

Corporate Social Responsibility

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I. Introduction

This article reviews important developments in 2014 in the field of corporate social responsibility as well as the field of business and human rights. Many of the developments in 2014 revolved around the *UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (the Guiding Principles).¹ In 2005, the United Nations Secretary General appointed Professor John Ruggie to serve as the Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises (SRSG).² In 2008, Ruggie submitted a *Framework for Business and Human Rights* (the UN Framework) to guide thinking about the relationship between business and human rights.³ In the UN Framework, Ruggie observed that the root cause of the business and human rights predicament today “lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”⁴ To Ruggie, these governance gaps “provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”⁵ “How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge,” Ruggie concluded.⁶ Noting that the business and human rights debate “currently lacks an authoritative focal point”⁷ and that “claims and counter-claims proliferate,”

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1. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

2. H. R. Comm'n Res. 2005/69 (Apr. 20, 2005), available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc.

3. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 Apr 2008 [hereinafter “UN Framework Report”]. A/HRC/RES/8/7, 18 June 2008.

4. *Id.* at para. 3.

5. *Id.*

6. *Id.*

7. *Id.* at para. 5.

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erate, initiatives abound, and yet no effort reaches significant scale,”⁸ Ruggie set out to identify a workable framework to guide understanding of the business and human rights linkages. Essentially, the UN Framework which “rests on differentiated but complementary responsibilities,”⁹ comprises of three core principles: (1) “the State duty to protect against human rights abuses by third parties, including business;”¹⁰ (2) “the corporate responsibility to respect human rights;”¹¹ and (3) “the need for more effective access to remedies.”¹² In June 2011, Ruggie presented the *Guiding Principles* for consideration by the Human Rights Council.¹³ On 6 July 2011, the Human Rights Council unanimously endorsed the Guiding Principles.¹⁴

2014 saw much action by governments, corporations, industry groups and international organizations aimed at implementing the Guiding Principles. First, several countries (e.g. Denmark, Spain and Canada) announced national action plans aimed at implementing the Guiding Principles, and others (e.g. the United States) announced plans to implement specific aspects of the Guiding Principles. Second, several courts, tribunals and other grievance mechanisms issued decisions that bear, directly or indirectly, on the business and human rights linkage an indication that that the third principle in the UN Framework—“the need for more effective access to remedies” is becoming a strong focal point for action. Finally, 2014 saw several bar associations take concrete steps to either endorse the Guiding Principles and to offer guidance to lawyers and law firms on how to implement them.

II. Normative Developments—National, Regional, and International

A. INTERNATIONAL DEVELOPMENTS

1. *The Committee on World Food Security*—The Principles for Responsible Investment in Agriculture and Food Systems

On October 15, 2014, at its forty-first session, the Committee on World Food Security endorsed and released the *Principles for Responsible Investment in Agriculture and Food Systems* (“Principles”).¹⁵ The stated objective of the Principles is “to promote responsible investment in agriculture and food systems that contribute to food security and nutrition, thus supporting the progressive realization of the right to adequate food in the context of national food security.”¹⁶ The purposes of the Principles are three-fold: (1) “[a]ddress the

8. *Id.*

9. *Id.* at para. 9.

10. *Id.*

11. *Id.*

12. *Id.*

13. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and “*Protect, Respect and Remedy*” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

14. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

15. Committee on World Food Security, *Principles for Responsible Investment in Agriculture and Food Systems*, CFS 2014/41/4 Rev.1.

16. *Id.* at para. 10.

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core elements of what makes investment in agriculture and food systems responsible;¹⁷ (2) “[i]dentify who the key stakeholders are, and their respective roles and responsibilities with respect to responsible investment in agriculture and food systems;”¹⁸ and (3) “[s]erve as a framework to guide the actions of all stakeholders engaged in agriculture and food systems by defining Principles which can promote much needed responsible investment, enhance livelihoods, and guard against and mitigate risks to food security and nutrition.”¹⁹ The Principles take into account and build on existing guiding frameworks such as the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods, and Resources* and the *Voluntary Guidelines on the Progressive Realization of the Rights to Adequate Food in the Context of National Food Security*.

The Principles is in three parts: Introduction; The Principles; and Roles and Responsibility of Stakeholders. In all, ten principles are laid out in the document. Principle 1: Contribute to food security and nutrition; Principle 2: Contribute to sustainable and inclusive economic development and the eradication of poverty; Principle 3: Foster gender equality and women’s empowerment; Principle 4: Engage and empower youth; Principle 5: Respect tenure of land, fisheries, and forests and access to water; Principle 6: Conserve and sustainably manage natural resources, increase resilience, and reduce disaster risks; Principle 7: Respect cultural heritage and traditional knowledge, and support diversity and innovation; Principle 8: Promote safe and healthy agriculture and food systems; Principle 9: Incorporate inclusive and transparent governance structures, processes, and grievance mechanisms; and Principle 10: Assess and address impacts and promote accountability.

