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# Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights

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# Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights

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## Introduction

Between 2005 and 2011, there was much debate both within Canada and at the United Nations (UN) over what role, if any, home states should play in regulating and adjudicating transnational corporate conduct to prevent and remedy associated human rights harms. In June 2005, the Canadian Parliament's Standing Committee on Foreign Affairs and International Trade (SCFAIT) adopted an all-party report of the Parliamentary Subcommittee on Human Rights and International Development entitled *Mining in Developing Countries* [*SCFAIT Report*].[1] The *SCFAIT Report* concludes that "mining activities in some developing countries have had adverse effects on local communities," and it 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."[2] In October 2005, the Canadian government tabled a response rejecting many of the *SCFAIT Report*'s recommendations due in part to the view that the international community was "still in the early stages of defining and measuring" corporate social responsibility (CSR), "particularly with respect to human rights."[3]

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1 House of Commons, Standing Committee on Foreign Affairs and International Trade (SCFAIT), *Fourteenth Report: Mining in Developing Countries*, 38th Parl, 1st Sess (June 2005) [*SCFAIT Report*].

2 *Ibid* at 1-2.

3 Canada, Department of Foreign Affairs and International Trade (DFAIT), *Mining in Developing Countries — Corporate Social Responsibility: The Government's Response*



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*Mining in Developing Countries — Corporate Social Responsibility: The Government's Response to the Report of the Standing Committee on Foreign Affairs and International Trade* (*Government's Response*) did, however, commit Canada to working with other states to "enhance and clarify the international normative framework for CSR and accountability" and expressed support for the work of Harvard professor John G. Ruggie.[4]

Ruggie had been appointed Special Representative of the UN Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises in July 2005 — a month after the release of the *SCFAIT Report* — pursuant to a resolution of the Commission on Human Rights (precursor to the UN Human Rights Council) co-sponsored by Canada.[5] Part of his mandate was to "elaborate on the role of States in effectively regulating and adjudicating" business activities relating to human rights.[6] In June 2008, the SRSG presented the *Protect, Respect and Remedy Framework for Business and Human Rights* to the Human Rights Council.[7] *Protect, Respect, and Remedy* rested upon three complementary principles: the state duty to protect against human rights abuses by non-state actors, including business; the corporate responsibility to respect rights; and the need for greater access by victims to effective remedies. It was unanimously welcomed by member states

*to the Report of the Standing Committee on Foreign Affairs and International Trade* (October 2005) at 2-3, 4 [*Government's Response*].

4 *Ibid* at 3-5.

5 UN Commission on Human Rights (CHR), *Human Rights and Transnational Corporations and Other Business Enterprises,* CHR Res 2005/69, UNCHR, 61st Sess, UN Doc E/CN.4/RES/2005/69 (2005). However, Canada is not identified as an ongoing co-sponsor of the mandate by the Special Representative of the UN Secretary-General (SRSG) in his final oral submission to the UN Human Council in May 2011, where he thanks Argentina, India, Nigeria, Norway, and the Russian Federation "for their steadfast leadership and support." See *Ruggie Statement to UN Human Rights Council May 30, 2011,* online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie-statement-to-un-human-rights-council-30-may-2011.pdf>.

6 *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* UNCHR, 62nd Sess, UN Doc E/CH.4/2006/97 (22 February 2006) at 1 [*Interim Report*].

7 John Ruggie, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights,* UNHRC, 8th Sess, UN Doc A/HRC/8/5 (2008) [*Protect, Respect, and Remedy*].

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in the Human Rights Council, and the SRSG was given a renewed three-year mandate to provide concrete and practical recommendations for its implementation.[8]

The Canadian government reiterated its support for the SRSG's mandate in a 26 March 2009 policy paper entitled *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector*.[9] Curiously, however, *Building the Canadian Advantage* gave remarkably little space to *Protect, Respect, and Remedy*, which was endorsed more than six months earlier.[10] In May 2011, the SRSG presented a final report to the Human Rights Council consisting primarily of *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (*Guiding Principles*).[11] The *Guiding Principles* too

[8] UN Human Rights Council (HRC), *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 8/7, UNHRC, 8th Sess, UN Doc A/HRC/RES/8/7 (2008).

[9] Canada, DFAIT, *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector* (26 March 2009) at 8, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-stategie.aspx?view=d> [*Building the Canadian Advantage*].

[10] *Ibid*. The reference to the SRSG's work is discussed in a single short paragraph within the fifteen-page document: "Obligations under international human rights conventions apply to states and do not directly create obligations for companies … [The UN framework contains] recommendations on the duties and responsibilities of both States and corporations with regard to human rights." Moreover, the list of international standards identified on the website of the Centre for Excellence in CSR, one of the outcomes of *Building the Canadian Advantage*, does not even list *Protect, Respect, and Remedy* among UN international standards. See listed resources under Centre for Excellence in CSR, *Policies and Regulations — United Nations*, online: Centre for Excellence in CSR, <http://web.cim.org/csr/MenuPage.cfm?sections=44&menu=45> (listing the UN Global Compact; the UN Development Programme; the UN Environment Programme; the UNEP Finance Initiative; and the UN Department of Economic and Social Affairs as well as three publications by the United Nations Conference on Trade and Development). The Human Rights Council is not listed nor are *Protect, Respect, and Remedy* or the *Guiding Principles*. See also the extensive list of additional CSR frameworks under *Tools and Resources: CSR Toolkits: Additional CSR Frameworks*, online: Centre for Excellence in CSR <http://web.cim.org/csr/MenuPage.cfm?sections=44,136&menu=138>).

[11] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRC, 17th Sess, UN Doc A/HRC/17/31 (2011) [*Guiding Principles*]. The *Guiding Principles* were accompanied by three

were unanimously endorsed by the Human Rights Council on 16 June 2011, establishing for the first time an international standard, or, in the words of the SRSG, a "global reference point," for business and human rights.[12]

This article begins with a more detailed overview of these as well as other developments in Canada between 2005 and 2011 relating to the regulation and adjudication of human rights concerns associated with global mining. This overview will document the challenges faced by legal reform proposals designed to prevent and remedy global mining harms. In particular, it will discuss the *SCFAIT Report*, the *Government's Response*, and a multi-stakeholder Advisory Group report completed in March 2007.[13] Following this discussion, an account will be given of the arguments put forward in favour of, and against, Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, which was defeated in October 2010.[14] An assessment will then be provided of the non-judicial dispute resolution process of the Office of the Extractive Industries CSR Counsellor, which opened the same year.

The article will then turn to a review of the work of the SRSG in relation to the home state duty to protect human rights, highlighting

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addenda: *Addendum: Piloting Principles for Effective Company/Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, UNHRC, 17th Sess, UN Doc A/HRC/17/3/Add.1 (2011); *Addendum: Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative*, UNHRC, 17th Sess, UN Doc A/HRC/17/31/Add.2 (2011) [*Corporate Law Addendum*]; and *Addendum: Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, UNHRC, 17th Sess, UN Doc A/HRC/17/31/Add.3 (2011).

12 See United Nations Human Rights Office of the High Commissioner, *New Guiding Principles on Business and Human Rights Endorsed by the Human Rights Council*, News Release (16 June 2011), online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf>. See also UN Human Rights Commission, *Revised Draft Resolution, Human Rights and Transnational Corporations and Other Business Enterprises,* UNHRC, 17th Sess, UN Doc A/HRC/17/L.17/Rev.1 (2011) (sponsored by Argentina, Austria, Canada, Denmark, Guatemala, India, Nigeria, Norway, Peru, Russian Federation, Sweden, and Turkey).

13 National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, *Advisory Group Report*, 29 March 2007, online: <http://www.mining.ca/www/media_lib/MAC_Documents/Publications/CSRENG.pdf> [*Advisory Group Report*].

14 Bill C-300, An Act Respecting Corporate Accountability for Mining, Oil and Gas Corporations in Developing Countries, 2nd Sess, 40th Parl (2009).

the conclusions reached in the *Guiding Principles*. Particular focus will be placed on the non-legally binding nature of many of the *Guiding Principles*, which are notable for their reluctance to recognize explicitly the existence of home state obligations under international human rights law. After a brief assessment of the extent to which Canadian developments may be consistent with the *Guiding Principles*, the article will reflect on the implications of industry and industry lawyer participation in the development of international norms relating to the existence, scope, and content of home state obligations. Specifically, the article will argue that, while engaging corporations and corporate lawyers in both domestic and international processes relating to business and human rights may be necessary for pragmatic reasons, the resulting outcomes appear to be oriented away from legally binding regulation and adjudication. The article will conclude by reflecting upon the implications of this phenomenon for our understanding of international law, justice, and ethics.

## Canadian Mining Internationally: From the *SCFAIT Report* to the Advisory Group Report (2005-08)

The June 2005 *SCFAIT Report* arose out of concerns that had been brought before the Subcommittee on Human Rights and International Development over several years in relation to Canadian mining projects in Latin America, Africa, and Asia.[15] The report called upon the Canadian government to implement "stronger incentives" designed to "encourage" mining companies to act "in a socially and environmentally responsible manner and in conformity with international human rights standards" when operating outside of Canada.[16] Specifically identified was the need to make Canadian government export and project financing, as well as services provided at missions abroad, conditional upon compliance with corporate social responsibility and human rights standards, including human rights impact assessments.[17] Stronger monitoring and complaints mechanisms were called for to address claims of

[15] *SCFAIT Report*, *supra* note 1 at 1. See also Sara L Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rights & Dev LJ 177 at 177-80 (outlining some of the evidence presented at committee hearings in March and May 2005 by a range of participants, including affected communities, civil society, and mining companies).

[16] *SCFAIT Report*, *supra* note 1 at 2.

[17] *Ibid*.

"socially and environmentally irresponsible conduct and human rights violations," and the need to "clarify, formalize and strengthen the rules and the mandate" of Canada's National Contact Point (NCP) for the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises (OECD Guidelines) was recognized.[18] Further, Canada was called upon to "[w]ork with like-minded countries" to strengthen the substance of the OECD Guidelines with respect to human rights and to make compliance mandatory.[19] Strikingly, the *SCFAIT Report* explicitly states that there is a need to establish "clear legal norms in Canada to ensure that Canadian companies and residents are held accountable" for environmental and human rights violations "associated with the activities of Canadian mining companies."[20]

The *Government's Response* identified a number of "practical policy challenges" in "translating" the recommendations of the *SCFAIT Report* into practice, including the underdeveloped nature of the "international CSR architecture"; the lack of consensus on "appropriate boundaries between governments, companies and other stakeholders," which leads to a "blurring of lines between public and private responsibilities"; and the need to "reconcile" the "primary responsibility of host governments" with the call for "global business standards and accountability mechanisms."[21] While conceding that more could be done to provide businesses with incentives to achieve positive environmental and social results in their operations abroad, the *Government's Response* took the position that "further developments" would be necessary in the definition and measurement of CSR with respect to human rights before government support could

18 *Ibid* at 2-3. See further OECD, *Guidelines for Multinational Enterprises* (Paris: OECD, 2000), online: OECD <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [OECD Guidelines]; and DFAIT Canada, *Canada's National Contact Point for the OECD MNE Guidelines*, online: DFAIT <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1> [*Canada's NCP*].

19 *SCFAIT Report*, *supra* note 1 at 3.

20 *Ibid* at 3. Also identified was the importance of the rights of indigenous peoples (*ibid* at 2).

21 *Government's Response*, *supra* note 3 at 2. Furthermore: "[W]hile the Canadian government can influence companies that are headquartered in Canada but where officers are subject to domestic law, it has few mechanisms at its disposal with which to influence companies that are headquartered abroad and managed by non-residents but incorporated in Canada or listed on a Canadian stock exchange" (*ibid* at 3).

be made conditional on companies meeting human rights standards as recommended by the *SCFAIT Report*.[22] Accordingly, other important means of encouraging CSR should be recognized, including market-based incentives such as reporting on social and environmental performance through international reporting initiatives, for example, the Global Reporting Initiative (GRI).[23]

The *Government's Response* specifically disagreed with the *SCFAIT Report*'s recommendations regarding the OECD Guidelines and the NCP process. With respect to the process, the *Government's Response* stated categorically:

> It is clear that the drafters of the OECD Guidelines did not intend the NCP to play an investigative or quasi-judicial role in settling disputes. Rather, the intention was to … facilitate a positive and constructive dialogue between multinational enterprises (MNEs) and those affected by their operations with a view to finding solutions to problems … [T]he non-binding, voluntary nature of the Guidelines has significantly increased the ability of like-minded governments to build greater international support than would have been possible had the intention been to build an instrument that was binding.[24]

With regard to the substance of the OECD Guidelines relating to human rights, the *Government's Response* suggested that the OECD was not the most appropriate forum to clarify this issue, as OECD members were largely developed states.[25] In contrast, the UN Human Rights Commission was best positioned to address human rights standards, for its membership was "drawn from all geographic regions, including both developed and developing countries."[26]

[22] *Ibid* at 4. However, Export Development Canada (EDC) had already taken steps to address human rights issues "such as involuntary resettlement, compensation, public consultation and Indigenous peoples" as part of "environmental reviews and political risk assessments" (*ibid* at 6). These commitments reflected changes to the Organisation for Economic Co-operation and Development (OECD)'s *Common Approaches on Environment and Officially Supported Export Credits*, which in turn draw upon the experience of development banks, including the World Bank Group. See OECD, *Recommendation on Common Approaches to Export Credits and Environment* (Paris: OECD, 2007), online: OECD <http://www.oecd.org/dataoecd/26/33/21684464.pdf> [*Common Approaches*].

[23] *Government's Response, supra* note 3 at 6-7. See Global Reporting Initiative (GRI), online: GRI <https://www.globalreporting.org/Pages/default.aspx>.

[24] *Government's Response, supra* note 3 at 7.

[25] *Ibid* at 13.

[26] *Ibid.*

Accordingly, the Canadian government was committed to working with other states to clarify a human rights framework, notably through support for John Ruggie's work at the UN, and to incorporate "emerging conclusions" into the work of the OECD's Investment Committee.[27]

Arguably, the most controversial recommendation in the *SCFAIT Report* was that Canada establish clear legal norms to ensure that Canadian companies are held accountable for rights violations outside of Canada.[28] This recommendation arose in light of the failed attempts by impacted communities to bring claims against Canadian companies in Canadian courts alleging environmental and human rights harms.[29] The "failure" of these claims was not with regard to their substance, which was never heard by the Canadian courts but, rather, with regard to their likely dismissal on the basis of the common law doctrine of *forum non conveniens*. While the assertion of adjudicative jurisdiction by courts over civil actions is clearly distinct from the exercise of prescriptive jurisdiction through legislation, these categories are not entirely without consequence for one another, as evidenced in the US context where civil actions for violations of the law of nations have been made possible due to the existence of legislation in the form of the Alien Tort Claims Act.[30]

The *Government's Response* asserted that "civil remedies *may* be available to … foreign plaintiff[s] in Canadian courts" and, thus,

[27] *Ibid* at 4-5, 13-14.

[28] *SCFAIT Report*, *supra* note 1.

[29] Sara L Seck, "Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law" (1999) 37 Can YB Int'l Law 139 at 154-68 (discussing *Recherches Internationales Québec v Cambior Inc*, [1998] QJ no 2554 (QL) (Qc Sup Ct)) and 168-74 (discussing the Mozambique doctrine); *Seck*, *supra* note 15 at 183-84 (discussing the Talisman litigation in US courts). See more generally Jennifer A Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006) at 124-27, 189-240; Craig Scott and Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation," in C Joerges, P Sand, and G Teubner, eds, *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004) 287; Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (Portland, OR: Hart Publishing, 2001).

[30] Alien Tort Claims Act, 28 USC § 1350 (2000) (providing subject matter jurisdiction for civil actions brought before US federal courts in relation to a modest number of clearly defined norms recognized by the law of nations).

that "Canadian corporations or their directors and employees *may* be pursued in Canada for their wrongdoing in foreign countries."[31] However, the *Government's Response* also acknowledged that, due to the *forum non conveniens* doctrine, "Canadian judges may decide that they should not exercise jurisdiction over a particular claim if another court is better placed to hear the matter."[32] In terms of prescriptive jurisdiction, the *Government's Response* highlighted that "Canadian law does not generally provide for extraterritorial application" as this could raise problems including "conflict with the sovereignty of foreign states; conflicts where states have legislation that differs from that of Canada; and difficulties with Canadian officials taking enforcement action in foreign states."[33] However, where there was a "sufficient nexus" to Canada or "where the international community has agreed … on the need for such jurisdiction," Canadian law might provide for extraterritorial application.[34]

One proposal in the *SCFAIT Report* that the *Government's Response* did embrace was to hold multi-stakeholder public consultations on problems arising from Canadian mining companies operating in developing countries, with the intention of providing the SCFAIT with recommendations not only for the Canadian government but also for "NGOs, labour organizations, businesses and industry associations."[35] National Roundtables on Corporate Social Responsibility and the Extractive Sector in Developing Countries were accordingly held in four Canadian cities from June to November 2006. An Advisory Group, composed of representatives of Canadian industry and civil society, working closely with an inter-governmental steering committee, issued a report in March 2007.[36] The Advisory Group's

[31] *Government's Response*, *supra* note 3 at 10 [emphasis in original].

[32] *Ibid.*

[33] *Ibid* at 9.

