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A CASE FOR THE ESTABLISHMENT OF A LEGAL
FRAMEWORK WITHIN THE ZIMBABWEAN MINING SECTOR
TO EFFECTIVELY REGULATE THE CORPORATE AND
SOCIAL RESPONSIBILITIES OF MULTINATIONAL
CORPORATIONS

by

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Master of Laws in International Law
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SUPERVISOR: CAROLINE NCUBE
UNIVERSITY OF CAPE TOWN
FEBRUARY 2011

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Submitted in partial fulfilment of the requirements for the degree LLM, International Law minor dissertation presented for the approval of Senate in fulfilment of part of the requirements for Master of Laws in International Law (LM003- ITL) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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ABSTRACT

The thesis makes a case for the creation of a legally binding instrument to regulate the conduct of multinational corporations operating in the Zimbabwean mining sector.

The aim of this thesis is to explore the concept of Corporate Social Responsibility (CSR) and its application (or lack thereof) in the Zimbabwean mining sector with a focus on multinational corporations.

In Chapter 1, a brief introduction of International Law is given. This is followed in Chapter 2 by an analysis of CSR and a review of academic literature on CSR. While the thesis focuses mainly on the environmental aspects of CSR, human rights and community development are addressed briefly in Chapter 3.

Chapter 4 is divided into two sections, Part I introduces the regulatory regimes of Zimbabwe and three foreign jurisdictions, namely Canada, Brazil and India. Part II of Chapter 4 consists of a brief comparison of these four jurisdictions, and draws out important principles for environmental protection as an aspect of CSR.

Chapter 5 points out some of the challenges associated with implementing CSR, such as conflicting interests, lack of capacity and awareness.

Chapter 6 illustrates different ways of implementing CSR which the Zimbabwean government may consider when creating a CSR Regulation Instrument.

Finally, chapter 7 consists of the conclusions and recommendations. The recommendations include various ideas which can be incorporated in Zimbabwe taking into account the unique needs of the Zimbabwean mining industry.

This has been a challenging project especially because information is not well documented. However, I hope this research contributes and adds value to the legal regulation of foreign investors in Zimbabwe.

ABBREVIATIONS

COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
EMA	Environmental Management Act
MNC	Multinational Corporation
OECD	Organisation for Economic Cooperation and Development
WTO	World Trade Organisation
ZIA	Zimbabwe Investment Authority
ZIMRA	Zimbabwe Revenue Authority

University of Cape Town

PROLOGUE

ACADEMIC AND PRACTICAL REASONS FOR CHOOSING THE TOPIC:

The thesis makes a case for the establishment of an effective and enforceable legal instrument to regulate the corporate and social responsibilities of multi-national corporations in the Zimbabwean mining sector.

The thesis explains the concept of CSR within the framework of international investment and indicates the necessity for creating a legally binding instrument specific to the mining sector of Zimbabwe. Thereafter, the thesis illustrates important factors to take into account when creating this instrument. The thesis then considers existing models of regulatory instruments in foreign and international law with the aim of advocating a statutory instrument to regulate CSR in Zimbabwe, which will address needs specific to the mining sector of Zimbabwe.

The practical reasons for this thesis are as follows:

Firstly, the effect of the economic situation in Zimbabwe serves as motivation to explore means through which investment in the mining sector can be regulated more effectively. Zimbabwe experienced an enormous economic collapse over the last few years, the result of which was the destruction of the Zimbabwean dollar as a viable currency.¹ Furthermore the shortage of foreign currency made it difficult for investors to repatriate profits, and the inflation, interruption of rail services and shortage of fuel crippled the mining sector thereby discouraging foreign investment.² The economic downturn simultaneously led to reports of

¹ Craig Richardson 'The Loss of Property Rights and the Collapse of Zimbabwe' (Fall 2005) 25 3 *Cato Journal* Cato Institute Available on http://www.sarpn.org.za/documents/d0001190/P1320-property_rights_Zimbabwe_Richardson2.pdf (Accessed 28/01/2011).

² OECD African Economic Outlook, 2003-2004 Country Studies: Zimbabwe, Paris Headquarters OECD 357 at 361; also available on <http://www.oecd.org/dataoecd/45/43/32411615.pdf> (Accessed 28/01/2011).

continuing human rights and environmental violations. Recently, the Ministry of Mines and Minerals publicly indicated the need to establish safeguards in relation to the influx of foreign investors in the mining sector.³

Secondly, there is a need to address the existing imbalance in the bargaining power of lower income countries such as Zimbabwe when trading with countries which have stronger economies such as Western, or European countries. These countries also tend to constitute the principal shareholders in MNCs operating business in Zimbabwe.

Thirdly, the thesis aims to respond appropriately to the gap in the legal regulation of the activities of multinational companies within the mining sector. As Zimbabwe seeks to rebuild the economy, it is important to ensure that safeguards are put in place to protect the people and natural resources of Zimbabwe. It can be argued that although some countries (such as the Democratic Republic of Congo, hereinafter DRC) are endowed with vast mineral resources, they tend to neglect to create a legal regulatory framework to hold foreign investors accountable to the host state and consequently this contributes to the continued pillaging of natural wealth. It follows, in my view, that in order to protect the mining industry from predators, Zimbabwe must put in place certain measures to ensure good corporate governance and accountability of investors.

Fourthly, while Zimbabwe has enacted various laws regulating aspects of corporate social responsibility (hereinafter, CSR), there is little CSR awareness in the country and thus no single statutory document on CSR which is available or enforceable as against MNCs operating in the mining sector. Consequently, this thesis argues for the establishment of an effective regulatory framework that is legally binding, as a necessary step in the development and restructuring of the economy of Zimbabwe.

³ Golden Sibanda 'Government to Implement Mining Policy' (Monday 31 January 2011) The Herald, Zimbabwe; Informal discussion with Mr Taurai Dhliwayo, Minerals Development Officer, Office of the Ministry of Mines at the Zimbabwe Investment Authority One Stop Shop, Raleigh Road, Rotten Row Harare (Held 21/01/2011).

1 OUTLINE OF RESEARCH TOPIC AND KEY QUESTIONS TO BE ANSWERED

The thesis starts by considering the concept of foreign investment by multinational corporations and analysing the concept of CSR. This includes a consideration of the obligations of the investor-state and the multi-national corporation within an international framework as well as an analysis of the concept of CSR.

The thesis then draws attention to the (non-existent) legal framework which ought to regulate the corporate and social responsibilities of multinational corporations within Zimbabwe. It examines the importance of CSR and considers ways to regulate, implement and enforce CSR in the Zimbabwean mining sector.

The thesis then considers examples of CSR Codes as a guide for legislators in Zimbabwe when creating a legal instrument to regulate CSR obligations within the mining industry. This includes a comparison of CSR codes of one developed country and two developing countries, these being Canada, Brazil and India.

2 BROAD PROBLEMS AND ISSUES TO BE INVESTIGATED:

The thesis assesses the importance of creating an effective legal framework to monitor the activities of multi-national corporations within the mining sector of Zimbabwe with a particular focus on CSR obligations.

In so doing, the thesis focuses on human rights and environmental violations by or through multi-national corporations operating in Zimbabwe. The thesis also addresses the accountability of MNCs to the host state and their international obligations in terms of growth and economic development of the host state. The provisions of the World

Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD), and the United Nations will be considered in this regard.

However, this thesis does not consider consumer protection or labour and employment in great detail because well-established international and domestic instruments are already in place to regulate these issues.

3 RESEARCH METHODOLOGY

The thesis consists mainly of exploratory research. Desk research of primary and secondary legal material was conducted; this constitutes the main element of the research paper.

Secondly, I conducted a limited comparative review of three jurisdictions, namely Canada, Brazil and India. The purpose of this comparison was to establish trends in CSR regulation and to identify key aspects of CSR which may be drawn in pursuit of creating a regulatory framework for the Zimbabwean mining sector.

4 CHALLENGES EXPERIENCED

The challenges faced in this research include the lack of and inaccessibility of information on mining and CSR in Zimbabwe. Secondly, the bureaucracy connected with government departments in Zimbabwe serves as a possible disincentive for companies and researchers to practice and develop CSR, respectively. Thirdly, the lack of, decentralisation and inaccessibility of CSR information may hinder willing corporations from practising CSR. It is disconcerting that while it commonly understood that human rights abuses are taking place in mines, so few human rights organisations have taken an interest in these abuses. However, many of these involve domestic corporations and therefore will not be the subject of discussion in this paper. It may be argued that it is in the national

interest to prioritise individual human rights over group rights such as those of mining communities especially during national elections.⁴

Fifthly, the lack of documentation on mining abuses and environmental disasters creates a vacuum in the regulation of CSR in mines and renders it difficult to obtain necessary information for purposes of research and development. Finally, the vertical and horizontal fragmentation of state organs and laws on aspects of CSR required a tedious analysis of several fields of law.

⁴ Craig Richardson (note 1).

CHAPTER 1
PRINCIPLES OF PUBLIC INTERNATIONAL LAW, THE
STATE AND STATE SOVEREIGNTY

1 1 General Principles

International Law is that part of law which regulates relationships between independent nation states. International Law is also referred to as the law of nations, indicating the key players as states as opposed to individuals.⁵ The key characteristics of a state as such are population, territory and government and some authors include a fourth characteristic, sovereignty or the ability to enter into relations with other states.⁶ (This work does not address the rules of private international law which is the conflict of laws). International Law is governed by various sources of law. Primary sources include bilateral and multilateral agreements, whereas secondary sources include general principles of law, judicial decisions, customary international law as well as soft law. Primary sources are authoritative sources, while secondary sources are subsidiary and merely persuasive.⁷

(a) Sovereignty:

Key to international law is the concept of sovereignty. Sovereignty is the acknowledgement and recognition of the independence of each nation state. The United Nations Declaration of Independence was a clear indication of the acknowledgement of state sovereignty for all states through independence.⁸ Consequently, each state has power, subject to no other, to create and regulate its own national laws without the interference of other states; this may also be referred to as territorial integrity.⁹ The principle of state sovereignty emphasises the horizontal relationship between states. This means in other words that despite the existence of

⁵ Kelsen H *Principles of International Law* (2003) 1; Shaw M *International Law* 5th Ed (2003) 3 & 65.

⁶ Harris D *Cases and Materials on International Law* 7th Ed (2010) 91.

⁷ Shaw M (note 5) at 1 & 65.

⁸ Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 United Nations General Assembly Resolution 1514 XV (1960).

⁹ Buchanan AE *Justice, Legitimacy and Self-Determination: Morals for International Law* (2007) 331; D Harris (note 6) 104.

international bodies such as the United Nations, no state is subordinate to, or subject to the laws of another state, regardless of the level of its economic development.¹⁰ All international rules are essentially based on agreement through treaty-law or customary international law.¹¹ Furthermore, despite the existence of the International Court of Justice, judicial precedents of the International Court of Justice are not binding and each judgment may only be effective if the affected states agree.¹² However, an offended state may take action by use of force, and the United Nations Security Council may also influence the conduct or misconduct of a state by way of sanction.¹³ A more effective control mechanism in international law is the concept of reciprocity, which often results in states pursuing mutual understanding, and prevention of unnecessary conflict.¹⁴

To regulate relations between states, bilateral or multilateral treaties may be concluded (both forms constitute primary sources). Bilateral treaties are those agreements concluded between two states, while multilateral treaties are those agreements concluded by three or more states, often regionally or upon ratification by any stipulated number of states. Of particular importance are bilateral investment treaties [hereinafter, BITs], regional and international agreements through regional or international organs such as COMESA, World Trade Organisation (WTO) Marrakesh Agreement and Organisation for Economic Cooperation and Development (OECD). Furthermore various international instruments are considered. The preparatory works and discussions of failed treaties, such as the failed Multilateral Agreement on Investment (MAI) have been considered briefly.

¹⁰ D Harris (note 6) at 104.

¹¹ Kelsen H (note 5) at 1; M Shaw (note 5) at 3.

¹² D Harris (note 6) at 3.

¹³ Shaw M (note 5) at xxiii.

¹⁴ Shaw M (note 5) at 7.

(b) Interpretation of International Instruments:

International instruments often create difficulties of interpretation, institutional processes, and discrepancies in interpretation by national courts, conflicting rules of private international law, status of international interpretation in national law, and domestication of international instruments. Furthermore, international investment entails two essential levels of relationship, the first being the relationship between the host state and the investor state, which is regulated primarily, by international law, and the second being the relationship between the host state and the foreign owned corporate entity, which is regulated domestically, often in terms of company laws or other statutory provisions of the host state. It is in my view that CSR concerns tend to be more identifiable at the domestic level as opposed to the international level thus rendering it necessarily difficult to hold the parent company accountable.

1 2 The Emergence of Foreign Investment:

Soon after World War II many of the former colonies gained independence and they sought a new economic order that would allow them to gain access to world markets and regulate their own economies.¹⁵ This fell in line with the United Nations Resolution which created the New International Economic Order, aiming to encourage and ensure free and fair trade among all states.¹⁶

A few years later, in the 1970s pursuant to global fuel shortages a new trend developed in which there was an increase in lending petro-dollars and thus a shift from the traditional lending banks. This transition, together with the emerging concept of free market economy led to the increased liberalisation of trade and foreign investment.¹⁷

¹⁵ Sornarajah M *International Law on Foreign Investment* 3rd Ed (2004) 1.

¹⁶ Declaration on the Establishment of a New Economic Order (1974) United Nations Resolution A/RES/S-6/3201 (1 May 1974); M Sornarajah (supra note 15) at 1.

¹⁷ Carroll AB 'A History of Corporate Social Responsibility' *The Oxford Handbook of Corporate Social Responsibility* Eds Crane A et al (2008) at 54.

CHAPTER 2

CORPORATE SOCIAL RESPONSIBILITY

2 1 The Concept of CSR

CSR is a term used to describe various policies and practices adopted voluntarily by companies in the interests of their external stake-holders.¹⁸ These include shareholders, employees, consumers, communities and the physical environment which is a silent stakeholder.¹⁹ There are also supranational stake-holders such as the United Nations and its agencies, the OECD, and various interest groups.²⁰ CSR codes tend to regulate societal issues including human rights, environmental protection, labour issues, consumer protection and community development. This paper focuses on social responsibility towards stake-holders whose needs are often overlooked, namely the community and the environment.

Although CSR exists as a concept, it is often misunderstood. CSR is often used interchangeably with corporate social investment (CSI), corporate accountability, corporate citizenship or business ethics.²¹

2 1 1 What is CSR?

In the European Union, CSR is defined as ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’.²²

This position is supported by the Austrian Institute for Small to Medium Enterprises (SME) Research which states that CSR entails the:

¹⁸ Fernando AC Ed *Corporate Ethics, Governance and Social Responsibility: Precepts and Practices* (2009) at 58.

¹⁹ Fernando AC Ed (note 18) at 58.

²⁰ Horrigan Byran *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Government, Law and Business* (2010) at 4.

²¹ Van Ende L *Corporate Social Responsibility in South Africa: Fact or Fiction* Unpublished LLM Dissertation Rand University, South Africa (October 2004) at 2.

²² Delbard O ‘CSR Legislation in France and the European Regulatory Paradox: An Analysis of EU CSR Policy and Sustainability Reporting Practice’ (2008) 8 4 *Corporate Governance* 397 at 398; Promoting a European Framework for Corporate Social Responsibility: Green Paper COM (01) 366 Final at 5 Available on http://europa.eu.int/comm/employment_social/socdial/csr/greenpaper_eu.pdf (Accessed on 03/02/2011).

‘integration of social and environmental concerns into the business operations of companies and in their interaction with their stakeholders on a voluntary basis, [in other words] going beyond compliance with legal obligations’.²³

In my opinion, both views indicate more than mere compliance. The words ‘integration’ and ‘interaction’ appear in both texts as does the word ‘voluntary’. The former may be interpreted as an effort toward multi-stakeholder collaboration, whereas the latter refers to non-statutory good intentions.

CSR is sometimes incorrectly used interchangeably with corporate social investment (CSI). Whereas CSI refers to charitable conduct of MNCs towards local communities, CSR goes further than mere corporate philanthropy and charitable donations.²⁴ CSI tends to focus on voluntary donations and does not seek to address the root causes of the social concerns such as recruitment and housing of mine workers.²⁵ CSR addresses actual accountability towards stakeholders including local communities affected by the mining operations, environment, employees and consumers among others.²⁶ CSR is further defined as ‘[actions taken] by firms that voluntarily take account of externalities produced by their market behaviour’.²⁷ This definition leans toward accountability. I support this view because it goes beyond mere corporate philanthropy, and engages companies to become accountable to the communities affected by their mining operations.