The Principles encourages business enterprises involved in agriculture and food systems, to “inform and communicate with other stakeholders, conduct due diligence before engaging in new arrangements, conduct equitable and transparent transactions, and support efforts to track the supply chain.”²⁰ Processors, retailers, distributors, input suppliers, and marketers are encouraged “to inform and educate consumers about the sustainability of products and services and respect national safety and consumer protection regulations.”²¹ Furthermore, enterprises involved in the marketing of food products are encouraged “to promote the consumption of food which is balanced, safe, nutritious, diverse, and culturally acceptable, which in the context of this document is understood as food that corresponds to individual and collective consumer demand and preferences, in line with national and international law, as applicable.”²²

The Principles also speaks to financing institutions, donors, foundations, and funds encouraging them “to apply the Principles when formulating their policies for loans and grants, in the articulation of country investment portfolios and in co-financing with other partners”²³ and to “take appropriate measures so that their support to investors does not lead to violations of human and legitimate tenure rights, and is in line with the Principles.”²⁴ Financial institutions are specifically encouraged “to develop innovative financial

17. *Id.* at para. 11(1).

18. *Id.* at para. 11(2).

19. *Id.* at para. 11(3).

20. *Id.* at para. 51.

21. *Id.*

22. *Id.*

23. *Id.* at para. 45.

24. *Id.*

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mechanisms and insurance tools in support of investment in agriculture, especially appropriate solutions for smallholders, including those that are family farmers, that consider a long-term development perspective.”²⁵

Although global in scope and developed to be universally applicable, the long-term impact of the Principles is not clear. The Principles are non-binding. The multi-stakeholder, holistic and consensus building approach to the development of the Principles may or may not foster global ownership and application. Much will depend on how widely the Principles are disseminated and the willingness of business enterprises involved in agriculture and food systems to embrace and apply them. Much will also depend on the extent to which other stakeholders involved in, benefitting from, or affected by investment in agriculture and food systems including States, smallholders and other organizations, communities, and civil society organizations, use the Principles.

The relationship between the Principles and bilateral investment treaties (BITs) and other international investment agreements (IIAs) is not entirely clear. Without more, the Principles do not override or displace the protection foreign investors typically enjoy under standard BITs and IIAs. Whether and how to reform the international investment law architecture to make it more sensitive and responsive to human rights and sustainable development goals and objectives thus remains a major challenge today.

2. *The United Nations Global Compact: Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group on 20 February 2014*

On 20 February 2014, the *United Nations Global Compact Human Rights and Labour Working Group* (Working Group) endorsed a *Good Practice Note on the Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent* (Good Practice Note).²⁶ Typically, Good Practice Notes of the Working group do not highlight specific practices of individual companies, but rather seek to identify general approaches that have been recognized by a number of companies and stakeholders as being good for business and good for human rights. The Good Practice Note *on the Indigenous Peoples' Rights* is in seven parts: Executive Summary (Part I); Human Rights Standard (Part II); The Business Case for FPIC (Part III); Challenges and Pitfalls (Part IV); Current Good Practice (Part V); Emerging Practices (Part VI) and Conclusion (Part VII). In Part III, the Good Practice Note *on the Indigenous Peoples' Rights* identifies four arguments for why businesses should respect the right to FPIC: gaining a social license to operate; avoiding reputational risks; avoiding legal risks; and engaging with marginalized groups.

Because companies have historically faced significant challenges when managing their engagement and interaction with indigenous peoples, this Good Practice Note is particularly timely and relevant. Across the globe, accounts of conflicts between corporations and indigenous people are growing.²⁷ The long-term impact of the Good Practice Note

25. *Id.*

26. UNITED NATIONS GLOBAL COMPACT, INDIGENOUS PEOPLES' RIGHTS AND THE ROLE OF FREE, PRIOR AND INFORMED CONSENT—A GOOD PRACTICE NOTE ENDORSED BY THE UNITED NATIONS GLOBAL COMPACT HUMAN RIGHTS AND LABOUR WORKING GROUP (2014) (hereinafter “Good Practice Note”).

27. *Free, Prior and Informed Consent*, FOREST PEOPLES PROGRAMME, <http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic> (last visited Mar. 10, 2015).

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is not clear. The Good Practice Note is not a treaty and is thus not binding. While lacking precise legal status under international law, the Good Practice Note will undoubtedly form part of “soft” international law that may increasingly shape corporate practice around the world.

