

UN Guiding Principles on Business and Human Rights at 10

*The Impact of the UNGPs on Courts
and Judicial Mechanisms*



Disclaimer

This report has been prepared in conjunction with the 'UNGPs 10+' project organized by the United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to mark ten years since the adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council in 2011.

This report is designed to provide an overview of the application of the UNGPs by judicial and quasi-judicial mechanisms, and is prepared on the basis of material available generally up to January 2021. It is not intended nor is it to be used as a substitute for legal advice. The information provided to you in this report is not intended to create and does not create an attorney-client relationship with Debevoise or with any lawyer at Debevoise. You may inquire about legal representation by contacting the appropriate person at Debevoise.

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TABLE OF ABBREVIATED TERMS

ACHR	American Convention on Human Rights
ACHPR Reporting Guidelines	State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment, adopted by the African Commission at its 62nd Ordinary Session (May 2018)
ACtHPR	African Court on Human and Peoples' Rights
ADR	Alternative dispute resolution
AfCFTA	African Continental Free Trade Area
African Charter	African Charter on Human and Peoples' Rights
African Charter Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
BHR	Business and human rights
BIT	Bilateral investment treaty
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
COMESA	Common Market for Eastern and Southern Africa
CRC	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate social responsibility
Debevoise	Debevoise & Plimpton LLP
DIHR	Danish Institute for Human Rights
EC	European Commission
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States

ECtHR	European Court of Human Rights
ESG	Environmental, social and governance
EU	European Union
Hague Rules	Hague Rules on Business and Human Rights Arbitration
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMM Framework	International Council on Mining & Metals Sustainable Development Framework
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTRM	International Criminal Tribunal Residual Mechanism
ICTY	International Criminal Tribunal for Yugoslavia
IFC	International Finance Corporation
ILO	International Labour Organization
ILO Declaration	ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977 (as amended in 2017)
ISO	International Organization for Standardization
Malabo Protocol	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
NAP	National action plan
NBA	National baseline assessment
NCP(s)	National contact point(s)
NGO(s)	Nongovernmental organization(s)
NHRI(s)	National human rights institution(s)

NSR Policy	Costa Rica's National Social Responsibility policy or Política Nacional de Responsabilidad Social
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises 1976 (as amended)
OEWG	Open-Ended Intergovernmental Working Group on Transnational Corporation and other Business Enterprises with respect to Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCA	Permanent Court of Arbitration
SADC	Southern African Development Community
SCSL	Special Court for Sierra Leone
SDGs	Sustainable Development Goals
SOMO	Centre for Research on Multinational Corporations
SRSO	Special Representative of the Secretary General
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council
UN Working Group	United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises
UPR	Universal Periodic Review
UPRWG	Universal Periodic Review Working Group
VPSHR	Voluntary Principles on Security and Human Rights
WTO	World Trade Organization



I. INTRODUCTION

A. Scope and Context of Report

1. This report was commissioned by the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (“**UN Working Group**”), as part of its UNGPs 10+ project. The UNGPs 10+ project marks the tenth anniversary of the unanimous endorsement of the United Nations Guiding Principles on Business and Human Rights (“**UNGPs**”) by the UN Human Rights Council (“**UNHRC**”) on 11 June 2011.² It provides a timely moment to “take stock of achievements to date, assess existing gaps and challenges, and, most importantly, develop an ambitious vision and roadmap for implementing the UNGPs more widely and more broadly between now and 2030”.³
2. This report examines the reach and impact of the UNGPs on the decisions of national, regional, and international judicial and quasi-judicial bodies across more than 50 jurisdictions. While the primary focus of this report is on express references to the UNGPs by judicial and quasi-judicial bodies, it also analyzes: (i) references to other nonbinding business and human rights (“**BHR**”) standards seeking to achieve similar goals; and (ii) other efforts to address business accountability and responsibility for adverse human and labor rights impacts in the jurisdictions considered.
3. Why the focus on judicial and quasi-judicial decisions? Pillar III of the UNGPs requires that States and businesses ensure the availability of remedies in the event of adverse human rights impacts. Judicial and quasi-judicial mechanisms therefore play a central role in ensuring the effectiveness of the UNGPs.
4. This report supports the following work product, which will be submitted by the UN Working Group to the UNHRC around the time of the UNGPs’ 10th anniversary in June 2021:
 - (i) A report to the UNHRC to provide a baseline, vision, and ambition for the next phase of implementation of the UNGPs by assessing progress to date, highlighting existing boundary-pushing practices, documenting impediments to wider and deeper action, and considering how to leverage more robust policy action for transformational change towards 2030 and beyond.
 - (ii) A “Roadmap for the Next Decade”, informed by multistakeholder input, setting out an implementation strategy with goals and targets for States, business enterprises and associations, international organizations, and other actors, to be launched at a dedicated event marking the 10th anniversary of the UNGPs.

² Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, endorsed by the UN Human Rights Council in its resolution 17/4 of 6 July 2011 (A/HRC/RES/17/4).

³ Office of the United Nations High Commissioner for Human Rights, “UN Guiding Principles on Business and Human Rights at 10” ([link](#)).

B. Methodology for Report

5. The methodology for compiling this report consisted first of identifying the jurisdictions on which we would focus our research. In the first instance, we identified jurisdictions with established National Contact Points (“NCPs”) under the Organization for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises 1976 (as amended) (“OECD Guidelines”) and jurisdictions which have or are in the process of enacting a National Action Plan (“NAP”),⁴ on the grounds that these jurisdictions have demonstrated a threshold level of commitment to businesses’ respect for human rights. A small number of other jurisdictions were also included in this report to ensure broad geographic coverage.⁵ We also reviewed decisions of international and regional courts and tribunals, many of which have adjudicated BHR issues.
6. We then undertook broadly the same two-stage process for each jurisdiction. *First*, we reviewed judicial, quasi-judicial, and NCP decisions for any references to: (i) the UNGPs or the OECD Guidelines; (ii) other international human rights standards the UNGPs seek to protect such as the International Labour Organization (“ILO”) conventions; and (iii) other BHR standards. *Second*, secondary sources—including book chapters, journals, reports, and policy documents—were reviewed to assess the wider use of the UNGPs, along with broader BHR developments. For certain jurisdictions, we sought and received the assistance of local counsel.⁶ This report is prepared on the basis of materials available to us and local counsel generally up to January 2021.

(1) Court Decisions

7. Generally, court decisions citing or discussing the UNGPs, OECD Guidelines, or similar guidelines⁷ were located from national legal databases, law reports, and court archives.⁸

⁴ For example, Ghana, Kenya, Mozambique, Nigeria, South Africa, Tanzania, Uganda, and Zambia were selected due to their NAP, or commitment to one, despite not having established an NCP.

⁵ For example, Bahrain, Lebanon, Palestine, Qatar, and Saudi Arabia.

⁶ These jurisdictions include Egypt, Finland, Ghana, Greece, Israel, Japan, Jordan, Kazakhstan, Kenya, Lebanon, Mexico, Morocco, Mozambique, Nigeria, Palestine, Poland, Portugal, Qatar, South Africa, South Korea, Spain, Sweden, Switzerland, Tanzania, Tunisia, Turkey, Uganda, Ukraine, and Zambia.

⁷ These include the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977 (as amended in 2017) (“ILO Declaration”), the OECD Guidelines, the International Organization for Standardization’s (“ISO”) ISO 26000 social responsibility standards, the International Finance Corporation (“IFC”) Performance Standards on Environmental and Social Suitability, and the UN Global Compact. In the International Courts and Tribunals chapter, wider search terms were also used, including: “Ruggie”; “Protect, Respect and Remedy”; “Protect, Remedy, Respect”; “guiding principles”; and “business and human rights”.

⁸ These included subscription-based databases, such as Westlaw, JustisOne, and Lexis Advance, as well as free-to-access online sources, such as Australasian Legal Information Institute, Jade, Courts in Japan, New Zealand Legal Information Institute, British and Irish Legal Information Institute, Irish Legal Information Initiative and the Court Service Ireland, and the Weekly Judiciary Gazette. Where decisions were not published in easily searchable databases such as: (i) the Communications and Activity Reports of the African Commission on Human and Peoples’ Rights; (ii) decisions of the African Court on Human and Peoples’ Rights; and (iii) decisions of the Economic

8. There was limited access to such decisions in certain jurisdictions. In particular, decisions of lower courts were not publicly available in many of the jurisdictions we researched.⁹

(2) NCP Decisions

9. NCP decisions were accessed using the relevant government website, the OECD website,¹⁰ or the OECD Watch case database.¹¹

(3) Secondary Sources and Broader Trends

10. The research for this report relies on a number of secondary sources, including book chapters, journals, reports, and commentaries.¹² The review of secondary sources helped to shed light on the wider implementation and application of the UNGPs along with key policy developments concerning BHR in each jurisdiction. We also analyzed the work of national human rights institutions (“**NHRI(s)**”), countries’ NAPs, and other policy tools adopted by States on the topic of BHR.

(4) Interactions with Relevant Stakeholders

11. A draft of this report was provided to the UN Working Group in March 2021, and the final version of this report reflects the comments received from the UN Working Group.

Community of West African States (“**ECOWAS**”) Court of Justice, decisions were downloaded and uploaded to Transperfect Legal Solutions’ “Digital Reef” platform to make them searchable.

⁹ We also faced some practical challenges. In Mozambique, judicial decisions are published at the discretion of judges, which made a systematic review of jurisprudence challenging. In Nigeria, local counsel were unable to undertake a complete review of national court decisions as many such documents were no longer physically accessible due to the destruction of a court building.

¹⁰ OECD, “Database of specific instances” ([link](#)).

¹¹ OECD, “OECD Watch” ([link](#)).

¹² Journals either publicly available or accessed via databases such as HeinOnline.



II. THE UNGPS AND OTHER RELEVANT STANDARDS

A. The UNGPs

(1) Introduction to the UNGPs

12. The UNGPs¹³ consist of 31 principles setting out “the respective duties and responsibilities of governments and business enterprises to prevent and address [adverse impacts] on people resulting from business activities”.¹⁴ Although voluntary in nature, the UNGPs are not mere guidelines. As a result of their unanimous endorsement by the UNHRC in 2011, the UNGPs are “a globally recognized and authoritative framework”¹⁵ applicable to States and businesses alike.
13. The genesis of the UNGPs can be traced back to 2005, when the UN Commission on Human Rights (the UNHRC’s predecessor) created the mandate of the Special Representative of the Secretary General “on the issue of human rights and transnational corporations and other business enterprises” (“SRSG”).¹⁶ The initial mandate lasted two years and involved researching and identifying existing standards and practices within the area of BHR. In 2007, the UNHRC renewed the SRSG’s mandate for another year. In 2008, the SRSG presented the UN “Protect, Respect and Remedy” Framework (“UN Framework”) to the UNHRC, which was to form the basis of the UNGPs. In its Resolution 8/7, the UNHRC unanimously endorsed the UN Framework and extended the SRSG’s mandate until June 2011, tasking the SRSG with providing recommendations for the practical implementation and operationalization of the UN Framework.¹⁷
14. The UNHRC later agreed that such recommendations would take the form of “guiding principles”, to be developed through research and consultation with impacted stakeholder groups globally, including business enterprises and communities directly affected by business activities. Following an extensive consultation process, the UNGPs were submitted to the UNHRC on 21 March 2011.¹⁸ In June 2011, the UNHRC unanimously endorsed the UNGPs.¹⁹
15. The UNGPs have been widely endorsed by a variety of stakeholders, including companies, business organizations, civil society organizations, trade unions, national and regional

¹³ Office of the High Commissioner for Human Rights, “Guiding Principles on Business and Human Rights” (2011) ([link](#)).

¹⁴ UN General Assembly, “Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises” A/73/163 (16 July 2018) at ¶ 1 ([link](#)).

¹⁵ *Id.*

¹⁶ Office of the High Commissioner for Human Rights, “Human Rights Resolution 2005/69 Human rights and transnational corporations and other business enterprises” (20 April 2005).

¹⁷ UN Human Rights Council, “Resolution 8/7 Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises” (18 June 2008).

¹⁸ UN Human Rights Council, “Resolution 17/4 Human rights and transnational corporations and other business enterprises” (6 July 2011).

¹⁹ Office of the High Commissioner for Human Rights, “Frequently Asked Questions about the Guiding Principles on Business and Human Rights” (2014), p 1 ([link](#)).

institutions, and other stakeholder groups.²⁰ A growing number of multinational corporations have expressly committed to implementing or to be guided by the UNGPs in their policies and practices.²¹

16. By encouraging businesses to respect human rights, by identifying and mitigating adverse human rights impacts, the UNGPs are considered to be a foundational tool in realizing the UN's Sustainable Development Goals ("SDGs").²² The SDGs are internationally agreed development goals that were adopted by the UN General Assembly as part of the 2030 Agenda for Sustainable Development.

(2) The Three Pillars: Protect, Respect and Remedy

17. The UNGPs have a tripartite framework and are grounded in recognition of three Pillars:
 - (i) **Pillar I (Protect):** Pillar I reflects States' existing obligations to respect, protect, and fulfil human rights and fundamental freedoms in the BHR context—the UNGPs do not create new obligations for States. In meeting their duty to protect human rights, States should "[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps [...]"²³ This domestic legal framework provides the basis on which local judicial and quasi-judicial bodies can adjudicate, uphold or provide a remedy for private enterprises' failure to respect human rights standards.
 - (ii) **Pillar II (Respect):** Pillar II reflects corporations' duty to respect human rights. As such, the UNGPs reflect existing obligations under domestic law and draw upon international soft law instruments, such as the OECD Guidelines, to "constitute a global standard of expected conduct applicable to all businesses in all situations".²⁴

Substantively, Pillar II entails that a business' responsibility to respect human rights refers, at a minimum, to the rights set out in the Bill of Rights—which comprises the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the Universal

²⁰ *Id.*

²¹ See, e.g., Total, "Human Rights — UNGP"; The Coca Cola Company, "Human Rights Principles" ([link](#)); Cisco, "Global Human Rights Policy"; ([link](#)) Unilever, "Human rights in our own operations" ([link](#)); AT&T, "AT&T's Human Rights Policy" ([link](#)); Deutsche Bank, "Human Rights" ([link](#)); Yamaha, "Respect for Human Rights" ([link](#)). In addition to corporations, prominent organizations that have done so include the International Chamber of Commerce, FIFA, the International Trade Union Confederation, and the International Council of Mining and Metals. See, e.g., International Chamber of Commerce, "Engagement with the United Nations on Business and Human Rights — Key Messages" (10 March 2019) ([link](#))

²² A. Ramasastry, "Keynote remarks at webinar on implementing human rights due diligence in global supply chains" (10 December 2020) ([link](#)).

²³ Office of the High Commissioner for Human Rights, "Guiding Principles on Business and Human Rights" (2011) Commentary to Principle 3, pp 5-6 ([link](#)).

²⁴ Office of the High Commissioner for Human Rights, "The Corporate Responsibility to Respect Human Rights: An Interpretative Guide" (2012) Response to Q8 at p 14 ([link](#)).

Declaration of Human Rights (“UDHR”)—as well as the fundamental rights set out in the ILO’s Declaration on Fundamental Principles and Rights at Work. The latter includes the core principles of freedom of association and collective bargaining, the abolition of child labor, and the elimination of forced labor and discrimination in respect of employment. The UNGPs also specify that other human rights standards may apply where the circumstances so require:

“[f]or instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, UN instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law”.²⁵

- (iii) **Pillar III (Remedy):** A State’s duty to protect under human rights law includes ensuring that effective remedies are available in the event of adverse human rights impacts.²⁶ “Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless”.²⁷ Providing access to an effective remedy also “helps stop further harms, influences improvements in corporate practices, and has the potential to improve relationships by recognizing what’s gone wrong and putting it right”.²⁸ It is considered “a major and urgent challenge for achieving meaningful process” and “a reality check on how far or not we have actually gone, regarding real and tangible implementation”.²⁹ Accordingly, UNGPs Principle 25 reminds States to take “appropriate steps to ensure” that those affected by business-related human rights abuses within their territory and/or jurisdiction “have access to effective remedy”.³⁰

²⁵ Office of the High Commissioner for Human Rights, “Guiding Principles on Business and Human Rights” (2011), Commentary to Principle 12, p 14 ([link](#)).

²⁶ See also UN General Assembly, “Human Rights and Transnational Corporations and other Business Enterprises” A/72/162 (18 July 2017) ([link](#)). This report addresses the interrelationship among the right to effective remedy, access to effective remedy, access to justice, and corporate accountability. It also examines the issue of effective remedies from the perspective of rights holders and proposes that remedial mechanisms should be responsive to the diverse experiences and expectations of rights holders.

²⁷ Office of the United Nations High Commissioner for Human Rights, “Guiding Principles on Business and Human Rights”, p 27 ([link](#)).

²⁸ A. Ramasastry and D. Pesce, “Remarks delivered at the closing plenary, 2020 UN Forum on Business and Human Rights” (18 November 2020) ([link](#)).

²⁹ D. Pesce, “Keynote remarks at B+HR Asia Lab 4 Towards the Next Decade of Action” (30 November 2020) ([link](#)).

³⁰ Office of the High Commissioner for Human Rights, “Guiding Principles on Business and Human Rights” (2011), Principle 25 ([link](#)).

