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Corporate Social Responsibility

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I. Introduction

This article summarizes important developments in 2015 in the field of corporate social responsibility (CSR) and the related field of business and human rights (BHR).¹ Both fields have witnessed significant developments since 2008 when the United Nations Special Representative (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises proposed a three-pillar—Protect, Respect, Remedy—policy framework for addressing the business and human rights linkage,² and since 2011 when the U.N. Human Rights Council endorsed the U.N. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (Guiding Principles or UNGPs).³ What is obvious is that the movement towards ensuring corporate respect and accountability for human rights is gaining momentum.

II. National Action Plan on Business and Human Rights

Since it was established in 2011, the U.N. Working Group on Business and Human Rights (Working Group) has urged States to develop a national action plan (NAP) on

* The Committee Editor is Dr. Uche Ewelukwa Ofodile (SJD Harvard), Professor of Law at the University of Arkansas School of Law, Arkansas Bar Foundation Professor (2015). Uche Ewelukwa Ofodile, authored sections II, VIII, and IX. Claudia Feldkamp with Fasken Martineau DuMoulin LLP authored section III. Nigel Roberts, Vice President, Global Associations, LexisNexis Legal & Professional, authored section IV. Chisara Ezie, a Litigation Associate at Fox Rothschild LLP, authored section V. Dr. Corinne Lewis, a partner with Lex Justi, a Brussels-based law firm, authored section VI. Constance Wagner, Associate Professor of Law; Saint Louis University School of Law, authored section VII. Michael Judin of Judin Combrinck Inc., attorneys of Johannesburg, authored Section X.

1. For developments during 2014, see Uche Ewelukwa Ofodile, *Corporate Social Responsibility*, 49 ABA/SIL YIR 179-193 (2015).

2. John Ruggie (Special Representative of the Secretary-General), *A Framework for Business and Human Rights*, Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

3. John Ruggie (Special Representative of the Secretary-General), *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).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

172 THE YEAR IN REVIEW

business and human rights as part of their duty to protect, defend, and respect human rights. To help States in this endeavor, in 2014 the Working Group launched a “Guidance on National Action Plans on Business and Human Rights.” Between 2013 and 2014, at least six countries (UK, The Netherlands, Italy, Denmark, Spain, and Finland) launched their respective NAPs. In 2015 a few more countries (such as Lithuania, Sweden, and Norway) launched their NAPs and many others announced plans to develop ones in the near future.

A. LITHUANIA

On February 9, 2015, the Permanent Mission of the Republic of Lithuania (Lithuania) presented to the United Nations Lithuania’s action plan on the implementation of the U.N. Guiding Principles.⁴ The document contains former, current, and future actions and measures by Lithuania regarding the implementation of the Guiding Principles. The document identifies three key objectives that Lithuania plans to pursue: (1) ensuring the State’s duty to protect, defend, and respect human rights; (2) promoting corporate responsibility and respect in the fields of business and human rights; and (3) ensuring access to effective remedies. Regarding the objective of ensuring the State’s duty to protect, defend, and respect human rights, Lithuania plans to adopt a host of measures including legislative measures, anticorruption measures, and measures related to research and training on non-discrimination and other human rights.⁵ Regarding the objective of promoting corporate responsibility and respect in the field of business and human rights, the documents mention Lithuania’s Entrepreneurship 2014-2020 Action Plan, which contains specific measures related to the promotion of CSR.⁶

B. NORWAY

Norway’s NAP was launched on October, 12 2015.⁷ In the action plan, the Norwegian government proposes a range of actions to be taken, including the following:

“Ensure greater policy coherence and expertise on corporate social responsibility in the public administration;” “Consider pooling the resources of several actors that currently advise companies on corporate social responsibility by establishing a single advisory centre;” “Include respect for internationally recognised human rights in public contracts;” “Seek to ensure that provisions on respect for human rights, including on safeguarding labour rights and working conditions, are included in bilateral free trade agreements and investment treaties;” “Give priority to framework conditions, institution building and the development of adequate legislation to ensure that human rights are respected in priority countries for receiving Norwegian

4. Permanent Mission of the Republic of Lithuania to the United Nations Office and Other International Organizations in Geneva, REGARDING THE IMPLEMENTATION OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS BY HRC RESOLUTION 17/14, 9 February 2015, *available at* http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Lithuania_NationalPlanBHR.pdf.

5. *Id.* at 1-2.

6. *Id.* at 8.

7. Press Release, Ministry of Foreign Affairs, National action plan on business and human rights (Oct. 12, 2015), *available at* https://www.regjeringen.no/en/aktuelt/business_hr/id2457726/.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

CORPORATE SOCIAL RESPONSIBILITY 173

development aid;” and “Seek to ensure, through international cooperation, that victims of grave and systematic human rights violations have access to effective appeals procedures.”⁸

C. SWEDEN

On August 24, 2015, the government of Sweden published its NAP.⁹ Sweden’s NAP is based on the conviction “that business and respect for human rights go hand in hand and must be part of an active corporate social responsibility (CSR) policy.”¹⁰ The document offers a description of how human rights are protected in Sweden,¹¹ identifies what the Government considers the main points of businesses’ human rights efforts,¹² and identifies recourse mechanisms available to victims of human rights abuse by businesses.¹³ The document contains three annexures that address measures taken, measures planned, and useful links.¹⁴ One of the measures planned is a baseline study of how Swedish legislation compares with the UNGPs.

