RECOMMENDATIONS TO THE NATIONAL ROUNDTABLE ON CORPORATE SOCIAL RESPONSIBILITY

THE UMUCHINSHI INITIATIVE
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INTRODUCTION

Umuchinshi is a Bemba word that means respect.[1] It is our feeling that respect for others should be the foundation of any effective Corporate Social Responsibility (CSR) policy.

The Umuchinshi Initiative has been set up in specific response to poor practices by Canadian mining companies in Zambia. These recommendations are informed by experiences in the mining town of Mufulira in the Copperbelt affected by the activities of a partially Canadian-owned mine. Concerns include sulphur dioxide emissions from the copper mine released directly into the community which make it impossible to grow vegetables, cause acid rain and result in a disproportionate number of respiratory ailments among the local population, 1/5th of whom are HIV/AIDS positive; seismic activity caused by mining that has destroyed several homes and damaged countless others – all without compensation; farmers who have farmed on the land for several decades being either evicted or forced to agree to land licensing schemes that have the effect of perpetuating impoverishment; several deaths and injuries resulting from mining accidents and the subsequent restriction of both Zambian government and media from access to the accident sites; toxic tailings from the mine that have contaminated the soil and ground water, seriously affecting the viability of subsistence farmers; and problems with the acid leaching process that led to contamination of local drinking water, causing it to turn a bright blue – residents were told that this water was safe to drink despite findings to the contrary by public health officials.

As Canadians, we were deeply shocked and offended that all of the above was being done by a Canadian company listed on the Vancouver Stock Exchange.

It is even more worrisome that despite the a local NGOs complaint under the current OECD framework and a negotiated solution, there has been a complete failure to implement or enforce this resolution, further highlighting the failure of the current system.[2]

We share the belief that Canadian multinational enterprises (MNEs) should be held responsible for human rights, environmental and social abuses whether those abuses take place at home or abroad. It is neither radical nor unreasonable to hold that if it is not acceptable for Canadian MNEs to treat Canadians in such a fashion, it is also not acceptable to treat those in developing countries in such a fashion.

To aid the Canadian Government an implementing an effective CSR policy in the extractive sector, the Umuchinshi Initiative has formulated the following recommendations for the government's consideration.

Our recommendations are presented in the following format:

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[1] Bemba is one of Zambia's over 70 indigenous languages

[2] Please see page 30 and 31 of these recommendations for a full description of the situation.

First, we make a number of recommendations on the steps that the government must take in order to form an effective CSR policy. These are recommendations that we feel are the minimum necessary to ensure adequate protection of human rights in the extractive industry context. In particular, we feel it is essential that **clear and enforceable legal CSR standards be adopted by the Canadian government** to ensure that everyone involved clearly understands what the obligations of Canadian MNEs. We also feel that sanctions are imperative if these standards are to have any effect. Voluntarism is not adopted as a solution to Canada's concerns regarding corporations and therefore should not be relied upon in the developing world, especially when human rights are at stake.

Second, we make a number of recommendations on how the government can use the current CSR policy with its emphasis on the role of the National Contact Point (NCP) of the OECD guidelines to strengthen its effectiveness. These recommendations focus on ways the government can improve the current structure without the introduction of new legislation. It should be noted that the Umuchinshi Initiative strongly feels that even if these changes were adopted, they would not be sufficient, and therefore should not be relied upon as a full solution. They are, however, a step in the right direction and have the advantage of being relatively easy to implement, especially while waiting for more substantive, but harder to implement, legislative reform.

CANADIAN LEGISLATION: A CSR POLICY

EXECUTIVE SUMMARY

The Canadian government should pass legislation that seeks to govern the behaviour of Canadian MNEs operating abroad. This law, at minimum, should address the following:

1) Identify standards to which Canadian MNEs are expected to comply.
    (a) We recommend that the *United Nations Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* be adopted by Canada as CSR standards for Canadian MNEs operating abroad
2) Provides for a broad scope of application so that technicalities do not allow corporations or subsidiaries to operate with impunity
    (a) We recommend that a formula similar to the one used to determine corporate residence for tax purposes be adopted to determine scope of application.
3) Provides for the establishment of a government office that is responsible for interpreting, disseminating and applying the above standards to Canadian MNEs and the communities that they affect.
    (a) We recommend that a specific and permanent CSR office be established to interpret, disseminate and enforce the standards.
4) Provides for regular and standardized disclosure for the benefit of shareholders, government, the Canadian public and trade unions and other civil society groups.
    (a) We recommend that Canadian corporations be required to make CSR related and standard form disclosure on an annual basis in regards to all of their operations with specific reference to the standards.
    (b) We further recommend that other interested parties such as relevant NGOs and Trade Unions be encouraged to make submissions on the behaviour of an MNE in tandem.
5) Provides for the establishment of an Ombudsperson that is responsible for receiving, investigating and ruling on complaints made by members of the affected community.
6) Provides for the protection of "whistle-blowers".
7) Allows for penalties for non-cooperation with the relevant government office, for failure to disclose and for failure to cooperate with the Ombudsperson. Allows for regulatory sanctions for failing to comply with the standards set by the government.

(a) We recommend that such penalties be fines similar to those imposed by many other regulatory bodies in Canada and elsewhere.

(b) We recommend that breach of the standards give rise to a cause of action in Canadian courts.

(c) We further recommend that incentives to compliance be implemented.

8) Finally, we believe that the Canadian government should foster and encourage private citizens from taking responsible action to encourage corporate compliance with the standards. To this end, procedural barriers to the submission of shareholder proposals should be removed from the Canadian Business Corporations Act.

The following proposed legislation should be considered with several issues in mind. First, the Canadian government's policy must address how supply chains, subsidiary corporations and the services used and provided by MNEs contribute to operations and therefore to potential human rights violations. If the legislation only superficially applies to Canadian companies, then it will fail in its objective. Second, there are severe differences between the various countries in which Canadian MNEs operate. It is strongly urged that the Canadian government provide for stricter standards for operation in conflict zones, potential conflict zones and regions with poor governance when formulating its policy response. If these concerns are not specifically addressed, any legislation will fail to protect the people most in need of protection.

We believe that Canadian law can provide additional tools with which to deter human rights abuses by Canadian MNEs working abroad. National law is either ineffective or insufficiently enforced in many developing and least-developed countries. The threat of being held responsible by the corporation's home state, and the potential of liability connected to that responsibility, are therefore an important source of deterrence against human rights abuses and a means to prevent impunity in the case of actual human rights abuses. Extraterritorial laws protecting human rights would also establish Canada as a global leader in the international discussion about what behaviours by corporations is intolerable.

Umuchnishi is not alone in our belief of the necessity of such legislation. Legislators in Australia and the United States introduced such legislation in 2000; British legislators introduced similar legislation in 2003. While none of these acts have successfully been passed into law, we believe that the recent introduction of similar legislation indicate world-wide support for such initiatives. We believe these documents can assist in determining the potential benefits and pitfalls of such legislation. We do not think that past failures entail that such legislation could not pass in the future.

It is high time that Canada implement a cohesive CSR policy. A survey recently released by Amnesty International shows that 79.3% of Canadians want binding

CSR standards imposed on Canadian Corporations.[3] It is time for Canada to match the efforts of other nations and indeed to succeed where others have not.

[3] *Amnesty International*, Press Release November 14, 2006 online: <http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=3789&c=Resource+Centre+News>

CORPORATE SOCIAL RESPONSIBILITY STANDARDS

Recommendation 1:

Adopt one set of Corporate Social Responsibility Standards to guide Government, civil society and industry in policy development, monitoring and reporting on human rights and environmental practices.

