
Business Responsibilities and Investment Treaties

David Gaukrodger

Consultation paper by the OECD Secretariat

15 January 2020

Context

The Freedom of Investment (FOI) Roundtable, an intergovernmental forum hosted since 2006 by the OECD Investment Committee, brings together over 50 OECD, G20 and other governments to exchange information and experiences on investment policies.¹ Participants in the Roundtable have been considering investment treaty policy and investor-state dispute settlement (ISDS) at regular meetings since 2011.

In March 2019, the Roundtable asked the OECD Secretariat to prepare background materials on Business responsibilities and investment treaties. Business and human rights (BHR) and responsible business conduct (RBC) are fast developing fields with converging approaches to business responsibilities. The convergence is demonstrated in the alignment of the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and core International Labour Organisation standards.

According to a common understanding, 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.

Trade and investment treaties can affect business responsibilities including through their impact on policy space for governments, their provisions that buttress domestic law or its enforcement, or their provisions that directly address business by, for example, encouraging observance of RBC standards or establishing conditions for access to investment treaty benefits. The Roundtable work in this area builds on earlier and ongoing Roundtable work on balancing of interests in investment treaties, on ISDS and on the benefits and costs of investment treaties.

In October 2019, Roundtable participants engaged in an initial discussion of a Secretariat scoping paper on Business responsibilities and investment treaties, and requested additional work. It was also decided that Business responsibilities and investment treaties would be the topic for the 2020 OECD Investment Treaty Conference, to be held at the OECD on 16 March 2020. The annual Conference allows senior investment treaty policy makers and negotiators from around the world to exchange views with leading representatives of business, trade unions, civil society, academia and international organisations.

In order to allow for input on the paper and issues in advance of the March 2020 Investment Treaty Conference, the attached consultation paper is essentially the initial paper prepared for the October 2019 Roundtable. Except for corrections or clarifications with regard to individual government policies, it does not yet reflect comments from governments received at the October 2019 Roundtable or subsequently. Ongoing revisions to the paper will address such input and reflect additional work.

¹ The following economies are invited to participate in the Roundtable: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, and the European Union.

The paper does not necessarily reflect the views of the OECD or of governments that participate in OECD-hosted dialogue on international investment policy. It cannot be construed as prejudging ongoing or future negotiations or disputes arising under investment treaties. This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area. Work on this paper was funded in part by a voluntary contribution from the Swiss government.

Invitation to contribute

Readers are advised that work in this area is in its initial stages and to take note of the fact-finding nature of the scoping paper. Commentators are invited to provide additional useful background information for investment treaty policy makers as they consider whether and how to take joint work forward in this area. Subject to logistical constraints, the Secretariat expects to make comments on the scoping paper public and to provide them to the governments participating in the Roundtable.

Contributions or comments should be sent to david.gaukrodger@oecd.org with a copy to kany.ondzotto@oecd.org by **17 February 2020**.

Contact

David Gaukrodger (david.gaukrodger@oecd.org ; +331 45 24 1848).

Summary Table of Contents

1. Introduction	8
2. Overview of investment treaties	16
3. The overall framework for business responsibilities	23
4. BHR/RBC developments in national and regional law and policy	45
5. Investor, business, trade union and civil society action.....	70
6. Binding Instrument on Business and Human Rights	74
7. Policy coherence on business responsibilities and National Action Plans	77
8. The role of investment treaties	80
9. Conclusion.....	106

Detailed Table of Contents

1. Introduction	8
1.1. The need for and development of policies on business and human rights (BHR), and responsible business conduct (RBC)	9
1.2. The need for work by investment treaty policy makers	13
2. Overview of investment treaties	16
2.1. Purposes of investment treaties	16
2.2. Expansion of covered investor protection and controversy	17
2.3. The interface: Business and human rights, responsible business conduct and investment treaties	20
3. The overall framework for business responsibilities	23
3.1. Introduction	23
3.2. Development of the United Nations Guiding Principles on Business and Human Rights (UNGPs)	23
3.2.1. The human rights regime applicable to states	23
a. The main human rights instruments	23
b. Limited effectiveness of the human rights regime vis-à-vis states	24
3.2.2. The human rights regime and business: early controversies and developments	25
3.2.3. John Ruggie and the development of a middle way on business and human rights	25
a. The problem: governance gaps	26
b. Rejection of the extremes	26
c. The middle way: the Protect, Respect and Remedy Framework and the UNGPs	27
3.2.4. Approach and content of the Framework and the UNGPs	28
a. The State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication	28
b. The independent corporate responsibility to respect human rights including due diligence and addressing adverse impacts	31
c. The need for greater access to remedy for victims of corporate-related human rights harm	32
e. Follow-up work at the UN	33
3.3. OECD work on RBC	34
3.3.1. The OECD Guidelines on Multinational Enterprises	34
3.3.2. The 2011 update: comprehensive coverage including alignment with the UNGPs and continued alignment with the ILO	35
a. Broad application of the Guidelines to corporate groups and to all types of enterprises	35
b. Responsible supply chain management	36
3.3.3. National authority grievance mechanism – National Contact Points (NCPs)	36
3.4. OECD development of due diligence guidance	39
3.4.1. Notion of due diligence in the RBC context	39
3.4.2. Development of detailed sectoral and general due diligence guidance at the OECD	40
a. Extractive sector: Due diligence on meaningful engagement with stakeholders	41
b. Financial sector	41
c. General due diligence guidance	42

3.5. Other OECD and OECD hosted work relating to business responsibilities since 2011: Tax and anti-money laundering	42
3.6. Other initiatives by international organisations addressing BHR/RBC	43
3.6.1. International Finance Corporation (IFC)	43
3.6.2. Asian Infrastructure Investment Bank (AIIB)	43
3.6.3. Council of Europe	44
4. BHR/RBC developments in national and regional law and policy	45
4.1. National and regional regulation and policies	46
4.1.1. Laws, regulations and regulatory proposals for general HR/RBC due diligence requirements	46
a. France: Law on the duty of vigilance of parent companies and commissioning enterprises (2017)	46
b. Switzerland: Current developments concerning a “Responsible Business Initiative” and the establishment of a due diligence obligation	47
c. Finland	51
d. Germany	51
e. European Union	52
4.1.2. Sectoral or geographically-focused due diligence requirements	52
a. United States: conflict minerals	52
b. EU: Conflict minerals	55
c. The Netherlands: Child labour	55
4.1.3. Criminal law and bribery: references to due diligence concepts in national law	55
4.1.4. Reporting obligations	56
a. European Union	56
b. UK: modern slavery	58
c. Australia: modern slavery	58
d. Climate change disclosure	58
4.1.5. Conditioning access to government contracts, services and benefits (other than investment treaties)	58
a. Government procurement	58
b. Export credit	59
c. Trade support and trade diplomacy	60
4.2. Domestic cases in home states for MNEs and access to remedies	61
4.2.1. The rise and fall of the US Alien Tort Statute as a potential avenue for remedies	61
4.2.2. Parent company liability for actions relating to their subsidiaries	63
a. Except in ISDS, the 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	63
b. Developments in direct parent company liability	64
4.2.3. Scope of directors’ fiduciary duties under corporate law	67
4.3. Interaction between national and regional legal regimes, as well as accepted international principles	67
5. Investor, business, trade union and civil society action	70
5.1. “Sustainable” or “environmental, social and governance” (ESG) investing	70
5.2. Rana Plaza and the Bangladesh Accord between international brands and trade unions	71
5.3. The Hague BHR Arbitration Rules	72
5.4. NGO monitoring	73
6. Binding Instrument on Business and Human Rights	74
6.1. Status of work	74

6.2. Selected issues	74
6.2.1. Scope	74
6.2.2. Prevention.....	75
6.2.3. Liability	75
6.2.4. Relation with other treaties	76
7. Policy coherence on business responsibilities and National Action Plans	77
7.1. Increasing attention to policy coherence between BHR/RBC and government action in the economic sphere	77
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	78
8. The role of investment treaties	80
8.1. The trade agreement background	80
8.1.1. The treatment of human rights and labour rights in trade agreements (and their accompanying agreements) (to 2010).....	81
a. The example of labour provisions in trade agreements and their side agreements	81
b. EU policy on human rights and trade agreements prior to the Lisbon Treaty	82
c. Preliminary comparison of the approaches.....	84
d. A degree of convergence in trade agreements post-2010.	85
8.2. As of 2014, there was little attention to RBC in stand-alone investment treaties.....	86
8.3. Evolution and reform in new investment treaties	87
8.3.1. The issue of investment treaty overreach interfering with state duty to protect from corporate human rights abuses through domestic regulation and adjudication	87
a. Investment treaties and interference with the state duty to protect – general considerations	87
b. Recent government action that addresses concerns about investment treaty impact on the state duty to protect.....	89
8.3.2. Speaking about and to business: express attention to BHR/RBC considerations in investment treaties	95
a. Hortatory clauses encouraging RBC or corporate social responsibility	95
b. Legality requirements for access to investment treaty benefits	97
8.3.3. The new Dutch model BIT	99
8.3.4. Additional considerations	103
9. Conclusion.....	106
Annex A. 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	107

1. Introduction

1. In March 2019, governments at an OECD Investment 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.² 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.³ It was the subject of preliminary discussion at the October 2019 Roundtable.

2. Investment treaty makers are increasingly faced with pressures 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 provides a preliminary overview of the fast-developing fields of business and human rights (BHR) and responsible business conduct (RBC) following the endorsement of the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (UNGPs);⁴ the agreement on the updated OECD Guidelines for Multinational Enterprises (OECD Guidelines or Guidelines);⁵ and the extensive OECD work on due diligence guidance.⁶ It considers a range of recent government action in the field, including in response to growing calls for policy coherence across government, as well as important initiatives by stakeholders including market-based initiatives.

3. Against this background, the paper begins to consider trade and investment treaty policies relating to business responsibilities including recent developments. 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, including with regard to business responsibilities, are increasingly exposed to criticism.

4. 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 an ambitious goal to renegotiate all

² OECD, [Freedom of Investment Roundtable, Summaries of Discussions](#), Roundtable 30 (13 Mar. 2019), p.3.

³ The research assistance of Ondrej Svoboda, under a staff-on-loan arrangement with the Czech government, and of Rahima Zitoumbi, an intern at the Investment Division, is gratefully acknowledged.

⁴ [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).

⁵ OECD, [Guidelines for Multinational Enterprises](#) (2011).

⁶ OECD, [Due diligence guidance for responsible business conduct](#).

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

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 Model is the most extensive attempt located so far to integrate 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. Key provisions in the Model BIT refer to the UNGPs and OECD Guidelines but do not describe them and a firm understanding of the overall framework of those instruments is vital to understanding the terms of the Model. An arbitration law firm has reported that “various countries have announced their intention to follow in the footsteps of the Dutch government”.⁹

5. A better understanding about developments with respect to BHR and RBC, including growing pressure for policy coherence, 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 whether to maintain investment protection treaties with a narrow focus or whether and how treaties need to be adapted to address business responsibilities.

6. This paper accordingly provides a preliminary basis to discuss investment treaty policy relating to business responsibilities and a basis to identify potential aspects for further consideration. The subject area of business responsibilities is vast and fast-moving and further work is contemplated to refine and complete the preliminary analysis, including with input from governments and stakeholders.

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

7. A healthy regulatory climate for trade and investment requires that businesses and investors act responsibly and a new global convergence on RBC is forming. According to a common understanding, 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.

8. Businesses can make a vital contribution to 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

⁸ 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 Freshfields Bruckhaus Deringer, [New Dutch model BIT: negotiations to commence soon](#) (18 June 2019).

and suppliers of capital. Their trade and investment activities 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 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.

9. The primary obligation of business is to comply with applicable law in jurisdictions where it is active. But the interaction of national regulation and global business and finance is increasingly seen as generating governance gaps with regard to harms generated by 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.”¹⁰ 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.

10. These governance gaps result in serious harms caused by some investors and businesses remaining unaddressed. The complexity of global supply chains – and the lack of transparency – in many cases can lead to subcontracting and an increase in many human rights and labour risks, including child labour, forced labour, harassment and violence, and unsafe working conditions.¹¹ Almost 24 million people are estimated to be victims of forced labour by the International Labour Organization, with women and girls disproportionately affected.¹² An estimated 168 million children are subject to child labour, accounting for 11% of the overall child population, with more than half working in hazardous conditions.¹³

11. 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%.¹⁴ Another recent report, prompted by an impetus from the G8+5, estimates the global top 100 environmental externalities are costing the economy world-wide around USD 4.7 trillion a year.¹⁵ The costs are attributable

¹⁰ Ruggie, John Gerard, *Just Business: Multinational Corporations and Human Rights*, 2013 (Kindle ed.) (hereinafter Ruggie 2013), at location 98.

¹¹ Schappert, J. and B. Bijelic, [Promoting Responsible Business Conduct: International Standards, Due Diligence And Grievance Mechanisms](#) (OECD 2017).

¹² 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).

¹³ ILO, *World Report on Child Labour* (2015), https://www.ilo.org/ipecc/informationresources/WCMS_358969/lang--en/index.htm

¹⁴ 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).

¹⁵ Trucost plc, “[Natural Capital at Risk – The Top 100 Externalities of Business](#)” (2013). The study was carried out by Trucost for TEEB for Business Coalition, which is the business application of the G8 and United Nations Environment Programme supported TEEB (The Economics of

to greenhouse gas emissions (38%), water use (25%), land use (24%), air pollution (7%), land and water pollution (5%), and waste (1%).

12. 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 the environment, 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.

13. 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.

14. The respective roles of governments and business have been most thoroughly addressed 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 and the 2011 UNGPs that implement the Framework.

15. 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.

