

RESPONSIBLE BUSINESS CONDUCT IN THE EXTRACTIVE INDUSTRIES: PROSPECT
OF RESPECTING WOMEN'S HUMAN RIGHTS IN GHANA.

by

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ABSTRACT

Business operations in the extractive industries (EI) continue to violate women's human rights and the environment in the communities in which they operate. In Ghana, existing laws and regulations do not preclude businesses from such violations. This makes it important to reflect on innovative means including soft laws which could encourage companies operating in the EI in Ghana to respect women's human rights and the environment over and above compliance with national laws and regulations. This thesis examines the problem of land grabbing by EI companies operating in Ghana, the unique negative impacts women in mining communities face as a result of land grabbing, and how this affects Ghana's economic backbone. The study suggests that respect for women's human rights in the EI in Ghana would help Ghana to achieve sustainable development, and that this could be accomplished through efforts by the government and EI companies to adopt and apply legally relevant international Responsible Business Conduct standards and principles. The analysis adopts a gendered perspective to help highlight the diverse intersectional factors that are discriminatory towards women in an attempt to address issues of women in the communities where extractive business operations are undertaken in Ghana.

LIST OF ABBREVIATIONS USED

| | |
|--------|---------------------------------------------------------------------------------|
| ALP | Alternative Livelihood Program |
| ASM | Small-Scale Mining |
| BHR | Business and Human Rights |
| CAP | Common African Position |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CSD | Commission on Sustainable Development |
| CSDP | Community Sustainable Development Plans |
| CSR | Corporate Social Responsibility |
| CSRA | Corporate Social Responsibility Agreement |
| EI | Extractive Industries |
| EIA | Environmental Impact Assessment |
| EIS | Environmental Impact Statement |
| EITI | Extractive Industries Transparency Initiative |
| EPA | Environmental Protection Agency, Ghana |
| ESIA | Environmental Social Impact Assessment |
| FAO | Food and Agriculture Organization of the United Nations |
| GAD | Gender and Development |
| GHEITI | Ghana Extractive Industries Transparency Initiative |
| GIA | Gender Impact Assessment |
| GOSPP | Golden Star Oil Palm Plantation |
| HRIA | Human Rights Impact Assessment |
| HRDD | Human Rights Due Diligence |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| IFC | International Finance Corporation |
| IGF | Intergovernmental Forum on mining, minerals, metals and sustainable development |
| ILC | International Law Coalition |
| LAP | Land Administration Project |
| LEA | Local Employment Agreement |
| LSM | Large-Scale Mining |
| LVA | Land Valuation Agency |
| MCA | Millennium Challenge Account |
| MCC | Millennium Challenge Corporation |
| MDG | Millennium Development Goals |
| MLNR | Ministry of Lands and Natural Resources |
| MMSD | Mining, Minerals and Sustainable Development |
| MNE | Multinational Enterprises |
| MPF | Mining Policy Framework |
| MSIs | Multi-Stakeholder Initiatives |
| NGOs | Non-Governmental Organizations |

| | |
|--------|----------------------------------------------------------------|
| NLP | National Land Policy |
| OECD | Organization for Economic Co-operation and Development |
| PFI | Policy Framework for Investment |
| RBC | Responsible Business Conduct |
| RSLA | Relationship and Sustainable Livelihood Agreement |
| SDGs | Sustainable Development Goals |
| SWF | Sovereign Wealth Funds |
| TNCs | Transnational Corporations |
| UDHR | United Nations' Universal Declaration of Human Rights |
| UNCTAD | United Nations Conference on Trade and Development |
| UNEP | United Nations Environment Programme |
| UNGPs | United Nations Guiding Principles on Business and Human Rights |
| VSI | Voluntary Standards Initiatives |
| WAD | Women and Development |
| WCED | World Commission on Environment and Development |
| WID | Women in Development |
| WSSD | World Summit on Sustainable Development |

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CHAPTER 1 INTRODUCTION

The extractive industries (EI) have continued to play a major role in the economy of the Republic of Ghana since about the 7th century A.D.¹ The Republic of Ghana is a West African country situated on the coast of the Gulf of Guinea.² It is also bordered by three Francophone countries: Côte d'Ivoire, Burkina Faso and Togo. It was the first British colony to gain independence from colonial rule in 1957 under the leadership of Kwame Nkrumah. The EI in Ghana historically and through to today is centered on mining operations and Ghana is second to South Africa in terms of gold extraction.³ The nature of EI activities in Ghana extended in 2010 when oil and gas started operations in commercial quantities.⁴

Although human rights are inalienable rights of all humans and arguably existed since the existence of human beings, human rights were first recognized at the international stage in the United Nations' Universal Declaration of Human Rights (UDHR) in 1948.⁵ The UDHR provided that the responsibility for human rights is not reserved for governments alone but for every individual and organ of society.⁶

¹ Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke, "Review of Environmental and Health Impacts of Mining in Ghana" (2018) 8:17 *Journal of Health & Pollution (JH&P)*: Narrative Review 43 at 44 online :<

www.researchgate.net/publication/323649960_Review_of_Environmental_and_Health_Impacts_of_Mining_in_Ghana>.

² Donna J et al, "Ghana" (January 12, 2020), online: *Britannica* <www.britannica.com/place/Ghana/Soils>.

³ Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke, *supra* note 1 at 43. See Debrah A, Watson I & Quansah D., "Comparison between Artisanal and Small-Scale Mining in Ghana and South Africa: Lessons Learnt and Ways Forward" (2014) 114:11 *Journal of the Southern African Institute of Mining and Metallurgy* online: < www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-62532014001100009#:~:text='Artisanal'%20as%20used%20in%20this,have%20a%20higher%20revenue%20turnover.>.

⁴ Katharina Neureiter et al, "Mineral Rights to Human Rights: Mobilising Resources from the Extractive Industries for Water, Sanitation and Hygiene: Case study: Ghana" (2017) *Water Aid: Oxford Policy Management* at 4 online

(pdf):<washmatters.wateraid.org/sites/g/files/jkxoof256/files/Mineral%20rights%20to%20human%20rights%20%20mobilising%20resources%20from%20the%20Extractive%20Industries%20for%20water%20sanitation%20and%20hygiene%20Ghana%20case%20study.pdf>.

⁵ Felicitas Weber & Olivia Watson, "Human Rights and the Extractive Industry: Why Engage, Who to Engage, How to Engage" *Principles for Responsible Investment* online (pdf) :< www.unpri.org/download?ac=1655> at 5. See Simon D Handelsman, *Human Rights in the Minerals Industry*, (London: International Institute for Environment and Development (IIED): World Business Council for Sustainable Development (WBCSD), 2002) at 15 online: <pubs.iied.org/pdfs/G00531.pdf>.

⁶ Business & Human Rights Resource Centre, "Business & Human Rights - A Brief Introduction" (assessed on June 14, 2020) online: *Business & Human Rights Resource Centre* <old.business-humanrights.org/en/business-

Land deals, particularly land grabbing will be discussed in order to demonstrate how the EI in Ghana has been violating human rights, especially those of women through their business activities. Land is one of the sacred natural resources most communities value and a natural resource most communities are quite attached to.⁷ Yet, governments and businesses among others have been disrupting the communities and disturbing the peaceful enjoyment of the land through land deals.⁸ Land deals have provoked a great deal of debate in recent times with regard to their impact on the economy, especially in developing countries.⁹ We shall highlight two schools of thought on land deals.¹⁰ One school of thought characterizes land deals as ‘land transactions’ in a ‘win-win’ discourse. It suggests that land deals that have aided investment by foreign nationals are positive trends that lead to economic growth. The other school characterizes such deals as ‘land grabbing’ on a ‘critical discourse’. It also views land deals as a negative trend which impact the economy and wellbeing of developing countries negatively and thus, land deals should either be controlled or stopped.

Land grabbing, which will be discussed in detail in subsequent sections, has been generally referred to as the act of acquiring large-scale arable land in a manner that results in human rights abuses. Ghana, like other developing countries, is bedeviled with the land grabbing phenomenon which has resulted from a high demand for land by “food-importing

human-rights-a-brief-introduction#:~:text=A%20human%20rights%20approach%20requires,companies%20social%20%26%20environmental%20impacts.> or <www.business-humanrights.org/en/business-human-rights-a-briefintroduction#:~:text=A%20human%20rights%20approach%20requires,companies%20social%20%26%20environmental%20impacts.>.

⁷ African Commission on Human and Peoples’ Rights (ACHPR), “Background Study on the Operations of the Extractive Industries Sector in Africa and its Impacts on the Realization of Human and Peoples’ Rights under the African Charter on Human and Peoples’ Rights” 2019 at 28 online (pdf):<www.achpr.org/public/Document/file/English/Background%20Study%20on%20the%20Operations%20of%20the%20Extractive%20Industries%20Sector%20in%20Africa_ENG.pdf>.

⁸ Festus Boamah, “Imageries of the Contested Concepts “Land Grabbing” and “Land Transactions”: Implications for Biofuels in Ghana”, (2014) 54 *Geoforum* 324 online:<www.sciencedirect.com.ezproxy.library.dal.ca/science/article/pii/S0016718513002339>.

⁹ Grant Evadne & Das Onita, “Land Grabbing: Sustainable Development and Human Rights” (2015) 4:2 *Transnational Environmental Law* 294 online :< doi.org/10.1017/s2047102515000023>.

¹⁰ Festus Boamah, “Imageries of the Contested Concepts “Land Grabbing” and “Land Transactions”: Implications for Biofuels in Ghana”, *supra* note 8.

countries that seek a buffer against future food price volatility and the quest to provide food for their burgeoning populations.”¹¹ Also, “global agribusiness and agricultural commodity traders who are extending their operations across more countries in search of lower production costs and higher profits” contribute to land grabbing.¹² In addition, due to rising land prices, financial institutions have been interested in land investment to serve as a hedge against inflation and also profit from agricultural investments in the future.¹³

More importantly, research on land grabbing seems to have been centralized on biofuel projects which it was argued, were used to provide solutions for the climate change.¹⁴ However, little attention has been given to land grabbing as practiced by companies in the EIs.¹⁵ In other words, while ‘agricultural land grabbing’ has been widely studied in Ghana, ‘extractive land grabbing’ in Ghana has not. However, the very nature of the extraction businesses requires the use of land, which implies that land deals are a necessary part of their operations. The argument here is that these land deals are carried out in an unfair manner¹⁶ by companies in the EI operating in Ghana. This has resulted in violations of human rights similar to the violations in the agricultural land grabbing context, hence, it is important to study them extensively.

In spite of the significant negative impacts many business operations have on human rights, ‘business’ and ‘human rights’ discourse has been discussed as separate and

¹¹ Grant Evadne & Das Onita, *supra* note 9.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Dan Charles, “The Salt What’s on Your Plate: How A Biofuel Dream Called Jatropha Came Crashing Down” (21 August 2012), online: *The Salt What’s on Your Plate* <www.npr.org/sections/thesalt/2012/08/22/159391553/how-a-biofuel-dream-called-jatropha-came-crashing-down>.

¹⁵ Heidi Hausermann et al, “Land-grabbing, land-use transformation and social differentiation: Deconstructing “small-scale” in Ghana’s recent gold rush”, (2018) *World Development* 103 at 104 online (pdf):<[file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/Hausermannetal.2018%20\(1\).pdf](file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/Hausermannetal.2018%20(1).pdf)>.

¹⁶ Business for Social Responsibility (BSR), “Ten Human Rights Priorities for the Extractive Sector” (2020) online *BSR*:<www.bsr.org/en/our-insights/primers/10-human-rights-priorities-for-the-extractives-sector>.

distinct areas of study.¹⁷ In addition, states have been left alone to address human rights violations within their jurisdictions. Companies' business operations impact the range of human rights irrespective of their business locations therefore, companies should be actively involved in addressing human rights issues wherever they operate.¹⁸

Although EI are associated with economic development, the significant human rights violations that have taken place in the course of their business operations in Ghana must be addressed.¹⁹ While these violations impact entire communities, women seem to face unique negative impacts.²⁰

This thesis seeks to investigate whether there are legally relevant international best practices and standards that could help to fill gaps in national laws, regulations and policies to help companies in the EI respect human rights, especially the rights of women, in order to achieve sustainable development in the EI in Ghana. The suggestion here focuses on soft laws and guidelines because states may adopt soft international standards such as recommendations from intergovernmental organizations which both local and transnational mining corporations could easily practice with fewer limitations relative to hard laws. Soft laws and guidelines consist of rules of international customs and standards generally respected by all states.²¹ Soft laws could also be binding on states when recommended practices are "widespread and representative" of the international community plus they are followed by states because such practices are legal obligations.²² Hard laws could have some restrictions comparatively. In theory international treaties are binding on all states yet in

¹⁷ Cynthia Kwakyewah & Uwafiokun Idemudia, "Canada-Ghana Engagements in the Mining Sector: Protecting Human Rights or Business as Usual?" (2017) 4 Canadian-African Human Rights Engagement: A Literature Review and an Agenda for Future Research: The Transnational Human Rights Review 146 at 146 online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1070&context=thr>.

¹⁸ Business & Human Rights Resource Centre, "Business & Human Rights- A Brief Introduction" *supra* note 6.

¹⁹ Alexandra Readhead, "Transfer Pricing in the Extractive Sector in Ghana" (2016) Ghana Natural Resource Governance Institute at 15 online: (pdf):<resourcegovernance.org/sites/default/files/documents/nrgi_ghana_transfer-pricing-study.pdf>.

²⁰ Sara L Seck & Penelope Simons, "Resource Extraction and the Human Rights of Women and Girls" (2019) 31:1 Canadian Journal of Women and the Law (CJWL) i. online:<www.utpjournals.press/doi/pdf/10.3138/cjwl.31.1.01a>.

²¹ Antonio Cassese, *International Law*, 2nd ed (Oxford: Oxford University Press, 2005) at 157. >.

²² Grant Evadne & Das Onita, *supra* note 9.

practice, dualist states are required to ratify relevant international treaties in order to be binding on them.²³ There seems to be no state that practices pure monism or dualism. Civil law states are usually monists states whereas common law states are dualist states.²⁴ Ghana practices dualism and would require further steps in order to implement international treaties. This is part of the reasons why the thesis is proposing solutions from international soft laws.

This thesis will explore whether legally relevant international best practices and guidelines under the Intergovernmental Forum on mining, minerals, metals and sustainable development (IGF)²⁵ and the OECD on responsible business conduct (RBC)²⁶ could help Ghana's EI to achieve sustainable development (SD).²⁷ Particularly, it will explore whether international best practices and guidelines could help Ghana to fill in gaps in some of its laws, regulations and policies governing the EI so that companies in the EI will be under the obligation to respect women's human rights of the communities in which they operate their businesses. This is why the thesis offers an analysis from a gender perspective to help highlight the diverse intersectional factors that are discriminatory towards women in an attempt to address issues confronting women in the communities where extractive business operations are undertaken.

Sustainable development has been referred to as “development that meets the needs of the present without compromising the ability of future generations to meet their own

²³ Christian N Okeke, “The Use of International Law in the Domestic Courts of Ghana and Nigeria” (2015) 32:2 Arizona Journal of International & Comparative Law 371 at 398 online (pdf):< arizonajournal.org/wp-content/uploads/2015/11/Okeke.Final_.pdf>.

²⁴ *Ibid.*

²⁵ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “Introduction: About IGF” (2020) online: *IGF* <www.igfmining.org/about/introduction/>.

²⁶ Organization of Economic Co-operation and Development (OECD), “Responsible Business Conduct: OECD Guidelines for Multinational Enterprises: About the OECD Guidelines for Multinational Enterprises” (2017) online: OECD <mneguidelines.oecd.org/about/#:~:text=The%20Guidelines%20were%20first%20adopted,landscape%20of%20the%20global%20economy.>. RBC will be discussed in detail under Part three of this study.

²⁷ Federal Office for Spatial Development ARE, “1987: Brundtland Report” (accessed on December 7, 2020) online: <*Federal Office for Spatial Development ARE* www.aren.admin.ch/aren/en/home/sustainable-development/international-cooperation/2030agenda/un-milestones-in-sustainable-development/1987-brundtland-report.html>. See also International Institute of Sustainable Development (IISD), “Sustainable Development” (2020) online: *IISD* www.iisd.org/about-iisd/sustainable-development>.

needs.”²⁸ The IGF shows its commitments to achieving sustainable development in the EI by drafting the Mining Policy Framework (MPF) which encourages governments and mining entities such as companies to follow human rights international norms relating to EI.²⁹ Hence, the RBC clarifies the responsibilities of companies and governments regarding human rights through tools such as the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD MNE Guidelines).³⁰ This clarification is also consistent with standards and guidelines of United Nations Guiding Principles (UNGPs).³¹ RBC guidelines are essential landscape on ‘business’ and ‘human rights’ discourse. The landscape has changed possibly due to some critiques of corporate social responsibility (CSR) which led to the emergence of the concept of business and human rights (BHR).³² BHR, as a corporate responsibility, focuses on business-related human rights issues. The BHR perspective has worked to “shift the focus from ‘needs’ to the ‘rights’ of the affected community”, and “from philanthropism by businesses to full accountability required of businesses.”³³ CSR, on the other hand, focuses solely on ‘needs’ of the people in the communities where business operations are undertaken.³⁴ Under CSR, companies have the discretion to choose which ‘needs’ to address or to decide whether or not to address ‘needs’

²⁸ *Ibid.* See Pinto MCW, “Reflections on the Term Sustainable Development and its Institutional Implications” in Ginter et al, *Sustainable Development and Good Governance* (Dordrecht: Marinus Nijhoff, 1995) at 72. See Boyle A & Freestone D, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999). See Seck Sara L, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *International Environmental Law and the Global South* (England: Cambridge University Press, 2015) online (pdf) <file:///C:/Users/HP/Downloads/Chapter_Sara_Seck.pdf>.

²⁹ Alec Crawford, *The Mining Policy Framework: Assessing the Implementation readiness of member states of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development*, (Winnipeg, Manitoba, Canada: The International Institute for Sustainable Development, 2015) at 7.

³⁰ Organization for Economic Co-operation and Development (OECD), “Together, We Create Better Policies for Better Lives” (assessed on April 7, 2020), online: *OECD* <www.oecd.org/about/>.

³¹ United Nations Human Rights, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework” New York and Geneva: United Nations, 2011 online (pdf): *UNGPs* <www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

³² Joanne Bauer, “The Problem with Corporate Social Responsibility” (December 17, 2014) online: *OpenDemocracy* <www.opendemocracy.net/en/problem-with-corporate-social-responsibility/>. See Diana Siawor-Robertson & Sefa Awaworyi Churchill, “The Mining Industry and Corporate Social Responsibility: Evidence from Two Mining Communities in Ghana” (2015) online (pdf): <www.econstor.eu/bitstream/10419/123725/1/Corporate%20Social%20Responsibility.pdf>.

³³ *Ibid* Joanne Bauer.

³⁴ *Ibid.*

of the communities in which they operate their businesses. In addition, whereas BHR is backed by the UNGPs and it is seen as a ‘legal responsibility’ of businesses and companies, CSR is only seen as a ‘social movement’.³⁵ Salient to this BHR discourse is the relationship between ‘human rights’ and the ‘environment’ following the work of Professor John Knox which draws attention to the opinion that human rights can only be enjoyed in a protected environment.³⁶ Thus, discussions on human rights cannot be had without consideration of the environment.

The thesis consists of three main chapters including a general introduction and conclusion.

Chapter 1 provides a general overview of the EI in Ghana with emphasis on the mining sector. The mining sector is used to represent the EI in Ghana in this thesis, so while the solutions are proposed in terms of the mining sector, they extend to the entire EI in Ghana. The two main mining types in Ghana, large scale mining (LSM) and artisanal and small-scale mining (ASM), will be described as well as the requisite mineral rights in Ghana. This chapter will then discuss some general positive and negative impacts of the industry on the economy, society and environment in Ghana. It will further examine whether some opportunities exist for women notwithstanding the negative impacts from the male dominated EI in Ghana.

Chapter 2 investigates the problem, land grabbing (LG), a common business practice by companies in the EI which violates women’s human rights in Ghana. This chapter will illustrate how companies in the EI also practice land grabbing aside from the commonly

³⁵ Frank Boateng, *Corporate Social Responsibility in the Ghanaian Mining Industry* (PhD, Walden University, 2017) [unpublished] at 24 online: <pdfs.semanticscholar.org/9a7f/f9b6409811bca9b32b072ba32363564ef9e9.pdf>.

³⁶ Human Rights Council Secretariat, “Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment” (2018) United Nations General Assembly at 2 online (pdf):<<file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/Business%20&%20Environ/Biz,%20Human%20right%20ane%20environ/2018%20Framework%20Principles%20HR%20Environment.pdf>>. or <www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A%20HRC%2031%2052_E.docx> <<file:///C:/Users/HP/Downloads/SSRN-id3148450.pdf>>.

known practice by companies in agriculture in Ghana. It will further investigate whether the Ghana government contributes to land grabbing through its laws and regulations governing land governance and tenure systems as well as the environment. It will explore some unique negative impacts women in mining communities face as a result of land grabbing. This chapter will also attempt to answer whether women singularly suffer the aftermath of land grabbing. Lastly, it will discuss whether Ghana is making inroads to address issues related to gender inequality.

Chapter 3 focuses on solutions to women's human rights violations caused by companies operating in EI in Ghana through land grabbing. Here, the thesis proposes solutions from legally relevant international best practices and guidelines that could help Ghana achieve sustainable development in the EI. This part will explore sustainable development³⁷ and sustainable development and mining.³⁸ It will further describe some international best practices and standards that could be relevant to states especially Ghana and companies to help achieve sustainable development in EI. Regarding states, it will describe the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments*.³⁹ In discussing international best practices relevant to companies, it will first describe the relationship among responsible business conduct (RBC)⁴⁰, CSR⁴¹ and BHR.⁴² Thereafter, it will examine some international guidelines and standards under RBC including the OECD Guidelines for Multinational

³⁷ Pinto MCW, *supra* note 28 at 72.

³⁸ Sara L Seck, "Transnational Corporations and Extractive Industries" 381 at 384 in Shawkat Alam et al, *supra* note 28 at 383.

³⁹ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management*, (Winnipeg Canada: The International Institute for Sustainable Development (IISD), 2020) at viii online (pdf) :< <file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/igf-guidance-for-governments-esia-en.pdf>>.

⁴⁰ Organization of Economic Co-operation and Development (OECD), "Responsible Business Conduct: OECD Guidelines for Multinational Enterprises: About the OECD Guidelines for Multinational Enterprises", *supra* note 26.

⁴¹ Archie B Carroll, "Carroll's Pyramid of CSR: Taking Another Look" (2016) 1:3 *Carroll International Journal of Corporate Social Responsibility* 1 at 1.

⁴² United Nations Human Rights Office of the High Commissioner (OHCHR), "Business and Human Rights" (1996-2020) online:<www.ohchr.org/en/issues/business/pages/businessindex.aspx>.

Enterprises (OECD MNE Guidelines),⁴³ due diligence,⁴⁴ stakeholder engagement,⁴⁵ and gender impact assessment.⁴⁶ The thesis will analyze these international guidelines and principles from a gender perspective to help determine how they have been useful and could be useful in matters relating to women's human rights in the EI in Ghana.

Finally, the thesis will conclude on whether proposed legally relevant international standards and principles under RBC could enhance efforts from governments and companies to achieve sustainable development in the EI which will lead to respecting women's human rights in Ghana.

⁴³ Organization of Economic Co-operation and Development (OECD), "Responsible Business Conduct: OECD Guidelines for Multinational Enterprises: About the OECD Guidelines for Multinational Enterprises", *supra* note 26.

⁴⁴ Organizations of Economic Co-operations and Developments (OECD), "OECD Due Diligence Guidance for Responsible Business Conduct" (assessed on July 3, 2020) online: *OECD.org* < www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.

⁴⁵ OECD Secretariat for Public Consultation, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, (OECD 2015) online (pdf):<www.oecd.org/daf/inv/mne/OECD-Guidance-Extractives-Sector-Stakeholder-Engagement.pdf>.

⁴⁶ Christina Hill, Chris Madden & Nina Collins, *A Guide to Gender Impact Assessment for the Extractive Industries*, (Australia: Oxfam Melbourne, 2017) online (pdf): <www.oxfam.org.au/wp-content/uploads/2017/04/2017-PA-001-Gender-impact-assessment-in-mining-report_FA_WEB.pdf>.

CHAPTER 2 THE EXTRACTIVE INDUSTRIES IN GHANA

1.0 An Overview of Extractive Industries in Ghana

The EI has been defined as “processes that involve different activities that lead to the extraction of raw materials from the earth (such as oil, metals, minerals and aggregates), processing and utilization by consumers.”⁴⁷ Ghana has significantly contributed to Africa’s development through its extractive industries.⁴⁸ Particular about this development is the strong and inclusive growth that has reduced poverty and has rendered better public services to the people of Ghana.⁴⁹ As part of Ghana’s inclusive growth, it is concentrating on making the most out of its natural resources given that it is one of the most resource-rich countries in Africa.⁵⁰

The EI in Ghana was mainly mining until about 2007 when it entered into a new phase with the discovery of petroleum assets.⁵¹ This discovery brought excitement to the general population and the former President Kufuor stated in his interview with the British Broadcasting Corporation (BBC) in 2007 that “...even without oil, we are doing so well already. Now, with oil as a shot in the arm, we’re going to fly.”⁵²

Ghana started producing oil in commercial quantities in 2010.⁵³ It is difficult to know exactly how much wealth has accumulated from oil because exploration is still ongoing. The Jubilee Oil Field in Ghana located in the Gulf of Guinea was discovered by Kosmos Energy (an independent American oil and gas exploration and production company) and developed by Tullow Oil & Gas (an independent Irish exploration and production

⁴⁷ Claudine Sigam & Leonardo Garcia, *Extractive Industries: Optimizing Value Retention in Host Countries*, United Nations Conference on Trade and Development (UNCTAD) (New York and Geneva: United Nations, 2012) at 1 online (pdf):<unctad.org/en/PublicationsLibrary/suc2012d1_en.pdf>.

⁴⁸ Katharina Neureiter et al, *supra* note 4 at 4.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid* at 8.

company).⁵⁴ Subsequent exploration resulted in the discoveries of the Twenoboah, Eneyema and Ntomme (TEN) oil and gas fields together with the Sankofa gas field.⁵⁵

The anticipated boost to Ghana's economy with the discovery of oil and gas seems to have stalled, however. Although Ghana was the first in sub-Saharan Africa to achieve the Millennium Development Goal (MDG) in relation to poverty, economic growth due to the discovery of oil and gas is yet to see the light of day.⁵⁶ Recently, Ghana has seen a substantial increase in public debt, high inflation and currency depreciation because of the poor management of its economy. In 2015 it became necessary for Ghana to resort to asking for international support from the International Monetary Fund (IMF) of about one billion United States Dollars (USD 1 billion) in order to rebound from the deteriorating economy. Ghana resorted to huge borrowings in order to finance its budget deficit. These factors may have influenced Ghana to join some relevant institutions and revise some of its legal frameworks in an attempt to manage its EI. Ghana joined the global Extractive Industries Transparency Initiative (EITI) in 2003 to help with the effective management of its natural resources extraction.⁵⁷ The EITI is a global standard that aims to manage oil, gas and mineral resources transparently.⁵⁸ This global standard also seeks to promote accountability in the management of the resources so that the best interests of the citizens of a country are taken into account. This standard further requires implementing countries to provide relevant information on extraction operations, revenue derived, as well as how the public benefits from such revenue.⁵⁹ The EITI has about 53 implementing countries and it uses a collaborative multi-

⁵⁴ Thomas Kastning, "Basic Overview of Ghana's Emerging Oil Industry" (assessed on June 1, 2020) Friedrich Ebert Stiftung online (pdf):<library.fes.de/pdf-files/bueros/ghana/10490.pdf>.

⁵⁵ *Ibid.*

⁵⁶ Katharina Neureiter et al *supra* note 4 at 8.

⁵⁷ Edna Osei & Charles Young, "All Hands on the Ghana Extractive Industries Transparency Initiative's New Data-Rich Dashboard" (2018) online: *Natural Resource Governance Institute* <resourcegovernance.org/blog/all-hands-ghana-extractive-industry-transparency-initiative-new-data-rich-dashboard>.

⁵⁸ Extractive Industries Transparency Initiative (EITI) International Secretariat, "Who We Are" (assessed on June 1, 2020) online: *Extractive Industries Transparency Initiative* <eiti.org/who-we-are>.

⁵⁹ *Ibid.*

stakeholder approach where government agencies, civil societies, and extractive companies are involved to help achieve effective management in the EI.⁶⁰

In 2004, the Ghana Extractive Industries Transparency Initiative (GHEITI) included fiscal transactions that the companies in the EI made to the government in its annual reconciliation report.⁶¹ A similar report was issued for the oil and gas sector in 2011. The GHEITI in collaboration with the Natural Resource Governance Institute (NRGI) are working to reduce corruption in the country's extractive sector so that the industry can be more effectively managed.⁶²

The US has also established a good relationship with Africa after the introduction of the Millennium Challenge Account (MCA) program.⁶³ The MCA was proposed by (former US president) Bush in 2002.⁶⁴ The aim of the MCA was to achieve global development which could link contributions from developed nations to developing nations. In 2004, the US Congress created the MCA and established the Millennium Challenge Corporation (MCC).⁶⁵ The MCC also seeks to achieve sustainable economic growth which could help to reduce poverty in developing countries such as Ghana. Subsequently, Ghana qualified to access the MCA fund having passed the eligibility criteria of good governance, economic management and social investment among others.

In terms of exploration and extraction business activities in Ghana, US and Canada based companies dominate in value relative to the Chinese.⁶⁶ Also, companies based in the US and Canada are largely multinationals operating on a large scale, while those from China are relatively small and operate on a small scale.

⁶⁰ *Ibid.*

⁶¹ Edna Osei & Charles Young *supra* note 57.

⁶² *Ibid.*

⁶³ Isaac Karikari, "Ghana's Millennium Challenge Account and the Land Component: A Holistic Approach" (2006) Shaping the Change XXIII FIG Congress Munich, Germany at 2 online (pdf):<www.fig.net/resources/proceedings/fig_proceedings/fig2006/papers/ts45/ts45_04_karikari_0916.pdf>.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Gordon Crawford et al, "The Impact of Chinese involvement in Small-Scale Gold Mining in Ghana" (2016) Policy Brief: International Growth Centre (IGC) at 3 online (pdf):<www.theigc.org/wp-content/uploads/2016/08/Crawford-et-al-2016-Policy-brief.pdf>.

The next section will focus on the mining sector as a representation of the EI in Ghana for purposes of discussion in this thesis.

1.1 Nature and History of the Mining Industry in Ghana

The extraction of naturally occurring minerals from the earth (mining) is the second oldest industry after agriculture. It continues to significantly impact global economic development including Ghana.⁶⁷

Ghana was formerly called ‘Gold Coast’ which signifies the large deposits of gold making it the second largest gold mining country to South Africa in Africa.⁶⁸ The change of name occurred in 1957 following its independence from the British colonial rule. Ghana is endowed with various naturally occurring minerals including bauxite, manganese, diamonds and gold.⁶⁹ These are found in the Western, Eastern, Ashanti, Brong-Ahafo and the Northern regions of Ghana where most of the communities engage in the mining businesses. However, the extraction of gold dominates the industry in contrast with diamonds among other minerals which have received less public attention.⁷⁰ The *1992 Constitution* (the Constitution)⁷¹ vests ownership of every naturally occurring mineral on or in the land to the Republic of Ghana under Article 257(6). The President hereby holds a fiduciary interest in such natural resources for Ghanaians. This means that the government will acquire the land found to contain relevant natural resources for the purposes of exploration and compensate the existing landowners accordingly.⁷² The government controls and regulates these minerals through the

⁶⁷ Kwesi Amponsah-Tawiah & Kwasi Dartey-Baah, “The Mining Industry in Ghana: A Blessing or a Curse” (2011) 2:12 International Journal of Business and Social Science online:<www.researchgate.net/publication/280557496_The_Mining_Industry_in_Ghana_A_Blessing_or_a_Curse>.

⁶⁸ Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke *supra* note 1 at 43. See Katharina Neureiter et al, *supra* note 3 at 7.

⁶⁹ Donna J et al, *supra* note 2. See Toni Aubynn, “Mining and Sustainable Development: The Case of Ghana” (2013) The Ghana Chamber of Mines online (pdf) :<im4dc.org/wp-content/uploads/2013/07/Mining-and-Sustainable-Development-Ghana.pdf>.

⁷⁰ Katharina Neureiter et al *supra* note 4 at 7.

⁷¹ *Constitution*, Ghana 1992, online (pdf): *1992 Constitution*<extwprlegs1.fao.org/docs/pdf/gha129754.pdf>.

