

THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

2013 Raymond and Beverly Sackler Distinguished Lecture

Professor John G. Ruggie

Just Business: Multinational Corporations and Human Rights

Roundtable Report

Implementing the U.N. Guiding Principles on Business and Human Rights



Foreword

The Thomas J. Dodd Research Center at the University of Connecticut is proud to have hosted Professor John Ruggie for the 2013 Raymond and Beverly Sackler Distinguished Lecture as well as the subsequent Roundtable on Implementing the UN Guiding Principles on Business and Human Rights. The work of Lisa Laplante and Suzanne Spears in developing, organizing, and now disseminating the results of these events was an invaluable contribution to the Dodd Center's programming. These events were critical contributions to a broader University initiative that has sought to prioritize business and human rights as an area of both academic inquiry and public service outreach. While some elements of this initiative predate the adoption of the UN Guiding Principles, developments at the international level have given new focus and purpose to these efforts and the Dodd Center looks forward to continuing to be a site of conversation, deliberation, and promotion of human rights within the business sector.

Glenn Mitoma, Ph.D.
Interim Director
Thomas J. Dodd Research Center
University of Connecticut

CONTENTS

- Introduction 1
- Professor John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* 2
 - 1. Heterodoxy 3
 - 2. The Guiding Principles 4
 - 3. Strategic Paths 6
 - 4. Next Steps 10
 - 5. Lessons Learned 11
- Roundtable Report, *Implementing the U.N. Guiding Principles on Business and Human Rights* 13
- Participants 13
- Roundtable Summary 14
 - 1. Making a Heterodox Approach Effective 14
 - 2. Assessing Processes and Outcomes 20
 - 3. Building Capacity 23

Introduction

On February 28 and March 1, 2013, the Thomas J. Dodd Research Center at the University of Connecticut held two events regarding the United Nations Guiding Principles on Business and Human Rights.

First, on February 28, the author of the Guiding Principles, Professor John G. Ruggie gave the 2013 Raymond and Beverly Sackler Distinguished Lecture. The title of Professor Ruggie's lecture was *Just Business: Multinational Corporations and Human Rights*. This document contains the text from which Professor Ruggie spoke. A podcast of Professor Ruggie's lecture can be found at <http://mediasite.dl.uconn.edu/Mediasite/Play/76c132b67e3e4aa0ad91295b041cbf381d>.

Second, on March 1, the Dodd Center convened a *Roundtable on Implementing the UN Guiding Principles on Business and Human Rights*. We co-chaired the Roundtable and drafted the summary of the discussion contained here as a contribution to broader efforts to disseminate and implement the Guiding Principles. We have reported participants' comments without attribution, as the Roundtable was conducted under the Chatham House Rule. Our summary is not intended to be a document adopted or endorsed by consensus of the group, nor necessarily reflecting the positions of the individual participants or their organizations.

We thank the Dodd Center for making the Roundtable and this Report possible; the participants for their active engagement and collaboration; John Sherman of the Shift Project for his guidance; Rachel Traficanti for her assistance in organizing the event; Emily Kaufman for her assistance in preparing the text of Professor Ruggie's talk; the Human Rights Institute and Robert C. Bird, Northeast Utilities Chair in Business Ethics at the University of Connecticut for their collaboration and co-sponsorship; and President Susan Herbst and Provost Mun Choi for supporting this initiative.

Lisa J. Laplante
Interim Director (2012-2013)
Thomas J. Dodd Research Center

Suzanne A. Spears
Fellow on Business and Human Rights
Thomas J. Dodd Research Center

2013 Raymond and Beverly Sackler Distinguished Lecture

Professor John G. Ruggie, *Just Business: Multinational Corporations and Human Rights*

The Sackler Distinguished Lecture Series was established through a generous endowment given by Raymond and Beverly Sackler. It is designed to bring internationally renowned speakers to the University of Connecticut campus to discuss human rights issues.

*John G. Ruggie is the Berthold Beitz Professor in Human Rights and International Affairs at Harvard's Kennedy School of Government, and Affiliated Professor in International Legal Studies at Harvard Law School. From 2005-2011 he was the UN Secretary-General's Special Representative for Business and Human Rights. He chairs the boards of two non-profits, New York-based Shift: Putting Principles into Practice, and the London-based Institute for Human Rights and Business, and also serves as senior advisor to the corporate social responsibility practice of the law firm Foley Hoag LLP. His new book is *Just Business: Multinational Corporations and Human Rights*, published by W. W. Norton.*

* * *

Business and human rights became an increasingly prominent concern on the international agenda in the 1990s: You'll all recall the world-wide campaign against Nike for Indonesian sweatshop practices; Shell accused of complicity with the Nigerian military in putting down community protests by force; North American mining companies in the Andes displacing communities without adequate consultation and compensation; bonded child labor in West African cacao plantations supplying global chocolate brands; internet and mobile service providers turning over user information to government agencies arresting dissidents. And so on.

The question that confronted the international community is how, in a world of profit maximizing firms and states jealously guarding their sovereign prerogatives, can multinational corporate conduct be regulated to prevent or mitigate such human costs?

The core challenge is that globally operating firms are not regulated globally. Instead, each of their component entities is subject to the individual jurisdiction in which it operates. Yet even where national laws exist prohibiting abusive conduct, which cannot always be taken for granted, states in many cases fail to implement them—because they lack the capacity, fear the competitive consequences of doing so, or because their leaders subordinate the public good for private gain.

To deal with these global governance gaps, activists groups had favored some overarching binding legal instrument—in other words, an international treaty imposing obligations on business directly under international law. Business had argued that compliance with national law coupled with voluntary initiatives and the dissemination of best practices sufficed. Governments had been reluctant to act in the absence of broader social consensus. This debate had been stalemated for years.

I entered the stage in 2005, when I was appointed the UN Secretary-General's Special Representative on Business and Human Rights. A short six years later, in June 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights I had developed. The endorsement represented two firsts. It was the first authoritative guidance the Council had ever issued on how to meet the complex global challenges of business and human rights; and it also was the first time that the Council, an intergovernmental body, had ever endorsed a normative text on any subject that governments did not negotiate themselves.

The Guiding Principles' core features have been incorporated by numerous other international and national standard setting bodies. International business associations and labor federations have issued user's guides to the Guiding Principles, and civil society groups invoke them in their work. The number of companies developing human rights-related policies and practices is increasing impressively.

This evening, I want to take a step back and reflect on three things: (1) briefly, the substance of the Guiding Principles themselves; (2) the process of moving the global debate from division to consensus; and (3) what the next steps might be on this journey. I do so in the hope of shedding light not only on how to meet business and human rights challenges, but more generally on how to narrow the growing gaps between the scope and impact of economic forces and actors, and the capacity of societies to respond to their adverse consequences.

I. Heterodoxy

The debate between so-called "mandatory" and "voluntary" approaches to regulating corporate conduct had induced policy stalemate at the international level. The overriding lesson I drew from the assessment of the two approaches was that a new, more heterodox approach was needed if we were to achieve significant progress.