[34] *Ibid.* Criminal law examples provided included: where there is a factual link between Canada and the offence constituting a "real and substantial link" to Canada, although whether asserting jurisdiction would "offend international comity" must still be considered; and where the international community has determined that certain offences are so important that "a country will have jurisdiction to prosecute, regardless of where the acts took place, on the basis of criteria established by treaty (such as the nationality of the offender or victim)." However, there remains the question of whether "the relevant crimes can, as a matter of international law, be committed by corporations" (*ibid* at 9).

[35] *Ibid* at 3 (embracing a proposal in the *SCFAIT Report, supra* note 1 at 2).

[36] *Advisory Group Report*, *supra* note 13.

report consisted of extensive consensus-based recommendations, which notably did not include a recommendation that Canada should implement legislation to ensure that allegations of transnational corporate wrongdoing could be heard in Canadian courts.[37] Instead, the Advisory Group's report recommended that the government develop a CSR framework composed of standards that Canadian extractive sector companies operating abroad would be expected to meet, reinforced through "reporting, compliance and other mechanisms," including an independent ombudsman office and a tripartite compliance review committee.[38] The framework standards would initially comprise International Finance Corporation (IFC) standards,[39] supplemented by the Voluntary Principles on Security and Human Rights,[40] with a multi-stakeholder Canadian Extractive Sector Advisory Group advising the government on both the implementation and further development of the CSR framework.[41] The GRI was recommended as the standard to be endorsed for the reporting component of the Canadian CSR framework.[42]

Civil society participants in the Advisory Group had urged the Canadian government to adopt federal legislation to regulate the foreign operations of Canadian extractive companies in accordance with the CSR framework standards, which would be linked to a civil liability system of enforcement.[43] However, industry partici-

[37] *Ibid* at 41-45. There was support for the Canadian government to "continue to work with relevant law enforcement authorities to identify and remedy legal and other barriers to the extraterritorial application of Canadian criminal law" and to "[a]mend the Corruption of Foreign Public Officials Act to clarify that it applies extraterritorially to Canadian nationals" (*ibid* at xii, 45).

[38] *Ibid* at iii; for details, see 8-24.

[39] *Ibid* at 11-14 (stating also that the application and interpretation of these standards "shall observe and enhance respect for principles of the Universal Declaration of Human Rights and other related instruments" and that "[s]pecific guidelines related to the application and interpretation of human rights principles will be developed"). See further International Finance Corporation (IFC) of the World Bank Group, *Sustainability Framework,* online: <http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/>.

[40] *Advisory Group Report, supra* note 13 at 11-14. See further Voluntary Principles on Security and Human Rights, online: <http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf> [Voluntary Principles].

[41] *Advisory Group Report, supra* note 13 at iv-v, 58-60.

[42] *Ibid* at 15-19. See further GRI, *supra* note 23.

[43] *Advisory Group Report, supra* note 13 at 42-44.

pants argued that existing criminal and civil liability regimes under Canadian law, combined with voluntary guidelines, were sufficient.[44] Moreover, industry participants expressed concern that new regulation would "violate rules against extraterritorial legislation, interfere with Canada's foreign policy objectives and damage international trade and investment."[45] Instead, the independent ombudsman office would be "mandated to provide advisory, fact-finding and reporting functions," while the tripartite Compliance Review Committee would "determine the nature and degree of any company non-compliance with the CSR standards."[46] Consideration was also given to how access to government services could serve as a possible incentive mechanism, and a number of government institutions and initiatives that provide financing, insurance, or political services to extractive companies were identified.[47] It was further recommended that a CSR Centre of Excellence be created that could "provide CSR information and advice to Canadian missions, Canadian companies, NGOs, affected communities, host governments and indigenous communities," while also serving to "promote Canada as a country committed to CSR and to the sustainable economic and social development of the countries in which the Canadian extractive industry operates."[48]

The Advisory Group's report explicitly recommended that the Canadian government "exercis[e] influence" within "relevant regional and multinational fora to optimize the positive contribution of the extractive sector," including by supporting and promoting CSR capacity building and advancing the rights of indigenous

[44] *Ibid* at 42-44.

[45] *Ibid* at 42.

[46] *Ibid* at 23-24. This could include referral to an external dispute resolution process (*ibid* at 21-23). The Advisory Group saw the OECD NCP as playing "an important mediation role, a function that could not be assigned to the ombudsman's office" (*ibid* at 23).

[47] *Ibid* at 46. These include the EDC, the Canada Fund for Local Initiatives, the Canada Investment Fund for Africa, Canadian International Development Agency, and support provided through trade missions and Canadian embassies (*ibid* at 47-49).

[48] *Ibid* at 30-31. On the competitive advantage of CSR, the Advisory Group concluded: "[T]he reputation of meeting or even exceeding CSR standards can offer extractive companies a competitive advantage and increase their overall economic success. The social and environmental performance of Canadian extractive companies can also reflect positively on the long-term success of Canadian business as a whole" (*ibid* at 7).

peoples.[49] It further recommended that Canada continue to support the ongoing work of the SRSG within the UN system.[50] Ultimately, the Advisory Group recommendations were passed along to an inter-governmental Steering Committee, which was to pick from the many recommendations a set of actionable ideas to present to Cabinet for inclusion in a report that was to be sent back to the SCFAIT. While the Advisory Group's report was presented in March 2007, it took until March 2009 for the government to respond officially, perhaps due to the disparate government departments involved as well as a federal election in October 2008.[51] Notably, the inter-departmental Steering Committee, chaired by the Department of Foreign Affairs and International Trade (DFAIT), included representatives from Natural Resources Canada (NRCan), Environment Canada, the Canadian International Development Agency (CIDA), Indian and Northern Affairs Canada, the Department of Justice, Export Development Canada (EDC), and the Privy Council Office.[52] While the wheels of government were slowly turning, the industry-civil society consensus behind the Advisory Group's report began to unravel.

### Canadian Mining Internationally: From Bill C-300 to the Office of the CSR Counsellor (2009-11)

February 2009 marked the beginning of a very busy period for those interested in Canada's role in global mining. On 9 February 2009,

[49] *Ibid* at 56. These include: the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development; the World Mines Ministries Forum; the Mines Ministries of the Americas; the African Mining Partnership; and the Global Gas Flaring Reduction Partnership (*ibid* at 54).

[50] *Ibid* at 56. Further recommendations included that Canada endorse the Voluntary Principles on Security and Human Rights by becoming a participant country, and formally participate in the Extractive Industries Transparency Initiative by becoming a supporting country while also encouraging Canadian extractive industries to participate (*ibid* at 56-57).

[51] In the interim, Canada became a supporter of the Extractive Industries Transparency Initiative (EITI), online: <http://eiti.org/>. See Department of Finance Canada, *Canada's New Government Supports an International Initiative to Improve Governance in Resource-Rich Countries,* News Release (10 February 2007), online: <http://www.fin.gc.ca/n07/07-012-eng.asp>.

[52] *Advisory Group Report, supra* note 13 at 2. The presence of representatives from Indian and Northern Affairs Canada on the Steering Committee suggests a keen awareness that the outcome of the roundtables process would not have implications only for Canadian companies engaged in mining internationally but also for mining within Canada on First Nations lands.

Bill C-300 was tabled in Parliament as a private member's bill by Liberal Member of Parliament (MP) John McKay.[53] Just over a month later, the government of Canada released *Building the Canadian Advantage*.[54] One notable proposal in *Building the Canadian Advantage* was to set up an Office of the Extractive Sector CSR Counsellor to "enable" the resolution of "CSR disputes related to the Canadian extractive sector active abroad in a timely and transparent manner."[55] Marketa Evans was appointed to the position in October 2009,[56] and she released the Rules of Procedure for the CSR Counsellor's review mechanism on 20 October 2010, just days before the vote on Bill C-300.[57]

Further proposed legislation aimed at least in part at the global activities of the Canadian mining industry was tabled in Parliament on 1 April 2009 by New Democratic Party MP Peter Julian, in the form of private member's Bill C-354, An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights).[58] Unlike either Bill C-300 or the CSR Counsellor, the purpose of Bill C-354 was explicitly to address access to legally binding remedies by non-Canadian plaintiffs for violations of international law.[59] Possible claims that could be brought under Bill C-354

[53] Bill C-300*, supra* note 14.

[54] *Building the Canadian Advantage, supra* note 9.

[55] *Ibid* at 10-11.

[56] CSR Counsellor, *Background,* online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/csr_counsellor-conseiller_rse/Background-Contexte.aspx?lang=eng&menu_id=123&view=d>.

[57] Canada, *Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility Counsellor* (20 October 2010), online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/rules_procedure-regles_procedure-eng.pdf

[58] Bill C-354, An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights), 2nd Sess, 40th Parl (2009) [Bill C-354]. Previously known as Bill C-492, it had originally been introduced in Parliament on 10 December 2007. Subsequently, following spring elections in 2011, Bill C-354 was reintroduced as Bill C-323 and received first reading in October 2011.

[59] *Ibid.* Section 1 of Bill C-354 provided that section 25 of the Federal Courts Act, RSC 1985, c F-7, be amended to explicitly provide the Federal Court with "original jurisdiction in all cases that are civil in nature in which the claim for relief or remedy arises from a violation of international law or a treaty to which Canada is a party and commenced by a person who is not a Canadian citizen, if the act alleged occurred in a foreign state or territory or on board a ship or aircraft registered in a foreign state while the ship or aircraft is outside Canada."

included those arising from a consistent pattern of gross violations of internationally recognized human rights as well as violations of various international labour and environmental rules.[60] While Bill C-354 itself made no specific mention of business enterprises, Peter Julian explicitly linked it to increased corporate accountability in his introductory remarks.[61]

Meanwhile, foreign plaintiffs alleging violations of their human rights by mining companies linked to Canada were not waiting for Bill C-354 to bring legal actions in Canadian courts. The courts had not been enlisted to address these types of issues since the dismissal with costs, on the basis of *forum non conveniens*, of an action brought by local community plaintiffs in 1997 alleging severe environmental harm due to the collapse of a tailings dam at a mine owned by Cambior Incorporated in Guyana,[62] although similar cases against Canadian companies had already been argued in US courts.[63] This situation changed in March 2009 with the filing in the Ontario Superior Court of Justice of a statement of claim, against Copper

Curiously, the insistence that "the act" occur abroad arguably limited the relevance of this amendment in situations where a Canadian company is involved and the act may be characterized as relating to conduct by directors or officers on Canadian soil, although this was likely not the intent.

60 *Ibid* at s 1(2).

61 *House of Commons Debates*, 40th Parl, 2nd Sess, No 038 (1 April 2009) at 1520 (Hon Peter Julian): "The bill would ensure corporate accountability for Canadian firms operating abroad. It would broaden the mandate of the Federal Court so that it protects foreign citizens against rights violations committed by corporations operating outside of Canada."

62 See the authorities in notes 29 and 30 and accompanying text. See also Bill C-354, *supra* note 58, s 3, proposing amendments to section 50 of the Federal Courts Act, *supra* note 59, which would amend the common law doctrine of *forum non conveniens* by preventing federal courts from staying proceedings "unless the defendant clearly, cogently and convincingly establishes" that the Federal Court of Appeal or the Federal Court is not a suitable forum in which to decide the case, a more appropriate forum is available that will fairly and effectively provide a final and binding decision, the more appropriate forum will likely provide a final and binding decision in a timely and efficient manner, and the interests of justice adamantly require that a stay of proceedings be granted.

63 See, eg, *The Presbyterian Church of Sudan v Talisman Energy Inc*, 582 F 3d 244 (2nd Cir 2009) (upholding dismissal on summary judgment motion). Plaintiffs petitioned for writ of *certiorari* to the US Court of Appeals, 2nd Circuit, in October 2010, which was denied. See also *Provincial Gov't of Marinduque v Placer Dome Inc*, 582 F 3d 1083 (9th Cir 2009) (reversing dismissal on *forum non conveniens* and act of state doctrine).

Mesa Mining Corporation and the Toronto Stock Exchange, alleging that the defendants were responsible for violence inflicted by security personnel at a mine site upon the plaintiffs, who opposed the mine.[64] By the time the dismissal of this action was upheld by the Court of Appeal for Ontario in March 2011,[65] another three lawsuits alleging violations of human rights overseas had been brought in Canadian courts against Canadian mining companies.[66]

Host state communities concerned about the conduct of Canadian-based mining companies operating in their backyards were also increasingly making use of other Canadian mechanisms to draw attention to their concerns. For example, a number of complaints against Canadian mining companies were brought, from 2000 on, to the Canadian NCP for the OECD Guidelines.[67] These specific instances included submissions made between 2009 and 2011 in relation to mines in Guatemala, Mongolia, Papua New Guinea, and Zambia.[68] In addition, concerned company shareholders, sometimes supported by local communities from the host states, and sometimes

[64] See *Piedra v Copper Mesa Mining Corp*, 2010 ONSC 2421 (Plaintiffs' Statement of Claim), online: <http://www.ramirezversuscoppermesa.com/statement-of-claim.pdf>. The allegations against the TSX focused upon the listing of the company in order to raise equity financing without any effort to prevent foreseeable harm to the plaintiffs, who were engaged in peaceful protests.

[65] *Piedra v Copper Mesa Mining Corp*, 2010 ONSC 2421, aff'd 2011 ONCA 191, 332 DLR (4th) 118.

[66] See details of three cases launched in Ontario against Hudbay Minerals Incorporated in relation to the actions of security forces at mine sites in Guatemala, as described on the website of counsel for the plaintiffs, online: Klippensteins, Barristers and Solicitors <http://www.chocversushudbay.com/>. See further *Choc v Hudbay Minerals Inc*, 2011 ONSC 4490. See also *Association canadienne contre l'impunité (ACCI) v Anvil Mining Ltd*, 2011 QCCA 1035 [*Anvil Mining*] (accepting jurisdiction to hear the case), but see *Anvil Mining v Association canadienne contre l'impunité (ACCI)*, 2012 QCCA 117 (determining that the case cannot be heard in Québec).

[67] *Canada's NCP*, *supra* note 18; see also *Canada's National Contact Point (Specific Instances)*, online: Department of Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx?lang=eng&menu_id=7>.

[68] Canada's National Contact Point (NCP), *Annual Report* (Ottawa: Department of Foreign Affairs and International Trade, 2010) at s 8; Canada's NCP, *Annual Report* (Ottawa: DFAIT, 2011) at s 7. See also brief summaries of the four specific instances considered by the NCP as of December 2008, all concerning mining companies, online: Department of Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx?lang=eng&menu_id=7&view=d>.

not, drew attention to local community concerns over global mining development through the use of shareholder proposals brought forward at company annual general meetings held in Canada.[69] Other complaints relating to CSR issues could have been filed, in theory, with the office of the Compliance Officer for Export Development Canada, which was created in 2002. However, few complaints that were deemed to fall within the Compliance Officer's mandate were received.[70]

It is beyond the scope of this article to describe fully the considerable developments briefly noted here. Instead, the following discussion will focus upon the debate surrounding the highly controversial Bill C-300 and contrast this debate with the initiatives that were implemented by the federal government pursuant to the policy paper *Building the Canadian Advantage*, most notably the creation of the Office of the CSR Counsellor. The debate surrounding Bill C-300 will illustrate the challenges facing even a mild law reform proposal in this area, whereas examination of the Office of the CSR Counsellor will demonstrate that even where home state non-judicial mechanisms are adopted, industry consent is deeply embedded within their structure.

## BILL C-300

Bill C-300 was designed to ensure that extractive sector companies receiving support from the Canadian government act "in a manner consistent with international environmental best practices and with Canada's commitments to international human rights standards."[71]

[69] See generally Aaron A Dhir, "The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice and Human Rights" (2009) 47 Osgoode Hall LJ 47; Johann A Klaassen, "Sustainability and Social Justice" (2011) 31 Issues in Business Ethics 179 at 182-83. For specific discussion of the use of the shareholder proposal mechanism in relation to Goldcorp's Marlin mine in Guatemala, see Shin Imai, Ladan Mehranvar, and Jennifer Sander, "Breaching Indigenous Law: Canadian Mining in Guatemala" (2007) 6 Indigenous LJ 101; Aaron A Dhir, "Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights and TWAIL Discourse" (2012) 22 Business Ethics Quarterly 99.

[70] See *Export Development Canada Compliance Officer*, online: EDC <http://www.edc.ca/english/compliance.htm>; EDC, *2009 Compliance Officer's Annual Report on Third Party Complaints*, online: EDC <http://www19.edc.ca/english/docs/compliance_officer_report_e.pdf> (noting that twenty-three complaints have been received from third parties of which six fell within the compliance officer's mandate).

[71] Bill C-300, *supra* note 14 at s 3.

