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# Business responsibilities and investment treaties

*by*

David Gaukrodger*

Investment treaty policy increasingly interacts with business responsibilities. This scoping paper first surveys the converging approaches to responsible business conduct (RBC) and business and human rights (BHR) as reflected in the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights and core ILO standards. Legislative developments and court cases are examined. The paper focuses primarily on government action as part of a flexible "smart mix" to address RBC and maximise the positive contribution of business to sustainable development, but also examines some business and civil society action.

Three aspects of trade and investment treaty interaction with business responsibilities are considered: treaty impact on policy space for governments including for the non-discriminatory regulation of business; treaty provisions that buttress domestic environmental, labour or other law; and provisions that speak directly to business by, for example, encouraging RBC or establishing conditions for access to investment treaty benefits.

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# Executive summary

This paper analyses developments potentially relevant to investment treaty policy in the area of business responsibilities. Responsible business conduct (RBC) and business and human rights (BHR) are fast-developing fields with converging approaches to business responsibilities. Investment treaty policy makers are increasingly hearing proposals to integrate policies relating to business responsibilities into investment treaties. As they contemplate whether and how to respond in their particular field, it is important to understand the broader framework for business responsibilities and its rapid evolution.

The paper first surveys the broad government and multi-stakeholder agreements and work on business responsibilities at international organisations. It outlines the remarkable convergence both on the respective roles of governments and business, and on the content of the standards for business conduct, as demonstrated in the alignment of the OECD Guidelines for Multinational Enterprises (OECD Guidelines), the United Nations Guiding Principles on Business and Human Rights (UNGPs) and core International Labour Organisation (ILO) standards. The need for RBC due diligence by companies has been emphasised in extensive work at the OECD on sectoral and general due diligence guidance.

Recognition in the UNGPs and OECD Guidelines of governance gaps and the need for governments and business to address them have given rise to a growing range of measures to address BHR/RBC. The paper reviews recent government legislation and policy proposals that can include imposing obligations on business to engage in or disclose action on human rights or RBC due diligence, conditioning access to government contracts or benefits on appropriate business conduct, or adopting broad National Action Plans to set out future areas for policy development on BHR/RBC. It also takes note of work on a binding instrument on business and human rights.

The paper also reviews some important recent developments in national courts. It considers in particular some avenues under which alleged victims of torts or human rights abuses caused by companies have sought remedies in the courts of the parent company of a corporate group, notably in cases where remedies in a host state appear to be unavailable. It also notes the growing debate over the purposes of the corporation and the scope of fiduciary duties of company directors.

Business is increasingly engaged in efforts to address RBC and BHR with major business organisations and companies affirming business responsibilities towards workers and communities. Strong public demand is notably reflected in intensive NGO engagement and in the growth of “environmental, social and governance” (ESG) investment. The mix of mandatory, incentive-based, or voluntary measures by governments and business, at national, regional and global levels, together with outside monitoring, is sometimes referred to as a flexible “smart mix” that seeks to improve business conduct.

The paper also begins to examine the varying ways in which government policies on investment treaties may interact with policies on business responsibilities. It is widely recognised that states have the primary duty to protect against human rights abuses caused by third parties including business. The broad recognition of the primary role of governments in addressing the adverse impacts of business activities makes attention to the interface between government investment treaty policy and domestic regulation of key interest.

There is growing criticism in particular of the perceived one-sided nature of investment treaties. They are seen as asymmetric, protecting covered investors and restraining host states while lacking accountability mechanisms for covered investors operating in those states. The 2012 OECD scoping paper on Investor-State Dispute Settlement (ISDS) and the 2012 progress report on Roundtable work on ISDS took note of the contrast between the access to remedies of ISDS investor claimants and tort victims (including victims of human rights abuses) in many jurisdictions. Silence in many investment treaties on issues like climate change, human rights, gender, the rights of indigenous peoples or public health is increasingly visible and contested.

Provisions in trade and investment agreements can buttress domestic law or its enforcement. Trade agreements and integrated trade and investment agreements have included commitments to adhere to or incorporate international labour, anti-corruption or environmental norms into domestic law or regulation, and to enforce relevant law. Such provisions remain relatively rare but interest and debate are growing in light of expanded use of such provisions in recent integrated agreements and the first examples of government attempts to enforce them. Issues include scope, whether and under what conditions access to binding resolution is available, standards of liability, remedies for breach, impact on the ground, and risks of protectionism. In contrast to these broader agreements, stand-alone investment treaties have rarely sought to strengthen domestic regulation of business. Some commentators have suggested that investment treaties could be used to facilitate the agreed exercise of domestic jurisdiction in a range of areas.

With regard to the impact of investment treaties on policy space, leading representatives of the BHR community have expressed concerns about investment treaty overreach, in particular in permitting claims against non-discriminatory regulatory policies. Governments have taken numerous actions to protect policy space in recent years. At the same time, many older investment treaties continue to be used for claims against governments, and theories generating liability for non-discriminatory regulation under vague treaty provisions continue to be applied frequently in ISDS.

Many investment treaties include provisions limiting treaty coverage to investments made in accordance with domestic law; it has been suggested that that such legality requirements apply in all cases of serious violations of important government regulation. These domestic law legality requirements applicable to market entry appear to be the principal binding incentive currently applicable to business in the existing pool of investment treaties.

Provisions in investment treaties can specifically encourage business observance of BHR/RBC standards or establish RBC-based conditions for access to investment treaty benefits. The traditional approach to investment protection treaties did not address RBC (other than in a limited fashion with regard to domestic law legality conditions as noted above). It reflects the view that host governments have the primary duty to protect their citizens and residents from injuries from business. Investment treaties accordingly did not need to address business conduct or adverse impacts caused by business because they could be addressed under domestic law. A 2014 OECD statistical survey of investment treaty language revealed few express references to RBC or sustainable development in treaties at that time.

However, some governments have begun to address business conduct in broader terms in their new trade and investment treaties in recent years and the paper notes some examples. Recent approaches to business responsibilities include hortatory clauses encouraging RBC or corporate social responsibility; express provision for reductions in damages for businesses that fail to meet BHR/RBC standards; modifying domestic law legality requirements for coverage to extend to the operation of the business as well as the making of the investment; expanding the scope for counterclaims by governments; or addressing demands for increased access by third parties whose rights may be at issue. Business concerns about liability in connection with due diligence obligations could suggest consideration, with regard to large enterprises, of making human rights or RBC due diligence a condition for investment treaty coverage without imposing any obligations.

Given the broad recognition of the existence of serious governance gaps, investment policy makers may need to consider a possibly stronger contribution of investment treaty policy in this area. The paper notes that proposals need to be considered taking into account the policy goals advanced for investment treaties, their success in achieving them, and the possible impact of new approaches on them. Competitive interests are also at issue and joint government work can help to address them. The vast number of investment treaties, however, coupled with strong and growing interest in reform, could provide an environment conducive to innovation.

# 1. Introduction

In March 2019, the OECD-hosted inter-governmental FOI Roundtable requested the OECD Secretariat to prepare a scoping paper analysing developments potentially relevant to investment treaty policy in the area of business and investor responsibilities. This paper responds to that request and seeks to provide an overview of developments to allow a more informed consideration of policy issues in this area.[1] Earlier versions were the subject of preliminary discussion at the October 2019 Roundtable and a public consultation in January-February 2020.[2]

Investment treaty makers are increasingly hearing proposals to integrate policies relating to business responsibilities into investment treaties. As policy makers contemplate whether and how to respond in their particular field, it is important to understand the broader framework for business responsibilities and its rapid evolution. This paper surveys the fast-developing fields of business and human rights (BHR) and responsible business conduct (RBC) including with regard to the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (UNGPs);[3] the OECD Guidelines for Multinational Enterprises (OECD Guidelines or Guidelines);[4] the extensive OECD work on due diligence guidance[5]; and core International Labour Organisation (ILO) standards and guidance.[6] It considers a range of recent government action in the field, including in response to growing calls for policy coherence across government.

Against this background, the paper also engages in a preliminary review of trade and investment treaty policies relating to business responsibilities. New investment treaties are now frequently part of integrated trade and investment agreements.[7] Because many trade agreements (or their accompanying linked agreements) have long expressly addressed issues such as human rights, labour, the environment, anti-corruption or sustainable development, investment treaties that do not address those issues may be viewed as out of date or needing updating.

Moreover, many investment treaty negotiators may have opportunities to address the issues in the near future both in their own thinking and in the context of discussions with other governments. The Dutch government has adopted a new Model bilateral investment treaty (BIT) and has reportedly announced a

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1 This paper does not necessarily reflect the views of the OECD or of the governments that participate in the FOI Roundtable, and it should not be construed as prejudging ongoing or future negotiations or disputes pertaining to investment treaties. Work on the initial version of the paper was funded in part by a voluntary contribution from the Swiss government.

2 See OECD, Public consultation on business responsibilities and investment treaties (including the consultation paper and a compilation of comments received from the public).

3 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, endorsed by United Nations Human Rights Council, A/HRC/RES/17/4 (6 July 2011).

4 OECD, Guidelines for Multinational Enterprises (2011).

5 OECD, Due diligence guidance for responsible business conduct.

6 See ILO, Declaration on Fundamental Principles and Rights at Work (1998); ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017).

7 Investment treaties, as used here, refers to both stand-alone investment treaties and investment chapters and provisions in broader trade and investment agreements.

goal of renegotiating all of its 78 existing extra-EU BITs.[8] Dutch reforms are important in practice because Dutch investment treaties are currently amongst the most widely-used vehicles for investor-state dispute settlement (ISDS) claims by investors from around the world, using Dutch shell companies as claimants. The new Dutch Model BIT seeks to integrate explicitly parts of the UNGP and OECD Guidelines frameworks into an investment treaty with regard to the roles of both governments (home and host) and business. The 2016 Morocco-Nigeria BIT and the 2019 Morocco Model BIT also contains significant references and clauses providing for binding effects of certain international standards.[9]

A firm understanding of the overall framework of the UNGPs and OECD Guidelines is vital to understanding debates and negotiations over their use in trade and investment agreements, or over other approaches seeking similar goals. Provisions in investment treaties increasingly refer to the UNGPs and OECD Guidelines but generally do not describe them. Other trade and investment agreements, such as the EU-Japan EPA or the USMCA,[10] use sector-specific chapters addressing domains like labour, the environment or anti-bribery that are also addressed in the UNGPs, the OECD Guidelines and ILO standards.

A better understanding about developments with respect to BHR and RBC, including growing pressure for governments to regulate toward and enforce their commitments, can thus help investment treaty policy makers understand some recent developments in trade and investment agreements. It can also help them decide and explain decisions about investment treaty policy.

The COVID-19 crisis and its economic aftermath make attention to RBC even more necessary. Vulnerable individuals and countries are often the most severely affected in major crises and economic downturns. In initial responses to the crisis, the OECD has underlined that adopting an RBC approach in government and business responses to the crisis, both globally and nationally, will generate short and long-term benefits such as increased resilience, a fairer and more inclusive distribution of benefits from recovery measures, and a stronger contribution to sustainable development. The ramifications of the COVID-19 crisis for investment treaty policies in particular remain uncertain. Early suggestions by some of an immediate wave of claims in ISDS arising from the crisis have not been borne out to date (although cases can often be filed in confidence). The OECD has pointed to the risks in vague investment treaty provisions applicable to an uncertain range of non-discriminatory government action; they can make it difficult to evaluate whether measures will generate government liability for damages and can reduce governments' regulatory policy space.[11]

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8 Netherlands model Investment Agreement (22 March 2019) [hereinafter Dutch Model BIT]; see Alexander Schurink et al, New Dutch model BIT: negotiations to commence soon, Freshfields Bruckhaus Deringer (law firm) (18 June 2019). Renegotiation is subject to authorisation from the European Commission and initial authorisations have been granted. See, e.g. European Commission implementing Decision, C(2019)3726/F2 (24 May 2019) (authorising the Kingdom of the Netherlands to open formal negotiations to amend the bilateral investment agreements with the Argentine Republic, Burkina Faso, the Republic of Ecuador, the Federal Republic of Nigeria, the United Republic of Tanzania, the Republic of Turkey, the United Arab Emirates and the Republic of Uganda).

9 See Morocco-Nigeria BIT (2016); Accord entre le Royaume du Maroc et ……pour la Promotion et la Protection Réciproques des Investissements (June 2019).

10 EU-Japan EPA (2018). The original Agreement between the United States of America, the United Mexican States and Canada (USMCA) was signed on 30 November 2018 and a Protocol of Amendment was signed on 10 December 2019. Both are available on the USTR website. The Parties have named the treaty differently; USMCA is used for convenience.

11 See OECD, COVID-19 and Responsible Business Conduct (2020); OECD, OECD investment policy responses to COVID-19 (2020).

## 1.1. The need for and development of policies on business and human rights (BHR), and responsible business conduct (RBC)

A healthy regulatory climate for trade and investment requires that businesses and investors act responsibly. Since 2011 with the inception of the UNGPs and the revised OECD Guidelines, a new global convergence on RBC is forming. According to a common understanding as expressed in the OECD Guidelines and – specifically for business and human rights – in the UNGPs, RBC entails above all conduct consistent with applicable laws and internationally recognised standards. It is a broad concept that focuses on two aspects of the business-society relationship: (i) the positive contribution businesses can make to sustainable development and inclusive growth; and (ii) avoiding adverse impacts on others and addressing them when they do occur. Governments have a vital role in setting a transparent and predictable regulatory framework for both business and society, in helping prevent adverse impacts and in ensuring that adverse impacts are sufficiently addressed when they do occur.

Business activity is fundamental to achieving sustainable development and inclusive growth. Innovations generated or developed by business, and their spread across the globe, have greatly improved the quality of life of many people. The activities of multinational enterprises, through international trade and investment, can bring substantial benefits to home and host countries. Multinational enterprises can supply the products and services that consumers want to buy at competitive prices and can provide fair returns to workers and suppliers of capital. Their trade and investment activities can contribute to the efficient use of capital, technology and human and natural resources. They can facilitate the transfer of technology among the regions of the world, including more humane and environmentally efficient technologies. Through both formal training and on-the-job learning enterprises can also promote the development of human capital and create employment in host countries.

Business has an obligation to comply with applicable law in jurisdictions where it is active and, where the national level of protection is low, a responsibility to respect internationally recognised human rights of those affected by their activities.[12] But in a globalised economy the boundaries of national jurisdiction have become blurred, leaving unanswered important questions about regulatory scope and rule enforcement with regard to global business. In addition, even where national rules exist, they may not be effective in practice against foreign or local companies. As noted by John Ruggie, "[e]ven where national laws exist proscribing abusive conduct, which cannot always be taken for granted, states in many cases fail to implement them—because they lack the capacity, fear the competitive consequences of doing so, or because their leaders subordinate the public good for private gain."[13] Additional governance gaps rendering regulation or remediation difficult can include corporate structuring and limited liability rules, and limits on the regulation of corporate groups through the controlling parent corporation.

At the same time, societal expectations and governance gaps can vary between countries including with regard to standards of corporate behaviour abroad. What constitutes compliance with standard of corporate behaviour abroad may be viewed differently in different home countries with the same behaviour seen as high standard by one and insufficient by another. This can affect whether companies are operating on a level playing field.

Governance gaps result in serious harms caused by some investors and businesses remaining unaddressed. The complexity of supply chains, lack of transparency and weak government enforcement can lead to serious risks being undetected such as human rights and labour rights abuses including child

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12 OECD Guidelines para. II, A.2.

13 Ruggie, John Gerard, Just Business: Multinational Corporations and Human Rights, 2013 (Kindle ed.) (hereinafter Ruggie 2013), at location 98.

labour, forced labour, harassment and violence, and unsafe working conditions.[14] The ILO estimates that almost 24 million people are victims of forced labour, with women and girls disproportionately affected.[15] An estimated 152 million children are victims of child labour, accounting for 11% of the overall child population, with almost half (73 million) working in hazardous conditions.[16]

Environmental impacts are also major. An IMF working paper has estimated the subsidy due to the failure to internalise the costs generated by polluters by the burning of coal, oil and gas amounted to USD 4.7 trillion (6.3 percent of world GDP) in 2015 and USD 5.2 trillion (6.5 percent of GDP) in 2017; the paper found that ending the subsidies would reduce global carbon emissions by 28%.[17] Another report, prompted by an impetus from the G8+5, estimates that the global top 100 environmental externalities are costing the economy worldwide around USD 4.7 trillion a year.[18] The costs are attributable to greenhouse gas emissions (38%), water use (25%), land use (24%), air pollution (7%), land and water pollution (5%), and waste (1%).

Different types of industries give rise to different types of victims of adverse impacts. Workplace issues dominate in manufacturing industries. In the energy and extractive industries frequently present in ISDS cases, issues related to environmental protection, local communities, and private and government security forces may predominate. Other issues are cross-cutting; for example, globalisation has made corruption more complex and difficult to prosecute.

There has been substantial degree of convergence over key aspects of business responsibilities in recent years. Although debate remains vigorous, a first area of significant policy convergence is over the proper respective roles of governments and business. There is also a second area of widespread agreement, on the content of business responsibilities, with the alignment of the major international instruments. Implementation remains an issue both in terms of achievements and methods.

The respective roles of governments and business in the human rights context have been most thoroughly addressed in work initiated by John Ruggie, Special Representative for Business and Human Rights of then UN Secretary-General Kofi Annan. Ruggie worked intensively to clarify and restate the respective roles of government and business in the process leading to the 2008 “Protect, Respect and Remedy” Framework[19] and the 2011 UNGPs that implement the Framework. Since 2011, further important work on the UNGPs has been carried out by UN bodies including the UN Working Group on Business and Human

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14 Schappert, J. and B. Bijelic, Promoting Responsible Business Conduct: International Standards, Due Diligence And Grievance Mechanisms (OECD 2017).

15 ILO, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, (Sept. 2017) (forced labour comprises forced labour in the private economy (forms of forced labour imposed by private individuals, groups, or companies in all sectors except the commercial sex industry), forced sexual exploitation of adults and commercial sexual exploitation of children, and state-imposed forced labour ).

16 ILO, World Report on Child Labour (2015).

17 Coady, D. et al, Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates, IMF Working Paper WP/19/89 (May 2019).

18 Trucost plc, “Natural Capital at Risk – The Top 100 Externalities of Business” (2013). The study was carried out as part of a joint programme of the G8 and United Nations Environment Programme. The report recommends that business gather impact data and conduct environmental studies on direct operations and supply chains, and identify the probability and financial impact of future internalisation of the costs; it also recommends that governments should “[d]evelop policies that efficiently and effectively internalize these costs, avoiding sudden shocks in the future, and help[] businesses to position themselves for a natural capital constrained world”. Id. p. 53.

19 Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Document A/HRC/8/5 (7 April 2008) [hereinafter, the “Ruggie 2008 Report”].

Rights, and the Office of the High Commissioner for Human Rights (OHCHR), and at the annual Forum on Business and Human Rights.

Under the UNGPs, governments and companies have differentiated yet complementary roles vis-à-vis human rights. States have a broad set of international human rights law obligations. Regarding human rights abuses caused by third parties including business, States have a duty to protect against such abuses through appropriate policies, regulation, and adjudication. Business enterprises have a responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others and to address adverse human rights impacts with which they are involved. Both governments and business have important roles in providing access to remedies to victims of human rights abuses. Governments in the UN Human Rights Council unanimously endorsed the UNGPs in 2011. The approach to the roles of governments and business in the UNGPs is also reflected in the 2011 OECD Guidelines in particular with regard to the chapter on human rights.

There is also today a high degree of convergence on the standards for BHR/RBC. For example, the ILO, OECD and OHCHR have strengthened their collaboration and coordination in a range of areas to help governments, companies, civil society and other stakeholders step up action on responsible business in a coherent way including for business operating globally. The high degree of convergence and mutual reinforcement is illustrated in a jointly-produced 2019 document.[20] It also reflected in regional instruments for instance in the EU.

The OECD, together with participating governments and stakeholders, has been at the forefront of developing internationally recognised standards on RBC, based principally on the OECD Guidelines.[21] The Guidelines are the most comprehensive set of government-agreed standards for RBC. They incorporate and are aligned with the UNGPs on BHR and with core International Labour Organisation (ILO) standards, and extend further to also address RBC with respect to the environment, consumers and other issues.

There has been convergence in particular on the idea that due diligence by business to assess risks for human rights or for responsible business conduct (HR/RBC due diligence) has a central place in the content of business and investor responsibilities. The OECD has taken a lead role in work on HR/RBC due diligence.

The implementation on the ground of the principles and guidance can involve a multi-faceted approach to improving business conduct based on social pressures including from investors, consumers, NGOs and others; government action including the adoption of national rules in some areas including possible extra-territorial regulation as well as encouragement to business action; and pro-active business engagement. An overview of developments with regard to business responsibilities thus includes action by governments, business and civil society.

The development of the Protect, Respect and Remedy Framework and the UNGPs followed a decision by the HRC not to take action on a proposed binding treaty that would have imposed international law human rights obligations on business similar to ones applicable to states. However, renewed action on a binding treaty commenced in 2014 in an intergovernmental working group created at the UN Human Rights Council in a divided vote. Both the content and process are controversial. Some Roundtable governments have

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20 ILO, OECD & OHCHR, Responsible Business: Key Messages from International Instruments (2019) (with support from the EU). The publication underlines the alignment among the instruments and implementation programmes of the three organisations, with each instrument referring to the others and building on each other's important value added. The organisations have also joined forces to provide technical advice and promote implementation at the country level including in Asia, Latin America and the Caribbean.

21 The OECD Guidelines are part of the broader OECD Declaration on International Investment and Multinational Enterprises. The Declaration's four components contain, in a balanced package, decisions addressed to Adherent governments concerning national treatment, conflicting regulatory requirements and international investment incentives, together with the Guidelines for MNEs.

played a key role in supporting the work, others participate to varying degrees, and others have declined to participate in the work as currently framed and conducted. The work is another important reference point in current debates about business and investor responsibilities.

With the significant achievements in convergence over the content of applicable principles and the respective roles of governments and business, there are increasing calls for greater government policy coherence with BHR/RBC priorities to improve implementation.

## 1.2. The need for work by investment treaty policy makers

In this context, it is timely for investment treaty policy makers collectively to consider business responsibilities. Investment treaty policy makers are increasingly asked to explain whether or how their investment treaties may have a role in contributing to reduce actual and potential adverse impacts from corporate activity. There is a need for better understanding of how government obligations and responsibilities under the OECD Guidelines and the UNGPs translate into investment policies. National laws and regulations establish the basic conditions for business activities, but business responsibilities such as due diligence requirements are being implemented as supplements or components of such regulation. Investment policy makers may need to re-examine whether current policies suffice to address responsible business conduct, and to consider whether and to what extent there is a role for investment treaty policy in this area. Silence in many investment treaties on issues like climate change, human rights, gender, the rights of indigenous peoples or public health is attracting increasing attention.

The issues in these areas require careful analysis and discussion. Proposals that could generate undue burdens, costs or concerns about liability for covered investors may run counter to some current purposes of investment treaties. To justify action of this nature to current proponents of the treaty system whose core goals are protection or increased investment, both public benefits and an efficient mechanism to achieve them are needed. At the same time, well-tailored improvements could better signal expectations for business performance and engender stronger public support for trade and investment agreements. Work in this area may also assist policy makers with their decisions about increasingly-disparaged older investment treaties and the development of new treaties.

While the paper considers investment treaty policies relating to BHR/RBC, its primary focus is to provide investment treaty policy makers with an overview of the basic framework and many developments in the fast-developing field of BHR/RBC. Government policy makers regulating the interactions of governments, international business and societies through investment treaties can learn from the many active debates and decisions about how to address demands for greater attention to BHR/RBC in other areas of economic law and policy. Thinking about appropriate government action also needs to take account of relevant market developments, private and civil society initiatives, as well as expert analysis.

The Roundtable is well-situated to discuss BHR/RBC developments and their possible nexus with investment treaties. It can benefit from easy access to specialised RBC knowledge in the OECD Working Party on Responsible Business Conduct and OECD Secretariat; more broadly, the breadth of OECD understanding of the full range of government policies is also a key asset. Participation by governments from around the world allows for a broad exchange of views and experiences.

The paper seeks to provide an initial common level of understanding for the Roundtable as a whole. It is a preliminary approach to a vast body of material for purposes of discussion. Some Roundtable participants will already have a firm understanding of some aspects discussed below and can skirt over the relevant sections. Others will have less familiarity with the issues. The paper can benefit from additional input from the broad range of government participants in the Roundtable and others.

The remaining sections of the paper are structured as follows. The second section provides a brief introduction to investment treaties including ongoing debates and reforms. Although as noted the paper is primarily directed at investment treaty policy community and seeks to provide an initial overview of key

BHR/RBC developments, it can also serve as a basis for increased dialogue between the investment treaty and RBC communities. For a fruitful dialogue between the two policy communities, the RBC community needs to seek to understand the policy rationales and context for government policies on investment and investment treaties.

The third section outlines the remarkable convergence of views on the respective roles of government and business in addressing BHR/RBC, and on the content of business responsibilities. The fourth section describes important developments in regional and national law and policy relating to BHR/RBC. Developments highlighted here relate primarily to those addressed to perceived governance gaps. While the initial analysis in this scoping paper focuses on government action, the fifth section addresses a few important and innovative investor, business, trade union and civil society initiatives. The sixth section briefly outlines the current work and some of the debates over a proposed binding treaty on BHR.

The seventh section and Annex 1 describe the growing demands for greater policy coherence across government action with regard to BHR/RBC including in some national action plans that are addressing trade and investment treaty policies. The eighth section reviews treaty provisions buttressing domestic law regulation, in particular in trade agreements, but also a few recent examples in stand-alone investment treaties. The ninth section considers the impact of investment treaties on policy space for domestic law and regulation of business. The tenth section examines provisions in investment treaties applicable to business conduct. A final section concludes.

# 2. Overview of investment treaties

## 2.1. Purposes of investment treaties

Investment treaties (including investment provisions in broader trade agreements) typically provide covered investors with protection from government actions such as discrimination, uncompensated expropriation of property, denial of justice or limitations on rights to transfer capital. Many treaties have been more broadly interpreted to protect covered investors from non-discriminatory government action, such as action that interferes with a covered investor's "legitimate expectations" or that is found to be "arbitrary"; these and other interpretations and provisions have given rise to preferential treatment for covered investors over other investors in some cases and are increasingly controversial.[22] The drafting and scope of covered investment protections is not uniform among investment treaties worldwide, however, and some contain more precise and narrowly-drafted provisions.

A covered investor generally has access to an arbitral tribunal to seek remedies, typically damages potentially including lost profits under prevailing interpretations, if it alleges that the government has violated the treaty provisions on protection. ISDS arbitration awards are enforceable by domestic courts including against the assets of award debtor governments around the world under applicable treaties.

Investment protection plays an important role in fostering a healthy regulatory climate for investment. Governments can and do expropriate investors or discriminate against them. Government acceptance of legitimate constraints on policies can provide investors with greater certainty and predictability, lowering unwarranted risk and the cost of capital. Domestic judicial and administrative systems provide investors

22 OECD, Investment Treaties and Level Playing Fields (agenda for Investment treaty Conference, Mar. 2019).

with one option for protecting themselves. Access to international arbitration under investment treaties gives substantial additional leverage to covered foreign investors in their dealings with host governments.[23]

Investment treaties are frequently promoted as a method of attracting investment. As a general matter, this is a goal of many governments. Despite many studies, however, it remains difficult to establish robust evidence of investment treaty impact in this regard, as noted in a recent broad OECD survey for the Roundtable of empirical literature on the costs and benefits of investment treaties.[24]

Economists have pointed in particular to a role of investment treaties in addressing "hold-up" scenarios. Governments may offer advantageous terms or favourable regulation at the time of an initial investment and then take measures that appropriate value from the investor once the investor is committed to the market and the investment. While there is wide recognition of the potential risk, its extent in practice in the current global economy is debated because practically all governments are competing for investment. Mistreatment of investment can affect the attractiveness of an economy for future investment and investment retention.

For some governments, ISDS is viewed as desirable in allowing for de-politicised settlement of investor-state disputes. Foreign and trade ministries need not wade into the facts of particular disputes or the complexities and sensitivities of applying diplomatic or economic pressures to other governments; they can apply significant leverage merely by referring to the possibility of an ISDS claim by an investor. Similarly, they can deflect requests by their investors for intervention or espousal by alerting the investor to its ISDS options. Some commentators contrast military interventions in favour of investor interests in the 19th and early 20th centuries with the peaceful resolution of disputes through ISDS.

Like other purposes advanced for investment protection treaties, depoliticisation has been challenged by critics both factually and as a policy matter. Government decisions to provide special treatment to covered investors over other investors or other constituencies are seen as highly political and decried; some recent studies indicate that available evidence suggests that diplomatic pressures continue to be applied notwithstanding the availability of ISDS.

There are currently approximately 2500 investment treaties in force including stand-alone treaties as well as broader agreements with investment protection provisions.[25] However, most of the world's largest and most important investment relationships, and particularly those between advanced economies, are not covered by investment treaties and ISDS.[26] In recent years, government have terminated a significant number of investment treaties, with the total number of effective terminations reaching 349 at the end of 2019.[27]

The vast majority of existing investment treaties do not address opening markets that are closed to foreign investment (sometimes referred to as rules for the "establishment" or "pre-establishment" of investment). They address foreign investment only after it has been made (or "established"); they provide only so-called "post-establishment" protection.

The 1994 NAFTA was an early trade and investment agreement combining both pre- and post-establishment commitments. The trend towards combined trade and investment agreements has increased attention to investment openness commitments. Unlike protection, for which there are a number

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23 See Angel Gurria, The Growing Pains of Investment Treaties, OECD Insights (13 Oct. 2014).

24 Pohl, J., Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence, OECD Working Papers on International Investment No. 2018/01.

25 See UNCTAD, International Investment Agreements Navigator (reporting on 2340 bilateral investment treaties and 319 additional treaties, some of which have investment protection provisions, in force as of 22 June 2020).

26 See Bonnitcha, J. & L. Poulsen and J. Yackee, A future without (treaty-based) ISDS: costs and benefits (2020), forthcoming in M. Elsig & R. Polanco, Multilateralism at Risk (2020).

27 See UNCTAD, 2020 World Investment Report, p. 107.

of substitutes (such as political risk insurance or contracts with commercial arbitration clauses) there are few alternatives to a negotiated treaty for businesses faced with a closed market.

The 1990's and 2000's saw the development of a number of expansive arbitral interpretations of investment treaties. Most visibly, claimants, cases and ISDS commentary generated lists of alleged norms that were asserted to be included within vague "fair and equitable treatment" (FET) provisions.[28] Claims under the FET provision, rather than claims about discrimination or expropriation, came to dominate ISDS claims and commentary.

## 2.2. Expansion of covered investor protection and controversy

By the 2010s, as outlined by the OECD Secretary-General, investment protection treaties had become controversial for a number of reasons:

> *A trickle of arbitration claims under these treaties has become a surging stream. Over 500 foreign investors have brought claims, mostly in the last few years. Investor claims regularly seek hundreds of millions or billions of dollars. High damages awards and high costs have attracted institutional investors who finance claims. …*
>
> *Arbitration cases can involve challenges to the actions of national parliaments and supreme courts. As Chief Justice Roberts of the US Supreme Court wrote earlier this year, "by acquiescing to [investment] arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary". …*
>
> *The frequently secretive nature of investment arbitration under many treaties heightens public concerns. The treaties of NAFTA countries and some other countries have instituted transparent procedures. But nearly 80% of investment treaties create procedures that fall well short of international standards for public sector transparency. This is a major weakness. …*
>
> *Advanced domestic systems for settling disputes between investors and governments go to great lengths to avoid the appearance of economic interests influencing decisions. Investment arbitration needs to do the same.*
>
> *Governments should protect competition and domestic investment by, for example, ensuring that treaty standards of protection do not exceed those provided to investors under the domestic legal systems of advanced economies. Some case law interpretations of vague investment treaty provisions go beyond these standards, and are unrelated to protectionism, bias against foreign investors or expropriation. Governments that allow for such interpretations should either make public a persuasive policy rationale for these exceptional protections for only certain investors, or take action to preclude such interpretations of their treaties.*[29]

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[28] The Roundtable has recently discussed this phenomenon and government rejections of practically all of the components of such "Alleged FET Lists" under the NAFTA in detail. See Gaukrodger, D. (2017), Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law, OECD Working Papers on International Investment, 2017/03, pp. 40-52; Summary of FOI Roundtable 24 (Mar. 2016), available at OECD, Freedom of Investment Roundtables: Summaries of Discussions.

A 2014 article on the "current contours" of FET, as defined by arbitrators, is illustrative of the list approach. See Rudolf Dolzer, Fair and Equitable Treatment: Today's Contours, 12 Santa Clara J. Int'l L. 7 (2014), p. 15 (listing numerous alleged elements of FET).

[29] See Angel Gurria, The Growing Pains of Investment Treaties, OECD Insights (13 Oct. 2014). This op-ed was published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed therein do not necessarily reflect the official views of OECD member countries. See also The Arbitration Game, The Economist (11 Oct. 2014) ("If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet

Many governments have taken action to engage in reforms and to improve public confidence in investment treaties. As a result, the protection component of today's investment treaty policy environment is unsettled and the object of multiple reforms as well as new treaties.

At UNCITRAL, governments have agreed by consensus that the current investor-state arbitration system for ISDS raises eleven concerns for which reform proposals are being developed.[30] The EU has rejected investor-state arbitration in favour of a court-like model and EU investment treaty policy continues to evolve including under constraints imposed by EU law.

Senior US and Canadian officials have expressed fundamental doubts about the logic and effects of investment protection treaties.[31] The US has exited or sharply narrowed the scope of ISDS with its treaty partners in the USMCA. The USMCA was rapidly ratified with broad support from business and labour in the US, and was also rapidly ratified in Canada and Mexico.

Major G20 capital importers like India, Indonesia and South Africa have rejected and terminated exited first generation investment treaties with South Africa preferring to address investor protection in domestic law applicable to all investors. China agreed to extend the scope of its investment treaty negotiations with the US and EU respectively to include market access. Negotiations between China and the EU also expressly extend to issues of sustainable development. However, lengthy negotiations have not yet produced an

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that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as 'investor-state dispute settlement', or ISDS."); How some international treaties threaten the environment, The Economist (5 Oct. 2020) (discussing Tienhaara, K. and L. Cotula, Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets (IIED 2020)).

30 Governments in Working Group III at UNCITRAL agreed by consensus at its November 2018 meeting that it is desirable to develop reforms to address concerns related to (i) unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals (¶ 40); (ii) the lack of a framework for multiple proceedings brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms (¶ 53); (iii) the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions (¶ 63); (iv) the lack or apparent lack of independence and impartiality of decision makers in ISDS (¶ 83); (v) the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules (¶ 90); (vi) the lack of appropriate diversity among decision makers in ISDS (¶ 98); (vii) the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules (¶ 108); (viii) the cost and duration of ISDS proceedings (¶ 123); (ix) the allocation of costs by arbitral tribunals in ISDS (¶ 127); and (x) security for costs (¶ 133). Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), A/CN.9/964. Third party funding was added subsequently as an additional area for the development of reforms.

31 See US House of Representatives, Ways and Means Committee, Hearing on US Trade Policy, Testimony of USTR Amb. Robert Lighthizer (21 Mar. 2018) (video - minute 22 and following) (criticising preferential rights for foreign over domestic investors under investment treaties; characterising investment treaty protection as government-underwritten free insurance that distorts markets, subsidises the harmful delocalisation of desirable investment and causes the loss of investment and jobs in the US; reporting on regulatory chill from ISDS as a reality in the US that has dissuaded valuable regulation that had bipartisan support; and describing state-to-state dispute settlement or contract-based arbitration as preferable substitutes for ISDS). A trade policy commentator has prepared an informal transcript.

Remarks of Canadian Foreign Minister Chrystia Freeland, "Prime Minister Trudeau and Minister Freeland deliver remarks on the USMCA" (1 Oct. 2018) ("The investor-state-dispute resolution system that has allowed companies to sue the Canadian government is also gone between Canada and the United States. Known as ISDS, it has cost Canadian taxpayers more than $300 million in penalties and legal fees. ISDS elevates the rights of corporations over those of sovereign governments. In removing it, we have strengthened our government's right to regulate in the public interest, to protect public health and the environment, for example.")

agreed treaty in either case.[32] A number of efforts to include ISDS in additional treaties between large advanced economies, at times advocated as necessary to convince other governments of its merits, appear to face serious obstacles or have been suspended, postponed or abandoned. ISDS has also reportedly been excluded from the scope of current negotiations over the Regional Comprehensive Economic Partnership (RCEP) with governments agreeing to address it in the future.

At the same time, the signing and ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) reflects the expansion of an updated NAFTA-inspired investment treaty model to a broader range of economies, albeit subject to carve-outs and side agreements to exclude or limit ISDS between some treaty parties. Brazil has emerged into investment treaty policy with a new model and concluded treaties focused on investment facilitation with state-to-state dispute settlement (SSDS) rather than ISDS. Other governments are also continuing to negotiate over and conclude new investment treaties using a variety of approaches.

Governments, in particular those that have faced claims under broad theories, have taken action to clarify, narrow or re-balance their new investment protection treaties or to exit treaties seen as undesirable. Beyond re-balancing to seek to control exposure to liability, modern investment treaties have evolved in other ways. Where the vast bulk of older investment treaties are stand-alone bilateral treaties that address only investment protection, new treaties today are frequently part of broad trade and investment agreements. Such treaties address openness to investment as well as protection. Some also have important chapters that can apply to both investment and trade on issues such as the environment, labour, or human rights.

## 2.3. The interface: Business responsibilities and investment treaties

In this context of treaty reform and uncertainty over policies, the growing social and political demands for more attention to BHR/RBC may create reputational risks linked to some governments' investment treaty policies.[33] Governments with large networks of unreformed older investment treaties may face particular challenges from loosely drafted provisions. On the one hand, they can be exposed to high-value claims and damages awards relating to important public policies involving the regulation of business in sensitive areas, including under older multilateral treaties between advanced economies such as the 1994 Energy Charter Treaty. On the other hand, as a home state signatory to a treaty invoked in an ISDS system now closely followed by stakeholders, they may be increasingly associated with aggressive claims by "their" investors, over which they may have little control, relating to the non-discriminatory regulatory policies of other governments. At least one government that sought to foster shell company claims under its investment treaties for many years has begun to reverse course.

The traditional approach to investment protection treaties did not address BHR/RBC. It reflects the view that host governments have the primary duty to govern in such a way as to ensure responsible business conduct, and to protect their citizens and residents from injuries from business. Investment treaties accordingly did not need to address injuries caused by business or business conduct because they could be best addressed under domestic law. This view is reflected in most existing investment treaties and continues to influence government policies.

As noted, the primacy of the state in this regard has been reaffirmed in intensive recent work on BHR. Business groups have emphasised "the fundamental role that governments must play in carrying out their duty to pass laws that meet international human rights standards, and then effectively enforcing those laws

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32 See European Commission, EU-China Comprehensive Agreement on Investment (setting out the broad scope of negotiations ongoing since 2014). The United States and China last held BIT negotiations in January 2017. See United States Department of State, 2019 Investment Climate Statements: China.

33 See, e.g. UNGP 2, Commentary.

within their own jurisdictions."[34] The distinctive nature of states, their differences from business, and the primary nature of their duties have been firmly restated.

At the same time, there is broad recognition of governance gaps and their multiple causes and serious impacts. The endorsed UNGP framework makes clear that all governments have duties with regard to the protection of human rights. The business responsibility to respect is independent of host government performance under both the UNGPs and the Guidelines. There are increasing demands for better policy coherence across government in light of strong government and business endorsement of the need to affirm the importance of BHR/RBC.

It may be natural for parliaments and others to take a special interest in investment protection treaties in a context of growing interest in BHR/RBC, and delays in the implementation of the endorsed principles in particular in the area of access to remedy for victims of adverse impacts. As noted in the 2012 ISDS scoping paper and the 2010 progress report on Roundtable work on ISDS, there are marked contrasts between the access to remedies for tort victims (including victims of human rights abuses) and ISDS investor claimants.[35]

Tort victims or people affected by the negative impacts of corporate activity, including victims of human rights abuses and those suffering bodily injury, may have no access to a remedy and remain uncompensated. Advanced systems of domestic law have multiple mechanisms to compensate victims of corporate injury. Social security provides protections without regard to fault. The law of negligence and product liability can compensate for injuries. Insurance is widely used and helps internalise costs. In some countries special regimes apply to workplace accidents. But these mechanisms are inexistent inaccessible, inoperable or unaffordable in many states, especially for vulnerable groups. Access to the courts may be only theoretical.