Human rights treaties can take a long time to negotiate and enter into force: Generally, the broader their scope and the more controversial the subject, the longer the duration. This is true even of soft law instruments focused on relatively circumscribed subjects such as the Declaration on the Rights of Indigenous Peoples, which took 26 years to negotiate and yet includes only one of the scores of issues that a comprehensive business and human rights treaty would need to encompass. So even if treaty negotiations were to have begun right away, more immediate solutions still would be needed to deal with existing challenges. Also, at the global level human rights treaties lack effective implementation mechanisms, so they always need to be supplemented by other means to secure compliance.

As for voluntary initiatives, they are a significant force on which to build. But there were too few of them. And none had moved markets. Where they existed, companies typically determined for themselves not only which human rights standards they would address but also how to define them. External accountability mechanisms for ensuring adherence to voluntary standards were weak or non-existent. Internally, CSR programs as a whole tended not to be well integrated with firms' core business functions. Finally, business-based initiatives rarely if ever provided affected individuals and communities with effective means of recourse.

And so I set out to develop a more heterodox approach. It comprises three main elements:

The first element we might call polycentric governance: the recognition that business and human rights challenges cannot be met by states, corporations and civil society acting on their own. Therefore, the Guiding Principles weave together three different rationales into a single normative platform.

- For states, the focus is on the legal obligations they have under the international human rights regime to protect human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations.
- For businesses, beyond compliance with legal obligations that may vary across countries in their applicability and enforcement, the Guiding Principles focus on the need to manage the risk of involvement in human rights abuses, which requires acting with due diligence to avoid infringing on the rights of others, and to address harm where it does occur.
- For affected individuals and communities, the Guiding Principles provide a basis for the further realization of their right to remedy, both judicial and non-judicial.

The second element we might call meaning management. It was to secure consensus on what these rationales mean and imply for states, businesses and civil society, and then to get an authoritative endorsement of those meanings by the UN.

The third element was to adopt a distributed network architecture for implementing the Guiding Principles by actively engaging national and international standard setting bodies that have more direct leverage vis-à-vis business enterprises than the United Nations does. This assures life for the GPs well beyond the confines of the UN.

In short, the idea was to drive greater authority into the market, in the expectation that this would produce greater scale effects and cumulative change over time—avoiding a formal overall treaty process but anticipating legal developments “as precision instruments.”

II. The Guiding Principles

There are 31 Principles in all, together with extensive commentary. They rest on three pillars: the state duty to protect against third party abuse, the corporate responsibility to respect human rights, and access to effective remedy. Let me say a few words about each.

1. State Duty to Protect

It is generally recognized that under international human rights law states have the duty to protect against human rights abuse within their jurisdiction by third parties, and that third parties include business enterprises. This requires states taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication. Several implications follow:

- States should set out clearly the expectation that all business enterprises domiciled in their jurisdiction respect human rights throughout their operations. This may involve forms of regulation that have extraterritorial application, provided there is a recognized jurisdictional basis.
- States should ensure that laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constraint but enable business to respect human rights;
- States have heightened obligations in relation to business enterprises that are owned or controlled by the state (SOEs), or that receive substantial support and services from state agencies, such as export credit or investment insurance agencies;
- Host governments should maintain adequate domestic policy space to meet their human rights obligations when they enter into international agreements—for example, bilateral investment treaties under which foreign investors can bring claims against them in binding international arbitration for so-called regulatory takings (Foresti).

And so on. While it has been known all along that states have the duty to protect, precisely what it means or implies in relation to business had never been spelled out authoritatively. The Guiding Principles do so.

2. The Corporate Responsibility to Respect

The corporate responsibility to respect human rights is widely acknowledged by business itself—I’ve never come across a company that says it doesn’t. In human rights discourse, respecting rights means not to infringe on the rights of others. My question to companies was: how do you know that you respect human rights? Do you have systems in place that enable you to demonstrate to yourselves that you do, let alone to anyone else? In fact, most companies did not and still do not have such systems. The Guiding Principles introduce the concept of human rights due diligence as the means for companies to know and show that they respect rights.

- Human rights due diligence requires a high level policy commitment to respect human rights, supported by operational level policies, training and incentive structures that embed a company’s commitment from the top of the organization to the bottom.
- It requires the assessment of company impacts on human rights, including assessing them from the perspective of external stakeholders.
- It requires coordinated actions in response to the findings from assessments to ensure that a company is addressing them coherently, across corporate silos. It requires monitoring the effectiveness of a company’s efforts to address how it affects human rights.
- It also requires a company to communicate these efforts to affected stakeholders, and when appropriate, to report on them publicly, particularly when the impacts are severe.
- Finally, the responsibility to respect requires businesses to cooperate in legitimate processes to remedy human rights harms that they caused or contributed to.

3. Access to Remedy

The third pillar is the need for greater access to effective remedy. It has both state and business components.

- The obligation of states to provide a remedy follows naturally from their duty to protect human rights; states must take appropriate steps to ensure that victims of business-related human rights violations have access to adequate remedy, through appropriate judicial or administrative processes.
- In addition, states should provide for, or support the use of, non-judicial grievance mechanisms, for example, an ombudsman office, in order to provide a comprehensive, state-based system to remedy business-related human rights abuse.
- Businesses also have a role to play in providing access to remedy as part of their responsibility to respect; under the GPs, a company should provide for, or participate in, operational-level grievance mechanisms in order to identify and to resolve issues promptly, and to act as a feedback mechanism on the effectiveness of the management of its human rights impacts.

4. Interrelationships

Those are some of the component elements of the Guiding Principles. Let me stress that they were not envisaged as a one-time static solution to the challenges of business and human rights. Rather, they are intended to generate an ongoing dynamic building on the interrelationships among the three pillars.

The concept of human rights due diligence is a key link. It brought the issue of identifying and addressing companies' adverse human rights impacts into a familiar risk-based framing for them. It provides the basis for a process standard that can be adopted by companies themselves, advocated by stakeholders and required by governments—which began to happen almost immediately. And having companies conduct adequate human rights due diligence inevitably reduces the incidence of corporate-related human rights harm, thereby benefiting impacted individuals and communities while also lowering the burden on other, more difficult to construct, regime components, such as legal reforms. Finally, if these kinds of preventative measures don't work then you turn to legal and other forms of redress.

III. Strategic Paths

The Guiding Principles are the most authoritative global standard in the area of business and human rights. But what makes them authoritative? As I indicated at the outset, they enjoy broad stakeholder support and they have been adopted by numerous standard setting bodies and companies themselves. The process of getting from there to here took six years. It is too complex to summarize tonight. But let me flag what I believe to be some of the strategic paths that led to the positive outcome.

1. Creating a Common Knowledge Base

The first strategic path was to try to establish a common knowledge base. While there is much anecdotal evidence about business-related human rights impacts, there is still no independent source of data to verify accounts and identify patterns. (The closest we come is the website of the Business and Human Rights Resource Centre in London, which successfully tries to be balanced by allowing advocates to post allegations and inviting companies to respond.)

So, as a first step, we conducted baseline studies to try to determine the extent and nature of the problem. We found out, not surprisingly, that business-related human rights impacts are more prevalent in places with weak or poor governments. That means either that bad governments drag good companies into doing bad things, or that even good companies exploit weak governance zones to do things they would not get away with in other places, or it could mean both.

We also did more strategic research, focusing on what it actually costs a company when their operations are disrupted by conflicts with communities. We convinced a major international oil company to look into two years worth of company data. They found that they had lost 6.5 billion dollars during that period due to stakeholder-related risk, with annual profits of around 20 billion.

