



January 31, 2011

Professor John Ruggie
Special Representative of the Secretary-General for Business and Human Rights
By email: regaignon@business-humanrights.org

Re: Guiding Principles for the implementation of the United Nations “Protect, Respect and Remedy” Framework

Dear Professor Ruggie:

We are writing in response to your request for comments on the proposed Guiding Principles for the implementation of the United Nations “Protect, Respect and Remedy” Framework¹.

With over C\$4.8 billion in assets under management, NEI Investments’ approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will provide higher risk-adjusted returns over the long term. Through our company evaluations, our active engagement with the companies in our funds, and our issues research, we have developed considerable insight into good practices and weaknesses in corporate practice with respect to human rights, which we endeavour to share in the context of consultations on public policy and standards. Mining and oil and gas companies are strongly represented on Canadian exchanges, and in recognition of this fact our ESG Program has a special focus on the extractive industries. Lack of consensus on expectations of companies with respect to human rights has long been a source of reputational and social license risk for Canadian companies, particularly for extractives companies that operate in high-risk countries and create major impacts on host communities.

We commend your continuing efforts to engage stakeholders and gather a wide range of input in the development of the Business and Human Rights principles and framework. In general, we support the Guiding Principles draft² and see particular value in the following aspects:

- It distinguishes effectively between State duties and the obligations of corporations.
- It reinforces that the full range of human rights must be addressed, as the full range of human rights can be impacted by corporate activity.
- It draws attention to the need for awareness-raising and “mainstreaming” of human rights amongst policy-makers, regulators and decision-makers in the business domain.
- It specifies the elements of corporate due diligence on human rights – policy, impact assessment, integration of findings, monitoring, and reporting. Notably, it specifies the need for corporations to engage effectively with stakeholders and with human rights experts, and the need to conduct human rights impact assessment and regular continuing assessment taking into account the full range of rights.

¹ **UN Human Rights Council.** Protect, Respect and Remedy: a Framework for Business and Human Rights. [Online] 2008. <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

² **UN General Assembly.** Guiding Principles for the implementation of the United Nations “Protect, Respect and remedy” Framework. [Online] 2010. <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>

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The value of the Guiding Principles lies in integrating diverse aspects of the business and human rights question. We recognize that a global high-level document of this kind is not the place for detailed discussion of operationalization measures. In fact there has been extensive work on this over the past two decades in a wide variety of sectors (for example, the Whitehorse Mining Initiative³, the Mining Association of Canada's "Towards Sustainable Mining"⁴, the International Council on Mining and Metals⁵, and the Mining Certification Evaluation Project⁶ – to speak only of the mining sector) and on a wide variety of specific issues (such as security and human rights, and Human Rights Impact Assessment). The detail of these efforts need not be reprised in this document, but there is an expectation that work on operationalization will continue, evolving towards further consensus.

In the following pages we set out a number of investor-perspective observations and suggestions on possible enhancements to the Guiding Principles draft.

Principle 2: Encouraging companies to respect human rights abroad

We would agree that there are strong policy reasons for home States to encourage businesses domiciled in their territory to respect human rights abroad. Where one company from a home State has developed a negative reputation in a host State for human rights performance, this can create reputational problems and barriers for other companies domiciled in that State. Both home States, and home State industry associations, could play a role in mitigating this risk.

Principle 3: Systemic challenges to a human rights-respecting culture

We would strongly agree with the observation that one of the challenges to be addressed is that policy-makers and officials who are charged with the most direct responsibility for trade and economic matters, and have the most direct impact on business practice, may lack awareness when it comes to human rights obligations. In our experience, glossing over the "S" in ESG – including the human rights aspect - is a pervasive problem. A recent example in Canada was the decision that, following a motion on ESG disclosure in the provincial legislature, the Ontario Securities Commission would address environmental and governance disclosure, but not social disclosure, in its 2010 policy agenda⁷. Drawing attention in the Guiding Principles to these human rights knowledge gaps is helpful to responsible investors seeking to address these weaknesses through corporate and policy engagement.

Principle 5: Corporate law and policy

We would strongly recommend adding the concept of fiduciary duty to the list of influential areas of business law and policy that may require review with a human rights lens. The incentive for companies to address human rights issues would be greater if more investment institutions recognized and acted upon their own responsibility to respect human rights in investment decision-making. In recent years, following the publication of the Freshfields report⁸, there has been increasing acceptance of the proposition that integration of environmental, social and governance considerations in investment decision-making is consistent with, or indeed part of, fiduciary duty. But this evolution is still at an early stage, and up to now more attention has focused on environmental and governance aspects than on human rights.

