



**SUBMISSION ON OIL & GAS SECTOR
DISCUSSION PAPER**

BY

**THE SINGAPORE MANAGEMENT UNIVERSITY'S ASIAN PEACE-
BUILDING AND RULE OF LAW PROGRAMME ('SMU-APRL')
& MAZARS INDONESIA**

30 June 2012

Introduction

1. The following submission is in response to the Institute for Human Rights and Business (‘IHRB’) & Shift’s public call for comments on its proposed discussion paper relating to the oil and gas sector for the European Commission’s consideration. Our submission touches, among other things, upon matters of core relevance to the South-East Asian context, in the hope that the comparative lessons from this region can prove beneficial to the European Commission’s work in developing a guide for this sector.
2. Our submission, and the recommendations it forwards, are informed by our academic and professional experience and expertise as scholars, lawyers and auditors based in Southeast Asia (‘SEA’). The comments submitted herein do not purport to be exhaustive. They instead draw on the expertise of its authors, the Singapore Management University’s Asian Peace-building and Rule of Law Programme (SMU-APRL)¹ and Mazars Indonesia.² Its structure addresses the thematic categories outlined in the public discussion paper produced by the Institute for Human Rights and Business (IHRB) & Shift.

KEY HUMAN RIGHTS IMPACTS

Section 3.1: Impacts on the rights to property and an adequate standard of living

3. Globally, there has been an unprecedented rise in forced evictions in recent years. A multitude of factors, including large infrastructure projects and the activities of extractive industries in both rural and urban areas are leading to the forced eviction of individuals and communities from their homes and habitat.³ Forced evictions intensify inequality, social conflict, segregation and “ghettoization”, and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society, especially women, children, minorities and indigenous peoples.⁴ In the absence of adequate rehabilitation, this has exacerbated homelessness and resulted in loss of livelihood.

¹ SMU’s Asian Peace-building and Rule of Law Program (APRL) is collaboration between Access to Justice Asia LLP (AJA) and the SMU School of Law. APRL serves as a focal point for coordinating cross-disciplinary governance, regulation and human rights research within SMU. APRL has worked with leading law schools, such as Yale and Berkeley, and supports regional human rights mechanisms. Working in partnership, APRL researchers write and consult on the rule of law, business & human rights and transitional justice in Asia.

² Mazars is an international, integrated and independent organisation, specialising in audit, accountancy, tax, legal and advisory services. In March of this year, Mazars won the international ‘Audit innovation of the Year’ award for its human rights audit practice to independently assess existing policies across company operations. Judges for the award commented that Mazars’ approach may establish a benchmark for Human Rights auditing globally.

³ Handbook on the United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement, 3rd edition, Housing and Land Rights Network / Youth for Unity and Voluntary Action, New Delhi, 2011, p.13.

⁴ Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Doc. A/HRC/4/18, para. 7. Referred to hereafter as ‘UN Guidelines on Development-based Evictions’.

4. Together, the numerous violations resulting from forced eviction have been held to constitute a gross violation of human rights.⁵ As such, the State's acquisition of land must be carried out lawfully and in full accordance with relevant provisions of international human rights and humanitarian law.⁶ It must also only occur under exceptional circumstances.⁷

5. The UN has produced basic principles and guidelines to address the human rights implications of development-linked evictions and related displacement in urban and/or rural areas.⁸ Having due regard for all relevant definitions of the practice of "forced evictions" in the context of international human rights standards, the guidelines in question apply to acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.⁹ We recommend that the Sectoral Guide be mindful of the UN Basic Principles and Guidelines on Development-based Evictions and Displacement.

6. Although protection against forced evictions extends procedural and substantive rights to all affected parties – *regardless* of formal tenure over occupied land or property – significant differences exist in levels of formal legal recognition of property and land title across national jurisdictions. In turn, such variance in levels of recognition impacts on the degree of protection afforded to those living in proximity to natural resources, whose property is at

⁵ The violation of internationally recognized human rights as a result of forced evictions may include the rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement. It is in this light that the former United Nations Commission on Human Rights, in Resolutions 1993/77 and 2004/28, has formally affirmed that forced evictions amount to a gross violations of human rights and in particular the right to adequate housing. *See also* United Nations Commission on Human Rights resolution 1993/77, UN Doc. E/CN.4/1993/RES/77, and United Nations Commission on Human Rights resolution 2004/28, UN Doc. E/CN.4/2004/RES/28. Both resolutions reaffirm that the practice of forced eviction is a gross violations of human rights and in particular the right to adequate housing.

⁶ UN Guidelines on Development-based Evictions, *supra* note 4, para. 6.

⁷ *Ibid.*, para. 6. This is reiterated in ESCR General Comment 4 : Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), para. 18, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003). Emphasis added. The UN Guidelines further emphasize the obligation to seek out all possible alternatives to evictions (*supra* note 4, para. 38).

⁸ UN Guidelines on Development-based Evictions, *supra* note 4, para 3. These guidelines are consistent with General Comment No. 4 (1991) and general comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights, the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in its resolution 60/147, and the Principles on housing and property restitution for refugees and displaced persons (see E/CN.4/Sub.2/2005/17 and Add.1).

⁹ UN Guidelines on Development-based Evictions, *supra* note 4, para. 4.

greatest risk of expropriation by the State or by the corporations who have been granted concessions. This is particularly so with regards to matters of compensation.

Sections 3.2: Impacts on the rights to free, prior and informed consultation and/or consent

7. Eminent domain', broadly understood, is the power of the State to seize private property without the owner's or the affected parties' consent. While companies ought to adhere to the principles of free, prior and informed consultation and/or consent, States often invoke eminent domain to appropriate land even if the community may not wish to relocate. This has often resulted in violence and human rights abuses. For instance, in Cambodia, the rapid growth of investment projects has resulted in the conversion of a record number of protected rainforests, endangered wildlife, rivers, villages, farmlands and urban neighbourhoods into land concessions for agro-industrial and mining companies. Together, these private firms now control 3.9 million hectares of land – more than 22 percent of Cambodia's total surface. The surge in concessions is reported to be causing major concern among rights groups, conservationists, governance experts and even donor countries, as it is set to dramatically worsen land disputes – already Cambodia's most pressing human rights issue – and exacerbate the destruction of the country's shrinking forests.¹⁰
8. Our comments with regard to Section 3.2 of the discussion paper also intersect with the discussion paper's additional section relating to stakeholder engagement in addressing human rights impacts (Section 5.6). The issue of consultation and stakeholder engagement is in fact, an overarching obligation that should be carefully considered and given effect throughout all operational stages of corporate conduct.
9. Our submission then turns to the concern expressed by many within the industry over the lack of clarity as to what constitutes 'transparent and meaningful engagement'.¹¹ While considerable debate still exists over what such engagement may entail, it is important for the guidance note point to the growing body of jurisprudence that sheds light on this issue.
10. The most authoritative ruling on this matter hails from the Inter-American Court of Human Rights in the case of the *Saramaka People v. Suriname*.¹² In this seminal indigenous land rights case, the Court held that "in ensuring the effective participation of members of the Saramaka people in development or

¹⁰ The above references to Cambodia were drawn from Paul Vrieze and Kuch Naren, 'Carving Up Cambodia One Concession at a Time', *The Cambodia Daily* (Weekend edition), March 10-11, 2012. The feature further emphasizes the direct link between the Government's neglect to enforce the 2001 Land Law, which requires it to consult with local communities and conduct environmental impact assessments before granting concessions. In turn, very few land disputes are said to result in adequate resolution for vulnerable communities.

¹¹ Applicable to sections 3.2 and 5.6 of the IHRB & Shift discussion paper.