Numbers like this are very high, but tend to go unnoticed because they are rolled into local operating costs. While senior leaders see general cost inflation, they tend not to see the cost of stakeholder-related risk disaggregated. The first companies to recognize the true costs of their stakeholder related risk were the first to install local grievance mechanisms to respond to stakeholder related risk on the ground.

2. Ensuring Process Legitimacy

The second strategic path is what I would describe as process legitimacy -- the process has to be seen as legitimate by everybody who is involved. In the UN this means you must be as inclusive as possible in your consultations, particularly geographically. For our mandate, it was also very important to engage the business community itself. This was unusual for the UN, but was necessary for this project in order to identify the costs of social conflict and to get buy-in from companies to ensure implementation of any future recommendations. Bringing civil society along throughout the project was also very important.

3. Involving New Communities of Practice

The third strategic path is getting new communities of practice involved. The business and human rights debate that had been going on for many years between advocacy groups and business associations was at a stalemate. We therefore tried to reach out to new actors, such as negotiators of investment agreements. As a result of their engagement with us, negotiators began to analyze the human rights implications of their country's agreements.

Corporate lawyers were the most important group of new actors we involved in the mandate. First, they helped us by conducting pro bono research on the relationship between corporate law and

securities regulation, and human rights. Looking at domestic bodies of corporate law, they found that most said nothing about a business' responsibility to society. They found a few exceptions, such as the UK's new piece of legislation that actually permits boards of directors to consider the company's impact on society and the environment. It seems extraordinary that, while corporations are deeply embedded in social fabric, they are treated simply as private property in most jurisdictions.

Second, corporate lawyers increased the visibility of the work we were doing inside companies by talking to general counsels of companies. Before long people had actually heard about this UN effort at very senior levels within a number of companies.

4. Road Testing

The fourth strategic path was road testing our proposals to be able to answer skeptics with accounts of how the proposals worked in practice. So, for example, we asked ten Dutch companies, including Shell and Unilever, to road test our due diligence proposals. And we piloted grievance procedures in six countries and six sectors over an eighteen month period. In both cases we established that our proposals worked to reduce human rights impacts and social conflict.

5. Gaining Endorsements (campaign)

The fifth strategic path was gaining endorsements for the Guiding Principles. I spent as much time campaigning for the principles as I did generating them. For example, I went to senior officials in large companies and asked them to write letters to their UN ambassadors asking them to vote for the Guiding Principles.

Strong stakeholder consensus led to the realization by the Human Rights Council that governments could never have negotiated the GPs themselves, and helped overcome initial resistance to endorsing a soft law instrument that governments did not negotiate themselves.

6. Distributed Network Approach to Implementation

Finally, even with official endorsement, the Guiding Principles would have remained in the realm of pure voluntarism had it not been for one additional step: getting other international and national standard setting bodies involved that have more direct leverage vis-à-vis business, and persuading them to align with the Guiding Principles. I worked closely with several throughout the latter years of my mandate. And there has been a cascading effect since then beyond that initial circle.

Here are a few examples:

- The new OECD Guidelines for Multinational Enterprises, which have a human rights chapter drawn from the UN Guiding Principles. This is important because the OECD requires the 42 adhering countries to establish a complaints mechanism under which anyone can bring a claim about the conduct of multinationals that operate in or from those countries.

- The International Finance Corporation is the private sector arm of the World Bank. It has adopted new standards they require their corporate clients to meet in return for funding. Those new standards also include provisions drawn from the UN Guiding Principles. This is important because it affects access to capital from the IFC—and it is amplified manifold because the IFC standards are tracked by 80 private sector lending institutions that account for more than 70 percent of project finance world-wide.
- The International Standards Organization has issued a social responsibility standard drawing on the Guiding Principles for its business and human rights provisions. The new standard was adopted by 93 percent of its national members, including China. ISO is important because it energizes an army of consultants eager to help companies come into compliance.
- In the European Union, the Commission has asked member states to submit national plans for implementing the Guiding Principles, and the Commission itself is developing additional guidance for several industry sectors and for small and medium-sized enterprises.
- In the United States, the concept of human rights due diligence, a central component of the corporate responsibility to respect human rights under the Guiding Principles, found its way into Section 1502 of the Dodd-Frank Wall Street Reform Act, in relation to certain minerals companies procure in the Democratic Republic of Congo and adjoining countries.
- The U.S. government also has referenced the Guiding Principles as a benchmark in a new reporting requirement for U.S. entities investing more than \$500,000 in Myanmar, now that most economic sanctions have been suspended.
- The American Bar Association has endorsed the GPs and “urged” not only governments and the private sector but also law firms, as businesses in their own right, “to integrate [them] into their respective operations and practices.
- The Guiding Principles have even featured in a critical U.S. Supreme Court case, *Kiobel v. Royal Dutch Petroleum*, testing the applicability of the U.S. Alien Tort Statute to companies and their overseas conduct, in which I submitted an amicus brief.

These developments reflect unprecedented convergence and uptake. At the same time, when I presented the Guiding Principles to the Council, I said: “I am under no illusion that the conclusion of this process will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning.” That remains my assessment tonight. There is much more to be done. But for the first time, we have a common foundation to build on.

IV. NEXT STEPS

The Guiding Principles have begun to function like a pebble thrown into in a pond, setting off rippling effects in a variety of directions. Let me briefly highlight what I believe to be three important next steps.

Capacity Building

The first concerns capacity building. Limited capacity is a far greater obstacle to rapid progress in business and human rights than we tend to acknowledge; it's much easier to blame someone. Limited capacity affects the ability of all stakeholder groups, including governments, businesses, NGOs and the UN system to play their necessary roles. The problem is particularly pronounced in relation to middle and lower-income countries as well as small and medium-sized enterprises.

But capacity building is not only a resource issue. As I already mentioned, most companies still do a poor job of assessing and aggregating at corporate levels the costs to themselves of getting things wrong, which typically are rolled into local operating expenses, never attracting the attention of senior management, boards and shareholders. Also, too many governments as well as companies do not yet fully appreciate how much of their capacity gaps stem from poor internal coordination, where one unit creates problems that another then has to try and cope with. In short, the challenge here involves both resource allocation and institutional reengineering.

Corporate Law & Securities Regulation

The second concerns corporate law. Integrating systems for conducting human rights due diligence and managing the resulting information flows constitute complex challenges, especially for large and far-flung companies. And yet the speed and ease with which an enterprise can respond to its potential human rights impacts can be decisive for the effectiveness of managing those risks. Therefore, companies need to institute fully linked-up chains of responsibility across the appropriate levels and functions within the business. Innovations in corporate law and securities regulation can help in at least two ways.

One is by recognizing the concept of "corporate culture"—in this instance, a corporate culture respectful of human rights. There are precedents in domestic law that can be drawn on. For example, under the Australian criminal code a firm itself may be held liable when its corporate culture directed, encouraged, tolerated or led to non-compliance with the relevant provisions. But only the individual may be prosecuted if the company has in place effective systems of control and supervision. The U.S. Federal Sentencing Guidelines require judicial consideration of whether a corporation has an "organizational culture that encourages ethical conduct and a commitment to compliance with the law" in assessing criminal penalties. Analogous provisions could be constructed in corporate and securities law and policy, incentivizing companies to institute more integrated corporate cultures directed towards ethical conduct, which in turn would facilitate more coherent approaches the respecting human rights across a company.