As already identified by the Standing Committee on Foreign Affairs and International Trade, MNEs and the Canadian government currently participate in programs applying a multitude of CSR standards. While each system of standards has relative strengths and weaknesses, it is necessary for the government to implement and apply a single standard of review. Failing to identify specific CSR standards to which all parties can refer results in confusion about what is meant by CSR, makes discourse between relevant stakeholders difficult, makes effective comparison between companies unlikely and identification of best practices impossible. It also undermines the ability of corporations, NGOs and the government to know whether or not a particular company is compliant with standards acceptable to Canadian values and ideals. All other aspects of an effective CSR policy depend on the ability of the government, industry and other stakeholders to reference and apply specific human rights and environmental standards. As such, identifying specific CSR standards is the *sine qua non* of an effective CSR policy.

Recommendation 1.1:

Endorse and pass legislation implementing the United Nations' "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights"[4] (the UN Norms) as Canadian standards of CSR in MNE practices outside of Canada. Pass legislation adopting these Norms as substantive standards of review.

The Norms supply a standard that fulfils many requirements of an effective, transparent standard of review. There are a number of key concerns that any effective CSR standards should address. It should be noted that these standards flow directly from international treaties and agreements that Canada has already committed to and are thus merely an acknowledgement of obligations already held by the government of Canada.

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4 *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-Fifth Session, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, (2003), online: <http://daccessdds.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf>

(1) They must be drafted in ***mandatory language*** rather than as mere suggestions. While the code may be voluntary, it should be drafted in such a way as to suggest that the human rights standards are ***minimum requirements***, and give due importance to the maintenance of these standards.

(2) They must ***comprehensively*** address key human rights and environmental concerns. Specifically, they must be compliant with international human rights standards already ratified by Canada. This means they should address, at minimum, *International Labour Organization* core standards including the right to non-discriminatory treatment; right to freedom of association; prohibition of forced labour and prohibition on child labour. They should also guarantee protection of basic rights protected under the *International Covenant on Civil and Political Rights*,[5] including the right to security of the person[6] and therefore to a safe and healthy working environment and a wage which allows for an adequate standard of living. They should also protect rights guaranteed under the *International Covenant on Economic, Social and Cultural Rights*.[7] The standards should also include bans on interference with local governance through bribes, other forms of corruption or inappropriate political pressure, commensurate with applicable Canadian law.[8] They should also recognize basic protections of collective bargaining and environmental standards to protect health commensurate with Canadian values.

(3) The standards must also take into account both supply chains and how the services rendered by the corporation are going to be used. The above should be achieved by reference to ***both international human rights standards and local context***. Moreover, these standards should allow for the accommodation of local legislation if the standards imposed by this legislation are higher. Finally, the above should be achieved by reference to the ***general goal of sustainable development*** and with reference to the affect that MNEs have on local communities.

(4) The standards must be ***specific*** enough to make it possible for corporations, civil society and government to meaningfully gauge compliance. Having standards that are vague, such as the currently applied OECD guidelines, makes it difficult to establish whether or not a breach has occurred and demands that extensive interpretation be taken by an adjudicative body – a step that Canada and the

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5 Entered into force in Canada in 1976.

6 See Article 9 of the ICCPR.

7 Entered into force in Canada in 1976.

8 including e.g. the Corruption of Foreign Public Officials Act 1998 C-34, pursuant to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

international community has been hesitant to do.

Of all of the current standards, only the *UN norms* achieves all of the above. Indeed, as argued by Professor Audrey Macklin, "only the [UN norms] provides a comprehensive set of principles that sufficiently addresses potential human rights concerns with respect to the overseas activities of TNCs."[9] It is for this reason that the Umuchinshi Initiative strongly recommends the adoption of the *UN norms* by the Canadian government for use as a benchmark in its CSR policy.

SCOPE OF APPLICATION

Recommendation 2:

Legislation should clearly define its scope of application. Such legislation should apply a formula to determine whether an MNE is considered a "Canadian corporation" for the purposes of CSR legislation, review, and monitoring.

A key question regarding CSR legislation is the scope of application of such legislation. Obvious ways of defining a corporation as being "Canadian" include whether the corporation is incorporated under Canadian legislation, whether the corporation is listed on a Canadian stock market, and the degree of Canadian market capitalization. We argue that a corporation should be defined as Canadian in a manner similar to how corporations are deemed resident for tax purposes. In such a case, in addition to all corporations incorporated within Canada being deemed Canadian, a formula involving the base of the corporations operations and where policy is formulated is applied. Essentially, a corporation will be defined as Canadian if its central mind, management and control are based in Canada.[10] We recommend such an approach for the following reasons:

1) Limiting application to companies incorporated through Canadian legislation would extensively limits the applicability of any CSR legislation. Further, due to the relative ease of dissolving and reincorporating in another jurisdiction, the implementation of any legislation that imposes costs on corporations will likely lead to corporations avoiding requirements through reincorporation.
2) Limiting applications to those companies listed on a Canadian stock exchange may cast the net too wide and include corporations that have very little real connection to Canada.
3) Defining a corporation as Canadian through application of a formula similar to how a corporation is deemed a resident for tax purposes seems

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[9] Gagnon, Georgette, Macklin, Audrey and Simons, Penelope C, "Deconstructing Engagement" (January 2003). U of Toronto, Public Law Research Paper No. 04-07, pp. 78-79.

[10] Canada Revenue Agency, *IT-391R Status of Corporations Bulletin*, (September 14, 1992) note 15-16 online: <http://www.cra-arc.gc.ca/E/pub/tp/it391r/it391r-e.html>

to be a natural means of determining nationality of a corporation. It is also a good middle ground between the two other options.

Recommendation 2.1:

The legislation must apply to all subsidiaries of Canadian Corporations.

COORDINATION AND REGULATION

Recommendation 3:

Establish a permanent government office of Corporate Social Responsibility.

This office should report to the Minister of Foreign Affairs and International Trade. Their mandate should be focused exclusively on CSR. While this office should involve frequent consultation with civil society, industry and other branches of government on a regular basis, it should be headed by one person who is responsible for the implementation of the government's CSR policy. This office should be adequately staffed and resourced to fulfil a substantive mandate. This will require at minimum two full-time dedicated employees, one for administrative coordination, one for outreach and education.

Dedicated staff within a particular department helps draw clear lines of bureaucratic and ministerial responsibility. Both are crucial for promoting public oversight and accountability.

Currently the issue of CSR is addressed by various different government departments on an *ad hoc* basis. Indeed, even the National Contact Point (NCP) for the OECD guidelines is decentralized, of uncertain membership, convenes on an *ad hoc* basis and addresses CSR only as one of each members various tasks. This is problematic for two reasons. First, not having a central, full-time office responsible for CSR makes it very difficult for the government to address CSR policy in a coherent and effective manner. Second, failing to have an office responsible for CSR policy does not give due weight to the issue at hand.

It should be noted that such an office would not be unique. Indeed, the UK appointed a Minister for Corporate Social Responsibility in 2000. This suggests that the Canada government is behind in recognizing Corporate Social Responsibility as a serious issue.

Recommendation 3.1:

The CSR office should be responsible for disseminating information

about Canada's CSR policy.

