

ANNEX 7

CANADIAN EXTRACTIVE SECTOR'S CORPORATE SOCIAL RESPONSIBILITY COUNSELLOR

INTRODUCTION

A standardised assessment framework, based on the UNGP, was used for this assessment (see Annex 2). It draws on information made publicly available by the Canadian Government and the Canadian Office of the Extractive Sector's Corporate Social Responsibility Counsellor (CSRC) through their websites, and a survey sent to CSOs (see Annex 3). One CSO has shared its experiences with the CSRC through the survey.

MECHANISM AT A GLANCE

The CSRC was created in 2009 as part of a Government strategy to address the environmental and social impacts of the Canadian extractive sector abroad. Its focus is strictly on the extractive activities of Canadian oil, gas and mining companies operating outside of Canada. It is a Government entity not affiliated with any development finance institution, and therefore is an anomaly compared to the other mechanisms covered by this report. It is included here because the CSRC has participated in the IAMs Network.

The CSRC offers problem-solving only but, according to the CSRC's Participant Guide, it does not offer formal mediation.¹ The CSRC has undergone some recent changes with the appointment of a new Counsellor in March 2015 and an update of its mandate. However, the new mandate is not yet publicly available. Similarly, the only available Rules of Procedure (RoP) for the CSRC are no longer valid.² Thus, the experiences described by users in this section relate to the previous mandate and rules.

TABLE 1: CSRC/GOC CASE ATTRITION

TOTAL COMPLETED CASES	FOUND ELIGIBLE	REACHED SUBSTANTIVE PHASE	ACHIEVED RESULTS
6	6	2	0

TABLE 2: CSRC/GOC PERFORMANCE INDICATORS

	RESEARCH PERIOD	TOTAL
CASES FILED	0	6 ³
CASES CLOSED WITHOUT REACHING SUBSTANTIVE PHASE ⁴	0	4
CASES ACHIEVING RESULTS	0	0

KEY FINDINGS AND RECOMMENDATIONS

The failure of the CSRC to facilitate a successful agreement in any of its six cases demonstrates the need for significant reform to the system. Measures can be taken to make it easier for complainants to find the mechanism, but they will be meaningless until the CSRC can demonstrate that it is effective. The CSRC must immediately publish its new mandate and initiate a review of its RoP. The Government must empower the CSRC to undertake compliance reviews and require the use of third party mediators in its problem-solving services.

Table 3 on the next page contains the recommendations derived from the UNGP assessment that follows. The recommendations describe the reforms needed to the policy and practice of each actor, the IAM and the Government. It should be noted, however, that the power to implement some of these recommendations regarding the IAM rests with the Government.

UNGP ASSESSMENT

LEGITIMACY

IAM: Because the Counsellor is considered a Governor-in-Council appointee of the Government,⁵ s/he is bound to the Government's Conflict of Interest Act,⁶ amongst others, which prohibits the Counsellor from being a Director or Officer in a corporation during his/her term.⁷ As a result, s/he cannot accept employment with any entity she or he had significant official dealings with during one year immediately before his/her last day in office.⁸ However, the Conflict of Interest Act does not have any requirements regarding employment prior to entering office. An Advisory Panel was established in 2010 to provide the Office with strategic advice and input from experts in the field. However, their terms expired in 2013 and it appears that they were not replaced.⁹

In practice, CSO experience with early cases did not generate confidence in the CSRC.

TABLE 3: RECOMMENDATIONS DERIVED FROM UNGP ASSESSMENT

	CSRC	GOVERNMENT OF CANADA
LEGITIMACY	<ul style="list-style-type: none"> Develop guidelines regarding previous employment of the Counsellor that ensures his/her impartiality. Appoint new members to the Advisory Panel. 	<ul style="list-style-type: none"> Immediately publish the new mandate for the CSRC. Empower the CSRC to undertake compliance reviews. Include external stakeholders in the selection process for the Counsellor.
ACCESSIBILITY	<ul style="list-style-type: none"> Allow complainants to file in languages other than English or French. 	<ul style="list-style-type: none"> Make the website accessible in more languages. The CSR Strategy should encourage Canadian extractive companies to disclose the availability of the CSRC to project-affected people.
PREDICTABILITY	<ul style="list-style-type: none"> Undertake, as a matter of priority, a review of the Rules of Procedure. Meet established deadlines. Monitor the implementation of any agreements reached through problem-solving. 	<ul style="list-style-type: none"> The Government should apply consequences not only to companies that refuse to engage in dialogue, but also those that refuse to implement agreements reached.

