

The Honorable Jay Clayton  
Chairman  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

Vanessa A. Countryman  
Secretary  
U.S. Securities and Exchange Commission,  
100 F Street NE  
Washington, DC 20549-1090

February 3, 2020

**Re: Comments on Proposed Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (File No.: S7-22-19) and Proposed Amendments to Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (File No: S7-23-19)**

Dear Chairman Clayton and Secretary Countryman:

I am the Samuel D. Thurman Professor of Law at the University of Utah's S.J. Quinney College of Law where I teach corporate social responsibility and human rights, constitutional law, international human rights law, international environmental law, and civil procedure. My recent scholarship has appeared in the *California Law Review*, the *Michigan Journal of International Law*, the *New York University Journal of Law and Policy*, and the annual proceedings of the American Society of International Law. I was Interim Director of the Tanner Center for Human Rights at the University of Utah. Currently, I serve on the Executive Board of the American Bar Association Center for Human Rights. I am a member of the Global Business and Human Rights Scholars Network.

I write to submit the following comment in response to the Securities and Exchange Commission's proposed rulemakings published in the federal register on December 4, 2019 (84 FR 66518 and 84 FR 66458) based on my research on the important role shareholder proposals play in improving business performance.

My research has found that smaller investors have effectively and efficiently identified material human rights and environmental concerns about business operations through the use of shareholder proposals in recent years. Shareholder proposals put forward by smaller investors have garnered support after resubmission and have resulted in improved human rights policies and better practices on the part of business enterprises to reduce human rights risks. I have researched the impact of business enterprises on human rights for over a decade. I have interviewed investor members of the *Interfaith Center on Corporate Responsibility* and the leadership *As You Sow*, organizations that aid shareholders interested in mitigating risks to human rights. I have reviewed a decade of shareholder proposals raising human rights issues in different industry sectors. I have learned that many of the smaller investors, aided by shareholder advocacy organizations, provide an important service to the business community by indicating when human rights risks may pose a reputational risk to a business. These investors serve to signal which issues are becoming salient.

The shareholder proposal process is a cost effective way for corporate management and boards to obtain information about changing shareholder priorities and concerns. Other more costly means of pressing shareholder priorities, such as litigation, campaigns or boycotts, are far less effective for addressing shareholder concerns and potentially more expensive for management. Shareholder resolutions have played an important role in promoting change and have contributed to companies addressing some of the most challenges issues of

our time including climate change. Other resolutions have raised human rights risks and have resulted in the creation of policies and grievance procedures.

The new proposed rule will effectively silence a significant shareholder voice. As companies increasingly influence democracy by pouring money into politics, shareholder voice through proposals remains one small way for the investing public to have a voice in the governance of publicly traded companies. The proposed rule risks closing yet another one of the very few avenues for participating in an institution that possess more power in society with less accountability to society. For these reasons, I urge you to reject the proposed rule.

Thank you for your time and attention.

Sincerely,  
/S/  
Erika George

## **SHAREHOLDER ACTIVISM AND STAKEHOLDER ENGAGEMENT STRATEGIES: PROMOTING ENVIRONMENTAL JUSTICE, HUMAN RIGHTS, AND SUSTAINABLE DEVELOPMENT GOALS**

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### **ABSTRACT**

The United Nations 2030 Agenda for Sustainable Development is an ambitious “plan of action for people, planet and prosperity” which seeks to promote peace and eradicate poverty. The Agenda’s goals cannot be reached without private sector participation and changes to certain business practices that contribute to adverse environmental and human rights impacts. When natural resources are managed responsibly the resulting economic development can help to eradicate poverty. However, when natural resources are managed poorly, certain extractives industry sector practices can generate or exacerbate human rights abuses, environmental degradation, corruption, and conflict. Fossil fuels are connected to the changing climate. The practices of the extractives industry sector and our patterns of consumption are implicated in the expected adverse social impacts and environmental injustices associated with the changing climate such as displacement and forced migration. For the Sustainable Development Goals (SDGs) set forth in the Agenda for Sustainable Development to be reached by 2030, action on climate change and patterns of corruption will require pressure from the public as well as partnership with the private sector. This paper explores the role of economic actors and public/private multi-stakeholder initiatives as partners in promoting action on climate and curbing corruption to protect human rights. It plots points of convergence between the SDGs and the priorities of socially responsible investors, the efforts of human rights and transparency initiatives regulating the extractives industry sector, and

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global principles intended to guide responsible business conduct. It explains how certain complementary points of convergence could create opportunities for business enterprises to address environmental and social challenges through aligning business incentives with the aims of the SDGs. First, the paper will provide an analysis of selected international law, policy, and governance instruments relevant to achieving the SDGs with reference to the role of the extractive industry sector in posing risks to human rights and environmental quality. The human right to a healthy environment and the responsibility of business enterprises to respect human rights is also addressed. Next, the paper will present examples of increasing investor interest in environmental and social issues examining shareholder proposals put forward by institutional investors seeking information about the financial implications of these issues for firms. The paper will then offer an overview of multi-stakeholder and extractive industry initiatives that provide an institutional framework for managing corruption and conflict. Finally, the paper concludes with a call for a consideration of shared values solutions to challenges and an increased appreciation of a range of ways to advance the SDGs by creating aligned incentives for economic actors.

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## INTRODUCTION

Until the 2018 decision of the Supreme Court of the United States in *Jesner v. Arab Bank* foreclosed access to remedy for alleged human rights violations involving foreign firms,<sup>1</sup> victims of human rights violations were able to bring legal actions in the United States against major foreign and domestic multinational oil corporations for a range of human rights violations around the world under the jurisdiction of the Alien Tort Statute (ATS).<sup>2</sup> Often, environmental activists were victims of

<sup>1</sup> *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1397 (2018) (holding Alien Tort Statute does not grant U.S. jurisdiction over foreign corporations for violations of the laws of nations).

<sup>2</sup> *See, e.g., Mastafa v. Chevron Corp.*, 770 F.3d 170, 175 n.1 (2d Cir. 2014); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009); *Botowo v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1246

human rights violations involving business enterprises. For example, Royal Dutch Shell Oil was sued for its alleged involvement in human rights violations associated with a Nigerian pipeline project.<sup>3</sup> The conduct of ExxonMobil in Indonesia led to a lawsuit alleging human rights abuses.<sup>4</sup> Chevron was sued for its alleged involvement in human rights abuses in Ecuador after it acquired Texaco.<sup>5</sup> Another suit brought against Chevron accused the company of hiring, transporting, and supervising Nigerian security forces who shot protesters at a Chevron offshore oil platform.<sup>6</sup> After acquiring Unocal, Chevron also confronted allegations of complicity in conduct violating human rights—including murder, rape, and corruption in Burma associated with efforts to protect a pipeline.<sup>7</sup> In still another incident, Unocal defended a lawsuit alleging that it engaged in human rights violations in Burma.<sup>8</sup> Other corporations in the extractives sector—natural resources, energy, and oil and gas exploration and production—are facing similar allegations of complicity in putting rights at risk in other countries.

Some of the same companies sued for alleged involvement in human rights violations are now the subject of climate change litigation in the United States and beyond. Several cities and counties in California have sued fossil fuel firms seeking damages and other relief for the costs incurred for adapting infrastructure to address sea level rise.<sup>9</sup> The State

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(N.D. Cal. 2004); *Doe v. Chiquita Brands Int'l, Inc.*, 285 F. Supp. 3d 228, 231–32 (D.C. Cir. 2018); *Doe v. Drummond Co.*, 782 F.3d 576, 580 (11th Cir. 2015); *Suhail Najim Abdullah Al Shimari v. CACI Premier Tech.*, 300 F. Supp. 3d 758, 762 (E.D. Va. 2018).

<sup>3</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000) (including allegations of complicity in torture and the summary execution of environmental activist Ken Saro-Wiwa).

<sup>4</sup> *Complaint, John Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, (D.C. Cir. June 19, 2001) (No. 01-01357).

<sup>5</sup> *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, (S.D.N.Y. 2001).

<sup>6</sup> *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004) (including allegations of human rights abuses); see also David R. Baker, *Chevron to Face Critics at Annual Meeting*, SF GATE (May 28, 2008, 4:00 AM), <http://www.sfgate.com/green/article/Chevron-to-face-critics-at-annual-meeting-3282423.php>.

<sup>7</sup> See generally EARTHRIGHTS INTERNATIONAL, ENERGY INSECURITY: HOW TOTAL, CHEVRON, AND PTTEP CONTRIBUTE TO HUMAN RIGHTS VIOLATIONS, FINANCIAL SECRECY, AND NUCLEAR PROLIFERATION IN BURMA (MYANMAR) (July 2010), <https://earthrights.org/wp-content/uploads/energy-insecurity.pdf> (detailing Chevron's complicity in human rights abuses related to the Yadana pipeline project).

<sup>8</sup> *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000) (including allegations of slavery).

<sup>9</sup> See, e.g., *County of San Mateo v. Chevron*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *Complaint, People v. BP P.L.C.*, No. 17-561370 (Cal. Super. Ct. Sept. 19, 2017); see also, Jeremy Hodges et al., *Climate Change Warriors' Latest Weapon of Choice Is Litigation*, BLOOMBERG (May 24, 2018), <https://www.bloomberg.com/graphics/2018-climate-change-lawsuits/>.

Attorney Generals for New York and Massachusetts—acting in the public interest and to protect the interests of consumers and investors—have opened investigations into fossil fuel companies for failure to make climate risk related disclosures.<sup>10</sup> Investors have brought securities fraud class-action lawsuits against companies contributing to climate change, alleging that failure to disclose climate change risks breached the fiduciary duty the firms owe to them.<sup>11</sup> Activists concerned about the impacts of climate change have appealed to investors to divest from fossil fuels, and are now advocating investment in alternative renewable energy sources.<sup>12</sup>

These challenges involving the business community illustrate the intersections between human rights, environmental protection, social development, and sustainable economic development. While an important driver of economic development, the business community has contributed to a range of environmental problems and related human rights risks. The United Nations Sustainable Development Goals (“SDGs”), also known as the “Global Goals,” provide an opportunity for the business community to be part of the solution.<sup>13</sup> This paper explores the role of economic actors and public/private multi-stakeholder initiatives as partners in accelerating corporate action on climate change and curbing corruption. Addressing these challenges could also serve to protect human rights and promote environmental justice, provided the intersections between these issues are appreciated by the public and policy makers.

The United Nations 2030 Agenda for Sustainable Development is an ambitious “plan of action for people, planet, and prosperity”<sup>14</sup> which seeks to promote peace and eradicate poverty.<sup>15</sup> The Agenda’s goals cannot be reached without private sector participation and changes to

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<sup>10</sup> See, e.g., *Exxon Mobil Corp v. Schneiderman*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018).

<sup>11</sup> See, e.g., *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832 (N.D. Tex. 2018).

<sup>12</sup> See, e.g., Bill McKibben, *The Movement to Divest from Fossil Fuels Gains Momentum*, NEW YORKER (Dec. 21, 2017), <https://www.newyorker.com/news/daily-comment/the-movement-to-divest-from-fossil-fuels-gains-momentum>; Bill McKibben, *Cashing Out from the Climate Casino*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/opinion/finance-global-warming.html>; *Join #DefundDAPL*, DEFUND DAPL, <http://www.defunddapl.org/defund>; Ben Cushing, *As Divestment Movement Grows, Wells Fargo Feels the Heat*, SIERRA CLUB (Aug. 1, 2017), <https://www.sierraclub.org/lay-of-the-land/2017/08/divestment-movement-grows-wells-fargo-feels-heat>.

<sup>13</sup> See, e.g., *Business Solutions for the SDGs: How Private Sector and UN Can Partner to Achieve the Global Goals*, U.N. DEV. PROGRAM (Sept. 17, 2017), <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/09/20/business-solutions-to-the-sdgs-how-private-sector-and-un-can-partner-to-achieve-the-global-goals.html>.

<sup>14</sup> See G.A. Res. 70/1, pmbl., (Sept. 25, 2015).

<sup>15</sup> *Id.*

certain business practices that contribute to adverse environmental and human rights impacts. When natural resources are managed responsibly the resulting economic development can help to eradicate poverty. However, when natural resources are managed poorly, certain practices in the extractives sector can generate or exacerbate human rights abuses, environmental degradation, corruption, and conflict. Fossil fuels are connected to the changing climate. The practices of the extractives industry and our patterns of consumption are implicated in the expected adverse social impacts and environmental injustices associated with the changing climate such as displacement and forced migration. For the SDGs to be reached by 2030, action on climate change and corruption will require not only pressure from the public, but also partnership with the private sector.

First, Part I of this Article offers an overview of the interrelated aspects of human rights, corporate responsibility, and climate change, with reference to the role of the extractives industry sector, particularly firms engaged in oil and gas exploration. It also explains the human right to a healthy environment and the responsibility of business enterprises to respect human rights as set forth in international standards. Next, Part II of this Article will provide an analysis of selected international law, policy, and governance instruments relevant to achieving the SDGs, with particular attention given to firms engaged in oil and gas production. Part III of this Article will present examples of the increasing interest of investors in environmental and social issues. It examines shareholder proposals put forward by institutional investors seeking information about the financial implications of environmental and social issues for leading oil and gas companies. It will also explain extractive industry multi-stakeholder initiatives intended to provide an institutional framework for managing corruption and conflict as governance institutions.

## **I. INTERRELATED ISSUES: HUMAN RIGHTS, CORPORATE RESPONSIBILITY AND ENVIRONMENTAL JUSTICE**

At the 1993 World Conference on Human Rights in Vienna, 171 countries came together to deliberate how best to make the protection and promotion of human rights a central priority for the international community.<sup>16</sup> Vienna Conference participants conducted a comprehensive

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<sup>16</sup> See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993) [hereinafter *Vienna Declaration*].

review of the international human rights system with a focus on how to make improvements and increase compliance in a “just and balanced manner.”<sup>17</sup> Participating nations reaffirmed a commitment to the purpose and principles of the United Nations Charter and the Universal Declaration of Human Rights.<sup>18</sup> Nations participating in the Conference agreed on the need for effective international cooperation to create conditions under which justice and respect for obligations under international law would be observed.<sup>19</sup>

The conference culminated in the Vienna Declaration which reasserted that the protection of human rights and fundamental freedoms, as the birthright of all humans, remained the first responsibility of governments.<sup>20</sup> The Vienna Declaration also asserted that “all human rights are universal, indivisible and interdependent and interrelated.”<sup>21</sup> It declared that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”<sup>22</sup> Accordingly, the Vienna Declaration emphasized that while different countries may have unique histories and distinct cultural, religious, or political and economic systems, the international community must treat all human rights in a fair and equitable manner for everyone, everywhere.<sup>23</sup> If the international community is to promote environmental justice and human rights, it is imperative to appreciate—as the Vienna Declaration does—the interdependent, interrelated, indivisible nature of the challenges confronting the international community, as well as the influence of non-state actors on human rights as we look towards 2030. The business community has an opportunity to contribute to advancing Agenda 2030 and reducing adverse environmental and human rights impacts.

#### A. ENVIRONMENTAL ACTIVISM AND HUMAN RIGHTS ABUSES INVOLVING THE EXTRACTIVES INDUSTRY

Human rights organizations have documented numerous instances of extractive companies adversely impacting the legally recognized right

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<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* ¶ 1.

<sup>21</sup> *Id.* ¶ 5.

<sup>22</sup> *Id.* ¶ 8.

<sup>23</sup> *Id.*

to “security of [the] person”<sup>24</sup>—in particular, for persons engaged in defending the environment. In 2016, Global Witness (a global monitoring and advocacy organization) documented approximately 200 killings of environmental activists, with most murders occurring in the Americas.<sup>25</sup> Berta Cáceres—a Honduran indigenous leader and environmental activist—was among those assassinated in 2016 for her work to protect water rights.<sup>26</sup> A business executive was implicated in her murder.<sup>27</sup> Honduran police arrested a high-ranking executive with a hydroelectric company in connection with the killing.<sup>28</sup> He is alleged to have conspired in committing the murder.<sup>29</sup> The following year, indigenous activists and their allies were arrested in the United States for protesting a pipeline project feared to put clean water at risk.<sup>30</sup>

Human rights advocacy organizations have investigated the role of corporations in the extractives industry sector and have documented allegations of abuse with respect to a range of fundamental rights standards, including: the right to security of the person,<sup>31</sup> economic and social rights,<sup>32</sup> civil and political rights,<sup>33</sup> labor rights,<sup>34</sup> and the rights of

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<sup>24</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to life, liberty and security of person”).

<sup>25</sup> GLOBAL WITNESS, DEFENDERS OF THE EARTH 8 (2016), <https://www.globalwitness.org/en/campaigns/environmental-activists/defenders-earth/>.

<sup>26</sup> Elisabeth Malkin & Alberto Arce, *Berta Cáceres, Indigenous Activist, Is Killed in Honduras*, N.Y. TIMES (Mar. 3, 2016), <https://www.nytimes.com/2016/03/04/world/americas/bertha-caceres-indigenous-activist-is-killed-in-honduras.html>; Fred Pearce, *Honduras, Where Defending Nature is a Deadly Business*, GUARDIAN (Mar. 22, 2017, 7:00 AM), <https://www.theguardian.com/environment/2017/mar/22/honduras-bertha-caceres-activism-defending-nature-deadly-business>.

<sup>27</sup> *Honduras Police Arrest Executive in Killing of Berta Cáceres, Indigenous Activist*, N.Y. TIMES (Mar. 3, 2018), <https://www.nytimes.com/2018/03/03/world/americas/honduras-bertha-caceres.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Will Connors, *Dakota Access Pipeline Protesters Arrested*, WALL STREET J. (Jan. 19, 2017, 6:09 PM), <https://www.wsj.com/articles/dakota-access-pipeline-protesters-arrested-1484863808>; Niraj Chokshi, *Dozens of Dakota Pipeline Protesters Are Arrested*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/us/dakota-pipeline-protesters-arrested.html>.

<sup>31</sup> UDHR, *supra* note 24, art. 3. Violations of this right include war crimes, crimes against humanity, genocide, enforced disappearances, extrajudicial killings, rape, excessive and lethal use of force, and torture, cruel, inhuman and degrading treatment.

<sup>32</sup> *See, e.g.*, International Covenant on Economic, Social and Cultural Rights pmb1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>33</sup> *See, e.g.*, International Covenant on Civil and Political Rights, pmb1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>34</sup> *Id.* art. 8.

indigenous people.<sup>35</sup> The actions or omissions of extractives industry sector companies can influence enjoyment of the right to security of the person. Often companies risk complicity in violation of the right to human security when people are assaulted or intimidated by company staff or contracted security staff. It was instances of security forces in conflict with local communities that led to litigation against major multinational oil and gas companies in US Courts allege rights abuses. Lawsuits implicating Exxon and Shell in human rights abuses illustrate the interrelationship between economic investments, protecting the environment, and respecting human rights.

