

Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations

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Petitioner

Canadian Network on
Corporate Accountability



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Summary of the Submission

In October 2013, the Commission heard from the Working Group on Mining and Human Rights in Latin America concerning systematic Indigenous and human rights violations experienced by mining-affected communities. They profiled 22 case studies prepared by civil society groups in Latin America. Their report points to a troubling pattern of abuses involving Canadian companies with strong support from the Canadian state. We wish to contribute our perspective as Canadian organizations who work with mining-affected communities in the region and who work for corporate accountability and respect for Indigenous and human rights at home. For example, the “Open for Justice” campaign¹ calls for legislated access to Canadian courts and the appointment of an independent ombudsman to provide vehicles for redress when Canadian companies are involved in abuses abroad. In June, 2014, the Permanent Peoples Tribunal held a session on the Canadian Mining Industry in Latin America and concluded that Canada has failed to take steps to address accountability issues related to its promotion of mining.² These recommendations address corporate and Canadian state responsibilities.

We also understand that in March 2015, the Departamento de Justicia y Solidaridad del Consejo Episcopal Latinoamericano (DEJUSOL) will address Canada’s extraterritorial responsibility for Canadian mining companies in a hearing before the Commission.

Our submission will argue for the adoption of measures to address two issues:

- (i) Canada’s promotion of the large-scale mining industry in Latin America through political, economic and legal support, while failing to put into place effective mechanisms to ensure corporate and state accountability.
- (ii) Voluntary standards and measures fail to provide effective recourse and remedies for victims of the negative human rights and environmental impacts of mining.

Effective mechanisms are essential to first prevent, and then to remedy harms taking place given the serious threat that this industry represents to individuals and populations. The adoption of extraterritorial regulatory provisions is in line with recommendations made specifically to Canada by United Nations treaty bodies as well as other authoritative instruments such as the Guiding Principles on Business and Human Rights and the Maastricht Principles on Extraterritorial Obligations of States

¹ <http://www.miningwatch.ca/openforjustice/>

² The Permanent Peoples’ Tribunal (PPT) was established in 1979 in Bologna, Italy. Founded by Italian lawyer and Senator Lelio Basso, the Tribunal was formally inaugurated by socially committed lawyers, human rights defenders and Nobel Peace Prize recipients. The PPT extended the scope of existing international opinion tribunals by creating a permanent instrument for the promotion of human rights. For the preliminary verdict of the tribunal, see online: <http://www.tppcanada.org/wp-content/uploads/Preliminary-Verdict-Permanent-Peoples%E2%80%99-Tribunal-Exerpt-1Jun14.pdf>

Profile of Petitioner



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The Canadian Network on Corporate Accountability (CNCA) brings together twenty-nine environmental and human rights NGOs, faith groups, labour unions, and research and solidarity groups across Canada who advocate for federal legislation to establish mandatory corporate accountability standards for Canadian extractive companies operating abroad, especially in developing countries.

Members

Africa-Canada Forum

Amnesty International Canada (anglophone)

Asia Pacific Working Group

Canadian Council for International Co-operation

Canadian Labour Congress

Committee for Human Rights in Latin America

Entraide Missionnaire

Grandmothers Advocacy Network

Inter Pares

Breaking the Silence Solidarity Network

MiningWatch Canada

Publish What You Pay Canada

Social Justice Connection

Steelworkers Humanity Fund

Unifor

Americas Policy Group

Amnistie internationale Canada (francophone)

Canada Tibet Committee

Canadian Jesuits International

Canadian Union of Public Employees

Development and Peace

Friends of the Earth Canada

Halifax Initiative

KAIROS: Canadian Ecumenical Justice Initiatives

Mining Injustice Solidarity Network

Projet Accompagnement Québec-Guatemala

Public Service Alliance of Canada

Solidarité Laurentides Amérique centrale

United Church of Canada

Profile of the Presenters



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Jen Moore is Latin America Program Coordinator for MiningWatch Canada and has been accompanying community-based struggles against Canadian-owned mining projects and related abuses through research, writing, solidarity and advocacy since 2007. MiningWatch Canada is a pan-Canadian initiative supported by twenty-eight environmental, social justice, Aboriginal and labour organisations from across Canada and is an active member of the Canadian Network on Corporate Accountability. MiningWatch Canada has a vigorous program in Latin America, and has supported mining-affected communities through networking, information sharing, research, campaigns and official complaints to Canadian offices. Recent research includes analyzing Canadian embassy involvement in supporting two controversial mining companies in Mexico.



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Shin Imai is a professor at Osgoode Hall Law School, York University and a director of the Justice and Corporate Accountability Project (JCAP). JCAP projects have included providing amici curiae to the Tribunal Constitucional del Perú; a petition to the Commission on behalf of activist Marco Arana of Peru; information to the UN Special Rapporteur on Indigenous Issues for an indigenous community in Panama; advising on the drafting and submission of three shareholder motions to annual general meetings of Canadian corporations; and drafting letters of complaint to the Ontario Securities Commission for failure to disclose material information.



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Matt Eisenbrandt is the Legal Director for the Canadian Centre for International Justice. CCIJ is a charitable organization that works with survivors of genocide, torture and other abuses to seek redress and bring perpetrators to justice. Working from CCIJ's Vancouver office, Matt focuses primarily on CCIJ's casework and outreach. This includes a lawsuit currently in a Vancouver court against Canadian mining company Tahoe Resources alleging that Tahoe is responsible for the shooting of seven Guatemalan men. He previously served as the Legal Director for the Center for Justice & Accountability, a U.S.-based non-profit organization that also works to prevent torture and other severe human rights abuses by helping survivors hold perpetrators accountable through legal cases, particularly under the Alien Tort Statute. He has a J.D. from the University of Virginia School of Law and B.A. degrees in Latin American Studies and History from the University of Illinois at Urbana-Champaign.