¹² *Saramaka People v Suriname*, Inter-American Court of Human Rights, Judgment of November 28, 2007, Series C, No. 172. Cited hereafter as '*Saramaka People v Suriname*'.

investment plans within their territory, the State ha(d) a duty to actively consult with said community according to their customs and traditions”.¹³ The Court additionally emphasized that this duty required the State (or other relevant party) to both accept and disseminate information, entailing constant communication between the parties.¹⁴

11. It further held that:

These consultations must be in good faith, through culturally appropriate procedures and *with the objective of reaching an agreement*. Furthermore, the Saramakas must be consulted (...) at the early stages of a development or investment plan, *not only when the need arises to obtain approval* from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the Saramaka people are *aware of possible risks*, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the Saramaka people’s traditional methods of decision-making.¹⁵

12. Similar conclusions were reached by the African Commission on Human and Peoples’ Rights in its 2010 ruling of the *Endorois* case.¹⁶ The decision, which considered the forced eviction of an indigenous community for the creation of a Game Reserve in the early 1970s, raised a violation of the right to property on the basis that the displacement of the community had been conducted under duress. The African Commission echoed the Inter-American Court in emphasizing the need for consultations to be held in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.¹⁷ The African Commission further rejected all forms of consultations that did not enable the community representatives to genuinely help shape the outcome.¹⁸

13. At a minimum, the practice of ‘meaningful consultation’ thus inherently rejects the practice of presenting options as *faits accomplis*.¹⁹ It also rejects the notion that the adoption of mere processes will automatically or fully absolve businesses from liability for causing or contributing to human rights abuses.²⁰

¹³ *Saramaka People v Suriname*, *supra* note 12, paras. 129 and 133.

¹⁴ *Ibid.*, *supra* note 12, paras. 129 and 133.

¹⁵ *Ibid.*, para 133. Emphasis added.

¹⁶ *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples’ Rights, Communication 276/2003 (2010). Cited hereafter as ‘*Endorois case*’. These principles are not only echoed in the UN Declaration on the Rights of Indigenous Peoples and ILO 169, but also in an increasing number of national jurisdictions.

¹⁷ *Ibid.*, para. 289.

¹⁸ *Ibid.*, para. 281.

¹⁹ *Ibid.*, para. 281.

²⁰ John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/31, 21 March 2011, Guiding Principle 17. Cited hereafter as the ‘Ruggie Guidelines’

14. While methods for effectively and meaningfully engaging with communities may vary, ‘meaningful consultations’ may best be understood as those capable of achieving mutually-beneficial solutions through constructive and on-going dialogue that is initiated from the outset. In this regard, indigenous peoples and other vulnerable communities are to be treated as ‘active stakeholders rather than passive beneficiaries’.²¹
15. Finally, while the aforementioned rulings place primary obligation upon the State, as naturally the case under international law, the UN Rapporteur on Indigenous Peoples has recently underscored that private companies are increasingly held accountable for their compliance with international human rights norms.²² Those human rights that are at greater risk in particular industries or contexts are subject to become the focus of heightened attention.”²³ Moreover, a failure to act in conformity with principles of due diligence and broader international norms renders companies vulnerable to difficulties such as loss of time and economic resources.²⁴ It also impedes them from attaining or maintaining an image of social responsibility.²⁵
16. Significantly, it exposes trans-national corporations to a considerably higher risk of costly legal cases before national or international tribunals. As such, regardless of the challenges that companies face in conducting meaningful consultations, the need and scope for the promotion of best practices cannot be overstated.

Section 3.4 (& 5.7): Impacts on the rights to health, clean water and food

17. States and trans-national corporations (‘TNCs’) must also inspect and regulate off-shore drilling that may negatively impact on and destroy marine life and bio-diversity, and the fishing livelihoods of coastal communities. Foreign direct investment in petroleum development has often resulted in major environmental pollution, particularly in developing countries in Asia and SEA where environmental laws have been limited or non-existent or where their enforcement has been weak.
18. Such development has not only resulted in extensive environmental damage, but damage to the health of workers and local populations, and social unrest, at times leading to the closure of operations, lawsuits and irreparable harm to

²¹ *Endorois* case, supra note 16, para. 204.

²² Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/12/34, 15 July 2009 para. 56. Cited herein as ‘Anaya’.

²³ Ruggie Guidelines, supra note 20. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

²⁴ Anaya, supra note 22, para 56.

²⁵ *Ibid.*, para. 56.

the company's reputation.²⁶ State and corporate culpability is especially evident where oil and gas pipelines are constructed, due to the countless indigenous communities that are consequently economically displaced. Of course, TNCs are not always solely to blame. Often, local governments themselves pose a barrier to human rights and environmental self-regulation and compliance.

19. Further, to illustrate the importance of non-judicial measures, we should consider the Camisea natural gas pipeline in Peru. Camisea is a transnational public-private partnership involving a multinational mix of public and private actors – domestic, foreign and international. The Camisea natural gas pipeline is over 25 years old. Shell and Mobil were originally involved in the project. Despite major discoveries, however, disagreements between Shell and the Government resulted in the company's withdrawal. Yet during the period of Shell's involvement in the project, human rights and environmental concerns influenced company policy.
20. This was mainly as a result of the campaign against Brent Spar in Nigeria that made the company recognize that "We know the eyes of the world are on us" in adopting extensive human rights and environmental-related directives. Shell's policies ranged from measures to prevent contact with indigenous communities to the vaccination of workers and local communities, to biodiversity initiatives. The project involves extraction in the Nahua-Kugapakori Reserve, which is home to a number of indigenous communities in the region.²⁷
21. We recommend that oil and gas corporations in the region, which operate controversial pipelines such as the Yadana pipeline²⁸ in Myanmar, should, with the assistance of expert consultants and in consultation with international NGOs and affected communities, study and adopt the best practices of the Camisea pipeline.
22. As we shall see below, it is critically important for TNCs in the oil and gas sector to consult with affected communities and rely upon a cross-disciplinary team when seeking to prevent, mitigate, address and adequately remedy human rights abuses.

²⁶ See Ian A. Bowles & Glenn T. Prickett, eds., *Footprints in the Jungle: Natural Resource Industries, Infrastructure, and Biodiversity Conservation*, (Oxford University Press, 2001)

²⁷ See Chatterjee, P. (1997). "Peru goes beneath the Shell", *Multinational Monitor*, 18(5), p. 14.

²⁸ The Yadana Gas Project in military-ruled Burma is one of the world's most controversial natural gas development projects. Transporting gas through a pipeline from Burma's Andaman Sea to Thailand, the project is operated by Total (France), Chevron (US), PTTEP (Thailand), and the Myanmar Oil and Gas Enterprise (MOGE). Since the project's beginnings in the early 1990s, it has been marred by serious and widespread human rights abuses committed by pipeline security forces on behalf of the companies, including forced labor, land confiscation, forced relocation, rape, torture, murder. Many of these abuses continue today.

Section 3.8: Impacts on the rights of vulnerable groups

23. Notwithstanding the State's power of eminent domain, emerging standards under international law have subjected State conduct pursuant to this and related powers to scrutiny. This is particularly apparent in respect of State obligations towards indigenous peoples and other vulnerable groups, whose socio-cultural and economic survival often depends on continued access to their ancestral lands. International jurisprudence, in this regard, emphasizes several key principles.
24. Both the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights have ruled that mere *possession* of ancestral land by indigenous peoples should be sufficient to obtain State recognition of their ownership in the absence of formal title.²⁹ Recognition has further been extended to communities who no longer inhabit their ancestral land, if the loss of that possession was due to displacement under duress.³⁰ While numerous States have not amended their domestic laws in compliance with these international legal obligations, the Sectoral Guide should encourage companies to be mindful of formal ownership accorded to indigenous peoples, and engage with these communities accordingly, even in the absence of formal title.
25. After all, international courts have held that:
- Limitations, if any, on the right of indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.³¹
26. The higher threshold of protection afforded to indigenous peoples is rooted in the recognition of the close ties of indigenous people with their ancestral land

²⁹ *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Inter-American Court of Human Rights, Judgment of August 31, 2001, Series C No. 79, paras. 140(b) and 151. Cited hereafter as '*Awav Tingni case*'. See also *Endorois case*, *supra* note 16. International law's wider recognition of indigenous claim to ownership despite the absence of official title deeds is further substantiated in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention 169. In both cases, indigenous peoples' rights to lands, territories and resources apply to those that they have 'traditionally owned, *occupied or otherwise used*'. See, for example, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007, Arts. 25-28, and ILO Convention 169 (1989), Arts. 7, 13(1), 13(2), 17(2).

