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RIGHTS, REGULATION AND REMEDY

THE EXTRACTIVE SECTOR AND DEVELOPMENT

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1. Introduction

The questions of if and how to regulate the human rights impacts of businesses operating abroad particularly in weak governance zones has long been a contentious one. These questions are extremely pertinent to businesses in the extractive sector, which frequently operate mines in countries where there is little protection for human rights. In 2011 there were two major developments of relevance. The United Nations Guiding Principles ("UNGPs) were adopted by the United Nations Human Rights Council and the Organisation for Economic Co-operation and Development ("OECD") issued a revision to its Guidelines on Multinational Enterprises, featuring for the first time a stand-alone human rights chapter. Both developments are helping to shape our understanding of how businesses including those in the extractive sector may be held responsible for human rights related harm.

The types of human rights which are impacted by the activities of extractive companies are varied. These range from economic and social rights affected by companies' use and possible degradation / pollution of land to workers' rights and the civil and political rights of those who protest about companies' activities. Indigenous people's rights are commonly impacted too.

This paper asks: in addition to the UNGPs and the OECD Guidelines what other methods are being used to try to regulate the behaviour of extractive corporations when they operate in weak governance zones? How have developments in this area changed the standards of due diligence and accountability expected from extractives? What grievance mechanisms are available to those harmed by the actions of businesses in the extractive sector?

Albeit that the UNGPs and the OECD Guidelines have been the subject of previous speaker meetings organised by the Responsible Business Group, it is helpful to add a little background on each set of Guidelines.[1]

2. Existing Frameworks Regulating Behaviour of Extractive Sector

The United Nations Guiding Principles

The UNGPs were adopted by the United Nations Human Rights Council on 16 June 2011. They seek to provide an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. They identify:

(i) a state duty to protect against human rights abuses committed by businesses;

(ii) a corporate responsibility to respect human rights; and

(iii) a right of access to an effective remedy for victims.

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[1] Vanessa Zimmerman '*Holding Businesses Accountable for Human Rights Harm'* (talk given on 21 June 2011) and Peter Muchlinski '*Human Rights, Supply Chains and the "Due Diligence" Standard for Responsible Business'* (talk given on 15 November 2011 and available on the A4ID web site).

They are not legally binding but they do create a new standard of expected conduct for businesses to respect human rights that exists independently of the duties of states and against which responsible business practice can be assessed.[2] This standard includes the obligation to conduct human rights due diligence,[3] and to ensure that business enterprises either establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted by their actions.[4]

The OECD Guidelines

The OECD Guidelines are the most comprehensive and well established code of conduct for corporate behaviour. The Guidelines do not legally bind multinationals, but adhering countries consisting of OECD member countries and a number of non-member countries are committed to promoting their observance. Unlike the UNGPs, the Guidelines provide a grievance mechanism unique to their enforcement. The observing countries provide National Contact Points, which operate as a complaints procedure for those affected by breaches of the Guidelines. Thus there is a forum where those whose human rights have been impacted by the activities of extractive corporations can be heard.

The Guidelines were adopted by the member countries of the OECD in 1976 and have since undergone several revisions including the most recent, which was completed last year. The new chapter on the human rights responsibilities of multinational enterprises stems directly from the work of Professor John Ruggie and the UNGPs, which we have already discussed. The revision also introduced changes to the function of the National Contact Point mechanism.

The starting point taken in the 2011 revision, as in the UNGPs, is the assertion that states have the duty to protect human rights while enterprises should respect human rights. The Commentary gives additional information in that it spells out that the duty is independent of states' ability and / or willingness to fulfil their human rights obligations; thus it tells companies operating in weak governance zones that the international human rights standards should be their main guide to action.

The sources of human rights standards are selected international instruments which are described as representing the 'core internationally recognised human rights'.

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2 The European Commission formally acknowledged the UNGPs in its paper *'A renewed EU strategy 2011-2014 for Corporate Social Responsibility'* p 14.

3 See principles 15 and 17 of the United Nation Guiding Principles compiled by Professor John Ruggie, *'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'* (A/HR/17/31), 21 March 2011.

4 See UNGP 29, n 3 above.

Company Reporting Obligations

The shifting attitudes towards corporate accountability which are evident in the adoption of the UNGPs and the revised OECD Guidelines are also apparent in recent legislative changes across the world through which states seek to understand and influence the actions of businesses operating abroad. So far these developments appear to be targeting the extractive industries in particular.