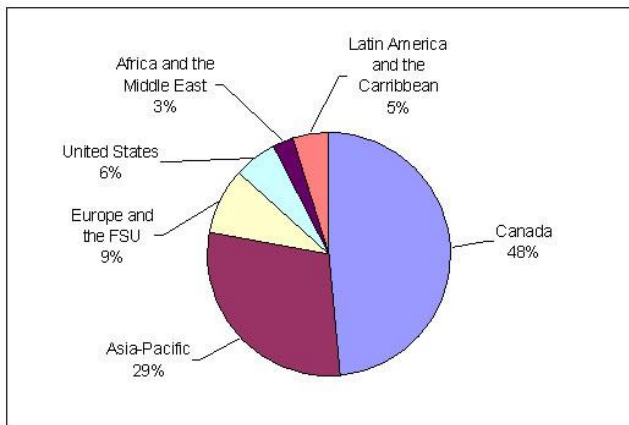
Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations

1. Canadian Support for the Extractive Industries

It is well known that Canada is home to the greatest number of mining companies in the world, as well as host to many others who raise money on the Toronto Stock Exchange. Indigenous and human rights violations associated with Canadian mining activities are also well documented, as is the Canadian state's extensive support for the industry. In this section, we provide a snapshot of the industry's size, the scope of government supports and the Indigenous and human rights violations that are related to Canadian mines.

(i) Mining companies registered in Canada and mining capital raised in Canada

More large mining companies are domiciled in Canada than in other country, and 41% of the large companies present in Latin America are Canadian.³ This is due partly to Canada's favourable tax regime, including the lowest corporate tax rate in the G7,⁴ along with a securities industry designed to promote mining.⁵ We do not explore these issues in any detail here, although they are important and should be further explored.



Of the world's larger mining companies with budgets of at least US\$3 million for precious-metal, base-metal, or diamond exploration, 298 of 618 are domiciled in Canada.

Source: Natural Resources Canada, based on Metals Economics Group's *Corporate Exploration Strategies: A Worldwide Analysis*. (2010)

³ Natural Resources Canada classifies a "larger company" as one which will spend more than US\$3 million in the coming year. Natural Resources Canada, "Canadian Global Exploration Activity" (July 22, 2013) Online: <http://www.nrcan.gc.ca/mining-materials/exploration/8296>

⁴ Mining Association of Canada, "Facts & Figures of the Canadian Mining Industry," 2013 [see top of page 14]. Online: <http://mining.ca/documents/facts-figures-2013>. See also: Tim Wach, The Globe and Mail, "Jim Flaherty's corporate tax overhaul made Canada competitive," (March 20, 2014) Online: <http://www.theglobeandmail.com/report-on-business/economy/economy-lab/jim-flahertys-corporate-tax-overhaul-made-canada-competitive/article17590384/>

⁵ Joan Kuyek, MiningWatch Canada, "Mining Investors," (November 2007), p.6 Online: http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Mining_Investors_0.pdf

Hundreds of companies listed on the Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSXV) are active in Latin America and the Caribbean, with almost 1500 mining projects in Latin America and the Caribbean, as of December, 2013.⁶

(ii) Government support for Canadian mining companies

The Canadian government actively promotes and supports the overseas mining sector through a wide variety of mechanisms including political support, economic support and the negotiation of commercial treaties.

a. Political support

The high degree of support may best be exemplified by the “Economic Diplomacy” initiative embedded in the Canadian Government’s “Global Markets Action Plan,” released in November 2013.⁷ This plan proposes to increase Canada’s presence in key markets, including in Latin America, promising that “all diplomatic assets of the Government of Canada will be marshalled on behalf of the private sector in order to achieve the stated objectives within key foreign markets.” We have documented cases in Mexico, Guatemala, Honduras, Costa Rica, Colombia, Ecuador, Peru and Chile where the Canadian embassy has acted in defence of corporate interests when it was aware that mining-affected communities strongly opposed mining projects, that Indigenous and human rights had been violated or that these rights were at great risk.⁸

The Canadian government has also funded projects in several states using overseas development aid to reform mining laws that favour corporate interests over Indigenous and human rights, including in Colombia,⁹ Peru,¹⁰ and Honduras.¹¹ Notably, Canada provided funding for Honduran reforms not only to ensure favourable conditions for foreign investment, but to lift a seven-year moratorium on new mining projects. Canada took advantage of the highly violent context following the 2009 military-backed coup in which communities in resistance, human rights advocates and journalists were frequently targeted.

⁶ TMX, “A Capital Opportunity: A Global Market for Mining Companies” (December 31, 2013), pp. 16-17. Online: http://www.tmx.com/en/pdf/Mining_Presentation.pdf

⁷ Department of Foreign Affairs, Trade and Development, “Global Markets Action Plan: The Blueprint for Creating Jobs and Opportunities for Canadians through Trade” Online: <http://international.gc.ca/global-markets-marches-mondiaux/plan.aspx>

⁸ MiningWatch Canada, “Backgrounder: A Dozen Examples of Canadian Mining Diplomacy,” (October 8, 2013) Online: <http://www.miningwatch.ca/article/backgrounder-dozen-examples-canadian-mining-diplomacy>

⁹ With respect to the changes to the Mining Code, see Emily Caruso et al., *Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank. Synthesis Report*. 2d. ed. (2005), pp. 158-159. Online: http://www.forestpeoples.org/sites/fpp/files/publication/2010/10/eirinternatwshopsynthesisrepengmay03_0.pdf.

