



# Second Annual Meeting of the International Corporate Accountability Roundtable

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Continuing our Coordinated Movement

Washington D.C.

September 6-7, 2012

## What is the International Corporate Accountability Roundtable?

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The International Corporate Accountability Roundtable (ICAR) is a coalition of leading human rights organizations including Amnesty International, EarthRights International, Global Witness, Human Rights First and Human Rights Watch.

ICAR harnesses the power of the human rights community to identify and promote robust frameworks for corporate accountability, strengthen current measures and defend existing laws, policies and legal precedents.

For more information about our work and our campaigns, visit [www.accountabilityroundtable.org](http://www.accountabilityroundtable.org), or email ICAR Coordinator Amol Mehra at [amol@accountabilityroundtable.org](mailto:amol@accountabilityroundtable.org).

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## Second Annual Meeting Agenda

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9/6/2012 Meeting	8:30 am – 5:30 pm	Gewirz Student Center 12th Floor
9/6/2012 Reception	6:00 pm – 7:30 pm	Sports and Fitness Lobby
9/7/2012 Meeting	9:00 am – 5:00 pm	McDonough Hall, Room 200

### *Thursday, September 6, 2012*

8:30 am – 10:00 am    **Breakfast**

Introductory Remarks by *Amol Mehra, Coordinator, ICAR* and *Rachel Taylor, Director, Human Rights Institute*

10:15 am – 12:00 pm    **Discussion 1: Corporate Accountability – Litigation Perspectives**

Overview of recent challenges for international corporate accountability litigation in U.S. Courts:

- The Alien Tort Statute and *Kiobel v. Royal Dutch Petroleum*
- Other threats to legal avenues for challenging corporate accountability.

Overview of challenges for international corporate accountability litigation in foreign courts.

Proposed models for overcoming challenges affecting litigation:

- U.S Courts
- Foreign Courts

12:00 pm – 1:00 pm    **Lunch**

Comments by *Eric Biel, Acting Associate Deputy Undersecretary for International Affairs, Department of Labor*

1:15 pm – 2:45 pm    **Discussion 2: Corporate Accountability – International Efforts**

Discussion of international efforts toward corporate accountability in:

- Legislation
- Regulation
- Voluntary mechanisms
- UN Mechanisms

Successes, roadblocks, current priorities and remaining gaps.

2:45 pm – 3:00 pm    **Coffee Break**

- 3:00 pm – 5:45 pm      **Discussion 3: Corporate Accountability – Domestic Efforts**
- Discussion of domestic efforts toward corporate accountability in:
- Legislation
  - Regulation
  - Voluntary mechanisms
- Successes, roadblocks, current priorities and remaining gaps.
- 5:45 pm – 6:00 pm      **Closing Remarks** by *William Treanor, Dean, Georgetown University Law Center*
- RECEPTION*              *Please join us in the Sports and Fitness lobby for a light reception.*

## *Friday, September 7, 2012*

- 9:00 am – 10:00 am      **Breakfast**
- 10:00 am – 12:00 pm      **Discussion 4: ICAR’s Human Rights Due Diligence Project**
- Discussion of project and preliminary findings with Human Rights Due Diligence Project experts, Professor Anita Ramasastry; Professor Olivier de Schutter, Mark Taylor and Bob Thompson.
- 12:00 pm – 1:00 pm      **Lunch**
- Comments by *Scott Busby, Senior Advisor in the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State.*
- 1:15 pm – 4:15 pm      **Roundtable Session: Continuing our Coordinated Movement, Discussion of Next Steps**
- Implementing findings from the Human Rights Due Diligence Project
- Opportunities for further collaboration:
- UN Working Group on Business and Human Rights
  - Further projects to improve State practice with respect to Business and Human Rights:
    - Procurement?
    - Access to remedy?
    - Other legislative options?
- 4:15 pm                      **Closing Remarks** by *Amol Mehra, Coordinator, ICAR*

# Discussion 1: Corporate Accountability – Litigation Perspectives

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## Scope of Discussion

The first panel, moderated by Marco Simons of EarthRights International and Gaby Quijano of Amnesty International, focused on barriers to access to remedy across different legal systems and opportunities for moving forward and address these barriers.

Important continuing barriers include jurisdictional issues, particularly *forum non conveniens* in common law countries and a lack of statutory clarity in civil law countries, as well as fee structures that make it increasingly difficult for plaintiffs' attorneys to take on human rights cases.