The contrast with the access to remedies for ISDS claimants is notable. ISDS claimants generally have direct access to ISDS as well as the domestic courts or commercial arbitration. They can receive high-profile damages awards to compensate for financial losses where governments are found to have breached treaty provisions. Investment treaties generally do not require that governments stop action found to be inconsistent with the treaty, but regularly give rise to large damages awards for claimants. These can reflect the size of the investments at issue. In most cases, the damages awards are for non-contractual liability and are unique because they have few if any equivalents under domestic law systems, as the Roundtable noted in its 2012 progress report on its work on ISDS:

> *Pecuniary remedies such as monetary compensation are dominant in investment arbitration. In contrast, advanced systems of administrative law (United Kingdom, the United States, Germany, France and Japan) rarely grant pecuniary remedies to investors. Except for cases of expropriation, advanced national systems strongly emphasise so-called "primary", "judicial review" remedies which are non-pecuniary (annulling illegal action, prohibiting or requiring specified government action, etc.); these remedies (but only these remedies) are often available in specialised proceedings. In contrast, damages remedies for investors are rare. The Roundtable noted that the legal doctrines, rules and approaches that have the effect of favouring primary remedies and making damages difficult to obtain for investors vary between the countries surveyed, but the outcome in terms of remedies is uniform in all countries surveyed.*[36]

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34 See, e.g. United States Council for International Business (USCIB), https://www.uscib.org/uscib-dialogues-with-un-high-commissioner-on-human-rights/ (undated).

35 See David Gaukrodger & Kathryn Gordon, Investor-State Dispute Settlement: A scoping paper for the investment policy community, OECD Working Paper on International Investment 2012/03; OECD, Government perspectives on investor-state dispute settlement: a progress report (14 December 2012) ("Progress report").

36 Id. at 10. The applicable domestic law generally providing for non-pecuniary remedies and limiting damages recovery for investors is analysed in David Gaukrodger & Kathryn Gordon, Investor-State Dispute Settlement: A scoping paper for the investment policy community, OECD Working Paper on International Investment 2012/03, Annex 4.

The co-existence of uncompensated injuries caused by business and high profile remedies under investment treaties is likely to attract significant and continuing public attention and criticism. Some libertarian groups often associated with vigorous advocacy for business interests have contended that a singular governmental focus on protecting a class of investors under international treaties rather than more vulnerable constituencies is an anomaly.[37] Interest may be unlikely to abate.

There is growing criticism in particular of the perceived one-sided nature of investment treaties. They are seen as asymmetric, protecting covered investors and restraining host states while lacking accountability mechanisms for covered investors operating in those states. Others continue to contend that, when viewed in light of the highly-sought capital that they seek to attract, such treaties are not asymmetric, but reflect a balancing of sovereign commitments to govern in a fair and predictable manner in exchange for private actors assuming risk and committing capital to their jurisdictions. Broader concerns about the extent of corporate influence over government policy in many jurisdictions can feed criticism against corporations specifically and investment treaties more generally in some cases.

Many governments have begun to promote responsible business conduct in their new investment treaties in recent years. Various non-binding preamble references or provisions have been included in recent treaties. There are increasing calls to do more, which can create challenges given the competitive concerns that are part of investment treaty policy.

Particularly where competitive considerations may be hindering positive action, joint government discussions and analysis can help governments better comprehend the breadth of the issue and address such situations in an appropriate manner. Without prejudice to ultimate decisions about policy, investment treaty policy makers need to expand their range of thinking and their exchanges of views about including RBC provisions in new and existing investment treaties. Investment treaty policy makers need to articulate the purposes of treaties and how they achieve them. But they also need to consider how to accommodate, address or respond to new demands. To do so, it is important to have an understanding of the current framework underlying the broader global movement on business responsibilities.

# 3. The overall framework for business responsibilities

This section provides a preliminary overview of the broad government and multi-stakeholder agreements and work on business responsibilities in work at international organisations. It outlines the remarkable convergence both on the respective roles of governments and business, and on the content of the standards for business conduct. The work of John Ruggie and the UNGPs (implementing to the Protect,

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"Administrative law" is used broadly in this context "to include damages claims for economic loss against the state (which may be characterised as private law or constitutional claims) as well as judicial review, but excluding contract claims". Progress report, p. 10, n.9.

[37] See, e.g. Simon Lester, Reforming the International Investment Law System, 30 Maryland J. Int'l L. 70 (2015), p. 70-71 (criticism from trade policy analyst at the Cato Institute: "[O]rdinary people … experience the most significant economic gains from free trade. There is one notable exception to this defense of trade agreements, however: the international investment law system, which has been incorporated into trade agreements, gives special rights to sue governments exclusively to foreign investors. When you look around the world today, you see many people being treated badly by their own governments. People who are being oppressed on the basis of their religion, race or gender; people whose property has been stolen; and people who are being treated unjustly for no apparent reason at all. Do any of these ordinary people have access to enforceable international law to assert their rights against their own governments? For the most part, they do not. But foreign investors do. As a result, the criticism of trade agreements as constituting special favors for big corporations has some resonance when the investment law system is at issue.") (footnotes omitted).

Respect and Remedy Framework) are addressed in the first instance followed by a brief presentation of the broad range of continuing work at the UN on BHR since 2011. A third part provides an overview of OECD work on RBC while a fourth section specifically addresses OECD work on due diligence because of its fundamental importance to business responsibilities. A fifth part provides an overview of some key ILO instruments and activities. A final part briefly notes a few other initiatives at other international organisations.

## 3.1. Development of the United Nations Guiding Principles on Business and Human Rights (UNGPs)

### *3.1.1. The human rights regime applicable to states*

#### *a. The main human rights instruments*

Analysis of the contemporary international human rights regime generally begins with the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 "as a common standard of achievement for all peoples and all nations." The Declaration's aspirational commitments were transformed into legal obligations for states in two United Nations Covenants adopted in 1966 that entered into force in 1976. States are obliged to respect the enumerated rights and to ensure their enjoyment by individuals within their territory or jurisdiction.

One Covenant addresses civil and political rights. These include the rights to life, liberty, and security of the person; fair trial and equal protection of the law; the right not to be subjected to torture or other forms of cruel, inhuman, or degrading treatment; not to be subjected to slavery, servitude, or forced labour; freedom of movement, thought, and conscience; the right to peaceful assembly, family, and privacy; and the right to participate in the public affairs of one's country.

The other Covenant addresses economic, social and cultural rights. These include the right to work and to just and favourable conditions of work; to form and join trade unions; to social security, adequate standards of living, health, education, rest, and leisure; and to take part in cultural life and creative activity.

The Declaration and the two Covenants, together with the two optional protocols to the Covenant on Civil and Political Rights, are often described as the "International Bill of Human Rights", a term coined by the UN.[38] They have been supplemented by additional UN treaties that further elaborate on prohibitions against racial discrimination, discrimination against women, and torture; affirm the rights of children, migrant workers, and persons with disabilities; and prescribe national prosecution or extradition for the crime of forced disappearance.

The UN treaties are supplemented by other protections. The ILO has adopted a series of conventions on workplace rights; some contain provisions extending beyond the workplace. The ILO Declaration on Fundamental Principles and Rights at Work (the "ILO Declaration") commits ILO member states to respect and promote principles and rights in four categories, whether or not they have ratified the relevant ILO conventions: freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour; and the elimination of discrimination in respect to employment and occupation. It was adopted in 1998 by the International Labour Conference, comprised of representatives of governments, employers and workers in the 187 member states of the ILO.[39]

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38 See OHCHR, Fact Sheet No.2 (Rev.1), The International Bill of Human Rights (1996).

39 ILO, Declaration on Fundamental Principles and Rights at Work (1998).

*b. Limited effectiveness of the application of the human rights regime to states*

While Ruggie emphasised the importance of the rights and state duties set forth in human rights treaties, he recognised the serious weaknesses in implementation by states under the human rights treaty system. The ratification of human rights treaties by states has not provided a guarantee of improved state behaviour. Human rights are seen as being under strain from authoritarian leaders or ineffective institutions. Governments undertake but fail to implement human rights obligations with laws and policies. Constitutions and laws that set forth rights are not observed. The treaties are often least effective in countries where they are needed most. State non-compliance with human rights obligations precludes remedies for many victims whose rights are infringed.

Ruggie also points to various structural limitations of the human rights regime as it applies to states: (i) the covenants and conventions are only binding on those states that have ratified them; (ii) other than for certain regional systems, the regime lacks adjudicative and enforcement powers (it typically relies on expert committees (called treaty bodies) that receive and make observations on periodic reports by governments regarding their adherence to treaty obligations, and offer recommendations and commentaries on treaty provisions in light of evolving circumstances, but most countries do not accept treaty bodies' views as a source of law); and (iii) many economic, social, and cultural rights – the rights to adequate standards of living, health, and education, for example – are subject to "progressive realization," that is, achievement to the maximum extent permitted by available resources, making it more difficult to assess compliance.

### *3.1.2. The human rights regime and business: early controversies and developments*

The language of international human rights conventions generally place duties on states in accordance with the general approach in traditional international law. Business was not explicitly addressed in some early UN human rights treaties and texts referred more generally to requirements that each state party prohibit the relevant human rights abuses by "any persons, group or organization."

More recent human rights treaties specifically focus on business behaviour, but continue to place duties on states to prevent business from infringing human rights. Even in treaties that are particularly relevant in business contexts, such as the ILO Conventions governing the workplace, the obligations apply to ratifying states within their respective jurisdictions.

Starting in the 1970s, there were several contentious and unsuccessful attempts at the UN to adopt norms placing international law duties explicitly on business. In 1973, the UN Economic and Social Council established a group to study the impact of Transnational Corporations (TNCs). The process led to a UN Draft Code of Conduct for Transnational Corporations in 1990. It was never adopted.

In the late 1990s, the UN Sub-Commission on the Promotion and Protection of Human Rights began drafting a treaty-like document called the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter the "Norms"). As Ruggie notes, the Norms would have imposed on companies the same human rights duties that states have under treaties they have ratified: "to promote, secure the fulfillment of, respect, ensure respect of and protect human rights." The Norms were supported by many human rights organisations.

In 2003, the Sub-Commission presented the text of the Norms for approval to the Commission on Human Rights, its intergovernmental parent body (which later became the Human Rights Council).[40] The

[40] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Document E/CN.4/Sub.2/2003/12/Rev. 2 (2003).

Commission declined to act on it.[41] Miretski and Bachmann summarise the criticism of the Norms as being focused "mostly on 1) the transition of responsibility from states to [transnational corporations] and the associated alteration of the traditional framework of international law; 2) the imposition on [transnational corporations] of responsibility for the actions of other actors; and 3) the perceived excessive legalism of the document on the one hand and its vagueness on the other".[42]

The continuing multilateral pressure for action to address the governance gaps relating to BHR, together with the lack of consensus about how to proceed on a multilateral basis, led UN Secretary-General Kofi Annan to appoint Prof. John Ruggie as his Special Representative on the issue of human rights and transnational corporations and other business enterprises in 2005. The appointment followed a request by the UN Commission on Human Rights.[43]

### *3.1.3. John Ruggie and the development of a middle way on business and human rights*

Professor Ruggie's 2005 mandate was to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.[44] It led to the 2008 "Protect, Respect and Remedy" Framework and the 2011 UNGPs. In carrying out his mandate, Ruggie submitted annual reports to the Human Rights Council from 2006 to 2011[45]; some annual

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41 See Commission on Human Rights, Decision 2004/116, Responsibilities of transnational corporations and related business enterprises with regard to human rights (20 April 2004), in Commission on Human Rights, Report on The Sixtieth Session (15 Mar. - 23 April 2004), E/2004/23 E/CN.4/2004/127, p. 332.

42 Miretski, Pini Pavel & Sascha-Dominik Bachmann, Global Business and Human Rights - The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' - A Requiem, Deakin Law Review, Vol. 17, No. 1 (2012).

43 Commission on Human Rights, Resolution 2005/69, Human rights and transnational corporations and other business enterprises, E/CN.4/RES/2005/69; see OHCHR, Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises.

44 Id. The resolution mandated the Special Representative: (i) to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; (ii) to elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;(iii) to research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence"; (iv) to develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; and (v) to compile a compendium of best practices of States and transnational corporations and other business enterprises.

45 See Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. E/CN.4/2006/97 (22 Feb. 2006) [hereinafter "Ruggie 2006 Report"] ; "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035 (9 Feb. 2007) [hereinafter "Ruggie 2007 Report"]; Ruggie 2008 Report; Business and human rights: Towards operationalizing the "protect, respect and remedy" framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/11/13 (22 April 2009) [hereinafter "Ruggie 2009 Report"]; Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/14/27 (April 9, 2010) (hereinafter "Ruggie 2010 Report"); Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative

reports were supplemented with addenda and in addition, he commissioned a broad range of reports from experts on particular issues.

This section outlines Ruggie's general conceptualisation of the issues and his rationale for following a middle way between the competing proposals for a binding BHR treaty similar to the Norms supported by many human rights organisations and a voluntary approach advocated by business.

### *a. The problem: governance gaps*

Ruggie saw that the corporate governance of multinational firms comprises two dimensions. First, at an operational level, they often have integrated strategic vision, institutional design, and management systems to allow the corporate group to function as a globally operating business, including in coherently managing enterprise-wide risks. Second, at a legal level, the separate legal personality of corporate parents and their subsidiaries allows them to partition their assets and limit their liabilities.[46]

Globally operating firms are not regulated globally. Instead, each of their individual component entities is subject to the jurisdiction in which it operates. Ruggie emphasised that national regulation of human rights abuses associated with business often remains ineffective. The necessary laws may not exist. Implementation of the law by states is often weak due to lack of capacity, concerns about the competitive consequences of doing so, or because of corruption. Victims, in particular the most vulnerable, do not have meaningful access to justice against well-funded defendants.

### *b. Rejection of the two opposing poles*

At the outset of his work, Ruggie rejected the idea of a binding treaty imposing international law human rights obligations on business, and in particular an adaptation of the Norms.[47] Ruggie also rejected a purely voluntary approach that was advocated by business groups.

Ruggie has explained that he rejected the binding treaty model for several reasons, based on his own analysis and previous decisions at the UN. The issue was relatively novel for governments and a shared knowledge base or consensus was lacking on desirable international responses. The weak institutional network in governments for addressing BHR contrasted with the numerous and more powerful government entities dedicated to promoting and protecting business interests. He also observed that governments only gave BHR issues intermittent attention due to a major event or crisis. He has explained that he feared that, in a BHR treaty negotiation process, commercial interests would prevail, and that possible *de minimis* treaty obligations resulting from negotiations would undercut more demanding social compliance mechanisms.

He also considered that there was a risk that governments would take ongoing BHR treaty negotiations as a pretext for not taking other significant steps such as changing national laws. A treaty focus would also hinder the scope for necessary experimentation and innovation. In addition, there was resistance from even some strong government supporters of human rights to directly imposing the broad range of international human rights obligations on companies. They feared such an approach would diminish states' essential roles and duties.

Ruggie has also pointed to the need to achieve concrete results and to the questionable effectiveness on human rights treaties on the ground. He was sceptical about enforcement of new treaty obligations in this area in light of the interest or capacity of key institutions. He considered agreement on a global court to judge business to be unlikely. Host states already have a legal basis to enforce under existing human

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of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/17/31 (21 Mar. 2011) [hereinafter Ruggie 2011 Final Report"].

46 Ruggie 2013 at location 491.

47 See Ruggie 2006 Report, paras. 59-69.

rights treaties they adhere to without the need for additional norms. They would be unlikely to agree to the new norms if they do not adhere to the existing treaties. For home states, enforcement of a BHR treaty could be limited by worries about the competitive position of "their" companies and opposition and objections to the broad exercise of extraterritorial jurisdiction (from business and host states).

Ruggie has also explained that he considered that the scope of a treaty would overwhelm the capacity of relevant institutions. There is a vast universe of businesses and people affected by them. Given this scope, even with cooperation on all sides, a traditional human rights-type treaty body would be overwhelmed. Governments or the treaty body would be over-burdened with reporting (or compelling company reporting) and analysis of the new obligations.

Ruggie also saw fundamental difficulties in resolving conflicts between international law norms. He recognised that establishing the pre-eminence of human rights obligations over other legal obligations is one goal of some proponents of a BHR treaty. However, he considered that existing international law does not provide for clear hierarchy (other than for the narrow category of *jus cogens* norms). He considered that the reconciliation of competing norms needs to occur in the realm of practice and sought to contribute to this goal in his project.

Ruggie also rejected a purely voluntary approach. He has noted that voluntary initiatives, like international law, are essential building blocks in any overall strategy for adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights harm.[48] However, his review of the field in the mid-2000s demonstrated that the number of voluntary business-led initiatives was growing but still small; managing the risk of adverse human rights impacts was rarely strategic for firms which mostly only responded to external developments. Human rights standards and definitions used by businesses varied based on local culture, company interests, preferences of home markets or market segments as much as the needs of affected people in the host country.[49] With few exceptions, major state-owned enterprises based in some emerging economies had not yet associated themselves with voluntary initiatives.[50]

In addition, both access to remedies and accountability were often weak in voluntary initiatives that he reviewed as part of his initial work. Individuals and communities affected by business were rarely provided with any means of recourse. External accountability mechanisms for ensuring adherence to voluntary standards were weak or non-existent.[51] Ruggie also noted civil society scepticism over voluntary initiatives frequently criticised as providing little more than whitewash for companies or international organisations and diverting attention from the need for legal accountability of business.

### *c. The middle way: the Protect, Respect and Remedy Framework and the UNGPs*

In 2008, Ruggie proposed the new 'Protect, Respect and Remedy Framework' on the issue of BHR that was unanimously welcomed at the June 2008 session of the Human Rights Council. It was the first time the Council or its predecessor had achieved a substantive policy position on BHR. The Council also extended Ruggie's mandate for another three years, tasking him with operationalizing the framework. He was to provide "practical recommendations" and "concrete guidance" to states, businesses and other social actors on its implementation and promote the framework, coordinating with relevant international and

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48 See Ruggie 2007 Report, paras. 45-81 (reviewing soft law and self-regulation mechanisms); Ruggie 2013 at location 1618.

49 See Ruggie 2007 Report, paras. 74-75.

50 Id., para. 81.

51 Id, paras, 76-81.

regional organizations and other stakeholders. At the conclusion of his mandate, the Human Rights Council unanimously endorsed the UNGPs included in Ruggie's final report.[52]

### *3.1.4. Approach and content of the Framework and the UNGPs*

Ruggie's work emphasised the importance of clearly separating the roles of states and business with regard to human rights. The Framework thus rests on three pillars: the first addresses the role of states in protecting against human rights abuses, the second the responsibility of business to respect human rights, and the third the need for better access to remedies where injuries do occur.[53] The Framework set out the three pillars as follows:

> *1. a state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication;*
>
> *2. an independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved;*
>
> *3. the need for greater access by victims to effective remedy, both judicial and nonjudicial.*

Ruggie has underlined the integrated nature of the Framework:

> *The UN Framework is intended to work dynamically, and no one pillar can carry the burden on its own. The State duty to protect and the corporate responsibility to respect exist independently of one another, and preventative measures differ from remedial ones. Yet, all are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights.*[54]

This section provides an overview of the role of states, business and remedies in the Framework and UNGPs.

#### *a. The State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication*

Ruggie has noted that "states, the business community, and the advocacy community supported the emphasis on state duties as the bedrock of protection against corporate human rights abuse."[55] This section addresses the nature of the duty and issues relating to government performance.

##### **i. Elaboration of the state duty to protect against human rights abuses by third parties including business**

Ruggie's elaboration of the state's duty to protect against human rights abuses by business involved several aspects. First, Ruggie principally focused on treaty-recognised human rights. He was cautious in referring to customary international law as a basis for human rights, noting the lack of consensus on its specific content and related concerns among important constituencies about a potential proliferation of customary international law norms. He accordingly focused principally on the International Bill of Rights (comprising the Universal Declaration of Human Rights, the International Covenants on Civil and Political

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52 Human Rights Council, Resolution 17/4, Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4 (6 July 2011).

53 2008 Ruggie Report, para. 9.

54 See "Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators," Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31/Add.3 (25 May 2011), p. 27.

55 Ruggie 2013 at location 1788.

Rights, and on Economic, Social and Cultural Rights), and the fundamental rights at work in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. The additional and more specific UN Conventions referred to above in section 3.2.1(a) could also be relevant. Ruggie's analysis of a range of controversies and disputes led him to conclude that businesses can potentially have an impact of practically the full scope of these internationally-recognised human rights.

Second, Ruggie confirmed that all the human rights treaties establish a state duty to protect against human rights abuses by third parties. Ruggie recognised that the language of human rights treaties varies; it does not always explicitly refer to states protecting against third party abuse of human rights. However, where the word protect was absent, he noted the general requirement that governments "ensure" the enjoyment of the rights or an equivalent verb.[56] His framing of the varying language into an overall protect framework for states provides coherence for the interpretation of states' obligations across the treaties, endorsed by states and stakeholders.

Third, Ruggie also underlined that the State duty to protect with regard to business is a duty of conduct not result. States are not held responsible for corporate-related human rights abuse *per se*, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs.[57]

Fourth, Ruggie squarely rejected arguments that the treaty-based human rights at issue are too vague to be useful or relevant including in the context of ISDS:

> *in the already-mentioned case brought against South Africa by European investors who claimed that certain provisions of the Black Economic Empowerment Act were unfair, inequitable, and tantamount to expropriation, the government was not defending "wishy-washy" or "airy-fairy" concepts, but its own constitution and legislative acts that sought to establish restorative justice after decades of apartheid rule. Argentina may have botched its water privatization program, but there is nothing "vague" about the need of its people to have access to clean and affordable drinking water. Protecting the rights of indigenous peoples when a mining company wishes to expand into ancestral burial grounds is not a "soft-law" issue to them or to the host government with which the indigenous group may have a long-standing treaty.*[58]

Ruggie also identified the need for greater state attention to their duty to protect in particular areas. For example, he underlined the need for additional state action to protect with regard to state-owned enterprises. He noted that where the acts of a business enterprise can be attributed to the state, a human rights abuse by the enterprise may also entail a violation of the state's own international law obligations.[59]

Ruggie also underlined that governments should also take additional steps to protect against human rights abuses by business enterprises that receive government support. UNGP 4 states in part that "States should take additional steps to protect against human rights abuses by business enterprises … that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."

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56 See Ruggie 2009 Report, para. 13; Letter of John Ruggie to Daniel Bethlehem QC, Legal Advisor Foreign and Commonwealth Office, United Kingdom (14 July 2009) ("even where the State duty to protect against third party abuse is not expressly stipulated in a treaty, it is logically implied by the requirement that States "ensure" (or an equivalent verb) the enjoyment/realization of rights by rights holders").

57 See Ruggie 2009 Report para. 14.

58 Ruggie 2013 at location 3077. Ruggie was responding notably to criticism of alleged vagueness of human rights norms by Professor Thomas Walde, an investment law and arbitration expert. Id. at 3069.

59 See UNGP 4.

On the sensitive issue of the extraterritorial dimension of the state duty to protect, Ruggie recognised that it "remained unsettled in international law".[60] The Commentary to the UNGPs notes that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction. Nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis and an overall test of reasonableness is met. Some treaty bodies have encouraged home States to take steps within those parameters to prevent abuse abroad by corporations within their jurisdiction.[61] The UNGPs emphasise the strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses, including predictability for business and preservation of the State's own reputation.[62]

**ii. Government implementation of the duty to protect**

National legal frameworks may lack laws to adequately address abusive conduct. But Ruggie viewed the most common governance gap as the failure to enforce existing laws. This can be due to lack of capacity, concerns about competitiveness in attracting investment, or the existence of bribery or other misconduct. More generally, many States currently lack adequate policies and regulatory arrangements to manage the complex BHR agenda.[63]

Ruggie discussed government legal and policy incoherence in the BHR domain. He referred to the existence of instances of "horizontal" incoherence, where "economic or business-focused departments and agencies that directly shape business practices — including trade, investment, export credit and insurance, corporate law, and securities regulation — conduct their work in isolation from and largely uninformed by their Government's human rights agencies and obligations".[64]

Ruggie has expressed particular concern about certain aspects of investment protection treaties. He criticised the extension of the application of treaties to non-discriminatory government regulatory action for legitimate public interest objectives. Ruggie considered that this could interfere with ability of governments to fulfil their duty to protect human rights including from abuse by business:

> *[U]nder threat of binding international arbitration, foreign investors may be able to insulate their business venture from new laws and regulations, or seek compensation from the host government for the cost of compliance, even if the policy enacted legitimate public interest objectives such as new labor standards or environmental and health regulations, and even if it applied in a nondiscriminatory manner to domestic and foreign investors alike. I set out to analyze this phenomenon and its possible implications for the ability of host*

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60 The Commentary to the UNGPs distinguishes between domestic measures with extraterritorial implications, such as requirements on parent companies to report on the global operations of the entire enterprise, and extraterritorial adjudicative jurisdiction – involving adjudication including over events in another jurisdiction. UNGP 2, Commentary. Ruggie's 2010 report refers to a further category: government public policies that apply to or support companies (such as CSR and public procurement policies, export credit agency criteria, or consular support). 2010 report, para. 49.

61 UNGP 2, Commentary. As an example, Ruggie cites General Comment 15 by the Committee on Economic, Social and Cultural Rights (CESCR), para. 33. See "State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries," Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/35/Add.1 (13 Feb. 2007), paras. 86-87. The CESCR is the body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties.

62 UNGP 2, commentary.

63 Ruggie 2010 Report, para. 18.

64 Id.

> *states to fulfill their duty to protect human rights, with the aim of contributing to a broader dialogue concerning the need for more balanced — and more human-rights-compatible — investment agreements.*[65]

He also criticised the lack of transparency of many ISDS cases.[66]

The UNGPs recommend ensuring that government departments, including those charged with investment policy, are "informed of and act in a manner compatible with the Governments' human rights obligations".[67] The UNGPs also recommend that governments ensure that they "maintain adequate domestic policy space to meet their human rights obligations" in their investment treaties and investment contracts. [68]

### *b. The independent corporate responsibility to respect human rights including due diligence and addressing adverse impacts*

The independent corporate responsibility aspect of the Framework and UNGPs involved the most innovation. First, Ruggie shifted from a legal perspective to a socio-legal perspective. The extent to which business and multinational enterprises are subject to international human rights norms as a legal matter is controversial. Mechanisms to enforce such international law obligations, to the extent they are considered to exist, are also rare.

Rather than focusing on this controversial question, Ruggie emphasised business responsibility to respect the human rights of others as a social norm, as a set of societal expectations of corporate behaviour. Some social norms are reflected in legislation or other norms. But social norms are also a reality even where the legal framework or its application to business is uncertain, incomplete or ineffective. Instead of looking for human rights laws that might or might not apply to them, business should identify human rights they should respect.

Second, business has an independent responsibility to respect human rights, which means that it exists irrespective of whether states are living up to their commitments. The roles of states and business are clearly distinguished in the Framework. Business responsibilities remain even where states fail to carry out their duties.[69]

Third, the business responsibility to respect rights applies to a broader set of human rights than most earlier attempts to list rights. Empirical surveys conducted as part of Ruggie's work demonstrated that businesses are potentially capable of adversely affecting a much broader set of rights than was generally believed. He noted that in some cases, the impact could be indirect, such as where bribing a judge or juror impairs the right to a fair trial.

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65 Ruggie 2013 at location 2408. See also Ruggie 2009 Report, para. 30; Ruggie 2010 Report, para. 22-23.

66 Ruggie 2009 Report, para. 34.

67 UNGP 8, Commentary.

68 UNGP 9. Contracts can also affect government policy space. Ruggie examined contractual stabilisation provisions including in a sample of non-public contracts obtained through the International Finance Corporation. He noted that while contracts with African states frequently had sweeping stabilisation clauses without reference to protecting human rights or any other public interest, no contract between a multinational corporation and an OECD country offered the investor exemptions from new laws and, with minor exceptions, they tailored stabilisation clauses to preserve public interest considerations. With the help of government negotiators, law firms and NGOs, he developed a set of "Principles for Responsible Contracts" issued as an addendum to the Guiding Principles. "Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators," UN Doc. A/HRC/17/31/Add.3 (25 May 2011); see also Shemberg, Andrea, Stabilization Clauses and Human Rights (2009) (analysing sample stabilisation clauses and model clauses in a research project conducted for International Finance Corporation and the United Nations Special Representative of the Secretary-General on Business and Human Rights).

69 UNGP 11, Commentary.

At the same time, Ruggie did not seek to identify or create new norms in the Framework or UNGPs. The responsibility to respect was linked specifically to international human rights instruments which are widely endorsed by the international community and already constitute an authoritative "list" of internationally recognized rights.

Fourth, Ruggie also clarified the meaning of "respect". He noted that in human rights discourse "respecting" rights means to not violate them, to not facilitate or otherwise be involved in their violation. In short, "as business goes about its business, it should not infringe on the human rights of others". For Ruggie, there is near-universal recognition of this as a social norm for business. It is widely recognised by business itself. It is the most likely to generate reactions such as boycotts, divestment or advocacy campaigns. As noted in UNGP 11, the notion of respect also includes a responsibility to address harms that do arise.

Although particular country and local contexts may affect the human rights risks of an enterprise's activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.[70]

Fifth, the UNGPs also move beyond the narrow corporate legal entity in at least two ways. As an initial matter, in the case of multinational corporations the "enterprise" is understood to include the entire corporate group, however it is structured. An additional extension in UNGP 13 includes adverse human rights impacts arising from enterprise's business relationships with third parties associated with its activities.

Sixth, Ruggie insisted on the importance of methods to help companies comply with their responsibilities, and to evaluate and to demonstrate compliance. The basic principle is that companies should develop and implement systems so that they can both "know and show" that they respect human rights. This should not be an isolated process; rather, it should be part of daily business practice with human rights due diligence addressing actual and potential adverse impacts on human rights. Due diligence is a core element of the current environment for business and investor responsibilities. The OECD has taken a leading role in developing and operationalising RBC and human rights due diligence in multi-stakeholder processes. It is addressed below in more detail following the discussion of the OECD Guidelines.

### *c. The need for greater access to remedy for victims of corporate-related human rights harm*

There is a broad range of contexts in which corporate activity can generate adverse effects – harms affecting human rights, the environment, consumers or others. Some adverse effects will occur even when state and corporate preventive systems are operating well. Well-run companies with active due diligence procedures may still inadvertently cause adverse impacts. In a large company, adverse effects can also occur because of ordinary negligence in many cases. Gross negligence and intentional actions can cause or contribute to additional adverse effects that can be amongst the most serious.

Both states and companies have a role to play in providing remedies. The UNGPs define "remedy" to include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions," as well as "the prevention of harm through, for example, injunctions or guarantees of non-repetition."[71] For states, providing remedies is part of the duty to protect. For business, it is part of the responsibility to respect.

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70 UNGP 23, Commentary.

71 UNGP 25, Commentary.

#### i. State action with regard to access to remedy for victims

As part of their duty to protect under international human rights law, governments are required to provide access to remedy – to take steps to investigate, punish, and redress corporate-related abuse of the rights of individuals within their territory and/or jurisdiction. Ruggie underlines that without access to remedy through these steps, the duty to protect could be rendered weak or even meaningless. For states, these steps to provide for remedies may be taken through judicial, administrative, legislative, or other means. Judicial systems in the host country where the harms occur can provide remedies to victims. But access to remedies is often seen as the weakest aspect of the current implementation of the BHR framework due to the governance gaps noted above. As discussed below, the OHCHR launched a comprehensive project to address accountability and access to remedy in 2014.

The exercise of extraterritorial jurisdiction by home state courts can also potentially provide remedies for victims. Access to remedy for victims in national courts for actions abroad in the BHR domain remains highly contested. Ruggie has noted that business remains strongly opposed; home states fear disadvantaging "their" corporations; and host states can resist it on the principle of non-interference in their domestic affairs. It raises a range of procedural, legal and other issues, and it involves high costs.[72] At the same time, there are important on-going developments and cases in the area as noted below in section 4.

Ruggie also noted that the notion of corporate separateness between parent and subsidiary companies can constitute an important barrier to remedies for victims.[73] This issue is addressed below in the discussion of recent domestic law cases in the light of the widely-applicable ISDS interpretation allowing ISDS claimants to disregard corporate separateness. (See below section 4.2.3).

State-based non-judicial remedy systems include both national and international mechanisms. National human rights institutions can play a role but many face limits on action on business-related human rights grievances, or are permitted to do so only when business performs public functions or impacts certain rights. Ruggie recommended that those mandates be expanded. The OECD National Contact Points (NCPs), discussed below, are the leading international grievance mechanism.

#### ii. Business action to provide access to remedy for victims

Ruggie's review of voluntary initiatives by business noted that they were generally weak in providing remedies to victims of human rights abuses. Under the corporate responsibility to respect human rights in the UNGPs, business enterprises should establish or participate in effective grievance mechanisms for individuals and communities that may be adversely impacted, without prejudice to legal recourse. Business can also provide remedies in the form of operational-level grievance mechanisms. The UNGPs seek to avoid companies being the sole judge of their own actions in this context, and recommends that processes involve dialogue or third-party mediation.[74]

## 3.2. Work on Business and Human Rights (BHR) at the United Nations since 2011[75]

Following the endorsement of the UNGPs by the UN Human Rights Council, the Council established an independent expert Working Group on Business and Human Rights and an annual Forum on Business

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72 Ruggie 2013, location 1972.

73 See Ruggie 2010 Report, paras. 104-106 ; Ruggie 2013, location 334 et seq. (parent company separate legal personality and limited liability "can prevent victims of corporate-related human rights abuses from obtaining adequate remedy").

74 UNGP 31(h), Commentary.

75 The work of the ILO, a specialised agency of the UN, is addressed separately below in section 3.5. The work on a binding treaty is also addressed separately below in section 6.

and Human Rights to monitor and to facilitate implementation of the UNGPs, as well as to exchange best practices on BHR issues. Work in this area has continued to be carried out and supported by the OHCHR as well as other agencies and bodies.

### *3.2.1. UN Office of the High Commissioner for Human Rights (OHCHR)*

The OHCHR acts as the principal focal point of human rights research, public information and advocacy in the UN system. It also serves as the Secretariat for the UN Human Rights Council.

The OHCHR has a mandate to lead the business and human rights agenda within the United Nations system, and, in collaboration with the Working Group on Business and Human Rights, to develop guidance and training relating to the dissemination and implementation of the UNGPs.[76] It provides advice, tools and guidance; supports capacity building on BHR to all stakeholders at the national level, including through OHCHR's field operations and across the UN system; and provides technical support to human rights mechanisms.

As noted above, OHCHR launched the Accountability and Remedy Project (ARP) in 2014 with a view to contributing to a fairer and more effective system of domestic law remedies in cases of business involvement in severe human rights abuses. The Project has received several mandates from the Human Rights Council.[77] The ARP Project has aimed to deliver credible and workable recommendations to enable more consistent implementation of the UNGPs with regard to access to remedy. OHCHR has completed three phases of the project, each focusing on a different category of grievance mechanism:

- Enhancing effectiveness of judicial mechanisms: 2016 report and explanatory addendum (ARP I)
- Enhancing effectiveness of State-based non-judicial mechanisms: 2018 report and explanatory addendum (ARP II)
- Enhancing effectiveness of non-State-based grievance mechanisms: 2020 report and explanatory addendum (ARP III)

The OHCHR has a role in providing authoritative advice on the interpretation of the UNGPs and has also developed a series of tools and guidance documents related to them. These offer further consideration of the often briefly-stated principles in the UNGPs themselves and assist in the process of applying them in practice. The OHCHR's "Corporate Responsibility to Respect Human Rights: An Interpretive Guide" focuses in particular on corporate responsibilities, providing additional background explanation to the UNGPs to support a full understanding of their meaning and intent.[78], including in areas such as responsible contracting. A broader document responds to Frequently Asked Questions on the UNGPs.[79] Additional examples of advice are available on the OHCHR Resources webpage.[80] A recent report examines the potential gains from integrating human rights and environmental dimensions of sustainability explicitly into mega-infrastructure plans and projects.[81]

The OHCHR also supports and advises the Working Group on Business and Human Rights, a special procedures mandate composed of five independent experts, with balanced geographical representation.

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76 A/HRC/RES/21/5.

77 Resolutions 26/22, 32/10 & 38/13.

78 https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf

79 https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf

80 https://www.ohchr.org/EN/Issues/Business/Pages/Resources.aspx

81 See Office of the United Nations High Commissioner for Human Rights and Heinrich Böll Stiftung, The Other Infrastructure Gap: Sustainability (Human Rights and Environmental Perspectives) (2018). The report includes consideration of investment treaty policies.

### *3.2.2. UN Working Group on Business and Human Rights, and the annual Forum on Business and Human Rights*

The Working Group has provided analytical reports that elaborate on key UNGP themes, such as state-owned enterprises, corporate human rights due diligence, policy coherence in government action or the need for National Action Plans to implement the UNGPs. The Working Group has engaged in some work on investment treaties.[82] The UN Working Group's 2021 report to the UN General Assembly is expected to focus on providing practical guidance to states on negotiating human rights-compatible investment treaties (both stand-alone treaties and investment provisions in broader trade agreements) in line with the three pillars of the UNGPs.

The Working Group on Business and Human Rights also guides the annual Forum on Business and Human Rights. The Forum has become the largest annual global gathering on BHR with up to 3000 participants, and many sessions at the Forum are relevant to the relationship between BHR/RBC and trade and investment. The Working Group serves as the chair of the Forum and submits a report on the proceedings and thematic recommendations of the Forum for consideration by the Human Rights Council.

### *3.2.3. Human rights treaty bodies, Special Rapporteurs and Independent Experts*

As noted, human rights treaty bodies are expert committees that receive and make observations on periodic reports by governments regarding their adherence to treaty obligations, and offer recommendations and commentaries on treaty provisions in light of evolving circumstances. A number of treaty bodies have provided recommendations on issues of BHR/RBC. The UN Committee on the Rights of the Child issued a General Comment on children's rights and business in 2013. With regard to international business the Comment states that government measures to prevent the infringement of children's rights by business enterprises when they are operating abroad include:

- Making access to public finance and other forms of public support, such as insurance, conditional on a business carrying out a process to identify, prevent or mitigate any negative impacts on children's rights in their overseas operations;
- Taking into account the prior record of business enterprises on children's rights when deciding on the provision of public finance and other forms of official support;
- Ensuring that State agencies with a significant role regarding business, such as export credit agencies, take steps to identify, prevent and mitigate any adverse impacts the projects they support might have on children's rights before offering support to businesses operating abroad and stipulate that such agencies will not support activities that are likely to cause or contribute to children's rights abuses.[83]

The UN Committee on Economic, Social and Cultural Rights, the treaty body for the International Covenant on Economic, Social and Cultural Rights (ICESCR), issued a comment in 2017 on State obligations under that Covenant on Economic, Social and Cultural Rights in the context of business activities.[84] The Comment states in part that governments should align business incentives with human rights responsibilities in relevant tax codes, public procurement contracts, export credits and other forms of State support, privileges and advantages (para 15). The Comment also states that "[t]he extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure

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82 See https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx.

83 See Committee on the Rights of the Child, General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, (17 April 2013).

84 See, e.g. UN Committee on Economic, Social and Cultural rights, General Comment No. 24, 2017, E/C.12/GC/24.

that they do not obstruct another State from complying with its obligations under the Covenant. This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties, as well as to judicial cooperation."

UN Special rapporteurs on human rights issues have also been active in addressing issues of BHR/RBC including with regard to trade and investment agreements. For example, the UN Special Rapporteur on the Right to Food issued a report in 2011 on Guiding principles on human rights impact assessments of trade and investment agreements.[85]

In her 2015 report to the General Assembly, the Special Rapporteur on the Rights of Indigenous Peoples concluded that the protections that investment treaties provide to foreign investors can have significant impacts on indigenous peoples' rights; a follow-up report to the Human Right Council provided additional analysis.[86] She expressed serious concerns about both the impact of certain investments on indigenous peoples and the subordination of indigenous peoples' rights to covered investor protections due to regulatory chill. She also considered that there were serious deficiencies in the dispute resolution process instituted by the investment treaty regime. She noted that the UNGPs and the OECD Guidelines affirm the independent corporate responsibility to respect indigenous peoples' rights as recognized in international human rights law.

In 2019, the UN Working Group on Business and Human Rights and several Special Rapporteurs and Independent Experts wrote to states participating in UNCITRAL's Working Group III, which is engaged in work on reform of ISDS. The letter drew governments' attention to the authors' views on (i) the need for systemic reform of ISDS that would go beyond procedural reforms and would actually address the entrenched power imbalance between investors and States, taking into account the rights and obligations of states in line with international laws and standards concerning human rights; and (ii) the concerns identified as desirable for reform within the existing UNCITRAL Working Group framework, expressing regret that the narrow focus on procedural reform is a missed opportunity to address policy coherence, predictability, legitimacy and effectiveness that underlie deep-rooted deficiencies of the ISDS system.[87]

### *3.2.4. UNCTAD*

UNCTAD has advocated for the re-orientation of investment treaties towards sustainable development which includes greater emphasis on protecting human rights. UNCTAD's 2015 Investment Policy Framework for Sustainable Development points to significant areas of overlap between sustainable development and RBC including human rights and sets out possible approaches including in investment treaty policy. It contains a set of core principles for investment policymaking that serve as design criteria for three sets of operational guidelines or action menus: guidelines for national investment policies; guidance for the design and use of international investment agreements (IIAs); and an action menu for the promotion of investment in sectors related to the sustainable development goals.[88]

UNCTAD also provides regular overviews of investment treaty practice in its issues notes and its annual World Investment Report. Some of its recent papers address human rights and RBC from a sustainable

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85 UN Doc A/HRC/19/59/Add.5, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/59/Add.5.

