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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON BUSINESS AND HUMAN RIGHTS: FROM SOFT TO HARD LAW

Developments in Canada on business and human rights: One step forward two steps back

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Abstract

Unlike its European counterparts, Canada appears to remain firmly entrenched in a soft approach to ensuring that Canadian extractive companies respect human rights abroad. Canada's powerful extractive industry has been very successful in resisting attempts to introduce hard law measures to regulate their transnational conduct. This article considers business and state motivations for supporting or pursuing the shift to hard law measures in the business and human rights context. It assesses Canada's 2022 policy on responsible business conduct and the implications of the government's failure to endow the Canadian Ombudsperson for Responsible Enterprise with the necessary powers to engage in credible independent investigations of transnational business conduct. It also considers the potential impact of three leading cases brought in Canadian courts against Canadian extractive companies in relation to their overseas operations. The article argues that these developments may not yet be sufficient on their own to shift extractive sector views on the introduction of domestic human rights due diligence legislation. It concludes with some thoughts on the impact that the legislative developments in Europe and treaty negotiations at the United Nations may have in Canada.

Keywords: Canada; Canadian Ombudsperson for Responsible Enterprise; extractive industry; human rights due diligence legislation; *Nevsun v. Araya*

1. Introduction

The efficacy of soft and hard forms of regulation in preventing and addressing transnational business activity that implicates human rights has been the subject of significant debate for decades.[1] Until recently, soft 'regulation' of business conduct was the global norm in the business and

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[1]P. Simons and A. Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (2014), 3.

human rights context.[2] Soft multi-stakeholder and inter-governmental initiatives were developed due to the lack of international and domestic law regulating the human rights impacts of corporate activity.[3] These initiatives have not proven to be effective on their own in ensuring that companies do not violate human rights and that victims of such violations have access to an effective remedy.[4]

Developments at both the international and domestic level signal a recognition by some states that hard law measures are necessary to complement these soft law initiatives and to ensure that states meet their international obligations to protect human rights by requiring companies to take steps to prevent and address their human rights impacts and to provide effective remedies for victims of corporate-related human rights violations. At the United Nations, an Open-Ended Intergovernmental Working Group of the Human Rights Council (HRC) is engaged in the negotiation of a treaty on business and human rights (BHR).[5] At the domestic level, a number of European states, including France[6] and Germany,[7] are at the vanguard of introducing legislation requiring corporations to undertake human rights due diligence (HRDD).[8] Additionally the European Union has taken steps towards the development of European level regulation on mandatory human rights due diligence and corporate accountability.[9] In February 2022, the European Commission released a proposal for a European directive[10] which is now proceeding through the European parliamentary process.[11]

Despite the growing number of jurisdictions in Europe that are introducing some form of HRDD legislation, soft forms of regulation still dominate the majority of state approaches to regulating business activity, and in particular transnational business activity. Business pushback

[2]S. Deva, 'Business and Human Rights: Alternative Approaches to Transnational Regulation', (2021) 17 *Annual Review of Law and Science* 139, at 140; J. Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law', in S. Deva and D. Bilchiltz (eds.), *Human Rights Obligations of Business* (2013), 138, at 139.

[3]J. Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights', (2014) 30(78) *Utrecht Journal of International and European Law* 7, at 12; J. Schrempf-Stirling, 'State Power: Rethinking the Role of the State in Political Corporate Social Responsibility', (2018) 150 *Journal of Business Ethics* 1, at 3.

[4]See, e.g., Simons and Macklin, *supra* note 1, Ch. 3; D. Bradlow and D. Hunter, 'Hard and Soft International Law and Their Contribution to Social Change: The Lessons Learned', in D. Bradlow and D. Hunter (eds.), *Advocating Social Change through International Law* (2020), 282, at 294. See also the example of Germany which committed in its 2016 National Action Plan to consider regulatory measures if 50% of companies with over 500 employees did not voluntarily adopt human rights due diligence processes and procedures by 2020 (Germany, *National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016–2020* (2016), available at www.ohchr.org/Documents/Issues/Business/NationalPlans/NAP_Germany.pdf. This did not occur and the government passed regulation mandating such due diligence.

[5]OEIGWG, 'Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises', Third Revised Draft, 17 August 2021, available at www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf.

[6]Law No. 2017-3999 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074 du 28 Mars 2017 relating to the duty of care of parent companies and contractors, available at www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte.

[7]Business and Human Rights Resource Centre, 'German Parliament Passes Mandatory Human Rights Due Diligence Law', 11 June 2021, available at www.business-humanrights.org/en/latest-news/german-due-diligence-law/. But see the criticism of the legislation by Initiative Lieferkettengesetz, 'What the New Supply Chain Act Delivers – and What It Doesn't', 11 June 2021, available at www.lieferkettengesetz.de/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf.

[8]For a full list of laws and initiatives see ECCJ, 'Evidence for Mandatory Human Rights and Environmental Due Diligence Legislation', January 2021, available at www.corporatejustice.org/wp-content/uploads/2021/03/evidence-for-mhredd-january-2021-.pdf.

[9]See Committee on Legal Affairs, *Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability* (European Parliament 2020); see also European Coalition for Corporate Justice, 'Commissioner Reynders Announces EU Corporate Due Diligence Legislation', 30 April 2020, available at www.corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation.

[10]European Commission, 'Proposal for a Directive on Corporate Sustainability Due Diligence and Annex', 23 February 2022, available at www.ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en.

[11]European Parliament, 'Corporate Sustainability Due Diligence', 2022, available at www.europarl.europa.eu/RegData/etudes/BRIE/2022/729424/EPRS_BRI(2022)729424_EN.pdf.

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against the legalization of BHR regulatory initiatives has been a constant feature of the regime. This includes past attempts to develop a treaty,[12] the current treaty project,[13] as well as lobbying by business actors and industry associations at the domestic level which has had some success in weakening proposed domestic HRDD legislation.[14] However, two recent studies that surveyed business views with respect to EU wide regulation on human rights due diligence[15] and a proposed UK law that would impose a duty on companies to prevent human rights violations related to their activities and associated with their business relationships,[16] suggest that a growing number of businesses support this type of regulation.

In Canada, the extractive sector has been very successful at preventing the introduction of hard law measures to regulate its overseas conduct that may violate human rights. Canadian extractive companies have been in the global spotlight since 1998. At that time, Talisman Energy Ltd. was implicated in the grave human rights violations being perpetrated by the Sudanese military and other militia in the course of protecting the oil development and infrastructure in what is now South Sudan.[17] The public outcry about Talisman's engagement in Sudan marked the beginning of calls from a variety of stakeholders for Canadian government action to regulate the conduct of Canadian extractive companies operating abroad, to ensure corporate accountability, and to provide effective remedies for victims of corporate-related human rights violations. Since then, there has been an increasing number of cases filed against extractive companies in Canadian courts,[18] calls to establish some form of legal oversight and remedial mechanisms from Canadian parliamentary committees,[19] United Nations treaty bodies,[20] and civil society actors,[21] hearings on this

[12]See, e.g., Deva, *supra* note 2, at 146.

[13]S. Deva, 'Treaty Tantrums: Past, Present and Future of a Business and Human Rights Treaty', (2022) 40(3) *Netherlands Quarterly of Human Rights* 211, at 217.

[14]See D. Kinderman, 'Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance?', (2016) 35 *Policy and Society* 29. With respect to the impact of such lobbying on the German HRDD legislation see the International Federation for Human Rights, 'Germany: Call for an Improvement of the Supply Chain Due Diligence Act', 15 November 2021, available at www.fidh.org/en/issues/globalisation-human-rights/germany-call-for-an-improvement-of-the-supply-chain-due-diligence-act.

[15]European Commission, *Study on Due Diligence Requirements Through the Supply Chain* (2020), available at op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[16]Pietropaoli, et al., *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms* (2020), available at www.biicl.org/publications/a-uk-failure-to-prevent-mechanism-for-corporate-human-rights-harms.

[17]Secretary General, Situation of Human Rights in the Sudan, UN Doc. A/54/467 (1999); see also J. Harker, *Human Security in Sudan: The Report of a Canadian Assessment Mission* (2000).

[18]See discussion in Section 4, *infra*.

[19]House of Commons, Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade: Mining in Developing Countries - Corporate Social Responsibility, 38th Parl., 1st Sess. (2005), available at www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14; Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, 'News Release: Statement by the Subcommittee on International Human Rights Concerning the Human Rights Situation of Uyghurs and Other Turkic Muslims in Xinjiang, China', 21 October 2020, available at www.ourcommons.ca/DocumentViewer/en/43-2/SDIR/news-release/10903199; House of Commons, Standing Committee on Foreign Affairs and International Development & Subcommittee on International Human Rights, Mandate of the Canadian Ombudsperson for Responsible Enterprise, 43rd Parl., 2nd Sess. (2021), at 33–8.

[20]See, e.g., UN Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Canada, UN Doc. CCPR/C/CAN/CO/6 (2015), para. 6; UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of Canada, UN Doc. E/C.12/CAN/CO/6 (2016), paras. 15–16; UN Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada, UN Doc. CEDAW/C/CAN/CO/8-9 (2016), para. 19. See also UN Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada, UN Doc. A/HRC/38/48/Add.1 (2018).

[21]See, for example, Canadian Network on Corporate Accountability, 'An Ombudsperson with Teeth', available at www.cnca-rcrce.ca/campaigns/ombuds-power2investigate/; and Canadian Network on Corporate Accountability, 'Human Rights and Environmental Due Diligence Legislation in Canada', available at www.cnca-rcrce.ca/campaigns/business-human-rights-legislation-hrdd/.

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issue before the Inter-American Human Rights Commission,[22] and the introduction of private members' bills.[23] To date, however, the Canadian government has taken only halting and inadequate steps towards establishing any form of effective oversight, accountability measures, or remedial mechanisms with regard to the behaviour of extractive companies operating abroad, preferring to rely on voluntary self-regulation.

In March 2022, a private member's bill on HRDD was tabled.[24] If enacted into law, it would impose a duty on companies to avoid causing adverse impacts abroad by entities within their corporate group and through their business relationships,[25] and impose liability for harm caused by a failure to comply with this duty.[26] It would require companies to develop and implement due diligence procedures, engage in ongoing HRDD[27] and report annually on their due diligence processes and the measures taken to identify, assess and mitigate risks of adverse human rights and environmental impacts.[28] It would also create a private cause of action for those who have suffered harm due to a failure of a company to meet its duty to prevent adverse impacts,[29] and a cause of action for certain persons to bring a claim against a company for failing to develop due diligence procedures.[30]

The prospects of this bill, or one like it, becoming law are limited without some support from powerful industries like the Canadian extractive sector. There are a variety of factors that can influence business, and therefore state, receptiveness to the development of hard law. These include regulatory developments in other countries and on the international plane,[31] but also internal developments that create legal uncertainty, and concern about remaining competitive at home, in domestic markets abroad and globally.

