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DEMOCRATIZING THE GLOBAL BUSINESS AND HUMAN RIGHTS PROJECT BY CATALYZING STRATEGIC LITIGATION FROM THE BOTTOM UP

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Abstract: With the June 2011 endorsement of the U.N. Guiding Principles for Business and Human Rights (GP) by the U.N. Human Rights Council, the international community entered a new phase in the approach to the important work of developing global norms for economic activity with human rights impacts, irrespective of the states in which these occur. But the business and human rights project still privileges the state and the elite communities of enterprises, lawyers, and civil society organizations that form the networks of norm creation and operationalization on which the objects of human rights discourse are dependent. To effectively implement the GP requires an empowerment of all stakeholders down the supply and value chain. This empowerment must naturalize the substantive norms embedded in the GP into the cultures of business activity shared by all stakeholders. This chapter, then, elaborates our initial framework for a three-phase approach for the Democratizing Human Rights/Catalyzing Strategic Litigation (DHR/CSL) initiative, which employs an updated knowledge management strategy that begins with knowledge production centered on focused toolkits, followed by the education/knowledge transmission phase that involves deployment of knowledge product, such as toolkits, through student-centered training, education, and technical assistance; finally, the project will move towards the operationalization phase where large networks of stakeholders can both effectively and sustainably enforce business due diligence through the implementation of litigation/complaint strategies. The combination of knowledge creation, education/technical assistance, and targeted litigation/complaint strategies may serve to overcome the problem of evolving the current development of business and human rights project from a bauble for the use of global elites and as an instrumental project to protect the privilege of states to a mechanism of asserting popular power through the operation of markets and the invocation of the international procedures which states themselves are bound to honor.

Key words: business due diligence, corporate social responsibility, education, human rights, international law, knowledge management, knowledge spiral cluster, nonprofit organizations, OECD, strategic litigation, Guiding Principles for Business and Human Rights, Guidelines for Multinational Enterprises, NGO, governance, soft law, national contact points, human rights due diligence, toolkits

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I. INTRODUCTION: A MULTI-DISCIPLINARY HUMAN RIGHTS AND BUSINESS PROJECT.

A. Prologue—Project Genesis and Roadmap.

This chapter starts from the premise that the business of human rights is more unbalanced than it needs to be. That framework tends to adopt essentially hierarchical forms, which at their limit can be perceived as anti-democratic in its structures and methodologies. It serves the interests of states in retaining their authority and is protective of the use of law as the most legitimate expression of coercive rule making power in global governance. It sometimes appears to privilege the largest global stakeholders—international organizations, multinational corporations, and non-state civil society actors—over others in the conversations about the meaning, scope, and framework of human rights and their application. Democratization of the business and human rights project is made more difficult by asymmetries of information and resources and, more importantly, by the tendency to silo expertise into disciplinary components—corporate law, international law, commercial law, policy, knowledge production, dispute resolution, etc.

The question presented, then, was how to provide a balance, from the bottom up, not merely with respect to the discourse of global human rights in business activity, but in its operationalization. That project, in turn, required a methodology for knowledge production, dissemination, and engagement relating to the business of human rights, and a means of capacity building to avoid developing yet another set of top-down structures (with us in control). Last, capacity building was of little use if the means for unleashing that capacity was not also developed. To that end, resorting to the law-state system¹ (incarnated in its judicial mechanism) was not enough.

Additional means of intervening, both to vindicate human rights wrongs and to effectively engage in the business and human rights discourse, were needed. This was the context in which the Democratizing Human Rights/Catalyzing Strategic Litigation (DHR/CSL) project was conceived. The DHR/CSL project is interdisciplinary in the sense that it seeks to make coherent the connections between law, education, capacity building (as a sociological concept), and theory (as a semiotic exercise in the construction of meaning). The DHR/CSL project is also dynamic in the sense that it seeks to

¹ We use this term as a shorthand for the Westphalian system of states and its international superstructure, ultimately expressed through the United Nations. It is one premised on the supremacy of the state and its government as the most legitimate organization of political power, and laws developed legitimately through these structures are understood as the most compelling and legitimate means of regulating [Can you use another word since “compelling” was used just a few words before?] behavior among individuals. See discussion in, Larry Catá Backer, *On the Tension between Public and Private Governance in the Emerging Transnational Legal Order: State Ideology and Corporation in Polycentric Asymmetric Global Orders* (April 16, 2012). Available at SSRN: <http://ssrn.com/abstract=2038103>.

operationalize its theoretical insights into methods of action that might empower smaller human rights related stakeholders.

The genesis of this project and its framework, suggest the roadmap of this chapter, which is offered to introduce the reader to both. First, we describe the context within which we situate the DHR/CSL project.² We then turn to the business of knowledge as the foundation of the DHR/CSL project. We divide this into three parts—acquisition, dissemination, and application.

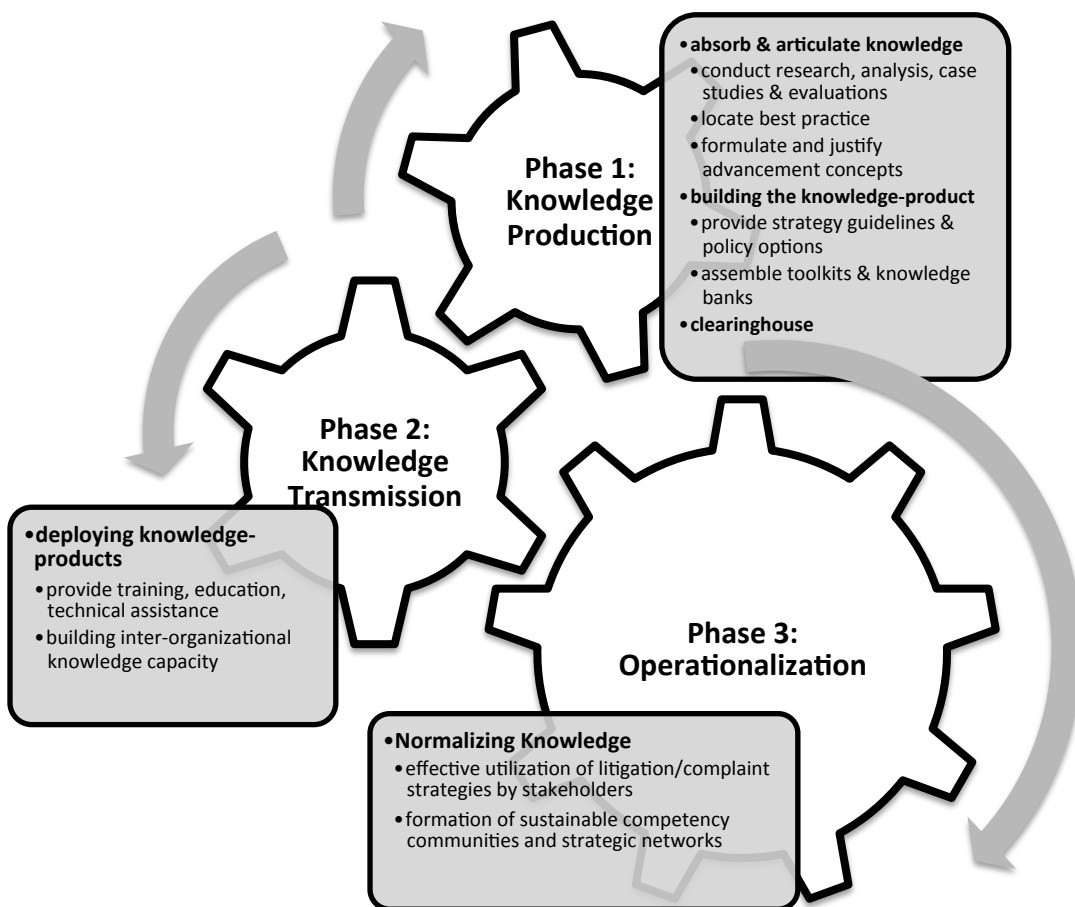


Figure 1: The three phases for the CSL initiative [Phase 1: add “conduct” before “research & analysis” and before “case study & evaluations.” Phase 2: two items are not parallel – add a verb before “training, education, technical assistance.” Phase 3: remove extra space after “Formation of.”]

Part II provides a broad conceptual overview of the mechanism of knowledge production, “knowledge spiral clusters,” which we develop from the concept of knowledge

² Part I.B, *infra*.

management, within the context of promoting international standards for socioeconomic rights and corporate social responsibility. The object is to apply the theoretical underpinning of organizational behavior and knowledge management to the development of toolkits for NGOs and civil society actors who aim to provide a bottom-up approach to global human rights. Part III looks at knowledge dissemination. The focus is on techniques for training civil society elements to teach, and methods to assess and monitor their effectiveness. The object is to align the premises and objectives of knowledge production with those of knowledge dissemination to create a mechanics of self-sustaining knowledge generation and internalization by actors whose needs for specific kinds of knowledge are satisfied. Part IV then moves from knowledge production/dissemination to application. *Democratizing human rights* is the ultimate objective of this exercise. That objective requires the deployment of knowledge and capacity that enables individuals and groups to become active agents for the protection of their own interests and the advancement of governance norms. That requires a strategy for these actors to effectively engage and develop state-based or international mechanics for the vindication of rights that are the subject of business and human rights regulatory regimes. To that end, a *project of knowledge application* is an effective form of engagement, one centered on the resolution of those disputes that embody the violations of human rights norms that human rights due diligence projects have been crafted to expose.