³ **Natural Resources Canada.** Whitehorse Mining Initiative. <http://www.nrcan-rncan.gc.ca/mms-smm/poli-poli/gov-gov/wmi-imw-eng.htm>

⁴ **Mining Association of Canada.** Towards Sustainable Mining. http://www.mining.ca/www/Towards_Sustaining_Mining/index.php

⁵ **International Council on Mining and Metals.** <http://www.icmm.com/>

⁶ **Mining Certification Evaluation Project.** http://www.minerals.csiro.au/sd/SD_MCEP.htm

⁷ **Ontario Securities Commission.** OSC Notice 51-717 Corporate Governance and Environmental Disclosure. [Online] 2009. http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20091218_51-717_corp-gov-enviro-disclosure.htm

⁸ **UNEP Finance Initiative.** A legal framework for the integration of environmental, social and governance issues into institutional investment. [Online] 2005. http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf



We welcome the reference to States requiring companies to communicate on human rights performance, and to the potential materiality of information on human rights impacts. We find that corporate reporting requirements tend to underplay the potential materiality of social matters, and that corporate reporting on the most material aspects of social performance (such as human rights) tends to be weaker than reporting on environmental and governance matters.

Principle 10: Conflict-affected areas

We note that effective State action to curb abuses in conflict-affected areas will require strong coordination among different agencies – including those responsible for foreign affairs, international aid, trade promotion and securities regulation⁹.

Principle 12: Indigenous rights

We note that the Guiding Principles do not give specific attention to indigenous rights issues. We understand that the principles are intended to be universal in application, and hence focus on universal human rights. Nonetheless, we are seeing rapid evolution in the standards by which companies, especially in extractive industries, are being evaluated and beginning to follow in the area of indigenous rights, for example with regard to the concept of Free, Prior and Informed Consent¹⁰. Globally, there are heightened expectations following the adoption of the UN Declaration on the Rights of Indigenous Peoples¹¹ in 2007, and the issue of engagement and consultation with indigenous peoples impacted by corporate activities has become the subject of intense debate. In practice, we have found that where extractive companies in our portfolios are facing social license challenges, the identity of the impacted communities means that human rights concerns are often intertwined with indigenous rights issues. We therefore believe that additional commentary on integration of indigenous rights considerations into wider human rights policy and practice could be of value to companies.

Principle 14: Corporate policy and human rights

We greatly value the references to the need to align performance incentives of corporate executives and corporate lobbying practices to human rights commitments. Over the past several years we have been engaging companies on the need to integrate long-term ESG performance measures into executive compensation packages - including human rights performance measures, where these are material for the company in question. We also strongly support greater public accountability and transparency around corporate lobbying on public policy and regulatory issues.

We believe the Guiding Principles would be enhanced by addition of a reference to the need for the board of a company to take responsibility for human rights issues. We believe this is an important aspect of mainstreaming human rights within companies, given the role of the board in risk oversight and setting strategy. We would also observe in this context that at many companies, the level of human rights awareness and expertise among board members needs to be improved. For example, over the last year we successfully engaged Barrick Gold, the world's largest gold mining company, to put forward a director candidate with experience in corporate responsibility, environment or human rights and community engagement issues, in recognition of the significance for the company of these areas of risk.

Principles 15-17: Human Rights Due Diligence

⁹ The US Dodd-Frank Act Conflict Minerals Provision provides an example of this concept in action. Section 1502 assigns various roles and responsibilities to the Securities and Exchange Commission, State Department and USAID. See: **US Government Printing Office**. Dodd-Frank Wall Street Reform and Consumer Protection Act. [Online] 2010. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf.

¹⁰ For example, Talisman Energy has recently released its Global Community Relations Policy, which makes specific mention of the UN Declaration on the Rights of Indigenous Peoples, and incorporates the FPIC principle. See: **Talisman Energy**. Global Community Relations Policy. [Online] 2010. <http://www.talisman-energy.com/upload/editor/File/10417493%20-%20GLOBAL%20COMMUNITY%20RELATIONS%20POLICY%20-%20DECEMBER%209%202010%20-%201%20-%20TLMRPD.pdf>

¹¹ **United Nations**. Declaration on the Rights of Indigenous People. [Online] 2007. <http://www.un.org/esa/socdev/unpfii/en/declaration.html>

We value the incorporation of the concept of due diligence in the human rights context, as it points to the high measure of prudence business enterprises should exercise when evaluating their human rights risks. Principle 15 details the elements of sound human rights due diligence, including assessment, integration of findings, monitoring performance, and communication on performance. We especially support the proposition that due diligence should start “as early as possible in the development of a new activity or relationship”. Acquiring sufficient and relevant baseline information on human rights and social issues is a necessary condition for effectively addressing risks, and avoiding possible rights infringements and conflicts.

