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Corporate Social Responsibility

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I. Introduction

This Article highlights important developments in 2016 in the field of corporate social responsibility as well as the field of business and human rights. This Article includes developments in the areas of corporate non-financial reporting, corporate climate change risk disclosure, Alien Tort Statute litigation in United States federal courts, corporate liability for environmental destruction in the International Criminal Court, promotion of the business and human rights agenda by various intergovernmental and non-governmental organizations, international anti-corruption efforts, and use of export credit financing to promote cleaner energy use to combat climate.


Pursuant to European Union Directive 2014/95/EU (2014 EU Directive), Member States of the European Union (EU) are required to enact laws requiring disclosure of non-financial information by certain large undertakings and groups by December 6, 2016. Such requirements became effective for fiscal years beginning on January 1, 2017, or during calendar year 2017. The 2014 EU Directive applies only to large public-interest entities (PIEs) with more than 500 employees. It also applies to large groups, of which a PIE is the parent entity, that meet the criterion of more than 500 employees on a consolidated basis. PIEs include companies listed in EU markets, as well as some unlisted companies, such as credit institutions, insurance companies, and other companies that are so

* The Committee Editor is Professor Constance Wagner, Saint Louis University School of Law. She was assisted by Kelly Smallmon and Martha Gallagher, faculty research assistants. Constance Wagner wrote Sections II, III (with Kelly Smallmon) and IV. Corinne Lewis, Partner, Lex Justi, wrote Section V. Cindy Woods, Legal and Policy Associate, International Corporate Accountability Roundtable, wrote Section VI. Claudia Feldkamp, Counsel, Fasken, Martineau, wrote Section VII. Sri Katragadda, formerly Project Coordinator for Global Pro Bono, Pro Bono Institute, wrote Section VIII.

2. Id.
3. Id. at 4.
4. Id. at 6.
designated by Member States because of their activities, size, or number of employees. The European Commission (EC) estimates that the new reporting requirements will apply to approximately 6,000 entities and groups across the EU.

The 2014 EU Directive states that "as a minimum" four categories of information must be covered, namely "environmental, social and employee matters, respect for human rights, and anti-corruption and bribery matters." But there are no specific requirements for what must be disclosed in each category. The 2014 EU Directive adopts a "comply or explain" approach to disclosure, meaning that companies are required to report only on issues that are covered by their policies. If a company does not pursue a policy on a particular issue mandated by the 2014 EU Directive, it does not need to adopt a policy to be in compliance. It must, however, give a "clear and reasoned explanation" for why it has no policy in place. This approach gives great latitude to companies to design their own approaches to non-financial reporting and to their corporate social responsibility policies.

The 2014 EU Directive takes a minimum harmonization approach to the reporting standards for non-financial disclosures. It does not contain detailed rules for the content of non-financial reporting and does not impose mandatory EU standards. Instead, companies may choose to present such disclosures in the way they consider most useful. They may rely on the following:

N]national frameworks, Union-based EU frameworks such as the Eco-
Management and Audit Scheme (EMAS), or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN 'Protect, Respect and Remedy' Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organization for Standardisation's ISO 26000, the International Labor Organization's Tripartite Declaration of principles concerning multinational


6. European Commission Statement/14/29. Disclosure of non-financial information: Europe's largest companies to be more transparent on social and environmental issues (Sept. 29, 2014).


8. Id. at 5.

enterprises and social policy, the Global Reporting Initiative, or other recognised international frameworks.  

The minimum harmonization approach means that companies must at least meet the requirements of the 2014 EU Directive in their national laws, but may also go beyond those requirements if they choose.

The minimum harmonization approach will probably result in companies using very different formats in their reporting, leading to wide variations in quantity and quality of reporting. These variations will likely make it difficult for the users of these reports to make meaningful comparisons across companies. To mitigate this problem as well as to facilitate the disclosure of non-financial information by companies, the 2014 EU Directive requires the EC to prepare "non-binding guidelines on methodology for reporting non-financial information, including non-financial key performance indicators, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-financial information by undertakings" by December 2016. Such non-binding guidance had not been promulgated as of this writing.