³⁰ For instance, in the case of the *Moiwana Community v. Suriname*, the Court considered that the members of the N'djuka people were the "legitimate owners of their traditional lands" although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them. In this case, the traditional lands have not been occupied by third parties. *Moiwana Community v. Suriname*, Inter-American Court of Human Rights, Judgment of June 15, para. 134. This was further restated in the *Case of the Indigenous Community Sawhoyamaya v. Paraguay*, Judgment of March 29, 2006, Series C, No. 146, paras. 124-131.

³¹ *Endorois case*, *supra* note 16, para. 212.

“as the fundamental basis of their spiritual life”, with “relations to the land not merely a matter of possession and production but a material and spiritual element which they must fully enjoy”.³²

27. The ILO Convention 169’s Implementation Guide, for example, states that land, as outlined in the Convention, must include “the whole territory (used by indigenous peoples), including forests, rivers, mountains and coastal sea, the surface *as well as the sub-surface*”.³³
28. The Inter-American and African human rights human rights bodies have upheld similar interpretations by ruling that “the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if the said right were not connected to the natural resources that lie on and within the land”.³⁴
29. Accordingly, the Sector Guidance should highlight that – at a minimum – rights over natural resources extend to those traditionally used and necessary for the survival, development and continuation of their way of life.³⁵ While protection does not typically include *subsoil* resources unless such resources have been traditionally relied upon by the community concerned, State and corporate responsibilities do arise in relation to any form of oil and gas extraction that negatively impacts upon other resources that are necessary for the community’s survival.
30. Ethical, legal and social responsibility issues in petroleum development in Asia have involved the failure of trans-national corporations to use best environmental practices – and the failure of local governments to insist on such practices. They have also involved corporations shortchanging the local government and its local partner, if any, on taxes and profit-sharing (in the context of transfer-pricing), and the neglect or destruction of the welfare of indigenous communities.
31. As a corollary, the authors of the Sector Guidance should ask what remedies exist for such breaches.

Effective and Adequate Remedies

32. Under international law, restitution – when and where possible – is regarded as the primary obligation in relation to reparations. In the case of indigenous peoples, any temporary relocation that is lawful and deemed necessary for the purposes of oil or mineral extraction must subsequently provide for the right of return as soon as the operational context permits or ceases to exist.³⁶ This

³² *Awat Tingni* case, *supra* note 29, para. 149

³³ ILO Convention No. 169 (Indigenous and Tribal Peoples Convention, 1989). Indigenous and Tribal Peoples’ Rights in Practice: A Guide to ILO Convention 169, 2009, p. 91. Emphasis added.

³⁴ *Saramaka People v Suriname*, *supra* note 12, para. 122. Emphasis added.

³⁵ *Endorois* case, *supra* note 16, para. 261.

³⁶ Art. 16(3), ILO Convention 169. See also General Recommendation XXIII (51) concerning Indigenous Peoples, which emphasizes that “where (indigenous peoples) have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and

underscores the importance of due diligence in mitigating or reducing all possible environmental harm during the course of operations.³⁷ Only in the event that return is ‘for factual reasons not possible’ may the right to restitution be substituted by the right to just, fair and prompt compensation.³⁸

33. Such restitution is required to take the form of lands and territories of equal quality and legal status to the lands that they previously inhabited.³⁹
34. Beyond restitution or relocation, international law equally entitles indigenous peoples to monetary compensation for loss or injury resulting from the relocation, including loss of livestock.⁴⁰ While recognizing the value of cash payments, we urge the authors of the Sector Guide to be mindful of the inherent limitations of compensatory strategies that rely exclusively on pay-outs.
35. In order to maximize the effectiveness of remedies, holistic and contextual approaches must be explored, critically examined and properly adopted. As such, it is imperative that the right to obtain ‘just compensation’ includes the right for members of the community in question to “reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival”.⁴¹
36. In this regard, international law calls for the treatment of affected communities as active stakeholders, rather than passive beneficiaries – a paradigm shift that serves as a valuable foundation for the empowerment and sustainability of any vulnerable community adversely affected by displacement.⁴²
37. In the context of economic displacement, experts have pointed to the following potential impacts in, *inter alia*, the oil and gas sector– each of which calls for comprehensive and contextual strategies. In order to be properly understood and deployed these strategies must take into account the varying experiences of different indigenous peoples, women, and other vulnerable groups; they should not be collectivized:

informed consent, to take steps to return these lands and territories”. Adopted at the Committee’s 1235th meeting, on 18 August 1997. UN Doc. CERD/C/51/ Misc.13/Rev.4., para 5.

³⁷ Ruggie Guidelines, *supra* note 20, Guiding Principles 11 and 14.

³⁸ General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee’s 1235th meeting, on 18 August 1997. UN Doc. CERD/C/51/ Misc.13/Rev.4., para 5.

³⁹ General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee’s 1235th meeting, on 18 August 1997. UN Doc. CERD/C/51/ Misc.13/Rev.4., para 5. See also ILO Convention 169, Art. 16(4) and UNDRIP Art. XX. This is consistent with IHRB Guideline XX, which calls upon companies to ensure that alternative accommodation is offered of superior quality and meets international standards.

⁴⁰ Art. 16(5), ILO Convention 169. See also ILO Guide p. 98.

⁴¹ *Endorois* case, *supra* note 16, para. 295. This ruling is consistent with the underlying principles of the UN Declaration on the Rights of Indigenous Peoples.

⁴² *Ibid.*, para. 204.

- a. *Landlessness*: Land that is lost has to be reconstructed or replaced with income-generating employment to avoid impoverishment and loss of capital.
 - b. *Unemployment*: Former employment is often lost, thus creating the need for new and sustainable job opportunities. Relocation may result in loss of economic power, which may in turn lead to redundancy of skills, loss of markets, and breakdown of economic networks.
 - c. *Homelessness*: Loss or decline in the quality of shelter is exacerbated if compensation is paid at market value rather than replacement value.
 - d. *Marginalisation*: Relocation may result in loss of social and political status if the host community regards new arrivals as strangers or inferior.
 - e. *Food insecurity*: The loss of productive land may lead to a decline in available nourishment, nutritional problems, and increased mortality.
 - f. *Loss of access to common resources*: People may lose access to grazing land, fisheries, and forests, which may contribute to loss of income, employment, and recreation opportunities.
 - g. *Loss of access to public services*: Access to health care, education, public transport, and other public services may be lost.
 - h. *Social breakdown*: There can be an erosion of social organisation, interpersonal ties, informal ties, and other forms of social capital.
 - i. *Risks to host populations*: If the resettlement site is already populated, these people may also suffer through increased pressure on social and environmental resources.
 - j. *Diversity*: Communities affected by displacement are often diverse. Companies should not assume that a community being relocated wishes to live together.⁴³
38. 'One-size fits all' solutions are illusory as power balances of present-day partnership agreements between trans-national corporations and host governments in the oil and gas sector vary according to the natural resource wealth and indigenous expertise of the host state. These factors will determine the choice of contract and also the specific terms governing relationships. Each of these factors relates to: (1) an appropriate allocation of responsibilities and benefits within the partnership agreement (including whether they bind third-party or independent sub-contractors); (2) the correlation between the nature of contractually determined responsibilities and the promotion of

⁴³ Kelly Scott, *Critical Issues Concerning Land and Human Rights*, Institute for Human Rights and Business, 2001, pp. 11-12.

development; and (3) the tax and regulatory regime which governs concession agreements.

39. Nevertheless, international courts have ruled that these complexities do not absolve the parties involved from fulfilling their obligations or reaching satisfactory compensation settlements., Both the African Commission and the Inter-American Court have ruled that:

(T)he State may not abstain from complying with its international obligations (...) merely because of the alleged difficulty to do so. The Court shares the State's concern over the complexity of the issues involved; nevertheless, the State still has a duty to recognize the right (...), and establish the mechanisms necessary to give domestic legal effect to such right recognized in the Convention (...).⁴⁴

40. Although the obligations arising from international human rights treaties primarily fall on the States party to those conventions, the Sector Guidance should encourage the oil and gas industry to act in accordance with these principles at various stages so as to move away from the unequal traditional concession agreements and towards more modern transnational public-private partnership-based contractual arrangements.
41. Otherwise, if left unresolved, many of the aforementioned ramifications can perpetuate vicious cycles of poverty and unrest in affected communities. Such unrest, in turn, can compromise the short, medium or long-term continuation of commercial operations. Suitable remedies will be as diverse as the circumstances that call for the displacement of communities, as well as the differing socio-economic and political contexts in which operations take place.
42. Key to the identification of suitable remedies is the commitment of oil and gas companies to engage in effective and meaningful consultations with affected communities.