	CSRC	GOVERNMENT OF CANADA
EQUITABILITY	<ul style="list-style-type: none"> Allow complainants to review draft reports. Allow complainants to have representation in the dialogue process. Use third-party mediators to ensure a fair process. 	<ul style="list-style-type: none"> Provide sufficient budget to the Counsellor to ensure that the office can provide the services necessary for complainants to meaningfully participate in the process, including, for example, covering the costs of translation.
TRANSPARENCY	<ul style="list-style-type: none"> Update and publish more information on the website. 	<ul style="list-style-type: none"> Publish the list of companies that receive Government support.
RIGHTS COMPATIBILITY	<ul style="list-style-type: none"> Develop robust procedures to prevent and address reprisals against complainants. 	<ul style="list-style-type: none"> Empower the CSRC to undertake compliance reviews and withdraw Government support when companies are found to be acting in a manner inconsistent with the Guidelines. Develop protocols to address retaliation against complainants.
LESSONS LEARNED	<ul style="list-style-type: none"> Review of the Rules of Procedures should include an opportunity for public comment. Analyze and document lessons learned from cases. 	<ul style="list-style-type: none"> Create procedures to learn from the CSRC's cases.

They found the CSRC's previous mandate inadequate because, among other reasons, the Counsellor could not undertake compliance reviews. Thus, when a company refused to participate in problem-solving, the complaint was closed. A new mandate is due to be published, though at the time of writing, no information was available about it.

GOVERNMENT: In March 2015, more than a year after the last Counsellor vacated the office, a new Counsellor was appointed, although he did not formally assume the position until mid-May 2015. A press release announcing the appointment of the new Counsellor states that he was selected *"after public competition"*.¹⁰ In his review comments to a draft of this report, the Counsellor clarified that the search for a new Counsellor was initiated at the time the enhanced CSR strategy was released and that the vacancy was posted along with a long list of criteria and preferred qualifications for the position.¹¹ No CSOs were seemingly involved in his selection. The newly appointed Counsellor has a history of working for mining companies, which has led some CSOs to question his impartiality.¹²

ACCESSIBILITY

IAM: The CSR Counsellor was promoted in Canada through meetings with stakeholders, and around the world through the Canadian Embassies. The Counsellor also provides online complaint templates. However, the fact that the CSRC has only received six complaints may indicate either that the mechanism is not that well known, that there are barriers to filing complaints, or that it is not trusted. A major impediment in filing a complaint is the fact that all complaints must be written in English or French.¹³ Given that many mining projects are located in regions where English and French are not the official languages (Latin America, for example), the CSRC's language requirement may create a barrier for project-affected communities and individuals to access the CSRC.

Users report that the Counsellor was not forthcoming in answering questions or providing advice on their cases. This is perhaps because it is CSRC's policy that, *"in order to maintain neutrality"*, it cannot *"walk the complainant step-by-step through the development of a request"*.¹⁴ At the time of writing, the link to the 'Contact Us' page on the CSRC's website, to which visitors are directed should they have questions about filing a complaint, is broken.¹⁵

GOVERNMENT: The problems with the Counsellor's accessibility are also related to the Government's website. The Counsellor's webpages can be found within three clicks of the homepage of Ministry of Foreign Affairs, Trade and Development.¹⁶ Nonetheless, the website is only accessible in English and French, making it difficult for potential complainants who are not fluent in those languages to know they can file a complaint. Furthermore, there seems to be no requirement for Canadian businesses to disclose the availability of the Counsellor to those affected by their operations. This further diminishes accessibility.

PREDICTABILITY

IAM: The Counsellor's RoP¹⁷ and the Counsellor's Participant Guide¹⁸ set deadlines for every step in the process, though it is unclear whether these rules are still in force. The RoP state that they are only valid until October 2012, and updated Rules could not be located. In practice, users report that the Counsellor often fails to meet these deadlines. It also appears that the Counsellor does not have the mandate to monitor the implementation of any agreements made through problem-solving. Without updated RoP, new complainants will have little information about what to expect from the complaints process.

GOVERNMENT: The new 2014 CSR Strategy states that *"the Government will introduce consequences for companies that are not willing to participate in the dialogue facilitation processes"*, including the complaint process of the CSRC.¹⁹ Since none of the Counsellor's cases have resulted in a successful dispute resolution, this new policy will, hopefully, provide Canadian companies in the extractive sector with the necessary incentive to engage in the CSRC process and improve the CSRC's results. However, the Strategy says nothing about the consequences for failure to implement agreements made during problem-solving or the underlying violation of relevant standards.

