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**Human Rights and the Canadian Extractive Sector in Latin America: Can Canada
do more to prevent abuses and improve access to justice?**

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ABSTRACT

Despite the abundance of international regulation mechanisms that have emerged since the 1990s, human rights violation scandals continue to plague mining operations, including Canadian mining projects in Latin America. Canada has adopted a policy approach to try to address the issues of corporate responsibility and respect for human rights by mining corporations. It has endorsed international voluntary compliance and reporting guidelines, and published its own corporate social responsibility (CSR) strategy. The paper evaluates to what extent are existing voluntary mechanisms adequate to ensure that Canadian mining companies respect human rights in their operations abroad, and assesses what other policy or legislative tool the Government of Canada could use to ensure respect for human rights and access to justice.

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INTRODUCTION

More mining companies are domiciled in Canada than anywhere else in the world, and Latin America is the single region with the most Canadian mining projects outside of Canada. Despite the abundance of international regulation mechanisms that have emerged since the 1990s, human rights violation scandals continue to plague mining operations, including Canadian mining projects in Latin America. Canada has adopted a policy approach to try to address the issues of corporate responsibility and respect for human rights by mining corporations. It has endorsed international voluntary compliance and reporting guidelines, and published its own corporate social responsibility (CSR) strategy.

Although the government has opted for a voluntary approach, there is no consensus that this is the most appropriate way to ensure respect for human rights and access to justice. On the contrary, numerous civil society organizations, in the mining sector particularly, have called for mandatory measures rather than the voluntary ones that the government has adopted. Since 2005, year in which a parliamentary subcommittee published a report addressing Canadian mining activities and their effects on local communities, public and political interest for the issue has not faded. Recently, it resurfaced again with renewed demands for an extractive sector ombudsman.

Demands for an ombudsman date back to 2007, when its establishment was recommended in an Advisory Group report. Last October, Liberal MP John McKay, long advocate for the establishment of an ombudsperson for the mining, oil and gas sector, stated that he was “reasonably satisfied now that the government is moving, [...] quite rapidly, on a proposal” for an ombudsperson (Mazereeuw, 2016). At the same time, Bill S-226 on “Justice for Victims of Corrupt Foreign Officials Act” (Sergei Magnitsky Law) was passed in the House of Commons on October 4 and now awaits approval by the Senate. The renewed momentum in favour of the creation of an ombudsperson, and the passing of Bill S-226 clearly indicate Canadian society’s demand for greater protection against human rights violations and for better access to remedy for victims.

The Canadian state already plays an important role in the extractive sector. It is actively involved in its promotion and support, particularly since the beginning of the 21st

century. This involvement takes the form of diplomatic support through embassies, influence over host countries' mining regulations, funding for mine-site CSR projects, and direct funding of projects through Export Development Canada (EDC).

State involvement in business activities, including mining activities, has been broadly discussed by authors in their analysis of "the new extraction". Whereas I argue that the state plays a major role in fostering the mining sector, three major theoretical perspectives prevail: the new extraction as a new imperialism, as a demonstration of host states' agency, or as an expression of the globalization trend. The adoption of each of these perspectives implies a different role for the state in the regulation and oversight of mining operations abroad.

Harvey, Gordon and Webber view foreign policy, such as Canada's support for and promotion of mining, as a 'new imperialism', where foreign policy is used to open new markets that will benefit the imperial state. Harvey, whose analysis focuses on the United States, argues that the opening of new markets is a spatial fix to overaccumulation¹. Gordon and Webber adapt Harvey's 'new imperialism' and 'accumulation by dispossession' concepts and apply them to the "predatory activities of Canadian mining companies in Latin America" (Gordon & Webber, 2008, p. 63). They argue that "Canadian mining involvement in Latin America is in fact an important part of the overall growth of an increasingly aggressive search by Canadian corporations for new spaces for capitalist accumulation" (Gordon & Webber, 2008, p. 70).

Heidrich and Ortiz Loaiza challenge this idea, underlining on the contrary the agency of states in which developed countries' companies are operating. They refute the assumption that Canadian corporations are exploiting Latin American resources to the detriment of, or with the consent of Latin American states. They argue that the mining taxation and royalty systems are expressions of states' agency and their role as

¹ Crises of overaccumulation "are registered as surpluses of capital and of labour power side by side without there apparently being any means to bring them profitably together to accomplish socially useful tasks" (Harvey, 2004, p. 1).

“regulator, enabler and guarantor of international mining investments” (Heidrich & Ortiz Loaiza, 2016, p. 116).

A third understanding of Canadian mining investment in Latin America is the belief that it fits within the bigger globalization trend. Globalization theories underline the rising power of corporations and the correlated declining power of states. In this sense, the multiplication of mining projects by Canadian firms in Latin America is an expression of corporations’ rising power in the new world order. This is exemplified by corporations’ increased involvement in multi-lateral fora such as the UN, including in human rights protections, a responsibility once wholly conferred to the state (Deonandan & Morgan, 2016, p. 160).

Each of these theories places the burden of oversight and regulation on a different actor: the home state, the host state, and corporations, respectively. Nonetheless, none of these theories paint a complete portrait that is representative of the situation in Canada, one in which the state plays a significant role in the promotion of the extractive sector, but a very limited one in its regulation.

The Government of Canada, albeit considerably involved in the development of the mining sector in Latin America, has left the regulation of Canadian mining companies’ operations subject to voluntary mechanisms, often created by or in partnership with these same companies. If the Canadian state is to support these companies, it needs to ensure that their operations align with Canada’s international obligations such as the ones laid out in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and with declarations that Canada has signed such as the UN Declaration on Rights of Indigenous Peoples.

This paper will dress an overview of the evolution of government tools and policies and evaluate if the current ones are sufficient to prevent human rights abuses by Canadian mining companies abroad. The paper will focus specifically on Latin America, given that it is the single most important region in terms of Canadian mining investment outside of Canada and that it has been the subject of various public cases of human rights abuses, among others the Choc vs. HudBay case which is currently in court. It will seek

to evaluate to what extent are existing voluntary mechanisms adequate to ensure that Canadian mining companies respect human rights in their operations abroad, and assess what other policy or legislative tool the Government of Canada can use to ensure respect for human rights and access to justice.

I argue that the Canadian state vigorously promotes and supports the mining sector abroad. As such, it has a significant role to play in the regulation of Canadian mining companies' operations to ensure that they comply with Canada's international human rights obligations. Lack of oversight leading to the government supporting companies that are later found to be involved in human rights violations could tarnish Canada's reputation and the public's trust in the government. As the actual voluntary mechanisms have proved insufficient in halting human rights violations by mining companies, the Canadian government needs to review its tools to prevent human rights violations and ensure effective access to remedy for victims.

Chapter 1 assesses how and to what extent the Canadian government supports the mining sector in Latin America. Chapter 2 outlines the UN Guiding Principles on Business and Human Rights, and evaluates the 2009 and 2014 CSR Strategies. Chapter 3 discusses the additional measures that have been suggested since 2005 as a complement to or a replacement for the CSR strategies. Finally, Chapter 4 outlines some recommendations for the Canadian government to improve respect for human rights, corporate accountability, and access to remedy.

1. STATE SUPPORT FOR MINING COMPANIES

This chapter will demonstrate that the government of Canada is heavily involved in the promotion and support of Canadian mining companies abroad, particularly in Latin America. This support takes various forms, the four main ones being mining code reform, development funding, political support through embassies, and project funding through Export Development Canada.

Prior to providing political and economic support, the government needs to ensure that these companies respect Canada's human rights obligations and that they operate in a transparent way. Failure to do so risks undermining the public's trust in the

government, particularly because taxpayers' money is at stake, and tarnishing Canada's reputation abroad.

1.1 Mining code reform

The Canadian state's influence in the opening of markets in Latin America began in the late 1980s with the structural adjustment measures imposed by the World Bank and the International Monetary Fund through their debt management practices. These reforms, enthusiastically supported by industrialized countries, opened the mining sector to foreign investment and led to a massive wave of privatization (Gordon & Webber, 2008, p. 66; Kneen, 2016, p. 1). Canada was, and remains, an important supporter of the Bretton Woods institutions and structural adjustment measures (Gordon and Harvey 68).

Chile was a pioneer. In the early 1980s, it remodeled its mining policies, removing barriers to entry and exit, establishing full transferability of mineral rights, and adopting non-discretionary rules that applied equally to public and private, national and foreign firms (World Bank & IFC, 2003, pp. 1–2). Many developing countries followed suite, but as underlined by the World Bank, it is in Latin America that legal reforms have had the most impact in attracting foreign investment in the mining and exploration sector (World Bank & IFC, 2003, p. 24). As it is observable today by their important share of the Latin American mining market, Canadian mining companies benefitted greatly from these liberal reforms.

Canada has also had a direct and indirect impact in legal reforms abroad that benefited the mining sector. A prime example is that of Colombia, to which Canada, through CIDA's Energy, Mining and Environmental Project, provided technical and financial support to redraft mining legislation (Canadian Network on Corporate Accountability, 2007, p. 18). Intermediaries or agents of Canadian companies, such as the Canadian Energy Research Institute, were hired as mining legislation experts to help draft the new law (Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina, 2014, p. 59). The resulting 2001 revised Mining Code (Law 685/01) weakened a number of existing environmental and social safeguards, reduced mining royalties and tax rates, and eliminated prior requirements that local communities receive economic

benefits deriving from mining activity (Canadian Network on Corporate Accountability, 2007, p. 18).

In Honduras, Canada benefitted indirectly from the 2009 military coup against President Manuel Zelaya. It refrained from condemning the elections that followed in November 2009, and, immediately after, sought the drafting of a new, more liberal, mining law.

Shortly after his election in 2006, President Zelaya had echoed civil society demands, calling for a ban on open-pit mining and establishing a new commission to redraft the mining law (Moore, 2012, p. 2). At the end of 2006, the Supreme Court declared unconstitutional 16 of the articles of the 1998 mining law, including the provision that gave mining companies unlimited access to water resources (Corte Suprema de Justicia, 2006). Finally, in May 2009, Zelaya presented a bill to Congress for a new mining law that proposed, *inter alia*, a tax reform that would increase state revenues from mining, a prohibition of open-pit mining, the obligation to get community approval to issue mining concessions, and a ban on the use of toxic substances such as cyanide and mercury (Canadian Council for International Co-operation, 2010, p. 3; Gordon & Webber, 2011, p. 333). The vote was scheduled for August 16, 2009, but on June 28, 2009, Zelaya was ousted through a military coup d'état. The vote never took place.

