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## **From Corporate Social Responsibility to Accountability Mechanisms: The Role of the Convention on Biological Diversity**

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## **Abstract**

This paper traces the progressive shift at the international level from purely voluntary approaches (corporate social responsibility or CSR) towards accountability mechanisms to ensure the environmentally sound conduct of private entities. It examines whether the most recent international discussion on human rights and corporate accountability have adequately considered environmental protection concerns. It then concentrates on the growing number of international oversight mechanisms that provide a readily-available and impartial avenue for addressing complaints against private companies for their negative environmental impacts. The paper concludes that certain key standards elaborated within the framework of the Convention on Biological Diversity, in particular environmental-cultural impact assessments and benefit-sharing, are increasingly referred to in the decisions of different international corporate accountability mechanisms to ensure both the protection of the environment and of human rights.

## **Keywords**

Corporate accountability; corporate social responsibility; biodiversity; business and human rights; benefit-sharing; international monitoring

## From Corporate Social Responsibility to Accountability Mechanisms

ELISA MORGERA

### Introduction

The international community has debated the need for international regulation and oversight of multinational companies for almost forty years.<sup>1</sup> While States have hitherto resisted the creation of an international legally binding instrument on the matter, voluntary<sup>2</sup> and soft-law<sup>3</sup> international instruments and initiatives of inter-governmental and multi-stakeholder origin have proliferated to support and encourage an environmentally sound conduct of multinational and other companies. This chapter seeks to trace the evolution of such international practice with a view to highlighting a progressive shift from purely voluntary approaches (corporate social responsibility or CSR<sup>4</sup>) towards accountability mechanisms. To this end, the chapter will first briefly discuss the increasing convergence in the definition of international environmental standards for corporate accountability operated by a variety of international organisations and processes (12.1.).<sup>5</sup> It will then focus on the most recent discussion on human rights and corporate accountability, with a view to determining whether environmental protection concerns are adequately taken into account (12.2.). Attention will then concentrate on the growing number of international oversight and dispute avoidance mechanisms that provide a readily-available and impartial avenue for addressing individuals', communities' and civil society groups' complaints against private companies and the possibility for an international entity to operate on the ground for fact-finding and/or mediation purposes (12.3).

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<sup>1</sup> Early attempts were undertaken in the context of the UN Economic and Social Council that adopted a resolution in 1972 acknowledging the lack of an international regulatory framework for multinational corporations and the need to institutionalise international debate on that issue: ECOSOC Res. 1721 (LIII) 28 July 1972.

<sup>2</sup> This is notably the case of international public-private partnerships, which were endorsed as an official outcome of the World Summit on Sustainable Development in 2002. See C. Streck, 'The World Summit on Sustainable Development: Partnerships as the New Tool in Environmental Governance' (2003) 13 *Yearbook of International Environmental Law* 21; E. Morgera, *Corporate Accountability in International Environmental Law* (Oxford: Oxford University Press, 2009) ch. 12; B. Richardson's contribution in this volume (below chapter 14).

<sup>3</sup> This is the case of international standards on corporate environmental accountability elaborated in the context of international organisations, which will be discussed in detail in section 2 below.

<sup>4</sup> CSR is the label used to group efforts and initiatives that are purposely voluntary in their approach to sustainable corporate conduct. Even voluntary initiatives may have, however, legal implications or relevance. See D. McBarnet, A. Voiculescu, T. Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007).

<sup>5</sup> A more extensive treatment of this subject can be found in Morgera, above n 2, chs. 4-8.

In concluding, this contribution aims to bring to light an under-studied aspect of the proliferation of relevant international initiatives. An argument will be put forward that the risk of fragmentation of international guidance on corporate accountability due to the multiplicity of different international accountability processes now in existence is significantly mitigated by the convergence of the standards used to guide and assess private companies' conduct. Previous research of mine had indicated that international standard-setting initiatives were increasingly characterised by a significant degree of convergence.<sup>6</sup> In the early 2010s, this trend - as discussed in this contribution - has nothing but accelerated. The complementary finding of the present study is that the outcomes of international monitoring activities, which are equally carried out by a plethora of different international actors, also show increasing signs of convergence and cross-fertilization. Notably, the environmental standards elaborated within the framework of the Convention on Biological Diversity, in particular environmental-cultural impact assessments and benefit-sharing, are referred to in the decisions of different international corporate accountability mechanisms. This is a significant contribution to ensuring substantive unity<sup>7</sup> across different areas of international law, notably on the environment and on human rights, that may be negatively affected by the conduct of private operators (12.4).

### **1.1 From CSR to corporate accountability through converging substantive environmental standards**

The term 'corporate accountability' was endorsed by the international community at the 2002 World Summit on Sustainable Development (WSSD),<sup>8</sup> and can be understood as a the legitimate expectation that reasonable efforts will be put in place, according to international standards, by private companies and foreign investors for the protection of a certain global interest or the attainment of a certain internationally agreed environmental objective.<sup>9</sup> The expectations and relevant international standards that make up corporate accountability in international environmental law have been gradually spelt out through various international processes, some of which pre-dated or ran in parallel with the WSSD. These processes are characterised by different approaches (regulation vs collaboration), nature (inter-governmental vs multi-stakeholder), and legal status (hard vs soft law). Nonetheless, upon

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<sup>6</sup> Morgera, above n 2.

<sup>7</sup> P-M. Dupuy, *L'unité de l'ordre juridique international* (The Hague : Martinus Nijhoff Publishers, 2003).

<sup>8</sup> Paragraph 49 of the WSSD Plan of Implementation, UN. Doc. A/CONF.199/20, Resolution 2, Annex, 4 September 2002.

<sup>9</sup> Morgera, above n 2, ch. 2.

closer inspection, they all build upon the same international standards for corporate environmental accountability.

These instruments include the ill-fated UN draft Code of Conduct for Transnational Corporations,<sup>10</sup> whose negotiations collapsed in the early 1990s,<sup>11</sup> and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights,<sup>12</sup> which were adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights<sup>13</sup> (a body comprising independent human rights experts acting in their personal capacity) but not by the former UN Commission on Human Rights.<sup>14</sup> The UN Norms thus reached a level of expert legitimacy, but no political legitimisation.<sup>15</sup> Relevant instruments also include the intergovernmentally approved OECD Guidelines for Multinational Corporations,<sup>16</sup> the partnership-focused principles of the UN Global Compact<sup>17</sup> (an initiative of the UN-Secretary General with support from various UN bodies)<sup>18</sup> and the Performance Standards of the World Bank's International Finance Corporation (IFC).<sup>19</sup> The

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<sup>10</sup> The draft Code of Conduct on Transnational Corporations, UN Doc. E/1990/94, 12 June 1990 ('UN Draft Code').

<sup>11</sup> W. Sprote, 'Negotiations on a United Nations Code of Conduct on Transnational Corporations' (1990) 33 *German Yearbook of International Law* 331, at 339.

<sup>12</sup> Commentary to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003 ('Commentary UN Norms')

<sup>13</sup> See 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003)

<sup>14</sup> The Commission did not adopt, but only 'took note' of the 'Norms' stating that they had 'not been requested by the Commission and, as a draft proposal, had no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.' Commission's decision 2004/116: The responsibilities of transnational corporations and related business enterprises with regard to human rights (E/CN.4/DEC/2004/116, 20 April 2004), paragraph C.

<sup>15</sup> See Simon Walker's contribution in: United Nations Research Institute for Social Development, 'Corporate Social Responsibility and Development: Towards a New Agenda: Summaries of Presentations made at the UNRISD' Conference (Geneva, 17-18 November 2003), at 85.

<sup>16</sup> OECD, *The OECD Guidelines for Multinational Enterprises* (OECD, 2011) ('OECD Guidelines')

<sup>17</sup> The website of the Global Compact can be found at <http://www.unglobalcompact.org/Portal/Default.asp>. See also United Nations Guide to the Global Compact: A Practical Understanding of the Vision and the Nine Principles, at 58, found at [www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/unge\\_html\\_content/Public\\_Documents/gcguide.pdf](http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/unge_html_content/Public_Documents/gcguide.pdf)

<sup>18</sup> In time, the Global Compact received an intergovernmental endorsement through General Assembly resolutions 62/211 'Towards Global Partnership' (2007) para. 9 and 64/223 'Towards Global Partnership' (2009) para. 13. The question of the intergovernmentally agreed mandate of the Global Compact remains open, however. See the Joint Inspection Unit, *United Nations Corporate Partnerships: The role and functioning of the Global Compact*, UN Doc. JIU/REP/2010/9 (2010), para. 13-18 and recommendation 1; and 'A response from the Global Compact Office' 24 March 2011, at 2.