Denmark was the first EU Member State to adopt implementing legislation under the 2014 EU Directive. It had first introduced non-financial reporting requirements for certain businesses in 2008 through an amendment to the Danish Financial Statements Act (FSA). Additional reporting requirements were adopted through further FSA amendments in 2012. The Danish implementing legislation was adopted in 2015 as additional FSA amendments. Such legislation expands the coverage of the 2014 EU Directive to include a wider group of companies. But it does not provide greater specificity on the contents of required non-financial reporting than the 2014 EU Directive, nor does it recommend or require a specific reporting standard. While the Danish approach provides great flexibility to covered companies, it does not solve the problem of comparability among companies. While it may lead to a greater quantity of non-financial reporting, it will not necessarily lead to an improvement in quality.

10. Directive 2014/95/EU at 2; Commission Consultation Document, supra note 9, at 4 ("Companies may also consider the sectorial OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, as appropriate.").


14. Id.

III. United States State Attorneys General: Actions on Misleading Corporate Climate Change Risk Disclosure

Several state attorneys general (A.G.s) in the United States have taken action to jointly address climate change, including launching investigations into suspected misleading corporate climate change risk disclosure.

On March 29, 2016, former United States Vice President and Chairman of the Climate Reality Project Al Gore and New York A.G. Eric Schneiderman announced the formation of a coalition called “A.G.s United for Clean Power.”16 State A.G.s from California, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington, as well as the A.G.s of the District of Columbia and the Virgin Islands, formed the coalition. One of several tactics proposed by the coalition was facilitating ongoing and potential joint investigations into fossil fuel companies and industry groups suspected of misleading the public about the dangers of climate change or the viability of renewable energy resources.

An example of such an investigation was the much-publicized investigation initiated by New York A.G. Schneiderman against Peabody Energy Corporation (Peabody) in 2013. On November 9, 2015, A.G. Schneiderman announced his office’s finding that Peabody “violated New York laws prohibiting false and misleading conduct in the company’s statements to the public and investors regarding financial risks associated with climate change and potential regulatory responses.”17 The investigation found that the company repeatedly denied in its public financial filings to the U.S. Securities and Exchange Commission (SEC) its ability to predict the impact that potential regulation of climate change pollution would certainly have on its business, “even though Peabody and its consultants actually made projections that such regulation would have severe impacts on the company.”18

The New York A.G.’s investigation found that the SEC filings and public communications provided incomplete or one-sided discussions of the findings of the International Energy Agency (IEA), which makes predictions about coal demand based on various scenarios for future world energy production, despite the fact that the IEA had predicted that future actions to combat climate change would significantly lessen the global demand for coal.19 Peabody and the A.G. reached an agreement for Peabody to end certain representations to investors and the public that minimize the

18. Id.
19. Id.
company’s financial risks related to climate change. Peabody agreed to (1) correctly and in good faith describe all of IEA’s scenarios for global demand in its public communications; (2) provide disclosures in its November 9, 2015, quarterly report filed with the SEC concerning company projections regarding impact on its business of certain potential laws, regulations, and policies involving climate change; and (3) “not represent in any public communication that it cannot reasonably project or predict the range of impacts that any future laws, regulations, or policies relating to climate change or coal would have on Peabody’s markets, operations, financial condition, or cash flow.”

