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Chapter 19
THE INTERSECTION OF LAW AND CORPORATE SOCIAL RESPONSIBILITY: HUMAN RIGHTS STRATEGY AND LITIGATION READINESS FOR EXTRACTIVE-SECTOR COMPANIES

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Synopsis

§ 19.01 Introduction*

The legitimacy of corporate social responsibility (CSR)[1] as a business concern has long been questioned.[2] Milton Friedman famously wrote in *Capitalism and Freedom* that advocates of CSR are beholden to

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[1]While CSR does not have a single, widely accepted definition, it has traditionally been considered to include five elements: (1) voluntary action by business, (2) to address stakeholder concerns regarding the business's (3) social, (4) economic, and (5) environmental impacts. *See* Alexander Dahlsrud, "How Corporate Social Responsibility is Defined: an Analysis of 37 Definitions," 15:1 *Corp. Soc. Responsib. Environ. Mgmt.* 1, 4 (2008).

[2]While CSR is a vast discipline, the focus in this chapter is on the "social" dimension, i.e., the impact that a company can have on individuals and groups that do not have a contractual or ownership relationship with the company.

> a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.[3]

Friedman's dictum has informed the "shareholder approach" to CSR, under which the only way to encourage CSR is to change the law.[4] This view, however, presumes that CSR is fundamentally irrational—that it is antithetical to conventional business pursuits. The CSR-skeptical paradigm carries less currency in a world where CSR is integral to profit maximization and risk mitigation.

For the extractive sector, CSR is not only defensible on conventional commercial metrics. It is a business necessity.[5] A major mining project, for instance, will lose approximately $20 million per week of delayed production in the event of a shutdown; costs can accrue even at the exploration stage.[6] Community conflict is a powerful source of delay and even permanent shutdown. For example, Shell was forced to cease operating oil concessions in the Ogoni areas of Nigeria due to community resistance; the concession was eventually revoked in 2008.[7] And, in Peru, regional protests in 2011 suspended three mining projects representing over $6 billion in investments.[8] In the wake of this social risk, an extractive-sector company that fails to integrate a CSR strategy to consider community reaction and address stakeholder concerns is acting irrationally.

But social risks are no longer the only dimension of CSR risk. The increasing standardization of CSR expectations through legislation, contract terms, and voluntary principles is the source of significant legal risk. In other words, using Friedman's framework, the "rules of the game" are changing such that a rational business must consider social responsibility as integral to its operations.[9] Beyond informing the reasons to engage in

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[3] Milton Friedman, *Capitalism and Freedom* 133 (1962).

[4] *See* Marcel van Marrewijk, "A typology of institutional frameworks supporting corporate sustainability," at 2 (Mar. 2008).

[5] For an overview of CSR, see Kevin O'Callaghan, "Corporate Social Responsibility: A Framework for Understanding the Legal Structure," 57 *Rocky Mt. Min. L. Inst.* 17A-1 (2011).

[6] Rachel Davis & Daniel Franks, Corporate Social Responsibility Initiative Report No. 66, "Costs of Company-Community Conflict in the Extractive Sector," at 8 (Harvard Kennedy Sch. 2014).

[7] Policy Briefing, Int'l Crisis Grp., "Nigeria: Ogoni Land after Shell" (Sept. 18, 2008).

[8] *See* "Concern Grows over Peruvian Protests," *E&MJ News* (Dec. 22, 2011).

[9] *See* Friedman, *supra* note 3, at 133.

CSR, the emergence of legal risk has profound implications for *how* CSR should be done. This is because addressing social risk is fundamentally distinct from addressing legal risk: the former requires catering to stakeholder expectations; the latter is largely independent of perception and requires alignment of CSR strategy with objective standards.

Legislative efforts to encourage or mandate CSR due diligence have proliferated over the last few years. In the United States, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires companies to conduct supply chain due diligence to determine if their products source certain minerals from the Democratic Republic of the Congo.[10] California passed the Transparency in Supply Chains Act of 2010,[11] in part, "to educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains . . . ."[12] Across the Atlantic, a proposed bill before the French Parlement would mandate corporate human rights and social due diligence.[13] And the European Parliament recently adopted a directive on disclosure of nonfinancial information by companies that would require the largest companies to report on a variety of issues, including "respect for human rights."[14]

Aside from the proposed French variant, the above measures are either limited in scope or focused on transparency about social impacts; they do not provide substantive guidelines on how to identify and remedy such impacts. Somewhat ironically, a more profound change in legal risk is born of voluntary business and human rights standards, particularly the *Guiding Principles on Business and Human Rights* (*Guiding Principles*).[15] The *Guiding Principles* are not law and are not likely to be part of customary international law. As this chapter will demonstrate, however, these

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[10] 15 U.S.C. § 78m(p), *invalidated in part by* National Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014) (finding 15 U.S.C. § 78m(p)(1)(A)(ii) & (E) unconstitutional).

[11] 2010 Cal. Legis. Serv. ch. 556 (S.B. 657) (codified at Cal. Civ. Code § 1714.43; Cal. Rev. & Tax Code § 19547.5).

[12] *Id.* § 2(j).

[13] *See* Yann Queinnec & Stephane Brabant, "De l'art et du devoir d'être vigilant," *Droit des Affaires et Developpement Durable* (2013), http://lamyline.lamy.fr. *See also* Mark B. Taylor, Int'l Corporate Accountability Roundtable, "Human Rights Due Diligence: The Role of States," at 4 & n.9 (rev. ed. 2013).

[14] Press Release, European Comm'n, "Improving corporate governance: Europe's largest companies will have to be more transparent about how they operate" (Apr. 15, 2014).

[15] John Ruggie, U.N. Special Representative, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN Doc. A/HRC/17/31 Mar. 21, 2011) (adopted by the UN Human Rights Council on June 16, 2011). *See also* Michael M. Lieberman, "The Ruggie Principles on Business and Human Rights: How Companies Can Prepare," 48 *Rocky Mt. Min. L. Fdn. J.* 271 (2011).

standards are singularly legal in both content and consequence. They are also comprehensive with respect to industry and business operations. The *Guiding Principles*' widespread endorsement transforms CSR strategy from public relations art to legal science by creating a new CSR paradigm driven by systematic precision based on legal concepts—one that is justiciable in a way that traditional CSR never could be.

The legal risks flowing from the *Guiding Principles* will be diffuse and indirect. Rather than imposing a specific obligation under national or international law, the *Guiding Principles* will inform considerations of reasonable business practice, with critical implications for transnational civil and commercial disputes. For the extractive sector, the most significant immediate risks lie in resource nationalism cases under international law and transnational tort cases under local law. The emergence of legal risk has significant implications for the design and implementation of CSR strategy. Rather than focusing only on public relations, CSR programs must now also be litigation ready. Corporate programs must be rigorously structured to align with the *Guiding Principles* to ensure that they are defensible before courts and international tribunals. Against this backdrop, counsel have an essential role to play in comprehensive and effective CSR strategy, as their insight is important to understand the requirements of the relevant standards and to ensure that legal risk is addressed in tandem with reputational risk.

This chapter focuses on the intersection of law and CSR in the wake of the *Guiding Principles* at two levels: content of strategy and nature of risk. Section 19.02 provides an overview of the *Guiding Principles* and their implications for CSR strategy. Section 19.03 explains the source and nature of emerging legal risks under international and national law, which arise from the *Guiding Principles*' structure and widespread endorsement. Section 19.04 focuses on the role of counsel in managing an effective CSR strategy to minimize exposure to legal risk.