States should provide effective and appropriate nonjudicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

18. In respect of Pillar III, the UNGPs make clear that “[e]ffective judicial mechanisms *are at the core of ensuring access to remedy*”.³¹ Other quasi-judicial bodies, nonjudicial bodies, and human rights institutions also have an important role to play in providing appropriate remedies. UNGPs Principle 27 specifies that: “States should provide effective and appropriate nonjudicial grievance mechanisms, *alongside* judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse”.³² Similarly, the Edinburgh Declaration by the Commonwealth of Nations “[e]mphasizes the important role [NHRIs] can play in addressing corporate-related human rights challenges, both as a body at the international level, at the regional level and individually at the national level”.³³
19. Finally, it is worth noting that the mere existence of appropriate judicial and quasi-judicial bodies may not, in and of itself, suffice to ensure that effective remedies exist. Factors such as the “impartiality, integrity and ability [of such mechanism] to accord due process”, as well as the existence of any barriers to justice, are important because they impact the availability and accessibility of remedies.³⁴ As the UNHRC has noted, given the transnational nature of business activity, cross-border cooperation between States may also strengthen efforts to provide an adequate remedy where adverse human rights impacts occur.³⁵

(3) UNGPs 10+

20. The goal of the UNGPs10+ project is to ensure more expansive and effective implementation of the UNGPs. It looks to place the UNGPs at the center of a global society for the post-COVID era:

“The UNGPs [...] need to be seen as pivotal to the new decade’s key agendas for sustainable and responsible business, including rebuilding a sustainable and more resilient post-COVID global economy; achieving the SDGs (including SDG 16 of

³¹ *Id.* Commentary to Principle 26, p 28. Emphasis added.

³² *Id.* Principle 27, p 30. Emphasis added.

³³ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, “The Edinburgh Declaration”, 10 October 2010 ([link](#)).

³⁴ Office of the United Nations High Commissioner for Human Rights, “Guiding Principles on Business and Human Rights”, pp 28-30 ([link](#)).

³⁵ See, e.g., UN General Assembly, “Best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights: Study of the Working Group on the issue of human rights and transnational corporations and other business enterprises” A/HRC/35/33 (25 April 2017) ([link](#)).

promoting just, peaceful and inclusive societies, and SDG 17 of revitalizing global partnerships); implementing the Secretary-General’s Call to Action on Human Rights; achieving a just transition to a green economy by 2050; addressing the growing inequalities and injustices of which the most vulnerable are bearing the brunt; making rapid technological change work for all people; and recalibrating the relationship between business and society”.³⁶

21. The UNGPs 10+ project will examine opportunities for scaling up the implementation of the UNGPs over the next decade. The role of effective regulation has been identified as one of the main drivers for changing business practice.³⁷ Increased regulation, in turn, is likely to lead to an increasing number of judicial and quasi-judicial decisions in this area.



B. Other BHR Tools and Standards

(1) National Action Plans

22. NAPs are policy documents articulating a State’s position with regard to a particular policy area and providing a roadmap for future policy commitments and legislation. As part of its mandate to promote the UNGPs, the UN Working Group has encouraged States to develop and enact NAPs that specifically address BHR.³⁸ As noted above, the adoption of an NAP

³⁶ United Nations Human Rights Special Procedures, “Business and human rights: towards a decade of global implementation” (2021), pp 2-3 ([link](#)).

³⁷ United Nations Human Rights Office of the High Commissioner, “UN Guiding Principles on Business and Human Rights at 10” ([link](#)).

³⁸ See, e.g., UN Working Group, “Guidance on National Action Plans on Business and Human Rights” (November 2016) ([link](#)).

signals a State's threshold commitment to advancing the BHR agenda and is used as a criterion for inclusion in this report.

23. States use NAPs to enhance coordination and coherence across various public policy streams relating to BHR, as well as to identify concrete legislative and regulatory commitments.³⁹ At the same time, NAPs allow for ongoing multi-stakeholder dialogue and provide a platform for international cooperation, coordination and an exchange of good practices.⁴⁰ The process of developing an NAP may also provide States with information on regulatory, institutional, and remedial gaps.⁴¹

(2) OECD Guidelines for Multinational Enterprises

24. In addition to the UNGPs, a number of other nonbinding BHR standards have been referenced in judicial and nonjudicial decisions. These include guidelines issued by the OECD and the ILO, which the UN Working Group has identified as closely aligned with the UNGPs.⁴² Notably, similar to the UNGPs, the OECD, and ILO guidelines both contain the concept of human rights due diligence.
25. The OECD first issued its Guidelines in 1976, and updated them in 2011. The OECD Guidelines are recommendations addressed to multinational enterprises operating in countries which have agreed to adhere to them. They are broad in scope and are concerned with corporate behavior in many areas, including tax, competition, bribery, labor relations, the environment, and human rights. They “provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards”⁴³ and recognize the role that international business may play in defining the nature of a global society: “[t]he common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise”.⁴⁴ The OECD Guidelines represent the only multilaterally agreed and comprehensive code of responsible business conduct.⁴⁵
26. In 2011, a human rights chapter, consistent with the UNGPs' framework, was added to the OECD Guidelines. The OECD has also issued its own due diligence guidance to assist in the implementation of the OECD Guidelines.

³⁹ *Id.* p 1.

⁴⁰ *Id.*

⁴¹ *Id.* pp 7-8.

⁴² See, e.g., A. Ramasastry, “Keynote remarks at webinar on implementing human rights due diligence in global supply chains” (10 December 2020) ([link](#)); D. Pesce, “Keynote remarks at B+HR Asia Lab 4 Towards the Next Decade of Action” (30 November 2020) ([link](#)).

⁴³ OECD, “OECD Guidelines for Multinational Enterprises” (2011), p 13 ([link](#)).

⁴⁴ *Id.* p 14.

⁴⁵ *Id.* p 3.

27. The OECD Guidelines also envisage the establishment of NCPs “to further [their] effectiveness”.⁴⁶ Although the mandate and process of each NCP varies, they commonly address complaints that a company has allegedly not lived up to its responsibilities under the OECD Guidelines through a process akin to mediation. In upholding and implementing the human rights chapter of the OECD Guidelines, NCPs are therefore implicitly advancing the principles underlying the UNGPs, particularly with respect to Pillar III. We have therefore included in this report decisions of NCPs in those jurisdictions where they have been established.

(3) ILO Declaration

28. As noted above, the UNGPs refer to the principles set out in the ILO’s Declaration on Fundamental Principles and Rights at Work (which in turn refers to the fundamental rights contained in the eight ILO core conventions). Furthermore, the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977—the only ILO instrument that provides guidance to enterprises on social policy and sustainable workplace practices—was updated in 2017 to reflect the UNGPs.⁴⁷ Similarly, references to the UNGPs can be found in a number of more recent ILO initiatives such as its proposals on decent work in global supply chains.⁴⁸

(4) Other BHR Standards

29. A number of other BHR standards mentioned in this report likewise reflect the aims of the UNGPs:
- (i) **ISO 26000 Social Responsibility standards:** The International Organization for Standardization (“ISO”) is an independent, nongovernmental organization which seeks to develop international standards.⁴⁹ The ISO 26000 Social Responsibility standards were developed to assist organizations in contributing to sustainable development, requiring them to “consider societal, environmental, legal, cultural, political, and organisational diversity ... while being consistent with international norms of behaviour”.⁵⁰ ISO 26000 is reviewed periodically and aligns with the UNGPs, OECD Guidelines, and the UN Global Compact.
 - (ii) **Equator Principles:** The Equator Principles are a voluntary risk management framework designed for financial institutions to “provide a minimum standard for

⁴⁶ OECD Website, “National Contact Points for the OECD Guidelines for Multinational Enterprises” ([link](#)).

⁴⁷ International Labour Organisation, “ILO revises its landmark Declaration on multinational enterprises” (March 2017) ([link](#)).

⁴⁸ International Labour Organisation, “Reports of the Committee on Decent Work in Global Supply Chains: Resolution and conclusions submitted for adoption by the Conference” (May–June 2016) ([link](#)).

⁴⁹ ISO, “What we do” ([link](#)).

⁵⁰ ISO, “Discovering ISO 26000” (2018), p 7 ([link](#)).

due diligence and monitoring to support responsible risk decision-making”.⁵¹ Equator Principle 2 specifically states that a client of a financial institution “should refer to the UNGPs when assessing Human Rights risks and impacts”.⁵² Equator Principle 6, which requires institutions to set up a grievance mechanism for affected communities, refers to the UNGPs as a source of additional guidance.

- (iii) **International Finance Corporation Performance Standards on Environmental and Social Sustainability:** The International Finance Corporation (“IFC”) is the largest global development institution focused on providing finance to the private sector in developing countries.⁵³ The Performance Standards are directed towards the IFC’s clients as they implement and operate projects that are financed by the IFC. The Performance Standards provide guidance on identifying sustainability risks and adverse impacts⁵⁴ and were amended in 2012 to strengthen the due diligence obligations.⁵⁵ The accompanying guidance to the Standards specifically states that Performance Standard 1—the Assessment and Management of Environmental and Social Risks and Impacts—reflects the “respect” and “remedy” pillars of the UNGPs.⁵⁶
- (iv) **UN Global Compact:** The UN Global Compact describes itself as the “world’s largest corporate sustainability initiative”.⁵⁷ It supports companies to: (i) conduct their business responsibly by aligning their strategies and operations with ten principles on human rights, labor, environment, and anti-corruption; and (ii) take strategic actions to advance broader societal goals, such as the SDGs. The Compact’s ten principles are derived from the UDHR, the ILO’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption. The human and labor rights that the Compact refers to are aligned with those underlying the UNGPs.⁵⁸

⁵¹ Equator Principles, “The Equator Principles” ([link](#)).

⁵² Equator Principles, “The Equator Principles” (July 2020), Statement of Principles, p 2 ([link](#)); *id.* Preamble, p 3.

⁵³ International Finance Corporation, “About IFC” ([link](#)).

⁵⁴ International Finance Corporation, “IFC Performance Standards on Environmental and Social Sustainability - Effective January 1, 2012” (January 2012), p i ([link](#)).

⁵⁵ International Finance Corporation, “Annex A. Summary of Key Changes in the Sustainability Policy and Performance Standards” ([link](#)).

⁵⁶ International Finance Corporation, “International Finance Corporation’s Guidance Notes: Performance Standards on Environmental and Social Sustainability” (1 January 2012), p 16 ([link](#)).

⁵⁷ UN Global Compact, “Who We Are” ([link](#)).

⁵⁸ UN Global Compact, “Human Rights” ([link](#)).



III. NOTABLE TRENDS

30. In this chapter, we analyze the trends that we have identified regarding the use of the UNGPs by judicial and quasi-judicial bodies, both globally and at a regional level.

A. Global Trends

(1) *Limited Use of the UNGPs in Judicial Decisions to Date*

31. Our initial research focused on express references to the UNGPs in decisions of judicial and quasi-judicial bodies. Across all of the jurisdictions that we examined, such direct references are few. This is perhaps unsurprising. Judicial bodies are presented with questions relating to, and adjudicate claims based on, domestic laws. While the UNGPs are well known, they do not take the form of domestic legislation. Even in cases where domestic laws were based on or influenced by the UNGPs, courts adjudicating BHR issues would in the first instance refer to the relevant domestic legislation.
32. However, the absence of direct references to the UNGPs by judicial and quasi-judicial bodies does not mean that the principles are being ignored. Rather, any time one of these bodies offers a remedy for a business' failure to respect human and labor rights provisions found in domestic law, it is upholding the spirit of the UNGPs.
33. We believe that the current lack of references to the UNGPs will change, for a number of reasons. *First*, there are some recent, notable examples of legislation that make explicit reference to the UNGPs. For example, the Taxonomy Regulation of the European Union ("EU"), which entered into force in March 2021, mandates that a taxonomy-compliant investment must comply with minimum safeguards "to ensure the alignment with the [OECD Guidelines] and the [UNGPs],"⁵⁹ expressly incorporating the "nonbinding" UNGPs standards into binding legislation. As express references to the UNGPs in domestic legislation and regulation increase, it is inevitable that they will make more frequent appearances in the decisions of judicial and quasi-judicial bodies, too.
34. *Second*, there are a number of examples of recent and forthcoming domestic laws that expressly refer to the UNGPs as part of the rationale for their adoption, including the French *Loi Relative au Devoir de Vigilance* ("**Loi de Vigilance**"), and the Modern Slavery Acts in Australia and the UK. Notably, the *Loi de Vigilance* has given rise to litigation against corporations in the French courts, and in certain cases the courts have made express references to the UNGPs. The EU's Conflict Minerals Regulation and the forthcoming Human Rights Due Diligence Directive likewise expressly reference the UNGPs as part of their rationale. These regulations, which are inspired by the UNGPs, likely will give rise to further express references to the UNGPs in judicial and quasi-judicial proceedings, as parties and decision-

⁵⁹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088, Article 18(1) ([link](#)).

makers alike look to the UNGPs to understand the context and meaning of the domestic provisions.

35. *Third*, we have also identified an increasing number of complaints in which the UNGPs have been used as a reference point by applicants and courts alike in support of arguments that corporations should be held to account for alleged adverse human rights impacts. Examples of cases where the UNGPs were cited by the parties or in *amicus* briefs were found in the Canadian,⁶⁰ English,⁶¹ and U.S. courts.⁶²
36. Notably, a range of judicial and quasi-judicial bodies, as well as individual judges and the parties appearing before them, are already making reference to the UNGPs: for example, higher courts, lower courts, different adjudicatory bodies, civil society, nongovernmental organizations (“NGO(s)”) acting as *amicus curiae*, applicants and respondents. This shows widespread awareness of the UNGPs, their meaning, and their utility. As consciousness of the UNGPs expands, the UNGPs will be increasingly cited in support of efforts to seek a remedy against corporations.

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37. *Fourth*, as we discuss further below, international courts and tribunals have utilized the UNGPs in assessing State accountability for third parties’ adverse human rights impacts. This may begin to inform the way States and their judicial or quasi-judicial bodies approach and apply the UNGPs to businesses operating in their jurisdictions.
38. *Finally*, States are being encouraged to adopt further measures to increase access to remedy for victims of business-related human rights abuse. For example, a 2016 report from the Office of the United Nations High Commissioner for Human Rights (“OHCHR”) contains recommendations on how States could achieve greater alignment between a range of legal

⁶⁰ *E.g., Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414; *Das v. George Weston Limited*, 2017 ONSC 4129; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (CanLII); *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 (CanLII).

⁶¹ *E.g., Dominic Liswaniso Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC); [2017] EWCA Civ 1528; [2019] UKSC 20; *Okpabi and Ors v. Royal Dutch Shell Plc and Anor* [2017] EWHC 89 (TCC); [2018] EWCA Civ 191; [2021] UKSC 3.

⁶² *E.g., Wirth v. Mars Inc.*, No. CV 15-1470 DOC, 2016 WL 471234 (C.D. Cal. Feb. 5, 2016), *aff’d*, 730 F. App’x 468 (9th Cir. 2018); *Calhoun v. Google LLC*, No. 5:20-cv-05146, 2020 WL 4368895 (N.D. Cal. July 27, 2020).

regimes that may be relevant to businesses' respect for human rights and UNGPs standards.⁶³ As such, it is likely that references to the UNGPs in legislation will only increase over time, which in turn will increase the number of references by judicial and quasi-judicial bodies.

39. At the same time, it appears likely that judicial and quasi-judicial implementation of the principles embodied in the UNGPs, including affording access to remedy, will continue to occur without express reference to the UNGPs. One example is in the area of labor rights, where national judicial bodies have cited ILO instruments and used them as interpretative aids. As a further example, a number of African jurisdictions have enacted a bill of rights that is applicable to legal persons, providing a constitutional avenue of recourse against corporations for alleged adverse human rights impacts. Similar protections exist in Europe and Latin America.

(2) Growing Use of UNGPs by International Bodies and Tribunals

40. We have observed an increasing number of references by international treaty bodies and tribunals to the UNGPs, in the context of discussing a State's duty to put in place measures to ensure that third parties, including businesses, respect human rights. As the judiciary is a State organ for the purposes of international law, including international human rights law, the judiciary is bound to play its part in ensuring that the State complies with its obligation to protect human rights.
41. As set out above, the UNGPs do not articulate any *new* obligations for States—they reflect *existing* human rights obligations as interpreted by human rights bodies over many years. The Inter-American Court of Human Rights (“**IACtHR**”) has been a leader in this field, both in developing the concept of a State's due diligence obligations in the business context, and affirming that all individuals within the jurisdiction of a State have the right to access justice, even when their rights have been violated by non-State actors.⁶⁴ In 2009, the IACtHR found that States must be held responsible for the actions of private entities when that State has knowledge that the entity poses a real risk of an adverse human rights impact.⁶⁵ In a landmark Advisory Opinion concerning the intersection of the environment with the human rights protected under the American Convention of Human Rights (“**ACHR**”), the IACtHR concluded that Colombia must follow the UNGPs in addressing adverse human rights impacts that might result from the environmental activities of private businesses.⁶⁶ Regional bodies in Africa have also made explicit States' obligations to ensure business' respect for human rights, including the African Commission on Human and Peoples' Rights (“**African Commission**”). For example, in 2018, the African Commission adopted the State Reporting Guidelines and

⁶³ See, e.g., UN Human Rights Council, “Improving accountability and access to remedy for victims of business-related human rights abuse: Report of the United Nations High Commissioner for Human Rights” A/HRC/32/19 (10 May 2016) ([link](#)). See also OHCHR, “OHCHR Accountability and Remedy Project I” ([link](#)).

⁶⁴ IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of 26 June 1987, ¶ 91.

⁶⁵ IACtHR, *González y otras v. México*, Judgment of 16 November 2009. Series C No.205, ¶ 284.

⁶⁶ IACtHR, Advisory Opinion OC-23/17, Judgment of November 15, 2017. Series A No. 23, ¶ 155 (citing to Principles 11-15, 17, 18, 22, and 25 of the UNGPs).

Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment (“**ACHPR Reporting Guidelines**”), which make reference to the UNGPs.