If the Canadian government is to have an effective CSR policy, this policy must be disseminated to all interested parties. This includes making both the CSR standards adopted by the government and its policies on implementation readily available to both industry and relevant NGOs. In addition to having a website with relevant information, the government should target Canadian companies who are operating in the extractive sector in the third world and the NGOs who act as watchdogs with direct and proactive communication. This will ensure that all parties concerned are well aware of Canadian expectations and can respond accordingly.

Recommendation 3.2:

The CSR office should be responsible for interpreting the standards as adopted by the Canadian government if and when the need arises.

Part of the current difficulty in implementing a coherent and effective CSR policy is the lack of consensus in what CSR means. While adopting an effective set of standards is important as discussed above, it is not enough. In order to ensure consistency, the CSR office must also be able to explain what the standards mean to both industry and civil society. This will ensure a coherent, consistent and predictable CSR policy that will be easy for industry to follow and allows for all involved to recognise when a breach has occurred.

Recommendation 3.3:

The CSR office should be responsible for issuing sanctions for failing to comply with the process outlined below and for failing to comply with the standards above.

Justification for sanctions will be made in conjunction with recommendation 7.

REPORTING

Under our recommendations, monitoring would take place in three ways. First, Canadian corporations operating in the extractive sector abroad would be responsible for disclosing their CSR policy on an annual basis with specific reference to what they are doing to meet the standards imposed by the Canadian government. Second, the legislation would provide for the establishment of an independent Ombudsperson that would be responsible for hearing and responding to private complaints.

Recommendation 4:

Legislation should be passed providing for the disclosure of corporate social responsibility (CSR) practices by all Canadian mining

companies.

Social consciousness regarding consumption and investment is becoming increasingly important. Billions of dollars are invested every year in "green" funds and shareholders are increasingly interested in the social conduct of the firms in which they invest.[11] Disclosure of social practices allows for informed investment decisions; social conduct can be important to investors on both an ethical and financial basis. Poor social performance by a firm can have economic ramifications for the investor, such as adverse public reaction, public product boycotts and expensive lawsuits. Furthermore, there is growing consensus within the academic community that "the manner in which a corporation handles environmental and human rights issues, including labour practices, is an important indicator of managerial competence and philosophy, which are important even to the purely economic investor."[12] The International Council and Mining and Metals, comprised of member companies, explicitly states that "by demonstrating superior business practices they will gain preferential access to land, capital and markets, thus high equity values and enabling recruitment of talented employees."[13]

Mandatory disclosure allows for a process of self-reflection on the part of the corporation "to learn about and contemplate the negative externalities associated with their conduct."[14] Mandatory disclosure enables companies to assess and compare their performance to that of similar companies, allowing for a process of positive competition regarding standards.

Public knowledge of company behaviour is also important in holding the corporation to task regarding their stated policies and practices. Public disclosure of policies and practices also allows for a process of independent verification and monitoring by civil society organizations.

There is extensive precedent for disclosure requirements of this sort. France has three pieces of legislation that deal, in part, with the mandatory release of information pertaining to corporate social responsibility. The "Employee Saving Plan"[15]of February 2001 requires all fund managers to disclose the social, environmental and ethical considerations that were taken into consideration in the sale or purchase of securities over the fiscal year. The "New Economic Regulations" (Nouvelles Régulations Économiques) requires that the annual shareholder report of every publicly listed company includes information regarding how the firm takes into account the social and environmental

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11 Cynthia Williams, "The Securities and Exchange Commission and Corporate Social Transparency" (1999) 112 Harv. L. Rev. 1197.

12 Ibid.

13 International Council on Mining & Metals. Online: <www.icmm.com/about.php> accessed November 17, 2006.

14 David J. Doorey, "Who Made That?: Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation," *Osgood Hall Law Journal* (winter 2005) 353-405.

15 LOI no. 2001-152 du 19 février 2001 sur l'épargne salariale

consequences of their activities. Retirement Reserve Funds require the same obligations on the part of the fund managers as the above law. Similarly, the United States has number of different statutes that require corporate disclosure of certain information deemed pertinent to the investor and the public at large including the U.S. Home Mortgage Disclosure Act and the U.S. Emergency Planning and Community Right-to-Know Act of 1986.

SUBSTANCE OF THE RECOMMENDED REPORTS

Several mining companies in Canada have committed to voluntary CSR reporting within the next few years. The Mining Association of Canada (MAC), as a member of the International Council on Mining & Metals, has aimed to report in accordance with the Global Reporting Initiative's (GRI) 2002 *Sustainability Reporting Guidelines* and the *Mining and Metals Sector Supplement* by 2007. A multi-stakeholder working group comprised of industry and civil society representatives created this reporting framework; it is well researched and comprehensive.

However, not all Canadian mining companies in Canada are members of the MAC; membership in this organization and disclosure requirements remain voluntary.

Recommendation 4.1:

CSR legislation should include requiring mining companies to publish annual reports detailing corporate social responsibility policies and practices. Companies may have the option to comply with the GRI disclosure standards or ones of equal rigour. These annual reports should be made in reference to the Standards adopted by the Canadian Government mentioned in recommendation 1.1.

Reporting requirements must extend from the broad organizational level to specific sites and projects. Both domestic operations and *all* international mining operations must be included. Disclosure reports by the organization must be based upon the concept of a triple bottom line: economic, environmental and social. **The report must include, at minimum, the following elements**

(1) A contact person(s) for the report and their contact information;

(2) Organizational structure of the company, including those people responsible for the areas the report addresses;

(3) Descriptions of the mechanisms by the which shareholders, stakeholders and the public can make recommendations and complaints regarding company activity;

(4) Economic performance indicators, including information regarding suppliers and their economic, environmental and social performance;

(5) Environmental performance indicators including but not limited to: emissions of greenhouse gases, ozone-depleting elements and other substantial emissions; waste production and management; energy,

water and material usage;

(6) Human rights performance indicators, including but not limited to: rules of conduct for security personnel, child labour and indigenous rights;

(7) Policies and practices regarding land rights of the communities, especially in regards in indigenous populations;

(8) Resettlement policies and practices;

(9) Description of relationship with the community and community members, including but not limited to: description of substantial incidents/conflicts and their resolution, networking with stakeholder groups and social development work undertaken by the company;

Description of complaints lodged and method of resolution within the reporting period by external parties, including but not limited to complaints of non-compliance of the company with international agreements (be they environmental, labour, etc.).These elements are drawn from the GRI Report Content.[16]

AVAILABILITY OF THESE REPORTS

Recommendation 4.2:

These reports should be made available to:

1) Every shareholder in their annual shareholder reports;

a) Display on the company's website;

b) A centralized database managed by the Department of Foreign Affairs and International Trade and posted on the Department's website.

The information in these reports, in order to be effective, must be made readily accessible to investors and the public. A centralized database on a government website would allow for simple accessibility and comparison, both between companies and between reporting periods.

Recommendation 4.3:

It is noted that a disclosure requirement could be implemented in many variant ways. In particular, mandatory human rights disclosure could be made by amending the Canadian Business Corporations Act (CBCA), the various

[16] "Global Reporting Initiative: GRI Mining and Metals Sector Supplement Pilot Version 1.0," February 2005. Available online at <http://www.icmm.com/news/775Mining Pilot.pdf>.

provincial *Securities Act*s, or could be the subject of independent legislation. The Umuchinshi Initiative firmly believes that any mandatory disclosure requirement should be pursued by way of independent legislation for the following reasons.