## United States

The conversation began with a discussion of the upcoming United States Supreme Court rehearing of *Kiobel v. Royal Dutch Petroleum*. The case, which was argued before the Court a second time on October 1, 2012, addresses a U.S. statute called the Alien Tort Claims Act (ATCA/ATS). The ATS gives U.S. federal courts jurisdiction to hear claims brought by non-U.S. nationals for torts committed "in violation of the law of nations." It has been a central tool in challenging corporate human rights abuses.

The Supreme Court originally heard arguments on the *Kiobel* case in February 2012. At that time, the central question was whether the statute could be applied to corporations as entities under international or domestic law. Rather than decide this issue, the Court instead scheduled a rehearing to determine whether

the statute could be applied to actions committed outside of the United States.

In the second round of briefing, the U.S. government submitted a brief in favor of neither party, but if its argument is adopted, the defendant will prevail. The government's brief does not foreclose extraterritorial application of the ATS, but argues that the ATS should not apply when the defendant is a foreign company doing business in a third country. The brief was submitted by Department of Justice, without official approval from lawyers at the Departments of State or Commerce. This was in contrast to a unified position submitted for first argument in February, 2012, when the government supported applying the statute to corporations. The motivations behind the split are unclear, and responses to Freedom of Information Act (FOIA) requests have not been illuminating. The governments of the United Kingdom and the Netherlands also submitted briefs in favor of dismissal, but the Argentinian government filed a brief in support of the ATS.

In the event of an adverse ruling on the ATS, more attention will be needed in the legislative arena to ensure victims have access to judicial remedy. However, there remain viable litigation strategies, particularly in state court, that activists may harness to challenge corporate impunity abroad. These include common law claims such as negligence, which have been used to successfully litigate environmental claims.

## Canada

In Canada, *ACCI v. Anvil Mining Ltd.*, a case against Anvil Mining for atrocities committed in the Democratic Republic of the Congo is currently before the Supreme Court. In this case, the defendant initially argued that the Québécois court did not have jurisdiction, and in the alternative, that *forum non conveniens* warranted dismissal.

The doctrine of *forum non conveniens* allows courts that have jurisdiction over a matter to dismiss a case in favor of an alternative forum which the court determines is more appropriate. This is a major challenge across common law countries. When *forum non conveniens* is argued, parties spend years litigating the issue without addressing the merits of the case. This delays justice and drains plaintiffs' resources. The lengthy process and low probability of success has made *forum non conveniens* challenges more attractive to defense lawyers. Cases that are dismissed to home countries often face substantial barriers to justice including corrupt judicial systems. *Forum non conveniens* has been a major barrier to remedy for victims of corporate related human rights abuses in the United States, Canada and Australia, including in the unsuccessful attempt to keep Bhopal litigation in the United States.

In the *Anvil Mining* case, however, the lower court rejected both of the defendants' arguments, finding that it indeed had jurisdiction over the defendant and that other available fora were not more appropriate. The Court of Appeal, by contrast, found that it did not have jurisdiction over the defendant and thus did not reach the issue of whether there existed a more appropriate forum. It did rule, however, that the plaintiffs had not shown that it would be impossible to bring their claim elsewhere. The Supreme Court denied the

plaintiffs' application to review the decision by the Court of Appeals.

Canada tends to be hostile to these claims such that, in a case in Nevada against Barrack Mining, plaintiffs expressed a preference to remove the case to the Philippines, where the harm occurred, rather than litigate in the company's home country of Canada.

## Europe

In European civil law countries, the primary challenge rests in establishing jurisdiction over a case at the outset. Once jurisdiction has been established, most courts cannot revoke it in favor of a different forum. It was noted, however, that during the Brussels I negotiations, the United Kingdom unsuccessfully tried to include provision which would effectively introduce *forum non conveniens* challenges.

Currently, European countries have a range of jurisdictional rules in corporate litigation. The United Kingdom, for example, recognizes that companies may be sued if they are domiciled in the country. In criminal litigation against Trafigura, however, a Dutch court dismissed the case after it determined the company was only located in the Netherlands for tax purposes.

Current fee structures in many countries also hinder access to justice. In a regressive move, the United Kingdom this year passed the Legal Aid Bill, which disallowed fee shifting arrangements including recovery from the defense and insurance agreements for lawyers taking human rights cases. This issue has presented a particularly difficult barrier in Latin America, where the lack of fee shifting, combined with a reticence among lawyers to challenge companies, has impeded bringing cases and thereby is a significant barrier to remedy for victims of corporate related human rights abuses.