42. Overall, we consider that references to the UNGPs by international treaty bodies and tribunals will increase, which will in turn have a “trickle down” effect leading to increased usage of the UNGPs by States, businesses, and domestic judicial and quasi-judicial decision-makers.

(3) Judicial Decisions and Other BHR Standards

43. Judicial bodies have made more frequent references to *other* BHR standards than the UNGPs. In many cases, as described above, these BHR standards are aligned with the UNGPs. It is therefore worth asking why standards other than the UNGPs appear to be more prevalent in judicial and quasi-judicial decisions. One key difference is that the UNGPs do not impose direct human rights obligations on either States or businesses but instead set out guidelines that operationalize how to protect and respect human rights obligations codified in other treaties and ILO instruments. On the other hand, other prominent BHR instruments do codify standards, and in some cases, also prescribe operational mechanisms. For example, in *Aviation and Allied Workers Union v. Kenya Airways Limited & 3 others*, the Industrial Court of Kenya determined that Kenya Airways’ internal restructuring resulted in redundancies that amounted to unfair termination of employment. In reaching its decision, the Industrial Court referred to the UN Global Compact and ILO conventions and determined that Kenya Airways’ new business model must meet the substantive standards contained within these instruments.⁶⁷

⁶⁷ *Aviation and Allied Workers Union v. Kenya Airways Limited & 3 others* [2012] eKLR, ¶ 47.

44. In addition, other BHR instruments have been used as the basis for policy initiatives and for public authorities' commitment to certain standards, raising awareness of these standards throughout the relevant jurisdiction. For instance, in 2019, the Egyptian Financial Regulation Authority announced that it had joined the UN Global Compact Network and committed to comply with its principles.⁶⁸ In 2008, the former President of Kazakhstan encouraged businesses to embrace social responsibility and supported the implementation of the UN Global Compact. The Ministry of Labor and Social Protection then entered into an agreement with certain local businesses to promote the principles of the UN Global Compact in the context of social and labor relations.⁶⁹
45. The policy impetus can also be seen at a regional level. In 2009, the African Union developed the *African Mining Vision Framework*, which references the International Council on Mining & Metals Sustainable Development Framework ("**ICMM Framework**"), a set of industry guidelines which aims to reduce mining's impact on the environment.⁷⁰ The ICMM Framework in turn benchmarks its principles against other international standards such as the Rio Declaration, the Global Reporting Initiative, the UN Global Compact, the OECD Guidelines, World Bank Operational Guidelines, the OECD Convention on Combating Bribery, and the ILO Conventions, among others. As such, both these frameworks raise awareness of these underlying international human rights standards across the region.

(4) NCPs

46. NCPs are just one, albeit important, example of a quasi-judicial mechanism that contributes to the landscape of remedial avenues in the field of BHR. There are caveats to their reach and impact: NCPs only exist in certain jurisdictions, and their powers, activity and efficacy also vary by jurisdiction.⁷¹
47. As explained above, NCPs are established to implement the OECD Guidelines, which includes a human rights chapter aligned with the UNGPs. As at the time of writing, there have been 288 NCP decisions, of which only 21 mention the UNGPs.⁷² This is likely because complaints

⁶⁸ State Information Service, "FRA joins UN Global Compact" (22 January 2019) ([link](#)). See also Financial Regulatory Authority, Letter of Commitment to the UN Secretary General (13 January 2019) ([link](#)).

⁶⁹ N. Nazarbayev, "Speech by President N.A. Nazarbayev at the, Republican Forum on Social Responsibility of Business" (24 January 2008) ([link](#)).

⁷⁰ The ICMM is an international mining organization comprising 28 mining and metals companies and over 35 national, regional, and commodities association members. The ICMM released its sustainable development framework in 2003 ([link](#)).

⁷¹ In general, upon receipt of a complaint (also known as an "instance"), an NCP conducts an initial assessment to determine if the complaint merits further examination, and if so, the NCP then facilitates a mediation or similar dialogue between the parties before it releases a final statement. See OECD (2019), Guide for National Contact Points on the Initial Assessment of Specific Instances, OECD Guidelines for Multinational Enterprises ([link](#)) and OECD (2019), Guide for National Contact Points on Follow Up to Specific Instances, OECD Guidelines for Multinational Enterprises ([link](#)).

⁷² OECD, "Database of specific instances" ([link](#)).

are based upon the OECD Guidelines themselves, and therefore applicants do not see the need to also reference the UNGPs.

48. Of the 21 NCP decisions that do reference the UNGPs, there is one particularly interesting example. In *Employees of Bralima v. Bralima and Heineken*, the Dutch NCP referenced the UNGPs as part of a forward-looking recommendation, encouraging Heineken’s commitment to “continue working on an internal analysis of Heineken’s existing policies and processes in the light of the [OECD Guidelines] and the [UNGPs]”. The Dutch NCP highlighted in particular the need to integrate into the analysis the specific context in which Heineken conducts operations.⁷³

(5) NHRIs

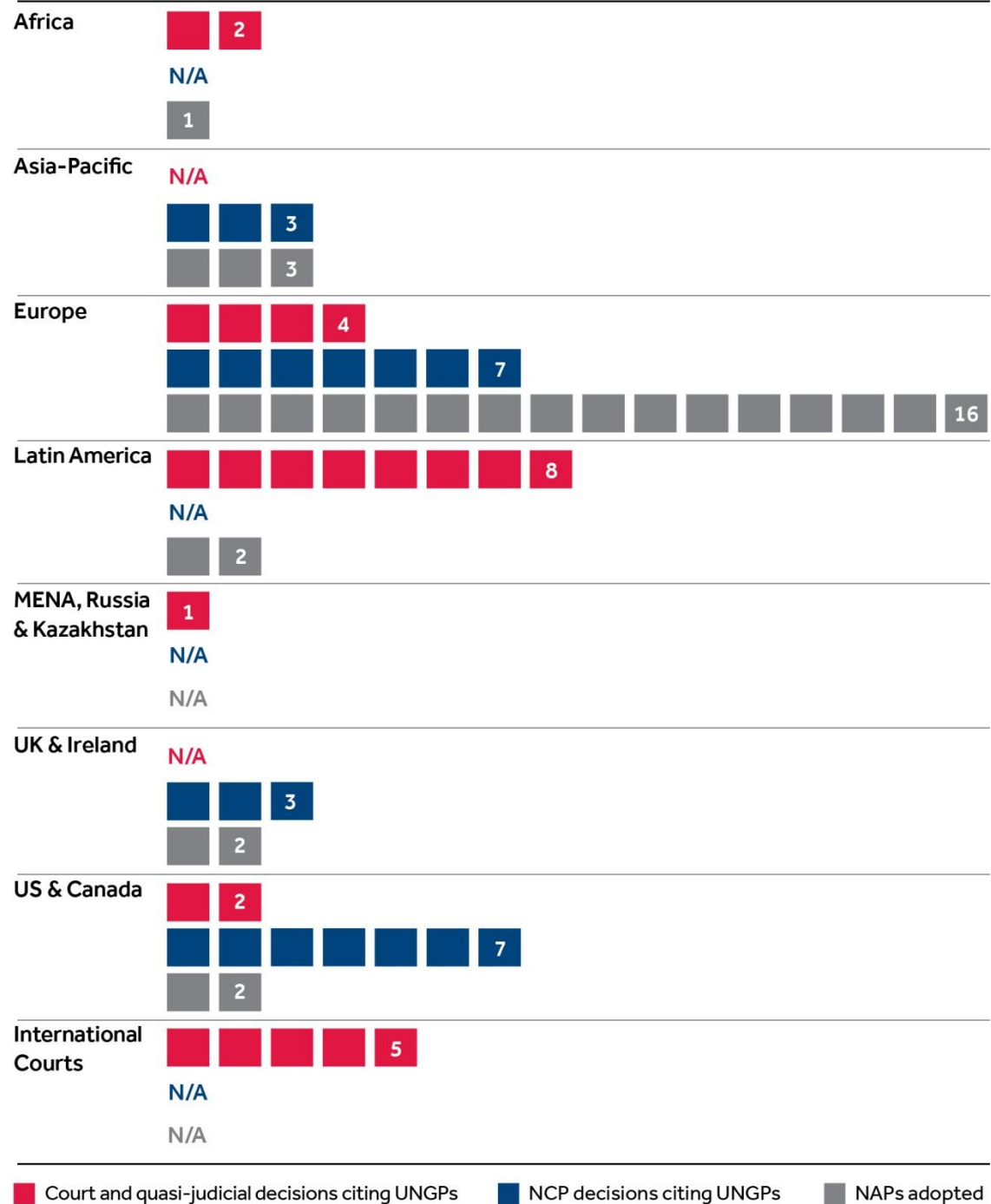
49. The UNGPs make clear that NHRIs form an integral part of its tripartite framework. Depending on the powers they have been afforded under domestic law, NHRIs may provide a degree of accountability through public investigations and inquiries.⁷⁴ In certain jurisdictions, NHRIs have also played a prominent role in capacity building and pushing forward the BHR agenda under an NAP. As with any other institution, an NHRI’s ability to do this will depend on its budget, independence, resources, and other factors.
50. For example, the Nigerian and Kenyan NHRIs have conducted BHR-related investigations. The role of NHRIs in relation to facilitating access to remedy in particular, and the various ways in which that role might be enhanced, were considered in the course of the second phase of the OHCHR Accountability and Remedy Project, the findings of which were submitted to the UNHRC in May 2018.⁷⁵

⁷³ *Former Employees of Bralima v. Bralima and Heineken*, Final Statement, The Dutch NCP (18 August 2017), ¶ 5 ([link](#)).

⁷⁴ For further discussion on the role of national human rights institutions in facilitating access to effective remedy in the context of business and human rights, see S. Lorion and N. Gotzmann, “National Human Rights Institutions and Access to Remedy in Business and Human Rights”, The Danish Institute for Human Rights (May 2020) ([link](#)).

⁷⁵ United Nations Human Rights Council, “Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms”, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/38/20 (14 May 2018) ([link](#)).

UNGPs at 10 – Infographic Information



B. Regional Trends

(1) Africa

51. Only two court decisions—one from the South African courts and the other from the Kenyan courts—directly refer to the UNGPs. In *re University of Stellenbosch Legal Aid Clinic, et al.*,⁷⁶ the High Court of South Africa invalidated a South African debt collection law that enabled lenders to implement predatory, unfair, and deceptive debt collection practices, which denied low-wage earners the right of access to courts. In support of its decision, the High Court cited the UNGPs, and in particular, the obligation on States to reduce the legal and practical barriers that may deny individuals access to a remedy. In *Kenneth Gona Karisa v. Top Steel Kenya Limited*,⁷⁷ the Kenyan Employment and Labour Relations Court also referred to the UNGPs in a case concerning inappropriate conduct in the workplace. However, the Court merely referred to the principles in the course of summarizing the petitioner’s arguments.
52. There has been wider application of the rights contained in the ILO instruments and the UDHR—which of course are rights that the UNGPs require States to protect and corporates to respect. For example, industrial courts in Kenya and labor courts in South Africa have tended to refer to these instruments in order to contextualize and interpret national labor laws and rights protected by their respective constitutions. Nevertheless, such cases are still relatively limited in number. Other UNGPs-aligned BHR standards also make an appearance in court decisions, such as the UN Global Compact.



⁷⁶ *Re University of Stellenbosch Legal Aid Clinic, et al.*, High Court of South Africa (Western Cape Division, Cape Town), Case No. 16703/14 (8 July 2015), Judgment, [2015] ZAWCHC99.

⁷⁷ *Kenneth Gona Karisa v. Top Steel Kenya Limited* [2020] eKLR.

53. As noted above, several national constitutions contain bills of rights that apply to the activities of private legal persons, and courts, including in Kenya, South Africa, Ghana, and Zambia, have adjudicated alleged corporate human rights impacts in this context which, again, advances the UNGPs' agenda.
54. Kenya remains the only African jurisdiction to have implemented an NAP. However, there have been some notable legislative developments across the region, usually in relation to the extractive industries sector, such as Ghana's due diligence regulations for grant-seeking construction businesses or the due diligence obligations under Kenya's Stewardship Code 2017. While these provisions do not form part of a wider NAP, they are a manifestation of a State's obligations set out in Pillar I and require businesses to operationalize respect for human rights in the manner prescribed by Pillar II.

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55. There are no NCPs established in the African jurisdictions examined in this report. Instead, NHRIs have been major drivers in operationalizing the UNGPs, including by publishing reports, holding seminars, and issuing guidelines, as well as in some cases (e.g., Nigeria and Kenya), conducting their own inquiries into alleged adverse human rights impacts by businesses. In Tanzania, South Africa, and Zambia, NHRIs have played a vital role in conducting and developing national human rights baseline assessments to help implement an NAP.

(2) Asia Pacific

56. We have not located any court decisions in the Asia-Pacific region that refer to the UNGPs. In the jurisdictions that have established NCPs, namely, Australia, Japan, New Zealand, and South Korea, there have been a handful of NCP decisions that refer to the UNGPs. In one Korean NCP decision, the UNGPs were used to assess whether a Korean bank took the proper steps to ensure the safety of indigenous peoples before funding a construction project. However, the NCP did not consider the merits of the complaint as it found that it did not have jurisdiction. An Australian NCP decision also referenced the UNGPs when considering whether a company's human rights policy was evidence of its commitment to "applying the UNGPs"; however, no further detail or analysis of the relevant principles was provided. As

seen in other jurisdictions, some complaints submitted to the Australian NCP referred to the UNGPs, alongside the OECD Guidelines, in order to provide further context on the relevant BHR standards.

57. NHRIs are playing an important role in the implementation of the UNGPs in the Asia-Pacific region. In Malaysia, the UNGPs were invoked in a case concerning the construction of a dam which it was alleged would adversely impact local fishing communities. While the NHRI found that it lacked jurisdiction, the local commission urged the Malaysian government to “develop policies or guidelines to monitor Malaysian companies operating outside of Malaysia in order to ensure compliance with [...] Principle 3 of [the UNGPs]”,⁷⁸ which outlines the State’s duty to protect by regulation and policy measures. In Japan, the NHRI referred to the standards contained in the UNGPs to articulate its submissions on legislative bills concerning, among other things, employee rights and the protection of vulnerable and impoverished children. Similarly, in New Zealand, the UNGPs have been used in the legislative process, to scrutinize proposed bills.
58. Japan, South Korea, and Thailand are the only jurisdictions in the Asia-Pacific region that have adopted an NAP, while India, Indonesia, Malaysia, Mongolia, and Pakistan are in the process of developing one. Certain other countries in the Asia-Pacific region, such as Malaysia, Myanmar, Thailand, and the Philippines, have also had some positive developments in terms of recognizing the UNGPs through State and civil society initiatives. In Australia, a Multi-Stakeholder Advisory Group on Implementation of the UNGPs published 28 recommendations to implement the UNGPs in 2017. However, to date, only the modern slavery reporting recommendation has been taken forward through the enactment of Australia’s Modern Slavery Act 2018.

(3) Europe

59. In Europe, we identified four judicial or quasi-judicial decisions that referred to the UNGPs.
60. *First*, in the Netherlands, the Hague District Court recently considered whether the defendant oil company could be ordered to reduce its annual CO2 emissions.⁷⁹ In reaching its decision the Dutch court referred to the UNGPs as authoritative guidance, finding that they are an internationally endorsed ‘soft law’ instrument, and that it was therefore irrelevant whether the defendant had itself committed to adopting the UNGPs.
61. *Second*, in Sweden, the Jönköping administrative court considered whether local procurement requirements establishing supply chain due diligence obligations, based on Swedish procurement law, the UNGPs, and UN Global Compact, were lawful.⁸⁰ The local procurement body justified its tender requirements in part on the basis that UNGPs Principles 3 and 6

⁷⁸ Suruhanjaya Hak Asasi Manusia Malaysia, “Annual Report 2015” (2015) ([link](#)).

⁷⁹ *Vereniging Milieudefensie v. Royal Dutch Shell Plc*, Hague District Court, C/09/571932 (Judgment of 26 May 2021) ([link](#)).

⁸⁰ *Paranova Läke medel AB v. Jönköping läns lansting Upphandlingsenheten*, Administrative Court in Jönköping, Case no. 4773-17 (2018).

- require States to ensure that businesses engaged in public procurement respect human rights. The court concluded that there was no reason to overturn the procurement requirements, given that they were in compliance with Swedish law and international standards.
62. *Third*, in Poland, the quasi-judicial National Appeals Chamber referred to the UNGPs in a case concerning a tender for cleaning services organized by the Polish Post Office.⁸¹ The claimant argued that the Polish Post Office's tender requirements did not comply with national procurement law because they did not require that the cleaners must be employed under an employment contract. The claimant cited the UNGPs, emphasizing that public procurement was an area in which States can ensure the respect of fundamental human rights. The National Appeals Chamber ultimately dismissed the claim and reasoned that the UNGPs did not address whether employment contracts were required.
 63. *Fourth*, in France, the UNGPs were referenced in a document underlying a Paris Administrative Court of Appeal case; however, the UNGPs had no bearing on the court's decision.
 64. In addition, there are a handful of NCP decisions in Denmark, the Netherlands, Italy, and Switzerland that refer to the UNGPs:
 - (i) The Danish NCP referred to the UNGPs to support its conclusions that PWT Group, a clothing company, had not carried out its due diligence obligations under Chapter IV of the OECD Guidelines.⁸²
 - (ii) In the Netherlands, the Dutch NCP referred to the UNGPs in its recommendations to improve policies and procedures in the *Employees of Bralima v. Bralima and Heineken* complaint mentioned above. It also referred to the UNGPs in providing recommendations on how a Dutch company and its Nigerian subsidiary could improve its grievance mechanism. In particular, the Dutch NCP cited to UNGPs Principle 31, which sets out the criteria for nonjudicial grievance mechanisms, and recommended that the mechanism make clear that the parties will be provided with information during the procedure, and compile and release statistics and case studies concerning the mechanism's performance.⁸³
 - (iii) The Italian NCP referred to the UNGPs when issuing its final statement on the Italian enterprise Salini Impregilo SpA's alleged failure to consult affected indigenous peoples in Kenya and Ethiopia about the construction of the Gibe III dam in the Omo Valley.⁸⁴

⁸¹ Judgment of the National Appeals Chamber, KIO 2350/15 (12 November 2015).