Another much-publicized investigation involved joint action against ExxonMobil by the state A.G.s of New York, California, Massachusetts, and the Virgin Islands. On November 4, 2015, New York A.G. Schneiderman issued ExxonMobil a subpoena, initiating an investigation into the corporation’s statements about climate change to determine whether they were false or deceptive. The New York A.G.’s office stated that it launched this investigation after an unnamed news series revealed that the company may have misled investors about the risks of climate change. The initial subpoena demanded ExxonMobil turn over the following:

All documents and information requested in the attached Schedule in accordance with the instructions and definitions contained therein in connection with an investigation to determine whether an action or proceeding should be instituted with respect to repeated fraud or illegality as set forth in the New York State Executive Law Article 5, Section 63(12), violations of the deceptive acts and practices law as set forth in New York State General Business Law Article 22-A, potential fraudulent practices in respect to stocks, bonds and other securities as set forth in New York State General Business Law Article 23-A, and any related violations, or any matter which the Attorney General deems pertinent thereto. The investigation is ongoing.

20. Id.
According to several sources, California A.G. Kamala Harris also announced an investigation of ExxonMobil in January of 2016, but there has been no evidence of a subpoena of ExxonMobil or any communication from the California A.G.'s office regarding this matter. As of March 29, 2016, the A.G.s of Massachusetts and the Virgin Islands also announced investigations into ExxonMobil's statements about the risks of climate change. But on June 28, 2016, the Virgin Island A.G. Claude Walker withdrew his Exxon subpoena after an agreement with the company. ExxonMobil told a federal court that A.G. Walker agreed to withdraw the subpoena if the company agreed to drop a related lawsuit alleging that the subpoena violated its rights under the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and the laws of its home state of Texas. In addition to the suit against Virgin Islands A.G. Walker, ExxonMobil sued Massachusetts A.G. Maura Healy on June 17, 2016, over her investigation seeking injunctive relief barring enforcement of a civil demand to ExxonMobil as it violates ExxonMobil's rights under state and federal law. This federal suit is still ongoing and A.G. Healy continues to argue that there is sufficient reason to investigate into ExxonMobil's practices.

On July 13, 2016, the U.S. House of Representatives Committee on Science, Space, and Technology (House Committee) issued subpoenas to Massachusetts A.G. Healy and New York A.G. Schneiderman regarding their probe of ExxonMobil, as well as eight environmental and legal organizations, about their inquiries into ExxonMobil. A.G. Healy responded with a letter claiming this demand to be "sweeping in its scope and completely unprecedented in its intended interference with an ongoing regulatory investigation." In August 2016, the SEC joined the


29. Id.

30. See ExxonMobil's Complaint for Declaratory and Injunctive Relief, Exxon Mobil Corp. v. Healey, 2016 WL 6091249, No. 4:16-cv-569.


investigation of ExxonMobil in regards to climate change risk disclosure. But the House Committee issued a letter to SEC Chair Mary Jo White on September 29, 2016, detailing its concerns about the SEC’s and New York A.G.’s investigations. The House Committee Chair Lamar Smith expressed his concern “that the SEC, by wielding its enforcement authority against companies like ExxonMobil for its collection of and reliance on what is perhaps in the SEC’s view inadequate climate change data used to value its assets, advances a prescriptive climate change orthodoxy that may chill further climate change research throughout the public and private scientific R&D sector.” The House Committee has launched its own investigation into the SEC’s investigation, and demanded all related documents. Both the SEC’s and the House Committee’s investigations are ongoing as of December 1, 2016.

IV. United States: Federal Court Decisions on Alien Tort Statute Claims

Litigation over Alien Tort Statute (ATS) claims continued in lower United States federal courts in 2016. Such litigation centered on legal issues left open by the United States Supreme Court’s 2013 decision in Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013), including the meaning of the “touch and concern” test for displacing the presumption against extraterritorial application of the ATS, whether corporations can be sued under the ATS, as well as the appropriate mens rea needed for aiding and abetting liability under the ATS. Several cases were decided in federal courts in the Second, Fourth, Ninth, and Eleventh Circuits.