## *Creating opportunities for social change*

The discussion then turned to the use of litigation as a tool to drive corporate accountability campaigns. Despite the relatively small number of successful cases, litigation has incentivized changes in corporate practices. It also can be an effective tool to increase transparency. Canadian litigation before the Ontario Securities Commission was cited as an example of how suits could be targeted to enforce disclosure requirements and enhance access to information.

Commenters noted the continued importance of legislation to enhance access to remedy. There have been two efforts in the Canadian legislature to introduce reform measures, one that would give foreign plaintiffs a cause of action for human rights violations, and one that would allow complaints to be brought to the government. Both failed, and there is currently a push to introduce legislation similar to the U.S. conflict minerals disclosure requirements.

## *Concluding Themes*

At the end of the session, participants considered a number of action items:

- Bring corporate accountability into the public view, particularly in light of the *Kiobel* case. Groups have begun investigating the public relations angle. The public dissatisfaction with corporate power must be harnessed to build broader coalitions and enhance pressure on companies.
- Orchestrate a coordinated effort for a legislative response. This will involve building a constituency with labor unions, environmental groups, and development organizations. Future efforts should bring together these diverse areas to build a unified movement to push for a regulatory strategy that will move beyond a case by case approach to abuses.
- Address jurisdictional barriers, notably *forum non conveniens* in common law countries and jurisdiction regulations in civil law countries.
- Address the costs of bringing cases. This will involve identifying sustainable funding sources and building networks of lawyers willing to take on casework. There is also a need to train judges to address these issues.
- Develop a strategy that emphasizes broader ramifications for companies by emphasizing reputational damage and other deterrents. This could include targeting corporate defense firms to build an understanding of the responsibilities of legal businesses under the Guiding Principles.
- Build scholarship on the issue by publishing articles on legal issues and studies detailing the most effective strategies.

## Discussion 2: Corporate Accountability – International Efforts

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### *Scope of the Discussion*

The discussion of International Efforts toward Corporate Accountability, moderated by Paul Donowitz of EarthRights International, began with the observation of positive developments, such as the universal adoption of the United Nations Guiding Principles on Business and Human Rights and supply chains disclosure provisions; before moving to a discussion of barriers to judicial remedy, multi-stakeholder initiatives, and voluntary mechanisms for corporate accountability.

### *United Nations Guiding Principles on Business and Human Rights*

The United Nations Guiding Principles on Business and Human Rights (Guiding Principles) were unanimously endorsed by the U.N. Human Rights Council last year. The Guiding Principles lay out a three-pillared approach to corporate accountability, establishing that States have a duty to protect human rights, businesses have a responsibility to respect human rights, and victims must be afforded access to both judicial and non-judicial remedy.

Current consensus among stakeholders is that the Guiding Principles represent a floor rather than a ceiling, but that there is an opportunity to “nail down” the floor while continuing to push up State practice. Through work of various groups, including ICAR’s work on the Human Rights Due Diligence Project, a common understanding of the normative framework underpinning the Guiding Principles is now coalescing. The concept of human rights due

diligence has been gaining traction, although it has not always been reflected in legislation or effective mechanisms.

### *Supply Chains Disclosure Provisions*

In addition to the passage of non-financial disclosure laws in the United States, discussed in part III, there are pending supply chain disclosure laws in several countries. In fall 2011, the European Commission released a policy position on corporate social responsibility that clearly articulated that having social, environmental, ethical and human rights policies is not voluntary, but rather is a responsibility of companies. In addition, the European Commission has drafted a proposal that would require companies to report on their environmental, social, human rights and governance impacts. This will not be introduced to the European Parliament, however, until a revenue transparency bill passes. Participants noted there is broad industry opposition to the measure.

Similar efforts are underway in Canada and South Korea. Specifically, the Canadian Parliament has proposed a bill that, like section 1502 of the Dodd-Frank Act, would require companies to exercise due diligence in their supply chains before trading in conflict minerals that originate in the Great Lakes Region of Africa. Companies would also have to disclose a description of measures it has taken to exercise due diligence, an independent audit of its measures, and other pertinent information to the government on an annual basis. In 2011, the South Korean National Assembly debated legislation that would require mandatory

financial reporting for extractive companies. The measure did not pass, but is likely to be re-introduced this year.

