THE IRRESISTIBLE RISE OF HUMAN RIGHTS DUE DILIGENCE: CONFLICT MINERALS AND BEYOND

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INTRODUCTION

Human rights due diligence (HRDD) is an important new concept in international efforts to improve the accountability of transnational corporations for violations of human rights. Due diligence has a clear meaning in corporate governance, setting out context-specific risk-management obligations for corporations. It also has been applied in a variety of contexts in international law, including international human rights law, to define the scope of state responsibility for the acts of non-state actors. HRDD applies international human rights standards to the acts of businesses in the international sphere. It is designed to provide guidance to corporations on how to avoid adverse impacts of business on human rights and how to remedy such adverse impacts.

HRDD was first described in detail in the Guiding Principles on Business and Human Rights (GP), adopted by the United Nations Human Rights Council in 2011. At the same time, the Organisation for Economic Co-operation and Development (OECD) was in the process of revising its Guidelines on Multinational Enterprises

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1. See, e.g., Tineke Lambooy, Corporate Due Diligence as a Tool to Respect Human Rights, 28 NETH. Q. HUM. RTS. 404, 416 (2010).


4. Id.

5. Id.

(MNE Guidelines) and incorporated the GP’s approach to HRDD in the new human rights chapter of the MNE Guidelines.\textsuperscript{7} The OECD also adopted a model of due diligence similar to the GP’s as a general policy in the MNE Guidelines.\textsuperscript{8}

The OECD has subsequently used the HRDD concept in developing sector-specific guidance for mining businesses in conflict and high-risk zones (OECD Guidance)\textsuperscript{9}; in drafting this guidance, the OECD has further advanced the HRDD concept. The OECD has thereby contributed to a better understanding of HRDD and to its legitimacy as an international measure for improving business accountability.

The potential effectiveness of the OECD’s approach to HRDD in the context of conflict minerals has been enhanced by §1502 of the United States’ Dodd-Frank Act.\textsuperscript{10} This provision requires companies to report on the incidence of conflict minerals from the Democratic Republic of the Congo (DRC) in company supply chains.\textsuperscript{11} Companies are also expected to report on the due diligence measures taken to eliminate conflict minerals from their supply chains, with the OECD Guidance as a reference point.\textsuperscript{12}

Developments in HRDD also demonstrate a move away from focusing on the armed conflict aspects of conflict minerals, and a move towards constructing the problem as a supply chain issue. This shift is evident even from the title of the OECD Guidance, which emphasizes “responsible supply chains.”\textsuperscript{13} While the implementation of the OECD Guidance is still in its early stages, the OECD is preparing sector-specific guidance for other areas, nota-


\textsuperscript{8} \textit{Id.} at 20.


\textsuperscript{11} \textit{Id.}

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{See OECD, \textit{Guidance}, supra note 9, at 1.}
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bly financial services and agriculture. The OECD therefore treats the elimination of conflict minerals as an issue of responsible business conduct that differs from other such issues only in terms of the specifics of the supply chain, and HRDD is a key concept in achieving this.

This Article begins in Part I with a review of the concept of due diligence in international law, examining its role in areas such as diplomatic protection, international environmental law, and human rights. Part II then examines how the Special Representative of the Secretary-General for Business and Human Rights, Professor John Ruggie, elaborated the concept of HRDD within the United Nations; it also examines how the OECD adopted HRDD. Part III focuses on how the OECD applied HRDD to international efforts to remove conflict minerals from supply chains, and Part IV discusses how the OECD model of HRDD for conflict minerals interacts with regulation under the Dodd-Frank Act. Part V elaborates on the implementation of these HRDD measures by the OECD. Finally, Part VI looks ahead to the OECD’s work in applying HRDD to other sectors, notably financial services and manufacturing.

I. DUE DILIGENCE IN INTERNATIONAL LAW

In international law, due diligence has been used to define the obligation of states to respond to violations by state and non-state actors. To engage the responsibility of the state, acts must be attributable to the state, meaning that the acts of non-state actors generally do not lead to state responsibility. In some circumstances, however, where a state fails to take action such as investigating or prosecuting crimes, it may be internationally responsible as a result. This issue was addressed, for example, in the Neer Claim, where the United States claimed that Mexico exhibited a lack of diligence in investigating the murder of an American national. Yet, because the state’s conduct necessarily “should

amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency,” Mexico was ultimately found not responsible.  

In the *Corfu Channel* case, too, the International Court of Justice (ICJ) decided that once knowledge of the presence of mines could be attributed to Albania, the state was under an obligation to notify all shipping vessels likely to use the Channel of the risk, a due diligence obligation.  

Similarly, the Court found that Uganda, as the occupying power in the DRC, had a duty of vigilance to prevent illegal exploitation of natural resources. Finally, in the *Genocide Convention* decision, the ICJ identified prevention of genocide as an obligation of conduct rather than result, and specifically as an obligation of due diligence. As set out in the *Neer* claim, the threshold for failure to achieve due diligence is high: a violation occurs when a state “manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.”

International environmental law has been an important area for the elaboration of due diligence. The *Trail Smelter Arbitration* is sometimes cited as an example of the due diligence principle, but is problematic because the arbitrators stated that state responsibility for transboundary pollution lay where “the case is of serious consequence and the injury is established by clear and convincing evidence.” More helpful is the International Tribunal for the Law of the Sea’s (ITLOS) detailed elaboration of due diligence in its Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. Having decided that the obligation to ensure that con-

18. *Id.* ¶ 4.
22. *Id.*
24. *See ITLOS Advisory Opinion, supra* note 2, ¶¶ 110–11; *see also* Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Case No. 21,
tractors operate in compliance with Part IX of the U.N. Convention on the Law of the Sea is an obligation of conduct rather than result. ITLOS set out the scope of required due diligence. While noting that the scope will vary depending on the nature of the activities undertaken and the state of scientific and technical knowledge at the time of decision-making, ITLOS concluded that due diligence requires a state to “take measures within its legal system and that the measures must be ‘reasonably appropriate.’”

Although still focusing on state obligations rather than those of business itself, some indications of due diligence in the business context appear in arbitral decisions on bilateral investment treaties. In AAPL v. Sri Lanka, the award confirmed that the phrase “full protection and security,” in relation to investments, was a due diligence standard rather than one of strict liability. The award also confirmed that the obligation of due diligence is a primary obligation of states, and a variable one, dependent on the circumstances of the case. More recently, in Noble Ventures v. Romania, the panel decided that Romania had not violated the due diligence standard, having acted reasonably in response to reported violence against Noble Ventures’ business. Following the ICJ’s ELSI decision, the panel decided that the claimant had not proved actions that amounted to a lack of due diligence. A lack of due diligence must have been established through grave failures on the part of the state.

Advisory Opinion of Apr. 2, 2015, ¶¶ 125–40 (citing the ITLOS Advisory Opinion, supra note 2, for its application of the term “due diligence”).


26. ITLOS Advisory Opinion, supra note 2, ¶¶ 117, 120.


28. Id. ¶¶ 76–77.

29. Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, Final Award (Oct. 12, 2005).


32. Id.
The 1988 decision of the Inter-American Court of Human Rights in Velásquez Rodríguez evinces the origins of HRDD. The case concerned the disappearance of a man following his detention by Honduran government authorities. While no direct evidence of government involvement in the disappearances existed, the Honduran government nonetheless was found to have violated the Inter-American Convention on Human Rights, because of a lack of due diligence in prevention of or response to human rights violations.

HRDD has been developed in instruments and case law concerning violence against women: the Declaration on the Elimination of Violence against Women; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; Fernandes v. Brazil; and Opuz v. Turkey. Article 7(b) of the Inter-American Convention obliges states to “apply due diligence to prevent, investigate and impose penalties for violence against women.” In Fernandes, the Inter-American Commission on Human Rights found a violation of Article 7(b) because of the state’s failure to investigate and prosecute the attempted murder of the applicant by her husband, and further that this failure was part of a pattern of impunity. Subsequently, the European Court of Human Rights applied the approach of the Inter-American Commission in Fernandes to the Opuz case, which also concerned domestic violence, deciding that even though some action had been taken by the police, it had not met the required level for due diligence.

Thus, the nature of due diligence in international law varies to some extent with circumstances. Where it relates to state responsi-

34. Id.
41. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, supra note 38, art. 7(b).
bility as in diplomatic protection and investment treaties, the concept allows states wide discretion.\footnote{44. See, e.g., Neer, 4 R.I.A.A. at 61; Asian Agric. Prods. Ltd., ICSID Case No. ARB/87/3, 30 Int’l Leg. Mat. ¶ 50.} The obligation in the context of human rights or environmental law may be more demanding, although Kamminga argues that it is still a lower standard than positive obligations to investigate and prosecute offenders.\footnote{45. Menno Kamminga, Due Diligence Mania, in The Women’s Convention Turned 30: Achievements, Setbacks and Prospects 407 (Ingrid Westendorp ed., 2012).} It is worth noting, however, that the European Court of Human Rights in Opuz appears to merge the ideas of due diligence and positive obligations with respect to the obligation to protect the life of a victim of domestic violence.\footnote{46. Opuz, 50 E.H.R.R. ¶ 131.} One might interpret this conflation as raising due diligence obligations to the level of positive obligations in the context of human rights violations.