§ 19.02 The Evolution of CSR in the Wake of the *Guiding Principles*

[1] The *Guiding Principles* Define Business Responsibility for Human Rights

The *Guiding Principles* are the leading standard on business and human rights: they have been widely endorsed by governments, industry associations, businesses, and international organizations:[16]

[16] John F. Sherman, III, Shift Project, "The UN Guiding Principles for the Corporate Legal Advisor: Corporate Governance, Risk Management, and Professional Responsibility," at 6 (Apr. 4, 2012).

- Unanimously endorsed by the United Nations (U.N.) Human Rights Council in June 2011.
- Incorporated in the *OECD Guidelines for Multinational Enterprises*, which 44 states, including the United States, have undertaken to promote.[17]
- Incorporated in the guidance materials for the IFC Performance Standards.[18]
- Recognized by the Council of Europe as "the current globally agreed baseline . . . in the field of business and human rights."[19]
- Recognized by the U.S. government as "provid[ing] an important framework for corporations, states, civil society, and others as they work to strengthen their respective approaches to the issue of business and human rights."[20]
- Endorsed and promoted by the United Kingdom in an action plan: "The [*Guiding Principles*] guide the approach UK companies should take to respect human rights, wherever they operate."[21]
- Embraced by IPIECA, an oil and gas sustainability association with 38 leading companies and 16 associations as members.[22]
- Embraced by the International Council on Mining and Metals (ICMM): The *Guiding Principles* "identified human rights due

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[17] *See* Organisation for Economic Co-Operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (rev. ed. 2011). *See also* Final Statement, Ofc. of the U.S. Nat'l Contact Point, "U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises" (May 19, 2014).

[18] *See* Int'l Fin. Corp. (IFC), "Guidance Note 1: Assessment and Management of Environmental and Social Risks and Impacts," *in International Finance Corporation's Guidance Notes: Performance Standards on Environmental and Social Sustainability* 1, 16 (Jan. 1, 2012) (emphasizing that "Performance Standard 1 reflects the 'respect' and 'remedy' aspects of the [*Guiding Principles*]"). *See also* IFC, "Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts," *in IFC Performance Standards on Environmental and Social Sustainability* 5 (Jan. 1, 2012).

[19] Committee of Ministers, Council of Europe, "Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights" (adopted Apr. 16, 2014).

[20] U.S. Dep't of State, "U.S. Government Approach on Business and Human Rights," at 3–4 (2013).

[21] Gov't of the U.K., "Good Business: *Implementing the UN Guiding Principles on Business and Human Rights*," § 3 (Sept. 2013).

[22] *See* IPIECA, "Focus Areas—Social Responsibility," http://www.ipieca.org/focus-area/social-responsibility.

> diligence as the key mechanism for companies to deliver on their 'responsibility to respect' human rights . . . ."[23]

The *Guiding Principles* reframe the social dimension of CSR in the language of rights and causation. They are built on three "pillars," conceived for the *Guiding Principles* to apply comprehensively to all states and business enterprises: (1) the state responsibility to protect rights; (2) the business responsibility to respect rights; and (3) the joint responsibility of the state and business to provide grievance mechanisms.[24]

The first pillar, the state duty to protect human rights, is largely a restatement of international law.[25] The responsibility is defined by the scope of a state's jurisdictional control: "States must protect against human rights abuse *within their territory and/or jurisdiction* by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."[26]

The second pillar, business responsibility to respect human rights, is the *Guiding Principles*' novel contribution to CSR and will be the focus of this chapter. The novelty lies in a framework to understand the scope of business responsibility for human rights *as distinct from* the state responsibility for rights. While state responsibility is absolute and defined by jurisdiction, business responsibility is context sensitive and defined by causal links: "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[27]

The third pillar, access to remedy, implicates the public and private sectors. For business, the key requirement is to provide access to private dispute resolution mechanisms focused on rights: "To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely

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[23] ICMM, "Human rights in the mining and metals industry—Integrating human rights due diligence into corporate risk management processes," at 3 (Mar. 2012).

[24] *See Guiding Principles*, at "General principles." *See also id.* ("These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.")

[25] U.N. Human Rights Comm., "General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant," ¶ 8 (CCPR/C/21/Rev.1/Add.13 May 26, 2004) (General Comment 31).

[26] *Guiding Principles* § I.A.1 (emphasis added).

[27] *Id.* § II.A.11.

impacted."[28] This pillar is noteworthy both for placing a dispute resolution responsibility on business and for laying out its procedural parameters. While it is undoubtedly relevant and complex, an understanding of the third pillar is beyond the scope of this chapter.

[2] Business Respect for Human Rights Is a System

[a] Why the *Guiding Principles* Are Necessary

The *Guiding Principles* provide a language and analytical framework to understand the scope of business responsibility for human rights. This is critical because human rights under international law are *state-centric* concepts. The International Covenant on Civil and Political Rights (ICCPR)[29] provides at the outset that the obligation undertaken is by each state party to the ICCPR.[30] So too the International Covenant on Economic, Social and Cultural Rights (ICESCR)[31]: "Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized . . . ."[32] After reviewing these covenants, the Universal Declaration of Human Rights, and the International Labour Organization's (ILO) core conventions, as well as the commentary of U.N. committees responsible for interpreting the relevant rights, John Ruggie, the Special Representative of the Secretary-General on business and human rights, concluded: "it does not seem that the international human rights instruments . . . currently impose direct legal responsibilities on corporations."[33]

The state focus of rights is also reflected in a number of national constitutions. The Canadian Charter on Rights and Freedoms (Charter) expressly extends its application only to government entities: "This Charter applies . . . to the Parliament and government of Canada . . . [and] to the legislature

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[28] *Id.* § III.B.29.

[29] International Covenant on Civil and Political Rights (ICCPR), *ratified* Mar. 23, 1976, 999 U.N.T.S. 172.

[30] *See id.* at art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .").

[31] International Covenant on Economic, Social and Cultural Rights (ICESCR), *ratified* Jan. 3, 1976, 993 U.N.T.S. 3.

[32] *Id.* at art. 2(1).

[33] John Ruggie, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," ¶ 44 (A/HRC/4/035 Feb. 9, 2007). The issue of corporate liability under international criminal law is distinct from corporate responsibility under human rights instruments, and Ruggie treated it as such. *See id.* ¶¶ 19–32. At most, international criminal law overlaps, without being synonymous, with a subset of human rights.

and government of each province . . . ."[34] Thus, as stated by the Supreme Court of Canada: "Where . . . private party 'A' sues private party 'B' relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply."[35] A similar position exists in the United States, where, aside from the Thirteenth Amendment (prohibiting slavery), "[h]uman rights set forth in the Bill of Rights are directed—by the language of the provisions—against the state."[36]

Even in states where constitutional human rights do apply to purely private relationships, the application is often indirect and must be conditioned by a balancing of competing rights.[37] Private actors, including corporations, are unlike states in that they are rights holders. Restraining their actions based on others' human rights alone would effectively "negate rights—since the right of one private party is the obligation of another private party."[38] That is, where constitutional human rights apply to purely private relations, they require a more nuanced and fact-specific application to balance competing interests than they would vis-à-vis the state, which is not a rights holder. In view of these complexities, it is no surprise that U.N. commentary on international human rights has focused on individuals' rights vis-à-vis government. As the U.N. Human Rights Committee noted in General Comment 31, the obligations in the ICCPR do not have "direct horizontal effect [i.e. to private actors] as a matter of international law."[39]

Against this international legal backdrop, a business commitment to "respect" human rights is largely meaningless, because there is no basis to understand either what respect by the business means or the scope of any right[40] vis-à-vis the business. While state responsibility for rights is based on deemed control over a particular territory and the reach of legal

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[34] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 32(1) (U.K.).