⁸² *Clean Clothes Campaign Denmark and Active Consumers regarding the activities of PWT Group*, Final Statement, The Danish NCP (17 October 2016) ([link](#)).

⁸³ *Obelle Concern Citizens (OCC) v. Shell Petroleum Development Company of Nigeria Limited (SPDC) and Royal Dutch Shell (RDS)*, Final Statement, The Dutch NCP (27 February 2020) ([link](#)).

⁸⁴ *Survival International v. Salini Impregilo*, Final Statement, 8 June 2017, ¶ 13 ([link](#)).

(iv) The Swiss NCP also made reference to the UNGPs in a complaint concerning Holcim's mining activities, although it did not form part of its reasoning.⁸⁵

65. More generally, a number of NCP decisions and complaints have been made under Chapter IV of the OECD Guidelines which, as noted above, reflects the UNGPs.⁸⁶ Many of the Chapter IV claims concern businesses' alleged failure to discharge their due diligence obligations, ranging from failing to consult local communities during large infrastructure projects to⁸⁷ failing to assess working conditions in supply chains⁸⁸ or omitting certain information from financial reports.⁸⁹
66. Europe accounts for the highest regional concentration of NAPs to date: 16 out of the 27 countries discussed in this report have adopted NAPs, and several other countries are in the process of developing one.
67. As a general matter, the UNGPs have had a wide-reaching effect on BHR legislation across Europe. For example, the EU's Non-Financial Reporting Directive and Conflict Minerals Regulation introduced due diligence and reporting requirements; both instruments expressly refer to the UNGPs. Moreover, the UNGPs have been highly influential in formulating the legislative proposal for the EU's mandatory due diligence directive.⁹⁰ At a national level, the influence of the UNGPs can be seen in the French *Loi de Vigilance*, the Dutch Child Labour Law and Germany's draft Due Diligence Law, all of which to varying degrees impose human rights due diligence and reporting obligations on businesses. NHRIs and civil society in Switzerland, Luxembourg, and the Netherlands have been key drivers in advocating for and developing BHR legislation based on the UNGPs.

(4) Latin America

68. The UNGPs have been referred to numerous times by a number of Latin American courts. The Colombian Constitutional Court, for instance, has explicitly referred to the UNGPs in at least six cases and considers the principles to be an "interpretive tool" in deciding BHR-related cases. Significantly, the Court considers the due diligence obligations in the UNGPs to be the

⁸⁵ *ELSAM et. al. vs. Holcim Indonesia*, Initial Assessment, Swiss NCP (30 June 2015) ([link](#)).

⁸⁶ E.g., Austria, Belgium, Czech Republic, Finland, France, Germany, Italy, the Netherlands, Norway, Poland, Spain, Sweden, and Switzerland.

⁸⁷ E.g., OECD, "Salini Impregilo S.p.A and Survival International Italia concerning activities in Ethiopia" (11 March 2016); *Siemenpuu et al v. Pöyry Group*, Final Statement, Finnish NCP (18 June 2013) ([link](#)).

⁸⁸ The submission is not publicly available, but the Final Statement incorporates some of its language. See *Uwe Kekeritz et al vs. KIK et al.*, Final Statement, The German NCP ([link](#)).

⁸⁹ *Amnesty International and Friends of the Earth vs Shell*, Complaint, The UK and Dutch NCP (25 January 2011) ([link](#)); *Amnesty International and Friends of the Earth vs Shell*, Complaint, The UK and Dutch NCP (30 December 2011) ([link](#)).

⁹⁰ In October 2020, the UN Working Group on Business and Human Rights wrote a letter to the EU Justice Commissioner setting out 10 recommendations for the EU framework ([link](#)).

applicable standard when assessing whether corporations and the government have respected the right to prior consultation.⁹¹

69. The Constitutional Court of Peru has also cited the UNGPs in its decisions and has developed a line of jurisprudence recognizing a duty of corporate social responsibility (“CSR”) by reference to both national law and international soft law, including the UNGPs.⁹² These cases primarily concern alleged human rights abuses by natural resource companies or infrastructure projects, in relation to the rights of workers or the rights of indigenous communities impacted by their operations.
70. Finally, a decision of the Argentine National Chamber of Labour Appeals has cited the UNGPs and the corporate duty to respect human rights in a claim for compensation brought against a company in connection with the forced disappearance of one of its employees during the military dictatorship.⁹³ As outlined in Section VII below, the Argentine Supreme Court ultimately overturned this decision without referencing the UNGPs.
71. Established jurisprudence in Chile, Mexico, and Brazil recognizes that corporations have obligations to respect human rights, although none of these decisions explicitly reference or rely upon the UNGPs.
72. All of the Latin American jurisdictions that have been considered have established NCPs, and there have been numerous complaints submitted under Chapter IV of the OECD Guidelines. None of the NCP decisions issued in the region directly refers to the UNGPs.
73. Chile and Colombia have developed and adopted NAPs and are set to adopt their second NAP in 2021. Although Brazil is yet to implement an NAP, the government has developed nonbinding national guidelines on BHR for medium and large companies that are based on the UNGPs.
74. Across the region, NHRIs have played a crucial role in promoting the UNGPs, as well as wider BHR issues.

(5) Middle East, North Africa, Russia, and Kazakhstan

75. Just one court decision from this region mentions the UNGPs: a decision of the Israeli Supreme Court, noting an *amicus curiae* submission which relied on the UNGPs. The UNGPs have not otherwise been cited by courts and quasi-judicial bodies in the Middle East, North Africa, Russia, and Kazakhstan. However, the courts in Lebanon and Turkey have both cited

⁹¹ *Acción de tutela instaurada por Jose Eliecer Diaz Bohorquez contra el Oleoducto Central Andino — Ocesa — y el Consorcio de Tierras Boyaca*, Sentencia T-732/16, La Sala Quinta de Revisión de la Corte Constitucional (19 December 2016).

⁹² *Sindicato Unificado de Trabajadores de la Electricidad y Actividades Conexas de Lima y Callao (Sutrel)*.

⁹³ *National Chamber of Labour Appeals (Cámara Nacional de Apelaciones del Trabajo), I., M.G. c/T. SA Compañía Técnica Internacional s/Accidente — Ley Especial*, Sala V (27 February 2015).

the UDHR and ILO instruments in judgments concerning workplace discrimination.⁹⁴ More generally, an Israeli court has acknowledged the importance of consumer and employee considerations being incorporated into company decision-making.⁹⁵

76. In the jurisdictions which have established an NCP, including Egypt, Israel, Jordan, Kazakhstan, Morocco, Tunisia, and Turkey, there are no NCP decisions or complaints that refer to the UNGPs or concern Chapter IV of the OECD Guidelines.
77. Of the 13 jurisdictions examined, only Jordan and Morocco have formally committed to developing an NAP, while in Kazakhstan, civil society has encouraged the government to develop one. Despite the absence of NAPs, there have been some significant legislative developments surrounding workers' rights. Over the last decade in Bahrain, Lebanon, Qatar, and Saudi Arabia, governments have sought to amend the *kafala*, or sponsorship system, which often results in limiting migrants' freedom of movement, right to terminate employment, or right to change employers.
78. At the same time, NHRIs in Bahrain, Kazakhstan, Morocco, and Qatar have held conferences promoting the UNGPs and corporate governance, while in Tunisia, the government, the ILO, and trade union groups signed a Memorandum of Agreement for the implementation of the Decent Work Country Programme 2017–2022.⁹⁶

(6) UK and Ireland

79. In the UK and Ireland, there are no court decisions that explicitly refer to the UNGPs. References to aligned BHR standards have also been limited, with just one English court case referring to the Equator Principles and the UN Global Compact.⁹⁷
80. However, in leading cases *Vedanta Resources*⁹⁸ and *Okpabi*,⁹⁹ which considered whether UK parent companies could be held liable for harms allegedly committed by their subsidiaries abroad under the common law of tort, there are a number of publicly available *amicus curiae* submissions that refer to the UNGPs. Interveners have argued that international standards on BHR, including the UNGPs, are relevant when considering whether a duty of care exists.

⁹⁴ See, e.g., Judgment in Case No. 5 of 13 January 2020, presiding before the Judge of Urgent Matters in Zahle (Rita Haro); Decision of the Labour Arbitration Council No. 253 of 29 June 1994; Hukuk Dairesi, 23.1.2017, File No. 2016/2979, Decision No. 2017/506. The Court of Cassation has used the identical sentence identifying Turkey's international obligations in at least 29 other decisions.

⁹⁵ D.N. 7/81 *Penider, investment, development and Construction Company Ltd. and Yosef Pnini v. David Castro* (14 December 1983) (P.D. 37(4) 673), p 695 (unofficial translation from Hebrew).

⁹⁶ ILO, "One more step towards decent work in Tunisia" (21 July 2017) ([link](#)).

⁹⁷ *Kadie Kalma & Others v. African Minerals Limited, African Mineral (SL) Limited, Tonkolili Iron Ore (SL) Limited* [2018] EWHC 3506.

⁹⁸ *Dominic Liswaniso Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC); [2017] EWCA Civ 1528; [2019] UKSC 20.

⁹⁹ *Okpabi and Ors v. Royal Dutch Shell Plc and Anor* [2017] EWHC 89 (TCC); [2018] EWCA Civ 191; [2021] UKSC 3.

81. No Irish NCP decisions refer to the UNGPs, and while seven UK NCP decisions do refer to the principles,¹⁰⁰ it was largely in the context of summarizing the NCP complaint and did not appear in the NCP’s reasoning. Conversely, a significant number of UK NCP complaints themselves refer to the UNGPs, particularly Principles 17 and 18, usually to provide further context to claims made under Chapter IV of the OCED Guidelines.
82. More generally, the UK was the first country to publish an NAP in 2013 and Ireland published its NAP in 2017. While the legislative impact of Ireland’s NAP remains to be seen, the UK’s NAP resulted in human rights reporting obligations under the Companies Act and contributed to the passage of the Modern Slavery Act 2015, which introduced “report or comply” obligations that apply throughout a business’ supply chains.

(7) United States and Canada

83. In the U.S., the courts have referred to the UNGPs on two occasions. However, in both cases, the UNGPs were not relevant to the court’s decision. In one case—*Atalaya v. Newmont Mining Corp*¹⁰¹—the UNGPs were referred to when summarizing the claimant’s arguments. In the other, *Tomasella v. Nestlé USA, Inc., Mars Inc. and The Hershey Company*,¹⁰² the court considered the UNGPs in more detail. The case concerned whether chocolate companies had failed to disclose that it was likely that their chocolate products contained cocoa beans farmed by child and slave labor. The court referred to the UNGPs as reflective of international guidelines but found that they were not directly applicable. It reasoned that even if the UNGPs were applicable, they would not have required the point-of-sale disclosures that were argued to be necessary in the case.
84. While the Canadian courts have not directly referred to the UNGPs, businesses’ responsibility to respect human rights has received greater judicial treatment. In *Choc v. Hudbay Minerals Inc.*,¹⁰³ the Ontario Superior Court considered whether a Canadian mining company could be held directly liable in negligence for alleged human rights impacts committed by contracted security personnel abroad. After reviewing Amnesty International’s submissions, which referred to the OECD Guidelines, the ILO’s standards on corporate responsibility, and the UN’s Protect, Respect and Remedy Framework under the UNGPs, the court stated that “[t]hese documents have emphasized the heightened risk of becoming complicit in human rights violations in certain environments, such as conflict-affected areas”.¹⁰⁴ The landmark case of *Araya v. Nevsun* also demonstrates that the Canadian courts are willing to use customary international law to found a cause of action for human rights claims in Canadian courts.

¹⁰⁰ *Privacy International v. Gamma International UK Ltd*; *IAC & WDM v. GCM Resources plc*; *WWF v. SOCO*; *Lawyers for Palestinian Human Rights v. G4S*; *BIRD v. HPG*; *Bird v. Rolex*; *Bird v. Jaguar Land Rover*.

¹⁰¹ *Acuna-Atalaya v. Newmont Mining Corp*, No. CV 17-1315, 2020 WL 1154783 (D. Del. Mar. 10, 2020), *aff’d as modified sub nom. Acuna-Atalaya v. Newmont Mining Corp*, No. 20-1765, 2020 WL 7311315 (3d Cir. Dec. 11, 2020).

¹⁰² *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 67 (1st Cir. 2020).

¹⁰³ *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.

¹⁰⁴ *Id.* ¶ 34.

85. As seen in other jurisdictions, such as the UK, the UNGPs have tended to feature more regularly in claimants' submissions or *amicus curiae* briefs than in court decisions. In most cases in the U.S., claimants and interveners have referred to the UNGPs as a way to demonstrate that businesses, including those that have publicly committed to the principles, have failed to honor their own BHR policies.¹⁰⁵ In Canada, claimants in parental liability cases have referred to the UNGPs in an attempt to argue that international corporate standards are relevant when considering a duty of care in negligence.
86. There are five U.S. NCP decisions that reference the UNGPs, either as a way to add further context to the OECD Guidelines or to recommend that the UNGPs be incorporated into businesses' corporate policies.¹⁰⁶ There are also two Canadian NCP decisions that directly refer to the UNGPs.
87. The U.S. and Canada published their NAPs in 2016 and 2017, respectively; both jurisdictions have passed legislation or issued guidelines that reflect the UNGPs. For example, in the U.S., the Environmental Protection Agency updated the Federal Acquisition Regulations with new requirements to ensure that the government only procures products meeting environmental performance criteria.¹⁰⁷ The U.S. State Department released a set of recommendations relating to respect for women's rights while addressing supply chain risks¹⁰⁸ and due diligence guidance for U.S. exporters of certain products or services with surveillance capabilities, to address possible human rights abuses.¹⁰⁹ In Canada, guidelines on responsible businesses have been issued by the Canadian Trade Commissioner and the Canadian Ombudsman for Responsible Enterprise and the Office of the Extractive Sector CSR Counsellor.

(8) International Courts and Tribunals

88. The Economic Community of West African States ("ECOWAS") Court of Justice, the Appeals Chamber of the Special Tribunal of Lebanon, and the IACtHR are the only international courts or quasi-judicial bodies to have explicitly cited to the UNGPs in their jurisprudence.¹¹⁰ The African Commission has also been active in reaffirming States' obligations to protect against human rights impacts of businesses.¹¹¹ Furthermore, it appears that the Inter-

¹⁰⁵ *Wirth v. Mars, Inc.; Calhoun v. Google; Nestlé USA, Inc. v. Doe I.*

¹⁰⁶ See e.g., *Specific Instance between the Community Legal Education Center of Cambodia ("CLEC") / EarthRights International ("ERI") and American Sugar Refining Inc.; Final Statement on the Specific Instance between the International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association and Starwood Hostels & Resorts Worldwide for conduct in the Maldives and Ethiopia.*

¹⁰⁷ Environmental Protection Agency, "Electronic Product Environmental Assessment Tool" (2017) ([link](#)).

¹⁰⁸ Bureau of Economic and Business Affairs, "Managing Risks to Women in Supply Chains" (8 August 2019) ([link](#)).

¹⁰⁹ Department of State, "U.S. Department of State Guidance on Implementing the 'UN Guiding Principles' for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities" (30 September 2020) ([link](#)).

¹¹⁰ *SERAP v. Federal Republic of Nigeria*, ECOWAS ECW/CCJ/APP/08/09, Judgment (14 December 2012); *Prosecutor v. New TV S.A.L.* We note that other human rights treaty bodies, such as the CEDAW, have cited to the UNGPs in their general recommendations or comments. See, e.g., CEDAW General Recommendation 35, fn 62.

¹¹¹ *Social and Economic Rights Action Centre (SERAC) & Another v. Nigeria* (2001) AHRLR 60 (ACtHPR 2001).

American and African Regional mechanisms,¹¹² through publications and relevant decisions, view the UNGPs favorably as tools to affirm their well-established BHR jurisprudence.

89. The European Court of Human Rights (“**ECtHR**”) has addressed issues relating to BHR in the context of a State’s responsibility to protect its citizens as defined by the European Convention on Human Rights (“**ECHR**”) rather than by reference to the UNGPs. Various other international mechanisms, including the International Court of Justice (“**ICJ**”), the ILO, the International Tribunal for the Law of the Sea, and the World Trade Organization (“**WTO**”), do not appear to have referenced the UNGPs in deciding cases before them.
90. Several references have been made to the UNGPs in submissions and decisions of international arbitral tribunals in support of the position that both States and private investors must respect human rights when carrying out commercial activities.



¹¹² African Commission on Human and Peoples’ Rights, the African Court on Human and Peoples’ Rights, and the Court of Justice of the Economic Community of West African States.