### *Barriers to Judicial Remedy*

Participants then discussed barriers to judicial remedy in Europe. In most European countries, the primary mechanism for sanctioning human rights abuses is through the penal code rather than through tort law. As such, access to private remedy in the E.U. is generally limited, with the exception of the United Kingdom, where plaintiffs can bring tort actions for human rights abuses. Commenters noted the change in leadership in Britain may foreclose this avenue.

As we consider reform in this area, participants noted the need to include victims in the reform process. Currently, those most affected are often not integrated into demands for justice or consulted in efforts to build accountability mechanisms. Sometimes, organizations in home countries engage with companies in ways that undermine community efforts in host nations. Organizing models from labor and other community initiatives should be examined to build an inclusive and effective response, and to ensure there is direct dialogue among those on the ground and those in the field abroad.

### *Free Trade Agreements*

Free Trade Agreements present additional challenges to ensuring accountability. Many agreements, including the North and Central American Free Trade Agreements (NAFTA/CAFTA), include investor protection provisions that empower companies to bring suit against government regulations and actions which threaten their interests. Recently, Canadian mining company Pacific Rim filed a complaint through a U.S. subsidiary with the World Bank's International Centre for Settlement of Investment Disputes (ICSID), hoping to use CAFTA provisions to sue the

Salvadoran government for refusing to issue a gold-mining permit. The company's mining project is likely to cause environmental damage, create few jobs, and is unpopular in El Salvador, where activists have faced reprisals, including at least two deaths. While the ICSID determined the Canadian company did not have standing under CAFTA, the tribunal concluded that the company could sue in Salvadoran court under national laws protecting investors. The use of international investment tools to protect corporate interests can subvert national regulation and impede governments' capacity to respond to abuses. There is a need to confront and reform the power these mechanisms have bestowed on multinationals.

### *Multi-stakeholder Initiatives*

The discussion then turned to the proliferation of multi-stakeholder initiatives (MSIs) and the need to critically examine the efficacy of such mechanisms at setting standards and ensuring compliance. While the efforts have made progress in governance, they have often fallen short on accountability. Corporate resistance to MSIs, particularly in the extractive industry, has impeded efforts to develop a verification scheme.

Without effective mechanisms to gauge or measure compliance, MSIs run the risk of becoming loopholes to compliance. Participants noted concerns that companies can often sign on to MSIs without having to demonstrate real compliance efforts.

### *Voluntary Mechanisms*

In another troubling development, governments appear to be using voluntary initiatives in place of binding legislation with legal enforcement mechanisms. States often draw the line at actual sanctions for human rights abuses, and often voluntary mechanisms do not include adequate avenues to remedy for

victims of corporate related human rights abuses. Commenters also noted corporations' ability to play initiatives and countries off of one another. The challenge for civil society is to bring value to a monitoring and evaluation system, determine which mechanisms work, and to develop a set of best practices for multilateral coordination.

## *Concluding Themes*

Participants offered a number of suggestions of how to move the international movement toward corporate accountability forward, including:

- Gather cases to send to the U.N. Working Group on Business and Human Rights to promote company compliance and shame non-conformers.
- Utilize lessons from indigenous people's movements, such as building consensus around a set of discrete and specific demands, coordinating a cohesive strategy, and developing a complaint procedure.
- Include human rights victims in the reform process.
- Look at national and regional development banks as a potential avenue for reform efforts.
- Educate investigative and prosecutorial authorities to use tools already at their disposal to promote enforcement under existing mandates, enhance criminal codes to ensure liability, develop better mutual legal assistance to improve investigations and more cooperation across jurisdictions, and examine issues of sovereign immunity.

## Discussion 3: Corporate Accountability – Domestic Efforts

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### *Scope of Discussion*

The discussion of Domestic Efforts toward Corporate Accountability, moderated by Meg Roggensack of Human Rights First and Corinna Gilfillan of Global Witness, examined measures in the United States to target corporate accountability including the non-financial disclosure provisions in the Dodd-Frank financial reform bill (sections 1502 and 1504), the child and forced labor consultative process mandated by the 2008 Farm Bill, proposals to modify restrictions on operating in Burma and regulations on supply chain transparency.

### *Sections 1502 and 1504 of the Dodd-Frank Act*

In August, the Securities and Exchange Commission (SEC) promulgated rules for two provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The agency was over a year late in releasing the rules, partly due to intense pressure from industry.