16. Governments in the UN Human Rights Council unanimously endorsed the UNGPs in 2011. Their approach to the roles of governments and business is also reflected in the 2011 OECD Guidelines in particular with regard to the chapter on human rights.

17. There is also today a high degree of convergence on the content of RBC. The global convergence on standards for RBC is reflected in part in several major international instruments developed at the OECD, UN and International Labour Organisation (ILO).

18. 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 for Multinational Enterprises (the “OECD Guidelines”). The Guidelines are the most comprehensive set of government-agreed standards for RBC. They

Ecosystems and Biodiversity) programme. The Coalition (now renamed Natural Capital Coalition) is a global, multi stakeholder platform for supporting the uptake of natural capital accounting in business decision-making.

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.

incorporate and are aligned with the UNGP standards on BHR and core International Labour Organisation (ILO) workplace standards, and extend further to also address RBC with respect to the environment, consumers and other issues.¹⁶ Governments, international organisations and stakeholders have worked hard to align standards with considerable success.

19. 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. It has produced consolidated and detailed due diligence guidance through multi-stakeholder processes involving governments, business, trade unions, civil society and experts. It helps business to understand and to act upon their responsibilities.

20. OECD sectoral due diligence guidance has also been incorporated into regional and national legislation and rule-making. General OECD Due Diligence Guidance for RBC across the full economy was adopted on 31 May 2018 during the annual OECD Ministerial Meeting at Council level. Such broadly-applicable guidance may be of particular interest with relation to investment treaties that cover all economic sectors.

21. With regard to implementation on the ground of the principles and guidance, Ruggie contemplates 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.

22. An overview of developments with regard to business responsibilities thus includes action by governments, business and civil society. Important national and regional law developments have sought and are seeking to advance RBC in international business including through use of the UN or OECD due diligence framework. Efforts to advance HR/RBC have given rise to intensive policy debates, legislation, corporate action to engage in due diligence and disclosure, and extensive litigation. There are many additional proposals for action by governments, many in an advanced stage. Regional coverage appears to vary significantly but more research is needed.

23. Business action, including in response to social and economic pressures and legal developments, is of course vital to the BHR and RBC frameworks. There have been many initiatives by business groups, including ones prompted by legislative developments or investor pressure as well as more voluntary ones. Environmental, social and governance (ESG) factors have become major considerations in investment decisions for asset owners and asset managers despite a lack of agreed standards and the uneven quality of information in key areas. Major business groups have also intensively challenged some national regulatory proposals, legislation or programs designed to advance BHR/RBC, expressing concerns about possible liability or the impact on competitiveness.

¹⁶ 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.

24. Alleged victims and groups of victims of corporate injury have sought redress against businesses in various courts resulting in some important legal decisions; there has also been increasing recourse to National Contact Points (NCPs), which address grievances against business relating to the OECD Guidelines. NGOs and civil society have contributed not only to the policy debate and to the monitoring of business performance but also through engagement with business groups in some cases. They have also engaged in litigation to seek implementation of new regulatory regimes on BHR/RBC issues.

25. The Protect, Respect and Remedy Framework and the UNGPs were expressly based on a rejection of 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 a working group created at the UN Human Rights Council in a divided vote. Both the content and process are controversial. Some Roundtable governments have 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. Work on the proposed treaty is strongly supported by many civil society organisations and some parliaments; it is vigorously opposed by many business groups. It is another important reference point in current debates about business and investor responsibilities.

26. 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. The arguments for renewed attention to BHR/RBC and policy coherence are reflected in not only government commitments but also by increasing calls from business as well as civil society.

1.2. The need for work by investment treaty policy makers

27. In this context, it is timely for investment treaty policy makers to consider collectively investor and business responsibilities. Investment treaty policy makers are increasingly asked to explain whether or how their investment treaties are contributing to reduce actual and potential damage from corporate activity. National laws and regulations establish the basic conditions for investors to do business, but business and investor responsibilities are being implemented both as supplements and additions to such regulation. Investment policy makers may need to re-examine the degree to which the traditional primary reliance on national law suffices to address investor and business conduct, and to consider a possibly stronger contribution of 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 increasingly visible and contested.

28. 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 help improve business performance and 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.

29. 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. Investment treaty makers are increasingly faced with pressures to integrate such features; before deciding what to do in the particular field of investment treaties, it is vital to understand the broader framework and its rapid evolution.

30. Moreover, broader or comparative analysis can reveal that issues are less novel than they might appear and can provide important context for policy making in particular areas. 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. With regard to investment treaties, properly understanding what governments have done or not done in succinctly drafted investment treaty provisions can require significant knowledge of the background framework for BHR/RBC. Thinking about appropriate government action also needs to take account of relevant market developments, private and civil society initiatives, as well as expert analysis.

31. The Roundtable is well-situated to undertake work on BHR/RBC and 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.

32. 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 input from the broad range of government participants in the Roundtable and others. Additional research and input is required to refine and expand the analysis including to take account of additional input from all regions of the world. Analysis and exchanges of experiences and ideas, within and beyond the Roundtable, can provide an improved understanding of potential methods to address business and investor responsibilities. This can help address concerns about balance in treaties and strengthen public support.

33. 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.

34. 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 main focus of the initial analysis in this scoping paper is 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 binding treaty on BHR.

35. The seventh section part describes the growing demands for greater policy coherence across government action with regard to BHR/RBC including in national action plans that are addressing investment treaty policies. The eight section describes investment treaty practice and developments relating to BHR/RBC. A final section concludes.

2. Overview of investment treaties

2.1. Purposes of investment treaties

36. 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 provisions have given rise to preferential treatment for covered investors over other investors and are increasingly controversial.¹⁷ A covered investor generally has access to an arbitral tribunal to seek remedies, typically damages including lost profits under prevailing interpretations, if it alleges that the government has violated the treaty provisions on protection. ISDS arbitration awards are enforceable against the assets of award debtor governments around the world under applicable treaties.

37. 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 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.¹⁸

38. Investment treaties are frequently promoted as a method of attracting investment and this is a goal of many governments. Despite many studies, however, it remains difficult to establish strong evidence of 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.¹⁹

39. 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 governments are competing for investment and are aware of the importance of their reputation.

40. For some governments, ISDS has also been seen as desirable in allowing for de-politicised settlement of investor-state disputes. Foreign and trade ministries can be relieved from the complexities and sensitivities of applying diplomatic or economic

¹⁷ OECD, [Investment Treaties and Level Playing Fields](#) (agenda for Investment treaty Conference, Mar. 2019).

¹⁸ See Angel Gurria, [The Growing Pains of Investment Treaties](#), OECD Insights (13 Oct. 2014).

¹⁹ 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.

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 by referring 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, depolitisation has been challenged by critics both factually and as a policy matter. Government decisions to provide special treatment to investors over 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.

41. There are currently approximately 3000 investment treaties. The vast majority of existing investment treaties are narrow. They do not address opening markets to foreign investment. They address foreign investment only once it has been made (or “established”); they provide only so-called “post-establishment” protection.

42. The 1994 NAFTA was an early trade and investment treaty combining commitments to both open markets to foreign investment and to protect investments once made. The trend towards combined trade and investment agreements has increased attention to investment openness commitments. Unlike protection, for which there are a number of substitutes (such as political risk insurance or contract provisions including commercial arbitration clauses) there are few substitute solutions for businesses faced with a closed market.

43. The 1990’s and 2000’s saw the development of a number of expansive arbitral interpretations of investment treaties. Most visibly, claimant, cases and ISDS commentary generated lists of norms that were asserted to be enveloped within vague “fair and equitable treatment” (FET) provisions.²⁰ 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

44. 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. ...

²⁰ 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).

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.²¹

45. 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.

46. 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.²² The EU has rejected investor-state arbitration in favour of a court-like model and EU policy continues to evolve including under constraints imposed by EU law.

²¹ 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 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.”)

²² 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

47. Senior US and Canadian officials have expressed fundamental doubts about the logic and effects of investment protection treaties.²³ The US has exited or sharply narrowed the scope of ISDS with its treaty partners in the Agreement between the United States of America, the United Mexican States and Canada (USMCA).²⁴

48. Major G20 capital importers like India, Indonesia and South Africa have rejected and exited first generation investment treaties with some exiting the system more broadly. Chinese investment treaty policy is subject to different pressures and is still in flux. 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.

49. 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 and conclude new investment treaties using a variety of approaches.

50. Governments, in particular those who have faced claims under broad theories, have taken action to clarify, narrow or re-balance their new investment protection treaties or to

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.

²³ 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 32 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, promotes the harmful delocalisation of desirable investment and causes the loss of 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.”)

²⁴ The original agreement signed on 30 November 2018 and the Protocol of Amendment signed on 10 December 2019 (after completion of this paper) are available on the [USTR website](#). The Parties have named the treaty differently; USMCA is used for convenience.

exit treaties seen as undesirable. It appears that some of this re-balancing has been driven by defensive concerns or concerns about the impact of preferential treatment for treaty-covered investors over domestic investors on competition and political support for treaties.

51. 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, today's treaties are frequently part of broad trade and investment agreements. Such treaties address openness to investment as well as protection. They 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 and human rights, responsible business conduct and investment treaties

52. 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. Governments with large networks of unreformed older investment treaties may face particular challenges. 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 treaties between advanced economies such as the 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. Some governments that sought to foster shell company claims under their investment treaties for many years have begun to reverse course.

53. The traditional approach to investment protection treaties did not address BHR/RBC. 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 injuries caused by business or business conduct because they could be addressed under domestic law.

54. 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 within their own jurisdictions."²⁵ The distinctive nature of states, their differences from business, and the primary nature of their duties have been firmly restated.

55. 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.

²⁵ See, e.g., United States Council for International Business (USCIB), <https://www.uscib.org/uscib-dialogues-with-un-high-commissioner-on-human-rights/> (undated).

56. It is 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 remedies 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.²⁶

57. Tort victims (and victims of human rights abuses), including 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 or inoperable in many states, especially for vulnerable groups. Access to the courts may be only theoretical.

58. The contrast with the access to remedies for ISDS claimants is notable. ISDS claimants generally have direct access to ISDS and can receive high-profile damages awards to compensate for financial losses. Investment treaties regularly give rise to large damages awards for claimants. 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.*²⁷

59. 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

²⁶ 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”).

²⁷ Id. at 10. The applicable domestic law generally barring damages recovery for investors except in narrow circumstances 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.

“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.

class of investors under international treaties rather than more vulnerable constituencies is an anomaly. Interest may be unlikely to abate.

60. 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. Broader concerns about the extent of corporate influence over government policy in many jurisdictions can feed the criticism in some cases.

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

62. Particularly where competitive considerations may be hindering positive action, joint government discussions and analysis can help governments to 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 options for investment treaties including in particular older treaties. Investment treaty policies 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

3.1. Introduction

63. This section provides a preliminary overview of the broad government and multi-stakeholder agreements 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.

64. The work of John Ruggie and the UNGPs (implementing to the Protect, Respect and Remedy Framework) are addressed in the first instance. The UNGPs comprise an overarching framework that addresses the roles of both governments and business in addressing business conduct. The re-affirmation of the primary role of governments with regard to preventing harm from business conduct is an important backdrop to consideration of business responsibilities and how BHR/RBC can be improved. The UNGPs were endorsed by consensus by governments in the UN Human Rights Council and they benefit from strong business support, including from the Business and Industry Advisory Council at the OECD (BIAC), and a significant degree of support from NGOs.

65. Second, this section provides an overview of OECD work on business responsibilities. The OECD Guidelines are broader in addressing business conduct than the UNGPs. They are a leading example of work that is embedding RBC and the UNGPs in business practices on the ground and inspiring regional and national legal developments. The 2011 updated Guidelines were approved by all Adherents and benefit from strong business support and a significant degree of support and interest from NGOs. They also provide for the leading international grievance mechanism.

66. A third section specifically addresses due diligence because of its fundamental importance to the framework for business responsibilities. Following the adoption of the updated OECD Guidelines and their inclusion of due diligence responsibilities, the OECD has played key role in developing extensive sectoral and general due diligence guidance for business and others.

67. In addition to OECD work relating to the Guidelines and due diligence, other relevant OECD work is briefly noted. While the main focus of this scoping exercise is on the UNGPs and Guidelines (including the International Labour Organisation norms they incorporate), a few other important initiatives at other international organisations are also briefly noted.

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

3.2.1. *The human rights regime applicable to states*

a. *The main human rights instruments*

68. 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.

69. 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.

70. 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.

71. The Declaration and the two Covenants together are often described as the "International Bill of Human Rights." 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.

72. The UN treaties are supplemented by other protections. The ILO has adopted a series of conventions on workplace rights. 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 by the ILO's tripartite assembly with representatives from business, labour and governments in 1998.²⁸

b. Limited effectiveness of the human rights regime vis-à-vis states

73. 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.

74. 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

²⁸

ILO, [Declaration on Fundamental Principles and Rights at Work](#) (1998).

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.

3.2.2. The human rights regime and business: early controversies and developments

75. The language of international human rights conventions generally place duties on states. Business was not explicitly addressed in some early UN human rights treaties and the text referred more generally to requirements that each state party prohibit the relevant human rights abuses by “any persons, group or organization.”

76. More recent human rights treaties specifically focus on business, but continue to place duties on states to prevent business from harming 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.

77. Starting in the 1970s, there were several contentious and unsuccessful attempts at the UN to adopt norms placing international law duties explicitly on business.²⁹ 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” (the “Norms”).³⁰ 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.”

78. 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). The Commission declined to act on it.

79. The continuing pressure for action to address the governance gaps relating to BHR, together with the lack of consensus about how to proceed, 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.

3.2.3. John Ruggie and the development of a middle way on business and human rights

80. 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.

²⁹ In 1973, the UN Economic and Social Council established a group to study the impact of Transnational Corporations (TNCs). The UN Economic and Social Council process led to a UN Draft Code of Conduct for Transnational Corporations in 1990. It was never adopted.