Porfirio Pepe Lobo was elected in November 2009, and shortly after, as reported by Canadian professor Todd Gordon, then Ambassador Neil Reeder and CIDA “set to work arranging meetings between Canadian mining executives and Lobo and members of his cabinet”. The head of CIDA for Honduras also “discussed with a Breakwater Resources executive possible strategies to influence the development of a new mining law for the country” (Gordon, 2011). In January 2013, the National Congress passed a new mining law that invalidated the 2006 Supreme Court ruling, effectively allowing open-pit mining, providing for consultation only after concessions had been granted, and allowing forced evictions (Holland, 2015, p. 7).

While it is clear that Canada did not support the coup that ousted Zelaya, it nonetheless took advantage of the effective cancelation of the vote and influenced the

newly elected government in order to see the passing of a mining law that would benefit Canadian investments in the country, similar to what it did in Colombia. The law was decried by social and environmental activists, but praised by government officials as essential to development (Moore, 2012, p. 4).

1.2 Development funding

Depiction of mining as a development tool is also an approach that the Government of Canada has adopted, particularly through CIDA. Beginning in 2009 with the government's first CSR strategy, CIDA started allowing funds for the extractive industry to carry CSR projects in partnership with NGOs. This mandate has been criticized as an effort of the Canadian state's mineral protection network "to reimagine development aid and assistance to serve extractive industry objectives" (Dougherty, 2016, p. 90).

CIDA's new mandate coincided with a policy shift towards Latin America, a shift that had started since the conservative election of 2006. Indeed, then Prime Minister Stephen Harper visited Colombia, Chile, Barbados and Haiti (Scott, 2007), and, in 2007, the Department of Foreign Affairs and International Trade (DFAIT) published the "Strategy for the Americas", which contained three pillars: increasing economic prosperity, reinforcing democratic governance, and advancing common security (MacDonald & Ruckert, 2013). As underlined in DFAIT's evaluation of the Americas strategy, "the initial cornerstone of the Americas Strategy was the prosperity pillar" (DFAIT, 2011). The region was experiencing economic growth and Canada had already started to capitalize on it through trade agreements, a momentum that the government thought important to sustain.

In the fall of 2011, Minister of International Cooperation Bev Oda announced \$6.7 million for three pilot projects with mining companies (IAMGold, Rio Tinto Alcan, Barrick Gold) and development NGOs (Plan Canada, WUSC, World Vision Canada) (Brown, 2013). One of the projects, implemented by World Vision Canada and co-funded by Barrick Gold, received 50% of its funding from CIDA (Barrick Gold Corporation, 2012). It consisted in organizing capacity-building workshops and providing loans to start small businesses to the residents of the Quiruvilca district of Peru, where Barrick operates to

this day an open-pit gold mine (Arnold, 2012; Barrick Gold Corporation, 2017). For the two other projects, in Burkina Faso and in Ghana, CIDA contributed 75% and 54% of the total funding, respectively (Brown, 2013).

In 2014, Stephen Harper went farther than allowing funding to mining companies through CIDA-funded CSR projects. He visited Peru and Colombia, and pledged \$56 million to Peru for aid tied to mining (Dougherty, 2016, p. 91). The shift in CIDA's aid model, from state-to-state development assistance to direct funding to corporations, undeniably marked the shift towards a new development model, one in which the Canadian extractive sector's interests are at the center.

The pilot project gave rise to new partnerships between the government, NGOs, and the extractive sector. In 2015, over \$12 million had been allocated or pledged by CIDA/DFATD to 5 projects taking place between June 2011 and July 2017. In Peru specifically, on top of the project in Quiruvilca, CIDA/DFATD provided over \$1.5 million in funding to foster the agricultural and livestock farming sectors between 2012 and 2014, a project in partnership with CARE Canada and Barrick Gold (Gilroy, 2015).

In 2013, CIDA was amalgamated with the Department of Foreign Affairs and Trade to form DFATD, the Department of Foreign Affairs, Trade and Development, today renamed Global Affairs Canada (GAC). Since that merge, the government continued to allocate funding for mine-site CSR projects, fulfilling its obligations that emerged from contracts signed prior to the amalgamation, and signing new agreements. One example is the renewed partnership in the Zinc Alliance for Child Health (ZACH), a partnership between Nutrition International, Teck Resources Limited and GAC, for which the government pledged an additional \$3 million last September to provide zinc treatment to children in Senegal, Ethiopia, Kenya and Bangladesh (Teck, 2017).

Furthermore, the department's Corporate Social Responsibility webpage states that "the Trade Commissioner Service (TCS) encourages Canadian embassies, consulates, high commissions, regional offices and headquarters divisions to undertake CSR initiatives by providing them with a dedicated source of internal funding" (Global Affairs Canada). The 2016 International Assistance Review also praises partnerships with

the private sector, particularly the Quirulvilca project in Peru (Global Affairs Canada, 2016, p. 16) a sign that this type of partnerships is here to stay.

1.3 Political support

Canada also supports the mining industry through its embassies, sometimes to the detriment of local and indigenous communities opposing the mines, and was already doing so prior to the reform of CIDA's mandate. In November 2003, Glamis Gold, bought in 2006 by Goldcorp, was granted the license for the exploitation of silver and gold for what would become the Marlin mine, in Guatemala (McGill Research Group Investigating Canadian Mining in Latin America, n.d.). The local, mostly Mayan, communities immediately opposed the project. In February 2004, 500 farmers protested against the mine, and in November of the same year, the national newspaper *Prensa Libre*, published the results of a survey that found that nearly 96% of people living near the Marlin mine opposed the project (Canadian Network on Corporate Accountability, 2007, p. 3.1; Ferrie, 2005).

Nonetheless, a month later, the Canadian embassy co-sponsored a National Mining Forum to showcase the mining industry. For that event, they flew in Jerry Asp, an indigenous leader from British-Columbia known for his pro-mining views "to inform indigenous Guatemalans about the various issues to be considered when exploring the option of natural resources development for economic development," as reported by Foreign Affairs spokesperson Andrew Hannan (Ferrie, 2005). The same month, protestors began a 40-day blockade which ended on January 11, 2005 in a stand-off with 700 military and 300 police that resulted in the death of Raul Castro Bocel, an indigenous farmer (Canadian Network on Corporate Accountability, 2007, p. 12; McGill Research Group Investigating Canadian Mining in Latin America, n.d.).

In Mexico, Canadian embassy support to Excellon's La Platosa mine was also surrounded by controversy. In 2012, mine workers held a blockade to protest health and safety conditions in the mine, after they had filed two formal complaints in Canada without success (Kneen, 2016, p. 2). As a MiningWatch report based on nearly 250 pages obtained through an Access to Information and Privacy (ATIP) request reveals, when worker representatives sought a meeting with the embassy to share their concerns and

inquire how it could help resolve the conflict, the Embassy planned to use this meeting “to listen, possibly to gather intel helpful to the company” (Moore, 2015, p. 5). The Embassy also facilitated meetings between Excellon and Mexican authorities, including what appears to be (but is redacted) the governor of the state of Durango. Despite protests and escalation of the situation, a trade commissioner assured to Excellon’s VP that the embassy remained at his “disposition should Excellon want further institutional linkages” (Moore, 2015, p. 7).

In Mexico again, the embassy supported Calgary-based Blackfire Exploration Ltd. and their Payback mining project in the state of Chiapas, despite important scandals involving the company. A report published by MiningWatch Canada, based on more than 900 pages of government documents spanning from 2007 to 2010 obtained through an ATIP request, reveals that the embassy was aware of potential problems with Blackfire’s consultation process and of community opposition to the project. In spite of this, the embassy pressured Mexican officials to ensure the mine would become operational.

Two years after it started to operate, Mexican authorities ordered the closing of the mine for violation of environmental regulations. In November 2009, Mariano Abarca, a community activist who opposed to the mine, was murdered. Three individuals were detained or arrested, all of whom had links with Blackfire. Nonetheless, the embassy continued to provide political support to the company, including advice on how to sue the state of Chiapas under the North American Free Trade Agreement (NAFTA) for closing the mine (Moore & Colgrove, 2013).

The Guatemalan and Mexican examples are just three of the multiple examples that illustrate the extensive political support that mining companies are conferred by Canadian embassies, sometimes despite a stained human rights record². In order to avoid future similar situations, the Government needs to review its tools and regulations

² For more examples of Canadian embassies’ support to mining companies amid controversy, consult (Grupo de Trabajo sobre Minería y Derechos Humanos en América Latina, 2014) and (Mining Watch Canada, 2013)

so that only companies who demonstrate a commitment to the protection of human rights receive support from embassies.

1.4 Project funding through Export Development Canada

Apart from political support through embassies, the government of Canada also finances the extractive industry by providing loans through Export Development Canada (EDC)³ and the International Finance Corporation (IFC) (Canadian Network on Corporate Accountability, 2007, p. 1.1). In 2015, EDC alone provided over \$14 billion in financing, insurance, and bonding, to mining companies in Latin America (Barnes, 2016). While EDC affirms that, prior to receiving funding, projects are reviewed under their Environmental and Social Review Directive, which “requires that projects provide appropriate environmental and social impact assessments that meet the requirements of the host country” (EDC, n.d.), the transparency of this review process has been questioned. Indeed, EDC affirms that it evaluates projects by benchmarking them “against the relevant aspects of the IFC Performance Standards” and “other internationally recognized standards (EDC, n.d.),” but nowhere does it disclose which other recognized standards are used, nor which aspects are considered relevant. Scandals of alleged human rights violations by Canadian extractive companies, such as the one involving Pacific Exploration & Production and its Colombian partner Ecopetrol in Colombia, have also put into question the due diligence practices of the Crown corporation. In 2014, EDC provided Pacific E&P with between \$50 and \$100 million in loans for the exploitation of two oil fields. In 2016, EDC provided additional funding to the projects, despite civil society organizations finding and documenting considerable negative human rights impacts associated with the activities of the companies (Above Ground, CIDH, CCAJAR and PASO International, 2016).

³ “Export Development Canada (EDC), a federal Crown corporation that promotes Canadian trade abroad, is the primary source of public financing for Canadian exports and overseas private sector investment. Like other export credit agencies, EDC provides government-backed loans, guarantees and insurance to domestic corporations for overseas projects. EDC backing often helps corporations leverage additional private-sector capital for their projects” (Canadian Network on Corporate Accountability, 2007, p. 1.1).