D. MALAYSIA

On March 24, 2015, the government of Malaysia welcomed the Strategic Framework for a National Action Plan on Business and Human Rights (Strategic Framework) drawn up by the Human Rights Commission of Malaysia¹⁵ and hinted at Malaysia’s plan to develop a NAP based on the UNGPs.¹⁶ The objective of the Strategic Framework is, “to secure the prevention and remedy of adverse business-related human rights impacts” and in the process “to respond to the challenges faced in fulfilling Malaysia’s vision of becoming a fully developed nation.”¹⁷ The Strategic Framework calls for a NAP that uses the UNGPs as its foundational reference. The Strategic Framework offers an assessment of Malaysia’s current integration of human rights in business (Section IV) and a discussion of critical policy objectives for a NAP on business and human rights (Section VI).

8. *Id.*

9. Government Offices of Sweden, ACTION PLAN FOR BUSINESS AND HUMAN RIGHTS, August 2015, available at <http://www.government.se/information-material/2015/08/action-plan-for-business-and-human-rights/>.

10. *Id.*, at 6.

11. *Id.*, at 9-11.

12. *Id.*, at 14.

13. *Id.*, at 15, 17.

14. *Id.*, at 30.

15. Human Rights Commission of Malaysia, STRATEGIC FRAMEWORK FOR A NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS, Mar. 2015, available at <http://business-humanrights.org/sites/default/files/documents/Malaysia-Strategic-Framework.pdf>.

16. *National Action Plan on Business and Human Rights to be drafted*, RAKYAT POST, Mar. 24, 2015, <http://www.therakyatpost.com/news/2015/03/24/national-action-plan-on-business-and-human-rights-to-be-drafted/>.

17. Human Rights Commission of Malaysia, *supra* note 15, at 3.

SPRING 2016

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

174 THE YEAR IN REVIEW

E. SCOTLAND – A NATIONAL BASELINE ASSESSMENT ON BUSINESS AND HUMAN RIGHTS

On May 12, 2015, the Scottish Government Commissioned a National Baseline Assessment on Business and Human Rights.¹⁸ This action builds on Scotland’s National Action Plan for Human Rights (SNAP) which was launched on December 10, 2013. SNAP called for the development of a NAP to implement the UNGPs in Scotland. In commissioning a baseline survey, the Scottish government seeks answers to a number of key questions. First, how is Scotland currently giving effect to the U.N. Guiding Principles? Second, what levers does Scotland have under the current devolved settlement to make policy choices to implement the UNGPs? Third, what mechanisms exist for individuals and groups to seek remedy in the event of alleged adverse human rights impacts connected to the activities of businesses based or operating in Scotland, and how effective and accessible are these mechanisms? Fourth, what good practice exists within the business community in relation to respecting human rights in line with the UNGPs? In answering these questions, one of the overall objectives of the baseline assessment is “to produce a researched evidence base that will inform and underpin the development of an action plan on business and human rights.”¹⁹

III. Transparency-Related Developments – Canada, United States, European Union

A. CANADA (REVENUE TRANSPARENCY)

On June 1, 2015, the government of Canada proclaimed into force the Extractive Sector Transparency Measures Act²⁰ (ESTMA) that had received Royal Assent on December 16, 2014. All resource companies subject to ESTMA must report taxes, royalties, production entitlements and other covered payments it makes to governments in relation to the commercial development of oil, gas, or minerals during the financial year that exceed \$100,000 (unless otherwise prescribed by regulation), whether monetary or “in-kind.”²¹ Payments that must be reported include those paid to all levels of government, both domestically and internationally, payments made to government agencies, and payments made to other bodies carrying out governmental functions.²² The first annual reports under the ESTMA will be in respect of financial years ending after June 1, 2016. ESTMA is also intended to apply to payments made to Aboriginal governments and organizations

18. Scottish Government, NATIONAL BASELINE ASSESSMENT ON BUSINESS AND HUMAN RIGHTS, May 11, 2015, available at http://www.publiccontractsscotland.gov.uk/search/show/search_view.aspx?ID=MAY208157&catID=.

19. *Id.*

20. Executive Sector Transparency Measures Act, S.C. 2014, c. 39, s. 376 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/E-22.7/page-1.html>.

21. Mackenzie Scrimshaw, *Aboriginal groups deplore lack of consultation on new extractive sector disclosure rule*, iPOLITICS, May 22, 2015, <http://ipolitics.ca/2015/05/22/aboriginal-groups-deplore-lack-of-consultation-on-new-extractive-sector-disclosure-rule/>; Summary of the Regional Aboriginal Roundtable Discussions on the Extractive Sector Transparency Measures Act (ESTMA), Feb. 3, 2016, available at <http://open.canada.ca/en/content/mandatory-reporting-standards-extractive-sector>.

22. Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, s. 376 § 9(2) (2014).

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

CORPORATE SOCIAL RESPONSIBILITY 175

in Canada; but, this application has been deferred for two years. Amidst complaints from Aboriginal groups that the government of Canada had failed to adequately consult with them, the government committed to further engagement with Aboriginal governments and organizations.²³ It remains to be seen how the new liberal government elected on October 19, 2015, will proceed with the consultations commenced by the previous government. To protect against fragmentation of national rules, ESTMA permits the Canadian government to designate the reporting requirements of another jurisdiction as an acceptable substitute for the obligations under ESTMA. As of July 31, 2015, a company may submit its report to a EU member state that has implemented the European Union's (EU) Accounting and Transparency Directives²⁴ as a substitute for a report prepared under ESTMA.²⁵

B. UNITED STATES (REVENUE TRANSPARENCY)

On October 2, 2015, the Securities Exchange Commission (SEC), as directed by the United States District Court for the District of Massachusetts,²⁶ submitted to the Court its proposed "expedited schedule" for the release of a final rule for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act²⁷ (Section 1504). On the proposed expedited schedule, draft rules would be released for comment by the end of 2015 with the rules to be finalized by June 2016. While the SEC Section 1504 Rule was the first out of the gate, the SEC now has precedents in Canada, the EU, and Norway reflecting the current international standard. The SEC is under pressure to align the new rule with existing national legislation in other jurisdictions and to avoid dual reporting requirements for cross-listed companies.

