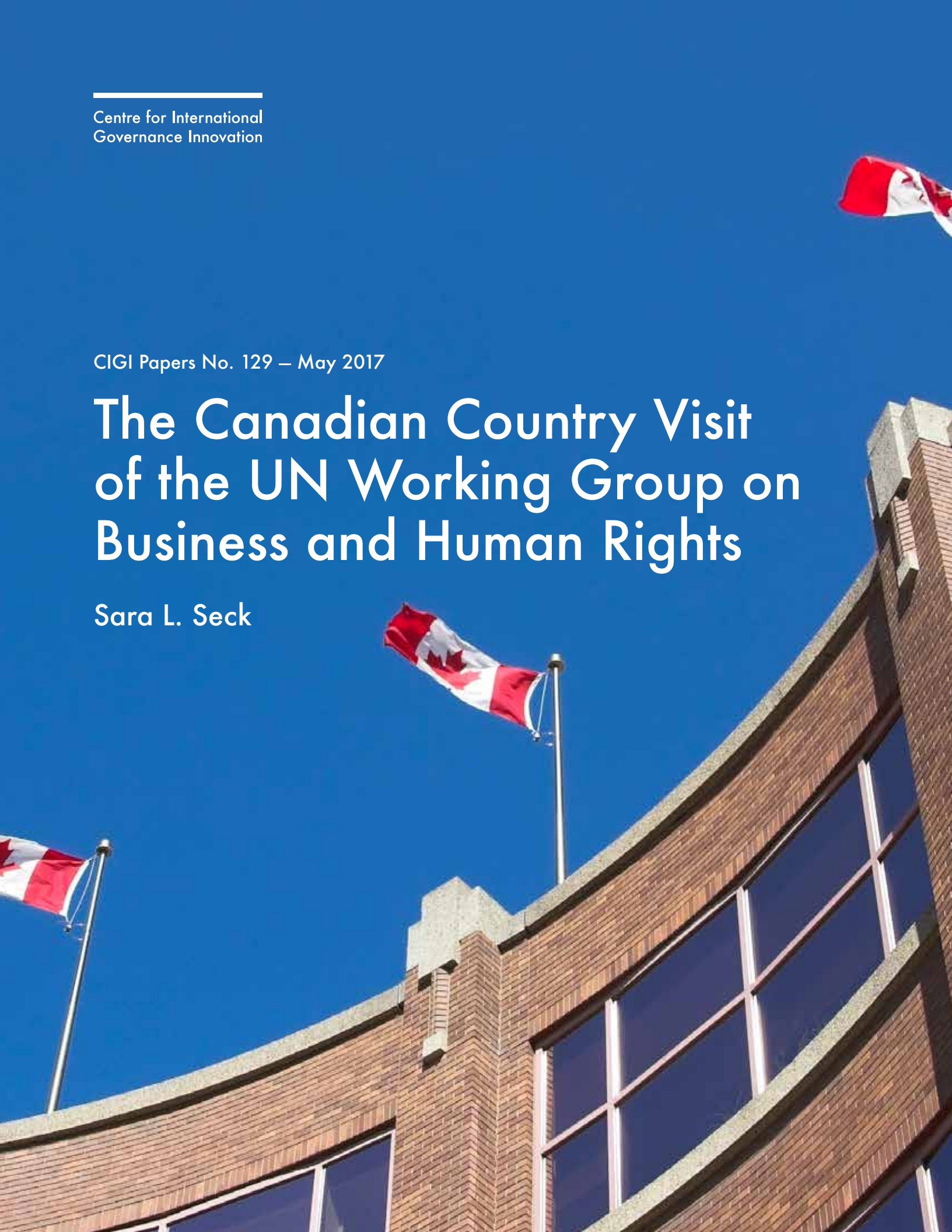

Centre for International
Governance Innovation

CIGI Papers No. 129 – May 2017

The Canadian Country Visit of the UN Working Group on Business and Human Rights

Sara L. Seck



CIGI Papers No. 129 – May 2017

The Canadian Country Visit of the UN Working Group on Business and Human Rights

Sara L. Seck

CIGI Masthead

Executive

President **Rohinton P. Medhora**

Director of Finance **Shelley Boettger**

Director of the International Law Research Program **Oonagh Fitzgerald**

Director of the Global Security & Politics Program **Fen Osler Hampson**

Director of Human Resources **Susan Hirst**

Director of the Global Economy Program **Domenico Lombardi**

Chief Operating Officer and General Counsel **Aaron Shull**

Director of Communications and Digital Media **Spencer Tripp**

Publications

Publisher **Carol Bonnett**

Senior Publications Editor **Jennifer Goyder**

Publications Editor **Patricia Holmes**

Publications Editor **Nicole Langlois**

Publications Editor **Sharon McCartney**

Publications Editor **Lynn Schellenberg**

Graphic Designer **Melodie Wakefield**

For publications enquiries, please contact publications@cigionline.org.

Communications

For media enquiries, please contact communications@cigionline.org.

Copyright © 2017 by the Centre for International Governance Innovation

The opinions expressed in this publication are those of the author and do not necessarily reflect the views of the Centre for International Governance Innovation or its Board of Directors.



This work is licensed under a Creative Commons Attribution – Non-commercial – No Derivatives License. To view this license, visit (www.creativecommons.org/licenses/by-nc-nd/3.0/). For re-use or distribution, please include this copyright notice.

Printed in Canada on paper containing 10% post-consumer fibre and certified by the Forest Stewardship Council® and the Sustainable Forestry Initiative.

Centre for International Governance Innovation and CIGI are registered trademarks.

Centre for International
Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

Table of Contents

vi	About the Author
vii	About the International Law Research Program
vii	Acronyms and Abbreviations
1	Executive Summary
1	Introduction
2	Protect, Respect and Remedy: Guiding Principles on Business and Human Rights
4	The Working Group on Business and Human Rights and Country Visits
8	Canada and Implementation of the Guiding Principles: Anticipating the Country Visit
11	Preliminary Conclusions: Time to Develop an NAP
14	About CIGI
14	À propos du CIGI

About the Author

Sara L. Seck is a senior fellow with CIGI's International Law Research Program and an associate professor at Western University's Faculty of Law. Her research interests include corporate social responsibility; international environmental, human rights and sustainable development law; and climate change and Indigenous law, with a focus on extractive industries. In 2015, Sara was awarded the Emerging Scholarship Award by the Academy of Environmental Law of the World Conservation Union for her research on international environmental law and extractive industries. She is a member of the International Law Association's Study Group on Business and Human Rights, and a founding member of the editorial board of the *Business and Human Rights Journal*, Cambridge University Press. In July 2017, Sara will be joining the Schulich School of Law at Dalhousie University. She holds a B.Mus. from Memorial University, an M.Mus. from the University of Ottawa, an LL.B. from the University of Toronto and a Ph.D. from Osgoode Hall Law School at York University.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions between international and transnational law, Indigenous law and constitutional law.