The bill would have applied only to "mining, oil or gas activities" located "in the territory of a developing country or on the high seas where such activities are controlled directly or indirectly by a Canadian corporation."[72] Within a year of the bill coming into force, the minister of foreign affairs and the minister of international trade were to issue guidelines articulating corporate accountability standards,[73] after consulting with government departments or agencies, industry representatives, and non-governmental organizations (NGOs), among others.[74] The corporate accountability standards were to incorporate social and environmental standards of the IFC[75] and the Voluntary Principles on Security and Human Rights,[76] which were both CSR standards proposed in the Advisory Group's report. They were also to incorporate "(c) human rights provisions that ensure corporations operate in a manner that is consistent with international human right standards; and (d) any other standards consistent with international human rights standards."[77] However, no specific reference was made to *Protect, Respect, and Remedy,* despite it having been adopted by the UN Human Rights Council more than six months earlier.[78]

Under Bill C-300, the ministers of foreign affairs and international trade would have been empowered to receive written complaints about Canadian companies or citizens in relation to mining, oil, or gas activities in developing countries, which they would then have been obligated (absent a determination that the complaint was frivolous or vexatious) to assess for compliance with the corporate

[72] *Ibid,* s 2(1). "Developing countries" were defined as "countries and territories named in the list of countries and territories eligible for Canadian development assistance established by the Minister of International Cooperation." This definition proved problematic as there was no longer any such list. An amendment, defining developing countries as those "classified as low income, lower middle income or upper middle income in the World Bank list of economies, as defined from time to time," was subsequently proposed. Regarding proposed amendments, see *House of Common Debates,* 40th Parl, 3rd Sess, No 66 (20 September 2010), Motion no 4, online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4656017&Language=E&Mode=1&Parl=40&Ses=3 - SOBQ-3267199> (Hon. John McKay).

[73] Bill C-300, *supra* note 14, s 5.

[74] *Ibid,* s 5(3).

[75] *Ibid,* s 5(2)(a).

[76] *Ibid,* s 5(2)(b).

[77] *Ibid,* s 5(2)(c)-(d).

[78] *Protect, Respect, and Remedy, supra* note 7.

accountability standards.[79] In doing so, the ministers would have been able to consider information from the corporation or the public, including witnesses from outside Canada, and results were to be published within eight months following receipt of the complaint.[80] If a corporation's activities were determined to be inconsistent with the standards, the ministers were to notify the EDC and the Canada Pension Plan Investment Board (CPPIB).[81] According to Bill C-300, continued compliance with the standards was to be a condition of any contract entered into by the EDC, and investment managers for CPPIB were to ensure that no assets were invested in companies that were not in compliance with these standards.[82] Moreover, the Department of Foreign Affairs and International Trade Act[83] was to be amended to ensure that, with the exception of ordinary consular services, no mining, oil, or gas activities that were not in compliance with the standards would receive support or promotion from the minister.[84] Bill C-300 also provided for amendments to the Special Economic Measures Act[85] to allow for orders and regulations to be made restricting or prohibiting mining, oil, or gas activities in cases of grave breaches of international peace and security or human rights.[86]

Many civil society groups and academics spoke out in support of Bill C-300. For example, Bill C-300 was compared favourably to proposals in the Advisory Group's report in a report written by McGill professor Richard Janda for the civil society coalition Canadian

[79] Bill C-300, *supra* note 14, s 4(1)-(3), (5). The ministers would also be able to examine a matter on their own initiative if they had reason to believe a company had contravened the guidelines (s 4(5)).

[80] *Ibid,* s 4(6). If a complaint was found to be frivolous or vexatious, reasons for this determination were also to be published (*ibid,* s 4(7)).

[81] *Ibid,* s 4(8).

[82] *Ibid,* ss 8, 10. However, proposed amendments would have greatly curtailed the role of the Canada Pension Plan Investment Board (CPPIB). See *House of Common Debates,* 40th Parl, 3rd Sess, No 66 (20 September 2010), Motion nos 11, 16, online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4656017&Language=E&Mode=1&Parl=40&Ses=3%20-%20SOBQ-3267199> (Hon. John McKay).

[83] Department of Foreign Affairs and International Trade Act, RSC 1985, c E-22.

[84] Bill C-300, *supra* note 14, s 9 (amending s 10 of the Department of Foreign Affairs and International Trade Act, *supra* note 83).

[85] Special Economic Measures Act, SC 1992, c 17.

[86] Bill C-300, *supra* note 14, s 11.

Network on Corporate Accountability.[87] Supporters argued that Bill C-300 would provide Canadian companies with a competitive advantage over others by providing a forum to address complaints[88] and by requiring companies to respect human rights, thus reducing the chance of operations being disrupted by local communities experiencing unrest.[89] This would, in the words of Toby Heaps, provide a "maple leaf stamp of approval" as junior companies, encouraged to adhere to environmental and human rights standards, could subsequently sell their properties for higher values, while senior companies would experience fewer "headaches" as the junior properties they acquired would have fewer messes to clean up.[90] Moreover, if Bill C-300 led some of the worst performers to leave Canada, Janda and others queried why Canadians should care.[91]

Some supporters suggested that most companies were already adhering to the standards in Bill C-300, which were in effect preexisting de facto international standards due to financing requirements implemented by export credit agencies and banks following the Equator Principles.[92] While there was clearly some truth to the

[87] 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* (September 2009), online: Canadian Network on Corporate Accountability <http://cnca-rcrce.ca/wp-content/uploads/Bill-C-300-Report-Janda.pdf>.

[88] *Ibid* at 8-9; House of Commons, SCFAID , *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 21 (3 June 2010) (Penelope Simons), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4588646&Language=E&Mode=1&Parl=40&Ses=3#T1145> [*Evidence* (Simons)].

[89] House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 35 (27 October 2009) (Alex Neve), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4178126&Language=E&Mode=1&Parl=40&Ses=2#T0920> [*Evidence* (Amnesty — Neve)].

[90] House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 44 (3 December 2009) (Toby A.A. Heaps), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4292634&Language=E&Mode=1&Parl=40&Ses=2#T0945> [*Evidence* (Corporate Knights)].

[91] House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 32 (8 October 2009) (Richard Janda), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4134547&Language=E&Mode=1&Parl=40&Ses=2#Int-2885901> [*Evidence* (Janda)]; *Evidence* (Simons), *supra* note 88.

[92] *Evidence* (Simons), *supra* note 88; *Evidence* (Janda), *supra* note 91. However, others acknowledged that the standards list in Bill C-300 needed to include specific reference to human rights because of deficiencies in the standards of the IFC,

claim that the standards incorporated in Bill C-300 were already de facto requirements for mining internationally due to the requirements of project financing, the claim that international human rights standards apply to corporate actors was highly controversial.[93] Indeed, it was precisely because of the contested nature of this claim that John Ruggie was appointed to the position of SRSG in the first place.[94]

Many of the supporters of Bill C-300 were also aware of its limitations — notably, that it was best understood as a government accountability bill that would ensure government money did not go to support unworthy corporate actors. For those seeking to punish corporate offenders or remedy environmental harm or human rights violations, Bill C-300 was far too limited.[95] A few submissions

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which serve as the baseline standards adopted by Equator Principles banks. See House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 32 (8 October 2009) (Catherine Coumans), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4134547&Language=E&Mode=1&Parl=40&Ses=2#Int-2885944> [*Evidence* (Mining Watch Canada)]; *Evidence* (Amnesty — Neve), *supra* note 89. See also Equator Principles Association, *Equator Principles* (June 2006), online: Equator Principles Association <http://www.equator-principles.com/resources/equator_principles.pdf> [Equator Principles].

[93] Matthew DG DeBock, Roger R Taplin, and Adam D Wanke, *Mining Law Update: Bill C-300* (1 March 2010), online: McCarthy Tetrault, LLP <http://www.mccarthy.ca/article_detail.aspx?id=4889>; Prospectors and Developers Association of Canada (PDAC), *Bill C-300 Myths and Facts* (17 December 2009), online: PDAC <http://www.pdac.ca/pdac/publications/na/pdf/091217-bill-c-300-myths-facts.pdf> at 2; Canadian Foundation for the Americas (FOCAL), *FOCAL Views: A Corporate Accountability Bill of No Avail* (April 2010), online: FOCAL <http://www.focal.ca/publications/focalpoint/235-april-2010-focal-views>.

[94] David Kinley, Justine Nolan, and Natalie Zerial, "The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations" (2007) 25 Company & Securities L J 30 at 33-37; Nina Seppala, "Business and the International Human Rights Regime: A Comparison of UN Initiatives" (2009) 87 J Business Ethics 401 at 408; John Gerard Ruggie, "Current Developments, Business and Human Rights: The Evolving International Agenda" (2007) 101 AJIL 819 at 821.

[95] Rights Action, "Bill C-300 Will Perpetuate Effective Immunity From Legal Recourse in Canada" (20 October 2009), online: Rights Action <http://www.rightsaction.org/articles/Analysis_Bill_C-300.htm>. See also House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 19 (25 May 2010) (Karin Lissakers), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4547693&Language=E&Mode=1&Parl=40&Ses=3#T1110> [*Evidence* (Revenue Watch)].

grounded their support for Bill C-300 with reference to *Protect, Respect, and Remedy*.[96] Yet, as noted earlier, *Protect, Respect, and Remedy* was not directly referenced by Bill C-300. Instead, Bill C-300 proposed a year-long consultation process to define the precise nature of the human rights standards to be applied,[97] a process that did not satisfy industry representatives[98] despite the ongoing engagement of global industry associations, such as the International Council on Mining and Metals (ICMM), with the problem of human rights and global mining.[99]

Opposition from the Canadian mining industry to Bill C-300 was fierce and premised on several key claims. First, some argued that there were structural issues with the bill that would create practical compliance difficulties or unfairness. For example, the Mining Association of Canada pointed out that the bill would create problems for companies that acquired properties that were out of compliance, as no grace period was built in to allow for these properties

[96] See *Evidence* (MiningWatch Canada), *supra* note 92; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 19 (25 May 2010) (Shanta Martin), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4547693&Language=E&Mode=1&Parl=40&Ses=3#Int-3174606> [*Evidence* (Amnesty — Martin)]; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 22 (8 June 2010) (Audrey Macklin), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4598846&Language=E&Mode=1&Parl=40&Ses=3#Int-3213529>.

[97] Bill C-300, *supra* note 14, s 5.

[98] See, eg, House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 42 (26 November 2009) (Mac Penney), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4266713&Language=E&Mode=1&Parl=40&Ses=2#Int-2974648> [*Evidence* (Kinross Gold)]. See also House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 21 (3 June 2010) (Gary Nash), online: House of Commons http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4588646&Language=E&Mode=1&Parl=40&Ses=3#T1120> (citing the length of time it was taking John Ruggie to finalize his recommendations as evidence that one year was too short a time).

[99] See, eg, International Council on Mining and Metals (ICMM), *Projects: Business and Human Rights*, online: ICMM <http://www.icmm.com/page/225/our-work/projects/articles/business-and-human-rights> (outlining the work of the ICMM on mining and human rights, including links to submissions to the SRSG); see also ICMM, *Human Rights in the Mining and Metals Industry: Overview, Management Approach and Issues* (May 2009), online: ICMM <http://www.icmm.com/page/14809/human-rights-in-the-mining-and-metals-industry-overview-management-approach-and-issues>.

to be brought into compliance.[100] Second, it was claimed that the bill would create a competitive disadvantage for Canadian companies, resulting in projects in developing countries either being developed by foreign competitors or not being developed at all, as responsible companies would avoid projects that might constitute a legal risk.[101] Not only would Bill C-300 disadvantage Canadian companies, claimed some industry lawyers, but it would also cause

[100] House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 32 (8 October 2009) (Gordon Peeling), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4134547&Language=E&Mode=1&Parl=40&Ses=2#T1005> [*Evidence* (Mining Association of Canada)]; see also House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 39 (17 November 2009) (Robert Wisner), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4231494&Language=E&Mode=1&Parl=40&Ses=2#Int-2948675> [*Evidence* (McMillan LLP)]. This issue was to have been addressed in the proposed amendments. See discussion in the text accompanying note 108.

[101] *Evidence* (Kinross Gold), *supra* note 98; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 40 (19 November 2009) (Perrin Beatty), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4237707&Language=E&Mode=1&Parl=40&Ses=2#T0910> [*Evidence* (Canadian Chamber of Commerce — Beatty)]; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 19 (25 May 2010) (Shirley-Ann George), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4547693&Mode=1&Parl=40&Ses=3&Language=E#Int-3175148> [*Evidence* (Canadian Chamber of Commerce — George)]; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 21 (3 June 2010) (David Stewart-Patterson), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4588646&Language=E&Mode=1&Parl=40&Ses=3#Int-3203121> [*Evidence* (Canadian Council of Chief Executives)]; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 42 (26 November 2009) (Peter Sinclair), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4266713&Language=E&Mode=1&Parl=40&Ses=2#Int-2974680> [*Evidence* (Barrick Gold)]; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 18 (13 May 2010) (Carlo Dade), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4533191&Language=E&Mode=2&Parl=40&Ses=3#T1215> [*Evidence* (FOCAL)]; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 42 (3 December 2009) (Robert Blackburn), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=2&DocId=4292634&File=0#Int-2994434> [*Evidence* (SNC Lavalin)]; Tony Andrews, *Bill C-300 Position Statement* (PDAC, August 2009) at 4, online: PDAC <http://www.pdac.ca/pdac/publications/na/pdf/090812-bill-c-300-position-statement.pdf>.

"an exodus of companies from Canada" and thereby disadvantage Canada itself as a mining jurisdiction of choice.[102] Third, many submissions claimed that Bill C-300 would violate the sovereignty of host states, promoting a "West knows best" mentality.[103] Finally, the industry raised concerns that "anti-mining" groups who launched complaints would be subject to no penalty for reputational damage to companies.[104]

[102] House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 42 (26 November 2009) (Michael Bourassa), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4266713&Language=E&Mode=1&Parl=40&Ses=2#Int-2974922> [*Evidence* (Fasken Martineau DuMoulin LLP — Bourassa)]; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 42 (26 November 2009) (Hon. James Peterson), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4266713&Language=E&Mode=1&Parl=40&Ses=2#Int-2974821> [*Evidence* (Fasken Martineau DuMoulin LLP — Peterson)]; *Evidence* Canadian Chamber of Commerce — George), *supra* note 101; Michael Bourassa, "Bill C-300 Threatens Canada's International Extractive Sector," (2009) 4 CIM Magazine 53; Fasken Martineau DuMoulin LLP, *Sharp Criticism for Bill C-300: Lawyers Tell Parliamentary Committee Private Member's Bill Threatens Canada's Minerals Industry* (26 November 2009), online: Fasken Martineau DuMoulin LLP <http://www.fasken.com/firm-opposes-bill-c-300-in-ottawa>; Harvey Enchin, "Will Mining Suffer If Bill C-300 Becomes Law? YES: It's Biased and Overly Punitive," *Vancouver Sun* (27 May 2010); Peter Koven, "Mining Bill Needs to Be Defeated: Industry Reps," *Financial Post* (25 November 2009); Gary Nash, "Canada's Very Flawed Bill C-300 Anti-Mining Legislation Should be Withdrawn," *Republic of Mining* (10 June 2010), online: Republic of Mining <http://www.republicofmining.com/2010/06/10/canadas-very-flawed-bill-c- 300-anti-mining-legislation-should-be-withdrawn-by-gary-nash>.

[103] House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 19 (25 May 2010) (Robert Anthony Hodge), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4547693&Language=E&Mode=1&Parl=40&Ses=3#Int-3175079> [*Evidence* (ICMM)]; PDAC, *The Prospectors and Developers Association of Canada Urges a House of Commons Standing Committee to Recognize the Ethically Responsible Nature of Canada's Mineral Industry and Reject Bill C-300,* News Release (19 November 2009), online: PDAC <http://www.pdac.ca/pdac/misc/pdf/091117-bill-c-300.pdf>; *Evidence* (Canadian Chamber of Commerce — Beatty), *supra* note 101; House of Commons, SCFAID*, Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 42 (26 November 2009) (Raymond Chrétien), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4266713&Language=E&Mode=1&Parl=40&Ses=2#Int-2974947> [*Evidence* (Fasken Martineau DuMoulin, LLP — Chrétien)]; *Evidence* (Canadian Council of Chief Executives), *supra* note 101.

[104] *Evidence* (Canadian Chamber of Commerce — Beatty), *supra* note 101; *Evidence* (Canadian Council of Chief Executives), *supra* note 101; *Evidence* (Canadian

Various federal government departments also weighed in against Bill C-300. For example, government bodies named in the bill complained that they had not been consulted and that confusion would be created as the "legislative" approach adopted in Bill C-300 would be inconsistent with the policy approach to CSR being adopted by government bodies — which might, for example, permit a body such as the EDC to give money to a company and then engage it in raising its CSR standards.[105] DFAIT, which would have been required to implement the legislation, complained that it would have to build capacity to investigate and adjudicate claims due to the quasi-judicial process contemplated by Bill C-300.[106] The EDC reiterated industry concerns that Bill C-300 would create competitive disadvantage for Canadian companies.[107]

The drafters of the bill were willing to acknowledge some of its deficiencies, and a number of the complaints raised in relation to

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Chamber of Commerce — George), *supra* note 101; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 3rd Sess, No 22 (8 June 2010) (Thomas Shrake), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4598846&Language=E&Mode=1&Parl=40&Ses=3#Int-3213839> [*Evidence* (Pacific Rim Mining Corporation)].

[105] House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 33 (20 October 2009) (Dr. Stephen Lucas, Minerals and Metals Sector, Department of Natural Resources), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4148257&Language=E&Mode=1&Parl=40&Ses=2#Int-2895130>; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 35 (27 October 2009) (Jim McArdle, EDC), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4178126&Language=E&Mode=1&Parl=40&Ses=2%20-%20T1000> [*Evidence* (EDC)]; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 39 (17 November 2009) (Donald Raymond, CPPIB), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4231494&Language=E&Mode=1&Parl=40&Ses=2%20-%20Int-2948327>; House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 39 (17 November 2009) (Ian Dale, CPPIB), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4231494&Language=E&Mode=1&Parl=40&Ses=2%20-%20Int-2948923>.