1) If made pursuant to the Canadian Business Corporations Act, it will apply only to businesses incorporated under this act. In so doing, it does not cast the net wide enough and misses a number of corporations that are incorporated in other jurisdictions but which There currently are disclosure requirements under the various provincial Securities Acts, and most notably the requirements imposed by National Instrument 51-102.[17] This National Instrument imposes mandatory continuous environmental and social disclosure upon all corporations who wish to trade securities within any Canadian province. While this is a step forward, it must be acknowledged that the proper name for such disclosure is risk disclosure, and the point of such disclosure is for the protection of Canadian investors rather than those being affected by the actions of Canadian corporations. Thus, disclosure is only required when the negative impacts of a corporation's actions abroad in the environmental or social sphere represent a risk for potential investors money. Indeed, the purpose behind provincial *Securities Acts* is to regulate trading of securities and can be viewed in part as 'consumer protection' for investors. Given the purpose of the provincial *Securities Act*s, it is not an appropriate or a sufficient avenue to regulate Corporate Social Responsibility disclosure requirements.

Recommendation 4.4:

Reports regarding the CSR compliance of MNEs should be solicited from relevant Trade Unions, NGOs, Community Groups and other members of civil society. These reports should be published in tandem with the MNEs reports.

The point of any disclosure is to distribute information. In the context of MNEs there are two interested parties: the corporations themselves and the people that they affect (employees, communities, NGOs). In the interest of promoting responsibility and accountability, those most closely related to the behaviours of Canadian companies should be given a chance to disclose their perspective. Such a practice has precedent in the context of the Convention on the Elimination of Discrimination Against Women (of which Canada is a signatory). In this case, countries are obligated to write reports about their progress in the implementation of the COmbudsperson

[17] National Instrument 51-102, Continuous Disclosure Recommendations. Online: <http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20031219_51-102_con-dis.pdf>

Recommendation 5:

Pass legislation establishing a national, independent Mining Ombudsperson office.

The Ombudsperson would investigate complaints made against Canadian mining company operating both within and outside Canadian territory. Standing would not be limited to those directly affected; complaints could be made by NGOs, community members, and employees.

The Ombudsperson provides recourse for individuals who have been wronged by a corporation, regardless of that company's participation in any voluntary standards body. Thus, an Ombudsperson program in Canada would provide a forum for those who are most vulnerable.

The independence of the Ombudsperson would avoid the concerns of bias and lack of consistency associated with corporate-financed third-party monitoring.

The establishment of the Ombudsperson as an arms length-party from both government and Parliament avoids political interference in the process, ensures faith in the fairness of the investigative procedure and therefore increases the likelihood of company-side participation.

There are a number of mechanisms, in operation in Canada and internationally, which the Ombudsperson program could be modeled after.

i) The North American Agreement on Labour Cooperation (NAALC) established a Canadian National Administration Office that accepts and investigates public communications regarding the failure of another party to comply to NAALC.

ii) A successful Mining Ombudsperson program has been established in Australia, operated solely Oxfam Australia. As a solely third-party program, Oxfam has no ability to lay fines for non-participation, nor to ensure mining company participation.[18]

The Canadian Extractive Ombudsperson would have some important differences that would increase its effectiveness. First, it is a government program and therefore could be imposed on all Canadian Extractive Companies working in the third world, regardless of their willingness to participate. Second, it would have the ability to punish non-compliance with the process and the failure to meet the standards set. Sanctions will be reviewed in subsequent sections.Recommendation 5.1:

The Ombudsperson would be solely concerned with practices of the extractive industry.

This would allow for expertise to be leveraged into best practices and would

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[18] See as an example: Oxfam Australia, Oxfam Community Aid Abroad. (2004) *Mining Ombudsman Annual Report 2004.* Online: http://www.oxfam.org.au/campaigns/mining/ombudsman/2004/pdf/annualreport.pdf

improve administrative expedience.

The Ombudsperson would adjudicate complaints according to specific Canadian CSR standards.

The Ombudsperon should apply specific human rights guidelines put in place for the purpose of monitoring responsible corporate practices, as discussed above in recommendation 1. Recommendation 5.3:

The Ombudsperson would have an investigative, quasi-judicial role.[19]

Many of the above factors differentiate the Ombudsperson program from the role of the NCP. The specific process we recommend for adjudicating CSR complaints against Canadian companies is outlind below.

Proposed Ombudsperson process[20]The effectiveness of the Ombud process is dependent on the powers provided to the office of the Ombudsman, the substantive power of review, the likelihood of corporate participation and the protection of reporting parties from reprisal. By carefully designing the process, we believe it is possible to create an Ombudsperson process which maximizes the conflict-resolution nature of such an instrument. Our proposed steps in the process.

i) Complaint

1. The multi-step process begins with the Ombudsperson receiving the initial complaint. The Canadian government should make the complaint process open, transparent and accessible to a wide variety of actors.

ii) Initial Assessment

1. The complaint is given an initial assessment using the provided documentation and preliminary research. If sufficient evidence is not provided, the Ombudsperson will monitor the situation until new evidence emerges.
2. The Ombudsperson will conduct an on-site investigation with employees and if necessary, community members.

iii) Contact and Mediation

1. If the Ombudsperson finds a violation of standards, it will make official contact with the mining company and request that remedial action be taken. A dialogue process is commenced between the mining corporations and the affected party.
2. The objective of the Ombudsperson is to take a rights-based approach to

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[19] Currently, the National Contact Point is focused on compliance and does not have an investigative role. This prevents the NCP from being able to get at the facts on the ground and hampers its ability to issue statements that are both accurate and useful.

[20] The process could be modeled after Oxfam Australia's Mining Ombudsperson program.

corporate social responsibility and international development.[21] The expectation of the corporation is that following contact by the Ombudsperson, they will engage in a dialogue with the affected parties in the advancement of both their interests.

3. Through dialogue between the community and the MNE, a strategy for becoming compliant with the standards will be agreed upon. This strategy will take into account the needs of employees, the community and the MNE.

iv) Reporting

1. The process concludes with ongoing monitoring and the publication of a very comprehensive report of the complaint, the rights issues involved and the eventual resolution, if any.[22]
2. This report will include a finding of fact of whether or not the company in question was compliant with the agreed upon standards.

v) Continued Monitoring

THE SANCTIONS

Recommendation 5.4:

The Ombudsperson should have the ability to lay fines against those companies who refuse to participate in either the investigation or mediation process. Sanctions should also be imposed against those companies who fail to comply with standards after participating in mediationThe focus of the Ombudsperson process is conflict resolution rather than punishment or sanctions. On this basis, we recommend that sanctions be imposed only after a report has been issued by the Ombudsperson stating that the company is not, in fact, compliant with the standards and if that corporation refuses to undertake steps to become fully compliant with the standards in an agreed-upon timeframe.

Recommendation 5.5:

The assessment, contact and mediation stages of the Extractive Ombudsperson process should be confidential.

iii) Companies will be more willing to participate in mediation if they can avoid the embarrassment of having their non-compliance revealed prior to

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[21] Marcos A. Orellana. (2002). Code of Codes: Compliance Oversight. Commissioned by Mining, Minerals and Sustainable Development project of World Business Council of Sustainable Development. Online: http://www.iied.org/mmsd/mmsd_pdfs/056_orellana.pdf

[22] For an example of a possible report format see: Oxfam Australia, Oxfam Community Aid Abroad. 2004. Mining Ombudsman Case Report: Vatukoula Gold Mine. Online: http://www.oxfam.org.au/campaigns/mining/ombudsman/2004/cases/vatukoula/pdfs/fullreport.pdf

resolution. By assuring confidentiality, the Omubdsperson would therefore improve compliance.

