LEGISLATIVE FRAMEWORK AND ACCOUNTABILITY MECHANISMS
CANADIAN MINING OPERATIONS IN CANADA AND ABROAD

This information in this memorandum is to date as of May 2012

Memorandum presented to:

DUE PROCESS OF LAW FOUNDATION, Washington, D.C.;
MISEREOR, Germany;
And other partners in the Americas.
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Mining in Canada

Canadian Mining Assets in the World


Canada’s Global Presence: Total Mining Assets in 2002 and 2008

“Discharging the responsibility to respect human rights requires due diligence whereby companies become aware of, prevent, and mitigate adverse human rights impacts of their activities and relationships. The responsibility to respect is not intended to carry the entire burden of the business and human rights agenda: it is bracketed by the State duty to protect on one side, and access to effective remedy on the other.”

Prof. John Ruggie

Special Representative of the Secretary-General on human rights and transnational corporations*

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* Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “Business and human rights: Towards operationalizing the ‘protect, respect and remedy’ framework”, (address delivered to the UN Human Rights Council 8th session, 22 April 2009) at para 5.
Introduction to UQAM’s International Legal Clinic for the Defense of Human Rights

Since 2005, UQAM’s International Legal Clinic for the Defense of Human Rights (CIDDHU in its French acronym) has successfully advanced new human rights initiatives in Canada, Latin America, Europe, Africa and Asia. Through its involvement in the promotion of human rights, the wealth of knowledge accumulated over the years and the support it receives from its partners and proponents, the International Legal Clinic for the Defense of Human Rights provides free and in-depth aid to victims of human rights violations and to the organizations which support them. These initiatives have also helped place Quebec on the map in the field of human rights protection.

What is UQAM’s International Legal Clinic for the Defense of Human Rights?

The CIDDHU is an academic initiative, led by teams of students supervised by attorneys and professors, that seeks to promote different initiatives for the protection of human rights around the world, in collaboration with more than thirty partner organizations spread across four continents.

The CIDDHU trains students in the practice of international human rights law. It offers assistance to victims and human rights defenders, by getting involved in activities such as legal research and drafting, filing legal actions before international human rights bodies, raising awareness both of the public and of the political community, capacity building and development of intervention strategies, etc.

The CIDDHU is also the first international legal clinic for the defense of human rights in the province of Quebec. This initiative allows students to experience hands-on training, to gain practical knowledge in the defense of human rights and to familiarize themselves with various procedural and ethical challenges related to this field of work. Its innovative approach, which combines practice and theory, offers a new and useful perspective in the understanding of the complexities involved in the protection of rights linked to individuals, groups and even entire populations. The CIDDHU affects citizens and makes them aware of the impact of globalization by allowing young adults to actively participate in the complex challenges it represents.

Prepared by the CIDDHU, this paper was drafted by Julie Dubé-Gagnon, project coordinator, Lenka Kručková and Audrey MacKay, 2012 clinical students, with coordination assistance by Souad Martin-Saoudi, case manager, and research by clinical students in 2011, Caroline Brodeur, Anaïs Desjardins-Charbonneau and Sarah-Michèle Vincent-Wright. Previous research on this issue was also conducted by clinical students in 2009. Catherine Duhamel provided external legal expertise to this project.

For more information, please visit us at www.ciddhu.uqam.ca.
CIDDHU’s mission

Advancing and defending human rights by applying the principles of civilized society while strengthening and solidifying the democratic process around the world.
EXECUTIVE SUMMARY

Within the Due Process of Law Foundation (DPLF)’s project to *promote the rule of law and human rights in Latin America through accountability mechanisms for human rights violations committed by the extractive industry in Latin America*, the present is an introduction to the legislative framework and accountability mechanisms that govern Canadian mining operations abroad. It also provides a limited account of the legal framework for mining in Canada. As there are overlapping powers between the federal and provincial governments, the provincial legal frameworks governing the mining sector will also be illustrated, mainly through the example of the province of Quebec.

The aim of this document is to give the reader a solid overview of the situation. Therefore, the present is for discussion purposes, **it is not an exhaustive detailed review** and further research can be provided based on identified topics.

The present paper is divided in three sections. The *first section* provides a brief non-exhaustive introduction of the Canadian legal framework relevant to the mining industry in Canada. Amongst the numerous fields of law that apply to the mining sector, we have focused on four main topics: environment impact assessment and review process, aboriginal consultations, corporate veil, taxes and laws pertaining to financing. For a comprehensive overview of the legal framework in Canada, **we recommend reading the document prepared by Ramsey Hart of Mining Watch Canada.**

The *second part* of this brief underlines the absence of a specific law which would hold Canadian mining corporations accountable in a civil court in Canada for human rights violations committed abroad, private bills lately introduced in Parliament and their failure to be adopted, discusses recent civil lawsuits attempts against those companies in Quebec and in Ontario and the late settlement out of court libel lawsuit introduced by Barrick Gold. This section also contains an analysis of Canada’s free trade agreements with Latin American states.

The *third part* focuses on the accountability mechanisms in Canada and abroad. It provides an overview of the Canadian OECD National Contact Point and the Canadian Corporate Social Responsibility (CSR) strategy. As part of the latter, we discuss the pitfalls of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor review process and the policy drawbacks of the Department of Foreign Affairs and International Trade (DFAIT) and the Canadian International Development Agency (CIDA) regarding the activities carried out abroad by Canadian mining companies. Finally, we briefly mention a few cases where victims of human rights violations committed by Canadian mining companies have attempted to file a claim under the Alien Tort Claims Act in the United States of America. Finally, we conclude by presenting several recommendations to DPLF regarding Canada’s responsibility for the human rights misconduct of Canadian mining corporations abroad.
INTRODUCTION

1. Canada has developed an international expertise in the extractive sector and is recognized as a global mining centre.

2. Toronto is one of the mining financial capitals of the world\(^1\) and the Toronto Stock Exchange (TSX) financial opportunities and expertise are world known.\(^2\)

**Mining in Canada**

3. The mining sector in Canada interacts in some cases with up to four levels of government: the federal and provincial governments are the two main players and have the power to legislate, municipal governments have adopted by-laws and some Aboriginal peoples\(^3\) have their own mining, cultural, environmental and economic development policies as well as a consultation policy. Provincial governments have the main jurisdiction over mining activities, but the federal government also has responsibilities in direct or indirect relation with the industry.\(^4\) Furthermore, municipal by-laws are invalid if they contradict provincial or federal laws.

4. Quebec will be used as an example of provincial mining legislation. As the legal framework for the mining industry differs in each province and because this memorandum is not meant to be exhaustive as per the legislative framework in Canada, we have chosen the province with which we are the most familiar.

5. Free, prior and informed consent (FPIC) does not exist per se in the Canadian legislative framework. However, the governments’ duty to consult and accommodate

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\(^3\) When applied to Canada, the terms “Aboriginal peoples” or “Aboriginals” used in this paper refer to the Indian, Inuit and Métis peoples of Canada, as stated in the *Constitution Act, 1867* (UK), 30 & 31 Vict c 3, reprinted in RSC 1985, App II, No 5, s 35(2). In this paper, “Aboriginal peoples” will be considered a synonym to “indigenous peoples”, used in international law.

Aboriginal communities has been confirmed through Supreme Court case law.\(^5\) Aspects of consultation may be delegated to third parties, such as mining companies, but the duty to consult itself may not be delegated as the “ultimate responsibility for consultation and accommodation rests the Crown”\(^6\).

6. Both provincial and federal governments have lately attempted to reform their legislative framework relevant to the mining industry to improve their scope. Apart from the Ontarian Mining Amendment Act,\(^7\) those attempts were unsuccessful.

7. Canada’s and Quebec’s regulatory landscapes are not adequately monitoring and controlling mining activities; either the laws are inadequate, or monitoring mechanisms are non-binding and ineffective.

8. Canada’s \textit{Policy on Minerals and Metals} covering mining activities in Canada is not up to date; it has not been rethought since 1996.\(^8\) The 10 provinces and the Yukon have their own mining policy/guidelines for a total of more or less 11 mining policies, regulations/statutes in Canada not counting mining policies, regulations/statutes for the northern part of Canada which have recently been adopted.\(^9\)

9. Indeed, Canada’s Arctic is experiencing a boom in the mining industry. In the province of Quebec, the 2011 \textit{Plan Nord}, which will develop the mining industry in the northern territory, involves massive investments.\(^10\)

10. Very active and well organised, the mining lobby has proven to be influential at the federal level. For instance, the Prospectors and Developers Association of Canada launched a full blown campaign against Bill C-300 at its 2010 convention,\(^11\) just months before the vote for the bill took place. Furthermore, when Bill C-300 (discussed in part II at 3) was defeated, the results were in part attributed to the strong lobbying activity lead

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\(^5\) See e.g. \textit{Nation Haida v British Columbia (Minister of Forests)}, [2004] 3 SCR 73, 2004 SCC 73 at para 16.
\(^6\) Ibid at para 53.
\(^7\) The legislation modernizes the mineral development process, in Ontario, through amendments to the Mining Act, related regulations and policies. Ontario Ministry of Northern Development and Mines, “Mining Act: Modernizing Ontario’s Mining Act”, online: Ontario.ca <http://www.mndm.gov.on.ca/mines/mining_act_e.asp>.
\(^11\) Catherine Coumans, “Making the Canadian Mining Industry more Accountable” (25 March 2010), online: Mining Watch Canada <http://www.miningwatch.ca/make-canadian-mining-industry-more-accountable>.
by mining associations, individual firms of the mining industry and well established law firms towards the members of Parliament. With 180 active lobbyists still registered in 2012 at the Office of the Commissioner of Lobbying of Canada, the mining lobby continues to be strikingly present in Ottawa.

**Mining outside Canada**

11. Canada is a major player in the international extractive sector. At more than $238 billion, mining and oil and gas extraction was the second-largest component of Canadian direct investment abroad (stocks) in 2011, generating significant additional exports from Canada. The industry’s share of direct investment abroad has increased to 18.8% in 2011, compared to 11.8% in 2001.

12. Receiving about half of the Canadian mining assets abroad, Latin America is the number one mining investment destination for Canadian companies. Moreover, as of 2010, Canadian investment in mining represents “more than 60 per cent of the total mining investment in the region.”

13. Besides the *Crimes Against Humanity and War Crimes Act* (enacted in 2000) under which complicity for war crimes, crimes against humanity or genocide committed abroad have not yet lead to any authorization from the Minister of Justice to file a criminal lawsuit against a Canadian company, there is no specific law in Canada to hold the extractive sector accountable before a Canadian civil court in Canada for human rights violations committed abroad. However, other laws with extraterritorial application

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16 Ibid at 2.


18 According to the *Economic Commission for Latin America and the Caribbean*, the amount of foreign direct investment from Canada to Latin America and the Caribbean is underestimated because it does not take into account the investments that transit through offshore financial centers before reaching its final destination. See Economic Commission for Latin America and the Caribbean, *Foreign Investment in Latin America and the Caribbean* (2007) at 191, online: ECLAC [http://www.eclac.cl/publicaciones/xml/1/32931/lcg2360i.pdf].

may apply to mining activities abroad, such as the *Corruption of Public Foreign Officers Act* (CPFOA).

14. In lieu, the Canadian government adopted in March 2009, a strategy for the international extractive sector on Corporate Social Responsibility (CSR) called *Building the Canadian Advantage* which did not follow recommendations to put in place an Ombudsman from the Advisory group’s report following consultations across Canada with industry, civil society and other stakeholders held in 2006 (the National Roundtables) nor recommendations to adopt specific legislation from its own Foreign Affairs Department’s Standing Committee on Foreign Affairs and International Trade (SCFAIT) report in 2005, *Mining in Developing Countries and Corporate Social Responsibility*.

15. *Building the Canadian Advantage*’s CSR policy performance and reporting guidelines as well as the review process for the extractive sector are non-compulsory and non-binding. Opened in March 2010, the Office of the Extractive Sector CSR Counsellor complaint mechanism and mediation process had already received complaints but successful outcomes have yet to come from this process.

16. Attempts to adopt legislation (Bill C-300) failed in 2010. This bill would have prevented political support and public money from being transferred to mining companies involved in human rights violations committed abroad. It was not intended as a remedy for victims of human rights violations committed abroad to hold Canadian mining companies responsible.

17. Three recent lawsuits in Canadian courts for involvement in human rights violations committed abroad were unsuccessful against Canadian mining companies: *Bil’in v. Green Park International Ltd.*, *Recherches Internationales Québec v. Cambior Inc. and Piedra v. Copper Mesa Mining*. In the latter, the Toronto Stock Exchange was also a defendant. At the time of writing, four other cases are pending including a class action against Canadian Anvil Mining Corporation for human rights abuses in Democratic Republic of Congo and *Choc, Call & Chub v. Hudbay Minerals Inc.*, a case involving murder and gang rapes in Guatemala.

18. This lack of governance has an impact on the global mining sector, since 75% of mining corporations in the world are headquartered in Canada and thus, must comply with the deficient mining legislative framework and non-binding accountability mechanisms in Canada for activities abroad. According to the Canadian government,
“1293 companies had an interest in some 7809 properties in Canada and in over 100 countries around the world.”\textsuperscript{20}

Part 1:
Mining in Canada
Legislative Framework and Political Context
19. In Canada, the mining industry sometimes deals with up to four levels of government: federal, provincial, municipal and Aboriginal.

20. Three levels of government supervise mining: the federal, provincial and in some cases municipal level. These three levels of government have adopted mining policies, regulations and statutes, and published guidelines. Courts have also rendered decisions. And where legislation is silent, lacking or non-existent, companies are left on their own to obtain their “social license to operate” which does not always successfully happen.

21. In addition to the federal, provincial and municipal governments, Aboriginal governments have also been involved parties. Aboriginal governments and/or communities have developed their own mining policies (including defining how they should be part of long-term planning natural resources exploitation, how to do business with the mining industry, how they should be consulted and accommodated), and have launched various lawsuits against governments or companies.

22. Important also to note that the mining industry is very well organized through associations and institutes and lobbies in Canada.

23. As known, environmental, social, political and cultural impacts are numerous.

24. We expand on five specific topics in this brief outlook of the legislative framework in Canada: constitutional, environment, Aboriginal, tax, corporate and criminal. Other topics can be researched if requested.

1. Constitutional matters

25. The *Canadian Constitution Act of 1867* provides the Parliament of Canada with control over certain matters of a general or national interest, and the provincial governments with control over matters of provincial or local significance.

26. Constitutional authority over mining activities is invoked by both levels of government as owner of the resources to be mined as well as that of regulator. There is separate mining rights legislation for each of the thirteen Canadian jurisdictions except Nunavut (the northern and eastern portions of the former Northwest Territories that became a separate territory on April 1, 1999).

27. Local or municipal governments created under provincial law can also enact by-laws (i.e. zoning regulations and issuance of construction permits).

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28. Aboriginal communities can exercise powers over reserve lands and other territories covered by specific agreements negotiated with the federal and/or provincial governments.

29. Some subjects like the environment are too general to be assigned exclusively to either the federal or provincial level of government and therefore there are overlapping jurisdictions in various matters related to the mining industry in Canada.

1.1 Federal power to regulate mining activities derives from - *Constitution Act of 1867, Section 91*:

- Ownership of public property (i.e.: environmental laws)
- Regulate through criminal law power (enforcement mechanisms)
- Peace, order and good government clause
- Works to be for the general advantage of Canada/connecting provinces; beyond boundaries of one province; within a province but to the advantage of Canada/or more than one province

Some other federal powers of concern to the mining industry – Section 91

- Regulation of Trade/Commerce
- Direct/indirect Taxation
- Incorporations of Companies (headquartered in Canada)
- Sea Coast and Inland Fisheries
- Money and banking
- Bankruptcy
- Indians/Indian reserves
- External relations

1.2 Provincial power to regulate mining activities derives from - *Constitution Act of 1867, Section 92*:

- Management/Sale of public lands belonging to province (including non-renewable natural resources, forestry resources and electrical energy)
- Property and civil rights in the province (i.e.: prohibiting the emission of contaminants into the natural environment)
- Local works and undertakings (i.e.: provincial regulation of mining activities)
• Natural resources (exploration development, conservation and management of non-renewable resources including rate of primary production and taxation)
• Matters of a merely local or private nature

Some other provincial powers of concern to the mining industry – Section 91

• Administration of justice/Criminal Justice
• Direct Taxation within Province
• Incorporations of Companies (headquartered in a province)
• Municipalities (among others, zoning regulations, issuance of construction permits, water, land use planning)

1.3 Some important overlapping powers between the two jurisdictions

• Taxation, property, and civil rights
• Incorporation of companies
• Exclusive federal jurisdiction over criminal law but many provincial laws result in incarceration or penalty
• Exclusive federal jurisdiction over aboriginals and lands but property and civil rights, penal and land matters of provincial jurisdiction
• Environmental federal jurisdiction when addressing matters of national concern or dimension and staying within criminal penalty-type enforcement mechanisms or focus on protection or conservation of a resource specifically entrusted to the federal government (i.e.: fisheries), federal environmental impact assessment procedures

1.4 Dual legal system

30. Canada is both a common law and civil law jurisdiction where common law applies to nine provinces and the territories, and civil law applies in Quebec only.

1.5 Dualistic system

31. International treaties are not directly embodied in the Canadian legal framework and the domestic implementation remains divided between the two levels of government.
1.6 Conclusion

32. The Canadian legislative framework with regards to mining consists of a duplication of laws and norms that mining companies are required to respect in Canada. Nevertheless, the following analysis shows at first glance that despite its existence, domestic legislation does not seem to be sufficiently compelling on mining companies in order to meet all standards of international human rights particularly with regards to the environment and aboriginals.

2. Environmental Law

33. Both provincial and federal governments are lawmakers.22 The subject of environmental regulations is broad: regulations on the quality of the air, the water, the soil and the protection of wildlife can affect the conduct of the mining industry. This section highlights environmental laws that directly impact mining, but numerous other regulations have an indirect impact.

34. Three types of legislation respecting environmental protection from mining activities in Canada exist:

1. Environmental planning and impact assessment legislation;
2. Regulatory legislation controlling emissions and discharges of contaminants to the environment, as well as management of mining activities, such as exploration and reclamation; and
3. Public involvement in the administrative and judicial processes related to protection of the environment.

35. The aim of the Canadian Environmental Protection Act23 (CEPA) is to prevent and prohibit general pollution. The government’s actions to protect the environment and health are guided by the precautionary principle, which states that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”24 According to the Minister of the Environment in office in 2012, Peter

22 “Provincial power to regulate the environmental effects of mining activity arises from the authority to legislate with respect to the management of public lands belonging to the province, property and civil rights in the province, matters of a merely local or private nature in the province, local works and undertakings in the province, and non-renewable resources.” Joseph F Castrilli, “Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements” (2008) 34 UBC L Rev 91 at 99 [Castrilli].

23 Canadian Environmental Protection Act, RSC 1999, c 33.

Kent, the CEPA does not apply to mining projects conducted abroad by Canadian companies.\(^{25}\)

36. CEPA provides:

- rights to request an injunction (or an investigation) and
- lists of prohibited activities and products (chemicals).
- And assures the right of individuals to:
  - request an investigation of alleged offenses under the Act.\(^{26}\)
  - seek an injunction where they had suffered or were about to suffer loss or damage by reason of a contravention of the Act or regulations.\(^{27}\)
- Civil cause of action: “An individual who has applied for an investigation may bring an environmental protection action if (a) the Minister failed to conduct an investigation and report within a reasonable time; or (b) the Minister’s response to the investigation was unreasonable.”\(^{28}\)

37. The *Canadian Environmental Assessment Act* (CEAA) provides a legal framework according to which projects under federal authority should be reviewed with regards to the environment before they develop.\(^{29}\) The purposes of the CEAA are “to minimize or avoid adverse environmental effects before they occur; and incorporate environmental factors into decision making.”\(^{30}\) It applies to projects led by the Ministers, federal government agencies and Crown companies and encourages public participation. Specific regulations are established for projects developed outside of Canada by a federal authority.\(^{31}\) The CEAA however excludes *Export Development Canada* (EDC) and the *Canada Pension Plan Investment Board* (CPPIB), among others, from its obligations.\(^{32}\)

38. The *Fisheries Act*, a federal law established to protect and manage Canada’s fisheries resources, also contains environmental regulations for the mining industry. The


\(^{26}\) Canadian Environmental Protection Act, RSC 1999, c 33, s 42.

\(^{27}\) *Ibid*, s 39.

\(^{28}\) *Ibid*, s 22.


\(^{30}\) *Ibid* at 3.

\(^{31}\) See Projects outside Canada Environmental Assessments Regulations, SOR/96-491.

\(^{32}\) *Canadian Environmental Assessment Act*, RSC 1992, ch 37, s 2 [Replaced in 2012 by the *Canadian Environmental Assessment Act*, RSC 2012, c 19, which contains the same provisions regarding EDC and the CPPIB]
Metal Mining Effluent Regulations (MMER) of the Fisheries Act aim at regulating the deposit of mine tailings and other waste matter produced during mining operations into natural fish bearing waters. Enforced by Fisheries and Oceans Canada, the MMER ensure that when a mining company uses natural fish bearing water for waste management, a compensation plan is put in place by the company to re-create the living habitat. The compensation plan is determined after an assessment, which is open to public participation, in accordance with the MMER. Although the MMER were enacted in 2002, they now apply to new and existing mines. As the MMER apply to Canadian waters, they do not affect the conduct of Canadian mining companies abroad.

2.1 Provinces

39. Each province has its environmental protection tools, some more applicable to the mining industry than others.\(^{33}\)

2.1.1 Quebec

40. Quebec’s territory is divided in two categories: 1) territory under the James Bay and Northern Quebec Agreement and 2) territory under the Quebec’s Environmental Quality Act.

\(^{33}\)“The mining legislation of certain common-law provinces may provide mining companies with certain rights or easements on neighboring lands to conduct mining activities. These provisions can have the effect of limiting persons harmed to monetary compensation, as opposed to an injunction, for any damage caused by such activities. [...] Where such rights or easements are granted to mining companies, the Mining Commissioner must order reasonable compensation to the person whose land has been or will be affected by the mining activities.” Castrilli, *supra* note 22 at 105-106.
Legislative Framework and Accountability Mechanisms
Canadian Mining Operations Abroad

41. Each of these two legislative frameworks has its own environment impact assessment procedures, and projects (including mining activities) submitted to such assessments are specifically listed by the Quebec government. Authorization certificates

34 For the list of the projects submitted to the assessments, available in French only, see Ministère du Développement durable, de l’Environnement et des Parcs, Cadre législatif et réglementaire, online: MDDEP <http://www.mddep.gouv.qc.ca/evaluations/cadre.htm#listesud>.
are requested throughout exploration phases\textsuperscript{35} and environmental and social impact assessments study and public consultations,\textsuperscript{36} if required, will usually take place before the mining development stage.\textsuperscript{37}

42. Environmental impact assessment studies are mostly too late in the decision-making process to deal with all impacts of exploration activities: “[e]nvironmental examination of development, including mining activities, in an isolated, fragmented, and piece-meal fashion is contrary to the spirit and purpose of environmental assessment and sustainable development principles.”\textsuperscript{38}

43. Section 19 of the Quebec Environmental Quality Act (EQA) contains injunction mechanisms for citizens while section 22 demands assessment studies and certificates of authorization\textsuperscript{39} but exploration and smaller mining projects can bypass legal mechanisms available to protect the environment.\textsuperscript{40}

44. Quebec's Mining Act, ruled by its fundamental principle of Free Mining,\textsuperscript{41} specifies that mining activities are not subject of the EQA and its mechanisms.\textsuperscript{42} Under section 2 of the Regulation respecting the application of the Environment Quality Act, drilling activities allowed under the Mining Act are exempt from section 22 of the EQA.

45. In 2012, 8 open pit mines projects are in operation or will begin to operate in Quebec.\textsuperscript{43}

\textsuperscript{35} The Environment Quality Act specifies that “no one may erect or alter a structure, undertake to operate an industry, carry on an activity or use an industrial process or increase the production of any goods or services if it seems likely that this will result in an emission, deposit, issuance or discharge of contaminants into the environment or a change in the quality of the environment, unless he first obtains from the Minister a certificate of authorization.” Environment Quality Act, RSQ 2012, c Q-2, art 22. But “[t]he following projects are exempt from the application of the first paragraph of section 22 of the Act, […] (6) drilling authorized under the Mining Act (R.S.Q., c. M-13.1).” Regulation respecting the application of the Environment Quality Act, RRQ 2012, c Q-2, r 3, art 2.

