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“MADE IN ETHIOPIA” – THE NEW NORM IN THE GARMENT INDUSTRY

Marie Durane*

Ethiopia is one of the fastest growing economies in the world, achieving enormous economic growth averaging 10.6% over the past decade and leading in Foreign Direct Investment (FDI).¹ According to the 2014 United Nations Conference on Trade and Development (UNCTAD) World Investment Report, FDI in Ethiopia has increased by 242% from 2012 to 2013.² However, the excessive speed at which Ethiopia is seeking foreign investment into the country, specifically in the garment industry, has led to an exploitation of garment workers who are paid extremely low wages. To ensure garment workers are paid fairly, Ethiopia should establish a minimum wage law that reflects an amount that Ethiopians can actually live on.

Ethiopia is on its way to becoming the “China of Africa” of the garment industry.³ Over the past few years, the rising cost of doing business in China has incentivized manufacturing businesses, specifically clothing and textile companies, to look for cheaper alternatives in African countries.⁴ Ethiopia is attractive to foreign investors because it is an untapped resource, known as “one of the last remaining unindustrialized frontiers.”⁵ Furthermore, Ethiopia boasts a business-friendly environment, political stability, low energy cost, raw materials, lack of tariffs, and a great deal of cheap labor.⁶

However, Ethiopia lacks minimum wage laws.⁷ While the country has labor laws, which reflect international standards of labor, the law does not establish a set minimum wage except in the domestic industry.⁸ Wages are generally set by employers or by a contract agreement between employer and employee,⁹ meaning that Ethiopians in the textile and clothing industry will have to make due with whatever wages they are given or risk having no income at all.¹⁰ In fact, this is exactly what has occurred: Ethiopia now holds the title for the lowest paid garment workers in the world.¹¹ Entry-level salary for an Ethiopian factory worker is estimated to be between \$35 to \$45 per month, considerably lower than workers paid in China, \$629 a month, and Bangladesh, \$68 a month.¹² These low wages are likely due to the fact that unlike many developing countries, Ethiopia has an unparalleled comparative advantage. Not only can it offer

foreign investors an abundance of labor, but it can also offer foreign investors the ability to set their own wages.

While Ethiopia is under no legal obligation to establish a minimum wage law, the International Labour Organization (“ILO”), of which Ethiopia is a member, encourages its members to adopt minimum wage laws in accordance with the 1970 Minimum Wage Fixing Convention No. 131.¹³ However, Ethiopia has chosen not to ratify this Convention, arguing that instead of setting a rigid minimum wage to address the unemployment in the country, it has created policies to attract foreign investment, which in turn will aid in unemployment.¹⁴ The government of Ethiopia argues that ratifying Convention 131 could be detrimental to employment, which is why it advocates for more flexibility in wages rather than creating a rigid national minimum wage.¹⁵ The Ethiopian government’s rationale is flawed. For young workers, who make up the bulk of factory workers in Ethiopia, setting a minimum wage would reduce unemployment.¹⁶ In a study of 31 countries during the mid-1990s in North Africa, Sub-Saharan Africa, Latin America and Asia, higher minimum wages were shown to have a positive effect on poverty by lowering the poverty rate.¹⁷ Comparatively, the employment rate remained unchanged when the minimum wage levels were increased. With Ethiopia aggressively pursuing the textile and clothing industry, a national minimum wage is essential to protect garment workers from further exploitation of being denied a livable wage.¹⁸ Therefore, Ethiopia must establish a minimum wage law that reflects an amount sufficient to provide food, shelter, education, and socialization.

While Ethiopia has made considerable gains in reducing poverty and increasing economic growth, sustainable economic growth requires the protection of its citizens’ rights to a livable wage. The next shirt you purchase at a nominal price may say “Made in Ethiopia,”¹⁹ but your economic gain should not come at the expense of protecting the right of factory workers to earn livable wages.



*JD Candidate 2017, American University Washington College of Law

ENDNOTES: THE EMERGENCE OF RIGHT-BASED APPROACHES TO RESOURCE GOVERNANCE IN AFRICA: FALSE START OR NEW DAWN?

¹ DELOITTE & TOUCHE, ETHIOPIA A GROWING MIRACLE 3 (2014), available at http://www2.deloitte.com/content/dam/Deloitte/na/Documents/strategy/za_ethiopia_growth_miracle_july2014.pdf (last visited April 15, 2015); U.S.

DEPARTMENT OF STATE, EXECUTIVE SUMMARY 1, (June 2014), available at <http://www.state.gov/documents/organization/228594.pdf>.

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³¹ See Ross, *supra* note 6, at 59.

³² See David S. Sorenson, *Global Pressure Point: The Dynamics of Political Dissent in Egypt*, 27 FLETCHER FORUM OF WORLD AFFAIRS 207, 211 (2003) (discussing how the Saudi regime placated the population and reduced dissent through resource distribution).