⁷² Discussion on compensation upon land acquisition by government will be made under the ‘mining rights’ section subsequently.

Minerals Commission Act, (Act 450) which established the Minerals Commission under section 1.⁷³

Ghana seeks to achieve sustainable mineral development so it has enacted various legislations to provide minimum standards of compliance in the mining industry.⁷⁴ Aside from its *Constitution*, other principal legislations governing mining in Ghana are the *Minerals and Mining Act, 2006 (Act 703)*⁷⁵ and the *Minerals Commission Act, (Act 450)*⁷⁶ which set out the mining framework.⁷⁷ These legislations are supported by subordinate enactments including *Minerals and Mining (Compensation and Settlement) Regulations 2012 (L.I 2175)*⁷⁸ and *Minerals and Mining (Health, Safety and Technical) Regulations, 2012 (L.I 2182)*.⁷⁹ Other related areas of law relevant to the EIs include Environmental Laws (for example, environmental impact assessment), Immovable Property Laws (for example, customary land tenure) and Administrative Laws (for example, State's sovereignty on minerals). The relevant institutions or agencies responsible for regulating the mining industry in Ghana include the following.⁸⁰ The Ministry of Lands and Natural Resources (MLNR)⁸¹ is the overarching agency responsible for the mining industry. Institutions under the MLNR include the

⁷³ *Minerals Commission Act*, Ghana 1993 act 450 online (pdf):<file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/MINERALS%20COMMISSION%20ACT.pdf.pdf.pdf>.

⁷⁴ Toni Aubynn *supra* note 69.

⁷⁵ *Minerals and Mining Act*, Ghana, 2006, (*Act 703*) as amended by *Minerals and Mining (Amendment)*, Ghana, 2015 (Act 900) online:<extwprlegs1.fao.org/docs/pdf/gha85046.pdf>.

⁷⁶ *Minerals Commission Act*, *supra* note 73.

⁷⁷ Fui Tsikata & Domini Dziewornu Quashigah, "Ghana: Mining 2020" (2019) online: *ICLG.com* <jclg.com/practice-areas/mining-laws-and-regulations/ghana>.

⁷⁸ *Minerals and Mining (Compensation and Settlement) Regulations*, Ghana, 2012 (*L.I 2175*) online (pdf): <www.documents.clientearth.org/wp-content/uploads/library/2012-03-20-minerals-and-mining-compensation-and-resettlement-regulations-2012-l.i.-2175-ext-en.pdf>. The Regulation provides details on 'compensation and resettlement pursuant to the *Act 703*. Provisions in the Regulation includes procedures for claiming compensation, manner in which compensation are to be assessed, and compensation principles such as publishing annually a price list for crops by the relevant government agency which shall be used in the event of assessment of crops. It also provides a time limit of three months for the payment of compensation after the amount of compensation payable has been determined. Although the Regulation provides the constituents of the committee responsible in assessing the compensation to include farmers and affected communities of which women could fall under this category, such category still does not have the right as interest holders in land to defend their rights during the event of compensation payment.

⁷⁹ *Minerals and Mining (Health, Safety and Technical) Regulations*, Ghana, 2012 (*L.I. 2182*) online (pdf): <extwprlegs1.fao.org/docs/pdf/gha168930.pdf>.

⁸⁰ Toni Aubynn *supra* note 69.

⁸¹ Ministry of Lands and Natural Resources, "Welcome to the Ministry of Lands and Natural Resources" (2020) online: *Ministry of Lands and Natural Resources* <mlnr.gov.gh/>.

Minerals Commission⁸² and Lands Commission.⁸³ The responsibilities of the Minerals Commission includes administering the *Mining Act*, advising and recommending policies to governments as well as serving as an intermediary between the government and the mining companies.⁸⁴ The Lands Commission also provides land services including surveying and registering title to land and assessing compensation upon compulsory acquisition, advising government and traditional authorities on policy frameworks and land administration. Last but not the least is the Environmental Protection Agency with objectives and functions including ensuring that the environment is protected so that future generations will inherit a cleaner and healthier world.⁸⁵

The *Minerals and Mining Act*⁸⁶ defines ‘minerals’ under section 111 as “a substance in solid or liquid form that occurs naturally in or on the earth, or on or under the seabed, formed by or subject to geological process including industrial minerals but does not include petroleum as defined in the Petroleum (*Exploration and Production*) Law, 1984 (*P.N.D.C.L. 84*) or water.”

Mining gold in Ghana started as early as the 7th and 8th centuries A.D.⁸⁷ There are two main modes of mining in Ghana.⁸⁸ One is surface mining which is also referred to as open-pit mining or strip mining. This mode is used when mineral deposits are found on the surface of the earth. The other mode is underground mining which is used when the mineral deposits are found deep in the earth. Mining in Ghana is undertaken either on a large-scale or small scale.⁸⁹ There are about thirteen large-scale gold miners or companies operating in the

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Environmental Protection Agency (Ghana), “About Us” online: *Environmental Protection Agency* <www.epa.gov.gh/epa/about>.

⁸⁶ *Minerals and Mining Act*, Ghana, *supra* note 75.

⁸⁷ Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke *supra* note 1 at 43.

⁸⁸ Kwesi Amponsah-Tawiah & Kwasi Dartey-Baah *supra* note 67.

⁸⁹ Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke *supra* note 1 at 43.

mining sector in Ghana.⁹⁰ These companies are mostly multinationals including Golden Star Resources, Anglo Gold Ashanti, Newmont and Goldfields.⁹¹ Local Ghanaian companies usually mine at a small scale.⁹²

The *Minerals Development Fund Act (Act 192)*⁹³ seeks to clarify the legal basis for disbursement and management of mining royalties the government derives.⁹⁴ The Minerals Development Fund (MDF) established under the *Act 192* seeks to address “the developmental challenges of mining communities by setting a higher proportion of royalties aside for development projects and sponsor socioeconomic development in the mining communities.”⁹⁵

Regarding socioeconomic development, the mining sector in Ghana has set up Community Sustainable Development Plans (CSDP).⁹⁶ The sector through Community Sustainable Development Plans seeks to fund projects that generate social and economic returns to the communities in collaboration with the local communities. The thesis will investigate the feasibility of the Community Sustainable Development Plans subsequently, under the section on ‘economic impacts’.

1.2 Large-Scale and Artisanal Small-Scale Mining

This section will discuss the two main types of mining in Ghana which are large-scale mining (LSM) and artisanal and small-scale mining (ASM).⁹⁷

ASM started in Ghana long before the emergence of modern LSM in the nineteenth century.⁹⁸ The indigenous Akans, for example, had means of identifying gold with

⁹⁰ Toni Aubynn *supra* note 69.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Minerals Development Fund Act*, Ghana, 2016 (Act 912), online (pdf): <mlnr.gov.gh/wp-content/uploads/2019/06/Mineral-Development-Fund-Act-2016-Act-912-1.pdf>.

⁹⁴ Hira A & Busumtwi-Sam J, *Mining Community Benefits in Ghana: A Case of Unrealized Potential* (British Columbia, Canada: Canadian International Resources and Development Institute (CIRDI), 2018) at 14 online (pdf):file:///home/chronos/u9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/Mining_Community_Benefits_in_Ghana_pdf.pdf or < <st3.ning.com/topology/rest/1.0/file/get/3410403531?profile=original>> or < cirdi.ca/wp-content/uploads/2019/01/Mining_Community_Benefits_in_Ghana_pdf.pdf>.

⁹⁵ *Ibid.*

⁹⁶ Toni Aubynn *supra* note 69.

⁹⁷ Cynthia Kwakyewah & Uwafiokun Idemudia *supra* note 17 at 155.

unsophisticated technology.⁹⁹ The local or indigenous miners identify mining sites by the nature of plants and rock formation on the sites. One of the elders in one of the Akan communities narrated a story as “when he got to our stream, he realized from the type of plants growing by it that, the land was rich with gold. He, therefore, put up camp here for three days to wash the soil for the gold. When he left, our people took up digging.”¹⁰⁰

Small-scale mining has been referred to generally as a collective term for mineral extraction and processing with intense labor and minimal mining technology and equipment.¹⁰¹ Section 111 of *Act 450*¹⁰² defines ‘small scale mining operation’ as “mining operation over an area of land in accordance with the number of blocks prescribed.” According to the *Act 450*, “block” means “21 hectares.” The *Act 450* does not clearly state the maximum number of blocks for small scale mining. However, small-scale mining takes place on concessions of 25 acres maximum of land generally.¹⁰³ The *Act 450* does not define ‘artisanal’ mining. However, it has generally been referred to as the ‘informal’ or ‘artisanal’ or ‘primitive’ small-scale mining of which terms are used interchangeably in Ghana.¹⁰⁴ ‘Artisanal mining’ has also been referred to as “unorganized mining activity that does not make use of sophisticated machinery...”¹⁰⁵

⁹⁸ Paul W K Yankson & Katherine V Gough, “Gold in Ghana: The Effects of Changes in Large-Scale Mining on Artisanal and Small-Scale Mining (ASM)” (2018) 6:1 *The Extractive Industries and Society* 120 online:<www.sciencedirect.com/science/article/pii/S2214790X16301745?casa_token=wJp2veUtkhAAAAA:K-NN0iSJRZRT9QXHqr7K1-Cpd33jchSuRHORRiozUpZF9ABAb_HhtXCjFRCjZLak-F78RKRKN9c#bib0005>.

⁹⁹ Emmanuel Ofori-Mensah Ababio, “Traditional Gold Mining in the Akan States of Ghana” (2012) online (pdf): <www.researchgate.net/profile/Emmanuel_Ofori-Mensah_Ababio/publication/263817432_Traditional_Gold_Mining_in_the_Akan_States_of_Ghana/links/0c96053bfa8fcd54fb000000/Traditional-Gold-Mining-in-the-Akan-States-of-Ghana.pdf?origin=publication_detail>.

¹⁰⁰ *Ibid.*

¹⁰¹ McQuilken James & Gavin Hilson, *Artisanal and Small-Scale Gold Mining in Ghana: Evidence to Inform an ‘Action Dialogue’*, (London: International Institute for Environment and Development (IIED), 2016) at 10 online (pdf):<pubs.iied.org/pdfs/16618IIED.pdf>.

¹⁰² *Minerals and Mining Act, Ghana, supra* note 75.

¹⁰³ McQuilken James & Gavin Hilson *supra* note 101 at 10.

¹⁰⁴ *Ibid.* See Beatrice Labonne, “Artisanal Mining: An Economic Stepping Stone for Women” (1996) 20:2 *Natural Resource Forum* 117 at 117 online (pdf):<womin.org.za/images/impact-of-extractive-industries/women-and-artisanal-mining/B%20Labonne%20-%20ASM%20as%20Economic%20Stepping%20Stone%20for%20Women.pdf>.

¹⁰⁵ Debrah A, Watson I & Quansah D., *supra* note 3.

Although ‘artisanal mining is referred to as ‘unorganized mining’ and ‘small-scale mining is also referred to as ‘organized mining’, they have been grouped under ‘Artisanal and Small-Scale Mining’ (ASM).¹⁰⁶ The thesis will consider ASM.

There are two forms of ASM business operations in Ghana.¹⁰⁷ These are the formal and informal ASM business operations. Miners operating under the formal ASM secure legal permits or licenses or mining rights as required by law in order to operate. Under informal ASM, the practice is that traditional leaders such as chiefs grant miners some concessions to mine. Although such practices by the traditional leaders are not backed by any law in Ghana. The ASM sector in Ghana has been reserved for Ghanaians only.¹⁰⁸ It serves as a supplementary business to subsistence farming in Ghana.¹⁰⁹ While some farmers engage in the ASM activities to fill in the gaps that are created by seasonal cycles of farming, others fully migrate onto the ASM businesses to fully depend on them. Farming is characterized with growth, harvest and fallow seasons as well as seasonal rainfall variations which are critical to the crop farming.¹¹⁰ This makes some farmers turn to mining activities during fallow periods. Fallow periods or seasons are periods within the farming cycle, where farmlands are left unfarmed to regain their nutrients or fertility.¹¹¹ During the fallow periods, some farmers resort to ASM as an alternative source of income. The interesting thing to note here is that some of the farmers earn relatively higher income from the ASM compared to their farming activities. The farmers usually invest some of these funds into their farming businesses some of which are used to procure farming inputs including crop seeds, fertilizers

¹⁰⁶ *Ibid.* See Kathy Jenkins, “Women, Mining and Development: An Emerging Research Agenda” (2014) 1:2 The Extractive Industries and Society 329 at 3 online (pdf): < core.ac.uk/download/pdf/41069912.pdf >.

¹⁰⁷ McQuilken James & Gavin Hilson *supra* note 101 at 10.

¹⁰⁸ *Minerals and Mining Act*, Ghana, *supra* note 75 at Section 83. See James Boafo, Sebastian Angzorokuu Paolo & Senyo Dotsey, “Illicit Chinese Small-Scale Mining in Ghana: Beyond Institutional Weakness?” (2019) at 10 online (pdf): < file:///C:/Users/HP/Downloads/sustainability-11-05943%20(1).pdf >.

¹⁰⁹ McQuilken James & Gavin Hilson *supra* note 101 at 13.

¹¹⁰ *Ibid* at 26.

¹¹¹ *Ibid* at 13.

and farming equipment to help upgrade their farming businesses.¹¹² It would be worth investigating into the reasons which could influence some farmers to return to their farming businesses even when they earn more income from ASM comparatively.

Business operations in the ASM sector are characterized by their informal nature of operations.¹¹³ This could be a motivating factor for most Ghanaian entrepreneurs including some farmers who could easily engage in the businesses without any legal requirements. Also, it is cheaper to start a business in the ASM sector. Mining entrepreneurs could start business operations with no special mining skills and or no start-up capital. The ‘open pit mining’ or traditional gold mining under the ASM sector is carried out in three forms;¹¹⁴ the first form is “washing or ‘panning’ for alluvial gold along the banks of streams and rivers and along ocean shores, particularly those near river estuaries.”¹¹⁵ The second form is “shallow-pit surface mining on either the crests or sides of hills or in the sedimented valleys of ancient riverbeds.”¹¹⁶ The third form is, the “deep-shaft mining for reef gold.”¹¹⁷

Unfortunately, the local entrepreneurs or the ASM operators engage in surface mining with little or no care of the associated adverse environmental and social impacts on the communities.¹¹⁸ Another negative side of the ASM business operations is how some miners smuggle gold for sale outside the territories of Ghana for allegedly higher incomes.¹¹⁹ Furthermore, as the *Minerals and Mining Acts*, Ghana seeks to reserve the ASM businesses for Ghanaians only, some local miners would rather sell or lease their licenses or permits to some foreign investors including China investors to also operate in the ASM.¹²⁰

¹¹² *Ibid.*

¹¹³ Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke, *supra* note 1 at 44. See McQuilken James & Gavin Hilson *supra* note 101 at 17.

¹¹⁴ Paul W K Yankson & Katherine V Gough, *supra* note 98. See McQuilken James & Gavin Hilson *supra* note 95 at 10.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ More on these impacts are discussed under subsequent discussion on ‘impacts of EI in Ghana’.

¹¹⁹ Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke *supra* note 1 at 44.

¹²⁰ Heidi Hausermann et al, *supra* note 15 at 104.

In Ghana, it is a requirement to acquire a license or mineral rights¹²¹ in order to operate in the mining industry. However, some ASM miners operate without the requisite licenses and such operations have been referred to as *galamsey*.¹²² *Galamsey* is a term derived from the English phrase ‘gather them and sell’ which is used to refer to the informal ASM in Ghana in a manner which is illegal or without the requisite license to operate such mining activities.¹²³ Despite the illegality of *galamsey*, it has been identified to dominate the ASM sector in Ghana.¹²⁴

It is not clear whether the involvement of the Chinese in the ASM sector might have caused the *galamsey* operation to dominate. Although the involvement of the Chinese in the sector continues to be worrying in Ghana, it seems to have positive connotations. The Chinese have introduced mechanized technologies into the ASM sector in Ghana.¹²⁵ They have introduced technologies including the use of “excavators, wash plants also known as *trommel*, crushing machines also known as *chanag fa* and other equipment for dredging the rivers.”¹²⁶ Obviously, the introduction of this technology has accelerated production in the ASM sector. This also implies that it has brought some level of competition among some ASM miners in the sector.¹²⁷ Such competition has forced most of the Ghanaian miners to partner or sub-lease their concessions to the Chinese miners in order to share in the accelerated gold production. Although this is good news to the sector, the Chinese’s method of mining has helped them to out-compete the Ghanaian or local miners in the sector who

¹²¹ Mineral rights and license will be discussed in subsequent sections in this paper.

¹²² West Africa Governance and Economic Sustainability in Extractive Areas (WAGES), “Mining Laws and Standards Sensitization Toolkit: Strengthening Capacity of Citizens and Local Authorities on Basic Mining Laws: A Case Study of the Wassa East and Prestea Huni Valley Districts of Ghana” (2019) World Universities Services Canada (WUSU) at 13 online (pdf) : < resources.wusc.ca/wp-content/uploads/2019/05/Mining-Laws-and-Standards-Sensitization-Toolkit.pdf>.

¹²³ McQuilken James & Gavin Hilson *supra* note 101 at 10. Cynthia Kwakyewah & Uwafiokun Idemudia *supra* note 17 at 155.

¹²⁴ *Ibid*, Cynthia Kwakyewah & Uwafiokun Idemudia.

¹²⁵ Paul W K Yankson & Katherine V Gough, *supra* note 98. See Francis Arthur-Holmes & Kwaku Abrefa Busia, “Occupying the Fringes: The Struggles of Women in Artisanal and Small-Scale Gold Mining in Rural Ghana-Evidence from the Prestea-Huni Valley Municipality” (2020) Gender Issues online: < link.springer.com/article/10.1007/s12147-020-09261-4>. See Gordon Crawford et al, *supra* note 66 at 3 & 4.

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

heavily rely on the manual mode of extraction.¹²⁸ Unfortunately, some local miners are unable to survive the competition which makes them lose their source of income. Alternatively, some local miners, especially women, secure employment opportunities with some Chinese employers and suffer the associated human rights abuses¹²⁹ by the Chinese employers.¹³⁰

Another issue associated with the ASM sector is its dynamic and diverse degrees of informality. It is important to formalize the sector to help regulate and address some of the human rights issues in the course of mining business operations.¹³¹ Some people argue that the ASM sector in Ghana was formalized in 1989.¹³² Perhaps the basis for this argument was the existence of the *Small Scale Gold Mining Law*¹³³ which has been repealed by the *Minerals and Mining Act*.¹³⁴ The point to note here is that formalization of a sector goes beyond the existence of legal frameworks only.¹³⁵ It is important to formalize the ASM sector since it employs a significant number of women compare to the LSM. On the basis that women's human rights could be addressed adequately if the sector is formalized.¹³⁶ Fortunately, 'poverty-driven activity' and 'business for the uneducated' perception about the ASM sector is changing in Ghana.¹³⁷ Currently, educated entrepreneurs are taking-up business opportunities in the ASM sector.¹³⁸ Perhaps if more educated entrepreneurs take up ASM sector businesses, formalization may become more viable.

¹²⁸ James Boafo, Sebastian Angzoorokuu Paalo & Senyo Dotsey, *supra* note 108 at 11.

¹²⁹ Women are often at risk of being preyed upon; they do not receive decent job pay; they also suffer sexual abuses among others.

¹³⁰ *Ibid.*

¹³¹ McQuilken James & Gavin Hilson *supra* note 101 at 12.

¹³² Heidi Hausermann et al, *supra* note 15 at 104.

¹³³ *Small Scale Gold Mining Law*, Ghana 1989 PNDCL 218.

¹³⁴ *Minerals and Mining Act*, Ghana, *supra* note 75.

¹³⁵ McQuilken James & Gavin Hilson *supra* note 101 at 10.

¹³⁶ James Boafo, Sebastian Angzoorokuu Paalo & Senyo Dotsey, *supra* note 108 at 11.

¹³⁷ McQuilken James & Gavin Hilson *supra* note 101 at 12.

¹³⁸ *Ibid* at 6.

Some barriers that prevent Ghana from formalizing the ASM business activities include the centralized government decision making in regulating the ASM sector.¹³⁹ Furthermore, some traditional leaders including the chiefs have strategically positioned themselves to be a part of the licensing processes however informal.¹⁴⁰ They force miners to perform some customary rituals in their communities because of the impending mining businesses to be undertaken. Such ‘unknown’ customary practices prolong the licensing processes in a way. This is unlike Tanzania where the local government is empowered to make decisions that are relevant in regulating the ASM sector.¹⁴¹ Such powers given by the central government to the local government in Tanzania helps it to expedite licensing processes in the ASM sector.

On the other hand, the LSM which is also known as ‘legal mining’ produces more minerals in the mining sector.¹⁴² Companies operating in the LSM sector in Ghana are usually foreign owned with an optional twenty percent ownership to the government.¹⁴³ Although the Ghanaian government is concerned about increasing its ownership rate in the LSM companies, it is also concerned about the adverse effects the LSM business operations have on the environment and river bodies around mining sites.¹⁴⁴ The core mining operations stages including mining, processing and mineral conveyance require the use of water.¹⁴⁵ For instance, water is used to cool the friction induced ignition of some machinery. It follows that the water bodies in the already deprived communities will be used for such operations. Furthermore, some of the LSM operators refuse to treat surplus mine water which they discharge back into water bodies within the mining communities.¹⁴⁶

¹³⁹ McQuilken James & Gavin Hilson *supra* note 101 at 10.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid* at 20.

¹⁴² Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke, *supra* note 1 at 44.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid* at 45.

Another issue associated with the business operations in the LSM relates to access to land.¹⁴⁷ This issue is largely contributed by the government of Ghana. The government awards more land or mineral concessions to foreign investors in the LSM compared to local investors in the ASM. It could also be the case that the local ASM operators cannot afford the cost of acquiring mineral concessions.¹⁴⁸ Perhaps, this is part of the government's strategies to attract more foreign investment in the LSM.¹⁴⁹ Although this may be a good strategy, awarding mineral concessions to miners should be fair to both ASM and LSM miners. When prospective ASM miners are unable to afford minerals-rich lands, they resort to illegal mining operations (*galemsey*).

On the basis of varying modes of minerals extraction, one may ask whether LSM and ASM extraction operations can be undertaken on the same piece of land in an attempt to solve matters relating to access to land. It is possible for both mining types to be undertaken on the same piece of land.¹⁵⁰ However, it could raise another problem. The problem relates to which miner is to be held responsible should there be an environmental degradation on the land for example? The problem is complex when the LSM is licensed to operate on the same piece of land but not the ASM who usually operate without requisite licenses. One of the challenges the LSM sector has to face is when some ASM miners start extraction businesses on the same piece of land as the LSM. Fortunately, some groups from the ASM and LSM have created some form of partnerships to help perform their respective mining business on the same land concessions peacefully.¹⁵¹ Having described the main types of mining in Ghana, the next section will examine minerals rights in Ghana.

¹⁴⁷ Gavin Hilson, "A Contextual Review of the Ghanaian Small-Scale Mining Industry" (2001) 76 Mining, Minerals and Sustainable Development (MMSD): International Institute for Environment and Development (IIED) at 18 online (pdf):< pubs.iied.org/pdfs/G00722.pdf>.

¹⁴⁸ *Ibid* at 19.

¹⁴⁹ *Ibid* at 18.

¹⁵⁰ *Ibid* at 17 & 19.

¹⁵¹ *Ibid* at 19.

1.3 Mineral Rights in Ghana

Generally, in order to operate a mining business in Ghana, minerals rights should also be acquired after securing land title as provided for under section 9 of *Act 703*.¹⁵² Section 111 of *Act 703* defines “mining right” as “a reconnaissance license, a prospecting license, a mining lease, a restricted reconnaissance license, a restricted prospecting license or a restricted mining lease.”

Under the LSM business operations, mineral rights are granted to either companies or partnerships registered under the laws of Ghana only.¹⁵³ Fortunately, individuals could also acquire such rights under the ASM sector.¹⁵⁴ The President of Ghana, acting through the Minister of Lands and Natural Resources (the “Minister”), grants, revokes, and suspends among other mineral rights on the recommendation of the Minerals Commission.¹⁵⁵ A mining company or partnership makes an application to the Minerals Commission in respect of its preferred mining rights.¹⁵⁶ Section 39 of *Act 703* provides that before the expiration of either a reconnaissance license or a prospecting license, a holder of such mineral rights could apply for the mining lease to commence with the extraction of minerals. While the duration for the mining lease is for a maximum of thirty years, the reconnaissance and prospecting leases are for a maximum of twelve months and three years respectively although renewable.¹⁵⁷

¹⁵² *Minerals and Mining Act*, Ghana *supra* note 75.

¹⁵³ *Ibid* at section 10.

¹⁵⁴ *Ibid* at section 83.

¹⁵⁵ *Ibid* at section 5 and 100. See United Nations Commission on Sustainable Development (UNCSD), “A Report on Ghana’s Mining Sector for the 18th Session of the UN Commission on Sustainable Development” 2010 at 6 online (pdf) :

sustainabledevelopment.un.org/content/documents/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/ghana/Mining.pdf.

¹⁵⁶ *Ibid*. United Nations Commission on Sustainable Development (UNCSD) at 13. *Minerals and Mining Act*, Ghana, *supra* note 75 at section 111 provides: Reconnaissance means “the search for minerals by geographical, geochemical and photo-geological surveys or other remote sensing techniques and surface geology in connection with it including collection of necessary environmental data but does not include drilling or excavation. Prospect means “to intentionally search for minerals and includes reconnaissance and operations to determine the extent and economic value of a mineral deposit.” See also of *Minerals and Mining (General) Regulations*, Ghana, 2012 (L.I. 2173) online *Regulations* 10 to 13 on reconnaissance operations and *Regulations* 14 to 17 (pdf): extwprlegs1.fao.org/docs/pdf/gha168926.pdf.

¹⁵⁷ *Minerals and Mining Act*, Ghana, *supra* note 75 at section 111.

The grant of mineral rights on a piece of land does not necessarily make the existing landowner or lawful occupier lose their land rights. The *Act 703* makes provisions for surface rights and compensation under sections 72 to 75. Section 72 of *Act 703* provides that a mineral right holder shall exercise its right subject to the limitations as made by the Minister relating to the surface right holder. It further provides that, upon the grant of mineral rights, a lawful owner, occupier or user of the said land may retain the right to graze livestock or cultivate the surface of the land without interference with the mining operations. The accompanying condition is that the owner or the lawful occupier could only upgrade to a higher value crop with the consent of mining lease holder or the Minister when necessary. Further provisions are that, in the event where the mining activities may interfere with the existing crops of the land, the government through its Land Valuation Agency (LVA) may produce a crop identification map for compensation to the existing land user.¹⁵⁸ However, the details of the crop identification map to be produced by the Land Valuation Agency are unclear in the *Act 703*. It is possible such unclear details may leave room for arbitrary crop identification processes by the Land Valuation Agency which may be unfair to the affected land users. For example, it is unclear whether such crop identification process includes both commercial and subsistence crops. The reason is that most women undertake subsistence crop farming and may lose out on compensation should subsistence crops be disregarded by Land Valuation Agency during its crop identification processes. It is hereby critical that the government expressly clarifies the identification processes to assist the Land Valuation Agency to perform its task in a fair manner.¹⁵⁹

¹⁵⁸ Section 72(5) of *Act 703*.

¹⁵⁹ Ayitey J, Kidido J & Tudzi E, "Compensation for Land Use Deprivation in Mining Communities, The Law and Practice: Case Study of Newmont Gold Ghana Limited" (assessed in June 2020) online:<[dspace.knust.edu.gh/xmlui/bitstream/handle/123456789/3424/Surveyor%20Journal%204.pdf?sequence=1](https://space.knust.edu.gh/xmlui/bitstream/handle/123456789/3424/Surveyor%20Journal%204.pdf?sequence=1)>.

The section 73 of the *Act 703*¹⁶⁰ also provides that compensation may also take the form of resettlement where a mineral right holder is expected to bear the cost of resettlement of the affected communities. The section further provides that the resettlement agreement should take cognizance of the social and cultural value of the communities displaced. The provision also encourages miners to pay compensation in accordance with compensations principles as provided under *Act 703*. It implies that in arriving at the compensation due consideration should be given to some losses incurred by the affected communities. Some likely losses are loss of immovable properties, and loss of expected or actual earnings. Unfortunately, the *Act 703* fails to expressly provide for remedies relating to non-payment or delay of compensations available to affected persons of communities.

The *Act 703* also requires the Minister to publish a notice in writing detailing the proposed boundaries of the land to the allodial owner, chief and relevant District Assembly.¹⁶¹ The Minister is required to do this publication pending the approval of the mineral rights. Subsequently, relevant members of the community will be engaged on the compensations due before the necessary mining rights are exercised.¹⁶²

The Newmont Golden Ridge Limited operating in Ghana reported on its public consultation and disclosure plan during their mining project in Akyem following the provisions on compensation in the *Act 703*.¹⁶³ It is encouraging to note that during this report, Newmont reported on inroads it is making to address challenges facing women among other vulnerable groups in the communities where they operate.¹⁶⁴ Newmont indicated that it was developing a “Gender Mainstreaming Plan for the Akyem Project which will ensure in particular the interests of women are considered in all aspects of the Akyem Project, and

¹⁶⁰ *Minerals and Mining Act*, Ghana *supra* note 75.

¹⁶¹ *Ibid* at section 13.

¹⁶² United Nations Commission on Sustainable Development (UNCSD), *supra* note 155 at 20.

¹⁶³ Newmont Ghana, “Public Consultation and Disclosure Plan: Akyem Project, Eastern Region, Ghana” (2010) online (pdf): <

s24.q4cdn.com/382246808/files/doc_downloads/operations_projects/africa/documents/Public_Consultation_and_Disclosure_Plan_May_2010_Akyem_Project_0.pdf>.

¹⁶⁴ *Ibid* at 28.

special efforts will be made for consultation with women.”¹⁶⁵ Perhaps future research could examine the progress of this initiative by Newmont Limited.

Aside from the Lands and Natural Resource Ministry and the Minerals Commission, there are other key regulatory institutions that operate in the mining sector.¹⁶⁶ Some of these institutions include the Inspectorate Division of the Minerals Commission, Forestry Commission, Water Resources Commission, Environmental Protection Agency, and Lands Commission. Section 101 of *Act 703*¹⁶⁷ establishes the Inspectorate Division which is responsible for enforcing the *Mining Regulations*¹⁶⁸ covering the health and safety in the mining operations. The mineral right holder has to satisfy requirements by the Inspectorate Division to be able to commence any mining activity. Furthermore, the mineral right holder requires a permit from the Environmental Protection Agency, Ghana (EPA) before any mineral operations could be undertaken as provided for under section 18 of *Act 703* and part one of the *Environmental Assessment Regulations*.¹⁶⁹

1.4 Impact of Extractive Industries in Ghana

Obviously, extraction of natural resources has both positive and negative impacts.¹⁷⁰ This thesis will focus on impacts on Ghana’s economy, environment and society.

1.4.1 Economic Impacts

Research indicates that the extractive companies significantly form part of the most profitable businesses in the world.¹⁷¹ The United Nations Conference on Trade and Development (UNCTAD), in 2010 indicated in its paper on “*Extractive Industries:*

¹⁶⁵ Newmont Ghana, *supra* note 163 at 28.

¹⁶⁶ Hira A & Busumtwi-Sam J *supra* note 94 at 12.

¹⁶⁷ *Minerals and Mining Act*, *supra* note 75.

¹⁶⁸ *Minerals and Mining (Health, Safety and Technical) Regulations*, Ghana, 2012 (L.I. 2182) *supra* note 79.

¹⁶⁹ *Environmental Assessment Regulations, Ghana 1999*, (L.I. 1652) (Environmental Regulations) online :< extwprlegs1.fao.org/docs/pdf/gha78169.pdf>.or < [www.bcp.gov.gh/acc/registry/docs/ENVIRONMENTAL%20ASSESSMENT%20REGULATIONS,%201999%20\(LI%201652\).pdf](http://www.bcp.gov.gh/acc/registry/docs/ENVIRONMENTAL%20ASSESSMENT%20REGULATIONS,%201999%20(LI%201652).pdf)>.

¹⁷⁰ Claudine Sigam & Leonardo Garcia *supra* note 47 at 9.

¹⁷¹ Holly Wise & Sokol Shtylla, *The Role of the Extractive Sector in Expanding Economic Opportunity*, (Harvard University: John F. Kennedy School of Government, 2007) at 6. online:<www.researchgate.net/publication/237617681_The_Role_of_the_Extractive_Sector_in_Expanding_Economic_Opportunity>.