[35] RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, para. 39. *See also* Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, para. 94 (holding that the Charter does not apply to "purely private" matters).

[36] Aharon Barak, "Constitutional Human Rights and Private Law," *Faculty Scholarship Series* No. 3698, at 247 (Yale L. Sch. 1996).

[37] *See id.* at 231.

[38] *Id.*

[39] General Comment 31, *supra* note 25, ¶ 8.

[40] Labor rights are the exception here, but they are a subset of human rights.

jurisdiction,[41] businesses are private, profit-seeking bodies with neither territorial control nor legal jurisdiction. A state-centric human rights regime cannot logically apply to businesses without a clear analytical framework linking business operations to the substance of the rights. The *Guiding Principles* provide this framework. They create a coherent system to define business responsibility for human rights, while recognizing the fundamental distinctions between states and private-sector enterprises.

Under the *Guiding Principles*, the responsibility of businesses to respect human rights includes: (1) a policy commitment; (2) a due diligence process; and (3) a remediation process (including grievance mechanisms).[42] The core of this system is the due diligence process to identify relevant impacts for remediation. It is built on three inherently legal concepts: (1) rights—businesses are expected to respect all human rights, not just labor rights; (2) causation—the range of rights any individual business should address is limited by causal links to business operations; and (3) proportionality—the range of actions any individual business should take is proportional to the nature of the business and the impact on the human rights.

The *Guiding Principles*' focus on system recognizes the critical institutional differences between states and businesses. While states are expected to "protect" human rights, businesses are responsible for "respecting" them. State human rights obligations are absolute and defined by jurisdiction. Business responsibility for rights is relative and based on causal links to business operations. In effect, businesses are held to a standard of best efforts. The "effort" is judged against a systematic approach to identifying and remedying impacts on rights. We next consider the constituent elements of that system.

[b] Stage 1: Understanding the Proper Scope of Human Rights

The *Guiding Principles* reformulate the language of social impact using rights. In doing so, they widen the ambit of relevant potential impacts far beyond labor rights. The responsibility to respect human rights "refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights[43] and the

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[41] *See* ICCPR, at art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .").

[42] *Guiding Principles* § II.A.15.

[43] The International Bill of Rights is comprised of the Universal Declaration of Human Rights, the ICCPR, and the ICESCR. *Id.* at Commentary to § II.A.12.

. . . [ILO's] Declaration on Fundamental Principles and Rights at Work."[44] There is no subset of rights that a business can ignore as part of its due diligence.

Businesses can affect all internationally recognized human rights directly and indirectly. Most obviously, a company can affect the "right to life"[45] and the "right to liberty and security of person"[46] by violently suppressing union or community dissent.[47] Businesses can also affect human rights in less obvious ways, such as impacting the "right to liberty of movement"[48] if business operations necessitate community relocation.[49] Other examples of recorded business impacts on rights include air and soil pollution and water contamination, which impact an array of human rights directly and indirectly.[50] For the extractive sector, a further area of complication lies in "free, prior and informed consent" (FPIC), recognized in ILO's Convention 169 and incorporating customary rights.[51]

The first stage in aligning CSR strategy with the *Guiding Principles* is understanding, at a minimum, the rights identified in the International Bill of Rights and the ILO Declaration. This stage has two elements:

- *Breadth*: The scope of rights should include all internationally recognized human rights.
- *Definition*: Human rights are terms of art with specific and practical meanings. Such definitions are at times narrower and at times broader than they appear from the text of the rights alone. As lawyers

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[44] *Guiding Principles* § II.A.12. In addition, the *Guiding Principles* mention that, "[d]epending on circumstances, business enterprises may need to consider additional standards," including "the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families." *Id.* at Commentary to § II.A.12.

[45] ICCPR, at art. 6.

[46] ICCPR, at art. 9.

[47] *See, e.g.*, Monash Univ. Castan Centre for Human Rights Law et al., "Human Rights Translated: A Business Reference Guide," at 10 (2008) (Human Rights Translated).

[48] ICCPR, at art. 12.

[49] *See, e.g.*, Human Rights Translated, *supra* note 47, at 32.

[50] *See* Inst. for Human Rights and Business & Global Bus. Initiative on Human Rights, "State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships," at 102 (2012).

[51] *See* ILO, "C169 - Indigenous and Tribal Peoples Convention, 1989." For a detailed discussion of FPIC, see David L. Deisley & Lloyd K. Lipsett, "Free, Prior, and Informed Consent: Observations on 'Operationalizing' Human Rights for Indigenous Peoples," *International Mining and Oil & Gas Law, Development, and Investment* 2A-1 (Rocky Mt. Min. L. Fdn. 2013).

well understand, while rights are framed as individual or group freedoms and claims, they are defined by limits on government action or imperatives to act. No right is absolute and unfettered. Freedom of expression, for instance, does not mean that people can express themselves in any way and at any time over any medium. It means that the government cannot use coercive powers of state to harass, detain, arrest, try, or imprison an individual for expressing an opinion or belief.[52] Similarly, FPIC applies to a specific type of consent for a specific period based on specific potential impacts. The Inter-American Court of Human Rights has held, for instance, that "indigenous peoples' property rights are not absolute and that the State can restrict their use and enjoyment, if such restrictions are established by law, necessary, proportional, and aim to achieve a legitimate objective in a democratic society."[53] Positive rights, such as the right to health, are similar in their state focus but distinct in the form of state obligation. Understanding precisely what these rights mean is a prerequisite to determining if a business might impact them.

[c] Stage 2: Understanding and Applying the Causal Filter

The second stage of the due diligence process is to identify the adverse human rights impacts to which the business is causally linked directly or indirectly. Businesses are expected to address those human rights impacts (1) that are caused or contributed to by businesses and (2) that are "directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[54] The "directly linked to" relationship between a business and adverse human rights impacts remains a causal link, albeit indirect, because it is grounded in the impacts "caused by" entities related to the business through its value chain, including suppliers and service providers, such as external security personnel.[55] Applying the causal filters precisely and consistently is the first step to ensuring that a corporate human rights program is practical.

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[52] U.N. Human Rights Comm., "General Comment No. 34, Article 19: Freedoms of opinion and expression" (CCPR/C/GC/34 Sept. 12, 2011).

[53] Deisley & Lipsett, *supra* note 51, at 2A-7.

[54] *Guiding Principles* § II.A.13.

[55] U.N., "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide," at 15 (2012) (Interpretive Guide).

The causal terms are not defined in the *Guiding Principles*. And, as jurists have long noted, there is nothing obvious about cause and effect.[56] Determining the relevance of particular impacts to a company under the *Guiding Principles* depends on adopting some definition of the causal links. For instance, a "but for" definition of "cause or contribute to" might capture de minimis connections between corporate operations and rights impacts while ignoring more significant links in the context of multi-cause impacts.[57] Given the complex context of human rights impacts, particularly in countries without entrenched institutional rights protections, a more viable definition might draw from the jurisprudence of multi-party torts to ask whether a company's actions materially increase the risk of an impact.[58]

The "directly linked to" prong has thus far been interpreted by civil society organizations as capturing the human rights impacts of all entities at all levels of a business's value chain. This issue has been most extensively addressed with the supply chain: "To meet their responsibility to respect human rights, companies need to understand human rights risks at all levels of their supply chain—not only in the first tier."[59] In other words, in the supply chain management context, an adverse human rights impact is "directly linked to" a business if any supplier at any supply tier caused the adverse impact.