Section 1502, the conflict minerals provision, will require that companies disclose whether they obtained certain minerals (tin, tungsten, tantalum, and gold) mined from conflict mines in the Democratic Republic of the Congo. The rule unfortunately includes a two to four year implementation delay depending on the size of a company, so we will not see the true effect of the provision for several years, although several companies have already begun examining their supply chains to comply with the rule. The rule also specifies that companies must conduct due diligence that is consistent with a nationally or

internationally recognized framework; at present, the only such framework is the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Afflicted and High-Risk Areas, which has been well received by civil society groups. Currently, the SEC is facing a lawsuit on behalf of the Chamber of Commerce and the National Association of Manufacturers on this rule.

Section 1504, the “Publish What You Pay” provision, requires that companies publish any major payments made to governments to obtain natural resources. The SEC rule hews closely to the original statutory language and rejects any exemptions from reporting, despite aggressive overtures from companies. Currently, the SEC is facing a lawsuit on behalf of the American Petroleum Institute on this rule.

### *Guidelines for Eliminating Child and Forced Labor in Agricultural Supply Chains*

The 2008 Farm Bill established a multi-stakeholder consultative group of experts and industry representatives to develop voluntary guidelines for companies to reduce the likelihood that agricultural products they produce, process, or distribute are linked with child or forced labor. The group’s mandate expires at the end of the year and the ultimate fate of the initiative is not clear. The resulting Guidelines for Eliminating Child and Forced Labor in Agricultural Supply Chains are a comprehensive effort designed to include standard-building mechanisms, supply-chain mapping, and third party review. The Guidelines do not provide for a grievance procedure

headed by an Ombudsman, though this has been suggested. Currently, there is a pilot project to have one NGO and one company pilot-test the Guidelines.

### *Reporting Requirements for Responsible Investing in Burma*

The United States recently announced a proposal to relax investment restrictions on Burma. The proposal would increase access to the country, contingent on reporting requirements. The proposal requires any individual or business with an investment of \$500,000 or greater to submit an annual report to the State department. The report must include a summary of due diligence policies and procedures that address impacts on human rights, worker rights, and the environment in Burma; anti-corruption policies and procedures; policies and procedures for community and stakeholder engagement; grievance policies and procedures, global CSR policies; and information about arrangements with security service providers, among other disclosures.

There was discussion of how companies might interpret this mandate with great variability, and the broader implications that such an approach might have for dealing with other regimes such as Syria and Cuba. Participants also expressed concern that the emphasis on reporting fails to address actual impacts within Burma. NGOs recently submitted comments to the Department of State on this and other points and will continue to engage with the U.S. government.

### *Transparency in Supply Chains*

Representative Maloney (D-NY) introduced bipartisan legislation, the Business Transparency on Trafficking & Slavery Act, to mandate that companies disclose their policies regarding forced and trafficked labor in their filings to the SEC.

The Socially Responsible Investor (SRI) community supports this bill, though there is concern over whether the SEC is the most strategic choice for future transparency bills. While the Dodd-Frank provisions were an important step in ensuring transparency, commenters cautioned against viewing the agency as the default. It is unclear how robust or broad-ranging SEC enforcement will be, and one participant noted there might be pushback from the agency now that it was being used as the main inroad on accountability issues. Other agencies, including the Department of Justice and the Department of State, could collect and monitor disclosure responsibilities. The Department of State might be in a particularly better position to engage in broader capacity building.

The Business Transparency on Trafficking & Slavery Act was modeled off of the California Transparency in Supply Chains Act, which took effect in January 2012. The measure requires that retail and manufacturing companies include information on their websites detailing their policies pertaining to reducing human trafficking and slavery in their supply chain. The measure, while a positive step, lacks enforcement mechanisms. Only one-third of the companies covered by the law have submitted information to date, and most of these simply included the general language already in their public materials. Participants questioned the ability of the measure to improve conditions on the ground without clear definitions or requirements.

### *Global Online Freedom Act*

The Global Online Freedom Act (GOFA), reintroduced this year, aims to promote freedom of expression by preventing U.S. companies from cooperating with repressive governments that use the Internet as a tool of censorship and surveillance. The Act seeks to

accomplish this in three ways. First, GOFA requires the Department of State to conduct country assessments of freedom of expression with respect to electronic information, including government attempts to censor, block, or monitor expressions, as well as government efforts to persecute, prosecute, or punish individuals for their expressions. Based on this assessment, the Department of State is required to publish a list of “Internet Restricting Countries.” Second, internet communications services companies are required to disclose to the SEC their due diligence policies related to human rights and usage of their technologies by government end users in internet restricting countries. Finally, the bill empowers the Department of State to impose export controls on certain dual-use technologies. This bill, in contrast to prior drafts, does not include civil penalties.

