



MiningWatch Canada

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March 31, 2011

Office of the Extractive Sector CSR Counsellor
Suite 5110
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Canada

RE: Response to CSR Counsellor on MiningWatch Canada's Brief on the CSR Counsellor's Review Process¹

Dear Ms. Evans,

Thank you for your letter of March 28, 2011. This response provides clarification where your letter indicates this is necessary and engages some of the fundamental issues you raise.

Following completion of the CSR Counsellor's Review Process in October of 2010, MiningWatch Canada prepared a brief on the Review Process in direct response to requests from our northern and southern partners who were increasingly asking for our opinion on the completed Review Process and on the differences between the CSR Counsellor and the National Contact Point (NCP). These questions are not surprising given that Canada now has two Government of Canada initiated non-judicial grievance mechanisms. The differences between the NCP and the CSR Counsellor mechanisms and the differing roles they might play were a frequent topic of conversation at the public hearings your office conducted (certainly at those I attended) and the relationship between the two offices is now captured in a formal MOU. In carefully considering the requests for information MiningWatch received, following the completion of your office's Review Process, we arrived at the analysis to which you have responded.²

Lack of access to justice

An important topic that you raise in your letter of March 28, 2011, is the question of "access to remedy for communities, groups and individuals adversely affected by the activities of Canadian mining, oil and gas companies." You refer to the work of UN Special Representative for Business and Human Rights,

¹ Concerns with Regard to the Mandate and Review Procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada. March 22, 2011. <http://www.miningwatch.ca/en/concerns-with-regard-mandate-and-review-procedure-office-corporate-social-responsibility-counsellor->

² Concerns with Regard to the Mandate and Review Procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada. March 22, 2011. <http://www.miningwatch.ca/en/concerns-with-regard-mandate-and-review-procedure-office-corporate-social-responsibility-counsellor->

John Ruggie.³ But of course, in his 2008 Framework document, Ruggie recognizes the current “permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation” (p. 3) – note Ruggie highlights both *sanctioning* and reparation. What Ruggie points to is a basic lack of access to justice. This is not remedied by non-judicial grievance mechanisms, such as your office’s Review Process.

In your letter you refer to the fact that “mediation exists alongside the courts” in Canada. That is fine, as Canadians can choose to have access to the courts, if that is the route most suited to their grievances. It is exactly that access to justice that Ruggie and others have recognized is lacking for too many citizens around the world “regardless of the merits of the claim.”⁴ This problem is not solved by the proliferation of non-judicial grievance mechanisms at the project level or at national and international levels, anymore than a proliferation of voluntary codes and standards eliminates the need for effective regulation. The Government of Canada and other national and international bodies need to dedicate far greater focus and effort to the urgent task of providing access to judicial remedy through courts.

Non-Judicial Grievance mechanisms: Some NCPs start to raise the bar

In our brief on the CSR Counsellor’s review process we made it clear that we find both the Canadian NCP and the CSR Counsellor’s Request for Review processes flawed. We welcome this opportunity to expand on one of the reasons for this assessment. 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 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.

In our brief on the CSR Counsellor’s review process, we advised that **if** an individual or community wishes to avail of one of Canada’s two government-initiated non-judicial grievance mechanisms, we would advise they use the NCP process. We list several reasons for this advice,⁵ which I will not reiterate here. We welcome this opportunity to expand on one of the reasons for our preference for the NCP: The Canadian NCP is part of a larger international network of NCPs, some of which are making progress on important issues and can serve as models.

In our communications with partners we have learned that important aspects of any grievance mechanism are an investigation of the complaint and a determination of fact about whether or not a norm, law, or standard was breached.⁶ Neither the CSR Counsellor nor the Canadian NCP currently carries out investigations or makes determinations of a breach of guidelines. However, NCPs from other countries are breaking new ground in carrying out investigations and in making determinations of fact, which may have important consequences for host state support for the companies in question. In the Vedanta case, for example, the UK NCP’s recommendation about a bauxite mine in Orissa, India, was subsequently acted upon by the Indian Ministry of the Environment. In the case of Intex Resources ASA, the Norwegian NCP recently engaged an independent expert to conduct fact-finding through a

³ Ruggie, John. 2008. Protect, Respect and Remedy Framework.

⁴ Ruggie, John. 2011. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” P. 23.

⁵ Concerns with Regard to the Mandate and Review Procedure of the Office of the Corporate Social Responsibility Counsellor for the Government of Canada. March 22, 2011. <http://www.miningwatch.ca/en/concerns-with-regard-mandate-and-review-procedure-office-corporate-social-responsibility-counsellor->

⁶ These important provisions existed as a recommendation in the 2007 CSR Roundtable report, which would have created an Ombudsman’s office.

field visit to the proposed Mindoro Nickel project site in the Philippines to establish a factual basis for the case. And on February 22, 2011, the UK NCP made a determination of fact with respect to BP's operations in Turkey in finding that the company's activities "were not in accordance with Chapter V paragraph 2(b) of the Guidelines." These examples provide positive direction for Canada's National Contact Point.

We welcome constructive dialogue on these important issues. We will post your March 28, 2011 letter to MiningWatch our web site, as you requested, along with this response. If you plan to post your letter to MiningWatch on your web site we would appreciate it if you would also post this response.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Coumans", with a horizontal line underneath.

Catherine Coumans