



Report Series

How Home Governments Can Incentivise Responsible Business Conduct of Extractive Companies Operating Abroad

4. Innovative New Approaches



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March 2017

Cite as: Institute for Human Rights and Business, “How Home Governments Can Incentivise Responsible Business Conduct of Extractives Companies Operating Abroad: 4. Innovative New Approaches” (March 2017).

Attribution: The report is written by Margaret Wachenfeld and Waleria Schuele. We are grateful to Ida Westphal for her substantial work on the report, to Pierre-Henri Gilliot for his research and to the students of the SOAS International Human Rights Clinic (Clarissa Cantadori, Farzad Izadi, Kelsey Ryburn, & Nayantara Raja) who provided the initial research for this report.

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About this Report Series

Creating an accountable marketplace in a widely interconnected world is a necessary corollary to globalisation, in which governments, companies and civil society play important roles. In a world where business activities and value chains span across many countries, finding the right types of measures to incentivise responsible business conduct (RBC) that crosses borders can be a challenge for states. The primary duty to protect human rights is with states, but companies too have a responsibility - a responsibility to respect human rights, as set out in the UN Guiding Principles for Business and Human Rights (UN Guiding Principles).¹ The Institute for Human Rights and Business (IHRB) has examined the role of states in advancing the protection of human rights in relation to business activities in its “State of Play” report on Human Rights in the Political Economy of States which highlighted examples from 70 countries of recent action.²

This series of Reports (the Reports) build on this line of work and IHRB’s activities in East Africa³ on the extractive sector (oil, gas and mining) under the “Nairobi Process.”⁴ The newly emerging East African producer nations as “host states” to extractive activities, bear the primary responsibility for regulating business activities within their territories. Generally, there are limits on states adopting laws that will take effect on the territory of another state. Nonetheless, the principle of sovereignty does not prevent the “home states” of extractive sector companies, large and small, from exploration companies to supermajors in the oil, gas and mining sectors, from setting clear expectations and legal requirements addressing how businesses domiciled in their jurisdiction should operate abroad. Many of the home states reviewed in these Reports have extractive companies domiciled in their jurisdictions currently operating in or considering operations in East Africa. These Reports are addressed to those home states to serve as inspiration for creating clear incentives and disincentives for responsible business conduct by “their” extractive companies while operating in East Africa and in other emerging producer nations.

The extractive sector is crucial to the development of both developing and industrialised countries, but it remains a high-risk sector with often significant human rights, environmental and social impacts.⁵ Extractive companies are more likely to operate in fragile and conflict-affected situations than other businesses⁶ and states where there may be limited regulation of

1 Office of the UN High Commissioner for Human Rights, “UN Guiding Principles on Business and Human Rights: Implementing the ‘Protect, Respect, Remedy’ Framework” (2011), at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

2 IHRB, ‘State of Play 3: Human Rights in the Political Economy of States: Avenues for Application’ (2014) p. 21. Available at: https://www.ihrb.org/uploads/reports/2014-03-18%2C_Report%2C_State_of_Play_-_Human_Rights_With_in_the_Political_Economy_of_States_-_Full_Report.pdf (IHRB State of Play 3)

3 In particular, Kenya, Tanzania, Uganda, Ethiopia, South Sudan.

4 <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-2-addendum-23-May-2008.pdf>

5 See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, “Corporations and human rights: a survey of the scope and patterns – of alleged corporate-related human rights abuse” (2008) highlighting human rights impacts in the extractive sector at the start of his mandate <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-2-addendum-23-May-2008.pdf>, the work done since then on human rights by some of the main international industry associations – the International Council of Mining & Metals: <https://www.icmm.com/en-gb/society-and-the-economy/mining-and-communities/human-rights> and IPIECA (global oil and gas industry association for environmental and social issues): <http://www.ipieca.org/our-work/social/human-rights/> as well as the active attention by civil society in documenting and addressing human rights impacts of the oil, gas and coal sectors: <https://business-humanrights.org/en/sectors/natural-resources/oil-gas-coal> and mining sector: <https://business-humanrights.org/en/sectors/natural-resources/mining>

6 World Bank Group, ‘Investment Climate in Practice: Promoting Foreign Investment in Fragile and Conflict-Af-

human rights, environmental or social impacts or where existing standards are not rigorously enforced. And while there has been significant developments among some of the major international extractive sector companies in developing policies and practices to implement the UN Guiding Principles, supported by work at the industry association level, these measures have been challenging to put into practice. These experiences are nonetheless important in demonstrating that these issues are relevant and are being addressed to the far wider group of extractive companies large and small that have not yet started to address these issues or are resolutely ignoring RBC developments.

In the meantime, several East African countries are working to upgrade their nascent national legal and regulatory frameworks to address these increasingly important sectors but face many challenges.⁷ Managing the extractive sector in a way that contributes to sustainable development and economic prosperity is an imperative. The African continent is all too familiar with the cost of getting it wrong.

While host states have the primary responsibility for shaping their own approach and regulation of the extractive sector, home states can play an important role in supporting a sustainable, accountable sector. The UN Working Group on Business and Human Rights has recommended that countries should set clear expectations for business and “take into account extraterritorial implications of business enterprises domiciled in their territory in accordance with the UN Guiding Principles.”⁸ This series of Reports seeks to highlight what home states are doing and what more they can do in supporting that vision.

Under the UN Guiding Principles, home states have a role to play in setting clear expectations that all businesses domiciled in their territory and/or jurisdiction respect human rights throughout their operations.⁹ In addition, in conflict-affected areas, (a characterisation that can be applied to South Sudan and parts of Uganda in the Eastern African region) in which “the ‘host’ State may be unable to protect human rights adequately due to a lack of effective control,” home states of multinationals have roles to play in assisting both the businesses and the host state in ensuring that businesses are not involved in human rights abuse, particularly gross human rights abuses. A home state’s duties vis-à-vis its often significant state owned enterprises in the extractive sector has recently been addressed by the UN Working Group on Business and Human Rights.¹⁰

Terminology

- The **“home state”** refers to the country where a company is legally registered.
- The **“host state”** refers to the country where a company operates.

ected Situations’ (April 2014) p. 3. Available at: https://www.wbginvestmentclimate.org/advisory-services/investment-generation/investment-policy-and-promotion/upload/In_Practice_Note_No_22.pdf

⁷ See Institute for Human Rights and Business, “Human Rights in Kenya’s Extractive Sector: Exploring the Terrain” at: <https://www.ihrb.org/focus-areas/commodities/human-rights-in-kenyas-extractive-sector-exploring-the-terrain> and Institute for Human Rights and Business, “Human Rights in Tanzania’s Extractive Sector: Exploring the Terrain” at: <https://www.ihrb.org/focus-areas/commodities/human-rights-in-tanzanias-extractive-sector-exploring-the-terrain>.