4. CONTEXTUAL FACTORS

Section 4.1: Host state governance in SEA

(a) Overview

43. The strong momentum of the business and human rights movement is timely for ASEAN, a region of promising emerging markets and booming economic growth. Economic development has always been at the forefront of the

⁴⁴ *Saramaka People v Suriname*, *supra* note 12, para. 102. See also, the *Endorois* case, *supra* note 16, para. 196. In both cases, the Inter-American Court and African Commission were referring specifically to the duty to recognize the right to property of indigenous peoples, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to the right in question. By analogy, the duty to overcome real or perceived obstacles equally extends to the issue of compensation for the violation of such property rights.

agendas of all ASEAN States, and is one of the primary themes of ASEAN's multilateral endeavours.

44. Now, human rights are also being embedded in ASEAN mechanisms. Human rights have traditionally been low on the region's agenda. ASEAN as a multilateral institution has been criticized for failing to adequately promote and protect human rights, due to its long-standing policy of non-interference in member States' internal affairs.
45. Nevertheless, noting the development of a network of ASEAN treaties governing trade and investment, former ASEAN Secretary-General Rodolfo Severino predicted that "this developing rules-based economic regime will gradually extend to other areas of ASEAN cooperation, [as] ASEAN is more than an economic association."⁴⁵ This prediction has come to pass.
46. With the adoption of the ASEAN Charter in November 2007, ASEAN moved toward becoming a single polity. In 2009, ASEAN member States designed a 'Roadmap', which envisions the creation of a "rules-based Community of shared values and norms" built on three pillars, namely, the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community, each with its own blueprint and infrastructure for implementation and integration.
47. Significantly, human rights compliance has become an established part of ASEAN's discourse and stated goals. The ASEAN Intergovernmental Commission on Human Rights (AICHR) is an important mechanism established to develop "common approaches and positions on human rights matters of interest to ASEAN."⁴⁶ The business sector is an obvious focal point for regional human rights efforts.
48. Business-related human rights abuses connected to the extractive industry are rife in the region, including breaches of labour standards. Recent headlines include Freeport-McMoRan coming under fire for funding government security forces, which clamped down violently on workers on strike at its Glasberg mine in West Papua.
49. The significance of business and human rights in ASEAN has been clearly recognized. Of the eleven thematic studies AICHR is mandated to prepare, the first is a baseline thematic study on CSR and Human Rights in ASEAN.⁴⁷ AICHR's Singapore representative, Mr. Richard Magnus, has lauded the UN Framework and the Guiding Principles as useful references for this study. At AICHR's 7th Official Meeting of AICHR in November 2011, the UN High Commissioner for Human Rights called for the ASEAN Human Rights Declaration to not only maintain, but also enrich international human rights

⁴⁵ Rodolfo C. Severino, "ASEAN Way and the Rule of Law," address at the International Law Conference on ASEAN Legal Systems and Regional Integration sponsored by the Asia-Europe Institute and the Faculty of Law, University of Malaya, Kuala Lumpur, 3 September 2001.

⁴⁶ AICHR Terms of Reference at para. 4.11.

⁴⁷ Press Release of the Fifth Meeting of the ASEAN Intergovernmental Commission on Human Rights, Jakarta, 25-29 April 2011, available at <http://www.asean.org/26208.htm>.

standards by focusing on new areas such as the responsibilities of business in relation to human rights.

50. The regulation of businesses will likely be impacted as ASEAN States' engagement with business and human rights deepens. The UN Framework and the Guiding Principles make clear that States have a duty under international law to take steps to prevent and redress business-related human rights abuses, including by formulating, and revising, its laws, regulations and policies governing businesses to ensure they are adequate for this purpose. Engagement with business and human rights by ASEAN States has already begun. For instance, in March 2012, the government of Lao PDR, supported by the UNDP and the EU, organized a forum on human rights and the role of corporate social responsibility.⁴⁸ In Cambodia, the Guiding Principles have been translated into Khmer, and government representatives have recently participated in roundtable dialogue with civil society on the Framework and the Guiding Principles.⁴⁹

(b) A Case-Study - Cambodia, Laos, Myanmar & Vietnam (ASEAN's C,L,M & V countries)

51. Prudent use of resources can help these States overcome poverty, but, as we shall see, there are many instances where the combination of conflict, corruption, and corporate complicity has contributed to flagrant human rights abuses.

52. We are particularly keen to study how the oil and gas sector in Cambodia, Laos, Vietnam and Myanmar – commonly referred to as the 'CLMV' States within the ASEAN context – can contribute to the Sector Guidance. These are States known for weak governance, and where the challenge of operationalizing the Guiding Principles is greatest and at the same time the most needed.

53. All four countries, save for Lao PDR have oil and natural gas industries and/or live exploration projects which deserve examination, also known for business-related human rights abuses. In particular, there are fears that countries with rapidly developing extractive industries, such as Cambodia, will fall prey to the "resource curse", i.e. the paradox that countries with an abundance of natural resources tend to have less economic growth than countries without these natural resources.⁵⁰

⁴⁸ See Summary Report on International Law Forum on Corporate Social Responsibility, 12 March 2012, Lao Plaza Hotel, Vientiane, Lao PDR. See also, http://www.undplao.org/newsroom/CSR%20Forum_12March2012.php.

⁴⁹ See <http://cambodia.ohchr.org/EN/PagesFiles/TrainingIndex.htm> and http://cambodia.ohchr.org/WebDOCs/DocPublications/Business-and-HR-Guidelines/Business%20and%20Human%20Rights_Khmer.pdf

⁵⁰ E.g. *The Guardian*, "Cambodia's Oil Must Not Be the Slippery Slope to Corruption and Catastrophe", 21 June 2011; "Revenues from oil, gas and mining must benefit all Cambodians, new coalition urges", Cambodians for Resource Revenue Transparency press release, 12 June 2009; *The Economist*, "Cambodia's Oil Resources: Blessing or Curse?", 26 February 2009.

54. Yet there is a dearth of even baseline academic research on the business and human rights situation in these countries. To fill this *lacuna*, SMU-APRL, with the generous support of the SMU Sim Kee Boon Institute of Financial Economics, are currently conducting such a study which we hope will be of use to the EC Advisory Committee and the Sector Advisory Group that has been convened.
55. One of the broad goals of SMU-APRL's study is to contribute to filling the gap, and make recommendations on how the Framework and the Guiding Principles may be operationalized there. The study will: (a) investigate the business and human rights situation in relation to extractive industries and land rights in the CLMV countries; (b) analyse the applicable legal and regulatory frameworks and how States have been addressing relevant business-related human rights abuses; (c) examine what businesses operating in the CLMV countries have done to meet their responsibility to respect human rights, including identifying positive business practices; and (d) give conclusions from the preceding analysis, and make recommendations to different stakeholders, e.g. the EC, States, the UN OHCHR, ASEAN, and businesses.
56. Perennial problems of corruption and poor governance in these countries make the 'resource curse' foreseeable. There are also concerns that the rapid awarding of, among other things, oil and gas exploration concessions, is undermining food security and income opportunities for rural people in C,L,M, & V countries, by for instance, putting pressure on competing demands for land and affecting rural livelihoods.⁵¹

(c) Preventing and Combating Corruption

57. One possible way to achieve greater progress is for States with low levels of corruption and strong enforcement capacity, such as Singapore, to take the lead. In this regard, we may consider recommending to such States the approach of the 2010 United Kingdom Bribery Act ('UK Bribery Act').
58. The UK Bribery Act not only makes bribery committed extraterritorially an offence,⁵² it also contains a unique provision requiring companies to *prevent* bribery committed by persons performing services for or on behalf of the company.⁵³
59. At the same time, it affords companies a defence if they have in place adequate procedures designed to prevent such persons from bribing in the course of performing services for or on behalf of the company. A creative

⁵¹ International Rivers, "Power Surge: The Impacts of Rapid Dam Development in Laos," September 2008, at 3; "Contribution By The United Nations Country Team In Lao People's Democratic Republic For The Universal Eight Session, 2010" [UNCT Lao PDR Report] at para. 54.

