

DEVELOPMENTS IN THE FIELD

Economic Diplomacy and Home State Responsibility for Human Rights Abuses Involving Extractive Industries Abroad: The Case of Canada

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Abstract

The debate over home state responsibility for human rights has focused on how home states might use accountability mechanisms to promote respect for human rights among their businesses abroad. However, a set of activists and researchers have opened a new front on the question of home state responsibility by focusing on the activities of Canadian diplomats providing advice and consular services to extractive firms abroad. This work documents how home states can be directly implicated in business and human rights controversies and how home state diplomats can put human rights defenders at increased risk. This paper outlines the growing body of research on the hidden influence of Canadian economic diplomacy in human rights controversies, suggesting a troubling disregard for corporate social responsibility and human rights concerns in these contexts, and making the case for robust accountability mechanisms to influence the conduct of both corporate actors and diplomatic officials.

Keywords: Canada; Economic diplomacy; Extractive Industries; Home state responsibility; Human rights defenders

1. Introduction

The debate in Canada over home state responsibility for human rights has focused primarily on accountability mechanisms to promote respect for human rights among businesses abroad. These discussions position the home state as a neutral ‘justice-giver’ uninvolved in the human rights controversies in question. However, Canadian activists and researchers have opened a new front on the question of home state responsibility by focusing on the activities of Canadian diplomats providing advice and services to Canadian extractive firms. They document how, far from being neutral participants, home states can be directly implicated in business and human rights controversies overseas in ways that can increase risks for human rights defenders. This work also suggests that home state diplomats could play a role in promoting respect for human rights through engagement with extractive firms and host state authorities. Unfortunately, practice so far indicates a culture of disregard and capture where corporate social responsibility (CSR) standards (i.e., privately generated, voluntary ethical or sustainability norms intended as benchmarks for responsible corporate behaviour) and corporate respect for human rights are not taken seriously in the conduct of economic diplomacy.

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Economic diplomacy, sometimes called commercial diplomacy, involves advocacy for domestic economic interests in diplomatic affairs. Long practiced, it takes many forms.¹ With economic globalization, many countries have expanded these kinds of diplomatic activities, particularly for domestic investors abroad.² In Canada, the federal government announced in 2013 that economic diplomacy would be ‘the driving force’ behind its diplomatic network.³

This paper explores the role played by economic diplomacy in Canada’s home state responsibility regime for extractive firms overseas. Section II explains Canada’s home state responsibility regime for the extractive sector overseas and outlines a growing body of research on the hidden influence of Canadian economic diplomacy in human rights controversies. Section III explores, through an illustrative example, some of the key implications of this research, particularly that the actions of Canadian diplomats and other officials reflect an institutional disregard for the home state responsibility regime that undermines its effectiveness. Section IV concludes the argument and makes the case for robust accountability mechanisms including in relation to diplomatic conduct.

II. Economic Diplomacy in the Home State Responsibility Debate in Canada

From a CSR Strategy to a Human Rights Ombudsperson: Continuity Amid Change

Canada is home to the majority of the world’s mining firms and is the primary jurisdiction used to raise capital, particularly for small firms.⁴ This has spurred an active mining accountability movement networked with environmental and mining justice movements domestically and abroad.⁵ Mining is a contentious activity with serious human rights risks, and Canadian operations in particular have been associated with violence and the criminalization of protest abroad,⁶ prompting critics to argue that the Canadian government must take action.⁷ Canada’s position as an important site of governance for the sector makes it a potential site for an accountability regime with global reach.

Economic diplomacy has long featured in home state responsibility debates in Canada, centered on establishing a non-judicial Ombuds complaints mechanism. Proponents of this mechanism envisioned a scheme based on ‘soft sanctions’ involving the withdrawal of government assistance, including economic diplomacy, from violators of CSR norms abroad.⁸ Members of the corporate accountability movement made a strategic concession in these debates, giving up strong enforcement in an effort to build multi-stakeholder support for a regime with effective investigations and the potential to authoritatively expose wrongdoing.⁹ Yet successive governments in Canada resisted this compromise, embracing soft sanctions while denying effective investigatory powers.

