



Note No.: GENEV-7690

Reference: Canada's response to JAL CAN 7/2021

The Permanent Mission of Canada to the Office of the United Nations and World Trade Organization at Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to refer to the joint letter JAL CAN 7/2021 dated 17 November 2021. The Permanent Mission of Canada further has the honour to submit Canada's response.

The submission consists of one document.

The Permanent Mission of Canada to the Office of the United Nations and World Trade Organization at Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.



E. Norton

Geneva, 18 January 2022

Responses by the Government of Canada to the Joint Communication from Special Procedures AL CAN 7/2021 of 17 November 2021

1. Additional information or comments on the allegations in this letter

The Government of Canada takes Special Procedure communications very seriously, and expresses strong concern regarding the allegations in the joint communication. Canada has been in contact with the company in question since December 2020 to confirm they are aware of Canada's approach, expectations, and guidance regarding responsible business conduct (RBC), as well as the allegations raised in the Special Procedures. Further, the Chair of the National Contact Point (NCP) for RBC for the OECD Guidelines for Multinational Enterprises also held a meeting with the company to underscore the Government of Canada's expectations. The Canadian government continues to maintain a dialogue with the company with respect to their operations in the Okavango Delta.

The Government of Canada expects the Canada-based private company in question – and all Canadian companies active abroad – to abide by all relevant laws, to respect human rights, to operate transparently, and in consultation with host governments and local communities, and to work in a socially and environmentally responsible manner that is consistent with internationally respected guidelines on RBC. This includes the *UN Guiding Principles on Business and Human Rights* and the *OECD Guidelines for Multinational Enterprises*.

2. Information on the legal basis of the oil exploration activities, including compliance with UNDRIP, the Ramsar Convention, the Paris Climate Agreement, and the Convention Concerning the Protection of the World Cultural and Natural Heritage, and measures taken by the Government of Canada to ensure that Canadian companies operating abroad are not causing or contributing to abuses of international norms and standards

Canada is proudly a Party to the legally binding international law instruments listed above and is in the process of implementing the UNDRIP, a non-legally binding instrument, into Canadian domestic legislation, notably through the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act*. This Act, enacted in June 2021, affirms the Declaration as a source for interpreting Canadian law and provides a framework to advance the implementation of the Declaration at the national level.

Canada takes its international legal obligations seriously and has implemented its international treaty obligations domestically through constitutional, federal, provincial, and territorial laws and policies, including, for example, the *Canadian Charter of Rights and Freedoms* and human rights legislation.

Canada strongly supports the participation of Indigenous peoples and local communities as important stakeholders and stewards in the management and conservation of World Heritage properties. The petroleum exploration licenses referenced by the World Heritage Committee are located in the Cubango-Okavango River Basin, outside the boundaries and buffer zones of the following two World Heritage properties:

- **Okavango Delta** (Botswana), natural property inscribed on the World Heritage List in 2014 under criteria (vii)(ix)(x). For more information, see <https://whc.unesco.org/en/list/1432>.
- **Tsodilo** (Botswana), cultural property inscribed on the World Heritage List in 2001 under criteria (i)(iii)(vi). For more information, see <https://whc.unesco.org/en/list/1021>.

The World Heritage Committee has frequently expressed concerns regarding the incompatibility of mining operations with World Heritage status of natural and cultural heritage properties, particularly when they lead to negative impacts to a property's Outstanding Universal Value. The Committee adopted a decision at its 44th session in July 2021 (44 COM.7B.80) noting its concern and urging additional measures to protect the Okavango Delta from proposed petroleum development.

Canada, as a Party to the World Heritage Convention, respects the technical advice provided by the International Union for Conservation of Nature (IUCN) as Advisory Body on natural heritage to the World Heritage Committee, and the decisions of the World Heritage Committee, including its requests for thorough and transparent environmental assessment processes to evaluate any potential impacts of large-scale projects to a property's Outstanding Universal Value. As per Article 4 of the Convention¹, the States Parties of Botswana and Namibia have sovereignty over decision-making related to World Heritage properties located within their respective jurisdictions, and are responsible for ensuring their protection.