²³ Mandl I ‘The Interaction between Local Employment Development and Corporate Social Responsibility VC/2007/0559’ KFU FORSCHUNG Austria, Vienna January 2009) Available on www.ledknowledge.org/index.php?mod=doc&act=detail&id=181&idC=1 (Accessed 03/02/2011).

²⁴ Hopkins M *Corporate Social Responsibility and International Development* (2007) 219.

²⁵ Hamann R and Kapelus P ‘Corporate Social Responsibility in Mining in Southern Africa: Fair Accountability or Just Greenwash’ (2004) 47 *3 Development* 85 at 87.

²⁶ Van Ende L (note 21) at 2; Hopkins M (note 24) at 219.

²⁷ Edwards T et al ‘Corporate Social Responsibility in Multinational Companies: Management Initiatives or Negotiated Agreements?’ at 2 & 8 Available on www.ilo.org/public/english/bureau/inst/publications/.../dp18507.pdf (Accessed on 03/02/2011) at 1.

On the other hand, other terms sometimes used are corporate accountability and business ethics. While corporate accountability tends to lean toward financial reporting and transparency in the conduct of the MNC, business ethics is a wide term which may include one or more of the above listed concepts.²⁸

2.2 To have or not to have CSR Codes?

The call for CSR remains a tug of war. Firstly, Nietzsche argues against the very basis of CSR by disputing the authenticity of ‘good’ or ‘bad’ conduct and questioning the determination of what is good or bad.²⁹ In my opinion, following Nietzsche’s position would be splitting hairs. I disagree with Nietzsche’s view that it is not possible to determine what truly constitutes good or bad conduct. In my view, the true concept of CSR goes beyond mere business ethics or choosing between good and bad. It entails an obligation for MNCs to act responsibly, especially towards host state stakeholders, and not merely pursue profit and economic gain.³⁰ It seems clear to me that when corporations extract mineral wealth to the benefit of the investor state, while depleting natural resources in the host state, there is an immediate tilting of the balance. The same applies when local communities are relocated for purposes of mining operations, and also when mine sites are abandoned without restoration of land and the immediate physical environment.

Frederick submits that when a company meets its social responsibilities, this positively influences the financial performance of the company. To this, Thomas D’Aquino as cited in Forcese adds that:

²⁸ Van Ende L (note 21) at 2; Haman and Kapelus (note 25) at 87.

²⁹ Nietzsche (1996) at 3) as cited in Dunne S ‘Corporate Social Responsibility and the Value of Corporate Moral Pragmatism’ (2 June 2008) 14 *Culture and Organization* 135 at 141.

³⁰ Yezdi H Godiwalla & Faramaz Damanpour (note 19) at 44; Jenkins R ‘Corporate Codes of Conduct: Self-Regulation in Global Economy (Technology, Business and Society’ Paper No. 2 *Geneva: United Nations Research Institute for Social Development* at 12 (2001) as cited in CP Countries ‘Corporate Social Behaviour in Risky States: Understanding Corporate Decision Making Processes Pertaining to Social Risk and Responsibility’ at 16 Available on www.carlton.ca/cifp/app/serve.php.1049.pdf (Accessed on 17/08/2010);.

‘Whether at the World Trade Organisation or at the OECD, or at the United Nations, an irrefutable case can be made that a universal acceptance of the rule of law, the outlawing of corrupt practices, respect for worker’s rights, high health and safety standards, sensitivity to the environment, support for education and the protection and nurturing of children are not only justifiable against the criteria of morality and justice. The simple truth is that these are good for business and most business people recognise this.’³¹

On the other hand, Margolis and Walsh conducted empirical research on the matter and came out with conflicting findings.³² Margolis and Walsh found that meeting CSR obligations did not directly alter the company’s financial performance, thus disputing the need for CSR codes. This view seems to be supported by the fact that well known CSR performance indicators such as AccountAbility (UK Based) which in its 2007 Fortune Good 100 ranking of increased sustainability failed to make any connection with the financial performance of the companies listed therein.³³ It is submitted further that performance indicators such as Dow Jones and FTSE4Good are not a true reflection of the market performance.³⁴ In my view, such a one-sided approach to CSR may act as a disincentive to corporations.

Beniof, together with Friedman argue against CSR, submitting that CSR obligations defy the concept of business whose main objective to make the highest attainable profits.³⁵ However, Sutherland takes a paternalistic view suggesting that it is the responsibility of businesses to respect the environment and develop the local communities in which they conduct their operations because businesses are important actors in society.³⁶ This

³¹ Aquino T CEO of Canadian Council of Chief Executives as quoted in CP Countries (note 30) at 43.

³² Margolis and Walsh as cited in Dunne S (note 29) at 137.

³³ Ruggie J ‘The Next Question: Does CSR Work?’ *The Economist* (17 January 2008) http://www.economist.com/specialreports/PrinterFriendly.cfm?story_id=10491055 (Accessed 04/02/2011).

³⁴ Ruggie J (note 33).

³⁵ Friedman M ‘The Social Responsibility of Business is to Increase Profits’ (September 13, 1970) *The New York Times Magazine* Available on <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html> (Accessed 04/02/2011); Marc Beniof Manager of Sales Force as cited in Ruggie J (note 33).

³⁶ Yezdi H Godiwalla and Faramaz Damanpour (note 30) at 44.

submission seems to expect companies to spearhead CSR practices in the local community. I am in agreement with the view that social responsibility is a duty which MNCs owe to society and consequently, CSR should not be left to the choice of MNCs, but should rather be regulated in terms of domestic laws of the host state. The motivation for this position is that MNCs benefit in numerous ways from local communities, such as through obtaining a labour force, and consumers for their products, and extraction of mineral wealth, yet mining corporations tend to do more harm than good, or as much harm as good in the communities in which mining operations take place.³⁷

Again Friedman argues that the use of company profits for purposes of CSR amounts to theft from the company.³⁸ In contrast, Fiorina argues that:

‘The idea that companies have no responsibilities to the communities in which they operate, that in other words, we operate in a vacuum, or the idea that our actions have no consequences on a world around us is short sighted at best, and is certainly not sustainable for very long.’³⁹

In further opposition, it is submitted that when a company contributes to social development, it not only develops genuine trust with members of the community and local government, but it also reaps the benefits that flow from that trust, such as commercial success and highly competitive financial performance.⁴⁰

Robert Reich argues against CSR suggesting that CSR encroaches on Government duties and that it is a sideshow and constitutes an abuse of company funds.⁴¹ However, Ruggie rebuts this view by indicating that the

³⁷ Yezdi H Godiwalla and Faramaz Damanpour (note 30) at 44.

³⁸ Dunne S (note 29) at 139.

³⁹ Fiorina (2003) as cited in Dunne S (note 29) at 140.

⁴⁰ Frankental P and House F (2000) ‘Human Rights: Is it any of your Business?’ London : Amnesty International UK and The Prince of Wales Business Leaders’ Forum’ *Corporate CSR* 1 at 43; Quoting Sir John Brown, CEO of BP Amoco cited in Franckental and House 2000 at 26; CP Countries (note 30).

⁴¹ Ruggie J (note 33).

absence of adequate domestic legislation is primarily the reason for the void which MNCs are faced with when entering foreign jurisdictions.⁴²

Moreover, Ruggie submits strongly in favour of CSR, stating that the need for CSR is clear, and that the real question concerns how CSR should be observed and not whether it ought to be observed.⁴³ I support the views of Ruggie because firstly, CSR has become largely accepted by members of the business community and secondly, there is strong social pressure in support of CSR to the effect that CSR has become a marketing tool for major businesses, and therefore the question is not whether to accept CSR, but rather how to regulate it.⁴⁴

My submission therefore is to enact a legally binding instrument which creates obligations on multinational entities to follow certain established minimum CSR obligations and to enter dialogue with relevant stakeholders in order to be pertinent and to avoid being redundant in their CSR projects.

2 3 Creating a CSR Code

To achieve optimum recognition and CSR compliance, CSR must be acknowledged as an integral part of the organization. Companies may practise CSR in different ways, for example, incorporating CSR as part of their organisational culture. Alternatively, companies may provide for CSR in a general code of conduct, or they may explicitly state their social responsibility practices in CSR codes. CSR policies tend to be regulated through codes created voluntarily and unilaterally by companies and are non-binding in nature.⁴⁵ The effectiveness thereof will depend on various factors such as the parties affected by the code and the enforceability of the code. CSR codes may be internal or external, negotiated or unilateral, advisory or mandatory and may be influenced by the size, nature or organisational structure of the corporation.

⁴² Ruggie J (note 33).

⁴³ Ruggie J (note 33).

⁴⁴ Ruggie J (note 33).

⁴⁵ Edwards et al (note 27) at 2.

Firstly, CSR codes may be internal, regulating management and employee relations, or external, regulating relations with the community, suppliers or consumers and local government. While internal CSR codes tend to create a strong CSR culture, external codes tend to have more positive returns. It is submitted that when a company contributes to social development, it not only develops genuine trust with members of the community and local government, but it also reaps the benefits that flow from that trust, such as commercial success and highly competitive financial performance.⁴⁶ Furthermore, CSR practices tend to contribute favourably to a firm's corporate image and serve as a marketing tool by appealing to the conscience of both consumers and investors (shareholders).⁴⁷

Secondly, stakeholder participation is imperative for the effective realisation of CSR initiatives.⁴⁸ Where CSR codes are negotiated with affected parties, the codes tend to be more detailed and specific. They easily gain legitimacy and lead to cooperation through the entire supply chain; whereas CSR codes created unilaterally, often top-down, are likely to be vague and ineffective.⁴⁹ This indicates to me the need for the formation of global partnerships, and increased multi-stakeholder participation as a way to identify and meet the different needs of the stakeholders.⁵⁰ In my opinion, it is imperative for the Zimbabwean legislator to establish a discussion forum as a means by which businesses and non-governmental organisations and civil society can co-operate and form CSR partnerships.

Thirdly, other influences on the substance of CSR codes include corporate culture in the home country, also known as the 'home effect', the size of

⁴⁶ Davy et al 1999 at 26 as cited in CP Countries (note 30) at 20.

⁴⁷ United Nations Policy Integration and Analysis Branch of the Division for Sustainable Development (February 2007) Issue 1 *Sustainable Development Innovation Briefs* (Based on Background Paper Prepared by Halina Ward, Emma Wilson, Lubya Zarsky (International Institute for Environment and Development (IIED)) and Tom Fox (United Nations Development Program (UNDP)) at 1.

⁴⁸ Yezdi H Godiwalla and Faramaz Damanpour (note 30) at 43.

⁴⁹ Edwards T et al (note 27) at 2 & 8.

⁵⁰ CP Countries (note 30) at p 45.

the company, sector and regulations, and organisational structure.⁵¹ For example, it was found that UK based MNCs showed strong indications of 'home effect' in that they reflect a greater focus on shareholders than social responsibility for purposes of listings on the London Stock Exchange; whereas German based MNCs tend to lean more toward sustainability.⁵² Thus, it will be necessary to assess the nature and organisational structure of the MNCs currently involved in the Zimbabwean mining sector and it will be helpful to determine what constitutes the key market drivers in the investor state in order to establish the home effect. Codes may be advisory or mandatory.⁵³ Furthermore, MNCs with less human resource management autonomy or where management functions are performed at a regional or international level are more likely to have mandatory CSR codes.⁵⁴

Although it may seem that the host state plays a limited or otherwise passive role, this is not correct because the host state has the capacity to enact laws and sanctions. While most governments have stayed clear of legislating good corporate governance, some have enacted binding laws to ensure CSR compliance and reporting by large firms, such as France, through the Nouvelles Regulations Economiques, social reporting requirement, Portugal, through its mandatory social statement requirement, and the United Kingdom, through its CSR legislation.⁵⁵

⁵¹ Bondy K et al 'The Adoption of Voluntary Codes of Conduct in Multinational Corporations: A Three-Country Comparative Study' (2004) 109 4 *Business and Society Review* 449 at as cited in Edwards et al (note 27) at 20.

⁵² Edwards T et al (note 27) at 4.

⁵³ Edwards T et al (note 27) at 2.

⁵⁴ Edwards T (note 27) at 13.

⁵⁵ French Law Nouvelle Reulations Economiques.

3 KEY ASPECTS OF CSR

3 1 HUMAN RIGHTS and CSR

Traditionally three schools of human rights were identified, namely ‘first generation’ blue rights, being individual, civil and political rights, followed by ‘second generation’ red rights, being socio-economic and cultural rights, and ‘third generation’ green rights, being group or community rights to self determination and protection of the environment.⁵⁶

CSR as a right enforceable against the corporation does not appear in these traditional views of human rights and consequently human rights abuses by MNCs went for a long time unnoticed.⁵⁷ This meant that human rights abuses instigated by mining companies were not recognised as such. While most of the industrial world has acknowledged that the conduct of MNCs was outside the scope of national corporate control measures, Zimbabwe, together with other developing countries, has moved rather slowly in this regard.⁵⁸

However, modern theories have been developed as follows: three generations are identified, of which the first focuses on short-term corporate interests, while the second focuses on long-term strategies, and the third and present generation is seen as concerned with the role of business in the public domain, such as in environmental protection, sustainable development and poverty reduction.⁵⁹

In Zimbabwe, as in India and Nigeria (*inter alia*) CSR started as philanthropic acts of multinational entities performed in response to the negative effects of mining activities on local communities and the physical

⁵⁶ Douzinas C ‘Human Rights, Sovereignty, Humanism’ in Hunter R and Keyes M (Eds) *Changing Law: Rights, Regulation and Reconciliation* (2005) at 3. Ashgate Publishers.

⁵⁷ Kinley D et al ‘The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations’ (2007) 25 *Company and Securities Law Journal* 30 at 30.

⁵⁸ Kinley D et al (note 57) at 30.

⁵⁹ Dossing H ‘The Business Case for CSR’ (2003) *International Chamber of Commerce UK Guide to Corporate Social Responsibility* at 34.

environment.⁶⁰ It is argued that present CSR mechanisms are direct transplants from the West and as a result may fail to reach optimum level of effectiveness if African values are undermined or ignored in the regulation and implementation process.⁶¹ In order to incorporate African values and community needs into CSR, multi-sector participation is necessary.⁶² It seems to me that involving all affected parties will indeed facilitate more inclusive CSR developments which take into account the interests of the different stakeholders.

3 2 THE DEVELOPMENT OF HUMAN RIGHTS AND BUSINESS IN THE UNITED NATIONS ORGANISATION

The United Nations Organisation has spearheaded human rights recognition under the CSR umbrella.⁶³ The UN Norms on the Responsibility of Trans-national Corporations and other Business Enterprises (hereinafter, Norms), were introduced in 2003 as a set of human rights obligations for corporations under international law.⁶⁴ While the draft Norms failed to materialise, they continue to be a light towards CSR enforcement through human rights laws. The Norms were initially presented to the United Nations Commission on Human Rights (UNCHR) for further analysis. Then the Office of the High Commissioner of Human Rights (OHCHR) considered them. However, these Norms were severely criticised and thus in 2005 the United Nations appointed Professor John Ruggie of the Kennedy School of Government, Harvard University as the Special Representative on the Issue of Human Rights and Business (SRSB).⁶⁵ In Professor John Ruggie's report he submits that the document of the Norms is 'engulfed by its own doctrinal excess [and creates] confusion and doubt [through] exaggerated legal claims and conceptual

⁶⁰ Helg A 'Corporate Social Responsibility from a Nigerian Perspective' Unpublished Essay Göteborgs Universitet/Företagsekonomiska Institutionen (22/08/2007) Available on <http://www.essays.se/essay/1fc14125db/> (Accessed 14 January 2011).

⁶¹ Helg A (note 60).

⁶² Helg A (note 60).

⁶³ Kinley D et al (note 57) at 31.

⁶⁴ Kinley D et al (note 57) at 31.

⁶⁵ United Nations Human Rights and Trans-National Corporations and other Business Enterprises (20/04/2005) United Nations General Assembly Resolution E/CN.4/RES/2005/69; Kinley D et al (note 57) at 32.

ambiguities'. However, while Professor Ruggie expresses these concerns about the Norms, he appreciates the importance of the substantive provisions of the Norms such as the summary of rights affecting business.⁶⁶ The Business Leaders Initiative on Human Rights (BLIHR) has also taken appreciation of the substance of the norms despite criticism levelled against the Norms. BLIHR has embraced the Norms as opposed to fighting them, and has thus shown that the Norms need not be as onerous as the critics anticipated.⁶⁷

3 2 1 Role of Companies

Companies are no longer perceived merely as contributors to trade. In fact, stakeholders acknowledge the role of corporations as actors in socio-economic and environmental concerns.⁶⁸ Companies may also incorporate aspects of human rights in the corporate policy and include matters such as non-discrimination, freedom of association, collective bargaining, and prohibition of child labour, equality and disability in terms of international law.⁶⁹ Furthermore, companies may include human rights clauses in important contracts such as employment contracts and contracts with suppliers and contractors.⁷⁰ Companies may also assess human rights compliance as part of due diligence for acquisitions and mergers.⁷¹

⁶⁶ United Nations, Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights, Transnational Corporations and Other Business Enterprises (22/02/2006) United Nations General Assembly Resolution E/CN.4/2006/97; Kinley D et al (note 57) at 30.