Acronyms and Abbreviations

CBCA	Canada Business Corporations Act
CSR	corporate social responsibility
EDC	Export Development Canada
HRC	Human Rights Council
ICT	information and communications technology
IFC	International Finance Corporation
MNEs	multinational enterprises
NAP	national action plan
NCP	national contact point
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner on Human Rights
SDGs	Sustainable Development Goals
UNGPs	United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

Executive Summary

The United Nations Human Rights Council (HRC) unanimously endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework” (UNGPs) in 2011. In May 2017, members of the United Nations Working Group on Business and Human Rights will conduct a country visit to Canada. This paper will introduce the UNGPs, examine the experience of other countries visited by the working group, including the United States, which was visited in 2013, and consider what to expect during the visit to Canada. It is likely that the working group will consider implementation of the state duty to protect human rights in terms of its application both to businesses operating within Canada and to Canadian companies operating internationally. Given Canada’s prominence in global mining and ongoing contestation over respect for Indigenous rights within Canada, especially in the oil and gas sector, it is also likely that the working group will pay careful attention to implementation of law and policy in natural resource development. Following the country visit, the working group is likely to recommend that Canada develop a national action plan (NAP) for the implementation of the UNGPs. This presents an opportunity for Canada to play a leading role in clarifying the link between business and human rights, Indigenous rights and climate change.

Introduction

From May 23 to June 1, 2017, members of the United Nations Working Group on Business and Human Rights will be conducting a country visit to Canada.¹ This paper will introduce the UNGPs, unanimously endorsed by the United Nations

HRC in 2011,² and then consider what to expect from the country visit based upon previous experiences, most notably a visit to the United States in 2013.³ The paper will briefly examine implementation of the UNGPs in Canadian law and policy, including the federal government’s promotion of a corporate social responsibility (CSR) strategy for extractive companies operating abroad,⁴ and identify possible issues that the working group might examine during its visit. The conclusions recommend that Canada develop an NAP for the implementation of the UNGPs, as other countries have done, and suggest that this could provide an opportunity to clarify the linkage between business and human rights, Indigenous rights, and the environment and climate change.⁵

1 UN Office of the High Commissioner on Human Rights (OHCHR), “Working Group on the issue of human rights and transnational corporations and other business enterprises”, online: <www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> [OHCHR Working Group]; UN OHCHR, News Release, “Canada: UN expert group to assess impacts of business operations on human rights” (18 May 2017), online: <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21631&LangID=E>.

2 UN HRC, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UNGAOR, 17th Sess, UN Doc A/HRC/17/31 (2011) [UNGPs], online: <www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf>, plus three addenda: UN HRC, *Addendum—Piloting Principles for Effective Company/Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, UNGAOR, 17th Sess, UN Doc A/HRC/17/31/Add.1 (2011); UN HRC, *Addendum—Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative*, UNGAOR, 17th Sess, UN Doc A/HRC/17/31/Add.2 (2011); and UN HRC, *Addendum—Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, UNGAOR, 17th Sess, UN Doc A/HRC/17/31/Add.3 (2011). See also UN OHCHR, “Business and human rights”, online: <www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx> and UN HRC, *Human rights and transnational corporations and other business enterprises*, UNGAOR, 17th Sess, UN Doc A/HRC/RES/17/4 (2011) at para 1 [*Human rights and transnational corporations*], online: <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>>.

3 See the May 2014 report regarding the visit to the United States: UN HRC, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Addendum, Visit to the United States of America*, UNGAOR, 26th Sess, UN Doc A/HRC/26/25/Add.4 (2014) [US Country Visit Report], online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/024/76/PDF/G1402476.pdf?OpenElement>>. For an alternative online source for all official working group documents, see UN OHCHR, “Reports and other documents”, online: <www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>.

4 Canada, Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad* (2014) at 2 [2014 CSR Strategy], online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>. On the history leading to the 2009 version of the strategy and its relationship with the development of the UNGPs, see Sara L Seck, “Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights” (2011) 49 *Can YB Intl L* 51 [Seck, “Canadian Mining”].

5 For details on state NAPs, see UN OHCHR, “State national action plans”, online: <www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

Protect, Respect and Remedy: Guiding Principles on Business and Human Rights

In June 2011, the UN HRC unanimously endorsed the UNGPs. The UNGPs are structured in chapters, following three pillars: the state duty to protect; the business responsibility to respect; and access to remedy.

Two foundational principles underlie the state duty to protect, which reflect existing state obligations under international human rights law. Principle 1 provides: “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”⁶

According to principle 2, “[s]tates should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”⁷ The content of the state duty to protect is then elaborated in a series of operational principles in four overarching themes that touch upon the following: “general state regulatory and policy functions;”⁸ “the state-business nexus;”⁹ “conflict-affected areas;”¹⁰ and “ensuring policy coherence.”¹¹

The business responsibility to respect rights is presented in foundational principle 11: “Business enterprises should respect human rights. This

means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”¹² This responsibility is described in the commentary as a “global standard of expected conduct for all business enterprises wherever they operate” that “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”¹³

The responsibility arises in relation to all “internationally recognized human rights.”¹⁴ It requires business enterprises to “avoid causing or contributing to adverse human rights impacts through their own activities,” to “address such impacts where they occur” and to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, projects or services by their business relationships,” even if the businesses “have not contributed to those impacts.”¹⁵

Business relationships “include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.”¹⁶ Moreover, the responsibility to respect “applies to all enterprises regardless of their size, operational context, ownership and structure.”¹⁷

Principle 15 outlines the “policies and processes” that business enterprises should have in place in order to meet their responsibility to respect.¹⁸ These are a policy commitment to meet the businesses’ responsibility to respect human rights; a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.¹⁹

6 UNGPs, *supra* note 2 at 6, Principle 1.

7 *Ibid* at 7, Principle 2. On the controversy over the drafting of this principle, see Seck, “Canadian Mining”, *supra* note 4 at 107–12.

8 UNGPs, *supra* note 2 at 8, Principle 3.

9 *Ibid* at 9–10, Principles 4, 5, 6.

10 *Ibid* at 10–11, Principle 7. See also John Ruggie, UN HRC, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses*, UNGAOR, 17th Sess, UN Doc A/HRC/17/32 (2011), online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/135/63/PDF/G1113563.pdf?OpenElement>>.

11 UNGPs, *supra* note 2 at 11–12, Principles 8–10.

12 *Ibid* at 13, Principle 11.

13 *Ibid*, Commentary to Principle 11.

14 *Ibid*, Principle 12.

15 *Ibid* at 14, Principle 13.

16 *Ibid*, Commentary to Principle 13. See further principle 17(a) on human rights due diligence (*ibid* at 16, Principle 17).

17 *Ibid* at 14, Principle 14.

18 *Ibid* at 15, Principle 15.

19 *Ibid*.

Operational principles expand upon these requirements.²⁰ Notably, human rights due diligence must go beyond an examination of material risks to the company “to include risks to rights-holders.”²¹ A clear distinction is made between the conduct of human rights due diligence and legal liability.²² However, should a business enterprise identify that it has “caused or contributed to adverse impacts,” the business “should provide for or cooperate in their remediation through legitimate processes.”²³

Access to remedy is the third pillar of the UNGPs. A single foundational principle, principle 25, informs the chapter: “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”²⁴

The commentary elaborates that remedies may include “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.”²⁵ The term “grievance” is defined as “a perceived injustice evoking an individual’s or a group’s sense of entitlement.”²⁶ The UNGPs promote both state- and non-state-based judicial and non-judicial grievance mechanisms in five operational principles.²⁷ Principle 31, the final principle, outlines “effectiveness criteria for non-judicial grievance mechanisms” applicable to both state-based and non-state-based mechanisms.²⁸

Following the endorsement of the UNGPs, the HRC established a Working Group on Business and

Human Rights.²⁹ The working group is comprised of five independent experts, representing balanced geographical regions, who are each appointed for a period of three years. Its mandate includes the promotion of effective implementation of the UNGPs and the exchange of good implementation practices, drawing upon information received from multiple sources, including governments, businesses, rights holders and civil society.³⁰ It is also charged with supporting capacity-building efforts and, if asked, is to provide recommendations for the development of domestic law and policy in the area of business and human rights.³¹ The working group must work closely with other HRC special procedures, as well as the human rights treaty bodies, other relevant United Nations and international organizations, and regional human rights organizations.³² The multi-stakeholder and internationally engaged nature of the mandate is further emphasized in two paragraphs that identify the importance of dialogue and cooperation across actor groups and with international organizations, including at the annual Forum on Business and Human Rights.³³

The importance of the UNGPs lies not only in the achievement of a global consensus on business and human rights, but also in the extent to which the responsibility to respect human rights is embedded in other international standards

20 *Ibid* at 15–20, Principles 16–21.

