Extraterritorial Obligations and Private Actors

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On behalf of MiningWatch Canada, I would like to thank the ESCR Unit, the Due Process of Law Foundation, and ESCR-Net for inviting us to participate in this consultation. Our key message today is that it is vital that the ESCR Unit include in its scope of work the systemic economic, social, and cultural rights violations of Indigenous, campesino, and other affected communities related to the impacts and expansion of extractive industries in the Americas and the shared responsibility borne by corporate actors, as well as home and host states.

Although it is important to consider the full range of extractive industries, my comments will focus on Canada's role in the globalized metal mining industry, given Canada's role in financing, promoting, and protecting this industry's interests throughout the region. With more than 60% of the world's publicly-traded mining companies on Canadian stock exchanges – some 1,600 at last count[1] – including the bulk of the world's exploration firms, it is not unusual for a Canadian company to be the first corporate actor that a community encounters in the early stages of a mining project. Canadian mining companies alone hold an estimated 8,200 projects around the world: over half of these in Canada, and almost 1,500 in Latin America.[2] Within Canada, there are serious fiscal and structural issues, and human and Indigenous rights violations related to this industry, but for today I will focus on the global operations of Canadian mining companies and Canada's obligations to rein them in.

In addition to the favourable terms for financing in Canada, the Canadian government plays an important role – using diplomacy, aid, and trade policy – to ensure privileged conditions for private sector investment in mining in Latin America, including having invested in mining law reforms in countries such as Colombia,[3] Honduras,[4] and now Haiti,[5] that ensure corporate interests prevail over local livelihoods, water sources, and community health and security.

Starting in the late 1980s, structural adjustment measures promoted by the World Bank and International Monetary Fund, enthusastically supported by the governments of industrialized countries, especially Canada, opened much of the region to foreign investment in the mining sector and instituted reforms to privilege corporate interests over the visions of development and the self-determination of diverse peoples of the region.[6] But the pressure to further tilt the rules in favour of corporations has continued as commodity prices fall.[7] Lopsided rules are being further locked in through powerful provisions granted to private corporations through diverse trade and investment pacts. Meanwhile, repression of communities and even whole peoples who contest their legitimacy and their legality has intensified.[8]

The affected territories in the region are huge. In Mexico, for example, some 27,000 mining concessions have been granted over an estimated 20% of the country.[9] Similarly, in Peru, over 20% of national

territory has been granted in mining concessions,[10] affecting over 50% of Andean campesino communities.[11] Furthermore, large-scale mining sectors are being forced open in countries that previously engaged very little in industrial mining activities, such as Guatemala and Ecuador, with devastating results in ecologically and culturally sensitive areas.[12]

In this context, and given the massive destruction associated with modern-day hard rock mining,[13] it should come as no surprise that the negative impacts on the economic, social, and cultural rights of affected communities are many and serious.[14]

I would like to highlight just a few examples.

1. ESCR violations related to actions taken by the Canadian state to promote and protect large-scale mining activities

The Canadian government has intervened at both the policy and the project level to guarantee the interests of mining companies at the expense of economic, cultural, and social rights of affected peoples.

At the policy level, for example, mere months after the military-backed coup that ousted President Zelaya of Honduras in June 2009, the Canadian government applied diplomatic pressure and invested overseas development aid funds, and made promises of a new free trade pact with the Honduran government, in order to achieve a new mining law.[15] A moratorium on new mining concessions and projects had previously been put in place pending a new mining law, in response to widespread opposition to open-pit mining stemming from environmental contamination and public health concerns arising from Goldcorp's San Martín project in the Siria Valley of Honduras.[16] At the time of the coup, a new mining law was ready for debate, that proposed to ban open-pit mining, prohibit the use of certain toxics in mineral processing, and make prior community consultation binding on government decisions on mining projects. The coup disposed with that bill and, in collaboration with local elite interests, the Canadian government successfully lobbied for the reopening of the large-scale mining sector. A law was passed in January 2013 that failed to include any of the previously-proposed protections for collective rights.[17] Over this period, Honduras also became the most dangerous country in the hemisphere in which to defend land and the environment.[18]

The Canadian government has also regularly intervened on behalf of Canadian mining companies in order to guarantee their interests at the project level, despite considerable knowledge of community complaints over diverse rights violations.[19] Most recently, documents from the Canadian Embassy in Mexico, obtained through an access to information request, revealed that the Embassy came to the rescue of Excellon Resources' La Platosa project in Durango despite official complaints that unionized mine workers and the local agricultural community, the Ejido La Sierrita, had presented to Canadian officials. These complaints documented health and safety problems in the mine and the violation of workers' right to freely organize, as well as the company's failure to fulfill provisions in its contract with the commmunity pertaining to environmental protection and economic opportunities.[20] Despite detailed knowledge of the case, the Canadian Embassy helped the company avoid redressing the violated land use contract and poor working conditions, and was supportive of repression against a peaceful protest.[21]

2. ESCR violations related to Canadian-financed or registered companies

The international operations of Canadian mining companies have a direct impact on economic, social, and cultural rights of affected communities, as detailed by the Polaris Institute and the Canadian Network on Corporate Accountability – of which MiningWatch Canada is a member – in its submission to the ESCR Unit.[22] This submission provides numerous examples of abuses of the right to work and freely organize, the right to a healthy environment, the right to health and livelihood, Indigenous rights and cultural rights,

as well as the civil and political rights of those defending economic, social, and cultural rights. It is clear form our work that these examples are not isolated cases, but are broadly reresentative. With additional time and resources to investigate, many more cases could readily be documented.