In the absence of an authoritative definition of these terms, the *fact* of a reasonable and defensible internal definition, rather than the definition itself, grounds consistent and effective due diligence and response. Corporate- or industry-level definitions of these causal terms are critical to define the scope of a due diligence and response process.

[d] Stage 3: Prioritizing and Implementing Remedial Measures

The third stage, implementing remedial measures, is built on the results of the comprehensive due diligence process of the first two stages, i.e., the business's understanding of its direct and indirect impacts on human rights. This due diligence process should result in a limited subset of

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[56] For an enlightening survey of causation theory in different fields of law, see H. L. A. Hart & Tony Honoré, *Causation in the Law* (2d ed. 1985).

[57] *See, e.g.*, Cook v. Lewis, [1951] S.C.R. 830 (Can.) (two hunters negligently fire in direction of plaintiff; only one bullet cause of injuries).

[58] *See, e.g.*, Bonnington Castings Ltd. v. Wardlaw, [1956] A.C. 613 (H.L.) (plaintiff developed pneumoconiosis from inhaling air containing silica; two sources for the silica).

[59] Shift Proj., "Respecting Human Rights Through Global Supply Chains," at 2 (Shift Workshop Rep. No. 2, Oct. 2012).

rights on which the specific business will focus. The remedial measures can then be designed based on the business's actual impacts, the precise causal link between the business and the impacts, and the nature and operating context of the business itself. The specific causal relationship is the link between rights and responsibility. Businesses are expected to avoid or address adverse human rights impacts that they cause or contribute to. With impacts "directly linked to" their operations, businesses are expected to exercise their leverage to "[s]eek to prevent or mitigate" such impacts.[60]

There is great flexibility in the specific remedial measures any business adopts. There are, however, three overarching points to bear in mind.

(1) The response expected will turn on both the nature of the business—including the relevant business relationship—and the severity of the human rights impact.[61] A business with limited resources, for instance, may need to adopt remedial measures different from those of a competitor with more resources.[62]

(2) The response expected will turn on whether the business caused or contributed to the impact or whether it was directly linked to the impact by virtue of a business relationship.[63] A business is expected to control its own actions and absolutely avoid or prevent adverse human rights impacts that it causes or contributes to. With entities in its value chain, however, the *Guiding Principles* recognize that businesses will not have complete control and may therefore need to find ways to employ or increase their leverage.[64]

(3) Independently of the causal relationship, when prioritizing responses, the severity of actual or potential adverse human rights impact should take precedence.[65] It is almost inevitable that a business will need to prioritize human rights impact responses. That prioritization, however, should be driven by the rights impact rather than by causal link. (These factors may influence what the business can do, but they should not inform the rights on which the business will focus.)

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[60] *Guiding Principles* § II.A.13(b).

[61] *Id.* § II.A.24.

[62] Interpretive Guide, *supra* note 55, at 20.

[63] *Guiding Principles* § II.A.14.

[64] Leverage refers to the company's ability to effect change in the behavior of entities with which it has a business relationship.

[65] *Guiding Principles* § II.A.24.

[3] The *Guiding Principles* Transform CSR from Public Relations Art to Legal Science

The traditional approach to CSR strategy has largely been stakeholder led, focusing on minimizing corporate exposure to reputational risk by catering to the concerns of community groups and non-governmental organizations. The model is reactive and impressionistic. It is also dated. The *Guiding Principles* reframe CSR as a legal science by imposing structure and precision on its social dimension. This structure transforms CSR from a stakeholder-driven exercise to a standard-driven one. That is, companies are not responsible by default for any social impacts that stakeholders are concerned about or that they choose to ascribe to the business. Rather, the scope of business's social responsibility is defined by (1) the practical definitions of rights themselves and (2) the practical definitions of causal links to any rights impact. This responsibility is independent of stakeholder perception. There are, in other words, legitimate and illegitimate grievances. And business is empowered, and expected, to distinguish between them.

The *Guiding Principles*' structure and precision is the source of opportunity and risk. The opportunity lies in the ability to anticipate risks and mitigate them systemically, rather than in an ad hoc, crisis-response fashion. The risk lies in the increased accountability that an objective framework provides for stakeholders and courts. First, rights are unlike social concerns more generally in that they are not defined by perception. They are clearly defined legal concepts that courts are willing and able to protect. Second, the causal links used by the *Guiding Principles* to define business responsibility for rights are legal concepts, which, even without fixed definitions, are justiciable using legal reasoning.

The "legality" of the CSR science under the *Guiding Principles* is based on their substance *and* their implications. It is *not* based on their entry into force through international treaties or customary law. Even as purely voluntary standards, the *Guiding Principles* bridge CSR strategy and commercial liability. At the highest level of abstraction, the legal significance of the *Guiding Principles* lies in their definition of a previously vague concept: "business respect for human rights." That definition, with its widespread acceptance by the public and private sectors,[66] allows the *Guiding Principles* to seep into adjudicatory contexts. The framework is already grounding disputes before OECD National Contact Points (NCP),[67] but it has the

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[66] *See* § 19.02[1], *supra*.

[67] *See, e.g.*, FIDH v. Corriente Res. Inc. (NCP Can. filed July 25, 2013) (alleged human rights abuses at Mirador mining project in Ecuador), http://oecdwatch.org/cases/Case_300; Crude Accountability v. Chevron (NCP U.K. filed June 6, 2013) (alleged environmental, health, and human rights impacts on a village in Kazakhstan by consortium including

potential to frame resource nationalism cases and international tort cases. As a result, businesses, particularly extractive-sector businesses, need to ensure that their CSR strategy—from policy design to due diligence implementation—is litigation ready.

To reiterate: this need exists independently of whether the *Guiding Principles* are incorporated in legislation and is distinct from the need to comply with existing CSR regulation. The next section will focus on the contours of the indirect legal liability that extractive-sector companies face under national and international law.

§ 19.03 Implications of the *Guiding Principles* Under National and International Law

[1] Business Respect for Human Rights and Bilateral Investment Treaty Protection

For the extractive sector, arguably the most significant legal risk posed by the *Guiding Principles* is in the resource nationalism context. States enter into bilateral investment treaties (BIT) to protect their investors against expropriation risk and other interference with the investment when operating in signatory states. The international investment regime is largely built on a proliferation of BITs: there are over 2,300 now, as well as several multilateral treaties, "which set forth norms aimed at the protection of foreign investment . . . ."[68] BITs ensure that investors have access to international tribunals to seek compensation from states in the event that their investment is mistreated (under certain specified grounds).

International tribunals reach their decisions based on treaty terms, public international law and *lex mercatoria*, and domestic law. The virtue of BITs is to protect investor rights in unstable or unpredictable regimes with a neutral forum and a neutral substantive law. The applicable international law flows from four sources: (1) international treaties and conventions; (2) international custom; (3) general principles of law; and (4) judicial decisions and the writings of prominent jurists.[69] In addition, arbitral tribunals

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Chevron, British Gas, and ENI; allegations include failure to conduct appropriate human rights due diligence), http://oecdwatch.org/cases/Case_306.

[68] Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law," *in Human Rights in International Investment Law and Arbitration* 45, 46 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni eds., 2009).