³⁰ “Draft 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).

a. *The problem: governance gaps*

81. 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.³¹

82. 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. Ruggie framed his general inquiry in the following terms: “How, in a world of profit-maximizing firms and states jealously guarding their sovereign prerogatives, can multinational corporate conduct be regulated to prevent or mitigate such human costs? How can companies that continue imposing them be held to account?”³²

b. *Rejection of the extremes*

83. 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. Ruggie also rejected a purely voluntary approach that was advocated by business groups.

84. Ruggie rejected the binding treaty model for several reasons. He pointed to the relative novelty of the issue for governments and the lack of a shared knowledge base or consensus on desirable international responses. He also contrasted the weak institutional network in governments for addressing BHR 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 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.

85. He also pointed to 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. Ruggie also noted 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.

86. Ruggie 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.

³¹ Ruggie 2013 at location 491.

³² Ruggie 2013 at location 95.

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 rights treaties they adhere to without the need for additional norms; where they don't so adhere, they would be unlikely to agree to the new norms. For home states, enforcement of a BHR treaty would 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).

87. Ruggie considered that the vast universe of businesses and people affected by them would overwhelm attempts to enforce a treaty using traditional a human rights-type treaty body. Governments or the treaty body would be over-burdened with reporting (or compelling company reporting) and analysis of the new obligations.

88. 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 cited experts who 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.

89. Ruggie also rejected a purely voluntary approach. His review of the field demonstrated that the number of voluntary 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. In addition, business action also lacked a shared knowledge base or consensus on desirable international responses. Human rights standards and definitions used by businesses varied based on company interests, preferences of home markets or market segments as much as the needs of affected people in the host country.

90. In addition, both access to remedies and accountability were often weak in voluntary initiatives. 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.

91. Ruggie also noted considerable civil society scepticism over voluntary initiatives. They were 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*

92. In 2008, Ruggie proposed a 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. As Ruggie notes, this marked the first time the Council or its predecessor had taken a substantive policy position on BHR. The Council also extended the 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 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.³³

3.2.4. Approach and content of the Framework and the UNGPs

93. 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. 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.*

94. 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.

95. This section provide 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*

96. Ruggie notes 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."³⁴ 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

97. 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 concerns among important constituencies about 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 Rights, and on Economic, Social and Cultural Rights),

³³ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, as endorsed by Human Rights Council, [A/HRC/RES/17/4](#) (6 July 2011).

³⁴ Ruggie 2013 at location 1788.

and the principles concerning fundamental rights 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 business has an impact of practically the full scope of these internationally-recognised human rights.

98. Second, Ruggie found 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.³⁵ 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.

99. 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.

100. Fourth, Ruggie squarely rejected arguments that the treaty-based human rights at issue are too vague to be useful or relevant, in particular 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. In short, the rules and tools of BITs and arbitration procedures may inappropriately constrain or punish governments for taking bona fide public interest measures, including meeting their human rights obligations, and even where the measures affect foreign and domestic investors equally.³⁶

101. 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.³⁷

³⁵ [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").

³⁶ Ruggie 2013 at location 3077.

³⁷ See UNGP 4.

102. 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.”

103. On the sensitive issue of the extraterritorial dimension of the state duty to protect, Ruggie recognised that it “remained unsettled in international law”. He noted that current guidance from international human rights bodies suggests 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.

ii. Government implementation of the duty to protect

104. National legal frameworks may lack laws to address abusive conduct. But the most common gap is failing to enforce existing laws. This can be due to lack of capacity, concerns about competitiveness in attracting investment, or bribery or other misconduct. More generally, many States currently lack adequate policies and regulatory arrangements to manage the complex BHR agenda.³⁸

105. Ruggie addressed government legal and policy incoherence in the BHR domain. He referred to “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”.³⁹

106. Ruggie expressed particular concern about investment protection treaties. He criticised the extension of the application of treaties to non-discriminatory government regulatory action for legitimate public interest objectives. 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 states to fulfill their duty to protect human rights, with the aim of contributing to a broader dialogue

³⁸ 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 Document A/HRC/14/27 (April 9, 2010) (hereinafter “Ruggie 2010”), para. 18.

³⁹ Id.

*concerning the need for more balanced — and more human-rights-compatible — investment agreements.*⁴⁰

107. 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”.⁴¹ 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.⁴²

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

108. 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.

109. 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.

110. 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.

111. 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 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.

112. 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

⁴⁰ Ruggie 2013 at location 2408.

⁴¹ UNGP 8, Commentary.

⁴² 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 Document A/HRC/17/31/Add.3 (25 May 2011).

human rights instruments which are widely endorsed by the international community and already constitute an authoritative “list” of internationally recognized rights. Its core is contained in the International Bill of Human Rights (the Universal Declaration and the two Covenants), coupled with the ILO Declaration on Fundamental Principles and Rights at Work. Investors and business may need to consider additional standards in some cases. The limitation to internationally-recognised rights helped address business and business lawyer concerns about potential vagueness of human rights norms or about possible “norm proliferation” in customary international law.

113. 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 be sanctioned through boycotts, divestment or advocacy campaigns. The notion of respect also includes a responsibility to address harms that do arise.

114. 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.⁴³

115. Fifth, the Framework and 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 includes adverse human rights impacts arising from enterprise’s relationships with third parties associated with its activities.

116. 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 led to the development of human rights due diligence to address 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 Guidelines.

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

117. There is a broad range of contexts in which corporate activity will 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.

⁴³ UNGP 23, Commentary.

118. 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.”⁴⁴ For states, providing remedies is part of the duty to protect. For business, it is part of the responsibility to respect.

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

119. 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 widely seen as the weakest link of the current implementation of the BHR framework due to the governance gaps noted above.

120. Extraterritorial jurisdiction can also provide remedies for victims. The practice remains highly contested in the BHR domain. 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 and other issues, and it involves high costs.

121. State-based non-judicial systems include both national and international systems. 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

122. 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 Framework seeks to avoid companies being the sole judge of their own actions in this context, and recommends that processes involve dialogue or third-party mediation.

e. *Follow-up work at the UN*

123. As noted, the UNGPs were unanimously endorsed by governments at the UN Human Rights Council. As a next step, the Human Rights Council established an independent expert working group and an annual Forum on Business and Human Rights to monitor and to facilitate implementation of the UNGPs, as well as to exchange best practices on BHR issues.

124. The UN Committee on Economic, Social and Cultural Rights, in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has provided

⁴⁴ UNGP 25, Commentary.

important guidance to governments in the area of BHR.⁴⁵ The UN Office of the High Commissioner for Human Rights (OHCHR) has also prepared important work on issues relating to BHR and RBC.⁴⁶ For example, a major recent report examines the potential gains from integrating human rights and environmental dimension of sustainability explicitly into mega-infrastructure plans and projects.⁴⁷

125. Human Rights Council resolution 26/22 (June 2014) notes the important role of national action plans (NAPs) as a tool for promoting the comprehensive and effective implementation of the UNGPs and encourages all states to develop a NAP or other such framework (see section 7 below).

3.3. OECD work on RBC

126. 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*

127. 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.

128. The Guidelines were first adopted in 1976 and have been updated five times, most recently in 2011.⁴⁸ As noted above, the Guidelines form part of the wider OECD Declaration on International Investment and Multinational Enterprises. Today, 48 governments are Adherents to the OECD Declaration on International Investment and Multinational Enterprises.⁴⁹

129. 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

⁴⁵ See, e.g., UN Committee on Economic, Social and Cultural rights, General Comment No. 24, 2017, [E/C.12/GC/24](#).

⁴⁶ 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.

⁴⁷ 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).

⁴⁸ 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 for Multinational Enterprises 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.

⁴⁹ All 36 OECD Members and 12 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); and Ukraine (15 March 2017).

Multinational Enterprises.⁵⁰ The Decision on the Guidelines provides in part that the OECD Investment Committee shall, in co-operation with National Contact Points, 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 and international commitments.

130. The OECD Investment Committee, through its Working Party on RBC (WPRBC), monitors the implementation of the Guidelines.⁵¹ They can clarify the Guidelines in the 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.

3.3.2. The 2011 update: comprehensive coverage including alignment with the UNGPs and continued alignment with the ILO

131. The updated 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. As noted, the updated Guidelines reflect strong convergence on the applicable standards for business conduct. The updated Guidelines maintain their long-standing alignment with ILO standards in the chapter on labour. The update includes a new human rights chapter. The alignment with the UNGPs resulted from close cooperation as well as extensive input from business, trade unions and civil society.⁵²

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

132. Like the UNGPs, the Guidelines move beyond the narrow corporate legal entity. They are addressed to all the legal entities within the multinational enterprise. The Guidelines note that “[w]hile one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another”.⁵³

⁵⁰ 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.

⁵¹ 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.

⁵² 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”).

⁵³ OECD Guidelines, I. Concepts and Principles, para. 4.

133. 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 expectations in respect of their conduct wherever the Guidelines are relevant to both.⁵⁴

134. 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.⁵⁵

b. Responsible supply chain management

135. The updated Guidelines apply a new and comprehensive approach to responsible supply chain management by enterprises. The Guidelines concern those 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.

136. The Guidelines clarify that an enterprise “contribut[es] to” an adverse impact when it substantially contributes, it does not include 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.

137. 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. National authority grievance mechanism – National Contact Points (NCPs)

138. Governments adhering to the OECD Guidelines are required to set up an authority to promote the Guidelines and handle complaints against companies. They are known as National Contact Points (NCPs), but NCPs can (and are encouraged to) adopt a more descriptive name.

139. 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.

140. In addition to promoting the Guidelines, the NCPs also handle complaints, known as “specific instances”. NCPs have broad potential reach in terms of potential complainants and covered companies in specific instances. 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. The Guidelines apply to MNEs that operate “in or from” the territories of Adhering

⁵⁴ Id. para. 5.

⁵⁵ Id. para. 2.

governments. The NCPs of home states of multinationals can accordingly hear complaints about “their” multinationals wherever they may operate.

141. 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. The NCP provides a platform and facilitates discussions. The Guidelines specify that NCPs should address specific instances in a manner that is impartial, predictable, equitable, and compatible with the OECD Guidelines.⁵⁶ 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.

142. There have been roughly 30 specific instances submitted annually to NCPs since the 2011 update of the Guidelines, for a total now of over 450. There was a record number of 52 new submissions brought to NCPs in 2018.⁵⁷ Human rights are the fastest growing basis for claims – accounting for over half of the cases since 2011 as opposed to only 4% prior to 2011. Most cases are brought by NGOs, followed by trade unions. Individuals, including parliamentarians, have brought a number of cases. A company has also brought a case against another company.

143. 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.

144. 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.

145. 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. This is not required by the OECD Guidelines but is a growing practice. In 2018, “45% [of the final statements issued] included determinations on whether the enterprises in question observed the recommendations of the Guidelines.” Provisions for monitoring and follow up were included in 78% of the final statements issued in 2018.⁵⁸ NCP final statements can be important sources of information on business behaviour as well as a stimulus to

⁵⁶ OECD Guidelines, Procedural Guidance, p. 72.

⁵⁷ OECD (2019), Annual Report on the OECD Guidelines for Multinational Enterprises 2018, p. 9.

⁵⁸ Id. p. 8.

improvement. An on-line OECD [database](#) gathers information about cases and outcomes, and includes a search mechanism.

146. 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.⁵⁹ However, such remedies remain rare.

147. Changes to a company's operations and policies to mitigate impacts are a more frequent outcome. In both 2016 and 2017, roughly 40% of concluded cases resulted in some changes to company policy or operations to better meet recommendations of the Guidelines.

148. 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.

149. 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 case is closed. Consultative status with the Investment Committee has also been extended to OECD Watch, the OECD Investment Committee's recognized representative of civil society organizations.

150. Until recently, six NCPs had received nearly half (49 %) 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%). Further efforts are underway to strengthen the NCPs and the grievance mechanism.

151. 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.⁶⁰ Other concerns include uneven performance in handling specific instances, including parallel proceedings or delays.⁶¹ There have been calls for reform of current rules, better implementation, and monitoring of NCP performance.

152. 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.

153. 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

⁵⁹ Dutch NCP, [Heineken, Bralima and former employees of Bralima](#), 2017. See also French NCP, [Natixis-Natixis Global Asset Manager and Unite Here](#), 2017; Swiss NCP, [Fédération Internationale de Football Association \(FIFA\) and Building and Wood Workers' International \(BWI\)](#), 2018.

⁶⁰ OECD Watch, [The State of Remedy under the OECD Guidelines: Understanding NCP cases concluded in 2018 through the lens of remedy](#), 2019.

⁶¹ OECD, [Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015](#), 2016.

accountable manner and whether it handles cases in a way that is impartial, predictable, equitable and compatible with the OECD Guidelines.

3.4. OECD development of due diligence guidance

154. 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 responsibly.

155. 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*

156. 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 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.

157. 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.⁶² 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.⁶³

158. The UNGPs and the 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

⁶² 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).

⁶³ 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.

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.⁶⁴ For convenience herein, the discussion below generally refers to “HR/RBC due diligence” to refer generally to both the UNGP and broader OECD approach.

159. 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”.⁶⁵

160. 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.

161. 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 scale their due diligence efforts accordingly. 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

162. 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.

163. 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.⁶⁶

⁶⁴ The chapters on Science and Technology, Competition and Taxation are not considered to relate to adverse impacts and are excluded.

⁶⁵ Ruggie 2013 at location 2119.

⁶⁶ In addition to those described below, specific due diligence guidance also addresses [responsible mineral supply chains](#), [responsible agricultural supply chains](#) (jointly developed by the

a. Extractive sector: Due diligence on meaningful engagement with stakeholders

164. The extractive sector⁶⁷ 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.

165. The OECD has prepared Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.⁶⁸ 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 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.