\textsuperscript{36} Environment Quality Act, RSQ 2012, c Q-2, art 31.1.

\textsuperscript{37} The Quebec mining industry’s administrative policy, called Directive 019 sur l’industrie minière, is used when authorization certificates or environmental assessments are required. Ministère du Développement durable, de l’Environnement et des Parcs, Directive 019 sur l’industrie minière (2012), online: MDDEP <http://www.mddep.gouv.qc.ca/milieu_ind/directive019/directive019.pdf>.

\textsuperscript{38} Castrilli, supra note 22 at 125.

\textsuperscript{39} See Environment Quality Act, RSQ, c Q-2, art 19-22.

\textsuperscript{40} Regulations respecting environmental impact assessment and review, RRQ2012, c Q-2, r 23, art 2(p).

\textsuperscript{41} “The object of this Act is to promote prospection, mineral exploration and development and the development and operation of underground reservoirs, taking into account other possible uses of the land in the territory.” Mining Act, RSQ 2011, c M-13.1, art 17.

\textsuperscript{42} Regulation respecting the application of the Environment Quality Act, RRQ 2012, c Q-2, r 3, art 2.

\textsuperscript{43} Institut de la statistique, Mines en production/en aménagement, Québec, 2012 [Mines in Production/Mines in Development], online : Institut de la statistique du Québec <http://www.stat.gouv.qc.ca/docs-hmi/cartovista/cartovista_frame.html?url=mines/Mines_Amenagement/Mines_Amenagement.html&footer>
46. Further research can be provided on open pit mines, decontamination of soils, expropriation and environmental impact assessment studies if you require specific information on these issues.

3. Indigenous Peoples and the Law

47. Aboriginal treaties and rights are recognized and ensured by the Canadian Constitution.\(^{44}\)

48. Many treaties have been signed between the various indigenous communities and both levels of government and will guide the mining industry’s activities throughout the territory.

49. In Quebec, for example, the Cree have signed agreements with both the federal and provincial governments, most notably as mentioned previously, the *James Bay and Northern Quebec Agreement* signed in 1975 with Canada and Quebec (modified by numerous complementary agreements). They have also entered into the *Agreement Concerning a New Relationship between le Gouvernement du Québec and the Cree of Quebec* signed in 2002 (also referred to as the *Paix des Braves*) and the *Agreement Concerning a New Relationship between Canada and the Cree of Eeyou Istchee* signed in 2008. All of these agreements create a unique legal environment in the Eeyou Istchee Territory.

50. The *James Bay and the Northern Québec Agreement* (JBNQA) provides indigenous communities with local and regional governmental autonomy, enabling them to establish health and education boards, economic and community development and management of the special police, justice and environmental protection.\(^{45}\) These provisions and property issues are divided into three categories: Category I lands, Category II lands and Category III lands.

51. The first Category encompasses lands for the exclusive use of the native peoples, except for public purposes. On these lands, Quebec retains mineral and sub-surface rights, but “the consent of the native peoples [is] required for mining activities”,

\(^{44}\) See Constitution Act, 1867 (UK), 30 & 31 Vict c 3, reprinted in RSC 1985, App II, No 5, s 35(1).

including for extraction.\textsuperscript{46} On the Category II lands, hunting, fishing and trapping rights belong exclusively to the native peoples but they have “no special right of occupancy.”\textsuperscript{47} In addition, the government may conduct mining exploration without their approval\textsuperscript{48} and without providing any compensation (e.g. replacement of lands or financial indemnity),\textsuperscript{49} as long as it does not “interfere unreasonably” with the aforementioned activities of the native peoples.\textsuperscript{50} However, lands affected by development activities must be either replaced or affected populations may ask for compensation.\textsuperscript{51} As for the Category III lands, they are accessible to everyone and the same Quebec laws and regulations regarding public lands apply.\textsuperscript{52} Furthermore, no consent is required for land or resources development.\textsuperscript{53}

52. The Cree nation has adopted its own mining policy\textsuperscript{54} and the Quebec and Labrador First Nation Assembly has done so as well.

53. Free, prior and informed consent (FPIC) is found in the International Labor Organization’s (ILO) 1989 Convention 169, with respect to relocation, and the United Nations’ (UN) Declaration on the Rights of Indigenous Peoples. Moreover, the Inter-American Court has also recognized the state obligation to obtain consent in certain cases.

54. Canada has not ratified the 1989 ILO Convention 169 – it is therefore not binding and other states cannot address a complaint against Canada. However, complaints before the ILO have been filed against host states involving Canadian mining companies.\textsuperscript{55}

55. In November 2010, Canada has endorsed the Declaration on the Rights of Indigenous Peoples, which, while not legally binding, sets international standards for the treatment of indigenous peoples.\textsuperscript{56} It recognizes the State duty to consult Aboriginals, in

\textsuperscript{47} Ibid at 9.
\textsuperscript{48} Ibid at 65.
\textsuperscript{49} Ibid at 83.
\textsuperscript{50} Ibid at 9.
\textsuperscript{51} Ibid at 74.
\textsuperscript{52} Ibid at 7-8.
\textsuperscript{53} Ibid at 67.
\textsuperscript{55} Some of these cases are discussed in Stefan Matiaton & Josée Boudreau, “Making a Difference : The Canadian Duty to Consult and Emerging International Norms Respecting Consultation with Indigenous Peoples”, in Oonagh E Fitzgerald, ed, The Globalized Rule of Law, Relationships between International and Domestic Law (Toronto: Irwin Law, 2006).
\textsuperscript{56} By a vote of 143 in favor to 4 against, with 11 abstentions, the UN General Assembly adopted on September 13, 2007 the United Nations Declaration on the Rights of Indigenous Peoples. The four countries against it were Australia, Canada, New Zealand and the United States. See United Nations
good faith and to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.\textsuperscript{57}

56. The FPIC principle is discussed by the Inter-American Court of Human Rights in notably \textit{Saramaka People v. Suriname} which stated that the indigenous people’s consent is necessary only for “large-scale development or investment projects”\textsuperscript{58} that could have a “profound impact on the property rights of the members of [the people] to a large part of the their territory.”\textsuperscript{59} Consultation of indigenous peoples is however always required when planning development projects of any scale.\textsuperscript{60}

3.1 Government’s duty to consult

57. With the \textit{Sparrow} decision, the Supreme Court of Canada introduced, in 1990, the element of consultation for the first time, which is now a key issue in Canadian Aboriginal law and policy.\textsuperscript{61}

58. The jurisprudence following the \textit{Sparrow} decision confirmed the “duty to consult” as part of the justification framework and clarified the nature and scope of consultation.\textsuperscript{62} In \textit{Delgamuukw}, the highest court in Canada suggested that there is always a duty to consult in the context of an infringement of Aboriginal title.\textsuperscript{63} \textit{Delgamuukw} also introduced the notion of a spectrum of consultation which means that the nature and scope of the “duty to consult” will vary with the circumstances.\textsuperscript{64}

59. The “duty to consult” was defined in other recent Supreme court decisions: \textit{Haïda} (2004), Taku River (2004), Mikisew (2005), Ahousaht First Nation (2008) and Rio Tinto (2010). The duty starts even before indigenous rights are formally established by a treaty or a court decision,\textsuperscript{65} when the government is said to have known of the potential existence of the right or the claimed ancestral title and where there is a potential prejudicial impact that will follow from a measure that will be taken.\textsuperscript{66}

\textsuperscript{58} \textit{Case of the Saramaka People v Suriname} (2007), Inter-Am Ct HR (ser C) No 172 at para 134 .
\textsuperscript{59} Ibid at para 137 .
\textsuperscript{60} Ibid.
\textsuperscript{61} \textit{R v Sparrow}, [1990] 1 SCR 1075.
\textsuperscript{63} \textit{Delgamuukw v British Columbia}, [1997] 3 SCR 1010 at 168.
\textsuperscript{64} Ibid.
\textsuperscript{65} \textit{Nation Haïda v British-Colombia (Minister of Forest)}, 2004 SCC 73, [2004] 3 SCR 511 at para 36 \textit{[Nation Haïda]},
\textsuperscript{66} \textit{Rio Tinto Alcan Inc v Carrier Sekani Tribal Council}, [2010] SCC 43 at para 45-46
60. The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.  

61. Test to evaluate if the government has met its duty to consult:  

(1) Has the Crown’s conduct triggered a duty to consult?  
(2) If so, what is the scope and content of the duty?  
(3) Was the duty fulfilled?  

62. The duty to consult varies depending on the severity of infringement on Indigenous peoples’ rights. Consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. Good faith implies informing the Aboriginal people of the project on Aboriginal and treaty rights.  

63. According to Canada’s Minerals and Metals Policy:  

[the Government, in carrying out its responsibilities under the Indian Act, has as objectives: a fair return to the First Nations from their minerals, protection of the environment, rehabilitation and restoration of the site for future generations, and First Nations involvement in projects, in keeping with their aspirations.]  

64. According to this government policy, the duty to consult is an objective rather than a mandatory obligation developed by case law throughout years.  

65. In 2011, following the Supreme Court of Canada’s decisions in Haida Nation, Taku River and Mikisew, the Canadian Government published its consultation guidelines.  

66. In a nutshell, the duty to consult in Canadian law is more exigent than what is required by international instruments (UN Declaration, ILO 169). Under Canadian law the state has to consult if there is merely a potential that an infringement of Aboriginal
rights may occur. In theory, Canadian law seems strong. In practice however, as shown with the example of Quebec, First Nations are often not duly consulted. In addition, the duty to obtain free prior and informed consent is absent from Canadian legislation. The Committee on the Elimination of Racial Discrimination reiterated its concerns on this matter, stating that Aboriginals’ rights to consultation and to prior consent “may be subject to limitations” and are not fully implemented by Canada.  

3.2 Quebec

67. As of May 2012, Quebec’s Mining Act authorizes mining activities without any duty to consult Aboriginal communities.  

68. The Quebec government has adopted the “Interim guide for consulting the Aboriginal communities” which aims at defining the guidelines adopted by the Supreme Court in relation to consultation of Aboriginal peoples. The guide has been however critiqued due to its lack of a meaningful consultation and accommodation process. The Algonquin Nation Secretariat has raised the following six mains problems that the guide entails:

- The threshold in the 2008 Guide for triggering the duty to consult appears to be inconsistent with Haida;
- The 2008 Guide is premised on the government of Quebec being the sole decision-maker, particularly with regard to whether consultations give rise to accommodation;
- The 2008 Guide does not take account of the nature of the right affected particularly with regard to contemplated accommodation measures;
- Resource revenue sharing is all but precluded as an appropriate accommodation measures;
- It is out of step with the UN Declaration on the Rights of Indigenous Peoples; and

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72 See below, section 3.2.
74 Mining Act, RSQ c M-13.1, entered into force 15 May 2012. The only reference to native people is found in article 305.1 which states that: “The Minister may classify an outstanding geological site and establish the boundaries of the site after consulting the Minister of Sustainable Development, Environment and Parks, associations in the Quebec mining industry and, where applicable, the holders of mining rights, municipalities, urban communities or Native communities concerned.”
- The 2008 Guide is not strong enough in requiring that consultation take place at the strategic planning stage.\textsuperscript{76}

69. The mining industry is divided into two types of operations: exploration and production activities. The goals and financial means of these two types of operations are very different, and there is thus no unified approach to consulting Aboriginals. As a result, each project is conducted on a case to case basis.

70. Agreements (i.e. Impact and Benefit Agreements, Memoranda of Understanding, Letter of Intent, etc.) are being signed between mining companies and Aboriginal peoples as commercial agreements and regulated by civil rights and obligations applying to commercial contracts.

71. At the time of the writing, a new bill was being studied by the parliamentarians of the province of Quebec: Bill-14 mentions that the “Minister must consult Native communities specifically, depending on the circumstances.”\textsuperscript{77}

72. In contrast, Ontario’s mining laws recognize the duty to consult but not to accommodate.\textsuperscript{78}

4. \textbf{Tax Laws}

73. By virtue of its federal nature, Canada has 3 levels of taxation: federal, provincial and municipal.\textsuperscript{79} Both the federal and the provincial jurisdictions can tax mining

\textsuperscript{76} Wolf Lake First Nation et al, Comments regarding the government of Quebec’s interim guide for consulting First Nations: RE: Comments on proposed changes to Quebec mining Act (Bill 14) (Aug. 15 2011), at 1 online: MiningWatch Canada <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/WL%20EV%20Algonquins%20to%20Charest%20%20Aug%202011_0.pdf>.

\textsuperscript{77} Bill 14, An Act respecting the development of mineral resources in keeping with the principles of sustainable development, 2nd Sess, 29th Leg, Quebec, 2011, online: Assemblée nationale <http://www.assnat.qc.ca/Media/Process.aspx?MediaId=ANQ.Vigie.Bll.DocumentGenerique_46995en&process=Default&token=ZyMoxNwUn8ikQ+TRKYwPCjWrKwg+v1v9rjj17p3xLGTZDmLVSmJLoqe/vG7/YWzz>.

\textsuperscript{78} “A cornerstone of Bill 173 is the recognition of Aboriginal rights to consultation (Sections 2, 78, 139(2), 140 and 141). In essence the amendments render apparent the existing legal requirement to consult with aboriginal groups. Bill 173 does not, however, include reference to “accommodation” which is also a requirement under the constitution and supported by case law.” MiningWatch Canada, “MiningWatch Canada Responds to Ontario's Proposals for a Modernized Mining Act” (12 June 2009), online: MiningWatch Canada <http://www.miningwatch.ca/miningwatch-canada-responds-ontarios-proposals-modernized-mining-act>. Bill 173 passed into law in 2009. The current Mining Act, does not contain any provision on the duty to accommodate. The implementation of amendments will be brought into effect over time: few changes took effect after the enactment of the Mining Amendment Act, whereas others, such as clarification of the requirements for Aboriginal consultation, will take place in Phase Two (2012 and 2013). Ministry of Northern Development and Mines, Ontario, Mining Act Modernization: Changes to Ontario’s Mining Act, online: MNDM <http://www.mndm.gov.on.ca/en/mines-and-minerals/mining-act/mining-act-modernization>. 
corporations while municipalities can only raise property taxes. Furthermore, the provincial governments also collect royalties from the mining activities.

74. The federal mining taxation stems from the *Income Tax Act* (ITA). The foreign tax credit provisions of the ITA allow corporations to deduct taxes paid in foreign jurisdictions. With regards to foreign investment in Canada and Canadian investment abroad, “Canadian international tax provisions adhere to the international tax principles promoted by the Organization for Economic Co-operation and Development (OECD).” Precisely, “[a] corporation is resident in Canada for tax purposes if its central management and control are located in Canada, or if it is incorporated in Canada.”

75. The number of tax credit provisions will vary depending on the branch income, i.e. a subsidiary income, a portfolio income etc. However, under the ITA, no regulation currently exists to prevent corporations from deducting business expenses with respect to international activities in the calculation of the corporate income tax - and this even if the project in question raises serious human rights concerns.

76. At the provincial level, the *Quebec Taxation Act*, the *Mining Tax Act*, and the ministerial decree concerning the perception on the mining industry ordered under the *Quebec Mining Act* are legislations regarding royalties and taxes imposed on mining corporations. The latter also provide for deductions and taxation measures that dispense corporations of costly expenses.

77. The report of the Auditor general of Quebec to the *Assemblée nationale* (Quebec’s provincial Parliament) for 2008-2009 documented the government’s intervention in the mining sector, mostly through the provincial *Ministère des ressources naturelles et de la faune* (Ministry of Natural Resources and Fauna - MNRF). The Auditor general had raised concerns regarding the MNRF’s fiscal/economic analyses as they did not establish whether Quebec is sufficiently compensated from the exploitation

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80 Ibid.
82 Canadian taxation rules are based on three principles: worldwide taxation, elimination of country double taxation and permanent establishment. See Natural Resources Canada *Canadian International Income Tax Rules*, online: Natural Resources Canada <http://www.nrcan.gc.ca/minerals-metals/business-market/3854>.
83 Ibid.
84 Ibid.
86 *Mining Tax Act*, RSQ 2011, c I-0.4.
87 Ministerial Order concerning the exercise of powers relating to petroleum, natural gas, brine and underground reservoirs vested in the Minister under the Mining Act, RRQ, c M-13.1, r 0.1.

78. In comparison with Ontario, Manitoba and British-Columbia, Quebec has the highest degree of fiscal/economical exemptions.\footnote{Ibid at 2-4 and 2-5.} The Auditor general noted gross irregularities in the payments planned by the Mining Tax Act: 14 companies had not paid their contributions and taxes paid by the other companies were equivalent to only 1.5% of the gross production annual value.\footnote{For each $1000 invested, Quebec offers a tax saving of $716, compared to Ontario’s $568, Manitoba’s $590 and British-Columbia’s $618. See ibid, 2-38 and 2-39.} Moreover, the report stated numerous cases where the payments were not at all made and where the due date for the payments was not met. In some cases, the MNRF was not aware of those irregularities and has not demanded payments.\footnote{Ibid at 2-3.}

79. Some changes have been implemented (i.e. in the 2010 budget),\footnote{Mainly tax rules changed. See Steve Suarez, 2010 Quebec Budget Changes to Mining Tax Regimes., online: Infomine.com <http://www.infomine.com/publications/docs/2010Quebec.pdf>.} but without leading to a concrete solution. Despite the propositions of the Québec meilleure mine coalition, the mining royalties system is still based on profits rather than on the gross value of production. This type of reform would ensure that all the resources are compensated.\footnote{“Profits are easy to manipulate and can be reduced or even brought to zero thanks to the numerous deductions mining companies can apply to their balance sheets”, Christian Simard, “Mineral Royalties: Quebec Still at the Bottom of the Heap” (18 May 2011), online: MiningWatch Canada <http://www.miningwatch.ca/news/mineral-royalties-quebec-still-bottom-heap>.}

80. Furthermore, there is a substantial lack of resources in the ministries, despite the increase of mining activities in Quebec.\footnote{It should be however noted that in the 2012 Quebec budget the government implemented a new Crown corporation, Ressources Québec. See Coalition pour que le Québec ait meilleure mine, “Boom minier au Québec “Évitons l’erreur minérale”” (24 November 2011), online: Québec meilleure mine <http://www.quebecmeilleuremine.org/content/boom-minier-au-qu%C3%A9bec-%C2%AB%C3%A9vions-l%E2%80%99erreur-min%C3%A9rale%C2%BB>.}
81. This is only an example of how Quebec legislation, ministries and agencies have problems related to the monitoring of the activities of mining corporations operating in the province of Quebec, hence it would be ambitious to presume that it has control over the activities of mining companies abroad.

5. Corporate Laws

5.1 Structure

82. In Canada, a company may either incorporate under a provincial or under federal law.

83. A corporation registered under the federal Canadian Business Corporation Act (CBCA), has a registered office in Canada at all times. In contrast, the head office of a company registered under a provincial law, such as the Business Corporation Act of Quebec (BCAQ), must be permanently located in the province in question.

84. A company constituted under federal corporate law may operate abroad. However, the opposite does not apply for a corporation registered under a provincial law.

85. Corporations are subject to civil litigation (either pursuant to civil law in the case of Quebec or tort law in the rest of Canada) and are criminally liable.

5.2 Corporate veil

86. In Canada, a corporation is a separate legal person from its shareholders or directors.

87. Common law rules, the Quebec Civil Code and corporate statutes set out obligations for corporate directors. Among these is a fiduciary duty not to place themselves in a position where their duty to act in the best interests of the corporation conflicts with their personal interests.

97 Canada Business Corporation Act, RSC 1985, c C-44.
98 Ibid s 19(1).
99 Canada Business Corporation Act, RSC 1985, c C-44, s 15.
100 This limited liability emanates mainly from section 309 of the Civil Code of Québec. See Civil Code of Québec, RSQ 1991,c 64, art 309 [CCQ].
101 Canada, Law and Government Division, Directors' Liability Under the Canada Business Corporations Act, (Ottawa: Parliamentary Information and Research Service, 2008), online: Parliament of Canada <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0825-e.htm> [Director's Liability Under the Canada Business Corporation Act]. See also Canada Business Corporation Act, RSC 1985, c C-44, s 122(1)(a), which states that directors of a corporation must “act honestly and in good faith with a view to the best interests of the corporation” when exercising their powers and discharging their duties.
88. Furthermore, directors are required to “exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.” Thus, they must “maintain a standard of care when managing the corporation” and “use their training, ability, experience and education in the same way as a reasonably prudent person would do in a similar situation.”

89. The personal responsibility of the shareholders remains limited to their stakes. They possess immunity. Consequently, they are not liable for any liability charges, actions or default of the corporation, except in some specific cases.

90. Similarly, the recently reformed corporate law of Quebec provides that the shareholders are not responsible for the activities of the corporation.

91. There are ways to engage the responsibility of a corporation’s members. The Civil Code of Quebec provides that “[i]n no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order.” It is therefore possible to hold shareholders or directors personally liable for the company's obligations pursuant to the legal concept of lifting the “corporate veil” when one of the following issues is concerned: fraud, abuse of rights, or a contravention of a rule of public order. Except for those three motives explicitly provided in the law, it remains difficult to engage the personal liability of a shareholder. And even so, the interpretation of such a concept remains at the discretion of the Courts.

6. Securities and Financing

6.1 Toronto stock market (TSX)

92. TSX is owned by TMX Group, a business that has a broad range of activities in the stock markets. TSX and TSX Venture Exchange (TSXV) offer many financing possibilities for junior and senior mining companies at all stages of their activities. The

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102 Directors’ Liability Under the Canada Business Corporations Act, supra note 101.
103 Canada Business Corporation Act, RSC 1985, c C-44, s 122(1).
104 Directors’ Liability Under the Canada Business Corporations Act, supra note 101.
105 Canada Business Corporation Act, RSC 1985, ch C-44, s 45.
106 Circumstances in which shareholders could be liable: “(1) The shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation except under subsection […] (2) Subject to subsection 49(8), the articles may provide that the corporation has a lien on a share registered in the name of a shareholder or the shareholder’s personal representative for a debt of that shareholder to the corporation, including an amount unpaid in respect of a share issued by a body corporate on the date it was continued under this Act. (3) A corporation may enforce a lien referred to in subsection (2) in accordance with its by-laws.” Canadian Business Corporation Act, RSC 1985, ch C-44, s 45.
107 Business Corporation Act Quebec, RSQ 2011, ch C-38, s 224.
108 317 CCQ.
latter offers competitive advantages such as strong trading liquidity, access to US capital, dual listing and few regulations.\textsuperscript{109}

93. In fact, Canada is the only developed state without a national stock market regulator.\textsuperscript{110} For instance, the supervision of Canadian publicly traded companies and markets is fragmented in 13 jurisdictions and commissions.\textsuperscript{111} Even if individual investors, asset managers, issuers, financial institutions, law firms, industry associations and regulatory organizations called for a reform of the securities’ regulation program,\textsuperscript{112} the implementation of a national regulator is yet uncertain.\textsuperscript{113} In December 2011, the Supreme Court has declared unconstitutional a federal bill that attempted to create a national securities regulator, arguing that the regulation of securities market falls under provincial jurisdiction.\textsuperscript{114} In the 2012 federal budget, the government reiterated its interest in a national securities regulator, announcing that it is “consulting with provinces and territories, a number of which have reaffirmed their interest in working on a cooperative basis towards a common securities regulator.”\textsuperscript{115}

94. This particular situation results in a complex regulatory sphere, where problems such as duplication, difficult coordination, delayed adjudication, unpunished wrongdoers and so on are frequent.\textsuperscript{116}

95. The lack of efficient control encourages the mining companies to list their shares in the TSX and the TXV. Furthermore, human rights issues are not entrenched in the market’s regulations, which are mainly designed to protect shareholders. Indeed, the main goal of the regulators is to promote and sanction the risk taking of an investment.\textsuperscript{117} “Therefore formal or criminal law was always a last resort, useful only after ‘broad discretion’, and ‘courts of honour’ have been tried and failed.”\textsuperscript{118}

\begin{thebibliography}{99}

\bibitem{TMX} TMX Group, “Global Leader in Mining”, online: TMX Group \url{<http://apps.tmx.com/en/listings/sector_profiles/mining.html>}. 