### *1. Exxon in Indonesia*

Exxon had operated in the Aceh province of Indonesia for several years.<sup>36</sup> Pursuant to an exclusivity agreement with the Indonesian government, Exxon began developing natural gas fields in the region.<sup>37</sup> Exxon hired the Indonesian military to provide security at its natural gas production fields and facilities in Aceh.<sup>38</sup> Soldiers providing Exxon security raided and razed villages in Aceh.<sup>39</sup> Soldiers employed by Exxon were alleged to have been responsible for the murders, disappearances, and wrongful deaths of Aceh residents.<sup>40</sup> Survivors sued Exxon, claiming

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<sup>35</sup> G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) [hereinafter UNDRIP].

<sup>36</sup> For discussion of the company's investment and involvement in the region, see generally EXXONMOBIL INDONESIA, <https://corporate.exxonmobil.com/en/company/worldwide-operations/locations/indonesia#About> (last visited Feb. 12, 2019); Wayne Arnold, *Exxon Mobil, in Fear, Exits Indonesian Gas Fields*, N.Y. TIMES (March 24, 2001), <https://www.nytimes.com/2001/03/24/business/exxon-mobil-in-fear-exits-indonesian-gas-fields.html>; Michael Schuman & Thaddeus Herrick, *Exxon Mobil's Gas Shutdown in Aceh Shows Unrest's Cost*, WALL STREET J. (April 4, 2001, 12:01 AM), <https://www.wsj.com/articles/SB986332572505839907>; Fergus Jensen, *UPDATE 1 – Indonesia Calls for Exxon to Replace Local Chief*, REUTERS (Jan. 28, 2013, 7:50 AM), <https://www.reuters.com/article/exxon-indonesia-idUSL4N0AL7BJ20130128>.

<sup>37</sup> Jensen, *supra* note 36.

<sup>38</sup> *ExxonMobil Lawsuit (re Aceh)*, BUS. AND HUMAN RIGHTS RES. CTR., <https://www.business-humanrights.org/en/exxonmobil-lawsuit-re-aceh> (last visited Mar. 11, 2019).

<sup>39</sup> For a discussion of the alleged abuses committed in Indonesia involving Exxon, see generally Ross Clarke, *A Matter of Complicity? Exxon Mobil on Trial for its Role in Human Rights Violations in Aceh*, INT'L CTR. FOR TRANSITIONAL JUSTICE (2008); Douglas Gillison, *Exxon Human Rights Case Survives – On Claim that Execs Knew All Along*, 100 REPORTERS (July 1, 2015), <https://100r.org/2015/07/exxon-human-rights-case-survives-claim-that-execs-knew-all-along/>; Complaint at 41, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007) (No. 05-7162).

<sup>40</sup> Sarah A. Altschuller, *Alien Tort Case Development: Plaintiffs in Exxon Mobil Case Survive "Touch and Concern" Review*, FOLEY HOAG LLP (July 31, 2015), <http://www.csrandthelaw.com>.

the company provided “material support” to security forces engaged in abuses to protect the company’s economic interests by providing supplies and equipment as well as funding for weapons purchases.<sup>41</sup>

Survivors claimed Exxon was responsible for wrongful death; assault and battery; arbitrary arrest and detention; false imprisonment; intentional infliction of emotional distress; and, negligence in hiring and supervising security forces.<sup>42</sup> Survivors alleged Exxon’s security forces committed murder; torture; sexual assault; battery; and, false imprisonment.<sup>43</sup> The suit sought compensation and punitive damages as well as injunctive relief prohibiting the company from engaging in similar conduct in the future.<sup>44</sup>

Indonesian villagers claimed government security forces working for Exxon Mobil committed brutal oppression while guarding a natural gas facility in Aceh province during a period of civil unrest from 2000 to 2001.<sup>45</sup> In a lawsuit against the company, the villagers alleged that members of their community were “beaten, burned, shocked with cattle prods, kicked, and subjected to other forms of brutality and cruelty” amounting to torture.<sup>46</sup> ExxonMobil retained soldiers from Indonesia’s military as guards its natural gas facility, despite allegedly knowing of past atrocities committed by the Indonesian army.<sup>47</sup> The company was viewed as complicit in the court of public opinion.<sup>48</sup>

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com/2015/07/31/alien-tort-case-development-plaintiffs-in-exxon-mobil-case-survive-touch-and-concern-review/.

<sup>41</sup> Sara Schonhardt, *Indonesians Sue Exxon Mobil in U.S. Court*, PUBLIC RADIO INT’L (April 26, 2013, 10:00 AM), <https://www.pri.org/stories/2013-04-26/indonesians-sue-exxonmobil-us-court>.

<sup>42</sup> *Indonesia: Exxon Mobil Decision a Reminder of Continuing Impunity in Aceh*, AMNESTY INT’L PUBLIC STATEMENT (July 20, 2011), <https://www.amnesty.org/download/Documents/28000/asa210212011en.pdf>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See, e.g.*, Jonathan Stemple, *Indonesia Torture Case vs. Exxon Mobil Revived*, REUTERS (July 8, 2011, 5:01 PM) <http://www.reuters.com/article/us-exxonmobil-indonesia-idUSTRE76761120110708>; *see also* *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007).

<sup>46</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 16 (D.C. Cir. 2001).

<sup>47</sup> *Id.* at 15–16.

<sup>48</sup> *See, e.g.*, Arnold, *supra* note 36, at 3.

## 2. Shell in Nigeria

Shell has been engaged in oil exploration and production in Southern Nigeria's Ogoni region for many years.<sup>49</sup> Shell has been the defendant in multiple law suits in the United States and Europe brought by residents of the Ogoni region.<sup>50</sup> The Ogoni allege the company, through its subsidiaries and agents, aided and abetted rights abuses against residents who were working to draw attention to the adverse environmental impacts of oil exploration in the region.<sup>51</sup> The Ogoni allege that Shell hired Nigerian military forces to provide security for its operations.<sup>52</sup> The military executed Ogoni environmental activists, shot and killed members of the Movement for Survival of the Ogoni People (MSOP), an organization involved in "protesting the environmental effects of oil exploration in the region."<sup>53</sup> Security forces hired by Shell destroyed and looted Ogoni villages.<sup>54</sup> Ogoni villagers were beaten, raped, and forcibly displaced by security forces working for Shell.<sup>55</sup> Shell allegedly financed and facilitated the abuses of security forces that served to displace and destroy opposition to oil exploration.<sup>56</sup>

Ultimately, in 2002 survivors sued Shell in the United States, claiming the company was complicit in extrajudicial killings; crimes against humanity; torture; cruel, inhumane and degrading treatment; arbitrary detention; forced exile and property destruction; and violations

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<sup>49</sup> *Ogoniland*, SHELL NIGERIA (2017), [https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/ogoniland/\\_jcr\\_content/par/toptasks.stream/1523110625544/fdae70431cde2d33edaa7bf3da816db3463081236998c36e0e39df06b8af955a/ogoniland.pdf](https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/ogoniland/_jcr_content/par/toptasks.stream/1523110625544/fdae70431cde2d33edaa7bf3da816db3463081236998c36e0e39df06b8af955a/ogoniland.pdf).

<sup>50</sup> For discussion of the numerous violations involving oil and gas companies in the region, see generally *The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria*, HUMAN RIGHTS WATCH (1995), <http://www.refworld.org/docid/3ae6a7d8c.html>; Elena Keates, *After Decades of Death and Destruction, Shell Pays Just \$83 Million for Recent Oil Spills*, GREENPEACE (Jan. 11, 2015), <https://www.greenpeace.org/usa/shell-oil-settlement-ogoniland/>.

<sup>51</sup> *See Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni Nine as Writ Served in Dutch Court*, AMNESTY INT'L NEWS (June 29, 2017, 12:22 AM), <https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1–2.

<sup>54</sup> HUMAN RIGHTS WATCH, *supra* note 50, at 8, 16, 24, 25.

<sup>55</sup> *Id.* at 15, 25.

<sup>56</sup> *See, e.g., A Criminal Enterprise? Shell's Involvement in Human Rights Violations in the 1990s*, AMNESTY INT'L 1, 61 (2017), <https://www.amnesty.org/download/Documents/AFR4473932017ENGLISH.PDF>.

of the rights to life, liberty, security, and freedom of association.<sup>57</sup> Several years after being accused of complicity in the execution of an environmental activist in Nigeria, allegations of conduct inconsistent with respect for human rights still continue to plague Shell, with local residents claiming they can no longer fish or farm.<sup>58</sup> The company's reputation was tarnished as the public perceived it to be a part of the problem that communities in the region faced.<sup>59</sup>

### 3. *Corporate Social Responsibility in Complex Contexts*

The unsustainable extraction of natural resources and associated environmental degradation over the objection of affected communities that are subjected to abuses show why it is important to appreciate how human rights, the environment, and sustainable development issues can intersect. The Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie, surveyed allegations in the worst cases of corporate-related human rights harm.<sup>60</sup> He found the incidents most often occurred in environments “where governance challenges were greatest: disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high.”<sup>61</sup> Professor Ruggie reported that most worst-case allegations involved extractives industry sector firms.<sup>62</sup>

Situations of insecurity and instability are especially complex.<sup>63</sup> Corruption further complicates the operating context for business

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<sup>57</sup> See *Shell Lawsuit (Re Nigeria-Kiobel & Wiwa)*, BUS. & HUM. RTS. RESOURCE CTR., <https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa?page=22&dateorder=dateasc> (last visited Mar. 11, 2019).

<sup>58</sup> See, e.g., *Niger Delta: Shell's Manifestly False Claims About Oil Pollution Exposed, Again*, AMNESTY INT'L NEWS (Nov. 3, 2015, 12:08 AM), <https://www.amnesty.org/en/latest/news/2015/11/shell-false-claims-about-oil-pollution-exposed/>; see also Will Ross, *Shell Agrees \$84m Deal over Niger Delta Oil Spill*, BBC NEWS (Jan. 7, 2015), <http://www.bbc.com/news/world-30699787>.

<sup>59</sup> See Chima Williams, *Shell Must Clean Up Its Act in Nigeria*, GUARDIAN (Dec. 4, 2009, 7:30 AM), <https://www.theguardian.com/commentisfree/cif-green/2009/dec/04/shell-nigeria-oil-spills>.

<sup>60</sup> John Ruggie (Special Representative of the Secretary-General), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶16, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See generally *id.*

enterprises in the extractives sector.<sup>64</sup> Sometimes corporate presence even serves to fuel existing conflict in persistently war-torn and resource-rich regions.<sup>65</sup> Professor Ruggie's reports reaffirm the findings of human rights organizations with respect to the role of business enterprises in influencing the enjoyment of human rights.<sup>66</sup> He explains: "[T]here are few if any internationally recognized human rights business cannot impact—or be perceived to impact—in some manner. Therefore, companies should consider all such rights."<sup>67</sup> There is a growing recognition that environmental issues deserve acknowledgement in the human rights sphere, as human health and well-being depends in significant part on environmental factors.

## B. RECOGNITION OF ENVIRONMENTAL RIGHTS

In 2015 Professor John Knox was appointed UN Special Rapporteur on Human Rights and the Environment after his service as the UN's first Independent Expert on "human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment."<sup>68</sup> During his tenure as rapporteur, he continued work to clarify what international law requires of governments regarding environmental issues and called for recognition of a global right to a clean and healthy environment.<sup>69</sup> According to Marcos Orellana, Director of the Environment and Human Rights Program of Human Rights Watch:

The human right to a healthy environment brings together the environmental dimensions of civil, cultural, economic, political and social rights and protects the core elements of the natural environment that enable a life of dignity. Clean water air and soils and diverse ecosystems are indispensable for people to lead lives in which they can enjoy adequate levels of health and security. The right also protects the civic space for individuals to engage in dialog on environmental

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<sup>64</sup> *Id.*

<sup>65</sup> See generally United Nations Environment Programme [UNEP], *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict* (2012), [http://www.un.org/en/events/environmentconflictday/pdf/GN\\_Renewable\\_Consultation.pdf](http://www.un.org/en/events/environmentconflictday/pdf/GN_Renewable_Consultation.pdf).

<sup>66</sup> See Amnesty Int'l, *Human Rights Principles for Companies*, AI Index: ACT 70/01/98 (Jan. 1998); U.N. Human Rights, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04, at 1, 13 (2011) [hereinafter UNGP].

<sup>67</sup> Ruggie, *supra* note 60, ¶ 52.

<sup>68</sup> *Special Rapporteur on Human Rights and the Environment*, U.N. HUMAN RIGHTS, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx> (last visited Mar. 11, 2019).

<sup>69</sup> See Human Rights Council Res. 31/8, U.N. Doc. A/HRC/RES/31/8, at 2 (Mar. 23, 2016).

policy. Without it government policies often cater to the commercial interests of the powerful, not the public and certainly not the politically disenfranchised.<sup>70</sup>

One benefit of recognizing environmental rights would be to legitimize the claims of environmental activists.<sup>71</sup> Recognition becomes protection where respect for the right to a clean and healthy environment serves to protect activists against being stigmatized as extremists or anti-development and summarily slaughtered for presenting a security threat to energy production and progress. Environmental activists have been labelled terrorists and treated as such in some countries.<sup>72</sup> Defending the human rights of individuals and communities that defend the environment must become a higher priority.

Some countries have granted status to environmental resources consistent with rights recognition. For example, the government of India has granted legal personality to the river Ganges.<sup>73</sup> New Zealand's Parliament passed a bill recognizing the Whanganui River as a legal person.<sup>74</sup> Colombia's Supreme Court ordered the government to end deforestation of the portion of the Amazon within the nation's boundaries and granted the river and tropical forest the legal standing of a person.<sup>75</sup> The Ecuadorian and Bolivian Constitutions recognize that nature has rights in its own right and not merely as the property interest of a

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<sup>70</sup> See Marcos A. Orellana, *The Case for a Right to a Healthy Environment*, HUMAN RIGHTS WATCH (Mar. 1, 2018, 1:21 PM), <https://www.hrw.org/news/2018/03/01/case-right-healthy-environment>.

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., *Eco Activists Labelled as Terrorists by Government*, TELEGRAPH (Jan. 27, 2010, 7:00 AM), <https://www.telegraph.co.uk/news/uknews/law-and-order/7081209/Eco-activists-labelled-as-terrorists-by-Government.html>.

<sup>73</sup> Erin L. O'Donnell & Julia Talbot-Jones, *Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India*, 23 *ECOLOGY & SOC'Y* 7 (2018); Betsy Blumenthal, *New Zealand and India Now Have Rivers That Are Legally Living Entities*, CONDE NAST TRAVELER (Mar. 29, 2017), <https://www.cntraveler.com/story/new-zealands-whanganui-river-is-now-legally-a-human-being>.

<sup>74</sup> See *Innovative Bill Protects Whanganui River with Legal Personhood*, N.Z. PARLIAMENT (Mar. 28, 2017), <https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/>; Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, GUARDIAN (Mar. 16, 2017, 12:50 AM), <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>; Kelly Buchanan, *New Zealand: Bill Establishing River as Having Own Legal Personality Passed*, LIBRARY OF CONGRESS (Mar. 22, 2017), <https://www.loc.gov/law/foreign-news/article/new-zealand-bill-establishing-river-as-having-own-legal-personality-passed/>; *New Zealand River is the World's First "Legal Person"*, AL JAZEERA (Mar. 16, 2017), <https://www.aljazeera.com/news/2017/03/zealand-river-world-legal-person-170316091153248.html>.

<sup>75</sup> Anastasia Moloney, *Columbia's Top Court Orders Government to Protect Amazon Forest in Landmark Case*, REUTERS (Apr. 6, 2018, 9:46 AM), <https://www.reuters.com/article/us-colombia-deforestation-amazon/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case-idUSKCN1HD21Y>.

natural or corporate person.<sup>76</sup> A legal person enjoys the ability to sue and to appeal to the legal system for protection.<sup>77</sup> According rights to the environment is expected to allow for greater environmental protection because an appeal to human rights is understood to impose an obligation to avoid and address abuses. Rights claims demand respect and remedy when rights are violated.

### C. CLIMATE CHANGE CHALLENGES AND HUMAN RIGHTS RISKS

Climate change is both an environmental protection issue and a human rights issue. Some of the anticipated social and security risks associated with climate change are now occurring with consequences for human rights. For example, “climate change refugees” or “environmental migrants”—those “persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently”<sup>78</sup>—are already on the move. The Environmental Justice Foundation<sup>79</sup> estimates that extreme weather events related to climate change such as floods, storms, heat waves, and drought are already displacing 41 people per minute or 21.5 million people per year.<sup>80</sup> As the number of people on the move across borders increases so too has opposition to migration and the mistreatment of migrants.<sup>81</sup> Migration has become a political flashpoint as fears and anti-immigrant sentiments seem to mount in receiving

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<sup>76</sup> See Kiana Herold, *The Rights of Nature: Indigenous Philosophies Reframing Law*, INTERCONTINENTAL CRY (Jan. 6, 2017), <https://intercontinentalcry.org/rights-nature-indigenous-philosophies-reframing-law/>.

<sup>77</sup> Cf. *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1641 n.1 (1982) (“A juristic person is a being who can be the bearer of a right and consequently claim standing in a court”).

<sup>78</sup> *Environmental Migration*, ENVTL. MIGRATION PORTAL, <http://www.environmentalmigration.ion.int/environmental-migration> (last visited Mar. 11, 2019).

<sup>79</sup> The Environmental Justice Foundation is an environmental advocacy campaign group based in the U.K. that places primary emphasis on oceans, pesticides, climate and cotton. ENVTL. JUSTICE FOUND., <https://ejfoundation.org> (last visited Mar. 11, 2019).

<sup>80</sup> *Protecting Climate Refugees*, ENVTL. JUST. FOUND., <https://ejfoundation.org/what-we-do/climate/protecting-climate-refugees> (last visited Mar. 11, 2019).