Significantly, the Good Practice Note avoids the thorny question about the legal status of the FPIC and does not take a definitive viewpoint on the issue.²⁸

B. COUNTRY-LEVEL DEVELOPMENTS

1. United States

a. The U.S. Plans to Develop a National Action Plan to Promote Responsible Business Conduct

On September 24, 2014, President Obama announced that the U.S. Government would develop a national action plan to promote responsible business conduct. The announcement was made at a meeting of the Open Government Partnership at the United Nations. According to a fact sheet released by the White House: “The United States will develop a National Action Plan to promote and incentivize responsible business conduct, including with respect to transparency and anticorruption, consistent with the U.N. Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises.”²⁹ The United States also plans to “continue to work with key allies and partners, including in the Open Government Partnership, the G-7, the G-20, and the OECD Working Group on Bribery, to improve transparency, integrity, and accountability worldwide”³⁰ and “will continue [its] support to promote the important role of civil society in providing accountability, including through non-government organizations, a robust and independent media, and the private sector.”³¹

b. Department of Treasury - Customer Due Diligence Requirements for Financial Institutions

On August 4, 2014, the Financial Crimes Enforcement Network (FinCEN) at the Department of the Treasury published in the Federal Register a notice of proposed rules under the Bank Secrecy Act (BSA)³² to clarify and strengthen customer due diligence (CDD) obligations for banks; brokers or dealers in securities; mutual funds; and future commission merchants.³³ Written comments on the Notice of Proposed Rulemaking (NPRM) were due by October 3, 2014. According to FinCEN, more explicit rules with respect to CDD “are necessary to clarify and strengthen CDD within the BSA regime.”³⁴

28. Good Practice Note, *supra* note 26, at 3.

29. Fact Sheet: The U.S. Global Anticorruption Agenda, WHITEHOUSE.GOV, (Sep. 24, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>.

30. *Id.*

31. *Id.*

32. The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 18 U.S.C. 1956, 1957, and 1960, and 31 U.S.C. 5311–5314 and 5316–5332 and notes thereto, with implementing regulations at 31 CFR chapter X. See 31 CFR 1010.100(e).

33. Prop. Treas. Reg., 79 Fed. Reg. 45151 (Aug. 4, 2014), available at http://www.fincen.gov/statutes_regs/files/CDD-NPRM-Final.pdf.

34. *Id.*

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Specifically, requiring financial institutions to perform effective CDD so that they know their customers—both who they are and what transactions they conduct—is a critical aspect of combating all forms of illicit financial activity, from terrorist financing and sanctions evasion to more traditional financial crimes, including money laundering, fraud, and tax evasion.³⁵

The proposed rules will deal specifically with six elements that according to FinCEN comprise the minimum standard of CDD: (i) Identifying and verifying the identity of customers; (ii) identifying and verifying the identity of beneficial owners of legal entity customers (i.e., the natural persons who own or control legal entities); (iii) understanding the nature and purpose of customer relationships; and (iv) conducting ongoing monitoring to maintain and update customer information and to identify and report suspicious transactions.

c. U.S. Court of Appeals—D.C. Circuit and the Conflict Minerals Rules

On April 14, 2014, in the case of *Nat'l Assoc. of Manufacturers v. SEC*,³⁶ the United States Court of Appeals for the District of Columbia Circuit issued its decision on the legal challenge to the Conflict Minerals Rules which the Securities and Exchange Commission (SEC) promulgated in 2012. The Conflict Minerals Rules³⁷ were adopted pursuant to Section 13(p) of the Exchange Act.³⁸ The Conflict Minerals Rules affects companies who determine that any of the four conflict minerals - tin, gold, tungsten or tantalum - are necessary to the functionality or production of products that they manufacture and originate from the Democratic Republic of the Congo or specified adjoining countries.³⁹ Section 13(p) required affected issuers to submit a report to the SEC that *inter alia* includes a description of the products manufactured or contracted to be manufactured that are not “DRC conflict free,” the facilities used to process the conflict mineral, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin.⁴⁰

The U.S. Chamber of Commerce and some industry groups brought suit in 2012 against the SEC seeking a review of the Conflict Minerals Rule (Exchange Act Rule 13p-1 and Form SD) and Section 1502. While upholding the conflict minerals rules against most of the challenges, the DC Circuit invalidated, on First Amendment grounds, some portions of the portion of the rules.

In a *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule* (Statement), Keith F. Higgins, Director, SEC Division of Corporation Finance, stated:

The Form SD, and any related Conflict Minerals Report, should comply with and address those portions of Rule 13p-1 and Form SD that the Court upheld. Thus, companies that do not need to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook. For those companies

35. *Id.*

36. *Nat'l Assoc. of Manufacturers v. SEC*, No. 13-5252 (D.C. Cir. April 14, 2014).