<sup>19</sup> IFC, *Performance Standards on Social and Environmental Sustainability*, adopted by the IFC Board on 21 February 2006 ('2006 IFC Performance Standards'). A revised version was adopted in 2011 and is discussed below: *2012 IFC Performance Standards*, available at: <http://www.ifc.org/ifcext/policyreview.nsf/Content/2012-Edition#PerformanceStandards>. See IFC press release, 'IFC updates Environmental and Social Standards, strengthening commitment to sustainability and transparency' 12 May 2011.

latter in particular includes environmental standards clearly identifying the responsibility of the private sector on the basis of international environmental agreements,<sup>20</sup> and have been widely followed by regional development banks as well as major commercial banks.<sup>21</sup>

A series of common standards have emerged from these initiatives that appear to have reached a significant level of detail and acceptance at the international level as directly applicable to private companies. They include the environmental impact self-assessment, namely the ongoing assessment, beyond legal requirements at the national level, of the possible environmental impacts of private companies' activities before and during their operations, on the basis of scientific evidence, as well as communication with likely-to-be-affected communities.<sup>22</sup> On the basis of such continuous assessment, private companies are further to elaborate environmental management systems (EMS) to assist in controlling direct and indirect impacts on the environment and possibly to continually improve their environmental performance.<sup>23</sup> In accordance with their environmental impact assessments and management systems, private companies are further expected to reasonably take active steps, including the suspension of certain activities, to prevent or minimise an environmental damage, particularly in case of likely transboundary environmental harm or environmental harm with serious human rights consequences.<sup>24</sup> In addition, in the face of scientific uncertainty, private companies are further expected to undertake precautionary action by taking the most cost-effective early action to prevent the occurrence of environmental harm, or by avoiding delays in minimising such harm.<sup>25</sup> Disclosure of public information,<sup>26</sup> direct

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<sup>20</sup> For a more in-depth discussion, see Morgera, above n 2, ch 7. Note that the IFC provides both direct and indirect investments: in the latter case, the Performance Standards apply to financial intermediaries rather than to private companies carrying out projects in developing countries. See B.J. Richardson, 'Financing Sustainability: The New Transnational Governance of Socially Responsible Investment' (2008) 17 *Yearbook of International Environmental Law* 73.

<sup>21</sup> D. Ong, 'From 'International' to 'Transnational' Environmental Law? A Legal Assessment of the Contribution of the 'Equator Principles' to International Environmental Law' (2010) 79 *Nordic Journal of International Law* 35–74; C. Wright, 'Setting Standards for Responsible Banking: Examining the Role of the International Finance Corporation in the Emergence of the Equator Principles', in F. Biermann, B. Siebenhüner and A. Schreyrögg (eds.), *International Organisations in Global Environmental Governance* (Abingdon: Routledge, 2009) 51–70.

<sup>22</sup> Commentary UN Norms, above n 12, at (b) and (c); OECD Guidelines, above n 16, chapter VI, para 3; 2006 IFC Performance Standards, above n 19, para. 4-6 (cf. 2012 IFC Performance Standards 1, above n 19, para 5-7).

<sup>23</sup> OECD Guidelines, above n 16, chapter VI, para. 1 and Commentary, para. 60; Commentary UN Norms, above n 12, section (g); 2006 IFC Performance Standards, above n 19, para. 16 and 23 (cf. 2012 IFC Performance Standard 1, above n 19, para 17 and 24).

<sup>24</sup> OECD Guidelines, above n 16, chapter VI, para 5; 2006 IFC Performance Standard 3, above n 19 (cf. 2012 IFC Performance Standard 3); implicitly, Principle 10 of the Global Compact (Guide to the Global Compact, above n. 17, at 64); Commentary UN Norms, above n 12, at (e)-(g).

<sup>25</sup> The Global Compact, Principle 7 and Guide to the Global Compact, above n. 17, at 54; OECD Guidelines, above n 16, chapter VI, para. 4; UN Norms, above n 13, section G.

consultations with the public,<sup>27</sup> and the creation of a review or appeal process for communities to express their complaints,<sup>28</sup> are complementary and mutually reinforcing procedural standards. What has been more difficult to determine is a substantive standard for corporate environmental accountability: only the IFC standards attempted to identify such a standard as the sustainable natural resource management<sup>29</sup> and respect for internationally protected sites.<sup>30</sup>

Such convergence on international standard-setting became even more visible in 2011, when both the OECD Guidelines and the IFC Standards were revised in order to, *inter alia*, take into account the development of the UN Framework on Business and Human Rights (discussed below). The review brought about further convergence in the procedural standards for corporate environmental accountability and new developments in terms of substantive standards, in particular linked to biodiversity and climate change.

On the procedural side, the 2011 review of the OECD Guidelines stressed stakeholder engagement as an interactive and two-way process based on good faith for the planning and decision-making concerning projects or activities ‘that may significantly impact local communities’ such as those involving the intensive use of land and water, as well as disclosure of climate change and biodiversity-specific information.<sup>31</sup> In addition, it included references to due diligence, reflecting the key concept underpinning the UN Framework on Business and Human Rights. These recent revisions, however, have been criticised by civil society for their lack of explicit reference to prior informed consent in the consultations with indigenous peoples, lack of indications on what constitutes an adequate impact assessment

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<sup>26</sup> UN Draft Code, above n 10, para 42; United Nations Guide to the Global Compact, above n 17, at 58; UN Norms, above n 13, (b) and (c); 2006 IFC Performance Standard 3, above n 19, para 19 (cf 2012 IFC Performance Standard 1, above n 19, para 29); OECD Guidelines, above n 16, chapter VI, para 2.

<sup>27</sup> Guide to the Global Compact, above n 16, at 58; OECD Guidelines, above n 16, chapter VI, para 2; 2006 IFC Performance Standard 3, above n 19, para 19 and 23 (cf 2012 IFC Performance Standards 1, para 30-33); 6, para 12; 7, objectives and para 9; and 8, para 6, all above n 19.

<sup>28</sup> 2006 IFC Performance Standard 3, above n 19, para 16 and 23 (cf 2012 IFC Performance Standard 1, above n 19, para 35).

<sup>29</sup> 2006 IFC Performance Standards 1, above n. 19, fn 7 made reference to ‘sustainable resource management’ as ‘the use, development and protection of resources in a way or at a rate that enables people and communities to provide for their present social, economic and cultural well-being while also sustaining the potential of those resources to meet the reasonably foreseeable needs of future generations’ (cf. 2012 IFC Performance Standard 6, above n 19).

<sup>30</sup> 2006 IFC Performance Standards 6, above n. 19. For a more detailed discussion on these substantive standards, see Morgera, above n 2, ch 8.

<sup>31</sup> OECD Council, ‘OECD Council, ‘OECD Guidelines for Multinational Enterprises : Update 2011 – Note by the Secretary-General’, OECD doc. C(2011)59 (3 May 2011), Appendix II, para II. A.14; OECD Council, ‘OECD Guidelines for Multinational Enterprises : Update 2011 – Commentaries’, OECD Doc. C(2011) 59/ADD1, 3 May 2011, paras. 25 and 33.

process, the lack of a requirement for environmental disclosure requirements, and lack of consideration for cumulative environmental impacts.<sup>32</sup>

The concomitant 2011 review of the IFC Performance Standards went along similar lines, being equally influenced by the UN Framework on Business and Human Rights.<sup>33</sup> As opposed to the OECD Guidelines review, however, the IFC significantly strengthened its approach to community consultations, linking the need for companies to conduct ‘informed consultation’ with a specific and express (albeit qualified) requirement for prior informed consent. IFC clients are thus to ‘consider’ involving representatives of affected communities in monitoring the effectiveness of their environmental management programs only ‘where appropriate,’<sup>34</sup> thus leaving a considerable margin of discretion to individual business entities. This is coupled with the creation of an ‘external communications system’ that will allow IFC clients to screen, assess and reply to communications from stakeholders with a view to continually improving their management system. The system is in turn subject to the requirement for a ‘stakeholder engagement framework’ in the case that the exact location of the project is unknown but the project is nonetheless reasonably expected to have significant impacts on local communities. More detailed indications regarding dissemination of information are provided when communities may be affected by risks of adverse impacts of the project, with the significant specification that when stakeholder consultations are the responsibility of the host government, the client is expected to conduct a complementary process if the government-led engagement does not meet the IFC Performance Standards.<sup>35</sup>

Prior informed consent specifically needs to be obtained from IFC clients in three cases: potential relocation of indigenous peoples, impacts on lands and natural resources subject to traditional ownership or under customary use and projects proposing to use cultural resources for commercial purposes.<sup>36</sup> The IFC has also engaged in ‘translating’ the concept of prior

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<sup>32</sup> OECDWatch statement on the update of the OECD Guidelines for Multinational Enterprises: Improved content and scope, but procedural shortcomings remain (25 May 2011); and Amnesty International, The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation’ (23 May 2011).

<sup>33</sup> Note that the UN Special Representative on Business and Human Rights that elaborated the UN Framework participated in both reviews: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Further steps toward the operationalization of the “protect, respect and remedy” framework (2010) UN Doc A/HRC/14/27, para. 13.

<sup>34</sup> 2012 IFC Performance Standard 1, ‘Assessment and Management of Social and Environmental Risks and Impacts’, above n 19, para 21.

<sup>35</sup> 2012 IFC Performance Standard 1, above n 19, paras. 26 and 30-31 and 38. Information to be disseminated to affected communities include: purpose, nature and scale of the project; duration of proposed project activities; risks and potential impacts on communities and relevant elements of the management programme; envisaged stakeholder engagement process; and grievance and redress mechanism.