⁸ UN Working Group on Business and Human Rights, “Guidance on National Action Plans on Business and Human Rights, (2015), p. 12, available at: http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance

⁹ UN Guiding Principles on Business and Human Rights, Principle 2.

¹⁰ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, “On the duty of States to protect against human rights abuses involving those business enterprises that they own or control, which are generally referred to as State-owned enterprises,” A/HRC/32/45 (4 May 2016).

Where a company operates solely in its domestic market, the country is the home and host country at the same time. When a company operates abroad, host and home countries are distinct. Both home and host states have different tools at their disposal to incentivise RBC of companies and disincentivise irresponsible conduct.

The series of Reports is published in five parts:

1. Overview of the key international standards
2. Multi-stakeholder initiatives
3. Reporting requirements
4. Innovative new approaches
5. The role of capital markets

Each Report draws the spotlight to particular legislative, regulatory or engagement tools that home countries can use to incentivise RBC among extractive companies operating abroad. Each Report will also provide a direct country-by-country comparison and identify trends.

The Reports examine how a select number of home states seek to meet UN Guiding Principles expectations and incentivise the RBC of extractive companies when operating abroad. The analysis focuses on eight Organisation of Economic Cooperation and Development (OECD) countries with significant extractive sector companies (Australia, Canada, France, Germany, the Netherlands, Norway, the United Kingdom and the United States), the European Union (EU) and five BRICs countries (Brazil, Russia, India, China, and South Africa). The topics covered highlight measures available to home states to set expectations, if not legal requirements, applicable to extractive companies based in their countries and operating abroad. These examples can serve as models for other sectors that have drawn less attention but which may have increasingly significant human rights impacts when operating abroad. Also of importance, the examples discussed provide input to civil society and other stakeholders as part of the broader toolkit for promoting greater accountability, and should stimulate further debate on the efficiency and effectiveness of such measures.¹¹

There are more tools and approaches that could be highlighted in a more in-depth study. For example, the extraterritorial application of home country laws is the subject of extensive and on-going studies in the business and human rights space. Further research on the economic incentives certain home states provide to their extractive companies operating abroad would provide an interesting comparison to the efforts put into the kinds of RBC measures highlighted in this set of Reports. Further coherence between economic diplomacy and RBC diplomacy opens interesting possibilities for leveraging further action in the future.

¹¹ Given the broad scope of the task, the Reports do not attempt to evaluate the effectiveness of the measures. IHRB acknowledges that monitoring and evaluation of the various initiatives and tools discussed in this series would be important to track the impact and assess progress made, particularly at the host country-level. However it does seek to compare countries' engagement as an indicator for the relevance and range of the various incentives.

Executive Summary



This Report is the fourth in a series reviewing measures that home governments can use to incentivise responsible business conduct (RBC) and disincentivise irresponsible conduct of extractive companies operating abroad. It reviews how a selection of countries in the Organisation of Economic Cooperation and Development (OECD)¹² - and BRICS¹³ - and the European Union (EU) have developed different approaches to incentivise responsible business conduct by extractive companies operating abroad and disincentivise conduct that undermines environmental, social, human rights and good governance standards. Highlighting these measures is intended to prompt reflection among home states on further tools to implement policy commitments to responsible business conduct and the UN Guiding Principles on Business and Human Rights (UN Guiding Principles)¹⁴ more explicitly.

This Report highlights a range of initiatives by home states (and regional organisations in the case of the EU) to address extractive company operations abroad. It does not purport to cover all actions home states may take vis-à-vis domiciled extractive companies when operating abroad, but instead provides a selection of illustrative initiatives. Indeed, the analysis does not explore the full range of economic support provided through economic diplomacy, tax incentives, export credit, or other economic tools home states use to facilitate access to foreign markets. Some resource rich states provide targeted support to their extractive sector private companies, focusing their efforts on creating access to markets to enable their private sector companies to establish themselves in third countries.¹⁵ It is useful to understand steps to incentivise countries and companies in adopting governance and operating standards for the sector that reflect sustainable development and RBC standards. Doing so can assist in identifying further opportunities to leverage further such actions and align them with broader sustainability goals for the sector.

For example, the Report highlights examples of state practice explicitly linking economic diplomacy with meeting RBC standards. Used by both the Canada and The Netherlands,¹⁶ these measures make the desired connection between access to diplomatic support and meeting RBC standards unambiguous both for their own diplomats who must provide the economic diplomacy services as well as extractive companies seeking support. Other states with significant extractive sector companies, from juniors to super majors, have less developed measures, if any at all, that explicitly link access to economic diplomacy with expected conduct. For example, while the guidelines from the Chinese Chamber of Commerce do not seem to link application of the guidelines to economic support from the Chinese government, they

12 Australia, Canada, France, Germany, Netherlands, Norway, UK, USA

13 Brazil, Russia, India, China, South Africa

14 UN Guiding Principles on Business and Human Rights, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

15 L. Cramphorn, M. Farooki, "Non-EU Country Engagements with Raw Materials Producing Countries," Strategic Dialogue on Sustainable Raw Materials for Europe (STRADE) Policy Brief No. 02 / 2016. Available at: http://stradeproject.eu/fileadmin/user_upload/pdf/PolicyBrief_02-2016_Aug2016_FINAL.pdf

16 Companies can join Dutch trade missions only if they have endorsed the OECD Guidelines for Multinational Enterprises and must comply with the OECD Guidelines to be eligible for government financial support for their international trade and investment activities. <https://www.government.nl/topics/corporate-social-responsibility-csr/contents/putting-corporate-social-responsibility-csr-into-practice>

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are explicit in their application to outbound Chinese mining companies and contain quite specific, detailed requirements as to provide clear expectations that could be tracked and tested by stakeholders and indeed, the Chamber of Commerce itself. In contrast, Australia, which has significant small and large extractive companies operating abroad, does not appear to have either conditional access to its economic diplomacy or guidelines for the operation of Australian mining companies operating abroad: it has simply made guidance available for the mining sector, without any explicit expectation of application or follow up.