³³ See Stevens, *supra* note 21, at 17-19.

³⁴ See *id.* at 5.

³⁵ See van Mil, *supra* note 20, at 9-10 (discussing how the “rentier state” allows lower taxation and greater public spending on patronage and pacifying dissent); see also Ross, *supra* note 6, at 67 (“The idea that a rise in taxes relative to spending can produce democratizing rebellions is closely related to the notion of a political budget cycle. They both imply that citizens will support governments that provide them with more benefits and lower taxes, and try to replace ones that supply few benefits with higher taxes. If these tax rebellions occur in dictatorships, they can bring about transitions to democracy.”); see generally Ross, *supra* note 6, at 65-71 (discussing the fiscal theory to democracy, and how secrecy allows governments to hide the size of revenues from the public).

³⁶ See Ross, *supra* note 6, at 59 (“But most undemocratic oil producers, and some partially democratic ones like Iran and Venezuela, take advantage of the slippery nature of oil revenues to keep them out of the public view.”).

³⁷ See *id.* at 6 (“Secrecy is a key reason why oil revenues are so commonly squandered, why oil-fueled dictators can remain in power, since they can conceal evidence of their greed and incompetence; and why insurgents are generally reluctant to lay down their arms, because they distrust offers by the government to share their country’s oil revenues more equitably.”); see also *id.* at 59 (“Secrecy is intrinsically hard to measure. There is no easy way to document how much money a government is concealing from the public.”).

³⁸ See *id.* at 80 (noting that “among autocracies, the oil-producing states have less budget transparency”); *Id.* at 81 (“The greater the oil wealth is, the more secretive the budget.”); see also *id.* at 82-83 (“Two patterns stand out: all countries were more likely to publicly disclose their expenditures than their revenues; and even though the oil producers published their expenditures at the same high rate as the non-oil producers, they were substantially more secretive about their revenues.”).

³⁹ See *id.* at 82 (noting that “among autocracies, however, oil is associated with greater censorship”).

⁴⁰ See *id.* at 70 (“Citizens in oil-producing countries, though, cannot directly observe how much their government collects in oil revenues. They must rely on the government and media for their information.”); *Id.* at 71 (“But autocrats in the oil states have more to gain from secrecy, because it allows them to fool their citizens into underestimating the size of the government’s revenues.”); see also van Mil, *supra* note 20, at 9 (noting that as governments gain external revenue sources, they decrease taxes, and “[i]n turn, the public is less likely to demand accountability from their governments, and governments become less transparent, accountable and responsive to the societies they govern”).

⁴¹ See van Mil, *supra* note 20, at 9-10 (discussing how citizens of resource-rich states tend to fail to demand accountability, and as a result, their governments are less accountable).

⁴² See Ross, *supra* note 6, at 63 (“But from the late 1970s to the late 1990s, a wave of democracy swept across the globe, bringing freedom to countries in virtually every region—except the petroleum-rich countries of the Middle East, Africa, and the former Soviet Union.”).

⁴³ See *id.* at 63 (“From 1980 to 2011, the democracy gap between the oil and non-oil states grew wider.”); see also *id.* (“Yet among the oil states—both in the Middle East and beyond—transitions to democracy have been exceedingly rare. Oil and democracy do not easily mix.”).

⁴⁴ See *id.* at 63 (noting that “oil has kept autocrats in power by enabling them to increase spending, reduce taxes, buy the loyalty of the armed forces, and conceal their own corruption and incompetence”).

⁴⁵ See generally *id.*, *supra* note 6, at 86-90 (noting the erosion of democracy with multiple examples in resource-rich, but poorer countries); see also *id.* at 87 (“Empowered democratic incumbents may not necessarily want their countries to remain democratic, however. In fact, they might try to remain in power longer by making their countries more autocratic.”); see *id.* (noting that wealthy democracies have strong checks and balances, but in less wealthy democracies, “incumbents accumulate enough political influence to dismantle the checks and balances that would otherwise keep their government democratic”).

⁴⁶ See van Mil, *supra* note 20, at 4 (“The resource curse is not inevitable; ultimately, it is the result of institutional and policy failure.”); see also *id.* (discussing how “the resource curse appears particularly severe for countries with weak institutions, poor legal systems and little democracy”).

⁴⁷ See Ross, *supra* note 6, at 86-90 (discussing how the resource curse makes democracies less democratic).

⁴⁸ See *id.* at 154 (showing that resource-rich nations are almost twice as likely to suffer from civil war, particularly less wealthy nations and after 1990); see also van Mil, *supra* note 20, at 10 (noting the “strong link between dependence on natural resources and the risk of civil war and its prolongation...”); see *id.* (further noting the “...severe human rights abuses in mineral-rich developing nations”).