This article considers salient developments in Canada and their potential to contribute to consensus around the need for domestic hard law measures, such as mandatory HRDD coupled with effective remedies for victims of corporate-related human rights violations. It focuses on Canada's extractive sector. Canada hosts a majority of the world's largest mining and mining exploration companies as well as major oil and gas companies many of which operate in other states.[32]

[22]See, e.g., Inter-American Commission on Human Rights, 'Impact of Canadian Mining Activities on Human Rights In Latin America', *YouTube*, 28 October 2014, available at www.youtube.com/watch?v=OWYue8FP9ZY; Inter-American Commission on Human Rights, 'Corporations, Human Rights, and Prior Consultation in the Americas', *YouTube*, 17 March 2015, available at www.youtube.com/watch?v=DGvASYx_j5c; Inter-American Commission on Human Rights, 'Measures to Prevent Human Rights Violations by Canadian Extractive Industries that Operate in Latin America', *YouTube*, 7 December 2017, available at www.youtube.com/watch?v=JF8duVRV7-8&list=PL5QlapyOGhXt0BSFvgydHBu6yz2atqEN2&index=6.

[23]See, e.g., Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 40th Parl., 3rd Sess. (2010–2011).

[24]Bill C-262, An Act Respecting the Corporate Responsibility to Prevent, Address and Remedy Adverse Impacts on Human Rights Occurring in Relation to Business Activities Conducted Abroad, 44th Parl., 1st Sess., 2021 (first reading completed 29 March 2022). The bill is based on the Canadian Network on Corporate Accountability's model legislation. See CNCA, 'The Corporate Respect for Human Rights and the Environment Abroad Act', 31 May 2021, available at www.cnca-rcrce.ca/site/wp-content/uploads/2021/05/The-Corporate-Respect-for-Human-Rights-and-the-Environment-Abroad-Act-May-31-2021.pdf.

[25]See Bill C-262, ibid., s. 6.

[26]Ibid.

[27]Ibid., s. 7–8.

[28]Ibid., s. 9.

[29]Ibid., s. 10(1).

[30]Ibid., s. 10(2). Persons with standing to bring a claim under this subsection are: 'any person who raises a serious issue and is either directly affected by the matter or (a) has a genuine interest in the matter; (b) presents a reasonable means of advancing the proceeding; and (c) has no conflict of interest with regard to the outcome' (ibid., s. 10(3)). The bill would also provide a defence to companies that can demonstrate that they undertook effective due diligence to prevent the alleged harm (ibid., s. 13).

[31]See K. Parella, 'Hard and Soft Law Preferences in Business and Human Rights', (2020) 114 *AJIL Unbound* 168.

[32]In 2019, 67.5% of Canadian mining assets were located abroad in just under 100 states and totaled CAD$178 billion. See Natural Resources Canada, 'Minerals and the Economy', 3 February 2022, available at www.nrcan.gc.ca/our-natural-resources/minerals-mining/minerals-metals-facts/minerals-and-the-economy/20529.

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Canadian extractives rank very low in the Corporate Human Rights Benchmark[33] and continue to be implicated in violations of human rights, including environmental harm around the globe.[34] In addition, in Canada, much of the BHR discourse, the majority of campaigns and policy developments have focused on the regulation of the transnational conduct of Canadian extractives. Canada has international human rights obligations to take legislative and other measures to protect against human rights violations by private actors and to provide effective remedies.[35] In light of these obligations and the size, global reach, and harmful impacts of Canada's extractive industry, the steps Canada takes in this regard are a crucial international law issue.

Section 2 discusses business and state motivations for supporting or pursuing the shift to hard law measures in the BHR context. Section 3 critically assesses legal developments and Canada's policy on responsible business conduct. It examines the implications of the failure of the government to give the new Canadian Ombudsperson for Responsible Enterprise (CORE) the necessary powers to engage in independent and credible investigations of transnational extractive sector conduct. Section 4 considers the potential impact of three leading cases brought in Canadian courts against Canadian extractives in relation to their overseas operations and the potential of these cases to influence extractive company views about the introduction of domestic legislation. The article argues that these developments could begin to shift business views but may not yet be sufficient on their own to pave the way for consensus around the development of hard law in Canada. It concludes with some thoughts on the impact that the legislative developments in Europe may have in Canada.

2. Business and state support for hard law

At the international level both soft and hard law 'can be vehicles for focusing consensus on rules and principles, and for mobilizing a consistent, general response on the part of States'.[36] The same is true for transnational business actors.[37] The relationship between soft forms of regulation and hard law is complex and multilayered. Drawing a simplistic distinction between these two forms of

[33]The Corporate Human Rights Benchmark (CHRB) measures companies' governance and policies, the extent to which they embed respect for human rights and human rights due diligence processes, provide remedies and grievance mechanisms, human rights practices, responses to serious allegations, and transparency. See CHRB, 'Download Data', 2019, available at assets.worldbenchmarkingalliance.org/app/uploads/2021/03/CHRB2019KeyFindingsReport.pdf. The 2019 report rated 56 of the largest extractive companies. Barrick Gold, which has been the subject of significant scrutiny with respect to its operations in Papua New Guinea related to brutal gang rapes perpetrated by mine security forces and has introduced a human rights policy, received an overall score of 56.9 out of 100. Other companies including Canadian Natural Resources, Suncor Energy, Teck Resources scored 13, 20.7, and 35 respectively (ibid.).

[34]Human Rights Clinic (Columbia Law School) and International Human Rights Clinic (Harvard Law School), 'Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned', November 2015, available at hrp.law.harvard.edu/wp-content/uploads/2015/11/FINALBARRICK.pdf; E. McSheffrey, 'Canadian Petroleum Giant Accused of Environmental, Human Rights Abuses in Colombia', *National Observer*, 12 July 2016, available at www.nationalobserver.com/2016/07/12/news/canadian-petroleum-giant-accused-environmental-human-rights-abuses-colombia; Justice and Corporate Accountability Project, *The 'Canada Brand': Violence and Canadian Mining Companies in Latin America* (2017), available at www.justice-project.org/the-canada-brand-violence-and-canadian-mining-companies-in-latin-america/; C. Arsenault, 'Canada Not Walking the Talk on its Miners' Abuses Abroad, Campaigners Say', *Mongabay,* 24 July 2020, available at news.mongabay.com/2020/07/canada-not-walking-the-walk-on-its-miners-abuses-abroad-campaigners-say/; Rights Action, 'More Lawsuits Against Pan American Silver For Human Rights Violations In Guatemala Canadian Mining "Business-As-Usual"', 14 April 2021, available at www.rightsaction.org/emails/more-lawsuits-against-pan-american-silver-for-human-rights-violations-in-guatemala-canadian-mining-business-as-usual.

[35]These obligations are reflected, albeit inadequately, in the United Nations Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011).

[36]A. Boyle, 'Soft Law in International Law-Making', in S. Evans (ed.), *International Law* (2014), 119, at 122. See also Bradlow and Hunter, *supra* note 4, at 284–5.

[37]M. J. Durkee, 'Persuasion Treaties', (2013) 99 *Virginia Law Review* 64, at 126.

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governance can obfuscate 'the various ways in which hard law can productively interact with softer forms of corporate (self-) regulation in protecting human rights'.[38]

While soft law is not necessarily a precursor to hard law developments, it can help to pave the way for hard law measures at the domestic and international level.[39] This type of interaction has been referred to as process complementarity.[40] Soft law initiatives give businesses 'time to experiment with best practices' and 'an opportunity to learn new practices'.[41] Inter-governmental initiatives, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs)[42] or the OECD Guidelines for Multinational Enterprises (OECD Guidelines),[43] aimed at addressing corporate behaviour, can and have played a crucial role in 'developing consensus on norms, creating and/or heightening public expectations of behaviour' and, in some cases, leading 'to the development of internal corporate processes and procedures aimed at demonstrating compliance'.[44] A major contribution of the UNGPs is the development of the human rights due diligence standard. Mares notes that 'this standard is now accepted in international soft law',[45] and has been influential both in the development of domestic legislation and the BHR draft treaty, as well as with respect to business practices.

Parella argues that within the current complex and dynamic BHR regulatory environment, whether states and/or businesses support the development of hard law at the international and/or domestic level may depend on a number of factors. States may prefer the flexibility of soft law until their peers demonstrate a willingness to make hard law commitments. At the same time, they may also weigh the domestic political cost of moving to hard law.[46] Business actors may initially prefer the complete flexibility of voluntary self-regulation and push back against the introduction of regulatory measures. Kinderman conducted a study that examined business responses to the introduction of some of the early BHR legislation including non-financial reporting obligations in Europe, transparency and due diligence reporting for conflict minerals in the US, corporate philanthropy rules in India, Indonesia and Mauritius, and non-financial reporting in South Africa and the UK. He found that businesses strongly opposed the introduction of most of these initiatives and in many cases were successful in significantly weakening the legislation.[47] He also observed there was less opposition to legislative reform where the law gave significant flexibility, such as 'comply or explain' models or where the obligations imposed by the legislation were flexible, such as the 'UK Companies Act [that did] not challenge core capitalist prerogatives such as shareholder-value'.[48] Based on these findings, Kinderman concluded that '[w]here regulation and mandates are stringent, business resistance will be fierce. Where regulation and mandates are flexiblized [sic] to the point of being almost voluntary, business will be more supportive'.[49] Thus, any transition from 'voluntary private governance' measures to measures that have a mandatory (legally binding) aspect will likely be opposed by industry associations and businesses.[50]

[38]D. Augustein, 'Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union', (2018) 9(2) *Global Policy* 254, at 256.

[39]See Bradlow and Hunter, *supra* note 4, at 288.

[40]S. Deva, 'The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface', (2012) 6(2) *Business and Human Rights Journal*, 336, at 347.

[41]See Parella, *supra* note 31, at 169.

[42]See UNGPs, *supra* note 35.

[43]OECD, OECD Guidelines for Multinational Enterprises (2011).

[44]See Simons and Macklin, *supra* note 1, at 88.

[45]R. Mares, 'Regulating Transnational Corporations at the United Nations – The Negotiations of a Treaty on Business and Human Rights', (2022) 26 *International Journal of Human Rights* 1522, at 1527.

[46]See Parella, *supra* note 31, at 168–9.

[47]See Kinderman, *supra* note 14.

[48]Ibid., at 39.

[49]Ibid.

[50]Ibid., at 41.

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However, the regulatory environment has since changed and surveys undertaken in Europe[51] and in the UK[52] suggest that there is increasing support from businesses for mandatory human rights due diligence legislation. The authors of these surveys noted that some businesses are actually 'calling for such regulation, accompanied by lucid business-centred reasons'.[53] In both studies a majority of businesses cited the lack of clarity in current laws and the legal uncertainty this creates, as a key reason for their support of such regulation. According to these companies, legislation on mandatory human rights due diligence would not only 'improve legal certainty', it would level the playing field, and 'improve or facilitate leverage with third parties by introducing a non-negotiable standard'.[54]

No similar survey seeking business views on mandatory human rights due diligence legislation has been undertaken in Canada. However, a recent study on modern slavery reporting legislation, that surveyed 26 businesses, found that 56 per cent of companies that participated 'indicated that they [had] been directly affected by related supply chain reporting or due diligence legislation in other jurisdictions', while another 29 per cent had 'been indirectly affected'.[55] When asked how they felt about the government's announcement about beginning consultations on such legislation, '65 per cent of the companies were positive, 29 per cent were neutral and 6 per cent were negative'.[56] Sixty-three per cent of participants indicated that reporting requirements would drive change, while 56 per cent indicated that a requirement to undertake supply chain due diligence 'would be effective' in driving change.[57]

Parella notes that once a business has invested in developing human rights processes and practices, it may become more supportive of domestic hard law regulation because the latter would not raise their costs relative to their domestic competitors.[58] This assertion is corroborated by a recent study that examined the lobbying practices of business actors with respect to EU regulatory proposals on CSR issues.[59] The study suggests that businesses that had signed onto voluntary self-regulatory initiatives, even weak initiatives like the UN Global Compact, were more likely to support the introduction of more stringent hard law measures than those that had not adopted such practices.[60]

There are also other domestic pressures that can help to nudge businesses and therefore states towards support for the introduction of hard law measures, including investor, consumer, and CSO campaigns as well as transnational litigation. As Durkee argues:

[51]See European Commission, *supra* note 15.