EDC has also been heavily criticized for the secrecy that surrounds its financing practices. As Ghomeshi and Zalik explain, “as EDC is a ‘self-sustaining’ financial institution, information concerning its activities is protected under corporate competition policy” (Ghomeshi & Zalik, 2013). Confronted to the limited information published on EDC’s website, the two researchers submitted an ATIP request seeking more information on a project financed by the Crown corporation. The material they subsequently received was heavily redacted, much like the material that other organizations that tried to get access to information about EDC received. The reason is that access to information regarding EDC is heavily hindered by subsection 24.3 of the Export Development Act.

Article 24.3(1) provides that: “All information obtained by the Corporation in relation to its customers is privileged and a director, officer, employee or agent of, or adviser or consultant to, the Corporation must not knowingly communicate, disclose or make available the information, or permit it to be communicated, disclosed or made available” (Minister of Justice, 2017). Paragraph 2 of the article provides for some exceptions in which information can be disclosed, but request by a member of the public is not one of them. Like the Halifax Initiative, an organization that has conducted extensive work about EDC and transparency and accountability, explains

“the effect of this provision is to indiscriminately characterize all information received by EDC from its clients as confidential. [It] also causes EDC to treat as confidential any internal EDC documentation developed during project assessment, approval and monitoring phases, given that these documents necessarily contain information received from clients. These legislative measures effectively undermine the application of the Access to Information Act to EDC” (Halifax Initiative, 2008).

Through political, diplomatic and financial support, the Government of Canada plays a key role in the creation of an environment favourable to the Canadian extractive sector abroad, as well as in the advancement of projects. Unfortunately, under the current regulations, details surrounding state support to the industry are not always transparent, and such support not always deterred by allegations of human rights violations.

1.5 Canadian mining industry

Funding through EDC, along with development funding, political support through embassies, and Canada-supported mining code reforms, have succeeded in increasing importantly the size and the share of the Canadian mining sector in Latin America. Between 2006 and 2012, revenue for Canadian mining projects in Latin America nearly doubled (Dougherty, 2016, p. 4). In 2016, the Mining Association of Canada evaluated the number of mining projects in Latin America operated by companies registered on the TSX or TSX-V at 1,134. Latin America is the region with the single most Canadian mining projects outside Canada, representing 18% of all Canadian mining projects around the world (Mining Association of Canada, 2016, p. 44).

Although rising players, such as China, are increasingly investing in Latin America, it was estimated in 2013 that 50 to 70% of the mining industry in the region was controlled by Canadian companies (Working Group on Mining and Human Rights in Latin America, 2014, pp. 3–4). In fact, Canada stands out as a mining nation not only in Latin America, but globally, with almost 60% of the world's mining companies domiciled in Canada (Garrod & Macdonald, 2016, p. 106). The sheer number of companies headquartered in Canada increases the likelihood of Canadian mining companies getting involved in mining conflicts.

The Justice and Corporate Accountability Project, led by a group of volunteer law students from five different Canadian universities, compiled data regarding documented cases of human rights violations in Latin America associated with Canadian companies that occurred between 2000 and 2015. They found 44 deaths and 403 injuries involving 28 Canadian companies in 13 countries (Imai, 2016, p. 4). In the face of these high numbers, we ought to ask ourselves: are existing voluntary mechanisms adequate to ensure Canadian mining companies respect human rights in their operations abroad?

Without diminishing the gravity of these numbers, it is important to note that, contrary to what some could believe, Canadian firms are not more likely to be associated with social conflicts than other foreign firms, as a recent quantitative research on Liability of Foreignness demonstrates (Haslam, Tanimoune, & Razeq, 2017). The main determinant is not the country of origin of the firm per se, but whether the firm is local or

foreign in the environment in which it operates. According to Haslam's analysis, foreignness represents a liability for mining companies, despite the fact that they engage in more CSR activities. This could suggest that current CSR mechanisms are not efficient in mitigating the risks of mining conflicts.

2. VOLUNTARY MECHANISMS

Chapter 1 demonstrated the extent of state support to Canadian mining firms. This chapter will now assess the regulation mechanisms that the Canadian government has put in place and how they compare to the UN Guiding Principles on Business and Human Rights, an internationally recognized voluntary mechanism.

Voluntary mechanisms have become the tool of choice for the international community, governments, and companies to regulate mining operations and address criticisms of the extractive industry. The push by mining companies to establish voluntary compliance mechanisms is part of the norm roll-out that began in the mining sector in the late 1990s following multiple mining-related environmental disasters around the world (Deonandan & Morgan, 2016, p. 163). In that context, a "plethora of governance schemes for the industry has emanated from organisations such as the UN and the OECD, as well as from the industry itself, in response to the slew of challenges such as accusations of human rights violations, call for mine closures, and lawsuits against companies" (Deonandan & Morgan, 2016, p. 163). To respond to heavy criticism and calls for greater control, and to improve its image, the mining sector got involved in the establishment of various voluntary governance regimes, one example being the Government of Canada's 2009 and 2014 CSR strategies.

2.1 The UN Guiding Principles on Business and Human Rights

The most widely recognized of such mechanisms is the UN Guiding Principles on Business and Human Rights, which were developed by the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG) John Ruggie and endorsed unanimously by the Human Rights Council in 2011. The Guiding Principles operationalize the 2008 UN

“Protect, Respect and Remedy” policy framework⁴. As explained by Ruggie himself in a conference he gave at the University of Ottawa back in 2011, the Guiding Principles were the UN’s initiative to reconcile the two competing approaches to the challenge of how to “adapt a state-based regime that was created by states to address state-related human rights abuses to also encompass companies” (Ruggie Presentation). Generally, NGOs were advocates for the mandatory approach and states and businesses for the voluntary approach.

Ruggie was given the mandate to identify and clarify existing standards and practices, and later to provide recommendations (Ruggie, 2011b, p. 3). He opted for not recommending the creation of a binding treaty because he considered that, given the novelty and controversy of the subject, there was not solid enough a foundation for a treaty negotiation. He opted rather to “produce a normative framework and policy guidance that all stakeholder groups could support” (Ruggie, 2011).

The UN Guiding Principles rest on three pillars: States’ obligations to respect, protect and fulfil human rights and fundamental freedoms; business enterprises’ requirement to

⁴ The UN “Respect, Protect and Remedy” framework is a framework on business and human rights that was presented by UN Special Representative John Ruggie and unanimously approved by the Human Rights Council in 2008. In 2005, Ruggie was given the mandate to move beyond the stalemate that followed the publication of the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” by the Sub-commission of the then UN Commission on Human Rights. These norms sought to impose on companies the same binding obligations that apply to states, namely “to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights”. Business fiercely opposed the Draft Norms, and the Commission declined to adopt the document. After three years of research and consultation, Ruggie presented the Framework, which sought to clarify the responsibilities of each relevant actor. It rests on three pillars: “the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial”. The Framework does not impose new legal obligations but clarifies the roles and responsibilities of states and companies.(Ruggie, 2010)

comply with all applicable laws and respect human rights; and the need for effective remedies to address violations (Ruggie, 2011a, p. 1).

A number of principles stand out as relevant to our comparison between the UN Guiding Principles and the Government of Canada's CSR Strategies. Relating to the first pillar, GP 2 provides that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" (4). The commentary explains that at the moment, States "are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction" (4-5). Nonetheless, they are not prevented from doing so. The Guiding Principles acknowledge that extraterritorial legislation and enforcement is already applied in some cases, such as in criminal regimes that allow for the prosecution of the country's nationals without regards to where the crime was perpetrated. Such is the case in Canada, where "Canadian citizens who sexually exploit children anywhere in the world can be prosecuted in Canada under the Criminal Code" (Simons & Macklin, 2015). Canada has jurisdiction to regulate Canadian citizens abroad, including corporate citizens, and could therefore decide to impose extraterritorial obligations should it judge it necessary to prevent human rights abuses by transnational corporations.

It is important to note as well that extraterritorial obligations have been applied in a number of texts by UN treaty bodies, Special Rapporteurs and Independent Experts, such as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Committee on the Rights of the Child, and the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, just to name a few (Global Initiative for Economic Social and Cultural Rights, 2015, p. 4).

These bodies have made recommendations such as: "The Committee recommends that the State party systematically conduct human rights impact assessments in order to ensure that projects promoting agrofuels do not have a negative impact on the economic, social and cultural rights of local communities in third countries where Belgian firms working in this field operate" (Global Initiative for Economic Social

and Cultural Rights, 2015, p. 8). Regarding Canada, the Committee on the Rights of the Child recommended that “the State party ensure: (a) The establishment of a clear regulatory framework for, inter alia, the gas, mining, and oil companies operating in territories outside Canada to ensure that their activities do not impact on human rights or endanger environment and other standards, especially those related to children’s rights” (Global Initiative for Economic Social and Cultural Rights, 2015, p. 14)⁵.

The numerous mentions of states’ extraterritorial obligations by treaty bodies and special procedures demonstrate that, although states are not required to regulate extraterritorially, under existing human rights treaties, they are encouraged to do so.

In terms of human rights abuses, the UN Guiding Principles acknowledge that some groups are more vulnerable than others and that States should therefore take specific measures to address these challenges. GP 3’s commentary mentions that guidance on corporate respect for human rights “should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families” (pp. 5-6).

Furthermore, on top of guidance regarding corporate social responsibility strategies, the Guiding Principles also addresses the precautions that states should take before allowing project financing. GP 4 provides that “States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence” (p. 6).

⁵ For an in-depth analysis of UN treaty bodies and special procedures’ pronouncements on extraterritorial obligations, consult The Global Initiative for Economic, Social and Cultural Rights’ “Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations”.

On the same note, the Guiding Principles also recommend making public support contingent on respect for human rights. GP 7c) recommends that States ensure that business enterprises are not involved in human rights abuses “including by denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation” (p. 8).

One of the ways that corporations can avoid being involved in human rights abuses is to engage in due diligence, which is a fundamental concept of the UN Guiding Principles. GP 17 provides that due diligence includes “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed” (p. 17). Companies should engage in due diligence before and throughout the project.

In terms of access to remedy, the Guiding Principles also set out some recommendations for States. GP 26 recommends that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy” (p. 28) and GP 27 that “States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse” (p. 30).

In sum, the UN Guiding Principles on Business and Human Rights is a comprehensive document that sets out recommendations for states in terms of the guidance that they provide to companies, the precautions that they take to ensure that they do not promote poor company behaviour, and the mechanisms that they put in place to provide access to remedy.