<sup>36</sup> 2012 IFC Performance Standard 1, above n 19, para 35, where it is explicitly mentioned that ‘consent does not necessarily require unanimity and may be achieved even when individuals and sub-groups explicitly

informed consent for private companies: according to the Performance Standard on indigenous peoples, prior informed consent is a good-faith negotiation with culturally-appropriate institutions representing indigenous peoples' communities, with a view to reaching an agreement that is seen as legitimate by the majority within the community.<sup>37</sup> In addition, private companies are called upon to put in place mitigation measures, such as compensation and benefit-sharing taking into account indigenous peoples' laws, institutions and customs, and to ensure that distribution of benefits be individually or collectively based or a combination of both. Benefits may include, according to the preferences of indigenous peoples, culturally-appropriate improvement of their standard of living and livelihoods and the long-term sustainability of the natural resources on which they depend.<sup>38</sup> Benefit-sharing is further envisaged where the business entity 'intends to utilise natural resources that are central to the identity and livelihoods of indigenous peoples and their use exacerbates livelihood risk.<sup>39</sup> With specific regard to involuntary resettlement, IFC clients are expected, according to one of the 2011 amendments, to implement measures to ensure, for communities with natural resource-based livelihoods, the continued access to affected resources or alternative resources with equivalent livelihood-earning potential and accessibility. In alternative, IFC clients are to provide compensation and benefits associated with the natural resource use that 'may be collective in nature rather than directly oriented towards individuals and households', taking into account the ecological context.<sup>40</sup> Significantly, the 2011 IFC review relied on the legal concept of benefit-sharing, as a key link between prior informed consent and due diligence.<sup>41</sup>

Notably, the 2011 reviews also expanded on substantive standards of corporate environmental accountability. The 2011 review of the OECD Guidelines addressed a new recommendation on 'exploring and assessing ways to improve environmental performance' with reference to emission reduction, efficient resource use, the management of toxic

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disagree'. Compare with the understanding of prior informed consent proposed by the UN Special Rapporteur on indigenous peoples' rights (discussed below), who clarified that prior informed consent does not provide indigenous people with a veto power when the State acts legitimately and faithfully in the public interest, but rather "establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned" and that consensus-driven consultation processes should not only address measures to mitigate or compensate for adverse impacts of projects, but also explore and arrive at means of equitable benefit-sharing in a spirit of true partnership (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc A/HRC/12/34 (2009), para 48 and 53).

<sup>37</sup> 2012 IFC Performance Standard 7: Indigenous Peoples, above n 19, para 15.

<sup>38</sup> *Ibid.*, para. 12-13.

<sup>39</sup> *Ibid.*, para 18.

<sup>40</sup> 2012 IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement, above n 19, para 26.

<sup>41</sup> In the previous version of the IFC Performance Standards the concept of benefit-sharing was only relied upon in the context of cultural heritage: 2006 IFC Performance Standard 8, above n 19.

substances and the conservation of biodiversity.<sup>42</sup> Regrettably, this significant addition is not addressed in the commentary to the Guidelines. The concomitant 2011 review of the IFC Performance Standards focused more extensively on climate change, resource efficiency and biodiversity. The IFC Policy on Social and Environmental Standards, which targets the IFC itself, acknowledged the need to support the private sector's contribution to climate change mitigation and adaptation, building the capacity of the private sector in relation to climate change, biodiversity and resource efficiency, as well as to limit its impacts on ecosystem services,<sup>43</sup> and to reflect a human rights due diligence approach across its sustainability principles.<sup>44</sup> In the Performance Standards addressed to private companies, the IFC then introduced very detailed standards on climate change, including that the client implements 'technical and financially feasible and cost-effective options to reduce project-related greenhouse gas emissions during the design and operation of the project', as well as more specific obligations in case of projects expected or actually producing more than 25,000 tonnes of carbon-dioxide equivalent annually.<sup>45</sup> Resource efficiency also includes specific standards to reduce potentially significant water consumption and waste reduction, including checking whether contractors for the disposal of hazardous waste are reputable and legitimately licensed and their sites are operated in a manner consistent with acceptable standards. IFC clients are also to consider whether they should develop their own recovery or disposal facilities at the project site. They are further subject to the prohibition to purchase, store, manufacture, use or trade in products classified as extremely hazardous or highly hazardous by the World Health Organisation.<sup>46</sup>

On biodiversity, the IFC Standards concerning natural habitats have been strengthened by making reference to establishing stakeholders' views on the extent of conversion or degradation and the identification and protection of 'set-aside areas.' The latter are excluded from development and targeted for conservation enhancement measures, which should be

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<sup>42</sup> OECD Council, 'OECD Guidelines Update 2011 – Note by the Secretary-General', Appendix II, para. II.A.10' and OECD Guidelines, above n 16, chapter VI, para 6.d.

<sup>43</sup> Which are defined at para 2 of 2012 IFC Performance Standard 6, above n 19, 'Biodiversity Conservation and Sustainable Management of Living Natural Resources', as the 'benefits that people, including businesses, derive from ecosystem services' (emphasis added). The definition is clearly based on the Millennium Ecosystem Assessment, a global scientific process that facilitated intergovernmental endorsement of the term 'ecosystem services': The Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Synthesis* (2005), <<http://www.maweb.org/en/index.aspx>>. For a discussion of legal implications, see E. Morgera, *The 2005 UN World Summit and the Environment: The Proverbial Half-Full Glass* 15 *Italian Y.B. Int'l L.* 53 (2006).

<sup>44</sup> 2012 IFC Policy on Social and Environmental Sustainability, <http://www.ifc.org/ifcext/policyreview.nsf/Content/SustainabilityPolicy>, para 10-11 and 15.

<sup>45</sup> 2012 IFC Performance Standard 3: Resource Efficiency and Pollution Prevention, above n 19, para. 7-8.

<sup>46</sup> *Ibid.*, para. 9, 12 and 17.

identified by their ‘high conservation value’ based on internationally recognised guidelines.<sup>47</sup> A new section on the management of ecosystem services has also been added, which calls upon the business entity to determine likely adverse impacts on ecosystem services, and systematically identify priority ecosystem services (either those having adverse impacts on affected communities or those on which the project will be directly dependent for its operations) with stakeholder participation. These are aimed to avoid negative impacts, or minimise them and implement measures to increase the operations’ resource efficiency.<sup>48</sup> Furthermore, additional requirements have been put in place for clients engaged in primary production of living natural resources (including forestry, agriculture, animal husbandry, fisheries and aquaculture), particularly in the absence of appropriate and applicable global, regional or national standards. These additional requirements include: committing to applying international industry operating principles and good management practices and available technology; actively engaging and supporting the development of national standards, for the definition and demonstration of sustainable practices; and (as was the case in the previous version of the Standards) committing to achieving certification.<sup>49</sup> Finally, private companies are also expected to prefer suppliers that can demonstrate that they are not significantly impacting on natural or critical habitats.<sup>50</sup>

The 2011 review of two of the most influential international sets of corporate environmental accountability standards has therefore led to a sophistication of the pre-existing procedural standards, bringing them into line with parallel developments related to business and human rights, and unprecedented guidance on substantive standards related to climate change, biodiversity and resource efficiency.

## **1.2 Business and Human Rights: what role for corporate environmental accountability standards?**

Interestingly, little of the impressive normative convergence achieved by mid-2000s had been used explicitly in the UN Framework on Business and Human Rights – the framework elaborated by the UN Special Representative on Business and Human Rights, John Ruggie, appointed by the UN Secretary-General to continue discussions on corporate accountability

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<sup>47</sup> 2012 IFC Standard 6, para 14 and fn 10.

<sup>48</sup> Ibid, para. 24-25.

<sup>49</sup> Ibid., para 26 and 29-30.

<sup>50</sup> Ibid, para 31.

in the absence of State endorsement of the UN Norms.<sup>51</sup> It could rather be argued that the 2011 reviews of the OECD Guidelines and the IFC Performance Standards filled a gap concerning environmental accountability in the UN Framework.

The UN Framework emerged from the rejection of the idea that there are direct legal obligations arising of international law for companies, and the support for international standards that are in ‘the process of being socially constructed’<sup>52</sup> in the face of the ‘fluid’ applicability of international legal principles to companies’ acts.<sup>53</sup> The Special Representative thus pointed to ‘standards’ governing corporate ‘responsibility’ – understood as the legal, social or moral obligations imposed on companies – and on corporate ‘accountability’ – understood as the mechanisms to hold companies to their obligations.<sup>54</sup> Ruggie did so on the understanding that corporations are under growing scrutiny by international human rights mechanisms and have been the object of the standard-setting, and accountability mechanisms created by international organisations, in light of ‘social expectations by States and other actors’.<sup>55</sup> Such practice was considered by the Special Representative as ‘blurring the lines between [what is] strictly voluntary, and mandatory’ and recognising the need to ‘exercise shared responsibility.’<sup>56</sup> As a result, the Representative put forward a Framework built on three pillars (“Protect, Respect and Remedy”), namely: the State duty to protect against human rights abuses by business; the corporate responsibility to respect human rights; and the need for greater access to effective remedies. Notably, the second pillar consists of the

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<sup>51</sup> UNCHR Res 2005/69 (20 April 2005), which proposed that the Special Representative: (i) identify and clarify standards of corporate responsibility and accountability for MNCs and other business; (ii) elaborate on the role of States in effectively regulating, and adjudicating on the role of MNCs, including through international cooperation; (iii) develop methodologies for human rights impact assessment of activities of MNCs, and other business; (iv) and compile a compendium of best practices of States, MNCs, and other businesses.

<sup>52</sup> UNCHR, ‘Interim Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises’ UN Doc E/CN.4/2006/97 (2006), para 55.

<sup>53</sup> *Ibid*, para 64.

<sup>54</sup> ‘Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises: Mapping International Standards of Responsibility and Accountability for Corporate Acts’ UN Doc A/HRC/4/35 (2007), para 6.

<sup>55</sup> *Ibid*, para. 44-46.