Another development that would reinforce and build on the GPs would be to strengthen corporate law provisions that explicitly permit company directors, in fulfilling their fiduciary responsibility to the company, to consider its impact on other stakeholders and on society as a whole. That could encourage boards to establish more extensive oversight of company programs intended to manage social risks, including to human rights, while also protecting directors from possible shareholder claims that they are breaching their duty to the company by straying too far from short-term profit maximization. Examples exist in several jurisdictions. In the U.S. directors are given discretion to determine what is in the best interest of the company under the so-called business judgment rule, but its scope is not defined. An important next step would be to make it explicit that taking into account a company's impact on society is in keeping with directors' duties to their companies. This has been variously described as the "enlightened shareholder" or "enlightened management" approach, permitting consideration of stakeholder interests as being broadly aligned with long-term shareholder interests, without risking legal liability for breach of duty.

International Crimes

Finally, let me turn to the subject of gross violations. You are all familiar with the case of *Kiobel v. Royal Dutch Petroleum* that has worked its way through the U.S. Court system, and now awaits a ruling by the Supreme Court. I have no position on the merits of that particular case. My concern is that appellate court decisions in this and similar cases have revealed that the structure and functioning of international law remains poorly understood in the American judicial system. The issues of particular relevance to business and human rights concern corporate liability for acts, or complicity in acts, that may rise to the level of internationally recognized crimes, such as crimes against humanity—and whether international standards that have been developed and agreed to for natural persons also apply to legal persons.

The international community no longer regards state sovereignty as a shield behind which such abuses can take place with impunity. In my view, the same surely must be true of the corporate form.

Indeed, many of us have thought that this was true all along. But an affirmation through an international legal instrument may be required to settle the matter once and for all.

V. Lessons Learned

Finally, what lessons can we draw from this experience? I would suggest three.

First, when we confront global governance challenges the initial instinct often is to strive for some "grand bargain" solution: typically a single, comprehensive command-and-control regulation. For issues like business and human rights, this simply is not feasible:

- Issues are too complex;
- Interests are too divergent;
- Global geopolitical changes increase centrifugal forces.

- At the same time, self-regulation doesn't go far enough.

The Guiding Principles show that it is possible to induce systematic change by establishing socially legitimated and politically authoritative standards, elements of which may get incorporated into hard law.

Second, major global challenges require innovative approaches under which public and private governance systems—corporate as well as civil—each come to add distinct value, compensate for one another's weaknesses, and play mutually reinforcing roles. The Guiding Principles embody and illustrate such a polycentric governance model.

Finally, the Guiding Principles rely on a distributed network approach to implementation—establishing the normative platform and high level policy guidance through the UN but involving other actors that have more direct leverage vis-à-vis business in implementation.

In conclusion, a great deal has happened in a relatively short period of time. But the Guiding Principles are not a destination; they are a journey. We invite you—indeed, we need you—as interested and committed students, to continue that journey.

Thank you.

Roundtable Report, Implementing the U.N. Guiding Principles on Business and Human Rights

Participants

- Michael Addo, Member, United Nations Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises
- Daniel Baer, Deputy Assistant Secretary, Bureau of Democracy, Human Rights and Labor, U.S. State Department
- Joanne Bauer, Adjunct Professor of International and Public Affairs, Columbia University
- Robert Bird, Professor and Northeast Utilities Chair in Business Ethics, University of Connecticut
- Natalie Bridgeman Fields, Founder and Executive Director, Accountability Counsel
- Doug Cahn, Principal, The Cahn Group, LLC
- Jonathan Drimmer, Vice President and Assistant General Counsel, Barrick Gold Corp.
- Erika George, Professor of Law, University of Utah, S.J. Quinney College of Law
- Adam Greene, Vice President, Labor Affairs and Corporate Responsibility, United States Council for International Business (USCIB)
- Shareen Hertel, Associate Professor, Department of Political Science and the Human Rights Institute, University of Connecticut
- Anita Househam, Policy and Legal Advisor, Issue Manager on Supply Chain Sustainability, U.N. Global Compact Office
- James Kallman, President, Director, Mazars
- Lisa Laplante, Interim Director, Dodd Center, University of Connecticut
- Kathryn Libal, Assistant Professor in Community Organization and Associate Director of the University of Connecticut Human Rights Institute
- Stephen Park, Assistant Professor of Business Law, University of Connecticut
- Peter Rees QC, Legal Director, Royal Dutch Shell plc
- David Schilling, Senior Program Director, Human Rights and Resources, Interfaith Center on Corporate Responsibility
- John Sherman, General Counsel, Senior Advisor and Secretary, Shift Project
- Aman Singh, Editorial Director of CSRwire.com
- Suzanne Spears, Fellow on Business and Human Rights, Dodd Center, University of Connecticut; Counsel, Wilmer Cutler Pickering Hale and Dorr LLP

Roundtable Summary

The purpose of the Roundtable was to explore the challenges and opportunities that efforts to implement the Guiding Principles are producing for various stakeholders – including businesses, governments, civil society and the United Nations. Nearly two years after the Guiding Principles were endorsed in June 2011 members of each of these sectors should have experiences to share about putting the Guiding Principles into practice. Those who are less far along in the process should benefit from hearing accounts of lessons learned from those who have been engaged in the process longer.

The Roundtable was organized around three main topics that emerged from pre-Roundtable discussions with participants as crucial to successful implementation of the Guiding Principles:

1. Making a Heterodox Approach Effective
2. Assessing Processes and Outcomes
3. Building Capacity

1. Making a Heterodox Approach Effective

The success of the Guiding Principles will depend in large part on the effectiveness of the new heterodox approach to regulating corporate conduct in the area of human rights. As Professor Ruggie explained in his Sackler Lecture, a heterodox approach was adopted in the Guiding Principles because “[t]he debate between so-called ‘mandatory’ and ‘voluntary’ approaches to regulating corporate conduct had induced policy stalemate at the international level.” Instead of accepting that either a binding international legal instrument or a wholly voluntary market-based system would be the best way forward, the Guiding Principles call for a mix of reinforcing governance measures with the potential to generate change, including in the law.

The discussion during the Roundtable touched upon the three main elements of the heterodox approach and provided some insight into how the approach is changing the attitudes and behavior of those engaged in implementing the Guiding Principles.

A. Polycentric Governance

Professor Ruggie and others have labelled the first element of the heterodox approach to regulating corporate conduct “a polycentric system of governance.” Such a system of governance is needed because globalization is making it increasingly difficult for individual regulatory bodies acting on their own to manage the adverse human rights consequences of market forces. Rather than introducing a new, overarching international regulatory regime, the Guiding Principles respond to these gaps in governance by identifying ways to strengthen and better align the governance systems that already exert some influence over the conduct of business enterprises. The aim is to generate a new, mutually-reinforcing regulatory dynamic in relation to human rights.