2.2 2009 CSR Strategy

Starting in 2009, the Government of Canada has also invested efforts in building a voluntary mechanism to promote corporate respect for human rights. Although numerous groups, including a parliamentary committee and NGOs, have recommended stronger measures, the government has chosen to opt for a strictly voluntary system: a

CSR Strategy. In 2009, the government introduced its first CSR strategy entitled 'Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad'. Its publication was the government's response to the 2007 Advisory Group report on a series of roundtables that took place in 2006- which themselves were mandated by the government following the release of a Parliamentary report in 2005- and denounced the human rights violations that were taking place at sites operated by Canadian mining companies (Coumans, 2012).

One of the highlights of the 2009 strategy was CIDA's new mandate to support mine site CSR projects abroad. This was the result of considerable lobbying by the Devonshire initiative, a partnership between mining corporations and development NGOs who lobbied CIDA to partner with them on mine site CSR projects(Coumans, 2012). Joining forces with development NGOs was the mining sector's strategy to counter the recommendations contained in the 2007 Advisory Group report on roundtables. This latter urged the Canadian government to identify and remedy legal and other barriers to the extraterritorial application of Canadian criminal law, and establish an independent ombudsman office, mandated to provide advisory, fact-finding and reporting functions (Advisory Group, 2007).

The intended effect of lobbying CIDA alongside NGOs to receive funding for CSR projects was twofold: 1) regain legitimacy by presenting mining as a development tool, and 2) avoid being held accountable by any mandatory measures (Coumans, 2012; Deonandan & Morgan, 2016, p. 164).

The lobbying proved fruitful, and in 2009, the government released its first CSR Strategy, one that excluded some of the recommendations contained in the roundtables report. As the name indicates, it rested on one fundamental principle: its voluntary nature. CSR itself is defined as "the voluntary activities undertaken by a company to operate in an economic, social and environmentally sustainable manner" (Global Affairs Canada, 2017a).

With the 2009 CSR strategy, CIDA was officially given the mandate to support mine sites CSR projects abroad. As the title of the strategy "Building the Canadian

Advantage” suggests, the undertaking of CSR activities was meant to increase Canada’s competitive advantage and companies’ capacity to secure a social license to operate following the decline of the reputation of the Canadian mining industry (Coumans, 2012). Until today, Global Affairs Canada advances that “responsible corporate behaviour by Canadian companies operating internationally enhances their chances for business” (Global Affairs Canada, 2017a).

The strategy consisted of four pillars: 1) Support for host country resource governance capacity-building initiatives to reduce poverty in host countries, 2) Endorsement and promotion of widely recognized international CSR performance guidelines, 3) Support for the development of a Centre for Excellence in CSR, and 4) Creation of the Office of the Extractive Sector CSR Counsellor (Government of Canada, 2009).

The first pillar was to be carried out through CIDA and consisted in providing funding for CSR activities like the previously mentioned partnerships between extractive companies and development NGOs (see section 1.2). The second pillar was to be carried out mainly through DFAIT and Natural Resources Canada (NRCan), and endorsed 4 international performance and reporting guidelines (OECD Guidelines for Multinational Enterprises⁶, IFC Performance Standards on Social & Environmental Sustainability⁷,

⁶ The OECD Guidelines for Multinational Enterprises are non-binding recommendations and standards for responsible corporate conduct addressed to multinational enterprises operating in or from adhering countries. The Guidelines are part of the 1976 OECD Declaration on International Investment and Multinational Enterprises, which seeks to create an open and transparent environment for international investment. The Guidelines address topics such as information disclosure, human rights, employment and labour, environment, anti-corruption, and consumer interests. (OECD, 2014)

⁷ The IFC Performance Standards on Social & Environmental Sustainability were established in 2006, along with IFC’s Policy on Environmental and Social Sustainability and Access to Information Policy. Together, they form the IFC Sustainability Framework, which was designed to help companies operate in a sustainable way by promoting sound environmental and social practices and encouraging transparency and accountability. There are 8 performance standards that companies receiving financing from the IFC are expected to meet: 1) Assessment and Management of Environmental and Social Risks and Impacts; 2) Labor and Working Conditions; 3) Resource Efficiency and Pollution Prevention; 4) Community Health,

Voluntary Principles on Security and Human Rights⁸, and Global Reporting Initiative⁹). Third, the Centre for Excellence in CSR was established at Ryerson University, and was envisioned as “a repository for information on CSR tools, rules, laws and best practices, as well as a place where various interested parties can come together in dialogue” (Government of Canada, 2009). Finally, the Office of the CSR Counsellor’s mandate was set to relate only to operations of Canadian companies abroad and to “review the corporate social responsibility practices of Canadian extractive sector companies operating outside Canada and advise stakeholders on the implementation of endorsed CSR performance guidelines” (Government of Canada, 2009).

The 2009 Strategy was heavily criticized because it failed to incorporate the main recommendations of the Advisory Group and failed to establish any mechanism by which mining companies could be held accountable for their CSR policies (Bodruzic, 2015, p. 138). On the other hand, it was positively welcomed by the industry. Pierre Graton, president of the Mining Association of Canada, called CIDA’s new mandate a change “long overdue” (Coumans, 2012).

Safety, and Security; 5) Land Acquisition and Involuntary Resettlement; 6) Biodiversity Conservation and Sustainable Management of Living Natural Resources; 7) Indigenous Peoples; and 8) Cultural Heritage. (International Finance Corporation, 2012, p. 2)

⁸ The Voluntary Principles on Security and Human Rights are a set of principles established in 2000 to “guide companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights”. 10 governments (including Canada), 31 companies (including many extractive companies) and 13 NGOs participate in the process. The Voluntary Principles address themes such as risk assessment, interactions between companies and public security, including security arrangements, deployment and conduct, consultation and advice, and responses to human rights abuses, and interactions between companies and private security. (Secretariat for the Voluntary Principles on Security and Human Rights, 2017)

⁹ The Global Reporting Initiative (GRI) is an international non-profit organization founded in 1997 that helps businesses and governments understand and communicate their impact on issues such as climate change, human rights, governance and social well-being. In 2016, it launched the first global standards for sustainability reporting to “enable all organizations to report publicly on their economic, environmental and social impacts – and show how they contribute towards sustainable development”. (Global Reporting Initiative, n.d.)

The strategy established the Office of the Extractive Sector CSR Counsellor as a response to civil society demands for an ombudsman, but fell short of expectations because its limited mandate did not include the ability to conduct independent investigation of claims or to compel companies to participate in the non-judicial process (Dougherty, 2016, p. 92). It was criticized as merely encouraging “extractive companies to adopt or sign on to certain intergovernmental and multistakeholder initiatives, establishing, as well, a toothless dispute settlement mechanism (the CSR Counsellor) that ultimately failed to resolve a single dispute between extractive companies and victims of alleged corporate-related wrongdoing” (Simons, 2015, p. 5). Indeed, this “toothless mechanism” provided a dispute resolution mechanism to affected communities only if they could demonstrate that they had exhausted the company’s own dispute resolution procedures (Bodruzic, 2015, p. 138).

Furthermore, despite the fact that Canada was a key supporter of the mandate of the SRSG, the 2009 strategy mentioned the UN “Respect, Protect and Remedy” framework but included no references to its core components (Simons, 2015, p. 4).

In 2012, the Canadian Network on Corporate Accountability (CNCA) issued a press release that called for progress on the national roundtables’ recommendations, in light of continued human rights and environmental damage caused by Canadian companies abroad. It condemned that only 3 of the 27 recommendations made by the Advisory Group had been implemented, as a report commissioned by the Mining Association of Canada revealed (Canadian Council for International Co-operation, 2013, p. 3).

2.3 2014 CSR Strategy

In 2014, the Government of Canada published its most recent CSR Strategy, an “enhanced” strategy supposed to address some of the limitations of the previous one. It introduced new elements, such as a stronger and more effective role for the CSR Counsellor, and a mechanism to incentivize extractive companies to meet the stated expectations and engage in dispute settlement.

The 2014 Strategy, titled "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad," clearly reflects the government's concern about the Canadian extractive sector's reputation abroad. It associates the "Canada brand" with high ethical, social and environmental standards, and portrays Canadian firms as recognized leaders on these issues.

The new strategy emphasizes above anything else the benefits for the companies of engaging in CSR practices. The document alludes to the fact that firms are motivated by profits and that some will prioritize those over local communities' interests¹⁰, and promotes CSR as a way to limit social risks and therefore attract investors. The strategy emphasizes CSR more as a business tool than a way to ensure that local communities' rights are respected and that they benefit from extractive operations.

It is built on four pillars: 1) Promoting and advancing CSR guidance; 2) Fostering networks and partnerships; 3) Facilitating dialogue towards dispute resolution; and 4) Strengthening the environment affecting responsible business practices (Government of Canada, 2014).

In the sphere of dispute resolution, the 2014 strategy does not introduce any new mechanism besides the already existing CSR Counsellor and the National Contact Point (NCP) for the OECD Guidelines¹¹ (which is not mentioned in the 2009 strategy but was established in 2000 (OECD, 2017)), but reinforces the role of the CSR Counsellor. Its mandate remains to advise companies on CSR practices and review them, but an important enhancement is that the new strategy gives the CSR Counsellor the ability to determine, after evaluation of the companies' compliance to CSR standards, whether they are eligible for Government of Canada economic diplomacy. Further, it makes eligibility

¹⁰ "Some corporate leaders understand the intrinsic value of contributing to society over and above job creation and investment wealth. Others will continue to subscribe to more traditional notions of profit and success. Both will find it useful to have credible reporting on the financial impacts of social risk mitigation" (Government of Canada, 2014, p. 8).

¹¹ The National Contact Point is one of the ways that the Guidelines are implemented. Its mandate is to undertake promotional activities, handle inquiries, and provide a mediation and conciliation platform for resolving issues that arise from the alleged non-observance of the Guidelines. (OECD, 2014, p. 2)

for the Trade Commissioner Service, advocacy support, and economic diplomacy, contingent on participation in the non-judicial dispute resolution mechanisms of the CSR Counsellor and the OECD NCP, incentivizing companies to take part in them.

