



State of Play

Human Rights in the
Political Economy of States:
Avenues for Application



Institute for
Human Rights and Business

Shaping Policy ■ Advancing Practice ■ Strengthening Accountability

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Institute for Human Rights and Business

34b York Way
London, N1 9AB
UK

Phone: (+44) 203-411-433

Email: info@ihrb.org

Web: www.ihrb.org

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CONTENTS

FOREWORD	3
EXECUTIVE SUMMARY	4
PART ONE: INCENTIVES AND DISCENTIVES FOR ACTION	
1. DISINCENTIVES AND INCENTIVES FOR STATES TO ACT	10
2. DISINCENTIVES AND INCENTIVES FOR BUSINESS TO ACT	17
PART TWO: STATE AVENUES FOR APPLICATION	
3. CREATING AN ACCOUNTABLE MARKETPLACE	25
4. ENFORCING AND ADJUDICATING	35
5. REINFORCING HUMAN RIGHTS IN TRADE & INVESTMENT	43
6. AS ECONOMIC ACTORS	50
7. AS PARTNERS IN DEVELOPMENT	59
COUNTRY INDEX	64

FOREWORD

As a member of the United Nations, Organisation for Economic Cooperation and Development, and the European Union, the Government of Finland promotes actively the implementation of the UN Guiding Principles on Business and Human Rights. We too are currently evaluating how to best align our own policies. The focus on business and human rights is one of the new frontiers for wider State policy coherence.

We hope that this Report will inspire States around the world to consider further opportunities for advancing the protection of human rights in relation to business activities. The “state of play” approach used in the Report will hopefully inspire all States to show that this is the art of the possible. This Report looks at areas such as legislation, adjudication and enforcement, international trade and investment regimes, the State as an economic actor within export credit, public procurement, and as a provider of goods and services. These issues are identified as areas in which States can clarify their business and human rights expectations. It is indeed gratifying to see that so many States already have innovative examples of practice relating to business and human rights, including labour rights, although no State on the planet has yet fully implemented their approach to this complex but important cross-cutting area of policy.

The Government of Finland has long supported international cooperation on human rights, as well as a firmer mainstreaming of human rights into issues such as security, development and trade. The Report also highlights ideas highly relevant to current discussions about cooperation relating to the 2015 UN Development Goals landscape. Partnerships amongst States and with other actors including business need to be founded on human rights principles. Gender mainstreaming, transparency and public accountability are considered to be strengths of our country and to our view of particular importance in furthering human rights in the activities of the State.

In this regard we hope you enjoy this independent report by the Institute for Human Rights and Business and find value in some of the ideas it reflects – expanding your knowledge of current and future practices of the State.

Erkki Tuomioja,
Minister for Foreign Affairs
Government of Finland

Alexander Stubb,
Minister for European Affairs
and Foreign Trade
Government of Finland

Pekka Haavisto,
Minister for International
Development
Government of Finland

EXECUTIVE SUMMARY

The term “political economy” has a number of definitions, but in this report (the Report) it is used to describe the nexus between the political and economic interests of the State. The focus of analysis is on the relationship between the at times competing social and economic goals of the State, and the motivations, opportunities and risks involved. While the economic and human rights activities of States are still largely distinct from one another, it is becoming increasingly apparent that these two agendas are heavily interdependent and both involve the private sector as a significant actor. Their interplay is a source of increasing global concern as well as interest.

The UN Guiding Principles on Business and Human Rights¹ provide the international baseline on the State duty to protect against human rights abuses involving business. As such, it is important to understand how States are already applying their duty to protect human rights in relation to the activities of business, as well as in relation to their own economic activities, and where opportunities for greater State-to-State cooperation exist. This “state of play” Report provides examples from over 70 countries of recent action within States’ economic and human rights agendas. It finds that enhanced cooperation within States is needed if the promotion and regulation of more socially and environmentally sustainable business practices is to lead to better human rights outcomes.

By presenting this overview, the Institute for Human Rights and Business (IHRB) seeks to prompt further dialogue within and between States, and with other actors, about the challenges in achieving greater coherence within State policies and practices governing business and their implications for human rights. Numerous motivations, incentives and disincentives can complicate or reinforce the relationship between business and human rights for States. It is hoped that through candid conversations and assessments, Government officials will identify their own priorities for national action as well as seek out greater opportunities for multi-lateral collaboration. The ultimate aim is to ensure that all such action prompts, and as necessary requires, more responsible practices ensuring respect for human rights.

Part I of this Report begins with an analysis of *why* States and businesses should act on the business and human rights agenda. It summarises some of these existing incentives and disincentives for States and businesses to adopt and implement more responsible economic policies and practices that are consistent with human rights standards.

1) Incentives and Disincentives for States to Act

Fundamentally, States are obligated to act to protect against human rights impacts from the adverse activities of business due to their international legal obligations to respect, protect and fulfil human rights. Too often, however, such obligations are ignored or not implemented. While human rights are an issue of international law, international law itself constantly needs strengthening and its observance requires vigilance, peer pressure, accountability and capacity building between States. Given the complexity of forces at play, States need additional incentives and disincentives in order to prioritise human rights protections while also encouraging productive and profitable business activities. Intergovernmental organizations have a key role to play and it is encouraging that some have embraced the business and human rights agenda. Civil society and campaigning NGOs also play a crucial role in bringing sectors and companies more likely to cause

¹ Report of the UN Special Representative on Business and Human Rights, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, A/HRC/17/31, (21 March 2011). Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

adverse human rights impacts to wider attention and prompt Government action. Governments themselves also develop frameworks through which they incentivise each other, such as through State-to-State reporting obligations, peer review mechanisms, and development goals. National Human Rights Institutions and other national bodies can further prompt State responses to significant business and human rights dilemmas.

Companies can also play a constructive role by reassuring Governments that policy coherence is important for a stable business environment, and by demanding clarity about State expectations of them regarding human rights. Business leaders can highlight that robust and effective governance where respect for the rule of law is ensured is actually an incentive for responsible business behaviour rather than a disincentive.

2) Incentives and Disincentives for Businesses to Act

For business, the concept of "human rights due diligence" is central to preventing human rights impacts and implementing the corporate responsibility to respect human rights as set out in the UN Guiding Principles. However, the scope and extent of the due diligence expected depends on numerous factors, not least of which is operating context. While expectations to conduct due diligence are clear, the scope and extent of such processes often are not. In the past, companies have not been incentivised by States or investors to acquire such knowledge and in fact many have often preferred to remain uninformed about risks and abuses. An obvious consequence is that companies often refrained from undertaking rigorous human rights due diligence precisely in locations where it was and is most necessary. The development of the UN Guiding Principles have flipped that approach on its head, affirming the international expectation today is that all companies should be aware of their own actions, and those of their business relationships, that may lead to negative human rights impacts.

The vast majority of the world's companies are still unfamiliar with the UN Guiding Principles however. States can put in place a number of economic incentives and disincentives to raise companies' awareness of their human rights responsibilities and guide company behaviour. Some States are beginning to experiment with economic levers they already possess, such as export credit and public procurement, to influence corporate behaviour with regard to human rights. There is room for much greater alignment between market-based mechanisms, as well as State licencing and oversight, which would serve to make human rights a commercially-relevant issue for all companies concerned. States are only beginning to think about far deeper structural reorientations, to redesign incentives and disincentives to move from rewarding short-term performance to longer-term outcomes, which are far more aligned with sustainability goals, including around human rights.

Part II of the Report then focuses on *how* States can act on the business and human rights agenda. It considers five core Government functions as "avenues for application" through which the State can act on a strategy to bring more coherence between its economic and human rights approaches. These avenues for application are laid out in sections covering the roles of States in: *creating an accountable marketplace; reinforcing human rights within trade and investment; enforcing and adjudicating* to ensure legal accountability; as *economic actors* in their own right; and as *partners in development*. Part II highlights the progress being made around the world across all five functions, but progress could be faster – it is a matter of political will and important choices.

3) Creating an Accountable Marketplace

States are demonstrating an increasing willingness to legislate to make marketplaces more accountable – in particular, in mandating an explicit focus on and responsibility for social and human rights impacts by company directors and requiring explicit human rights content within formal corporate reporting. These are important initial steps across a number of jurisdictions that need to be built upon globally. The increasingly explicit State expectations for human rights awareness and disclosure by business represent a change in attitude that has not yet fully been understood or implemented by company executives and officers, including corporate legal counsels. For the time being at least, many companies are proceeding with caution. As such it is not yet clear whether greater transparency itself will enable convergence on what might be “adequate and appropriate” due diligence, driven by third party scrutiny, or whether States will also provide more specific directives about the required contours of due diligence (as has been the case on conflict minerals, trafficking and forced labour, and new US investments into Myanmar/Burma).

States need to do more to create a level playing field for business, providing more clarity around how much “knowledge” can reasonably be expected of business in proactively understanding their human rights risks and actual or potential impacts. Many of the existing requirements are cast in very general terms, permitting the needed flexibility, especially in the early days of application, to respond to widely varied contexts. As regulators, businesses and civil society become more experienced with the issues and applying and reporting on their actions however, further clarity – especially around prevention requirements – will be needed to ensure that current marketplace approaches fully reach their potential to improve human rights outcomes.

There is an opportunity for States to fill the gap where their national stock exchanges do not yet include ESG indexes, and create such indices within their own national exchanges – incentivising a race to the top for companies in this area. This would support States efforts to encourage responsible investment and the continuous improvement of environmental, social and governance (ESG) standards, including with respect to human rights.

4) Enforcing and Adjudicating

In one of his first reports to the UN, the Special Representative on Business and Human Rights pointed to the governance gap between the global expansion of business and the ability of Governments to effectively regulate them. Yet even today the conditions for and enforcement of corporate liability for human rights harm have not evolved along with the global expansion of modern business. States have the tools to provide for appropriate and measured responses to human rights abuses involving business. Administrative law, civil law and criminal law, and sometimes a combination of the three are legal avenues States may pursue to ensure that businesses take preventative measures to avoid harm to people and are held accountable for human rights harms in which they are involved. Prevention and remedy are two fundamental legal functions – and yet, many States are failing on both counts. They are failing to provide sufficiently clear messages – regulatory or otherwise – of what is expected of business, and failing to take action where those expectations are not met. Even for gross violations of human rights, where the theoretical possibility of sanctions may exist, the current system of remedies in the vast majority of States, and internationally, is very often unpredictable and ineffective.

The failure to provide appropriately structured outlets for claims does not serve the interests of victims, States, or businesses. A national system that provides for stable and robust application of the rule of law is an attraction rather than deterrent for most businesses. Structured, efficient, and predictable processes for mediating disputes – judicial or non-judicial – serve all parties and can help avoid resorting to more desperate and extreme measures to seek justice. The unequal pace of addressing access to justice is already foreshadowing a schism in the carefully built coalition that led to the unanimous approval of the UN Guiding Principles in the Human Rights Council. 2014

promises to be an important year in deepening discussions on further necessary steps to enhance access to remedies.

5) Reinforcing Human Rights within Trade and Investment

States regulate and enable trade and investment in their territories. Respect for human rights can be catalysed within trade and investment agendas through integration of human rights awareness and due diligence expectations within States' national strategies and policies on trade and investment. Doing so would provide more uniformity when moving to the formal investment and trade agreement negotiation phase between two or more States. International trade and investment agreements offer important opportunities for States to safeguard human rights, as well as the chance for such safeguards to be incorporated into subsequent contracts between States and investing businesses. However, policy makers and practitioners have only recently begun to fully consider these opportunities, as well as the risks of failing to provide for sufficient policy and regulatory space within such agreements. As such, capacity building and further awareness raising throughout the investment and trade chain is key: for State negotiators and legal and financial advisers to international trade and investment agreements; the State and company negotiators and legal and financial advisers to individual investor-State contracts; and for the arbitrators mediating international investment and trade disputes. Greater contract transparency in a number of States can also offer important clarity about how human rights can be integrated in the investment process.

Export Credit Agencies and trade missions, as State services for business, offer a related opportunity to integrate awareness of business and human rights into State's frontline dealings with businesses. Requiring export credit agencies to undertake their own human rights due diligence before providing support to business (particularly SMEs) should be the goal, as should developing a common approach amongst States to providing information and expertise on human rights to businesses on trade missions around the world.

6) States as Economic Actors

States are powerful economic actors – they can use their ownership, buying and selling power to improve human rights protections within their own value chains and can offer a model to private actors as to how to behave. States have only recently started responding to the need for greater accountability for their economic activities, but also the diplomatic and commercial opportunity of better aligning their economic power with their international obligations, including human rights. Parliamentarians, business, investors and civil society should have high expectations of the State to make significant progress on this issue within the shorter term.

There have been increasing signs of positive trends toward transparency of State-owned enterprises (SOEs), and also their engaging in local human rights dialogues in countries where they operate. Some States have also shown willingness to explore ways that State-ownership can more explicitly be used as an area of diplomatic cooperation and a lever for improving social standards in third countries. While there may remain ambiguities under international law as to when businesses have "State-like" human rights duties, what is beyond doubt is that all SOEs, in their variety of forms, have a responsibility to respect human rights.

Within their public procurement processes, States can also incentivise companies to incorporate human rights considerations, including human rights due diligence, into their operations before they qualify for bidding for Government contracts. Few States currently do so, but indications are that some are actively looking at how best to use this leverage. For those States that have already begun integrating human rights considerations and processes into their public procurement, they have a compelling national interest in encouraging other States to do likewise in order to provide a more level playing field for their own companies when operating abroad.

Much less has been written about the role States can have as a provider of raw materials, goods or services to the private sector. In theory, it is a major unexplored area of leverage to improve human rights outcomes.

7) States as Partners in Development – Opportunities for Greater Cooperation

States demonstrated an unprecedented willingness to cooperate on business and human rights during the development of the UN Guiding Principles. They should continue in that spirit of cooperation today to innovate and work together in advancing implementation of the business and human rights agenda, avoiding making this a competitive topic only for the commercial sections of their trade departments.

Greater cooperation between States on business and human rights can take many forms. More partnerships between the UN and business, particularly in the emerging call for more public-private partnerships in the context of the post 2015 development agenda, are expected and would benefit from the perspective and experience of the UN Guiding Principles in developing much needed criteria around governance and accountability. Multistakeholder initiatives are an established method of cooperation amongst States, businesses, trade unions and civil society, but more focus on engagement with the global South is needed.

Though a key driver of accountability, public awareness of human rights and the responsibilities and impacts of business remains low across the populations of all States. Enabling an information society is a key avenue States can pursue in empowering the public to ensure their own rights are being respected.

It is the hope of the Institute for Human Rights and Business (IHRB) that this “state of play” Report has captured recent developments around the world in the key avenues through which States can advance human rights in business. IHRB welcomes receiving examples by email to info@ihrb.org of other approaches that may not have been included. We hope that a follow up to this Report in several years time will show increased progress and innovation in approaches prioritising human rights within the political economies of States.

PART ONE

INCENTIVES AND DISCENTIVES FOR ACTION

1. DISINCENTIVES AND INCENTIVES FOR STATES TO ACT

The State duty to respect, protect and fulfil human rights is a fundamental obligation of all States under international law. However, in reality States have on occasion been unwilling, and at other times unable, to adequately meet these obligations.

In the context of business and human rights, interviews conducted for this Report revealed a number of commonly referenced disincentives and incentives that currently shape State performance around human rights and business. The following do not necessarily represent the perspective of IHRB, but provide an overview of some of the commonly held perceptions:

Disincentives for States to act on human rights issues relating to business:

- Lack of political will with little voter interest in the subject
- Measures around human rights are seen as an economic constraint and cost
- Conflicts of interest and short-termism
- Lack of policy coherence between Government ministries
- Allegations of protectionism

Incentives for States to act on human rights issues relating to business:

- Meeting international legal obligations to protect human rights
- Providing a more accountable trade–development nexus
- Providing greater clarity of expectations for business
- Providing greater clarity for the role of embassies and more effective foreign policy
- Competitive advantage within the political economy of the State

1.1 The Existing Disincentives

A number of disincentives exist that undermine the aim of ensuring that States act on their obligations to protect human rights in relation to the activities of business. States may fear the flight of business activity, capital and investment from highly regulated to other less regulated economies. Sometimes this fear is justified, but often it is less well founded when the evidence is reviewed. The so called “race to the bottom”, as seen for example in the constant shifting of apparel sector supply chains to the countries with the lowest wages and weak regulation, is again under question following factory fires and the death of over 1,100 workers in the Rana Plaza disaster in Bangladesh in 2013. Short-term rationale has again come under question, such as squeezing suppliers and workers to produce goods for the lowest possible price, a process which increases the cost pressure on the local manufacturer. With the local manufacturer unable or unwilling to absorb all costs fully and bear the burden, the true social cost – of lowered standards – is externalised and borne by the society. This contributes to deteriorating work conditions, unsafe buildings, poor supervision, and a work place that does not treat workers with dignity.

States can also be driven by short-term considerations when the immediate concerns of politicians and business owners coalesce in a pact of mutual self-interest. Opaque corporate lobbying can undermine the rights of the vulnerable. This risk is particularly heightened in cases where the Government departments and ministries being lobbied lack the internal expertise on business and human rights issues needed to understand and navigate the potential impacts on human rights contained within the matters in question.

While there are a growing number of companies around the world willing to speak openly about the need for greater human rights protection and for greater corporate responsibility, this is rarely reflected by national business associations and other business interest groups. The positions of these groups can influence politicians who wish to liberalise their markets and who cast the protection of human rights as simply a matter of reducing “red tape” to a minimum.

The problem is further compounded by Governments that believe that the problem lies elsewhere; that their own companies do not harm human rights. The reality is that international flows of capital, labour, information and raw materials respect few absolute boundaries. The forces that influence the global marketplace are systemic, meaning that the actions of businesses in any part of the world can impact customers, communities and workers within distant lands as well as locally.

Political leaders are often surprised when their own companies call for clearer and more effective legislation to ensure a more level playing field. States can at times assume that businesses are consistently anti-regulation, when what actually concerns them is uncertainty and unfair competition from companies that are not held accountable for their bad practices. Often perceptions differ between ministries within the same Government, and the challenge is also one of internal coherence and political will, as well as the need for transparent and consultative policy making to achieve a smart mix of regulatory and voluntary approaches. Real or perceived, the disincentives for States to advance the business and human rights agenda remain substantial. However, the consensus achieved between all member States of the UN Human Rights Council in 2011 in relation to the UN Guiding Principles on Business and Human Rights represented an unprecedented level of international consensus within the agendas of business and human rights – a consensus important to maintain and progress in the years ahead, as the next section seeks to illustrate.

1.2 How States are Incentivised

Since the 2011 consensus vote on the UN Guiding Principles at the Human Rights Council in Geneva, States have been incentivised to act in two ways: first, directly, in terms of their own international treaty obligations, and; secondly, indirectly, in terms of the expectations on Governments by businesses themselves.

The Fundamental Case

The fundamental case for Governments to act is simple. They have a fundamental legal obligation to respect, protect and fulfil human rights under international law. The UN Guiding Principles themselves reaffirm this fundamental obligation in the context of the State duty to protect against human rights abuses by business, stating in the first foundational principle:²

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

This long-standing core human rights duty has been contextualised in different ways regarding business impacts. The OECD frames it as the duty for States to create a level-playing field for all businesses when enforcing their commitments under international law, including human rights. A human rights chapter is now included in the revised 2011 version of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines).³ This reflects the view that the State duty to protect should not be a competitive issue, as noted in Section II of the Guidelines:

² Ibid.

³ OECD, “Guidelines for Multinational Enterprises” (2011). Available at: <http://mneguidelines.oecd.org/2011HumanRights.pdf>

*That adhering governments should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government treatment under their laws, regulations and administrative practices, consistent with international law and **no less favourable** [emphasis added] than that accorded in like situations to domestic enterprises.⁴*

Sometimes States will contextualise business and human rights within broader frameworks and policies. The **European Union's** position within its 2011 Communication on CSR mentions the need for States to use both legal and non-legal approaches to protection of human rights:

Public authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability.⁵

It is an open question if this common European Union position incentivises or requires the EU's 28 Member States to act. A recent project launched to review the progress of Governments when developing national action plans on business and human rights (as invited in the 2011 CSR Communication) suggests moderate if somewhat uneven progress.⁶ However, on more specific issues taken in isolation, Member States are increasingly acting together on issues such as conflict minerals in the supply chain, non-financial disclosure and reporting, as well as including human rights in public procurement, bilateral trade negotiations and across Member State trade delegations.

The Indirect Case

The indirect case is demonstrated when Governments call for action not in terms of commitments to pre-existing international agreements, but to respond to the expectations of specific stakeholder groups. The **UK** national action plan on business and human rights, among the earliest national action plans published,⁷ makes this case, stating:

Companies have told us that they need Government policy coherence and clear and consistent policy messaging. They need certainty about the Government's expectations of them on human rights, and expect support in meeting those expectations.⁸

It is useful to note the observation that in some cases business would like better and more coherent Government action. In some of the more complex areas of human rights, it is not regulation that businesses often fear (so long as it well crafted) but rather the uncertainty that often exists about what is really expected of them in human rights terms. In some contexts businesses themselves are calling for improved policy coherence on the part of States.

⁴ Section II(1) of the OECD Guidelines for Multinational Enterprises (revised in 2011). Available at: <http://www.oecd.org/corporate/mne/>

⁵ European Commission, "A renewed EU strategy 2011-14 for Corporate Social Responsibility", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, (25 October 2011). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>

⁶ See the joint project of the Danish Institute for Human Rights and International Corporate Accountability Roundtable. Available at: <http://accountabilityroundtable.org/analysis/upcoming-african-civil-society-dialogue-and-consultation-with-nanhri-members-on-the-national-action-plans-naps-project/>

⁷ Catalysed by the invitation to create such action plans contained with the EU CSR Communication in 2011.

⁸ Government of the United Kingdom, "Good Business: Implementing the UN Guiding Principles on Business and Human Rights", (September 2013). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf

1.3 National Debates Driving State Action

Whilst States have the obligation to respect, protect and fulfil all human rights, the way they do so in practice – and the priority given – can depend also on domestic factors. In some cases, national debates drive action and politicians respond to what they see as a growing public sentiment. A good example is the effort to tackle the worst forms of child labour – a very tangible issue for consumers, albeit a complex one in reality. Modern-day slavery, trafficking and forced labour represent another area where the media and NGOs help create public awareness, which in turn drives action by Governments. The same can be said for issues such as conflict minerals and the role of private security companies in conflict areas. Issues such as health and safety can also become the focus of greater attention in response to specific incidents, such as when a mine, oil platform or factory collapses or burns down, galvanising national and international public sentiment.

There are a growing number of examples where public interest forces political action in the form of legislation relating to high-risk environments in particular parts of the world. In some instances, it strengthens national legislation to address particular human rights issues, especially international crimes. For example, the **US** Government has made reporting on conflict minerals in a company's supply chain a requirement⁹ as part of comprehensive legislation to reform the financial sector. Similarly, supply chain transparency legislation was adopted in **California** to deal with slavery, forced labour and trafficking.¹⁰ **Denmark** is the only State to use primary legislation to reform its OECD National Contact Point. Similarly, in **Brazil** the so-called "dirty list" of companies deemed by the Federal Government to have been complicit in the use of slavery has received a significant amount of parliamentary and press attention. Fundamental health and safety challenges in the mining industry in countries such as **Chile, South Africa, and China** or with respect to factories in **Bangladesh** or **Pakistan** have all received scrutiny in recent years. Recent disasters, such as the Rana Plaza tragedy in Bangladesh, have forced Governments and businesses to consider more effective ways to prevent and respond to such crises and have become part of national debate in many countries, particularly those that source from Bangladesh. It is too soon to determine if robust national dialogues of this kind act as a sufficient incentive for lasting Government action, but they make such action more likely. Sometimes the response is more cross-cutting and proactive, such as the preparing of National Action Plans on business and human rights or including human rights in national reporting requirements for companies.