B. Contextualizing the DHR/CSL Project Within the Global Business and Human Rights Enterprise.

Over the last several decades, substantial efforts have been made to bridge the regulatory gaps between the emerging human rights architecture of the law-state system and that of non-state actors operating in transnational economic, social, cultural, and religious space. Among the most important recent efforts was that developed by the Organization for Economic Cooperation and Development (OECD) through its Guidelines for Multinational Enterprises (MNE Guidelines).³ The MNE Guidelines developed a framework through which international standards could be applied directly to business enterprises by states enforcing transnational norms under their treaty obligations. The system was neither binding on states, nor incorporated into their domestic legal orders. The system was not binding on enterprises. However, application of the MNE Guidelines could affect the judgment of individuals and investors who might assert either sovereign authority (against state actors) or market power (against non-state actors) to enforce these norms. This would render those non-binding rules functionally effective, thus promoting convergence between the normative regulatory frameworks of the law-

³ See Org. for Econ. Cooperation and Dev., OECD Guidelines for Multinational Enterprises (2011), available at http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html.

state system and those of the globalized market systems.⁴ The MNE Guidelines were especially important because they provided a mechanism, quasi-judicial in character, through which non-state actors could bring complaints against multinational enterprises for violations of the MNE Guidelines. Some of us have argued that this has created the potential for a transnational jurisprudence of standards beyond the reach of domestic law.⁵

In June 2011, this framework was augmented when the U.N. Human Rights Council unanimously endorsed the Guiding Principles for Business and Human Rights (GP).⁶ The GP represented the culmination of the work of John Ruggie, in his role as Special Representative of the Secretary-General of the United Nations for Business and Human Rights. Over the course of six years, Ruggie developed a framework within which the human rights effects of business activities could be folded into international standards for human rights.⁷ Within a very short period of time, at least among important global actors, the GP has come to represent an authoritative global standard for understanding business and human rights.⁸ It has been incorporated to a large extent into the OECD Guidelines on Multinational Enterprises,⁹ and in the revised EU Strategy on CSR, the International Finance Corporation's Performance Standards, which in turn are used by Export Credit Agencies in OECD Countries.¹⁰ The same approach can be found in the OECD Guidance on responsible supply chain management of conflict minerals¹¹ and in

⁴ Harold S. Bloomenthal & Samuel Wolff, *Fragile Nature of International Securities Regulation*, 10 Int'l Cap. Markets & Sec. Reg §1:81 (Nov 2009).

⁵ See, Larry Catá Backer, Case Note: *Rights And Accountability In Development (Raid) V Das Air (21 July 2008) And Global Witness V Afrimex (28 August 2008)*; *Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 258-307 (2009).

⁶ John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, Seventeenth session, Agenda item 3 A/HRC/17/31 (21 March 2011). Available <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

⁷ See, John Ruggie, U.N. HRC, 8th Sess., U.N. Doc. A/HRC/8/5 (2008); John Ruggie, U.N. HRC, 8th Sess. U.N. Doc. A/HRC/8/5 (2008); John Ruggie, Keynote Presentation, EU Presidency Conference on the 'Protect, Respect and Remedy' Framework, Stockholm, November 10-11, 2009 at 6; John Ruggie, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) princ. 2; John Ruggie, U.N. SRSR for Business and Human Rights, Keynote Presentation at EU Presidency Conference on the "Protect, Respect and Remedy" Framework, (Nov. 10-11, 2009).

⁸ See, e.g., Susan Ariel Aaronson and Ian Higham, "'Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms," 35(2) Human Rights Quarterly 333-364 (2013).

⁹ See, Guidelines for Multinational Enterprises, *supra*, at Part IV (Human Rights). Comment ¶ 36.

¹⁰ See, e.g., SHIFT, Supporting Norway's Export Credit Agency on the UN Guiding Principles, available <http://www.shiftproject.org/project/supporting-norway%E2%80%99s-export-credit-agency-un-guiding-principles>.

¹¹ OECD Due Diligence Guidance for Responsible supply Chains of Minerals from Conflict-Affected and High-Risk Areas 2nd Edition (2013). Available <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>.

national legislation and regulation in the United States on conflict minerals in the Democratic Republic of the Congo.¹²

The GP is based on the elaboration of the state duty to protect, the corporate responsibility to respect human rights, and the obligation of both to provide effective remediation.¹³ What made the GP so innovative was its recognition of a sphere of governance obligations of corporations that existed autonomously of the specific legal obligations of states either as a matter of the domestic law of a state or of its obligations under international law.¹⁴ It recognized, in effect, the binding power of non-state or law-based regulatory regimes when undertaken by communities of non-state actors. It also recognized the power of simultaneously applicable regulatory regimes—a transnational governance regime grounded in international law and norms which bind corporations through the community of stakeholders among which they operate, and a national governance regime grounded in domestic constitutional orders constrained by developing applicable international law frameworks to which states have bound themselves. Both sets of regimes, representing traditional state and law-based governance and also the emerging regulatory regimes of private economic activity, would be harmonized and made coherent through the mediating standards of international law and norms. These mediating standards, in turn, would both reflect and apply consensus-based rules applicable in public and private spheres. Law and social norms could then be understood as originating from distinct governance spheres but reflecting a common set of core values that could be aggregated to produce a system that would further the human rights projects of public and private governance entities.

However, the broadest reach of the innovation of the Guiding Principles' three-pillar structure also proved threatening to the dominant law-state framework and the privilege of law as the only legitimate basis for regulatory undertaking.¹⁵ As a consequence, the final version of the GP represented a retreat, to some extent, from the broadest implications of corporate regulatory autonomy.¹⁶ In particular, the GP insisted on the dominance of state-based judicial remedies and relied on the application of the law of the

¹² Securities And Exchange Commission, 17 CFR PARTS 240 and 249b, Release No. 34-67716; File No. S7-40-10; RIN 3235-AK84 (Conflict Minerals). Available <http://www.sec.gov/rules/final/2012/34-67716.pdf>.

¹³ Larry Catá Backer *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 71 2010.

¹⁴ See, Larry Catá Backer, *A Conversation About Polycentricity in Governance Systems Beyond the State*, Law at the End of the Day, Nov. 11, 2013. Available <http://lcbackerblog.blogspot.com/2013/11/a-conversation-about-polycentricity-in.html>.

¹⁵ For a criticism, see Larry Catá Backer *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 71 2012; and Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L L. 37, 73-77 (2011).

¹⁶ Backer, *From International Misalignments*, *supra*.

domestic legal orders in which activities occur, with a nod toward state obligations to apply international standards. It is possible to suggest that this approach failed to apply fully the conceptual framework of Protect-Respect-Remedy.¹⁷ Yet it left enough room for non-state entities to continue to fashion and apply transnational standards for business and human rights autonomously of those developed by or through the domestic legal orders of states.

This traditionalist turn has been reinforced by academics and elements of civil society. The conventionally prominent role of states has tended to center analysis of the GP on the state duty.¹⁸ This approach would reduce the corporate responsibility to respect human rights as little more than an international effort to standardize the scope and method of corporate reporting and what is called due diligence, the enforcement of which would remain centered on the state, subject perhaps to emerging international obligations.¹⁹ And indeed, recent cases from the United States suggest the difficulties of an over reliance on the law-state part of the emerging global regulatory framework.²⁰ Both Mr. Ruggie's reports as Special Representative and the GP framework were grounded in the premise that powerful states, like the U.S. would continue to develop their domestic legal orders to incorporate international standards fully.²¹ The *Kiobel* decision²² suggests the optimism of that position, especially one that is grounded in the notion of either uniformity in the domestication of international obligations or in the adequacy of national judicial protection beyond those of a relatively few states.

Others have questioned the state-centric approach, characterized by an over reliance on the jurisprudence and domestic legal order of key states, like the United States, as naïve and reductionist.²³ Non-state global governance exists and is useful, especially in the context of global economic activity. There is merit to the notion that states may be useful

¹⁷ See, e.g., Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 8, at 41.

¹⁸ See, e.g., Beata Faracik, *The Role of the State in Implementing the UN Guiding Principles on Human Rights and Business With Special Consideration of Poland*, 31 POLISH Y.B. INT'L L. 349; European Commission, Directorate-General for Trade, *Corporate Social Responsibility and Trade Policy—Implementing CSR Practices and the OECD Guidelines for Multinational Enterprises in Developing Countries* (June 7, 2004).

¹⁹ *Ibid.*, 2-3.

²⁰ See, Joel Slawatsky, *Corporate Liability Under The Alien Tort Statute: The Latest Twist*, Law at the End of the Day, April 26, 2014. Available <http://lcbackerblog.blogspot.com/2014/04/joel-slawatsky-on-corporate-liability.html>.

²¹ See, e.g., John Ruggie, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007); John Ruggie, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

²² *Kiobel v. Royal Dutch Petroleum* 569 U. S. ____ (2013).

²³ Larry Catá Backer, *Using Corporate Law to Encourage Respect for Human Rights in Economic Transactions: Considering the November 2009 Summary Report on Corporate Law and Human Rights Under the U.N. SRSR Mandate*, Law at the End of the Day (Jan. 14, 2010). Available <http://lcbackerblog.blogspot.com/2010/01/using-corporate-law-to-encourage.html>.

as vehicles for the application of international norms, even extraterritorially.²⁴ But the domestic judicial organs of states may not provide the best venue for the application of international norms, especially when they are proffered as the sole or privileged site for the remediation of adverse human rights impacts of state or non-state actor activities.²⁵ An appropriate approach to global regulation now requires both a respect for the regulatory power of the state and for its multilateral instruments—the international organizations that have been responsible for the great legal progress in articulating human rights standards—and the recognition of the regulatory power of non-state actors as effectuated through markets. The logic and structural framework of globalization suggests the robust governance of non-state actors and the need to recognize the role of non-state actors in shaping and applying human rights norms. States like Norway recognized this relationship and have begun to leverage their regulatory objectives through market interventions, especially through their sovereign wealth fund.²⁶ Moreover, we have suggested the contours of emerging systems of remediation beyond the traditional boundaries of the state- supported judicial mechanics.²⁷

The limitations of the GP, then, as a mechanism for the development of strong venues for the protection of individuals and organizations against adverse human rights impacts, may well lie in its re-characterization principally as a tool of the law-state system for managing legal responses to adverse consequences. In the absence of a strong organizational framework for coherence, the state duty to protect human rights will necessarily be limited by a state's legal relation to international law as well as by the legal traditions within which such obligations, to the extent they are recognized, are interpreted and applied. As important, the state duty is ineffective in the context of transnational activities that are the foundation of the emerging global legal order. Current efforts to enclose global transnational activities within the fences of territorially limited legal regimes are bound to fail.²⁸ The failure to recognize the power of regulatory regimes that are sourced and managed through markets will also substantially impede global efforts to advance a coherent structure of protection from adverse human rights

²⁴ Sara L. Seck, *Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations*, 3(1) TRADE L. & DEV. 164 (2011).

²⁵ See, e.g., Gunther Teubner, Review Essay, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 162–65 (1997); GRAF-PETER CALLIESS AND PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (Oxford: Hart Publishing, 2010).

²⁶ Discussed in Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law-Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29(1) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1-121 (2013).

²⁷ See, e.g., Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA Journal of International & Comparative Law 499-523 (2008).