Optimising Value Retention in Host Countries” that the EI emerged as the largest revenue generating companies in the energy and mining sectors.¹⁷²

Ghana among other host countries generates revenues from the EI through channels such as direct ownership, taxation, royalties and contractual agreements.¹⁷³ Revenues generated serve as a major source of funds to support sectors such as public infrastructures and human capital in terms of education and health among others.¹⁷⁴ Regarding the macroeconomic sector for example, Ghana is able to finance imports of goods and services as a result of income generated from its minerals exports businesses.¹⁷⁵ Which means that management of inflows from minerals exports is imperative to enhance economic performance.¹⁷⁶ Mismanagement of inflows or income from minerals exports may result in macroeconomic instability which is commonly known as “Dutch Disease”. The consequences of the natural resources extraction in developing countries are the underlining ideas on the ‘natural-resource curse’ and ‘Dutch disease’ discussions.¹⁷⁷ These concepts describe how natural resources-rich countries are unable to improve their economies with the wealth derived from the resources. On this note, it is important for Ghana among other host-developing countries to develop strategies to better utilize business opportunities that the EI bring to help achieve sustainable economic development in the EI sector.¹⁷⁸

An example of guidelines relevant to the economic sector in Ghana is the Guidelines for Corporate Social Responsibility in Mining Communities and Compensation Policy and Regulations.”¹⁷⁹ Some contents on this Guidelines could be deduced from some of

¹⁷² Claudine Sigam & Leonardo Garcia *supra* note 47 at 1.

¹⁷³ *Ibid* at 10.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at 9.

¹⁷⁶ *Ibid*.

¹⁷⁷ Ramez Abubakr et al, “The Evolution of the Natural Resource Curse Thesis: A Critical Literature Survey” (2017) 51 Resource Policy 123 online:<www.sciencedirect.com.ezproxy.library.dal.ca/science/article/pii/S0301420716301507>.

¹⁷⁸ Claudine Sigam & Leonardo Garcia *supra* note 47 at 9.

¹⁷⁹ Ghana Chamber of Mines, “Corporate Social Responsibility (CSR) in Mining” (2020) online: *Extractive Industries Transparency Initiative (GHEITI)* <

the objectives of Ghana Chamber of Mines.¹⁸⁰ According to the Ghana Chamber of Mines “by CSR initiatives, it has adopted a policy where member companies are encouraged to set aside a minimum of USD 1.00 out of every earning per ounce of Gold and also one percent of their companies’ net profit to develop their communities.”¹⁸¹ Furthermore, one of the LSM companies, AngloGold Ashanti has launched a malaria eradication program recently which is aimed at spraying insecticides in some districts across the country to kill malaria spreading mosquitoes. Another LSM company, Golden Star Resources has also developed the Golden Star Oil Palm Plantation (GOSPP) foundation that seeks to promote oil palm plantation within their communities. According to Golden Star, “agri-businesses could be used in reducing poverty and creating wealth.”¹⁸²

In an attempt to help the communities to benefit from income generated from the EI business operations, Ghana established the Community Sustainable Development Plans and the Minerals Development Fund (MDF).¹⁸³ Despite the establishment of these initiatives by the government, the local extractive communities especially are yet to record significant development in the communities.¹⁸⁴ In addition, poverty rates in such communities have increased. It would be worth investigating feasibility of these initiatives by the government in future.

Furthermore, the EI have increased employment opportunities in Ghana among other host countries.¹⁸⁵ Although it is difficult to estimate with real figures, they increased job opportunities for women in Ghana.¹⁸⁶ Subsistence women farmers in extractive communities in Ghana also earn income from the EI especially from the ASM sector. Again, job

www.gheiti.gov.gh/site/index.php?option=com_content&view=article&id=201:corporate-social-responsibility-csr-inmining&catid=1:latest-news&Itemid=29>.

¹⁸⁰ Ghana Chamber of Mines, “Local Content” (2020) online: Ghana Chamber of Mines, <ghanachamberofmines.org/>.

¹⁸¹ Ghana Chamber of Mines, “Corporate Social Responsibility (CSR) in Mining”, *supra* note 179.

¹⁸² *Ibid.*

¹⁸³ Diana Siawor-Robertson & Sefa Awaworyi Churchil, *supra* note 32. See also Hira A & Busumtwi-Sam J *supra* note 94 at 14.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

opportunities in the ASM have empowered women to take up roles and also develop their civil careers in the male dominated industry.

The UNCTAD further noted that developing countries that host the extraction business activities remain poor notwithstanding significant revenue generated from extraction business operations undertaken.¹⁸⁷

A concern to host-developing countries that rely heavily on minerals exports for economic development is volatility in pricing of minerals on the international market.¹⁸⁸ Prices of commodities booms and busts on the international market which negatively affect exchange rates which obviously affect local industries activities in Ghana.¹⁸⁹ Research on countries endowed with natural resources indicates that sovereign wealth funds (SWF) could help mitigate negative macroeconomic effects.¹⁹⁰ Sovereign Wealth Funds is an investment fund owned by the state which consists of pools of money from a country's reserves.¹⁹¹ The reserves are funds specifically set aside for investment purposes to boost the country's economy.¹⁹² Such funds are generated from "trade surpluses, official foreign currencies operations, and money from privatizations, governmental transfer payments and revenue generated from the exporting of natural resources" by central banks.¹⁹³ In addition, sovereign wealth funds helps countries to develop pragmatic exchange rates policies.¹⁹⁴ Another issue relating to employment in the EI in Ghana is recruitment of industry professionals.¹⁹⁵ In developing countries such as Ghana, the EI recruit a good number of high-earning expatriate skilled workers.¹⁹⁶ This means that there will be high cost of employee salaries which will decrease profits realized from the industry. If profits are low, it is possible that the monies

¹⁸⁷ Claudine Sigam & Leonardo Garcia *supra* note 47 at 1.

¹⁸⁸ *Ibid* at 9.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid*.

¹⁹¹ Alexandra Twin, "Sovereign Wealth Fund (SWF)" (2019) online:

Investopedia<www.investopedia.com/terms/s/sovereign_wealth_fund.asp>.

¹⁹² *Ibid*.

¹⁹³ *Ibid* Alexandra Twin.

¹⁹⁴ *Ibid*.

¹⁹⁵ Alexandra Readhead *supra* note 19 at 11.

¹⁹⁶ Alexandra Readhead *supra* note 19 at 12.

that will be due to the government will also reduce. Why is the Ghanaian government not investing in training local human resources who will qualify to take-up more roles in the EI? In training the locals or Ghanaians to occupy positions in the industry, attention should be given to women as previous discussions indicate how women have significantly contributed to the informal ASM sector. If the industry recruits most of its employees from Ghana, it goes to benefit both the companies in the EI and the host-developing country including Ghana.

1.4.2 Impacts on Society

The impacts of mining activity in Ghana on the society would be illustrated by a seminal case in Kenya. Mining activities usually displace people from lands that they have been attached to from generations.¹⁹⁷ When the people in the mining communities are displaced for purposes of extractive business operations, they also lose their rich traditional cultures. In Ghana, the indigenous or the local people in the communities “ascribe spiritual qualities to everything that constitutes nature.”¹⁹⁸ Therefore, displacing them connotes detaching them from their spiritual source.

A case in point is the *African Commission on Human and Peoples’ Rights v. The Republic of Kenya (Ogiek case)*.¹⁹⁹ This case involved the indigenous people of Ogiek in Kenya and the Kenyan government. In May 2017, the people defended their land rights against the government in the African Court on Human and People’s Rights.²⁰⁰ The Ogiek

¹⁹⁷ Samuel Awuah-Nyamekye & Paul Sarfo-Mensah, “Mining or Our Heritage?: Indigenous Local People’s Views on Industrial Waste of Mines in Ghana” (2012) at 165 online: <cdn.intechopen.com/pdfs/30862/InTech-Mining_or_our_heritage_indigenous_local_people_s_views_on_industrial_waste_of_mines_in_ghana.pdf>.

¹⁹⁸ *Ibid.*

¹⁹⁹ African Commission on Human and Peoples’ Rights (ACHPR), *supra* note 7 at 28. See *African Commission on Human and Peoples’ Rights v Republic of Kenya, 2017 African Court on Human and People’s Rights* online (pdf): <en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>.

²⁰⁰ Lucy Claridge, “Litigation as a Tool for Community Empowerment: The Case of Kenya’s Ogiek” (2018) 11:1 Erasmus Law Review (ELR) online :<file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/ELR_2018_011_001_006.pdf>. See also Economic, Social and Cultural Rights-Net (ESCR-Net), “*African Commission on Human and Peoples’ Rights v Republic of Kenya*, ACHPR, Application No. 006/2012: 2017” online: *ESCR-Net* <www.escr-net.org/caselaw/2017/african-commission-human-and-peoples-rights-v-republic-kenya-acthpr-application-no>. See also Olabisi D Akinkugbe & Adebayo Majekolagbe, “The African Court of Human and People’s Rights Decision in the Ogiek Case: An Appraisal: Extractive Industries and Human Rights in an Era of Global Justice:

have a special connection with the Mau Forest which serves as “home, school, cultural identity and way of life that provides the community with an essential sense of pride and destiny.”²⁰¹ Well over fifty years, they suffered arbitrary and forced eviction from their land by their government without any form of community engagement or consultation as well as compensation. The sad news was that the government had conveyed the land to third parties for commercial purposes and denied them access to their land. The government argued that its activities including evicting them from the land were in the best interest of the wider people of Kenya. The court held that the Kenyan government had violated some rights provided under the African Charter of Human and People’s Rights.²⁰² It further held that “the eviction of the Ogiek people by the government must be condemned in two respects, in relation to the right to development, due to the lack of effective consultation, and in relation to the right to property, which was ‘against their will and without prior consultation’.”²⁰³ In this case, the African Court acknowledged that there is a close relationship between members of the local communities and the environment. According to the court “the most salient feature of most indigenous populations is their strong attachment with nature, particularly land and the natural environment. Their survival in a particular way depends on unhindered access to and use of their traditional land and the natural resources thereon.”²⁰⁴

This was the first and seminal case by the court on violations of human and people’s rights under the African Charter.²⁰⁵ It became a major precedent and provided a community engagement model as well.²⁰⁶ The decision in this case throws emphasis on the argument that evicting the local people from their native lands in order to extract these

New Ways of Resolving and Preventing Conflicts” (2020) Social Science Research Network (SSRN) online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3307170>.

²⁰¹ *Ibid.*

²⁰² Organization of African Unity, “African Charter on Human and Peoples’ Rights” (1981) online (pdf): <treaties.un.org/doc/Publication/UNTS/Volume%201520/volume-1520-I-26363-English.pdf>.

²⁰³ African Commission on Human and Peoples’ Rights (ACHPR), *supra* note 7 at 51.

²⁰⁴ *Ibid* at 28.

²⁰⁵ *Ibid.*

²⁰⁶ Lucy Claridge, *supra* note 200.

natural resources is more likely to abuse their environmental human rights such as right to life, livelihood, and cultural rights among others. Further significance of this case is that it has “empowered the people of Ogiek to feel relevant as indigenous people.”²⁰⁷ The court also “recognized the leading roles indigenous people including the people of Ogiek and other African countries have in protecting and conserving their local ecosystems, land and natural resources.”²⁰⁸ This case has highlighted indigenous or the local people’s capabilities or contributions in protecting the environment and biological diversity. Perhaps this case may serve as a precedent with persuasive effect in the Ghanaian courts.

It must also be noted that, when the community is displaced, women’s land rights especially, are marginalized.²⁰⁹ As a result, this case serves as an authority to empower the local women who become victims of extractive business-related human rights abuses to defend their rights to their lands. It also goes to encourage other stakeholders including the government and companies to desist from all forms of discrimination against the local community members and women especially on their rights to their traditional lands.²¹⁰

1.4.3 Environmental Impacts

The study here focuses on issues surrounding minerals rights as against environmental rights. The underlying question is, which of these rights prevails in the mining sector? Although the minerals rights generate revenues that significantly support the economy in the areas such as education, health and employment, associated environmental impacts from mining operations are indelible.²¹¹ In this sense, perhaps there should be a reasonable balance between the two competing rights.

²⁰⁷ Economic, Social and Cultural Rights-Net (ESCR-Net), *supra* note 200.

²⁰⁸ *Ibid.*

²⁰⁹ Nora Gotzmann et al, “*Towards Gender-Responsive Implementation of Extractive Industries Projects*” (Copenhagen: The Danish Institute for Human Rights, 2019) at 8 online (pdf) <: file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/gender_and_extractives_report_sept2019.pdf>. or <www.humanrights.dk/publications/towards-gender-responsive-implementation-extractive-industries-projects>.

²¹⁰ Economic, Social and Cultural Rights-Net (ESCR-Net), *supra* note 200.

²¹¹ Alexandra Readhead, *supra* note 19 at 14.

Ghana must seek a balance between minerals rights and environmental rights through its laws in order to be consistent with international standards.²¹² Some legislations and policies governing economic activities in relation to the environment includes:²¹³ “the National Environmental Policy of Ghana²¹⁴ as complemented by the *Environmental Protection Agency Act, 1994 (Act 490)*,²¹⁵ *Environmental Assessment Regulations, 1999 (L.I. 1652) (Environmental Regulations)*,²¹⁶ the *Forestry Commission Act, 1999 (Act 571)*,²¹⁷ Ghana’s Mining and Environmental Guidelines, 1994,²¹⁸ Environmental Guidelines for Mining in Production Forest Reserves in Ghana.²¹⁹

Now on mining and the environment, the government of Ghana seeks to achieve the objective of mining in a safe environment through its Environmental Regulations and policies.²²⁰ However, the existence of these legislations and policies are brought to life through effective enforcement. In developing countries such as Ghana, the government seems to be more interested in “their profit margins than the associated environmental hazards the

²¹² Minerals and Mining Policy of Ghana, “Ensuring Mining Contributes to Sustainable Development” (2014) at 24 online :< www.extractiveshub.org/servefile/getFile/id/798>. Or <extwprlegs1.fao.org/docs/pdf/gha194056.pdf>.

²¹³ *Ibid.* See Joe Amoako-Tuffour, “Ghana: Mineral Policy” (2020) Encyclopedia of Mineral and Energy Policy online: <link.springer.com/referenceworkentry/10.1007%2F978-3-642-40871-7_165-1>.

²¹⁴ National Environmental Policy, Ghana (2016) online (pdf): < new-ndpc-static1.s3.amazonaws.com/CACHES/PUBLICATIONS/2016/04/16/NATIONAL_ENVIRONMENTAL_POLICY.pdf>.

²¹⁵ *Environmental Protection Agency Act, Ghana 1994, (Act 490)* online: <extwprlegs1.fao.org/docs/pdf/gha13234.pdf>.

²¹⁶ *Environmental Assessment Regulations, Ghana supra* note 169.

²¹⁷ *Forestry Commission Act, Ghana 1999, (Act 571)* online (pdf): < file:///C:/Users/HP/Downloads/FORESTRY%20COMMISSION%20ACT%20-%201999.pdf.pdf>.

²¹⁸ Ghana Minerals Commission & Ghana Environmental Protection Council, *Ghana’s Mining and Environmental Guidelines*, (Ghana: 1994). These guidelines form the basis for Environmental Regulations under the Minerals and Mining Law (PNDCL 135) 1986 at 1.

²¹⁹ ClientEarth, “Environmental Guidelines for Mining in Production Forest Reserves in Ghana” (2001) online (pdf): <www.documents.clientearth.org/wp-content/uploads/library/2001-05-01-environmental-guidelines-for-mining-in-production-forest-reserves-in-ghana-2001-ext-en.pdf> or <www.documents.clientearth.org/library/download-info/environmental-guidelines-for-mining-in-production-forest-reserves-in-ghana-2001/>. The Guidelines provide a framework to guide mining operations in production areas of forest reserves. Specifically, they provide uniform criteria to establish environmental constraints for all parties involved in operations within a Forest Reserve. They identify the aspects of ‘best practice’ mining and environmental management, and then set a framework within which to elaborate best practice principles on a case-by-case basis.

²²⁰ *Ibid.* See Alexandra Readhead *supra* note 19 at 14.

mining activities cause.”²²¹ This is evident in how under-resourced most of government agencies are in effectively enforcing such laws. For example, “in 2001, one of the LSM companies, Goldfields Limited spilled cyanide into River Asuman, which serves as drinking water for some communities in Ghana.”²²² The spillage was reported to have killed “hundreds of fish and birds” yet the responsible government agencies including EPA were challenged in resources in order to hold their mandates under the laws.²²³ This means the EPA could not deliver its mandates adequately in enforcing the laws due to the challenges.

In Ghana, the mining sector negatively impacts the land and water bodies. It has been argued that the environmental consequences of mining activities are associated with the entire value chain. It implies that the type and size of the mining operation could determine the extent of impacts.²²⁴ As has been indicated earlier, the mining activities usually take place in the rural areas where the communities are already enduring their deprived state of livelihood. Most mining communities lack access to potable water and are forced to rely on the water bodies including the rivers. They rely on these water bodies for their domestic chores including drinking and also for their farming activities. The important point to note here is that the mining activities heavily rely on water to facilitate their operations.²²⁵ This implies that the LSM miners may necessarily compete with the locals ASM miners on the use of the water bodies for their various activities. Typically, the Chinese miners introduced “direct mining within rivers” which has a catastrophic destruction of rivers in some local communities including the river *Pra* which serves several communities.²²⁶ This destruction inevitably pollutes the rivers since chemicals such as mercury and cyanide are used in this

²²¹ Samuel Awuah-Nyamekye & Paul Sarfo-Mensah, *supra* note 197 at 152.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ Alexandra Readhead *supra* note 19 at 14.

²²⁵ Emmanuel Yaw Aboka, Samuel Jerry Cobbina & Dzigbodi Doke *supra* note 1 at 43

²²⁶ Gordon Crawford et al *supra* note 66 at 6. See James Boafo, Sebastian Angzorokuu Paalo & Senyo Dotsey, *supra* note 108 at 10.

type of mining.²²⁷ Such water pollution bring further losses to Ghana as it is associated with increased cost of chemical treatment of the rivers to make it potable.²²⁸ The mechanized mining technology introduced by the Chinese into the ASM which employs earthmoving machines have destroyed vast farms lands where large open pits have been left as a result with associated safety risks.²²⁹ It is difficult to ascribe such pollution to the indigenous or local miners in the ASM considering how they ascribe “a lot of beliefs around precious minerals and local gods” as well as spirituality to nature.²³⁰ Consequently, “they treat rivers, sacred groves and other areas designated as the domain of local gods with so much care.”²³¹ In spite of the difficulty in ascribing environmental pollution to the indigenous or local miners, the very nature of the extraction activity is associated with environmental pollution and the local people cannot be left out as also polluting the environment in the course of their extraction businesses.

Destroying farmlands and water bodies are also crucial with large-scale mining. Golden Star Resources’ mining operations which are grossly associated with the destruction of natural resources upsurge community mistrust and opposition towards LSM.²³² The local people believe that Golden Star Resources Limited is far from achieving its business operation in an environmentally responsible manner even in the long term. This is because GSR has refused the call from government and the society to work towards this achievement.²³³ An environmental NGO indicated that “...they have been fighting Golden

²²⁷ James Boafo, Sebastian Angzoorokuu Paalo & Senyo Dotsey, *supra* note 108 at 10.

²²⁸ Gordon Crawford et al, *supra* note 66 at 6.

²²⁹ James Boafo, Sebastian Angzoorokuu Paalo & Senyo Dotsey, *supra* note 108 at 10.

²³⁰ Samuel Awuah-Nyamekye & Paul Sarfo-Mensah, *supra* 197 at 165.

²³¹ *Ibid.*

²³² Obed Adonteng-Kissi & Barbara Adonteng-Kissi , “Living with Conflicts in Ghana’s Prestea Mining Area: Is Community Engagement the Answer?” (2017) 16:4 Journal of Sustainable Mining 196 online: < www.sciencedirect.com/science/article/pii/S2300396017301027#sec2>.

²³³ This position will be explored more under land grabbing in the next Part of this paper.

Star Resources Limited together with local farmers, artisanal miners and other environmental NGOs to change their way of operation for a long time.”²³⁴

Another negative environmental impact from the mines is related to the decommissioning and closure phase of the mining operation.²³⁵ This phase is inevitable when the mining activity comes to an end. It has been argued that this phase is associated with mismanagement towards effective rehabilitation. Regulation 14 of the Environmental Impact Assessment Legislation and the *Environmental Protection Agency Act* in Ghana commit all mining companies to register and describe the impact of their activities on the environment and how it will be mitigated. In addition to this requirement, they are to pay a reclamation bond to the EPA as a security to rehabilitate the mining site if the company in question refuses to do as expected. The concern here is that are the rehabilitation practices effective in ensuring the suitability for agricultural purposes for example? Perhaps, future research may investigate the effectiveness of the rehabilitation practices in Ghana.

Aside from the issues that may be surrounding rehabilitation in Ghana, rehabilitation of the mining sites requires some level of technical knowledge and skills. This means that there is also an opportunity for the local people to acquire and have such skills developed in order to help mitigate environmental impacts. Skills are required to mitigate carbon footprint, control greenhouse gas emissions affecting climate change among others.²³⁶ The mitigation processes will include developing renewable sources such as biofuels, energy efficiency initiatives using local technology of renewable resources. Studies have indicated that about thirty per cent of metals used worldwide is recycled. Iron and steel are among the easiest metals to reprocess. Hence local people could learn skills which are relevant to recycling metals.

²³⁴ Obed Adonteng-Kissi & Barbara Adonteng-Kissi, *supra* note 232.

²³⁵ Alexandra Readhead *supra* note 19 at 14.

²³⁶ *Ibid.*

From the foregoing, it is no doubt that the miners may have mineral rights to operate in mining businesses, but the communities also have a right to enjoy safe environment in the mining communities. These are competing rights that should be considered and balanced accordingly.

Having discussed a general overview of the mining sector in Ghana, the thesis will investigate whether there are opportunities for women in the male dominated mining sector in the next section.

1.4 Women in Mining

The study here will start by exploring some key concepts in gender analysis and studies. Gender studies distinguish between ‘sex’ and ‘gender’.²³⁷ ‘Sex’ is “biologically determined differences between men and women whereas ‘gender’ refers to “the learned, context-specific, and mutable socially construed notions of what it means to be a man or woman within specific cultural and historic contexts.”²³⁸ Gender studies also identify “the inequalities in the roles assigned to men and women, to the detriment of both, pursuing ‘equality’ as the objective situation in which individuals or both sexes may develop their personal capabilities and make decisions about their lives, without the limitations imposed by traditional stereotypes.”²³⁹ With this in the background, the study will explore women’s participation in the mining industry.

The concept of feminization in the mining industry is geared towards normalizing the hegemonic masculinity discourse as seen in the industry.²⁴⁰ Mining operation is

²³⁷ Nathan Andrews, *Responsibility for What, to Whom? A critical Assessment of the Corporate Social Responsibility (CSR) of Kinross and Newmont in Ghana* (Doctor of Philosophy, University of Alberta, 2015) [unpublished] at 80 online:<era.library.ualberta.ca/items/9a3eeca3-86af-4c19-a84a-cc4010813a89/view/b6d46ee4-810a-477a-a72b-90446d4556f6/Andrews_Nathan_201508_PhD.pdf>.

²³⁸ *Ibid.*

²³⁹ Paulina Salinas, Glanni Romani & Jimena Silva, “Gender Equality or Diversity in the Mining Industry for 2035? Crossroads for Chilean Higher Education” (2018) 31:7-8 *Journal of Education and Work* 628 at 630 online (pdf):

<www.tandfonline.com/doi/pdf/10.1080/13639080.2018.1563288?casa_token=RTtEhYl5EMYAAAAA:AvTqzIPvOxslcLxiUAKh-D4nxm38P4unvfP2acSwEqnZfidfZpMdzodSI-RbtwI0AYmmtIIoIggq_Eb>.

²⁴⁰ Kuntala Lahiri-Dutt, “The Feminisation of Mining” (2015) 9:9 *Geography Compass* 523 at 523 online :<www.researchgate.net/publication/282429351_The_Feminisation_of_Mining>.

characterized as dangerous and heroic work which requires sheer physical strength to penetrate the earth for the minerals.²⁴¹ Patriarchal society thus stands to protect women from the dangerous mining environment.²⁴² Feminists are of the opinion that patriarchal society rather prevents women from developing their civic professional lives and also confines them into domestic spaces only.²⁴³ They are concerned about how mining industries have undermined gender equality including human rights of women.²⁴⁴ Women have been reduced primarily as reproductive citizens and been denied high profile employment opportunities in the mining industry. Interestingly, a significant number of women are laboring in the mining sector especially in the ASM sector in Ghana.²⁴⁵ Yet the industry is perceived as a male dominated. It must also be noted that the hyper-masculine mining industry is radically transforming to accommodate women especially in the ASM.²⁴⁶ However, most researchers focus on women miners in the ASM sector but not the LSM sector, perhaps (but not certainly) because more women participate in the ASM compared to the LSM.²⁴⁷

Gold production from the ASM accounts for one-fifth of gold in the world.²⁴⁸ The studies of Noetseller in 1995 indicated that a significant number of women in developing countries including Ghana are engaged in ASM.²⁴⁹ Which means women contribute to success in ASM in Ghana.

Some current matters regarding the ASM sector in Ghana includes the formalization of the sector as well as opportunities and risks women take in the industry.²⁵⁰

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ Kuntala Lahiri-Dutt, "Do Women Have a Right to Mine?" (2019) 31:1 Canadian Journal of Women and the Law (CJWL) 1 at 2 online: <muse-jhu-edu.ezproxy.library.dal.ca/article/722266>. See Francis Arthur-Holmes & Kwaku Abrefa Busia, *supra* note 125. See Kathy Jenkins, *supra* note 106 at 21.

²⁴⁵ *Ibid* Kuntala Lahiri-Dutt, "Do Women Have a Right to Mine?" at 2.

²⁴⁶ Kuntala Lahiri-Dutt, "The Feminisation of Mining" *supra* note 240. See also Kathy Jenkins, *supra* note 106 at 3.

²⁴⁷ *Ibid* at 3.

²⁴⁸ Beatrice Labonne *supra* note 104 at 118.

²⁴⁹ *Ibid.*

²⁵⁰ Australia in Africa, "Promoting Women in Ghana's Mining Industry" (2020) online: *Australia Awards* <www.australiaawardsafrica.org/success_stories/promoting-women-in-ghanas-mining-industry/>. Rufai Haruna

Exploring these matters among others could encourage women to reshape their socio-cultural environment which oppresses them to some extent.²⁵¹ As a result, women could secure independent livelihoods via the ASM businesses. Since ASM has been characterized as “reaping the riches of the earth to make a more productive living”²⁵² regardless of its economic insecurities. Also, a Zimbabwean mining consultant also referred to ASM as “islands of prosperity in a sea of poverty”.²⁵³

In order to fully appreciate opportunities available to women in the mining industry, job roles and contributions of women should not be limited to ‘activities in pits’ but also ‘activities outside the pits’.²⁵⁴ This implies considering the “whole spectrum of activities including mining, processing, delivery, and goods and service provision in and around ASM.”²⁵⁵

Let us analyze some of the ‘outside the pits activities’ in the mining industry. The fiscal revenues derived from the mining industry in Ghana include direct and indirect revenues.²⁵⁶ The direct revenues include mineral royalties’ dividends and levies while the indirect revenues are derived from the supply chain through taxes and fees.²⁵⁷ Supply chain has been defined as “a network of organizations that are involved through upstream and downstream linkages in the different processes and services in the hands of the ultimate customer.”²⁵⁸ The effective management of the ‘supply chain’ is critical to boost profitability

Kilu, *Shifting Gender Dynamics in Multinational Ghanaian Mine Jobs* (Doctoral Thesis, Lulea University of Technology, 2017) [unpublished] at 12 online (pdf):< www.diva-portal.org/smash/get/diva2:1095648/FULLTEXT02.pdf>. See Beatrice Labonne *supra* note 104 at 117.

²⁵¹ *Ibid* Australia in Africa. See Beatrice Labonne *supra* note 104 at 117.

²⁵² Rufai Haruna Kilu, *supra* note 250 at 15. See Beatrice Labonne *supra* note 104 at 117.

²⁵³ *Ibid*, Beatrice Labonne at 118.

²⁵⁴ Fitsum Weldegiorgis, Lynda Lawson & Hannelore Verbrugge, *Women in Artisanal and Small-Scale Mining: Challenges and Opportunities for Greater Participation* International Institute for Environment and Development (IIED) for Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) (Winnipeg Canada: The International Institute for Sustainable Development (IISD), 2018) at 2 online (pdf):< www.iisd.org/system/files/publications/igf-women-asm-challenges-opportunities-participation.pdf>.

²⁵⁵ *Ibid*. See Kathy Jenkins, *supra* note 106 at 4.

²⁵⁶ Toni Aubynn, *supra* note 69.

²⁵⁷ *Ibid*.

²⁵⁸ Matida Kokui Owusu-Bio, Daniel Obeng Donkor & Addul Samed Muntaka, “Improving Local Linkages in the Supply Chain of Ghana’s Mining Industry: A Case of Newmont Ghana Gold Limited” (2016) 5:1 *Journal of*

in businesses by “adding value and creating efficiencies” towards customer satisfaction.²⁵⁹ The supply chain processes could involve information processes and financial processes within the EI where women are possibly a part of these processes. Therefore, if women are part of the ‘outside the pits’ activities such as the supply chain process which are a part of the EI, it would be inaccurate to conclude that the EI is male dominated.

Having noted this, more women could be encouraged to take up opportunities in the supply chain aspect of the mining sector. It also calls for increasing local participation and local resources necessary for the mining business operations. In this sense, women could help increase indirect revenue derived from the supply chain in the EI in Ghana.²⁶⁰ Furthermore, the mining companies must be clear on their supply needs in order for the local suppliers to produce accordingly.

It is sad to note that when women secure opportunities in the mining businesses, perhaps as an alternative source of their farming income, they are rather exploited by their male-counterparts with little or no remuneration.²⁶¹ In addition, they suffer workplace hazards and risks with little or no care. It could be possible that the informal nature of most ASM businesses as well as regulation challenges, especially on labor matters leave room for women to be exploited.²⁶² Therefore, the empowerment of women in mining is inextricably connected to regulating and formalizing the sector just like LSM to help improve the working conditions of women in mining.²⁶³

Logistics Management 32 at 33 online (pdf):

<file:///C:/Users/HP/Downloads/10.5923.j.logistics.20160501.05.pdf>.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid* at 36.

²⁶¹ Kuntala Lahiri-Dutt, “Do Women Have a Right to Mine?”, *supra* note 244 at 2. More on how women are exploited will be described under Part II of this thesis.

²⁶² *Ibid.*

²⁶³ World Bank, “Ghana: Artisanal and Small-Scale Mining Formalization (P168002): Project Information Document (PID)” (2019) at 4 online (pdf):<documents1.worldbank.org/curated/en/588251567092763252/pdf/Concept-Project-Information-Document-PID-Ghana-Artisanal-and-Small-Scale-Mining-Formalization-P168002.pdf>. See also Beatrice Labonne, *supra* note 104 at 120.

Essentially, the issue here is not whether or not women are part of the mining sector, but whether women derive equal benefits as their male counterparts from the industry.²⁶⁴ Women continue to occupy secondary roles in the mining sector which do not allow them to enjoy equal compensations and participate in decision making on issues that directly affect them.²⁶⁵ Typically, women in the industry are employed to work in the downstream category of mining operations which although are labor intensive but income is extremely low.

Women are also limited by cultural and traditional norms that prevent them from fully enjoying benefits from the industry. Typically, in some customs women in mining are perceived and deemed as “loose women” and unclean which creates barriers for some women in the mining sector.²⁶⁶ Such perception connotes that women cause a spirit of bad luck when in close proximity to minerals or mineral-bearing stones. Some communities rely on these perceptions to ban women in engaging in mining especially pits mining activities. Some women have been criticized as being handicapped in the performance of assigned roles in the mining industry.²⁶⁷ Actually, women have competitive advantages in performing tasks that are delicate in the mining operation including ‘panning’ which requires agility and care. Panning is one of the simple methods in ASM operations where particles relieved to be gold are separated from soils by way of washing the sediments in a pan with water.²⁶⁸

Nevertheless, it must be acknowledged that women have a real challenge in meeting the demands of job equality in the industry.²⁶⁹ Women have family responsibilities including taking care of the family and as such are unable to spend adequate time at the

²⁶⁴ Francis Arthur-Holmes & Kwaku Abrefa Busia, *supra* note 125. See Beatrice Labonne, *supra* note 104 at 119.

²⁶⁵ *Ibid.*

²⁶⁶ Fitsum Weldegiorgis, Lynda Lawson & Hannelore Verbrugge, *supra* note 254 at 2.