¹ Olivier Naray, ‘Commercial Diplomacy’, paper presented at the 7th World Conference of TPOs, The Hague in January 2008; Francisco J Valderrey, Adriana Sánchez and Alejandro Delgado, ‘International business diplomacy’ (2022) 8 *International Journal of Diplomacy and Economy* 81.

² Evan H Potter, ‘Branding Canada’ (2004) 5 *International Studies Perspectives* 55.

³ Government of Canada, *Global Markets Action Plan* (Ottawa: Government of Canada, 2013).

⁴ Daviken Studnicki-Gizbert, ‘Canadian Mining in Latin America (1990 to present)’ (2016) 41 *Canadian Journal of Latin American and Caribbean Studies* 95, 96–7.

⁵ Charis Kamphuis, ‘The Transnational Mining Justice Movement’ (2020) 57 *Canadian Yearbook of International Law* 286.

⁶ Shin Imai, Leah Gardner and Sarah Weinberger, *The “Canada Brand”: Violence and Canadian Mining Companies in Latin America* (Toronto: JCAP, 2017).

⁷ Imai, Gardner and Weinberger, *note 6*, 28.

⁸ Charis Kamphuis, ‘Canadian Mining Companies and Domestic Law Reform’ (2012) 13 *German Law Journal* 1459.

⁹ Advisory Group, *National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries: Advisory Group Report* (Ottawa: Government of Canada, 2007).

In 2009, Canada adopted a ‘CSR Strategy for the Canadian International Extractive Sector’ (CSR Strategy), stating that the government ‘encourages and expects’ extractive firms to comply with international CSR standards, including the International Finance Corporation (IFC) Performance Standards, and the Voluntary Principles on Security and Human Rights. Backed only by voluntary reporting, voluntary mediation (firms could refuse mediation without penalty) and the remote risk of soft sanctions, the CSR Strategy was widely criticized as ineffectual.¹⁰ A decade later in 2019, the government created the Canadian Ombudsperson for Responsible Enterprise (CORE), an Ombuds mechanism to review overseas human rights complaints against Canadian extractive and garment companies. While the shift to human rights rather than CSR standards is significant, CORE still lacks robust investigatory powers and penalties are still limited to soft sanctions focusing on the withdrawal of economic diplomacy.¹¹ Thus, while these mechanisms assert that Canadian enterprises are held to high standards, critics argue that they lack the necessary investigatory and enforcement powers to be taken seriously.¹²

Economic Diplomacy and Home State Complicity in Corporate Abuses Abroad

While economic diplomacy has been contemplated in debates about sanctions, it has remained on the sidelines in discussions about drivers of abuse and state complicity. Yet over time, the corporate accountability movement has documented how Canadian economic diplomacy is more centrally implicated in business and human rights controversies in the extractive sector. Through access to information (ATI) requests, researchers have begun to discover the role embassy staff have played supporting extractive firms involved in human rights related conflicts. Although ATI requests are slow, expensive and provide redacted records, they can reveal detailed accounts of embassy involvement. Using these requests, researchers have revealed the role played by economic diplomacy in a small but growing number of human rights controversies involving Canadian extractive firms. To date, researchers have published studies informed by ATI disclosures in relation to two Canadian companies operating in Guatemala (Goldcorp¹³ and Tahoe Resources¹⁴), another two in Mexico (Blackfire Exploration¹⁵ and Excellon Resources¹⁶) and one in Peru (Hudbay Minerals¹⁷).

¹⁰ Global Affairs Canada. *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector* (Ottawa: Government of Canada, 2009). The CSR Strategy was originally backed by a CSR Counsellor limited to voluntary mediation and often ignored by both mining companies and communities. See Catherine Coumans, ‘Mining and Access to Justice’ (2012) 45 *UBC Law Review* 651. In 2014, Canada revised its CSR Strategy to state explicitly that economic diplomacy services would be withdrawn from extractive companies found not to be embodying CSR best practices and who refused to participate in dispute resolution processes. See Global Affairs Canada, *Doing Business the Canadian Way* (Ottawa: Government of Canada, 2014).