37. *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

38. Securities Exchange Act of 1934, 15 U.S.C. § 78a (2015).

39. *Fact Sheet: Disclosing the Use of Conflict Minerals*, U.S. SEC. AND EX. COMM'N (Jul. 29, 2014), <http://www.sec.gov/News/Article/Detail/Article/1365171562058#.VH8Gm3TTnoo>.

40. *Conflicts Minerals*, *supra* note 37.

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that are required to file a Conflict Minerals Report, the report should include a description of the due diligence that the company undertook. If the company has products that fall within the scope of Items 1.01(c)(2) or 1.01(c)(2)(i) of Form SD, it would not have to identify the products as “DRC conflict undeterminable” or “not found to be ‘DRC conflict free,’” but should disclose, for those products, the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin.⁴¹

According to the Statement:

No company is required to describe its products as “DRC conflict free,” having “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable.” If a company voluntarily elects to describe any of its products as “DRC conflict free” in its Conflict Minerals Report, it would be permitted to do so provided it had obtained an independent private sector audit (IPSA) as required by the rule. Pending further action, an IPSA will not be required unless a company voluntarily elects to describe a product as “DRC conflict free” in its Conflict Minerals Report.⁴²

2. *Canada*

On November 14, 2014, Canada released its enhanced Corporate Social Responsibility (CSR) Strategy, “*Doing Business the Canadian Way: Advancing Corporate Social Responsibility in Canada’s Extractive Sector Abroad* (The Enhanced Strategy).”⁴³ The enhanced CSR Strategy is a follow-up to Canada’s first CSR strategy, “*Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad*” which was launched in 2009. The Enhanced Strategy “makes clear the Government’s expectation that Canadian extractive sector companies reflect Canadian values in all their activities abroad.”⁴⁴ The Enhanced Strategy also offers an overview of Canada’s approach to promoting and advancing CSR abroad.⁴⁵ In the Enhanced Strategy, the Canadian Government declare that it “will continue to be involved in the development, promotion and dissemination of widely-recognized international CSR performance and reporting guidelines, with the expectation that Canadian companies will align their practices as applicable.”⁴⁶ The Canadian Government also commit to promote several core international guidance to Canadian extractive companies operating abroad including: OECD Guidelines for Multinational Enterprises (MNEs), United Nations (UN) Guiding Principles, Voluntary Principles on Security and Human Rights (VPs), International Finance Corporation’s (IFC’s) Performance Standards on Social & Environmental Sustainability, OECD

41. *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*, U.S. SEC. AND EX. COMM’N (Apr. 29, 2014), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370541681994#.VH8DunTTnoo>.

42. *Id.*

43. Press Release, Foreign Affairs, Trade and Development Canada, Harper Government Announces Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad, (Nov. 14, 2014), available at <http://www.international.gc.ca/media/aff/news-communiques/2014/11/14a.aspx?lang=eng>

44. *Canada’s Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad*, FOREIGN AFFAIRS, TRADE AND DEVELOPMENT CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (last visited Mar. 10, 2015).

45. *Id.*

46. *Id.*

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Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and Global Reporting Initiative (GRI). As part of the enhanced strategy, the Canadian Government plans to ensure that Canadian missions abroad “are given increased CSR-related training and materials to provide support to companies that are looking for opportunities to integrate corporate social responsibility into their practices.”⁴⁷

3. *Denmark*

In March 2014, the Danish Government released the *Danish National Action Plan—Implementation of the UN Guiding Principles on Business and Human Rights* (Danish NPA).⁴⁸ Based largely on the recommendations from the Danish Council for Corporate Social Responsibility, the Danish NPA is a follow-up to the second National Action Plan for CSR, which was released in 2012. In the Preface, the Danish Government expresses its ambition regarding CSR that Denmark be “a global front-runner by ensuring that all players in society demonstrate social responsibility and create value both for their own organization and the surrounding society.” In publishing the National Program of Action, the intention of the Danish Government is “to give a complete overview on the implementation of UN Guiding Principles on Business and Human Rights in Denmark anno 2014.” Overall, the initiatives in the Danish NPA “are focused on preventing and mitigating adverse impacts on human rights by Danish companies at home and abroad.”⁴⁹

The Danish NPA is divided into five sections structured around the three pillars in the UN Framework and the UN Guiding Principles: Introduction (Section 1), The State Duty to Protect Human Rights (Section 2), the Corporate Responsibility to Respect Human Rights (Section 3), Access to Remedy (Section 4) and UNPGs in Denmark Looking Ahead (Section 5). Appendix 1 is titled “Overview of the Implementation of the State Duty to Protect” and Appendix 2 is titled “Overview of the Implementation of the Access to Remedy.”