2.4 Limitations of the CSR Strategy

Although an improvement, Canada's enhanced CSR strategy has been criticized for its lack of preciseness and the limitations of the non-judicial dispute mechanisms. For example, it states that the Government "expects Canadian companies operating abroad to respect human rights and all applicable laws, and to meet or exceed widely-recognized international standards for responsible business conduct," but it does not go as far as explicitly stating which activities they expect companies to conduct. It lists six performance and reporting guidelines, but does not layout the specific elements of each of them that companies are expected to respect. Given that each of these guidelines are different in terms of what they prescribe, this conveys to extractive companies, as observed by Penelope Simons, an associate professor at the Faculty of Law of the University of Ottawa who has conducted research on corporate human rights accountability for over a decade that they can "pick and choose among these initiatives and/or the latter's particular requirements and still meet the policy's standard of expected conduct" (Simons, 2015, p. 14).

An important notion is strikingly absent from the strategy: free, prior and informed consent, despite the fact that Canada has ratified the UN Declaration on the Rights of Indigenous Peoples, which refers to the right to free, prior and informed consent (FPIC). The Government encourages Canadian firms to do business that "reflects Canadian values" (Government of Canada, 2014, p. 3), but limits itself to suggesting companies "engage" with stakeholders. The term "engaging" is vague and does not imply an appropriate consultation with local and indigenous communities. Further, nowhere is it explained what exactly is meant by "Canadian values".

The 2014 Enhanced CSR Strategy mentions that the Canadian government will promote the UN Guiding Principles and that these guidelines were co-sponsored by Canada in the Human Rights Council. Nonetheless, it fails to completely align itself with them.

The government lists a series of actions that it encourages companies to take, but a major absent from the list is the expectation that companies should engage in human rights due diligence. The strategy outlines some practices that could form part of a due diligence process and acknowledges that several voluntary mechanisms that it encourages companies to follow have due diligence as one of their core principles. However, given that the Strategy does not require companies to abide by one international guidance, and rather lists six, it leaves the door open for companies to follow one of the guidance that does not promote due diligence.

The Strategy mentions that the Government expects Canadian companies to respect human rights, but the expectation is imprecise and weak in comparison to the concept of human rights due diligence outlined in the UN Guiding Principles. Arguably, some aspects of it, such as communicating impacts and solutions, are mentioned in the recommendations. However, due diligence goes further in that it requires companies to assess the *potential* impact of projects and communicate how these are addressed, and it requires that this be done on an ongoing basis.

In terms of the vulnerable populations mentioned in GP3, the Canadian Strategy, only mentions that “Private sector operations can impact, and be impacted by, security and conflict, human rights issues (including those affecting women and children), the environment, corruption, indigenous rights, local economic conditions, and more” (Government of Canada, 2014, p. 8). It encourages companies to understand local culture and customs, but fails to provide any guidance on how to address the needs of and risks to particularly vulnerable populations.

With regards to denial of public support to enterprises involved in human rights abuses (GP 7), the Canadian government’s enhanced strategy partially fulfills this expectation. The Strategy claims that Canadian firms that do not embody CSR best practices (although those are not fully outlined) or who refuse to participate in dispute resolution mechanisms will no longer be eligible for diplomatic support. It also mentions that such practices “will be taken into account in the CSR-related evaluation and due diligence conducted by the Government of Canada’s financing crown corporation, Export Development Canada (EDC)” (Government of Canada, 2014, p. 12). However, like

Penelope Simons observed, it is unclear how that will impact EDC's support for the company, as "the policy does not go as far as require EDC to refuse or withdraw financing" (Simons, 2015, p. 22).

2.5 Access to remedy

2.5.1 CSR Counselor

In terms of non-judicial grievance mechanisms, the 2014 Strategy provides two: the CSR Counsellor and the OECD National Contact Point (formed in 2000). As previously noted, the CSR Counsellor has been criticized for being "a toothless mechanism," because its mandate does not give it the ability to independently investigate claims. Its role is strictly to bring disputing parties together to attempt to resolve disputes at an early stage and, since 2014, to advise on companies' alignment with CSR Guidelines in order to establish whether or not they are eligible for diplomatic support from the Canadian government.

More problematic even, participation in the CSR Counsellor process is entirely voluntary, which means that companies can withdraw from the process at any time, or refuse to participate altogether. At the time of writing, 6 cases had been brought to the CSR Counsellor, the last one being in July 2013. These 6 cases were all closed without resolution, including 3 that were closed because the company withdrew from the process (Global Affairs Canada, 2017b).

Moreover, the CSR Counsellor cannot impose a remedy or issue any sanctions. This means that, should companies participate in the entirety of the process, remedy would still be contingent on their willingness to provide it, since they cannot be forced to do so.

Despite the voluntary nature of participation in the CSR Counsellor process, the 2014 Strategy introduces a new incentive to participation, namely the threat of withdrawal of diplomatic support from the Government of Canada. This advisory role is a welcome addition, but it is unclear whether it will be sufficient to compel companies to participate. Given that the exact impact on EDC support is not mentioned in the strategy, the

withdrawal of political support may not be sufficient a consequence to incite well-established corporations to engage in non-judicial dispute resolution.

2.5.2 OECD NCP

As provided by the 2014 strategy, if the CSR Counsellor mechanism does not bear any result, the Counsellor will advise the parties to consult the OECD NCP. This mechanism is, like the CSR Counsellor, a voluntary one. Its mandate is to facilitate access to “consensual and non-adversarial procedures, such as conciliation and mediation” (Government of Canada, 2014, p. 12) for disputes related to the implementation of the OECD Guidelines for Multinational Enterprises. Since 2011, the OECD Guidelines include a chapter on human rights, one that is almost identical to the UN Guiding Principles (Ruggie, 2011). It mentions, among others, due diligence.

A major limitation of the OECD National Contact Point is that countries are given a great deal of latitude to determine its composition. Canada’s NCP is composed of an interdepartmental committee formed exclusively of government representatives, some of which come from departments that directly support extractive companies (Simons 27). As a comparison, other OECD states (Denmark, Korea, the Netherlands and Norway) have NCPs that are completely independent, or that include some representatives from outside the government (including Belgium, France, Finland, and Sweden) (OECD 69-71). Norway’s NCP peer review, published in 2014, highlights how its shift to an independent structure in 2011 “increased the credibility of the NCP and decreased the direct involvement of the government in its daily performance” (Peer Review Delegation, 2014, p. 2). Such peer reviews, conducted by representatives from two to four NCPs, serve to identify strengths and areas of improvement and help the NCP under review to operate in a more visible, accessible, transparent and accountable manner.

The location of the NCP is also important with regards to public perception of transparency and impartiality. Like an OECD report observes, “situating an NCP within an investment promotion agency or one whose role is to foster economic relationships between the government and companies, risks the perception among some stakeholders that the NCP will act preferably towards enterprises” (OECD, 2016, p. 72). The Canadian NCP is situated within the International Trade Portfolio of the Department of Global Affairs

Canada, an element which, taken together with the lack of outside representation, can negatively influence the public perception of impartiality.

In this regard, 19 OECD states have established a multi-stakeholder advisory body to assist the NCP in its tasks, and six have established an oversight body. These two mechanisms are generally multi-stakeholder in nature and one of their roles is to monitor the effectiveness of the OECD Contact Point and ensure that procedures are followed. Canada has created none of the above.

A general limitation of NCPs is that countries are given wide discretion regarding the procedures on how to deal with complaints. For example, NCPs are not required to make the filing of a complaint or the names of the parties public. Nor are they required to keep the parties informed about the progression of their case, except if, after the initial assessment, they decide not to pursue the complaint further (Simons, 2015, p. 27). The website of the Canadian NCP does not provide a registry of the complaints it has received. Estimates put the total at 29 complaints between 2000 and 2016, 19 of which were led by the Canadian NCP, the remainder being led by other NCPs (Above Ground Mining Watch OECD Watch, 2016, p. 2)s.

Both the CSR Counsellor and the OECD NCP lack the power to independently investigate facts, require remediation for victims, or make any binding recommendations (Maheandiran, 2016, p. 253; Simons, 2015). In line with their voluntary and non-adversarial nature, remediation is dependent on mutual agreement between the two parties, a condition that, together with the fact that none of these mechanisms can independently investigate claims, can be an obstacle to satisfactory remedy. More strikingly, “NCPs are not required to follow up on whether any such agreement between the parties has been implemented and there are no consequences [provided by the OECD] for companies that fail to comply with an NCP’s recommendations” (Simons, 2015, p. 29). The lack of independence, opacity, and lack of investigative and enforcement power are some of the limitations that might be addressed in Canada’s NCP peer review that is scheduled for 2018.

2.5.3 Operational-level Grievance Mechanisms

Another non-judicial tool that is sometimes available to members of a community affected by Canadian mining operations is companies' Operational-level Grievance Mechanism (OGM). The establishment of such is recommended in the IFC's Performance Standards and the UN Guiding Principles, but is not mandatory as per Canada's CSR Strategy.

An important advantage of OGMs is their accessibility for mining communities. They can also provide fast resolution of complaints and can help build trust between communities and companies, provided that companies address community complaints and resolve them in a respectful way. However, this mechanism is not suited to resolve allegations of a criminal nature, and should always be accompanied by the assurance that the complainant can escalate the complaint to a judicial mechanism should a resolution not be reached in a reasonable timeframe (Mining Association of Canada, 2015, p. 14). Unfortunately, research has shown that OGMs can sometimes be used to thwart legal action. In at least two instances, victims were offered some remedy in return for signing legal waivers (Coumans, 2017, p. 2).

Another important limitation is in case of factual disagreement between parties. If the victims and the company cannot agree on basic facts, it is questionable whether a company-based grievance mechanism will be able to provide satisfactory redress for victims (Maheandiran, 2016, p. 252).

The International Commission of Jurists (ICJ) acknowledges the current limitations of OGMs. Poor design or poor implementation of these latter can result in further problems, and aggravate the harm caused by business enterprises. The Commission is concerned by recent cases in which people affected by a company's project were not even aware of the existence of an OGM. In other instances, the procedures were unfair or unclear and the outcomes inadequate. More importantly, some OGMs "seem to stand in the way of meaningful access to justice for adversely affected people" (International Commission of Jurists, 2017). To address these problems, the ICJ announced last February the establishment of an expert panel of jurists, composed of retired judges,

academics and legal practitioners supported by civil society organizations, lawyers and academics, to study and provide guidance to improve the effectiveness of OGMs.

2.5.4 Judicial mechanisms

With regards to judicial mechanisms, the 2014 Strategy mentions that the government's efforts regarding prevention and resolution of disputes "will include information on local processes, the use of which will be encouraged in the first instance. If local processes are unavailable or have not succeeded, guidance on Canadian and international mechanisms will be made available to relevant parties" (Government of Canada, 2014, p. 11). This suggests that affected communities will have to prove that their grievances cannot be solved in a local court. Such a burden can prove problematic in countries with functioning but weak judicial systems, or in which the government is highly supportive of the extractive sector because of the important investment that mining companies bring.