[69] Statute of the International Court of Justice, at art. 38.

consider principles of transnational public policy, which are related to, but distinct from, international law.[70]

General principles of law and principles of transnational public policy are relevant in the context of investment arbitration because they are fluid.[71] The evolution of state practice will shape the content of the principles. When it comes to respect for human rights, general principles of law and transnational public policy become relevant at the threshold level of determining whether an investor is entitled to BIT protection in the face of government interference. The relevant issue is whether the investor made the investment "in accordance with law":

> Tribunals have found that where they had to apply a BIT that contained an "in accordance with host State law" clause, an investment that was in violation of host State law did not enjoy the protection of the BIT. But it appears that even where tribunals had to apply a BIT without an "in accordance with host State law" clause, they would refuse to afford protection to investments that are contrary to host State law.[72]

While the reference in the above quotation is to "host State law," the cases below demonstrate how tribunals have interpreted this concept to capture general principles of law and principles of transnational public policy. The reasoning in each of the cases lays the groundwork for the dismissal of claims on the basis of investor failure to respect human rights.

[a] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*[73]

Inceysa involved a claim raised under the Spain-El Salvador BIT. Inceysa Vallisoletana, S.L. (Inceysa) was a Spanish company that won a government concession for vehicle inspection services in a public bidding process organized by the Ministry of the Environment and Natural Resources of El Salvador (Ministry). A dispute arose between Inceysa and the Ministry; the Ministry awarded the concession to other companies, leading Inceysa to commence arbitration. The decision has become one of the leading cases on the meaning of "in accordance with law" and the relevant analysis when determining whether an investor qualifies for BIT protection. The

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[70] *See* Dupuy, *supra* note 68, at 60 ("Parallel to the applicability of national law to a given case of international commercial arbitration is that of a *transnational* public policy ('ordre public transnational')—the existence of which having been long demonstrated . . . .").

[71] *See* Fabián O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* 48 (2008) ("general principles of law are not necessarily rigid and permanent").

[72] Ursula Kriebaum, "Chapter V: Investment Arbitration—Illegal Investments," *in Austrian Arbitration Yearbook 2010*, at 307, 308 (Christian Klausegger et al. eds., 2010).

[73] ICSID Case No. ARB/03/26, Award (Aug. 2, 2006).

tribunal's reasoning suggests the breadth and potential applicability of the requirement to deny investors BIT protection based on emerging principles of public policy.

El Salvador objected to the International Centre for Settlement of Investment Disputes' (ICSID) jurisdiction on the ground that Inceysa had procured the concession by fraud. The tribunal found that Inceysa had falsely represented material information during the bidding process. The tribunal concluded that, if Inceysa's fraudulent actions were contrary to El Salvador's law, it would vitiate consent to the arbitral protection provided for under the BIT.[74] Importantly, to determine whether the fraud was against El Salvador's law, the tribunal focused its inquiry on "generally recognized rules and principles of International Law" rather than El Salvador's domestic legislation alone.[75] The tribunal concluded that general principles of international law included the "supreme principle" of good faith[76] and international public policy.[77] Because Inceysa was found to have violated both of these principles, among others, the tribunal denied ICSID jurisdiction on the ground that Inceysa did not make an investment in accordance with law.[78]

[b] *World Duty Free v. Kenya*[79]

World Duty Free Company Limited (World Duty Free) was awarded a contract to develop duty-free complexes at Kenyan airports. After disputes with the state arose, World Duty Free commenced international arbitration. Kenya argued that the case should be dismissed because consent to the investment was procured through bribery of the Kenyan President. The tribunal accepted Kenya's bribery claim and dismissed the claim for World Duty Free's breach of international public policy, holding that "claims based on . . . contracts obtained by corruption cannot be upheld."[80]

In defining relevant policy, the tribunal referred to "an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora."[81] Alternative formulations of the same concept

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[74] *Id.* ¶ 207.

[75] *Id.* ¶ 224.

[76] *Id.* ¶ 230.

[77] *Id.* ¶ 245.

[78] *Id.* ¶ 257.

[79] ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

[80] *Id.* ¶ 157.

[81] *Id.* ¶ 139.

include "good morals," "bonas mores," and "ethics of international trade."[82] The tribunal's conclusion that the prohibition of bribery was a principle of international public policy, and effectively part of the ethics of international trade, was based on a review of various international conventions—even those that were not binding on states or investors.[83] The tribunal also observed that public policy should be interpreted to protect the public, especially "citizens making up one of the poorest countries in the world."[84]

[c] The *Guiding Principles* Provide an Alternative "In Accordance with Law" Defense for States

The reasoning in *Inceysa* and *World Duty Free* has proved influential. Both decisions were relied upon and reiterated in *Plama Consortium Ltd. v. Republic of Bulgaria*[85] and in *Phoenix Action, Ltd. v. The Czech Republic*.[86] Indeed, the "in accordance with law" argument is very commonly used in BIT cases, including those concerning expropriation of mining and other extractive-sector assets.[87] With regard to the *Guiding Principles*, the reasoning is relevant because their widespread endorsement is creating a new principle of "transnational public policy," which could have a determinative effect for investors seeking BIT protection.

In the investor-state context, human rights are playing an increasingly important role in expropriation cases and are drawing the attention of jurists.[88] Certain commentators have gone so far as to suggest that the "in accordance with law" ratio applies directly to abuses of human rights:

> To the extent that recent tribunals have denied admissibility of claims based on bribery or misrepresentations made by the claimant, it is submitted that they should do the same when faced with human rights violations. In other words, the solution that prevailed so far for bribery, should, *a fortiori*, find application when

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[82] *Id.* ¶ 141.

[83] *Id.* ¶¶ 143–146.

[84] *Id.* ¶ 181.

[85] ICSID Case No. ARB/03/24, Award (Aug. 27, 2008).

[86] ICSID Case No. ARB/06/5, Award (Apr. 15, 2009).

[87] For a comprehensive list, see Abby Cohen Smutny & Petr Polášek, "Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration," *in A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* 277, 277 n.2 (Jacques Werner & Arif Hyder Ali eds., 2009).

[88] *See, e.g.*, Dupuy, *supra* note 68, at 45; Patrick Dumberry & Gabrielle Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law," 10:1 *Transnational Dispute Management* 1 (Jan. 2013).

> a tribunal finds fundamental human rights abuses by claimant. In our view, these are precisely the kind of investments not worthy of protection under a BIT.[89]

While there is an intuitive allure to this argument, it ignores the conceptual difficulty in applying human rights obligations directly to businesses. As has been noted, "it seems necessary to question whether legal persons such as corporations can be bearers of human rights responsibilities. After all, these are traditionally considered to pertain to the domain of states alone."[90] In addition, the "in accordance with law" limitation is temporally bound to the moment of making the investment: the issue is whether the "claimant had acquired or established its investment in a manner that constituted abusive or bad faith conduct . . . ."[91] Even if human rights could be understood as applying directly to businesses, it is highly unlikely that the "abuse" would happen in the process of investing.

These difficulties go some way towards explaining why, rather than raising human rights violations directly against businesses, states have more often attempted to raise their own human rights obligations as the basis for deviating from an agreement with an investor.[92] Thus far, such arguments have been unsuccessful.[93]

The *Guiding Principles* provide an alternative route to incorporating human rights concerns in investor-treaty claims. In providing a definition of "business respect for human rights," the *Guiding Principles* effectively civilize human rights by creating an obligation for businesses to follow a systematic process, comprised of policy adoption, due diligence, and remediation efforts. In so doing, they provide a basis to challenge investor access to BITs grounded not on human rights impact but on a human rights system.

To formulate the argument using the structure of *World Duty Free*: there is "an international consensus," including in both the public and private sectors, that businesses should respect human rights; the definition of business respect for rights is in the *Guiding Principles*, which have emerged

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[89] Dumberry & Dumas-Aubin, *supra* note 88, at 9.