86 UNGA, Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples, A/70/301, 7 August 2015; Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, A/HRC/33/42 (11 Aug. 2016).

87 Letter dated 7 Mar. 2019, available on the UNCITRAL website

88 See UNCTAD, Investment Policy Framework for Sustainable Development.

development perspective, including some human rights and liability issues in recent treaties.[89] UNCTAD regularly participates on investment policy issues at the annual Forum on Business and Human Rights.

## 3.3. OECD work on Responsible Business Conduct (RBC)

This section presents the Guidelines, the 2011 update and the Guidelines' unique grievance mechanism. Because of its importance and achievements, the development of due diligence guidance at the OECD is addressed subsequently in a separate section.

### *3.3.1. The OECD Guidelines on Multinational Enterprises*

The OECD Guidelines are a comprehensive code of responsible business conduct that governments have committed to promoting. They are recommendations by governments to business. Adhering governments have committed to promote conduct in accordance with the Guidelines by multinational enterprises that operate in or from their territories.

The Guidelines were first adopted in 1976 and have been updated five times, most recently in 2011.[90] As noted above, the Guidelines form part of the wider OECD Declaration on International Investment and Multinational Enterprises. Today, 50 governments are Adherents to the OECD Declaration on International Investment and Multinational Enterprises.[91]

Countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises.[92] The Decision on the Guidelines provides in part that the OECD Investment Committee shall, in co-operation with National Contact Points (NCPs), pursue a proactive agenda in collaboration with stakeholders to promote the effective observance by enterprises of the principles and standards contained in the Guidelines with respect to particular products, regions, sectors or industries. Matters covered by the Guidelines may also be the subject of national laws, international commitments and industry-led standards.

NCPs have an important role in furthering the effectiveness of the Guidelines. Many NCPs, for example, focus their efforts on informing and educating MNEs, SMEs and other stakeholders in the due diligence process. This valuable role strengthens the culture of RBC and constitutes an important contribution of NCPs to policy coherence. In 2018, 41 NCPs carried out promotional work including a mix of presentations in events organised by others and by organising or co-organising their own events; 38 NCPs developed a promotional plan for 2019 and 46 have a website.[93]

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89 See, e.g. UNCTAD, Reforming Investment Dispute Settlement: A Stocktaking (2019), pp. 22 et seq. (section on . "Rebalancing investment dispute settlement: sustainable development and human rights").

90 The updated Guidelines and the related Decision were adopted by the then 42 adhering governments on 25 May 2011 at the OECD's 50th Anniversary Ministerial Meeting. Commentaries on the OECD Guidelines were also adopted in 2011 by the Investment Committee in enlarged session, including the then eight non-Member adherents to the Declaration on International Investment and Multinational Enterprises.

91 All 37 OECD Members and 13 other governments adhere to the Declaration: Argentina (22 April 1997); Brazil (14 November 1997); Colombia (8 December 2011); Costa Rica (30 September 2013); Egypt (11 July 2007); Jordan (28 November 2013); Kazakhstan (20 June 2017); Morocco (23 November 2009); Peru (25 July 2008); Romania (20 April 2005); Tunisia (23 May 2012); Ukraine (15 March 2017); and Uruguay (25 February 2021).

92 Decision of the Council on the OECD Guidelines for Multinational Enterprises, OECD/LEGAL/0307, adopted on 27 June 2000, amended on: 25 May 2011. The key elements of the NCP's role are detailed in the Procedural Guidance attached to the Decision on the Guidelines.

93 See OECD, Progress Report on National Contact Points for Responsible Business Conduct (2019) (report prepared for the Meeting of the OECD Council at Ministerial Level Paris, 22-23 May 2019), para. 34.

The OECD Investment Committee, through its Working Party on RBC (WPRBC), monitors the implementation of the Guidelines.[94] They can clarify the Guidelines in light of concrete cases/issues brought to their attention, strengthening the implementation of the instrument. They do not pronounce on the behaviour of individual enterprises.

The OECD organises an annual Global Forum on Responsible Business Conduct that brings together stakeholders from governments, business, trade unions, civil society and academia to debate key global social and economic challenges related to responsible business conduct. The 2020 Global Forum was held virtually in May-June 2020 with over 2000 participants and addressed the implications of RBC and COVID-19, and Access to Remedy.

### *3.3.2. The 2011 update of the OECD Guidelines: comprehensive coverage including alignment with the UNGPs and continued alignment with the ILO*

The updated 2011 OECD Guidelines contain 11 chapters. They comprehensively address business conduct from the environment to anti-bribery, from consumer interests to human rights, from tax to labour. They maintain their long-standing alignment with ILO standards in the chapter on labour. The update includes a new human rights chapter. Due diligence applies beyond human rights to all areas covered by the Guidelines except the chapters on science and technology, competition and taxes. The alignment with the UNGPs resulted from close cooperation as well as extensive input from business, trade unions and civil society.[95]

#### *a. Broad application of the Guidelines to corporate groups and to all types of enterprises*

Like the UNGPs, the Guidelines are addressed to all the legal entities within the multinational enterprise.[96] The Guidelines apply to all types of multinational enterprises, as do the UNGPs. Ownership may be private, State or mixed. The Guidelines are also not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same societal expectations in respect of their conduct wherever the Guidelines are relevant to both.[97]

In countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.[98]

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94 The Working Party on Responsible Business Conduct was established in 2013 to, among other things, 'assist in enhancing the effectiveness of the Guidelines' in the context of a pro-active agenda. Its mandate was revised and renewed by the Investment Committee in 2018.

95 For example, Ruggie underlined the alignment with the UNGPs in the context of the broader RBC scope of the Guidelines: "The revised OECD Guidelines are the first inter-governmental instrument to integrate the second pillar of the UN framework – the corporate responsibility to respect human rights. They are also the first to take the Guiding Principles' concept of risk-based due diligence for human rights impacts and extend it to all major areas of business ethics". John Ruggie, quoted in OECD, Responsible Business Conduct Matters (2018), p. 5.

While the Guidelines are focused on business responsibilities rather than government, they recognise the primary role of governments in a manner consistent with the UNGPs. See, e.g, Guidelines, Commentary on General Policies, para. 11 (the "primary responsibility for improving the legal and institutional regulatory framework lies with governments").

96 OECD Guidelines, I. Concepts and Principles, para. 4.

97 Id. para. 5.

98 Id. para. 2.

*b. Responsible supply chain management*

The updated Guidelines apply a comprehensive approach to responsible supply chain management by enterprises. The Guidelines address adverse impacts that are (i) caused by the enterprise; (ii) contributed to by the enterprise; or (iii) are directly linked to the operations, products or services of the enterprise by a business relationship.

The Guidelines clarify that an enterprise "contribut[es] to" an adverse impact when it substantially contributes, excluding minor or trivial contributions. A substantial contribution means an activity that causes, facilitates or incentivises another entity to cause an adverse impact. "Business relationships" include relationships with business partners and with entities in the supply chain. It also includes any other non-State or State entities "directly linked" to the business operations, products or services of the enterprise.

In the context of its supply chain, if the enterprise identifies a risk of causing an adverse impact, then it should take the necessary steps to cease or prevent that impact. If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.

### *3.3.3. The OECD Guidelines grievance mechanism – National Contact Points (NCPs)*

As noted, government Adherents to the OECD Guidelines are required to set up an NCP to promote the Guidelines and to handle complaints against companies. Governments have broad discretion how to set up their NCP. However, they must meet the core criteria for "functional equivalence". These require NCPs to function in a way that fosters visibility, accessibility, transparency and accountability.

Cases at NCPs are known as "specific instances". Specific instances have broad potential reach in terms of both potential complainants and companies. Since the 2000 update of the Guidelines, any entity – an individual, organisation or community – may allege that a company has not observed the OECD Guidelines and may submit a formal request to an NCP for their assistance in facilitating resolution of a dispute. The Guidelines apply to MNEs that operate "in or from" the territories of Adhering governments. The NCPs of home states of multinationals can accordingly receive complaints about "their" multinationals wherever they may operate. The revised 2011 Guidelines no longer require a link with a foreign direct investment for a case to be handled by an NCP.

NCPs are not judicial bodies and specific instances are not legal cases. NCPs contribute to the resolution of complaints. The process is voluntary. An NCP cannot compel parties to participate in the resolution of issues, impose sanctions or order compensation (absent a government mandate that would be separate from the Guidelines). The NCP provides a platform and facilitates a dialogue. The Guidelines specify that NCPs should address specific instances in a manner that is impartial, predictable, equitable, and compatible with the OECD Guidelines.[99] The principal advantage is flexibility since the parties can craft solutions. Mediation is a possible method, but is not required and is not always accepted.

Between 2000 and 2019, NCPs handled more than 500 cases relating to company operations in over 100 countries and territories.[100] Human rights are the fastest growing basis for complaints – accounting for

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99 OECD Guidelines, Procedural Guidance, p. 72.

100 See OECD, Cases handled by the National Contact Points for Responsible Business Conduct (overview of cases handled from 2000-2019).

57% of the cases since 2011 as opposed to only 3% prior to the 2011 update of the Guidelines. Other major areas for cases since 2011 are general policies, including expectations related to due diligence (53%), followed by employment and worker issues (40%) and the environment (21%). There was a record number of 52 new submissions brought to NCPs in 2018.[101]

Trade unions and NGOs have accounted for 40% and 38%, respectively, of the cases submitted to NCPs since 2000. Individuals, including parliamentarians, have brought a number of cases. Several cases have been submitted by a company against another company.

The financial sector has grown to be a leading sector for specific instances submissions in recent years. Sometimes a financial institution plays a role in encouraging a company to engage in mediation. In other cases, financial institutions are the targets of complaints.

Once a specific instance has been submitted, there are potentially four steps which follow, all of which include NCP decisions: (i) an initial assessment to determine if the issues raised merit further examination and meet the criteria as set out in the procedural guidance; (ii) an offer of good offices to examine the issues raised, which involves facilitating dialogue to assist parties in reaching a mutual agreement on the resolution of the issues raised and can include mediation by the NCP or professional mediators; (iii) a conclusion, with the issuance of a final statement, including possible recommendations to the parties and, if the parties have reached an agreement, publication of the agreement by the NCP; and (iv) follow-up, which can apply in cases where the NCP has made recommendations with a time frame in its final statement, with an NCP determination if the recommendations have been followed and issuance of a statement.

NCPs are required to issue final statements upon concluding specific instance processes. Some NCPs also make determinations, setting out their own views on whether a company observed the OECD Guidelines or not although this is not required by the OECD Guidelines. Determinations of whether an enterprise observed or did not observe the Guidelines were included in five final statements (45% of all final statements published for concluded cases and 20% of all final statements published in 2018).[102] Provisions for monitoring and follow up were included in 78% of the final statements issued in 2018.[103] NCP final statements can be important sources of information on business behaviour as well as a stimulus to improvement. An on-line OECD database gathers information about cases and outcomes, and includes a search mechanism.

In a few cases, agreements reached among parties have included direct remedy for the complainants. For example, a specific instance filed at the Dutch NCP involving former employees of Bralima (a subsidiary of Heineken) resulted in financial compensation to 168 employees, a remedy they had been seeking for nearly 17 years, and changes to Heineken's human rights due diligence policy.[104] However, financial remedies remain rare.

Changes to a company's operations and policies to mitigate impacts are a more frequent outcome. Between 2011 and 2019, over a third of all cases which were accepted for further examination by NCPs (36%) resulted in some form of agreement between the parties; approximately 33% resulted in an internal policy change by the company in question.[105]

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101 OECD (2019), Annual Report on the OECD Guidelines for Multinational Enterprises 2018, p. 9.

102 Id., p.25.

103 Id. p. 8.

104 Dutch NCP, Heineken, Bralima and former employees of Bralima, 2017. See also French NCP, Natixis-Natixis Global Asset Manager and Unite Here, 2017;

105 OECD, Cases handled by the National Contact Points for Responsible Business Conduct; see, e.g. Swiss NCP, Fédération Internationale de Football Association (FIFA) and Building and Wood Workers' International (BWI), 2018.

As noted, the process is voluntary. Some governments have considered withdrawing certain governmental benefits, such as trade diplomacy or investment guarantee support, to companies that refuse to participate in the process.

The 2011 update of the Guidelines introduced indicative timelines for the NCPs for issues brought to their attention and established the requirement for a statement when a cases is closed. Consultative status with the Investment Committee has also been extended to OECDWatch, the OECD Investment Committee's recognized representative of civil society organizations.

Until recently, six NCPs had received nearly half of all the cases. However, recourse to the system is spreading. In 2018, 25 NCPs (52% of all NCPs) received specific instance submissions. This represents an increase in historical rates and the rate reported in 2017 (38%).

Some NCPs do not meet the core criteria of visibility, accessibility, transparency and accountability. Critics have also highlighted a widespread lack of remedy for victims under the NCP system.[106] Other concerns include uneven performance in handling specific instances, including parallel proceedings or delays.[107] There have been calls for reform of current rules, better implementation, and monitoring of NCP performance.

The role of the Guidelines and NCPs has been recognised by the G20 and there have been high level political commitments in the OECD Council at Ministerial Level to strengthen the NCP system with peer learning and peer review. Further efforts are underway to improve the capacity of NCPs and the operation of the grievance mechanism.[108]

OECD Members committed themselves in June 2017 to peer review all NCPs by 2023. During a peer review the Secretariat and representatives of two to four different NCPs assess whether the NCP is functioning in a visible, accessible, transparent and accountable manner and whether it handles cases in a way that is impartial, predictable, equitable and compatible with the OECD Guidelines.

### *3.3.4. Other OECD and OECD hosted work relating to business responsibilities since 2011: Tax and anti-money laundering*

Additional OECD and OECD-hosted work since the 2011 adoption of the updated Guidelines also establishes important business responsibilities. A prominent example is the development of agreed standards and requirements for the disclosure of information about beneficial ownership of companies, i.e. the natural person behind a legal entity or arrangement. The 2014 G20 Leaders' Communique made transparency in beneficial ownership a key priority: "We commit to improve the transparency of the public and private sectors, and of beneficial ownership by implementing the G20 High-Level Principles on Beneficial Ownership Transparency".[109] The third principle in the High-Level Principles, for example, states that "[c]ountries should ensure that legal persons maintain beneficial ownership information onshore and that information is adequate, accurate, and current".

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106 OECD Watch, The State of Remedy under the OECD Guidelines: Understanding NCP cases concluded in 2018 through the lens of remedy, 2019.

107 OECD, Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015, 2016.

108 See OECD, Action Plan to Strengthen National Contact Points.

109 G20 Leaders Communique, point 14 (16 Nov. 2014); G20 High-Level Principles on Beneficial Ownership Transparency.

Transparency International reviewed in 2018 the implementation of the ten Principles by G20 members and four recent guest countries at G20 meetings, and found that serious gaps remain with regard to many of the Principles even in G20 countries and their associated territories.[110]

The Recommendations of the OECD-hosted Financial Action Task Force (FATF) are the most widely established international standards for ensuring the availability of information about beneficial ownership.[111] Ensuring the availability of information on beneficial ownership is of central importance to anti-money laundering and combatting the financing of terrorism (AML/CFT).

Following the G20 call for more integrated cooperation in work on beneficial ownership between international organisations, the FATF and the OECD-hosted Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) were given a mandate to align their technical work on beneficial ownership more closely, with a view to better serving the international community. The Global Forum now uses the FATF definition on beneficial ownership.

OECD work on tax has emphasised that the availability of beneficial ownership information is a key requirement of international tax transparency and the fight against tax evasion and other financial crimes. It is at the heart of the international tax transparency standards both for the exchange of information on request and for the automatic exchange of information. Transparency of beneficial ownership information is also vital to fight corruption, as underlined in the G20 Anti-Corruption Action Plan 2019-2021: "[t]ransparency of beneficial ownership is critical to preventing and exposing corruption ….".

Businesses including financial institutions and others have key responsibilities including to undertake due diligence about their customers to determine beneficial ownership. For example, FATF's work on beneficial ownership includes prescriptive recommendations applicable to financial institutions covering general customer due diligence (FATF Recommendations 10 and 22) and record keeping (Recommendation 11). These recommendations require that financial institutions carry out customer due diligence measures to identify and verify the identity of customers, including beneficial owners, when: entering into business relationships; carrying out occasional transactions above USD/EUR 15,000 (or above USD/EUR 1 000 for wire transfers); there is suspicion of money laundering or terrorist financing; or there are doubts about the veracity or adequacy of previously obtained customer identification data.

## 3.4. OECD development of due diligence guidance

The OECD Guidelines, the UNGPs and the ILO Declaration all call on businesses to carry out due diligence. Due diligence is increasingly recognized as the central framework for knowing and showing whether a business is behaving responsibility.

The OECD has played a leading role in further operationalising the notion of HR/RBC due diligence through multi-stakeholder processes. It has been widely accepted in principle including by business organisations, most clearly in their strong endorsement of the UNGPs and OECD Guidelines and due diligence guidance.

### *3.4.1. Notion of due diligence in the RBC context*

The BHR/RBC community now often speaks of "due diligence" without any qualifier. Although an understanding of HR/RBC due diligence is growing, shorthand references to due diligence may be confusing for business and others given traditional meanings. Business and business lawyers are familiar

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110 See Transparency International, G20 Leaders or Laggards? Reviewing G20 Promises on Ending Anonymous Companies.

111 The FATF is an autonomous intergovernmental international body established in 1989. It is hosted by the OECD which provides its secretariat, within the Directorate for Financial and Enterprise Affairs (DAF).

with the notion of due diligence. The phrase is used as shorthand to refer to an investigation carried out with due diligence. Due diligence is thus a risk evaluation and risk avoidance concept. It is flexible and risk-based. However, the traditional business lawyer use of the term differs from the notion of RBC or human rights due diligence.

Traditional due diligence generally involves efforts to determine potential risks to the company. A well-developed example occurs in the context of corporate merger transactions.[112] The putative acquiror reviews the target's financial matters, intellectual property, customers/sales, material contracts, employee/management issues, litigation, environmental issues, tax issues and other aspects. The inquiries seek to determine the risks of the acquisition for the acquiror. Depending on the context, the purchase price or terms for the target may be adjusted, or the proposed transaction may be terminated. Beyond inter-party adjustments, the due diligence process may reveal regulatory issues at the target.[113]

The UNGPs and the OECD Guidelines build on this familiar concept, but change its focus to include impacts on constituencies outside the company. Ruggie referred to potential and actual adverse impacts of corporate activity on the human rights of others. The Guidelines underline that due diligence must go "beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines". The risks identified in a due diligence process under the Guidelines encompass adverse impacts related to a range of issues covered by the Guidelines including human rights, employment and industrial relations, the environment, combating bribery, bribe solicitation and extortion, and consumer interests.[114] For convenience herein, the discussion below generally refers to "HR/RBC due diligence" to refer generally to both the UNGP and broader OECD approach.

Due diligence is the process through which enterprises identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed. Ruggie underlines that "the due diligence requirement applies not only to a company's own activities, but also to the business relationships linked to them—for example, its supply chain, security forces protecting company assets, and joint venture partners".[115]

Due diligence is a flexible process. It is not a specific formula for companies to follow. It should, however, be an integral part of decision-making and risk management systems. It is an on-going, proactive and reactive process. HR/RBC due diligence can be integrated into existing due diligence processes in a company providing it focuses on actual and potential adverse impacts. It must go beyond identifying and managing material risks to the enterprise itself. The due diligence concept also covers efforts to increase transparency in supply chains and to improve consumer information.

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112 The acquiror (and its advisors) will conduct "due diligence" of the target company to be acquired. The due diligence typically reveals new information about the target, including possible risks. See, e.g. Richard D. Harroch and David A. Lipkin, 20 Key Due Diligence Activities in a Merger and Acquisition Transaction, Forbes (19 Dec. 2014) (noting intensity of due diligence process of the target company to review financial matters, intellectual property, customers/sales, material contracts, employee/management issues, litigation, environmental issues, tax issues and others).

113 Due diligence in this sense became an important source of foreign bribery cases as foreign bribery became a greater risk for liability and reputation. The acquiror's close review of the target's business (through review of documents by accountants, lawyers and others) could reveal evidence of possible bribery. The acquiror has an interest in resolving the issues prior to integration of the companies; prosecutorial authorities have sought to encourage disclosure of this nature.

114 The chapters on Science and Technology, Competition and Taxation are not considered to relate to adverse impacts and are excluded.

115 Ruggie 2013 at location 2119.

The UNGPs and Guidelines recommend carrying out risk-based due diligence, meaning that the nature and extent of due diligence will depend on the risks of adverse impacts related to a particular situation. For operations that are unlikely to result in adverse impacts or operations where the adverse impacts are not significant, enterprises may adjust their due diligence efforts. However, all enterprises regardless of their size and the nature of their operations should conduct due diligence.

### *3.4.2. Development of detailed sectoral and general due diligence guidance at the OECD*

Since 2011, governments have focused on developing detailed guidance on how to carry out due diligence. Under the OECD-led multi-stakeholder processes, several sector-specific implementation guides have been agreed. The OECD "proactive agenda" helps enterprises identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries through practical guidance.

Continuing the cooperation with UN processes from the Guidelines update, the OECD has also worked closely with the OHCHR and members of the UN Working Group on Business and Human Rights in developing the guidance to maximise clarity and alignment of standards for stakeholders. Some key examples of due diligence guidance are noted below.[116]

#### *a. Extractive sector: Responsible supply chains and due diligence on meaningful engagement with stakeholders*

The extractive sector[117] is associated with "large, resource-seeking financial and infrastructure investments, immobile production, a long project lifecycle and extensive social, economic and environmental impacts". It is a major source of ISDS claims. Companies can contribute to positive social and economic development when they involve stakeholders in their planning and decision making.

The OECD has developed Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[118] It contains detailed recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices. This Guidance is for use by any company potentially sourcing minerals or metals from conflict-affected and high-risk areas. It is global in scope and applies to all mineral supply chains. The Forum on Responsible Mineral Supply Chains was launched in 2011. The 2019 Forum gathered more than 1000 stakeholders to discuss measuring impact and driving change, opportunities and challenges related to specific minerals such as diamonds, base metals, cobalt, 3Ts and gold, and cross cutting issues such as reporting requirements, collaborating with industry initiatives and addressing corruption risks.[119]

The OECD has also prepared Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.[120] It provides practical guidance to mining, oil and gas enterprises to help companies identify and manage risks, and avoid and address adverse HR/RBC impacts, in line with the OECD

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116 In addition to those described below, specific due diligence guidance also addresses responsible agricultural supply chains (jointly developed by the OECD and the Food and Agriculture Organisation (FAO)) and responsible supply chains in the garment and footwear sector.

117 Extractive sector enterprises are considered to include enterprises conducting exploration, development, extraction, processing, transport, and/or storage of oil, gas and minerals.

118 OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

119 The Forum is jointly organised by the OECD, the International Conference on the Great Lakes Region and UN Group of Experts on the Democratic Republic of Congo and is supported by the EU.

120 OECD (2016), Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.

Guidelines. Targeted guidance addresses specific stakeholder groups such as indigenous peoples, women, workers or artisanal and small scale miners. A multi-stakeholder advisory group participated in developing the guidance and a public consultation was held in 2015.[121]

As with regard to the notion of due diligence, the notion of stakeholders in the BHR/RBC context may differ from or be more expansive than some common business usage in this context. Some companies may have a tendency to prioritize stakeholders with the most influence over a project, including shareholders, creditors or future off-takers (buyers of the resource).[122] The BHR/RBC approach shifts the focus to those who face potential or actual adverse impacts that are high risk, severe or difficult to remedy. This also requires attention to stakeholder representatives, including verifying whether stakeholder representatives are truly communicating the perspectives of their constituents and that the views of vulnerable stakeholders are included.

### *b. Financial sector*

The WPRBC is overseeing extensive multi-stakeholder work in this area, which is of particular relevance to investment treaties. In 2017, the OECD developed a first set of guidance.[123] Due diligence guidance on corporate lending and securities underwriting was released in October 2019.[124] Work on project and asset-based finance is envisaged.

Key concepts in the UNGP and Guidelines – such as the notion of adverse impacts that are "directly linked" to the operations, products or services of the enterprise by a business relationship – are particularly important in the financial sector. In the context of OECD analytical work in this area, input was obtained from Ruggie, the OHCHR and the UN Working Group on Business and Human Rights on the "directly linked" concept under the UNGPs (with which the Guidelines are aligned as noted). The work made clear that financial institutions can both be "directly linked" and "contribute" to adverse impacts on people.

### *c. General due diligence guidance*

As noted, in May 2018, the OECD Due Diligence Guidance for Responsible Business Conduct was approved for application to companies from all sectors. Due diligence is an excellent example of convergence and mutual reinforcement in international standards. The initial treatment of due diligence in the UNGPs was incorporated in the OECD MNE Guidelines and the ILO MNE Declaration; more recently, the 2018 OECD Due Diligence Guidance for Responsible Business Conduct fosters a common understanding on due diligence for responsible business conduct that is promoted by both the ILO and the UN Working Group on Business and Human Rights, as the UN Working Group set out in its report to the UN General Assembly in 2018 highlighting key features of human rights due diligence.[125]

The due diligence guidance process is an on-going one. As industry sectors develop more detailed proposed approaches to the issues, it is important to maintain consistency with the Guidelines and UNGPs to the greatest extent possible in the absence of compelling reasons. The OECD has engaged in review of the degree of the alignment of industry standards with OECD due diligence guidance. This evaluation role has been recognised in some regional legal frameworks.

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121 Several ILO Conventions are of particular relevance to the extractive sector, such as ILO Conventions on Forced Labour (Convention N° 29 & Convention N° 105), Child labour (Convention N° 182) and Safety and Health in Mines (Convention N° 176 and its accompanying Recommendation N° 183). See further on the ILO below.

122 Shift, Stakeholder Engagement and the Extractive Industry (2013).

123 OECD (2017), Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises.

124 OECD (2019), Due diligence guidance on responsible corporate lending and securities underwriting.

125 See Responsible Business: Key Messages from International Instruments, p. 6.

## 3.5. The International Labour Organization (ILO)

Since 1919, the ILO has maintained and developed a system of international labour standards aimed at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity. In today's globalized economy, international labour standards are an essential component in the international framework for ensuring that the growth of the global economy provides benefits to all.[126]

As noted above, the ILO Declaration on Fundamental Principles and Rights at Work (1998) sets out the principles concerning fundamental rights in the eight ILO core conventions. It addresses forced labour, child labour, non-discrimination and freedom of association and collective bargaining. The Declaration makes it clear that these rights are universal, and that they apply to all people in all States - regardless of their level of economic development.[127]

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the ILO MNE Declaration) provides guidance to encourage the positive contributions companies can make to economic and social progress and to minimise and resolve difficulties in their operations. It was most recently updated in 2017 to include new labour standards and policy outcomes and to make explicit references to global developments such as the adoption of the UNGPs and the 2030 Agenda for Sustainable Development. It highlights the important role of industrial relations and social dialogue in due diligence -- the process should take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process.[128] The principles addressed to business reflect good practice for all enterprises.

The ILO MNE Declaration also provides policy guidance to governments as well as employers' and workers' organisations, which play central and distinctive roles in creating an enabling environment for responsible business. Its recommendations on employment, training, conditions of work and life, and industrial relations are based on international labour standards, including the fundamental Conventions underpinning the ILO Declaration on Fundamental Principles and Rights at Work (1998).

## 3.6. Other initiatives by international organisations addressing BHR/RBC

### *3.6.1. International Finance Corporation (IFC)*

The International Finance Corporation (IFC), which is part of the World Bank Group, is focused on the private sector in developing countries. It helps developing countries achieve sustainable growth by financing investment, mobilizing capital in international financial markets, and providing advisory services to businesses and governments.

The IFC adopted a new sustainability policy in mid-2011. It expressly recognizes the business responsibility to respect human rights. Ruggie has noted that the core concepts are identical to the UNGPs: the responsibility exists independently of states' duties; "respect" means to avoid infringing on the rights of others; and the "list" of human rights is provided by the International Bill of Human Rights and the ILO's eight core conventions.[129]

IFC clients who receive its direct investments must meet performance standards. These include having adequate due diligence systems to assess and manage social and environmental risks. IFC standards

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126 See https://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm

127 See ILO, Declaration on Fundamental Principles and Rights at Work.

128 See ILO MNE Declaration, Paragraph 10(e).

129 Ruggie 2013 at location 2237.

affect companies' access to capital at the IFC and beyond; they are now also used by many private sector financial institutions as well as by several regional development funding agencies and national export credit agencies.

### *3.6.2. Asian Infrastructure Investment Bank (AIIB)*

The Asian Infrastructure Investment Bank (AIIB) provides a multilateral regional financing and investment platform for infrastructure development and enhanced interconnectivity in Asia. It commenced operation in 2016 and is expected to transition from its start-up phase in 2020.[130]

The AIIB updated its Environmental and Social Framework in 2019.[131] The Framework does not refer specifically to the business responsibility to respect human rights or RBC; nor does it refer to the UNGPs or OECD Guidelines. The Framework appears to reflect a similar approach in some respects.

### *3.6.3. Council of Europe*

The Committee of Ministers of the Council of Europe (composed of the Ministers for Foreign Affairs of the 47 Member States), adopted a Recommendation on Business and Human Rights in 2016.[132] It notably recommends that the governments of Council of Europe Member States (i) review their national legislation and practice to ensure that they comply with the recommendations, principles and further guidance set out in an appendix (which describes the UNGPs in detail, but not the OECD Guidelines), and evaluate the effectiveness of the measures taken at regular intervals; and (ii) ensure, by appropriate means and action, a wide dissemination of the recommendation among competent authorities and stakeholders, with a view to raising awareness of the corporate responsibility to respect human rights and contribute to their realisation.

# 4. Business and Human Rights/Responsible Business Conduct developments in national and regional law and policy

States bear the principal responsibility for protection of human rights from impacts by third parties. Domestic legislatures and courts are the main venues for the implementation of this responsibility including with regard to the regulation of business conduct. As outlined above, domestic law in each of the jurisdictions where a MNE does business through its affiliates and value chain bears the primary responsibility. At the same time, the governance gap means that there is increasing attention to developments elsewhere.

As outlined above, Ruggie rejected the single binding treaty and voluntary models in favour of a multi-faceted approach with a mix of social and legal pressures and measures. Ruggie sees the incorporation of some international and social norm standards into domestic law systems as an important component of his approach. As he notes, social norms about appropriate behaviour are often reflected in law over time.

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130 https://www.aiib.org/en/news-events/news/2019/20190713_003.html

131 https://www.aiib.org/en/policies-strategies/_download/environment-framework/Final-ESF-Mar-14-2019-Final-P.pdf

132 Human rights and business, Recommendation CM/Rec.(2016)3 of the Committee of Ministers to Member States (2016).

He sees the process as one where different jurisdictions take action that reflects different sensitivities. The incorporation of the norms can have multiple effects including raising business and public awareness, strengthening and clarifying the norms, and applying them in concrete situations.

His 2013 book noted some early government action. He recommended that governments take action to make government benefits conditional upon companies undertaking human rights due diligence and developing mitigating steps in case of potential harm:

> *As recommended by the GPs, the home states of foreign investors should provide them with clear guidance about the context in which companies will operate, including its human rights risks. Equally important, home governments should make export credit and investment insurance conditional upon companies undertaking such due diligence and developing mitigating steps in case of potential harm.*

Experience shows governments "have a range of tools at their disposal, including for example, providing incentives through procurement policies or licensing processes favourable to businesses with strong due diligence approaches, providing resources and guidance to companies to conduct due diligence, or introducing regulations with with respect to RBC."[133]

There are an increasing number of domestic laws and initiatives in the home states of major MNEs inspired by the UNGPs and OECD Guidelines. There is a trend of transposition of international standards into binding domestic laws and regulations and "hardening" soft law commitments. Cases in national courts have also been noteworthy. In the discussion of a proposed scoping paper addressing business responsibilities and investment treaties, the FOI Roundtable requested attention to these developments in the paper.

Both the regulatory measures and cases have given rise to intensive policy debates. They can raise complex issues of national and international law and require additional analysis, but some are briefly noted. This section first briefly considers national regulatory developments and then notes some significant court decisions.

## 4.1. National and regional regulation and policies

### *4.1.1. Laws, regulations and regulatory proposals for general HR/RBC due diligence requirements*

#### *a. France: Law on the duty of vigilance of parent companies and commissioning enterprises (2017)*

On 27 March 2017, the Law on the duty of vigilance of parent companies and commissioning enterprises[134] was promulgated in France following extensive debate. The law addresses human rights and environmental adverse impacts generated by corporate activities.

The law applies to (i) companies having their head office in France that employ at least 5,000 people in France, directly or indirectly through their subsidiaries or commercial partners; and (ii) companies having their head office abroad that employ at least 10,000 people in France, directly or indirectly through their subsidiaries or commercial partners.[135]

Covered companies must establish and implement a 'vigilance plan' including due diligence measures. The due diligence plan must identify risks generated by the company's activities with regard to human

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133 OECD, Annual report on RBC (2018).

134 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, in force since 29 March 2017.

135 Article L225-102-4 of the French Commercial Code.

rights and fundamental freedoms, the health and security of individuals, and the environment. It must also contain measures to mitigate those risks or avoid serious adverse impacts, an early warning mechanism enabling the notification of existing risks or realisation of risks, as well as follow-up procedures to evaluate the implementation and efficiency of the measures. The due diligence requirements were inspired by the Guidelines and UNGPs, which were viewed, even prior to the 2018 OECD general Due Diligence Guidance, as the internationally recognised basis to establish a vigilance plan. A 2013 report by the French NCP was also influential.

The law requires the vigilance plan to address the activities of (i) the company subject to the duty; (ii) the companies that the duty-holder controls, directly or indirectly; and (iii) subcontractors or suppliers with which the duty-holder maintains a fixed business relationship, including the activities undertaken abroad. The plan, as well as a report on its implementation, must be published and included in the annual management report available to the public at the registry of the Commercial Court.

Any person or entity can formally demand that a covered company comply with its obligations. If after three months the company response is considered to be insufficient, the person or entity, providing it has standing to bring proceedings, can commence court proceedings seeking an order compelling compliance, under financial compulsion if appropriate. Companies that do not comply with their obligations may also be held liable to compensate victims under the conditions of general tort law.

Supporters of the proposal highlighted the urgent need to improve compliance with due diligence standards beyond reporting obligations, in order to adapt the French legal system to the reality of globalisation. Recent disasters relating to the value chains of French-based (as well as other) multinational enterprises caused a considerable stir in French public opinion and convinced many of a necessity to take further steps to require responsible business conduct from companies benefiting from such supply chains. Supporters contended that the law establishes a good mix of principles of hard law and soft law because it creates an obligation to establish a vigilance plan but leaves a margin of appreciation for companies as to the means. They also underlined that the new requirements were already being implemented by many companies on a voluntary basis and that a legally binding obligation helps create a level playing field between companies.[136]

Critics of the draft law expressed concerns about the competitiveness of French companies and the attractiveness of France as a place of business. Some have expressed a preference for EU or multilateral regulation. Critics also suggested the law is unclear in some areas, such as its extraterritorial reach, the content of the vigilance plan or the scope of liability.[137]

The text as adopted by the Parliament was subjected to a constitutional challenge. The Constitutional Council generally upheld the law, but invalidated a provision allowing fines of up to EUR 10 million in addition to tort liability. The fine was found to be akin to a criminal sanction and the specificity of the infraction was found to be insufficient to meet criminal law standards. With respect to civil liability, the Council interpreted the law as referring to the general principles of French tort law liability.

In June 2019, a group of French city mayors and NGOs sent the first formal notice under the law to an energy company, requesting that the company take measures to identify the risks to human rights and the environment caused by its emissions of greenhouse gas, as well as adequate preventive measures against climate change. The company subsequently made some changes to its plan. The group has requested further action and has indicated an intention to take the matter to court in the absence of significant further action.

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136 See, e.g. interventions of M. Dominique Potier, rapporteur, in the clause-by-clause examination of the proposal, in *Avis n° 2625 de Mme Annick LE LOCH, fait au nom de la commission des affaires économiques, déposé le 10 mars 2015*.

137 See, e.g. interventions of M. Philippe Houillon, in the clause-by-clause examination of the proposal, in *Avis n° 2625 de Mme Annick LE LOCH, fait au nom de la commission des affaires économiques, déposé le 10 mars 2015*.

*b. Switzerland: Current developments concerning a "Responsible Business Initiative"*

There have been recent intensive debates and public and parliamentary action in Switzerland over a proposal to introduce mandatory due diligence for companies. In April 2015, a coalition of 77 Swiss civil society organisations launched a "popular initiative" entitled the Responsible Business Initiative (RBI).[138] The RBI proposes to introduce an obligation for companies headquartered in Switzerland to engage in reasonable risk-based human rights and environmental due diligence.[139] The due diligence obligation extends to controlled foreign entities, which the Explanatory Note describes as primarily the company's subsidiaries. It also applies to all business relationships. The scope of the due diligence to be carried out depends on the risks to the environment and human rights. Legislation would take account of the needs of SMEs which present lesser risks; the Initiating Explanatory Note indicates that few SMEs would be concerned, principally those in high risk sectors.[140]

The RBI would require legislation to introduce civil liability for multinational companies for violations of internationally-recognised human rights and environmental standards. It would provide for potential liability based on violations with demonstrated due diligence serving as a defence to liability. More specifically, covered companies would be liable in principle for violations of internationally recognised human rights or international environmental norms in the course of their activity or that of their controlled entities; however, liability would be avoided if the company demonstrates that it met the requirements for reasonable risk-based due diligence set out in the RBI, which are inspired by the UNGP and OECD principles for due diligence.[141] The applicable law established by the RBI would override conflict of laws rules that could otherwise result in local law (eg. applicable law at the situs of the injury) being applied.

The Explanatory Note refers to applicable human rights norms as encompassing the International Bill of Rights and the eight core ILO Conventions, as identified in UNGP 12. In the environmental area, it refers to international conventions and to standards developed by international organisations like the IFC or private bodies such as the International Standards Organization (ISO).

After receiving 100,000 signatures, the popular initiative was first referred to the Federal Council in 2016, which acknowledged the legitimacy of the objectives pursued by the initiative – protecting human rights

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138 Under the Swiss Federal Constitution, a popular initiative that successfully collects, within 18 months after its official publication, the signatures of 100,000 citizens entitled to vote, can trigger a vote on a constitutional amendment. Once the initiative collects the signatures, the Swiss Parliament (Federal Assembly), composed of the National Council (lower house) and the Council of States (upper house), can approve or reject it. Where the Parliament approves it, the Parliament formulates the project envisioned by the initiative and submits the draft to a popular vote and to the cantons. Where the Parliament rejects the initiative, it becomes subject to a national vote. If the vote is in favour of the initiative, the Parliament develops a project in accordance with it.

The Parliament and the Federal Council (the 7-member Executive branch of the federal government) can also adopt a counter-proposal. The committee that organised the initiative (Initiating Committee) can support or reject counter-proposals. Where it supports the counter-proposal, it withdraws the initiative and the government proceeds to develop the counter-proposal. When the Initiating Committee rejects the counter-proposal and maintains its original proposal, the initiative is submitted to a popular vote. If the initiative is rejected in the popular vote, the counter-proposal is adopted.

139 For the text of the RBI and an analysis of its provisions by its initiator, see Association initiative multinationales responsables, "Rapport explicatif de l'initiative populaire fédérale « Entreprises responsables – pour protéger l'être humain et l'environnement »"(2017). For a brief description of the RBI by its initiator, see Swiss Coalition for Corporate Justice, Explications sur le texte de l'initiative (Factsheet 5), (hereinafter the "Explanatory Note"). An unofficial English version of the RBI and Explanatory Note is also available.

140 See Explanatory Note, p. 2 (« Les petites et moyennes entreprises ne sont en principe pas concernées par l'initiative, sauf si elles sont actives dans un secteur à haut risque.»)