\bibitem{One} One for each province and territory.

\bibitem{Phelps supra} See Phelps, \textit{It’s Time}, supra note 110.

\bibitem{Ibid} \textit{Ibid}.


\bibitem{Phelps supra 2} Phelps, \textit{It’s Time}, supra note 110 at 40.


\end{thebibliography}
96. Self-regulatory organizations provide rules and mechanisms. An example of this is the Investment Industry Regulatory Organization of Canada (IIROC), which has been recognized by many jurisdictions, amongst others Alberta, British-Columbia, Quebec, Ontario and Saskatchewan. However, TSX and TSXV do not comply with the complaint mechanism that it offered. Even if they did, the scope of the mechanism does not encompass human rights and is strictly related to business and finance. Without an efficient mechanism control then, it is understandable why most mining companies would want to enlist with the TSX and TSXV.

97. In fact, Canada is considered as number one in the mining industry. 58% of the world’s public mining companies are listed in Toronto, which makes the TSX the market with the highest number of listed mining companies worldwide. From 2001-2004, approximately 30% of Canadian companies’ mining assets were in Latin America, representing cumulative values ranging from CAN$7.8 billion in 2001 to $10.1 billion in 2004. In 2005, a 45% increase brought the value of cumulative assets to $14.7 billion and the proportion of total assets to 36%. This proportion rose to 44% in 2006, bringing the cumulative assets value to $28.2 billion. In 2009, 50% of the mineral exploration projects held by corporations listed in Toronto, approximately 4,700 projects, were located outside of the Canadian borders and more than half of the assets of Canadian mining companies were in Latin America. The numbers speak for themselves: in 2011, TSX/TSXV calculated 201 new listings in the mining business, compared to 79 in the Australian Securities Exchange (ASX) and 20 in the London Stock Exchange.

123 At the time of writing, this was the latest available report on Canada’s international mining presence issued by the Canadian government.
125 Canada’s Mining Assets Abroad Information Bulletin, Natural Resources Canada (February 2011), online: Natural Resources Canada <https://www.nrcan.gc.ca/mining-materials/publications/8764>. As of April 2012, this is the latest available information on Canada’s International Mining Presence issued by the Canadian government.
(LSE/AIM). In 2011, the TSX/TSXV alone generated 90% of the total of all mining equity financing. 286 mining companies operating in South America are listed in the TSX/TSXV and altogether own 1069 properties. In addition, 211 companies operating in Mexico, and 51 operating in the Caribbean and Central America are also listed in the TSX/TSXV.

6.2 Department of Foreign Affairs and International Trade (DFAIT)

DFAIT has multiple programs to help finance corporations, it focuses on providing grants and loans for many kinds of businesses. Aside from the EDC (discussed below), the Trade Commissioner Service offers the following programs: Global Commerce Strategy Program, Investment Cooperation Program, International Science and Technology Partnerships Program and Market Expansion Financing-Business/Development Bank of Canada.

6.3 Export Development Canada (EDC)

EDC was implemented by the Export Development Act and by the Financial Administration Act. It is fully owned by the Government of Canada and its initial capital base for making the loans was funded by Canadian taxpayers. EDC’s credit is also “backed by the Government of Canada and the taxpayer.”

EDC is Canada’s export credit agency that provides trade finance services such as guarantees, political risk insurance, direct loans and lines of credit to support Canadian

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125 TMX Group, A Capital Opportunity: Mining (2012) at 26 [online at the time of writing, unavailable at publication].
126 Ibid at 20.
127 Ibid at 29.
128 TMX Group, Fact sheet: Global Leader in Mining (2012) at 2 [online at the time of writing, unavailable at publication].
129 Support for national organizations, communities and researchers. Funding Opportunities, Foreign Affairs and International Trade Canada, [online at the time of writing, unavailable at publication]
130 “The Investment Cooperation Program (INC)’s objective is to support responsible, developmentally beneficial, private sector engagement in developing countries leading to sustained economic growth and poverty reduction.” Foreign Affairs and International Trade Canada, Investment, Investment Cooperation Program, [online at the time of writing, unavailable at publication].
131 Foreign Affairs and International Trade Canada, International Science and Technology Partnerships Program, [online at the time of writing, unavailable at publication].
132 Business Development Bank of Canada, Market Expansion Financing, [online at the time of writing, unavailable at publication].
133 Mostly specialized in commercial and entrepreneurship funding.
134 Export Development Act, RSC 2001, c E-20, s 1; c 33, s (2)F.
135 Financial Administration Act, RSC 1985, c F-11, s 1.
136 Halifax Initiative, FAQ ECAs and EDC: What makes EDC a public financial institution?, online: Halifax Initiative <http://halifaxinitiative.org/content/faqs-ecas-and-edc>.
137 Ibid.
exporters and investors abroad. In 2010, EDC provided for 8,236 customers for a total of $84.6 billion. EDC support for Canadian extractive companies is vital, particularly since it provides political risk insurance that few other insurers offer.

101. It offers four types of financing solutions for Canadian corporations. Project finance helps project sponsors to mobilize enough funding. Through this program, EDC has supported a gold mine in the Dominican Republic and a copper and cobalt mine in Mexico.

102. EDC recalls that it follows the norms governing international trade recognized by Canada. EDC developed its own Corporate Social Responsibility (CSR) policy at the end of the 90’s. The CSR’ strategy was officially launched in 2000. The strategy is divided in five sections: Business Ethics, Environment, Transparency, employee development, and criteria regarding human rights.

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138 Export Development Canada, About us, online: EDC <http://www.edc.ca/EN/About-Us/Pages/default.aspx>.
139 $5.5 million directed to South and Central America. Export Development Canada, 2010 Performance Highlight, [online at the time of writing, unavailable at publication].
140 See Export Development Canada, Political Risk Insurance, online: EDC <http://www.edc.ca/en/our-solutions/insurance/pages/political-risk-insurance.aspx>. This type of insurance covers risks typically associated with the unstable and conflict-prone countries in which many Canadian mining, oil and gas companies operate. See Alan Berlin, “Managing Political Risk in the Oil and Gas industries” (2004) 1 Transnational Dispute Management, 19. Even more important than EDC support for these firms, however, are the investment decisions of the Canadian CPPIB. The Board manages a portfolio of over CAN$150,1 billion as of December 2011. For the current value of the CPPIB portfolio, see Canadian Pension Plan Investment Board, Total Portfolio View, online: <Erreur ! Référence de lien hypertexte non valide.>
141 At the time of writing, the four types are: Export Guarantee Program, Supplier Financing, Project Finance and Buyer Financing. For the up to date types of financing solutions, see Export Development Canada, Financing, online: EDC <http://www.edc.ca/EN/Our-Solutions/Financing/Pages/default.aspx>. For the purpose of this brief, we will focus on the Project Finance solution because it reaches mining companies.
142 Structured and Project Finance, Export Development Canada, online: EDC <http://www.edc.ca/EN/Our-Solutions/Financing/Project-Finance/Pages/default.aspx>.
143 EDC, civil organizations and NGOs do not expose the same projects in their publication due to the high failure rate of projects funded by EDC. See generally NGO Working Group on the Export Development Corporation, Reckless Lending, How Canada’s Export Development Corporation Puts People and the Environment at Risk (Ottawa: Halifax Initiative, 2000), online: Halifax Initiative <http://halifaxinitiative.org/updir/Reckless_Lending_1.pdf> [Reckless Lending] and Export Development Canada, Limited Recourse Project Examples, online: EDC <http://www.edc.ca/EN/Our-Solutions/Financing/Project-Finance/Pages/limited-recourse-projects.aspx>.
144 Those norms are the Guidelines for Multinational Enterprises, the Extractive Industries Transparency Initiative, the World Trade Organization’s Countervail Measures Agreement and the Anti-Corruption Program. See Structured and Project Finance, Export Development Canada, online: EDC <http://www.edc.ca/EN/Our-Solutions/Financing/Project-Finance/Pages/default.aspx>. None of those present extensive norms and criteria regarding human rights. This issue been criticized by experts: “EDC’s spoken commitment to follow government policy in the area of human rights cannot be translated into practice” due to the lack of EDC operational policies. Reckless Lending, supra note 143 at 3.

103. Much like an ombudsman, the Officer operates independently from management, receiving and reviewing complaints from stakeholders and fielding inquiries about CSR policies and initiatives. Any individual, group, community, entity or other party affected or likely to be affected by EDC’s corporate social responsibility policies and initiatives can submit a complaint. In 2009, the Compliance Officer had only revised 6 requests.

104. Furthermore, the requests are not made public and “this internal Officer is no substitute for an independent adjudicative body and cannot provide victims with appropriate remedies.”

105. Moreover, the Access to Information Act allows EDC to “refuse to disclose a record requested under this Act that contains trade secrets or financial, commercial, scientific or technical information.” In that sense, EDC states that its disclosure policy balances public accountability and “commercially confidential information.” This gives EDC a great scope of activities unrevised by public authorities, and creates no legal obligation to reveal to the Canadian public which companies are being financed.

146 See generally Export Development Canada, Corporate Social Responsibility, online: EDC <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Pages/default.aspx>.
152 Access to Information Act, RSC 1985, c A-1, s 18.1.
154 Reckless Lending, supra note 143 at 2.
106. EDC also adopted the *Equator principles*,\(^{155}\) which implies that EDC has to ensure that their clients comply with the International Finance Corporation (IFC)\(^{156}\) Performance Standards.\(^{157}\) The Performance Standards “establish standards that the client is to meet throughout the life on an investment by IFC”. The 8 Standards are the following: Assessment and Management of Environmental and Social Risks and Impacts; Labor and Working Conditions; Resource Efficiency and Pollution Prevention; Community Health, Safety, and Security; Land Acquisition and Involuntary Resettlement; Biodiversity Conservation and Sustainable Management of Living Natural Resources; Indigenous Peoples; Cultural Heritage\(^{158}\) The IFC sustainability framework, which includes the performance standards, has been however criticized for not including a specific requirement to commit to respect human rights.\(^{159}\)

107. It is worth mentioning that EDC implemented the Performance Standards in response to the recommendations of the subcommittee of the Parliamentary Standing Committee on Foreign Affairs and International Trade (SCFAIT)\(^{160}\) and, to the final report of the National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries.\(^{161}\) The final report requested that EDC “includes a provision in its client contracts stating that serious non-compliance with

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155 “The Equator Principles (EPs) is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making.” Equator Principles, *About the Equator Principles*, <http://www.equator-principles.com/index.php/about-ep>. An Environmental and Social Impact Assessment (ESIA) is required for projects implemented in low- and middle-income countries. Among others, a compliance with “applicable international treaties and agreements” is required by the assessment, which implicitly includes human rights. However, since there is no possible recourse against an institution that does not comply with the standards, binding policies on human rights remain necessary. Furthermore, the Eps do not offer any remedy for individuals whose rights are violated. Amnesty International, *Human Rights, Trade and Investment Matters* (London and New York: Amnesty International, 2006) at 16, online: Amnesty international USA <http://www.amnestyusa.org/sites/default/files/pdfs/hrtradeinvestmentmatters.pdf>.

156 As a member of the World Bank Group, the International Finance Corporation is a multilateral financial institution which provides direct investments and advisory services to both foreign and domestic enterprises in emerging markets.

157 *Export Credit Agencies and Human Rights*, supra note 151 at 12. See section VI. B I. for more information on IFC.


159 See e.g. Amnesty Int’l, *Time to Invest in Human Rights* (Amnesty International, 2010) at 8 [online at the time of writing, unavailable at publication], which offers a complete analysis of the Performance Standards.


standards will lead to the withdrawal of EDC services.\footnote{Export Credit Agencies and Human Rights, supra note 151 at 14.} Nevertheless, it is mentioned nowhere that EDC has legal obligations to specifically assess the human rights impact of a particular project and it seems that this recommendation was ignored.\footnote{See generally Export Credit Agencies and Human Rights, supra note 151 at 11. In fact, according to the Halifax Initiative, the specific standards that should be applied to a project are not revealed and companies are not required to consult project-affected communities in order to receive financial support from EDC.}\footnote{Canadian Network on Corporate Accountability, \textit{Dirty Business, Dirty Practices: How the Federal Government Supports Canadian Mining, Oil and Gas Companies Abroad} (Ottawa: Halifax Initiative, 2007) at 1.4, online: Halifax Initiative <http://www.halifaxinitiative.org/sites/halifaxinitiative.org/files/DirtyPractices.pdf> [\textit{Dirty Business}].}

### 6.4 Canadian Pension Plan Investment Board (CPPIB)

108. The CPPIB was created in 1997 by the \textit{Public Sector Pension Investment Board Act}.\footnote{Public Sector Pension Investment Board Act, RSC 1999, c 34.} Its mandate is to invest the assets of the Canadian Pension Plan\footnote{“The Canada Pension Plan is a contributory, earnings-related social insurance program. It ensures a measure of protection to a contributor and his or her family against the loss of income due to retirement, disability and death.” Every worker, except of some exceptional cases, will contribute to this plan from the age of 18 to 70. Service Canada, \textit{Forms Catalogue: Canada Pension Plan}, online: Service Canada <http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=ctlg&ln=englast>.} to achieve a maximum rate of return.\footnote{Public Sector Pension Investment Board Act, RSC 1999, c 34, s 4.}

109. The Canadian Pension Plan is a crown corporation, which is funded by workers’ contributions to the Canadian retirement plan.\footnote{CPPIB is not a Sovereign Wealth Fund, “Plan assets are not government assets and are not dependent on tax revenues. The Canadian government is neither a sponsor nor guarantor of the plan.” CPP Investment Board, Written Statement of the Canada Pension Plan Investment Board before the House Financial Services Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises, and Subcommittee on Domestic and International Monetary Policy, Trade, and Technology (5 March, 2008) at 13, online: Committee on Financial Services <http://archives.financialservices.house.gov/hearing110/denison030508.pdf>\footnote{At the time of writing, CPPIB manages a fund of $152.8 billion. CPP Investment Board, \textit{About Us}, online: CPPIB <http://www.cppib.ca/About_Us>.} } It is one of the biggest funds in Canada.\footnote{Governor in Council Appointments, \textit{Organization Profile - Canada Pension Plan Investment Board}, online: GIC Appointments <http://www.appointments-nominations.gc.ca/prflOrg.asp?OrgID=CPI&typ=1&lang=eng>.}

110. The Board acts independently from the government, but nevertheless the Governor in Council appoints Board members on recommendations of the Minister of Finance and of the government.\footnote{Governor in Council Appointments, \textit{Organization Profile - Canada Pension Plan Investment Board}, online: GIC Appointments <http://www.appointments-nominations.gc.ca/prflOrg.asp?OrgID=CPI&typ=1&lang=eng>.} Furthermore, the CPPIB tables an annual report to Parliament through the Ministry of Finance and every three years the Board is subject to the review of federal and provincial Ministers of Finance. As any other crown corporation, the CPPIB’s records, systems and, practices are also subject to a special
examination every six years. In this regard, the CPPIB is not totally independent from the government.

111. In 2009, CPPIB invested in more than 2,900 public companies, 600 of them were Canadian and 400 of the latter were in the extractive sector.

112. The CPPIB adopted a Policy on Responsible Investing, which articulated the environmental, social and governance factors in how it invests, but the board does not assess the human rights impacts of their corporations’ investments before validating them. The human rights policy for the entire extractive sector is to improve standards of operation in high-risk countries, including human rights practices and local community relations, and reduce corruption risk. However, companies with poor human rights records can still be financed by the CPPIB, since it does not screen its investments with regards to human rights performance.

171 General Information About the Canada Pension Plan, Service Canada, [online at the time of writing, unavailable at publication].

172 Opening Statement from Don Raymond, Senior Vice President of Public Market Investments at the Canada Pension Plan Investment Board, Foreign Affairs and International Development Committee Appearance Regarding Bill C-300 (17 November 2009), [online at the time of writing, unavailable at publication]. For a complete list of private and public equities, see Investments: Equities, The Canada Pension Plan Investment Board, [online at the time of writing, unavailable at publication].

173 The Canada Pension Plan Investment Board, Policy on Responsible Investing (2010) [online at the time of writing, unavailable at publication].

174 The Canada Pension Plan Investment Board, Report on Responsible Investing (2011) at 12 [online at the time of writing, unavailable at publication].

175 Dirty Business, supra note 164 at 1.4.
Part 2:

Mining outside Canada

Legislative Framework and Political Context
113. Canada does not regulate the activities of the extractive industry outside its frontiers. Because of its dual legal system, both the federal and the provincial level could hypothetically legislate on the matter, according to their respective powers as described in the previous section. Indeed, the federal Parliament has the power to adopt extraterritorial criminal laws, but the provincial Parliaments could also legislate on civil matters relating to companies registered in the province that operate abroad. However, the jurisdiction of the provincial legislatures being geographically limited to their territory by the Constitution, they could only legislate on the activities that companies lead in the province. This section reviews the legal framework set forth by both levels of government: it highlights the lack of proper legislation, presents recent legislative proposals and cases brought to Canadian courts for human rights violations caused by Canadian companies abroad, and analyses the human rights provisions of the Free Trade Agreements and Foreign Investment Promotion and Protection Agreements contracted by Canada.

1. No Extraterritorial Human Rights Law in Canada

114. Canada does not have any extraterritorial human rights law that would allow victims of human rights abuse committed abroad to present a judicial recourse based on violation of human rights law before a Canadian court of law. For this reason, victims of human rights violations have presented their claims under civil legislation in Canadian courts, or before foreign jurisdictions such as the United States (US). Indeed, in such a context, civil lawsuits have been filed in provincial courts against Canadian companies or Canadian subsidiaries of foreign companies that have committed human rights abuse abroad, using the existing legal frameworks of the provinces. The lack of extraterritorial human rights law has thus instigated the introduction of bills before Canadian Parliament, and prompted victims, as mentioned, to file civil suits before civil courts. It may also be theoretically possible for the Attorney General to prosecute a corporation of a specific category of human rights crime. None of these forums have yet proven to provide an effective remedy for Canadian corporate human rights misconduct.

2. Criminal Legislation

2.1 Crimes Against Humanity, War Crimes and Genocide

115. Under Canadian criminal law, legal persons such as corporations can be prosecuted for wrongful acts.176

176 See Niels Beisinghoff, Corporations and Human Rights (New York: Peter Lang, 2009) at 46. See also Criminal Code, RSC 1985, c C-46, s 2. A corporation is considered an “organization.”
116. Pursuant to the complementary principle of the Rome Statute creating the International Criminal Court to which Canada is signatory, Canada has enacted the 

**Crimes Against Humanity and War Crimes Act** in 2000. It permits prosecution for crimes committed on Canadian territory and by Canadians anywhere in the world; it gives Canada jurisdiction over crimes committed against Canadian nationals; and the possibility to prosecute any individual present in Canada for crimes listed in the Act—regardless of that individual’s nationality or where the crimes were committed.

117. The application of this law enacted in 2000 was confirmed by the case of *R. vs. Désiré Munyaneza*, the first man in Canada found guilty and sentenced to life in 2009 for the commission of genocide acts and crimes against humanity during the Rwandan genocide of 1994.

118. The *Crime against Humanity and War Crimes Act* is an example of how Canada regulates the activities of its nationals—be they natural or legal persons—extraterritorially. However, the *Crimes against Humanity and War Crimes Act* only gives jurisdiction over specific crimes: crimes against humanity, war crimes and genocide. According to the *Rome Statute of the International Criminal Court*, to which the *Crimes against Humanity and War Crimes Act* refers, crimes against humanity have to be “committed as part of a widespread or systematic attack directed against any civilian population, with

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178 **Crimes Against Humanity and War Crimes Act**, RSC 2000, c 24.  
179 This is an example of active nationality and territorial jurisdiction. *Ibid*, s 4-5.  
180 This is an example of passive nationality jurisdiction. *Ibid*, s 6-8.  
181 These include genocide, crimes against humanity and war crimes.  
182 This is an example of universal jurisdiction. *Ibid*, s 6-8.  
183 *R v Munyaneza* [2009] QCCS 2201. At the time of writing, the case is at the appeal’s stage before the Quebec Court of Appeal.  
184 Crimes against humanity are described in the Act as “murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission” *Crimes Against Humanity and War Crimes Act*, RSC 2000, ch 24, s 4(3).  
185 War crime is described in the Act as “an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.” *Crimes Against Humanity and War Crimes Act*, RSC 2000, ch 24, s 4(3).  
186 Genocide is described in the Act as “an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.” *Crimes Against Humanity and War Crimes Act*, RSC 2000, ch 24, s 4(3).
knowledge of the attack.” This leaves numerous other human rights violations without proper adjudication from a criminal perspective.

2.2 Terrorist Acts

119. Bill C-10, entitled An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (Safe street and Communities Act), an Omnibus criminal law statute that received the Royal Assent on 13 March 2012, contains a section which allows victims of terrorist acts to seek remedy in Canadian courts, even if the act was committed abroad. The first part of the bill, entitled Justice for Victims of Terrorism Act, establishes a cause of action that allows victims who have suffered damage or loss in or outside of Canada as a result of a terrorist act to bring an action in damages before a domestic court. The cases can however be heard “only if the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident.”

2.3 Corruption

120. In 1998, Canada ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was rendered effective in Canada by the adoption of the Corruption of Public Foreign Officials Act (CPFOA) in 1998.

121. The CPFOA includes three indictable offences –bribing a foreign public official and possessing or laundering property and proceeds “obtained or derived from bribing a foreign public official,” over which Canada has jurisdiction if there is a “real and

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187 *Rome Statute, supra* note 177, art 7(1).
188 *Debates of the Senate*, 41st Parl, 1st Sess, No 60 (13 March 2012) at 1610 (The Hon. the Speaker).
189 Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, 1st Sess, 41st Parl, 2011, cl 4(1).
190 *Ibid* cl 4(2).
substantial link between the offence and Canada.” Therefore, part of the offence must have taken place in Canada for the Canadian courts to have jurisdiction over the case.

122. After the ratification of the United Nations Convention against Corruption, in 2007, two RCMP (federal police) anti-corruption investigative teams, based in Ottawa and Calgary, were created. In June 2011, an RCMP investigation led to the conviction of Niko Resources Ltd., an oil and gas exploration and production company, for the bribe of a Bangladesh official. As a result of a plea bargain, the company had to pay a $9.5 million fine. As of December 2011, the RCMP teams had 23 cases under investigation.

3.1 Remarks on criminal litigation in Canada

123. Practical barriers are however to be considered when assessing the possibility of a corporation being found liable under federal criminal law. A case of such a nature may only find its course if the office of the Attorney General of Canada authorizes the indictment and takes on the case. In that respect, it is important to note that the Attorney General of Canada is also the Minister of Justice and a politically elected Member of Parliament.

124. In addition, Canadian criminal law permits private prosecutions. In practice, however, the Attorney General of Canada may intervene in the case and stay the proceedings. This is the norm rather than the exception in Canada when allegations of international human rights violations are involved.

3. Civil Litigation

3.1 Civil Law Suits in Quebec

125. Canadian courts are reluctant to hear cases in which the defendant is a Canadian parent company and the alleged harm took place in another country. Civil suits present

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193 Ibid at 7.
194 Royal Canadian Mounted Police, Ottawa International Anti-Corruption Unit – “A” Division, , [online at the time of writing, unavailable at publication].
196 Ibid at 36.
197 Criminal Code, RSC 1985, c C-46, s 504.
198 Ibid, s 579.
199 See for instance, the case of former President Bush for which a coalition of human rights organizations filed a private prosecution for allegations of torture – it has been rapidly dismissed by the British Colombia Attorney General: Matt Eisenbrandt and Katherine Gallagher, “Halting Canadian Bush Prosecution Violated International Obligations” (17 January 2012), online: Jurist <http://jurist.org/hotline/2012/01/eisenbrandt-gallagher-bush.php>.
many impediments, such as the *forum non conveniens* doctrine and the lack of accessibility of courts for human rights victims.