Of particular interest was the decision in Nestle U.S.A., Inc., et al. v. John Doe I, et al., in which the United States Supreme Court denied a petition for writ of certiorari to the U.S. Court of Appeals to the Ninth Circuit on January 11, 2016. The case involved allegations that Nestle U.S.A., Inc., along with Archer-Daniels-Midland Company and Cargill, aided and abetted violations of the ATS through their purchase of cocoa and provision of crop-related assistance to cocoa farmers who committed labor abuses involving the use of child labor. Petitioners requested that the United States Supreme Court grant certiorari to resolve a circuit split on the three issues left open by the Court’s decision in Kiobel. The Ninth Circuit’s decision had held that (1) specific intent, i.e., acting with the purpose of

36 Id.
37 Id.
causing the injury complained of, was not required; (2) the focus test set out in *Morrison v. National Australian Bank, Ltd.*, 561 U.S. 247 (2010) does not govern whether a proposed application of the ATS would be impermissibly extraterritorial under *Kiobel*; and (3) corporations can be subject to liability under the ATS. By denying certiorari, the Court let stand the Ninth Circuit’s decision. As such, it failed to resolve what the petitioners claimed were several splits among the federal circuit courts of appeal on these issues. On the first issue, petitioners claimed that the Ninth Circuit’s position conflicted with that taken by the Second and Fourth Circuits, in which aiding and abetting liability attaches only when a defendant purposefully aids the violation of international law.\(^{40}\) On the second issue, petitioners claimed that the Ninth Circuit’s position conflicted with that taken by the Second and Eleventh Circuits, in which the location of the conduct that is either in direct violation of international law or constitutes aiding and abetting another’s violation of international law must be sufficiently focused in the United States to overcome the *Kiobel* presumption against extraterritorial application.\(^ {41}\) On the third issue, petitioners claimed that the Ninth Circuit’s position, with which the Seventh and Eleventh Circuits have agreed, conflicted with the Second Circuit’s position that corporations are not subject to ATS liability.\(^ {42}\) Due to the Court’s unwillingness to provide clarity on these issues, decisions under the ATS in the United States federal courts will continue to diverge on important points as lower courts wrestle with the questions left open by the Court’s decision in *Kiobel*.

V. International Criminal Court in The Hague: Prosecutorial Policy and Potential Liability of Business Officials

The Office of the Prosecutor for the International Criminal Court (ICC)\(^ {43}\) has signaled, in its September 15, 2016, Policy Paper on Case Selection and Prioritisation (2016 Policy Paper), that in selecting cases, the Office “will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”\(^ {44}\) Consequently, business officials could find themselves held accountable before the ICC for complicity in governmental acts or for acts they perpetrate through their own businesses,

\(^{40}\) *Id.* at 13.

\(^{41}\) *Id.* at 25.

\(^{42}\) *Id.* at 35.


because the ICC can prosecute any individual who has committed a crime within the ICC’s jurisdiction.

The 2016 Policy Paper outlines the general principles and criteria guiding the prosecutorial discretion exercised by the ICC’s Office of the Prosecutor in its selection and prioritization of cases to investigate and prosecute. With its limited resources, the Office of the Prosecutor cannot prosecute all specific incidents which give rise to crimes within the ICC’s jurisdiction and therefore, must select cases for investigation and prosecution. To date, the ICC has only prosecuted a handful of cases, although some of these involved several individuals. The 2016 Policy Paper complements the 2013 Policy Paper on Preliminary Examinations, which addresses how the Office of the Prosecutor assesses whether a situation merits investigation.

The 2016 Policy Paper was issued by the Office of the Prosecutor amid continued challenges to its impartiality by African States. In October, Gambia stated its plan to withdraw from the ICC and cited the ICC’s targeting of Africans for prosecution while ignoring crimes committed by Western countries. The same month, two other African States, Burundi and South Africa, also declared their intention to withdraw from the ICC. Moreover, the United States, China, and Russia, three of the world’s major powers, have never joined the ICC and have not indicated that they intend to do so any time soon. Yet, while they abstain from membership in the ICC, they can simultaneously impede the referral of situations by the UN Security Council to the Office of the Prosecutor through their veto power.