SOME CONCERNS

The ombudsperson programme relies upon NGOs and local communities to fulfil the crucial role of monitoring. Because of this reliance, it must recognise that resources that would normally be going to other developmental issues such as HIV/AIDS awareness or food security is now going to CSR. It is unfair to rely upon a sector that is already pressed for resources to take the job of monitoring Canadian MNEs. In recognition of the burden that is being placed on the sector, increased resources should be devoted to foreign aid.

WHISTLEBLOWER PROTECTION

Recommendation 6:

Legislation should strive to include "whistleblower protection" to shield employees of the corporation from punitive measures taken by their employers.

Failure to include whistleblower protection will lead to significant cooling affect and will prevent employees from bringing legitimate complaints to the attention of the Ombudsperson and the Canadian government.

SANCTIONS

Recommendation 7:

Attach sanctions to violations of CSR legislation.

Recommendation 7.1:

Institute sanctions for failure to comply with the disclosure elements of the CSR legislation or for failure to cooperate with the Ombudsperson in an investigation of a complaint.

In order for the government of Canada to have an effective CSR policy, the government is going to have to rely on the cooperation of corporations in its implementation. Without the cooperation of corporations, it will be impossible for the government to determine whether or not a corporation is in compliance with the agreed upon standards. This remains true even if compliance with the standards is ultimately voluntary. Given the importance of cooperation, the Canadian government needs to have punishments at its disposal in cases where corporations do not want to cooperate. Indeed, the goal of France's disclosure legislation (Nouvelles Régulations Économiques) is being undermined by the

non-compliance of major French MNEs and the failure of this legislation to set out punishments for non-compliance.

We recommend that any CSR legislation therefore be accompanied by a monetary penalty for non-compliance, similar to the numerous regulatory schemes that the Canadian government currently engages in. Further, we recommend that this fine be sufficient in weight to ensure compliance.

Recommendation 7.2:

Institute specific regulatory sanctions for violations of the above CSR standards.

Simply put, voluntary codes of conduct do not work. The Canadian government does not rely upon voluntary codes to ensure corporate compliance with important human rights in the domestic context. It seems perverse and naïve to hold that voluntary codes will work in the international context when we do not trust them at home. Further, there is evidence to show that despite the increasing presence of voluntarism, there has been an increase in human rights abuses attributed to MNEs. [23]

While a simple finding of guilt with no accompanying penalty may act as a deterrent, we feel that in the context of the extractive sector, the reputational damage suffered as being a known human rights abuser will not be enough. Unlike other consumer goods such as soccer balls or clothes, in the extractive industry there is generally an indirect link between the consumer and the corporation in question, no identifiable brand, and no product purchased that can be reliably traced to one corporation. This in turn makes it unlikely that a finding of non-compliance will result in consumer punishment of the MNE in question, even if there is a large amount of public anger directed toward it. This being the case, it becomes necessary that the government impose sanctions where consumers cannot.

To this end, we feel that the following basket of sanctions and incentives are appropriate:

(1) *Monetary Fines*: Like all regulatory frameworks adopted by the government, the government could impose fines on MNEs that are not compliant with the standards adopted. Indeed, recent proposed legislation by Australia included monetary penalties for non-compliance.[24] It should be noted that fines as a remedy are very common in regulatory frameworks including domestic human rights and labour law context.

(2) *Creation of a Cause of Action*: Legislation could give a cause of action

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23 International Council on Human Rights Policy Report, *Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies*, February 2002, Versoix, Switzerland, p. 7.

24 *Corporate Code of Conduct Bill 2000*, section 16, Australia online: <http://www.natural-resources.org/minerals/csr/docs/csr/Australia%20Corporate%20Code%20Bill%202000.pdf>

to those affected by a MNEs breach of the instituted standards. While such a move is desirable from the perspective of those affected by the actions of corporations because it provides compensation for wrongs done, it should be noted that merely allowing for a specific cause of action may not play much of a deterrent role. Law suits are expensive, and the Canadian government should not rely upon those in the developing world to initiate cases. Regardless, because of the compensatory goal that such a move achieves, it is recommended that a cause of action be created. The proposed Australian Corporate Code of Conduct Bill would have allowed for the creation of a cause of action.[25] As a further point of justification, it should be noted that it is currently possible to sue Canadian corporations in Canadian courts owing to the legal doctrine of *forum non conveniens*; legislation in this regard would merely reinforce already existent legal doctrine and make it easier for foreigners to get standing in Canadian courts.

(3) *Withhold all governmental support for the offending MNE*: The Canadian government should make its support of MNEs contingent on compliance with the agreed upon CSR standards. This means all governmental support, export credits, financial assistance and insurance should be extended only when an MNE establishes its compliance with the above CSR standards.

Implementation of rewards for Industry Leaders: Finally, rewards should be offered to MNEs that prove themselves to be leaders in the field. Recent American legislation offered a series of positive incentives to corporations for following the code of conduct. It would reward corporations who adopt and enforce the code with preference in award of contracts by executive agencies, preference in providing certain foreign trade and investment assistance. It would also have trade and development agencies as well as export-import banks in the United States give preferences to such corporations. The proposed American scheme would offer incentives and benefits to corporations that fulfilled their duties in the Act.[26]Corporate Law Reform

Recommendation 8:

Remove all barriers for shareholder proposals that currently exist in the Canadian Business Corporations Act[27].

It is incumbent on the government to create consistency across laws. To this end, the government must allow shareholders to press for the very CSR standards that the government wishes to uphold. It is inconsistent and perverse to have procedural barriers barring shareholders from raising genuine concerns about

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25 Ibid.

26 *Corporate Code of Conduct Act*, HR3577, USA, online: <http://www.govtrack.us/congress/bill.xpd?bill=h109-5377>

27 *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44, s. 137.

CSR policy at shareholder meetings. Unfortunately, even after significant modifications of the Canadian Business Corporations Act (CBCA) in 2002, there continue to be significant barriers to making a shareholder proposal.

Shareholder proposals can, and have been in the past, a valuable tool for shareholders to change the behaviour of corporations. In particular, they provide an opportunity for shareholders to cast light on a particular aspect of the corporation's activities that some may find objectionable; further, they force the company to address its actions, defend them and if necessary, reform them. From the standpoint of corporate governance, it is generally preferable to allow as many shareholder proposals as possible to provide a vehicle for shareholder-driven initiatives without compromising the independence of corporate governance and without imposing significant costs on the corporations themselves.

Recommendation 8.1:

Remove or modify s. 137 (2) (b.1) of the CBCA

According to s. 137 (2) (b.1), a proposal can be barred from being heard by the corporation if "it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation". S. 137 (2) (b.1) is worryingly vague and has the potential to be interpreted in such a way as to exclude shareholder proposals that are nonetheless valuable from a CSR perspective. As Argued by Professor Aaron Dhir, s. 137 (2) (b.1) is a functional equivalent contained same in the old CBCA, but phrased in a negative manner. Given the court's past restrictive interpretation of the old section, there is cause for concern that s. 137 (2) (b.1) will be interpreted in a narrow manner.[28] Further, it appears that, prima facie, valuable shareholder proposals analogous to those advocating divestment in apartheid South Africa would be disallowed under this rule.

It is thus recommended that s. 137 (2) (b.1) be removed, or at the very least, reworded to ensure it does not block shareholder proposals that seek to encourage CSR.

Recommendation 8.2:

Set up an Administrative Dispute Resolution System so that those wishing to make proposals have recourse if the proposal is barred.

