IN THE DARK

Bringing Transparency to Canadian Supply Chains

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International Justice and Human Rights Clinic

PETER A. ALLARD SCHOOL OF LAW

Cover Image: "Dhaka Savar Building Collapse," from Bangladesh, by Jaber Al Nahian

The cover photograph depicts people gathering as rescuers look for survivors and victims at the site of the eight-story Rana Plaza building, which housed several factories that manufactured garments for numerous multinational companies. The building, which was illegally built on top of a former shopping center, collapsed on April 24th, 2013 in the Savar Upazila of Dhaka District, Bangladesh, killing 1,129 and injuring 2,500 people—the deadliest disaster in the history of the garment industry. To cut costs, many international corporations have outsourced their production to countries with lower labour costs and fewer labour regulations, such as Bangladesh. Joe Fresh, a Canadian corporation owned by Loblaw Co., was one of the companies sourcing materials from the Rana Plaza complex.

Comments may be directed to:

International Justice and Human Rights Clinic
Peter A. Allard School of Law
1822 East Mall
Vancouver, British Columbia, Canada V6T 1Z1
Email: ijhrclinic@allard.ubc.ca
Telephone: +1-604-822-9298

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PREFACE & ACKNOWLEDGEMENTS

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Research for the report involved in-depth reviews of relevant legal, policy and academic sources, as well as interviews with politicians, scholars, activists and industry representatives. The final results are presented here.

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- Bruce MacDougall, Peter A. Allard School of Law, University of British Columbia
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- Robert Paterson, Peter A. Allard School of Law, University of British Columbia
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- Caroline Robinson, Focus on Labour Exploitation, UK
- Galit Sarfaty, Peter A. Allard School of Law, University of British Columbia
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EXECUTIVE SUMMARY

This report recommends that the government of Canada establish a regulatory framework for transparency in the supply chains of Canadian corporations. In so doing, the federal government can meet its international law obligations to prevent forced labour and human trafficking and reduce the involvement of Canadian corporations in related human rights abuses. Currently, Canada has few targeted statutory mechanisms for regulating corporate supply chains or corporate extraterritorial activities. Legislation regulating corporate activity overseas is essential, given corporate globalization. Without targeted legislation requiring more information on corporate supply chains, we can only guess as to whether abuses perpetrated by Canadian corporations overseas, as alleged in several civil lawsuits in Canadian courts, are common occurrences or isolated instances. In short, we are in the dark.

In recent years, a number of countries, including the United States and the United Kingdom, have enacted legislation mandating disclosure of detailed information about corporate supply chains.[1] Drawing from recent academic and empirical studies, this report evaluates these existing legal regimes and secondary literature in order to assist the Government of Canada with efforts to enact supply chain legislation. Based on its findings, the report offers specific legislative recommendations to address Canada's international obligation to combat human trafficking and bring Canada into line with human rights leaders in this area.

The report is divided into five sections:

- **Section 1** details the lack of international supply chain oversight and suggests multi-faceted legislation that is responsive to the needs of industry, the demands of Canadians and consumers, and the plight of victims and populations vulnerable to exploitation the world over.

- **Section 2** examines the development of supply chains in the context of transnational capitalism, discusses how globalization of production has led corporations to rely on third-party suppliers in countries plagued by weak governance, and concludes that voluntary corporate social responsibility (CSR) codes are insufficient to prevent exploitation and abuse.

- **Section 3** of the report reviews domestic law regimes in other countries covering transparency in supply chains (TSC) and evaluates enacted and proposed legislation in the US and the UK, drawing lessons from these existing models to produce a more effective and responsive Canadian regulatory scheme.

- **Section 4** examines the challenges of adopting legislation and transparent supply chain regimes in Canada, specifically considering previous failed legislative attempts in the country to regulate transnational corporations.

- **Section 5** discusses mechanisms required for implementation of a transparency supply regime in Canada, including various reporting, auditing, monitoring, oversight and compliance mechanisms.

This report recommends that Canada:

1) Adopt mandatory supply chain disclosure legislation that requires all extractive industries and companies over an initial threshold of 35 million CAD (measured by annual turnover) to:

    - Disclose certified information on corporate supply chains;
    - Answer and certify a government-issued questionnaire on an annual basis;
    - Include Director/Partner/Member sign-off on disclosures (rather than external auditors);

2) Collect and maintain information, available to the public, including:

    - A central database or government repository of corporate disclosure statements, including reports, links, and audits, if provided;
    - Lists of all corporations required to publish a disclosure report, in order to identify companies governed by the legislation, minimally-compliant companies and non-compliant companies;

3) Create an empowered, arms-length Corporate Social Responsibility (CSR) Ombudsperson, capable of:

    - Soliciting grievances from affected parties abroad;
    - Investigating complaints and industry practices;
    - Publishing reports, advising government and recommending steps to achieve both reporting compliance and an abuse-free supply chain;

4) Adopt a compulsory framework of rewards and penalties to ensure compliance with supply chain disclosure laws, which:

    - Implements tax credits for companies that comply with transparency in supply chains (TSC) disclosure and adopt “best practices”;
    - Restricts federal procurement to companies that comply with TSC disclosure and adopt “best practices”;

- Withdraws certain foreign affairs services and trade promotion benefits for companies that fail to comply with TSC disclosure rules;
- Creates a statutory civil liability mechanism, available to third parties, to allow for civil lawsuits by victims of labour trafficking or abuse;
- Affirms parent company liability for the actions/inactions of their subsidiaries operating abroad and/or negates by statute the defence of *forum non conveniens* in certain instances;
- Provides Ministerial/Ombudsperson powers of enforcement, including the power to seek compliance through injunctive relief;
- Levies fines for general non-compliance and egregious instances of misconduct, such as failure to hand over records;
- Allows government or its proxy to issue additional binding disclosure regulations, if necessary; and
- Prohibits the importation of goods produced by forced or child labour.

1 INTRODUCTION

In April 2016, Canadian corporations were thrust into the international spotlight when news articles brought to light alleged complicity by Canadian firms in egregious human rights abuses occurring in Guatemala.[2] These articles were the latest in a series of reports documenting Canadian companies' involvement in human rights abuses – reports which have proliferated over the past decade.[3] Indeed, the Human Rights Committee of the United Nations (UN), in its recent "Concluding Observations" on Canada, expressed its concerns "about allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations, and about the inaccessibility to remedies by victims of such violations."[4]

These alleged human rights abuses implicate the actions of Canadian actors by virtue of a complex web of interconnected subsidiaries, contractors, and suppliers that constitute 21st century production processes. The conduct under investigation in the news articles was at least one or two steps removed from the defendant company, Hudbay Minerals, which operates out of Toronto, Ontario.[5] However, relying on the tort of negligence, the Guatemalan plaintiffs have alleged in a Canadian court that Hudbay took insufficient steps to ensure that its subsidiaries and contractors carried out their tasks lawfully. Having been cleared for a full trial to begin later this year, the Hudbay case thus far suggests that Canadian corporations may increasingly be held responsible for incidents that occur deep within their transnational supply chains (TSC).

Rather than dismiss growing global agitation over conduct linked to Canadian firms, the Canadian government can reclaim its roots as a human rights leader and join forces with other public law actors in the US, the UK and beyond to legislate an effective set of rules to regulate Canadian firms operating abroad. Failure to act puts Canada at risk of becoming a haven for companies looking to exploit lax laws and regulations of nations with weak governance structures. Continuing to allow corporations to self-regulate without government oversight amidst emerging reports of overseas abuses threatens Canada's reputation and international identity as a defender and follower of human rights.

This report envisions a multi-faceted regulatory regime that encourages all Canadian corporations relying on transnational supply chains to work diligently to identify and eliminate human rights abuses connected with their corporate activities.

Building on previous efforts to create awareness about corporate social responsibility, the government should legislate a regime that mandates disclosure, investigates complaints and enforces compliance. We recommend legislation that establishes a level playing field for all Canadian businesses while promoting best practices, supporting democratic values and protecting the country's national identity and brand abroad.

Reports of Canadian companies' involvement in human rights abuses have proliferated over the past decade.

The time is ripe for Canadian leadership to promote real corporate social responsibility (CSR), which collects information and provides some oversight of global corporate supply chains. These issues are too important and urgent to be left to individual initiative, the haphazard process of multilateral negotiations, or to the soft law guidelines of the UN and the Organisation for Economic Cooperation and Development (OECD).

To that end, this report recommends federal legislation requiring all Canadian commercial and industrial actors to assume responsibility for the effects of their business operations in the developing world. The proposed multi-faceted legislation attempts to be responsive to the needs of industry, the demands of Canadians and consumers[6] and the plight of victims and populations vulnerable to exploitation the world over. It proposes that: corporations must collect and disclose information about their overseas supply chains; complainants in Canada and abroad be given a means to address allegations of misconduct; and specific incentives and penalties be placed on corporations that either honour or refuse to comply with the proposed disclosure requirements, thus rewarding CSR leaders and shaming laggards.

2 HISTORY & CONTEXT OF TRANSPARENCY IN SUPPLY CHAINS

Transnational production is tied to rhetoric relating to the need for world markets to function unimpeded by state regulation.[7] The search for cheaper labour inevitably leads corporations to the developing world, where low wages and per capita income are correlated with weak domestic governance.[8] The "weak governance zone" includes states that are "unable or unwilling to protect the fundamental human rights of some or all of [their] population over some or all of [their] territory."[9]

Meanwhile, a "soft law" approach and the absence of regulatory frameworks in corporations' home states results in a "governance gap"[10] in which the disconnect between a contiguous geopolitical state and the diasporic model of transnational production has created regulatory blind spots in the supply chains that produce the goods and services upon which western consumers routinely rely. These blind spots persist due to the inability or unwillingness of the developed world to monitor the extraterritorial activities of their corporate citizens. This disjunction creates an asymmetry whereby legal institutions do not police corporations in aid of the public interest while simultaneously continuing their "prominent role in protecting corporations and their interests" at home.[11]

Weak governance zones, abundant resources and a sudden deluge of foreign direct investment have combined to create a breeding ground for human rights abuses. The National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries' Advisory Group Report (AGR) from March 2007 notes:

> There have been increasing concerns about the human rights impact of Canadian extractive companies with respect to their operations abroad. Open Session participants and civil society members of the Advisory Group pointed out that communities affected by Canadian extractive operations have lodged a number of human rights-related complaints with national and international bodies, including Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, the World Bank Group's Compliance Advisor/Ombudsman, and the Inter-American Commission on Human Rights.[12]

Companies are keenly aware of the increased risks created by supply chains that span multiple time zones and operate across different cultural norms. In an increasingly global business environment, procurement is no longer simply about getting the best supplies at the lowest cost; companies are now looking at political, environmental, macroeconomic and commercial risks.

With this understanding, companies have adopted private regulation to actively limit the traditionally public regulatory laws and frameworks from keeping pace with transnational production.[13] This "new governance" preferences collaboration and self-management at the expense of traditional state regulation.[14] For instance, many larger companies now have internal risk assessment teams that analyze

the quality and costs of products as well as the political climate and the potential for social unrest and environmental disasters in order to ensure the stability and competitiveness of their supply chains. Companies typically conduct risk assessments using "Supply Quality Management Guides," which provide questions for a company to ask its suppliers before agreeing to purchase from them.[15] These risk assessment teams are often also responsible for conducting "due diligence" of their supplier networks – responsibilities which sometimes extend to the payment of "special fees" and other bribes to foreign government officials in countries with weak governance and rampant corruption.[16] This type of due diligence evidently serves business purposes rather than ensuring compliance with human rights or other obligations related to protecting workers from being exploited or trafficked.[17]

Complicating matters is the wide range of supply chain models that exists across multiple industries. Companies with headquarters in Western Canada, such as British Columbia, tend to have complex supply chains due to their heavy reliance on manufacturers based out of East Asia and the presence of the world's third largest port in Vancouver. Some of these companies, especially in the mining industry, rely on a completely outsourced supply model, which can often include hundreds of suppliers at multiple tiers, making it almost impossible to trace liability for human right abuses. Thus while a Canadian company may only deal directly with one supplier, that supplier may have multiple secondary suppliers, who then rely on multiple tertiary suppliers, and so on. A recent survey conducted by D&B Supply Management Solutions found that while most business leaders understand the range of unforeseen events that can impact the stability of their supplies, "80% are limited in their ability to respond quickly and only 20% have clearly-defined plans in place to deal with the unexpected."[18]

In this context, the risk of trafficked and exploited labour exists at every level. Companies may be able to ensure that the materials they source are produced without any human right abuses, but this does not mean that their manufacturing plants are not using exploited labour. The risk of trafficked and exploited labour is not limited to a product's supply chain but exists in the service industry as well. For example, companies may rely on transportation services that employ child labour, or on security services that use slave labour.

Although Canadian companies are less likely to engage in direct and outright abuses of human rights, serious reports of alleged complicity and abuse do emerge. In June 2015, the United Nations published a report that accused Canadian-owned Nevsun Mining of using forced labour at Eritrea's only active mine. In October 2016, the British Columbia (BC) Supreme Court allowed a civil lawsuit brought by three Eritrean workers against Nevsun to proceed, dismissing Nevsun's assertion of *forum non conveniens*, a legal doctrine and defense that allows courts to dismiss a case on jurisdictional grounds if there is a more convenient forum in which the case can be heard.[19] These allegations emerged despite Nevsun's impressive and extensive corporate social responsibility policy promising investors and the public that abuses within their supply chain were unlikely to exist. Companies that do not sell directly to consumers, such as Nevsun Mining and other extractive companies, may be less motivated by branding impact, which is unlikely to affect their sales and thus, their profit margins. The human rights abuses that allegedly occurred at the Eritrea mine under Nevsun's purview demonstrate the insufficiency of self-monitoring and CSR policies, and the clear need for a firm regulatory hand.

In other cases, such as exploited labour in Thailand's shrimp exports, consumer awareness has been instrumental in effecting change. In 2015, news reports traced shrimp peeled by enslaved child labourers back to Thai exporting companies, who then shipped those shrimp to major grocery stores and restaurants in the United States and Canada, including Walmart, Whole Foods and Costco.[20] The reports led to widespread calls for boycotts of shrimp from those chains, as well as a class action lawsuit against Costco.[21] In February 2016, US President Obama signed into law an amendment closing a loophole in the US Tariff Act of 1930 that allowed Thai shrimp, seafood and other products made with exploited, slave and indentured labour to enter the US market due to the lack of other available sources for those goods.[22]

Corporate disclosure laws focused on supply chains, such as the *Dodd-Frank Act*, the *California Transparency in Supply Chains Act* (*CTSCA*), and proposed and forthcoming US and European Union (EU) legislation represent international convergence towards responsible corporate governance. Unfortunately, Canada is a laggard in this movement. Proposed Canadian supply chain laws, discussed in Section 4, not only failed to meet the standards of other existing laws – they failed to become law at all. International regulatory convergence around human rights disclosure is particularly needed[23] to relieve corporate concerns of potential loss of competitive advantage for good corporate citizens.[24]

Recent Allegations of Abuse Related to Canadian Corporations

Outcry over the purported involvement of Canadian oil and gas firm Talisman Energy in Sudan's civil war in the late 1990s and early 2000s resulted in UN citations for "massive and chronic human rights violations,"[25] and created the impetus for measures such as the *Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act* (Bill C-300). Talisman Energy's alleged complicity in the Sudanese civil war resulted only in a shaming exercise that led to Talisman's divestment from its Sudanese oil interests – after an initial denial and apparent hostility to the reports.[26]

The situation of Talisman and its operations in Sudan has played out with slight variation in other contexts.[27] More recently, two Canadian mining corporations, Hudbay Minerals and Tahoe Resources, have been involved in civil suits stemming from abuses committed by their private security firms in Guatemala. As there is no cause of action for human rights abuses in most common law jurisdictions, these claims were advanced as torts, such as assault and battery.[28] The case against Tahoe at the British Columbia Supreme Court was stayed following Tahoe's successful invocation of *forum non conveniens*. The BC Court of Appeal, however, reversed the lower court in January 2017 and is permitting the case to proceed in the British Columbia courts. Tahoe's appeal of the BC Court of Appeal's decision to the Canadian Supreme Court was dismissed with costs in June 2017.[29] Hudbay invoked but then withdrew its *forum non conveniens* defense at the Ontario Superior Court and the case is currently in the discovery phase and headed towards trial.[30]

Prior to these cases, citizens from the Democratic Republic of Congo (DRC) filed a petition in November 2010 for certification of a class action suit against Anvil Mining for alleged abuses associated with its mining activities in the Katanga region. The decision to file in Canada stemmed from the impossibility of

receiving a fair hearing in the DRC – a fact recognized by the United Nations High Commissioner for Human Rights at the time, Louise Arbour.[31] Despite strong evidence in favour of the petitioners and the endorsement of a Canadian ex-Supreme Court justice, the Quebec Court of Appeal rejected the case on the same ground of *forum non conveniens,* re-directing petitioners to seek justice in DRC courts.[32]

The historically cold reception of plaintiffs seeking justice in Canada for alleged abuses by certain Canadian companies has been particularly concerning given that Canadian mining corporations have routinely been accused of complicity in large-scale environmental and human rights abuses. A report commissioned by the Prospectors & Developers Association of Canada (PDAC) and later obtained by the Toronto Star newspaper stated, "Canadian companies have been the most significant group involved in unfortunate incidents in the developing world."[33] The news report also contained the following summary from the still unreleased PDAC report:

> The leading causes of incidents involving Canadian mining companies were related to community conflict, including "significant negative cultural and economic disruption to a host community, as well as significant protests and physical violence."
>
> The second most common cause of incidents involved environmental degradation, followed by unethical behaviour, which the Centre [for the Study of Resource Conflict] defines as operating in a state that is under embargo or careless disregard for human rights or local laws.[34]

Such human rights abuses are not only associated with the extractive industry. Indeed, the incident that truly opened Canadians' eyes to the problem of transnational supply chains was the Rana Plaza garment factory collapse in Bangladesh in 2013,[35] which killed more than 1,100 people and wounded 2,500.[36] While dozens of household brands were implicated in the disaster, Canadians were shocked to learn that Joe Fresh, owned and operated by Loblaw Companies Limited, was one of the companies sourcing apparel from the complex. Loblaw has been named a defendant in a $2 billion lawsuit on behalf of the victims.[37]

Canadian apparel companies were among those manufacturing at the Rana Plaza garment factory, which collapsed in 2013, killing more than 1,100 people and wounding 2,500.

This brief survey of recent incidents involving human rights abuses and Canadian corporations indicates the persistence of problems associated with transnational production processes, or supply chains, in weak governance zones. The newsworthy nature of these incidents—the fact that they are as much

covered by popular media as academic literature—indicates the important reputational and credibility aspects of human rights abuses for Canadian corporations as well as for the government.

Despite the concern that human rights abuses are "difficult to assess in quantitative terms with respect to their scope and frequency," a general agreement by numerous stakeholders that proactive measures are required already exists.[38]

The next section will deal with privatized solutions to the proliferation of human rights abuses.

Self-Policing through Voluntary Corporate Social Responsibility (CSR)

The development of voluntary corporate social responsibility (CSR) over the past several decades reflects a growing awareness among corporations and consumers of the risks of rights abuses, such as forced and exploited labour within supply chains. The rise of CSR as a tool is a phenomenon that has been facilitated and legitimized by governments and law due to the preference of large businesses for "voluntary codes of conduct, guidelines, and sectoral initiatives."[39] These preferences have been supported by home governments, as well as by the G8 and the European Union. Canada also heavily favours voluntary CSR, despite the reported gravity and frequency of human rights abuses occurring under the authority of Canadian companies.[40]

While voluntary initiatives could potentially change the behaviour of companies, many governments have merely encouraged, not compelled, companies to adopt such policies.[41] At the same time, some CSR initiatives have been transformed into law, thereby demonstrating their true potential as compliance devices. For example, Section 1504 of the US's *Dodd-Frank Wall Street Reform and Consumer Protection Act* requires US companies to disclose certain payments made to governments for the commercial development of oil, gas and minerals. This law reinforces a standard set out in the Extractive Industries Transparency Initiative (EITI), a multi-stakeholder coalition and CSR tool that promotes revenues transparency through government legislation.[42]

CSR attempts to obtain ethical behaviour from corporations voluntarily, versus measures that require corporations to behave according to certain norms or face consequences.[43] While corporations at times directly or actively engage in severe rights abuses, more frequently they are complicit in—responsible for helping, or aiding and abetting[44]—human rights violations by other actors they support. In Hudbay, for example, plaintiffs argued that the parent company was complicit or an accessory to the acts in question.[45] Complicity requires an act that assists a human rights violation together with a mental element, most often knowledge of the illicit activities. However, what that level of knowledge is or should be, particularly in the context of business and human rights, is debatable. In business and human rights cases, negligence arguably becomes the appropriate standard for criminal responsibility as it "ties responsibility for human rights to a failure to perform the due diligence requirements that businesses already have to carry out for their shareholders."[46] The negligence standard would cover incidents where corporations and/or their representatives attempt to deny knowledge by choosing not to know what they should have known.

While governments and corporations favour voluntary CSR approaches, cases such as Nevsun, Talisman, Hudbay Minerals and Tahoe Resources demonstrate that CSR initiatives and tools can be insufficient to prevent severe abuses in corporate supply chains that begin in developing countries with poor regulatory frameworks.[47] A firmer regulatory hand is needed to address the problem of corporate complicity in gross human rights abuses in countries with weak governance.