<sup>56</sup> *Ibid* para. 61-62.

prevailing societal expectation that companies ‘do no harm’ and exercise ‘due diligence’<sup>57</sup> – the same language that could already be found in the 2006 IFC Performance Standards.<sup>58</sup>

While the Special Representative stressed the importance for the Framework of international policy coherence,<sup>59</sup> particularly with specific regard to “prevailing social norms ... that have acquired near-universal recognition by all stakeholders,”<sup>60</sup> there was, however, no attempt to seek or acknowledge synergies between the UN Framework and relevant widely ratified international environmental agreements in the specific case of natural resource exploitation<sup>61</sup> -- an area in which serious corporate abuses of human rights have been documented. Nonetheless, the Special Representative developed the procedural aspect of his proposed human rights due diligence process on concepts and approaches<sup>62</sup> that have been developed and experimented in the environmental sphere, notably: (i) impact assessment; (ii) stakeholder involvement in decision-making; and (iii) life-cycle management.<sup>63</sup>

The 2011 Guiding Principles to implement the UN Framework clarify that there is a ‘global standard of expected conduct for all business enterprises wherever they operate’, that exists independently of States’ abilities and willingness to fulfil their human rights obligations. Such global standard operates ‘over and above compliance with national laws and regulations protecting human rights,’ basically requiring business entities to take adequate measures to prevent, mitigate and remediate adverse human rights impacts.<sup>64</sup> The

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<sup>57</sup> HRC, ‘Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights’ UN Doc A/HRC/8/35 (2008), para. 25 and 58. Due diligence in the context of business and human rights is indeed defined as the ‘process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it’, based on reasonable expectations (para 25).

<sup>58</sup> For an earlier, more detailed assessment, see Morgera, above n 2, 98-101.

<sup>59</sup> 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: Further steps toward the operationalisation of the “protect, respect and remedy” framework UN Doc A/HRC/14/27 (2010), para 52.

<sup>60</sup> Ibid., 13.

<sup>61</sup> The UN Representative indicated that the scope of corporate responsibility to respect human rights is defined by the actual and potential human rights impacts generated by business, which can be identified on the basis of an authoritative list of international recognised rights including the “International Bill of Rights”, Conventions of the International Labour Organisation (ILO) and depending on circumstances also human rights instruments concerning specifically indigenous peoples and other vulnerable groups: 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: Towards operationalising the ‘Protect, Respect and Remedy’ Framework” UN Doc. A/HRC/11/13 (2009), at 15.

<sup>62</sup> Ibid, at 14.

<sup>63</sup> E Morgera, Expert Report Corporate Responsibility to Respect Human Rights in the Environmental Sphere, European Commission-funded project ‘STUDY OF THE LEGAL FRAMEWORK ON HUMAN RIGHTS AND THE ENVIRONMENT APPLICABLE TO EUROPEAN ENTERPRISES OPERATING OUTSIDE THE EUROPEAN UNION’, May 2010, at 12. The report is available online at: <http://www.law.ed.ac.uk/euenterpriseslf/documents/files/CSREnvironment.pdf>.

<sup>64</sup> UN Special Representative on Human Rights and Business Enterprises, ‘Guiding Principles on Business and Human Rights to implement the UN Protect, Respect and Remedy Framework’, UN Doc A/HRC/17/31

Guidelines further clarify that the human rights due diligence process entails: (i) assessing actual and potential impacts with ‘meaningful consultations’ with potentially affected groups and other stakeholders at regular intervals; (ii) integrating the assessment findings in internal decision-making budget allocation and oversight processes; (iii) acting upon those findings; (iv) tracking responses (including by drawing on feedback from affected stakeholders); and (v) communicating how impacts are addressed to right-holders in a manner that is sufficient for stakeholders to evaluate the adequacy of the company’s response.<sup>65</sup> Companies are expected to prioritise the prevention and mitigation of most severe impacts or those that a delayed response would make irremediable.<sup>66</sup> Finally, enterprises ‘should establish or participate in’ legitimate, transparent, predictable, equitable, and right-compatible grievance mechanisms that are directly accessible to individuals and communities that may directly be affected by their business operations, with a view to both supporting the identification of adverse impacts and systematic problems, and remedying adverse impacts.<sup>67</sup> The Guiding Principles, therefore, continue the self-referential trend of the UN Framework, with no specific reference to the relevance of multilateral environmental agreements. No reference was made to specific rights of indigenous peoples either, which could have provided a bridge between human rights to environmental protection discourses.

This mismatch between the work of the UN Special Representative and international initiatives contributing to defining corporate environmental accountability standards has been recently picked up by the UN Rapporteur on indigenous peoples’ rights, James Anaya, who started addressing corporate environmental accountability issues in 2009.<sup>68</sup> Anaya noted that private companies engaging or promoting extractive or other development activities affecting indigenous peoples should themselves “as a matter of company policy” endeavour to conform their behaviour at all times to relevant international norms concerning the rights of indigenous peoples, including those norms related to consultation. To this end, he recommended that companies identify, fully incorporate and make operative the norms concerning the rights of indigenous peoples within every aspect of their work carried out within or in close proximity to indigenous lands. In addition, as part of their due diligence,

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(2011), para 11 (the Guiding Principles were adopted by the Human Rights Council by Resolution A/HRC/17/4 (2011); see also Office of the UN High Commissioner on Human Rights press release, ‘New Guiding Principles on Business and human rights endorsed by the UN Human Rights Council’, 16 June 2011).

<sup>65</sup> Guiding Principles, above n 63, para. 17-21.

<sup>66</sup> Ibid, para 24.

<sup>67</sup> Ibid, para. 29 and 31.

<sup>68</sup> A/HRC/12/34, above n 39, Section E.

companies should avoid endorsing or contributing to any act or omission on the part of the State amounting to a failure to adequately consult with the affected indigenous community before proceeding with a project. The Special Rapporteur furthermore recommended that States develop specific mechanisms to closely monitor company behaviour to ensure full respect for indigenous peoples' right and that required consultations are fully and adequately employed.<sup>69</sup>

In 2010, Anaya expanded upon this preliminary guidance by devoting the substantive section of his annual report to corporate accountability. He thus fleshed out standards for corporate accountability emerging from the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>70</sup> and other human rights instruments and processes, to be incorporated in the understanding of the due diligence framework proposed by the UN Special Representative on Human Rights and Business.<sup>71</sup> Anaya proposed that companies identify prior to commencing their activities all matters related to the basic human rights of indigenous peoples with a view to taking them into account when their activities are carried out. He emphasised that social and environmental impact studies should be conducted on behalf of companies by independent experts under the supervision of the State, specifically referring in this respect to guidance on cultural, social and environmental assessments adopted under the Convention on Biological Diversity (CBD) - the Akwé: Kon Guidelines.<sup>72</sup> As a result of these assessments, companies are expected to take all possible technically feasible solutions to mitigate likely negative impacts on the environment and social, economic, cultural and spiritual life of indigenous peoples. Where adverse impacts cannot be avoided, Anaya indicated that indigenous peoples are entitled to just and fair redress.<sup>73</sup>

Anaya also devoted significant attention to the question of benefit-sharing - a concept that figured prominently in the 2011 revision of the IFC Performance Standards discussed above. He emphasised that in addition to entitlement to compensation, indigenous peoples have a right to share in the benefits arising from business activities taking place on their traditional lands or in relation to their traditionally used natural resources. Accordingly, he argued that due diligence would imply that companies set up specific benefit-sharing

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<sup>69</sup> Ibid.

<sup>70</sup> UN Declaration on the Rights of Indigenous Peoples, UNGA Resolution 61/295 (13 September 2007).

<sup>71</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, UN Doc. A/HRC/15/37 (2010), Section III.

<sup>72</sup> Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, in Article 8(j) and related provisions (CBD COP 7 Decision VII/16F, 13 April 2004).

<sup>73</sup> Ibid., para. 73-74.

mechanisms, based on international standards, genuinely strengthening the capacity of indigenous peoples to establish and follow up on their development priorities and supporting communities' own decision-making mechanisms.<sup>74</sup>

Overall, Anaya clearly indicated that concepts such as benefit-sharing<sup>75</sup> and socio-cultural and environmental impact assessments, as elaborated upon under the CBD through the Akwé: Kon Guidelines, can significantly contribute to fleshing out standards for corporate accountability with respect to indigenous rights in the context of the due diligence framework proposed by the UN Special Representative on Human Rights and Business. The same understanding seems to emerge from other indigenous rights processes. The Expert Mechanism on the Rights of Indigenous Peoples, in 2010, stressed the link between prior informed consent, benefit-sharing and mitigation measures in the context of large-scale natural resource extraction on indigenous peoples' territories or the creation of national parks, forest and game reserves, underscoring the importance of the CBD work programme on protected areas<sup>76</sup> and the Akwé: Kon Guidelines.<sup>77</sup> These references - which are reflected to a great extent in the IFC Performance Standards - are significant in ensuring a coherent approach to corporate environmental accountability across different international bodies, and ultimately to contribute to substantive unity across different areas of international law.

### **1.3 From CSR to Corporate Accountability Through Multiple Monitoring Mechanisms**

Several international initiatives have not limited themselves to standard-setting for corporate environmental accountability, but have also put in place mechanisms to monitor corporate conduct and/or to consider complaints from members of the public. These are key steps in bringing to light instances of unsustainable corporate conduct or to proactively manage possible conflicts through an independent mechanism for assessing facts and facilitating the identification of constructive solutions. These mechanisms may provide a readily-available and impartial avenue for individuals, communities and civil society groups to have their

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<sup>74</sup> Ibid., para. 76-80.

<sup>75</sup> The legal concept of benefit-sharing has been developed under the CBD not only in the context of access to genetic resources, but also with regard to the conservation and sustainable use of biological resources (such as protected areas, tourism, and forest management): see E Morgera and E Tsioumani, 'The Evolution of Benefit-sharing: Linking Biodiversity and Community Livelihoods' (2010) 19 RECIEL 150-173.