Currently, unlike its American counterpart, the CBCA does not provide for the establishment of an Administrative Dispute Resolution System. This is problematic for a number of reasons. First, under the current act, if a proposal is barred by the corporation and the party disagrees with its exclusion, the only

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28 Aaron Dhir, "Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability" *American Business Law Journal* 43.2 (2006), 392-396.

means of gaining a remedy is to go to court. Second, the current system places the legal and financial onus on the shareholder. Indeed, as the Shareholder Association for Research and Education (SHARE) argue "Putting the burden of proof on the shareholder requires the shareholder to satisfy the court that the proposal does not fall under a ground of exclusion before having full knowledge of the management's case".[29] This is in direct contrast to the American system in which when management seeks to exclude a shareholder proposal, it must justify its exclusion to the Securities Exchange Commission in writing.

It is recommended that an Administrative Dispute Resolution System be set up on the model provided by the Securities Exchange Commission in the United States to ensure that shareholders have adequate means of seeking redress when a proposal is excluded by the corporation.

Recommendation 8.3:

Remove the restriction against issuing a proposal for publicity contained in s. 137 (5) (e).

S. 137 (5) (e) of the CBCA allows for a proposal to be excluded if "the rights conferred by this section are being abused to secure publicity". This exclusion is particularly troublesome given that the main purpose of a shareholder proposal to encourage CSR will generally be to promote public accountability. Shareholder proposals rarely achieve a 50% majority and are not binding on management. As argued by Professor Dhir, the primary value of a shareholder proposal is its ability to force management to justify its behaviour. As he states, "for shareholders, especially due to the asymmetry of information . . . an essential tool in the negotiation arsenal is the ability to attract media attention to the subject at issue in the proposal"[30].

S. 137 (5) (e) of the CBCA should therefore be repealed.

POSSIBLE CRITIQUES AND SOME RESPONSES:

When Australia attempted to pass similar legislation in 2000, the legislation was critiqued on several fronts. In an attempt to head off potential criticism, we will address concerns people may have with the overarching goal of the introduction of new legislation.

EXTRATERRITORIAL NATURE OF THE LAW:

A common concern with the introduction of legislation intended to impose standards on MNEs is that this law must be extraterritorial and therefore will

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29 Shareholder Association for Research and Education (SHARE), *Submission In Response To Finance Canada's Corporate Governance Of Financial Institutions* (Mar. 28, 2003), online: <http://www.fin.gc.ca/consultresp/GovernRespns_3e.html>

30 *Supra* note 21 at 403

exceed the jurisdiction of the legislating country. It is a basic concept of law that Canada can only govern its own jurisdiction and cannot impose laws on other countries. There are, however a number of responses to these challenges.

1) The legislation would not be an attempt to impose Canadian law on other jurisdictions, but rather would be an attempt to uphold recognized international legal standards. In the Australian context, Oxfam responded to this critique by arguing that "extraterritorial legislation underpinned by the international human rights framework neither equates to the imposition of Australian values no undermined the sovereignty of foreign governments."[31] The basis of international standards for human rights is the United Nations Universal Declaration on Human Rights. The Oxfam report concludes,

> "The wide ranging consultation process in the development of the UDHR together with universal acceptance among UN member states demonstrate clearly that adherence to international human rights standards as proposed in the Corporate Code of Conduct Bill 2000 is not the product of Australian imperialism. Inhumane and degrading treatment human beings is alien to all cultures, even if it used by some governments to achieve their political ends."[32]

   This argument is further supported by the fact that the standards suggested are explicit in the various treaties and agreements that the Canadian government has already committed itself to upholding including the International Labour Organisation Core Labour Standards, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

2) There is an emerging international duty to protect human rights. The notion of sovereignty in cases of human rights abuses is coming under attack. It has recently been argued by Professor Macklin that there is emerging international duty to uphold human rights standards regardless of traditional notions of sovereignty.[33] This is evidenced by the recent extension of human rights law beyond state action to holding states accountable for failing to prevent human rights abuses by third parties and by the emerging duty to protect in the UN context in which the Security Council can legitimately intervene in the domestic affairs of a country to stop grave human rights abuses. Both suggest that human rights are a matter of international concern and are thus the legitimate target of Canadian legislation.

3) The proposed legislation would allow for flexibility in the implementation of

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[31] James Esnor, "Submission to the Joint Parliamentary Committee on Securities and Corporations Inquiry into the Corporate Code of Conduct Bill 2000", Oxfam Community Aid Project (December 2000) at 23

[32] *Ibid*, p. 7

[33] *Supra* note 5 at 107-111

the standards. It is essential that context be taken into account when applying these standards abroad. If flexibility is allowed for, the traditional concerns of extraterritoriality are less pressing.

4) Concerns regarding extraterritoriality have not previously prevented Australia, the United State, or even Canada, from enacting extraterritorial legislation. The Oxfam report writes that Australia has passed a number of workable extraterritorial laws.[34] For example, both Canada and Australia allow for the prosecution of Canadian citizens who commit chid sex offences overseas. Australia also allows for the prosecution of those who commit crimes against Australians serving overseas as United Nations personnel.

5) Finally, it must be acknowledged that the targets of the proposed legislation are Canadian MNEs. There is nothing offensive about the Canadian people, through their government, demanding that basic human rights standards be respected by Canadian controlled companies. The primary concern of extraterritorial law

COST TO CANADIAN BUSINESS

In the context of the Australian legislation, it was argued that the legislation put Australian companies at a disadvantage. Australian companies would likely be required to outlay capital in order to comply with human rights standards and may be put at a competitive disadvantage. However, we argue that the proposal envisioned do not necessarily entail that Canadian companies would be put at a disadvantage for the following reasons:

1) There is a large and growing number of scholars who argue that Corporate Social Responsibility makes good business sense, either by affecting reputational capital, enhancing employee motivation, or directly impacting share price.[35] Evidence in this regard is hard to ignore.

2) As pointed out by the Roundtables, 60% of mining companies world wide are Canadian controlled. Similarly, a large number of international oil and gas

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34 *Supra*, n. 31

35 E.g. see Mark Freeman, "Doing Well by Doing Good: Linking Human Rights with Corporate Self-Interest", 6 *INT'L. BUS. L.J.* 741 (2001); Jennifer G. Griffin & John F. Mahon, "The Corporate Social Performance and Corporate Financial Performance Debate: Twenty-Five Years of Incomparable Debate", 36 *BUS. & SOC'Y* 5 (1997); Mark Orlitzky & John D. Benjamin, "Corporate Social Performance and Firm Risk: A Meta-Analytic Review", 40 *BUS. & SOC'Y* 369 (2001); Charles J. Fombrun et al., "Opportunity Platforms and Safety Nets: Corporate Citizenship and Reputational Risk", 105 *BUS. & SOC'Y REV.* 85 (2000); Keith W. Chauvin & Mark Hirschey, "Goodwill, Profitability, and the Market Value of the Firm", 13 *J. ACCT. & PUB. POL'Y* 159 (1994); Christine M. Riordan et al., "Corporate Image: Employee Reactions and Implications for Managing Corporate Social Performance", *16 J. BUS. ETHICS* 401, 410 (1997); Riahi-Belkaoui, "Organizational Effectiveness, Social Performance and Economic Performance", in *RESEARCH IN CORPORATE SOCIAL PERFORMANCE AND POLICY* 143, 152 (J. E. Post ed., 1991); Lee E. Preston & Douglas P. O'Bannon, "The Corporate Social-Financial Performance Relationship: A Typology and Analysis", 36 *BUS. & SOC'Y* 419, 428 (1997) to name but a few.

companies are Canadian controlled. This is for good reason. Canada is a known expert in the field of mining and oil and gas and investors and the industry recognise this. That so many extractive MNEs are based in Canada is a testament to the strength of the industry – strength that will not be hampered by the imposition of the above standards. Moreover, industry has historically proven to be quite flexible when the need arises. Such a concern underestimates the strength and the flexibility of the Canadian extractive sector.