⁴⁹ See Ross, *supra* note 6, at 145 (“Among low-and middle-income countries oil producers are more than twice as likely to have civil wars.”).

⁵⁰ See *id.* at 147 (“Armed conflicts have a high recurrence rate. According to one study, there is a one in five chance that a conflict, once it has ended, will restart within five years.”).

⁵¹ See *id.* at 151 (“The secrecy of these revenues can also trigger conflict by making it harder for separatists and the government to strike a revenue-sharing bargain.”).

⁵² See *id.* (“In a greedy rebellion, the insurgents profit from crime, and are motivated by the chance to earn money from stolen oil, ransomed oil workers, and extortion paid by oil companies trying to avoid these and other forms of sabotage.”).

⁵³ See *id.* at 149-50 (noting that the resource-rich government offers “low taxes and large benefits,” citizens that live in the resource-rich region “would now be better off if they established an independent state, since it would provide each resident with a larger share of the oil wealth than they currently receive”).

⁵⁴ See *id.* at 153 (“Government oil revenues grew much larger in the 1970s, making it more profitable for the residents of oil-producing regions to acquire their own sovereign governments.”).

⁵⁵ See *id.* at 153 (“The rising oil prices of the 1970s also sent petroleum firms to increasingly remote and unsteady regions—for example, in Indonesia, Colombia, Nigeria, Sudan, and Yemen—thereby setting the stage for a rising incidence of both goal-oriented and greedy rebellions.”).

⁵⁶ See van Mil, *supra* note 20, at 10.

⁵⁷ See Stevens, *supra* note 21, at 27.

⁵⁸ See *id.* at 11, 18.

⁵⁹ See *id.*

⁶⁰ Many former authoritarian regimes, such as Mexico, Chile, Nigeria, and Indonesia, were able to transition to democracy. However, they may have benefited from strong institutions, lack of state capture of all resource development and a sufficiently diversified economy accompanied by certain strong macroeconomic policies. In addition, these democracies were more likely to fail, including Nigeria’s original transition in 1979. Moreover, the centralized natural resource wealth and lack of taxation preserve autocratic tendencies and undermine less wealthy democracies. See Ross, *supra* note 6, at 4; see also Stevens, *supra* note 21, at 23-24.

⁶¹ See Stevens, *supra* note 21 at 24.

⁶² See BNEF *Forecasts Big Global Investment in Clean Energy, with Eyes on Asia and Africa*, CLEANTECHIQ (July 11, 2014), <http://cleantechiq.com/2014/07/bnef-forecasts-big-global-investment-in-clean-energy-with-eyes-on-asia-and-africa/>.

⁶³ See REN 21, RENEWABLES 2014 GLOBAL STATUS REPORT 13, 16, 26 (2014), available at http://www.ren21.net/portals/0/documents/resources/gsr/2014/gsr2014_full%20report_low%20res.pdf.

⁶⁴ See Justin Doom, *Africa to Add More Renewables in 2014 Than Past 14 Years*, BLOOMBERG (Aug. 21, 2014, 4:00 AM), <http://www.bloomberg.com/news/articles/2014-08-21/africa-to-add-more-renewables-in-2014-than-past-14-years>.

⁶⁵ See *id.*

⁶⁶ See Fred Lucas, *White House Announces \$6 Billion to Promote Clean Energy in Asia*, CNSNEWS, (Nov. 20, 2012 11:58 AM), <http://cnsnews.com/news/article/white-house-announces-6-billion-promote-clean-energy-asia>; see also John Morton, *U.S.-Africa Clean Energy Finance Initiative – Supporting renewable energy to power Africa*, OPIC BLOG (Jan. 13, 2015), <http://www.opic.gov/blog/renewables/u-s-africa-clean-energy-finance-initiative-supporting->