International Law

As transnational actors, headquartered and incorporated in one country but operating in multiple jurisdictions,[48] corporations yield far more power, wealth and influence than any individual person, and consequently play a role in constructing the rule of law.[49] Thus, international law remains a "potential mechanism for closing the governance gap and regulating corporate human rights abuses abroad."[50] Unfortunately, the status of corporations, particularly multinational corporations (MNCs), and their obligations under international law are difficult to determine. Rather than extending the scope of a home state's laws to deal with corporate actors abroad or leave the patchwork of international law to capture an errant corporation, CSR initiatives have been embraced as an easy alternative.

Nevertheless, various areas of international law apply and can be used to oversee corporate behaviour vis-à-vis overseas workers in their supply chains: these include sundry binding provisions of international criminal law, human rights treaties and international investment law. [51]

International criminal law is claimed by experts to be the most "consequential legal development in the field of business and human rights,"[52] with "a set of undiscovered relationships between commerce, atrocity, corporate criminal liability and international criminal law waiting to be mapped."[53] Corporate criminal liability in the international arena developed in order to respond to gaps in accountability; in the United States this manifested in part through the development of the Alien Tort Statute (ATS), discussed below.

Another interesting development in international criminal law took place at the Special Tribunal for Lebanon, which held that a corporation could be prosecuted for contempt of court. The Tribunal found that "[n]o person, natural or legal, should be placed above the law or be allowed to operate outside of the rule of law," and further that "corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law."[54]

While human rights treaties can technically only be signed by states, scholars suggest that

> the burden would now seem to be on those who claim that states are the sole bearers of human rights obligations under international law to explain away the obvious emergence onto the international scene of a variety of actors with sufficient international personality to be the bearers of rights and duties under international law. If *The Sunday Times* has sufficient personality and the capacity to enjoy rights under the European Convention on Human Rights, it might surely have enough personality and capacity to be subject to duties under international human rights law.[55]

Although corporations are not party to human rights treaties, they may nevertheless be subject to certain treaty obligations. One example is a treaty in force adopted by the African Union that allows corporations to be prosecuted for international crimes.[56] This treaty creates international obligations for corporations and proposes that they be held accountable for violations in courts of law.[57] The treaty provides a list of crimes, which includes the illicit exploitation of natural resources, trafficking in persons and corruption.[58] Both the African Court of Justice and the European region are venues where there is an "unequivocal legislative mandate for corporate criminal liability for international crimes," thereby relieving the need to rely on customary international law.[59] This type of explicit legislative mandate is one that Canada could consider adopting.

International investment law also holds a promise for those wishing to hold corporate entities accountable by allowing states to bring claims that an investor (such as a corporation) has violated international human rights law.[60] Arbitrators may take human rights law into account under the terms of a relevant treaty, as is done, for instance, in the Model Indian Bilateral Investment Treaty. This treaty allows counterclaims brought by the state against an investor, including a breach of human rights law.[61]

US Alien Tort Statute

The US Alien Tort Statute (ATS) is a statutory mechanism that gives jurisdiction over certain violations of international law to US federal district courts. In theory and past practice, the ATS has allowed victims of human rights abuses anywhere in the world to bring a civil action in the US. With respect to corporate actors, ATS advocates have argued that victims of abuses have a legal right to compensation from corporations complicit in human rights violations, and ATS cases have reflected this.[62] However, plaintiffs must first overcome a domestic set of legal barriers, including *forum non conveniens* and act of state and political question doctrines.[63]

Were civil remedies ever an appropriate or sufficient means of redress?

The US Supreme Court recently addressed the application of the ATS in *Kiobel v. Royal Dutch Petroleum Co* ("*Kiobel*"), a case in which a corporation allegedly aided and abetted human rights violations committed by the Nigerian government in service of oil development for Royal Dutch Shell in the Ogoni Niger River Delta. In *Kiobel*, the US Supreme Court established a presumption against extraterritoriality with respect to the ATS, limiting the scope of the ATS to cases which "touch and concern" with sufficient force the territory of the US.[64] The decision failed to address the actual question of whether a corporation can be held liable for violations of customary international law, beyond stating that "mere corporate presence" does not suffice to displace the presumption against extraterritorial application.[65] Although *Kiobel* was interpreted by some as a blow to corporate accountability for extraterritorial

human rights violations, subsequent ATS cases have indicated that corporate entities may still be held accountable for complicity in human rights violations committed abroad.[66]

Future ATS caselaw may limit or expand civil remedies available to victims, depending on shifting political and cultural developments. But were civil remedies ever an appropriate or sufficient means of redress? Scholars have questioned whether civil liability is "a sufficient response to corporate participation in unimaginable atrocities that deeply shock the conscience of humanity."[67] A turn to "corporate criminal liability rather than civil liability for international crimes can offer human rights advocates a new means of seeking justice."[68] Indeed, following the *Kiobel* decision, Swiss authorities announced a criminal investigation into the activities of Royal Dutch Shell.[69]

Despite its challenges, litigation remains a way to protect and promote international human rights. However, it is only one tool in the arsenal when it comes to enforcing extraterritorial corporate compliance with international human rights standards.

CSR Initiatives

CSR initiatives have developed in conjunction with voluntary international law regimes to address the human rights conduct of transnational corporations. Unfortunately, most of these initiatives—characterized by non-binding laws and the absence of centralized oversight agencies and enforcement mechanisms—have continued to reinforce the status quo. Accordingly, CSR regimes face substantial criticism for their inability to prevent corporations from violating human rights and for their failure to ensure accountability or compensation for the victims of human rights abuses. Nonetheless, even some of the most vocal critics of CSR initiatives recognize that they "have valuable characteristics and can complement and enhance international and domestic legal regulation."[70] For companies in particular, there are advantages to adopting a CSR policy, which include protecting and promoting the corporate reputation (it's the "right thing to do"), reducing the risk of strikes, protests and boycotts, improving the workplace environment and attracting future employees.[71]

Unfortunately, governments have been using CSR as a substitute for actual legislation to address the social consequences of globalization.[72] Nineteenth century laissez-faire approaches allowed corporations to be considered legal persons able to pursue their self-interest unimpeded by government. Out of those initial attitudes developed a kind of "circular logic—still in place today—that justifies governments' facilitation of the interests of corporations."[73]

Advocates for self-regulation and voluntary initiatives have argued that legal regulation would be too rigid and stifle the creativity needed by corporations in a fast-paced and globalized economy, adversely impacting a corporation's ability to respond to their human rights impacts in a practical and efficient manner. Yet given the inefficiency and ineffectiveness of CSR regimes at preventing human rights abuses, something stronger is evidently required.[74]

Civil society has played an emergent role in enforcing norms, policies and CSR initiatives by pressuring governments and corporations. Viewing the "soft approach" as the only practical and politically feasible

way to ensure progress in this area, some civil society organizations have embraced CSR, considering it, in some cases, the only hope for affecting change in the short-term.[75] This view considers stronger regulations and binding norms a long-term goal that must be worked towards over the next several decades.[76]

Some of those working for corporations have counselled that corporations will focus first on their profit-making mandate and resist additional costs in any form.[77] Indeed, many "corporate decision-makers see no need to adjust their policies when this might radically affect short-term profits."[78] Such views support the conclusion that some corporations must be obliged, rather than gently persuaded, to act ethically.

There are several leading multi-stakeholder and intergovernmental self-regulatory initiatives today that focus either on state obligations to protect human rights and/or on corporate duties to minimize and prevent adverse human rights impacts. This section outlines four of the most well-known and influential international CSR regimes: the UN Guiding Principles on Business and Human Rights (also known as the "Ruggie Principles" or "UNGP"); the OECD Guidelines for Multinational Enterprises; the Global Compact; and the Voluntary Principles on Security and Human Rights.[79] None of the instruments discussed are binding, and all couch their obligations in permissive language. The question therefore remains whether these voluntary instruments can adequately protect the rights of vulnerable workers.

Ruggie Principles

One of the most recognized and influential CSR initiatives today is the *Guiding Principles on Business and Human Rights*, authored by John Ruggie, the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG).[80] Referred to more commonly as the Ruggie Principles, this initiative was developed to implement the United Nations Protect, Respect and Remedy Framework (PRR Framework) to address human rights abuses committed in business operations. According to Ruggie, "national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes."[81] Consequently, Ruggie suggests that the challenges of transnational corporations operating in weak governance zones require home states to hold corporations to account.[82] The PRR Framework, which the SRSG presented to the United Nations Human Rights Council in June 2008, rests on

> 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.[83]

The Ruggie Principles follow in the wake of the United Nations draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Norms"). The highly controversial Norms were vehemently opposed by the business community for seeking "to impose on companies, directly under international law, the same range of human rights duties that

States have accepted for themselves under treaties they have ratified: to promote, secure the fulfilment of, respect … and protect human rights."[84] The Norms were rejected by not only the business community but by state members of the former UN Human Rights Commission.[85] Following their failure, an expert mandate created the SRSG and led to the eventual adoption of the Ruggie Principles. After rejecting the Norms, Ruggie determined that the basis for moving forward lay in recognizing state governance of transnational behaviour.

The PRR Framework and the Ruggie Principles include both binding and non-binding norms for states and non-binding responsibilities for corporate actors. Beyond voluntary observance by corporate actors, and except where their activities violate domestic law, "compliance with such human rights responsibilities is to be monitored and enforced by the 'courts of public opinion.'"[86]

The United Nations Human Rights Council (UNHRC) adopted the Ruggie Principles unanimously in June 2011. The Principles have been criticized for avoiding the clear language of legal obligation, relying instead on permissive language. Given the lack of capacity and/or unwillingness of host states to regulate foreign investment, home states must be required to take an active role in regulating the extraterritorial conduct of their corporate nationals.

The main contribution of the Ruggie Principles, according to Ruggie himself, lies "not in the creation of new international law obligations, but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template."[87]

Over the last few years, the global appetite for a solution to the challenges of transnational corporations operating in weak governance zones has increased. In 2013, the governments of 84 states, including the African Group of States, the Arab Group of States and several South Asian and South American countries, called on the UNHRC to recognize "the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations."[88] Later that year, a joint statement signed by over 600 civil society organizations (CSOs) was adopted by the UNHRC to establish a working group to begin the process of developing a treaty in order to "provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises."[89] In March 2016, the working group presented its first report to the United Nations General Assembly, which included discussions on the challenges of developing and implementing an international legally binding instrument, and will present its second report in March 2017.[90]

OECD Guidelines

The Organization for Economic Cooperation and Development (OECD) first released the *Guidelines for Multinational Enterprises* ("*OECD Guidelines"*) in 1976 as part of its Declaration on International Investment and Multinational Enterprises.[91] The *OECD Guidelines* are voluntary for corporations, cannot be legally enforced and contain a limited compliance mechanism for dispute mediation. The *OECD Guidelines* require adhering states to set up a National Contact Point (NCP) for dealing with business

compliance, responsible for hearing complaints and mediating disputes with the potential to generate information that could be used to shame a corporation. States that participate in the process are required to set up and fund an NCP; however, NCPs' functions are left to each state to determine.[92]

Some experts have characterized the "softness" of the OECD system as its main strength, pointing to the UK NCP, which found two British corporations, Das Air and Afrimex,[93] guilty of violating international rules regarding transporting and sourcing conflict minerals from the DRC, respectively.[94]

At present, 34 OECD countries and 12 non-OECD countries adhere to the *OECD Guidelines*; the majority of these states are developed countries with the institutional capacity to regulate foreign business activity within their jurisdiction.[95] The challenge lies with the ability of these adhering states to investigate and monitor their corporate nationals in a non-adhering state, as NCPs lack the resources to do so and would need the consent of the host state (which would be unlikely in circumstances where human rights abuses were occurring).[96]

The *OECD Guidelines* were updated in May 2011, and the general human rights provisions were expanded into a dedicated chapter that draws directly from the PRR framework and the Ruggie Principles. In particular, the *OECD Guidelines* set out states' duties to

- protect human rights (business actors are merely encouraged to respect human rights);
- avoid causing or contributing to adverse human rights impacts within the context of their own activities and seek out ways to prevent or mitigate those impacts;
- adopt a policy commitment to respect human rights; carry out human rights due diligence in a manner appropriate to their size, nature and context of operations; and provide for or co-operate through legitimate processes with the remediation of adverse human right impacts to which they have contributed.[97]

In general, the same criticisms that apply to the Ruggie Principles and other CSR initiatives also apply to the *OECD Guidelines*. While these CSR initiatives are undoubtedly advancing the global conversation on the need for corporate accountability, they have had little practical effect in terms of corporate respect for human rights, preventing violations, or providing remedies when abuses occur. For instance, in Canada, the NCP "applies a high threshold for accepting complaints and doesn't make findings on whether companies have breached the Guidelines in question"; furthermore "[o]nly twice have [these] complaints … resulted in agreement between companies and complainants."[98] Given that there are "no effective follow-up procedures in place to ensure that companies actually implement the NCP's recommendations or their own commitments," it is clear that Canada's NCP, as currently structured, is insufficient to prevent or remedy human rights abuse by Canadian companies operating overseas.[99]

The role of NCPs and the challenges they face are discussed in more detail in Section 5.

United Nations Global Compact

The United Nations Global Compact is a CSR initiative that directs its focus towards corporations rather than states. Initially developed by Former UN Secretary General Kofi Annan at the 1999 World Economic Forum in Davos, the Global Compact is a voluntary governance mechanism that corporations may sign. Unlike previously discussed CSR initiatives, it is not a code of conduct, but is "meant to serve as a framework of reference and dialogue to stimulate best practices and to bring about convergence in corporate practices around universally shared values."[100]

The Compact consists of ten principles of good corporate citizenship, related to human rights, labour, the environment, and anti-corruption.[101] The Compact uses permissive language, and references the PRR Framework to impose a moral obligation on corporations to "refrain from having a negative impact on the enjoyment of human rights."[102] In Principle 2, the Compact acknowledges the problem of corporate complicity, defining it as

> 1) An act or omission (failure to act) by a company or individual representing a company, that 'helps' (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, and 2) [t]he knowledge by that company that its act or omission could provide such help.[103]

The specific duties of corporations with respect to human rights remain unelucidated under the Compact. Rather they are left to the determination of individual enterprises, which are directed to information from the International Labour Organization and other institutions.[104]

The Global Compact has become one of the leading CSR initiatives, and in 2008 was referenced in the CSR reports of over 2,400 major firms.[105] It has expanded to include 7,413 businesses and 3,823 non-business participants. The Global Compact's large number of signatories, while indicating wide acceptance of the norms it promulgates, is also likely a result of the absence of any monitoring mechanisms or consequences for non-compliance. Signing the Compact thus allows corporations to enjoy the Compact's reputational benefits without needing to worry about resulting scrutiny or regulation.

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The Voluntary Principles on Security and Human Rights

Private security forces have instigated or been complicit in abuses, atrocities and other types of harm, as alleged in the case of Hudbay. The Voluntary Principles on Security and Human Rights (the "Principles") have arisen as a "particularly important initiative in terms of addressing human rights concerns related to business activity in zones of weak governance...significant for the norms they elaborate on extractive company engagement with security arrangements."[106] A product of dialogue between the UK and US governments, transnational corporations and international human rights CSOs, the Voluntary Principles are designed to guide companies in maintaining the safety and security of their operations, within an operating framework that encourages respect for human rights.[107] Like other mechanisms described in this section, they are non-binding and couched in permissive language.[108]

In the Hudbay case, a private security firm under the direction of one of Hudbay's subsidiaries was accused of committing gross human rights abuses. Intervener Amnesty International noted the Voluntary Principles create international norms and demonstrate that transnational businesses have generally long been aware of the risk of security forces violating human rights.[109] Indeed, Hudbay publicized the fact that it adhered to the Principles as a guide to its own corporate conduct.[110] Notwithstanding this particular human rights failure, civil society advocates continue to promote the use of the Principles in order to provide guidance and to pilot initiatives in conflict and violence-ridden countries such as the DRC.[111]

Membership in the Principles was originally confined to the founding members of the OECD; however participation is now open to governments, extractive companies and CSOs. Unlike the Global Compact, membership in the Principles only includes 8 governments, 21 extractive companies, 12 CSOs and five organizations with observer status.[112] The acceptance of Canadian mining company Barrick Gold—notorious for allegations of human rights abuses—into the Principles Program has raised questions about the integrity of the criteria and application process.[113] Critics have noted that the program has an open door policy with respect to companies with poor human rights records, allowing them to participate on the basis of a submitted action plan and nothing more.[114]

In April 2016, Canada became Chair of the Principles.[115] CSOs have called on Canada, during its tenure as Chair to address key problems with the Principles. In addition to the open door policy, these include a lack of transparency with a general disregard for public accounting or reporting, as well as a deeply flawed complaints mechanism which only allows allegations of abuse to be raised by participants in the Principles, and not by victims or local communities. In addition, problematic Memoranda of Understanding (MOUs) between companies and state securities forces appear to justify reliance on state forces even when those forces violate human rights and do not require companies to disclose the content of MOUs. The Principles do not stipulate that companies seek a written agreement with the host state incorporating the Principles as a condition of investment.

Conclusion

While accountability under international human rights law is still in its infancy, norms are emerging by which corporations may be held liable for egregious human rights abuses. However, the current political environment, along with the challenges of regulating the extraterritorial conduct of corporations, makes establishing an international legally binding instrument unlikely in the near future.

Meanwhile the "gap" in regulation between home state corporate activities and corporate extraterritorial effects abroad has been temporarily occupied by "private regulation," i.e. voluntary CSR regimes and other "soft law" mechanisms.

While voluntary CSR initiatives continue to be vital to the development of norms and obligations of corporate entities, they are inherently weak instruments, which have allowed corporations to claim CSR without actual transparency or effective human rights policies. It is, thus, imperative that states assert jurisdiction over transnational companies operating in other nations, and draw from the wide array of potential tools to improve corporate behaviour, including charter revocation, refusal to limit corporate liability in relation to foreign subsidiaries, and participation in international regimes that demand promulgation and enforcement of domestic standards.[116] The Canadian government in particular should develop legislation mandating that corporations verify what steps they have taken to find and correct labour and human rights abuses within their supply chain. We outline the scope and nature of this proposed legislation in Section 5.

3 SURVEY OF EXISTING TRANSPARENCY IN SUPPLY CHAINS LEGISLATIVE REGIMES

This section surveys existing supply chain regimes and the laws that comprise them in the US, UK, and elsewhere, including the *Dodd-Frank Act*, the *California Supply Chain Transparency Act*, and the *UK Modern Slavery Act*, among others. It further examines other measures, such as US Executive Order 13627, the closing of the "Consumptive Demand Loophole" in the Tariff Act of 1930, a proposed US Bill on supply chain transparency related to trafficking, and a proposed EU rule on conflict minerals as tools which may be effective in combating human rights abuses in supply chains and addressing supply chain transparency.

The *Dodd-Frank Act*

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("*Dodd-Frank Act"*) actively addresses human rights abuses tied to the extraction of conflict minerals in the Democratic Republic of the Congo (DRC) by imposing extensive disclosure obligations on companies doing business there. Adopted by the US in 2010, it exemplifies the increasing global trend towards attempting to hold corporate actors responsible via mandatory regulations of corporate disclosure related to human rights abuses, including forced labour and human trafficking.[117]

The *Dodd-Frank Act* goes a step further than CSR by codifying a due diligence approach to human rights-related issues.[118] Responding to the need to address decades of violence in the DRC related to natural resources, Section 1502 of the *Act* addresses non-financial disclosure on human rights issues and, along with section 1504 (pertaining to anti-corruption measures), was enacted with the aim of curtailing violence in the DRC and meeting humanitarian goals. Not only was there significant civil society impetus in the US surrounding the creation of section 1502, but Congolese citizens, residents and diaspora played an essential role in establishing SEC rules and in Congressional hearings on section 1502.[119] Ultimately, section 1502 added section 13(p) to the *Securities Exchange Act of 1934*, requiring the Commission to promulgate rules for certain companies to disclose their use of conflict minerals if those minerals are "necessary to the functionality or production of a product manufactured by those companies" and such minerals originated in the DRC or any country with an adjacent border.[120]

Section 1502 applies to companies that (1) file reports under section 13(a) or section 15(d) of the 1934 *Securities and Exchange Act*, including domestic companies, foreign private issuers, and smaller reporting companies, and (2) manufacture or contract to manufacture, products with conflict minerals that are necessary to the production or functionality of a product. Conflict minerals include columbite-tantalite (coltan), cassiterite, wolframite and gold, as well as tantalum, tin, gold or tungsten (the "3TGs"). Any other mineral or derivative determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country may be designated a conflict mineral.[121]

Once it is determined that a company meets the definition of a "US Nonbank Financial Company" as laid out in section 113 of the Act and is consequently subject to section 1502, it must conduct a reasonable country of origin inquiry (RCOI) and determine whether any conflict minerals used originated in an adjoining country. The company discloses its determinations regarding whether the minerals originated in the "covered countries" or were from scrap or recycled sources and provides a brief description of the inquiry undertaken and the results of the inquiry on a Form SD.[122]

If a company's RCOI indicates that the company knows or has reason to believe that any conflict mineral may have originated in a covered country and is not from recycled or scrap sources, the company must proceed with supply chain due diligence and file Form SD with a Conflict Mineral Report. If a company determines its products are DRC-conflict free (i.e. they originated in a covered country but did not finance or benefit armed groups) then the company must 1) obtain an independent private sector audit of its Conflict Mineral Report 2) certify that it obtained this audit 3) include the audit report as part of the Conflicts Mineral Report and 4) identify the auditor.