<sup>81</sup> See, e.g., M. Akram Faizer, *America First: Improving a Recalcitrant Immigration and Refugee Policy*, 84 TENN. L. REV. 933, \*933 (2017) (arguing that climate change is a likely factor behind several surging immigration crises and will only increase as a factor, while state failure to constructively respond to these crises has fueled backlashes by nativists and social conservatives); Amelia Hill, *Migration: How Many People are on the Move Around the World?*, GUARDIAN (Sept. 10, 2018, 1:15 AM), <https://www.theguardian.com/news/2018/sep/10/migration-how-many-people-are-on-the-move-around-the-world>.

countries.<sup>82</sup> This anti-migrant sentiment serves to create conditions where the human rights of “climate change refugees” and other conventional refugees could be put at risk as they seek new places to make a home in the world. People are changing their country of residence in response to the changing climate.<sup>83</sup>

According to the United Nations Environmental Program (UNEP), the impacts of climate change on the earth’s ecosystems is already undermining access to basic human needs like shelter, food, and water.<sup>84</sup> The inability to meet basic needs could in turn fuel conflict over dwindling natural resources. The expected impacts of climate change could compromise the exercise and enjoyment of basic human rights and fundamental freedoms, including the rights to life, health, housing, food and water, and an adequate standard of living. The Intergovernmental Panel on Climate Change (IPCC)<sup>85</sup> published an assessment report on how predicted climatic changes could affect ecosystems, natural resources, and physical infrastructure.<sup>86</sup> The IPCC found that climate change will reduce the amount of surface and groundwater resources in some regions, creating increased competition for water.<sup>87</sup> The frequency, duration, and severity of droughts are expected to worsen due to variations in timing and type of precipitation, leading to degradation of water quality for human

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<sup>82</sup> See, e.g., Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* 2, 4 (Harv. Kennedy Sch. Faculty Research Working Paper Series, No. RWP16-026, 2016) (demonstrating the average vote of populist parties across Europe has doubled since the 1960s, while their share of seats has tripled, and arguing recent populist victories support a “cultural backlash” thesis which implies further political divide is likely); *Migrant Crisis: EU at Grave Risk, Warns France PM Valls*, BBC NEWS (Jan. 22, 2016), <http://www.bbc.com/news/world-europe-35375303> (warning that European countries were at risk of being “totally destabilised”).

<sup>83</sup> See generally Sarah Opitz Stapleton et al., *Climate Change, Migration and Displacement*, UNITED NATIONS DEV. PROGRAM 7 (Nov. 2017), <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11874.pdf>. See also Mostafa Mahmud Naser, *Climate Change, Environmental Degradation, and Migration: A Complex Nexus*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 713, 714 (2012) (arguing for the recognition of and protection for migrants forced to move due to the demonstrated substantial role climate change plays in triggering human migrations, notwithstanding the existence of multi-causality).

<sup>84</sup> United Nations Env’t Programme [UNEP], *Climate Change & Human Rights*, at viii (Dec. 2015).

<sup>85</sup> Intergovernmental Panel on Climate Change [IPCC], *IPCC Factsheet: What is the IPCC?* (Aug. 30, 2013), [https://www.ipcc.ch/site/assets/uploads/2018/02/FS\\_what\\_ipcc.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/FS_what_ipcc.pdf) (“The Intergovernmental Panel on Climate Change (IPCC) is the international body for assessing the science related to climate change. The IPCC was set up in 1988 by the World Meteorological Organization (WMO) and United Nations Environment Programme (UNEP) to provide policymakers with regular assessments of the scientific basis of climate change, its impacts and future risks, and options for adaptation and mitigation”).

<sup>86</sup> *Climate Change and Human Rights*, supra note 84, at viii.

<sup>87</sup> *Id.* at 3.

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consumption and agriculture.<sup>88</sup> Coastal and low-lying land will have to contend with flooding and erosion, landslides, and salt water intrusion due to sea level rise.<sup>89</sup> Sea level rise is also expected to compromise shelter, city functions, and physical infrastructure.<sup>90</sup>

Extreme weather events are expected to have adverse impacts on agriculture and result in food shortages as changes in temperature and precipitation endanger the production of major staple crops such as wheat, rice, and maize.<sup>91</sup> According to IPCC research, climate change is altering the temperature of the ocean such that a large scale shift in the spatial distribution of species is occurring due to changes in the physical, chemical, and biological properties of a warmer ocean.<sup>92</sup> Fish are migrating to the poles and to deeper, cooler waters and are adapting different behaviors for breeding and feeding which will have implications for the productivity marine food source stocks.<sup>93</sup> The challenge of addressing climate change is connected to respect for human rights because the changing climate will put rights at risk and adverse impacts will burden the most vulnerable populations disproportionately. The indirect effects of climate change on basic human needs is expected to lead to increased pressures on societies and potentially conflict or political instability as prices for food, energy, and other basic commodities essential to human existence increase.<sup>94</sup>

In 2007, a group of small island nations produced the first intergovernmental statement identifying the social risks associated with a changing climate explaining: “climate change has clear and immediate implications for the full enjoyment of human rights.”<sup>95</sup> The United Nations Human Rights Council subsequently approved a number of resolutions connecting climate change to adverse human rights impacts.<sup>96</sup> In 2014, all

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 4.

<sup>90</sup> *Id.* at 5.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 4.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 7–8.

<sup>95</sup> Small Island Developing States, *Malé Declaration on the Human Dimension of Global Climate Change*, at 2 (Nov. 14, 2007), [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

<sup>96</sup> See Human Rights Council Res. 31/8, U.N. Doc. A/HRC/RES/31/8 (Apr. 22, 2016); Human Rights Council Res. 32/33, U.N. Doc. A/HRC/RES/32/33 (July 18, 2016); Human Rights Council Res. 34/20, U.N. Doc. A/HRC/RES/34/20 (June 4, 2017); Human Rights Council Res. 35/20, U.N. Doc. A/HRC/RES/35/20 (July 7, 2017); see also *Climate Change and Human Rights*, *supra* note 84, at viii.

78 United Nations Human Rights mandate-holders released an unprecedented joint statement to highlight the risks climate change would pose to human rights.<sup>97</sup> The joint statement urged states “to make sure that human rights are at the core of climate change governance.”<sup>98</sup>

The 2015 Paris Agreement adopted by state parties to the United Nations Framework Convention on Climate Change (UNFCCC) now explicitly introduces human rights language into discussion of climate change.<sup>99</sup> The Paris Agreement provides, in pertinent part:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.<sup>100</sup>

Beyond state parties to the Paris Agreement, private actors have an important role to play in addressing the human rights implications of climate change. The climate change challenge is not confined to the actions or inactions of governments alone.

## **II. INTERCONNECTED GLOBAL POLICY PRIORITIES: DEVELOPMENT GOALS AND GUIDING PRINCIPLES**

Under the auspices of the United Nations and UN-affiliated agencies, the international community periodically sets global policies to address common concerns. These negotiated policy commitments operate alongside binding international law to bridge global regulatory gaps. This Part offers a general overview of global policy instruments with the potential to promote environmental justice and plots points of policy convergence that could create incentives for business enterprises to address interrelated environmental and social challenges. Specifically, the United Nations Sustainable Development Goals contained in Agenda 2030, the United Nations Guiding Principles on Business and Human

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<sup>97</sup> *Climate Change and Human Rights*, *supra* note 84, at viii.

<sup>98</sup> *Id.*

<sup>99</sup> Paris Agreement of the United Nations Framework Convention on Climate Change, Dec. 12, 2015, U.N.T.S. 54113 [hereinafter Paris Agreement].

<sup>100</sup> *Id.*, art. 12; U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter *Adoption of the Paris Agreement*].

Rights, and the United Nations Principles for Responsible Investment provide opportunities to inform management and investment priorities in order to improve protections for human rights and the environment. These instruments are discussed below.

A. THE UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS:  
AGENDA 2030

In 2015, the member states of the United Nations announced “Transforming Our World: The 2030 Agenda for Sustainable Development” (Agenda 2030).<sup>101</sup> Agenda 2030 is a “plan of action for people, planet and prosperity”<sup>102</sup> that builds on the earlier Millennium Development Goals of 2000.<sup>103</sup> Agenda 2030 contains 17 Sustainable Development Goals (“SDGs” or “Global Goals”) with 169 targets that are to be achieved over the 15-year period between 2015–2030.<sup>104</sup> The preamble of Agenda 2030 explains that the Global Goals are “integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.”<sup>105</sup> The unifying themes of Agenda 2030’s Global goals are: people, planet, prosperity, peace, and partnership.<sup>106</sup>

While the Global Goals should be treated as integrated and indivisible, there are four sustainable development goals which can be read as speaking directly to human rights and environmental risks in a manner that is most relevant to the extractives industry sector as companies must contend with meeting the challenges presented by climate change. Goal 12 on responsible consumption, Goal 13 on climate action, Goal 16 on peace and justice, and Goal 17 on partnerships for the goals, taken together provide a path for progress and recognizing the important role for non-state actors in ensuring the Global Goals are attained.

Goal 12 on “Responsible Consumption and Production” invites societal change to ensure sustainable consumption and production patterns.<sup>107</sup> Goal 13 on “Climate Action” calling for “urgent action to

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<sup>101</sup> G.A. Res. 70/1, (Sept. 25, 2015).

<sup>102</sup> *Id.* pmb1.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* Goal 12.

combat climate change and its impacts”<sup>108</sup> invites innovation, adaptation, and mitigation.<sup>109</sup> Goal 16 calls for the promotion of peaceful and inclusive societies for sustainable development—including the provision of access to justice for all—through effective, accountable, and inclusive institutions at all levels.<sup>110</sup> Goal 17 to “strengthen the means of implementation and revitalize the global partnership,”<sup>111</sup> provides opportunities for collaboration.<sup>112</sup> Goals 16 and 17 concern the situations (conditions free of corruption), as well as the strategies (collaboration and cooperation) that could allow the rest of the Global Goals to be attained more readily.<sup>113</sup> To that end, Goals 16 and 17 are enabling aims. Goals 12 and 13 concern more subject specific issues that are interrelated as consumption choices could serve to accelerate or reduce the pace of climate change.

The Goals contain a call for action to change the world. The preamble to Agenda 2030 recognizes that: “It is ‘we the peoples’ who are embarking today on the road to 2030.<sup>114</sup> Our journey will involve Governments as well as parliaments, the United Nations system and other international institutions, local authorities, indigenous peoples, civil society, business and the private sector, the scientific and academic community—and all people.”<sup>115</sup> There are targets attached to each Global Goal in order to assess progress towards reaching them.

#### B. THE UNITED NATIONS PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: INFLUENCE AND INFORMATION

At the request of the Human Rights Commission, the late Nobel Laureate and former UN Secretary-General Kofi Annan appointed Harvard Professor John Ruggie as the “Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises” (hereinafter the UNSRSG or “Ruggie”) in 2005.<sup>116</sup> Professor Ruggie was tasked with clarifying the “roles and responsibilities of states,

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<sup>108</sup> *Id.* Goal 13.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* Goal 16.

<sup>111</sup> *Id.* Goal 17.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* Goal 16–17.

<sup>114</sup> Agenda 2030 Preamble.

<sup>115</sup> *Id.* Declaration, ¶ 52.

<sup>116</sup> Press Release, Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005).

companies, and other social actors in the business and human rights sphere.”<sup>117</sup> He coordinated a consultation process engaging a range of stakeholders and crafted a framework and a set of principles to provide an “authoritative focal point” around which to address issues of business and human rights.<sup>118</sup>

The “Protect, Respect, Remedy Framework” developed by the UNSRSG sought to ground the business and human rights debate and to guide all stakeholders.<sup>119</sup> Three core principles form the foundation of the UN Framework on Business and Human Rights: (1) the state duty to protect human rights; (2) the corporate responsibility to respect human rights; and (3) effective access to remedy.<sup>120</sup> The UNSRSG later developed the 2011 United Nations Guiding Principles on Business and Human Rights to “operationalize” the Framework.<sup>121</sup>

The second pillar of the UN Framework on business and human rights details the responsibility of business enterprises to respect human rights.<sup>122</sup> A number of the UN Guiding Principles are addressed to businesses and discuss ways to ensure business practices are consistent with respect for human rights.<sup>123</sup> In order to meet the responsibility to respect human rights, which involves at a minimum avoiding involvement in rights abuses and addressing abuses and adverse impacts that occur, it is necessary for a company to identify and understand the impacts of its business operations on human rights.<sup>124</sup> Companies can best carry out obligations to respect rights by conducting human rights due diligence and assessing human rights impacts of its business activities and relationships in my view.

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<sup>117</sup> U.N. Special Representative on Business and Human Rights, The UN “Protect, Respect and Remedy” Framework for Business and Human Rights (Sept. 2010), <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf> [hereinafter UN Framework on Business and Human Rights] (concerning a brief explanation of the Framework by Special Representative Ruggie).

<sup>118</sup> *Id.*

<sup>119</sup> U.N. Special Representative of the Secretary-General on Business and Human Rights, *Promotion and Protection of All Human Rights, Civil, Political, Economic Social and Cultural Rights, Including the Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

<sup>120</sup> *Id.* at 4.

<sup>121</sup> U.N. Special Representative of the Secretary-General on Business and Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 9, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Implementing “Protect, Respect and Remedy” Framework*].

<sup>122</sup> UNGP, *supra* note 66, at 13.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

The 2011 United Nations Guiding Principles (“UNGPs” or “Guiding Principles”) contain provisions that pertain to corporate relationships.<sup>125</sup> The UNGPs urge business enterprises to leverage relationships to ensure respect for human rights.<sup>126</sup> For example, UNGP 19 provides:

In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes and take appropriate action.

(a) Effective integration requires that:

- (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
- (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to:

- (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
- (ii) The extent of its *leverage in addressing the adverse impact*.<sup>127</sup>

According to the commentary interpreting UNGP 19: “Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.”<sup>128</sup> The commentary interpreting UNGP 19 continues to explain that: “if the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it.”<sup>129</sup>

The Guiding Principles also contain provisions that pertain to corporate reporting and communications.<sup>130</sup> The Principles contemplate that reporting related to human rights should be of a form and frequency sufficient to empower an interested audience to assess the adequacy of how a business enterprise addresses its human rights impacts.<sup>131</sup> The Principles suggest business enterprises must be in a position to “know and

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<sup>125</sup> *Id.* princ. 11–24.

<sup>126</sup> *Id.* princ. 19.

<sup>127</sup> *Id.* (emphasis added).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* princ. 20–21.

<sup>131</sup> *Id.*

show” their human rights performance.<sup>132</sup> In pertinent part, Principle 21 of the UNGPs provides:

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences;

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved;

(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.<sup>133</sup>

Commentary accompanying UNGP 21 offers the following guidance: “Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.”<sup>134</sup> Significantly, the commentary to UNGP Principle 21 encompasses a potential audience beyond shareholders. The commentary to UNGP 21 contemplates an expanded audience including stakeholders and in particular to individuals or groups likely to be impacted by the practices

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> The commentary further clarifies:

“The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice. . .

Communication can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports.

Formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports, to include on-line updates and integrated financial and non-financial reports.

Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail.” *Id.*

or policies of the enterprise.<sup>135</sup> It is also important that the commentary recognizes a range of ways communications can occur including direct in-person meetings and dialogues.<sup>136</sup> This envisions engagement beyond a pro-forma formal sustainability report or securities filing a business may make in the routine course of business.

A growing segment of the business community has embraced the UNGPs.<sup>137</sup> Notably, the Principles have been endorsed by the global oil and gas industry association for environmental and social issues (IPIECA) and the International Council on Mining and Metals (ICMM), major trade associations representing different segments of the extractives industry sector.<sup>138</sup> These trade associations have also taken on the task of creating guidance documents for the industry. For example, in 2015 IPIECA published a manual on community grievance mechanisms in the oil and gas industry.<sup>139</sup> The ICMM also published research on conflicts between companies and communities in 2015.<sup>140</sup> Indeed, the true costs and risks to extractives industry sector companies associated with conflicts are becoming better understood and are significant.<sup>141</sup> The intersection between human rights law, and corporate social responsibility, and potential legal risks to businesses continues to be explored.<sup>142</sup> An

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See John D. Feerick, *A New Model of Corporate Social Responsibility in the 21st Century*, 25 *FORDHAM ENVTL. L. REV.* 1, 4 (2013) (highlighting praise for the Principles from companies like General Electric and Coca-Cola).

<sup>138</sup> *Our Work: Human Rights*, IPIECA, <http://www.ipieca.org/our-work/social/human-rights/> (last visited Nov. 18, 2018); *Human Rights: Society and the Economy/Mining and Communities*, INT'L COUNCIL ON MINING & METALS, <https://www.icmm.com/en-gb/society-and-the-economy/mining-and-communities/human-rights> (last visited Mar. 11, 2019); see also KENAN INST. FOR ETHICS, THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: ANALYSIS AND IMPLEMENTATION (2012), <https://archive.kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf>; John G. Ruggie, *The Shift from Principles To Practice*, SHIFT (Mar. 2012), <https://www.shiftproject.org/resources/viewpoints/shift-principles-practice/>.

<sup>139</sup> *Community Grievance Mechanisms in the Oil and Gas Industry*, IPIECA, <http://www.ipieca.org/resources/good-practice/community-grievance-mechanisms-in-the-oil-and-gas-industry/> (last visited Mar. 11, 2019).

<sup>140</sup> INT'L COUNCIL ON MINING & METALS, RESEARCH ON COMPANY-COMMUNITY CONFLICT (2015).

<sup>141</sup> See, e.g., RACHEL DAVIS & DANIEL FRANKS, COSTS OF COMPANY-COMMUNITY CONFLICT IN THE EXTRACTIVE SECTOR (2014).

<sup>142</sup> See, e.g., Yousuf Aftab, *The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies*, 60 *ROCKY MTN. MIN. L. INST.* 19-1 (2014); Michael M. Lieberman, *The Ruggie Principles on Business and Human Rights: How Companies Can Prepare*, 48 *ROCKY MTN. MIN. L. FOUND. J.* 271, 278-79 (2011).

integrated approach to the SDGs could serve to illuminate opportunities for the extractives industry sector to improve practices.

C. UNITED NATIONS PRINCIPLES ON RESPONSIBLE INVESTMENT:  
PROACTIVE OWNERSHIP

In April 2006, the United Nations announced a set of international sustainable and responsible investment principles.<sup>143</sup> An accepted aim of investment is to secure a profitable return for investors; the UN Principles for Responsible Investment (PRIs) emphasize an obligation to invest with the aim of advancing broader societal interests as well.<sup>144</sup> This commitment is stated as follows in the preamble to the PRIs:

We have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, asset classes and through time). We also recognize that applying these Principles may better align investors with broader objectives of society. . .<sup>145</sup>

The commitment to act in the best long-term interests of beneficiaries captures the practical concern that social and environmental issues have implications for investment performance. To that end, the PRIs set forth six steps to be taken by investors in order to advance both the long-term interests of beneficiaries and broader societal interests by incorporating environmental, social and governance (commonly referred to as “ESG”) concerns into investment decisions.<sup>146</sup> Signatories to the PRIs agree to the following commitments:

- We will incorporate ESG issues into investment analysis and decision-making processes
- We will be active owners and incorporate ESG issues into our ownership policies and practices

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<sup>143</sup> Press Release, Secretary-General, Secretary-General Launches ‘Principles for Responsible Investment’ Backed by World’s Largest Investors, U.N. Press Release SG/2111-ECO/106 (Apr. 27, 2006).