The first of these developments was the Dodd Frank Wall Street Reform and Consumer Protection Act which was enacted in the United States in July 2010.[5] This Act made a number of amendments to the Securities and Exchange Act of 1934; two of which are relevant here. The first amendment relates to transparency in the extractive industries. It requires all extractive industry companies (oil, gas and mining) registered with the Securities and Exchange Commission to publicly report payments to foreign governments on a country and project specific basis.[6] This amendment has been highly controversial and the SEC has thus far conspicuously failed in its statutory duty to issue the regulations necessary to add detail to the disclosure obligations outlined above.[7] Recent statements from NGOs such as Oxfam report that there has been intensive lobbying by oil and gas companies to stop the SEC from issuing these regulations.

Despite this delay in their detailed implementation, the measures in the Dodd Frank Act have generally been highly regarded – so much so that in October 2011 the European Commission, expressly influenced by the Act, introduced a package of measures to encourage responsible business.[8] These proposals target the extractive industry. They require that listed and large or public interest non-listed companies who are 'active in the extractive or logging of primary forest industries' report annually on payments made to foreign governments. The proposed amendments were debated at the EU Council on 21 February 2012. There are still matters of controversy including the definition of 'project' for

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5 *The Dodd Frank Wall Street Reform and Consumer Protection Act 2010* ("the Dodd Frank Act") was enacted in the US on 21 July 2010.

6 Section 1504 of the Dodd Frank Act amends section 13 of the Securities and Exchange Act of 1934 to this effect.

7 Section 1504 of the Dodd Frank Act requires the SEC to issue final rules on the information required under the new disclosure obligations within 270 days of the enactment of that Act.

8 See the Amendment Directive '*Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC*' 2011/0307 (COD) 25 October 2011. See also the Directive replacing the Accounting Directive '*Proposal for a Directive of the European Parliament and Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings*' EU 2011/0308 (COD) 25th October 2011. These proposals are not yet enforceable. They will need to be approved and published by the Council of the European Union and approved by the European Parliament before they can become effective. It is expected that once they have become effective the deadline for implementation by the Member States will be in 2013.

the requirement that disclosure by extractive companies be at the project level – this is crucial as it determines the level of detail in which the company must report.[9]

The relationship between the transparency of payments to foreign governments and the enjoyment of human rights is simple: if payments go unpublished and unaccounted then the money is less likely to end up benefitting those in need of it. Thus there is no progression towards the greater enjoyment of economic, social and cultural rights such as the right to an adequate standard of living.

The Dodd Frank Act contains a second amendment which has specific relevance to certain extractive corporations. This amendment requires that all companies trading in conflict minerals disclose in their company report a description of measures taken to exercise due diligence on the source and supply chain of such minerals and to disclose a description of products that are not Democratic Republic of Congo conflict free.[10]

The trend of using of non-financial reporting obligations to pursue corporate accountability for human rights related harm committed abroad is not unique to the United States and the EU nor is it unique to payments to foreign governments.[11] As far back as 2007 the Swedish Government required that by 2009 all state-owned companies must issue an annual sustainability report in line with the guidelines issued by the Global Reporting Initiative which must, by its nature, include a human rights chapter.[12] The UK is moving in a similar direction. In September 2011 the Department for Business, Innovation and Skills published a consultation paper on 'the Future of Narrative Reporting'. This report proposes additional disclosure requirements for quoted companies on human rights, in so far as they are necessary for an understanding of the development, performance or position of the company's business.[13] Should such a proposal be accepted it would mark a significant development to the UK's existing reporting scheme.

Currently there is no requirement for companies to include information on human rights impacts in their reports. The existing scheme requires only that quoted companies disclose environmental, employee, social and community issues 'to the extent necessary for an understanding of the development, performance or position of the company's

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9 See www.publishwhatyoupay.org/sites/publishwhatyoupay.org/files/UK%20Brief%20EU%20proposals.pdf

10 Per section 1502 of the Dodd Frank Act, "Democratic Republic of Congo conflict free" has been defined to mean '*the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country*.'

11 For an overview of different reporting obligations see '*Global CSR Disclosure Requirements*' at the Initiative for Responsible Investment at Harvard University available at www.hausercenter.org.