²⁶⁷ Francis Arthur-Holmes & Kwaku Abrefa Busia *supra* note 125. See Beatrice Labonne, *supra* note 104 at 120.

²⁶⁸ William Andrew Hustrulid, “Panning: Mining” (accessed on June 6, 2020) online: *Search Britannica* <www.britannica.com/technology/panning>.

²⁶⁹ Francis Arthur-Holmes & Kwaku Abrefa Busia, *supra* note 125. See Beatrice Labonne, *supra* note 104 at 120.

workplace making it extremely difficult to meet up the challenge.²⁷⁰ Yet, women have successfully combined their domestic responsibilities (reproductive abilities) and their mining jobs.²⁷¹ It must be emphasized that combining career development, childbearing and housewifery has never been easy till date.²⁷² In order to meet the societal expectations as a woman under most customs,²⁷³ most women are reluctant to venture into the industry even though it may be more profitable compared to the traditional agriculture businesses.

Embracing opportunities coupled with challenges in the industry allows women to meet their societal expectations in cases where the traditional agricultural businesses face land-resources obstacles including economic, cultural and legal.²⁷⁴ It is important to empower women in the mining sector to help them to meaningfully participate in matters that directly affect them. Women could be empowered by the government and the mining companies if they recognize both the ‘reproductive’ (biological) as well as ‘productive’ capabilities of women through laws and policies.²⁷⁵ Perhaps, this may help in building a robust gendered character where women would be comfortable in a male dominated industry.²⁷⁶

The good news is that exploring matters in the ASM seems to be yielding positive results. Women in Ghana among some other developing countries have risen up to the challenge of equality in the industry and could now acquire their own mining titles in recent times although it is not clear exactly when it started.²⁷⁷ This bold step is a source of inspiration for women to be empowered to achieve more in the industry.

²⁷⁰ *Ibid.*

²⁷¹ Fitsum Weldegiorgis, Lynda Lawson & Hannelore Verbrugge, *supra* note 254 at 1. See Katy Jenkins, “Women Anti-Mining Activists’ Narratives of Everyday Resistance in the Andes: Staying put and Carrying on in Peru and Ecuador” (2017) 24:10 Gender, Place & Culture: A Journal of Feminist Geography 1441-1459 online: <www.tandfonline.com/doi/full/10.1080/0966369X.2017.1387102>.

²⁷² The Ghana Chamber of Mines, “First National Conference on HR Management in the Mining Industry, Tarkwa Gold Mine” (2007) online:<ghanachamberofmines.org/wp-content/uploads/2016/11/Women_in_Mining_By_Elaine_Kwame_Mrs.pdf>.

²⁷³ Francis Arthur-Holmes & Kwaku Abrefa Busia, *supra* note 125.

²⁷⁴ Fitsum Weldegiorgis, Lynda Lawson & Hannelore Verbrugge, *supra* note 254 at 2. See Beatrice Labonne, *supra* note 104 at 119.

²⁷⁵ Kuntala Lahiri-Dutt, “Do Women Have a Right to Mine?”, *supra* note 244.

²⁷⁶ *Ibid.* at 2. See Francis Arthur-Holmes & Kwaku Abrefa Busia, *supra* note 125.

²⁷⁷ Beatrice Labonne, *supra* note 104 at 120.

In conclusion the ASM sector provides benefits to women. However, the sector should be fully formalized and regularized to help empower women who take up roles in the industry. Furthermore, in order to counter the perception that the mining industry is male dominated, the full spectrum of the industry should be considered but not limited to its pits activities only.

In summary, Chapter 1 of this thesis essentially described the mining sector as a representation of the EI in Ghana. Also, minerals rights are required in order to operate business in either the LSM sector or the ASM sector in Ghana. And the grant of minerals rights to a particular land does not automatically deprive a landowner or user of his or her land surface rights. Yet, some miners operate illegally or without the requisite mineral rights in the ASM, which is referred to as *galamsey*. In addition, although Ghana has reserved the ASM sector to its citizens, some Chinese miners have invaded the sector. The Chinese miners in the ASM sector have negatively impacted the environment especially perhaps with the introduction of their mechanized technology in the sector. It is also possible that their technology could have improved environmental outcomes.

Notable among examining the impacts from the EI under this Chapter is the seminal case which involved the indigenous people of Ogiek in Kenya and the Kenyan government which was the first case decided under the African Charter by the African Court. It serves as an authority for local and indigenous people to defend their rights to land with a persuasive effect on the Ghanaian courts. Furthermore, it is arguable to conclude that the mining sector is or not male-dominated industry since there are a significant number of women who are significantly contributing to the ASM especially in Ghana. And to further appreciate women's participation in the industry, the full spectrum of the industry must be acknowledged and not be limited to 'pits activities'. Since it is possible that women have taken or could take full advantage of the 'non pits activities' including supply chain in the EI in Ghana. Therefore, by way of empowering women to fully participate in the EI to also

enjoy the benefits as their male counterparts, the ASM should be formalized among others to help address the diverse issues facing women. Again, to empower women, the government and companies should acknowledge the reproductive or biological attributes of women through laws and policies to normalize their presence in the industry as they also overcome traditional cultural limitations.

CHAPTER 3 LAND GRABBING AND THE EXTRACTIVE INDUSTRIES IN GHANA

Introduction

Mining business operations include exploration, mine-site design and planning, construction, production as well as closure and reclamation.²⁷⁸ The operations involve various activities which may negatively impact human rights.²⁷⁹ This thesis will explore how the EI in Ghana is negatively impacting human rights especially human rights of women in the communities where their business operations are undertaken. The thesis will focus on ‘land grabbing’ as practiced by companies in EI operating in Ghana.

This section will describe the general concept of land grabbing and give reasons for focusing on land grabbing in this thesis. The section will also explore some factors that contribute to the practice of land grabbing in the EI. It will also examine some unique impacts on women’s human rights and investigate whether the consequences of such impacts are suffered by women only. Lastly, it will review the government of Ghana’s efforts regarding matters of inequality.

2.1 Concept and Definitions of Land Grabbing

Matters relating to land deals, specifically “land grabbing” or “land transactions”, re-surfaced in the 21st century when modern sovereign states emerged.²⁸⁰ There has been a global discourse by some international bodies such as the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization (FAO) on whether land deals involving corporate bodies should be characterized as either “win-win” or “critical”. In other

²⁷⁸ Mining Global, “Mining: The Five Stages of the Mining Life Cycle” (2020) online: *Mining Global* <www.miningglobal.com/operations/gifs-5-stages-mining-life-cycle>.

²⁷⁹ Business for Social Responsibility (BSR), “Ten Human Rights Priorities for the Extractive Sector”, *supra* note 16.

²⁸⁰ Festus Boamah, “Imageries of the Contested Concepts “Land Grabbing” and “Land Transactions”: Implications for Biofuels in Ghana”, *supra* note 8.

words, while proponents of the “win-win” discourse describe such land deals as “land transactions”, proponents of the “critical” discourse describe them as “land grabbing.”²⁸¹

According to the proponents of the critical discourse, such land deals are associated with negative and detrimental consequences to the communities or host countries where the deals were undertaken.²⁸² Some of the negative consequences are food insecurities, and communities’ displacement among other environmental and human rights violations. Proponents of the win-win discourse on the other hand, posit that such land deals are associated with positive outcomes including economic growth to both companies in the EI and the communities or host countries.²⁸³ This notwithstanding, proponents of ‘win-win’ discourse “acknowledge the inherent dangers of large-scale land deals but expresses potentially promising consequences for governments and the populace if effective policies are made to improve land administration, institutional capacity of host regions for contract management and to ensure transparency in land deals.”²⁸⁴

Arguably, the concept of land grabbing (LG) is not a recent one, yet the term has gained notoriety around the globe since 2008.²⁸⁵ Generally, land grabbing has since been identified to constitute acquisition of large-scale of arable land by individuals and corporate bodies for commercial purposes.²⁸⁶ Usually, governments, traditional leaders (for example,

²⁸¹ *Ibid.*

²⁸² Festus Boamah, “Imageries of the Contested Concepts “Land Grabbing” and “Land Transactions”: Implications for Biofuels in Ghana”, *supra* note 8.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.* See also The Water Channel, “Land Grabs: The Global Rush for Farmland” (accessed on December 4, 2019) online: *The Water Channel* <www.thewaterchannel.tv/features/290-land-grabs>.

²⁸⁵ Zukunftsstiftung Landwirtschaft (Foundation on Future Farming) “Land Grabbing” (accessed on December 3, 2019) online: *Agriculture at a Crossroads Land grabbing* <www.globalagriculture.org/report-topics/land-grabbing.html>. See Jeremie Gilbert, *Land Grabbing, Investments & Indigenous Peoples’ Rights to Land and Natural Resources: Case Studies and Legal Analysis* International Work Group for Indigenous Affairs (IWGIA) Report 26 (Copenhagen, Denmark: 2017) at 11 online (pdf): <www.iwgia.org/images/publications/new-publications/land-grabbing-indigenous-peoples-rights.compressed.pdf>.

²⁸⁶ *Ibid.*, Jeremie Gilbert at 11.

chiefs) as well as land investors are involved in negotiations for lands, excluding the people in the community.²⁸⁷

Land Matrix,²⁸⁸ a public database on land deals, defines land grabbing in one of its projects as the conveyance of about two hundred hectares or five hundred acres of land to foreign investors either through a lease or sale.²⁸⁹ The figures by the Land Matrix were collected in the 2000s in the era of food-price spikes. The Land Matrix's project indicated that most corporate land investors were member states of the Organization of Economic Cooperation and Development (OECD).²⁹⁰ Among the OECD member states are developed states including Canada, United States and Western Europe who invest in lands in developing states.

In 2011, the International Law Coalition (ILC)²⁹¹ at its Assembly in Tirana, Albania, declared that land grabbing occurs when land investors violate both procedural and substantive rights.²⁹² The ILC identified some factors that if associated with such land acquisition constitute land grabbing. These factors are:

violation of human rights, particularly the equal rights of women; the deal is not based on free, prior and informed consent of the affected land users; not based

²⁸⁷ Grant Evadne & Das Onita, *supra* note 9. See Suhiyini I Alhassan, Mohammed T. Shaibu & John K. Kuwornu, "Is Land Grabbing an Opportunity or a Menace to Development in Developing Countries? Evidence from Ghana" (2018) 23:12 Local Environment: The International Journal of Justice and Sustainability 1121 online:

ugspace.ug.edu.gh/bitstream/handle/123456789/31741/Is%20land%20grabbing%20an%20opportunity%20or%20a%20menace%20to%20development%20in%20developing%20countries%20Evidence%20from%20Ghana.pdf?sequence=1&isAllowed=y.

²⁸⁸ Land Matrix, "Welcome to the Land Matrix Public Database on Land Deals" (2020) online: *Land Matrix* <landmatrix.org/>.

²⁸⁹ Timothy Wise, Dollars A & Sense, "Land-Grabbing around the World" (2015) 317 ProQuest 14 at 14 online:<search-proquest-com.ezproxy.library.dal.ca/docview/1692911488/fulltextPDF/A1FB265486524428PQ/1?accountid=10406>.

²⁹⁰ Chapter 3 of this thesis will explore more on OECD.

²⁹¹ International Land Coalition (ILC): Global Assembly, "Tirana Declaration: Securing Land Access for the Poor in times of Intensified Natural Resources Competition" (2011) online (pdf): *Tirana Declaration* <www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>. See also International Land Coalition, "About ILC" (accessed on December 5, 2019) online :< www.landcoalition.org/en/about-ilc>. ILC is a global alliance of civil society and intergovernmental organizations working together to put people at the center of land governance. Its shared goal is to "realize land governance for and with people at the country level, responding to the needs and protecting the rights of women, men and communities who live on and from the land". See Zagema Bertam, *Land and Power: The Growing Scandal Surrounding the new wave of Investments in Land*, 151 Oxfam Briefing Paper (Oxford: Oxfam International, (2011) at 5 online (pdf):<www.oxfam.de/system/files/20110922_land-power-rights-acquisitions.pdf>.

²⁹² *Ibid*, International Land Coalition (ILC).

on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; not based on effective democratic planning, independent oversight and meaningful participation.²⁹³

Land grabbing was also prevalent at the time oil prices were rapidly increasing.²⁹⁴ The rapid increase in oil prices was directly related to climate change.²⁹⁵ Governments were more concerned about finding solutions to climate change than responding to the problem of land grabbing. Some governments supported and were convinced by research findings which indicated that biofuel could be a plausible solution to climate change.²⁹⁶ According to the research findings, biological fuel factories (including *jatropha* crops) absorb carbon dioxide from the air which could help reduce greenhouse gases. Consequently, some agricultural investors rushed to invest in land in order to cultivate *jatropha* plants for purposes of producing biofuel. Unfortunately, since the same arable lands for agricultural food production were acquired for *jatropha* projects, it resulted in the unhealthy competition between food and fuel securities.²⁹⁷ It is incredibly difficult to record accurate figures of land sizes acquired for purposes of the *jatropha* project due to the high levels of secrecy involved in such land deals.²⁹⁸ This notwithstanding, Land Matrix Partnership managed to find that about “227 million hectares of arable lands have been sold, leased and licensed to international or

²⁹³ Jeremie Gilbert, *supra* note 285 at 11.

²⁹⁴ Dan Charles, *supra* note 14. See also Cotula L et al, *Land Grab or Development Opportunity?: Agricultural Investment and International Land Deals in Africa*, (London/Rome: International Institute for Environment and Development (IIED), Food and Agriculture Organization of the United Nations (FAO), International Fund for Agricultural Development of the United Nations (IFAD), 2009). See also African Development Bank (AfDB), “Rethinking Land Reform in Africa New Ideas, Opportunities and Challenges” (2020), online: *African Development Bank (AfDB)* <www.afdb.org/en/documents/rethinking-land-reform-africa-new-ideas-opportunities-and-challenges>.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ Boamah Festus, “Competition between Biofuel and Food?: Evidence from a *Jatropha* Biodiesel Project in Northern Ghana” (2011) [unpublished, archived at University of Bergen Department of Geography, at 6 online:<bora.uib.no/bitstream/handle/1956/7351/69634514.pdf?sequence=1&isAllowed=y>.

²⁹⁸ Zagama Bertam, *supra* note 291.

transnational investors.”²⁹⁹ More importantly, about 34 million hectares of these lands are located in Africa.³⁰⁰

Research on land grabbing has been centralized on biofuel projects whereas little attention has been given to land grabbing in the EI.³⁰¹ Therefore, this thesis seeks to investigate land grabbing as practiced by companies in the EIs operating in Ghana.

In summary, Land deals may be understood as ‘land transactions’ with positive outcomes, or as ‘land grabs’ with negative outcomes. Land grabbing discourse should not be limited to the agricultural sector but also applied to the EI in Ghana.

2.2 Practice of Land Grabbing by EI in Ghana

Generally, when miners acquire mineral rights from the Ghanaian government, they prefer to also acquire the surface rights on the same land that they have acquired rights to mine from underground. Holders of surface rights in Ghana include the government, communities and individuals. In the case of communities, traditional leaders such as chiefs hold surface rights in trust for the people.³⁰² Hence the chiefs grant or alienate surface land rights to miners for purposes of their mining operations. When the miners express interests to acquire surface rights for their mining businesses, the government or chiefs often agree to alienate such lands which have been categorized as “vacant, marginal, inefficiently cultivated etc.”³⁰³ For example, in Ethiopia, which has a similar situation as Ghana, the government described some lands as “ineffectively used” and conveyed those lands to foreign investors which displaced about five hundred thousand individuals.³⁰⁴ Arguably, these categories are merely to facilitate alienation of lands because the lands belong to some communities who have lived on them for years. Questionable categorization of lands contributes to land grabbing in Ghana. Also, lands are alienated to the companies operating in the EI without

²⁹⁹ Dan Charles, *supra* note 14.

³⁰⁰ *Ibid.*

³⁰¹ Heidi Hausermann et al, *supra* note 15 at 104.

³⁰² Granting of permit to mine has been discussed under the heading “Minerals Rights in Ghana”

³⁰³ Heidi Hausermann et al, *supra* note 15 at 104.

³⁰⁴ *Ibid.*

regard to existing land users such as the communities. This means that land acquisition and alienation processes are carried out in ways that are insensitive to communities where the extractive activities will be undertaken.

Land grabbing by companies in the EIs usually takes place in the rural areas where the communities are already battling with poverty. How some farmers, particularly women, lose their farmlands to extractive activities is illustrated as follows.³⁰⁵ According to research by Hausermann in 2011, Lilian (this is just a representation name due to privacy issues) was given a tip-off by a neighbor on how her farmland has been invaded by some miners. She quickly carried her weapon to defend her right upon hearing the sad news. On her arrival, she witnessed how some foreign gold miners who had come onto her cocoa farm to commence their mining operations. She found that some miners were destroying her cocoa farm which served as her source of income without her consent or knowledge.³⁰⁶ It is more likely that the traditional leaders in her community who hold fiduciary interests in the community lands might have sold the land she was farming on to these miners.

Ghana is the second largest cocoa producer and exporter in the world after La Cote d'Ivoire.³⁰⁷ Production and export of cocoa has supported the economy of Ghana since 1955.³⁰⁸ Cocoa is a commercial crop that is cultivated by most farmers in Ghana. Cocoa trees produce cocoa fruits for about fifty years, and so serve as a sustainable source of income to farmers and even to their future generations.³⁰⁹ As such, it was a devastating moment for Lilian to witness her cocoa farm being destroyed and losing her source of income in just one morning. When she confronted the miners to stop destroying her farm, they resisted. The miners then produced their permit issued by the central government, authorizing them to

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ Marcella Vigneri & Shashi Kolavalli, *Growth through Pricing Policy: The Case of Cocoa in Ghana*, Background Paper to the UNCTAD-FAO Commodities and Development Report 2017 Commodity Markets Economic Growth and Development (Rome: Food and Agriculture Organization (FAO) of the United Nations, 2018) at 2 online (pdf):<www.fao.org/3/I8329EN/i8329en.pdf>.

³⁰⁸ *Ibid.*

³⁰⁹ Heidi Hausermann et al, *supra* note 15 at 104.

commence their mining operations by clearing the land. In Ghana, Lilian's case could be an example of how some farmlands are arguably categorized as 'inefficient cultivation' of land and so land to be alienated. Even if it was the case that her farmland was inefficiently cultivated, why was she denied a reasonable consultation to use her land for purposes of extraction businesses?

Unfortunately, some Ghanaians aid some foreigners in their land grabbing practices. In Lilian's case, the foreign owned company together with its Ghanaian partners came onto her farmland to destroy her cocoa. The miners only informed Lilian to go back home and await negotiations pending informal compensation having lost her farmland to them.³¹⁰ Lilian, who was left with no alternatives heeded to their request sadly and waited for such compensation at the mercy of the miners.

There was another instance where miners 'land grabbed' in a community called Prestea.³¹¹ The miners were some Canadian mining companies including Golden Star Resources. The land grabbing resulted in a conflict between the community and the transnational mining companies. Prestea is one of the oldest mine-site in Ghana located at about fifty kilometers to the north of the Atlantic Ocean.³¹² Mining operations in Prestea has been on-going for close to a century. Although some mining communities do benefit from the mining business operations, Prestea is among the unfortunate communities who do not reap such benefits. Its poverty status still remains even though it is the community that produces the second highest amount of gold in Ghana. Golden Star Resources (GSR), a transnational corporation based in Canada, holds about ninety per cent of the shares of the Prestea LSM in Ghana.³¹³

³¹⁰ Heidi Hausermann et al, *supra* note 15 at 104.

³¹¹ Obed Adonteng-Kissi & Barbara Adonteng-Kissi, *supra* note 232. See Cynthia Kwakyewah & Uwafiokun Idemudia, *supra* note 17 at 162.

³¹² *Ibid.*

³¹³ *Ibid.* See Hira A & Busumtwi-Sam J, *supra* note 94 at 30.

Golden Star Resources' mining operations are major sources of conflicts in Prestea.³¹⁴ In this instance, Golden Star Resources miners 'land grabbed' an area where some ASM activities were operating. An artisanal miner narrated that;

We have disagreements with GSR because we've been deprived of our rich lands. You see, this situation has affected our cultural heritage and many of our people have been socially dislocated. I believe you've heard about the destruction of our livelihoods. GSR should know that, if they contend all the good parcel of land in their concession, there is no way, we will understand because this is where we come from. We'll mine with all the force because we must make ends meet and they can bring in security forces and that would not stop us from mining here.³¹⁵

Perhaps, conflicts would not have ensued between the community and Golden Star Resources miners had the miners engaged in a reasonable consultation with the community who are strongly attached to their lands.

Lilian's scenario shows how thousands of women subsistence farmers in Ghana lose their land for purposes of extraction businesses.³¹⁶ Some farmers are forcibly displaced from their lands to make way for large-scale mining without adequate compensation.³¹⁷ Sad to say that as miners displace farmers from their lands, they also unlawfully destroy both public and private immovable properties including houses and schools.³¹⁸ Regrettably, some police and soldiers are contracted by some miners who physically abuse community members.³¹⁹ Engaging security forces in this sense is contrary to the Voluntary Principles on Security and Human Rights.³²⁰

³¹⁴ *Ibid.* See Hira A & Busumtwi-Sam J, *supra* note 94 at 65.

³¹⁵ Obed Adonteng-Kissi & Barbara Adonteng-Kissi, *supra* note 232.

³¹⁶ The United Nations Interagency Framework Team for Preventive Action, Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Extractive Industries and Conflict, (2012) at 17.

³¹⁷ Cynthia Kwakyewah & Uwafiokun Idemudia, *supra* note 17 at 158.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.* at 158 & 148.

³²⁰ Chapter 3 of the thesis will describe more on the Voluntary Principles of Security and Human Rights.

In my opinion, there seem to be gaps in the *Minerals and Mining Act (Act 703)*.³²¹ For example, section 94 of *Act 703* provides that the Minister, that is, the Minister of Lands and Natural Resources, may prescribe compensation due to the landowner in consultation with the Commission and Valuation Agency. Section 94 of *Act 703* seems to be considering payment of compensation to landowners only but not land users who usually farm on the lands. In Ghana the laws governing land ownerships, especially customary laws, favor men but not women.³²² Typically, customary laws frown upon women being landowners. Hence women under customary laws are only permitted to be land users as their male counterparts hold ownership titles to lands. It follows that when compensations are paid with only landowners in mind, women will be at a disadvantage. So, for example, in Lilian's case as illustrated above, compensation due would be paid to the landowners even though she might be cultivating the cocoa farm with her own capital. Another gap in this provision is related to the procedure for prescribing compensation. Section 94 does not expressly include landowners or users in the process of prescribing compensation. This could lead to an unfair prescription of compensation due especially in cases where the government is responsible to pay such compensation. Also, it does not expressly provide for which agency is responsible for ensuring payment of compensation to affected communities. When compensation is not paid to the affected communities it is more likely to result in disputes.

There was an instance where compensation was not paid in full to a community which resulted in a dispute between miners and the community where the extraction activity was undertaken. The dispute was between Chirano Gold and community members of Sefwi in Ghana.³²³ It appeared the community was left to follow-up on the compensation due them. Unfortunately, the Ghanaian government was allegedly complicit with the transnational

³²¹ *Minerals and Mining Act*, Ghana, *supra* note 75.

³²² More on this will be explored under the section on 'Land governance and tenure systems in Ghana' below.

³²³ Stephen Aboagye, "Mining and Resettlement of Communities in Ghana: Exposing the Harm caused by Forced Displacement and Relocation" (2014) Mining Watch Canada at 8.

corporation that was responsible to pay compensation to the community, instead of protecting the Sefwi residents. When Chirano Gold failed to pay the compensation in full, a dispute ensued. Sadly, Chirano Gold attempted to assuage the dispute by donating two motorcycles to the community. One would wonder what the Ghanaian government is doing about the dispute since it remains unresolved.

2.3 Factors that Contribute to Land Grabbing in Ghana by the EI

This section will explore some factors that contribute to land grabbing as practiced by some miners in Ghana. Some identified factors relate to land governance and tenure systems in Ghana. The focus here will be on how some factors make women more vulnerable to land grabbing.

2.3.1 Land Governance and Tenure systems in Ghana

Companies in the EI could readily practice land grabbing due to the nature and gaps in land governance and tenure systems in Ghana. This section examines the nature of land governance and tenure systems and examine how they expose women to the risk of land grabbing. It will also investigate whether Ghana is making inroads to address gaps that may be present.

Land governance relates to “rules, processes and organizations through which decisions are made about access to land and its use, the manner in which these decisions are implemented and how competing interests in land are managed.”³²⁴ Again, good land governance system is achieved when land governance is consistent with principles of good governance. Good governance requires the “application of a range of widely recognized principles, including the rule of law, transparency, accountability, and effective management

³²⁴ Bugri JT, “Final Report: Improving Land Sector Governance in Ghana: Implementation of the Land Governance Assessment Framework” (2012) [unpublished, at Kwame Nkrumah University of Science and Technology, Kumasi] at 4 online or (pdf):<siteresources.worldbank.org/INTLGA/Resources/Ghana_Final_Report.pdf>. or <pdfs.semanticscholar.org/27aa/a6b1492849dce3d90faa6ff14f8ed04bd95b.pdf>.

of public resources, control of corruption, citizen participation, and equity.”³²⁵ In Ghana, as many other African countries, land governance takes place in a state of legal pluralism.³²⁶ Legal pluralism here means there are a variety of laws which govern lands in different parts of a country. While some parts are governed by customary laws, other parts are governed by other public legislations. The two main categories of lands in Ghana are private lands and the public lands.³²⁷ The majority of private lands are governed by customary law which have various land tenure systems. The thesis is concerned about private lands where women usually have access to farm.

The *Constitution*³²⁸ of the Republic of Ghana sets forth land rights and responsibilities and also confirms the legal status of customary land rights. Chapter 267 of the *Constitution* establishes fiduciary responsibilities chiefs have over lands in some areas. Generally, in the northern part of Ghana, lands are not regarded as saleable commodities hence chiefs among other traditional leaders would only grant access to use land by community members without transferring ownership titles to them.³²⁹ In the urbanized southern part, on the other hand, lands are regarded as saleable commodities and chiefs transfer titles in land to multiple land investors which results in unending disputes.³³⁰ This implies that in the southern part, landowners would have to resort to state land governance mechanisms to protect their titles to lands or improve on their tenure securities. State land governance mechanisms requires landowners to register their titles to lands to help secure such titles. More mining activities are undertaken in the southern parts of Ghana compared to the northern parts. This could

³²⁵ Grant Evadne & Das Onita *supra* note 9. See Santiso Carlos, “Towards Democratic Governance: The Contribution of Multilateral Development Banks in Latin America” in Burnell Peter, eds, *Democracy Assistance: International Co-operation for Democratization* (Psychology Press, 2000) 150 -190 at 166.

³²⁶ Tracy Higgins & Fenrich Jeanmarie, “Legal Pluralism, Gender, and Access to Land in Ghana” (2011) 23:2 *Fordham Environmental LR* 7-21 at 8
online:<ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1673&context=elr>.

³²⁷ *Ibid.*

³²⁸ *Constitution*, Ghana 1992 *supra* note 71.

³²⁹ Bugri JT, “Final Report: Improving Land Sector Governance in Ghana: Implementation of the Land Governance Assessment Framework” *supra* note 324 at 5.

³³⁰ *Ibid.*

possibly be part of the reasons why land-ownership disputes are prevalent in the southern parts of Ghana.³³¹

The *Constitution* further vests powers in the state under Article 20 to acquire some private lands under some circumstances.³³² This process is referred to as compulsory acquisition of land which is globally known as ‘eminent domain’.³³³

The *Constitution* provides that compulsory acquisition of land in Ghana can be made under Article 20 of the *Constitution* for purposes of developmental projects or activities which promote public benefit or public interest. Some researchers refer to ‘Public interest’ in this context as “acquisition of land in the name of public safety, public morality, public health, public benefit” among others.³³⁴ Another condition for compulsory acquisition is that the state must support the identified public interest with a detailed explanation and reasonable justification for causing hardship to anyone who has an interest in or right over these lands. Furthermore, the acquisition process is expected to be carried out in a fair manner, and prompt payment of compensation is expected. Regarding payment of compensation, Article 20 of the *Constitution* further provides that an aggrieved person may proceed to the High Court for a determination.³³⁵ In the EI, the state compulsorily acquires lands which have been found to contain mineral resources. Section 2 of *Act 703* provides that the President of the Republic of Ghana undertakes compulsory acquisition or may be do so under the authority of the President when lands are discovered to contain minerals. In Ghana, all minerals found within the land belongs to the state. Usually, the state will compulsorily acquire such lands temporarily and would revert the land to the owners should the mineral exploration be

³³¹ International Council on Mining & Metals (ICMM), “Mining in Ghana-What Future can we Expert?” (2015) at 26 online:< www.icmm.com/website/publications/pdfs/mining-partnerships-for-development/mining-in-ghana_what-future-can-we-expect>.

³³² *Constitution*, Ghana 1992, *supra* note 71.

³³³ Stenberg E & Rafiee VS, *Land Grabbing and its Implications on Rural Livelihoods in Ghana and Ethiopia* (Degree of Bachelor, Södertörn University 2018) at 20 [unpublished] online (pdf): <www.diva-portal.org/smash/get/diva2:1242736/FULLTEXT01.pdf>.

³³⁴ See Stenberg E & Rafiee VS, *supra* note 333 at 20.

³³⁵ *Constitution*, *supra* note 71. See *Ibid*.

completed.³³⁶ Characteristic of compulsory acquisition is community displacement for purposes of extraction business operations.³³⁷ Although compulsory acquisition is supported by the Constitution, it is associated with human rights violations including community displacement. It is a concern as it reinforces land grabbing in mining communities.³³⁸

Regarding land tenure in Ghana, some land titles under the customary land tenure are allodial title, freehold title and leasehold title.³³⁹ Allodial title, which is the highest interest in land is vested in either chiefs or family heads of a particular community or family respectively that hold it as fiduciaries or trustees for their respective subjects.³⁴⁰ It is from this allodial title that other titles in land are created including leaseholds. However, complexities associated with customary land tenure system makes it challenging to formalize the ownership status through processes such as land title registration which forms part of the state governance mechanisms. The state land governance system which is synonymous to the Western form of governance system simplifies the land tenure systems to some extent. The customary system on the other hand has not augured well in the past for good land governance practices in the country due to the over-simplified Western forms of tenure systems.³⁴¹ Related to land tenure system is tenure security.

‘Tenure security’ in general terms could be seen as “an individual’s perception of his or her right to a piece of land on a continual basis, free from interference from outside

³³⁶ *Ibid Constitution* at Article 20.

³³⁷ See ‘Minerals Rights in Ghana’ under Chapter 1 of this thesis.

³³⁸ Michael Gyan Nyarko, “The Right to Property and Compulsory Land Acquisition in Ghana: A Human Rights Perspective”, (2019) 27:1 *African Journal of International and Comparative Law* 100 at 101 online:< heinonline-org.ezproxy.library.dal.ca/HOL/Page?collection=journals&handle=hein.journals/afjincol27&id=96&men_tab=srchresults>.

³³⁹ John Tiah Bugri & Samuel Kumi, “Dynamics of Community Perceptions, Common Resources and Compensation Practices in Mining: the Case of Newmont Ghana Gold Ltd at Ahafo” (2018) 12:1 *International Journal of the Commons* 1 at 5 online:< www.jstor.org/stable/pdf/26522945.pdf>.

supra note 152 at 6. See also George A Sarpong, “Improving Tenure Security for the Rural Poor: Ghana-Country Case Study: Towards the Improvement of Tenure Security for the Poor in Ghana: Some Thoughts and Observations” (2006) online (pdf): < www.fao.org/3/a-k0783e.pdf>.

³⁴⁰ *Ibid* at 6.

³⁴¹ *Ibid*.

sources as well as the ability to reap the benefits of investments in land.”³⁴² Thus, ‘Land tenure security’ as defined, is “the ability to continually cultivate land without interference.”³⁴³ ‘Land access’ also refers to “the availability of land and ownership security, desirable physical and economic attributes, reliable credit and property information and the level of transparency and fairness of transactions.”³⁴⁴ In Ghana, access to land refers to the right to use, control and transfer titles in lands.³⁴⁵ In response to the confusion arising from the customary and state land governance systems, a comprehensive national policy framework was put in place in Ghana.³⁴⁶ The National Land Policy (NLP) was created in 1999 to improve the land governance system in Ghana. The underlining guiding principle under the National Land Policy is to enhance tenure securities and protection of land rights. Some key objectives established in the policy are to facilitate equitable access to land, ensure fair and timely compensation for expropriated lands, and to promote community participation in and public awareness of sustainable land management.³⁴⁷

In 2004, the government subsequently implemented the Land Administration Project (LAP) to help achieve NLP.³⁴⁸ The aim of Land Administration Project is to stimulate economic development, enhance security of land tenure, simplify access to land processes in a fair manner, and promote prudent land management in Ghana. In 2011, Ghana made progress by implementing phase 1 of the Land Administration Project (LAP-1) as a means to accomplish the National Land Policy’s objectives.³⁴⁹ The phase 1 of the Land Administration

³⁴² Kuusaana ED, Kidido JK & Halidu-Adam E, “Customary Land Ownership and Gender Disparity: Evidence from the Wa Municipality of Ghana” (2013) 10:1,2 Ghana Journal of Development Studies: GJDS 63 at 66 online (pdf): <siteresources.worldbank.org/INTLGA/Resources/Ghana_Final_Report.pdf>. or <www.zef.de/fileadmin/user_upload/ekuusaana_download_115786-322067-1-SM.pdf>.

