



The Mining Association | L'association minière
of Canada | du Canada

Government of Canada's Review of

*Building the Canadian Advantage:
A CSR Strategy for the International Extractive Sector*

**Supplemental Submission to the
Department of Foreign Affairs, Trade and Development**

January 28, 2014

Introduction

The Mining Association of Canada (MAC) is the national voice of the mining industry in Canada, representing 38 member companies in iron ore, gold, diamonds, oil sands, metallurgical coal, base metals, uranium and other metal and non-metal products. MAC represents 45% of all base metals, precious metals, coal, diamonds, uranium and oil sands mines in Canada. Members are engaged in exploration, mining, smelting, semi-fabrication and supply.

MAC understands that the Department of Foreign Affairs, Trade and Development (DFATD) is currently considering how to proceed with the Office of the Extractive Sector Corporate Social Responsibility Counsellor (Office of the CSR Counsellor) in light of the resignation of Marketa Evans and the pending review of the Government of Canada's *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector* (CSR Strategy).

The Canadian mining industry appreciates the Government of Canada seeking our views on how to best advance the interests and opportunities of the Canadian extractive industry abroad. MAC and its members had the opportunity to participate in the roundtable component of the consultation and we are pleased to share our perspective on the government's current trade-related policies and programs in this submission.

Summary of Recommendations:

- Mining is a critical component of Canada's international presence and as such, the government should preserve the Office of Extractive Sector CSR Counsellor and its mandate specifically focused on the CSR practices of Canadian extractives companies operating outside Canada;
- The function of the Office should further be focused on the "front end" of any request for review involving Canadian extractive companies operating outside Canada, i.e., to clarify the issues and the guidelines involved, to encourage the parties to address the issues through direct dialogue under local-level mechanisms, and to advise parties on the implementation of the guidelines;
- The dispute resolution function of the Office of the Extractive Sector CSR Counsellor should be delegated to Canada's National Contact Point for the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (NCP);
- The NCP should be strengthened by incorporating fact-finding into its mandate within the dispute resolution process, and re-prioritizing existing resources within the CSR Strategy to allow the NCP to formalize the practice of hiring independent mediators.

Canadian Mining Industry's International Presence

In 2012, Canadian mining companies accounted for approximately 37% of global exploration budgets, the largest share of all nations. More than 800 Canadian companies were actively exploring in over 100 countries, accounting for the largest share of exploration spending in the United States, Central and South America, Europe, and Africa. In many cases, Canadian mining investment is the largest foreign investment in the host country. In 2012, Canadian direct investment abroad from the metallic minerals and metals products sector accounted for 9.5% of Canada's total, or \$62.7 billion. Further, mining contributes to Canada's largest area of foreign investment--finance and insurance.

From an export perspective, mining accounted for 20.4% (\$92.6 billion) of Canada's total export value in 2012. From a finance perspective, of the \$10.3 billion in mining equity raised on the TSX and TSX-V in 2012, \$6.6 billion was for projects in Latin America, Africa, Asia and Australia.

These investments generate significant economic activities both domestically and in recipient jurisdictions abroad. The professional services supply side of Canada's mining industry (supporting the financial, legal, accounting, and other related components of international projects) represents considerable fiscal activity and employment here in Canada. Further, the engineering, construction, environmental and other related areas of expertise required for project development expand this impact further. All told, the Canadian mining supply sector constitutes more than 3,200 companies, many of which support international mining projects in a myriad of ways from exploration to mine closure.

As an example of the economic benefits that can accrue from mining projects, the World Gold Council recently released a report surveying almost 100 gold mines around the world, including several from Canada. This report found that out of \$55.6 billion in total expenditures, at least \$44.7 billion (or 80%) was paid out in the country where the operation was situated. Internationally, natural resource extraction can create jobs for local populations and business opportunities for direct and indirect suppliers. The industry also generates infrastructure, and supports training and skills development. In addition to job creation, business opportunities and local procurement, benefits also accrue via tax and royalty payments, which are made from companies to governments and then transformed into public investments like health and education services and physical infrastructure. Beyond mining-specific investments and associated benefits, companies frequently make private investments that promote and deliver education, health and other services to local communities.

While developing "win-win" scenarios – where companies and host communities mutually benefit from resource extraction – are the goals of every mining company investing abroad, challenges can and do arise that prevent these from being achieved. The Department of Foreign Affairs, Trade and Development (DFATD) plays an important role in facilitating ease of business in foreign jurisdictions. An important example of this is DFATD's role in providing independent dispute resolution mechanisms, such as the Organization for Economic Cooperation and Development National Contact Point (NCP) and the Office of the CSR Counsellor (the Office) that can be effective options for communities when site level mechanisms are unable to resolve an issue.