[106] House of Commons, SCFAID, *Minutes of Proceedings and Evidence*, 40th Parl, 2nd Sess, No 43 (1 December 2009) (Grant Manuge, Trade Commissioner Service, DFAIT), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4281177&Language=E&Mode=1&Parl=40&Ses=2%20-%20Int-2984517>.

[107] *Evidence* (EDC), *supra* note 105.

Bill C-300 were the subject of proposed amendments to the bill.[108] Yet, ultimately, on 27 October 2010, by a close vote of 138 to 134, Bill C-300 passed into history.[109]

### *BUILDING THE CANADIAN ADVANTAGE* AND THE OFFICE OF THE CSR COUNSELLOR

The policy paper *Building the Canadian Advantage* describes itself as providing a "comprehensive strategy on corporate social responsibility for the extractive sector operating abroad," informed by the national roundtables and the *SCFAIT Report*.[110] In keeping with its name, *Building the Canadian Advantage* specifically claims that it will

> *improve the competitive advantage* of Canadian international extractive sector companies by *enhancing* their ability to manage social and environmental risks. It recognizes that, while most Canadian companies are committed to the highest ethical, environmental and social standards, those that lack the commitment can cause harm to communities abroad and undermine the competitive position of other Canadian companies.[111]

Accordingly, *Building the Canadian Advantage* first promises to support initiatives that enhance the capacities of developing countries to manage the development of minerals, oil, and gas so that they might benefit from these resources to reduce poverty.[112] Second,

108 *House of Common Debates*, 40th Parl, 3rd Sess, No 66 (20 September 2010), online: House of Commons <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4656017&Language=E&Mode=1&Parl=40&Ses=3%20-%20SOBQ-3267199> (Hon. John McKay).

109 The vote tally, organized by party, is available online: House of Commons <http://www2.parl.gc.ca/HouseChamberBusiness/ChamberVoteDetail.aspx?Language=E&Mode=1&Parl=40&Ses=3&Vote=125&GroupBy=party&FltrParl=40&FltrSes=3>. See also Jane Taber, "Ignatieff's Mixed Messages on Mining Leaves Liberal Heads Spinning," *Globe and Mail* (28 October 2010), online: Globe and Mail <http://www.theglobeandmail.com/news/politics/ottawa-notebook/ignatieffs-mixed-message-on-mining-leaves-liberal-heads-spinning/article1776539/>; Mining Watch Canada, *Bill C-300 a High Watermark for Mining and Government Accountability* (16 November 2010), online: Mining Watch Canada <http://www.miningwatch.ca/article/bill-c-300-high-water-mark-mining-and-government-accountability>.

110 *Building the Canadian Advantage, supra* note 9 at 4.

111 *Ibid* [emphasis added].

112 *Ibid* at 4-5. The report highlights the role that CIDA has played in "building and modernizing the governance regimes to ensure that natural resources are

DFAIT and NRCan commit to promoting three "widely recognized" international CSR performance guidelines — not surprisingly, those identified by the Advisory Group — with Canadian extractive companies operating abroad.[113] Third, the Office of the CSR Counsellor is to be set up.[114] Finally, a CSR Centre of Excellence is to be developed to encourage the Canadian international extractive sector to implement the voluntary performance guidelines by developing and disseminating high-quality CSR information, training, and tools.[115]

With respect to international CSR performance guidelines, the IFC Performance Standards on Social and Environmental Sustainability are described in *Building the Canadian Advantage* as "*de facto* performance benchmarks for projects in developing countries that require substantial financial investment,"[116] due to their adoption by financial institution signatories to the Equator Principles.[117] The Voluntary Principles on Security and Human Rights, developed through a partnership of states, corporations, and NGOs in 2000, are said to have been "designed specifically" to address the challenges

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managed in a technically and environmentally sound manner," including through legal and judicial reform (*ibid* at 6.) Also highlighted is the role that NRCan has played, at times with CIDA, in technical assistance, policy development, and training at the domestic level, while providing support for multi-governmental mining organizations and the establishment of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (*ibid* at 6-7). See further, on the Intergovernmental Forum, online: <http://www.globaldialogue.info/wn_e.htm> and note 263 in this article.

[113] *Building the Canadian Advantage, supra* note 9 at 4-5.

[114] *Ibid.*

[115] *Ibid.* See further CSR Centre of Excellence, *supra* note 10.

[116] *Building the Canadian Advantage, supra* note 9 at 8. The performance standards "set expectations of conduct in eight issue areas, including Social and Environmental Assessment and Management Systems; Labour and Working Conditions; Pollution Prevention and Abatement; Community Health, Safety and Security; Land Acquisition and Involuntary Resettlement; Biodiversity Conservation and Sustainable Natural Resource Management; Indigenous Peoples; and Cultural Heritage" (*ibid*).

[117] *Ibid* at 8. Eighty percent of global financing for extractive sector projects is provided by these institutions, which agree to adopt lending practices consistent with the IFC performance standards (*ibid*); see also Equator Principles*, supra* note 92. However, the Equator Principles specify that a different review process applies to projects in high income OECD countries. See Equator Principles Association, *FAQs*, online: <http://www.equator-principles.com/index.php/about-ep/faqs/42-about/frequently-asked-questions/21>.

of "violence-related risk assessment," including security provider and extractive industry relations.[118] The Global Reporting Initiative (GRI), "developed … via a multi-stakeholder process involving industry, investors, civil society and labour," is characterized as "broadly recognized as the *de facto* international reporting standard."[119]

Yet, in terms of human rights, *Building the Canadian Advantage* states:

> Obligations under international human rights conventions apply to states and do not directly create obligations for companies. While such obligations can serve to guide the development of CSR standards, the international legal environment is under pressure for change and adaptation.[120]

*Building the Canadian Advantage* highlights the UN Human Rights Council's unanimous endorsement in 2008 of *Protect, Respect, and Remedy,* yet makes no reference to any of its three pillars or to what these might mean for the Canadian government's own responsibility to address problems associated with Canadian companies engaged in global mining. Nor is there mention of the international human rights treaties to which Canada is a party. This appears to be a notable omission, given *Building the Canadian Advantage*'s explicit reference to Canada's anti-bribery obligations as a state party to numerous multilateral corruption conventions.[121] The clear implication is that, while Canada's international anti-bribery commitments require it

[118] *Building the Canadian Advantage, supra* note 9 at 9; Voluntary Principles*, supra* note 40.

[119] *Building the Canadian Advantage, supra* note 9 at 9. *Building the Canadian Advantage* also discusses the environmental disclosure requirements in place for issuers listing on Canadian stock exchanges and the role of provincial securities laws in relation to disclosure (*ibid* at 9-10). See also GRI*, supra* note 23; GRI, *Reporting Framework,* online: GRI <https://www.globalreporting.org/reporting/reporting-framework-overview/Pages/default.aspx>; GRI, *Mining and Metals Sector Supplement,* online: GRI <https://www.globalreporting.org/resourcelibrary/MMSS-Complete.pdf>.

[120] *Building the Canadian Advantage, supra* note 9 at 8.

[121] *Ibid* at 14, referring to the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, Can TS 1999 No 23 [Anti-Bribery Convention]; the Inter-American Convention against Corruption, 29 March 1996, Can TS 2000 No 21; the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209; and the United Nations Convention against Corruption, 31 October 2003, 2349 UNTS 41.

to address corporate conduct, its international human rights commitments do not.

Interestingly, legal incentives are proposed in the anti-corruption context, with a commitment to "examine the possibility of extending the application of the offence of bribing a foreign public official" under the Corruption against Foreign Officials Act[122] "on the basis of the active nationality principle."[123] While traditional bases of jurisdiction that prevail in Canadian law are noted, there is no mention of the fact that Canada has been criticized for its reluctance to implement nationality-based jurisdiction in the bribery context as has been required for years under the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[124] As a whole, the lack of reference to obligations under international human rights law and the limited understanding of jurisdiction expressed in *Building the Canadian Advantage* reflect a preoccupation with avoiding any exercise of either legislative (prescriptive) or judicial (adjudicative) jurisdiction that could be perceived as an infringement of host state sovereignty.[125]

*Building the Canadian Advantage* identifies steps to "ensure that government services align with high standards of corporate social responsibility."[126] For example, CIDA will ensure that CSR is practised within the Canada Investment Fund for Africa by "assess[ing] its procedures and guidelines related to projects involving Canadian private sector partners."[127] The EDC already uses the OECD's

[122] Corruption against Foreign Officials Act, SC 1998, c 34.

[123] *Building the Canadian Advantage, supra* note 9 at 14-15.

[124] Anti-Bribery Convention, *supra* note 121. See, eg, OECD Working Group on Bribery in International Business Transactions, *Canada: Phase 2: Follow-up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combatting Bribery of Public Officials in International Business Transactions* (2006) at 5, online: OECD <http://www.oecd.org/dataoecd/5/6/36984779.pdf>. See also Julian Sher, "Canada Ranked Worst of G7 Nations in Fighting Bribery, Corruption," *Globe and Mail* (24 May 2011), online: Globe and Mail <http://www.theglobeandmail.com/news/politics/canada-ranked-worst-of-g7-nations-in-fighting-bribery-corruption/article592312/; Transparency International, "Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention" (2011), online: Transparency International <http://www.transparency.org/whatwedo/pub/progress_report_2011_enforcement_of_the_oecd_anti_bribery_convention>.

[125] See generally Seck, *supra* note 15.

[126] *Building the Canadian Advantage, supra* note 9 at 11.

[127] *Ibid* at 11-12. Canada Investment Fund for Africa (CIFA) is a public-private investment fund designed to stimulate growth in Africa, with approximately a quarter

*Common Approaches on Environment and Officially Supported Export Credits* when developing policy and practices for evaluating the environmental and social impacts of projects.[128] Moreover, the EDC is a signatory to the Equator Principles[129] and issued a statement on human rights in April 2008 committing to human rights due diligence for projects and countries determined to have a higher potential human rights risk.[130] *Building the Canadian Advantage* also notes the CPPIB's *Policy on Responsible Investing*, along with the CPPIB's role as a contributor and signatory to both the UN Principles for Responsible Investment and the Extractive Industries Transparency Initiative.[131]

Arguably, the most interesting proposal in *Building the Canadian Advantage* is the creation of the Office of the CSR Counsellor, which is justified on the basis that "[u]nresolved disputes directly affect business through expensive project delays, damaged reputations, high conflict management costs, investor uncertainty, and, in some cases, loss of investment capital."[132] Accordingly, a CSR Counsellor would enable CSR disputes related to extractive activity abroad to be resolved in a "timely and transparent manner."[133] The position was created by an Order in Council,[134] and, in October 2009,

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of its investments in six extractive sector projects. Four of these are operated by Canadian or Canadian-listed companies. See CIFA, *Portfolio Summaries*, online: CIFA <http://www.cifafund.ca/en/portfolio.html>.

128 *Ibid* at 12-13. See *Common Approaches, supra* note 22. See also generally EDC's environmental commitments, online: EDC <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Pages/default.aspx>.

129 *Building the Canadian Advantage, supra* note 9 at 13. IFC standards are also a benchmark standard under the *Common Approaches, supra* note 22. However, the EDC subjects G-7 countries to a streamlined approach, in keeping with the Equator Principles, *supra* note 92 and EDC, *Environmental and Social Review Directive,* para 29(c), online: EDC <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Documents/environment-social-review-directive.pdf>.

130 *Building the Canadian Advantage, supra* note 9 at 13. See EDC, *Business Ethics: Human Rights,* online: <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Documents/human-rights-statement.pdf>.

131 *Building the Canadian Advantage, supra* note 9 at 3-14. See also the *United Nations Principles of Responsible Investment (UNPRI),* online: UNPRI <http://www.unpri.org/>; and note 51 on the Extractive Industries Transparency Initiative.

132 *Building the Canadian Advantage, supra* note 9 at 10.

133 *Ibid* at 11.

134 Order in Council, PC 2009-0422 (25 March 2009), online: <http://www.pco-bcp.gc.ca/OIC-DDC.asp?lang=eng&Page=&txtOICID=2009-0422&txtFromDate

Marketa Evans was appointed.[135] The CSR Counsellor "report[s] directly to and [is] accountable to" the minister of international trade.[136] The office officially opened in Toronto in March 2010.[137]

Before accepting complaints, the CSR Counsellor held public consultations regarding the rules of procedure that should govern her review process.[138] Notably, the consultations were held not only in Canada but also overseas and included stakeholders from "industry, civil society, host country governments and Canadian government officials."[139] The Rules of Procedure were released in October

=&txtToDate=&txtPrecis=&txtDepartment=&txtAct=&txtChapterNo=&txtChapterYear=&txtBillNo=&rdoComingIntoForce=&DoSearch=Search+%2F+List&viewattach=20393>.

[135] CSR Counsellor, *supra* note 56.

[136] Order in Council, *supra* note 134, s 7(1). This structure has raised concerns as to the ability of the CSR Counsellor to act impartially and at arm's length from DFAIT. See *Meeting Summary Report: Legal Experts Meeting on 'Identifying and Exploring the Key Legal Issues Associated with the Office of the Extractive Sector Corporate Social Responsibility Counsellor* (6 May 2010) at 6, online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Legal%20issues%20Workshop%201%20May%202010.pdf> [*CSR Experts Report*].

[137] Office of the Extractive Sector Corporate Social Responsibility Counsellor, *Building a Review Process for the Canadian International Extractive Sector: A Backgrounder* (June 2010) at 2, online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/building%20a%20review%20process%20backgrounder%20FINAL%20June%202010.pdf>.

[138] See Office of the Extractive Sector Corporate Social Responsibility Counsellor, *Public Consultations Summary Report: Building a Review Process for the Canadian International Extractive Sector: A Summary of Public Consultations Held June-August 2010* (September 2010) at 4-5, online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Consultations%20Summary%20Report%20Sept%202010.pdf> [*CSR Consultations Summary*], describing the public consultations as consisting of "five separate but complementary activities: (1) a series of full day, professionally facilitated workshops in 5 cities across Canada; (2) a 90 minute interactive webinar; (3) formal and informal interviews and dialogue sessions with international stakeholders in Mexico, Mali, and Senegal; (4) an invitation to provide written feedback on the draft rules of procedure; and (5) three legal experts workshops."

[139] *Ibid* at 2. See further individual consultation reports, online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications-publications.aspx?lang=eng&view=d>. See also description of stakeholders in Office of the Extractive Sector Corporate Social Responsibility Counsellor, *Annual Report to Parliament October 2009 – October 2010* (February 2011) at 3, online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/publications-publications.aspx?lang=eng&view=d>: "[T]he Counsellor has spent much of

2010,[140] and, in April 2011, a Review Process Participant Guide was unveiled, identifying six guiding principles: "accessible, effective, independent, transparent, responsive, predictable."[141]

As emphasized in the summary report of the public consultations, the content of the Rules of Procedure was limited by the mandate given to the CSR Counsellor in the Order in Council.[142] According to section 4 of the Order in Council, the CSR Counsellor is to both "review" the CSR practices of "Canadian extractive sector companies operating outside Canada" and "advise on the implementation of the performance guidelines."[143] Unlike Bill C-300, the possibility of review is not limited to companies operating in developing countries. However, a Canadian extractive sector company is defined as an "oil, gas or mining company that has been incorporated in Canada or that has its head office in Canada."[144] Thus, companies that list on Canadian stock exchanges, for example, are presumably excluded without further connecting factors, despite the fact that the GRI is included as a performance standard.[145]

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the past year in conversations with the multitude of constituencies who have an interest in the issues ... These stakeholders include Canadian companies, host country authorities, project affected communities and individuals, joint venture partners, Canadian industry associations, overseas industry associations, professional associations, Canadian NGOs, non-Canadian civil society groups, Canadian parliamentarians, host country regulators, service providers including the legal and consulting communities, socially responsible investors, academics, international financial institutions, global initiatives, and others."

140 *CSR Rules of Procedure, supra* note 57; Office of the Extractive Sector CSR Counsellor, *Launch of the Review Process of Canada's Office of the Extractive Sector Corporate Social Responsibility Counsellor*, News Release (20 October 2010), online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/csr_counsellor-conseiller_rse/launch_Oct2010_lancement.aspx?view=d>.

141 Office of the Extractive Sector Corporate Social Responsibility Counsellor, *The Review Process Participant Guide* (April 2011), online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Participant%20guide%20April%202011.pdf> [*Review Process Participant Guide*].

142 *CSR Consultations Summary, supra* note 138 at 4.

143 Order in Council, *supra* note 134, s 4.

144 *Ibid,* s 1. This definition is repeated in the *CSR Rules of Procedure, supra* note 57, s 1.

145 For a typology of Canadian mining companies, categorizing them according to their head office and government jurisdiction, among other factors, see DFAIT-Canada, *Discussion Paper, Prepared for the National Roundtables on Corporate Social Responsibility and the Extractive Sector in Developing Countries* (June 2006) at 26-27, Table 2.