21 *Ibid* at 16, Commentary to Principle 17.

22 *Ibid* at 17.

23 *Ibid* at 20, Principle 22.

24 *Ibid* at 22, Principle 25.

25 *Ibid*, Commentary to Principle 25.

26 *Ibid*. A grievance may be based on “law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.”

27 *Ibid* at 23–27, Principles 26–30.

28 *Ibid* at 26, Principle 31.

29 *Human rights and transnational corporations*, *supra* note 2 at para 6. In 2014, the mandate of the working group was extended for three more years: see UN HRC, *Human rights and transnational corporations and other business enterprises*, UNGAOR, 26th Sess, UN Doc A/HRC/RES/26/22 (2014) at para 10 [A/HRC/RES/26/22], online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/083/82/PDF/G1408382.pdf?OpenElement>>.

30 *Human rights and transnational corporations*, *supra* note 2 at paras 6(a), 6(b).

31 *Ibid* at para 6(c).

32 *Ibid* at para 6(g).

33 *Ibid* at paras 6(h), 6(i). See e.g. *ibid* at para 6(h):

To develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies, specialized agencies, funds and programmes, in particular the Office of the United Nations High Commissioner for Human Rights, the Global Compact, the International Labour Organization, the World Bank and its International Finance Corporation, the United Nations Development Programme and the International Organization for Migration, as well as transnational corporations and other business enterprises, national human rights institutions, representatives of indigenous peoples, civil society organizations and other regional and subregional international organizations. See also A/HRC/RES/26/22, *supra* note 29 at paras 8, 11 and 17 on the importance of multi-stakeholder engagement for the success of the working group.

of corporate responsibility.³⁴ These include the UN Global Compact,³⁵ the Organisation for Economic Co-operation and Development's (OECD's) Guidelines for Multinational Enterprises [MNEs],³⁶ the Voluntary Principles on Security and Human Rights,³⁷ the International Finance Corporation's (IFC's) Performance Standards on Environmental and Social Sustainability³⁸ and the Global Reporting Initiative,³⁹ among others.

The Working Group on Business and Human Rights and Country Visits

Paragraph 6(d) of the resolution that created the working group tasks it with conducting "country visits and to respond promptly to invitations from States."⁴⁰ While the mandate does not elaborate on the nature of these country visits, an additional mandate paragraph highlights the importance of exploring the need to "enhanc[e] access to effective remedies" for victims of human rights violations arising from corporate activities.⁴¹ Furthermore, the working group is required by paragraph 6(f) to "integrate a gender perspective throughout the work of the mandate

and to give special attention to persons living in vulnerable situations, in particular children."⁴²

To date, the working group has reported on visits to seven countries, including the United States, Brazil and Mexico.⁴³ The country visit to the United States, from April 22 to May 1, 2013, was its second, following its first visit to Mongolia.⁴⁴ A full report of the US country visit is available as an addendum to a report to the HRC in 2014.⁴⁵ Given that the United States is Canada's closest neighbour and also a developed country, the US country visit report provides a useful template to consider as Canada prepares for its own country visit.

The working group selected specific policy themes and sectors for the US country visit.⁴⁶ As a preliminary matter, the report considers the overall country context, including the extent to which the United States is a party to key human rights and labour conventions, and briefly examined a policy document on business and human rights published by the US government immediately before the country visit.⁴⁷ While the working group commends the United States for taking regulatory and policy steps to prevent adverse impacts associated with US companies operating internationally, it suggests that a "rigorous and comprehensive review of the current legal and policy environment for businesses" both "at home and abroad" is necessary to ensure that businesses are "capable of meeting the expectations" in the UNGPs.⁴⁸

The substantive portion of the US country report begins by assessing the implementation of several key aspects of the UNGPs in US law and policy. First, the report notes the importance of achieving policy coherence across federal government agencies with regard to human rights and observes that while various initiatives were in place, this could not substitute for a comprehensive

34 See also Sara L. Seck, "Business, Human Rights, and Canadian Mining Lawyers" (2015) 56 *Can Business L J* 208 at 216–24. On the contested normative status of the business responsibility to respect human rights in international and domestic law and its practical relevance for lawyers, see *ibid* at 210–11.

35 See UN Global Compact, "The Ten Principles of the UN Global Compact", online: <www.unglobalcompact.org/what-is-gc/mission/principles>.

36 OECD, "OECD Guidelines for Multinational Enterprises" (2011), DOI: <10.1787/9789264115415-en>.

37 Foley Hoag LLP, "What Are The Voluntary Principles?", online: <www.voluntaryprinciples.org/what-are-the-voluntary-principles/>.

38 IFC, "Performance Standards on Environmental and Social Sustainability" (2012) [IFC, "Performance Standards"], online: <www.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES>.

39 Global Reporting Initiative, online: <www.globalreporting.org/Pages/default.aspx>.

40 *Human rights and transnational corporations*, *supra* note 2 at para 6(d).

41 *Ibid* at para 6(e).

42 *Ibid* at para 6(f).

43 UN OHCHR, "Country visits of the Working Group on the issues of human rights and transnational corporations and other business enterprises", online: <www.ohchr.org/EN/Issues/Business/Pages/WGCountryVisits.aspx>. The other countries for which country visit information is available are Azerbaijan, Ghana, Mongolia and the Republic of Korea.

44 *Ibid*.

45 See US Country Visit Report, *supra* note 3.

46 *Ibid* at para 2.

47 *Ibid* at paras 7–15.

48 *Ibid* at paras 14–15.

“assessment of the current state of overall policy coherence and coordination between Government entities, the effectiveness of the measures undertaken, identification of good practices and gaps and challenges in the protection of rights and access to remedy.”⁴⁹ Such an assessment, suggests the working group, would be useful in the development of an NAP for implementation of the UNGPs.⁵⁰ As will be seen below in this paper, the United States published an NAP on business and human rights subsequent to the country visit.