166. 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).⁶⁹ 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

167. 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.⁷⁰ Due diligence guidance on corporate lending and securities underwriting was released in October 2019.⁷¹ Work on project and asset-based finance is planned for 2020.

168. 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

OECD and the Food and Agriculture Organisation (FAO)) and [responsible supply chains in the garment and footwear sector](#).

⁶⁷ Extractive sector enterprises are considered to include enterprises conducting exploration, development, extraction, processing, transport, and/or storage of oil, gas and minerals.

⁶⁸ OECD (2016), [Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#).

⁶⁹ Shift, [Stakeholder Engagement and the Extractive Industry](#) (2013).

⁷⁰ OECD (2017), [Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises](#).

⁷¹ OECD (2019), [Due diligence guidance on responsible corporate lending and securities underwriting](#).

UN Working Group on Business and Human Rights on the “directly linked” concept under the UNGPs (with which the Guidelines are aligned as noted).

c. General due diligence guidance

169. As noted, in May 2018, the OECD [Due Diligence Guidance for Responsible Business Conduct](#) was approved for application to companies from all sectors.

170. 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 regional legal frameworks in some cases.

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

171. 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”.⁷²

172. 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.⁷³ Ensuring the availability of information on beneficial ownership is of central importance to anti-money laundering and combatting the financing of terrorism (AML/CFT).

173. 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.

174. 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](#):

⁷² [G20 Leaders Communique](#), point 14 (16 Nov. 2014); [G20 High-Level Principles on Beneficial Ownership Transparency](#).

⁷³ 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).

“[t]ransparency of beneficial ownership is critical to preventing and exposing corruption”.

175. 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.

3.6. Other initiatives by international organisations addressing BHR/RBC

3.6.1. *International Finance Corporation (IFC)*

176. 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.

177. 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.⁷⁴

178. 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 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)*

179. 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 2020.⁷⁵

180. The AIIB updated its Environmental and Social Framework in 2019.⁷⁶ The Framework does not refer specifically to the business responsibility to respect human rights

⁷⁴ Ruggie 2013 at location 2237.

⁷⁵ https://www.aiib.org/en/news-events/news/2019/20190713_003.html

⁷⁶ https://www.aiib.org/en/policies-strategies/_download/environment-framework/Final-ESF-Mar-14-2019-Final-P.pdf

or RBC; nor does it refer to the UNGPs or OECD Guidelines. Additional research is required, but the Framework appears to reflect a similar approach in some respects.

3.6.3. Council of Europe

181. 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 2016.⁷⁷ 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), 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.

⁷⁷ [Human rights and business, Recommendation CM/Rec.\(2016\)3 of the Committee of Ministers to Member States](#) (2016).

4. BHR/RBC developments in national and regional law and policy

182. 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 and the regulation of companies. 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.

183. 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. 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.

184. His 2013 book noted some early government action. He recommended that governments take action to make government benefits conditional upon companies undertaking such 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.

185. 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 respect to RBC”.⁷⁸ This section addresses a range of recent government policies.

186. 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. They 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.

⁷⁸

OECD, Annual report on RBC (2018).

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)

187. On 27 March 2017, the Law on the duty of vigilance of parent companies and commissioning enterprises⁷⁹ was promulgated in France following extensive debate. The law addresses human rights and environmental adverse impacts generated by corporate activities.

188. 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.⁸⁰

189. 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 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.

190. 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.

191. 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.

192. 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

⁷⁹ 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.

⁸⁰ Article L225-102-4 of the French Commercial Code.

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.⁸¹

193. 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.⁸²

194. 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.

195. 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.

b. Switzerland: Current developments concerning a “Responsible Business Initiative” and the establishment of a due diligence obligation

196. Recent intensive debates and public and parliamentary action in Switzerland over a proposal to introduce mandatory due diligence for companies are also instructive about the current tenor of views about the issues.

197. In April 2015, a coalition of 60 Swiss civil society organisations launched a “public initiative” entitled the Responsible Business Initiative (RBI).⁸³ The RBI proposed to

⁸¹ 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*.

⁸² 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*.

⁸³ Under the Swiss Federal Constitution, a public 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.

introduce an obligation for companies headquartered in Switzerland to engage in reasonable human rights and environmental due diligence (with a carve-out for certain SMEs). The due diligence obligation extends to controlled foreign entities.⁸⁴ The RBI would also introduce civil liability for multinational companies for violations of human rights and environmental standards by their controlled companies.

198. The RBI provides 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. 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.

199. After receiving 100,000 signatures, the 2015 public initiative was first referred to the Federal Council, which acknowledged the legitimacy of the objectives pursued by the initiative – protecting human rights and the environment –, but considered that the proposal went too far. The Federal Council declined to make a counter-proposal. It recommended to the Parliament to submit the initiative to a vote of the people and the cantons, and recommended the rejection of it.⁸⁵

200. In November 2017, the Legal Affairs Committee of the Council of States (upper house) expressed the view that it would be appropriate to design a counter-proposal with statutory amendments which it outlined in general terms.⁸⁶ The Legal Affairs Committee of the National Council (lower house) initially disagreed, but subsequently drafted a bill with a counter-proposal that it submitted to the National Council in May 2018.⁸⁷ By 121 votes to 73, the National Council adopted the bill with the counter-proposal on 14 June 2018 (Counter-Proposal).

201. The Counter-Proposal, which would amend several Swiss statutes, modifies the initiative in a number of areas. Regarding covered companies, the Counter-Proposal limits

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.

⁸⁴ For a detailed analysis of proposed article 101a by its initiator, see Swiss Coalition for Corporate Justice, Factsheet V (at https://initiative-multinationales.ch/wp-content/uploads/2018/05/3.2_KVI_Factsheet_5_F_low.pdf).

⁸⁵ Conseil fédéral suisse, Message relatif à l'initiative populaire « Entreprises responsables – pour protéger l'être humain et l'environnement », 15 septembre 2017 (at <https://www.admin.ch/opc/fr/federal-gazette/2017/5999.pdf>).

⁸⁶ Cf. Initiative 17.498 de la Commission des affaires juridiques du Conseil des États (at <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20170498>).

⁸⁷ The Counter-Proposal consists of a series of amendments to the Swiss Code of Obligations (16.077, projet 2). Its text is available at <https://www.parlament.ch/centers/eparl/curia/2016/20160077/N2-3%20F.pdf>.

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.⁸⁸ Where the RBI refers to *de facto* economic control being sufficient to constitute control in some cases, the Counter-Proposal states that economic dependency is not by itself sufficient to establish control.

202. The RBI refers to applicable human rights norms as encompassing the International Bill of Rights and the eight core ILO Conventions. In the environmental area, it refers to international conventions but also to standards developed by international organisations like the IFC or private bodies such as the International Standards Organization (ISO). The Counter-Proposal limits the applicable human rights and environmental norms to those binding on Switzerland.

203. The Counter-Proposal explicitly excludes the personal liability of directors and administrators which is not referred to in the RBI. The Counter-Proposal refers to damage to life, personal injury and damage to property as bases for liability whereas the RBI does not specify the categories of damage that can trigger liability.

204. The Counter-Proposal maintains the due diligence defence to company liability. It also adds 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 Counter-Proposal adds a public reporting obligation not included in the RBI. It also provides that the law would be subject to a referendum.

205. The Initiating Committee noted reservations but expressed its overall support for the Counter-Proposal and its intention to withdraw the RBI if the Counter-Proposal is adopted.

206. The Counter-Proposal was referred to the Council of States (upper house). On 12 March 2019, by a vote of 22 to 20, the Council of States declined to discuss it. Following this vote, the Counter-Proposal was referred back to the National Council. Its Legal Affairs Committee, in April 2019, voted 15-10 in favour of maintaining the counter-proposal. It expressed the view that it would be desirable to avoid a public voting campaign on the initiative. It noted possible amendments, but did not develop them in light of the refusal of the Council of States.⁸⁹

207. On 13 June 2019, the National Council (lower house) re-affirmed its support for its original Counter-Proposal, by 109 votes to 69.⁹⁰ At this stage, the matter returned to the

⁸⁸ 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.

⁸⁹ Commission des affaires juridiques du Conseil National, Press Release of 5 April 2019, “La Commission souhaite maintenir le contre-projet indirect à l’initiative pour des multinationales responsables”.

⁹⁰ National Council, [Le Conseil national maintient son contre-projet à l’initiative](#) (13 June 2019).

A few days later, the Conference of the Heads of Cantonal economic affairs’ departments publicly expressed its support for the Counter-Proposal at its plenary assembly. Conférence des Chefs des Départements cantonaux de l’Economie Publique, Press release of 17 June 2019 (at

Council of States. On 14 August 2019, a majority of the Legal Affairs Committee of the Council of States approved discussion of the Counter-Proposal. On 3 September 2019, it presented the results of its clause-by-clause examination of the Counter-Proposal and its proposed amendments.⁹¹

208. By 8 votes to 5, the Committee supported the basic principle of a parliamentary vote on a counter-proposal providing for corporate liability for the breach of due diligence obligations.⁹² The Committee proposed to introduce a mandatory conciliation procedure, with the Swiss NCP as the competent conciliation authority, prior to permitting access to the Swiss courts. It expressed concern about the possible multiplication of court claims. The Council of States will discuss the matter at its fall session.

209. The Initiating Committee has declared that it would withdraw the initiative if the original Counter-Proposal or the counter-proposal as amended by the Legal Affairs Committee of the Council of States is definitively adopted.⁹³ It emphasised its constructive attitude, criticised opposition from some business groups, and pointed to opinion polls finding strong public support.

210. Among business circles, the Counter-Proposal has attracted varying responses. Major business organisations, including Economiesuisse, SwissHoldings and Scienceindustries, have expressed strong opposition, 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 business partners operating abroad, and the danger for the competitiveness and attractiveness of Swiss economy, in the absence of a coordinated international regulatory framework for binding corporate due diligence.

211. On the other hand, some investors and business groups have pressed Swiss lawmakers to support the Counter-Proposal. In a June 2019 statement signed by 23 institutional investors, which together manage around CHF 395 billion in assets, the

https://www.vdk.ch/files/uploads/documente_vdk/Medienmitteilung%20Assembl%C3%A9e%20du%20C3%A9ni%C3%A8re%20CDEP_13062019_fr.pdf).

⁹¹ Cf. 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”. The amended version of the proposal is available at <https://www.parlament.ch/centers/eparl/curia/2016/20160077/S2-4%20F.pdf>.

⁹² By a vote of 7 to 6, the Committee agreed to abandon a “subsidiarity clause” which it had earlier proposed but which had been rejected by the National Council; the clause would have provided that, so long as it is possible and reasonable, victims should bring their claims against foreign-based subsidiaries before the courts of the country where the damage occurred. Claims against Swiss parent companies before Swiss courts would only be admissible if victims could prove that it was impossible for them to seek justice before the courts of the place of the damage. Cf. Dépêche ATS, “Délibérations au Conseil des Etats”, 12 March 2019 (at <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20170060#/AffairSummary>).

⁹³ Swiss Coalition for Corporate Justice, “Prise de position des initiant-e-s sur le contre-projet indirect”, 9 September 2019 (at <https://initiative-multinationales.ch/actualites/contre-projet-indirect-appreciation-des-initiant-e-s/>).

investors urged the members of the Swiss Parliament to vote for the Counter-Proposal.⁹⁴ 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 has indicated that in developing a workable compromise Switzerland would be joining other countries and would not be alone.⁹⁵ The investors also underlined that the Counter-Proposal is supported by important representatives of the Swiss private sector.

212. If the two chambers are not able to agree on a counter-proposal, a national referendum on the introduction of the RBI in its original form will be held in 2021 at the latest.

c. Finland

213. 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.

214. 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.⁹⁶

d. Germany

215. In its coalition agreement on implementing its NAP, the German government has committed to legislative measures if by 2020 fewer than 50 percent of German companies with more than 500 employees have introduced an effective human rights due diligence process. There has also been reported government work on a draft law on mandatory human rights due diligence for German companies and their supply chains.⁹⁷

⁹⁴ 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.

⁹⁵ Id, citing “Statement on Swiss Citizens’ Initiative”, John G. Ruggie, Former UN Special representative on Business & Human Rights, 10 June 2018.

⁹⁶ See Finland, [Inclusive and Competent Finland – a socially, economically and ecologically sustainable society](#) (government programme of 6 June 2019), p. 115.

⁹⁷ See [German Development Ministry drafts law on mandatory human rights due diligence for German companies](#), Business and Human Rights Resource Centre (Feb. 2019).

e. European Union

216. In October 2016, the European Parliament adopted a Report on corporate liability for serious human rights abuses in third countries. This 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 rules setting out that companies must respect human rights throughout their operations by establishing mandatory human rights due diligence.

217. 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.

4.1.2. Sectoral or geographically-focused due diligence requirements

a. United States: conflict minerals

218. 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.⁹⁸ 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.

219. 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).⁹⁹

220. 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 minerals that directly or indirectly finance or benefit armed groups in the [DRC] or an adjoining country.”¹⁰⁰ 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.

221. On 22 August 2012, the SEC adopted a rule regarding conflict minerals disclosure (“Final Rule”).¹⁰¹ 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

⁹⁸ 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.

⁹⁹ 15 U.S.C. § 78m(p).

¹⁰⁰ Id. § 78m(p)(1)(D).

¹⁰¹ Conflict Minerals, 77 Fed. Reg. 56,274, 56,277-78 (12 Sept. 2012), codified at 17 C.F.R. §§ 240.13p-1, 249b.400.

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.¹⁰² Depending on its findings, the initial reasonable country of origin inquiry may trigger a third step, a due diligence and further reporting obligation.¹⁰³ 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.”¹⁰⁴ The SEC approved use of the OECD due diligence guidance in this regard.¹⁰⁵

222. 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’”.