²⁸ See, Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1017-1044 (2004); Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3 (Christian Joerges et al. (eds.), 2004).

impacts of economic and other organizational activities, suggesting an imbalance between state and non-state actors and between state-centric and non-state-centric legal frameworks.²⁹ The focus on the state duty to protect is especially apparent in the Guiding Principles' remedies pillar. Amplifying the premises of the state duty to protect human rights and minimizing the autonomous role of the corporate responsibility to respect human rights, the remedial pillar attaches itself to the judicial mechanisms of states. This pattern is also reflected in the Guidelines for Multinational Enterprises, which has sometimes been constricted to a species of state authority to advance foreign policy under the OECD treaties.³⁰

As a consequence, much of the current work of incorporating the GP has occurred only among state actors and between these organizations and global non-state actors committed to a state-law based program of global regulation.³¹ Over the last few years, it has become clear that states and the largest multinational corporations, along with global civil society organizations, have embraced the premises and structures of the GP.³² At the highest levels of hierarchies of public and private power, the GP appears to be increasingly invoked to fashion the framework within which these entities can determine the structures of their relationships (and obligations to and from) other people and groups below them on their respective power hierarchies.³³

However, smaller companies, and especially companies lower on the global value or supply chain, may find it harder both to access information about the GP and to obtain the help necessary to begin to incorporate human rights in their operations. Business and human rights in supply chains tend to flow down from the top of the chain in the form of virtually non-negotiable packages of pre-structured human rights behavior codes, and with little expectation other than that downstream supply chain entities are the cause of trouble and management from the top of the supply chain is the solution.³⁴ This pattern is reinforced by the tendency of Western states increasingly to impose supply chain liability on producers at the top of these chains, a result that is also reflected in the organizational

²⁹ Discussed in Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance*, 25(1) PACIFIC MCGEORGE GLOBAL BUSINESS & DEVELOPMENT LAW JOURNAL 69-171 (2012).

³⁰ See discussion *infra* Part II.

³¹ John Ruggie, Shift Putting Principles into Practice. Available <http://www.shiftproject.org/profile/professor-john-ruggie-0>.

³² See, e.g., John F. Sherman III, The U.N. Guiding Principles: Practical Implications for Business Lawyers, In-House Defense Quarterly 50, 51-52 (Winter 2013), available <http://shiftproject.org/sites/default/files/Practical%20Implications%20for%20Business%20Lawyers.pdf>.

³³ See, e.g., Shift, UN Guiding Principles on Business and Human Rights, available <http://www.shiftproject.org/page/un-guiding-principles-business-and-human-rights>.

³⁴ David Linich, Labor Unrest in the Global Supply Chain: Major Risk or Untapped Opportunity?, Supply Chain Comment, Nov. 29, 2012. Available http://www.scdigest.com/experts/Linich_12-11-29-1.php?cid=6481&ctype=content.

and relational expectations of the GP.³⁵ Likewise, local civil society organizations, which tend to have the greatest contact with middle level and local businesses, are also at a disadvantage. The difficulties include access to information in local language and to training. Moreover, local enterprises and civil society organizations lack the means to obtain technical assistance. As a result, key stakeholders in the development of cultures of respect for and incorporation of human rights in business lack access to basic information, training, and technical assistance. Many of the workers employed locally are part of global supply chains managed by large multinational corporations. Most of these workers, small shops, and local civil society actors are bypassed by global structures of business and human rights focused on elites in national capitals and the non-state actor organizations that serve them and their own interests.

Thus, this is the problem to which this article is addressed: With the June 2011 endorsement of the GP by the U.N. Human Rights Council, the international community entered a new phase in the approach to the important work of developing global norms for economic activity with human rights impacts, irrespective of the states in which these occur.³⁶ Operationalization has so far focused on the home states of most Multinational Corporations, on the great multinational corporations at the top of the supply chain and on the great global civil society organizations at the apex of these justice chains. These are presumed to be the active agents of domestic and international, public and private sector change. This traditional approach also assumes a passive set of actors on whom the activity of these great actors is targeted. Passive and grateful, local elements of civil society, labor and communities, and middle level supply chain enterprises are meant to conform to the application of human rights regimes developed for them and imposed for their benefit by their elite betters. Over all of this architecture stands the state apparatus, which uses the business and human rights regimes as a means of cementing its power, both over the production of law and as the center of the nexus of public and private actors that control domestic and transnational space. But this is an impossible agenda, at odds with the realities of global behaviors over which states may not be able to assert complete control.³⁷ Continued single-minded focus on the state and the great global elite actors in

³⁵ See, e.g., Jan-Willem Scheijgrond, *Extending Producer Responsibility Up and Down the Supply Chain, Challenges and Limitation*, 29(9) WASTE MANAG. & RES (Sage) 902-910 (2011).

³⁶ See Jose Alvarez, *Are Corporations "Subjects" of International Law*, 9 SANTA CLARA J. INT'L L. 1, 5 (2011); Paul Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1574 (2011). See also Larry Catá Backer, *Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.*, 20(2) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 805-879 (2013).

³⁷ Larry Catá Backer, *Inter-Systemic Harmonization and Its Challenges for the Legal-State*, in *The Law of the Future and the Future of the Law* 427-437 (Editors: Sam Muller, Stavros Zouridis, Morly Frishman and Laura Kistemaker; Oslo: Torkel Opsahl Academic EPublisher, 2011) (FICHL Publication Series No. 11 (2011)) (ISBN 978-82-93081-27-2). Available at http://www.fichl.org/fileadmin/fichl/documents/FICHL_11_Web.pdf.

fashioning a top-down architecture for business and human rights regimes³⁸ can amount to a perversion of the core objectives of the business and human rights project.

Rather than contribute to the cultivation of cultures of accepting and passive recipients of the human rights largess of elite businesses and Western states, effective global justice delivery requires a strong targeting of the critical actors in the human rights effects chain down traditional supply and value chains. These include economic enterprises situated within the supply chain in host countries and to local elements of civil society that bear the brunt of the work of bringing justice to those adversely affected by the activities of business and states. This is especially important for bridging the gap between the discoveries of adverse human rights impacts of economic activity and remediating and preventing further damage for those adversely affected; in effect, the provision of justice within this framework requires substantial attention at the level of justice delivery.

To effectively realize the promise of new regimes of business and human rights within both the law-state system and the markets-based private regulatory transnational system, it may be useful to begin to *reconceive both the regulatory space and the role of actors within it*. Unlike other efforts that tend to seek a buy-in of the GP - typically by home and host states and the largest multinational corporations at the end of the supply chain – effective projects for catalyzing human rights sensitive conduct at the operational level require a focus not on Geneva, New York, Berlin, and Washington, D.C., but at those sites and in those states in which much of the low level work of global industry is undertaken with the greatest potential for human rights adverse effects. Such a project would have to target smaller firms down the supply chain, especially those enterprises which will bear the greatest responsibility for complying with the GP but which also have the least involvement in the due diligence process.³⁹

And thus the thesis of this chapter is: To effectively implement the GP requires an empowerment of all stakeholders down the supply and value chains. This empowerment must naturalize the substantive norms embedded in the GP into the cultures of business activity shared by all stakeholders. This objective requires that *two distinct but related avenues of activity* must be undertaken to embrace recently emerging approaches that are

³⁸ Janet Koven Levitt *Bottom-Up Transnational Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007).

³⁹ And indeed, the Working Group on the issue of human rights and transnational corporations and other business enterprises have sought to cultivate SMEs as part of their project. Yet there is an irony in this support coming from Geneva where the focus necessarily remains on the implementation of the state duty to protect human rights. Human Rights Council Forum on Business and Human Rights, Second session 2–4 December 2013, Summary of discussions of the Forum on Business and Human Rights, prepared by the Chairperson, Makarim Wibisono, A/HRC/FBHR/2013/4 (15 April 2014) available http://www.ohchr.org/Documents/Issues/Business/ForumSession2/A-HRC-FBHR-2013-4_en.pdf (“The ASEAN representative highlighted the fact that implementation remained a challenge in Asia, stressing that better understanding of the issues was needed, including on challenges facing small and medium enterprises.” Id., ¶ 31).

globally sensitive and inclusive. The first aims at the production of knowledge and its transmission targeting those critical actors at the operational levels of the global supply chains who bear the greatest risk and undertake the greatest burden of complying with human rights sensitive work. The second is to engage and develop state-based or international mechanics for the vindication of rights that are the subject of business and human rights regulatory regimes. Developing new approaches to knowledge production and dissemination (capacity building and sustainable norm internalization mechanics) can catalyze vigorous approaches (through technical assistance and support) to the protection against business human rights violations through non-judicial and non-state-based remedial and dispute resolution mechanisms.

Catalyzing litigation produces empowerment among the most neglected group of human rights stakeholders in two ways—it serves to remedy individual wrongs, and it provides a powerful venue for participation of traditionally excluded groups who may now more vigorously participate in the international development of business and human rights standards. This chapter lays out a strategy for advancing programs of human rights related to business activity, the Democratizing Human Rights/Catalyzing Strategic Litigation (DHR/CSL) initiative. This project seeks to mainstream and *democratize* concepts of business and human rights and to raise awareness among the general public, as well as business and civil society organizations relating to the human rights responsibilities of business, so that discussion may move from academic discourse and policy declarations at the highest levels to naturalization within the experiences of those who feel the sting of adverse human rights effects directly.

The remainder of this chapter elaborates our initial framework for a three-phase approach for the DHR/CSL initiative. It begins with knowledge production and is followed by an education/knowledge transmission phase and an operationalization phase where large networks of stakeholders can both effectively and sustainably enforce business due diligence through the implementation of litigation/complaint strategies.⁴⁰ The combination of knowledge creation, education/technical assistance, and targeted litigation/complaint strategies may serve two objectives. First, it may contribute to the evolution of the current business and human rights project from a bauble for the use of global elites and as an instrumental project to protect the privilege of states into one that is accessible to the actors on the ground and the individuals who suffer human rights wrongs. Second it may help structure the business and human rights project into a system for asserting popular power through the mechanics of markets and the invocation of the international procedures which states themselves are bound to honor.

II. THE MANAGEMENT OF KNOWLEDGE.

⁴⁰ See Figure I, *supra*.

Engagement in the business of human rights is difficult without knowledge and training. Those preliminary efforts are often overlooked as global elites target those already well situated to engage in the development of governance structures that will then be applied to those unable to participate in the making and use of human rights norms. This section will introduce the concept “knowledge spiral cluster”—a novel knowledge management framework developed for the purpose of advancing human rights education and promoting international standards for socioeconomic rights and corporate social responsibility.