\section{From Due Diligence to Human Rights Due Diligence}

As discussed in the previous section, diligence in international law has focused on the responsibility of states for the acts of non-state actors. HRDD shifts the focus to the non-state actors themselves.\footnote{47. Guiding Principles, supra note 3.} Professor John Ruggie, the Special Representative of the Secretary-General for Business and Human Rights from 2005 to 2011, links HRDD to other forms of business due diligence,\footnote{48. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), Protect, Respect, Remedy: A Framework for Business and Human Rights ¶ 25, U.N. H.R.C., U.N. Doc. A/HRC/8 (Apr. 7, 2008) [hereinafter Ruggie 2008 Report].} but as an ongoing process rather than directed to a particular event (such as one business acquiring another).\footnote{49. Lambooy, supra note 1, at 404, 416, 437–38 (defining the content of due diligence); see also Faith Stevalman, Global Finance, Multinationals and Human Rights: With Commentary on Backer’s Critique of the 2008 Report by John Ruggie, 9 SANTA CLARA J. INT’L L. 101, 119 (2011).} Linking the business obligation to respect human rights to ongoing due diligence obligations has the effect of making the obligation to respect human rights more than a passive duty of avoiding harm, while at the same time keeping it within a familiar range of concepts for businesses.\footnote{50. Stevalman, supra note 49, at 110–11, 117–18.} Most existing standards of business due diligence do not include a requirement to evaluate human rights impacts, but there are impact assessment tools developed by non-governmental organizations (NGOs) which businesses can use for that purpose.\footnote{51. Lambooy, supra note 1, at 441–44.}
the intention of both the GP and in the MNE Guidelines is that HRDD is not a set of legally enforceable obligations, HRDD should nonetheless have some impact on the behavior of business.\(^{52}\)

In a critique of due diligence, Dhooge argues that it is a weak concept that can be used defensively by business to avoid liability.\(^{53}\) The principle on its own leaves open the potential for such defensive use.\(^{54}\) The final version of the GP, however, and the OECD documents on conflict minerals, define with greater precision the steps required for due diligence.\(^{55}\) HRDD is also designed primarily to be a preventative obligation rather than a ground of liability: it requires businesses to take positive steps to prevent harm.\(^{56}\)

John Ruggie’s work as Special Representative culminated with the drafting of the GP, including HRDD provisions.\(^{57}\) In his 2008 report, he first introduced his framework for business and human rights.\(^{58}\) The three-pillar framework—Protect, Respect and Remedy—sets out an obligation for states to protect individuals from human rights abuses, an obligation on businesses to respect human rights, and a general obligation to remedy harms caused by human rights violations.\(^{59}\) The report also began the process of defining HRDD, describing it as “the steps a company must take to become aware of, prevent and address adverse human rights impact.”\(^{60}\) The incentive for businesses to engage in HRDD, in Ruggie’s view, is that it shifts business emphasis from reacting to external human

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53. See generally Lucien J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 Emory Int’l L. Rev. 455 (2008). The Special Representative of the Secretary General for Business and Human Rights, however, stated in his 2010 report that having HRDD policies would not automatically immunize businesses from legal claims. Ruggie 2010 Report, supra note 52, ¶ 86.

54. See Lambooy, supra note 1, at 408; Stevalman, supra note 49, at 120.

55. *Guiding Principles*, supra note 3, princ. 17; OECD, *Guidelines*, supra note 7, ch. IV.

56. Lambooy, supra note 1, at 432.

57. See generally *Guiding Principles*, supra note 3.

58. See generally *Guiding Principles*, supra note 3.

59. *Id.*

60. *Id.* ¶ 56.
rights criticism to internalizing processes that promote respect for human rights.\footnote{61}{Ruggie 2010 Report, \textit{supra} note 52, ¶ 80.}

The 2010 and 2011 reports developed the concept of HRDD.\footnote{62}{Id.; \textit{Guiding Principles}, \textit{supra} note 3.} The 2010 report emphasizes the “dynamic and ongoing” nature of HRDD, and the features which distinguish it from due diligence for business transactions.\footnote{63}{Ruggie 2010 Report, \textit{supra} note 52, ¶ 84.} These features are the need for engagement with stakeholders and the related elements of transparency and accessibility.\footnote{64}{Id. ¶¶ 84–85.} These three elements are confirmed in Principle 16 of the GP.\footnote{65}{\textit{Guiding Principles}, \textit{supra} note 3, princ. 16.} The 2011 report, setting out the GP, relates HRDD to risk-management.\footnote{66}{Id. princ. 17.} HRDD, therefore, ascribes traditional modes of corporate governance, but also has distinctive features that respond to the nature of human rights.\footnote{67}{Ruggie 2010 Report, \textit{supra} note 52, ¶ 85.}

The OECD’s MNE Guidelines includes the definition of due diligence, which draws on Ruggie’s work on HRDD: “due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems.”\footnote{68}{OECD, \textit{Guidelines}, \textit{supra} note 7, at 23, ¶ 14 (commentary on general policies).} The OECD’s definition is similar to the definition of HRDD provided by the Office of the United Nations High Commissioner for Human Rights (OHCHR), which describes it as “an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.”\footnote{69}{Off. of the High Comm’n for Hum. Rts. (OHCHR), \textit{The Corporate Responsibility to Respect Human Rights: An Interpretive Guide} 6 (2012) [hereinafter OHCHR Interpretive Guide].}

While the obligations in the GP and MNE Guidelines do not create legally binding obligations,\footnote{70}{The nature of the business obligation to respect human rights is not clear, beyond the statements in the GP and MNE Guidelines that they do not create legally enforceable obligations. Backer asserts that the obligation to respect human rights is a social norm, but does not elaborate on the implications of classifying it as a social norm. \textit{See} Backer, \textit{supra} note 52. \textit{See generally} Radu Mares, \textit{A Gap in the Corporate Responsibility to Respect Human Rights}, \textit{36 Monash U. L. Rev.} 33 (2010) (discussing the lack of clarity in several elements related to the business obligation to respect human rights). For the purposes of analyzing}
level of effort is required by businesses. In general international law, due diligence is a procedural standard. For example, in the Neer claim, Mexico argued that nothing short of bad faith would engage the responsibility of the state.\textsuperscript{71} HRDD seems to set the bar lower for businesses. Commentators have argued that the standard of knowledge in HRDD that would create liability (albeit not legal liability), arises from human rights impacts of which the business should have known.\textsuperscript{72}

Which human rights, then, are covered by HRDD? Both the GP and OECD Guidelines assert that “human rights” refers at a minimum to those rights included in the International Bill of Rights,\textsuperscript{73} plus the International Labour Organization (ILO) 1998 Declaration on Fundamental Principles and Rights at Work.\textsuperscript{74} The GP and OECD also account for any other international human rights instruments that might have particular relevance, such as those relating to the rights of children, indigenous groups, and racial or ethnic minorities.\textsuperscript{75} Additionally, the OECD web pages for the MNE Guidelines list international instruments relevant to HRDD, including the Conventions on Torture and on Enforced Disappearances, the Convention on Migrant Workers and their Families, and Declarations on Indigenous Peoples and on Persons Belonging to Ethnic, Religious and Linguistic Minorities.\textsuperscript{76}

The GP describes the elements of HRDD, including a policy commitment, a process, and remediation; remediation also has its

\textsuperscript{71} See \textit{Neer}, 4 R.I.A.A. at 61–62.

\textsuperscript{72} See Lambooy, \textit{supra} note 1, at 433–34. See generally Mares, \textit{supra} note 70.