12 See https://www.globalreporting.org/resourcelibrary/G3.1-Guidelines-Incl-Technical-Protocol.pdf

13 Any changes to the current disclosure regime are expected to commence for those companies whose financial year begins on or after 1 April 2013.

business.'[14] These requirements have been criticised as being too vague and weakly enforced.[15]

However, even as the law currently stands in the UK, there is scope to refer a company to the regulator for failing to meet the necessary reporting standards. In a rare example of this power being used, the NGO ClientEarth referred mining company Rio Tinto to the Financial Reporting Review Panel ("FRRP") of the Financial Reporting Council in March 2011.

The FRRP found that the company had failed to make material disclosures in respect of its environmental, employee, social and community issues. The FRRP concluded that in respect of the company's report and accounts for the years ended 31 December 2008 and 31 December 2009 additional information comprising details of the potential health risks posed to workers and local communities from exposure to harmful substances at the company's uranium mines ought to have been included. Likewise, details of the sensitivities the group faces in dealing with local communities, such as the La Granja copper development in Peru and the Eagle project in Michigan in the United States were omitted. Perhaps most importantly, there was no information provided about the group's non-managed Grasberg mine in Indonesia: the nature of the environmental, social and reputational issues relating to that mine ought to have been included.

The fact that Rio Tinto felt that they were justified in withholding this information from their shareholders highlights the vagueness of the existing reporting standards. Accurate reporting on human rights impacts is vital if shareholders are to have any meaningful role in ensuring standards of corporate behaviour: likewise company reports provide information to civil society organisations to use in campaigning for better human rights protection.

Bribery Act 2010

Whilst not 'pure' human rights issues, bribery and corruption can have a negative impact on human rights in particular upon economic and social rights such as the right to an adequate standard of living as they remove from the public domain all-important revenues of resource extraction. The UK Bribery Act 2010 is a significant development in this field.[16]

The Act was conceived following criticism from both the Organisation for Economic Co-operation and Development[17] and the European Commission[18] of the UK's failure to establish adequate bribery laws. It is extra-territorial in its application and creates a

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14 Section 417(5) of the Companies Act 2006.

15 Jennifer Zerk '*Simply Put: Towards an Effective UK Regime for Environmental and Social Reporting by Companies*' CORE (May 2011).

16 The Act was implemented in July 2011.

17 Annual Report of the OECD Working Group on Bribery 2008 at 43 available at www.oecd.org/dataoecd/21/24/44033641.pdf

18 Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22nd July 2003 on combating corruption in the private sector, COM (2007) 328 Final, 18 June 2007.

number of different offences including the bribery of another person;[19] being bribed;[20] bribing a foreign official[21] and the failure, by a corporation, to prevent bribery.[22]

The offences of giving and receiving bribes and bribing foreign officials apply to UK companies, partnerships, citizens and individuals ordinarily resident in the UK irrespective of where the relevant act occurs. Non UK companies, partnership and nationals can also commit these offences if an act or omission, which forms part of the offence, takes place within the UK. Companies can be held liable under these provisions in just the same way that an individual may be held liable, subject to proof of the necessary *mens rea.*[23]

The offence of failing to prevent bribery, which is specifically aimed at companies, can be committed by any 'relevant commercial organisation'[24] irrespective of where the acts or omissions took place and irrespective of the identity of the associated person who offered the bribe. [25] It is a defence for the corporation to prove that it had in place adequate procedures to prevent bribery. The UK government has published guidance to assist companies to put in place these procedures.[26] It identifies six principles that should assist all companies, irrespective of size, in this regard. It requires that all companies take action proportionate to the risks that the company faces and to the size of its business; that there is a top level commitment to conducting business without bribery; that the corporation assesses the risk it is at of being subjected to bribery; that it conducts due diligence; that it communicates these policies to its staff and that it monitors and reviews its anti-bribery measures to keep pace with any possible changes in practice and business development.

Such procedures should include a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice.

These so called 'speak up' procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concern.

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19 Section 1 Bribery Act 2010.

20 Section 2 Bribery Act 2010.

21 Section 6 Bribery Act 2010.

22 Section 7 Bribery Act 2010.

23 Under English criminal law a corporation may be held liable just as a natural person may be held liable and may be convicted of common law and statutory offences. For those offences for which a *mens rea* is required, corporate liability is generally attributed through the identification principle, which requires that the natural person who committed the offence must fall within the category of individuals who are the directors of the company.

