human rights and addressing community concerns in Guatemala. We look forward to reviewing the results.”²⁰⁶ Helene Regnell, Research Director of GES Investment Services, an advisor to First and Fourth Swedish National Pension Funds, suggested that, “The outcome of this process could set a precedent for the entire industry and is crucial for Guatemala, since the mining industry has rapidly expanded there.”²⁰⁷ Lastly, Goldcorp has received praise from the Ethical Funds, which on their website wrote that, “some observers who criticized us for remaining engaged with Goldcorp to support the HRIA have since begun utilizing and quoting from the assessment report. This is definitely a positive turn of events.”²⁰⁸

This is not really surprising as Coumans explained, as they have convergent interests. She wrote that, “engaged SRI firms act out of their self-interested need to assert their ability to effect change, protect their investment, and prove to companies such as Goldcorp that they can ‘manage’ the shareholder activism arena.”²⁰⁹ The SRI firms have to demonstrate to their investors that they are engaging with companies and improving the latter’s behaviours on, for example, the environmental or human rights fronts. If not “clients may demand that an SRI firm simply divest from lucrative corporations if these corporations are causing serious environmental and social harm.”²¹⁰ Evidence of the role they are expected to play can be found on the website of one of the SRI member, the Ethical Funds. It uses normative phrases such as “making good companies better” and “the power of shareholder action lies not in divesting or avoiding companies with poor practices, but by helping to improve them.”²¹¹

²⁰⁶ Quoted in GES Investment Services, “Investors Spur Goldcorp to Address Human Rights in Guatemala.”

²⁰⁷ Quoted in GES Investment Services, “Investors Spur Goldcorp to Address Human Rights in Guatemala.”

²⁰⁸ Ethical Funds, “Goldcorp Inc,” Ethical Funds, 2012, Retrieved February 19, 2015, from <http://www.ethicalfunds.com/Pages/Stories/viewstorypage.aspx?storyid=78>

²⁰⁹ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 261.

²¹⁰ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 263.

²¹¹ Coumans, “Mining, Human Rights and the Socially Responsible Investment Industry,” 263.

Hence, even though the HRIA did not have a demonstrable effect in alleviating tensions or improving human rights, the SRI group is still promoting the process and the shareholder engagement that led to it, as a worthy and constructive undertaking. According to the NGOs Rights Action, a leading mining critic, the actions of the SRI group and their praise of Goldcorp are really “whitewashing public relations exercise” that undermines and harms local indigenous communities’ interests and that benefits Goldcorp, its shareholders and investors.²¹²

Evidence of the benefits which have accrued to Goldcorp are seen in the fact that the company has won numerous industry awards including being named as one of the “Ten Best Companies to Work For” by the *Financial Post* magazine in 2010, installed on the Nasdaq Sustainability Index in 2011, and listed on the Dow Jones Sustainability Index North America in 2012,²¹³ to name a few. In 2015, Ian Telfer, the Goldcorp Chairman of the Board, was inducted into the Canadian Mining Hall of Fame.

Linking Theory and Practice

The final section of this chapter will discuss how the case study of Goldcorp’s HRIA fits into the theoretical framework. As Peck and Tickell have posited, protecting the freedom of the market is the key objective of neoliberalization. However, this protection is two-pronged. It involves both the dismantling of regulations (“roll-back” neoliberalism) that hinder the free market and also the re-regulation (“roll-out” neoliberalism) when these new regulations are deemed beneficial to firms in the marketplace. As was shown in the preceding discussion, the re-regulation were the various human rights norms that emerged to govern the mining industry when it was challenged and criticized by communities who argued that they were being harmed by mining operations, and that the firms in the sector were violating their human rights. As a

²¹² Dhir, “Shareholder Activism,” 105.

²¹³ Goldcorp, “Responsible Mining: Awards & Recognition.”

result of these new norms, new strategies were devised to address the criticisms against the sector. One of these was a new CSR strategy, the Human Rights Impact Assessment.

However, all the new re-regulation including the various human rights norms and CSR practices are essentially built on the voluntarism principle. Companies decide what, when, where and how they will adopt the new regulations. Goldcorp's HRIA was a form of re-regulation, a term that is really a misnomer as these regulations have no enforcement behind them. Goldcorp was able to emerge as a success at the end of the HRIA as it remained in control throughout and dictated its structure, and process and even controlled the outcome.

Chapter 7: Conclusion

This thesis examined the effectiveness of HRIAs as a tool for corporations to address concerns regarding human rights violations in resource conflicts by analyzing Goldcorp's Marlin mine HRIA. It situated the HRIA as an outcome of the international human rights frameworks for businesses, particularly those promoted by SGSR Ruggie, and it assessed the limitations of this particular instrument HRIA at address human rights concerns.

Conflicts in Guatemala's mining sector, and at the Marlin mine in particular, continue despite the HRIA. This trend shows no signs of abating as the country is eager to attract foreign capital to its resource sector and is not likely to impose greater restrictions on it for fear of sending mining firms elsewhere.

This thesis has showed that while HRIAs, in theory, are well intentioned, they need to be more enforceable in order to address the concerns of communities hosting mining operations and to reduce conflicts. However, HRIAs are a new tool, and research on them is limited. As this instrument of CSR becomes more popular and as research on it expands, strategies may emerge to render them more effective. While one may wish that CSR were more substantive in its beneficial impacts, following the logic of the authors whose theoretical works guided this analysis, Peck, Tickell, Theodore, and HRIAs will not be capable of creating effective, meaningful change for communities whose rights have been harmed by mining activities. The theoretical framework situates HRIAs as a coming out of a creative moment in time, or during "roll-out" neoliberalism, as a new mechanism to address challenges to the market, and are designed to ensure that the market operates without too much hindrance. HRIAs, as the theory would suggest, are a result of "regulatory reinvention" and part of corporations' response of CSR

to market crises.²¹⁴ As CSR is a voluntary response with no enforcement mechanisms in place, HRIAs will not be an effective response to crises and will instead create the illusion of a meaningful response to address concerns.

As HRIAs are a newer tool and there is a lack of literature surrounding the topic, further research in the wider research area is possible. Potential topics that can be explored further include: examining the role companies play in the process, implementation and outcomes of the HRIA process; investigating whether shareholder proposal mechanisms is be a valid method to encourage (or force) a company into carrying out an HRIA; studying whether HRIAs can be effective without being legally binding; and the lasting historical implications on both communities and corporations of an HRIA.

²¹⁴ Peck and Tickell, "Neoliberalizing Space," 392.

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