⁵² The offences created by the Act apply to bodies incorporated in the UK in respect of acts committed anywhere in the world; the offence of failing to prevent bribery applies to the same, as well as bodies wherever incorporated carrying on business in the UK. See UK Bribery Act, ss. 7 and 12.

⁵³ 2010 UK Bribery Act, ss. 7 and 8.

“with, not against” approach has been adopted in respect of enforcement.⁵⁴ In determining whether to prosecute, public interest factors will be considered. Factors against prosecution include proactive corporate compliance measures, self-reporting (whistle-blowing) and remedial actions.⁵⁵

60. Companies are therefore, in a rather novel manner, given a role in anti-bribery regulation and enforcement. To comply, companies are encouraged to include anti-bribery provisions in, for example, their supply chain contracts or joint venture agreements.⁵⁶ They are also discouraged from doing business with companies that pose corruption risks that one should reasonably know of.⁵⁷ Further, the approach to prosecutions encourages companies to report possible violations by their business associates and partners even if they are not directly involved.
61. This approach gives effect to Guiding Principle 13(b), which states that “[t]he responsibility to respect human rights requires that business enterprises...[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” Further, the extraterritorial reach of the offence of failing to prevent bribery spurs this company-driven regulation and enforcement to cross borders and have a region-wide impact.⁵⁸
62. A company-driven approach to addressing regional corruption, as opposed to one dominantly driven by member States, is apposite in the ASEAN context, where the principle of non-interference means that member States are reluctant to directly address systemic rule of law weaknesses in another member State. Notably, Singapore, for instance, is moving towards an approach similar to that in the UK by urging companies to cooperate with enforcement and prosecutorial agencies to avoid or defer corporate crime prosecutions.⁵⁹

⁵⁴ See Charlie Monteith, “The Bribery Act 2010: Part 3: Enforcement”, (2011) 2 Crim. L.R. 111, (Sweet & Maxwell) at 114 (“To work with business, in other words, not against it, has meant the SFO placing a huge emphasis on raising awareness, education, persuasion, and ultimately prevention.”) Charlie Monteith was a member of the Law Commission’s Bill Advisory group and the UK Serious Fraud Office who was a key architect of the UK Bribery Act.

⁵⁵ See Charlie Monteith, *supra* note 54.

⁵⁶ UK Ministry of Justice, “The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing,” at 16 to 17.

⁵⁷ The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, OHCHR, 2011, at 7.8 (“...not knowing about human rights abuses linked to the enterprise’s operations, products or services is unlikely by itself to satisfy key stakeholders, and may be challenged in a legal context, if the enterprise should reasonably have known of, and acted on, the risk through due diligence.”)

⁵⁸ The offences created by the Act apply to bodies incorporated in the UK in respect of acts committed anywhere in the world; the offence of failing to prevent bribery applies to the same, as well as bodies wherever incorporated carrying on business in the UK. See UK Bribery Act, ss. 7 and 12.

⁵⁹ *Business Times*, “Prosecutors may do deals to seal justice,” 4 October 2011.

(d) Revenue Transparency & EITI – Timor-Leste’s Sovereign Wealth Fund as an Exemplar

63. In the face of these challenges, Timor-Leste’s sovereign wealth fund, the Petroleum Fund, has proved to be an exemplar. Its reporting requirements and integration with the State budget help ensure transparency and suggest that the government is committed to using the petroleum revenues to benefit the country’s population.
64. The Fund was established by the Petroleum Fund Law Number 9/2005 promulgated in August 2005. The law empowers the Central Bank of Timor-Leste to undertake the operational management of the Fund under an agreement with the Minister of Finance who is responsible for the overall management and investment strategy of the Petroleum Fund.⁶⁰ The Petroleum Fund has now reached more than US\$5 billion. To ensure transparency, the Central Bank submits Quarterly Reports on the performance of the Petroleum Fund to the Minister of Finance, with the reports being published within 40 days of the end of each quarter.
65. The Petroleum Fund’s Annual Report, which contains a more complete description of the Fund’s activities and its audited financial statements, is published by the Ministry Finance.⁶¹ The Fund’s reporting requirements and integration with the State budget help ensure transparency and demonstrate the Government’s commitment to using the petroleum revenues to benefit the country’s population.
66. The Fund’s framework is considered a best-practice for petroleum production, taxation and revenue management, and was given the third highest overall score in a ranking of sovereign wealth funds by the Peterson Institute for International Economics.⁶²
67. The Extractive Industry Transparency Initiative (‘EITI’) is a mechanism for improving transparency and accountability by requiring companies to publish what they pay, and governments to disclose what they receive, when they strike deals with each other relating to the extractives sector. Beyond

⁶⁰ In 2005, a Management Agreement was signed between the BPA (predecessor of Central Bank of Timor-Leste) and the Ministry Finance. It was, amended in June 2009 and its annex 1 subsequently amended in October 2010. In June 2009, the first diversification of the Fund took place by appointing the Bank for International Settlements (BIS) as the Fund’s first external manager managing 20% of the Fund. The BIS mandate is a global portfolio invested in sovereign and supranational bonds in leading foreign currencies. A further diversification, into global equities, took place in October 2010 through the selection of Schroder Investment Management Limited as the Funds’ first equity manager. This mandate is 4% of the Fund and is invested in global stocks traded in the world’s largest 23 markets.

⁶¹ Central Bank of Timor-Leste <http://www.bancocentral.tl/PF/main.asp>

⁶² Despite these successes, the Petroleum Fund’s spending limits have come under strain recently. A new amendment Petroleum Fund Law, passed by parliament in late August and recently approved by the president, allows for up to 50 percent of the Petroleum Fund, currently exceeding US\$8.7 billion, to be invested in equities, including up to 5 percent in other forms of investments. This is a stark change from the previous position where all but 10 percent of the fund had to be kept in US-dollar-denominated government-issued bonds, which traditionally have been a safe but low-return investment.

disclosure of payments, the effectiveness of such transparency initiatives may be strengthened by requiring informed consultations with affected communities before contracts are signed.⁶³

68. The success of Timor-Leste with extractive industry transparency also provides useful lessons. Timor-Leste has developed an advanced system for monitoring and receiving petroleum revenues, designed to insulate it from the resource curse. All such revenues (except for comparatively minor management and marketing fees) are transferred directly to a Petroleum Fund ('Fund'), which underwrites the lion's share of the country's expenditure. To ensure transparency, the Central Bank of Timor-Leste, which has operational management of the Fund, submits quarterly reports on the performance of the Fund to the Minister of Finance. The Fund's Annual Report contains a more complete description of the Fund's activities and its audited financial statements.⁶⁴
69. The Fund's reporting requirements and integration with the State budget help ensure transparency. The Fund's framework is considered a best practice for petroleum production, taxation and revenue management, and was given the third highest overall score in a ranking of sovereign wealth funds by the Peterson Institute for International Economics. Timor-Leste is also on EITI's list of compliant countries.
70. We recommend that participation in the Extractive Industries Transparency Initiative ('EITI') and other publish-what-you-pay initiatives should be strongly encouraged. The Expert Advisory Committee should consider facilitating a natural resource certification process in ASEAN. Also, the Expert Advisory Committee should study the work of the African Commission's Working Group on Extractive Industries for additional best practices to build on.⁶⁵

(e) Conflict

71. Recent news of payments by Freeport to Indonesian police officers guarding its West Papua mine, which could "[taint] police neutrality" in the ongoing and violent strike by Freeport workers, demonstrates how preventing and combating corruption in this region is an important issue for any business and human rights agenda.⁶⁶

⁶³ *BBC Asia Edition*, "NGO wants involvement of public in mining deals", 28 November 2011, available at <http://www.thecitizen.co.tz/news/4-national-news/17488-ngo-wants-involvement-of-public-in-mining-deals.html>.

⁶⁴ See <http://www.bancocentral.tl/PF/main.asp>.

⁶⁵ The African Commission's Working Group on Extractive Industries was established to examine, and act upon, human rights violations by extractive industries and governments. See "Resolution On The Establishment Of A Working Group On Extractive Industries, Environment And Human Rights Violations In Africa," CHPR/Res148(XLVI)09, available at http://www.achpr.org/english/resolutions/resolution148_en.htm.