\textsuperscript{74} International Labour Organisation, ILO Declaration on Fundamental Principles and Rights at Work, June 1998, 37 I.L.M. 1237 (1998). The Declaration names eight International Labour Organisation (ILO) conventions—two each in the areas of freedom of association, forced labor, child labor, and discrimination—as core conventions of the ILO and provides for a follow-up process to monitor respect for these core areas and to promote wider ratification of these treaties by ILO member states. \textit{Id.}

\textsuperscript{75} See \textit{Guiding Principles}, \textit{supra} note 3, princ. 12 & cmt.; OECD, \textit{Guidelines}, \textit{supra} note 7, at 32, ¶ 40.

own pillar under the GP.\(^{77}\) A policy commitment is a statement concluded at the senior levels of a company and integrated into its internal policies, stipulating human rights expectations of employees and business partners.\(^{78}\) The process aspect is of an ongoing nature,\(^{79}\) and includes the following mandates: identify and assess actual or potential human rights impacts\(^{80};\) integrate findings of impact assessments across functions and processes, and take appropriate action\(^{81};\) track effectiveness of responses\(^{82};\) and communicate, including through formal reporting.\(^{83}\)

The GP address remedies against states and businesses primarily in the third pillar of the framework.\(^{84}\) The principles on HRDD first encourage businesses to reduce human rights violations throughout their supply chain and other business relationships, and in extreme circumstances presents businesses with the choice of trying to ameliorate human rights impacts or withdrawal from business relationships causing the adverse impacts.\(^{85}\) The GP also calls on businesses to use leverage to prevent or ameliorate human rights impacts where not directly caused by that business’s activities, but where those activities contribute to a human rights impact.\(^{86}\)

The OECD version of HRDD is similar to that of the GP. It is included in the human rights chapter of the MNE Guidelines and a more generalized version is part of the General Policies chapter.\(^{87}\) Thus, due diligence similar to HRDD applies to all aspects of responsible business covered by the Guidelines.\(^{88}\) Although HRDD was only introduced into the MNE Guidelines in 2011, the United Kingdom National Contact Point referred to HRDD in a 2008 final

\(\begin{align*}
77. & \textit{Guiding Principles}, \textit{supra} \text{ note 3, princ. 15.} \\
78. & \textit{Id.} \text{ princ. 16.} \\
79. & \textit{Id.} \text{ princ. 17.} \\
80. & \textit{Id.} \text{ princ. 18; see OHCHR Interpretive Guide, } \textit{supra} \text{ note 69, at 28.} \\
81. & \textit{Guiding Principles}, \textit{supra} \text{ note 3, princ. 19.} \\
82. & \textit{Id.} \text{ princ. 20.} \\
83. & \textit{Id.} \text{ princ. 21.} \\
84. & \textit{Id.} \text{ princ. 25–31; Mares, } \textit{supra} \text{ note 70, at 59 (criticizing the separation of remedies from the principles of business responsibility).} \\
85. & \text{Mares, } \textit{supra} \text{ note 70, at 75–76.} \\
86. & \textit{Guiding Principles, } \textit{supra} \text{ note 3, princ. 19; see OHCHR Interpretive Guide, } \textit{supra} \text{ note 69, at 42–43. \text{On leverage, see also Mares, } \textit{supra} \text{ note 70; OECD, } \textit{Guidelines, } \textit{supra} \text{ note 7, cmt., ¶¶ 43–44.} \\
87. & \text{See OECD, } \textit{Guidelines, } \textit{supra} \text{ note 7, chs. II, IV.} \\
88. & \textit{Id.} \text{ ¶¶ 10–13, 14–15, 5, 45–46 (paragraphs regarding “General Policies[,]” “Commentary on General Policies[,]” “Human Rights[,]” and “Commentary on Human Rights” respectively).}
\end{align*}\)
statement. The 2011 MNE Guidelines are intended to be consistent with the approach of the GP overall, and the same is true for the OECD Guidance on conflict minerals, although the latter includes significantly more detail than either the GP or the MNE Guidelines.

The General Policies chapter of the 2011 MNE Guidelines introduces the concept of due diligence for transnational business in paragraph A.10. Paragraph A.10 describes the steps businesses are to take to meet the requirements of due diligence as identifying, preventing, and mitigating potential adverse impacts of their activities, and accounting for how these impacts are addressed. Paragraph 5 of the Human Rights chapter calls on businesses to carry out appropriate HRDD, which is defined in the Commentary by reference to paragraphs A.10-A.12 of the General Policies Chapter. While reflecting the language of Principles 17-21 of the GP, the MNE Guidelines do not provide as much specification on the process of due diligence.

The MNE Guidelines represents an important development of HRDD, particularly in the concept of adverse impacts. Situated in the General Policies chapter, paragraphs A.11 and A.12 address all adverse impacts of business activities—not only those relating to human rights. Paragraph A.11 calls on businesses to avoid causing or contributing to adverse impacts through their activities and to address those impacts that do occur. Paragraph A.12 instructs businesses to prevent or mitigate adverse impacts that they did not

90. OECD Guidelines, supra note 7, at 31, ¶ 36.
93. Id.
94. Id. ¶ 50 (applying paragraphs A.10–A.13 of the General Policies chapter to the Employment and Industrial Relations chapter, which covers many human rights issues in the context of employment, including freedom of association and the elimination of child labor).
95. OECD, Guidelines, supra note 7, ch. II, ¶¶ A.11–12.
96. Id. ch. II, ¶ A.11.
cause or contribute to, but are linked to through a business relationship, and the Commentary states that they should use their leverage to do so.\textsuperscript{97}

In defining contribution to an adverse impact, the MNE Guidelines go further than the GP. Principle 17(a) uses the phrase “cause or contribute to” human rights impacts, but the Commentary on the GP does not elaborate on its meaning.\textsuperscript{98} nor does the OHCHR Interpretative Guidance.\textsuperscript{99} The MNE Guidelines envisions businesses as contributing to adverse impacts, including human rights impacts, where they make “a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions.”\textsuperscript{100} Furthermore, the Commentary to the MNE Guidelines specifies that due diligence applies to supply chains.\textsuperscript{101}

Supply chains are a key issue for HRDD. In 2010, Ruggie suggested that a business should exercise influence over its suppliers where its own demands, such as price or timescale, contribute to a supplier’s failure to observe human rights.\textsuperscript{102} The OECD, particularly in the OECD Guidance for mining companies, sets out more detailed expectations concerning the avoidance of human rights abuses in the supply chain.\textsuperscript{103} Nonetheless, to meet the expectations inherent in HRDD, a business must always have functional systems for acquiring information and good internal controls that are responsibly monitored.\textsuperscript{104}

In its 2013 report on the MNE Guidelines, the OECD recognized the need to work with the ILO and the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (U.N. Working Group) to ensure consistent interpretation and application of the “Protect,
Respect, and Remedy” framework. As yet, the U.N. Working Group has not engaged in any direct efforts to interpret the concept of HRDD. The current focus of the U.N. Working Group is on promoting the development of National Action Plans on the GP. This process focuses on state action rather than action by businesses, although at least some National Action Plans are the result of broad stakeholder consultation, including of business. It appears that some states adopting National Action Plans emphasize the role of the state and minimize the role of business.

It is more likely that interpretation and application of HRDD will arise from the practice of National Contact Points that oversee the implementation of the MNE Guidelines and provide a non-judicial complaint mechanism for infringements of the Guidelines. The U.N. Working Group acknowledged the work of the OECD in a statement in 2013, as follows:

We acknowledge the steps taken so far incorporating the Guiding Principles in the OECD’s guidance to States and companies, in particular through the 2011 update of the OECD Guidelines


108. De Felicie & Graf, supra note 107, at 54, 55–57.

109. Id. at 58–59.
for Multinational Enterprises, and in work by the National Contact Points managing complaints related to human rights infringements, and the adoption of Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence in June 2012.\textsuperscript{110}

The OECD’s 2013 report noted a record high rate of activity in specific instances\textsuperscript{111} before National Contact Points in that year, demonstrating the potential of this mechanism to contribute to the interpretation of HRDD principles.\textsuperscript{112} The number of new specific instances in 2014 (thirty-four) was nearly as high as in 2013 (thirty-six).\textsuperscript{113}

\section*{III. Applying Human Rights Due Diligence to Conflict Minerals}

HRDD is context-specific, depending on the human rights challenges faced by particular companies in particular activities. This is why the first step of HRDD is assessing impacts.\textsuperscript{114} As Ruggie noted in his 2008 report, “the scope of due diligence to meet the corporate responsibility to respect human rights . . . depends on the potential and actual human rights impacts resulting from a company’s business activities and the relationships connected to those activities.”\textsuperscript{115} Many significant issues around human rights impacts of business activities arise in the extractive industries.\textsuperscript{116} In addition, the GP calls for more intense action by businesses when operating in conflict zones and other weak governance areas.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{110} OHCHR, \textit{Letter to Working Party on Request for guidance on specific aspects the Guiding Principles and their meaning in the context of financial transactions and institutions} (Dec. 3, 2013).
\item \textsuperscript{111} Specific instances are described in the Procedural Guidance to the Implementation to Part II of the OECD Guidelines as “issues that arise relating to implementation of the Guidelines” and may be raised by any interested person. OECD, \textit{Guidelines, supra} note 7.
\item \textsuperscript{112} OECD, 2013 \textit{Annual Report}, supra note 14.
\item \textsuperscript{113} OECD, \textit{Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business Conduct by Sector}, 18 (2014) [hereinafter OECD, 2014 \textit{Annual Report}].
\item \textsuperscript{114} \textit{Guiding Principles, supra} note 3, prnc. 18, cmt.
\item \textsuperscript{115} Ruggie 2008 \textit{Report}, supra note 48, \S 72.
\item \textsuperscript{116} Lambooy, \textit{supra} note 1, at 429. An example of applying the GP to a mining operation may be seen in the opinion of the Office of the High Commissioner for Human Rights, where the Office of the High Commissioner for Human Rights found that the waiver agreement that claimants were asked to sign, which included a waiver on pursuing criminal or non-judicial proceedings, was over-broad and contrary to Principles 29 and 31 of the Guiding Principles. OHCHR, \textit{Re: Allegations Regarding the Porgera Mining Joint Venture Remedy Framework} 1 (July 2013), \text{http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf} (note that this opinion addresses remedies rather than HRDD).
\item \textsuperscript{117} \textit{Guiding Principles, supra} note 3, prnc. 23; see also John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corpora-
The first example of context-specific measures on HRDD is contained in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas\(^{118}\); the OECD has adopted two industry-specific supplements to the OECD Guidance, one on tin, tantalum, and tungsten (3T Supplement) (2011) and one on gold (Gold Supplement) (2012).\(^{119}\) As a Council Recommendation, the OECD Guidance is non-binding,\(^{120}\) but it calls on member states to promote its observance by companies operating in or from their territories, and to take measures to “actively support” the integration of the framework for due diligence and the model supply chain policy into corporate management.\(^{121}\)