A. From Theory to Practice.

Human rights education, according to Amnesty International (AI), “is both a lens through which to observe the world and a methodology for teaching and leading others.”⁴¹ In 1995, the United Nations Decade for Human Rights Education was initiated.⁴² The goal was for a global and universally accepted culture of human rights education that is shared through imparting certain knowledge about human rights and pedagogy. Following the tradition of the International Congress on the Teaching of Human Rights (1978), the U.N. has been pushing for human rights education globally to be respected by states. Human rights education has been a growing trend of inquiry since the 1970s and traditionally situated at the intergovernmental level.⁴³ The aim of many human rights organizations is to integrate trainers and learners in what has been labeled “empowerment process.”⁴⁴

The core mission will be to supply a framework for the implementation of access to a justice system that is grounded in compliance with the GP and to target those deliverables to precisely those stakeholders that tend to be seen as having only a passive role in the construction of and access to the justice system. The ultimate object is the creation of a sustainable and essentially self-contained system—offering both a normative structure and a set of knowledge products (toolkits) for implementation—in which the participants can ultimately take control of and participate more fully in its application and evolution. These toolkits will be designed for students and civil society actors to provide materials for the pedagogy of business and human rights and the application of the GP, as well as for businesses, that can be used to effectively engage in human rights due diligence and to provide access to the justice system. The objective is to make systems of human rights justice more accessible at the point of service delivery, rather than just at the highest

⁴¹ “Educators.” Amnesty International USA. <http://www.amnestyusa.org/resources/educators> (accessed June 7, 2014).

⁴² David Suarez, ‘Education Professionals and the Construction of Human Rights Education’ (2007) 51 *Comparative Education Review* 1, 48-70.

⁴³ Felisa Tibbitts, ‘Transformative Learning and Human Rights Education: Taking a Closer Look’ (2005) 16 *Intercultural Education* 1, 107-113. Available at http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.hrea.org%2Findex.php%3Fbase_id%3D302&external=N.

⁴⁴ *Ibid.*

institutional levels. This objective can be achieved through the creation of a sustainable knowledge-management architecture grounded in technical assistance and self-empowerment.

In the following paragraphs, we will draw from recent development in organizational and knowledge-management studies and propose an updated human rights advocacy strategy that facilitates both the development of toolkits for asserting complaints through National Contact Points (NCPs) as well as the formation of clearinghouses and competency networks for knowledge and experience sharing for coordinated action. This chapter argues that networked human rights organizations operate most effectively as open-knowledge systems that transcend traditional institutional and political boundaries, where information and knowledge are shared freely. It is therefore imperative for human rights organizations to utilize participatory knowledge management strategies in order to guide our approach in integrating the Protect-Respect-Remedy framework.

B. The SECI Model of Knowledge Management.

Considering the increasingly important role of NGOs as global human rights advocacy groups, it is necessary to examine the way these organizations can produce, manage, disseminate, and deploy knowledge effectively to promote and enforce human rights standards. During the last decade, scholars have directed increasing attention to patterns of knowledge creation of emerging multinational enterprises, recognizing the enormous potential of global knowledge-creating networks.⁴⁵ The discipline of management studies has long recognized the importance of knowledge as a key source of competitive advantage, as suggested by the growing literature focusing on the production and transfer of knowledge in private firms.⁴⁶ During the last decade, knowledge management (KM) emerged as a distinctive area within management and organizational studies. Although concepts such as tacit knowledge and organizational knowledge unify much of this emerging research, there remains much variety in terms of angles and approaches chosen to examine the knowledge production and advancement process.⁴⁷ Despite the ever-growing footprint of knowledge-management strategies in private sectors, we are yet to

⁴⁵ Nonaka, Ikujiro, Nishiguchi, Toshihiro. 2001. *Knowledge emergence: Social, technical, and evolutionary dimensions of knowledge creation*. New York: Oxford University Press, 7.

⁴⁶ See, e.g., Michael C. Jensen and William H. Meckling, Specific and General Knowledge, and Organizational Structure, *Journal of Applied Corporate Finance* 8(2):4-18 (1995); Stephen Tallman, Mark Jenkins, Nick Henry and Steven Pinch. Knowledge, Clusters and Competitive Advantage, *Academy of Management Review* 29(2):258-271 (2004); Steven Pinch, Nick Henry, Mark Jenkins and Stephen Tallman, From 'industrial districts' to 'knowledge clusters': a model of knowledge dissemination and competitive advantage in industrial agglomerations, *J Econ Geogr* 3(4):373-388 (2003); Oliver Gassmann and Marcus Matthias Keupp, The competitive advantage of early and rapidly internationalising SMEs in the biotechnology industry: A knowledge-based view, *Journal of World Business* 42(3):350-366 (2007). [used different format for this footnote]

⁴⁷ *Ibid.*, 3.

witness the widespread application of knowledge management strategies outside of private business and governmental sectors.⁴⁸

Although the term “knowledge” has multiple concurrent meanings, this chapter is primarily concerned with the kind of knowledge that operates within organizational contexts—especially for organizations that provide knowledge-based products and services.⁴⁹ An important and yet frequently ignored aspect of organizational epistemology is the fact that beneath the visible domain of knowledge performance, there is a large tacit domain of knowledge base.⁵⁰ Figure 2 provides the conceptual frame that guides our work:

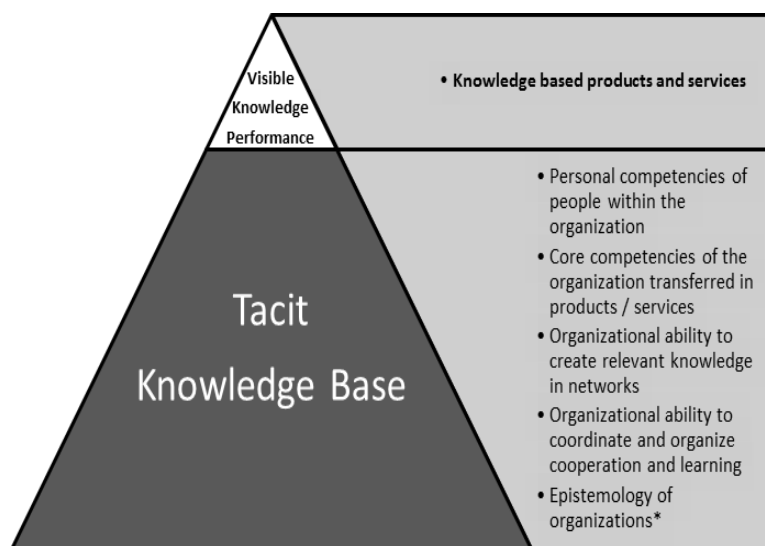


Figure 2: Organizational Epistemology [add hyphen between “Knowledge” and “based” in title. Remove spaces before and after “/”. What is the * after “organizations” for?]

The pyramid figure above demonstrate how observable organizational practices (knowledge performances) are largely shaped by the organizational knowledge base -- the underlying competencies, skills and culture embodied by the members or employees of the organization. It follows that, in an organizational setting, both the advancement of

⁴⁸ *Ibid.*, Intro.

⁴⁹ Epistemology of an organization, as defined by Neumann and Blecker, is the organization’s ability to “create, combine, and integrate knowledge concerning the own organization and relevant environments on the basis of self-referential operations and reflexive reproductions of the organizational knowledge order as a part of the organizational identity.” Blecker, Thorsten and Neumann, Robert (1999). International Knowledge Management: Some Perspectives for Knowledge Oriented Strategic Management in Virtual Organizations. In Knowledge management and virtual organizations, (ed.) Yogesh Malhotra, 2000. Hershey, PA, USA: Idea Group Publishing, pp. 63-83. [format in next footnote is different from this – although it seems to be the same document.]

⁵⁰ Thorsten Blecker and Robert Neumann, “International Knowledge Management: Some Perspectives for Knowledge Oriented Strategic Management in Virtual Organizations” in Knowledge management and virtual organizations Yogesh Malhotra, (ed.), 2000; Hershey, PA, USA: Idea Group Publishing 63-83 (1999).

existing knowledge performance and the acquisition of new knowledge performance by the organization require corresponding changes/improvements within the organizational knowledge base.

Based on this new understanding of organizational epistemology, in the 1990s Japanese organizational theorist Ikujiro Nonaka famously proposed a continuous “spiral” knowledge creation and advancement strategy for organizations known as the “SECI” (socialization, externalization, combination, internationalization) model.⁵¹ In the SECI model, socialization (socially acquiring tacit knowledge),⁵² externalization (articulating tacit knowledge into explicit knowledge),⁵³ combination (converting externalized knowledge into more complex knowledge products),⁵⁴ and internationalization (turning explicit knowledge into tacit knowledge skills)⁵⁵ are discussed as four interdependent yet idiosyncratic concepts, which are vital for a democratized human rights structure. The newly acquired knowledge performance is then shared among practitioners through socialization, thus triggering a new spiral knowledge-creation process:

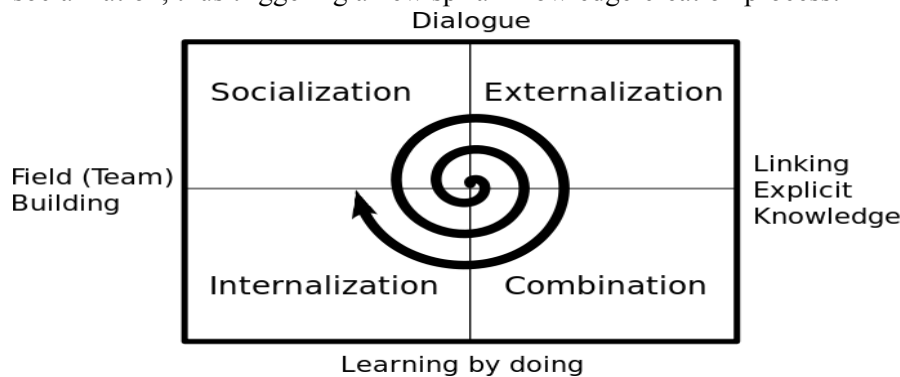


Figure 3: The SECI “spiral” model

Nonaka uses the term “spiral” rather than “cycle” to stress the *advancement* aspect of the SECI model. This suggests that organizational knowledge does not remain static; on the contrary, the word “knowledge” signifies a continuous process of organizational (and inter-organizational) capacity-building.

Additionally, there are three patterns of inter-regional or cross-border knowledge creation. The first is to combine “generic knowledge” from the central knowledge-producing organization with location-specific knowledge in various localities to produce

⁵¹ Nonaka and Nishiguchi, *supra* pp.14-21.

⁵² *Ibid.*, 11-14.

⁵³ *Ibid.*, 16.

⁵⁴ *Ibid.*, 16-17.