24 Section 7(5) Bribery Act 2010.

25 Section 8 Bribery Act 2010.

26 Section 9 Bribery Act 2010. The Ministry of Justice, '*The Bribery Act 2010 – Guidance*' (March 2011) is available at www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf

3. Due Diligence and Accountability Standards

The concept of due diligence originated in the UNGPs and was taken up in the 2011 revision of the OECD Guidelines, via a recommendation at paragraph 5 that enterprises should carry out human rights due diligence. The Commentary to the Guidelines explains that due diligence can be part of a broader enterprise risk management system but that it must identify risks not just to the enterprise but also to rights-holders.

The introduction of the requirement to undertake due diligence is one of the most significant developments of the UNGPs / Guidelines and, if applied in the way that the UNGPs propose, is likely to have a significant impact on the way many extractive companies' processes work. Businesses are told to carry out human rights due diligence to assess the actual and potential human rights impacts of their operations, covering both impacts which their own activities cause or contribute to, and impacts which may be directly linked to their operations.

Although it will vary according to the complexity and size of the business, the risks associated with it, and the nature and context of its operations, human rights due diligence is meant to be an ongoing process, recognising that human rights risks may change over time, and is to involve meaningful consultation with potentially affected groups and stakeholders. The data gathered through human rights due diligence is supposed to be integrated across relevant internal functions and processes, with responsibilities allocated and appropriate action taken. Companies are meant to track the effectiveness of their response to issues brought to light through human rights due diligence.

As Peter Muchlinski points out, the concept of due diligence is an important development because it acts as a general principle of corporate action to act in a socially responsible manner which may form the basis of a corporate duty of care where due diligence is inadequately carried out causing harm and consequential loss to a third party.[27] Thus although essentially a procedural requirement, due diligence has the potential to bring about substantive accountability for human rights violations.

4. Grievance Mechanisms available to Claimants

When an individual's human rights are affected by the actions of an extractive company, their starting point is to seek recourse through the domestic courts. Their ability to access justice and a remedy will depend on the strength of that country's judicial system. Should the domestic judicial system prove ineffective it may be that the individual will have recourse to a court in a different jurisdiction, for example to a court in the United States under the Alien Tort Claims Act, or alternatively to a regional body, such as the African Commission in which a government's involvement with such abuses may be tested.

It is rare that the latter option proves fruitful, however in the *Ogoni* litigation the Ogoni people took action against the Nigerian Government for their role in irresponsible oil extraction practices in the Ogoni region.[28] The claimants alleged that the activities of the Nigerian

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27 P Muchlinski, n 1 above, at 17.

28 The Social and Economic Rights Action Center and the Center for Economic and Social Rights,

National Petroleum Company (NNPC), the state oil company and a joint venture with Shell Petroleum Development Corporation (SPDC) caused environmental degradation and health problems among the Ogoni people, resulting from the contamination of the environment. In particular, the complaint alleged the widespread contamination of soil, water and air; the destruction of homes; the burning of crops and killing of farm animals; and the climate of terror the Ogoni communities had been suffering of, in violation of their rights to health, a healthy environment, housing and food. The African Commission accepted jurisdiction to hear the claim and found that the Nigerian Government had been in breach of a number of the human rights contained within the African Charter. In particular, the Commission found breaches of the right to life, the right to property, the right to health, the right to family, the right of peoples to dispose freely of their wealth and natural resources and the right to a satisfactory environment.

In recent years several cases have been brought in the United States alleging gross human rights abuses by extractive companies. One such case is *Doe v Unocal* in which Burmese Villagers alleged that they had been subjected to rape, forced labour, murder and other forms of torture at the hand of the Burmese military who had been hired by Unocal to provide security in connection with the construction of a pipeline through their land.[29] This case was settled before the matter was determined.[30]

The past six or so years have also seen an increase in the number of claims brought in the UK courts against corporations for their harmful activities overseas. These claims have primarily focused on the extractive sector. Beginning with a claim against BP which was commenced in the High Court in 2005, a total of five such claims have been issued, of which three have ended in settlement. Two examples are provided here.