<sup>76</sup> Programme of Work on Protected Areas, adopted by CBD COP Decision VII/28, Protected Areas (2004), Annex.

<sup>77</sup> Expert Mechanism on the Rights of Indigenous Peoples, Progress report on the study on indigenous peoples and the right to participate in decision-making, UN Doc. A/HRC/15/35 (2010); and Report of the Expert Mechanism on the Rights of Indigenous Peoples on its third session, Geneva (12-16 July 2010), UN Doc. A/HRC/15/36 (2010).

complaints against private companies heard, going beyond the hurdles and bias that may be experienced in accessing justice at the national level. These mechanisms may also serve the legitimate interests of private companies to have allegations against them assessed by an independent entity through their fact-finding activities on the ground, and through the good offices of an independent mediator in helping prevent conflicts from emerging or escalating. From a broader perspective, these mechanisms also offer concrete opportunities to test the suitability of corporate environmental accountability standards, further clarifying the conditions for their applicability to private companies in different contexts. Furthermore, they may contribute to ensure a coherent approach to corporate accountability, by making systematic reference to those international standards that emerge as common from different international standard-setting initiatives.

Four illustrations of such international mechanisms will be offered in the following sub-sections, focusing first, more briefly, on the more recent system for handling allegations of severe environmental damage under the UN Global Compact and the consideration of communications on alleged violations of indigenous rights by the UN Rapporteur on Indigenous Peoples' Rights. Then, two more in-depth case-studies will focus on the well-established practice of two other accountability systems: the international compliance body established by the IFC to resolve complaints related to its Performance Standards, and the implementation procedure established under the OECD Guidelines for Multinational Enterprises.

### *3.1 The Global Compact's Integrity Measures*

The UN Global Compact, even if it was 'not designed, nor does it have the mandate or resources, to monitor or measure participants' performance,'<sup>78</sup> has developed a procedure to handle 'credible allegations of systematic or egregious abuse of the Global Compact's overall aims and principles.'<sup>79</sup> The procedure aims to safeguard the reputation, integrity and good efforts of the initiative, as well as to promote continuous quality improvement and assist participants in aligning their actions with their commitments. Abuse includes 'severe environmental damage,'<sup>80</sup> which is particularly significant as the vast majority of companies participating in the Compact tend to emphasize their adherence to the environment-related

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<sup>78</sup> UN Global Compact, 'Note on Integrity Measures', 12 April 2010, at 1.

<sup>79</sup> Ibid. On the origins of the procedure, see K. Norwot, 'The New Governance Structure of the Global Compact: Transforming a "Learning Network" into a Federalized and Parlamentarized Transnational Regulatory Regime' *Essays in Transnational Economic Law* 47 (2005), at 24-30.

<sup>80</sup> UN Global Compact Office, 'Frequently Asked Questions on the Integrity Measures' (2009).

principles of the initiative.<sup>81</sup>

According to the procedure, any written complaint can be submitted by any individual, organisation or state to the Global Compact Office, which will require the relevant company to provide written comments and keep it informed of action undertaken to address the situation. While the Office will not make any assessment of its own as to the matter at hand, it will provide guidance and assistance to the company in taking action to remedy the situation. More interestingly, the Office can also, including of its own initiative, refer the matter to the relevant UN entity (in the case of environmental principles, the UN Environment Programme) for advice, assistance or action; or refer the matter to the Global Compact Board, to draw on its business members' expertise. The Office may further share with parties information about the compliance procedure under the OECD Guidelines (discussed below), which could provide for some cooperation, or at least some linkages between two distinct international accountability processes. If a company refuses to engage in dialogue within two months or if the review of the complaint reveals something detrimental to the reputation and integrity of the Global Compact, the Office will remove the company from its list of participants.<sup>82</sup> Overall, the procedure has been described, in low-key terms, as a 'dialogue facilitation mechanism,'<sup>83</sup> and it has already been suggested that the mechanism could be strengthened by empowering the Global Compact Office to 'mediate the process and seek to define conditions to be met by companies in order to remain a Compact participant.'<sup>84</sup>

While this mechanism has some potential to monitor private companies' compliance with the environmental principles of the Global Compact, information available on the complaints dealt with is at the time of writing very limited and would not allow a more detailed discussion in this chapter. This lack of transparency concerning the complaint procedure has already been highlighted within the UN System.<sup>85</sup> Information on integrity cases is being included in the Global Compact Annual Review starting from the 2009 edition, but to date these reports have limited themselves to note the number of cases received and

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<sup>81</sup> R. Barkemeyer, *Beyond Compliance - Below Expectations? Cross-border CSR, Development and the UN Global Compact* (SSRN, 2009) at 15.

<sup>82</sup> UN Global Compact Office, above n. 77, at 2-4.

<sup>83</sup> U. Wynhoven and M. Stausberg, 'The United Nations Global Compact's Governance Framework and Integrity Measures' in A. Rasche and G. Kell, *The United Nations Global Compact: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press, 2010) 251, at 262-263.

<sup>84</sup> E. Brugger and P. Maurer, 'Concluding Remarks' in Rasche and Kell, above n. 82, 386, at 395.

<sup>85</sup> Joint Inspection Unit, above n 18, para. 70-73 and recommendation 6(d). See also 'A response from the Global Compact Office' above n 18, at 5.

handled by the Global Compact Office,<sup>86</sup> without providing any further information - not even with reference to the specific principles that were alleged to be seriously violated by the company. This practice can be contrasted with that of the implementation procedure of the OECD Guidelines, discussed below: although until mid-2000s the OECD did not publish the names of companies involved in instances under consideration by its implementation procedure, it provided an annual update of the status of each instance with specific reference to the guideline alleged to be non-complied. This was, however, largely considered insufficient, and an NGO named “OECDWatch” started to independently produce quarterly updates on the filing, conclusion or rejections of instances.<sup>87</sup>

### *3.2 Communications to the UN Special Rapporteur on Indigenous Peoples’ Rights*

Attention can now turn to the incipient practice of UN Rapporteur on Indigenous Peoples’ Rights in addressing communications on alleged violations of indigenous rights.<sup>88</sup> In his first report to the General Assembly, James Anaya prioritised among four areas for his work, the task of responding on an ongoing basis to specific cases of alleged human rights violations, noting that cases hitherto brought to his attention included infringements of the right to free, prior informed consent, especially in relation to natural resource extraction and displacement or removal of indigenous communities, and denial of rights of indigenous peoples to lands and resources.<sup>89</sup> Accordingly, the Special Rapporteur established a practice of gathering, requesting, receiving and exchanging information from all relevant sources, notably from indigenous peoples and governments, and carrying out on-site visits to examine the issues raised with a view to providing observations and recommendations on the underlying human rights issues.

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<sup>86</sup> The 2010 edition of the Annual Report states that ‘21 separate matters alleging abuses of the Ten Principles by business entities were raised with the Global Compact Office in 2010 [of which] 3 matters were handled under the Integrity Measures dialogue facilitation mechanism’ (UN Global Compact Office, 2010 Annual Report of the Global Compact (UN, 2011), at 42). Similar information is provided in the 2009 edition (UN Global Compact Office, 2010 Annual Report of the Global Compact (UN, 2010), at 20).

<sup>87</sup> E. Morgera, ‘An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead-up to the 2006 Review’, (2006) 18 *Georgetown International Environmental Law Review* 751, at 774. The OECDWatch database is still functioning at the time of writing and can be freely consulted at <http://oecdwatch.org/cases>.

<sup>88</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Communications to and from Governments, A/HRC/15/37/Add.1 (2010).

<sup>89</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/64/338 (2009), Section D.

While it is too early to draw definitive conclusions on this practice, it can be highlighted that it may provide a new avenue for indigenous communities' complaints against environmentally unsustainable corporate conduct. In a case concerning the Marlin mine project in Guatemala and Maya indigenous communities, for instance, Anaya focused mostly on the regulatory and administrative shortcomings of the State, but did not shy away from noting that private companies had an influence on the conflicts with indigenous peoples in that context. He therefore concluded that companies have a 'certain degree of responsibility with regard to the disrespect of indigenous rights, independently from the international obligations of the host state.'<sup>90</sup> Anaya further noted that the consultations undertaken by the company did not lead to an adequate understanding of the project impacts on the communities, did not take into account sufficiently the community concerns, and in all events should have involved more fully the government. He thus called for a new consultation process focusing on mitigation measures, reparation of damage, establishment of a formal mechanism for benefit-sharing with full participation of the relevant communities, and the establishment of a complaint and conciliation mechanism.<sup>91</sup> In his final recommendation on this case, Anaya confirmed that the private enterprises' faults in due diligence could not be justified only by the limitations of the host state legal framework.<sup>92</sup> He thus recommended that private enterprises adopt internal policies on indigenous peoples' rights and independent follow-up mechanisms, as well as permanent mechanisms for dialogue and grievance with the participation of state authorities.<sup>93</sup>

Anaya's monitoring and normative work appear to converge in his recognition that 'in its prevailing form, the model for advancing natural resource extraction within the territories of indigenous peoples appears to run counter to the self-determination of indigenous peoples in the political, social and economic spheres.'<sup>94</sup> This conclusion led the Special Rapporteur to request in 2011 a mandate to elaborate a set of guidelines providing specific orientation to

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<sup>90</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Observaciones sobre la situación de los derechos de los pueblos indígenas de Guatemala en relación con los proyectos extractivos, y otro tipo de proyectos, en sus territorios tradicionales, advance unedited version of 4 March 2011, para 69.