C. THE EUROPEAN UNION (DISCLOSURE OF NON-FINANCIAL INFORMATION)

In May 2015, Denmark became the first European country to transpose the EU Directive²⁸ on disclosure of non-financial and diversity information (EU Disclosure

23. Extractive Sector Transparency Measures Act § 9(3).

24. Directive 2013/50/EU, of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, 2013 O.J. (L294), *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=lex:32013L0050>

25. Natural Resources Canada, EXTRACTIVE SECTOR TRANSPARENCY MEASURES ACT - SUBSTITUTION DETERMINATION (Aug. 12, 2015), *available at* <http://www.nrcan.gc.ca/acts-regulations/17754>.

26. *Oxfam America Inc. v. U.S. Securities and Exchange Commission*, 2015 WL 5156554 at *6 (D.Mass. 2015) (The SEC was responding to the Court's decision released on September 2, 2015, directing the SEC to file with the Court an expedited schedule for promulgating the final rule for Section 1504.)

27. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173 § 1504, 111th Cong. (2010) (enacted) (The final rule will require companies engaged in the commercial development of oil, natural gas or minerals to annually disclose payments to governments).

28. Directive 2014/95/EU of the European Parliament and of the Council on disclosure of non-financial and diversity information by certain large undertakings and groups amends the Accounting Directive 2013/34/EU, O.J. (L330), *available at* <http://eur-lex.europa.eu/legal-content/EU/TXT/?uri=LEX:32014L0095>.

SPRING 2016

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SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

176 THE YEAR IN REVIEW

Directive).²⁹ As Member States may impose more stringent regulations than the minimum requirements set forth in an EU directive, it is important for companies with exposure in multiple EU Member States to carefully monitor the implementation of the EU Disclosure Directive in the relevant Member States. The Danish legislation, for example, expands the scope of application of the EU Disclosure Directive. The EU Disclosure Directive applies to companies that are public interest entities with more than 500 employees. Denmark's disclosure rules extend the application to all Danish companies with more than 250 employees effective 2018. The Danish legislation also eliminates the clause in the EU Disclosure Directive that allows Member States to permit companies to hold back information relating to "impending developments" if "disclosure of such information would be seriously prejudicial to the commercial position of the group."³⁰

IV. The Launch of the United Nations Global Compact Business for the Rule of Law Framework ("Framework")

The June 2015 launch of the United Nations Global Compact Business for the Rule of Law Framework (Framework)³¹ is designed to engage the business community in respecting and supporting the rule of law. The Framework will serve as a compliment to, and not a substitute for, government action. In particular, the Framework outlines the ways businesses can take action to support the rule of law, including practical examples of how businesses are already doing so. Business for the Rule of Law compliments other work of the United Nations Global Compact by highlighting that the rule of law serves as a critical foundation for sustainable development. A strong rule of law allows people and businesses to feel confident about investing in the future.

The Business for the Rule of Law campaign began in 2013 at an event in New York. The original purpose of the event was twofold; to raise awareness of the issue and to get the business community to support the campaign to advance the rule of law around the world. LexisNexis, in cooperation with the Atlantic Council, produced a draft set of Business Principles; the idea being to get businesses to sign up to, or otherwise support, a set of principles ensuring that they would try to advance the rule of law in the way they do business. LexisNexis, a global corporation with business in more than 100 countries, saw an opportunity to make a meaningful difference in the world by using their core skills in the legal industry and asking partners and friends around the world to join them. At the New York event, United Nations Secretary General Ban Ki-moon, former President of the Republic of Ireland Mary Robinson, and the then immediate past-President of the ABA, Laurel Bellows, attended and spoke in support of the campaign.

Business for the Rule of Law is a U.N. Global Compact initiative that is guided by a multi-stakeholder Steering Group of which LexisNexis is a founding member. Supporting the campaign and corporate social responsibility is good for business and in

29. Danish Business Authority, IMPLEMENTATION IN DENMARK OF EU DIRECTIVE 2014/95/EU ON THE DISCLOSURE OF NON-FINANCIAL INFORMATION, available at <http://www.ft.dk/samling/20141/lovforslag/L117/index.htm> and <http://csr.gov.dk/file/557863/implementation-of-eu-directive.pdf>.

30. EU DIRECTIVE 2014/95/EU, *supra* note 28, at 6.

31. See *Business for the Rule of Law Framework*, www.globalcompact.org/library/1341.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

CORPORATE SOCIAL RESPONSIBILITY 177

fact essential for economic prosperity. The rule of law creates an enabling environment for responsible businesses to operate and contribute to sustainable development.

The expression “rule of law” can mean different things to different people, with different histories and different legal systems. It is important to take the concept at its simplest and not get confused by labels which may not translate very well: (1) all are equal under the law; (2) the law applies to everyone in the same way no matter who you are; (3) the law should be administered by an impartial judiciary; (4) the law should be properly published and accessible; (5) without knowing what the law is, you cannot demand its protection; (6) provision for reasonable access to remedy; and (7) not having a remedy for your grievance means the law can be ignored.

