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Concerns with regard to the mandate and review procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada

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Summary: The Office of the Corporate Social Responsibility (CSR) Counsellor's mandate from the Government of Canada and its review process are similar to those of the Canadian National Contact Point for the OECD Guidelines and replicate many of the shortcomings of that voluntary non-judicial grievance mechanism.

If an individual or organization seeks the office of a Canadian institution to facilitate a voluntary dialogue about a complaint against a Canadian mining company, we advise using the OECD National Contact Point (NCP) for the following reasons:

- The Canadian NCP is part of a larger international network of NCPs (some of which are much better than Canada's and can serve as models).
- The legitimacy of the NCP is international, rather than tied to Canada alone, or to a particular government, as is the case for the CSR Counsellor, which was created in 2009 with an initial three year mandate.
- Canada's NCP review process is deeply flawed. But unlike the CSR Counsellor's review process, it is subject to international review of the OECD Guidelines and the NCP review process; such a review is currently underway.
- The NCP process directly involves a number of Canadian government departments exposing civil servants in these departments to the issues of the Request for Review, and to criticism of the way the Canadian Government handles the complaint, if necessary. The CSR Counsellor, while appointed by the Government of Canada and reporting to the Minister of Trade, does not involve civil servants in her review process.

Specific Concerns regarding the CSR Counsellor's process:¹

¹ The information in this brief is mainly based on the CSR Counsellor's *Order in Council* mandate and *Rules of Procedure*. The *Order in Council* mandate is the CSR Counsellor's instructions from the Government of Canada.

The CSR Counsellor's review process is entirely focused on resolving disputes concerning Canadian extractive companies - which are not too "trivial" and not too serious² - through voluntary dialogue.

1. Participation in the review process is voluntary

- The company can refuse to participate and can withdraw at any time (as can the person or community who requests the review). The CSR Counsellor can also end the process at any time.
- If the parties to a Request for Review decide they want to progress from "informal mediation" and dialogue ("trust building") to more "structured dialogue" or to seek "formal mediation" to resolve a dispute, they must create and sign a letter of intent providing formal consent to carry on - but they can still withdraw at any time.³

2. The Guidelines for extractive companies are weak on human rights

- The Government of Canada advises Canadian Extractive companies to meet the following "Guidelines": International Finance Corporation Performance Standards; Voluntary Principles on Security and Human Rights; Global Reporting Initiative; OECD Guidelines for Multinational Enterprises;
- These Guidelines are weak on human rights and the CSR Counsellor is not allowed to "apply standards other than the performance guidelines" mentioned above.⁴

3. The CSR Counsellor will not determine whether a company has harmed a person or community or breached the Government of Canada's Guidelines for extractive companies.⁵

- Although Requests for Review to the CSR Counsellor need to be based both on a perceived harm by an individual, group, or community that believes it has been "adversely affected," *and* on a breach of the Guidelines (see 2) -- the CSR Counsellor's instructions from the Government of Canada do not allow the Counsellor to determine whether a company has harmed anyone or breached the guidelines.

4. The CSR Counsellor will not investigate the complaint in a Request for Review.

- The CSR Counsellor will not conduct an investigation to determine the validity of a complaint. The CSR Counsellor, an independent third party, or the parties to the Request for Review, may conduct limited "fact-finding" if it will help to resolve the dispute.⁶

This document can be found in *Building a Review Process for the Canadian International Extractive Sector: A Backgrounder*. P. 27-30. http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/building%20a%20review%20process%20backgrounder%20FINAL%20June%202010.pdf

See also *Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor*. October 20, 2010. http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/Rules%20of%20procedure%20FINAL.pdf

² The CSR Counsellor does not provide guidance as to what is too "trivial" or too serious. In personal communication with MiningWatch Canada the CSR Counsellor has indicated that cases that could be of a criminal nature would be too serious.

³ *Rules of Procedure*

⁴ Order in Council mandate

⁵ Review Process Brochure. http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/info%20brochure%20Nov1.pdf

⁶ *Ibid*. There is no clear guidance provided but from communications with the CSR Counsellor it is clear that "fact-finding" will be limited to specific issues, if this may help the parties come to an agreement, rather than to establish whether the complaints are valid.

5. The CSR Counsellor will not make binding recommendations.⁷

- Because the process is voluntary, the CSR Counsellor cannot require that a company do anything, even with respect to adhering to the Guidelines.

6. The CSR Counsellor will not make policy or legislative recommendations to the Government of Canada.⁸

- The CSR Counsellor has no authority to make any policy or regulatory recommendations to the Government of Canada based on the findings of the review process.

7. The CSR Counsellor is not independent from the Government of Canada

- The CSR Counsellor was appointed by the Government of Canada, reports directly to the Minister of Trade, and has to follow the Order in Council mandate (instructions) from the Government of Canada. Before publishing a report on the results of a specific review process the CSR Counsellor must submit the report to the Ministers of Trade, Natural Resources and, possibly, International Cooperation. The Minister of Trade may require the CSR Counsellor to carry out further study. It is up to the discretion of the Minister if the results of this additional study are published or not.⁹

Additionally:

- This Review Process only applies in the following cases: The activity or issue about which the petitioner is requesting review must have taken place after 19 October 2009.
- The petitioner must have tried to resolve the issue before making a Request for Review. For example by engaging the company or trying a local grievance mechanism.
- The petitioner has not previously submitted a Request for Review on the same issue. If so, the petitioner will need to provide new information for consideration.
- A Request for Review cannot be made anonymously (the petitioner's name can be kept confidential upon request).
- A Request for Review cannot relate solely to the OECD Guidelines for Multinational Enterprises (if it does, it will be sent to the National Contact Point in Canada).
- The activity or issue the petitioner is requesting review of must not be "trivial"¹⁰ nor too serious.
- A Request for Review must be based on more than media reports or unverified third party reporting.
- The petitioner must act within a "reasonable"¹¹ period of time after becoming aware of the issue.

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⁷ Order in Council Mandate

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ This term is not defined by the CSR Counsellor. From, *Review Process Brochure*.

http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/info%20brochure%20Nov1.pdf

¹¹ This term is not defined by the CSR Counsellor.