¹⁰ Foreign Affairs, Trade and Development, “Project Profile: Peru-Canada Mineral Resources Reform Project”. Online: <http://www.acdi-cida.gc.ca/cidaweb/cpo.nsf/vWebCSAZEn/EC9BECACB9F82869852572F70037148D>

¹¹ Mining Watch “Honduran Mining Law Passed and Ratified, But the Fight Is Not Over” (January 24, 2013), Online: <http://www.miningwatch.ca/news/honduran-mining-law-passed-and-ratified-fight-not-over>

The Canadian government has also adopted new programming that uses foreign aid funding to support mining project community initiatives overseas. This programming coincided with cuts to community-generated independent development initiatives.¹² In a complementary initiative, \$24.6 million of overseas development aid was used to establish the university-based Canadian International Institute for Extractive Industries and Development (CIIEID), whose mandate includes assisting “developing countries to meet their needs for policy, legislation, regulatory development and implementation” in relation to extracting resources. The CIIEID lacks independence from government and industry, and its programs will be prioritized principally based upon “[s]ignificant presence of Canadian capital investment in the extractive sector” in countries of focus for the Canadian state.¹³ Canadian industry views the CIIEID as “key delivery device” for influencing natural resource management in resource-rich countries.¹⁴

b. Economic support

Export Development Canada (EDC) is Canada’s export credit agency. This public corporation provides financing and insurance to Canadian and foreign companies to facilitate investment and exports. The extractive sector is the single greatest beneficiary of EDC support by a significant margin. In 2013, the sector represented 29% of the corporation’s exposure with a value of almost CDN\$25 billion.¹⁵

The Canadian Pension Plan Investment Board manages a public pension worth close to CDN \$227 billion, to which most working Canadians are legally required to contribute. The Plan holds equity investments worth hundreds of millions of dollars in Canadian extractive companies that operate overseas.¹⁶

c. Investment treaties and free trade agreements

Free trade agreements and investment agreements play an important part in structuring the relationship between Canadian corporations and states in Latin America and the Caribbean. While we do not have space to describe the full complexity of these arrangements, they provide corporations with recourse to seek damages in private international tribunals against countries

¹² Catherine Coumans. “CIDA’s Partnership with Mining Companies Fails to Acknowledge and Address the Role of Mining in the Creation of Development Deficits”, (2012) p.7. Online: http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Mining_and_Development_FAAE_2012.pdf.

¹³ MiningWatch Canada, “Brief: The Canadian International Institute Extractive Industries and Development,” (March 2014) Online: http://www.miningwatch.ca/sites/www.miningwatch.ca/files/ciieid_overview_march2014__0.pdf

¹⁴ MiningWatch Canada, “New Federally Funded Academic Institute a Tool to Support Mining Industry,” (March 4, 2014) Online: <http://www.miningwatch.ca/news/new-federally-funded-academic-institute-tool-support-mining-industry>

¹⁵ Export Development Canada. About Us. Online: <http://www.edc.ca/EN/About-Us/Pages/default.aspx>

¹⁶ Canada Pension Plan Investment Board, “Canadian Publicly-Traded Equity Holdings” (March 31, 2014) Online: <http://www.cppib.com/dam/cppib/What%20We%20Do/Our%20Investment/CanadianPublicEquityMar312014%28EN%29.htm>

whose governments or courts make decisions that they say detrimentally affects their interest. Canadian mining companies have filed multi-million dollar cases against El Salvador,¹⁷ Costa Rica,¹⁸ Ecuador¹⁹ and Peru.²⁰ Such claims can put a chill on decision-making intended to respect collective rights, thereby impinging on national sovereignty and local democracy, while exacerbating the power asymmetry between corporations and mining-affected communities.²¹ The Prospectors and Developers Association of Canada has argued that these Foreign Investment Promotion and Protection Agreements “help contribute to the creation of stable operating environments for Canadian exploration and mining companies abroad and reduce risks arising from political instability, regulatory uncertainty, and resource nationalism.”²² However, the human rights impacts of these agreements have been noted by the United Nations Guiding Principles on Business and Human Rights:

... the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.²³

(iii) Human rights and Indigenous rights problems associated with Canadian mining companies

The extractive industries are plagued with conflicts and Canadian companies are not the only ones implicated in related problems. However, given the country’s dominant role in the globalized mining industry and the extensive support that Canada gives to the industry, it is appropriate to focus on Canada.

¹⁷ Sarah Anderson and Manuel Pérez Rocha, Institute for Policy Studies, “Mining for Profits in International Tribunals,” (April 2013 edition) Online: http://www.ips-dc.org/mining_for_profits_update2013/.

¹⁸ Blue Planet Project, Common Frontiers, Council of Canadians and MiningWatch Canada, “Canadian Organizations Condemn Gold Company’s Lawsuit Against Costa Rica,” (February 13, 2014) Online: <http://www.miningwatch.ca/news/canadian-organizations-condemn-gold-company-s-lawsuit-against-costa-rica>

¹⁹ Procuraduría General del Estado, “Cuadro de Casos Dirección Nacional de Asuntos Internacionales y Arbitraje,” May 15, 2014.

²⁰ Richard Woolley, Global Arbitration Review, “New mining claim against Peru,” (August 14, 2014) Online: <http://globalarbitrationreview.com/news/article/32892/new-mining-claim-against-peru/>

²¹ Gus Van Harten, “Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law” in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010), pp. 627-637

²² Prospectors and Developers Association of Canada (PDAC), “PDAC Submission to the Department of Foreign Affairs, Trade and Development on ‘Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector,” January 8, 2014.