IV. AFRICA

A. Overview

91. This chapter examines reference to the UNGPs by judicial and quasi-judicial bodies in Ghana, Kenya, Mozambique, Nigeria, South Africa, Tanzania, Uganda, and Zambia. Similar to other jurisdictions considered in this report, such references have been limited and only court decisions in South Africa and Kenya have directly referred to the UNGPs.
92. However, some of the rights the UNGPs seek to protect, which are protected by other instruments such as the ILO Conventions, have been subject to adjudication in the region. Courts have also cited more frequently to other international BHR standards which align with the underlying premise that businesses have a responsibility to respect human rights, such as the UN Global Compact. Industrial courts in Kenya and labor courts in South Africa have tended to refer to these instruments to contextualize and interpret national labor laws, as well as the rights protected by their respective constitutions. Nevertheless, such cases are relatively limited in number and between the two jurisdictions—Kenya and South Africa—there are fewer than a dozen cases which directly refer to these UNGPs-aligned standards.
93. Several NHRIs have also conducted investigations into alleged adverse impacts of business operations on labor and human rights as well as the environment. While they do not specifically refer to the UNGPs, the investigations consider alleged failures by businesses to conduct due diligence into potential adverse human rights impacts, as encapsulated in Pillar II of the UNGPs. In Nigeria, for example, the national human rights institution has put in place a public inquiry to investigate alleged environmental pollution and violations of labor rights by 31 companies. Similar investigations have been conducted in Kenya and South Africa.
94. Developments in the wider polity also show some limited movement towards operationalizing the UNGPs. Kenya, Ghana, Tanzania, Mozambique, Nigeria, and Zambia have completed a national baseline assessment (“**NBA**”). Kenya remains the only jurisdiction to have implemented an NAP (in June 2019), while Mozambique, Uganda, and Zambia are in the process of developing NAPs or have committed to developing one. In Ghana, Nigeria, South Africa, and Tanzania, NHRIs and civil society have started the process of developing an NAP. The delay in implementing an NAP has meant that—as far as public information shows—no jurisdiction has passed legislation directly based on the UNGPs. However, there have been some notable legislative developments, usually in relation to the extractive industries sector, such as Ghana’s due diligence requirements for grant-seeking construction businesses or the due diligence obligations under Kenya’s Stewardship Code 2017.
95. Developments in BHR legislation are often supported by the constitutional framework in a country. Rights enshrined in the national constitutions of Ghana, Kenya, Zambia, South Africa and Mozambique, are binding on private legal persons and are directly actionable before the national courts.

96. NHRIs have also been major drivers of awareness and implementation of the UNGPs. In Tanzania, South Africa, and Zambia, NHRIs have played a vital role in developing the NBA, or conducting similar assessments to help implement an NAP. NHRIs have worked with local stakeholders, indigenous peoples, and multinational corporations to publish reports, issue guidelines and hold workshops on the UNGPs. The publications seek to improve awareness, assist individuals in bringing human rights claims, and ultimately shape new BHR legislation. Regional organizations and bodies, with influence over the implementation of international obligations into domestic legal orders and over the direction of regional policy, have also reflected the UNGPs in guidance regarding, for example, trade agreements and combatting forced labor and trafficking.
97. This review demonstrates that, in their first decade, the UNGPs have firmly entered the consciousness of public bodies at various levels throughout the region. There is much work still to be done on their implementation, but the trend is towards a greater reflection of the UNGPs in national legal orders and policies. As such, we expect references to the UNGPs to be increasingly prevalent in the decisions of judicial and quasi-judicial bodies and the laws and regulations that they adjudicate.
98. Finally, regional frameworks provide an important backdrop to understanding how African Member States have reflected the UNGPs in their national legal orders and policies so far. These frameworks are either binding or influential on their Member States and will therefore have some influence over the national polity. The African Union, the African Commission, the Southern African Development Committee (“**SADC**”), and the African Continental Free Trade Area (“**AfCFTA**”) have directly referenced the UNGPs in either their constitutional, framework or policy documents.¹¹³ The Member States of the other regional bodies referenced in this Chapter—the Common Market for Eastern and Southern Africa (“**COMESA**”) and the Intergovernmental Authority on Development (“**IGAD**”)—have explicitly committed to promote and protect the rights contained in the African Charter on Human and Peoples’ Rights (“**African Charter**”) in their constitutional instruments.
99. Some of the important jurisprudence arising in relation to these regional bodies and their underlying instruments is discussed in detail in Section X.I. below. For present purposes, we provide a brief overview of relevant policies adopted by these regional bodies, which are not covered in Section X.I., and provide a backdrop to the discussion on the implementation of the UNGPs in a number of African States below.

¹¹³ The UNGPs have been referenced in other regional fora including pan-African nonprofit organizations such as the African Coalition for Corporate Accountability (“**ACCA**”). ACCA, launched in 2013, is a coalition of organizations based in Africa supporting communities and individuals whose human rights are adversely affected by the activities of corporations. ACCA advocates for individuals whose rights have been breached to access justice and it references the UNGPs as “internationally accepted human rights standards” in this area. See, ACCA, “Terms of Reference: Access to Remedy” (16 September 2016) ([link](#)).

(1) The African Commission on Human and Peoples' Rights

100. The African Commission was established by Article 30 of the African Charter in 1981. The African Commission is a quasi-judicial body tasked with promoting and protecting human rights on the African continent, as well as the interpretation of the African Charter.¹¹⁴ In 2018, the African Commission developed draft State reporting guidelines for Articles 21 and 24 of the African Charter on Human and Peoples' Rights through one of the special mechanisms overseen by the African Commission, the Working Group on Extractives, Environment and Human Rights. The ACHPR Reporting Guidelines were adopted by the African Commission at its 62nd Ordinary Session in May 2018.
101. The ACHPR Reporting Guidelines determine how States should provide information in their periodic reports to the African Commission, both generally and with specific reference to the operations of extractive industries in their territories.¹¹⁵ The guidelines reference the UNGPs in a section entitled "Obligations of Companies", in the context of "negative obligation[s]" on companies and corporations to "ensure that their actions or operations do not result in or trigger the occurrence of harm or the curtailment or deprivation of the rights guaranteed under the African Charter",¹¹⁶ as well as in support of an obligation to consult affected communities.¹¹⁷ The guidelines note that: "[t]he duty to respect and consider others...and reinforcing mutual respect and tolerance is provided for in Article 28 of the African Charter. The United Nations Guiding Principles on Business and Human Rights (the Ruggie Principles) confirm in Principle 11 that businesses 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'".¹¹⁸

(2) The Southern Africa Development Community

102. The SADC is a regional economic community comprising 16 States. The SADC is committed to regional integration and poverty eradication within Southern Africa, through economic development and ensuring peace and security.¹¹⁹ In 2015, the SADC produced the "Report on Forced Labour and Human Trafficking in the Southern African Development Community" which suggests an "increased focus" on the UNGPs to ensure "States accountability for compliance with customary international human rights norms to end forced labor and other forms of contemporary slavery and related practices".¹²⁰ The document also refers to

¹¹⁴ S. Gumedze, "Bringing communications before the African Commission on Human and Peoples' Rights," *African Human Rights Law Journal* (2003), p 119 ([link](#)).

¹¹⁵ Arts. 21 and 24 of the African Charter are the sections of the African Charter that specifically concern the extractive industries. Art. 21 guarantees the right of all peoples to freely dispose of their wealth and natural resources. Art. 24 provides for the right of all peoples to a general satisfactory environment, favorable to their development.

¹¹⁶ ACHPR, "State Reporting Guidelines and Principles on Arts. 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment" (2018), p 37 ([link](#)).

¹¹⁷ *Id.*, p 39.

¹¹⁸ *Id.*, pp 37 and 42.

¹¹⁹ SADC, "SADC Vision" ([link](#)).

¹²⁰ SADC, "Draft Report on Forced Labour and Human Trafficking in the Southern African Development Community" (17 November 2015), p 21 ([link](#)).

businesses' responsibilities in the context of a discussion on "forms and manifestations of forced labor and human trafficking in South Africa", noting that "[t]he regulation of human rights and ensuring transparency in supply chains has therefore achieved increasing global momentum with greater emphasis on business responsibility to respect human rights and avoid adverse impacts in their operations and relationships, as well as the duty under Pillar III of the UNGPs to remediate human rights abuses".¹²¹



(3) The African Union

103. The African Union is the largest regional body in Africa, consisting of 55 Member States. Its function is to draft treaties, conventions and frameworks, including those relevant to human rights, which Member States are encouraged to adopt and implement.¹²²
104. Recognizing that Africa is the world's fastest growing continent, and continues to be a key source of minerals exports to the rest of the world,¹²³ the EU has worked alongside the African Union to support the development of a continental "Business and Human Rights Policy" "based on the UN Guiding Principles on Human Rights and Business".¹²⁴ The objective is to promote the implementation of the UNGPs in Africa and foster peer-learning opportunities

¹²¹ *Id.*, pp 22 and 96.

¹²² African Union, "The African Union organizes Stakeholders Validation Workshop on the Draft AU Policy Framework on Human Rights and Business" (March 2017) ([link](#)).

¹²³ *Id.*

¹²⁴ Business & Human Rights Resource Centre, "African Union & EU hold meeting to promote UN Guiding Principles on Business and Human Rights" (2014) ([link](#)).

between the two regions.¹²⁵ As at the time of writing, however, there is no indication that this document has been published or finalized; and no draft policy has been made available.¹²⁶

105. In 2009, the African Union developed the *African Mining Vision Framework*, which references the ICMM Framework, a set of guidelines used by the ICMM to promote sustainable mining practices. The ICMM Framework in turn benchmarks its principles against “leading international standards”, which include standards that seek to promote corporate respect of human rights that are based on the UNGPs, or that are operationalized by the UNGPs, such as: the Rio Declaration, the Global Reporting Initiative, the UN Global Compact, the OECD Guidelines, the World Bank Operational Guidelines, the OECD Convention on Combating Bribery, the ILO Conventions and the VPSHR.

(4) The African Continental Free Trade Area

106. The AfCFTA was established pursuant to the African Continental Free Trade Agreement, dated 21 March 2018 (“**AfCFTA Agreement**”). The AfCFTA Agreement has the principal objective of creating a single continental market for goods and services, by building on and ultimately consolidating the integration already achieved through existing regional trade agreements.¹²⁷ The AfCFTA aims to pursue its objectives through the free movement of businesses and investment, and ultimately the creation of a customs union encompassing at least 54 of the 55 African Union Member States.¹²⁸ The AfCFTA became nominally operational on 1 January 2021, but it is expected to take at least another two years—if not longer—for trade to begin flowing through the AfCFTA mechanisms in earnest.¹²⁹
107. The AfCFTA Agreement does not presently include references to the UNGPs. However, in a review of regional approaches to BHR, the UN Economic Commission for Africa noted that “[l]essons from [the] Guiding Principles on Business and Human Rights could be incorporated” in the implementation of the AfCFTA. Nevertheless, they note that “since [the UNGPs] were devised as nonbinding guidelines”, they “should be examined carefully to ensure practicability”.¹³⁰

¹²⁵ *Id.*

¹²⁶ European External Action Service, “Joint Communiqué — European Union and African Union hold 15th human rights dialogue” (19 October 2019), at p 12 ([link](#)).

¹²⁷ Art. 5 of the AfCFTA Agreement envisages that the AfCFTA will build on existing regional trade agreements such as COMESA. However, it is recognized that the relationship between the AfCFTA and the other regional trade agreements has not yet been fully developed or understood. See, e.g., COMESA, “Continental and Regional Trade Regimes Need Proper Management to Succeed” (19 October 2020) ([link](#)).

¹²⁸ Tralac, “African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents” ([link](#)).

¹²⁹ Al Jazeera, “After months of COVID delays, African free trade bloc launches” (1 January 2021) ([link](#)).

¹³⁰ The UN Economic Commission for Africa, “Next Steps for the African Continental Free Trade Area” (2019), pp 96 and 198 ([link](#)).

(5) Other Regional Organizations

108. Two additional regional trade blocs, COMESA and IGAD, do not refer to the UNGPs specifically in their constitutional documents (or elsewhere). However, the States parties to the treaty establishing COMESA, dated 5 November 1993,¹³¹ and agreement establishing the IGAD, dated 21 March 1996, commit to the “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”.¹³² The African Charter is the principal human rights treaty for the African continent, and has been ratified by 54 States.¹³³ The Charter codifies State responsibility to protect human rights, in line with Pillar I of the UNGPs. In addition, Article 60 of the African Charter requires the ACtHPR to take into account international instruments when interpreting rights guaranteed by the African Charter, particularly those “instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights”.¹³⁴ The UNGPs is one such instrument.

The African Charter is the principal human rights treaty for the African continent, and has been ratified by 54 States. The Charter codifies State responsibility to protect human rights, in line with Pillar I of the UNGPs.

B. Ghana

(1) Court Decisions

109. There are no cases from the courts and quasi-judicial bodies in Ghana that refer to the UNGPs. However, certain other decisions under the Ghanaian Constitution have considered or applied the standards contained in international human rights instruments and international labor conventions to the conduct of businesses.
110. Chapter 5 of the Ghanaian Constitution protects 18 fundamental rights, including civil and political rights and economic, social and cultural rights. Section 12(1) of the Ghanaian Constitution provides that these rights must be respected and upheld by natural and legal persons in Ghana.¹³⁵ Consequently, businesses operating in Ghana have constitutional obligations not to violate the human rights enshrined in the Ghanaian Constitution, and breaches of these obligations are actionable before the Ghanaian courts. In their decisions, the

¹³¹ See Treaty Establishing the Common Market for Eastern and Southern Africa (December 1994). COMESA consists of 21 African states.

¹³² See Agreement Establishing the Inter-Governmental Authority on Development (March 1996). The IGAD bloc includes Djibouti, Ethiopia, Somalia, Eritrea, Sudan, South Sudan, Kenya and Uganda.

¹³³ Nuclear Threat Initiative, “African Union (AU)” ([link](#)).

¹³⁴ See African Charter on Human and Peoples’ Rights (June 1981), art. 60 ([link](#)).

¹³⁵ See The Constitution of Ghana (1992) ([link](#)).

courts have considered international human rights and labor treaties to which Ghana is signatory, even where those treaties have not been expressly incorporated into Ghanaian law. In *Customs Excise & Preventive Service (CEPS) v. National Labour Commission, Public Services Workers Union of GTUC (Interested Party)*, the Supreme Court held that courts are “under a duty to interpret the Constitution and statutes to conform to international legal norms and also to promote and encourage respect for human rights and freedom”.¹³⁶

111. For example, in *CHRAJ & 2 Ors. v. Ghana National Fire Service & Attorney-General*, the courts considered allegations that female employees of the Ghana National Fire Service were dismissed on discriminatory grounds.¹³⁷ They had each been dismissed pursuant to a provision in the National Fire Service’s terms of their employment which provided that female employees of the Ghana National Fire Service could be dismissed if they became pregnant within the first three years of their employment. After considering the protections afforded by Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), the Court held that the dismissal was unconstitutional and a breach of their right to freedom from discrimination. In *Benjamin Aryee & 691 Ors v. Cocoa Marketing Company*, former employees of the Cocoa Marketing Company sued the company, alleging that they had been wrongfully classed as casual workers and paid wages instead of salaries. They further claimed that the employment termination process was inconsistent with their status as junior staff or employees of the company. The Court held that, having regard to the circumstances, to treat the plaintiffs as anything less than permanent employees would lead to injustice and would defeat their rights under international labor conventions.¹³⁸ In other cases, the Ghanaian courts have considered the ILO Declaration of Fundamental Principles and Rights to Work,¹³⁹ ILO Recommendation No. 119 and Article 4 of the ILO Convention,¹⁴⁰ the ILO Convention on the Freedom of Association and Protection of the Right to Organize,¹⁴¹ the UDHR and the ICESCR.¹⁴² The courts have not imported these protections wholesale into Ghanaian law where they differ from the rights protected under Ghanaian law. For example, in *Narko & Anor. v. Bank of Ghana*, the courts considered ILO Recommendation No. 119, noting that it did not reflect the law in Ghana, but hoped that “the pious hopes of the ILO would inform the legislators of various countries and persons charged with engaging labor”.¹⁴³

¹³⁶ *Customs Excise & Preventive Service (CEPS) v. National Labour Commission, Public Services Workers’ Union of GTUC (Interested Party)* (4 February 2009), Adinyira, JSC.

¹³⁷ The challenge was based on Art. 17 of the Ghanaian Constitution, which guarantees freedom from discrimination.

¹³⁸ “In our opinion, to hold otherwise will lead to injustice and also to defeat the protection of workers from exploitation by employers as provided under constitutional and statutory provisions and international labor conventions” (*Benjamin Aryee & 691 Ors v. Cocoa Marketing Company* (29 November 2017), Adinyira, JSC. The court did not refer to specific labor conventions in its judgment.

¹³⁹ *Ernest Adofo and Another v. The Attorney-General and Another* (20 April 2005). See also, *Ghana Cocoa Board (Reorganization and Indemnity) Law* (1985) (PNDCL 125).

¹⁴⁰ *Vivian Bannerman v. State Transport Corporation*.

¹⁴¹ *Customs Excise & Preventive Service (CEPS) v. National Labour Commission, Public Services Workers’ Union of GTUC (Interested Party)* (4 February 2009), Adinyira, JSC.

¹⁴² *Ghana Lotto Operators Association v. National Lottery Authority* (23 July 2008), Dr. Date-Bah, JSC.

¹⁴³ [1973] 2 GLR 265, p 274.

(2) Other Developments

112. In July 2014, the Ghanaian Commission on Human Rights and Administrative Justice (“CHRAJ”), an independent organization established under the Ghanaian constitution, facilitated three capacity building workshops designed to further the implementation of the UNGPs for civil society and other stakeholders in Accra, with assistance from Shift and the Centre for Research on Multinational Corporations (“SOMO”).¹⁴⁴
113. Ghana was the first African country in 2014 to sign onto the VPSHR initiative for extractive sector companies.¹⁴⁵ While the principles do not refer to the UNGPs, they do include guidance on how companies should respond to alleged human rights impacts, including, *inter alia*, that companies should “urge investigation and take action to prevent any reoccurrence”.¹⁴⁶
114. The Ghana Institute of Management and Public Administration has also undertaken an NBA, which was due to be published in late 2020.¹⁴⁷ The Ghanaian government has not, to date, committed to producing an NAP, although the development of an NBA is expected to be the first step towards doing so.
115. Outside of the Ghanaian Constitution, no other legislation has been identified as directly addressing or implementing the UNGPs. According to a report by the EU, regulatory agencies in Ghana regularly require businesses to conduct due diligence for grant approvals and licenses for business activities that might impact the environment or worker safety in the construction sector.¹⁴⁸ However, the report does not provide any further information on the laws, regulations or policies underlying these due diligence requirements.