EQUITABILITY

IAM: The CSRC's procedures do not take any steps to overcome the potential power imbalance that exists between the complainants and the company. The Office does not provide third party mediators, who can help ensure that the process is fair and constructive, in its problem-solving initiatives.²⁰ The parties may, however, choose to hire their own mediator. Although complainants may be aided in their complaint by other parties, such as CSOs, they do not have the right to representation. The RoP, which may no longer be valid, do not explicitly give complainants the opportunity to review and comment on the Counsellor's draft reports.²¹

GOVERNMENT: There is no information available on the Counsellor's budget to verify whether the government provides enough resources to allow the mechanism to effectively handle complaints and ensure that complainants can meaningfully participate in the process. Users believe that, at least in one case, there were not sufficient resources available to provide translation for an indigenous complainant, resulting in the case being closed.

TRANSPARENCY

IAM: The CSRC maintains an online complaint registry with case summaries.²² However, the website needs considerable improvement. A lot of information is missing or outdated, such as the Rules of Procedure. During the complaint process, the CSRC may be overly transparent. It cautions against sending any confidential information to the Office.

Instead, the CSRC asks that complaints only contain publicly available information.²³ That could potentially be problematic for complainants if the information necessary to make their case must be kept confidential for security purposes.

GOVERNMENT: Unlike the other institutions assessed in this report, complaints may be filed to the CSRC against any company regardless of whether it has received financing from the Canadian Government. However, it is useful for complainants to know if the Government is providing support because that may make it more likely that the company would participate in a dialogue, as refusal to do so may result in the withdrawal of Government support, per the new 2014 CSR Strategy.

Export Development Canada (EDC) publishes some limited information about the companies it supports (and maintains an office that can receive complaints from external stakeholders about those companies).²⁴ Other than the EDC, it may be difficult for complainants to know whether the company at issue is receiving support from the Government.

RIGHTS COMPATIBILITY

IAM: Although the CSR Counsellor is intended to promote policies that reflect human rights standards, it never makes a determination about compliance with those standards, rather it can only provide problem-solving services. As none of the CSRC cases has led to a successful agreement, it cannot be said that the process is leading to rights-compatible outcomes. Another important aspect of rights compatibility is protecting the identities of the complainants, should they fear retaliation. The Office will keep the identities of complainants confidential, if requested, but its preference is to disclose the complainants' identities to the other party.²⁵ Allowing complainants to have representation would allow the dialogue to take place without placing complainants in jeopardy. As it is often the company that the complainants fear will take retaliatory action, the CSRC's policy does not demonstrate an understanding of the concerns involved.

GOVERNMENT: The policies the CSRC promotes, identified in the Government's 2014 CSR Strategy, reflect internationally recognised human rights standards: the UN Guiding Principles on Business and Human Rights, IFC's Performance Standards, the Voluntary Principles on Security and Human Rights, the Global Reporting Initiative, and the OECD Guidelines for Multinational Enterprises.²⁶ According to that Strategy, support from the Canadian Government is dependent on the company's commitment to and implementation of these standards.²⁷ In theory then, the Strategy should ensure that the Canadian Government does not offer support to companies that do not respect human rights. In practice, though, there is no compliance mechanism. Neither the CSRC nor the Canadian National Contact Point for the OECD Guidelines undertakes an assessment to determine whether companies comply with these standards in their operations.

LESSONS LEARNED

IAM: Reviewing a Mechanism's procedures allows it to seek feedback from users and improve its practices. The CSRC's RoP were supposed to have been reviewed in 2012.²⁸ However, as mentioned above, this review appears not to have taken place. There are no guidelines for how such a review would be undertaken, including whether there would be an opportunity for public comment. In practice, users report that the Counsellor does not improve its policies and practice to reflect lessons from previous cases. The CSRC lacks the mandate to identify trends across cases, which would help facilitate lessons learned for the sector and the Canadian Government.

GOVERNMENT: There was a general review of the Government's entire CSR Strategy, which included the Counsellor. This new Strategy was published in 2014.²⁹ Feedback was accepted in written form from anyone who wished to provide it, and sought in oral form on an individual basis. Although many CSOs have criticised the CSRC's limited mandate and effectiveness, the Strategy did not adopt any measures to improve them.