The Office of the Extractive Sector Corporate Social Responsibility Counsellor

In 2009, the Government of Canada created the Office of the CSR Counsellor with the following mandate:

- (a) to review the corporate social responsibility practices of Canadian extractive sector companies operating outside Canada; and
- (b) to advise stakeholders on the implementation of the performance guidelines.

MAC has provided consistent support for the Office of the CSR Counsellor since its inception. This support has included participation in the consultation process for development of the review process, and member participation in numerous meetings and trainings with the Office of the CSR Counsellor. As an example, MAC recently participated in a workshop held jointly with the Office of the CSR Counsellor aimed at building guidance to help companies overcome common implementation barriers for site level grievance mechanisms. This guidance will aim to raise the awareness of the need to implement site level mechanisms and to do so in a way that avoids common pitfalls that have been experienced by others.

In addition, individual member companies have participated in the review process of their operations whenever a request for review has been lodged. Not all of these requests for review progressed to the “structured dialogue” phase; however, this was not because MAC or its member companies oppose the mandate of the Office: in fact, there are many valid reasons why the requests for review did not progress to structured dialogue:

- In some cases, other processes overtook the Office of the CSR Counsellor process, e.g., direct company-union negotiations or host country EIA/permitting processes;
- In some cases, after exchange of information during the initial phase of the review, the parties identified opportunities for direct local level dialogue using existing mechanisms;
- In one case, the Office of the CSR Counsellor was unable to contact the parties requesting the review.

Through these cases, the Office of the CSR Counsellor has developed a database of case studies in effective local level dispute resolution, and is poised to be a useful center of expertise for Canadian extractive companies with regard to how to set up and implement effective local level grievance mechanisms. Particularly in the case where a review has been requested, the Office is well-prepared to conduct initial review of the issues and to advise the parties regarding local-level alternatives prior to independent mediation.

Canadian’s National Contact Point for the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises

MAC understands that the Department of Foreign Affairs, Trade and Development (DFATD) is currently considering consolidating the dispute resolution functions of the NCP and the Office of the CSR Counsellor.

The OECD National Contact Point (NCP) offers an established avenue for addressing and resolving disputes. However, in our view the NCP cannot replace the mandate of the Office of the CSR Counsellor:

- The NCP can only review cases involving alleged breaches of the OECD Guidelines for Multinational Enterprises; and while these guidelines have been expanded in recent years, complaints may still come forward that do not fall within their current scope. In contrast, Canada's *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector*, encompasses a broader array of standards that includes the OECD Guidelines, but also the IFC Performance Standards, the Voluntary Principles on Security and Human Rights and the Global Reporting Initiative.
- The threshold for the NCP to take on a case is limited to those instances where the NCP determines there are "substantiated" allegations of breach of the OECD guidelines, which implies a higher standard of preparation and documentation (and potential barrier for entry into the process) than is required for review by the Office of the CSR Counsellor.
- The NCP includes all industries, and as such does not have a mandate to look specifically at the actions of Canadian extractive companies working outside Canada.

Some of our members have had experience with the Canadian NCP and can attest to its professionalism and value. As a dispute resolution process, the Canadian NCP offers several distinct advantages:

- It has been in existence since 2000;
- The OECD guidelines and the NCP review process were strengthened in 2011;
- The NCP is part of a larger network of international NCPs, and can draw on a large body of experience in dispute resolution;
- The Canadian NCP is subject to international review as part of that network;
- The NCP process has a proven track record of helping communities and companies resolve disputes; and
- The NCP has adopted a practice of utilizing truly independent mediators with appropriate language skills and cultural sensitivities that has proven effective in dispute resolution. This practice should be formalized within the NCP process.

The NCP also can serve as a platform for more rigorous approaches at dispute resolution. For example, allowing the NCP to retain independent mediators, and incorporating the ability to undertake fact finding within the mediation process, would mirror the process established within the Compliance and Advisory Ombudsman Office at the IFC and strengthen the use of the Remedy component of John Ruggie's Protect, Respect, Remedy human rights framework.

Recommendations

While a strengthened NCP process can be an effective non-judicial dispute resolution process, the Office of the CSR Counsellor can provide value as a “front-end” screening process focused on searching for local-level solutions involving direct dialogue between the parties, before referring the matter to NCP for review and mediation.

This approach incorporates the specific strengths of each of these mechanisms. The NCP’s strengths include, among others, an internationally recognized structure founded on internationally recognized standards, the ability for peer review and the ability to facilitate independent and impartial mediation. The Office of the CSR Counsellor mechanism draws on strengths that include specialization in the extractive sector, a lower barrier for entry, a requirement that a complainant be directly affected by the project, a wider spectrum of standards, and the ability to address issues raised by companies.