The OECD Guidance builds on ideas of due diligence and supply chain monitoring set out in the revised MNE Guidelines.\(^{122}\) It is based on experience in the Great Lakes region of Africa and drafted in cooperation with the International Conference on the Great Lakes Region (ICGLR) and the OECD’s Investment Committee and Development Assistance Committee.\(^{123}\) It also follows due diligence standards adopted by the Group of Experts on the Democratic Republic of the Congo, and endorsed by the UN Security Council.\(^{124}\)

The OECD Guidance also builds on earlier OECD work on business ethics in conflict zones, which began before the GP.\(^{125}\) In 2006, the OECD Council adopted the Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (Risk Awareness Tool).\(^{126}\) An important element of the Risk Awareness Tool, foreshadowing HRDD, is the assertion that businesses must not only obey local law, but also observe relevant international instru-

\(^{118}\) OECD, Guidance, supra note 9; see Liberti, supra note 91, at 38.

\(^{119}\) OECD, Guidance, supra note 9, at 31–60, 61–118.

\(^{120}\) Convention on the Organisation for Economic Cooperation and Development, supra note 9, art. 5(b); see also OECD Legal Affairs, OECD Legal Instruments, http://www.oecd.org/legal/legal-instruments.htm (explaining that recommendations are not legally binding).

\(^{121}\) OECD, Guidance, supra note 9, at Foreword.

\(^{122}\) Liberti, supra note 91, at 41.

\(^{123}\) OECD, Guidance, supra note 9, at Foreword.


\(^{126}\) Id.
ments, including those relating to human rights and core labor rights.\textsuperscript{127} The Risk Awareness Tool calls for “heightened managerial care” for business operations in weak governance zones, a concept which includes some of the elements of HRDD, including information gathering and reporting.\textsuperscript{128}

The OECD Guidance which applies to “conflict-affected and high risk areas[, those] identified by the presence of armed conflict, widespread violence, or other risks of harm to people,”\textsuperscript{129} does not specify that the due diligence required is HRDD, but most of the risks identified in the OECD Guidance are directly or indirectly related to potential human rights violations.\textsuperscript{130} Furthermore, due diligence is defined as “an ongoing, proactive, and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict.”\textsuperscript{131} The steps for due diligence in the OECD Guidance are similar to those set out in the GP.\textsuperscript{132}

The detailed requirements of the OECD Guidance are set out in the three Annexes.\textsuperscript{133} Annex I sets out a five-step framework for due diligence, which is similar to that set out in the GP: establish strong company management systems; identify and assess risk in the supply chain; design and implement a strategy to respond to the identified risks; carry out independent third-party audit of supply chain due diligence; and report on supply chain due diligence.\textsuperscript{134}

The framework calls on businesses to have regard for the mineral industry-specific supplements in identifying risks.\textsuperscript{135} In contrast to HRDD in the GP, the OECD Guidance specifies a separate step for the establishment and maintenance of internal management systems.\textsuperscript{136} The OECD Guidance also includes more specific and stronger expectations concerning audit and reporting on due

\textsuperscript{127} \textit{Id.} \textsection 2.
\textsuperscript{128} \textit{Id.} \textsection 3.
\textsuperscript{129} OECD, \textit{Guidance, supra} note 9, at 13.
\textsuperscript{130} See \textit{id.} at Annex II, 20.
\textsuperscript{131} \textit{Id.} at 13.
\textsuperscript{132} Compare OECD, \textit{Guidance, supra} note 9, Annex I, \textit{with Guiding Principles, supra} note 3, princs. 17–21.
\textsuperscript{133} OECD, \textit{Guidance, supra} note 9, Annexes I–III.
\textsuperscript{134} \textit{Id.} at 17–19.
\textsuperscript{135} \textit{Id.} at 17.
\textsuperscript{136} \textit{Id.}
diligence.\textsuperscript{137} It specifically recommends public reporting, unlike the GP and the 2011 MNE Guidelines.\textsuperscript{138}

Annex II, the “Model Supply Chain Policy,” provides instructions on how to avoid human rights impacts.\textsuperscript{139} It identifies the potential serious abuses associated with extraction, transport, and trade of minerals, including: torture, forced labor, the worst forms of child labor, other gross human rights violations, war crimes or other serious violations of international humanitarian law, crimes against humanity, or genocide.\textsuperscript{140} The concept of serious abuses is repeated in the Supplements.\textsuperscript{141} The OECD Guidance calls on businesses to immediately suspend or discontinue working with suppliers that are implicated in serious abuses.\textsuperscript{142} Other HRDD instruments tend to see disengagement as a last resort,\textsuperscript{143} but in the context of operations in conflict or weak governance zones, the potential for mitigation is likely to be more limited than in other business contexts, justifying recourse to disengagement at an earlier stage.

Finally, Annex III sets out “Risk Mitigation Measures and Suggested Indicators for Measuring Improvement.”\textsuperscript{144} The risk mitigation measures include ensuring that security staff is trained in accordance with the United Nations Voluntary Principles on Security and Human Rights,\textsuperscript{145} minimizing the exposure of small-scale miners to abuses,\textsuperscript{146} and informing authorities of suspicious behavior.\textsuperscript{147} In terms of measuring improvement, Annex III largely uses indicators from the Global Reporting Initiative, such as its “Indicator Protocols Set: Human Rights, Mining and Metals Sector Supplement.”\textsuperscript{148}

\textsuperscript{137} Id. at 17, 19.  
\textsuperscript{138} Id. at 19.  
\textsuperscript{139} Id. at 20.  
\textsuperscript{140} Id. at 20–21.  
\textsuperscript{141} Id. at 35; id. at 31–60 (“Supplement on Tin, Tantalum and Tungsten”); id. at 61–118 (“Supplement on Gold”).  
\textsuperscript{142} Id. at 21.  
\textsuperscript{143} OECD, Guidelines, supra note 7, at 25.  
\textsuperscript{144} OECD, Guidance, supra note 9, at 25.  
\textsuperscript{145} Id. at 25–26, 83, 92; see What are the Voluntary Principles, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (Dec. 20, 2000), http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/.  
\textsuperscript{146} OECD, Guidance, supra note 9, at 27.  
\textsuperscript{147} Id. at 28.  
\textsuperscript{148} Id. at 27, 29; see GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/Pages/default.aspx (last visited Apr. 8, 2016).
The two supplements give detailed guidance on processes related to particular minerals. The aim of the supplements is to regulate the entire process relating to the mining and processing of those categories of minerals. The supplements treat smelting as a pivot point: downstream (post-smelting) companies’ obligations are less detailed and specific because of the difficulty of tracing minerals post-smelting. The supplements specifically require independent third-party audit of the smelter’s or refiner’s due diligence practices as the fourth step of the overall due diligence requirements. The main obligation on downstream companies is to identify and review due diligence processes of smelters/refiners and assess whether they adhere to the OECD Guidance. The focus is on internal controls over immediate suppliers. Upstream (pre-smelting) companies are expected to have greater knowledge of circumstances of extraction, transport, and trade of the minerals in which they deal. Additionally, they are expected to have internal controls of minerals in their possession and to establish on-the-ground assessment teams for generating information on the qualitative circumstances of mineral extraction, trade, handling, and export from conflict-affected and high-risk areas.