[52]See Pietropaoli et al., *supra* note 16.

[53]L. Smit et al., 'Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies', (2020) 5(2) *Business and Human Rights Journal* 261, at 269. But see, for example, Corporate Europe Observatory, Friends of the Earth Europe and the European Coalition for Corporate Justice, 'Off the Hook? How Business Lobbies against Liability for Human Rights and Environmental Abuses', *Corporate Justice*, 17 June 2021, available at www.corporatejustice.org/publications/off-the-hook-how-business-lobbies-against-liability-for-human-rights-and-environmental-abuses/, which discusses the concerted business lobbying ongoing in Europe in order to weaken the human rights due diligence laws both at the domestic and EU level.

[54]See Smit et al., ibid., at 265–6.

[55]K. Phung, D. Greig and S. Lewchuk, *Straight Goods: Canadian Business Insights on Modern Slavery in Supply Chains*, May 2019, at 31, available at www.schulich.yorku.ca/wp-content/uploads/2019/05/Canadian-Business-Insights-on-Modern-Slavery-in-Supply-Chains-Full-Report.pdf.

[56]Ibid., at 33.

[57]Ibid., at 35.

[58]See Parella, *supra* note 31, at 170.

[59]O. van den Broek, 'Soft Law Engagements and Hard Law Preferences: Comparing EU Lobbying Positions between UN Global Compact Signatory Firms and Other Interest Types', (2021) 23(3) *Business and Politics* 383. Although, industry associations tended to lobby for 'a regulatory race to the bottom' (ibid., at 387).

[60]Ibid., at 399.

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> Because corporations are dependent on legal and social licenses to operate, the threat of removal of those licenses is a powerful way to shape corporate conduct. Corporate responsibility measures provide a way for industry members and groups to prove to government regulators and civil society that they are already managing a given problem, and there is no need, therefore, for further regulation. Transnational litigation can expose corporate conduct in a way that threatens further regulation and social opprobrium, and thus the removal of licenses. Litigation can also, of course, threaten the imposition of damages, and corresponding shareholder responses. Triggering competition for consumers also motivates corporations to change their behavior. Advocates can seek to neutralize industry resistance to treaty regimes by putting corporate choices in the public eye. Doing so can constrain all three licenses, as consumers and shareholders vote with their feet and state regulators gather popular support for new regulatory regimes. Thus, transnational litigation, corporate responsibility measures, and public information campaigns can all serve a role in publicizing corporate choices.[61]

While Durkee is discussing business support for international treaty law, her argument is equally applicable at the domestic level. State measures, even those that rely on soft law enforced primarily through voluntary self-regulation and/or coupled with incentives, can contribute to creating a more favourable political environment for hard law. State-based remedial mechanisms also offer some means for paving the way to consensus around hard law measures. Courts for example can adjudicate on business-related human rights violations which could establish legal liability, and/or create legal uncertainty for business actors. Independent non-judicial grievance mechanisms that are able to engage in credible investigations and publicly report on their findings can also create pressure on companies and governments and thereby contribute to building consensus around hard law measures.

The Canadian extractive industry has vehemently opposed a shift from a soft policy approach that allows them maximum flexibility in their activities, pushing back against attempts to introduce hard law measures.[62] In 2019, the Canadian government established the CORE and in April 2022, it released a new policy on responsible business conduct abroad.[63] The next section critically assesses these developments in law and policy in Canada and considers the extent to which they may nudge the extractive industry towards supporting the introduction of BHR legislation.

3. Canada's responsible business conduct strategy and the Canadian Ombudsperson for Responsible Enterprise

In Canada, campaigns focused on broader legislative reform have resulted in the development of federal government policies on transnational extractive activities, and more recently on all business sectors in relation to their operations abroad. In addition, the Canadian government has established state-based non-judicial grievance mechanisms. This section looks briefly at the history of these developments and assesses Canada's current policy on transnational business activity along with the CORE.

[61]See Durkee, *supra* note 37, at 127.

[62]See Bill C-300, *supra* note 23. Significant lobbying by extractive companies and mining industry associations took place before the vote on the bill. See B. Curry, 'Lobbying Blitz Helps Kill Mining Ethics Bill', *Globe and Mail*, 27 October 2010, available at www.theglobeandmail.com/news/politics/lobbying-blitz-helps-kill-mining-ethics-bill/article1215704/. See also C. Meyer, 'Opposition MPs Who Skipped C-300 Vote Were Targeted by Industry Lobby', *Embassy*, 3 November 2010.

[63]Global Affairs Canada, 'Minister Ng Announces Launch of New Responsible Business Conduct Strategy', *Canada,* 28 April 2022, available at www.canada.ca/en/global-affairs/news/2022/04/minister-ng-announces-launch-of-new-responsible-business-conduct-strategy.html.

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3.1 Canada's strategy on responsible business conduct abroad

In 2005 the House of Commons Standing Committee on Foreign Affairs and International Trade (SCFAIT) undertook hearings and issued a report that called on the government to develop incentives to encourage Canadian mining companies to operate in 'a socially and environmentally responsible manner and in conformity with international human rights standards' to develop monitoring mechanisms, and to '[e]stablish 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'.[64] In response, the government undertook a series of national roundtables to consult with Canadians on the issue. The final report of the Roundtables Advisory Committee,[65] a body made up of stakeholders from civil society, academia and the extractive industry, made a series of recommendations to the government. These included the adoption of standards of conduct for Canadian businesses requiring the latter to respect human rights in their transnational activities, the establishment of an independent non-judicial grievance mechanism, the establishment of a compliance committee, and the creation of sanctions for companies with recurring serious failures to comply with the standards.[66]

The government has enacted some laws that implicate extractive companies. The Extractive Sector Transparency Measures Act (ESTMA)[67] requires extractive companies to report on certain payments over CAN$100,000 made to governments. Its introduction was supported by the Canadian mining industry, although there was some resistance from the oil and gas sector.[68] It also recently amended the Customs Tariff legislation to prohibit the importation of goods that have been 'mined, manufactured or produced wholly or in part by forced labour',[69] and it is in the process of passing reporting legislation on forced labour.[70] There have been a number of private members' bills introduced that were aimed at implementing the recommendations of the Advisory Committee Report, but only one, Bill C-300, advanced through the legislative process and was ultimately defeated by a slim margin in the House of Commons due to heavy lobbying by extractive companies.[71]

Instead of enacting legislation to regulate the transnational conduct of Canadian extractives, the government responded to the Advisory Committee recommendations by introducing a series of policies based on voluntary self-regulation. The 2009 policy 'Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector',[72] was replaced in 2014 by an updated version, 'Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector

[64]See House of Commons, *supra* note 19.

[65]See the Advisory Group Report, National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries, *MiningWatch*, 29 March 2007, available at www.miningwatch.ca/sites/default/files/RT_Advisory_Group_Report.pdf.

[66]Ibid., at 18–24.

[67]Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, s. 376.

[68]C. Bildfell, 'The Extractive Sector Transparency Measures Act: Critical Perspectives', (2016) 12(2) *McGill Journal of Sustainable Development Law and Policy* 231, at 270.

[69]Customs Tariff, S.C. 1997, c. 36, s. 132(1)(m)(i.1).

[70]Bill S-211, An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff, 44th Parl., 1st Sess. (second reading in the Commons completed 1 June 2022). This bill is modeled on the UK and Australian modern slavery legislation. It focuses only on forced and child labour and mandates reporting on any company policies, due diligence processes, or measures to remediate forced or child labour. However, it does not require companies to engage in HRDD or to eradicate forced or child labour in their supply chains, and there is no remedy for victims of such human rights violations.

[71]See Bill C-300, *supra* note 23; Curry, *supra* note 62.

[72]Canada, Natural Resources Canada, *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector* (2009), available at www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng.

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Abroad'.[73] The 2014 policy, although considered to be an improvement on its predecessor,[74] was criticized for its equivocal prescriptions and inadequate complaint mechanisms.[75] It was a quintessential soft approach to addressing transnational corporate behaviour that failed to meet Canada's obligation to protect human rights. It did not require extractive companies to comply with a particular set of standards in their overseas operations. Rather, it made vague recommendations and allowed extractive companies broad discretion in meeting government expectations. There was no requirement or clear recommendation that companies engage in human rights due diligence. Instead, companies were simply expected to 'align their practices as applicable' with a range of different inter-governmental and multi-stakeholder initiatives.[76] These included the UNGPs,[77] and the OECD Guidelines,[78] among others. As such, the policy did not even meet the recommendations in the United Nations Guiding Principle 2, which calls on states to 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'.[79]

In April 2022, the government introduced a new strategy, 'Responsible Business Conduct Abroad: Canada's Strategy for the Future'.[80] There are some improvements from the former strategies. The 2022 Strategy applies to all business sectors and not exclusively to the extractive sector, or to the extractive and garment sectors.[81] It also links the Strategy to the legislation implicating transnational business activities, mentioned above, as well as the Corruption of Foreign Public Officials Act (CFPOA),[82] enacted in 1998 pursuant to Canada's obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[83]

The stated goal of the Strategy is to ensure that 'Canadian companies recognize the value and implement responsible business practices, meeting and exceeding widely recognized international standards, guidelines and frameworks'.[84] It is based on three pillars: building awareness about responsible business conduct (RBC) and its value; increasing corporate uptake of due diligence practices and ensuring accountability; and contributing to the global 'ecosystem' of RBC norms.[85] Like its predecessors, the Strategy is framed primarily as a risk mitigation policy for business actors and based on voluntary self-regulation. However, the language in the new Strategy is more specific than the 2014 strategy. The government 'expects' Canadian businesses not only to comply with local laws of the states in which they operate, but 'to adopt internationally recognized best

[73]Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad* (2014), available at www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng.

[74]See *Building the Canadian Advantage*, *supra* note 72.

[75]P. Simons, 'Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses', (2015) 56 *Canadian Business Law Journal* 167, 185–6.

[76]See *Doing Business the Canadian Way*, *supra* note 73.

[77]See UNGPs, *supra* note 35.

[78]See OECD Guidelines, *supra* note 43. It also includes: the *Voluntary Principles on Security and Human Rights*, available at www.voluntaryprinciples.org; the *International Finance Corporation's 'Performance Standards on Environmental and Social Sustainability'* (2012), available at www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk; the *OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition* (2016); the Global Reporting Initiative Standards, available at www.globalreporting.org.

[79]See UNGPs, *supra* note 35, at 7.