⁶⁷ Kinley D et al (note 57) at 38.

⁶⁸ Josep M. Lozano and Maria Prandi 'Corporate Social Responsibility and Human Rights' in Mullerat R (Ed) Corporate Social Responsibility: The Corporate Governance of the 21st Century (2005).

⁶⁹ United Nations Conventions: Declaration of Human Rights (Arts 4,7,20 &23 Res 217 A(III) 1948); Convention on Rights of All Migrant Workers and Members of their Families (Art 25 &26 Res 45/58 18/12/1990); and Convention on Children's Rights Art 32 (Res 44/2. 20/11/2011).

⁷⁰ AngloGold Ashanti 'Sustainability Review' Available on http://www.anglogold.co.za/subwebs/informationforinvestors/reports09/SustainabilityReview09/gri_humanrights.htm (Accessed 10 /02/2011).

⁷¹ GRI 'Human Rights: Current Project Status' Available on <http://www.globalreporting.org/CurrentPriorities/G31Developments/HumanRights/> (Accessed 10/02/2011).

3 3 COMMUNITY DEVELOPMENT

In my view, inasmuch as corporate philanthropy is commendable, it seems to be more effective for corporations to establish from local government and local community leaders what their real needs are, as opposed to randomly selecting a charitable activity to perform. Some practical ways of community development may include infrastructural improvements, such as the introduction of sanitation facilities, building and fixing roads, or landfill and waste management.⁷² These seem to be good examples of basic developmental policies with mutual benefit for the host state and the MNC. The host-state benefits in terms of infrastructural development, such as roads or railway networks and communication cables, while the corporation benefits from a safer and more efficient transport system and improved communications. Furthermore, community involvement in planning and co-ordination of proposed activities is pivotal to ensure legitimacy and trust, as well as to incorporate community interests into the CSR initiatives.⁷³

MNCs may also conduct a diagnosis prior to investment, in order to assess the impact of its proposed mining activities on various stake holders particularly, the immediate communities in which mining operations will take place, and the physical environment.⁷⁴ Some important concerns include health services, housing, reforestation, productive agriculture, micro-enterprise initiatives, and construction of recreational facilities.⁷⁵ It is important in my view, for MNCs to enter dialogue with the host government in order to establish social needs specific to the sector and communities. While it may be argued that foreign corporate entities are not organs of state and thus should not be compelled to perform the obligations of government, institutional support is essential to community building, and it can be provided through consultation, technical and

⁷² CP Countries (note 30) at 16.

⁷³ CP Countries (note 30) at 17.

⁷⁴ Zimbabwe Environmental Management Agency 'Impact Assessment Guidelines' Unpublished Internal Document.

⁷⁵ CP Countries (note 30) at 20.

environmental training and capacity building.⁷⁶ Furthermore, working in collaboration with the host government may facilitate true realisation of development through the government's economies of scale.

Larger MNCs may be bound by global CSR policy.⁷⁷ Some corporations have indicated a high regard for CSR in Zimbabwe, such as Ashanti Gold, and Rio Tinto which have taken positive steps to ensure CSR compliance by relocating displaced communities and building better housing for them in the new location, as well as building and refurbishing schools and clinics in the local community.⁷⁸ This type of incentive may be termed social investment, thus indicating that the mining corporation equally benefits from observing its CSR obligations.⁷⁹

⁷⁶ United Nations Global Compact (UNGC) and Office of the High Commissioner for Human Rights (OCHCR) 'Embedding Human Rights in Business Practice II'(2007) at 6; CP Countries (note 30) at 20.

⁷⁷ Edwards T et al (note 27) at 21.

⁷⁸ AngloGold Ashanti 'Sustainability Review' (note 70); Informal discussion with Taurai Dhliwayo Minerals Development Officer, Zimbabwe Ministry of Mines ZIA One Stop Shop, Raleigh Street, Rotten Row Harare (Annex 1B).

⁷⁹ Van Ende L (note 21) at 2.

CHAPTER 4: REGULATING CSR

PART 1

4 1 INTERNATIONAL LAW OBLIGATIONS

International obligations arise from agreements entered into between states bilaterally and multi-laterally, as well as by soft law and *ius cogens*. This section will briefly introduce bilateral and multilateral agreements.

4 1 1 Bilateral Investment Treaties

During the negotiations of BITs the host state typically seeks to encourage the investor to invest, while the investor seeks the best possible return.⁸⁰ In a bid to persuade investors to invest, the host states may offer various tax advantages or allow repatriation of profits and waive import restrictions, while the investor may offer to provide a minimum level of employment to the domestic labour force, or promise to transfer technology or know-how to the nationals of the host state.⁸¹ Although, the United Nations Resolution on Permanent Sovereignty over Natural Resources of 1973 puts the host government in full control of its natural resources, developing countries tend to prefer to enter into lopsided BITS which undermine sovereignty in order to remain competitive in attracting foreign investment.⁸²

4 1 2 Multilateral Agreements

To date there is no universally accepted instrument to regulate multinational investments. The efforts of the OECD in creating a binding Multilateral Agreement on Investment (MAI) failed. Therefore, the OECD Guidelines, being the most widely accepted standards by multinational entities, will be used in Part II of this chapter as a basis for comparison pertaining to substantive CSR provisions in selected jurisdictions.

⁸⁰ Guzman AT 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639 at 661.

⁸¹ Guzman AT (note 80) at 661.

⁸² Declaration on Permanent Sovereignty Over Natural Resources (17/12/1973) United Nations General Assembly Resolution A/RES/3171 XXVIII; Guzman T (note 80) at 651.

4 2 INTRODUCTION TO CANADA; BRAZIL AND INDIA CSR REGIMES ON MINING

In creating a regulatory regime, it is important to consider how other jurisdictions currently regulate CSR in their respective mining sectors. For this purpose Canada, Brazil and India will be considered as examples. Canada has a significantly well developed CSR regime, and consequently serves as a potential model from which Zimbabwe can draw inspiration. On the other hand, Brazil and India are developing countries, and as such, they will provide a more practical perspective on what may be reasonably attainable in a country with a similar economic background. Furthermore, Brazil and India constitute part of the BRIC countries which represent four of the emerging economies, thus Zimbabwe can learn from Brazil and India for progressive development and effective regulation of the mining sector.⁸³

A brief introduction to the respective countries follows below:

4 2 1 Canada

Canada has a prevailing cultural division between the indigenous peoples of aboriginal descent occupying rural Canada and the rest of the Canadians. A similar divide can be found between the urban and the rural Zimbabweans with regard to literacy, educational aptitude, knowledge of legal rights and social needs such as development and sustainability.⁸⁴ I will consider the application of Canadian regulations and determine how they take this disparity into account as this may have an impact on the Zimbabwean sector.

⁸³ BRIC consists of four emerging economies, namely Brazil, Russia, India and Canada. These countries have a positive growth projection from 2006 to 2050 according to Goldman Sachs in Dominic Wilson and Roopa Purushothaman 'Dreaming with BRICs: The Path to 2050' available on <https://www.gs.com/insight/research/reports/99.pdf> (Accessed 03/02/2011); Bird RC 'Defending Intellectual Property Rights in the BRIC Economies' (2006) 43 2 *American Business Law Journal* 317 at 317-318.

⁸⁴ Inés P Grainger IP 'The Literacy Campaign' (1987) 2 2 *Journal of Social Development in Africa* 49 at 56.

As in most mines world-over, mining companies operating in Canada walked away when mineral reserves were depleted. The land would be left unfit for beneficial use due to environmental damage such as acid rock drainage and contamination of water sources beyond the original demarcated mining area, among other things.⁸⁵ As a result, Canada has a strong CSR commitment thus Canada is used here to illustrate the operation and implementation of CSR in an industrialized country. Canada has implemented various instruments and statutes to regulate corporate responsibility through its mining laws and environmental laws. Practical implementation of international standards can be found in domestic laws because international regulations of policies must first be translated into domestic legislation. Canada has done well in its domestic CSR regulation by creating extensive CSR provisions, and monitoring mechanisms. Canada applies the principle of national treatment to foreign investors (rules applicable to foreign investors are not more restrictive than rules for domestic companies) and consequently sets high standards not only for its domestically registered MNCs, but also for foreign investors in Canada.⁸⁶

The section below considers regulation of CSR in Canada. However, while Canada has created an elaborate regime for CSR regulation domestically, there is still a lot to be done about alleged violations by Canadian companies operating in developing countries.⁸⁷ There is a movement to pass the Bill C-300 on Corporate Accountability for Activities of Mining, Oil and Gas Corporations in Developing Countries which seeks to create obligations on Canadian companies prospecting or exploring in developing

⁸⁵ United Nations 'Canada Thematic Profile on Mining' Available on www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/canada/Mining.pdf (Accessed 7 October 2010).

⁸⁶ Foreign Affairs and International Trade Canada 'Opening Doors to the World: Canada's International Market Access Priorities' Available on http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-reami/2005/2005_4_05.aspx?lang=eng (Accessed 03/02/2011).

⁸⁷ Canadian Centre for the Study of Resource Conflict (CCSRC) 'Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World' October 2009 Available on http://www.miningwatch.ca/sites/miningwatch.ca/files/CSR_Movements_and_Footprints.pdf (Accessed 3 December 2010).

country host states, parallel to its domestic CSR requirements.⁸⁸ Below is an indication of instruments and programs initiated in Canada in response to harmful mining activities.

In response to the abandoned mine dilemma, the Canadian government established restorative measures, namely the Mine Environment Neutral Drainage (MEND, 1989)⁸⁹ and the National Orphaned and Abandoned Mines Initiative (NOAMI, 2001)⁹⁰ to develop technologies to combat acid drainage and for sustainable rehabilitation of abandoned mines, respectively. Both initiatives are multi-stakeholder efforts involving government, mining industry and non-governmental organisations.⁹¹

Canada played an important role in the establishment of the OECD Guidelines on Multinational Enterprises (1976). At present, Canada regulates mining-sector CSR through various instruments, including the Canadian Environmental Assessment Act (hereinafter, CEAA), Metal Mining Effluent Regulations (MMER) which prescribes authorised effluent limits for deleterious substances in mine effluents that discharge to waters frequented by fish, Environmental Code of Practice for Metal Mines (2009), the Green Mining Initiative(GMI), and the Canada Mining Innovation Council (CMIC, 2009) as part of the Pan-Canadian Mining Research and Innovation Strategy.

Canadian government policy values CSR highly and provides for key social issues such as poverty reduction, economic diversification, fighting HIV and developing local infrastructure and health services in developing country host states, as well as equitable distribution of risks and benefits.⁹²

⁸⁸ Mining Watch Canada 'Bill C300 Corporate Accountability for the Activities of Mining, Oil and Gas Corporations in Developing Countries' Available on <http://www.miningwatch.ca/en/bill-c-300-corporate-accountability-activities-mining-oil-or-gas-corporations-developing-countries> (Accessed 03/02/2011).

⁸⁹ MEND Secretariat 'Natural Resources Canada' Available on <http://www.fppt-pftt.gc.ca/eng/success/awards2003/2003awards3.html> (Accessed 9 October 2010)

⁹⁰ NOAMI 'About NOAMI: Background' Available on <http://www.abandoned-mines.org/home-e.htm> (Accessed on 9 October 2010).

⁹¹ United Nations Canada Thematic Profile (note 85).

⁹² United Nations Canada Thematic Profile (note 85).

Furthermore, there is a requirement for MNCs to communicate transparently with stakeholders and to develop strong relationships with investment-host states based on mutual benefits, and community development.⁹³ In Canada, several instruments such as the Aboriginal Human Resource Council and Guidelines, as well as the Mining Information Kit for Aboriginal Communities, information bulletins and videos on Aboriginal mining activities have been made publicly available to promote dialogue with historically disadvantaged groups, consisting of aboriginal peoples.⁹⁴ More importantly, Canadian efforts toward social responsibility are multi-sector inclusive. The industry has also taken initiatives such as the TSM-Towards Sustainable Development Initiative which regulates tailings management, energy use, greenhouse gas management and crisis management, among other things.⁹⁵

Moreover, the Federal Government of Canada also continually develops CSR regulation by enacting various laws and policies. Important initiatives taken by Canada, which can be used as a backdrop for regulating CSR include the establishment of the International Institute for Sustainable Development, (1990s), Whitehorse Mining Initiative which monitors CSR in the investment host country, the Standing Committee on Foreign Affairs and International Trade which organized through its Advisory Group the Multi-Stakeholder National Roundtables on CSR and the Extractive Sector in Developing Countries (2006). In 2009, Canada created new policy goals aiming to boost host country capacity-building and created an office to assist with the resolution of CSR issues with regard to foreign direct investment (FDI) activities. It has also established mechanisms to ensure compliance with the OECD Guidelines and the Global Reporting Initiative, through reporting on Performance Standards on Social and Environmental Sustainability, and Recognition of Voluntary Principles on Security and Human Rights.⁹⁶

⁹³ UNGC and OCHCR (note 76) at 6.

⁹⁴ United Nations Canada Thematic Profile (note 85) at 10.

⁹⁵ United Nations Canada Thematic Profile (note 85) at 12.

⁹⁶ Canada Foreign Affairs and International Trade 'CSR: Building the Canadian Advantage' Available on www.international.gc.ca (Accessed 05/02/2011).

Furthermore, the Government of Canada provides official support for the Extractive Industries Transparency Initiative.⁹⁷ Canada is also a member of the Kimberley Process.⁹⁸ The Kimberley Process is a voluntary international initiative of governments, diamond companies and NGOs. The aim of the Kimberley Process is to ensure that shipments of rough diamonds are free from conflict diamonds, thus it requires participating countries to certify shipments to this effect. At present it has 49 participants, representing 75 countries, with the European Commission acting as a single participant. Members constitute 99.8 percent of global production of rough diamonds. Canada implements the Kimberley Process domestically through its Import and Export of Rough Diamonds Act which exceeds the requirements of the Kimberley Process.⁹⁹

Canada is also a founding member and host of the Secretariat for the Inter-Government Forum on Mining, Minerals, Metals and Sustainable Development which was established in 2005 pursuant to the World Summit on Sustainable Development 2002, and the Green Mining Initiative which is a research initiative focusing on carbon footprint reduction, waste management and reduction, ecosystem risk-management, and mine closure and rehabilitation.¹⁰⁰

4 2 2 Brazil

Brazil serves as a good example for Zimbabwe in terms of setting realistic, attainable environmental and mining standards. Unlike the extensive, well-detailed CSR regulations and recommendations enacted in Canada, Brazil seems to have a less manifest CSR regulation. Instead of enacting legal instruments to regulate CSR, the Brazilian Environmental Law and Policy is supported by core principles which run through the different regulations

⁹⁷ Extractive Industries Transparency Initiative 'What is EITI?' Available on <http://eiti.nrcan.gc.ca/whatquoi/index-eng.php> (Accessed 12 October 2010).

⁹⁸ United Nations Canada Thematic Profile (note 85) at 14.

⁹⁹ Act c.25, 2002 Available on www.justice.gc.ca (Accessed 05/02/2011).

¹⁰⁰ United Nations Canada Thematic Profile (note 85) at 14; Natural Resources Canada 'Green Mining Initiative' Available on <http://www.nrcan.gc.ca/mms-smm/nmw-smc/gmi-gmi-eng.htm> (Accessed 31 November 2010).

and policies, somewhat similar to the Indian National Guidelines for CSR. Brazil recognises environmental protection as a constitutional value, and as an important part to its national policy.