223. 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.”¹⁰⁶ 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].”¹⁰⁷

224. 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

¹⁰² 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).

¹⁰³ 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.

¹⁰⁴ 77 Fed. Reg. at 56,326.

¹⁰⁵ 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.

¹⁰⁶ *Id.* at 56,350.

¹⁰⁷ *Id.*

major US business organisations (the U.S. 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.¹⁰⁸ 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.¹⁰⁹ 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.

225. 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.¹¹⁰ 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.¹¹¹

226. 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.

227. 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.¹¹² Audits of such diligence appear to be less frequent.

¹⁰⁸ 5 U.S.C. §§ 701 et seq.

¹⁰⁹ 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.

¹¹⁰ *National Association of Manufacturers v. Securities and Exchange Commission*, 748 F.3d 359 (D.C. Cir. 2014).

¹¹¹ 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).

¹¹² 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

b. EU: Conflict minerals

228. 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.¹¹³ 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.

229. 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

230. The Netherlands recently adopted 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

231. 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.¹¹⁴

232. 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

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.”).

¹¹³ [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.](#)

¹¹⁴ See United States Sentencing Commission, [2018 Guidelines](#) (2018).

unlawful conduct, a full defence is available.¹¹⁵ 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.*¹¹⁶

233. 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.¹¹⁷ The guidance has reportedly been used as the basis for many UK-based anti-bribery and corruption programmes.

234. 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”.

235. 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.

236. The debates 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

237. The 2014 EU Directive on Non-Financial Reporting requires EU corporations to disclose the social and environmental impacts of their business activities in nonfinancial

¹¹⁵ UK [Bribery Act 2010](#), ss. 7-8.

¹¹⁶ White & Case LLP, [The Bribery Act: The Changing Face of Corporate Liability](#) (2016).

¹¹⁷ 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).

statements.¹¹⁸ 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.

238. 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 proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.”¹¹⁹

239. 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 proposed EU regulation on disclosure requirements related to sustainable investments and sustainability risks.

240. Political agreement in March 2019 was reached between the EU Council and EU member states on a new proposed EU regulation on disclosure requirements related to sustainable investments and sustainability risks.¹²⁰ The agreed rules will strengthen and improve the disclosure of information by suppliers of financial products and financial advisors towards end-investors.

241. The new regulation sets out how financial market participants and financial advisors must integrate environmental, social or governance (ESG) risks and opportunities in their processes, as part of their duty to act in the best interest of clients. It also sets uniform rules on how those financial market participants should inform investors about their compliance with the integration of ESG risks and opportunities. By so doing, it addresses information asymmetries on sustainability issues between end-investors and financial market participants or financial advisors. The regulation also requires the disclosure of adverse impacts on ESG matters, such as in assets that pollute water or devastate bio-diversity, to ensure the sustainability of investments.

¹¹⁸ 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.

¹¹⁹ Id., preamble para 6 & art. 1 (1)) (adding a new art. 19a to Directive 2013/34/EU).

¹²⁰ See European Commission, [Capital markets union: Commission welcomes agreement on sustainable investment disclosure rules](#) (7 Mar. 2019).

b. UK: modern slavery

242. 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

243. 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. Climate change disclosure

244. 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.¹²¹ 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.¹²²

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

a. Government procurement

i. United States

245. 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.¹²³ 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

246. Three new EU Directives on public procurement adopted in 2014 expanded the scope for consideration of HR/RBC.¹²⁴ At the same time, they leave considerable

¹²¹ Nadine Robinson, [Are we headed towards mandatory climate disclosure?](#) (1 Aug. 2019).

¹²² Mark Carney, [Enable, Empower, Ensure: A New Finance for the New Economy](#), (20 June 2019).

¹²³ 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).

¹²⁴ 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");

discretion, inviting but not requiring more active use by Member States' purchasing authorities.

247. 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 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.¹²⁵

248. 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

249. 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").¹²⁶ 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".

250. The Recommendation frames due diligence as a requirement for government Adherents rather than for enterprises seeking support.¹²⁷ 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

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).

¹²⁵ 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").

¹²⁶ See OECD (2016), [Recommendation on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence](#).

¹²⁷ 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").

indigenous peoples' lands) or are related to the project's operating context (*e.g.* conflict and post-conflict situations).¹²⁸ The text does not clarify whether the additional due diligence should be carried out by the government, the applicant for support or both.

251. 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.

252. 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.¹²⁹ Where conditions are imposed, compliance should be monitored.

253. For "Category A" projects which bear the greatest risks¹³⁰, 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.

254. 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.

255. 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.

c. Trade support and trade diplomacy

256. 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

¹²⁸ Id. para 14 n.2.

¹²⁹ 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, minimise, mitigate or remedy potential adverse environmental and social impacts, covenants, and monitoring requirements.")

¹³⁰ 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.")

2017, the Declaration had been signed by over 550 companies or private sector officials since 18 November 2016.¹³¹

257. 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 Ombudsperson’s jurisdiction overlaps to some degree with Canada’s NCP.

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

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

259. 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 2010.¹³² 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.

260. 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.

261. 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;

¹³¹ See Canada, [2017 National Contact Point \(NCP\) Annual Report](#).

¹³² 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](#).

*manufacturing companies (6.5%); and 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.*¹³³

262. 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.*¹³⁴ Shell argued that the statute did not apply to corporations.

263. 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.”¹³⁵ Consequently, even claims that “touch and concern the territory of the United States ... must do so with sufficient force to displace” that presumption.¹³⁶

264. Having limited the territorial reach of the statute, the Supreme Court returned to the issue of its application to corporations in a subsequent case, *Jesner v. Arab Bank PLC*.¹³⁷ It held that the statute does not apply to foreign corporations. The issue of whether the statute applies to US corporations (where there are sufficient contacts with the US to establish jurisdiction) remains undecided.

265. Ruggie had mixed views about the ATS in 2013, but lamented the possibility of its complete demise as an avenue for human rights claims in the absence of alternative

¹³³ 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.

¹³⁴ *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

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

¹³⁶ 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).

¹³⁷ *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386 (2018).

remedies. He noted that the many ATS cases against corporations had rarely reached a conclusion and still less remedies for alleged victims, but noted a few remedies and significant impact on social and corporate awareness of the issues and on corporate policies. He considered that during its period of broad potential application the statute may have excessively comforted non-US governments and courts in their inaction on improving access to remedies against “their” companies.¹³⁸ Its sharp decline as a basis for human rights claims against both non-US and US companies since 2013 has been accompanied by increased attention to the issues and developments in other jurisdictions under a range of theories.

4.2.2. Parent company liability for actions relating to their subsidiaries

a. Except in ISDS, the 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

266. 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.¹³⁹

267. 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 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

¹³⁸ Ruggie 2013 at 3284.

¹³⁹ 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).

principle of limited liability, under which shareholders are held financially liable only to the extent of the value of their ownership shares.”¹⁴⁰

268. As the Roundtable has seen, 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. 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.¹⁴¹

269. 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. They generally reject claims by both (i) tort victims of companies seeking recovery against a shareholder (parent corporation)¹⁴²; and (ii) shareholders seeking recovery of reflective loss against a party that has injured the company.¹⁴³

b. Developments in direct parent company liability

270. 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 is consistent with the separate entity principle.

271. 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.

272. 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

¹⁴⁰ Ruggie 2013 at 3132.

¹⁴¹ OECD, “[The impact of investment treaties on companies, shareholders and creditors](#)”, ch. 8 in OECD Business and Finance Outlook 2016, pp. 229-30.

¹⁴² 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).

¹⁴³ See, e.g., *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); *Johnson v. Gore Wood & Co.*, (2002) 2 AC 1 (UK House of Lords); *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 arising from government bail-out of company), <https://www.leagle.com/decision/infco20170509141>, leave to appeal to the US Supreme Court denied (cert. denied), 26 Mar. 2018.

personal injuries as a result of having to consume and use polluted water. They are seeking damages, remediation and cessation of the continual pollution.

273. 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.¹⁴⁴ Two key issues in *Vedanta* were (i) whether the claims gave rise to a real triable issue against Vedanta, the English parent company¹⁴⁵; and (ii) whether the English courts should take jurisdiction over a case involving alleged victims and injuries in Zambia.

274. 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.

275. 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.¹⁴⁶ 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.

276. 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”.¹⁴⁷

277. 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”.¹⁴⁸

278. 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 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”.¹⁴⁹

¹⁴⁴ *Lungowe & Others v Vedanta Resources Plc & Konkola Copper Mines* [2019] UKSC 20 (Vedanta).

¹⁴⁵ 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.

¹⁴⁶ *Vedanta*, para. 52.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*, para. 53.

¹⁴⁹ *Id.*

279. 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.*¹⁵⁰

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

281. 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.*¹⁵¹

282. 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.¹⁵²

¹⁵⁰ Id., para. 55.

¹⁵¹ Id., para. 61.

¹⁵² Id., para. 89.

283. 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 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.

4.2.3. Scope of directors' fiduciary duties under corporate law

284. 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.

285. 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.

286. 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.

287. The issues are under discussion in corporate law and policy generally. 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.¹⁵³ At least one US presidential candidate has proposed a bill that addresses fiduciary duties. The issue remains contentious in the general corporate law debate as well as in the context of international business responsibilities and more research is needed.

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

288. 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.

289. *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

¹⁵³

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

damage to land and waterways. This presumably reflects the focus of the disputing parties.¹⁵⁴

290. 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.*¹⁵⁵

291. 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.

292. 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 and it appears that few companies have exercised this option. The Economist reported in 2017 that over 80,000 organisations have signed up for an open-data register demonstrating that they and their suppliers make no use of forced labour.¹⁵⁶

293. 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.

294. 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;

¹⁵⁴ 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.

¹⁵⁵ *Vedanta*, para. 49.

¹⁵⁶ The Economist, Daily chart, [Modern slavery is disturbingly common](#) (20 Sept. 2017).

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.

295. 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. Significant obstacles remain. Some MNEs may have a market-based incentive not to embrace RBC standards in the first place. Critics argue that neither the UNGPs nor the Guidelines have made substantial progress in improving conditions on the ground.¹⁵⁷

¹⁵⁷ Human Rights Watch, [Without Rules. A Failed Approach to Corporate Accountability](#), 2013; Social and Cultural Rights, [Rethinking the UN Guiding Principles and company grievance mechanisms](#), 2015.

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

296. 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

297. There is broad interest today among investors and asset managers in environmental, social and governance (ESG) investment. 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 2016.¹⁵⁸ 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.

298. 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 ESG factors and to support an international network of investor signatories in incorporating these factors into their investment and ownership decisions. 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.

299. 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 without regard to environmental or social impacts, or governance issues such as corruption, are receding.

300. 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.¹⁵⁹ 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.

301. 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](#)

¹⁵⁸ John Gerard Ruggie and Emily Middleton, [Money, Millennials and Human Rights: Sustaining “Sustainable” Investment](#), Global Policy (Feb. 2019).

¹⁵⁹ 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).

[\(SASB\)](#). These voluntary initiatives reflect regulatory disclosure requirements in key jurisdictions and extend further.

302. 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

303. 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.

304. Companies took different approaches. The Accord on Fire and Building Safety in Bangladesh (the “Accord”) is the most innovative.¹⁶⁰ 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.

305. 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.

306. 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”.¹⁶¹ In addition to the standing Steering Committee, the Accord provided for *ad hoc* arbitration.

¹⁶⁰ [Accord on Fire and Building Safety in Bangladesh](#) (13 May 2013).

¹⁶¹ Accord, art. 1, Governance.

307. The Accord has been widely praised as an innovative measure to address supply chain issues.¹⁶² Detailed [public quarterly reports](#) address progress in achieving inspections, remediations, safety training and other matters.

308. 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.

309. 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.¹⁶³ 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.

310. 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 linked to purchasing practices, costs and speed on the other.

5.3. The Hague BHR Arbitration Rules

311. 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.¹⁶⁴ It aims to create an international private judicial dispute resolution avenue available to parties involved in BHR issues as claimants

¹⁶² 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). Together with other companies, mainly from North America, they 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.

¹⁶³ Dominic Rushe, [Unions reach \\$2.3m settlement on Bangladesh textile factory safety](#), The Guardian (22 Jan. 2018).

¹⁶⁴ 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](#).

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. Further research and analysis is needed in this area.

5.4. NGO monitoring

312. 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.¹⁶⁵ The Alliance for Corporate Transparency has examined 100 companies' reports under the EU's Non-Financial Reporting Directive. It found that while 90% reported a commitment to respect human rights, only 36% describe their human rights due diligence system in any detail.¹⁶⁶ These findings have not been analysed in detail and are reported as important examples of monitoring; more research is needed.

313. 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.

¹⁶⁵ Corporate Human Rights Benchmark, [2018 results press release](#) (Nov. 2018).

¹⁶⁶ Alliance for Corporate Transparency, [Companies failing to report meaningful information about their impacts on society and the environment](#) (8 Feb. 2019).

6. Binding Instrument on Business and Human Rights

314. 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.

315. 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.”¹⁶⁷ The Council did not provide further details about the sort of instrument that should be drafted.

6.1. Status of work

316. In September 2017, the Chairperson-Rapporteur of the Working Group released a document that outlined elements that would be included in the draft binding instrument (the 2017 Elements).¹⁶⁸ 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 Working Group discussed the 2019 Revised Draft in its fifth session in Oct. 2019.¹⁶⁹ The Working Group has invited comments on the revised draft from states and other relevant stakeholders to be submitted by February 2020.

6.2. Selected issues

6.2.1. Scope

317. 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 corporations “and other business enterprises.”¹⁷⁰ 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.”¹⁷¹ The EU and some other governments have insisted that the

¹⁶⁷ 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.