Unfair though it might seem to high-profile branded companies, the fact remains that consumers and politicians pay most attention to the conduct of such companies. This is not always in proportion to the actual human rights impacts of their operations, when compared with, for example, less well known companies that operate in the business-to-business sphere, or SMEs operating in high-risk countries or sectors, or companies operating in the more hidden, but still influential, sectors of the economy. For example, the activities of investment banking – in particular the more technical aspects – received little or no public or political scrutiny until the financial crisis of recent years was already underway.

Whilst the UN Guiding Principles apply universally and to every State and company, the trigger for public, political and media interest does not, at least not yet. It is here that civil society and campaigning NGOs play their crucial role, not just to maintain campaigns against bad practice in more traditional and better known industries, but to seek out more opaque sectors and companies which are more likely to have adverse impact, and bring them to wider attention. Governments can facilitate the capacity of civil society in this regard by increasing transparency and reporting requirements for all companies registered within their jurisdiction.

⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 §§1502-04, 15 U.S.C. §78a et seq. (2013). Available at: <http://www.sec.gov/spotlight/dodd-frank.shtml>

¹⁰ California Transparency in the Supply Chain Act (2012). Available at: <http://www.state.gov/documents/organization/164934.pdf>

1.4 States Incentivising Each Other

Strengthening the accountability of States, both for their human rights performance at home as well as on the global stage, continues to be a critical concern for civil society, the UN system and other actors – including the private sector. Inadequate State accountability is often associated with factors including lack of political will, ineffective checks and balances on power and inadequate capacities to implement commitments made, as well as limited domestic policy coherence and decentralization of service delivery without necessary resources or oversight. Efforts to pressure States to take responsibility for their decisions, actions and omissions, and be subject to enforceable sanctions if their conduct results in human rights violations, are not new. However, enhancing States' accountability in the context of protecting against human rights abuses by business, has taken a more prominent place in international policy debates in recent years.

State Reporting Requirements

Under State reporting requirements for UN human rights treaties to which States are party, expert committees established by each treaty are increasingly including in their recommendations and comments specific points concerning the need for State action with respect to private sector involvement in human rights abuses.¹¹ The UN's treaty monitoring committees are also beginning to provide more guidance for States regarding their obligations with respect to business activities. For example, in April 2013 the UN Committee on the Rights of the Child adopted a General Comment on State obligations regarding the impact of the business sector on children's rights.¹² This General Comment will guide future examination by the Committee of State reporting with respect to the private sector under the UN Convention on the Rights of the Child. Similarly, the UN Committee on the Elimination of Discrimination Against Women recently issued General Recommendation 30.¹³ In it is the recommendation for States to engage non-state actors including business to prevent abuses regarding their activities in conflict-affected areas, particularly regarding all forms of gender-based violence, provide adequate assistance to businesses to assess and address the heightened risk of abuse in conflict-affected areas, and establish effective accountability mechanisms.

Peer Review

In addition to reporting and expert reviews in the context of UN human rights treaties, the UN Human Rights Council is also mandated to carry out its own form of international accountability and peer review under its Universal Periodic Review Mechanism (UPR). The UPR is a State-driven process, which reviews the human rights record of each UN Member State every four years and provides recommendations which the State concerned may accept or reject. Given that the UPR process has only recently completed its first full cycle, it is too early to assess the potential effectiveness of this peer review approach. It is hoped that through its universal coverage, focus on dialogue, and assessments based on information from UN human rights monitoring mechanisms as well as civil society organisations, this ongoing process will over time lead to clarification of human rights expectations and positive changes in human rights implementation at national level. To date, UPR recommendations to countries under review have generally not emphasised issues relating to State duties with respect to business enterprises. However, there are a limited number of examples of recommendations to Governments under review that have addressed concerns in this area, focusing in particular on the need for States to address business activities which may undermine

¹¹ See for example the Reports of the mandate of UN Special Representative on Business and Human Rights on each of the main UN human rights treaty bodies available at: <http://business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Internationalorganizations/UNhumanrightsmechanisms>

¹² UN doc. CRC/C/GC/16 of 17 April 2013, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>

¹³ CEDAW/C/GC 30, "General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations", 18 October 2013. Available at: <http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>

protection of labour rights as well as the rights of indigenous peoples and other vulnerable groups.¹⁴

It should also be noted that the UPR model is seen as being potentially useful in related policy domains such as international development cooperation. In the lead up to the 2015 deadline for implementation of the UN Millennium Development Goals and decisions concerning a new internationally agreed development framework for the future, some actors are calling for a new global peer review mechanism to monitor progress on implementation of agreed development targets. As the Office of the UN High Commissioner for Human Rights has stressed, any new post-2015 accountability mechanism of this kind should acknowledge the role of existing international human rights mechanisms, avoid unnecessary duplication, ensure rigorous independent review, effective civil society participation and high-level political accountability.¹⁵

Development Goals

In terms of private sector accountability in the context of the post-2015 development agenda, it should be noted that the UN Secretary-General's high level panel on this subject has called on Governments to "work with business to create a more coherent, transparent and equitable system for collecting corporate tax, to tighten the enforcement of rules that prohibit companies from bribing foreign officials, and to prompt their large multinational corporations to report on the social, environmental, and economic impact of their activities".¹⁶ The panel's report also highlights the potential for public-private partnerships to strengthen development results over the coming years. However, the report misses the opportunity to stress the need for State actions and corporate due diligence in line with the UN Guiding Principles on Business and Human Rights. It also gives inadequate attention to the need to guard against harmful human rights, social and environmental impacts associated with industry sectors often critical to economic and social development such as extractives, as well as related challenges with respect to corporate investments in land, water and natural resources which may lead to conflict with local communities over their rights and interfere with other long-term sustainable development strategies. The final section of this Report looks at areas for greater cooperation between States on development goals that fully integrates the business and human rights nexus.

1.5 National Human Rights Institutions and Other National Bodies

National Human Rights Institutions (NHRIs) play an increasingly proactive role in the arena of business and human rights, and often occupy a unique space from which to do so. Those with "Category A status" in relation to the Paris Principles¹⁷ are perhaps the best positioned, given their independent nature and political influence (greater in some cases than in others). NHRIs continue to deepen their work in this area, with training, capacity-building work with Government officials (as well as others) and, in some cases, the handling of business-related complaints.¹⁸ Some NHRIs

¹⁴ See for example the database of recommendations available on the website of UPR-info.org. See also UPR submissions by the Institute for Human Rights and Business on the following countries: **Colombia, Russia, the UK, India, South Africa, Thailand, Uganda, Liberia** and the **US**. Available at: http://www.ihrb.org/about/programmes/capacity_and_accountability.html

¹⁵ For more information on this subject see for example the OHCHR and Center for Economic and Social Rights publication, "Who Will Be Accountable? Human Rights and the post 2015-Development Agenda". Available at: http://cesr.org/downloads/who_will_be_accountable.pdf

¹⁶ Available at: <http://www.post2015hlp.org/the-Report/>

¹⁷ See further: <http://www.ohchr.org/EN/NewsEvents/Pages/ParisPrinciples20yearsguidingtheworkofNHRI.aspx>

¹⁸ See further, the Edinburgh Declaration of NHRIs (2010), which calls for more national and international monitoring of businesses' compliance with human rights law, that advice should be given to companies, governments, campaigners and individuals about corporate responsibility, and that institutions themselves have an important role to play in supporting companies and victims of potential human rights violations. At: http://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf

have undertaken specific pieces of research on particular industries or companies, which have incentivised politicians to act.¹⁹

Beyond NHRIs, a whole range of national bodies, commissions and investigations have prompted political responses to significant business and human rights issues – albeit these are rarely labelled as such. Issues ranging from press freedoms and personal privacy to investigations after security incidents outside a major infrastructure project, to forced relocations or land grabs, are among a long list relating to specific industries and specific sites. Similarly, coordinated international action can be seen on a wide range of rights-relevant concerns including actions to combat worst forms of child labour, ban smoking, fight corruption, end trafficking and most recently to eliminate corporate tax loopholes. Such initiatives are rarely framed within the language of international human rights norms, but they can have powerful human rights impacts.

Another policy issue that has created international debate concerns the way States impose surveillance on their own citizens (for reasons of national security), or on citizens of other States. This subject will likely become an increasingly contentious policy and legal challenge for States and one in which an increasing number of companies are directly or indirectly involved. The management of big data, mass surveillance and dual-use technologies are amongst some of the emerging business and human rights issues in which national bodies, such as data protection authorities, will need to develop clear guidance and legal clarity based on international norms.²⁰ With the rapid development of new technologies the safeguarding of citizen privacy, as well as freedom of expression and the right to information, will be central to national agendas in most States for years to come.²¹

1.6 Summary Note

Fundamentally, States are obligated to act to protect against human rights impacts from the adverse activities of business due to their international legal obligations to respect, protect and fulfil human rights. Too often, however, such obligations are ignored or not implemented. While human rights are an issue of international law, international law itself constantly needs strengthening and its observance requires vigilance, peer pressure, accountability and capacity building between States. Given the complexity of forces at play, States need additional incentives and disincentives in order to prioritise human rights protections while also encouraging productive and profitable business activities. Intergovernmental organizations have a key role to play and it is encouraging that some have embraced the business and human rights agenda. Civil society and campaigning NGOs also play a crucial role in bringing sectors and companies more likely to cause adverse human rights impacts to wider attention and prompt Government action. Governments themselves also develop frameworks through which they incentivise each other, such as through State-to-State reporting obligations, peer review mechanisms, and development goals. National Human Rights Institutions and other national bodies can further prompt State responses to significant business and human rights dilemmas.

Companies can also play a constructive role by reassuring Governments that policy coherence is important for a stable business environment, and by demanding clarity about State expectations of them regarding human rights. Business leaders can highlight that robust and effective governance where respect for the rule of law is ensured is actually an incentive for responsible business behaviour rather than a disincentive.

¹⁹ For example the research of the **South African** Human Rights Commission relating to aluminum mining, **Kenya** National Human Rights Commission relating to flower farms, the **UK** Human Rights Commission in relation to meat-packing, the **Scottish** Human Rights Commission in relation to care homes for the elderly.

²⁰ See, for example, the statement by the **German** Human Rights Commissioner in relation to allegations of eavesdropping on the telephone conversations of the German Chancellor. Jevan Vasagar, "Germany ready to speak to Snowden over U.S. surveillance" *Financial Times* (1 November 2013). Available at: <http://www.ft.com/cms/s/0/92cce9ae-4303-11e3-9d3c-00144feabdc0.html#axzz2lqcDjtft>

²¹ See Fundamental Rights Agency Annual Report 2012, Chapter 3, on Information Society and Data Protection, Fundamental rights: challenges and achievements in 2012. Available at: <http://fra.europa.eu/en/publication/2013/fundamental-rights-challenges-and-achievements-2012>

2. DISINCENTIVES AND INCENTIVES FOR BUSINESS TO ACT

The list below sets out the main disincentives and incentives concerning businesses taking action on human rights, cited by State, business and civil society representatives interviewed for this Report. The following do not necessarily represent the perspective of IHRB, but provide an overview of some of the commonly held perceptions:

Disincentives for business to act on human rights issues:

- Red tape and anti-competitiveness arguments
- Absence of a level playing-field internationally
- Lack of clarity from States in terms of expectations
- No reward for undertaking human rights due diligence or transparency
- Complexity of human rights language and translation to business action and responsibility

Incentives for business to act on human rights issues:

- Inevitable trend, best to be ahead of compliance
- Risk management and “social license to operate”
- Competitive advantage in some cases
- Increasing investor interest
- Internal motivations, governance and corporate culture

2.1 Existing Disincentives for Business to Act

The complexities some businesses face when integrating human rights into their own systems and relationships are outlined and analysed in the two previous volumes of IHRB’s “state of play” series.²² The vast majority of the world’s companies are still unfamiliar with the UN Guiding Principles on Business and Human Rights, but the numbers are gradually rising, though slowly. The Business and Human Rights Resource Centre records 339 companies with human rights policies or policy statements.²³ These numbers rise if the incorporation of standards such as the Global Reporting Initiative or ISO 26000 is included (both of which contain human rights provisions). The UN Global Compact lists over 7,000 signatory companies in over 146 countries, all of which have in principle declared their intention to respect human rights.²⁴

These figures also suggest a gap between intention (i.e. signing up to the Global Compact) and practice (i.e. publishing a human rights policy statement as called for in the UN Guiding Principles). Since the corporate responsibility to respect human rights requires companies to have a publicly stated policy commitment²⁵ then based on the numbers above (i.e. 339 companies with policies listed on the Business & Human Rights Resource Centre vs. the 7,000 Global Compact signatories) as little as 5% of those seeking to implement the corporate responsibility to respect human rights are actually aligned with a basic component of it. Even if a time factor is allowed for – from proclamation to implementation – this would still not account for the gap. It implies there

²² See: IHRB, “The State of Play of Human Rights Due Diligence: Anticipating the next 5 years” (2011). Available at: http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf; and, IHRB and the Global Business Initiative on Human Rights (GBI), “State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships” (2012). Available at: <http://www.ihrb.org/publications/reports/state-of-play.html>

²³ See: <http://www.business-humanrights.org/Documents/Policies>

²⁴ See: www.unglobalcompact.org

²⁵ UN Guiding Principle 15(a)

are major disincentives for many businesses to act, even amongst the 7,000+ companies who declare that they are aware of their human rights responsibilities by joining the Global Compact. It is likely that many of these companies do not yet understand where to begin in implementing the UN Guiding Principles or are not sure States themselves are serious about uptake of the UN Guiding Principles. Given the UN Global Compact is now 13 years old, it is surprising that so many companies can still make declaratory statements with no follow up action. The continued emphasis on the voluntary nature of an initiative such as the UN Global Compact, and the absence of accountability mechanisms, have for some been seen to weaken its potential to influence change. The relative ease of participation in Global Compact's activities can sometimes act as a disincentive for businesses to implement the UN Guiding Principles. Greater alignment within the UN (to speak to business directly with a clearer voice) is overdue.²⁶

Beyond transnational companies, there are many millions of small to medium sized enterprises (SMEs) around the world that also need to be incentivised to act. State-owned enterprises are yet another category requiring attention. To date less work has been done in these areas – but it is clear from efforts on health and safety, anti-corruption and non-discrimination over recent years that national Governments as well as national business associations, trade unions and local authorities all have an important role to play. Recent human rights guidance from the European Commission to SMEs is an example of a promising step in this direction.²⁷

2.2 How Governments Articulate the Business Case for Human Rights

The “business case” for respecting human rights by business is not new and has many facets, including, for example: because the law requires it; because the state is sometimes unable or unwilling to protect rights; because it helps manage reputation; because external or internal stakeholders call for it; or because it helps obtain local approval.

States too are beginning to reflect these arguments when promoting their own approaches. For example, the UK Nation Action Plan states:

Companies increasingly understand that there is a business case for respect for human rights and that this brings business benefit in various ways, by:

- *helping to protect and enhance a company's reputation and brand value;*
- *protecting and increasing the customer base as consumers increasingly seek out companies with higher ethical standards;*
- *helping companies attract and retain good staff, contributing to lower rates of staff turnover and higher productivity, and increasing employer motivation;*
- *reducing risks to operational continuity resulting from conflict inside the company itself (strikes and other labour disputes), or with the local community or other parties (social licence to operate);*
- *appealing to institutional investors, including pension funds, who are increasingly taking ethical, including human rights, factors into account in their investment decisions;*
- *helping companies to become a partner/investor of choice for other businesses or governments that are concerned to avoid human rights risks.*²⁸

There have been and continue to be significant discussions about whether there really is a business case for human rights, whether the business case is enough to prompt business to act, or whether there should be any discussion of a business case at all given that the discussion is ultimately about

²⁶ See further: IHRB, “UN Global Compact: Developing a vision for 2020” (October 2010). Available at: http://www.ihrb.org/pdf/UNGC_and_Human_Rights-18Oct2010-optimised.pdf

²⁷ European Commission, “My business and human rights: A guide to human rights for SMEs” (2013). Available at: http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/human-rights-sme-guide-final_en.pdf

²⁸ Government of the United Kingdom, “Good Business: Implementing the UN Guiding Principles on Business and Human Rights”, (September 2013). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf

basic human dignity. There is little to argue with any of the statements made in the UK's National Action Plan, as they are all true some of the time. However, it is equally true that none of the statements are true all of the time. There are instances where the business case for human rights alone is not enough to ensure that businesses respect human rights. Taking solely a business case approach inevitably means that in cases where there may be no clear immediate bottom line, reputational or motivational return, businesses would then be absolved from the responsibility to respect human rights. That goes against the now consolidated expectations expressed in the UN Guiding Principles, and often national law. It is often in precisely those murky situations where corporate responsibility to respect human rights may be most important.

2.3 Reward Versus Risk

Businesses often undertake risks in order to obtain rewards. The higher the risk, the higher the reward sought. Arguably the greatest motivation for business in relation to human rights is the risk-reward ratio. Bad (and often illegal) practices like paying bribes, degrading the local environment, or discriminating between employees may show short-term "benefits" to a company because in many poorly-administered jurisdictions the risk of criminal or civil action are slim to none. It is important therefore that the penalties for not respecting human rights are firmly advanced by States to ensure the risk-reward ratio incentivises active knowledge acquisition on the part of companies and a race to the top in terms of human rights awareness and prevention. The creation of appropriate laws, the monitoring and regulating of businesses, and the enforcement of laws are clearly paramount to disincentivise bad behaviour by business. Deaths in the workplace may not necessarily be an issue of criminal culpability, but a growing number of companies have set targets for zero tolerance around workplace fatalities. Here the companies have decided that the benefit of being seen as an industry leader in health and safety outweighs the savings of not investing in the highest levels of safety, security, scrutiny and due diligence.

There are as yet few examples of companies being rewarded for undertaking adequate human right due diligence. NGOs, the press and politicians are instead focused on companies that experience crisis, especially well-known brands, and some run campaigns against them. Recognising that companies may not be able to control all risks all the time, some regulatory regimes (for example, securities and corruption) provide some dispensation (e.g. a reduction of penalties or a defence to liability) for companies that can show they have management systems in place to manage the issues.

2.4 Longer-term versus Shorter-term Considerations

The ruling paradigm of market-based economics has long been the pursuit of profit. Most markets and most investors still reward companies, their boards and senior management, on the basis of short-term success rather than for long-term sustainability. Traditionally, the business case has been the only incentive for CEOs to consider human rights issues, motivated on a brand niche or differentiation basis – leaving out the vast majority of companies whose boards were not sufficiently moved by the business case for human rights. However, if States want companies to respect human rights, then they need to create incentive structures that mobilise the vast majority and not just the minority of companies. States can and do influence the balance between short and long term thinking in key international markets. It is generally true, that the shorter term the business thinking, the less likely that human rights due diligence will be done unless it is a firm legal requirement. States can regulate markets to place a greater emphasis on longer-term considerations, in particular reporting requirements and director duties can be framed in this way as will be discussed later in this report. Indeed, there is a positive trend developing around mandating social responsibility within directors' duties in some States (see section 3).

In some countries, the industry itself has started to move on this issue, for example with calls for an end to the practice of quarterly earnings statements in the **UK** (which is not in fact a legal requirement but a market practice). Another example would be *The Nairobi Process: A Pact for*

*Responsible Business in East Africa.*²⁹ In addition to galvanising action by both home and host States, the aim is for oil and gas exploration companies to make human rights a material issue during the acquisition process. Whether exploration companies should be required by law to undertake human rights due diligence is one issue, and a good case can be made. In any case, business respect for human rights will likely be even stronger if exploration companies, as some of the earliest operators in oil and gas projects, are also incentivised to address these issues at every stage of operations. States cannot require major oil companies to price in good human rights due diligence and the associated “social licence to operate” when acquiring junior exploration companies or their finds, but States should at a minimum ensure that market structures lead and do not lag such trends. Similar arguments can be made in how brands could incentivise responsible suppliers in retail markets. Bilateral trade agreements, export processing zones and efforts such as the ILO’s Better Work Initiative (discussed further in section 5) can all assist to counter the short-term incentives that pervade the apparel sector.

2.5 National or Regional Exceptionalism

There are different types of national exceptionalism, which is perhaps more likely to be voiced by business than by other actors even if the thinking is more widely held. For example, in many parts of **Europe**, and the OECD more generally, there is the perception that human rights do not matter so much at home (as “developed nations”) and that the issue of business and human rights is only material for transnational companies operating in high-risk areas. Such reactions are pervasive and reflect wider societal pre-conceptions that infiltrate how the company itself perceives human rights. Outside the OECD, the human rights agenda may be portrayed as being imposed from outside the country, in particular by powerful State and business interests. Unfortunately there remain too many States in all regions willing to criticise each other for their respective human rights shortcomings, but who are much less accepting of criticism domestically. States need to be open about their own shortcomings, as well as those of business hosted and headquartered within their jurisdictions.

It is often much harder to have domestic business and human rights dialogues for this reason. And yet, businesses are regularly addressing specific human rights issues such as gender, migrant workers, collective bargaining, healthcare, or freedom of expression and privacy without understanding or acknowledging that these themes are parts of a broader international framework. It should also be acknowledged here that the words “human rights” continue to be understood and interpreted differently in different parts of the world, sometimes with negative implications in the eyes of Governments, the public and other actors, including business.

2.6 The Business Model: Size and Structure

Clearly some business models, such as cooperatives and partnerships, more explicitly value positive social impact including positive support to human rights. Publicly listed companies are often relatively slow moving in their adoption of human rights due diligence, driven partly by the expectations of investors, but also constrained by short-term market forces. However, they do ensure at least some in-built accountability to shareholders and also the stock exchange or listing agency. As such, social considerations are becoming increasingly explicit within listing requirements around the world (see section 3 for further discussion). Private companies tend to either lead the pack as “early adopters” due to the vision of these founders or CEOs, or as laggards where investors or other external actors have little or no leverage other than through legislation.

One of the most often cited “challenges” in business and human rights terms is the small or medium-sized enterprise (SME). SMEs are generally viewed to have relatively less resources to devote to social issues. However, this grossly underestimates SMEs as the future of every nation’s economy and limits opportunities for the business and human rights agenda to be recognised as essential for the entrepreneur. In fact, smaller companies are generally closer to issues such as

²⁹ See: <http://www.ihrb.org/about/programmes/nairobi-process.html>

social impact and less burdened by hierarchy and bureaucracy. A number of key observations were made during the interviews for this Report:

- SMEs in some sectors, such as those with large global reach or particularly severe potential human rights risks, need to give considerable attention to human rights due diligence, such as ICT companies or junior companies in the extractive sectors.
- SMEs might rightly claim their operations are often less complex, for example, in terms of global supply chains. However, there are a range of issues relevant to all employers, such as non-discrimination or workplace health and safety, where size clearly does not matter.
- The due diligence expected under international standards is proportionate to the size of the operation, but also the significance of the risk it may create. If an SME is focused on high-risk products, materials or markets, then due diligence needs to be a larger percentage of overall investment.