Moreover, the 3T Supplement includes an Appendix, the “Guiding Note for Upstream Company Risk Assessment.” The Appendix sets out a series of red flags concerning the source of minerals which trigger due diligence, such as the purported source of minerals from an area with few known deposits, or the possibility that non-state armed groups or security forces have committed violations of human rights. It then sets out specific obligations, which parallel the five due diligence headings in the general OECD Guidance, often including distinctive guidance for

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149. OECD, Guidance, supra note 9, at 31–60, 61–118.
150. Id.
151. Id. at 33.
152. Id. at 47–51, 106–10.
153. Id. at 33. Refer to the conflict-free smelter program of the Conflict Free Sourcing Initiative for an example of industry attempts to identify smelters that can certify that the minerals they process are not conflict minerals. See Conflict Free Sourcing Initiative, http://www.conflictfreesourcing.org/ (last visited Apr. 8, 2016).
154. OECD, Guidance, supra note 9, at 33.
155. Id. at 58.
156. Id. at 55–56, 80–81.
157. Id. at 54–60.
158. Id. at 32–33.
159. Id. at 35.
upstream companies, smelters/refiners, and downstream companies.\footnote{160} For upstream companies, the key element of the guidance is to establish chain of custody or traceability for minerals.\footnote{161} In some cases, downstream companies are encouraged to use their leverage over suppliers to ensure conflict-free supply chains as a method of risk management.\footnote{162}

The Gold Supplement sets out differing obligations in relation to gold originating from large-scale mines, artisanal and small-scale miners (ASM),\footnote{163} and recyclable gold.\footnote{164} Development issues relating to ASM gold are addressed in an Appendix to the Gold Supplement, “Suggested measures to create economic and development opportunities for artisanal and small-scale miners.”\footnote{165} ASM are identified as being particularly vulnerable to serious abuses listed in Annex II to the main OECD Guidance as well as to other adverse impacts.\footnote{166} They are also especially vulnerable to exclusion from legitimate trade by downstream companies seeking to avoid conflict minerals.\footnote{167} Instead of seeking to eliminate ASM gold from the supply chain entirely, however, businesses are exhorted to seek legalization and formalization of ASM in order to provide opportunities for legal trade in gold.\footnote{168}

\footnote{160. See id. at 31–60.}
\footnote{161. Id. at 38.}
\footnote{162. Id. at 45.}
\footnote{163. Id. at 65. The OECD Guidance defines artisanal and small-scale miners (ASM), as follows: “[F]ormal or informal mining operations with predominantly simplified forms of exploration, extraction, processing, and transportation. ASM is normally low capital intensive and uses high [labor] intensive technology. “ASM” can include men and women working on an individual basis as well as those working in family groups, in partnership, or as members of cooperatives or other types of legal associations and enterprises involving hundreds or even thousands of miners. For example, it is common for work groups of 4–10 individuals, sometimes in family units, to share tasks at one single point of mineral extraction (e.g., excavating one tunnel). At the organisational level, groups of 30–300 miners are common, extracting jointly one mineral deposit (e.g., working in different tunnels), and sometimes sharing processing facilities.” Id.}
\footnote{164. See id. at 62–64.}
\footnote{165. See id. at 114–18.}
\footnote{166. The Marange diamond fields in Zimbabwe provide one example of the vulnerability of ASM in weak governance zones. There, continuing allegations of human rights abuses against ASM by government forces was a key factor in the decision of the NGO Global Witness to cease involvement in the Kimberley Process Certification Scheme for diamonds. See Holly Cullen, Is There a Future for the Kimberley Process Certification Scheme for Conflict Diamonds?, 12 MACQUARIE L. J. 61, 74–77 (2013).}
\footnote{168. See OECD, Guidance, supra note 9, at 114–18.}
IV. HARDENING THE SOFT LAW: THE INTERACTION OF THE OECD GUIDANCE WITH § 1502 OF THE DODD-FRANK ACT

The OECD Guidance is not binding on companies. Nor are states obliged to incorporate the OECD Guidance or the MNE Guidelines into their domestic law. These measures operate as soft law, which creates no legally enforceable obligations. International measures directed at improving respect for human rights by transnational businesses, including all forms of HRDD, have all been soft law. Without legal enforcement, soft law relies on forms of social pressure, although these can have significant impacts. Social pressure can include efforts of civil society to publicize failures of business to respect human rights, or negative effects on “reputational capital” for businesses.

It is nonetheless possible for individual states to impose legal sanctions on non-conforming businesses by means of domestic law incorporating HRDD principles. For example, the Kimberley Process Certification Scheme for conflict diamonds relies on participant states incorporating the scheme’s principles into their domestic law. Federal law in the United States now incorporates the OECD’s idea of due diligence to prevent the trade in conflict minerals into securities regulation law. In 2010, as part of the wide-ranging financial service industry reforms adopted in the Dodd-Frank Act, §1502 of the Act, which amended §13 of the Securities Exchange Act of 1934, required the Securities and Exchange Commission (SEC) to adopt regulations requiring dis-


170. See id.


174. See Stevalman, supra note 49, at 144.

175. See Backer, supra note 52, at 77; Olsen & Sorensen, supra note 172, at 33.


closure by companies regulated by the SEC of any use of conflict minerals from the DRC and neighboring countries.179

Where companies are unable to certify that their mineral supply chains are conflict-free, they must report on due diligence measures taken to eliminate conflict minerals from their supply chains.180 The SEC adopted the Final Rule setting out the reporting requirements in 2012.181 Broadly, the reporting obligation includes three steps: determination of whether the Final Rule applies to the company, a reasonable country of origin inquiry, and due diligence reporting.182

Pursuant to the first step, the Final Rule applies to companies that file reports under § 13(a) or § 15(c) of the Exchange Act,183 and manufacture or contract to be manufactured products for which conflict minerals are necessary to the functionality or production of the product.184 The idea of “contracting to be manufactured” is intended to exclude pure retailers, who merely add their branding to a generic product.185 There is no minimum content requirement, only that the presence of the mineral must be “necessary.”186

The second step, the reasonable country of origin inquiry, is directed to the question of whether the conflict minerals originated in the DRC or the listed neighboring countries, or are from scrap or recycled sources.187 The reporting company may base the determination on “reasonably reliable representations” from the facility which processed the minerals, or from the reporting company’s immediate suppliers.188 The company must indicate where the conflict minerals were processed and demonstrate that the minerals did not originate in the DRC or neighboring countries, or that they came from recycled or scrap sources.189 In this inquiry, the Final Rule directs companies to be consistent with

181. Id.
182. Id. at 56285, 56310, 56316.
183. Id. at 56287.
184. Id. at 56279.
186. Id. at 291.
188. Id. at 56312.
189. Id.
the OECD Guidance, looking for “red flags” indicating the potential presence of minerals originating in the DRC or neighboring countries.\textsuperscript{190} If the results of the second step inquiry indicate that the company is using conflict minerals from the DRC or neighboring countries, the company must proceed to the third step, due diligence.\textsuperscript{191} If, however, the company has concluded that there are no conflict minerals from the DRC or neighboring countries in its supply chain, it must provide a brief explanation for that conclusion.\textsuperscript{192}

The third step, where necessary, is creation of a Conflict Minerals Report showing the due diligence measures taken with respect to sourcing and supply chain of minerals.\textsuperscript{193} Again, the OECD Guidance is recommended as a framework for the due diligence standard.\textsuperscript{194} A private sector audit is required for this step.\textsuperscript{195} The report must include a description of facilities that processed the conflict minerals used in the company’s products, including efforts to determine the origin of the minerals.\textsuperscript{196} Companies have a transitional period of two or four years, depending on size, to be able to determine the origin of the minerals.\textsuperscript{197} The company is to declare whether its supply chain is “DRC conflict free”; the Final Rule does not allow for findings of “DRC conflict undeterminable.”\textsuperscript{198} The supply chain may still be considered conflict free if the minerals come from the DRC or a neighboring country, but the company is able to prove that the sourcing of the minerals did not finance armed groups.\textsuperscript{199}

The enactment of § 1502 has not been universally popular, with some skepticism raised about the appropriateness of using corporate regulation, and in particular reporting requirements, to control the flow of conflict minerals.\textsuperscript{200} Some have argued that the conflict minerals reporting regime is outside the proper scope of

\begin{itemize}
\item \textsuperscript{190} Id. at 56312–13.
\item \textsuperscript{191} Id. at 56320.
\item \textsuperscript{192} Id. at 56285.
\item \textsuperscript{193} Id. at 56281.
\item \textsuperscript{195} Conflict Minerals: Final Rule, C.F.R. at 56320.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id. at 56321–22.
\item \textsuperscript{198} Id. at 56322.
\item \textsuperscript{199} Id. at 56321. The “undeterminable” category is only available during the transitional period of two or four years. Id. at 56321–22.
\item \textsuperscript{200} See, e.g., Raj, \textit{supra} note 178, at 1012 (noting concerns about the extent to which companies have been complying with analogous environmental disclosure requirements).
\end{itemize}
functions of the SEC.\textsuperscript{201} In particular, it has been argued that disclosure of use of conflict minerals is not material information for investors.\textsuperscript{202}

This criticism, however, fails to take into account the growth in ethical investment. Ethical investors regard matters such as environmental sustainability, respect for human rights, basic labor standards, and the absence of state conflict as material matters for investment decisions.\textsuperscript{203} They regard these matters as potentially creating risks for the investment,\textsuperscript{204} and more broadly, for corporate reputation and the social license to operate.\textsuperscript{205}

Other concerns come from those who may be described as friendly critics. Some key companies, such as Panasonic and Microsoft, have not joined the chorus of disapproval of the § 1502 regime, demonstrating some support for efforts to control conflict minerals in the supply chain.\textsuperscript{206} Although they do not reject the principle of corporate reporting on use of conflict minerals,\textsuperscript{207} they join those hostile to § 1502 in criticizing the cost of the regime for companies,\textsuperscript{208} and predict that companies will seek to avoid use of minerals from the Great Lakes region of Africa at a time when the exploitation of the region’s mineral wealth is crucial to economic development for those states.\textsuperscript{209}

Some are concerned that despite the support of the OECD for the § 1502 reporting regime, the regime is not a manifestation of the underlying principles of the due diligence process in the OECD Guidance.\textsuperscript{210} Sarfaty, an advocate of using securities law to promote sustainability, including the avoidance of conflict minerals, suggests that a better way forward would be to use the capacity of the SEC to adopt disclosure guidance concerning information in the public interest, rather than binding rules, to encourage com-

\textsuperscript{201} See, e.g., Woody, \textit{supra} note 179 (arguing that the conflict minerals reporting provision in Dodd-Frank goes beyond the scope of SEC enforcement obligations).