126. For instance, a recent judgement from the Montreal Superior Court (civil first instance court) allowed for Canadian relatives of a person who was tortured abroad to be granted damages.200 Canadian citizen Zahra Kazemi was tortured to death in Iran and her son subsequently initiated civil proceedings against Iran before the Montreal court. The claims made by the Estate of Zahra Kazemi were dismissed because the abuses Ms. Kazemi suffered took place in Iran. However, the recourse of her son was allowed to proceed, as he was residing in Quebec when he suffered psychological trauma upon learning of his mother’s hospitalisation and death. As a result of the court’s approach, relatives in Canada of those tortured or killed abroad may have a remedy while those actually tortured abroad often would not. Although the arguments in this case are mainly oriented around state immunity, it illustrates the difficulty of victims of human rights violations committed abroad to be heard by the Canadian legal system. This judgment is an invitation to Parliament to act by passing Bill C-483201 in order to clarify that there should never be immunity for torture, war crimes, genocide or crimes against humanity. At the time of writing, the case is on appeal.

3.1.1  Forum non conveniens

127. *Forum non conveniens* “is a discretionary doctrine by which a court may decline to exercise its jurisdiction over a dispute if it finds that an alternative forum is more convenient or appropriate.”202

128. Developed through case law, the *forum non conveniens* practice in common law provinces is ruled by the jurisdiction *simpliciter*: courts do not have to prove they have jurisdiction before deciding if the *forum non conveniens* doctrine is applicable. In Quebec (civil law province), however, courts must first decide if they can adjudicate the case.203 Nevertheless, the *forum non conveniens* doctrine, whether it is in a common law or civil jurisdiction can be applied in a similar fashion.

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200 Kazemi (Estate of) v Islamic Republic of Iran, [2011] QCCS 196.
201 On March 3, 2010, Liberal MP Irwin Cotler re-introduced a bill in Parliament to deny immunity to countries and officials alleged to be responsible for atrocities. The bill would have created a human rights exception to the *State Immunity Act*‘s general rule that foreign governments cannot be sued in Canadian courts. The exception would have removed the key barrier to lawsuits involving torture, genocide, war crimes and crimes against humanity. Bill C-483 passed through first reading on 26 November 2009 but did not become law. Bill C-483, *An Act to amend the State Immunity Act (genocide, crimes against humanity, war crimes or torture)*, 2nd Sess, 40th Parl, 2009.
129. For instance, a real and substantial connection test must relate the cause of the action and the court’s competence.\textsuperscript{204} Also, especially in common law, the \textit{Federal Courts Act} identifies two situations in respect of which they may stay proceedings

\begin{itemize}
  \item [(a)] on the ground that the claim is being proceeded within another court or jurisdiction; or
  \item [(b)] where for any other reason it is in the interest of justice that the proceedings be stayed\textsuperscript{205}
\end{itemize}

130. In Quebec, the real and substantial test aim is to establish if the court has authority or not.\textsuperscript{206} The \textit{Quebec Civil Code} provides ways to use its jurisdiction when

\begin{itemize}
  \item [(1)] the defendant has domicile or his residence in Quebec;
  \item [(2)] the defendant is a legal person, is not domiciled in Quebec but has an establishment in Quebec and the dispute relates to its activities in Quebec;
  \item [(3)] a fault was committed in Quebec, injury was suffered in Quebec, an injurious act occurred in Quebec or one of the obligations arising from a contract was to be performed in Quebec.\textsuperscript{207}
\end{itemize}

131. However, section 3135 of the \textit{Civil Code of Quebec}\textsuperscript{208} codified the principle of \textit{forum non conveniens}. It is often used by Canadian corporations as an argument to obtain the Court’s dismissal of a case. Section 3136 of the \textit{Civil Code of Quebec} may also be used to impose jurisdiction by a Quebec authority.\textsuperscript{209}

132. The \textit{forum non conveniens} doctrine is currently prominent in judgements from Quebec when it comes to choose the appropriate forum for a non-citizen victim of human rights abuses. However, an April 2012 judgement of the Supreme Court of Canada could have an impact on the \textit{forum non conveniens} doctrine, since it states that “a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).”\textsuperscript{210}


\textsuperscript{205}\textit{Federal Courts Act}, RSC 1985, c F-7, s 50.

\textsuperscript{206}To know if the court has competence in Quebec, criteria where developed in the \textit{Lexus Maritime inc v Oppenheim Forfait GmbH case}; “1) the residence of the parties and witnesses and experts; 2) the status of evidence; 3) the place of training and performance; 4) the existence of another action abroad; 5) the location of property belonging to the defendant; 6) the law applicable to the dispute; 7) the advantage enjoyed by the plaintiff in the chosen forum; 8) the interests of justice; 9) the interest of both parties; 10) the possible need for a procedure in another jurisdiction.” Mikis Manoli et al, “The Doctrine of Forum Non Conveniens: Canada and the United States Compared” (2010), 6 Federation of Defense & Corporate Counsel Quarterly 3 at 22.

\textsuperscript{207}Art 3148 \textit{CCQ}.

\textsuperscript{208}Art 3135 \textit{CCQ}.

\textsuperscript{209}“Even though a Quebec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required”. Art 3135 \textit{CCQ}.

\textsuperscript{210}\textit{Club Resort Limited v Van Breda}, 2012 SCC 17 at para 86.
3.1.2 First case in Canada (1998): Cambior lawsuit for environmental damages

133. The use of the *forum non conveniens* in Quebec was initiated with *Recherches Internationales Québec v. Cambior Inc*, 211 a Quebec-based mining firm. The plaintiffs sued Cambior for the environmental damages its joint-ventured activities caused spilling toxic tailing in Guyana. 213 Because Cambior was domiciled in Quebec, the class action lawsuit -formed of 23 000 victims- was filed in Quebec. In order to determine whether Quebec was the appropriate forum, the Quebec Superior Court focused in particular on eight considerations: the place of residence of the parties and witnesses, the location of the evidence, the place where the fault occurred, the existence of court proceedings in another forum, the location of property owned by the defendant, the law applicable to the case, juridical advantage for the plaintiff in the chosen forum, and the interests of justice. 214

134. In accordance with this test, the Court applied the *forum non conveniens* and declared that the High Court of Guyana was a more appropriate forum for the plaintiffs and dismissed the *Recherches Internationales Québec*’s motion. 215 Afterward, Guyanese victims attempted a Guyanese legal remedy but the case was also dismissed by the Court, “leaving the victims without recourse.” 216

3.1.3 Anvil Mining (class action): war crimes and crimes against humanity

135. In November 2010, the *Canadian Association Against Impunity* (CAAI) filed a class action 217 against Anvil Mining Limited who operated a copper and silver mine 218 in

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212 The plaintiffs in the case were a class of Guyanese who have been affected by the spill.
213 The Superior Court called it “[o]ne of the worst environmental catastrophes in gold mining history. The dam of a treatment plant of a gold mine ruptured, resulting in approximately 2.3 billion litres of contaminated liquid spilling into two rivers in Guyana in 1995.” Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse: A Comparative submission prepared for Professor John Ruggie UN Secretary General’s Special Representative on Business & Human Rights* 45 (Oxford: University of Oxford, 2008).
215 *Cambior, supra* note 213 at para 100.
217 Anvil was alleged to have provided logistical help to Congolese military in the massacre of Kilwa in DRC that left 100 killed. Anvil denied the allegations. The Canadian National Contact Point rejected the case claiming its role was to mediate and was unable to investigate into the activities of the company. See OECD Watch, *Rights and Democracy v Anvil Mining*, online: OECDWatch <http://oecdwatch.org/cases/Cases_82>.
218 “Currently 74% of all cobalt mined in continental Africa (49% of all production worldwide) comes from the DRC; 69% of tin; roughly 50% of all tantalum; 17% of all copper; 11% of zinc; and 2% of all gold also comes from the DRC. Exports in these minerals from the DRC were estimated to be $6.59 billion in 2008, up significantly from 2006”. John Burchill, *Out of the Heart of Darkness: A New Regime for Controlling Resource Extraction in the Congo* (2010), 10 Asper Rev of Int’l Bus and Trade Law 99, at 99-100.
the Democratic Republic of Congo (DRC) from 1998 until 2010. The plaintiffs alleged that the company, in providing transport and logistics to Congolese soldiers, had an important role in the Kilwa massacre of October 2004.219

136. The Quebec Superior Court rejected Anvil’s *forum non conveniens* argument which asserted that the case should be heard in the DRC or Australia.220 However, three Anvil employees had previously been acquitted in the DRC, following a trial filled with procedural irregularities which was criticized at the time by the High Commissioner for Human Rights.221

137. The Court declared that Anvil did not prove that Congolese or Australian authorities would be more appropriate, nor did it convince the judge that victims would have access to other civil judicial mechanism if the Court dismissed the case.222 Anvil argued that the Court was wrong in its interpretation of section 3135 and 3148(2) *in fine* of the *Civil Code of Quebec* and filed an appeal.

138. On 24 January 2012, the Quebec Court of Appeal found the Quebec Courts not competent to hear the case and reversed the Superior Court’s decision. The Court accepted Anvil’s argument regarding section 3148(2) of the *Civil Code of Quebec*, which states that “a Québec authority has jurisdiction where the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec.”223 The Court of Appeal ruled that the Superior Court had failed to consider the link between the acts allegedly committed by the company in the DRC in 2004 and its activities in Quebec.224 Since Anvil’s activities in Quebec were only established in 2005 and the company’s representative in Quebec was merely in charge of


220 *ACCI c Anvil Mining Ltd*, 2011 QCCS 1966, at para 41 [*ACCI c Anvil Mining Ltd*].

221 “Significant irregularities were also present in the trial process itself. These included the transfer of the military prosecutor to another jurisdiction and his replacement with someone with little knowledge of the case, the absence of the victims’ lawyers, and the failure to summon key witnesses to appear in court. There is also evidence that a senior politician with links to the defendant company attempted to dissuade victims from participating in the trial, enlisting the help of tribal leaders to do so.” Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse: A Comparative submission prepared for Professor John Ruggie UN Secretary General’s Special Representative on Business & Human Rights* 64 (University of Oxford, 2008); Press Release, Office of the High Commissioner for Human Rights, “High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo” (4 July 2007).

222 *ACCI c Anvil Mining*, *supra* note 219, at para 38-39.

223 Art 3148(2) *CCQ*.

224 Anvil Mining Ltd c *Association Canadienne contre l’impunité*, 2012 QCCA 117 at para 93-94.
dealing with investors and stockholders, the Court found that Anvil’s activities in the province were not related to the dispute.225

139. The Quebec Court of Appeal did not discuss the forum non conveniens argument since it was held that the Quebec authorities were not competent.226 In addition, the Court of Appeal analysed the forum of necessity argument. It however concluded that the CAAI had not demonstrated that it was impossible to bring the case before Australian courts since the CAAI failed to explain the procedures it undertook before it declared itself unable to find an Australian lawyer.227 Therefore, the Quebec Court of Appeal reversed the Superior Court’s decision. On 26 March 2012, the CAAI filed an application to bring the case before the Supreme Court of Canada.228

3.1.4 Green Park Case: war crimes and crimes against humanity
140. Unlike the Anvil Case, the Green Park Case does not concern mining activities, but rather Canadian construction companies (Green Park and Green Mount) that erected residential buildings in the West Bank. The plaintiffs, Bil’in village's Council, filed a lawsuit at the Superior Court of Quebec alleging that residential buildings for Israeli settlement were in violation of the 4th Geneva Convention which proscribes an occupying power from “transfer[ing] parts of its own civilian population into the territory it occupies.”229 The Israeli justice system, according to Bil’in, has forced the plaintiffs to file a lawsuit in Canada because Israeli courts would rule the case non-justiciable since it would question the legality of the settlements in the West Bank.230

141. The Superior Court did not take into account the legality of Israeli settlements but determined the adequate authority for the Green Park Case. Justice Louis-Paul Cullen judged that Bil'in would find proper procedures with Israeli courts since their “judgments did not completely close the Israeli courts to Bil'in […] and because the case has a much closer connection to Israel than Canada.” 231 Consequently, the Court ruled that forum non conveniens applied and dismissed the plaintiffs’ lawsuit. Thereafter, Bil'in’s appeal action was dismissed on the same forum non conveniens ground.232 Since the Supreme

225 Ibid at para 83-85.
226 Ibid at para 95.
227 Ibid at para 102-103.
229 Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949. 75 U.N.T.S. 289, s 49.
230 Canadian Center for International Justice, Cases the CCIJ is monitoring: Bi'l'in, online: CCIJ <http://www.ccij.ca/programs/cases/index.php?WEBYEP_DI=11#Bi%27in>.
231 Ibid.
232 For the Court, “A more appropriate forum for this litigation is a Court in the State of Israel” Bil’in (Village Council) v Green Park International Ltd, 2009 QCCS 4151, at para 97.
Court of Canada did not accept the appeal.\textsuperscript{233} the \textit{Green Park case} in Canada is now closed. However, the Superior Court’s decision, which was upheld by the Appeal Court, notes that “a defendant's participation in war crimes could potentially lead to civil liability in a Quebec court.”\textsuperscript{234}

3.2 Barrick Gold Extra-Judicial Settlement with Ecosociété

142. While the present case might appear peripheral to the argument presented in this memorandum, the Barrick Gold extra-judicial settlement with Ecosociété demonstrates the capacity of the mining industry in Canada to prevent human rights misconduct from being publically exposed. Indeed, the book \textit{Noir Canada} (Editions Ecosociété) gives an account of the controversial role of Canadian mining corporations in Africa, based exclusively on previously-known international documentation, such as United Nations reports\textsuperscript{235} or the research of non-governmental organizations such as Human Rights Watch.

143. Éditions Ecosociété and the authors of \textit{Noir Canada} were first sued in Quebec for libel by Barrick Gold, on 29 April 2008 for $6 million. Banro entered the fray on 11 June 2008 by reproducing essentially the same allegations as Barrick, in a suit for $5 million, this time in Ontario, under another law. Éditions Ecosociété and the authors of \textit{Noir Canada} saw in the Banro suit a strategy to exhaust them with duplications of judicial procedures and costs, as well as numerous trips to Toronto.

144. These law suits against Ecosociété correspond to what is called “Strategic lawsuits against public participation” (SLAPP). This instrumentalization of law perils liberty of expression and the right of the public to information. The province of Ontario, contrary to Quebec, has no anti-SLAPP legislation currently in force.

\textsuperscript{233} \textit{Ibid} at para 98-99.
\textsuperscript{234} Canadian Center for International Justic, \textit{Cases the CCIJ is monitoring: Bi'l'in}, online: CCIJ <http://www.ccij.ca/programs/cases/index.php?WEBYEP_DI=11#Bi'l%27in>.
\textsuperscript{235} For instance, the United Nations Security Council in 2000 requested the Secretary General to establish “an expert panel on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo,” which was authorized to investigate the situation and issue a report. The panel issued its final report in 2002 and declared some 85 mining companies operating in the DRC contrary to the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises. The report also called on the Canadian government to investigate the actions of eight Canadian companies operating in the country.
145. In fact, in Quebec, before June 2009, companies were able to sue individuals or public groups for defamation (libel).\footnote{The code of civil procedure reform came after a civil society pressure campaign to denounce the abusive procedure intended by Barrick Gold against Écosociété. Barrick Gold and Banro, sued the authors and publishers of Noir Canada for $11 million claiming defamation for the book’s description of Canadian mining practices in Africa.” “Barrick Gold moves to block mining book”, CBC News (12 May 2010), online: CBC <http://www.cbc.ca/news/canada/british-columbia/story/2010/05/12/barrick-gold-mining-book.html>.} Companies’ actions produced a chilling effect on citizen participation in public debate and consequently Quebec reformed its law.\footnote{For example, Ugo Lapointe, a Quebec journalist has been subject to a legal proceeding by Petrolia because he denounced the fact that it is permissible to extract and sell oil and gas in the exploration stage, without paying royalties, using a robbery metaphor. In July 2011, the honorable Judge Tessier Couture dismissed the legal process intended by Petrolia, and declared it abusive. See Ugo Lapointe v Petrolia, 2011 QCCS 4014.}

146. In March 2011, the Supreme Court of Canada rejected Banro’s action in Ontario and returned the case to Quebec’s jurisdiction. In October 2011, Barrick Gold Corporation, the authors of Noir Canada and Écosociété settled out of court as regards the action in defamation instituted by Barrick in April 2008 before the Superior Court of Québec. In order to settle the litigation with Barrick, Écosociété put an end to the publishing and reprinting of Noir Canada and made a significant payment to Barrick.

3.3 Civil Law Suits in Ontario

147. Ontarian courts have also been asked to rule on alleged cases of human rights violations committed by mining corporations in other counties. The Piedra and the Choc, Caal & Chub cases were recently brought before the Ontario Superior Court of Justice.

3.3.1 Piedra v Copper Mesa Mining

148. In 2009, the plaintiffs filed their petition in Ontario. The Ontario Superior Court of Justice dismissed the petition in May 2010. Ontario’s Court of Appeal upheld the decision in March 2011.

149. In May 2004, Ascendant Copper\footnote{Ascendant Copper changed its name to Copper Mesa Mining in 2008.} was incorporated under the laws of British Colombia.\footnote{Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero, and Israel Pérez Lucero v Copper Mesa Mining Corporation, TSX Inc, TSX Group Inc, William Stearns Vaughan, and John Gammon [Piedra c Copper Mesa Mining]. Statement of claim W09-37354, 3 March 2009 at 9.} In June of the same year, Ascendants Holdings Ltd. (incorporated in Bermuda) purchased the mining concessions near Junín in Ecuador.\footnote{Piedra v Copper Mesa Mining. Statement of claim, W09-37354, 3 March 2009 at 10.} In November, Ascendants Holdings Ltd. transferred all of its shares in the copper projects to its Canadian subsidiary.\footnote{Ibid.} Ascendant Copper was supposed to pursue the “Junín Project”,

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which consisted in an open-pit copper mine. In their petition of 2009, the plaintiffs mentioned “Ascendants had total control over all nine subsidiaries in law and in fact.”

150. By the end of 2005, when Ascendants was listed on the TSX stock market, the opposition of the local community to the Junín mine project was a known fact.

151. The three plaintiffs, Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero based their claim on the clash that occurred on 2 December 2006 between the Security Forces and the local community on the railroad which leads into Junín. The Security Forces members allegedly assaulted the unarmed villagers with pepper-spray and gunshots. No one was killed but some were seriously injured. Polivio Pérez stated twice in June and July 2007 that his life was threatened by employees, agents or affiliates of the Ascendants/Cooper Mesa Group. He said he was strongly advised to abandon his opposition to the Junín mine project.

152. In their claim, the plaintiffs argued that TSX should be held liable for what happened because it accepted to list Ascendant despite being aware that harm could occur in the context of long opposition to mining projects in Junín and as a result of having received prior communication to this effect. Furthermore they argued that TSX Inc. is under a legal duty of care. “In particular, TSX Inc. is under a legal duty not to list a corporation when there is a reasonably foreseeable and serious risk that funds raised on the Exchange will be used in such a way as to harm individuals” and to take precautionary measures to prevent any form of harm.

153. Moreover, William Stearns Vaughan and John Gammon, both Ontario residents and members of the board of directors of Copper Mesa, were alleged to be personally liable for what happened to the plaintiffs. The plaintiffs argued “that Vaughan and Gammon intentionally and consciously engaged in tortious actions and omissions which caused harm to the Plaintiffs, and further that Vaughan and Gammon permitted and condoned the threats of violence and acts of violence that are at the heart of these actions.”

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242 Ibid.
243 Piedra v Copper Mesa Mining, Statement of claim W09-37354, 3 March 2009 at 12-16.
244 Ibid.
245 Ibid at 19.
246 Piedra v Copper Mesa Mining, Statement of claim W09-37354, 3 March 2009 at 23
247 Board member since June 2006.
248 Board member since February 2007.
249 Piedra v Copper Mesa Mining Corporation, 2010 ONSC 2421, at para 9.
154. To determine TSX’s liability under the duty of care standard, the Court applied the *Cooper-Anns* test.\(^{250}\) First, the Court had to determine whether other courts had concluded to a duty of care in a similar case.\(^{251}\) Second, in its first stage, the test attempts to establish a *prima facie* duty of care by considerations of foreseeability,\(^{252}\) proximity and policy.\(^{253}\) Furthermore “[t]he evaluation of whether a relationship (between the parties) is sufficiently proximate to ground a duty of care entails a consideration of the ‘expectations, representations, reliance, and the property or other interests involved’.”\(^{254}\) At the second stage of the test, the Court has to ask itself the following question: “are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?”\(^{255}\) The difference between a law and its execution and broad and residual policy considerations are taken into account at this stage.

155. In *Piedra v. Copper Mesa Mining*, the motion judge applied the *Cooper-Anns* test in order to determine whether a duty of care existed in that particular situation.\(^{256}\) Indeed, both the Superior and the Appeal courts asserted that the plaintiffs’ claims failed to meet the first stage of the *Cooper-Anns* test through the requirements of foreseeability, proximity and policy and therefore the second stage was not applied.\(^{257}\) Moreover, policy reasons, precisely at the first stage of the test, “must arise from the nature of the relationship between the parties”\(^{258}\) and there was not a sufficient nexus in this case to convince the judges of the imposition of a duty of care. The plaintiffs’ arguments were based on external concerns, which would only have been considered at the second stage of the test.

156. The TSX and the directors of the companies were found not liable under the duty of care because there was no cause of action. The nexus between what happened to the plaintiffs on 2 December 2006 and during the summer of 2007, and the TSX and Copper


\(^{252}\) The foreseeability standard is understood by the Court as “whether a person harmed was so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected.” *Piedra v Copper Mesa Mining Corporation*, [2011] ONCA 191 at para 54.

\(^{253}\) “(1) was the harm that occurred reasonably foreseeable consequence of the defendant’s act and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?” *Cooper v Hobart*, [2001] 3 SCR 537, at para 30.

\(^{254}\) *Ibid* at para 30.

\(^{255}\) “Efforts to provide economically and administratively sustainable criteria for establishing the existence of duty of care which are also just and humane has bedeviled the law of torts for the last 150 years or so.” Danuta Mendelson, “The Law of Tort: John C. Flemming” (1995), 1 Deakin L Rev 255, 258 (book review).

\(^{256}\) *Piedra v Copper Mesa Mining Corporation*, [2011], ONCA 191 at para 31 (Can.).

Mesa Mining defendants were found to be too weak to assert a case of negligence of the duty of care.

157. Rather than the *forum non conveniens* which has been applied in Quebec jurisdictions, this dismissal was based on the lack of evident nexus between the plaintiffs’ claim and the TSX and the directors of Copper Mesa. Even though the claim was dismissed, it illustrates that victims can be heard for violations of human rights even if they occurred abroad. The judges of the Court of Appeal of Ontario recognized that

> [t]he threats and assaults alleged by the plaintiffs are serious wrongs. Nothing in these reasons should be taken as undermining the plaintiffs’ rights to seek appropriate redress for those wrongs, assuming that they are proven. But that redress must be sought against proper parties, based on properly pleaded and sustainable causes of action.\(^{259}\)

If the Court appears to be opening a door to similar cases in the future, it is silent on indicating what is a sustainable cause of action or who the proper parties to seek redress against should be. Therefore, victims in similar cases still face uncertainty as to whether or not Canadian courts can offer an effective remedy.

3.3.2 Choc, Caal & Chub v Hudbay Minerals Inc

158. Recently, three claims concerning the activities of Hudbay Minerals Inc. in Guatemala were filed before Ontarian courts. Angelina Choc, representing Adolfo Ich Chaman, who is deceased, made the first claim against Hudbay Mineral Inc., HMI Nickel Inc.\(^{260}\) and their Guatemalan subsidiary.\(^{261}\)

159. Adolfo Ich Chaman was the President of the community of La Unión, a Mayan Q’eqchi’ leader and a school teacher. He was known for his work for protecting human rights against mining companies and he was opposed to the Fenix mining project developed by Hudbay near El Estor. On 27 September 2009, there were several protestations throughout the day because of an unannounced visit of the Governor of the Department of Izabal, accompanied by the police and Fenix Security Forces.\(^{262}\) The community feared this visit was the start of new forced evictions.\(^{263}\) The plaintiff argues that on his way home, Adolfo Ich Chaman heard gunshots from the Fenix Compound. On his way he encountered the Head of the Security forces, M. Mynor Padilla, who appeared to invite him to speak with the forces about the community protests.\(^{264}\) As Adolfo

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\(^{259}\) Piedra v Copper Mesa Mining Corporation, [2011] ONCA 191 at 99.

\(^{260}\) Incorporated under the law of British Columbia and headquarters are based in Toronto.