[90] Clara Reiner & Christoph Schreuer, "Human Rights and International Investment Arbitration," *in Human Rights in International Investment Law and Arbitration* 82, 86 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni eds., 2009).

[91] Smutny & Polášek, *supra* note 87, at 277.

[92] *See, e.g.*, Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006); Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010).

[93] Reiner & Schreuer, *supra* note 90, at 89.

as the "norms of conduct that must be applied in all fora"; that the *Guiding Principles* are not legally binding is not critical, as neither were many of the anti-bribery conventions relied on in *World Duty Free* to establish the parameters of "good morals" or the "ethics of international trade"; therefore, an investor who does not have a system in place to respect human rights aligning with the *Guiding Principles* has not made an investment "in accordance with law" and does not merit BIT protection.[94]

An alternative possibility is for a tribunal to hold that the duty to invest in good faith—already recognized as a principle of transnational public policy—captures the duty to respect human rights, particularly since such policy should be interpreted to protect "citizens making up one of the poorest countries in the world."[95] Yet another variant is to invoke "clean hands," which would allow the tribunal to consider whether the investor's claim should be protected based on principles of equity; the principle has been qualified as a "general principle of law," and would be applicable under an "in accordance with law" analysis or a consideration of the merits.[96] A final version of this argument would be to rely on any corporate policies or statements to the effect that the investor "respects human rights": failure to implement a systematic process for due diligence and response could then ground a misrepresentation claim.

No matter the formulation, by offering a widely accepted definition of "business respect for human rights," the *Guiding Principles* provide the framework for an argument to deny an investor treaty protection based on a failure to implement an effective CSR strategy. This argument would not turn on community or stakeholder perception; rather, it would succeed or fail based on the CSR strategy's objective alignment with the *Guiding Principles*.

[2] Human Rights Due Diligence and Transnational Torts

[a] Conventional Tort Litigation Is Distinct from Human Rights Litigation

Transnational tort litigation provides another fertile ground for the *Guiding Principles* to shape corporate liability. In this regard, there is a critical distinction between human rights litigation and tort litigation *simpliciter*; it is in the latter context that the *Guiding Principles* provide a link between

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[94] World Duty Free v. Kenya, ICSID Case No. ARB/00/7, Award, ¶ 139 (Oct. 4, 2006).

[95] *Id.* ¶ 181.

[96] Dumberry & Dumas-Aubin, *supra* note 88, at 3, 7.

CSR strategy and legal risk. In the United States, this link will come to the fore as the focus of plaintiffs and commentators shifts from corporate liability for international human rights abuse to corporate liability for negligence with international effect. In other jurisdictions, including Canada and the United Kingdom, the rise of such suits has already begun, with the contours of arguments to attach civil liability to CSR strategy clearly developed.

In the context of corporate liability for human rights abuses, the focus has long been on public law notions of human rights. This is particularly true in the United States, where the Alien Tort Statute (ATS)[97] provides for federal court jurisdiction to adjudicate torts based on violations of "the law of nations," including human rights that have become part of customary international law. But even in its broadest formulation, this form of litigation is limited in scope. In *Filartiga v. Pena-Irala*,[98] the case opening the door to modern ATS litigation, the court highlighted the need for international consensus regarding particular norms and the need for a government nexus when it came to defining rights:

> Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that *official torture* is now prohibited by the law of nations. . . . The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people *vis-à-vis their own governments*.[99]

The jurisdictional reach of the ATS was significantly curtailed in *Kiobel v. Royal Dutch Petroleum Co.*[100] based on the statutory "presumption against extraterritoriality." But this does not mark the end of tort litigation based on human rights violations. Rather than seeking to translate international human rights norms into actionable torts under statute, plaintiffs can simply bring claims under traditional tort principles directly against corporations.[101]

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[97] 28 U.S.C. § 1350.

[98] 630 F.2d 876 (2d Cir. 1980).

[99] *Id.* at 884–85 (emphasis added) (footnotes omitted).

[100] 133 S. Ct. 1659 (2013).

[101] *See* Donald Earl Childress III, "The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation," 100 *Geo. L.J.* 709, 739 (2012) ("Perhaps we are about to witness a new wave of human-rights litigation not based on the ATS but based on state law or even foreign law.").

Transnational torts offer a far more flexible route to corporate liability for injury than ATS suits.[102] Virtually every human rights claim can be framed in tort terms.[103] The distinction means that plaintiffs do not have to: (1) pass the high threshold of demonstrating that the alleged wrong is prohibited under customary international law; (2) prove any element of intent beyond negligence; (3) prove a government nexus to abuse; (4) meet the higher pleading thresholds in federal court; or (5) meet the stricter *forum non conveniens* concerns of federal courts.[104]

Even prior to the U.S. Supreme Court's ruling in *Kiobel*, foreign plaintiffs had begun pursuing tort actions against U.S.-based companies for transnational torts, in both federal and state courts. In *Bowoto v. Chevron Corp.*,[105] the U.S. District Court for the Northern District of California held that California's substantive law applied to the claim by Nigerian plaintiffs for injuries suffered in Nigeria.[106] Similarly, in *Doe v. Exxon Mobil Corp.*,[107] which concerned activities in Indonesia, the U.S. Court of Appeals for the D.C. Circuit held that D.C. and Delaware law should apply because the United States "has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries."[108] And, in *Doe v. Unocal Corp.*,[109] once the ATS claims were dismissed, Indian plaintiffs were able to assert all of their ATS claims as state common law torts claims. The case proceeded to discovery before Unocal Corporation settled.[110]

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[102] *See* Roger Alford, "Kiobel Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation," *Opinio Juris* (Apr. 17, 2013) ("Human rights litigation is about grave public wrongs; transnational tort litigation is about redressing simple private wrongs.").

[103] *Id.*

[104] *Id.*

[105] No. C 99-02506 SI, 2006 WL 2455761 (N.D. Cal. Aug. 22, 2006).

[106] *Id.* at *7.

[107] 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (mem.).

[108] 654 F.3d at 70 (quoting Doe v. Exxon Mobil Corp., No. Civ.A.01-1357(LFO), 2006 WL 516744, at *2 (D.D.C. Mar. 2, 2006)).

[109] Nos. BC 237980, BC 237679, 2002 WL 33944506 (Cal. Super. Ct. June 11, 2002).

[110] *See* Paul Hoffman & Beth Stephens, "International Human Rights Cases Under State Law and in State Courts," 3 *UC Irvine L. Rev.* 9, 16 (2013).

The trend to bring conventional tort actions in lieu of human rights claims is likely to accelerate in the wake of *Kiobel*. In this context, the *Guiding Principles* provide an effective barometer of corporate negligence. Negligence analyses, broadly, consider five elements: (1) duty; (2) failure to exercise reasonable care; (3) factual cause; (4) proximate cause; and (5) injury.[111] CSR strategy, and specifically the *Guiding Principles*, will inform two essential elements of any negligence claim: (1) the corporate "duty" of care and (2) the definition of "reasonable care."

Courts in the United Kingdom and Canada have recently considered both these elements in transnational negligence claims against mining companies.[112] Their analyses are illuminating for liability in those countries, as well as providing the outlines of similar arguments that might be raised in other jurisdictions. In *Guerrero v. Monterrico Metals PLC*,[113] the High Court of England and Wales considered a claim by Peruvian plaintiffs against Monterrico Metals plc (Monterrico) and a Peruvian subsidiary for human rights violations committed by security forces during protests against a mine. While the case lay against a human rights backdrop, the plaintiffs framed the claim using traditional bases of civil liability. The claim alleged the negligent exercise by the English parent company of "responsibility for risk management."[114] In a motion to freeze Monterrico's U.K. assets, the court held that the plaintiffs had demonstrated a "good arguable case" that the parent company owed a duty of care to the foreign plaintiffs.[115] Monterrico subsequently settled the claim.