Despite the difficulties associated with bringing a case to court, given the limitations of the CSR Counsellor and OECD NCP processes previously outlined, some communities choose to do so to get access to remedy. Despite being a lengthy and costly process, it is presently the only option that plaintiffs have to compel companies to participate and the only way to get companies to be forced to remedy should they be found liable for human rights violations.

Ideally, plaintiffs would be able to bring cases before the host country's courts. However, weak judicial institutions or lack of confidence in the host country's institutions can push alleged victims to seek remedy in the companies' home country. In cases that take place in countries with a reliable justice system, plaintiffs may be able to seek remedy in the host state, but the nature of transnational corporations creates the risk of the local subsidiary being undercapitalized, undermining plaintiffs' ability to be compensated. This happens when companies undercapitalize their local subsidiary or transfer assets out of the country in order to reduce potential liability (Simons, 2015, p. 30). In that case, even if the plaintiffs were to win the case, "there may not be assets in the [subsidiary's] home country against which the judgment can be enforced" (Maheandiran, 2016, p. 254).

Pursuing justice in the corporation's home state also proves difficult for alleged victims of human rights violations. In terms of practical barriers, high costs, difficulty in securing legal representation, language barrier, length of procedure, and evidentiary issues are just some of the obstacles that alleged victims have to face.

There are also a number of legal barriers. First of all, plaintiffs need to demonstrate that the court has jurisdiction to hear the case (Maheandiran, 2016, p. 254). For that, they need to demonstrate that the case has "a real and substantial connection" with the province in which it is being brought, since civil litigations are a provincial matter (*Club Resorts Ltd. v. Van Breda*).

The case of *Club Resorts Ltd. V. Van Breda*, which was litigated in Ontario, outlines eight factors that the court must consider in determining whether a real and substantial connection exists. The case consisted in Ms. Van Breda, at the time an Ontario resident, suing the resort company for breach of contract and negligence that led to her suffering serious permanent injuries. When the defendants tried to establish that Ontario had no jurisdiction over the action, the court outlined the eight factors that must be considered by the court in determining jurisdiction: 1) The connection between the province and the plaintiffs' claim; 2) The connection between the province and the defendants; 3) Unfairness to the defendant in assuming jurisdiction; 4) Unfairness to the plaintiff in not assuming jurisdiction; 5) Involvement of other parties to the suit; 6) The court's willingness to recognize and enforce a similar judgment against a domestic defendant rendered on the same jurisdictional basis; 7) Whether the case is international or interprovincial in nature; and, 8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere (*Club Resorts Ltd. V. Van Breda*).

If, after applying these factors, the court determines that it has jurisdiction over the case, it can still decline jurisdiction if the defendant establishes the doctrine of *forum non conveniens*, or in other words, that the present court is not the most appropriate forum in which to decide the issue (Maheandiran, 2016, p. 259). On the basis on *forum non conveniens*, a Canadian court can dismiss a case if it judges that there is another court "with a closer connection to the matter and that is therefore better placed to hear the case (typically the host state)" (Advisory Group, 2007, p. 43). This can leave plaintiffs with no

access to remedy if, for one of the reasons previously outlined, they feel like they cannot bring their grievance before national courts.

One way that Canadian courts can assume jurisdiction even if a real and substantial connection between the case and the province in which the case is being brought has not been established is under the forum of necessity doctrine, namely if the plaintiff would be unable to file the case in any other jurisdiction. However, there are cases in which the court declined to exercise this discretion and refused to hear the case despite indications that no other forum was available to plaintiffs. This is the case of *Anvil Mining*, in which the Québec Court of Appeal dismissed the case on the basis that “the test for jurisdiction could not be satisfied” and that the plaintiffs “had failed to meet its burden under the “forum of necessity” doctrine” (McCarthy Tétrault’s Mining Practice Group, n.d.).

The Association Canadienne contre l’impunité filed a class action against Anvil Mining, a Canadian mining company headquartered in Perth, Australia, operating a silver and copper mine in the Democratic Republic of Congo (DRC). The Association argued that, in October 2004 in the DRC, Anvil helped the DRC’s military repression of an insurrection in the town of Kilwa by providing logistical support. Despite the fact that previous attempts to bring the case before courts in Australia and in the DRC had proved unsuccessful, and that the Superior Court of Quebec found that it had jurisdiction over the case (Cour supérieure, 2011), the Quebec Court of Appeal ruled that the alleged victims could have proceeded before the Australian court and dismissed the case (Business & Human Rights Resource Centre, n.d.; Cour d’appel, n.d.).

The consequences of the application of the *forum non conveniens* doctrine was raised during the 2006 roundtables, and some presenters highlighted the fact that the doctrine is not applied the same way in other countries, opening the discussion as to whether Canada should consider the consequences of the current application of the doctrine, and other possible avenues. In Australia for instance, a court will only dismiss a case where it can be established that the Australian court is the “clearly inappropriate forum” (Advisory Group, 2007, p. 43). The test still rests on a set of factors, but seeks to establish if the Australian system is an appropriate forum, rather than if there are other forums that would be more appropriate. As Bernadette Maheandiran notes, this

application of the test makes access to Australian courts easier for plaintiffs and “also prevents the courts from engaging an uncomfortable exercise in which they analyse another system” (Maheandiran, 2016, p. 264). The Advisory Group mentions in its final report that “These discussions led the Advisory Group to questions about whether the current legal regime strikes the appropriate balance between access to justice in Canada and respect for the jurisdiction of foreign courts” (Advisory Group, 2007, p. 43).

The next obstacle that plaintiffs face is that, in order to bring a civil action in Canada against a Canadian company for actions that were taken by its subsidiaries abroad, they need to establish that the parent company is responsible for the acts of its subsidiary. Penelope Simons explains that proving this is difficult, for “There is, at present, no cause of action in Canada that attributes liability to a Canadian parent for the acts of another separate legal person even where the latter is legally controlled by the parent company” (Simons, 2015, p. 34). Plaintiffs have to demonstrate that the subsidiary is the “agent of the parent” or that the subsidiary was “completely dominated and controlled and being used as a shield for fraudulent or improper conduct” (Simons, 2015, p. 35). This proves very complex to do given the common practices of the industry which consist in letting junior companies take the risks of exploration, and result in the multiplication of junior companies and a complex pattern of sales, acquisitions and merges.¹² This, in turn, blurs the notion of companies’ citizenship and makes proving the responsibility of the parent company increasingly difficult.

The complex ownership pattern also complicates the establishment of duty of care, or the company’s legal obligation to avoid acts or omissions that could foreseeably cause harm to others. As explained by Crystal, Imai and Maheandiran, “in Canada and in many other common law jurisdictions, duty of care is established when the court determines that (1) the harm suffered is “reasonably foreseeable” as a result of the defendant’s conduct; and (2) there is a relationship of “proximity” between the defendant and the

¹² “Typically, very small junior companies conduct initial exploration. These companies are often acquired by larger, but still relatively small companies during late exploration and permitting. Once the mine is successfully permitted, typically much larger companies come in to safely bring the mine through production and closure.” (Dougherty 89)

claimant, such that the defendant should be required to contemplate the claimant's legitimate interests when acting" (Imai, Maheandiran, & Crystal, 2012, p. 22).

Establishing duty of care is extremely difficult because day-to-day operations, including hiring and training employees, are often conducted by a subsidiary. Many instances in which plaintiffs have claimed to have suffered human rights abuses also involved third-party companies such as security companies. These are often hired by subsidiary companies as well, making the parent company's responsibility even harder to establish.

Because Canadian parent companies are so removed from daily operations, it is difficult to prove that they have a responsibility in the actions that harmed the plaintiffs and that they had responsibility to take the necessary measures to avoid causing harm to the plaintiffs. The case of Copper Mesa exemplifies the difficulty in establishing duty of care. In 2009, three Ecuadorians alleged that they were threatened and physically assaulted by security personnel contracted by Copper Mesa. The plaintiffs sued the TSX for negligence and two company directors for raising funds to finance Copper Mesa's security personnel. They argued that both the TSX and the directors were aware of the likelihood of violence and that they had a duty of care towards the individuals and communities located around the mine. The court dismissed the plaintiffs' claim, finding that "neither the TSX nor the company's directors had sufficient connection to the plaintiffs to establish an enforceable legal obligation" (Above Ground, 2017, pp. 2–3; Imai et al., 2012, p. 23)

Choc v Hudbay

The cases of *Anvil Mining* and *Copper Mesa* are two illustrations of the barriers that thwart access to Canadian courts. To this day, there are eight claims regarding allegations of environmental or human rights abuses by Canadian extractive companies abroad that have been filed in Canada. On top of *Anvil Mining* and *Copper Mesa*, these claims are: *Recherches Internationales Québec v. Cambio Inc.*, *García v Tahoe Resources*, *Araya v Nevsun Resources Ltd.*, and *Choc v Hudbay*, *Chub v Hudbay*, and *Caal v Hudbay* (Above Ground, 2017). The only case that has managed to move beyond

the pleadings stage is that composed of the three claims against Hudbay (Simons, 2015, p. 35).

In this precedent-setting case, the plaintiffs based their case not on the parent companies' responsibility for the actions of its subsidiary, but on the parent company's own liability for negligence. Mayan Q'eqchi' from El Estor, Guatemala brought three related actions alleging that the security personnel employed in Hudbay's Fenix project 1) shot to death one plaintiff's husband, Adolfo Ich; 2) shot and left another plaintiff, German Chub Choc, paraplegic without the use of his right lung; and 3) along with police and military gang-raped 11 of the plaintiffs during the forceful expulsion of Mayan Q'eqchi' families from their village (Superior Court of Justice - Ontario, 2013).

Hudbay sought three motions to dismiss the case on the basis of *forum non conveniens*, that no cause of action existed in Ontario, and that one claim was brought outside the limitation period. The defendants finally dropped their motion on *forum non conveniens* shortly before the hearing (Simons, 2015, p. 35).

The plaintiffs' argument was that Hudbay, the parent company, was directly liable for its own acts and negligence that led to human rights abuses. The defendants argued that "there is no recognized duty of care owed by a parent company to ensure that the commercial activities carried on by its subsidiary in a foreign country are conducted in a manner designed to protect those people with whom the subsidiary interacts" (Superior Court of Justice - Ontario, 2013). Amnesty International, which was granted intervenor status, submitted that "transnational corporations can owe a duty of care to those who may be harmed by the activities of subsidiaries, particularly where the business is operating in conflict-affected or high-risk areas, such as Guatemala" (Superior Court of Justice - Ontario, 2013).