[80]Canada, *Responsible Business Conduct Abroad: Canada's Strategy for the Future* (2022), available at www.international.gc.ca/trade-commerce/assets/pdfs/rbc-cre/strategy-2021-strategie-1-eng.pdf.

[81]Ibid., at 3. The 2014 Strategy was amended by the Liberal government to include the garment sector.

[82]Corruption of Foreign Public Officials Act, S.C. 1998, c. 34. Only ESTMA was mentioned in the 2014 strategy.

[83]1999 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, 2802 UNTS 225.

[84]See *Responsible Business Conduct Abroad*, *supra* note 80, Ann. V.

[85]Ibid., at 9.

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practices and internationally respected guidelines on RBC such as the [UNGPs] and the [OECD Guidelines]'.[86] This goes beyond the vague prescriptions of the 2014 strategy noted above. It also encourages companies 'to contribute to achieving the Sustainable Development Goals'.[87] The Strategy notes that adopting and integrating 'a robust approach to responsible business practices' will reduce business risk exposure and will give companies a competitive advantage.[88]

In terms of regulating business conduct abroad, the Strategy does not mandate human rights and environmental due diligence. However, unlike its predecessor, it clearly states that due diligence is a core component of Canada's approach to RBC and it creates mechanisms to encourage companies to undertake due diligence. According to the Strategy, Trade Commissioner Services (TCS), which provides a variety of support for Canadian companies operating in other countries, could be withdrawn where businesses fail 'to comply with Canada's RBC laws, policies and standards'.[89] Companies 'are expected to ... identify, prevent and mitigate and account for how they address actual and potential adverse impacts of their operations, supply chains and relationships'. They are also expected to develop policies and management systems to support such due diligence and 'potential and actual negative impacts on communities and environments, identified through meaningful stakeholder engagement'.[90] This language draws from the provisions of the UNGPs on human rights due diligence.[91] These expectations are clearer than those in the previous strategy. However, there is little guidance on what engaging in due diligence requires companies to do. The Strategy does note, however, that the government is working with the Canadian General Standards Board to develop an RBC due diligence standard.[92] At the time of writing this standard had not been released and it is unclear therefore how RBC due diligence will be defined and the extent to which it will lay out expectations that companies engage in due diligence in relation to a broad range of human rights impacts, as opposed to certain grave violations of human rights such as forced labour. It is concerning that the Strategy's list of relevant international instruments[93] fails to include two key international human rights treaties to which Canada is party, the International Covenant on Civil and Political Rights[94] and the International Convention on the Elimination of All Forms of Racial Discrimination.[95]

The Strategy also outlines three mechanisms aimed at incentivizing companies to engage in such due diligence. These mechanisms are reflexive rather than prescriptive, in that they do not require the company to take specific actions, such as due diligence. Rather the aim is that by requiring companies to make certain attestations or declarations, they will reflect on their business practices and the risks associated with violating human rights or causing environmental harm and take measures such as undertaking HRDD and other forms of due diligence. The first mechanism is a Digital RBC Attestation which must be made where a company seeks TCS support abroad or referrals to Canada's export credit agency, Export Development Canada (EDC), or the Canadian Commercial Corporation (CCC).[96] TCS support includes introducing companies 'to important contacts such as potential buyers and partners, foreign governments and decision-makers, helping them to access partnership opportunities, and providing important advice,

[86]Ibid., at 10.
[87]Ibid.
[88]Ibid., at 11.
[89]Ibid.
[90]Ibid., at 12.
[91]See UNGPs, *supra* note 35, at 16–18.
[92]See *Responsible Business Conduct Abroad*, *supra* note 80, at 12.
[93]Ibid., Ann. II.
[94]1976 International Covenant on Civil and Political Rights, 999 UNTS 171.
[95]1969 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 1.
[96]See *Responsible Business Conduct Abroad*, *supra* note 80, at 13. The CCC, a federal Crown corporation, facilitates international trade between Canadian industry and, most often, foreign governments. CCC conducts government-to-government contracting for the sale of Canadian products and services abroad.

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including related to risks and opportunities'.[97] In the attestation, companies will have to 'acknowledge the importance of RBC, including an adherence to Canadian Laws and other international legal norms and conventions with respect to human rights, labour rights and the environment, and as applicable good faith participation in the dispute resolution mechanisms'. This attestation is vague and weak. It may cause some businesses to learn more about initiatives like the UNGPs and the OECD Guidelines, but it is unlikely on its own to provide much of an incentive for companies, including extractive companies, to engage in HRDD or other forms of due diligence. The second part of the attestation – that companies will engage in good faith in disputes brought before the non-judicial grievance mechanisms associated with the Strategy – is also unlikely to incentivize due diligence practices. As will be discussed below, in the previous strategy, access to TCS support was already contingent on such good faith participation. This requirement has not had an impact on the non-judicial grievance mechanisms' effectiveness in investigating complaints and resolving disputes, and thereby putting pressure on companies to adopt effective policies and practices to avoid, prevent and mitigate their impacts. Indeed, Canadian extractives have continued to be implicated in violations of human rights and environmental harm.[98]

A second level of attestation is required of companies wishing to engage the advocacy support of TCS. They must confirm that they are operating 'consistent with' the UNGPs and the OECD Guidelines.[99] This type of declaration may have more of a normative impact on business behaviour than the attestation discussed above. However, the language of the Strategy does not mandate the TCS to consider whether such companies are indeed operating in line with those initiatives. Rather, the language is permissive. The TCS retains the discretion of whether or not to take into account the RBC practices of a company before providing advocacy support.[100]

For those companies wishing to have the support of the Canadian government in dealing with foreign governments, they must also, among other things, sign an Integrity Declaration relating to past and future engagement in bribery and corruption. Whether this type of declaration will be effective is questionable. Integrity declarations have been in use by the Canadian government[101] and its embassies for a number of years[102] and the policy is silent on how the TCS will have to deal with these declarations. In other words, it is unclear whether the TCS has discretion to provide support when a company has been engaged in bribery or other forms of corruption. The Canadian government has a weak track record of enforcing the CFPOA.[103] Additionally, legislation is now in place allowing for court approved deferred prosecution agreements, known as remediation agreements. Where the Attorney General consents, companies can avoid prosecution and potential conviction for CFPOA and other offences, by meeting certain terms and conditions,[104] and thereby still access certain government support. EDC has had an Integrity Declaration in place on bribery and corruption for many years and ostensibly has 'a zero-tolerance policy'.[105] According to EDC where there is 'credible evidence that bribery was involved in a transaction supported by EDC', it *may* take a number of measures including withdrawal of funding or

[97]Ibid., at 5.

[98]See note 34, *supra*.

[99]See *Responsible Business Conduct Abroad*, *supra* note 80, at 13.

[100]Ibid.

[101]Global Affairs Canada, 'Canada's Fight against Foreign Bribery: Sixteenth Annual Report to Parliament September 2014-August 2015', available at www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-16.aspx?lang=eng.

[102]See, e.g., Trade Commissioner Service, 'How One Company Tackled Corruption Abroad', July 2016, available at www.tradecommissioner.gc.ca/canadexport/0000706.aspx?lang=eng.

[103]Only eight companies have been convicted under the act since it came into force and Canada is ranked as a 'Limited Enforcement' jurisdiction by Transparency International. See G. Ferguson (ed.), *Global Corruption: Its Regulation under International Conventions, US, UK, and Canadian Law and Practice* (2022), 101.

[104]Ibid., at 664–5.

[105]EDC, 'EDC's Approach to Combatting Bribery and Corruption in International Transactions', 2021, available at www.edc.ca/content/dam/edc/en/non-premium/approach-to-combatting-bribery.pdf.

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requiring repayment of a loan.[106] However, it does not rule out supporting a company that has been engaged in corruption in the past, where the company has taken certain measures to address these failures.[107] EDC has provided billions of dollars in loans to Canadian and non-Canadian companies that have engaged in bribery, other forms of corruption, and human rights violations.[108] For example, Canadian engineering company, SNC Lavalin, has received EDC funding for projects across the globe,[109] despite being the subject of many allegations of bribery and corruption[110] and being debarred from World Bank projects in 2013 for ten years, for bribery.[111] In December 2019, the company pleaded guilty to fraud over CAN$5,000 related to bribery and corruption charges associated with its operations in Libya, and agreed to pay a fine of CAN$280 million over five years. The guilty plea allowed the company to avoid a trial for bribery, where a conviction could prevent it from bidding on federal government procurement contracts for ten years.[112] EDC also provided additional funding to Canadian extractive company, Kinross Gold Corporation, for projects in Africa, after the company was charged by, and settled with, the US Security Exchange Commission for violating the US Foreign Corrupt Practices Act.[113] Much will therefore depend on how seriously the TCS treats these declarations going forward.

Finally, the Strategy lays out another requirement that may come into play where a company is operating in 'a specific region, or [where] a sector faces heightened risks'. Companies in these situations may be required to sign a Specialized Integrity Declaration (SID).[114] Since January 2021, Canadian companies operating in, or sourcing goods or services from, the Xinjiang Uyghur Autonomous Region (XUAR) must make an SID. Companies are required to acknowledge that they are aware of the human rights situation there and that TCS will not provide support to any company that 'knowingly engage[s]' in conduct 'inconsistent' with the UNGPs or OECD Guidelines. Companies must also confirm that they have 'not knowingly sourced, directly or indirectly, products or services from a supplier implicated in forced labour or other human rights violations connected to the repression of Uyghurs and other ethnic minorities in the XUAR'.[115]

Signing such a declaration will require prudent companies to engage in some sort of due diligence. As noted above, the standard for such due diligence has yet to be released. However, one of the problems with a declaration requiring a company to operate in a manner consistent with the UNGPs or the OECD Guidelines is that these latter initiatives do not contemplate no-go zones. Rather they assume that risks of becoming complicit in human rights violations can be addressed by complying with international human rights law and undertaking mitigation measures.[116]

[106]Ibid., at 2.

[107]Ibid.

[108]M. McClearn and G. York, 'See No Evil: How Canada is Bankrolling Companies Accused of Bid-Rigging, Graft and Human-Rights Violation', *Globe and Mail*, 1 June 2019, available at www.theglobeandmail.com/canada/article-export-development-canada-investigation/.

[109]D. Seglins and R. Houlihan, 'SNC-Lavalin Insider's Bribery Allegations Spark Probe by Crown Agency that Loaned the Firm Billions', *CBC*, 3 April 2019, available at www.cbc.ca/news/business/snc-lavalin-export-development-canada-loans-1.5079922.

[110]Ibid. This includes corruption within Canada. See *R. v. SNC-Lavalin inc.*, 2022 QCCS 1967.

[111]World Bank, 'World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 Years', Press Release, 17 April 2013, available at www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years.

[112]K. Hinkson, 'SNC-Lavalin Pleads Guilty to Fraud for Past Work in Libya, Will Pay $280M Fine', *CBC*, 18 December 2019, available at www.cbc.ca/news/canada/montreal/snc-lavalin-trading-court-libya-charges-1.5400542. Four subsidiaries of the company have been banned from bidding on public contracts within Quebec for five years as a result of the guilty plea. 'SNC-Lavalin Subsidiaries Barred from Public Contracts in Quebec for Five Years', *CTV News*, 6 February 2020, available at www.ctvnews.ca/business/snc-lavalin-subsidiaries-barred-from-public-contracts-in-quebec-for-five-years-1.4800367?cache=yes.