To date, the three main criteria used by the Office of the Prosecutor for selection of cases has been (1) gravity of the crimes; (2) degree of responsibility of the alleged perpetrators; and (3) potential charges. In assessing the gravity of the crime, the ICC considers several factors, one of which is the impact of the crime. This includes an evaluation of “inter alia the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.”

In noting its intention to pay particular consideration to crimes that involve environmental destruction, “land grabbing,” or unauthorized

45. Id. at ¶ 4.
46. Id. at ¶ 11.
50. Policy Paper on Case Selection and Prioritisation, supra note 44, ¶ 34.
51. Id. at ¶ 41. The other factors considered as part of this assessment are the scale, nature, and manner of commission of the crime. International Criminal Court, Regulations of the Office of the Prosecutor, reg. 29(2), ICC-BD/05-01-09 (Apr. 23, 2009).
exploitation of natural resources, the Office of the Prosecutor is not expanding the crimes it can prosecute; these remain war crimes, crimes against humanity, genocide, and crimes of aggression. Nor is the Office enlarging its prosecutorial ambit to include corporations; the option of including potential liability of corporations was considered during the drafting of the Rome Statute, but was firmly rejected. The personal jurisdiction of the ICC remains over natural persons rather than legal persons, such as businesses, although the ICC’s use of the concept of “indirect perpetration through an organization” holds the potential for prosecuting businesspersons who use their business enterprises to commit the crimes.

The Office of the Prosecutor does appear to be highlighting readiness to move beyond its traditional ambit of investigating and prosecuting war crimes primarily in African countries. Cases involving significant harm to the environment, natural resources, and land use could arise in a peacetime context and be framed as crimes against humanity. “Crimes against humanity” under the ICC’s Statute are “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” and include: deportation or forcible transfer of population, imprisonment, rape, and persecution on political, racial, national, ethnic, cultural, religious, gender, or other grounds.

In pursuing such cases, the ICC is not entering into a completely uncharted area. The ICC heard a case concerning destruction of historical and religious monuments in Timbuktu, Mali in August 2016 and found the accused guilty of the “war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion.” Also, in 2014, a “Communication” was submitted to the Office of the Prosecutor that asked it to investigate acts, including forced population transfers, illegal imprisonment, and persecution, in connection with illegal land seizures carried out by Cambodian governmental officials and security forces as well as individuals in government-connected businesses.

The 2016 Policy Paper, which states the ICC’s intention to give particular consideration to crimes that entail environmental destruction, illegal exploitation of natural resources or illegal dispossession of land in its

52. Rome Statute, supra note 43, art. 5.
55. Rome Statute, supra note 43, art. 7(1).
57. FIDH & Global Diligence, Questions & Answers: Crimes against humanity in Cambodia from July 2002 until present, 4 (Oct. 2014).
selection of cases for investigation and prosecution, may create greater global awareness of the consequences of these acts for those most frequently affected: minorities, indigenous peoples, and the rural poor. The announcement also underlines that governmental officials, members of militias or rebel forces, and business officials who participate in international crimes, may be held accountable before the ICC.

VI. Business and Human Rights Developments

A. UN National Action Plans on Business and Human Rights

Since 2013, the UN Working Group on Business and Human Rights (Working Group) has encouraged States to develop a national action plan (NAP) on business and human rights as a way to operationalize the UN Guiding Principles on Business and Human Rights (UNGP) at the State level.

On December 9, 2015, the Colombian government published the Colombia NAP, becoming the first non-European country to do so. The Presidential Advisory Office led the process, along with the Ministry of the Presidency and a multi-stakeholder steering committee. The NAP is based on the three pillars of the UN Guiding Principles, and develops eleven key lines of action, which prioritize the energy, mining, agro-industry, and road infrastructure sectors. The NAP, whose aim is to “guarantee respect of human rights in business activities,” is valid for three years and developed to align with both the Colombian National Strategy on Human Rights 2014–2014 and the Guidelines for a Public Policy on Business and Human Rights, published by the government in 2014. The Plan was developed with the following factors in mind: a human rights based approach, coherence with other international norms and standards, a differential approach, territorial emphasis, sectorial prioritization, input into the post-conflict and peace building situation, coordination and articulation, and shared leadership in implementation.