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- ⁶⁹ See EUROPEAN COMMISSION, *IMPROVING STATE AID FOR ENERGY AND THE ENVIRONMENT 2* (2014) available at http://ec.europa.eu/competition/publications/cpb/2014/016_en.pdf.
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- ⁷⁶ See FACT SHEET: POWER AFRICA, *supra* note 15.
- ⁷⁷ See *id.*
- ⁷⁸ See *id.*
- ⁷⁹ See Julie Nania & Doug Vilsack, *Put out the Fire: Developing a Sustainable Energy Policy for All Namibians*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 287, 297, 311, 312, 338 (2010); Osob Samantar, *RIO+20: Shining Sun and Blissful Wind: Access to ICT Solutions in Rural Sub-Saharan Africa through Access to Renewable Sources*, 12 SUSTAINABLE DEV. L. & POL'Y 42, 42 (2012).
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- ⁸¹ See *id.*
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- ⁸³ See Nigel Wilson, *Top Energy Official Sacked as China's Anti-Corruption Probe Widens*, INT'L BUS. TIMES (May 28, 2014, 10:41), <http://www.ibtimes.co.uk/top-energy-official-sacked-chinas-anti-corruption-probe-widens-1450240>.
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- ⁹² See *id.*
- ⁹³ See RICHARD L. OTTINGER ET AL., *Case Studies of Renewable Energy in China*, in RENEWABLE ENERGY LAW AND DEVELOPMENT: CASE STUDY ANALYSIS 1, 3 (2013).
- ⁹⁴ See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *BRIBERY IN PUBLIC PROCUREMENT: METHODS, ACTORS, AND COUNTER-MEASURES 28* (2007), available at <http://www.oecd.org/investment/anti-bribery/anti-bribery-convention/44956834.pdf>; see also Elizabeth Baldwin, *The Effect of Stakeholder Involvement on Electricity Generation: An IAD Study of State Electric Sector Decision-Making* (Dec. 12, 2013) (unpublished Ph.D. student-written publication, Indiana University), http://www.indiana.edu/~workshop/publications/materials/conference_papers/Baldwin_2013_Y673_SMCP.pdf.
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- ¹¹¹ *Id.* at § 1504.
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- ¹³⁴ See *id.* at 133.
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- ¹³⁶ See *id.*
- ¹³⁷ See South East Europe Sustainable Energy Policy, *supra* note 86, at 1, 4-5.
- ¹³⁸ See *id.* at 9.
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ENDNOTES: RECOMMENDATIONS FOR ADDRESSING ENVIRONMENTAL IMPACTS OF AFRICAN DEVELOPMENT PROJECTS FUNDED BY CHINESE BANKS

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¹⁷ China Banking Regulatory Commission, NOTICE OF THE CBRC ON ISSUING THE GREEN CREDIT GUIDELINES, Article 21 (February 24, 2012), <http://www.cbrc.gov.cn/EngdocView.do?docID=3CE646AB629B46B9B533B1D8D9FF8C4A>. (stating "project sponsors abide by applicable laws and regulations on environmental protection, land, health, safety, etc. of the country or jurisdiction where the project is located. The banking institutions shall make promise in public that appropriate international practices or international norms will be followed as far as such overseas projects are concerned, so as to ensure alignment with good international practices.").

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- ¹⁹ Ministry of Commerce of the People's Republic of China and Ministry of Environmental Protection of the People's Republic of China, NOTIFICATION OF THE MINISTRY OF COMMERCE AND THE MINISTRY OF ENVIRONMENTAL PROTECTION ON ISSUING THE GUIDELINES FOR ENVIRONMENTAL PROTECTION IN FOREIGN INVESTMENT AND COOPERATION, Shang He Han [2013] No. 74 (February 18, 2013), <http://english.mofcom.gov.cn/article/policyrelease/bbb/201303/20130300043226.shtml>.

ENDNOTES: THE EMERGENCE OF RIGHT-BASED APPROACHES TO RESOURCE GOVERNANCE IN AFRICA: FALSE START OR NEW DAWN?

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- ¹³ See U.N. ENV'T PROGRAMME, ENVIRONMENTAL ASSESSMENT OF OGOILAND 24 (2011) [hereinafter UNEP], available at http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf; see also Richard Boele et. al., *Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: I. The Story of Shell, Nigeria and the Ogoni People Environment, Economy, Relationships: Conflict and Prospects for Resolution*, 9 SUST. DEV. 74, 76-78 (2001); see P.C. Nwilo & O.T. Badejo, *Oil Spill Problems and Management in the Niger Delta*, Department of Surveying and Geoinformatics University of Lagos, 568 <http://tosproceedings.org/doi/pdf/10.7901/2169-3358-2005>;
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- ¹⁵ UNEP, *supra* note 13, at 2-5.
- ¹⁶ See generally OLUBAYO OLUUDURO, OIL EXPLOITATION AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES, 25 AFRIKA FOCUS 160, 165 (2014) (providing an account of the nature and scope of the problems discussed); see also HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA'S OIL PRODUCING COMMUNITIES 112-113(1999), available at <http://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf>.
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¹⁹ See Thomas Greiber et al., *Conservation with Justice: A Rights-Based Approach*, 71 IUCN ENVTL. POLICY AND LAW PAPER 23-34 (2009) (discussing the implementation of HRBA); see Chilenyé Nwapi, *A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria*, 54 J. Afr. L. 184, 206-11 (2010); see Jakob Kirkemann Boesen & Hans-Otto Sano, *The Implications and Value Added of a Rights-Based Approach*, in DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS, 45 (Bård-Anders Andreassen & Stephen P. Marks eds., 2010), <http://www.intersentia.com>; REBECA MACIAS, PUBLIC PARTICIPATION IN ENERGY AND NATURAL RESOURCES DEVELOPMENT: A THEORY AND CRITERIA FOR EVALUATION 10-11 (2010); Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUST. DEV. LAW & POLICY 43, 50-54 (2004).