As to the extractive sector actors targeted by home state measures, only Canada explicitly focuses on the far less visible actors in the sector that often operate “below the radar screen” of wider public scrutiny – the junior exploration companies. While many of these companies are listed in Canada, the UK and Australia are also home to a significant portion of “juniors”. However the UK and Australia do not appear to have explicit measures to address their juniors. This is concerning given increasing recognition that actions by these companies can have a significant impact on developing trust – or distrust – with stakeholders affected by extractive operations spanning many years, and far longer than their often brief role in projects.¹⁷

The Report also highlights measures that are not extractive specific but which arose out of concerns related to the sector and other large footprint projects: the Brazilian and Chinese Central Banks have required banks under their supervision to develop environmental and social management systems to scrutinise impacts of their client borrowers. These measures use a crucial choke point – access to needed finance – to reinforce RBC requirements at home and abroad, using commercial banks as the medium.

¹⁷ See for example, IFC “A Strategic Approach to Early Stakeholder Engagement: A Good Practice Handbook for Junior Companies in the Extractive Industries,” (2014). Available at: <http://commdev.org/wp-content/uploads/2015/06/A-Strategic-Approach-to-Early-Stakeholder-Engagement.pdf>

Extractive-Specific Home Government Tools

2

2.1 The Canadian Strategy on Corporate Social Responsibility in the Extractive Sector

2.1.1 Overview

“Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad”¹⁸ – is the clearest example of home state action addressed directly to extractive companies operating abroad. Launched by the Government of Canada in November of 2014, it replaced an earlier 2009 strategy.¹⁹ Like the earlier Strategy, this one focuses specifically on Canadian extractive companies operating overseas. The updated Strategy “makes clear the Government’s expectation that Canadian extractive sector companies reflect Canadian values in all their activities abroad”²⁰ and contains a straightforward recognition of the governance gap such a strategy is meant to fill and the implications for Canadian extractive companies. Canadian extractive companies are “expected to do better than the minimum” where host country requirements differ from the international standards listed below. In such instances, the Government of Canada expects Canadian companies to meet the higher, more rigorous standard – and where they cannot, to reconsider their investment.²¹

The Strategy contains four principle lines of action:

1. promoting and advancing corporate social responsibility (CSR) guidance
2. fostering networks and partnerships
3. facilitating dialogue towards dispute resolution
4. strengthening the environment affecting responsible business practices

18 Global Affairs Canada, “Canada’s Enhanced corporate social responsibility strategy to strengthen Canada’s extractive sector abroad: Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad,” Introduction (Doing Business the Canadian Way). Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

19 Global Affairs Canada, “Building the Canadian Advantage: Canada’s Corporate Social Responsibility Strategy for the Canadian International Extractive Sector” (2009). Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>

20 Doing Business the Canadian Way, p. 2.

21 Doing Business the Canadian Way, p. 6

The Government is stepping up efforts to support engagement between companies and communities, including at the exploration stage and in particular, highlighting this issue with juniors who make up a considerable portion of Canada's extractive sector.²² The Strategy commits to increasing efforts to prepare Canadian Trade Commissioners both in Canada and missions abroad to provide country-specific guidance in this area. While many countries have trade services acting through diplomatic missions abroad, Canada's Strategy specifically targets the trade mission role in "help[ing] raise CSR performance among Canadian extractive sector companies on the ground" and providing contacts to assist in establishing partnerships between companies and development organisations, enabling companies to gain insights and information in areas such as community relations and building local capabilities.

The Strategy also strengthened the Office of the CSR Counsellor²³ to address the weaknesses and criticism of the Counsellor role as formulated in the earlier strategy.²⁴ Civil society organisations (CSOs) criticised the role for not being strong enough, while the mining community viewed it as ineffectual and therefore several declined to participate in the voluntary process offered by the CSR Counsellor.²⁵ Of the six cases brought to the Extractive Sector Counsellor between 2009 to 2013, none were resolved.

The revitalised CSR Counsellor has two functions: advisory work that focuses on implementation of the performance standards endorsed in the CSR Strategy,²⁶ and dispute reduction and prevention, called the "Review Process." This promotes dispute resolution through dialogue and joint problem-solving between Canadian companies and people directly affected by extractive projects overseas. The Review Process operates in close cooperation with Canada's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises to ensure coherence and where formal mediation is required, the Parties will be referred to the NCP.²⁷

Canadian extractive companies are expected "to integrate CSR throughout their management structures so that they operate abroad in an economic, social and environmentally sustainable manner" and to "respect human rights and all applicable laws, and to meet or exceed widely-recognized international standards for responsible business conduct." Companies are also encouraged "to find ways to reflect Canadian values that also respect local laws" in all situations. Canada also has developed a Corporate Social Responsibility (CSR) Checklist for Canadian Mining Companies Working Abroad²⁸ as a practical tool to put the performance standards into practice.

22 In 2013, over 50% of the world's publically listed exploration and mining companies were headquartered in Canada. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

23 http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?lang=eng

24 Canadian Catholic Organization for Development and Peace, *New Corporate Social Responsibility Strategy : Making progress, but we can do better*, November 2014, available at <https://www.devp.org/en/articles/new-corporate-social-responsibility-strategy-making-progress-we-can-do-better>

25 See: <https://www.opencanada.org/features/between-rock-and-responsibility/>

26 These are International Finance Corporation's Performance Standards on Social and Environmental Sustainability, the Voluntary Principles on Security and Human Rights, the Global Reporting Initiative and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. See : http://www.international.gc.ca/csr_counsellor-conseiller_rse/About-us-A-propos-du-bureau.aspx?lang=eng

27 <https://www.opencanada.org/features/between-rock-and-responsibility/>

28 <http://www.nrcan.gc.ca/mining-materials/mining/corporate-social-responsibility/17152>

2.1.2 Incentives and Disincentives

The Canadian Strategy is significant because it goes beyond simply declaratory statements as is the case with many other home government strategies and instead provides modest carrots and sticks to prompt implementation. Companies that are found to comply with the Strategy will be recognised by the CSR Counsellor's Office as eligible for "enhanced Canadian economic diplomacy." Those that do not will face negative consequences, including:

- Public disclosure of a company's decision not to participate in the review processes of the CSR Counsellor's Office or the NCP
- Withdrawal of enhanced economic diplomacy support by the Canadian Government, including by the Canadian Trade Commissioner Service which provides local contacts, assists in resolving local problems, and assists with market preparation and assessment
- Withdrawal of diplomatic support by the Canadian Government (such as issuance of letters of support, advocacy efforts in foreign markets, and participation in Canadian Government trade missions)
- Restrictions on the availability of financing or other support from the Canadian government's financing crown corporation, Export Development Canada (EDC)