<sup>144</sup> *What are the Principles for Responsible Investment?*, PRINCIPLES FOR RESPONSIBLE INV., <https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment> (last visited Mar. 11, 2019).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

- We will seek appropriate disclosure on ESG issues by the entities in which we invest
- We will promote acceptance and implementation of the Principles within the investment industry;
- We will work together to enhance our effectiveness in implementing the Principles; and
- We will each report on our activities and progress towards implementing the Principles.<sup>147</sup>

As of 2018, the PRI Principles had over 2000 signatories, including the California Public Employees' Retirement System, the New York State Teachers' Retirement System, the Canada Pension Plan, and the Norwegian Government Pension Fund.<sup>148</sup> Since its launch in 2006, the number of signatories to the PRIs has grown steadily and includes approximately 338 asset owners and 1,111 investment managers.<sup>149</sup> Collectively the PRI signatories represent US\$45 trillion of assets.<sup>150</sup> According to the UN PRI, about 94 percent of signatories have adopted policies consistent with the six core commitments.<sup>151</sup> U.S. signatories account for approximately fifteen percent of all PRI participating investors and include public, private, and union pension funds such as CalPERS, CalSTRS, AFL-CIO funds, and Connecticut, Illinois, and New York state pension funds, and TIAA-CREF.<sup>152</sup> In 2014 total signatory assets under management (AUM) exceeded more than US\$45 trillion.<sup>153</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> PRINCIPLES FOR RESPONSIBLE INVESTMENT, ANNUAL REPORT 5 (2018), [https://www.unpri.org/Uploads/z/b/u/pri\\_ar2018\\_761642.pdf](https://www.unpri.org/Uploads/z/b/u/pri_ar2018_761642.pdf).

<sup>149</sup> *Id.* at 31.

<sup>150</sup> Fiona Reynolds, *Annual Report 2014: Working to Deliver Value to Signatories*, PRINCIPLES FOR RESPONSIBLE INVESTMENT (Aug. 24, 2014), <https://www.unpri.org/about-the-pri/annual-report-2014/709.article>. See also PRI IN PERSON, A UNIQUE SUITE OF PARTNERSHIP OPPORTUNITIES TO SHOWCASE YOUR BRAND AT THE WORLD'S PREMIER RESPONSIBLE INVESTMENT CONFERENCE 2 (2018), [https://www.unpri.org/Uploads/j/o/n/PRI-in-Person-2018\\_Partnership-brochure.pdf](https://www.unpri.org/Uploads/j/o/n/PRI-in-Person-2018_Partnership-brochure.pdf); Ian B. Lee, *The Role of the Public Interest in Corporate Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 106 (Claire A. Hill & Brett H. McDonnell eds., 2012); David K. Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 530–31 (2011).

<sup>151</sup> PRINCIPLES FOR RESPONSIBLE INVESTMENT, RESPONSIBLE INVESTMENT IN PRIVATE EQUITY: A GUIDE FOR LIMITED PARTNERS 2 (2011), <https://www.unpri.org/download?ac=260>; Remy Briand et al., *Integrating ESG into the Investment Process: From Aspiration to Effective Implementation*, MSCI (2011).

<sup>152</sup> Virginia E. Harper Ho, "Enlightened Shareholder Value": *Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 87 (2010).

<sup>153</sup> Reynolds, *supra* note 150.

The United Nations Environment Programme Finance Initiative (UNEP FI) and the United Nations Global Compact (UNGC or “Global Compact”) have partnered with the PRI to promote responsible investing with attention to ESG issues through education. Both the UNEP FI and the Global Compact play an important role in PRI’s strategic planning and hold positions on the Board of the PRI. UNEP FI is a collaboration between the United Nations Environment Programme (UNEP) and the global financial sector that works closely with financial institutions that have signed the UNEP FI “Statement on Sustainable Development,”<sup>154</sup> and a range of partner organizations, to develop and promote linkages between sustainability and financial performance. UNEP FI uses “peer-to-peer networks” to conduct research, provide training, and to identify and promote “the adoption of best environmental and sustainability practice at all levels of financial institution operations.”<sup>155</sup>

The United Nations Global Compact is both a policy platform and a practical framework for companies that are committed to sustainability and responsible business practices.<sup>156</sup> According to the UNGC, “[w]ith 7,000 corporate signatories in 135 countries, [it is] the world’s largest voluntary corporate sustainability initiative.”<sup>157</sup> The Global Compact aims to align business operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment, and anti-corruption.<sup>158</sup>

#### D. POINTS OF POLICY CONVERGENCE TO PROMOTE ENVIRONMENTAL JUSTICE AND PROTECT HUMAN RIGHTS

What do these policy instruments have in common? How do these policy instruments advance an imagined future for people to enjoy a planet where prosperity, peace, and partnership to promote environmental justice and protect human rights are common features?? How do these policies speak to the interests of business enterprises and investors? How are the needs of communities and consumers accounted for in these instruments?

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<sup>154</sup> U.N. Environment Programme, UNEP Statement by Financial Institutions on the Environment & Sustainable Development (May 1997), <https://enb.iisd.org/climate/ba/unep-fin.pdf>.

<sup>155</sup> *About the PRI*, PRINCIPLES FOR RESPONSIBLE INVESTMENT, <https://www.unpri.org/pri/about-the-pri> (last visited Mar. 11, 2019).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> U.N. Global Compact, The Ten Principles, <https://www.unglobalcompact.org/system/attachments/29351/original/COP%20English.pdf?1376981331>.

The policies are quite complementary despite different points of focus and being drafted at different points in time.

When the Global Goals were announced in 2015, over seventy percent of business executives surveyed said their company planned to “engage with the goals,” but only thirteen percent felt equipped to engage.<sup>159</sup> The Global Compact has published an action platform on achieving the Global Goals, (Business Reporting on the SDGs: An Analysis of Goals and Targets) to aid businesses interested in contributing to advancing the Global Goals.<sup>160</sup> Over ninety percent of the 250 biggest businesses in the world release sustainability reports.<sup>161</sup> The Global Compact invites companies to upgrade sustainability reporting to underscore progress towards the SDGs.<sup>162</sup>

The Global Compact, with the help of corporations in its membership and other concerned constituencies, has developed a set of qualitative and quantitative disclosures based on existing accepted disclosure standards to easily become part of a company’s regular reporting cycle.<sup>163</sup> The Global Compact action platform offers recommendations both for what companies can do to advance the Global Goals and what companies should disclose to demonstrate acts that are on target with achieving the aims of the SDGs.<sup>164</sup>

The targets associated with Goal 16 on peace, justice, and strong institutions offer an opportunity for corporations to contribute to promoting environmental justice and protecting human rights.<sup>165</sup> Target 16.1 calls for the reduction of death rates and all forms of violence.<sup>166</sup> The Compact action plan connects the business commitment to “do no harm”

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<sup>159</sup> Global Reporting Initiative & U.N. Global Compact, Business Reporting on the SDGs: An Analysis of the Goals and Targets, 12 (2017) [https://www.unglobalcompact.org/docs/publications/GRI\\_UNGC\\_SDG\\_Reporting\\_An\\_Analysis\\_of\\_Goals\\_and\\_Targets\\_2017.pdf](https://www.unglobalcompact.org/docs/publications/GRI_UNGC_SDG_Reporting_An_Analysis_of_Goals_and_Targets_2017.pdf) (citing Price Waterhouse Coopers, *Make it Your Business: Engaging with the Sustainable Development Goals* (2015)) [hereinafter Business Reporting on the SDGs].

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See generally Bernard Frey, *Action Platform: Reporting on the SDGs*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/take-action/action-platforms/sdg-reporting> (last visited Mar. 11, 2019).

<sup>163</sup> See generally U.N. Global Compact, Basic Guide Communication on Progress (2012), [https://www.unglobalcompact.org/docs/communication\\_on\\_progress/Tools\\_and\\_Publications/COP\\_Basic\\_Guide.pdf](https://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_Basic_Guide.pdf).

<sup>164</sup> See generally U.N. Global Compact, Action Platforms (2018), [https://www.unglobalcompact.org/docs/publications/AP\\_brochure\\_2018.pdf](https://www.unglobalcompact.org/docs/publications/AP_brochure_2018.pdf).

<sup>165</sup> Business Reporting on the SDGs, *supra* note 159, at 180.

<sup>166</sup> *Id.* at 181.

such that business planning provides for consideration that “business operations do not have an adverse effect on the countries or regions where they operate.”<sup>167</sup> The Global Compact advocates: “Assessing the impact of corporate decisions on investment, employment, community relations, environmental protection and security arrangements, particularly when operating in conflict and conflict-affected countries around the world, with a view to avoid exacerbating potential drivers of conflict or violence (e.g. social inequality), to avoid complicity in human rights violations and to support peace efforts.”<sup>168</sup> To serve these ends, the Global Compact proposes that companies could disclose the percentage of security personnel that have been trained in human rights policies and procedures relevant to the responsibility to respect rights.<sup>169</sup> In addition, companies could disclose how suppliers are screened using social impact criteria.<sup>170</sup> This would be consistent with the UNGP call for disclosures and human rights impact assessments to avoid complicity in creating conditions for abuse.<sup>171</sup>

Targets 16.4 and 16.5 speak to curbing corruption by reducing illicit financial flows and bribery.<sup>172</sup> Actions companies could take to reach this aim identified by the Global Compact include the implementation of due diligence audit processes to trace the flow of funds throughout supply chains, to identify and eliminate any illicit flows.<sup>173</sup> Companies could demonstrate a zero-tolerance approach to corruption and bribery at leadership levels and communicate the consequences for compliance failures.<sup>174</sup> Disclosing those who are the ultimate beneficial owners of the business and documented third-party assessments to detect risks could result in improved transparency and traceability.<sup>175</sup> Companies could also take steps to ensure that its gains are not ill-gotten. To serve this end, the Compact recommends:

Ensuring that any property (intellectual, financial or material) has been legally acquired. Where others may have been displaced in order to

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 182.

<sup>170</sup> *Id.*

<sup>171</sup> See generally UNGP, *supra* note 66, princs. 18, 19, 21.

<sup>172</sup> Business Reporting on the SDGs, *supra* note 159, at 187–88.

<sup>173</sup> *Id.* at 187.

<sup>174</sup> *Id.* at 188.

<sup>175</sup> *Id.* (“Conducting properly documented third party due diligence and risk assessment in own operations and supply chain to detect potential or actual corruption and bribery”).

access said property or resources (such as displacement of persons for agricultural land), ensuring that such persons have been treated fairly, their human and legal rights are protected and compensation procedures are in place. Insuring business adequately, both for their own assets as well as for public liability, as per national or international law or regulations (whichever is most stringent).<sup>176</sup>

These actions would be consistent with the responsibility to respect human rights as set forth in the UNGPs.

Target 16.7 calls for inclusive and representative decision making.<sup>177</sup> The Global Compact recommends: “Reporting whether stakeholder consultation is used to support the highest governance body’s identification and management of economic, environmental and social impacts, risks, and opportunities.”<sup>178</sup> The Global Compact explains: “Disclosing information about the composition of the highest governance body and its committees (such as executive or non-executive members, independence, tenure on the governance body, number of each individual’s other significant positions/commitments and the nature of the commitments, gender, membership of under-represented social groups, competences, and stakeholder representation).”<sup>179</sup> However, the Compact’s recommended action items do not make reference to “Free, Prior, Informed Consent” standards.<sup>180</sup> Often conflict with communities involving extractives companies come from failure to inform, to consult, and to seek the consent of communities likely to be affected by a particular project.<sup>181</sup> Communities complain that there is no clear channel for raising complaints about projects that are inflicting damage.<sup>182</sup> Providing clear

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<sup>176</sup> *Id.* at 187.

<sup>177</sup> *Id.* at 192.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See generally Lorenza B. Fontana and Jean Grugel, *The Politics of Indigenous Participation Through “Free Prior Informed Consent”: Reflection from the Bolivian Case*, 77 *WORLD DEV.* 249 (2016) (explaining that Free Prior Informed consent aims to establish bottom up participation and consultation of an Indigenous Population prior to the beginning of a development on ancestral land or using resources within the Indigenous Population’s territory).

<sup>181</sup> See, e.g., Oliver Balch, *Carrejón Mine in Colombia: Can It Address Its Human Rights Risks?*, *GUARDIAN* (Jul. 25, 2013, 9:39 AM), <http://www.theguardian.com/sustainable-business/cerrejon-mine-colombia-human-rights>; *Forced Displacement Devastating Colombia’s Indigenous People*, U.N. Refugee Agency (Aug. 8, 2008), <http://www.unhcr.org/489c1a4b7.html>.

<sup>182</sup> See generally Nicholas A. Fromherz, *Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 *W. VA. L. REV.* 109 (2013); John Vidal, *Ogoni King: Shell Oil Is Killing My People*, *GUARDIAN* (Dec. 3, 2016, 2:45 PM), <https://www.theguardian.com/world/2016/dec/03/ogoni-king-shell-oil-is-killing-my-people>.

information about decision making and making a way to involve stakeholders could prevent problems where implemented effectively.

Locating the interconnections between these overlapping priorities and the interests of business and the needs of communities and consumers would make reaching the Global Goals more likely and would likely have positive impacts on the environment and human rights.

### III. INTERSECTING INTERESTS: SHAREHOLDER PROPOSALS AND STAKEHOLDER INITIATIVES

While global policy instruments provide a strong foundation, the international community must look beyond the states to take steps towards bringing about the world envisioned in these instruments. Non-governmental actors have a vital role. In particular, businesses can and must do better. What is being done to improve business performance with respect to environmental and social issues, and to ensure that business enterprises put policies and principles into practice? Shareholder proposals and stakeholder initiatives offer insights and some impetus for improvement. Shareholders can influence corporations to change policies. Stakeholder initiatives can involve corporations in efforts to reduce the risk of adverse impacts.

#### A. TAKING STOCK OF SHAREHOLDER PROPOSALS TO PROMOTE ENVIRONMENTAL JUSTICE AND PROTECT HUMAN RIGHTS

Shareholder proposals or resolutions are requests to vote on a particular policy at a company's annual meeting submitted by eligible individuals or institutions that own shares in the company.<sup>183</sup> In the United States, the Securities and Exchange Commission (SEC) regulates the shareholder resolution submission process for publicly traded companies.<sup>184</sup> Shareholders seeking to make proposals must meet certain eligibility and procedural requirements.<sup>185</sup> Under the Securities and Exchange Act qualifying shareholders—those who owned at least \$2,000

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<sup>183</sup> The terms “resolution” and “proposal” are used interchangeably. A proposal usually includes a “resolved clause” that requests a particular course of action followed by a supporting statement explaining the reason for the request. A proposal cannot exceed 500 words but may include links to references and resources with additional information.

<sup>184</sup> Securities and Exchange Act of 1934, 17 C.F.R. § 240.14a (2018).

<sup>185</sup> 17 C.F.R. § 240.14a-8.

or 1% of the company's voting shares for a year—can file resolutions.<sup>186</sup> A company must include all qualifying shareholder proposals in the proxy materials it distributes to shareholders unless the proponent of the resolution fails to meet procedural requirements.<sup>187</sup> If a shareholder's proposal meets the SEC requirements a company cannot refuse to include the resolution in its proxy materials and the matter must be put to a vote at an annual or other meeting of the company.<sup>188</sup> In this way, proposals can bring issues to the attention of the investing public.

Usually corporate management opposes shareholder resolutions and will include a recommendation to vote against the proposals contained in proxy materials.<sup>189</sup> Companies can seek to exclude shareholder proposals by appealing to the SEC's Division of Corporation Finance Staff to issue a "no-action letter."<sup>190</sup> An SEC Staff no-action letter provides the company with an advisory opinion regarding whether or not it would recommend any enforcement action if the company takes a given course of action to address the concerns raised by a proposal.<sup>191</sup> SEC no-action letters usually discuss whether a company can exclude a proposal if there is a sound basis for the company's opposition or if the proponent of the proposal makes changes or clarifications to the resolution.<sup>192</sup> SEC rules allow corporations to exclude proposals and statements in support of proposals that are materially false or misleading.<sup>193</sup> When the SEC determines that a company has already addressed the issue or substantially implemented changes sought in a shareholder proposal, then the company does not have to include the proposal in proxy materials.<sup>194</sup> Shareholder proposals must be significantly related to the company's business.<sup>195</sup> The

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<sup>186</sup> 17 C.F.R. § 240.14a-8(b).

<sup>187</sup> 17 C.F.R. § 240.14a-8(f).

<sup>188</sup> 17 C.F.R. § 240.14a-8.

<sup>189</sup> See generally Yonca Ertimur et al., *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. OF CORP. FIN. 53 (2010).

<sup>190</sup> 17 C.F.R. § 240.14a-8(j).

<sup>191</sup> 17 C.F.R. § 240.14a-8(j)(2)(ii).

<sup>192</sup> *Fast Answers: No Action Letters*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/fast-answers/answersnoactionhtm.html> (last updated Mar. 23, 2017).

<sup>193</sup> 17 C.F.R. § 240.14a-8(i)(3); 17 C.F.R. § 240.14a-9; SEC Staff Legal Bulletin No. 14, 17 C.F.R. 14a-8 (July 13, 2001).

<sup>194</sup> 17 C.F.R. § 240.14a-8(i)(10); see, e.g., Texaco, Inc., SEC No-Action Letter, 1990 WL 286126 (Feb. 23, 1990); Anheuser-Busch Companies, Inc., SEC No-Action Letter, 2007 WL 162272 (Jan. 17, 2007); Exelon Corp., SEC No-Action Letter, 2010 WL 4922472 (Feb. 26, 2010).