[b] *Choc v. Hudbay Minerals Inc.*[116]: A Novel Duty of Care

The Canadian case of *Choc v. Hudbay* alleges similar facts and is ongoing. The case involves three related actions brought by indigenous Mayan Q'eqchi' from Guatemala against Hudbay Minerals Inc. (Hudbay) and its Guatemalan subsidiaries.[117] The plaintiffs claim that Hudbay is liable in

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[111] David G. Owen, "The Five Elements of Negligence," 35 *Hofstra L. Rev.* 1671, 1673 n.15 (2007) (citing *Restatement (Third) of Torts: Liability for Physical & Emotional Harm* § 6 cmt. b (2010)).

[112] For an overview of relevant trends in Canadian jurisprudence, see H. Scott Fairley & Kim Lawton, "International Human Rights-Based Torts: A New Species of Litigation Risk for Canadian Companies Operating Abroad," *Lexpert* 49 (Dec. 2013).

[113] [2009] EWHC (QB) 2475.

[114] *Id.* at [9].

[115] *Id.* at [26].

[116] 2013 ONSC 1414 (Can.).

[117] *Id.* para. 4.

tort on the ground that "security personnel working for Hudbay's subsidiaries, who were allegedly under the control and supervision of Hudbay, the parent company, committed human rights abuses."[118] The claim alleged Hudbay's negligence in failing to prevent the harms committed by security forces.[119] Hudbay sought to dismiss the claim on the basis that there is no duty of care owed by a parent to the plaintiffs affected by the actions of a foreign subsidiary.[120] The court rejected Hudbay's submissions.

The most significant element of the ruling is the finding of a potential duty owed directly by the parent company to the foreign plaintiffs—and not simply based on piercing the corporate veil: "the plaintiffs have pled all material facts required to establish the constituent elements of their claim of direct negligence as against Hudbay, *separate and distinct from any claims framed in vicarious liability as against it*."[121]

The court's reasoning lays the foundation for voluntary CSR standards to become legally binding under Canadian law. To determine that a novel duty of care may exist, the court considered foreseeability and proximity. The foreseeability analysis considered merely whether the facts as pleaded disclosed that the harm was the "reasonably foreseeable consequence" of Hudbay's conduct in authorizing the use of force for community evictions and suppressing protests.[122]

It was in assessing whether a "proximate relationship" exists between Hudbay and the plaintiffs that the court's analysis opened the door to legal liability for negligent implementation of CSR strategy. The proximity analysis focuses on whether the nature of the facts and relationship between the parties are such that the defendant "may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs."[123] The analysis is based on the relationship context, but includes an examination of "expectations, representations, reliance, and the property or other interests involved."[124]

The court ultimately found that there was "sufficient basis to suggest that a relationship of proximity between the plaintiffs and defendants

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[118] *Id.*

[119] *Id.* para. 52.

[120] *Id.* para. 18.

[121] *Id.* para. 54 (emphasis added).

[122] *Id.* paras. 59–65.

[123] *Id.* para. 66 (quoting Cooper v. Hobart, 2001 SCC 79, para. 33 (Can.)).

[124] *Id.* (quoting *Cooper*, 2001 SCC 79, para. 34).

exists, such that it would not be unjust or unfair to impose a duty of care on the defendants."[125] To reach this conclusion, the court highlighted Hudbay's public representations regarding "its commitment to respecting human rights," which would have grounded plaintiffs' expectations, as well as the mining project context, which necessarily engaged the plaintiffs' interests.[126]

At the stage of this application, the court did not have occasion to determine the standard of care. That is an issue for trial. But the intervener Amnesty International Canada's submissions, summarized in some depth in the decision, provide the contours of possible standards of care based on emerging CSR standards encapsulated "in a range of voluntary codes of conduct developed in conjunction with multinational corporations."[127] Chief among these is the *Guiding Principles*, which provide the only comprehensive framework to understand the conduct of a reasonable business in conducting due diligence on, and mitigating, impacts on communities in which they operate. As discussed above, these standards have received a wide array of public- and private-sector support. The *Guiding Principles* are therefore the leading candidate to form the standard of care once a duty of care has been established (for fact patterns arising after the *Guiding Principles* became the widely accepted standard for human rights risk management). While they would not directly form the substantive basis of a claim, they have the potential to be just as significant in proving corporate negligence.

§ 19.04 The *Guiding Principles* and the Essential Role of Counsel in CSR Strategy

[1] Legal Counsel Is Necessary to Understand the Standards and the Risks

The emergence of legal risk marks a profound change for the development and implementation of CSR strategy. Multinational companies can no longer treat CSR as a purely public relations exercise, nor can they house CSR decision making simply in the hands of communications practitioners. This is not to say that stakeholder perception risks are not real or significant.[128] Rather, in addition to ensuring stakeholder legitimacy, CSR programs must now be litigation ready. Such readiness depends on a

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[125] *Id.* para. 70.

[126] *Id.* para. 69.

[127] *Id.* para. 33.

[128] To the contrary, social risks still pose a significant cost for extractive-sector companies. *See generally* Davis & Franks, *supra* note 6.

systematic approach to ensure the policies and procedures align with the *Guiding Principles*. For businesses, it is a double-edged sword. On the one hand, because the responsibility of business is to use a systematic approach, it is possible to treat CSR in a strategic and business-like way. On the other hand, the system focus means that, without the right processes to conduct due diligence and prioritize response, businesses may be found wanting even if they do not have impacts on particular rights.

The need for litigation readiness calls for counsel's involvement in CSR decisions. This need is only strengthened by the nature of business and human rights standards themselves, which are based on inherently legal concepts. Human rights due diligence is central to respect for human rights. But it is also the source of potentially significant legal risk, particularly in jurisdictions that mandate or encourage evidence sharing between parties. The role of lawyers is, in part, to balance the demands of due diligence and confidentiality in implementing effective CSR strategy.

Any role for lawyers must be sensitive to the CSR tasks for which they are not suited. Respect for human rights, in particular, is neither built on compliance nor defined exclusively by legal risk. Beyond legal issues, "the challenge for companies is also about improving relationships and changing ways of doing business."[129] An effective model should therefore draw on lawyers' particular strengths while recognizing the specific limitations inherent in their role as counsel. Lawyers have a vital role to play in CSR strategy chiefly because of (1) their expertise in understanding relevant concepts and (2) their legally protected role as confidential advisors.

First, the *Guiding Principles* are inherently legal. They are built on legal concepts defined in jurisprudence and international commentary: human rights, causation, and proportionality. Defining rights and the scope of business responsibility precisely is the first step in implementing effective due diligence and response. Independent of whether the standards are law, legal insight is as central to understanding the scope of respect for human rights and designing an effective CSR program as engineering insight is to building a bridge.

Precision is critical for litigation readiness. An ad hoc, reactive CSR strategy may be effective to address stakeholder concerns, but it will be difficult to justify in a court or international tribunal. These legal institutions will assess business adherence to standards based on definition, not perception. As the legal risks crystallize, companies will need to be able to justify the scope of their due diligence and their prioritization of response

[129] Sherman, *supra* note 16, at 14.

with reference to the *Guiding Principles* as the basis of international public policy or the standard of care.