The Canadian Government's commitment to such measures was tested in 2014 with a specific instance before the Canadian NCP under the OECD Guidelines on Multinational Enterprises. The case concerned a mining company, China Gold International Resources Corp. Ltd, and its activities in Tibet involving a landslide that killed 83 mine workers that was alleged to be related to its mining operations.²⁹ The company consistently refused to engage with the NCP, and eventually refused the NCP's offer of good offices to mediate the dispute. The NCP issued its final statement recalling both the aim of Canada's enhanced CSR Strategy and the OECD Guidelines. It noted that as the company did not respond to the NCP's offer of its good offices, its non-participation would be taken into consideration in any applications by the Company for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services. The statement also makes clear that before it can access such services in the future, the company would need to submit a request for review to the NCP, or show the Government of Canada it has engaged in good-faith dialogue with the CSO that filed the specific instance.³⁰

2.1.3 Assessment

The 2014 Canadian Strategy is noteworthy in a number of ways. First, it is specifically targeted to the extractive sector, based on the importance of the sector to the country's prosperity and reputation. It is a strategy that seeks to highlight benefits for the home and host country, the companies involved, and importantly, stakeholders in the host country. Second, the Strategy specifically recognises and highlights the importance of the UN Guiding Principles on Business

²⁹ The company is registered and headquartered in British Columbia, and listed on the Toronto Stock Exchange.

³⁰ Global Affairs Canada, "Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd.; at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region," Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>

and Human Rights (UN Guiding Principles)³¹ and the OECD Guidelines as two of the endorsed performance standards that apply to the sector. Third, the Strategy highlights the importance of engagement with stakeholders and communities as underpinning a number of the actions in the Strategy. This includes the very earliest moments of exploration by juniors, through a variety of mechanisms from enhanced capacity of trade counsellors to help make introductions to local NGOs, to better guidance, to avenues for dispute resolution. It is a clear recognition that above ground risks are equally significant as those below ground. Fourth, revamping the Counsellor's role and enhancing coordination with the NCP provides another avenue for communities affected by extractive operations to have some measure of access to remedy. How effective these remedy mechanisms are remains to be seen in terms of whether new reviews are brought to the new Counsellor and resolved;³² whether Canadian trade missions abroad are aware of and promote the mechanism³³ and whether stakeholders consider the process credible. Fifth, and not surprisingly given the significance of the junior exploration sector to the Canadian economy, the Strategy draws attention to this often overlooked but important segment of the extractives sector.

2.2 The Dutch Special Envoy for Natural Resources

2.2.1 Overview

The Netherlands has created the unique position of the "Special Envoy for Natural Resources" based within the Netherlands Ministry of Foreign Affairs -- an innovative approach to promoting corporate responsibility in natural resources management and extraction through diplomacy.³⁴ The Ministers of Foreign Affairs and of Development and International Trade decided to establish this ambassador-at-large position in 2011 as it enables a dynamic, cross-government response to the challenges and opportunities in the field of natural resources management. The post is grounded in the idea that transparent and sustainable extraction of minerals should be beneficial to both producing and consuming countries alike.

The Special Envoy's role is twofold: one, securing the supply of strategic natural resources for the Netherlands, and two, responsible exploitation and trading of resources.³⁵ The Envoy uses the OECD Due Diligence Guidance for Responsible Minerals Trade and the UN Guiding Principles as specific signposts for the role. Given the focus on diplomacy, the Envoy engages with a wide range of actors. For example, in 2016, he took part to the Mining Indaba Conference, a global gathering of the mining industry and mining investment community,

31 Interestingly, while the UN Guiding Principles are clearly mentioned in the Strategy, the Counsellor's website of « endorsed performance standards » fails to mention the UN Guiding Principles. It is unclear if this is an oversight or deliberate. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

32 According to the Counsellors website, there have been no new reviews since 2013. See http://www.international.gc.ca/csr_counsellor-conseiller_rse/Registry-web-enregistrement.aspx?lang=eng

33 See: <https://www.opencanada.org/features/between-rock-and-responsibility/>

34 The current envoy is Dirk-Jan Koch, a former diplomat.

35 Email exchanges with Dirk-Jan Koch

presenting the “Dutch approach” to minimizing water and mining risks³⁶ and the Water and Mining Platform, a Dutch initiative where actors of the mining industry can meet and talk about strategies and solutions to achieve sustainable mining.³⁷

In the conflict minerals area, the Special Envoy has taken the initiative to build and support multi-stakeholder approaches to meet the complex challenges. For example, he helped establish the Conflict Free Tin Initiative³⁸ in the Democratic Republic of Congo in which the Dutch Government brought together Congolese exporters, peacekeeping organisations and the international industry association and big brands to showcase that it would be possible to source in a responsible way from the DRC. More recently he helped create the public-private European Partnership for Responsible Minerals, launched in May 2016³⁹ to accompany the new EU conflict minerals legislation. In this collaboration companies work together with governments and NGOs to stimulate the supply and demand of responsible minerals.

2.2.2 Incentives and Disincentives

There is little information in the public domain about the Special Envoy’s first role – securing sustainable supplies of minerals for the Netherlands, but that function presumably comes with an important market-based incentive – procurement by the Government of the Netherlands. Given the mandate, that procurement presumably includes conditions the the supply of minerals is sourced in a manner aligned with the two “signposts” the Special Envoy is guided by – the UN Guiding Principles and the OECD Guidelines – but there is no public evidence to verify this assumption.

As to the Special Envoy’s second role, the Envoy has been able to use the position to do the hard work of bringing multi-stakeholder initiatives together. While MSIs and public private partnerships (PPP) are considered important tools in filling governance gaps, they take time and resources to establish, cajole parties into participating and in maintaining the initiative. The Special Envoy acted as the neutral broker in bringing parties together, using the various tools available, including development funding, making targeted contributions to overcoming specific obstacles to collaboration in pursuit of the shared goal

2.2.3 Assessment

The Netherlands is still the only government to have a special envoy position on natural resources globally – giving the Special Envoy a unique vantage point and potentially a head start among other home governments that are competing to secure supplies. The role permits promotion of the responsible business agenda into what were purely economic domains. Further transparency about the Netherland’s procurement of mineral supplies and the conditions placed on the mining of procured minerals would be useful in demonstrating leadership but also setting precedents for other governments. This is presumably the only area where the

36 Mining Indaba Conference, Key note speech by Dirk-Jan Koch, special envoy for natural resources, on the water & mining platform, Water and mining, disasters & opportunities. The Dutch approach, February 2016.