At the moment, an enormous number of people are without the protection of the rule of law. In a report in 2010 by Gary Haugen and Victor Boutros called “And Justice for All,” the authors estimated that approximately four billion people in the world live outside of the protection of the rule of law.³² Studies show a direct connection between the Gross Domestic Product (GDP), the economic growth and prosperity of a country, and the rule of law.

What a specific business decides it can do to advance the rule of law can take a variety of different forms depending on their core business: advocacy and public policy engagement; strategic social investment and philanthropy; partnerships and collective action; and the ability to influence and promote the importance of the rule of law within them. Each business is different and each can offer different things. The Framework should give all businesses a perfect starting point. While lawyers can, and should, lead this effort, we need to engage one of the biggest sectors of society that can make an immediate and significant difference – the business community.

V. The United Nations Sustainable Development Goals: The Role of Legal Counsel

September 2015 marks a turning point in this past year’s landmark policy achievements. Resolution 70/1, “Transforming our world: the 2030 Agenda for Sustainable Development,” one of the most pivotal resolutions adopted by the United Nations General Assembly and all 193 U.N. member states, presents seventeen bold Sustainable Development Goals (SDGs) and 169 specified “targets” aimed at remedying the most critical global challenges of our time.³³ The SDGs provide an ambitious new universal agenda that has the potential to complete what its predecessor, the Millennium Development Goals,³⁴ could not achieve by the end of 2015.

Goal Six of the SDGs (SDG 6), which focuses on access to clean water, and Goal Nine of the SDGs (SDG 9), which considers innovative infrastructure as a means of social

32. Gary Haugen and Victor Boutros, *And Justice for All*, FOREIGN AFFAIRS (May/June 2010), <https://www.foreignaffairs.com/articles/2010-05-01/and-justice-all>.

33. See G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Oct. 21, 2015). Resolution 70/1 contains the full list of SDGs, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1 (last accessed Nov 6, 2015).

34. See *United Nations Millennium Development Goals*, UNITED NATIONS, <http://www.un.org/millenniumgoals/> (last visited Nov,5 2015). The United Nations’ Millennium Development Goals set forth eight international development goals aimed for completion by 2015.

SPRING 2016

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

178 THE YEAR IN REVIEW

inclusion and economic development, are two of the most cutting edge SDGs worth attention from the legal CSR community. As demonstrated below, there are significant ways that the SDGs will benefit from the expertise of practicing attorneys.

A. SDG 6. ENSURE AVAILABILITY AND SUSTAINABLE MANAGEMENT OF WATER AND SANITATION FOR ALL

SDG 6 promotes the collaboration of well-established corporate stakeholders, global communities, and developing industries to promote water and sanitation initiatives worldwide.

As access to clean water and sanitation has multi-fold impacts on health, hygiene, and livelihood at large, SDG 6 sets a target for international initiatives geared towards improving access to safe water and increased water use-efficiency programs. Furthermore, SDG 6 places restrictions on the disposal of hazardous wastes. In order to effectuate SDG 6, varied stakeholders must work together to design and implement infrastructure initiatives that incorporate compliance with environmental regulations and transnational partnerships.

Attorneys can help negotiate, draft, and secure agreements between local and corporate stakeholders to create environmentally sound partnerships geared towards increasing access to clean water and improving sanitation systems.

B. SDG 9. BUILD RESILIENT INFRASTRUCTURE, PROMOTE INCLUSIVE AND SUSTAINABLE INDUSTRIALIZATION, AND FOSTER INNOVATION

Understanding the critical role that infrastructure and industrial diversification plays in establishing stable and healthy economies, SDG 9 calls for sustainable development through innovation, project finance initiatives, and job creation. In particular, SDG 9 views infrastructure as a means of promoting more inclusive societies, especially in landlocked developing countries and small island developing states. SDG 9 requests the support of the financial services industry to invest in small-scale business enterprises, including extending affordable credit to better integrate value chains and markets.

C. CONCLUSION

A common thread apparent in the seventeen SDGs is that a space exists for legal professionals to contribute their skill set in support of strides to achieve the goals. The undertakings necessary to achieve the SDGs require binding legal agreements that comply with applicable international and domestic laws and regulations, and contain appropriate governing law provisions to guide dispute resolution. Comprehensive risk management assessments will also be needed. Though policy heavy at first blush, the SDGs directly connect to the legal profession and call for the expertise of legal counsel adept with the intersection of law and corporate social responsibility strategies. As stated by Dr. Bob Eccles, “the brutal reality however is that governments alone cannot ensure the achievement of the Sustainable Development Goals, all of which have very concrete

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

CORPORATE SOCIAL RESPONSIBILITY 179

quantitative targets, without the support of the corporate community.”³⁵ Similarly, the SDGs will lack fundamental practical validity without the support of the legal community. The legal community plays an indispensable role in supporting the SDGs, which if successful, can stimulate holistic action over the next fifteen years to combat gaping socioeconomic and gender inequalities, secure health and safety, and implement environmental protections worldwide.