Thus, the Guiding Principles call upon states, corporations and civil society each to do their part in regulating multinational corporate conduct. In brief, they provide that:

- States should meet their existing international human rights obligations to protect against human rights abuses by third parties, including business enterprises. To do this, they must take appropriate steps to prevent, investigate, punish and redress such abuses within their territory and/or jurisdiction and set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights.
- Businesses should fulfil society's expectation that they respect human rights in addition to complying with legal obligations in the states where they operate. Meeting their responsibility to respect human rights means acting with due diligence to avoid infringing on the human rights of others, addressing human rights impacts with which they are involved, and having in place relevant policies and processes.
- Individuals and communities affected by business-related human rights abuse should have access to effective remedies, both judicial and non-judicial.

The 31 Guiding Principles and their extensive commentary spell out in greater detail than ever before how states, corporations and civil society should approach business-related human rights issues.

New Human Rights Advocates

Comments by Roundtable participants indicated that the process of implementing the Guiding Principles is in fact beginning to generate a new, mutually-reinforcing regulatory dynamic. In particular, it is transforming governments, businesses and members of civil society into advocates for one another's effectiveness as promoters of human rights.

For example, whereas most business leaders once would have argued that the public sector should do nothing other than create the space for business to expand, business leaders at the Roundtable championed a strong public sector capable of intervening in the market to protect human rights. They welcomed sensible regulatory requirements that clearly demarcate where private sector responsibility for human rights begins and ends. They said that where such regulation is lacking or chronically unenforced (as it usually is in countries plagued by widespread informality and corruption), businesses have difficulty fulfilling their own responsibilities under the Guiding Principles and difficulty competing with others who do not operate responsibly.

Multinational corporations, one participant suggested, would therefore like to see states named and shamed at the United Nations or elsewhere for failing to protect against business-related human rights abuses. Another participant suggested that there should be a mechanism for companies (or perhaps states acting on behalf of their companies, as at the World Trade Organization) to make claims against states for failing to uphold their duty to protect. And a number of participants gave examples of companies that, hoping to lock in their first-mover competitive advantage, have publically supported the passage of laws (such as a labor law in China and green-house gas emission limits in the United States) and international conventions (such as the OECD Anti-Bribery Convention) regulating business.

Business leaders at the Roundtable also expressed strong support for building the capacity of social actors to engage, individually and collectively, directly with governments on business-related human rights issues. When social actors lack the ability to oversee public policy effectively they often demand that the multinational corporations in their midst address human rights issues that would be better addressed by the state. A number of participants said that companies were caught in the middle and feared being held liable by affected communities for states' failures to protect human rights.

Roundtable participants from civil society and government applauded the new attitude on the part of business, as it opens the door for stronger and more effective states and civil society. But a few also expressed concern that it risks opening the door for some businesses to evade responsibility. They emphasized that, by setting a minimum standard of behavior for business enterprises, the message of the Guiding Principles is that businesses must not wait for states to fulfill their duty to protect against human rights violations. Society expects businesses to respect human rights wherever they operate – even in conflict-affected areas – and expects leading multinational companies, like those represented at the Roundtable, to act as transformational forces. If leading multi-nationals adopt good practices, it may give governments in the developing world the space to require that their own firms do so too or exert an upward pull on the performance of local enterprises regardless of what governments do.

Business leaders at the Roundtable indicated that they were indeed concerned about the laggards, which include many small and medium sized enterprises (SMEs) and state-owned enterprises in both developed and developing countries. Their concern is heightened when they need to do business with such enterprises – for example, as part of their supply chain in the case of manufacturing or when constructing a project in the case of the extractive industries. Leading by example -- which a number of companies represented at the Roundtable said that they are doing by way of highly-acclaimed compliance programs and pilot projects in human rights due diligence – can only accomplish so much. This is worrying because, according to Guiding Principles 13(b) and 19(b), companies are supposed to seek to prevent or mitigate adverse human rights impacts that are directly linked to them by way of their business relationships.

In that regard, capacity building for SMEs and the efforts of business organizations, such as the US Council for International Business (USCIB), are crucial. Participants learned that the USCIB is distributing the Guiding Principles to all the employers in its vast global network, engaging in educational and awareness-raising efforts, and assisting its members with implementation of the principles in a variety of ways. Such efforts should help ensure that the Guiding Principles begin to change attitudes even among those who, unlike a select group of leading multinationals, were not involved in the process that produced them.

Heading Towards a "Tipping Point"

Anecdotes shared at the Roundtable indicated that, after decades in which a wholly voluntary approach made little progress and repeated efforts to agree an international instrument failed, the adoption of the Guiding Principles in 2011 started a cascade of change in the area of business and human rights. Sudden and dramatic changes in direction are occurring as individuals and groups take up the Guiding Principles even in seemingly small ways or in peripheral contexts.

One participant cited the example of the dramatic effect one economist's embrace of the Guiding Principles is having in and beyond his country. In particular, this individual was appointed the Superintendent of Banking, Insurance and Private Pension Fund Administrators of Peru in August 2011, and since then has been asking how financial regulation can influence the evaluation of projects to prevent and mitigate their negative impact on the human rights of affected communities. He will soon propose regulation that will require banks in Peru to take into account externalities (*i.e.*, social risks) in addition to commercial considerations (*i.e.*, private risks) when making lending decisions. If his plan is adopted, it could have a transformative effect on the Peruvian economy and, if other countries emulate it, on the global economy.

Another participant noted that government efforts to implement the Guiding Principles may have the kind of contagion effect that the disclosure requirements in the Dodd Frank legislation in the United States are having across the Atlantic. Companies that must comply with Dodd Frank are seeking to lock in their first mover advantage in Europe by calling for the adoption of similar legislation by the European Union. Another participant noted that countries that promulgate national action plans to facilitate the implementation of the Guiding Principles – with the United Kingdom on course to be the first – may in doing so encourage other countries to consider how to implement the Guiding Principles. And another participant suggested that, if domestic and regional human rights courts begin to cite the Guiding Principles, they may hasten the principles' transformation into hard law. Such developments indicate, as one participant observed, that there is an element of serendipity in who decides to take up the Guiding Principles, and that the dissemination and implementation of the Guiding Principles is happening organically.

These comments prompted a number of participants representing business to express concern about the process of implementing the Guiding Principles. In particular, several business leaders and government representatives commented that they did not agree with the use of the term "implementation," because it implied that the Guiding Principles are prescriptive and require businesses and governments to do specific things; it was more appropriate to speak of "putting the Guiding Principles into practice." One business leader was also concerned about the suggestion that the Guiding Principles might be transformed into "hard law," and questioned whether that was appropriate or intended by Professor Ruggie and his team. The idea that it is impossible to predict where the Guiding Principles might pop up next was also disconcerting to business leaders who seek certainty and predictability.

During the debate that ensued, some participants from civil society argued that, while they certainly warrant further elaboration and interpretation, the Guiding Principles are in fact prescriptive. A prescriptive approach was necessary because experience had shown that compliance with national laws where companies operate, coupled with voluntary adherence to the best practices already adopted by leading companies, was not enough to enable the market to drive the process of change in the area of business and human rights. Instead of adopting a wholly "voluntary" approach, the Guiding Principles indicate that businesses must do specific things in order to meet their responsibility to respect human rights, including acting with due diligence to avoid infringing on the rights of others and addressing harm where it does occur. (One participant also noted that Human Rights Council Resolution A/HRC/17/4, which established the Working Group on Business and Human Rights, charged the Working Group with facilitating the process of "*implementing* and disseminating" the Guiding Principles).