Regarding the **“legal basis of the oil exploration activities, including compliance with Canada’s obligations pursuant to the [...] Convention Concerning the Protection of the World Cultural and Natural Heritage” (OHCHR, AL CAN 7/2021, pg. 5, para. 2,)**, it is important to note that Canada’s obligations pursuant to the Convention are restricted to ensuring that World Heritage properties located within its own territory are managed and protected according to the principles and guidelines put forth by the Convention, and that the Canadian government does not undertake any deliberate measures which might damage World Heritage sites in other countries. The legal basis of the oil exploration activities being undertaken by the company and its subsidiaries would, therefore, be a subject for the States Parties of Botswana and Namibia to evaluate in accordance with their obligations under the Convention to protect World Heritage properties in their respective territories.

A treaty applies to a Party’s territory, where it has jurisdiction. A treaty’s obligations only apply outside a Party’s territory if the treaty is explicit. The jurisdiction for the Party’s obligations in the treaties mentioned is strictly territorial as per the treaty text. In conformity with the principle of sovereignty of States, a State may not exercise jurisdiction over the territory of another State without the latter’s consent. If Namibia and Botswana are Parties to these treaties, then indeed they would have legal obligations under international law. Canada expects other States to implement their international obligations.

Although UNDRIP is not a legally-binding instrument, Canada’s domestic implementation of UNDRIP is also only applicable within Canadian territory. Canada expects all Canadian

¹ Article 4: Each Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. <https://whc.unesco.org/archive/convention-en.pdf>

companies operating abroad to abide by all relevant local laws, to respect human rights in their operations, and to adopt voluntary best practices and internationally respected guidelines on RBC such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

3. Information on steps taken to protect against human rights abuses by business enterprises domiciled in its territory and/or jurisdiction in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs)

Although Canada does not have international human rights legal obligations outside its territory and jurisdiction, the Government of Canada expects all Canadian companies operating in Canada and abroad, regardless of sector, to respect human rights, all applicable laws and international standards, to operate transparently and in consultation with host governments and local communities, and to work in a socially and environmentally responsible manner, in accordance with internationally recognized guidelines. This expectation applies to Canadian companies sourcing their goods and services abroad as well.

Canada has two non-judicial dispute resolution mechanisms. Canada's National Contact Point (NCP) was established in 2000 as part of our commitment to the OECD Guidelines for Multinational Enterprises. The NCP applies to all sectors, and a range of issues including human rights, employment, environment, disclosure and bribery.

The Canadian Ombudsperson for Responsible Enterprise (CORE) was established in 2019 to strengthen Canada's longstanding and extensive engagement in RBC. The CORE demonstrates Canada's commitment to human rights and inclusive trade. The CORE complements the NCP and focuses on allegations of human rights abuse by Canadian companies abroad in the mining, oil and gas and garment sectors.

Moreover, through its network of more than 1,000 Trade Commissioners at offices in Canada and at diplomatic missions around the world, Canada actively promotes best practices and provides advice on RBC to Canadian companies active abroad. Trade Commissioners work with Canadian businesses to help them grow through connecting them with international opportunities, funding and support programs. Global Affairs Canada provides RBC training to its Trade Commissioners that covers how to support Canadian companies to do business in a socially and environmentally responsible manner consistent with internationally recognized standards and practices. A company's track record on RBC is taken into consideration by Trade Commissioners prior to providing trade advocacy support. For example, Canadian companies seeking trade advocacy support abroad must sign an Integrity Declaration which attests that the Canadian company understands the Government of Canada's RBC expectations, has not been charged, convicted or sanctioned for bribery or corruption, and will not engage in such illegal activities. In December 2021 over 1,500 Integrity Declarations signed by Canadian companies were in place.