Second, the working group considers the legal and policy measures developed by the US government to “increase transparency and reporting by companies in relation to their potential and actual human rights impacts.”⁵¹ Next, initiatives undertaken to address human rights issues in conflict-affected areas are considered, with reference to due diligence in the supply chain of conflict minerals, and private security contracting by extractive companies.⁵² Fourth, the working group considers the “State-business nexus” and whether respect for human rights is expected when financing or other support is provided by US export credit and insurance guarantee agencies.⁵³ Finally, attention is drawn to the need to strengthen the specific instance procedure of the national contact point (NCP) for the OECD MNE guidelines, with regard to transparency and fact-finding potential.⁵⁴

The US report continues with an extensive examination of labour standards as applied within the United States and with regard to US companies operating abroad.⁵⁵ Issues considered are low-

wage labour and unfair practices, anti-trafficking initiatives, anti-child-labour initiatives and labour rights in supply chains. Access to remedy is the next section in the US report, with the working group noting the limited references to this pillar in the US government’s policy document on business and human rights.⁵⁶ The US report identifies the existence of ombudspersons housed in several federal agencies that link private citizens and businesses to address domestic human rights issues and re-emphasizes the important role that could be played by an effective NCP for the OECD MNE guidelines for issues involving US companies abroad.⁵⁷ Ultimately, the report identifies the need for “regulatory gaps, or legal or practical barriers” to be addressed so that legitimate cases seeking remedy from US-based companies, for human rights violations whether at home or abroad, can be heard.⁵⁸

The US report next considers three issues in specific contexts, of which the first, “Coal Mining in West Virginia,” and the third, “Business Impacts and Native Americans,” are of particular interest for the purpose of this paper.⁵⁹ With regard to coal mining, the working group highlights that the industry is regulated at both state and federal levels, including by the Environmental Protection Agency. Communities impacted by surface mining were “deeply divided,” and activists who were seen as “anti-coal” complained of experiencing “threats, intimidation and harassment.”⁶⁰ The concerns raised by community representatives over surface coal mining include impacts on physical and mental health, access to clean water, access to information for protection of cultural heritage and lack of consultation about planned permits.⁶¹ Industry sources, on the other hand, expressed concern that a “general environmental agenda against coal” made it impossible to operate transparently

49 *Ibid* at paras 16–18.

50 *Ibid* at para 18.

51 *Ibid* at paras 19–22 (referring to initiatives with regard to investments in Burma and revenue transparency rules for resource companies, among others).

52 *Ibid* at paras 23–28 (commenting favourably on the “Voluntary Principles on Security and Human Rights,” among other initiatives).

53 *Ibid* at paras 29–32 (commenting favourably on the alignment of environmental and social policies with IFC standards; the requirement to establish project-level grievance mechanisms; and alignment with the Equator Principles, online: <www.equator-principles.com>, and the OECD’s “Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence,” online: <www.oecd.org/tad/xcred/oecd-recommendations.htm>) (OECD, “Common Approaches”).

54 *Ibid* at para 33. This section concludes with consideration of the need to ensure a greater role for Congress in raising awareness of business and human rights issues and addressing them in legislation and policy coherence: *ibid* at paras 34–36.

55 *Ibid* at paras 37–57.

56 *Ibid* at paras 58–64.

57 *Ibid* at paras 60–61.

58 *Ibid* at paras 63–64 (noting that the country visit took place just after the US Supreme Court had issued its ruling in *Kiobel v Royal Dutch Petroleum Co*, 569 US ___ (2013) [*Kiobel*]). On *Kiobel*, see also Sara L Seck, “*Kiobel* and the E-word: Reflections on Transnational Environmental Responsibility in an Interconnected World” (5 July 2013), *Law at the End of the Day* (blog), online: <<http://lbackerblog.blogspot.ca/2013/07/sara-seck-on-kiobel-and-e-word.html>>.

59 The second issue context identified is city government. See US Country Visit Report, *supra* note 3 at paras 73–76.

60 *Ibid* at para 68.

61 *Ibid* at para 69.

when engaging with local stakeholders as it would attract protests.⁶² The working group expresses concern over the nature of the allegations and recommends that responsible authorities conduct investigations and provide effective remedy to those affected.⁶³ In addition, the working group clearly recommends that the coal companies themselves “ensure that they operate with respect for human rights, including by conducting due diligence on human rights issues in accordance with the Guiding Principles.”⁶⁴ The responsibility to respect human rights, and to demonstrate efforts to engage effectively with stakeholders even in the face of opposition and protest, remains in effect, despite the “divisive nature of the issue and strong opposition from some groups.”⁶⁵

With regard to Native Americans, the working group highlights US support for the United Nations Declaration on the Rights of Indigenous Peoples.⁶⁶ Yet the report also points to submissions made to the working group by Indigenous peoples within the United States that raised concerns over adverse “impacts on environment, land and water and on sites of economic, cultural and religious significance” leading to displacement.⁶⁷ The report welcomes efforts by US extractive companies to carry out human rights due diligence, in consultation with Indigenous peoples.⁶⁸

Next, the US report examines specific industry sectors, beginning with consideration of how the business responsibility to respect human rights applies to financial institutions.⁶⁹ The working group clarifies that the responsibility of financial institutions is not only “to prevent and address adverse impacts of their own activities” but also “to seek to prevent or mitigate impacts that are directly linked to their operations, products or

services through their business relationships.”⁷⁰ However, bankers who met with the working group noted that “their leverage and ability to prevent adverse impacts was limited” and stressed that the understanding of how the business responsibility applies to financial institutions was evolving through various initiatives, including the OECD MNE guidelines and the United Nations Environment Programme’s Finance Initiative, as well as legislative changes to domestic law definitions of fiduciary duties of asset managers.⁷¹ The working group also briefly considers the disproportionate impact of the recent financial crisis on vulnerable groups, especially the poor, racialized minorities and poor women.⁷²

Finally, the report considers business and human rights issues in the information and communications technology (ICT) sector.⁷³ Here, concerns are raised about the responsibility of ICT companies for compliance with “legal requirements for national security and countering terrorism,” where access to private data is involved, when operating both within the United States and abroad.⁷⁴ Other business and human rights responsibility issues raised with the ICT sector include the need to avoid conflict minerals in manufacturing supply chains and the need to address the harmful impacts of “improperly handled hazardous wastes.”⁷⁵

Because there has been a change in membership of the working group since the US country visit,⁷⁶ lessons from other more recent country visits may also provide insights into what can be expected.

62 *Ibid* at para 70.

63 *Ibid* at para 72.

64 *Ibid*.

65 *Ibid*.

66 *Ibid* at para 77 (referring also to relevant reports of other human rights mechanisms).

67 *Ibid* at para 78 (rights violations cited were of “individuals to the enjoyment of the highest attainable standard of health; to an adequate standard of living, including food; to safe drinking water and sanitation; and to the right of self-determination for indigenous peoples”).

68 *Ibid* at paras 79–80 (drawing attention to its own thematic report on business and the rights of Indigenous peoples, A/68/279).

69 *Ibid* at paras 81–88.

70 *Ibid* at para 81 (described as “an enabler of business activity, a gatekeeper of investment, an arbiter of economic risk and opportunity, and a major business sector in itself”).

71 *Ibid* at paras 82–83 (also referencing the Equator Principles, *supra* note 53, the Thun Group of Banks and meetings with socially responsible investors). Note that the application of the UNGPs to financial institutions remains controversial today. See e.g. the February 2017 letter from the working group to the Thun Group of Banks: UN OHCHR, *Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises* (2017) [Thun banks dispute], online: <www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf>.

72 US Country Visit Report, *supra* note 3 at paras 85–88.

73 *Ibid* at paras 89–93.

74 *Ibid* at para 90.

75 *Ibid* at para 92 (recommending in part that the Electronics Industry Citizenship Coalition “ensure that its code of conduct aligns with the Guiding Principles”).