3) Many of the costs associated with the proposed legislation are offset by standards that are already in place. Indeed, securities regulation already involves extensive social and environmental disclosure. Expanding these practices to include the standards will not involve a large increase in costs.
4) It is a poor argument to hold that human rights should not be respected because it costs too much. Human rights are basic and universal and deserve to be respected by Canadians wherever Canadians operate. A price should not be able to be put on the life of anyone, regardless of where they live.
5)

Finally, the Canadian government must recognize it role as an enabler of the operations of MNEs abroad. The government of Canada actively promotes foreign investment in Canadian corporations to other governments, often playing a key role in brokering the final deal. Further, the Canadian government continues to advance a free trade agenda, often with countries where national labour laws are inconsistent with Canadian labour standards or, in the majority of cases, where labour standards exist, yet the relevant governments fail to enforce these standards or are easily bribed out of them. There is something contradictory between Canada's trade policy and what are commonly identified as Canadian values.

As such, the Umuchinshi working group perceives the above series of recommendations as a compulsory step towards the Canadian government's recognition that they are party to the behaviour, and misbehaviour, of Canada's extractive industry MNEs abroad.

RECOMMENDATIONS FOR THE REFORM OF CANADA'S NATIONAL CONTACT POINT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

We recognise that the Canadian government currently uses the OECD Guidelines as a framework for its CSR policy. We further recognize that if the Canadian government is going to implement an effective CSR policy, it is going to have to take a more active role through the passing of CSR legislation. However, much can be done to improve the current OECD structure. The following recommendations focus on the role of the National Contact Point and how this office can be strengthened to better implement the goals of the OECD Guidelines.

It should be remembered, however, that the OECD Guidelines and its supporting structure are not and cannot be a sufficient basis for an effective and comprehensive CSR structure. In particular, the OECD guidelines themselves are neither clear nor precise and fail to adequately define what appropriate or inappropriate behaviour. The OECD Guidelines having to do with human rights, for example, are few in number, couched in generalities, vague and provide little guidance to either multinationals or the communities affected by such corporations.

This being said, the National Contact Point (NCP) will become an effective actor only when it operates within a clear legislative framework and specifically defined criteria for CSR. These criteria should include minimum binding standards in human and labour rights and environmental protection as reflected in Canadian law, Canada's international legal commitments and UN standards such as *Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights*.

Commensurate with its industry role and expertise, and with its place of material privilege in the world, Canada should occupy a role of leader and exemplar in implementing and enforcing human rights, labour and environmental standards for Canadian extractive companies abroad.

Responsible businesses need clear guidelines to confirm their compliance with human and labour rights and environmental protection.

In this regard, we echo the recommendations made both by the 14th Report of the Parliamentary Standing Committee on Foreign Affairs and International Trade, "Mining in Developing Countries – Corporate Social Responsibility," and by civil-society groups in "Moving Beyond Voluntarism." Specifically,

- The mandate of the NCP in Canada should be an investigative one, following the leadership of France, Great Britain and Sweden. An accessible complaints process with clear time limits is essential to fulfilling such a mandate.
- The NCP should serve to strengthen corporate transparency through monitoring and reporting on social and environmental performance.
- Canada's NCP should work with other National Contact Points toward

establishing binding standards of evidence.

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As a way of contributing to feasible recommendations for government action, we further recommend that the Government of Canada undertake the following reforms with respect to the National Contact Point.

ACCOUNTABILITY IN GOVERNANCE

The Government of Canada needs to bring democratic oversight and accountability to the operations of all departments and agencies involved in supporting and overseeing the operation of Canadian companies mining abroad.

Despite the inter-departmental character of the NCP and corporate responsibility in mining, it is critical that citizens, NGOs, parliamentarians, and industry have a politically responsible Minister to oversee the development, implementation and enforcement of CSR standards for Canadian mining companies.

Even without reconstituting the NCP as an effective, investigative body, the NCP needs adequate personnel to fulfil its role as per the OECD Guidelines: "undertaking promotional activities, handling inquiries and discussions with the parties concerned on all matters covered by the Guidelines...." Providing resources and political will to live-up to the OECD Guidelines would help the NCP perform its role of monitoring, publicizing CSR, outreach and education with government, industry, NGOs and the public at large.

Furthermore, placing dedicated staff within a particular department helps draw clear lines of bureaucratic and ministerial responsibility. Both are crucial for promoting public oversight and accountability.

1. The NCP should have a governance structure that promotes Parliamentary and democratic accountability. *The NCP should be in a clear reporting relationship with one Minister*, the Minister of Foreign Affairs and International Trade, and this should be clearly identified in all NCP communications.
2. The NCP should be adequately staffed and resourced to fulfil a substantive mandate. Under present conditions, this requires at minimum two full-time dedicated employees, one for administrative coordination, and one for outreach and education. This will have to be expanded as the NCP's mandate becomes complaints-based and investigative.

COORDINATION WITH OTHER NCPS

1. The results of annual OECD-NCP meetings should be made public, with the opportunity for comment on the findings.
2. NCPs are mandated by the OECD to attend annual NCP meetings, and to report to the Committee on International Investment and Multinational Enterprises. Reports, work plans, and best practices from these meetings

should be visibly posted on the OECD and NCP websites.

3. The Canadian Government should send its NCP to these meetings with the explicit mandate to develop specific binding standards and performance reports for multinationals in the mining sector. The Treasury Board Secretariat of Canada should support this work by providing resources and expertise.
4. The Treasury Board Secretariat of Canada is an expert in developing performance and reporting standards. It should assist Canada's NCP to catch-up to more robust NCPs (e.g. UK and Australia) and to become a leader in transparency and accountability in mining sector CSR. In a similar process to negotiating with governments in Canada to establish common national standards and public reporting in health care, the Canadian Government should assume a role of leadership among its NCP peers.
5. Canada should encourage every NCP to publish best practices in promoting CSR in mining, including in complaints mechanisms, monitoring and enforcement.

TRANSPARENCY AND MONITORING

The NCP has refused to state whether or not there has been a breach of the guidelines when a corporation and NGO involved cannot agree. This is unacceptable and contrary to the public good of transparency and accountability required of the NCP.

Similarly, to date, the NCP has interpreted "confidentiality" protection offered to companies under the OECD Guidelines very broadly. Even in cases where the NCP has knowledge of grave violations of human and labour rights by Canadian mining companies, it does not make this information accessible to the Canadian public. Canada's NCP has the authority to interpret the degree of "confidentiality" offered to mining multinationals and it should do so in a narrower manner that promotes Canada's commitments to international human and labour rights.

1. The NCP should publish and post on its website a public report card of Canadian companies based on binding (legislative) standards in human and labour rights and environmental protection.

2. After considered mediation and investigation based on clear standards, the NCP should publish lists and details of Canadian companies that do not comply with the OECD guidelines.

As an incentive, the NCP should publish lists and details of cases where Canadian mining companies are leaders in CSR.