### *Foreign Corrupt Practices Act*

In the past year, the Chamber of Commerce has engaged in a sustained attack against the Foreign Corrupt Practices Act, which prohibits bribery of foreign officials as a means of obtaining or retaining business. The Chamber proposed a number of amendments to the Act, each of which would weaken liability for corporations that bribe foreign officials to attain or retain business.

The Chamber’s proposals were to: create a statutory compliance defense to FCPA enforcement, eliminate successor liability for pre-acquisition acts of an acquired company, add a “willfulness” requirement, eliminate parent company liability for the actions of its subsidiary, and narrow the statutory definition of “foreign official.” While it at first seemed that Senator Coons (D-DE) and Senator Klobuchar (D-MN) entertained the idea of introducing amendments, the Chamber’s attempt appear to have been at least temporarily unsuccessful.

This is in part due to the work of ICAR members and partners. The Department of Justice and the Securities and Exchange Commission are expected to release guidance as to their enforcement of the Act in fall 2012.

### *OECD Guidelines*

Participants discussed efforts to engage in the OECD procedure by bringing complaints to the U.S. National Contact Point (NCP). The NCP has secured cooperation and funding for federal conciliation and mediation, but this instrument has rarely been utilized. One of the primary obstacles is the confidentiality requirements imposed by the process. Currently, complaints cannot be made public, making resolution difficult. A 2011 reform created the Stakeholder Advisory Board, which is a potential avenue for promoting accountability. The Stakeholder Advisory Board provides recommendations to the U.S. government on implementation of the OECD Guidelines for Multinational Enterprises. There are currently representatives of five ICAR member groups on the Stakeholder Advisory Board.

### *Concluding Themes*

The panel concluded with a discussion of future action items, including:

- Galvanize around one comprehensive piece of national legislation. Think strategically about the best agencies to handle any new reporting requirements, investigate ways to leverage investor expectations, and build a broad constituency to push through reform.
- Consider the relative efficacy and feasibility of voluntary strategies relative to mechanisms that impose penalties for non-compliance.

- Develop a plan to implement the Guiding Principles in the United States and use that framework to drive broad-based reforms. Engage with the Department of State to promote implementation of the Guiding Principles.
- Determine how to effectively use the information being collected through disclosure requirements. This will include developing an understanding of agency expectations of companies and examining different forms of reporting to map corporate supply chains.
- Evaluate whether the SEC is the best agency through which to push additional disclosure bills.
- Use shareholder actions to promote corporate change.

## Discussion 4: ICAR's Human Rights Due Diligence Project

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### *Scope of Discussion*

The final panel focused the Human Rights Due Diligence Project, which ICAR has conducted for the past year with the European Coalition for Corporate Justice (ECCJ) and the Canadian Network for Corporate Accountability (CNCA). The Project engaged four experts, Professor Olivier De Schutter, Professor Anita Ramasastry, Mark Taylor, and Bob Thompson, to examine how States fulfill their duty to protect human rights by using their regulatory power to ensure that companies conduct human rights due diligence. Through a number of consultations with legal practitioners and civil society from various jurisdictions, the experts have explored a range of regulatory practices including transparency and disclosure initiatives, incentive-based models, approval mechanisms and vicarious civil and criminal liability regimes. The Project will produce a report that examines current state efforts to outline and enforce due diligence, and identify common themes and best practices for government actors to create obligations and incentives to ensure corporate compliance.

Panelists noted there is a huge degree of overlap, particularly in the labor and environmental spheres, and a range of regulations already enacted that can be used as tools to promote human rights due diligence. Researchers are also examining regulatory approaches that have been undertaken to directly address corporate accountability including the OECD Guidelines, the Dodd-Frank disclosure requirements, EU regulations on timber, and Chinese laws that outline standards for the treatment of both national workers

abroad and foreign workers at state-owned enterprises and other businesses that need a permit to operate overseas.

One particularly important area being examined is project assessment models. Conditioning governmental approval on meeting certain standards builds compliance mechanisms into the process from the beginning.