76 On past and current membership of the working group, see OHCHR Working Group, *supra* note 1.

The most recent country visits were to Brazil, the Republic of Korea and Mexico; only Brazil's complete country report is currently available.⁷⁷ The Brazilian country visit was held in December 2015. Of particular interest for the purpose of this paper is the discussion of business and human rights issues arising in connection with "large-scale development projects," also a subject of study in Brazil by its National Council on Human Rights.⁷⁸ The Brazil country report notes that the working group heard "testimonies from affected communities about cases relating to extractive industries, agribusiness, and construction" that "illustrate recurrent concerns such as pollution, lack of consultation, inadequate government oversight, land expropriation, health impacts, and destruction of communities."⁷⁹ Three projects are considered in detail in the report: the construction of the Belo Monte hydro dam,⁸⁰ the Doce River mining disaster,⁸¹ and construction for the 2016 Olympics.⁸² Additional specific issues considered in the report are the protection of the rights of Indigenous peoples,⁸³ the risks facing human rights defenders⁸⁴ and labour rights.⁸⁵ Access to remedy, both state-based judicial and non-judicial, as well as non-state-based grievance mechanisms, receive attention, including the need to strengthen Brazil's NCP for the OECD MNE guidelines to address issues arising both within Brazil and abroad.⁸⁶ The Brazil report, like the US report, recommends that Brazil undertake to develop an NAP.⁸⁷

Although the full country reports on the Mexican and Korean visits are not available, a short statement made at the end of each visit provides useful insights. For example, following the visit

to the Republic of Korea, the working group observed that it was struck by the absence of women in senior management positions.⁸⁸ The Mexico statement similarly observes that "less than 5% of companies registered on Mexican stock exchanges have female CEOs."⁸⁹ While the Korea statement discusses supply chain responsibility and labour rights in some detail, the Mexico report focuses extensively upon Indigenous and environmental rights issues, including a toxic spill at a copper mine. The Mexico report also highlights the "alarming situation" facing human rights defenders, with "environmental human rights defenders and indigenous peoples" in particular being "targeted when they have shown opposition to development projects."⁹⁰

From this brief survey, it is clear that a wide range of issues have been examined during country visits by the Working Group on Business and Human Rights. The next section will consider the Canadian context and anticipate possible areas of interest that may be the subject of scrutiny by the working group.

77 UN HRC, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil*, UNGAOR, 32nd Sess, UN Doc A/HRC/32/45/Add.1 (2016), online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/096/43/PDF/G1609643.pdf?OpenElement>>.

78 *Ibid* at paras 18–45.

79 *Ibid* at para 19.

80 *Ibid* at paras 21–27.

81 *Ibid* at paras 28–33.

82 *Ibid* at paras 34–39.

83 *Ibid* at paras 46–47.

84 *Ibid* at paras 48–50.

85 *Ibid* at paras 51–55.

86 *Ibid* at paras 56–59.

87 *Ibid* at paras 61–62.

88 UN OHCHR, "Statement at the end of visit to the Republic of Korea by the Working Group on Business and Human Rights" (1 June 2016) [Republic of Korea Statement], online: <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20038&LangID=E>.

89 UN OHCHR, "Statement at the end of visit to Mexico by the United Nations Working Group on Business and Human Rights" (7 September 2016) under the heading "Labour rights", sub-heading "Gender" [Mexico Statement], online: <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20466&LangID=E>.

90 *Ibid* under the heading "Human rights defenders."

Canada and Implementation of the Guiding Principles: Anticipating the Country Visit

Canada has a long-standing commitment to international human rights law and is a party to most key treaties.⁹¹ Canada was also an active participant in the early days of the development of the UNGPs, as the cosponsor of the resolution appointing the UN special representative on business and human rights.⁹² There are no signs, however, that Canada is considering drafting an NAP for the implementation of the UNGPs. Nevertheless, Canada has taken some action to address concerns arising from the activities of Canadian extractive companies operating internationally, most recently in the form of the 2014 revision of Canada's CSR strategy for extractive companies operating abroad.⁹³ This section will briefly consider multiple dimensions of implementation of the UNGPs that could be considered by the UN working group on its visit to Canada.

First, the importance of policy coherence on business and human rights issues across the federal government is likely to be a priority. Aside from the process used to develop Canada's CSR strategy for extractive companies operating abroad,⁹⁴ there is no evidence of similar efforts at the federal level targeting other industry sectors or business more generally.⁹⁵ The working group is likely to suggest that Canada conduct an

assessment of policy coherence and effectiveness as part of a process to develop an NAP.

Transparency and reporting are areas highlighted under the state duty to protect. It is likely that the federal government will point to sector-specific legislative initiatives, such as the Extractive Sector Transparency Measures Act,⁹⁶ as well as the current review of the Canada Business Corporations Act (CBCA), which may provide for increased transparency on corporate board diversity.⁹⁷ While a proposal to require additional disclosure of environmental and social information as part of the CBCA review was not accepted,⁹⁸ securities law does require disclosure of environmental information for listed companies,⁹⁹ and consideration is being given to additional disclosure requirements relating to climate change risks.¹⁰⁰ However, unlike the United Kingdom and California, for example, Canada has not yet implemented legislation to require transparency in supply chains to avoid slave labour issues.¹⁰¹

In terms of human rights issues arising in conflict-affected areas, the federal government is likely to highlight Canada's role in the multi-stakeholder Voluntary Principles on Security and Human Rights, one of the standards promoted to

91 See generally Government of Canada, "Human rights treaties", online: <<http://canada.pch.gc.ca/eng/1448633333982>>.

92 Seck, "Canadian Mining", *supra* note 4 at 52.

93 2014 CSR Strategy, *supra* note 4.

94 Seck, "Canadian Mining", *supra* note 4 at 55–85 (describing the process leading to the drafting of the 2009 version of the CSR strategy).

95 However, Industry Canada does promote CSR, including international CSR standards and the UNGPs, to all Canadian businesses. See Industry Canada, "Corporate Social Responsibility", online: <www.ic.gc.ca/eic/site/csr-rse.nsf/eng/home> and Industry Canada, "International CSR Standards", online: <www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00587.html>.

96 SC 2014, c 39, s 376, online: <<http://laws-lois.justice.gc.ca/eng/acts/E-22.7/page-1.html>>.

97 Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act*, 1st Sess, 42nd Parl, 2015–2016, Part XIV.1, online: <www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8446299>.

98 See Andrew MacDougall et al, "Significant corporate governance changes in proposed amendments to the Canada Business Corporations Act" (24 October 2016), Osler, Hoskin & Harcourt LLP, online: <<https://www.osler.com/en/resources/governance/2016/significant-corporate-governance-changes-in-propos>>.

99 Canadian Securities Administrator, "CSA Staff Notice 51-333: Environmental Reporting Guidance" (27 October 2010), online: <www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101027_51-333_environmental-reporting.pdf>; see also Ontario Securities Commission, "Securities Laws and Instruments: OSC Notice 51-717: Corporate Governance and Environmental Disclosure", online: <www.osc.gov.on.ca/en/SecuritiesLaw_sn_20091218_51-717_corp-gov-enviro-disclosure.htm>.

100 Canadian Securities Administrators, "Canadian Securities Regulators Announce Climate Change Disclosure Review Project" (21 March 2017), online: <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1567>>.