\(^{264}\) *Ibid* at para 40.
approached the fences, he was captured by the Security forces and beaten. Once inside the Fenix’s fences, Padilla allegedly shot him in the head at close hand with a handgun.\textsuperscript{265} Adolfo Ich Chaman died shortly after.

160. In her claim, Angelina Choc argues that “the defendant knew, or should have known, that in Guatemala, targeted violence is often directed against human rights defenders such as Adolfo Ich.”\textsuperscript{266} Hudbay Minerals Inc. should have considered that Guatemala’s judicial and political systems are dysfunctional and that private security forces often perpetrate such violence.\textsuperscript{267} Furthermore, the plaintiff mentioned that the actions of Hudbay in the Fenix project were contrary to their own CSR program and to their commitment to the international Voluntary Principles on Security and Human Rights.\textsuperscript{268} “In particular, Ms. Choc claims for the loss of guidance, care and companionship, loss of financial support and loss of services caused by the death of her husband, Aldolfo Ich.”\textsuperscript{269} She claims compensation on behalf of her husband “against Hudbay for negligence causing physical harm, in particular for Adolfo Ich’s tremendous pain and suffering between the time he was first attacked and the time he died.”\textsuperscript{270}

161. The statement of claim was filed in September 2010 and was amended three times, in November of the same year, on 31 March 2011 and on 6 February 2012.\textsuperscript{271}

162. In the second claim, solely filed against Hudbay Mineral Inc. and HMI Nickel Inc., 11 Mayan Q’eqchi’ women\textsuperscript{272} argue that they were gang-raped by “uniformed mining company security personnel, police and military during the forceful expulsion of Mayan Q’eqchi’ families from their farms and homes in the remote community of Lote Ocho.”\textsuperscript{273} Some of the territories claimed by HMI Nickel, in particular the land around the Fenix project, were occupied by Mayan Q’eqchi’. As allegedly ordered by the company, the police, Security Forces and the military conducted forced evictions on 8 and 9 January 2007.\textsuperscript{274} Houses were burned down and goods were stolen. The violence perpetrated by the police, the Security forces and the military was a known fact to the

\begin{footnotes}
\item\textsuperscript{265} Ibid at para 42.
\item\textsuperscript{266} Ibid at para 51.
\item\textsuperscript{267} Ibid at para 54.
\item\textsuperscript{268} Ibid at para 62, 65-66.
\item\textsuperscript{269} Ibid at para 79.
\item\textsuperscript{270} Ibid at para 80.
\item\textsuperscript{271} Ibid.
\item\textsuperscript{272} Margarita Caal Caal and al v Hudbay Minerals Inc. and HMI Nickel Inc [Caal v Hudbay Minerals Inc] Statement of claim, W-11-423077, 28 March 2011.
\item\textsuperscript{273} The Lawsuits: Summary of Caal v HudBay (Lawsuit regarding the rapes at the community of Lote Ocho), online: Choc v HudBay Minerals Inc, <http://www.chocversushudbay.com/about#Summary%20of%20Caal>.
\item\textsuperscript{274} Caal v Hudbay Minerals Inc., Statement of claim, W-11-423077, 28 March 2011 at para 50.
\end{footnotes}
HMI Nickel’s President, Mr. Austin. During the following week, the families returned to their village to rebuild their houses. On 17 January 2007, HMI Nickel allegedly ordered a second eviction of the villagers.

163. The plaintiffs argue that when the police, the Security forces and the military arrived to Lote Ocho, women were alone with some of the children. All of the plaintiffs say they were gang-raped by the Police, military and uniformed security members. Two of the eleven women were then pregnant and the physical assault they suffered that day resulted in complications of their pregnancy.

164. The plaintiffs’ counsel argues that the defendants “knew, or should have known that there was a serious and high risk that more extreme forms of violence would be used during the eviction of remote communities where human rights violations would not be observed or reported to the outside world.” They should have been aware that a number of the members of Fenix’s Security forces had been members of the military or paramilitary during the civil war and that they would likely replicate particular tactics used during that conflict. Even more, they should have recalled that their Guatemalan subsidiary had already been implicated in violence regarding the Fenix project. For the negligence of HMI Nickel Inc., the plaintiffs claim compensation for physical and psychological harm and punitive damages.

165. The third claim was made by German Chub Choc, a 23-year-old single father who was allegedly shot at close range by Mynor Padilla, the Head of Security of Fenix Security forces during an unprovoked attack on 27 September 2009. Mr. Chub says that he was showing no sign of aggressiveness at the time of the shooting. After he was shot, Mr. Chub was left for dead by the security forces. The attack left him paralysed and without the use of his left lung.

166. German Chub Choc argues that through acts and omissions committed in Canada and in Guatemala by the managers, executive and directors of HudBay Minerals, the

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275 “Executives of HMI Nickel, including Mr. Austin, saw photographic and/or video evidence of homes being burned down during some of these evictions, and heard credible allegations of undue force used during the evictions.” Caal v Hudbay Minerals Inc, Statement of claim, W-11-423077, 28 March 2011, at para 51.
276 “During the gang rapes, the members of the Fenix Security Personnel were wearing uniforms bearing the logo and initials of CON.” Caal v Hudbay Minerals Inc, Statement of claim, W-11-423077, 28 March 2011, at para 57.
278 Ibid at para 80.
279 Ibid at para 83-84.
280 Ibid at para 86.
281 Ibid at para 88-92.
282 German Chub Choc v Hudbay Minerals Inc and Compania de Niquel SA [Chub v Hudbay], Amended Statement of Claim, W-11-435841, 26 September 2011 at para 2.
283 Ibid at para 54.
latter is “directly liable in negligence for the injuries suffered by Mr. Chub.”\(^{284}\) The plaintiff argues that HudBay did not comply with its duty to act with reasonable care, while it knew that Mynor Padilla had been accused of criminal acts, among which death threats against community members, prior to the shooting of Chub.\(^{285}\) Furthermore, the counsel states that Hudbay had authorized the deployment of Fenix Security forces personnel, including Mr. Padilla, who were armed with illegal and unlicensed weapons, “despite knowledge that this deployment would likely precipitate violence.”\(^{286}\) The plaintiff claims for general, aggravated and special damages as well as punitive damages.\(^{287}\)

167. At the time of writing, the defendants, Hudbay Minerals Inc. and HMI Nickel Inc. have declared that they will present two motions. They will argue that the cases should be heard in Guatemala rather than in Canada, and that there is no cause of action demonstrated in the Statement of Claim.\(^{288}\)

168. In August 2011, it was announced that the Fenix mining project will be sold to Solway Group, a Russian company incorporated in Cyprus.\(^{289}\) The lawyers representing Angelina Choc and the eleven women of Lote Ocho have stated that the lawsuit will continue against Hudbay Minerals despite the sale of the project.\(^{290}\)

169. The outcome of these three claims should be closely monitored.

3. **Bills – Legislative Proposals**

170. Bill C-300, an *Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*,\(^{291}\) was introduced by Canadian Member of Parliament John McKay, from the Liberal Party,\(^{292}\) on 9 February 2009. It represented the result of several notable years of advocacy, study and dialogue on CSR and the Canadian

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\(^{284}\) *Ibid* at para 84.

\(^{285}\) *Ibid* at para 88.

\(^{286}\) *Ibid* at para 84-84.

\(^{287}\) *Ibid* at para 6.


\(^{291}\) Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 2nd Sess, 40th Parl, 2009.

\(^{292}\) The Canadian federal Parliament is constituted by Members of four main political parties: 1) the Conservative Party (right wing); 2) the Liberal Party (centre); 3) the New Democratic Party (left wing); and 4) the *Bloc Québécois* (separatist party). When Bill C-300 was defeated in Parliament, the Conservatives were in power, though constituting a minority government.
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The extractive sector, and was designed as an explicit response to the negative impacts of nationally domiciled transnational corporations. Introduced as a private Member’s bill, Bill C-300 received an important support, being defeated by only 6 votes at the Report stage\(^\text{293}\) on 27 October 2010.\(^\text{294}\)

171. Contrary to government bills, private Member’s bills are introduced into the House of Commons by a Member of Parliament who is not a cabinet member. A private Member’s bill is typically allotted less time for debate than a government bill, and is therefore unlikely to be sanctioned in Parliament, especially in the context of a majority government.\(^\text{295}\)

172. The purpose of Bill C-300 was to ensure that the activities of corporations of the extractive sector receiving support from the government of Canada behave “in a manner consistent with international environmental best practices and with Canada’s commitments to international human rights standards.”\(^\text{296}\) In sum, Canadian extractive sector corporations operating in developing countries and benefiting from financial support of the Canadian federal government would have been subject to withdrawal of funding if their environmental and human rights performance abroad violate international standards.

173. The Bill required the Canadian Parliament to establish “guidelines that articulate corporate accountability standards for mining, oil or gas activities.”\(^\text{297}\) Canadian extractive companies would then have been forced to comply with these guidelines in order to receive financial or diplomatic support from Export Development Canada (EDC,

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\(^{291}\) In both the House of Commons and the Senate, a bill needs to go through six stages in order to become law. The first stage (First reading) aims at introducing the bill in the House of Commons. At that stage, there is no debate or discussion. The Second reading allows a debate on the principle of the Bill but not on its provisions. At the third stage (Committee stage), which may also precede the Second reading, a committee studies the bill and reports it to the House, “with or without amendment.” Further amendments may then be debated or proposed in the House at the following stage (Report stage). However, the motion for concurrence is voted without debate. At the fifth stage (third reading) a debate on the final form of the bill is held and the bill is voted. If approved, the bill is then sent to the Senate where it goes through similar stages. After the final approval of both Houses, the bill receives Royal assent and becomes law. For further information, see “Stages in Legislative Process” in Audrey O’Brien and Marc Bosc eds, *House of Commons Procedure and Practice*, 2nd ed (2009), online: Parliament of Canada <http://www.parl.gc.ca/procedure-book/livre/document.aspx?language=e&mode=1&sbdid=da2ac62f-bb39-4e5f-9f7d-90ba3496d0a6&sbpid=&sbpidx=6>.

\(^{293}\) *House of Commons Debates*, 40th Parl, 3rd Sess, No 88 (Oct. 27, 2010).


\(^{296}\) Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 2nd Sess, 40th Parl, 2009, cl 3.

\(^{297}\) *Ibid* cl 5.
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Canada’s export credit agency, the Canadian Pension Plan Investment Board (CPPIB) or the Department of Foreign Affairs and International Trade (DFAIT). In addition, Bill C-300’s would have amended the act that regulates the CPP Investment Board. For instance “every investment manager who invests the assets of the Board” would have had to “ensure that the assets are not invested in any corporations whose activities have been found” to be “inconsistent with the guidelines.” It has been argued that these restrictions had the potential to impose real financial costs on Canadian extractive companies.

174. In order to ascertain which activities around the world may violate the guidelines, the Bill would have created a complaints mechanism whereby complaints could have been filed with the Canadian Minister of Foreign Affairs and International Trade by “any Canadian citizen or permanent resident or any resident or citizen of a developing country in which such activities have occurred or are occurring.” If accepted, the complaint would have led to an investigation of a company’s compliance with the guidelines and a public report on findings published in the Canada Gazette within eight months of receipt of the complaint.

175. Nevertheless, Bill C-300 would have neither created a statutory obligation for Canada to investigate corporate abuse nor permitted victims of human rights to obtain reparations before a court of law or any other forum. Indeed, the Minister of Foreign Affairs and the Minister of International Trade would have investigated the corporations who have allegedly infringed the guidelines but nothing indicates that these inquiries

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298 EDC provides Canadian investors with credit and debt financing and insurance to support foreign direct investment. In 2008, EDC provided over 8,300 Canadian companies with over CAN$85 billion in financing and insurance. See EDC, Press Release, “EDC Customers and Business Volume at Record Levels in 2008” (5 March 2009). Over 25 per cent of this figure was spent to support Canadian firms’ investments in emerging markets. On 10 September 2009, it announced that its business volume in the first half of 2009 reached CAN$38.2 billion, an increase of CAN$2.5 billion over the same period in 2008. See EDC, Press Release, “EDC reports business volumes of $38.2 billion for first half of 2009” (10 September 2009).

299 As a large institutional investor, the CPPIB’s investment decisions are often closely scrutinized by other investors—a decision to disinvest may carry with it the scent of reputational risk for the “outsider” stock as other socially responsible shareholders follow the Board’s lead. See Daniel M Firger, “Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010” (2010), 41 Geo J Int’l L 1043, 1091 [Firger].

300 Concerning DFAIT support to mining companies, see section Host Country Capacity-Building: The Role of DFAIT and CIDA, below at 110.

301 Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 2nd Sess, 40th Parl, 2009, cl 10(3).

302 See Firger, supra note 299 at 1091. These governmental agencies and their involvement in the extractive sector are documented in more details at section 6.4 (CPPIB), section 6.3 (EDC) and at section 2.2 (DFAIT) of this memorandum.

303 Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 2nd Sess, 40th Parl, 2009, cl 4(1) and 2(2).

304 Ibid, cl 4(4)-(6).

305 Ibid, cl 4(3)-(9).
would have resulted in an investigation leading to prosecution or other types of reprimand.

176. Other bills addressing the accountability loophole for corporate human rights misconduct abroad have been presented in the past.

177. Bill C-354, an Act to amend the Federal Courts Act (international promotion and protection of human rights), inspired by the US Alien Tort Claims Act, was introduced in February 2009 by NPD MP Peter Julian. As of June 2012, it was retabled as Bill C-323, which has gone through its first reading in October 2011 and has been reinstated in the 2nd Session of the 41st Parliament. Its enactment would create cause for civil action at the federal level and allow for an appropriate remedy for victims of human rights violations committed abroad by non-state actors such as corporations. According to Peter Julian, “the bill calls for extending the authority of the Federal Court system to protect foreign citizens against a broad range of human rights violations committed by Canadian and non-Canadian corporations and persons operating outside Canada.”

178. On 30 September 2010, NPD MP Paul Dewar initiated Bill C-571, the Trade in Conflict Minerals Act, inspired by section 1502 (Conflict minerals) of the U.S Dodd-Frank Wall Street Reform and Consumer Protection Act. Bill C-571 would have required Canadian companies purchasing minerals from the Great Lakes Region of Africa to practice due diligence on the chain of custody of the minerals “from extraction to final utilization.” In addition, the Canadian CSR Counsellor would have had the mandate to identify in its annual report the companies that do not respect CSR standards in the aforementioned African region. Bill C-571 passed the first reading but did not become law.

179. Other bills similar in nature have also been introduced, such as Bill C-298 and Bill-438. However, although both bills passed the first reading, neither became law.

180. The purpose of Bill C-298, an Act respecting Corporate Social Responsibility for the Activities of Canadian Mining Corporations in Developing Countries, introduced by

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308 House of Commons Debates, 41st Parl, 1st Sess, No 27 (Oct. 5, 2011) at 1510 (Peter Julian).
312 Ibid.
NPD MP Paul Dewar, was to ensure that mining activities of Canadian corporations in developing countries comply with international standards regarding human rights.313

181. Bill C-438 was introduced by the Bloc Québecois.314 Unlike Bill C-298, the Extraterritorial Activities of Canadian Businesses and Entities Act would have required all “Canadian business[es] or entit[ies] operating abroad” to comply with Canada’s obligations under international standards.315

4. Free Trade Agreements

4.1 Human Rights Obligations under FTAs and FIPAs

182. Canada has mainly concluded two types of international trade agreements; Free Trade Agreements (FTAs) and Foreign Investment Promotion and Protection Agreements (FIPAs). The North American Free Trade Agreement (NAFTA), between Canada, the United States and Mexico, is the oldest FTA concluded by Canada.

183. FTAs concern services, goods, foreign direct investments and migration of the workmanship, while FIPAs relate only to foreign investments. Through those agreements, states give equal access to their national market to another party. They provide the possibility of international arbitration in cases of dispute between states and between the investor and the host state.

4.1.1 Bilateral FTAs

184. At the time of writing, Canada has concluded five bilateral FTAs with Latin American countries, four of which316 have come into force with Chile,317 Costa-Rica,318

313 Bill C-298, An Act respecting Corporate Social Responsibility for the Activities of Canadian Mining Corporations in Developing Countries, 2nd Sess, 40th Parl, 2009.
315 Ibid.
316 FTAs with Panama and Honduras will be brought into force after completion of the domestic approval processes. The final text of the Canada-Honduras Free Trade Agreement has not yet been released. For the Canada-Panama Free Trade Agreement, see Free Trade Agreement between Canada and the Republic of Panama, 14 May 2010, Canada TS 2013/9 (entered into force on Apr. 1 2013) [Canada-Panama FTA].
317 Canada-Chile Free Trade Agreement, 5 December 1996, Canada TS 1997/50 [CCFTA].
Peru\superscript{319} and Colombia.\superscript{320} They all include side agreements on environmental and labor cooperation.\superscript{321}

185. The preambles of the five agreements underline that States Parties to these FTAs are resolved to “preserve their flexibility to safeguard public welfare”, as well as to enforce environmental laws and workers’ rights.\superscript{322} In addition, with the exception of the Canada – Costa-Rica FTA,\superscript{323} it is specified that such investment which weakens “domestic health, safety or environmental measures” should not be encouraged.\superscript{324} However, no human rights monitoring mechanism is provided for in the FTAs.

186. Furthermore, under bilateral FTAs with Peru, Colombia and Panama, Canada affirms its “commitment to respect the […] promotion and protection of human rights and fundamental freedoms as proclaimed in the Universal Declaration of Human Rights.”\superscript{325} To that end, FTAs contain neither binding clauses, nor mechanisms providing effective remedy for individuals.

187. In order to fulfill their commitments, States Parties encourage enterprises to adopt standards of corporate social responsibility,\superscript{326} without taking further measures - with the exception of the FTA with Colombia. Indeed, pursuant to the Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia, each Party shall produce a report regarding the actions undertaken under the agreement and their impact on human rights in both countries.\superscript{327} Consequently, on 15 May 2012, the Government was expected to present a human rights report to Parliament. However, the report regarding the aforementioned act did not include an analysis on

\footnotesize{\superscript{319} Free Trade Agreement between Canada and the Republic of Peru, 29 May 2008, Canada TS 2009/15\[CPFTA].
\superscript{320} Free Trade Agreement between Canada and the Republic of Colombia, 21 November 2008, Canada TS 2011/11 \[CCOFTA].
\superscript{321} Canada-Panama FTA, supra note 316; CCFTA supra note 317; CCRFTA, supra note 318; CPFTA, supra note 319; CCOFTA, supra note 320.
\superscript{322} See the Preambles of the CCRFTA, supra note 318, CCFTA, supra note 317, CPFTA, supra note 319, CCOFTA, supra note 320 and Canada-Panama FTA, supra note 316.
\superscript{323} Although some provisions are similar to other bilateral FTAs, the necessity to protect human life, environment and health is less raised in the CCRFTA supra note 318.
\superscript{324} CCFTA, supra note 317, art G-14(2); CPFTA, supra note 319, art 809; CCOFTA, supra note 320, art 815; Canada-Panama FTA, supra note 316, art 9.16. Necessity to protect human life, environment and/or health overrides some provisions of the agreement: see e.g. CCFTA, supra note 317, art G-06(6); CCOFTA supra note 320 and CPFTA, supra note 319, art 14.02; Canada-Panama FTA, supra note 316 art 16.03, 23.02.
\superscript{325} See the Preambles of the CPFTA, supra note 319, CCOFTA supra note 320 and the Canada-Panama FTA, supra note 316.
\superscript{326} CPFTA, supra note 319, art 810; COFTA, supra note 320, art 816; Canada-Panama FTA, supra note 316, art 9.17.
human rights because, as justified by the Government, “there was not enough available data to do a comprehensive analysis” because “the agreement had only been in force for the last four and a half months of 2011.” It rather promised that the Government would table a report in 2013.

188. Provisions regarding the necessity to protect human, animal and plant life, as well as health, are incorporated in FTAs with Colombia and Peru, as long as “sanitary and phytosanitary measures do not create unjustified barriers to trade.” A committee on sanitary and phytosanitary measures has been established in order to identify related problems and develop guidelines for risk assessment procedures. A similar committee was established by the FTA with Costa Rica, however, the agreement does not explicitly encompass sanitary and phytosanitary measures, but directly refers to the WTO Agreement on the application of Sanitary and Phytosanitary Measures (SPS Agreement), to which both States are Parties. As for the agreement with Panama, both Parties have agreed to implement the SPS Agreement by designating SPS coordinators responsible for promotion, communications and consultation on sanitary and phytosanitary trade-related matters. However, individual complaints cannot be filed under these FTAs.

189. A State Party may initiate dispute settlement procedures if the other State acts inconsistently with its obligations under all of the aforementioned FTAs.

190. Pertaining to labor cooperation, all agreements with Latin America include that

[e]ach Party shall ensure that a person with a recognized interest under its labour law in a particular matter has appropriate access to administrative or tribunal


329 House of Commons Debates, 41st Parl, 1st Sess, No 125 (May 16, 2012) at 1500 (Hon Ed Fast).


331 CPFTA, supra note 319 and COCFTA, supra note 320, art 501.

332 CPFTA, supra note 319, ch 5.


334 CCRFTA, supra note 318, art 9.5.

335 Canada-Panama FTA, supra note 316, ch 6.
proceedings which can give effect to the rights protected by such law, including by granting effective remedies for any breaches of such law. 336

State Parties to these agreements may undertake actions, such as ministerial consultation or arbitration. However, individual complaints are excluded from the agreement. On the other hand, certain authors contend that provisions which encourage market liberalization 337 may in some instances “exacerbate conflict and violations of worker rights” in countries such as Colombia, where violence against trade unionists is widespread, 338 and is also associated “with political and economic interests.” 339

191. Agreements on environmental cooperation encompass provisions for State Parties to provide access to remedies for violations of its national laws. For instance “persons with a legally recognized interest under [national] law in a particular matter covered by this agreement” may request the state’s “competent authorities to investigate alleged violations of its environmental law.” 340

192. In a nutshell, States may request consultations to ensure compliance with the agreement by the other State, but these agreements do not provide individual remedies to victims of human rights violations.

4.1.2 North American Free Trade Agreement (NAFTA)

193. Bilateral FTAs follow the framework set by NAFTA, which came into force in 1994 between Canada, the United States and Mexico. 341 NAFTA does not contain human


337 “The investment chapter restricts the ability of governments to put in place public policies and regulations needed to ensure that foreign investment contributes to development and that development benefits are shared equitably.” Canadian Council for International Co-operation, Making a Bad Situation Worse: An Analysis of the Text of the Canada-Colombia Free Trade Agreement (Ottawa: CCIC, 2009) at 4, online: CCIC <http://www.ccic.ca/_files/en/making_a_bad_situation_worse.pdf>.


339 Ibid.

340 See similar provisions in the Agreement on Environmental Cooperation between Canada and Chile, 5 December 1996, Canada TS 1997/51, art 3; Agreement on Environmental Cooperation between Canada and Peru, 29 May 2008, Canada TS 2009/16, art 3; Agreement on Environmental Cooperation between Canada and Costa-Rica, 23 April 2001, art 5; Agreement on Environmental Cooperation between Canada and Panama, 14 May 2010, Canada TS 2002/18, art 8; Agreement on the Environment between Canada and Colombia, 21 November 2008, Canada TS 2011/12.

rights obligations. However, provisions on basic labor rights, environmental rights and the improvement of living conditions are mentioned in the Preamble as principles the Parties are resolved to respect. Two cooperation agreements supplement the Agreement: the *North American Agreement on Environmental Cooperation* (NAAEC) and the *North American Agreement on Labor Cooperation* (NAALC).

194. Neither NAAEC nor NAALC set standards for the protection of labor and environmental rights. They recognize the right of each Party to establish its own domestic standards for labor and environmental protection and development to “provide for high levels of environmental protection” while being “consistent with high quality and productivity workplaces.” In fact, States Parties have the obligation to enforce their own labor and environmental laws, and to provide effective remedies for a violation of such law.

195. Both agreements include a dispute resolution mechanism that delivers binding decisions, but can only be triggered by State parties. Furthermore, the NAALC mechanism can address an “alleged persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards,” leaving other labor rights issues, such as unions, unconsidered.