¹¹ Karyn Keenan, ‘Canada’s New Corporate Responsibility Ombudsperson Falls Far Short of its Promise’ (2020) 5 *Business and Human Rights Journal* 137.

¹² Canadian Network on Corporate Accountability, ‘An ombudsperson with teeth’ *CNCA – RCRCE Blog* (23 March 2020), <https://cnca-rcrce.ca/campaigns/ombuds-power2investigate/> (accessed 29 Jun 2023); Tavia Grant, ‘UN Criticizes Canada’s Corporate Oversight’ *The Globe and Mail* (9 September 2023) A4.

¹³ Charis Kamphuis and Charlotte Connolly, *The Two Faces of Canadian Diplomacy: Undermining International Institutions to Support Canadian Mining* (Toronto: JCAP, 2022).

¹⁴ Caren Weisbart, ‘Diplomacy at a Canadian Mine Site in Guatemala’ (2018) 26 *Critical Criminology* 473; Caren Weisbart, Charlotte Connolly and Jennifer Moore, ‘Qualifying as Canadian: Economic Diplomacy, Mining, and Racism at the Escobal Mine in Guatemala’ in David P Thomas and Veldon Coburn (eds.), *Capitalism & Dispossession* (Halifax: Fernwood Publishing, 2022).

¹⁵ Jennifer Moore and Gillian Cosgrove, *Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy* (Ottawa: United Steelworkers, Common Frontiers, and MiningWatch Canada, 2013).

¹⁶ Jen Moore, *Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy, and the Violation of Land and Labour Rights in Durango, Mexico* (Ottawa: MiningWatch Canada, United Steelworkers, 2015).

¹⁷ Charis Kamphuis et al., *The Two Faces of Canadian Diplomacy: Undermining Human Rights and Environment Defenders to Support Canadian Mining* (Toronto: JCAP, 2022).

The body of research undertaken so far in this field points to several common issues. It shows that Canadian extractive firms often turn to specialized staff at Canadian embassies for assistance in dealing with challenges in foreign jurisdictions. Diplomatic staff may help with bureaucracy and permitting, arranging meetings with host country officials or by advocating on the company's behalf. Conflicts with local communities present extractive firms with complex challenges, and in such cases, diplomatic personnel may be called on to provide support on matters critical to human rights compliance. These studies show that embassy staff actively engage with matters that bear directly on CSR compliance and corporate respect for human rights.

Research also suggests that diplomatic staff are influential with both Canadian extractive firms and host country officials. Extractive firms approach embassy officials for the perceived value of their knowledge and influence. This shows that Canadian diplomats may also be well-positioned to promote Canada's CSR and human rights goals. However, despite Canada's stated commitment to promoting CSR standards and human rights accountability, the literature suggests that these concerns are not reflected in the conduct of economic diplomacy. On the contrary, the research based on ATI disclosures suggests that embassy staff tend to prioritize the economic interests of Canadian extractive firms and adopt industry perspectives (on, for example, the illegitimacy of local concerns and protest).¹⁸ Reportedly, the disclosures fail to show that Canadian diplomats raise human rights or CSR concerns with extractive firms in meaningful ways. For example, the reports documenting embassy involvement do not reveal embassy staff asking hard questions or making independent inquiries to verify claims by extractive firms.¹⁹ The authors of these reports argue that, by prioritizing support for extractive companies in the face of serious human rights concerns, Canadian officials increase dangers for human rights defenders and contribute to contexts that make abuses more likely.²⁰

Disturbingly, these cases also suggest a shared disregard among embassy officials and extractive firms for Canada's CSR Strategy. To date, these studies all concern events that took place after the adoption of Canada's CSR Strategy for the extractive sector in 2009 but before its 2019 human rights Ombuds upgrade. The concern is that the priority put on corporate interests and perspectives in these cases reflects an institutionalized disregard for conflicting considerations. The nature and consequences of this disregard can be illustrated with the concrete example developed below.