³⁴³ *Ibid* at 67.

³⁴⁴ *Ibid*.

³⁴⁵ *Ibid*.

³⁴⁶ Bugri JT, “Final Report: Improving Land Sector Governance in Ghana: Implementation of the Land Governance Assessment Framework” *supra* note 325 *supra* note 53 at 5.

³⁴⁷ *Ibid*.

³⁴⁸ Stenberg E & Rafiee VS, *supra* note 333 at 20 & 26.

³⁴⁹ Bugri JT, “Final Report: Improving Land Sector Governance in Ghana: Implementation of the Land Governance Assessment Framework” *supra* note 325 at 6.

Project seeks to enhance security of land tenure, simplify processes for accessing land, and ensure fairness, efficiency and transparency in the land governance systems.

One of the major achievements of phase 1 of the Land Administration Project includes the enactment of the *Lands Commission Act, 2008 (Act 767)*.³⁵⁰ The *Act 767* restructured the land sector agencies where Customary Land Secretariats were established. Some responsibilities of the Customary Land Secretariat are to demarcate customary land boundaries and keep state lands inventories.

Furthermore, phase 2 of Land Administration Project (LAP-2) was implemented.³⁵¹ This phase essentially built on some areas of the first phase of the Land Administration Project (LAP-1) including the legal framework, decentralization and service delivery as well as human resource development.

Although the government is making inroads to address complexities in land governance and tenure systems, the current nature of these systems does not adequately protect Ghanaian women's land rights. For instance, state land governance requires only landowners to register their titles to lands but not secondary or usufructuary right holders which most women hold in Ghana. It follows that in the event of alienation transactions, primary right holders would only be recognized but not the secondary or usufructuary right holders. In other words, secondary rights holders especially, women cannot register their rights which could give them the legal capacity to defend their rights whenever necessary. This is critical in areas that have been demarcated as registration areas.³⁵²

The customary land tenure system in Ghana "generally follows traditional norms in the control over resources."³⁵³ Traditional norms including inheritance systems do not give women access and control of lands among other resources which are necessary for their

³⁵⁰ *Lands Commission Act, Ghana 2008 Act 767*.

³⁵¹ Bugri JT, "Final Report: Improving Land Sector Governance in Ghana: Implementation of the Land Governance Assessment Framework" *supra* note 325 at 6.

³⁵² *Land Title Registration Act, Ghana, (1986) (P.N.D.C.L. 152)* at section 5 online (pdf): <opencontentghana.files.wordpress.com/2014/01/gha6287.pdf>.

³⁵³ Kuusaana ED, Kidido JK & Halidu-Adam E, *supra* note 342 at 65.

fundamental human rights development.³⁵⁴ Traditionally women’s “access and control over resources including land are determined by male-centered kinship institutions and authority structures.”³⁵⁵ Hierarchical nature of rights and responsibilities over land and other properties in Ghana emerges as a result of gender-differentiated rights and roles, which favor men than women.³⁵⁶ Granting men primary rights of inheritance of land and property and women secondary (usufructuary) rights results in unequal power relations in land tenure.³⁵⁷ The principal ways women could access lands are through their lineage, membership in households, inheritance, marriages or by traditional contractual arrangements among others.³⁵⁸ Women’s secondary rights are associated with tenure uncertainties and are also not clearly defined or documented because they depend on relationships they have with their male counterparts. These, among other factors show how women’s secondary rights are unsecured. In the rare event, some women could gain titles to lands they use for their farming under the principle of adverse possession.³⁵⁹ In Ghana, this principle allows land users or persons in possession of lands which its ownership titles have not been challenged for a continued period of twelve years to acquire legal titles as owners of such lands.³⁶⁰

Access to land in Ghana connotes control over land, yet this is not the case for women especially in the rural areas.³⁶¹ Perhaps, some societal restrictions and customs that discourage women from owning lands could part of the reasons why women do not have control over lands even when they could have access and use it. If women do not have the

³⁵⁴ *Ibid.* See Tracy Higgins & Fenrich Jeanmarie *supra* note 326 at 8.

³⁵⁵ Kuusaana ED, Kidido JK & Halidu-Adam E *supra* note 342 at 65.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid* at 70.

³⁵⁸ Mechthild Runger, “Governance, Land Rights and Access to Land in Ghana: A Development Perspective on Gender Equity” (2006) at 22 online

(pdf):<www.fig.net/resources/proceedings/fig_proceedings/accra/papers/ts01/ts01_02ruenger.pdf>. See also Kuusaana ED, Kidido JK & Halidu-Adam E, *supra* note 342.

³⁵⁹ *Limitation Decree (Act)*, Ghana, 1975 (N.R.C.D. 54) at section 10 online <acts.ghanajustice.com/actsofparliament/limitation-act-1972-n-r-c-d-54/>.

³⁶⁰ *Ibid.*

³⁶¹ Nora Gotzmann et al, *supra* note 209 at 21.

ability to transfer titles, third parties who acquire such lands would only be responsible to the rightful landowner in terms of payment of compensation.

Furthermore, with respect to compulsory acquisition, the nature of compensation procedures creates barriers to remedies. When a landowner loses his or her land through compulsory acquisition, he or she would be due for compensation as provided under the *Constitution*.³⁶² In the event where a person is aggrieved in relation to assessed compensation, the *Constitution* expressly limits remedy to judicial remedy approaches only. This limitation is a challenge to women especially to those in developing countries such as Ghana. In a typical situation where women do not hold legal titles to land as registered owners, it would be nearly impossible to institute legal proceedings to seek remedies.³⁶³ It is no doubt that the judicial processes are extremely important means of ensuring that legal rights are protected.³⁶⁴ However, some disputes or grievances may require a flexible approach in order to accommodate the non-rights based interests of parties.³⁶⁵ Some flexible remedy approaches include mediation.³⁶⁶ In this sense, non-rights based parties such as women could seek remedies when they are aggrieved.³⁶⁷

In summary, for the reasons explored above, land governance and tenure systems in Ghana make women vulnerable to land grabbing.

³⁶² *Constitution*, *supra* note 71 at Article 20.

³⁶³ Kuusaana ED, Kidido JK & Halidu-Adam E, *supra* note 342 at 75.

³⁶⁴ Belynda Hoffman & Johan Berg, *Pioneering New Approaches in Support of Sustainable Development in the Extractive Sector: Guidelines and Methodologies for Conflict Management* (International Council on Mining and Metals (ICMM): One World Sustainable Investment 2003) at 16 online (pdf):<file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/359400Guidelin1d0to0ESM31001PUBLI C1.pdf_sequence=1.pdf>.

³⁶⁵ *Ibid*.

³⁶⁶ David Collins, "Alternative Dispute Resolution for Stakeholders in International Investment Law" 2012 15:2 *Journal of International Economic Law* 673 online:<[academic-oup-com.ezproxy.library.dal.ca/jiel/article/15/2/673/2193626](http://academic.oup.com.ezproxy.library.dal.ca/jiel/article/15/2/673/2193626)>. See Roger Fisher & William Ury, *Getting to Yes: Negotiating an Agreement without Giving in*, (Great Britain: Random House Business Books, 2012) at 6 online (pdf):<www.fd.unl.pt/docentes_docs/ma/AGON_MA_25849.pdf>.

³⁶⁷ Belynda Hoffman & Johan Berg, *supra* note 364.

2.3.2 Environmental laws

Laws governing environment in Ghana also leave room for companies in the EI to engage in land grabbing. This section will examine some environmental laws in Ghana and investigate the extent to which they expose women to the risk of land grabbing.

Ghana enacted the *Environmental Protection Agency Act* (Act 490)³⁶⁸ in 1994 which established the Environmental Protection Agency, Ghana (EPA)³⁶⁹ to implement the *Act 490*. Section 28 of *Act 490* empowers the Minister responsible for environment to make subsidiary legislations necessary for implementing *Act 490*. On February 18, 1999, the *Environmental Assessment Regulations (L.I 1652)*³⁷⁰ were made by the Minister for environment acting upon the advice of the Environmental Protection Agency Board.³⁷¹ The *Environmental Assessment Regulations* make provision for ‘environmental impact assessment’ in regulation 3.

Regulation 30 of the *L.I 1652* provides interpretations for some terms that are worth noting. ‘Environmental assessment’ “means the process for the orderly and systematic identification, prediction and evaluation of the likely environmental, socio-economic, and cultural and health effects of and undertaking and the mitigation and management of those effects.”³⁷² ‘Environmental impact assessment’ also

means the process for the orderly and systematic evaluation of a proposal including its alternatives and objectives and its effect on the environment including the mitigation and management of those effects; the process extends from the initial concept of the proposal through implementation to completion, and where appropriate, decommissioning.³⁷³

‘Environmental impact’

includes any direct or indirect, positive or negative change in the environment caused by man-made works or activity when such change affects life in general, biodiversity, the quality or a significant quantity of natural or environmental

³⁶⁸ *Environmental Protection Agency Act*, Ghana *supra* note 215.

³⁶⁹ Environmental Protection Agency (Ghana), “About Us” *supra* note 85.

³⁷⁰ *Environmental Assessment Regulations*, *supra* note 169.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Ibid.*

resources and their use, wellbeing, health, personal safety, habits and customs, cultural heritage or legitimate means of livelihood.³⁷⁴

The thesis is concerned about how provisions on ‘environmental impact assessment’ are gender blind which readily expose women to land grabbing risks in Ghana. For example, section 3 of the *L.I 1652* requires an applicant for an environmental permit to provide an environmental impact statement (EIS). Yet there are no specific provisions requiring applicants to specifically include matters relating to women when preparing the EIS in Ghana. The purpose of the EIS is to sets out the scope of the impact assessment to be carried out by the applicant. The Regulation further provides that the EIS would be subjected to public hearing and reviewed by the EPA before such permit is granted to the applicant. The EPA in Ghana encourages gender issues to be added in environmental impact assessment (EIA) process and makes reference to the document on the “Inclusion of Gender in Environmental Impact Assessment.”³⁷⁵

In addition, Ghana has adopted a public disclosure tool, the Environmental Performance Rating and Public Disclosure Programme (AKOBEN)³⁷⁶ to help enhance the environmental regulatory system since 2009.³⁷⁷ This tool uses public pressure “to motivate companies to follow environmental regulations and improve environmental performance.”³⁷⁸ The objective by the EPA in using this tool is to also disclose companies’ performance on the Ghana EPA website as well as through the general media. As a corporate environmental performance rating program, it encourages companies to comply with national environmental

³⁷⁴ *Ibid.*

³⁷⁵ Sujit Kumar Singh & Vikrant Wankhede, *Inclusion of Gender in Environmental Impact Assessment*, (New Delhi: Centre for Science and Environment, 2018). More on this will be highlighted in Chapter 3 of this thesis.

³⁷⁶ Environmental Protection Agency, “AKOBEN Programme” (assessed on October 21, 2020) online: *Environmental Protection Agency Ghana* <www.epa.gov.gh/epa/projects/akoben>. See also Co-Operation Between United Nations Environment Programme and China, “Enforcement of Environmental Law: Good Practices from Africa and Asia (Volume II)”, (2017) at 29 online: <wedocs.unep.org/bitstream/handle/20.500.11822/22310/enforcement_env_law_africa.pdf?sequence=1&isAllowed=y>.

³⁷⁷ Darko-Mensah & Okereke, “Can Environmental Performance Rating Programmes Succeed in Africa?: An Evaluation of Ghana’s AKOBEN Project” (2013) 25:5 *Management of Environmental Quality*.

³⁷⁸ *Ibid* Co-Operation Between United Nations Environment Programme and China at 28.

regulations.³⁷⁹ Its rating scheme has colors which represent companies' performance level from best to worst. For instance, a company rated by 'Gold' represents that the company has complied with environmental standard, responsive to public complaints as well as follows CSR policies.³⁸⁰ Although companies' performances with the tool are not readily available on the Ghana EPA website, it is possible that its implementation is in-progress or the initiative has been abandoned.

The point is that, when it comes to laws, it is not only their existence but their implementation and enforcement that matters. When laws exist to govern a particular area and they are not implemented and enforced, it connotes weak governance.³⁸¹ Obviously, individuals and corporate entities would be more likely to operate in areas where the governance system is weak.³⁸² Unless the environmental rule of law is firmed up, fundamental human rights to a healthy environment may not be accomplished.³⁸³ In developing country such as Ghana, there is the obvious need to reform legal and institutional frameworks to adequately address environmental issues.³⁸⁴

The very first global assessment on 'environmental rule of law' was done in Nairobi on January 24 2019.³⁸⁵ According to this global assessment report, "weak enforcement is a global trend that is exacerbating environmental threats, despite prolific growth in environmental laws and agencies worldwide over the last four decades."³⁸⁶ This United Nations Environment report found that despite a significant increase in environmental

³⁷⁹ *Ibid* at 29.

³⁸⁰ *Ibid* at 30.

³⁸¹ The Economist, Weekly Edition, "The Surge in Land Deals: When Others are Grabbing their Land: Evidence is piling up against acquisitions of farmland in poor countries" (May 5, 2011), online: *The Economist* <www.economist.com/node/18648855>.

³⁸² *Ibid*.

³⁸³ *Ibid*.

³⁸⁴ Mechthild Runger, *supra* note 358 at 3. See also Osorio M & Gallina A, "Gender Opportunities and Constraints in Land-Related Agricultural Investments" (Rome: Food and Agriculture Organization of the United Nations, 2018) at 23 online (pdf): <www.fao.org/3/ca0182en/CA0182EN.pdf>.

³⁸⁵ United Nations Environment Programme "Environmental Rule of Law: First Global Report" (accessed on December 5, 2019) online: *UN Environment* <www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report>.

³⁸⁶ *Ibid*.

laws enacted since 1972, ineffective implementations and enforcement of these laws are crucial challenges that must be overcome to help mitigate climate change, reduce pollution and prevent widespread species and habitat loss.³⁸⁷ Notwithstanding this, environmental laws have highly developed over time.³⁸⁸ According to David Boyd, UN Special Rapporteur on Human Rights and Environment, this compelling new report solves the mystery of why problems such as pollution, declining biodiversity and climate change persist despite the proliferation of environmental laws in recent decades.³⁸⁹ This global perspective is also the situation in Ghana.

2.4 Unique Impacts of Land Grabbing by the EIs on Women in

Ghana

Although earlier discussions touched on how some negative practices affect women in the EI communities, this section will explore more on some unique negative impacts land grabbing has on women. Afterwards, the section will further explore whether the government of Ghana is taking steps to address the unique negative impacts.

2.4.1 Negative Environmental and Social Impacts

Although the government of Ghana is making inroads to solve gender issues especially in land matters through laws and policies, women are still not empowered. For example, the Land Administration Projects (LAP) institutions, particularly the Customary Land Secretariats framework, lack necessary legal framework needed to address the land governance issues peculiar to women.³⁹⁰ There are no provisions which expressly compel major actors to land acquisitions processes such as chiefs to consult and elicit the consent of

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ Bugri JT, "Final Report: Improving Land Sector Governance in Ghana: Implementation of the Land Governance Assessment Framework" *supra* note 325 at 7.

women land users about impending land alienations.³⁹¹ These gaps leave women at the mercy of government institutions that may (or may not) act in women's best interests.

Women are less able to access the registration system in the instance where they hold landownership titles in Ghana. It is possible that since the Land Administration Project does not reflect the various traditions and customs of the various ethnic groups in Ghana, it makes it difficult to implement in most communities in Ghana. Especially, it fails to reflect various traditions and customs that limits women in landownerships. Since 1962, recording and ascertaining transactions in land have been limited to the Registry of Deeds in the Land Registration Division.³⁹² According to the Registry's empirical evidence, women form a smaller proportion of persons who have accessed both the Deeds Registry and the Land Title Registry for registration of title since its establishment.³⁹³ This means that the nature of the land title registration scheme practically cuts out women who are basically customary usufructs holders or secondary rights holders.³⁹⁴ It would be great if secondary rights of women are also registered to help secure their land rights to some extent.³⁹⁵ The need to address gender inequities in land administration has been emphasized in numerous national and international legal and policy documents,³⁹⁶ as well as the roles traditional leaders could play to help reduce or eliminate cultural biases relating to women's land rights.³⁹⁷ If Land Administration Project was implemented in most areas in Ghana, women in rural areas where EI activities are undertaken could also benefit from the administration services available under the Land Administration Project.³⁹⁸

³⁹¹ *Ibid* at 8.

³⁹² Mechthild Runger *supra* note 358 at 11.

³⁹³ *Ibid*. See also Nora Gotzmann et al, *supra* note 209 at 22.

³⁹⁴ *Ibid*, Mechthild Runger *supra* note 358 at 11.

³⁹⁵ *Ibid*.

³⁹⁶ *Ibid*.

³⁹⁷ Osorio M & Gallina A, *supra* note 384 at 40.

³⁹⁸ Bugri JT, "Final Report: Improving Land Sector Governance in Ghana: Implementation of the Land Governance Assessment Framework" *supra* note 325 at 7.

Along with the injustices associated with land ownership and use, women are also disproportionately discriminated against in terms of their participation in local development and decision-making processes in their communities relating to lands.³⁹⁹ Women are also usually the last to know about any extraction operations to be undertaken in their communities. For example, in an interview session that was conducted on “citizen participation in development” in Uganda,⁴⁰⁰ some women victims expressed their frustration about how their government and their local representatives have denied them information regarding mining activities on their lands. They stated that “... strangers come, disrespect us, ignore us and take over our lands...”⁴⁰¹ Unfortunately, some companies in the EIs operating in developing countries capitalize on the level of ignorance of the local communities regarding their rights especially on the lands and abuse them.⁴⁰² In the case study of Uganda, it was indicated that these foreign companies in the EIs misled the local people which resulted in the forfeiture of their rights. Women continue to rebel against companies who take over their lands even if they lost their lands through forfeiture.

Regarding the violations of the cultural rights of the communities in the case study above, the argument is that the local people lose their arable lands to the companies in the EIs without compensations or requisite consent from the affected local people. This non-participation by the women in the communities is evident in the event of compensations due. Determination of compensation due does not recognize that many women do not only lose their arable lands to these companies but their farm crops as well. Yet valuations of these

³⁹⁹ Avocats Sans Frontieres (ASF), *Human Rights Implications of Extractive Industry Activities in Uganda*, (Kampala, Uganda: Avocats Sans Frontieres, 2014) at 14 at 20 online (pdf):<www.asf.be/wp-content/uploads/2014/09/ASF_UG_ExtractiveSectorHRImplications.pdf>. See also Nora Gotzmann et al, *supra* note 209 at 22.

⁴⁰⁰ Although the paper is focused on Ghana, some examples will be borrowed from other developing countries with similar situations like Ghana. It is important to do so because research in the area of women and mining are still at initial stages and not much has been written on relevant issues).

⁴⁰¹ Avocats Sans Frontieres (ASF), *supra* note 399 at 20.

⁴⁰² *Ibid* at 21.

crops are not usually incorporated in the determination of the compensations due.⁴⁰³ Here the compensations due to the people are usually derived only from the value of the said land. Moreover, the compensations tend to be enjoyed by only the men in the communities although women also lose the arable land on which they cultivate their farm produce. Again, this loss to women does not only affect them but their families they feed from the proceeds of their farming businesses.⁴⁰⁴ In addition, the women are not adequately compensated for the loss of their shelters on the land as a consequence of the displacement to make way for the EIs. Other disturbing consequences women are forced to endure under these circumstances include the chaos and insecurities associated with the disputes arising from the evasion by the companies for their extraction activities. Alarming, women are not usually included in the negotiation process when compensation is being determined, so their interests are not well represented. They are denied the opportunity to contribute to the decisions on suitable alternative lands to resettle.

Moreover, affected women are left unemployed or employed to perform sub-standard jobs such as laborers.⁴⁰⁵ There is an example from the agriculture sector where a Belgian investor, Vanderbeeck acquired a large tract of land.⁴⁰⁶ This example shows similar experience of women's human rights in the mining industry in Ghana. These deals negatively impact women's human rights including social and economic rights are negatively impacted since these women are usually not involved in these land acquisition processes.⁴⁰⁷ According to this case study farmers are engaged on contract basis such as carriers, harvesters, loaders,

⁴⁰³ Nora Gotzmann et al, *supra* note 209 at 22.

⁴⁰⁴ Enrique Boone Barrera, "Extractive Industries and Investor-State Arbitration: Enforcing Home Standards Abroad" (2019) Canada, Sustainability: MDPI at 6 online (pdf) :< [file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/sustainability-11-06963%20\(1\).pdf](file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/sustainability-11-06963%20(1).pdf)>.

⁴⁰⁵ Nathan Andrews, *supra* note 237 at 183. See also Gavin Hilson et al, "Female Faces in Informal 'Spaces': Women and Artisanal and Small-Scale Mining in Sub-Saharan Africa" (2018) 4:3 Africa Journal of Management: Managing Africa's Informal Economy: Research, Practice and Advocacy online: < www.tandfonline.com/doi/abs/10.1080/23322373.2018.1516940?scroll=top&needAccess=true&journalCode=rajm20>.

⁴⁰⁶ Akologo SZ & Guri BY, Unmasking Land Grabbing in Ghana: Restoring Livelihoods and paving way for Sustainable Development Goals, (Ghana: Caritas, 2016) at 22.

⁴⁰⁷ *Ibid* at 23.

sprayers and security personnel while others are hired seasonally and asked to go on leave without salary during the dry season.⁴⁰⁸ Their salaries are based on performance ranging from GHS 10 to GHS 23 the equivalent of (USD 2.5 - USD 5.725) per day for 4 hours. This income is likely not sustainable income for women who are also supporting their children and their entire family. Exacerbating the problem, not only are these women deprived of their lands and employed on unfavorable/unsustainable terms, but they also suffer permanent physical injury.⁴⁰⁹ From the case study, it was also revealed that some employees suffered physical injuries including loss of limbs due to the use of unfamiliar huge machinery for such cultivation. Since most women are employees in these categories, they tend to suffer these physical injuries with little or no medical attention due to lack of funds. Other women who do not qualify to be employed by the investor divert into petty trading which is also associated with start-up capital which is also challenging to come by.⁴¹⁰ Some of the unemployed and yet displaced women suffer undesirable status changes in the communities.⁴¹¹ They become housewives for example with increased house chores. According to Ahmed and Lahiri-Dutt, women “in most cases, are meant to remain at home taking little part in income-generating activities. At the same time, their household chores, including the collection of water and fuel from the now-distant forests, have increased.”⁴¹² In addition, the role depreciation of women increases their poverty inequalities in the communities. The poverty inequalities reinforce women to become absolutely dependent on their husbands for their source of income and the consequences thereof are without doubts. The case may be worse for unmarried women.

Some women also suffer severe additional impacts when they lose their source of income. A typical example is of a woman who had lost her land to extractive businesses. In her frustration, she indicated that:

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid* at 24.

⁴¹⁰ *Ibid.*

⁴¹¹ Nathan Andrews, *supra* note 237 at 184.

⁴¹² *Ibid.*

Now, I'm just sitting here feeling useless. This is the reason why nowadays people tend to commit suicide by drinking substances. Had it not been for my children who feed me, what could have become of me? I believe I would have poisoned myself too. After all, what would have been the point in living? You have taken my land and I can't cater for myself; all that I can do is to poison myself.⁴¹³

Another unique business related negative impact women encounter is related to socio-cultural beliefs.⁴¹⁴ Since the EI is generally perceived as male-dominated industry, most women refuse to take up employment opportunities in the industry.⁴¹⁵ Some socio-cultural beliefs are that it is a taboo for women to engage in the mining operations.⁴¹⁶ Some women courageously break the socio-cultural barriers and engage in ASM businesses, yet women in mining communities concede that their domestic reproductive roles could not facilitate their smooth success in the sector. Some women expressed their frustrations as follows:⁴¹⁷

Both of us are in the same situation [i.e. poverty]; we don't get employed. But then we the women are not as strong as the men to work 'by-day'¹²⁰ so I can say that the women are more pathetic. At least, the men can do *galamsey* but someone like me cannot engage in *galamsey* because I have children with me. I cannot leave them and go elsewhere. So, we are struggling more.

In spite of the negative impacts, some transnational corporations in the EI operating in Ghana have made efforts to address the negative social impacts. Golden Star Resources, a transnational corporation in the LSM has invested in an Alternative Livelihood Program (ALP) in some mining communities.⁴¹⁸ The Alternative Livelihood Program seeks to provide job training skills for the local people.⁴¹⁹ Again, in 2006, Golden Star Resources created Golden Star Oil Palm Plantation (GSOPP) to provide an alternative source of

⁴¹³ Nathan Andrews, *supra* note 237 at 187.

⁴¹⁴ *Ibid* at 189.

⁴¹⁵ Francis Arthur-Holmes & Kwaku Abrefa Busia, *supra* note 125.

⁴¹⁶ Nathan Andrews, *supra* note 237 at 187.

⁴¹⁷ Nathan Andrews, *supra* note 237 at 190.

⁴¹⁸ Obed Adonteng-Kissi & Barbara Adonteng-Kissi, *supra* note 232.

⁴¹⁹ *Ibid*.

livelihoods especially to farmers who may have lost their lands to their mining activities.⁴²⁰ The initiative allows farmers who lose their lands to the mining industry resume their farming activities by giving them alternative lands. Furthermore, some of the ‘victim farmers’ could access start-up loans from the Golden Star Resources created Golden Star Oil Palm Plantation according to the Golden Star Resources’ report in 2015.⁴²¹

Golden Star Resources made positive efforts by reaching some agreements with the community members of Prestea in 2012 to help achieve peaceful business operations.⁴²² Some of these agreements include Corporate Social Responsibility Agreement (CSRA), Relationship and Sustainable Livelihood Agreement (RSLA) and Local Employment Agreement (LEA). Corporate Social Responsibility Agreement established a ‘Development Foundation’ through which the Golden Star Resources is committed to the socio-economic development as well as ‘peace and harmony’ within the communities.⁴²³ This Development Foundation was endorsed by Golden Star Resources and the local authorities within the communities. Unfortunately, there is a non-disclosure clause attached to the Foundation’s finances which may impede future analysis or investigation on its performance and management. In addition, Golden Star Resources introduced a diversified job opportunity for the communities aside mining jobs. It created Golden Star Skills Training and Employability Program (GSSTEP) which provided practical skills to the communities including jewelry making, carpentry, masonry and cooking.⁴²⁴ However, it appears the Alternative Livelihood Program among others has not been implemented. Some members in the local communities especially women aver that communities’ expectations including job opportunities and managing environmental negative impacts have not been met.⁴²⁵

⁴²⁰ Hira A & Busumtwi-Sam J *supra* note 94 at 45.

⁴²¹ *Ibid.*

⁴²² *Ibid* at 44.

⁴²³ *Ibid* at 45.

⁴²⁴ *Ibid* at 45. See Hira A & Busumtwi-Sam J *supra* note 94 at 45.

⁴²⁵ *Ibid.*

2.4.2 Do these negative impacts affect only Women?

Agriculture is the backbone of Ghana's economy and it accounts for about 19% of its GDP.⁴²⁶ In 2014, the Ghana Statistical Service indicated that “about 67.9% of women in the rural areas rely on agriculture as their main employment activity.”⁴²⁷ Women are smallholder farmers responsible for a significant proportion of the food produced for local consumption in the country. Women feed their families and take care of themselves with income generated from agricultural businesses.⁴²⁸

The Food and Agriculture Organization of the United Nations (FAO) suggested that satisfying women's human rights is a prerequisite for a just and humane society since women significantly produce food to help sustain societies.⁴²⁹ It also suggested that, “if rural women are to reach their potential as providers of food and income for their families, they must have rights to the means of production.”⁴³⁰ According to FAO, there is a strong linkage between the right to food and other fundamental human rights. This goes to support the point that threats to food security goes a long way to affect some fundamental human rights of women.⁴³¹ When women's farmlands are ‘land grabbed’ for extractive purposes it goes to affect the economic backbone of Ghana.

⁴²⁶ Darkwah AK, Medie PA & Gyekye-Jandoh M, “Interrogating Large Scale Land Acquisition and Its Implication on Women in Sub-Saharan Africa: A Case Study of Ghana” (2017) University of Ghana Working Paper No 2017/401 at 1 online (pdf): *Gender Security*<genderandsecurity.org/sites/default/files/Peace_Medie_Working_Paper_401.pdf>.

⁴²⁷ *Ibid.*

⁴²⁸ Pezzi JP, “Ghana. Fighting the Land-Grabbing in the Volta Region” SouthWorld News & Views from Emerging Countries (accessed on December 4, 2019) online: *SouthWorld News*<www.southworld.net/ghana-fighting-the-land-grabbing-in-the-volta-region/>.

⁴²⁹ Food and Agriculture Organization of the United Nations (FAO) Women and Population Division: Sustainable Development Department, “Rural Women and the Right to Food” (1998) online: *FAO Women and Population Division*<www.fao.org/3/w9990e/w9990e10.htm>.

⁴³⁰ *Ibid.*

⁴³¹ Gordon Crawford et al, *supra* note 59 at 6.

2.4.3 Is Ghana interested in bridging the Inequality Gaps?

Ghana seems to be concerned about gender issues and it is making efforts both locally and internationally to address them.⁴³² The Republic of Ghana is a member of the United Nations and the African Union.⁴³³ Ghana has ratified a number of the UN Human Rights Conventions in order to make these international treaties binding at the domestic level. The Universal Declaration of Human Rights (UDHR)⁴³⁴ by the UN in 1948 affirmed the essential dignity and integrity of all human beings.⁴³⁵ Yet women's fundamental human rights including economic and social rights are increasingly abused by companies such as those operating in the EI.⁴³⁶

In an attempt to address inequality matters, Ghana has ratified both the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*⁴³⁷ and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol)*⁴³⁸ on January 2, 1986 and June 13, 2007 respectively.⁴³⁹ With regard to the international human rights treaties, *CEDAW* brings the feminine part of humanity into the focus of human rights concerns. Also, it acknowledges that discrimination against women "violates the principles of equality of rights and respect for human dignity."⁴⁴⁰ In addition, the Maputo Protocol essentially requires state parties to combat all forms of

⁴³² Rufai Haruna Kilu, *supra* note 250, at 11.

⁴³³ United Nations' Educational, Scientific and Cultural Organization (UNESCO), "Claiming Human Rights-in Ghana" (2010) online: *Claiming Human Rights* <www.claiminghumanrights.org/ghana.html>.

⁴³⁴ *United Nations Universal Declaration of Human Rights (UDHR)*, 10 December 1948, resolution 217 A (III).

⁴³⁵ Food and Agriculture Organization of the United Nations (FAO) Women and Population Division: Sustainable Development Department, "Rural Women and the Right to Food" (1998) *supra* note 429.

⁴³⁶ *Ibid.*

⁴³⁷ *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 18 December 1979, General Assembly Resolution 34/180 (entered into force 3 September 1981).

⁴³⁸ *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 13 September 2000, CAB/LEG/66.6 (25 November 2005).

⁴³⁹ Make Every Woman Count (MEWC), "Ghana" (accessed on December 5, 2020) online: *Make Every Woman Count* >www.mewc.org/index.php/countries/west-africa/ghana>.