If the company's products are found not to be DRC-conflict free then a different procedure applies: the company must describe 1) the products manufactured or contracted to be manufactured that are not "conflict free"; 2) the facilities used to process the conflict minerals in those products; 3) the country of origin of the conflict minerals used; and 4) the efforts to determine the mine or location of origin, with greatest possible specificity.[123] In some situations it may not be possible to determine whether minerals originated in a covered country or benefited armed groups. In those situations, a product is deemed to be "DRC conflict undeterminable"; this period of indeterminacy applies for a temporary two or four-year period depending on the size of the reporting company. For conflict undeterminable products, a different procedure applies and the company must, in addition to the steps above, provide information in its Conflict Mineral Report regarding the steps it has taken to mitigate the risk of using conflict minerals that benefit an armed group.

Separate rules apply to scrap or recycled metals, which are considered "DRC conflict free." If a company cannot determine whether its gold came from recycled or scrap sources, it must exercise due diligence and obtain an audited Conflict Mineral Report.

Dodd-Frank requires that supply chain due diligence for a particular conflict mineral be conducted under a nationally or internationally recognized framework, such as the OECD's *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.[124] An independent private sector auditor is also required to reviews companies' due diligence practices and conclude whether methods conform to rule standards and are a true and accurate summary of what occurred.[125]

Legislators have enacted both legal and non-legal mechanisms to encourage compliance with section 1502, which imposes penalties on companies for not reporting or complying in good faith. Form SD is also subject to section 18 of the *Securities Exchange Act of 1934*, which attaches liability for any false or misleading statements. In cases where companies fail to file a Conflict Mineral Report or file one that is misleading, the SEC has the power to delist a company from the New York Stock Exchange. Individual states such as California and Maryland have passed laws encouraging compliance with the rule.[126]

Moreover, because the rule mandates public disclosure, civil society and third party rankings can act as additional pressure on companies to comply.

Both sections 1502 and 1504 of Dodd-Frank remain highly contested,[127] with overwhelming opposition from business interests and the SEC itself, whose former Commissioner stated

> Section 1502 is about curtailing violence in the DRC; it is not about investor protection, promoting fair and efficient markets, or capital formation. Warlords and armed criminals need to fund their nefarious operations. Their funding is their lifeline, it's a chokepoint that should be cut off. That is a perfectly reasonably foreign policy objective. But it's not an objective that fits anywhere within the SEC's threefold mission.[128]

Other valid criticisms of the law include:

- the scope of the law is limited to one country, which may simply displace the conduct to other countries;[129]
- the costs of complying with section 1502—estimated at $1 billion in initial compliance costs, and $200 to $400 million in ongoing compliance costs, including new or revised computer systems, evaluation of products and supply chain vendors, modification of supplier contracts, participation in industry-wide validation schemes, and independent third-party audits—may disproportionately affect small and medium-sized businesses who receive no "de minimis" exception from the law;[130]
- the law is unclear as to whether the auditing requirement covers only the Conflict Minerals Report or the entire supply chain due diligence process[131]; and
- required disclosures may damage a corporation's reputation and impact its business relationships in countries where they operate.[132]

Additionally, while disclosure provides much needed information on operations where companies may want to avoid scrutiny,[133] merely requiring disclosure does not necessarily lead to a change in practice. Additional complicating factors hindering compliance with section 1502 include inadequate local security and weak governance inhibiting the mapping of the mineral trade and tracing of minerals in the region, and other competing certification and in-region sourcing initiatives.[134] The state could address such issues by collecting and publishing information on all companies to facilitate information-sharing and promote convergence of regulatory standards for transparent supply chains,[135] thereby relieving corporate concern over loss of competitive advantage from doing business in regulated regions.[136]

Carefully crafted disclosure securities regulations such as Dodd-Frank have the potential to bridge the gaps between business interests and human rights interests.[137] By treating human rights as business risks, "the due diligence approach attempts to operationalize [human rights] norms into a company's decision-making process."[138]

"When the *Dodd-Frank Act* passed, I sensed a business opportunity. *Dodd-Frank* could be the impetus for developing, in the DRC, an innovative and socially sustainable source of conflict-free tantalum."

Despite critiques and opposition, section 1502 remains law, the result of shifts in consumer-driven demand for greater corporate transparency in the wake of various human rights abuses. Indeed, some within the business sector view section 1502 positively. For instance, an executive of an electronics company that sources from artisanal miners testified to Congress that "when the *Dodd-Frank Act* passed, I sensed a business opportunity. *Dodd-Frank* could be the impetus for developing, in the DRC, an innovative and socially sustainable source of conflict-free tantalum."[139] Field research conducted in 2015-2016 in the eastern DRC by the Enough Project assessed the impact of section 1502, finding that supply chain transparency had improved, and the prior links between mining, trade in conflict minerals and violent conflict in the eastern DRC had been broken, affecting hundreds of thousands of people that rely on small artisanal mining operations for survival.[140] Amidst critiques of the unintended effects of section 1502, the Enough Project's report was downplayed by other groups.[141]

In February 2017, newly elected US President Donald Trump signed a directive aimed at curtailing provisions of the Dodd-Frank Act, giving the Treasury Department the authority to restructure major provisions of the law.[142] Although it is not clear yet exactly how the law will be curtailed, a leaked draft of the directive calls for the conflict minerals disclosure rule to be temporarily suspended for two years.[143]

Although Dodd-Franks' section 1502 is an imperfect corporate disclosure law, it represents a valid attempt to address the governance gap that exists between home state regulation and extraterritorial effects, as well as an effective deterrent and enforcement mechanism. Canada has no equivalent, and Canadian attempts to enact legislation with the same essential purpose of section 1502 have failed to comprehensively address or capture human rights abuses within supply chains.[144]

California Supply Chain Transparency Act

Targeting the world's largest corporations, the *California Transparency in Supply Chains Act* (*CTSCA*) came into force on January 1, 2012. The *CTSCA* is the first law to address the issue of trafficking and slavery in commercial supply chains.[145] Since its enactment, many other draft and operative laws have been modelled upon the *CTSCA*'s success. The *CTSCA* is a relatively short, simple piece of legislation requiring retail sellers and manufacturers with annual worldwide gross receipts exceeding 100 million US dollars doing business in California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chain for tangible goods offered for sale.[146]

Any production-specific or human resource-relevant practices related to trafficking and slavery fall within the scope of the legislation.[147] Although it does not define certain key terms including "human trafficking," "slavery," or "exploitation,"[148] the *CTSCA* emphasizes that slavery and human trafficking are crimes under international law and notes the efforts of legislators to hold accountable the perpetrators of such crimes. It also refers to a list published by the US Department of Labor of certain goods known to be produced with child or forced labour. Noting that market forces drive demand for goods and are "a key impetus" for slavery and trafficking, and further that "consumers and businesses are inadvertently promoting and sanctioning trafficking and slavery through the purchase of goods and products that have been tainted in the supply chain,"[149] the *CTSCA* makes a solid case for why legislation is needed to countermand these forces.

Regarding a company's efforts to ensure that their supply chains are free from slavery and human trafficking, *CTSCA* disclosures must be made in the areas of verification,[150] audits,[151] certification,[152] internal accountability,[153] and training.[154] Companies must post the disclosed information on their websites with a conspicuous and easily understood link.[155] If a company does not have a website, written disclosure must be provided within 30 days of receiving a written request from a consumer.[156]

Although, at first glance, remedies for violations seem limited to actions brought by the Attorney General for injunctive relief,[157] there is nothing in the *CTSCA* that precludes bringing a private suit based on breach of the Act.[158] For instance, in *Sud v Costco*, a case brought under the *CTSCA*, it was alleged that Costco knowingly disclosed false information regarding slavery in its supply chain. Although Sud's action was dismissed earlier this year for lack of standing,[159] *Sud v Costco* is not the only example of private litigation under the *CTSCA.* In *Barber v Nestle USA Inc*,[160] Nestle USA faced a $5 million class action lawsuit alleging that the company supported slave labour through its sale of Fancy Feast, a pet food product that sourced seafood ingredients from Thailand's notorious "sea slave" industry.[161] The suit further alleged that the failure to disclose this fact to the public at point of sale violated the disclosure requirements in the *CTSCA*.[162] Examining both the text and the history of the *CTSCA*, the District Court for the Central District of California concluded that the *CTSCA* only required general disclosure about its practices – not any specific product-related disclosure – and dismissed the case.[163] This case reinforced the understanding of the *CTSCA* as a mere information disclosure law that does not mandate the actual eradication of forced labour or human trafficking.

Empirical evidence suggests that full compliance with the *CTSCA* is poor, and the extent of compliance remains an open question. A database compiled by CSO KnowTheChain,[164] which analyzes regulator compliance with the *CTSCA,* reveals that approximately 20% of companies to which the law applies have not filed a disclosure report.[165] Furthermore, of the 80% that did seek to comply, nearly 34.8% of the companies that filed disclosures did not discuss all five required topics.[166] As the law requires disclosure on all five topics, only around 52% of companies are thus in full compliance with the *Act*.

A consumer awareness study of the *CTSCA* revealed that 75% of consumers could not correctly identify the purpose of the *CTSCA* and were unaware of its existence,[167] while only 10% knew that the purpose of the *CTSCA* was to "provide information on efforts to prevent and root out human trafficking and

slavery."[168] Interviews with CSOs indicate that consumer awareness may be tied to how often a business updates its disclosure statement; while companies publish their initial disclosure online, they rarely update it there.[169]

Although the *CTSCA* is a step in the right direction, its voluntary nature[170]—leaving regulation to companies or civil society with no government oversight—has hindered compliance and effectiveness. Recognizing some of these shortcomings, guidelines regarding compliance were provided by California Attorney General Kamala Harris in April 2015, who also issued a consumer alert asking the public to report suspected violations of the Act.[171]

UK Modern Slavery Act

The UK's *Modern Slavery Act of 2015* (*MSA*) builds upon the relative success of the *CTSCA*. Key provisions of the *Act* include: (a) consolidating the current offences of slavery and human trafficking into a single Act of Parliament; (b) lengthening the maximum prison sentence for these crimes from 14 years to life imprisonment; and (c) establishing a new Independent Anti-Slavery Commissioner.[172] After extensive dialogue with interested CSOs and business organizations, lengthy debate and campaigning by Parliamentarians, Part 6 (Section 54)—compelling certain businesses to disclose steps taken to ensure that slavery and human trafficking do not take place within a supply chain—was included in the *MSA.* Section 54 of the *Act* contains additional provisions that strengthen and distinguish the *MSA* from the *CTSCA.* Summarizing the significance of the *MSA*, Karen Bradley, the Home Office minister for preventing abuse and exploitation, noted:

> The government has introduced harsher penalties, and better protections for victims in the landmark Modern Slavery Act. The act will mean that major businesses will, for the first time, be expected to be transparent about the action they are taking to address modern slavery in their global supply chains.[173]

The *MSA* requires every organization conducting business in the UK with a total annual turnover—defined as the amount a company derives from the provision of goods and services falling within ordinary activities, after deducting trade discounts, value-added tax and any other taxes based on the amounts derived[174]—of £36 million or more to produce a slavery and human trafficking statement every financial year (thereby addressing one of civil society's key criticisms of the *CTSCA*). Like the *CTSCA*, the *MSA* also requires that statements be published on an organization's website with the hope that this information will allow consumers to make more informed decisions prior to purchasing.[175] If a business fails to produce a slavery and human trafficking statement for a particular financial year, the Secretary of State may seek an injunction through the High Court (or, in Scotland, civil proceedings for specific performance of a statutory duty under section 45 of the *Court of Session Act 1988*) requiring the organization to comply.[176]

However, the *MSA* both broadens and makes optional the type of information the disclosure statement may include, a troublesome step backward from the *CTSCA*'s list of mandatory minimum disclosure requirements. The *MSA* does, however, include a provision for the publication of further ministerial

guidelines regarding compliance with the TSC provisions, though it is unclear if these rules would strengthen the deferential disposition of the act overall. Guidance issued by the UK government indicates that the flexible nature of the statement was intended to allow for an evolution and improvement of statements over time, a "race to the top by encouraging businesses to be transparent about what they are doing, thus in turn, increasing competition in order to drive up standards."[177]

Canadian legislation would certainly benefit from the inclusion of specific probing questions in corporate disclosures, as well as a provision that enables the government to elaborate further general and industry-specific questions. Building in the potential for government to specify TSC criteria over time is essential in a field where "solutions are going to require a lot of experimentation."[178]

In Section 5, we propose adopting some of the more definitive provisions of the *MSA*: those that impose clear obligations, such as director signoff and yearly reporting, as in section 54(6) which requires that a slavery and human trafficking statement be approved and signed by appropriate persons in the organization (e.g. the board of directors). Imposing a definitive obligation on responsible members of an organization ensures senior-level accountability, leadership and responsibility, and could raise slavery statements to the same level of importance as a company's financial statements in terms of managerial accountability. Senior management is also well placed to foster a business culture in which modern slavery is not tolerated in any form.

Other TSC Regimes & Tools

The US Labor Department's Bureau of International Labor Affairs (ILAB) released a toolkit in December 2012 to help businesses root out forced and child labour in operations and supply chains. The Canadian government could transpose such a kit into its own arsenal of tools, and expand its scope to apply to both domestic and extraterritorial activities of Canadian entities. Other potential actions could be based on some of the following measures.

US Executive Order 13627

The US government is the single largest purchaser of goods and services in the world. Executive Order 13627 (the "Order") *Strengthening Protections Against Trafficking in Persons in Federal Contracts* significantly expanded the responsibility of federal contractors and subcontractors to prevent human trafficking and forced labour. US President Obama signed the Order on September 25, 2012. The Order amends the Federal Acquisition Regulation (FAR)[179] and prohibits contractors and their subcontractors from engaging in a broad array of trafficking-related activities, such as providing misleading information about work conditions, requiring employees to pay recruitment fees, confiscating employees' identity papers, or failing to pay return transportation costs for employees brought to a locale to work on a government contract.[180]

The FAR rule strengthens the US government's existing zero tolerance policy on trafficking in persons outlined in the *Trafficking Victims Protection Act* (*TVPA)*.[181] Current US law already prohibits all contractors and their employees from engaging in "severe forms of trafficking in persons," procuring

commercial sex, or using forced labour during the performance of the contract.[182] The FAR rule establishes significantly more specific prohibitions and requirements with which federal contractors and subcontractors must comply.[183] While the TVPA is a domestic law targeting domestic issues, the Order reaches beyond national borders by contemplating government contractors and subcontractors.

The Order goes one step further than the pre-existing statutory duty to report suspected human trafficking by requiring that contracting officers that "become aware of" activity related to trafficking notify an agency's inspector general—the official responsible for suspension or debarment actions—and, if necessary, law enforcement.[184] To ensure compliance, contractors and their subcontractors agree to cooperate fully with a contracting agency's audits and investigations. Contracts that are worth more than $500,000 must maintain a compliance plan.[185] Violating the provisions of the executive order can result in the termination of the contract and debarment from future federal contracts.[186]

Although the Order is currently still law, current US President Trump is reversing many of President Obama's Executive Orders, especially those affecting contractors; it is likely that his administration will rescind Executive Order 13627 and has already taken steps to that end.[187]

Closing the "Consumptive Demand Loophole" in the Tariff Act of 1930

On February 11, 2016, the US Senate passed an amendment (HR 644)[188] to close a loophole in Section 307 of the *Tariff Act of 1930*.[189] Section 307 of the *Tariff Act of 1930* (also known as the *Smoot–Hawley Tariff*) bans the importation of goods made with forced labour. The law formerly included the "consumptive demand exception," which allowed a product to be exempted from the forced labour import prohibition if it was not produced in sufficient quantities in the US. Amendment HR 644 closed this slave labour loophole, effectively prohibiting all goods made with forced labour from being imported.

Monitoring and enforcing the importation ban on goods made with forced labour is an enormous challenge. Enforcement resources are key to determining what kind of impact this new law will have.[190] The US Department of Homeland Security's Customs and Border Protection (CBP) is tasked with implementing the law. Presently, the CBP relies on a Department of Labor list that enumerates 136 foreign goods believed to be made using child labour and 74 foreign goods believed to be made using forced adult labour.[191] While CBP can use this list to stop and search goods for prohibited items, the list's primary purpose is to raise public awareness and act as a catalyst for those collaborating and working to address the problem of forced labour; it is not intended to be punitive.[192]

Individuals can also petition the CBP to issue a withhold release order for a particular good if they have reason to believe that the item in question was produced using forced labour. For example, the Cotton Campaign, a civil society coalition of human rights organizations, has recently petitioned against imports of cotton goods from Turkmenistan produced by forced labour.

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Importantly, HR 644 also mandates CBP to file an annual report with Congress, highlighting how many times in the past year goods made with forced labour were denied entry into the U.S market under Section 307.[193] This will deliver a long overdue measure of transparency and accountability, encouraging the agency to step up its historically weak enforcement efforts.[194]

HR 644 could affect Canadian markets, as goods produced using forced labour anywhere in the world and then marked for export to US markets could potentially be refused at the US border.

Proposed US Bill: Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 (HR 3226)

On July 27, 2015, US Representatives Carolyn Maloney (Democrat, New York) and Chris Smith (Republican, New Jersey) introduced the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 (HR 3226) (the "Bill").[195] Similar to the *MSA* and the *CTSCA*, the Bill requires publicly traded companies to broadly and specifically disclose their policies and efforts aimed at ridding their supply chains of slavery and human trafficking.

The Bill would amend Section 13 of the *Securities Exchange Act of 1934* and require publicly traded companies with over $100 million in annual worldwide gross receipts to publish disclosures on their website and report yearly to the Securities and Exchange Commission (SEC). Such reports would consist of an annual disclosure discussing whether the covered issuer had taken any measures during the year to identify and address conditions of forced labour, slavery, human trafficking, and the worst forms of child labour within the issuer's supply chain.

The Bill requires information describing to what extent, if any, the covered issuer conducts certain activities set out in the legislation, including internal policies, identified risks, evaluations, consultations, audits, supplier's attest, internal accountability, training, labour recruitment practices, and remedial actions taken.[196] This extensive list reflects the evolution of supply chain transparency laws, and also provides companies with guidance as to what aspects of their supply chain need to be examined. The Bill additionally mandates certain SEC filings and public disclosures. Furthermore, the SEC is required to publish a list of covered issuers required to comply with the legislation,[197] which facilitates the involvement of CSOs and interested parties and allows comparisons between issuers to be made. Our recommendations in Section 5 of this report endorse and expand this measure.

Even though reporting is mandated, however, the bill's language is similar to the permissive language of the *MSA*, allowing for a wide variety of information to meet the bill's requirements.[198] This broad language weakens the bill from a human rights perspective.

European Union Proposed Rule on Conflict Minerals

The US is not alone in using supply chain disclosure laws to regulate the use of conflict minerals. The EU has been attempting to address the conflict mineral situation since 2011, after the *Dodd-Frank Act* came into effect in the US.[199] Recently the EU has made efforts to combat forced labour in supply chains in response to calls from civil society, business leaders, religious leaders and investors. Indeed, the winner of the EU's Sakharov Prize noted that "a commitment to responsible sourcing must be made mandatory for all businesses that could potentially bring conflict minerals into Europe. If not, the legislation now under discussion risks undermining efforts to clean up global trade."[200] On the other side of the political spectrum, conservative Members of the European Parliament (MEPs) claimed that "implementing such an obligation on supply chains is utopian and impracticable especially for small and medium sized enterprises."[201]

Nevertheless on 20 May 2015, MEPs voted for a law promoting the more transparent and responsible sourcing of minerals,[202] which will hopefully result in a final resolution by the end of 2017.[203] The proposed law will affect over 800,000 European companies,[204] and is broader in scope than section 1502 of the *Dodd-Frank Act* as it would apply to conflict mineral sources in all conflict affected areas.[205] EU companies that use 3TG minerals in consumer products would become obliged to provide information on steps they take to identify and address risks in their supply chain using a system based on the OECD's *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.[206]

The law would also apply to manufacturers and companies that purchase directly from the smelter or refinery.[207] Rather than allowing smelters to self-regulate, a certification program would mandate an independent third-party audit and establish a "European responsible importer" label.[208] Labels would provide a link to consumers highlighting the effects conflicts have on human rights. The European Parliament also requested the creation of a list of responsible importers and smelters, financial support to micro-businesses and medium-sized firms in compliance with the legislation and tougher monitoring schemes.[209] The next steps in implementing this proposed law involve entering into negotiations with EU member states regarding the text, which will need approval from the European Council in order to become law.[210]

European Corporation Disclosure Law[211]

In September 2014, the Council of the EU adopted a directive (EU NFRD) on disclosure of diversity and non-financial corporate social responsibility information, by certain large companies.[212] The Directive entered into force in December 2014 and gave EU Member States a two-year implementation period, time which also allowed corresponding conflict minerals regulation to come into force.[213] The directive mandates that by 2017, companies with more than 500 employees will include in their annual reports a

non-financial statement with information relating to at least, environmental, social and employee matters, as well as respect for human rights, anti-corruption and bribery.[214] Companies must also disclose their policies with regard to such matters; if a company does not have a policy regarding one of these areas (for example, human rights), it must explain the omission. This new directive constitutes a significant step forward from the existing rules on disclosure of non-financial information, as most member states do not have laws mandating disclosure on CSR policies.[215] Although the EU directive is unlikely to make CSR reporting a primary concern for companies or force them to adopt CSR policies, it will likely improve the amount of reporting on CSR initiatives. Unfortunately, the potential for promoting CSR could be limited because of the directive's "comply or explain" approach.[216]

4 APPLYING TRANSPARENCY IN SUPPLY CHAIN LEGISLATION IN CANADA

This section provides an overview of recent federal attempts to regulate human rights accountability, discussing in turn the Cor*porate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act* ("Bill C-300"), the *Conflict Minerals Act* ("Bill C-486") and the *Extractive Sector Transparency Measures Act* (SC 2014, c 39, s 376), as well as some of the jurisdictional questions presented by TSC legislation in Canada.