4. Information on any plans to permit hydraulic fracturing (fracking) for this project and if so, measures being taken to mitigate risk of exposure to radioactive materials, earthquakes, and potential contamination

The primary responsibility for regulating the activities of companies in Botswana and Namibia lies with the democratically elected governments of both countries. These national governments

retain the authority to oversee corporate activities according to national law. However, the Government of Canada also expects Canadian companies active abroad to abide by all relevant laws, to respect human rights, to operate transparently, and in consultation with host governments and local communities, and to work in a socially and environmentally responsible manner that is consistent with internationally respected guidelines on RBC. This includes the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

5. Information on any consultations with the affected Indigenous communities prior to the approval of the project and whether their free, prior, and informed consent was sought and received

Canada seeks to support developing countries in strengthening institutions, laws and policies for the sustainable management of natural resources, to increase the participation of women and traditionally marginalized groups in decision-making and access to natural resources, to protect human rights defenders and to strengthen frameworks for RBC. Canada is a core funder of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), which supports its 80 member countries in leveraging mining for sustainable development to ensure negative impacts are limited and financial benefits are shared. Botswana and Namibia are both members of the IGF and have benefited from its technical assistance.

6. Details on measures taken by the Government of Canada to undertake environmental and human rights assessments regarding the impacts of oil and gas exploration activities on the San Indigenous peoples and plans to adopt appropriate mitigation and protections measures

The primary responsibility for regulating the activities of companies in Botswana and Namibia lies with the democratically elected governments of both countries. These national governments retain the authority to oversee corporate activities according to national law. However, the Government of Canada also expects Canadian companies active abroad to abide by all relevant laws, to respect human rights, to operate transparently, and in consultation with host governments and local communities, and to work in a socially and environmentally responsible manner that is consistent with internationally respected guidelines on RBC. This includes the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and engaging meaningfully with Indigenous peoples.

Natural resource wealth can be a transformative driver of sustainable development, but the way resources are managed and how benefits are shared makes all the difference. For resource wealth to create a positive human impact, decisions on use of resources and benefits have to be inclusive. Under Canada's Feminist International Assistance Policy Canada promotes a feminist approach to natural resource governance abroad which promotes empowerment and inclusion, strengthens institutions and frameworks and protects human rights defenders.

7. Information regarding measures taken by the Government of Canada, or in consideration, to ensure that those affected by the overseas activities of ReconAfrica have access to effective remedies as per the UNGPs

Canada has a balanced approach to RBC, which commits to identifying and preventing problems before they escalate, as well as to offering effective, low cost and accessible dispute resolution. Canada has adopted legislation addressing critical issues related to RBC such as corruption, transparency and most recently, forced labour. For example:

- Canada has made it a criminal offense to offer a bribe to a foreign public official under the *Corruption of Foreign Public Officials Act (CFPOA)*.
- Under the *Extractive Sector Transparency Measures Act (ESTMA)*, Canada requires extractive companies listed in Canada to declare all taxes paid and where they are paid.
- In July 2020, amendments to the *Customs Tariff*, made it illegal to import products manufactured wholly, or in part, through forced labour.

As noted earlier, Canada also has two complementary and dispute resolution mechanisms: Canada's NCP, established in the year 2000 as part of our commitment to the OECD Guidelines for Multinational Enterprises; and the CORE, announced in April 2019. Companies that do not collaborate in good faith with either dispute resolution mechanism may be denied official trade advocacy support and future Export Development Canada financial support. Use of Canada's dispute resolution mechanisms do not preclude pursuing recourse in other fora such as courts in host countries or in Canada, as appropriate.

8. Information on actions taken by the Canadian Ombudsperson for Responsible Enterprise (CORE)

Canada's National Contact Point (NCP) for RBC offers dispute resolution for a wide range of issues including disclosure, labour issues, human rights and environmental issues, whereas the CORE is a non-judicial remedy mechanism that reviews human rights abuses stemming from the operations of Canadian companies operating abroad in the garment, mining, and oil and gas sectors. While ReconAfrica's operations in the Kavango Basin region has attracted international attention, the CORE has not received an admissible complaint to date. The NCP has not received a formal request to review the project.