VI. Drafting of a Treaty on Business and Human Rights

The first substantive discussions, which relate to an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises with respect to international human rights law, were held at the United Nations’ offices in Geneva from July 6-10, 2015. The discussions in Geneva were the opening session of the open-ended intergovernmental working group (OEIWG), established by the U.N. Human Rights Council in June 2014, with a mandate to elaborate a treaty regulating the activities of businesses with regard to human rights law.³⁶ Discussions centered on the content, scope, nature, and form of the treaty. Panel presentations by representatives from the U.N. and other international organizations, academics, and other experts were followed by open discussions, with active participation by numerous civil society organizations. Although businesses did not participate in the discussions, their views received some representation through the International Organization of Employers. These initial discussions marked what will likely be a lengthy process because U.N. treaties can take years, sometimes even a decade, to negotiate. While the OEIWG’s efforts follow the U.N. Human Rights Council’s unanimous adoption, in June 2011,³⁷ of the UNGP, the UNGP remains a soft-law instrument that primarily provides process guidance on how states should ensure and businesses should implement the corporate responsibility to respect human rights. Moreover, as the U.N. Special Representative on business and human rights who formulated the UNGP has stated, the area of business and human rights “is characterized by . . . extensive problem diversity, significant institutional variations, and conflicting interests across and within states.”³⁸

The track record for drafting standards related to business and human rights at the U.N. bears witness to the political difficulties associated with the process. Negotiations on a Draft Code of Conduct on Transnational Corporations,³⁹ which began in 1977, were

35. Dr. Bob Eccles, *U.N. Sustainable Development Goals: Good for Business*, FORBES (Oct. 20, 2015, 10:02 AM), available at <http://www.forbes.com/sites/bobeccles/2015/10/20/un-sustainable-development-goals-good-for-business/>.

36. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/L.22/Rev.1, ¶ 1 – 2, 26th Sess., (June 26, 2014).

37. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, ¶ 1, 17th Sess., (June 16, 2011).

38. Ruggie, John Gerard, *Regulating Multinationals: The U.N. Guiding Principles, Civil Society, and International Legalization*, Regulatory Policy Program Working Paper RPP-2015-04, MOSSAVAR-RAHMANI CENTER FOR BUSINESS AND GOVERNMENT, HARVARD KENNEDY SCHOOL, HARVARD UNIVERSITY, at 7, available at http://www.hks.harvard.edu/index.php/content/download/74032/1678739/version/1/file/RPP_2015_04_Ruggie.pdf.

39. *Proposed Text of the Draft Code of Conduct on Transnational Corporations*, G.A. Res. 186, U.N. GAOR, 45th Sess., 71st plen. Mtg. U.N. Doc. E/1990/94 (June 12, 1990).

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

180 THE YEAR IN REVIEW

inconclusive and later abandoned in the early 1990s. A subsequent U.N. initiative resulted in the 2003 “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (Norms), which provided soft-law norms that could be used as the basis for a treaty.⁴⁰ However, the Norms were never adopted by the U.N. Commission of Human Rights, the forerunner of the U.N. Human Rights Council, and were set aside. At present, there is still a lack of consensus by States on the need for such a treaty. The June 2014 resolution establishing the OEIWG, co-sponsored by Ecuador, Bolivia, Cuba, South Africa and Venezuela, was reportedly supported by over 600 civil society organizations that signed a Joint Statement,⁴¹ but received only a plurality (twenty) of votes of States on the Human Rights Council.⁴² Of the fourteen States that voted against the resolution, many of them are global economic leaders that are home to significant numbers of transnational companies, such as the United States, Japan, South Korea, the United Kingdom, and a number of other EU member states.⁴³ While three of the four BRIC countries, Russia, India, and China, voted in favor, Brazil abstained along with thirteen other States.⁴⁴ The United States submitted a written rationale for its negative vote that highlighted the concern that the treaty efforts would undermine implementation of the UNGP, and stated that the United States would not participate in the OEIWG.⁴⁵ True to its word, the United States did not attend the July 2015 session.

The OEIWG also faces an array of challenging legal issues in the drafting of the treaty. A fundamental but divisive issue among States is whether the treaty should cover all business enterprises or only transnational corporations and their entities, but not local businesses.⁴⁶ While the EU proposed that the former, more expansive, meaning be used, that proposal was rejected. Consequently, the EU left the discussions on the second day. Further, the option of limiting the treaty to certain rights, such as those that constitute gross violations of human rights, was countered by numerous comments that the instrument should cover all human rights. In addition, the OEIWG received a bewildering array of suggestions of topics that should be included in the treaty, including not only all human rights, but also environmental principles, intellectual property rights, the use of the best technology, and the principle of direct responsibility of transnational

40. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, Preamble, at 3 (2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.

41. See *Enhance the International Legal Framework to Protect Human Rights from Corporate Abuse*, TREATY ALLIANCE, available at www.treatymovement.com/statement.

42. Human Rights Council Res. 26/9, *supra* note 36.

43. *Id.*

44. *Id.*

45. U.S. Delegation to the U.N. Human Rights Council, *Explanation of Vote, Proposed Working Group Would Undermine Efforts to Implement Guiding Principles on Business and Human Rights*, PERMANENT MISSION OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS IN GENEVA (June 26, 2014), <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/>.

46. See Human Rights Council Res. 26/9, *supra* note 36, 1–2 n.1. Footnote 1 in the Resolution provides that “other business enterprises” denotes all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in terms of relevant domestic law.”

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

CORPORATE SOCIAL RESPONSIBILITY 181

corporations, among many others.⁴⁷ Also during the discussions, many references were made to the lack of sufficient remedies for victims of human rights violations, although there was no consensus on how to address this problem. One clear outcome of the July session was recognition that the treaty process does not contradict the UNGP and that the two can be considered complementary.

Despite the numerous obstacles and substantial work that remains to be done by the OEIWG to formulate a treaty, the July discussions at the U.N. evidenced the significant momentum behind the articulation of human rights standards for businesses and the serious desire to see greater implementation of respect for human rights in practice. Therefore, the OEIWG's work is likely to substantially enhance current efforts to develop a means to measure businesses' respect for human rights and hold them accountable if they fail to do so.