III. An Institutional Disregard for Canada's CSR Strategy?

Blackfire Exploration, the Canadian Embassy, and the Death of Mariano Abarca

In 2009, Mariano Abarca, a community activist and protestor against Blackfire's barite mine in Chiapas, Mexico, was murdered.²¹ The mine had attracted opposition due to environmental concerns, corruption allegations involving illicit payments to a local mayor and disputed land-use agreements made with local *ejidos* (peasant farmer communities).²² These conflicts, and the protests and blockades they provoked, increased tensions between supporters and opponents of the mine. Mr. Abarca was a prominent local

¹⁸ Weisbart, Connolly and Moore, note 14; Kamphuis and Connolly, note 13.

¹⁹ Kamphuis and Connolly, note 13, 6, 38; Moore and Cosgrove, note 15, 29; Kamphuis et al., note 17, 92.

²⁰ E.g. Moore and Cosgrove, Note 15, 2–3.

²¹ Andy Hoffman, 'Mexican Mystery: The Mayor, the Model and the Mining Company' *The Globe and Mail* (12 December 2009) A23; Moore and Cosgrove, Note 15, 18.

²² Moore and Cosgrove, note 15; United Steelworkers, Common Frontiers, MiningWatch Canada, *Report from the March 20-27, 2010 fact-finding delegation to Chiapas, Mexico, to investigate the assassination of Mariano Abarca Roblero and the activities of Blackfire Exploration Ltd* (Ottawa: United Steelworkers, Common Frontiers, MiningWatch Canada 2010).

critic of the mine who faced threats and aggression from actors allegedly associated with Blackfire. In August 2008, he was assaulted by three men, including a Blackfire employee.²³ When opposition to the mine accelerated in June 2009, Mr. Abarca was involved in various protests including a blockade of an access road to the mine²⁴ and a protest at the Canadian embassy in Mexico City later in July 2009.²⁵ In August 2009, Mr. Abarca was arrested (based on a complaint filed by a Blackfire representative in Mexico)²⁶ and held in ‘pre-charge’ detention for his participation in the protests by Chiapas state police. He was released unconditionally eight days later because ‘there was no evidence that the protest in which [he] was participating was violent or threatened public order.’²⁷ In November 2009, Mr. Abarca complained to police that two Blackfire employees had made death threats against him.²⁸ Within a week, Mr. Abarca was shot dead in front of his house by an assailant who escaped on a motorcycle.²⁹ Three individuals associated with Blackfire were arrested, but all were released or acquitted.³⁰ Shortly after Mr. Abarca’s murder, the state government ordered the closure of the mine for environmental reasons.³¹

In a report based on redacted embassy documents received through an ATI request, researchers showed that embassy staff advised Blackfire and engaged with Mexican officials on its behalf both before and after Mr. Abarca’s murder.³² Embassy staff tracked the situation facing Blackfire, arranged meetings with senior government officials, including the state governor, and advocated for the company with Mexican officials. This included a visit with state authorities to resolve the challenges that Blackfire was facing with ‘lengthy blockades’. According to an internal memo, ‘the Embassy requested’ at that meeting with state officials ‘that the rule of law be respected and executed in a timely manner when disputes arose’.³³ The report suggests that embassy staff uncritically ‘adopted and reinforced’ Blackfire’s hostile view towards community resistance and ‘Abarca’s leading role’ in this resistance. It concludes that this ‘set the stage for the violence to come’.³⁴

Missing from the ATI disclosure are indications that the embassy used its influence with Blackfire or with Mexican authorities to de-escalate the situation and diminish risks to human rights defenders. Embassy staff did make inquiries with Mexican authorities during Mr. Abarca’s detention; however, further actions were apparently not taken.³⁵ It appears that the embassy did not meaningfully engage with Blackfire concerning the expectations of Canada’s CSR Strategy, including compliance with international CSR best practices and standards.³⁶ In 2009, Canada’s CSR Strategy emphasized the importance of violence-related risk assessment and the Voluntary Principles on Security and Human Rights, instruments

²³ United Steelworkers et al, *Note 22*, 11.