<sup>195</sup> Proposed Amendments to Rule 14a-8, Exchange Act Release No. 19135, 26 SEC Docket 494 (Oct. 14, 1982). Rule 14a-8(i)(5), referred to as the "relevance rule," explains when it would be appropriate to exclude proposals "not otherwise significantly related to the issuer's business." *Id.*

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SEC has allowed proposals regarded as socially or politically significant to be included in proxy statements, accordingly company requests to exclude must explain why the proposal is not significant to the company.<sup>196</sup>

Ordinarily, shareholder resolutions are non-binding with votes serving as an indication of shareholder sentiment.<sup>197</sup> It is rare for any resolution to receive a majority of votes, as management opposes most shareholder proposals.<sup>198</sup> Only “for” and “against” votes are counted in determining support for a resolution.<sup>199</sup> Many resolutions now receive votes within the thirty to fifty percent range because shareholders see resolutions as related to improving corporate performance.<sup>200</sup> Proponents are permitted to resubmit defeated resolutions within a specified timeframe, provided that support for the proposal reaches a minimum threshold percentage of the vote.<sup>201</sup> Nevertheless, despite being non-binding and frequently defeated in votes, shareholder resolutions play an

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A proposal can properly be excluded when less than 5 percent of the company’s total assets or less than 5 percent of its net earnings and gross sales are at stake. *Id.* The SEC “has taken the position that certain proposals, while relating to only a small portion of the issuer’s operations, raise policy issues of significance to the issuer’s business . . . [and] a particular corporate policy which involves an arguably economically insignificant portion of an issuer’s business . . . may have a significant impact on other segments of the issuer’s business or subject the issuer to significant contingent liabilities.” *Id.*

<sup>196</sup> *Id.*; see, e.g., *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877 (S.D.N.Y. 1993) (ruling in favor of proponent shareholders of a resolution seeking disclosure of Walmart’s anti-discrimination policies over company objection).

<sup>197</sup> See 17 C.F.R. § 240.14a-8(i)(1).

<sup>198</sup> See generally Ertimur et al., *supra* note 189; see also INTERFAITH CTR. ON CORP. RESPONSIBILITY, ICCR’S 2019 PROXY RESOLUTIONS AND VOTING GUIDE 9 (2019), [https://www.iccr.org/sites/default/files/2019\\_iccrproxyresolutionsandvotingguidehr.pdf](https://www.iccr.org/sites/default/files/2019_iccrproxyresolutionsandvotingguidehr.pdf) (“Any abstentions are counted as votes for management by default, so we strongly urge investors to practice ‘active ownership’ by voting their proxies every year.”); U.S. FOUND. FOR SUSTAINABLE & RESPONSIBLE INV., REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS I (2018) (noting that “[s]ustainable, responsible and impact (SRI) investing in the United States continues to expand at a healthy pace” with increased focus on climate change, conflict risk, human rights, and transparency and anti-corruption); Owen Davs, *The Next Shareholder Revolution*, INEQUALITY.ORG (Jan. 30, 2019), <https://inequality.org/research/next-shareholder-revolution/>; Julie Wokaty, *Storming the Corporate Castle: Does Shareholder Activism Work?*, INTERFAITH CTR. ON CORP. RESP. (May 23, 2015), <https://www.iccr.org/storming-corporate-castle-does-shareholder-activism-work> (noting that although there may be greater acknowledgment of the need for reform, actual reform can be hard, but not impossible, to achieve).

<sup>199</sup> See 17 C.F.R. § 240.14a-8(i)(1).

<sup>200</sup> See Julie Fox Gorte & Tim Smith, *The Value of the Shareholder Proposal Process*, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (July 11, 2017), <https://corp.gov.law.harvard.edu/2017/07/11/the-value-of-the-shareholder-proposal-process/>.

<sup>201</sup> 17 C.F.R. § 240.14a-8(i)(12).

important role in corporate governance.<sup>202</sup> Shareholder resolutions have the potential to lead to improvements in corporate policies and serve to increase public awareness about issues related to corporate practices.<sup>203</sup> To that end, shareholder proposals are becoming an increasingly important part of environmental and human rights advocacy.<sup>204</sup>

The number of shareholder resolutions filed in the United States rose after 2011, when the UNGPs were endorsed and again in 2015 after the Paris Accord was adopted.<sup>205</sup> The Interfaith Center on Corporate Responsibility (ICCR) brings together institutional shareholders of various religious traditions to press public companies to change policies in order to promote social justice and to protect the environment.<sup>206</sup> According to data collected by the ICCR on annual shareholder resolutions, there has been a relatively steady increase in the total number of resolutions filed.<sup>207</sup> In 2011 there were just under 200 shareholder resolutions filed.<sup>208</sup> By 2017 there were over 300 shareholder resolutions filed.<sup>209</sup>

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<sup>202</sup> See generally Doron Levit & Nadya Malenko, *Nonbinding Voting for Shareholder Proposals*, 66, J. Finance 1579 (2011); see also Andrew K. Prevost & Ramesh P. Rao, *Of What Value Are Shareholder Proposals Sponsored by Public Pension Funds?*, 73 J. Business 177 (1999).

<sup>203</sup> Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 Am. Bus. L.J. 365, 374 (2006).

<sup>204</sup> *Id.*

<sup>205</sup> *2018 Proxy Season Wins and Challenges*, Interfaith Ctr. on Corp. Responsibility, <https://www.iccr.org/2018-proxy-season-wins-and-challenges> (last visited Mar. 11, 2019).

<sup>206</sup> *About ICCR*, Interfaith Ctr. on Corp. Responsibility, <https://www.iccr.org/about-iccr> (last visited Mar. 11, 2019).

<sup>207</sup> *ICCR's 2017 Shareholder Resolutions*, Interfaith Ctr. on Corp. Responsibility, <https://www.iccr.org/reports-and-publications/iccrs-2017-shareholder-resolutions> (last visited Mar. 11, 2019).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

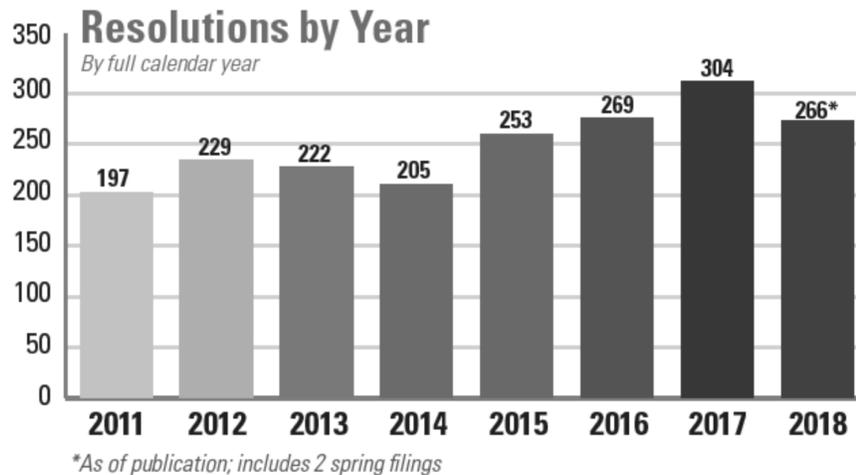


Chart: ICCR, 2018 Proxy Resolutions and Voting Guide

Significantly, for advancing the SDGs and climate justice, investors are advocating to advance particular issues through shareholder resolutions.<sup>210</sup> For example, as the sheer number of shareholder resolutions has grown, the number of resolutions related to environmental and social issues has also increased.<sup>211</sup> According to data collected by the ICCR on annual shareholder resolutions, a range of environmental and social issues are of interest to investors.<sup>212</sup> In 2018, investors made proposals seeking to change the policies and practices of public companies on issues ranging from diversity, corporate political contributions, human trafficking, and

<sup>210</sup> Shirley Wescot, *Surprises from the 2018 Proxy Season*, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (June 27, 2018), <https://corpgov.law.harvard.edu/2018/06/27/surprises-from-the-2018-proxy-season/>.

<sup>211</sup> See, e.g., Gordon L. Clark et al., *Social and Environmental Shareholder Activism in the Public Spotlight: US Corporate Annual Meetings, Campaign Strategies, and Environmental Performance, 2001–04*, 40 *Env't & Plan. A* 1370 (2008); *Trends in ESG / Sustainability Shareholder Proposals*, ALPHASENSE, <https://www.alpha-sense.com/blog/trends-in-esg-sustainability-shareholder-proposals/> (last visited Mar. 11, 2019).

<sup>212</sup> *2018 Proxy Season Wins and Challenges*, *supra* note 205; Ruth Williams, *Big Investors Backed Shareholder Campaigns on Climate, Human Rights*, *Sydney Morning Herald*, (Feb. 23, 2018), <https://www.smh.com.au/business/markets/big-investors-take-a-public-stand-on-climate-change-risk-20180215-p4z0gr.html>.

corporate governance.<sup>213</sup> Climate related shareholder resolutions outweighed all other social and environmental issues based on the number of proposals put forward.<sup>214</sup> There were 61 different climate related resolutions filed by investors in 2018.<sup>215</sup>

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<sup>213</sup> See ERNST & YOUNG LLP, 2018 PROXY SEASON REVIEW (2018), [https://www.ey.com/Publication/vwLUAssets/EY-cbm-proxy-season-review-2018/\\$FILE/EY-cbm-proxy-season-review-2018.pdf](https://www.ey.com/Publication/vwLUAssets/EY-cbm-proxy-season-review-2018/$FILE/EY-cbm-proxy-season-review-2018.pdf).

<sup>214</sup> See *2018 Proxy Season Climate Change Update*, Interfaith Ctr. on Corp. Responsibility, <https://www.iccr.org/2018-proxy-season-climate-change-update> (last visited Mar. 11, 2019).

<sup>215</sup> *Id.*

## Resolutions by Issue



Chart: ICCR, 2018 Proxy Resolutions and Voting Guide

The extractives industry sector has garnered the attention of investors. Leading oil and gas firms have been a focus for investors concerned about climate change and human rights risks for over a decade.<sup>216</sup> A review of recent shareholder resolutions is instructive and illuminates the direction a growing number of investors and asset managers are moving on ESG issues. The following reviews climate related resolutions put forward by investors in Exxon and Chevron.

<sup>216</sup> David Hasemyer, *3 Dozen Shareholder Climate Resolutions Target Oil, Gas and Power Companies*, Inside Climate News (Mar. 8, 2018), <https://insideclimatenews.org/news/07032018/shareholder-resolutions-climate-change-2-degrees-methane-lobbying-trump-administration>; Georgina Gustin, *From Beef to Palm Oil, Investors Worry About Climate Risk in the Food Industry*, Inside Climate News (July 5, 2017), <https://insideclimatenews.org/news/05072017/agriculture-climate-change-risk-investors-share-holder-resolutions-beef-palm-oil>; U.N. Secretary-General, Remarks on Climate Change (Sept. 10, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered>.

*1. Climate Resolutions*

In 2017, Exxon shareholders made history when they approved a proposal to require the company to report on its climate impacts.<sup>217</sup> This result was reached after years of investor requests.<sup>218</sup> My review of shareholder resolutions from 2010–2015 identified fifty-three shareholder proposal involving Exxon, which were relevant to a changing climate.

Exxon Mobile Corporation: 53 Resolutions Found & Reviewed

10% or Less Approval: 8 Resolutions

11% to 19% Approval: 1 Resolutions

20% to 30% Approval: 17 Resolutions

30% to 49% Approval: 4 Resolutions

50% or more Approval: 1 Resolutions

Omitted: 7 Resolutions

Withdrawn: 13 Resolutions

Filed: 2 Resolutions

The first substantive shareholder proposal calling for Exxon to take action on climate issues was filed in 2009 by the Tri-State Coalitions for Responsible Investment, a non-profit organization of Roman Catholic institutional investors based in New England.<sup>219</sup> The Coalition's resolution requested that Exxon set goals on greenhouse gas (GHG) emissions, with reduction targets.<sup>220</sup> Specifically, the Tri-State Coalitions for Responsible

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<sup>217</sup> Diane Cardwell, *Exxon Mobil Shareholders Demand Accounting of Climate Change Policy Risks*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/business/energy-environment/exxon-shareholders-climate-change.html>.

<sup>218</sup> See Exxon Mobil Corp., Notice of 2009 Annual Meeting and Proxy Statement (Form 14A) 59–60 (May 27, 2009) [hereinafter Exxon Proxy 2009].

<sup>219</sup> *Id.*

<sup>220</sup> *Exxon Mobile - Green House Gas Emissions Reduction (2009)*, Trillium Asset Mgmt., <http://www.trilliuminvest.com/shareholder-proposal/oil-and-gas-emissions-reduction/>. In pertinent part the resolution explained the need for targets and reductions as follows:

a. Cambridge Energy Research Associates' (CERA) Chairman Daniel Yergin notes that "climate change and putting a price on carbon will change the dynamics of the energy marketplace." CERA further reports that clean energy investment could surpass \$7 trillion by 2030 and that "clean energy is not a bubble or passing phenomenon. Clean energy is now poised to cross the divide and move from the fringes of the energy sector to the mainstream."

Shareholders' repeated request for emission reduction goals reiterates ExxonMobil's own Environmental Business Planning process, which is used "to identify key environmental drivers . . . set targets in key focus areas, and identify projects and actions to achieve those targets."

Investment asked that the Board of Directors “adopt quantitative goals, based on current technologies, for reducing total greenhouse gas emissions from the Company’s products and operations; and that the Company report to shareholders by September 30, 2009, on its plans to achieve these goals. Such a report will omit proprietary information and be prepared at reasonable cost.”<sup>221</sup> Supporting materials included in the proposal criticized Exxon, called for change, and compared Exxon to other firms taking action on risks and opportunities associated with a changing climate.<sup>222</sup> The resolution gained 29 percent support of the shares voted.<sup>223</sup>

When the coalition filed its resolution again in 2011, asking that Exxon adopt GHG reduction targets, the resolution received only 26.5 percent support.<sup>224</sup> The coalition argued that its repeated requests for GHG goals were aligned with the company’s existing environmental business planning process where environmental performance targets had been set to manage energy efficiency in operations.<sup>225</sup> The 2011 proposal

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Proponents believe ExxonMobil’s board never has sufficiently responded to shareholders in their request for an action plan and articulated goals for reducing GHG emissions from the Company’s products and operations.

b. ExxonMobil has recently announced \$300 million for lithium ion battery technologies, and \$100 million for carbon capture research. Yet, we believe ExxonMobil has done a poor job of articulating a cohesive business plan for dealing with climate risk and opportunity—especially regarding its products—or offered robust responses to the financial, regulatory, and technology impacts of the climate crisis.

BP, Royal Dutch Shell, ConocoPhillips, and Chevron have made newsworthy investments in renewables and low-carbon technologies to reduce emissions, and/or have begun integrating the cost of carbon into planning and investments.

<sup>221</sup> See 2009 Exxon Shareholder Resolution, *Adopt GHG Reduction Targets (XOM, 2009 Resolution)*, CERES, [https://engagements.ceres.org/ceres\\_engagementdetailpage?recID=a011H00000C4nVUQAZ](https://engagements.ceres.org/ceres_engagementdetailpage?recID=a011H00000C4nVUQAZ) (last visited Mar. 11, 2019).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> 2011 Exxon Shareholder Resolution, *Adopt GHG reduction targets (XOM, 2011 Resolution)*, CERES, [https://engagements.ceres.org/ceres\\_engagementdetailpage?recID=a01A0000002syg6IAA](https://engagements.ceres.org/ceres_engagementdetailpage?recID=a01A0000002syg6IAA) (last visited Mar. 11, 2019).

<sup>225</sup> *Id.* In pertinent part the resolution explained the need for targets and reductions as follows:

- a. Shareholders’ repeated request for GHG reduction goals is consistent with ExxonMobil’s own Environmental Business Planning process, which is used “to identify key environmental drivers, set targets in key focus areas, and identify projects and actions to achieve these targets.” ExxonMobil has set specific targets for environmental performance in recent years, such as operations and refinery energy efficiency (10% by 2012), VOCs (5% reductions per year), upstream flaring volumes (23% cuts from 2008 baseline), and NOx and SO<sub>2</sub> (70% reduction by 2012 from 2000 baseline).
- b. Our Company has made incremental investments in energy efficiency and flaring reductions, the low-hanging fruit. But the time has clearly come for

acknowledged that there had been some improvements, such as: “incremental investments in energy efficiency and flaring reductions.”<sup>226</sup> Nevertheless, for the coalition, Exxon’s incremental investments were insufficient to address broader climate concerns in the absence of a clear strategy for dealing the risks and opportunities associated with climate change.<sup>227</sup> The coalition investors made their expectations clear: “Investors expect ExxonMobil to take leadership in developing solutions to this global challenge as the company plays such a critical role in energy markets.”<sup>228</sup>

By 2017 sentiment had shifted and a climate-related shareholder proposal by the New York State Comptroller passed over the objection of Exxon’s board of directors.<sup>229</sup> The Comptroller oversees the third largest public pension plan in the United States, with an estimated value of over \$206 billion in assets held in trust for over one million members, retirees, and beneficiaries.<sup>230</sup> In the intervening years—between the first climate related resolution proposed to the final resolution adopted—the global community had come to a consensus about the risks associated with climate change, culminating in the Paris Agreement.<sup>231</sup>

The New York State Comptroller’s shareholder resolution calling for reporting on 2-degree analysis and strategy received 62.1 percent support.<sup>232</sup> The 2017 New York State Comptroller’s resolution was reminiscent of the proposals put forward several years earlier raising

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ExxonMobil to articulate a cohesive strategy for deeper emissions reductions. Proponents believe our Board has never sufficiently responded to shareholders in their request for a clear strategy for dealing with climate risk and opportunity, including articulating goals for reducing GHG emissions from ExxonMobil’s products AND operations.

- c. It is widely agreed that research has understated the enormity of the impact of GHG emissions. Investors expect ExxonMobil to take leadership in developing solutions to this global challenge as the company plays such a critical role in energy markets.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Press Release, New York State Comptroller, ExxonMobil Agrees to Assess Impacts of Climate Change (Dec. 12, 2017), <https://www.osc.state.ny.us/press/releases/dec17/121217.htm>.

<sup>230</sup> See *Pension Fund Overview*, N.Y. STATE COMPTROLLER, <https://www.osc.state.ny.us/pension/snapshot.htm> (last updated Mar. 31, 2017).

<sup>231</sup> *Adoption of the Paris Agreement*, *supra* note 100.