VII. United States: United States Court Decisions on Alien Tort Statute Claims

A. *Jane Doe, et al. v. Drummond Company, Inc., et al.*

The United States Court of Appeals for the Eleventh Circuit issued its opinion in the case of *Jane Doe, et al. v. Drummond Company, Inc., et al.* on March 25, 2015.⁴⁸ Plaintiffs were legal heirs of Colombian labor leaders who were murdered by Autodefensas Unidas de Colombia (AUC), a paramilitary group designated as a terrorist organization by the United States government. Plaintiffs brought an action against Drummond Company, Inc., a closely-held coal mining corporation based in Alabama (the "Company"), Drummond Ltd., a wholly-owned subsidiary of the Company in charge of day-to-day mining activities in Colombia, and two individual defendants who served as corporate officers. Plaintiffs sought relief under the Alien Tort Statute (ATS), the Torture Victim Protection Act (TVPA), and Colombia's wrongful death laws, claiming that the Company aided and abetted and conspired with AUC in its extrajudicial killings and war crimes. The Eleventh Circuit Court of Appeals affirmed the United States District Court for the Northern District of Alabama's summary judgment for defendants.

Regarding the ATS claim, the Appeals Court analyzed whether the United States Supreme Court's presumption against extraterritoriality for ATS claims established in *Kiobel v. Royal Dutch Petroleum, Co.*, 133 S.Ct. 1659 (2013), precluded jurisdiction. In *Kiobel*, the United States Supreme Court stated that the presumption against territoriality precludes federal courts' exercise of jurisdiction over ATS claims unless the claims "touch and concern the territory of the United States. . . with sufficient force to displace the presumption."⁴⁹ In reaching its decision, the Appeals Court discussed relevant opinions

47. Human Rights Council Chairperson-Rapporteur Ambassador María Fernanda Espinosa Garcés, *Draft Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, ¶ 21, 46, U.N. Doc. A/HRC/. . . (July 10, 2015), available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx>.

48. *Jane Doe, et al. v. Drummond Company Inc., et al.*, 782 F.3d 576 (11th Cir. 2015).

49. *Kiobel v. Royal Dutch Petroleum Co., et al.*, 133 S.Ct. 1659, at 1669 (2013).

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

182 THE YEAR IN REVIEW

on ATS claims from the Second, Fourth, and Eleventh Circuit Court of Appeals that were handed down post-*Kiobel*.⁵⁰

The Eleventh Circuit Court of Appeals held in *Drummond* that the claim did not permit jurisdiction under the ATS because the complaint did not demonstrate facts that sufficiently “touch[ed] and concern[ed]” the territory of the United States in order to displace the presumption against extraterritoriality and permit jurisdiction. The Appeals Court stated that although the defendants’ U.S. corporate status and U.S. citizenship were relevant to the “touch and concern” inquiry, this factor was insufficient to permit jurisdiction on its own. Further, defendants’ conduct in funding AUC, a U.S.-designated terrorist organization, was relevant because it triggered U.S. interests, but it was insufficient to displace the presumption against extraterritoriality. Finally, the Appeals Court determined that although some of the conduct underlying the ATS claims occurred in the United States, namely making funding and policy decisions, that fact did not outweigh the extraterritorial location of the rest of the claims. Therefore, the presumption against territoriality was not displaced. As a consequence, the Appeals Court affirmed the district court’s decision for defendants on the ATS claims.

Regarding the TVPA claims, the Appeals Court also held that the District Court’s grant of summary judgment for defendants was correct because plaintiffs failed to present sufficient evidence to create a genuine issue of material fact as to liability, while also clarifying the correct legal standard that the District Court should have used in dismissing the claims. Finally, the Appeals Court held that the District Court did not abuse its discretion in declining to exercise supplemental jurisdiction over plaintiffs’ Colombian wrongful death claim, or in refusing to allow plaintiffs to amend their complaint in order to pursue those claims after the merits of the federal claims were dismissed.

B. *John Doe, et al. v. Exxon Mobil Corporation, et al.*

The District Court for the District of Columbia handed down its decision in another ATS case, *John Doe, et al. v. Exxon Mobil Corporation, et al.* on July 6, 2015.⁵¹ Plaintiffs alleged that Exxon Mobil Corporation and its subsidiary Exxon Mobil Oil Indonesia, Inc. (collectively “Exxon”) should be liable for aiding and abetting human rights abuses committed by members of the Indonesian military because the abuses were committed while the military was providing security for Exxon’s natural gas development operations in the Aceh Province of Indonesia in 2000 and 2001. The conduct complained of included sexual assault, kidnapping, torture, murder, and other acts of cruel and inhumane treatment.

The District Court denied Exxon’s motion to dismiss as to defendant Exxon Mobil Corporation because it found that the plaintiffs had pled sufficient facts to demonstrate that the plaintiffs’ claims touched and concerned the United States with sufficient force to overcome the *Kiobel* presumption against extraterritoriality with regard to Exxon Mobil Corporation. The plaintiffs had alleged numerous and detailed instances of U.S.-based decision making, including planning and authorizing the deployment of military security personnel and ordering the provision of supplies and vehicles for the Indonesian security

50. *Drummond*, 782 F.3d at 586-592.

51. *John Doe, et al. v. Exxon Mobil Corporation, et al.*, Slip Copy, 2015 WL 5042118 (D.C. Cir. 2015).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

CORPORATE SOCIAL RESPONSIBILITY 183

personnel that were used to commit the alleged wrongful acts. In addition, the plaintiffs sufficiently alleged the state of mind needed for aiding and abetting violations based on the knowledge of Exxon Mobil Corporation executives within the United States of abuses committed by Exxon security personnel in Aceh against the local population.