Recent Federal Attempts at Regulating Human Rights Accountability

The last decade has seen three efforts by Parliament to respond to the governance gap through the creation of federal legislation that sought to regulate the international aspects of Canadian corporations: namely, the failed *Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act* ("Bill C-300"); the *Conflict Minerals Act* ("Bill C-486"); and the successful *Extractive Sector Transparency Measures Act* (SC 2014, c 39, s 376). While two significant measures to regulate corporate activities ultimately failed, multiple attempts at regulating distinct, but related, aspects of corporate governance vis-à-vis human rights abuses indicate an awareness of the need for change at the federal level. The fact that each of the bills originated from the three main federal political parties in Canada (Liberal, New Democratic Party (NDP), and Conservative, respectively) further indicates that while the details surrounding the individual pieces of legislation may be contentious, all major political parties in Canada appear to be on board with the notion that the governance gap can, and perhaps *should,* be filled by national legislation.

In this section, we will briefly delineate the purpose of each prior proposed bill and highlight provisions that are relevant to the implementation of transparency in supply chains legislation. Given their complexity, we will not address why some bills failed and others passed beyond noting that traditionally, right-of-centre parties have not favoured either strict domestic or international corporate regulation as intensely as their counterparts on the left.

Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act (Bill C-300)

Liberal MP John McKay introduced Bill C-300 in the House of Commons in February 2009. At the time, the Conservative Party of Canada dominated the House; consequently Bill C-300 was advanced as a private member's bill, a designation that typically requires the legislation be cost-neutral; however, since 1994, a private Member may introduce a public bill containing provisions requiring the expenditure of public funds "provided that a royal recommendation is obtained by a Minister before the bill is read a third time and passed."[217]

Bill C-300 originated in large part as a response to the outcry generated by the Canadian firm Talisman Energy entering Sudan amidst a festering civil war that resulted in UN citations for "massive and chronic human rights violations."[218] The Talisman affair led to the Roundtable's Advisory Group report that recommended "a wide range of policy instruments, including CSR standards and an accountability mechanism."[219] Bill C-300 can be seen as an attempt to implement the core recommendations of the report following relative inaction by the government of the day.[220]

The purpose of Bill C-300 was to "ensure that corporations engaged in mining, oil or gas activities and receiving support from the Government of Canada act in a manner consistent with international environmental best practices and with Canada's commitments to international human rights standards."[221] The Bill empowered the Minister of Foreign Affairs and the Minister of International Trade to receive and investigate complaints from both Canadian citizens and residents of developing countries where Canadian corporations operate. The complaints were to be made in relation to prescribed ministerial guidelines for which the Bill provides an outline. Violations of these guidelines, as well as exonerations, would be reported publicly in the *Canada Gazette*; the Ministers would also notify Export Development Canada and the Canada Pension Plan, which would be required by law to divest (in terms of finance and assistance) from the corporation in question.

Resistance to this bill was largely composed of industry players opposed to standards that could have been implemented under the guidelines protocol and punitive measures associated with the withdrawal of government support through Export Development Canada and the Canada Pension Plan.[222]

Conflict Minerals Act (Bill C-486)

Bill C-486, Canada's second failed TSA bill, was introduced by NDP Member of Parliament Paul Dewar and targeted the "trade and use of conflict minerals from the Great Lakes Region of Africa."[223] Region-specific and motivated by the civil conflict in the DRC, Bill C-486 was significantly more modest than Bill C-300.

Lacking the financial or supportive teeth of Bill C-300, the *Conflict Minerals Act* required companies to exercise due diligence in relation to designated minerals, i.e. to provide for risk assessment, supply chain controls, and independent audits. None of these specific requirements were described in-depth but were left to the discretion of the companies.

Companies dealing with a designated mineral were to submit a report detailing "measures taken to exercise due diligence" to the Minister of Foreign Affairs, who would publish it on the departmental website. The company must publish the same report on their own corporate site. The details of this process were similar to both the *CTSCA* and section 1502 of the *Dodd-Frank Act.* The company was to publish the results of the independent audit and a description of the company's relationship to the designated mineral, including the use to which the mineral is put, the country of origin and efforts taken to determine the mine or location of origin.

Bill C-486 proposed no incentives or punitive measures, whether statutory or by way of ministerial discretion. Despite this major concession to corporate critics, the *Conflict Minerals* bill received only tepid support from industry. The governing Conservatives opposed the bill from the start, faulting it for its "bureaucratic weight and complexity" in contrast to the soft-law approach elaborated by the OECD.[224] Unlike the more controversial Bill C-300, which came within six votes of satisfying the House at third reading, Bill C-486 failed at second reading.[225]

Extractive Sector Transparency Measures Act

The *Extractive Sector Transparency Measures Act (SC 2014, c 39, s 376) (ESTMA)* came bundled in a Conservative government omnibus bill (C-43) in October 2014. *While ESTMA* is primarily an anti-corruption effort rather than a supply chain management program, it has a number of features that make it worth considering in the supply chain context. Also, unlike Bill C-300 and Bill C-486, *ESTMA* is now part of federal law and as such establishes a baseline for similar acts.

Similar to a TSC regime such as C-486 or the *CTSCA, ESTMA* is based around a duty to report, with an anti-corruption impetus. Notably, the *Act* focuses on payments made to individuals abroad by Canadian corporations and applies to any entity "listed on a stock exchange in Canada" as well as any entity that has either "a place of business in Canada, does business in Canada or has assets in Canada."[226] This exceptionally broad scope (in comparison with the reporting regimes discussed above) appears to disregard any limitations posed by federalism (see discussion below).

Section 9 of the *Act* requires annual reports regarding transactions involving amounts prescribed by regulation for the category of payment, or amounts equaling $100,000 or more. Importantly, the *Act* requires director or officer attestation to the contents of the report, or an independent auditor's certification that the "report is true, accurate and complete."[227]

The *Act* is set apart by its enforcement provisions. The designated minister may compel disclosure and verify compliance through physical search and seizure based on "reasonable grounds."[228] These powers echo those of the new police-style powers of the Gangmaster's & Labour Abuse Authority (GLAA) in the UK (for more on the GLAA, see Section 5).[229] The minister is also granted discretion in dealing with non-compliant entities.[230] Offences and punishment prescribed by the *Act* include fines capped at $250,000, with a measure to provide for discrete offences where the original deed continues for more than one day.[231] The *Act* also establishes liability for directors and officers on behalf of the actions of their agents for mere acquiescence in those actions, unless a due diligence defence can be raised.[232]

In all, *ESTMA* provides for enforceable legislation targeted at a very specific corruption offence. The *Act* indicates that the federal government has the authority to regulate businesses firmly when there is commitment to do so. While the regulation of supply chain transparency is more complicated than transactions committed between corporate actors in Canada and public entities in Canada or abroad, the general principle underling *ESTMA* and our proposed supply chain legislation—encouraging reputable corporate behavior—is essentially the same.

Jurisdiction: Federal Authority vs. Provincial Authority

The Canadian constitution delineates federal and provincial powers through sections 91 and 92 respectively of the Constitution Act, 1867.[233] Among the powers assigned to the federal government are the regulation of trade and commerce (91(2)), as well as a notably broad enumeration of criminal law and procedure (91(27)) and what has come to be known as the POGG (Peace, Order and Good Government power).[234] Any or perhaps all of these powers can give the federal government justification for legislation that seeks to regulate subjects traditionally in the provincial domain. Indeed, although the federal trade and commerce power has historically taken a back seat to provincial regulation of local commercial activity, in recent years, Canadian courts have tended to move away from a sharp distinction between the two and have instead encouraged cooperation between the provinces and federal government.[235]

The same is true of the federal Criminal Law power. For instance, *R v Hydro-Québec* (1997), a case involving a company dumping polychlorinated biphenyls into Quebec's St. Maurice River, established that the *Canadian Environmental Protection Act* constituted criminal law and was valid federal legislation.[236] The Supreme Court of Canada emphasized that under section 91(27), "Parliament has been accorded plenary power to make criminal law in the widest sense."[237] It was thus "entirely within the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard," as long as some "legitimate public purpose … underlie[s] the prohibition."[238] The Court found "[t]he protection of the environment, through prohibitions against toxic substance … a wholly legitimate public objective in the exercise of the criminal law power."[239]

Other cases, such as *R v Nur* (2015, relating to mandatory minimums for firearm offences), further bolster the federal government's ability to establish certain regulatory regimes under the criminal law power.[240] Others, such as *R v. Crown Zellerbach Canada Ltd* (1988), have upheld regulatory regimes under the national concern branch of the POGG clause in the preamble to section 91 of the Constitution Act 1867, in that case upholding the validity of the Ocean Dumping Act and finding all matters related to polluting the ocean within the exclusive jurisdiction of the federal government.[241]

Thus, any challenges presented by Canada's system of federalism with respect to regulating the conduct of Canadian businesses in their global operations can likely be overcome by invoking the federal power over international trade in Section 91(2), criminal law in 91(27) of the Constitution, and/or POGG. Beyond these provisions, the federal government can also take advantage of its authority to bring businesses under federal jurisdiction by declaring them to be "federal undertakings" (ss. 91(29) and 92(10) and the recently broadened scope of the doctrine of federal paramountcy).

5 IMPLEMENTING TRANSPARENCY IN SUPPLY CHAINS

This section builds on the above research and analysis to outline proposed TSC legislation and capture the essential qualities of an effective TSC regime. To this end, we focus on the aspects required to make the legislation successful in correcting behaviour and reducing human rights abuses. The following three subsections build a pyramid of effective and enforceable legislation, beginning with the foundation of a comprehensive disclosure regime. This disclosure regime aims to improve upon the flaws in the existing models (discussed in Section 3) in order to facilitate corporate self-knowledge and to serve as a teaching aid to encourage "best practices" by incorporating mandatory disclosure rules, among other features.

In the second subsection, we move beyond TSC to look at monitoring and oversight. Following on the important work undertaken by the National Roundtables on Corporate Social Responsibility in 2007, we propose the creation of an ombudsperson office in place of the existing CSR Counsellor, with substantial complaint resolution powers, including the ability to solicit abuse complaints from persons the world over and to investigate Canadian complicity in those abuses.

We close by reviewing how to best ensure compliance, noting that existing TSC regimes are weak in this area, both in terms of fostering compliance through persuasion and incentives, and in penalizing non-compliance. We recommend a sliding scale of different measures from tax credits for market leaders in disclosure best practices, to hefty financial penalties for refusing to comply with the legislation or the orders of the ombudsperson office. By adopting a structured approach, our proposed regime responds to various types of Canadian corporate practices and encourages best practices.

Disclosure Mechanisms

Voluntary mechanisms and laws that purport to change corporate behaviour are inadequate on their own. To effectively address human rights issues within global supply chains, both discretional and binding measures are required. Experience indicates that persuasion is more effective when it takes place in the shadow of compulsory sanctions.[242]

Threshold

While legislation can, and perhaps should, require disclosure from all corporations, not all corporations have the means to engage fully in disclosure due to the nature of their operations and the size of their business. Similarly, the potential flood of disclosure reports could prove overwhelming both for regulatory agencies and civil society. For these reasons, most jurisdictions with TSC legislation have included a threshold provision to limit disclosure requirements to larger corporations.

The question then posed is what aspect of a corporation—e.g. size, revenue or profit—should act as the threshold trigger for TSC. While certain metrics may initially be appealing (e.g. the number of total employees), they can also be meaningless given the divergence in business models adopted by contemporary corporations. For example, a retail clothing business may only employ a few North

American workers while employing thousands under forced labour conditions in the developing world through the use of a series of subsidiary corporations or suppliers.

At the same time, it is important to recall that industries are unique and some businesses, for example those in the retail sector, may be well suited to the use of threshold determinations such as goods turnover. For industries such as the extractive sector, other methods of determining threshold may be more appropriate. Junior mining companies may be thinly capitalized with little turnover or profits, yet engaged in large-scale exploratory mining operations where human rights abuses have been reported.

The *MSA* and the *CTSCA* use the concepts of turnover and gross receipts, respectively, to determine threshold. They target big business, multinationals and those companies with the capacity to implement the legislation – thus, the threshold levels are quite high. "Turnover" under the *MSA* regime is defined as the amount derived from the provision of goods and services falling within the ordinary activities of the organization.[243] The *MSA* captures a commercial organization if, according to section 54(2), it (a) supplies goods and services, and (b) has a total turnover of not less than an amount prescribed by regulations made by the Secretary of State. Section 54(3) states that for the purposes of subsection 2(b) an organization's total turnover is to be determined in accordance with regulations made by the Secretary of State. Although regulations have not been issued, statutory guidelines published by the UK Home Secretary set that amount at 36 million GBP, after extensive consultations, discussed further below.

In the US, the *CTSCA* does not apply to a retail seller or manufacturer with less than 100 million USD in annual worldwide gross receipts. It is unclear how the threshold level was determined in California, although it is likely a reflection of California's economy, the sixth largest in the world. The terms retail seller, manufacturer and receipts are defined in the *CTSCA* to have the same meaning as those in the Revenue and Tax Code. The relative success of the *CTSCA* and the *MSA* suggests that similar thresholds or processes for determining the threshold amount should be adopted in Canada.

The nature of Canada's economy and its unique reliance on extractive industries in the natural resource sector suggest that consultations with stakeholders to determine the appropriate threshold would be prudent. To reduce uncertainty, however, particularly while waiting for either regulations or guidelines to be adopted, an initial threshold should be set. We suggest a threshold turnover of 35 million CAD. This takes into consideration lessons learned from the UK Consultation process, which canvassed the opinions of Parliamentarians, businesses, CSOs and other interested parties. [244] The UK's 36 million GBP threshold was chosen as businesses with this turnover level were more likely to have the necessary resources with which to conduct supply chain due diligence. Consultation participants also expressed the view that opting into the reporting requirements should be an option for smaller and medium-sized businesses that wished to participate in the legislative scheme. As an added benefit, data from the process could then be used to inform future considerations regarding the threshold limit.[245]

Interestingly, a number of participants in the UK felt that the threshold should be lowered over time to decrease the likelihood of slavery further down the supply chain and positively contribute to providing consumers with information regarding their efforts to tackle modern slavery.[246] A 35 million CAD threshold thus pre-emptively captures some "smaller" companies, potentially establishing an early

threshold benchmark from which to measure the effectiveness of disclosure. At the same time, this threshold allows the proposed legislation to primarily target multinational companies.

Because of the issues inherent and unique to the industry, we suggest a blanket application of the TSC disclosure regime to all extractive companies. Lastly, in order to truly capture the dynamic nature of supply chains and the myriad industry players involved in transnational operations, we emphasize the need for regulations and guidelines that can be updated periodically.

Disclosure Regime

Disclosure involves providing information on the level of due diligence that companies undertake in order to minimize human rights violations through self-monitoring. Disclosure laws "operate under the assumption that transparency will lead to accountability."[247] They encourage corporations to investigate and police themselves for human rights risks and impacts, and have the potential to both change corporate behaviour and to facilitate or improve the efficacy of other mechanisms for holding corporations accountable."[248] Disclosure also allows information about corporate conduct to reach the public and third parties, including CSOs and other stakeholders, who can challenge and pressure corporations to modify their behaviour[249] through "shareholder resolutions, CSO campaigns, complaints in non-judicial compliance mechanisms like the OECD National Contact Points or even through private litigation."[250] Disclosure laws, in this sense, are facilitative rather than directly coercive, and have been the focus of legislation in the US, the UK and Europe.

Despite these advantages, many commentators believe that private regimes, such as audits (discussed below), and CSR initiatives can be more effective than their public counterparts in a world where "globalization has significantly diminished the authority of states to regulate MNCs."[251] TSC disclosure falls somewhere in between the public and private realm, insomuch as interested parties may access some relevant information but its release is controlled and may be circumscribed (or potentially even altered) by the corporation.

Template Disclosure

Rather than follow in the footsteps of existing regimes, we suggest a hybrid form of disclosure that builds on California's *CTSCA*, the UK's *Modern Slavery Act* and the US *Dodd-Frank Act*. Instead of issuing model disclosures, the Canadian Government should design and test a uniform template that companies would be required to use.[252] As suggested in Appendix A, questions could be designed based on the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, which provides extensive guidance to companies. The template's questions should, at a minimum, canvas the same topics as those set out by the disclosure regimes in the *CTSCA* and *MSA*.

The *CTSCA* requires reporting on verification, audits, certification, internal accountability and training with respect to a company's supply chain, while the *MSA* only requires a slavery and human trafficking statement stating the steps the organization has taken during the financial year to ensure there is no slavery or human trafficking in its supply chain or business.

The MSA allows for a broad range of information to fulfill the reporting requirement, including information about:

(a) the organization's structure, its business and its supply chains;

(b) its policies in relation to slavery and human trafficking;

(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

(e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;

(f) the slavery and human trafficking training available to its staff.[253]

To avoid wide-ranging disclosure, which is difficult to compare, we recommend a uniform template that can be informed by both extractive industry disclosure templates and securities disclosure laws, such as section 1502, which requires reporting by publicly traded companies that manufacture products using certain conflict minerals. Rather than copy this complex due diligence scheme, government-mandated disclosure should provide for simple, short, or yes/no answers with an option to elaborate; disclosure would not be onerous and expense and inconvenience would be minimal. As already noted, the legislation should provide the Minister with the option to issue regulations and guidelines allowing questions to change and develop over time. Another option would be to allow regulations to be updated on a specific basis based on input from the office of the ombudsperson (discussed in the next section).

Questions could include:

- Do you have an independent grievance procedure? If yes, how many times was it used this year?
- Do you conduct unannounced visits on labour suppliers? If yes, how many surprise visits were conducted this year?
- Do you ensure that workers are not indentured to their supplier?
- Do you use labour recruiters?
- Do you have enforceable measures in place to correct for abuses?
- Have you corrected for abuses in the past year? If yes, provide a brief description of these efforts.

Given that "a key factor for determining success is how disclosures are designed and executed,"[254] our disclosure template seeks to avoid the problems identified in the UK and California disclosure laws, with a longer form to allow for detailed questions, to help identify market leaders and laggards. Additionally, our disclosure law will use answers provided to questions as a basis for a "TSC report." Disclosure in the form of short answers will further help to avoid the mismanagement of information.[255] For those companies that are identified as market leaders, a system of incentives can be made available (discussed below).

We also recommend adding a provision similar to the mandatory element of the *MSA* requiring that a slavery and human trafficking disclosure report be approved by the board of directors and signed by a director if the organization is a body corporate.[256] This requirement has the potential of making directors liable, morally and or/legally, for the content of disclosure reports.

In order to increase the likelihood that supply chain disclosure will improve human rights outcomes, we consider mechanisms in the next section to provide additional means by which disclosed information can be effectively used in the public sphere. We recommend incorporating a provision in the TSC legislation that extinguishes *forum non conveniens* arguments often raised by corporations seeking to defend themselves, their subsidiaries or affiliates (e.g. security operations) operating in foreign jurisdictions against lawsuits. Disclosure could provide a springboard from which litigants could file suits against corporate actors for failing to disclose, while adding a provision for a civil suit would clearly bar a *forum non conveniens* argument. However, opening up the possibility of litigation is merely one legislative tool and is not sufficient on its own to enforce corporate compliance with international human rights standards.[257]

Frequency

We recommend adding a yearly reporting requirement as an additional voluntary measure to complement the mandated disclosure form, drawing from those required by the *MSA* and Bill H.R.3226.[258] Annual reporting encourages companies to build on their progress year by year and to change their practices appropriately.

Audits

Before turning in more depth to compulsory mechanisms, we will briefly consider audits. Audits are a prominent component of CSR and disclosure initiatives, and have been promoted as efficient and effective strategies to promote change and monitor corporate behaviour. The *CTSCA* requires disclosure that stipulates to what extent the retail seller or manufacturer "conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains," further requiring that the disclosure "specify if the verification was not an independent, unannounced audit."[259] By contrast, the *MSA* does not directly refer to an auditing reporting requirement but does allow slavery and human trafficking statements to include information about due diligence processes and steps taken to assess and manage risk.

In practice, audits are fraught with problems.

In practice, audits are fraught with problems. Because they fall into the category of soft norms and private self-regulation, audits have been seen to produce "standardized metrics, measurements, and rankings that create the appearance of independent supply chain monitoring; yet, the information produced through and derived from audits is partial, highly political, and fundamentally shaped by the retail audit client."[260]

One major problem with audits is that information is typically shared with either the corporate client or the supplier of the audit but is rarely made available to the government or public.[261] Most audit firms also have no investigative powers and so have limited capacity to verify information presented to them, whether about safety conditions, labour contracts or environmental standards.[262] Research suggests that audits are a) a weak tool for detecting non-compliance with corporate codes of conduct; b) a means of fostering a 'checklist' compliance approach to audits amongst suppliers; and c) are ineffective at improving standards.[263] Scholars argue that the power and profitability of corporate firms is deepened by audit regimes, which vary in effectiveness based on how they are designed and practiced.[264]

There are limited means by which the efficacy of audits can be strengthened. Strategic scheduling of audits of a supply chain can improve results; the time of year, frequency of audits, and an announced versus surprise audit will affect what is revealed or not.[265] Companies' choice to contract out to an independent auditor or use an internal audit team can also impact audit results.[266] Standards and certification schemes have proliferated, with CSOs attempting to use benchmarking and auditing practices to strengthen corporate accountability. Unfortunately, some CSO involvement with corporate audits has only served to legitimize unsustainable patterns of global production[267] by helping "to codify and neutralize corporations' poor social and environmental records," and, in so doing, undermine the role of states in global corporate governance.[268] Nevertheless, civil society remains important to improving monitoring mechanisms and reporting requirements. Known for its experience with supply chains and audit regimes, the CSO Verité, while recognizing that audits are a contested arena, argues for working to maximize any potential they have to reveal information about a supply chain. For instance, one could institute a requirement in transparency disclosure laws to compel companies to discuss or explain how their auditing system complements compliance efforts of local government.[269]

Thus, while audits serve to conceal endemic problems and maintain unequal power relationships, they still have the potential to shine light on human rights abuses that exist within supply chains. We suggest requiring disclosure about whether a company undertakes audits, but we do not recommend a provision mandating that audits be conducted.