196. While NAALC and NAAEC create independent bodies that can receive communications from the public, they do not offer effective remedies for victims of labor or environmental rights violations. The Commission for Environmental Cooperation (CEC) and the Commission for Labor Cooperation (CLC), created respectively by the NAAEC and the NAACL, can receive citizens’ complaints and have the power to investigate, demand ministerial consultations and deliver recommendations to the States. However, neither the CEC nor the CLC can bring issues before the binding dispute resolution mechanism, which can only be triggered by the State Parties’

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343 *North American Agreement on Environmental Cooperation*, US, Canada and Mexico, 14 September 1993, 32 ILM 1480 [NAAEC].
345 NAAEC, supra note 343, art 3.
346 NAALC, supra note 344, art 2.
347 *Ibid*, art 3; NAAEC, supra note 343, art 5.
348 NAALC, supra note 344, art 4; NAAEC, supra note 343, art 6.
349 NAALC, supra note 344, art 29; NAAEC, supra note 343, art 23.
350 NAALC, supra note 344, art 29.
351 The National Administrative Office for the NAALC and the Secretariat of the Commission for Environmental Cooperation for the NAAEC, see NAALC, supra note 344, art 16 and NAAEC, supra note 343, art 14.
352 NAALC, supra note 344, art 9 and NAAEC, supra note 343, art 9.
governments. As of today, the public communications received by the CLC have mostly been followed by public seminars, the creation of working groups and government-to-government meetings. Likewise, none of the public communications received by the CEC have been brought before the dispute resolution mechanism. As such, a scholar notes that the processes through which citizens’ complaints are filed “are reasonably considered inadequate and largely ineffective,” their impact resulting mostly from the negative exposure for the government failure to enforce its laws. To this date, none of the public communications received in regards to either NAALC or NAAEC have been brought before to the dispute resolution mechanism by State Parties.

4.1.3 Foreign Investment Promotion and Protection Agreements FIPAs

Canada is also Party to FIPAs with Argentina, Barbados, Costa Rica, Ecuador, Panama, Peru, Trinidad and Tobago, Uruguay, and Venezuela. None of them contain any mechanism monitoring the protection of human rights.

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354 Ibid at 312 and 320.


362 Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments, 17 November 2007, Canada TS 2007/10 [FIPA with Peru].


However, all FIPAs, with the exception of the FIPA with Argentina, contain similar provisions to FTAs recalling that Parties are not prevented from adopting measures to protect human, animal or plant life or health and that investment should not be encouraged by relaxing domestic environmental, safety or health measures.\textsuperscript{368} In addition, seven FIPAs exclude enforcement of some articles where Aboriginal peoples are concerned. Agreements with Barbados, Costa Rica, Ecuador, Venezuela Panama, Trinidad and Tobago and Uruguay indeed state that “the provisions of Articles II, III, IV and V” do not apply to “any measure denying investors of the other Contracting Party and their investments any rights or preferences provided to the Aboriginal peoples” of a Contracting Party.\textsuperscript{369} These articles address the promotion, protection and establishment of investments, the treatment of established investment, the appointment of management position individuals and directors as well as the entry of personnel. Article VI on performance standards is also included in the FIPAs with Costa Rica and Uruguay.\textsuperscript{370} Yet in FIPAs with Barbados, Ecuador and Uruguay, only aboriginal peoples of Canada are concerned.\textsuperscript{371} Canada’s new FIPA model and FIPAs with Argentina and Peru do not contain such provisions.

4.2 Investor State dispute settlement

198. International arbitration provided by FIPAs is not competent to decide on human rights issues since such clauses are not entrenched in such agreements. The “role of human rights in the context of investment arbitration is peripheral at best.”\textsuperscript{372} Indeed, human rights and investment rights have been seen as antagonistic, but recent approaches consider them to be complementary. While human rights law focuses on giving proper access to justice to individuals and communities, investment law gives priority to the investor.\textsuperscript{373}

199. FTAs and FIPAs contain provisions that allow for direct use of international arbitration to investors against States parties,\textsuperscript{374} removing the traditional intermediary of

\textsuperscript{368} See art XVII-3 in \textit{FIPAs} with Trinidad and Tobago, Barbados, Ecuador and Panama; annex I III(1) in \textit{FIPAs} with Costa Rica and Uruguay; annex II.10 in the \textit{FIPA} with Venezuela; art 10 and 11 in the \textit{FIPA} with Peru and in Canada’s \textit{FIPA} model.

\textsuperscript{369} See \textit{FIPAs} with Barbados, art VI (2); with Panama, art VI (2); with Costa Rica, -III(5)c; Ecuador, art VI(2)c; with Trinidad and Tobago, art VI(2)c; with Uruguay, art III(5)c and with Venezuela, annex II (8)c. \textit{FIPAs} with Costa Rica, art III(5)c; and with Uruguay, art III(5)c.

\textsuperscript{370} See \textit{FIPAs} with Barbados and Ecuador, art VI(2); and with Uruguay, annex I-III(5).


\textsuperscript{373} See e.g. \textit{NAFTA, supra} note 341 ch 9.
the investor’s home state, and the legal obligation to exhaust national remedies.375 Recently, this has allowed a Canadian mining company to bring El Salvador through a process of Investor-State dispute settlement and compromise the effectiveness of the country’s environmental policies.376

200. In 2002, Pacific Rim (PacRim), a Canadian company, started mining exploration activities in El Salvador, with governmental approval.377 In 2008, after spending considerable resources on these activities, PacRim was not able to obtain the operating permit necessary for the development of the mining project.378 Meanwhile, the President of El Salvador declared that the government would not be granting further mining permits.379 According to PacRim, this decision was made in a “highly-charged political situation”380 and the government “did not act reasonably, rationally or fairly.”381 Since Canada and El Salvador have not concluded any FTA, PacRim used its wholly-owned American subsidiary – which has been conveniently reincorporated from the Cayman Islands to Nevada in 2007 – to bring El Salvador before an international tribunal through the Central American Free Trade Agreement (CAFTA).382 PacRim considers that the State has breached several CAFTA obligations, among which National Treatment and Expropriation and Compensation, and has “effectively destroyed” the investments made by the company in exploration activities.383 The decision of the Salvadoran government has allegedly incurred US$77 million in losses to PacRim.384

375 Francioni, “Access to Justice”, supra note 373 at 731.
379 Ibid.
382 Alexandre de Gramont, “Mining for facts: PacRim Cayman LLC v El Salvador” (8 September 2010), Vale Colombia Center on Sustainable Development No 29, online: CCSI <http://ccsi.columbia.edu/files/2014/01/FDI_29.pdf>
383 Ibid.
384 Ibid at para 19.
201. Meanwhile, it is argued that the Salvadoran government stopped granting mining permits following a shift towards cautionness in its environmental policy. At the time the President made his announcement, there was an ongoing controversy on the “potential hazardous environmental impact to the freshwater in the area” of the PacRim project. Furthermore, a strong civil coalition was opposed to the project.

202. The arbitration process is taking place at the World Bank’s International Center for Settlement of Investment Disputes and the public hearings are streamed live on the Internet, in English and Spanish. While the case is still pending, two conclusions can be made. First, the Investor-State dispute settlement provisions of FTAs can limit States’ sovereignty over their policies, among which those concerning the environment, to the benefit of foreign investors. Furthermore, the ease of movement of private companies increases their power in the process, because it allows them to shop for the best forum to defend their interests.

203. Although the case of Chevron Texaco in Ecuador is not directly linked to the Canadian FIPAs, it is nevertheless an example of how international arbitration under bilateral agreements may be a remedy for enterprises that seek to overthrow a decision of a domestic court. Indeed, after several injunctions and appeals in both the USA and Ecuador, Chevron filed an international arbitration claim, asserting that Ecuador violated the US – Ecuador Bilateral Investment Treaty (BIT).

204. Chevron was being sued for environmental devastation caused by Texaco’s activities in the Ecuadorian rainforest from 1964 through 1992. In the last ruling against Chevron, the company was ordered to pay over $18 billion for environmental

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388 International Centre for Settlement of Investment Disputes, Cases, online: ICSID (<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>.
390 Ibid.
391 Ibid.
392 Chevron acquired Texaco in October 2001.
393 Aquinda v Texaco, 303 F (3d) 470, at 3.
damages.\textsuperscript{395} However, in September 2009, Chevron has initiated arbitration against Ecuador under the U.S. - Ecuador Bilateral Treaty.\textsuperscript{396} Foreign investors may, in fact, submit a dispute settlement against a State Party to the BIT.\textsuperscript{397} Chevron claimed that the “Ecuadorian government improperly interfered with the Lago Agrio proceedings”\textsuperscript{398} and requested a declaration stating that the company was not responsible for the environmental damage.\textsuperscript{399} On 27 February 2012, the Permanent Court of Arbitration rejected all objections submitted by Ecuador and held that it has jurisdiction to hear the company’s claims.\textsuperscript{400} Thus, the case will proceed to the merits phase.


\textsuperscript{397} Ibid at 12-13.


\textsuperscript{399} This includes “(1) a declaration that they “have no liability or responsibility for environmental impact or for performing further environmental remediation”; (2) a declaration that Ecuador has breached both the BIT and the terms of its release agreement with TexPet; (3) an order requiring Ecuador to inform the Lago Agrio court that Chevron has “been released from all environmental impact and that Ecuador and Petroecuador [Ecuador’s state-owned oil company] are responsible for any remaining and future remediation work”; (4) a “declaration that Ecuador or Petroecuador is exclusively liable for any judgment that may be issued in the Lago Agrio Litigation”; (5) an order “requiring Ecuador to indemnify, protect and defend [Chevron] in connection with the Lago Agrio Litigation, including payment of all damages that may be awarded against Chevron”; and (6) attorneys’ fees, litigation costs, arbitration costs, “moral damages,” and interest.” Ibid at 9.

Part 3:
Accountability Mechanisms in Canada and Abroad
205. In 2011, the United Nations Human Rights Council endorsed the *Guiding Principles on Business and Human Rights* (Guiding Principles) developed by John Ruggie, the Special Representative for Business and Human Rights. In addition to effective judicial mechanisms, the Guiding Principles stress that states provide “effective and appropriate non-judicial grievance mechanisms” \(^{401}\) in order to create a “comprehensive State-based system for the remedy of business-related human rights abuse.”\(^{402}\) These non-judicial mechanisms need to comply with seven criteria in order to be considered effective: they should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning. On the operational level, they should be based on engagement and dialogue.\(^{403}\)

206. In this section, we will review the options offered to victims of business-related human rights abuses. It will be demonstrated that none of them comply with the criteria set out in the Guiding Principles. As such, at the time of writing, the Canadian government does not offer effective and appropriate remedies as defined in the Guiding Principles to victims of human rights violations committed by Canadian mining companies abroad.

1. **OECD National Contact Point**

207. The Organisation for Economic Co-operation and Development (OECD) Guidelines are an intergovernmental initiative of the OECD designed to promote “responsible business conduct.”\(^{404}\) Drafted in 1976 and last revised in 2000 and 2011, they are extensive recommendations by governments addressed to transnational corporations (TNCs) pertaining to employment, industrial relations, human rights, environmental issues, information disclosure and transparency (bribery), competition, taxation, and other aspects of corporate activity.\(^{405}\) At the time of their drafting, the OECD Guidelines were intended to be recommendations to OECD investors on how to conduct their operations in other OEDC countries.\(^{406}\)


\(^{402}\) *Ibid.*

\(^{403}\) *Guiding Principles, supra* note 401, Principle no 31 at 26.


208. The OECD Guidelines specifically focus on minimum standards for TNCs and operate in a non-binding fashion⁴⁰⁷ - a characteristic that has invited much criticism. In fact, commentators observed that the main weakness of the OECD Guidelines is precisely that its observance by transnational corporations “is voluntary and not legally enforceable”⁴⁰⁸ by express stipulation. The Guidelines are portrayed as policy and not law.

209. In order to encourage implementation and observance, the 2000 revision of the Guidelines added a consultation mechanism, known as “specific instances,” that receive complaints and in return “clarify” the said Guidelines for all invested parties – State, victims, trade unions, political parties, NGOs and corporations (the group is commonly known as “stakeholders”).

210. The clarifications (or the so called “decisions”) that result from this consultation mechanism are, again, not legally-enforceable, though State parties signatory to the soft-law document commit to promoting the standards enumerated in the instrument and the State is obligated to set up the prerequisite complaint procedures.⁴⁰⁹ This is perhaps the only obligation contained in the Guidelines. In addition, the OECD Guidelines target both the State and the corporations in its language, although they retain general principles of international law in privileging the prerogative of the national government in setting local standards.⁴¹⁰ Conversely, the complaints target the corporation or its entities and not States.⁴¹¹

211. Concerning the prerogative of national governments, the NCPs are constituted by local government offices in each of the OECD’s thirty-four member states, such as in Canada, as well as in non-member States that nevertheless adhere to the Guidelines by

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⁴¹¹ Ibid.
their own will.\footnote{In practice, the NCPs promote the Guidelines and handle the complaints.\footnote{In practice, the NCPs promote the Guidelines and handle the complaints.}}

212. The revised Guidelines of June 2011 now encompass a specific chapter on human rights.\footnote{In practice, the NCPs promote the Guidelines and handle the complaints.}

213. 49% of all NGO cases allege that a company violated the human rights of those affected by their operations.\footnote{In practice, the NCPs promote the Guidelines and handle the complaints.} In addition, between 2000 and 2010, 54 NGO cases submitted at sNCPs related to human rights, of which 35% were rejected, blocked or closed without resolution and 31% concluded.\footnote{In practice, the NCPs promote the Guidelines and handle the complaints.} Different types of human rights have been addressed in these NGO cases including labour rights, illegal exploitation of natural resources, complicity with human rights violations by host regimes or rebel groups, violation of the rights of indigenous peoples or women’s rights through forced evictions, and violations of the right to health and a healthy environment.\footnote{In practice, the NCPs promote the Guidelines and handle the complaints.}

214. Generally, a complaint should be lodged with the NCP in the State of the violation. However, when violations occur in a non-OECD State - which is highly likely to happen given that most OECD States are rather developed countries - complaints may be instituted in the home State of the TNC.\footnote{In practice, the NCPs promote the Guidelines and handle the complaints.} This flexible component to the procedure allows complaints to be lodged against both the TNCs originating from an OECD country, and its related entities, which may operate in non-OECD territories. Moreover, this flexible component allows for complaints of violations occurring as a result of TNC operations in, for instance, Guatemala (a non-OECD country), to be instituted before the NCP in the TNC’s home State of Canada.

215. The NCP makes “an initial assessment of whether the issues raised merit further examination,”\footnote{In practice, the NCPs promote the Guidelines and handle the complaints.} though there is no guidance about how they decide this. The NCP then

\footnotesize
\begin{itemize}
\item The non-OECD states include Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. OECD, \textit{Guidelines for Multinational Enterprises: About}, online: OECD <http://www.oecd.org/about/membersandpartners/>.
\item \textit{Ibid} at 31.
\item Joris Oldenziel, Joseph Wilde-Ramings and Patricia Feeney, 10 Years On: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct (Amsterdam: OECD Watch, 2010) at 34.
\item \textit{Ibid}.
\item \textit{Ibid} at 86.
\item \textit{OECD Guidelines, supra} note 413 at 72. See for example \textit{FREDEMI coalition v Goldcorp}, filed 9 December 2009 before the Canadian NCP, all materials submitted by the NGO and the TNC are available online: \textit{FREDEMI coalition vs Goldcorp}, online: OECD Watch <http://oecdwatch.org/cases/CASE_172>.
\end{itemize}
offers “good offices” by contributing “informally to the resolution of issues.”\footnote{OECD Guidelines, supra note 413 at 83.} This includes mediation or conciliation.\footnote{Ibid.} If no agreement is reached following these efforts, the NCP issues a final statement and makes recommendations regarding the implementation of the Guidelines.\footnote{Ibid. at 85.}

216. Although there is no “right of appeal” in the strict sense, the OECD’s Investment Committee (IC), formally the Committee on International Investment and Multinational Enterprises (CIME), who has ultimate responsibility for the Guidelines, may review the recommendation or interpretation of an NCP. Government authorities, and the business and trade union groups that have official status before the OECD, may directly ask the IC to interpret the Guidelines. The IC decides by consensus. The NCP may also obtain guidance from the IC if it has doubts about the interpretation of the Guidelines. The decisions of the IC do not contain enforceable orders. They do not judge the behaviour of individual companies but merely clarify the meaning of the OECD Guidelines for the future. NCPs and the IC cannot rely on popular pressure in order to obtain compliance with their decisions since it is not the OECD’s practice to reveal the identity of companies against which complaints have been lodged. In fact, the OECD uses the mechanism to educate business managers and executives about their obligations under the Guidelines, and aims to work gradually towards a voluntary culture of compliance.

217. The “Procedural Guidance” accompanying the establishment of the NCPs provides that “NCPs will operate in accordance with [the] core criteria of visibility, accessibility, transparency and accountability.”\footnote{Directorate for Financial, Fiscal and Enterprise Affairs, OECD Guidelines for Multinational Enterprises: 2003 Annual Meeting of the National Contact Points (Paris: OECD, 2003) at 12.} However, the Guidelines also recognize that claims of alleged violations of OECD Guidelines could potentially damage a company’s reputation. They therefore provide, as briefly mentioned, for the possibility of keeping complaints confidential. According to the International Council on Human Rights Policy, this means that there is no public scrutiny.\footnote{International Council on Human Rights, Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies (ICHRP, 2002) at 101.} It notes that the procedure has little immediate impact on the behaviour of specific companies that operate in violation of the Guidelines.\footnote{Ibid.} However, it stresses that the procedure could become a source of useful precedents on acceptable business behaviour.\footnote{Ibid.}

218. Canada’s NCP is far from being as transparent as other NCPs such as in the United Kingdom or the Netherlands. On the website of \textit{Foreign Affairs and International Trade Canada}, it is indicated that the Canadian NCP is an interdepartmental committee...
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chaired by the Department of Foreign Affairs and International Trade and that “the role of the NCP is to promote awareness of the OECD Guidelines and to ensure their effective implementation.”

Since 2000, the Canadian NCP has received seven submissions from interested stakeholders regarding corporate conduct and the OECD Guidelines. As of December 2008, four of these have been considered by the Canadian NCP as specific instances. As a comparative value, as of 2011, the UK NCP has considered 27 complaints. In addition, stakeholders are not always notified when the Canadian NCP decides to close a case judging it does not merit any further consideration.

The initial assessments or the final statements are not usually published in Canada. The NCP website contains the text of the Guidelines and a very brief description of some of the specific instances it is currently processing without enumerating all the complaints that have been filed.

However, concerning the proceedings lodged on 9 December 2009 by the Front in Defense of San Miguel Ixtahuacán (FREDEMI) against Canadian Gold mine company, Goldcorp Inc., the Final Statement pertaining to the case is published as an appendix to the 2011 annual report.

According to OECD Watch, four of the Canadian NCP cases pertain to human rights violations. Prominent among these human rights cases is the aforementioned FREDEMI coalition v. Goldcorp case.

FREDEMI filed a extensively documented complaint against Canadian mining company Goldcorp Inc., which operates the Marlin gold mine in the western highlands of

427 Ibid.
429 Ibid.
430 Department for Business Innovation & Skills, Annual report to the OECD investment committee for 2010/11, (Department for International Development, 2011), at 26-30 [online at the time of writing, unavailable at publication].
431 Table de Concertation sur Droits Humains v First Quantum: Timeline of Developments, online: OECD Watch <http://oecdwatch.org/cases/Case_51>. In the NCP’s 2004 annual report, the case is noted as “closed.” The complainants state that the NCP never communicated its decision.
432 The document was prepared by the Center for International Environmental Law. The Center for International Environmental Law, Specific Instance Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises concerning The Operations of Goldcorp Inc. at the Marlin Mine in the Indigenous Community of San Miguel Ixtahuacán, Guatemala (FREDEMI, 2009), online: OECD Watch <http://oecdwatch.org/cases/Case_172/824/at_download/file>.
434 Ibid.
435 All materials submitted by the NGO and the TNC are available online: FREDEMI coalition v Goldcorp, online: OECD Watch <http://oecdwatch.org/cases/Case_172>.
Guatemala, for failing to respect the human rights of the local indigenous population.\textsuperscript{436} The claim alleges four separate violations. Firstly, that the company’s land acquisition violated communal indigenous property rights and the right to free, prior, and informed consent.\textsuperscript{437} Such a violation would be in contradiction with Guatemala’s international human rights obligations.\textsuperscript{438} Goldcorp Inc. responded that it had conducted a series of consultations with the local population and that it had bought the land legally, holding valid property titles from individual landowners.\textsuperscript{439}

223. Secondly, FREDEMI argues that toxic contamination from the mine and the lessening of potable water violates the right to health and that overconsumption of water by the mine violates their right to water.\textsuperscript{440} Conversely, the company is of the view that the Guatemalan Ministry of the Environment and Natural Resources is closely monitoring the quality of the water and that it has been tested by a variety of reliable third parties.\textsuperscript{441} It also contends that the mine recycles the water it uses\textsuperscript{442}.

224. Thirdly, the complainants allege that the use of explosives for mining purposes and heavy equipment has caused structural damage to many houses of the community and that, as a consequence, the right to property of the local population is violated.\textsuperscript{443} Again, the company rejects all responsibility and counterargues that there is no direct nexus between the activities of the mining company and the alleged damage.\textsuperscript{444}

\textsuperscript{436} The Center for International Environmental Law, \textit{Specific Instance Complaint Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises concerning The Operations of Goldcorp Inc at the Marlin Mine in the Indigenous Community of San Miguel Ixtahuacán, Guatemala} (FREDEMI, 2009), online: OECD Watch \url{http://oecdwatch.org/cases/Case_172/824/at_download/file} [FREDEMI Complaint].

\textsuperscript{437} \textit{Ibid} at 6-9.


\textsuperscript{439} \textit{Ibid} at 5-7.

\textsuperscript{440} FREDEMI Complaint, supra note 436 at 10-11.

\textsuperscript{441} Goldcorp’s Response, supra note 439, p. 7.

\textsuperscript{442} \textit{Ibid} at 5-7.

\textsuperscript{443} FREDEMI Complaint, supra note 436 at 9-10.

\textsuperscript{444} Goldcorp’s Response, supra note 439.
225. The last human rights violation contended concerns the right to life and security of persons because of the alleged reprisal against anti-mine protesters omnipresent in the region where the mine operates. The company argues that it complies with Guatemalan law when acquiring the services of the military for its security purposes. It also responds that it has been investigated by the Guatemalan Human Rights Ombudsman (Procuraduría de Derechos Humanos) and it was found that the company was compliant with human rights norms in that respect.

226. FREDEMI expressly asked the Canadian NCP to examine the facts of the case and determine whether breaches of the Guidelines have occurred. After carrying out an initial assessment (not available to the public), the Canadian NCP declared the case admissible in March 2010 and proposed a closed-door meeting between the parties. FREDEMI replied they did not feel conditions existed for an open and beneficial dialogue with the mining company. They declined the NCPs proposed terms for a confidential meeting, stating that the meeting would create further tensions and division within the community. FREDEMI embraced the opportunity to reiterate their request for the NCP to conduct a rigorous examination of the facts, including a fact-finding visit to the mining region in Guatemala and render a final statement including recommendations to ensure Goldcorp’s compliance with the Guidelines.

227. Instead, the Canadian NCP closed the case and considered it had offered its good offices. The Final Statement states the following:

The NCP’s initial assessment was that the issues raised merited further examination. Pursuant to the process outlined in the Guidelines, the NCP offered its “good offices” to facilitate a dialogue between the parties. The offer was accepted by the company. However, the notifiers declined the offer. The NCP attempted to explore whether the notifiers would be willing to participate in facilitated dialogue without any confidentiality requirements. The notifiers also declined the NCP’s second offer of facilitated dialogue with more flexible confidentiality requirements and reiterated their request for a full investigation of the facts, including a field visit to San Miguel Ixtahucán, and for the NCP to issue a “robust final statement”.

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445 FREDEMI Complaint, supra note 436 at 11-12.
447 FREDEMI Complaint, supra note 436 at 4.
448 FREDEMI coalition v Goldcorp, online: OECD Watch <http://oecdwatch.org/cases/Case_172>.
449 Letter from FREDEMI, to Grant Manuge, Director General, Trade Commissioner Service, Re: Response from FREDEMI to the NCP’s Letter of March 24, 2010 (23 April 2010), online: OECD Watch: <http://oecdwatch.org/cases/Case_172/849/at_download/file>.
450 Ibid.
451 Ibid.
The NCP’s position is that communication and dialogue between the company and the notifiers are essential to the resolution of any disputes. This message has been conveyed to the parties throughout the process.