More restrictively, the Order in Council provides that the CSR Counsellor requires the "express written consent of the parties involved" in order to undertake a review.[146] Furthermore, she is not permitted to make "binding recommendations" or "policy or legislative recommendations" or to "create new performance standards."[147] Nor may she apply any standards other than the designated performance guidelines (the IFC Performance Standards, the Voluntary Principles, and the GRI),[148] together with the OECD Guidelines.[149]

The CSR Counsellor may review a complaint if requested by "an individual, group or community" that "reasonably believes" it is, or may be, affected by activities of a Canadian extractive sector company that are inconsistent with the performance guidelines.[150] More strikingly, the CSR Counsellor may also review a complaint if approached by a Canadian extractive sector company that "believes it is the subject of unfounded allegations concerning its corporate conduct outside Canada in relation to the performance guidelines."[151] This provision was clearly designed to appease industry

[146] Order in Council, *supra* note 134, s 6. The CSR Counsellor is also not to review any activity that occurred before the day on which the first Counsellor was appointed (*ibid,* s 5(1)), which is identified in the *CSR Rules of Procedure* as 19 October 2009. *CSR Rules of Procedure, supra* note 57, s 3(a).

[147] Order in Council, *supra* note 134, s 5(5).

[148] *Ibid.*

[149] *Ibid,* s 1. However, the NCP for the OECD Guidelines is to remain the "primary authority" concerning these (*ibid,* s 5(2)-(4)). As the GRI is a voluntary guideline for sustainability reporting, it is unclear how it could be used. One possibility is that a community that believes it is being impacted by company conduct could complain to the CSR Counsellor if it believes the company is not accurately reporting CSR issues as required under the GRI. Another possibility is that a concerned investor group could approach the CSR Counsellor, although it is unclear whether an investor group would qualify as a "requestor."

[150] Order in Council, *supra* note 134, s 6(1)(a). An "individual, group or community" may authorize an "individual or organization" to aid or assist them in the submission of a request for review, thus allowing for the possibility that Canadian civil society organizations could assist foreign complainants in accessing the review process. *CSR Rules of Procedure, supra* note 57, s 5(a). Anonymous requests may not be submitted, although submissions may be made that request confidentiality (*ibid,* s 3(c)).

[151] Order in Council, *supra* note 134, s 6(1)(b). Such a request must "clearly name the Responding party." *CSR Rules of Procedure, supra* note 57, s 5(b). Presumably this responding party must then consent in writing to the review process under section 5(6) of the Order in Council.

concerns over "civil society" accountability, yet appears to be without precedent in any similar non-judicial CSR dispute resolution mechanism. Finally, the CSR Counsellor is not on her own initiative to review the activities of a Canadian extractive sector company, although she "may informally approach a company if ... she believes that early dialogue could prevent a dispute from arising or escalating."[152]

The aim of the five-stage review process is "to foster constructive collaboration and dialogue between stakeholders."[153] The CSR Counsellor does have the discretion to refuse to deal with a request for review,[154] yet she must consider listed factors when conducting a review, including whether the request was made in good faith.[155] While submissions must be made in either of Canada's official languages (French or English), the CSR Counsellor has hired Spanish interpreters to conduct field visits in relation to the first complaint received.[156] The participant guide identifies the need for the requester to ensure that they have "adequate resources and capacity" to continue the process through to its conclusion,[157] yet no resources are specifically designated to support a requestors' capacity to engage the process.

Once a review has been concluded, the CSR Counsellor is to issue a "written public statement"[158] and is also to submit an annual report that is to be tabled in Parliament by the minister of international

152 Order in Council, *supra* note 134, s 6(2).

153 *Ibid,* s 6(3). The five stages are: (1) initial assessment; (2) informal mediation; (3) fact finding; (4) access to formal mediation; and (5) reporting (*ibid,* s 6(4)).

154 *Ibid,* s 6(5)(a); see also generally s 6(5).

155 *Ibid,* s 6(6)(d); see also generally s 6(6).

156 *CSR Rules of Procedure, supra* note 57, s 9. See field visit reports concerning the complaint filed by Excellon Workers, National Mining Union, and Proyecto de Derechos Económicos, Sociales y Culturales A.C. in relation to Excellon Resources Incorporated, online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?view=d> [Excellon Complaint].

157 *Review Process Participant Guide, supra* note 141 at 17.

158 Order in Council, *supra* note 134, s 6(8). Before issuing the public statement, the CSR Counsellor is to inform the parties of the result and share the statement with the ministers of international trade and natural resources as well as the minister of international co-operation if relevant. See section 6(9). According to section 6(10), the minister of international trade may direct the CSR Counsellor to study additional matters.

trade.[159] If an annual report "would reflect adversely on any person or organization," the CSR Counsellor is to give them an opportunity to comment and "shall include a fair and accurate summary" of their comments in the report.[160] Ultimately, if the CSR Counsellor finds that company operations are "inconsistent with the performance guidelines," the CSR Counsellor is to "make recommendations to assist the company in ensuring that its activities are consistent."[161] No sanction follows, beyond the presumed shaming inherent in the making of the written public statement.

The adoption of the Rules of Procedure and concomitant activation of the review mechanism was greeted with some enthusiasm by industry representatives in the week preceding the vote on Bill C-300, including the Prospectors and Developers Association of Canada (PDAC)[162] and the Mining Association of Canada (MAC).[163] Civil society supporters of Bill C-300 were less enthusiastic, however, noting that while the CSR Counsellor might be of some use in less serious cases, companies were unlikely to consent to the process in the case of more serious allegations, which represented the bulk of complaints received by civil society.[164] Moreover, it was argued that the CSR Counsellor's review process "lacks a transparent fact-finding function and will lead to neither recommendations to government

159 *Ibid,* s 7(2).

160 *Ibid,* s 7(4).

161 *Ibid,* s 8(2).

162 PDAC, *Canada's Exploration and Mining Companies Welcome Canada's Independent CSR Counsellor,* News Release (20 October 2010), online: PDAC <http://www.pdac.ca/pdac/misc/101020.html>.

163 Mining Association of Canada (MAC), *Mining Association of Canada Welcomes the Launch of the CSR Counsellor's Review Mechanism,* Press Release (20 October 2010), online: MAC <http://www.mining.ca/www/media_lib/MAC_News/2010/10_20_10_Press_Releaserev.pdf>.

164 Canadian Network on Corporate Accountability, *Civil Society Statement on CSR Counsellor: Government's New Toothless Review Mechanism Underlies Why Responsible Mining Bill C-300 Is Necessary,* Press Release (26 October 2010), online: Halifax Initiative <http://www.halifaxinitiative.org/content/civil-society-statement-csr-counsellor>. According to the civil society statement, the most common complaints received were "allegations of serious environmental pollution, collaboration with paramilitary networks and deliberate attempts to corrupt government and the judiciary of the host country where the Canadian company establishes its operations." Moreover, as the CSR Counsellor mechanism "lacks an investigative function to clarify disputed facts," it is unclear how she would be able to resolve disputes without establishing first "whether the allegations are well founded."

nor to sanctions."[165] As of December 2011, one review process begun in relation to a mine in Mexico[166] had concluded unsatisfactorily as the company subsequently withdrew from the process.[167] A second request for a review had also been received.[168]

### PRELIMINARY CONCLUSIONS

The overview provided in the two preceding sections suggests that, while there is a consensus that the federal government has a role to play in preventing and remedying environmental and human rights harms occurring at mines outside Canada with links to Canadian companies, there is no consensus at this point as to the scope and structure of the relevant implementing mechanisms. For example, Bill C-300 would have applied only to mines in developing countries, yet the CSR Counsellor may in theory respond to problems at Canadian mining operations anywhere outside of Canada.[169] The CSR Counsellor's reach is inherently limited, however, by the requirement of all-party consent.[170] There is also disagreement over

[165] *Ibid.* See further MiningWatch Canada, *The Government's New 'CSR Counsellor' for the Extractive Sector*, Newsletter 27 (5 January 2010), online: MiningWatch Canada <http://www.miningwatch.ca/government-s-new-csr-counsellor-extractive-sector>; JP Laplante and Catherine Nolin, "Snake Oil and the Myth of Corporate Social Responsibility" (25 January 2011) 45:1 Canadian Dimension, online: Canadian Dimension <http://canadiandimension.com/articles/3613/>.

[166] See Excellon Complaint, *supra* note 156.

[167] See Office of the Extractive Sector Corporate Social Responsibility Counsellor, *Closing Report, Request for Review File #2011-01-MEX* (October 2011), online: DFAIT <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Closing_report_MEX.pdf>.

[168] See complaint filed by Maître Ahmed Mohamed Lemine and others in relation to First Quantums Minerals Limited, online: DFAIT Trade <http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?view=d>. This request has since been closed.

[169] Complaints have been made about Canadian mining companies operating in developed countries such as the United States. See UN Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on Elimination of Racial Discrimination,* UN Doc CERD/C/CAN/CO/18 (5 March 2007) at para 17 (responding to Western Shoshone Defense Project, *Report on Effects of Canadian Transnational Corporate Activities on the Western Shoshone Peoples of the Western Shoshone Nation: Report Submitted to CERD in relation to Canada's 17th and 18th Periodic Reports of CERD 4 (2007)*).

[170] The OECD's NCP process, by contrast, does not require company consent. See notes 67 and 68 in this article. However, OECD NCP complaints have withered

the content of the applicable standards and, in particular, whether or not human rights specifically may or should be invoked. Similarly, there are clear differences of opinion over the appropriate structure of any non-judicial dispute resolution mechanisms, such as whether they should have investigative or merely fact-finding powers, act in an independent ombudsperson capacity,[171] or, as with the CSR Counsellor, serve a mediating role.[172]

More profoundly, it remains contentious whether legal sanctions should be enforced against companies that are not prepared to comply with applicable standards or whether respect for CSR standards should be "voluntary."[173] Yet even mild sanctions, such as the removal of government support from non-compliant companies, is seen as a major threat by industry and industry legal counsel, who raise fears of an exodus of companies from Canada. Further, the need to ensure access to legal remedies for victims of environmental and human rights harms appears beyond contemplation once industry is at the table. And it is equally clear from the anti-bribery experience that, even in the face of a clear multilateral commitment to prohibit specified behaviour, the Canadian government is reluctant to implement legislative reform sanctioning transnational corporate conduct. Clearly, Canadian government regulation facilitating binding remedies or punishment for CSR breaches by recalcitrant companies will not readily be forthcoming. The result is that a non-judicial dispute resolution mechanism — one, moreover, that would permit industry complaints against civil society — has emerged as the government's sole remedial response — a response best seen as having the potential to prevent only minor harms and encourage

due to withdrawal by civil society and community groups frustrated by the process.

[171] Jyll Hansen et al, *Canada's Extractive Industry Ombudsperson: Background and Recommendations for an Ombudsperson for Canadian Extractive Companies Operating Abroad: Brief Submitted to the Government of Canada Roundtables on Corporate Social Responsibility in the Extractive Sector* (November 2006), online: <http://halifaxinitiative.org/updir/OmbudspersonMemo.pdf>.

[172] Of course, it may be that a layering of non-judicial mechanisms serving different roles would be the ideal solution.

[173] The government of Canada frequently states that compliance with identified international standards is voluntary. However, the line between "voluntary" and "mandatory" is generally understood to be less clear than this would suggest. See, eg, Michael Kerr, Richard Janda, and Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, ON: LexisNexis, 2009) at 93-104 (examining the voluntary versus regulatory debate and concluding that the debate is unhelpful).

the equivalent of strategic litigation against public participation.[174] While the CSR Counsellor is to be commended for her efforts to achieve consensus on the functioning of the mechanism to which she was appointed, the power and influence of her position is, ultimately, inherently limited.

Finally, it is striking how competing claims relating to competitive advantage and disadvantage feature prominently in the discourse documented earlier. Civil society generally claims that Bill C-300 would provide Canadian companies with a competitive advantage, while industry opponents frame their critiques by asserting that Bill C-300 would create a competitive disadvantage. The contested and, at the same time, persuasive nature of competitive (dis)advantage claims is highlighted by the significantly titled *Building the Canadian Advantage*. Whether or not meaningful home state regulation of transnational corporate conduct is politically feasible appears to hinge greatly upon perceptions of the effects of such regulation on competitive advantage. This point was highlighted in 2008 by John Ruggie in *Protect, Respect, and Remedy,* to which we now turn.[175]

## The UN's *Protect, Respect, and Remedy* Framework and the *Guiding Principles*

### Introduction: *Protect, Respect, and Remedy* and the Ruggie Process

Prior to the appointment of John Ruggie as SRSG, the UN Sub-Commission on the Promotion and Protection of Human Rights had produced a set of draft *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (*Norms*).[176] The draft *Norms* were not adopted by the UN Human Rights Commission, which, in 2004, described them

[174] See recent Ontario report calling for legislation against strategic litigation against public participation (SLAPP). Anti-SLAPP Advisory Panel, *Report to the Attorney General* (28 October 2010), online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf>. See also Barrick Gold lawsuit against small publisher in Quebec (which has anti-SLAPP legislation), *Barrick Gold Corp. c Éditions écosociété inc,* 2011 QCCS 4232; and parallel lawsuit in Ontario, *Banro Corporation v Éditions Écosociété Inc,* 2009 CanLII 7168 (ONSC).

[175] *Protect, Respect, and Remedy, supra* note 7 at para 14.

[176] UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*

as a draft proposal of no legal standing but that contained useful elements and ideas.[177] The SRSG's appointment was designed to "move beyond the stalemate" produced by the draft *Norms,* which, while widely endorsed by civil society groups, were opposed by business and governments.[178] Thus, when the SRSG was initially appointed, "there was little that counted as shared knowledge across different stakeholder groups in the business and human rights domain."[179] Accordingly, the SRSG "began an extensive programme of systematic research," resulting ultimately in "[s]everal thousand pages of documentation" available on the Internet and actively disseminated.[180] Among the research highlights of the first two phases of the SRSG's mandate were reports that provided a "scientific mapping" of the position taken by the UN human rights mechanisms with regard to the obligations of both states and corporations.[181]

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*with Regard to Human Rights,* UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003). See generally John Gerard Ruggie, "Current Developments: Business and Human Rights: The Evolving International Agenda" (2007) 101 AJIL 821.

177 *Interim Report, supra* note 6 at 55. See also David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97 AJIL 901; David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931.

178 *Interim Report, supra* note 6 at para 55. The 2005 mandate included the need to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights" and to "elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation" (*ibid* at para 1).

179 *Guiding Principles, supra* note 11 at para 4.

180 *Ibid* at para 4, referring to the SRSG's web portal, online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/SpecialRepPortal/Home>.

181 John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts,* UNHRC, 4th Sess, UN Doc A/HRC/4/35 (19 February 2007). Summary conclusions of this mapping included: explicit recognition of the existence of direct legal obligations for business under international criminal law, despite the lack of an international forum to hear claims (*ibid* at paras 21, 19-32); explicit recognition that international law does not (yet) recognize direct legal obligations for business for violations of less egregious international human rights law norms (*ibid* at paras 33, 33-44); the "uncontested nature" of the "firmly established" fact that "states have a duty to protect against nonstate human rights abuses within their

He also conducted several legal expert consultations [182] and numerous multi-stakeholder consultations,[183] touching upon various aspects of his mandate including the issues of whether corporations have direct obligations under international human rights law, the extent of the state duty to protect human rights, and the role of states in conflict-affected areas.

In 2008, *Protect, Respect, and Remedy* was unanimously welcomed by member states of the UN Human Rights Council.[184] It is aimed at all human rights[185] and is designed to "assist all social actors — governments, companies, and civil society — to reduce the adverse human rights consequences of [institutional] misalignments."[186] It identifies the "root cause" of the business and human rights problem

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jurisdiction, and that this duty extends to protection against abuses by business entities" (*ibid* at para 10). See also John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, UNHRC, 4th Sess, UN Doc A/HRC/4/35/Add.1 (13 February 2007).

182 *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum: Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops*, UNHRC, 4th Sess, UN Doc A/HRC/4/35/Add.2 (15 February 2007). The author attended the New York legal experts' consultation.

183 SRSG, *Corporate Responsibility to Protect Human Rights: Summary Report on Consultation in Geneva (4-5 December 2007)*, online: Business and Human Rights Resource Centre <http://www.reports-and-materials.org/Ruggie-Geneva-4-5-Dec-2007.pdf>; SRSG, *The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations With Respect to Human Rights: Summary Report on Meeting in Copenhagen (8-9 November 2007)*, online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf>; SRSG, *Business and Human Rights in Conflict Zones: The Role of Home States: Summary Report of Consultation Co-convened by SRSG and Global Witness in Berlin (5 November 2007)*, online: Business and Human Rights Resource Centre <http://www.reports-and-materials.org/Ruggie-Global-Witness-Berlin-report-5-Nov-2007.pdf>. The author attended the Copenhagen multi-stakeholder consultation. See also links to summary reports of all consultations, meetings, and workshops throughout the mandate, online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/SpecialRepPortal/Home/Consultationsmeetingsworkshops>.

184 *Protect, Respect, and Remedy, supra* note 7; UNHRC, *supra* note 8.

185 *Protect, Respect, and Remedy, supra* note 7 at paras 24, 52.

