

Analysis: A New Scheme For Canadian Corporate Responsibility Operating Abroad

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By: James Hendry

The federal government has announced the creation of a Canadian Ombudsperson for Responsible Enterprise to carry out its international obligations and to ensure that Canadian companies operating abroad act responsibly in the communities in which they operate. This article will look at the government's description of the new office it will create as well as the current mechanisms aimed at this goal.

Introduction

There have been articles in this Journal about foreign nationals attempting to seek redress in Canadian courts for alleged injury to their human rights by Canadian companies and their subsidiaries abroad. These actions have raised issues of law, including the choice of a Canadian forum for events abroad and the application of international law as a source of domestic liability.[1] The courts have allowed the actions to proceed in Canadian courts when applications were brought at the preliminary stage to stop them.

A majority of the world's largest extractive enterprises operating abroad are Canadian.

Canadian Ombudsperson for Responsible Enterprise

On January 17, 2018, the federal government announced that it is going to establish a new Canadian Ombudsperson for Responsible Enterprise (CORE) to fulfill its international obligations and to ensure compliance by Canadian businesses operating abroad. The new scheme will increase the effectiveness of government regulation of Canadian companies' human rights issues, by supporting responsible operations and increasing the likelihood of remedy for abuses. The government claims that the Ombudsperson will be the first of its kind in the world.[2] The government is selling the scheme as good for people and good for business.

The government says[3] that CORE:

- Will be given the power to address, with or without complaint, what might be human rights abuse by Canadian companies operating abroad
- Will establish and publish Standard Operating Procedures
- May carry out independent or collaborative fact-finding and will have power to compel witnesses and documents, including the power to recommend to the government the withdrawal of certain governmental services such as trade advocacy and future Export Development Canada support where they are not produced
- In a public Final Report,
    - Make recommendations to a company where it is found in the wrong, such as to compensate, to apologise, to cease specific activities, to mitigate harms or to make company policy changes
    - Make recommendations to the government in such cases, including the withdrawal of certain governmental services such as trade advocacy and future Export Development Canada support
- Monitor the carrying out of the recommendations
- Report criminal activities to the police
- Report publicly throughout the process, from investigation to monitoring recommendations
- Make Annual Reports to Parliament through the Minister of International Trade
- Will be guided by international norms: UN Guiding Principles on Business and Human Rights[4] and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines)[5]
- Will have a legislative mandate by Order in Council
- Will have the discretion to act independently
- Promote respect for human rights and responsible business conduct through the adoption of "best practices"
- Make recommendations to the government on fulfilling human rights obligations through laws and practices for conducting business abroad
- Will not affect any rights to bring matters to Canadian courts
- Will act across industry sectors starting with garment and extractive industries.

The remedy provided by the CORE will be based on the publication of findings of human rights abuse and will rely on the desire of companies to avoid such adverse publicity and damage to its reputation,

as well as the indirect fiscal effects of the withdrawal of trade advocacy and possibly EDC funding.

The Advisory Body on Responsible Business Conduct

The government also says that it will establish an Advisory Body on Responsible Business Conduct reporting to the Minister of International Trade. This Body will be made up of members from diverse backgrounds including civil society and industry. Its job will be to advise government on the development of law and policy on responsible business conduct. It will advise the Minister of International Trade on CORE's procedures and future direction, such as the expansion of the CORE's jurisdiction in other business sectors.

These initiatives will supplement the work of Canadian diplomatic missions' promotions of corporate responsibility abroad.

Reception of the CORE initiative

The move has been welcomed by NGOs interested in human rights.[6] Business organizations have been supportive, especially because other industries besides the extractive sector are included in the new scheme and the Advisory Committee was among their recommendations.[7] Business remains concerned about the practicality of extraterritorial investigations that might involve local authorities and become tied up with local police investigations.[8] Labour has also been hopeful that this process will provide investigations of workers' complaints.[9]

National Contact Point

The CORE will complement Canada's "National Contact Point" (NCP) established under the OECD Guidelines. The NCP is an inter-departmental body that promotes awareness of the OECD Guidelines which provide voluntary principles and standards for global responsible business conduct recommended to multi-nationals by the 48 OECD and non-OECD States Party to the Declaration on International Investment and Multinational Enterprises.[10]

Any individual, organization or group may file a formal request for review of an enterprise's actions when they believe the actions are not consistent with the OECD Guidelines.[11] The company is notified. The NCP then makes a preliminary assessment using OECD criteria to decide if the request merits further examination. If it does, then NCP offers voluntary facilitated dialogue or mediation to the parties and the parties may accept or not. The process may lead to agreement. Parties are expected to act in good faith. If they do not, their actions may be reported in the final statement and Canadian companies not acting in good faith or refusing to participate may be deprived of trade advocacy abroad or may affect Export Development Canada financing. The NCP will end the process for serious acts in bad faith such as breach of confidentiality or threats. The NCP is supposed to be transparent in its process, but there may be matters such as the identity of the individuals or sensitive business information, and the on-going proceedings themselves, that are kept confidential. The NCP is to publish a final statement on requests on its website and with the OECD within a targeted 12 months. The NCP may also publish follow-up statement on the implementation of any agreement or its

recommendations to the parties.