141 Id.

and the environment –, but considered that the proposal went too far. It recommended to the Parliament to reject the initiative and to submit it to a vote of the people and the cantons without a counter-proposal.[142] The Federal Council advocated an internationally coordinated approach and relied on existing instruments in Switzerland.[143]

A first counter-proposal was adopted by the National Council in June 2018 (First Counter-Proposal).[144] It expressly limited the due diligence obligation to large companies meeting certain thresholds or smaller companies whose activities present a significant risk of human rights violations and of infringement of environmental norms.[145] It also limited the applicable human rights and environmental norms to those binding on Switzerland. It maintained the due diligence defence to company liability. It also added a further defence relating to control; liability can be avoided if the company can prove that it could not practically influence the behaviour of the controlled entity involved in the infringement. The First Counter-Proposal added a public reporting obligation not included in the RBI.[146]

In August 2019, the Federal Council expressed support for an approach focused on certain reporting obligations without liability provisions.[147] It reiterated its support for the overall goals of the RBI but rejected the liability provisions in the RBI or the narrower ones in the First Counter-Proposal on the basis that they would clearly harm the Swiss economy. It instructed the Ministry of Justice and Police to defend this position in the parliamentary debates and to consider whether it would appropriate to establish due diligence obligations with regard to child labour and conflict minerals. In December 2019, the Council of States adopted a new counter-proposal inspired by the Federal Council's view. As the period for the possible adoption of a counter-proposal drew to a close, in June 2020 the National Council ultimately voted after a final conciliation conference to accept the Council of States' project (the "Final Counter-Proposal").[148]

The Final Counter-Proposal would require an obligation on sustainability reporting for certain Swiss public companies (such as companies listed on a stock exchange or that have issued bonds to the public) and

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142 Conseil fédéral suisse, Message relatif à l'initiative populaire « Entreprises responsables – pour protéger l'être humain et l'environnement », 15 septembre 2017. The Message provides extensive analysis of the initiative.

143 It referred in particular to the Action Plan on Corporate Social Responsibility of 2015, the National Action Plan for the Implementation of the United Nations Guiding Principles for Business and Human Rights of 2016 and the Report on Green Economy of 2016, a further development of the corresponding action plan of 2013.

144 The text of the First Counter-Proposal is available at https://www.parlament.ch/centers/eparl/curia/2016/20160077/N2-3%20F.pdf (16.077, projet 2, Decision of the Conseil national of 14 June 2018).

145 The companies that exceed, during two successive financial years, two of the three following thresholds: an annual balance sheet exceeding CHF 40 million, a CHF 80 million turnover, an annual average of 500 full-time employees. The Federal Council would be empowered to decide on companies excluded due to low risks.

146 Further back and forth between the two legislative chambers gave rise to an amended counter-proposal from the Legal Affairs Committee of the Council of States. See Commission des Affaires Juridiques du Conseil des Etats, Press release of 4 September 2019, "Contre-projet indirect à l'initiative pour des multinationales responsables: la Commission soutient la responsabilité civile des entreprises et l'introduction d'une procédure de conciliation". It would have maintained provisions for corporate liability for the breach of due diligence obligations, but with a mandatory pre-litigation conciliation procedure involving the Swiss NCP to avoid the possible multiplication of court claims. However, this approach was not addressed by the Council of States.

147 Federal Council, Les entreprises suisses appelées à rendre compte du respect des droits humains et des normes environnementales (14 Aug. 2019).

148 See Code des obligations (Contre-projet indirect à l'initiative populaire «Entreprises responsables – pour protéger l'être humain et l'environnement») (modification of 19 June 2020) ; see also "Le peuple votera sur l'initiative sur les entreprises responsables", La Tribune de Genève (4 June 2020).

financial institutions providing they meet size criteria.[149] It would also ask for due diligence and public reports on two issues: (i) conflict minerals -- by companies that release for free circulation or processing in Switzerland ores or metals containing tin, tantalum, tungsten or gold from conflict zones or areas with high risk; and (ii) child labour – by companies which offer goods or services for which there is a well-founded suspicion of the use of child labour. There is no provision on civil liability for violations of human rights or environmental standards. Criminal sanctions can apply to the obligation to produce a report on due diligence. Fines up to a maximum of SFR 100,000 can be imposed for intentional failures to publish a report on due diligence or for a false report.

The Initiating Committee did not agree to withdraw the RBI in favour of the Final Counter-Proposal. The Federal Council has scheduled the referendum for November 2020. Under Swiss law, a majority vote for the RBI adopts it, and a majority vote against it results in the adoption of the Final Counter-Proposal.

Some polls have shown significant public support for the RBI.[150]Among business circles, the RBI and the counter-proposals have attracted varying responses. Major business organisations, including Economiesuisse, SwissHoldings and Scienceindustries, expressed strong opposition to the RBI and First Counter-Proposal, as have some Swiss companies. They have expressed concerns about legal uncertainty, a heightened risk of legal proceedings brought before Swiss courts against Swiss companies in case of damage caused by controlled entities operating abroad, and danger for the competitiveness and attractiveness of Swiss economy in the absence of a coordinated international regulatory framework. Economiesuisse supports the Final Counter-Proposal.[151]

On the other hand, some investors and business groups pressed Swiss lawmakers to support the First Counter-Proposal. In a June 2019 statement signed by 23 institutional investors, which together manage around CHF 395 billion in assets, the investors urged the members of the Swiss Parliament to vote for the First Counter-Proposal.[152] They expressed the view that combined private sector and policy action will help to eliminate human rights and environmental breaches in subsidiaries and supply chains of Swiss companies, strengthen the investment case of Swiss companies and reinforce the appeal of Switzerland as a global financial hub. They noted that detailed due diligence guidance is available, including from the OECD, and that Ruggie had indicated that in developing a workable compromise Switzerland would be joining other countries and would not be alone.[153] The investors also underlined that the First Counter-Proposal was supported by important representatives of the Swiss private sector. Varying viewpoints among business groups and political parties continue to be expressed as the choice has narrowed to the RBI and the Final Counter-Proposal.[154]

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149 To be covered, the public company and its controlled subsidiaries must have 500 full-time positions on average annually and exceed one of the following thresholds in two consecutive financial years: (1) a balance sheet total of SFr20 million; or (2) turnover of SFr40 million.

150 See Rachel Richterich, Multinationales responsables: les faîtières économiques à couteaux tires, Le Temps (21 Aug. 2020); Sam Jones, Swiss debate on corporate liability comes to a head, Financial Times (1 June 2020).

151 See Economiesuisse, Economiesuisse soutient le contre-projet à l'initiative "entreprises responsables" (5 June 2020).

152 Investor Statement for mandatory human rights due diligence legislation in Switzerland https://ethosfund.ch/sites/default/files/2019-05/190606_Human_rights_due_diligence_investor_statement_EN.pdf).

153 Id, citing "Statement on Swiss Citizens' Initiative", John G. Ruggie, Former UN Special representative on Business & Human Rights, 10 June 2018.

154 See, e.g. Radio-télévision suisse, Le camp bourgeois partagé sur l'initiative sur les entreprises responsables (30 Sept. 2020).

### *c. Finland*

In 2018, more than 70 companies, civil society organisations and trade unions were reportedly calling for a Finnish law on mandatory human rights due diligence. They expressed concern that Finland was being left behind in the global trend towards binding regulation on BHR. They advocated a law that would obligate companies to map their human rights impacts and take steps to prevent and mitigate possible adverse impacts, based on the concept of human rights due diligence set out in the UNGPs. The #ykkösketjuun campaign ("the number one class" in Finnish) called on the Finnish government to join the frontrunners in taking steps to regulate the companies' duty to prevent human rights abuses along their global supply chains.

In June 2019, the new Finnish government announced plans to prepare a report with the objective of enacting a corporate social responsibility (CSR) act based on a duty of care imposed on companies regarding their operations in Finland and abroad. The report will be prepared together with confederations and organisations for industries, entrepreneurs and employees, paying special attention to the position of small and medium-sized enterprises. Similar goals will be promoted in the EU.[155]

### *d. Germany*

In its coalition agreement on implementing its NAP, the German government has committed to legislative measures if German companies' voluntary commitment to the implementation of the NAP is insufficient by 2020.[156] The government has identified a goal for 50 percent of German companies with more than 500 employees to have introduced an effective human rights due diligence process. It has developed surveys which seek to apply transparent and methodologically sound scientific standards to the evaluation of company performance. Two large-scale quantitative monitoring surveys have been conducted, with the final one in March-May 2020.

In July 2020, the government reported on preliminary results of the final 2020 survey, noting that it enabled the federal government to decide on possible follow-up measures during this legislative term. The main finding was that at the time the 2020 survey was conducted, significantly less than 50 percent of enterprises based in Germany with over 500 employees had incorporated the core elements of human rights due diligence described in the NAP into their business processes.[157]

### *e. European Union*

In October 2016, the European Parliament adopted a Report on corporate liability for serious human rights abuses in third countries. The report stresses that non-binding private sector initiatives are not sufficient by themselves. Accordingly, it calls on the EU and Member States to lay down binding and enforceable

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The referendum took place on 29 November 2020. The initiative was rejected by a majority of cantons and failed on that basis. It obtained a majority of votes cast nationwide (50.7%). See Marie Vuilleumier, Divisée, la Suisse refuse de responsabiliser ses multinationales, SWI swissinfo.ch (29 Nov. 2020).

155 See Finland, Inclusive and Competent Finland – a socially, economically and ecologically sustainable society (government programme of 6 June 2019), p. 115.

156 See German Ministry of Foreign Affairs, Monitoring the National Action Plan for Business and Human Rights (NAP) (14 July 2020) (noting that the current government coalition agreement states the following: "We are working towards the consistent implementation of the National Action Plan for Human Rights and the Economy (NAP), which also includes public procurement. If an effective and comprehensive review of the NAP in 2020 finds that companies' voluntary commitment is insufficient, we will introduce appropriate legislation at the national level and advocate an EU-wide regulation.")

157 See German Ministry of Foreign Affairs, Monitoring the National Action Plan for Business and Human Rights (NAP) (14 July 2020).

rules setting out that companies must respect human rights throughout their operations by establishing mandatory human rights due diligence. A working group on RBC at the European Parliament has emphasised the importance of a level playing field with regard to human rights due diligence. Many companies are allocating considerable resources to implementing human rights due diligence while others are not. They have expressed concern that in the global marketplace, it is still possible to gain undue competitive advantages by ignoring international human rights standards.

In February 2020 the European Commission published a broad study on due diligence requirements through the supply chain. The study was prepared by outside consultants and does not reflect current EU positions. It identifies four broad policy options for the EU. It finds that mandatory due diligence as a legal standard of care would have significant social, human rights, and environmental impacts as well as potential economic benefits for companies.

In April 2020, EU Commissioner for Justice Didier Reynders announced that the European Commission will propose mandatory due diligence legislation in 2021.[158] It is expected that the Commission will hold a public consultation on its proposal.

At the OECD Global Forum on RBC in May 2020, the EU Trade Commissioner discussed the proposed work on due diligence in the EU and noted that sustainable value chains and due diligence will be an important part on an ongoing Commission internal review of European trade and investment policy. The review will include consultations with experts and a public consultation.[159]

The European Parliament commissioned a study on Human Rights Due Diligence Legislation – Options for the EU. It includes proposals for substantive elements of potential legislation on human rights due diligence and for monitoring, enforcement and access to justice for victims.

### *4.1.2. Sectoral or geographically-focused due diligence requirements*

#### *a. United States: conflict minerals*

In 2010 the US Congress, as part of the Dodd-Frank reform law, required corporate action and disclosure relating to conflict minerals originating in the Democratic Republic of the Congo and neighbouring countries.[160] The law seeks to promote peace and security in the Democratic Republic of the Congo (DRC) by reducing funding to armed groups in the DRC region from trade in conflict minerals.

The law directed the Securities and Exchange Commission (SEC) to adopt regulations requiring annual disclosure to the SEC. Companies must report whether any conflict minerals "necessary to the functionality or production" of a product are from the Democratic Republic of the Congo or nine adjacent countries (Covered Countries).[161]

In cases in which such conflict minerals did originate in any such country, listed companies must provide a report describing the measures taken to exercise due diligence on the source and chain of custody of those minerals. Under the statute, "DRC conflict free" means that a product "does not contain conflict

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158 The announcement was made during a 29 April 2020 webinar of the European Parliament Working Group on Responsible Business Conduct (RBC).

159 See Introductory Remarks by Commissioner Phil Hogan at OECD Global Forum on Responsible Business Conduct (19 May 2020).

160 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (relevant parts codified at 15 U.S.C. §§ 78m(p), 78m.

Conflict minerals principally refers to tin, tantalum, tungsten and gold, sometimes abbreviated to 3TG.

161 15 U.S.C. § 78m(p).

minerals that directly or indirectly finance or benefit armed groups in the [DRC] or an adjoining country."[162] The report must include an independent private sector audit of the report. Reports to the SEC must also be made available on the companies' websites.

On 22 August 2012, the SEC adopted a rule regarding conflict minerals disclosure ("Final Rule").[163] The subject attracted intense interest, with over 13,000 comments received on the draft rule. It adopted a three-step approach which relied upon the original OECD due diligence framework for conflict minerals. First, companies must determine if they are covered by the Rule. Second, covered companies must conduct reasonable and good faith efforts to determine if its conflict minerals originate in the Covered Countries.[164] Depending on its findings, the initial reasonable country of origin inquiry may trigger a third step, a due diligence and further reporting obligation.[165] The due diligence seeks to determine more definitively the source and chain of custody of the conflict minerals. Companies must "use a nationally or internationally recognized due diligence framework, if such a framework is available for the specific conflict mineral."[166] The SEC approved use of the OECD due diligence guidance in this regard.[167]

If the issuer's due diligence reveals that its minerals did originate in the Covered Countries and did not come from recycled or scrap sources—or if the issuer cannot determine the source of its conflict minerals through due diligence—then the issuer must prepare and submit a Conflict Minerals Report with a description of its due diligence and of its products that have "not been found to be 'DRC conflict free'".

In the rulemaking, the SEC recognised that the statute – and its regulations – were "directed at achieving overall social benefits," that the law was not "intended to generate measurable, direct economic benefits to investors or issuers," and that the regulatory requirements were "quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve."[168] The SEC considered that companies not subject to the rule (private US companies or non-reporting foreign companies) would have competitive advantages over covered companies. However, it concluded that "to the extent the final rule implementing the statute imposes a burden on competition in the industries of affected issuers," it "believe[d] the burden is necessary and appropriate in furtherance of the purposes of [the statute]."[169]

The SEC adopted the Final Rule in 2012 and required the first disclosures in accordance with the Rule for 2014. Shortly after the adoption of the Rule in 2012, several major US business organisations (the U.S.

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162 Id. § 78m(p)(1)(D).

163 Conflict Minerals, 77 Fed. Reg. 56,274, 56,277-78 (12 Sept. 2012), codified at 17 C.F.R. §§ 240.13p-1, 249b.400.

164 A US court noted that the SEC's "reasonable country of origin approach" is modelled after and consistent with the "red flag" framework that triggers due diligence obligations under OECD guidance. It found that the "SEC's general adherence to 'the only nationally or internationally recognized due diligence framework available,' renders its interpretation all the more reasonable and permissible". See *National Association of Manufacturers v. Securities and Exchange Commission*, 956 F. Supp. 2d 43, 68 n.20 (US Dt. Ct. for Dt. of Columbia, 2013), *affirmed*, 748 F.3d 359 (D.C. Cir. 2014).

165 Under the Rule, the due diligence obligation is triggered if the company (1) "knows" that its conflict minerals "originated in the Covered Countries and did not come from recycled or scrap sources," or (2) "has reason to believe" that its minerals "may have originated in the Covered Countries (and may not have come from recycled or scrap sources)." If due diligence is not triggered, only limited disclosure must be filed.

166 77 Fed. Reg. at 56,326.

167 The SEC emphasised that a "critical component of due diligence" is an independent, private sector audit. The audit is designed to ensure that the company's due diligence "is in conformity with . . . [a] nationally or internationally recognized due diligence framework,"; it also certifies that the issuer's actual due diligence efforts comport with the due diligence approach described in its report. Id. at 56,320, 56,329.

168 Id. at 56,350.

169 Id.

Chamber of Commerce, the Business Roundtable and the National Association of Manufacturers) sued the SEC over the Rule. They challenged various aspects of the Rule as "arbitrary and capricious" under the US Administrative Procedure Act ("APA"), as well as under the US securities laws.[170] In their claims based on statutes, the business organisations contended that the SEC unduly extended the scope of "reasonable country of origin inquiry" outcomes that trigger requirements for due diligence and reports. They claimed that the SEC wrongly applied the Final Rule to companies that only "contract to manufacture" products with necessary conflict minerals, rather than limiting the Rule to manufacturers of such products.[171] They also claimed that both the Final Rule and the Dodd-Frank statute violated the free speech provision of the US Constitution in requiring that companies publicly describe applicable products as not "DRC conflict free" based on the statutory definition.

The district court upheld the Final Rule and the Court of Appeals for the D.C. Circuit affirmed the rejection of the APA and securities law claims.[172] However, a majority of the Court of Appeals found that part of the Rule mandating certain disclosure violated the constitutional right to free speech. The court found that the requirement that companies describe applicable products as not "DRC conflict free" in their securities filings and on their website violated the free speech guarantee in the US Constitution.[173]

In light of the Court of Appeals decision, the SEC issued guidance in late April 2014, preserving the obligation for applicable companies to conduct and disclose due diligence, but clarifying that covered companies were not obliged to identify certain products as "not found to be 'DRC conflict free'". In 2017, the SEC issued additional guidance, in effect ceasing to require due diligence or conflict minerals reports. Companies with conflict minerals in their supply chains were still required to engage in limited disclosure. There have not been further regulatory developments since the 2017 guidance.

Law firms with publications on the issues have reported that notwithstanding the litigation and SEC guidance, many companies are continuing to conduct and report on conflict minerals due diligence, in part because systems are in place as a result of the statute and in part due to investor or social pressure.[174] Audits of such diligence appear to be less frequent.

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170 5 U.S.C. §§ 701 et seq.

171 They also argued that the SEC did not conduct an adequate analysis of the overall costs and benefits of the Final Rule; arbitrarily underestimated some aspects of the Rule's costs; wrongly failed to adopt a *de minimis* exemption; and improperly adopted a four-year phase-in period for small companies while only allowing for a two-year phase-in period for large companies.

172 *National Association of Manufacturers v. Securities and Exchange Commission*, 748 F.3d 359 (D.C. Cir. 2014).

173 After a decision by the entire appellate court overruled the basis for the 2014 Court of Appeals decision, the Court of Appeals agreed to a rehearing of the constitutional issue; it reaffirmed its finding of a breach of the free speech provision in another 2-1 split decision. *National Association of Manufacturers v. Securities and Exchange Commission,* 800 F.3d 518 (D.C. Cir. 2015).

174 See, e.g. Ropes & Gray LLP, SEC Issues Updated Statement on Conflict Minerals Rule (10 April 2017) ("For most registrants, the most immediate considerations will be how much to say in the calendar year 2016 Form SD and whether to include a separate Conflict Minerals Report exhibit. As a result of the Division of Corporation Finance's Statement, we expect that there will be more variation in disclosure this year relative to calendar year 2015 reporting. Among the factors that registrants will be considering in crafting their disclosure are NGO and socially responsible investor pressure around responsible minerals sourcing and disclosure rankings, messaging to commercial customers and consumers, internal corporate social responsibility values and their best guestimate as to where the Rule and market practice will be heading over the next year."); Skadden, Arps, Slate, Meagher & Flom LLP, Conflict Minerals Disclosures Due May 31, 2019 (28 May 2019) ("Even though the no-action relief remains in effect, many companies have continued to conduct due diligence and file full conflict minerals reports with the SEC, given that they already have diligence processes in place and that some stakeholders have come to expect the reports.").

*b. EU: Conflict minerals*

A 2017 EU Regulation establishes supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.[175] The Regulation establishes an EU system for supply chain due diligence obligations in order to curtail opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, their ores, and gold. It is designed to provide transparency and certainty as regards the supply practices of Union importers, and of smelters and refiners sourcing from conflict-affected and high-risk areas. The regulation comes into force in 2021.

OECD alignment assessment methodology, which analyses the alignment of industry standards with the OECD Guidelines and due diligence guidance, has been embedded into European Commission rules. They foresee a consultative role for the OECD Secretariat in the EU's recognition of industry schemes deemed compliant with the Regulation.

*c. The Netherlands: Child labour*

The Netherlands recently adopted adopt the Child Labour Due Diligence Law (2019), which requires companies to determine whether child labour occurs in their supply chains and set out a plan of action on how to combat it.

### *4.1.3. Criminal law and bribery: references to due diligence concepts in national law*

The US Sentencing Guidelines applicable to corporations were an early example of a legal incentive to develop a corporate culture and apply due diligence methods to address legal risks. The US applies relatively broad principles for the criminal liability of corporations. However, in deciding on sanctions, judges look at whether a corporation exercises due diligence to prevent and detect criminal conduct and otherwise promotes an "organizational culture that encourages ethical conduct and a commitment to compliance with the law" in assessing criminal penalties. The Guidelines set out a detailed set of guidelines and include risk-based approaches.[176]

More recently, other national legal systems have incorporated organisational issues into determinations of criminal liability. For example, under the UK Bribery Act 2010, a company is liable to prosecution if, for example, its employee engages in bribery. However, where the company can prove that it has "adequate procedures" in place to prevent such unlawful conduct, a full defence is available.[177] Law firms have described the law, and in particular the adequate procedures defence, as having a major effect on corporate behaviour:

> *No one can doubt that the [UK Bribery act 2010] (and, in particular, the threat of the corporate offence) has had a huge impact on how bribery and corruption compliance is now viewed by most companies that carry on any of their business in the UK. Indeed, it is now common practice for companies to assess their high-risk areas and develop a myriad of procedures and processes to mitigate their risks as far as possible, and ensure 'adequate procedures' are in place.*[178]

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175 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

176 See United States Sentencing Commission, 2018 Guidelines (2018).

177 UK Bribery Act 2010, ss. 7-8.

178 White & Case LLP, The Bribery Act: The Changing Face of Corporate Liability (2016).

While there is as always some uncertainty about new principles, lawyers are quick to provide guidance and the courts provide interpretations over time. In March 2011, the UK Ministry of Justice published guidance, as required by section 9 of the Act, setting out six high-level principles for companies to consider when implementing procedures to prevent bribery, which reflect an approach similar to due diligence.[179] The guidance has reportedly been used as the basis for many UK-based anti-bribery and corruption programmes.

Article 102 of the Swiss Criminal Code institutes two systems of criminal liability for enterprises which both provide that defective organisation is a condition for corporate criminal liability. In order to incur liability on the basis of Article 102(2), the enterprise must not have taken "all reasonable and necessary organisational measures to prevent the individual from committing the offence".

The use of due diligence concepts in the context of criminal statutes and proceedings may suggest that there may be today sufficient clarity about what such corporate policies require as a general matter even if certain precise aspects remain to be determined in individual cases.

The debates over due diligence measures reveal examples of strong public support for government action. Company concerns centred on perceived risks of multiple claims and liability under uncertain standards. The debates also reveal intense attention to the various aspects of the due diligence and liability framework. The configuration of interests and concerns may differ between the context of mandatory due diligence obligations and potential liability, and due diligence as a condition for access to government benefits, as discussed below.

### *4.1.4. Reporting obligations*

#### a. European Union

#### i. Directive on Non-Financial reporting

The 2014 EU Directive on Non-Financial Reporting requires EU corporations to disclose the social and environmental impacts of their business activities in nonfinancial statements.[180] The rules apply to large public-interest companies with more than 500 employees. This covers approximately 6,000 large companies and groups across the EU, including listed companies, banks, insurance companies and other companies designated by national authorities as public-interest entities. Companies are required to include non-financial statements in their annual reports from 2018 onwards. EU member states can provide for broader application.

Covered companies must publicly report on the policies they implement in relation to environmental protection; social responsibility and treatment of employees; respect for human rights; anti-corruption and bribery; and diversity on company boards. The non-financial statement should also include "information on the due diligence processes implemented by the undertaking, also regarding, where relevant and

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179 UK Ministry of Justice, The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (2011); see also UK Ministry of Justice, The Bribery Act 2010: Quick Start Guide (2011).

180 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

EU directives are legislative acts that put forth requirements that all EU member states need to achieve. EU member states must implement laws to attain the requirements but can do so in different ways. The directive required member state implementation by 2016.

proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts."[181]

The Directive gives companies significant flexibility to disclose relevant information in the way they consider most useful. Companies may use international, European or national guidelines such as the UNGPs, the OECD Guidelines or ISO 26000. The European Commission published guidelines on environmental and social disclosure in 2017 and on climate change disclosure in 2019.

#### ii. New EU regulation amending sustainability-related disclosures in the financial services sector

In December 2019, the EU adopted a new regulation on disclosure requirements related to sustainable investments and sustainability risks.[182] The agreed rules will strengthen and improve the disclosure of information by suppliers of financial products and financial advisors towards end-investors.

The new regulation sets out information obligations for financial market participants and financial advisers with regards to the integration of sustainability risks (environmental, social or governance (ESG) risks) in their processes, as part of their duty to act in the best interest of clients. By so doing, it addresses information asymmetries on sustainability issues between end-investors and financial market participants or financial advisers. The regulation also requires the disclosure of adverse impacts on sustainability (ESG) matters, such as in assets that pollute water or devastate bio-diversity, to ensure the sustainability of investments. The regulation also establishes disclosure rules for financial products that pursue sustainable investment objectives ("dark green" financial products) or promote environmental or social characteristics ("light green" financial products).

### *b. UK: modern slavery*

In the UK, the Modern Slavery Act (2015) requires businesses with a certain turnover to report each year on the steps they have taken during the past year to ensure that slavery and human trafficking are not taking place in their own business or in their supply chains.

### *c. Australia: modern slavery*

The Australian Modern Slavery Act (2018) imposes mandatory reporting obligations related to the steps taken to respond to the risk of modern slavery in the operations and supply chains of the reporting entity and its controlled entities.

### *d. Canada: introduction of a private member's bill for reporting on modern slavery*

In February 2020, a bill for a Modern Slavery Act was introduced in Canada's Parliament.[183] It is supported by the All-Party Parliamentary Group (APPG) to End Modern Slavery and Human Trafficking. The Act would require certain corporate entities to report steps they have taken to eliminate instances of forced labour and child labour in their supply chains. The Act would also allow for a prohibition on the importation of products that are produced wholly or in part by forced labour or child labour. The bill does not include

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181 Id., preamble para 6 & art. 1 (1)) (adding a new art. 19a to Directive 2013/34/EU).

182 See Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability- related disclosures in the financial services sector, Official Journal L-317 (9 Dec. 2019).

183 S-211, An Act to enact the Modern Slavery Act and to amend the Customs Tariff.

any due diligence requirements. The reporting obligations would be enforced through a Government minister rather than by the courts or an ombudsperson.[184]

#### *e. Climate change disclosure*

More research is required, but a recent survey of national and regional developments suggests movement towards mandatory reporting on climate change in a number of jurisdictions.[185] In June 2019, Mark Carney, Governor of the Bank of England, signalled the need to move to mandatory climate change disclosure. He also noted that analysis of firms' exposure to "transition risks" was a key element of the future policies needed to address climate change.[186]

### *4.1.5. Conditioning access to government contracts, services and benefits (other than investment treaties)*

#### *a. Government procurement*

##### i. United States

The US Federal Acquisition Regulation (FAR) places due diligence requirements on the supply chain activities of government contractors with particular emphasis on eradicating human trafficking.[187] As a condition to seek government contracts, the FAR requires contractors to certify that they have implemented compliance plans to prevent the occurrence of the prohibited acts. The rules contains "flow-down provisions" through which contractors will be responsible for the acts and omissions of subcontractors and agents in their supply chain. Accordingly, contractors need to verify that they have conducted due diligence to ensure none of their agents or subcontractors are involved in trafficking-related activities.

##### ii. European Union

Three new EU Directives on public procurement adopted in 2014 expanded the scope for consideration of HR/RBC.[188] At the same time, they leave considerable discretion, inviting but not requiring more active use by Member States' purchasing authorities.

They appear to prohibit consideration of whether an economic operator (a tenderer) applies broad-based due diligence to address HR/RBC in accordance with OECD Guidelines and DDG or the UNGPs. All procurement criteria must be "linked to the subject matter" of the contract. Criteria is "linked" where it

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184 See Emily Dwyer, Modern slavery bill misses the mark (25 Feb. 2020) (criticism from NGO); Miville-Dechene, Julie & John McKay, Modern slavery bill sponsors respond to CNCA Op-Ed saying Bill S-211 'misses the mark' (6 Mar. 2020) (response by bill sponsors).

185 Nadine Robinson, Are we headed towards mandatory climate disclosure? (1 Aug. 2019).

186 Mark Carney, Enable, Empower, Ensure: A New Finance for the New Economy (20 June 2019).

187 See generally FAR 52.222-50, 48 CFR § 52.222-50 - Combating Trafficking in Persons (prohibiting government contractors from engaging in human trafficking and using forced labour in the execution of their contracted work).

188 Directive 2014/24/EU updates previous procurement rules for public supply, service and works contracts (the "Public Sector Directive"); Directive 2014/25/EU updates previous procurement rules in the transport, water, energy and postal sectors (the "Utilities Directive"); Directive 2014/23/EU was also newly introduced in 2014 to cover the award of concessions over EUR 5 million (the "Concessions Directive"). See Institute for Human Rights and Business, Protecting rights by purchasing right: the human rights provisions, opportunities and limitations under the 2014 EU Public Procurement Directives (Nov. 2015).

relates to the works, supplies or services in question at any stage of their life cycle, including production and trading. Criteria that relates to general corporate policies are prohibited.[189]

Procurement decisions are numerous and are taken by national buyers. Generality in procurement criteria could open the door to risks of protectionism and local favouritism. Adjudicators reviewing decisions would have a limited capacity to police such behaviour.

### *b. Export credit*

In 2016, the OECD Council adopted an amended version of its 2012 Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches").[190] Its first objective was to "[p]romote coherence between Adherents' policies regarding officially supported export credits, their international environmental, climate change, social and human rights policies, and their commitments under relevant international agreements and conventions, thereby contributing towards sustainable development." It also sought to "[p]romote a global level playing field for officially supported export credits and increase awareness and understanding, including among non-Adherents, of the benefits of applying this Recommendation".

The Recommendation frames due diligence as a requirement for government Adherents rather than for enterprises seeking support.[191] Where there is a high likelihood of severe project-related human rights impacts occurring, the environmental and social review of a project may need to be complemented by specific human rights due diligence. The text describes examples of severe project-related human rights impacts as impacts that are particularly grave in nature (*e.g.* threats to life, child/forced labour and human trafficking), widespread in scope (*e.g.* large-scale resettlement and working conditions across a sector), cannot be remediated (*e.g.* torture, loss of health and destruction of indigenous peoples' lands) or are related to the project's operating context (*e.g.* conflict and post-conflict situations).[192] The text does not clarify whether the additional due diligence should be carried out by the government, the applicant for support or both.

The applicant's role is framed primarily in terms of preparing an environmental and social review of its project rather than in terms of due diligence. Impact and assessments or reports are to be provided in accordance with a range of international standards depending on the circumstances.

Possible Adherent decisions to condition support are contemplated. However, there is no recommendation to impose conditions. The only recommendation is to consider and decide on the issue.[193] Where conditions are imposed, compliance should be monitored.

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189 See, e.g. Utilities Directive, recital 102: ("the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting entities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place").

190 See OECD (2016), Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence.

191 See, e.g. id. para. 13 ("Adherents should undertake an environmental and social review of projects, in accordance with the international standards applied to the project as set out in paragraphs 21-26 of this Recommendation, consisting of … consideration of measures that can be taken to prevent, minimise, mitigate or remedy adverse impacts and/or to improve environmental and social performance ….").

192 Id. para 14 n.2.

193 See id., para. 32. ("In the event that support is to be provided, Adherents should decide whether this should involve conditions to fulfil prior to, or after, the final commitment for official support, for example, measures to prevent,

For “Category A” projects which bear the greatest risks[194], reports and related information are to be provided to ensure that relevant potential environmental and/or social impacts are addressed according to the information provided by applicants during the environmental and social review.

In the case of non-compliance with the conditions of official support, the Recommendation provides that Adherents should take actions that they deem appropriate in order to restore compliance, in accordance with the terms of the contract for official support. The focus is on improving the situation on the ground. Withdrawal of or recovery of support is not expressly contemplated.

The Recommendation is monitored through periodic surveys on Members’ policies and practices relating to environmental and social due diligence; and information provided by Members for all projects supported that had a potentially high or medium negative environmental or social impact (known as Category A and Category B projects). In addition, Members are required to publish information on how their export credit agency implements the Common Approaches, together with information on the Category A projects under consideration and the Category A and Category B projects supported in any one year.[195]

### *c. Trade support and trade diplomacy*

Some governments have taken action or are considering establishing links between business conduct and trade advocacy services. For example, companies who wish to receive trade advocacy services from the Government of Canada are required to sign an Integrity Declaration to be able to qualify for trade advocacy support. The Declaration refers to the OECD Guidelines, the NCP and the potential denial of individualized trade advocacy support to companies that do not cooperate in good faith with the NCP. As of December 2017, the Declaration had been signed by over 550 companies or private sector officials since 18 November 2016.[196]

In April 2019, the Canadian government appointed the first Canadian Ombudsperson for Responsible Enterprise who “has the mandate to review alleged human rights abuses arising from a Canadian company’s operations abroad, make recommendations, monitor those recommendations, recommend trade measures for companies that do not co-operate in good faith, and report publicly throughout the process.” The linkages between the Ombudsperson’s jurisdiction and the mandate of Canada’s NCP still need to be clarified.

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minimise, mitigate or remedy potential adverse environmental and social impacts, covenants, and monitoring requirements.”)

194 See id., para. 11. (“Category A projects are those with the potential to have significant adverse environmental and/or social impacts, which are diverse, irreversible and/or unprecedented. These impacts may affect an area broader than the sites or facilities subject to physical works. Category A, in principle, includes projects in sensitive sectors or located in or near sensitive areas.”)

195 The OECD Council has also adopted a Recommendation specifically devoted to bribery and officially supported export credits. See OECD, Recommendation on Bribery in Officially Supported Export Credits (adopted by the OECD Council on 13 March 2019, replacing an earlier 2006 Recommendation). The revised Recommendation applies to transactions benefitting from all types of official export credit support. It recommends that Adherent governments screen and undertake due diligence on all applications for official export credit support covered by the Recommendation with the aim of identifying which applications should be subject to enhanced due diligence for risks associated with bribery. It also expands the scope of recommended declarations by applicants for support to allow for screening and appropriate due diligence. It takes a flexible and practical approach to screening and enhanced due diligence given a variety of possible contexts. The Recommendation provides for follow-up of implementation.

196 See Canada, 2017 National Contact Point (NCP) Annual Report.

## 4.2. Domestic cases in home states for MNEs and access to remedies

This section reviews developments in national courts. It considers particular some avenues under which alleged victims of torts or human rights abuses caused by companies have sought remedies in the courts of the parent company of a corporate group, notably in cases where remedies in a host state appear to be unavailable. This is a sensitive and important issue. This section primarily describes recent developments of note in this area. It also notes the debate over the scope of fiduciary duties of company directors.

### *4.2.1. Corporate liability for breach of customary international law or for torts under domestic law inspired by customary international law*

In a landmark 2020 case, the Supreme Court of Canada held in a 5-4 decision that a corporation can be held liable for breach of customary international law (CIL).[197] The court concluded that a common law claim that a Canadian mining company had violated various CIL obligations was sufficiently plausible to survive a motion to strike the pleadings.

The plaintiffs in the case are Eritrean refugees who allege they were forced to work at a gold mine in that country. The plaintiffs allege that defendant Nevsun Resources Ltd (Nevsun) engaged the Eritrean military, and corporations controlled by it and by the sole political party in Eritrea, to build the mine and related infrastructure.[198] For this purpose, the military deployed or provided forced labour, conscripted under Eritrea's National Service Program. The plaintiffs allege that they were among those forced to work at the mine in inhuman conditions and under the constant threat of physical punishment, torture and imprisonment, even after they had served their periods of conscription in the military.[199]

The main question on appeal was whether the CIL prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity may ground a claim against a corporation for damages under Canadian law.[200] The defendant corporation sought to have the CIL based causes of action struck out at a preliminary stage on the basis that the pleading disclosed no reasonable claim under CIL or that any such claim was unnecessary because of the existence of recognised torts under existing tort law.

The court found that CIL norms in fact constitute Canadian domestic common law absent any conflicting domestic laws. In other words, CIL is not separate from Canadian law but rather froms part of it. The court found that "'[s]ince "[i]nternational law not only percolates down from the international to the domestic sphere, but ... also bubbles up', there is no reason for Canadian courts to be shy about implementing and advancing international law."[201]

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197 Nevsun Resources Ltd. v. Araya, Supreme Court of Canada (28 Feb. 2020).

198 In the preliminary procedural context of a motion by a defendant to dismiss the case based only on the pleadings, the factual allegations by the plaintiffs are generally assumed to be true. According to the complaint, the operating company, Bisha Mine Share Company ("BMSC"), is owned (indirectly) by defendant Nevsun (as to 60%) and Eritrean state companies (as to 40%).

199 Nevsun also applied to have the action dismissed on the basis of the domestic law doctrine of act of state. This doctrine is said to preclude a domestic court from adjudicating on the legality or validity of legislation of a foreign state or acts done by officials of a foreign state. A seven judge majority found that the Act of State doctrine is not part of Canadian common law which has addressed the policy issues underlying it in the law conflict of laws and judicial restraint. The court held that Canadian courts are not barred from enquiring as to the lawfulness or validity of foreign laws, especially where this is necessary or incidental to the resolution of domestic legal controversies before the Canadian courts.

200 Most of the claims were "derivative or 'indirect" claims that the company was complicit in wrongs committed by Eritrea, its officials or agents.

201 *Nevsun*, para. 71.

The court found that that CIL could apply in civil actions against corporations and provide a basis for damages liability for breaches. The court noted that international human rights treaties grant individuals direct rights against states. It noted that international criminal law imposes international legal obligations on private parties.

In addition to finding that CIL could potentially apply directly as part of Canadian law, the court also found that CIL norms may also form a proper basis for tort claims under Canadian law including possible new torts inspired by CIL principles (i.e. use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity). The court found that claims of both types – claims based on CIL as such and claims based on possible new torts inspired by CIL principles -- had a reasonable prospect of success and were thus not subject to dismissal on a preliminary motion.

The court did not describe the remedies for CIL breaches, including whether damages are available. Instead, the court held that it would be for the trial judge to determine appropriate remedies after trial if violations are found to exist.

In its opening words, the court underlined the important role that it sees for domestic courts in providing access to remedy for human rights victims in appropriate cases:

> *This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.*
>
> *The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case….*[202]

Abella J. (writing for the majority) referred to the International Covenant on Civil and Political Rights. She also referred to a treaty body report on state obligations under that Covenant, underling the importance of remedies:

> *With respect specifically to the allegations raised by the workers, like all state parties to the International Covenant on Civil and Political Rights, Canada has international obligations to ensure an effective remedy to victims of violations of those rights (art. 2). Expounding on the nature of this obligation, the United Nations Human Rights Committee — which was established by states as a treaty monitoring body to ensure compliance with the International Covenant on Civil and Political Rights — provides additional guidance in its General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004. In this document, the Human Rights Committee specifies that state parties must protect against the violation of rights not just by states, but also by private persons and entities. The Committee further specifies that state parties must ensure the enjoyment of Covenant rights to all individuals, including "asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (para. 10). As to remedies, the Committee notes:*
>
> *[T]he enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. (para. 15)*[203]

Four judges dissented. They agreed that CIL forms part of Canadian law, but did not accept that it could be used as a basis for corporate liability. They considered that that it is for the legislature to provide remedies for breaches of CIL, not the courts. The dissent also considered that the Canadian courts should not recognise new nominate torts inspired by CIL, relating to forced labour, slavery, cruel, inhuman or

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202 *Nevsun*, paras. 1-2.

203 *Nevsun*, para. 119.

degrading treatment and crimes against humanity because Canadian law already has appropriate causes of action for the miners' claims under existing torts.

Law firms based both in Canada and abroad have commented on the case, noting that it forms part of a growing global trend of regulation and guidelines that have strengthened business integrity obligations. In discussions of the case, they have advised companies to engage in greater efforts to ensure they are acting in accordance with RBC principles and requirements.[204]

### *4.2.2. The rise and fall of the US Alien Tort Statute as a potential avenue for remedies*

The Alien Tort Statute (ATS) was for a number of years the principal avenue for seeking remedies in national courts for alleged corporate violations of human rights, with over 150 cases against corporations filed from the 1990s to 2010.[205] The ATS, part of United States law since 1789, permits aliens (non-U.S. nationals) to file actions in U.S. federal courts based on "violations of the laws of nations." The statute lay dormant for many years. In the late 1970s there began a trend of using the ATS to bring actions against individuals of any nationality, if they are present in the United States, for certain egregious human rights abuses they committed abroad. In the mid-1990s, corporate defendants began to be targeted with regularity.