<sup>232</sup> See 2017 Exxon Shareholder Resolution, *Report on 2-Degree Analysis and Strategy (XOM, 2017 Resolution)*, CERES, [https://engagements.ceres.org/ceres\\_engagementdetailpage?recID=a011200000Bn9eLAAR](https://engagements.ceres.org/ceres_engagementdetailpage?recID=a011200000Bn9eLAAR) (last visited Mar. 11, 2019).

similar issues and requesting similar actions on the part of Exxon.<sup>233</sup> The 2017 Resolution provided:

Shareholders request that, beginning in 2018, ExxonMobil publish an annual assessment of the long-term portfolio impacts of technological advances and global climate change policies, at reasonable cost and omitting proprietary information. The assessment can be incorporated into existing reporting and should analyze the impacts on ExxonMobil's oil and gas reserves and resources under a scenario in which reduction in demand results from carbon restrictions and related rules or commitments adopted by governments consistent with the globally agreed upon 2-degree target. This reporting should assess the resilience of the company's full portfolio of reserves and resources through 2040 and beyond, and address the financial risks associated with such a scenario.<sup>234</sup>

In pertinent part, the proposal in support of the resolution explained:

The Paris Agreement, which went into effect on November 4, 2016, requires signatories to submit progressively stronger nationally determined contributions every five years with a view to ensuring that the objective to restrict warming to well below 2 degrees is met. ExxonMobil recognized in its 2015 10-K that "a number of countries have adopted, or are considering adoption of, regulatory frameworks to reduce greenhouse gas emissions," and that such policies, regulations and actions could make its "products more expensive, lengthen project implementation timelines, and reduce demand for hydrocarbons." However, ExxonMobil has not presented any analysis to investors of how its portfolio performs under a 2 degrees scenario. Performing such an analysis is critical to informing a business strategy that meets ExxonMobil's objective of increasing energy access to the world's poorest, without conflicting with the Paris Agreement.

When ExxonMobil sought to exclude this resolution from the proxy statement last year, the SEC advised that "it does not appear that ExxonMobil's public disclosures compare favorably with the guidelines of the proposal."<sup>235</sup>

## 2. *Human Rights Resolutions*

While not as common as resolutions related to the environment and climate change, human rights resolutions are on the rise. Today, the

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<sup>233</sup> See *Exxon Mobil Corporation Proxy Paper*, GLASS LEWIS (May 31, 2017), <http://www.glasslewis.com/wp-content/uploads/2018/04/XOM-2017.pdf>.

<sup>234</sup> See 2017 Exxon Shareholder Resolution, *supra* note 232.

<sup>235</sup> *Id.*

typical human rights resolution calls for a human rights risk or impact assessment of the sort described in the UNGPs.<sup>236</sup> My review found that rights resolutions evolved over time to ask more of business enterprises. Shareholder proposals related to human rights issues have become more specific and sophisticated. A comparative review of the substantive content of proposals made by shareholders in Exxon and Chevron show a pattern of escalating social and environmental performance expectations on the part of a wider range of investors linking adverse social and environmental impacts to economic risks for the businesses.

In 2010 and 2011, Exxon shareholders presented proposals seeking clarity on Exxon's impacts on the human right to water.<sup>237</sup> When the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) in 1948, there was no express enumeration of the human right to water or to sanitation.<sup>238</sup> The United Nations Special Rapporteur on the Right to Water, Catarina De Albuquerque, has observed that the failure to explicitly make reference to water in the text of the treaty was simply due to the prevailing assumption that "water, like air, was already freely available to all."<sup>239</sup>

Recognition of the human right to water has gained ground recently as concerns about access to water and conflicts over water have become more pronounced.<sup>240</sup> The human rights-based approach to water has evolved in recent years with international institutions identifying the human right to water as implicit in existing fundamental human rights instruments and giving explicit expression to the right in more recently adopted international instruments.<sup>241</sup> "In 1998, the U.N. Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities . . . outlin[ed] the basis for 'the right of access of everyone to drinking water supply and sanitation services.'" <sup>242</sup> In 1999, the UN General Assembly issued a resolution on The Right to Development, proclaiming the rights to food and clean water to be

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<sup>236</sup> See UNGP, *supra* note 66, princ. 21.

<sup>237</sup> Exxon Mobil Corp., 2010 Proxy Statement (Form 14A) 59–60 (Apr. 13, 2010) [hereinafter Exxon Proxy 2010]; Exxon Mobil Corp., 2011 Proxy Statement (Form 14A) 63 (Apr. 13, 2011) [hereinafter Exxon Proxy 2011].

<sup>238</sup> CATARINA DE ALBUQUERQUE, REALISING THE HUMAN RIGHTS TO WATER AND SANITATION: A HANDBOOK 23, 29–30 (2014).

<sup>239</sup> *Id.* at 23.

<sup>240</sup> *Id.* at 24.

<sup>241</sup> *Id.*

<sup>242</sup> Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over Privatization*, 31 BERKELEY J. INT'L L. 89, 100 (2013).

fundamental human rights, the promotion of which constitutes “a moral imperative both for national Governments and for the international community.”<sup>243</sup> In 2002, the Committee for Economic, Social, and Cultural Rights, the treaty body that monitors State compliance with the ICESCR, issued a General Comment explaining the foundation for the human right to water.<sup>244</sup> General Comment 15 provides that the human right to water is “implicitly included” in particular provisions of the treaty—Article 11, which provides the right to an adequate standard of living, and Article 12, which provides for the right to health.<sup>245</sup>

The human right to water received additional affirmation in a 2010 UN General Assembly Resolution approved by 122 States, recognizing “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”<sup>246</sup> The Resolution reflects the belief of member states that the right to water was not new, but was instead a clarification of the already existing norms.<sup>247</sup> The Human Rights Council also adopted a Resolution on human rights and access to safe drinking water and sanitation.<sup>248</sup> The Council resolution explains that the human right to safe drinking water and sanitation derives from the right to an adequate standard of living and is “inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”<sup>249</sup>

NorthStar Asset Management, as shareholders in Exxon, filed a 2010 resolution requesting “the Board of Directors to create a comprehensive policy articulating our company’s respect for and commitment to the human right to water.”<sup>250</sup> In a supporting statement, NorthStar explained: “Proponents believe the policy should elucidate ExxonMobil’s commitment to ensuring sustainable access to water resources, entitling everyone to sufficient, safe, acceptable, physically accessible and affordable water while operating our business in global

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<sup>243</sup> *Id.* (quoting G.A. Res. 54/175 (Feb. 15, 2000)).

<sup>244</sup> ALBUQUERQUE, *supra* note 238, at 24. General comments are authoritative interpretations of the ICESCR.

<sup>245</sup> WASH UNITED, FRESHWATER ACTION NETWORK & WATERLEX, THE HUMAN RIGHT TO SAFE DRINKING WATER AND SANITATION IN LAW AND POLICY—A SOURCEBOOK 24, 80 (2012).

<sup>246</sup> Murthy, *supra* note 242, at 104 (quoting G.A. Res. 64/PV.108 (Aug. 3, 2010)) (internal quotation marks omitted).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Exxon Proxy 2010, *supra* note 237, at 60.

communities.”<sup>251</sup> The proposal detailed a range of reasons for the company to craft a water policy.<sup>252</sup> Exxon’s Board of Directors recommended that other shareholders vote against NorthStar’s water policy proposal, offering a summary of the steps the firm already takes pursuant to its code of conduct.<sup>253</sup> Significantly, while rejecting calls for the creation of a specific water policy, Exxon did state that it has a responsibility to respect

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<sup>251</sup> *Id.*

<sup>252</sup> *See, e.g., id.* at 59–60:

- a. Water is a key resource used in production of our Company’s product, and therefore water quality and quantity is vital for ExxonMobil’s success;
- b. Over-consuming and depleting community groundwater is a direct violation of the human right to water that the UN Committee on Economic, Social and Cultural Rights defines as all people’s right to safe, sufficient, acceptable, physically accessible and affordable water for personal and domestic use;
- c. In 2003, the UN Commission on Human Rights issued a report on the scope of the human rights obligations which clearly states that ‘transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments.’ Regarding equitable access to safe drinking water and sanitation, this report means that the responsibility for ensuring this level of access is not only on governments, but also on private water providers and corporations that utilize water resources;
- d. Our Corporate Citizenship Report touts our Company’s commitment ‘actively promot[ing] respect for human rights, which is essential for helping to create a stable business environment;’ We believe that it is the obligation of our Company to adhere to the UN’s declaration in General Comment 15 which describes that ‘the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water.’ The best way for us to ‘ensur[e] sustainable access to water resources’ is through a comprehensive company policy on the human right to water, using General Comment 15 as a sound and appropriate model;
- e. We believe that global corporations operating without strong human rights and environmental policies face serious risks to their reputation and share value if they are seen to be responsible for or complicit in human rights violations, specifically the violation or erosion of the human right to water;
- f. We believe that significant commercial advantages may accrue to our company by adopting a comprehensive human right to water policy, including enhanced corporate reputation, improved employee recruitment and retention, improved community and stakeholder relations, and reduced risk of adverse publicity, consumer boycotts, divestment campaigns, and lawsuits.

<sup>253</sup> *Id.* at 60.

human rights and to manage environmental resources in a sustainable manner.<sup>254</sup> Responding to the proposal, Exxon offered the following:

- a. The Board agrees ExxonMobil has a responsibility to surrounding communities and the environment for managing our freshwater use in a sustainable manner, and to respect human rights. The Board believes ExxonMobil already has sound policies and processes in place, as part of our *Standards of Business Conduct*, which address the water and human rights issue. Therefore, a specific policy on water and human rights is unnecessary.
- b. ExxonMobil is committed to operating in a way that protects the environment and takes into account the economic and social needs of the communities where we operate. Our environmental policy commits us to continuous efforts to improve environmental performance; and requires our facilities to be designed, operated, and managed with the goal of preventing incidents and reducing adverse impacts to the environment and society, including impacts to society of our freshwater use.
- c. To address the growing global concern for freshwater quality and availability, we continue to assess our current and planned activities to identify where freshwater may become a scarce resource, to better understand our freshwater use patterns, and to assess opportunities to reduce our use. This includes analysis of the social and economic impact of our new projects. For example, at our Singapore chemical plant expansion, we are installing innovative wastewater treatment technology which increases re-use, thereby reducing our water use by about 2 million cubic meters per year compared to conventional technology.

NorthStar filed the same resolution again in 2011.<sup>255</sup> NorthStar's second proposal received less support than the initial proposal filed.<sup>256</sup>

Shareholders in Chevron have also been highly active on human rights issues. My review of Chevron filings identified a total of ten shareholder resolutions from 2000–2015 making reference to human rights.<sup>257</sup> Early proposals sought policy statements on respect for human

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<sup>254</sup> *Id.*

<sup>255</sup> Exxon Proxy 2011, *supra* note 237.

<sup>256</sup> Compare Exxon Mobil Corp., Current Report Item 5.07 (Form 8-K), at 5 (Jun. 1, 2010) (161,359,282 or 6.7% for, 2,239,095,580 or 93.3% against, 531,333,230 abstentions, and 857,989,099 broker non-votes), with Exxon Mobil Corp., Current Report Item 5.07 (Form 8-K), at 5 (May 31, 2011) (182,936,514 or 6.9% for, 2,450,745,370 or 93.1% against, 512,218,286 abstentions, and 887,259,836 broker non-votes).

<sup>257</sup> Chevron Corp., 2006 Proxy Statement (Form 14A), at 40–41 (Mar. 20, 2006) [hereinafter Chevron Proxy 2006]; Chevron Corp., 2007 Proxy Statement (Form 14A), at 48–49 (Mar. 19, 2007) [hereinafter Chevron Proxy 2007]; Chevron Corp., 2008 Proxy Statement (Form 14A), at 70–71 (Apr. 17, 2008) [hereinafter Chevron Proxy 2008]; Chevron Corp., 2009 Proxy Statement (Form

rights, later proposals asked for information about the firm's human rights performance and board level participation and public input concerning human rights risks.<sup>258</sup> Earlier proposals between 2005–2009 sought to secure policy commitments and structural change.<sup>259</sup> By 2012–2015, shareholders sought the specification of criteria for country selection.<sup>260</sup> A representative sample of Chevron shareholder proposal related to human rights risks are surveyed and summarized below.

A 2006 shareholder resolution contained the following request:

**Resolved:** Shareholders request the Board to adopt a comprehensive, transparent, verifiable **human rights** policy and report to shareholders on the plan for implementation by October, 2006. This report to be prepared at reasonable expense, omitting proprietary information.<sup>261</sup>

The proposal accompanying the resolution explained the importance of having a policy commitment related to human rights as follows:

Whereas: We believe transnational corporations operating in countries with repressive governments, ethnic conflict, weak rule of law, endemic corruption, or poor labor and environmental standards face serious risks to their reputation and share value if they are seen as responsible for, or complicit in, **human rights violations**; Our company has business operations in more than 180 nations, many of which have consistently been noted by the U.S. Department of State as violating basic human rights; (February 27, 2005, [www.state.gov/g/drl/rls/hrrpt/2004](http://www.state.gov/g/drl/rls/hrrpt/2004)).

At least 78 companies have already adopted **human rights** policies referencing the Universal Declaration of Human Rights.<sup>262</sup>

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14A), at 78–81 (Apr. 13, 2009) [hereinafter Chevron Proxy 2009]; Chevron Corp., 2010 Proxy Statement (Form 14A), at 82–83 (Apr. 15, 2010) [hereinafter Chevron Proxy 2010]; Chevron Corp., 2011 Proxy Statement (Form 14A), at 76–77 (Apr. 14, 2011) [hereinafter Chevron Proxy 2011]; Chevron Corp., 2012 Proxy Statement (Form 14A), at 80–81 (Apr. 12, 2012) [hereinafter Chevron Proxy 2012]; Chevron Corp., 2013 Proxy Statement (Form 14A), at 88–89 (Apr. 11, 2013) [hereinafter Chevron Proxy 2013]; Chevron Corp., 2014 Proxy Statement (Form 14A), at 72–73 (Apr. 10, 2014) [hereinafter Chevron Proxy 2014]; Chevron Corp., 2015 Proxy Statement (Form 14A), at 72–73 (Apr. 9, 2015) [hereinafter Chevron Proxy 2015].

<sup>258</sup> See Chevron Proxy 2006, *supra* note 257, at 40; Chevron Proxy 2007, *supra* note 257, at 48.

<sup>259</sup> See Chevron Proxy 2006, *supra* note 257, at 40; Chevron Proxy 2007, *supra* note 257, at 48; Chevron Proxy 2008, *supra* note 257, at 70; Chevron Proxy 2009, *supra* note 257, at 80.

<sup>260</sup> Chevron Proxy 2008, *supra* note 257, at 76; Chevron Proxy 2009, *supra* note 257, at 78; Chevron Proxy 2010, *supra* note 257, at 78; Chevron Proxy 2011, *supra* note 257, at 80; Chevron Proxy 2012, *supra* note 257, at 80; Chevron Proxy 2013, *supra* note 257, at 88; Chevron Proxy 2014, *supra* note 257, at 72.

<sup>261</sup> Chevron Proxy 2006, *supra* note 257, at 40 (emphasis added).

<sup>262</sup> *Id.* (emphasis added).

Chevron, in response to pending shareholder proposals, explained that the company was working to develop a policy consistent with earlier voluntary commitments it had undertaken.<sup>263</sup> In a 2005 statement the company asserted:

One of the proposals ChevronTexaco received was a resolution from stockholders interested in the Company's approach to human rights. ChevronTexaco has developed a draft Human Rights Statement and supporting material. The Statement is based on the values and support for universal **human rights** reflected in The ChevronTexaco Way and is consistent with the Company's support for the Global Sullivan Principles and participation in the Voluntary Principles on Security and **Human Rights dialogue** process. The Statement is intended to provide guidance to ChevronTexaco employees. In 2005, the Company is testing this Statement in field locations and assessing the most efficient and effective deployment alternatives. Following discussions with ChevronTexaco on the development of this Human Rights Statement, the stockholders agreed to withdraw the resolution.<sup>264</sup>

Undeterred, activist shareholders continued to submit substantially the same proposal in 2007 and again in 2008 until ultimately Chevron did adopt an acceptable human rights statement.<sup>265</sup> The 2007 shareholder proposal noted the shortcomings of the company's early attempts to craft policy and perhaps informed reforms.<sup>266</sup> For example, the 2007 proposal included the following observations:

The **Human Rights Statement** adopted last year by the Board of Directors does not address the full range of Chevron stakeholder concerns. For instance, social and economic developments are absent, but they are central to the UN Declaration on Human Rights and to the concerns of Chevron stakeholders; The Statement is also not transparent. It does not identify specific actions to prevent, investigate or mediate allegations against our Company, nor does it address responsibility and accountability for implementation. It does not identify the mechanism to monitor and evaluate the implementation of the values Chevron proclaims.<sup>267</sup>

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<sup>263</sup> Chevron Corp., 2005 Proxy Statement (Form 14A), at 34 (Mar. 21, 2005).

<sup>264</sup> *Id.* (emphasis added).

<sup>265</sup> Compare Chevron Proxy 2007, *supra* note 257, at 48, with Chevron Proxy 2008, *supra* note 257, at 70; CHEVRON CORP., POLICY 520: ABOUT OUR HUMAN RIGHTS POLICY (2016), <https://www.chevron.com/-/media/chevron/corporate-responsibility/documents/AboutOurHumanRightsPolicy.pdf>.

<sup>266</sup> Chevron Proxy 2007, *supra* note 257, at 48.

<sup>267</sup> *Id.* at 48 (emphasis added).

The 2008 proposal calling for the creation of a human rights policy to inform business practices was crafted in a way to educate and inform providing more specifics and making explicit reference to global policy developments and the work of the UN Special Representative on Business and Human Rights.<sup>268</sup> The 2008 proposal explained:

Corporations operating in countries with civil conflict, weak rule of law, endemic corruption, poor labor and environmental standards face serious risks to reputation and shareholder value when they are seen as responsible for, or complicit in, **human rights** violations. Chevron operates in numerous areas that the U.S. State Department classifies as high-risk environments. Conditions in such areas continue to experience significant **human rights violations**, notably Burma and Nigeria. (<http://www.state.gov/g/drl/rls/hrrpt/2006/>) This urgency is further highlighted by U.N. Special Representative John Ruggie: “**The extractive sector**—oil, gas, and mining—utterly dominate the sample of reported [human rights] abuses . . . The extractive industries also account for most allegations of the worst abuses, up to and including complicity in crimes against humanity, typically for acts committed by public and private security forces . . . large-scale corruption; violations of labor rights; and a broad array of abuses in relation to local communities.”<sup>269</sup>

With a human rights policy in place at Chevron after 2008, activist investors turned attention to securing processes to ensure human rights issues were addressed at the highest levels of the company.<sup>270</sup> To that end, a 2010 shareholder proposal sought the creation of a dedicated human rights committee, providing in relevant part:

[S]hareholders request that Chevron establish a **Human Rights Committee** with the responsibility to review and approve all policies and actions taken by the Company that might affect human rights observance in countries where it does business, or where its products and technologies are being sold or used. This Committee will follow the Universal Declaration of Human Rights and will include high-level officials of Chevron and respected outside human rights experts (especially with knowledge of China’s human rights situation) to help Chevron understand the human rights impacts of Chevron business abroad.<sup>271</sup>

Chevron shareholders submitted similar proposals in 2010, 2011, and 2012, with the request for the creation of a human rights committee

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<sup>268</sup> Chevron Proxy 2008, *supra* note 257, at 70.