Government Monitoring & Oversight Mechanisms

The previous section dealt primarily with discretional activities that corporations could undertake in the hopes of indirectly minimizing human rights abuses that occur within transnational supply chains. The next two sections propose a more active role for government in monitoring and investigating problems that arise in overseas supply chains to reduce the risk of human rights abuses.[270]

TSC Disclosure: A Database, No Labels, and Published Compliance Lists

One of the most cost-effective and least intrusive actions government can take is to create a centralized database of TSC reports and audits mandated by legislation. By providing a single, central location for information about supply chains, consumers, CSOs and other interested parties are guaranteed access to disclosure information. This would be a vast improvement over *CTSCA* and *MSA* provisions, which permit corporations to self-publish their reports on their own website, if they have one, and to otherwise provide a written copy upon request.[271] Bill C-486 required that certain companies submit their reports to the Ministry of Foreign Affairs, where it would be published on the departmental website, a step forward for transparency.[272] A centralized, government-administered database would remedy the problem of needing to request reports or find reports buried deep in a corporation website. In addition to improving access to information, we recommend this measure as a way to allow interested parties the opportunity to analyze, and, more importantly, compare and contrast disclosure statements with ease.

Labelling systems that award grades to corporations that they must display at point of sale are another potential transparency mechanism. By condensing the report into a simple, easy-to-understand rating and presenting it to consumers at their point of contact with businesses, the goal of transparency, and, relatedly, intelligibility, is most fully achieved.[273]

However, establishing a labelling system is tricky, given that TSC legislation targets reporting itself. A labelling system would thus not reflect the presence or absence of human rights abuses but rather the compliance or non-compliance of the reporting parent corporation with the proposed disclosure regime. Furthermore, human rights disclosures include information that is difficult to interpret for the average consumer, who may intuitively expect a positive, compliant label to indicate a supply chain free from abuses. This confusion could quickly escalate if a corporation achieved full compliance, and hence a positive label, through a detailed listing of abuses it uncovered. Moreover, if the goal of TSC is to promote transparency as a vehicle for reform, a labelling system that rewards clean supply chains may encourage corporations to under-report problems in exchange for a better rating. Finally, a labeling system seems particularly well-suited for corporations involved in the production of retail goods versus suppliers or service-based industries, which may not have the same contact with the public and thus be at a disadvantage.

Instead of labelling, the government can publish a list of all Canadian corporations that fall under the reporting requirements of the legislation. This list would ensure that companies feel pressured to

comply with the disclosure requirements by increasing transparency and allowing public engagement. There could also be a list of minimally-compliant companies. While falling short of Brazil's "dirty list" (i.e. companies that use forced labour), a list of minimally-compliant companies managed by the federal government could assist in encouraging compliance without the use of directly coercive means. Finally, the use of published lists would also expose those companies that refused to comply with the legislation and allow government to procure services only from complaint companies. Non-compliant companies would also be vulnerable to sanctions and/or compliance orders (discussed in Section 5) for breaking the law, a policy that is in line with TSC regimes in California and the UK.

Independent and Empowered Agency

An effective way to play a larger role in soliciting complaints and investigating rights would be the creation of an independent and empowered agency to monitor human rights abuses abroad and oversee the implementation of TSC procedures and CSR policies in parent corporations at home. Such an agency would be in line with the UN Human Rights Committee recommendations that Canada "consider establishing an independent mechanism with powers to investigate human rights abuses by [mining] corporations abroad" and "develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad."[274]

The National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries likewise recommended in their 2007 Advisory Group Report (AGR) that the federal government establish an independent ombudsperson and a tripartite compliance review committee.[275] Though the National Roundtables and the Advisory Group were composed of members from industry and civil society and the report itself was a product of consensus, many of the stronger regulatory measures, including the ombudsperson and committee, were ignored by the prior government.[276]

The Advisory Group recommendations, which propose an ombudsperson for the extractive sector, are informative and sufficiently general to be of use to other sectors as well. First, the AGR noted Canada's lack of an oversight agency with monitoring and enforcement powers in favor of a) an OECD "National Contact Point" (NCP), and b) one Compliance Officer for Export Development Canada (EDC).

The OECD National Contact Point is confined to the tools provided by the OECD Guidelines for Multinational Enterprises. While this makes for cohesion at least amongst OECD nations, it does not reflect a Canadian approach or effectively address the scale of the issue in Canada. Moreover, given the OECD's status, its powers are necessarily circumscribed in a way that a government-empowered agency need not be. The NCP is premised on private CSR and is ultimately limited, as discussed in the next section.

Export Development Canada is an industry-friendly body designed to foster Canadian economic growth abroad.[277] Insofar as EDC claims to "let the private sector player set the terms,"[278] it would be a conflict of purpose, if not of interest, to locate an oversight agency within the EDC. Moreover, the EDC is, as the name implies, export-focused, while the problem of supply chains is, for the most part, import-focused. While there are compatibilities between supply chains emanating from Canada and those terminating

here, the EDC is ultimately not the right fit to oversee and monitor complaints related to human rights abuses for imported products. Finally, as the AGR noted, the EDC "only reaches a small percentage of extractive projects and does not have the necessary independence to serve an [ombudsperson] role."[279] If the EDC cannot sufficiently fulfill the task for the extractive sector, it will certainly be incapable of doing so on the wider scale of Canadian industry writ-large.

Since the findings in the 2007 report, the government of Canada has created and expanded the Centre for Excellence in CSR ("the Centre"). The Centre is the most logical place to house an oversight and monitoring agency, which would reconnect the Centre, an innovation of the federal government that grew out of the 2007 AGR, with the full vision established by the Advisory Group. Although the government created the Centre, it declined to implement many of the core components of the 2007 report that would have given it real reach in terms of oversight and compliance. This structural ambivalence is recorded on the Centre's own website:

> In March 2009, the Government of Canada announced its action plan on CSR, Building the Canadian Advantage, which featured 4 points, including supporting the creation of the Centre for Excellence in CSR, and setting up the Office of the Extractive Sector CSR Counsellor.
>
> In October 2009, the Government of Canada appointed its first-ever corporate social responsibility counsellor, Marketa Evans. Some saw this decision as a giant step forward towards social and environmental improvement, while others were disappointed, feeling the counsellor's role would not extend far enough to enact notable change.[280]

The federal government has continued to foster its "soft touch" approach to CSR, doubling down on this strategy with the release of its 2014 document, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad."[281] Ultimately, however, no new powers have been assigned to the Centre or its CSR Counsellor:

> The CSR Counsellor does not have any significant powers. She can only act when there has been a complaint; a process can be instituted only with the agreement of the corporation; it cannot offer determinations as to whether harm has occurred; it cannot investigate the complaints; and it cannot issue binding recommendations on the corporations.[282]

Indeed, the "Strategy to Advance Corporate Social Responsibility" ultimately urges that actual disputes be resolved through the OECD National Contact Point office. While the strategy does promise enforcement for corporations that refuse to engage in dispute resolution, this takes the sole form of withdrawal of government support – an arbitrary penalty given that corporations rely to differing degrees on government support. Given that neither the CSR Counsellor nor the NCP have actual compliance powers in terms of outcome, there is ultimately no risk to corporations in the event they are

found to be complicit in grave abuses. As we discuss in the case of Afrimex,[283] the type of enforcement offered through the NCP is undesirable if serious reforms are intended.

Perhaps more significantly, without the tools to permit the active investigation of complaints against corporations, there is little likelihood that rights grievances or elements of non-compliance will be reported. Moreover, as with the EDC, there is inherent tension in the Counsellor's dual mandate to provide advice and guidance *and* to review CSR practices of Canadian extractive sector corporations.[284]

Section 2.4 of the Advisory Group Report on "Compliance" outlines a range of possible functions for the ombudsperson. They include fact-finding, mediation, reporting, and sanctions.[285] The elements of fact-finding and mediation are underscored as being especially useful to the role as they would distinguish the ombudsperson from existing institutions including the NCP.[286] According to the AGR, "the ombudsman model discussed in the recommendation was *the best way to advance CSR compliance* in the extractive sector"[287] (emphasis added).

The office of the ombudsperson as envisioned in the AGR would be a funded, independent, agency that would screen complaints, investigate at its discretion, and publish the results of its investigations. The ombudsperson would then deliver the complaint process to a compliance committee for adjudication, thereby distinguishing the quasi-judicial aspects of the procedure from the investigatory. This approach would help fortify the view that the ombudsperson is independent.

The investigatory aspect of the ombudsperson could also be strengthened by adopting powers given to the executive branch under *ESTMA*. Sections 14 and 16 of *ESTMA* empower designated persons to verify compliance by compelling information from corporations under review. These powers that are currently in the service of preventing or catching corruption in transnational operations would be equally useful in targeting human rights abuses. By giving the ombudsperson real powers to investigate, compel additional disclosure, and, if necessary, forcibly search and seize evidence, incentives to conceal or abet abusive practices would diminish significantly.

The strongly-worded recommendation of the AGR—itself the product of a series of roundtables involving industry, civil society, organized labour, academia, and the financial sector[288]—on the position of an independent ombudsperson office should be heeded. Following the establishment of CSR legislation, an empowered oversight and monitoring office capable of investigating complaints, even absent broad compliance powers, would facilitate the greatest amount of transparency in an area that is otherwise impenetrable for Canadian civil society and industry alike.

The office of the ombudsperson would be a funded, independent, agency that would screen complaints, investigate at its discretion, and publish the results of its investigations.

Licensing and Regulation

Building on the model of the ombudsperson defined in the AGR, the Canadian government could take further steps in empowering oversight of transnational supply chains by embracing licensing regulation similar to the Gangmasters Licensing Authority (GLA) model that has operated effectively in the UK. The GLA, now known as the Gangmasters and Labour Abuse Authority (GLAA),[289] is based on the premise that many human rights abuses occur through the recruitment of labour to supply the ebb and flow of production in the era of post-industrial capitalism. By licensing labour recruiters, the state directly targets the locus of human rights abuses, while providing for education, training, monitoring and enforcement of labour codes in relation to a transient labour supply.

The UK GLA was created in response to the deaths of 23 migrant shellfish workers due to the negligence of a UK "gangmaster" who was in charge of supplying temporary labour.[290] The GLA has since attempted to regulate the labour trade in industries prone to exploitation. According to Oxfam, where the GLA has been mandated to operate, labour abuses have diminished; conversely, abuses have grown in areas where the GLA is restricted from operating.[291] In addition,

> [t]he GLA has *substantially raised standards through licensing*, with advice and support agencies reporting considerably fewer cases of exploitation. Seventy per cent of gangmasters who went through the licensing process had to improve their practices as part of getting the licence[292] (emphasis added).

The UK Immigration Act 2016 provided wider policing powers for the investigation of broader labour market offences under the GLA.[293] While the GLA solution to the problem of exploitative and forced labour is praiseworthy, its application to the problem of transnational supply chains is far from obvious. In terms of jurisdiction, a Canadian regulatory agency would assumedly be unable to conduct pop-up inspections in Brazil or Bangladesh. However, in Canada's case, with most labour abuses occurring extraterritorially, there is little to be gained by having an agency with such broad regulatory powers confined domestically.

Licensing home companies that source products from areas vulnerable to human rights abuses does not present itself as an immediately effective method of control. It would likely be prohibitively expensive to translate the GLA model to all sectors of the Canadian economy that rely on imports. Even if a licensing

authority was confined to imports from certain zones (e.g. conflict minerals), it is not readily apparent that the GLA model would best serve the purpose of investigating and enforcing standards.

A licensing model, akin to the GLA, is not well-suited to the task of rooting out abuses in Canadian supply chains. The web of competing national jurisdictions and the financial limitations of the federal government inherently thwart such a model. Furthermore, without access to the actual exploitative intermediaries (i.e. the "Gangmasters") or recruitment agencies that the GLA can directly target, it is unlikely that a licensing agency could prove effective at combatting transnational human rights or labour abuses.

Persuasive Compliance Mechanisms

In order to effectively address human rights abuses within TSCs, Canada's approach must incorporate compliance mechanisms, as well as persuasive and compulsory measures such as the abovementioned disclosure regime.

This section discusses several such measures, and recommends creating incentives for corporations to investigate their supply chains, to provide truthful disclosure, and most importantly, to take steps to correct any abuses that exist within their supply chains.[294] The Canadian government should adopt compulsory measures for situations where corporations fail to comply with disclosure and transparency requirements or are found to have knowingly lied or negligently misrepresented information in their responses. The government could also enact persuasive measures to reward corporations who have emerged as leaders in responsible behaviour, withhold support from those who do not engage in "best practices," and penalize those who refuse to comply with disclosure rules and/or instructions from the ombudsman office.

Rewarding CSR leaders serves to both validate the efforts undertaken by corporations and to encourage CSR laggards to comply with TSC legislation. To this end, we recommend that corporations that adopt "best practices," as determined by their disclosure report, be rewarded. Incentives already exist for corporations to emerge as market leaders: they reduce their legal liability, improve public relations, and increase the stability and security of their supply chains. Building off the potential to create lists of companies based on their disclosure reports discussed earlier, we recommend that the government single out corporations who have met the best practices standard as "market leaders."

We also recommend persuasive measures to create additional financial incentives for market leaders, thus encouraging corporations to expend resources to implement procedures that protect against abuses within their supply chains. The government should exercise its authority to determine the distribution of privileges and benefits that are available to corporate citizens, including tax credits and federal procurement tenders, and also withdraw EDC support and force non-compliant companies to divest from the Canadian Pension Plan.

By withholding financial and diplomatic support beyond basic consular services for corporations who fail to comply with our disclosure regime, the government can send a strong message that it will not tolerate non-compliance.

Bill C-300 envisioned conferring upon the ministry the power to receive written complaints from both nationals and non-nationals in respect of violations of prescribed guidelines issued by the government. Where the ministry had reason to believe that a company had violated one of the guidelines, along with publishing this finding, the EDC and the Canadian Pension Plan (CPP) would be notified. The EDC and CPP would then be required to withdraw support for that company, and Canadian embassies and trade commissions would also be required to withdraw support beyond "ordinary consular services."[295]

By withholding financial and diplomatic support for corporations who fail to comply with a disclosure regime, the government can send a strong message that it will not tolerate non-compliance.

Designing TSC Incentives

A set of general rules has been proposed that is both "prospective in so far as it conditions future access to support, and retrospective in so far as it permits the retraction of existing support."[296] These general rules are useful guidance for drafting legislation aimed at controlling corporate behaviour, and avoiding the possibility of the Canadian government directly or indirectly supporting companies with labour trafficking in their supply chains.

The most fundamental of these general rules is that the "government shall not support, subsidize, promote, or protect projects in weak governance zones of a corporate citizen, or its affiliates or other business entities, who are controlled directly or indirectly by such corporate citizens"[297] where:

1. It is determined that the corporate citizen has not demonstrated due diligence in preventing a future risk, significant risk or severe harm.

2. It is determined that the corporate citizen, or its subsidiary or affiliate did commit, is causing or has been complicit in the commission of severe harm to people.

3. It is determined that the corporate citizen, or its subsidiary or affiliate, is in a material, contractual or other relationship with a third party that perpetuates severe harm in the course of the third party's business undertaking; and where it is determined that the corporate citizen knew or ought to have known that the third party would or did cause serious harms. The third party may include the host government and any public or private security force.[298]

The government should be empowered to withdraw some or all existing support, subsidy, promotion or protection of projects and corporations in the situations outlined above.

Ideally, the Canadian government should create a TSC disclosure regime based on these general rules, which require corporate citizens to be publicly accountable for the benefits they receive through public funds and direct or indirect political support. Regardless of the details of the resulting TSC disclosure regime, compliance should be tied to incentives such as:

- tax credits
- diplomatic support through trade promotion and consular support
- federal government procurements
- investment by state pension funds
- loan guarantees
- export credit insurance
- project financing

We turn now to discuss the first four of these incentives.

Tax Credits

The government can offer tax credits to corporations who evince "best practices" – i.e. the top tier of companies whose disclosure reports indicate substantial implementation of practices and procedures that work to minimize human rights abuses.

As it is purely prospective and does not have any inherent negative impact on corporations that do not want to change their behaviour, this financial incentive would likely face little pushback from corporations. The *Advisory Group Report* likewise urges the government to "establish a scheme within the *Income Tax* Act that provides refundable tax credits for CSR reporting using GRI [Global Report Initiative] Guidelines or their equivalent."[299] By rewarding best practices, TSC legislation can encourage and incentivize companies to take steps to correct problems and deficiencies within their supply chain. Moreover, by incentivizing "market leaders" rather than simply penalizing laggards, companies are encouraged to be honest about existing problems in their supply chains.

Diplomatic Support

The government already provides corporate citizens with diplomatic benefits through trade promotion and consular support services. Access to those benefits could be contingent on a corporate citizen's participation in the CSR regime. The *Advisory Group Report* recommends that the government and

industry associations develop guidance and tools, and support capacity building (e.g. human rights assessments) to assist companies in community engagement and human rights. Specifically, they recommend that the government sponsor workshops, conferences and other forums to enhance the CSR capacity of Canadian companies operating overseas.[300] Focusing on how diplomatic support is doled out would address previous criticisms that the Canadian government has faced in this regard. For example, the Canadian Embassy's support of Blackfire Exploration's conflict-ridden barite mine in Chiapas, Mexico was particularly controversial.[301]

In order to dispel the impression that "Canadian Embassies have regularly gone to bat to protect the interests of Canadian mining companies in cases where communities do not want them and where there have been egregious human rights and environmental abuses,"[302] Canada needs to address past incidents and train and equip its diplomatic missions to become leaders in human rights.[303] Information tools and targeted education programmes could be offered through Global Affairs Canada. Access to these tools and programmes could be made contingent on a company's participation in the CSR regime, creating an incentive for companies that want to adopt good corporate social behaviour and exercise better diligence within their supply chains.

"Canadian Embassies have regularly gone to bat to protect the interests of Canadian mining companies in cases where communities do not want them and where there have been egregious human rights and environmental abuses."

The development of these tools and programmes will also help to supplement governance capacity on the part of the host country. All of these steps will help to improve Canada's public image and promote Canada as a leader in responsible and ethical transnational business.

Federal Procurements

Socially Responsible Investment (SRI) has developed as a means by which investors can exercise their market preferences to influence corporate behaviour.[304] The government of Canada can set an example in this area by adopting SRI principles for its federal procurements by Public Works and Government Services Canada (PWGSC).[305] The government could require companies that want to bid for federal contracts to comply with disclosure requirements, at a minimum, and could even require companies to show progress in correcting any identified labour problems within their supply chains. This approach allows the government to become an active participant in corporate norm setting through its control of public capital. Given the ability to directly impact profits, corporations would have a vested interest in compliance.

Canada Pension Plan

Similarly, by making non-compliance with the TSC grounds for divestment, the Canada Pension Plan (CPP) can also support socially responsible investment principles and improve corporate behaviour.[306] In the case of pensions, whose management is usually outsourced to private trustees, the government could adopt the Roundtable's recommendation and change trustee rules to allow for the consideration of the social impact of a corporation along with its profitability and dependable earnings.[307] In the United Kingdom, for example, "pension funds must by law disclose the extent to which any social, environmental, or ethical considerations are taken into account in the selection and retention of investments."[308]

The perpetuation of labour and human rights abuses within a transnational supply chain can be better addressed when the project capital comes from public funds, as in the case of the CPP; the government's ability to restrict eligibility to compliance companies creates a financial incentive for corporations to take steps to know their supply chains. Ultimately though, government spending can only be one lever—albeit a significant one—in the system. Other mechanisms must be employed in order to affect real change in corporate behaviour.

Compulsory Compliance Mechanisms

The type of regulatory legislation proposed limits the choice of punitive compliance mechanisms. For example, a regulatory form that mimics the US's *Dodd-Frank* provisions would fall under securities law and thus delist a company from a stock exchange as the ultimate penalty. This threat was thought to have encouraged Talisman Energy to divest from Sudan.[309] However, given the federalism discussion in Section 4, it seems more likely that Canadian legislation will be related to import/export regulation and/or the criminal law power. Each of these is discussed below. This report ultimately recommends that forthcoming legislation embrace an enforceable, multi-step regulatory approach that involves both regulatory and criminal prohibitions. This will provide the federal government (or an independent agency) with a wide range of tools to effectively deal with compliance.

Criminal Compliance Mechanisms[310]

Criminal law is a natural place to draw support for compliance mechanisms. Legislation that mimics the structure of the recent *Extractive Sector Transparency Measures Act*, which provides for both the extension of corporate liability and fines, could provide the way forward. While fines of up to $250,000 may be too excessive for a TSC regime, the structure of imposing penalties for non-compliance and false or misleading statements proves a useful model. Barriers to applying criminal sanctions in overseas rights violations include the difficulty of establishing guilt beyond a reasonable doubt for criminal acts occurring overseas, sometimes in conflict zones – as well as the unwillingness of government to criminally prosecute powerful multinationals and economic producers.[311] There is, nonetheless, "a role for direct state coercion in the form of criminal liability and sanctions" which resides "at the apex of our regulatory pyramid,"[312] even if such methods are seldom used.