AWARENESS AND PROMOTION OF GUIDELINES

The NCP has a primary responsibility of ensuring that government actors, industry, and civil society are aware of and implementing OECD Guidelines. Its

work in this regard is wholly inadequate. The NCP's primary mode of communicating with industry is a largely superficial website and brochure.

The federal government, in meeting its obligations as a signatory to the Guidelines for MNEs, must provide the NCP with adequate resources to fulfil this aspect of its mandate.

The Government should require the NCP to build upon existing communication tools (the brochure and the website) and to broaden promotional activities to include NGOs and civil society. Specifically,

1. The NCP Website and brochure should be revamped to communicate clear information, expectations, processes (including complaints) to government departments and agencies, industry, NGOs, and citizens.

2. The NCP should promote adherence to OECD guidelines through extended training sessions that include presentations by NGOs. This training should be mandatory for all government officials working in areas with an extractive industry.

3. The NCP, together with NGOs, should develop a training program and certification in CSR for industry.

NGOs and Civil Society

The NCP must improve in its already-mandated areas of visibility and accessibility, in terms of NGOs and civil society, specifically. This should be done through the following immediate and direct operational improvements, which embody a more honest and robust effort at fulfilling the NCP's mandate from the OECD, which demands that it seek "the active support of social partners, including the business community, employee organisations, and other interested parties, *which includes non-governmental organization*s".

First and foremost, the NCP must develop an accessible and transparent complaints process to allow civil society and NGOs to realistically play the monitoring and awareness-raising role that they have been encouraged to pursue by the 14th Report of the Parliamentary Standing Committee on Foreign Affairs and International Trade, "Mining in Developing Countries – Corporate Social Responsibility," by the Government's response to that report, by the OECD, and by their own report, "Moving Beyond Voluntarism."

To make such a complaints process more effective and to promote CSR generally, there must be a method of communication of the human and labour rights and environmental standards to governmental partners, industry, and most importantly, the local NGOs and the communities they represent. It is incumbent upon the NCP to have a local presence where extraction takes place. This should happen through information and education campaigns as well as through Canadian Embassies.

The current situation is unacceptable. Experience in Zambia has highlighted that local NGOs are largely unaware of the existence of the guidelines or what they mean and thus cannot play the monitoring role that is so badly lacking in the OECD guideline framework. One NGO in particular only became aware of the guidelines after being told by a Dutch NGO. The guidelines should be promoted by the NCP in such a way as to ensure that all interested parties are fully aware of their existence.

Local, on-site, NGOs need to be made aware of the sort of treatment they are entitled to, and the avenues available both for general communications and registering specific complaints. A revamped website is required, with an NGO and citizen portal – with clear access to a standardized complaints form, distinct from the method of general inquiry – a strong statement on CSR, and, as mentioned above, lists of both companies that are leaders in CSR, and those that are not in compliance with the Guidelines. Moreover, structural difficulties of local communities and NGOs (such as lack of access to the internet) should be acknowledged. It is incumbent upon the Canadian NCP to ensure that the OECD guidelines and complaints mechanism are made known to local NGOs and local communities. This means that the NCP must take proactive steps to find out what NGOs and community groups are operating in the vicinity of Canadian mining operations.

To further facilitate connections between local conditions and NGO work, non-governmental organizations in Canada should be partners in the NCP, and should be funded as such. The diverse viewpoints, agendas and strategic positions that such members bring would be invaluable in the formation and operation of an NCP that truly fulfills a mandate of visibility, accessibility, transparency and accountability, and that reaches out to all actors involved in the issues at hand, as per the OECD mandate for NCPs.

Again in terms of involving NGOs, the Australian model is instructive – with biannual consultations consisting of issue-focused and accessible discussions, reported on the NGO portal of the NCP website, and held in line with the meeting of the OECD Investment Committee.

1. The NCP should develop a standardized complaints form and process, and make all interested parties aware of the form and complaint procedure, including through the website. The form should be tailored to local, and often non-Western NGOs, being cognizant of the limitations they may face and context in which they approach the process.

2. The NCP website should be revamped in order to engage openly and substantively with NGOs and citizens, as first step in increasing its visibility and the accessibility.

3. The NCP should hold regular consultations with relevant NGOs and members of civil society.

4. The NCP should invite NGOs and/or relevant members of civil society to sit

on the NCP.

5. The NCP should invite NGOs to help train Canadian Government and DFAIT personnel as well as members of the mining industry in CSR and the operation and meaning of the OECD Guidelines.
6. The NCP should take proactive steps to communicate the guidelines to local communities and local NGOs. Simply posting the guidelines and complaints procedure is not enough and does not take the constraints faced by those in the developing world seriously enough.
7. The federal government must acknowledge that it is relying on NGOs and local communities to fulfil the crucial role of monitoring. Moreover, because of its reliance on NGOs, it must recognize that resources that would normally be going to other developmental issues such as HIV/AIDS awareness or food security is now going to CSR. It is unfair to rely upon a sector that is already pressed for resources to take the job of monitoring Canadian MNEs. In recognition of the burden that is being placed on the sector, increased resources should be devoted to foreign aid.

FOLLOW UP

Currently, after the successful resolution or the withdrawal of a complaint, no efforts are made to ensure that the agreed upon resolution is actually acted upon and has led to reported successes that were utter failures in implementation. For example, in 2001, a local Zambian NGO, with the help of Oxfam Great Britain, issued a written complaint to the Canadian NCP about the forced eviction of farmers who were farming on land owned by Mopani – a company partially owned by Canadian company First Quantum. This complaint was successful on paper and resulted in a stop to all evictions. Indeed, this particular case has been cited both by the OECD Guidelines (as recently as June 2006) and by OECD Watch as an example of how the procedure is supposed to work.[36] Yet the situation on the ground is a completely different story. While the evictions did indeed stop, the fundamental root of the problem – the lack of title to land – went unaddressed, contrary to the resolution reached by the parties. Further, the mine has instituted a land-licensing scheme that has kept the squatters in a perpetual state of financial insecurity – a situation that has served to cement the squatters' impoverishment. At the same time, contrary to the agreement, no meaningful dialogue has ever been initiated and the farmers' demands continue to be ignored. Worse, and directly contrary to the resolution, evictions resumed

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[36] *OECD Watch*, "Five Years On" online: http://www.oecdwatch.org/docs/OECD_Watch_5_years_on.pdf; OECD Guidelines for Multinational Corporations, Specific Instances Considered by National Contact Points, June 2006 Online: http://www.oecd.org/dataoecd/15/43/33914891.pdf; the 'successful' resolution of the human rights abuse was also noted approvingly in a chapter written by OECD Secretary-General Donald Johnston in a book on Corporate Social Responsibility Donald Johnston, "Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises" in *International Investment Perspectives* online: http://www.oecd.org/dataoecd/54/16/34896738.pdf

during the summer of 2006 and there were plans to evict many more to make way for new mining development.[37] This case, which has so often been used as a shining example of how the OECD Guidelines are supposed to work, is actually an abject failure to uphold basic human rights. There is no excuse for such a fundamental breakdown of the OECD framework.

Therefore, there needs to be a better system of ensuring that the conclusions reached by negotiations between the NCP, the NGO and the multinational are actually carried out on the ground. Specifically, the NCP should keep in regular communication with all concerned parties and should issue new statements if it suspects that the terms of the resolution were not, in fact, carried out.

[37] Based on evidence gathered directly from meetings with Mopani security, management and affected farmers by Cory Wanless in June/July 2006. Eviction notices and the licensing agreements were also seen.

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