A participant also noted that, while they rejected a “mandatory,” treaty-based approach and accepted that the Guiding Principles should not be read as creating new international law, Professor Ruggie and his team hoped that elements of the Guiding Principles would eventually be incorporated into hard law. Indeed, in his Sackler Lecture, Professor Ruggie offered several examples of ways in which corporate law could build upon the Guiding Principles and expressed optimism that elements of the socially legitimated and politically authoritative standards set out in the Guiding Principles would become hard law. He also indicated that, to overcome uncertainty with respect to one issue in particular – corporate liability for acts, or complicity in acts that may rise to the level of internationally recognized crimes – an international legal instrument may still be needed in the near future.

B. Meaning Management

In his Sackler Lecture, Professor Ruggie labelled the second element of the heterodox approach to business and human rights adopted in the Guiding Principles “meaning management.” The idea behind that element was to secure consensus on what the state duty to protect, the business responsibility to respect, and affected communities’ right to remedies meant and obtain the UN’s endorsement of that meaning. To that end, following its endorsement of the Guiding Principles, the Human Rights Council established a Working Group on Business and Human Rights and charged it with facilitating the process of implementing and disseminating the Guiding Principles. The Office of the United Nations High Commissioner for Human Rights (OHCHR), in collaboration with the Working Group, has also been given a mandate by the UN Secretary-General to provide guidance and clarification on issues relating to the interpretation of the UN Guiding Principles.

Although the Working Group and the OHCHR are working well together as guardians of the interpretation of the Guiding Principles, some Roundtable participants expressed concern that there was no treaty-body or charter-based body charged with their application. They suggested that only a body with command and control authority to apply the Guiding Principles or to insist that they be applied by other bodies would be able to ensure their coherent and consistent application.

Participants heard that, in the absence of such authority, the Working Group is seeking to mainstream the Guiding Principles throughout the whole UN System and to encourage those treaty- and charter-based bodies that do have command and control authority to apply the Guiding Principles in a coherent and consistent manner. The task is not easy, as the treaty-bodies tend to operate in isolation from one another, to focus exclusively on their own specific mandates and to address only the behavior of states. Many treaty bodies also take a largely reactive approach to allegations of violations of human rights attributable to states, rather than impressing upon them the need to prevent such violations. In general, the treaty bodies have shown a surprising lack of awareness of the Guiding Principles and some still need to be persuaded of the importance of integrating the Guiding Principles into their work.

As a first step towards getting the treaty bodies to implement the Guiding Principles coherently and consistently, the Working Group is working with them to compile a series of generic questions about business and human rights that could be addressed by each of them to states during periodic reviews. States could also be asked about specific allegations of business-related human rights violations, which would in turn require them to ask the businesses involved for information.

The Working Group would also like to see the treaty bodies adopt general comments that incorporate the Guiding Principles. The Committee on the Rights of the Child, for example, is planning to adopt a General Comment on State Obligations Regarding the Impact of the Business Sector on Children's Rights that refers to the Guiding Principles and reflects input from the Working Group. It also might be possible to get all nine treaty bodies to adopt collective general comments on business-related topics, such as on the appropriate scope of remedies for victims of business-related human rights abuse. However, given that a well-informed comment on remedies would need to reflect the viewpoints of victims, this would require the treaty bodies to change the way they work with non-state actors (at present, general discussions by the treaty bodies are open to civil society, but evidence for general comments tends to be gathered only from states).

C. Distributed Network Architecture

The third and final element of the heterodox approach to business and human rights identified by Professor Ruggie in his Sackler Lecture is a "distributed network architecture." The idea behind it is to engage national and international standard setting bodies that have more direct leverage over businesses than the United Nations in the process of implementing the Guiding Principles.

A number of roundtable participants observed that this element of the heterodox approach is particularly important, as they believed that the UN has little relevance to businesses. Businesses are far more likely to listen to regulators and industry groups, which are also in a better position than the UN to develop the standards established in the Guiding Principles to suit certain domestic contexts and industries.

Standard setting bodies are already engaging with the Guiding Principles, as Professor Ruggie pointed out during his Lecture. These include the OECD, the IFC, the ISO, the EU, the US government, the American Bar Association, ASEAN and the African Union, among others. It is less clear whether domestic or international judicial bodies have started engaging with the Guiding Principles, a subject that the Working Group is studying.

One participant suggested that the international economic architecture – including the WTO and the network of bilateral investment treaties (BITs) – could be engaged in the effort to disseminate and implement the Guiding Principles. Future trade agreements and BITs could refer to the Guiding Principles and direct arbitral tribunals to consider the issue of non-compliance with the Guiding Principles when determining and applying treaty protection and assessing compensation. More generally, such instruments should leave adequate domestic policy space to allow states to meet their duty to protect human rights, as recommended in Guiding Principle 9.

Another idea is to incorporate the Guiding Principles into foreign investment legislation, as the UN Conference on Trade and Development (UNCTAD) suggested in its 2012 World Investment Report. In that report, UNCTAD encouraged governments to set out investor obligations and responsibilities, including adherence to the Guiding Principles, clearly in national legislation. It further encouraged investors to adhere to the Guiding Principles and to carry out corporate due diligence relating to economic, social and environmental risk.

2. Assessing Processes and Outcomes

The UN Guiding Principles establish process-based standards with respect to the corporate responsibility to respect human rights. Specifically, the Guiding Principles outline a due diligence process that should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed. Through such a process businesses should be able to both know and show that they are meeting their responsibility to respect human rights in practice. The Guiding Principles also provide that, where businesses identify that they have had adverse human rights impacts, they should provide for or cooperate in remediation through legitimate processes.

The discussion during the Roundtable focused on some of the more difficult questions that arise with respect to the process-based standards set forth in the Guiding Principles, particularly with respect to verification, communication and remediation.

A. Tracking Responses to Human Rights Impacts

Guiding Principle 20 advises that, “[i]n order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response.” To do so, the Commentary suggests, businesses might use tools that they already use in relation to other issues, such as performance contracts and reviews as well as surveys and audits, and obtain feedback from operational-level grievance mechanisms.

The discussion during the Roundtable showed that, despite this general advice, many companies are still grappling with the issue of how best to track their responses to the actual and potential human rights impacts they identify through their due diligence processes. One participant noted that many companies use accident/incident reports to assess the effectiveness of the processes they have in place to prevent potential impacts. Yet past experience should not be the only guide to the future; otherwise, companies risk addressing only the types of impacts they have had in the past, rather than the unprecedented impacts they may have in the future. Clearly more sophisticated metrics are needed to assess the robustness of the processes that companies have in place to address potential impacts, as well as the outcomes of those processes.

One participant described how some civil society organizations and shareholders groups are beginning to demand that companies employ more sophisticated metrics. (During the 2013 proxy season, members of the Interfaith Center on Corporate Responsibility (ICCR) will sponsor 180 resolutions with respect to 127 companies on questions of corporate governance, and social and environmental impacts.) In that regard, there are a number of initiatives to devise human rights indicators for certain sectors (*e.g.*, oil and gas, and apparel) and to get companies to assess their performance against international standards, including ILO conventions. It is likely that the civil society groups that are already monitoring the social performance of companies, and the burgeoning industry of auditors that are doing the same, will add “adherence to the Guiding Principles” to the criteria they consider in evaluating a company’s social performance.