Although Brazil does not seem to have a CSR statute, the Federal Government has entrenched certain important principles for environmental protection. Environmental protection is one of the key aspects of CSR. The national policy takes these principles into account, including the principles of sustainable development, co-operation, prevention and the polluter-pays principle, explained below.¹⁰¹

The principle of sustainable development refers to the need to achieve a necessary equilibrium between the use of resources, development and economic growth, while the principle of co-operation entails a joint effort from state and private parties.¹⁰² Participation of local communities is highlighted by the possibility to institute class actions in courts of law.¹⁰³ The principle of prevention is an important guide to avoid the occurrence of adverse impacts on the environment by taking pro-active prevention measures.¹⁰⁴ The main argument for preventative measures is that some adverse environmental effects are irreparable, and restoration may take many years or even generations. Finally, the principle of ‘polluter pays’ which also forms part of international customary law, provides that he who causes harm is obliged to compensate or repair the affected entity.¹⁰⁵ In Brazil, this principle applies in two ways, the first being an obligation on the person who causes harm to the environment or other parties to indemnify these parties; and the second way is the obligation to neutralize

¹⁰¹ Metne-Lindenbojm L ‘Environmental Law in Brazil’ (May 2001) 3 4 *International Environmental Law Committee Newsletter Archive* at 1 Also Available on <http://www.abanet.org/environ/committees/intenviron/newsletter/may01/lind.html> (Accessed 2 December 2010).

¹⁰² Metne-Lindenbojm (note 101).

¹⁰³ Metne-Lindenbojm (note 101).

¹⁰⁴ Metne-Lindenbojm (note 101).

¹⁰⁵ Bastida E ‘Negotiating Mining Agreement: Past, Present and Future Trends’ as cited in Hines J et al ‘New Amendments to Russia’s Underground Resources Law’ (2000) *Energy and Natural Resources Law Book Review* Volume 18 No 2 at 218.

or eliminate harm caused which is an ex-post-facto obligation to repair the damage.¹⁰⁶

Legislative provisions aimed at protecting the environment include Title VIII of the Constitution,¹⁰⁷ Environmental Crimes Law,¹⁰⁸ and the National Environmental Policy.¹⁰⁹ These statutes are supplemented by SINASMA (the National Environmental System) consisting of multi-stakeholder parties, including at a government level, CONAMA (the National Environmental Council), the Secretary for the Environment, the President of the Brazilian Institute of Environment and Renewable Resources (IBAMA) and representatives of each ministry, corporate entities, non-governmental organisations and private individuals.¹¹⁰ Brazil adheres to the Kyoto Protocol and has modified laws governing mining and the environment in terms of the Brazilian Mining Law.¹¹¹ The reform incorporates increased national control over natural resources, exploration fee and permits, special permits, minimum standards and increased flexibility in negotiation of exploration rights.¹¹²

The Constitution as the guiding primary law sets out important rights and aspirations. It is important to note that the Brazilian Government allocated an entire Chapter to the Environment, Chapter VI. Furthermore, the Preamble to Article 225 reads:

‘All have the right to an ecologically balanced environment which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.’

Article 225 above, strikes me as an entrenched guarantee not merely of rights, but also guarantee of obligations on everyone, natural and juristic,

¹⁰⁶ Metne-Lindenbojm L (note 101).

¹⁰⁷ Article 225, Chapter VI Constitution of the Federal Republic of Brazil, 1988.

¹⁰⁸ Brazil Law 9605 of 1998.

¹⁰⁹ Brazil Law 6938 of 1981.

¹¹⁰ Metne-Lindenbojm L (note 101).

¹¹¹ Brazil Law 9 314 of 1996.

¹¹² Vale E (Mining Economist) ‘The Brazilian Mining Code’ Available on www.bamburra.com/Code.pdf (Accessed 05/12/2010).

private and public, to play a role in the protection of the environment taking into account long term interests. This vastly differs from the Zimbabwean Constitution which does not reserve an entire chapter on the environment, and secondly, does not provide positive rights per se to protect the environment, yet it provides for the limitation of property rights for the purpose of environmental protection.

The Brazilian Environmental Crimes Law imposes criminal sanctions on those who cause harm to the environment, and these sanctions can be sufficient cause to pierce the corporate veil and filter to auditors or the board of directors if they were aware of the harm and failed to act to prevent or stop the occurrence of harm.¹¹³ Zimbabwe similarly provides criminal sanction for non-compliance with the Environmental Management Act in terms of causing pollution or failing to report incidents of pollution (section 57 EMA).¹¹⁴

The Brazilian National Environmental Policy aims to preserve, protect, and restore the environment, and to achieve an effective balance between environmental protection and social and economic development.¹¹⁵ Certain laws implement these policy initiatives, such as the Industrial Zones Law which demarcates urban areas for housing and separates them from land available for industrial use. Parts of certain areas such as the Amazon and Serra do Mar are reserved and protected by law, thus no mining activities can take place in these reserved areas.¹¹⁶ Another example is the National Education Plan which was enacted with the goal to enforce access and availability of information pertaining to environmental protection and preservation, as well as pursuing environmental awareness.¹¹⁷ The requirement for certain operating licences also assists in monitoring environmental compliance.¹¹⁸

¹¹³ Brazil Law 9605 of 1998.

¹¹⁴ Environmental Management Act 13 of 2002, Chapter 20:27

¹¹⁵ Article 2 Law 6.938 1981.

¹¹⁶ Metne-Lindenbojm L (note 101) at 1.

¹¹⁷ Brazil Law 10.172 of 2001.

¹¹⁸ Metne-Lindenbojm L (note 101) at 1.

4 2 3 India

India regulates CSR through the National Guidelines for CSR of 2009 and regulates mining through the Mining and Minerals Development and Regulation Act, 1957. India has created CSR guidelines which refer largely to multinational corporations. It seems to me that while Indian and Canadian Regulations differ vastly in structure and format, they remain closely connected in terms of the general content and aim therein.

The Indian Mining Statute was established before sustainable development became a global concern, and consequently the Indian Government is currently creating a draft mining regulation, entitled ‘Sustainable Development Framework’ with the aim of incorporating principles of sustainability. The draft regulation incorporates investor-friendly provisions and at the same time seeks to protect the interests of local communities affected by mining. These proposed Guidelines for the Sustainable Development Framework will include the following key factors: reducing adverse impact on quality of life of local communities, protecting interests of affected persons, creating opportunities for socio-economic development, waste management and reduction, minimal ecological disturbance and promotion of restoration and reclamation activities, and it will also establish a National Mining Tribunal to monitor and regulate CSR and sustainability.¹¹⁹

While the Indian Government has made clear efforts to regulate CSR, in some areas, the National Sustainable Development Framework is considered as constituting a mere window-dressing.¹²⁰ It is further suggested that the Framework uses politically correct terms such as ‘CSR’ and ‘sustainable development’ while in fact failing to address the real concerns. It is argued that these terms are used merely to assuage the opposition of tribal communities and ‘disarm civil society critics’ and

¹¹⁹ Kasturi K ‘Draft Mining Regulation: Mining vs Communities’ (05/10/2010) *India Together* Available on www.indiatogether.org/2010/oct/law-mining.htm (Accessed on 26 October 2010).

¹²⁰ Kasturi (note 119).

potential investors.¹²¹ Furthermore, despite the considerable link perceived between mining and economic growth in India, government faces strong opposition from communities living close to mine sites due to the lack of local development and the persisting environmental damage affecting communities pursuant to mining activities.¹²² With regard to the lack of local development, it is argued that while over 11% of India's coal is produced in Chhattisgarh, Korba, 51% of its population remains rural.¹²³ There is also an outcry for mining companies to limit social harm from mining activities and to make certain services accessible to the locals residing near mine sites especially with regard to services emanating from the mine operations. An example here is the challenge from Chhattisgarh residents that while the nearby mine maintains four thermal power plants, generating 3650MW of electricity for India, less than half of the households in this district have electricity, and furthermore, several residents have obtained respiratory diseases as a result of the fly ash from thermal plants located on higher ground than the villages.¹²⁴

Whereas, the Canadian recommendations stipulate measures for each stage of the mine life cycle including planning, prospecting, operation, maintenance and closure; the Indian Guidelines tend to focus more on a pro-active approach stipulating measures to be taken by MNCs to prevent occurrence of damage, rather than monitoring the results.¹²⁵ The Indian provisions are based on voluntary compliance, devoid of legal or administrative penalties for non-performance, and set no minimum requirements, or maximum permissible pollution levels, or performance standards. This in my opinion takes away the legitimacy of the Guidelines because the draft regulation does not seek to alter the current passive approach taken globally, and will likely have the same result as was the case before its inception.

¹²¹ Kasturi K (note 123).

¹²² Kasturi K (note 119).

¹²³ Kasturi K (note 119).

¹²⁴ Kasturi K (note 119).

¹²⁵ Kasturi K (note 119).

As the economy of India grows, so does the gap between the rich and the poor increase.¹²⁶ It is with this background that the Indian Ministry of Corporate Affairs (hereinafter ‘the Ministry’) advocates for responsible business practices.¹²⁷ The Ministry acknowledges that multinational businesses and shareholders have reaped benefits of trade for over 60 years, while the rift separating them from the poor and unemployed has widened. The Indian government is actively involved in social development, however, these guidelines request the participation of the corporate sector to facilitate distribution of wealth and ensure the well-being of communities.¹²⁸ The Ministry acknowledges that the corporate sector traditionally participates in various philanthropic activities and invites suggestions from corporate entities and other interested persons to assist in refining the CSR Guidelines.¹²⁹

It is argued in India that companies tend to engage in CSR activities primarily for the development of their corporate image and creation of good will. For example, Sterlite industries, a Vedanta group company has a large 68 page document on sustainable development, yet the Madras High Court recently granted an order against Sterlite, to close its Thoothukudi site for being severely polluted and emitting hazardous heavy metals and fluorides, and lacking the mandated green belt around the plant.¹³⁰ Moreover, although large companies make a large public display of CSR performance, the reality is often times different as profit margins of large MNCs often do not correspond with the royalties paid to government for CSR purposes or relocations, for example, Sterlite spent Rupees 2 *crores* on CSR despite its net profit of Rupees 1236 *crores*.¹³¹

¹²⁶ Ministry of Corporate Affairs Government of India *Corporate Social Responsibility Voluntary Guidelines* (2009).

¹²⁷ Salman M Khurshid Minister of State (I/C) Ministry of Corporate Affairs, India (note 94) at 5.

¹²⁸ Indian CSR Guidelines (note 94) at 5.

¹²⁹ Indian CSR Guidelines (note 94) at 5.

¹³⁰ Kasturi K (note 119).

¹³¹ Kasturi K (note 119).

In response to these public concerns for development and accountability, the Government of India prepared a draft regulation imposing a 26 percent annuity (of total profits after tax) payable to families affected by mining operations.¹³² The Federation of Indian Mineral Industries objects that 26 percent annuity is too high, but agrees with the reasoning for its imposition. Instead, it recommends a lower annuity of 10 percent.¹³³ Businesses in the mining industry have expressed concern that their CSR contributions are likely to fall should the 26 percent annuity become law because they would have to re-direct resources.¹³⁴ This, in my view would translate to stating that the charitable activities of businesses would reduce while government ideally redirects funds to meet the true CSR needs and challenges of local communities affected by mining operations, along with meeting other CSR concerns.

I find that both the Indian and Canadian regulations aim for the acknowledgement of social responsibility. The main difference seems to lie in the motivations therein. In India, international relations continue to be a priority as well as continued trade relations and investment, whereas, in Canada, the motivation lies in environmental protection. Canada is home to some of the world's biggest forests and it is in Canadian interests (and world interests) to protect these from depletion and damage. It may be argued that due to Canada's standing as a developed country, it is likely to have more resources to put into CSR-related research and development. Furthermore, Canada has been in the field of CSR for a longer period than India (which created CSR Guidelines in 2009), and longer than Brazil and Zimbabwe (which at present do not have a written CSR instrument in place).

Furthermore, the language used in the Indian Guidelines indicates a certain political and economic bias due to the highlighted interests such as continued trade relations.

¹³² Kasturi K (note 119).

¹³³ Kasturi K (note 119).

¹³⁴ Sharma RK Secretary General of the Federation of Indian Mineral Industries as quoted in Anon 'Miners cry foul on Profit-Sharing' Hindistan Times 26/10/1010 Available on <http://www.hindustantimes.com/Miners-cry-foul-on-profit-sharing/Article1-606190.as...> (Accessed 26 October 2010).

One might argue that the writing style used in the Indian Regulation which emphasises voluntary cooperation, implies subservience, while the Canadian Recommendations seem to be drafted in a more authoritative manner. It may be argued further that this disparity might be stemming from the weak bargaining power of India towards investing MNCs in its territory as opposed to Canada which has the advantage of being a developed country. In my view, more should be done to increase awareness of social responsibility as a right to affected stakeholders and no longer as charitable or philanthropic deeds.

4 2 4 Zimbabwe

Zimbabwe is a member of SADC and ascribes to the Social Charter through which SADC member states endeavour to ensure that economic and investment measures take into account the protection of health, safety and environmental standards.¹³⁵ Environmental Protection in Zimbabwe is regulated by the Environmental Management Act Chapter 20:27 (hereinafter EMA).¹³⁶ While the EMA is clear and easily accessible, other information on CSR and mining, such as records of investment contracts remain within the confines of the Ministry of Mines and Minerals partly due to confidentiality agreements and strict bureaucracy. I will begin by briefly explaining the existing CSR practice, and then explain the new developments to be expected. In the final part, I will bring out the substantive statutory provisions applicable in the mining sector.

(a) Existing CSR Practice

Ministry of Mine and Minerals

The Ministry of Mines and Minerals has no existing statutory instrument regulating CSR, however a new policy position has been taken to legislate CSR by way of creating measurable benchmarks. Currently, the Ministry merely encourages responsible corporate citizenship and development of

¹³⁵ Article 12(K) Southern African Development Corporation (SADC) Charter of Fundamental Social Rights in SADC, 1970.

¹³⁶ Act 13 of 2002.

local communities. Regulation of investors is through ZIA registration and licensing. MNCs communicate with local community leaders who also monitor MNCs. Furthermore, foreign investors are bound by the same laws applying to domestic investors (national treatment). The Ministry works in collaboration with the EMA, the Department of National Parks and Wildlife and the Ministry of Environment and Tourism. There is no regulation of domestic companies investing in foreign countries.

Zimbabwe Investment Authority

CSR compliance is ensured by the catch-all requirements in the ZIA Investment Guidelines which requires compliance with all rules and regulations governing investment in the country. Moreover, ZIA performs periodic on-site inspection and requires quarterly returns from investors with the cooperation of EMA, Zimbabwe Revenue Authority (ZIMRA), Ministry of Labour and Social Welfare and local councils. ZIA identifies the Indigenisation and Economic Empowerment Act, EMA Act, ZIA Act, Mines and Minerals Act, and the Labour Relations Act as key instruments in the regulation of MNCs. Domestic companies investing in foreign countries are regulated by the Reserve Bank of Zimbabwe (RBZ) through the Exchange Control Regulations which require repatriation of dividends.

(b) An Overview of Recent Developments at the Ministry of Mines

While the above illustrates the position on the ground, certain changes may be introduced in the near future. A proposed reform Mines and Minerals Bill (the Bill) is at the inception or 'Principles' stage which means the Ministry has prepared and sent a draft to Parliament for the First Reading and Debate.¹³⁷ The Bill aims to introduce CSR legislation in the form of an indigenisation and environmental performance scorecard. The Bill aims to incorporate greater participation by Indigenous Zimbabweans (historically disadvantaged persons), enhance environmental protection, simplify the royalty regime, and to provide for beneficiation of minerals, among other

¹³⁷ Preamble to the Memorandum of Principles to Cabinet on the Mines and Minerals Amendment Bill para 1 (ii); (vi)-(viii); Informal discussion with employer of the Ministry of Mines.

amendments. 51 percent is set as minimum threshold for indigenisation in line with the new Indigenisation Act.¹³⁸ A scorecard will be introduced and administered by the Ministry, for which the empowerment score will include Social and Infrastructure Spending, Zimbabwean Procurement, Assistance to Small Scale Miners, Skills Development/Technology Transfer, Establishing Companies and Factories and Employee Share Ownership Schemes.¹³⁹ As the Bill is still in its infancy, it is difficult to predict when, and if at all, it will become law. However, it is important to note that the introduction of the Bill indicates some will by the state to regulate CSR in the mining sector.

I also established that despite the absence of a CSR statute, the Ministry incorporates CSR terms into the investment contract, often at the request of the investor to obtain a competitive advantage. An alternative is for the Ministry to offer concessions in exchange for CSR compliance. Another option is to regulate CSR in terms of an investment vehicle such as the China-Zimbabwe project in terms of which the Ministry concludes contracts with investors for special projects (that is investment of amounts in excess of 100 000USD) on behalf of the Zimbabwe Mining Development Corporation (ZMDC). These agreements are kept confidential, thus I had no access to them.

I was unable to determine how mining disasters have been handled by MNCs and the Ministry in the past, due to the lack of published records on the matter. Seeking interviews to obtain information would be unfruitful due to strict confidentiality rules in the Office of the Chief Mining Engineer.