Although expectations on SMEs should be proportionate to the risks they pose, there is no “get out clause” – they too have human rights risks, impacts and responsibilities. What remains the case however is that many national business associations represent not just international companies, but predominately also SMEs, for whom the words “human rights due diligence” do not sound like an opportunity. This will shift as human rights more generally become better understood in the context of specific issues such as discrimination or health and safety – and some guidance has begun to be produced to assist such considerations³⁰ – but there is an onus on States to lead this transition.

2.7 Language and Communication

Businesses often report that the language of human rights is not the most accessible for business managers.³¹ Therefore, many companies will cite that they have undertaken human rights relevant due diligence even if human rights are not explicitly stated in associated policies and procedures. It is not always necessary or even appropriate that a policy dealing with human rights be called a human rights policy. In some countries, using explicit human rights terms may ring alarm bells and draw unwarranted attention that leads to unproductive outcomes where others in the area are unfamiliar or suspicious of human rights language. For example, a company does not need to rename its existing health and safety procedures as those relating to the right to life and the right to health in the workplace. Existing approaches to sustainability and social impact assessments often cover key human rights concerns. But if the choice is made not to use human rights language, there should be an understanding and articulation among management about why the choice was made, an understanding of the links between relevant topics and human rights, and an awareness of the terms stakeholders may use to talk about these rights.

The State plays a key role in clarifying the expectations of its companies, ideally with the involvement of other actors such as workers, trade unions, investors and civil society. Clearly national legislation plays an interpretative role between international law and domestic law. As mentioned earlier, it is also the role of UN and other treaty bodies, the UN Human Rights Council and other inter-State mechanisms to contribute to human rights interpretation and implementation. Moreover, even if not legislated domestically, States can support businesses by publishing guidance and toolkits to help standardise human rights understandings and approaches by companies. The European Commission sought to do this for example, with the production of

³⁰ See for example the SME Guide to the UN Guiding Principles produced by the European Commission at: <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/>; see also the UK Equality and Human Rights Commission’s SME Guide on human rights at: http://www.equalityhumanrights.com/uploaded_files/sme_hr.pdf

³¹ See, for example: IHRB, “The State of Play of Human Rights Due Diligence: Anticipating the next 5 years” (2011). Available at: http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf; and, IHRB and the Global Business Initiative on Human Rights (GBI), “State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships” (Dec. 2012). Available at: <http://www.ihrb.org/publications/reports/state-of-play.html>

sector guides on the corporate responsibility to respect in three industries – Oil & Gas, ICT, and Employment & Recruitment Agencies.³²

2.8 The Scope of the Human Rights Due Diligence

Businesses constantly wish to know how much due diligence and associated mitigation is enough to meet legal requirements, how much is adequate by external benchmarks, and how much is expected of a responsible company by society. Human rights due diligence is not an absolute, it is finite and limited by resources, time and context. Nonetheless, it must be predicated on a thorough understanding of human rights risks caused by or associated with business activities. Clarity from the State, and other actors, is needed regarding what level of due diligence is adequate in relation to particular risks and impacts in order for companies to move forward with implementation of their corporate responsibility to respect human rights. Such thresholds are unlikely to be fixed universally, but will likely be developed over time and need to respond to the specifics of particular operations and community needs.

Whilst each company needs to prioritise what it examines as part of its human rights due diligence, Governments can create incentives and disincentives so that certain priorities are reflected. This can be done through legislation, such as has been done on issues such as trafficking or forced labour, or in relation to business investments in countries where it was previously disallowed. Specific commodities can be identified in legislation where more rigorous approaches to supply chain due diligence are seen as necessary. States can also require such due diligence before granting licences. States can also prioritise issues through involvement in specific multi-stakeholder initiatives, or by making specific multi-stakeholder standards part of public procurement requirements. It is clear also that embassies, trade missions, bilateral investment treaties, export credit, as well as public procurement, all have an increasingly important role in informing business about expectations regarding the scope of the human rights due diligence to be undertaken.

Clear consequences for companies unwilling to conduct adequate human rights due diligence or provide effective remedies could include economic disincentives for companies refusing to engage meaningfully with legitimate human rights entities, such as National Human Rights Institutions, OECD National Contact Points or other national mechanisms for mediation or investigation, such as exclusion from public procurement or forming joint ventures with State-Owned Enterprises, for example. Human rights due diligence could also be accepted as a defence against charges of criminal, civil or administrative violations, as is practiced in the environmental and anti-corruption realms.

Consistent reporting and disclosure standards on these issues can also help to reduce competition on these issues and incentivise collaboration between competitors. Competition in terms of the quality of disclosure and reporting can be a good thing, but States need to ensure that the baseline of “respecting all human rights” is met. Current approaches to non-financial reporting that are premised on a “comply or explain” basis can use investor and civil society pressure to prompt robust disclosures and explanations that will contribute to the development of due diligence thresholds (see section 3).

2.9 Summary Note

For business, the concept of “human rights due diligence” is central to preventing human rights impacts and implementing the corporate responsibility to respect human rights as set out in the UN Guiding Principles. However, the scope and extent of the due diligence expected depends on numerous factors, not least of which is operating context. While expectations to conduct due diligence are clear, the scope and extent of such processes often are not. In the past, companies have not been incentivised by States or investors to acquire such knowledge and in fact many have

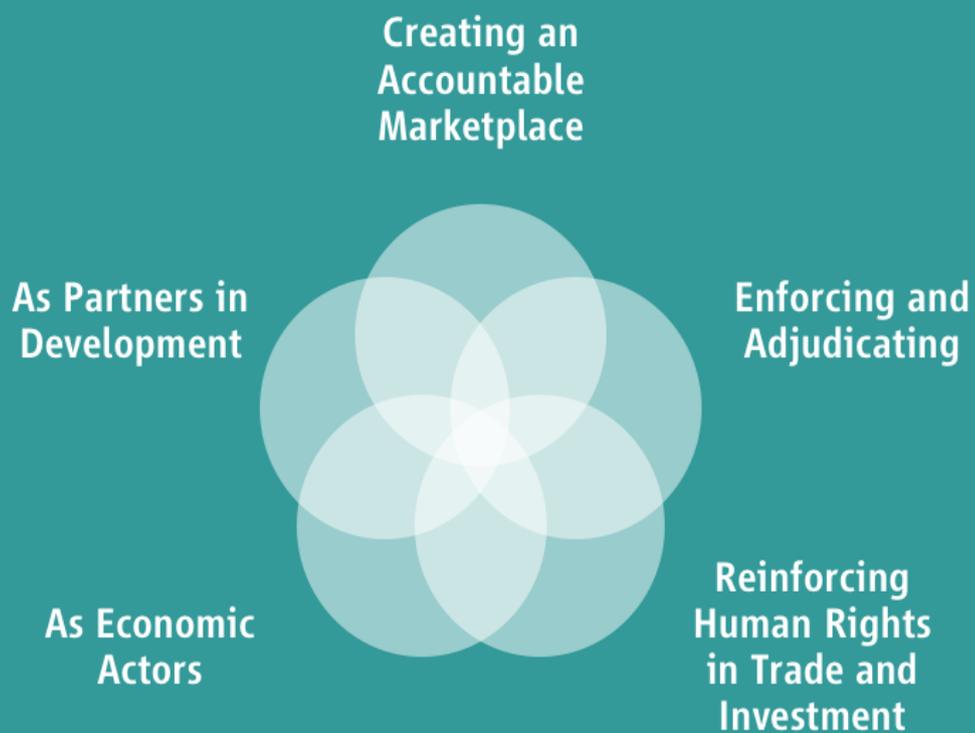
³² See further: <http://www.ihrb.org/publications/reports/human-rights-guides.html>

often preferred to remain uninformed about risks and abuses. An obvious consequence is that companies often refrained from undertaking rigorous human rights due diligence precisely in locations where it was and is most necessary. The development of the UN Guiding Principles have flipped that approach on its head, affirming the international expectation today is that all companies should be aware of their own actions, and those of their business relationships, that may lead to negative human rights impacts.

The vast majority of the world's companies are still unfamiliar with the UN Guiding Principles however. States can put in place a number of economic incentives and disincentives to raise companies' awareness of their human rights responsibilities and guide company behaviour. Some States are beginning to experiment with economic levers they already possess, such as export credit and public procurement, to influence corporate behaviour with regard to human rights. There is room for much greater alignment between market-based mechanisms, as well as State licencing and oversight, which would serve to make human rights a commercially-relevant issue for all companies concerned. States are only beginning to think about far deeper structural reorientations, to redesign incentives and disincentives to move from rewarding short-term performance to longer-term outcomes, which are far more aligned with sustainability goals, including around human rights.

PART TWO

STATE AVENUES FOR APPLICATION



3. CREATING AN ACCOUNTABLE MARKETPLACE

3.1 The Key Issues

This section explores some of the latest national developments within the legal environment of accountability for business, which States directly shape within their jurisdictions. States' ability to create and secure an accountable business environment is exerted through a number of forms of control, including over:

- the way corporations govern their business – framed through corporate governance requirements and securities laws, in particular looking to explicit directors' duties (section 3.2);
- the way corporations disclose their human rights policies, practices and performance, framed through reporting requirements (section 3.3); and
- the social and human rights criteria of stock exchanges and indices, operated or regulated by States, including increasing disclosure requirements (section 3.4).

In early 2009, the UN Special Representative on Business and Human Rights (SRSG) began a project to review corporate law in 39 national jurisdictions, noting: "Corporate law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. The two have often been viewed as distinct legal and policy spheres, populated by different communities of practice."³³ The SRSG issued in May 2011 a report on trends and observations from his cross-national study,³⁴ and near the end of the research summarised two key findings:³⁵

1. Current corporate and securities law does recognize human rights to a limited extent. Put simply, where human rights impacts may harm companies' short or long term interests if they are not adequately identified, managed and reported, companies and their officers may risk non-compliance with a variety of rules promoting corporate governance, risk management and market safeguards. Even where the company itself is not at risk, several states recognize through their corporate and securities laws that responsible corporate practice should not entail negative social or environmental consequences, including for human rights.

2. At the same time, there is a lack of clarity in corporate and securities law regarding not only what companies or their officers are required to do regarding human rights, but in some cases even what they are permitted to do. Moreover, there appears to be only limited (to non-existent) coordination between corporate regulators and government agencies tasked with implementing human rights obligations. As a result, companies and their officers appear to get little if any official guidance on how best to oversee their company's respect for human rights.

³³ You can find the original project framing documents, research template and country-specific Reports on a special portal of the Business and Human Rights Resource Centre. Available at: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-note-re-corp-law-reports-sep-2010.pdf>.

³⁴ UN SRSG, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative", 23 May 2011. Available at: <http://www.business-humanrights.org/media/documents/ruggie/report-human-rights-and-corporate-law-23-may-2011.pdf>

³⁵ The Harvard Law School Forum on Corporate Governance and Financial Regulation, "Review Links Corporate and Securities Law and Human Rights" 27 July 2010. Available at: <http://blogs.law.harvard.edu/corpgov/2010/07/27/review-links-corporate-and-securities-law-and-human-rights/>

Since the endorsement of the UN Guiding Principles in 2011 and the publication of the SRSG's findings from the corporate law project, there have been notable efforts within various national laws and policies to more explicitly address some of the gaps identified. The following section seeks to illustrate those recent developments, excluding most developments up to 2011, which are concisely laid out in the SRSG's report.

3.2 Directors' Duties

Directors are required to oversee decisions regarding a company's business activities, including ensuring activities do not harm or cause damage to third parties. The scope of directors' duties is usually set out in a country's corporate law statutes and complemented by case law and regulatory guidance. They can also be reaffirmed in corporate governance codes, companies' organizational documents, directors' employment contracts, as well as stock exchange listing rules. The SRSG's corporate law research also suggested that by and large directors are required to consider the human rights impacts of subsidiaries, suppliers and other business partners if the company could face risks in relation to their impacts.³⁶ In many jurisdictions directors can also be held criminally liable if they commit a crime in connection with their role, separately to any liability the company might face.

In his 2011 report the SRSG identified that certain human rights-related duties may be implied from the broader duty to act with due care, loyalty and in the best interests of the company, such as in the **U.S.** where directors are responsible for overseeing the assessment of significant risks to the company, including, as appropriate, actions that may infringe human rights, and for taking necessary steps to ensure that these risks are addressed.³⁷ This is because of the potential legal and reputational risks that a company may face if it fails to take such impacts into account.³⁸ Some jurisdictions impose more explicit duties to third parties on company directors, such as in the **UK** where the 2006 Companies Act provides that in promoting the success of the company, directors must have specific regard to "the interests of the company's employees," "the need to foster the company's business relationships with suppliers, customers and others," and "the impact of the company's operations on the community and the environment."³⁹ This Act has had a standard setting effect whereby organisations have advocated for similar explicit duties to be enacted in the corporate and securities laws of other countries, such as in **Hong Kong**.⁴⁰

More recently, explicit responsibility for and focus on social impacts by company boards have been mandated. For example, the **Philippines'** 2011 Corporate Social Responsibility Act requires corporations to "consider the interests of society by taking responsibility for the impact of their activities on customers, employees, shareholders, communities and the environment in all aspects

³⁶ UN SRSG, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative" (23 May 2011), pg. 21. Available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf>,

³⁷ Ibid, pg. 17

³⁸ As recently exemplified, for example, in the 2012 invocation of Yahoo!'s directors duties by a Chinese activist and company shareholder. The activist and shareholder originally sued the company in US federal court in 2007 for human rights abuses occurring in China, which settled, but is now suing the company for potential mismanagement of the Human Rights Fund handling the settlement payouts, contending: "Yahoo! and its shareholders were put at risk and the purpose of the fund was undermined" and is "seeking production of documents to allow shareholder to take appropriate action in the event that Yahoo!'s Board of Directors did not properly discharge their fiduciary duties". See:

<http://www.businesswire.com/news/home/20120206006580/en/Milberg-LLP-Human-Rights-Activist-File-Suit>

³⁹ See above, UN SRSG, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative" (23 May 2011), pg. 18. For further analysis of the practical implications of the provision in the UK context see the Corporate Responsibility Coalition, "Directors, Human Rights & the Companies Act: Is the new law any different?", 2011, at: http://corporate-responsibility.org/wp-content/uploads/2011/03/directorshumanrightsandthecompaniesact_march2011.pdf

⁴⁰ See e.g. Oxfam's submission to the 2010 Companies Ordinance review of Hong Kong at: http://www.oxfam.org.hk/en/news_1215.aspx

of their operations.”⁴¹ Softer in enforcement, but nonetheless explicit, the Monetary Authority of **Singapore** issued a revised Code of Corporate Governance in 2012 to broaden the responsibility of company boards to include sustainability and ethical guidance, encouraging them to ensure management embeds them in company processes and management systems.⁴² The amended code also affirms that the responsibility of the board of directors includes the consideration of environmental and social risks to the company. In **Indonesia**, Government Regulation no. 47/2012⁴³ regarding companies involved in natural resources states that social and environmental responsibility is the obligation of the Board of Directors and implementation must be disclosed in the Company’s annual report. In **India** the 2013 Companies Act similarly mandates companies to design and implement CSR policies and spend 2% of the previous three years’ average net profit on CSR projects and activities in order to establish a culture of sustainable development governance at board level.⁴⁴ **New Zealand** is also in the process of considering major revisions to its national health and safety regime, which would make it a statutory duty for directors and officers to ensure the business complies with health and safety requirements, guided by an updated code of practice and potentially requiring the formation of formal health and safety subcommittees to ensure it is addressed as a governance issue.⁴⁵ From 2012, the Board of Directors of all State-owned enterprises in **Sweden** are responsible for matters relating to ethical issues, the environment, human rights, gender equality and diversity.⁴⁶ They are obliged to define and decide on a few sustainability goals for their companies and follow up on these goals in yearly dialogues between the owner and Board.

3.3 Reporting on Corporate Activities

Express national requirements for formal company reporting on social and environmental impacts have increased in recent years. A major global inventory of sustainability reporting policies and guidance reports that in 2013 72% of the 180 sustainability reporting policies in the 45 countries reviewed are mandatory, up from 58% in 2006.⁴⁷ Sustainability reporting was afforded unprecedented international attention at the June 2012 UN Conference on Sustainable Development in Rio de Janeiro (Rio+20). At Rio, Governments, strongly supported by a number of businesses, affirmed the importance of corporate transparency and sustainability reporting, and the role they needed to play in advancing it, in Paragraph 47 of the outcome document “The Future We Want”.⁴⁸ Led by the Governments of **Brazil, Denmark, France and South Africa**, as

⁴¹ Congress of the Republic of the Philippines, “Committee Report No. 22 Regarding Senate Bill 2747” (16 March 2011). Available at: <http://www.senate.gov.ph/lisdata/109799357!.pdf> See also: <http://www.congress.gov.ph/press/details.php?pressid=5192>

⁴² Monetary Authority of Singapore, “Code Of Corporate Governance” 2 May 2012. Available at: http://www.mas.gov.sg/~media/resource/fin_development/corporate_governance/cgcrevisedcodeofcorporategovernance2may2012.ashx

⁴³ See: http://www.kemendagri.go.id/media/documents/2012/05/21/p/p/pp_no.47-2012.pdf. According to the KPMG et al Report “Carrots and Sticks” above, pg. 66, this goes into effect after receiving approval from the Board of Commissioners or the General Meeting of Shareholders.

⁴⁴ The Companies Bill 2012, as passed by the Lok Sabha, pg. 80. Available at: http://www.mca.gov.in/Ministry/pdf/The_Companies_Bill_2012.pdf

⁴⁵ See <http://www.lexology.com/library/detail.aspx?g=67914c31-ea25-431a-8381-ac19497bd433>. The taskforce making the proposals has also been asked to advise the Government on the merits of introducing corporate manslaughter into New Zealand’s health and safety regime.

⁴⁶ KMPG, the Centre for Corporate Governance in Africa, GRI and UNEP, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 75. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁴⁷ KMPG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 8. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁴⁸ A/RES/66/288*, “Annex: The future we want” (11 September 2012). Available at: <http://www.unctd2012.org/thefuturewewant.html>. Paragraph 47 reads: “We acknowledge the importance of corporate sustainability reporting, and encourage companies, where appropriate, especially publicly listed and large companies, to consider integrating sustainability information into their reporting cycle. We encourage industry, interested governments and relevant stakeholders, with the support of the UN system, as appropriate, to develop models for best practice and facilitate action for the integration of sustainability

well as **Norway** and **Colombia**, a “group of friends” of Paragraph 47 was formed to implement the outcome document’s intentions. A formal Charter was established, declaring:

Based on several national experiences, we are of the view that the development of models of best practice on policy and market regulation on corporate sustainability reporting is an important step towards making sustainability reporting widespread practice. Policy and regulation will level the playing field and create enabling conditions for the business sector to contribute to sustainable development.⁴⁹

Most sustainability reporting policies and regulation tends to focus on large companies (though there has been a notable increase in the voluntary uptake of reporting by SMEs⁵⁰). For example, much legislative activity on both financial and non-financial reporting has been taking place at the **European Union** level as well as within individual Member States. In April 2013, the Accounting and Transparency Directives of the European Commission were amended to require the disclosure of payments to Governments on a country and project basis by listed and large non-listed companies with activities in the oil, gas and mining industries, as well as in logging of primary forests, known as country-by-country reporting (CBCR).⁵¹ Since then, the European Commission has proposed legislation that would require large companies to report relevant and material⁵² information on policies, results, risks, and risk management efforts pertaining to respect for human rights, as well as other environmental, social, and governance issues, through a “comply or explain” approach.⁵³ The European Parliament has also been very active in this area, adopting in February 2013 two reports stressing the importance of sustainability reporting.⁵⁴ In December 2013, the European Parliament’s Legal Affairs Committee voted in favour of the proposal. The Parliament then enters into negotiations with the Commission and Council on the future of the non-financial reporting reform and Member State implementation.⁵⁵

Certain EU Member States already have in place non-financial reporting requirements similar to or more stringent than the EU proposal. For example, in **Denmark** the 2008 revised Financial Statements Act requires large companies to report on their social responsibility policies, including any guidelines or principles for social responsibility, how those are implemented and through what

reporting, taking into account experiences from already existing frameworks and paying particular attention to the needs of developing countries, including for capacity-building.”

⁴⁹ Charter of the Group of Friends of Paragraph 47 on Corporate Sustainability Reporting. Available at: <https://www.globalreporting.org/SiteCollectionDocuments/para47/Group-of-Friends-of-Paragraph-47-Charter.pdf>.

⁵⁰ See e.g. GRI, “Small, Smart and Sustainable — Experiences of SME Reporting in Global Supply Chains,” GRI, Amsterdam, 2008: <https://www.globalreporting.org/resourcelibrary/Small-Smart-Sustainable.pdf>.

⁵¹ See: http://ec.europa.eu/internal_market/accounting/country-reporting/

⁵² It falls outside the scope of this report to present in detail the latest developments around materiality. For recent commentary see e.g. ICAR, “Knowing and Showing: Using U.S. Securities Laws to Compel Human Rights Disclosure”, 2013. Available at: <http://accountabilityroundtable.org/analysis/launch-of-knowing-and-showing-using-u-s-securities-laws-to-compel-human-rights-disclosure/>; and AccountAbility, “Redefining Materiality”, 2003. Available at: http://www.accountability.org/images/content/0/8/085/Redefining_Materiality_Full_Report.pdf

⁵³ See: http://ec.europa.eu/internal_market/accounting/non-financial_reporting/. Justifying the proposal, the Commission has stated: “Over the years, we have seen the limits of a voluntary approach. Today, around 2,500 large EU companies disclose environmental and social information regularly. Regulating the disclosure of some minimum requirements, whilst avoiding an undue administrative burden, in particular for the smallest companies, is the right decision at this time.” Available at: http://europa.eu/rapid/press-release_MEMO-13-336_en.htm

⁵⁴ European Parliament, “Resolution of on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth”, 2012/2098(INI) (6 February 2013). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-49>; and “Resolution on Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery” 2012/2097(INI) (6 February 2013). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0023&language=EN>

⁵⁵ See further: http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2013/06/20130612_en.htm

systems and procedures. Companies need to report if they have not formulated any social responsibility policies.⁵⁶ From 2013, the Danish Parliament has also required specific disclosure on whether or not the company has policies to ensure respect for human rights in their operations and activities. A website called “CSR Compass”, specifically referencing the UN Guiding Principles, has been created to support companies’ implementation of the requirements, which was informed by representatives from the **Norwegian, Finnish, Swedish and Icelandic** Governments and industry associations.⁵⁷ In **France**, provisions for implementing two key laws⁵⁸ were adopted in 2012. By the end of 2013, all companies with over 500 employees will be required to prepare annual CSR reports reflecting the main international guidelines on non-financial reporting. Following the “comply or explain” approach, companies will need to include all actions taken by the company and its subsidiaries, and verify the report by an accredited independent third party. A recent amendment to the **UK** Companies Act came into effect in October 2013 requiring companies to prepare a strategic report as part of their annual report that includes information about environmental matters, employees, as well as social, community and human rights issues, related policies and their effectiveness (to the extent necessary to understand the company’s business development and performance).⁵⁹

The **U.S.** has also recently been active in mandating specific reporting requirements, particularly in relation to company supply chains. The International Corporate Accountability Roundtable comprehensively describes the US system in a report focusing on U.S. securities law.⁶⁰ Firstly, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010⁶¹ features specialised disclosure provisions. Section 1502 requires some annual report issuers to disclose their connections with conflict minerals, and conduct an assessment of their supply chain activities to determine whether those minerals originated in the **Democratic Republic of Congo** or adjoining countries. The rule requires a report that includes a description of the measures taken to exercise due diligence on the source and “chain of custody” of the minerals, and must be independently audited and certified. Section 1504 requires annual report issuers that commercially develop oil, natural gas, or minerals to disclose certain payments made to the US or a foreign Government. The SEC has also issued interpretive guidance for disclosures related to climate change⁶² and to cyber-security information⁶³ directing disclosure of certain social and human rights-related information. Though environmentally focused, a 2009 U.S. Executive Order 13514 shows the cascading effect within the supply chain that reporting requirements on human rights could have.⁶⁴ It requires all federal agencies to measure and report on their sustainability performance, including

⁵⁶ Three years of consecutive studies confirm that the Act has significantly increased the number of large companies publishing CSR reports, from about 50% to 95%. See: Danish Business Authority, “CSR and Reporting in Denmark: Impact of the third year subject to legal requirements for reporting CSR in the Danish Financial Statement Act”, 2011. Available at:

www.dcca.dk/graphics/publikationer/CSR/CSR_and_Reporting_in_Denmark_2nd_year_2011.pdf.