37 Ibid., p.4

38 <http://solutions-network.org/site-cfti/>

39 <http://english.eu2016.nl/binaries/eu2016-en/documents/press-releases/2016/05/13/innovative-european-partnership-to-stimulate-responsible-mineral-trade/innovative-european-partnership-to-stimulate-responsible-mineral-trade.pdf>

Envoy has the power to impose mandatory obligations and to drive innovations in doing so.

2.3 The Chinese Guidelines for Social Responsibility in Outbound Mining Investments

2.3.1 Brief Overview

The Chinese Chamber of Commerce of Metals, Minerals and Chemicals Imports and Exports (CCCMC) launched its *Guidelines for Social Responsibility in Outbound Mining Operations* in 2014⁴⁰ -- the first industry specific guidance on social responsibility for the Chinese mining industry to “integrate social and environmental factors into their investment decision making and operations abroad.”⁴¹ The CCCMC is a subordinate unit of the Ministry of Commerce of China and represents a membership of over 6,000 companies, encompassing the majority of Chinese mining companies investing abroad and trading mineral, metal and hydrocarbon products.⁴² The drafting process lasted more than a year, and included public consultations and support from the German Government⁴³ and input from Global Witness.⁴⁴

The purpose of the Guidelines is specified in the foreword: “to regulate Chinese mining investments and operations, and to guide Chinese companies in improving CSR and sustainability strategies, as well as management systems.” The Guidelines apply to all mineral exploration, extraction, processing and investment cooperation projects, including related activities such as mining-related infrastructure development in foreign countries, in which Chinese companies have invested.⁴⁵

The Guidelines are constructed around seven “guiding principles,” that represent the overarching commitment to social responsibility in outbound mining investments and embody the “spirit” of the Guidelines.⁴⁶ These include respect for human rights and protecting the rights and interests of employees, respect for stakeholders, strengthening responsibility throughout the extractive industries value chain and striving for transparency. The Guidelines specifically note that they are aligned with the principles and core subjects of the ISO 26000

40 https://www.emm-network.org/wp-content/uploads/2015/03/Guidelines_for_Social_Responsibility_in_Outbound_Mining_Investments.pdf (CCCMC Guidelines)

41 Emerging Market Multinationals Network for Sustainability, “CCCMC: Developing Guidelines for Social Responsibility in Outbound Mining Investment.” Available at: https://www.emm-network.org/case_study/cccmc-developing-guidelines-for-social-responsibility-in-outbound-mining-investment/. The Guidelines were developed with the support of the bilateral Sino-German Corporate Social Responsibility Project and the Emerging Market Multinationals Network for Sustainability Project that are jointly initiated by the Chinese and German governments. Emerging Market Multinationals Network for Sustainability, CCCMC : Developing Guidelines for Social Responsibility in Outbound Mining Investment

42 <http://en.cccmc.org.cn/>

43 Sino-German Corporate Social Responsibility Project, Public Consultation – Draft Guideline for Social Responsibility in Chinese Outbound Mining Investments, available at http://www.chinacsrproject.org/Events/Event_Show_EN.asp?ID=222

44 <https://www.globalwitness.org/en-gb/archive/new-chinese-guidelines-offer-mineral-companies-chance-reduce-conflict-corruption-risks-and-0/>

45 CCCMC Guidelines, p.28

46 CCCMC Guidelines, Chapter 1.

Guidance on Social Responsibility with some exceptions and also take into account the Ten Principles of the United Nations Global Compact as well as several other industry-specific sustainability standards.⁴⁷

Chapter Two, which is the main chapter of these Guidelines, sets out more detailed “minimum requirements”, that companies are expected to comply with, and which – “at a later stage – could serve as the baseline for performance measurement.”⁴⁸ As a start, out-going mining companies are required to develop organisational management systems necessary to implement their social responsibilities under the Guidelines. These include detailed requirements on human rights, labour rights, occupational health and safety, and community involvement and engagement. The human rights chapter reflects the basic requirements of the UN Guiding Principles and the Global Compact, references the Voluntary Principles on Security and Human Rights and covers a number of other human rights specific impacts associated with mining including resettlement, respecting indigenous peoples rights including the right to free, prior and informed consent (FPIC) as well as provisions on conflict minerals.⁴⁹

2.3.2 Incentives and Disincentives

The Guidelines note that they are “to regulate Chinese mining investments and operations” and includes a further reference to “minimum requirements”, giving the impression that they are meant to be legally binding. However they do not refer to a particular enforcement mechanism. Instead, the Guidelines refer to CCCMC conducting an evaluation of CSR performance of Chinese companies engaged in outbound mining investments according to these Guidelines but there is no reference to a penalty for non-compliance. 50 CCCMC’s diagram of follow up actions notes⁵¹ that “the Guidelines may provide input into Chinese mining laws and regulations” and that “policy recommendations are presented at international fora and integrated into intergovernmental processes.” Uptake by other governments would broaden the application of the Guidelines and help level the playing field if the same requirements were applied to other outbound mining companies.

Until the incorporation of the Guidelines into Chinese laws or regulations, the incentives for compliance will come through more explicit linkage to any necessary Chinese government permission for approval for overseas investment. Financial institutions – both state and private – could also start to use the Guidelines as a condition of financing, much the same way the IFC Environmental and Social Performance Standards have become a condition of financing used by the Equator Banks in the form of the Equator Principles. In addition, given the widespread scrutiny and criticism of Chinese extractives operating abroad that prompted the development of the Guidelines in the first place, reputational considerations are likely to remain an important incentive for application for the Chinese Government, CCCMC and at least the more high profile Chinese mining companies operating abroad.

47 CCCMC Guidelines, p.26

48 CCCMC Guidelines, p. 26.

49 CCCMC Guidelines, Chapter 2.4

50 http://www.ghub.org/cfc_en/wp-content/uploads/sites/2/2014/11/China-Mining-at-Home-and-Overseas_Main-report2_EN.pdf, p. 67

51 Diagram representing the process and influence of the Guidelines for Social Responsibility in Chinese Outbound Mining investments, available at https://www.emm-network.org/case_study/cccmc-developing-guidelines-for-social-responsibility-in-outbound-mining-investment/

In the meantime, CCMC is expected to plan an active role in “encourag[ing] companies to assess their social responsibility according to the principles and social responsibility issues of these Guidelines” and assist implementation by providing trainings, workshops, exchanges, and other measures to strengthen the capacities of companies and in spreading the lessons learned through international processes.

2.3.3 Assessment

The CCME Guidelines represent a significant step forward when compared to overseas investment guidelines issued by other Chinese bodies.⁵² They reflect both some hard lessons learned around particular Chinese mining investments but also a broader recognition that other mining companies and mining nations have learned – that “[a]s a capital-intensive long-term business, the sustainable development of mineral resources requires continuous public trust and a stable legal, political, social, and economic environment.”⁵³ The Chinese Government and CCME now faces the challenge of incentivising the implementation of the Guidelines.