To highlight just one example, the British Columbia-registered and Toronto Stock Exchange-listed company Tahoe Resources is implicated in violations of the right to self-determination, the right to live in a safe environment, and the civil and political rights of people defending their economic, social, and cultural rights in southeastern Guatemala. The insecurity that has been created by the presence of this company's operations in the area could also be viewed as seriously affecting the right to health within these communities.

Before Tahoe's Escobal mine went into operation in 2014, over 50,000 community members in the area voted against mining in multiple municipal and community-level plebiscites. The company and national government both flatly disregarded these local decisions, despite constitutional court findings affirming their legitimacy and importance to municipal decision making.[23]Additionally, in 2012-13, as the company awaited the final permits required to begin production, the Guatemalan government deployed 8,500 military and police personnel to the four municipalities surrounding the mine site and declared the area under a state of siege. The government issued at least 18 arrest warrants for individuals allegedly involved in delinquent acts, and a dozen others had their homes raided by police and military forces.[24] During this time, there were more than 70 legal processes against individuals who had peacefully opposed the mine.[25] Militarization of the area continues.[26] Furthermore, after a mere two years of mine operations in this largely agricultural area, negative impacts on local water quality and quantity are already being felt.[27]

In parts of Latin America where governments or courts have adopted measures in response to community demands to protect ESC rights from mining abuses, notably in El Salvador and Costa Rica, mining companies are turning to the investment protection provisions of internaional trade and investment agreements to punish states for such decisions and put a chill on public policy making in the collective interest. Given this, such agreements need to be critically understood as a threat to ESC rights, including the right to live in a safe environment, the right to health and livelihood, and the dependence of such livelihoods on water sources and adequate land, as well as the right of all peoples to self-determination. They serve to lock in the structural adjustment framework that guided earlier mining reforms in much of the region and pose a serious obstacle to measures for protection of ESC rights.

In the case of El Salvador, OceanaGold is suing the state at the World Bank's International Center for the Settlement of Investment Disputes (ICSID) for US$301 million for not granting it a permit to build a gold mine, despite not having met regulatory requirements. The original proponent, Pacific Rim Mining, launched the suit in 2009 after the first of three successive Salvadoran Presidents committed to not approve any new mining projects, given broad-based concerns in the country over the potential impacts of proposed mining activities on agricultural activities and already over-taxed water supplies. OceanaGold purchased Pacific Rim Mining in 2013, narrowly saving it from bankruptcy, and has stubbornly continued with the case.[28] Even if the company loses, it has already cost the state of El Salvador over US$13 million to fight this case, money that surely could have been better used for education, health or other programs – in other words, to improve the State's fulfillment of its ESCR obligations.

Extraterritorial Obligations of Home States

Given all of this, it is vitally important that the ESCR Unit consider the role of corporate actors in the extractive sector, and the obligations of their home and host states to first and foremost prevent further harms and to protect the individual and collective rights of Indigenous, campesino, Afro-descendant and other affected communities. In particular, we hope the ESCR Unit will consider the measures that home

states like Canada should take both to prevent and to address harms and to ensure that both corporate and state agents are held accountable, including through effective judicial and non-judicial means.

In so doing, the ESCR Unit would build on the concerns recently raised by the Commission. In November 2014, following thematic hearings at which the MiningWatch Canada presented on behalf of the Canadian Network on Corporate Accountability, the Commission urged states to "adopt measures to prevent the multiple human rights violations that can result from the implementation of development projects, both in countries in which the projects are located as well as in the corporations' home countries, such as Canada."[29] In this, the Commission joined various UN bodies, numerous affected communities and civil society groups around the world, as well as Canadian parliamentarians and Canadian civil society groups who are calling on the Canadian government to take such measures.

The report that the CNCA submitted to the IACHR at the hearing in 2014 provides further detail about the specific UN bodies that have urged Canada to take action since 2002.[30] It also describes efforts within Canada to urge such change since 2005, starting with the recommendations of the Canadian House of Commons Standing Committee on Foreign Affairs and International Trade. This committee expressed concern that "Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of [I]ndigenous peoples." The committee called for "clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies."[31] This is very much still the case.

In fact, Canada has rightfully been called a fiscal and judicial paradise for the globalized mining industry.[32] The Canadian government has fallen back time and again arguing that voluntary mechanisms suffice to address rampant human rights violations in connection with Canadian mining operations, even though they provide no avenue for independent investigation of abuses, let alone sanction or remedy. Listing on the Toronto stock exchanges is notoriously easy, and complaints mechanisms are tremendously weak and non-transparent. Canada also lacks legal and administrative mechanisms to ensure that state agencies that support corporations operate in a way that is consistent with the state's Indigenous and human rights commitments. Canada has also been the worst performer compared to other G7 countries for most of the last decade with regard to the implementation of anti-bribery measures. And while some attempts are being made to bring civil suits against Canadian mining companies within Canadian courts for harms they have caused or been negligent in allowing, no such lawsuit has yet reached a settlement or verdict.

Without expanding further on the sorts of recommendations that the ESCR Unit could make and that have been laid out previously in the CNCA's submissions,[33] as well as through processes such as the Permanent Peoples' Tribunal that took place in Montreal in May 2014,[34] we hope that you will take the time to look in further detail at these issues and help bring pressure to bear on the Canadian government to fulfill its obligations in this regard through new measures to fulfill its extraterritorial obligations, as well as by putting an end to the extensive and unconditional support that Canada currently lavishes on mining corporations, all too often at the expense of the economic, social, and cultural rights of affected communities.

Thank you for your time and attention to these important problems.

Endnotes

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