Panelists identified several important conceptual frameworks that the project will advance. One important theme panelists noted was the need to separate due diligence and the responsibility to respect. Due diligence is a concept rooted in law, and the report will emphasize that it is a standard by which to assess impacts.

Panelists noted the central importance of lowering barriers to justice. Governments have a range of choices when developing liability regimes, and defining the tools available to courts and prosecutors will be critical to ensuring access and accountability. The panel noted that international crimes have not always been incorporated into local jurisprudence. However, there is also a broader need to move beyond criminal sanctions to a more comprehensive compliance scheme. The report will examine different legal regimes to identify the most effective mechanisms and incentive structures.

Panelists noted that varied regulatory regimes will require a range of different tools in diverse contexts. However, from their initial assessment, researchers have noted that there are a range of common schemes that appear to be coalescing across jurisdictions. Currently,

disclosure and transparency regimes are seeing the most forward momentum.

## *Questions and Answers*

The panel was asked how the report's framework would address compliance in conflict areas. In this context, the focus is on a corporation's country of origin, and measures that the home state government can take to regulate business relationships abroad. By focusing on transnational liability in domestic jurisdictions, home states can ensure compliance by their corporate citizens in foreign markets. Currently, the Dodd-Frank measures are a first step in testing the efficacy of transparency measures to alter corporate behavior through disclosure.

The discussion also touched on heightened due diligence requirements in conflict areas. Here, governments can play important roles in identifying problem areas or industries, and building specific responses. Options include a 'red flag' approach of categorizing and mandating specific requirements on regions or goods, or building third-party auditing mechanisms into verification schemes.

Conference participants noted the challenges inherent in measuring the effectiveness of different regulatory regimes and ensuring that states comply with their duties. The report's aim is to identify the quality of regulations that leads to changes in corporate behavior or improve access to justice for victims. This process involves both identifying current state practices that have been effective and identifying mechanisms that could be effective if implemented. There are some instruments, such as the ability to sue state agencies for failing to apply their mandate, which could be utilized to improve states' responsiveness. One encouraging trend briefly noted was that once a

regulation is passed, large companies usually comply first because they have more at stake, and then pressure others to do the same to level the playing field.

The discussion then turned to the challenges that have arisen around environmental impact assessments, and the implications for similar efforts in the human rights sphere. Environmental activists have struggled to ensure that impact studies are accurate, unbiased, and include community voices. This can be particularly problematic when government organs, notably the judiciary, are not independent. Panelists emphasized the need for checks and balances at the State level. The report will examine examples of multiple agency oversight, or community tribunals, which can guard against industry-controlled processes. One commenter brought attention to the fact that in some countries, community activists must first participate in impact assessments even when the process is widely seen as ineffective in order to gain later standing in court. Panelists noted that this area is a good target for reform.

One commenter raised the issue of state variance, and drew specifically on EU regulations on timber. This was cited as an example of a law that did not contain a clear standard, and thus some states have rigorous enforcement programs while others do not. Those with weaker regulations have seen spikes in imports as a result.

Participants raised the need to build public participation and third party review into the government contracting process. The incentive structure should be built into the initial permit, but also address subsequent contracts, and subcontractors. The use of export licensing and other state practices was also discussed.

Commenters discussed the paucity of sanctions in disclosure regimes, and stressed the need to develop tools to punish omissions and obfuscations. Participants also drew attention to the conflict between the requirements of a due diligence regime, and the corporate protections that are often written into trade agreements.

## *Concluding Themes*

The discussion concluded by examining strategy and mobilization once the report is completed. The report is currently on track for release in December 2012. There is a need for coordinated action to identify the best targets for reform and where there may be domestic inroads; to build a cohesive strategy to advance for accountability measures.

Remarks of Acting Associate Deputy  
Undersecretary for International Affairs,  
Department of Labor, Eric Biel

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*Closed session.*

Remarks of Senior Advisor in the  
Bureau of Democracy, Human Rights,  
and Labor, U.S. Department of State,  
Scott Busby

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*Closed session.*

Final Roundtable Session:  
Continuing our Coordinated Movement

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*Closed strategy session.*

## Meeting Participants

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### ***Accountability Counsel:***