186 *Ibid* at paras 7, 17.

today as "governance gaps created by globalization — between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."[187]

*Protect, Respect, and Remedy* consists of three "differentiated but complementary responsibilities": the state duty to protect against human rights abuses by business enterprises; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedies. While the state duty to protect is described by the SRSG as lying "at the very core of the international human rights regime," the corporate responsibility to respect is described as "the basic expectation society has of business in relation to human rights."[188] Access to remedies is also essential because "even the most concerted efforts cannot prevent all abuse."[189]

*Protect, Respect, and Remedy* notes that international human rights treaty bodies recommend that states take all necessary steps to protect against abuse by non-state actors, including prevention, investigation and punishment, and provision of access to redress.[190] The duty to protect has both legal and policy dimensions, and while states have discretion in terms of how to implement this duty, both regulation and adjudication are appropriate.[191] However, home states "may feel reluctant to regulate against overseas harms" either because the "permissible scope of national regulation with extraterritorial effect remains poorly understood" or "out of concern that those firms might lose investment opportunities or relocate their headquarters."[192] In terms of the jurisdictional scope of the duty, international law provides that states are required to protect against human rights abuses by businesses "affecting persons within their territory or jurisdiction."[193] Yet

> [e]xperts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists, and

[187] *Ibid* at para 3.

[188] *Ibid* at paras 9 and 55.

[189] *Ibid* at para 82.

[190] *Ibid* at para 18.

[191] *Ibid.*

[192] *Ibid* at para 14.

[193] *Ibid* at para 18.

the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States. Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.[194]

Notably, the elaboration of the state duty to protect in *Protect, Respect, and Remedy* focuses very much on the policy dimensions of the duty, encouraging rather than mandating that they do more and never chastising host states for their failures.[195]

The role of home states is also discussed under the access to remedies pillar. Here, *Protect, Respect, and Remedy* outlines the problems that complainants have encountered when seeking judicial remedies in home state courts, such as costs, lack of standing, and the common law doctrine of *forum non conveniens*.[196] The SRSG suggests that the "law is slowly evolving in response to some of these obstacles" and concludes that states "should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims."[197] The discussion of non-judicial remedies also makes reference to home state mechanisms in the form of the OECD's NCPs and the OECD Guidelines.[198] While the NCPs have potential, *Protect, Respect, and Remedy* concludes that they fall short of the requirements for credible and effective non-judicial mechanisms due to potential conflicts of interest, lack of resources, uncertain time frames, and lack of transparent outcomes.[199] As with the state duty to protect, the elaboration of the access to remedies pillar

194 *Ibid* at para 19.

195 See Sara L Seck, "Collective Responsibility and Transnational Corporate Conduct," in Tracy Isaacs and Richard Vernon, eds, *Accountability for Collective Wrongdoing* (Cambridge: Cambridge University Press, 2011) 140 at 158 (noting *Protect, Respect, and Remedy*'s focus on policy recommendations for state implementation of the duty to protect rather than mandatory prescriptions coupled with sanctions against recalcitrant states).

196 *Protect, Respect, and Remedy, supra* note 7 at para 89.

197 *Ibid* at paras 90 and 91. Further, states should "address obstacles to access to justice, including for foreign plaintiffs — especially where alleged abuses reach the level of widespread and systemic human rights violations" (*ibid).*

198 *Ibid* at paras 98-99.

199 *Ibid* at paras 98, 92. However, some NCPs are taking innovative approaches that the OECD and adhering states "should consider" (*ibid* at para 99).

appears designed to encourage states to increase the availability of remedies, through both judicial and non-judicial mechanisms, rather than chastising states for not living up to their obligations under international human rights law. *Protect, Respect, and Remedy* concludes that the existing "patchwork of grievance mechanisms at different levels of the international system, with different constituencies and processes" leaves "considerable numbers of individuals whose human rights are impacted by corporations [without] access to [any] remedy."[200] While this situation is attributed in part to a "lack of information," the SRSG remarks, strikingly: "It also reflects *intended* and unintended limitations in the competence and coverage of existing mechanisms."[201]

The third phase of the SRSG's mandate consisted of an additional three-year period to "operationalize" *Protect, Respect, and Remedy* — "that is, to provide concrete and practical recommendations for its implementation."[202] The SRSG was asked to proceed "in the same research-based and consultative manner" as he had for *Protect, Respect, and Remedy*.[203] Of significance to the SRSG in embarking on this next phase of his work was the fact that *Protect, Respect, and Remedy* was "endorsed or employed" not only by individual governments but also by "business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors" as well as "such multilateral institutions as the International Organization for Standardization and the [OECD]" and other UN special procedures.[204] He attributed the "widespread positive reception" of *Protect, Respect, and Remedy* to both its "utility" and "the large number and inclusive character of stakeholder consultations convened by and for the mandate."[205] Indeed, by the time the draft *Guiding Principles* were being considered in January 2011, "the mandate had held 47 international consultations, on all continents," and the SRSG and his team "had made site visits to business operations and their local stakeholders in more than 20 countries."[206] The *Guiding Principles* were thus

200 *Ibid* at para 102.

201 *Ibid* at para 103 [emphasis added].

202 *Guiding Principles, supra* note 11 at para 9.

203 *Ibid* at para 10.

204 *Ibid* at para 7.

205 *Ibid* at para 8.

206 *Ibid.*

informed by extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that the Guiding Principles touch upon.[207]

In addition, some of the *Guiding Principles* were "road tested" and thus provide "guidance informed by actual practice."[208] For example, the *Guiding Principles* that address how governments should help companies avoid being drawn into human rights abuses in conflict-affected areas "emerged from off-the-record, scenario-based workshops with officials from a cross-section of States that had practical experience in dealing with these challenges."[209] Corporate lawyers were involved in the corporate law project, in which more than twenty leading corporate law firms from around the world assisted, on a pro bono basis, to "identify whether and how corporate and securities law in 39 jurisdictions currently encourages companies to respect human rights."[210]

The *Guiding Principles* themselves were "subject to extensive consultations," first in October 2010 at sessions held separately with Human Rights Council delegates, business enterprises and associations, and civil society groups, at which an annotated outline of the proposals was discussed.[211] In November 2010, a full draft of the *Guiding Principles* and related commentary was "sent to all Member States" and simultaneously "posted online for public comment" until the end of January 2011.[212]

207 *Ibid* at para 10.

208 *Ibid* at para 11.

209 *Ibid.* See John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses,* UNHRC 17th Sess, UN Doc A/HRC/17/32 (27 May 2011) [*Conflict-Affected Regions*]. Three workshops were convened involving participants from 12 countries representing a balance of "home and host states": Belgium, Brazil, Canada, China, Columbia, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the United Kingdom, and the United States (*ibid* at para 2).

210 *Corporate Law Addendum, supra* note 11 at paras 6, 11.

211 *Guiding Principles, supra* note 11 at para 12.

212 *Ibid.* See John Ruggie, *Draft Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework,* online: <http://www.reports-and-materials.org/

THE *GUIDING PRINCIPLES*

The *Guiding Principles* were presented to the UN Human Rights Council on 30 May 2011. The report highlights that endorsement of the *Guiding Principles* by the UN Human Rights Council would "mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."[213] Significantly, the normative contribution of the *Guiding Principles*

> lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[214]

The *Guiding Principles* are structured in chapters following the template of *Protect, Respect, and Remedy*, with each pillar described as "an essential component in an inter-related and dynamic system of preventative and remedial measures."[215]

Two foundational principles underlie the state duty to protect. Principle 1 provides:

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Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf> [*Draft Guiding Principles*]. The online consultation "attracted 3,576 unique visitors from 120 countries and territories," and "[s]ome 100 written submissions were sent directly to the Special Representative, including by Governments." The *Draft Guiding Principles* were further "discussed at an expert multi-stakeholder meeting, and then at a session with Council delegations, both held in January 2011." *Guiding Principles, supra* note 11 at para 12. For links to commentaries and submissions on the *Draft Guiding Principles*, see online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/CommentariesonDraftGuidingPrinciples> and online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions> [Submissions to Consultations on *Draft Guiding Principles*].

[213] *Guiding Principles, supra* note 11 at para 13.

[214] *Ibid* at para 14. Moreover, while the *Guiding Principles* are "universally applicable," "one size does not fit all," given the "fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises" (*ibid* at para 15).

[215] *Ibid* at para 6.

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[216]

According to Principle 2, "[s]tates should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[217] The commentary to Principle 2 begins with a statement reminiscent of the uncertainty identified in *Protect, Respect, and Remedy* regarding the permissibility of home state regulation despite a lack of obligation under international human rights law.[218] However, the commentary also notes the existence of strong "policy reasons" for home states to clearly set out expectations, in particular, where the state is either involved in the business or supports it, in part so as to preserve the reputation of the home state itself.[219] Moreover, the commentary highlights that a range of approaches have been adopted by states to date including both "domestic measures with extraterritorial implications"[220] and "direct extraterritorial legislation

[216] *Ibid* at 6, Principle 1. The chapter outlining the state duty to protect is described as focused upon preventative measures (*ibid* at 7). As the state duty to protect is a standard of conduct, states are not "per se responsible for human rights abuse by private actors" but, rather, "may breach their international human rights law obligations where such abuse can be attributed to them" or where they "fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse" (*ibid* at 7, Commentary to Principle 1).

[217] *Ibid* at 7, Principle 2.

[218] *Ibid* at 7, Commentary to Principle 2. See text accompanying note 194.

[219] *Guiding Principles, supra* note 11 at 7, Commentary to Principle 2.

[220] *Ibid.* These measures include "requirements on 'parent' companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the [OECD] Guidelines; and performance standards required by institutions that support overseas investments." The distinction between measures with extraterritorial effect and direct extraterritorial measures was first introduced by the SRSG in a keynote address in Stockholm in November 2009 and elaborated upon in his 2010 report. See John G Ruggie, *Keynote Presentation at EU Presidency Conference on the 'Protect, Respect and Remedy' Framework,* Stockholm, 10-11 November 2009, online: <http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf>; John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect and Remedy,* UNHRC, 14th Sess, UN Doc A/HRC/14/27 (9 April 2010) at para 48.

and enforcement."[221] The commentary concludes that a variety of factors "contribute to the perceived and actual reasonableness of States' actions," including whether they are "grounded in multilateral agreement."[222]

Following these foundational principles, the chapter outlining the state duty to protect presents a series of operational principles categorized within four overarching themes. The first theme on "general state regulatory and policy functions" highlights both Principle 3 on the importance of enforcement and periodic assessment of the adequacy of existing laws and the need to ensure that "laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights."[223] The principle elaborates on the need for states to provide businesses with "effective guidance" on "how to respect human rights throughout their operations" and to "[e]ncourage or where appropriate require, business enterprises to communicate how they address their human rights impacts."[224]

The second theme on "the state-business nexus" encompasses Principles 4, 5, and 6.[225] According to Principle 4, states should "take additional steps" when business enterprises are "owned or controlled by the State" or "receive substantial support and services from State agencies," including export credit agencies and official investment insurance or guarantee agencies.[226] These additional steps may include "requiring human rights due diligence."[227] The third theme, "supporting business respect for human rights in conflict-affected areas," is addressed in Principle 7 and consists of four recommendations for states due to the heightened risk of gross human rights abuses in conflict zones.[228] These include: engaging with businesses

[221] *Guiding Principles, supra* note 11 at 7, Commentary to Principle 2. This includes "criminal regimes that allow for prosecution based on the nationality of the perpetrator no matter where the offence occurs."

[222] *Ibid.*

[223] *Ibid* at 8, Principle 3.

[224] *Ibid.*

[225] *Ibid.* Principle 5 addresses privatization, while Principle 6 focuses on procurement activities.

[226] *Ibid* at 9, Principle 4.

[227] *Ibid.*

[228] *Ibid* at 10, Principle 7.

to help them "identify, prevent and mitigate" human rights-related risks at the "earliest stage possible"; providing "adequate assistance to business enterprises to assess and address the heightened risks"; "denying access to public support and services" where a business enterprise involved in gross human rights abuses refuses to co-operate; and ensuring that the risks of business involvement in gross human rights abuses are effectively addressed by "current policies, legislation, regulations and enforcement measures."[229]

"Ensuring policy coherence," which is the fourth and final theme under the state duty to protect, is addressed in Principles 8 through 10. Most relevant to home states is Principle 8, according to which "governmental departments, agencies or State-based institutions that shape business practices" need to be "aware of and observe the State's human rights obligations" when fulfilling their mandates.[230] Finally, Principle 10 provides that, as members of multilateral institutions, states should promote business respect for human rights by helping other states meet their duty to protect through "technical assistance, capacity-building and awareness-raising" while also drawing upon the *Guiding Principles* to promote "shared understandings" and "advance international co-operation" on business and human rights.[231]

The role of home states is also considered in the final chapter of the *Guiding Principles,* "Access to Remedy." A single foundational principle, Principle 25, informs the chapter:

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.[232]

[229] *Ibid* at 10-11, Principle 7. See also *Conflict-Affected Regions, supra* note 209.

[230] *Guiding Principles, supra* note 11 at 11, Principle 8. Principle 9 highlights the need for states to maintain "adequate domestic policy space" and regulatory ability to meet their own human rights obligations, even when pursuing investment treaties or contracts with other States or business enterprises( *ibid* at 12, Principle 9).

[231] *Ibid* at 12, Principle 10. Principle 10 further provides that as members of multilateral institutions dealing with business-related issues, States should ensure that the institutions do not "restrain the ability of their member States to meet their duty to protect."

[232] *Ibid* at 22, Principle 25.

The commentary elaborates that access to effective remedies includes both "procedural and substantive aspects" and that remedies may 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."[233] The term "grievance" is defined as "a perceived injustice evoking an individual's or a group's sense of entitlement," while "grievance mechanism" is used "to indicate any routinized, State-based or non-State-based, judicial or non-judicial process" through which grievances "can be raised and remedy can be sought."[234]

Five operational principles appear under the chapter "Access to Remedy." Principle 26 on "state-based judicial mechanisms," provides that states should "ensure the effectiveness of domestic judicial mechanisms" by considering how to reduce legal and other barriers that "could lead to a denial of access to remedy."[235] The commentary highlights the importance of states ensuring that they do not "erect barriers to prevent legitimate cases from being brought before the courts" and ensuring that the "legitimate and peaceful activities of human rights defenders are not obstructed."[236] Principle 27 on "state-based non-judicial grievance mechanisms," suggests that "alongside judicial mechanisms," states should "provide effective and appropriate non-judicial grievance mechanisms … as part of a comprehensive State-based system for the remedy of business-related human rights abuse."[237] The commentary notes that a judicial remedy is not always required nor is it always the approach favoured by claimants "even where judicial systems are effective and well-resourced." Consequently, there is an essential role for administrative, legislative, and other non-judicial mechanisms as a complement and supplement to judicial mechanisms.[238]

233 *Ibid* at 22, Commentary to Principle 25.

234 *Ibid*. A grievance may be based on "law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities."

235 *Ibid* at 23, Principle 26.

236 *Ibid* at 23, Commentary to Principle 26.

237 *Ibid* at 24, Principle 27.

238 *Ibid* at 24, Commentary to Principle 27.

Principles 28 to 30 address "non-state grievance mechanisms." Principle 28 highlights that states should play a role in facilitating access to effective non-state-based grievance mechanisms.[239] The commentary identifies two different categories of non-state-based grievance mechanisms: first, those "administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group"[240] and, second, "regional and international human rights bodies," which, while most often dealing with "alleged violations by States of their obligations to respect human rights," have also at times dealt with the "failure of a State to meet its duty to protect against human rights abuse by business enterprises."[241] This commentary is striking for several reasons. Positively, it highlights that access to remedies may include remedies against the state rather than against the business enterprise alone, as appears implicit in the rest of the "Access to Remedy" chapter.[242] However, by categorizing regional and international human rights mechanisms as non-state-based grievance mechanisms rather than enforcers of international law, the *Guiding Principles* curiously appear to equate such mechanisms with private company or industry grievance mechanisms.

Principle 31, the final principle under the "Access to Remedy" chapter, outlines "effectiveness criteria for non-judicial grievance mechanisms" and is applicable to both state-based and non-state-based mechanisms.[243] To be effective, grievance mechanisms should

[239] *Ibid* at 24, Principle 28. Principle 29 then focuses upon the need for business enterprises to "establish or participate in effective operational-level grievance mechanisms for individuals and communities" in order to address and remediate grievances early on, while Principle 30 provides that "collaborative initiatives that are based on respect for human rights-related standards," whether industry or multi-stakeholder, should "ensure that effective grievance mechanisms are available" in order to achieve greater legitimacy (*ibid* at 25-26).

[240] *Ibid* at 24, Commentary to Principle 28. According to the commentary, non-state-based grievance mechanisms administered by business enterprises offer potential benefits, including "transnational reach." The commentary also notes that non-state-based grievance mechanisms are "non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes."

[241] *Ibid* at 25, Commentary to Principle 28.

[242] Seck, *supra* note 195 at 158-59 (discussing with respect to *Protect, Respect, and Remedy*).

[243] *Guiding Principles, supra* note 11 at 26, Principle 31.

be: (1) legitimate;[244] (2) accessible;[245] (3) predictable;[246] (4) equitable;[247] (5) transparent;[248] (6) rights-compatible;[249] and (7) a source of continuous learning.[250] Operational grievance mechanisms should also be "[b]ased on engagement and dialogue," including by "consulting stakeholder groups for whose use they are intended on their design and performance."[251]

### PRELIMINARY CONCLUSIONS

In sum, the *Guiding Principles* do not definitively state that home states have binding obligations under international human rights law to regulate and adjudicate transnational corporations so as to prevent and remedy human rights harms. However, they do provide guidance as to the types of measures that all states should implement to prevent and remedy business harms and so can serve as a useful tool for evaluating the recent Canadian developments described earlier with regard to global mining. Further reflection on how the "Ruggie process" informed the substance of his conclusions on the existence and scope of home state obligations will be provided in the following section.