⁴⁴⁰ *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, *supra* note 437.

discrimination against women through their national constitutions, legislations, institutional and other measures.⁴⁴¹

The supreme law of Ghana, the 1992 *Constitution* of the Republic of Ghana makes provision for equality and freedom from discrimination. It provides under Article 17 that a person shall not be discriminated against on grounds including gender. And further makes provision for Parliament to legislate and make policies aimed at redressing social and economic imbalances in the Ghanaian society. For the purposes of this thesis, we shall discuss a few of these laws. Furthermore, some Ghanaian laws including the *Constitution* seek to address gender inequalities. Article 17 of the *Constitution* provides for gender equality. Also, the *Intestate Succession Law*, 1985 (P.N.D.C. Law 111),⁴⁴² an existing law⁴⁴³ is consistent with the *Constitution* on achieving gender equality in Ghana. The P.N.D.C. Law 111 was designed to eliminate all forms of gender discrimination in the distribution of property relating to intestacy. Its underlining principle is that equal rights of succession must be granted to all children of the intestate, irrespective of gender or age.⁴⁴⁴ Even though the *P.N.D.C. Law 111* seeks to offer more protection to women than customary law, its impact on enhancing the position of women with regards to inheritance rights has been limited by a number of factors.⁴⁴⁵ The ability of women to enforce their inheritance rights under the *P.N.D.C. Law 111* has been hampered by factors such as financial constraints, customary restrictions, high levels of illiteracy, ignorance of the law, high cost of enforcement of judgment, interference and fear of extended families, and limitations in respect of access to justice.⁴⁴⁶ Duncan in her study on Women in Agriculture in Ghana has noted that the Intestate

⁴⁴¹ *Ibid.*

⁴⁴² *Intestate Succession Law*, Ghana, 1985 (P.N.D.C. L 111) online (pdf): <extwprlegs1.fao.org/docs/pdf/gha140393.pdf>.

⁴⁴³ Which means that the law was in operation before the coming into force of the 1992 *Constitution* of Ghana.

⁴⁴⁴ Mechthild Runger *supra* note 358 at 8.

⁴⁴⁵ Kuusaana ED, Kidido JK & Halidu-Adam E, *supra* note 342 at 77.

⁴⁴⁶ *Ibid.* See also Mensa-Bonsu HJAN, *The Intestate Succession Law of Ghana: Practical Problems in Application* (1994) 8 Yearbook of African Law at 105.

Succession Law has been described as weak in its current form for the following reasons.⁴⁴⁷ It fails to protect women divorcees and widows who “face discrimination in accessing their farmland due to these changes in marital status.”⁴⁴⁸ Furthermore, it fails to protect women who are unmarried to their male partners before their partners died. Unmarried relationships are locally referred to as “*mpeña aware*” or common law relationships. Such failure becomes unfair to women who may have immensely contributed to the acquisition of landed properties. It is also the case that the law does not address the position of widows with no children with their deceased husbands to make them eligible to inherit the property of their deceased husband.

Although there is legislation enacted and some international treaties ratified, they do not do enough to meaningfully protect women in vulnerable positions relating to land matters in Ghana. Hence women’ human rights become susceptible to abuses by companies operating in the EI.

In summary, Part II of the thesis investigated the extent to which the mining sector also practices land grabbing in Ghana. The investigation revealed that gaps in some laws including the *Constitution* and the *Act 703* contribute to land grabbing. More importantly, the land governance and tenure systems are associated with complexities that expose women to land grabbing. Also, when women suffer from land grabbing as a result, Ghana’s economic backbone, agriculture gets affected too. Furthermore, we realized that although Ghana is making inroads to address environmental issues, special attention must be given to women who may suffer negative environmental impacts. However, insights from the investigations under Chapter 2 show why it is important to revise the land governance and tenure systems as well as environmental legal framework also from a gender equality perspective.

⁴⁴⁷ Mechthild Runger, *supra* note 358 at 9.

⁴⁴⁸ Kuusaana ED, Kidido JK & Halidu-Adam E, *supra* note 342 at 65.

The first two chapters of this thesis explored how companies operating in the EI in Ghana negatively affect women's human rights through land grabbing which goes to affect the economic backbone of Ghana. Now the thesis will investigate whether some legally relevant international best practices and standards could provide some insights on how to solve the challenges, especially those faced by women, as discussed above.

CHAPTER 4 INTERNATIONAL STANDARDS THAT SUGGEST SOLUTIONS

Introduction

This thesis asks whether soft law international best practice standards for sustainable development could help to ensure respect for women's human rights in EI in Ghana.

Although there seem to be no accepted definition of soft law, soft law has generally been referred to as “any international instrument other than a treaty that contains principles, norms, standards, or other statements of expected behavior.”⁴⁴⁹ A national boundary will require a dualist state⁴⁵⁰ such as Ghana to ratify treaties into hard laws before that state could implement provisions of treaties. Furthermore, it has been argued that “general principles stated in soft law documents can still be powerful tools of evidence of existing law, or can be demonstrative of *opinio juris* or state practice leading to the formation of new customary law.”⁴⁵¹ These means “soft laws could evolve into binding norms.”⁴⁵² Principles of international law expressed in a soft law document could be “useful as tools for the interpretation, application and articulation of international law in addition to being used to reinforce trends already in existence in international law.”⁴⁵³ In effect, soft laws or internationally endorsed standards could be adopted in Ghana irrespective of Ghanaian laws. In relation to arguments of the non-binding nature of soft laws, “soft laws are widely recognized across cultures and states.”⁴⁵⁴ Again, soft laws are characterized by “strong normative content around which non-governmental organizations (NGOs), the public and states could use as vehicles for focusing consensus on rules and principles towards consistent

⁴⁴⁹ Dinah Shelton, “Normative Hierarchy in International Law” (2006) 100:2 *The American Journal of International Law* 291 at 319 online (pdf):<
www.jstor.org/stable/pdf/3651149.pdf?refreqid=excelsior%3Ae5fd9b26f7cd15ae1170a0e902617bce>.

⁴⁵⁰ Christian N Okeke, *supra* note 23.

⁴⁵¹ Alan Boyle, “Soft Law in International Law-Making” in Malcolm D Evans, *International Law*, 2nd ed (Oxford: Oxford University Press, 2006) at 153.

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

states' general response.”⁴⁵⁵ Perhaps, soft laws are complementary tools to traditional hard laws that could help address women's human rights issues in the EI in Ghana.

This chapter will explore sustainable development (SD)⁴⁵⁶ and sustainable development and mining.⁴⁵⁷ Here, some international guidelines and principles for states and companies will also be examined. Regarding guidelines for states, this part shall explore guidelines from the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments*⁴⁵⁸ on how states including Ghana could reform their laws and policies on corporate responsibilities in mining operations. With regard to guidelines for mining companies, it will first describe the meaning of corporate social responsibility (CSR),⁴⁵⁹ business and human rights (BHR),⁴⁶⁰ and Responsible Business Conduct (RBC),⁴⁶¹ then examine some guidelines and standards that could help companies practice RBC. These include the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD MNE Guidelines),⁴⁶² as well as OECD guidance on due diligence,⁴⁶³ and stakeholder engagement,⁴⁶⁴ and additional guidance on gender impact assessment.⁴⁶⁵ The thesis will analyze these international guidelines and

⁴⁵⁵ *Ibid* at 70.

⁴⁵⁶ Pinto MCW, *supra* note 28 at 72. See Boyle A & Freestone D, *supra* note 28.

⁴⁵⁷ Motoko Aisawa, Daniela C dos Santos & Sara L Seck, “Financing Human Rights Due Diligence in Mining Projects” at 100 in Sumit K Lodhia, *Mining and Sustainable Development: Current Issues* (New York: Routledge 2018) online: < construccion.uv.cl/docs/textos/TEXT0.10.pdf>. See also Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 383.

⁴⁵⁸ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management*, *supra* note 39 at viii. See also Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “Introduction: About IGF”, *supra* note 25.

⁴⁵⁹ Archie B Carroll, *supra* note 41 at 1.

⁴⁶⁰ United Nations Human Rights Office of the High Commissioner (OHCHR), “Business and Human Rights” (1996-2020) *supra* note 42.

⁴⁶¹ Organization of Economic Co-operation and Development (OECD), “Responsible Business Conduct: OECD Guidelines for Multinational Enterprises: About the OECD Guidelines for Multinational Enterprises”, *supra* note 26.

⁴⁶² *Ibid*.

⁴⁶³ Organizations of Economic Co-operations and Developments (OECD), “OECD Due Diligence Guidance for Responsible Business Conduct”, *supra* note 44.

⁴⁶⁴ Organization for Economic Co-operation and Development (OECD), Secretary General of the OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD Publishing, 2017) at 100.

⁴⁶⁵ Christina Hill, Chris Madden & Nina Collins, *supra* note 46.

principles from a gender perspective to help determine how they have been useful and could be useful in matters relating to women's human rights in the EI in Ghana.

3.1 Sustainable Development (SD)

The World Commission on Environment and Development (WCED) was first to articulate sustainable development (SD) in 1987 in the *Brundtland Report*.⁴⁶⁶ The Rio Declaration on Environment and Development (Rio Declaration) in 1992 also reiterated sustainable development and set out twenty-seven principles of sustainable development.⁴⁶⁷ Thereafter, sustainable development has become a useful precondition or consideration for governments, civil societies and businesses regarding impacts of businesses on livelihoods.⁴⁶⁸ The aim is to help prevent and minimize negative business-related impacts on livelihoods now and in the future. This should be part of all strategic commercial practices to enhance the economy, environment and social capital.

Sustainable Development was defined in the *Brundtland Report* as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴⁶⁹ It also “entails the preservation of natural resources, the use of natural resources equitably between states, and the integration of environmental concerns and considerations into economic and developing planning.”⁴⁷⁰ Sustainable Development has a

⁴⁶⁶ Federal Office for Spatial Development ARE, “1987: Brundtland Report”, *supra* note 27. See also Ian G McChesney, “The Brundtland Report and Sustainable Development in New Zealand” (1991) Centre for Resource Management. See United Nations Sustainable Development, “Prototype: Global Sustainable Development Report: Executive Summary” at 12. See Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 381.

⁴⁶⁷ United Nations General Assembly, “Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development” (1992). See *Ibid* Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al at 383.

⁴⁶⁸ *Ibid*.

⁴⁶⁹ Federal Office for Spatial Development ARE, “1987: Brundtland Report”, *supra* note 27. See Ian G McChesney, “The Brundtland Report and Sustainable Development in New Zealand” (1991) Centre for Resource Management. See United Nations Sustainable Development, “Prototype: Global Sustainable Development Report: Executive Summary” *supra* note 466. See Pinto MCW, *supra* note 28 at 72. See Boyle A & Freestone D, *supra* note 28. See Sara L Seck, “Transnational Corporations and Extractive Industries”, 381 at 384 in Shawkat Alam et al, *supra* note 28 at 384. See also United Nations Sustainable Development Goals, “The Sustainable Development Agenda” (accessed on December 5, 2019) Online: [UN SDGs <www.un.org/sustainabledevelopment/development-agenda/>](http://www.un.org/sustainabledevelopment/development-agenda/).

⁴⁷⁰ Philippe Sands et al, *Principles of International Environmental Law*, 3rd ed (Cambridge & New York: Cambridge University Press, 2012) at 207.

significant legal effect as a soft law principle that has gained “worldwide currency as a desirable objective for the management of global natural resources.”⁴⁷¹

The three pillars of Sustainable Development are the economy, the environment and the society.⁴⁷² When economies are developed and the environment and society are protected, Sustainable Development could be achieved. It also implies that if natural resources are extracted responsibly, there would be fewer negative impacts on the environment while there will be more natural resources available for industrial or economic growth. The aim of economic development under sustainable development is to “provide incentives for businesses and other organizations to adhere to sustainability guidelines beyond their normal legislative requirements.”⁴⁷³ Secondly, social development seeks to create awareness and encourage people regarding environmental sustainability. The third pillar, environmental development, is the “primary concern of humanity which is obviously concerned about protecting the environment aside from achieving the 4 Rs concept of ‘reduce, recycle, recover, and reuse’.”⁴⁷⁴ The aim of the environmental development is consistent with the concept of planetary boundaries.⁴⁷⁵ The planetary boundaries and ecological limits suggest that the environment should be considered as the floor or ceiling of sustainable development.⁴⁷⁶ Achieving all three pillars of sustainable development could be challenging or conflicting in the short term yet they could be effective in the long term.

⁴⁷¹ Grant Evadne & Das Onita, *supra* note 9.

⁴⁷² Iyyanki V Muralikrishna & Valli Manickam, “Sustainable Development” (2017) *Environmental Management* 5 online: < www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development >

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ Will Steffen et al, “Planetary Boundaries: Guiding Human Development on a changing Planet” (2015) 347: 6223 *Science* online: <science.sciencemag.org>. Planetary boundaries concept relates to defining a safe operating space for human societies to develop and thrive, based on our evolving understanding of the functioning and resilience of the earth system.

⁴⁷⁶ Jonathan Pickering & Asa Persson, “Democratising Planetary Boundaries: Experts, Social Values and Deliberative Risk Evaluation in Earth System Governance” (2020) 22:1 *Journal of Environmental Policy & Planning* 59 online: < www.tandfonline.com/doi/full/10.1080/1523908X.2019.1661233 >. See also Colin D. Butler, Kerryn Higgs & Rosemary Anne McFarlane, “Environmental Health, Planetary Boundaries and Limits to Growth” (2019) *Elsevier Public Health Emergency Collection* 533 online: <www.ncbi.nlm.nih.gov/pmc/articles/PMC7151851/>.

Sustainable development has improved over the years and it has contributed to the creation of Sustainable Development Goals (SDGs). SDGs were adopted in September 2015.⁴⁷⁷ The main goal of the SDGs is to end all forms of poverty by building on the Millennium Development Goals (MDGs)⁴⁷⁸. The SDGs were adopted to replace the MDGs which ended in 2015.⁴⁷⁹ The SDGs compared to the MDGs consider Africa's interest and are expected to shape the global agenda on economic, social and environmental development globally.⁴⁸⁰ Furthermore SDGs seek to build productive capacities and give more credence to economic and environmental factors which are also prominent in the Common African Position (CAP),⁴⁸¹ the consensus of African leaders, civil society and the private sector on the post-2015 development agenda.⁴⁸²

The congruence between African recommendations for the post-MDGs era and the framework accepted by the UN General Assembly as the basis for 2015 negotiations on the final shape of the SDGs may be an indication that most developing countries share the same concerns as Africa.⁴⁸³ The implementation of the SDGs started worldwide in 2016 and government in each country were tasked to translate the goals into national legislation and or policy in order to regulate the country's activities towards the achievement of the sustainable development.⁴⁸⁴

The SDGs consist of seventeen universal goals which seek to improve livelihoods, end poverty and yet save the planet irrespective of one's location.⁴⁸⁵ Some of the SDGs include no poverty, gender equality, clean water and sanitation, decent work and economic

⁴⁷⁷ United Nations Sustainable Development Goals, "The Sustainable Development Agenda" *supra* note 469.

⁴⁷⁸ United Nations Development Programme (UNDP), "Millennium Development Goals" (2020) online: *UNDP* <www.undp.org/content/undp/en/home/sdgoverview/mdg_goals.html>.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Tim Wall, "Sustainable Development Goals: New Targets hold Promise for Africa" (December 2014), online: *Africa Renewal*:<www.un.org/africarenewal/magazine/december-2014/sustainable-development-goals-new-targets-hold-promise-africa>.

⁴⁸¹ African Union, "Common Africa Position (CAP) on the Post 2015 Development Agenda" (2014).

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*

⁴⁸⁴ Wildfeir-Field N, Simon J & Basu S, "Three Ways Businesses can help Achieve the SDGs" (2016) online: *World Economic Forum* <www.weforum.org/agenda/2016/02/3-ways-businesses-can-help-achieve-the-sdgs/>.

⁴⁸⁵ United Nations Sustainable Development Goals, "The Sustainable Development Agenda" *supra* note 469.

growth among others. Unfortunately, it is impossible to achieve SDGs by the year 2030 as the set target. This made it necessary to call for a “decade of action” in 2019.⁴⁸⁶ The decade of action is designed to bring these ambitious goals to speed in 2020. At the core of the ‘decade of action’ is to realize poverty reduction, empower women and girls as well as address climate change.⁴⁸⁷ Obviously, it is close to impossible to achieve the set target of the decade of action in the midst of COVID-19 pandemic.⁴⁸⁸

Among the SDGs, the thesis will focus on gender equality and empowering all women and girls. SDGs consider gender equality as fundamental human rights and a foundation towards a sustainable world.⁴⁸⁹ Although there has been some progress in achieving gender equality under SDGs to some extent, women continue to be underrepresented at all levels of society backed by discriminatory laws and customs.⁴⁹⁰ It is anticipated that the COVID-19 (coronavirus) pandemic is likely to retrogress if not worsen the limited progress being made to realize gender equality globally.⁴⁹¹ This pandemic continues to increase women’s unpaid care work including caring for children at home due to school closures thereby exposing women to poverty. Still, alongside its negative impacts, the Covid-19 pandemic could spawn radical positive actions to help address gender inequalities. The UN Women for example has developed a ‘rapid and targeted response tool’ to help

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Tientip Subhanij & Zenathan Hasannudin, “Decade of Action: Financing SDGs Under a New Normal: Challenges and Response to COVID-19 Pandemic” (2020) online: United Nations ESCAP <www.unescap.org/blog/financing-sdgs-covid-19>.

⁴⁸⁹ Sustainable Development Goals “Goal 5: achieve Gender Equality and Empower all Women and Girls” (assessed on June 15, 2020) online: *United Nations* <www.un.org/sustainabledevelopment/gender-equality/>.

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.* See Pjotr Elshout, “COVID-19, Artisanal & Small-Scale Mining and Gender Inequality” 2020 online (pdf): <womenandmining.org/wp-content/uploads/2020/06/WRM-blog-COVID-19-ASM-and-Gender-Inequality-May-2020.pdf>. See also Organization for Economic Co-operation and Development (OECD) Watch, “Emergency Action Needed for Vulnerable Artisanal & Small-Scale Mining Communities & Supply Chains” 2020 online (pdf): <www.oecdwatch.org/wp-content/uploads/sites/8/2020/05/Civil-Society-Call-to-Action-May-12-EN.pdf>.

mitigate some of the negative impacts from the pandemic and achieve gender equality around the world.⁴⁹² Such efforts may have the effect of speeding up responses to gender equality.

3.1.1 Mining and Sustainable Development

This section will explore the relationship between sustainable development and the mining sector. It will also examine how international communities have responded to sustainable development in the mining industry. Transnational companies reference international sustainable mineral development law and support the global consensus that the extraction businesses are critical for economic development.⁴⁹³ Yet, communities in the Global South (developing or Third World states) continue to struggle with negative environmental and social impacts caused by the Global North (developed World or First World states).⁴⁹⁴ The EIs have been heavily criticized for their negative human rights and environmental impacts.⁴⁹⁵ Adverse consequences from the EI business operations led to calls by communities to constantly scrutiny EI business activities in communities. This constant scrutiny by communities has evolved into a social license requirement before EI could begin their business activities in communities.⁴⁹⁶

The United Nations in the year 2000 established the Commission on Sustainable Development (CSD).⁴⁹⁷ “Minerals, metals and rehabilitation in the context of sustainable development” made it on the future priority list by CSD’s eighth session. During this session relevant actors of land grabbing such as governments and the international community were encouraged to “examine the social, economic and environmental impacts of mineral

⁴⁹² Sustainable Development Goals “Goal 5: achieve Gender Equality and Empower all Women and Girls”, *supra* note 489.

⁴⁹³ Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 381.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ Hira A & Busumtwi-Sam J *supra* note 94 at 30.

⁴⁹⁶ Rachel Davis & Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector*, Corporate Social Responsibility Initiative, Report No. 66 (Cambridge, MA: Harvard Kennedy School, 2014).

⁴⁹⁷ Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 381. See also Noah Bechwith, “Inclusive Business can help Solve the Sustainability Equation” (2016) online: *OECD*<www.oecd.org/corporate/inclusive-business-sustainability-equation.htm>.

extraction and metals production as well as encouraged to formulate and implement strategies that provide for the rehabilitation of land degraded by mining.”⁴⁹⁸

Sustainable development in the mining industry could be achieved if all companies operating in the industry, irrespective of their size, set out to help achieve it. However, smaller companies in the mining industry hold a different view. The Mining, Minerals and Sustainable Development (MMSD)⁴⁹⁹ in 2002 noted that relatively smaller companies in the industry are of the opinion that the concept of sustainable development is reserved for the large multinationals.⁵⁰⁰ According to the report, smaller companies referred to sustainable development as a “big company game” which they could not be a part of with their limited mine-finding abilities.⁵⁰¹ The report also indicated that the large multinationals on the other hand were making “substantial efforts to assess, minimize, and mitigate many of the environmental and social impacts, to develop an effective mine closure plan, and to foster constructive and consensual involvement with the local community.”⁵⁰² At least it is encouraging to note that large multinational companies are making efforts to achieve SD in the course of their business operations. This means that the concept of sustainable development is not entirely rejected by companies in the mining industry.

Another complexity from the MMSD report was related to the artisanal and small-scale mining (ASM) sector. The report noted that although the ASM sector is unregulated and

⁴⁹⁸ Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 383.

⁴⁹⁹ International Institute for Environment and Development (IIED), *Breaking New Ground: The Report of the Mining, Minerals and Sustainable Development (MMSD) Project*, (London: Earthscan Publications Limited, 2002). See International Institute for Environment and Development (IIED), “Mining, Minerals and Sustainable Development (MMSD)” (accessed on December 4, 2020) online: *IIED* <www.iied.org/mining-minerals-sustainable-development-mmsd>.

⁵⁰⁰ *Ibid* at 296. See Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 383.

⁵⁰¹ *Ibid*, International Institute for Environment and Development (IIED), *Breaking New Ground: The Report of the Mining, Minerals and Sustainable Development (MMSD) Project*, at 63.

⁵⁰² *Ibid*. See also Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 383.

often classified as illegal, it continues to support rural livelihoods.⁵⁰³ Furthermore, the report indicated that ASM has negative environmental and health impacts in communities where mining operations are undertaken. In Ghana for instance, the presence of the Chinese in the sector with the introduction of new technologies have significantly impacted the community negatively. This implies that smaller companies that operate in the ASM sector cannot be left out on sustainable development agenda in the industry.

The good news is that sustainable development “has become the mantra of the global mining industry, and a focus on sustainable development has arguably changed both corporate strategies and the goals and objectives of mining law reform.”⁵⁰⁴ Mining industries understand that sustainable mineral development requires “the right balance among environmental, economic, and social sustainability.”⁵⁰⁵

The World Summit on Sustainable Development (WSSD)⁵⁰⁶ also explicitly addressed matters related to mining in its Johannesburg Plan of Implementation in 2002 (Johannesburg Summit).⁵⁰⁷ The WSSD suggested three specific actions to help achieve sustainable development in the industry. These actions are:

- (i) to support efforts to address the environmental, economic, health, and social impacts and benefits of mining, mineral, and metals throughout their life cycle; (ii) to enhance the participation of stakeholders, ‘including local and indigenous communities and women’ to play an active role in mineral, metals and mining development; and (iii) to foster sustainable mining practices through the provision of financial, technical, and capacity building support to developing countries including for small-scale mining.⁵⁰⁸

⁵⁰³ International Institute for Environment and Development (IIED), *Breaking New Ground: The Report of the Mining, Minerals and Sustainable Development (MMSD) Project*, *supra* note 499 at xxii.

⁵⁰⁴ Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 381-382.

⁵⁰⁵ *Ibid* at 384.

⁵⁰⁶ The Division for Sustainable Development Goals (DSDG) in the United Nations Department of Economic and Social Affairs (UNDESA), “World Summit on Sustainable Development (WSSD), Johannesburg, South Africa” (2002), online: *Sustainable Development Goals Knowledge Platform*<sustainabledevelopment.un.org/milestones/wssd>.

⁵⁰⁷ Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 381-382. See United Nations, “Plan of Implementation of the World Summit on Sustainable Development” (2002) online:

<www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>.

⁵⁰⁸ *Ibid* at 385.

More importantly it was stated during the Johannesburg Summit that sustainable development needs to be promoted in Africa and also to enhance corporate environmental and social responsibilities as well as accountability through enterprise-communities dialogue.⁵⁰⁹

In addition, partnership initiatives for “Global Dialogue of Governments on Mining/Metals and Sustainable Development”⁵¹⁰ in order to maintain capacity-building spirit for development was announced during the Johannesburg Summit.⁵¹¹ This encouraged Canada and South Africa to form the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) in 2005.⁵¹² Another international conference made a global statement relating to sustainable development in the mining industry. ‘*The Future We Want*’ is a global outcome statement relating to sustainable development which was made at the Rio +20 conference in 2012.⁵¹³ This statement acknowledges the obvious economic development and benefits the mining industry brings to states.⁵¹⁴ Yet it is emphasized that in order to take advantage of this opportunity, mining industries must be effectively managed. And they must prioritize mitigating the negative impacts associated with their business operations.⁵¹⁵

The concept of sustainable development has, however, been critiqued by both the South and the North as having impacted the environment and human rights negatively.⁵¹⁶

⁵⁰⁹ *Ibid.*

⁵¹⁰ United Nations Terminology Database (UNTERM), “Global Dialogue on Mining/Metals and Sustainable Development” (accessed on December 9, 2020) online: *UNTERM* <unterm.un.org/unterm/Display/record/UNHQ/NA?OriginalId=095579bc3d6e2e35852571d4006c54d1>.

⁵¹¹ Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 381-382. See United Nations, “Plan of Implementation of the World Summit on Sustainable Development” *supra* note 507.

⁵¹² More on IGF will be described in subsequent section.

⁵¹³ The Division for Sustainable Development Goals (DSDG) in the United Nations Department of Economic and Social Affairs (UNDESA), “The Future We Want-Outcome Document” (2012) online: *Sustainable Development Knowledge Platform* <sustainabledevelopment.un.org/futurewewant.html#>. See Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 30 at 387

⁵¹⁴ *Ibid.*, The Division for Sustainable Development Goals (DSDG) in the United Nations Department of Economic and Social Affairs (UNDESA), “The Future We Want-Outcome Document” at resolution 109.

⁵¹⁵ *Ibid* at resolution 227.

⁵¹⁶ Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 388.

According to Wolfgang Sachs, “‘development’ is above all, a way of thinking and it cannot be easily identified with a particular strategy or program, but ties many different practices and aspirations to a common set of assumptions.”⁵¹⁷ He avers further that “development discourse is deeply imbued with western certainties like progress, growth, market integration, consumption, and universal needs which are part of the problem, not of the solution.”⁵¹⁸ Sachs added that sustainable development is a distraction from discussing humans' relationship with nature since sustainable development rather “calls for the conservation of development, not for the conservation of nature.”⁵¹⁹ Others have also critiqued that the definition of sustainable development as stated at the Rio Conference rather has “trapped environmental NGOs in a farce to have “lent support to governments in return for some small concessions on language which has legitimized increased industrial development.”⁵²⁰ Others have, however, described the definition of sustainable development as “noteworthy for its incorporation of a separate section on globalization, and for treating poverty and unsustainable production and consumption patterns as crosscutting issues.”⁵²¹ Furthermore, the Third World critiques sustainable development as “a new, more intrusive set of reasons for managing the ‘dark, poor and hungry masses’ of the Third World.”⁵²² Some environmentalists also condemned the statement “minerals are essential for modern living” which was made at the WSSD in 2002. According to some environmentalists, the statement is “skewed towards the satisfaction of the consumption patterns of the North at the expense of human and ecological rights of the South.”⁵²³ Be that as it may, it is encouraging to note that

⁵¹⁷ Wolfgang Sachs, *Global Ecology: A New Arena of Political Conflict*, (Halifax, Nova Scotia, Canada: Fernwood Books Limited, 1993) at 8.

⁵¹⁸ *Ibid.* at 4. See Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 30 at 388.

⁵¹⁹ Wolfgang Sachs, *supra* note 517 at 10.

⁵²⁰ *Ibid.*

⁵²¹ Cordonier Segger & Khalfan, *Sustainable Development Law: Principles, Practices & Prospects*, (Oxford: Oxford University Press, 2004) at 29.

⁵²² *Ibid.*

⁵²³ *Ibid.* at 389. See Third World Network Africa, “Statement by AIMES on Mining” (2002) online: *Third World Network Africa* <twnafrica.org>. See also Pring G, “The 2002 Johannesburg World Summit on Sustainable

miners are responding to and embracing the principles of sustainability in connection to their social and environmental responsibilities globally.

3.2 Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF)

This section will explore government efforts in achieving sustainable development in mining industries that are useful or could be useful to mining host countries in reforming their laws and policies on corporate responsibilities.

The IGF provides a global policy forum where governments interested in mining could come together to enhance the mining sector to help realize sustainable development.⁵²⁴

The IGF was also designed to serve on a “consultative and advisory basis and to bring together governments with an interest in policy, governance, and other issues related to sustainable mineral development that would benefit from consideration at a global level.”⁵²⁵

One objective of the IGF is to promote the mining sector as a significant driver to sustainable development and poverty reduction.⁵²⁶ The aim of the IGF is to provide IGF member states with “a summary of good international practice in legal frameworks for environmental and social related management plans for large-scale mines.”⁵²⁷ In addition, it seeks to provide best practices for governing and regulating negative impacts from mining business activities as well as their benefits throughout the lifecycle of the mining processes from exploration

Development: International Environmental Law Collides with Reality, Turning Jo’Burg into ‘Joke’Burg” (2002) 30 Denver Journal of International Law and Policy 420.

⁵²⁴ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “Introduction: About IGF”, *supra* note 25.

⁵²⁵ *Ibid.* See Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “IGF Mining Policy Framework: Mining and Sustainable Development” (2013) at 3 online: (pdf) <file:///home/chronos/u-9a98e4df85d36988d788e95453420705c4111f9d/MyFiles/Downloads/MPF-EN.pdf>>.

See Sara L Seck, “Transnational Corporations and Extractive Industries”, 381 at 384 in Shawkat Alam et al, *supra* note 28 at 385.

⁵²⁶ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “Introduction: About IGF”, *supra* note 25.

⁵²⁷ *Ibid.*

through to the post-mining transition.⁵²⁸ Ghana is a member of the IGF which constitutes about 76 countries currently.⁵²⁹

The IGF among other activities has developed guidance documents including the Mining Policy Framework (MPF)⁵³⁰ and, more recently, the guidance for governments on environmental social impact assessment (ESIA)⁵³¹ in order to enhance its initiatives and objectives.

The Mining Policy Framework (MPF) was drafted by some minerals-rich states from both the North and South in 2010 which was updated in 2013.⁵³² The Mining Policy Framework is described as the “best practices for good environmental, social and economic governance of the mining sector and the generation and equitable sharing of benefits in a manner that will contribute to sustainable development.”⁵³³ According to the IGF, the Mining Policy Framework signifies their commitment towards sustainable development and poverty reduction. It therefore called on the UN among other donor agencies to support this course.⁵³⁴ Essentially, Mining Policy Framework is concerned about potential security issues and respect for human rights.⁵³⁵ It therefore proposed that governments and ‘mining entities’ should be “guided in their actions by international norms” that promote human rights.⁵³⁶ Furthermore, governments and mining entities should be guided on such international norms and standards⁵³⁷ such as the International Finance Corporations’ Performance Standards on

⁵²⁸ *Ibid.*

⁵²⁹ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “Members” online: *IGF* <www.igfmining.org/member/>.

⁵³⁰ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “IGF Mining Policy Framework: Mining and Sustainable Development” (2013), *supra* note 525 at 3.

⁵³¹ More on ESIA will be explored subsequently.

⁵³² Alec Crawford, *supra* note 29 at 1. See Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “IGF Mining Policy Framework: Mining and Sustainable Development” (2013), *supra* note 525. See Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 386.

⁵³³ *Ibid.*

⁵³⁴ *Ibid.* See Sara L Seck, “Transnational Corporations and Extractive Industries”, 381 at 384 in Shawkat Alam et al, *supra* note 30 at 386.

⁵³⁵ Alec Crawford, *supra* note 29 at 4.

⁵³⁶ *Ibid* at 7.

⁵³⁷ Some of these international norms will be discussed later under this Chapter.

Social and Environmental Sustainability,⁵³⁸ the Voluntary Principles on Security and Human Rights,⁵³⁹ as well as the Organization for Economic Cooperation and Development Guidelines for Multinational enterprises (OECD Guidelines).⁵⁴⁰

The IGF decided in 2017 to “develop a new guidance document on legal framework for environmental and social impact assessment as well as granting of permits and negotiating mining contracts.”⁵⁴¹ Unfortunately, considerations for the legal frameworks and guidelines were made with reference to LSM but not ASM⁵⁴² although the IGF is clearly working on ASM as well.⁵⁴³ The IGF acknowledges how complex and diversified the ASM sector is in the developing states and it is now developing a concrete guidance relating to ASM and sustainable development.⁵⁴⁴

In June 2020, the IGF released a new policy framework, that is a guidance document for governments.⁵⁴⁵ This new Guidance document emphasized the importance of legal frameworks for the environment as well as social impact assessment and management. Its key recommendations for such legal frameworks are: “commitment to sustainable development; consistency and coordination across all legal instruments; public engagement,

⁵³⁸ International Finance Corporation (IFC), “IFC Sustainability Framework” (accessed on December 7, 2020) online: *International Finance Corporation, World Bank Group* <www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/sustainability+framework>.