Monterrico Claim: Monterrico is a mining company which was incorporated in the UK. The claim in the High Court against the company concerned protests which took place in Peru in 2005 about its proposals to build a copper mine there. The claimant protesters sought compensation for torture which they suffered at the hands of the Peruvian police, allegedly incited to do so by the mine management. The protesters were hooded, bound and detained over a period of days. Two women alleged that they were sexually assaulted. One protester died. Monterrico vehemently denied that its officers had any involvement in the mistreatment of the protesters but nonetheless settled the claim out of court in 2011 just months before the case was due to be heard at trial. They did so without admission of liability. The claimants had won a preliminary legal point the previous year when they successfully applied for a freezing injunction which ensured that £5 million of the company's assets remained in the UK, sufficient funds to cover the level of damages sought by the claimants and their costs.[31] Lawyers for the company had sought to argue that there was no justification for freezing its assets as the claimants did not have an arguable case against Monterrico. This argument was rejected.

Nigeria v Nigeria, African Commission on Human and People's Rights Communication number 155/96 (2001).

29 *Doe I v Unocal Corp* 963 F Supp 880 (C D Cal 1997).

30 See Rachel Chambers '*The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*' 13 No 1 Hum Rts Brief 14 (2005).

31 *Guerrero and others v Monterrico Metals plc and another* [2009] EWHC 2475 (QB).

Shell Claim: These claims concern the environmental damage caused to land in the Niger Delta, Nigeria following massive oil spills which took place in 2008 and 2009. Proceedings were issued in the High Court in April 2011 on behalf of 69,000 claimants from the Bodo community and settled just four months later with an admission of liability on the company's part. The company accepted that equipment failures were responsible for the two spills and agreed to pay compensation in accordance with Nigerian law. The sum of money was reported as being £250 million (although this figure was disputed by Shell). The settlement came just days before a United Nations report detailing the extent of environmental degradation in the Niger Delta brought about by oil pollution was released. Shell was to be heavily implicated in the report. Further litigation against Shell for environmental damage in the Niger Delta is being conducted in the Netherlands in the case of *Oguru v Shell* and in the United States where a case was filed in the District Court in Detroit in October 2011 on behalf of the village of Ogale in Nigeria's Rivers state. In the latter case US$1 billion is being sought in compensation for long term environmental damage brought by oil production. The lawsuit accuses Shell of 'wilful' negligence in its 50 years of oil production through a local subsidiary and relies heavily on the UN report mentioned above to substantiate this allegation.[32]

There are many difficulties facing claimants who seek to achieve justice using the courts of the company's home state. Such claims are expensive, uncertain in outcome and protracted in length. Thus only a tiny minority of grievances and complaints will be resolved in this way.

Non Judicial Grievance Mechanisms: the OECD National Contact Points

The OECD Guidelines contain a well established and widely used non judicial grievance mechanism. Complaints concerning non-compliance with the OECD Guidelines can be brought to a National Contact Point ("NCP") by any 'interested party', which includes trade unions, NGOs, as well as companies. Such a party can submit a complaint against a multinational headquartered in a member state or one of the ten non-OECD states adhering to the Guidelines.

NCPs are obliged to offer their 'good offices' and attempt to mediate between the parties with the aim of reaching a mutually-agreed solution to the dispute. NCPs primarily rely on information submitted by the parties, but some NCPs have begun to carry out fact-finding missions in the area where alleged breaches of the Guidelines took place. Some NCPs have employed professional mediators and technical experts to help in the mediation and establishment of technical facts respectively.

Extractive companies are regularly the subject of complaints to NCPs, for example, the UK mining company Vedanta Resources. Survival International filed a complaint about the company's aluminium refinery and planned bauxite mine in Orissa, India which was said to violate the rights of a local indigenous tribe. The company refuted the complaint but refused to engage in mediation or to submit evidence to back up its stance. The UK NCP investigated the complaint and published a final statement in September 2009 upholding

[32] It should also be noted that there is an ongoing OECD complaint on the same subject. On 25 January 2011 Amnesty International and Friends of the Earth filed a complaint at the Dutch and UK National Contact Points against Shell for breaching the OECD Guidelines by making false, misleading and incomplete statements about incidents of sabotage to its operations in the Niger Delta and the sources of pollution in the region.

the allegations that Vedanta acted in violation of the OECD Guidelines. It issued recommendations for the company to bring its practices into line with the Guidelines. The company did not accept the NCP's findings and did nothing to comply with its recommendations. In March 2010, the NCP issued a follow-up statement urging further recommendations upon the company in light of its intransigence. Ultimately, however, the NCP could not compel Vedanta to comply or co-operate with the procedures and recommendations.