The new Advisory Board will advise the NCP on outreach.

Corporate Social Responsibility

Through a program to be folded into CORE,[12] the government promotes Corporate Social Responsibility (CSR) through a policy aimed at encouraging voluntary and co-operative efforts by companies and other organizations to promote responsible social and environmental operations abroad, including human rights.[13]

The government has a CSR strategy specifically for the extractive industry.[14] The Office of the Extractive Sector CSR Counsellor:

- Develops and promotes strong CSR guidelines for companies operating abroad and engage in other activities with the goal of preventing harmful impacts of business initiatives in host countries
- May assist company-community conflict resolution by trying to prevent or resolve conflict in local communities either by itself through an early non-judicial review process or by encouraging requests to the NCP, especially where formal mediation is required. The CSR counsellor reviews CSR practices of Canadian extractive companies operating abroad. The CSR's Office Review Process may be initiated by affected individuals or communities or by the companies and aims at bringing them together to resolve differences.

Companies are subject to withdrawal of economic support in foreign markets for companies refusing to implement CSR best practices or dispute resolution processes. The refusal of complainant or company to participate in the review process will be made public.

The CSR Counsellor has received only six complaints and none were resolved.[15]

A private member's bill entitled "An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries" was tabled in the House of Commons as Bill C-584 on March 31, 2014, but was defeated on October 1, 2014.[16] The Bill would have continued the Office of the Extractive Sector Corporate Social Responsibility Counsellor as an Ombudsman to ensure Canadian extractive companies operating abroad complied with international environmental and human rights standards. The Ombudsman would issue Guidelines[17] and use many of the powers to be given to CORE to enforce them.[18]

Conclusion

By setting up the CORE, the federal government has taken a step forward in dealing with potential human rights abuse by Canadian enterprises abroad. Advocates are pleased and industry appears supportive. It remains to be seen whether CORE provides a mechanism for anticipating, preventing and resolving human rights disputes. It will apparently have the same economic sanctions as the CSR

and NCP to enforce compliance. The power to provide public guidance to industry and to publicly report on defaults during the enforcement process and afterwards will no doubt create a strong incentive to engage in the process and to see a problem remedied.

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References

1. See James Hendry, “Potential Corporate Liability in Transnational Law Redux” (2017) 1 PKI Global Just J 19, Pearl Eliadis, “*Forum non Conveniens* and Liability for Alleged Human Rights Violations: The *Nevsun Resources Ltd. Case*” (2017) 1 PKI Global Just J 4; James Hendry, “Potential Corporate Liability in Transnational Law” (2017) 1 PKI Global Just J 6; Irit Weiser, “Thoughts on a Customary International Law Tort and the Canadian Legal System” (2017) 1 PKI Global Just J 17.
2. “The Government of Canada brings leadership to responsible business conduct abroad” see https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html and Backgrounder, “Advancing Canada’s Approach on Responsible Business Conduct Abroad” see https://www.canada.ca/en/global-affairs/news/2018/01/advancing_canadasapproachonresponsiblebusinessconductabroad.html and Q&As at http://www.international.gc.ca/trade-agreements-accords-commerciaux/top….
3. Id.

4. At http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Article 25 requires States to take measures to ensure remedies for those suffering human rights abuse within their territory and or jurisdiction. The commentary says that State-based grievance mechanisms through which grievances can be raised and remedies sought may include ombudsperson offices.
5. At http://www.oecd.org/daf/inv/mne/48004323.pdf.
6. Amnesty International, “At Last, Communities Impacted by Canadian Corporations Overseas will be Heard: Government Creates Human Rights Watchdog”, see https://www.amnesty.ca/news/last-communities-impacted-canadian-corporat… noting the agreement of Canadian Network on Corporate Accountability (CNCA).
7. The head officer of the Mining Association of Canada, Pierre Gratton see http://www.globeinvestor.com/servlet/ArticleNews/story/GAM/20180117/RBN….
8. Id.
9. Id. reporting on the remarks of the president of the Canadian Labour Congress, Hassan Yussuff.
10. At http://www.oecd.org/daf/inv/investment-policy/oecddeclarationoninternat….
11. Procedural flowchart at http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/flowchart-organigramme.aspx?lang=eng. See also generally, “Canada’s National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises” at http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp…;
12. Q&A note 2.
13. See “Corporate Social Responsibility” at http://www.international.gc.ca/trade-agreements-accords-commerciaux/top….
14. “Canada’s Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad” at http://www.international.gc.ca/trade-agreements-accords-commerciaux/top….
15. https://www.thestar.com/news/canada/2018/01/17/ottawa-creates-office-to….
16. See http://www.parl.ca/Content/Bills/412/Private/C-584/C-584_1/C-584_1.PDF.
17. Id. s. 10.
18. Id. s. 7.