The Guidelines also represent an important contribution to the topic of home state measures in setting specific standards and expectations for outbound extractive companies that are aligned with international standards. The Guidelines very explicitly draw on a wide range of international standards rather than creating new or different standards. The explicit cross-referencing of international standards, the detailed nature of the guidance and the clear indication that companies need to fill governance gaps by complying with the Guidelines will provides a solid set of requirements for other home governments and outbound mining companies.

The key issue now is to understand whether there is specific uptake by Chinese mining companies and importantly, if it is having an impact, given the widespread concerns about Chinese extractive sector operations abroad. Commissioning an independent and credible evaluation of the uptake and application of the Guidelines would be a bold move.

2.4 The Dutch Sector Risk Analysis and Covenants

2.4.1 Overview

Setting out to understand which sectors pose higher risks to the environment, labour, human rights, corruption and taxation issues, the Dutch Ministry for Foreign Trade and Development Cooperation and the Ministry of Economic Affairs, commissioned KPMG, (one of the “Big Four” accounting firms) to examine a number of industry sectors including oil and gas. Mining was not a selected sector because of its relatively limited economic importance in the Netherlands but mining risks for building materials, metals, and minerals are highlighted via the sectors

52 http://www.ghub.org/cfc_en/wp-content/uploads/sites/2/2014/11/China-Mining-at-Home-and-Overseas_Main-report2_EN.pdf - p. 67

53 CCMC Guidelines, Foreword.

that make intensive use of and/or trade these raw materials.⁵⁴ For every selected sector, KPMG examined 13 to 24 material risks across five different categories (environment, labour, human rights, corruption and taxation) within key Dutch supply chains.⁵⁵ The endeavour aims to analyse which sectors have a higher risk profile, to identify the main risks and to illustrate how the sectors in question are assuming their ‘responsibility to respect’ human rights as set out in the UN Guiding Principles.⁵⁶

The findings of the sector risk assessments (SRA) have two purposes: for companies and their stakeholders, the findings can be used as a starting point for due diligence processes; for the government, companies and stakeholders, the SRA are the basis of dialogue, both within and with the sectors. Based on dialogue around them, the sector associations agree with their stakeholders - member companies, government, trade unions and civil society organisations -- on collaborative approaches to address the risks, resulting in sector “covenants.” The covenants are a particularly Dutch approach to achieving concrete outcomes from multi-stakeholder dialogue. While not binding, the parties sign an agreement that sets out collaborative steps to implementing responsible business conduct to improve the sustainability of international production and supply chains.

The Agreement on a Sustainable Garment and Textile Sector is the first in a series of agreements with high risk sectors.⁵⁷ While there is no current timetable for the oil and gas sector, its time may come.

2.4.2 Incentives and Disincentives

The covenant or “agreement on international responsible business conduct” model provides a number of specific incentives as well as disincentives. The Netherlands Government has particularly focused on incentivising stakeholder participation, even setting specific targets for participation. For example, for the garment and textile sector agreement, the target is for at least 50% of the Dutch garment and textile sector to sign the agreement by 2018, and 80% by 2020.⁵⁸ The most obvious incentive for companies is to find shared solutions at the sector level to specific risks that are hard to address individually. They offer industry sectors and companies the opportunity to give effect to their responsibility to respect human rights and to take the initiative in assuming and reinforcing this responsibility jointly with their peers and stakeholders and thus to increase their leverage.⁵⁹ For CSOs, the model creates a new tool for actually addressing risks of breaches of human rights and environmental damage in the supply chain through the specific action plans that are to be developed, the eventual transparent reports, and having the Government in the background to prompt participant action when needed.

54 KPMG, “CSR Sector Risk Assessment, Considerations for dialogue,” (September 2014) p. 174. Commissioned by the Minister for Foreign Trade and Development Cooperation, and the Minister of Economic Affairs. Available at: <http://www.kpmg.com/NL/en/Issues-And-Insights/ArticlesPublications/Documents/PDF/Sustainability/CSR-Sector-Risk-Assessment.pdf> (CSR Sector Risk Assessment).

55 CSR Sector Risk Assessment, p. 8

56 See: <http://www.ser.nl/en/publications/news/20160704-sustainable-garment-textile-sector.aspx>

57 <http://www.ser.nl/en/publications/news/20160704-sustainable-garment-textile-sector.aspx>

58 Id.

59 Social and Economic Research Council, “Agreements on International Responsible Business Conduct,” Advisory Report 14/04, (April 2014). Available at: <http://www.ser.nl/-/media/files/inter-net/talen/engels/2014/international-responsible-business-conduct.ashx>

2.4.3 Assessment

For home governments, sector agreements are a good example of using new types of instruments to work on collective action problems while at the same time contributing to the government's duty to protect role under the UN Guiding Principles in a targeted way. The purpose of the covenants is to reduce specific risks for groups facing adverse impacts, such as workers in the supply chain and local communities in areas where resources are extracted, within an ambitious yet realistic time frame of three to five years. The home government role is three-fold: facilitating the process that leads to the establishment of the agreements, participating in the agreements as a party as well as including international responsible business conduct diplomacy as part of economic diplomacy.⁶⁰

While the agreements are expected to include specific commitments on human rights and labour rights, these are linked to a wider set of risks, demonstrating linkage between international responsible business conduct standards and wider policy objectives such as contributing to efforts to combat climate change and to implement the 2030 international development agenda that are also relevant to the future of the extractive sector.