<sup>91</sup> Ibid., para. 69-70.

<sup>92</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Observaciones sobre la situación de los derechos de los pueblos indígenas de Guatemala en relación con los proyectos extractivos, y otro tipo de proyectos, en sus territorios tradicionales, UN Doc. A/HRC/18/35/Add.3 (2011), para. 69-72.

<sup>93</sup> Ibid., para. 89-93.

<sup>94</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Extractive industries operating within or near indigenous territories, UN Doc. A/HRC/18/35 (2011), para. 82.

governments, indigenous peoples and corporations regarding the protection of indigenous peoples' rights in the context of resource extraction or development projects.<sup>95</sup>

### *3.3 IFC Ombudsman*

A more established practice can be studied in the context of the IFC Performance Standards. Complaints from those affected by IFC-financed projects can be filed before a Compliance Advisor/Ombudsman (CAO), an independent oversight authority that reports directly to the President of the World Bank Group and that thus ascertains application of the IFC Standards to companies.<sup>96</sup> The CAO “attempts to resolve complaints through a flexible problem-solving approach and to enhance the environmental outcomes of the project” (Ombudsman function).<sup>97</sup> Any person, group or community affected, or likely to be affected, by a project is eligible, at anytime in the project, to file complaints that may relate to any aspect of the planning, implementation or impact of the project, without the need to allege necessarily violations of specific IFC procedures and standards.<sup>98</sup> When the complaint is accepted, the CAO decides the best course of action. Besides seeking to resolve issues for individuals who are directly or likely to be directly affected by IFC projects, CAO is also mandated to provide IFC with policy and process advice on environmental and social performance, and conduct environmental and social audits and reviews as an aid to institution learning (Compliance function). CAO can thus decide to resolve a complaint by undertaking a compliance audit or exercising advisory functions instead of its Ombudsman functions. In the latter cases, the complainant no longer controls the process.<sup>99</sup>

The Ombudsman's modus operandi includes field visits to the site of contested projects and interviews with all parties involved: staff of the private company, local authorities, affected communities representatives, other relevant local organisations and IFC staff. Complaints, reports of field missions and recommendations are all published on the CAO website, together with updates on ongoing investigations.<sup>100</sup> Among these, the most

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<sup>95</sup> *Ibid.*, para. 74-75.

<sup>96</sup> 2012 IFC Policy on Social and Environmental Sustainability, above n 35, para. 54-57.

<sup>97</sup> *Ibid.*

<sup>98</sup> Centre for International Environmental Law (CIEL), *A Handbook on the Office of the Compliance Advisor/Ombudsman of the International Finance Corporation and Multilateral Investment Guarantee Agency*, September 2000, at 16, available online at [www.ciel.org/Publications/CAOhandbook.pdf](http://www.ciel.org/Publications/CAOhandbook.pdf) ('CIEL Handbook'), at 5-6.

<sup>99</sup> *Ibid.*, at 8.

<sup>100</sup> <http://www.cao-ombudsman.org/html-english/ombudsman.htm>, where all the CAO documents cited below can be found.

important document is the assessment report, which is intended both as a finding of facts by CAO in relation to allegations contained in the complaint, and as an assessment of the “ripeness” of any conflict or tension for resolution or management.<sup>101</sup> Interestingly, after considering complaints, the CAO formulates recommendations not only to IFC itself, but also directly to the private company involved, albeit such recommendations will then need to be endorsed by the IFC President. The latter would then transmit them to the private company and/or request the IFC to take the appropriate action.<sup>102</sup>

In a complaint regarding a hydropower project in India,<sup>103</sup> for instance, the CAO recommended the company to provide for an independent study of environmental concerns, make it public, ensure the public monitoring of resulting commitments, and generally engage more constructively local communities also through the intermediation of independent facilitators or observers. The CAO further called for developing a schedule for implementation of commitments resulting from the environmental impact assessment on the basis of each of the IFC performance standards.<sup>104</sup> In addition, the CAO provided for both the IFC and the private company to engage in quality monitoring. The IFC, in turn, was requested to appoint an independent engineer to oversee the project and report on social and environmental matters, while the company was requested to report to IFC on a quarterly and annual basis on social, environmental and health issues.<sup>105</sup>

In several instances, the Ombudsman considered whether the private company had undertaken an appropriate environmental impact assessment and whether the IFC had appropriately reviewed such assessment.<sup>106</sup> In other instances, the Ombudsman even concluded that in the absence of formal non-compliance with IFC standards, companies should still build a climate of trust and understanding with local communities with regards to the environmental impacts of the project.<sup>107</sup> One of the most striking features of the CAO’s recommendations is thus the paramount attention devoted to the perception of the environmental and social performance of IFC-funded projects by local communities.

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<sup>101</sup> CAO, Assessment Report on the complaint concerning COMSUR/Don Mario Mine, Bolivia, November 2003.

<sup>102</sup> *Ibid.*, at 4.

<sup>103</sup> *Ibid.*, at 7.

<sup>104</sup> *Ibid.*, 8-9.

<sup>105</sup> *Ibid.*, 14.

<sup>106</sup> CAO, Assessment Report on the complaint regarding the Zambia Konkola Copper Mine Project, November 2003, *partic* at 16; CAO, Assessment Report of the complaint regarding Allain Duhangan Hydropower Project, India, March 2005.

<sup>107</sup> CAO, Assessment Report on the complaint regarding IFC’s investment in Kalahari Diamonds Ltd, Botswana, June 2005; CAO, Assessment Report of a complaint in relation to the Marlin Mining Project in Guatemala, September 2005.

The CAO also undertook follow-up monitoring and site visits,<sup>108</sup> and where possible, it also engaged directly in the resolution of complaints, facilitating an agreement between the private sector and the complainants.<sup>109</sup> Based on its activities until 2006, it could be concluded that CAO provided individuals and communities an avenue for expressing their complaints and receive prompt consideration. In more recent cases, however, the CAO appears to have gradually abandoned its practice of establishing its own findings and making its own recommendations, and rather focuses on creating the conditions for more collaborative interactions between the company and stakeholders, setting out steps for establishing or strengthening dialogue,<sup>110</sup> or where dialogue is not favoured by the complainants, proposing to refer the case to the Compliance facility.<sup>111</sup> This is confirmed by the fact that in recent reports the CAO explicitly cautions that it merely ‘summarizes the views expressed by the various stakeholders without the intention to validate or deny any issues.’<sup>112</sup>

It is regrettable that the practice of the CAO has experienced a significant change, providing for visibly more limited discussion of the practical application of relevant international environmental law standards for corporate accountability, particularly because the IFC Performance Standards remain the most explicit and elaborated substantive standards on corporate environmental accountability on the basis of the CBD.<sup>113</sup>

### *3.4 OECD Guidelines Implementation Procedure*

Although the OECD Guidelines are not as explicit or detailed with regard to corporate environmental accountability standards than the IFC, their implementation procedure has contributed on occasions to flesh out the links between corporate accountability and multilateral environmental agreements. The procedure<sup>114</sup> is based on the creation of national contact points (NCPs) in adhering countries, which handle inquiries (‘specific instances’) at

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<sup>108</sup> CAO, Follow-up Assessment Report on Complaint regarding the Marlin Mining Project May 2006.

<sup>109</sup> CAO, Assessment Report in relation to a complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project, Georgia, February 2006. See also “Trouble in the Pipeline”, *The Guardian*, 3 September 2002.

<sup>110</sup> See, for instance, CAO, Assessment Report of the complain regarding the Electron Investment S.A. Pando-Monte Lirio Hydroelectric Project, Ciriquire Province, Panama, July 2010, at 20-21.

<sup>111</sup> CAO, Assessment Report to Stakeholders regarding concerns of local stakeholders about the PRONACA Farms In Santo Domingo, Ecuador, June 2011.

<sup>112</sup> CAO, Pando assessment report, above n 109, at 18.

<sup>113</sup> In addition to 2012 IFC Performance Standard 6 (discussed under section 1 above), also 2012 IFC, Performance Standard 8: Cultural Heritage, above n 19, para 1, is “based in part on standards set by the Convention on Biological Diversity”.

<sup>114</sup> The Implementation Procedure of the OECD Guidelines for Multinational Enterprises is included in Part II of the OECD Guidelines, above n 16, section I.

the national level.<sup>115</sup> The procedure is subject to the oversight by the OECD Investment Committee (CIME), which issues clarifications (providing additional information about whether and how the Guidelines apply to a particular business situation, without assessing the appropriateness of that enterprise's conduct), reviews the Guidelines and is ultimately responsible for their interpretation.<sup>116</sup> Specific instances are basically a means for any 'interested party' to draw the NCP's attention to a company's alleged non-observance of the Guidelines.<sup>117</sup> NCPs make an initial assessment of the issue and then offer their services as mediators. If the conflict is not resolved, it can be referred to the CIME, where non-binding decisions are taken by consensus. In the vast majority of cases, however, the onus of attempting to resolve specific instances and ensuring the effectiveness of the Guidelines is largely upon NCPs.<sup>118</sup>

Disappointment, however, has been expressed for quite some time about the weak implementation mechanism of the Guidelines,<sup>119</sup> including by the UN Special Representative on Human Rights.<sup>120</sup> The lack of predictable timelines for NCPs to acknowledge receipt of, or respond to, instances in an efficient and timely manner also raised concerns.<sup>121</sup> To some extent these shortcomings were addressed in the 2011 review, which resulted in spelling out

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<sup>115</sup> Ibid., section II.