4. *Italy—The Italian Action Plan on the UN Guiding Principles*

On 20 March 2014, the Italian Government published *The Foundations of the Italian Action Plan on the United Nations “Guiding Principles on Business and Human Rights”*.⁵⁰ The 84-page document focuses primarily on first Pillar (The Duty of the State to Protect Human Rights) and the third Pillar (Access to Remedy Measures) of the UN Framework and the UN Guiding Principles. The document notes that “in Italy a role is emerging in the Public Administration which intends to promote a virtuous connection between company profit and human rights protection.”⁵¹ Further, the document concludes that “it can

47. *Id.*

48. DANISH NATIONAL ACTION PLAN—IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2014).

49. *Id.* at 2.

50. THE FOUNDATIONS OF THE ITALIAN ACTION PLAN ON THE UNITED NATIONS “GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS” (2014).

51. *Id.*, at 76.

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be said that the Government believes that what favors human rights is good for the enterprise and for the affirmation of the Country abroad.”⁵²

III. Grievance Mechanisms

It is increasingly recognized that effective grievance mechanisms “play an important role in the State duty to protect, in both its legal and policy dimensions, as well as in the corporate responsibility to respect.”⁵³ Guiding Principle 25 states that: “As part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure That when such abuses occur within their territory and/or their jurisdiction those affected have access to effective remedy.”⁵⁴ As part of their responsibility to respect human rights, businesses are required to provide “[p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”⁵⁵ UN Guiding Principle 22 stipulates that “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.” Grievance mechanisms (GMs) can exist at several and all levels in the supply chain including the project, company, industry, multi-industry, national, regional, and international levels. Examples of GMs at the international level are: the World Bank’s Inspection Panel; the International Finance Corporation/Multilateral Investment Guarantee Agency’s Compliance Advisor Ombudsman; and the National Contact Points established under the OECD Guidelines for Multinational Enterprises. Example of regional level GMs include: the African Development Bank’s Independent Review Mechanism;⁵⁶ the Asian Development Bank’s Accountability Mechanism;⁵⁷ the Inter-American Development Bank’s Independent Consultation and Investigation Mechanism;⁵⁸ and the European Bank for Reconstruction and Development’s Project Complaint Mechanism.⁵⁹ An example of a GM at the sectoral level is the Round Table on Sustainable Palm Oil Complaint System. Whatever the level, it is important that GMs are effective. Guiding Principle 31 sets forth seven effectiveness criteria for non-judicial GMs, both State-based and non-State-based. According to Guiding Principle 31, GMs should be: Legitimate; Accessible; Predictable; Equitable; Transparent; Rights Compatible; and a Source of Continuous Learning.

52. *Id.*

53. UN Framework, *supra* note 3, at para. 82.

54. UN Guiding Principles, *supra* note 1.

55. *Id.*, at para. 15(3).

56. See *Independent Review Mechanism*, AFRICAN DEVELOPMENT BANK GROUP, <http://www.afdb.org/en/about-us/structure/independent-review-mechanism-irm> (last visited Mar. 10, 2015).

57. *Accountability Mechanism*, ASIAN DEVELOPMENT BANK <http://www.adb.org/site/accountability-mechanism/main> (last visited Mar. 10, 2015).

58. *Inter-American Development Bank’s Independent Consultation and Investigation Mechanism*, INTER-AMERICAN DEVELOPMENT BANK, <http://grievancemechanisms.org/grievance-mechanisms/regional-multilateral-development-banks/inter-american-development-bank2019s-independent-consultation-and-investigation-mechanism> (last visited Mar. 10, 2015).

59. *The European Bank for Reconstruction and Development’s Project Complaints Mechanism*, EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, <http://www.ebrd.com/pages/project/pcm.shtml> (last visited Mar. 10, 2015).

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A. THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

1. *The “Los Chancas” Mining Project and the Southern Peru Copper Mining Corporation—Peru*

On 24 July 2014, the Inter-American Commission of Human Rights (“the Commission” or “the IACHR”) ruled admissible a 2003 petition that was lodged by the National Coordinator of Peruvian Communities Affected by Mining (“the petitioner” or “CONA-CAMI”) on behalf of 54 inhabitants of Quishque-Tapayrihua, in the district of Tapayrihua, Apurímac department (“the alleged victims”) in Peru.⁶⁰ In the petition, the petitioner alleged that the Republic of Peru (“Peru,” or “the State”) violated several provisions of the American Convention on Human Rights (“the American Convention” or “the Convention”) when it granted Southern Peru Copper (SPC), a foreign mining corporation, a concession to prospect and mine on the lands traditionally inhabited by the Quishque community, causing serious harm to the ecosystem and to their lifestyle, which depends on those same lands. The petition alleged that SPC has been exploring and prospecting on Quishque community lands with the authorization of the State but absent any prior consultations with the affected communities.⁶¹ The petition further alleged that SPC’s prospecting and mining activities have harmed the community’s access to drinking water and other natural resources and have destroyed crops, schools, and archaeological sites, in violation of the right to life, the right to humane treatment, the right to freedom of expression, the right to freedom of association, the rights of the family, the right to property, the right to freedom of movement, the right of equality before the law, and the right to judicial protection, as enshrined in Articles 4, 5, 13, 16, 17, 21, 22, 24, and 25 of the American Convention.⁶² Peru requested that the petition be ruled inadmissible on grounds that domestic remedies have not been exhausted as required by Article 46(1)(a) of the Convention.