I was however able to obtain some information on philanthropic activities performed by MNCs from the Mining Promotions Division.¹⁴⁰ For

¹³⁸ Amendment Bill (note 137) Clause 54.

¹³⁹ Amendment Bill (note 137) para 5.

¹⁴⁰ Informal discussions with Mabuzve C (Ministry Chief Administrator) Makuza T, Makandwa J and Makunde T (Ministry Mining Promotions Division) Ministry of Mines and Minerals, Zimre House 6th Floor, Kwame Nkrumah (Held 03/02/2011).

example, Rio Tinto (Murowa Diamond Project) which successfully relocated former residents of the mine location, and provided houses, schools, and agricultural implements, and conceded to recruit unskilled labour from the local community. Another example is Ungi Platinum Project, Shurugwi which is building a dam wall and will facilitate irrigation and road development to the benefit of local communities. However, corporations are under no obligation to perform CSR and some companies have failed to make any positive contribution to the local communities, and in some cases have even destroyed the local infrastructure such as roads due to the use of heavy loaded vehicles.

(c) Current Statutory Provisions

The Environmental Management Act (EMA) designates three bodies which exercise differing roles, the National Environment Council (Council)¹⁴¹ the Environmental Management Agency (Agency)¹⁴² and the Environmental Management Board (Board)¹⁴³. The Council consists of various stakeholders including secretaries of ministries, representatives of universities, specialist research institutions, members of the business community, NGOs, co-opted members as well as a Director General (section 7 EMA). The Council serves in an advisory role and advises on national goals, objectives, policies, practices and priorities for environmental protection.¹⁴⁴ The Council may review environmental plans and make recommendations as well as encourage cooperation and provide incentives for environmental protection.¹⁴⁵

On the other hand, the Agency is a body corporate which can sue and be sued in its own name. The Agency is responsible for the formulation of quality standards on air, water, soil, noise, vibration, emission of pollutants or hazardous substances, radiation and waste management (collection,

¹⁴¹ Section 7 Environmental Management Act 13 of 2002, Chapter 20:27 (EMA).

¹⁴² Section 9 EMA.

¹⁴³ Section 10 EMA.

¹⁴⁴ Section 7 EMA.

¹⁴⁵ Section 7 EMA.

recycling, treatment, and disposal).¹⁴⁶ The Agency is further tasked with developing guidelines for the preparation of national and local environment action plans, regulating and monitoring the use of fragile ecosystems, controlling alien species, to recommend conventions which may be entered by Zimbabwe, and to make model laws for local environmental management.¹⁴⁷ As regards enforcement, the Agency has the capacity to serve written orders on any person and to carry out periodic audits to ensure compliance (section 10 (1) (b) (xiii; xiv)).¹⁴⁸ The Agency shall not preclude the Board from exercising its functions in terms of section 34 (4) (c).

Thirdly, the Environmental Management Board consists of nine to fifteen members appointed by the Minister of Environment and Tourism in consultation with the President with at least one specialist in each of the following fields: environment management and planning, environmental economics, ecology, pollution, waste management, soil science, hazardous substances, water and sanitation as well as a legal practitioner and a secretary of the Ministry of the Environment (section 12 (2)(a); 12 (3)). The Board may establish committees to exercise part of its functions as it deems fit (section 20 (1)). According to section 56 (b), the Standards and Enforcement Committee is established to advise the Board on criteria and procedures for the measurement of water quality for various purposes including drinking water, industry and other prescribed uses of water. The Board has stringent accountability requirements towards the Minister of Environment and Tourism. The Board is required to submit annual reports to the Minister for presentation before Parliament (section 24), and it is further required to consult with experts on technical questions (section 26). The powers of the Board include the capacity to hold hearings on matters on which the Board is permitted to take action (section 27(1)).

¹⁴⁶ Section 10 EMA.

¹⁴⁷ Section 10 EMA

¹⁴⁸ Act 13 of 2002.

It appears as though the functions of the Environmental Management Agency might be better suited with the composition of the Council which seems to facilitate multi-stakeholder involvement. However, it is likely to be difficult for various stakeholders to reach consensus and effectively enforce environmental protection measures because of their often conflicting interests. Therefore, the current responsibilities of the Agency may be adequately positioned. Perhaps the Agency should work in close cooperation with the Board in order to elicit these interests and factor them into the programs of the Agency.

Mining companies are required to report all projects which may cause pollution. Certain conduct is considered criminal and may carry heavy penalties. For example, in terms of section 57, water pollution is prohibited and may attract a fine of up to 15million dollars.¹⁴⁹

¹⁴⁹ Environmental Management Act 13 of 2002, Chapter 20:27.

CHAPTER 4

PART 2

4 3 A COMPARISON OF CSR SUBSTANTIVE REGULATIONS IN CANADA; BRAZIL AND INDIA

In this section relevant provisions of the OECD Guidelines will be used as a framework for the comparison of the substantive CSR provisions in India, Brazil, Canada and Zimbabwe, bearing in mind the basic introduction of the CSR regimes of these countries in Part 1 above. In this study, Canada is a member of the OECD and Brazil has recently joined. However, India and Zimbabwe are not members of the OECD.

The OECD Guidelines provide an internationally accepted framework for CSR because the major participants in investment in the mining sector are members of the OECD.¹⁵⁰ This section contains a brief comparison of CSR efforts in Canada, Brazil and India based on the policies of the OECD Guidelines, particularly regarding disclosure and environmental protection. Furthermore, this section seeks to assess whether the Zimbabwean legislator and policy maker can draw from the countries above in creating a legal framework for the regulation of CSR.

4 3 1 Introduction to the OECD Guidelines for Multinational Enterprises

The OECD Guidelines are the most widely adhered to international instrument relating to international investments and MNCs since the failure of the proposed MAI.¹⁵¹ However, these Guidelines have some limitations in that they are not fully representative of the interests of developing countries. When the guidelines were created OECD members consisted mainly of developed countries, thus developing countries were largely excluded from this process as they were not members of the

¹⁵⁰ OECD Guidelines for Multinational Enterprises Available on <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (Accessed 14/11/2010).

¹⁵¹ See www.oecd.org (Accessed 04/02/2011).

OECD.¹⁵² A further limitation is that the guidelines are not binding and merely constitute soft law.

The first part of the OECD Guidelines distinguishes key areas of concern for the conduct of multinational enterprises as follows: Concepts and Principles, General Policies, Disclosure, Employment and Industrial Relations, Environment, Combating Bribery, Consumer Interests, Science and Technology, Competition and Taxation.¹⁵³ Some of these principles are of particular relevance to mining thus more attention will be focused on those. Science and Technology, Competition and Taxation form part of the law which is extensively regulated by Zimbabwean national statute, and thus need not be explored in any great detail in pursuing the aims of this paper.

(i) Concepts and Principles

The OECD Guidelines (the Guidelines) provide a set of voluntary guidelines addressed by governments of OECD member states, to multinational enterprises of various forms and structures, and with varying forms of control. The guidelines apply equally to parent companies and local entities.

The Guidelines encourage international co-operation, and aim to create indistinct standards for domestic companies and multinational companies.¹⁵⁴ Instead the guidelines indicate a framework of good practice applicable to both domestic and multinational entities, whether large, small or medium-sized.¹⁵⁵

Governments are encouraged to act in good faith and not to create a comparative advantage through their application of the Guidelines, and are discouraged from using protectionist measures.¹⁵⁶ The Guidelines acknowledge state sovereignty by requiring MNCs to operate in accordance with domestic laws of the host state as well as principles of

¹⁵² See www.oecd.org (Accessed 04/02/2011).

¹⁵³ OECD Guidelines (note 114).

¹⁵⁴ Para 2 OECD Guidelines.

¹⁵⁵ Para 4 & 5 OECD Guidelines.

¹⁵⁶ Para 6 & 7 OECD Guidelines.

international law.¹⁵⁷ Governments adhering to the Guidelines are expected to respect the Guidelines and promote and treat investor entities equitably.¹⁵⁸ While the Guidelines anticipate cordial relations between host state and investors, it is acknowledged that disputes are likely, thus the Guidelines recommend arbitration as the primary means of international disputes settlement.¹⁵⁹

Arbitration is a practical and viable mechanism for dispute settlement and is often preferable to other mechanisms such as litigation, where state sovereignty may interfere with enforcement of judgments, or conciliation and mediation which result in a non-binding solution.¹⁶⁰

(ii) General Policies¹⁶¹

The OECD Guidelines encourage MNCs to acknowledge and respect national policies of host states, through sustainable development, respect for human rights, local capacity building, and human capital formation through employment creation in the host state. Furthermore, the Guidelines employ MNCs to not seek benefits beyond the statutory guarantees in areas such as taxation and safety at work, for example. MNCs are encouraged to practise good corporate governance and foster a relationship of mutual trust in the communities within which they conduct business as well as with other enterprises with which they do business.

Information disclosure to employees is encouraged, and MNCs are discouraged from discriminating against employees who make reports against the MNC to local government. MNCs should encourage other businesses along their respective supply chains to exercise good corporate practice. MNCs are discouraged from interference with domestic politics.

¹⁵⁷ Para 8 OECD Guidelines.

¹⁵⁸ Para 9 OECD Guidelines.

¹⁵⁹ Para 10 OECD Guidelines.

¹⁶⁰ Stefan Kroell 'Arbitration' in Elgar Encyclopedia of Comparative Law 78-90 at 80.

¹⁶¹ Part 2 OECD Guidelines.

(iii) Disclosure

Article III requires multinational enterprises to 'ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance'. Rules governing disclosure can be set out in company policies and may vary depending on the nature of the business in terms of its size, location or nature.

Article III distinguishes between different types of information that should be disclosed, namely basic, material and additional information. This seems to imply a hierarchy of importance. I would find basic information to be important such that it is often stipulated as minimum requirements by the host state government, whereas material information is important, but can be optional depending on various factors such as the size or nature of the business. Finally, additional information is that information which lies on the margin, and is likely to be considered as optional. Whereas paragraphs 3 and 4 dealing with basic and material information are phrased as positive obligations using the word 'should', paragraph 5 dealing with additional information is phrased 'are encouraged to'. Unfortunately, it is in this category that CSR and communication are placed. Article III (5) provides that multinational enterprises are encouraged to communicate additional information including information on social, ethical and environmental policies and relationships with employees and other stakeholders.

Basic information may include the name, location and structure of the business, address and telephone number of parent company, percentage ownership as well as direct and indirect affiliates and their shareholdings (Article III (3)), while material information may include, financial and operating results of the company, ownership and voting rights, governance and policies and materials concerning employees and other stakeholders (Article III (4)). This information constitutes part of the mandatory requirements for company registration under the Zimbabwean Companies

Act section 8 (1).¹⁶² On the other hand, the Indian CSR Guidelines go a step further than the OECD Guidelines by creating a stronger compliance obligation by stating that ‘companies *should* disseminate information of CSR activities and progress’, as opposed to the OECD Guidelines which merely *encourages* companies to disclose CSR information.¹⁶³

On the other hand, the OECD Guidelines try to identify and distinguish key areas of communication, thus enabling clear construction of implementation strategies. Both the Indian Guidelines and the OECD Guidelines require information to be disseminated widely through annual reports, company websites and other media. The OECD Guidelines distinguish between different types of information and types of companies (Article III (4)), whereas Indian Guidelines provide a general requirement to disclose information to all stakeholders (Indian Guidelines paragraph 4). Inasmuch as such a broad provision acts as a catch-all, I find that the OECD Guidelines follow a more practical approach in that they acknowledge that not all information should be made public, and that some information is so pivotal to the success of businesses that it ought not to be divulged publicly such as information affecting competitiveness. It is important to set this distinction. The Canadian Environment Code for example, goes further than requiring mere dissemination of information. Instead, over and above the requirement for annual public reporting (Recommendation R121), the Canadian Code requires mining corporations to describe measures taken to provide information to the public in a form that can be understood by its recipients.¹⁶⁴ To some extent the Zimbabwean Government has made a similar distinction by setting certain minimum disclosure requirements in the Companies Act (section 8).¹⁶⁵

¹⁶² Act 47 of 1951, Chapter 24: 03.

¹⁶³ Indian CSR Guidelines (note 94) at 13.

¹⁶⁴ Government of Canada Mining Section (Mining & Processing Division; Public and Resources Sectors Directorate; Environmental Stewardship Branch, Environment Canada) ‘Environmental Code of Practice for Metal Mines’ (2009) Ref: 1/MM717 Recommendation R121 at 5.

¹⁶⁵ Act 47 of 1951, Chapter 24: 03.

(iv) Environment

The OECD Guidelines set out environmental requirements, phrased in the imperative, 'should'. Specific paragraphs are preceded by a general requirement for multinational enterprises to take due consideration of the need to protect the environment, public health and safety, and to contribute towards sustainable development (Article V, OECD Guidelines). This provision is made subject to the laws of the host state, as well as international agreements, principles, objectives and standards.

It is interesting to note that the OECD Guidelines group together, environmental protection, public health and safety, as well as sustainable development under the provision entitled 'Environment'. To this end, the Guidelines require multinational entities to collect and evaluate information and conduct impact assessments on each of these areas (OECD Guidelines Article V (1) and to inform, and educate customers and employees on these present and future impacts, respectively (Articles V (6); (7)).

On the other hand, the Indian Guidelines consider both the physical environment and the corporate environment. This is better clarified in the words of Indian Guidelines Article 3 (1) which states that 'companies should provide a workplace environment that is safe, hygienic and humane and which upholds the dignity of all employees'.

In contrast to the Indian Guidelines, the Canadian Environment Code is highly detailed.¹⁶⁶ The Canadian Environment Code identifies similar key issues as those set out in the OECD Guidelines. However, the Canadian Environment Code goes into great depth and specifies recommended conduct clearly and precisely. It is set out in six parts including a short abstract, a summary and four sections as follows:

- (i) an Introduction setting out recommended practices;
- (ii) Mine Cycle Activities;
- (iii) Environment concerns throughout the Mine Cycle; and

¹⁶⁶ Canadian Environmental Code (note 164) at 5.

(iv) Recommended Environmental Management Practices.

The final section is important to this comparison because it indicates measures specific to the protection of the natural environment in mining areas, and the nearby environment. Although the Canadian Code was created specifically for Metal Mining, it can be adopted in other mining areas too.¹⁶⁷ The fourth part of the Canadian Code is further divided into five subtopics, namely:

- (4.1) Recommendations for Environmental Management Tools,
- (4.2) Environmental Management Practices for the Exploration and Feasibility Phase,
- (4.3) Environmental Management Practices for the Planning and Construction Phase,
- (4.4) Environmental Management Practices for the Mine Operations Phase,
- (4.5) Environmental Management Practices for the Mine Closure Phase.

On the other hand, Brazil, (similar to Zimbabwe), does not have a free standing CSR code as such; it relies on CSR protection through relevant laws. For example, the Brazilian Constitutional provision on the environment and the Environment Law as well as the Pollution and Environmental Crimes Law regulate environmental aspects of CSR. Below lies a comparative analysis based on the framework of the OECD Guideline V.

(a) ENVIRONMENTAL MANAGEMENT

The OECD Guidelines require enterprises to establish and maintain environmental management practices by collecting and evaluating information on environmental, health and safety impacts, setting targets for environmental performance, and monitoring of projects against these targets.¹⁶⁸ The OECD Guidelines also recommend site specific environmental management plans, which should contain the following: information about the owner of the mine, the mine itself, and mining process, environmental policy, and environmental performance

¹⁶⁷ Canadian Environmental Code (note 164) at 41.

¹⁶⁸ OECD Guideline V (1).

requirements. The plans may also include specific provisions such as air, water and land quality management programs. Waste management is also a key element; this should be supplemented by pollution management and management of garbage and other waste. Environmental objectives and auditing should be included, together with communication with various stakeholders such as affected communities.

This differs from the pollution prevention plan because it considers the impact of the mine on the environment, ensures compliance, monitors environmental activities and meets environmental goals. Canadian Code introduces environmental auditing which ensures that mines are operating in compliance with applicable regulatory requirements, and other non-regulatory requirements, ensure that Environmental Management Systems (EMS) and plans have been properly implemented.

Closure planning is another key aspect of environmental management in mines. The Canadian Code requires pro-active planning, and places a duty on mining corporations to create an exit plan during the planning phase for proposed mines or as early as possible for existing mines. Mine closure should prevent or minimize impacts and risks to the environment and human health. A closure plan should be site-specific and incorporate the intended land-use after closure. The plan should explain the processes to be used to decommission and reclaim aspects of the mine, such as site infrastructure, waste management facilities, and mine processing facilities. The Canadian Code encourages companies to monitor air and water quality, as well as monitoring aquatic and terrestrial ecosystems. Monitoring mechanisms should be realistic and specific plans to measure and verify all effects and endpoints should be predicted in the environmental assessment. A cumulative effects monitoring plan can be implemented, and can be linked to legislative provisions and potential activities occurring in the area or surroundings of the mine.