The ATS reference to "violations of the law of nations" has been construed to cover a limited class of alleged harms that are construed according to international law principles. Plaintiffs in corporate ATS cases generally do not contend that the companies themselves have committed the underlying violations. Instead, they tend to rely on theories of secondary or vicarious liability. The theories utilized include agency, conspiracy and, most commonly, aiding and abetting.

The breadth of coverage of ATS claims against corporations in terms of location of the alleged harm, economic sectors and type of conduct was underlined in a 2010 study:

> *In looking at the general trends associated with these roughly 150 ATS cases, 21 industries in total have been the subject of one or more ATS lawsuits – most commonly the extractive industry (25%); the financial services industry generally (18%) and banks in particular; food and beverage companies (10%); transportation companies (6.5%) such as airlines, ship companies, and railroads; manufacturing companies (6.5%); and*

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[204] See, e.g. Debevoise & Plimpton, Canadian Supreme Court Opens Door to Corporate Liability for Human Rights Abuses Abroad (19 Mar. 2020) (*Nevsun* "comes in the context of a growing global trend of regulation and guidelines that have strengthened business integrity obligations" and "corporations are increasingly expected to implement best practices to comply with guidelines such as the [UNGPs], the United Nations Global Compact, the Voluntary Principles on Security and Human Rights, and the [OECD Guidelines]"; companies "should exercise even greater caution to mitigate business integrity risks at home and abroad"); Allen & Overy, Nevsun Resources Ltd. v Araya: Canadian Supreme Court confirms that Eritreans can seek legal redress against Canadian parent company for alleged violations of customary international law (12 May 2020) (noting that the case "set[s] a ground-breaking precedent" but is also "part of a burgeoning global trend"; "companies should be alert to the risks their businesses pose, directly or indirectly, to the enjoyment by others of internationally recognised human rights and put in place strong safeguards to mitigate those risks … [including] engaging in meaningful consultations with potentially affected groups and other stakeholders, and establishing robust mechanisms to enforce compliance by business partners with internationally recognised human rights standards"); Blakes, Canadian Courts Adjudicate Alleged Breaches of International Law in Eritrea (4 Mar. 2020) (the landmark case "illustrates the growing willingness of courts in Canada and elsewhere to allow plaintiffs to pursue claims against corporations in their home jurisdictions, even when the acts complained of occurred in a foreign jurisdiction"; "corporations need to be increasingly vigilant in supervising their foreign operations and subsidiaries, and the actions of contractors, subcontractors and joint venturers").

[205] The Alien Tort Statute gives US federal courts jurisdiction over civil suits brought by foreign nationals "for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

> *communications/media companies (5%). They have arisen in roughly 60 different countries, most commonly from the Middle East (23%) and Iraq in particular; South America (20%) and Colombia in particular; Africa (15%) and Nigeria in particular; and Asia (15%). They involve a variety of alleged underlying conduct – most commonly acts by foreign security forces (25%); labor-related issues (20%); environmental claims (12%); or against companies that provide support, goods or services to allegedly repressive political regimes.*[206]

However, in recent years, the US Supreme Court and other US appellate courts have interpreted the statute to largely exclude such claims. The application of the statute to both US and foreign corporations (with a substantial business presence in the US) was largely taken for granted for a number of years. The came to fore, however, in a 2013 US Supreme Court case, *Kiobel v Royal Dutch Petroleum Co.*[207] Shell argued that the statute did not apply to corporations.

The Supreme Court did not answer that question in *Kiobel*, but found for Shell on an alternative ground – finding that the statute has limited territorial reach. The court found that the ATS does not extend to suits against foreign corporations when "all the relevant conduct took place outside the United States." It found that "the presumption against extraterritoriality applies to [ATS] claims."[208] Consequently, even claims that "touch and concern the territory of the United States … must do so with sufficient force to displace" that presumption.[209]

The Supreme Court returned to the issue of the application of the ATS to corporations in a subsequent case, *Jesner v. Arab Bank PLC*.[210] In an amicus brief, the US argued that an individual nation's recognition of a remedy against a corporation for violation of a well-established norm is consistent with international law. It considered that international law sets out substantive standards of conduct but generally leaves each nation with substantial discretion as to the means of enforcement within its own jurisdiction. International law accordingly neither requires nor precludes corporate liability.[211] The court held that the statute does not apply to foreign corporations, but did not resolve the issue of whether it applies to US corporations.

A federal circuit court of appeal found that *Jesner* did not affect its prior decisions that the statute applies to US corporations.[212] Leave to appeal the decision was sought from the Supreme Court. The US submitted an amicus brief which adopted a different position from its brief in *Jesner*.[213] It argued that corporations cannot be liable in ATS cases and that the court should agree to hear the case to address

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206 Jonathan Drimmer, Think globally, sue locally: Out-of-court tactics employed by plaintiffs, their lawyers, and their advocates in transnational tort cases (US Chamber Institute for Legal Reform (2010)), p.18.

207 *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

208 569 U.S. at 124. The presumption is based on the idea that express language is required for a statute to have extra-territorial application.

209 In *Kiobel*, Ruggie considered that counsel for Shell had not correctly reported his findings and filed an amicus brief (in support of neither side) to set the record straight on the official UN mandate findings regarding corporate liability under international law as well as extraterritorial jurisdiction: "that domestic courts may hold companies liable for human rights violations that rise to the level of international crimes, and that states are generally neither required to, nor prohibited from, exercising extraterritorial jurisdiction over corporations domiciled in their territory and/or jurisdiction provided that there is a recognized jurisdictional basis". Ruggie 2013 at 3244 (quoting *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Supreme Court), "Brief Amici Curiae of Former UN Special Representative for Business and Human Rights, Professor John Ruggie; Professor Philip Alston; and the Global Justice Clinic at NYU School of Law in Support of Neither Party," June 12, 2012).

210 *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386 (2018).

211 See *Jesner v. Arab Bank PLC* , Brief for the United States as Amicus Curiae Supporting Neither Party, (June 2017), pp. 17-19.

212 See *Doe I v. Nestle, S.A.*, 906 F.3d 1120 (9th Cir. 2018), as amended, reported at 929 F.3d 623 (2019).

213 *Nestle USA, Ltd. v. Doe I*, Brief of the United States as amicus curiae (May 2020).

that issue. The Supreme Court has accepted to hear the appeal and has scheduled argument for December 2020.[214]

Recently, plaintiffs in the United States who alleged that they have suffered from human trafficking and forced labour have brought class action claims against major companies under a different statute, the Trafficking Victims Protection Reauthorization Act.[215] The TVPRA creates civil and criminal liability for persons that engage in human trafficking and forced labour. It applies to both natural persons and legal entities. It also applies to conduct both within and outside of the United States if (i) the alleged offender is a U.S. national or permanent resident; or (ii) the alleged offender is present in the United States, irrespective of the nationality of the alleged offender.[216] Violations of the TVPRA can result in criminal or civil liability.

### *4.2.3. Parent company liability for actions relating to their subsidiaries*

#### *a. Except in ISDS, a company is generally seen as a separate entity with its own property and liabilities: neither its shareholders nor its tort victims can ignore the corporate entity*

As noted in prior Roundtable work, national courts generally consider a corporation to be a separate entity with its own property and liabilities. Shareholders are protected by limited liability: parties injured by the corporation can only look to the company's assets for recovery and cannot access shareholder assets. Conversely, shareholders, who suffer reflective losses when the company is injured by a third party, are precluded from claiming for those losses because the claim belongs solely to the company. The courts frequently note the link between the two rules, prohibiting shareholders from claiming individually for injuries to the company when they are protected from liability for injuries inflicted by the company on others.[217]

Ruggie noted that the separate entity and limited liability principle, as applied in the context of international business, can constitute significant barriers to remedies for victims of business injuries. However, Ruggie's

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214 See *Nestle USA, Ltd. v. Doe I,* Decision granting leave to appeal (cert.) (2 July 2020). In addition to corporate liability, the court will also further address the jurisdictional requirements. In the Supreme Court, two related appeals raising the same issues have been consolidated. No. 19-416, *Nestlé USA, Inc. v. Doe I*, and No. 19-*453*, *Cargill, Inc. v. Doe I*. See Supreme Court of the United States, Granted & Noted List October Term 2020, Cases For Argument.

215 In 2000, Congress enacted the Trafficking Victims Protection Act ("TVPA"). In 2003, the US Congress reauthorized the TVPA as the Trafficking Victims Protection Reauthorization Act ("TVPRA") and has amended it several times since then. See Littenberg, Michael R., Nellie V. Binder and Anne-Marie L. Beliveau, Corporate Social Responsibility Legislation: A Summary of Selected Instruments, p. v and 60-61 (May 2020).

216 Id.

217 See, e.g. *Kagan v. Edison Bros. Stores Inc.*, 907 F.2d 690, 693 (7th Cir. 1990) ("The [shareholder and company creditor] investors are asking us to disregard [the company's] corporate form.... Although the [shareholder] plaintiffs want us to allow them to recover for injuries mediated through [the company], they most assuredly do not want us to hold them liable for [the company's] debts. They seek the best of both worlds: limited liability for debts incurred in the corporate name, and direct compensation for its losses. That cushy position is not one the law affords. Investors who created the corporate form cannot rend the veil they wove."); *Alford v. Frontier Enterprises, Inc.*, 599 F.2d 483 (1st. Cir. 1979) ([the shareholder] "is attempting to use the corporate form both as shield and sword at his will. [T]he corporate form effectively shielded [him] from liability" but the shareholder contended that he "can disregard the corporate entity and recover damages for himself. Of course, this is impermissible."); see generally Gaukrodger, D., Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency, OECD Working Paper on Investment 2013/3, pp. 15-23 (surveying advanced corporate law systems; shareholders of companies generally benefit from limited liability but cannot claim for reflective loss).

survey of the relationship between corporate law and human rights in thirty-nine jurisdictions around the world indicated that legal separation and limited liability exists in all of them. Ruggie noted that "[a]t the very foundation of modern corporate law lies the principle of legal separation between a company's owners (the shareholders) and the company itself, coupled with its correlative principle of limited liability, under which shareholders are held financially liable only to the extent of the value of their ownership shares."[218]

As the Roundtable has seen in earlier work, ISDS is unique among legal systems in generally overriding the legal separation principle to allow covered shareholders (but only them) to ignore "their" company as a separate entity and claim for reflective loss in ISDS. The legal separateness principle has thus been widely disregarded in ISDS for purposes of allowing remedies for parent companies against governments for loss arising from injury to their subsidiaries. Shareholders' limited liability is not addressed in investment treaties. Covered shareholders can thus have the extraordinary benefit of benefitting from limited liability while ignoring the corporate entity in claims in ISDS.[219]

Other than in ISDS, however, the general principles identified by Ruggie remain well established in national courts and under international law. Courts generally continue to uphold the corporate doctrine of separateness, as exemplified by the recent UK Supreme Court decision in *Marex Financial Ltd v Sevilleja*. They generally reject claims by both (i) tort victims of companies seeking recovery against a shareholder (parent corporation)[220]; and (ii) shareholders seeking recovery of reflective loss against a party that has injured the company.[221]

Both ISDS and BHR/RBC developments in this area may be of note in the context of policy consideration of corporate separateness and limited liability concepts, and possible exceptions thereto, in international business, including in the context of ongoing work at the OECD and UNCITRAL. International organisations and treaties can be valuable avenues for negotiation and agreement on jurisdictional and related matters.

### *b. Developments in parent company liability*

While corporate separateness remains generally intact under national law, a few courts including the UK Supreme Court have recently recognised potential tort liability for parent corporations in some recent major cases involving human rights-type claims. This type of theory involves "direct" parent company liability for its own actions under ordinary tort law principles rather than vicarious liability for the actions of its subsidiary; consequently, it does not involve the separate entity principle.[222]

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218 Ruggie 2013 at 3132.

219 Gaukrodger, D., Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency, OECD Working Paper on Investment 2013/3.

220 See, e.g. *Yaiguaje v Chevron Corporation*, 2018 ONCA 472 (Ontario (Canada) Ct. App., 23 May 2018) (rejecting effort to enforce judgment against assets of indirect shareholder of judgment debtor).

221 See, eg., Marex Financial Ltd v Sevilleja [2020] UKSC 31 (UK Supreme Court 2020) (bar against shareholder claims for reflective loss where company has a cause of action is a bright line legal rule - a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable; overruling cases that applied exceptions to the rule); *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55 (Supreme Ct. of Canada 2018) (in civil law case under Quebec law, affirming summary dismissal of shareholder claim for reflective loss where shareholder had not suffered a direct and personal injury that was distinct from that of the company); *United States v. Starr Int'l Co. Inc.*, 856 F.3d 953 (Ct. App. of D.C. Cir., 9 May 2017) (denying claim for reflective loss by shareholder of AIG against the United States arising from government bail-out of company), leave to appeal to the US Supreme Court denied (cert. denied), 26 Mar. 2018.

222 Vicarious parent company liability is at issue in *Nevsun*. As noted, according to the complaint, the operating company, Bisha Mine Share Company ("BMSC"), is owned (indirectly) by defendant Nevsun (as to 60%) and Eritrean

As a unanimous supreme court decision in an intensively litigated case, the case is of note *inter alia* for its consideration of parent company liability, the importance of corporate policies analogous in some ways to HR/RBC due diligence, and for the appropriate scope of extraterritorial jurisdiction.

In the UK, 1,826 Zambian citizens brought proceedings against (i) Vedanta, a UK domiciled multinational mining company, and (ii) its Zambian subsidiary Konkola Copper Mines ("KCM"), a copper mining company operating one of the largest copper mines in the world. The claimants allege that as a result of the defendants' toxic effluent discharge from their Nchanga Copper Mine they have suffered loss of income through damage to the land and waterways on which they rely. They further contend that many are suffering from personal injuries as a result of having to consume and use polluted water. They are seeking damages, remediation and cessation of the continual pollution.

The defendants contested the jurisdiction of the UK courts over the case. After lengthy and contentious proceedings, the UK Supreme court unanimously upheld lower court decisions finding jurisdiction over both defendants.[223] Two key issues in *Vedanta* were (i) whether the claims gave rise to a real triable issue against Vedanta, the English parent company[224]; and (ii) whether the English courts should take jurisdiction over a case involving alleged victims and injuries in Zambia.

The issue of whether there was a triable issue with regard to Vedanta turned in large part on whether it had a "duty of care" to the claimants for purposes of possible liability for negligence. This depended on its actions *vis-à-vis* its subsidiaries including statements and actions with regard to environmental policies.

KCM and Vedanta argued for a general principle that a parent company could never incur a duty of care in respect of the activities of a subsidiary simply by putting in place group-wide policies and guidelines and expecting the management of each subsidiary to comply with them.[225] A unanimous Supreme Court rejected this argument for such a bright-line rule and indicated that parent company liability should be subject to general tort law principles for determining the existence of a duty of care.

The court identified several possible grounds for findings of a duty of care based on general principles. A first ground could be systemic errors in group guidelines: "Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties".[226]

Second, the court found that "[e]ven where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries".[227]

Third, a parent company failure to act in accordance with claimed supervision and control of its subsidiaries in published materials was also seen as potentially giving rise to liability: "if in published materials, [the

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state companies (as to 40%). On the question of parent company liability, the plaintiffs assert that Nevsun is liable for the conduct of its (indirect) subsidiary BMSC on the basis of (i) agency; (ii) that it was an "extension of the business enterprise of Nevsun"; and (iii) that the corporate ownership structure separating Nevsun from BMSC is "artificial and should be disregarded in the interests of justice." Nevsun claimed that it and several corporations in the corporate structure between Nevsun and BMSC are entitled to the protection of limited liability. However, Nevsun did not bring a preliminary motion on that issue, leaving it for trial, and it was not addressed by the recent Supreme Court of Canada decision.

223 *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2019] UKSC 20 (*Vedanta*).

224 Because of the preliminary nature of the challenge to jurisdiction, the court was only determining whether there is a triable case, not actual liability or remedies.

225 *Vedanta*, para. 52.

226 Id.

227 Id., para. 53.

parent] holds itself out" as taking active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries, but does not in fact do so, "its very omission may constitute the abdication of a responsibility which it has publicly undertaken".[228]

The court noted that the claimants in *Vedanta* primarily based their case for a duty of care on actual intervention by Vedanta (and not for example on a failure to carry through on claimed policies and supervision):

> *The essence of the claimants' case against Vedanta is that it exercised a sufficiently high level of supervision and control of the activities at the Mine, with sufficient knowledge of the propensity of those activities to cause toxic escapes into surrounding watercourses, as to incur a duty of care to the claimants. In the lengthy Particulars of Claim (in which this allegation of duty of care, together with its particulars, occupied 13 pages) the claimants make copious reference, including quoted highlights, to material published by Vedanta in which it asserted its responsibility for the establishment of appropriate group-wide environmental control and sustainability standards, for their implementation throughout the group by training, and for their monitoring and enforcement.*[229]

The court upheld the lower court decisions that the claimants' case was sufficient to establish a triable issue on the point.

In remarks possibly giving the decision broader significance, the court placed more emphasis on general published materials of the parent company than on more case-specific evidence such as an intra-group contract or evidence from an individual:

> *This court has, again, been taken at length through the relevant underlying materials. For my part, if conducting the analysis afresh, I might have been less persuaded than were either the judge or the Court of Appeal by the management services agreement between the appellants, or by the evidence of Mr Kakengela. But I regard the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control, over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards, by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial, after full disclosure of the relevant internal documents of Vedanta and KCM and of communications passing between them.*[230]

The court also addressed arguments about whether the English court was the "proper place" or whether the case should be heard in Zambia. Vedanta underlined that by the time of the initial hearing it had agreed to submit to the jurisdiction of the Zambian courts. This largely eliminated the risk of inconsistent judgements against the parent (in England) and the subsidiary (in Zambia). The court noted Vedanta's agreement to submit to the Zambian courts and recognised that this substantially reduced the risk of inconsistent judgements. It nonetheless found that the English courts were the proper place because there was a real risk that substantial justice would not be obtainable in the foreign jurisdiction due the absence of funding mechanisms for impoverished claimants such as legal aid or conditional fee agreements (CFAs), and due to the lack of substantial and suitably experienced legal teams for complex litigation against a well-funded adversary.[231]

As a unanimous decision from an influential common law court, *Vedanta* has attracted considerable attention. Corporate law firms have highlighted the issues for their clients and potential clients. A few other

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228 Id.

229 Id., para. 55.

230 Id., para. 61.

231 Id., para. 89.

recent cases have adopted similar approaches to potentially finding parent companies liable for their own actions *vis-à-vis* their subsidiaries, but more research is needed.

### *4.2.4. Corporate law and the scope of fiduciary duties*

There is a growing debate over the nature of the fiduciary duties of boards of directors that have the overall governance of the company. Fiduciary duties generally include a duty of care (to carry out duties diligently and carefully) and a duty of loyalty (to advance the interest of the beneficiary of the duty rather than other interests including personal interests). Since the 1970s, notably under the influence of Milton Friedman, the notion of shareholder primacy has been widely influential.

Concerns about excesses linked to governance of companies solely in the interests of shareholders have been increasingly raised in recent years. A key issue is the degree to which corporate law permits directors to consider interests of constituencies other than shareholders (such as workers or local communities), in particular when the two conflict. Another key issue is the scope of risks that directors can consider where the risks may be long-term due to current policy failures to internalise the costs of externalities generated by the firm. Climate change risks are a high-profile example of this.

The tension can be reduced to some degree by the notion of the long-term interests of shareholders which directors are generally permitted to consider even under shareholder primacy model. These can include many factors including relations with workers, communities or consumers, as well as long-term risks.

The issues are under discussion in corporate law and policy generally. In France, the “Loi Pacte” adopted in May 2019 requires that the management of French companies takes into consideration social and environmental issues and encourages companies to integrate social objectives into their corporate mission. In the United States, traditionally a strong proponent of the shareholder primacy model, the Business Roundtable recently issued a high-profile call for companies to pay attention to broader constituencies.[232]

In the EU, the European Commission launched a public consultation in July 2020 on a sustainable corporate governance initiative that aims to better align the interests of companies, their shareholders, managers, stakeholders and society. The Commission will publish the comments received and its reactions. It expects to prepare a proposal for a directive in the first quarter of 2021.[233]

The impact assessment prepared for the consultation notes concerns about incentives favouring shareholder interests over others, leading to high levels of pay-outs by companies to shareholders and low levels of investment. The assessment suggests that the drivers of these problems are both market and regulatory failures:

> *Though (national) company laws in essence require corporate boards to act in the interest of the company as a whole, the company interest and directors duties are interpreted narrowly favouring maximisation of short-term financial value. Shareholder pressure also plays a role as well as directors' remuneration linked to financial performance. This market failure has been facilitated by shortcomings in corporate legislation and governance codes as they foster directors' accountability towards shareholders and do not sufficiently cover the interest of other stakeholders, including those affected by the company and the local and global environment.*[234]

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232 See Business Roundtable, Statement on the Purpose of a Corporation (Aug. 2019).

233 See European Commission, Sustainable corporate governance initiative.

234 Id. The study focuses on pay-outs to shareholders by the company under normal corporate law (dividends and share buybacks); it does not address the impact of current investment treaty interpretations modifying corporate law rules to provide further benefits to covered shareholders through direct pay-outs without any company approval or role.

The paper notes a recent review of many studies finds that companies performing well on sustainability factors outperform their peers and that similar findings have emerged from the covid crisis context. The paper also addresses the issue of corporate groups and value chains and suggests that the current legal framework "lags behind the development of global value chains and corporate structures when it comes to the responsibility of a limited liability company for identifying and preventing harm in its group-wide operations and production channels".

The issue remains contentious in the general corporate law debate as well as in the context of international business responsibilities.[235]

## 4.3. Interaction between national and regional legal regimes, as well as accepted international principles

As noted, the UNGPs and the OECD Guidelines contemplate a multi-faceted approach to improving business conduct. At a scoping level, identifying cross-pollination of initiatives and developments is challenging. However, the phenomenon is worth noting and the *Vedanta* case may provide an interesting illustration.

*Vedanta* does not mention the OECD Guidelines, due diligence guidance or the UNGPs. Nor does it mention the business responsibility to respect human rights. It was primarily argued under English tort law although the case involved international business and alleged environmental harm causing personal injuries due to polluted water as well as damage to land and waterways. This presumably reflects the focus of the disputing parties.[236]

The basis for possible liability was the assumption of responsibility by the parent over the actions of its subsidiary, notably through published group-wide guidelines and policies. The court made clear that under English law the parent company has no general duty to take such responsibility over its subsidiaries:

> *Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity.*[237]

While the Guidelines, due diligence guidance and UNGPs do not impose duties on business, they do make clear that businesses have the responsibility to respect. As noted, this responsibility applies to the corporate group and beyond. It also requires the exercise of due diligence.

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235 For recent corporate governance debates on the issues in the US following the Business Roundtable statement, see, e.g. Bebchuk, Lucian A. and Roberto Tallarita, The Illusory Promise of Stakeholder Governance, forthcoming in Cornell Law Review, December 2020 (summarised in a blog); Strine, Leo E. Jr, Toward Fair and Sustainable Capitalism, Univ. of Penn., Institute for Law & Econ Research Paper No. 19-39 (2019) (summarised in a blog).

236 The defendants portrayed the case as one seeking to impose a new and novel cause of action (which would have made it easier to dismiss under applicable law). The claimants successfully argued that the case should be decided based on ordinary tort law principles. Citation of international guidance and principles, even ones where there is remarkable multi-stakeholder convergence on content, could have undermined the claimants' focus on ordinary English tort law.

237 *Vedanta*, para. 49.

There is also potential interaction between regional and national regulation with regard to due diligence and reporting obligations. For example, as noted, the UK 2015 Modern Slavery Act addresses slavery and human trafficking in the supply chains of large companies (wherever incorporated) that carry on a business or part of a business in the UK. The Act itself imposes no legally binding requirements to conduct due diligence on supply chains. A covered company, however, must choose either to make (i) a "statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place … in any of its supply chains and in any part of its own business"; or (ii) declare publicly that it has taken no such steps. The latter approach would affect its reputation. The UK government has not created a central registry for statements by companies, but one is maintained by the Business and Human Rights Resource centre together with partner organisations.[238] It allows stakeholders to analyse whether statements are in compliance with the legislation and analyse the quality of reporting. A recent review of over 10,000 statements found that 30% complied with all of the minimum requirements under the Modern Slavery Act.[239]

Under *Vedanta*, public commitments are relevant to parent company liability. Public descriptions by companies of their policies to ensure that slavery and human trafficking is not taking place may be relevant to determining if companies have exposure to tort liabilities in that area.

A company subject to UK tort law may also be subject to the French duty of vigilance law imposing due diligence obligations and reporting with regard to subsidiaries; this could provide the basis for a finding of a duty of care. Similarly, reporting under the EU Non-Financial reporting directive could be relevant.

Despite important cases and developments in a few jurisdictions, there is little doubt that access to judicial remedies for many victims remains a major issue.

# 5. Investor, business, trade union and civil society action

As noted, the principal focus of this initial scoping analysis is on government action. There are, however, numerous initiatives by investors, business, trade unions and civil society. This section merely highlights a few salient examples.

## 5.1. "Sustainable" or "environmental, social and governance" (ESG) investing

There is broad interest today among investors and asset managers in responsible investment and the incorporation of environmental, social and governance (ESG) factors in investment decision making.[240] ESG investing grew out of the UN Global Compact. The goal of the initiative was to find ways to integrate ESG considerations into capital markets. The number of funds using ESG factors increased from fewer than 50 in 2,000 to nearly 1,100 in 2016.[241] Today, ESG investing is estimated at over USD 20 trillion in assets under management or around a quarter of all professionally managed assets around the world.

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238 See Business & Human Rights Resource Centre, Modern Slavery Registry.

239 Id. (based on review of the 10,926 most recent statements by companies under the UK Modern Slavery Act in the register).

240 The term ESG is used here for convenience due to its wide current usage. The term responsible investment is preferred by important actors in the field, such as the Principles for Responsible Investment, discussed below. See the PRI comments on the consultation paper and the PRI webpage on the issue.

241 John Gerard Ruggie and Emily Middleton, Money, Millennials and Human Rights: Sustaining "Sustainable" Investment, Global Policy (Feb. 2019).

ESG investing is promoted by numerous initiatives. The Principles for Responsible Investment (PRI), dating from 2006, are a private initiative supported by UN agencies. It seeks to understand the investment implications of responsible investment and to support an international network of investor signatories in incorporating these factors into their investment and ownership decisions. The number of PRI signatories reached 2800 in 2020, with 90 trillion USD of assets under management (AUM). In 2018, the PRI introduced minimum requirements for signatories including an investment policy that covers the investor's responsible investment approach, which must account for more than 50% of assets under management. The Sustainable Stock Exchange Initiative (SSEI), seeks to integrate ESG considerations into stock exchange policies. Some exchanges now require ESG disclosure for listed companies or provide guidance on reporting.

Fund managers and other institutional investors were initially reluctant to embrace the concept. Consideration of ESG factors is increasingly seen as a legitimate part of the fiduciary duty of institutional investors. Views that fiduciary duties are limited to the maximization of shareholder value are receding and in any event recognition that ESG factors affect shareholder value is becoming widespread.

While there is strong consumer demand and a clear market response, it is unclear that investors are getting what they seek because the quality of information about ESG performance can be uncertain. Funds and agencies marketing ESG ratings use non-public algorithms that are difficult to evaluate. Some academic work has shown that the same company can be at top of one service's ratings and at the bottom of another's.[242] The ESG factors have generally been developed autonomously by financial market service providers actors without regard for agreed frameworks such as the UNGPs or Guidelines. Uncertainty about the measurement of ESG performance by companies remains a major issue that affects the transmission of consumer demand to company performance.

Various initiatives seek to produce standardised forms of disclosure. For example, the Global Reporting Initiative (GRI) was launched in 2000. Today, 80% of the world's largest corporations use GRI standards. Other include the International Integrated Reporting Initiative (IIRC) and the US-based Sustainability Accounting Standard Board (SASB). These voluntary initiatives reflect regulatory disclosure requirements in key jurisdictions and extend further.

IOSCO (the International Organisation of Securities Commissions) published a statement in 2019 on ESG disclosure and a report encouraging securities regulators to require ESG disclosures from issuers.[243] Financial market authorities are updating their listing rules and disclosure requirements to introduce mandatory ESG disclosures.[244]

The 2020 OECD Business and Finance Outlook notes that ESG investing has grown considerably and is fast becoming mainstream, but underlines that market participants across the board are missing the relevant, comparable ESG data they need to properly inform decisions, manage risks, measure outcomes, and align investments with sustainable, long-term value. [245] The 2020 Outlook is a call to action for governments and market participants to make ESG investing fairer, more transparent and more efficient. Regulators of large jurisdictions with developed financial markets are already engaging on these very topics, and making good progress. However, both capital markets and many ESG factors are global in reach. The Outlook underlines that global principles are needed to help establish good practices that

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242 See Berg, F., J. Kölbel and R. Rigobon, Aggregate Confusion: The Divergence of ESG Ratings, MIT Sloan Research Paper No. 5822-19 (17 Aug. 2019).

243 See IOSCO, Statement on Disclosure of ESG Matters by Issuers (18 Jan. 2019); Growth and Emerging Markets Committee, IOSCO, Sustainable finance in emerging markets and the role of securities regulators, Final report (June 2019).

244 Further information on ESG disclosure consultations by market authorities can be found on PRI's briefings and consultations webpage.

245 See OECD, Sustainable and Resilient Finance (2020).

acknowledge regional and national differences, while ensuring a constructive level of consistency, transparency, and trust. PRI has similarly advocated for an international dialogue on ESG reporting harmonisation and standardisation involving multilateral organisations and ESG reporting stakeholders.

There have been many efforts to determine the impact of ESG issues on financial performance of companies. Some recent studies find that ESG investments perform at least as well as others, which has heightened and broadened investor interest.

## 5.2. Rana Plaza and the Bangladesh Accord between international brands and trade unions

On April 24, 2013, the Rana Plaza building in Savar, Bangladesh collapsed catastrophically, resulting in the deaths of over a thousand factory workers and injuring thousands more. The building housed among other things several garment factories that produced clothes for well-known global companies and brands. In another tragic accident only five months earlier, at least 112 workers had lost their lives, trapped inside a burning fashions factory, also in Bangladesh. The Rana Plaza disaster attracted global media attention.

Companies took different approaches. The Accord on Fire and Building Safety in Bangladesh (the "Accord') is the most prominent.[246] The website of the Accord describes it as "an independent, legally binding agreement between brands and trade unions designed to work towards a safe and healthy Bangladeshi Ready-Made Garment Industry." Its signatory companies include many of the world's leading global brands and retailers, and two global trade union federations.

Both buyers and trade unions (both global and Bangladeshi) are parties to the Accord which is primarily focused on safety issues. It makes signatory buyers at the top of the supply chain jointly responsible, along with contractors, for safety conditions in Bangladeshi garment factories. It imposes obligations on the buyers which include financial obligations to help suppliers pay for safety upgrades, such as the installation of fire exits, or, in the case of structurally unsound buildings, major repairs while guaranteeing the payment of workers' salaries for time lost at work. Buyers make commitments of at least two years, at current production volume levels, to their supplier factories to address concerns about the impact on workers and safety. Lead firms are required to drop contractor factories that do not adhere to the program's standards. The Accord is a contract and its provisions are enforceable.

The Accord established a Steering Committee of seven members: three representatives from trade union signatories (one from each of the Global Union Federations that signed the agreement and a representative of the Bangladeshi labour movement), three representatives from company signatories, and a representative chosen by the ILO as "a neutral chair and independent advisory member".[247] In addition to the standing Steering Committee, the Accord provided for *ad hoc* arbitration.

The Accord has been seen as an innovative measure to address supply chain issues.[248] Detailed public quarterly reports addressed progress in achieving inspections, remediations, safety training and other matters.

Under the Accord's dispute resolution process, disputes concerning implementation are first submitted to the seven-member Steering Committee. Any decision of the steering committee may then, at the request of either party, be appealed to a process of binding arbitration. Awards are stated to be subject to the New York Convention.

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246 Accord on Fire and Building Safety in Bangladesh (13 May 2013).

247 Accord, art. 1, Governance.

248 US companies in particular, however, were concerned about liability risks in relation to the Accord. See Steven Greenhouse, U.S. Retailers See Big Risk in Safety Plan for Factories in Bangladesh, New York Times (22 May 2013).

The trade union signatories brought two cases. The main arbitral tribunal decision was that the claims were admissible notwithstanding the lack of a prior Steering Committee decision in favour of one of the parties. (The Steering Committee had split 3-3 on the cases and the ILO representative had declined to take a position.) The disputing parties settled one of the cases in Jan. 2018 with a reported USD 2.3m settlement.[249] The brand agreed to pay USD 2m to fix issues at more than 150 garment factories. A further USD 300,000 will be paid to the two unions to fund a joint "supply chain worker support fund", an initiative that supports union-backed efforts to improve pay and conditions for workers in global supply chains. The second case was also settled in Dec. 2017, but under tighter confidentiality provisions with no disclosure of the amount.

In another initiative arising from the Rana Plaza tragedy, a group of companies, mainly from North America, formed the Alliance for Bangladesh Worker Safety. The Alliance also engaged in work to improve safety conditions in Bangladesh. It describes itself as a group of 28 global apparel companies, retailers and brands that recognized the urgent need to rapidly improve working conditions for garment industry workers and have joined together to help improve worker safety in Bangladeshi ready-made garment (RMG) factories. The Alliance took the form of a Delaware corporation. The program did not take the form of an agreement with unions or enforceable by them.

For some commentators, the experience of the Accord has demonstrated the efficacy of a collective approach towards addressing the safety of garment workers. Some brands are experimenting with collective action in other areas of labour standards regulation. While the Accord and Alliance were narrowly focused on safety, ACT (Action, Collaboration, Transformation) is a ground-breaking agreement that extends to wages. As an agreement between 19 global companies representing a range of brands and the IndustriALL trade union, it seeks to achieve living wages for workers through collective bargaining at industry level.

## 5.3. The Hague BHR Arbitration Rules

A project to develop arbitration rules for BHR cases was initiated in September 2017 by the Business and Human Rights Arbitration Working Group, a private group of international practicing lawyers and academics.[250] It aims to create an international private judicial dispute resolution avenue available to parties involved in BHR issues as claimants and defendants. It sought thereby to contribute to filling the judicial remedy gap in the UNGPs. It seeks to distinguish the proposed BHR arbitration from investor-state arbitration. The Rules were published in December 2019.[251]

## 5.4. NGO monitoring

A number of NGOs are engaged in monitoring corporate performance in the area of BHR/RBC. For example, the Corporate Human Rights Benchmark engages in monitoring of the quality of corporate human rights due diligence. In a recent review, it found that 40 out of 101 of some of the biggest companies in the world were failing to carry out proper human rights due diligence.[252] The Alliance for Corporate Transparency has examined 100 companies' reports under the EU's Non-Financial Reporting Directive. It

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249 Dominic Rushe, Unions reach $2.3m settlement on Bangladesh textile factory safety, The Guardian (22 Jan. 2018).

250 The project is funded by the City of The Hague. It is administered by the Center for International Legal Cooperation which *inter alia* provides services to Dutch government and executive agencies in the area of project and program management for justice and rule of law, including the promotion of The Hague, City of Peace and Justice.

251 Center for International Legal Cooperation, The Hague Rules on Business and Human Rights Arbitration (2019).

252 Corporate Human Rights Benchmark, 2018 results press release (Nov. 2018).

found that while 90% reported a commitment to respect human rights, only 36% describe their human rights due diligence system in any detail.[253] These findings have not been analysed in detail and are reported as important examples of monitoring; more research is needed.

This brief review of action by investors, business, trade unions and civil society has focused on some important recent examples of their actions. They have also produced a wealth of analysis that merits attention as work progresses in this area.

# 6. Binding Instrument on Business and Human Rights

The rejection of the binding treaty model to regulate business behaviour in the context of the work leading to the adoption of the UN Guiding Principles in 2011 did not close debate on a binding international instrument. Doubts about the effectiveness of other approaches, especially with regard to remedies for victims, led Ecuador and South Africa in 2014 to ask the UN Human Rights Council to begin a process to draft a legally binding treaty.

By a plurality vote of 20 States in favour, 14 opposed, and 13 abstaining, the Human Rights Council agreed in 2014 to establish an open-ended Intergovernmental Working Group (OEIGWG) to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[254] The Council did not provide further details about the sort of instrument that should be drafted.

## 6.1. Status of work

In September 2017, the Chairperson-Rapporteur of the OEIGWG released a document that outlined elements that would be included in the draft binding instrument (the 2017 Elements).[255] The chair published a first "Zero" draft of a proposed treaty in July 2018 and a draft optional protocol in August 2018. A revised draft treaty was published in July 2019 (the 2019 Revised Draft). The OEIGWG discussed the 2019 Revised Draft in its fifth session in Oct. 2019.[256] The OEIGWG has invited comments on the revised draft from states and other relevant stakeholders to be submitted by February 2020. In August 2020, a second revised draft (the 2020 Draft) was released by the chairperson of the OEIGWG.

## 6.2. Selected issues

### *6.2.1. Scope*

The scope of work on a binding treaty has been contentious. As noted above, the UNGPs and the OECD Guidelines apply to all business enterprises. UN resolutions addressing Ruggie's work cover transnational

253 Alliance for Corporate Transparency, Companies failing to report meaningful information about their impacts on society and the environment (8 Feb. 2019).

254 UN Human Rights Council, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", Resolution No. 26/9, A/HRC/RES/26/9, 14 July 2014, para. 1.

255 OEIGWG, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 29 Sept. 2017.

256 There has been controversy and criticism including over aspects of the procedures used in this work. Those issues are not addressed here.

corporations "and other business enterprises."[257] A preambular footnote in the Human Rights Council resolution initiating the binding treaty process appears to limit "other business enterprises" to those with a "transnational character."[258] The EU and some other governments have insisted that the work should address all business enterprises whereas other governments have favoured a focus on transnational enterprises. The "Zero" draft applied to human rights violations in the context of any business activities of a transnational character, and only those. The 2019 Revised Draft adopted a different formulation, but remained ambiguous. The 2020 Draft broadens the scope "to all business enterprises, including but not limited to transnational corporations", but some uncertainty remains about the scope of application to enterprises.

A second key consideration for scope involves state-owned enterprises (SOEs). The "Zero" draft required that "business activity" be "for profit" for it to come within the scope of the treaty. Concerns were expressed that some SOEs could contend that they serve state purposes rather than seeking profit, and try to exempt themselves from the treaty. With the growing role of SOEs in the global economy, including in high risk sectors and countries, this proposal could have excluded major economic actors. The 2019 Revised Draft eliminated the "for profit" criterion. In the 2020 Draft, SOEs are expressly included in the definition of "business activities". However, the "for profit" criterion has also been reintroduced (art. 1.3).

A third issue arises from the range of human rights at issue. The 2019 draft, covering "all" human rights, provoked objections that States should not be subject to treaties they have not joined. The 2020 Draft refers to human rights in core UN and ILO treaties joined by the State in question, or which are universally recognized by the Universal Declaration of Human Rights or customary international law (art. 3.1).

### *6.2.2. Prevention*

The primary obligation on states set out in art. 6 of the 2020 Draft is to regulate business enterprises within their territory or jurisdiction so that they are required to "respect" human rights and "prevent human rights violations". The 2020 draft maintains the 2019 clarification of the definition of due diligence in line with the "identify, prevent, mitigate and account" process defined in the UNGPs. It sets out four necessary steps in the due diligence process: (a) identifying and assessing any actual or potential human rights abuses; (b) taking appropriate actions to prevent human rights abuses; (c) monitoring the human rights impact; and (d) communicating to stakeholders and accounting for the policies and measures adopted. The 2020 Draft adds new provisions clarifying that due diligence considerations include gender and requiring that consultations with indigenous peoples are undertaken in accordance with "the internationally agreed standards of free, prior and informed consent". The obligation to conduct due diligence as such is subject to a new specific enforcement provision; the failure to conduct due diligence is to be subject to "commensurate sanctions, including corrective action where applicable."(art. 6.6).

### *6.2.3. Liability*

Article 8.1 provides that "State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, domiciled or operating within their territory or jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities" or "from their business relationships."

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257 See, e.g. UN Human Rights Council, "Human rights and transnational corporations and other business enterprises", Resolution No. 17/4, A/HRC/RES/17/4, 6 July 2011.

258 In a footnote to a preambular clause referring to prior UN work, the notion of "other business enterprises" was narrowly defined to refer to "all business enterprises that have a transnational character in their operational activities", and not to apply to "local businesses registered in terms of relevant domestic law". See UN Human Rights Council, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", Resolution No. 26/9, A/HRC/RES/26/9, 14 July 2014, note 1.