\textsuperscript{202} \textit{Id.} at 1340–42; Nanda, \textit{supra} note 185, at 303.

\textsuperscript{203} Sarfaty, \textit{supra} note 173, at 118–20.

\textsuperscript{204} \textit{Id.} at 114–15.

\textsuperscript{205} \textit{Id.} at 124–25.

\textsuperscript{206} \textit{Id.} at 113.

\textsuperscript{207} \textit{Id.} at 102–05 (noting that there are numerous national measures which include sustainability-related reporting).

\textsuperscript{208} See Nanda, \textit{supra} note 185, at 301 (describing difficulties companies face in meeting requirements); Woody, \textit{supra} note 179, at 1332–35.

\textsuperscript{209} Woody, \textit{supra} note 179, at 1345–46 (describing the deterrent effect of the conflict minerals reporting regime as a \textit{de facto} embargo, although this is probably an overstatement); Nanda, \textit{supra} note 185, at 304 (noting another commentator using the same description).

\textsuperscript{210} Nanda, \textit{supra} note 185, at 297–98 (citing European NGO Euractiv).
panies to monitor supply chains and know where their mineral supplies originate. Such guidance would follow the model of recently adopted measures on climate change.

The requirements imposed by the SEC regulations were seen by some companies as sufficiently burdensome that they instituted a legal challenge, arguing that the Final Rule violated provisions of the Administrative Procedure Act; that it exceeded the competence of the SEC under the Exchange Act, and that the SEC had failed to take into account considerations mandated by the Act; and that § 1502 violated the First Amendment. On July 23, 2013, the United States District Court for the District of Columbia rejected the challenge.

The District Court had rejected all the arguments made by plaintiffs, most of which amounted to claims that the SEC had not engaged in a proper cost-benefit analysis. In particular, the district court judgment emphasized that the contents of the regulations were specifically mandated by § 1502. It also found that the SEC had fully considered all factors required by other parts of the Act, and that the SEC had acted reasonably in not including a de minimis requirement for the amount of conflict minerals in a product. Most of the arguments against the Final Rule challenged the breadth of the SEC’s exercise of discretion. The plaintiffs also argued, however, that the Final Rule’s requirement to declare supply chains as conflict free or not, and to publish the report, was contrary to the guarantee of freedom of speech in the First Amendment.


216. Id. at 70–72.

217. Id. at 46, 55–56.

218. Id. at 46.

219. Id. at 59.

220. Id. at 66.

221. See generally Nat’l Ass’n of Mfrs., 956 F. Supp. 2d at 43.

The plaintiffs appealed to the United States Court of Appeals, and the appeal was allowed in part on April 14, 2014.\textsuperscript{223} While the District Court rejected the constitutional challenge, the Court of Appeals upheld it, finding that the requirement of describing products as not “DRC conflict free” in reports was an instance of compelled speech.\textsuperscript{224}

The SEC has successfully requested a re-hearing of the appeal, partly based on subsequent decisions of the Court of Appeals, which suggest that the publication requirement may not amount to compelled speech.\textsuperscript{225} The Court of Appeals itself was uncertain as to whether the requirement resulted from the SEC’s discretion, as exercised in drafting the Final Rule, or from § 1502 itself.\textsuperscript{226} It therefore held that § 1502 was unconstitutional only if it was the source of the publication requirement.\textsuperscript{227} Otherwise, only the parts of the Final Rule requiring publication of a designation of products as conflict mineral free or not were to be treated as unconstitutional.\textsuperscript{228}

Two weeks after the Court of Appeals judgment, the SEC issued a statement responding to the ambiguity in the judgment.\textsuperscript{229} It confirmed that reports were still legally required, but that there was no requirement to name products as “DRC conflict free,” “not found to be DRC conflict free,” or “DRC conflict undeterminable,” although companies were free to use that language if they wished.\textsuperscript{230} The statement also specified that, nonetheless, companies should disclose their reasonable country of origin inquiry and if submitting a conflict minerals report, describe their due diligence measures.\textsuperscript{231} More significantly, the statement notified com-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{223} Id.
  \item \textsuperscript{224} Id.
  \item \textsuperscript{225} The United States Court of Appeals for the District of Columbia Circuit granted the Securities and Exchange Commission’s (SEC) petition to re-hear the case in light of the decision in American Meat Institute v. U.S. Department of Agriculture, 760 F. 3d 18 (D.C. Cir. 2014), where the Court of Appeals ruled that regulations requiring country of origin labels on meat products were constitutional, as they required only factual and non-controversial information, therefore justifying a lower standard of scrutiny for compliance with the First Amendment as it applies to commercial speech. See Nat’l Ass’n of Mfrs. v. SEC, 1:13-cv-00635-RLW, Nov. 18, 2014.
  \item \textsuperscript{226} See generally Nat’l Ass’n of Mfrs., 956 F. Supp. 2d at 58, n.15.
  \item \textsuperscript{227} Id. at 51.
  \item \textsuperscript{228} Nat’l Ass’n of Mfrs., 748 F.3d at 373, n.14.
  \item \textsuperscript{229} See Keith F. Higgins, Director, SEC Division of Corporation Finance, Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule (Apr. 29, 2014), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994.
  \item \textsuperscript{230} Id.
  \item \textsuperscript{231} Id.
\end{itemize}
\end{footnotesize}
panies that they did not need to perform an independent private sector audit unless they voluntarily chose to use the term “DRC conflict free” to describe their products in their reports.232

Opinions on the quality of the first reports filed under the Final Rule vary, from NGO Global Witness’s critical view of the standard of reporting,233 to one legal commentator’s broadly positive view about the number and quality of reports.234 Many companies filing reports used, or appeared to use, the template developed by the Conflict Free Sourcing Initiative,235 a body founded by members of the Electronic Industry Citizenship Coalition and the Global e-Sustainability Initiative, which provides resources to companies for addressing issues of conflict minerals in their supply chains.236 The reports contained considerable variation in their approaches to the reasonable country of origin inquiry,237 and Global Witness described many of the reports as “minimal” in this respect.238 Most of the conflict mineral reports were based on the OECD Guidance,239 but Global Witness and Amnesty International’s comprehensive review of the first round of reports concluded that over three-quarters of the reports did not include the level of detail on due diligence required by the OECD Guidance.240 Of the over 1,000 companies which filed full conflict minerals reports, only four included the independent private sector audit.241

While a domestic legislative and regulatory framework such as § 1502 of the Dodd-Frank Act and the regulations adopted under it provide a binding enforcement mechanism for the otherwise non-binding OECD Guidance, in practice there are risks with the approach. The very stringency of the regulatory framework may

232. Id.
235. Id. The template may be found at CFSI, Conflict Minerals Reporting Template, http://www.conflictfreesourcing.org/conflict-minerals-reporting-template/.
237. Goodman, supra note 234.
239. Goodman, supra note 234.
encourage companies to avoid sourcing minerals from the Great Lakes region, which deprives miners in the region of opportunities for development, as recognized particularly in the Gold Supplement.\textsuperscript{242} The Expert Group on DRC, established by the U.N. Security Council as part of the sanctions regime in DRC, have also expressed concerns to this effect.\textsuperscript{243} Slow progress on certification of § 1502-compliant smelters within the DRC has led to closure of segments of the DRC mining industry for extended periods of time, and to companies avoiding DRC minerals.\textsuperscript{244}

While the framework has a significant extraterritorial reach because of the number and size of companies subject to SEC jurisdiction,\textsuperscript{245} it is still a model adopted only by the United States; few indications at the time of writing suggest that similar legislation will be adopted by other states that are home to large numbers of companies that may have conflict minerals in their supply chains.\textsuperscript{246} The financial regulators in other states may not have the resources to implement a regulatory scheme similar to the SEC’s regulations. Finally, § 1502 only addresses conflict minerals in one part of the globe and would have to be amended to extend to other circumstances where conflict minerals might be found.\textsuperscript{247}

Another key actor in the potential regulation of the trade in gold and 3T minerals,\textsuperscript{248} the European Union, is divided on the ques-

\textsuperscript{242} See Sarfaty, supra note 173, at 110–11.


\textsuperscript{245} For criticism on this point, see Woody, supra note 179, at 1342–44.