²⁴ Amnesty International, ‘Mexico: Protestor’s Family at Risk after Killing’ (3 December 2009) <https://www.amnesty.org/en/documents/amr41/062/2009/en/> (accessed 30 January 2024).

²⁵ Moore and Cosgrove, *Note 15*, 3.

²⁶ *Ibid*, 3.

²⁷ Amnesty International, *Note 24*.

²⁸ Moore and Cosgrove, *Note 15*, 18; United Steelworkers et al, *Note 22*, 11.

²⁹ Moore and Cosgrove, *Note 15*, 18; Amnesty International, *Note 24*, 1; United Steelworkers et al, *Note 22*, 12.

³⁰ Moore and Cosgrove, *Note 15*, 18-19. Justice and Corporate Accountability Project, *Submission to the Public Sector Integrity Commissioner in Relation to the Embassy of Canada in Mexico* (Toronto: JCAP, 2018), 5.

³¹ Moore and Cosgrove, *Note 15*, 21.

³² *Ibid*, *Note 15*.

³³ Access to information request A-2010-00758/RF1, 000038.

³⁴ Moore and Cosgrove, *Note 15*, 13.

³⁵ *Ibid*. The ATI disclosure shows embassy staff made inquiries with Mexican authorities following Mr. Abarca’s arrest on a complaint from Blackfire. During his detention without charge, the Canadian Embassy received 1,400 emails and letters expressing concerns for Mr. Abarca’s safety. JCAP, *Note 30*, 5.

³⁶ Moore and Cosgrove, *Note 15*, 8, 13.

that, if taken seriously, could have reduced risks for human rights defenders.³⁷ As the ATI disclosures are redacted, it is not clear what information is missing.³⁸ As a result, the report on the Blackfire case and embassy involvement raises questions that it cannot fully answer.

Gordillo v. Canada: Judicial Review of the Public Sector Integrity Commissioner's Refusal to Investigate

In 2018, Mr. Abarca's family and Canadian supporters made a complaint to Canada's public sector watchdog, the Public Sector Integrity Commissioner, asking it to investigate potential wrongdoing by embassy officials that may have contributed to endangering Mr. Abarca's life. The evidentiary issue in this case was not whether the applicants could prove that embassy staff engaged in wrongdoing but rather whether they could meet a basic threshold to justify a proper investigation of the matter. However, the Commissioner denied this request,³⁹ and the applicants sought a court order to reverse that decision. The courts sided with the government at trial⁴⁰ and on appeal,⁴¹ concluding that the Commissioner's decision to refuse to investigate possible embassy wrongdoing was not unreasonable. The Supreme Court of Canada denied leave to appeal in early 2023.⁴²

The decisions of the Public Sector Integrity Commissioner and the two reviewing courts are noteworthy. The decisions all agree that Canada's CSR Strategy for the extractive sector does not create obligations on embassy staff carrying out economic diplomacy. The CSR Strategy states that extractive firms are expected to comply with international CSR standards and best practices.⁴³ However, in the Commissioner's view, this expectation does not oblige embassy officials to engage with this issue when assisting extractive firms, apparently even in circumstances of obvious social conflict and serious threats to human rights. The Public Sector Integrity Commissioner found that the documents cited by the applicants, including Canada's CSR Strategy, were not 'official Government of Canada policies' and did not 'appear to prescribe specific actions that should have been taken or not taken by the Embassy'.⁴⁴ Further, the Commissioner found that, in its interactions with Blackfire, the Embassy acted within its proper mandate to assist Canadian companies abroad. On judicial review, the application judge supported this view and characterized the CSR Strategy and other documents as 'aspirational documents and policies', stating that the applicants had 'not identified anything which created a legal obligation upon the Embassy to act or not to act in a certain manner'.⁴⁵ The judge added that, had the embassy taken the actions suggested by the applicants, 'perhaps Mr. Abarca would not have been murdered'.⁴⁶ However, this too was not enough to create an obligation to carry out economic diplomacy differently. Undaunted however, advocates are taking the case to the Inter-American Commission on Human Rights, arguing that Canada's approach to

³⁷ Global Affairs Canada, *Building the Canadian Advantage* (Ottawa: Government of Canada, 2009).