²³ Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework” A/HRC/17/31 (March 21, 2011), Principle 9. Online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

Neither the Canadian government nor the industry has attempted to provide a systematic catalogue of conflicts.²⁴ It has been left to civil society organizations, networks and universities to monitor extractive industry conflicts as best they can. The most ambitious data base for conflicts involving Canadian mining projects is a site sponsored by the McGill Research Group Investigating Canadian Mining in Latin America (MICLA) project at McGill University in Montreal.²⁵ This site lists 85 conflicts involving Canadian mining companies in Latin America and the Caribbean. A more in depth study of selected cases was presented to the Commission by the Working Group on Mining and Human Rights in Latin America last year. This report reviewed 22 Canadian mining projects and documented 23 violent deaths and 25 cases of injury in ten of the projects examined. Law students at the Justice and Corporate Accountability Project (JCAP) at Osgoode Hall Law School have started to compile a list of conflicts involving bodily injury. The work is at a preliminary stage, as information is difficult to find and confirm. However, JCAP's research so far shows that, in the last twenty years, there are reports of almost 50 people killed and over 300 people injured in conflicts related to Canadian mining companies in Latin America and the Caribbean. The documentation project is not yet complete, so it is likely that the numbers will be higher. In some cases, the link between the Canadian mining company and the deaths is obvious. For example, in separate cases from Guatemala, the head of security for HudBay Minerals and the head of security for Tahoe Resources have both been charged criminally for injuries caused to protesters, and are currently awaiting trial. In other cases, the assailants have never been identified, or deaths and injuries occurred because of police or army action during protests. The data is beginning to reveal a disturbing pattern of violence associated with a significant number of projects that needs to be addressed.

In addition to causing physical harm to individuals, Canadian companies are engaged in a wide range of human rights violations. These include: failure to respect Indigenous rights to self-determination and to free, prior, informed consent, creating social divisions and attempts to thwart democratic processes; pressuring local governments (sometimes with the help of the Canadian embassy) to bring greater police and military presence in the local area; encouraging criminalization of dissent and social protest; serious and long-lasting environmental harms that can threaten public health; and displacement.²⁶

²⁴ National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, *Advisory Group Report* (March 29, 2007), p. 5 Online:

http://www.miningwatch.ca/sites/www.miningwatch.ca/files/RT_Advisory_Group_Report_0.pdf

“Industry participants expressed the view that due to a general lack of reliable information, except of an anecdotal nature, concerns about the human rights impact of extractive operations and the challenges underlying them are difficult to assess in quantitative terms with respect to their scope and frequency, and there is no consensus as to whether human rights abuses or other types of infractions are rare or widespread.”

²⁵ McGill Research Group Investigating Canadian Mining in Latin America, Online: <http://micla.ca/>

²⁶ Examples of these situations have been presented to the Commission in the report of the Working Group on Mining and Human Rights in Latin America. Online:

http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf

For Indigenous people, the problem is exacerbated by Canada's hostility to the concept for free, prior, informed consent (FPIC) found in the United Nations Declaration of Indigenous Rights. In the World Conference on Indigenous Rights in New York City in September 2014, Canada was the only country to vote against a resolution reaffirming commitment to the Declaration on the Rights of Indigenous Peoples.²⁷ Canada also blocked inclusion of FPIC in the United Nations-backed 'Principles for Responsible Investment in Agriculture and Food Systems'.²⁸

2. Canada and Extraterritorial Responsibilities

A 2014 report by ESCR-Net, a coalition of 270 civil society organizations, points out that many states have tended to avoid responsibility for events outside their borders. However, governments are now under increasing international pressure to recognize their extraterritorial responsibilities when corporations domiciled in their territory are involved in human rights abuses in another state.²⁹

(i) UN bodies that urge Canada to act on its extra territorial responsibilities

The United Nations treaty bodies have been delegated the task of interpreting the core human rights treaties. On several occasions, beginning in 2002, these bodies have urged Canada, specifically, to assume its responsibility to protect against human right abuse outside its territory and to provide effective oversight regarding its companies' overseas operations, including through extraterritorial regulation.

In 2002, the UN Special Rapporteur on Toxic Waste noted that "self-regulation and voluntary codes of conduct – however laudable – can only complement legally binding norms for holding transnational companies responsible for human rights violations." She called on Canada to

... explore ways of establishing extraterritorial jurisdiction over human rights violations, committed by companies operating abroad. The concept of extraterritorial jurisdiction for human rights violations is not unknown in both international and many national laws, and the Special Rapporteur recommends that the establishment of accountability be explored.³⁰

²⁷ Union of BC Indian Chiefs, Joint Public Statement, "Canada Uses World Conference to continue indefensible attack on UN Declaration on the Rights of Indigenous Peoples," September 24, 2014;

http://www.ubcic.bc.ca/News_Releases/UBCICNews09241401.html#axzz3GcznvQLQ

²⁸ Hugh Wheelan, "Civil society warns on Canada blocking FPIC in Principles for Responsible Agriculture," October 8, 2014; https://www.responsible-investor.com/home/article/gw_fpic/

²⁹ See, for example, Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*, (2014) Online: <http://www.amnesty.org/fr/library/info/POL30/001/2014/en>.

³⁰ Commission on Human Rights, "Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights Report, Mission to Canada, 17-30 October 2002", E/CN.4/2003/56/Add.2 (14 January 2003) para. 126.

In 2007, the Committee on the Elimination of Racial Discrimination (CERD) noted “reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions.” The Committee then formally recommended that Canada

... take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada.³¹

CERD returned to this theme in 2012 when it expressed concern that Canada “has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside of Canada, in particular in mining activities.”³²

That same year, the Committee on the Rights of the Child expressed concern that Canada “lacks a regulatory framework to hold all companies and corporations from the State party accountable for human rights and environmental abuses committed abroad.”³³

(ii) International sources

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, released in 2013, draw on international law to clarify the content of extraterritorial state obligations. The Principles call on states to adopt “measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses and to ensure an effective remedy for those affected.”³⁴

But States have more than obligations to provide a remedy for victims of human rights abuses. States also have legal obligations regarding the operations of their agencies and agents. Under the international rules of ‘state responsibility,’ the acts and omissions of state institutions, such as export credit agencies, are attributable to the state, even in cases where such agencies are separate legal entities. States must ensure that they do not violate their international legal obligations through the operations of their agencies, including in the area of human rights law.