101 *Modern Slavery Act 2015* (UK), c 30, online: <www.legislation.gov.uk/ukpga/2015/30/contents/enacted>; *California Transparency in Supply Chains Act*, Cal Civ Code, § 1714.43 (2010), online: <<https://www.dol.gov/ilab/child-forced-labor/California-Transparency-in-Supply-Chains-Act.html>>.

extractive companies operating internationally under the CSR strategy.¹⁰² Canada does not have legislation to address conflict minerals in supply chains, although a bill of this nature has been introduced to the legislature on more than one occasion.¹⁰³ Another topic that might be discussed with the working group is the role that Canada has played in the development of key guidance tools for human rights due diligence through the OECD, including the development of the OECD conflict minerals guidance¹⁰⁴ and the recently released Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.¹⁰⁵

The state-business nexus is a key component of the state duty to protect. Here, the government of Canada will likely refer to Export Development Canada's (EDC's) new Annual Public Forum platform for stakeholder engagement,¹⁰⁶ as well as its commitment to CSR, including business ethics¹⁰⁷ and environmental and social review,¹⁰⁸ with strategic priorities of climate change, human rights and transparency.¹⁰⁹ EDC's adoption of both the OECD Recommendation on Common Approaches on Environment¹¹⁰ and the Equator

Principles¹¹¹ will likely be noted. The value of EDC's compliance officer in enhancing transparency and accountability may also be a topic for discussion.¹¹²

It is likely that attention will be paid to the fact that the CSR strategy for extractive companies operating abroad currently provides that companies that refuse to participate in dispute resolution processes, such as the OECD NCP¹¹³ or the CSR Counsellor for the Extractive Industries,¹¹⁴ will have this refusal taken into account when seeking support from the EDC or trade commissioner services when abroad.¹¹⁵ The effectiveness of Canadian state-based non-judicial remedies will certainly be a subject for discussion, and it is likely that both these mechanisms will be the subject of criticism. Notably, civil society groups have recently proposed legislation creating an independent mining ombudsperson with fact-finding powers to resolve disputes involving Canadian mining companies operating internationally.¹¹⁶ An interesting question is whether the working group will take a position on this proposal, and whether the group will also, or instead, suggest strengthening the structure of the OECD NCP process to align with best practices, including transparency and fact finding, as was suggested with regard to the US NCP.¹¹⁷

Access to judicial remedy will likely be a topic that the working group will examine. While domestic access to justice issues remain a subject of attention within Canada, the working group is more likely

102 2014 CSR Strategy, *supra* note 4.

103 Bill C-486, *Conflicts Minerals Act: An Act respecting corporate practices relating to the extraction, processing, purchase, trade and use of conflict minerals from the Great Lakes Region of Africa*, 2nd Sess, 41st Parl, 2014, online: <<https://openparliament.ca/bills/41-2/C-486/?tab=mentions&singlepage=1>>.

104 OECD, "OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" (Paris, France: OECD Publishing, 2016), online: <www.oecd.org/corporate/mne/mining.htm>.

105 OECD, "OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector" (Paris, France: OECD Publishing, 2017), online: <<http://dx.doi.org/10.1787/9789264252462-en>>.

106 EDC, "EDC's Annual Public Forum", online: <<https://edc.trade/promo/en/apf2017/?il=hp-resbrwsr-3-apf-E>>.

107 EDC, "Business Ethics", online: <<https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Pages/business-ethics.aspx>> (including anti-corruption and human rights programs).

108 EDC, "Environment", online: <<https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Pages/default.aspx>> (environmental and social risk management framework, including a review directive and disclosure policy).

109 EDC, "Corporate Social Responsibility", online: <<https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Pages/default.aspx>>. Other key components of CSR at EDC are community investment and employee engagement.

110 *Ibid.* See also OECD, "Common Approaches", *supra* note 53.

111 EDC, *supra* note 109; see also Equator Principles, *supra* note 53, and IFC, "Performance Standards", *supra* note 38 (making the IFC performance standards the dominant approach to support in developing countries).

112 EDC, "Compliance Officer", online: <<https://www.edc.ca/EN/About-Us/Management-and-Governance/Compliance-Officer/Pages/default.aspx>>.

113 Global Affairs Canada, "Canada's National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs)", online: <www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R>.

114 Global Affairs Canada, "Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor", online: <www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?lang=eng>. See also Seck, "Canadian Mining", *supra* note 4 at 79-85.

115 2014 CSR Strategy, *supra* note 4; see Global Affairs Canada, "Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at Gyama Valley, Tibet Autonomous Region", online: <www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>.

116 Canadian Network on Corporate Accountability, "Ombudsman", online: <<http://cnca-rcrce.ca/fr/campagnes-justice/ombudsman/>>.

117 US Country Visit Report, *supra* note 3 at para 61.

to consider the extent to which Canadian courts are agreeing to hear cases brought by foreign plaintiffs alleging human rights harms arising from Canadian corporate conduct abroad. At one time, there were very few such cases, but the judicial landscape has changed recently, with three such claims proceeding to trial on the merits in Canadian courts.¹¹⁸ Nevertheless, the working group may consider whether barriers remain for legitimate plaintiffs seeking transnational access to remedy.¹¹⁹

The focus of most of the initiatives discussed above is on responsible business conduct by Canadian companies outside of Canada, but it is clear that implementation within Canada will also be a focus. It is likely that Canada will be seen as having strong labour laws (perhaps with the exception of protections for migrant agricultural workers) and that the work of human rights commissions will be viewed favourably.¹²⁰ However, it is also likely that attention will be drawn to several areas and sectors that may be seen less favourably, including respect for Indigenous rights. For example, the Supreme Court of Canada has clarified that the Crown has a duty to consult and accommodate Indigenous peoples under section 35 of the Constitution and that the procedural aspects may be delegated.¹²¹ Nevertheless, controversy remains within Canada as to what precisely may be delegated. Companies, in particular those in the extractive sector, routinely do consult and reach agreements with Indigenous communities — sometimes, but

not always — due to legislative requirements.¹²² When consultation does not lead to agreement, protests and blockades (and more litigation) may result.¹²³ It is unclear whether domestic Canadian understandings of the duty to consult and accommodate align with the UNGPs. Irrespective of whether the state is in compliance with its own duties, businesses must still respect Indigenous rights.¹²⁴ It would not be surprising if extractive industries (mining, oil and gas, and pipeline companies in particular) are among the sectors likely to be under the spotlight of the working group.¹²⁵ Other sectors that may be examined include agribusiness,¹²⁶ ICT industries¹²⁷ and the financial sector.¹²⁸ It is possible that attention will be drawn to the potential of subnational governments (provinces and municipalities) to play a role in protecting human rights, as was the case in the US country report.¹²⁹ The low rate of female executives on corporate boards of

118 See especially *Choc v Hudbay Minerals Inc*, 2013 ONSC 141, online: <<http://canlii.ca/t/ghr0n>>; *Garcia v Tahoe Resources Inc*, 2017 BCCA 39, online: <<http://canlii.ca/t/gx49k>>, allowing the appeal of *Garcia v Tahoe Resources Inc*, 2015 BCSC 2045; *Araya v Nevsun Resources*, 2016 BCSC 1856, online: <<http://canlii.ca/t/gv11z>>.

119 See e.g. UN OHCHR, “OHCHR Accountability and Remedy Project: improving accountability and access to remedy in cases of business involvement in human rights abuses”, online: <www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>.

120 See e.g. Canadian Human Rights Commission, online: <<http://www.chrc-ccdp.gc.ca/eng>> and Ontario Human Rights Commission, online: <www.ohrc.on.ca/en>.

121 See *Haida Nation v British Columbia*, 2004 SCC 73, online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do>>. See also *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

122 Penelope C Simons & Lynda Margaret Collins, “Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective” (2010) 6:2 McGill J of Sustainable Development L 2; Norah Kielland, “Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements” Library of Parliament Research Publications, In Brief No. 2015-29-E (5 May 2015), online: <www.lpp.parl.gc.ca/Content/LOP/ResearchPublications/2015-29-e.html?cat=aboriginal>.