⁵⁷ See: <http://csrcompass.com/parties-behind-initiative>

⁵⁸ France: Ministry of Environment, Grenelle I Act (3 August 2009) and Grenelle II Act (12 July 2010). In 2011 a governmental evaluation of the cost of reporting in compliance with the Grenelle II requirements was undertaken, showing that complying with reporting obligations was affordable and did not represent an additional financial burden. See further, KMPG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 62. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁵⁹ Government of the United Kingdom, The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013. Available at:

http://www.legislation.gov.uk/ukdsi/2013/9780111540169/pdfs/ukdsi_9780111540169_en.pdf.

⁶⁰ ICAR, “Knowing and Showing: Using U.S. Securities Laws to Compel Human Rights Disclosure”, 2013, on which this paragraph is drawn. Available at: <http://accountabilityroundtable.org/analysis/launch-of-knowing-and-showing-using-u-s-securities-laws-to-compel-human-rights-disclosure/>.

⁶¹ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 §§1502-04, 15 U.S.C. §78a et seq. (2013). Available at: <http://www.sec.gov/spotlight/dodd-frank.shtml>

⁶² SEC, “Commission Guidance Regarding Disclosure Related to Climate Change”, 2010. Available at: <http://www.sec.gov/rules/interp/2010/33-9106.pdf>

⁶³ SEC Division of Corporation Finance, “CF Disclosure Guidance: Topic No. 2: Cybersecurity”, 13 October 2011. Available at: <http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm>

⁶⁴ Available at: http://www.whitehouse.gov/assets/documents/2009fedleader_eo_rel.pdf

assessing their supply chains, driving contractors, suppliers and any business working with the federal Government to report on their environmental impacts in order to satisfy the requests of the agencies they serve.⁶⁵ More recently, in May 2013, the U.S. State Department issued rules requiring disclosure of policies and processes used to oversee new investments in **Myanmar/Burma** – specifically, those regarding human rights, worker rights, anti-corruption, land acquisitions, the environment, and grievance mechanisms.⁶⁶ At the State level, in 2011, **California** became the first state to pass a law preventing companies under scrutiny for ineffective compliance with the reporting requirements of Section 1502 of the Dodd-Frank Act from eligibility to bid on state procurement contracts.⁶⁷ **Maryland** passed a similar law in 2012, and Massachusetts is presently considering legislation to follow suit.⁶⁸ In 2010 **California** enacted the Transparency in Supply Chains Act, requiring disclosure related to company efforts to monitor supply and eradicate slavery and human trafficking within their supply chains.⁶⁹

Recently in **Norway** the Parliament passed legislative amendments requiring large companies to provide information about what they do to integrate considerations for human rights, labour rights and social issues, the environment and anti-corruption in their business strategies, in their daily operations, and in their relations with their stakeholders, which entered into force in June 2013.⁷⁰ The report must at least contain information about policies, principles, procedures and standards that are followed to integrate these considerations. In an effort to incentivise uptake of international reporting standards the Ministry of Finance can exempt companies that prepare a public report according to GRI's Framework or Global Compact Principles.⁷¹

South Africa was one of the first countries in the world to require integrated reporting by listed companies, first formalised in 2002 and updated in 2009. Since its introduction in 2010, over 450 companies on the Johannesburg Stock Exchange have been required to produce an integrated financial and sustainability report.⁷² The King Code of Governance recommends that organisations should adopt integrated reporting, albeit on a “comply or explain” basis.⁷³ Furthermore, disclosure

⁶⁵ KMPG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 36. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁶⁶ See: <http://www.humanrights.gov/2012/07/11/burmaresponsibleinvestment/>. The European Union also adopted a resolution May 23, 2013 that reinstated Burma/Myanmar’s access to generalized tariff preferences, which included provisions that call on large European companies doing business in Burma/Myanmar to report on their human rights due diligence policies and procedures and calling on the European Commission to monitor the commitments made by European businesses in light of corporate social responsibility principles. See Resolution on Reinstatement of Burma/Myanmar’s Access to Generalized Tariff Preferences, EUR. PARL. DOC. B7-0198 (2013). Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0218+0+DOC+XML+V0//EN>

⁶⁷ Since then, initiatives such as “Know the Chain” have been created to encourage uptake of this reporting standard: <https://www.knowthechain.org/>

⁶⁸ Maryland Conflict Minerals Bill, B.H. 2898, 188th Leg. (March 2013). Available at <https://malegislature.gov/Bills/188/House/H2898>.

⁶⁹ Available at: <http://www.state.gov/documents/organization/164934.pdf>

⁷⁰ Royal Norwegian Ministry of Finance, Prop 48 L (2012---2013) 2012. Available at:

<http://www.regjeringen.no/nb/dep/fin/dok/regpubl/prop/2012---2013/prop---48---l---20122013.html?id=709311>. See also: <https://www.globalreporting.org/information/news-and-press-center/Pages/Regulating-for-a-more-sustainable-future-New-Norwegian-CSR-regulation-entered-into-force.aspx>

⁷¹ KMPG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 33-34. Available at:

<https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁷² See further KPMG et al, “Carrots and Sticks: Sustainability reporting policies worldwide – today’s best practice, tomorrow’s trends”. 2013 edition, pg. 34, on which these findings have been drawn. Available at: <https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁷³ Institute of Directors in Southern Africa, 2009. King Code of Governance for South Africa 2009 (King III). Available at: www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King_Code_of_Governance_for_SA_2009_Updated_June_2012.pdf.

of information on specific topics to regulatory authorities and/or the public is required by laws under the supervision of relevant Government departments such as the Department of Trade and Industry (black economic empowerment) and the Department of Mineral Resources and Department of Energy (social and labour plans). More recently, proposed amendments to the 2002 Mineral and Petroleum Resources Development Act and proposed amendments in the 2012 Mineral Resources and Petroleum Bill require certain companies to disclose social and labour plans to Government, describing how they will address the social impacts of their operations during and after operation.⁷⁴ In **India** the Ministry of Corporate Affairs launched in 2011 the National Voluntary Guidelines on Social, Environmental and Economical Responsibilities of Business⁷⁵, aiming to encourage Indian businesses to disclose their responsible business practices based on a comply or explain approach. Since then, the Securities and Exchange Board of India mandated that from March 2012 the 100 top listed companies must submit Business Responsibility Reports as a part of their annual reports, providing information about their performance against the social, environmental and economic principles within the Guidelines.⁷⁶

At a non-binding level, a number of other countries issue reporting guidelines to encourage reporting practices, including in **Australia, Brazil, Colombia, Chile, Ivory Coast** and **Singapore**. **Brazil** for example revised and launched its national Action Plan for Sustainable Production and Consumption⁷⁷ in 2011 requiring participating companies to disclose how socio-environmental issues are integrated in their planning schedules and decision-making processes, and their plans for doing so.⁷⁸ Pronouncement no. 13 was also issued in 2012 setting up annual report guidelines stipulating that annual reports should include information on financial, social, environmental and governance aspects of the business, including an overview of its past performance, main risks and opportunities, and the corporate strategy in place to address these items in the short, medium and long-term.⁷⁹

3.4 Stock Exchange and Index Requirements

At the time of the SRSg's 2011 report on the corporate law project, he had found that most jurisdictions do not have separate indices related to environmental and social performance through their national or regional stock exchanges. However, the number had slowly grown over the five years prior to 2011. In the limited cases where the SRSg found such indices to exist, human rights were generally not specifically included in ranking criteria.⁸⁰

An increasing number of stock exchanges are themselves private companies, but are regulated (often heavily) by States. Numerous exchanges are increasingly considering social issues when it comes to their listing requirements, including in **Brazil, China, Indonesia, Luxembourg, Malaysia,**⁸¹ **Mexico, New Zealand, Norway, the Philippines,**⁸² **Singapore,**⁸³ **South Africa,**

⁷⁴ See: www.info.gov.za/view/DownloadFileAction?id=181151

⁷⁵ Ministry of Corporate Affairs of India, 2011. "National Voluntary Guidelines (NVGs)". New Delhi: Ministry of Corporate Affairs of India. Available at:

http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf

⁷⁶ See further, KPMG et al, Carrots and Sticks: Sustainability reporting policies worldwide – today's best practice, tomorrow's trends. 2013 edition, pg. 33. Available at:

<https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁷⁷ Approved by Ministerial Decree 44, of 13 February 2008 and revised and launched on 23 November 2011.

⁷⁸ See further KPMG et al, "Carrots and Sticks: Sustainability reporting policies worldwide – today's best practice, tomorrow's trends". 2013 edition, pg. 26. Available at:

<https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

⁷⁹ It also recommends including a GRI Content Index, and information on adherence to initiatives such as the UN Global Compact, and inclusion in sustainability indexes.

⁸⁰ UN SRSg, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative" (23 May 2011), pg. 21. Available at:

<http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf>, pg. 13.

⁸¹ See: Bursa Malaysia, "Power Business Sustainability: A Guide for Directors" at 43 and 53, available at http://www.bursamalaysia.com/misc/sustainability_guide_for_directors.pdf.

Sweden, Thailand⁸⁴ and **Turkey**.⁸⁵ Exchanges' social criteria usually range from requirements for listed companies to have "high standards of integrity" to acting with "honestly, integrity, fairness, due skill and care, diligence and efficiency".⁸⁶

In 2011, the SRSG found two indices more explicitly focused on human rights worth noting. Firstly, **Brazil's** Bovespa Corporate Sustainability Index of the Sao Paulo Stock Exchange, which seeks feedback to a questionnaire from the top 150 companies on their sustainable development commitments, including human rights promotion and combating social inequality.⁸⁷ Moreover, at the Rio+20 conference the Sao Paulo Stock Exchange launched a comply or explain policy which by May 2012 has prompted 253 companies to publish social, environmental and corporate governance information, or explain why such information was not disclosed.⁸⁸ Secondly, the OMX GES Nordic Sustainability Index screens companies from **Denmark, Finland, Norway and Sweden** against the GES Risk Rating, which includes compliance with the UN Principles for Responsible Investment and the Universal Declaration of Human Rights, and rates the selected shares in three categories: human rights, environmental and governance.⁸⁹ Exchanges in **Finland** and **Sweden** also have their own GES indexes constructed to similar standards.⁹⁰

Many exchange and index requirements involve disclosure on social, ethical and environmental issues more generally. **South Africa** for example launched the Socially Responsible Investment Index of the Johannesburg Stock Exchange in 2004, requiring its listed companies to meet minimum criteria based on the UN Principles for Responsible Investment (PRI). The S&P ESG Index was launched in **India** in 2008, listing companies based on business strategies and performance which demonstrate a high level of commitment to meeting ESG standards and incorporating these into investment decisions.⁹¹ Since 2012 this has been required for the top 100 listed companies. **China** is another notable example, with the 2006 Social Responsibility Guideline for Listed Companies of the Shenzhen Stock Exchange – binding for the top 100 companies.⁹² And the 2008 Notice of Improving Listed Companies' Assumption of Social Responsibilities, issued under the Shanghai Stock Exchange – required for the 240+ companies on their Corporate Governance Index (as well as companies listed in both domestic and overseas markets, plus financial companies). More recently, the Stock Exchange of **Hong Kong** issued a 2012 guide of recommended reporting practice, forming an appendix to the existing listing rules for the exchange, and with a view to moving to a comply or explain approach from 2015. Since 2012 **Indonesia** similarly requires disclosure to its Capital Market Supervisory Agency by its publicly listed companies on policies,

⁸² www.congress.gov.ph/press/details.php?pressid=5192 and <http://www.senate.gov.ph/lisdata/109799357!.pdf>

⁸³ See: Singapore Exchange (SGX), "Guide to Sustainability Reporting for Listed Companies", available at: http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Sustainability_Reporting_Guide_and_Policy_Statement_2011.pdf.

⁸⁴ ASEAN CSR Network, "Thai Stock Exchange Publishes Guidance Document on CSR" (30 July 2012) Available at: <http://bit.ly/12ZRotZ>

⁸⁵ See: "Corporate governance principles compliance report". Available at: <http://www.spk.gov.tr/displayfile.aspx?action=displayfile&pageid=56&fn=56.pdf&submenuheader=null>

⁸⁶ While a positive step, it is still not clear where the line would be drawn for delisting a company on human rights grounds. Sweden for example may reject a company applying if the listing is not considered appropriate or may harm the confidence in the securities market, yet there is no global pattern or threshold emerging by which delisting is deemed a necessary measure.

⁸⁷ See: <http://www.bmfbovespa.com.br/indices/ResumoIndice.aspx?Indice=ISE&Idioma=en-US>

⁸⁸ See BM&F Bovespa, "Listed Companies: Sustainability Report or Similar Document". Available at: www.bmfbovespa.com.br/en-us/markets/download/Relate-ou-Explicue-ingles.pdf.

⁸⁹ UN SRSG, A/HRC/17/31/Add.2, "Human rights and corporate law: trends and observations from a cross-national study conducted by the special representative" (23 May 2011), pg. 14. Available at: <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf>

⁹⁰ See further: "Rules for Construction and Maintenance of the OMX GES Sustainability Indexes" at: https://indexes.nasdaqomx.com/docs/Methodology_OMXSUSTAIN.pdf

⁹¹ See further KPMG et al, "Carrots and Sticks: Sustainability reporting policies worldwide – today's best practice, tomorrow's trends". 2013 edition, pg. 33. Available at: <https://www.globalreporting.org/resource/library/Carrots-and-Sticks.pdf>.

⁹² Ibid, pg. 66.

types of programmes, and expenditure on environmental performance, labour practices, social and community empowerment and product responsibility.⁹³ Since February 2012 companies wishing to be considered for listing on the **Mexican** Stock Exchange's sustainable investment index companies are assessed by two independent third party organisations on environmental, social and corporate governance practices.

A recent report ranks stock exchanges by the sustainability reporting of their largest companies. Although these "first generation" sustainability indicators are more implicit than explicit about human rights, the ranking of the ten most active stock exchanges in terms of disclosure gives some indication also of human rights reporting. The Top 10 Stock exchanges ranked by sustainability reporting of large listed companies in 2013 were:⁹⁴

- Spain (BME Spanish Exchanges)
- Finland (Helsinki Stock Exchange)
- Japan (Tokyo Stock Exchange)
- Norway (Oslo Stock Exchange)
- South Africa (Johannesburg Stock Exchange)
- France (Euronext Paris)
- Denmark (Copenhagen Stock Exchange)
- Switzerland (SIX Swiss Exchange)
- Greece (Athens Stock Exchange)
- Netherlands (Euronext Amsterdam)

For example, **Switzerland**, and specifically Geneva, now hosts 80% of the all the world's trading in oil and it is note-worthy that the Swiss Government has cited this fact in explaining one reason why it has joined initiatives such as the Voluntary Principles on Security and Human Rights – an initiative which it chaired during 2013.⁹⁵

3.5 Summary Note

States are demonstrating an increasing willingness to legislate to make marketplaces more accountable – in particular, in mandating an explicit focus on and responsibility for social and human rights impacts by company directors and requiring explicit human rights content within formal corporate reporting. These are important initial steps across a number of jurisdictions that need to be built upon globally. The increasingly explicit State expectations for human rights awareness and disclosure by business represent a change in attitude that has not yet fully been understood or implemented by company executives and officers, including corporate legal counsels. For the time being at least, many companies are proceeding with caution. As such it is not yet clear whether greater transparency itself will enable convergence on what might be "adequate and appropriate" due diligence, driven by third party scrutiny, or whether States will also provide more specific directives about the required contours of due diligence (as has been the case on conflict minerals, trafficking and forced labour, and new US investments into Myanmar/Burma).

States need to do more to create a level playing field for business, providing more clarity around how much "knowledge" can reasonably be expected of business in proactively understanding their human rights risks and actual or potential impacts. Many of the existing requirements are cast in

⁹³ Ibid. See further: Capital Market and Financial Institution Supervisory Agency, Ministry of Finance, "Decision of the Head of Capital Market and Financial Institution Supervisory Agency" No. Kep-431/BU/2012, ed. (2012).

⁹⁴ CK Capital, "Trends in Sustainability Disclosure: benchmarking the world's stock exchanges" (October 2013). Available at: <http://static.corporateknights.com/StockExchangeReport2013.pdf>

⁹⁵ See for example comments made by Swiss Economics Minister in March 2013: http://www.swissinfo.ch/eng/swiss_news/Cabinet_refuses_to_legislate_on_commodity_sector.html?cid=35337284

very general terms, permitting the needed flexibility, especially in the early days of application, to respond to widely varied contexts. As regulators, businesses and civil society become more experienced with the issues and applying and reporting on their actions however, further clarity – especially around prevention requirements – will be needed to ensure that current marketplace approaches fully reach their potential to improve human rights outcomes.

There is an opportunity for States to fill the gap where their national stock exchanges do not yet include ESG indexes, and create such indices within their own national exchanges – incentivising a race to the top for companies in this area. This would support States efforts to encourage responsible investment and the continuous improvement of environmental, social and governance (ESG) standards, including with respect to human rights.

4. ENFORCING AND ADJUDICATING

4.1 The Key Issues

Domestic enforcement of laws governing business involvement in human rights abuses, including through adjudication, is still underdeveloped in almost all areas of the world. The basic components for an effective legal response are present in many countries, whether its formal recognition of the concept of corporate criminal liability, prosecution mechanisms, as well as tort-based systems for non-criminal claims, and administrative sanction and fine systems. Yet victims harmed by business activities around the world still face huge obstacles in accessing adequate and effective remedies (section 4.2). Even in the limited number of States that provide for corporate criminal liability, the practice of adjudicating criminal corporate involvement in human rights abuses is limited to non-existent in many States (section 4.3). Moreover, there is widely divergent State practice, as well as extensive practical, procedural and extraterritorial barriers, to the use of private or tort-based claims against companies that have limited the success rate of most cases (section 4.4). One response has been the development of non-legal remedy options, particularly mediation, but these are not used in every country and State capacities required to efficiently and effectively operate such mechanisms remains a challenge (section 4.5).

4.2 Access to Justice

As the UN Guiding Principles reaffirm, States have the duty to protect against human rights violations within their boundaries, including ensuring access to effective remedies. There are however often enormous obstacles to victims accessing justice for business-related impacts. The *Protect, Respect, Remedy* Framework itself describes them:

*Judicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse. Victims face particular challenges when seeking personal compensation or reparation as opposed to more general sanction of the corporation through a fine or administrative remedies. They may lack a basis in domestic law on which to found a claim. Even if they can bring a case, political, economic or legal considerations may hamper enforcement.*⁹⁶

The UN Guiding Principles call for States to address the legal, practical, procedural and financial barriers preventing legal cases from being brought in situations where judicial resource is an essential part of accessing remedy or alternative sources of effective remedy are unavailable.⁹⁷ As will be discussed below however, disparities in the way States approach criminal, civil and administrative remedies for businesses' human rights related impacts means that in some cases victims will have one or more possible routes to remedy, and in other cases none at all. In one of his first reports to the UN, the SRSG pointed to the governance gap between the global evolution and expansion of business and the ability of Governments to effectively regulate them.⁹⁸ Yet recent reviews of the corporate legal accountability landscape confirm that while many multinational companies operate easily across national borders, those harmed by their activities struggle to access judicial remedies.⁹⁹

⁹⁶ Report of the SRSG, "Protect, Respect and Remedy: a Framework for Business and Human Rights", UN SRSG, A/HRC/8/5, (7 April 2008), pg. 23. Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

⁹⁷ Guiding Principle 26, Commentary.

⁹⁸ Report of the SRSG, "Business and human rights: mapping international standards of responsibility and accountability for corporate acts", A/HRC/4/035 (9 Feb 2007), pg. 23. Available at: <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>

⁹⁹ See for example: Prof Gwynne Skinner, Prof Robert McCorquodale, Prof Olivier De Schutter, with Case Studies by Andie Lambe, "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business December 2013". Available at: <http://accountabilityroundtable.org/analysis/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/>. See also Business

4.3 Criminal Law

The Norwegian research foundation Fafo undertook a first of its kind comparative survey in 2006 of the relevant national legislation in selected countries concerning businesses' liability under domestic civil and criminal law for the commission of, or complicity in, violations of international criminal and humanitarian law, both in and beyond national jurisdictions. It found a range of countries, (usually civil law countries) that legally recognise the concept of corporate criminal liability, including **Australia, Canada, the US, South Africa, Norway, the Netherlands, the UK, Belgium, the Czech Republic, Italy, Luxembourg, Poland, Romania, the Slovak Republic, and Spain.**¹⁰⁰ Other countries, such as **France**, explicitly recognise the concept of corporate criminal liability, but caveat this general recognition with a list of exceptions. **Argentina, Indonesia and Japan** recognise corporate criminal liability only in relation to a specific list of offences contained in statutes and penal codes. More generally, States may impose criminal responsibility on a company for failing to properly act with due diligence to prevent certain crimes, which are often relevant to the protection of human rights though not couched in rights-explicit terms, for example regarding environmental crimes that may threaten the right to life or health, violent crimes, as well as failures to prevent transnational bribery of public officials.¹⁰¹ There are however far more countries that do not recognise the concept of corporate criminal liability than those that do.

In practice, the legal recognition of corporate criminal liability for human rights impacts is not being put to the test. Though corporate criminal liability is a theoretical possibility in a number of States, attempted prosecutions of companies for human rights impacts are practically non-existent, though some exceptions exist¹⁰². Indeed, most criminal cases against companies on human rights grounds are brought or instigated by NGOs and other representatives of victims, including lawyers who specialise in bringing these types of claims.¹⁰³ Moreover, country practices differ as to how actively involved victims can be in the investigation and prosecution after legal proceedings are initiated, as well as to how accountable to victims the prosecution itself will actually be. This lack of prosecutions could be due to a range of factors: from a lack of political interest and will to proceed with investigations and enforcement, a lack of specific guidance and resources for prosecutors, or a combination of factors. For example, the involvement in unscrupulous employers in violations such as forced labour or human trafficking is already a criminal offence in most jurisdictions, but there have been very few prosecutions of such businesses in most States. This gap is even more obvious considering that gross labour exploitation is recognised as a global problem with vulnerability in every State. The lack of State-backed investigations shows the current challenges extend beyond the important step of putting an appropriate legal framework in place.