As discussed above, precision turns on definition. In particular, counsel's insight is essential to definitions of core terms, including rights and causal links. These definitions will underpin any plausible due diligence defense or justification of a business's respect for human rights. They will also ensure the proper limitations on public statements, including policies and reporting, to limit the scope of any reliance.

Second, the role of lawyers as confidential counselors provides necessary protection for companies seeking to limit legal risk. The seeping of CSR risks into law elevates the importance of privilege. Privilege is particularly important in jurisdictions that allow extensive discovery, as a lawsuit could reveal a tremendous amount of sensitive information. As CSR standards ground legal risk, businesses will need to think strategically about discovery of evidence gained through human rights due diligence, because that evidence could play a decisive role in findings of legal liability. Involving external counsel in the due diligence process can thus be an effective means of limiting emerging legal risks while a business aspires to be better.

While being strategic about disclosing due diligence information is anathema to CSR practitioners, from a practical perspective, privilege is an inevitable consideration in potentially litigious settings and is valuable for even the most well-meaning business to implement an effective CSR program. Businesses manifest their respect for human rights by adopting policies, conducting due diligence, and implementing appropriate responses. Done well, that due diligence will often reveal vulnerabilities in company processes and potential rights impacts on stakeholders. Companies need a safe space in which to explore adverse impacts and design effective remedies without fearing that the due diligence itself will expose them to additional risk.

[2] The Limitations of Counsel

The tension between stakeholder interests in transparency and litigation strategy reveals the limits of legal counsel's role in CSR policy implementation. That limit is at the frontier of stakeholder expectations and engagement. Legal risk is a new and additional dimension of CSR; it does not supplant social or reputational risk and opportunity. An effective CSR strategy attends to both legal and stakeholder concerns. In this regard, however, the very basis for privileging attorney-client communications undermines the ability of legal counsel to engage with stakeholders.

Lawyers are agents and fiduciaries for their clients. They are not independent. Their duty is to represent the interests of their clients vigorously

within the bounds of the law and their professional ethics. The advice that they are duty-bound to give is fundamentally legal. But that duty will at times be at odds with the fluid nature of CSR risk and opportunity, which flows between legal and reputational. As a result, the best CSR strategy may be hampered by over-involvement of counsel.

[a] CSR Is as Much About Good Business Practice as It Is About Legal Compliance

The *Guiding Principles* are not law; they will filter into law in different ways, but it is not yet clear whether it will be wholesale or piecemeal. Good business practice, catering to stakeholder expectations and legal risk, will not necessarily align with sufficient business practice, catering only to legal risk.[130] It is too early to tell how, in representing their clients' interests vigorously, counsel will integrate human rights advice when the law does not demand it.

[b] Stakeholder Engagement Remains Essential

The role of corporate counsel as agents of the company, with a duty to defend corporate interests, limits their ability to engage effectively with stakeholders because of their perceived formalistic and adversarial stance. This is not to say that corporate counsel necessarily have such a stance, or that such a stance is the best way to defend corporate interests. Rather, lawyers are not experienced in stakeholder engagement and may be perceived skeptically by stakeholders because of their role; in addressing stakeholder concerns, perception is paramount.

[c] Counsel's Involvement Can Work Against the Client in the Disputes Context

First, privilege may hamstring counsel in explaining the steps taken by the firm to ensure compliance with the relevant standards. Second, a law firm that designed and assisted in implementing a CSR strategy may have a conflict of interest with the client when it comes to justifying the program—as it has a vested interest in defending the rigor of its CSR advice, independently of whether that is in the best interests of the client. Third, the evidentiary weight of counsel's defense of its own program is likely to be lessened by its involvement in program design and implementation.

[3] A Collaborative Model: Counsel as the CSR Hub

The unique opportunity presented by a standard-driven approach to CSR is that it unites stakeholder and business interests around a language

[130] For more information on corporate compliance programs, see Peter L. Webster, "Governance, Risk and Compliance: Establishing the Framework for Corporate Compliance Programs," *Strategic Risk Management for Natural Resources Companies and Their Advisors* 1-1 (Rocky Mt. Min. L. Fdn. 2008).

of precision and accountability. The unity in advantage comes with increased tools for accountability. But that additional risk requires practical approaches by companies to address it. Businesses cannot afford to be naïve about legal risk. Pragmatism requires caution. Caution demands privilege.

An effective model for legal counsel's involvement in CSR strategy should therefore incorporate legal insight and legal protections without sacrificing stakeholder concerns. One model is that of counsel as the CSR hub. External counsel would oversee the development of effective CSR strategy while relying on diverse groups of corporate staff and independent consultants to implement it. Counsel would play the role of information manager and the intermediary between the company and any third parties involved in CSR implementation.

The exact parameters of the relationship between counsel, the company, and external consultants would depend on the nature of the company (junior, mid-level, or major) and the extent of existing corporate knowledge and commitment to human rights risks. Companies and law firms are familiar with this model as it is the basis for different types of litigation and due diligence, particularly under the Foreign Corrupt Practices Act of 1977 (FCPA).[131] The critical element is that all independent consultants report to counsel in order to preserve privilege.[132]

Relying on counsel as the information manager and intermediary in CSR strategy has significant advantages for companies:

(1) Privilege ensures a protected space in which businesses can honestly assess and respond to adverse impacts on rights.

(2) Legal expertise ensures that businesses accurately understand the scope of relevant standards and business responsibility as well as the particular legal risks they need to address.

(3) Implementation by independent consultants preserves legitimacy before stakeholders for effective engagement.

(4) Counsel's separation from the implementation process preserves its ability to defend the CSR policies and procedures in legal settings and to provide a legal opinion regarding the efficacy of the program.

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[131] 15 U.S.C. §§ 78dd-1 to -3. For a review of FCPA due diligence processes, see Rebekah J. Poston & David A. Saltzman, "Practical Guidance on How to Conduct FCPA Due Diligence," 1 *Business Law News* 34 (State Bar of Cal. 2012).

[132] The privilege is different than attorney-client privilege, but with similar practical effect. For more detailed consideration of relevant privilege law in the United States, see Todd Presnell, "Scope of the Corporate Attorney-Client Privilege," *For the Defense* 26 (Jan. 2000).

(5) Separating counsel from the time-intensive process of implementation and due diligence is cost effective.

This model provides a framework to ensure that the legal dimension of CSR issues—both in content and in risk—is addressed systematically and comprehensively, while preserving a space for strategic mitigation of CSR-related reputational and social risks.

§ 19.05 Conclusion

The *Guiding Principles* fundamentally restructure CSR as a legal discipline. They do not, of course, eliminate the need for stakeholder engagement or public relations strategy. But even when pursuing these ends, extractive-sector companies need to do so in a systematic way informed by legal concepts and potential legal risks. Beyond the risks discussed above, CSR strategy and reporting will bear on director and officer liability, third-party reliance claims, unfair competitive practices claims, and contract liability.

The legal precision, and widespread endorsement, of the *Guiding Principles*' definition of "business respect for human rights" underpins these risks. The potential liability will be heightened or mitigated with each CSR-related decision taken by the company: corporate policies and statements will impact both the duty of care and the legitimate expectations of stakeholders and states; due diligence and reporting may furnish potential plaintiffs with sensitive information through litigation discovery; and ad hoc prioritization of CSR responses will expose the company to questioning on legal grounds no matter the public relations successes.

In the face of such risks, it is essential for the extractive sector to treat CSR seriously as a strategic legal exercise, not an unstructured communications sub-discipline. To return to Friedman's quotation: the rules of the game have changed, and CSR is no longer an auxiliary social responsibility—it is a business imperative.