³¹ Committee on the Elimination of Racial Discrimination, “Concluding Observations”, CERD/C/CAN/CO/18, 25 May 2007, para.17.

³² Committee on the Elimination of Racial Discrimination, “Concluding Observations”, CERD/C/CAN/CO/19-20, 4 April 2012, para. 14.

³³ Committee on the Rights of the Child, “Concluding Observations”, CRC/C/CAN/CO/3-4, 6 December 2012, para. 29.

³⁴ International Network for Economic, Social and Cultural Rights (ESCR-Net) *Global Economy, Global Rights*, (2014) Online: <http://www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf>

This means that the state duty to protect against human rights abuse by third parties extends to the operations of institutions such as embassies and export credit agencies. States therefore have international law obligations to ensure that such institutions neither facilitate nor ignore human rights abuses by the corporations whose activities they support. Arguably, the fulfillment of these obligations requires the adoption of measures with extraterritorial effect.³⁵

In his 2011 annual report³⁶ to the General Assembly, Mr. Cephias Lumina, then UN Independent Expert on the effects of foreign debt on the full enjoyment of all human rights, addressed the obligations of states regarding the operations of their export credit agencies:

[w]hile the State where an export credit agency-backed project is implemented bears primary responsibility for the protection of human rights of the local population, the agencies' home States are responsible for the regulation and supervision of the activities carried out by their national export credit agencies (whether owned, mandated or regulated by Government) that had an adverse effect on the enjoyment of human rights of the population of the host State.³⁷

He continues:

[w]hen a Government, directly or through its export credit agency, fails to exercise due diligence to protect human rights from the potentially harmful behaviour of non-State actors, it is in breach of its obligations under international human rights law.³⁸

3. Attempts to Enact Legislation in Canada

There have been concerted and continuing attempts to call on the Canadian government to assume its extraterritorial responsibilities from within Canada, as well.

(i) Standing Committee on Foreign Affairs and International Trade

In June 2005, the 38th Parliament's Standing Committee on Foreign Affairs and International Trade ("SCFAIT" or "Standing Committee") issued its report, *Mining in Developing Countries and Corporate Social Responsibility*, which called on the Government of Canada to ensure that resource companies adhere to internationally recognized human rights standards, particularly in relation to Indigenous peoples.³⁹

³⁵ See: Halifax Initiative, "Export Credit Agencies and the International Law of Human Rights" (January 2008) Online: http://www.halifaxinitiative.org/updir/ECAs_and_HR_law.pdf

³⁶ U.N. General Assembly, 66th Session. *Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*. 5 August 2011 (A/66/271).

³⁷ *Ibid.*, pg. 8.

³⁸ *Ibid.*

³⁹ Standing Committee on Foreign Affairs and International Trade (2005) Online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=1961949&File=0>

The Standing Committee heard submissions on Canadian resource extraction activities in Colombia, Sudan, the Democratic Republic of the Congo and the Philippines. The Standing Committee noted that Canadian companies were involved in countries “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.” They expressed concern 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 [I]ndigenous peoples.” The committee recommended that there be “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.”⁴⁰

Moreover, the Committee urged the government to put in place measures “to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards.” The Committee emphasized that “[m]easures in this area must include making 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.”⁴¹

(ii) National Roundtables on Corporate Social Responsibility

The government’s response was not to draft legislation to address the Committee’s recommendations, but rather to establish a consultative process called the National Roundtables on Corporate Social Responsibility (“CSR”) and the Canadian Extractive Industry in Developing Countries. An Advisory Group representing civil society, investors, and mining and exploration executives met between June and November 2006. It recommended that an independent ombudsman office be created to provide advisory, fact finding and reporting services regarding complaints with respect to the operations of Canadian extractive companies in developing countries. A compliance review committee would reinforce the ombudsman’s function and be composed of individuals who would be independent of the government and the parties. The committee would assess compliance with a set of Canadian Corporate Social Responsibility standards, based on findings of the ombudsman with respect to complaints, and would make recommendations regarding appropriate responses in such cases. Where the review committee

⁴⁰ Ibid.

⁴¹ Ibid.

found a problem with compliance, it could recommend that government financial and political support be withdrawn.⁴²

(iii) Bill C-300 - Ombudsman

The Government of Canada did not implement key recommendations of the Advisory Group, such as the creation of the office of the ombudsman and the compliance review committee. Opposition members of Parliament reacted by introducing proposals to address extraterritorial accountability.

In 2009, Liberal member of Parliament John McKay introduced Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*. The Bill would have created eligibility standards for any Canadian extractive company that seeks support from Export Development Canada, the Canada Pension Plan Investment Board or Canadian embassies. Had it passed, the legislation would have applied international environmental and human rights standards to these companies and would have required that the government examine complaints about alleged failures to comply with those standards. A finding of noncompliance would have resulted in a withdrawal of support from the public agencies listed above.⁴³ In 2010 the Bill was narrowly defeated by six votes.

(iv) Bill C-323 – Cause of Action

A second proposal from a member of the opposition New Democratic Party, Bill C- 323, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)* would provide a long list of new grounds for citizens of other countries to bring claims directly to the Federal Court of Canada.⁴⁴ This Bill has yet to make significant steps toward a vote in the House of Commons.