Komala Ramachandra, Attorney

### ***AFL-CIO:***

Brian Finnegan, Global Worker Rights Coordinator, International Department

Cathy Feingold, Director, International Department

### ***Amazon Watch:***

Andrew Miller, DC Advocacy Coordinator

### ***Amnesty International:***

Gaby Quijano, Adviser on Business and Human Rights

Seema Joshi, Head of Business and Human Rights

### ***Business and Human Rights Resource Center:***

Sif Thorgeirsson, Manager, Corporate Legal Accountability Project

### ***Calvert Investments:***

Bennett Freeman, Senior Vice President for Sustainability Research and Policy

### ***Center for Constitutional Rights:***

Amanda Kistler, Program Associate, Law & Communities Program

Marcos Orellana, Director, Human Rights and Environment Program

### ***Center for Justice and Accountability:***

Scott Gilmore, Legal Fellow

### ***Conflict Risk Network:***

Kathy Mulvey, Director

### ***Corporate Accountability International:***

TJ Faircloth, Research Director

### ***Dietel Partners:***

Betsy Dietel, Senior Partner

### ***Due Process of Law Foundation:***

Carla Garcia Zendejas, Senior Program Officer, Human Rights & Extractive Industries

Katya Salazar, Executive Director

### ***EarthRights International:***

Jonathan Kaufman, Legal Coordinator

Marco Simons, Legal Director

Misty Seemans, Consultant

Paul Donowitz, Campaign Director

# participants



## ***ECPAT-USA:***

Marina Colby, Director, Public Policy and Government Relations

## ***ESCR-Net:***

Chris Grove, Executive Director  
Dominic Renfrey, Programme Officer

## ***European Coalition of Corporate Justice:***

Filip Gregor, Board Member

## ***Free the Slaves:***

Karen Stauss, Director of Programs

## ***Global Rights:***

Flavia Milano, Natural Resources and Human Rights Initiative Director

## ***Global Witness:***

Andie Lambe, Team Leader, Ending Impunity  
Corinna Gilfillan, Head of US Office

## ***Greenpeace:***

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## ***Pulitzer Center for Crisis Reporting:***

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## ***Revenue Watch:***

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## ***Rockefeller Brothers Fund:***

Tom Kruse, Democratic Practice-Global Governance Program Officer

## ***SOMO (Centre for Research on Multinational Enterprises):***

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#### **COORDINATOR**

**Amol Mehra** is an international human rights lawyer focusing on corporate accountability for human rights violations and corporate social responsibility. He has developed an extensive background on business and human rights issues, including at the United Nations where he has worked to build accountability over private security companies and offered submissions to the mandate of the Special Representative on Transnational Corporations. Amol received his Juris Doctorate Degree with an Honors Certificate in International and Comparative Law from the University of San Francisco School of Law, and also holds a Bachelor of Commerce with a concentration in Global Strategic Management and the Social Context of Business from McGill University. In addition to his work at ICAR, Amol is a Board Member of Human Rights Advocates, a Coordinating Member and Thematic Specialist for Amnesty International USA, and writes for Forbes.com CSR site. Amol also serves as an Advisory Board Member of Lawyers for Better Business (L4BB) and an Advisory Member for SumOfUs. He is fluent in French and conversant in Hindi.

#### **LEGAL AND POLICY ASSOCIATE**

**Katie Shay** received her Juris Doctor from Georgetown University Law Center, where she completed coursework in human rights and environmental law. While in law school, Katie worked with fellow students to identify human rights issues for on-the-ground study and traveled to Jamaica to study the effects of U.S. deportation policy on the realization of human rights of people with mental disabilities. The team's findings were published in a report titled *Sent "Home" with Nothing: The Deportation of Jamaicans with Mental Disabilities*. In addition, Katie served as President of the Law Center's Amnesty International chapter, co-chair of the Law Center's Human Rights Fact-Finding Committee, the Managing Editor of the *Georgetown Journal of Law & Modern Critical Race Perspectives*, and was a member of the Institute for Public Representation's environmental law division. Katie previously interned with EarthRights International, a member of the ICAR Steering Committee. She holds a Bachelor of Arts degree from Marquette University.

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**Cassandra Waters** is a third year student at Georgetown University Law Center, where she is pursuing coursework in human rights. While in law school, she has interned with International Rights Advocates, working on human rights litigation in US federal and state courts. She was an AFL-CIO summer law clerk at IFPTE Local 21 in San Francisco and a legal fellow at the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights. Before law school, she worked in communications with SEIU 32BJ in New York City. She has a Bachelor of Arts in Government from Connecticut College.

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#### **SPECIAL THANKS TO**

Wallace Global Fund  
Dietel Partners  
Georgetown Law Human Rights Institute