(b) DISCLOSURE

MNCs are required to communicate with affected communities and to disclose information regarding potential environmental, health and safety impacts of their conduct and progress in environmental compliance and

improvement. However, such disclosure should take into account, related costs, business confidentiality and intellectual property rights.¹⁶⁹ Public participation is important in CSR awareness, implementation and reporting. Canada advocates for local community and local government participation throughout the mine life cycle.¹⁷⁰ Canada also tries to incorporate traditional ecological knowledge in its CSR practice, suggesting that companies should incorporate traditional ecological knowledge as can be acquired by working together with local communities. This requires establishment of trust relationships and strong communication with those who hold traditional ecological knowledge. This type of knowledge is acquired over time and may supplement modern methods and monitoring. In Zimbabwe, the EMA Agency encourages consultation through open houses, community meetings, advisory committees, public hearings and internet sites. The Agency encourages public consultation to manage change, benefit from information on local conditions useful to Environmental Impact Assessment (EIA), allow local communities to point out key concerns to them and values, as well as suggestions.¹⁷¹

(c) IMPACT ASSESSMENT AND THE SUPPLY CHAIN

Environmental, health and safety impacts should be monitored throughout the entire life cycle of the product and through the supply chain.¹⁷² The Handbook for Mining in Zimbabwe advises that in pursuance of a special licence, there is a requirement for an environmental impact assessment to be conducted in accordance with the Mines and Minerals Act (section 159 (3)).¹⁷³ The Canadian Code recommends consultation by mine owners and operators with the different levels of government, that is local, provincial and national government when conducting an environmental impact assessment. This is the process used to plan, predict, analyse and to

¹⁶⁹ OECD Guideline V (2).

¹⁷⁰ Canadian Environment Code (note 164) at 46.

¹⁷¹ EMA Environmental Impact Assessment (EIA) Guidelines Unpublished Internal Document at 19.

¹⁷² OECD Guideline V (3).

¹⁷³ Zimbabwe Ministry of Mines and Mining Development (Mining Law Division) *Procedures of Acquiring Licences and Permits* (2009) para 1.11 at 2.

interpret the effects of a project on the environment and to find ways to mitigate adverse effects.¹⁷⁴ Also important is feedback from which government and environmental agencies can draw from the impact assessment, or predictions and compare this with the reality once the mine is operative or closed. In my view, the feedback stage is of critical importance as it guides future mining prospects and helps to conduct more accurate environmental assessments, in other words, without checking reality against the prediction, governments may continue blindly on the assumptions that reality occurred in line with predictions, thereby limiting potential for improvement and development in the sector and in environmental protection.

Furthermore, Canada exercises product stewardship and has ratified the Canadian Boreal Forest Agreement, a product of the Forest Stewardship Council. The FSI is considered to be the highest standard of forest management.¹⁷⁵ Moreover, Canada advises corporations to have Environmental Management Systems (EMS). These are strategies to implement the mining policy throughout the mining life cycle by fully integrating it into all aspects of the mine life cycle. This requires regular reviews and audits for continual improvement and compliance with the ISO 14001 Certification or other similar standard certification. Brazil, on the other hand imposes criminal sanctions for complicity in environmental damage at any stage in the supply chain.¹⁷⁶

(d) RISK

Mining corporations should not use the absence of conclusive information on risk as a means of escaping environmental liability and prevention requirements.¹⁷⁷ In other words, multinational entities are discouraged from using scientific risks as an excuse for delaying cost-effective

¹⁷⁴ Canadian Environmental Code (note 164) at 42.

¹⁷⁵ United States Forest Stewardship Council 'Canadian Boreal Forest Agreement Adopts FSC as the Standard of Reference' Available on www.canadianborealforestagreement.com and also <http://www.fscus.org/news/?article=620> (Accessed 18/05/2010).

¹⁷⁶ Brazil Law 9605 of 1998.

¹⁷⁷ OECD Guideline V (4).

measures to prevent or mitigate damage (OECD Article V (4)). All four jurisdictions being considered in this thesis support the pro-active approach to environmental protection. India and Brazil emphasise the need to focus on preventative measures, and similarly Canada recommends preventative planning and compliance with a further Prevention Planning Code.

The Canadian Code is very much in line with this part of the Guidelines and recommends compliance with Environment Canada (2001) Guidelines for the Implementation of the Pollution Prevention Planning Provisions of Part 4 of the Canadian Environmental Protection Act, 1999 (CEPA 1999). The aim of pollution prevention plans is to systematically reduce and avoid the creation of pollutants or waste. The Code sets out the benefits of prevention plans, which include that the most cost-effective process will be chosen, ensures prevention in line with the objectives identified in the broader organisational goals of the corporate entity.

Furthermore, the Canadian Code recognises that risk management entails identifying risks and applying control measures to eliminate, reduce or control risk and consequently created further guidelines, the CAN/CSA-Q634-M91 Risk Analysis Requirements and Guidelines and the CAN/CSA-Z763-96 Introduction to Environmental Risk Assessment Studies.¹⁷⁸ Reference is made to the Australian Best Practice Environmental Management in Mining from which the Canadian Code got inspiration.¹⁷⁹

Australia and Canada constitute the top CSR performers worldwide, hence the reference made here is pertinent. The Australian Best Practice stipulates that risk management involves systematic application of policies and procedures to the identified hazards, determining the effects of the hazards, and assessing the level of risk as well as minimizing the risk.¹⁸⁰

¹⁷⁸ Canadian Environmental Code (note 164) para 4.1.3 at 42.

¹⁷⁹ Government of Australia *Environmental Risk Management* (1999).

¹⁸⁰ Canadian Environmental Code (supra note 164) at 42.

On the other hand, the Indian Guidelines require companies to take steps to control and prevent pollution and also to respond proactively to climate change by adopting cleaner production methods, and promoting efficient energy and environmentally friendly technology (Indian Guidelines, Article 5).

Brazil ascribes to the polluter pays principle in the wide sense in that both restoration after harm, and damages to affected parties are payable. This is the same position in Zimbabwe, where the polluter is liable to criminal fines, restoration and compensation as well as potential damages claims from affected parties. Furthermore, the polluter is obliged to make right any payments extended by any government organ which may have cleaned up the polluting substance (section 57(2) EMA).¹⁸¹ Pollution prevention plans inform the public and facilitate business planning and decision making. This appears to be a uniformly accepted provision in all three countries selected for comparison.

(e) CONTINGENCY PLANS FOR ENVIRONMENTAL AND HEALTH DAMAGE

It is important for corporations to maintain contingency plans to prevent and control harm, emergencies and accidents.¹⁸² In the Canadian Code these plans should be specific to the site and must comply with relevant instruments such as the Environmental Emergency Regulations and Metal Mining Effluent Regulations. Several environmental emergencies may arise at mining facilities, including oil spills and release of other hazardous materials, airborne releases of unsafe gases, or untreated wastewater. The ISO 140001 standards for identifying and managing emergency situations and the UN Environmental Programme Awareness and Preparedness for Emergencies on a Local Level (APELL) may be used as guidelines for creating contingency plans. These guidelines provide a framework for emergency response plans to be used at different levels, by management, local communities or public officials.

¹⁸¹ Environmental Management Act 13 of 2002, Chapter 20:27.

¹⁸² OECD Guideline V (5).

(f) CONTINUAL IMPROVEMENT OF CORPORATE ENVIRONMENTAL PERFORMANCE

Corporations are encouraged to continually seek to improve their environmental management, such as by incorporating the best technology and practices in the industry.¹⁸³ They may also ensure product safety, and avoid adverse impacts of their processes or products on the environment, and promote customer awareness as well as research and development of more environmentally friendly products.¹⁸⁴

Performance indicators may constitute benchmarks or standards and environmental quality objectives. Key indicators used in international spheres include the Global Reporting Initiative, the Johannesburg Sustainability Index, AccountAbility, and SA 8000 among others. Canada requires adequate and regular monitoring and 'adaptive management procedures for quality assurance and quality control (QA/QC). In Zimbabwe, monitoring is done through ZIA inspections and inspections from the Engineering and Metallurgy Department.

(g) EDUCATION AND TRAINING

The OECD emphasises education and training on health and safety matters such as using hazardous substances.¹⁸⁵ Similarly, the Brazilian Government requires not only consultation but also education and training on environmental issues, while the Canadian Code goes even a step further by requiring both education of employees and consultation of multinational entities with aboriginal community leaders as well as other stakeholders in the sector, such as businesses and local government (R116: Environmental Training and Awareness).¹⁸⁶ Furthermore, the Canadian Code requires corporations to adopt site specific procedures to ensure that training procedures meet the training needs. The Indian Guidelines are silent on training and education; however, these Guidelines do require

¹⁸³ OECD Guideline V (6) (a).

¹⁸⁴ OECD Guideline V (6).

¹⁸⁵ OECD Guideline V (7).

¹⁸⁶ Canadian Environment Code (note 164) at 47.

MNCs to ensure health and safety of workers (paragraph 3 Core Elements).¹⁸⁷

(h) PUBLIC POLICY

Corporations may participate in creating an effective public policy for environmental protection by entering partnerships or environmental, health and safety awareness initiatives.¹⁸⁸ The Canadian Code recommends the establishment of a policy statement by the corporate entity, in my view the government ought to also have a clear and realistic policy statement on mining. The Canadian Code recommends that mining entities should have an environmental policy statement constituting fundamental goals and principles that outline the company's environmental commitments.¹⁸⁹ In the policy, key concepts recommended include, prevention, continual improvement, as well as legal compliance, and communication of the environmental policy to the employees, on-site contractors and the general public.¹⁹⁰

The Zimbabwean policy on environmental protection almost ignores mining completely. The Ministry of Environment and Tourism prioritizes biological diversity, and its focus lies on communities and relocation such as during the time period after the Land Reform in 2004.¹⁹¹ However, it is also important to note that biodiversity is affected by mining operations including land clearing on the mine site, dumping and chemical discharges and effluents, land degradation caused by lack of accountability, information, regulation and enforcement of environmental protection measures.¹⁹²

Key concepts featuring in most instruments include the concept of sustainability and waste management. Brazil, for example enforces the

¹⁸⁷ Indian Guidelines (note 94) at 12.

¹⁸⁸ OECD Guideline V (8).

¹⁸⁹ Canadian Environmental Code (note 164) at 42.

¹⁹⁰ Canadian Environmental Code (note 164) at 41.

¹⁹¹ Zimbabwe Ministry of Environment and Tourism 'National Capacity Self Assessment' (2006) at 15.

¹⁹² Zimbabwe Ministry of Environment and Tourism (note 191) at 15.

principles of sustainable development, prevention, cooperation, participation and polluter pays. Whereas the OECD Guidelines spell out broad concepts of environmental management and sustainability, the Indian Guidelines seem to provide more specific areas for companies to pay attention to, such as recycling, waste management and reduction, sustainable management of natural resources and optimal use of resources. The phrasing of the Indian Guidelines provides clarity by distinguishing various methods of sustainable resource management, whereas the OECD Guidelines seem to make somewhat superficial provisions, perhaps in the expectation that large multinational entities already have adequate knowledge of CSR and environmental protection. It seems that the OECD Guidelines operate mainly as a guiding framework for companies to construct their own CSR Codes.

CHAPTER 5: CHALLENGES ASSOCIATED WITH CSR

This section considers various challenges associated with CSR. Firstly, I will identify the main reasons against legislating CSR. Secondly, I will consider the conflicting stakeholder interests. Thirdly, I will consider CSR from a company law perspective on Corporate Social Responsibility.

5.1 VOLUNTARY NATURE OF CSR

CSR is treated as voluntary in most jurisdictions. This means that compliance is not a legal obligation, but in some cases CSR compliance may constitute a moral obligation due to social pressure.¹⁹³ The existing international treaties and guidelines provide mere frameworks for CSR compliance and are in fact non-binding. Consequently, several multinational enterprises that perform CSR have included self-regulated CSR codes. Some companies take a blanket approach by enacting CSR policies at the level of the parent company in such a way that the policy trickles down to the subsidiary.¹⁹⁴ International codes seem to encompass enhanced transparency and certainty, but may also have the effect of limiting autonomy at the domestic level and thereby limit growth of local expertise.

Furthermore, international CSR regulations are only binding to the extent of specific treaty provisions. CSR has traditionally been considered as voluntary, and has continued to be seen as such.¹⁹⁵ There is to date no binding CSR regulatory instrument on an international level.¹⁹⁶ The voluntary nature of CSR is illustrated in various instruments such as the OECD Guidelines for Multinational Enterprises and Global Reporting Initiative (framework for CSR reporting). These guidelines are voluntary and merely provide a framework as opposed to binding hard law which can be enforced against corporate entities. However, the voluntary nature

¹⁹³ Edwards T (note 27) at 41.

¹⁹⁴ UN Sustainable Development (note 47) at 2.

¹⁹⁵ European Commission, Luxembourg Office for Official Publications of the European Communities (2001) 'Promoting a European Framework for Corporate Social Responsibility' Green Paper (2001).

¹⁹⁶ European Commission (note 195).

of CSR renders it difficult to enforce or implement, and in that regard a set of binding standards is preferred. It is argued that ‘in a vacuum of effective, legally binding regulation, mining corporations simply walk away from what should be their “corporate responsibility”, their ecological and social debt to affected societies.’¹⁹⁷

One of the challenges of voluntary regulations is that compliance can not be ensured or monitored effectively and there is no immediate incentive for companies to act in the desired manner.¹⁹⁸ The main objective of business activities is to create profits and also to meet the interests of the shareholders, that is the owners of the business.¹⁹⁹ Thus it seems unlikely that a business would ignore or overlook these interests in order to fulfil a seemingly philanthropic goal, for which conduct exists no penalty.²⁰⁰

5 2 OPPOSITION TO LEGISLATING CSR

The main arguments against legislating CSR include the profits interest propagated by Milton Friedman who argues that it is important for companies to ensure that the greatest possible profits are attained, and that shareholder interests are paramount.

Firstly, Friedman argues that the modern concept of CSR crosses the dividing line between a free market and socialist economy and reaches into the realm of socialism.²⁰¹ In addition, Reich argues that corporations should not be expected to perform duties of government.²⁰² That profit-making and social responsibility, ought not to be subjected to government regulation as this defeats the concept of a free market, in which the market drives business conduct, as opposed to the ‘iron-fist’ of the government.²⁰³

¹⁹⁷ Rivas-Ducca G *Less Mining for a Better World* (2002) at 101.

¹⁹⁸ Friedman M (note 35).

¹⁹⁹ Rivas-Ducca G (note 199) at 101.

²⁰⁰ Rivas-Ducca G (note 199) at 102.

²⁰¹ Friedman M (note 35).

²⁰² Ruggie J (note 33).

²⁰³ Friedman M (note 35).

Secondly, Beniof supports Friedman's argument that executives owe their primary obligations to their employers, being the owners of the business, and consequently the primary obligation of corporate executives is to make profits for the benefit of their employers, the shareholders.²⁰⁴ However, while this view might have been acceptable at the time of publication of Friedman's article, to date most jurisdictions have moved from a single bottom line reporting based on financial reporting, to a triple bottom line reporting incorporating sustainable development and CSR. Zimbabwe is in the same legal family as South Africa, following Roman-Dutch Law, thus various laws and guidelines can be used interchangeably. Reference is made to the King II Report (2002, South Africa) which incorporates triple bottom line (TBL) reporting.²⁰⁵ TBL entails non-financial reporting on matters such as social, transformation, ethics, health and safety, and environmental policies and practices.²⁰⁶ The King II Report encourages also commitment to corporate integrity through the creation of code of ethics, risk management, internal and external accounting and auditing and ensuring transparency and reliability in public reporting.²⁰⁷

Thirdly, Friedman suggests that a corporation ought not to be accountable for the negative externalities it creates through the conduct of its business.²⁰⁸ In my opinion, such a statement raises the transaction costs of the investment agreement rectify these externalities.

Fourthly, Friedman suggests that by participating in philanthropic activities, the corporate executive reduces company profits and thereby steals money from shareholders:

'[t]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.'

²⁰⁴ Marc Beniof Manager of Sales Force as cited in Ruggie J (note 33).

²⁰⁵ King II Report (2002) Integrated Sustainability Reporting para 1.1 at 14.

²⁰⁶ King II Report (note 204) para 2.1.