C. Kenya

(1) Court Decisions

116. The UNGPs have only been mentioned once by the Kenyan courts, in the case of *Kenneth Gona Karisa v. Top Steel Kenya Limited*, and then, only in the course of summarizing the petitioner’s arguments.¹⁴⁹ The Constitutional Court did not rely on the UNGPs in its reasoning.

¹⁴⁴ National Action Plans on Business and Human Rights, “Ghana” ([link](#)).

¹⁴⁵ “Voluntary Principles on Security and Human Rights” (2000) ([link](#)). See also, Fund for Peace, “Voluntary Principles in Ghana: Final Project Report — Supporting the Implementation of the Voluntary Principles on Security and Human Rights in the Oil and Mining Sectors in Ghana” (August 2018) ([link](#)).

¹⁴⁶ “Voluntary Principles on Security and Human Rights” (2000) ([link](#)).

¹⁴⁷ National Action Plans on Business and Human Rights, “Ghana” ([link](#)). The original intent was for this NBA to be published in 2019. At the time of writing, the NBA was not available.

¹⁴⁸ Directorate-General for External Policies, “Implementation of the UN Guiding Principles on Business and Human Rights” (2017), p 32 ([link](#)). This report cites to M. Taylor, “A Mapping and Gap Analysis: The State’s Duty to Protect” (2013), p 4 ([link](#)).

¹⁴⁹ *Kenneth Gona Karisa v. Top Steel Kenya Limited* [2020] eKLR, ([link](#)).

117. The petitioner (a former employee) brought the case before the Constitutional Court, alleging that Top Steel Kenya Limited's human resources manager had forcefully undressed him in the presence of others in breach of his constitutional rights, certain provisions of the UDHR, and the Labour Principles of the UN Global Compact. The petitioner sought a declaration that his rights had been violated and compensation for such breaches. In particular, the petitioner claimed that, *inter alia*, the defendant had failed "to discharge its responsibilities on human rights by failing to support and respect the protection of internationally proclaimed human rights by ensuring that its operations are not complicit in human rights abuses as provided in the [UNGPs]".¹⁵⁰ The Constitutional Court found that it lacked jurisdiction because the petition was an employment dispute, rather than a constitutional one. The case was dismissed.
118. The Kenyan Constitution contains a Bill of Rights that enshrines fundamental social, economic and political human rights, which bind all persons.¹⁵¹ Further, pursuant to Articles 2(5) and 2(6) of the Kenyan Constitution, international agreements (including the ILO Conventions) ratified by Kenya automatically form part of Kenyan law.¹⁵² Other Kenyan court decisions have concerned businesses' respect for human and labor rights under these instruments, reflecting Pillar II of the UNGPs. Such cases include:
- (i) ***Aviation and Allied Workers Union v. Kenya Airways Limited & 3 others***:¹⁵³ Kenya Airways offered a voluntary early retirement program as part of an internal restructuring. The claimant, which represented the aviation industry, asked the Industrial Court¹⁵⁴ to declare that its members had suffered unfair and wrongful redundancy and sought corrective action. In its decision, the Court referred to the UN Global Compact and the international standards contained in ILO instruments, as well as the Rio Declaration on Environment and Development and the Convention against Corruption,¹⁵⁵ and determined that Kenya Airways' new business model must meet the international standards set out in the UN Global Compact and the ILO.¹⁵⁶ Applying those standards, the Court found that the restructuring and associated redundancy exercises "were substantively without justification" and procedurally

¹⁵⁰ *Id.*

¹⁵¹ See, Constitution of Kenya of 2010, Chapter 4 ([link](#)).

¹⁵² The list of the ILO conventions that Kenya has ratified is available here: ([link](#)).

¹⁵³ *Aviation and Allied Workers Union v. Kenya Airways Limited & 3 others* [2012] eKLR ("**AAWU Case**") ([link](#)).

¹⁵⁴ Now known as the Employment and Labour Relations Court.

¹⁵⁵ The court noted that each of these international instruments was receivable in Kenya through arts. 2(5) and 2(6) of the Kenya Constitution. AAWU Case, ¶ 37. Art. 2(5): "The general rules of international law shall form part of the law of Kenya". Art. 2(6): "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". See, Constitution of Kenya of 2010, available [here](#). As Kenya has ratified certain of the conventions of the ILO, by virtue of art. 2(6), such conventions form part of Kenyan law. In respect of the ILO recommendations and conventions not ratified by Kenya, there is no restriction on Kenyan judges referring to such recommendations or conventions where the law is unclear or unsettled.

¹⁵⁶ AAWU Case, ¶ 47.

“wrong” and therefore amounted to unfair termination of employment.¹⁵⁷ The affected employees were to be reinstated and to receive back pay of their salaries.

The Industrial Court’s decision was overturned on appeal.¹⁵⁸ In coming to its decision, the Court of Appeal referred to and considered the ILO Convention on Termination of Employment, as well as other recommendations of the ILO, and agreed that the Convention was applicable by virtue of Article 2(6) of the Kenyan Constitution.¹⁵⁹ The Court of Appeal did not cite to the UN Global Compact.

- (ii) ***Severine Luyali v. Ministry of Foreign Affairs & International Trade***:¹⁶⁰ The petitioner was formerly employed as Second Secretary/First Counsellor at the Kenya High Commission in South Africa. The petitioner requested that the Employment and Labour Relations Court issue a conservatory order barring the respondent from recalling her from her position. She alleged that the respondent had violated her constitutional rights by revoking a letter of extension of her employment. The Court held that the Kenyan Constitution, through Articles 2(5) and 2(6), provides “a window for enforcement of the rights and freedoms of employees through the application of international law principles, treaties and conventions that Kenya has ratified”. In its reasoning, the Court went on to note that the UN Global Compact and the ILO conventions classify “fair procedure, reasonableness and consultation [as] core principles to the employer/employee relationship”.¹⁶¹ In this case, the Court varied the respondent’s recall letter by extending the notice period by four weeks from the judgment date and ordered the respondent to make any payments and/or expenditure allocations properly due and owing and/or incurred by the petitioner during this notice period.

(2) Other Developments

119. There is no Kenyan legislation that makes specific reference to the UNGPs. However, in Kenyan’s submissions to a Working Group survey, Kenya noted that there had been consultations on potential laws and policies regarding BHR in Kenya (referring to specific examples, such as the Mining Bill and the Energy Bill and Policy).¹⁶²

¹⁵⁷ AAWU Case, ¶ 53.

¹⁵⁸ *Kenya Airways Limited v. Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR (“**Kenya Airways Case**”) ([link](#)).

¹⁵⁹ *Kenya Airways Case*, Judgment of Murgor, JA.

¹⁶⁰ *Severine Luyali v. Ministry of Foreign Affairs & International Trade & 3 others*, [2014] eKLR (“**Severine Luyali Case**”) ([link](#)).

¹⁶¹ *Severine Luyali Case*, ¶ 31.

¹⁶² Permanent Mission of the Republic of Kenya to the United Nations, “Survey on the implementation of the Guiding Principles on Business and Human Rights: the role of states as economic actors” (25 August 2015) ([link](#)).

120. Kenya was the first jurisdiction in Africa to produce an NAP in June 2019.¹⁶³ The NAP indicates that the government will take various policy actions in connection with the three Pillars of the UNGPs. Specifically, in connection with Pillar III, the NAP notes the relevance of SDGs 16.3 (promotion of the rule of law) and 16.6 (developing accountable and transparent institutions).¹⁶⁴ It also details certain challenges with ensuring access to remedy in Kenya, including:
- (i) limited physical access to courts for people living in rural and remote areas;
 - (ii) low rates of prosecution of directors and managers of companies implicated in alleged human rights impacts;
 - (iii) high costs of litigation;
 - (iv) threats directed towards human rights defenders; and
 - (v) limited capacity of administrative tribunals to offer nonjudicial remedies.
121. In order to address these challenges, the government indicated that it would, *inter alia*:
- (i) promote the use of ADR mechanisms;
 - (ii) provide training and support to judicial and quasi-judicial bodies;
 - (iii) improve access to information on judicial and quasi-judicial bodies;
 - (iv) prioritize access to legal aid for victims of business-related human rights impacts; and
 - (v) develop and disseminate guidance for businesses on the establishment of credible operation-level grievance mechanisms.

¹⁶³ See Republic of Kenya, "National Action Plan on Business and Human Rights for the Implementation of the United Nations Guiding Principles on Business and Human Rights" (June 2019) ([link](#)). See also, Republic of Kenya, "National Action Plan on Business and Human Rights for the Implementation of the United Nations Guiding Principles on Business and Human Rights 2020-2025" ([link](#)).

¹⁶⁴ Sustainable Development Goal 16 encourages the promotion of "peaceful and inclusive societies for sustainable development", provision of "access to justice for all" and building of "effective, accountable and inclusive institutions at all levels". Specifically, 16.3 requires the promotion of "the rule of law at the national and international levels and ensure equal access to justice for all" and 16.6 requires the development of "effective, accountable and transparent institutions at all level". Sustainable Development: Goal 16, United Nations, Department of Economic and Social Affairs ([link](#)). The NAP launches straight into a consideration of how achievement of the SDGs is intrinsically interrelated with the obligations under the UNGPs and Kenya's wider economic and social agenda: "[h]uman rights treaties and standards underpin the entire 2030 Agenda and over 90% of SDGs targets can be linked to human rights standards. Thus, business respect for human rights will be a key means of ensuring progress towards achievement of the SDGs in a manner that contributes to equal outcomes for all, and the realisation of human rights" Republic of Kenya, "National Action Plan on Business and Human Rights for the Implementation of the United Nations Guiding Principles on Business and Human Rights 2020-2025", at 1 ([link](#)).

122. The Kenya National Commission on Human Rights (“**KNCHR**”), an independent NHRI established under the Kenyan constitution, is active in the BHR space in Kenya. It advised on Kenya’s NAP,¹⁶⁵ and has conducted investigations into allegations of human rights impacts by businesses, noting its broad mandate under the KNCHR Act.¹⁶⁶ The KNCHR’s reports do not specifically mention the UNGPs, but note certain standards that businesses should respect. The KNCHR has flagged on its website two particular inquiries that it has undertaken:

- (i) **Magarini, Malindi:** Following complaints from the local community, the KNCHR led a public inquiry into the practice of salt mining in the Magarini area of Malindi in Kilifi County. The allegations included, *inter alia*: (i) dispossession of land; (ii) deliberate salination of fresh water wells; (iii) poor working conditions; (iv) child labor; and (v) harassment by the provisional administration and police. The public inquiry involved a cross-section of stakeholders, resulting in a report issued in 2006, which identified a number of findings:¹⁶⁷



- Workers employed by local salt companies worked under “extremely poor conditions”. The inquiry recommended that the companies provide their workers with appropriate clothing and equipment.¹⁶⁸
- Where salt companies sought to compensate the community for adverse impacts,¹⁶⁹ it was “assessed at woefully inadequate levels”. The inquiry stressed that appropriate redress must be offered.¹⁷⁰

¹⁶⁵ See KNCHR, “Business and Human Rights” ([link](#)).

¹⁶⁶ Kenya National Commission on Human Rights Act, No. 14 of 2011 ([link](#)).

¹⁶⁷ The Malindi Inquiry Report 2006, “Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi” (July 2006) (“**Malindi Report**”) ([link](#)).

¹⁶⁸ Malindi Report, pp 22–23.

- The salt companies confused “corporate citizenship with charity”. The inquiry recommended that the relevant companies liaise with local communities on the nature of their projects and that these discussions should be incorporated into the long-term plans of the company.¹⁷¹
- In addition, the KNCHR recommended that the legislative framework on labor relations be overhauled “as a matter of urgency”.¹⁷² The KNCHR and other stakeholders continue to follow up on the implementation of the recommendations, including the Kenya Association of Manufacturers through the UN Global Compact.¹⁷³

(ii) **Taita Taveta County:** The KNCHR investigated alleged adverse human rights impacts in Taita Taveta County in connection with mining activities, noting that it was “overwhelmed by the extent of human rights violations in the mining sector”.¹⁷⁴ A number of cross-cutting and systemic allegations were made, which included: (i) land issues; (ii) environmental degradation; (iii) poor working conditions; (iv) sexual and gender-based violence; and (v) lack of community participation in decision making. The KNCHR conducted several investigative missions prior to a public inquiry in 2016. The public inquiry report, published in 2018, set out a series of key findings in response to the allegations:¹⁷⁵

- Environmental rights — business activities were exposing workers to environmental health and safety risks, as well as adversely affecting local land for current and future use by the community. The inquiry recommended that there should be well-designed health and safety programs for miners and that a framework for corporate environmental reporting should be implemented.
- Labor rights — mine workers were subjected to low pay and violations of their employee rights, as well as risky and unhygienic working environments. It was recommended that employers should strictly adhere to labor laws, as well as prepare and implement plans for CSR activities and skills transfer to their employees.

¹⁶⁹ Compensation was for losses accruing on land from which members of the local community had been evicted. This compensation covered only standing crops, permanent trees and houses and excluded land.

¹⁷⁰ Malindi Report, p 19.

¹⁷¹ Malindi Report, p 33.

¹⁷² Malindi Report, p 28.

¹⁷³ Kenya National Commission on Human Rights, “Investigations into Human Rights Violations” (30 June 2018) (“**KNC June 2018 Report**”) ([link](#)).

¹⁷⁴ See KNC June 2018 Report. See also, Kenya National Commission on Human Rights, “Public Inquiry Report on Mining Activities in Taita Taveta County” (30 May 2018) (“**KNC May 2018 Report**”) ([link](#)).

¹⁷⁵ KNC May 2018 Report.

- Gender rights — various violations were cited, including in connection with sexual abuse and violation of rights to nondiscrimination. The KNCHR recommended, *inter alia*, that measures be implemented to ensure regular and enhanced monitoring; that the victims, particularly victims of sexual abuse and harassment, be compensated; and that employers and unions should agree policies to protect gender rights.
123. In addition to the actions described above, the Kenyan government has taken other steps to strengthen respect of human rights by businesses, for example, through the introduction of a Corporate Governance Code in 2016 and an investor Stewardship Code in 2017. The latter requires that institutional investors, among other things, conduct due diligence and act responsibly in promoting sustainable markets and societies.¹⁷⁶
124. Separately, Kenya is part of the “Nairobi Process: A Pact for Responsible Business”, which aims to embed the protection of and respect for human rights, transparency and accountability, in Kenya and more generally in East Africa, through the application of the UNGPs in the oil and gas sector.¹⁷⁷

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D. Mozambique

(1) Court Decisions

125. Jurisprudence is not systematically published in Mozambique.¹⁷⁸ The court decisions that are publicly available contained no references to the UNGPs or to BHR issues more broadly.
126. The Mozambique Constitution contains a section on fundamental rights, duties and freedoms, upholding certain basic civil and political rights.¹⁷⁹ Article 56 provides that the individual

¹⁷⁶ The Capital Markets Act (Cap 485A), Stewardship Code for Institutional Investors (2017) ([link](#)). See also, Modern Ghana, “ESG Takes Centre Stage in a Post-Pandemic Africa” (26 November 2020) ([link](#)).

¹⁷⁷ Institute for Human Rights and Business, “The Nairobi Process — A Pact for Responsible Business” ([link](#)).

¹⁷⁸ The Supreme Court rulings should in principle be published in *Boletim da República* (the Official Gazette), but this obligation is not often observed.

¹⁷⁹ See Mozambique Constitution of 2004 ([link](#)).

rights and freedoms are “directly applicable” and binding upon public and private entities.¹⁸⁰ However, references to the Mozambique Constitution are also scarce in publicly available judicial decisions.

(2) Other Developments

127. Public reports suggest that an NBA has already been conducted in Mozambique and the subsequent report recommended the formulation and approval of an NAP,¹⁸¹ although it has not been possible to locate a copy of the NBA report. The OHCHR has indicated that Mozambique is either in the process of developing or has committed to developing an NAP.¹⁸² The Ministry of Justice, in partnership with civil society and represented by the Mozambique Human Rights League, has embarked on a BHR initiative, which envisages the creation of an NAP.¹⁸³
128. In addition, during the first day of the negotiations on the UN Treaty on Business and Human Rights, Mozambique spoke in support of the treaty. At the same time, Mozambique urged States to exercise caution and not exceed the scope of “elaborating an international legally binding instrument on transnational corporations and other business enterprises”, as mandated by UN Resolution 26/9.¹⁸⁴

E. Nigeria

(1) Court Decisions

129. There are no cases from the courts and quasi-judicial bodies in Nigeria that cite to or discuss the UNGPs.

(2) Other Developments

130. The Nigerian national human rights institution, the Nigerian Human Rights Commission (“**Nigerian HRC**”), has an explicit mandate to deal with issues relating to BHR, as well as to investigate all alleged human rights impacts of businesses.¹⁸⁵
131. A consultative draft of an NAP was produced by the Nigerian HRC and Nigerian civil society in 2017,¹⁸⁶ which recommended that businesses operating in Nigeria should conduct human

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² United Nations Human Rights Office of the High Commissioner, “State national action plans on Business and Human Rights” ([link](#)).

¹⁸³ Business & Human Rights Resource Centre, “Mozambique” ([link](#)).

¹⁸⁴ See Business & Human Rights Resource Centre, “Day 1 Summary: UN Treaty on Business & Human Rights negotiations kick off amid major global uncertainties” (27 October 2020) ([link](#)).