(v) The “Open for Justice” Campaign

In May 2014, the Canadian Network on Corporate Accountability (CNCA) launched its “Open for Justice Campaign”.⁴⁵ The campaign has two objectives. First, it seeks the adoption of

⁴² National Roundtables on Corporate Social Responsibility (“CSR”) and the Canadian Extractive Industry in Developing Countries, “Advisory Group Report” (29 March 2007), online: Foreign Affairs and International Trade Canada <<http://geo.international.gc.ca/cip-pic/library/Advisory%20Group%20Report%20%20March%202007.pdf>>

⁴³ Richard Janda. “Bill C-300: Sound and Measured Reinforcement for CSR. A Report on the Legal and Policy Dimensions of Bill C-300 prepared for the Canadian Network on Corporate Accountability” (2009) pp. 4-5. Online: <http://cnca-rcrce.ca/wp-content/uploads/Bill-C-300-Report-Janda.pdf>

⁴⁴ Bill 323, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)* Online: <http://openparliament.ca/bills/41-2/C-323/>

⁴⁵ CNCA. “Open for Justice” Online: <http://cnca-rcrce.ca/take-action-today-to-ensure-canada-becomes-open-for-justice/>

legislation that would facilitate access to Canadian courts for non-Canadians who have been seriously harmed by the international operations of Canadian companies. This would permit aggrieved parties to sue companies in Canada. Second, it calls on Canada to establish an extractive sector ombudsperson who can investigate complaints and recommend the suspension or cessation of political, financial and diplomatic support by the Government of Canada. As part of this initiative, an opposition member of Parliament introduced Bill C-584 in March 2014. The bill proposed to establish an ombudsman who could receive complaints, conduct inquiries and ensure that corporations not in compliance with identified standards do not receive financial or political support from Canada. The Bill was defeated in October 2014.

4. Existing Mechanisms in Canada: An Accountability Vacuum

The Canadian government released its “Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector” strategy in March 2009. In that document, the Canadian government purports to “[encourage]...Canadian companies to meet high standards of corporate social responsibility” through the promotion of CSR and transparency guidelines and the creation of government supports for companies facing CSR issues.⁴⁶

However, existing tools do not address the state and corporate accountability gap that persists regarding the overseas operations of Canadian companies. Current mechanisms include voluntary industry standards, government-sponsored mechanisms, and the existing legal system.

(i) Voluntary industry standards

There is a dizzying array of standards relating to the extractive industries, all of them voluntary. Some standards have been developed by industry associations, such as the Mining Association of Canada or the Prospectors and Developers Association of Canada, while others are international, industry-specific standards such as those proposed by the International Council on Mining and Metals or by financial institutions, like the Equator Principles.

Typically, these standards outline what are considered to be best practices for the members of the association and address issues such as environmental impact, labour standards and Indigenous rights. For example, the Equator Principles⁴⁷ are a standard for 77 of the world’s major financial institutions, including all five of the major banks in Canada. These principles set out conditions

⁴⁶ Department of Foreign Affairs, Trade and Development Canada. (2009). Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector. Online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx>

⁴⁷ The Equator Principles, Online: <http://www.equator-principles.com/>

for certain loans relating to the extractive industries, including a requirement that the projects have the free, prior, informed consent of Indigenous communities in certain circumstances. This standard was adopted from the United Nations Declaration on the Rights of Indigenous People. However, the Equator Principles have no mechanism for making a complaint about a bank and no facility for investigating whether its members are in compliance. The Prospectors and Developers Association Canada has a standard called e3 Plus⁴⁸ which sets out best practices for its members, including engagement with Indigenous communities. But again, there is no complaints mechanism and compliance is not even a requirement of membership in the Association.

The lack of independent audits or reporting makes it difficult to assess whether companies adhere to these standards. In the absence of effective enforcement mechanisms, these standards are of limited utility to mining-affected persons and communities. To the extent that reporting is required, it is usually self-reporting. This is the case with the Voluntary Principles on Security and Human Rights. The Principles were developed in 2000 by a group consisting of industry, governments and NGOs to set standards for the use of security forces on mine sites. In 2013, one of the founding members of this group, Oxfam, withdrew because of its frustration at the lack of progress on independent assessment of member compliance.⁴⁹ Amnesty International has also withdrawn.⁵⁰

(ii) Mechanisms for regulating state entities

Canada lacks the legal and administrative mechanisms necessary to ensure that state agencies that support corporations operate in a way that is consistent with the state's Indigenous and human rights commitments.

Canada lacks legislative provisions regarding human rights and export credit. There is no mention of human rights in the *Export Development Act*, which governs Export Development Canada. EDC reports that it applies a human rights assessment process as part of its due diligence. The details of this human rights assessment process are not public, nor are the results of project-specific human rights assessments. This lack of transparency makes it impossible to assess the efficacy of EDC's approach. Although EDC has a Compliance Officer who will take

⁴⁸ Prospectors and Developers Association, "e3Plus: A Framework for Responsible Exploration" Online: <http://www.pdac.ca/programs/e3-plus>

⁴⁹ "Oxfam leaves Voluntary Principles for Security and Human Rights" Online: <http://business-humanrights.org/en/oxfam-leaves-voluntary-principles-for-security-and-human-rights-multi-stakeholder-initiative>

⁵⁰ The Voluntary Principles website stopped listing Amnesty International as a member <http://www.voluntaryprinciples.org/for-ngos/>; it was listed in their 2011 list available here: http://www.voluntaryprinciples.org/files/VPs_FactSheet_March_2011.pdf

complaints, this Officer lacks independence from EDC, has no power to effect change within the organization and provides no direct remedies to victims.⁵¹

While the Canada Pension Plan Investment Board has had a policy for Responsible Investment since 2010, it does not exclude investment in businesses with a history or high potential of human rights abuses.⁵² Current investments include the two companies that are now being sued in Canada for alleged rapes, murders and the shooting of unarmed campesinos: Tahoe Resources and HudBay Minerals.⁵³