NOTES

- 1 Office of the Extractive Sector Corporate Soc. Responsibility (CSR) Counsellor, The Review Process Participant Guide II (2011), at 24 available at http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/participant_guide-eng.pdf (“The involvement of a third party mediator may sometimes support the parties to resolve their dispute. The Office does not conduct formal mediation. The Office will help the parties understand the pros and cons of entering into formal mediation. The Office is unable to provide funding for formal mediation.”).
- 2 The webpage with the Rules of Procedure notes they are valid until October 2012: http://www.international.gc.ca/csr_counsellor-conseiller_rse/rules_procedure-regles_procedure.aspx?lang=eng [hereinafter CSR Rules of Procedure].
- 3 This number may differ from the ‘total completed cases’ in the previous table, because it includes all cases filed, including cases that are currently active and have not yet closed or entered monitoring.
- 4 This row includes cases that were not registered, were found ineligible or were closed after being found eligible, but before reaching a substantive phase.
- 5 Foreign Affairs, Trade and Dev. Can., *Who We Are*, http://www.international.gc.ca/csr_counsellor-conseiller_rse/who-we-are_qui-nous-sommes.aspx?lang=eng.
- 6 Conflict of Interest Act, S.C. 2006, c. 9, s. 2 (2006) (Can.) <http://laws-lois.justice.gc.ca/PDF/C-36.65.pdf>.
- 7 *Id.* at 8.
- 8 *Id.* at 19.
- 9 Foreign Affairs, Trade and Dev. Can., Advisory Panel, http://www.international.gc.ca/csr_counsellor-conseiller_rse/Advisory_Panel-Groupe_consultatif.aspx?lang=eng on.
- 10 Foreign Affairs, Trade and Dev. Can., *Appointment of Canada’s Extractive Sector Corporate Social Responsibility Counsellor*, <http://www.international.gc.ca/media/comm/news-communiques/2015/03/01a.aspx?lang=eng>.
- 11 Government of Canada’s Office of the Extractive Sector CSR Counsellor comments to draft report, received October 15 2015.
- 12 Mining Watch Can., *New Federal CSR Counsellor an “Industry Man”-Weak Mandate Remains* (Mar. 3, 2015), <http://www.miningwatch.ca/news/new-federal-csr-counsellor-industry-man-weak-mandate-remains>.
- 13 Foreign Affairs, Trade and Dev. Can., *Submitting a Request for Review*, http://www.international.gc.ca/csr_counsellor-conseiller_rse/Submitting_a_Request_for_Review-Soumettre_une_demande_examen.aspx?lang=eng.
- 14 The Review Process Participant Guide, *supra* note 1, at p. II.
- 15 Foreign Affairs, Trade and Dev. Can., *Submitting a Request for Review*, http://www.international.gc.ca/csr_counsellor-conseiller_rse/Submitting_a_Request_for_Review-Soumettre_une_demande_examen.aspx?lang=eng.
- 16 Foreign Affairs, Trade and Dev. Can., *Welcome to the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor*, http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?lang=eng.
- 17 Foreign Affairs, Trade and Dev. Can., *Rules of Procedure for the Review Mechanism of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor*, http://www.international.gc.ca/csr_counsellor-conseiller_rse/rules_procedure-regles_procedure.aspx?lang=eng [hereinafter CSR Rules of Procedure].
- 18 The Review Process Participant Guide, *supra* note 1.
- 19 Foreign Affairs, Trade and Dev. Can., *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad II* (2014) [hereinafter *Doing Business the Canadian Way*], available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf.
- 20 The Review Process Participant Guide, *supra* note 1, at 24 (“The involvement of a third party mediator may sometimes support the parties to resolve their dispute. The Office does not conduct formal mediation. The Office will help the parties understand the pros and cons of entering into formal mediation. The Office is unable to provide funding for formal mediation.”).
- 21 CSR Rules of Procedure, *supra* note 2.
- 22 Foreign Affairs, Trade and Dev. Can., *Registry of Requests for Review*, http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?lang=eng.
- 23 The Review Process Participant Guide, *supra* note 1, at 8.
- 24 Export Dev. Can., *Reporting on Transactions*, <http://www.edc.ca/EN/About-Us/Disclosure/Reporting-on-Transactions/Pages/default.aspx>.
- 25 The Review Process Participant Guide, *supra* note 1, at 8.
- 26 *Doing Business the Canadian Way*, *supra* note 19, at 6.
- 27 *Id.* at 13.
- 28 CSR Rules of Procedure, *supra* note 2.
- 29 *Doing Business the Canadian Way*, *supra* note 19.