The federal government could develop a series of strict liability offences for egregious acts of non-compliance. Strict liability offences have a due diligence defence in which the accused can claim that his/her conduct was that of a reasonable person in the same situation. A charge under a strict liability offence would require a corporation to demonstrate the steps it took to *know* about problems and hence avoid a particular offence. Such proceedings could incentivize companies to institute steps designed to prevent non-compliance and human rights violations in order to avail themselves of the defence.

The offences punishable by fine under the *ESTMA* include:

- failure to keep accurate records (s 13)
- failure to hand over records to the ministry or to otherwise make them public in compliance with the regulations (s 12), and
- failure to disclose the relevant information in its annual report (s 9).[313]

These provisions are classic transparency mechanisms that can and should be built into future TSC legislation. The threat of criminal sanction for non-compliance will provide a sufficient deterrent for actors while allowing necessary leeway through the due diligence defence.

TSC legislation would benefit the most from criminal penalties (fines) for general non-compliance and for failure to hand over records. The threat of a fine in the face of the minor inconvenience of satisfying the disclosure requirements of the legislation should motivate all but the most stubborn corporate actors to comply. This would ensure that, in practice, the criminal power of the legislation is rarely triggered. There would, however, need to be an investigatory agency (discussed above) to exercise these coercive powers, including the powers of compulsion, search and seizure, and the ability to try and convict offending corporations in order to denounce, deter, and rehabilitate rights-violating corporate behaviour.

Regulatory Compliance Mechanisms

Criminal law can provide only part of the solution. As the *Re Assisted Human Reproduction Act* (2010) case demonstrates, Parliament is entitled to pass legislation that is simultaneously criminal and regulatory, so long as the various provisions fall clearly into either camp. In addition to the criminal measures, binding regulatory provisions should be included in the TSC law. These provisions can open the door to civil claims for non-compliance by both the government and interested third parties, as has been the case in California under the *CTSCA.*[314]

Both the *CTSCA* and the *MSA*[315] include provisions that allow the designated ministry to file a civil suit to compel or enjoin a recalcitrant corporation to comply with the provisions of the respective acts. At present, no such actions have been taken by the state of California or the UK Home Office. While this may not be surprising in the case of the UK *Act,* which is fairly new, the *CTSCA* is over five years old, and

recent empirical studies indicate that full compliance with its disclosure provisions is at only 52%.[316] Still, even absent government enforcement, the inclusion of these provisions within the California and UK acts provides government with an important tool to compel compliance without resort to criminal prohibitions, if and when desired.

Statutory Right of Action

The emergence of non-governmental civil suits against corporate actors for failing to comply with TSC legislation is a relatively recent phenomenon. While these suits were likely not intended by the structure of the California TSC Act—which provides no explicit mechanism for third parties—civil society has attempted to use the Act's provisions to hold companies accountable for human rights abuses discovered, and not revealed, in corporate disclosures (see Section 3 above). While the plaintiffs have had little luck in convincing the courts, this unexpected avenue of enforcement suggests that a cost-effective method of encouraging compliance might be to explicitly allow for such suits to proceed in Canada. This can be done simply by adding a civil claim provision such as s 36(1) of Canada's *Competition Act*.[317] The structure of s 36(1) of the *Competition Act* requires, first, that a person has "suffered loss or damage," which ensures that frivolous suits cannot proceed. The rest of the provision creates a statutory cause of action based on any conduct contrary to the Act.

Parent Company Liability

Another economical addition to proposed TSC legislation is to enable the persons affected by human rights abuses in host countries to conveniently sue for damages in Canada. Historically, the doctrine of *forum non conveniens* has been used to effectively forestall civil actions against parent companies in Canada (see Section 2 above). Given the difficulties in accessing justice in weak governance zones and the operation of host-nation subsidiaries with little or no capitalization, many victims of abuse are precluded from due process and the ability to receive damages commensurate with their loss. The government should enable potential victims from other countries to sue parent companies for damages by statutorily eliminating the *forum non conveniens* defence, or conversely, by affirming the liability of parent corporations in Canada for the actions of their foreign subsidiaries. Changes such as these would be a substantial step towards implementing true CSR.[318]

Compliance Mechanisms at the Discretion of the Ombudsperson

The proposed ombudsperson should have certain compliance powers enabling their office to handle grievances in an efficient and effective capacity. In the 2007 *Advisory Group Report*, complaints processed by the proposed ombudsperson were to be handed over to a tripartite committee for final decision. This committee had the power to make recommendations on measures to address grievances, including withdrawing financial services and federal government support from offending companies.[319] It is reasonable and desirable for the proposed ombudsperson to have broader powers than those depicted in the 2007 report. Most obviously, the creation of an ombudsperson (with or without a compliance review committee) would permit a delegation of duties normally ascribed to the ministry.

Over and above its investigatory duties, the ombudsperson could be granted powers to make orders and enjoin compliance in relation to corporate activities found to cause human rights abuses abroad. A separate tripartite committee could handle additional enforcement tasks, as per the *Advisory Group Report*, for further effectiveness.

RECOMMENDATIONS

The Canadian federal government should adopt a compulsory framework of rewards and penalties to ensure compliance with supply chain disclosure laws. In particular, **we recommend that Canada**:

1) **Adopt mandatory supply chain disclosure legislation** that requires all extractive industries and companies over an initial threshold of 35 million CAD (measured by annual turnover) to:

   - Disclose certified information on corporate supply chains;
   - Answer and certify a government-issued questionnaire on an annual basis;
   - Include Director/Partner/Member sign-off on disclosures (rather than external auditors);

2) **Collect and maintain information**, available to the public, including:

   - A central database or government repository of corporate disclosure statements, including reports, links, and audits, if provided;
   - Lists of all corporations required to publish a disclosure report, in order to identify companies governed by the legislation; minimally-compliant companies; and non-compliant companies;

3) **Create an empowered, arms-length Corporate Social Responsibility Ombudsperson**, capable of:

   - Soliciting grievances from affected parties abroad;
   - Investigating complaints and industry practices;
   - Publishing reports, advising government, and recommending steps to achieve both reporting compliance and an abuse-free supply chain;

4) **Adopt a compulsory framework of rewards and penalties** to ensure compliance with supply chain disclosure laws, which:

   - Implements tax credits for companies that comply with transparency in supply chains (TSC) disclosure and adopt “best practices”;
   - Restricts federal procurement to companies that comply with TSC disclosure and adopt “best practices”;
   - Withdraws certain foreign affairs services and trade promotion benefits for companies that fail to comply with TSC disclosure rules;

- Creates a statutory civil liability mechanism, available to third parties, to allow for civil law suits by victims of labour trafficking or abuse;
- Affirms parent company liability for the actions/inactions of their subsidiaries operating abroad and/or negates by statute the defence of *forum non conveniens* in certain instances*;*
- Provides Ministerial/Ombudsperson powers of enforcement, including the power to seek compliance through injunctive relief;
- Levies fines for general non-compliance and egregious instances of misconduct, such as failure to hand over records; and
- Allows government or its proxy to issue additional binding disclosure regulations, if necessary; and
- Prohibits the importation of goods produced by forced or child labour.

CONCLUSION

Canada should legislate and regulate the extraterritorial effects of transnational companies doing business in regions with weak governance. We propose specific recommendations to bring Canada in line with a growing body of international legislation that combats forced labour and human trafficking issues in global supply chains. Scholarship, policy and jurisprudence from around the world support these efforts, and elucidate the multiple steps and initiatives that can be marshalled to assist in this effort. The future of international law and a globalized world dictate greater respect for human rights and the elimination of serious abuse in corporate supply chains. The time has come for Canada to align itself with these emerging norms and reclaim its status as a global human rights leader.

APPENDIX A

SAMPLE TEMPLATE FOR DISCLOSURE QUESTIONS

Instructions: Please answer each question with yes or no, or a short answer where requested, and provide additional details, explanations or follow-up as needed.

#	Question	Y / N
1	Do you have an independent grievance procedure? If so, how often has the independent grievance procedure been used by third parties?	
2	Do you conduct unannounced visits on labour suppliers? If so, how frequently are these visits conducted? (I.e. biannually, quarterly, etc.)	
3	Do you ensure that workers are not indentured to their supplier? If yes, please explain.	
4	Do you have enforceable measures in place to correct for abuses? If so, what kind?	
5	What percentage of your facilities has workers who are contracted directly by the employer?	
6	Do you ensure your suppliers have policies in place to hold recruiters responsible for the workers they hire?	
7	Do you ensure your suppliers contract for workers in a language the workers can read?	
8	Do you ensure your suppliers do not have policies forcing migrant workers to give up their passports and IDs? How is this verified?	
9	Do your suppliers guarantee return travel for their migrant workers?	
10	Have you corrected for abuses in the past year? If so, please provide details of how such issues were addressed, and how frequently.	
11	Do you ensure your suppliers provide housing and other social benefits for workers, in line with Canadian rules for employing foreign migrant workers in Canada?	

12	Do you maintain a policy to identify and eliminate the risks of forced labour, slavery, human trafficking, and child labour within your supply chain? If so please attach text of the policy or a substantive description of the elements of the policy.	
13	Do you maintain a policy prohibiting your employees and employees of entities associated with your supply chain from engaging in commercial sex acts with a minor?	
14	Have you identified any risk of forced labour, slavery, human trafficking or child labour in your supply chain in the past year? How do you measure and assess this risk?	
15	Do you have a third party help you identify the risk of forced labour, slavery, human trafficking or child labour in your supply chain? If so, who?	
16	Have you consulted with any independent labour organizations or workers' associations on the process of identifying risks of forced labour, slavery, human trafficking or child labour in your supply chain? If so, which ones?	
17	Does your process of identifying risks of forced labour, slavery, human trafficking or child labour in your supply chain cover your second-layer suppliers?	
18	Does your process of identifying risks of forced labour, slavery, human trafficking or child labour in your supply chain cover your third-layer suppliers?	
19	Do you conduct audits to investigate the working conditions and labour practices of your suppliers? If so, how frequently are these audits conducted?	
20	Do you conduct audits to verify whether your suppliers have in place appropriate systems to identify risks of forced labour, slavery, human trafficking, and child labour within their own supply chain? If so, how often are audits conducted?	
21	Do you conduct audits to evaluate whether such systems are in compliance with your policies? If so, how often are audits conducted?	
22	Do you conduct audits through independent auditors? Which ones?	
23	Do the auditors have authority to visit sites without advance warning?	
24	Do you conduct audits during peak production periods when labour issues are more likely to emerge? When are audits generally conducted?	

25	Do you require your suppliers to certify that the manufacture of materials incorporated into any product and the recruitment of labour are carried out in compliance with Canadian and local laws regarding forced labour, slavery, human trafficking, and child labour?	
26	Do you maintain internal accountability standards regarding forced labour, slavery, human trafficking, and child labour? Please attach a description of such standards if so.	
27	Do you maintain a supply chain management system regarding forced labour, slavery, human trafficking, and child labour? Please attach a description of such system if so.	
28	Do you maintain a procurement system designed to avoid forced labour, slavery, human trafficking, and child labour? Please attach a description of such system if so.	
29	Do you maintain reporting procedures for employees, suppliers, contractors, or other entities within the supply chain based on internal or other standards regarding forced labour, slavery, human trafficking, and child labour? Please attach a description of such procedures if so.	
30	Do you train the employees and management who have direct responsibility for supply chain management on issues related to forced labour, slavery, human trafficking, and child labour, particularly with respect to mitigating risks within the supply chains of products?	
31	If you answered yes to 30, is the training mandatory?	
32	If you answered yes to 30, how often does the training occur?	
33	Do you ensure that recruitment practices for all suppliers associated with the supply chain comply with your policies for eliminating exploitative practices, including by complying with audits of labour recruiters and disclosing the results of such audits?	
34	Where forced labour, slavery, human trafficking, and child labour have been identified within your supply chain, do you ensure that remedial action is provided to those who have identified as victims? What specific steps are taken?	
35	Where forced labour, slavery, human trafficking, and child labour have been identified within the supply chain, do you provide support for programs designed to prevent the recurrence of those abuses within the industry or sector in which they have been identified? If so, please describe in more detail.	

[1] Adam S. Chilton & Galit A. Sarfaty, "The Limitations of Supply Chain Disclosure Regimes" (2016) 52:2, Stanford J of Int'l Law (forthcoming) at 1.
[2] Suzanne Daley, "Guatemalan Women's Claims Put Focus on Canadian Firms' Conduct Abroad," *The New York Times* (2 April 2016), online: <http://www.nytimes.com/2016/04/03/world/americas/guatemalan-womens-claims-put-focus-on-canadian-firms-conduct-abroad.html>. Suzanne Daley, "Outcry Echoes Up to Canada: Guatemalans Citing Rapes and Other Abuses Put Focus on Companies' Conduct Abroad," *The New York Times* (3 April 2016) at A1.
[3] Pew Research Center, "Top 50 Online News Entities (2015)," (28 April 2015), online: *Pew Research Center's Journalism Project* <http://www.journalism.org/media-indicators/digital-top-50-online-news-entities-2015/> (According to Pew, The New York Times Brand ranked #8 with 57,132,000 unique visitors in January 2015); Pew Research Center, "Top 25 US Sunday Newspapers with Digital Editions," (26 March 2014), online: <http://www.journalism.org/media-indicators/top-25-u-s-sunday-newspapers-with-digital-editions/> (The Times is also, by far, the most popular Sunday newspaper in the United States). See also: Justice & Corporate Accountability Project, "The 'Canada Brand': Violence and Mining Companies in Latin America," Oct 24 2016, online: https://justice-project.org/the-canada-brand-violence-and-canadian-mining-companies-in-latin-america/ [Canada Brand], a recent report documenting troubling incidents of violence associated with Canadian mining companies in Latin America.
[4] *Concluding Observations on the sixth periodic report of Canada*, UNHRC, 2015, UN Doc CCPR/C/CAN/CO/6 [*HRC Observations*].
[5] "Hudbay Minerals - Utilities - Contact Us," online: <http://www.hudbayminerals.com/English/Utilities/Contact-Us/default.aspx>.
[6] California Department of Justice, Attorney General, *The California Transparency in Supply Chains Act: A Resource Guide* (2015) at i. ("In recent years, California consumers have demanded that producers provide greater transparency about goods brought to market. Consumers utilize this additional information to drive their purchasing decisions, and various indicators suggest that Californians are not alone. A recent survey of western consumers revealed that people would be willing to pay extra for products they could identify as being made under good working conditions.")
[7] Peer Zumbansen, "Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back" (2016) 07 TLI Think! Paper King's College London 1 at 28.
[8] Arne Bigsten, *Globalization and Development: Rethinking Interventions and Governance* (Routledge, 2013) at 5-6; Daniel Kaufmann et al, "Growth without Governance [with Comments]" (2002) 3:1 Economía 169 at 169.
[9] Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive industries, human rights, and the home state advantage* (New York: Routledge, 2014) at 291; Joel Bakan, "The Invisible Hand of Law: Private Regulation and the Rule of Law" (2015) 48:2 Cornell Intl LJ 279 [Bakan, "Invisible Hand"] at 289 (Bakan likewise, refers to the norms of what we are calling "new governance" as "heterarchical, voluntary and private"); see also OECD, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (2006) online: <http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf>.
[10] *Ibid.*
[11] Bakan, "The Invisible Hand," *supra* note 9 at 280.
[12] National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, *Advisory Group Report* (Ottawa, 2007) [NRCSR, *Advisory Group Report*] at 5.
[13] Bakan, "Invisible Hand," *supra* note 9 at 281.
[14] Simons & Macklin, *supra* note 9 at 13; Bakan, "Invisible Hand," *supra* note 9 at 289 (Bakan likewise, refers to the norms of what we are calling "new governance" as "heterarchical, voluntary and private").
[15] Dun and Bradstreet Limited, Media Release, "Mitigating Supply Chain Risks: A Special Report" (May 2011) online: <http://www.dnb.com/content/dam/english/business-trends/mitigating_supply_chain_risk.pdf> [*D&B*] (Dun and Bradstreet, or D&B as it is more commonly known, collects and sells information on 235 million companies across 200 countries worldwide. In this Special Report published in 2011, they discuss a recent survey of elite manufacturers).

[16] Interview with Sham Singh, Managing Partner at BGM Developments Inc (9 February 2016). Mr. Singh is a supply chain and operations management professional with over 22 years of experience.
[17] Some legal protections currently in existence in Canadian law include the provisions against human trafficking, such as Section 279.01 of the Canadian Criminal Code.
[18] D&B, *supra* note 15, at 8.
[19] Commission of Inquiry on Human Rights in Eritrea, *Report of the Twenty Ninth Session*, UNHRC, 2015, UN Doc A/HRC/29/42; *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856. Nevsun is currently appealing the BC Supreme Court's decision to the BC Court of Appeal, with oral arguments scheduled for September 2017.
[20] Margie Mason et al, "Global supermarkets selling shrimp peeled by slaves," *The Associated Press* (14 December 2015), online: <http://bigstory.ap.org/article/0d9bad238bc24a059beeb4041aa21435/ap-global-supermarkets-selling-shrimp-peeled-slaves>.
[21] Statement of Claim Sud v Corporation, 15-cv-03783, US District Court, online: < http://www.cpmlegal.com/media/news/222_Costco%20Prawns%20Complaint.pdf> at 192 (for "selling prawns that are the product of slave labour, were and are unfair methods of competition and unfair or deceptive acts and practices in violation of the Consumer Legal Remedies Act, Civil Code Section 1750, et seq.") The suit reflects a creative use of private law, since the claim is based on the Supplier Code of Conduct that Costco adopted that prohibits human right abuses and requires suppliers to ensure that their sub-suppliers also comply with the Code. The Code also requires that Costco conduct audits of its suppliers to ensure that they and their sub-suppliers are in compliance.
[22] Oliver Milman, "Obama to sign law banning US imports of fish caught by slave labour" *The Guardian* (16 February 2016) online: < http://www.theguardian.com/us-news/2016/feb/16/obama-ban-fish-imports-slavery>.
[23] Galit A. Sarfaty, "Human Rights Meets Securities Regulation" (2013) 54:1 Va J Intl L 97 at 125 [Sarfaty, "Human Rights"].
[24] *Ibid.*
[25] Simons & Macklin, *supra* note 9 at 260, 26.
[26] *Ibid.*
[27] *Ibid* at ch 2 at 22-78.
[28] *Ibid* at 248.
[29] Supreme Court of Canada, "Docket," Tahoe Resources Inc. v. Adolfo Agustin Garcia et al. [2017] S.C.C.A. No. 94, online: < http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37492>.
[30] Jennifer Brown, "Hudbay human rights case will be heard in Canadian courts," *Canadian Lawyer Magazine* (26 February 2013), online: <http://www.canadianlawyermag.com/legalfeeds/1332/hudbay-human-rights-case-will-be-heard-in-canadian-courts.html>; "Hudbay Minerals lawsuits (re Guatemala)," *Business & Human Rights Resource Centre,* online: <https://business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0>.
[31] United Nations News Service Section, "UN News - DR Congo: UN's Top Rights Official Concerned at Acquittals in Military Trial," *UN News Service Section* (4 July 2007), online: <http://www.un.org/apps/news/story.asp?NewsID=23139>.
[32] "Anvil Mining (D.R. Congo/Canada)," *Canadian Centre for International Justice*, online: <http://www.ccij.ca/cases/anvil-mining/>.
[33] Les Whittington, "Canadian Mining Companies Are Far and Away the Worst Offenders in Environmental, Human Rights and Other Abuses around the World, according to a Global Study Commissioned by an Industry Association but Never Made Public," *The Toronto Star* (19 October 2010) online: <http://www.thestar.com/news/canada/2010/10/19/canadian_mining_firms_worst_for_environment_rights_report.html>.
[34] *Ibid.*
[35] Genevieve LeBaron & Jane Lister, "Benchmarking Global Supply Chains: The Power of the 'ethical audit' regime." (2015) 41:5 Rev of Intl Studies 905, DOI:10.1017/S0260210515000388 (This recent review of supply chain transparency begins with reference to Rana Plaza).
[36] Alyssa Ayres, "A Guide to The Rana Plaza Tragedy, And Its Implications, In Bangladesh," (24 April 2014), online: *Forbes* <http://www.forbes.com/sites/alyssaayres/2014/04/24/a-guide-to-the-rana-plaza-tragedy-and-its-implications-in-bangladesh/print/>.