The Chilean government announced its intention to draft a National Action Plan at the Annual UN Forum on Business and Human Rights in


60. Id. at 3, 7–8.
61. Id. at 6.
62. Id. at 6–8.
November 2014.63 During the course of 2016, the government held dialogues in four regions of the country with business and trade unions, civil society, and indigenous peoples, in order to feed into the NAP content.64 The government, in partnership with the Human Rights Center at the University of Diego Portales Faculty of Law, undertook a national baseline assessment (NBA) on the current status and implementation of domestic laws and policies which impact business respect for human rights and access to remedies for corporate-related human rights abuses.65 The baseline was launched in March 2016. Chile’s actions are in line with international best practice, which prescribes the creation of an NBA before the publication of an NAP, in order to inform the content of an NAP and create a more reactive and responsive plan to the identified gaps in implementing the UNGPs and other business and human rights frameworks.66

In November 2015, the Mexican government announced its intention at the UN Annual Forum on Business and Human Rights to draft an NAP.67 The Ministry of the Interior and the Ministry of Foreign Affairs are leading the process, along with a multi-stakeholder working group comprised of civil society organizations, unions, business, and academics.68 In line with international best practice, the Mexican government has arranged to utilize an NBA conducted by the Mexican Civil Society Focal Group on Business and Human Rights.69 The baseline is expected to be published in November 2016. The government has also entered into a formal agreement with the

69. Id.
Danish Institute for Human Rights to receive expert advice on business and human rights capacity building, and on the methodology for public consultations and production of the NAP.70

B. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

In 2016, the Organization of American States (OAS) continued to show interest in the subject of business and human rights. In 2014, the OAS General Assembly endorsed the UNGPs and requested that the Inter-American Commission on Human Rights (IACHR) "continue supporting States in the promotion and application of State and business commitments in the area of human rights and business."71 In June 2016, the OAS General Assembly reiterated and strengthened these calls by resolving to continue to "urge member states and their respective national human rights institutes . . . to disseminate these [Guiding] principles as broadly as possible, promoting the exchange of information and sharing best practices on the promotion and protection of human rights in business."72 The General Assembly also specifically requested the IACHR to "contribute to the progressive development of standards in the area of human rights in business, including, among other initiatives, support to develop national action plans on human rights and business."73 The IACHR was also requested to conduct "by the last half of 2016, a study on inter-American standards on business and human rights based on an analysis of conventions, case law, and reports issued by the inter-American system" to be used in NAPs processes and other business and human rights initiatives.74 This resolution by the OAS signals its increasing interest and engagement with the issue. This focus is particularly timely given the increase in interest of Latin American countries in drafting NAPs.

C. HUMAN RIGHTS DEFENDERS

In 2016, the challenges and risks faced by human rights defenders organizing against extractive operations, large-scale infrastructure development projects, and other mega-projects were brought to international attention. This amplified interest resulted in part due to the high-profile assassination in March 2016 of human rights defender Berta