²⁰ Clarence J. Dias, *Understanding the UN Common Understanding on a Human Rights-Based Approach to Development Programming*, in HUMAN RIGHTS AND DEVELOPMENT: LAW, POLICY AND GOVERNANCE 5-7 (C. Raj Kumar & D.K. Srivastava eds., 2006); see also U.N. High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach*, UN/ HR/PUB/08/3 (2008), available at http://www.ohchr.org/Documents/Publications/Claiming_MDGs_en.pdf.

²¹ See U.N. HRBA Portal, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies* (2003), available at <http://hrbportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>; see also Dias, *supra* note 20, ; see also Greiber, *supra* note 19,

²² See U.N. HRBA Portal *supra* note 21.

²³ Open Letter from the United Nations Human Rights Commissioner to All Permanent U.N. Missions (30 Mar., 2012) (emphasis added), http://www.wecf.eu/download/2012/April/3003HCLet_AllPermMissions_GVANYork_Rio20.pdf.

²⁴ See Dias, *supra* note 20; see HRBA Portal, *supra* note 21 (According to the United Nations, other elements of good programming practices that are also essential under an HRBA include: i) People are recognized as key actors in their own development, rather than passive recipients of commodities and services; (ii) Participation is both a means and a goal; iii) Strategies are empowering, not disempowering; iv) Both outcomes and processes are monitored and evaluated; v) analysis includes all stakeholders; vi) Programmes focus on marginalized, disadvantaged, and excluded groups; vii) The development process is locally owned; viii) Programmes aim to reduce disparity; ix) Both top-down and bottom-up approaches are used in synergy; x) situation analysis is used to identify immediate, underlying, and basic causes of development problems; xi) Measurable goals and targets are important in programming; xii) strategic partnerships are developed and sustained; xiii) programmes support accountability to all stakeholders).

²⁵ See UN HRBA Portal, *supra* note 21.

²⁶ TOM BLOMLEY, PHIL FRANKS & MAKSHA RAM MAHARJAN, RIGHTS AND RESOURCES INITIATIVE, FROM NEEDS TO RIGHTS: LESSONS LEARNED FROM THE

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²⁷ Boesen & Sano, *supra* note 19.

²⁸ See OLUFEMI O. AMAO, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW: MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES (2012).

²⁹ UN HRBA Portal, *supra* note 21.

³⁰ *Id.*, MARGUERITE GARLING, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, ENHANCING ACCESS TO HUMAN RIGHTS: DRAFT REPORT (2003); Francesco Francioni, *The Rights of Access to Justice under Customary International Law*, in ACCESS TO JUSTICE AS A HUMAN RIGHT (2007).

³¹ UN Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework*, HR/PUB/11/04 (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

³² *Id.* at 19-20.

³³ U.N. Secretary-General, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Rep. of the Secretary-General*, U.N. Doc. A/ HRC/8/5 (Apr. 7, 2008) (by John Ruggie), available at <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>; see also U.N.E.P. Finance Initiative in Partnership with U.N. Global Compact, Principles For Responsible Investment, <http://www.unpri.org/> (2005) (providing a framework incorporating environment, social and governance considerations into mainstream investment practices).

³⁴ SEE AFR. COMM'N ON HUMAN AND PEOPLE'S RIGHTS, RESOLUTION ON A HUMAN RIGHTS-BASED APPROACH TO NATURAL RESOURCES GOVERNANCE (2012) [HEREINAFTER AFR. COMM'N RESOLUTION], [HTTP://WWW.ACHPR.ORG/SESSIONS/51ST/RESOLUTIONS/224/](http://WWW.ACHPR.ORG/SESSIONS/51ST/RESOLUTIONS/224/).

³⁵ *Id.*

³⁶ *Id.*

³⁷ The weight attached to soft law instruments is discussed in subsequent parts of this Article. See *infra* at Political Will.

³⁸ See U.N. Conference on Sustainable Dev., Rio de Janeiro, Braz., June 20-22, 2012, ¶¶ 9, 31, 227, 228, U.N. Doc. A/CONF.216/16 (2012), available at <http://www.uncsd2012.org/content/documents/814UNCSD%20REPORT%20final%20revs.pdf>.

³⁹ *Id.*; see also, U.N. Conference on Sustainable Development, Rio de Janeiro, Braz., *The Need for a Rights-Based Approach to Sustainable Development* (June 14, 2012), <http://www.uncsd2012.org/index.php?page=view&type=1000&nr=390&menu=126>.