<sup>269</sup> *Id.* (emphasis added).

<sup>270</sup> Chevron Proxy 2010, *supra* note 257, at 82.

<sup>271</sup> *Id.* (emphasis added).

becoming more refined over time.<sup>272</sup> For example, in the 2011 proposal shareholders sought to amend the firm's by-laws as follows:

RESOLVED: To amend Article I of the By-Laws, by inserting after Section 5, a new Section 6.

SECTION 6. Board Committee on **Human Rights**. There is established a Board Committee on **Human Rights**, to review the implications of company policies, above and beyond matters of legal compliance, for the **human rights** of individuals in the US and worldwide, including assessing the impacts of company operations on resources and public welfare in host communities and the relationship of company operations and resources to any government security forces that secure company operations in those communities.

The Board of Directors is authorized, by resolution, in its discretion and consistent with these By-Laws, the Articles of **Incorporation and applicable law to: (1) select the members of the Board Committee on Human Rights**, (2) provide said committee with funds for operating expenses, (3) adopt a charter to govern said Committee's operations, (4) empower said Committee to solicit public input and to issue periodic reports to shareholders and the public, at reasonable expense and excluding confidential information, including but not limited to an annual report on the findings of the Board Committee, and (5) any other measures within the Board's discretion consistent with these By-Laws and applicable law. Nothing herein shall restrict the power of the Board of Directors to manage the business and affairs of the company. The Board Committee on Human Rights shall not incur any costs to the company except as authorized by the Board of Directors.<sup>273</sup>

After the proposals for a board level committee on human rights came a series of proposals regarding country selection guidelines. Proposals on country selection criteria incorporating human rights risks started in 2012 with a request that Chevron develop and disclose standards which would, among other things, inform investment in and divestment or withdrawal from specific high-risk countries, in particular Burma (now Myanmar).<sup>274</sup> The resolution was reintroduced and refined in 2013 and again in 2014.<sup>275</sup>

The 2013 proposal calling for the development and disclosure of country selection criteria explained the reason for the request with an unusually detailed narrative as follows:

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<sup>272</sup> *Id.*; Chevron Proxy 2011, *supra* note 257, at 76; Chevron Proxy 2012, *supra* note 257, at 80.

<sup>273</sup> Chevron Proxy 2011, *supra* note 257, at 76.

<sup>274</sup> Chevron Proxy 2012, *supra* note 257, at 80.

<sup>275</sup> Chevron Proxy 2014, *supra* note 257, at 72.

In March 2005, Unocal settled a case for a reported multi-million dollar amount in which it was claimed that Unocal was complicit in **human rights abuses** by Burmese troops hired by the Yadana project to provide security; . . . By purchasing Unocal, Chevron acquired Unocal's investment in Burma including its legal, moral, and political liabilities; Nobel Peace Prize Laureate Aung San Suu Kyi, leader of the National League for Democracy, stated in June 2012, that MOGE "The Myanmar Oil and Gas Enterprise (MOGE) . . . with which all foreign participation in the energy sector takes place through joint venture arrangements, lacks both transparency and accountability at present. . . . . . . ." In 2012, Chevron sponsored oil and gas industry conferences in Burma and is reported to be exploring new investments in the country; Chevron does business in other countries with controversial **human rights** records: Angola, Kazakhstan, and Nigeria; BE IT RESOLVED: The shareholders request the Board to make available by the 2014 annual meeting a report, omitting proprietary information and at reasonable cost, on Chevron's criteria for (i) investment in; (ii) continued operations in; and, (iii) withdrawal from specific high-risk countries.<sup>276</sup>

The text of the proposal emphasized the importance of "transparency and accountability"<sup>277</sup> and expressed concern about the company's acquisitions of assets in Burma and beyond.

Effective coordinated shareholder advocacy could leverage securities laws that protect the interests of investors to also promote environmental justice and reduce risks to human rights. Shareholder advocacy differs in strategy from the often adversarial strategies used by grass-roots human rights and environmental activists.<sup>278</sup> Out of necessity, grass-roots activists and affected communities may adopt an adversarial posture because of their position relative to the company in disputes involving a business enterprise because they are not direct stakeholders.<sup>279</sup> In contrast, shareholders have a direct financial stake in the company's conduct and as a result a different relationship.<sup>280</sup> Shareholder advocacy often is a dialog with the company. Should talks fail to produce the desired results, shareholders will resort to the resolution-proposal process to put

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<sup>276</sup> Chevron Proxy 2013, *supra* note 257, at 88 (emphasis added).

<sup>277</sup> *Id.*

<sup>278</sup> See, Charles Eesley et al., *Through the Mud or in the Boardroom: Examining Activist Types and Their Strategies in Targeting Firms for Social Change*, 37 STRATEGIC MGMT. J. 2425, 2428 (2015).

<sup>279</sup> *Id.* at 2427–28 (citing as an example a 2008 Greenpeace protest against Unilever as demonstrative of activists' attempts to "generate negative media attention for the firm").

<sup>280</sup> *Id.*

the matter in front of others.<sup>281</sup> Proposed shareholder resolutions frequently can provide a formal communication channel between shareholders and management to come to an agreement resulting in the proponent voluntarily withdrawing a request where the issues raised are resolved.

#### B. STAKEHOLDER INITIATIVES TO REDUCE HUMAN RIGHTS RISKS

Multi-Stakeholder Initiatives (MSIs) are collaborations between representatives of different stakeholder sectors of society that agree to come together to focus attention on issues or confront challenges that are of mutual concern.<sup>282</sup> In the business context, a stakeholder is understood to be a party with an interest in a company, in that the company's conduct can either affect or be affected by such a party.<sup>283</sup> Historically, investors, employees, suppliers, and customers have been understood to be primary stakeholders for typical corporations.<sup>284</sup> These stakeholders have some direct relationship to the business. More modern approaches to corporate theory recognize that a wider range of external stakeholders such as civil society and governments are also relevant.<sup>285</sup> External stakeholders may not be in direct relationship with the company but are affected by the company's actions.<sup>286</sup> For example, when a company pollutes, the community it has polluted is properly considered an external stakeholder because it is affected by the company's conduct. The climate change litigation on behalf of the public provides a case in point. While most external stakeholders do not generally have a direct effect on a company, some do. For example, when governments regulate pollution, companies must make changes to comply with the law.

MSIs may combine different approaches to addressing the focal issue subject to shared concerns. For example, MSIs range from the

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<sup>281</sup> *Id.* at 2428 (suggesting use of the legal system or proxy vote measures as more likely "institutional" rather than "extra-institutional" methods such as public protests).

<sup>282</sup> *What Are MSIs?*, MSI INTEGRITY, <http://www.msi-integrity.org/what-are-msis/> (last visited Mar. 11, 2018).

<sup>283</sup> *Stakeholder*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/stakeholder.asp> (last visited Mar. 11, 2019).

<sup>284</sup> *Id.*

<sup>285</sup> See Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. & THEORY 543 (2007).

<sup>286</sup> See, e.g., Nadine B. Hack, *How Deeply Engaging Stakeholders Changes Everything*, FORBES (May 3, 2011, 10:16 AM), <https://www.forbes.com/sites/85broads/2011/05/03/how-deeply-engaging-stakeholders-changes-everything/#5db465736932>.

“quasi-regulatory”<sup>287</sup> self-monitoring initiatives that set voluntary standards for conduct or create systems of certification, to partnerships that provide a platform for learning and sharing information across different stakeholder constituency groups.<sup>288</sup> There are many different MSI approaches from formal initiatives and institutions at the global level, to informal national or local partnerships.

While the efficacy of different MSIs remains disputed and requires more research, there are now several MSIs that seek to improve the performance of business enterprises on ESG indicators by addressing corporate responsibility in the related realms of corruption and complicity in human rights abuses.<sup>289</sup> Problems can arise in MSIs when the interests of different stakeholders are not sufficiently aligned or when interests conflict.<sup>290</sup> The SDGs could be treated as a focal point around which to align interests in ways that promote environmental justice and protect human rights. This Part surveys two leading MSIs in the extractives industry sector and identifies points of common concern with the SDGs—the Voluntary Principles on Security and the Extractives Industry Transparency Initiative.

1. *The Voluntary Principles on Security: Settings Standards for the Extractives Industry Sector*

The governments of the United States and the United Kingdom, where many companies confronting allegations have headquarters, hosted a series of discussions with concerned constituencies after high-profile incidents of human rights abuses involving business enterprises attracted attention in the 1990s.<sup>291</sup> In 2000, the Voluntary Principles on Security were announced to address the human rights abuses associated with the

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<sup>287</sup> *What Are MSIs?*, MSI INTEGRITY, <http://www.msi-integrity.org/what-are-msis/> (last visited Mar. 11, 2019).

<sup>288</sup> *Id.*

<sup>289</sup> *See About SAI*, SOCIAL ACCOUNTABILITY INTERNATIONAL, <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=472> (last visited Mar. 11, 2019); *The Association*, INT’L CODE OF CONDUCT ASS’N, <https://icoca.ch/en/association> (last visited Mar. 11, 2019); *Our Mission*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission> (last visited Mar. 11, 2019).

<sup>290</sup> *See, e.g., Eff Resigns From Global Network Initiative*, ELEC. FRONTIER FOUND. (Oct. 10, 2013), <https://www.eff.org/press/releases/eff-resigns-global-network-initiative> (explaining the EFF’s departure from the Global Network Initiative, a technology centric MSI, over disparate views on security and surveillance).

<sup>291</sup> *See* Cynthia A. Williams, *Oil and the International Law: The Geopolitical Significance of Petroleum Corporations*, 36 N.Y.U. J. INT’L L. & POL. 457, 477 (2004).

use of force to protect the interests and operations of extractive companies.<sup>292</sup> The result of government facilitated multi-stakeholder meetings that brought together civil society organizations and corporate officers to discuss problems and develop strategic solutions, the Voluntary Principles provide an operational approach to conducting assessments of human rights risks associated with security.<sup>293</sup> The Principles aid companies with engaging in constructive dialog with both public and private security forces.<sup>294</sup> The Voluntary Principles encourage the proactive screening and training of security forces to ensure that the use of force is lawful and proportionate.<sup>295</sup> The Principles also provide guidance for developing systems to detect and deal with reporting and investigating alleged abuses.<sup>296</sup>

## 2. *The Substance of the Voluntary Principles: Risk Assessment and Relationship Management*

The Voluntary Principles are a set of non-binding standards developed to influence the way extractives industry sector companies assess how best to reconcile respect for human rights with security.<sup>297</sup> The Voluntary Principles are best viewed as a risk assessment instrument for companies. The Voluntary Principles outline practices for businesses to undertake to avoid conflicts over security with language such as “accurate” and “effective.”<sup>298</sup> The Voluntary Principles begin by framing security as an interest shared by communities and corporate interests

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<sup>292</sup> *What Are The Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS, <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/> (last visited Mar. 11, 2019); *Contemporary Practice of the United States Relating to International Law: International Law and Nonstate Actors*, 106 AM. J. INT’L L. 156, 156 (2012).

<sup>293</sup> *What Are the Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS, *supra* note 292.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> Noura Barakat, *The U.N. Guiding Principles: Beyond Soft Law*, 12 HASTINGS BUS. L.J. 591, 593 (2016); Leigh A. Payne & Gabriel Pereira, *Corporate Complicity in International Human Rights Violations*, 12 ANN. REV. L. & SOC. SCI. 63, 66 (2016) Bennett Freeman et. al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT’L & COMP. L. REV. 423, 433, 436 (2001).

<sup>298</sup> *The Voluntary Principles on Security and Human Rights*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS (2019), [https://docs.wixstatic.com/ugd/f623ce\\_60604aa96d1c4bdcb633916da951f25.pdf](https://docs.wixstatic.com/ugd/f623ce_60604aa96d1c4bdcb633916da951f25.pdf).

alike.<sup>299</sup> The Voluntary Principles are founded on recognition that “security and respect for human rights can and should be consistent.”<sup>300</sup>

The Voluntary Principles start with a series of affirmative statements and points of consensus. First, the language of the preamble acknowledges that the primary responsibility to protect human rights resides with governments.<sup>301</sup> Next, the preamble asserts that while companies must “act in a manner consistent” with the laws of the host countries, companies must also be “mindful” of “the highest applicable international standards.”<sup>302</sup> These standards must be understood to include international human rights standards. However, the text of the Voluntary Principles do not directly address potential conflicts between local customs and practices, and international normative systems and standards. The Principles do acknowledge the importance of engaging with local communities to minimize risk of conflict and to promote community welfare.<sup>303</sup>

In essence, the Voluntary Principles provide a framework for risk assessment and relationship development. The Principles cover three core categories of concern: 1) risk assessment; 2) relations with public security; and 3) relations with private security.<sup>304</sup> Again, from the perspective of business enterprises, emphasis appears to be placed primarily on risks to business and relationships with security providers.<sup>305</sup>

### 3. Risk Assessment

The Voluntary Principles acknowledge that a secure operating environment is essential to commercial success. The following factors for business enterprises to consider in evaluating a potential operating environment are set forth in the Voluntary Principles: identification of security risks, potential for violent conflict, human rights record, rule of law, conflict analysis, and equipment transfer.<sup>306</sup> The Voluntary Principles explain that proper identification of risk enables firms to better prepare to potentially minimize the risk of being caught in or contributing to violent

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<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

conflict.<sup>307</sup> The potential for violence may also vary. The Voluntary Principles caution that risks associated with violence may be sporadic and limited to specific regions or the risks may be endemic and widespread across an area.<sup>308</sup> The Voluntary Principles advise firms to examine patterns of violence to predict and prevent risks.<sup>309</sup> The Voluntary Principles further counsel firms to seek information from host and home governments as well as civil society organizations to aid in an accurate risk assessment.<sup>310</sup>

Firms should assess the reputation and human rights records of the available security service providers in a region. The past human rights performance of national and local law enforcement authorities, private security forces, paramilitary groups could point to future problems.<sup>311</sup> For example, many complaints were lodged against military state security forces in certain countries, yet firms later went on to employ these same state security forces apparently without asking questions or seeking adherence to standards of conduct.<sup>312</sup> The Voluntary Principles offer that by paying attention to past abuses and allegations of abuse, companies can avoid repeating a pattern of impunity, promote accountability, and perhaps even develop alternative ways to address conflict with communities.<sup>313</sup>

Considering the consequences of equipment transfer in environments complicated by conflict or corruption is also advised. The Voluntary Principles counsel caution with respect to equipment transfer, to avoid complicity in enabling abuses by security forces.<sup>314</sup> For example, in a lawsuit against Shell, victims alleged that infrastructure and equipment provided to state security forces by the firm were used to perpetrate abuses, forcibly put down peaceful protests, and decimate

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *See, e.g.*, Complaint, John Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20, at 18 (D.C. Cir. June 19, 2001) (No. 01-01357) (plaintiffs alleging that Exxon knew or should have known of previous human rights abuses carried out by Indonesian military forces).

<sup>313</sup> *What Are The Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS, *supra* note 292.

<sup>314</sup> *Id.*

villages.<sup>315</sup> The Principles suggest that firms put in place procedures to prevent misappropriation and misuse of corporate property.<sup>316</sup>

Finally, a functional legal system with the will and ability to hold accountable those individuals and entities responsible for abuses, is also acknowledged in the Voluntary Principles as an important factor in assessing risks.<sup>317</sup> There have been instances where local legal authorities have failed to prosecute perpetrators, resulting in impunity, disorder, and damaged community relations.<sup>318</sup> The increased emphasis on operational level grievance mechanisms is an attempt to compensate for compromised legal systems, by providing a private dispute resolution system.

#### 4. *Relationships with Security Service Providers*

In addition to the basics of risk assessment, the Voluntary Principles offer guidance on relationship management with security providers. Corporations are called upon to be the conscience of public actors.<sup>319</sup> The Voluntary Principles emphasize that businesses have an interest in ensuring that actions taken by security forces affiliated with public authorities are “consistent with the protection and promotion of human rights.”<sup>320</sup> The Principles draw a distinction between public and private security providers by recognizing the different roles and responsibilities of public and private organizations.<sup>321</sup>

Appreciating that the primary role of a public security force is to uphold the rule of law, the Voluntary Principles instruct firms to use their influence with host governments to ensure that certain standards are met when security forces are deployed.<sup>322</sup> By no means should “individuals

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<sup>315</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92–93 (2d. Cir. 2000).

<sup>316</sup> *The Voluntary Principles on Security and Human Rights*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS, *supra* note 298.

<sup>317</sup> *Id.*

<sup>318</sup> Nina Lakhani, *Berta Cáceres Murder: Ex-Honduran Military Intelligence Officer Arrested*, GUARDIAN (March 2, 2018, 3:40 PM), <https://www.theguardian.com/world/2018/mar/02/berta-caceres-death-murder-ex-honduran-military-intelligence-officer-arrested>; *At What Cost? Irresponsible Business and the Murder of Land and Environmental Defenders in 2017*, GLOBAL WITNESS, <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/> (last visited Mar. 11, 2019).

<sup>319</sup> *The Voluntary Principles on Security and Human Rights*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS, *supra* note 298.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

credibly implicated in human rights abuses”<sup>323</sup> be permitted to provide security services, according to the Voluntary Principles. There also must be limits on the use of force and respect for the right to peaceably assemble and to engage in collective bargaining.

The Principles call for companies contracting with private security providers to aim to implement “emerging best practices” developed by industry, civil society, and public authorities to promote respect for international human rights and humanitarian law.<sup>324</sup> The Voluntary Principles instruct that companies or independent third parties should monitor the policies and practices of private security providers.<sup>325</sup> Private providers should have disciplinary policies in place to deter abuses.<sup>326</sup> Allegations of abuses or illegal actions should be investigated.<sup>327</sup> Credible allegations of abuses should be reported to the relevant public law enforcement authorities.<sup>328</sup> Companies should advocate for abuses to be addressed and must monitor the status of public investigations into alleged abuses.<sup>329</sup>

The Voluntary Principles reiterate that private providers should “exercise restraint”<sup>330</sup> just as public security providers should, and similarly limit the use of force, consistent with UN standards on appropriate conduct for law enforcement officials. Similarly, the Voluntary Principles make clear that private providers must also respect the rights of assembly and association as well as collective bargaining.<sup>331</sup> In contrast to state security, the Voluntary Principles make clear that private security “should provide only preventative and defensive services and should not engage in activities exclusively the responsibility of state military or law enforcement authorities.”<sup>332</sup> To reduce the risk of private security providers exceeding or abusing their authority, the Voluntary Principles advise companies to incorporate the Voluntary Principles into contracts with providers.<sup>333</sup> Companies are instructed to include terms that allow termination of contracts for security services where there is credible

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<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

evidence of abuse or illegal conduct.<sup>334</sup> Companies are advised to do due diligence and review the record of private security providers, particularly with respect to excessive use of force.<sup>335</sup> Companies are also advised to facilitate the exchange of information about abuses committed by private security providers.<sup>336</sup>

There is now an International Code of Conduct for Private Security Service Providers which asks its signatory companies to “recognize the importance of respecting the various cultures encounter [ed] in their work”<sup>337</sup> and to “affirm that they have a responsibility to respect the human rights of, and fulfill humanitarian responsibilities toward, all those affected by their business activities, including personnel, clients, suppliers, shareholders, and the population of the area in which services are provided.”<sup>338</sup> As private security contractors are given more responsibility and assume a more prominent role in the absence of strong regulation, codes of conduct and contract provisions are the most common strategy for setting standards and aligning expectations to avoid involvement in rights abuses.