<sup>116</sup> P. Acconci, 'The Promotion of Responsible Business Conduct and the New Text of the OECD Guidelines for Multinational Enterprises' (2001) 2 *Journal of World Investment* 123, 140–41.

<sup>117</sup> P. van der Gaag, 'OECD Guidelines for Multinational Enterprises: Corporate Accountability in a Liberalised Economy?' (November 2004) <<http://www.oecdwatch.org/docs/paper%20NC%20IUCN.pdf>>, 3.

<sup>118</sup> J. Karl, 'The OECD Guidelines for Multinational Enterprises', in M. K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International, 1999) 89, 92–5.

<sup>119</sup> Friends of the Earth 'OECD Guidelines for Multinational Enterprises' (undated) <<http://www.foe.org/oecdguidelines/>> 6; OECD, Roundtable on Corporate Responsibility: Encouraging the Positive Contribution of Business to Environment through the OECD Guidelines for Multinational Enterprises. Background Report (June 2004) <[http://www.oecd.org/document/1/0,2340,en\\_2649\\_34889\\_31711425\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/1/0,2340,en_2649_34889_31711425_1_1_1_1,00.html)> (hereinafter, OECD 2004 Roundtable Background Report) 12; UNCTAD, 'Disclosure of the Impact of Corporations on Society: Current Trends and Issues' (15 August 2003) UN Doc TD/B/COM.2/ISAR/20, 6. Other critiques concerned: the lack of independent verification of whether companies follow the Guidelines, the confidentiality rule applied in the 'best interests' of the implementation of the Guidelines, and the failure by NCPs to issue statements and make recommendations when no agreement can be achieved between the parties concerned. V. Nilsson, 'The OECD Guidelines for Multinational Corporations in Practice' (Paper Presented at the OECD Global Forum on International Investment — Investment for Development: Forging New Partnerships, 19–21 October 2004) <<http://www.oecd.org/dataoecd/6/61/33807212.pdf>>.

<sup>120</sup> Special Representative on Business and Human Rights, 'Protect, Respect and Remedy', above n 56, para 98.

<sup>121</sup> 'Letter from Friends of the Earth to Wesley Scholz, Director, Office of Investment Affairs and National Contact Point for the OECD Guidelines for Multinational Enterprises, Department of State 3–8' (29 April 2003) <<http://www.foe.org/camps/intl/Appendices/OECDComplaint.pdf>>. The letter reports that under the agreement between the consortium and Turkey, Turkey is committed to compensating the Consortium if new taxes or health, safety, or environment laws adversely affect the finances of the project. Turkey also cannot impose any future environmental and social standards affecting the pipeline that are more stringent than 'those operating elsewhere in the petroleum industry.'

principles for NCP ‘functional equivalence’ (accessibility, transparency, predictability, impartiality, accountability, efficiency and timeliness), while leaving adhering governments flexibility in their set-up as long as NCPs are enabled to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government.<sup>122</sup> The 2011 review also called for the systematic publication of the outcomes of the NCP procedure and detailed their minimum content: NCP statements should at a minimum describe the issue raised and the reasons for the NCP decision, and emit recommendations on the implementation of the Guidelines ‘as appropriate.’<sup>123</sup> The Commentary also provided indicative timelines: three months for the initial assessment of instances and three months for issuing a statement of report following the conclusion of the procedure, with a view to concluding the whole procedure in 12 months.<sup>124</sup> The 2011 review has, however, been criticised by civil society organisations for the lack of specification as to NCPs’ role in identifying breaches of the Guidelines and providing recommendations, including consequences for companies’ failure to engage in the implementation procedure, as well as in monitoring and following up on their recommendations.<sup>125</sup>

Instances considered before the 2011 review have concerned different parts of the environmental recommendations of the Guidelines, often focusing on the recommendation regarding assessment and communication to the communities affected by the environmental impacts of projects in developing countries. Many questions, however, remain unanswered as to the direct application to MNEs of standards based on general environmental principles, such as precaution and sustainable development as reflected in the Guidelines. In some cases, the NCP recommended that, in a weak legal and regulatory system, MNEs should do their utmost to implement the internationally acknowledged best practices that they follow in their own country on the construction site and for the people affected by their activity, making reference to environmental impact assessment and consultations.<sup>126</sup> In other instances, instead, the NCP recommended respecting the legal standards of the company’s home

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<sup>122</sup> OECD Guidelines Update 2011 – Commentaries, above n 31, para 9; and OECD Guidelines Update 2011 – Note by the Secretary-General, above n 31, Appendix III, section I. A and C. The ‘Procedural Guidance’ and its Commentary are included in Part II of the OECD Guidelines, above n 16.

<sup>123</sup> OECD Guidelines Note by the Secretary-General, above n 31, Appendix III, section I.C, para 3.

<sup>124</sup> OECD Guidelines Update 2011 – Commentaries, above n 31, para 40.

<sup>125</sup> See sources cited at note 33.

<sup>126</sup> French NCP, ‘Recommendations intended for EDF and its Partners with Regard to the Implementation of the ‘Nam Theun 2’ Project in Laos’ (1 April 2005) <<http://www.reports-and-materials.org/French-NCP-Nam-Theun-2-recommendations-1-April-2005.doc>>.

country to its activities abroad.<sup>127</sup> In yet other instances, the NCP statement focused on institutionalising channels for communication and information exchange between the company and affected constituencies.<sup>128</sup>

Although NCPs have made uneven references to international standards for corporate accountability, the UK NCP set a significant precedent in 2009. It addressed a complaint brought to its attention by Survival International, a UK-based NGO, against Vedanta, a UK-registered mining company operating directly or through subsidiaries in India, concerning the use of forest land for bauxite mining near Lanjigarh for failing to consult with an indigenous group affected by its operations, the Dongria Kondh. The NCP found, mostly on the basis of evidence from the complainant (as Vedanta did not engage fully in the procedure and its own investigations), that Vedanta had failed to put in place an adequate and timely consultation mechanism to engage fully the Dongria Kondh. Accordingly, the NCP declared non-compliance with, *inter alia*, the Guidelines sections on engaging in adequate and timely communication and consultation with the communities directly affected by the environmental policies of the enterprise and by their implementation. It further found that Vedanta did not respect the rights and freedoms of the Dongria Kondh in a manner consistent with India's commitments under various international instruments, including the CBD and the UNDRIP. Specifically, the NCP used the CBD Akwé: Kon Guidelines to interpret the OECD Guidelines provisions on consultations on environmental impacts,<sup>129</sup> to determine that Vedanta did not employ the local language or means of communication other than written form for consultations with communities with very high rate of illiteracy. It also found that the environmental impact assessment that had been carried out, although including an analysis of the "socio-economic environment" of the study area, did not address the impact of the mine on the community.<sup>130</sup> The NCP concluded that the company did not carry out adequate or timely consultations about the potential environmental impact of the construction of the mine on them.<sup>131</sup> The NCP thus recommended that Vedanta engage in consultations

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<sup>127</sup> Van der Gaag, above n 116, according to whom an NCP report in October 2003 recommended that environmental standards of Nutreco in Chile should progressively be brought into line with those found in the Netherlands.

<sup>128</sup> Government of Canada, 'Annual Report 2002: Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises' (2002) <[http://www.ncp-pcn.gc.ca/annual\\_2002-en.asp#implementation](http://www.ncp-pcn.gc.ca/annual_2002-en.asp#implementation)>. The NCP suggested establishing a Land Task Force Committee by the company, the local government, and local NGOs, with the mandate to, *inter alia*, protect the environment, provide information to the public on land and environmental issues, and resolve any land disputes at the local level.

<sup>129</sup> UK NCP, Final Statement on the Complaint from Survival International against Vedanta Resources plc, 25 September 2009, para. 44-46, at <http://www.berr.gov.uk/files/file53117.doc>

<sup>130</sup> *Ibid.*, para 57.

<sup>131</sup> *Ibid.*, para 65 and 67.

with the indigenous group on access to the project affected area, ways to secure its traditional livelihood, and alternative arrangements (other than re-settlement) for the affected families according to the process outlined in the CBD Akwé: Kon Guidelines. At a minimum, the NCP expected Vedanta to advertise the consultation in a language and form that could be easily understood by the Dongria Kondh, thereby ensuring the participation of the maximum number of their representatives in the consultation<sup>132</sup> Interestingly, the NCP also underlined that in carrying out a human rights impact assessment, as suggested by the UN Framework on Business and Human Rights, the Akwé: Kon Guidelines could be used as a point of reference, particularly for carrying out indigenous groups' impact assessments.<sup>133</sup>

The follow-up statement by the NCP, however, provided a mixed picture, with the NGO claiming that no change in the company's conduct could be detected while Vedanta reported on specific action being undertaken following consultations with affected communities, and no comment provided by the NCP.<sup>134</sup> Nevertheless, the case remains groundbreaking in showing how the OECD Guidelines implementation procedure can significantly point to companies' shortcomings vis-à-vis international environmental standards, as well as lead to coherent interpretation and application of different international sources of corporate environmental accountability standards. To the latter end, the NCP proposed filling a gap in the UN Framework on Business and Human Rights through CBD guidelines.

#### **1.4. Institutional Fragmentation and Substantive Unity: the Role of the Convention on Biological Diversity**

Although the multiplicity of international standard-setting and monitoring mechanisms related to corporate accountability inevitably creates the risk of fragmentation of international guidance on corporate accountability, the above discussion has clarified that such risk is significantly mitigated by the convergence of the standards used to assess private companies' conduct. In particular, environmental standards for corporate accountability have explicitly or implicitly facilitated progress in standard-setting and influenced the international debate on corporate accountability tout court, by providing key elements of the due diligence framework on business and human rights such as impact assessment, stakeholder consultations, and more recently benefit-sharing.