MAC is pleased to make the following recommendations:

1. The government should preserve the Office of CSR Counsellor and its mandate to review the CSR practices of Canadian companies and to advise stakeholders on the implementation of the performance guidelines. The advisory role within the mandate the Office should be emphasized to provide advice to companies to help build capacity in dispute resolution and conflict avoidance within their organizations.
2. The function of the Office should further be focused on the “front end” of any request for review, i.e., to clarify the issues and the guidelines involved, to encourage the parties to address the issues through direct dialogue under local-level mechanisms, and to advise parties on the implementation of the guidelines. MAC believes companies will be motivated to participate in this front end of the process, as they have participated in the initial stages of the requests for review brought to the Office to date, and as an alternative to other, more formal forms of review.
3. In some cases, the parties may decide that independent mediation and/or “structured dialogue” is appropriate; those cases should be referred by the Office of the CSR Counsellor to the NCP.
4. Likewise, the government should require the NCP to refer to the Office of the CSR Counsellor any claim involving a Canadian extractive company operating outside Canada, before starting formal review by the NCP.
5. Maintaining the Office of the CSR Counsellor’s mandate will also preserve the ‘clear the air’ function which would allow the Office to review a request by a company in cases where the issue or dispute does not clearly relate to an alleged breach of the guidelines.
6. The government should consider strengthening the NCP by re-prioritizing existing resources within the CSR Strategy to allow the NCP to formalize the current practice of retaining independent mediators. Independent mediators should be mutually agreed to by the company and a community. A truly independent mediator, retained by the NCP, would be better positioned to run an impartial process that is focused on helping both

sides agree on an action plan to resolving disputes between parties, in the spirit of the UN Guiding Principles on Business and Human Rights.

7. That the ability to undertake fact finding be incorporated into the NCP dispute resolution mechanism within the mediation process. This recommendation mirrors the process established within the Compliance and Advisory Ombudsman Office at the IFC whereby once a mediation has begun between a company and a community, joint fact finding can be incorporated into the process if both sides agree to conduct the process together with mutually agreed upon terms. This ensures that results are more likely to be supported by both sides, making it more likely that the fact finding will help contribute to resolving the conflict. If fact finding happens without agreement to the process by both parties, it can often make the situation worse as each side becomes further entrenched based on their views of the fact finding process and their independent interpretation of the results.
8. With respect to this fact finding component, it is very important to understand that if a joint fact finding process arrives at a finding that has legal implications within the host jurisdiction, the complaint should be shifted from an independent mediated process to a locally or nationally based judicial mechanism.
9. The Office of the CSR Counsellor and the NCP should be required to issue annual reports on their activities and final reports on each case once they are closed. Ideally, both parties should be given an opportunity to review and comment on a draft of the individual report pertaining to their case prior to the report being finalized.
10. With the dispute resolution part of the Office of the CSR Counsellor's mandate being delegated to the NCP, the advisory component of the mandate of the Office of the CSR Counsellor is important and should not be lost. There is value in helping to raise the awareness in Canadian mining companies of the importance of having site-level grievance mechanisms and participating in independent third-party processes. There is also value in working with the industry to improve practice and understanding of dispute resolution mechanisms. In fact, the work of the Office of the CSR Counsellor in building a body of evolving best practice in dispute resolution practices has been the most valuable part of the Office's efforts since the office was established. This advisory function should be maintained in the Office of the CSR Counsellor. The government should also consider enabling the Office of the CSR Counsellor to provide similar advisory services to local communities.
11. When cases are brought forward regarding Canadian extractives working outside Canada, it would be helpful to be able to rely on the trade commissioner and other local embassy or consular staff who may have relevant knowledge from the country that the case is coming from to provide intelligence on the conditions on the ground. Diplomatic staff, such as these, likely have the language and cultural knowledge to provide important context that will be helpful to addressing a complaint. Diplomatic staff may also be able to play a role in gaining and sharing important insights into the local conditions between the community raising the complaint and the mine in question. Using diplomatic staff in this way would reduce costs and could also avoid this mechanism being drawn into complaints that are either unwarranted or outside of its mandate.

Conclusion

DFATD's programmatic support and services for the extractive sector operating abroad aid in the facilitation of business engagements. Dispute resolution processes independent from companies are a critical part of this support. MAC supports efforts to enhance the transparency, accountability and credibility of these mechanisms. If implemented, these recommendations will help increase the appeal and usefulness of these mechanisms to communities and will further enhance Canada's reputation as a leader in responsible mining practices.