However, the Court did grant Exxon's motion to dismiss as to defendant Exxon Mobil Oil Indonesia, Inc. because the plaintiffs failed to allege sufficient instances of U.S.-based conduct by the corporation's officers or employees relevant to the ATS claims.

VIII. Children, Business and Human Rights

2015 witnessed an increased focus not only on the impact of globalization and global businesses on children, but also on how States, as well as businesses, can track the impact of businesses on children.

A. A NEW GUIDANCE TO STATES ON CHILDREN'S RIGHTS

On November 6, 2015, the International Corporate Accountability Roundtable, the Danish Institute for Human Rights, and the United Nations Children's Fund launched the "Children's Rights in National Action Plans (NAPs) on Business & Human Rights."⁵² The aim of the document is to provide guidance on how children's rights can be addressed in national action plans on business and human rights and other similar policies. The document is important and timely because although children play a significant role in the global economy, interact with businesses every day, and are severely impacted by business activities, operations, and relationships, a full understanding of the impact of business on children is lacking. The document contains two important application tools: a "Children's Rights NAP Checklist" (Checklist) and a "Children's Rights National Baseline Assessment (NBA) Template" (Template). The Checklist "summarizes how States can ensure that children's concerns and opinions are adequately taken into account as States begin the process of developing, evaluating, or revising a NAP."⁵³ The Template identifies four key areas of implementation for children's rights and business: Legal and Policy Framework, Initiatives and Responses on Children's Rights, Implementation Areas, and Context.

B. A GUIDANCE TO COMPANIES ON CHILDREN'S RIGHTS

In August 2015, the Association of Chartered Certified Accountants (ACCA) published a report, "Reporting on Children's Rights" (Report), that is intended to help companies manage their impact on children's rights by offering guidance for better reporting.⁵⁴ The

52. Catherine Poulsen-Hansen, Sara Blackwell, & Patrick Geary, *Children's Rights in National Action Plans (NAPs) on Business and Human Rights*, INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE (2015), available at <http://icar.ngo/analysis/childrens-rights-in-national-action-plans-on-business-and-human-rights/>.

53. *Id.* at 5.

54. *Reporting on Children's Rights*, ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS (August 2015), available at https://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjyiImr8ODKAhXLOyYKHZwZAawQFggdMAA&url=ttp%3A%2F%2Fwww.accaglobal.com%2Fcontent%2Fdam%2FACCA_Global%2FTechnical%2Fsus%2FReporting_childrens_rights.pdf&usg=AFQjCNErGn32jF_nMzwWIZHbd0FjirEbg&sig2=lkCZuqL_rBiwkz0RJBajbQ.

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

184 THE YEAR IN REVIEW

Report stems from a conviction that “[t]here are few issues that can be as powerful in affecting a corporate brand adversely as children’s rights”⁵⁵ and that businesses “must use their corporate reporting to address the risks that arise, globally, from the potential abuse of children’s rights.”⁵⁶ The Report calls for a five-step approach to reporting on children’s rights: “context and risk; policies and governance; integration and action; monitoring and review; and remediation.”⁵⁷ The Report offers a detailed description of the five key areas and provides useful case studies to help explain each key area.

IX. Indigenous People

A. THE PALAWAN STATEMENT ON HUMAN RIGHTS AND AGRIBUSINESS IN SOUTHEAST ASIA

The impact of agribusiness on the rights and livelihood of Indigenous Peoples and other vulnerable groups is generating considerable concern and attention. On November 6, 2015, a regional network of Asian human rights commissions and supportive non-governmental organizations (NGOs), attending the Fifth South East Asian Regional Conference on Human Rights and Agribusiness, adopted the Palawan Statement on Human Rights and Agribusiness in Southeast Asia (Palawan Statement).⁵⁸ The Palawan Statement notes that the “[g]rowing global concern about land grabbing and land investments is not being matched with mandatory controls and enforceable standards,” and that “[d]espite notable advances in the evolution of voluntary standards, significant gaps remain in the framework of law for making human rights binding on agribusiness.”⁵⁹ Noting the increase in massive fires in the region, the Palawan Statement calls for a strong moratorium on land clearance and palm oil development. The Palawan Statement also called for the establishment of a regional human rights court at the ASEAN or Asian level.

B. INDIGENOUS PEOPLES AND MINING – A NEW GUIDE

The International Council on Mining and Metals (ICMM), established in 2001 to improve sustainable development performance in the mining and metals industry, has published an updated guide that addresses the relationship between mining companies and Indigenous Peoples. The *2015 Good Practice Guide: Indigenous Peoples and Mining* (Second Edition) (Good Practice Guide) is an updated version of ICMM’s 2010 Good Practice Guide. The Good Practice Guide is directed at mining companies and is aimed at “providing guidance to companies on good practice where mining-related activities occur on or near traditional indigenous land and territory.”⁶⁰ Divided into four chapters, the

55. *Id.* at 4.

56. *Id.*

57. *Id.* at 11.

58. *Palawan Statement on Human Rights and Agribusiness in South Asia*, (Nov. 6, 2015), available at <http://www.rightsandresources.org/en/news/palawan-statement-on-human-rights-and-agribusiness-in-southeast-asia/>.

59. *Id.* at 1.

60. INTERNATIONAL COUNCIL ON MINING AND METALS, GOOD PRACTICE GUIDE: INDIGENOUS PEOPLES AND MINING 14 (2d ed. 2015), available at <https://www.icmm.com/page/115445/indigenous-peoples-and-mining-good-practice-guide>.