123 See e.g. Amnesty International, “Resource Development in Canada”, online: <www.amnesty.ca/our-work/issues/indigenous-peoples/indigenous-peoples-in-canada/resource-development-in-canada>.

124 Further, understandings of Indigenous rights must be informed by international law and the United Nations Declaration on the Rights of Indigenous Peoples, which Canada has recently committed to implement. See e.g. Shin Imai, “Consult, Consent, and Veto: International Norms and Canadian Treaties” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto, ON: University of Toronto Press, 2017) at 371.

125 See e.g. Treaty Alliance Against Tar Sands Expansion [Treaty Alliance], online: <www.treatyalliance.org/> (listing opposition to the Kinder Morgan Trans Mountain, TransCanada Energy East, TransCanada Keystone XL, Enbridge Northern Gateway, and Enbridge Line 3 pipelines, due to concerns over both water quality and climate change).

126 See Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Working Group on the issue of Human rights and transnational corporations and other business enterprises*, UNGAOR, 71st Sess, UN Doc A/71/291 (2016), online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/249/06/PDF/N1624906.pdf?OpenElement>>.

127 US Country Visit Report, *supra* note 3 at paras 89–93.

128 See *ibid* at paras 81–84; Thun banks dispute, *supra* note 71; see also *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191, online: <<http://canlii.ca/t/fkg76>>, dismissing appeal from 2010 ONSC 2421, online: <<http://canlii.ca/t/29x4x>> (arguing in part that the Toronto Stock Exchange owes a duty of care to Indigenous peoples whose rights were violated in the process of establishing a mine listed on the exchange).

129 US Country Visit Report, *supra* note 3 at paras 73–76.

directors in Canada may also merit consideration, as discussed in the Korea and Mexico reports.¹³⁰

One interesting question is whether the working group might link the many Canadian Indigenous rights and oil and gas industry conflicts¹³¹ to larger questions of climate change and human rights. For example, the Government of Canada explicitly recognizes that climate change could adversely affect “the spectrum of recognized international human rights norms” and that it can “worsen existing situations of poverty and fragility and create new vulnerabilities” especially for Indigenous peoples, women and children.¹³² Among the Canadians most vulnerable to climate change are the Inuit, as eloquently and powerfully argued by Inuk climate activist Sheila Watt-Cloutier in her recent book, *The Right to Be Cold*.¹³³ Watt-Cloutier led the Inuit climate change petition to the Inter-American Commission on Human Rights in 2005,¹³⁴ the first international legal action on climate change. While novel at the time, the link between climate change and the enjoyment of human rights is now increasingly accepted, as evidenced by the multiple resolutions and submissions on this topic at the HRC.¹³⁵ That business has a responsibility to respect human rights and that this also applies to rights affected by climate change is argued in the recent Philippines human rights petition, in which some of the defendant

“carbon majors” are Canadian companies.¹³⁶ This might be an issue for the working group to consider in Canada, both in terms of domestic and international companies operating within Canada and of Canadian companies operating outside of Canada. The issue of climate change is clearly of great concern to Indigenous peoples in Canada, who often lead opposition to controversial pipeline proposals out of concern not only for local environmental harm, but also for the impact of climate change on future generations.¹³⁷

Preliminary Conclusions: Time to Develop an NAP

It remains to be seen what specific issues will be raised during the working group’s country visit to Canada. Nevertheless, it seems highly likely that one outcome will be a recommendation that Canada develop an NAP for the implementation of the UNGPs. As of May 9, 2017, 14 countries have published NAPs: Colombia, Denmark, Finland, Lithuania, the Netherlands, Norway, Spain, Sweden and the United Kingdom, and, most recently, France, Germany, Italy, Switzerland and the United States.¹³⁸ More than 20 other countries have committed to developing NAPs in the near future, but Canada is not listed as one.¹³⁹

While it is beyond the scope of this paper to make detailed recommendations regarding what a Canadian NAP might include, a few observations are in order. Of the NAPs drafted to date, many have tended to follow closely the principles in the UNGPs — or its three-pillar structure — but with detailed

130 See Republic of Korea Statement, *supra* note 88, and Mexico Statement, *supra* note 89. See also Anita Anand & Krupa Kotecha, “Canada’s approach to board diversity needs a rethink”, *The Globe and Mail* (22 March 2017), online: <www.theglobeandmail.com/report-on-business/rob-commentary/canadas-approach-to-board-diversity-needs-a-rethink/article34386450/>.

131 See the list of disputes in Treaty Alliance, *supra* note 125.

132 Government of Canada, “Climate change and human rights”, online: <http://international.gc.ca/world-monde/world_issues-enjeux-mondiaux/climate_change_rights-droits_changements_climat.aspx?lang=eng>.

133 Sheila Watt-Cloutier, *The Right to Be Cold: One Women’s Story of Protecting Her Culture, the Arctic and the Whole Planet* (Toronto, ON: Penguin, 2015).

134 Inuit Circumpolar Council Canada, “Inuit Petition Inter-American Commission on Human Rights to Oppose Climate Change Caused by the United States of America” (7 December 2005), online: <www.inuitcircumpolar.com/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america.html>; see also Arctic Athabaskans’ petition against Canada: Verónica de la Rosa Jaimes, “The Petition of the Arctic Athabaskan Peoples to the Inter American Commission on Human Rights” (22 July 2013), *ABlawg.org* (blog), online: <<http://ablawg.ca/2013/07/22/the-petition-of-the-arctic-athabaskan-peoples-to-the-inter-american-commission-on-human-rights/>>.

135 UN OHCHR, “Documents and Resources: HRC Resolutions on human rights and climate change”, online: <www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRCAction.aspx>.

136 Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, “Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change”, online: <www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf> (Canadian companies listed on page 4 of the petition include EnCana, Suncor, Canadian Natural Resources, Talisman, Nexen and Husky Energy).

137 See Treaty Alliance, *supra* note 125.

138 UN OHCHR, “State National Action Plans”, online: <www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

139 *Ibid.*

attention only to a subset of select principles.¹⁴⁰ Of note is that while some NAPs use the phrase “corporate social responsibility” and set out a voluntary expectation for business conduct, others adopt a “business and human rights” approach that is used either interchangeably with CSR, or clearly distinguished from it.¹⁴¹ The US plan, on the other hand, adopts the language of “responsible business conduct,” which is defined as emphasizing both positive business impacts and the importance of avoiding adverse impacts.¹⁴² As a preliminary matter, then, it appears that the scope and purpose of a Canadian NAP could take many forms.

The majority of NAPs to date take the position that the country’s domestic legislation already safeguards human rights and therefore focus on furthering business respect for human rights — responsible business conduct or CSR — internationally.¹⁴³ In terms of the NAPs’ subject matter, most included attention to supply chain

responsibility,¹⁴⁴ as well as the importance of reporting and transparency,¹⁴⁵ with the Denmark plan including both human rights and climate impacts in reporting requirements.¹⁴⁶ Most NAPs consider gender equality issues,¹⁴⁷ while Indigenous rights were addressed in a smaller subset of NAPs.¹⁴⁸ Of note, the Norway plan highlights the vulnerability of Indigenous peoples to climate change.¹⁴⁹ Virtually all NAPs discuss the role of the OECD NCPs as part of the issue of access to remedy.¹⁵⁰ The obligations of export credit or related agencies are addressed in detail in most NAPs,¹⁵¹ and most NAPs committed to considering the incorporation of business responsibilities for human rights into trade and investment agreements.¹⁵²

140 For example, Colombia, Denmark, Finland, Germany, Italy, Lithuania, Norway, Sweden, Switzerland and the United Kingdom all loosely follow the structure of UNGPs. The Netherlands plan and the US plan are outliers in terms of structure.