[113]See McClearn and York, *supra* note 108.

[114]See Responsible Business Conduct Abroad, *supra* note 80, at 13.

[115]Global Affairs Canada, 'Integrity Declaration on Business with Xinjiang Entities', available at www.international.gc.ca/global-affairs-affaires-mondiales/news-nouvelles/2021/2021-01-12-xinjiang-declaration.aspx?lang=eng.

[116]See Simons and Macklin, *supra* note 1, at 99, 103.

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As with conflict zones, it may be very difficult for companies to operate in, or source goods or services from, regions like the XUAR without becoming complicit in grave violations of human rights such as forced labour. Again, the impact of these declarations will depend on what TCS does with them: whether it conducts any sort of investigation into company compliance and how the results of such an investigation play out in the decision-making of whether or not to provide support.

3.2 Non-judicial grievance mechanisms

In addition to the attestations and declarations, the 2022 Strategy incorporates two pre-existing non-judicial grievance mechanisms, the Canadian National Contact Point (NCP), established pursuant to the OECD Guidelines, and the CORE. Under the Strategy, these mechanisms have roles to promote RBC,[117] 'increase the uptake of due diligence' practices, and provide accountability.[118] The two previous CSR strategies were supported by the NCP and another complaint mechanism, the CSR Counsellor. The CSR Counsellor had a dual role of helping companies to 'detect, address and resolve misunderstandings or disagreements at an early stage' relating to their projects abroad, and resolving disputes between such companies and 'project-affected individuals or communities'.[119] This latter role did not involve an independent investigation of a complaint, but was, rather, 'an informal mediation or conciliation mechanism "designed to bring disputing parties together to help them resolve their differences for a mutually beneficial result"'.[120] The CSR Counsellor's mandate allowed it to recommend a company's ineligibility for TCS support where the company failed to align its practices with the requisite soft law initiatives or to participate in the informal mediation process.[121] The former strategy stated that a recommendation of ineligibility could also be taken into account by EDC, in the latter's decision of whether or not to provide funding or other support requested by a company.[122] The CSR Counsellor was widely criticized as toothless and ineffective.[123] Despite having the leverage to recommend denial of access to, or withdrawal of, TCS and EDC support, the CSR Counsellor was unable to resolve a single one of the six disputes that were brought before it.[124]

The role of the NCP, under the previous strategies, was to provide formal mediation services in situations where the CSR Counsellor determined this was needed to resolve a dispute. The NCP, which is also a remedial forum for complaints alleging violations of the OECD Guidelines, has a long history of failing to provide effective remedies and holding companies to account.[125] It has been criticized for lacking independence and transparency, having too high a threshold for accepting complaints, failing to accept and resolve disputes in a timely way, failing to make findings on whether companies have breached the OECD Guidelines, only rarely helping the parties come to

[117]The CORE advises 'companies on RBC-related policies and practices' and promotes the implementation of the UNGPs and OECD Guidelines, while the NCP is required under the OECD Guidelines to promote the latter. See *Responsible Business Conduct Abroad*, *supra* note 80, at 11, 13–14.

[118]Ibid., at 9.

[119]See *Doing Business the Canadian Way*, *supra* note 73, at 12.

[120]See Simons, *supra* note 75, at 189.

[121]See *Doing Business the Canadian Way*, *supra* note 73, at 12.

[122]Ibid., at 12–13.

[123]See e.g., Simons, *supra* note 75, at 192–3; J. Bone, 'The State of Canada's Corporate Social Responsibility Strategy', *Open Canada*, 25 March 2015, available at www.opencanada.org/the-state-of-canadas-corporate-social-responsibility-strategy; G. Alsharif, '"No Real Role": Canada's Watchdog for Mining Abroad Struggles to Sharpen its Teeth', *CBC*, 20 November 2016, available at www.cbc.ca/news/canada/mining-watchdog-1.3855789; E. R. Grégoire, 'Dialogue System as Racism? The Promotion of "Canadian dialogue" in Guatemala's Extractive Sector', (2019) 3(6) *The Extractive Industries and Society* 688.

[124]Mining Watch, 'Time to Axe the Conservative Government's Ineffective CSR Counsellor Office', *MiningWatch,* 22 January 2016, available at www.miningwatch.ca/news/2016/1/22/time-axe-conservative-government-s-ineffective-csr-counsellor-office.

[125]For a full discussion of the weaknesses of the Specific Instance process and NCPs see Simons and Macklin, *supra* note 1, at 105–13.

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an agreement or putting forward recommendations and following up on compliance with agreements or recommendations.[126] A peer review of Canada's NCP undertaken by the OECD in 2018 reiterated many of these issues and noted that despite efforts by the NCP to respond to these criticisms, 'there is a lack of confidence and trust in the NCP amongst some civil society and trade union stakeholders'.[127] Without some change, there is little reason to believe that it will fulfil the objectives of the 2022 Strategy and prompt companies to undertake due diligence or to ensure corporations are accountable.

The CORE replaced the CSR Counsellor. Among other things, the aim of establishing the CORE was to remedy the shortcomings of the CSR Counsellor. The government stated it would create a mechanism that could receive complaints, investigate allegations, and come to a decision about whether the alleged acts or conduct had occurred and then make recommendations as to appropriate action to be taken, including 'compensation, corporate policy changes and apologies' and withdrawal of government support, among other things. It was to have 'all the tools required' to ensure compliance from companies.[128] This meant that it would be endowed with powers to compel witnesses and documents[129] that would enable it to engage in credible independent investigation of allegations of business-related human rights violations associated with the overseas activities of Canadian extractive and garment companies.

There was a 15-month delay between the announcement of the CORE and the issuing of the Order in Council (OIC) to establish it. During this time the extractive industry associations engaged in significant lobbying.[130] There were collectively over 500 meetings registered by the Mining Association of Canada and the Prospector and Developers Association of Canada with public office holders. Among other government agencies, the registry lists Natural Resources Canada, the Prime Minister's Office (PMO), and Global Affairs Canada as subject to frequent lobbying.[131] The OIC did not grant the ombudsperson with the powers to compel witnesses and documents.[132] The government initially argued that it needed legal advice on these powers.[133] It sought a legal opinion, which among other things concluded that, 'without a way to compel the cooperation of entities against which a complaint is made or others who hold relevant

[126]OECD Watch, Above Ground, and MiningWatch Canada, 'Canada is Back. But Still Far Behind. An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises,' 2016, available at www.miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf. See also Simons, *supra* note 75, at 194–8.

[127]OECD, 'OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Canada', 2019, available at mneguidelines.oecd.org/Canada-NCP-Peer-Review-2019.pdf, at 4.

[128]F.P. Champagne, Global Affairs Canada, 'Announcement by the Honourable François-Philippe Champagne, Minister of International Trade, Concerning the Creation of a Canadian Ombudsperson for Responsible Enterprise (CORE)', *Canada,* 18 January 2018, available at www.canada.ca/en/global-affairs/news/2018/01/announcement_by_thehonourablefrancois-philippechampagneministero.html.

[129]See screenshot of government page on CNCA website, available at www.cnca-rcrce.ca/campaigns/ombuds-power2investigate/.

[130]C. Connolly, 'Lobbying by Mining Industry on the Proposed Canadian Ombudsperson for Responsible Enterprise (CORE)', *Justice and Corporate Accountability Project*, 24 July 2019, available at www.justice-project.org/wp-content/uploads/2019/07/2.-Report-on-Lobbying-by-Mining-Industry-july-24-fin.pdf.

[131]Data retrieved from the Office of the Lobbying Commissioner of Canada, available at www.lobbycanada.gc.ca/en/. See also Connolly, ibid. The PMO agreed to meet with mining lobbyists 33 times during this period (a high number for that office), which suggests that the industry has had an influence on government decision-making. See Mining Watch Canada, 'News Release: Mining Industry Lobbied Government 530 Times in 15 Months: Is This the Reason for Diluted Mandate for Business Ombudsperson?', *Mining Watch*, 24 July 2019, available at www.web.archive.org/web/20201124183329/https://miningwatch.ca/news/2019/7/24/mining-industry-lobbied-government-530-times-15-months-reason-diluted-mandate.

[132]Order in Council, PC No. 2019-1323, 6 September 2019, available at orders-in-council.canada.ca/attachment.php?attach = 38652&lang = en.

[133]J. Carr, quoted in J. Wells, 'Canada Has a New Watchdog for Corporate Ethics. But Where Are its Teeth?', *Toronto Star*, 9 April 2019, available at www.thestar.com/business/opinion/2019/04/09/canada-has-a-new-watchdog-for-corporate-ethics-but-where-are-its-teeth.html.

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information, the CORE's effectiveness may be compromised'.[134] In December 2020, the government made a final decision not to endow the CORE with these powers.[135]

The resistance of the industry to an ostensibly soft law remedial mechanism is not surprising. The CORE was envisaged as a non-judicial grievance mechanism meant to provide an alternative to a remedy through the courts. It is a hard law mechanism, in the sense that it is created through law (albeit an OIC rather than legislation), but was meant to have both hard and soft powers. The hard law powers were to be procedural, allowing the ombudsperson to mandate witness testimony and document production to ensure that she had all the relevant information before her as part of her investigation. The soft law powers related to the remedial aspect of the mandate. Even with the requisite powers of investigation, the CORE would not have had authority to make legally binding decisions. This is reflected in the mandate. Following a review of allegations of business-related human rights violations, the ombudsperson is required to issue a report and has the power to recommend, but not require, the following: '(a) financial compensation; (b) a formal apology; and (c) changes to a Canadian company's policies'.[136] The ombudsperson also has the power to follow up on these recommendations.[137] Nonetheless, the office does not have, and was never slated to have, the authority to enforce any of its recommendations. While failure of companies to follow recommendations of the CORE following an investigation could potentially be used by plaintiffs in future tort claims to bolster other claims of wrongdoing, the findings of the CORE would not likely constitute admissible evidence and it is unclear whether the ombudsperson could be compelled to appear as a witness.[138]

Leaving aside the issue of effective remedy, the implications of the decision not to give the CORE powers to compel witnesses and document production are twofold. First, it is unlikely that the CORE will meet the goals of the Strategy to increase RBC and due diligence practices among, or the accountability of, Canadian companies. The ombudsperson's mandate states that she is to be guided in the discharge of her duties by the UNGPs and the OECD Guidelines.[139] This means that in carrying out a 'review' of allegations, the ombudsperson will consider the extent to which the company in question has complied with these two inter-governmental initiatives. An ombuds office endowed with such powers, and therefore able to undertake reliable investigations, could have incentivized businesses to implement and follow the prescriptions of UNGPs and the OECD Guidelines, including undertaking human rights and other due diligence, in order to avoid being the subject of an investigation. In this regard, these powers, although procedural, would have 'hardened' the mechanism's effectiveness. It could also have helped to overcome some of the softness of the prescriptions for corporate conduct in the 2022 Strategy and the flexibility it allows companies in terms of meeting the expectations. As it stands, the CORE has garnered little trust from those who might use it. The Canadian Network on Corporate Accountability has cautioned communities and its NGO partners against using the CORE since it is unlikely to prove more effective than its predecessor.[140]

Second, it undermines the ability of the CORE to generate credible public information about corporate wrongdoing and contribute to the development of consensus around a future legislative framework. As Durkee notes, this type of information can help to 'neutralize resistance' to hard

[134]B. McIsaac, 'McIsaac Report', *Canadian Network on Corporate Accountability,* at 28, available at www.cnca-rcrce.ca/site/wp-content/uploads/2021/02/McIsaac-Report-2019.pdf.