(iii) Government-sponsored mechanisms

The Canadian government has two complaints mechanisms. The first is the *Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises*.⁵⁴ These voluntary Guidelines aim to promote company adherence to economic, environmental and social standards. Any interested party can submit a complaint (called a “specific instance”) to a National Contact Point (NCP) in the government where the complaint arose, or where the country is not a member of the OECD, to the NCP in the home state. The NCP can investigate a complaint and provide a platform for dialogue to help broker a resolution for issues arising from the alleged non-observance of the Guidelines. At the end of this process, the NCP issues statements or reports that are not binding rulings intended to compel redress from non-adhering companies. They merely report on the issue put before the NCP, the mediation processes that took place, and the results of such processes. These reports can provide further recommendations, particularly in cases where no agreement is reached or the parties withdraw from the NCP facilitated dialogue. However, adoption of such recommendations is not mandatory. In our experience, unlike other NCPs in participating states, the Canadian NCP will not investigate a complaint nor issue a detailed consideration of matters raised in a complaint. Rather, in practice, the Canadian NCP will only offer its offices for dialogue. If both parties are not willing to engage in mediation, it will close a case without further investigation and issue a report, tending to favour the company. Reports are released exclusively in English or French, not in Spanish or Portuguese.⁵⁵

⁵¹ Export Development Canada. EDC’s Compliance Officer: Steps to Resolution, p. 1 Online: <http://www.edc.ca/EN/about-us/management-and-governance/compliance-officer/Documents/compliance-officer-steps-to-resolution.pdf>

⁵² The Canada Pension Plan Investment Board. Policy on Responsible Investing (2010). Online: <http://www.cppib.com/en/how-we-invest/responsible-invest-approach/integrating-esg.html>

⁵³ Canada Pension Plan Investment Board, “Canadian Publicly-Traded Equity Holdings as of March 31, 2014” Online: <http://www.cppib.com/dam/cppib/What%20We%20Do/Our%20Investment/CanadianPublicEquityMar312014%28EN%29.htm>

⁵⁴ OECD “Guidelines for Multinational Enterprises” Online: <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>

⁵⁵ MiningWatch Canada notes that it has participated in four complaints from Latin America to the Canadian NCP and all ended in utter frustration for mining-affected communities.

The second government-sponsored mechanism is the Office of the Extractive Sector CSR Counsellor.⁵⁶ The Canadian government established this office as part of its CSR Strategy in March 2010 to allow affected communities and mining companies to avail themselves of a facilitator in cases of conflict or potential conflict. The Counsellor has no power to compel or force parties to participate, has no powers of investigation, and cannot adjudicate whether or not a company had breached the standards, cannot issue recommendations to the company or to address failures in government policy, and cannot order reparations to victims.⁵⁷ The Office has only dealt with six cases. In three of the cases, the Counsellor was left powerless because the mining company withdrew from the process. Two cases ended with a preliminary exchange of letters, and one case was pending. In the end, the Counsellor resigned from her position in October 2013, and has not been replaced.⁵⁸

The OECD and CSR Counsellor mechanisms sponsored by the Government of Canada appear better than the voluntary industry codes because they provide low cost access to a complainant. However, these mechanisms do not provide for an independent evaluation of the factual basis of complaints, do not establish any form of corporate or state accountability and do not ensure any direct redress to victims. As such, these mechanisms do not meet the standard set by Principle 25 of the United Nations Guiding Principles on Business and Human Rights:

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedies include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.⁵⁹

⁵⁶ Office of the Extractive Sector CSR Counsellor, Online: http://www.international.gc.ca/csr_counsellor-conseiller_rse/about-us-a-propos-du-bureau.aspx?lang=eng

⁵⁷ MiningWatch Canada, “Concerns with regard to the mandate and review procedure of the Corporate Social Responsibility Counsellor for the Government of Canada,” March 2011; http://www.miningwatch.ca/sites/www.miningwatch.ca/files/MiningWatch_Brief_on_CSR_Counsellor.pdf

⁵⁸ MiningWatch Canada, “The Federal CSR Counsellor Has Left the Building - Can we now have an effective ombudsman mechanism for the extractive sector?” (November 1, 2013) Online: <http://www.miningwatch.ca/blog/federal-csr-counsellor-has-left-building-can-we-now-have-effective-ombudsman-mechanism-extracti>

⁵⁹ Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework” A/HRC/17/31 (March 21, 2011) Online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

(iv) Existing legal system

There is one piece of legislation relevant to the extractive industry that has a clear extra-territorial application. The Corruption of Foreign Public Officials Act (CFPOA) makes bribing or the intent to bribe a foreign public official a crime. The Act prohibits giving, offering to give, or agreeing to offer a benefit of any kind to a foreign public official with the purpose to obtain or retain a business advantage. Although in effect since 1998, it took ten years for the Royal Canadian Mounted Police to create dedicated teams to enforce the Act and still the CFPOA remains poorly enforced.⁶⁰ As of August 2013, there were only three convictions under the Act.⁶¹ One investigation of a Calgary-based mining firm, Blackfire Exploration, has been underway since 2010 and there have not yet been any charges laid despite strong evidence.⁶² Canada is considered the worst performer amongst the G7 countries for eight of the last nine years in the fight against corruption.⁶³

Under the general laws of Canada, a company may be responsible for paying compensation to an injured party if the company was negligent in carrying out its activities. A company can be liable for negligence if it has some responsibility to the victim – a “duty of care”. While litigation for negligence is common for Canadians suing Canadian companies, there are difficulties for people from outside of Canada who have been harmed by Canadian companies abroad to get a court hearing in Canada. In a handful of cases, companies have successfully argued that hearings are better held in courts where the injury took place. In another case, a parent company in Canada has argued that it should not be responsible for the actions of its subsidiary in the foreign country.