141 For example, the Lithuania plan refers to CSR in a voluntary sense. See Lithuania, “Lithuania’s Action Plan on the Implementation of the United Nations Guiding Principles on Business and Human Rights” (2015) at 5, online: <www.ohchr.org/Documents/Issues/Business/NationalPlans/Lithuania_NationalPlanBHR.pdf>. The Netherlands, Norway and Sweden plans, while using the language of CSR, appear to employ the term in a more normative “business and human rights” sense, noting the “responsibility” of business and the “expectations” of government. See Netherlands, “National Action Plan on Business and Human Rights” (2014) at 9 [Netherlands Plan], online: <<https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>>; Sweden, Ministry for Foreign Affairs, “Action plan for business and human rights” (2015) at 13 [Sweden Plan], online: <www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>; and Norway, Ministry of Foreign Affairs, “Business and Human Rights: National Action Plan for the Implementation of the UN Guiding Principles” (2015) at 9, 14 [Norway Plan], online: <www.regjeringen.no/globalassets/departementene/ud/vedlegg/mr/business_hr_b.pdf>. The other NAPs, with the exception of the US plan, appear to either implicitly or explicitly adopt a “business and human rights” approach, except for the Italy plan which distinguishes CSR from business and human rights, indicating CSR is dealt with elsewhere. See Italy, “Italian National Action Plan on Business and Human Rights” (2016) at 8, online: <www.cidu.esteri.it/resource/2016/12/49117_f_NAPBHENGFINALEDEC152017.pdf>.

142 United States Secretary of State, “Responsible Business Conduct: First National Action Plan for the United States of America” (2016) at 4 [US Plan], online: <www.state.gov/documents/organization/265918.pdf>.

143 The US and Switzerland plans, for example, explicitly adopt a focus on the conduct of businesses operating abroad. See *ibid* at 4; Switzerland, “Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights” (9 December 2016) at 11/51 [Switzerland Plan], online: <<https://business-humanrights.org/sites/default/files/documents/Report%20on%20Swiss%20strategy%20for%20implementation%20of%20UNGPs.pdf>>.

144 See e.g. the updated UK plan which refers to the G7 Leaders Declaration (7–8 June 2015) on point: “To enhance supply chain transparency and accountability, we encourage enterprises active or headquartered in our countries to implement due diligence procedures regarding their supply chains.” United Kingdom, Secretary of State for Foreign and Commonwealth Affairs, “Good Business: Implementing the UN Guiding Principles on Business and Human Rights” (May 2016) at 3 [UK Updated Plan], online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf>.

145 See e.g. *ibid* at 4 (referring to the importance of reporting/transparency); 8 (referring to reporting requirements under the Modern Slavery Act and Companies Act 2006); 16 (referring to the Corporate Human Rights Benchmark Initiative and the UNGP Reporting Framework); and 16 (noting a commitment to “ensure the provisions of [the] EU Directive on non-financial disclosure are transposed in the UK”).

146 Denmark, “Danish National Action Plan – implementation of the UN Guiding Principles on Business and Human Rights” (2014) at 14 [Denmark Plan], online: <www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf> (noting that, as of 2013, the largest Danish companies “expressly must state in their reports what measures they are taking to respect human rights and to reduce their impact on the climate.... If the company does not have policies for human rights or climate issues, this must also be disclosed”).

147 See e.g. Germany, “Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte” (2016) at 15–16, online: <www.auswaertiges-amt.de/cae/servlet/contentblob/754690/publicationFile/222786/161221-NAP-DL.pdf> (noting domestic efforts to ensure gender parity); and 18–19 (noting the goal of empowerment of women through development projects).

148 For example, Indigenous issues are referred to in the plans of Colombia, Denmark, Finland, Germany, Norway, Spain, Switzerland, the United Kingdom and the United States.

149 Norway Plan, *supra* note 141 at 32, 34.

150 See e.g. Denmark Plan, *supra* note 146 at 12, 20–21 (noting that the Danish NCP is established by law and can conduct investigations abroad on its own accord).

151 In this regard, many of the NAPs refer to the OECD’s “Common Approaches on Export Credits and the Environment,” *supra* note 53. See e.g. Denmark Plan, *supra* note 146 at 13; UK Updated Plan, *supra* note 144 at 8; Netherlands Plan, *supra* note 141 at 9.

152 See e.g. Sweden Plan, *supra* note 141 at 21, 29; UK Updated Plan, *supra* note 144 at 11.

There is wide variation among the NAPs in terms of whether or how they choose to incorporate environmental issues. Some consider environmental issues incidentally and in passing, but do not devote attention to environmental harm as a business and human rights issue.¹⁵³ Other NAPs explicitly draw a link between the environment and human rights and, in some cases, incorporate consideration of climate change throughout.¹⁵⁴ Those that do consider the environmental dimensions of business and human rights then link to a wide variety of legal and policy measures, including reporting requirements, clauses in trade agreements, the rights of Indigenous and local communities, agricultural policy, export credit agencies and environmental crimes. Some NAPs note that attention to business responsibilities for human rights will help in implementation of Agenda 2030 and the Sustainable Development Goals (SDGs).¹⁵⁵

A steadily increasing number of countries are adopting NAPs on business and human rights. Some, but not all, integrate consideration of environmental issues, Indigenous issues and climate change. Canada, with its historic commitment to international human rights law and a strong commitment to Indigenous rights, environmental protection and addressing climate change, is well placed to seize the opportunity to develop a cutting-edge NAP of domestic and global significance. The country visit of the Working Group on Business and Human Rights may provide the necessary motivation to move forward.

Author's Note

The author would like to thank Jessica Buckerfield for excellent research assistance.

153 This was the case, for example, with the Colombia, Denmark, Finland, Germany, Lithuania, Netherlands, Sweden, Switzerland and United Kingdom plans.

154 See e.g. the Italy, Norway, Spain and United States plans. The Norway plan is particularly clear on these linkages. See Norway Plan, *supra* note 141 at 5 (on climate change), 13 (linking human rights to environmental protection and climate change), and 32 (regarding principle 12 of the UNGPs, stating: "Impacts on the climate and the environment resulting from the enterprise's activities, for example through land use, exploitation of natural resources, greenhouse gas emissions or releases of hazardous substances, may also have adverse impacts on a broader range of human rights, such as minority and indigenous people's rights or the right to life, health, food, water or adequate housing. If a company is responsible for such impacts, it is also responsible for addressing them").

155 See e.g. Switzerland Plan, *supra* note 143 at 6/51 (referring specifically to SDGs 8, 10, 12 and 17); Sweden Plan, *supra* note 141 at 6, 29. "The 2030 Agenda for Sustainable Development and the SDGs", online: European Commission <http://ec.europa.eu/environment/sustainable-development/SDGs/index_en.htm>.

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan qui formule des points de vue objectifs dont la portée est notamment mondiale. Nos recherches, nos avis et l'opinion publique ont des effets réels sur le monde d'aujourd'hui en apportant autant de la clarté qu'une réflexion novatrice dans l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

**Centre for International
Governance Innovation**

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