⁶⁶ *The Atlantic*, "Is a US Mining Company Funding a Violent Crackdown in Indonesia?", 29 November 2011, available at <http://www.theatlantic.com/international/archive/2011/11/is-a-us-mining-company-funding-a-violent-crackdown-in-indonesia/249164/>.

5. KEY PROCESS CHALLENGES

5.1: Embedding respect for human rights in a company

72. We fully support the notion outlined in this section that “a business’s policy commitments to respect human rights should be embedded from the top of the enterprise through all of its functions, which otherwise may act without regard for human rights”. This dovetails with section 5.3, which calls for integrated cross-functional decision-making to address human rights.
73. With respect to questions raised as to the rationale of reporting on both social and human rights impact assessments – a concern further recalled in section 5.2 – priorities should be accorded to compliance with the highest applicable standards under international human rights law.
74. States should implement their international human rights obligations in relation to businesses. This obligation has been pronounced upon by monitoring bodies of international human rights treaties. For instance, the Committee on the Elimination of Racial Discrimination has stated, in the context of resources exploitation on indigenous peoples’ traditional lands, that independent monitoring mechanisms should be set up to conduct environmental impact surveys before any operating licenses are issued, and to conduct health and safety checks on small-scale and industrial gold-mining and oil and natural gas exploration. The Committee has also recommended that States include in their agreements with large business ventures provisions for these ventures to contribute to the promotion of human rights in areas such as education.⁶⁷
75. The adoption of such measures by States in accordance with their international obligations will undoubtedly impact businesses. Environmental impact and sustainability assessments by States and corporations are thus crucial in this regard, as is the overall duty to avoid causing irreparable harm to the environment or vulnerable communities, as prescribed by the UN Guiding Principles and international instruments.⁶⁸
76. It is also widely recognized that the displacement of communities – a factor often connected with the extraction of oil and gas – potentially threatens the entire spectrum of internationally-recognized human rights – *including* a multitude of elements that may be construed as social rights.⁶⁹ Accordingly, rather than debating whether one form of assessment should be prioritized

⁶⁷ Concluding Observations of the Committee on the Elimination of Racial Discrimination, Suriname.

⁶⁸ Ruggie Guidelines, *supra* note 20, Guiding Principles 11 and 14.

⁶⁹ The Guiding Principles’ Interpretive Guide indeed highlights that addressing business and human rights issues requires expertise across “virtually the entire spectrum” of internationally-recognized human rights such as the rule of law, the right to development, and the rights of vulnerable groups. This has been exemplified by the Committee on the Rights of the Child, who for the first time in June 2011, called on a State party to comply with international and domestic standards on corporate social and environmental responsibility, particularly the UN Framework. (See Committee on the Rights of the Child, 57th Session, 30 May to 17 June 2011, “Concluding Observations: Cambodia,” CRC/C/KHM/CO/2, at paras. 26 and 27.)

over the other, we submit that the consideration of social impacts should instead form part of wider human rights assessments and support the inclusion of common standards in applicable impact assessments in SEA countries.

Accountability

77. Human right and environmental issues in the extractive industries are often viewed through the lens of litigation under the Alien Torts Claim Act ('ATCA'). Such cases have been limited recently in certain respects. Similar cases have, however, emerged internationally in the courts of Australia, Canada, Japan, India, and the United Kingdom.
78. The European Union is also encouraging similar routes into the courts of its Member States.⁷⁰ The broader movement of which this litigation is a part is referred to as either "transnational public interest litigation"⁷¹ or "plaintiff's diplomacy"⁷².
79. Essentially, it involves the use of the courts to advance human rights and environmental policies internationally. Well-publicized cases that have been written about extensively have been brought against Unocal and Total and also against Chevron and Shell for their alleged roles in perpetrating human rights abuses in Burma and Nigeria respectively. The U.S. Supreme Court's current examination of the *Kiobel v Royal Dutch Petroleum Co.* case is instructive in this regard.⁷³ The forthcoming determination of ATCA's future applicability to corporations as defendants is highly significant in light of the importance of redress, both for its significance to victims as well as the crucial preventive role effective and dissuasive remediation processes can have. The fact that the ATCA is currently one of the few legal mechanisms available to those seeking to bring claims against corporations for human rights abuses showcases the *Kiobel* case as a stark reminder of the continued struggle around the world for justice by victims of corporate human rights violations and the need for more effective remedies at every level.⁷⁴
80. Despite jurisprudential setbacks, there have been ACTA cases relating to Myanmar and Aceh, which the EC's Advisory Committee and its Sector Guidance should study and learn from. In 1996, a lawsuit was filed against the US Company Unocal and the French company Total SA under the US Alien Tort Claims Act, alleging human rights abuses in the construction of the Yadana gas pipeline, in which Unocal Corporation and Total were joint venture partners.
81. Villagers from the Tenasserim region in Mynamar alleged that Unocal and Total 'subjected the villagers to forced labour, murder, rape, and torture' when

⁷⁰ Engle E.A. (2005). "Alien torts in Europe? Human rights and tort in European law", *Zentrum für Europäische Rechtspolitik an der Universität Bremen ZERP-Diskussionspapier*.

⁷¹ Joseph, S. (2004). *Corporations and Transnational Human Rights Litigation*. Oxford: Hart Oxford.

⁷² Slaughter, A-M and Bosco, D. (2002). "Plaintiff's diplomacy", *Foreign Affairs*, p. 102.

⁷³ *Kiobel v Royal Dutch Petroleum Co.*, U.S. Supreme Court (10-1491), pending.

⁷⁴ See <http://www.ihrb.org/commentary/staff/kiobel-case-reminder-of-remedy-gaps-still-to-be-bridged.html>.

constructing a gas pipeline through the region.⁷⁵ The suit did not allege direct human rights violations by the companies but rather knowing complicity in violations committed by the Myanmar military.

82. Total has been given a licence to produce, transport and sell natural gas from deposits in the Yadana off-shore field. Unocal (taken over by Chevron in 2005) acquired a 28 percent minority share in the project, in which Total, the French petroleum company, the Petroleum Company of Thailand, and Myanmar Oil and Gas Enterprise were other partners.⁷⁶ The Myanmar military provided security work on the project, including, it was alleged, forcing villagers to work on the project. The villagers alleged in their lawsuit that ‘while conscripted to work on pipeline-related construction projects, (women) were raped at knife-point by Myanmar soldiers.’⁷⁷ The US federal court of appeals determined that there were material factual disputes to be heard and tried with regard to complicity (aiding and abetting) of Unocal in the use of forced labour, murder and rape.⁷⁸ Unocal, for its part, argued a lack of knowledge of and no complicity in abuses. The case was ultimately settled by Unocal out of court and the lawsuit was thus subsequently dismissed.⁷⁹

83. Exxon Mobil Corporation was also sued in 2001 by Indonesian villagers in a United States district court under the Alien Tort Claims Act and the Torture Victims Protection Act, and for common law torts of wrongful death, assault, battery, arbitrary arrest and detention, negligence and other torts. The complaint alleged human rights abuses committed by the Indonesian security forces in the province of Aceh and knowledge of this by Exxon Mobil. The complaints alleged that Exxon Mobil had hired security forces who were members of the Indonesian military to protect its natural gas extraction facilities and pipeline. Claimants alleged murder, rape and torture by security forces.⁸⁰ In 2008, after a series of interim appeals, the trial court judge found that the claimants had presented sufficient preliminary evidence of abuse and that the case should proceed to trial.

⁷⁵ *Doe v Unocal Corp, Total SA. (and others)* 395 F 3rd 932, United States Court of Appeals for the Ninth Circuit, 2002. The claimants were assisted in the suit by a number of NGOs, as is typical in this type of litigation. They included Earth Rights International (Washington), the Centre for Constitutional Rights (New York) and the International Labor Rights Forum (Washington).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ The case, which had been dismissed at the trial court level, was thus remanded for further proceedings (*Doe v Unocal Corp.* 395 F. 3rd 932, United States Court of Appeals for the Ninth Circuit, 2002). See Edwin V Woodsome and T Jason White, ‘Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a “Reason to Know” Standard for Aiding and Abetting Liability under the Alien Tort Claims Act’, *Loyola LA International and Comparative Law Review*, 26 (2003): p. 89.