⁵⁵ *Ibid.*

locally tailored products or services.⁵⁶ The second pattern is a more networked approach, that is, to combine generic knowledge from several knowledge-producing locations, and to form “competence communities” that serve to link geographically dispersed practitioners and specialists in a continuous learning community to sustain and improve knowledge performance in the field. The third pattern is to begin with location-specific knowledge and to use analogy to make specific knowledge performance transferable and applicable to broader localities.⁵⁷

D. Knowledge Spiral Cluster: A New Approach to Knowledge Management.

For the purpose of the DHR/CSL initiative,⁵⁸ we have attempted to develop the traditional KM approach into networked *knowledge spiral clusters*. The knowledge spiral cluster is a flexible, expansive, and dynamic process of knowledge flow among relevant networks. It is also more applicable to NGOs and other forms of noncorporate organizations that existing knowledge-management research has largely ignored. Four factors differentiate the knowledge spiral cluster from existing knowledge-management models.

First, the knowledge spiral cluster mainly focuses on facilitation of knowledge flow rather than management of knowledge. Unlike the private business model, which considers the model as a vertical and closed system albeit with an inherent flexible flow of information, the knowledge spiral cluster model is decentered and highly fluid, and goes in every direction. Even if a developed model of knowledge management is meant to bring vertical relationship (top-down) to a more horizontal communication, it is confined in an organizational knowledge flow. Therefore, the knowledge sharing process is still confined within the corporate structure. By contrast, our model is structured in networks by how one agency is connected with multiple entities, which is polycentric.

Second, in our spiral cluster model, the effect of knowledge production is felt without the need to constantly manage and direct the flow of knowledge. Moreover, the characteristics of knowledge organically change through the process of circulation, and dynamically adapt to different circumstances and needs. In contrast, the existing KM model presupposes a rigid corporate control system in which the flow of knowledge is linear (top-to-bottom), and the production, possession, and deployment of knowledge is centrally managed by the leadership of an organization.

Third, while the traditional corporate KM model employs the mechanism of knowledge management as an instrument for profit maximization, the spiral cluster model adopts the

⁵⁶ Nonaka and Nishiguchi, *supra* pp.169-170

⁵⁷ *Ibid.*, 170-172

⁵⁸ See discussion Section I.A., *supra*.

KM mechanism for its own sake—namely the advancement and proliferation of human rights knowledge. The role of human rights KM framework is to provide a clearinghouse on litigation of human rights, due diligence, and corporate social responsibility. In the noncorporate civil society context, organizational activities, such as research, case studies, and communication with locals, are in themselves knowledge-products, which in turn can be openly shared and used as toolkits for various purposes of those who use them.

Fourth, the most critical aspect of the knowledge spiral cluster rests upon an open and polycentric ecosystem of knowledge emergence. Unlike the private business setting, which requires secrecy to some extent, the knowledge spiral cluster model is unique in the way that it is completely open to the external [put in a noun] and generates multiple cluster cores in networks. Constant exposure to the external [put in the noun] decentralizes a system of knowledge management and renders any entity as both subject and object. An entity in the networks is a subject that greatly influences other entities, as well as an object that is observed, accessed, and influenced by other actors.

This open and polycentric ecosystem of knowledge clusters is quintessential in the development of networked toolkits, because a closed and monolithic system ultimately suffocates and loses its knowledge production abilities. The knowledge spiral cluster is a non-structured and organic sphere, yet needs to be nurtured with deliberate care. However, without praxis, the idea of human rights due diligence cannot be sustained. Praxis is the way to internalize the idea of master discourse and produce a new knowledge circle.

The most effective mechanism of knowledge production is to mobilize the masses in the form of crowdsourcing, where the flow of knowledge is democratized. Therefore, effective human rights knowledge production can be best achieved through the utilization of open-source frameworks—organic systems that function autonomously through the free sharing of information, networked collaborations, and peer productions.

The traditional SECI model provides a useful framework for knowledge to emerge organically and sustainably within corporate boundaries. However, in order for the SECI model to become operational outside of private business settings, the theoretical abstractions must be developed into a set of workable strategies. For the purpose of this chapter, we would like to propose a seven-step knowledge advancement strategy based on the spiral cluster KM model.⁵⁹

⁵⁹ Von Krogh, George, Ichijō, Kazuo, Nonaka, Ikujiro. 2000. *Enabling knowledge creation: How to unlock the mystery of tacit knowledge and release the power of innovation*. Oxford: Oxford University Press, pp. 44-99.

Step 1: Absorbing knowledge: This step is the prerequisite to bring tacit knowledge performance (practice) into the domain of explicit knowledge. As tacit knowledge is normative, locally bound, and pertains to personal experience and performance, it requires close observation and often direct socialization in order to be absorbed and familiarized. This typically involves: (1) dialogue and communication with relevant stakeholders, sharing of experiences and expertise among individuals and (2) direct observation of knowledge performances or practices.

Step 2: Articulating knowledge: This step signifies the movement between internal, tacit knowledge and external, explicit knowledge, where the absorbed normative knowledge is externalized and articulated in explicit forms (e.g. case reports, illustrations, video documentaries).

Step 3: Evaluating knowledge: This step marks the movement from *externalization* towards *combination*, where the explicit knowledge is then prepared and distributed to organization members, usually through internal reports and meetings. In-depth comparison, analysis, and diagnosis will be performed. The goal for this step is to locate best practices and identify major challenges to the current practice.

Step 4: Formulating and justifying advancement concepts: This step represents the bulk of the *combination* process, where the research team will formulate knowledge advancement concepts through combining and synthesizing the acquired knowledge from the above three steps with the organization's internal knowledge base. The research team involved might ask the following questions:⁶⁰ (1) Is the concept consistent with the overall advancement strategy and priorities? Is the concept generally applicable? (2) Who are the relevant stakeholders that will benefit from the concept? How will they benefit? How and why are they likely to react? (3) What kinds of competences need to be established in order to operationalize and further develop the concept? (4) How can the concept support existing frameworks dealing with business and human rights? (5) What kinds of new stakeholders might emerge through implementation of the concept? (6) How does the new concept contribute to the value of business due diligence and human rights?

Step 5: Building toolkits/knowledge products: This step is the latter half of the *combination* process. Once the advancement concepts have been justified, the concepts need to be processed into transferrable, usable knowledge products, or "toolkits" that may take the form of strategy options, policy recommendations, toolkits, and so on. The knowledge product is constructed by combining existing concepts, products, and procedures with the new concept. The key to knowledge-product building is to strive for simplicity and practicality without losing sight of the original justified concept. A

⁶⁰ See Nonaka and Von Krogh, *supra* note 44, 89-90.

database or “knowledge bank” for previous knowledge products and best practices in knowledge-product design will be created to help organization members to identify previous lessons and facilitate future knowledge-production cycles.

Step 6: Deploying the toolkit: This step marks the movement from *combination* back to *socialization*, where the knowledge product will be transmitted and disseminated to relevant stakeholders and turned into normative practice. The goal is to build capacity and improve knowledge performance among practitioners and specialists. The key for the deployment step is education, where through “learning-by-doing,” the practitioners will internalize the explicit knowledge product into improved tacit knowledge performance. It is also imperative to facilitate the formation of networked “competence communities,” where practitioners may share and further develop the knowledge product.

Step 7: Normalizing knowledge: This stage signifies the outcome of the above six steps, where innovative toolkits are widely dispersed and applied through networked knowledge-sharing. The prototype knowledge product, then, may become a source of inspiration across organizations, localities, and sectors, which eventually may bring to normative transformations. However, a norm will ossify and become dysfunctional when it is not being constantly updated in accordance with changing realities. As knowledge advancement is a continuous process, the operationalized knowledge product will be subjected to routinized monitoring and assessment and will be further refined. As time passes and new challenges inevitably emerge, the knowledge-advancement process would cycle back to step one (updating tacit knowledge), triggering a new cycle of the above steps.

For the purpose of this chapter, it is important to note that knowledge production is the first step to implement the GP in practice. First of all, we make the GP explicit and accessible for locals in need. This involves deliberate case studies and communication with local groups of interest in order to analyze the mechanism of the GP. As successful business and human rights advocacy cases are being observed, recorded, shared and analyzed by networks of human rights organizations, numerous cases studies and litigation guides will be compiled and shared via open-access databases.⁶¹ Through this open-source collaborative framework, civil society actors are both knowledge end-users as well as producers of new knowledge products.

The project ultimately seeks to develop a sustainable and essentially self-contained system—offering both a normative structure and a set of knowledge (toolkits) for implementation—in which the participants can ultimately take control of and participate more fully in its application and evolution. The objectives are to make justice accessible

⁶¹ Cf., Larry Catá Backer, [incomplete citation]

at the point of service delivery (rather than just at the highest institutional levels), to create a sustainable architecture for this system grounded in technical assistance and self-help, reduce barriers to entry of the most vulnerable populations, reduce informational asymmetries that make real access to justice more difficult, and reduce power asymmetries in a way that works for the mutual advantage of all parties.

III. TRANSMITTING KNOWLEDGE: HUMAN RIGHTS EDUCATION.

Global human rights norms and relevant stakeholders operate interdependently and increasingly so under the GP. This gives rise to a new governance framework where networks of civil society actors and local communities are the actors that will force organizational change through educational initiatives and strategic advocacy initiatives. This is a multi-pronged approach, which employs effective knowledge management strategy that involves various layers of society—local communities, academic institutions, public organizations, and private actors.

Human rights education grounded in the spiral cluster KM is the key to providing ongoing technical assistance. Training and consultation services to downstream supply chain business and local civil society actors for implementing and seeking remedies under the GP will ensure that this approach will create sustainable and self-contained systems through toolkits, research, and dissemination. This section considers the second phase of the Project.

A. Human Rights Education: Methods and Structures.

Taken together, our educational approach rests on familiarizing individuals and groups with local transparency rules, guidelines, and international norms and on developing methods and structures for training civil society members on how to teach and implement the U.N. Guiding Principles and its framework independent of a centralized unit or center. Our aim is to reach all stakeholders involved - local community members, academics, business leaders, and public officials - and to then promote and expand the reach of this new international standard on business and human rights. This process will educate practitioners on the use of international tribunals to discipline corporate behavior and promote socioeconomic and cultural rights to communities affected by transnational business. Success is measured by the extent to which the usually passive elements in human rights supply chains begin to take ownership of international human rights standards and obligations. The innovation is to ensure that host states, local NGOs, local stakeholders, and enterprises can take a more proactive role in shaping their relationships and in constructing improved human rights relationships between the largest multinational organizations, home states, and global NGOs.

In these first steps, we will focus on the development of pedagogical mechanisms for the training of civil society members, illustrate how to utilize the knowledge, in the form of toolkits and other literature illustrating the best practices, and then transform the way assessment and monitoring occur to fulfill the full potential civil society actors. This will be done by providing a more effective set of assessment metrics through education.⁶² The assessment metrics will target enterprises in their efforts to implement the GP, and guide local NGOs in their efforts to monitor and assess the implementation of the GP at the service provision level. The assessment process also serves to produce data that can be used to evaluate the impact of the GP and the need to further develop these on the basis of experience.