The 2020 Draft also provides that States must ensure that legal or natural persons conducting business activities are held liable for their failure to prevent another legal or natural person with whom they have a business relationship, from causing or contributing to human rights abuses, "when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities… or in their business relationships, but failed to put adequate measures to prevent the abuse." (Article 8.7)

A law firm commentary noted that an earlier 2019 provision was analogous to the "failure to prevent" mechanism used for bribery offences under the UK Bribery Act:

> *Where a business has implemented human rights due diligence to an adequate standard but, nevertheless, a rogue employee or agent of the contract counter-party causes an unforeseeable adverse impact, it seems unfair to hold the business legally liable. In the UK Bribery Act, this concern is addressed by the inclusion of a statutory defence of "adequate procedures". The same could apply in a human rights context; if the business can show that it has carried out adequate human rights due diligence, it could rely on this to extinguish liability (albeit that the rogue agent would still be open to liability). This would offer a measure of legal certainty to businesses who meaningfully engage in human rights due diligence.*[259]

The 2020 addition of a reference to "adequate measures to prevent" appears to move further in the direction of recognising the importance of due diligence. However, due diligence is not a complete "safe harbour"; art. 8(8) states that it does not "automatically absolve" the business. Courts are to decide on liability after examining "compliance with applicable human rights due diligence standards" (art. 8.8). The 2020 Draft also requires that States take certain steps to establish criminal liability for involvement in human rights abuses which amount to criminal offences.

### *6.2.4. Relation with other treaties*

The 2017 Elements (art. 1.2) had called for "recognition of the primacy of human rights obligations over trade and investment agreements". The "Zero" draft stated that States Parties would agree that any future trade and investment agreements they negotiate shall not contain provisions that are inconsistent with the obligations under the binding instrument and shall be interpreted in a way that is least restrictive of their ability to respect and ensure their obligations under it. The 2019 Revised Draft contained a general provision providing that States Parties would agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to the binding instrument and its protocols shall be compatible and shall be interpreted in accordance with the obligations under the binding instrument and its protocols.

The 2020 Draft contains a more explicit reference to the issue of policy space. It also separately addresses existing treaties generally and future trade and investment agreements. For existing treaties, including trade and investment agreements, the draft provides that States Parties agree that they shall be interpreted and implemented in a manner that "will not undermine or limit [States'] capacity to fulfill" their obligations under the binding instrument and its protocols, as well as under other relevant human rights conventions and instruments. (art. 14(5)(1)). A new clause specifically addresses new bilateral or multilateral trade and investment agreements and requires that they be compatible with the State Parties' human rights obligations under the binding instrument and its protocols, as well as other relevant human rights conventions and instruments (art. 14(5)(2)).

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259 Julianne Hughes-Jennett and Peter Hood, UN Working Group publishes revised draft of business and human rights treaty: commentary on scope, prevention and legal liability, Hogan Lovells law firm (26 July 2019).

# 7. Policy coherence on business responsibilities and investment protection treaties

While the convergence over the framework and content of business responsibilities among governments, international organisations, business and stakeholders has been remarkable, there are continued concerns about impact on the ground. Growing calls for policy coherence have increasingly focused on the trade and investment policy communities. The increased attention to policy coherence for investment treaty policies is driven in part by the multiple interactions between those policies and BHR/RBC.

In June 2014, Human Rights Council resolution 26/22 noted the important role of NAPs as a tool for promoting the comprehensive and effective implementation of the UNGPs and encouraged all States to develop a National action plans (NAP) or other such framework. A NAP can be defined as an evolving policy strategy developed by a government to protect against adverse human rights impacts by business enterprises in conformity with the UNGPs and/or the OECD Guidelines. Governments have formulated NAPs using different titles, referring for example to BHR, RBC or corporate social responsibility (CSR) in different cases.

One way to address policy coherence in trade and investment agreements is through the adoption and application of a NAP that addresses trade and investment treaty policy. The discussion on NAPs here focuses on the status of NAPs among Roundtable participants and their content with regard to policies on trade and investment agreements. However, while NAPs offer benefits in terms of visible commitment, there are of course other ways to achieve policy coherence.

This section first takes note of government and other calls for policy coherence in the application of BHR/RBC policies. It then reviews the status of NAPs with regard to their content on trade and investment agreements. Governments without NAPs or that do not address investment treaty policy in their NAPs are encouraged to provide additional information about their efforts to include a broad range of constituencies in the development and application of their trade and investment treaty policies, and to consider RBC issues in their treaty policies.

## 7.1. Increasing attention to policy coherence between BHR/RBC and government policies in the economic sphere

There is a strong push from the RBC and BHR community for improved policy coherence with other government action. From the early stages of his mandate, Ruggie emphasised its importance:

> *The general nature of the state duty to protect is well understood by human rights experts within governments and beyond. What seems less well internalized is the diverse array of policy domains through which states may fulfill this duty with respect to business activities, including how to foster a corporate culture respectful of human rights at home and abroad. This should be viewed as an urgent policy priority for governments - necessitated by the escalating exposure of people and communities to corporate related abuses, and the growing exposure of companies to social risks they clearly cannot manage adequately on their own."*[260]

At the OECD, the Policy Framework for Investment states (p. 76) that "[g]overnments should co-operate internally as well as externally with foreign governments and stakeholders to ensure coherence and support of policies relevant to RBC". The recent G20 Guiding Principles for Global Investment Policymaking provide that "Investment policies should promote and facilitate the observance by investors

260 Ruggie 2008 Report, para. 27.

of international best practices and applicable instruments of responsible business conduct and corporate governance."[261]

In 2018, the OECD Investment Committee revised the mandate of the Working Party on Responsible Business Conduct (WPRBC) to include policy analysis and promotion of policy coherence. NCP promotion of policy coherence was also newly incorporated as a fourth track of action for NCPs in the WPRBC's second Action Plan to Strengthen NCPs (2019-2021).[262] The importance of policy coherence was reaffirmed including by business in a number of sessions at the 2018 Global Forum on Responsible Business Conduct, with panellists calling on governments to not shy away from their responsibilities to ensure that businesses operate in a responsible manner.

Recent OECD-hosted discussions on policy coherence with RBC have addressed the role of governments in promoting due diligence; RBC in government procurement practices; RBC and development finance and cooperation; and RBC and the OECD Framework on Policy Coherence for Sustainable Development. Work is ongoing on how the WPRBC can support governments in strengthening their role in promoting RBC in different policy areas.

## 7.2. National action plans (NAPs) on business and human rights to enable policy coherence for responsible business conduct, including with regard to investment treaties

The UN and the OECD have cooperated in drawing attention to the importance of governments developing NAPs on BHR to address policy coherence for responsible business conduct.[263] The UN Working Group on Business and Human Rights has also produced guidance for governments, most recently updated in November 2016.[264]

Government achievements in this area, however, remain uneven. To date, it appears that only twenty-three governments have completed a NAP on BHR or RBC. Major economies, including Japan, China, Canada, South Korea, India and Brazil, have not yet developed a NAP, although many have committed to develop one. Most existing NAPs have been adopted by European countries, mostly EU member states, although some have not yet developed one. Thailand adopted the first NAP in Asia in 2019.

In the context of the "Responsible Business Conduct in Latin America and the Caribbean" (RBC-LAC Project), the OECD, OHCHR and ILO have been supporting governments' efforts in the region to strengthen policies for RBC, with a particular emphasis on NAPs. The project has the objective of supporting the development of NAPs" in nine countries in the Americas. The RBC Policy Review of Peru – the first self-standing RBC review of its kind – was released in June 2020. The review examines a wide range of Peruvian policies including with regard to trade and investment agreements, and provides recommendations.

Annex 1 outlines information collected with regard to NAPs and their references to trade and investment agreements for Roundtable participant governments. Additional input from governments and others can improve and complete the information in the table.

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261 G20 Guiding Principles for Global Investment Policymaking, July 2016, para. VIII.

262 OECD (2019), Annual Report on the OECD Guidelines for Multinational Enterprises 2018, p. 16.

263 See, e.g. OECD, National action plans on business and human rights to enable policy coherence for responsible business conduct (2017) (noting session co-organised by the OECD and the UN Working Group on Business and Human Rights during Roundtable for Policy Makers at the 2017 OECD Global Forum on Responsible Business Conduct).

264 UN Working Group on Business and Human Rights, "Guidance on National Action Plans on Business and Human Rights", Geneva, November 2016.

Most of the 23 NAPs address trade and investment treaties in general terms. For example, they refer to preserving sufficient policy space to adopt measures in the field of human rights, workers' rights and the environment. Some also address the issue of possible investor responsibilities to balance state obligations. Although broad ideas on increasing references to internationally recognised human rights and environmental standards in order to strengthen policy coherence are a general feature, most NAPs do not contain detailed commitments or ideas for practical solutions.

EU member state NAPs generally express support for EU initiatives with regard to trade and investment treaty policy. The NAPs remain general and there are few specific proposals to improve existing policies; a French proposal to make EU sustainability chapters subject to the general dispute settlement mechanisms in trade agreements is an exception.[265] Most States focus on policies for new treaties and do not address existing treaties, including EU member states which generally focus on the EU level and do not mention their national treaties.

Commitments to increase references to standards of responsible business conduct are also generally directed towards the negotiation of future trade and investment agreements. Only Colombia[266] and Switzerland[267] explicitly address the issue of revising their existing treaties in order to incorporate stronger references to CSR standards and sustainable development.

## 7.3. Academic and NGO work on policy coherence

While as noted the main focus of this scoping paper is on government action, there has been growing academic and NGO attention to issues of policy coherence between BHR/RBC principles and investment treaty policy. There is a substantial amount of academic literature in particular on the question of integrating human rights considerations into investment treaties.[268] There are also regional studies in this area.[269] The Investment and Human Rights Project at the London School of Economics (LSE) has developed a Guide

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265 France, Ministère des Affaires Etrangères et du Développement International, "National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights" (2017), p. 22.

266 Government of Colombia, National Action Plan (2015), p. 13.

267 In 2012, Switzerland developed model provisions that "state clearly that the agreements are to be interpreted and applied in a manner consistent with other international obligations incumbent on Switzerland and its partner countries, including those concerning human rights. This ensures that IPAs do not conflict with the protection of human rights". It has been proposing these new provision in negotiations since 2012. Switzerland, "Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights" (2016), pp. 31-32. In addition, Switzerland has indicated that a reference to RBC standards is tabled by Switzerland in all negotiations on the revision of existing or conclusion of new investment protection agreements.

268 See, e.g. Dumberry, Patrick and Gabrielle Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties?", 4 Yearbook on International Investment Law and Policy (2011–2012) 569; Krajewki, Markus, A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application, Business and Human Rights Law Journal (Jan. 2020); Kriebaum, Ursula, "Human rights and international investment arbitration", in Radi, Yannick (ed.), Research Handbook on Human Rights and Investment (2018) 13; Dupuy, Pierre-Marie, Ernst-Ulrich Petersmann and Francesco Francioni (eds.), Human Rights in International Investment Law and Arbitration (2009); Jacob, Marc, 'Faith Betrayed: International Investment Law and Human Rights' in Rainer Hofmann and Christian Tams (eds.), International Investment Law and Its Others (2012) 25; Bilchitz, David, "Corporate Obligations and a Treaty on Business and Human Rights", in Surya Deva and David Bilchitz (eds.), Building a Treaty on Business and Human Rights (Cambridge: Cambridge University Press, 2017) 185; Perrone, Nicolás M., "The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" 113 AJIL Unbound 16 (2019).

269 See, e.g. Polanco Lazo, Rodrigo and Rodrigo Mella, "Investment Arbitration and Human Rights Cases in Latin America" in Radi, Yannick (ed.), Research Handbook on Human Rights and Investment (2018) 41.

to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking available in several languages. It is intended for government investment policy makers as well as for civil society and business. It seeks to help governments better implement their duty to protect under the UNGPs in their investment policymaking.[270]

NGOs have also engaged in substantial work on the integration of responsible business conduct considerations, including with regard to human rights, into investment treaty policy. In January 2018, the International Institute for Sustainable Development (IISD) and the Friedrich Ebert Stiftung (FES) co-organized an expert meeting on Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements. Participants (acting in a personal capacity) included officials from governments and international organisations, professors, lawyers and NGOs. The expertise included ranged from diplomacy, economics, law and environment to the fields of investment, human rights and trade. The discussions focused on possible pathways to articulate and incorporate investor obligations into international economic law and treaties.[271]

The Columbia Center on Sustainable Investment (CCSI) has analysed the interaction between human rights law and the investment treaty regime. It has examined challenges that arise from the tension between human rights and investment norms, the treatment of human rights issues in the international investment regime to date and perceived shortcomings of current approaches. It has also identified options for reform.[272] In 2018, the International Institute for Environment and Development (IIED) issued a briefing paper considering whether investment treaties can promote responsible business conduct in areas such as human rights, labour relations, land rights and the environment. The briefing reviews recent treaty practice and charts possible ways forward.[273]

## 7.4. Multiple interactions between investment treaties and BHR/RBC

Investment treaties may interact with policies on business responsibilities in several ways including through

- their provisions that buttress or reinforce domestic law or its enforcement as a general matter or in key areas such as labour, the environment, anti-corruption or human rights;
- their impact in restricting policy space for host governments and in particular for their non-discriminatory regulation of business;
- their provisions that speak directly to business by, for example, encouraging observance of RBC standards, conditioning access to investment treaty benefits on compliance with RBC standards or providing for reductions in damages based on failure to observe them.

Given the scope of impacts, from a human rights perspective, state duties to both respect and protect human rights may be at issue.

Recent years have seen an acceleration of investment treaty reform. A significant development during this period was the 2009 transfer of competence over FDI from EU member states to the EU as result of the

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270 See London School of Economics (LSE) Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking (2016).

271 See International Institute for Sustainable Development (IISD) & Friedrich Ebert Stiftung (FES), Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements (2018) (reporting on the meeting). The author of this note participated in the discussions.

272 See Coleman, Jesse, Kaitlin Y. Cordes, and Lise Johnson, 'Human Rights Law and the Investment Treaty Regime' (CCSI Working Paper June 2019), final version in Deva, Surya and David Birchall (eds.), Research Handbook on Human Rights and Business (2020) 290; see also Johnson, Lise, Lisa Sachs, and Nathan Lobel, Aligning International Investment Agreements with the Sustainable Development Goals (2016).

273 See Cotula, L., Raising the Bar on Responsible Investment: What Role for Investment Treaties? (IIED 2018).

Lisbon treaty. Questions arose about how to integrate investment protection into the EU trade framework with its emphasis on human rights, albeit principally focused on state violations, and its growing attention to trade and sustainable development including labour and environment as in the 2010 EU-Korea FTA.[274] The European Parliament called in 2010-11 for the inclusion in EU trade and investment treaties of provisions on CSR based, *inter alia*, on the UNGPs, the OECD Guidelines and the ILO MNE Declaration.[275] In the United States, the 2012 Model BIT introduced new provisions on labour and the environment.[276]

Many other governments have also been increasingly active in reforming their policies to address concerns about the impact of investment treaties on the right to regulate or about the system of investor-state arbitration. Some of these reflections and reforms were contemporaneous with the intensive and high-profile UNGP and OECD work on BHR and RBC. However, at the time of a 2014 OECD review of investment treaty provisions, the impact of these efforts had little effect on the explicit RBC content of stand-alone investment treaties.

## 7.5. As of 2014, except for clauses requiring domestic law legality, there was little express attention to RBC in stand-alone investment treaties

In 2014, the Secretariat generated statistical information after reviewing the language of over 2000 investment treaties to see whether governments were using their investment treaties to advance their sustainable development (SD) and RBC agendas.[277] The treaty pool was overwhelmingly composed of BITs, numbering 2,042. It also contained 50 non-BIT treaties (mainly FTAs with investment provisions).[278]

The paper first considered whether governments had included specific treaty language aimed at preserving space for policy making in areas important to SD/RBC. The study also examined whether governments had included language in their investment treaties to communicate directly to investors about RBC. The study revealed a number of general characteristics of the investment treaty pool at that time:

- ***Older investment treaties without any express SD/RBC language dominated the overall treaty pool.*** Given very low rates of express attention to the issues, an initial analysis of the entire pool focused on the low threshold of whether the investment treaties made even a single reference. Only 12% of investment treaties contained any reference to SD/RBC. (p. 10)
- Only 10% of BITs had any reference to SD or RBC; broad FTAs with investment chapters had significantly more.

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274 While EU trade agreements or accompanying agreements systematically included human rights clauses as of 1995, EU member state investment protection treaties did not address human rights. Similarly, the introduction of labour and environment provisions into EU trade agreements was generally not reflected in EU member state investment protection treaties.

275 See European Parliament resolution of 25 November 2010 on Corporate social responsibility in international trade agreements; European Parliament resolution of 6 April 2011 on the future European international investment policy, para 27.

276 See 2012 U.S. Model Bilateral Investment Treaty, arts. 12-13, preamble.

277 Kathryn Gordon, Joachim Pohl and Marie Bouchard, Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey, OECD Working Papers on International Investment, 2014/01. The review focused on the text of the investment treaty. Side agreements, such as the labour and environment side agreements signed along with the NAFTA, were not addressed. The study also pre-dated the first EU investment protection treaties. EU trade treaties, including the development of human rights clauses in trade agreements or in overarching strategic partnership agreements, were not reflected. Legality requirements for access to treaty benefits were not counted.

278 Id. p. 14.

- ***Governments were not using their investment treaties to communicate directly to companies on RBC***. No specific language on business responsibilities was found in the treaty pool. (Requirements for compliance with domestic law, including as conditions for treaty coverage of investments, were not included in the provisions that were counted.)
- New treaties were far fewer in the 2008-2013 period than in prior periods. They were often broad FTAs with investment chapters; the inclusion of at least one reference to SD/RBC had become frequent. More than three-fourths of the treaties concluded between 2008 and 2013, mainly such FTAs, contained at least some language referring to one aspect of SD/RBC. (p. 10)
- In the 12% of investment treaties with SD/RBC language, the major functions were, in the order of prevalence: (i) RBC principles in preambles setting out the context and purpose of the treaty (7.4% of treaties); (ii) preserving policy space to enact public policies dealing with RBC concerns, generally referring to environmental concerns (7%); and (iii) agreeing not to lower standards, in particular environmental and labour standards, for the purpose of attracting investment (3.9%). In 28 treaties (1.3%), there was language about maintaining, implementing (or striving to implement) internationally recognised standards, generally with regard to labour or corruption.
- Many countries with extensive investment treaty networks had low rates of inclusion of any references to any SD/RBC issue (Germany: 2 in 149; Switzerland: 11 in 121; China: 7 in 107; Netherlands: 7 in 107; France: 1 in 104; United Kingdom: 2 in 98).[279]

There were large variations in rates of inclusion between governments with rates (of making at least one reference) ranging from 89% to 0% of bilateral treaties.

While few stand-alone investment treaties incorporated specific provisions relating to business responsibilities as of 2014, developments in the field of trade agreements in some jurisdictions reflected increased attention to such considerations.

# 8. Treaty provisions buttressing domestic law regulation -- the broader reach of trade agreements

As noted above, today's investment treaties are most frequently part of broader trade and investment agreements. Trade agreements, and their accompanying framework or side agreements, generally innovated in addressing human rights issues, or specific areas such as labour and the environment, before investment treaties began to do so. Reflection on investment treaty policy has been influenced in part by the pre-existing frameworks for trade policy.

This section analyses trade and investment agreements (and accompanying agreements) that began to address human rights, or labour and environmental issues more specifically, in the 1990s. It then notes a degree of convergence in approaches and the expanded use of provisions buttressing domestic law in trade and investment agreements post-2010. It then notes a few exceptional examples of such provisions in stand-alone investment treaties.

279 Id. at 13-14.

## 8.1. The treatment of human rights and labour rights in trade agreements (and their accompanying agreements) (to 2010)

This section provides an overview of the trade agreement framework. In broad terms, two major approaches were initially taken by the jurisdictions that initially innovated in addressing human rights, labour and environmental issues. The NAFTA countries and some other countries took a sectoral approach, focusing on specific rights in the areas of labour and environmental issues. The EU used a broader and more general reference to human rights.[280]

From the NAFTA-style experience with side agreements and specialised chapters, this section focuses on the example of labour. There are specificities to the approaches to the various issues, but the evolution of practice on labour provisions can illustrate some general trends. This section also briefly compares the initial EU and the NAFTA-style approaches, and notes gradual convergence in some areas.

### *8.1.1. The example of labour provisions in trade agreements and their side agreements*

#### *a. The growth of coverage of labour issues*

Labour provisions in the context of free trade agreements were first included in the North American Agreement on Labor Cooperation (NAALC), a side agreement to the 1994 NAFTA.[281] Provisions in trade agreements have expanded from government commitments to enforce a country's own domestic labour laws to include commitments to adopt and enforce core principles of the ILO. A 2016 ILO report noted that many of the trade agreements that include labour provisions promote ILO instruments including the Declaration on Fundamental Principles and Rights at Work, and, somewhat less frequently, the ILO Social Justice Declaration and the ILO MNE Declaration. These instruments are referred to more frequently in recent treaties.[282]

In addition, since 1994, "the normative content, legal implications, and scope of labour provisions has evolved to place more emphasis on stakeholder involvement and implementation activities, including time-bound commitments and dialogue mechanisms for conflict resolution."[283] An important component of the provisions is the power of trade unions and others to raise issues and bring complaints to the attention of government authorities.

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280 See Ionel Zamfir, Human rights in EU trade agreements: the human rights clause and its application (European Parliament Research Service (July 2019)) ("Many trade agreements concluded around the world in recent years include some reference to human rights. The US and Canada are among the strongest supporters of this linkage. However, unlike the EU, which focuses on universal human rights, the US and Canada focus more narrowly on specific rights in their bilateral trade agreements. The US has traditionally been considered a leader in promoting labour rights, transparency, due process and anti-corruption in trade agreements. Canada has been perceived in similar terms. Both countries have strong enforcement procedures with respect to such rights. Chile is yet another country that pays particular attention to human rights in its trade relations.')

281 Cathleen D. Cimino-Isaacs, Labor Enforcement Issues in U.S. FTAs, US Congressional Research Service (updated 23 Aug. 2019).

282 ILO, Labour-related provisions in trade agreements: Recent trends and relevance to the ILO, GB.328/POL/3 (Sept. 2016), paras. 4, 7. The report found that as of 2016, 77 out of 267 FTAs globally included labour provisions.

283 Id., para. 16.

### *b. Enforcement*

Most trade agreements do not subject labour provisions to dispute settlement. They provide a framework for dialogue, capacity building, and monitoring, rather than linking violations to economic consequences, such as trade sanctions. Even in cases where dispute settlement is applicable, such mechanisms have been rarely invoked; governments have largely aimed to solve disputes through cooperative consultations.

The NAALC established that any civil society group could take a complaint about non-compliance to the Department of Labour in another Party. In the NAALC, only a few of labour provisions are subject to possible sanctions in the event of non-compliance by a Party. However, the later Peru-U.S. FTA, Colombia-U.S. FTA and USMCA labour chapters reflect provisions required by the so-called "May 10th agreement," a 2007 bipartisan deal between US Congressional leadership and the Bush Administration. The agreement notably required that FTA labour and environment provisions be subject to the same state-to-state dispute settlement (SSDS) procedures and remedies, including recourse to trade sanctions, as applied to other treaty obligations.[284] Recent US Congress grants of trade promotion authority (TPA) have imposed a similar requirement.

Trade unions have emphasised that coverage under SSDS is preferable to the absence of binding dispute settlement in earlier agreements. However, they have underlined that it does not permit workers or unions to have direct access to dispute settlement and remedies, in contrast to covered investors in ISDS.

### *c. Cases and complaints*

It appears that most complaints to date have been brought under the NAALC. Complaints must focus on government failures to meet their commitments. There are no provisions applicable to companies. However, complaints can focus on the situation with regard to particular companies alleged to be in violation of unenforced labour laws and seek government action against them.

Thus, the provisions together with the possibility for union and civil society complaints leads to a degree of focus on companies as well as governments. Complaints filed by trade unions and others with government Departments of Labour under the NAALC have alleged favouritism toward employer-controlled unions; firings for workers' organizing efforts; denial of collective bargaining rights; forced pregnancy testing; mistreatment of migrant workers; life-threatening health and safety conditions; and other violations of the eleven labour principles set out in the NAALC. They have alleged systematic workers' rights violations in all three countries – fourteen in Mexico, seven in the United States, and two in Canada. Major companies have been named as alleged violators of labour rights. A 2001 Human Rights Watch study recognised that the NAALC was unique at the time, but raised numerous issues. With regard to the impact on companies and remedies, it underlined that none of the 23 complaints had resulted in sanctions against an alleged labour rights violator.

The US-Guatemala dispute under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) was the first arbitration case directly invoking labour standards in a trade and investment agreement. It was brought after several years of unsuccessful inter-governmental consultations.[285] In an inter-state arbitration, the US claimed that Guatemalan authorities failed to protect workers' rights of freedom of association and related rights. The panel concluded that Guatemala's failure to effectively enforce the law necessarily conferred some competitive advantage by effectively removing the risk that company employees would organize or bargain collectively for a substantial period of time.

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284 The May 10th agreement also called for an additional enforceable commitment that FTA Parties adopt and maintain core labour principles of the 1998 ILO Declaration.

285 In the Matter of Guatemala –Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report of the Panel, 14 June 2017.

However, the panel rejected the US claim because it considered that a requirement that the failure occur "in a manner affecting trade or investment" was not demonstrated.

### *8.1.2. EU policy on human rights and trade agreements prior to the Lisbon Treaty*

The main mechanism for incorporating human rights into the EU's bilateral trade agreements has consisted of an "essential elements" human rights clause that enables one party to take appropriate measures in case of serious breaches by the other party.[286] The human rights clause was initially intended as a mechanism allowing the EU to suspend its obligations under international agreements in situations of egregious violations of human rights.

After the first agreements containing an explicit human rights clause were signed in the 1990s, the European Community established a policy of systematically including such clauses in all of its new trade agreements in 1995. Today, the EU has dozens of bilateral or regional free trade agreements, fully or partly implemented, covering roughly a third of the world's countries. With a few exceptions, they are all subject to human rights conditionality.[287]

The EU's official policy on the matter is outlined in a "Common Approach on the use of political clauses", agreed by "Coreper"[288] in 2009. This provides that "political clauses" should be systematically included in agreements with third countries with the aim of promoting EU's values and political principles and its security interests. According to EU practice,

- human rights are to be included in EU political framework agreements under "essential elements" clauses;
- EU FTAs are to be linked to these political framework agreements; if no political framework agreement exists, essential elements clauses are to be included in FTAs; and
- serious breaches of the essential elements clauses may trigger the suspension in whole or part of the overall framework agreement and all the linked agreements, including the trade agreement (non-execution clause).[289]

The approach makes human rights subject to mechanisms of political dialogue and cooperation, and creates the legal possibility to adopt restrictive measures proportionate to the gravity of the violations. From the beginning of its application, the clause was intended to be part of all of the EU's international agreements, including on trade, cooperation and development aid.

While the EU seeks uniformity, negotiations lead to variance including in the references to human rights (general reference or also with reference to international norms[290]). When the clause is present in a

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286 Ionel Zamfir, Human rights in EU trade agreements: the human rights clause and its application (European Parliament Research Service (July 2019)).

287 Id.

288 Coreper is the "Committee of the Permanent Representatives of the Governments of the Member States to the European Union". It is the main preparatory body for the Council of the European Union. It consists of representatives from the EU countries with the rank of ambassador to the European Union and is chaired by the EU country which holds the Council Presidency.

289 See Zamfir, supra.

290 This can refer to the Universal Declaration of Human Rights. It can also refer more broadly to the Universal Declaration of Human Rights and other relevant international human rights instruments. See, e.g. Framework Agreement between the EU, EU Member States and the Republic of Korea (2010), art. 1(1).

framework agreement, a linkage clause in the trade agreement has the legal effect of making the human rights clause applicable to this as well.[291]

Governments control the application of the clauses. The Parties to EU treaties have a right to adopt "appropriate measures", but no obligation to do so. EU trade agreements are generally considered not to have any direct legal effect (i.e. an agreement cannot be construed as conferring rights or imposing obligations that can be directly invoked before EU or Member State courts and tribunals).[292] Therefore, individuals and organisations cannot invoke the human rights clause before the courts of the EU or EU member state courts over failure of their trade partners to adopt appropriate measures in response to human rights breaches. The treaties do not provide for any formal mechanism for civil society complaints to a neutral body or to the government Parties, although informal input can be provided.

### *8.1.3. Preliminary comparison of the approaches*

The focus of the provisions in both areas is on state obligations and responsibilities. More research is required, but it appears that the approaches in trade agreements and accompanying agreements do not address the responsibilities of companies whether as traders or investors.

It appears that most of the human rights clauses in EU treaties focus only on the government obligation to "respect" human rights. As noted above, to respect human rights is to not infringe the rights of others. The clause thus appears primarily directed at stopping government abuse of human rights. It does not expressly address the government obligation to protect its citizens and residents from infringements by third parties including business – the key government obligation at issue in BHR.[293] It does not address business responsibilities.

The NAFTA side agreement approach is also directed only at governments. However, it is more concerned with the regulation of business behaviour in the particular sectors. Requiring government action in those areas can constitute direct support for the duty to protect. However, it does not address business responsibilities.

Developing and emerging countries can be reluctant to accept human rights and labour provisions creating government obligations in trade agreements, "seeing them as a form of potential interference in their internal affairs and fearing that higher human rights standards (particularly labour rights) are not only difficult to implement but also risk undermining their competitiveness in international trade".[294] It has been criticised as a form of protectionism practised by advanced economies.[295]

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291 See, e.g. Framework Agreement between the EU, EU Member States and the Republic of Korea (2010), art. 1(1) ("The Parties confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law. Respect for democratic principles and human rights and fundamental freedoms as laid down in the Universal Declaration of Human Rights and other relevant international human rights instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement."). The EU-Korea FTA (2010) contains a typical linkage clause to the Framework Agreement: "Article 2. The present Agreement shall be an integral part of the overall bilateral relations as governed by the Framework Agreement. It constitutes a specific Agreement giving effect to the trade provisions within the meaning of the Framework Agreement".

292 This is explicit in treaties concluded after 2008. See Zamfir, supra.

293 No view is expressed on whether such an obligation to protect, which is included in some of the human rights instruments referenced in some treaties, may be considered to be included.

294 Id.

295 Id.

## 8.2. A degree of convergence and expanded use in trade and investment agreements post-2010

There has been some convergence in the approaches in recent trade agreements. References to the principle of sustainable development in EU FTAs including social and environmental dialogues appeared in the 1990s. The 2010 EU-South Korea FTA was the first EU agreement to contain a separate Trade and Sustainable Development chapter addressing labour and environmental issues.[296] It introduced an *ad hoc* two-stage process to deal with disputes under that chapter: first consultation and then the setting up of a panel of experts to help to find a solution.

Express attention to human rights as such among countries outside Europe has also increased in trade agreements although more research is required to determine its scope. For example, the preambles of recent Canadian agreements with EFTA, Jordan, Peru and Colombia refer to human rights objectives and cite the Universal Declaration on Human Rights, as well as labour rights, cultural participation and protection of human rights and freedoms.[297] The CPTPP contains individual chapters on labour, the environment, development and anti-corruption, but does not refer to human rights as such.

While some differences in approach remain, the overall trend appears to include wider use of provisions, greater attention and strengthened provisions in some cases. An increasing number of recent trade and investment agreements thus include chapters on labour and social security, environment or sustainable development, which recognise the importance of promoting responsible investment. For example, the CPTPP (2016) labour chapter includes obligations to protect and promote internationally recognized labour principles and rights. It commits the parties to protect and promote labour rights as established in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. It also includes commitments to ensure that national laws and policies provide protection for the fundamental principles and rights at work, including: the right to freedom of association and collective bargaining, the elimination of child labour, forced labour or compulsory labour, and of discrimination in respect of employment and occupation. It also obliges the Parties not to derogate from their domestic labour laws to attract trade or investment.

A Party can request consultations with another on any matter covered by the labour chapter to jointly decide on a course of action. Members of the public or trade unions can raise concerns about labour issues related to the chapter. However, only governments can bring claims. The chapter provides recourse to the general SSDS provisions for violations of the labour provisions. To establish a violation, however, a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the Parties. Violations of the provisions can permit trade sanctions or result in awards of monetary compensation.

The 2018 USMCA provided for similar commitments and procedures to those in the CPTPP. Some other major trade and investment agreements contain similar provisions to those in the CPTPP. The CPTPP and the USMCA reflects recent practice of the US and other governments in subjecting the duties to regulate in labour and other chapters to the general regime for SSDS.

Other jurisdictions such as the EU do not apply the general SSDS provisions in the trade agreements to their trade and sustainable development chapters that address labour, the environment and climate action. They provide instead for consultations and reports by panels of experts with findings and recommendations. The Parties must discuss actions or measures to resolve the matter in question, taking

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296 Laura Puccio and Krisztina Binder, Trade and sustainable development chapters in CETA, European Parliament Research Service (Jan. 2017), p. 2. Earlier EU trade and association agreements contained rules on social and environmental dialogues. Id.

297 See Iffas Idris, Human rights and governance provisions in OECD country trade agreements with developing countries (April 2017) (report commissioned by UK government), p. 9.

into account the panel's final report and its suggestions. Panel reports are to be made public. The respondent to a complaint must inform the other Party and its own domestic advisory group or groups of any follow-up actions or measures no later than three months after the date of issuance of the final report. Follow-up actions or measures are monitored by a joint committee and civil society groups may submit their observations in this regard to the committee.[298] The 2017 Argentina-Chile FTA contains specific chapters on labour, the environment and gender.[299] They provide for consultations between the Parties and civil society input, but exclude the chapters from the general SSDS regime.

Chapters of this type can be a basis for positive impacts and the promotion of RBC through mutual cooperation. For example, a government has noted that these chapters have led to the verification of specific supply chains (for example in agricultural goods such as sugarcane, where forced and child labour are latent risks in some jurisdictions). They have also encouraged the development of diverse methods for traceability (from certifications like Rainforest Alliance or Fair Trade, to digitalized methods such as blockchain). A government has noted use of such chapters in ISDS cases, with a government citing the environmental chapter for example with the purpose of establishing the investor´s duty to protect the environment by conducting due diligence in good faith, and to uphold the government´s right to regulate on environmental protection.[300]

Enforcement of provisions in this area is also attracting increased attention. Strengthening labour provisions, including with regard to enforcement, was a major component of the December 2019 protocol amending the USMCA and those provisions are included in the final agreement as ratified by the three governments in 2020. In December 2018, for the first time, the EU asked for formal consultations regarding labour measures under an EU FTA. The request concerned certain measures, including provisions of the Korean labour law, which appeared to the EU to be inconsistent with Korea's obligations related to multilateral labour standards and agreements under the EU-Korea FTA.[301]

In December 2019, the European Commission announced the creation of a new post as a Chief Trade Enforcement Officer (CTEO) to strengthen the enforcement of EU trade agreements. The CTEO will be in charge of implementing and enforcing EU trade agreements, both within the EU and outside the EU, under direct guidance of the Commissioner for Trade. This will include efforts to enforce the sustainable development commitments of EU trade agreements. The first CTEO was appointed in July 2020.

Issues can also be raised during negotiations. For example, the issue of ratification of fundamental ILO Conventions was recently raised by the EU in the context of approaching signatures of the EU-Viet Nam FTA and EU-Viet Nam Investment Protection Agreement (IPA). In September 2018, a letter sent by a cross-party group of 32 MEPs to EU Trade Commissioner Cecilia Malmström and EU High Representative Federica Mogherini urged them to insist on improvements to the human rights situation in Vietnam, including implementation of ILO Conventions, before the FTA can be ratified. At a hearing organised by the European Parliament's International Trade Committee in October 2018, representatives of the Vietnamese government explained that the government had an action plan to ratify the three remaining ILO core conventions.[302]

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298 See, e.g. EU-Japan EPA, arts. 16.17, 16.18; EU-Viet Nam FTA, arts. 13.16(1), 13.17.

299 See Argentina-Chile FTA, chs. 12, 13, 15.

300 See, e.g. *David Aven et al. v. Republic of Costa Rica*, ICSID, Respondent's Post-hearing Brief (13 Mar. 2017) paras. 479 et seq. ("A proper interpretation of DR-CAFTA under the VCLT mandates the Tribunal to balance [the investment chapter] with other Chapters of the Treaty" and in particular the environment chapter)

301 European Union, Republic of Korea – compliance with obligations under Chapter 13 of the EU – Korea Free Trade Agreement. Request for Consultations by the European Union, 17 December 2018.

302 See European Parliament, Legislative Train Schedule, A Balanced and Progressive Trade Policy to Harness Globalisation, EU-Vietnam Free Trade Agreement (June 2019).

## 8.3. Rare use of provisions affirming government duties to regulate in stand-alone investment treaties

It appears that few stand-alone investment treaties affirm government obligations to regulate although more research is necessary. Some treaties include provisions committing governments not to encourage investment by lowering the standards of domestic regulation of labour, the environment, public health or safety. While as noted above this was found in under 4% of the investment treaties in the 2014 investment treaty survey and limited to treaties of a few governments, a broader range of governments now include this on a regular basis and recent treaties have included provisions of this nature more frequently.[303]

Some recent model treaties and treaties go somewhat further. The 2012 US Model BIT innovated in providing that the Parties "reaffirm their respective obligations as members of the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up".[304] The Morocco-Nigeria BIT (2016) and the recent 2019 Dutch Model BIT contain similar provisions.[305]

The Morocco-Nigeria BIT (2016) also provides that (i) each Party "shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these law and regulations"; and (ii) the Parties "shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party".[306] The 2019 Dutch Model BIT provides that the governments must "ensure that [their] investment laws and policies provide for and encourage high levels of environmental and labor protection and … strive to continue to improve those laws and policies and their underlying levels of protection".[307] The reference to "investment laws and policies" may require interpretation because environmental and labour law and policy is not usually specifically characterised as an investment law.

The Dutch Model BIT appears to one of the first investment treaties or models to address expressly governments' duty to protect against business-related human rights abuse. The treaty addresses in particular the remedial component; art. 5(3) essentially reproduces the foundational principle for access to remedy under the UNGPs (UNGP 25):

> *As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.*

This is a significant extension of human rights provisions. It expressly extends to and affirms the obligations of governments in the area of remedies as part of the duty to protect. The duty of each state is triggered when "abuses occur within their territory and/or jurisdiction". Art. 5(3) adds a requirement, not found in the UNGPs, that the remedial mechanisms should be "fair, impartial, independent, transparent and based on the rule of law". This appears to set a higher procedural standard for action on remedies than the UNGPs

303 See, e.g. Argentina-UAE BIT, article 12; Argentina-Japan BIT, art. 22.

304 2012 US Model BIT art. 13(1).

305 Morocco-Nigeria BIT (2016) art. 15; Dutch Ministry of Foreign Affairs, Model Investment Agreement, Mar. 2019, art. 6(6).

306 Morocco-Nigeria BIT (2016), art. 15.

307 Dutch Ministry of Foreign Affairs, Model Investment Agreement, Mar. 2019, art. 6(2).

which contemplate a wide range of remedies including internal grievance procedures.[308] Art. 5(3) is subject to SSDS which applies to the whole treaty. It is not included in the scope of ISDS.[309]

Art. 5(3) only expressly addresses the remedial component of the duty to protect. The treaty does not directly address issues such as the potential interference with the duty to protect of treaty protections for covered investors, a concern highlighted by Ruggie as noted above. There are a number of provisions that seek to protect policy space, but none refer to the duty to protect. An express recognition of the duty, even limited to remedies, could nonetheless be an important element in cases where claims under general protections such as FET interact with government regulation addressing adverse impacts.

A few recent treaties also address the jurisdiction and role of home state courts. The Morocco-Nigeria BIT (2016) provides that "[i]nvestors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state" (art. 20). The Dutch Model also addresses home state court jurisdiction. It provides that investors "shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state". The provision is based on the application of home state rules on jurisdiction and does not require that they be extended. However, negotiations over the issue can reflect agreement by the government parties to the treaty to the exercise of home state jurisdiction. It could thus help improve access to remedy in some cases.

Beyond issues of domestic law compliance or duties to adopt regulation or to regulate in some areas, governments have also been considering and taking action with regard to the impact of investment treaties on policy space.

# 9. The impact of investment treaties on policy space for domestic law and regulation of business

This section examines both concerns and policy responses relating to investment treaty overreach interfering with the state duty to protect from corporate human rights abuses through domestic regulation and adjudication.

## 9.1. Investment treaties and interference with the host state duty to protect – general considerations

In calling the attention of governments to policy areas where the duty to protect needed to be considered, Ruggie identified four policy clusters focused on broadly preventative measures. The first cluster focused on investment treaties. Ruggie identified two problems for the duty to protect.