⁴⁰ U.N. Env't Program, *Outcome Document of the High Level Expert Meeting on the New Future of Human Rights and Environment: An Agenda for Moving Forward* (Nov. 30-Dec. 1, 2009), available at www.unep.org/environmental-governance/Portals/8/documents/Events/OutcomeDocumentHumanRightsEnvironment.pdf.

⁴¹ *Id.*

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⁴³ See Org. of Am. States [OAS], *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador"*, at 1 (Nov. 17, 1998) [hereinafter Protocol of San Salvador].

⁴⁴ U.N. Econ. Comm'n for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, June 25, 1998 2161 U.N.T.S. 447 [hereinafter Aarhus Protocol], available at <http://www.uncece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

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⁴⁶ Org. of African Unity, African Charter on Human and Peoples' Rights, art. 24, June 27, 1981, O.A.U. CAB/LEG/67/3 [hereinafter Banjul Charter].

⁴⁷ See *id.* (mainstreaming human rights considerations into the design and approval of resource extraction projects is not directly addressed in any article of the Banjul Charter).

⁴⁸ Aarhus Protocol, *supra* note 44.

⁴⁹ Banjul Charter, *supra* note 46.

⁵⁰ AFR. COMM'N RESOLUTION, SUPRA NOTE 34.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