The Commission examined the parties’ positions in light of the admissibility requirements set out in Articles 46 and 47 of the American Convention. The Commission started by examining the different kinds of remedies the petitioner pursued in order to stop the prospecting and extractive activities, to secure compensation for the alleged damage caused, and to establish the criminal responsibility of the mining project’s directors. The Commission reiterated its position that “the requirement of exhausting domestic remedies does not mean that the alleged victims are obliged to exhaust every remedy available to them.”⁶³ According to the Commission, “the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means.”⁶⁴ To the Commission, “if the alleged victim raised the issue by way of any of the valid and suitable options under domestic law, and the State had the opportunity to correct the situation under its jurisdiction, the purpose of the international provision must be considered to have been

60. IACHR, Report No. 62/14, Petition 1216-03 (July 24, 2014).

61. *Id.* at para. 2.

62. *Id.*

63. *Id.* at para. 30.

64. *Id.*

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accomplished.”⁶⁵ In the case at hand, the Commission noted that the alleged victims sought to halt the prospecting and mining activities through administrative and constitutional channels and to secure compensation, exhausting the civil and criminal remedies available. Ultimately, the Commission ruled the petition admissible concluding that although the alleged victims could have continued to exhaust other judicial channels, “they gave the State the opportunity to hear the claims made by the community and to remedy the alleged human rights violations,” and thus met the requirements of Article 46(1)(a) of the American Convention.

2. *The Marlin Mine I - Guatemala*

On April 3, 2014, the IACHR ruled admissible a petition lodged on December 11, 2007, by 13 communities of the Sipakepense Mayan people in the municipality of Sipacapa, Department of San Marcos (“petitioners”) against the State of Guatemala (“Guatemala,” “State,” or “Guatemalan State”).⁶⁶ Specifically, the petitioners alleged that the State authorized the Marlin Mine I project without prior, free, and informed consultation with the affected indigenous communities. Furthermore, the petitioners alleged that Guatemala did not take into account the negative outcome of a consultation that the communities themselves called. Specifically, complainants accused Guatemala of violating Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), 11 (right to privacy), 13 (freedom of thought and expression), 19 (rights of the child), 21 (right to property), 23 (right to participate in government), 24 (right to equal protection), 25 (right to judicial protection), and 26 (progressive development) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (obligation to adopt domestic measures) of the said treaty. Guatemala filed preliminary objections on the grounds *inter alia* of failure to exhaust domestic remedies and *res judicata*. The Commission examined the argument of the parties and concluded that “the IACHR is of the view that Guatemala did not provide the alleged victims with a remedy enabling them to protect the rights that were allegedly violated, which, pursuant to Article 46.2.a of the American Convention, is one of the exceptions to the exhaustion of domestic remedies rule.”⁶⁷ Significantly, the Commission noted that Article 46(2) of the American Convention, by its nature and purpose, “is a norm with autonomous content vis-à-vis the substantive norms of the Convention.” Given its autonomous nature, “the determination as to whether the exceptions to the exhaustion of domestic remedies rule are applicable to the case at hand should be made prior to, and separately from, the analysis of the merits, since it relies on a standard of assessment different from that used to determine the violation of . . . the Convention.”⁶⁸

The *res judicata* argument arose because Article 46.1.c of the American Convention stipulates as a condition for admissibility that a case “is not pending in any other international proceeding for settlement.” Further, Article 47(d) of the American Convention

65. *Id.*

66. IACHR, Report No. 20/14, Petition 1566-07, Admissibility, Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán, Guatemala (April 3, 2014). Although the petition was originally filed by the affected community, subsequently, the municipal mayors of Sipacapa and San Miguel Ixtahuacán asked to join as petitioners on behalf of the communities of the Sipakepense Mayan people and the communities of the Mam Mayan people in their respective municipalities.

67. *Id.* at para. 41.