⁷⁹ ‘Unocal Settles Out of Court With Myanmar Villagers’, *Environmental News Service*, 17 December 2004. <http://www.ens-newswire.com/>. See John Betton, ‘The Global Context of Human Rights Violations: The Impact of the Alien Tort Claims Act’, *Journal of Business Systems, Governance and Ethics* 3, no. 1 (2008). The 2002 Unocal decision had been vacated pending a rehearing by the full Ninth Circuit Court of Appeals, 395 F. 3d 978 (2003), and the case then was dismissed in 403 F. 3d 708 by the Ninth Circuit Court of Appeals (2005), after the settlement.

⁸⁰ *John Doe, Village A, Aceh, Indonesia, et al. v Exxon Mobil Corporation*, 393 F. Supp. 2d 20 (DDC 2005) (trial court decision).

84. The EC Advisory Committee should note that citizens and communities from other regions of the world, including Latin America, have instituted lawsuits alleging human rights violations and environmental damage from mining and petroleum projects.
85. These cases illustrate that corporate responsibility for trans-national companies to respect human rights extends beyond the domestic legal and regulatory sphere and can be adjudicated by international and foreign courts. Companies can no longer afford to be complacent in discharging their due diligence obligations in this regard .

Section 5.5: Measure effectiveness of company responses to human rights impacts

86. Notwithstanding the importance of these high-profile cases, it bears mentioning that human rights and environmental issues are more often addressed by extractive industry projects through non-litigation means, that is, through contracts, voluntary codes and best practices, loan agreements and State regulations.⁸¹

(a) Human Rights due diligence & audits

87. The discussion paper cites several challenges in effectively monitoring or ‘showing’ a corporation’s human rights impacts. While the concept of human rights audits is met with some degree of apprehension within the oil and gas sector, we would like to draw attention to an emergent international and regional due diligence best practice that may be of interest to the oil and gas industry – i.e. human rights gap assessments and audits.
88. In June 2011, the law firm Clifford Chance and the British Institute of International and Comparative Law were awarded a grant by the Association of International Petroleum Negotiators to conduct a joint research project on the implementation of the UN Guiding Principles on Business and Human Rights in the oil and gas sector. The project is also supported by the Bingham Centre for the Rule of Law. The agreed output of this project is an article to be submitted for publication in the Journal of World Energy Law and Business.
89. The paper is due to be submitted in April 2012. The project entails two phases of research. The first phase involves clarifying the scope of the Guiding Principles and their relevance to oil and gas companies. The second phase involves surveying and interviewing oil and gas companies about their existing approaches to managing their human rights impacts. Through these two phases of research, the paper will develop recommendations about further steps that oil and gas companies need to take in order to discharge

⁸¹ See Likosky, M.B. (2006). *Law, Infrastructure, and Human Rights*. New York: Cambridge University Press; and Likosky, M.B. (ed.) (2005). *Privatising Development: Transnational Law, Infrastructure and Human Rights*. Leiden: Martinus Nijhoff.

their responsibility to respect human rights consistently with the Guiding Principles.

90. Similarly, in SEA, Mazars and its academic consultants intend to work jointly on human rights auditing and consulting using a sophisticated audit system developed by Mazars for the private sector, which involves the GPs in assessing clients' compliance.⁸² Importantly, we will collaborate on one of the first human rights audits undertaken by a company in the region – the Asia Pulp & Paper Group (APP) – using Mazars proprietary audit methodology. APP has appointed Mazars Indonesia to independently assess existing policies, principles and performance across the company's regional corporate operations, eight Indonesian pulp and paper mills and supply chain.⁸³
91. Mazars has developed a proprietary tool incorporating eight core principles to assess human rights policies and performance, known as the Mazars Indicators for Human Rights and Social Compliance ('MIHRSC'). This assessment tool is also based on and refers to the most relevant national and international standards, including prevailing Indonesian labour-related law and regulations, Universal Declaration on Human Rights, Organization for Economic Cooperation and Development ('OECD') guidelines for multinational enterprises, and around 80 Human Rights and International Labour Organization ('ILO') conventions and declarations. The Mazars audit team will be led by James Kallman, President Mazars Indonesia, and advised by Marzuki Darusman, director of the HRRC and an internationally acclaimed human rights expert.
92. In consultation with the authors of this submission, the EC's Expert Advisory Committee should closely follow and study the background, process and outcomes of the APP human rights audit with a view to encouraging other responsible businesses to follow in APP's footsteps.

(b) Stock exchange regulation

93. Stock exchange regulators can play a significant role in encouraging listed oil & gas companies that are listed on national stock exchanges in SEA to implement the GPs through the listing, disclosure and reporting requirements they impose. The UN Interpretive Guide has emphasized that formal reporting helps embed within an enterprise an understanding of human rights issues and the importance that respecting human rights holds for the business itself; the additional transparency provided can help protect the enterprise's reputation and build trust in its stakeholder relationships.⁸⁴

⁸² See <http://www.mazars.co.id/Home/Our-services/Sustainability-Practice/Human-Rights-Audit>.

⁸³ Asia Pulp and Paper press release, "Asia Pulp and Paper Follows UN Lead, Commits to First-Ever Human Rights Audit," 13 September 2011, available at <http://www.businesswire.com/news/home/20110913007613/en/CORRECTING-REPLACING-Asia-Pulp-Paper-Lead-Commits>.

⁸⁴ United Nations Office of the High Commissioner on Human Rights, "The Corporate Responsibility to Protect Human Rights: An Interpretive Guide, 2012, at 10.4.

94. Bursa Malaysia requires listed issuers to include in their annual reports a description of the CSR practices and activities undertaken by them and their subsidiaries; this is mandatory.⁸⁵ Listed issuers' CSR reporting are assessed by, e.g. their risk management/analysis framework, disclosure of non-compliance with laws/legislation/codes/listing requirements, policy statements and stated commitments, specific reporting guideline(s) adopted, and third party audits/reviews undertaken.⁸⁶ To some extent, these requirements reflect the GPs' Operational Principles of the corporate responsibility to respect human rights, such as GPs 16 (policy commitment), 17 (human rights due diligence), 18 (assess human rights impacts by drawing on internal and/or external human rights expertise), and 21 (external communication and formal reporting).
95. The Singapore Exchange ('SGX') encourages, but does not require, its listed companies to report to stakeholders on their "corporate footprint in the environmental and social realms" through listing and annual reports and standalone sustainability reports.⁸⁷ SGX recommends that listed companies report their sustainability policy and goals, corporate stand on bribery and corruption, performance assessment against stated goals, labour practices and relations, diversity and inclusion programs and practices that assess and manage the impacts of operation on communities, and product responsibility policy and practices. Listed companies in high impact environmental and social risk industries are specifically encouraged to conduct sustainability reporting.⁸⁸
96. Significantly, the stock exchanges of seven ASEAN countries will soon be setting up electronic trading links that will interconnect the seven stock exchanges and facilitate cross-border order trading, in furtherance of the ASEAN Economic Community agenda.⁸⁹ Bursa Malaysia and SGX will be the first stock exchanges connected in June 2012.⁹⁰ The establishment of a direct trading link among the region's stock exchanges promises to facilitate the harmonization of listing, disclosure and reporting requirements, including those related to CSR.
97. In light of the above, we recommend that the EC's Expert Advisory Committee should support efforts by bourses and regulators in their region to implement non-financial reporting, disclosure and other requirements in accordance with the GPs. The Expert Advisory Committee should also encourage business enterprises to integrate human rights reporting into its annual financial reports. This would go a long way towards demonstrating

⁸⁵ Bursa Malaysia Main Market Listing Requirements, Chapter 9, section 9.25 read with Appendix 9C, Part A, sub-paragraph 29.

⁸⁶ 2008 National Annual Corporate Report Awards (NACRA) criteria for the CSR Report Award category, available at <http://www.world-exchanges.org/sustainability/m-6-4-4.php>. Bursa is one of the organisers of NACRA. The said criteria helps to elaborate on the non-prescriptive CSR reporting requirements in Bursa Malaysia's listing requirements.