³⁸ Activists have challenged these redactions in court without success. Canadian Network on Corporate Accountability, 'Court Rules Ottawa Can Maintain Secrecy on Aid to Goldcorp in Human Rights Dispute' CNCA – RCRCE (2 March 2022), <https://cnca-rcrce.ca/2022/03/02/court-rules-ottawa-can-maintain-secrecy-on-aid-to-goldcorp-in-human-rights-dispute/> (accessed 2 October 2023).

³⁹ Office of the Public Sector Integrity Commissioner of Canada, Decision Letter File No. PSIC-2017-D-0413 (5 April 2018).

⁴⁰ *Gordillo v Canada (Attorney General)* 2019 FC 950.

⁴¹ *Gordillo v Canada (Attorney General)* 2022 FCA 23.

⁴² *Gordillo v Canada (Attorney General)* 2023 CanLII 561 (SCC).

⁴³ Global Affairs Canada, Note 10.

⁴⁴ OPSIC, Note 39, 2.

⁴⁵ *Gordillo v Canada*, Note 40, para 66.

⁴⁶ *Ibid*, para. 66.

economic diplomacy puts it in breach of its international obligations to protect human rights defenders.⁴⁷

The *Gordillo* case appears to confirm the fears of the Canadian corporate accountability movement that without solid accountability mechanisms, including the capacity for robust independent investigations, Canada's CSR strategy and its human rights ombuds office risk being disregarded by extractive firms, by Canadian embassies, by home state officials and by reviewing courts. This raises serious concerns. In recent years, Canada has addressed the absence of explicit guidelines for diplomatic officials relating to economic diplomacy and human rights issues. In 2016, Canada adopted a policy on human rights defenders with explicit guidelines for Canadian diplomatic missions wherein a Canadian enterprise is alleged to be involved in a human rights controversy. Staff are instructed to refer to Canada's CSR Strategy for guidance and may deny or withdraw access to trade advocacy support.⁴⁸ The 2019 update to the policy adds that Canadian diplomatic officials must also support and offer protection to human rights defenders.⁴⁹ However, the question remains whether these documents will influence the institutional culture within the diplomatic service or whether they too may be characterized as documents that are 'aspirational' or somehow not 'official'.⁵⁰

IV. Conclusion

Research to date on Canadian economic diplomacy reveals a neglected dimension of the debate over home state responsibility for human rights. It shows that home state diplomatic staff can be consequential actors in corporate human rights controversies abroad with the potential to exacerbate or de-escalate situations involving criminalization and other threats to human rights. This work also presents evidence of a troubling disregard in the diplomatic service regarding Canadian policies intended to advance CSR and corporate respect for human rights. This raises the question of whether more policy changes in favour of CSR or human rights protections are sufficient to shape economic diplomacy without the addition of robust accountability mechanisms to enable independent and effective inquiries into both private and public actions, including diplomatic action, involved in corporate human rights controversies abroad.

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⁴⁷ The Canadian Press, 'Supporters of Slain Mexican Mining Activist Take Case against Canada to International Body' (7 June 2023) *CBC News*, <https://www.cbc.ca/news/canada/canada-mexico-mining-mariano-abarca-1.6868459> (accessed 17 September 2023).

⁴⁸ Global Affairs Canada, *Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders* (Ottawa: Government of Canada, 2016), 12.

⁴⁹ Global Affairs Canada, *Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders* (Ottawa: Government of Canada, 2019), 21.

⁵⁰ Kamphuis et al document how Canadian diplomats failed to comply with the "Voices at Risk" guidelines in a case involving a Canadian human rights defender in Peru in 2017. Kamphuis et al, [Note 17](#).