68. *Id.*

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prohibits the admission of any petition that is “substantially the same as any petition or communication previously examined by it or another international body.” Guatemala’s *res judicata* objection was based on a May 8, 2007, decision of the Guatemala Constitutional Court. The Commission rejected the objection because it was “based on the existence of a decision adopted by a domestic body whereas the requirement under the Convention refers to “international *res judicata*,” which assumes that the subject of the petition has been or is being considered by an ‘international body.’”⁶⁹

B. OECD NATIONAL CONTACT POINTS

The *Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises* (Guidelines) are voluntary principles for responsible business conduct in areas including employment, human rights and the environment. Each OECD member government is required to maintain a National Contact Point (NCP) to promote the Guidelines and to consider complaints that multinational enterprises (MNEs) based in their country or operating there, have breached the Guidelines.⁷⁰ Complaints (called Specific Instance) can be lodged with any NCP.⁷¹ The OECD complaint process is broadly divided into three key stages: Initial Assessment, Mediation, and Issuance of a Final Statement. First, an NCP with which a complaint is lodged has to make an initial assessment of the complaint to see if it merits further investigation.⁷² Second, where a complaint is deemed to merit further examination, an NCP is required to “offer good offices to help the parties involved to resolve the issues.”⁷³ In addition to seeking advice from relevant authorities, and/or representatives of the business community, employee organizations and NGOs, the NCP is to “[o]ffer, and . . . and facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.”⁷⁴ Third, at the conclusion of the procedures and after consultation with the parties involved, NCPs are expected to make the results of the procedures publicly available, by issuing a statement when the NCP decides that the issues raised do not merit further consideration,⁷⁵ by issuing a report when the parties have reached agreement on the issues raised, or by issuing a statement when no agreement is reached or when a party is unwilling to participate in the procedures.

1. *WWF International v. Soco International PLC.*: UK NCP (February 2014)

This case relates to the oil exploration operations of Soco International plc. (SOCO) in an area of the Virungu National Park in the Democratic Republic of the Congo (DRC.). In October 2013, the World Wildlife Federation (WWF) filed a complaint with the United Kingdom NCP alleging that SOCO’s oil exploration activity in the Virungu National Park, a UNESCO-designated world heritage site, violated international agreements and domestic law and risked adverse impact on local environment and local communities

⁶⁹ *Id.* at para. 44.

⁷⁰ OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION 68 (2011).

⁷¹ *Id.* at 72.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 73.

⁷⁵ *Id.*

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and thus violated several provisions of the OECD Guidelines including those pertaining to human rights and the environment.

In February 2014, the United Kingdom NCP published its Initial Assessment in connection with the complaint essentially deciding to accept some of the issues raised in the complaint for further investigation.⁷⁶ On June 11, 2014, as a result of the work of a mediator appointed by the UK NCP, an agreement was reached between the parties. In the Joint Statement by the parties, SOCO committed “not to undertake or commission any exploratory or other drilling within Virungu National Park unless UNESCO and the DRC government agree that such activities are not incompatible with its World Heritage status.”⁷⁷ SOCO also committed “not to conduct any operations in any other World Heritage site,” and promised to “Seek to ensure that any current or future operations in buffer zones adjacent to World Heritage sites, as defined by the national government and UNESCO, do not jeopardise the Outstanding Universal Value for which these sites are listed.”⁷⁸

The WWF-SOCO agreement is significant because it is the first time a company has agreed to halt operations during NCP-facilitated mediation. The agreement which led to SOCO essentially abandoning its oil exploration plans in Virungu National Park been hailed one of conservationists’ “greatest successes in recent years.”⁷⁹ With the release of a Final Statement on July 15, 2014, the UK NCP concluded the process and closed the complaint.⁸⁰ In the Final Statement, the UK NCP congratulated both parties for their engagement with the NCP process and their efforts in reaching an agreement.

2. *Danish NCP—A Statement on the Retention of Employees’ Identification Papers*

On 14 August 2014, the Danish Mediation and Complaints-handling Institution for Responsible Business Conduct (“Institution”) released a *Statement on Retention of Employees’ Identification Papers* (“Statement”).⁸¹ In the Statement, the Danish NCP emphasized that “it is a gross violation of the OECD Guidelines to retain employees’ passports.”⁸² While recognizing that an employer may have legitimate reasons to require documentation (e.g. in order to pay salary in advance), the Statement stressed that that “this does not justify that a company can withhold employees’ identification papers.” Citing Article 8 of the International Covenant on Civil and Political rights (“no one shall be required to perform forced or compulsory labor”) and Article 12 of the same treaty (“everyone law-

76. The UK National Contact Point, Initial Assessment by the UK National Contact Point for The OECD Guidelines for Multinational Enterprises—Complaint from WWF International Against SOCO international PLC (February 2014), available at <https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-against-soco-international-plc>.