73. Id. at ¶ ii, 3.

74. Id. at ¶ ii, 4.
Caceres in Honduras, in retaliation for her work against the Agua Zarca Dam project.75

In June 2016, the International Corporate Accountability Roundtable and the International Service for Human Rights launched the “Human Rights Defenders in National Action Plans (NAPs) on Business and Human Rights.”76 The aim is to provide guidance to States on how the rights and needs of human rights defenders can be addressed in NAPs and other similar policies, and how human rights defenders can and should be substantially engaged and consulted in the process of creating a NAP. In seeking to protect against rights violations by business activities, human rights defenders often face threats, criminalization, attacks, and even murder. The document is important and timely because as more States continue to develop NAPs, it is critical for them to understand not only the risks faced by defenders working on these issues, but also how to engage with human rights defenders in a meaningful and rights-respecting way. The guidance contains two tools to help guide States in these considerations: a “Human Rights Defenders in NAP Processes Checklist” (Checklist) and a “Human Rights Defenders National Baseline Assessment (NBA) Template” (Template). The Checklist “contains the minimum elements needed for States to ensure adequate human rights defender participation in NAP processes.”77 The Template “highlights key areas of concern regarding defenders working on business and human rights, drawing out issues likely to be of particular salience.”78 It is divided into four sections: Legal and Policy Framework; Expectations, Incentives, and Sanctions on Business; Redress and Remedy; and Context.79

On December 31, 2015, the IACHR published a thematic report, “Criminalization of the Work of Human Rights Defenders,” in response to a number of “alarming reports of a trend indicating that human rights defenders in various contexts are systematically subjected to unfounded criminal proceedings in order to paralyze or delegitimize their causes.”80 The report “identified the contexts and groups of defenders who are most

77. Id. at 11.
78. Id. at 13.
79. Id. at 13-25.
affected by this practice," highlighting the business and human rights nexus with this alarmingly increasing trend of criminalization.81

VII. Canada: Supreme Court Decision on International Anti-Corruption Efforts

On April 29, 2016, the Supreme Court of Canada (SCC) released its decision in World Bank Group v. Wallace82 upholding the immunities of the World Bank Group and its personnel. The SCC's decision was strongly informed by its recognition of the critical role of a cooperative, global response from state and non-state actors in combatting corruption in development projects. By upholding the immunities of the World Bank Group, the SCC is lending support to information sharing between the investigative units of development banks and domestic enforcement agencies. In doing so, the SCC is also making it less likely that individuals and organizations charged under domestic anti-corruption legislation in Canada will have access to the details of any related investigation by an international organization. Whether this will have a chilling effect on voluntary cooperation by individuals and organizations with investigations conducted by international organizations remains to be seen.

The World Bank case arose in the context of a criminal case involving four former executives of SNC Lavalin charged with offences under the Corruption of Foreign Public Officials Act (CFPOA).83 The World Bank's independent anti-corruption and anti-fraud investigative unit, the Integrity Vice Presidency (INT), shared the information collected through its investigation of whistleblower complaints including copies of whistleblower e-mails, the investigation reports, and other related documents with the Royal Canadian Mounted Police (RCMP), the Canadian law enforcement authorities.84 This information supported the RCMP's request for wiretap authorizations and search warrants against the executives and resulted in charges being laid by the RCMP against the former executives under the CFPOA.

The alleged corruption was in connection with the bidding procurement process for the Padma road and railway bridge development project in Bangladesh, which was financed with a US$1.2 billion loan extended by a consortium of development banks and agencies including the International Development Association (IDA) of the World Bank Group. SNC-Lavalin was one of the engineering companies that bid on the construction project.

81. Id. at ¶ 2.
83. S.C. 1998, c.34.
84. Development banks increasingly share information received through their investigations with partner governments' domestic enforcement agencies. Consequently, in addition to the sanctions that may be imposed by the development bank (and other participating banks further to cross-debarment agreements), the investigation may be used by state enforcement agencies to pursue criminal charges under domestic anti-corruption legislation.
In 2010, the INT received information through its whistleblower mechanism alleging that employees of SNC Lavalin had attempted to bribe Bangladesh officials to gain an unfair advantage in the procurement process for the Padma project.

The former executives charged under the CFPOA challenged the wiretap authorizations and sought a court order requiring that the World Bank produce the documents shared with the RCMP, and the validation of two subpoenas issued to two senior investigators at INT with which the investigators did not comply. The decision of the trial judge to order production of certain documents and validate the subpoenas was appealed by the World Bank Group, with leave, to the SCC.