2.5 The EU Raw Materials Initiative

2.5.1 Overview

The European Union Raw Materials Initiative (RMI) has three aims: fair and sustainable supply of raw materials from global markets, sustainable supply of raw materials within the EU, and resource efficiency and supply of "secondary raw materials" through recycling.⁶¹ The RMI is relevant to the mining sector inside and outside the EU. A 2011 update of the initiative notes that "[t]he challenge is to ensure that commodity and raw materials needs are met in a way which supports wider goals for development in source countries, environmental protection, open trade and stable markets which do not pose risks to the wider economy."⁶²

The EU's actions to secure a "fair and sustainable supply of raw materials" from global markets is focused on "enhanced cooperation" with non-EU countries and regions, such as Africa, China and Russia. Raw materials diplomacy around securing supply outside the EU is carried out through: eliminating export restrictions; enforcing international trade rules and tackling restrictions; raising non-EU countries' awareness of policies on trade in raw materials and; developing best practice through bilateral dialogue and in international fora such as the G8/ G7, G20, OECD and the United Nations Conference on Trade and Development (UNCTAD).⁶³

60 Id, p. 16

61 <https://ec.europa.eu/programmes/horizon2020/en/area/raw-materials>

62 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 'Tackling the Challenges in Commodity Markets and on Raw Materials', COM (2011) 25. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476800958401&uri=CELEX:52011DC0025>

63 European Commission Staff Working Document, "On the implementation of the Raw Materials Initiative," (SWD/2014/0171). Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014SCO171>

The 2011 update of the RMI noted that the Commission intends to reinforce its Raw Materials Trade Strategy⁶⁴ in line with development and good governance objectives. The update notes that enhancing governance and transparency, as well as the trade and investment climate in the raw materials sector, is essential for achieving inclusive growth and sustainable development in resource rich countries. This is in part through supporting partner governments to develop comprehensive reform programmes on revenue and contract transparency to help society at large and national supervisory bodies to hold governments and companies to account for revenue payments and receipts. The RMI is coordinated with the EU's support across other relevant extractive sector initiatives such as on conflict minerals, the Kimberly Process, and the Extractive Industries Transparency Initiative.⁶⁵ For example, the Commission agreed with the African Union Commission to establish bilateral cooperation on raw materials and development issues based on the EU's RMI and the African Union's 2009 'African Mining Vision'. These steps point in the direction of joining up economic diplomacy with broader development objectives. However, the EU's approach on accessing *critical* raw materials contains no link to or mention of sustainability requirements or responsible business conduct.⁶⁶

Concrete implementation of the RMI can be witnessed through the European Innovation Partnership on Raw Materials - a stakeholder platform that brings together representatives from industry, public services, academia and NGOs to provide high-level guidance to the European Commission, Members States and private actors on innovative approaches to the challenges related to raw materials.⁶⁷

2.5.2 Incentives and Disincentives

The RMI could make better use of a range of incentives and disincentives. Given the focus on trade and competition tools, it does not link procurement of raw materials to specific RBC or sustainable development requirements concerning minerals extraction. Procurement is one of the most powerful tools the EU has at its disposal. Instead, the EU uses other far softer approaches to incentivise government partners to put in place better mining frameworks, for example, through development cooperation and targeted exchanges of practice and by prompting companies to engage in research and development to improve practices. There are no obvious disincentives – i.e. procurement is not conditioned on meeting any requirements around the conditions under which raw materials are extracted and participation in the Innovation Partnership is not based on commitments to sustainable development – only sector expertise.⁶⁸

64 European Commission, DG Trade, "Raw materials policy - 2009 annual report." Available at: <http://ec.europa.eu/trade/policy/accessing-markets/goods-and-services/raw-materials/>

65 European Commission Staff Working Document, "On the implementation of the Raw Materials Initiative," (SWD/2014/0171), Section 2.3 Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014SC0171>

66 <http://ec.europa.eu/growth/sectors/raw-materials/specific-interest/critical/>

67 <https://ec.europa.eu/growth/tools-databases/eip-raw-materials/>

68 <https://ec.europa.eu/growth/tools-databases/eip-raw-materials/en/content/call-applications>

2.5.3 Assessment

As a home “government” initiative, the EU RMI makes important connections between securing raw materials and the impact of natural resource extraction on societies and on good governance. It also draws connections between the EU’s other initiatives on the extractive sector, particularly in areas of weak governance and conflict.

The challenge is in understanding how those commitments are implemented and whether they have equal weight with the more immediate imperatives of securing raw materials supply. The strategy will have to meet several different objectives, including sustainability and development goals in both Europe and raw materials producing countries. While some of the RMI dialogues with partners have focused on exchange of best practice around inter alia, sustainable mining, safety and the environment, corporate social responsibility standards, and labour rights, other more specific commitments around extractive companies have yet to be delivered. In particular, the 2011 update commits to “developing a code of conduct of EU companies operating in third countries” but that did not materialise.⁶⁹ The newly launched “Strategic Dialogue on Sustainable Raw Materials for Europe” has made the same observation that the “the European Raw Material Initiative promotes ‘sustainable development’ without formulating precise targets and policy instruments” and has committed to addressing this gap in its dialogue process.⁷⁰

2.6 The Australian Good Practice Handbooks for Sustainable Mining

2.6.1 Overview

Australia’s Department of Industry, Innovation and Science hosts the “Leading Practice Sustainable Development Program (LPSDP)” for the mining industry. This program has developed 15 handbooks on different areas of mining. Two of the 15 handbooks focus on social issues (community engagement and development and working with indigenous communities) while the remaining handbooks are focused on more technical aspects of mining. The “Guide to Leading Practice Sustainable Development in Mining”⁷¹ consolidates the information in the handbooks into a single reference guide, organised to reflect the life cycle of a mining operation.⁷² “Social Responsibility in the Mining and Metals Sector in Developing Countries” draws on leading practice examples from Australian companies operating both domestically and internationally and complements the LPSDP message that wealth distribution, community development, environmental protection, health, education and human rights is the business of

69 Communication from the European Commission, “Tackling the Challenges In Commodity Markets and on Raw Materials” (COM (2011) 25, p. 15. Available at: <http://eur-lex.europa.eu/legal-content/EN/TX-?qid=1468337588887&uri=CELEX:52011DC0025>

70 P. Dolega, S. Degreif, M. Buchert, D. Schüler, “Outlining Environmental Challenges in the Non-Fuel Mining Sector,” Strategic Dialogue on Sustainable Raw Materials for Europe (STRADE), No. 04/2016. Available at: http://stradeproject.eu/fileadmin/user_upload/pdf/PolicyBrief_04-2016_Sep2016_FINAL.pdf

71 The 15 handbooks are available at: <http://www.industry.gov.au/resource/Programs/LPSD/Pages/LPSDhandbooks.aspx>

72 <http://www.industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf>

both governments and mining companies.⁷³

2.6.2 Incentives and Disincentives

The Handbooks draw together information and provide references and links to useful sources but are not intended to be a prescriptive manual for companies, governments or communities to follow. There are no particular incentives for following the Handbooks other than what companies may find useful, and no disincentives for failing to follow the practices captured.

2.6.3 Assessment

Despite the significant size of the Australian mining sector domestically and overseas, the Australian Government does not appear to have particular requirements or strategies for its Australian miners operating overseas, other than through promoting the useful sharing of knowledge.