77. Joint Statement by SOCO International PLC (‘SOCO’) and WWF. 11 June 2014.

78. *Id.*

79. David Vidal, *Soco bails oil exploration in Africa’s Virunga national park*, THE GUARDIAN (June 11, 2014), <http://www.theguardian.com/environment/2014/jun/11/soco-oil-virunga-national-park-congo-wwf>

80. *Final Statement Following Agreement Reached in Complaint from WWF International Against SOCO International PLC*, Gov.UK (July 2014), <https://www.gov.uk/government/publications/uk-ncp-final-statement-wwf-international-and-soco-international-plc-agreement-reached>

81. *Statement on Retention of Employees’ Identification Papers*, DANISH MEDIATION AND COMPLAINTS-HANDLING INSTITUTION FOR RESPONSIBLE BUSINESS CONDUCT (August 14, 2014), http://businessconduct.dk/file/507301/aug_14_2014_general_statement.pdf.

82. *Id.*

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fully within the territory of a State shall, within that have the right to move freely and freedom to choose his residence”), the Statement noted that retention of employees’ identification papers can create situations where these two rights are violated.

3. *Norwegian Support Committee for Western Sahara (NSCWS) v. Sjøvik AS*

On July 2, 2014, the Norwegian Support Committee for Western Sahara (NSCWS) and the Norwegian enterprise group Sjøvik AS, signed a joint statement in relation to a December 5, 2011 complaint that NSCWS filed with NCP Norway against Sjøvik AS.⁸³ In the complaint, NSCWS alleged that Sjøvik AS, through its subsidiaries Sjøvik Africa AS and Sjøvik Morocco S.A, breached the Guidelines by operating a fishing vessel and leasing or running a fish processing plant in the Non-Self-Governing Territory of Western Sahara. Specifically, NSCWS accused the company of breaching the human rights provision of the OECD Guidelines by having failed to respect the Sahrawi right to self-determination, including the right to be consulted in relation to the exploitation of natural resources. The Guidelines stipulate in Part IV (Human Rights) that: “Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁸⁴

In 2013, both sides accepted the offer of Norway NCP to mediate the case. Former Supreme Court Judge Lars Oftedal Broch served as mediator. In the 2013 joint statement, Sjøvik AS expressed its support and respect for the protection of internationally recognized human rights. Both sides agreed that the UN Guiding Principles and human rights chapter in the OECD Guidelines “provide a good platform for efforts relating to human rights and the environment.”⁸⁵ According to the Joint Statement:

If the *de facto* authorities for any reason or at any time are prevented due to practical or legal concerns to fulfil their responsibility to protect, companies bear a particular responsibility for complying with international norms on the exploitation of resources and respect for human rights.⁸⁶

While NSCWS took the position that Morocco “does not exercise internationally recognised sovereignty over Western Sahara,”⁸⁷ Sjøvik AS declined to take a position on the status of Western Sahara under international law. However, both sides agreed that the Norwegian authorities have not given a clear and consistent advice to businesses on whether business activity can be carried out in Western Sahara and what kinds of activities are permitted. Noting that states “should clearly express their expectations that businesses are to respect human rights in all their operations,”⁸⁸ both sides recommended that Norwegian authorities “give unambiguous advice to businesses operating in conflict areas.”⁸⁹

83. See JOINT STATEMENT BETWEEN THE NORWEGIAN SUPPORT COMMITTEE FOR WESTERN SAHARA AND SJØVIK AS (July 2, 2013) (hereinafter “Joint Statement”).

84. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION, *supra* note 70 at 31.

85. Joint Statement, *supra* note 84, at para. 4(a).

86. *Id.*

87. *Id.* at para. 2(a).

88. *Id.* at para. 3(a).

89. *Id.* at para. 3(b).

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Given that the Parties interpret the information on Western Sahara published on the Government's website differently, they called on the Ministry of Foreign Affairs to "clarify what type of activities are included in the Government's advice and why."⁹⁰ According to the Joint Statement, "If the Government's view is that no business activities should be carried out in Western Sahara at all, the Parties request that this is expressed more clearly."⁹¹

Significantly, the Joint Statement included some major undertakings by Sjøvik AS. First, Sjøvik pledged that it "will carry out an environmental and social impact assessment for its activities in the territory based on the principles set out in the OECD Guidelines and the UN Guiding Principles."⁹² Second, Sjøvik AS agreed that the impact assessment report will be published in accordance with chapter III of the OECD Guidelines.⁹³ Third, Sjøvik AS also agreed that when assessing what is material information concerning activities in Western Sahara, "special account must be taken of the status and vulnerability of the territory."⁹⁴ Fourth, Sjøvik AS agreed it will publish codes of conduct particularly those relating to human rights and the environment. Finally, Sjøvik AS also pledged to "maintain an internal grievance mechanism for dealing with both internal and external concerns and suggestions for improvements."⁹⁵

90. *Id.*

91. *Id.*

92. *Id.* at para. 4(b).

93. *Id.* at para. 4(c).

94. *Id.* at para. 4(d).

95. *Id.* at para. 5(a).

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