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<sup>132</sup> Ibid, para. 73-74.

<sup>133</sup> Ibid., 79.

<sup>134</sup> Follow up to Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc (12 March 2010).

Specific guidance elaborated in the context of the Convention on Biological Diversity has clearly influenced the practice of corporate accountability mechanisms, providing detailed procedures that have received the endorsement of the CBD's virtually universal membership. Notably, the CBD Akwé: Kon Guidelines<sup>135</sup> have been used more and more often in different contexts to assess whether private companies' conduct is acceptable in light of international human rights standards, thus showing that it is possible to ensure substantive unity across different areas of international law that may be negatively affected by the conduct of private operators. Other CBD guidelines can also serve as a benchmark for the conduct of the private sector: this is the case of the Addis Ababa Principles and Guidelines on Sustainable Use,<sup>136</sup> the Guidelines on Biodiversity and Tourism Development,<sup>137</sup> and the Tkariwaié:ri Code of Ethical Conduct on respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biodiversity.<sup>138</sup> Other guidelines may also be relevant for corporate environmental accountability purposes, such as those included in the CBD work programmes on protected areas, mountain and forest biodiversity.<sup>139</sup> All these instruments include specific procedures underpinning private companies' interactions with indigenous and local communities.<sup>140</sup>

The CBD has thus provided a virtually universal forum for reaching intergovernmental consensus on standards for corporate environmental accountability with significant human rights dimensions.<sup>141</sup> This has occurred even before the Convention parties and Secretariat started activities specifically targeting the involvement of the business community into the

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<sup>135</sup> Although they are directed to Parties and governments, the Akwé: Kon Voluntary Guidelines, above n 71, are expected to provide a collaborative framework for Governments, indigenous and local communities, decision makers and managers of developments (para 3) (emphasis added).

<sup>136</sup> Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity, CBD Decision VII/12, Sustainable Use (Article 10) (2004), Annex II, para 1 clarifies that 'The principles provide a framework for advising Governments, resource managers, indigenous and local communities, the private sector and other stakeholders about how they can ensure that their use of the components of biodiversity will not lead to the long-term decline of biological diversity' (emphasis added).

<sup>137</sup> International guidelines for activities related to sustainable tourism development in vulnerable terrestrial, marine and coastal ecosystems and habitats of major importance for biological diversity and protected areas, including fragile riparian and mountain ecosystems, CBD Decision VII/14, Biological Diversity and Tourism (2004), Annex, para 2 clarifies that the Guidelines provide a framework for addressing what the proponent of new tourism investment or activities should do to seek approval, as well as technical guidance to managers with responsibility concerning tourism and biodiversity (emphasis added).

<sup>138</sup> CBD Decision X/42, The Tkariwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities (2010).

<sup>139</sup> Expanded Programme of Work on Forest Biological Diversity, CBD Decision VI/22, Forest biological diversity (2002), Annex.

<sup>140</sup> Morgera and Tsioumani, above n 74, at 165 and 167.

<sup>141</sup> E. Morgera, E. Tsioumani, 'Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity' (2011) 21 Yearbook of International Environmental Law [please add initial page].

CBD implementation in 2005.<sup>142</sup> Notably, according to the most recent decision of the CBD Conference of the Parties on the subject of private sector involvement, business entities are encouraged to monitor and assess impacts on biodiversity and ecosystem services, to develop and apply processes and production methods that minimise or avoid negative impacts on biodiversity, and ‘take into account, as appropriate, the Akwé: Kon Guidelines.’<sup>143</sup> The CBD normative activity is particularly significant in supporting a coherent approach to corporate environmental accountability bridging human rights and environmental perspectives with its focus on indigenous and local communities, and covering several environmental issues in light of the ecosystem approach,<sup>144</sup> particularly with regard to consultation, impact assessment and benefit-sharing.

On the other hand, the CBD Secretariat has participated in various activities that directly engaged private companies,<sup>145</sup> such as collaboration with the UN Permanent Forum on Indigenous Issues, and an association of private enterprises that elaborated the Natural Resources Stewardship Circle Declaration to provide guidance to the aromatic, perfume, and cosmetics industry interacting with indigenous peoples.<sup>146</sup> Another example concerns the BioTrade Initiative that was initiated under the aegis of the UN Commission on Trade and Development<sup>147</sup> to engage private companies to develop a verification framework that will formally recognise their efforts towards conservation, sustainability and benefit-sharing.<sup>148</sup> Several other initiatives<sup>149</sup> confirm that the CBD is not only contributing to the international debate on corporate accountability through standard-setting but also through direct engagement with the private sector.<sup>150</sup>

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<sup>142</sup> For an early assessment, see Morgera, above n 2, chapter 8, based on CBD Decision VIII/11 ‘Private Sector Engagement’ (2006) and CBD COP decision IX/26 ‘Promoting Business Engagement’ (2008).

<sup>143</sup> CBD Decision X/21, Business engagement (2010), para 2(b)-(c).

<sup>144</sup> Principles of the Ecosystem approach, in Ecosystem approach (CBD Decision V/6, 22 June 2000), Annex B and Refinement and Elaboration of the Ecosystem Approach, Based on Assessment of Experience of Parties in Implementation, in Ecosystem approach (CBD Decision VII/11, 13 April 2004), Annex I.

<sup>145</sup> See discussion in Morgera, Tsioumani, above n 74, at 165-167.

<sup>146</sup> See the report of the meeting ‘Indigenous and local communities, business and biodiversity consultation’, held in New York on 12-13 May 2009 (13 May 2009), available at <[www.equatorinitiative.org/images/stories/events/2009events/tribal\\_link\\_csd/ilcs\\_business\\_biodiversity\\_report\\_final\\_iv.pdf](http://www.equatorinitiative.org/images/stories/events/2009events/tribal_link_csd/ilcs_business_biodiversity_report_final_iv.pdf)>.

<sup>147</sup> The term ‘biotrade’ refers to the ‘collection, production, transformation, and commercialisation of goods and services derived from native biodiversity under the criteria of environmental, social and economic sustainability.’ See The BioTrade Initiative (Biotrade, undated) found at <[www.biotrade.org/Intro/bti.htm](http://www.biotrade.org/Intro/bti.htm)>, which was referred to in Decision X/21, above n 142.

<sup>148</sup> See BioTrade Principles and Criteria (Biotrade, undated), Principles 3-4 and 7, found at <[www.biotrade.org/Intro/Principles/bti-principles.htm](http://www.biotrade.org/Intro/Principles/bti-principles.htm)>.

<sup>149</sup> Other initiatives can be found at : <http://www.cbd.int/business/tools/>.

<sup>150</sup> Similarly to the case of the World Heritage Convention Secretariat discussed by N Affolder, ‘The Private Life of Environmental Treaties’ (2009) 103 *American Journal of International Law* 510.

## Conclusions

The trend towards corporate environmental accountability at the international level has intensified, as demonstrated by the 2011 review of the OECD Guidelines and IFC Performance Standards, the recent practice of the Global Compact's integrity measures and the communications procedure initiated by the UN Special Rapporteur on Indigenous Peoples' Rights. Convergent international standards for corporate environmental accountability have also significantly impacted upon the international debate on corporate accountability and human rights – although the UN Framework for Business and Human Rights did not acknowledge it – by providing key tools such as impact assessment, stakeholder involvement and life-cycle management.

Overall, the resulting plurality of international avenues for addressing complaints against private companies not only supports those affected by corporate environmental damage, but may also protect the reputation of companies from unfounded allegations and contribute to the credibility of international standard-setting efforts. The risk of fragmented and possibly conflicting guidance to companies emerging from these international monitoring efforts appears for the great part averted by the significant convergence and increasing cross-fertilization of international standards on corporate environmental accountability.<sup>151</sup> Specifically, concepts and guidelines elaborated under the CBD and adopted by consensus by its 193 state parties increasingly provide useful benchmarks to assess and guide corporate conduct towards environmental sustainability *and* the respect of relevant human rights. Accordingly, the 2011 review of the IFC Performance Standards, the UN Special Rapporteur on Indigenous Peoples' Rights and the OECD Guidelines implementation procedure<sup>152</sup> relied on the Akwé: Kon Guidelines and the concept of benefit-sharing developed under the CBD to complement and operationalise the UN Framework for Business and Human Rights.

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<sup>151</sup> More systematic documentation of the operations and findings of international accountability mechanisms, however, would help in coherently developing international quasi-caselaw on corporate environmental accountability. In part, this was reflected in the 2011 review of the OECD Guidelines, where emphasis was placed on collecting and making publicly available information on recent trends among NCPs and the establishment of a database on specific instances: OECD Guidelines Update 2011 – Note by the Secretary-General, above n 31, at 29.

<sup>152</sup> Note that the CBD is the only MEA cited in the list of international instruments of reference on which implementation of the OECD Guidelines should rely, together with an unclear reference to 'international treaties on persistent organic pollutants.' The Secretary-General's note stresses that 'the number of instruments and initiatives that are relevant to the Guidelines far surpasses the possibility for introducing explicit references to them in the text of the Guidelines. For this reason, there is general agreement that, as part of follow-up on the updated Guidelines, a resource document [will] be compiled...' (OECD Guidelines Update 2011 – Note by the Secretary-General, above n 31, at p. 6 and 9).