Therefore, the NCP recommends that the parties participate in a constructive dialogue in good faith with a view to addressing the issues raised. The sooner the parties agree to engage in a meaningful dialogue, the better it will be for all concerned.

The NCP considers this specific instance to be closed.

Should the circumstances change the NCP remains available to provide assistance to facilitate a dialogue.  

228. The NCP has therefore not taken into account the requests of FREDEMI and has closed the case amid failure of the parties to agree on participating in a dialogue.

229. As shown by the NCP practice in other countries, the mechanism can be however used in a more effective manner. For instance, the Dutch NCP is mandated to “seek advice from relevant organisations, local or international experts” and has already taken this provision into account in the Shell - Friends of the Earth case, where an “independent local counsel was hired to provide the NCP with local understanding and context.” This practice was noted in the Final Peer Review Report conducted by five fellow NCP members, including the Chair of the team, Mr Andre Kavchak, from the Canadian NCP. Members of the Canadian NCP are therefore aware of such practices.

230. The UK also has a wider interpretation of the NCP mandate. For example, if the mediation fails or is refused, the NCP will further examine the complaint “in order to assess whether [it] is justified.” Additionally, the British implemented a “follow-up” procedure to the final statements. When recommendations are included in the final statement, both parties are asked to inform the UK NCP “on the multinational...”


455 Department for Business Innovation & Skills, UK National Contact point Procedures for Dealing with Complaints brought under the OECD Guidelines for Multinational Enterprises (Department for International Development, 2011) at 10.
enterprise’s progress towards meeting these recommendations. The parties’ responses are subsequently published in a further statement issued by the UK NCP.

231. It may also be noted that, in the Guatemalan case, the NCP did not translate the full report into Spanish, which would have rendered it more accessible. Furthermore, it did not offer further recourse to victims after conciliation was not attainable and did not move on to assess whether or not the company had breached the OECD Guidelines. In fact, OECD Watch is of the view that NCPs usually favor businesses and even seem to be “designed to discourage complainants” by responding too slowly, being non-transparent and interpreting the Guidelines in a restrictive manner. Other impediments to the performance of NCPs include their lack of investigative power, absence of a timeframe within which to determine cases, unequal treatment of NGOs, and, the existence of parallel legal proceedings. Additionally, victims of human rights may not be comfortable in this kind of State-sponsored procedure where the State is also the accused.

457 Ibid.
460 Eg before the Canadian NCP in *Rights and Democracy v Anvil Mining* (filed on 17 June 2005), Anvil was alleged to have provided logistical help to Congolese military in the massacre of Kilwa in DRC that left 100 killed. Anvil denied the allegations. The Canadian NCP rejected the case claiming its role was to mediate and was unable to investigate into the activities of the company. See *Rights and Democracy v. Anvil Mining*, online: OECD Watch, <http://oecdwatch.org/cases/Case_82>. See also Engobo Emeseh et al, *Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?* (2010), 11 German Law Journal 230, at 240.
461 The Guidelines do not provide a timeline for NCPs to evaluate cases. For instance, in *RAID v Anglo American*, a case involving the unfair resettlement related to mining in Zambia filed in 2002 and was resolved 6 years later by the UK NCP. See *RAID v Anglo American*, online: OECD Watch, <http://oecdwatch.org/cases/Case_22>.
462 Eg, *ATTAC & FoE Sweden v Atlas Copco*, filed before the Swedish NCP on 18 February 2003, Sandvik was alleged to have supplied gold mining equipment to Ashanti Goldfields Company, which violated human rights and rights of the environment. The Swedish NCP conducted a fact-finding mission but refused to meet with Ghanaian NGOs. See *ATTAC & FoE Sweden v Atlas Copco*, online: OECD Watch, <http://oecdwatch.org/cases/Case_30>.
463 “Parallel legal proceeding” is the term NCPs use when a complaint deals with business conduct that is also the subject of legal or administrative proceedings at the national or international level. The existence of those parallel proceedings is one of the most frequently cited reasons for turning down or delaying a case in specific instances.” Joris Oldenziel, Joseph Wilde-Ramsing & Patricia Feeney, *10 Years On: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct* 46 (OECD Watch, 2010) at 46. For example, in *11.11.11 et al v Cogecom*, filed on 24 November 2004 before the Belgian NCP, Cogecom was alleged to have financed rebel movements. The Belgian NCP rejected the case because there were on-going legal proceedings. See *11.11.11. et al v Cogecom*, online: OECD Watch, <http://oecdwatch.org/cases/Case_65>.
2. **Canadian CSR Strategy**

232. In June 2005, following the hearing of the testimony of a delegation of community members from the municipality of Siocon, Zamboanga del Norte, in the Philippines, that raised concerns about alleged violations of environmental and human rights at the Canatuan mining project, owned by Canadian mining company TVI Pacific, and related preoccupations about Canadian government support to the project, the Standing Committee on Foreign Affairs and International Trade (SCFAIT) – a parliamentary committee – issued a report entitled “Mining in Developing Countries and Corporate Social Responsibility.” It called on the federal government to institute measures to ensure that Canadian mining companies conduct their operations abroad in a socially responsible manner since there are no laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights norms.

The report indicated that extractive activities in some developing countries have had negative and unwanted effects on local communities, “especially where regulations governing the mining sector and its impact on the economic and social wellbeing of employees and local residents, as well as on the environment, are weak or non-existent, or where they are not enforced.” The Subcommittee also recommended that Canada implement higher incentives to encourage compliance with international human rights standards, as well as stronger monitoring and complaints mechanisms.

233. For instance, the report urged the government to take measures to make “Canadian government support – such as export and project financing and services offered by Canadian missions abroad – conditional on companies meeting clearly defined

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465 Sara L Seck points out that testimonies “alleged that TVI Pacific Inc. violated the indigenous communities’ rights to free, prior and informed consent by engaging in involuntary displacement and resettlement of communities, that TVI Pacific employed a large number of heavily armed security forces trained by the Philippine military to protect the mine in a heavily militarized area, and that environmental problems threatened food security, subsistence living and sustainable livelihoods of local communities. Canadian government support for the mine included Canadian International Development Agency Canada Fund money channeled through TVI Pacific, and positive endorsements of the project by current and former Canadian ambassadors to the Philippines, along with general support by the Canadian embassy in Manila.” Sara L Seck, “Home State Responsibility and Local Communities: The Case of Global Mining” (2008), 11 Yale Hum Rts & Dev L J 177, at 179 note 3.


467 Ibid.

468 Ibid.

469 Ibid.
corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments.” Importantly, the report also called for “clear legal norms” to ensure that Canadian corporations and nationals were held accountable for environmental and human rights violations. To that extent, it may be highlighted that a Canadian governmental committee raised the argument that the home State should be obliged to ensure that companies comply with human rights standards. Such an obligation would be particularly important because host States may be unable (e.g. due to a weak government) to ensure their “duty to protect” and impose legal obligations on transnational companies, although they have the right to do so.

234. The government of Canada dismissed the SCFAIT recommendations, but committed to organize a series of Roundtables on Corporate Social Responsibility (Roundtables), in order to “examine measures that could be taken to position Canadian extractive sector companies operating in developing countries to meet or exceed leading international CSR standards and best practices.” They rejected many recommendations of the aforementioned report by arguing that the international community is “still in the early stages of defining and measuring CSR, “particularly with regard to human rights.” The government did not commit to establish “clear legal norms in Canada to ensure that Canadian companies are held accountable”, as recommended by the Committee, but rather decided to examine the “best practices of other states.”

235. The federal government, in March 2009, as a counterpoint to the SCFAIT report, released its own CSR strategy for the international extractive sector. It then became clear that the government would not implement the recommendations emanating from the Roundtables. Indeed, although the government claimed it “will take steps to ensure that

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470 Ibid.
471 Ibid.
473 Ibid at 39.
477 See DFAIT, Building the Canadian Advantage, supra note 20. This CSR strategy established an Order-in-Council Counsellor with the mandate to review the CSR practices of Canadian extractive sector companies operating outside Canada and to advise stakeholders on the implementation of the performance guidelines.
government services align with high standards of corporate social responsibility,” it did not implement recommendations of the SCFAIT 2005 report nor the final report on CSR roundtables.

236. In fact, the Canadian CSR strategy is built on four pillars: endorsing internationally recognized CSR standards, strengthening the governance in host countries, and creating a Centre for Excellence in CSR and the Office of the Corporate Social Responsibility Counsellor.

237. The main international CSR standards endorsed and promoted by Canada are the International Finance Corporation Performance Standards on Social and Environmental Sustainability (IFC Standards), the Voluntary Principles on Security and Human Rights and the Global Reporting Initiative. These three sets of guidelines merely serve as non-binding CSR guidance for companies and, from a victim-centered perspective, do not offer victims of human rights abuse any kind of remedy.

238. The role of the Centre for Excellence in CSR is “to encourage the Canadian international extractive sector to implement these voluntary performance guidelines by developing and disseminating high-quality CSR information, training and tools.” It is supported by the federal government, but being developed outside of the government by the Canadian Institute of Mining, Metallurgy and Petroleum. The Centre for Excellence in CSR is designed to help Canadian companies conduct business abroad by promoting voluntary CSR principles. Therefore, its role is merely promotional and it

476 Ibid.


478 Ibid.

479 In fact, those guidelines are less than perfect. For instance, critics consider the Voluntary Principles insufficient and Amnesty International has been demanding “that the principles be made more rigorous, by working towards the establishment of a reliable reporting mechanism.” See Business and Human Rights: International Processes, Amnesty International Canada [online at the time of writing, unavailable at the time of publication] and Center for Economic and Social Rights, A Human Rights Critique of the IIED & World Business Council for Sustainable Development: Mining, Minerals and Sustainable Development Report (CESR, 2003) at 13, online: CESR <http://cesr.org/downloads/MMSD%20Critique%20Final_1.pdf>.

480 Ibid.

481 Ibid.

482 Lloyd Lipsett, Michelle Hohn and Ian Thomson, Recommendations of the National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries: Current Actions, Stakeholder Opinions and Emerging Issues (Vancouver: On Common Grounds Consultant for Mining Association of Canada’s International Social Responsibility Committee, 2012) at 37, online: On
does not impose any binding regulations which could make companies liable for human rights violations.

2.1 **Office of the Extractive Sector Corporate Social Responsibility Counsellor**

239. The Office of the Extractive Sector Corporate Social Responsibility Counsellor (the Office) was appointed in fall 2009 through the strategy *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector*.\(^{485}\) This was part of the Canadian effort to oversee the activities of the Canadian extractive corporations abroad and was also an alternative to the adoption of the 2005 SCFAIT recommendations and the 2007 national roundtables report, both of which were dismissed by the government.

240. As part of the new CSR Strategy, the Office was established under the DFAIT and reports directly to the Minister of International Trade. The Counsellor and its mandate are appointed by an order in council.\(^{486}\) The Governor-in-council, who is a member of the Privy Council, assigns the Counsellor.\(^{487}\) In October 2009, the federal government appointed Marketa Evans as the first Counsellor of the Office which opened in March 2010 in Toronto.\(^{488}\)

241. “The Counsellor is not a judge and the review process is not a Court,”\(^{489}\) she assists the parties in a dialogue to find some resolutions to their problems. The Counsellor is intended to be an impartial third party that provides a negotiation table for the parties.

242. The Office’s staff is composed of the Counsellor, a seven member advisory panel, a senior adviser, a research and an administrative assistant.\(^{490}\) The Office has a $654,240 yearly budget.\(^{491}\)

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\(^{485}\) DFAIT, *Building the Canadian Advantage*, supra note 20.

\(^{486}\) An order in council is issued by the Privy Council Office, which is the non-partisan support to the Prime Minister and Cabinet, in order to implement some of the legislative decisions. In reality, decisions are made by the Prime Minister and his Cabinet and are later approved by the Governor General. That means that there is no debate in parliament about those decisions.


\(^{488}\) *The Office of the Extractive Sector SCR Counsellor: About Us*, Foreign Affairs and International Trade Canada [online at the time of writing, unavailable at the time of publication].

243. The Office offers a review process that provides a private, voluntary, and non-judicial forum for the resolution of claims by affected communities against Canadian mining, oil or gas companies operating outside the borders.492 Its mandate also calls for reviewing the CSR practices of Canadian extractive sector companies operating outside Canada and advising stakeholders on the implementation of the performance guidelines. 493 Through dialogue, the CSR’s Office only resolves disputes that are connected to the IFC Performance Standards, the Voluntary Principles on Security and Human Rights, the Global Reporting Initiative, and OECD Guidelines.494 However, a request cannot solely rely on a breach of the OECD Guidelines and in such a case the requesters are redirected to the NPC office.495

244. In fact, both NCP and CSR Counsellor consider the OECD Guidelines in their respective process and thus overlap. This matter was raised during the roundtables prior to the establishment of the CSR’s Office, but unfortunately, the issue has not been taken into account.496 On the NCP and the CSR Counsellor, Catherine Coumans from Mining Watch Canada notes:

Neither process is empowered to offer or enforce remedy, even in cases where this proves warranted. More egregiously, both processes put complainants in an untenable position of having to rely on the very company that stands accused of having caused them harm to decide if it is inclined to provide any form of remedy, and if so, what and how

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490 ibid at 1.
491 House of Commons Debates, 40th Parl, 3rd Sess, vol 145 No 26 (15 April 2010) Question No. 30 at 1005 (Hon Peter Van Loan).
493 PC 2009-0422, supra note 487.
494 The Office of the Extractive Sector CSR Counsellor, Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility Counsellor (Toronto: Foreign Affairs and International Trade Canada, 2010) [online at the time of writing, unavailable at the time of publication].
496 “Canada now has two Government initiated non-judicial grievance mechanisms. The differences between the NPC and the CSR Counsellor mechanism and the differing roles they might play were a frequent topic of conversation at the public hearings your office conducted (certainly those I attended) and the relationship between the two offices is now captured in a formal MOU.” Letter from Catherine Coumans, Research Coordinator, MiningWatch Canada, to Marketa Evans, Extractive Sector CSR Counsellor, RE: Response by Extractive Sector CSR Counsellor to MiningWatch Canada brief on the review process (31 March 2011) at 2, online: Mining Watch <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Office_of_the_Extractive_Sector_CSR_Counsellor_29-03-2011.pdf>.
much remedy it may provide. This puts effective power in the hands of the alleged violator. From a human rights perspective this is very problematic.  

245. Individuals, groups or communities directly affected by a Canadian corporation abroad can ask for a review if the company is incorporated or has its headquarters in Canada. Also, “Canadian mining, oil and gas companies who believe they are the subject of unfounded allegations concerning their overseas corporate activities may also bring requests to the Office.”

246. A request cannot be anonymous but the Office ensures the anonymity of the pleading party upon request. A company can also ask for anonymity, allowing itself to be shielded from the public’s opinion. The claimant community should be aware of the traveling cost, the language and communication barriers, the request for precise documents etc. For example, submissions must be written in French or English.

247. A partnership between the community in question and a Canadian NGO can ease the process. Even if there is no official fee to file a request for review, other costs can be necessary and can highly indispose the requesting party. The CSR’s office will not provide any financial assistance to help the review process and it can be very difficult for a remote community to participate full and effectively.

248. The CSR’s Office asks that the petitioners must act within a “reasonable” time frame and stipulates that the issue raised cannot be “too trivial” nor “too serious.” Those words are left without specific definitions and hence to a broad range of interpretations.

249. Furthermore, the requesting party has to demonstrate that he has previously tried to resolve the asserted problem. An attempt to directly contact the company by the community, left unanswered, can be considered as a sufficient attempt. A copy of the correspondence will then be needed. Moreover, documents and evidence to assert the

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497 Ibid.
498 On Disputed Ground, supra note 489 at 14.
500 On Disputed Ground, supra note 489 at 15.
502 On Disputed Ground, supra note 489 at 18.
corporations’ alleged violation of the aforementioned international standards are also required.\footnote{Ibid. at 17.} To be considered, the alleged violation must have occurred after 19 October 2009.\footnote{Ibid.}

250. After the requesting party has completed the request for review,\footnote{Ibid.} the Counsellor acknowledges the request within 5 business days\footnote{The Office of the Extractive Sector Corporate Social Responsibility Counsellor, \textit{Request for Review Cover Form}, online: FAITC <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/cover_form-formulaire_presentation-eng.pdf>.} Then, the Counsellor has 40 business days to determine whether the request meets the criteria to fall within her legal mandate. If both parties accept the Counsellor’s good offices an informal mediation and trust building process begins that may ultimately lead to a structured dialogue to conclude a final agreement. Before entering into the final stage - the structured dialogue - the two parties must consent to the dialogue through a letter of intent. It is important to keep in mind that this non judicial-mechanism is founded on a voluntary basis and that the parties can decide to withdraw at any time.

251. Since the CSR’s Office opened its doors, only two requests for review have been submitted to the Office,\footnote{House of Commons Debates, 41st Parl, 1st Sess, vol 146 No 49 (30 January 2012) Question No 265 at 1515 (Hon Ed Fast).} both of which were heard by the Counsellor. The first one was submitted in April 2011 by Excellon workers, National Mining Union and Proyecto de Derechos Económicos, Sociales y Culturales A.C., concerning the Excellon Ressources Inc.’s Mexican La Platosa mine project.\footnote{Excellon Ressources Inc. is incorporated under the laws of British Columbia and has its headquarters in Toronto. Closing report \textit{Request for review file #2011-01-MEX}, supra note 499.} One of the issues raised concerned an incident that occurred on the mine site following a theft of copper. It was alleged that the state police was called to investigate the theft and, “while on the company’s premises, the state police subjected several of the workers to physical beatings”.\footnote{Ibid. at 11.} The workers were also concerned about the violation of health and safety standards as well as management relations.\footnote{Ibid. at 17.}

252. After the initial assessment, the process progressed into the informal mediation stage. From April to September 2011, the Counsellor worked with both parties in trust-building, but the review process did not proceed to the structured dialogue phase. The parties never actually met. Ms Evans and her adviser traveled to Mexico twice, in May...
and in July 2011. The primary objective\(^{512}\) of the May visit was not reached because the provinces of Durango and Coahuila, where the mine is located, were the target of a warning issued by the DFAIT, hence the Counsellor could not complete a field visit.

253. In a debriefing meeting with Excellon, the company argued that the review request was not underpinned by project-affected people, and therefore lacked credibility.\(^{513}\) In fact, in order to proceed to the next stage, the Counsellor must ensure that project-affected communities are part of any request for review.\(^{514}\) The executives of the company also conveyed to the Office that a mine visit was “absolutely critical.”\(^{515}\) In accordance with this recommendation, the Counsellor visited the mine in July.\(^{516}\)

254. The site visit enabled the Counsellor to confirm that affected individuals approved the request, thus addressing Excellon’s concerns about the process. The Office subsequently offered both parties to proceed to the structured dialogue stage, thereby confirming the legitimacy of the complaints.

255. In September 2011, the claimant party was eager to start the structured dialogue phase. Excellon kept pushing back the date, on which they should all meet, and never sent back the letter of intent to formalize its participation in the last phase.\(^{517}\) Finally, at the end of the month, without further explanations, Excellon withdrew from the process altogether.\(^{518}\) As mentioned in the closing report, the CSR’s Office closed the file shortly after.\(^{519}\)

256. The claimant party was left unsatisfied. In the closing report, Ms. Evans’ expressed she regrets “that she was unable to deliver on her mandate of bringing parties together in constructive dialogue.”\(^{520}\)

\(^{512}\) The five objectives were: “1- to clarify the issues/concerns from a variety of perspectives, 2- to identify and meet with relevant stakeholders, 3- to provide information about the Office and the process to stakeholders in Mexico, 4- to deepen understanding of how the Office can best assist in moving the issues, 5- to enhance the Office’s understanding of local context and issues.” Office of the CSR Counsellor, *Field Visit Report: Mexico, May 2011* (Toronto, Foreign Affairs and International Trade Canada, 2011) at 5. online: FAITC <http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/field_visit_01-visite_sur_le_terrain_01_2011-06-eng.pdf>.


\(^{514}\) *Ibid.*

\(^{515}\) *Ibid.*

\(^{516}\) *Ibid.*

\(^{517}\) *Ibid.*

\(^{518}\) Excellon’s representative, in its correspondence with the Counsellor, always stated that the company was fully implicated in the Review. The pleaded that they would difficultly meet the deadline but never left to believe that they would withdraw. See *Closing report Request for review file #2011-01-MEX*, supra note 499 at 18-19.

\(^{519}\) *Ibid* at 19.

\(^{520}\) *Ibid.*
257. The Counsellor has acknowledged a second request for review in August 2011 concerning the activities of First Quantum Minerals Limited in Mauritania.\textsuperscript{521} The requesters raised concerns regarding environmental issues, labor issues, as well as stakeholder engagement and consultation, stating that there was no grievance mechanism at the site, and that no environmental assessments had been conducted.\textsuperscript{522} They also argued that First Quantum Minerals did not want to discuss the issues with the affected individuals.\textsuperscript{523}

258. The review process progressed to the informal mediation stage, which was conducted from August 2011 to January 2012. During that stage, the Counsellor concluded that a site-level grievance mechanism does exist and that requesters’ concerns “were probably related to low levels of information.”\textsuperscript{524} Consequently, the Office encouraged the requesters to access the operational level mechanism first and closed the request on 21 February 2012.\textsuperscript{525}

259. Many questions, concerns and critiques were advanced regarding the CSR’s Office.\textsuperscript{526} It has been repeatedly argued that this non-judicial mechanism has no teeth and thus is not adequate for human rights victims. The Counsellor’s review has no judicial value and cannot provide for proper reparation. Corporations are not obligated to participate in a review and, as proven by the Excellon case, even if they do, they can withdraw at any time. Ms. Evans, in a correspondence with MiningWatch Canada, compared its review mechanism to the mediation offered for civil litigation.\textsuperscript{527} But, as


\textsuperscript{523} Ibid.

\textsuperscript{524} Ibid at 8.

\textsuperscript{525} Ibid at 9.

\textsuperscript{526} Throughout our research process regarding the CSR Counsellor Office, we have experienced some problems of accessibility to the Office. First, the email provided on the Office’s website did not work. Indeed, we have received a delivery status notification stating that the delivery of our message to the recipient domain failed. Furthermore, the phone number provided on the website is not a toll-free number, and when dialed, our call was redirected to an answering machine. Although we have left a message, the Office never returned our call. The official information regarding the CSR Counsellor Office is available on the website of the Department of Foreign Affairs and International Trade Canada. However, the staff of the DFAIT was not aware of the existence of a CSR Counsellor, and suggested to contact the Minister Ed Fast, the minister of International Trade and Minister for Asia-Pacific Gateway.

\textsuperscript{527} Letter from Marketa Evans, Extractive Sector CSR Counsellor, to Catherine Coumans, Research Coordinator, MiningWatch Canada, Response by Extractive Sector CSR Counsellor to MiningWatch Canada Brief on the review process of the Office of the CSR (28 March 2011) at 2, online: MiningWatch <http://www.miningwatch.ca/article/concerns-regard-mandate-and-review-procedure-office-corporate-social>.
Catherine Coumans from MiningWatch argues, mediation is an option offered to the victims but they can always choose to access the court.\textsuperscript{528}

260. The Counsellor’s mandate is to act as an impartial third party. However, limits she has no right and power to “determine whether a company has harmed anyone or breached the Guidelines.”\textsuperscript{529} As a consequence, the Office does not impose binding measures.\textsuperscript{530} The Office will not investigate in order to determine the validity of a request for review and the Counsellor’s fact-finding missions are limited.\textsuperscript{531} Moreover, the CSR Counsellor requires permission of both involved parties to investigate. Last but not least, the Office is not independent from the Canadian government. Indeed, the Counsellor is not authorized to make legislative or policy recommendation to the government.\textsuperscript{532} In addition, annual reports are submitted to the Minister of Trade who subsequently tables them in Parliament. Further investigation may also be requested, but it is up to the Minister to decide whether the study is made public or not.\textsuperscript{533}

261. In light of this, the only Canadian non-judicial mechanism clearly does not comply with the criteria established in the aforementioned UN Guiding Principles. Firstly, access to the Counsellor’s Office is limited by the requirement of the acknowledgment of both parties. Secondly, the Counsellor has no power to make binding recommendations. Moreover, the fact that the Counsellor is mandated by the DFAIT and reports directly to it limits the independence and the legitimacy of the mechanism. These characteristics of the Counsellor’s Office do not comply with the criteria set out in the UN Guiding Principles.