[37] CBC News, "Loblaw & Joe Fresh will 'vigorously defend' against $2B Bangladesh factory lawsuit," online: <http://www.cbc.ca/news/business/loblaw-will-vigorously-defend-lawsuit-over-rana-plaza-factory-collapse-1.3055872>.
[38] NRCSR, *Advisory Group Report, supra* note 12 at 5.
[39] Andrew Clapham, *Human Right Obligations of Non-State Actors* (Oxford: Oxford Scholarship Online, 2010) at 196 online: <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199288465.001.0001/acprof-9780199288465-chapter-7> [Clapham, "Human Right Obligations"].
[40] Jen Moore, 'Cracks' in Canadian Policy for Overseas Mining, Evidence of an Abyss, *Mining Watch* (30 October 2014) online: <http://miningwatch.ca/blog/2014/10/30/cracks-canadian-policy-overseas-mining-evidence-abyss> ("Canada tried to defend its Corporate Social Responsibility (CSR) Strategy for the overseas mining sector, falsely stating that it was developed based upon broad consultation with civil society and other sectors, and emphasizing that 'Canada prefers voluntary mechanisms.'") Mining Watch stressed that the problem goes beyond lack of redress and that Canada must prevent harms from occurring in the first place. This is fully within Canada's power to do; one need merely contrast the Canadian state's hands-off approach in terms of harms done with its very hands-on manner of enabling and defending the interests of Canadian mining companies through thick and thin, despite the industry's short-term interests and long-term impacts on affected communities.
[41] *Ibid*. ("Professor Shin Imai from JCAP outlined how not one of the many CSR instruments that the Canadian government purports to encourage Canadian companies to adopt provides any means for affected communities to obtain redress for damages done. The lengthy CSR reports that some mining companies produce neither prevent harm nor deal with serious abuses arising, they literally paper over the issues.")
[42] Sarfaty, "Human Rights" *supra* note 23 at 98.
[43] Clapham, "Human Right Obligations," *supra* note 39 at 196. (Corporate accountability (or compliance) 'refers to requiring corporations to behave according to social norms or face consequences.' The corporate preference for voluntary initiatives, as opposed to binding legal commitments, is coming under scrutiny by the same groups that throughout the 1990s encouraged such voluntary initiatives.)
[44] James G Stewart, "The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute" (2014) 47:1 NYUJ Intl L & Pol at 22 online: Social Science Research Network at 40, <http://ssrn.com/abstract=2354443> [Stewart, "The Turn"]; James G Stewart, "Complicity in Business and Human Rights" (2015) University of British Columbia, ASIL Proceedings at 1 [Stewart, "Complicity"] (complicity is another mode of attribution).
[45] Simons & Macklin, *supra* note 9 at 254.
[46] Stewart, "Complicity," *supra* note 44 at 6.
[47] Although this report focuses on human labour abuses, it bears noting that multinational corporations have also failed to internalize the environmental costs associated with their operations in developing countries – another important consideration for corporate governance.
[48] Clapham, "Human Right Obligations," *supra* note 39 at 199.
[49] José E. Alvarez, "Are Corporations Subjects of International Law" (2010) Public Law & Legal Theory Research Paper No 10-77 at 19.
[50] Chilton & Sarfaty, *supra* note 1 at 8.
[51] Clapham, "Human Right Obligations," supra note 39 at 18. Andrew Clapham, "Human Rights Obligations for Non-State-Actors: Where Are We Now?" Essays in International Law and *Relations in Honour of Louise Arbour, edited by Fannie Lafontaine and François Larocque, to be published by Intersentia* (2015) at 13 [Clapham, "Where Are We Now"] ("We have now come a long way from the assumption that international legal principles do not apply to corporations, or that if they do this would be limited to 'certain war crimes and crimes against humanity").
[52] Stewart, "The Turn," *supra* note 44 at 15.
[53] *Ibid* at 7.
[54] *Ibid*.
[55] Alvarez, *supra* note 49 at 9; also see: Clapham, "Human Rights Obligations," *supra* note 39.
[56] Clapham, "Where Are We Now, *supra* note 51 at 13. ("The first is a new treaty, adopted by the African Union in 2014 which adds a criminal chamber to the African Court of Justice and Human Rights and does so in a way that makes clear that corporations can be prosecuted for certain international crimes in this new Chamber. For the

members of the African Union at least there is now no doubt as to the applicability of international criminal law to corporations").
[57] *Ibid* at 15.
[58] *Ibid.*
[59] Stewart, "The Turn" *supra* note 44 at 47.
[60] *Ibid* at 16.
[61] *Ibid* at 17.
[62] Stewart, "The Turn," *supra* note 44 at 36. For example, Talisman Energy Inc. was accused of complicity with the Sudanese government in a campaign of genocide and crimes against humanity.
[63] *Ibid* at 57.
[64] Kiobel v. Royal Dutch Petroleum, 569 US _ (2013).
[65] *Ibid* at 14.
[66] See, e.g., Center for Constitutional Rights, *Appellate Court Reinstates Abu Ghraib Torture Lawsuit Against Private Military Contractor* (CCR, 2016), online: <https://ccrjustice.org/home/press-center/press-releases/appellate-court-reinstates-abu-ghraib-torture-lawsuit-against>.
[67] Stewart, "The Turn," *supra* note 44 at 53.
[68] *Ibid* at 1.
[69] *Ibid*.
[70] Simons & Macklin, *supra* note 9 at 79 (The authors have written extensively about the inefficacy of the Ruggie Principles and other CSR initiatives; however, they concede that these initiatives have nonetheless contributed to normative changes, by furthering the global conversation on the duties on corporations to protect against human rights).
[71] *Ibid.*
[72] *Ibid.*
[73] Joel Bakan, *The Corporation,* (New York: Simon & Schuster, 2004) at 176.
[74] The question of whether to involve coercive mechanisms to encourage compliance with CSR standards bears consideration. Some authorities suggest that coercive means are not appropriate where wrongdoing is not criminal *per se.* This argument extols the virtues of transparency and reflexivity, arguing that industrial actors are keen to self-correct where the error of their ways have been pointed out.
This argument is problematic for a number of reasons. First, as a matter of principle, it goes against the principle that ignorance of the law is not a defense against wrongdoing. Second, it downplays the importance of coercive mechanisms to encourage reforms that are not within the self-interest of an actor. Even if corporations are assumed to be "good corporate citizens," the incentives to avoid self-reflection are acute. Finally, some corporations simply justify both ignorance and (potential or actual) misfeasance as the cost of doing business. Under that thinking, no amount of transparency will encourage some corporations to change their behaviour.
BCE Inc v 1976 Debentureholders, 2008 SCC 69 at para 66, [2008] 3 SCR 560; Peter J Henning, "Guilty Pleas and Heavy Fines Seem to Be Cost of Business for Wall St.," *The New York Times* (20 May 2015), online: <http://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html>.
[75] Interview with Simon Lewchuk, Policy Advisor-Sustainable Economic Development, and Martin Fischer, Director of Policy, at World Vision Canada (28 January 2016 & 3 March 2016).
[76] *Ibid.*
[77] Interview with Sham Singh, *supra* note 16.
[78] Clapham, "Human Right Obligations" *supra* note 39 at 3.
[79] Other regimes not discussed in depth in this report include transnational governance initiatives of international and private financial institutions such as the Equator Principles and the International Finance Corporation's Performance Standards, as well as voluntary transparency initiatives such as the Extractive Industries Transparency Initiative and the Global Reporting Initiative.
[80] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UNHRCOR*, 2011, UN Doc A/HRC/17/3, [UNHRC, "Protect, Respect and Remedy"].

[81] Clapham, "Where Are We Now, *supra* note 51 at 14; also see Stewart, "The Turn" *supra* note 44 at 26 ("In fact, a clearer understanding of the precise meaning of some international offenses points to the diametrically opposite conclusion—many corporate actors commit the war crime of pillage in modern resource wars, and they frequently do so as direct perpetrators not accomplices. A fulsome analysis of the doctrine governing pillage indicates the term "appropriate" in the definition of the crime incorporates those who harvest resources directly from the ground and those who acquire them from an intermediary. As such, the war crime encapsulates an entire supply chain, without resort to complicity.")

[82] Clapham, "Where Are We Now, *supra* note 51 at 14; see also: John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UNHRC, 8th Sess, (2008), at 7. (According to Ruggie, "[t]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and acts, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.")

[83] Ruggie, *supra* note 82 at 7.

[84] UNHRC, "Protect, Respect and Remedy," *supra* note 80 see accompanying text.

[85] Simons & Macklin, *supra* note 9 at 3.

[86] *Ibid* at 4.

[87] UNHRC, "Protect, Respect and Remedy," *supra* note 80 at 14.

[88] *Statement on behalf of a Group of Countries at the 24rd [sic] Session of the Human Rights Council*, UNHRCOR, 24th Sess, Annex, Agenda Item 3, UN Doc A/HRC/24/2 (2013).

[89] *Joint Statement: Call for an International Legally Binding Instrument on Human Rights, Transnational Corporations and Other Business Enterprises*, UNHRCOR, 24th Sess, (2013) (This statement was originally drafted by participants in the first annual Peoples' Forum on Human Rights and Business. The Forum was convened jointly by ESCR-Net and Forum-Asia from 5 to 7 November in Bangkok, Thailand.)

[90] *Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UNGAOR, 31st Sess, UN Doc A/HRC/31/50, (2016).

[91] OECD, Secretary-General of the OECD, *OECD Guidelines for Multinational Enterprises*, 2011 Ed, (Paris: OECD, 2011) online: <http://www.oecd.org/corporate/mne/> [*OECD Guidelines*].

[92] Simons & Macklin, *supra* note 9 at 105. For example, an NCP may consist of a single governmental official or may be structured with civil society representatives.

[93] The 2008 Afrimex case illustrates the inadequacy of the current "soft law" approach to dealing with corporate actors appropriating abroad, as the OECD Guidelines proved to be largely ineffective. Afrimex, a UK corporation with deep roots in the tin ore industry, was mining coltan in the DRC. Its operations allegedly tied the company to large-scale human rights abuses including forced labour, the funding (and therefore intensification and prolongation) of a brutal armed conflict and the economic pillage of a vulnerable nation. While the British corporation claimed to be independent, and therefore unaware of, the actions of its Congolese affiliates, the OECD's UK National Contact Point office found that the organizations that comprised the Afrimex supply chain were so inextricably connected that "Afrimex was in a position to significantly influence [its Congolese counterparts] Société Kotecha and SOCOMI." UK National Contact Point, *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd*, Statements by National Contact Points for the OECD Guidelines for Multinational Enterprises Statement (2008), online: <https://www.oecd.org/corporate/mne/43750590.pdf> at paras 17-27 (The findings of the NCP included that there was overlap among corporate directors and shareholders and that these entities were indeed interdependent). While this finding was a victory for human rights, the NCP's limited enforcement powers meant that the remedy it prescribed for the egregious conduct was to direct Afrimex to implement CSR guidelines, a measure actually proposed by Afrimex itself. *Ibid* at para 63. Thus, having found that Afrimex was responsible for violating the OECD Guidelines, the UK National Contact Point merely thanked the company for offering to formulate a corporate responsibility policy document 'to shape its actions going forward.' Aside from public shaming, this was the only penalty visited upon the company, a patently inadequate sanction if the underlying conduct constituted the war crime of pillage. Stewart, "The Turn," *supra* note 44 at 65.

[94] *Ibid* at 90.
[95] *OECD Guidelines*, *supra* note 91.
[96] Simons & Macklin, *supra* note 9 at 70.
[97] *Ibid* at 102; *OECD Guidelines*, *supra* note 91 at 31.
[98] Mining Watch Canada, News Release, "Report Calls for New Measures to Prevent and Remedy Harm by Multinational Companies," (2016) online: <http://miningwatch.ca/news/2016/11/15/report-calls-new-measures-prevent-and-remedy-harm-multinational-companies>.
[99] Mining Watch Canada, Publication, "Canada Is Back" But Still Far Behind," (2016) online: <http://miningwatch.ca/publications/2016/11/15/canada-back-still-far-behind>.
[100] Simons & Macklin, *supra* note 9 at 114.
[101] United Nations, "United Nations Global Compact: The Ten Principles," online: https://www.unglobalcompact.org/what-is-gc/mission/principles.
[102] UNHRC, "Protect, Respect and Remedy," *supra* note 80 at 48.
[103] Simons & Macklin, *supra* note 9 at 115.
[104] *Ibid* at 114.
[105] KMPG International, Media Release, "KMPG International Survey of Corporate Social Responsibility Reporting 2008," (2008) online: KMPG.com <https://www.kpmg.com/EU/en/Documents/KPMG_International_survey_Corporate_responsibility_Survey_Reporting_2008.pdf> at 29.
[106] Simons & Macklin, *supra* note 9 at 129.
[107] Voluntary Principles on Security and Human Rights, "What are the Voluntary Principles" online< http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>.
[108] Simons & Macklin, *supra* note 9 at 123.
[109] Holly Dranginis, "Point of Origin: Status Report on the Impact of Dodd-Frank 1502 in Congo, *Enough*, (February 2016) online: <http://www.enoughproject.org/files/DRC_PointofOrigin_022016.pdf>.
[110] *Choc v. Hudbay*, 2013 ONSC 1414 [Factum of the Intervenor Amnesty International at para 21]
[111] Dranginis, *supra* note 109 at 9.
[112] Simons & Macklin, *supra* note 9 at 117,126.
[113] *Ibid* at 129.
[114] "NGOs Warn: 'Companies Duck Responsibility for Abuse Because of Flawed Human Rights Guidance, Lack of Independent Oversight," *Mining Watch* (9 March, 2016) online: < http://miningwatch.ca/news/2016/3/9/ngos-warn-companies-duck-responsibility-abuse-because-flawed-human-rights-guidance>.
[115] *Ibid*.
[116] Bakan, "The Invisible Hand," *supra* note 9 at 299.
[117] Sarfaty, "Human Rights" *supra* note 23 at 102.
[118] *Ibid* at 100.
[119] Dranginis, *supra* note 109 at 20.
[120] US Securities and Exchange Commission, "Fact Sheet - Disclosing the Use of Conflict Minerals" (July 29, 2014), online: <https://www.sec.gov/News/Article/Detail/Article/1365171562058#.VOTiOcZOHNs>. Countries that share an internationally recognized border with the DRC include Angola, Burundi, Central African Republic, Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.
[121] *Disclosing the Use of Conflict Minerals*, online: SEC Fact Sheet < https://www.sec.gov/News/Article/Detail/Article/1365171562058>.
[122] *Ibid* at 2. The company must also make this information available on its website and provide the internet address of the site on a Form SD.
[123] *Ibid* at 3.
[124] Conflict Minerals, 77 Fed Reg. 56, 274, 56, 282. See also: OECD, Guidelines for Multinational Enterprises, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* online:<http://www.oecd.org/corporate/mne/mining.htm>.
[125] Conflict Minerals, 17 CFR Part 240 and 249b (2012), online: <www.sec.gov/rules/final/2012/34-67716.pdf>.
[126] Galit Sarfaty, "Shining Light on Global Supply Chains" (2015) 56 Harv Intl LJ 419 [Sarfaty, "Shining Light"].

[127] *Ibid* at 98.
[128] Daniel M. Gallagher, Comm'r, SEC, State at SEC Open Meeting: Proposed Rule to Implement Section 1502 of the *Dodd-Frank Act* - the "Conflict Minerals" Provision (August 22, 2012) , online: <www.sec.gov/news/speech/2012/spch082212dmg-minerals.htm>; see also: US, Bill, HR 4173, *Dodd-Frank Wall Street Reform and Consumer Protection Act,* 111th Cong, 2010, s 1502, online: <https://www.congress.gov/bill/111th-congress/house-bill/4173?q=%7B%22search%22%3A%5B%22dodd+frank+act+section+1502%22%5D%7D&resultIndex=1>.
[129] Sarfaty, "Human Rights," *supra* note 23 at 125-126.
[130] *Ibid* at 111-112.
[131] *Ibid* at 120.
[132] *Ibid*.
[133] *Ibid* at 109. ("Human right NGOs, including Oxfam, Global Witness, and Revenue Watch have recently targeted securities regulation to achieve corporate accountability. This is part of an international movement, which now focuses on lobbying the European Union, the United Kingdom, and Canada to pass similar legislation. The primary reason for using securities law is the ineffectiveness of existing mechanisms for corporate accountability, including international standards and litigation under the Alien Tort Claims Act."). *Ibid* at 117. ("Securities regulation is the preferred form of information disclosure for corporate human rights performance for a variety of reasons. First, there are clear sanctions imposed on companies for not reporting. Second, financial disclosure rules communicate a link between human rights risks and financial performance. Third, and most importantly is that these laws facilitate the operationalizing of human rights into the date to date decision making of companies.")
[134] Sarfaty, "Shining Light," *supra* note 126 at 419.
[135] *Ibid* at 457.
[136] *Ibid*.
[137] Sarfaty, "Human Rights," *supra* note 23 at 115.
[138] *Ibid* at 106.
[139] Dranginis, *supra* note 109 at 17.
[140] "Dodd-Frank 1502: Impact Update," *Enough Project* (February 26, 2016) online: <http://www.enoughproject.org/reports/dodd-frank-1502-impact-update>. Dranginis, *supra* note 109 at 14, 17. (In Enough's interviews with civil society activists who monitor the minerals trade in North and South Kivu, they agreed that armed groups are not nearly as prevalent at 3T mines as they were five and 10 years ago.)
[141] Interview with Professor James Stewart (11 May 2016).
[142] Ben Protess and Julie Hirschfeld Davis, New York Times, "Trump Moves to Roll Back Obama-Era Financial Regulations," (February 3, 2017) online: <https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html>.
[143] Sarah N. Lynch and Emily Stephenson, Reuters, "White House plans directive targeting 'conflict minerals' rule: sources," (February 8, 2017) online: http://www.reuters.com/article/us-usa-trump-conflictminerals-idUSKBN15N06N?feedType=RSS&feedName=businessNews&utm_source=Twitter&utm_medium=Social&utm_campaign=Feed%3A+reuters%2FbusinessNews+%28Business+News%29.
[144] Canada is party to the following international forced labour and trafficking conventions: Trafficking Protocol to the UN Convention on Transnational Organized Crime; International Labour Organization's Conventions on Forced Labour, Minimum Age of Employment, and Child Labour; the Rome Statute of the International Criminal Court; the Convention on the Rights of the Child; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights; see also Sarfaty, "Human Rights," *supra* note 23 at 100.
[145] Chris N. Bayer PhD, "Corporate Compliance with the California Transparency in Supply Chains Act of 2010" (2015) Development International Paper at 9.
[146] Cal. Civ. Code §1714.43(a)(1).
[147] Bayer, *supra* note 145 at 13.
[148] Nor are there implementing rules, regulations or guidelines that do so. However, in April 2015 the California Attorney General published a guide for companies: "The California Transparency in Supply Chains Act: A Resource Guide (2015)."
[149] Cal. Civ. Code §1714.43(2)(f),(h).

[150] *Ibid* at §1714.43(c)(1): engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
[151] *Ibid* at §1714.43(c)(2): conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
[152] *Ibid* at §1714.43(c)(3): requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
[153] *Ibid* at §1714.43(c)(4): Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
[154] *Ibid* at §1714.43(c)(5): Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.
[155] *Ibid* at §1714.43(b).
[156] *Ibid.*
[157] *Ibid* at §1714.43(d).
[158] *Ibid*.
[159] Shook Hardy & Bacon LLP, "Costco Shrimp Case Dismissed for Lack of Standing," online: <www.lexology.com/library/detail.aspx?g=25ab1bc6-c6ab-4f2e-bc29-594120a09637>.
[160] *Melanie Barber, et al., v. Nestle USA, Inc., et al.,* 8:15-cv-01364, in the US District Court for the Central District of California, Southern Division.
[161] Top Class Action, "Nestle Fancy Feast Slave Labor Class Action Suit Dismissed," online: http://topclassactions.com/lawsuit-settlements/lawsuit-news/256446-nestle-fancy-feast-slave-laborlabour-class-action-lawsuit-dismissed/ [*Top Class Action*]. The court also applied the "safe harbour" idea in consumer protection laws, i.e. examining when the legislature has "permitted certain conduct" and when "it has considered a situation and concluded that no action should lie."
[162] *Ibid.*
[163] *Ibid.*
[164] Chilton & Sarfaty, *supra* note 1 at 17. California CSOs have played a key role in monitoring compliance with organizations such as KnowTheChain educating companies, investors, policymakers, and consumers to encourage greater disclosure and transparency.
[165] *Top Class Action, supra* note 161 at 18-19.
[166] *Ibid* at 20.
[167] *Ibid*.
[168] *Ibid* at 21.
[169] Interview with Killian Moote, Project Direct of Know the Chain (March 11, 2015).
[170] Voluntary or non-mandatory legislation/regulation is also referred to as "reflexive" in the literature. Theories of reflexive law and new governance include the following elements:
1) An approach to regulation that is more collaborative than traditional forms of regulation in terms of the relationship between the regulator and regulatee;
2) regulatory initiatives that give more freedom to regulatees to determine their internal means of compliance, while at the same time requiring transparency and accountability;
3) an emphasis on problem solving and experimentation in the ongoing design of regulatory strategies; and broader stakeholder participation and voice. Simons & Macklin, *supra* note 9 at 13.
However, tools founded on the reflexive model such as the UN Global Compact and other CSR initiatives have become highly politicized and ineffective, rather than the technical or neutral tools they were intended to be. LeBaron & Lister, *supra* note 35 at 207. Conversely, responsive legislation refers "to state regulation which relies to a certain extent on non-state actors to facilitate compliance in the shadow of escalating state-based sanctions," and involves more coercive compliance mechanisms. Simons & Macklin, *supra* note 9 at 13-14.
[171] Attorney General Kamala D. Harris Issues Consumer Alert on California Transparency in Supply Chains Act Monday, *State of California Department of Justice*, (13 April 2015) online: < https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-issues-consumer-alert-california-transparency>.