[135]Canadian Network on Corporate Accountability, available at www.cnca-rcrce.ca/campaigns/ombuds-power2investigate.

[136]See PC No. 2019-1323, *supra* note 132, s. 11(1).

[137]Ibid., s. 11(2).

[138]See McIsaac, *supra* note 134, at 5.

[139]See PC No. 2019-1323, *supra* note 132, s. 6.

[140]Canadian Network on Corporate Accountability, 'Canadian Ombudsperson for Responsible Enterprise [CORE]: Approach with Caution', *CNCA-RCRCE,* April 2020, available at www.cnca-rcrce.ca/wp-content/uploads/2020/04/core-caution-E-1.pdf.

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law measures,[141] and could shore up arguments for legislation from the public and civil society actors. Extractive and garment companies that were already implementing HRDD processes and procedures might have begun to support legislation that would level the playing field domestically.

Without these powers, the mandate of the CORE differs very little in all material ways from the mandate of the earlier CSR Counsellor. The CORE has the same powers as its predecessor to recommend the denial or withdrawal of TCS support and future EDC financial support or future CCC support where a company does not participate in good faith in the complaint process.[142] Differences include the CORE having a longer term than the CSR Counsellor (five instead of three years),[143] a mandate covering both extractive and garment companies,[144] the power to initiate a review without having to rely on a complaint,[145] and a larger budget. The CORE, like its predecessor, has a mandate to provide informal mediation and to advise the Minister 'on any matter relating to their mandate, including issues related to the responsible business conduct of Canadian companies operating abroad'.[146] It also has the same dual role of advising 'Canadian companies on their practices and policies with regard to responsible business conduct' and reviewing allegations of violations of human rights associated with the overseas activities of Canadian extractive or garment companies,[147] which creates a potential conflict of interest.

The clearer expectations with respect to due diligence in the 2022 Strategy are a small but welcome step forward. While the threat of withdrawal of TCS political support may be concerning to companies operating abroad,[148] the effectiveness of the attestations and declarations in motivating companies to engage in fulsome human rights and environmental due diligence will depend on how the TCS exercises its discretion. Past practice of the TCS (or other entities such as EDC) does not give much confidence that support will be denied or withdrawn where a company has been engaged in wrongdoing. In any event, the attestations and declarations will only be required of those companies seeking support from these bodies. The establishment of the CORE is not a step forward and, given that it fails to address the weaknesses of its predecessor, it may well be two steps back. The changes outlined in the new Strategy are therefore unlikely on their own to change business views on mandatory human rights and environmental due diligence legislation that applies to all Canadian companies and relates to all human rights.

The next section will explore three cases and their impacts and consider the extent to which they have created legal uncertainty for extractive companies and might therefore shift their views on domestic regulation.

4. Developments in transnational human rights litigation in Canadian courts

Durkee points to the importance of transnational litigation in changing business views on the introduction of hard law measures. Such litigation is costly, brings corporate abuses into the public eye, can undermine investor/shareholder trust in the company, and can increase the risk of legal

[141] See Durkee, *supra* note 37, at 127.

[142] See PC No. 2019-1323, *supra* note 132, s. 10; see *Responsible Business Conduct Abroad*, *supra* note 80, at 14.

[143] See PC No. 2019-1323, ibid., s. 2.

[144] Ibid., s. 1(2).

[145] Ibid., s. 4(d).

[146] Ibid., s. 4(e)-(f).

[147] Ibid., s. 4(b)-(c).

[148] A study undertaken at the Munk School of Global Affairs and Public Policy for the CORE notes that Canadian companies do 'rely heavily on trade and/or political support from the TCS, including Canadian missions abroad'. It also notes, however, that the threat of withdrawal of government of Canada financial support (through EDC for example) from mining, oil and gas and garment companies may have less impact since these companies do not solely seek support from government agencies but also acquire insurance and loans from the private sector'. Chen et al., 'Mapping the Government of Canada's Trade Support for Canadian Garment, Mining and Oil/Gas Companies Operating Abroad', *Munk School of Global Affairs and Public Policy, University of Toronto, and Office of the Canadian Ombudsperson for Responsible Enterprise (CORE)*, 30 March 2022, at 11, 13 (copy on file with the author). Please note that the CORE has not officially endorsed the findings of this report.

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liability.[149] As such it has the potential to create legal uncertainty that can prompt companies to support legal measures that clarify their obligations.[150] There have been a number of cases brought before Canadian courts by foreign plaintiffs seeking remedies for grave violations of human rights allegedly caused by, or with the complicity of, Canadian extractive companies.

Extractive companies, with well-financed legal defence teams, have a considerable advantage over the plaintiffs in these types of cases. The legal obstacles and the practical and structural challenges faced by foreign plaintiffs bringing transnational human rights claims against companies in home state courts are well known.[151] In addition, the adversarial nature of civil litigation and permissive professional responsibility rules allow corporate counsel to engage in aggressive litigation strategies aimed at outlitigating and/or wearing down the plaintiffs.[152] This includes bringing all motions possible in order to have the case summarily dismissed. Up until 2013, most of these types of cases had been dismissed on jurisdictional grounds[153] or for a failure to disclose a reasonable cause of action.[154] While no transnational human rights cases against extractive companies have yet been decided on the merits, three cases, *Choc* v. *Hudbay*,[155] *Garcia* v. *Tahoe*,[156] and *Araya* v. *Nevsun*[157] have made important inroads into undermining the advantage corporations have in having cases struck out, stayed, or dismissed before they are heard on the merits and to creating legal uncertainty for extractive companies operating abroad. The following sections will first describe the decisions and subsequently assess their implications in terms of building extractive industry support for hard law measures.

4.1 Causes of action

Among other things, *Hudbay* and *Nevsun* have helped to advance the law on causes of action. In most common law jurisdictions, there is no specific cause of action for violations of human rights including violations of the right to peaceful protest, violations of the right to food, or grave violations of human rights such as murder, rape or gang rape, torture, forced labour, slavery, starvation, and/or violations of international humanitarian law. Plaintiffs bringing these cases therefore have to make use of existing tort remedies such as negligence, assault, battery, unlawful confinement, unjust enrichment, wrongful death, and intentional or negligent infliction of

[149]See Durkee, *supra* note 37, at 127.

[150]A study by Schrempf-Stirling and Wettstein suggests that just filing a lawsuit can spur action on the part of companies to take certain measures such as introducing or improving their human rights policies. However, this does not necessarily translate into human rights compliant behaviour to address the impugned conduct. J. Schrempf-Stirling and F. Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies', (2015) 145 *Journal of Business Ethics* 545, at 546, 550.

[151]For a discussion of the legal obstacles see Simons and Macklin, *supra* note 1, at 246–59. See also United Nations High Commissioner for Human Rights, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, UN Doc. A/HRC/32/19 (2016), paras. 4–5; J. Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies: Report Commissioned for the Office of the High Commissioner for Human Rights', 2014, at 103, available at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

[152]A. Salyzyn and P. Simons, 'Professional Responsibility and the Defence of Extractive Corporations in Transnational Human Rights and Environmental Litigation in Canadian Courts', (2021) 24(1) *Legal Ethics* 24.

[153]*Assoc. canadienne contre l'impunité (A.C.C.I.) v. Anvil Mining Ltd.,* 2011 QCCS 1966 (C.S. Que.), reversed [2012] J.Q. no. 368, 2012 QCCA 117 (C.A. Que.), leave to appeal refused 2012 CarswellQue 11091 (S.C.C.); *Bil'in (Village Council) v. Green Park International Inc*, 2009 QCCS 4151, affirmed 2010 QCCA 1455, leave to appeal to SCC refused, [2010] SCCA No 364; *Recherches internationales Québec v. Cambior inc.,* 1998 CanLII 8760 (C.S. Que.).

[154]*Piedra v. Copper Mesa Mining Corp.* (2011), 332 D.L.R. (4th) 118 (Ont. C.A.), affirming 2010 ONSC 2421 (Ont. S.C.J.).

[155]*Choc v. Hudbay Minerals Inc. et al.*, 2013 ONSC 1414.

[156]*Garcia v. Tahoe Resources Inc.,* 2015 BCSC 2045, reversed 2017 BCCA 39, leave to appeal to SCC refused, 37492 (8 June 2017).

[157]*Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856, para. 258; *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

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emotional distress, in order to frame their case. The *Hudbay* case involves three related actions against Hudbay Minerals Inc. and its wholly owned subsidiaries, HMI Nickel Inc. and Compañia Guatemalteca de Níquel S.A. (CGN), alleging negligence and other torts.[158] The plaintiffs in all three cases are Indigenous Mayan Q'eqchi' from El Estor, Guatemala. They allege that Hudbay is directly liable for the acts of its predecessor corporation, Skye Resources, in negligently authorizing 'the reckless and provocative deployment of heavily-armed security personnel' that resulted in the brutal murder of Angela Choc's husband Adolfo Ich Chamám,[159] the shooting at close range of Chub Choc, leaving him paralysed from the waist down,[160] and the gang-rape of Margarita Caal and ten other women in the course of forcibly evicting them from their homes in the village.[161] All three actions pleaded a novel duty of care, namely that 'a duty of care exists between a Canadian mining company and individuals who suffer harm perpetrated by security personnel in a host state where the parent company had direct control over those operations'.[162]

Hudbay brought two pre-trial motions, one on *forum non conveniens* (which it dropped two weeks before the hearing), and one to have the case struck out for failure to disclose a reasonable cause of action, on the basis that there was no such recognized duty of care. The Ontario Superior Court found in favour of the plaintiffs, holding that the plaintiffs had met the two-part test for establishing a novel duty of care. The plaintiffs had satisfied the first part of the test by pleading 'facts which, if proved at trial, could establish that the harm complained of was the reasonably foreseeable consequence of the defendant's conduct'.[163] The plaintiffs had also demonstrated a proximate relationship with the defendants, including through the latters' representation that they had adopted the Voluntary Principles on Security and Human Rights.[164] For the second part of the test, the Court considered whether there were any policy considerations that would militate against the development of a new cause of action. It found that there were 'competing policy considerations', but that novel claims of negligence should only be struck out where they are clearly unsustainable. In this case, it held that the claim was neither 'clearly unsustainable [n] or untenable' and that 'the elements necessary to recognize a novel duty of care' had been properly pleaded.[165]

The plaintiffs in the *Caal* action recently won their application to amend their statement of claim.[166] Hudbay had argued that the amendments amounted to a new cause of action and that the original claim had not pleaded that Hudbay was negligent with respect to the participation of the military and police in the alleged sexual assaults, but rather, only with respect to the private security forces employed by the mine. The Court disagreed and allowed the plaintiffs' motion. It held that the amendments 'provide particulars and clarifications' of the existing claim 'related to the alleged roles of the police and the military. This includes Skye's breach of its duty by requesting, influencing, controlling, planning, participating in, and co-ordinating the evictions with the police and military including by providing funding and support and failing to take steps to prevent violence'.[167] This is an important victory for the *Caal* plaintiffs in terms of shoring up their case.