¹⁶⁸ OEIGWG, [Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights](#), 29 Sept. 2017.

¹⁶⁹ There has been controversy and criticism including over aspects of the procedures used in this work. Those issues are not addressed here.

¹⁷⁰ 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.

¹⁷¹ 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

work should address all business enterprises whereas other governments have favoured a focus on transnational enterprises.

318. 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 adopts a different formulation. Art. 3 provides that it shall apply to “all business activities, including particularly but not limited to those of a transnational character”. This suggests that the scope of the draft treaty has been expanded to cover all business activity. However, art. 1 defines “business activities” as “any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity [...]”, creating ambiguity.

319. 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. Ruggie and others expressed concerns 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 eliminates the “for profit” criterion.

6.2.2. Prevention

320. The primary obligation on states set out in art. 5 of the 2019 Revised 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 subsequent paragraphs clarify that this means introducing legislation to make human rights due diligence mandatory and requiring enterprises to “take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under contractual relationships”.

321. The 2019 Revised Draft also clarifies 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 violations or abuses; (b) taking appropriate actions to prevent human rights violations or abuses; (c) monitoring the human rights impact; and (d) communicating to stakeholders and accounting for the policies and measures adopted.

6.2.3. Liability

322. Art. 6 of the 2019 Revised Draft introduces a new provision which would require states to establish liability for natural or legal persons for failing to prevent another person with which it has a contractual relationship from causing harm to third parties, irrespective of where such harm takes place. Such liability would arise only where there is either control over the contract counter-party or where the human rights violation or abuse is reasonably foreseeable. A law firm commentary has noted that the provision is 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

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.

*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.*¹⁷²

323. The 2019 Revised 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

324. 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.

325. The 2019 Revised Draft contains 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.

¹⁷² 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 National Action Plans

326. 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. These concerns have generated increasing calls for policy coherence. After noting some examples, this section then reviews the status of National action plans (NAPs).

327. 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 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. 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.

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

328. 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.*¹⁷³

329. 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 of international best practices and applicable instruments of responsible business conduct and corporate governance.”¹⁷⁴

330. 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

¹⁷³ 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), paragraph 27.

¹⁷⁴ [G20 Guiding Principles for Global Investment Policymaking](#), July 2016, para. VIII.

Strengthen NCPs (2019-2021).¹⁷⁵ 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.

331. 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. There is a particularly important role for National Action Plans (NAPs) on BHR to enable policy coherence for responsible business conduct.

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

332. The UN and the OECD have cooperated in drawing attention in particular to the importance of governments developing NAPs on BHR to address policy coherence for responsible business conduct.¹⁷⁶ The UN Working Group on Business and Human Rights has also produced guidance for governments, most recently updated in November 2016.¹⁷⁷

333. Government achievements in this area, however, remain uneven. To date, it appears that only twenty-two governments have completed a NAP on BHR or responsible business conduct. 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.

334. Annex 1 outlines information collected to date 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.

335. Most of the 22 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.

336. 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

¹⁷⁵ OECD (2019), Annual Report on the OECD Guidelines for Multinational Enterprises 2018, p. 16.

¹⁷⁶ 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).

¹⁷⁷ UN Working Group on Business and Human Rights, "[Guidance on National Action Plans on Business and Human Rights](#)", Geneva, November 2016.

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.¹⁷⁸ 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.

337. Commitments to increase references to standards of responsible business conduct are also generally directed towards the negotiation of future trade and investment agreements. Only Colombia¹⁷⁹ and Switzerland¹⁸⁰ explicitly address the issue of revising their existing treaties in order to incorporate stronger references to CSR standards and sustainable development.

¹⁷⁸ 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.

¹⁷⁹ Government of Colombia, [National Action Plan](#) (2015), p. 13.

¹⁸⁰ Switzerland, “[Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights](#)” (2016), p. 32.

8. The role of investment treaties

338. This section considers the interaction and possible interaction of investment treaties with policies on BHR and RBC. 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.

339. Accordingly, this section first analyses trade agreements (and accompanying agreements) that began to address human rights, or labour and environmental issues more specifically, in the 1990s. Second, it considers the large numbers of mostly older investment treaties as analysed in a 2014 statistical survey of treaty practice. Other than in trade and investment treaties, there was very little attention to labour, the environment or human rights in the language of investment treaties. Third, it considers the evolution of more recent investment treaty practice as a result of continued reforms. It 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. It also considers the emerging role of investment treaties in speaking about and to business about RBC.

8.1. The trade agreement background

340. 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.¹⁸¹

341. 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.

¹⁸¹ 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.")

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

a. The example of labour provisions in trade agreements and their side agreements

i. The growth of coverage of labour issues

342. 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.¹⁸² 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 the many trade agreements that include labour provisions promote ILO instruments including the Declaration on Fundamental Principles and Rights at Work, and the practice of including labour provisions has become more frequent.¹⁸³

343. 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."¹⁸⁴ 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.

ii. Enforcement

344. 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.

345. 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.¹⁸⁵ Recent US Congress grants of trade promotion authority (TPA) have imposed a similar requirement.

¹⁸² Cathleen D. Cimino-Isaacs, [Labor Enforcement Issues in U.S. FTAs](#), US Congressional Research Service (updated 23 Aug. 2019).

¹⁸³ 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.

¹⁸⁴ *Id.*, para. 16.

¹⁸⁵ 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.

346. 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.

iii. Cases and complaints

347. 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.

348. 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.

349. 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.¹⁸⁶ 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. 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.¹⁸⁷

b. EU policy on human rights and trade agreements prior to the Lisbon Treaty

350. 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

¹⁸⁶ 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.

¹⁸⁷ The amended USMCA signed in December 2019 introduces substantial new labour provisions including important innovations on this issue; they will be analysed in a future revised version of this paper. The original agreement signed on 30 November 2018 and the Protocol of Amendment signed on 10 December 2019 are available on the [USTR website](#).

party to take appropriate measures in case of serious breaches by the other party.¹⁸⁸ 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.

351. 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.¹⁸⁹

352. The EU's official policy on the matter is outlined in a "[Common Approach on the use of political clauses](#)", agreed by "Coreper"¹⁹⁰ 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).¹⁹¹

353. 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.

354. While the EU seeks uniformity, negotiations lead to variance including in the references to human rights (general reference or also with reference to international norms¹⁹²). When the clause is present in a framework agreement, a linkage clause in the

¹⁸⁸ Ionel Zamfir, [Human rights in EU trade agreements: the human rights clause and its application](#) (European Parliament Research Service (July 2019)).

¹⁸⁹ Id.

¹⁹⁰ [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.

¹⁹¹ See Zamfir, *supra*.

¹⁹² 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).

trade agreement has the legal effect of making the human rights clause applicable to this as well.¹⁹³

355. 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).¹⁹⁴ 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.

c. Preliminary comparison of the approaches

356. 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.

357. 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.¹⁹⁵ It does not address business responsibilities.

358. 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.

359. 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

¹⁹³ 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”.

¹⁹⁴ This is explicit in treaties concluded after 2008. See Zamfir, *supra*.

¹⁹⁵ 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.

undermining their competitiveness in international trade”.¹⁹⁶ It has been criticised as a form of protectionism practised by advanced economies.¹⁹⁷

d. *A degree of convergence in trade agreements post-2010.*

360. 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.¹⁹⁸ 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.

361. Compliance with internationally-recognised labour rights, however, is an increasing issue also in trade and investment relations of the EU. For example, 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.¹⁹⁹

362. 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.²⁰⁰ However, the overall approach in the body of those treaties remains sector-specific. The CPTPP contains individual chapters on labour, the environment, development and anti-corruption, but does not refer to human rights as such.

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ 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.

¹⁹⁹ 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.

Issues can also be raised during negotiations. The issue of ratification of fundamental ILO Conventions has been 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 has an action plan to ratify the three remaining ILO core conventions. See European Parliament, Legislative Train Schedule, A Balanced and Progressive Trade Policy to Harness Globalisation, [EU-Vietnam Free Trade Agreement](#) (June 2019).

²⁰⁰ 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.

8.2. As of 2014, there was little attention to RBC in stand-alone investment treaties

363. 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.²⁰¹ The treaty pool was overwhelmingly composed of BITs, numbering 2,042. It also contained 50 non-BIT treaties (mainly FTAs with investment provisions).²⁰²

364. 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.***
- ***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 apart from domestic legality requirements for treaty coverage of investments.
- ***New treaties were far fewer in the 2008-2013 period than in prior periods and 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 FTAs with investment chapters, 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

²⁰¹ 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.

²⁰² Id. p. 14.

(or striving to implement) internationally recognised standards, generally with regard to labour or corruption.

365. 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. 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).²⁰³

8.3. Evolution and reform in new investment treaties

366. 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 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.²⁰⁴ 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 or the OECD Guidelines.²⁰⁵

367. Many other governments were also 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.

368. This section addresses two areas of relevance to business responsibilities in investment treaty policy: (i) concerns about investment treaty overreach interfering with domestic law, the primary source of obligations for business; and (ii) a budding role of investment treaties in speaking about and to business about fostering a culture of RBC at home and abroad. It then considers the recent new Dutch Model BIT.

8.3.1. The issue of investment treaty overreach interfering with state duty to protect from corporate human rights abuses through domestic regulation and adjudication

a. Investment treaties and interference with the state duty to protect – general considerations

369. 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

²⁰³ Id. at 13-14.

²⁰⁴ 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.

²⁰⁵ 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.

preventative measures. The first cluster focused on investment treaties. Ruggie identified two problems for the duty to protect.

370. 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 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.”²⁰⁶

371. 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.

372. 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”.²⁰⁷ He thus advocated for more balanced investment agreements and better alignment among government agencies and policies.²⁰⁸

373. 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.²⁰⁹ 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”.²¹⁰

374. 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

²⁰⁶ Ruggie 2013 at location 1737.

²⁰⁷ Ruggie 2013 at location 1746.

²⁰⁸ 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.

²⁰⁹ UNGP 9.

²¹⁰ UNGP 8, Commentary.

with regard to business respect for human rights, but it should do so by raising the performance of laggards.”²¹¹

375. 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 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.²¹² 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 investors have in advanced economies, considerations relating to the state duty to protect could play a greater role.

376. 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 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.

377. Governments have taken a range of actions that address the concerns expressed by Ruggie.

b. Recent government action that addresses concerns about investment treaty impact on the state duty to protect

378. Governments have acted to protect policy space. They have also affirmed more strongly government duties to regulate in key policy areas in extensions of earlier trade agreement policies. 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.

i. Protecting policy space

379. 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.²¹³ 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

²¹¹ UNGP 10, Commentary.

²¹² 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.

²¹³ 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.

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.²¹⁴

380. 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.²¹⁵

381. The USMCA goes further and largely eliminates the risk of ISDS claims against non-discriminatory measures.²¹⁶ 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.²¹⁷ The general regime in Annex 14-D of the USMCA

²¹⁴ Id., p. 29.

²¹⁵ 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 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 of investment treaties).

²¹⁶ As noted above, the USMCA was amended in December 2019 following completion of this paper. The investment chapter discussed in this section was not amended. The original agreement signed on 30 November 2018 and the Protocol of Amendment signed on 10 December 2019 are available on the [USTR website](#).

²¹⁷ 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

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.²¹⁸ Exhaustion of domestic remedies is required and treaty shopping is curtailed.

382. 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.²¹⁹

383. 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.²²⁰ 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 protection of cultural diversity ...".²²¹ The [Colombia-UAE BIT \(2017\)](#) contains similar carve-outs for environmental and labour law measures.²²²

384. The Roundtable has noted that ISDS arbitral interpretations generally allowing shareholder claims for reflective loss create the clearest example of preferential rights for

the same interpretations. In contrast, in a unilateral ISDS system, an investor claimant has no exposure as a result of advancing expansive interpretations.

²¹⁸ A special regime allowing broader access to ISDS applies to certain sectors where certain federal government contracts are involved.

²¹⁹ [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".

²²⁰ [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).

²²¹ [Joint Declaration by Canada and Moldova regarding the Canada-Moldova FIPA \(2018\)](#).

²²² 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.").

covered investors over domestic and other investors;²²³ 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 claims²²⁴, and in renewed attention to the issue at the OECD and in connection with ISDS reform at UNCITRAL Working Group III.²²⁵ 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.

385. 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.²²⁶ 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 major source of treaty shopping in ISDS.²²⁷ 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 jurisdictions also limit treaty shopping.²²⁸ 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.²²⁹

²²³ 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

²²⁴ 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).

²²⁵ 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.

²²⁶ See OECD, [Treaty shopping and tools for reform, agenda and conference materials](#) (4th Annual Conference on Investment Treaties, 12 Mar. 2018),

²²⁷ 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.

²²⁸ See, e.g., 2012 US Model BIT, art. 17(2); CETA art. 8.1 (definition of investor).

²²⁹ 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) (“treatment” referred to in [the MFN provision] only encompasses measures adopted or maintained by the other Annex Party, which

386. 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.²³⁰ Art. 16(3) contrasts with more aggressive efforts to address treaty shopping in the tax field.²³¹

387. 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.

ii. Affirming government duties to regulate

388. Recent trade and investment agreements also include government duties to regulate in key sectors, reinforcing earlier trade agreement practice. 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.

389. 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

for greater clarity may include measures adopted in connection with the implementation of substantive obligations in other international trade or investment agreements”); 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.

²³⁰ 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.

²³¹ See, e.g., OECD, BEPS Action 6; Isabel Gottlieb, [“2019 Outlook: ‘End of Treaty Shopping’ for Multinationals”](#), Bloomberg Tax (28 Dec. 2018).

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.