& Human Rights Resource Centre, "Annual Briefing: Corporate Legal Accountability", (November 2013) at: <http://www.business-humanrights.org/media/documents/corp-legal-acc-annual-briefing-final-nov-2013.pdf>

¹⁰⁰ See Fafo, Business and International Crimes. Available at: www.fafo.no/liabilities. Regarding European countries, see further Clifford Chance, "Corporate Liability in Europe", 2012, Available at: http://www.cliffordchance.com/content/dam/cliffordchance/PDF/European_Technical_Bulletin.pdf.

¹⁰¹ See further a recent update to ICAR's due diligence report: Mark Taylor, "2013 Progress Report". Available at: <http://accountabilityroundtable.org/wp-content/uploads/2013/11/ICAR-Human-Rights-Due-Diligence-2013-Update-FINAL.pdf>.

¹⁰² Such as the policy of the Government of the **Netherlands** to actively discourage investments by Dutch companies in settlements in the Israeli-occupied West Bank because it views such settlements as illegal under international law. The public prosecutor has also confirmed it considers business activity in settlements a potential war crime and suggesting Dutch companies take concrete steps to end their activities in the area. See further, Mark Taylor, "Human Rights Due Diligence: The Role of States – 2013 Progress Report", pg. 11. Available at: <http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/>.

¹⁰³ Recently, for example: a **Swiss** probe into a gold refiner accused in a criminal complaint by a Swiss NGO of suspected money laundering in connection with alleged war crimes in the **DRC**. See further: <http://www.reuters.com/article/2013/11/04/congo-gold-idUSL5N0IP29K20131104#comments>; a **French** judicial investigation the the sale of a surveillance system to the Gaddafi regime in **Libya** filed by FIDH and LDH. See further: <http://www.refworld.org/docid/511cb668a.html>; a **German** complaint regarding a timber manufacturer's senior manager regarding abuses by its contracted security forces against a community in the **DRC**. See further: <http://www.echr.de/index.php/danzer-en.html>.

One promising demonstration of legislative uptake of the corporate responsibility to respect was recently laid before the Parliament in **France**. In November 2013 MPs introduced a bill that would amend the penal and civil codes to require French companies to demonstrate due diligence systems have been put in place as defined by the content of the UN Guiding Principles and OECD Guidelines. As noted in a recent report notes: “The presumption of liability is not conclusive and the company may be exempt from liability if it proves that it was not aware of any activity that may have a potential impact on fundamental rights or if it proves that it made every effort to avoid it.”¹⁰⁴ Moreover, the bill would amend the French Commercial Code to encourage monitoring of all activities that may potentially impact fundamental rights, as well as to adjust these measures according to the means available to the company, enabling SMEs to implement measures according to their potential human rights impacts.¹⁰⁵

4.4 Civil Law

Most countries allow civil or private law claims against businesses for harm or loss as well as failing to act with due care. Claimants using civil law approaches however tend to have to adapt their language and description of the impacts to fit certain legal definitions, such as “assault”, “false imprisonment”, or “wrongful death”, rather than using human rights terminology such as “torture”, “enslavement” or “genocide”. Clearly, such definitions do not always readily or adequately describe the severity of harms at issue in a human rights case.

While many States allow the use of civil law for alleged human rights impacts by businesses, there are wide variances in States’ approaches to bringing such cases, including on issues such as deciding on the forum to hear the case, the various grounds for dismissal of a case, State immunity, serious challenges around financing of such cases, the speed, efficacy and competence of the court itself, rules around damage awards, investigation and enforcement across borders, and other political and procedural issues. All of this divergence makes the private law approach a very unpredictable remedy option for victims.

The **U.S.** Alien Tort Claims Act (ATCA) has been the overwhelmingly dominant tort-based tool to try to hold businesses accountable for human rights impacts inside and outside the USA. Historically however, claims have rarely made it beyond the procedural stage to the merits of the case in trial. Moreover, in April 2013, a US Supreme Court decision in *Kiobel v Royal Dutch Petroleum* curtailed the ability of non-U.S. claimants to bring cases in the future involving business conduct occurring outside the U.S. or against non-U.S. companies.¹⁰⁶ The decision does for now leave the door open to cases involving U.S. companies, and potentially wider interpretations based on cases that “touch and concern” the U.S. As a result, there are new initiatives in the U.S. emerging to spur exploration of this new domestic legal landscape’s potential and limits.¹⁰⁷

As noted in a recent update to a 2012 report on State regimes around due diligence by the International Corporate Accountability Roundtable (ICAR), there have been some promising developments within the civil law sphere in other jurisdictions. For example in **Uganda** where the High Court in Kampala recently found in favour of land tenants violently evicted by Government forces in order to develop a coffee plantation on the grounds that the Ugandan Investment Authority failed to act with due diligence regarding the land transfer and community relocation.¹⁰⁸

¹⁰⁴ As reported in ICAR, “Human Rights Due Diligence: The Role of States – 2013 Progress Report”, pg. 5. Available at: <http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/>.

¹⁰⁵ Ibid.

¹⁰⁶ For further background on the case, see: <http://business-humanrights.org/media/documents/kiobel-supreme-court-17apr-2013.pdf>

¹⁰⁷ See e.g. ICAR and EarthRights International’s “Nation-wide law school partnership project”, where Loyola University New Orleans College of Law, New England Law (Boston), Santa Clara Law, UCLA School of Law, University of Oregon School of Law, University of Virginia School of Law, Western New England University School of Law, Rutgers School of Law–Camden will research state law and propose recommendations and draft legislation for legal reform around corporate accountability in their state.

¹⁰⁸ ICAR, “Human Rights Due Diligence: The Role of States – 2013 Progress Report”, pg. 6. Available at: <http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/>

Another recent development was in the **Netherlands**, where a Dutch Court found a Nigerian subsidiary negligent for damages from pipeline oil spills harming a Nigerian farmer, by failing to take the precautionary measures necessary to reduce the risk to local people from sabotage to their operations (though the Court refused to rule on the explicit existence of a violation to their human rights due to a lack of precedent regarding a third party causing the harm).¹⁰⁹

The ability to bring civil claims is an indispensable avenue of redress for victims, and one where too few lawyers are willing to act given the costs and risks of litigation. States must not act in ways that further restrict access to such mechanisms, including within their legal aid programmes and other supportive measures.¹¹⁰ Instead, as set out in the UN Guiding Principles, there is a clear need to reinforce access to civil remedies for victims. States should expect civil society organisations to continue to research and advocate for expansion of the civil mechanisms available, as well as to experiment with new national and international avenues that yet to be tested.¹¹¹

4.5 Administrative Law

States such as **Germany, Italy** and **Ukraine** apply administrative penalties to companies – if found guilty a company will face financial and other penalties. Within their administrative systems, States' explicit expectations with respect to corporate due diligence ranges considerably. The most widespread requirements for mandatory due diligence is in the area of environmental protection, where over 130 countries are reported to have adopted an environmental assessment regime of one sort or another. Other topics covered by mandatory due diligence requirements often include workplace health and safety due diligence (such as in **Canada, China** or the **Netherlands**), and the prevention of money laundering and illicit flows (such as in widespread State regulation around "Know Your Customer" legislation).¹¹²

A promising development is that of many countries developing additional deterrents to financial penalties, such as restricting company operations in specific economic areas, banning them from procurement opportunities, publicising the conviction and penalties, and confiscating property if found to breach administrative regulations. Under the **U.S.** Sentencing Guidelines for example companies can be put on probation, which requires proof of compliance with the law, combined with implementation of an ethics programme and periodic reporting on its progress in implementing the designated reform programme.¹¹³

As noted earlier, the **U.S.** has also mandated reporting for new investments in **Myanmar/Burma** in relation to their human rights due diligence processes, as well as regarding supply chain due diligence in relation to conflict minerals sourced from the **DRC** or adjoining countries. Besides these cases however, there few examples of other States explicitly clarifying their human rights due diligence expectations of business within their administrative systems. Developing such requirements could go a long way in preventing human rights impacts in the first place, lessening the demand for the various judicial remedy options yet to provide sufficient access to justice for victims of business-related human rights impacts.

¹⁰⁹ Ibid.

¹¹⁰ See for example the 2011 letter from the SRS to the Parliamentary Under-Secretary of State concerning changes proposed to the legal aid system in the **UK**, outlining the significant potential barriers to legitimate business-related human rights claims that can be imposed by States' structures. At: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-ltr-to-uk-justice-minister-djanogly-16-may-2011.pdf>

¹¹¹ In this regard, see further the 2nd annual briefing by the Business and Human Rights Resource Centre on corporate legal accountability, noting that barriers are worsening for victims. Available at: http://business-humanrights.org/Links/Repository/1023587/link_page_view

¹¹² See further ICAR, "Human Rights Due Diligence: The Role of States", pg. 20. Available at: <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>

¹¹³ Ibid. See further: US Sentencing Guidelines Manual, para. 8D1.4, page 527. Available at: http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_8.pdf

4.6 Extraterritorial Jurisdiction

States can exercise jurisdiction over activities occurring beyond their territorial boundaries under customary international law (though discussion of the complex nuances falls outside the scope of this Report).¹¹⁴ There are variations in State practice in exercising extraterritorial jurisdiction regarding businesses' human rights impacts at a number of levels, both in regard to when they take a cross-border case and the extent to which they retain that jurisdiction through to conclusion. There is even variation within a single State's approach, depending on the political implications of the case.¹¹⁵ This divergence leads to a great deal of uncertainty in accessing judicial remedy outside the jurisdiction where the harm occurred, with the uncertainty itself becoming a barrier to victims accessing justice. The *Protect, Respect, Remedy* Framework notes:¹¹⁶

Some complainants have sought remedy outside the State where the harm occurred, particularly through home State courts, but have faced extensive obstacles. Costs may be prohibitive, especially without legal aid; non-citizens may lack legal standing; and claims may be barred by statutes of limitations. Matters are further complicated if the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary... These obstacles may deter claims or leave the victim with a remedy that is difficult to enforce.

Compounding the issue, the concept of separate corporate "personality" means that one member of a corporate group will not automatically be held legally responsible for the actions of another member of the corporate group. Using the corporate form can be a legitimate way of allocating and dividing risk to limit liability. There will however be times when there are grounds for "piercing the corporate veil" in order to hold the parent company liable for its involvement in or control over the acts of a subsidiary. Many jurisdictions are still working out their tests for determining when to look to the parent rather than the subsidiary as the responsible party. Most domestic courts are cautious in taking such action out of concern that they will undermine the concept of separate corporate personality.¹¹⁷ As a result, it is only in very rare circumstances that parent companies have been held liable in their home jurisdiction for the actions of their overseas subsidiaries. This was seen however in a major legal precedent set within the **UK** in 2012 where a parent company of a multinational group was held accountable under the law of negligence for the harms to the employees of one of its subsidiaries in **South Africa**.¹¹⁸

There are many reasons why claimants may want to bring their human rights claim in another jurisdiction, for example if they have concerns over impartiality or the capacity of the local court to hear the claim in a timely way, or there may be more advantageous funding arrangements in another jurisdiction for payment of costs and fees to bring a claim, access to more public interest lawyers and pro bono help, or there may be procedural advantages or greater scope for damage awards. Bringing a claim in the legal environment where the abuse occurred will not necessarily

¹¹⁴ For a comprehensive discussion of extraterritoriality in a range of regulatory contexts, see: Jennifer Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" Harvard Corporate Social Responsibility Initiative, 2010, 163-169. Available at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

¹¹⁵ For example with the **US** Presidential Administration of George Bush took a position on the question of corporate liability under the US Alien Tort Claims Act that was reversed by the subsequent Obama Administration. Moreover, the US Government opinion during the Obama Administration changed during the course of a single case under the Act. The case also elicited a range of views from the **German, Dutch** and **UK** Governments, as well as from the European Commission. See further: <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/>

¹¹⁶ Report of the SRSG, "Protect, Respect and Remedy: a Framework for Business and Human Rights", UN SRSG, A/HRC/8/5, (7 April 2008), pg. 23. Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

¹¹⁷ Jennifer Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" Harvard Corporate Social Responsibility Initiative, 2010, pg. 23. Available at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

¹¹⁸ See: <http://www.business-humanrights.org/Links/Repository/1012578/jump> and <http://www.business-humanrights.org/Links/Repository/1012519/jump>.

invoke a victim's confidence, whether for doubts about local court capacity, lack of genuine political will to halt and remediate the harms, or fear of reprisal in bringing any claim at all. As such, there is evolving practice in terms of parent-subsidiary liability and expansive rules on jurisdiction regarding certain offences, extending the geographic reach of domestic law systems, such as in the **UK, France and Australia** where new theories are being developed based on a duty of care towards victims.¹¹⁹ This is a positive trend, and one that should be considered by all States to consolidate the reach of their human rights due diligence expectations on business, and not allow or enable the corporate form or chains of business relationships to be used to evade responsibility for impacts.

Calls for an international legally binding mechanism to hold companies accountable for human rights abuses committed anywhere in the world, often raised before the SRSG's mandate began in 2005, have recently been renewed by a group of States, led by **Ecuador**, and backed by dozens of NGOs.¹²⁰ The UN Office of the High Commissioner for Human Rights, in collaboration with the United Nations Working Group on Business and Human Rights, is conducting research aimed at contributing to the development of a more coherent and consistent global response to corporate liability for gross human rights abuses. Moreover, in January 2014, the former SRSG issued his own briefing on the prospect of a "business and human rights treaty", calling firstly for a systematic assessment of overall progress on global implementation of the UN Guiding Principles, as well as a needs assessment of what an international instrument would need to achieve to be of value.¹²¹ Clearly, 2014 promises to be an important year in deepening discussions on further necessary steps to enhance access to remedies. Extraterritoriality will continue to be one of the most vexing of State-to-State issues in terms of legal redress. It raises sensitive issues of sovereignty not just for the host State but also the home State¹²² and is no longer an issue of "north" versus "south" as the number of transnational companies registered in key emerging economies continues to rise. Some encouragement can be drawn from non-legal extra-territorial cooperation, as relating to the OECD Guidelines on Multinational Enterprises, discussed further below.

4.7 Non-Legal Processes

Mediation is a central function of National Contact Points (NCP) in relation to the OECD Guidelines on Multinational Enterprises (the OECD Guidelines). Each OECD member, as well as a number of other Governments in **North Africa and South America**, adhering to the Guidelines is required to operate a non-legal national mechanism to contribute to the resolution of issues that arise from the alleged non-observance of the guidelines in specific instances by companies wherever in the world they might be operating. In this way, the mechanism is truly extraterritorial.

In the period since the OECD Guidelines were updated in 2011, human rights has emerged as a common denominator across nearly all the cases brought to NCPs by NGOs and communities, and to a lesser extent also by trade unions.¹²³ An increasing number of business sectors are the subject

¹¹⁹ Jennifer Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" Harvard Corporate Social Responsibility Initiative, 2010, pg. 163-168. Available at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

¹²⁰ See the civil society statement in support of the statement made to the Human Rights Council by **Ecuador** on behalf of the **Africa Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru**. Available at: http://www.tni.org/sites/www.tni.org/files/statement_in_support_of_states_at_the_hrc_enesp_17092013.pdf and <http://cancilleria.gob.ec/wp-content/uploads/2013/09/DECLARACION.pdf> (in Spanish only).

¹²¹ See further, John Ruggie, "A UN Business and Human Rights Treaty?" (28 January 2014). Available at: <http://business-humanrights.org/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>

¹²² As will be explored by the Inter-American Commission on Human Rights, which recently announced it will consider the question of "home country liability" for the extraterritorial actions of their companies abroad. See: <http://www.earthrights.org/blog/inter-american-commission-human-rights-consider-home-country-liability-extraterritorial-actions>.

¹²³ See for example: IHRB and the UK Government "Update on the role of OECD National Contact Points with regard to the extractive sectors" (London, 22 March 2013). Available at: <http://www.ihrb.org/pdf/IHRB-NNCP->

of cases, but the extractive sector still dominates NCP activity across a broad range of geographic jurisdictions. Some NCPs attract more extractive sector-related cases than others (for example, **Australia, Argentina, Canada, Chile, Netherlands, Norway, UK and US**) given the composition of the industries in these countries. However, an increasing diversity of NCP cases can also be seen (for example, the following NCPs have also been involved in recent cases: **Belgium, Japan, Luxembourg, Mexico, Morocco, South Korea and Switzerland**). Increasing collaboration between NCPs in relation to specific cases is also evident, as well as peer-review and support more generally. In 2012-2013 several NCPs have been re-constituted or strengthened in line with the updated Guidelines and national priorities. Other interesting trends over the last 12 months include the growth of capacity in non-OECD members who currently adhere to the Guidelines (for example a recent NCP conference in **Brazil**) and the development of parallel mechanisms in other economies (such as in **India** for example).

Some States use NCPs increasingly strategically in their foreign policy. The **Norwegian** and **UK** NCPs have capacity-building agreements with the **Brazilian** NCP, and several NCPs have been engaged in peer-review, for example the **UK** with **Japan**. Although such collaboration brings no direct commercial benefit, it does work towards a more level playing field for all OECD-based companies when working in key emerging markets. Another interesting example is the effort by the **Italian** NCP, together the OECD Secretariat, to promote much greater coherence and commonality of expectation of OECD registered companies operating in **Myanmar**.

States can also strengthen the leverage of NCPs by ensuring there are economic consequences for businesses that are unwilling to enter into mediation and against whom they have issued a statement. The OECD "Common Approaches" for Export Credit Agencies requires these agencies to take all NCP statements into account when considering whether to grant finance. The **Norwegian** State Pension Fund has already cited NCP statements as a reason for divesting from certain companies.

It should be noted that most non-OECD States do not yet have an NCP equivalent. However, a significant sub-set do have functioning National Human Rights Institutions (NHRIs). The best of these institutions, those granted "A status" in relation to the "Paris Principles", can be effective monitors not just of State behaviour in relation to human rights, but also non-State actors such as business. For example, the **African** Group of NHRIs is one of the largest and most active – many of its members have mediated directly in cases involving companies, some have initiated their own investigations whilst others have also proactively engaged with companies to increase awareness and even delivered training.¹²⁴ There has yet to develop any strategic alliance between NCPs and NHRIs but there seems to be a strong complement both in terms of geographic coverage and also function. One question to be considered is whether a complaint should go directly to an NCP if an NHRI is better placed to deal with the issue locally, at least in the first instance. It might be expected that donor Governments will at least see the potential for stronger collaboration.

4.8 Summary Note

In one of his first reports to the UN, the SRSG pointed to the governance gap between the global expansion of business and the ability of Governments to effectively regulate them. Yet even today the conditions for and enforcement of corporate liability for human rights harm have not evolved along with the global expansion of modern business. States have the tools to provide for appropriate and measured responses to human rights abuses involving business. Administrative law, civil law and criminal law, and sometimes a combination of the three are legal avenues States may pursue to ensure that businesses take preventative measures to avoid harm to people and are

OECD-National-Contact-Points-and-the-Extractive-Sector_2013-Update.pdf. A more recent discussion was also held jointly with the Norwegian NCP entitled "Multinational Enterprises, Human Rights and Internet Freedom" at the OECD in June 2013.

¹²⁴ See for example, **Uganda** Human Rights Commission, IHRB and OHCHR, "Summary Report: Capacity Building for NHRIs from **East Africa, Malawi** and **Ghana** (Kampala, January 25-26th, 2012)". Available at: http://www.ihrb.org/pdf/Uganda-Workshop-Final_Summary_Report.pdf

held accountable for human rights harms in which they are involved. Prevention and remedy are two fundamental legal functions – and yet, many States are failing on both counts. They are failing to provide sufficiently clear messages – regulatory or otherwise – of what is expected of business, and failing to take action where those expectations are not met. Even for gross violations of human rights, where the theoretical possibility of sanctions may exist, the current system of remedies in the vast majority of States, and internationally, is very often unpredictable and ineffective.

The failure to provide appropriately structured outlets for claims does not serve the interests of victims, States, or businesses. A national system that provides for stable and robust application of the rule of law is an attraction rather than deterrent for most businesses. Structured, efficient, and predictable processes for mediating disputes – judicial or non-judicial – serve all parties and can help avoid resorting to more desperate and extreme measures to seek justice. The unequal pace of addressing access to justice is already foreshadowing a schism in the carefully built coalition that led to the unanimous approval of the UN Guiding Principles in the Human Rights Council. 2014 promises to be an important year in deepening discussions on further necessary steps to enhance access to remedies.

5. REINFORCING HUMAN RIGHTS IN TRADE AND INVESTMENT

5.1 Key Issues

- Trade policy and trade instruments have long-been used as levers to try to improve social and human rights standards, but practice is inconsistent and could go further in encompassing all human rights, beyond the traditional focus on labour rights (section 5.2).
- Interest in the legal and practical relationships between foreign investment and international human rights has grown in interest over the past two decades, including with respect to investment dispute proceedings (section 5.3).
- As a starting point within either avenue for application, States first need to consider how best to integrate human rights expectations within their own domestic policies and strategies on trade and investment and ensure uniformity, before moving on to negotiate formal trade and investment agreements. Investment contracts between companies and States has also come into sharp focus in recent years for their at times prohibitive terms binding States' ability to change policy or regulation in line with evolving social or environmental realities, though some promising norm setting has been undertaken in recent years to establish principles for more responsible contracting (section 5.4).
- Underpinning much private investment are the various services offered by States, including export credit and financing. Positive developments have occurred in recent years to establish frameworks for these services, as well as encourage more visible human rights awareness within trade promotion activities (section 5.5).

5.2 International Trade Agreements

Linking human rights, particularly labour rights, with trade has a long history. More recently, particularly in light of the financial crisis, there has been renewed interesting in looking at the interplay between trade and social impacts – positive and negative. As a first and crucial step, the opportunity to integrate human rights awareness arises well before the formal negotiation phase of trade agreements. It arises at the time of domestic strategy setting and trade policy development. At the other end of the trade lifecycle is dispute resolution, where further coherence could be achieved, such as that highlighted by the UN High Commissioner for Human Rights when calling for the WTO's Trade Policy Review and Dispute Settlement mechanism to include an analysis of how protection or abuse of human rights might affect realisation of the WTO objectives.¹²⁵ Aligning human rights and trade outcomes faces practical and legal difficulty in successfully manoeuvring through the legal hurdles that prohibit trade distorting measures. This section however seeks to demonstrate the state of play in efforts to interject human rights awareness and considerations into the trade policy and agreements process globally. The Director-General of the WTO in 2010 asserted a similar message when he said:¹²⁶

For trade to act as a positive vector for the reinforcement of human rights, a coordinated international effort is needed. A coherent approach, which integrates trade and human rights policy goals, should be developed. Progress can no longer be achieved by acting in an isolated manner. Coherence should become our guiding principle in fostering development and human rights: coherence between the local and the global, between the world of trade and the world of human rights, between

¹²⁵ See UNITAR High Level Panel on Human Rights and Trade, "Statement by Ms. Navanethem Pillay, UN High Commissioner for Human Rights", Geneva, 27 September 2010. Available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10380&LangID=E>

¹²⁶ WTO News, "Lamy calls for mindset change to align trade and human rights" (13 January 2010). Available at: http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm

the WTO as an institution and the various organizations active in the field of human rights.