In a precedent-setting decision, the Ontario Superior Court of Justice dismissed Hudbay's motions, and found that "the plaintiffs have properly pleaded the elements necessary to recognize a novel duty of care". The Court dismissed all motions to strike the actions. The lawsuits are ongoing. Between September and December 2016, Hudbay delivered internal corporate documents that it was required to turn over to be reviewed by

the plaintiffs' lawyers (Klippensteins, 2017). As it has been highlighted by experts, "the trial will involve hard questions of legal policy and law in establishing a novel duty of care" (Fraiberg, Dattu, Gelowitz, & Coleman, 2013). Regardless of the outcome, this case has the potential of significantly improving access to Canadian courts. It reflects "a general trend of Canadian courts taking a broader jurisdictional view outside the country's borders" (Gerrity, 2016, p. 21).

This case, as well as the ICJ's initiative, has the potential of greatly improving access to justice for victims of human rights abuses by Canadian mining corporations. Nonetheless, many obstacles in terms of access to Canadian courts and efficacy of non-judicial mechanisms remain. As they stand, the CSR Counselor and the NCP are inadequate mechanisms, and OGDs do not constitute a consistent tool, as they vary from a company to the other and are not even required by the Canadian CSR Strategy. As for judicial mechanisms, numerous legal barriers complicate access to Canadian court for foreign nationals. The Canadian government needs to take the appropriate measures to ensure effective access to justice and remedy for victims of corporate abuse.

3. EFFORTS TO IMPLEMENT STRICTER COMPLIANCE MECHANISMS

Chapter 3 outlined the numerous hindrances that stand in the way of effective access to justice for alleged victims of human rights violations by Canadian mining companies, in Latin America and elsewhere. The following chapter will detail the various recommendations that have been made since 2005 to complement or replace CSR policies, by a parliamentary committee, roundtables, and bills in order to facilitate access to remedy and more generally to increase corporate accountability and reduce risks of human rights abuses,

3.1 Standing Committee on Foreign Affairs and Trade

In 2005, the Subcommittee on Human Rights and International Development, established by the Standing Committee on Foreign Affairs and International Trade to "inquire into matters relating to the promotion of respect for international human rights and the achievement of sustainable human development goals" issued a report. In it, it noted that "mining activities in some developing countries have had adverse effects on local communities, especially where regulations governing the mining sector and its

impact on the economic and social wellbeing of employees and local residents, as well as on the environment, are weak or non-existent, or where they are not enforced” (Standing Committee on Foreign Affairs and International Trade, 2005, p. 1). It also expressed concern regarding the fact that “Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of indigenous peoples” (Standing Committee on Foreign Affairs and International Trade, 2005, p. 2).

The subcommittee issued a series of recommendations. Among others, it urged the government to make “Canadian government support – such as export and project financing and services offered by Canadian missions abroad – conditional on companies meeting clearly defined corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments” (Standing Committee on Foreign Affairs and International Trade, 2005, p. 2). As previously outlined, political support was made conditional on respect for CSR and human rights standards only in 2014, and neither strategy makes clear the conditionality of EDC support. Also, neither the 2009 nor the 2014 Strategy mentions human rights impact assessment.

The report also called on Canada to “Establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies” (Standing Committee on Foreign Affairs and International Trade, 2005, p. 3). The Government of Canada did not act on these recommendations by drafting legislation that would address the Committee’s concerns, but rather called for a series of national roundtables on CSR.

3.2 National Roundtables on Corporate Social Responsibility

Between June and November 2006, an advisory group, composed of members of the industry, civil society and academia received over 100 written submissions and heard over 150 oral presentations over the course of the four National roundtables on CSR. It published its report in March 2007.

The Advisory Group's central recommendation was for the Government of Canada to establish a CSR framework that Canadian extractive companies operating abroad would be expected to follow. Although this main recommendation was fulfilled by the creation of the 2009 CSR Strategy, many of the specific recommendations made by the Advisory Group were not implemented. Importantly, the strategy only "endorsed" the Global Reporting Initiative, whereas the Advisory Group recommended that the Framework should include "CSR reporting *obligations* based on the Global Reporting Initiative, or its equivalent" (emphasis added, Advisory Group, 2007, p. 6). Furthermore, the Advisory Group recommended the establishment of an independent ombudsperson with a mandate to advise, investigate facts and report on complaints about Canadian extractive sector's operations abroad. As previously explained, the 2009 Strategy fell short of expectations by establishing the CSR Counsellor, a mechanism unable to independently investigate facts.

3.3 Bill C-300

Unsatisfied with the 2009 CSR policy, liberal MP John MacKay, long-time advocate for an ombudsman for the extractive sector, sponsored the private members' Bill C-300 "Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act". Its purpose was to "ensure that corporations engaged in mining, oil or gas activities and receiving support from the Government of Canada act in a manner consistent with international environmental best practices and with Canada's commitments to international human rights standards" (House of Commons of Canada, 2009).

The bill proposed to introduce corporate accountability standards based on the IFC's social and environmental standards and the *Voluntary Principles on Security and Human Rights* that would incorporate "human rights provisions that ensure corporations operate in a manner that is consistent with international human rights standards" (House of Commons of Canada, 2009). It also proposed to amend the Export Development Act, the Department of Foreign Affairs and International Trade Act and the Canada Pension Plan Investment Board Act to make political and economic support to, as well as investment in, extractive companies contingent on compliance with these standards. Finally, the bill proposed to require the government to investigate claims of

noncompliance with the standards. According to John MacKay, the bill was purposely crafted to avoid requiring the creation of any new agency or new expenditures which would make its passing more difficult by requiring a royal recommendation. As such, it did not provide for the creation of an ombudsman office (“Bill C-300 (Historical) Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act,” n.d.).

During the March 2009 second reading of the bill, Conservative MP Ron Cannan outlined the conservative government’s preference for voluntary compliance mechanisms. He acknowledged that more could be done to help the Canadian extractive sector to manage the environmental and social risks associated with its activities abroad but criticized the bill for leaving “the legal effect of these guidelines unclear”. He rejected the bill for not being “the right approach to take” and “redundant”. Conservative MP Ed Holder also opposed to the bill on the basis that “this legislative framework would affect the ability of the government departments, agencies and crown corporations to fulfill their mandates, and its compulsory nature would entail a rigidity that would not be beneficial in today's economic climate” (House of Commons of Canada, 2009a).

The Bloc Québécois, on the other hand, welcomed the bill as a “step in the right direction” and promised to support it. It condemned the federal government’s “principle of laissez-faire, preferring a voluntary approach,” affirming that it is not possible “to simply rely on companies' good faith”. It even described the bill as too narrow and expressed that it would like to see a stricter regulation passed. Notably, it called for the establishment of an ombudsman.

The NDP agreed, declaring:

“We know extractive industries are often able to take advantage of political cultures in developing countries that do not accept or respect our domestic principles of democratic accountability and transparency. Centralized decision-making at the executive level that can offer extraction rights in exchange for capital in many developing companies can greatly infringe upon human rights and environmental sustainability of localized populations.”

It also described the bill as too narrow and too weak in its enforcement, and suggested amendments, including the establishment of an independent ombudsman.

The bill was defeated in October 2010 by 6 votes, with all MPs following the party line (Conservatives voting against the bill, NDP, Liberal and Bloc Québécois voting in favour) and 2 paired Conservative MPs and two Bloc Québécois MPs abstaining (House of Commons of Canada, 2010).

The defeat of the bill was highly decried by civil society organizations such as Amnesty International, the Canadian Network on Corporate Accountability (CNCA), a network of 23 civil society organizations, Mining Watch, the Canadian Council for International Cooperation, and United Steelworkers National, Canada's main mining union. "Passing Bill C-300 would have boosted Canada's national reputation and demonstrated that we take human rights seriously," said Alex Neve, secretary general of Amnesty International's Canadian chapter (Whittington, 2010). Catherine Coumans, of Mining Watch Canada, said it was a "lost opportunity" (Canadian Network on Corporate Accountability, n.d.).

3.4 Bills to Amend the Federal Courts Act

In 2009, another bill regarding corporate accountability was introduced in the House of Commons. NDP MP Peter Julian introduced Bill C-354, which was in fact a reiteration of 2007 Bill C-492 "An Act to amend the Federal Courts Act (international promotion and protection of human rights)". Its purpose was to "expressly permit persons who are not Canadian citizens to initiate tort claims based on violations of international law or treaties to which Canada is a party if the acts alleged occur outside Canada. It also sets out the manner in which the Federal Court and the Federal Court of Appeal can exercise their jurisdiction to hear and decide such claims" (House of Commons of Canada, 2007, 2009c). If passed, the bill would have given jurisdiction to the Federal Court over all civil cases brought by a person who is not a Canadian citizen, and which arise from a violation of international law or a treaty to which Canada is a party that occurred outside of Canada. It would have also made the criteria for the court to refuse jurisdiction stricter. The bill mirrored the Alien tort claims Act in the United States, which allows foreigners to bring cases of gross human right abuses committed outside of the

United States in violation of international law or a treaty to which the United States is a party.

The motion was adopted, and the bill was read a first time. In 2011, at the 41st parliament, the bill was re-tabled under the new number C-323 (House of Commons of Canada, 2011). In December 2016, it was re-tabled again at the 42nd parliament under the number C-331. At that point, a number of changes were introduced. Notably, the bill was modified to give jurisdiction to the Federal Court in all civil cases in which a remedy is sought in respect of “an act *or omission*” that “arises from a violation of international law or a treaty to which Canada is a party” (emphasis added, House of Commons of Canada, 2016). The bill was first read and printed on December 16, 2016, and is now dormant (“Bills for the 42nd Parliament, 1st Session,” n.d.).

3.5 Bill C-584

In March 2014, NDP MP Ève Péclet introduced Bill C-584 entitled “Corporate Social Responsibility of Extractive Corporations Outside Canada Act”. It sought to ensure that Canadian extractive companies “respect Canada’s commitments under international law and the International Bill of Rights,” as well as to create the Office of the Ombudsman. The bill would have changed the title of the CSR Counsellor to Ombudsman and given it the mandate to create guidelines respecting the best practices to be followed by extractives companies in their operations abroad, and monitor the corporations’ extractive activities to ensure compliance with the guidelines (House of Commons of Canada, 2014). Those guidelines would take into account the OECD Guidelines for MNE, the IFC’s Performance Standard on Environmental and Social Sustainability, the UN Guiding Principles on Business and Human Rights, and the National Roundtables Advisory Group Report. The bill would have also created a duty to report for corporations.