²⁰⁷ King II Report (note 204) para 3.2&2.4.

²⁰⁸ Friedman M (note 35).

Margolis and Walsh submit that CSR compliance does not translate to financial performance.²⁰⁹ This is disputable because, one may argue that when a company contributes to charitable causes there is mutual benefit. For example, while the company benefits the community by making amenities accessible, it also benefits by having access to the same roads and also through tax concessions.

5 3 Enforceability

5 3 1 State Sovereignty

The lack of a binding uniform international law on CSR and in fact the general lack of binding domestic laws thereto, renders it difficult to enforce CSR when multinational entities have failed to comply with CSR obligations (voluntary or otherwise). Reference can be made to the US case of *Beanal v Freeport-McMoran Inc.*²¹⁰ In this case, the plaintiff alleged that the defendant had violated individual human rights, displaced local communities, destroyed their natural habitat, and committed environmental torts by depositing 100 000 tons of tailings per day in local rivers thereby causing a change in the natural water flow and making the river's water unusable for household use. The plaintiff lost this case partly for failure to discharge his onus of proof; however, concerning the environmental damage allegations, the court found that there was 'no cognizable international law standard to test environmental violations'. Furthermore, the court was unable to apply domestic law (the National Environmental Policy Act, and the Endangered Species Act) by virtue of the court's respect for the principle of state sovereignty. The court chose not to interfere with state sovereignty in order not to displace the environmental policies of other governments.²¹¹

²⁰⁹ Margolis and Walsh as cited in Dunne S (note 29) at 137.

²¹⁰ *Beanal v Freemont-McMoran Inc* 969 F Supp 362 No 98-30235 (Nov 1998) US 5th Circuit Available on www.csrandthelaw.com (Accessed 03/02/2011).

²¹¹ *Beanal v Freemont-McMoran Inc* (note 209 supra).

5 3 2 Conflicting Laws in Host State and Investor State

MNCs tend to ignore their home country regulations on key CSR issues while conducting business in the investment host state especially where the host state is considered a pollution haven.²¹² Traditionally, it was argued that the relationship between the host state and the investor is purely contractual, and is separate from the supra-national relationship between the host state and the investor's home state, which is governed by public international law, but this position has since been rejected.²¹³ It is debateable whether domestic courts will apply home country laws to torts committed by MNCs. For example where certain conduct is considered as tort in the home state, but is not legally regulated in the host state. However, courts when approached for enforcement of foreign judgments tend to apply comity and deference due to state sovereignty, convenience and necessity.²¹⁴

An alternative to litigation is arbitration which may be conducted under various forums such as the World Bank administered International Centre for the Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC), among others.²¹⁵

5 3 3 Absence of a Single Uniform Treaty Regulating CSR Rules and Procedure

CSR is currently regulated through various international guidelines and performance indicators, as well as through company codes and policies. While these measures are helpful, it is in my opinion that CSR ought to be regulated uniformly through widely accepted standards. This would

²¹² Mabey N 'Foreign Investment and the Environment' *Organisation for Economic Cooperation and Development* (1999) Available on www.oecd.org/dataoecd/9/48/2089912.pdf (Accessed 04/02/2011).

²¹³ Bishop D et al *Foreign Investment Disputes: Case, Materials and Commentary* (2005) at 657. Kluwer Law International

²¹⁴ *Morguard Investments Ltd v De Savoye* (1990) 3 SCR 1077 Canada Available on <http://csc.lexum.umontreal.ca/en/1990/1990scr3-1077/1990scr3-1077.html> (Accessed 04/02/2011).

²¹⁵ Bretton Woods Project 'The International Centre for the Settlement of Investment Disputes' Available on <http://www.brettonwoodsproject.org/art-564868> (Accessed 04/02/2011).

facilitate worldwide implementation and also ensure compliance. It can be argued that at present it is difficult to set an equal and universal minimum CSR compliance standard because each corporation and investment project is unique. Furthermore, self-reporting in the absence of a uniform standard may be misleading.²¹⁶

5 4 Information on CSR in Mining is Lacking

At present, CSR is perceived largely as constituting philanthropic acts of corporate entities, as opposed to actual obligations or responsible citizenship. A close analysis of the Zimbabwe Companies Act,²¹⁷ and the Mines and Minerals Act,²¹⁸ highlights the legislator's emphasis on the creation, registration and administration of companies and mines as opposed to social obligations. Due to confidentiality clauses in mining investment contracts, no specific names could be added, however certain investors have failed to make any improvement or maintenance in the areas in which they conduct mining operations, to the extent that some corporations cause road degradation by use of heavy, loaded vehicles as part of their mineral extraction processes, and have put the local communities in a worse position than that prevailing before the entry of those corporations. This situation is untenable.

In my opinion, traditionally accepted charitable deeds by MNCs are not welcome when tainted by disproportionate, and unsustainable mining practices that cause serious and often irreversible damage to the environment, and communities. The state should take positive action to ensure CSR compliance and to hold MNCs accountable for the harm caused by their mining activities because the state is the custodian of its citizens and natural resources.

²¹⁶ Hamann R and Kapelus P (note 25) at 87.

²¹⁷ Act 47 of 1951, Chapter 24:03.

²¹⁸ Act 38 of 1961, Chapter 21:05.

5.5 Conflicting Interests

There is often great difficulty in striking a balance between the interests of key stakeholders, in this case the host state, investor, shareholders and the affected communities. As regards community interests, the most common conflict relates to environmental impacts of mining activities. This is especially the case where domestic life is affected by environmental damage caused by mine operations, such as where water sources have become contaminated, or air and noise pollution is experienced.

It is also important to note certain concerns peculiar to women in local communities. In Latin America, as indeed in rural parts of Zimbabwe, women tend to be marginalised and their interests are given little weight in community discussion. Moreover, women living in traditional roles struggle with the increased burden of caring for family and relatives who become ill as a result of pollution and contamination of land and water caused by the mining operations.²¹⁹

In Latin America, many communities have rejected mining operations in their vicinity to the extent that governments have declared such conduct criminal. For example, a woman from *Estor*, Guatemala, who was charged with 'inciting public unrest' for holding awareness raising workshops, which led to the community rejecting the entry of a Canadian mining corporation 'Skye Resources' in 2003. She was later charged 'instigator, intellectual author of the conflict' when in 2006, the property of Skye Resources was burnt down.²²⁰

From another angle, human rights tend to be overlooked in the face of profits. It is argued that the Canadian government has continued to support multinational entities in their foreign investments, despite apparent violations of environmental, labour and human rights by these corporations. For example, in 2006, 24% of Canada's investment in exploration was in Latin America, in the most important projects, however, these investments were tainted by complicity with military

²¹⁹ Latin American Mining Monitoring Programme (LAMMP) 'Corporate Social Responsibility: Newmont, Mining and Communities' Available on <http://lammp.org/issues/csr/> (Accessed 05 January 2011).

²²⁰ LAMMP (note 219).

forces, and corruption was also alleged in connection with some corporations such as Glencairn Gold and Vanessa Ventures in Costa Rica.²²¹

The state is obliged to meet the socio-economic needs of its nationals and to stand as guardian of their legitimate interests, and on the other hand, an economic interest in that states wish to attract investors for economic reasons. As a result states tend to offer concessions even to the harm of the environment, or local communities.

In contrast, business players such as shareholders have an important interest in profit making and maintaining a green corporate image for competitive advantage. This interest may be compromised by excessive spending in CSR related activities thus shareholders rely on multinational corporation executives to safeguard their interests.

Tension may arise between the host state and the investor when there are poor relations, or poor dialogue, and also where the host state uses protectionist measures to which the investor objects. Whereas the host state seeks to increase its own regulatory powers and to safeguard competitiveness of domestic markets, the investor seeks to enforce personal and property rights as against the state. In other words the host state tends to lean towards protectionist measures, whereas the investor seeks the greatest amount of contractual freedom.

5 6 CSR or ‘Greenwash’

It is argued that companies have become more concerned with creating a positive corporate image as opposed to actual responsibility in the light of harmful business practices, ‘greenwash’.²²² It is submitted further that ‘it is often the world’s most polluting corporations that have developed the

²²¹ APIA ‘Mining Scandal Involves Canadian Authorities in Costa Rica’ Available on www.apiavirtual (Originally Accessed Nov 2004).

²²² Hamann R and Kapelus P (note 25) at 90.

world's most sophisticated techniques to communicate their message of corporate environmentalism'.²²³

On the other hand, the business case for CSR states that when companies respond to their stakeholders and maximize positive impacts, while reducing negative impacts, this is likely to result in increased profits.²²⁴

The International Council for Mining and Metals reinforces this view by committing its members to align their corporate policies with CSR and to make more meaningful contributions to sustainable development.²²⁵

5 7 Implementation

Zimbabwe is in a recovery process following severe economic decline over the period 2001-2008. Thus, financial and related resources may be difficult to avail for purposes of CSR awareness and implementation. The likely solution is to create partnerships to contribute towards CSR compliance. For example to train community leaders who will in turn train local residents, and to get industry involved. Furthermore, government may engage NGOs to facilitate awareness raising and research towards improved CSR compliance and monitoring. Implementation and monitoring is difficult with regard to binding standards because funds may not be available long term to finance the administration, and also it may create an undue burden on corporations such as were they are required to submit detailed reports frequently. This may also constitute a disincentive for investment thereby causing long term losses.

5 8 Ineffective or Misguided Compliance

In India and Zimbabwe, multinational entities have complied with corporate social investment and not CSR. This is to say that these investors randomly select beneficiaries of their philanthropic and charitable contributions. In my view, this defeats the purpose of CSR. In my

²²³ Hamann R and Kapelus P (note 25) at 86.

²²⁴ World Business Council for Sustainable Development (WBCSD) 'Corporate Social Responsibility: Making Good Business Sense' (2000) Available on <http://www.wbcsd.ch> (last accessed October 2002).

²²⁵ WBCSD (note 224).

understanding, companies in fact have an obligation towards the communities affected by their mining operations, and these communities have a right as against the corporations. A right differs vastly from a donation, and perhaps this is where society has it wrong. Furthermore, when giving away donations, MNCs ought to, in my view, cooperate or enter into dialogue with local government or community leaders and NGOs in order to meet correct needs, or priorities.

CHAPTER 6 IMPLEMENTATION MEASURES

The Government of Zimbabwe may introduce binding standards or voluntary guidelines requiring or encouraging multinational enterprises to undertake socially responsible practices.²²⁶ In this chapter, various options will be considered as possible implementation measures, binding and regulatory.

Effecting change can be a difficult process, but transition can be facilitated through adequate change management.²²⁷ A rigid approach to change is dangerous, as is a contingency approach, thus a middle ground is preferred.²²⁸

6 1 BINDING REGULATION

6 1 1 Types of Binding Regulation

Governments have taken different approaches to implementing and enforcing CSR in mining. A few examples will be given below.

In the 'Carrots and Sticks' Project it was found that in a sample of 30 countries, there were 142 CSR and sustainability standards, out of which two thirds were found to be mandatory instruments, while the remaining one third was voluntary and sixteen of these standards required compliance with global or regional reporting standards.²²⁹

²²⁶ Ascoli K & Benzaken T (BSR) 'Public Policy and the Promotion of Corporate Social Responsibility' available on (Accessed 2011).

²²⁷ MacKay C *Strategic Management Module 5: Managing Change* University of Derby Derbyshire Business School (2000) at 3.

²²⁸ MacKay C (note 227) at 3.

²²⁹ The United Nations Environmental Program (UNEP), KPMG Sustainability (The Netherlands), the University of Stellenbosch Business School (USB) (South Africa) and The Global Reporting Initiative (GRI) 'Carrots and Sticks: Promoting Transparency and Sustainability' (May 2010) at 96 (Sample: Australia, Austria, Belgium, Brazil, Canada, Chile, China, Denmark, Ecuador, Finland, France, Germany, Greece, Hungary, India, Indonesia, Italy, Japan, Luxembourg, Mexico, The Netherlands, Norway, Portugal, South Africa, South Korea, Spain, Sweden, Switzerland, United Kingdom, United States) Available on http://www.nfrcsr.org/international/disclosure_and_reporting_requirements/ (Accessed 04/02/2011).

In South Africa, the government has introduced the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (referred to as the Mining Charter).²³⁰ South Africa has a Broad Based Black Economic Empowerment policy, and Zambia has a Citizens Economic Empowerment policy.²³¹ While this leans toward economic empowerment, it is nevertheless a component of CSR in the form of development of local communities. In Zimbabwe, the Ministry of Mines currently holds the power to withhold new licences, withdraw existing licences and refuse renewal of licences, thus the enforcement method applied in terms of the South African Mining Charter seems like a feasible, attainable goal for the Zimbabwean Mining Sector. Zimbabwe aims to incorporate Indigenisation scorecards as part of its CSR legislation in the Mines and Minerals Amendment Bill 'Principles'.²³²

Another binding instrument is found in the United States of America which recently enacted the Federal Dodd-Frank Wall Street Reform and Consumer Protection Act (July 2010) which creates new disclosure requirements for resource extraction for issuers subject to the Securities and Exchange Commission and seeks to protect consumers through different stages of the supply chain.²³³

In European circles, it seems that France and Portugal have been pioneers in creating legally binding CSR regulations. In France, the Nouvelles Régulations Economiques (NRE) (2001) requires all publicly listed companies to submit social and environmental reports. In Portugal, companies are obliged to submit a social statement by law.²³⁴

²³⁰ UN Sustainable Development (note 47) at 3 & 5; Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2010.

²³¹ All South Africa.com 'South Africa: Reviewed Mining Charter Launched' BuaNews-Tshwane Available <http://allafrica.com/stories/201009131194.html> (Accessed 12 January 2011).

²³² Amendment Bill (note 137).

²³³ US Pub.L. 111-203, H.R. 4173.

²³⁴ Law 55-A/2010, 31 December 2010; Olivier (note 22) at 399.

6 1 2 Advantages and Disadvantages of Binding Regulations

Advantages include a broad scope for implementation, clarity and legal certainty. Binding standards have the advantage that they can be implemented on a wide scale especially when regulated by state which enjoys various economies of scale. The state can rely on various state organs for implementation and enforcement such as the Environmental Management Agency and local municipalities and agents of the environmental impact assessment within the mining areas to monitor compliance. Compliance by corporations is made easier when specific stipulations are made available in a regulatory instrument, as opposed to vague guidelines which are often unenforceable and open-ended.²³⁵

However, binding standards may create a strain on the economy in the long term because regulation and monitoring can be costly, and standards may fail to be maintained long term due to lack of consistency or funding, or when a different government is in power and it has different priorities.²³⁶ Moreover, binding standards may be construed as overburdening the investors. This may constitute a disincentive for further investment and as a result cause a potential exodus of foreign investors. Furthermore, local communities and employees may fail to appreciate the long term benefits of the binding standards.²³⁷

6 1 3 Criminal Sanction for Environmental Harm

At present the Zimbabwe Environmental Management Agency has few enforcement mechanisms including withholding of new licences and withdrawal of existing licences, as well as refusing to renew licences. Environmental violations may also attract administrative fines and penalties. Violation of environmental protection laws such as the Environmental Management Act may constitute an offence and as such attract criminal sanctions such as fines or imprisonment depending upon

²³⁵ Ascoli K & Benzaken T (note 226).

²³⁶ Ascoli K & Benzaken T (note 226).

²³⁷ Ascoli K & Benzaken T (note 226).

the nature and extent of damage caused.²³⁸ It is an offence to cause water pollution and offenders may be liable to fines up to a maximum of a level 14 fine, which is 15 million dollars (section 57 EMA), and for disposal of waste in a manner that may cause pollution, the penalty is pegged at a maximum of 5 million dollars or imprisonment for a period not exceeding 5 years, or both (section 70(5) (a) EMA).

6 2 VOLUNTARY REGULATION

Corporations may integrate CSR into the goals, values, mission statement and vision of the company, in other words, core principles should include ethical objectives and pursue more than just profits or success. Companies may also create CSR goals at an international level, national level, and divisional level as well as into job descriptions. Companies may incorporate in-house training, awareness, communication and education about CSR to employees. The company's recruitment, recognition and award strategy may be set so as to encourage CSR. Reporting and auditing through structures that seek more than financial accounting, for example AccountAbility 1000 from the Institute of Social and Ethical Accountability, Global Reporting Initiative guidelines, SA8000 from Social Accountability International.²³⁹ These standards may help companies to define their goals, and measure progress.

6 3 OTHER MEASURES

Despite the divergent stakeholder interests, it is my view that a middle ground can be found for CSR. In the European Union, there is a general trend towards a liberal CSR regime which would recommend but not impose CSR reporting in large firms (500 employees or more) as opposed to the traditional regulatory approach.²⁴⁰

²³⁸ Zimbabwe Environmental Management Act 13 of 2002, Chapter 20:27.