5. UN Guiding Principles

The UNGPs underline that where human rights harm occurs those affected must have access to an effective remedy.[33] Effective judicial systems should be the core of any such system of remedy but equally important are non-judicial mechanisms which can complement judicial systems which are not always available, accessible, appropriate or reliable. Particularly important in this context are the obligations that the UNGPs place on companies in relation to operational-level grievance mechanisms - which are where businesses interact directly with those that they may impact.

The UNGPs develop the requirement found already in a number of existing standards for companies to have in place an operational-level grievance mechanism.[34] This approach is taken up in the OECD Guidelines, subject only to the proviso that operational level grievance mechanisms should not preclude access to judicial or non-judicial grievance mechanisms including the National Contact Points. According to the UNGPs, the criteria which should underpin such a mechanism are:

Legitimacy

Enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

Accessibility

Being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

Predictability

Providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

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33 UNGPs, Principles 26 – 31, n 3 above at 22-27.

34 These include the Performance Standards of the International Finance Corporation, which are mirrored in the Equator Principles; the ISO 14000 standard; and initiatives such as Social Accountability International; the Fair Labour Association, Ethical Trading Initiative and the Responsible Jewellery Council. The International Council on Mining and Metals has also developed guidance for its members on the development of grievance mechanisms.

Equitability

Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to take part in a grievance process on fair, informed and respectful terms;

Transparency

Keeping parties to a grievance informed about its progress and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

Rights-compatibility

Ensuring that outcomes and remedies accord with international recognised human rights;

Dialogue and engagement

Consulting the stakeholder grounds for whose use they are intended on their design and performance, and focussing on dialogue as the means to address and resolve grievances;

Continuous learning

Drawing on relevant measures to identify lessons for improving mechanism and preventing future grievance and harms.[35]

In particular mechanisms which operate at the operational level should operate through direct or mediated dialogue rather than through unilateral decisions (quasi-adjudication) by the company.[36]

The UNGP's aim is that operational-level grievance mechanisms will perform two key functions:

First, they will identify adverse human rights impacts as part of an ongoing human rights due diligence by providing a channel for those directly impacted by the company's operations to raise concerns when they believe they are being or will be harmed. This will allow companies to identify problems and adapt their practices accordingly;

Secondly, these mechanisms make it possible for grievances to be addressed and harms remediated early and directly by the company, thereby preventing problems from escalating.[37]

Many companies already have operational-level grievance mechanisms in place.[38] These companies have, through interaction with stakeholders and third parties, been able to mitigate and remedy some of the impacts caused by their activities. The International Council on Mining and Minerals gives a number of examples in its report 'Human Rights in the Mining and Metals

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35 UNGP 31, n3 above, at 26 – 27.

36 UNGP 31, n3 above, at 26 – 27.

37 Caroline Rees, '*Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned.*' CSR Initiative, Harvard Kennedy School, Cambridge, (2011) at 9.

38 International Council on Mining and Minerals. '*Human Rights in the Mining and Metals Industry: Handling and Resolving Local Level Concerns and Grievances*' (October 2009).

Industry: Handling and Resolving Local Level Concerns and Grievances.' The following examples demonstrate both the complexity of the issues that can arise in the operations of extractive businesses and the lengths to which companies will go to establish an effective grievance mechanism.

One such example is Exxon Mobil who came across a number of difficulties in relation to their Chad-Cameroon pipeline.

Exxon Mobil formed a multi-party commission to establish eligibility for land compensation and address concerns and grievances relating the company's acquisition of land for its Chad-Cameroon pipeline project. The commission was formed at an early stage in anticipation of potentially conflicting demands due to a complex land-use system in Cameroon which allowed multiple individuals to have claims on the same use of land.

The commission included government officials, village chiefs, traditional authorities, Exxon Mobil representatives and two NGOs selected through a competitive bidding process. The Commission undertook a systematic, village-by-village process of "social closure", whereby they reviewed each compensation agreement along the pipeline route, and determined whether it was in compliance with the broader environmental and social management plan. For cases of noncompliance, the commission determined appropriate corrective measures. To promote transparency, the final compensation payments took place at public hearing in the affected villages, with one of the NGOs serving the role of witness to the process.[39]

Another example of an operational-level grievance mechanism is that of OceanaGold Philippines. The company worked with a local Filipino council to design a six step complaints procedure with explicit involvement of the local council at key stages. This means that when a complaint is investigated, a member of the council will be part of the investigation team, along with the complainant and a representative of the company. The council member along with the complainant will then have the opportunity to approve or reject solutions proposed by the company. Any and all concerns reaching the company are entertained ranging from the right to access water from within the company's project area to employment disputes.