\textsuperscript{246} On March 5, 2014, the Commission of the European Union proposed legislation on 3T minerals and gold that differed substantially from the Dodd-Frank Act. It instead would provide for a voluntary self-certification system. See Arthur Neilsen, \textit{EU Draft Law on Conflict Minerals Fails to Satisfy Campaigners}, \textit{GUARDIAN DEVELOPMENT NETWORK} (Mar. 5, 2014), http://www.theguardian.com/global-development/2014/mar/04/eu-draft-law-conflict-minerals. It also would apply only to smelters, not throughout the supply chain, and in particular, not to end-users. \textit{Id.} It is not clear how much it follows the OECD \textit{Guidance}, and it certainly does not extend as far as the \textit{Guidance} in covering the entire supply chain.

\textsuperscript{247} See Neilsen, supra note 246.

\textsuperscript{248} See Sarfaty, supra note 173, at 103 (noting that the European Union and several of its member states already require social and environmental reporting).
tion of mandatory reporting of due diligence in the elimination of conflict minerals from supply chains.249

The draft regulation published in March 2014 would provide only for voluntary self-certification, despite calls by the European Parliament for the European Union to follow the Dodd-Frank Act model.250 The draft regulation focuses on ensuring due diligence at the stage of smelting or refining,251 reasoning that this is the last stage at which the origins of minerals can be accurately traced.252 Civil society groups, including Global Witness, have expressed disappointment that the draft regulation relies on self-certification, and does not impose legal liability.253 The European Commission has said, however, that its proposed measure is intended to encourage mining development as well as responsible sourcing of minerals.254 The proposal is still working its way through the European Union legislative process.255

In Canada, a private member’s bill was introduced in the federal parliament in 2014 by an opposition member of parliament (MP), but, lacking government support, it was defeated.256 This bill would have imposed due diligence requirements on extraction and


250. Id. at 8.

251. Id. at 15.

252. Id. at 9.

253. Neilsen, supra note 246.

254. Id.; see also Joint Communication To The European Parliament and The Council: Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas Towards an Integrated EU Approach, JOIN (2014), 8 final (Mar. 5, 2014) (noting the EU proposed measures that serve as incentives for companies to promote responsible sourcing).


exploitation of minerals from the Great Lakes region of Africa.\textsuperscript{257} While not explicitly referring to the OECD Guidance, the due diligence steps in § 3(3) resemble those of the OECD.\textsuperscript{258} Section 4 of the bill required reporting on due diligence and publishing those reports, similar to the Dodd-Frank Act requirements.\textsuperscript{259} The reporting and publication requirements, however, do not require the designation of products as free or not free of conflict minerals, and therefore the bill would probably have avoided a challenge that it violated freedom of expression under § 2(b) of the Canadian Charter of Rights and Freedoms.

Finally, it is worth noting that the DRC adopted a law in 2012 requiring mining companies to apply the OECD Guidance due diligence standard.\textsuperscript{260} Rwanda and Burundi have also integrated the OECD Guidance into their national legislation.\textsuperscript{261}

\section*{V. Implementation of the OECD Guidance}

The OECD Guidance is implemented in stages, the first of which involved pilot programs implementing the two supplements.\textsuperscript{262} The 3T pilot ran from April 2011 to April 2012, following a preliminary phase from December 2010 to March 2011.\textsuperscript{263} It appears that actors in the 3T mining sector were motivated to engage with the OECD Guidance partly because of the Dodd-Frank Act requirements on due diligence.\textsuperscript{264} The pilot project involved the integration of due diligence into national legal frameworks.\textsuperscript{265} Beyond the legal integration of due diligence, the pilot emphasized certification of minerals, particularly at the smelting stage, and other

\begin{thebibliography}{99}
\bibitem{257} Id.
\bibitem{258} See id. § 3(3).
\bibitem{259} Id. § 4.
\bibitem{261} OECD, 2014 Annual Report, supra note 113, at 115.
\bibitem{263} See OECD, Upstream Report, supra note 262, at 11.
\bibitem{264} Id.
\bibitem{265} Id. at 15.
\end{thebibliography}
supply chain control mechanisms. Ongoing challenges in fulfilling the five steps of due diligence set out in the OECD Guidance include: the need for due diligence principles to be available in local languages, limited awareness of the principles in some areas, lack of risk management strategies, and inadequate audit and reporting processes.

With respect to downstream (post-smelting) companies, the report on the 3T pilot project noted significant progress in adopting company policies to incorporate the due diligence principles, but that several participating businesses found difficulties in communicating expectations to suppliers. Furthermore, many companies involved in the pilot had difficulties identifying the smelters who supplied them and obtaining accurate information concerning sources. Difficulties in obtaining accurate information also affected the ability of companies to design risk management programs. Downstream companies are those most likely to be affected by the Dodd-Frank Act requirements. As a result, they tend to rely on industry initiatives to demonstrate that they are auditing their processes adequately. The pilot projects established, if nothing else, that the process of ensuring due diligence in accordance with the OECD Guidance will take many years and require the engagement of every actor in the mining process.

Following the 3T pilot program, the OECD began contributing to the development of best practice guides on due diligence in the 3T supply chain. A draft guide was presented to the 2013 meeting of stakeholders in the International Conference on the Great Lakes Region, OECD, and to the United Nations. It called on businesses to make further attempts to obtain information about

266. *Id.* at 27–34.
267. *Id.* at 35.
268. *Id.* at 40.
269. *Id.* at 41–42.
271. *Id.* at 33.
272. *Id.* at 39–41.
273. *Id.* at 45.
274. See *id.* at 50, 55.
275. *Id.* at 46–47.
277. See *id.*
the origin of minerals for which they have incorrect or incomplete information. At that point, businesses would classify the minerals by the degree of risk that transacting in them may contribute to conflict. For minerals that present a low risk, businesses may transact normally, while maintaining communication with stakeholders. For minerals whose origin is indeterminate or where there is a risk of contributing to conflict, but which may be mitigated, businesses are expected to improve due diligence processes and, in the latter case, to notify relevant authorities. Where there is a risk of contributing to conflict, businesses should temporarily suspend dealings with relevant suppliers, notify relevant authorities, and work with authorities and stakeholders to improve due diligence. In all cases, businesses are expected to report on their due diligence activities. Although the draft does not mention the Dodd-Frank Act, an agreement at this level on what constitutes best practices in due diligence for mineral supply chains would likely be taken into account by the SEC in determining whether companies’ filings under § 1502 met their requirements.

The gold implementation program launched in May 2013. It established a working group on audit practices, as well as a “hub” on artisanal and small-scale mining. These groups focus on providing training and support for implementation of the OECD Guidance. A number of baseline assessments on gold supply chains are being undertaken in the DRC, Uganda, Dubai, and the United Nations.

278. Id. at 4.
279. Id.
280. Id. at 5.
281. Id. at 6.
282. Id. at 7.
283. Id. at 9–10.
284. OECD, 2013 Annual Report, supra note 14, at 111.
Arab Emirates, and four baseline assessments have already been published—three in the DRC and one in Uganda.

The OECD’s Investment Committee and Development Assistance Committee will oversee implementation of the OECD Guidance in the longer term. A Multi-Stakeholder Forum and a Multi-Stakeholder Steering Group will support these committees in this task. The Multi-Stakeholder Forum is of particular importance, as it will approve work plans and reports on implementation, as well as draft recommendations concerning the OECD Guidance.

VI. Assessment of the OECD Guidance and the Use of HRDD for Conflict Minerals

The HRDD instruments—the GP, the 2011 MNE Guidelines, and the OECD Guidance—are recent, and there is as yet little assessment of their impact on corporate behavior, particularly in the mining sector. Reports of the U.N. Working Group suggest that on a global level there has been little interest from businesses in taking up the GP. The OECD, meanwhile, is concentrating on dissemination of the due diligence principles in the 2011 MNE Guidelines and providing more context-specific guidance, called the “proactive agenda.” By 2013, some OECD member states had begun developing national guides for due diligence.

The OECD’s 2013 and 2014 annual reports also note a rise in specific instances relating to risk-based due diligence, but the National Contact Points are beginning to include recommenda-
tions on due diligence in their final statements. An interesting early development is that at least one National Contact Point regards a business’s failure to cooperate with the National Contact Point regarding a specific instance to be a failure of due diligence.

The 3T pilot program examined on a limited scale the changes in business behavior wrought by the OECD Guidance. There seems to be a noticeable impact, but behind that impact is pressure resulting from § 1502 of the Dodd-Frank Act. An audit report commissioned by the ICGLR compared the OECD Guidance with other programs for reducing abuses in the mineral supply chain, although most of the comparators are run by industry groups or civil society bodies such as Fairtrade. The OECD Guidance compares favorably for a range of issues covered, with environmental matters the only ones not directly addressed.