²³⁹ See www.accountability.org.uk; www.globalreporting.org; www.cepaa.org/ (Accessed 04/02/2011).

²⁴⁰ Olivier Delbard (note 22) at 398.

6 3 1 Global Partnerships & Multi-Stakeholder Involvement

Ashanti Goldfields is one of the few mining corporations which have a dedicated CSR department in Zimbabwe.²⁴¹ However, the dedication of multinational mining corporations to CSR is in itself not sufficient for CSR success in Zimbabwe. In my view, cooperation between mining companies and all spheres of government is imperative. Furthermore, the absence of clear national policies may render it difficult or even impossible for MNCs to comply with CSR requirements.

For example, the economic crisis in Zimbabwe and ‘dollarisation’ process which entailed currency conversion from the depleted Zimbabwe Dollar (ZWD), to the currently operating United States Dollar (USD) affected all sectors. For example, the Freda Rebecca Mine (subsidiary of Ashanti) complied with statutory requirements of applying to the Labour Court for retrenchments (application denied) damages claims were still raised by the employees who did not return to work after the Labour Court’s refusal of the retrenchment. This is to say that in as much as mining corporations have an international element; they continue to be affected by the economic situation (and other situations- such as political tension).²⁴²

In order to create synergy, the government and stakeholders should engage in dialogue in order to find ways in which effective cooperation can be attained. For example, the government or any stakeholder can establish a fund to which both government and the private sector can contribute for purposes of CSR implementation.²⁴³ The Canadian Code requires that participation plans should be implemented by creating and keeping a list of key community contacts, creation of appropriate measures to provide accessible information to the communities and public reporting.²⁴⁴

Government may also encourage and facilitate multi-stakeholder collaboration such as forging ties with mining corporations to clean up

²⁴¹ The Sunday Mail ‘Former Ashanti Workers Furious Over Defunct Zim Dollar Package’ (20 February, 2010) Available on (Accessed).

²⁴² The Sunday Mail (note 241).

²⁴³ Ascoli K & Benzaken T (note 226).

²⁴⁴ Canadian Environment Code (note 164) at 46.

pollution, or facilitating business relations with local communities.²⁴⁵ In this regard, the proposed Amendment Bill aims to introduce an Environment Rehabilitation Fund.²⁴⁶

Efforts by business parties to involve the local communities encourage trust and reinforce legitimacy, especially where communities are suspicious of the motives of mining corporations. A further example involves business competitors collaborating to improve the quality of public school teachers in the Philippine Business for Education Program.²⁴⁷

Moreover, CSR implementation may be facilitated by cross-national and regional networks such as the European Alliance on CSR or the European Environment and Sustainable Development Advisory Councils and the European Business Ethics Network which link business organisations and facilitate CSR cooperation and performance.²⁴⁸ Similar African CSR Organisations include the Africa-Canada Accountability Coalition (ACAC), the Zimbabwe Forestry Commission and Johannesburg Stock Exchange Social Responsibility Initiative.²⁴⁹ Key stakeholders which may be interested in forming CSR partnerships include the Zimbabwe Forestry Commission, Zimbabwe Mining Development Corporation and Minerals Marketing Corporation of Zimbabwe, Zimbabwe Revenue Authority, local government, business parties and NGOs.

6 3 2 Awareness Raising

In my view, with adequate CSR awareness, consumers, employees, shareholders and local communities will not be misled by MNCs into believing that they are CSR compliant, and similarly, they will not be

²⁴⁵ Alfonso FB (Vice Chairman of Asian Institute of Management [AIM] and Board of Trustees Executive Directors of AIM Ramon del Rosario SR Centre for Corporate Social Responsibility) Available on https://services.inquirer.net/print/print.php?article_id=20100101-245059 (Accessed 5 January 2011).

²⁴⁶ Amendment Bill (note 137) para 10.

²⁴⁷ Alfonso FB (note 245).

²⁴⁸ Mandl I (note 23) at 3.

²⁴⁹ See www.ligi.ubc.ca/NetworksGroups.htm (Accessed 14 January 2011).

misled into believing that smaller companies are ignorant and passive to CSR.²⁵⁰ Therefore, the following measures may also be used to supplement any CSR instruments which may be introduced.

National campaigns can be introduced to raise CSR awareness, especially within the mining sector. This can be done at a grass roots level with the assistance of non-governmental organisations.²⁵¹ A possible constraint here is that few NGOs seem to be aware of CSR, and therefore it will be necessary at first to train the trainers. The government may also for a period of time, recognise annually, a day for CSR in which schools and local (especially rural) communities are trained on the concept of CSR with the help of non-governmental organisations. Moreover, companies may also facilitate awareness by training employees or granting CSR performance incentives.²⁵²

6 4 STRUCTURAL IMPLEMENTATION

6 4 1 Identification of Key Stakeholders and Potential Roles

(a) Government

(i) Local Government

(ii) National Government

National government may act through its organs and agencies. Each organ is clothed with capacity to facilitate or act in matters pertaining to protection of the environment; human rights, justice and community interests. For example, the Zimbabwean Environmental Management Board is required by statute to submit an annual report to the Minister of Environment and Tourism, and later submission to Parliament. It is obliged to hear matters of state interest.

CSR may be incorporated by various organs individually or in association, for example private entities, government, or non-profit organisations may

²⁵⁰ Mandl I (note 23) at3.

²⁵¹ Ascoli K & Benzaken T (note 226).

²⁵² Alfonso FB (note 245).

act independently or in partnership.²⁵³ One foreseeable challenge with cross-sector collaboration where it concerns business and government is that some businesses do not wish to be associated with specific governments. There may also be social tensions, such as in Zimbabwe during the time period leading to elections or other political events, there may arise tensions between private sector stakeholders and government, due to political affiliations.

(b) Companies

A company may conduct CSR on its own. This may be done by creating a company code at the level of the parent company, or creating a code at subsidiary level or otherwise performing CSR activities in the absence of a code, or in any other way. Due to state sovereignty the Government of Zimbabwe may not regulate the CSR codes of foreign parent companies, but instead, it may regulate the creation of these codes and monitor conduct domestically by virtue of its jurisdiction created by the requirement (section 6, Companies Act) which requires all foreign originated companies to be registered domestically in the Zimbabwe Companies Register.²⁵⁴

Mining Corporations may create foundations to conduct CSR activities for the corporations in order to not lose sight of their corporate objectives while simultaneously meeting CSR compliance requirements. The advantage of this is that the staff of the foundation may have specialist expertise in CSR unlike general employees of the corporation. However, internal tensions may arise if companies do not perceive the foundation as part of the entity. It is also important for companies to adopt harmonized reporting standards to avoid inaccurate or incompatible reporting, such as were one company reports on the entire mining operation and at all employment levels, while another corporation reports only on its headquarters.²⁵⁵

²⁵³ Alfonso FB (note 245).

²⁵⁴ Act 47 of 1951, Chapter 24:03.

²⁵⁵ Hamann R and Kapelus P (note 25) at 87.

6 5 INCENTIVES

The government may also introduce incentives for CSR recognition and compliance. Such incentives may include performance awards, tax concessions, and preferential public procurement. Various incentives are offered by international bodies and non-governmental organisations with the purpose of encouraging CSR compliance and sustainable development. Examples of incentive programs running annually include the SEED Initiative, which supports the Millennium Development Goals and the Johannesburg Plan of Implementation. Another such award is the Business Award for Sustainable Development Partnerships.²⁵⁶

What role can the government play in this regard? The government may encourage participation by allowing more publicity for incentive programs such as SEED Program (Supporting Entrepreneurs for Sustainable Development) an award partnered by the United Nations Development Program. SEED aims to award entrepreneurs.²⁵⁷ Programs may be advertised during prime television time or during the national News broadcast, and radio stations. Government can also fund or support the awards and other initiatives.

²⁵⁶ SEED 'SEED Programme' Available on <http://www.seedinit.org/en/about/seeds-programme.html> (Accessed 04/02/2011).

²⁵⁷ SEED (note 256).

7 CONCLUSIONS AND RECOMMENDATIONS

7.1 CONCLUSION

The first step of this research was to consider international and domestic rules on investment and CSR, the result of which indicated that international investment laws allow for state sovereignty. I submit that it is theoretical because host state capacity to make decisions is often limited by weak bargaining power and immediate economic incentives to attract foreign investment. Furthermore, the study showed that there is currently no existing statutory regulation for CSR presently applicable in Zimbabwe. Instead there are various un-connected laws regulating aspects of CSR.

The second step was to delve into the concept of CSR in order to determine what it consists of. This step was achieved by conducting a review of academic literature. Various academic writings were considered and compared and consequently, it was established that the concept of CSR tends to be unclear, and definitions tend to be confused and used inter-changeably. Furthermore, it was found that CSR is largely treated as voluntary as opposed to obligatory. A brief distinction was made between CSR and CSI and it was established that few mining corporations already engage in CSI within the mining sector.²⁵⁸

The third step was to consider how CSR is regulated in three other jurisdictions. Three countries were considered for purposes of comparison: Canada as one of the most developed CSR regulating jurisdictions; Brazil and India as developing countries with similar historical and economic backgrounds to Zimbabwe, and also as part of the BRIC emerging economies which serve as a model for development. It was established that Canada has highly detailed regulations for CSR, applicable equally to domestic and foreign investors and that these regulations are in the form of voluntary guidelines. However, it was also found that while Canada has elaborate CSR regulations, its MNCs operating in foreign countries have been reported to be violating human rights, and causing severe

²⁵⁸ See Chapter 2 at 10.

environmental damage such as in Latin America, on numerous occasions, and that the Canadian government continues to support these investments financially and despite its knowledge of the violations. On the other hand, it was established that Brazil has a growing CSR awareness and regulates CSR through decentralised laws on aspects of CSR, such as the Environment Law.²⁵⁹ India acknowledges CSR as a concept but instead approaches it as corporate philanthropy and as such merely encourages corporations to be involved in what can be referred to a CSI, without any enforcement mechanism, and despite the Indian government's recognition that MNCs have benefited from natural resources in the country for over 60 years.

When compared with Zimbabwe it was found that while CSI has in the past been extended to Zimbabwe, there remains certain apathy towards holding multinational mining corporations accountable for their harmful conduct and actions contrary to sustainable development. There is furthermore, no legal framework for CSR and mining corporations are left to recognise CSR at their own initiative, and this present situation has left a vacuum and a void in the regulation of foreign investment in the country. India and Zimbabwe seem to fall on a similar line when it comes to bargaining power when negotiating with foreign investors. It is found that Zimbabwe tends to settle for less due to its weak bargaining power caused by economic inequalities and competition within the region to attract foreign direct investment.

The fourth step was to consider specific CSR aspects in the fields of environmental protection, human rights, and the local community. The environment tends to be heavily regulated in terms of statute, over and above CSR regulations, thus it was dealt with in detail, while human rights and the community were dealt with very briefly. There seems to be a larger human rights focus on individual rights and politically motivated human rights abuses, as opposed to rights affecting mine workers. These rights are

²⁵⁹ Brazil Law 9605 of 1998.

left almost entirely in the hands of the labour unions, mining district offices and mining councils. These offices are located in remote mining areas, and I was therefore unable to approach these for further guidance.

The final step was to consider implementation measures and to establish the measures which are feasible, realistic and attainable in Zimbabwe. This was done by first comparing implementation measures used in other countries. These were then considered in the context of the Zimbabwean Mining Sector and a shortlist of possible implementation measures created, as well as a checklist for compliance based on various international performance indicators.

7 2 RECOMMENDATIONS

The first practical step I would recommend is to create a forum for deliberation and publication of information on CSR to facilitate discussions between the legislator and relevant stakeholders on the contents and creation of a National CSR Code or Policy for Investment in the Zimbabwean Mining Sector. This Code would be used as a prerequisite for investment approval through the Zimbabwe Investment Authority. In my view, the code may be divided in such a way as to have both mandatory and regulatory provisions. I recommend this structure because it is feasible for some provisions to be binding and enforceable; whereas other provisions cannot be applied uniformly to corporations of a different size, nature, capacity or turnover, or can be performed with greater leeway. Therefore, it seems more beneficial to distinguish between mandatory and voluntary provisions instead of treating every provision in exactly the same manner. The Environmental Management Agency of Zimbabwe has among its functions the power to set quality standards for environmental protection (section 10 (3) (a) Environmental Management Act). These standards may continue to be used as minimum standards (section 10(5)). However, forcing a blanket mandatory provision may result in a vague and ineffective statute.

Having incorporated multi-sector involvement, the substance may be drawn from existing guidelines, as modified by our national values and culture. In other words, the legislator may cherry-pick appropriate provisions from various foreign and international guidelines and laws. Furthermore, the legislator may adapt these provisions to the unique needs of the Zimbabwean Mining Sector. At present various NGOs and international organs have created CSR guidelines for compliance and also for reporting. Examples of these include the OECD Guidelines for Multinational Enterprises, the Global Reporting Initiative, and the Global Sullivan principles among others.²⁶⁰ As well as the King II Reports on Corporate Governance, JSE Listing Requirements, FTSE4GOOD Index, Global Compact, Dow Jones Sustainability Index, AccountAbility Initiative, AA 1000 Series, SA 8000 Series, JSE Social Responsibility Index and Sigma Guidelines, among others. A uniform or harmonized reporting framework is necessary, especially with the aim to eliminate disparities in reports. In this regard, government may adopt an existing set of guidelines or introduce a checklist for CSR reporting. This checklist may be used as a binding statutory requirement for annual company reporting in terms of the Companies Act (section 123 Annual Return), or for licence applications and renewals in terms of the Mines and Minerals Act (section 199).²⁶¹ Alternatively, the checklist may be used as a non-binding guideline for reporting to encourage voluntary compliance and this may be used in conjunction with incentives such as Recognition and Awards in business circles, this exposure is likely to be a strong incentive for multinational corporations, which may then use this for marketing and publicity and thus improve their global corporate image.

It may be argued that MNCs might be unwilling to follow guidelines and standards set by host government due to concerns of sovereignty of the investor state and unwillingness to be associated with the government, thus it is recommended that government allows industry to spearhead the creation of CSR guidelines for Zimbabwe, especially in light of existing

²⁶⁰ Olivier Delbard O (note 22) at 399.

²⁶¹ Act 47 of 1951, Chapter 24:03; Act 38 of 1961, Chapter 21:05.

sanctions and political tensions. Therefore, it may be more effective for government to offer support to the initiatives of industry or other private actors, such as through funding, publicity, tax concessions or other means.

I would also recommend the establishment of key partnerships including collaboration between government and industry, as local businesses and international partners such as BLIHR. Other key partners include the Zimbabwe Investment Authority, Ministry of Mines and Minerals, Ministry of Environment and Tourism including the National Environment Council, Environmental Management Agency and Environmental Management Board, together with business parties and representatives of civil society, mining district council, local councils and community chiefs and village heads.

Further research will be necessary, so as to obtain information on the available infrastructure for implementation, and budgetary planning and capacity, among other things.

7 2 1 Factors to Incorporate into the Proposed CSR Mining Regulation

To begin with, the proposed CSR legislation is a positive step towards CSR regulation; however, it seems not to adequately address CSR concerns in mining. The Bill merely incorporates Indigenisation score cards and in its address of the environment merely introduces a rehabilitation fund and extends EIA to all mining leases.²⁶² While these amendments are welcome, more can be done to better regulate CSR.

Having considered the three jurisdictions above, as well as various international law factors, it seems in my view, that the Zimbabwean legislator can draw five main principles or concepts which emerge in the legal systems used for comparison. Firstly, the principle of sustainability, secondly the principal of preventative or ex ante protection measures

²⁶² Amendment Bill (note 137) para 4& 10.

which aim to prevent the occurrence of harm, thirdly, the principle to limit and mitigate damage, fourthly, the management of waste, and finally monitoring of the entire mine life cycle and supply chain. Therefore, I would recommend the creation of legal measures or local policy for mining best practices to include these principals as core values in the Zimbabwean Mining Sector. Moreover, I would recommend the creation of practical, realistic implementation measures which take into account the unique economic situation of Zimbabwe. Finally, should the Zimbabwean legislator choose not to regulate CSR in terms of binding legislation, I would strongly recommend tightening of related laws such as environmental protection laws and licensing requirements for multinational corporations.

In the final analysis I reassert my position that a binding instrument is necessary for CSR implementation in the Zimbabwean mining sector to monitor and control the potentially harmful conduct of MNCs in the interests of sustainable management of national resources.

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