¹⁸⁵ Cases with a criminal component are forwarded to the attorney general of the Federation for prosecution.

¹⁸⁶ See Federal Republic of Nigeria, “National Action Plan on Business and Human Rights in Nigeria to Support the Implementation of the United Nations Guiding Principles on Business and Human Rights” (February 2017) ([link](#))

rights due diligence from the outset of operations and should put in place an operation-level grievance mechanism.¹⁸⁷ Although the draft NAP does refer to a baseline assessment, no copy of such baseline assessment or the finalized NAP is readily available.¹⁸⁸

132. In connection with Pillar III, the draft NAP distinguishes between three types of judicial mechanisms: (i) State-based judicial mechanisms;¹⁸⁹ (ii) State-based nonjudicial mechanisms; and (iii) non-State based grievance mechanisms. There are challenges associated with “the delivery of justice” in relation to each of these mechanisms, which include corruption, limited resources, political influence and low levels of awareness of the UNGPs.¹⁹⁰ The draft NAP suggests remedial measures to mitigate these challenges, such as training and use of ADR, and calls for “innovative” ways to mainstream the UNGPs into non-State based grievance mechanisms.¹⁹¹
133. In addition, the Nigerian HRC has indicated that the Federal and State Judiciary, together with the Federal and State Executive, will carry out a review of the role and capacity of the courts, administrative officers and security officers responsible for investigating and remedying business-related impacts as part of the draft NAP. It was recommended that intense advocacy to the judiciary to issue relevant “practice directions” would facilitate speedy resolution of human rights impacts by businesses by the courts.
134. As regards compensation for adverse human rights impacts, the draft NAP includes as a “major recommendation” the establishment of a National Working Group on Human Rights and Business, which would be tasked with reviewing the applicable laws and proposing amendments to ensure that compensation and other forms of restitution are adequate and that the benefits are directly received by the victims of such impacts, i.e., the communities or individuals affected.

F. South Africa

(1) Court Decisions

135. The South African Constitution contains a Bill of Rights upholding civil and political rights, as well as rights to privacy, labor rights and the right to a healthy environment. Section 8(2) of the Constitution provides that provisions in the Bill of Rights are binding on both natural and “juristic” persons. Further, the Companies Act 2008 (as amended) provides that the purposes

(“**Nigeria Draft NAP**”). See also, United Nations Human Rights Office of the High Commissioner, “State national action plans on Business and Human Rights” ([link](#)). The HRC has highlighted that the draft NAP is a working document and anticipates that it will be updated with further input to reflect varying regional and geopolitical considerations within the country.

¹⁸⁷ Federal Republic of Nigeria, Nigeria Draft NAP ([link](#)).

¹⁸⁸ *Id.*

¹⁸⁹ Including the HRC, the National Oil Spill Detection and Response Agency and the Consumer Protection Council, among others.

¹⁹⁰ Federal Republic of Nigeria, Nigeria Draft NAP, pp 34-38 ([link](#)).

¹⁹¹ *Id.*

- of the Act include “promot[ing] compliance with the Bill of Rights as provided for in the Constitution, in the application of company law”.¹⁹²
136. There is only one South African court decision that refers specifically to the UNGPs. In *re University of Stellenbosch Legal Aid Clinic, et al.*,¹⁹³ the High Court of South Africa invalidated a South African debt collection law that enabled lenders to implement predatory, unfair, and deceptive debt collection practices, depriving tens of thousands of low-wage earners of their rights to access the courts for remedy, to an adequate standard of living, and to family life.
 137. The University of Stellenbosch Legal Aid Clinic and 15 of its clients, who were all employed as low-wage general workers, decided to initiate legal proceedings against the Minister of Justice and Correctional Services, the Minister of Trade and Industry, as well as 15 micro-lenders and related entities, who they alleged had been abusing the mechanism of emoluments attachment orders (“**EAO**”). EAOs permitted the attachment of a judgment debtor’s earnings and obliged the debtor’s employer to make installment payments to the judgment creditor from those earnings. There was no statutory limit on the amount which could be deducted from a debtor’s earnings, nor was there a limit on the number of EAOs which could be granted against a particular debtor. Further, the applicants’ counsel pointed out that the micro-lenders were forum shopping for courts that were likely to grant their applications for EAOs, even if the courts were located far from where the debtors resided and worked.
 138. The applicants sought a declaration: (i) that the relevant legislation was unconstitutional to the extent that it failed to provide for judicial oversight over the issuing of an EAO against a judgment debtor; (ii) that EAOs obtained on the basis of invalid written consent in jurisdictions alien to the debtors be declared invalid; and (iii) setting aside EAOs granted against the applicants on the basis that the orders were unlawful and invalid.
 139. In its reasoning, the High Court surveyed certain international instruments, including the UNGPs, which the Court stated “place a duty upon the state to take measures to prevent the abuse of human rights in their territory by business enterprises”.¹⁹⁴ States are therefore “obliged to reduce legal and practical barriers that may deny individuals a remedy”.¹⁹⁵ The Court also looked to the ILO Protection of Wages Convention, to which South Africa is not a party, but which “has probably reached the status of international customary law which is binding on all States”,¹⁹⁶ and UNHRC Resolution 26/22 of 15 July 2014, which raises the concern of legal and practical barriers to remedies for business-related human rights impacts. In light of its survey, the High Court concluded that “[i]t seems to be firmly established in international law that States have a duty to protect their citizens against the abuse of human

¹⁹² Companies Act 2008, Section 7.

¹⁹³ *Re University of Stellenbosch Legal Aid Clinic, et al.*, High Court of South Africa (Western Cape Division, Cape Town), Case No. 16703/14 (8 July 2015), Judgment, [2015] ZAWCHC99 ([link](#)).

¹⁹⁴ *Id.*, ¶ 71.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*, ¶ 67.

rights by business enterprises in their territory. Where such abuses do occur, States have a duty to provide victims with an effective remedy”.¹⁹⁷

140. In July 2015, the High Court ruled in favor of the applicants, declaring that: (i) the EAOs issued against the applicants were “unlawful, invalid and of no force and effect”;¹⁹⁸ (ii) the provisions of the legislation allowing for the issuing of EAOs were constitutionally invalid to the extent they did not provide for judicial oversight;¹⁹⁹ and (iii) the legislation “does not permit a debtor to consent in writing to the jurisdiction of a magistrate’s court other than that in which the debtor resides or is employed”.²⁰⁰
141. The Constitutional Court was then seized of an application for confirmation of the order of invalidity made by the Western Cape Division of the High Court and an appeal against certain parts of that order. The Constitutional Court did not confirm the order of constitutional invalidity made by the High Court. Instead, it ordered a change in the wording of the relevant legislation to align with the text of the Constitution.²⁰¹ The Court nonetheless confirmed the judicial obligation to take into account certain factors in applications for EAOs in order to ensure that they only apply to funds in excess of the amount a debtor needs for maintenance. The Court found that this was in line with the relevant international standards (i.e., the ILO Protection of Wages Convention). It did not rely upon the UNGPs in its decision.
142. Certain other South African courts have applied international human rights and labor protections—such as those contained in the ILO and the UDHR—to cases concerning corporate behavior. The South African labor court has referred to the UDHR in at least four cases²⁰² and to the ILO Declaration in at least one.²⁰³ In that case, the labor court considered itself bound to apply the ILO Declaration on the basis that South Africa is a member of the ILO. The court held that the “[d]eclaration is more than aspirational. It is as much a tool for regulating the effects of globalisation on employment as it is a weapon for holding MNEs and other stakeholders accountable for upholding and promoting the standards set in the Declaration. Although neither party relied on the Declaration; the court is obliged to have regard to it as it forms part of International Labour law which is binding on South Africa as a member of the ILO”.²⁰⁴

¹⁹⁷ *Id.*, ¶ 74.

¹⁹⁸ *Id.*, ¶ 94.1.

¹⁹⁹ *Id.*, ¶ 94.2.

²⁰⁰ *Id.*, ¶ 94.3.

²⁰¹ *Re University of Stellenbosch Legal Aid Clinic, et al.*, Constitutional Court of South Africa, Case CCT 127/15 (13 September 2016) ([link](#)).

²⁰² *PFG Building Glass (Pty) Ltd v. CEPWU & others* [2003] 5 BLLR 475 (LC); *Co-operative Worker Association & another v. Petroleum Oil & Gas Co-operative of SA & others* [2007] 1 BLLR 55 (LC); *Mondi Packaging (Pty) Ltd v. Department of Labour & others* [2008] 3 BLLR 280 (LC); *Mohlaka v Minister of Finance & others* [2009] 4 BLLR 348 (LC).

²⁰³ *Moslemany v. Unilever PLC & another* [2006] 12 BLLR 1167 (LC) ([link](#)).

²⁰⁴ *Id.*, ¶ 13.

143. Other decisions illustrate judicial engagement with BHR considerations, albeit without express reference to the UNGPs or the standards referenced therein. For example, in 2006, the Witwatersrand Division of the High Court referred to domestic laws protecting human rights and the environment in a case involving allegations of pollution of water sources as the result of mining activities. The High Court held that:²⁰⁵

“[p]ractising sound corporate governance is essential for the well-being of a company and is in the best interest of the growth of this country’s economy essentially in attracting new investments. To this end the corporate community within South Africa has widely and almost uniformly accepted the findings and recommendations of the King Committee on Corporate Governance”.²⁰⁶ (emphasis added)

And further that:

“[t]o permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act and the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations an impression will be created that mining companies are free to exploit the mineral resources of the country for profit over the lifetime of the mine, thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognizes the right of all of its citizens to be protected from the effects of pollution and degradation”.²⁰⁷

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²⁰⁵ *Minister of Water Affairs & Forestry v. Stilfontein Gold Mining Company Ltd & others* [2006] JOL 17516 (W), ¶ 16.7 ([link](#)).

²⁰⁶ The King Committee on Corporate Governance issues guidelines for the governance structures and operation of companies in South Africa, also known as King Reports on Corporate Governance. Compliance with the most recent King Report is a mandatory requirement for companies listed on the JSE. The latest King Report is non-legislative and is based on principles and recommended practices.

²⁰⁷ *Minister of Water Affairs & Forestry v. Stilfontein Gold Mining Company Ltd & others* [2006] JOL 17516 (W), ¶ 16.9 ([link](#)).

(2) Other Developments

144. The South African government has not formally endorsed the UNGPs.²⁰⁸ It has been leading the process towards a binding treaty on BHR, alongside the Ecuadorian government, having supported UNHRC Resolution 26/9, which established an Open-Ended Intergovernmental Working Group (“OEIWG”) to explore the possibility of developing a binding instrument on BHR.²⁰⁹ However, the EU Policy Department has noted in a report on the “Implementation of the UN Guiding Principles on Business and Human Rights” that “[t]he approach exemplified by South Africa is that of a country where the decision to push for a binding treaty at international level resulted in the lack of any meaningful efforts to address the existing human rights and business/accountability challenges”.²¹⁰ The report further observes that “[t]here is no pursuit at national level to initiate actions aimed at improving respect for human rights in the business context. Action was seen only on the side of CSOs and academic centres such as the Centre for Human Rights at the [University] of Pretoria (Centre for Human Rights, 2016) where the shadow national baseline assessment has been developed”.²¹¹
145. South Africa’s national human rights institution—the South African Human Rights Commission (“SAHRC”)—has demonstrated its support for the UNGPs and urged the government to follow other States that have openly expressed support for the UNGPs and begun developing NAPs.²¹² In 2016, academia and civil society more generally led the call for an NAP, including by conducting a “‘Shadow’ Baseline Assessment of Current Implementation of Business and Human Rights Frameworks” (“Shadow NBA”). The Shadow NBA lays the foundation for an NAP process and provides evidence-based recommendations for developing BHR policies at the government level.²¹³
146. The SAHRC’s powers and functions include the authority to investigate and report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated. The SAHRC has considered the UNGPs when exercising this authority. Further, its “Investigative Hearing Report on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa”²¹⁴ notes that in the course of assessing the monitoring and resolution of complaints, “[the] Commission noted two

²⁰⁸ The Centre for Human Rights at the University of Pretoria, “‘Shadow’ National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks, South Africa” (2016), at 2 ([link](#)).

²⁰⁹ On 6 August 2020, the OEIWG released the Second Revised Draft of a proposed binding treaty on business and human rights. Discussions about the draft are still ongoing.

²¹⁰ Directorate-General for External Policies, “Implementation of the UN Guiding Principles on Business and Human Rights” (2017), at 46 ([link](#)).

²¹¹ *Id.*

²¹² SAHRC, “Business and Human Rights: Access to fair play for those affected by business-related human rights violation is possible via SA’s Constitution” (21 April 2016) ([link](#)).

²¹³ The Centre for Human Rights at the University of Pretoria, “‘Shadow’ National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks, South Africa” (2016), at 6 ([link](#)).

²¹⁴ SAHRC, “National Hearing Report on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa” (13–14 September; 26 and 28 September; and 3 November 2016), at 79 ([link](#)).

instances whereby complaints resolutions were based on the UN Guiding Principles on Business and Human Rights”.

147. The SAHRC has also delivered several capacity building programs in an attempt to ensure that the legal framework is adequate to protect human rights vis-a-vis business activities.²¹⁵ In March 2015, the SAHRC launched a Human Rights and Business Country Guide on South Africa (“**South Africa Country Guide**”) to sensitize businesses to key human rights risks in the country. The South Africa Country Guide draws on the UNGPs to define the roles and responsibilities of the government and companies. It canvasses challenges in relation to security and conflict, which impact, *inter alia*, the right to life and labor protests. The South Africa Country Guide discusses cases in which the SADRC is involved, and makes recommendations to the government and other stakeholders, such as setting a minimum wage in certain sectors, improved monitoring of employment contracts, enforcing environmental obligations, and providing decent housing.²¹⁶
148. Certain major corporations operating in South Africa have endorsed the UNGPs. For example, Standard Bank of South Africa Limited, a leading South African bank, takes the position that “part of its corporate responsibility is to protect and uphold human rights in its operational practice and financing activities in line with the UN Guiding Principles on Business and Human Rights”.²¹⁷

G. Tanzania

(1) Court Decisions

149. There are no decisions from the courts and quasi-judicial bodies in Tanzania that cite to or discuss the UNGPs or other BHR-related guidelines. Nor are there any court decisions that discuss businesses’ responsibility to respect international human rights.

(2) Other Developments

150. In Tanzania, the Commission for Human Rights and Good Governance (“**CHRAGG**”) is an independent institution, established as a national focal point for the promotion and protection of human rights, as well as good governance in Tanzania. In 2013, the Human Rights Action Plan (2013–2017) tasked the CHRAGG with developing an NBA to support the development

²¹⁵ The Centre for Human Rights at the University of Pretoria, “‘Shadow’ National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks, South Africa” (2016), at 14 ([link](#)). DIHR-SAHRC, “Business and Human Rights Dialogue Report” (13–14 March 2018), at 2 ([link](#)). These included, for example, the organization of a “Business and Transparency Conference” in 2013 and of a “Business and Human Rights Dialogue” in 2018, seeking to build on its past activities with the objective of progressively strengthening business responsibility in respect of human rights.

²¹⁶ SAHRC, “Business and Human Rights: Access to fair play for those affected by business-related human rights violations is possible via SA’s Constitution” (21 April 2016) ([link](#)).

²¹⁷ The Centre for Human Rights at the University of Pretoria, “‘Shadow’ National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks, South Africa” (2016), at p 14 ([link](#)).

of an NAP. In 2017, the CHRAGG, in partnership with the Danish Institute for Human Rights (“**DIHR**”) and SOMO, published the “National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks in the United Republic of Tanzania”.²¹⁸ The NBA noted that, as of 2017, there was no action plan on BHR, nor had any firm steps been taken towards developing one, despite the commitment to do so in the government’s Human Rights Action Plan.²¹⁹ This remains the situation today. The NBA also noted: (i) the lack of awareness regarding BHR considerations among government ministries, businesses, civil society and community stakeholders; (ii) the lack of coherent policy and institutional framework to implement the UNGPs;²²⁰ and (iii) the State’s failure to disseminate information about the UNGPs.²²¹

151. The development of the NBA is part of a larger project to implement the UNGPs in sub-Saharan Africa and to strengthen civil society’s capacity.²²² For example, SOMO has worked to build the capacity of civil society organizations to address alleged adverse human rights impacts linked to the extractive sector and other land-intensive industries.²²³ Similarly, the DIHR aims to support local partners in establishing multi-stakeholder dialogues on BHR, as well as reforming proposals on the extractive sector and other land-intensive industries in Kenya and Tanzania.²²⁴

H. Uganda

(1) Court Decisions

152. There are no cases from the courts and quasi-judicial bodies in Uganda that cite to or discuss the UNGPs.

(2) Other Developments

153. The Uganda Human Rights Commission (“**UHRC**”) was established by the 1995 Constitution of the Republic of Uganda.²²⁵ In 2016, the UHRC and the DIHR published the “Human Rights and Business Country Guide Uganda” (“**Uganda Country Guide**”), focusing on a range of issues, such as child labor, forced labor, working conditions, the environment, revenue transparency and management. The Uganda Country Guide contains information regarding

²¹⁸ The Commission for Human Rights and Good Governance, “National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks in the United Republic of Tanzania” (November 2017) ([link](#)).

²¹⁹ *Id.*, at p 9.

²²⁰ *Id.*, at p 9.

²²¹ *Id.*, at pp 44-45.