[244] *Ibid.* Legitimate means "enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes."

[245] *Ibid.* Accessible means "being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access."

[246] *Ibid.* Predictable means "providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation."

[247] *Ibid.* Equitable means "seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms."

[248] *Ibid.* Transparent means "keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake."

[249] *Ibid.* Rights-compatible means "ensuring that outcomes and remedies accord with internationally recognized human rights."

[250] *Ibid.* Continuous learning is defined as "drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms."

[251] *Ibid.* Dialogue should be the means used to address and resolve grievances.

## Discussion

### CANADA, GLOBAL MINING, AND THE *GUIDING PRINCIPLES*

The *Guiding Principles* use permissive language in making several recommendations relating to the home state duty to protect rights. Thus, Principle 3(a) indicates that states "should" enforce laws requiring business enterprises to respect rights and review existing laws to identify and address any gaps. The Canadian roundtables process could qualify as a review of the adequacy of Canadian laws relating to global mining. Its multi-stakeholder approach, mirroring in some ways that of the SRSG's process, might even be viewed as commendable. Principle 3(b) identifies the need to ensure that corporate laws do not constrain business respect for human rights. Recent developments in Canadian corporate law suggest that some steps may have been taken to make director fiduciary duties more human rights friendly,[252] while shareholder proposals reflecting affected community concerns may now be brought to annual general meetings with greater ease than in the past.[253] However, there is no guarantee that these proposals will influence decision making.[254]

Principle 3(c)'s recommendation that states provide further guidance to businesses on "how to respect human rights throughout their operations" is met at least in part by the existence of the Centre of Excellence for CSR, although as noted earlier in this article, the list of CSR standards to which the centre refers companies does not include *Protect, Respect, and Remedy* or the *Guiding Principles*.[255]

252 See *BCE Inc v 1976 Debentureholders,* 2008 SCC 69, [2008] 3 SCR 560. For related commentary, see, eg, Mohamed F Khimji, "People v. Wise — Conflating Directors' Duties, Oppression, and Stakeholder Protection" (2006) 39 UBCL Rev 209; Anthony Vanduzer, "*BCE v 1976 Debentureholders*: The Supreme Court Hits and Misses in Its Most Important Corporate Law Decision since *Peoples*" (2010) 43 UBC L Rev 205. See also Stikeman Elliott LLP, *Corporate Law Tools Project* (September 2009), online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie/corp-law-tools-canada-stikeman-elliott-for-ruggie-sep-2009.pdf> [*Stikeman Elliott CLT Report*].

253 See *ibid* at 19; Aaron A Dhir, "Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability" (2006) 43 Am Bus LJ 365.

254 Dhir, "Shareholder Engagement," *supra* note 69.

255 See text accompanying note 10 in this article.

Principle 3(d) calls upon states to encourage or even require business enterprises to communicate how they address their human rights impacts. This recommendation may be partially met by the inclusion of the GRI as a performance standard for the CSR Counsellor,[256] although there have also been calls for increased social disclosure under securities laws in Ontario.[257]

The EDC's human rights and environmental policies may be in keeping with Principle 4's recommendation that human rights impact assessments be conducted when states provide substantial support or services to business ventures.[258] However, no similar requirement exists in relation to other government support such as that provided through Canadian missions abroad, despite such a proposal in Bill C-300. Moreover, unlike Bill C-300, the *Guiding Principles* do not suggest that this financing or support should be made conditional upon company compliance with human rights standards. The one exception is where enterprises engaged in gross human rights abuses in conflict-affected areas refuse to co-operate to address the situation.[259] Yet even in this seemingly extreme case, Canada has not adopted conditionality.

Other recommendations in Principle 7(a) and (b) concern engagement with, and assistance to, business enterprises that are at a heightened risk of committing abuses so that they might identify, prevent, and mitigate these risks. These recommendations may be partially addressed by the inclusion of the Voluntary Principles on Security and Human Rights in the CSR Counsellor's mandate.[260] Principle 7(d) also proposes that states ensure that their policies, legislation, regulations, and enforcement measures are effective in addressing these risks. The possibility of "civil, administrative or criminal liability for enterprises domiciled or operating in" a state's

[256] See note 149 in this article.

[257] See Ontario Securities Commission (OSC), *OSC Corporate Sustainability Reporting Initiative: Report to Minister of Finance* (18 December 2009) at 14, online: OSC <http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20091218_51-717_mof-rpt.pdf>; Hennick Centre for Business and Law and Jantzi-Sustainalytics, *Corporate Social Reporting Initiative: Report to Minister of Finance* (June 2010) at 8, online: Hennick Centre <http://www.hennickcentre.ca/documents/FINALREPORT.pdf>. See also increased disclosure requirements in the OECD Guidelines, which are promoted by Canada's NCP. *OECD Guidelines, supra* note 18 at 15.

[258] See notes 129-30 and accompanying text in this article.

[259] *Guiding Principles, supra* note 11 at 10-11, Principle 7.

[260] See Voluntary Principles, *supra* note 40.

territory and/or jurisdiction that contribute to gross human rights abuses is raised here, a possibility that may, or, more likely, may not be met in Canada.[261] Effective enforcement remains unlikely given Canada's historically poor enforcement record in the bribery context.

Principle 8's recommendation that government departments achieve policy coherence with state human rights commitments may be partially met by the existence of federal department CSR policies.[262] Finally, Principle 10's emphasis on multilateral engagement through multilateral institutions, including technical assistance, capacity building, and "awareness-raising" may be met by Canada's leadership role in the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development.[263]

The role of the home state is also addressed in the *Guiding Principles* under "Access to Remedy" chapter. In terms of access to judicial remedies, as discussed earlier, there have been no recent legislative changes to facilitate this recourse,[264] although it remains to be seen whether courts will themselves begin to embrace this type of litigation, at least by not exercising their discretion to decline to hear such cases.[265] While increasing numbers of non-judicial mechanisms have been implemented, it appears unlikely

[261] See James Yap, "Corporate Civil Liability for War Crimes in Canadian Courts: Lessons from *Bil'in (Village Council) v. Green Park International Ltd.*" (2010) 8 J Int'l Crim Justice 631; W. Cory Wanless, "Corporate Liability for International Crimes under Canada's Crimes against Humanity and War Crimes Act" (2009) 7 J Int'l Criminal Justice 201.

[262] See, eg, the list of government departments with links to CSR policies on the website of the CSR Centre of Excellence, online: <http://web.cim.org/csr/MenuPage.cfm?sections=126&menu=131#block253>.

[263] See further on the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, *supra* note 112. However, another view of the Intergovernmental Forum and other capacity-building exercises in developing countries would be that these are designed to facilitate the exploitation of host state natural resources to benefit Canadian companies. See, eg, critical commentary surrounding the support provided by CIDA to "development NGOs" for "CSR projects" of mining companies at mine sites overseas by Catherine Coumans, *Brief Prepared for the House of Commons Standing Committee on Foreign Affairs and International Development's Study on the Role of the Private Sector in Achieving Canada's International Development Interests* (MiningWatch Canada: January 2012), online: MiningWatch Canada <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Mining_and_Development_FAAE_2012.pdf>.

[264] However, see Bill C-354, *supra* note 58.

[265] See notes 64-66 in this article.

that any would meet the list of effectiveness criteria outlined in Principle 31.[266]

This review would not be complete without acknowledging the influence of the SRSG's contributions to other international standards referenced by Canadian government mechanisms. For example, the most recent version of the OECD Guidelines for Multinational Enterprises, released in May 2011, includes a new chapter on human rights designed to reflect the recommendations in *Protect, Respect, and Remedy* and the *Guiding Principles.*[267] Greater attention was also paid to the design of the NCP process in order to better reflect the recommendations of the SRSG.[268] There is pressure from human rights advocates for the OECD to take human rights into account in the current review of the OECD Recommendation on Export Credits and the Environment.[269] The most recent revisions to the IFC's Sustainability Framework and Policies and Procedures, dating from May 2011, also include increased references to human rights, although it may be debated whether they are sufficiently aligned with *Protect, Respect, and Remedy* and the *Guiding Principles* to satisfy the SRSG himself.[270] On 23 March 2011, the GRI

[266] In this regard, it is interesting to compare the *Guiding Principles*' list of criteria, *supra* notes 243-51 with the list of claims made by the Office of the Extractive Sector CSR Counsellor, *supra* note 140.

[267] See generally materials on the update process on the OECD website, online: OECD <http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html>. See also new text OECD, *OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context* (25 May 2011), online: OECD <http://www.oecd.org/dataoecd/43/29/48004323.pdf >. As of 25 May 2011, adhering governments are all OECD members as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania.

[268] OECD, *OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context* (OECD Ministerial Meeting, 2011) at 32, online: OECD <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

[269] See Amnesty International, *A Call for OECD's Export Credit Group to Protect the Rights of Those Affected by Business-Related Human Rights Abuses* (28 June 2011), online: Amnesty International <http://www.amnesty.org/fr/node/24942>; Amnesty International, *Review of the Revised Recommendation on Common Approaches on the Environment and Officially Supported Export Credits*, Submission of Amnesty International (20 February 2010) (March 2010), online: Amnesty International <http://www.amnesty.org/en/library/asset/POL30/002/2010/en/a1b48827-bdc9-4d8b-afd8-7cc25daed63a/pol300022010en.pdf>.

[270] See letter to World Bank Group President from John Ruggie sent March 2011, online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie/ruggie-ltr-to-world-bank-president-zoellick-re-ifc-policies-standards-review-3-mar-2011.pdf>. The revised

released the latest revised and updated GRI reporting standards, the G3.1 Guidelines, which explicitly incorporate human rights reporting.[271] Thus, even without explicit reference to *Protect, Respect, and Remedy* or the *Guiding Principles*, Canada's promotion of other international standards will increasingly include a human rights component — although it appears unlikely to be in a legally binding form.

## INTERNATIONAL LAW AND CORPORATE POWER

*Protect, Respect, and Remedy* has been described as a polycentric governance framework, an attempt to "build simultaneous public and private governance systems as well as coordinate, without integrating, their operations."[272] This article has sought to determine what role is envisioned within this framework for home states in regulating and adjudicating to prevent and remedy human rights harms, and how measures implemented by the Canadian government measure up to the *Guiding Principles*. As seen earlier, Canadian practice is clearly not fully consistent with the *Guiding Principles*. However, a bigger question is why the *Guiding Principles* themselves frame the home state duty to protect in suggestive terms rather than as a binding legal obligation under international human rights law.[273] From a legal perspective, the *Guiding Principles* are curious. While they have received a significant amount of support, many international human rights lawyers are critical of their substance.[274]

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Sustainability Framework was released in May 2011 (online: IFC <http://www.ifc.org/ifcext/policyreview.nsf>) and includes revisions to the Policies and Performance Standards (online: IFC <http://www.ifc.org/ifcext/policyreview.nsf#SF>. See full text of revised Sustainability Framework, online: IFC <http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Updated_IFC_SFCompounded_August1-2011/$FILE/Updated_IFC_SustainabilityFrameworkCompounded_August1-2011.pdf>.

[271] For text see online: GRI <https://www.globalreporting.org/reporting/latest-guidelines/g3-1-guidelines/Pages/default.aspx>. See also Global Reporting Initiative, *G3.1 Guidelines: Human Rights — Current Project Status*, online: GRI <http://www.globalreporting.org/reportingframework/g31guidelines/guidelines.htm> (stating that revisions address Ruggie's work).

[272] Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context* (2011) 9 Santa Clara J Int'l L 37 at 43.

[273] See discussion on this point in Seck, *supra* note 195 at 158-59.

[274] See, eg, Business and Human Rights Resource Centre, "Commentaries Issued after UN Council Endorsement of Guiding Principles," online: Business and

It is worth reflecting on the substance of the *Guiding Principles* in light of the process used to formulate them. Rather than ignoring the reality of corporate power, the SRSG pragmatically chose to engage it. The idea that multi-stakeholder engagement is an essential tool of global governance is guided by Ruggie's contributions as a constructivist international relations scholar, notably in his recognition of a "newly emerging global public domain that is no longer coterminous with the system of states."[275] Defined as an "institutionalized arena of discourse, contestation and action organized around the production of global public goods," the global public domain is "constituted by interactions among non-state actors as well as states."[276] Ruggie suggests that the development of new non-territorial political spaces may create a more inclusive institutional arena in which the global public domain is equated not simply with states and the interstate realm but also includes non-state actors such as civil society organizations, transnational corporations, and international organizations.[277] This new global public domain does

Human Rights Resource Centre <http://www.business-humanrights.org/Documents/UNGuidingPrinciples/Commentaries>, in particular the critical commentary from the Child Rights Information Network (21 June 2011), International Federation for Human Rights (17 June 2011), and Human Rights Watch (16 June 2011). See also Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3 J Human Rights & the Environment 5, online: Edward Elgar Publishing <http://e-elgar.metapress.com/content/uq8l855458700m334/fulltext.pdf>. See also David Bilchitz, "The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?" (2010) 7 Sur Int'l J Human Rights 199; Robert McCorquodale, "Corporate Social Responsibility and International Human Rights Law" (2009) 87 J Business Ethics 385.

[275] John Gerard Ruggie, "Reconstituting the Global Public Domain: Issues, Actors and Practices" (2004) 10 Eur J Int'l Relations 499 at 519. See also John G Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations" (1993) 47 Int'l Org 139; John G Ruggie, "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" (1998) 52 Int'l Org 855. For a complete list of Ruggie's academic work, see online: Harvard University <http://www.hks.harvard.edu/m-rcbg/johnruggie/index.html>.

[276] Ruggie, "Public Domain," *supra* note 275 at 519. See also Glen Whelan, Jeremy Moon, and Marck Orlitzky, "Human Rights, Transnational Corporations and Embedded Liberalism: What Chance Consensus?" (2009) 87 J of Business Ethics 367 at 373; Hevina S Dashwood, "Canadian Mining Companies and Corporate Social Responsibility: Weighing the Impact of Global Norms" (2007) 40 Can J Political Science 129 at 133.

[277] Ruggie, "Public Domain," *supra* note 275 at 502.

not "replace states," but its effect is to "embed systems of governance in broader global frameworks of social capacity and agency."[278]

With this in mind, it is worth considering Principles 1 and 2 of the *Guiding Principles* anew and what they might mean for home state obligations in the human rights realm. While Principle 1 indicates that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties," Principle 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." The somewhat curious choice of language in the two principles differs slightly from the wording that appeared in the draft *Guiding Principles.*[279] Notably, Principle 2 of the draft *Guiding Principles* was extensively critiqued in submissions by industry, civil society, and academic commentators.[280] Generally speaking, civil society commentators, joined by many academics, were concerned that the use of "should encourage"

[278] *Ibid* at 519. Ruggie describes the global public domain as "exist[ing] in transnational non-territorial spatial formations" and being "anchored in norms and expectations as well as institutional networks and circuits within, across and beyond states" (*ibid*). However, see Ronen Shamir, "Corporate Social Responsibility: Towards a New Market-Embedded Morality?" (2008) 9 Theor Inq L 371. Socio-legal scholars such as Shamir have described similar phenomena as leading "towards a new market-embedded morality," with the rationality of the market becoming the organizing principle for society as a whole while a "process of responsibilization" follows in which it is assumed that various social actors have "reflexive moral capacities" (*ibid* at 371, 374, 379).

[279] While the text of Principle 1 is virtually unchanged, the revised commentary to Principle 1 no longer discusses the specific language of the UN human rights treaties. See *Guiding Principles: supra* note 11 at 6-7. It does, however, include a reference to the state duty to "protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing adequate accountability, legal certainty, and procedural and legal transparency" (*ibid* at 7). Principle 2 was more substantially changed. In the draft *Guiding Principles,* it stated: "States should *encourage* business enterprises domiciled in their territory and/or jurisdiction to respect human rights throughout their *global* operations, *including those conducted by their subsidiaries and other related legal entities.*" See *Draft Guiding Principles, supra* note 212 [emphasis added], reflecting words omitted from the final version). In the final text, "encourage" was replaced by "clearly set out the expectation." See *Guiding Principles, supra* note 11 at 7.

[280] See Submissions to Consultation on *Draft Guiding Principles, supra* note 212. The problem of extraterritorial jurisdiction was also the subject of a legal experts' consultation in September 2010. John Ruggie, *Exploring Extraterritoriality in Business and Human Rights: Summary Note of Expert Meeting* (14 September 2010),

in draft Principle 2 was not strong enough given the importance of "extraterritorial" home state regulation as a tool to fill global governance gaps. Moreover, it did not accurately reflect the absence of jurisdictional limits in international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights.[281] Industry submissions, on the other hand, including submissions from the PDAC and Talisman Energy, were concerned that any reference to a role for home states and the possibility of "extraterritorial" jurisdiction would create confusion.[282] Notably, the submission on behalf of Talisman Energy stated:

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online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf>.