##### 5. *Relationships with the Public: Human Security and Community Consent*

The Voluntary Principles marked a significant shift in policy when they were introduced in 2000. The Principles approached the concept of security from the perspective of the extractives industry sector and focused on securing assets, operations, and personnel employed in oil-and-gas exploration and development.<sup>339</sup> With the introduction of an authoritative focal point through which to view the intersection of business and human rights in the United Nations Guiding Principles on Business and Human Rights and the targets set by the Global Goals, it is appropriate incorporate concepts of human security. Arguably, other effective means of enhancing the security and the interests of all stakeholders consistent with the Global Goals and promoting the responsibility of businesses to respect human

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<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *International Code of Conduct for Private Security Service Providers*, INT’L CODE OF CONDUCT ASS’N, pmbl. ¶ 4, [http://www.icoca.ch/en/the\\_icoc](http://www.icoca.ch/en/the_icoc) (last accessed Mar. 11, 2019).

<sup>338</sup> *Id.*

<sup>339</sup> *See What Are the Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SEC. & HUMAN RIGHTS, *supra* note 292.

rights would be to consider risks to the rights to communities affected by business operations and making relations with communities a core category of concern.

The United Nations Human Rights Committee uses the term “security of person”<sup>340</sup> to emphasize the importance of security needs of the human person. International human rights law protects the rights to life, physical integrity, and psychological integrity.<sup>341</sup> While security is perhaps more often used with reference to “homeland security” concerns such as border protection for the territorial integrity of the nation state or securing property or assets, this alternative view of security—human security—starts from the vantage point of what a human rights approach would demand to ensure human dignity is protected.<sup>342</sup> Article 3 of the Universal Declaration of Human Rights recognizes that everyone has “the right to life, liberty and security of person.”<sup>343</sup> Provisions of binding international human rights instruments require nation states to protect security of the person. For example, Article 9 of the International Covenant on Civil and Political Rights (“ICCPR”) protects the rights to liberty and security of person.<sup>344</sup> Article 6 of the ICCPR protects the right to life,<sup>345</sup> while Article 7 prohibits conduct that is counter to the right to security of the person or that could put human life at risk—such as torture; cruel, inhuman, or degrading treatment or punishments; or medical experimentation without free and informed consent.<sup>346</sup> Pursuant to Article 5 (b) of the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), a State is to protect the right to security of person against violence or bodily harm, without regard to what type of individual, or entity inflicts the abuse.<sup>347</sup> Taken together, these standards support the right to security and should inform business efforts to contribute to reaching the Global Goals.

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<sup>340</sup> HUMAN RIGHTS WATCH, ON THE MARGINS OF PROFIT: RIGHTS AT RISK IN THE GLOBAL ECONOMY (2008), <https://www.hrw.org/reports/2008/bhr0208/bhr0208webwcover.pdf>.

<sup>341</sup> See, e.g., UDHR, *supra* note 24, art. 3; ICCPR, *supra* note 33, art. 6.

<sup>342</sup> See, e.g., Yaniv Roznai, *The Insecurity of Human Security*, 32 WIS. INT’L L.J. 95–96 (2014); Irene Khan, *A Human Rights Agenda for Global Security*, in HUMAN SECURITY FOR ALL: A TRIBUTE TO SERGIO VIEIRA DE MELLO 17 (Kevin M. Cahill ed. 2004).

<sup>343</sup> See, e.g., UDHR, *supra* note 24, art. 3.

<sup>344</sup> ICCPR, *supra* note 33, art. 9. The Human Rights Committee, the body that monitors the ICCPR has given the term “security of person” a meaning independent from the “liberty and security” provision to encompass personal security and bodily integrity beyond situations of detention.

<sup>345</sup> ICCPR, *supra* note 33, art. 6.

<sup>346</sup> ICCPR, *supra* note 33, art. 7.

<sup>347</sup> G.A. Res. 2106 (XX), *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 5(b) [hereinafter CERD].

C. STAKEHOLDER INITIATIVES TO PREVENT CORRUPTION: THE  
EXTRACTIVES INDUSTRY TRANSPARENCY INITIATIVE

The multi-stakeholder governance approach to implementation of principles developed through the Extractives Industries Transparency Initiative (“EITI”),<sup>348</sup> a global standard to advance the accountable, inclusive, and open management of oil and gas resources, can also advance Agenda 2030. The EITI is well-placed to address the challenges of a changing climate and promoting the rule of law through mandating and managing information disclosures given the organization’s emphasis on transparency. The EITI contributes to reducing illicit financial flows, bribery, and corruption,<sup>349</sup> and to increasing effective, accountable, and transparent institutions through promoting inclusive and representative decision-making, civil society partnerships, and public access to information.<sup>350</sup>

The EITI standard seeks to address core governance issues in the oil, gas, and mining sectors.<sup>351</sup> The EITI standard requires countries and companies to disclose information on the actions being taken to manage revenues from oil, gas, and mining activities.<sup>352</sup> The EITI standard starts from the premise that a country’s natural resources belongs to its citizens.<sup>353</sup> While an abundance of natural resources can contribute to a country’s economic development, when there is corruption or when a country’s natural resources are not managed in a fair and equitable manner, conflict is often the result. The term “resource curse” was coined to capture this “paradox of plenty” present in many resource rich but economically poor nations.<sup>354</sup> Development economists have found that natural resource abundance appears inversely related to democracy and development.<sup>355</sup> “[T]he worst development outcomes—measured in

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<sup>348</sup> EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, HOW THE EITI CONTRIBUTES TOWARDS MEETING THE SUSTAINABLE DEVELOPMENT GOALS (2016), <https://eiti.org/document/how-eiti-contributes-towards-meeting-sustainable-development-goals>.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Who We Are*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/who-we-are> (last visited Mar. 11, 2019).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT’L ECON. L. 1, 6–7 (2005).

<sup>355</sup> Pius Siakwah, *Political Economy of the Resource Curse in Africa Revisited: The Curse as a Product and a Function of Globalised Hydrocarbon Assemblage*, 46 DEV. & SOC’Y 83, 86 (2017); Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* 21

poverty, inequality, and deprivation—are often found in those countries with the greatest natural resource endowments. Rather than contributing to freedom, broadly shared growth, and social peace, rich deposits of oil and minerals have often brought tyranny, misery, and insecurity to these nations.”<sup>356</sup> Accordingly, the EITI points to “more openness and public scrutiny”<sup>357</sup> of how a country’s natural resource revenues from extractives activities are managed. Ideally, revenues will be managed in ways that benefit the public by promoting broader public welfare, providing opportunities, and reducing poverty.

The EITI mandates that there be transparency in the value chains of extractive industry sector companies.<sup>358</sup> From source point of extraction to profits and revenues to community reinvestment, the EITI standards require that countries and companies disclose information to the public.<sup>359</sup> The EITI standards cover disclosures of information pertaining to the registration and allocation of licenses, land concessions, contracts and production, payments, employment, revenue allocations, and contributions to the public.<sup>360</sup> To improve public debate and promote understanding, the EITI aims to increase capacity of governments and business enterprises to engage in open and transparent policy making related to natural resource development.

The EITI is a multi-stakeholder coalition of governments, companies, investors, civil society organizations and other partners.<sup>361</sup> In each implementing country a board composed of different stakeholders manages and monitors the EITI process.<sup>362</sup> In 2018 there were 51 countries committed to implementing EITI standards.<sup>363</sup> Chevron, Exxon and Shell are EITI-supporting companies which means they agree to “publicly

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(Nat’l Bureau of Econ. Research, Working Paper No. 5398, 1995); Ning Ding & Barry C. Field, *Natural Resource Abundance and Economic Growth*, 81 LAND ECON. 496, 501 (2005).

<sup>356</sup> Stewart M. Patrick, *Why Natural Resources Are a Curse on Developing Countries and How to Fix It*, ATLANTIC (Apr. 30, 2012), <https://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/>.

<sup>357</sup> *Who We Are*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/who-we-are> (last visited Mar. 11, 2019).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Supporters*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/supporters> (last visited Mar. 11, 2019).

<sup>362</sup> *How We Work*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/about/how-we-work> (last visited Mar. 11, 2019).

<sup>363</sup> *EITI Countries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/countries> (last visited Mar. 11, 2019).

support . . . the EITI and help . . . to promote the Standard internationally and in countries where [they] operate . . .”<sup>364</sup> However, no additional reporting or disclosure of payments are required of EITI-supporting companies.<sup>365</sup> Indeed, many member companies have taken positions in lobbying efforts and litigation that are not consistent with a strong commitment to transparency.<sup>366</sup> For example, industry trade associations worked to oppose provisions of the Dodd–Frank Financial Reform Act, which required disclosure of payments to foreign governments.<sup>367</sup>

Investors and financial institutions are understood to be a “critical pillar”<sup>368</sup> of EITI and the organization draws a distinction between extractives industry sector companies and financial institutions.<sup>369</sup> The “Statement of Support to the EITI from Financial and Lending Institutions”<sup>370</sup> document makes clear that participation in the EITI is intended to send “a clear signal to markets of a financial institution’s commitment to anti-corruption and broader governance standards.”<sup>371</sup>

#### D. ALIGNING BUSINESS PRIORITIES WITH ENVIRONMENTAL

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<sup>364</sup> *Company Support of the EITI*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/company-support-of-eiti> (last visited Mar. 11, 2019); *Stakeholder Companies*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/supporters/companies> (last visited Mar. 11, 2019).

<sup>365</sup> EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *Company Support of the EITI*, *supra* note 364.

<sup>366</sup> *See, e.g.*, Alice Ross, *Dodd–Frank’s Bid to Clean Up Extractive Industries Stymied by the Oil Business*, GUARDIAN (July 22, 2015, 9:15 AM), <https://www.theguardian.com/global-development/2015/jul/22/dodd-frank-act-section-1504-natural-resources-extractive-industries-oil-api-sec>.

<sup>367</sup> *Id.*; *see* Dodd–Frank Wall Street Reform and Consumer Protection Act § 1504, Pub. L. No. 111-203, 124 Stat. 2093 (2010). After Rex Tillerson, former CEO of Exxon assumed the role of U.S. Secretary of State transparency regulations were repealed.

<sup>368</sup> *Stakeholder Financial Institutions*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/supporters/financial-institutions> (last visited Mar. 11, 2019).

<sup>369</sup> *Id.*

<sup>370</sup> *Statement of Support to the EITI from Financial and Lending Institutions*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/document/statement-of-support-to-eiti-from-financial-lending-institutions> (last visited Mar. 11, 2019).

<sup>371</sup> *Id.* Investor signatories to the EITI affirm the following:

As financial and lending institutions with exposure to extractive companies operating around the world, we believe it is in the interest of the companies in and to which we invest and lend to operate in a business environment that is characterized [sic] by stability, transparency and respect for the rule of law. These factors are essential to securing economic prosperity and social cohesion, which, in turn, enable these companies to prosper. *Id.*

## PROTECTION AND RESPECT FOR HUMAN RIGHTS

The UN Finance Initiative in partnership with the UN Global Compact and the PRI have published “The SDG Investment Case” in which the SDGs are characterized as a “crucial part of investors’ fiduciary duty.”<sup>372</sup> Indeed, if the uptick in ESG proposals is any indication, investors could come to find progress towards SDG targets a helpful benchmark for proactive ownership. Concerned shareholders could make more informed decisions to prefer companies that are avoiding adverse environmental impacts and human rights risks over those companies that have not aligned policies and practices with respect for rights and measures to mitigate climate change.

Fiduciary duty requires investors to act in the best interest of their clients. The SDG Investment Case points to the importance of taking ESG factors into account because they can be financially material.<sup>373</sup> The SDGs provide investors with “a definitive list of the material ESG factors that should be taken into account as part of an investor’s fiduciary duty”<sup>374</sup> because the SDGs represent “an articulation of the world’s most pressing environmental, social and economic issues.”<sup>375</sup> Understanding ESG issues and moving to more sustainable business practices could also provide opportunities for investment returns and could shape investment strategies.<sup>376</sup>

The SDG Investment case presented by PRI identifies macro and micro risks and opportunities.<sup>377</sup> For example, at the macro level some asset owners with diversified portfolios invested in a range of asset classes around the world will be exposed to many of the risks the SDGs seek to mitigate. Still, there is opportunity for the SDGs to drive global economic growth to the benefit of long-term investors. At the micro level there are operational risks across different assets in different places, but the shift to more sustainable practices could provide opportunities to profit. Failure to act could be costly, an estimated loss of up to 45 percent for equity

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<sup>372</sup> PRINCIPLES FOR RESPONSIBLE INV., THE SDG INVESTMENT CASE 7 (2017), <https://waldenassetgmt.com/wp-content/uploads/2018/06/THE-SDG-INVESTMENT-CASE.pdf>.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 8 (statement of Viviana Berla, “The SDGs are a powerful, visible and colourful set of flags around which investors can gather to learn a common language. Improved communication, complemented by bigger data on the consequences of choices made in the past, will lead to a better understanding and better investment decisions for the future”).

<sup>377</sup> *Id.* at 7.

portfolios and 23 percent for fixed income portfolios has been estimated related to the physical effects of climate change.<sup>378</sup> Action could yield returns. A 2015 survey of consumers and businesses found 78 percent reported they were more likely to buy goods and services from a company that had signed up to the SDGs.<sup>379</sup>

There are also synergies between the EITI standards and certain SDGs. The EITI has identified connections between its standards and several of the targets set to mark progress towards reaching different SDGs.<sup>380</sup> The International Secretariat of the EITI maintains that implementation of the EITI standards will help countries to reach the SDGs.<sup>381</sup> In a document titled, “How the EITI Contributes Towards Meeting the Sustainable Development Goals,”<sup>382</sup> the organization concedes that historically extractives industry sector firms have contributed to many of the challenges that the SDGs aim to address such as environmental degradation, displacement, conflict, corruption, and human rights violations.<sup>383</sup> The Secretariat also says that EITI participation contributes to change in that participants are better able to manage and mitigate adverse impacts and environmental and social risks related to business operations.<sup>384</sup>

In light of recent human rights and climate change litigation, perhaps most relevant SDGs for business enterprises engaged in the extractives industry sector are Goal 16 on the “promotion of peace, justice and strong institutions,”<sup>385</sup> and Goal 17 on partnerships to promote sustainable development.<sup>386</sup> Target 16.4 calls on countries to reduce illicit financial flows.<sup>387</sup> Because the EITI acts as a “diagnostic tool for improving government systems,”<sup>388</sup> it can serve to shore up weaker

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<sup>378</sup> *Id.* at 17.

<sup>379</sup> *Id.* at 24.

<sup>380</sup> EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, HOW THE EITI CONTRIBUTES TOWARDS MEETING THE SUSTAINABLE DEVELOPMENT GOALS, *supra* note 348.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Goal 16: Promote Just, Peaceful and Inclusive Societies*, SUSTAINABLE DEV. GOALS, <https://www.un.org/sustainabledevelopment/peace-justice/> (last visited Mar. 11, 2019).

<sup>386</sup> *Goal 17: Revitalize the Global Partnership for Sustainable Development*, SUSTAINABLE DEV. GOALS, <https://www.un.org/sustainabledevelopment/globalpartnerships/> (last visited Mar. 11, 2019).

<sup>387</sup> EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, HOW THE EITI CONTRIBUTES TOWARDS MEETING THE SUSTAINABLE DEVELOPMENT GOALS, *supra* note 348.

<sup>388</sup> *Id.*

institutions against exploitation and reduce the illegal redirection of revenues derived from natural resource exploitation.<sup>389</sup> EITI-participating countries must regularly review and report compliance with EITI standards and, as a result, are in a better position to meet Target 16.6 which demands the development of “effective accountable and transparent institutions.”<sup>390</sup> At every level of a country’s government and at every link in a company’s value chain there are opportunities to strengthen processes and procedures to curb corruption. Target 16.7 speaks to the importance of ensuring “responsive, inclusive participatory and representative decision making.”<sup>391</sup> The EITI participating countries and companies are to create space for public participation in decision making processes.<sup>392</sup> According to the EITI Secretariat:

The EITI is built on the idea that stakeholders can achieve more working together, even if their points of departure may be diametrically opposed. In many countries, the EITI’s main achievement is providing a platform for stakeholders who would otherwise be unable to take part in public debate . . . the EITI provides a framework that allows all parties to come to the table and [] engage in meaningful discussions on the management of the natural resource sector—often for the first time.<sup>393</sup>

Target 17.17 provides that effective partnerships including the public sector, the private sector, and civil society should be encouraged in order to advance Agenda 2030.<sup>394</sup> The multi-stakeholder approach of the EITI is consistent with SDG 17’s invitation for members of the global community to cooperate to address challenges that could impede achieving the broad aims of Agenda 2030. The EITI Secretariat points to Principle 12 of the EITI Standard to show how the wisdom derived from many sources can result in more creative and durable solutions.<sup>395</sup> Principle 12 of the EITI provides: “In seeking solutions, we believe that all stakeholders have important and relevant contributions to make—including governments and their agencies, extractive industry companies,

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<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

multilateral organizations, financial organizations, investors and non-governmental organizations.”<sup>396</sup>

#### IV. CONCLUSION

This paper has explored the role of economic actors and public/private multi-stakeholder initiatives as partners in promoting action on climate change and curbing corruption to protect human rights. It has discussed points of convergence between the SDGs and the priorities of socially responsible investors, the efforts of human rights and transparency initiatives regulating the extractives industry sector, and global principles intended to guide responsible business conduct. It has explained how certain complementary points of convergence create opportunities for business enterprises to address environmental and social challenges, through aligning business incentives with the aims of the SDGs. If the international community is to meet the challenges presented by a changing climate and provide conditions for peace and prosperity, an appreciation of the interrelationship between corporate social responsibility and the imperative of aligning business priorities with protecting people and the planet is essential.

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<sup>396</sup> *Id.*

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