[172] David Lowe, "How Transparent is Your Supply Chain? Effect of the Modern Slavery Bill," online: <gowlingwlg.com/en/united-kingdom/insights-resources/how-transparent-is-your-supply-chain-effect-of-the-modern-slavery-bill-1>.
[173] Amelie Gentleman, UK firms must show proof they have no links to slave labour under new rules, *The Guardian* (28 October 2015) online:<http://www.theguardian.com/world/2015/oct/28/uk-companies-proof-no-links-slave-labour-supply-chain>.
[174] Home Secretary, "Transparency in Supply Chains etc. A practical guide," online: www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf.
[175] Gentleman, *supra* note 173.
[176] It is worth noting, however, that the UK Government has no mechanism set up for monitoring or enforcing the provision, making such injunctions likely to be brought very rarely if at all; furthermore, under the Act, a company can state it has taken 'no steps' and still be in compliance.
[177] Home Secretary, "Transparency in Supply Chains etc. A practical guide," online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf>.
[178] Interview with Shawn MacDonald, Director of Programs & Research at Verité (5 April 2016).
[179] US, HR 4310, *Title XVII - Ending Trafficking in Government Contracting*, 102nd Cong, 2012 online: <https://www.gpo.gov/fdsys/pkg/PLAW-112publ239/pdf/PLAW-112publ239.pdf>.
[180] US, *Executive Order No 13627*, *Strengthening Protection Against Trafficking in Persons in Federal Contracts*, 99 Fed Reg, 2012 at 2(a)(1)(A) online: <https://www.gpo.gov/fdsys/pkg/FR-2012-10-02/html/2012-24374.htm [*Executive Order]*.
[181] Canada has a similar zero-tolerance policy for trafficking in persons. In Canada, the leading case on forced labour/labour trafficking is *R v. Domotor* [2012] OJ No 3630. Section 279.01(1) of the Criminal Code provides that: "Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence." In *R v. Domotor*, the court considered which elements of 'exploitation' are elements of the crime, defined by sections 279.04(1) and s.279.04(2). In *R v Domotor* the court found the factual circumstances matched the elements of the crime of labour trafficking and that victims were exploited and being recruited based on a "web of lies," in addition to being coached, threatened and not paid for work.
[182] Arnold & Porter LLP, "Final anti-human trafficking regulations mean stricter requirements for government contractors and subcontractors," online: <www.lexology.com/library/detail.aspx?g=8809bbe7-3316-4a45-9d14-d6f7310ade58>.
[183] *Ibid.*
[184] Brittany Prelogar, Laura Ardito & Michael Navarre "New Human Trafficking Laws and US Government Initiatives Make Anti-Trafficking a Compliance Priority for Businesses in 2013" *Steptoe & Johnson LLP* (14 February 2016) online: <http://www.steptoe.com/publications-8618.html>.
[185] *Executive Order*, supra note 180. (… "each such contractor and subcontractor maintain a compliance plan during the performance of the contract or subcontract that is appropriate for the size and complexity of the contract or subcontract and the nature and scope of the activities performed, including the risk that the contract or subcontract will involve services or supplies susceptible to trafficking. The compliance plan shall be provided to the contracting officer upon request, and relevant contents of the plan shall be posted no later than the initiation of contract performance at the workplace and on the contractor or subcontractor's Web site (if one is maintained), and shall, at a minimum, include…").
[186] *Ibid.*
[187] Joe Davidson, The Washington Post, "Obama's fair-pay order for contractors under attack in Congress," (February 28, 2017) online: < https://www.washingtonpost.com/news/powerpost/wp/2017/02/28/obamas-fair-pay-order-for-contractors-under-attack-in-congress/?utm_term=.090f0307107a>; Joe Davidson, The Washington Post, "Obama's orders protecting federal contract workers face reversal by Trump," (January 18, 2017), online: <

https://www.washingtonpost.com/news/powerpost/wp/2017/01/18/obamas-orders-protecting-federal-contract-workers-face-reversal-by-trump/?utm_term=.b9fa8113b096>.
[188] US, Bill HR 644, *Trade Facilitation and Trade Enforcement Act of 2015,* 144th Cong 2016 [*HR 644*].
[189] Erik Larson, "Closed by US Senate after 8 Decades" *Bloomberg* (11 February 2016) online: <http://www.bloomberg.com/news/articles/2016-02-11/slavery-loophole-is-closed-by-u-s-senate-after-85-years>.
[190] Interview with Kilian Moote, Project Director at KnowTheChain (March 11, 2015); Ian Urbina, "US Closing a Loophole on Products Tied to Slaves," *The New York Times* (15 February 2016) online: <https://www.nytimes.com/2016/02/16/us/politics/us-closing-a-loophole-on-products-tied-to-slaves.html?_r=0>.
[191] United States Department of Labor, "List of Goods Produced by Child Labor or Forced Labor," online: <www.dol.gov/ilab/reports/child-labor/list-of-goods/>.
[192] *Ibid.*
[193] HR 644, *supra* note 188, at s 310.
[194] Eric Cottwald, "Tariff Act Strengthened, but Will Enforcement Follow?," online: <www.laborrights.org/blog/201602/tariff-act-strengthened-will-enforcement-follow>.
[195] US, Bill, HR 3226, *Business Supply Chain Transparency on Trafficking and Slavery Act of 2015*, 114th Cong, 2015.
[196] *Ibid* at s 3(1).
[197] *Ibid* at s.3(2).
[198] E.g. "information describing to what extent, if any, the covered issuer conducts any of the following activities".
[199] Jeremy C. Jeffrey, "Tungsten is Forever: Conflict Minerals, Dodd-Frank, and the Need for European Response," (2012) 18 New Eng J Intl & Comp L 503 at 512.
[200] Global Witness, "Conflict Minerals in Europe" (4 February 2015) online: <https://www.globalwitness.org/en/campaigns/conflict-minerals/conflict-minerals-europe-brief/>.
[201] Guardian Development Network, "European parliament votes for tougher measures on conflict minerals: Surprise passage of bill enforcing obligatory monitoring of supply chains will affect 800,000 European companies" *The Guardian*, (21 May 2015) online:< http://www.theguardian.com/global-development/2015/may/21/european-parliament-tougher-measures-conflict-minerals >; also see: Agnesse Krivade, "Conflict minerals: MEPs ask for mandatory certification of EU importers," *European Parliament News* (20 May 2015) online: <http://www.europarl.europa.eu/news/en/news-room/20150513IPR55318/Conflict-minerals-MEPs-ask-for-mandatory-certification-of-EU-importers>.
[202] Report on the proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas (24 April 2015) online: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0141&language=EN#title1> [Report].
[203] Claire Hack, Agreement on EU conflict minerals law may not be reached until H2 - law firm, *Metal Bulletin* (23 February 2016) online: <https://global.factiva.com/ha/default.aspx#./!?&_suid=146290772970709254721703473479>.
[204] Chilton & Sarfaty, *supra* note 1 at 15.
[205] *Ibid*.
[206] European Parliament Press Release, "Conflict Minerals: MSPs ask for mandatory certification of EU importers," [Press Release], online: <http://www.europarl.europa.eu/news/en/news-room/20150513IPR55318/Conflict-minerals-MEPs-ask-for-mandatory-certification-of-EU-importers>
[207] Chilton & Sarfaty, *supra* note 1 at 15.
[208] *Ibid;* see also Report, *supra* note 202 accompanying text at Recital 13.
[209] *Ibid.*
[210] Press Release*, supra* note 206.
[211] Matt Scott, "EU corporate disclosure law will enhance supply chain efficiency," *CIPS Supply Management* online: <http://www.cips.org/supply-management/opinion/2015/august/eu-corporate-disclosure-law-will-enhance-supply-chain-efficiency/>; see also "Estonia contests planned EU directive on disclosure of non-financial information" *Baltic News Service* (14 June 2013) online: <https://global.factiva.com/ha/default.aspx#./!?&_suid=146289969065604997290570754558.

[212] Report, *supra* note 202 see accompanying text. ("The directive on disclosure of non-financial and diversity information by certain large groups and companies (Directive 2014/95/EU), which was adopted by Parliament and Council in 2014 and which will be applicable in 2017, enhances business transparency on social and environmental matters and also covered supply chain due diligence… .) See also Rae Lindsay, Anna Kirkpatrick and Jo En Low, "Hardly Soft Law: The Modern Slavery Act 2015" (2017) 18 Bus. Law International 29 at 42-3.
[213] EUR-Lex, Directive 2014/95/EU of the European Parliament and of Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, online:< http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095>.
[214] Andreas Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Cheltenham: Edward Elgar Publishing Limited, 2015) at 58.
[215] *Ibid* at 2.
[216] *Ibid* at 195.
[217] Robert Marleau and Camille Montpetit, eds., "House of Commons Procedure and Practice: 21. Private Members' Business," (2000), online: <http://www.parl.gc.ca/MarleauMontpetit/DocumentViewer.aspx?Sec=Ch21&Seq=3&Language=E>.
[218] Simons & Macklin, *supra* note 9 at 260, 26.
[219] *Ibid* at 261.
[220] *Ibid* at 262.
[221] Bill C-300, *Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act*, 2nd Sess, 40th Parl, 2009 (first reading), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3658424&File=33#3>.
[222] Simons & Macklin, *supra* note 9 at 264.
[223] Bill C-486, *An Act respecting corporate practices relating to the extraction, processing, purchase, trade and use of conflict minerals from the Great Lakes Region of Africa*, 1st Sess,41st Parl, 2011-12-13 (first reading), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6258270&File=27#1>.
[224] Canada, Parliament, *House of Commons Debates*, 41st Parl, 2nd Sess, Vol 147, No 068 (3 April 2014), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6513111&Language=E&Mode=1> (See the comments by David Anderson and Lois Brown in regard to Bill C-486).
[225] Simons & Macklin, *supra* note 9 at 270.
[226] *Extractive Sector Transparency Measures Act,* SC 2014, c 39, s 376 at s 8(1).
[227] *Ibid at* s 9(4).
[228] *Ibid at* s 16.
[229] Gangmasters Licensing Authority, "What We Do," online: http://www.gla.gov.uk/who-we-are/what-we-do/.
[230] *Ibid at* s 19(1).
[231] *Ibid at* s 24.
[232] *Ibid at* ss 25-26.
[233] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.
[234] *Ibid* at s 91; see *Scowby v Glendinning*, [1986] 2 S.C.R. 226, at 11: "The terms of s. 91(27) of the Constitution must be read as assigning to Parliament exclusive jurisdiction over criminal law in the widest sense of the term. Provincial legislation which in pith and substance falls inside the perimeter of that term broadly defined is ultra vires. Parliament's legislative jurisdiction properly founded on s. 91(27) may have a destructive force on encroaching legislation from provincial legislatures, but such is the nature of the allocation procedure in ss. 91 and 92 of the Constitution." "Pith and substance" is a legal doctrine in Canadian constitutional interpretation used to determine under which head of power a given piece of legislation falls. The doctrine is primarily used when a law is challenged on the basis that one level of government (be it provincial or federal) has encroached upon the exclusive jurisdiction of another level of government. The analysis must answer two questions: 1) what is the pith and substance or essential character of the law?; and 2) does it relate to an enumerated head of power in section 91 or 92 of the Constitution Act, 1867?. "Classification of Laws – Pith and Substance," *Constitutional Law of Canada*, online:< http://www.constitutional-law.net/index.php?option=com_content&view=article&id=25&Itemid=39>.
[235] See, for example, *Re Agricultural Products Marketing Act,* [1978] 2 SCR 1198.

[236] *R v Hydro-Québec*, [1997] 3 S.C.R. 213
[237] *Ibid* at para 119.
[238] *Ibid* at para 121.
[239] *Ibid* at para 132.
[240] *R v Nur*, [2015] SCC 15.
[241] *R v Crown Zellerbach Canada Ltd* [1988] 1 S.C.R. 401.
[242] Simons & Macklin, *supra* note 9 at 15.
[243] "Transparency in Supply Chains etc.: A practical guide: Guidance issued under section 54(9) of the Modern Slavery Act" (29 October 2015) at 7, online: Slavery and human trafficking in supply chains: guidance for businesses <https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide> 3.2 Total turnover is calculated as: a. the turnover of that organisation; and b. the turnover of any of its subsidiary undertakings (including those operating wholly outside the UK). 3.3 "Turnover" means the amount derived from the provision of goods and services falling within the ordinary activities of the commercial organisation or subsidiary undertaking, after deduction of— a. trade discounts; b. value added tax; and c. any other taxes based on the amounts so derived.
[244] Home Office, "Modern Slavery and Supply Chains Government Response Summary of consultation responses and next steps" (2015) at 7, 16 online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response__final__2_pdf.pdf>.
[245] *Ibid* at 8.
[246] *Ibid* at 10.
[247] Chilton & Sarfaty, *supra* note 1 at 23.
[248] *Ibid.*
[249] Simons & Macklin, *supra* note 9 at 211
[250] *Ibid* at 212.
[251] Bakan, "Invisible Hand," *supra* note 9 at 282.
[252] Chilton & Sarfaty, *supra* note 1 at 47.
[253] *Modern Slavery Act 2015* (UK), c 30, s 54(5).
[254] Chilton & Sarfaty, *supra* note 1 at 25.
[255] *Ibid.*
[256] *Modern Slavery Act 2015 (UK),* c 30, s 54(6)(a)
[257] Simons & Macklin, *supra* note 9 at 259.
[258] *Ibid* at s 54(1). The MSA requires an organization to prepare a slavery and human trafficking statement each financial year.
[259] Cal Code at 10.2(c)(2).
[260] LeBaron & Lister *supra* note 35 at 914.
[261] *Ibid* at 915.
[262] *Ibid* at 914.
[263] *Ibid* at 906 – 907.
[264] *Ibid*.
[265] *Ibid* at 917.
[266] *Ibid* at 911.
[267] *Ibid* at 910.
[268] *Ibid* at 924.
[269] Interview with Shawn MacDonald (5 April 2016) ("Why are we paying all this money when the government isn't enforcing their local labour law; how do you use transparency to spur them to be more proactive?").
[270] Chilton & Sarfaty, *supra* note 1 at 22-23. There is evidence, both from academic literature (see Section 2) and from the histories of previous Canadian legislation (see Section 4), that Canadian corporations are more likely to prefer a reflexive rather than a responsive approach to transparency in supply chains. However, the literature also suggests that adopting a merely reflexive approach to TSC may amount to little more than window dressing, and thus, responsive measures are absolutely crucial to effectiveness.

[271] *CTSCA* SB657, online <http://www.state.gov/documents/organization/164934.pdf>; *Modern Slavery Act 2015*, s 54(7), (8).
[272] Bill C-486, *supra* note 223 at cl 5(a).
[273] Chilton & Sarfaty, *supra* note 1 at 47.
[274] *HRC Observations, supra* note 4, at s 6. The Human Rights Committee noted, in particular, that "[t]he State party should … enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad." Ibid. Comments, views and observations of the Human Rights Committee, as the implementation arm of the foundational International Covenant on Civil and Political Rights (ICCPR), which Canada and most countries have ratified, are noted to have "some important characteristics of a judicial decision," and to thus be authoritative determinations by a quasi-judicial organ tasked with the interpretation of the ICCPR – they are highly influential and, according to some commentators, indirectly legally binding. Alex Conte & Richard Burchill, Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee, (2nd ed., London, 2009); Nikolaos Sitaropoulos, States are Bound to Consider the UN Human Rights Committee's Views in Good Faith, 11 March 2015, (OxHRH Blog, 11 March 2015) <http://humanrights.dev3.oneltd.eu/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/>.
[275] NRCSR, *Advisory Group Report, supra* note 12 at s 2.4.2.1.
[276] Some of the proposed measures took new shape in the form of Bill C-300 which was ultimately defeated (see s 4a above).
[277] Report of the Special Rapporteur of the Secretary General on the Issue of Human Rights and Transnational Corporations and other business enterprises, March 2011, A/HR/17/31 online: <http://internationalhumanrightslaw.net/wp-content/uploads/2012/01/Ruggie-Report.pdf> (States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence…Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State).
[278] Export Development Canada, "About Us," online: <http://www.edc.ca/EN/About-Us/Pages/default.aspx>.
[279] NRCSR, *Advisory Group Report, supra* note 12 at 21.
[280] Centre for Excellence in CSR, "Brief History of CSR," online: <http://www.cim.org/en/CIMSubSites/CenterForExcellence/About-Us/Brief-history-of-CSR.aspx>.
[281] Foreign Affairs Trade and Development Canada, "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad," online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.
[282] Valerie Crystal, Shin Imai & Bernadette Maheandiran, "Access to Justice and Corporate Accountability: A Legal Case Study of Hudbay in Guatemala" (2014) Osgoode Legal Studies Research Paper Series, online: <http://digitalcommons.osgoode.yorku.ca/olsrps/73> at 15.
[283] See endnote 93.
[284] Foreign Affairs Trade and Development Canada, "Canada's Enhanced CSR Strategy," *supra* note 281.
[285] NRCSR, *Advisory Group Report, supra* note 12 at 21.
[286] *Ibid* at 22. Interestingly, the AGR notes (at 22-23) that it may be possible to broaden the scope of the NCP's mandate within Canada in order to assume a more active investigatory role. While the NCP would ultimately be restricted by the extent of the OECD guidelines, it is possible that an expansion of its existing powers could go some way toward addressing the problems outlined in this report.
[287] *Ibid* at 23.
[288] NRCSR, *Advisory Group Report, supra* note 12 at 2.
[289] The GLAA was officially rolled out in October 2016. The new Director of Labour Market Enforcement is to set out an annual strategy identifying key risks in the labour market from which the GLAA will take its direction, but has yet

to do so. The GLAA has only seen a £2M budget increase, raising its £4.5M budget to £6,090,000 for 2017-18 – a tiny increase given it will now cover the whole labour market and incorporate police style powers.
[290] Krisnah Poinasamy & Antonia Bance, *Turning the Tide: How best to protect workers employed by gangmasters, five years after Morecambe Bay (Summary)*, Oxfam Briefing Papers Policy Paper (Oxfam, 2009), online: <http://oxfamilibrary.openrepository.com/oxfam/bitstream/10546/114054/2/bp-turning-tide-morecombe-bay-290709-summ-en.pdf> at 4, 11 (Oxfam defines a "gangmaster" as "a generic term to cover any individual or agency whose primary purpose is to organise the supply of labour to employers").
[291] *Ibid* at 4-8.
[292] *Ibid* at 4.
[293] Powers and remit to change at GLA, *Gangmasters & Labour Abuse Authority* (16 May 2016), online: <http://www.gla.gov.uk/whats-new/press-release-archive/16516-powers-and-remit-to-change-at-gla/>.
[294] Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 19.
[295] Simons & Macklin, *supra* note 9 at 263.
[296] *Ibid* at 283.
[297] *Ibid* at 283-284.
[298] *Ibid.*
[299] NRCSR, *Advisory Group Report, supra* note 12 at vii.
[300] *Ibid* at viii.
[301] Moore, supra note 40, see the text accompanying; see also, "Backgrounder: A Dozen Examples of Canadian Mining Diplomacy," *Mining Watch* (8 October 2012) online: <http://miningwatch.ca/blog/2013/10/8/backgrounder-dozen-examples-canadian-mining-diplomacy> (Their [Canadian Embassies] interventions have been strategically timed with regard to mining project or policy decisions related to Canadian commercial interests and demonstrate systematic disregard for the perspectives and interests of the affected communities).
[302] Moore, *supra* note 40, see accompanying text.
[303] *Ibid*. (There are many more examples and bound to multiply, particularly now that the Canadian government has made it policy to channel 100% of its diplomatic corps to back private interests, something it calls 'economic diplomacy'.) Also see: Canada, Global Affairs Canada, *Global Markets Action Plan: The Blueprint for Creating Jobs and Opportunities for Canadian through Trade*, online: <http://international.gc.ca/global-markets-marches-mondiaux/plan.aspx?lang=eng#2> (By concentrating on core objectives within priority markets, the Global Markets Action Plan will entrench the concept of "economic diplomacy" as the driving force behind the Government of Canada's activities through its international diplomatic network. Other countries are doing the same, and Canada cannot be complacent. Under the plan, all diplomatic assets of the Government of Canada will be marshalled on behalf of the private sector in order to achieve the stated objectives within key foreign markets.)
[304] Simons & Macklin, *supra* note 9 at 229.
[305] PWGSC is the ministry responsible for purchasing $16.05 billion worth of goods and services every year on behalf of federal departments and agencies. "The Procurement Process," Public Works and Government Services Canada, accessed online <https://buyandsell.gc.ca/for-businesses/selling-to-the-government-of-canada/the-procurement-process>.
[306] In 2017, the CPP had $316.7 Billion in its investment fund, as declared by the CPP Investment Board. "Who We Are," CPP Investment Board, accessed online <http://www.cppib.com/en/home.html>.
[307] NRCSR, *Advisory Group Report, supra* note 12 at 39.
[308] Clapham, "Human Rights Obligations," *supra* note 39 at 198.
[309] *Ibid* at 339.
[310] While the regime proposed within this report is primarily regulatory, gross violations—particularly those related to human trafficking— could be considered under Canadian Criminal Code 279.01 et seq. Specifically, Section 279.02 criminalizes the receiving of a financial or material benefit from the commission of a human trafficking offense as delineated in Section 279.01, punishable by imprisonment. Given that the definition of "person" in the Criminal Code includes "an organization," this could potentially be applied to corporations who bear some share of responsibility for, and materially benefit from, human trafficking within their supply chain.

[311] Clapham, "Human Rights Obligations," *supra* note 39 at 207.
[312] *Ibid* at 346.
[313] *Extractive Sector Transparency Measures Act,* SC 2014, c 39, s 376.
[314] Emily B Holland, "California Transparency in Supply Chains Act Disclosure Suits," (14 March 2016), online: *Lexology* <http://www.lexology.com/library/detail.aspx?g=0bc838f5-5c6f-4534-beca-5611b6175155>.
[315] Both Scotland and Northern Ireland have adopted anti-trafficking legislation that includes specific provision for corporate criminal liability – this is missing from the MSA and it is not clear on the face of the Act whether or in what circumstances companies can be prosecuted for MSA offences.
[316] Chilton & Sarfaty, *supra* note 1 at 5.
[317] *Competition Act,* RSC 1985, c C-34. s 36(1). The Act reads: "Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI, or (b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section."
[318] Parent company liability is the goal that sustains Simons & Macklin's *The Governance Gap, supra* note 9.
[319] NRCSR, *Advisory Group Report, supra* note 12 at 24.

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THE UNIVERSITY OF BRITISH COLUMBIA