The first was the impact of treaties on the right to regulate:

> *[Investment treaties] can lock in existing domestic regulatory requirements for the duration of a project, thus allowing the foreign investor to seek exemption from or compensation for the host government adopting, say, a new labor law, even if it raises costs equally on all enterprises in the country, domestic as well as foreign. If*

308 See Commentary to UNGP 25 ("Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.")

309 Dutch Model BIT, art. 16(1).

> *the government does not comply, the investor may be able to sue under binding international arbitration, in which an ad hoc panel of arbitrators considers only the treaty or contract text ("the law applicable"), not any broader public interest considerations that may be at stake."*[310]

The extension of the application of treaties to non-discriminatory government regulatory action in these areas was of particular concern. Research on the issues noted the growth of expansive interpretations and the possibility of chilling effects on the willingness of the host government to adopt adequate regulations in the best interests of its own population.

A second problem identified by Ruggie with regard to investment treaty policy was the relative political weight of different components of government: "the extensive fragmentation within governments, and the greater bureaucratic clout of investment promotion policy and agencies compared to entities concerned with the protection of human rights".[311] He thus advocated for more balanced investment agreements and better alignment among government agencies and policies.[312]

The UNGPs reflect these concerns. In their provisions on the state duty to protect, they recommend that governments ensure that they "maintain adequate domestic policy space to meet their human rights obligations" in their investment treaties and investment contracts.[313] The UNGPs also recommend ensuring that government departments, including those charged with investment policy, are "informed of and act in a manner compatible with the Governments' human rights obligations".[314]

States' duties in this regard also extend to their activity in international organisations. The UNGPs address in particular competitive considerations raised by BHR, and the role of international organisations in helping to create a level playing field: "Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards."[315]

Government and stakeholder consideration of the impact of investment treaties on the state duty to protect may vary depending on a range of circumstances. For governments that have faced major claims in ISDS or expect more claims, defensive interests in limiting taxpayer exposure or preserving regulatory autonomy may have already generated significant recalibration of investment treaty policy, at least for new treaties, even in the absence of specific consideration of the duty to protect. Other countries are much less exposed to claims because of their limited stock of inward investment or of inward covered investment.[316] Defensive exposure to investment treaties would be correspondingly low and claims may be rare. In such cases, while consideration of purely economic interests could lead to an interest in maximising covered investor protection in foreign countries including with preferential rights greater than those of investors in advanced economies, considerations relating to the state duty to protect could play a greater role.

Stricter constraints on developing countries than on advanced economies resulting from two-tiered approaches – which seek greater claimant protection in treaties or joint interpretations with developing

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310 Ruggie 2013 at location 1737.

311 Ruggie 2013 at location 1746.

312 Ruggie also included investor-state contracts in the first cluster due to their impact on the right to regulate, particularly through stabilisation provisions. He developed a set of "Principles for Responsible Contracts" issued as an addendum to the Guiding Principles. "Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators," UN Document A/HRC/17/31/Add.3 (25 May 2011). See further above, n. 42.

313 UNGP 9.

314 UNGP 8, Commentary.

315 UNGP 10, Commentary.

316 For example, Japan had an "inward FDI stock to GDP ratio [of] 4.2 percent in 2015, far below the OECD average of 50.4 percent". See Takeo Hoshi and Kozo Kiyota, Potential for Inward Foreign Direct Investment in Japan, National Bureau of Economic Research Working Paper 25680 (Mar. 2019), p.1.

countries where investment flows are one-way than with developed countries where flows are bilateral – might also be subject to consideration from the perspective of their impact on developing state capacity to protect, particularly to the extent they are associated with preferential rights. As Ruggie underlines, much may depend on the degree of integration of ministries with human rights responsibilities with investment treaty policy makers.

Governments have taken a range of actions that address concerns with the impact of investment treaties on policy space.

## 9.2. Recent government action that addresses concerns about investment treaty impact on the state duty to protect

Governments have acted to protect policy space from investment treaties in numerous ways in recent years. In some cases, these changes may reflect consideration of the duty to protect. However, although more research is required, it appears no treaty (other than the recent new Netherlands Model BIT addressed below) explicitly addresses the government duty to protect under the UNGPs.

The balance between investor protection and the right to regulate is a central issue in current debates regarding investment treaties. It is a subject of on-going Roundtable work.[317] Examples of government action to protect policy space have become numerous in recent treaties and government action. It responds in part to concerns that broad or vague investment protection standards might limit the ability of states to regulate in the public interest, including to realize the human rights of their citizens or to protect local communities. The work has noted the broad range of possible approaches:

> *The most obvious technique involves decisions about whether to include or exclude particular provisions, whether to draft them narrowly or broadly, precisely or in vague terms. The most important provisions in this regard are likely to be those most often at issue in investor claims. A second area of obvious interest are express provisions addressing the right to regulate. …*
>
> *A partial list of additional techniques used recently to re-balance treaties to allow for greater policy space would likely include the following: clarifications of treaty language; interpretative statements; joint interpretive statements; general exceptions; specific exceptions; reservations; conditions precedent to consent to arbitration; standards of review; limits or exclusions of MFN clauses; or limits on injunctions, damages or other remedies.*[318]

Only a few recent salient examples are noted here. The Roundtable has recently reviewed the numerous statements and interpretations by NAFTA governments of the FET clause in NAFTA to challenge broad readings including in order to protect the right to regulate and competitive equality.[319]

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317 See Gaukrodger, D. (2017), The balance between investor protection and the right to regulate in investment treaties, OECD Working Papers on International Investment 2017/03.

318 Id., p. 29.

319 See, e.g., USTR, The Facts on Investor-State Dispute Settlement (Mar. 2014) ("The United States has been a leader in developing carefully crafted ISDS provisions to protect the ability of governments to regulate …."); Government of Canada, Counter-Memorial (1 December 2009), § 268, in *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4 ("If it were true that customary international law required States to refrain from regulating in a way that frustrated the expectations of foreign investors, it would be impossible for States to regulate at all. The same can be said for the assertion that States are bound by custom to provide a "stable regulatory framework" for foreign investors."); Submission of The United States of America, 31 July 2009, § 8 in *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17 (US Non-Disputing Party Submission) ("States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the

The USMCA goes further and largely eliminates the risk of ISDS claims against non-discriminatory measures.[320] Canada and the US have excluded ISDS from their bilateral relations under USMCA following a series of controversial claims and awards based largely on the interpretation of absolute standards such as FET in a manner contrary to government submissions. SSDS continues to apply to the absolute standards and is less subject to expansive interpretations.[321] The general regime in Annex 14-D of the USMCA for ISDS between the US and Mexico limits the scope of ISDS to claims of discrimination, under the national treatment or most-favoured nation treatment provisions, or for direct expropriation; FET claims are excluded.[322] Exhaustion of domestic remedies is required and treaty shopping is curtailed.

The Parties to the EU-Canada Comprehensive Economic and Trade Agreement (CETA (2016)) included a general right to regulate clause and the EU now includes the clause as matter of general policy. In the CETA, the clause reaffirms, for greater certainty, the Parties' right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.[323]

Some treaties, such as the Canada-Moldova FIPA (2018), include GATT art. XX-style general exceptions to protect policy space for measures to protect human, animal or plant life or health; ensure compliance with domestic law that is not inconsistent with the treaty; or conserve the living or non-living exhaustible natural resources.[324] Such exceptions are frequent in trade agreements but are generally lacking in investment treaties. In a joint declaration, the Parties to the treaty also "[r]eaffirm the right of each Government to regulate within its territory to achieve legitimate policy objectives such as safety; the protection of health; the environment; public morals; social and consumer protection; or the promotion and

state of regulation in a particular sector.") (footnote omitted). See generally Gaukrodger, D. (2017), Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law, OECD Working Papers on International Investment, 2017/03, pp. 40-52 (analysing NAFTA government interpretations).

320 The investment chapter discussed in this section was not amended by the 2019 Protocol of Amendment. The original agreement signed on 30 November 2018 and the Protocol of Amendment signed on 10 December 2019 are available on the USTR website.

321 For example, in a reciprocal SSDS system, interpretations advanced by claimant governments in SSDS can expose the government to future claims from other governments under the same interpretations. In contrast, in a unilateral ISDS system, an investor claimant has no exposure as a result of advancing expansive interpretations.

322 A special regime allowing broader access to ISDS applies to certain sectors where certain central government contracts are involved.

323 CETA (2016), art. 8.9(1). Art. 8.9 also clarifies protection from claims for certain policies relating to subsidies and clarifies that certain interference with a claimant's expectations does not constitute a breach. More generally, the CETA Joint Interpretative Instrument between the Parties (point 6.a) states that "CETA will not result in foreign investors being treated more favourably than domestic investors".

324 Canada-Moldova FIPA (2018), art. 17(1) ("For the purpose of this Agreement: (a) a Party may adopt or enforce a measure necessary to: (i) protect human, animal or plant life or health,(ii) ensure compliance with domestic law that is not inconsistent with this Agreement, or (iii) conserve the living or non-living exhaustible natural resources; (b) provided that the measure referred to in subparagraph (a) is not: (i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or (ii) a disguised restriction on international trade or investment.") See also Canada-Kosovo FIPA (2018), art. 18(1) (same).

protection of cultural diversity …".[325] The Colombia-UAE BIT (2017) contains similar carve-outs for environmental and labour law measures.[326]

The Roundtable has noted that ISDS arbitral interpretations generally allowing shareholder claims for reflective loss create the clearest example of preferential rights for covered investors over domestic and other investors;[327] they also expand the scope of ISDS by allowing claims over government regulatory action affecting any domestic company with covered shareholders. Governments are increasingly taking action in this area, including in respondent and non-disputing government submissions challenging reflective loss claims[328], and in renewed attention to the issue at the OECD and in connection with ISDS reform at UNCITRAL Working Group III.[329] Governments have also adopted some treaty provisions that seek to limit multiple claims against governments in the same dispute, including reflective loss claims, in particular by related entities.

Treaty shopping by claimants and their beneficial owners can negate government efforts to protect policy space. Beneficial owners and claimants can treaty shop to access more favourable investment treaty provisions, which can include avoiding provisions protecting government policy space.[330] Some government action has addressed treaty shopping. For example, government rejection of claims in ISDS for reflective loss, noted above, can sharply limit treaty shopping – the attribution by beneficial owners of reflective loss claims to their controlled corporate entities is a significant source of treaty shopping in ISDS.[331] Provisions that allow governments to deny benefits to shell companies controlled by investors from non-Parties to treaties or requiring covered investors to have substantial activities in their home

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325 Joint Declaration by Canada and Moldova regarding the Canada-Moldova FIPA (2018).

326 See Colombia-UAE BIT (2017), art. 10(1) ("Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in accordance with the applicable environmental and labour law of the Contracting Party.").

327 Covered shareholders can bring extraordinary claims for reflective loss in ISDS while similarly-injured non-covered shareholders are generally barred from even bringing a claim under domestic law. See Gaukrodger, D., Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency, OECD Working Paper on Investment 2013/3.

328 See, e.g., *Bilcon of Delaware Inc. v. Canada*, Canada Counter-Memorial on Damages (9 June 2017), p. 2, 8-18; *Bilcon of Delaware Inc. v. Canada*, Submission of the United States of America (29 Dec. 2017), paras. 2-22 (non-disputing party submission).

329 Costa Rica and the Republic of Korea sponsored a discussion on claims for reflective loss in ISDS at the 2019 OECD Investment Treaty Dialogue with participation from the UNCITRAL Secretariat. See also UNCITRAL Secretariat, Possible reform of investor-State dispute settlement (ISDS): Shareholder claims and reflective loss (9 Aug. 2019); Gaukrodger, D., Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law", OECD Working Papers on International Investment, 2014/02; Gaukrodger, D., Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency, OECD Working Paper on Investment 2013/3; Julian Arato, Kathleen Claussen, Jaemin Lee, and Giovanni Zarra, Reforming Shareholder Claims in ISDS, Academic Forum on ISDS Working Paper 2019/9. The OECD, UNCITRAL Secretariat and the UNCITRAL Academic Forum co-hosted a webinar on Shareholder claims and Reflective Loss in July 2020. UNCITRAL Working Group III requested additional work on reflective loss in October 2020.

330 See OECD, Treaty shopping and tools for reform, agenda and conference materials (4th Annual Conference on Investment Treaties, 12 Mar. 2018), pp. 11-15.

331 See OECD, Treaty shopping and tools for reform, agenda and conference materials (4th Annual Conference on Investment Treaties, 12 Mar. 2018), p. 13 and figure 2.

jurisdictions also limit treaty shopping.[332] Some governments have also clarified that treaty shopping through use of the MFN clause is excluded for both substantive and procedural matters; the MFN clause applies to domestic law treatment of the investor.[333]

The Dutch Model BIT also introduces some limits on investment treaty shopping. Art. 16(3) bars ISDS claims where an investor has "changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable". Limits on treaty shopping using post-dispute corporate structuring, however, such as those in art. 16(3), can encourage advance corporate structuring for every investment before a dispute arises, raising transaction costs and opacity for investment generally.[334] Art. 16(3) contrasts with more aggressive efforts to address treaty shopping in the tax field.[335]

Recent decisions by constitutional courts have also had important effects on investment treaty policy in particular in restraining the preferential treatment of foreign investors over domestic investors under equal rights guarantees under national constitutions. Examples include recent decisions by the Colombian[336] and French[337] constitutional courts.

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[332] See, e.g., 2012 US Model BIT, art. 17(2); CETA art. 8.1 (definition of investor).

[333] See, e.g., CETA (2016), art. 8.7(4) (clarifying that "substantive obligations in other international investment treaties do not in themselves constitute 'treatment', and thus cannot give rise to a breach of [the MFN provision], absent measures adopted or maintained by a Party pursuant to those obligations"); 2018 USMCA, Annex 14.D.3(1)(a)(i)(A) & n. 22 ("treatment" referred to in [the MFN provision] only encompasses measures adopted or maintained by the other Annex Party, which for greater clarity may include measures adopted in connection with the implementation of substantive obligations in other international trade or investment agreements"); id., Annex 14-E (2)(a)(i)(A) & n.30 (same); Dutch Model BIT, art. 8(3). See OECD, Treaty shopping and tools for reform, agenda and conference materials (4th Annual Conference on Investment Treaties, 12 Mar. 2018), pp. 9-11.

[334] The OECD Secretary-General pointed in 2014 to the harmful impact of investment treaty incentives for companies to routinely create complex corporate structures on efforts to achieve responsible business conduct. He called for the elimination of those incentives:

**"**By allowing a wide range of claims by direct and indirect shareholders of a company injured by a government, most investment treaties encourage multi-tiered corporate structures. Each shareholder can be a potential claimant. Indeed, many treaties encourage even a domestic investor to create foreign subsidiaries – it can then claim treaty benefits as a "foreign" investor.

If complex structures were cost-free, perhaps it wouldn't matter. But they aren't. Complex structures increase the cost of insolvencies and mergers. They also interfere with the fight against bribery, tax fraud and money laundering because they can obscure the beneficial owner of the investment. Governments should promptly eliminate investment treaty incentives to create multi-tiered corporate structures."

Angel Gurria, The Growing Pains of Investment Treaties, OECD Insights (13 Oct. 2014). This op-ed was published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed therein do not necessarily reflect the official views of OECD member countries.

[335] See, e.g., OECD, BEPS Action 6; Isabel Gottlieb, "2019 Outlook: 'End of Treaty Shopping' for Multinationals", Bloomberg Tax (28 Dec. 2018).

[336] See Constitutional Court of Colombia, Judgment No. C-252/19, 6 June 2019 (on the Colombia-France BIT) (holding that the Colombian Constitution prohibits giving greater rights to foreign investors than to Colombian investors); Constitutional Court of Colombia, Judgment No. C-254/19, 6 June 2019 (on the Colombia-Israel FTA) (same). See also summaries of the cases in Constitutional Court of Colombia, Communication No. 19 of 2019, 5-6 June 2019. All materials are in Spanish.

[337] See France, Constitutional Council, Decision No. 2017-749 of 31 July 2017, para. 36 (interpreting the CETA treaty clauses providing national treatment, most-favoured nation, fair and equitable treatment (FET), and indirect and

Concerns about the impact of investment treaties on climate action in particular have emerged with particular intensity recently as the evidence of climate change has accumulated.[338]

There are many other examples of government efforts to protect policy space in new treaties. However, other than the decision by some countries to exit first generation treaties and the growing attention to reflective loss, action has been modest with regard to renegotiation of the older treaties still used for most ISDS claims.

# 10. Provisions in investment treaties applicable to business conduct

## 10.1. Domestic law legality requirements

As noted above, the 2014 OECD statistical survey of investment treaties focused on express language addressing RBC and sustainable development, and did not collect statistical information about clauses referring to domestic law. Such clauses are important to consider, however, in a broader consideration of business responsibilities and investment treaties. This section briefly takes note of some different formulations in treaty practice.

UNCTAD's general mapping of investment treaties finds extensive use of legality requirements including in older treaties, focusing on the use of legality provisions in the definition of investment. The database information refers to roughly two thirds of investment treaties containing a clause requiring that an investment be in accordance with domestic law in 2014 (1620 out of 2527 mapped treaties).[339] In the smaller number of treaties concluded from 2015-2020, such clauses are found in roughly the same proportion (28 out of 49 treaties).

It appears that most provisions provide that the investment must be "made in accordance with" domestic law of the host State in order to benefit from treaty coverage. This requirement typically forms part of the definition of covered investments.[340] It can also be included in provisions on the scope of application of the treaty. Some treaties refer to "investments within the territory of one Contracting Party's State, made in compliance with its legislation."[341] The 2018 Argentina-Japan BIT contains a footnote "confirm[ing] that nothing in this Agreement shall apply to investments made by investors of a Contracting Party in violation

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direct expropriation protections as having as « their only purpose to provide covered investors with rights that nationals also have") [« [les clauses du traité] qui sont relatives en particulier au traitement national, au traitement de la nation la plus favorisée, au traitement juste et équitable et à la protection contre les expropriations directes ou indirectes, ont pour seul objet d'assurer à ces investisseurs des droits dont bénéficient les investisseurs nationaux »].

338 See, e.g, How some international treaties threaten the environment, The Economist (5 Oct. 2020) (discussing Tienhaara, K. and L. Cotula, Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets (IIED 2020)).

339 See UNCTAD, International Investment Agreements Navigator, Mapping of IIA Content (last consulted 4 Sept 2020).

340 See EU-Viet Nam IPA (2019), art. 1.2(q) (defining a "covered investment" as "an investment by investor of a Party in the territory of the other Party, in existence as of the date of entry into force of this Agreement or made or acquired thereafter, that has been made in accordance with the other Party's applicable law and regulations").

341 1997 Kazakhstan-Uzbekistan bilateral investment treaty, art. 12.

of the applicable laws and regulations of either or both of the Contracting Parties".[342] One recent treaty provides in part that it is applicable to investments made "in accordance with [host state domestic law] by *responsible* investors of the other Contracting Party".[343] It also contains an exclusion for investments made using assets derived from illegal activities, subject to certain conditions.[344] The EU-Singapore IPA (2018) requires the legality of investment under "applicable law" at the time the investment is made.[345] This may be designed to encompass both EU and EU member state law in appropriate cases.

Some treaties define investment as including a requirement that it must be "admitted" by the host state by the host state subject to its law and investment policies. Some Australian treaties define investment to mean "every kind of asset, owned or controlled by investors of one Party and admitted by the other Party subject to its law and investment policies applicable from time to time". Another variation requires "acceptance" of the investment in accordance with domestic law.[346]

The CETA contains both (i) a general domestic law legality condition for the application of investment protection as a whole; and (ii) a separate provision applicable to ISDS that clarifies for greater certainty that investments made "through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process" are excluded from ISDS.[347] The use of a "for greater certainty" clarification communicates the Parties' view that the rule applies generally even where not expressly stated.[348] The Dutch Model BIT and the Belgium-Luxembourg Economic Union Model BIT each contain two legality requirements similar to those in CETA.[349]

A few treaties expressly clarify that minor breaches do not preclude coverage. For example, the Peru-Australia Free Trade Agreement (PAFTA), for example, provides that "[n]o claim may be brought under this Section in relation to an investment which has been established through illegal conduct, including fraudulent misrepresentation, concealment or corruption". It clarifies that the exclusion "does not apply to investments established through minor or technical breaches of law."[350]

Some treaties expand the requirements for a covered investment to include law-abiding behaviour in accordance with host state domestic law during the "operation" of the investment as well as when it was "made". This is particularly the case for treaties that limit covered investments to enterprises. The Indian Model BIT published in 2015 (art. 1.4) defines an investment in part as "an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the party in which territory the investment is made ….".[351] The 2019 Morocco model investment treaty includes a general requirement

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342 Agreement Between the Argentine Republic and Japan for the Promotion and Protection of Investment, art. 1 n.1.

343 Colombia-UAE BIT (2017), art. 1(1) (emphasis added).

344 Id., (art. 1(3).

345 EU-Singapore IPA (2018), art. 2(1).

346 1997 Germany-Philippines BIT.

347 CETA (2016), art. 8.1(definition of "covered investment"), art. 8.18(3) (condition for access to ISDS).

348 The practice, however, is not uniform for recent treaties especially in stand-alone investment treaties. For example, two investment treaties signed by Canada subsequent to CETA do not include this type of express clarification about exclusions of coverage; nor do they expressly refer to the domestic law legality of the investment. Canada-Moldova FIPA (2018); Canada-Kosovo FIPA (2018).

349 See Dutch Model BIT arts. 2(1), 16(2); Agreement Between the Belgium-Luxembourg Economic Union, on the one hand, and ..., on the other hand, on the Reciprocal Promotion and Protection of Investments (2019), arts. 2(4), 19(A)(2).

350 Peru-Australia Free Trade Agreement (2018), art. 8.20(2).

351 See also Morocco-Nigeria BIT (2016), art. 1 ("[i]nvestment means an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made".)

of compliance with domestic law during the operation of the investment (art. 18.1); art. 28.3 precludes access to ISDS if an investor or investment breaches one of its obligations under the treaty. The treaty does not include an express seriousness requirement for breaches which could result in uncertainty over whether minor breaches would affect access to ISDS.

In addition to clauses that affect coverage of investment or the operation of ISDS, some treaties include general requirements of compliance with domestic law by investors and investments.[352] These are sometimes excluded from the scope of ISDS or dispute settlement. For example, the 2020 Brazil-India investment treaty imposes a binding obligation on investors and investments to comply with all investment-relevant laws, including those on taxation, prohibits them from bribing public officials and commits them to providing all information required by the state parties. The SSDS provisions do not apply to the investor and investment obligations to comply with domestic laws.[353] In other cases, they are included in the scope of ISDS. For example, the Investment Agreement for the COMESA Common Investment Area provides that a government respondent under the treaty may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor has not fulfilled its obligations under the treaty, including the obligation to comply with all applicable domestic measures.[354]

While few contest the importance of domestic law compliance in principle, some investment treaties, including some major treaties, do not include express legality clauses. As noted, it is possible that some implied requirements are expected to apply. But this omission may also suggest that some governments consider that it may not be advisable to include domestic law legality requirements in treaty policy or that alternative treaty approaches are preferable.

A preliminary review of existing treaty language in this area allows some tentative conclusions. A first point as noted is the frequent use of provisions of this type in the existing pool of investment treaties including in older treaties, suggesting broad government interest in ensuring the legality of investment. A second conclusion is that most references are very brief; for example, the requirement of an investment made in accordance with domestic law or in compliance with domestic law is generally not further explained. A third provisional conclusion is that the drafting of the provisions varies with a number of different approaches being used. Further examination of different drafting variations may be useful. Contrasting treaty policies and experiences with including binding clauses and their scope provide a valuable basis for exchanges of views and experiences.

ISDS cases have interpreted differently-drafted provisions in a number of cases including with regard to whether they require the legality of investment and whether that is a condition of treaty coverage. They have expressed varying views on whether substantial compliance of investment with domestic law is a condition of coverage generally. Prior to further analysis of treaty variations or ISDS interpretations, however, it may be valuable to consider broader policy questions including the appropriate incentives in this context and the potential impact of legality issues on legitimacy.

## 10.2. Express attention to RBC in recent investment treaties -- Speaking to business beyond domestic law legality

This section reviews sample approaches located so far that address business responsibilities in investment treaties beyond domestic law legality. Most recent approaches to business responsibilities in investment treaties

352 2019 Morocco model BIT, art. 18.1 (general requirement of compliance with domestic law during operation of investment).

353 See Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (2020), Arts. 8, 10.1, 19.3.

354 See Investment Agreement for the COMESA Common Investment Area (2016), arts. 13, 28(9).

are hortatory clauses encouraging RBC/CSR; these are addressed in the first instance. A second part reviews treaty clauses addressed to business extending beyond legality requirements and hortatory clauses.

### *10.2.1. Hortatory clauses encouraging RBC or corporate social responsibility*

Most approaches located so far to BHR/RBC in investment treaties are similar. Treaties limit themselves to requiring states to encourage investors to observe internationally recognized standards of CSR in their practices and internal policies; alternatively, they may ask investors to strive to achieve RBC standards. Further work between governments on the issues is sometimes indicated.

For example, in the Additional Protocol to the Pacific Alliance (2014) (Chile, Colombia, Mexico, Peru), the Parties agree to encourage enterprises operating in their territory or jurisdiction to voluntarily adopt internationally recognised standards of CSR.[355] The Parties also remind companies of the importance of incorporating them in internal policies and identify particular policy area including human rights, labour rights, the environment and others covered by the Guidelines. The Parties also agree to take account of the OECD Guidelines and identify and share best practices to achieve the goals of the Guidelines and achieve sustainable development.[356] Argentina's investment and trade treaties in recent years have included clauses regarding corporate social responsibility, including in some cases an explicit reference to the OECD Guidelines.[357]

Under the Canada-Côte D'Ivoire FIPA (2014), "[e]ach Party shall encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, […]".[358] The labour chapter in the CPTPP provides that "[e]ach Party shall endeavour to encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party".[359] Some other examples, such as the Czech Model BIT, refer to RBC in the preamble rather than in the text.[360]

Under the Brazilian Model CFIA (2015) "[i]nvestors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices […]".[361] The model treaty expressly sets out a broad list of CSR principles, including protecting the environment, respecting human rights, cooperation with local communities, building human capital, observing legislation on the environment, health, safety and labour issues, refraining from discrimination against workers, or promoting supply chain responsibility by encouraging their business partners to observe these principles.[362]

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355 Additional Protocol to the Framework Agreement of the Pacific Alliance (2014), art. 10.30.

356 Additional Protocol to the Framework Agreement of the Pacific Alliance (2014), art. 10.30(3). See also Agreement to Amend, in respect of investment and trade and gender, the Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile (2019), Appendix I, art. G-14 bis.

357 See, e.g. Argentina-Chile FTA, art. 8.17; Argentina-UAE BIT, art. 17).

358 Canada-Côte D'Ivoire FIPA (2014), art. 15(2). See also Canada-Kosovo FIPA (2018), art. 16.

359 CPTPP (2016), art. 19.7.

360 Czech Model BIT, preamble ("Desiring to encourage enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized standards and principles of corporate social responsibility, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct […]").

361 Brazilian Model CFIA (2015), art. 14(1).

362 Brazilian Model CFIA (2015), art. 14(2).

The Dutch Model BIT includes a general commitment by the governments to the international framework on BHR, including the UNGPs and the OECD Guidelines, and to strengthening it.[363] It also sets forth the goal of promoting responsible foreign investment in its preamble.

The 2019 Belgium-Luxembourg Economic Union Model BIT includes an agreement to promote RBC in line with international guidelines and principles, by companies, investors and governments, including through exchange of information and best practices. It also requires continued and sustained efforts by the governments towards adhering to internationally recognised guidelines and principles on CSR and RBC. RBC is defined to mean that investors or investments comply with laws, such as those on human rights, environmental protection, labour relations and financial accountability among others, and respond to societal concerns.[364]

While the effects of hortatory clauses are often questioned and contrasted with the binding obligations in the treaties, commentators have noted that these types of hortatory provisions can serve a number of purposes. One is to seek to raise or level the playing field by seeking to promote the production of products in the partner country that do not undercut home country products produced in compliance with RBC or strict legal norms.[365] This is reflected in the view that corporate non-compliance with RBC principles constitutes a form of social and environmental dumping.

To the extent the hortatory clause has impact, this would work on the trade side to internalise costs in foreign products that may compete in the home market. On the investment side, it would limit delocalisation incentives. This may be of increasing interest as senior officials have expressed concerns that the binding obligations of governments in investment treaties can promote delocalisation of investment and jobs from advanced economies; they are seen as reducing the relative attractiveness of jurisdictions with strong domestic rule of law protections in favour of investment abroad that can benefit from even-stronger treaty protections. Whether hortatory clauses counteract the impact of binding provisions in this area raises empirical questions.

A second potential effect of such clauses could be stronger. Treaty recognition that RBC is important could provide a possible basis for findings that RBC and non-RBC respecting companies are not in "like circumstances" for purposes of relative standards such as NT or MFN. They could encourage interpretations that permit government regulation that favours products and services that are produced by companies that comply with RBC principles even if firms without such policies are disadvantaged.

A third potential effect of hortatory CSR clauses could be to attenuate or overcome possible objections to the extraterritorial regulation of the activities of companies in the partner country.[366] In principle, as noted above, public international law principles permit a government to regulate its nationals, including companies, with regard to their activities abroad; it can also regulate other companies provided there is a sufficient basis for jurisdiction, such as conduct of significant business in the forum state. However, even if lawful, such extraterritorial regulation may create tensions with the other country in certain circumstances.

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363 Dutch Ministry of Foreign Affairs, Model Investment Agreement, Mar. 2019, art. 7(5) ("The Contracting Parties express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework.").

364 Agreement Between the Belgium-Luxembourg Economic Union, on the one hand, and ....., on the other hand, on the Reciprocal Promotion and Protection of Investments (2019), arts. 18(2)-(3), 2(11).

365 See Lorand Bartels, The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements (2014) (study requested jointly by the European Parliament's Subcommittee on Human Rights and its Committee on International Trade), pp. 15-16.

366 Id.

Treaty provisions making clear that governments support the promotion of RBC could make reasonable extraterritorial regulation more acceptable.[367]

A fourth possible effect could be to provide a stronger base on which adjudicators could potentially apply doctrines such as a requirement that a claimant must have "clean hands" either to bring a claim or to recover in full. It appears that a few cases have applied such principles as a general matter without an express textual basis in the applicable treaty although more research is required. General references in investment treaties to support for BHR/RBC principles could encourage such outcomes. However, they provide no guidance about whether and to what extent adjudicators should apply such doctrines based, for example, on the whether the claimant or its affiliates engaged in reasonable HR/RBC due diligence or based on adverse impacts. This could lead to widely varying outcomes depending on the adjudicators, particularly in an *ad hoc* system.

Existing treaties do not appear to provide any role for NCPs. Commentators have suggested that NCPs could be given a role in connection with investment treaties. A government has suggested reflection on the possible interaction between the NCP network (respectively NCP conclusions and recommendations) and treaty-based ISDS mechanisms. The Trade Union Advisory Committee to the OECD (TUAC) noted that more than half of the cases submitted to NCPs in 2018 were rejected and did not proceed, and suggests that reflection is warranted on how to link investment treaties and effective RBC procedures.[368]

### *10.2.2. Clauses addressed to business extending beyond legality requirements and hortatory clauses*

A number of regional treaties, in particular in Africa, set out treaty obligations on investors in several areas including with regard to the environment, labour and human rights.

The 2008 Supplementary Act on Investment of the Economic Community of West African States (ECOWAS) sets out several express obligations on investors with regard to both human rights and labour. It predates the UNGPs. Article 14(2) provides that "[i]nvestors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties'.[369] The notion of investors "upholding" human rights may require interpretation. Art. 14(2) provides that "[i]nvestors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998". Investments are defined to include companies; it is not clear why the labour provision extends to both investors and investments while the human rights provisions appear to be largely limited to investors.

The Morocco-Nigeria BIT (2016) also adopts an autonomous approach without express reference to the UNGPs or the OECD Guidelines. It includes a number of provisions regarding both investor and investment obligations, and investor liability. For example, it provides that "[i]nvestors and investment shall uphold human rights in the host state" (art. 18(2)). It also obligates investors and investments not to "manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties" (art. 18(4)). It requires that

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367 Bartels has suggested that some mere hortatory clauses might be insufficient for this purpose. He has suggested a clause that would state that the Parties "affirm their commitment to the UN Guiding Principles on Business and Human Rights [and agree to promote best business practices related to corporate social responsibility]". Id.

368 OECD, Public consultation on business responsibilities and investment treaties, compilation of comments received from the public, p. 67.

369 Economic Community of West African States (ECOWAS) Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (19 Dec. 2008).

"[i]nvestments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard" (art. 18(1)).

Article 18(1) of the 2019 Model BIT of Belgium and Luxembourg requires investors to "act in accordance with internationally accepted standards applicable to foreign investors to which the Contracting Parties are a party". A commentator has suggested that "internationally accepted standards applicable to foreign investors" in this context could refer to such regimes as the UNGPs, the OECD Guidelines or the ILO MNE Declaration providing the government has adhered the relevant instrument. However, the treaty elsewhere refers specifically to those instruments and the use of the term "party" is unusual.[370] The provision could also apply to future treaties.

The Dutch Model expressly addresses the UNGPs and OECD Guidelines including the roles of both governments and business in several new areas. As noted in the introduction, this development is of potentially broad significance because the Netherlands has been the home state for many ISDS claimants, has an extensive stand-alone investment treaty network and has announced its intention to engage in a broad effort to renegotiate its treaties. The Model is also the product of an extensive process and debate in the Netherlands to seek to address the interaction of business responsibilities and investment treaties.

The model appears to be one of the first to refer expressly to the importance of investor due diligence to address risks and adverse impacts. As discussed above, HR/RBC due diligence is of fundamental importance in the overall effort to improve RBC. While general references in investment treaties to the UNGPs, OECD Guidelines or ILO instruments implicitly incorporate their due diligence components, the explicit recognition of the importance of due diligence in an investment treaty is a significant innovation and can help improve investment lawyer and investor awareness of the importance of HR/RBC due diligence. Art. 7(3) "reaffirms the importance" of investors conducting a due diligence process to identify, prevent, mitigate and account for risks and impacts of its investment. The provision refers to due diligence with regard to environmental and social risks and impacts, but does not refer to human rights risks and impacts, or those relating to other policy areas covered by the OECD Guidelines and due diligence guidance. The omission of human rights and other due diligence from art. 7(3) may attract attention in light of broader references to the UNGPs and OECD Guidelines in arts. 7(5) and 23 (see below).[371]

The provision encourages due diligence relating to the particular investment rather than the general risk-based due diligence as recommended in the UNGPs and OECD Guidelines. Due diligence to address risks and impacts focused on a particular investment is important. At the same time, policies regarding broader due diligence are important in themselves; they can also be important in evaluating situations where a particular project generated adverse impacts. For example, as noted above, some regimes for bribery take account of the quality of general due diligence in assessing corporate behaviour where it has engaged in particular acts of bribery. Coverage of investors and investments under the treaty is not linked to due diligence.

The ECOWAS Supplementary Act on Investment does not specifically refer to investor due diligence, but covers some of the same ground in requiring investors to conduct an environmental and social impact assessment of the potential investment using the precautionary principle, and to make it available to the

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370 Krajewki, Markus, A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application, Business and Human Rights Law Journal (Jan. 2020).

371 Human rights are noted as an issue of importance for arbitrator selection. The treaty provides that arbitral appointments shall reflect a broad range of expertise including issues such as environmental or human rights law as well as international investment law and dispute settlement (art. 20(5)).

local community and affected interests in the host State.[372] This can supplement domestic law requirements of this nature.

The Dutch model also includes an innovative provision addressing the impact of investor conduct in arbitral tribunal determinations of the quantum of damages due to the investor. Art. 23 provides in full as follows:

> *Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.*

As noted in Roundtable discussions, a few ISDS cases have applied reductions to claimant damages based on investor misconduct without an express basis in the treaty. The Model provision provides a clearer basis for such reductions. It directs the arbitral tribunal to consider certain investor conduct in deciding on the amount of compensation. It also identifies well-established principles and guidelines for business conduct in the form of the UNGPs and OECD Guidelines. It marks a significant innovation in the consideration of business responsibilities in investment treaties.

The provision raises a number of interesting issues. The use of the terms "non-compliance" by the "investor" with its "commitments" under the UNGPs and OECD Guidelines is unusual. The term "commitments" could suggest that the investor must somehow have committed to observe the UNGPs or Guidelines. Investors that make no claim to act in accordance with those instruments – or that expressly disavow them and publicly state that they are not committed to them – could argue that they fall outside the clause. The use of commitments contrasts with the general use of the term responsibilities in the BHR/RBC context, as noted above. The legal term "non-compliance" also contrasts with the general tenor of the UN and OECD instruments and the processes they seek to encourage. As outlined above, some national legal regimes that take account of due diligence use more flexible language rather than referring to compliance.

The intersection between the legal view of a corporate group and the UNGP/Guidelines view of corporate groups also raises issues here in light of the reference to the "investor".[373] Ongoing work on reflective loss, including joint work involving the OECD and UNCITRAL Working Group III, may help address the issues in this area.[374]

The provision also raises the issue of how to weigh poor corporate HR/RBC due diligence, for example, in monetary terms. Here too reference to domestic law examples may provide guidance. The US Sentencing Guidelines for Organizations (including corporations) include due diligence-type considerations for

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372 ECOWAS Supplementary Act, art. 12.

373 The Dutch Model BIT does not address reflective loss. It does preclude shell company claims which are a major component of current claims under Dutch treaties against other governments. Dutch Model BIT, art. 1(b) & (c). The treaty thus requires that an investor have substantial contacts with its home state in order to be eligible. The provisions are less demanding than analogous provisions in tax treaties.

If the Model is interpreted to allow reflective loss claims, the issues noted above could continue to exist. While home state contacts are required, the treaty does not appear to require any active implication in the investment – a passive indirect shareholding would appear to qualify. A mid-tier passive shareholder (with the requisite substantial contacts in the Netherlands for treaty coverage but ones unrelated to the investment) could thus claim in ISDS while the active management of the operating company in the host state may be carried out through higher tier companies (that own or control the investor), lower tier companies or through the operating company itself. Misconduct by those affiliates of the passive investor at those active levels might not be caught by the art. 23 reference only to the "investor". Effective policies and procedures on HR/RBC due diligence are often group-wide.

374 See supra section 4.2.3 [Parent company liability for actions relating to their subsidiaries].

purposes of deciding on sanctions on corporations including financial sanctions. These and other national law experiences with the weighing of the quality of general corporate policies can be instructive.

## 10.3. Potential additional considerations

As government action increases in the broader field of BHR/RBC, investment treaty policy makers are facing calls for more action. For example, the Parliamentary Assembly of the Council of Europe has expressed concerns over the implications of ISDS for human rights, the rule of law, democracy and national sovereignty and called for, among others, the use of due diligence tools by prospective investors and States negotiating investment treaties.[375]

Several areas of analysis could be valuable. First, governments could consider the risk profile for adverse impacts in the investment treaty system. It would appear to be fairly high. Investors and their investments are generally more engaged in the host country than a trader selling from another country. This has been noted as a reason for a greater need for protection of investors than traders; it also suggests higher risks of adverse impacts. Investment treaties are frequently applicable to developing countries where remedies for adverse impacts may face more obstacles.

Second, investment protection treaties could be compared with other government action. As noted, UNGP 4 calls for particular government action with regard to the duty to protect for enterprises that receive governments benefits. It notes in particular government support for activities in foreign jurisdictions such as enterprises that "receive substantial support and services from state agencies such as export credit agencies and official investment insurance or guarantee agencies". Investment treaties appear to be analogous in some ways to government benefit systems, such as export credit.[376]

Third, governments could consider how various policies that are being employed to advance BHR/RBC in other fields might apply in the investment treaty context. As outlined above, governments are imposing, among other things, due diligence obligations or reporting obligations. They are using due diligence conditionality for government procurement or benefits. The quality of corporate due diligence is also increasingly used to determine liability or sanctions in key areas such as bribery. As in other areas, governments could reflect the particular concerns or interests of their societies by specifying conditions for particular BHR/RBC issues (such as modern slavery) or for particular sectors. National debates over the scope of application and other conditions of existing and proposed BHR/RBC regimes can also be instructive, taking account of the different contexts.

Differentiated approaches are also possible. For example, business access to ISDS for core protections, such as those against direct expropriation or discriminatory measures, could remain unconditional while coverage in ISDS under broader protections that can generate liability for non-discriminatory measures, where included, could be made conditional on business conformity with BHR/RBC due diligence responsibilities.

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375 Council of Europe, Parliamentary Assembly Resolution 2151, 2017, paras 1, 9.