⁵³⁹ Voluntary Principles on Security and Human Rights (Voluntary Principles) were created in 2000. The Voluntary Principles serves as a guide to companies in conducting a comprehensive human rights risk assessment in their engagement with public and private security providers, to ensure human rights are respected. As part of contributing towards sustainable development in the Extractive sector, the Voluntary Principles helps companies to understand the environment they are operating in, identify security-related human rights risks, and take meaningful steps to address them. Voluntary Principles on Security and Human Rights, “Security and Human Rights”, (2020) online: *Voluntary Principles on Security and Human Rights* <www.voluntaryprinciples.org>

⁵⁴⁰ Sara L Seck, “Transnational Corporations and Extractive Industries” 381 at 384 in Shawkat Alam et al, *supra* note 28 at 386.

⁵⁴¹ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management*, *supra* note 39 at viii.

⁵⁴² *Ibid* at vi.

⁵⁴³ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “Artisanal and Small-Scale Mining” (2020) online: *IGF* <www.igfmining.org/guidance-for-governments/artisanal-and-small-scale-mining/>.

⁵⁴⁴ *Ibid*.

⁵⁴⁵ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), “IGF Mining Policy Framework: Mining and Sustainable Development” (2013) *supra* note 525.

consultation, and transparency; environmental and social impact assessment (ESIA) requirements; and monitoring, inspections, and enforcement.”⁵⁴⁶ According to the IGF, it is important to properly regulate the mining sector according to the new Guidance document in order to fully capture the benefits from the mines and maintain a healthy environment and socio-economic structures. Again, the new Guidance document emphasized that good governance in the mining sector could help address issues related to implementation, monitoring and enforcement processes on the environment, human rights among others.⁵⁴⁷ Furthermore it identified that the “environmental and social impacts of mining are usually not properly considered before the mining activities commences.”⁵⁴⁸ It also identified that regulatory and procedural flaws in impact assessments could contribute to trust issues between governments, miners and communities. It further stated that it would be helpful to have a clear, transparent, and comprehensive legal framework for environmental and social impact assessment (ESIA) and environmental and social management.⁵⁴⁹ According to the new IGF Guidance document, there should also be consistency in all legal instruments governing environmental and social impact assessment and environmental and social management.⁵⁵⁰ It means that governments should ensure that “when adopting or revising laws and regulations in these areas, they must be aligned at two levels that is, within domestic legislation as well as between domestic legislation and international commitments.”⁵⁵¹ For example, by domestic legislation alignment, “domestic laws should comprehensively address and regulate all components of environmental and social impact assessment processes and

⁵⁴⁶ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management*, *supra* note 39 at xii-xiii.

⁵⁴⁷ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management*, *supra* note 39 at viii.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid* at ix.

⁵⁵⁰ *Ibid* at 36.

⁵⁵¹ *Ibid.*

outcomes without contradictions.”⁵⁵² Also, by alignment between domestic laws and international commitments, “domestic laws should reflect and implement the principles and obligations of international and regional instruments the government has adopted and ratified.”⁵⁵³

Furthermore, the new Guidance document notes that “voluntary standards initiatives (VSIs) can synthesize good international practices and provide guidance for national legislation...”⁵⁵⁴ The new Guidance document encourages governments and companies, among others, to adopt voluntary standards initiatives however challenging. It also cites the Environmental Management and Post-Mining Transition themes of the IGF Mining Policy Framework as an example of an international voluntary standard adopted by a government-led organization.⁵⁵⁵ According to the new Guidance, lenders requirements could also be considered when governments are aligning domestic laws with international commitments.⁵⁵⁶ It notes that a range of lender requirements by development banks and private lenders have enhanced environmental and social impact assessment across the globe.⁵⁵⁷ It further notes that the Equator Principles⁵⁵⁸ as the main set of lender requirements which incorporates the IFC Performance Standards. Therefore, the new document recommends that states should revise and incorporate lenders requirement into relevant laws. Also, in the new Guidance, some financial lenders have imposed a range of requirements including those of the International Finance Corporation (IFC) and its related guidance notes on projects funded by development banks.⁵⁵⁹ The new Guidance also emphasizes the

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid* at 38.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ The Equator Principles Association, “The Equator Principles” (2020) online: *Equator Principles* <[⁵⁵⁹ *Ibid.*](https://equator-principles.com/about/#:~:text=The%20Equator%20Principles%20(EPs)%20is,support%20responsible%20risk%20decision%2Dmaking.>.”</p></div><div data-bbox=)

importance of “avoiding legal stabilization⁵⁶⁰ of environmental and social provisions in laws and contracts.”⁵⁶¹ According to this Guidance, if legal stabilization is avoided, it could assist governments to meet their human rights obligations.⁵⁶² This approach is highly considered valuable in the recent OECD Guiding Principles on Durable Extractive Contracts.⁵⁶³

It must be emphasized that a collaborative approach from both public and private stakeholders would be required to help achieve sustainable development in the EI.⁵⁶⁴ Hence, having explored how governments are actively working to help achieve this course through the IGF, the next section will explore some international guidance and standards that have been designed to assist companies especially those in the EI to also help realize sustainable development.

3.3 Responsible Business Conduct (RBC)

This section will examine the relationship among responsible business conduct (RBC), corporate social responsibility (CSR), and business and human rights (BHR).

CSR

Businesses have since about hundred years ago, sought to improve society.⁵⁶⁵ According to Archie Carroll, Howard R. Bowen’s landmark publication on *Social Responsibilities of the Businessman* in 1953 marks CSR or social responsibility.⁵⁶⁶ The basis of Bowen’s work was that large businesses in the US influence decision making and touch

⁵⁶⁰ *Ibid* at 39. “Stabilization provisions are law or contract clauses that limit the application of certain new laws and regulations to a particular investor or require a government to compensate an investor who does apply them”. See also Mann H, “Stabilization in investment contracts: Rethinking the context, reformulating the result” online *Investment Treaty News* < www.iisd.org/itn/2011/10/07/stabilization-in-investment-contracts-rethinking-the-context-reformulating-the-result/>.

⁵⁶¹ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management*, *supra* note 39 at 39.

⁵⁶² *Ibid* at 40.

⁵⁶³ *Ibid*. See The OECD Development Centre, “Guiding Principles for Durable Extractive Contracts” (2019) online: <www.oecd.org/dev/Guiding_Principles_for_durable_extractive_contracts.pdf>.

⁵⁶⁴ Wildfeir-Field N, Simon J & Basu S, *supra* note 484.

⁵⁶⁵ Archie B Carroll, *supra* note 41 at 1.

⁵⁶⁶ *Ibid*. See also Nathan Andrews, *supra* note 237 at 29.

lives in the society.⁵⁶⁷ His key question which continues to be relevant today was “what responsibilities to society may businessmen⁵⁶⁸ reasonably be expected to assume?”⁵⁶⁹ There is no singular definition of CSR, yet most definitions only incorporate corporate philanthropy but no other categories of responsibilities.⁵⁷⁰ Carroll’s four-part definition of CSR is “corporate social responsibility encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time.”⁵⁷¹ The economic responsibilities are “fundamental conditions businesses have to society and society expects businesses to sustain themselves by being profitable”⁵⁷² Globally, private sectors are critically concerned about how to maximize business value by exploring the complex interplay between financial, human, social and environmental returns.⁵⁷³ As a result, “corporate social responsibility (CSR) is no longer perceived as a series of seemingly random feel-good grants, in the sense of philanthropism, but as an essential tool that impacts a company’s philosophy and core business strategy including its brand value, market access and operations.”⁵⁷⁴ In order for companies to survive competition in a sustainable industry, company directors must preserve companies’ profit as part of their fiduciary responsibilities in the best interest of their shareholders.⁵⁷⁵ However, companies’ directors can only engage in CSR activities to the extent to which the companies’ shareholders approve of it.⁵⁷⁶ Usually, shareholders perceive CSR as rather interfering with companies’ profit. This could discourage some shareholders from allowing resource allocation for CSR activities. Regarding legal responsibilities, societies also expect businesses to comply with fair business

⁵⁶⁷ *Ibid.* See also Frank Boateng, *supra* note 35 at 3.

⁵⁶⁸ It was in an era where businesswomen did not exist or the few were not acknowledged in formal writings.

⁵⁶⁹ Archie B Carroll, *supra* note 41 at 2.

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.* See also Frank Boateng, *supra* note 35 at 3, 24, 25.

⁵⁷³ *Ibid.*

⁵⁷⁴ Joanne Bauer, *supra* note 32. See also Noah Bechwith, *supra* note 497.

⁵⁷⁵ Frank Boateng, *supra* note 112 at 26. See also *Companies Act*, Ghana 2019 (Act 992) at section 190 online (pdf): < rgd.gov.gh/Act%20992.pdf>. “An Act to amend and consolidate the law relating to companies” at 24 of the *Companies Act*.

⁵⁷⁶ Frank Boateng, *supra* note 35 at 26.

practices as established by laws at all levels.⁵⁷⁷ Society also expects businesses to operate in an ethical fashion since “laws are only essential but not sufficient.”⁵⁷⁸ Impliedly, businesses should embrace norms and standards which are not in written laws. In other words, “the spirit of the law must be respected by businesses but not just the letter.”⁵⁷⁹ Lastly, philanthropic responsibilities include all forms of discretionary activities to “give back” to society.⁵⁸⁰ Proponents of CSR emphasize that virtuous companies will be rewarded in the marketplace and thus ‘can do well by doing good’.⁵⁸¹ CSR programs are often used to deflect attention from socially irresponsible practices in core operations of businesses. The good thing is that CSR has been successful in stimulating companies that operate in high-risk environments to concentrate on their social and environmental roles.⁵⁸²

However, CSR has been critiqued for two fundamental problems. These relate to “lack of standards defining what constitutes corporate responsibility and leaving the same to the discretionary powers of business managers to decide.”⁵⁸³ Secondly, it has been critiqued “for the over-reliance on citizen oversight to make CSR effective.”⁵⁸⁴ In effect, despite the recognition of CSR, there are no standard criteria for couching what CSR is aside from it being an indication for a good corporate citizenship.⁵⁸⁵ Again CSR initiatives are solely based on the companies’ choices to address such societal or business related abuses.

CSR discourse in Africa including Ghana is very limited.⁵⁸⁶ In Ghana for example, there has been an attempt to provide legal framework for CSR yet there seems to be no comprehensive document on it.⁵⁸⁷ Fortunately, in 2019, the new and only consolidated law

⁵⁷⁷ Archie B Carroll, *supra* note 41 at 3.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid* at 4.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Joanne Bauer *supra* note 32.

⁵⁸² *Ibid.*

⁵⁸³ *Ibid.*

⁵⁸⁴ *Ibid.*

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Raymond Atuguba & Christine Dowuona-Hammond, “Corporate Social Responsibility in Ghana” (2006) online: <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.465.5190&rep=rep1&type=pdf>.

governing companies in Ghana, the *Companies Act*,⁵⁸⁸ was revised and CSR provisions were included. According to the *Companies Act*, directors of companies are required to report on CSR activities including the amount spent during the financial year.⁵⁸⁹

Fortunately, the concept of CSR is transforming from being a ‘social movement’ to a ‘legal responsibility’ as a response to critiques.⁵⁹⁰ Otherwise, due to the absence of adequate domestic legal protections on CSR, society is left alone to articulate protection of the rights of its members.⁵⁹¹

BHR

Advocates of human rights have found that CSR is inadequate to protect people from harm caused by corporate bodies in their business operations.⁵⁹² The critique of CSR over the years made way for the BHR movement to emerge.⁵⁹³ A human rights’ approach to business-related abuses which is universally recognized, requires companies to respect all human rights issues related to their business operations.⁵⁹⁴

BHR has worked to “shift the focus from ‘needs’ to the ‘rights’ of the affected community”, and “from philanthropism by businesses to full accountability in international law.”⁵⁹⁵ According to BHR movement “international human rights law provides a hard legal benchmark against which companies can be judged and in accordance with what they must do, regardless of convenience, profitability or improved reputation.”⁵⁹⁶

⁵⁸⁸ *Companies Act*, Ghana, *supra* note 393.

⁵⁸⁹ *Ibid* at section 136.

⁵⁹⁰ Archie B Carroll, *supra* note 41 at 2. See also Frank Boateng *supra* note 35 at 25.

⁵⁹¹ *Ibid*.

⁵⁹² Joanne Bauer *supra* note 32.

⁵⁹³ *Ibid*.

⁵⁹⁴ United Nations Human Rights, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”. See also Danish Institute for Human Rights (Mike Baab), “The UN Guiding Principles on Business and Human Rights: Brief Video Introduction” (2015) at 00h:3m:36s, online (video):

YouTube<www.youtube.com/watch?time_continue=10&v=BCoL6JVZHrA&feature=emb_logo> on Business & Human Rights Resource Centre, “UN Guiding Principles” (assessed on June 15, 2020) online: <www.business-humanrights.org/en/un-guiding-principles>.

⁵⁹⁵ Joanne Bauer, *supra* note 32.

⁵⁹⁶ *Ibid*.

Human rights are inalienable rights of humans including economic, social, educational, cultural, children, and women’s rights.⁵⁹⁷ The UDHR was the first international human rights instrument that recognized human rights after the Second World War in 1948 by the UN General Assembly though it did not end human rights abuses.⁵⁹⁸ The UDHR made “every individual and every organ of society” responsible in protecting and respecting human rights.⁵⁹⁹ Two major Covenants, *International Covenant on Civil and Political Rights (ICCPR)*⁶⁰⁰ and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁶⁰¹ followed UDHR in 1966.⁶⁰² Human rights here refer to “internationally recognized human rights such as the International Bill of Human Rights⁶⁰³ consisting of the Universal Declaration of Human Rights (UDHR) as well as the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work⁶⁰⁴.”⁶⁰⁵

All companies’ operations impact the range of human rights including economic rights, cultural and rights practices, women’s rights and equality and freedom from discrimination.⁶⁰⁶ Yet, ‘business’ and ‘human rights’ have been treated as separate and distinct areas since states were left alone to address human rights violations.⁶⁰⁷ The increasing business-related human rights abuses encouraged civil societies to rally behind BHR in order to hold companies answerable to human rights standards as a result of social and economic

⁵⁹⁷ Felicitas Weber & Olivia Watson, *supra* note 5 at 5. See Simon D Handelsman, *supra* note 5 at 15.

⁵⁹⁸ *Ibid*, Felicitas Weber & Olivia Watson, *supra* note 5 at 5.

⁵⁹⁹ United Nations, *Universal Declaration of Human Rights (UDHR)*, *supra* note 460.

⁶⁰⁰ *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations Treaty Series 999:171 (23 March 1976) General Assembly Resolution 2200A (XXI).

⁶⁰¹ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, 16 December 1966, United Nations Treaty Series 999:3 (3 January 1976) General Assembly Resolution 2200A (XXI).

⁶⁰² Felicitas Weber & Olivia Watson, *supra* note 5 at 5.

⁶⁰³ Office of the United Nations High Commissioner for Human Rights (OHCHR), “The International Bill of Human Rights” (1948”) online (pdf): < www.ohchr.org/documents/Publications/FactSheet2rev.1en.pdf>.

⁶⁰⁴ United Nations International Labour Organization (ILO), ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, 86th Sess, 18 June 1998 (Annex Revised 15 June 2010). The ILO declaration commits member states to respect and promote principles and rights including the elimination of forced or compulsory labour whether or not they have ratified the relevant Conventions. Ghana is a member state and has ratified a number of the ILO Conventions.

⁶⁰⁵ United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, *supra* note 31 at 13.

⁶⁰⁶ Business & Human Rights Resource Centre, “Business & Human Rights- A Brief Introduction”, *supra* note 6

⁶⁰⁷ Cynthia Kwakyewah & Uwafiokun Idemudia, *supra* note 17 at 146.

influence. More importantly, in the case of transnational companies, “diplomats, policy makers, business strategists and social activists have recognized the need to ensure that victims of corporate-related human rights abuses receive remedies.”⁶⁰⁸ Inasmuch as attention must be given to transnational corporations (TNCs) usually based in influential and powerful global economies in relation to human rights abuses small-scale corporations must not be left out in Ghana.⁶⁰⁹ The Chinese small-scale miners continue to significantly abuse human rights of communities in which they operate their businesses. And as it is recommended by the UNGPs,⁶¹⁰ all companies must respect human rights in communities in which they operate although the expectation under this recommendation may differ with respect the size of corporation. Achieving sustainable development in EI is not necessarily about mine-finding abilities but how companies mitigate and prevent human rights abuses in the course of their businesses.

Human rights issues became one of the major concerns of mining companies in the mid-1990s.⁶¹¹ Mining companies acknowledged the relationship between human rights and businesses as a result of significant publicity.⁶¹² Mining companies now include human rights issues as part of their corporate responsibility activities to help realize sustainable development in the industry.⁶¹³ The impact of the mining activities on human rights starts from the exploration stage, throughout the mining process to the mine-closure stage.⁶¹⁴

BHR landscape was enhanced upon the introduction of United Nations Guiding Principles on Business and Human Rights (UNGPs).⁶¹⁵ The United Nations, as part of

⁶⁰⁸ *Ibid* at 147.

⁶⁰⁹ *Ibid* at 149.

⁶¹⁰ More on UNGPs are described below.

⁶¹¹ Cynthia Kwakyewah & Uwafiokun Idemudia, *supra* note 17 at 146.

⁶¹² Simon D Handelsman *supra* note 5 at 5, 21, 25. Cynthia Kwakyewah & Uwafiokun Idemudia, *supra* note 17 at 149.

⁶¹³ *Ibid*, Simon D Handelsman, *supra* note 5 at 19.

⁶¹⁴ *Ibid* at 7.

⁶¹⁵ Motoko Aisawa, Daniela C dos Santos & Sara L Seck, *supra* note 457 at 100.

encouraging its members to work towards achieving sustainability, endorsed the (UNGPs)⁶¹⁶ to help implement the UN “Protect, Respect and Remedy” framework.⁶¹⁷ The UN Human Rights Council unanimously endorsed the UNGPs in its resolution on June 16, 2011 in order to address the complexities associated with who is responsible to address business-related human rights abuses.⁶¹⁸ According to the UN, although the UNGPs are not to create new international law obligations, they are applicable to all states and businesses.⁶¹⁹ The UN further encourages that in applying the principles attention should be given to the vulnerable or marginalized groups of which women are a part. Some international groups such as Danish Institute for Human Rights, Institute for Human Rights and Business and Shift are assisting businesses or companies to operationalize human rights in the course of their business operations.⁶²⁰

The UNGPs establish that companies cannot rely on their positive contributions to the communities towards human rights to off-set their negative human rights impacts.⁶²¹ Examples of such contributions include community developmental projects such as funding health and educational sectors. It must be emphasized that, interpretations given to provisions of these legally relevant principles, UNGPs should be consistent with both national and international laws.⁶²² It must be emphasized that although the Principles are non-binding, their core provisions are related to legal duties.⁶²³

⁶¹⁶ United Nations Human Rights, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, *supra* note 31.

⁶¹⁷ United Nations Human Rights *supra* note 196.

⁶¹⁸ John Ruggie, “The United Nations Guiding Principles on Business and Human Rights” (assessed on January 27, 2020) online: *United Nations Guiding Principles Reporting Framework* <www.ungpreporting.org/resources/the-ungps/>.

⁶¹⁹ United Nations Human Rights *supra* note 196 at 1.

⁶²⁰ Business & Human Rights Resource Centre, “Business & Human Rights- A Brief Introduction”, *supra* note 6

⁶²¹ Nora Gotzmann & Claire Methven O’Brien at 52.

⁶²² The Committee on World Food Security (CFS), “Principles for Responsible Investment in Agriculture and Food Systems” (October 15, 2014) at 6 online (pdf):<www.fao.org/3/a-au866e.pdf>. See also Nora Gotzmann & Claire Methven O’Brien *supra* note at 40.

⁶²³ Nora Gotzmann & Claire Methven O’Brien *supra* note at 40.

The UNGPs are categorized under three pillars.⁶²⁴ The first pillar encourages government to make provisions to protect citizens from human rights abuses; the second pillar encourages companies to respect the human rights of the communities in which they operate; and the third pillar makes provision on access to remedy in relation to business related human rights abuses.⁶²⁵ The thesis will focus on the second pillar which is ‘corporate responsibility to respect human rights.

The foundational principle under principle 11 of the UNGPs provides that “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address human rights impacts with which they are involved.”⁶²⁶ More importantly, companies responsibilities “exist over and above compliance with national laws and regulations protecting human rights.”⁶²⁷ It must be noted, such responsibilities expected of companies are “distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.”⁶²⁸ Businesses are also encouraged to prevent, mitigate and provide remediation in addressing human rights impacts that their business operations may bring.⁶²⁹ Additionally, companies were encouraged to consider additional standards of respecting the human rights of specific groups including women and indigenous people who require particular attention.⁶³⁰ Although the responsibility for companies to respect human rights is required irrespective of the companies’ sizes, meeting such human rights impacts will be proportional

⁶²⁴ United Nations Human Rights, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, *supra* note 31.

⁶²⁵ *Ibid.*

⁶²⁶ United Nations Human Rights, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, *supra* note 31 at 13.

⁶²⁷ *Ibid.*

⁶²⁸ *Ibid.*

⁶²⁹ *Ibid.*

⁶³⁰ *Ibid* at 14.

among other factors including size.⁶³¹ This is because the UNGPs acknowledge the different levels of capacities companies may have in an attempt to address human rights impacts.

Since the inception of UNGPs in 2011 and following the work of Professor John Ruggie on BHR, companies are expected globally to respect human rights in the course of their business operations irrespective of where they operate.⁶³² Following this, some major international bodies including the OECD and IFC have incorporated the UN Guiding Principles into their frameworks and guidance. In recent times, it has been an increasing requirement for companies to provide reports on their human rights performance in relation to their business operations.⁶³³ Most of these companies do cite the UNGPs as a key reference point in the course of their reports. Now financial investors among others are keen on companies' transparency in the implementation of the UNGPs.

The UNGPs further encourages companies to meet the responsibilities through relevant policies and processes.⁶³⁴ One of the processes recommended was “human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.”⁶³⁵ In addition, companies are encouraged to conduct ‘environmental impact assessment’ in the communities where they operate.⁶³⁶ Companies are further motivated to engage in meaningful consultation with some of the specific groups including women whose rights are likely to be abused by the companies.⁶³⁷ Businesses or corporations are also encouraged to monitor the effectiveness of the measures put in place to

⁶³¹ *Ibid.*

⁶³² Cynthia Kwakyewah & Uwafiokun Idemudia, *supra* note 17 at 151.

⁶³³ Shift, “UN Guiding Principles Reporting Framework” (2015) online: Business & Human Rights Resource Centre <www.business-humanrights.org/en/business-and-human-rights-reporting-and-assurance-frameworks-initiative-rafi>.

⁶³⁴ *Ibid* at 15.

⁶³⁵ *Ibid.*

⁶³⁶ Sara Seck, “Reflections on Business, Human Rights, the Environment and Climate Justice” (December 4, 2017), online (blog): *Dalhousie University Environmental Law News* <blogs.dal.ca/melaw/2017/12/04/reflections-on-business-human-rights-the-environment-and-climate-justice-december-4-2017/>.

⁶³⁷ United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, *supra* note 31 at 19.

address the adverse human rights impacts.⁶³⁸ Monitoring could be done through feedback from internal and external sources including affected stakeholders.⁶³⁹ A good thing that is associated with companies performing some of the processes recommended under the UNGPs is that, in the event of legal claims, businesses could rely on conducted procedures to prove that they took reasonable steps to prevent or mitigate alleged human rights abuses.⁶⁴⁰

In the event where corporations have identified that their business activities have resulted or contributed to adverse human rights impacts, they should remediate them through legitimate processes.⁶⁴¹ One of the effective means by which companies could perform the remediation is through ‘operational-level grievance mechanisms’.⁶⁴²

Lately, human rights discourse is now coming together with the environment. This is evident in the works of Professor John Knox, former UN Special Rapporteur and the first independent expert on human rights and the environment,⁶⁴³ who clarified the interdependent relationship between environmental protection and human rights. According to Knox, since nature includes human beings and the environment, human rights are intertwined with the environment.⁶⁴⁴ Hence, the environment must be protected so that human beings could enjoy human rights. He also proposed to the UN that it should encourage its member states to consider human rights in their environmental policies and laws. He further proposed that environmental human rights defenders just like human rights defenders should be given

⁶³⁸ *Ibid* at 22.

⁶³⁹ *Ibid*.

⁶⁴⁰ United Nations, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, *supra* note 31 at 19.

⁶⁴¹ *Ibid* at 24.

⁶⁴² *Ibid* at 25.

⁶⁴³ Human Rights Council Secretariat, “Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment”, *supra* note 36 at 2.

⁶⁴⁴ *Ibid* at 7.

protection under their respective state-laws to enable them to peacefully perform their tasks.⁶⁴⁵

There is a “gender lens to the UNGPs.”⁶⁴⁶ The UNGPs encourage states and business enterprises to “give special attention to the unique experiences of women and the structural discrimination barriers that they face.”⁶⁴⁷ Under Principle 3 of the UNGPs, states should provide assistance to businesses on how to address gender issues in the course of their business operations.⁶⁴⁸ The commentary to Principle 12 of UNGPs further encourages businesses to embrace additional standards necessary to complement states’ efforts.⁶⁴⁹ Although UNGPs make reference to gender, the BHR discourse should give adequate attention to the differentiated impacts of business-related human rights abuses on women.⁶⁵⁰

There are different ways in which BHR's principles could be implemented. An example is multi-stakeholder initiatives (MSIs) to prompt responsible business conduct (RBC).⁶⁵¹ MSIs are “forms of self-regulation in which the rules and monitoring of corporate adherence to specific business and human rights problems are negotiated among representatives of civil society, business and the government.”⁶⁵² The successful operation of these negotiated business and human rights terms will then become the basis for new laws and regulations.⁶⁵³

⁶⁴⁵ Human Rights Council Secretariat, “Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment” *supra* note 36 at 9.

⁶⁴⁶ United Nations Human Rights Office of the High Commissioner (OHCHR), “Gender Lens to the UNGPs” (accessed on December 5, 2020) online: *OHCHR* <www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>. This has also been incorporated in the new OECD Diligence Guidance for Meaningful Engagement in 2017 which made provisions to address the gendered implications of extraction business. More on this will be explored later on in this Chapter.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

⁶⁵¹ The Committee on World Food Security (CFS). See Institute for Human Rights and Business, “How Home Governments Can Incentivize Responsible Business Conduct of Extractives Companies Operating Abroad: 3. Multi-Stakeholder Initiatives” (2017) online (pdf): <justice-project.org/wp-content/uploads/2017/07/ihrb_home_governments_series_-_3_multi-stakeholder_initiatives_march_2017.pdf>.

⁶⁵² Cynthia Kwakyewah & Uwafiokun Idemudia *supra* note 17 at 150.

⁶⁵³ The Committee on World Food Security (CFS), *supra* note 651.

RBC

The last concept for purposes of this section is RBC. RBC is also a concept that encourages companies to comply with national applicable laws as well as internationally recognized standards regarding their business operations.⁶⁵⁴ This is based on the principle that the successes of businesses do not thrive on doing harm in the course of business operations.⁶⁵⁵ The principle stems from ‘business-society relationship’ including: “positive contribution businesses can make towards sustainable development and inclusive growth, as well as avoiding negative impacts and addressing them when they do occur.”⁶⁵⁶ At the heart of this principle is “risk-based due diligence and value creation.”⁶⁵⁷ Globally, “incorporating responsibility into business conduct is not a new idea.”⁶⁵⁸ Responsibilities in relation to humans and their environment have been traditionally embedded in various cultures and religions around the world. Perhaps this global recognition helped to establish an international baseline standard on “how businesses should understand and address their risks and how governments should support and promote such responsible business practices.”⁶⁵⁹

At the core of the OECD Policy Framework for Investment (PFI) is that RBC is effectively implemented if companies and governments play their respective roles.⁶⁶⁰ Chapter 7 of the OECD Policy Framework for Investment states that, governments should provide enabling legal environment for responsible businesses to help attract high quality investors or

⁶⁵⁴ Organizations of Economic Co-operations and Developments (OECD), “(OECD): Responsible Business Conduct: OECD Guidelines for Multinational Enterprises (2019) online: <mneguidelines.oecd.org/ncps/>. See Organizations of Economic Co-operations and Developments (OECD), “Policy Framework for Investment” (2018) online: *OECD* <www.oecd.org/investment/toolkit/policyareas/responsiblebusinessconduct/>. See Marie-France Houde & Tihana Bule, “Myanmar: Responsible Business Conduct and the OECD Guidelines for Multinational Enterprises” (2014) online (pdf): OECD <www.oecd.org/daf/inv/mne/2014-Myanmar-Responsible-Investment-Conference-Background-Note.pdf>.

⁶⁵⁵ *Ibid.*, Marie-France Houde & Tihana Bule.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ *Ibid.* The concept of ‘risk-based due diligence and value creation would be discussed subsequently under discussion on due diligence.

⁶⁵⁸ Marie-France Houde & Tihana Bule, *supra* note 654.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ OECD, “Policy Framework for Investment” (2018), *supra* note 607.

companies that operate responsibly to help achieve sustainable development.⁶⁶¹ In this context, governments could endorse RBC practices and clarify various RBC frameworks to help companies or investors effectively implement RBC in the course of their operations. However, over the years some governments have rather compromised on environmental and social standards in order to minimize short-term costs as governments sought to also attract investments.⁶⁶² Yet if businesses are able to implement RBC practices with or without governments' assistance, they could acquire social license to operate in communities.⁶⁶³

Subsequent sections will describe some international guidelines and principles under RBC that companies, especially those in the EI, could adopt to help attain sustainable development in the mining industry.⁶⁶⁴ Many of these RBC guidelines have integrated the business responsibility to respect rights from the UNGPs.

3.3.1 OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines)

The Organization for Economic Co-operation and Development (OECD) is an international organization consisting mostly of developed economies which fund it.⁶⁶⁵ Its aim is to help states to shape policies for 'better lives'.⁶⁶⁶ It seeks to achieve this by collaborating with governments, citizens and policymakers in "establishing evidence-based international standards."⁶⁶⁷ It also seeks to promote international principles relating to the environment,

⁶⁶¹ Tihana Bule & Cristina Tebar Less, *supra* note 654 at 119.

⁶⁶² *Ibid* at 121 & 126.

⁶⁶³ Organization for Economic Co-operation and Development (OECD), "Responsible Business Conduct and Human Rights" (2019) online: *OECD* < [⁶⁶⁴ Tihana Bule & Cristina Tebar Less, *Promoting Sustainable Development through Responsible Business Conduct* Development Co-Operation Report: The Sustainable Development Goals as Business Opportunities \(OECD 2016\) online \(pdf\):<\[www.oecd-ilibrary.org/docserver/dcr-2016-12-en.pdf?expires=1592471508&id=id&acname=guest&checksum=6734DCFD492751EA288AD2DA6B10B75B\]\(http://www.oecd-ilibrary.org/docserver/dcr-2016-12-en.pdf?expires=1592471508&id=id&acname=guest&checksum=6734DCFD492751EA288AD2DA6B10B75B\)> or <\[www.oecd-ilibrary.org/docserver/dcr-2016-12-en.pdf?expires=1592782678&id=id&acname=guest&checksum=C40A520CDAE5067F7B552F1E06361109\]\(http://www.oecd-ilibrary.org/docserver/dcr-2016-12-en.pdf?expires=1592782678&id=id&acname=guest&checksum=C40A520CDAE5067F7B552F1E06361109\)>.](http://www.oecd.org/industry/inv/responsible-business-conduct-and-humanrights.htm#:~:text=As%20businesses%20aim%20to%20'do,a%20social%20license%20to%20operate.>.</p></div><div data-bbox=)

⁶⁶⁵ Organization for Economic Co-operation and Development (OECD), "Together, We Create Better Policies for Better Lives", *supra* note 30.

⁶⁶⁶ *Ibid*.