Although it is too early to determine the impact of HRDD, it has structural features that give cause for optimism, particularly in the area of conflict minerals. Unlike previous initiatives that were

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297. See e.g., OECD, 2012 Annual Report, supra note 294, at 49–50, 71–73; id. at 50–52 (the final statement by the Norwegian National Contact Point in relation to a specific instance involving Germaq); id. at 93–98 (the final statement by the Norwegian National Contact Point in relation to a specific instance involving Intex Resources Nickel Mining); OECD, 2013 Annual Report, supra note 14, at 94–95 (the statement by the Dutch National Contact Point in relation to a specific instance involving Royal Dutch Shell); id. at 95–96 (statement by the Norwegian National Contact Point in relation to a specific instance involving Norwegian Bank Investment Management); id. at 103–04 (statement by the United States National Contact Point in relation to a specific instance involving American Refining Inc.). With reference to due diligence in the OECD Guidance, see Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, Final Statement by the Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from the Future In Our Hands (Fioh) against Intex Resources ASA and the Mindoro Nickel Project 47 (2011), www.regjeringen.no/upload/UD/Vedlegg/ncp/intex_final.pdf.

298. Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, Final Statement by the Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development against POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway) 23–25 (2013), http://www.responsiblebusiness.no/files/2013/12/nbim_final.pdf [hereinafter NBIM].

299. See OECD, Upstream Report, supra note 262, at 9; OECD, Downstream Report, supra note 262, at 12.

300. See ICGLR Analysis Report, supra note 167, at 21, fig. 3. Fairtrade is revising its standards to bring them into line with the OECD Guidance. Id. at 24. Most of the comparator schemes are regional in scope or only focus on a smaller range of minerals. See also id. at 20, fig. 2. The comparison of audits demonstrates that the OECD Guidance is one of the few approaches to address the entire supply chain, not just upstream or downstream businesses. Id. at 22–24.

301. Id.
state-focused, such as the Kimberley Process.\textsuperscript{302} HRDD focuses on companies that have power to control the supply chain.\textsuperscript{303} Whereas the Kimberley Process focused narrowly on preventing conflict minerals from funding armed groups,\textsuperscript{304} HRDD addresses a wide range of abuses in the mining supply chain.\textsuperscript{305} The ICGLR, on the other hand, developed a regional certification mechanism that focuses on the entire supply chain, and includes human rights standards such as the elimination of the worst forms of child labor.\textsuperscript{306} Nonetheless, like the Kimberley Process, it places obligations on governments rather than business.\textsuperscript{307} Thus, the HRDD instruments recognize that sometimes states cannot or will not act, for example in weak governance zones, and therefore emphasize the need for companies to act instead. The OECD Guidance in particular stresses business action.\textsuperscript{308}

VII. Future Expansion of HRDD: The Irresistible Rise Continues

Given the high profile of conflict minerals in the general media,\textsuperscript{309} it is not surprising that HRDD relating to conflict minerals has been a focus of efforts within the OECD and civil society globally. Pressure continues to be put on actors involved at all points of the supply chain.\textsuperscript{310} NGOs have even called on the OECD to extend the OECD Guidance to the electronics and automobile industries, which are end-users of minerals.\textsuperscript{311} Within the OECD, Canada and Norway have undertaken a joint project to develop a user guide for stakeholder engagement in the whole

\begin{itemize}
\item 302. See Cullen, supra note 166; KPCS Core Document, supra note 176.
\item 303. See Guiding Principles, supra note 3, princ. 14; OECD, Guidelines, supra note 7, Preface, ¶ 1.
\item 304. See KPCS Core Document, supra note 176, § 1. The failure of the Kimberley Process to address human rights abuses in ASM mining in Zimbabwe has been a major focus of critics of the Process, such as the NGO Global Witness, which withdrew from the Process in 2011. See Cullen, supra note 166, at 74–77.
\item 305. See OECD, Guidance, supra note 9, at 14.
\item 306. ICGLR Analysis Report, supra, note 167, at 13–19.
\item 307. Id.
\item 308. OECD, Guidance, supra note 9, at 15.
\item 309. A Google search for news items on “conflict minerals” on August 14, 2015, restricted to items published only in the previous week, produced four pages of results.
\end{itemize}
extractive sector, not just for conflict minerals. Following a public consultation process, the guidance was published in 2016, although it was noted that not all adhering governments endorse the standards in the guidance.

HRDD for conflict minerals, and for extractive industries generally, is only the beginning of the impact of HRDD on supply chain management. The OECD, in cooperation with the Food and Agriculture Organization (FAO) has published guidance on agricultural supply chains. For example, it is developing guidance directed to the financial sector, with a priority on defining when a financial institution investment may be regarded as contributing to adverse impacts. This focus on the financial sector arose from the practice of National Contact Points on the MNE Guidelines. The financial sector may overtake extractive industries as the most frequent subject of specific instances of contribution to adverse impacts, although in 2014 none of the thirty-four new specific instances of adverse impacts related to financial services.

It was not originally clear whether the MNE Guidelines applied to the financial sector, particularly to investment activities. The application of the MNE Guidelines, and particularly HRDD, to Norwegian Bank Investment Management by the Norwegian National Contact Point in a recent specific instance, has removed that uncertainty. The application of the MNE Guidelines to the financial sector was also discussed at the Inaugural Global Forum on Responsible Business Conduct. One of the key points emphasized by the OECD at the forum was that financial institu-

316. NBIM, supra note 298, at 13.
319. For example, a specific instance concerning the financing of a wind farm, brought against a German bank, was rejected on initial examination. See OECD, Financing of a Wind Park Project in Sweden, OECD Responsible Business Conduct, http://mneguidelines.oecd.org/database/instances/se0003.htm (last visited Apr. 7, 2016).
320. NBIM, supra note 298, at 7, 9.
321. OECD, 2014 Annual Report, supra note 113, at 148–151; see also, Global Forum on Responsible Business Conduct, Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship, OECD (June 26–27, 2014) [hereinafter Global Forum, Due Diligence]; Global Forum on Responsible Bus-
tions could and should exercise leverage over businesses with which they invest.\textsuperscript{322} In 2014, manufacturing replaced financial services as the source of the largest number of specific instances before National Contact Points.\textsuperscript{323} This is unsurprising given the heightened profile of poor conditions in outsourced manufacturing after the Rana Plaza disaster,\textsuperscript{324} when over 1,000 people were killed in the collapse of a building housing several factories that supplied global retail.\textsuperscript{325} As part of the OECD’s 2014 annual report on implementation of the MNE Guidelines, it published recommendations of the French and Italian National Contact Points on implementation of the MNE Guidelines in the textile and ready-made garment sector.\textsuperscript{326}

There are also moves towards sector-specific guidance on agriculture, with draft guidance issued for public comment in January 2015.\textsuperscript{327} After a scoping paper presented to a number of OECD Committees in 2012, the OECD established a multi-stakeholder advisory group with the ultimate goal of producing a practical guide for ensuring due diligence throughout agricultural supply chains, as set out in the MNE Guidelines.\textsuperscript{328} The final version of the guidance was published in 2016.

CONCLUSION

From the GP to the OECD MNE Guidelines, HRDD has been established as a coherent framework for business behavior in relation to preventing and mitigating human rights impacts. HRDD establishes that business should go beyond observance of local law, which, in areas with severe risks of human rights impacts, may be insufficiently protective. The key challenges following the adoption of the GP and the 2011 MNE Guidelines are to ensure that HRDD is kept at the forefront of the agenda for the accountability

\textsuperscript{322} Global Forum, \textit{Due Diligence}, supra note 321.
\textsuperscript{327} OECD, \textit{FAO-OECD Guidance for Responsible Agricultural Supply Chains}, supra note 314.
\textsuperscript{328} OECD, \textit{2013 Annual Report}, supra note 14, at 115.
of transnational business and to legitimize it with all relevant stakeholders.

The OECD appears to be the main driver since 2011, much more than the United Nations. The U.N. Working Group that succeeded the Special Representative of the Secretary General has not yet had much impact, and its early reports have generated little enthusiasm from business for taking up the GP. On the other hand, the OECD’s measures on HRDD are increasingly the standard reference point, particularly in the area of conflict minerals, largely thanks to their incorporation into the Final Rule of § 1502 of the Dodd-Frank Act. In addition, U.N. Security Council Resolution 2101 (2013) on Cote d’Ivoire mentions OECD Guidance, encouraging the Ivorian authorities to cooperate with the OECD Guidance implementation program. The due diligence framework used by the U.N. Security Council in relation to the DRC also draws on the OECD’s Guidance: the European Union’s proposed regulation uses the definition of due diligence from the OECD Guidance. Additionally, Articles 4 and 5 of the draft specifically refer to the supply chain due diligence set out in Annex II of the OECD Guidance.

The evolution of HRDD in the area of conflict minerals demonstrates that, even at the intersection of conflict management and post-conflict transition, the trade in conflict minerals represents a specific example of the development of responsible supply chain management by international business. The fact that the OECD is using the lessons from implementation of the OECD Guidance to develop guidelines for other sectors, particularly financial services, reinforces this conclusion. HRDD seems poised to be the main framework for responsible business and the standard against which transnational corporations will be judged for the foreseeable future.

333. Id. at 12–13.