376 Investment protection treaties are increasingly seen as akin to a government subsidy in the form of free political risk insurance, as illustrated by the remarks of USTR Lighthizer cited above. The cost of the subsidy for the capital exporting sector has been seen as being paid for with a combination of (i) lost opportunities to obtain trade benefits (at the time of treaty negotiation) due to negotiation costs to obtain ISDS, of particular concern to some free trade advocates; (ii) government exposure to unlimited contingent liabilities in ISDS proceedings and awards to covered investors of treaty counterparties, with the size of the contingent liabilities varying depending on investment stocks and flows; and (iii) the costs to negotiate and maintain investment treaty networks, and to litigate cases. There are of course also differences with transaction-specific grants of support such as export credit. Comparative analysis of the frameworks would be needed.

Work in this area requires close collaboration with stakeholders. Business interests and sensitivities are key in framing appropriate approaches. For example, business concern about liability in connection with due diligence obligations could suggest consideration of making due diligence a condition for investment treaty coverage for large enterprises, without imposing any obligations, or requiring its consideration in assessing damages, as in the Dutch model. Market substitutes for protection exist and companies that do not engage in due diligence would incur the costs of obtaining those substitutes, providing increased incentives for due diligence.

More broadly, governments could consider whether investment treaties could do more to inform business and their law firms about their responsibilities. Greater consistency in references to endorsed principles and guidance, together with greater detail, could help achieve one of the key goals of the UNGPs and Guidelines: a common global normative platform and authoritative policy guidance.[377] The Additional Protocol to the Pacific Alliance (2014) (Chile, Colombia, Mexico, Peru) is an example of a treaty that combines references to endorsed principles and guidance with some description of their content. Other than the Dutch Model BIT, however, few if any treaties to date appear to refer specifically to the fundamental importance of HR/RBC due diligence.

Competitive interests must also be addressed and the FOI Roundtable, with its broad participation, is well placed to consider them. Information from Roundtable governments about their policies provides a first basis upon which to work in this area. Consideration of policies in this area also needs to take careful account of the various purposes of investment treaties and how possible approaches would interact with those purposes. At the same time, what may first appear to be conflicts could perhaps be resolved by careful analysis. For example, a greater focus on the use of investment treaties for promoting investment for sustainable development could support a more focused approach to protection based on objective criteria that are widely seen as contributing to better business conduct and outcomes.

# 11. Conclusion

The interaction of business responsibilities and investment treaties has been subject to date to limited consideration and practice. This paper seeks to provide background information on the many developments in the field of BHR/RBC in order to provide investment treaty policy makers with a broader basis of consideration of policy options. This includes a description of the powerful convergence of thinking about both the respective roles of governments and business in addressing business conduct that generates adverse impacts, as well as on the content of business responsibilities. It also includes consideration of how different policy communities including governments and stakeholders are incorporating BHR/RBC considerations into rules, policies and conduct.

The paper provides limited analysis of the still mostly-recent experiences and debate within the world of investment treaties. Further work could explore how the experiences in other fields outlined here and a more detailed examination of investment treaty developments – together with thinking about the commonalities and differences between different policy areas – may assist in addressing the issues in the field of investment treaties.

377 Ruggie 2013 at location 1674.

# Annex 1: Preliminary overview of status of governments' National Action Plans (NAPs) on Business and Human Rights (BHR) or Responsible Business Conduct (RBC), and their attention to policies on trade and investment agreements

The following table seeks to give a preliminary overview of the status of work on NAPs on BHR and RBC by Roundtable governments, and to note in particular their attention to policies on trade and investment agreements.[378] As noted in the text, governments have formulated NAPs using different titles, referring for example to BHR, RBC or corporate social responsibility (CSR) in different cases. This preliminary review includes these differently-denominated NAPs together in the second column below in light of the primary focus on trade and investment agreement policy.

Several sources were consulted in order to track and compile information. The website of the Office of the UN High Commissioner for Human Rights (OHCHR) is the repository for all NAPs on BHR. Further information was sought in governmental websites in order to track evolutions regarding the development of NAPs. Statements made by government officials in contexts and fora relevant to BHR or some other relevant documents, including official follow-up reports specific to the implementation of the NAP on BHR, were also consulted. Additional information has been obtained from the Business & Human Rights Resource Centre,[379] which circulated a government survey in order to gather information on national initiatives on BHR.

The table summarises available information about the status of NAPs. It provides information including explanations for inaction provided by governments in response to the Business & Human Rights Resource Centre's survey. Only explanations for inaction provided in these sources or that could be identified in other official statements have been included in the table.

The sources used may be incomplete or out of date. In addition, the information compiled to date is limited to materials available in English, French and Spanish. Information from Roundtable governments can provide a more complete picture and governments are invited to review the table for this purpose. The information was primarily compiled in late 2019 and early 2020, and also reflects additional information supplied by governments since then.

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[378] For a broader review of NAPs and their status, see OECD, National action plans on business and human rights to enable policy coherence for responsible business conduct (2017).

[379] In a speech given in the context of the annual lecture celebrating Sir Geoffrey Chandler organised by the Business & Human Rights Resource Centre on 11 January 2011, John Ruggie described the Business and Human Rights Resource Centre's website as "the most comprehensive source of information available on global business and human rights issues".

## Preliminary overview of status of governments' NAPs on BHR or RBC and their attention to policies on trade and investment agreements

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| **Argentina** | Argentina adopted a National Action Plan on Human Rights 2017-2020 in December 2017. It contains a section dedicated to BHR (section 5.6), in which Argentina committed to adopt a specific NAP on BHR.<br>No further information has been found to date. | Argentina's NAP on Human Rights 2017-2020 does not contain any reference to policies on trade and investment agreements. |
| **Australia** | In June 2017, the Australian Ministry for Foreign Affairs announced the establishment of a Multi-Stakeholder Advisory Group on the implementation of the UNGPs, tasked to review existing laws, policies and best practices relevant to the UNGPs and to provide expert advice to support the Government and businesses.<br>In October 2017, the Australian Government reportedly declined to develop a NAP on BHR that the Multi-Stakeholder Advisory Group recommended.<br>In December 2017, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises addressed an open letter to the Australian Government, in order to invite it to reconsider its position.<br>No further information has been found to date. | |
| **Austria** | No information has been found to date. | |
| **Belgium** | The Belgian NAP was completed in June 2017. | Belgium has committed to continue to promote the integration of respect for internationally recognised human rights in EU trade and investment agreements.<br>The Flemish government and the government of the Brussels-Capital region have committed to promote the realisation of a human rights impact assessment (HRIA) in the context of negotiations of trade and investment agreements by the EU.<br>The Flemish government has also committed to support EU's decision to suspend an agreement in case of gross and blatant human rights abuses (pp. 42-44). |
| **Brazil** | Brazil has not yet adopted a NAP.<br>Brazil responded to the Business & Human Rights Resource Centre's government survey and stated that it would hold a public consultation involving businesses, civil society and government agencies to identify the main challenges to the implementation of the UNGPs and to map existing good practices.<br>In February 2020, Brazil provided updated information. It indicated that the government is in the process of gathering best international practices in this regard from several other governments, in particular OECD members, such as the United Kingdom, the United States and Chile. Furthermore, a public policy review that is currently being conducted (RBC Policy Review) will be instrumental in defining the next steps with | |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| | regard to the National Action Plan. In addition, Brazil intends to compile the best national practices already implemented within the scope of RBC. | |
| **Bulgaria** | Bulgaria has not yet adopted a NAP on BHR.<br>In its reply to the Business & Human Rights Resource Centre's government survey, Bulgaria stated that the development of a NAP is under consideration, that the future NAP will endorse all the international principles in the area of BHR and that it will be adopted after public consultations with all stakeholders.<br>Bulgaria also stated that the Government was reviewing whether the NAP should be adopted as an independent instrument or as part of the new CSR strategy.<br>No further information has been found to date. | |
| **Canada** | Canada has not engaged in the development of a NAP on BHR.<br>No further information has been found to date. | |
| **Chile** | The Chilean NAP was completed in July 2017. | Chile has acknowledged the importance of reinforcing coherence in its international position with respect to BHR, both through its participation in international fora and through its international economic agreements.<br>Chile has committed to try to promote the inclusion of references to and provisions on the importance of sustainability and CSR, with a special focus on respect for human, environmental, social and labour rights, in its negotiations of trade agreements, including through express references to the UNGPs and the OECD Guidelines.<br>Chile has also committed to propose the integration in the preamble of trade agreements of language that expresses the full commitment of States Parties to respect human rights.<br>(pp. 58-59) |
| **China** | China has not engaged in the development of a NAP on BHR.<br>It adopted a National Human Rights Action Plan 2016-2020 containing some provisions relevant for BHR.<br>No further information has been found to date. | China's National Human Rights Action Plan 2016-2020 does not contain any reference to policies on trade and investment agreements. |
| **Colombia** | The Colombian NAP was completed in December 2015. | Colombia has committed to promote the inclusion of human rights provisions or criteria in its commercial negotiations with other States, including in the context of negotiation of future agreements.<br>Colombia has also committed to promote the inclusion of human rights provisions in the context of revision of existing agreements, and/or unilateral or common declarations with its commercial partners (p. 13).<br>The first and second Colombian follow-up reports on the implementation of the NAP do not provide information on the steps taken since then in this area.<br>In 2018, the Presidential Council for Human Rights prepared a document in consultation with different stakeholders, containing recommendations for the actualisation of the NAP on BHR. This document recommends that the government, in the next NAP, adopt and implement appropriate principles |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| | | and measures to safeguard human rights in the negotiation and implementation of economic agreements with other States or with businesses. Such measures may include the evaluation of the human rights, social and environmental impacts of FTAs, measures to prevent and mitigate the potential adverse impacts of economic agreements, and the reinforcement of multi-stakeholder governance in monitoring and evaluating the effects of such agreements on human rights (p. 23). |
| **Costa Rica** | No information has been found to date. | |
| **Czech Republic** | The Czech NAP was completed in October 2017. | The Czech Republic recalled that its model BIT refers to internationally recognised CSR standards and principles, and to the OECD Guidelines.<br>The Czech Republic has further committed to participate actively in discussions within the EU towards the negotiation of international trade agreements, and to express its viewpoints on the need to balance the economic nature of those agreements with the objectives of promoting democracy, the rule of law and human rights.<br>The Czech Republic has also committed to try to take into account not only economic interests in the negotiation of its own BITs, but also the issues of sustainable development and human rights protection, by making reference to respect for human rights, CSR principles and/or sustainable development principles (p. 28). |
| **Denmark** | The Danish NAP was completed in March 2014. | Denmark recalled that the EU adheres to RBC principles and standards, such as the OECD Guidelines. This is reflected in negotiations for FTAs with investment chapters, with the aim to balance the rights and obligations between investors and host States and protect the host State's regulatory power.<br>Denmark also recalled that it actively supports substantial Trade and Sustainable Development chapters in EU bilateral FTAs, as well as human rights suspension clauses in these agreements (p. 31) |
| **Egypt** | No information has been found to date. | |
| **Estonia** | Estonia has not adopted a NAP on BHR.<br>In its reply to the Business & Human Rights Resource Centre's government survey, Estonia stated that promotion and protection of human rights, including in relation to business activities, are enshrined in its Constitution and regulated through statutory law. Estonia also stated that they are incorporated in its foreign investment and export strategies.<br>Estonia has not officially expressed intention to establish a comprehensive NAP on BHR.<br>No further information has been found to date. | |
| **Finland** | The Finnish NAP was completed in October 2014. | Finland has committed to support the strengthening of human rights assessments in the negotiation and implementation of EU trade and investment agreements with non-EU member states. It will consider these human rights assessments when forming its opinions on trade policies.<br>Finland has committed to support the consideration of human rights issues in EU investment agreements or in |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| | | potential new bilateral agreements concluded by Finland.<br>Finland will support the inclusion of human rights clauses in all EU political framework agreements and their consideration as essential elements in trade agreements, as well as clauses enabling an exemption from agreed provisions in cases where the other contracting party violates human rights (p. 18). |
| **France** | The French NAP was completed in April 2017. | France recalled that EU FTAs include sustainable development chapters, containing provisions on labour law and environmental protection, and referring to CSR, and set out cooperation mechanisms for the contracting parties to support progress in these fields. Sustainable development chapters in EU free trade and investment agreements also contain provisions preventing Parties from lowering social and environmental standards, and provisions confirming States' right to regulate in the social and environmental fields.<br>France is revising its model agreement for the protection of investments. In this regard, France plans to significantly reinforce provisions on CSR and the State's capacity to regulate in the social, environmental, health and cultural fields, in line with the European draft model.<br>France has committed to encourage the EU Commission to improve the enforcement of existing sustainable development chapters in EU free trade and investment agreements by reinforcing implementation mechanisms. France will promote making sustainable development chapters in EU FTAs binding and enforceable under these agreements' dispute settlement mechanisms.<br>France will encourage the EU Commission to increase the involvement of businesses by taking further steps to include CSR requirements in sustainable development chapters in FTAs, including by adding references to key international texts on the subject, especially the OECD Guidelines.<br>France will encourage the completion of impact assessments before and after the conclusion of agreements and support making FTAs conditional on the inclusion of human rights clauses and prioritisation of the UNGPs.<br>France encourages the efforts of the EU Commission to replace the current ISDS system with an investment court system, as well as its efforts to promote the creation of a permanent Multilateral Investment Court.<br>France has committed to initiate discussions in international bodies to which it is a party on the impact of failure to respect human rights on competition and the inclusion of human rights policies tackling unfair competition (pp. 19-22). |
| **Germany** | The German NAP was completed in December 2016. | Germany recalled that it supports the EU practice of including provisions designed to safeguard human rights in framework agreements with trading partners and using sustainability chapters in all new FTAs to enshrine high labour, social and environmental standards, and to guarantee States' right to regulate, including for the protection of human rights.<br>Germany said that it is pressing for the inclusion of an ambitious sustainability chapter in the planned TTIP agreement with the US.<br>Germany said that it advocates for further development of the range of instruments to undertake HRIA in EU trade and investment agreements. It is of the view that comprehensive |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| | | impact assessments should be conducted before negotiations begin, in order to consider the findings of these assessments in the negotiation process.<br>Germany said that it is committed to the negotiation of comprehensive binding standards for inclusion in these sustainability chapters (p. 13).<br>The German government presented an interim report on the implementation of the NAP in July 2019, of which an English summary was made available. The summary does not provide elements demonstrating that Germany has taken steps regarding its policies on trade and investment agreements. |
| **Greece** | The OHCHR's website and the Business & Human Rights Resource Centre's website indicate that Greece has committed to adopt a NAP or is in the process of elaborating one.<br>No further information has been found to date. | |
| **Hungary** | In its reply to the Business & Human Rights Resource Centre's government survey, Hungary stated that the government plans to examine the national implementation of the UNGPs and the adoption of a related NAP in the future.<br>It stated that for the time being, the Government is promoting BHR through the adoption of a CSR Action plan.<br>No further information has been found to date. | |
| **Iceland** | No information has been found to date. | |
| **India** | India is in the process of developing a NAP on BHR.<br>Following several consultations with different stakeholders in 2018, India published a zero draft NAP on BHR in February 2019. | India's zero draft NAP on BHR does not contain any reference to policies on trade and investment agreements. |
| **Indonesia** | Indonesia is in the process of developing a NAP on BHR.<br>The Indonesian government reportedly appointed the National Commission on Human Rights (Komnas HAM) and the Institute for Policy Research and Advocacy (ELSAM) in September 2014 to develop a recommended NAP. The recommended NAP was released in May 2017, following several public consultations involving different stakeholders, including civil society organisations, the business sector and government agencies.<br>In February 2019, the organisation of a focus group discussion by the Coordinating Ministry for Economic Affairs marked the beginning of the current process to develop a NAP. | The 2017 "recommended NAP" referred to the potential impacts of bilateral investment treaties on human rights and the environment. It recommended that the government ensure that it keeps adequate policy space to protect human rights in such agreements, while offering the necessary protection to investors (p. 35).<br>It also recommended that the government develop a suitable policy framework for investment agreements by referring to respect for human rights standards, as well as environmental standards and standards for the protection of workers (p. 51).<br>Information has not been located about whether or how the 2017 recommended NAP will be used in the ongoing process to develop a NAP. |
| **Ireland** | The Irish NAP was completed November 2017. | Ireland has committed to continue to take into account human rights considerations when expressing its views during FTA negotiations at the EU level, and to support the appropriate implementation of human rights clauses in EU FTAs (p. 20).<br>More generally, Ireland has committed to ensure coherence between Ireland's new Trading Strategy and its NAP on BHR (p. 17). |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| **Israel** | In October 2019, the Israeli government informed the OECD Secretariat that the government is currently analyzing the possibility to develop a NAP on RBC.<br>No further information has been found to date. | |
| **Italy** | The Italian NAP was completed December 2016.<br>A revised version of this NAP was released in November 2018 following a mid-term review (in Italian). | In its revised NAP, Italy stated that it considers it a priority to promote the implementation of existing international tools on BHR within multilateral institutions and in the negotiation of international treaties and agreements.<br>Italy will support initiatives in all relevant fora aiming to develop instruments to enhance fair competition to safeguard and promote human rights.<br>Italy will advocate at the European and international level for a system of "human rights credits" in international trade by proposing to introduce a "special duty" for goods imported from countries and/or produced by enterprises not complying with fundamental standards of human rights (p. 26).<br>The language used in the first Italian NAP concerning policies on trade and investment agreements is similar to the language used in the revised NAP. |
| **Japan** | Japan is undertaking a process to formulate a NAP on BHR.<br>Japan has initiated its own baseline assessment and conducted several multi-stakeholder consultation meetings since March 2018, covering various topics.<br>In December 2018 the Government of Japan published a provisional translation of the 'The Report of the Baseline Study on Business and Human Rights'.<br>In July 2019, the Inter-Ministerial Committee on Japan's NAP on BHR published a document entitled Towards formulating the National Action Plan (NAP) on Business and Human Rights where it identified general priority areas and particular aspects to consider in the future NAP. | In the Report of the Baseline of the Baseline Study on Business and Human Rights, Japan recalled that many investment agreements and economic partnership agreements (EPAs) containing investment chapters signed by Japan incorporate provisions relating to social issues such as the environment, labour and safety.<br>Japan recalled that the Trans-Pacific Partnership Agreement (TPP Agreement) provides for independent "Environment" and "Labour" chapters. It also stated that the Japan-EU EPA also contains an independent "Trade and Sustainable Development Chapter" (p. 7).<br>Japan noted that there is a recent tendency for investment treaties and EPAs to contain some provisions related to a social agenda, such as health, safety and labour standards, in the perspective of balancing the preservation of public interests and investment protection. It also noted that this tendency does not mean that there is a lowering of standards related to investment protection.<br>Japan has acknowledged that more concrete provisions on consistency with human rights and public policy should be stipulated in agreements, in light of the examples offered by other States, including with the view to create a level playing field between investors from different States.<br>At the same time, Japan has also noted that there are various opinions as to whether CSR or HR related provisions should be stipulated in investment treaties and EPAs, considering the scope of such treaties (p. 16).<br>The July 2019 document confirms that economic partnership agreements will receive attention in the future NAP on BHR (p. 3). |
| **Jordan** | The OHCHR's website and the Business & Human Rights Resource Centre's website indicate that Jordan has committed to adopt a NAP or is in the process of elaborating one.<br>No further information has been found to date. | |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| **Kazakhstan** | The OHCHR's website and the Business & Human Rights Resource Centre's website indicate that steps have been taken by the National Human Rights Institute or civil society groups in Kazakhstan to trigger the development of a NAP.<br>No further information has been found to date. | |
| **Korea** | The OHCHR's website and the Business & Human Rights Resource Centre's website indicate that steps have been taken by the National Human Rights Institute or civil society groups in the Republic of Korea to trigger the development of a NAP.<br>In July 2016, the National Human Rights Commission of Korea (NHRCK) presented its recommendations for a NAP on Business and Human Rights to the South Korean Government.<br>In August 2018, Korea adopted a Human Rights National Action Plan containing a chapter on business and human rights. A provisional unofficial translation of the chapter on BHR is available. | There is no reference to policies on trade and investment agreements in the recommendations of the NHRCK, nor in the provisional English translation of the business and human rights chapter of Korea's new Human Rights National Action Plan. |
| **Latvia** | Latvia declared in response to the Business & Human Rights Resource Centre's government survey that it is in the process of developing a NAP to promote CSR and RBC in consultation with business and trade unions and NGOs representatives.<br>No further information has been found to date. | |
| **Lithuania** | The Lithuanian NAP was completed in February 2015.<br>In 2018, Lithuania stated, in the context of its Voluntary National Review on the Implementation of the UN 2030 Agenda for Sustainable Development that it plans to draw up a second NAP on BHR. It intends to follow the guidelines of the OECD and the UN. | Lithuania's NAP on BHR does not contain any reference to policies on trade and investment agreements. |
| **Luxembourg** | The Luxembourg's NAP was completed in June 2018. | Luxembourg recalled that all EU trade and cooperation agreements concluded with third countries include a human rights clause specifying that these rights constitute a fundamental aspect of relations with the EU, which imposes sanctions in cases of violations of human rights (p. 16). |
| **Malaysia** | Malaysia has not yet developed a NAP on BHR.<br>In March 2015, the Human Rights Commission of Malaysia (SUHAKAM) released a Strategic Framework on a National Action Plan on Business and Human Rights for Malaysia.<br>On 24 June 2019, the Legal Affairs Division of the Prime Minister's Department announced in a joint press statement with the Human Rights Commission and the UN Development Programme, that a National High-Level Dialogue on Business & Human Rights will be jointly organised with the view to develop a NAP on BHR.<br>No further information has been found to date. | The 2015 Strategic Framework recommended that the Government ensure that Malaysia's investment and trade agreements do not have adverse impacts on human rights through the development of adequate solutions and the adoption of appropriate reforms to review existing policies on trade and investment. It also recommended that the Government account to the public on how it is addressing human rights and impacts during negotiations on trade and investment agreements, including through transparency measures and stakeholder consultations (pp. 28-29).<br>The Strategic Framework noted that various proposals have been put forth in this respect, including conducting prior human rights impact assessments to trade and investment agreements, ensuring that stabilisation clauses in investment agreements do not constrain States' regulatory power, and using guidance developed by the former UN |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| | | Special Representative on BHR in the negotiation of State-investor contracts in order to integrate human rights risks management (p. 28). |
| **Mexico** | Mexico is still in the process of producing a NAP on BHR. The launch date was reportedly postponed following demands from various stakeholders to increase public dialogue and participation.<br>The government released a draft NAP on BHR for consultation In June 2017.<br>No further information has been found to date. | The draft NAP referred, as part of the efforts to increase coherence in the normative framework applicable to business enterprises in accordance with international human rights standards, to the promotion of inclusion of human rights clauses or criteria in bilateral or multilateral trade and investment agreements (line of action 4.1.6, p. 15).<br>Further information about progress in the elaboration of the NAP has not been located to date. |
| **Morocco** | Morocco has not yet adopted a NAP on BHR.<br>Morocco adopted a 2018-2022 National Action Plan for Democracy and Human Rights on 21 December 2017. This plan contains a section on BHR (sub-section VII) in which Morocco expresses its intention to adopt a NAP dedicated to BHR.<br>No further information has been found to date. | The BHR section in Morocco's 2018-2022 NAP for Democracy and Human Rights does not contain any reference to policies on trade and investment agreements. |
| **Netherlands** | The Dutch NAP was completed in December 2014.<br>In January 2019, the Dutch government addressed to the UN Committee on Economic, Social and Cultural Rights information on follow-up to the concluding observations of the Committee. The Dutch government stated that it is considering whether the NAP on BHR is in need of revision. | Public consultations in the Netherlands drew attention to the need to pay specific attention to policy coherence and incorporation of the UNGPs and OECD Guidelines in trade and investment agreements (p.16).<br>The Dutch NAP stresses public consultations demonstrated that both the business community and civil society organisations recognise the need for a European approach to BHR. The business community supports action at the EU level in the interests of a level playing field, and civil society organisations underline the greater effectiveness of action at the EU level (p. 18).<br>The Netherlands is committed to including clear provisions on the relationship between investment and sustainability in trade and investment agreements.<br>The Netherlands stated that it promotes the inclusion of a section on trade and sustainable development in EU trade and investment agreements, with monitoring and enforcement mechanisms. The aim is for parties to reaffirm their commitment to enforce internationally recognised standards, including ILO obligations to eliminate child labour and forced labour, and to promote cooperation among the parties to promote CSR.<br>The Netherlands has acknowledged that the involvement of civil society organisations in these agreements is an essential component.<br>The Netherlands recalled that the EU's aim is to link every trade agreement with a broader partnership and cooperation agreement reaffirming States' human rights obligations, with the possibility to suspend an agreement when human rights are abused. The Netherlands supports the inclusion in all future EU investment protection agreements of a separate section on environment, labour, sustainability and transparency.<br>The Netherlands also stated that existing Dutch bilateral trade agreements provide Parties with the policy space to take non-discriminatory measures to protect public interests such as human rights, working conditions and the environment (pp. 20-21). |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| **New Zealand** | Following its third universal periodic review of January 2019, New Zealand informed the Human Rights Council that it intends to elaborate a NAP to implement the UNGPs.<br>No further information has been found to date. | |
| **Norway** | The Norwegian NAP was completed in October 2015. | Norway will seek to ensure that provisions on respect for human rights, including fundamental workers' rights, and the environment, are included in bilateral free trade and investment agreements (p. 27). |
| **Paraguay** | No information has been found to date. | |
| **Peru** | Peru adopted a National Action Plan on Human Rights 2018-2021 in date. It contains a section on BHR, in which Peru commits to develop a NAP on BHR. | The section on BHR in Peru's National Action Plan on Human Rights 2018-2021 does not contain any reference to policies on trade and investment agreements. |
| **Poland** | The Polish NAP was completed in May 2017. | Poland refers to the EU "Action Plan on Human Rights and Democracy 2015-2019" adopted in 2015, in which the EU identified actions to raise awareness and knowledge of the UNGPs in non-EU countries. The EU Action Plan also mentions EU's aim to take into account CSR standards in EU trade and investment agreements (p. 5). |
| **Portugal** | In its response to the Business & Human Rights Resource Centre's government survey, Portugal stated that it is developing an integrated public policy in the form of a Guidance Plan for Corporate Social Responsibility in consultation with civil society stakeholders. The plan will include a section on BHR highlighting the fundamental elements of the UNGPs and promoting their integration in business enterprises' CSR strategies.<br>No further information has been found to date. | |
| **Romania** | No information has been found to date. | |
| **Russia** | No information has been found to date. | |
| **Saudi Arabia** | No information has been found to date. | |
| **Singapore** | No information has been found to date. | |
| **Slovak Republic** | The Slovak government stated in its response to the Business & Human Rights Resource Centre's government survey that the issue of establishing a NAP is under consideration.<br>No further information has been found to date. | |
| **Slovenia** | The Slovenian NAP was completed in November 2018. | Slovenia referred to EU competence to conclude trade and investment agreements. It recalled that the latest EU trade and investment agreements contain sustainable development provisions, relating to labour rights, the environment and CSR standards, as well as a "human rights, democracy and rule of law clause" (pp. 30-31). |
| **South Africa** | The government of South Africa has not yet taken any official commitment to develop a NAP on BHR.<br>No further information has been found to date. | |
| **Spain** | The Spanish NAP was completed in July 2017. | Spain will promote the inclusion of references to respect for human rights in trade agreements, investment agreements and other agreements related to business activities signed by Spain and affecting areas covered by the UNGPs. |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| | | Spain will also promote the inclusion of such references in agreements between the EU and third countries on these issues (p. 23). |
| **Sweden** | The Swedish NAP was completed in August 2015. | Sweden recalled that it has supported and will continue to support the inclusion of references to CSR in the chapters on sustainability in EU bilateral and regional trade agreements, investment agreements and partnership and cooperation agreements (p. 21). |
| **Switzerland** | The first Swiss NAP was completed in December 2016.<br>On 15 January 2020, the Federal Council approved revised Action Plans 2020-2023 on corporate social responsibility, and on Business and Human Rights. | The revised Action plan on BHR (2020-2023) sets out an objective of "improv[ing] consistency between Switzerland's trade agreements and respect for human rights. The indicators for achieving this goal are that (i) "Human rights references, corporate social responsibility and the right to regulate are incorporated into trade agreements (FTAs/IPAs) submitted to parliament; and (ii) The subject is discussed by the WTO/FTA liaison group." Responsibility for the objective is assigned to the Federal Department of Economic Affairs, Education and Research (EAER).<br>The revised NAP notes that the primary aim of free trade agreements is to foster bilateral trade relations and increase the economic competitiveness of contracting states. In negotiating free trade agreements (and investment promotion and protection agreements; see below), Switzerland is committed to ensuring that provisions to achieve consistency between trade and sustainable development are included. These serve to underline the parties' obligation to comply with the applicable multilateral environmental agreements and ILO conventions, and to implement them effectively. They also refer to international instruments to protect human rights, and the principles of responsible corporate governance. Swiss free trade agreements also contain provisions stipulating that the agreement should not impede or compromise existing obligations under international law, including in respect of human rights. Free trade agreements are monitored by joint committees. Civil society contributes to the preparatory work for joint committee meetings, specifically through the WTO/FTA liaison group. The Federal Council continues to monitor and conduct impact assessments regarding international developments on human rights due diligence in trade agreements.<br>In the interests of policy coherence, Switzerland also advocates the inclusion of consistency provisions when negotiating investment protection agreements (IPAs). The federal government drafted provisions to achieve greater consistency between IPAs and sustainable development objectives (e.g. provisions setting out the right to regulate; references to human rights and corporate social responsibility in the recitals to IPAs). These provisions underline the importance of interpreting and applying these agreements in a manner that is consistent with other international commitments undertaken by Switzerland and its partner countries, including those on human rights protection.<br>In its original NAP, Switzerland also declared that it is also committed to the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in new investment protection agreements since 2014.<br>It also indicated that Switzerland will continue to track development in investment protection in the future and, |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| | | where necessary, review whether further amendments to its treaty practices are required or not (pp. 31-32). |
| **Thailand** | In October 2019, Thailand adopted its First NAP on Business and Human Rights (2019-2022) as proposed by the Rights and Liberties Protection Department, Ministry of Justice. Thailand is the first country in Asia to adopt a stand-alone NAP. The NAP was developed with the participation of government sectors, state owned enterprises, business sectors and civil society. The NAP includes assessment and follow-up processes. | Cross Border Investment and Multinational Enterprises was one of the four Key Priority Areas included in the Plan.<br>In the section on challenges, the NAP provides that the Government should "consider human rights impacts before signing international trade or investment agreements and treaties"; and "[r]eview provisions for a stabilization clause in the investment agreement that will not affect government policies to promote the UNGPs". The Action Plan provides for the establishment of "guidelines and procedures to provide comments to the contract considering the Human Rights Assessment". Investment treaties are not specifically mentioned in the Action Plan. |
| **Tunisia** | No information has been found to date. | |
| **Turkey** | No information has been found to date. | |
| **Ukraine** | The Ukrainian Ministry of Justice reportedly announced the beginning of a process to adopt a NAP on BHR in January 2019.<br>The results of the National Baseline Assessment developed by the Yaroslav Mudryi National Law University at the request of the Ministry of Justice were released in July 2019.<br>No further information has been found to date. | The National Baseline Assessment does not contain any reference to policies on trade and investment agreements. |
| **United Kingdom** | The first UK's NAP was completed in September 2013.<br>UK's updated NAP was completed in May 2016. | In its first NAP on BHR, the UK declared that it will seek to ensure that agreements facilitating investment overseas by UK or EU companies incorporate the business responsibility to respect human rights, and do not undermine the host country's ability to either meet its international human rights obligations or to impose the same environmental and social regulation on foreign investors as it does on domestic firms (p. 12).<br>In its second NAP on BHR, the UK declared that it will support the EU's commitment to consider the possible human rights impacts of FTAs, including FTAs with investment chapters, and to take appropriate steps including through the incorporation of human rights clauses (p. 11).<br>A 2017 report on BHR of the Joint Committee on Human Rights of the House of Lords and the House of Commons called on the UK Government to develop more ambitious and specific targets and to implement evaluation measures to assess the achievement of these targets when producing its next updated NAP on BHR (p. 28).<br>The Joint Committee noted that consulted witnesses agreed that the UK should, as a minimum, include the same level of human rights protection as are currently seen in EU trade and investment agreements in its own trade and investment agreements following Brexit (p. 68).<br>The Joint Committee also encouraged the Government to use the opportunity of Brexit to set higher human rights standards in future trade agreements, to include workable provisions on enforcement, and to undertake human rights impact assessments before agreeing trade agreements (p. 70). |

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| **United States** | The U.S. NAP on RBC was completed in December 2016. | The U.S. declared that it has sought to promote the role of governments in encouraging companies to engage in RBC in its latest FTAs.<br>The U.S. recalled that all U.S. FTAs since 2004 contain transparency and anti-corruption provisions, including requiring their trading partners to criminalise domestic and foreign bribery.<br>The U.S. recalled that the Trans-pacific partnership (TPP) Parties have agreed to encourage companies to voluntarily adopt CSR principles related to labour and environmental issues that they support or that they have endorsed (p. 9). |
| **European Union**[380] | As a regional economic integration organisation, the EU has not adopted a NAP as such.<br>However, several recent EU policy documents are relevant to map the actions and commitments of the EU in the field of BHR and to get input on the way the EU understands the articulation between its own competences, particularly in the field of trade and investment agreements, and Member States' competence to conclude trade and investment agreements with third countries. Two documents are of particular relevance:<br>• The EU Action Plan on Human Rights and Democracy 2015 – 2019 adopted by the Council of the EU on 20 July 2015; and<br>• The 2015 Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play. | The EU Action Plan on Human Rights and Democracy 2015-2019 contains a set of measures aiming to advance BHR (Objective 18) and a set of measures on trade and investment policy (Objective 25) which incorporate specific actions to advance BHR in trade and investment agreements. As part of these actions:<br>• EU institutions shall continue to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements, in ex-ante impact assessments, sustainability impact assessments and ex-post evaluations, and explore ways to extend existing quantitative analysis in assessing the impact of trade and investment initiatives on human rights (Action 25(b), p. 39);<br>• The Commission shall aim at systematically including, in EU trade and investment agreements, the respect of internationally recognised principles and guidelines on CSR, such as those contained in the OECD Guidelines, the UN Global Compact, the UNGPs, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and ISO 26000 (Action 25(d), p. 40); and<br>• Member States shall to strive to include in new or revised BITs that they negotiate in the future with third countries provisions on CSR, in line with those inserted in agreements negotiated at EU level (Action 25 (c), p. 39).<br>The 2015 Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights recalled that the EU recognises the UNGPs as "the authoritative policy framework" in addressing BHR issues. It also recalled that the Commission's 2011 Communication on Corporate Social Responsibility referred to the importance of working towards the implementation of the UNGPs in the EU and encouraged Member States to adopt and implement a NAP (p. 2).<br>With respect to trade and investment agreements in particular, the Working document recalled that all recent FTAs concluded by the EU with third countries include a |

380 The EU is a regional economic integration organisation and therefore did not establish as such a NAP nor did it commit to do so. However, EU institutions have repeatedly encouraged Member States to adopt and implement a NAP on BHR in order to comply with the UNGPs. Additionally, specific EU documents, while they do not constitute a NAP as such, are policy documents that address the implementation of the UNGPs and provide an overview of the actions that the EU undertakes and plans to undertake in the field of BHR.

| Jurisdiction | Status of NAP on BHR or RBC | Reference to trade and investment agreements in NAPs |
|---|---|---|
| | | chapter on trade and sustainable development, with commitments on on labour and the environment, and provisions on the promotion of CSR. It noted that the Commission encourages its trade partners to ratify and implement international labour and environmental conventions (p. 49). It also recalled that EU international trade agreements since the 1990s include a human rights clause and that the EU has suspended financial aid in response to human rights violations from the other contracting party (p. 49).<br>In February 2018, the Commission services presented a non-paper with an action plan to improve the effectiveness of implementation and enforcement of the Trade and Sustainable Development chapters in EU FTAs. It proposed 15 action points in four areas: (i) working together with Member States, the European Parliament and relevant International Organisations; (ii) enabling the role of civil society; (iii) delivering results, notably via more assertive monitoring and enforcement; and (iv) transparency and communication. It noted increased EU action and funding for work to promote RBC including capacity building.<br>It advocated against the use of a trade sanctions based approach. It advocated civil society and business participation in TSD implementation, and foresaw activities with FTA partner countries to promote CSR, building on the expertise and leverage of relevant international organisations and stakeholders. |

# Annex 2. OECD Working Papers on International Investment

www.oecd.org/investment/working-papers.htm

**2021**

2021/1 Assessing the effectiveness of currency-differentiated tools: The case of reserve requirements

**2020**

2020/1 The Most Favoured Nation and Non-Discrimination Provisions in international trade law and the OECD Codes of Liberalisation

**2019**

2019/2 The broad policy toolkit for financial stability: Foundations, fences, and fire doors

2019/1 The determinants of Foreign Direct Investment: Do statutory restrictions matter?

**2018**

2018/1 Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence

**2017**

2017/5 Adjudicator Compensation Systems and Investor-State Dispute Settlement

2017/4 Have currency-based capital flow management measures curbed international banking flows?

2017/3 Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law

2017/2 The balance between investor protection and the right to regulate in investment treaties: A scoping paper

2017/1 Foreign direct investment, corruption and the OECD Anti-Bribery Convention

**2016**

2016/3 State-to-State dispute settlement and the interpretation of investment treaties

2016/2 Investment policies related to national security

2016/1 The legal framework applicable to joint interpretive agreements of investment treaties

**2015**

2015/3 Currency-based measures targeting banks - Balancing national regulation of risk and financial openness

2015/2 Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World

2015/1 The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey

**2014**

2014/3 Investment Treaties and Shareholder Claims: Analysis of Treaty Practice

2014/2 Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law

2014/1 Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey

**2013**

2013/4 Temporal validity of international investment agreements: a large sample survey of treaty provisions

2013/3 Investment treaties as corporate law: Shareholder claims and issues of consistency

2013/2 Lessons from Investment Policy Reform in Korea 2013/1 China Investment Policy: an Update

**2012**

2012/3 Investor-state dispute settlement: A scoping paper for the investment policy community

2012/2 Dispute settlement provisions in international investment agreements: A large sample survey

2012/1 Corporate greenhouse gas emission reporting: A stocktaking of government schemes

**2011**

2011/2 Defining and measuring green FDI: An exploratory review of existing work and evidence

2011/1 Environmental concerns in international investment agreements: a survey

**2010**

2010/3 OECD's FDI Restrictiveness Index: 2010 Update

2010/2 Foreign state immunity and foreign government controlled investors

2010/1 Intellectual property rights in international investment agreements

**2006**

2006/4 OECD's FDI regulatory restrictiveness index: Revision and extension to more economies

2006/3 Interpretation of the Umbrella Clause in Investment Agreements

2006/2 Investor-State Dispute Settlement in Infrastructure Projects

2006/1 Improving the System of Investor-State Dispute Settlement: An Overview

**2005**

2005/3 Corporate Responsibility Practices of Emerging Market Companies - A Fact-Finding Study

2005/2 Multilateral Influences on the OECD Guidelines for Multinational Enterprises

2005/1 Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures

**2004**

2004/6 Mobilising Investment for Development: Role of ODA - The 1993-2003 Experience in Vietnam

2004/5 ODA and Investment for Development: What Guidance can be drawn from Investment Climate Scoreboards?

2004/4 Indirect Expropriation and the Right to Regulate in International Investment Law

2004/3 Fair and Equitable Treatment Standard in International Investment Law

2004/2 Most-Favoured-Nation Treatment in International Investment Law

2004/1 Relationships between International Investment Agreements

**2003**

2003/2 Business Approaches to Combating Corrupt Practices

2003/1 Incentives-based Competition for Foreign Direct Investment: The Case of Brazil

**2002**

2002/2 Managing Working Conditions in the Supply Chain: A Fact-Finding Study of Corporate Practices

2002/1 Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses

**2001**

2001/6 Codes of Corporate Conduct: Expanded review of their contents

2001/5 The OECD Guidelines for Multinational Enterprises and other corporate responsibility instruments
2001/4 Public policy and voluntary initiatives: What roles have governments played?

2001/3 Making codes of corporate conduct work: Management control systems and corporate responsibility

2001/2 Corporate Responsibility: Results of a fact-finding mission on private initiatives

2001/1 Private Initiatives for Corporate Responsibility: An Analysis

**2000**

2000/5 Recent trends, policies and challenges in South East European countries

2000/4 Main determinants and impacts of FDI on China's economy

2000/3 Lithuania: Foreign Direct Investment Impact and Policy Analysis

2000/2 Investment Patterns in a Longer-Term Perspective

2000/1 Bribery and the business sector: Managing the relationship

**1999**

1999/3 Rules for the Global Economy: Synergies between Voluntary and Binding Approaches

1999/2 Deciphering Codes of Corporate Conduct: A Review of their Contents

1999/1 Southeast Asia: the Role of FDI Policies in Development 1998 1998/1 Survey of OECD work on international investment