- 54 *Id.*
- 55 *Id.*
- 56 Afr. Comm'n Resolution, *supra* note 34.
- 57 *Id.*
- 58 See R. Macias, *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation*, 10 CAN. J. L. & JURISPRUDENCE (2010) (discussing the importance of a legal threshold in energy discourse); see also S. Caney, *Cosmopolitan Justice, Responsibility and Global Climate Change*, 18 LEIDEN J. OF INT'L L. 747-775 (2005); S. Caney, *Global Justice, Rights and Climate Change* (2006) 18 CAN. J. OF L. AND JURISPRUDENCE 255-278 (2006); see also Int'l Council on Human Rights Policy [ICHRP], *Climate Change and Human Rights: A Rough Guide*, 18 (2008).
- 59 Afr. Comm'n Resolution, *supra* note 34.
- 60 SEE EMILY GREENSPAN, OXFAM AMERICA, FREE, PRIOR, AND INFORMED CONSENT IN AFRICA: AN EMERGING STANDARD FOR EXTRACTIVE INDUSTRY PROJECTS 10-11 (2014), AVAILABLE AT [HTTP://WWW.OXFAMAMERICA.ORG/STATIC/MEDIA/FILES/COMMUNITY-CONSENT-IN-AFRICA-JAN-2014-OXFAM-AMERICAAA.PDF](http://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-america.pdf) (PROVIDING DETAILED SUMMARIES OF PRIOR REGIONAL EFFORTS IN AFRICA); SEE ALSO M. BROWN, DEVELOPMENTS: RECENT LEGAL DEVELOPMENTS IN THE MINING SECTOR OF WEST AFRICAN STATES (2010), AVAILABLE AT [HTTP://WWW.MAYERBROWN.COM/FILES/PUBLICATION/](http://www.mayerbrown.com/files/publication/) (LAST VISITED APR. 15, 2015).
- 61 See Afr. Comm'n Resolution, *supra* note 34.
- 62 U.N. Econ. Comm'n for Africa, *ECOWAS- Economic Community of West African States*, <http://www.uneca.org/oria/pages/ecowas-economic-community-west-african-states-0> (last visited Apr. 15, 2015) (naming the ECOWAS member-nations as Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo).
- 63 Economic Community of West African States [ECOWAS], *On the Harmonization of Guiding Principles and Policies in the Mining Sector*, C/DIR.3/05/09, art. 2 (2009) [hereinafter 2009 ECOWAS Directive], available at http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf
- 64 See Greenspan, *supra* note 60 at 10.
- 65 See 2009 ECOWAS Directive, *supra* note 62, at art.16(3).
- 66 *Id.*
- 67 *Id.*
- 68 *Id.*, at art. 16(4)
- 69 *Id.*, at art. 1
- 70 *Id.* art.6(3).
- 71 GREENSPAN, *supra* note 60, at 10.
- 72 2009 ECOWAS Directive, *supra* note 62, at art. 22(3).
- 73 Sixth Ordinary Session of the Pan-African Parliament Recommendations and Resolutions, PAP(2)/RECOMS/(VI) 4 (2012) [hereinafter Recommendations and Resolutions], available at http://www.pan-africanparliament.org/Documents/FINAL%206Th%20Session%20Recoms%20&%20Resolutions_EN-bm.pdf
- 74 *Overview of the Pan-African Parliament*, PAN-AFRICAN PARLIAMENT, http://www.pan-africanparliament.org/AboutPAP_GeneralOverview.aspx (last visited Apr. 13, 2015).
- 75 *Id.*
- 76 Recommendations and Resolutions, *supra* note 73, at 5. (noting with deep concern the recent rise of large-scale land acquisitions also known as 'land grabbing' and the impact of domestic and Foreign Direct Investment in land, water and related natural resources).
- 77 *Id.*, at 6.
- 78 *Id.*
- 79 *Id.* at 5 (noting that the Pan African parliament is "fully alarmed by the negative impacts on human rights especially on women, including unequal access to land and disruption of access to water).
- 80 See PAN-AFRICAN PARLIAMENT, MAKING INVESTMENT WORK FOR AFRICA – A PARLIAMENTARIAN RESPONSE TO "LAND GRABS" 4-6 (2011), available at http://www.iisd.org/pdf/2012/land_grabs_africa_en.pdf.
- 81 *Overview of the Pan-African Parliament*, *supra* note 74.
- 82 See AFRICAN UNION, AFRICAN MINING VISION (2009), available at http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf.
- 83 *Id.*
- 84 See *id.* at 39-43 (referencing Annex I "Initiatives in Search of a New Social Contract to Mine").
- 85 *Id.* at 12, 34.
- 86 *Id.* at 33.
- 87 Addis Ababa Declaration on Building a Sustainable Future for Africa's Extractive Industry – From Vision to Action, African Union, AU Conference of Ministers Responsible for Mineral Resources Development 2nd Ordinary Session, EX. CL/749(XXI) (Dec. 16, 2011), available at http://webmail.africa-union.org/Lilongwe_July_2012/EX%20CL%20749%20%20.
- 88 *Id.* at 3.
- 89 *Id.*
- 90 SEE AFR. COMM'N RESOLUTION, *SUPRA* NOTE 34; SEE ALSO MINING WORKING GROUP, A RIGHTS-BASED APPROACH TO RESOURCE EXTRACTION IN THE PURSUIT OF SUSTAINABLE DEVELOPMENT 3 (2014), AVAILABLE AT [HTTP://MININGWG.FILES.WORDPRESS.COM/2014/05/ADVOCACY-BRIEF.PDF](http://MININGWG.FILES.WORDPRESS.COM/2014/05/ADVOCACY-BRIEF.PDF); BROWN, *SUPRA* NOTE 60, AT 2.
- 91 See Afr. Comm'n Resolution, *supra* note 34.
- 92 *Id.*
- 93 *ID.*
- 94 E. Brown Weiss, *On Being Accountable in a Kaleidoscopic World*, 104 AM. SOC'Y INT'L L. PROC. 477, 479-81 (2010); Edith Brown Weiss et al., *The World Bank Inspection Panel: Participation and Accountability*, in ENVISIONING REFORM: ENHANCING UN ACCOUNTABILITY IN THE TWENTY-FIRST CENTURY 272 (Sumihiko Kuyama & Michael Ross Fowler eds., 2009); SIOBHAN MCINERNEY-LANKFORD & HANS-OTTO SANO, HUMAN RIGHTS INDICATORS IN DEVELOPMENT 34-36 (2010).
- 95 See generally MICHAEL HAMMER & ROBERT LLYOD, ONE WORLD TRUST, PATHWAYS TO ACCOUNTABILITY II: THE 2011 REVISED GLOBAL ACCOUNTABILITY FRAMEWORK REPORT ON THE STAKEHOLDER CONSULTATION AND THE NEW INDICATOR FRAMEWORK (2011).
- 96 Special Rapporteur of the Commission on Human Rights, *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. A/58/4 27 (Oct. 10, 2003).
- 97 A good example is the World Bank Inspection Panel which was established by the World Bank in September 1993 to serve as an independent investigative forum through which individuals or communities who believe that they are, or are likely to be harmed, by a World Bank funded project to bring their concerns directly before the Board of Executive Directors of the World Bank. See *Panel Mandate and Bank Policies*, THE WORLD BANK, <http://ewebapps.worldbank.org/apps/ip/Pages/Panel-Mandate.aspx> (last visited Apr. 13, 2015) (providing the Resolutions which created the Panel).
- 98 For example, one of the strongest criticisms against the World Bank Inspection Panel is the lack of independence in its review process. To guarantee independence, a review panel should have full control over what it wishes to investigate in accordance with its own procedures after receiving a public request, without having to wait for the approval of a higher authority. See D. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 219-20 (2002); Dana Clark, *The Rise and Fall of Accountability*, 6 WATERSHED 52, 52-55 (2001) (providing examples of lack of control in the World Bank Inspection Panel review process); D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L LAW & CONTEMP. PROBS. 47, 76-77 (1996).
- 99 "Free refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed." UN-REDD PROGRAMME, GUIDELINES ON FREE, PRIOR AND INFORMED CONSENT 18 (2013).
- "Prior" is a requirement that "information be provided before activities can be initiated, at the beginning or initiation of an activity, process or phase of implementation, including conceptualization, design, proposal, information, execution, and following evaluation." *Id.* at 19. Information should be given well in advance to provide time for stakeholders to understand, access, and analyze information on the proposed activity. *Id.* "Informed" refers to the full disclosure of the intent and scope of the projects and policies. This element focuses on "the type of information that should be provided prior to seeking consent and also as part of the on-going consent process." *Id.* Information should be "accessible, clear, consistent, accurate, and transparent," and should be delivered in appropriate language and format. *Id.* "Consent" refers to the decision made by indigenous peoples and other local communities reached through their customary decision-making process. "Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community." *Id.* at 20. Such consent must be freely and collectively given. *Id.* Decision-making must be by consensus and must be transparently made. There should be the absence of coercion, bribery, or manipulation in the