The goal will be to increase the skills that human rights practitioners, businesses, and smaller and local governments will have in dealing with human rights and non-state actors. Knowledge and understanding of crucial elements will provide the greatest outcome. The ability to critically analyze, to assess which problems have the most urgency, and to set the agenda based on key human rights concerns are the elements on which human rights education is based. In addition to understanding the crucial areas of human rights education, tactics are also important. The ability to mobilize constituencies, to garner media attention, and to reach the public is key in advocacy and coalition building for an equitable solution.

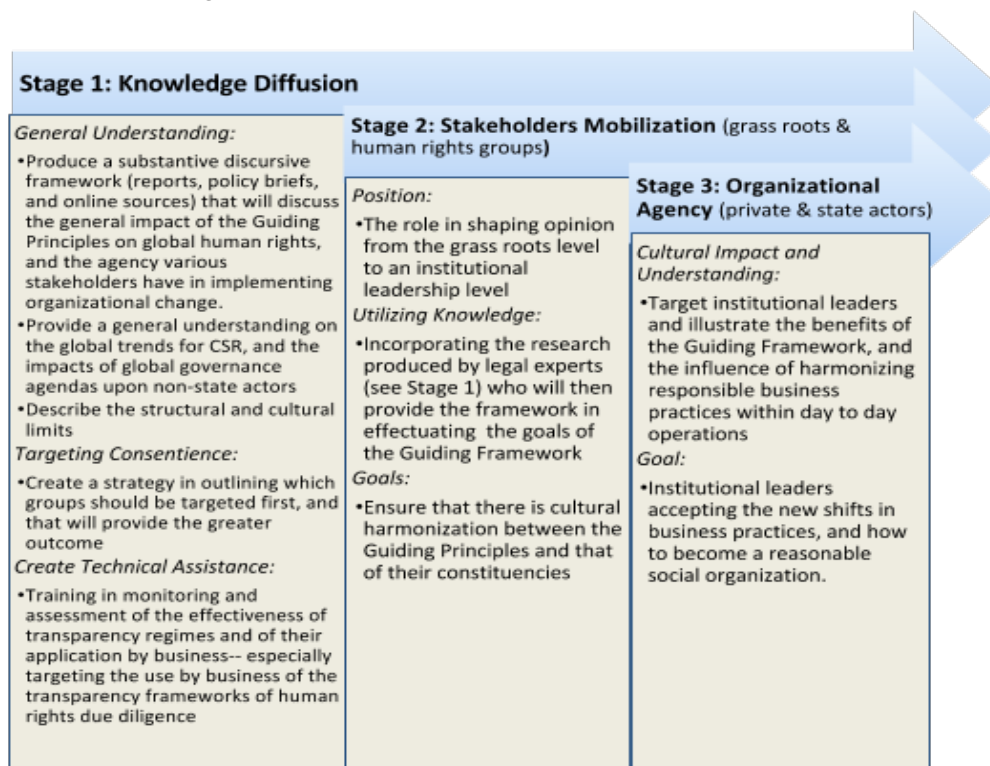
Effective dissemination is an important feature implementing a substantive and equitable outcome.⁶³ Strategically generating knowledge and diffusing it is the most effective way to impact the behavior of transnational corporations and to provide local stakeholders with the tools, manuals, and practices to effectuate an organizational change. A model of dissemination is the creation of toolkits, which would include documents, manuals, contact information, plan worksheet, among other tools, that will further advance the third pillar of the U.N. Guiding Principles and the OECD Guidelines, especially with regard to human rights due diligence. One way to produce knowledge is by compiling a research team that will conduct quality research and analysis on issues related to business and human rights and socioeconomic rights. This will advance efforts in contextualizing the GP depending on the cultural environment. In addition, protocols and procedures need to be developed to protect against human rights violations and provide adequate remedy.

B. Three Stages of Implementation

⁶² The emphasis is on the development of data banks and assessment techniques useful to stakeholders, business, policymakers, and academics for transparency, engagement, knowledge production and dissemination, monitoring, and policy development.

⁶³ Fiona Duggan and Linda Banwell, 'Constructing a Model of Effective Information Dissemination in a Crisis' (2004) 9 *Information Research* 3.

The human rights education framework suggested above should be grounded in three stages: diffusion of knowledge, stakeholders' mobilization, and organizational agency. The diagram below illustrates these stages of implementation and the roadmap in realizing human rights pedagogy that is consistent with the U.N. Framework. This is summarized in Figure 4:



Stage 1: what is "Consentience"? Also, what is "Guiding Framework"?

Stage 1 is the most vital. This stage focuses on designing the framework for learning. In essence, it is the development stage in which decisions will be made respecting the content of knowledge to be disseminated and the means of effectively delivering this knowledge to target groups. This will be rooted in the production of knowledge, the creation of strategy guides, and cultural competency that conveys core knowledge that describe the GP, and the importance of holding transnational actors accountable to human rights norms. This is not limited to just the GP, but includes all universally accepted human rights standards.⁶⁴ The creation of strategy guides assessing the key stakeholders

⁶⁴ GP 12 identifies the International Bill of Human Rights as Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. To these are added the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. See GP 12 Commentary.

and institutions that should be targeted provides a useful direction for action for groups with few resources and little experience. Key partnerships should be considered, and vital non-state actors should be targeted. Both must be culturally specific—the object is to produce knowledge that can be understood in context. The team should consider the general cultural, political, and institutional aspects of any environment in which it is operating. Cultural competency and respect are key elements of successful dissemination.

Stage 2 focuses on mobilizing the general stakeholders involved and creating vital partnerships in a human rights coalition. The network of partnerships fulfilling the goals of the GP is a key element in applying pressure from the bottom up, rather than the top down. There are three key elements. The first is coalition building. Working with professional organizations is key to effective formation of a human rights coalition. The goal should be based on reaching different audiences—stakeholders, academics, and government—and promoting and expanding the reach of international standards on corporate social responsibility. This will create sustainable systems for helping affected stakeholders who are seeking assistance in holding transnational business accountable. This includes developing strategies for active engagement with business, for creating effective non-state remediation mechanisms within communities or businesses, and networking with organizations that are invested in issues of access to justice beyond those contemplated by the GP. The second is development of educational systems. These educational initiatives allow people to continue the training and consultation functions in local communities and organizations. This will also create a broader coalition of individuals with similar goals, values, and expectations for corporate behavior. The third element involves connecting coalitions through the Internet and other networks. This requires the creation of an online tool to assess or to monitor how coalitions can react to the GP, who may not know exactly what to do, or how the Guiding Principles are changing the environment. In addition, the coalitions have an opportunity to change the GP.

Stage 3 is perhaps the most innovative and yet most difficult to implement. It targets institutional leaders within a cost/benefit framework. In essence, the goals are document production (Stage 1) and mass mobilization (Stage 2) to illustrate the benefits of the GP for business practices. This, then, will harmonize responsible business practices within day-to-day operations by providing institutional leaders with the appropriate information, coupled with a mass coalition of stakeholders who strive for organizational change. In sum, the goals will rest in institutional leaders accepting new paradigm shifts in business practices, which meet international standards for business and human rights.

Last, the development of toolkits is an essential feature of the foundational structures for catalyzing action. The three principle objectives may be identified as follows.⁶⁵ First,

⁶⁵ The project has as its ultimate objective the development of a sustainable and essentially self-contained system—offering both a normative structure and a set of systems (toolkits) for implementation—in which the

make justice accessible at the point of service delivery (rather than just at the highest institutional levels). Second, create a sustainable architecture for technical assistance and self-help. Third, reduce barriers to entry by the most vulnerable populations, reduce informational asymmetries that make access to justice more difficult, and reduce power asymmetries in a way that works for the mutual advantage of all parties.

Toolkits should be based on the following four general considerations. The first is *empirical and evidence-based research*. This involves the creation of a scholarly edifice that is grounded in a networked alliance of institutions, public leaders, advocacy groups, and grassroots movements.⁶⁶ The biggest hurdle for the advancement of human rights regimes globally is the lack of awareness about such global initiatives. Indeed, the creation of coalitions and the dissemination of knowledge of the current human rights are needed. This is true especially within the middle and lower supply chains, which may or may not have the financial and technical capacity to institutionalize the Protect-Respect-Remedy Framework. The second is *freely available resources*. In order to implement these areas, research and scholarship must be freely available.⁶⁷ This requires the development of research that illustrates not only the complexities surrounding institutionalizing human rights norms, but moreover, the impact on indigenous groups, local constituencies, and communities. The popular press has brought to light adverse corporate behavior in developing nations, which, in effect, has provided western audiences with a view of the byproducts of globalization. This has forced companies, from the top of the supply chain, to respond to public and private pressures to mitigate human rights abuses abroad.⁶⁸ The third is *online resources based on research*. Toolkits that meet competency needs will provide online webcasts (Webinars) that will broadcast human rights organizations and relevant stakeholders with the knowledge from experts and policymakers on how to utilize the GP within their networks to enhance civil society.⁶⁹ The last is *dissemination and diffusion of knowledge*. Partnerships are an important key to producing technical assistance. Partnerships with key players is

participants can ultimately take control of and participate more fully in its application and evolution. These toolkits will be designed for students and civil society actors to provide materials for teaching about business and human rights and the application of the Guiding Principles, as well as for businesses to effectively engage in human rights due diligence and to provide access to justice.

⁶⁶ Cf. Anne Marie Slaughter, *A New World Order: Government Networks and the Disaggregated State*. (Princeton: Princeton University Press, 2004).

⁶⁷ “‘Open Access’ to information – the free, immediate, online access to the results of scholarly research, and the right to use and re-use those results as you need – has the power to transform the way research and scientific inquiry are conducted. It has direct and widespread implications for academia, medicine, science, industry, and for society as a whole.” International Open Access Week. Available <http://www.openaccessweek.org/page/about>.

⁶⁸ Described in its systemic consequences in Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, *University of Connecticut Law Review* 39(4):1739-1784 (2007).