2.7 The Norwegian Oil for Development Programme

2.7.1 Overview

Norway's Oil for Development (OfD) programme aims to help developing countries use and distribute their petroleum resources in a sustainable and transparent way, by building capacity and competence, fighting corruption, and by distributing incomes from the sector to aid the reduction of poverty.⁷⁴ Through the OfD Programme, Norway shares its experience from five decades of managing oil and gas resources, including developing an advanced regulatory system with respect for the environment, health and safety and the transparent management of resources.⁷⁵ In addition to more technical matters, the OfD Programme recognises that it is crucial to have an informed public, both in order to develop a sound national policy and to hold authorities accountable for their management of petroleum resources.

2.7.2 Incentives and Disincentives

The programme can be seen as incentivising responsible Norwegian oil and gas companies – as well as companies from other countries -- to expand their markets into developing countries as they will benefit from stronger regulatory environments with reduced chances of corruption and poorly conceptualised regulatory approaches as well as stronger understandings of the need for environmental, health and safety protection in the sector. Strong regulatory frameworks, accountable government and active civil society and media are expected to be a disincentive to extractive industry actors used to dealing in corrupt environments, behind closed doors.

73 <http://www.industry.gov.au/resource/Documents/LPSPD/DEPRES.pdf>

74 The Norwegian Foreign Ministry, 'Letter to the government on Norway's Foreign Policy in Africa' (2007) 24. Available at: <https://www.regjeringen.no/globalassets/upload/UD/Vedlegg/afrikastrategi.pdf>.

75 <https://www.norad.no/en/front/thematic-areas/oil-for-development/what-we-do/>

2.7.3 Assessment

The OfD Programme is different from the other measures reviewed in this Report in that it focuses on state-to-state cooperation, rather than measures directed to extractive sector companies. Norway has chosen to focus its efforts on where it has expertise: sharing its experience of managing oil and gas resources to help developing countries translate oil and gas resources into poverty reduction through the economically, environmentally and socially responsible management of these resources that safeguards the needs of future generations. The 2012 evaluation of the OfD Programme highlighted the need to keep good governance of the sector at the forefront.⁷⁶ While not explicitly linked to the country's economic diplomacy, the initiative improves the operating environment for Norwegian companies in the sector seeking to do business abroad.⁷⁷

Other Tools

3

3.1 BRICS Country Financial Sector Guidelines

3.1.1 Brief Overview

A number of BRICS countries have put in place "green finance" requirements -- aligning financing conditions to sustainable development in three areas in particular that are relevant to the longer-term funding of the extractives sector:

- Preventing the financing of illicit practices or profiting from weak enforcement
- Unlocking opportunities for green investment
- Exploring solutions to dilemmas and trade-offs between economic, environmental and social outcomes.⁷⁸

China's Green Credit Guidelines⁷⁹ issued by the China Banking Regulatory Commission are just one part of a suite of its "green finance" tools.⁸⁰ The Guidelines set out requirements for

76 Norad Evaluation Department, "Facing the Resource Curse: Norway's Oil for Development Program," (2012). Available at: https://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/evalueringsa-vdelingens-filer/facing-the-resource-curse_norways-oil-for-development-program.pdf

77 Indeed, researchers have highlighted the links between the choice of countries in the OfD Programme and the activities of the Norwegian state owned petroleum company, Statoil. R. Hundsbæk Pedersen and P. Bofin, Danish Institute for International Studies, "The politics of gas contract negotiations in Tanzania: a review", (2015), p.18. Available at: http://pure.diiis.dk/ws/files/615479/WP_2015_03.pdf.

78 See more at: <http://unepinquiry.org/publication/green-finance-for-developing-countries/#sthash.2jzGfuwq.dpuf>

79 <http://www.cbrc.gov.cn/EngdocView.do?docID=3CE646AB629B46B9B533B1D8D9FF8C4A> (China Green Credit Guidelines)

80 <https://www.iisd.org/sites/default/files/publications/greening-chinas-financial-system.pdf>

effective environmental and social risk management, whereby banks must identify, assess, monitor, control and mitigate environmental and social risks and disclose information as required by laws and regulations and subject themselves to market and stakeholder supervision.⁸¹ The environmental and social risks are broad and refer to the hazards and risks on the environment and society including environmental and social issues related to energy consumption, pollution, land, health, safety, resettlement of people, ecological protection, climate change, etc that may be brought about by the construction, production and operating activities of banking institutions' clients and key affiliated parties. It includes an obligation on banks to report on "performance standards".⁸²

Other BRICs countries have also turned to the banking sector to provide a check on the environmental and social management of private sector projects, including extractive sector projects, as a reinforcement of direct regulation. The Brazilian Central Bank was the world's first banking regulator to request that banks monitor environmental risks as part of the implementation of Basel III in 2011. Brazil's banking regulations require socio-environmental risk management that was put in place as part of the Central Bank's core functions as a prudential bank regulator.⁸³ Peru's Superintendency of Banking, Insurance and Private Pension Fund Administrators (SBS) launched a similar measure in response to explicit concerns about the stability of the banking sector given its exposure to social conflicts blocking or reducing operations in the Peruvian mining sector.

3.1.2 Incentives and Disincentives

These systems typically have a clear incentive and disincentive structure: projects that meet established environmental and social requirements are eligible to access finance (provided they meet other requirements) and projects that do not, cannot receive funding through the banks covered.

3.1.3 Assessment

The new Chinese Guidelines are in their infancy and are likely to suffer from some of the same constraints as the older Chinese Green Credit Guidelines: a lack of expertise at the banks that are meant to apply them, and a lack of skills and sometimes political will to assess the environmental and social performance of banking clients. The expectation is that as experience improves over time, so will application. The bigger challenge is consistent enforcement and the impact on the scale of lending to extractive industries.⁸⁴

The initiatives nonetheless represent an interesting new dynamic of use of home state tools – in this case banking supervisory powers – to craft the kinds of finance available to projects in the extractive sector – and other sectors. They also serve to overcome weaknesses in environmental and social regulation and enforcement by adopting specific due diligence requirements around environmental and social issues, including respect for human rights.

81 <http://pfbc-cbfp.org/docs/news/avril-mai-13/RDP12-Mars-2013/DCC-China%20Banking%20Regulation%20-%20Green%20Credit%20Guidelines.pdf>

82 China Green Credit Guidelines, para.8

83 http://unepinquiry.org/wp-content/uploads/2016/05/Green_Finance_for_Developing_Countries.pdf, p. 23

84 Friends of the Earth United States, "Going out, but going green? Assessing the implementation of China's green credit guidelines overseas" (2014) Available at: <http://www.foe.org/news/archives/2014-11-going-out-but-going-green>.