390. The 2018 USMCA provided for similar commitments and procedures to those in the CPTPP, and the labour provisions were further strengthened in innovative 2019 amendments to the USMCA. Some other major trade and investment agreements contain similar provisions to those in the CPTPP. While 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 continue to exclude SSDS for their trade and sustainable development chapters that address labour, providing instead for consultations and reports by panels of experts with findings and recommendations.

391. As in the 1994 NAFTA, both some trade and investment agreements and some new stand-alone investment treaties include provisions committing governments not to encourage investment by lowering the standards of domestic regulation of labour, the environment, public health or safety. It appears, however, that few stand-alone investment treaties affirm government obligations to regulate although more research is necessary. Three examples are the [2012 US Model BIT](#), the [Morocco-Nigeria BIT \(2016\)](#) and the recent [Dutch Model BIT](#) published in March 2019.

392. Both the US Model BIT and the Morocco-Nigeria BIT (2016) provide 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”.²³² The Morocco-Nigeria BIT (2016) further 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”.²³³

393. The 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”.²³⁴ It also states that “[w]ithin the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights”.²³⁵

394. Beyond seeking to protect policy space and affirming duties to regulate in some areas, governments have also begun to address in their investment treaties the second pillar

²³² [2012 US Model BIT](#) art. 13(1); [Morocco-Nigeria BIT \(2016\)](#) art. 15.

²³³ [Morocco-Nigeria BIT \(2016\)](#), art. 15.

²³⁴ Dutch Ministry of Foreign Affairs, [Model Investment Agreement](#), Mar. 2019, art. 6(2).

²³⁵ Dutch Ministry of Foreign Affairs, [Model Investment Agreement](#), Mar. 2019, art. 6(6).

of the UNGP framework and RBC – business’ responsibility to respect and to avoid and address adverse impacts.

8.3.2. Speaking about and to business: express attention to BHR/RBC considerations in investment treaties

395. This section reviews sample approaches located so far that address business responsibilities in investment treaties. The [Dutch Model BIT](#) published in March 2019 is considered in the following section.

396. Most recent approaches to business responsibilities can be grouped in to two categories: (a) hortatory clauses encouraging RBC/CSR; and (b) legality requirements for access to investment treaty benefits.

a. Hortatory clauses encouraging RBC or corporate social responsibility

397. 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.

398. 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.²³⁶ 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.²³⁷

399. 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, [...]”.²³⁸ 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”.²³⁹ Some other examples, such as the [Czech Model BIT](#), refer to RBC in the preamble rather than in the text.²⁴⁰

²³⁶ [Additional Protocol to the Framework Agreement of the Pacific Alliance \(2014\)](#), art. 10.30.

²³⁷ [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.

²³⁸ [Canada-Côte D’Ivoire FIPA \(2014\)](#), art. 15(2). See also [Canada-Kosovo FIPA \(2018\)](#), art. 16.

²³⁹ [CPTPP \(2016\)](#), art. 19.7.

²⁴⁰ [Czech Model BIT](#), preamble (“Desiring to encourage enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized standards and principles

400. 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 [...]”.²⁴¹ The model treaty provides 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.²⁴²

401. Commentators have noted that these types of hortatory provisions can serve a number of purposes. One is 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.²⁴³ This is reflected in the view that corporate non-compliance with RBC principles constitutes a form of social and environmental dumping. On the trade side, this works to internalise costs in foreign products that may compete in the home market; on the investment side, it could restrain delocalisation incentives.²⁴⁴

402. Clauses of this type could have a stronger effect, and 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. 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”.

403. A second 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.²⁴⁵ 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. Treaty provisions making clear that governments support the promotion of RBC could make reasonable extraterritorial regulation more acceptable.²⁴⁶

of corporate social responsibility, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct [...]).

²⁴¹ [Brazilian Model CFIA \(2015\)](#), art. 14(1).

²⁴² [Brazilian Model CFIA \(2015\)](#), art. 14(2).

²⁴³ 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 by the Committee on International Trade), pp. 15-16.

²⁴⁴ Investment treaties, however, have been themselves considered to promote delocalisation away from advanced economies by 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.

²⁴⁵ Id.

²⁴⁶ 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

404. A third 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.

b. Legality requirements for access to investment treaty benefits

405. Clauses expressly setting out legality requirements for treaty coverage of investments appear to be rare in the overall treaty pool. Consequently, illegal investments may be covered under some treaties. Several variants of legality clauses can be identified in recent treaties.

- Legality of investment under host state law only at time the investment is “made”

406. Some investment treaties explicitly 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. The [EU-Viet Nam IPA \(2019\)](#) defines 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”.²⁴⁷

407. The [Colombia-UAE BIT \(2017\)](#) contains a host state legality requirement as well as additional provisions. It 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”.²⁴⁸ (emphasis added). The notion of a “responsible” investor is not defined in the treaty; it could be interpreted in light of the high-profile UN and OECD work on business responsibilities, but in the absence of treaty text the interpretation is uncertain. The treaty (art. 1(3)) also contains an exclusion for investments made using assets derived from illegal activities, subject to certain conditions.

- Legality of investment under “applicable law” only at time the investment is “made”

408. The [EU-Singapore IPA \(2018\)](#) adopts this approach.²⁴⁹ It could refer in part to law in different states.

UN Guiding Principles on Business and Human Rights [and agree to promote best business practices related to corporate social responsibility]”. 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 by the Committee on International Trade).

²⁴⁷ [Viet Nam IPA \(2019\)](#), art. 1.2(q).

²⁴⁸ [Colombia-UAE BIT \(2017\)](#), art. 1(1).

²⁴⁹ [EU-Singapore IPA \(2018\)](#), art. 2(1).

- Clarification that treaty coverage is excluded where there are specified violations of law only at time the investment is “made”

409. Some treaties clarify that specific grounds constitute reasons for exclusion of coverage rather than referring to domestic law generally. The CETA, for example, clarifies that an investor cannot submit an ISDS claim if the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.²⁵⁰

410. The use of a “for greater certainty” clarification communicates the Parties’ view that the rule applies generally even where not expressly stated. 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 clarification about exclusions of coverage; nor do they expressly refer to the domestic law legality of the investment.²⁵¹

- Domestic law legality extending to the operation of the investment

411. 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”.²⁵²

412. Although more research and analysis is needed, a few preliminary observations can be made about legality requirements. First, they are not found in most investment treaties. This has given rise to uncertain case interpretations about whether illegal investments are covered or whether legality requirements are implied and under what conditions. While as noted the initial focus in this paper is on treaty practice, it appears that a few ISDS cases have applied implied legality requirements in particular in the area of corruption in the absence of treaty text, in a manner similar to implied “clean hands” requirements noted above. Approaches and outcomes vary and research is needed.

413. Second, legality requirements for treaty coverage sometimes fail to include a requirement of a degree of seriousness. On their face, a major investment could lose coverage over a minor breach of administrative law requirements. In practice, it appears that ISDS tribunals imply a seriousness requirement, but these may vary especially in absence of any text. Governments could clarify and provide more guidance.

414. Third, a narrow focus on legality at the time of the “making” of the investment may require explanation. Bribery statutes, for example, do not limit their application to bribery during the making of the investment. Art. 1(1) of the OECD Anti-Bribery Convention applies to bribes made “in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper

²⁵⁰ [CETA \(2016\)](#), art. 8.18(3).

²⁵¹ [Canada-Moldova FIPA \(2018\)](#); [Canada-Kosovo FIPA \(2018\)](#).

²⁵² 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”).

advantage in the conduct of international business”.²⁵³ Similarly, the 2007 statement by the OECD Working Group on Bribery that “bribery of foreign public officials is contrary to international public policy and distorts international competitive conditions” did not limit its application to the making of investment.²⁵⁴ Business groups that have actively addressed bribery in international business, like the ICC, have developed anti-corruption clauses for contracts whose “general aim ... is to provide parties with a contractual provision that will reassure them about the integrity of their counterparts during the pre-contractual period as well as during the term of the contract and even thereafter.”²⁵⁵

415. The focus on “making” appears to suggest a narrow focus primarily on issues relating to vitiated consent although the underlying theory is not made clear. A BHR/RBC focus on adverse impacts, in contrast, would invite consideration of the impacts of corruption or other misconduct. These may be greater in the case of performance-related corruption, for example, than for entry-related corruption because performance may be more likely to affect the population. Different rules or remedies may be appropriate for misconduct in the making as opposed to the operation of an investment. But an absence of attention to serious misconduct during the operation of investments may need explanation.

416. Fourth, many claimants in ISDS today are not the allegedly directly injured operating company but a shareholder of the operating company claiming for reflective loss. The “investment” may involve only the acquisition of shares; passive and indirect share ownership of the operating company can be sufficient under current arbitral interpretations of many investment treaties. More research is needed but it appears that the application of domestic legality or no-corruption type requirements could be eviscerated if they are applied only to the narrow range of shareholder actions by the investor – buying shares and voting for directors, possibly only for another mid-tier entity in a corporate chain – without regard to illegal action by affiliates including active owners and the operating company.²⁵⁶

8.3.3. *The new Dutch model BIT*

417. Two treaties appear to stand out in recent stand-alone investment treaty practice (although more research is required on the pool of recent treaties): the [Dutch Model BIT](#) published in March 2019 and the [Morocco-Nigeria BIT \(2016\)](#). The Morocco-Nigeria treaty contains a range of interesting provisions and has attracted considerable attention. At this preliminary stage, however, this section will principally focus on the Dutch Model because it expressly addresses the UNGPs and OECD Guidelines including the roles of both governments and business; as noted in the introduction, the Netherlands also has a very extensive stand-alone investment treaty network, is the home state for a high

²⁵³ [OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (1997). The UN Anti-Corruption Convention uses similar language.

²⁵⁴ OECD, [OECD to conduct a further examination of UK efforts against bribery](#) (14 Mar. 2007).

²⁵⁵ ICC, [ICC Anti-corruption Clause](#) (2012), p. 2. The text contains a discussion of the issues and accords key importance to due diligence type action by business.

²⁵⁶ The same issue can exist with hortatory references to encouraging RBC by investors addressed above.

proportion of current ISDS claimants and has announced its intention to engage in a broad effort to renegotiate its treaties.²⁵⁷

418. The Dutch Model BIT innovates in many areas relevant to BHR and RBC. It includes a general commitment by the governments to the international framework on BHR, and to strengthening it.²⁵⁸

419. It also sets forth the desire to promote “responsible” foreign investment in its preamble. It is the product of an extensive process and debate in the Netherlands to seek to address the interaction of business responsibilities and investment treaties, and merits close attention. The discussion here will address two aspects of particular note.

i. Recognition of the remedial aspect of the governmental duty to protect

420. The remedial part of governments’ duty to protect against business-related human rights abuse is expressly addressed in art. 5(3) of the Dutch Model BIT. Part of that article 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.

421. This is an important extension of human rights provisions that address only the government duty to respect. 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 which contemplate a

²⁵⁷ Further analysis can address the [Morocco-Nigeria BIT \(2016\)](#). It adopts a more autonomous approach without express reference to the UNGPs or Guidelines. It includes a number of noteworthy 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)) and obliges 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 “[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)).

The treaty also includes a specific provision on investor liability in its home state. It 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). For an arbitration law firm commentary on the treaty, see Herbert Smith Freehills, [Is the recently signed Morocco-Nigeria BIT a step towards a more balanced form of intra-African investor protection?](#), 23 May, 2017.

²⁵⁸ 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.”).

wide range of remedies including internal grievance procedures.²⁵⁹ Art. 5(3) is subject to SSDS which applies to the whole treaty. It is not included in the scope of ISDS.²⁶⁰

422. 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 of treaty protections with the duty to protect, 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.

ii. Business responsibilities

423. In provisions addressing business conduct, the Dutch Model BIT contains a mix of hortatory provisions, a domestic law legality requirement limited to the making of the investment and a provision addressing the impact of investor conduct in cases where a tribunal reaches the issue of the quantum of damages that the government must pay.

424. In its hortatory provisions, the treaty reaffirms the importance of each Contracting Party encouraging investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of CSR that have been endorsed or are supported by that Party. The OECD Guidelines, the UNGPs and the Council of Europe Committee of Ministers' recommendation to Member States on human rights and business are all mentioned.

425. The treaty also appears to be the first to refer specifically to the importance of investor due diligence to address risks and impacts. 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 reference to due diligence refers only to environmental and social risks and impacts. It does not refer to human rights risks and impacts, or those relating to other policy areas covered by OECD due diligence guidance. Given otherwise general references to the UNGPs and OECD Guidelines, the omission of human rights and other due diligence from art. 7(3) may attract attention.

426. The focus of the provision is on encouraging due diligence relating to the particular investment rather than on the general introduction of 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.

427. Art. 2(1) contains a domestic law legality condition for the application of the treaty. It requires that the investment have been made in accordance with domestic law at the time the investment is made. It thus applies to the making of the investment but not to the

²⁵⁹ 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.")

²⁶⁰ Dutch Model BIT, art. 16(1).

operation of the investment.²⁶¹ The definition of covered investment does not include a legality requirement.

428. The Dutch Model treaty 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.

429. This article 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 major innovation in the consideration of business responsibilities in investment treaties.

430. 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.

431. 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.

432. 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

²⁶¹ Obligations for investors and investments to comply with domestic law are set forth. However, they are not tied to treaty coverage. The ISDS regime in the treaty does not provide for claims against investors or for counterclaims by the respondent government.

to the “investor”.²⁶² Ongoing work on reflective loss, including joint work involving the OECD and UNCITRAL Working Group III, may address the issues in this area.²⁶³

433. 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 corporations regularly take account of due diligence-type considerations in deciding on sanctions on corporations including financial sanctions. Such provisions are recognised as having a marked impact on general corporate interest in compliance systems. Government guidelines can provide significant detail about how factors are to be weighed and the market generates significant additional guidance from lawyers, business groups and others with regard to what is required. These and other national law experiences with the weighing of the quality of general corporate policies can be instructive.

