

Regulating Canadian mining companies abroad:

The 10-year search for a solution

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Canada prides itself on being a mining superpower, home to an estimated 75% of the world's mining and exploration companies and an important centre of mining finance. While the majority of Canadian firms operate responsibly abroad, a small but significant number of companies are accused of environmental and human rights abuses each year, often in developing countries where the government is weak or corrupt. In such cases, the company can act with impunity, confident that neither the host government nor its home government will impose sanctions. When non-governmental organizations focus on these abuses and publicize the plight of the victims, it damages not just the reputation of the company involved, but also that of other Canadian firms and Canada itself.

The argument over how to close the governance gap between the global reach of corporations and the limited reach of national law is at least a decade old. Mining firms, which are participating in an increasing number of voluntary initiatives aimed at encouraging responsible behaviour, are vehemently opposed to mandatory regulations on grounds that this would harm their competitive position. The Canadian government is receptive to these concerns and loath to extend its legal reach for fear of

At a glance...

- *The federal government has struggled for 10 years to come up with a mechanism to ensure that all Canadian mining companies respect and support economic, environmental and social human rights in their operations abroad.*
- *Having rejected a hard-won consensus between mining companies and their critics on a workable accountability framework, the government has come forward with an inadequate response that still leaves people in developing countries vulnerable to abuse without redress, allows responsible companies to be tarred along with the guilty, and tarnishes Canada's image abroad.*
- *While Canada has basically stood still for a decade, much research and thinking has been done internationally, especially by John Ruggie, the UN special representative on business and human rights. The government should use his detailed suggestions for business, expected in 2011, as the foundation for a more useful and comprehensive policy.*

violating the sovereignty of host governments. It is focusing much of its effort on building institutional capacity in developing countries so they can better govern their extractive sectors. Yet as critics of this policy point out, while increased capacity might help in the long term, in the short and medium term it leaves victims of abuse without access to remedy, legal or otherwise, if a corporation is unwilling to engage.

Policy change is needed. Canada's current approach, with its narrow domestic focus, leaves civilians in developing countries vulnerable to abuse, allows responsible companies to be tarred along with the guilty, and damages Canada's image abroad. It is also out of step with an emerging international consensus that in matters of human rights, states have a duty to protect against abuses, including those by third parties such as business, corporations have a duty to respect human rights, and victims have the right to access effective remedy.

The debate over how home governments can ensure that their mining companies operate responsibly abroad is not like the climate change debate, where the federal government argues that Canada is such a small player that its actions will not influence the outcome. In the global mining sector, Canada is lagging in an area where it should lead.

How we got here

It's been 10 years since the federal government began to grapple with the question of how best to regulate the behaviour of Canadian mining firms abroad. At that time the then-Liberal government struggled with a response to allegations that Talisman Energy of Calgary was complicit in human rights abuses in Sudan.¹ The government quickly realized the tools at its disposal were inadequate and the debate began about what new tools were needed. Then, as now, those pressing for stronger laws argued that voluntary self-regulation by mining firms was not enough to hold firms accountable

¹ A lawsuit filed against Talisman by Sudanese plaintiffs under the U.S. Alien Tort Claims Act was dismissed in 2006 on grounds that the plaintiffs did not prove the company was purposely complicit in human rights abuses.

for environmental and social abuses abroad. Then, as now, mining firms argued that mandatory laws would be difficult to comply with and would place them at a competitive disadvantage vis-à-vis their global peers. Then, as now, the government fretted about infringing the sovereignty of foreign governments. There is dissatisfaction on all sides that the question remains unresolved.

The lack of progress is not for want of trying. There was a brief moment in 2007 when common ground was found. Acting on a June 2005 report from the Standing Committee on Foreign Affairs and International Trade, the then-Liberal government asked an advisory group drawn from industry, labour, non-governmental organizations, academe and the legal profession to conduct national consultations and produce a consensus report. The recommendations in that report, delivered in March 2007 to the Conservative government, represented a hard-won compromise. Among other things, the report recommended the government develop standards and a reporting mechanism for companies on their economic, environmental and social performance abroad, set up an independent ombudsman to advise Canadian firms and to investigate complaints against them, and establish a tripartite review committee to follow up on the ombudsman's findings and determine an appropriate response. In cases of serious and continuing non-compliance, the report recommended that government support be withdrawn from the offending company.