Indeed, Roundtable participants learned that the global accounting firm Mazars and the non-profit consultancy Shift are launching a project to develop global standards for human rights reporting and assurance. They aim to devise a reporting standard that would allow companies to issue a Human Rights Statement demonstrating how their internal policies and processes align with the Guiding Principles. An accompanying assurance standard would allow independent external human rights assurance providers to confirm that the Statement is a fair assessment. The idea is to bring the rigor of accounting to the verification processes proscribed in the Guiding Principles.

Anecdotal evidence presented by Roundtable participants shows that civil society groups are likely to play an important role in developing and applying global auditing standards based on the Guiding Principles. At times that role may not be productive, judging by the fact that one accounting firm received a letter from a leading environmental NGO criticizing it for even agreeing to undertake an audit of a company with a poor environmental record. But at other times that role may be very helpful, such as when the same firm received a long letter from another NGO detailing what it expected the company in question to be doing to improve its environmental record. That letter provided the company and its auditors with a good road map for the audit. This story demonstrated that there is no reason why NGOs cannot cooperate with companies while also holding them accountable.

Operational-level grievance mechanisms are also providing valuable feedback to companies about the effectiveness of the steps they are taking to address human rights impacts. One participant noted that his company had realized that any endemic social problem in a community where the company operated would become the company's problem. To alleviate tensions the company had established grievance mechanisms that provided safe spaces for communities to air such problems and enabled the company to develop programs and relationships to help address them.

The focus of NGOs and shareholder groups so far has been primarily on the big multinationals (which is where it should be, according to one participant, as such companies ought to lead by example). However, pressure is also mounting on small and medium sized enterprises, in some cases by way of the big multinationals. Starbucks, for example, refused to renew a contract with a supplier company because of its poor human rights record. That led the supplier to approach accountants with human rights expertise to find out why they were performing so badly and to help them improve.

B. Reporting on Responses to Human Rights Impacts

Guiding Principle 21 provides that, "in order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally." It further provides that, "business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them." Beyond these general instructions, neither the Guiding Principles nor their Commentary tell companies whether they must report on specific impacts of their operations (in addition to reporting on the processes they have in place to address those impacts) or, if they must, which specific impacts they must report on in order to fulfil their responsibility to respect human rights.

Roundtable participants representing business said that they were struggling with these questions. All said they were comfortable being transparent about their due diligence and remediation processes, and acknowledged that being transparent was vital to the legitimacy of those processes. Some were also willing to report in general terms on the kinds of impacts they identify through their due diligence processes. But they were all reluctant to report on specific impacts, particularly with respect to the location of those impacts, because of the need to manage their legal risks and protect themselves from unscrupulous plaintiffs' lawyers.

A participant from civil society observed that calls for reporting on specific impacts are nonetheless getting louder. Shareholders and stakeholders want to be able to evaluate companies not only on the basis of their processes but also on the basis of their outcomes; they want to be able to see whether real progress is being made. Another participant agreed, but noted that not all shareholders require the same degree of transparency – there is little pressure on Chinese companies, for example, to report on the human rights impacts of their overseas operations. There is also wide variation among the reporting standards currently being used by companies and consulted by investors with respect to environmental and social issues – thus participants welcomed the Mazars/Shift project discussed earlier.

Whatever the level of detail of a final report by a company, the process of pulling one together has a beneficial effect on a company, according to one participant. It requires personnel to track human rights issues and, as a consequence, raises consciousness about those issues within the company. Issuing a human rights report therefore represents a significant step forward in any effort to embed human rights principles and to institutionalize a human rights program within a company. Another participant noted that a study done by the University of California showed that the actual environmental impacts of companies' operations diminished as their reporting of those impacts increased.

C. Remediation of Human Rights Impacts

Guiding Principle 22 provides that, “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.” While Chapter III on access to remedy provides further guidance on mechanisms through which remediation may be sought, it leaves open a number of questions with respect to how the effectiveness of remediation efforts should be tracked and communicated externally.

Roundtable participants involved in remediation efforts said that transparency was crucial to tracking the effectiveness of such efforts. It is far easier to determine whether a community's claim has merit and has been dealt with fairly if the process is transparent. It is also important to put into place compliance or monitoring mechanisms to ensure that commitments made by the community and the company are adhered to once a claim has been resolved. Participants agreed that this is an area that needs further development. One participant suggested that the grievance process itself must be ongoing to ensure compliance with any agreements reached, while another suggested that even non-judicial processes could produce legally binding agreements with enforcement mechanisms such as arbitration clauses.

There is also a need to give further thought to how companies might communicate externally about their remediation processes. A participant noted that confidentiality may be of concern to some claimants. Remarks by business participants indicated that, while they would be willing to disclose information about the existence of grievance processes, they would be hesitant to disclose information about specific allegations of negative human rights impacts.

3. Building Capacity

As Professor Ruggie pointed out in his Sackler Lecture, limited capacity on the part of all stakeholder groups – including affected communities, businesses and governments – is one of the greatest obstacles to implementation of the Guiding Principles. Much of the tangible progress that has been made in implementing the Guiding Principles thus far has been made by a small number of large multinational corporations concentrated in the extractive and manufacturing industries, and by a small number of governments. Now other stakeholders need to embrace and master the Guiding Principles, and develop the skills, acquire the language and build the coalitions necessary to put them into practice.

To do so, stakeholders will need resources, assistance and training, and some institutions will need to be reengineered. The discussion during the Roundtable explored how various stakeholder groups are grappling with these issues and highlighted the extent of the challenges that remain.

A. Building the Capacity of Affected Communities

The third chapter of the Guiding Principles focuses on the need for affected communities to have greater access to effective remedies for business-related human rights impacts. A number of participants at the Roundtable asserted that this is an area in particular need of further attention, as access to effective remedies is still extremely limited for most affected communities.

Participants observed that, even where grievance mechanisms do exist, many affected communities remain unaware of them or unsure of how to access them. And, even when they have such knowledge, affected communities often have difficulty articulating how they are being harmed in a manner that can be assessed and acted upon through a grievance process. These impediments to accessing effective remedies derive from the fact that affected communities are usually marginalized economically, politically and geographically (particularly in the case of those affected by extractive industry projects), and often lack education and basic advocacy skills.

Accountability Counsel is one organization that is helping affected communities overcome these barriers by representing them before operational-level grievance procedures and before other non-judicial bodies that hear complaints against companies, such as the OECD National Contact Points. However, many more such organizations are needed, particularly at the domestic level in host countries.

One participant noted that there was also a need for organizations to represent affected communities at the international level, including at the WTO and before other institutions that set the rules for the global economy. In this vein, another participant suggested that organizations might bring pressure to bear on governments to raise human rights issues before committees on investment established

pursuant to free trade and bilateral investment treaties. Another participant suggested that, as a general matter, there is a need for greater transparency and more space for civil society within global economic institutions.

According to one Roundtable participant, the overriding goal of organizations that represent affected communities should not be to stop all projects that have negative human rights impacts. Rather, such organizations should aim to facilitate the airing and resolution of grievances, help stop and remedy the negative human rights impacts that have caused those grievances, and ultimately benefit all stakeholders through the resolution of disputes. Based on the experience of one participant who has helped communities bring human rights claims against states to achieve these objectives organizations will need to learn such skills as writing grant proposals, and communicating effectively with government and company representatives.