The International Labour Organisation (ILO) and International Institute for Labour Studies (IISD) recently published a detailed review of the social dimensions of bilateral and regional Free Trade Agreements (FTA's).¹²⁷ Similar to the proliferation of international investment agreements, the number of FTAs have dramatically increased over the past 25 years. Alongside that increase has been a growing focus on and inclusion of social and labour provisions in those agreements – 58 FTAs included labour provisions in 2013, up from 4 in 1995.¹²⁸ The ILO/IISD study found this trend has influenced national labour standards globally through: Firstly, the negotiations that take place before ratification of the trade agreement, with prospective partner States using their positions of leverage to raise other countries' social and labour policies and safeguards before acceptance of the deal; Secondly, through engagement and cooperation activities between signatory parties on labour issues once the FTA is signed, and; Thirdly, to a lesser extent, the creation and use of complaints mechanisms.¹²⁹ The labour provisions in FTAs have also evolved over the years. Where they once only called for effective enforcement of existing national law (regardless of whether that national law falls below international standards), many now require compliance with the 1998 ILO Declaration on Fundamental Principles and Rights at Work – though divergent approaches within these 58 FTAs referencing a range of ILO standards abound, which commentators note could lead to confusion and lack of consensus over the appropriate international benchmarks.

These social and labour provisions in FTAs are not always or fully implemented however, and a number of innovative approaches have been developed over the years to realise the intentions of these safeguards in practice. One recent positive example is the "Agreement concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia", which requires that **Canada** and **Colombia** each draft an annual report for tabling in their respective legislatures on the effects on human rights in both countries of measures taken under the Canada-Colombia FTA.¹³⁰ The **European Union** has gone a step further than most by including an entire chapter within its recent FTAs devoted to achieving sustainable development through preferential trade arrangements. Measures include requiring sustainability impact assessments prior to negotiations, capacity building of partner countries, including civil society participation in implementation and monitoring, encompassing a wider sector coverage than many other FTAs, and operating a complaints mechanism.¹³¹

The **US–Cambodia** Textile Agreement is seen as one of the most successful examples of a conditional trade relationship based on engagement and using incentives to improve the social conditions in the trade partner's domestic human rights situation.¹³² Through the Better Factories Cambodia programme, the US agreed to progressively increase Cambodia's quotas on textile imports to the US as improved working conditions are achieved. Since 1999 the programme has grown to provide monitoring, training and advisory services to Cambodian factories. It has also become a model for similar programmes around the world under the "Better Work" initiative, in

¹²⁷ See ILO and IISD, "Social Dimensions of Free Trade Agreements", (2013). Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_228965.pdf.

¹²⁸ Ibid, pg. 9.

¹²⁹ As the ILO/IISD study notes, there are a range of ways in which bilateral and regional FTAs seek to implement these labour provisions, mainly falling within two approaches. A large proportion place economic incentives or disincentives on FTA partners before and/or after ratification (known as conditional provisions) – mainly used in FTAs involving the **US** and **Canada**. More than half of those studied instead focus on political cooperation between FTA partners, social dialogue, technical cooperation and capacity building (known as promotional provisions) – mainly used in FTAs involving the **EU**, **New Zealand**, **Chile** and, notably, within agreements between South-South country partners.

¹³⁰ See: http://www.canadainternational.gc.ca/colombia-colombie/bilateral_relations_bilaterales/hrft-co_2012-dple.aspx?lang=eng

¹³¹ See generally: <http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/> and http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang--en/index.htm

¹³² See: http://betterfactories.org/?page_id=5082

countries such as **Jordan** and **Lesotho**. This kind of approach in engaging with private sector actors, as opposed to just the country partners to trade agreements in isolation, is particularly important in countries with limited enforcement capacity.

5.3 International Investment Agreements

As with trade policy, the opportunity to integrate human rights awareness and expectations within the investment priorities of States arises at the time of domestic strategy setting and policy development. Some positive practice has been occurring where States are setting international human rights standards and benchmarks within their domestic trade and investment strategies. **Canada** for example has a policy guide that expects its extractive companies to apply the IFC Performance Standards, Voluntary Principles and Global Reporting Initiative frameworks on non-financial reporting to all outbound investments.¹³³

The global web of international investment agreements today consists of roughly 3000 investment treaties, including bilateral investment treaties between two States, regional agreements, and investment protection provisions in free trade agreements, with roughly 70 new treaties signed every year.¹³⁴ International investment agreements help protect investors against the risk of expropriation and interference in their investments and provide investors access to international tribunals to seek compensation from States for non-compliance with the agreement's provisions. The SRSG considered the human rights implications of international investment agreements during his mandate.¹³⁵ He identified them as one area where States often fail to consider the implications on their policy-making abilities and their duty to protect human rights. The result is that States can unduly constrain their ability to respond to evolving social needs and conditions due to the confines of the terms of investment agreement.

One of the rising areas of concern focuses on the general consent States give upon signing most international investment agreements to automatically accede to international arbitration forums to hear and settle any investment disputes. These clauses may bind Governments for years and even decades, preventing them from settling a dispute locally in a domestic forum. Moreover, industry practice generally designates the governing law from a selective list of legal systems on the perception that commercial law under these jurisdictions is clear and helpful in a dispute situation. The opposing view questions the appropriateness of applying foreign law to a dispute happening on the ground in the host state. As such, calls are increasing for an examination of what law to apply and how to to such agreements. In addition, the terms of the investment agreement may leave no possibility to interpret provisions in light of a State's human rights obligations, nor provide for appropriate obligations or responsibilities on the investor.

Even if investment agreements do contain such clauses, arbitrators within these forums have historically had little experience or expertise in human rights law or in balancing the tensions between investment and human rights protection. This will be a key area of future engagement by States and other actors in educating and building the capacity of current and future arbitrators to ensure the human rights implications of disputes are appropriately considered.¹³⁶ Arbitral proceedings have historically been conducted privately, with no open proceedings, in an international forum outside the state in which the disputed investment has been made. Recent

¹³³ See: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx>

¹³⁴ See: http://www.unctadxi.org/templates/DocSearch____779.aspx. Historically these agreements have been made between developed, capital-exporting States and developing, capital importing States, to ensure nationals of those developed States were legally and financially protected when investing abroad, though that balance is increasingly changing to a more south-south composition.

¹³⁵ See UN SRSG and IFC, "Stabilization and Human Rights" (May 2009). Available at: http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_loe_stabilization__wci__1319577941106

¹³⁶ The IA Reporter website has just launched an "Arbitrator Profiles" section, featuring comprehensive compilations of the caseloads of over 80 of the most active arbitrators. Access requires authorization. See further: <http://www.iareporter.com/categories/profiles>

developments indicate this historical and overriding lack of transparency within dispute proceedings may be changing in the coming years. The UN Commission on International Trade Law (UNCITRAL), one of the key arbitral forums and rule making bodies, after years of negotiations and drafting, recently shifted its approach in favour of transparency in dispute proceedings, providing for increased disclosure of information generated from initiation through to termination of the disputes.¹³⁷

States have only tentatively become more proactive in updating and better aligning their investment agreements and arbitration provisions with broader sustainability goals, including human rights.¹³⁸ In 2008 for example the OECD studied the inclusion of labour, environmental and anti-corruption issues in investment agreements, focusing on 39 countries and 291 international investment agreements or investment chapters in trade agreements.¹³⁹ It found that of these 39 countries, only 15 (**Australia, Belgium, Canada, Finland, Japan, South Korea, Luxemburg, Mexico, Netherlands, Poland, Sweden, Switzerland, U.S., Chile and Latvia**) included labour, environmental and to a lesser extent anti-corruption language in one or more agreements.¹⁴⁰ Alternative treaty models¹⁴¹ are being created to try to fill this gap, and many States are beginning to explore different investment regimes¹⁴² that better promote investments that support sustainable development. In 2012 for example, UNCTAD's Investment Policy Framework for Sustainable Development identified commitment to human rights as a core principle in designing investment agreements.¹⁴³

Many States seeking to update their investment agreement approach are tending to wait for current and historic investment agreements to run their course until expiry before replacing them, often taking decades. Some other countries however have chosen to review their existing investment agreement regimes with a view to renegotiation or full termination because they consider they have been unduly constrained by these agreements from changing their domestic law or policy according to the needs of their people or their environment, as well as their wish to be able to resolve disputes locally in the country in which the investment has been made. **Ecuador** has been the most prominent within this space, establishing a treaty audit commission to review its current agreements.¹⁴⁴ **Bolivia** and a number of other **Latin American** states,¹⁴⁵ as well as **South Africa**,¹⁴⁶ are also reviewing the content of their treaties with a view to cancellation or non-renewal.

¹³⁷ See UNCITRAL "Rules on Transparency in Treaty-based Investor-State Arbitration", October 2013. Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>

¹³⁸ See for example the Helsinki Process on Globalization and Democracy which held an Investment Seminar in **Finland** in April 2013 with About 50 high-level investment regime experts from governments, international organisations, academia, business and civil society groups to discuss sustainable development, poverty alleviation, and public policy making in relation to the international investment regime. Available at: <http://www.formin.fi/public/default.aspx?nodeid=47162&contentlan=2&culture=en-US>

¹³⁹ Kathryn Gordon, "Environmental, Labour and Anti-Corruption Texts in International Investment Agreements: A Large Sample Survey" (OECD, 2008). Available at: <http://ssrn.com/abstract=1719089>

¹⁴⁰ See further: ITUC, "Briefing note on Bilateral Investment Treaties". Available at: <http://gurn.info/en/topics/bilateral-and-regional-trade-agreements/bilateral-investment-treaties/background/tils-briefing-note-on-bilateral-investment-treaties>

¹⁴¹ For example the IISD Model International Investment Agreement. Available at: <http://www.iisd.org/investment/capacity/model.aspx>

¹⁴² See: OECD, "The Policy Framework for Investment" (2006). Available at: <http://www.oecd.org/daf/inv/investment-policy/pfi.htm>; and UNCTAD, "Investment Policy Framework for Sustainable Development" (2012). Available at: <http://investmentpolicyhub.unctad.org/Views/Public/IndexIPFSD.aspx>.

¹⁴³ UNCTAD, "Investment Policy Framework for Sustainable Development" (2012). Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf

¹⁴⁴ See further: "Ecuador Establishes Commission To Audit Investment Treaties", Wall Street Journal (October 2013). Available at: <http://online.wsj.com/article/BT-CO-20131008-712214.html>

¹⁴⁵ See further: IHRB, "The Elephant in the Room: Addressing International Investment Conditions to Improve Human Rights" (2011). Available at: http://www.ihrb.org/commentary/staff/elephant_in_the_room.html

¹⁴⁶ See further: <http://www.iisd.org/itn/2013/09/20/news-in-brief-13/>

5.4 Investor-State Contracts

Sitting underneath, and often tied to, the global network of international investment and trade agreements are the variety of contracts that States enter into with specific companies, for example through procuring goods and services, entering into public-private partnerships or for natural resource concessions.¹⁴⁷ Historically most investor-State contracts have exhibited little awareness of the fact that major projects can pose significant human rights risks and held few if any provisions addressing the significant human rights risks major projects can create. Even more concerning, clauses known as “stabilisation clauses” lock in regulation at the time of the agreement or specifically prohibit or limit regulatory changes in connection with investments, thus at times inappropriately constraining the State’s policy space and ability to update social and environmental regulations as needed throughout the life of the investment contract.

Investor-State contracts have been identified in recent years as a key lever States can use to require implementation of business and human rights responsibilities by the investors they partner with.¹⁴⁸ The SRSG developed the *Principles for Responsible Contracts* as an addendum to the UN Guiding Principles, setting out the steps that parties (public and private) to investor-State contracts can consider and how such issues can be reflected in contracts.¹⁴⁹ Interactive and accessible training is being developed to support education and capacity building,¹⁵⁰ and platforms are being developed to connect the various stakeholders at play, such as the LSE Investment and Human Rights Project.¹⁵¹

Contract transparency is also featuring as part of the growing focus on investor-State contracts. Transparency is increasingly seen as not only in the interest of the State, but also the companies involved. The SRSG calls for contract transparency in his *Principles for Responsible Contracts*, as have international bodies like the International Bar Association and the International Finance Corporation. The World Bank recently launched its “Open Contracting Initiative”, bringing together a coalition of diverse stakeholders from Government, business, NGOs, the media and others to catalyse enhanced contract disclosure and improve public participation. As reported by the International Institute for Sustainable Development, there have been a number of promising national and institutional developments in recent years regarding contract transparency:¹⁵² a set of principles for responsible agricultural investment, prepared by the World Bank, FAO, IFAD and UNCTAD, call for transparency in accessing land and making investments, and the UN Special Rapporteur on the right to food has made the same calls regarding land leases and purchases; the Extractives Industry Transparency Initiative (EITI) recently updated its Standard to require disclosure of licenses and production figures on a project-by-project basis; **Liberia** introduced in 2009 the Liberia Extractive Industry Transparency Initiative (LEITI) Act requiring all payments by individual

¹⁴⁷ These investor-state contracts are particularly common for large agricultural projects, large infrastructure projects (to construct roads, railways, ports, official buildings, dams, etc.), and exploration and exploitation of natural resources (oil, gas, minerals, water, forestry resources). Contract terms typically address issues that are uniquely in a government’s power to grant and regulate, such as indemnifications, authorisations, taxation, protections from expropriation, local content requirements, and granting access to land.

¹⁴⁸ See IHRB and GBI, “The State of Play in Business Relationships”, Chapter 10: Respect for Human Rights in Investor-State Relationships (2012), which highlights a number of ways in which private investors and the States they contract with can use the business relationship to improve human rights due diligence processes and outcomes. Available at: <http://www.ihrb.org/publications/reports/state-of-play.html>. Other groups researching extensively on the issue include Global Witness, the International Institute for Environment and Development (IIED), the International Institute for Sustainable Development (IISD) and Revenue Watch.

¹⁴⁹ UN SRSG, A/HRC/17/31/Add.3, “Principles for Responsible Contracts: Integrating The Management of Human Rights Risks Into State-Investor Contract Negotiations: Guidance for Negotiators”. Available at: <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>

¹⁵⁰ The UN OHCHR will be launching new multimedia training materials for integrating human rights risk management into investor-State contract negotiations here: <http://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx>

¹⁵¹ See further: <http://www.lse.ac.uk/humanRights/research/projects/theLab/trainingTrailer.aspx>

¹⁵² See: Investment Treaty News, “Going public to improve investment in agriculture”, October 2011. Available at: http://www.iisd.org/pdf/2012/going_public_improve_investment_ag.pdf

companies and operating contracts and licenses to be published and reviewed on the LEITI website; **Ghana** is now publishing contracts in the oil sector, and countries such as **East Timor, Peru, Ethiopia** and **Ecuador**, are making certain contracts public; and a number of countries including **Sierra Leone, Ghana** and **Liberia**, require large investment projects to be ratified in parliament, providing a layer of public scrutiny.

An important issue on the horizon within this space – and one that will require much careful thought, engagement and development – will be the matter of how to craft and incorporate community considerations within such contracts and how to involve communities in the agreement process. Such tripartite agreements have been tried for example in mining deals in **Australia** and **Canada**. As companies move to standardise their practices with indigenous communities, incorporating their consent into formal documents, a new body of work will develop around incorporating free, prior and informed consent (FPIC) formally into or alongside these investor-State contracts.¹⁵³

5.5 State Services and Support for Business

The UN Guiding Principles recognise that there are a range of agencies, either formally or informally linked to the State, that may supply or provide services to businesses. These include: export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions.¹⁵⁴

The OECD “Common Approaches” relating to States’ Export Credit Agencies (ECAs) have been subject to an updated set of recommendations since June 2012 that request member States to benchmark against either the World Bank Safeguard Policies and the IFC Performance Standards when undertaking their own due diligence before supporting companies with export credits.¹⁵⁵ This covers some human rights content, but it should be noted that World Bank and IFC standards, whilst useful benchmarks, are geared more to the extractive and infrastructure sectors than to new technologies, such as ICT. ECAs are still searching for appropriate human rights benchmarks for newer business sectors or those traditionally not associated with the large projects supported by development finance institutions. Notably, in the OECD Common Approaches, there is a recommendation that States also take into consideration any statements or reports made by their National Contact Points under the OECD Guidelines on Multinational Enterprises. The de facto consequence of these new measures will be to bring human rights due diligence increasingly centre stage into the work of ECAs. For example, a meeting in **Canada** in October 2013, focusing specifically on human rights, was attended by ECA representatives from over 20 States.

Development finance institutions have also been in discussion during 2012 and 2013 about when and how to request specific human rights due diligence – noting that IFC Performance Standard 1 recognises that a bespoke human rights impact assessment might be needed in specific circumstances. Even prior to this, progress in collaboration in the form of a set of principles signed by 16 **European** development finance institutions seeking to harmonise their ESG standards in investment activities was seen in 2009 with the “EDFI Principles for Responsible Financing”, benchmarking the UN Declaration on Human Rights, ILO Core Conventions, and IFC Performance Standards.¹⁵⁶

¹⁵³ See for example the work on “impact benefit agreements” (IBA) and “community controlled ESIA (environmental and social impact assessment)” (CCIA). Ginger Gibson and Ciaran O’Faircheallaigh, “IBA Community Toolkit: Negotiation and Implementation of Impact Benefit Agreements” (2011). Available at: http://gordonfoundation.ca/sites/default/files/publications/IBAToolkit_web.pdf

¹⁵⁴ Guiding Principle 4, ‘The State Business Nexus’.

¹⁵⁵ Working Party on Export Credits and Credit Guarantees, “Revised Council recommendation on Common Approaches on the environment and officially supported export credits” (OECD Trade Committee, 2007); updated by the OECD Working Party on Export Credits and Credit Guarantees, “Recommendation of the Council on Common Approaches for officially supported Export Credits and Environmental and Social Due Diligence”, June 2012. Available at: <http://www.oecd.org/tad/xcred/oecd-recommendations.htm>

¹⁵⁶ See further: <http://www.bio-invest.be/en/component/downloads/downloads/15.html>

A smaller number of States have also sought to integrate human rights into official trade missions promoting States' businesses around the world. The **Netherlands** now has this as a routine requirement for all missions to consider human rights implications and to brief businesses and Government ministers accordingly. The **UK** did similarly in relation to **Myanmar**. **Finland** involved human rights NGOs in a joint trade mission led by both its Trade and Development Ministers to **Tanzania** and **Zambia**. Other than these three examples, few home States have integrated awareness of business and human rights issues into trade missions, with the result that business can be left with the impression that States care more about economic concerns than other legitimate issues, such as human rights. Trade promotion will undoubtedly remain a competitive field between States, but respect for human rights should not. The goal should be for States to agree common approaches and provide sources of expertise to inform business, in particular small and medium enterprises, of potential human rights risks and impacts.

5.6 Summary Note

States regulate and enable trade and investment in their territories. Respect for human rights can be catalysed within trade and investment agendas through integration of human rights awareness and due diligence expectations within States' national strategies and policies on trade and investment. Doing so would provide more uniformity when moving to the formal investment and trade agreement negotiation phase between two or more States. International trade and investment agreements offer important opportunities for States to safeguard human rights, as well as the chance for such safeguards to be incorporated into subsequent contracts between States and investing businesses. However, policy makers and practitioners have only recently begun to fully consider these opportunities, as well as the risks of failing to provide for sufficient policy and regulatory space within such agreements. As such, capacity building and further awareness raising throughout the investment and trade chain is key: for State negotiators and legal and finance advisers to international trade and investment agreements; the State and company negotiators and legal and financial advisers to individual investor-State contracts; and for the arbitrators mediating international investment and trade disputes. Greater contract transparency in a number of States can also offer important clarity about how human rights can be integrated in the investment process.

Export Credit Agencies and trade missions, as State services for business, offer a related opportunity to integrate awareness of business and human rights into State's frontline dealings with businesses. Requiring export credit agencies to undertake their own human rights due diligence before providing support to business (particularly SMEs) should be the goal, as should developing a common approach amongst States to providing information and expertise on human rights to businesses on trade missions around the world.

6. STATES AS ECONOMIC ACTORS

6.1 The Key Issues

The commercial nexus between the State and the private sector can be positive in human rights terms, but can also be associated with abuses and ambiguities about accountability – particularly regarding international activities and operations outside the domestic jurisdiction of the controlling State, such as by State-owned enterprises (SOEs). States have only recently started responding to the need for greater accountability for their economic activities, but also the diplomatic and commercial opportunity of better aligning their economic power with their international obligations, including human rights.

States can exercise powerful incentives and disincentives over companies registered in their jurisdiction and operating within their territories. This influence is, of course, at its highest if the State itself owns the company in question, but even publicly listed and privately owned companies can be influenced by States, for example when States or sovereign wealth funds own a significant percentage of the shares (section 6.2). States are also powerful customers. Public procurement represents a significant part of the GDP of most countries, and in some markets it can be a dominant force (section 6.3). Finally, States can also be vendors – sellers of services or products to the private sector (section 6.4).

6.2 States as Owners or Part-owners of Companies

According to UNCTAD, there at least 650 transnational State-owned enterprises (SOEs) around the world doing business through more than 8,500 foreign affiliates, of which about 56% of such enterprises originate from developing economies.¹⁵⁷ In 2010, 19 of the world's 100 biggest multinational companies, as well as 28 out of the 100 biggest multinationals in emerging markets in 2009, were State-owned.¹⁵⁸ UNCTAD's 2011 World Investment Report notes:

The government is a majority shareholder in about 44% of these SOEs, and a holder of less than 50% of the stock in 42%. In the latter type of SOEs, the government is usually the largest minority shareholder, or owns 'golden shares' which enable it to influence the composition of the board of directors and the way the enterprise is managed. There are exceptions to this, where states own smaller percentages of shares more purely as a form of investment.¹⁵⁹

"SOEs" come in a large variety of forms. There are those owned and operated or managed by the State. There are also sovereign wealth funds (SWFs), which are a classic example of the portfolio investment model of States using specific investment vehicles. In the case of the **Norwegian Pension Fund**, which owns about 1% of privately owned tradable shares globally, this can represent significant leverage, and the Government of Norway is almost unique in having some aspects of human rights explicitly included in its fund management criteria. Some sovereign wealth funds have banded together under the banner of the International Forum on SWFs¹⁶⁰. They are bound by the Santiago Principles,¹⁶¹ which mention ethical standards and related risk criteria, but leave the parameters to each SWF to implement and disclose.

¹⁵⁷ UN Global Compact, "Working with SOEs", Human Rights and Business Dilemmas Forum (2012). Available at: <http://human-rights.unglobalcompact.org/dilemmas/working-soe/#.UpYPu2RdUr8>

¹⁵⁸ UNCTAD, "World Investment Report 2011: Non-Equity Modes of International Production and Development", (June 2011), reported in UN Global Compact, op. cit.

¹⁵⁹ For example the Government of Finland's 10% share in the mobile telephone company, TeliaSonera, which is mainly under private ownership in Sweden.