In 2013, for the first time, a Canadian judge has allowed Guatemalans to sue a Canadian company in Canada. Claims have been brought against HudBay Minerals by, among others, the widow of a man allegedly murdered by HudBay’s chief of security (who is currently awaiting trial in Guatemala) and a group of women who were allegedly gang raped by HudBay’s security forces.⁶⁴ A full trial on the issue will be one or two years away, but the fact that the victims will have a trial is a breakthrough. In June 2014, seven Guatemalans injured at a mine owned by

⁶⁰ Brett House and David Landry, The Globe and Mail, “As world moves to weed out graft, Canada remains a laggard,” (December 9, 2013) Online: <http://www.theglobeandmail.com/globe-debate/as-world-moves-to-weed-out-graft-canada-remains-a-laggard/article15820316/#dashboard/follows/>

⁶¹ Boscariol, J.W. et al, “First Trial Under Canada’s Corruption of Foreign Public Officials Act Results in Conviction,” (August 28, 2013) http://www.mccarthy.ca/article_detail.aspx?id=6409

⁶² Atlantic Regional Solidarity Network, Comité pour les droits humains en Amérique latine (CDHAL) et al, “Four Years After Submitting Evidence, Organizations Challenge Anti-Corruption Law as Ineffective,” (March 10, 2014) Online: <http://www.miningwatch.ca/news/four-years-after-submitting-evidence-organizations-challenge-anti-corruption-law-ineffective>

⁶³ Supra n.60

⁶⁴ For more information, see: <http://www.chocversushudbay.com/>

Tahoe Resources filed a lawsuit in Canada after they were shot at by Tahoe's private security guards (whose former chief is also awaiting trial in Guatemala).⁶⁵

The ability to litigate in Canada fulfills three of the criteria for an effective mechanism for accountability: there is an independent adjudicator who can report on the factual basis for the complaint (a judge); there may be compensation for victims (damages); and the company may be the subject of punitive damages. Unfortunately, there are many challenges in accessing the Canadian court system. Litigation is very expensive in Canada and companies have far greater resources than victims who might want to pursue litigation. Communities and individuals from Latin America must rely on lawyers who can work for a contingency fee. In addition, if the company wins, the communities and individuals may have to pay for part of the legal fees of the company. These risks make it difficult to find lawyers willing to take on cases. The number of potential lawyers is further reduced by the fact that many law firms in Canada have clients in the extractive industries and might be unwilling or unable to be involved on the side of the plaintiffs in a lawsuit against a mining company.

5. Criteria for Mechanisms for State and Corporate Accountability in Canada

We seek an effective system of accountability for multinational extractive sector companies that are domiciled in Canada and for the government departments and agencies that promote and defend these corporations.

(i) Standards

The UN treaty bodies have stated that the obligation to effectively regulate and adjudicate corporate activity with respect to human rights includes the adoption of legislation to safeguard individual and collective rights. To fulfill its obligations to prevent the commission of human rights violations by third parties, the Canadian government should adopt clear standards to guide corporate activity overseas. The standards must include the right to free, prior informed consent by Indigenous peoples set out in the United Nations Declaration on Human Rights.

(ii) Enforcement: Accessibility

Accountability mechanisms should be well publicized so that complainants are made aware of the mechanism. The process needs to be straightforward, allowing direct access to complainants and expenses associated with the process should not deprive access to those who need it.

⁶⁵ For more information, see: <http://tahoeontrial.net/>

(iii) Enforcement: Independent third party evaluation of the factual basis for the complaint

The process should produce the relevant facts in a transparent manner. All parties should be required to divulge the information necessary to determine the factual basis for any allegations. In civil litigation, parties produce the evidence, but in order to increase accessibility, the process could provide for investigatory powers for a fact finder. Information should be assessed by an independent third party, such as an ombudsman, who will provide a rationale for any conclusions that are reached.

(iv) Enforcement: Provide a remedy to victims

If it is found that a company has caused harm, there must be remedies available to victims. The only process that exists at the present time is litigation in Canada. A court order from a Latin American country, even if one could be obtained, could only be enforced against a Canadian head office through a court proceeding in Canada. Other mechanisms should provide compensation to victims and sanctions against companies to prevent future harm.

(v) Enforcement: Require compliance by government entities

There should be a mechanism to address the failure of government department and agencies to comply with Indigenous rights and human rights standards.

6. Recommendations for the Commission

Preventing and addressing the serious harms that the Canadian mining industry is causing in Latin America and the Caribbean with political, economic and legal support from the Canadian government ultimately involves reforms in a number of areas. In order to prevent harms, it is vital that the Canadian government comply with its international obligations to promote universal respect for the Indigenous and human rights, and enhanced protections for the environment on which communities depend. Furthermore, as the ‘Open for Justice’ Campaign suggests, Canada will have to look at a combination of initiatives in order to establish an adequate legally binding framework for extraterritorial corporate and state accountability.

- Urge Canada to adopt corporate and state accountability standards that provide accessible processes, independent fact finding and remedies for harm.
- Urge Canada to comply with its international obligations to promote and respect Indigenous and human rights.

- Urge Canada to stop directing overseas development aid and diplomatic services toward the promotion of large-scale mineral extraction overseas.
- Urge Canada to enact legislation to ensure that Crown corporations, particularly those that finance and hold equity in companies, comply with its international human rights obligations
- Urge Canada to revise existing agreements and to stop promoting investor protection agreements that provide corporations with recourse to private international arbitration tribunals in order to sue governments when they or their courts make decisions intended to protect Indigenous and human rights.
- Make note of these concerns in the Commission's annual report.
- Prepare a regional thematic report on home state responsibility and the impact of the extractive industry on Indigenous and human rights.