decision-making process.

¹⁰⁰ SEE AFR. COMM'N RESOLUTION, *SUPRA* NOTE 34.

¹⁰¹ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 17-18 (2011), available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf?v=1392752313000/_jcr:system/jcr:versionStorage/53/b6/9c/53b69c6d-0745-4070-99b2-68e02dde1b99/1.4/jcr:frozenNode.

¹⁰² *Id.* at 17.

¹⁰³ S. Walker, *Human Rights Impact Assessments of Trade-Related Policies, in SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW* (M. Gehring & M. Cordonier-Segger, eds., 2005).

¹⁰⁴ AMNESTY INTERNATIONAL & INTERNATIONAL HUMAN RIGHTS NETWORK, OUR RIGHTS, OUR FUTURE HUMAN RIGHTS BASED APPROACHES IN IRELAND: PRINCIPLES, POLICIES AND PRACTICES 1 (2005) (quoting Mary Robinson, former UN High Commissioner for Human Rights, comments at 2nd Interagency Workshop on Implementing a Rights-based Approach in the Context of UN Reform from May 2003).

¹⁰⁵ For example, Bruno Simma has suggested a system of Human Rights Audit, that would be a joint undertaking of foreign investors and host States, to survey the host State's human rights treaty commitments especially in the field of economic and social rights and methods for implementing such commitments (such as doctrines of incorporation or transformation). See Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L. Q. 573, 595-96 (2011). According to Simma, the ultimate result of conducting a 'human rights audit' would be a better definition of the landscape of the foreign investor's 'legitimate expectations' in a way that would not leave excessive *ex post* discretion to arbitrators, should investor-host State disputes arise in the future. *Id.* On the one hand, foreign investors would be able to better estimate and prepare for alternative scenarios of regulatory measures which the host State might take to vindicate its economic and social human rights obligations, and on the other, host States would not be unduly constrained from defining their public policy agenda as a result of investment protection guarantees within foreign investment contracts and their corresponding treaties. *Id.* As Simma notes, "human rights audit . . . would not be the same as 'human rights impact assessments'. Those are of a much broader scope, spanning inter-disciplinary approaches, very detailed and fact-intensive". *Id.* at 594. HRIA discussed here would go beyond evaluating human rights instruments or measuring compliance, it includes on-the-ground assessments of human rights issues in a project and providing holistic solutions on how to avoid unintended impacts.

¹⁰⁶ See Afr. Comm'n Resolution, *supra* note 34.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Taiwo Makinde, *Problems of Policy Implementation in Developing Nations: The Nigerian Experience*, 11 J. Soc. Sci. 63, 64-68 (2005) (explaining implementation problems and factors which can lead to an implementation gap).

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¹²⁷ See generally *id.*

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¹³⁰ See Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INT'L L.J. 888, 891 (2009). See also Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 171 (2010); Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q., 901, 902 (2009); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. OF INT'L L., 499, 502 (1999); ROBERT ANDOMO, *The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics*, UNESCO (July 2007), <http://>

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¹³¹ See Afr. Comm'n Resolution, *supra* note 34

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¹³³ See Maria Lee, et al., *Public Participation and Climate Change Infrastructure*, 25 J. OF ENVTL. L., 33, 33 (2012) (discussing how unreasonable public participation rights may become a "simple bureaucratic hurdle, frustrating for all concerned."); See also, Maria Lee & Carolyn Abbot, *The Usual Suspects? Public Participation under the Aarhus Convention*, 66 MOD. L. REV. 80, 82-83 (2003); Julia Black, *Proceduralizing Regulation: Part II*, 21 OXFORD J. OF LEGAL STUD. 33, 33 (2001); Julia Black, *Proceduralizing Regulation: Part I*, 20 OXFORD J. OF LEGAL STUD. 597, 597 (2000).

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