434. As noted, the discussion here is preliminary for purposes of discussion. There are also other important provisions of the treaty that merit consideration. For example, with regard to ISDS, the treaty replaces appointments of arbitrators by the disputing parties and their counsel, and possibly an appointing authority, with appointment of all three arbitrators by an appointing authority. The claimant can choose between appointment by the ICSID Secretary-General or the PCA Secretary-General.²⁶⁴ The treaty also provides that arbitral appointments shall reflect a broader range of expertise including issues such as environmental or human rights law as well as international investment law and dispute settlement.

8.3.4. Additional considerations

435. As government action increases in the broader field of BHR/RBC, investment treaty policy makers are facing growing 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

²⁶² 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 also often group-wide.

²⁶³ See UNCITRAL Secretariat, [Possible reform of investor-State dispute settlement \(ISDS\): Shareholder claims and reflective loss](#) (9 Aug. 2019).

²⁶⁴ For background on issues raised in connection with the selection of arbitrators in ISDS by appointing authorities, see OECD, [Appointing authorities and the selection of arbitrators in investor-state dispute settlement](#), and the materials cited therein; David Gaukrodger, [Who chooses the judges – and should they?](#), OECD on the Level (20 April 2018).

and called for, among others, the use of due diligence tools by prospective investors and States negotiating investment treaties.²⁶⁵

436. 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.

437. Second, investment protection treaties could usefully 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.²⁶⁶

438. 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.

439. 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 which would provide increased incentives for due diligence.

440. More broadly, governments could consider whether investment treaties could do more to inform business and their law firms about their responsibilities. Greater consistency

²⁶⁵ Council of Europe, [Parliamentary Assembly Resolution 2151](#), 2017, paras 1, 9.

²⁶⁶ 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.

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.²⁶⁷ 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.

441. 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.

²⁶⁷

Ruggie 2013 at location 1674.

9. Conclusion

442. 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.

443. The paper provides limited analysis of the still mostly-recent experiences and debate within the world of investment treaties. Further work can 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.

Annex A. 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

444. 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.²⁶⁸ 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.

445. 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](#),²⁶⁹ which circulated a government survey in order to gather information on national initiatives on BHR.

446. 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.

447. 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.

²⁶⁸ 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).

²⁶⁹ 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	<p>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.</p> <p>No further information has been found to date.</p>	<p>Argentina's NAP on Human Rights 2017-2020 does not contain any reference to policies on trade and investment agreements.</p>
Australia	<p>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.</p> <p>In October 2017, the Australian Government reportedly declined to develop a NAP on BHR that the Multi-Stakeholder Advisory Group recommended.</p> <p>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.</p> <p>No further information has been found to date.</p>	
Austria	<p>No information has been found to date.</p>	
Belgium	<p>The Belgian NAP was completed in June 2017.</p>	<p>Belgium has committed to continue to promote the integration of respect for internationally recognised human rights in EU trade and investment agreements.</p> <p>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</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		<p>negotiations of trade and investment agreements by the EU.</p> <p>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).</p>
Brazil	<p>Brazil has not yet adopted a NAP.</p> <p>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.</p> <p>No further information has been found to date.</p>	
Bulgaria	<p>Bulgaria has not yet adopted a NAP on BHR.</p> <p>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.</p> <p>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.</p> <p>No further information has been found to date.</p>	
Canada	<p>Canada has not engaged in the development of a NAP on BHR.</p> <p>No further information has been found to date.</p>	
Chile	<p>The Chilean NAP was completed in July 2017.</p>	<p>Chile has acknowledged the importance of reinforcing coherence in its international position with respect to</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		<p>BHR, both through its participation in international fora and through its international economic agreements.</p> <p>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.</p> <p>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.</p> <p>(pp. 58-59)</p>
China	<p>China has not engaged in the development of a NAP on BHR.</p> <p>It adopted a National Human Rights Action Plan 2016-2020 containing some provisions relevant for BHR.</p> <p>No further information has been found to date.</p>	<p>China's National Human Rights Action Plan 2016-2020 does not contain any reference to policies on trade and investment agreements.</p>
Colombia	<p>The Colombian NAP was completed in December 2015.</p>	<p>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.</p> <p>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).</p> <p>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.</p> <p>In 2018, the Presidential Council for Human Rights prepared a document in consultation with different stakeholders,</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		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 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.	<p>The Czech Republic recalled that its model BIT refers to internationally recognised CSR standards and principles, and to the OECD Guidelines.</p> <p>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.</p> <p>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).</p>
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

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		<p>chapters, with the aim to balance the rights and obligations between investors and host States and protect the host State's regulatory power.</p> <p>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)</p>
Egypt	No information has been found to date.	
Estonia	<p>Estonia has not adopted a NAP on BHR.</p> <p>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.</p> <p>Estonia has not officially expressed intention to establish a comprehensive NAP on BHR.</p> <p>No further information has been found to date.</p>	
Finland	The Finnish NAP was completed in October 2014.	<p>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.</p> <p>Finland has committed to support the consideration of human rights issues in EU investment agreements or in potential new bilateral agreements concluded by Finland.</p> <p>Finland will support the inclusion of human rights clauses in all EU political framework agreements and their consideration as essential elements in</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		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.	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>France will encourage the completion of impact assessments before and after the</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		<p>conclusion of agreements and support making FTAs conditional on the inclusion of human rights clauses and prioritisation of the UNGPs.</p> <p>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.</p> <p>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).</p>
Germany	The German NAP was completed in December 2016.	<p>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.</p> <p>Germany said that it is pressing for the inclusion of an ambitious sustainability chapter in the planned TTIP agreement with the US.</p> <p>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 impact assessments should be conducted before negotiations begin, in order to consider the findings of these assessments in the negotiation process.</p> <p>Germany said that it is committed to the negotiation of comprehensive binding standards for inclusion in these sustainability chapters (p. 13).</p> <p>The German government presented an interim report on the implementation of</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		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	<p>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.</p> <p>No further information has been found to date.</p>	
Hungary	<p>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.</p> <p>It stated that for the time being, the Government is promoting BHR through the adoption of a CSR Action plan.</p> <p>No further information has been found to date.</p>	
Iceland	No information has been found to date.	
India	<p>India is in the process of developing a NAP on BHR.</p> <p>Following several consultations with different stakeholders in 2018, India published a zero draft NAP on BHR in February 2019.</p>	India's zero draft NAP on BHR does not contain any reference to policies on trade and investment agreements.
Indonesia	<p>Indonesia is in the process of developing a NAP on BHR.</p> <p>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</p>	<p>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).</p> <p>It also recommended that the government develop a suitable policy framework for investment agreements</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
	<p>organisations, the business sector and government agencies.</p> <p>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.</p>	<p>by referring to respect for human rights standards, as well as environmental standards and standards for the protection of workers (p. 51).</p> <p>Information has not been located about whether or how the 2017 recommended NAP will be used in the ongoing process to develop a NAP.</p>
Ireland	<p>The Irish NAP was completed November 2017.</p>	<p>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).</p> <p>More generally, Ireland has committed to ensure coherence between Ireland's new Trading Strategy and its NAP on BHR (p. 17).</p>
Israel	<p>In October 2019, the Israeli government informed the OECD Secretariat that the government is</p>	
Italy	<p>The Italian NAP was completed December 2016.</p> <p>A revised version of this NAP was released in November 2018 following a mid-term review (in Italian).</p>	<p>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.</p> <p>Italy will support initiatives in all relevant fora aiming to develop instruments to enhance fair competition to safeguard and promote human rights.</p> <p>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).</p> <p>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.</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
Japan	<p>Japan is undertaking a process to formulate a NAP on BHR.</p> <p>Japan has initiated its own baseline assessment and conducted several multi-stakeholder consultation meetings since March 2018, covering various topics.</p> <p>In December 2018 the Government of Japan published a provisional translation of the 'The Report of the Baseline Study on Business and Human Rights'.</p> <p>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.</p>	<p>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.</p> <p>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).</p> <p>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.</p> <p>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.</p> <p>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).</p> <p>The July 2019 document confirms that economic partnership agreements will receive attention in the future NAP on BHR (p. 3).</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
Jordan	<p>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.</p> <p>No further information has been found to date.</p>	
Kazakhstan	<p>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.</p> <p>No further information has been found to date.</p>	
Korea	<p>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.</p> <p>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.</p> <p>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.</p>	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	<p>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.</p> <p>No further information has been found to date.</p>	
Lithuania	<p>The Lithuanian NAP was completed in February 2015.</p>	Lithuania's NAP on BHR does not contain any reference to policies on trade and investment agreements.

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
	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.	
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	<p>Malaysia has not yet developed a NAP on BHR.</p> <p>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.</p> <p>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.</p> <p>No further information has been found to date.</p>	<p>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).</p> <p>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 Special Representative on BHR in the negotiation of State-investor contracts in order to integrate human rights risks management (p. 28).</p>
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	The draft NAP referred, as part of the efforts to increase coherence in the normative framework applicable to business enterprises in accordance with

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
	<p>increase public dialogue and participation.</p> <p>The government released a draft NAP on BHR for consultation In June 2017.</p> <p>No further information has been found to date.</p>	<p>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).</p> <p>Further information about progress in the elaboration of the NAP has not been located to date.</p>
Morocco	<p>Morocco has not yet adopted a NAP on BHR.</p> <p>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.</p> <p>No further information has been found to date.</p>	<p>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.</p>
Netherlands	<p>The Dutch NAP was completed in December 2014.</p> <p>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.</p>	<p>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).</p> <p>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).</p> <p>The Netherlands is committed to including clear provisions on the relationship between investment and sustainability in trade and investment agreements.</p> <p>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</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		<p>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.</p> <p>The Netherlands has acknowledged that the involvement of civil society organisations in these agreements is an essential component.</p> <p>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.</p> <p>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).</p>
New Zealand	<p>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.</p> <p>No further information has been found to date.</p>	
Norway	<p>The Norwegian NAP was completed in October 2015.</p>	<p>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).</p>
Paraguay	<p>No information has been found to date.</p>	
Peru	<p>Peru adopted a National Action Plan on Human Rights 2018-2021 in date. It</p>	<p>The section on BHR in Peru's National Action Plan on Human Rights 2018-2021 does not contain any reference to</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
	contains a section on BHR, in which Peru commits to develop a NAP on BHR.	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. 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. 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

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		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. 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. 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 Swiss NAP was completed in December 2016.	Switzerland will ensure that sufficient domestic policy scope remains in BITs, FTAs and contracts for investment projects to fulfil the human rights obligations of both Switzerland and its contractual partner. Switzerland will seek to ensure that protection of human rights, labour and environmental standards is incorporated by means of consistency clauses into these agreements, and that its partners’ regulatory power to fulfil their human rights obligations is not restricted (p. 30). In 2012, the Secretary of State for Economy joined forces with interested federal agencies to draft new provisions that incorporate sustainability aspects in investment protection agreements. These provisions state that agreements are to be interpreted and applied in a

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		<p>manner consistent with other international obligations incumbent on Switzerland and its partner countries, including those concerning human rights, in order to ensure that investment protection does not conflict with the protection of human rights. Switzerland proposes these new provisions in its negotiations with partner countries, for the revision of existing agreements or conclusion of new agreements.</p> <p>Switzerland 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.</p> <p>Switzerland will continue to track development in investment protection in the future and, where necessary, review whether further amendments to its treaty practices are required or not (pp. 31-32).</p> <p>In December 2018, the Swiss government published a report on the implementation of Switzerland's NAP to implement the UNGPs, where it is stated that the NAP will be updated for the period 2020-23. The drafting process would commence in 2019 by way of internal consultations at the Federal Administration and with the participation of various stakeholders.</p>
Thailand	<p>The process for adoption of a NAP on BHR is ongoing in Thailand.</p> <p>The government of Thailand circulated the final draft of the NAP (only available in Thai) in February 2019 for public comments, with the plan to publish a NAP by the end of 2019.</p> <p>The Thai NAP (2019-2022) was completed in October 2019 following completion of this paper and will be addressed in a revised version</p>	
Tunisia	No information has been found to date.	

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
Turkey	No information has been found to date.	
Ukraine	<p>The Ukrainian Ministry of Justice reportedly announced the beginning of a process to adopt a NAP on BHR in January 2019.</p> <p>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.</p> <p>No further information has been found to date.</p>	The National Baseline Assessment does not contain any reference to policies on trade and investment agreements.
United Kingdom	<p>The first UK's NAP was completed in September 2013.</p> <p>UK's updated NAP was completed in May 2016.</p>	<p>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).</p> <p>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).</p> <p>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).</p> <p>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</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		<p>investment agreements in its own trade and investment agreements following Brexit (p. 68).</p> <p>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).</p>
United States	The U.S. NAP on RBC was completed in December 2016.	<p>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.</p> <p>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.</p> <p>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).</p>
European Union ²⁷⁰	<p>As a regional economic integration organisation, the EU has not adopted a NAP as such.</p> <p>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</p>	<p>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:</p> <ul style="list-style-type: none"> • EU institutions shall continue to develop a robust and methodologically sound approach to the analysis of

²⁷⁰ 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
	<p>and investment agreements with third countries. Two documents are of particular relevance:</p> <ul style="list-style-type: none"> • The EU Action Plan on Human Rights and Democracy 2015 – 2019 adopted by the Council of the EU on 20 July 2015; and • The 2015 Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play. 	<p>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);</p> <ul style="list-style-type: none"> • 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 • 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). <p>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).</p>

Jurisdiction	Status of NAP on BHR or RBC	Reference to trade and investment agreements in NAPs
		<p>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 provisions on the promotion of CSR and a chapter on trade and sustainable development, including provisions on labour and the environment. 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).</p>