¹⁶⁰ <http://www.ifswf.org/>

¹⁶¹ <http://www.iwg-swf.org/pubs/gapplist.htm>

State ownership or part-ownership of business enterprises is not just a vestige of State-run economies, but rather has reemerged in its current form in every economy in the world. The OECD notes that SOEs are: "...prevalent in utilities and infrastructure industries, such as energy, transport and telecommunication, whose performance is of great importance to broad segments of the population and to other parts of the business sector".¹⁶² Banks can now be added to the list. In the aftermath of the financial crisis, the **UK** – one of the world's leading privatizers of previously publicly owned assets – renationalized a number of leading financial institutions to prevent them from failing. So too was the national rail infrastructure company renationalised in the UK during the 1990s. Importantly, there is an important opportunity for the 2014 update of the OECD Guidelines on Corporate Governance of State-owned Enterprises, to be fully aligned with the OECD Guidelines for Multinational Enterprises, including the new human rights chapter.¹⁶³

This suggests that SOEs are a permanent part of the economy in many States, although the business sectors involved will vary. Jurisprudence within the Council of Europe suggests that whether any business has "State-like duties", rather than just corporate responsibilities to respect rights, depends on whether it is carrying out a function normally associated with the State.¹⁶⁴ Beyond Europe this seems not to be the consensus position, partly because globally there is much greater variance as to what are regarded as public functions.

Interestingly, some private companies reflect that SOEs have an unfair advantage in the global marketplace in human rights terms. For example, the "Human Rights and Business Dilemmas Forum" of the UN Global Compact notes that SOEs:

- *Are more likely to pursue non-commercial objectives, including geostrategic, political and social objectives that trump company reputation or profitability (it should be noted, that where 'parent' governments do respect human rights – the opposite can equally be true, with SOEs used to support the human rights of citizens in a way that goes beyond commercial considerations),*
- *Are likely to be less transparent and accountable to markets and consumers than their non-government linked counterparts,*
- *Often enjoy a position of market domination due to the advantages conferred on them by their 'parent' governments, reducing their incentives for acting in a responsible, accountable way that will appeal to investors and customers*
- *Can operate with higher levels of impunity from legal sanction or political censure than other companies,*
- *May come under pressure to transfer knowledge and know-how to 'parent' governments that may then be misused to commit human rights violations,*
- *May – in certain circumstances – be subject to sovereign immunity, or may be used by governments to distance themselves from human rights abuses carried out on their behalf.¹⁶⁵*

Some States have specific a Government agency that administers and regulates SOEs, such as **China's** State-owned Assets Supervision and Administration Commission or **South Africa's** Department of Public Enterprises. Such agencies ensure their SOEs are internationally competitive and can raise funds in the international capital markets. As such, they have a strong role in guiding these SOEs' conduct at home and abroad. This is an obvious area for policy coherence efforts and a coherence opportunity between these SOE agencies and their foreign affairs ministries

¹⁶² OECD, "Guidelines on Corporate Governance of State-owned Enterprises" (2005), p. 9. Available at: <http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>

¹⁶³ OECD, "Guidelines on Corporate Governance of State-owned Enterprises" (2005), p. 9. Available at: <http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>

¹⁶⁴ *Forster v. British Gas plc*, case of the European Court of Justice, 1991, cited in Camilla Wee, "Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility", International Commission of Jurists (Denmark, 2008). Available at: <http://www.reports-and-materials.org/State-owned-enterprises-Oct-08.pdf>

¹⁶⁵ UN Global Compact, "Working with SOEs", Human Rights and Business Dilemmas Forum (2012). Available at: <http://human-rights.unglobalcompact.org/dilemmas/working-soe/#.UpYPu2RdUr8>

to ensure human rights are respected by States' SOEs anywhere in the world. In this context, human rights can even serve a beneficial diplomatic function and aid for bilateral cooperation, such as has been demonstrated between **Norway** and **China** who announced in late-2012 a cooperation agreement between their two Governments and their respective State-owned extractive companies on issues relating to sustainability, including human rights.¹⁶⁶

Some countries' policies and regulation target SOEs for greater accountability and transparency on social and human rights issues. Much regulatory activity has been seen around SOE disclosure and transparency in particular, with an increasing number of countries targeting SOEs with disclosure regulations, including: **Brazil, China, Ecuador, Finland, France, Iceland, Indonesia, India, the Netherlands, a, South Africa, Spain** and **Sweden**.¹⁶⁷ **Finland** for example issued a Government Resolution on State Ownership Policy 2011,¹⁶⁸ asking non-listed state-owned companies and State majority-owned companies to report their sustainability performance in an accurate and comparable manner, with an Annex featuring a reporting model based on the GRI's G3 Guidelines. **India's** recently revised Sustainable Development and Corporate Social Responsibility Guidelines for Central Public Sector Undertakings (CPSEs), issued by the Indian Department of Public Enterprises (DPE)¹⁶⁹, which entered into force in April 2013, have a special focus on employee rights and welfare and include a dedicated section on transparency and disclosure of CPSE's strategies and activities. While not legally binding, in a letter dated 24 April 2009, the **Netherlands'** Minister of Finance informed Parliament that he expects the largest Dutch State Holdings to use the GRI Guidelines in their reporting practices, with due consideration of the effort needed to implement reporting practices and the goals that different companies expect to reach through reporting.¹⁷⁰ The Minister also expects to include all the largest holdings in the national Transparency Benchmark of the Ministry of Economic Affairs.¹⁷¹ In **China** SOEs are encouraged to publish sustainability reports, resulting in around 1,700 reports a year to date.¹⁷² **Sweden** issued mandatory Guidelines in 2007 for external reporting by State-owned companies requiring a sustainability report based on the comply or explain approach using GRI G3's Guidelines¹⁷³, which must be independently assured. Sweden explains this specific requirement for SOEs as follows:

*A responsible and professional owner should, among other things, take responsibility for issues relating to sustainable development, for example ethical issues, the environment, human rights, gender equality and diversity. All companies bear this responsibility but the state-owned companies are to set an example and be at the leading edge of this work.*¹⁷⁴

¹⁶⁶ See: Norway News, "Chinese Press Visited Norway" (14 December 2012). Available at:

<http://www.norwaynews.com/en/~view.php?7352a54jPb4837x2851pi844TK3887TV76HBh253Naq8>

¹⁶⁷ KPMG et al, "Carrots and Sticks: Sustainability reporting policies worldwide – today's best practice, tomorrow's trends". 2013 edition, pg. 17. Available at:

<https://www.globalreporting.org/resourcelibrary/Carrots-and-Sticks.pdf>.

¹⁶⁸ Government of Finland, "Government Resolution On State Ownership Policy" (3 November 2011).

Available at: http://valtioniomistus.fi/english/files/2012/01/Periaatepaaetoetes03112011_eng.pdf

¹⁶⁹ Indian Ministry of Heavy Industries and Public Enterprises, "Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises" (2013). Available at:

http://dpe.nic.in/sites/upload_files/dpe/files/Revised_CSR_Guidelines2_31122012.pdf

¹⁷⁰ See: Radostław Wolniak and Patrycja Hąbek, "CSR Reporting in France and the Netherlands", 2013, pg. 95. Available at:

http://www.wydawnictwo.am.szczecin.pl/administrator/components/com_jresearch/files/publications/14_ZN_A_M_34106_Wolniak_Hubek.pdf

¹⁷¹ See: http://www.transparantiebenchmark.nl/en/about_transparency_benchmark/objective

¹⁷² See for example: Simon Zadek, "China: the path to responsible business and sustainable growth", The Guardian (23 March 2013). Available at: <http://www.theguardian.com/sustainable-business/blog/china-sustainability-corporate-social-responsibility>

¹⁷³ See: www.sweden.gov.se/sb/d/8739/a/94120

¹⁷⁴ Swedish Ministry of Enterprise: 'Energy and Communications: 'Guidelines for External Reporting by State-owned companies', November 2007, cited in Camilla Wee (2008) Op. Cit.

State-ownership looks set to be part of the world's political economy for the remainder of the century – some have even predicted it might become a defining part of it.¹⁷⁵ At present, there remains evidence that such ownership can still serve to shield these companies from their human rights responsibilities and in some cases facilitate the abuse of rights when these companies are operating outside of their national jurisdictions. There remain ambiguities under international law as to when such companies have human rights duties more similar to those of States – or human rights responsibilities more akin to private companies. What is beyond doubt, however, is that all SOEs have a responsibility to respect human rights, and are accountable for their human rights impacts and associated mitigations and preventative steps. In addition, there do seem to be increasing signs of more positive trends, with SOEs becoming more transparent about their own impacts and also engaging in local human rights dialogues in countries where they are operating.¹⁷⁶ As noted, some Governments seem also to be willing to explore the ways in which State-ownership can more explicitly be used as an area for diplomatic cooperation and as a lever for improving standards in third countries.

6.3 States as Customers

Public procurement is a powerful part of the political economy – amounting to between 15%-25% of the Gross National Product of OECD member states, and even more in developing countries.¹⁷⁷ Many States remain cautious about introducing human rights considerations into the procurement process, but the reasons for this risk aversion can be misplaced. In 2010 for example, the World Trade Organisation's (WTO) Director-General at the time Pascal Lamy, remarking on the traditional mistrust between the two issues, affirmed that human rights and trade are in fact mutually supportive, that "human rights are essential to the good functioning of the multilateral trading system, and trade and WTO rules contribute to the realisation of human rights".¹⁷⁸ Yet States and public authorities also fear legal challenges, particularly in countries with more litigious cultures and legal regimes. Some States may fear that companies will see human rights requirements as trade barriers, as akin to local content and other trade practices designed to favour local businesses.

Social issues may be taken into consideration in different ways at different stages in the procurement process. For example, since 2004, the **European Union** Procurement Directive has required that public procurement does not discriminate between tenderers and that all processes are open and transparent. The EU principles of equal treatment, transparency, proportionality, non-discrimination on grounds of nationality, and free movement of goods and services also apply to all public sector contracts.¹⁷⁹ More recently, the EU updated its rules on public procurement, integrating new provisions allowing for social and environmental considerations and innovations to be taken into account when awarding public contracts.¹⁸⁰

¹⁷⁵ See for example: Adrian Wooldridge, "The visible hand: The crisis of Western liberal capitalism has coincided with the rise of a powerful new form of state capitalism in emerging markets" *The Economist Magazine* (21 January 2012). Available at: <http://www.economist.com/node/21542931>

¹⁷⁶ Note for example the work of the **Myanmar** Centre for Responsible Business in Yangon, initially established by IHRB and the Danish Institute for Human Rights. Available at: <http://www.myanmar-responsiblebusiness.org/>. See also the membership of the Nairobi Process: A pact for responsible business in oil and gas exploration in **Kenya** and wider **East Africa**, established by IHRB and the Kenyan National Commission on Human Rights in 2013. Available at: <http://www.ihrb.org/about/programmes/nairobi-process.html>

¹⁷⁷ International Development Law Organisation, "Public Procurement". Available at: <http://network.idlo.int/eng/publicprocurement/Pages/index.aspx>

¹⁷⁸ WTO News, "Lamy calls for mindset change to align trade and human rights" (13 January 2010). Available at: http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm

¹⁷⁹ Equality and Human Rights Commission, "Buying Better Outcomes: mainstreaming equality considerations in procurement" (March 2013), pg. 8. Available at:

http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/buying_better_outcomes_final.pdf

¹⁸⁰ See further: EurActiv, "EU brings innovation into public procurement rules" (15 January 2014). Available at: <http://www.euractiv.com/future-eu/parliament-approves-new-rules-pu-news-532783>

Rather than acting as a trade barrier, human rights – if appropriately integrated into the procurement process – can align with WTO as well as regional trade requirements such as those of the European Union. There is nothing to prevent more explicit references to human rights, as noted during a recent enquiry within the **UK** Parliament:

The Procurement Directive enables contractors to exclude suppliers if they have been found guilty of human rights breaches. ...it is perfectly open for public sector procurers to stipulate compliance for basic human rights principles as well, particularly where we are talking provision of care services or things which directly engage human rights provisions as well. So it is not that we do not think that these things are important, but there are opportunities to bring this into play and we need to make sure that they are done across the public sector.¹⁸¹

It should be noted that the Government of the **Netherlands** has already introduced social criteria for its own procurement, based on ILO Core Conventions¹⁸², and the **US** Government recently extended its own provisions to include due diligence measures relating to forced child labour and human trafficking¹⁸³. Other Governments are looking closely at the issue, including **Norway**, **Northern Ireland** and **Scotland**¹⁸⁴. **Finland** for example recently issued a guide to socially responsible public procurement to enable its agencies to incorporate social and human rights criteria within their processes.¹⁸⁵ Additionally, the inclusion of certain human rights within local authority procurement is practiced in a number of **Scandinavian** and **Baltic** cities, as well as **San Francisco**, and procurement for mega-sporting events such as **London 2012 Olympics** or the **Glasgow 2014 Commonwealth Games**.¹⁸⁶ In **England**, equality outcomes can already be a standard consideration, whether this relates to ethnicity, age, sexual orientation or disability, for example:

Incorporating equality outcomes, where relevant and in a proportionate way, should be a normal part of designing and specifying a service. It is important that they are considered upfront before the procurement process starts. This will help identify the specific needs of different potential users and allow them to be appropriately

¹⁸¹ Evidence given by the **UK** Government to the Parliamentary Human Rights Joint Committee, No.287, Human Rights and the UK Private Sector, 2009. Available at: <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/9071405.htm>

¹⁸² For further details on the **Dutch** Government initiative see, for example: Gisela ten Kate, "Tying public procurement to human rights standards" SOMO (August 2013). The author notes: "These criteria contain the fundamental principles of the International Labour Organisation (ILO): freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation. For some specific sectors, such as cacao, garments, flowers and tea, additional criteria are being formulated with regard to a living wage, fair trade principles and statutory working hours. Under this policy, selected contractors must indicate the existence of social risks. If they do, the contractual requirements may include disclosure of suppliers and an action plan to respect ILO standards. In theory, the contract can be terminated if the company fails to live up to the performance requirements." Available at: <http://www.thebrokeronline.eu/en/Blogs/Spurring-economic-transition/Tying-public-procurement-to-human-rights-standards>

¹⁸³ The **US** 2013 Ending Trafficking in Government Contracting Act amends and strengthens the protections in section 106(g) of the Torture Victims Protection Act by prohibiting in all federal contracts acts that directly support human trafficking and by requiring compliance and certification measures to help prevent trafficking and related acts. See further: <http://www.humanrights.gov/2013/05/01/u-s-government-approach-on-business-and-human-rights/>

¹⁸⁴ Note, for example, the work of the **Scottish** Human Rights Commission on social care procurement, now published by the Scottish Government. Available at: <http://www.scottishhumanrights.com/ourwork/business/businessinscotland>

¹⁸⁵ Ministry of Employment and Economy, Government of **Finland**, "Guide to Socially Responsible Public Procurement" (November 2013). Available at: http://www.tem.fi/files/38102/TEM_Opas_Sos.hank_EN_netti.pdf

¹⁸⁶ See further: IHRB, "Striving for Excellence: Mega-Sporting Events and Human Rights" (October 2013). Available at: http://www.ihrb.org/pdf/2013-10-21_IHRB_Mega-Sporting-Events-Paper_Web.pdf

reflected in the process. Properly done, this should help you buy better outcomes and therefore achieve value for money, while helping to meet your corporate objectives.¹⁸⁷

There are three stages of the public procurement process where human rights might be appropriately applied:¹⁸⁸

When Specifying Requirements

Specific human rights criteria can be made part of the requirements all bidders must meet when setting the tender. The challenge is finding the right balance between the need for value for money versus public policy preferences. For example the criteria might set a percentage for both price and quality considerations provided they are material to the product or service to be provided.

One current concrete example of this is in relation to the Governments that have made accession to the International Code of Conduct for Private Security Companies – and therefore due diligence relating to human rights contained within this Code and the Montreux Declaration upon which it is based – a condition for bidding for Government contracts. States known to have already implemented this practice include the **US, Switzerland and Finland**.

When Selecting Candidates

The rights of specific vulnerable groups can be integrated into the selection process, including at the first stage in specifying human rights, labour and other social development qualifications in the bidding documents themselves. For example, some local authorities have specified child rights, disability rights or the rights of older persons when inviting tenders for local transport or transport design. Some states give preference for minorities-owned businesses, such as by ethnic minority groups or disabled persons. Three authorities are known to have invited children and older persons to “test” short-listed applicants to see if, in their opinion, the applicants had met the design or service specification, enabling the participation of these vulnerable groups in assessing the robustness of the procurement process.

When Monitoring Effectiveness of the Service or Product Provided

Most contracts will have provision for “grave professional misconduct” under which penalties might be incurred or contracts might be revoked. However, such professional misconduct is rarely clearly defined and itself contributes to the risk adverse culture surrounding public procurement. Clearly definitions of misconduct, which might include the non-respect of human rights, might give both the State as well as the business a clearer understanding of the boundaries of acceptable behaviour during the life-span of a project.

Given the above, there is evidence that human rights is beginning to find its way into public procurement when it meets the standards of non-discrimination, transparency and equal treatment in relation to all tenderers and when human rights are material to the product or service in question. The procurement process itself allows the public authority to create its own “legal microcosm” for doing so, and legal challenges by tenderers are much less likely if the human rights in question are internationally recognised, such as those within the UN Bill of Rights or the ILO Core Conventions.

¹⁸⁷ UK Equality and Human Rights Commission, “Buying Better Outcomes: mainstreaming equality considerations in procurement” (March 2013). Available at:

http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/buying_better_outcomes_final.pdf

¹⁸⁸ See the work of Jamie McRorie, on which this analysis is based: “Public Procurement and Human Rights” Parts 1 (2008) and 2 (2009), Scottish Human Rights Journal. Available at:

<http://www.scottishhumanrights.com/publications/journal/article/issue43procurementhumanrights> and <http://www.scottishhumanrights.com/publications/journal/article/issue44articleprocurementp2>

The implications for States are two-fold. On the one hand, States with very accessible public markets, i.e. into which it is easy for foreign companies to compete for public tenders, such as **Finland** for example, can and do already specify human rights requirements at the national and local level. On the other hand, businesses from such accessible markets also report that they face barriers to entry when trying to bid for public tenders in other parts of the world – places where there are at present rarely human rights content to tenders.¹⁸⁹ Given there would be no national interest in reducing national social standards, there is a case to be made for further human rights specifications to best safeguard the quality and impacts of such services. In fact, States such as Finland that have already begun integrating human rights considerations and processes to their public procurement also have a compelling national interest in encouraging other States to do likewise in order to provide a more level playing field for their own companies when operating abroad.

6.4 States as Vendors to Companies

Much less has been written about the role States can have as a provider of raw materials, goods or services to the private sector. In theory, it is a major unexplored area of leverage in human rights terms.

States as the Provider of Raw Materials and Natural Resources

In most States, natural resources such as oil, gas and mineral deposits are sovereign property regardless of who owns the surface land. These deposits are a valuable resource to their domestic industries but also companies based in other jurisdictions. The need for States to source from other jurisdictions, for security of supply, is reflected in a large number of bilateral agreements between States, and sometimes also in agreements between the companies concerned and Governments of the States in which they are operating. The more cross-cutting nature of these agreements in relation to human rights has already been explored in section 5 of this report, but a few specific examples in relation to natural resources will be made here.

Whilst the Government of **Germany** does not explicitly refer to human rights in either of its bilateral agreements on raw materials with **Kazakhstan**¹⁹⁰ or **Mongolia**¹⁹¹, it does in the general policy of the German Ministry of Economics in relation to such agreements. Countries such as **Japan** and **Switzerland** have similar agreements. Similarly the Government of **France** has a bilateral agreement with **Niger** under which its mainly State-owned company mines for uranium for the French nuclear industry. Countries such as **China** also have a myriad of such supply agreements for their own industries. Others – such as the **UK** – have security and development agreements with countries such as **Somalia**, in contexts where oil and gas exploration by UK-registered companies can also take place.¹⁹² A number of **Gulf States** and companies have developed strong relations with a number of **African** countries for the provision of natural resources for their own industries.¹⁹³ It is not known whether specific references to human rights

¹⁸⁹ Ministry for Foreign Affairs, Government of Finland, “Survey on Internationalisation and Trade Barriers” (2013). Available at:

<http://formin.finland.fi/public/default.aspx?contentid=277185&contentlan=2&culture=en-US>

¹⁹⁰ “Agreement between the Government of the Federal Republic of Germany and the Government of Kazakhstan on Cooperation in the fields of raw materials, industry and technology” (2012). Available at: <http://www.bmwi.de/English/Redaktion/Pdf/agreement-kazakhstan-germany,property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf>

¹⁹¹ “Agreement between the Government of the Federal Republic of Germany and the Government of Mongolia on Cooperation in the fields of raw materials, industry and technology” (2011). Available at: <http://www.bmwi.de/English/Redaktion/Pdf/agreement-between-germany-and-mongolia-cooperation-raw-materials-industry-technology,property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf>

¹⁹² For example: Katrina Mansori “Former Tory Leader spearheads Somali oil deal” Financial Times (6 August 2013). Available at: <http://www.ft.com/cms/s/0/0a9e0f74-febe-11e2-b9b0-00144feabdc0.html>

¹⁹³ For example: Mirna Sleiman, “Wealthy Gulf Investors warm to Africa” Reuters (2 January 2013). Available at: <http://www.reuters.com/article/2013/01/02/us-gulf-africa-investment-idUSBRE9010B520130102>

are made in any of the above agreements, but the opportunity to integrate considerations within these and similar future agreements should be advanced.¹⁹⁴

States as the Provider of Services

States will often provide specific services for their own companies to facilitate trade and market entry. Some of these services have already been discussed in section 5 of this Report, and it is encouraging that some of these – such as export credit or trade-related services – are starting to align more explicitly with human rights standards.

In addition to those already mentioned, States can also provide security for companies as well many services including those relating to infrastructure, transport, energy, education and rule of law, all of which are critical to the effective operation of businesses. Labour provision is another interesting service area in which the States were often historically a primary labour provider to businesses. Today, the role of private or third party labour providers is now an integral part of how most labour markets operate. In a minority of countries, such as **Russia** for example, labour provision remains a core State function and therefore is directly guided by the human rights duties of the State. Labour provision in **China** has been a critical part of its economic development, and legislative developments in relation to labour providers have explicitly aligned these activities to international standards such as the core conventions of the International Labour Organisation.¹⁹⁵ Other States, such as **Bangladesh**, have admitted to having less well regulated labour providers but a sovereign interest in how these providers send workers to third countries and to protect their workers from labour exploitation prevalent in many destination countries.¹⁹⁶ The Government of the **Philippines** and **Mexico** are amongst those that have developed specific consular services to assist in the protection of rights of their migrant workers in specific destination countries.

States as the Provider of Products

States are not traditionally viewed as the provider of products – most of this is administered through public procurement – but financial products are one notable exception. Currencies and other financial products such as sovereign bonds and gilts are essential components of the way that financial markets work and are critical to any business worldwide. The recent financial crisis in **Europe** has demonstrated the critical role such products play in the enjoyment of human rights by whole populations – in particular the capacity of the State to protect and fulfil economic and social rights. State-backed pension funds are another example and no less controversial.

These are such a fundamental relationship that is deserving of a report in its own right, and as such all this Report can do in the limited space available is highlight this important area of further research and engagement. States are very significant vendors to the private sector in ways that sometimes escape analysis. Some of these are integral to the fundamental purpose of States, but others are more strategic and competitive in the global marketplace. Sometimes, such as in decisions to join specific currencies or monetary unions, States agree to provide services to each other and therefore indirectly condition the products and services available to the private sector.