281 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (in force 3 January 1976) [ICESCR]. See Submissions to Consultation on *Draft Guiding Principles*, Document 3, *supra* note 212, in particular, the submissions by Emily Howie, The Human Rights Law Resource Centre (11 January 2011); Robert Grabosch (28 January 2011); John Knox (17 January 2011); Bernd Nilles, CIDSE (31 January 2011); Thomas Lazzeri (27 January 2011); Maplecroft (31 January 2011); Center for Human Rights and Environment (31 January 2011); Cathal Doyle (31 January 2011); Earth Rights International (January 31, 2011); Joint statement signed by twenty organizations including Amnesty International and the International Center for Economic & Social Rights (January 2011); OXFAM (31 January 2011); Chip Pitts (31 January 2011); Responsible Mineral Sector Initiative, Segal Graduate School of Business, Simon Fraser University (31 January 2011); SOMO (31 January 2011); Castan Centre for Human Rights Law, Monash University (January 2011, prepared by Sarah Joseph and Adam McBeth); Robert McCorquodale (January 2011); Sherpa (January 2011); Amnesty International, CIDSE, ESCR-Net, Human Rights Watch, International Commission of Jurists, International Federation for Human Rights (FIDH), Rights and Accountability in Development (RAID) (14 January 2011); European Centre for Constitutional and Human Rights (27 January 2011); and Peter Muchlinski (24 January 2011) (raising concern over the limitations of the term "domicile"). Submissions by various governments and state human rights commissions also supported an expanded understanding of extraterritorial jurisdiction. The Canadian government did not make a public submission.

282 See especially PDAC, *Submission* (January 2011), online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie/pdac-submission-re-guiding-principles-jan-2011.pdf> [*PDAC Submission*]; and Hogan Lovells LLP, *Talisman Energy's Comments to Draft Guiding Principles* (20 December 2010) at 5-6, online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/talisman-comments-on-guiding-principles-dec-2010.pdf> [*Talisman Energy*]. See also submissions by US Chamber of Commerce Institute for Legal Reform (31 January 2011), online: Business and Human Rights Resource Centre <http://

We believe that the Special Representative can make a significant contribution in the area of extraterritorial jurisdiction by making specific recommendations for the creation of a forum and a process to enable *States* to engage in multilateral deliberation with a view to developing a set of principles in relation to the assertion of extraterritorial jurisdiction to protect human rights.[283]

The suggestion that the scope of home state jurisdiction should be determined through a state-based process is in keeping with a positivist, state-centric analysis of international law. At first glance, this approach may appear commendable, raising the prospect that states will come together to agree formally to exercise extraterritorial jurisdiction in order to regulate and adjudicate transnational corporate harms. However, further thought raises the question of why Talisman's lawyers would have considered it appropriate to make such a submission in the first place. If corporate counsel believed that some things are best left to states, it was arguably inconsistent for them to make submissions on these issues in the first place. At the same time, submissions on other aspects of the *Guiding Principles* (those *not* best left to states) might be entirely appropriate.

The *Guiding Principles* contain two other principles that are relevant to the issue of home state jurisdiction: Principle 7 on conflict-affected areas[284] and Principle 25 on access to remedies.[285]

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www.business-humanrights.org/media/documents/ruggie/us-chamber-of-commerce-inst-for-legal-reform-re-guiding-principles-31-jan-2011.pdf>; Commission on Multinational Enterprises of the Confederation of Netherlands' Industry and Employers VNO-NCW (31 January 2011), online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie/vno-ncw-comments-on-draft-guiding-principles-jan-2011.doc>.

[283] *Talisman Energy, supra* note 282 at 6 [emphasis added].

[284] *Guiding Principles, supra* note 11, Principle 7; *Draft Guiding Principles, supra* note 212, Principle 10. See, eg, submission by Michael Deas (31 January 2011) (expressing concern that there is little emphasis on the role of home states in conflict-affected areas), online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions>.

[285] *Guiding Principles, supra* note 11, Principle 25; *Draft Guiding Principles, supra* note 212, Principle 23. See the submission of Earth Rights International (31 January 2011), online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/media/documents/ruggie/earthrights-comments-on-guiding-principles-31-jan-2011.pdf> (noting that Principle 23 (new Principle 25) is ambiguous with respect to remedies that home states may provide against

Principle 7 must be read in light of the SRSG's separate report on *Business and Human Rights in Conflict-Affected Regions* (*Conflict-Affected Regions*), a report that, notably, was "road-tested" in an exclusively state-based process.[286] While this report would have provided an excellent opportunity to highlight the necessity of home state action where businesses are operating in conflict-affected areas that are clearly beyond host state regulatory control, *Conflict-Affected Regions* is far more tentative. For example, "'home' States … have a role to play in assisting both … corporations and host States to ensure that businesses are not involved with human rights abuses," such as using "policies, laws and regulations" to warn business enterprises of the "heightened risk of being involved with gross abuses of human rights in conflict-affected areas" and "clearly communicat[ing] their expectations with regard to business respect for human rights, even in such challenging environments."[287] Unco-operative enterprises might be subject to an ombudsperson or national contact point mechanism as well as the "withdrawal of consular and/or business development support," among other measures.[288] In extreme situations where gross human rights abuses have been committed, "States should explore civil, administrative or criminal liability," among other measures.[289] Ultimately, however, in a striking echo of the Talisman submission and the Canadian experience with Bill C-300, *Conflict-Affected Regions* concludes with a recommendation that "multilateral standard-setting on this issue may be a necessary part of ensuring that states move forward in the fulfillment of the state duty to protect human rights" because "States are more inclined to adopt policies that set standards *that do not put their own businesses at an unfair disadvantage*."[290] Thus, as with *Protect, Respect, and Remedy*, the SRSG's conclusions on the role of home states, even in conflict-affected areas where egregious human rights violations are most likely to occur, are tempered by a dose of realism. Ultimately, home states will not regulate for fear of competitive disadvantage, even

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business entities within their legal jurisdiction for acts that occur outside their territorial jurisdiction, with the ambiguity stemming from the phrase "territory and/or jurisdiction" as it is not clear if "jurisdiction" in this context is intended to include "extraterritorial jurisdiction").

[286] *Conflict-Affected Regions, supra* note 209.

[287] *Ibid* at paras 6 and 12.

[288] *Ibid* at para 17.

[289] *Ibid* at para 18.

[290] *Ibid* at para 21 [emphasis added].

where host states clearly lack the capacity to protect rights and harms unquestionably amount to serious violations of universal human rights norms. It is left unclear, however, how in practice this multilateral standard-setting exercise is likely to reach consensus, given that states seem unlikely to agree to anything that might be perceived as harming the competitive advantage of home state businesses. Even if a text could be agreed, implementation would remain a challenge.

Interestingly, a slightly different analysis emerges if Principle 1 is read together with foundational Principle 25 on "access to remedy." Under Principle 25, states' duty to protect clearly includes an obligation to provide access to effective remedies where abuses occur "within their territory and/or jurisdiction." This formulation mirrors the language of Principle 1. Yet, a notable example of a state-based non-judicial mechanism included in the commentary to Principle 25 is that of the NCPs for the OECD Guidelines — a home state mechanism.[291] The OECD Guidelines are explicitly referred to under Principle 2 as an example of a multilateral soft law instrument that requires implementation of domestic measures with extraterritorial implications. This raises the question of how to understand the term "jurisdiction" in Principle 25 and, consequently, in foundational Principle 1. As both Principles 1 and 25 use mandatory language ("must"), there is clearly room to argue that, at least in some circumstances, home states already have obligations to exercise jurisdiction to protect against and remedy human rights abuses. There is some support for this analysis if Principle 2 is read in the context of many of the operational principles under "the State duty to protect human rights," which either implicitly or explicitly recommend either direct extraterritorial regulation or domestic measures with exterritorial implications.[292] As these are all written in permissive language, they are equally consistent with

[291] *Guiding Principles, supra* note 11 at 22, Commentary to Principle 25. See also Commentary to Principle 26, which identifies legal barriers as including both the attribution of legal responsibility across members of corporate groups, and denial of justice due to lack of access to home State courts (*ibid* at 23).

[292] See especially *ibid,* Principles 3, 4, 7 and 8. Further analysis of this issue is beyond the scope of this paper, but see further Sara L Seck, "Conceptualizing the Home State Duty to Protect Human Rights," in Karin Buhmann, Lynn Roseberry, and Mette Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Hampshire, UK: Palgrave Macmillan, 2010) 1 (exploring this jurisdictional question from both a permissive and mandatory perspective).

Principle 2 and with an encouraging, rather than sanctioning, understanding of Principle 1.[293]

While this interpretation may have merit, the adoption of multi-stakeholder processes to inform substantive outcomes such as the Advisory Group's report and the *Guiding Principles*, and the space created for industry lawyer submissions in legislative deliberations such as those relating to Bill C-300, ultimately make it unlikely that traditional binding "command-and-control" regulation, or even the conditionality of support with legally binding sanctions, will be implemented in home state practice any time soon, at least in Canada. This unlikelihood can be attributed in part to beliefs about the impact of the relevant instruments on the competitive advantage of businesses. However, there are implications for legal theory, too, that are generally neither discussed nor reflected in the submissions of either civil society or industry contributors. Constructivist international relations scholarship, including Ruggie's work, has influenced international legal scholars such that they may be more likely to acknowledge that non-state actors are participants in the creation of international legal norms.[294] Yet many submissions by non-state actor participants in the processes described earlier seem to reflect a state-centric understanding of international law that is arguably inconsistent with their own participation. Thus, they may be more likely to promote narrow views of the principles of sovereign equality and non-interference in the internal affairs of other states[295] as well as views that strongly endorse the value of legal, over non-judicial, remedial mechanisms.[296]

Another related and extremely important aspect of multi-stakeholder discourse is recognition. For a multi-stakeholder process to work, participants must recognize each other as being legitimately at the table. Yet this requirement begs the question of what happens

[293] See Seck, *supra* note 195.

[294] See, eg, Jutta Brunnée and Stephen J Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum J Transnat'l L 19; Julie Mertus, "Considering Nonstate Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application" (2000) 32 NYUJ Int'l L & Pol 537.

[295] PDAC Submission and *Talisman Energy*, *supra* note 282.

[296] MiningWatch Canada, Comments on the Draft Guiding Principles (31January, 2011), online: Business and Human Rights Resource Centre <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions>.

when some potential participants are not recognized by others (for example, affected, perhaps indigenous, communities; "anti-development" NGOs; or even "anti-community-consent" businesses) and are consequently deemed unworthy of participation. Similarly, what happens when relationships break down? A curious feature of Bill C-300 is that it was not all that different from a proposal contained in the industry-civil society Advisory Group's report. Yet industry and civil society relationships clearly deteriorated in the interim, producing a remarkable industry backlash that was wildly out of proportion to the mild proposals in the bill.

The Canadian initiatives aimed at addressing allegations of wrongdoing by Canadian mining companies operating internationally, reviewed earlier, are in marked contrast with the situation in 1999 when I reviewed in this Yearbook the public and private international law dimensions of environmental harm caused by Canadian mining companies overseas.[297] This increased Canadian activity could serve as evidence of state practice supporting the emergence of customary international legal rules confirming either the permissive or mandatory nature of home state jurisdiction to regulate and adjudicate transnational corporate conduct to prevent and remedy environmental and human rights harms. As Canada is known as "a particularly strong player in the global mining sector," the exercise of jurisdiction by Canada over transnational mining companies in order to prevent and remedy environmental and human rights harms would serve as a significant step in the development of customary international law.[298] As a consequence, the outcomes of processes such as the roundtables and Bill C-300 have implications not only for Canada but also for the international community more generally.[299] Yet the role of business and corporate counsel in influencing this state practice is easily overlooked in traditional international legal analysis.

## Conclusions

This article has provided an overview of developments in Canada between 2005 and 2011 relating to the regulation and adjudication of human rights concerns associated with global mining, with the

[297] Seck, *supra* note 29.

[298] *Building the Canadian Advantage, supra* note 9 at 3.

[299] See generally Sara L Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" (2008) 46 Osgoode Hall LJ 565 at 576-80.

aim of documenting the challenges faced by legal reform proposals designed to prevent or remedy global mining harms. The article has also described the work undertaken by the SRSG in relation to the home state duty to protect human rights, highlighting the conclusions reached in the *Guiding Principles* in relation to the existence and scope of home state obligations. In both contexts, industry, industry lawyers, and other non-state actors participated in processes designed to address these issues. And, in each context, the outcome of such participation is that traditional legal frameworks, whether domestic command and control, conditionality laws, or international human rights laws articulating firm home state obligations, will have a limited role to play. This result gives cause to reflect on the implications of non-state corporate actor participation in the development of international norms relating to the existence and scope of home state human rights obligations.

The implications are important not only for the specific question of the regulation of human rights concerns arising from global mining but also for related ones. For example, James Anaya, the UN special rapporteur on the rights of indigenous peoples, recently endorsed the SRSG's pragmatic approach in relation to an issue of great importance to both the global mining industry and indigenous peoples. Anaya's July 2011 report to the UN Human Rights Council proposes the need to develop a set of specific guidelines or principles "operationaliz[ing] the rights of indigenous peoples in the context of natural resource extraction and development projects affecting indigenous territories."[300] To do so, Anaya calls for "expert consultations and studies" so as to promote an "effective and practicable" understanding of indigenous rights.[301] According to Anaya, of "utmost importance" is the "bridging of divergent viewpoints of States, indigenous peoples and corporate actors" though a "process of wide consultations and dialogues with all actors."[302]

This article shows both the possibilities and the potential limitations for law reform of such an approach. The processes reviewed in this article suggest that engaging with industry and industry lawyers will lead to outcomes that may in theory reduce the number of corporate human rights abuses in the mining sector due to the

[300] James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries Operating Within or Near Indigenous Territories*, UNHR 18th Sess, UN Doc A/HRC/18/35 (11 July 2011) at para 79.

[301] *Ibid.*

[302] *Ibid.*

proliferation of voluntary codes, host state local community capacity building, and the CSR education of junior mining companies. Yet even if this optimistic picture proves well founded, improved access to legal remedies for those that ultimately are harmed will not be forthcoming.

Importantly, it does not necessarily follow from these conclusions that businesses and their lawyers should not be allowed to participate in these processes. Indeed, it is inevitable that they will, whether directly in the process that creates the legal framework or after the fact by contesting an outcome that they did not participate in shaping. My conclusion, then, is the more modest claim that if the reality of industry and corporate legal power is recognized and accommodated, it should come as no surprise that legislated remedies or internationally binding rules prove unattainable. We must either come to terms with a new understanding of the limitations of both domestic and international law or seek new ways of harnessing corporate power, perhaps by exploring the ethical obligations of corporate lawyers as participants in international legal processes.[303]

*Sommaire*

Entre 2005 et 2011, les débats se multiplient, tant au Canada qu'au sein de l'Organisation des Nations Unies (ONU), sur le rôle des États d'origine dans la réglementation et la poursuite des violations des droits de la personne liées aux activités transnationales de sociétés. Au Canada, ce débat est axé sur des préoccupations liées à l'exploitation minière mondiale, et conduit à une série de rapports et de propositions de la part du gouvernement, des parties de l'opposition et d'autres intervenants. En résulte, en 2010, la nomination d'une conseillère du secteur des entreprises extractives sur la responsabilité sociale et la défaite du projet de loi C-300 (la Loi sur la responsabilisation des sociétés à l'égard de leurs activités minières, pétrolières ou gazières dans les pays en développement). Entretemps, le professeur John G. Ruggie est nommé Représentant spécial du Secrétaire général chargé de la question des droits de l'homme et des sociétés transnationales par la Commission (depuis: le Conseil) des droits de l'homme de l'ONU. Le travail de Ruggie

[303] See, eg, Advocates for International Development, Lawyers Eradicating Poverty, *Law Firm's Implementation of the Guiding Principles on Business and Human Rights: Discussion Paper* (November 2011), online: Advocates for International Development <http://a4id.org/resource/report/guidingprinciples>.

conduit à l'élaboration, en 2008, du cadre de référence "*Protéger, respecter et réparer*" et, en 2011, des "*Principes directeurs relatifs aux entreprises et aux droits de l'homme.*" Bien que ces deux documents reconnaissent le devoir qui incombe aux États de protéger contre les violations des droits de l'homme par les entreprises et la nécessité d'accès à des recours par les victimes, le rôle des États d'origine à cet égard y est contesté. Cet article compare les développements au Canada entre 2005 et 2011 avec ceux de l'ONU en ce qui concerne les devoirs d'États d'origine pour la protection des droits de la personne dans le contexte d'exploitation transnationale par les sociétés. Il offre également des réflexions sur les enjeux de l'inévitabilité de la participation d'entreprises et de leurs avocats pour le développement d'obligations juridiques pour les états d'origine.

*Summary*

Between 2005 and 2011, there was much debate, both within Canada and at the United Nations (UN), over what role home states should play in the regulation and adjudication of human rights harms associated with transnational corporate conduct. In Canada, this debate focused upon concerns related to global mining that led to a series of government, opposition and multi-stakeholder reports and proposals. These culminated in 2010 with the appointment of an Extractive Sector Corporate Social Responsibility Counsellor and the defeat of Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries. Meanwhile, at the UN Human Rights Commission/Council, John G. Ruggie was appointed Special Representative to the UN Secretary-General on Business and Human Rights (SRSG). Ruggie's work led to the 2008 *Protect, Respect and Remedy: A Framework for Business and Human Rights* and the 2011 *Guiding Principles for Business and Human Rights* (the latter designed to "operationalize" the former). While both documents highlight state duties to protect against human rights violations by businesses and the need for access to remedies by victims, the role of home states in this regard was contested. This article compares the developments in Canada between 2005 and 2011 with the work of the SRSG in relation to the home state duty to protect human rights in the transnational corporate context. It also offers reflections on the implications of the inevitability of industry and industry lawyer participation for the development of home state legal obligations.