Had the government accepted the compromise position worked out between industry and civil society groups, the debate may well have ended there. But the government response, when it came in March 2009, rejected the idea of Canadian standards, an independent ombudsman, a tripartite review committee, or any threat of withdrawing of government support. Instead it set up a new counselor, answerable to the minister of international trade, to advise companies and to investigate complaints if all parties to the complaint agreed. The government accepted some of the consensus recommendations, including that it help host governments build institutional

capacity to oversee their extractive sectors, and it joined the Extractive Industries Transparency Initiative, which puts the onus on host governments to be more transparent about resource revenues. However, by ignoring the main provisions of the consensus report, the government rekindled the decade-old debate and eroded support in the mining community for the compromise position.

This opened the door to attempts by opposition members to change government policy by way of a private member's bill. The most recent, Bill C-300 was, at the time of writing, being examined by the the renamed Standing Committee on Foreign Affairs and International Development. Bill C-300 bumps the complaint review up to the ministerial level, instead of leaving it with a counselor answerable to the minister of trade. The bill calls on the ministers of foreign affairs and of trade to set out guidelines for economic, environmental and social performance of Canadian firms operating abroad, to accept and investigate complaints that firms have contravened these guidelines, and to withdraw consular support, funding by Export Development Canada and investment by the Canadian Pension Plan Investment Board when a company is found in non-compliance.

Bill C-300 is not as comprehensive as the 2007 consensus report.² Nor does it command the same broad support. Yet critics of the current government policy have rallied to support it, perhaps because although it is a long shot, it is the only means on offer to tighten Canadian oversight of mining companies abroad. At best it addresses one part of a problem that requires a more comprehensive response. It does not, for example, deal with the question of access to remedy for victims, who should after all be at the heart of any proposed solution. Supreme Court Justice Ian Binnie, among others, has recommended that Canadian law be changed so that companies can be sued in our courts for alleged complicity in human rights violations abroad. This is currently not possible in Canada, which

² A private member's bill cannot propose spending public funds, unless it is accompanied by a royal recommendation, which can only come from the government. This limits the types of measures that a private member can propose.

is why plaintiffs have turned to the United States and brought suits under the Alien Tort Claims Act. Opening this door to legal redress could well have a salutary effect on the conduct of irresponsible corporations that are currently able to act with impunity.

What's happening elsewhere

It would be folly to decide on a policy course for Canada without considering what actions, if any, have been taken by multilateral institutions and organizations and by other governments grappling with this issue. Somewhat surprisingly, given the global nature of the mining industry and the broad range of international actors, the parliamentary committee hearings into Bill C-300 have touched only superficially on this important aspect.

In making the case for maintaining the status quo, representatives of the mining industry have pointed to their participation in global and domestic initiatives. A bewildering number of these initiatives have been set up or updated in the last 10 years and more are on the way. Some, such as the UN Global Compact, involve principles that businesses subscribe to directly. Some, like the OECD guidelines for multinational enterprises, are adhered to by governments who agree to promote their use by business. Others, such as the Extractive Industries Transparency Initiative and the Voluntary Principles for Security and Human Rights, are open to both business and government participation. The International Financial Corporation, the financing arm of the World Bank, applies Performance Standards on Social and Environmental Sustainability to financing applications. These are currently being reviewed and will be used in future as part of the Equator Principles, initially created in 2002 for financial institutions. There is also the Global Reporting Initiative, which has developed principles and indicators that business can use to measure and report on economic, environmental and social performance. It has recently harmonized its work with the UN Global Compact. The International Standards Association plans to bring out ISO 26000, an international standard providing guidelines for social responsibility in 2010.

The parliamentary committee has not delved too deeply into Canadian adherence to these initiatives or indeed whether they are effective. The UN Global Compact, which is frequently cited, has 5,200 business participants, but only 45 of those are Canadian and only 12 are oil, gas or mining companies. Given that Canada is home to an estimated 7,000 companies involved in some aspect of the mining sector, this represents a very low level of participation in an industry at the centre of this debate.