⁶⁹ Cf. Guobin Yang, *The Co-Evolution of the Internet and Civil Society in China*, *Asian Survey* 43(3):405-422 (May 2003); Richard [Richard?] Holt, *Dialogue on the Internet: Language, Civic Identity, and Computer-Mediated Communication* (Praeger: Westport, CT, 2004).

important for (a) support through foundations and granting agencies or (b) empowerment through further dissemination of knowledge and network coalition building.⁷⁰

IV. CATALYZING CHANGE THROUGH LITIGATION STRATEGIES—THE OECD GUIDELINES.

All of the knowledge production and training in the world is of little value if it cannot be utilized to advantage. The key objective of knowledge production and dissemination, to stakeholders down the supply and value chain, is their application in two key respects. The first is to use knowledge of the governance frameworks to protect themselves against business activity which has detrimental human rights effects or to more effectively seek to remedy these wrongs. The second, more long-term but also vital role, is to use this knowledge to engage in and advance the normative project of developing global standards for business conduct. The overall goal is to liberate the objects of knowledge production and dissemination from dependence on elite groups—states, business, and NGOs—and to empower them to become more instrumental and active participants in the development of the field of business and human rights.

Democratizing human rights is central to the embedding of human rights norms within the operation of enterprises and as part of the structure of domestic legal orders. To become active agents for the protection of their own interests and the advancement of governance norms, these actors need a strategy through which they can effectively engage and develop state-based or international mechanics for the vindication of rights that are the subject of business and human rights regulatory regimes. To that end, a *project of knowledge application* is necessary. The most effective form of engagement in this respect necessarily arises from and must be centered on the resolution of those disputes that embody the violations of human rights norms that human rights due diligence projects have been crafted to expose. *Catalyzing litigation* produces empowerment among the most neglected group of human rights stakeholders in two ways. First, it serves to remedy individual wrongs. Second, it provides a powerful venue for participation of traditionally excluded groups. This section suggests a strategy for advancing programs of human rights related to business activity grounded in client-centered litigation⁷¹ beyond traditional legal channels.

⁷⁰ Cf. Kendall W. Stiles, *Civil Society by Design: Donors, NGOs, and the Intermestic* [is this word correct?] Development Circle in Bangladesh (Praeger: Westport, CN [the footnote above has CT – which is correct?], 2002); Heinz-Dieter Meyer and William I. Boyd (eds.), *Education Between State, Markets, and Civil Society Comparative Perspectives* (London: Lawrence Erlbaum, Pub., 2001).

⁷¹ See, e.g., Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379 (2006); Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901 (1997).

The two come together in this technical-assistance-litigation phase) as the Democratizing Human Rights Catalyzing Litigation (DHR/CSL) project.⁷² This phase is centered on targeted technical assistance as a litigation catalyzing mechanism.⁷³ This technical assistance has as its objectives coordination among stakeholders, the identification of appropriate actions, training in monitoring, and assessment of the effectiveness of transparency regimes and of their application by business. With respect to the latter point, technical assistance would point toward the use by business of the transparency frameworks of human rights due diligence. The goals are to make sustainable the project of remediating human rights detriments and developing human rights and business norms and to facilitate the spread of this transnational framework grounded in the human rights principle of the right to information among stakeholders.

Technical assistance serves two important functions. First, it contributes to capacity building and sustainability. The experiences acquired in the course of technical assistance empower those assisted to undertake more of this work themselves and to suit their own ends.⁷⁴ Second, technical assistance permits the objects of the human rights narrative project to take control of both the remedial strategies they would follow and to participate in the further development of these norms. It de-centers “cause lawyers” in the international context from the stakeholders whose rights require vindication⁷⁵ and also de-centers the state as the focus of efforts at norm creation.⁷⁶ Technical assistance then has an important instrumental purpose. It provides the means of empowerment through the litigation it catalyzes. Capacity building and litigation, then, complete the DHR/CSL circle—providing the basis of further knowledge production⁷⁷ that then feeds into the sustaining cycle of knowledge production-ordering-training-application that takes the DHR/CSL project to its end.

Litigation, at first blush, appears to be a fairly weak reed on which to build empowerment, especially in the area of business and human rights. A number of studies have suggested the limitations of litigation as the center of any strategy either for the resolution of individual wrongs or for the advancement of business and human rights

⁷² Discussed Section I.A., *supra*.

⁷³ Cf. Philip Lynch, *Harmonising International Human Rights Law and Domestic Law and Policy: The Establishment and Role of the Human Rights Law Resource Centre*, 7 MELB. J. INT'L L. 225.

⁷⁴ Cf. Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyer for Indigenous Peoples*, 82 N.D. L. REV. 863 (2006); Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37 (2008).

⁷⁵ Thomas M. Hilbink, *You Know the Type...: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657 (2004); Stuart A. Scheingold & Austin Sarat, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* 6-7 (2004).

⁷⁶ Cf. Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* 16-25 (1998).

⁷⁷ See, e.g., Johanna Bond, *The Global Classroom: International Human Rights Fact-Finding as Clinical Method*, 28 WM. MITCHELL L. REV. 317 (2001).

norm development.⁷⁸ Indeed, one can understand the reason for the development of international soft law standards of business and human rights as proceeding from a conclusion that the domestic legal orders of host or home states have not provided a suitable space for advancing a business and human rights agenda.⁷⁹ This was recognized by John Ruggie during the development of the Protect-Respect-Remedy Framework that became the GP.⁸⁰ Yet even that venue appears to have narrowed considerably in the aftermath of the *Kiobel* decision.⁸¹ Despite this, public interest lawyering persists,⁸² within the state system in which it operates and embedding the state system more profoundly in the networks within which international human rights norms are developed.

The GP third pillar emphasizes remediation through dispute resolution.⁸³ Though the GP continues to privilege the judicial systems and domestic legal orders of states,⁸⁴ there is a space created for both non-judicial state-based remedies,⁸⁵ and non-state-based grievance mechanisms.⁸⁶ More importantly, the GP suggests that state-based judicial and non-judicial remedial mechanisms include a variety of nontraditional tribunals. “Examples include the courts (for both criminal and civil actions), labour tribunals, national human rights institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development, many ombudsperson offices, and Government-run complaints offices.”⁸⁷ The business and human rights framework, then, seeks to extend the scope of state-based remedial mechanisms from a focus on national judicial systems to international law-based and non-judicial systems in which states participate either by treaty obligations or otherwise.⁸⁸ This extension is contentious. However, it does contribute to the creation of a space within which international law norms can be developed under transnational dispute resolution regimes overseen by states but not embedded within the domestic legal order of states.

⁷⁸ See, e.g., Anthony J. Colangelo, *Jurisdiction, Immunity, Legality and Jus Gogens*, 14 Chi. J. Int'l L. 53 (2013); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV INT'L L. J. 271, 274 (2009); James B. Cavallaro and Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 778 (2008).

⁷⁹ See, e.g., Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, 21 TRANSNATIONAL L. & CONTEMP. PROBLEMS 305 (2012); Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOKLYN J. INT'L L. 41 (2010).

⁸⁰ Ruggie 2008 Report (and quote).

⁸¹ *Kiobel v. Royal Dutch Shell*, No. 10-1491 __ U.S. __ (April 17, 2013).

⁸² See, e.g., Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008).

⁸³ See, Guiding Principles ¶¶ 25-31.

⁸⁴ “Effective judicial mechanisms are at the core of ensuring access to remedy” *Ibid.*, at ¶¶ 26 Commentary; see generally, *ibid.*, 5-27.

⁸⁵ *Ibid.*, ¶ 27.

⁸⁶ *Ibid.*, at ¶¶ 28-30.

⁸⁷ *Ibid.*, ¶ 25 Commentary.

⁸⁸ See, GP 25 (Commentary).

Catalyzing complaints through the National Contact Points under the MNE Guidelines⁸⁹ is particularly useful for non-elite actors. Originally a very small portion of its governance architecture, the remedial objectives of the MNE Guidelines structure were modest: “to enhance procedures by which consultations may take place on matters covered by these Guidelines and to promote the effectiveness of the Guidelines.”⁹⁰ Yet over the last decade, the remedial framework has become an increasingly important part of the MNE Guidelines.⁹¹ The structure of the MNE Guidelines has proven to be a flexible procedural device that is functionally equivalent to a quasi-judicial process.⁹² This emergent remedial framework is serving a critical role in transforming the MNE Guidelines from a set of non-binding and free floating principles into a normative standard that can be effectively used to access and discipline corporate behavior.

The centerpiece of the remedial architecture of the MNE Guidelines is the National Contact Points (NCP). The principal role of the NCP is to “further the effectiveness” of the MNE Guidelines.⁹³ To that end, it is tasked with an informational role as well as a dispute resolution role. Effectiveness is thus furthered “by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance.”⁹⁴ Informational and promotional activities are to be undertaken through online activities in local languages, awareness raising through stakeholder cooperation, and outreach through technical assistance.⁹⁵ Adhering states are to cooperate with their designated NCPs by funding them adequately.⁹⁶

⁸⁹ See Org. for Econ. Cooperation and Dev., OECD Guidelines for Multinational Enterprises (2011), available at http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html.

⁹⁰ MNE Guidelines Part II, Preamble.

⁹¹ The Investment Committee of the OECD is charged with the political work of the OECD and the promotion of the MNE Guidelines. MNE Guidelines Part II, Sec. II.3. The Investment Committee is also charged with clarifying the MNE Guidelines, including the remedial function. *Ibid.*, II.4. The object is to pursue a proactive agenda that promotes observation of the Guidelines. This requires embedding the MNE Guidelines within the governance structures of non-state actors to deepen the functional effect of the standards, without regard to their adoption as law by any state. *Ibid.*, II.8. As a consequence, it is clear that the OECD is engaged in functional governance; the agenda is predicated on the development of functional lawmaking.

⁹² Larry Catá Backer, *Case Note: Rights And Accountability In Development (Raid) V Das Air (21 July 2008) And Global Witness V Afrimex (28 August 2008); Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW 258-307 (2009).

⁹³ MNE Guidelines Part II, Chp. I.1.

⁹⁴ *Ibid.*

⁹⁵ MNE Guidelines, Part II, Procedural Guidance I.B. NCPs are to create a network to foster coordination of activities and more uniformity in the application of the MNE Guidelines, MNE Guidelines Part II, Chp. I.2. They are also expected to meet regularly to “share experiences and report to the Investment Committee.” *Ibid.*, Chp. I.3

⁹⁶ *Ibid.*, Chp. I.4.