VOL. 50

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

CORPORATE SOCIAL RESPONSIBILITY 185

Good Practice Guide explores a number of important themes: engagement with indigenous people and principles of good engagement; indigenous peoples' involvement in decision-making; the principle of free, prior, and informed consent; impact mitigation and enhancement; addressing discrimination and historical disadvantages; managing impacts and sharing the benefits of mining through agreements; and dealing with grievances.

C. ICMM'S 2015 MINING AND INDIGENOUS PEOPLES POSITION STATEMENT

In May 2015, the commitments in the *2013 Indigenous Peoples and Mining Position Statement* adopted by the ICMM went into effect.⁶¹ In the Position Statement, ICMM members commit, *inter alia*, to: "Engage with potentially impacted Indigenous Peoples;" "Understand and respect the rights, interests and perspectives of Indigenous Peoples regarding a project and its potential impacts;" and "Agree on appropriate engagement and consultation processes with potentially impacted Indigenous Peoples and relevant government authorities as early as possible during project planning, to ensure the meaningful participation of Indigenous Peoples in decision making."⁶² ICMM members also made commitments to "[w]ork to obtain the consent of indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples."⁶³

X. Ode to Corporate Social Responsibility of American Companies in South Africa

The ethos of American companies in business is admired, as these companies often address the three pillars of sustainability—people, planet, and profit—while growing their businesses. This practice provides for quality foreign direct investment when investing in a host country like South Africa. South Africa is a complex market, most particularly because it is a market in transition. Outside of South Africa's strategic role on the continent of Africa, there is a desperate need to see economic growth and a melting pot of socio-economic issues. These issues are, in part, a legacy of the past policy of Apartheid which restricted access to the most fundamental human rights for the majority of South Africans, and in part, a result of South Africa's status as a fledgling democracy that has not yet found the resolve and confidence to think and act as a collective and therefore prioritize the interests of all of its people above all else.

For American companies, there is an age-old familiarity with corporate social investments (CSI) as a charitable contribution to worthy causes. In South Africa, this commitment runs much deeper and includes: investment for developing skills and building capacity through education and training; commitment to buying from local small businesses to boost the economy and access to opportunity for previously disadvantaged individuals; investment in developmental programs and initiatives geared towards

61. *Indigenous Peoples and Mining Position Statement*, INTERNATIONAL COUNCIL ON MINING AND METALS (May 2013), available at <http://www.icmm.com/document/5433>.

62. INTERNATIONAL COUNCIL ON MINING AND METALS, *supra* note 60, at 11.

63. *Id.*

SPRING 2016

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

186 THE YEAR IN REVIEW

servicing those individuals deemed to be disadvantaged; and the proactive employment of individuals who meet those same criteria.

Most companies that have been in South Africa for some time struggle with increasing demands to participate in the socioeconomic agenda, which as unemployment rises, becomes more and more onerous; but a few smart companies have shifted their thinking. As the world changes its focus to Integrated Reporting in order to measure the Environmental, Social and Governance (ESG) responsibilities of companies, many companies have used the change in focus to align their own operating ethos, and as an opportunity to rethink how they operate in these emerging markets.

The legislative requirement in South Africa is that one percent of the local Net Profit after Tax (NPAT) should be invested annually into qualifying programs. A further three percent of NPAT should be invested into economic development programs that translate into procurement spending. If these investments are not achieved strategically, they are considered a cost of doing business. But, if the investments are optimized to achieve greater economies of scale, they can often be co-funded through government investment and the return on investment measured in direct savings or return.

A recent survey of just eighty-nine out of an estimated 600 American companies in South Africa revealed that these companies contributed R278 billion to the South African economy in 2014.⁶⁴ The eighty-nine American companies employed 221,400 South Africans directly and indirectly, and if one uses a multiplier effect of four persons benefitting from the employment, then these eighty-nine companies provided positive opportunities for just under one million persons.⁶⁵ The eighty-nine companies surveyed spent R144 million on training and R400 million on skills development.⁶⁶ The companies' principle of growing their staff into the best staff they can be is tantamount to being successful in the business world, and the principle's importance is evidenced by this is evident from the amount of money the companies spent on developing their workers. The finest contribution of all is that these companies spent more than R350 million on corporate social investment projects.⁶⁷ These companies are deeply immersed in developing schools, clinics, roads and sports venues, and they build and manage academies of excellence in order to grow local skills.

To encourage corporate social investment, and to acknowledge the excellence of projects that American companies implement and manage, The American Chamber of Commerce in South Africa (Amcham) presents a Stars of Africa competition every second year. Companies are invited to enter into the competition in various categories, which include: health, the green environment, education, incubation, and community welfare. External judges evaluate the entries, and the winning entry in each category is announced at the Amcham Thanksgiving Dinner, which features more than 600 captains of industry.

64. *Public Hearings on the Promotion and Protection of Investment Bill*, THE AMERICAN CHAMBER OF COMMERCE IN SOUTH AFRICA (Sept. 15, 2015), at 4, available at https://www.google.com/url?sa=&ret=j&q=&esrc=S&source=web&cd=1&ved=0ahUKEwjV3sSbquLKAhVEWCYKHY-IDCEQFggdMAA&ur=https%3A%2F%2Fwww.thedti.gov.za%2Fparliament%2F2015%2Famcham_15Sept2015.pdf&usg=AFQjCNFlpd6rYm73TCz8YEQgwToyYaXFg&sig2=pkzfhYix1A1uJB590aBnw.

65. *Id.*

66. *Id.*

67. *Id.*

VOL. 50

PUBLISHED IN COOPERATION WITH
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