Although rarely tested the standard for what it is that constitutes an effective operational-level grievance mechanism is a high one. In light of the guidance given by the UNGPs and the ICMM in particular those involved in the extractive sector must be prepared for this standard to become even more rigorous.

In February 2011 the UK NCP found that BP had failed, during the construction of the Baku-Tbilisi-Ceyhan (BTC) pipeline, to have in place an adequate grievance and consultation mechanisms. The BTC pipeline traversed three countries, Georgia, Azerbaijan and Turkey. The company had put in place a compensation and grievance mechanism. In one particular corner of northern Turkey the company received complaint from locals that they were being intimidated by local security forces to accept lower compensation payments. The UK NCP found that the company had failed to identify specific complaints of intimidation against affected communities by local security forces where the information was received outside of the formal grievance and monitoring channels. They found that by not taking adequate steps in response to such complaints the company had failed to adequately safeguard against the risk of local partners undermining the overall consultation and grievance process.

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39 International Council on Mining and Minerals, n 39 above, at 19.

6. Conclusion

In addition to the UNGPs and the OECD Guidelines what other methods are being used to try to regulate the behaviour of extractive corporations when they operate in weak governance zones?

There is an increasing awareness amongst legislatures, companies, multilateral agencies and NGOs of the responsibility of companies to respect human rights. The use of company reporting to better understand the human rights impacts of extractives marks a departure from earlier voluntary initiatives towards tangible and enforceable obligations. However, these obligations do not regulate the actions of extractives themselves all they do is ask for disclosure of particular information in the hope that such disclosure will encourage companies to respect human rights. It should not be forgotten that the impetus for the changes in financial reporting obligations have, for the main part, their roots in the financial crash and are aimed not at increased human rights standards but at better transparency for shareholders.

The extractive sector is also 'regulated' by a number of voluntary but nonetheless important codes and initiatives including the Extractive Industries Transparency Initiative; the Voluntary Principles on Security and Human Rights, industry specific schemes such as the Kimberly Process (on conflict mined diamonds)[40] and by membership of peak bodies such as the International Council on Mining and Metals. Such initiatives often illustrate best practice and thus lead where legislation and regulation may follow.

How have developments in this area changed the standards of due diligence and accountability expected from extractives?

Developments in this area have created a new standard of expected conduct by extractive companies. Although the concept of human rights due diligence was new when it was introduced by the UNGPs, the processes involved will however be familiar to extractive companies which will already have highly evolved risk management systems. Such systems need to be amended now to take account of the requirement of due diligence from the UNGPs.

It will be interesting to see what human rights due diligence looks like in practice and how well companies in the extractive sector take on board the UNGP recommendations in this area.

What grievance mechanisms are available to those harmed by the actions of businesses in the extractive sector?

Traditionally those harmed by the actions of businesses in the extractive sector have had limited access to an effective remedy. In situations where the harm occurs in a country with

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40 The Kimberly Process has been significantly discredited in recent years following its failure to deal effectively with the problem of conflict diamonds coming out of certain African countries such as Zimbabwe.

weak governance the complainant will often have no access to an in-country judicial grievance mechanism and will be forced to pursue court action through the courts in another county, most often the United States. The inclusion of a human rights chapter within the OECD Guidelines and the strengthening of the National Contact Point provides complainants with a different kind of remedy which lies outside of the court system.

The benefit of the NCP is that it is able to work towards a practical, cheap solution within a relatively short timeframe. One disadvantage is that it may only appropriate for certain kinds of harm mostly attributable to breaches of complainants social, economic and cultural rights rather than their civil and political rights.

In addition to the NCP complainants should not overlook the operational-level grievance mechanisms that are run by the companies themselves. These mechanisms can be used to prevent future harm and to remedy harm that has already occurred. The emphasis that the UNGPs and the ICCM in particular place on the proper development of operational grievance mechanisms is further evidence of an increasing standard of expected conduct for companies operating abroad.