In *Nevsun*, the plaintiffs, Eritrean refugees, alleged that they had been subjected to forced labour, slavery, and torture at Nevsun Resources Ltd.'s Bisha mine in Eritrea. They argued that

[158] *Caal v. Hudbay Minerals Inc*, 2020 ONSC 415, Statement of Claim, Plaintiffs (*Caal*); *Angelica Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, Second Amended Fresh as Amended Statement of Claim, Plaintiffs (*Choc*); *German Chub Choc v. Hudbay Minerals Inc et al.*, 2013 ONSC 998 Amended Statement of Claim, Plaintiffs (*Chub*).

[159] See *Choc*, ibid., para. 2.

[160] See *Chub*, *supra* note 158, paras. 2–3.

[161] See *Caal*, *supra* note 158, paras. 1–2.

[162] See Simons, *supra* note 75, at 204.

[163] See *Hudbay*, *supra* note 155, para. 65.

[164] Ibid., paras. 67–70.

[165] Ibid., para. 75.

[166] See *Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415.

[167] Ibid., para. 40.

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the British Columbia goldmining company was directly liable for such acts through its own omissions due to its commercial relationship with the Eritrean military and with two contractors hired to develop the Bisha mine. The plaintiffs framed their case in tort,[168] but also in customary international law (CIL) on the basis that CIL is automatically part of the law of Canada. They contended that existing torts in Canada, do not 'fully capture the prohibited injurious conduct' they had allegedly suffered, and the claims of torture, slavery, forced labour, and crimes against humanity were not ordinary torts or 'a variant or hybrid' of them.[169]

Nevsun brought a motion to have the CIL aspect of the claim struck out for failure to disclose a reasonable cause of action. It argued that 'breaches of CIL do not give rise to a private law cause of action for damages and these claims are unknown at law'.[170] Nevsun was unsuccessful at first instance and in the British Columbia Court of Appeal (BCCA) on this issue. It appealed to the Supreme Court of Canada (SCC), which dismissed the motion.[171] Recognizing the international human rights law obligation of Canada to provide an effective remedy, a five–four majority of the SCC agreed with the plaintiffs that it was 'at least arguable that the [plaintiffs'] allegations encompass conduct not captured by ... existing domestic torts'. The Court noted that '[r]efusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct'.[172] The SCC held that it was not '"plain and obvious" that corporations today enjoy a blanket exclusion' from liability under CIL.[173] The *jus cogens* norms pleaded by the plaintiffs which were part of the law of Canada 'potentially apply to Nevsun'[174] and 'it was not "plain and obvious" that Canadian courts [could not] develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law'.[175] The majority of the SCC also held that 'since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law',[176] and that it was not 'plain and obvious' that the claims against Nevsun based in CIL could not succeed.[177]

4.2 Forum non conveniens

Extractive companies defending transnational human rights cases in Canadian courts have routinely brought motions to stay proceedings on the basis that there is a more appropriate forum (usually the host state) to hear the case (*forum non conveniens*). *Tahoe* was the first case in which the Canadian courts were found to be the most appropriate forum to hear these types of claims. In that case, the plaintiffs, who were members of the local community of San Rafael Las Flores in Guatemala, were peacefully protesting outside the front gates of the Escobal mine when they were allegedly shot and injured by private mine security forces. Tahoe's motion to stay the proceedings on the basis that Guatemala was the most appropriate forum to hear the claim was successful at first instance. The British Columbia Supreme Court (BCSC) held that in determining the most appropriate forum, the question was 'whether the foreign legal system [was] capable of providing

[168]The torts included negligence, battery, conversion, conspiracy, unlawful confinement, and negligent infliction of mental distress.

[169]See *Araya v. Nevsun* (BCCA), *supra* note 157 (Respondent's Factum, para. 146).

[170]Ibid., (Factum of Appellant, para. 53).

[171]See *Nevsun v. Araya*, *supra* note 157.

[172]Ibid., paras. 123, 125.

[173]Ibid., para. 113.

[174]Ibid., para. 116.

[175]Ibid., para. 122.

[176]Ibid., para. 127.

[177]Ibid., para. 132.

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justice'.[178] This decision was reversed by the BCCA, which held that the test for determining the most appropriate forum was whether there was a 'real risk that the appellants [would] not obtain justice in Guatemala'.[179] The judge concluded that in this case there was a 'measurable risk that the appellants [would] encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state'.[180]

The 'real risk' standard was affirmed in *Nevsun*. The company brought an unsuccessful motion to have the case stayed, arguing that the claim should be heard in Eritrea. The BCSC held, and the BCCA affirmed, that there was a real risk that the plaintiffs would not obtain a fair trial in Eritrea.[181]

4.3 Act of state

The *Nevsun* decision is also an important milestone with respect to the act of state doctrine in Canadian law. Act of state is a common law doctrine according to which courts may decline to exercise jurisdiction over a case where it would involve adjudication of the acts of a foreign state or of their state-owned enterprises. In these types of cases, a successful motion on act of state can essentially provide a company that has been implicated in human rights violations committed by the host state with immunity from suit.[182] In *Nevsun*, the company brought a motion on act of state, arguing that allowing the claim to go forward would require the court to adjudicate on the legal validity of Eritrea's laws or sovereign acts with respect to its National Service Program.[183] The defendants were unsuccessful in the lower courts on this issue and appealed to the SCC. The key issue before the Court was whether or not the act of state doctrine was a part of Canadian common law. A seven–two majority of the SCC held that the principles underlying the doctrine had been addressed within Canadian 'conflict of law and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine'. Thus, act of state was 'not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence' barred the claims of the plaintiffs.[184]

4.4 Implications of these cases for the development of consensus around domestic hard law

What impact have these cases had in terms of shifting the view of Canadian extractives on the introduction of hard law measures? The cases discussed above all involve pre-trial decisions. *Tahoe* and *Nevsun* have settled[185] and the *Hudbay* case has been in discovery[186] since the 2013 decision. It remains unclear whether any of the three *Hudbay* actions will eventually be litigated on the merits or whether the parties will settle. Prior to the 2020 *Caal* decision on the

[178]See *Garcia v. Tahoe* (BCSC), *supra* note 156, para. 64.

[179]See ibid., para. 127.

[180]Ibid., para. 130.

[181]See *Araya v. Nevsun* (BCSC), *supra* note 157, para. 258; *Araya v. Nevsun* (BCCA), ibid., para. 119.

[182]*Nevsun v. Araya*, Factum of Joint Interveners, Amnesty International Canada and the International Commission of Jurists, SCC File No. 37919, para. 14.

[183]See *Araya v. Nevsun* (BCSC), *supra* note 157, paras. 419–422.

[184]See *Nevsun v. Araya*, *supra* note 157, paras. 57–59.

[185]Business and Human Rights Resource Centre, 'Pan American Silver Announces Resolution of Garcia v. Tahoe Case', 30 July 2019, available at www.business-humanrights.org/en/latest-news/pan-american-silver-announces-resolution-of-garcia-v-tahoe-case/; N. McGee, 'Canadian Miner Nevsun Resources Settles with African Workers Over Case Alleging Human-Rights Abuses' *Globe and Mail*, 28 October 2020, available at www.theglobeandmail.com/business/article-canadian-miner-nevsun-resources-settles-with-african-workers-over-case/.

[186]This is a procedural stage in the litigation process prior to the case being heard on its merits. The aim of it is to allow the parties to gain access to admissible evidence that will allow them to substantiate or defend their case. It can include requests for document production, requests to answer written questions, and the examination under oath of parties and witnesses.

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amendments to their statement of claim, the parties in all three actions had attempted but failed to reach a settlement agreement in each of the three claims.[187] Nevertheless, the decision in *Hudbay* has opened the door to direct liability claims against Canadian parent companies for the actions of their subsidiaries and contractors in situations where they have made representations about adherence to certain soft law principles that would lead the plaintiffs to have expectations about their treatment by the company.[188] For companies that have implemented and/or made public statements about their adherence to inter-governmental or multi-stakeholder initiatives such as the UNGPs or OECD Guidelines, the *Hudbay* decision increases the risk of liability and therefore creates legal uncertainty.[189]

The decisions of the British Columbia courts in *Tahoe* and *Nevsun* on *forum non conveniens* have made it clear that Canadian courts can hear these types of claims and will make it easier for plaintiffs to win these motions. However, each case is unique and plaintiffs will still face the burden of meeting the threshold of the real risk test. Defendant companies may, therefore, still be successful in *forum non conveniens* motions where the plaintiffs are unable to show, at the pre-trial stage, a 'real risk' that they will not get access to justice in the host state.

The Supreme Court of Canada's decision in *Nevsun* on CIL as a cause of action is groundbreaking in a number of ways. First it highlighted the importance of state obligations under international human rights law, including the obligation to provide effective remedies.[190] It also recognized the role of domestic courts in identifying and addressing violations of international human rights law.[191] Second, it has paved the way for the creation of new causes of action for business-related violations of human rights. The decision will likely change the nature of these types of claims by opening the door to the development of new torts, such as a tort of torture or forced labour.[192] Perhaps more significantly it could allow the creation of a cause of action based directly on a breach of CIL, or at least a norm of *jus cogens*.

At the same time, this aspect of the SCC's judgment was decided by a slim majority. The four dissenting judges found that 'corporate liability for human rights has not been recognized under customary international law'.[193] Moreover, they argued that creating a cause of action for a breach of CIL encroaches 'on the roles of both the legislature (by creating a drastic change in the law and ignoring the doctrine of incrementalism), and the executive (by wading into the realm of foreign affairs)'. They further contended that the majority's decision 'departs from foundational principles of judicial law-making in tort law' which will cause instability and uncertainty.[194] This detailed dissenting judgment will therefore provide significant fodder for corporate defendants in such motions in future cases and plaintiffs will have the burden of addressing such arguments.

The SCC's decision on act of state in *Nevsun* has a more immediate impact than its decision on CIL as a cause of action. It effectively removes act of state motions from the arsenal of defendant companies seeking to have transnational human rights cases summarily dismissed. However, a company could still bring a motion for comity, requesting the court to decline jurisdiction in a case out of deference to the laws, sovereignty, and interests of the host state.[195] Moreover,

[187]See *Caal*, *supra* note 166, para. 13.

[188]M. Cohen, 'Doing Business Abroad: A Review of Selected Recent Canadian Case-Studies on Corporate Accountability for Foreign Human Rights Violations', (2020) 24(10) *International Journal of Human Rights* 1499, at 1505.

[189]Smit et al., *supra* note 53, at 264, suggest that the decision of the UK Supreme Court in *Lungowe v. Vedanta* which held that 'public commitments towards meeting the expectations of the UNGPs may expose UK-domiciled companies to legal liability … may have further contributed to the lack of legal certainty and legal clarity' identified by the UK companies in the survey discussed above.

[190]See *Nevsun v. Araya*, *supra* note 157, para. 119.