Critics of the current government policy note that all of these international initiatives are voluntary, that sanctions, if they exist at all, are minimal, and none provides victims with access to legal remedy. All that is true. Yet these voluntary initiatives should not be dismissed out of hand. They have had the positive effect of raising awareness in the mining sector of the importance of human rights. And some, like the Global Reporting Initiative, which shows companies how to measure and report on environmental and social performance, could be incorporated into a mandatory regime. Regulation in other spheres, such as the environment, followed a similar trajectory from voluntary to mandatory.

No national government has blazed a policy trail that Canada might follow. However, Denmark now requires large companies and institutional investors to report annually on their social and environmental policies and how they have implemented them. If they do not have such policies, they are required to report that as well. In contrast to Canada, the Danish government believes that stronger regulation in this area would give its firms a competitive advantage. The British government has implemented similar statutory requirements for businesses listed on the stock exchange. Neither can be construed as the final answer to the problem of regulating the overseas activities of mining companies. But making such disclosure mandatory rather than voluntary increases transparency, a necessary component of accountability. Securities law in Canada, largely harmonized across 13 separate jurisdictions, calls for some disclosure of corporate social and environmental policies, but contains loopholes that

can be easily exploited by those unwilling to give a full accounting of their policies and performance.

The work at the international level that holds the most promise for providing a policy map that Canada might follow is that of John Ruggie, the UN secretary general's special representative on business and human rights. Mr. Ruggie was appointed in 2005 to break an impasse between business and civil society groups over the best way to hold companies legally accountable for their impact on human rights. Civil society was supporting a text called the Draft Norms on Transnational Corporations and Other Business Enterprises that would have, if it had been accepted, imposed on businesses the same duties that states have to protect human rights. Business was strongly opposed. In his 2008 report, written after extensive consultations with companies, governments and non-governmental organizations, Mr. Ruggie came up with a proposed framework that clarified the rights and responsibilities of all parties. States have a duty to protect human rights, business is obliged to respect human rights, and victims have a right to access remedy. Having won broad support for the framework, he is now working on translating it into practical guidance that states, businesses, and other social actors can use and is road testing some of his ideas in pilot projects.

The scope of Mr. Ruggie's work goes well beyond the steps contemplated in Bill C-300 and involves issues particularly relevant to Canada such as the extraterritorial implication of national laws, how securities law can be used to promote human rights, the question of business complicity in human rights abuses, and the responsibilities of companies operating in conflict zones. Mr. Ruggie, whose work has been supported by Canada, may not provide all the answers when he delivers his report, now expected in 2011. But given the breadth and depth of his research, the Canadian government would be wise to await his findings before tackling policy change in this area. The added advantage of waiting to see his proposals is that they may attract the support of other governments with significant mining sectors, such as the U.S., Australia, and Great Britain. Canada will likely make

more headway with the formidable mining lobby if it is acting in concert with other governments. Joint action would also be more appealing to mining firms fearful of being put at a competitive disadvantage if Canada acts alone.

This suggestion will no doubt disappoint those groups and individuals who see the many glaring inadequacies in the current Canadian approach. Yet there is little use in pushing for partial change now when a more comprehensive template may be just around the corner. There is of course the possibility that Mr. Ruggie will disappoint and that his proposed solutions will not be workable or attract sufficient support. Even if that happens, his research will still provide a more complete picture of the issues at stake and possible solutions than what is available now. Critics of the current policy should put their efforts into winning a commitment from the federal government that it will ask parliament to review Mr. Ruggie's final report and recommendations and report publicly on how they might be implemented in Canada.

Conclusion

The federal government has struggled for a decade with how to hold mining firms accountable for their actions overseas. So far its attempts have proved inadequate. No one gains from the current state of affairs except irresponsible companies that violate human rights abroad. A change of course is required. The policy debate in Canada has deteriorated since the government rejected consensus recommendations worked out by the mining industry and its critics in 2007. However, the work being done at an international

level by the special representative for the UN secretary general on business and human rights may provide workable options to break this impasse. The federal government should commit now to asking parliament to review the final report due in 2011 and report on how it might be implemented in Canada. Maintaining the status quo beyond 2011 is a poor option. Doing nothing leaves people in developing countries vulnerable to abuse, allows responsible companies to be tarred along with the guilty, and damages Canada's image abroad. 

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