Several participants recounted how some universities are starting to help build the capacity of affected communities to access grievance mechanisms, including in countries where there are no non-governmental organizations able to do so. Universities are, for example, starting to provide formal clinical education in the area of business-related human rights; to train and certify mediators; and to study the causes and consequences of business-related human rights impacts. One participant noted that universities could also help foreign companies familiarize themselves with local operating environments and identify local NGOs to represent the interests of affected communities, while also helping local NGOs and affected communities interact with foreign companies.

Lawyers could also play a greater role in helping affected communities access remedies by representing them and by providing advisory services on a *pro bono* basis, one participant suggested. That participant sought to dispel the common assumption that when lawyers get involved in non-judicial grievance procedures they invariably push disputes into the judicial realm. Lawyers subject to ethical standards like those applicable in the United States are required to act in the best interests of their clients and it is often in the best interest of communities to resolve disputes with companies through non-judicial means.

B. Building the Capacity of Businesses

The discussion during the Roundtable also highlighted the challenges facing companies in implementing the Guiding Principles. As Professor Ruggie pointed out in his Sackler Lecture, one reason many companies lack the capacity to implement the Guiding Principles is that they are organized so that the costs of their human rights impacts are seen only at the operational level, while awareness of the Guiding Principles resides, if anywhere, only at the central senior management, board and shareholder level. Such businesses need to undergo institutional and cultural reform to ensure internal coordination and consistency in implementing the Guiding Principles.

One participant suggested that lessons could be learned from the way many companies have reengineered themselves and changed their cultures in response to foreign corrupt practices legislation. Lawyers might offer advisory services and training courses with respect to the Guiding Principles along the lines of those they have offered to businesses with respect to corruption legislation. Such efforts

appear to have been successful to the extent that alarm bells now usually ring at the operational level even within small and medium sized enterprises when corrupt practices are involved.

The United Nations and international human rights organizations also have an important role to play in assisting, not only governments, but also companies in implementing the Guiding Principles. One Roundtable participant observed that efforts by the UN Global Compact, UNICEF and Save the Children to build the capacity of businesses to implement the Children's Rights and Business Principles that those organizations issued in 2012 offers a good example. Those organizations are tapping into their local networks to raise awareness and organize training workshops on the Children's Principles. They are also preparing a toolkit to recommend ways for companies to incorporate children's rights into their policies and codes of conduct; provide criteria for companies to assess their performance in respecting children's rights; and review critical areas of impact on children's rights.

According to a number of participants companies are having a particularly difficult time providing affected communities access to remedies as part of their responsibility to respect human rights. One of the greatest challenges they face in that regard is identifying affected communities and their representatives. Local NGOs can play a valuable role in that regard, but several participants warned that NGOs interests do not always align with those of particular affected communities. Another of the greatest challenges facing businesses is determining who should pay for efforts to build the capacity of affected communities to access remedies. Companies that have caused negative human rights impacts usually pay for such efforts, but it might be better if there were support funds for communities that were not associated with specific companies or specific grievances.

One participant described a challenging but ultimately successful effort by a large, multinational food company to address the grievances of migrant agricultural workers in a fruit growing region. With various NGOs and trade unions claiming to speak for the workers, it took the company about a year working locally to determine who actually represented the interests of the affected community. The company decided it was in its own interest to pay for mediators, and to do outreach and trainings of the affected workers to enable them to articulate their grievances so that the company could provide remedies. Although this approach worked, the company probably would have preferred for the local suppliers who directly employed the workers to have provided them with a remedy – an approach that would also be more sustainable.

The need for sustained engagement with affected communities was highlighted by a number of Roundtable participants representing business. These participants' companies seek to establish ongoing relationships and to build trust with affected communities, rather than convening isolated meetings only when specific problems arise. Companies that adopt a proactive approach and regularly engage in healthy dialogue over issues of concern to affected communities hope to avoid the sort of debilitating opposition to their projects faced by some other companies (such as by many foreign mining companies in Peru). A Roundtable participant from civil society noted that companies are likely to face fewer crises related to community opposition if they engage in the ongoing due diligence process proscribed in the Guiding Principles and thereby assess actual and potential human rights impacts, integrate and act upon the findings, track responses and communicate how impacts are addressed.

A number of participants representing business remarked that it was crucial for them to assess the actual and potential human rights impacts of their operations at the local level, rather than assuming that all of their operations have the same impacts. For example, one company had learned that its operations in Alaska threatened an indigenous community's annual whale hunt, while its operations in China threatened a community's cattle herds. Once it had received this information, the company was able to adjust its operations accordingly and to resolve long-standing disputes with communities.

C. Building the Capacity of Governments

Governments are also struggling to implement the first pillar of the Guiding Principles -- their duty to protect communities against human rights violations by businesses. As Professor Ruggie pointed out in his Sackler Lecture, government capacity gaps are often, like corporate capacity gaps, a result of poor internal coordination. For example, agencies charged with promoting foreign investment often seek to create a permissive environment for companies while agencies charged with addressing social problems are left to manage the resulting human rights impacts. Thus, many governments, like many businesses, need to undergo institutional and cultural reform to ensure internal coordination and consistency in implementing the Guiding Principles.

One Roundtable participant suggested that home state governments could play an influential role in this regard. They could, for example, act to fill in the capacity gaps of host state governments by requiring their own investors to outline the steps they are taking to implement the Guiding Principles in a manner similar to the labor and environment reporting requirements recently imposed by the U.S. government on investors in Myanmar. Another participant suggested that free trade and investment agreements could be drafted to require host states to require businesses operating within their territory to implement the Guiding Principles in a manner similar to the (non-hortatory) corporate social responsibility provisions in several Canadian free trade agreements. Another idea would be to require host states to meet their duty to protect human rights as outlined in the Guiding Principles or at least not to lower their human rights standards in order to attract investment along the same lines as the labor and environment chapters of a number of US free trade and investment agreements.

Such efforts to encourage host governments and home state companies to adhere to the Guiding Principles are very important in one participant's view. Without such efforts, companies might believe that, as long as they establish operational-level grievance mechanisms and build the capacity of communities to access such mechanisms, it is always acceptable to operate in places where governance is weak. Similarly, weak governments might believe that, as long as they help build the capacity of local communities to make claims directly against companies through operational or other grievance procedures, they are doing their job. Instead, weak governments should be encouraged to fulfill their duty to protect, which includes the duty to prevent human rights impacts by businesses and to establish state-based judicial and non-judicial grievance procedures, or risk foregoing or losing foreign investment.

A number of business representatives, however, cautioned that some home state regulatory efforts were in their view misguided and had unintended consequences. They argued that the cost and effort required to comply with the Myanmar reporting requirements, for example, would be too great for

small and medium sized enterprises and therefore would discourage investment in Myanmar. At the same time, a number of civil society groups have argued that those same reporting requirements are not stringent enough to ensure US businesses respect human rights when operating in Myanmar. It was clear from the discussion during the Roundtable that, although the Guiding Principles represent the convergence of diverse positions into a single authoritative framework, efforts to implement them will produce divergent views that policy makers will need to consider carefully.