⁶⁶⁷ Organization for Economic Co-operation and Development (OECD), "Together, We Create Better Policies for Better Lives", *supra* note 30.

economy and society.⁶⁶⁸ It is also concerned about the accountability of industries and companies operating abroad on environmental and human rights issues.⁶⁶⁹ The OECD is now helping the UN to achieve its SDGs through its knowledge and unique tools for monitoring companies' performances in both developed and developing countries.⁶⁷⁰

As an annex to the OECD's Declaration on International Investment and Multinational Enterprises, the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines) were adopted in 1976 as one of its principal instruments and have been "revised for five times to promote RBC in the changing global economy."⁶⁷¹ The OECD MNE Guidelines is arguably the "most comprehensive set of government-backed recommendations on RBC currently."⁶⁷² The OECD MNE Guidelines was also reviewed and updated in 2011 including its environmental protection chapter.⁶⁷³ At the time of its review, a chapter on human rights which was consistent with the UNGPs was also added. It is safe to emphasize that in 2011, the OECD MNE Guidelines were updated to reflect the second pillar of the UNGPs where companies are to respect human rights in the areas where they operate their businesses irrespective of where they operate.⁶⁷⁴ The OECD MNE Guidelines has been described as a set of "recommendations addressed by governments to multinational

⁶⁶⁸ Organizations of Economic Co-operations and Developments (OECD), *OECD Guidelines for Multinational Enterprises*, 2011 edition (OECD 2011) online (pdf):<www.oecd.org/daf/inv/mne/48004323.pdf>. See also Sara L. Seck, "Business, Human Rights, and Canadian Mining Lawyers" (2015) 56 *Canadian Business Law Journal* 208 at 217. See also David Collins, *supra* note 366.

⁶⁶⁹ *Ibid*, David Collins.

⁶⁷⁰ Organizations of Economic Co-operations and Developments (OECD), "OECD and the Sustainable Development Goals: Delivering on Universal Goals and Targets" (assessed on June 17, 2020) online: *OECD*<www.oecd.org/dac/sustainable-development-goals.htm>.

⁶⁷¹ Organization of Economic Co-operation and Development (OECD), "Responsible Business Conduct: OECD Guidelines for Multinational Enterprises: About the OECD Guidelines for Multinational Enterprises", *supra* note 26. See also Sara L. Seck, "Business, Human Rights, and Canadian Mining Lawyers", *supra* note 690 at 217. See Sara L. Seck, "Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights" 12:1 *JSDLP-RDPDD* 57 at 79 online (pdf):<www.mcgill.ca/mjsdl/files/mjsdl/seckfinal.pdf> or <www.mcgill.ca/mjsdl/files/mjsdl/volume_12_issue_1_seck-10-03-2016.pdf>.

⁶⁷² Marie-France Houde & Tihana Bule, *supra* note 654.

⁶⁷³ Sara L. Seck, "Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights", *supra* note 719 at 73. See also Elisa Morgera, *Corporate Accountability in International Environmental Law*, (Oxford: Oxford University Press, 2009) at 105-113.

⁶⁷⁴ Sara L. Seck, "Business, Human Rights, and Canadian Mining Lawyers", *supra* note 690 at 217.

enterprises operation in or from adhering countries to provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards.”⁶⁷⁵

Further on the OECD MNE Guidelines’ review in 2011, a new provision on stakeholder engagement was also added.⁶⁷⁶ It stated that enterprises or companies should “engage with relevant stakeholder in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.”⁶⁷⁷ It also notes that “enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.”⁶⁷⁸ It further encourages enterprises to “contribute and respect internationally recognized human rights to the fullest even if the domestic law conflicts with them and yet in a manner which does not violate domestic laws.”⁶⁷⁹ The commentary section of this provision of the OECD MNE Guidelines elaborates that companies could achieve this through “interactive processes via meetings, hearings or consultations proceedings which can effectively be done on two-way communication dependent on good faith of participants.”⁶⁸⁰ These processes have been identified by OECD

⁶⁷⁵ Organizations of Economic Co-operations and Developments (OECD), *OECD Guidelines for Multinational Enterprises*, 2011 edition at 13. See Sara L. Seck, *Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights* at 79.

⁶⁷⁶ OECD Secretariat for Public Consultation, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, (OECD 2015), *supra* note 45 at 4. See Sara L. Seck, *Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights*”, *supra* note 719 at 82.

⁶⁷⁷ Organizations of Economic Co-operations and Developments (OECD), *OECD Guidelines for Multinational Enterprises*, 2011 edition (OECD 2011), *supra* note 607 at 20.

⁶⁷⁸ Sara L. Seck, *Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights*” at 73.

⁶⁷⁹ Organizations of Economic Co-operations and Developments (OECD), *OECD Guidelines for Multinational Enterprises*, 2011 edition *supra* note 607 at 32. See Sara L. Seck, *Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights*”, *supra* note 719 at 77.

⁶⁸⁰ Organizations of Economic Co-operations and Developments (OECD), *OECD Guidelines for Multinational Enterprises*, 2011 edition (OECD 2011) at 20.

as being helpful in projects or activities with potential negative impacts on the communities related to the use of land and water.⁶⁸¹

It further encourages enterprises to “carry out risk-based due diligence⁶⁸² to identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed.”⁶⁸³ It was proposed in the OECD MNE Guidelines that “properly conducting meaningful stakeholder engagement is particularly important in the extractive sector which is associated with large, resource-seeking financial and infrastructure investments, immobile production, a long project lifecycle and extensive social, economic and environmental impacts.”⁶⁸⁴ In addition to OECD MNE Guidelines’ update in 2011, the OECD emphasized the responsibility of states to establish a non-judicial remedy mechanism thereby clarifying the National Contact Points (NCPs) for Responsible Business Conduct (RBC) procedural roles.⁶⁸⁵ The roles of NCPs include to promote the OECD MNE Guidelines and respond to complaints (specific instances) regarding alleged violations of human rights by companies based in OECD adhering states.⁶⁸⁶ Members of the OECD or adhering OECD states are encouraged to establish NCPs in their respective countries to perform their roles in relation to business related human rights matters.⁶⁸⁷

⁶⁸¹ Organizations of Economic Co-operations and Developments (OECD), *OECD Guidelines for Multinational Enterprises*, 2011 edition, *supra* note 607 at 25. See Sara L. Seck, Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights”, *supra* note 719 at 74.

⁶⁸² Due diligence will be discussed below.

⁶⁸³ OECD Secretariat for Public Consultation, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector*, (OECD 2015), *supra* note 45.

⁶⁸⁴ Sara L. Seck, Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights” at 4.

⁶⁸⁵ Organizations of Economic Co-operations and Developments (OECD), “National Contact Points for the OECD Guidelines for Multinational Enterprises” (accessed on December 8, 2020) online: *OECD* <www.oecd.org/investment/mne/neps.htm>. See Organizations of Economic Co-operations and Developments (OECD), “(OECD): Responsible Business Conduct: OECD Guidelines for Multinational Enterprises (2019) online: <mneguidelines.oecd.org/neps/>. See Sara L Seck, “Business, Human Rights, and Canadian Mining Lawyers”, *supra* note at 217.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ Shelley Marshall, *OECD National Contact Points: Better Navigating Conflict to Provide Remedy to Vulnerable Communities*, Non-Judicial Redress Mechanisms Report Series 16 Corporate Accountability Research (Creative Commons Attribution Noncommercial Share Alike, 2016) at 12 online (pdf):<static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/580d7b7bb3db2b51a441a6e8/1477278601503/NJM16_OECD.pdf>.

3.3.2 OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (EI Due Diligence)

We shall start the discussion here with a background information on due diligence as derived from UNGPs by the OECD.

Although ‘due diligence’ is generally a prudent investigation of risks and liabilities in a business setting, it is a “term of art with roots in law.”⁶⁸⁸ Professor John Ruggie “tapped into this term so familiar in the business world in defining the meaning of a corporation’s Responsibility to Respect Human Rights.”⁶⁸⁹ He added in Guiding Principle 15 of the UNGPs, which is reflected in the human rights chapter of the OECD MNE Guidelines.⁶⁹⁰ As a human rights tool, “the role of due diligence is driven by social norms and it serves to meet a company’s social license to operate.”⁶⁹¹

The concept of ‘social license’ appears to be running parallel with ‘legal license to operate’ although its requirements exceed that of legal requirements.⁶⁹² If business enterprises acquire a legal license to operate, such license would be ‘valid’ for business operation should it fall within the ambit of social license of local communities.⁶⁹³ This hereby unravels the ethical dimensions attached to the human rights’ due diligence.

Human Rights Due Diligence (HRDD)⁶⁹⁴ is an essential activity required of EI companies by financial institutions.⁶⁹⁵ HRDD has been referred to as “a process that a business needs to undertake to identify, prevent, mitigate and account for how it addresses

⁶⁸⁸ Kendyl Salcito & Mark Wielga, “Due Diligence in the Mining Sector: An Expanding Concept” at 87 in Sumit K Lodhia, *Mining and Sustainable Development: Current Issues* (New York: Routledge 2018) online: < construccion.uv.cl/docs/textos/TEXT0.10.pdf>.

⁶⁸⁹ Kendyl Salcito & Mark Wielga at 88.

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.*

⁶⁹² *Ibid.* See also Rachel Davis & Daniel Franks, *supra* note 496.

⁶⁹³ *Ibid.*

⁶⁹⁴ CIDSE Private Sector Working Group, “Human Rights Due Diligence: Policy Measures for Effective Implementation” (2013) online:< www.businesshumanrights.org/sites/default/files/documents/HRDD_EN_Final.pdf>.

⁶⁹⁵ Motoko Aisawa, Daniela C dos Santos & Sara L Seck, *supra* note 457 at 100.

adverse human rights impacts.”⁶⁹⁶ The Principle 17 of the UNGPs establishes that the process of HRDD by companies should constitute four critical elements.⁶⁹⁷ These elements are “assessing actual and potential impacts of business activities on human rights; acting on the findings of the assessment through company policies; monitoring effectiveness of the measures as well as publishing their HRDD results”.

This part of the thesis will focus on the first element of the HRDD processes which is on ‘assessment’. Again, since human rights violations are not gender-neutral, this first element will be analyzed from a gender perspective.⁶⁹⁸ EI business operations have unique negative impacts on women yet the companies in the EIs address human rights issues on a gender-neutral bases.⁶⁹⁹ The EIs should endeavor to recognize and incorporate gender issues in the course of their operations in an attempt to achieve in the industry.⁷⁰⁰

The UNGPs further provides under Principle 18 that the first element of assessing human rights impacts the company should include expert advice on human rights within the community of operation, consult and engage relevant rights holders, be gender-sensitive among others throughout the company’s lifecycle of business operations.⁷⁰¹ This process is generally referred to as ‘*human rights impact assessment*’ (HRIA). HRIA has been defined as “a process of identifying, understanding, assessing and addressing the adverse effects of a

⁶⁹⁶ Nora Gotzmann & Claire Methven O’Brien, *Business and Human Rights: A Guidebook for National Human Rights Institutions*, (International Coordinating Committee of National Human Rights Institutions (ICC) and Danish Institute for Human Rights (DIHR) 2013) at 40.
online

(pdf):<www.humanrights.dk/files/media/dokumenter/udgivelser/bhr_guidebook_for_nhris_2013_eng.pdf>.

⁶⁹⁷ Nora Gotzmann & Claire Methven O’Brien, at 40.

⁶⁹⁸ Business & Human Rights Resource Centre, “Gender, Business & Human Rights” (assessed on June 15, 2020) online: *Business & Human Rights Resource Centre* <www.business-humanrights.org/en/gender-business-human-rights>.

⁶⁹⁹ Sara L Seck & Penelope Simons, “Resource Extraction and the Human Rights of Women and Girls” *supra* note 20 at i. See also Nora Gotzmann et al, *supra* note 271 at 8. See Motoko Aisawa, Daniela C dos Santos & Sara L Seck, *supra* note 457 at 101.

⁷⁰⁰ Christina Hill, Chris Madden & Nina Collins, *supra* note 46 at 3.

⁷⁰¹ Nora Gotzmann & Claire Methven O’Brien, at 42.

business project or activities on the human rights enjoyment of impact rights-holders such as workers and community members.”⁷⁰²

The OECD MNE Guidelines refers to ‘due diligence’ as “the process through which enterprises identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed.”⁷⁰³ Due diligence “is an integral part of decision-making and the OECD recommends “‘risk-based due diligence’ throughout the lifecycle of the project.”⁷⁰⁴

The OECD identified that the OECD MNE Guidelines alone was insufficient and thus developed sector specific guidance documents.⁷⁰⁵ Multinational enterprises were encouraged to “engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities” when the OECD MNE Guidelines were revised in 2011.⁷⁰⁶ The OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (the OECD Stakeholder

⁷⁰² Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management*, *supra* note 39 at 81.

⁷⁰³ Organizations of Economic Co-operations and Developments (OECD), “OECD Due Diligence Guidance for Responsible Business Conduct”, *supra* note 44. See Karin Buhmann, “Human Rights Due Diligence” (assessed on June 11, 2020) online:<teachbhr.org/resources/teaching-bhr-handbook/teaching-notes/human-rights-due-diligence/#_ftn8>. See also Kendyl Salcito & Mark Wielga at 91. The ‘right to participate in public life’ as provided under Article 21 of the Universal Declaration of Human Rights (UDHR) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

⁷⁰⁴ Organization for Economic Co-operation and Development (OECD), Secretary General of the OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD Publishing, 2017), *supra* note 464 at 17.

⁷⁰⁵ Sara L. Seck, Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights” at 88. OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas were developed. See Organization for Economic Corporation and Development (OECD), “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas” (assessed on November 28, 2020) online: *OECD iLibrary* <www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-responsible-supply-chains-of-minerals-from-conflict-affected-and-hugh-risk-areas_9789264185050-en>.

⁷⁰⁶ Organization for Economic Co-operation and Development (OECD), Secretary General of the OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD Publishing, 2017), *supra* note 464 at 3.

Engagement Guidance) was developed to provide “practical guidance to mining, oil and gas enterprises in addressing the challenges related to stakeholder engagement.”⁷⁰⁷

The OECD Stakeholder Engagement Guidance makes two main recommendations relating to corporate planning and management as well as personnel.⁷⁰⁸ Regarding corporate planning, it recommends that enterprises should clearly communicate its commitment to stakeholder engagement, integrate it into their core management systems and consider stakeholders’ feedback in decision making.⁷⁰⁹ This will help enterprises to mitigate organizational risks that will result in adverse impacts in communities.⁷¹⁰ Recommendations for on-the-ground personnel expect enterprises to ensure that personnel of the stakeholder engagement activities have strong understanding of the local context necessary for the activities. Furthermore, personnel should be well informed by sharing relevant materials and balancing transparency and privacy concerns.⁷¹¹ In addition, monitoring systems must be put in place to track agreements and commitments reached with communities. In addition, it addresses the essence of community consultation and consent of the local EI communities as well as integrating gender perspectives.⁷¹²

Ghana is not a member of the OECD nor a non-adhering country to the OECD MNE guidelines but influential home states of foreign investor countries such as Canada and US are members of the OECD.⁷¹³ However, it is worth noting that China is not an OECD member country⁷¹⁴ and it has its version of social responsibility guidelines for the mining industry. Its version is the *Chinese Guidelines for Social Responsibility in Outbound Mining Investment* (Chinese Guidelines) by the China Chamber of Commerce of Metals, Minerals

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid* at 23.

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Ibid* at 28.

⁷¹¹ *Ibid* at 25.

⁷¹² *Ibid* at 100. More on gender will be examined under subsequent section on “Gender Impact Assessment”. See also Motoko Aisawa, Daniela C dos Santos & Sara L Seck, *supra* note 457 at 100.

⁷¹³ Organization for Economic Cooperation and Development (OECD), “List of OECD Member Countries-Ratification of the Convention on the OECD” (assessed on July 10, 2020) online: *OECD* <www.oecd.org/about/document/list-oecd-member-countries.htm>.

⁷¹⁴ *Ibid.*

and Chemical Importers and Exporters.⁷¹⁵ The Chinese Guidelines launched in 2014, recommends that companies in the mining industry observe the UNGPs in the course of their business operations in relation to human rights. In addition, Chinese companies should seek free, prior and informed consent of indigenous peoples and local communities irrespective of the laws even when operating abroad. Notwithstanding the Chinese Guidelines, the Chinese continue to violate human rights in Ghana during their mining operations. On this note, it would be good to investigate the effectiveness of the Chinese Guidelines in future.

The question is, are foreign investors from OECD member countries such as Canada (operating in the LSM sector) doing any better than investors from non-member or non-adhering countries such as China (operating in the ASM sector) in relation to human rights matters, especially those of women in Ghana.

3.3.3 Gender Impact Assessment (GIA)

This section will describe gender in relation to human rights due diligence impact assessment. It will also give a background to gender analysis for the purposes of this thesis. Analysis on gender impact assessment will be supported by provisions in the 2017 OECD Diligence Guidance for Meaningful Engagement which relates to gender engagement, Oxfam's GIA guide⁷¹⁶ as well as Ghana's EPA on EIA.

Gender analysis is defined as “the systematic gathering and examination of information on gender differences and social relations in order to identify, understand and redress inequalities based on gender.”⁷¹⁷ Gender analysis or perspective helps to identify grey areas of gender inequalities such as “how men and women have different access to and

⁷¹⁵ Motoko Aisawa, Daniela C dos Santos & Sara L Seck, *supra* note 594 at 103.

⁷¹⁶ Oxfam International, “About Us”, (2020) online: *Oxfam International* <www.oxfam.org/en/what-we-do/about>. Oxfam is a global movement of people who are fighting inequality to end poverty and injustice across local regions to the global. They rely on feminist approaches to foster their commitments to the universality of human rights.

⁷¹⁷ Motoko Aisawa, Daniela C dos Santos & Sara L Seck, *supra* note 594 at 180.

control over resources, carry out different social roles, face different constraints, and receive different benefits.”⁷¹⁸

Gender equality in BHR in relation to mining industries is associated with ethical concerns but also it serves as an instrument towards strategic management in the mining companies.⁷¹⁹ Some women lament that due to their lack of education, their voices are not heard, and they tend to face sheer neglect by relevant government authorities. As a result, they have lost touch with decision-making authorities who make decisions that directly affect them.⁷²⁰

Most frameworks that assess the impacts of mining on women including the Harvard Analytical Framework (Gender Analysis Framework or Gender Roles Framework) are primarily based on the Women in Development (WID) approach.⁷²¹

The Women in Development approach from the 1970s stems from the liberal feminist framework which emphasizes “the need to integrate women into existing social, political and economic practices.”⁷²² The Women in Development was critiqued for having only focused on the productive aspects of women but not on their reproductive aspects as well. Subsequent to Women in Development was Women and Development (WAD) which is a neo-Marxist feminist approach. Women and Development emerged in response to modernization and Women in Development perspectives. Women and Development which considered that women were already in development focuses on “the relationship between women and development processes rather than purely on strategies for the integration of women into development.”⁷²³ In summary, while Women in Development focused on

⁷¹⁸ *Ibid.* See Sujit Kumar Singh & Vikrant Wankhede, *supra* note 375 at 8.

⁷¹⁹ Nattavud Pimpa & Robin Nunkoo, “How Mining Companies promote Gender Equality through Sustainable Development” (2019) 6:1 Cogent Business & Management online: <
www.tandfonline.com/doi/full/10.1080/23311975.2019.1647590?src=recsys>.

⁷²⁰ Nathan Andrews, *supra* note 237 at 180.

⁷²¹ *Ibid* at 180.

⁷²² *Ibid* at 181.

⁷²³ *Ibid.*

integrating women into the existing market, Women and Development considered the specific roles of women in development (productive and social reproduction) processes.

In the 1980s a concept in socialist feminism emerged due to frustration with the Women in Development and Women and Development perspectives.⁷²⁴ This concept is Gender and Development (GAD). GAD is multidimensional and considers economic, political, and social processes which includes men and women and seeks to challenge the inequities of the international political economy structure.⁷²⁵ Notably, Gender and Development has linked the “relations of production to the relations of social reproduction of women.”⁷²⁶

Gender Impact Assessment (GIA) is a due diligence tool that assists in ensuring that EI business operations: “respect the rights of women and men; promote women’s empowerment and encourages participation in decision making processes; identify and mitigate potential impacts and increase the benefits of EI projects.”⁷²⁷ Companies could acquire ‘social license to operate’ peacefully in the communities should they practice recommendations under the GIA.

According to Esposito and Daaji, GIA “is a policy tool for the screening of a given policy proposal, in order to detect and assess its differential impact or effects on women and men, so that these imbalances can be redressed before the proposal is endorsed.”⁷²⁸ GIA tool assesses the socio-economic dynamics among women, men and girls in relevant communities in relation to access to and control over resources.⁷²⁹ In a nutshell, GIA would reflect the diverse intersectional factors that are discriminatory in order to address issues of the

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid* at 182.

⁷²⁶ *Ibid.*

⁷²⁷ Christina Hill, Chris Madden & Nina Collins, *supra* note 46.

⁷²⁸ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management*, *supra* note 39 at 82. See Ilaria Esposito and Sodfa Daaji, “Gender Impact Assessment of the Council of Europe Youth for Democracy Programme: A Study about the Gender Equality Dimension of the Activities promoted by the Youth Department of the Council of Europe” (2019) at 14.

⁷²⁹ *Ibid.*

marginalized in the communities in the event of business operations. It is encouraging to note that the new IGF Guidance document highlights extensively on gender in an attempt to achieve equality within communities. It also emphasized that gender equality “should be considered in defining the scope of the assessment: regarding environmental and social impacts.”⁷³⁰

There is a significant improvement on the OECD Diligence Guidance for Meaningful Engagement in 2017 in relation to gender.⁷³¹ An annex, (annex C) was attached to the Due Diligence Guidance for Meaningful Engagement, which is dedicated on women.⁷³² The annex C is captioned, ‘Engaging with Women’. According to the Annex C, enterprises should ensure that gender dynamics are accounted for during engagement activities and strategies to address unequal power balances between men and women. Again, if stakeholder engagement processes staff is gender balanced, it would be more comfortable if women staff engage with women community members during the processes. The Annex C however cautioned in relation to staff selection or identifying leaders’ processes that, companies should not wrongly assume that it is only high-profile women who can effectively represent women. Furthermore, it encouraged companies to appropriately identify and prioritize women since they are impacted differently by the EI business operations.⁷³³ This is a great initiative to assist mining companies in addressing gender issues in the course of their business operations. Perhaps, other international bodies that are keen on encouraging mining companies to respect human rights of women should add their perspectives to the Annex C in an attempt to maximize the scope of this initiative.

⁷³⁰ *Ibid* at 69 and 177.

⁷³¹ Sara L Seck et al, “Impact Assessment and Responsible Business Guidance Tools in the Extractive Sector: Implications for Human Rights, Gender and Stakeholder Engagement” (2020) Schulich Law Scholars: Responsible Business Conduct and Impact Assessment Law: Marine and Environmental Law Institute at 17 online:< digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1000&context=ialawrbc>.

⁷³² Organization for Economic Co-operation and Development (OECD), Secretary General of the OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris: OECD Publishing, 2017), *supra* note 464 at 100.

⁷³³ *Ibid*.

Oxfam also updated its guide to gender impact assessment in 2017 which ensures that “women’s voices are meaningfully included in project decision-making in the EI.”⁷³⁴ Oxfam emphasizes that “companies could gain and maintain a social license to operate with impacted communities and avoid conflict and costly shut-downs” by using GIA.⁷³⁵ Oxfam’s guidance tool on GIA elaborates on some underlying principles and approaches of GIA.⁷³⁶ Some of its underpinning principles are that company-led GIA must be participatory to help identify inter-sectional impacts and encourage consensus-building in mine-affected communities. It must also be human rights compatible by maintaining consistency with international human rights standards. In addition, it should be transparent, and information gathered should be used to enhance companies’ relationship with communities in which they operate.

Regarding EIA, the EPA in Ghana makes reference to the “Inclusion of Gender in Environmental Impact Assessment document.”⁷³⁷ This document highlights some benefits of gender inclusion in EIA. Gender equality in development projects will boost economic development.⁷³⁸ It noted that women’s concerns are reflective of the broader community hence women could help make better decisions that affect communities.⁷³⁹ Furthermore, women in decision making is likely to empower women in relation to resource control. As a result, resources in communities would be distributed equally. Lastly, involvement of women will enhance management planning to provide better infrastructure and skill development. According to the Inclusion of Gender in EIA document, Ghana is among many African countries that has laws, policies and guidelines which promote gender inclusion, yet it lacks

⁷³⁴ Christina Hill, Chris Madden & Nina Collins, *supra* note 46 at 2.

⁷³⁵ *Ibid* at 3.

⁷³⁶ *Ibid* at 6.

⁷³⁷ Sujit Kumar Singh & Vikrant Wankhede, *supra* note 375.

⁷³⁸ *Ibid* at 14.

⁷³⁹ *Ibid*.

an exclusive framework for promoting same.⁷⁴⁰ Regarding the EIA in Ghana, there is no active participation of women.⁷⁴¹

It is encouraging to note that progress has been made on addressing women issues in various international guidelines. It is however important for governments including Ghana to make exclusive guidelines or laws that address gender issues relating to human rights and the environment. Alternatively, relevant laws on human rights and the environment should be revised to ensure gender issues are addressed extensively. In order to effectively implement provisions of international guidance documents that promote gender inclusion, Ghana and companies in the EI could develop a local guidance document that provide details that are peculiar to Ghanaian communities. For example, a how-to guide that informs companies on how to approach women issues that emerge from various cultural norms in Ghana.

Ultimately, the suggested legally relevant international standards and principles under RBC could enhance efforts from governments and companies as they protect and respect women's human rights in the EI in Ghana. This could help Ghana to realize SD in the EI.

⁷⁴⁰ *Ibid* at 16.

⁷⁴¹ *Ibid*.

CHAPTER 5 CONCLUSION

This final part of this thesis restates the research problem and summarizes the findings and approach proposed in the thesis. It also seeks to provide some recommendations and discuss some limitations herein.

Companies operating in the EI in Ghana violate women's human rights in the course of their business operations through land grabbing. The thesis thus suggested some international best practices and standards that could help to address business related human rights abuses in the EI in Ghana. Particularly, it suggested that the IGF Guidance document and RBC standards could help protect and respect women's human rights in the EI in Ghana. It implies that they could help achieve sustainable development in the EI in Ghana. The thesis emphasized that both the government and companies have responsibilities towards business related human rights abuses. Obviously, the government has a responsibility to protect the human rights of its citizens, especially those of women through its laws and policies. Therefore, inasmuch as the government performs its role however inadequate, companies in the EI should perform their independent roles to respect human rights especially those of women in communities in which they operate irrespective of the government's role. In other words, the thesis, argued for other sustainable alternatives that could encourage companies to be more responsible towards human rights issues especially those of women irrespective of the national laws and regulations.

In order to achieve the goal of the thesis, discussions were segmented into three parts. The first part discussed 'who' was causing the 'problem', the second part illustrated the problem, and the third part suggested some solutions to the problem.

The first part of the paper identified the government and companies operating in the EI in Ghana as major contributors to the problem. Thus, it started by describing the general overview of the EI in Ghana. The mining sector was used as a representation of the EI in Ghana. It identified that the mining industry is the second oldest largest industry after

agriculture in Ghana which continues to significantly contribute to its economy. The two main mining types in Ghana are identified as the LSM and ASM. The LSM was an advancement of the ASM sector which was mainly reserved for Ghanaians. The LSM on the other hand is mainly operated and invested by transnational corporations usually from giant economies like Canada and US whereas China invests in the ASM sector. China has introduced a semi-mechanized technology into the ASM operations which seems to have worsened environmental and human rights impacts in mining communities although it is also possible such technology may have improved environmental outcomes.

Furthermore, mineral rights or licenses are required in order to operate in the mining sector in Ghana. Whereas mineral licenses for LSM operations are granted to only companies or partnerships registered in Ghana, mineral rights for ASM could also be granted to individuals as well. It was also found that acquisition of mineral rights on a particular land does not automatically make the existing landowner or lawful occupier to lose their interests on such lands. However, the landowner or the lawful occupier should seek consent from the mining lease holder or the Minister of Lands and Natural Resources before existing crops on such lands could be upgraded. Some landowners whose interests in such lands are subsequently acquired could be entitled to compensation as provided under the *Act 703*. It was found that land occupiers especially women encounter unfair, delayed or unpaid compensation. Some attributable reasons are that some Ghanaian cultural limitations only give secondary interests on lands to women which is dependent on primary interests of men which make them to lose out on compensation.

Notably, although the mining sector is perceived as a male dominated industry, investigations here revealed that women form a significant part of the industry especially in the ASM sector. Yet the non-formalization of the ASM sector may have contributed to some disadvantages women suffer in the sector. Hence it is critical to formalize the ASM sector. The thesis further explored some opportunities in the industry that are also available to

women in the EI in Ghana. It also added to the argument that feminization in the mining industry is necessary to help challenge the hegemonic masculinity discourse as seen in the EI. Essentially, the full spectrum of the mining industry from the ‘inside the pits’ to ‘outside the pits’ including the entire supply chain should be recognized in order to appreciate women’s holistic contributions in the industry. By this more women will be empowered to take up roles in the industry.

The second part of the thesis examined land grabbing as practiced by companies in the EI in Ghana. It emphasized that LG discourse should not be limited to the agricultural sector but the EI as well. Examination here revealed that the Ghana government contributes to land grabbing as practiced by EI especially through gaps in some of its laws and regulations governing land governance and tenure systems, and the environment. In addition, most of such laws are gender-blind and fail to address issues relating to women. Sadly, during the land grabbing processes miners also unlawfully destroy some social amenities in communities in which they operate. Regrettably, some governments’ agents including the police and soldiers aid some miners to engage in this destruction and physically abuse some women in the course. Further investigations revealed that the unique negative impacts women in mining communities suffer as a result of land grabbing go to affect the agricultural sector which is the backbone of Ghana’s economy. Fortunately, Ghana has ratified some international treaties including *CEDAW* in an attempt to address gender inequalities in the country.

The part three of the thesis focuses on solutions. The solutions here were inspired by the recommendation that inasmuch as government provide legal frameworks to help companies operate responsibly, companies on the other hand should operate responsibly over and above compliance with national laws and regulations protecting human rights. It there proposes that governments in collaboration with companies could achieve sustainable development in the EI in developing countries. Particularly, it proposes that since Ghana is a

member of the IGF, it could actively draw insights from the IGF Guidelines among other guidelines explored and revise its laws, regulations and policies that address women's concerns in the EI. For instance, it proposes that the government of Ghana should actively express its commitment to sustainable development and ensure consistencies in its laws governing areas including the environment societal impact assessment and management (especially gender impact assessment). Companies in the EI on the other hand could practice relevant recommendations from international guidelines especially on GIA such as those under RBC to help respect women's human rights in the EI.

The part three explored sustainable development and how it is related to mining. Then it examined some international standards and guidelines that both states and companies could use to help achieve sustainable development in the EI especially in Ghana. Regarding states' efforts to this course, the IGF guidance document was examined. In considering some international standards and guidelines that could be useful to companies, it explored the relationship among RBC, CSR and BHR concepts. The thesis focuses on RBC so it further explored some international guidelines and practices that could help companies practice RBC in order to achieve sustainable development in the EI. Some of such guidelines are OECD MNE Guidelines, OECD Stakeholder Engagement Guidance as well as GIA guidance tools. The thesis concluded that should Ghana and companies use these international guidelines and standards sustainable development could be realized in the EI where women's human rights are more likely to be respected.

The thesis however has some limitations that must be acknowledged. An important limitation includes that the thesis only proposes international standards as possible solutions to help solve women's human rights issues in the EI in Ghana. Also, there are a lot of international standards from various sources which could make it more challenging in accessing them in the event where governments and companies intend to implement suggested recommendations. Again, the thesis could not identify enough practical evidence to

support that these proposed international standards could be feasible to implement in Ghana. In addition, there seems to be limited data on business-related women's human rights abuses in the EI in Ghana, the LSM sector for the most part. It could not also identify enough data on how such abuses have been addressed.

Areas for future research include clearly distinguishing among terminologies such as CSR, RBC and BHR to help use such terms appropriately. This is because some research seems to be using for example RBC, BHR and CSR interchangeably. Furthermore, future research could explore how financial investors could influence companies in the EI to respect human rights, especially women's human rights in the community in which they operate. In addition, the role of lawyers in helping achieve sustainable development in the EI in Ghana with respect to business related human rights abuses could be explored. Furthermore, the extent to which the COVID-19 has impacted the business and human rights discourse especially on women could also be examined. Lastly, it appears the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa⁷⁴² has not conducted studies on the gender dimensions of impact assessment till date. Hence future research could investigate the Working Group's efforts under this context.

In summary, if companies in the EI operating in Ghana practice RBC's standards and guidelines over and above national laws, they will be contributing to sustainable development in the EI which will help to respect women's human rights in EI communities in Ghana.

⁷⁴² African Commission on Human and People's Rights (ACHPR), "Working Group on Extractive Industries, Environment and Human Rights Violations" (2020) online: *ACHPR* <www.achpr.org/specialmechanisms/detailmech?id=13>. See International Justice Resource Center (IJRC), "Working Group on Extractive Industries, Environment and Human Rights Violations in Africa" (accessed on December 13, 2020) online: *International Justice Resource Center* <ijrcenter.org/regional/African/working-group-on-extractive-industries-environment-and-human-rights-violations-in-africa/>.

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