⁸⁷ Singapore Exchange, "Guide to Sustainability Reporting for Listed Companies," at 3, 13 and 14.

⁸⁸ *Ibid* at 9.

⁸⁹ Reuters, "ASEAN stock exchanges eye cross-border trading in 2012," 3 December 2011.

⁹⁰ Today, "ASEAN Trading Link to connect SGX, Bursa in June next year," 18 November 2011.

that respecting human rights is truly integral to the ways in which businesses operate and is relevant to their bottom line.⁹¹

(c) Regulation by Banks & Financial Institutions

98. At the global level, the Energy Charter Treaty advances sustainable, sovereignty-respecting development. The most important public subsidies are offered by the World Bank Group through the International Finance Corporation (‘IFC’) and Multilateral Investment Guarantee Agency (‘MIGA’). The Oil, Gas, Mining and Chemicals Department of the IFC is particularly relevant. For example, the Baku Tbilisi Ceyhan oil pipeline relies on a diverse set of public agencies. The pipeline part of this project runs through several countries, including Azerbaijan, Georgia and Turkey. Among others, this pipeline is financed by seven export credit agencies, the European Bank for Reconstruction and Development, the IFC and fifteen commercial banks. Each bank, public and private, will have its own set of project documentation. This may mean multiple loan agreements, each with its own set of terms and conditions. At the same time, the actions of multiple public and private banks are often coordinated.
99. These public agencies may attach certain conditions to their subsidies. For example, both OPIC and the Export-Import Bank often attach environmental and human rights conditions to their loans. Complying with these conditions may mean establishing special entities or else hiring consultants to ensure that wishes are fulfilled. Such conditions will be discussed in detail below. Importantly, they must be understood in tandem with international efforts through the IFC and MIGA to adopt the UN Guiding Principles. They must also relate to initiatives for good governance and regulation by major private investment banks involved in these oil and gas projects, such as the Equator Principles – a set of human rights and environmental guidelines. The Equator Principles apply to project finance-initiated projects costing over ten million United States dollars.
100. Together, the banks that have signed on to the Principles represent a dominant majority of the market. In the “Preamble” to the Principles, the banks set out their main object and purpose which is consistent with the UN Guiding Principles.⁹²

⁹¹ United Nations Office of the High Commissioner on Human Rights, “The Corporate Responsibility to Protect Human Rights: An Interpretive Guide,” (2012), p. 51.

⁹² “The Equator Principles Financial Institutions (EPFIs) have consequently adopted these Principles in order to ensure that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental management practices. By doing so, negative impacts on project-affected ecosystems and communities should be avoided where possible, and if these impacts are unavoidable, they should be reduced, mitigated and/or compensated for appropriately. We believe that adoption of and adherence to these Principles offers significant benefits to ourselves, our borrowers and local stakeholders through our borrowers’ engagement with locally affected communities. We therefore recognise that our role as financiers affords us opportunities to promote responsible environmental stewardship and socially responsible development”

101. The Equator Principles are significant to the operationalization of the GPs. They require member financial institutions to, *inter alia*, conduct internal due diligence on the social and environmental risks of projects proposed for financing, and to oblige their borrowers to conduct social and environmental impacts and risks assessments, implement responsive management measures, conduct informed consultations with affected communities and establish grievance mechanisms.
102. These lending requirements reflect the GPs, in particular, the Operational Principles of the corporate responsibility to respect human rights, and GP 13 (“the responsibility to... avoid causing or contributing to adverse human rights impacts... and [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”). Notably, a review of the Equator Principles published this year has recommended that they be extended their reach beyond project financing to, e.g. corporate loans.⁹³
103. However, while many major worldwide banks with a strong presence in ASEAN are members of the Equator Principles, they may not always be given effect in practice.
104. It is difficult to generalize with confidence about the extent to which projects contractualize human rights and environmental concerns. However, assumedly private international investment banks that have signed on to the Equator Principles incorporate such commitments in their project documentation. Likewise, when international financial institutions such as the IFC, the Inter-American Development Bank and others are involved in financing projects, then similar human rights and environmental documentation will be present. Further, the involvement of export credit agencies may carry with it such commitments in the project documentation. In other words, if all of the major project financiers have made commitments to incorporate these issues in the projects they are funding, then the project documentation assumedly reflects these commitments. As with even the most commercial aspects of agreements, the fact that contracts are not public makes it difficult to authoritatively assert their contents. We recommend that the Sector Guidance call for the publication of sample contracts which other companies, and regions, can emulate.
105. There are a number of ways the GPs can help strengthen the Equator Principles, which would in turn strengthen the GPs’ application. For example, the GPs are driving burgeoning participation in human rights due diligence and auditing.
106. Member institutions’ compliance with the Equator Principles could be part of such human rights compliance assessments. Also, the GPs are spurring

⁹³ See: www.cliffordchance.com/publicationviews/publications/2011/06/broadening_the_equatorprinciples_beyondproject.html.

financial regulators to include human rights standards in their regulatory requirements, similar to the regulatory developments in respect of ASEAN stock exchanges. The Equator Principles would be a relevant guide/benchmark for these regulatory requirements. It is worth considering recommending that financial regulators do so.

Section 6: Nature of the Guidance

107. The UNOHCHR's Interpretive Guide on the Corporate Responsibility to Respect Human Rights recommends that businesses draw on credible internal and external expert resources that can support and assist them in meeting their corporate responsibility to respect human rights.
108. We support the broad areas of agreement outlined under section 6.1 of the discussion paper. The sole additional recommendation that we put forward is that the guidance framework be designed as a 'living instrument', with the incorporation of portals to allow for the dissemination of best practices, evolving case law and practical resources.

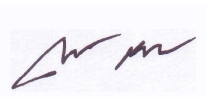
Conclusion

109. We hope the above has been of assistance, and invite the Expert Advisory Committee to contact us should we be able to contribute to its efforts in any way.

Yours faithfully,



Mahdev MOHAN
Director
SMU-APRL



James KALLMAN
President Director
Mazars



Cynthia MOREL
Special Advisor
SMU-APRL



Delphia LIM
Associate Fellow
SMU-APRL

The Authors

Chief contributors to this submission include SMU-APRL's Mahdev Mohan, Cynthia Morel and Delphia Lim.

Mahdev Mohan is SMU-APRL's Director. Mahdev has a background in commercial dispute resolution in Singapore and the UK and has served as a military prosecutor with Singapore's Ministry of Defence. A former Fulbright scholar, Mahdev's research and writing in the fields of international law and genocide studies have been awarded Stanford University's Carl Mason Franklin Jr. Prize for International Law and the Richard S. Goldsmith Research Grant for International Negotiation.

Cynthia Morel, is a Special Adviser to the SMU-APRL, as well as an advisory member to the International Committee of the Law Society of England and Wales. Cynthia has served as both legal officer and senior legal advisor to Minority Rights Group International, litigating landmark cases before the African Commission on Human and Peoples Rights (*Endorois Welfare Council v Kenya*) and the European Court of Human Rights' Grand Chamber (*Finci v Bosnia Herzegovina*). She has also litigated equality and statelessness cases for the Open Society Justice Initiative.

Delphia Lim is an Associate Fellow with SMU-APRL. Delphia has practiced commercial litigation in Singapore, and is assisting in civil party representation at the Extraordinary Chambers of the Courts of Cambodia's international criminal trials. She is also a researcher on women and child's rights and leads the business and human rights study with the Human Rights Resource Centre in ASEAN ('HRRC').

James Kallman is a Senior Partner of the global accounting and consulting firm, Mazars. A 30-year veteran of the emerging markets, James also is a leader in Mazars emerging markets practice globally. James began his career with Price Waterhouse (PW) in Miami focusing on business in the South American region. In 1985, he became the first PW employee in China. James then left the accounting and consulting profession to work as the Director of Standard Chartered International Trustees Limited in charge of investment banking activities and business development worldwide, with a primary focus on Asia and South America. He then established and led what is now Mazars Indonesia from the beginning of 2000. Today, James has successfully built the firm into the fifth largest accounting and audit firm in Indonesia, with a very strong international donor and development bank consulting practice.

The authors kindly thank SMU-APRL intern **Shalini Jayaraj** for her assistance in finalizing this document.