The MNE Guidelines establish specific procedural guidance for NCPs in their dispute resolution role among parties—so-called specific instance actions.⁹⁷ The procedural rules are fairly straightforward. The NCP must first make an initial assessment and respond to the parties indicating whether they believe the issues merit further examination.⁹⁸ The NCP may then proceed to conclusion and, in consultation with the parties, decide to make the results of the procedures available to the public. That choice requires the NCP to take into consideration the need to protect sensitive business and other stakeholder information.⁹⁹ With that in mind, the NCP may decide the issue on the merits, report an agreement between the parties, or issue a statement when no agreement has been reached.¹⁰⁰ These procedures tend to privilege mediation, and they tend to avoid the outward forms of judicial determination. Cooperation is enhanced by a willingness to protect confidentiality.¹⁰¹ Rather than a finding of breach, the procedures speak to recommendations on implementation.¹⁰²

The focus on the details of the procedural architecture of the MNE Guidelines is important because it is through these procedures that the DHR/CSL project is most likely to find the space where it might succeed. The development of the remedial architecture supporting the MNE Guideline's substantive project can contribute to the construction of a new jurisprudence of governance. It is emerging as an important remedial space within which the transaction costs of invoking remedies are lower than in judicial proceedings and do not require the intervention of a class of experts (lawyers and judges for example).¹⁰³ Yet it is governance space that is neither law nor necessarily constrained by the premises of law and the constructs for its assertion through states. Foucault once conceptualized the interaction between disciplines and their relationships with dominant power structures in society. He suggested that disciplines manifest within and throughout all forms of social and cultural systems. Specifically, disciplines are ways of conducting

⁹⁷ (NE Guidelines Part II, Procedural Guidance I.

⁹⁸ *Ibid.*, I.C1-3. If they do, the NCP is to offer it offices to mediate the dispute. For this purpose, the NCP will consult with these parties and where relevant to seek advice, consult, seek guidance, and offer facilitation mechanisms. *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* The NCP will make recommendations on the implementation of the Guidelines as appropriate, which should be included in the statement. *Ibid.*, I.C1-3. Where appropriate, the statement could also include the reasons that agreement could not be reached and notify the results of its specific instance procedures to the appropriate OECD Committee. *Ibid.*

¹⁰¹ *Ibid.*; C.4

¹⁰² *Ibid.*, C.5. There is a tentative openness to permitting review if the issues arise in non-adhering states which has made it possible for some NCPs to take a more aggressive approach to their jurisdiction. See, Larry Catá Backer, Case Note: Rights And Accountability In Development (Raid) V Das Air (21 July 2008) And Global Witness V Afrimex (28 August 2008); Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations, *Melbourne Journal of International Law* 10(1):258-307 (2009). [this format is different from previous footnotes with this citation.]

¹⁰³ See, e.g., Melvin Simensky & Eric C. Osterberg, *The Insurance and Management of Intellectual Property Risks*, 17 CARDOZO ARTS & ENT. L.J. 321 (1999) .

and organizing human behavior, which are built within a normative cultural system that all members accept as natural.¹⁰⁴ Thus, the society can systematize its policies by means of socialization, harmonization, and by control of behavior through subtle norms. These disciplines can also act as forms of soft law, where governance can exist within and without the apparatus of the state, where “soft international law has begun to provide incentives for the management of a values-based behavior structure for multinational corporations...[and]... serve as a vehicle for the enhancement of a market environment in which corporate stakeholders, and principally consumers and investors, might incorporate information about corporate social behavior in their consumption and investment decisions.”¹⁰⁵ As a disciplinary facility, the MNE Guidelines de-center the lawyer and the judge, to better privilege the objective of litigation as its principal driver. “But to further political justice abroad, lawyers must approach their work not as legal positivists, understanding law as a prepackaged product, but as facilitators of processes of lawmaking and social change.”¹⁰⁶ It is, in effect, the most useful and realistic space within which the knowledge tools of business and human rights for the lower ranks of the supply and value chains can be effectively catalyzed.

Thus, as much as frameworks like the MNE Guidelines and GP attempt governance through the functional mechanics of soft law, the effort is ultimately a *cultural* rather than a legal object for organic change. It is very effective but does not lend itself well to instrumentalism; it cannot be controlled. For stakeholders at the bottom of the power hierarchies in democratic and authoritarian states, this is a good thing. It is “not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategic situation in a particular society.”¹⁰⁷

¹⁰⁴ As Foucault suggests, “[d]iscipline[s]’ may be identified neither with an institution nor with an apparatus; it is a type of power, a modality for its exercise, comprising a whole set of instruments, techniques, procedures, levels of application, targets; it’s a ‘physics’ or an ‘anatomy’ of power, a technology.” Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. New York: Vintage, 1995. p. 215. Foucault stressed further that a disciplinary society “has infiltrated the others, sometimes undermining them, but serving as an intermediary between them, linking them together, extending them and above all making it possible to bring the effect of power to the most minute and distant elements.” *Ibid.*, 216. These disciplinary apparatuses, then, are imbued and embedded within our existences, ever-present, and all natural, having the effect of shaping the political and sococultural expectations of whomever operates within it.

¹⁰⁵ Larry Catá Backer, “[From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations](#),” [why in quotes and underlined – why a link?] 39 *Georgetown Journal of International Law* 591 (2008).

¹⁰⁶ Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 *YALE HUM. RTS. & DEV. L.J.* 18, at p. 238.

¹⁰⁷ Michel Foucault, *The History of Sexuality*. New York: Pantheon Books, 1978. [why is this repeated here?] Foucault, Michel. *The History of Sexuality*, (New York: Pantheon 1978. p. 93. Foucault is referring to his version of power. We have switched it and claimed his definition of power is similar to that of soft law/soft power mechanics. He stresses further that “power must be understood . . . as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which . . . transforms, strengthens, or reverses them; as the support which . . . form[s] a chain or a system, or on the contrary, . . . which isolate them from one another; and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies.” *Ibid.*, 92-93.

It is clear, though, that this is a jurisprudence, a promise, and a development that is as much filled with contradiction as it is clearly articulated and precisely delivered. Targeted and sustained invocation of the NCP complaint processes by stakeholders down the supply and value chain, against upstream supply and value chain enterprises—and states—would do much to help change the realities of the NCP systems within these OECD projects that are themselves embedded within global efforts at norm construction by the very states that resist their imposition. But it parallels approaches being undertaken in related areas where networked groups are joining to create quilts of soft law and hard law that can be used to impose responsibility of actors.¹⁰⁸ International arbitration regimes have suggested, as well, the possibilities of grafting private international law dispute resolution mechanisms onto public international law treaties—international investment arbitration provides one example.¹⁰⁹ It also parallels the movement, led by states, to combine interventions in public and private spaces to create broad legal and social norm-based regulation.¹¹⁰

An additional factor for focusing on NCP is the transnational space within which remediation and norm development occur and radiate outward to states and private actors. Transnational actors can act as “self-regulating” entities, which are able to create and set new inter-systemic harmonized regulatory frameworks throughout their operations as well as within their industry. This can be done without the presence of any public institutions, however, with and by the assertion of pressure, social and cultural, from all levels of society. It provides an international benchmark that aims at harmonizing these standards throughout all national boundaries. Harmonization can be voluntary and noncoercive, as well as compulsory and coercive; and transnational actors are able to implement these frameworks throughout their entire industry. Many are continuing to struggle to conceptualize the challenges globalization creates and “this ‘reality’ reflects deep running transformations of the normative and institutional regulatory landscape...of intertwining, both public and private, that is hybrid, forms of regulation that can no longer be easily associated with one particular country or, for that matter, one officially mandated rule-making authority.”¹¹¹ Corporations do not have direct obligations under international law; states do. However, corporations are obliged to

¹⁰⁸ See, e.g., MARGARET KECK & KATHRYN SIKKNIK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1999); Peter Evans, *Fighting Marginalization with Transnational Networks: Counter-Hegemonic Globalization*, 29 CONTEMP. SOC. 230-41 (2000).

¹⁰⁹ See Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013).

¹¹⁰ See, e.g., Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW – (forthcoming 2013). [is this correct? Forthcoming last year?]

¹¹¹ Zumbansen, Peer, [Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance](#) (February 7, 2012). Osgoode CLPE Research Paper No. 1/2012.

follow the laws of the national government they are operating in.¹¹² The goal is to harmonize the current legal frameworks internationally, creating an overarching global regulatory apparatus. If the dominant company within an industry institutionalizes these norms throughout its operations, this would significantly influence its value chains and business relationships to follow its practices. If civil society could apply pressure to the dominant institutions within a particular industry, and within a particular social context, and monitor its operations, it could generalize throughout the entire industry as well as that social context.

V: CONCLUSION.

In earlier work, one of the authors argued that “[t]ransnational corporations are at the center of extraordinary and complex governance systems that are developing outside the state and international public organizations, and beyond the conventionally legitimating framework of the forms of domestic or international hard law.”¹¹³ These systems suggest a new template for networked governance beyond the state, but one in which public and private actors are integrated stakeholders.

These activities are now starting to take place: their development will help reshape the focus of the business and human rights project from one focused on the prerogatives of states to the necessities of stakeholders throughout the supply chain. States committed to principles of democracy might welcome this reorientation. Those focused on the preservation of privilege might not. The object, therefore, is to democratize international human rights by creating venues for the development and dissemination of knowledge of human rights governance down supply and value chains to stakeholders who tend to be treated as the objects of such efforts. This exercise requires the development of an updated knowledge management strategy that facilitates both the development of toolkits for asserting complaints through national NCPs as well as the formation of clearinghouses and competency networks from coordinated action through sharing knowledge and experience.

The hope is that, through a process of democratization and litigation, these stakeholders leverage their ability to engage in the enterprise of human rights law development and have an active hand in the remediation of human rights detrimental activities. The focus of these efforts is on two of the most important emerging international instruments for human rights and business responsibility—the OECD’s Guidelines for Multinational Enterprises and the U.N. Principles for Business and human Rights. By targeting the

¹¹² Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 JOURNAL BUSINESS ETHICS 385-400 (2009).

¹¹³ Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order*, 18(2) Indiana Journal of Global Legal Studies 751 (2011).

OECD NCP as the forum in which human rights wrongs may be contested and the substance of human rights norms may be asserted, even in an informal venue, the objects of human rights may be able to engage more directly and forcefully in the development of these rights and remedies of most direct concern to them. And thus the DHR/CL project: *to undermine the control of global elites and the development of legal orthodoxies*¹¹⁴ that represent efforts to control the course of human relations, for the best of all reasons to be sure, but in which the objects of legal largesse remain dependent on legal, NGO, enterprise, and other elites¹¹⁵ to chart the course of their lives and their rights for them.

¹¹⁴ Cf. Yves Dezalay & Bryant G. Garth, *LEGITIMATING THE NEW LEGAL ORTHODOXY*, IN *GLOBAL Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* 306, 306 (Yves Dezalay & Bryant G. Garth (eds.), 2002). [watch the font here]

¹¹⁵ Cf. Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 540-554 (2005); Ugo Mattei & Laura Nader, *Plunder: When the Rule of Law is Illegal* (2008).