Principle 16 provides useful guidance on human rights impact assessment for proposed or new operations, and for human rights aspects which companies have more experience in managing. However, we would argue that many companies face more complex human rights-related challenges, involving existing operations with a problematic human rights history, and human rights matters on which they as yet lack well-developed internal expertise. While recognizing that this is a high-level document, we feel that a slightly more detailed discussion of considerations for defining the approach to assessment may be warranted, including the role of formal Human Rights Impact Assessments (HRIA) - especially in light of the work already undertaken by the Special Representative on the topic of HRIA¹² and examples of practice in the field. In 2008, we were part of a group of responsible investors that called on Goldcorp, a Canadian gold mining company, to commission an independent Human Rights Impact Assessment (HRIA) of the Marlin mine in Guatemala. Goldcorp agreed to the request, and we were involved in the process as a member of the independent steering committee responsible for overseeing the assessment. The assessment confronted a number of challenges that may be relevant in the context of the Guiding Principles: notably, human rights assessment was a relatively novel field, and the focus was an existing and controversial mining operation. In this context, the involvement of external human rights experts proved to be crucial when the assessment itself was challenged by some actors. Although Principle 19 deals with communication and reporting on human rights due diligence in general, we would suggest adding a specific reference under Principle 16 to the value of publishing the findings of human rights assessments. In keeping with the tenet of transparency, the Marlin Mine Human Rights Assessment was released publicly in 2010¹³. Not only was this a demonstration of openness and commitment to action on the part of the company, but it also made available an important body of work on methodology in the emerging field of HRIA. We also note that published assessments may serve as a convening mechanism for government participation in resolution of human rights challenges. The Marlin assessment report included recommendations for government, as well as for Goldcorp.

Under Principle 19, we would suggest highlighting that different stakeholders have different needs in terms of human rights reporting. Responsible investors require material information on human rights policy and mitigation measures, and aggregated reporting that reveals the company’s level of exposure to human rights risk, and the quality of corporate performance in mitigating that risk. Rights holders associated with the company’s operations in a specific location may require more granular information on topics such as local human rights performance, as well as detailed information on how to access grievance mechanisms. One-size-fits-all reporting is unlikely to meet the needs of all stakeholders.

Principles 29: Grievance mechanisms

We compared the list of criteria for grievance mechanisms against several current and proposed standards: the International Finance Corporation Performance Standards¹⁴, the Canadian CSR Counsellor’s review mechanism¹⁵, the complaint

¹² The Special Representative submitted a report in 2007 discussing the basic tenets of Human Rights Impact Assessment (HRIA). This report outlined a number of private sector initiatives and NGO approaches that were under development including guidance documents, assessment tools and pilot projects. See: **UN Human Rights Council**. Human rights impact assessments - resolving key methodological questions. [Online] 2007. <http://www.reports-and-materials.org/Ruggie-report-human-rights-impact-assessments-5-Feb-2007.pdf>

¹³ **Steering Committee**. Human Rights Assessment of Goldcorp’s Marlin Mine. [Online] 2010. <http://hria-guatemala.com/en/default.htm>

¹⁴ **International Finance Corporation**. Performance Standards on Social & Environmental Sustainability. [Online] 2007. [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf)



mechanism proposed under Canadian Bill C-300 on extractive activity in developing countries¹⁶, and the Responsible Jewellery Council code of practices¹⁷. The Guiding Principles criteria are comprehensive and reflect, or go beyond, the current scope of these principles and mechanisms. We look forward to further refinements that may emerge from the grievance mechanism pilot project.

Under requirement b (accessibility) there is a requirement for “adequate assistance to aggrieved parties who may face barriers to access, including... fear of reprisal”. We would note that an important accessibility factor in such cases is the option for parties to remain anonymous, though this is perhaps implied here. At several points, reference is made to the concept of “legitimacy” in the context of human rights complaints. It might be helpful to elaborate this concept, which can be an area of disagreement among stakeholders, particularly when human rights complaints are made by individuals or organizations other than the rights holders themselves.

Conclusion and main recommendations

We commend the Special Representative’s continuing commitment to improving practice on business and human rights. From a responsible investment perspective, we see much value in the Guiding Principles draft. In response to the request for comment, we highlight the following suggestions for possible enhancements:

- Add fiduciary duty to the list of corporate law and practice concepts to which human rights should be mainstreamed.
- Make reference to the need for mainstreaming of human rights at the corporate board level, and within corporate systems such as enterprise risk management and executive compensation frameworks.
- Elaborate the discussion on approaches to human rights assessment, taking into account lessons from practice and the conflicted situations that many companies face, particularly in the extractives sector.

We will continue to work with the companies held in our funds, and with policy makers, in finding ways to promote corporate respect for human rights. The Guiding Principles will be a helpful tool in those discussions.

Should you have any questions with regard to this submission, please do not hesitate to contact Michelle de Cordova, Manager, Public Policy & Research (mdecordova@NEIinvestments.com, 604-742-8319).

Sincerely,

NEI Investments

A handwritten signature in black ink, appearing to read "Robert Walker", with a long horizontal flourish extending to the right.

Robert Walker
Vice President, ESG Services

CC: Board of Directors, NEI Investments

¹⁵ **Government of Canada.** Review Process of the Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor. [Online] 2010. http://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/info%20brochure%20Nov1.pdf

¹⁶ **House of Commons Canada.** Bill C-300. [Online] 2009. <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4>

¹⁷ **Responsible Jewellery Council.** Principles and Code of Practices. [Online] 2009. http://www.responsiblejewellery.com/downloads/boxed_set_2009/S001_2009_RJC Prin COP.pdf