Similar to Bill C-300, Bill C-584 received considerable backlash from the Conservative Party. Erin O’Toole declared: “This is a bill that has tapped a number of themes that keep surfacing from the opposition members from time to time, who show a profound lack of understanding of the extractive industry here in Canada and globally”. The Liberals supported the bill, deeming it an opportunity for the House of Commons to “play a role in terms of ensuring there is more corporate responsibility when it comes to

international affairs, especially in the area of development proposals and mining”. More particularly, they expressed support for the creation of the Office of the Ombudsman. Moreover, Liberal MP Kevin Lamoureux criticized the Conservative government for not being “open, from a legislative perspective, to playing a stronger international leadership role” (“Bill C-584 (Historical) Corporate Social Responsibility of Extractive Corporations Outside Canada Act,” 2015).

On October 1st, 2014, the Bill was defeated, with a vote of a 150 opposing a second reading of the bill and its referral to the Standing Committee on Foreign Affairs and International Development against 127 in favour. All the votes against were from Conservative MPs and one independent, and all the votes in favour were from the Liberals, NDP, Bloc, and Green Party (“Vote #246 on October 1st, 2014,” 2014).

Despite the unsuccessful attempts at passing stricter legislation to prevent human right violations and hold companies accountable, the close votes signal the concern of politicians and their constituents for this issue. Demands for stricter regulation indicate that at least a portion of Canadian society considers the actual mechanisms as insufficient to prevent human rights abuses and ensure effective access to justice. The breakout of the votes, with Liberals consistently voting in favour of such bills, also bears hope that the now Liberal government will take stronger action and consider ways of replacing or improving the mechanisms in place.

4. CONCLUSION

Presently, with the CSR Strategy and its associated CSR Counsellor and OECD NCP, the government is ill-equipped to ensure Canadian corporations comply with internationally recognized human rights guidelines and Canada’s international obligations. The two non-judicial grievance mechanisms are also too weak to ensure effective access to remedy for victims, and too many obstacles stand in the way of plaintiffs to allow them effective access to Canadian courts.

At the moment of their release, the 2009 and 2014 strategies did not measure to civil society’s demands. The 2009 Strategy was notably more limited than the recommendations that had been made by the parliamentary committee, the roundtables

and the Advisory Group report. The 2014 one, albeit introducing some improvements such as the stronger role for the CSR Counsellor, still presents some important limitations. Particularly, it does not outline the specific guidelines that companies are expected to respect, and it fails to address the issue of access to remedy.

Although states are presently not required to exercise extraterritorial jurisdiction and regulate the operations of their extractive companies abroad, human rights treaty bodies and Special Procedures, including Special Rapporteurs and Independent Experts, encourage states to do so. The Government of Canada's large support for the mining industry is another compelling reason to introduce stricter regulation, as it has a considerable impact on the government's reputation both at home and abroad.

Despite the tools available to host states to ensure respect for human rights and benefits from mining operations to their population, such as mining reform, taxation and royalty systems, Canada cannot solely rely on their good faith and capacity to do so. Putting apart the possibility of host states willingly enforcing lax regulations to attract mining investment, several examples reveal that host states are importantly restricted in their capacity to regulate mining operations in their own country, among others by investor-state dispute settlement, which allow private foreign investors to sue governments in international tribunals.

One of such instances is the Pacific Rim lawsuit against El Salvador, in which the Vancouver-base mining company sued the government of the small central American country for US\$301 million under the US-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) when El Salvador refused to issue the company a mining permit. Although Pacific Rim lost the case, El Salvador spent seven years and \$8 million into their defense, an amount which, even if reimbursed, will not have been spent elsewhere in the meantime (Dougherty, 2017). This lawsuit could also potentially intimidate other small nations into complying with corporations' demands, by fear of having to engage in a similar lengthy and costly lawsuit as El Salvador. The corporate investment rights regime, such as enshrined in the DR-CAFTA, has the potential to undermine host countries' capacity to regulate mining operations on their territory (Anderson, Pérez-Rocha, & Dougherty, 2016, p. 229).

In light of this, it is Canada's duty to ensure that Canadian mining activities are carried out in conformity with Canada's international human rights obligations. Doing so will improve the mining sector's and Canada's reputation overall, on top of building a competitive advantage, like it was wisely written in the CSR strategies. Ensuring that Canadian corporations respect human rights is an opportunity to reattach a positive connotation to the expression "doing business the Canadian way".

4.1 Recommendations

1. Canada should actively take part in the negotiations of the Intergovernmental Working Group on Transnational Corporations and other business enterprises with respect to human rights

At its 26th session, on 26 June 2014, the Human Rights Council adopted Resolution 26/9 which "*Decides* to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (Human Rights Council, 2014, p. 2).

The Working Group has since held three sessions, the last having taken place last October. Canada has been notably absent, despite the participation of some likeminded countries such as Australia, Finland, Norway, and UK in the second and third session (Espinosa, 2017, p. 24; Long, 2017, p. 25). At the third session, the Chairperson-Rapporteur of the Working Group had prepared elements for a draft legally binding instrument, and substantive negotiations on these draft elements started, as provided by Resolution 26/9.

Canada should take part in future negotiations starting as soon as possible to signal commitment and leadership in the sphere of human rights, and to ensure that it has a say in the development of the legally binding instrument, in hopes of ratifying it.

A concern of likeminded countries was that this process would undermine the implementation of the UN Guiding Principles (European Union, 2016), but the Special Rapporteur underscored at the Working Group's first session "that the Guiding Principles

should continue to be used as an interim framework while developing the platform for advancing the prevention and remedy of corporate-related human rights abuses” (Espinosa, 2016, p. 3). Further, the UN Guiding Principles now provide a solid foundation for a treaty negotiation.

As this concern has been addressed and likeminded countries are involved in the Working Group’s work, eliminating the possibility of Canada becoming alienated should our allies oppose this initiative, Canada should actively participate in the negotiations. Failure to do so will risk Canada being perceived as a laggard and seeing the development of an instrument that does not encompass its input, making it harder to ratify in the future.

2. Canada should develop a comprehensive National Action Plan to implement the UN Guiding Principles

The development of a legally-binding framework is a lengthy process. In parallel with its participation in this process, Canada should take intermediary measures to improve respect for human rights.

Currently, Canadian efforts with regards to the UN Guiding Principles on Business and Human Rights are limited to their mention and endorsement in the country’s CSR Strategy. To this date, 14 countries have published National Action Plans (NAPs) and 20 others have committed to do so, but Canada is not one of them (Seck, 2017, p. 11). The development of a NAP is one of the preliminary recommendations that emerged from the UN Working Group on Business and Human Rights’ visit to Canada (OHCHR, n.d.).

Although the complete report from the Working Group’s visit will provide better insight on the areas of improvements for Canada, the following inclusions would be in order: how to further business respect for human rights nationally and internationally, how to ensure effective reporting and transparency, how to address gender equality issues, and how to improve access to judicial and non-judicial remedies. The drafting of the NAP should include extensive consultations with all stakeholders involved, including, inter alia, representatives from the extractive sectors, local and international NGOs, Indigenous

people, academia, and members of communities affected by Canadian mining operations abroad¹³.

3. Canada should establish the Office of the Ombudsman

Linked with the recommendation above, the Government of Canada should create the Office of the Ombudsman to improve corporate accountability and effective access to redress. Demands for the establishment of an ombudsperson have not died down since its first mention in 2007. Its establishment would palliate some of the limitations of the CSR Counsellor and the OECD NCP. Encouragingly, Liberal MP John Mackay recently stated that he was “reasonably satisfied” with the government moving “quite rapidly” on a proposal (Mazereeuw, 2016).

Particularly, the Office of the Ombudsman should establish clear guidelines, as opposed to the simple outlining of internationally recognized sets of guidelines that is presently contained in the CSR strategy, and monitor corporations’ extractive activities to ensure that they comply with these preestablished guidelines. Moreover, it should investigate complaints and recommend sanctions, two important elements that are outside of the mandate of the existing non-judicial mechanisms.

4. Canada should make EDC financing contingent on respect for CSR Guidelines and improve transparency

Canada must ensure that projects receiving government support, including through Crown corporations and credit agencies, respect human rights, including by abiding by clear pre-established CSR Guidelines. The 2014 Strategy is unclear as to whether failure to embody CSR best practices or refusal to participate in the OECD NCP or CSR Counsellor mechanisms will result in withdrawal of EDC’s support. In order to be consistent with the withdrawal of political and economic support through embassies, the Government of Canada must also ensure that financing, including through EDC, is

¹³ The UN Guiding Principles do not concern the extractive sector only but all business enterprises. For this reason, consultations should also include representatives of relevant industries and members of civil society affected by or working in relation to those industries. For the purpose of this paper, the list is limited to extractive industry’s stakeholders.

withdrawn in cases where companies fail to implement the CSR Guidelines or refuse to partake in non-judicial grievance mechanisms.

EDC must also improve its disclosure policy to improve transparency and public accountability, possibly through the amendment of the Export Development Act. EDC does not presently disclose information about its project review process¹⁴, and articles in the Export Development Act regarding corporate competition policy effectively undermine the application of the Access to Information Act to EDC. EDC should publicly release documents used to evaluate company eligibility for financing, including: standards used to benchmark projects; project categorization rationale; social, environmental and human rights risk assessments; mitigation measures required by EDC; and ongoing monitoring of project performance and compliance with standards.

5. Canada should pass legislation to improve access to Canadian courts

Many hurdles complicate access to Canadian courts for people outside of Canada that have been harmed by a Canadian company's operations, one of them being the application of the doctrine of *forum non-conveniens*. To ensure effective access to justice, the Government of Canada should pass legislation that would clarify that Canadian courts are an appropriate forum to hear cases of human rights violations by Canadian corporations abroad, such as Bill C-331 to amend the Federal Courts Act. The Bill was first heard in the House of Commons in December 2016 and is now dormant. Generalized Liberal support for the bill, added to support from NDP MPs (the bill was introduced by NDP MP Peter Julian) would ensure that the bill reaches Committee Consideration.

¹⁴ EDC published a 4-page document entitled "Understanding EDC Project Review Process" (<http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Documents/project-review-booklet.pdf>) but does not release project review information about specific projects.

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