2.2 Host Country Capacity-Building: The Role of DFAIT and CIDA

262. The fourth pillar of the CSR strategy is capacity building in host countries, through government agents such as DFAIT and CIDA. However, much criticism has been directed towards this initiative. DFAIT promotes the extractive industry abroad while it also promotes its CSR policy.

263. Canada’s governmental aid agency supports the mining industry by bestowing important grants and aid money (from taxpayers) to projects emanating from mining corporations. It also issues requests for proposals to major corporate Canadian law firms
to assist aid countries to reform their mining laws. Same law firms represent the interests of the mining industry.

264. For example, in 1997, the agency granted $11.3 million for an economic and social development project with the government of Colombia. Part of this amount was directly provided to the Canadian Energy Research Institute (CERI) to redraft the new Colombian mining legislation. Martínez-Córdoba and Associates were contracted both by the CERI and the Colombian government to write the new Code despite the fact that half of the mining companies registered in Colombia are represented by this same law firm. Among others, the final 2001 Mining Code weakened several human rights-related provisions, such as indigenous property rights. It also created a more favorable policy environment and a better tax system for investment (i.e. through reduced mining royalty and tax rates), thereby facilitating mining activities in Colombia. Thus, this example highlights the fact that human rights compliance is directly affected by the use of Canadian public funds through technical and financial support provided by CIDA.

265. Furthermore, through official development assistance, Canada’s governmental aid agency is bestowing important grants and aid money (from taxpayers) to projects closely affiliated to or sponsored by mining corporations. In September 2011, CIDA has announced it will provide a $6.7 million-aid to three CSR pilot projects.

266. For instance, the CIDA will be funding half ($500 000) of the World Vision Canada and Barrick Gold project in Peru. Although the agency should be financing processes to reduce poverty, and despite its announcement that such initiative will ‘strengthen local governments’ and communities’ capacity to implement sustainable development projects for the well-being of people living in extractive operations, and will

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535 According to Rights Action, CERI’s “private donor list reads like a who’s who of Canadian energy, oil and mining companies.” Sandra Cuffe, A Backwards, Upside-Down Kind of Development: Global Actors, Mining and Community-Based Resistance in Honduras and Guatemala (Rights Action, 2005) at 8.

536 Ibid, at 7-8. Official publications regarding CIDA’s involvement in mining legislation reforms are not available.

537 Regarding the important changes to the Mining code, see Emily Caruso et al, Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank (Marcus Colchester and Emily Caruso eds., 2nd ed, 2005) at 158-159.

538 Ibid. See also Dirty Business, supra note 164 at 6.1.

539 We have contacted the CIDA to obtain more information regarding the Agency’s “technical” and “financial” support, but our calls were left unanswered.

540 Catherine Coumans, “CIDA’s Partnership with Mining Companies Fails to Acknowledge and Address the Role of Mining in the Creation of Development Deficits” 7 (Ottawa: MiningWatch Canada, January 2012) at 7, online: MiningWatch <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Mining_and_Development_FAAE_2012.pdf> [Coumans, “CIDA’s Partnership”].

541 Ibid.
improve dialogue between communities and the private sector,” 542, the needs of the population were not taken into account. 543 In fact, external actors are leading the project and there has been no consultation with local population. 544

267. The other two projects include a partnership with NGO Plan and IAMGOLD in Burkina Faso, in which CIDA is expected to provide $500 000, and the World University Service of Canada and Rio Tinto Alcan in Ghana. 545 The budget of the latter project is of $7.6 million over 5 1/2 years, with a $5.7 million support from CIDA. Other partnerships may also be developed in the future.

268. CSR projects and partnerships with NGOs are intended to overcome the increasing collective opposition against mining, which is why the industry “has urged greater support from the Canadian government and from CIDA.” 546 As noted by Mining Watch, each of the aforementioned partnerships “involves major, well-financed, mining companies and […] the taxpayer funded portion of these mine-site projects is substantial.” 547

269. DFAIT conducts itself in a similar fashion. It has been revealed that the DFAIT has indirectly supported Talisman Energy in a lawsuit filed under the Alien Tort Act. 548 While the Canadian extractive company was sued in the U.S courts for its involvement in several crimes in Sudan, including ethnic cleansing, Canada has lobbied the U.S twice in order to halt the process. 549

3. Recent Assessment of Canada’s CSR Progress

270. The latest report (January 2012) from the Mining Association of Canada (MAC) points toward the steady progress on corporate social responsibility made by Canadian mining, oil and gas companies in developing countries. The report was

544 Ibid.
545 Ibid.
546 Ibid.
547 Ibid.
548 “The Canadian Embassy in Washington submitted a diplomatic letter to the court via the U.S. Department of State. The letter called the case “an infringement in the conduct of foreign relations by the Government of Canada” that would have a “chilling effect” on Canadian firms engaging in the Sudan. It argued that Canadian firms would think twice about working in Sudan since they would fear similar lawsuits in U.S. courts.” Dirty Business, supra note 164 at 5.1.
549 Ibid.
550 Lispett, Hohn, Thomson, supra note 484.
commissioned by MAC’s International Social Responsibility Committee as a follow-up to the 2007 advisory group to the federal government. MAC personnel participated along with representatives of industry, investors, human rights, academics and government.

271. Of the 27 recommendations arising from the 2007 talks, the new report indicates that 18 of them have been fully or partially implemented. By joining the Extractive Industry Transparency Initiative and the Voluntary Principles on Security and Human Rights as well as by disclosing information regarding the Canada Investment Fund for Africa, the government was able to fully answer to three recommendations. However, most recommendations are only partially implemented, leaving important gaps in the Canadian CSR strategy. For instance, the authors state that Canada has not yet incorporated the Guiding Principles into its CSR strategy, contrary to the Roundtables recommendations. Also, the authors note that the Canada Pension Plan Investment Board’s and Export and Development Canada’s level of disclosure of project information and the powers of the CSR Counsellor are insufficient with regards to what was recommended by the Roundtables. Furthermore, nine recommendations were left completely unattended by the government. These include extending extraterritorial criminal laws, making government support conditional on compliance to CSR standards and building capacity for judicial systems in Host Countries.

4. Alternative Accountability Mechanisms

272. The lack of effective accountability mechanisms in Canada has brought activists to find alternative solutions to the issue of human rights violations committed by Canadian mining companies abroad. In this section, two of them will be presented: the use of foreign jurisdictions to bring Canadian companies in court, which will be illustrated by the example of the American Alien Tort Claim Act, and the personal initiatives of responsible shareholders. In fact, none of these two options has yet proven reliable in providing for effective remedy to the victims of human rights violations or to prevent their occurrence.

4.1 Civil Litigation before US Courts Under the Alien Tort Claim Act

273. A Canadian corporation may be brought before a US court for violations of human rights which occurred outside Canada by triggering the Alien Tort Claims Act (ATCA). However, the Canadian legal person should have a real and substantial nexus with the US.

551 Ibid 5-8.
552 Ibid.
553 Ibid at 5-8.
274. Indeed, the ATCA has been interpreted by US Federal Courts as providing jurisdiction over companies either incorporated in the US or having a continuous business relationship with the country, where foreigners – namely victims of violations of the law of nations (international law) - may request damages from enterprises that have committed such unlawful acts or are complicit in violations committed by state agents.\(^{555}\) As such, Canadian corporations could potentially be sued pursuant to this law in the US provided that the Canadian corporate national has a continuous business link with the US.

275. Such was the case in *Presbyterian Church of Sudan v. Talisman Energy Inc.*,\(^{556}\) - a Calgary based company. Talisman was accused of aiding and abetting the Sudanese government in the forced movement and massacre of civilians residing near the oil facilities. The first instance Federal Court granted Talisman’s motion to dismiss on 12 September 2006 finding that the plaintiffs had failed to supply sufficient admissible evidence to permit the lawsuit to go to trial on the plaintiffs’ claims.\(^{557}\) The Court of Appeals later found that, in order to determine liability under the ATCA, the plaintiffs must show that the defendant “purposefully” aided and abetted a violation of international law (rather than applying the “knowledge test”).\(^{558}\) In April and May 2010, plaintiffs filed petitions for certiorari\(^{559}\) with the Supreme Court which were both denied.\(^{560}\) Despite the disappointing outcome of this case from a victims-centered perspective, it is thus theoretically possible that Canadian corporations be sued pursuant to this law in the US if the required conditions are met.

276. In practice, however, due to the numerous limitations of the applicability of this law, the ATCA does not seem to be an effective remedy for victims of human rights violations. As a matter of fact, by 2010, only three cases involving transnational

\(^{555}\) See eg, *Doe I v Unocal Corporation*, 395 F (3d) 932 (9th Cir 2002). This latter case addresses the complicity of Unocal with human rights abuses committed by the Burmese military. See also generally Doug Cassel, “Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts” (2008), 6 Nw J Int'l Hum Rts 304 at 320. This author addresses the difficulty for US Courts to incorporate the purpose or/and knowledge test in order to consider corporate complicity for human rights violations.

\(^{556}\) Presbyterian Church of Sudan v Talisman Energy Inc, 582 F (3d) 244, at 251 (2d Cir 2009).


\(^{558}\) On the issue of knowledge or purpose test, see Doug Cassel, “Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts” (2008), 6 Nw J Int'l Hum Rts 304 at 320.

\(^{559}\) A petition for a writ of certiorari is filled by a losing party that asks the US Supreme Court to review a decision of a lower Court. It is commonly called a cert petition. A writ of certiorari is the decision of the US Supreme court to hear the appeal. See US Supreme Court, *Rules of the Supreme Court of the United States* (Department of Justice, 2010) at 10-16, online: Supreme Court of the USA <http://www.supremecourt.gov/crules/2010RulesoftheCourt.pdf>.

\(^{560}\) Mamolea, *supra* note 557 at 138.
corporations have not been dismissed prior to trial, among which only one resulted in a verdict in favor of the plaintiffs.\textsuperscript{561}

277. Indeed, in order to proceed against a corporation under ATCA, a claim must meet numerous modern criteria announced in \textit{Sosa v. Alvarez-Machain (Sosa)}.\textsuperscript{562} Among other requirements, the plaintiffs must establish that either a treaty ratified by the US or a recognized international norm has been violated.\textsuperscript{563} In fact, several human rights treaties to which the US is a Party are non-self-executive treaties and therefore not part of US law.\textsuperscript{564} For instance, although the US is bound under the International Covenant on Civil and Political Rights (ICCPR), the treaty is not enforceable in the Federal Courts.\textsuperscript{565} Such is also the case for the Universal Declaration of Human Rights (Declaration), since it is a statement of principles that does not impose legal obligations.\textsuperscript{566} Consequently, it is unlikely that human rights treaties would be actionable under ATCA in US Courts.

278. Moreover, in \textit{Sosa}, the Court stated that a recognized international norm is required to “have clearly articulated principles and discernable standards and regulations with which to identify potential violations.”\textsuperscript{567} Therefore, when alleging a violation of a norm, the plaintiffs must make a clear and unambiguous statement. However, as shown in \textit{Flores v. Southern Peru Copper Corporation Rights (Flores)},\textsuperscript{568} some principles are hard to define. Indeed, in that case, the plaintiffs asserted that the company’s activities infringed their rights to life and health. However, the Court stated that these rights “are insufficiently definite to constitute rules of customary international law.”\textsuperscript{569} Furthermore, despite the fact that treaties may serve to demonstrate a customary norm, in \textit{Sosa}, the Court argues that the Covenant and the Declaration themselves are insufficient to “establish the relevant and applicable rule of international law.”\textsuperscript{570} Hence,

\begin{itemize}
  \item \textsuperscript{562} \textit{Sosa v Alvarez-Machain}, 542 US 692 (2004) [\textit{Sosa}]. \textit{Sosa} is considered as being the first “modern United States Supreme Court case to consider ATCA and its limits.” See James Goodwin and Armin Rosencranz, \textit{Holding Oil Companies Liable for Human Rights Violations in a Post-Sosa World} (2008), 42 New Eng L Rev 701, at 702.
  \item \textsuperscript{563} Wesley V Carrington, “Corporate Liability for Violations of Labor Rights Under the Alien Tort Claims Act” (2008-2009), 94 Iowa L Rev 1381, at 1383. According to Carrington, rather than an analysis based on treaties, the “law of nations” is more frequently discussed in ATCA litigation. \textit{Ibid} at 1383.
  \item \textsuperscript{564} de Jonge, \textit{supra} note 561.
  \item \textsuperscript{565} \textit{Sosa}, \textit{supra} note 562.
  \item \textsuperscript{566} \textit{Ibid}.
  \item \textsuperscript{567} Wesley V Carrington, “Corporate Liability for Violations of Labor Rights Under the Alien Tort Claims Act”(2009), 94 Iowa L Rev 1381, at 1404.
  \item \textsuperscript{568} \textit{Flores v Southern Peru Copper Corporation Rights}, 414 F (3rd) 233 (2003).
  \item \textsuperscript{569} \textit{Ibid} at para 72.
  \item \textsuperscript{570} \textit{Sosa}, \textit{supra} note 562.
\end{itemize}
it is doubtful that violations of human rights that are not gross violations, such as some labor rights, would be actionable under the ATCA.

279. It is also important to note that the aforementioned interpretation of the ATCA may differ depending on the jurisdiction in which the case is heard and is inclined to change due to recent jurisprudential developments in the US. The case decided by the US Court of Appeals for the 2nd Circuit in Kiobel v. Royal Dutch Petroleum held that corporate liability is not a rule of customary international law and may not apply under the ATCA. Differing from the 2nd Circuit Court of Appeal’s decision, the 7th and 11th Circuit Courts of Appeal both held that the ATCA’s scope extends to corporations and they may be held liable under this statute for matter of customary law. Lately, in Doe VIII v. Exxon Mobile Corp., the D.C. Circuit Court of Appeal asserted that the knowledge standard for the mens rea requirement for aiding and abetting is sufficient to determine the corporation’s liability under the ATCA. This latter conclusion has a more favorable stand for the petitioners and therefore challenges the ruling held in the Talisman case.

280. Subsequent to the Kiobel petition which was granted by the US Supreme Court, the 9th Court of Appeal accepted the plaintiff’s petition in the Sarei v. Rio Tinto’s case. The petition pertained to allegations of genocide and war crimes, and dismissed the arguments based on racial discrimination and crimes against humanity. The genocide and war crimes claim passed the test of universal acceptance set forth in Sosa and was received by the Court. The judges also concluded that a corporation could be held liable under the ATCA for such violations, as previously mentioned, by purposefully aiding and abetting. Prudently, the judges left open the question “of whether

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571 On that matter, see Wesley V Carrington, “Corporate Liability for Violations of Labor Rights Under the Alien Tort Claims Act” (2009), 94 Iowa L Rev 1381.
572 Kiobel v Royal Dutch Petroleum, 621 F (3d) 111 (2d Cir 2010).
575 Doe VIII v Exxon Mobil Corp, No 09-7125, 2011 WL 2652384 (DC Cir 8 July 2011).
576 See Bak supra note 574.
577 Sarei v Rio Tinto, No 02-56256 (9d Cir 25 October 2011) [Sarei c Rio Tinto].
578 In Sosa, the US Supreme Court asserted a framework for determining human right liability under ATCA. A claim prevailing outside of what was expressed in international law in 1789, when Congress voted the ATCA must “meet a threshold level of acceptance in the international community, and the claim must have specificity comparable to the original set of limited violations.” The pleaded right must have a specific definition generally recognized by the international community and respond to the universal and obligatory requirement. See Igor Fuks, “Sosa v Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labour Claims and Corporate Liability” (2006), 106 Colum L Rev 112, at 121-123.
579 Sarei c Rio Tinto, supra note 577.
allegations of knowledge but not purpose in aiding or abetting the commission of war crimes would also be cognizable under *Sosa*,"\textsuperscript{580} given the specific purposeful allegations of this case. As noted, the different Circuits are clearly divided on the ATCA issue.

281. Subsequent to the denial before the 2\textsuperscript{nd} Circuit Court of Appeal, the petitioner’s counsel in Kiobel filed a petition of certiorari with the Supreme Court in June 2011. It alleges that the 2\textsuperscript{nd} Circuit Court of Appeal’s “if allowed to stand, severely undermines the AT[CA]’s deterrence of international law violations. It invites corporations to violate universal international norms with impunity, and is thus in conflict with *Sosa*, Congress’ purpose and international law.”\textsuperscript{581} The case was heard on 28 February 2012, and on 5 March 2012, the Supreme Court ordered the parties to file supplemental briefs on “whether and under what circumstances the Alien Tort Statute […] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”\textsuperscript{582} The supplemental brief of the petitioners is due in June 2012, and the respondents’ brief in August 2012.\textsuperscript{583}

282. In light of the aforementioned, it is thus theoretically possible for victims of human rights violations committed by a Canadian corporate citizen to be brought before US courts. However, in practice, the future of a corporation’s liability under the ATCA remains uncertain - and this for all corporations independently of their corporate nationality. In addition, the specific criteria for a petition of this nature to be granted are still to be determined. Regardless of the possibility that Canadian corporations with a continuous link with the US could still be sued under the ATCA for violations that took place outside the Canadian and American borders, it is worth noting that a claim can always easily be dismissed because of the many specific requirements for a petition to be granted. Therefore, litigation before a foreign Court under a law such as the ATCA, and the possible application of the latter to Canadian corporations, remain the inadequate forum for victims whose rights have been violated by a Canadian corporate national.

4.2. Responsible Shareholders

283. Groups of responsible shareholders currently exercise effective pressures on mining companies to conduct themselves in a responsible manner (i.e.: Goldcorp

\textsuperscript{580} Ibid.
\textsuperscript{581} Kiobel v Royal Dutch Petroleum Co, 621 F (3d) 111, 21 (2d Cir 2010), petition for cert. filed, No 10-1491 (U.S. 6 June 2011).
responsible shareholders resolutions post human rights impact assessment study released by consultants On Common Grounds). These shareholders should however be distinguished from ethical shareholders. While both seek to influence a companies’ business activities to ensure that external factors (e.g. environmental impacts, public opinion) do not affect their financial returns, the ethical shareholders also care about these factors for moral reasons. For corporations, as discussed above, the way these external factors are taken into account affects their reputation, which may lead to a better access to capital (i.e. through CSR programs).

284. Shareholders’ eligibility to vote may influence decision-making of corporations, and both federal and some provincial Business Corporation acts provide that all directors shall act in the best interests of the enterprise.

285. Under the Canada Business Corporation Act (CBCA), the Unanimous Shareholders Agreement (USA) allows shareholders to have a greater role in the company, by restricting “the powers of directors to manage, or supervise the management of, the business and affairs of the corporation.” To be valid, it must include all shareholders.

286. As for the minority shareholders, their holdings restrict their influence on the governance of a corporation. For example, as outlined in CBCA, in order to submit proposals at the annual meetings, a shareholder is required to hold at least 1% of total shares, or to have a value of shares of $2000 or more. Although the minority shareholders who are eligible to vote may propose “to make, amend, or repeal a by-law” and request the directors to summon a meeting, they have less resources than controlling shareholders to express their opinions.

287. Similar limitations to minority shareholders’ influence are outlined in the recent case of Goldcorp and the Marlin mine. In 2008, upon request of a group of shareholders, Goldcorp initiated a Human Rights Assessment (HRA) of the Marlin mine, which is

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585 Among others, an adoption of amalgamation agreement or any major decision may require shareholders approval. See eg, Ontario Business Corporation Act, RSO 1990, c B-16, s 182 and 184(3).
586 See eg, Canada Business Corporation Act, RSC 1985, c C-44, s 122(1); and Ontario Business Corporation Act, RSO 1990, c B-16, s 134(1).
587 See eg, Canada Business Corporation Act, RSC 1985, c C-44, s 146.
588 Canada Business Corporation Act, RSC 1985, c C-44, s 146.
590 Canada Business Corporation Act, RSC 1985, c C-44, s 102(5).
591 Canada Business Corporation Act, RSC 1985, c C-44, s 143(1).
592 Sarra, supra note 589 at 70.
located in Guatemala. The final report, issued in May 2010, identified several human rights violations and recommended immediate suspension. Two minority shareholders’ concerns have also led to a resolution asking Goldcorp to suspend its activities at the mine, on account of “damages to credibility and business reputation” of the company. After a vote at the annual meeting on 18 May 2011, 94% of the shareholders rejected the proposal.

288. In 2007, a complaint has also been filed to the Inter-American Commission on Human Rights by the affected communities. Although the Commission called on the government of Guatemala to suspend the activities at the Marlin mine, the demand was eventually withdrawn in 2011.

289. Pertaining to responsible mining, Barrick Gold recently established a new CSR Advisory Board that will provide advice on several issues, including human rights. Barrick announced that John Ruggie had been appointed as a Special Consultant to the Board. It is, however, too early to evaluate the real impact of this recent initiative.


598 Ibid.
**RECOMMENDATIONS**

According to former Canadian Supreme Court Justice Ian Binnie, while the global economic system is thriving, the global legal system remains dysfunctional. Instead of debating on the creation of international organizations, he calls for States to create forums for victims of human rights abuses committed by multinational corporations within domestic jurisdictions. The recommendations put forward by the CIDDHU follow such advice and are influenced by the Ruggie Guiding Principles.

The following recommendations refer to the problems and shortcomings identified in this memorandum.

1. In accordance with the Guiding Principles, DPLF could request that Canada take “appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses.” Such steps should include:
   a. Enacting extra-territorial laws that would directly allow for victims of human rights abuses committed by Canadian companies abroad to seek remedy before Canadian courts.
   b. Widening the range of human rights violations encompassed in extra-territorial criminal legislation already in place such as the *Crime Against Humanity and War Crimes Act* to include all human rights protected by Canadian laws and treaties.

2. DPLF could call upon Canada to respect its duty to protect by enforcing “laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights.” Such laws could include:
   a. National standards for stock market regulators with regards to human rights, creating binding human rights obligations for companies listed in Canadian stock markets, whether their activities are conducted abroad or in Canada. For instance, periodical reports and human rights assessments before the listing of a company should be demanded.
   b. Legislative measures that ensure that domestic human rights standards are applied to projects conducted abroad by Canadian companies.

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599 Cristin Schmitz, “Binnie calls for corporate accountability” (29 August 2009), *The Lawyers Weekly.*
600 *Guiding Principles, supra* note 401, Principle no 26 at 23.
601 *Ibid,* Principle no 3a) at 8.
3. The CIDDHU recommends that DPLF request from Canada to improve the effectiveness of its non-judicial grievance mechanisms, in concordance with all seven criteria enumerated in the Guiding Principles.\(^\text{602}\)

   a. Canada should therefore either strengthen the effectiveness of the Office of the Corporate Social Responsibility Counsellor, or create a new independent ombudsman. For instance, the Office of the CSR Counsellor should be more accessible, independent and should ensure that « aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms. »\(^\text{603}\) Its mandate should also enable the Counsellor to identify patterns and causes of grievance in order to prevent future harms and take binding measures against Canadian corporations involved in human rights violations.

   b. Canada should widen its interpretation of the OECD Guidelines, by following the good practices of other National Contact Points, such as the NCPs of the UK and the Netherlands.

4. DPLF should request Canada to take “additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the state, or that receive substantial support and services from State agencies,”\(^\text{604}\) by requiring clear regulations and human rights due diligence.

   a. In this perspective, Canada should commit that Export Development Canada, the Canadian International Development Agency, the Department of Foreign Affairs and International Trade, the Canadian Pension Plan Investment Board and other state agencies offer financial or diplomatic support to corporations only if the latter respond to international human rights standards.

   b. Canada should implement a monitoring mechanism mandated to ensure that the state agencies comply with the requirements, particularly by enforcing transparency.

5. Since offer appropriate and effective remedies are not available to victims within the current Canadian legal framework, DPFL and other partners are encouraged to continue using alternate domestic and international forums to seek justice for victims of human right violations committed abroad by Canadian mining companies.

\(^{602}\) Ibid, Principle no 31 at 26.
\(^{603}\) Ibid, Principle no 31d) at 26.
\(^{604}\) Ibid, Principle no 4 at 9.
Legislative Framework and Accountability Mechanisms
Canadian Mining Operations Abroad