[191]Ibid., para. 2.

[192]See, e.g., F. Larocque, 'The Tort of Torture', (2009) 17(3) *Tort Law Review* 158.

[193]See *Nevsun v. Araya*, *supra* note 157, para. 191.

[194]Ibid., paras. 262–265.

[195]F. Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (2010), 197.

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there remain other pre-trial motions that can be fatal to these claims, including a motion on applicable law. Applicable law motions have not yet featured in pre-trial transnational human rights proceedings in Canada against Canadian extractive companies and they remain a useful weapon for a defendant company and a stumbling block for plaintiffs. A motion to determine the applicable law can result in a claim being dismissed before it is heard on the merits, for instance, where the applicable law does not provide a cause of action for the type of harm alleged or where a limitation period in the applicable law has run.[196]

When the *Hudbay* decision was rendered in 2013 'it sent shockwaves across the Canadian mining and legal communities' that it would open the floodgates to many more claims.[197] This initial concern subsided as extractive companies and their counsel began to see this as a smaller setback, namely a claim that could 'survive the "motion to strike" stage'.[198] The *Tahoe* and *Nevsun* decisions, however, have muddied the legal landscape, clearing a few more of the hurdles plaintiffs face to have the case heard on its merits.

Rogge, for example, contends that the SCC decision in *Nevsun* 'has widened the realm of uncertainty for business decision makers, since the legal risks that have been created are not yet clearly defined'. Thus 'corporate decision makers who may have been reluctant yesterday to turn their minds to human rights impacts abroad have a very compelling reason to do so now'.[199] Some Canadian corporate lawyers have warned that the *Nevsun* decision could open the doors to increased litigation against extractive companies and that defending such claims could be more costly and take more time. They also suggest that corporations should seek legal guidance on available tools to 'assess and monitor international law issues involving their subsidiaries, contractors, partners, suppliers and others'.[200]

These cases have created some legal uncertainty. However, with no case yet having been decided on the merits in favour of the plaintiffs, the cumulative effect of the *Hudbay*, *Tahoe* and *Nevsun* cases does not appear to have been enough to date to nudge extractive companies towards supporting the introduction of hard law. The *Nevsun* case was decided in February 2020 and settled in October of that year. The extractive industry may have also been reassured by the government's ultimate decision in December 2020 not to endow the CORE with the procedural powers discussed above.

A new claim filed against Barrick Gold Corporation in the Ontario courts in November 2022,[201] includes many of the elements necessary to advance the law on causes of action, building on the decisions in *Hudbay* and *Nevsun*. The plaintiffs allege that the security forces employed at Barrick's North Mara mine in Tanzania, engaged in acts of violence including shootings, beatings and torture of local residents in order to prevent and dissuade the latter from entering the waste rock areas of the mine to gather rocks with trace amounts of gold. The case is based in both the tort of negligence and CIL. The plaintiffs allege that Barrick recklessly and negligently created, directed, implemented, and supervised the security strategy and human rights policy for the mine 'leading to the killings of five local residents, and injuries to nine others' and that the company is complicit 'in the violation of customary international law' namely torture and extrajudicial killings.[202]

[196]See, e.g., *Das v. George Weston Ltd.*, 2017 ONSC 4129, affirmed 2018 ONCA 1053, leave to appeal to SCC refused, 38529 (8 August 2019).

[197]P. Koven, 'HudBay Case Raises Litigation Risk for Canadian Resource Companies', *Financial Post*, 30 October 2013, available at www.financialpost.com/legal-post/hudbay-case-raises-class-action-risk-for-canadian-resource-companies.

[198]Ibid.

[199]M. Rogge, 'Nevsun Puts Canada's Corporate Decision Makers in the "Human Rights Zone"', Corporate Responsibility Initiative (CRI) Working Paper No. 70, 19 March 2020, available at www.dx.doi.org/10.2139/ssrn.3557902, at 1, 10.

[200]R. B. Swan and G. G. Beaulne, 'Legal Uncertainty Increasing when Doing Business Abroad', (2020) 141(5) *Canadian Mining Journal* 5, at 15.

[201]*Sophia Matiko John et al. v. Barrick Gold Corporation*, ONSC Court File No. CV-22-00690649-0000 (Statement of Claim).

[202]Ibid., para. 15.

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They further allege that Barrick is directly liable for the harm caused by the security forces owing to: its assumption of direct control over the North Mara mine in 2019, its public commitment to adhere to numerous voluntary self-regulatory initiatives, including the UNGPs, OECD Guidelines and the Voluntary Principles on Security and Human Rights; its commitment to respect human rights; and its zero tolerance policy regarding human rights abuses associated with its operations.[203]

The plaintiffs will likely have to defend against a range of pre-trial motions including a motion on *forum non conveniens*,[204] and therefore the progress of the case through the courts is expected to take many years. Nonetheless, it is an important development that could eventually ramp up pressure on Canadian extractives concerned with liability to call for legislation that would establish more legal certainty.

5. Conclusions

This article has considered Canada's 2022 Strategy and the relevant compliance mechanisms, as well as the three leading cases brought in Canadian courts against Canadian extractives. It asked the question of whether these developments might shift extractive company support towards the introduction of HRDD legislation. Both sets of developments may have made incremental progress in this regard. Advancements in litigation against extractive companies have chipped away at some of the advantages the latter have in defending these types of lawsuits. However, these cases do not appear to have created sufficient legal uncertainty to persuade the extractive industry to support hard law. If one or more of the *Hudbay* actions go to trial and the plaintiffs are successful, the case would establish a new duty of care for extractive companies that claim to take human rights into account in their decision-making or that adhere to certain inter-governmental or multi-stakeholder initiatives. This would likely have a more profound impact on business views of hard law. Similarly, the Barrick case has the potential to establish, among other things, new causes of action for breaches of CIL. The dismissal of pretrial motions brought by the defendant company that advance the law could help to sway how businesses view regulation and the progress of this case through the courts will likely be closely followed by extractive companies and corporate counsel, as well as prospective plaintiffs.

Although Canada's 2022 Strategy is an improvement on its predecessor in terms of establishing some clearer expectations of business conduct, the normative effect of these changes remains to be seen. First, the due diligence standard has not yet been released. Second, the compliance mechanisms are problematic. The Strategy leaves TCS with significant discretion to continue to support companies that violate human rights, harm the environment or engage in bribery and other forms of corruption. Finally, the complaint mechanisms, meant to encourage business uptake of HRDD, are no more effective than those that supported the 2014 Strategy. No material changes have been made to the NCP, the CORE has no powers to compel witnesses and documents, and neither are trusted by the NGO community to provide effective remedies. Nor can the CORE engage in investigations of its own initiative with any more credibility than it could investigate allegations through the complaint process.

The timing of the release of the 2022 Strategy could be seen as significant. It came a few weeks after the private member's bill on HRDD was tabled[205] and just under a year after the release of the

[203]Ibid., paras. 7–9.

[204]Barrick has released a statement noting that it 'looks forward to defending itself against the meritless allegations that lie at the heart of the Claim, at the appropriate time and in the appropriate forum'. See Barrick, 'Statement on Legal Proceeding', 25 November 2022, available at www.barrick.com/English/operations/north-mara/legal-proceeding-nov2022/default.aspx.

[205]A second private member's bill was tabled the same day aimed at endowing the CORE with the powers to compel witness testimony and document production. See Bill C-263, An Act to establish the Office of the Commissioner for Responsible Business Conduct Abroad and to Make Consequential Amendments to Other Acts, 44th Parl., 1st Sess., 2021 (first reading completed 29 March 2022).

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report of the Standing Committee on Foreign Affairs and International Development and the Subcommittee on International Human Rights.[206] The latter report recommended that the government introduce legislation mandating human rights and environmental due diligence by Canadian companies and that the government consider legislation that would vest the CORE with the powers discussed above.[207] The introduction of the 2022 Strategy, with all its shortcomings, therefore appears to signal to Canadian companies, the public, and victims of extractive-related human rights violations, the government's current intransigence in moving beyond a voluntary self-regulation regime on HRDD.

In light of this, what happens in Canada in the near future in terms of legislative action and effective remedies on BHR may depend on what happens with respect to HRDD laws in European states and at the EU. Some Canadian extractives that have a presence in Europe may be subject to those laws and be required to develop HRDD processes, practices and reporting which will raise their costs vis-à-vis their competitors in Canada. They may therefore shift their position on the development of domestic law in their own state to level the playing field at home. European companies that are required to undertake HRDD in their global operations and supply chains are in global competition with businesses from unregulated jurisdictions like Canada.[208] They may, therefore, become supportive of the UN treaty process as a means to level the playing field. This in turn could put pressure on Canada to engage in the treaty process and to introduce HRDD legislation.

Compared to their European counterparts, Canada and Canadian companies are outliers and Canada's timid approach to regulating the global activities of its extractive sector is no longer sustainable. The lack of accountability of Canadian extractive companies has already led to reputational damage of the industry, particularly in Latin America.[209] It could also affect Canada's relationship with host countries and the former's ability to negotiate investment agreements, and to promote Canadian business interests abroad, with consequent impact on Canadian companies themselves.

Leaving aside the importance of regulation on HRDD and effective remedies for victims of corporate-related human rights violations – and Canada's international human rights law obligations[210] – there are significant benefits for companies in introducing regulation. These include clearer expectations, which provide companies with certainty about appropriate conduct,

[206]See House of Commons, Standing Committee on Foreign Affairs and International Development & Subcommittee on International Human Rights, *supra* note 19.

[207]Ibid., at 36, 38.

[208]See Parella, *supra* note 31, at 170. Mares, *supra* note 45, at 1535, argues that 'the level playing field argument in itself carries no power to enroll business support in the early stages of the legalization process'. But the HRDD laws that are now being enacted at the national level in Europe and at the EU level, with some support from business actors, may be the catalyst that shifts the views of other business actors in the EU and elsewhere on domestic hard law. This in turn may generate support for the UN BHR treaty process or a treaty developed in another forum (ibid., at 1536).

[209]See Arsenault, *supra* note 34; D. Hood, 'People Are Dying because of Canadian Mines. It's Time for the Killing to Stop', *Globe and Mail*, 19 February 2019, available at www.theglobeandmail.com/business/rob-magazine/article-people-are-dying-because-of-our-mines-its-time-for-the-killing-to/.

[210]The state duty to protect human rights also includes 'an obligation to ensure that business actors are able to engage with political processes without influencing them in ways that are inimical to human rights'. This means that states should not only enact HRDD legislation to protect against corporate-related violations of human rights, but that such legislation should also apply 'explicitly to corporate political engagement activities' such as lobbying. See UN General Assembly, Report of the Working Group on the Issue of Corporate Influence in the Political and Regulatory Sphere, UN Doc. A/77/201 (2022), paras. 75, 78. Thus, Canada should be taking steps to ensure that lobbying efforts by Canadian extractive companies and their industry associations do not undermine crucial legislation that would help to curtail business-related human rights violations and establish effective remedies.

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standardization of practices,[211] and levelling the playing field among good actors and laggards. As the former Special-Representative on Business and Human Rights stated:

> [g]overnments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.[212]

[211]See Parella, *supra* note 31, at 170.

[212]J. Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/8/5 (2008), para. 22.

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