The SCC set aside the production order of the trial court. On the documents being sought by the respondents, the SCC held that the documents were protected by a broad “archival immunity” which protects all documents and records held by the World Bank from production in any court proceedings. Furthermore, the archival immunity cannot be waived. The subpoenas were invalid on the basis of a “personnel immunity” protecting all employees of the World Bank Group from civil suits and criminal prosecution when acting in their official capacity. Personnel immunity can be waived, but the waiver must be express to ensure control over when World Bank personnel can be compelled to give testimony.

VIII. OECD: New Sector Understanding on Export Credit Financing of Coal-Fired Power Plants

The new United States President, Donald Trump, promises to “cancel” U.S. participation in the Paris Agreement regarding climate change concluded December 2015. While consequences remain uncertain, it is worth understanding the “New Rules,” adopted by members of the Organization for Economic Cooperation & Development (OECD) in November 2015, in the run-up to the Paris Agreement, focused on coal-fired power plant financing. Published February 2016 as Annex VI to the OECD’s Arrangement on Officially Supported Export Credits and scheduled to come into force January 2017, the New Rules are intended to

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shift financing of coal power plants, a relatively dirty and high greenhouse gas emitting source of electricity,89 into a lower emissions direction.

Some background is in order. National export credit agencies (ECAs), such as the Export-Import Bank of the United States, provide government guarantees to lower the investor risk associated with overseas projects of their companies, like power plant construction. ECA financing is big business: G20 nations financed seventy-six billion dollars of international coal projects between 2007 and 2015.90 Although the United States, some parts of the EU, and some multilateral development banks had already adopted environmentally-conscious ECA restrictions, the OECD decision adds additional countries to this list,91 such as Japan, which plans to finance ten billion dollars in future international coal projects.92

As background to the below summary of the New Rules,93 coal power plants with the most efficient technology (ultra-supercritical) produce lower emissions per generated megawatt,94 as compared to supercritical, and finally the least efficient technology, subcritical. IDA-eligible countries are developing countries eligible for International Development Association (IDA) resources.95

Under the New Rules, plants using ultra-supercritical technology, or having emissions less than 750 g CO2/kWh, of any size, remain eligible for export credit support subject to a maximum 12-year repayment term.

Plants using supercritical technology or having emissions between 750 and 850 g CO2/kWh are (1) ineligible if large (above 500MW), or (2) eligible if medium (between 300 – 500MW) or small (less than 300MW), for a 10-year repayment term, and only in (a) IDA-eligible countries;, (b) non-IDA countries with a National Electrification Rate of 90% or below, or (c) non-IDA countries with special circumstances such as geographic isolation and where less carbon-intensive alternatives are not viable.

Plants using subcritical technology or having emissions greater than 850 g CO2/kWh are (1) ineligible if they are large or medium, or (2) eligible if they are small, for a 10-year repayment term, and only in countries falling under (1), (2) or (3) noted above.

93. OECD New Rules, supra note 87, at 121.
95. OECD New Rules, supra note 87, at 122.
In crafting these rules, the OECD ostensibly struck a balance between poor countries' continuing need to generate electricity while not undermining wealthy countries' emission reduction commitments. As might be expected, stakeholder response has been mixed. The World Coal Association believes coal is necessary to affordably meet poor countries' electricity needs and thus welcomes any continuation of ECA financing. Some experts fear that despite environmentally conscious intentions, a lot of coal financing will slip through allowable exceptions. And finally, environmental groups contend that any continuation of ECA funding for coal power plants needlessly undermines wealthy countries' climate emission commitments, and has negative local environmental and health impacts. While recognizing that the New Rules may represent the beginning of the end of using scarce public funds to support overseas coal expansion, environmentalists ask why wealthy country ECA's cannot simply drop the financing for coal altogether, and instead support clean energies like wind and solar, whose efficiencies have dramatically improved over time.

96. Biros, supra note 91.
97. Id.
98. Id.
99. Id.