¹⁹⁴ Things are more complex when the role of sovereign wealth funds is considered. There has been a good deal of alarm over claims of so-called “land grabs” by such funds, as well as private interests, over recent years. (See further: For example: Ambrose Evans-Pritchard, “The backlash begins against the world landgrab” Daily Telegraph (12 September 2010). Available at:

http://www.telegraph.co.uk/finance/comment/ambroseevans_pritchard/7997910/The-backlash-begins-against-the-world-landgrab.html). It is note-worthy that a few private companies have publicly distanced themselves from any such activities in their supply chains for reasons of respecting human rights. See further: Mark Tran, “Coca-Cola vows to axe suppliers guilty of land grabbing”, The Guardian (8 November 2013). Available at: <http://www.edie.net/news/6/Coca-Cola-vows-to-axe-suppliers-guilty-of-land-grabbing/>

¹⁹⁵ See further: <http://www.ilo.org/public/english/bureau/program/dwcp/download/china.pdf>, p 3.

¹⁹⁶ See for example, The Dhaka Principles for Migration with Dignity. Available at: www.ihrb.org. See also, European Commission, “Employment and Recruitment Agencies Guide to Implementing the UN Guiding Principles on Business and Human Rights” (2013). Available at: <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/>

Further analysis of the complexities of relationships, and implications for human rights, in States' role as vendors are needed.

6.5 Summary Note

States are powerful economic actors – they can use their ownership, buying and selling power to improve human rights protections within their own value chains and can offer a model to private actors as to how to behave. States have only recently started responding to the need for greater accountability for their economic activities, but also the diplomatic and commercial opportunity of better aligning their economic power with their international obligations, including human rights. Parliamentarians, business, investors and civil society should have high expectations of the State to make significant progress on this issue within the shorter term.

There have been increasing signs of positive trends toward transparency of State-owned enterprises (SOEs), and also their engaging in local human rights dialogues in countries where they operate. Some States have also shown willingness to explore ways that State-ownership can more explicitly be used as an area of diplomatic cooperation and a lever for improving social standards in third countries. While there may remain ambiguities under international law as to when businesses have "State-like" human rights duties, what is beyond doubt is that all SOEs, in their variety of forms, have a responsibility to respect human rights.

Within their public procurement processes, States can also incentivise companies to incorporate human rights considerations, including human rights due diligence, into their operations before they qualify for bidding for Government contracts. Few States currently do so, but indications are that some are actively looking at how best to use this leverage. For those States that have already begun integrating human rights considerations and processes into their public procurement, they have a compelling national interest in encouraging other States to do likewise in order to provide a more level playing field for their own companies when operating abroad.

Much less has been written about the role States can have as a provider of raw materials, goods or services to the private sector. In theory, it is a major unexplored area of leverage in human rights terms.

7. STATES AS PARTNERS IN DEVELOPMENT: OPPORTUNITIES FOR GREATER COOPERATION

7.1 The Key Issues

- Cooperation is seen as an essential component to the way many States approach human rights, and encouraging signs of existing cooperation between States can be seen in the work of their embassies and also multilateral institutions in which they are members (section 7.2).
- A renewed interest in public-private partnerships will help to clarify their future effectiveness in deepening State areas and activities that are now only competitive (section 7.3).
- MSIs are a long-standing and valuable method of cooperation on business and human rights issues, but more focus on cooperation with the global South is needed (section 7.4).
- Fundamental to cooperation and participation is public education, access to information, and freedom of expression (section 7.5).

7.2 Existing Forms of Cooperation

States which see business and human rights purely as an issue related to “corporate social responsibility” may be more likely to treat it as an issue of competition – a strategy that gives an edge to companies in the global marketplace. While many of the underlying trends between State economies remain competitive, such as around access to resources, security and the flows of finance, labour and information for example, this Report suggests, and emerging practice strongly indicates, that cooperation is an essential component to the way States approach human rights and business.

There is already a good amount of engagement between States, businesses, civil society, trade unions, national human rights institutions and rights-holders emerging, as the 1000+ stakeholders that attended the 1st and 2nd Annual UN Annual Forums on Business and Human Rights in 2012 and 2013 attest to.¹⁹⁷ More specifically, encouraging signs of increased cooperation between States can be seen in respect to their practices regarding export credit, mediation, and public procurement. For example, over 20 export credit agencies are now cooperating within the context of the **OECD** “Common Approaches” with an increasing focus on human rights, and over 40 Governments now have functioning National Contact Points (NCPs) under the OECD Guidelines on Multinational Enterprises. Cooperation on relevant issues is intensifying within the **European Union** (through the development of national action plans on business and human rights), as well as within the **ASEAN** region, between **Gulf States** and between National Human Rights Institutions in **Africa**. A growing number of States are seeking to align their efforts on specific issues such as gender discrimination, indigenous peoples, fighting human trafficking and forced labour, conflict minerals, and the worst forms of child labour. Some signs of collaborative policy engagement are also emerging, through the formation of donor groups at local level that take up business and human rights issues, as well as in the proactive agenda of OECD NCPs in specific third countries.

The question for business and human rights, as a movement between States and other actors, is can cooperation can be deepened in areas that are now only competitive?

7.3 Public-Private Partnerships

States are used to collaborating with business partners to achieve commercial and sometimes also developmental goals. Whilst the Millennium Development Goals did not give full consideration to the role of the private sector in their fulfilment, this was a key focus of the mid-term review when a number of direct references to business were added. All indications suggest that the new UN

¹⁹⁷ See: United Nations, Geneva, 2-4 December 2013. Available at: <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013ForumonBusinessandHumanRights.aspx>

Development Goals for the post-2015 context will put a heavy emphasis on public-private partnerships (PPPs), as noted for example in a recent High-Level panel report: “Each priority area identified in the post-2015 agenda should be supported by dynamic partnerships.”¹⁹⁸

There are differing views on the effectiveness of PPPs and their suitability for the provision of public goods for the realisation of human rights. For example, efforts to establish PPPs for the provision of water met a slowdown and reversal in many parts of **Africa** and **Latin America** in late 1990s and 2000s. Whilst the UN Special Rapporteur on the Right to Safe Drinking Water and Sanitation has remained agnostic on the issue of public or private ownership¹⁹⁹, PPPs have remained very localised to specific developments – such as situations where mining companies have become the de facto providers of water in remote areas. There has been greater consensus over the effectiveness of international PPPs when tackling global diseases – with examples such as the Global Fund to Fight AIDS, Tuberculosis and Malaria²⁰⁰ or the Global Alliance for Vaccines and Immunisation.²⁰¹

The post-2015 agenda is bringing a renewed interest in the role of PPPs at the international level. However, there is little research as to what such partnerships might look like if they are to fully respect human rights.²⁰² There are perhaps two initial reflections, based on current experiences of such PPPs:

- Partnerships between State-actors and companies are less controversial when they explicitly aim at tackling international development targets, but become more controversial if they impose new private-public relations at the national or local level;
- Partnerships between NGOs and companies also exist, and can sometimes relate directly to human rights, but challenges of scale-ability exist, as NGOs are unlikely to accept corporate funds for reasons of legitimacy and impartiality.

The UN will need to develop criteria for crucial issues like governance and accountability and human rights in relation to PPPs if the post-2015 discussions on PPPs are to succeed. Existing UN initiatives, such as the Global Compact, will be most effective if they too model the high standards anticipated in post-2015 UN Development Goals.²⁰³

7.4 Multi-stakeholder Initiatives and Other Related Approaches

It could be argued that Multi-stakeholder Initiatives (MSIs) have become a de-facto response by States, businesses, NGOs and to some extent trade unions in recognition of the international governance gaps around business and human rights. Over the past ten years, a number have been developed by States themselves, such as:

- The Kimberley Process
- The Extractive Industries Transparency Initiative
- The Voluntary Principles on Security and Human Rights
- The International Code of Conduct for Private Security Providers

¹⁹⁸ The report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, “A new global partnership: eradicate poverty and transform economies through sustainable development” (UN, 30 May 2013). Available at: http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf

¹⁹⁹ IHRB, “More than a resource: Water, Business and Human Rights” (2011). Available at: http://www.ihrb.org/pdf/More_than_a_resource_Water_business_and_human_rights.pdf

²⁰⁰ See: www.theglobalfund.org

²⁰¹ See: www.gavialliance.org

²⁰² See one exception by GPF, Brot für die Welt and Misereor, “Corporate influence in the Post-2015 process” (January 2014). Available at: http://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_influence_in_the_Post-2015_process_web.pdf

²⁰³ See: IHRB, “The UN Global Compact and Human Rights: Developing a vision for 2020” (October 2010). Available at: http://www.ihrb.org/pdf/UNGC_and_Human_Rights_A4_FINAL.pdf

In other cases, States have helped to initiate supply chain approaches that have been developed by businesses and civil society together, such as:

- The Fair Labour Association
- The Ethical Trading Initiative
- Social Accountability International

In some cases States have been deliberately excluded, such as with the Global Network Initiative, or businesses similarly, such as with the Clean Clothes Campaign. More recently attempts have been made to standardise the way that MSIs are evaluated and assess the value of current arrangements.²⁰⁴

When taken as a whole, it is clear that some Governments – such as the **Netherlands, Norway, UK** and the **US**, have been particularly active in multistakeholder approaches. Far fewer have been at least partly rooted in the global south, though exceptions include:

- The Roundtable on Sustainable Palm Oil, based mainly in Indonesia and **Malaysia**
- The International Cocoa Initiative, based in **Geneva** with national offices in **Ghana** and the **Ivory Coast**
- The Nairobi Process relating to oil and gas exploration, based in **Kenya** and **East Africa**
- The various “Better Work” initiatives of the International Labour Organisation and the International Finance Corporation, such as those in **Cambodia, Jordan** and **Lesotho**.

Multi-stakeholder initiatives (MSIs) do bring States together with other actors on what are complex and sometimes competitive issues, for example security. However, MSIs face a range of commonly accepted challenges:

- They are still dominated mainly by OECD-based States, and in particular **North American and North-West European** States. Efforts are being made to widen the interests and memberships of some MSIs. Exceptions include the Extractive Industries Transparency Initiative that has significantly widened its membership over recent years.
- Similarly, many of the companies involved are also those based in OECD member countries, but efforts are underway to diversify State membership in a number of initiatives. Sometimes there is a “mid-Atlantic” split between **Europe** and **North American** business approaches, leading to two separate initiatives – as has been the case in the Electronics Industry²⁰⁵ or in the apparel sector following the Rana Plaza disaster in **Bangladesh**²⁰⁶.
- Civil society is engaged in most of these initiatives but they place a very heavy resource commitment on NGOs. Human rights NGOs, in particular, are also frustrated at the lack of progress towards governance and accountability measures in some of the initiatives.
- Trade unions have been openly critical of the auditing aspects of the some of the initiatives, partly those in which trade unions are not themselves party.²⁰⁷
- The lack of engagement by communities and civil society organisations based in the **Global South** is a fundamental problem.
- All MSIs and related initiatives are still very much focused on process and find it much harder to demonstrate tangible impact on human rights outcomes. This is still harder if the impact is preventative – i.e. has been focused mainly on due diligence.

²⁰⁴ See further: <http://www.msi-integrity.org/>

²⁰⁵ Contrast the memberships of the Electronics Industry Code (EICC) of Conduct with the Global E-Sustainability Initiative (GeSI), for example.

²⁰⁶ European companies have mainly joined “The Accord” in partnership with the ILO, whilst US-based companies have largely gone for “The Alliance”.

²⁰⁷ See, for example: AFL-CIO, “Responsibility outsourced: social Audits, Workplace certification and twenty years of Failure to protect Worker Rights” (April 2013). Available at: <http://www.aflcio.org/content/download/77061/1902391/CSReport.pdf>

The consensus amongst those interviewed for this Report is that MSIs are still a valuable part of cooperation on business and human rights, but there needs to be more focus on drawing in States from the global South to processes that are accountable as well as relevant to the needs emerging in developing economies.

7.5 Enabling an Information Society

Public awareness of human rights generally remains low across the populations of all States. Such awareness is important in framing expectations of the State as well as participation by citizens in civil and political processes and explaining the rationale for transparency and accountability.²⁰⁸ Whilst some reference to human rights are part of primary or secondary education in many States, aspects relating to the responsibilities and impacts of non-State actors such as business, in the most part, have yet to emerge. This leaves a context in which consumers are poorly informed of and equipped to understand the human rights responsibilities of companies, other than those that directly related to them (i.e. “consumer rights”). If asked to judge a company on its wider impact on communities, society, its workers, suppliers or customers, most consumers would struggle – guided only by media representations, or for the small minority of actively responsible, publicly available materials on the internet. A promising development is the small, but growing, number of law and business schools teaching business and human rights within core their curricula.

As well as integrating business and human rights into school curricula, States therefore need to also think about wider public education. There have been some notable successes in behaviours that relate to specific products, not least the change in public attitudes to smoking worldwide, following the milk scare in **China** or meat tracing in **Europe**. It would seem that consumer health resonates more strongly with the wider public than most other business and human rights issues. Beyond this, consumers – and even experts – find it hard to objectively rate the societal impacts of businesses and their leaders.²⁰⁹ Public education on how the public might best evaluate the performance of companies is an unmet need almost universally, and one in which the State has a central role.

More fundamental is public information. Business and human rights can only proceed as an evolving issue of public policy if the facts are available to rights-holders within society and not just to those narrowly defined as “stakeholders” to a specific company.²¹⁰ As noted in previous sections of this Report, on issues such as formal corporate reporting and contract disclosure, transparency is becoming the central priority for those States wishing to advance greater accountability on human rights performance by business. This accountability objective is hinged on active third party scrutiny by States’ citizens and civil society. Such scrutiny first requires freedom of information laws, and disclosure in practice, in order to empower the public in their acquisition of knowledge – the effect being the ability of any rights-holder to understand and exercise their rights, ensure they are being respected, and seek and effectively access remedy should their rights be infringed.

Balanced against this is the need for legitimate commercial confidentiality where this is necessary to safeguard the competitiveness of a company. States must define this threshold as clearly as possible. The threshold might sit differently in the case of State-owned enterprises or other interactions with States as economic actors, such as in public procurement, where freedom of information requests might be applicable. States also need to be clear as to when private disclosures by a company in mediation processes, such as those under the OECD Guidelines on Multinational Enterprises, might be subject to full disclosure – as this will have a direct effect on the mediation itself.

²⁰⁸ See for example, materials available through the UN Office of the High Commissioner for Human Rights: <http://www.ohchr.org/EN/ISSUES/EDUCATION/TRAINING/Pages/HREducationTrainingIndex.aspx>

²⁰⁹ Note, for example data on “Trust” from the Edelman annual “Trust Barometer”. Available at: <http://www.edelman.com/insights/intellectual-property/trust-2013/>

²¹⁰ Note the work of the Business and Human Rights Resource Centre in this regard. Available at: www.business-humanrights.org

Freedom of expression on-line, facilitated by the private companies who often control access to the network and run on-line services such as social media, remains a valuable underpinning of an open and fair society.²¹¹ Free or more widely affordable internet access is a key enabler to both access to information as well as education and should be prioritised by States for the future. States must also avoid creating a “chilling effect” on freedom of expression and arbitrary interference with the right to privacy through excessive data gathering and sharing practices.²¹² States must strive to carefully balance their own national security concerns with those that protect the privacy, freedom of expression and right to information of citizens.

7.6 Summary Note

States demonstrated an unprecedented willingness to cooperate on business and human rights during the development of the UN Guiding Principles. They should continue in that spirit of cooperation today to innovate and work together in advancing implementation of the business and human rights agenda, avoiding making this a competitive topic only for the commercial sections of their trade departments.

Greater cooperation between States on business and human rights can take many forms. More partnerships between the UN and business, particularly in the emerging call for more public-private partnerships in the context of the post 2015 development agenda, are expected and would benefit from the perspective and experience of the UN Guiding Principles in developing much needed criteria around governance and accountability. Multistakeholder initiatives are an established method of cooperation amongst States, businesses, trade unions and civil society, but more focus on engagement with the global South is needed. Though a key driver of accountability, public awareness of human rights and the responsibilities and impacts of business remains low across the populations of all States. Enabling an information society is a key avenue States can pursue in empowering the public to ensure their own rights are being respected.

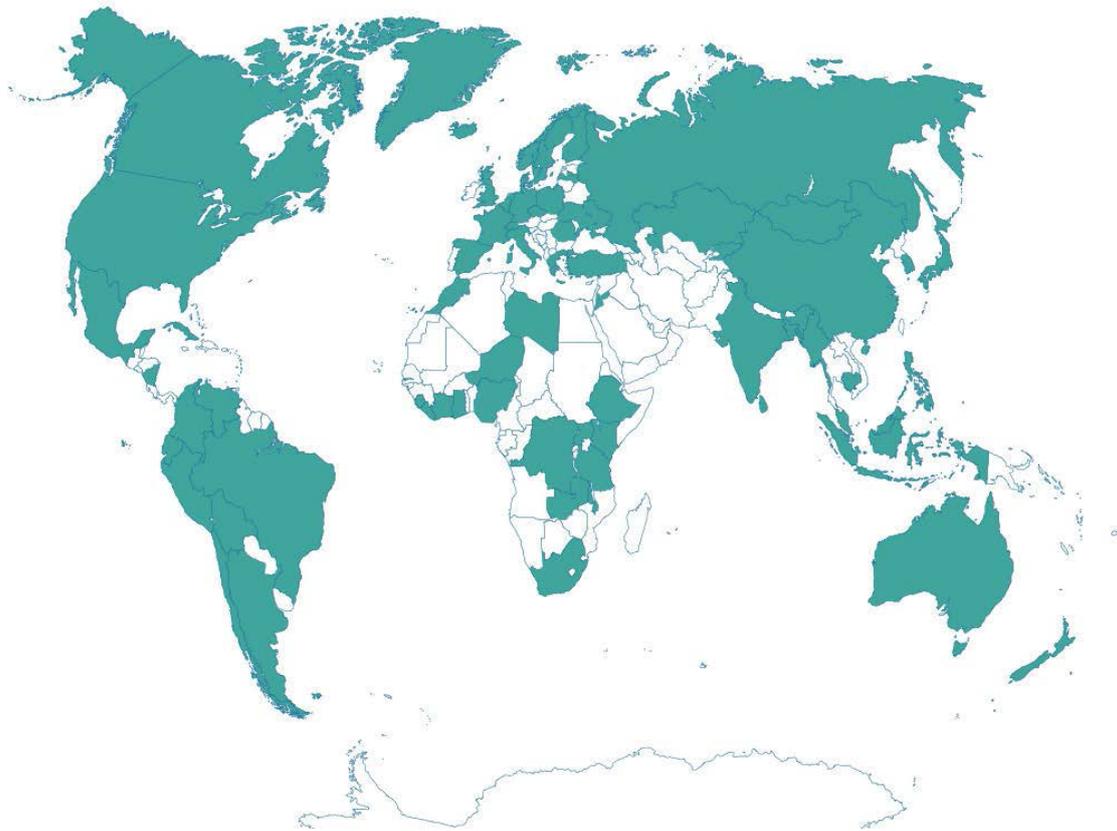
²¹¹ See UN Human Rights Council Resolution, “The promotion, protection and enjoyment of human rights on the Internet” (29 June 2012), A/HRC/20/L.13. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G12/147/10/PDF/G1214710.pdf?OpenElement>

²¹² See further: IHRB, “Big Data, Big Government, Big Companies: NSA data gathering raises new questions about corporate human rights responsibilities” (June 2012). Available at: <http://www.ihrb.org/commentary/staff/big-data-big-government-big-companies.html>; see also: IHRB, “Part II: Telecommunications companies must join the debate on surveillance” (June 2012). Available at: <http://www.ihrb.org/commentary/staff/telecommunications-companies-must-join-the-debate-on-surveillance.html>

COUNTRY INDEX

Argentina	36, 41	Luxembourg	31, 36, 41
Australia	31, 36, 40, 41, 46, 48	Malawi	41
Bangladesh	10, 13, 57, 61	Malaysia	31, 61
Belgium	36, 41, 46	Mexico	31, 41, 46, 57
Bolivia	40, 46	Mongolia	56
Brazil	13, 27, 31, 32, 41, 52	Morocco	41
Myanmar	6, 30, 33, 38, 41, 49, 53	Netherlands	33, 36, 38, 41, 46, 49, 52, 54, 61
Cambodia	44, 61	New Zealand	27, 31, 44
Canada	36, 38, 41, 44-46, 48	Nicaragua	40
Chile	13, 31, 41, 44, 46	Niger	56
China	13, 26, 31, 32, 38, 51, 52, 56, 57, 62	Nigeria	38
Colombia	15, 28, 31, 44	Norway	28, 30-33, 36, 41, 50, 52, 54, 61
DRC	29, 36, 38	Pakistan	13, 40
Cote d'Ivoire	31, 61	Peru	40, 49
Cuba	40	Philippines	26, 27, 31, 57
Czech Republic	36	Poland	36, 46
Denmark	13, 27, 28, 29, 32, 33, 51	Romania	36
Ecuador	40, 46, 48, 52,	Russia	15, 57
Ethiopia	48	Scotland	54
Finland	3, 32, 33, 46, 49, 50, 52, 54-56	Sierra Leone	48
France	28, 29, 33, 36, 37, 40, 52, 56	Singapore	27, 31, 32
Germany	16, 38, 56	South Africa	13, 15, 16, 27, 30-33, 36, 39, 51
Ghana	41, 48, 61	South Korea	41, 46
Greece	33	Spain	33, 36, 52
Hong Kong	26, 32	Sri Lanka	40
Iceland	29, 52	Sweden	27, 32, 46, 50, 52
India	15, 27, 31, 32, 41, 52	Switzerland	33, 41, 46, 55, 56
Indonesia	27, 31, 32, 36, 52, 61	Tanzania	49
N. Ireland	54	Turkey	32
Italy	36, 38	Uganda	15, 37, 41
Japan	33, 36, 41, 46, 56	Ukraine	38
Jordan	44, 61	UK	12, 15, 16, 18, 19, 21, 26, 29, 36, 38-41, 49, 51, 54, 56
Kazakhstan	56	US	13, 15, 29, 36, 37, 39, 44, 54, 56, 61
Kenya	16, 53, 61	Venezuela	40
Kyrgyzstan	40	Zambia	49
Latvia	46		
Liberia	15, 47, 48		
Libya	36		

COUNTRIES REFERENCED



The Institute for Human Rights and Business is dedicated to being a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards. The Institute works to raise corporate standards and strengthen public policy to ensure that the activities of companies do not contribute to human rights abuses, and in fact lead to positive outcomes.

How can international human rights standards and frameworks be more firmly embedded within the economic activities of the State? Discussions in this area are often framed around the importance of policy coherence, but the issues revolve even more fundamentally around questions of motivations, incentives and disincentives. Maximising economic gains and attaining social justice are key foundations of the modern globalised era. Given the complexity of the nexus between the two, competing priorities often make policy coherence harder to achieve than checklists or action plans would suggest.

This “state of play” Report aims to stimulate deeper thinking and more candid and serious conversation on the links between economic policies and human rights policies for States, and between departments within governments, as well as spur a more informed dialogue on this subject with other actors, including business and civil society. It gives examples from over 70 countries of recent State action within these two interdependent agendas, and suggests that enhanced cooperation within and amongst States is needed if the promotion and regulation of more socially and environmentally sustainable business practices is to lead to better human rights outcomes.

Institute for Human Rights and Business

34b York Way
London, N1 9AB
UK

Phone: (+44) 203-411-433
Email: info@ihrb.org
Web: www.ihrb.org

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