²²² The Danish Institute for Human Rights, “Implementing the United Nations Guiding Principles on Business and Human Rights in Sub-Saharan Africa” ([link](#)).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Uganda Human Rights Commission, “UHRC Background” ([link](#)).

the potential and actual adverse human rights impacts of businesses operating in Uganda.²²⁶ It is intended to encourage education on BHR issues through training sessions and capacity building.²²⁷

154. Following a Universal Periodic Review (“UPR”) of Uganda in 2016, a group of UN rapporteurs recommended, among other things, that Uganda: (i) implement the UNGPs framework to guarantee labor and land rights; and (ii) adopt an NAP, building on the principles of the UNGPs.²²⁸ The UPR report indicates that its recommendations “have been examined by Uganda and enjoy the support of Uganda”.²²⁹
155. While it has been reported that Uganda has prepared a draft NAP,²³⁰ at the time of writing, it has not yet been published.

I. Zambia

(1) Court Decisions

156. No court or quasi-judicial decisions were found in Zambia that directly address or mention the UNGPs. However, there are at least two examples of the Zambian courts holding a business accountable for the impacts of its activities and policies on human rights and the environment. First, in *James Nyasulu et al., v. Konkola Copper Mines Plc*, the High Court of Zambia found that a mining company was negligent in relation to the pollution of the main source of water of the Chingola community.²³¹ Justice Phillip Musonda concluded that there had been “corporate recklessness” and a “lack of corporate responsibility”, and that “[i]nternational investors should observe high environmental standards, that is a global approach”.²³²
157. Second, in *Longwe v. Intercontinental Hotel*, the High Court held that certain constitutional guarantees, including, for example, the right to life and personal liberty, freedom from slavery, forced labor and torture, the rights to privacy of home and other property, and the freedom of conscience, must be respected by private persons and institutions, as well as public authorities.²³³ Applying these guarantees, the High Court found that a hotel’s policy denying

²²⁶ Uganda Human Rights Commission and The Danish Institute for Human Rights, “Human Rights and Business Country Guide Uganda” (2016) ([link](#)).

²²⁷ *Id.*, at p 5.

²²⁸ UNHRC, “Report of the Working Group on the Universal Period Review: Uganda”, A/HRC/34/10 (27 December 2016) ([link](#)).

²²⁹ *Id.*, at p 115.

²³⁰ National Action Plan on Business and Human Rights, “Uganda” ([link](#)).

²³¹ *James Nyasulu, et al., v. Konkola Copper Mines Plc*, Environmental Council of Zambia, Chingola Municipal Council, High Court for Zambia, 2007/HP/1286 ([link](#)).

²³² *Id.*, pp 22-23.

²³³ *Longwe v. Intercontinental Hotel*, High Court of Zambia, 4 November 1992, p 231.

entry to women unaccompanied by men constituted discrimination on the basis of gender and contravened the constitutional rights to freedom of assembly, association and movement.²³⁴

(2) Other Developments

158. As explained above, the Zambian Constitution contains a Bill of Rights which is binding on legal persons. In 2016, the 1996 Constitution was amended by an Act of the National Assembly,²³⁵ with the exception of the Bill of Rights. A referendum on amendments that would have strengthened the Bill of Rights failed to meet the required threshold.²³⁶ Notably, the proposed amendments would have extended the Bill of Rights to cover economic, social, cultural and special rights, as well as environment-related rights.²³⁷
159. The Zambia Human Rights Commission (“ZHRC”) is mandated to uphold the Bill of Rights, to investigate human rights violations and maladministration of justice and to propose effective measures to prevent human rights abuses.²³⁸
160. To date, the ZHRC has led efforts towards developing an NAP. The NBA was published by the ZHRC on 9 July 2016, which examines the State’s duty to protect human rights, including its role in providing effective remedies for business-related human rights impacts under Pillars I and III of the UNGPs. A Pillar II NBA is in progress.²³⁹
161. In relation to Pillar I of the UNGPs, the NBA noted that the Zambian government had taken no steps to implement the UNGPs. The research underlying the NBA found that Zambia had not assessed its laws, regulations, policies or practices against the UNGPs.²⁴⁰ Accordingly, the NBA recommended to the government to make a formal commitment to implement the UNGPs and to put in place an NAP. It also recommended that the Zambian government ensure that relevant agencies provide standards and guidance to companies and other stakeholders on their responsibilities under the UNGPs. With regards to Pillar III, the NBA indicates that Zambian institutions are mandated to afford access to remedy but that barriers to justice exist in the context of BHR disputes.²⁴¹ These barriers help explain why few

²³⁴ *Id.*, p 233.

²³⁵ United Nations Zambia, “Briefing Note on Human Rights in Zambia: A submission to the Working Group on the Universal Periodic Report for Zambia” (March 2017), at p 3.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Zambian Human Rights Commission, “Establishment of the Commission” (30 September 2014) ([link](#)).

²³⁹ Zambian Human Rights Commission and The Danish Institute for Human Rights, “National Baseline Assessment on Business & Human Rights: Zambia”, at p 9 ([link](#)).

²⁴⁰ *Id.*

²⁴¹ For example, cases are processed slowly and can be expensive; in cases of human rights abuses by business, most citizens do not know where to bring their claims; and where judgments have been made in favor of victims of human rights violations (especially against the government), compensation is delayed or not paid at all.

successful cases have been brought against companies for a failure to prevent or mitigate adverse impacts on rights.²⁴²

162. In its submission to the UNHRC prior to Zambia's UPR in November 2017, the ZHRC explained that it had held several stakeholder engagement meetings with the Ministry of Commerce, Trade and Industry to share and discuss the NBA's findings, and ways to further domesticate the UNGPs. The ZHRC recommended that the Zambian government "(i) [d]esignate a Government focal point institution to spearhead implementation of the UN Guiding Principles on business and human rights, and (ii) [d]evelop and implement a National Action Plan on business and human rights in Zambia based on the baseline assessment report".²⁴³
163. Taking into account these recommendations, Zambia's national UPR report indicates that: (i) "Zambia is committed to developing a National Action Plan in order to facilitate the enactment of laws and policies which require revision in efforts to strengthen protection of human rights in business. Zambia is also conducting an assessment on the domestication of the [UNGPs]";²⁴⁴ and (ii) that the ZHRC will "mainstream the UN Guiding Principles on Business and Human Rights; and sensitize members of the general public on human rights. Sensitization is expected to be a continuous process and the Human Rights Commission has had several logistical challenges to undertake this obligation".²⁴⁵

²⁴² Zambian Human Rights Commission and The Danish Institute for Human Rights, "National Baseline Assessment on Business & Human Rights: Zambia", at pp 24-25 ([link](#)).

²⁴³ National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21, "Zambia", A/HRC/WG.6/28/ZMB/1 (26 October 2017), at p 120 ([link](#)).

²⁴⁴ *Id.*

²⁴⁵ *Id.*, at p 138.



V. ASIA-PACIFIC

A. Overview

164. The UNGPs have had some impact in the Asia-Pacific region and appear to be gradually gaining prominence. There has been no formal implementation of the UNGPs as local laws in the region and, as a likely result of this, there has been no judicial enforcement of or reference to the principles in publicly available court decisions. However, Australia, Japan, New Zealand and South Korea have established NCPs with complaint mechanisms in accordance with the OECD Guidelines, and these NCPs have referred to the UNGPs in a number of decisions. Furthermore, the UNGPs had a significant influence on the Modern Slavery Act of Australia and the Modern Slavery Act of New South Wales. In addition, the UNGPs have regularly been used in the scrutiny of proposed bills as part of New Zealand's legislative process.
165. As at the time of this report, three countries in the Asia-Pacific region—Japan, South Korea and Thailand—have adopted an NAP for implementing the UNGPs, and five other countries—India, Indonesia, Malaysia, Mongolia and Pakistan—are in the process of doing so. Certain other countries in the Asia-Pacific region, such as Malaysia, Myanmar, Thailand and the Philippines, have also had some positive developments in terms of recognizing the UNGPs through State and non-State initiatives.
166. Many countries in Southeast Asia have seen strong economic growth over recent decades as a result of increasing investment, particularly in the manufacturing and industrial sector. The relatively slower implementation of the UNGPs in the region can be attributed in part to diverse political systems, inadequate awareness of the UNGPs among private corporations, and the limited capacity of local human rights bodies to drive change without enforcement authority.²⁴⁶ However, recent positive developments reflect the growing importance and recognition of the UNGPs in the Asia-Pacific region.

B. Australia

167. Australia has a robust legal framework which supports the application of the UNGPs by States and businesses. Although the UNGPs do not have force of law as legislation, Australia's Modern Slavery Acts at the federal and state levels were influenced by the UNGPs. Furthermore, Australia has set up an NCP which, to date, has received 22 complaints. Other trends in Australia suggest a growing recognition of the importance of respect for human rights in the business context.

²⁴⁶ Melbourne Asia Review, "Obstacles to Implementing the UNGPs in Southeast Asia" (29 July 2020) ([link](#)) and The Diplomat, "Pandemics, Politics, and Principles: Business and Human Rights in Southeast Asia in a Time of Crisis" (27 August 2020) ([link](#)).

(1) Court Decisions

168. There has been no formal implementation of the UNGPs in Australia. Instead, Australia relies on its existing laws to protect human rights in the business context, although it has shown support for the UNGPs by “encourag[ing] businesses to apply them in their operations”.²⁴⁷ Consistent with this, there are no reported decisions in which an Australian court expressly refers to the UNGPs.
169. However, *Kamasee v. Commonwealth* is a recent example of BHR issues being increasingly litigated in the Australian courts. This case involved a class action brought in the Supreme Court of Victoria concerning an alleged breach of duty of care owed to asylum seekers by the Commonwealth of Australia and the two independent contractors running an immigration detention center.²⁴⁸ The Court did not adjudicate the claims as the parties reached a settlement on 7 July 2017 following mediation.²⁴⁹

(2) NCP Decisions

170. Outside of the judicial process, complaints concerning BHR issues may be brought before the Australian NCP (“**AusNCP**”).²⁵⁰ The AusNCP was set up in 2000–2001 in consultation with government, nongovernment, and OECD stakeholders.²⁵¹ It handles complaints about alleged non-observance of the OECD Guidelines. Since the AusNCP’s first complaint in 2005, it has received 24 complaints.
171. Of these complaints, two decisions explicitly refer to the UNGPs. In one complaint, the AusNCP found that the respondent company was not ultimately responsible for a refugee processing facility and dismissed the complaint. In its written decision, the AusNCP cited the company’s human rights policy as evidence of its commitment to “applying the UNGPs”.²⁵²

²⁴⁷ The Parliament of the Commonwealth of Australia, House of Representatives, “Modern Slavery Bill 2018: Explanatory Memorandum”, at 38 ([link](#)) (“**Modern Slavery Bill Explanatory Memorandum**”). See also, “Questionnaire for States: National Action Plan on Business and Human Rights: Australian Response” (July 2014), at 1, question 4; Australian Government, Department of Foreign Affairs and Trade, “Business and Human Rights,” ([link](#)) (stating “[b]usinesses must comply with all Australian laws. In addition, under international law, the government is obliged to ensure that non-state actors, including businesses, respect human rights”).

²⁴⁸ G. Holly, “Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: *Kamasee v. Commonwealth*,” 19 MELB. J. INT’L L. 52 (2018), at 54.

²⁴⁹ *Kamasee v. Commonwealth of Australia & Ors* (Approval of settlement) [2017] VSC 537 (6 September 2017), ¶ 2.

²⁵⁰ Additional non-judicial complaints mechanisms include: those made available by the Australian and state/territory human rights commissions (e.g., the Australian Human Rights Commission investigates complaints about discrimination and human rights breaches—the Conciliation Register ([link](#)), provides summaries of a selection of complaints that have been resolved through the Commission’s conciliation process); and Export Finance Australia, the Australian government’s export credit agency, has a mechanism for handling complaints or grievances, and its Human Rights Statement refers to the UNGPs (Export Finance Australia, “Human Rights Statement” (3 December 2015) ([link](#))).

²⁵¹ For further background, see AusNCP, “About,” ([link](#)).

²⁵² Complaint 10, Human Rights Law Centre and Rights and Accountability in Development alleging human rights abuses of asylum seekers committed by G4S, an Australian security company contracted by the Australian

172. In the second case, the AusNCP facilitated a discussion between an NGO and a financial institution resulting in a confidential agreement. The AusNCP's public documents indicate that as part of this settlement, the financial institution agreed to assist communities forcibly displaced by a borrower that ran a sugar plantation and refinery²⁵³ by contributing its gross profit from the loan, and to review and strengthen its human rights policies. In the parties' statement published by the AusNCP, the two NGOs that brought the complaint indicated their willingness to work with the financial institution to "continue to align its human rights approach" with the OECD Guidelines and the UNGPs. In a follow-up statement, the AusNCP noted that the parties were expected to continue to respect applicable due diligence obligations, which would be informed by any subsequent guidelines issued by the OECD Secretariat.²⁵⁴

(3) Other Developments

173. The Australian government has not adopted an NAP.²⁵⁵ Notwithstanding this, in its response to recommendations made during its second UPR in 2015, the Australian government made a voluntary commitment to undertake a national consultation on the implementation of the UNGPs.²⁵⁶ As part of this process, the Australian government established a Multi-Stakeholder Advisory Group on Implementation of the UNGPs,²⁵⁷ which finalized a report in August 2017 prioritizing issues and actions to implement the UNGPs in Australia.²⁵⁸ The report contained 28 short-, medium- and long-term recommendations for the Australian government.²⁵⁹ In October 2017, Australia's Foreign Minister confirmed that the government was "not proceeding with a [NAP] at this time".²⁶⁰ Thus far, the Australian government has

government to oversee management and security at the Manus Regional Processing Centre. See Australian National Contact Point, Appeal Statement (27 October 2017), at 7 ([link](#)).

²⁵³ Complaint 11, Equitable Cambodia and Inclusive Development International on behalf of 681 families against Australian and New Zealand Banking Group, concerning ANZ's investment in a developer responsible for a sugar plantation and refinery project in Cambodia, which allegedly forcibly displaced 681 families and dispossessed them of their land and resources. See Australian National Contact Point, Follow-Up Statement (27 February 2020), at 6 ([link](#)).

²⁵⁴ *Id.*, at 5.

²⁵⁵ For background on the recommendations and decisions made in relation to a potential Australian NAP, see The Danish Institute for Human Rights, National Action Plans on Business and Human Rights, "Australia," ([link](#)).

²⁵⁶ See "Australian Government Response to the Working Group on the Issue of Human Rights and Transnational Corporations' Survey on the Implementation of the Guiding Principles on Business and Human Rights: National Action Plans on Business and Human Rights" (18 September 2016); "Report of the Working Group on the Universal Periodic Review: Australia: Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review" (29 February 2016), UN Doc A/HRC/31/14/Add.1, ¶ 63.

²⁵⁷ For background on the Multi-Stakeholder Advisory Group, see Australian Government, Department of Foreign Affairs and Trade, "Multi-Stakeholder Advisory Group on Implementation of the UN Guiding Principles on Business and Human Rights," ([link](#)).

²⁵⁸ Multi-Stakeholder Advisory Group on Implementation of the UN Guiding Principles on Business and Human Rights, "Advice on the Prioritisation of Issues and Actions to Implement the UN Guiding Principles on Business and Human Rights (UNGPs)" (August 2017) ([link](#)).

²⁵⁹ See generally, Advice on the Prioritisation of Issues and Actions to Implement the UN Guiding Principles on Business and Human Rights (August 2017).

²⁶⁰ Human Rights Law Centre, "Government ignores advice of expert group on business and human rights" (18 October 2017) ([link](#)).

- implemented one of the Advisory Group’s 28 recommendations, namely, enacting modern slavery reporting requirements.
174. The Australian government’s Department of Foreign Affairs and Trade has also taken steps to “identif[y] the existing Australian laws, government policies and business practices relevant to the UNGPs” by commissioning the April 2017 “Stocktake on Business and Human Rights in Australia”.²⁶¹ The report noted, for example, that there was no formal government policy requiring human rights provisions to be included in free trade and investment policies.²⁶² It also noted that Australian companies often did not “appreciate their supply chain links to higher-risk contexts” until after a significant incident had occurred.²⁶³
 175. Other developments in Australia point towards an increasingly robust BHR environment, the most significant of which is the introduction of modern slavery laws.
 176. Many of the Australian laws that protect against business-related human rights impacts, including those which implement Australia’s obligations under international human rights law, predate the UNGPs.²⁶⁴ The federal and New South Wales’ modern slavery acts are exceptions to this.
 177. Significantly, documents underpinning Australia’s Modern Slavery Act 2018 (Cth) expressly refer to the UNGPs, and the Act requires certain entities to report on the risks of modern slavery in their operations and supply chains—as well as those of any entities owned or controlled by them—and actions they are taking to address those risks.²⁶⁵ It is evident from the explanatory memorandum and other materials that the Modern Slavery Act draws heavily on the UNGPs.²⁶⁶ The explanatory memorandum to the Act explains that “[t]he mandatory criteria [for modern slavery statements] draw on terminology and concepts used in the business and human rights context, particularly in the [UNGPs]”.²⁶⁷ It is notable, however, that there are no penalties attached to noncompliance with the reporting requirement established

²⁶¹ Allens, “Stocktake on Business and Human Rights in Australia” (April 2017), at 4 ([link](#)) (“**Stocktake on Business and Human Rights in Australia**”). For an overview of business and human rights in Australia, including the legal and policy framework and judicial redress, see Clifford Chance, “First-Step Analysis: Business and Human Rights in Australia” (28 February 2020) ([link](#)) (“**First-Step Analysis: Business and Human Rights in Australia**”).

²⁶² Stocktake on Business and Human Rights in Australia, at 12.

²⁶³ *Id.*, at 17.

²⁶⁴ See, e.g., First-Step Analysis: Business and Human Rights in Australia for a list of acts (all of which predate the UNGPs).

²⁶⁵ ([link](#)).

²⁶⁶ See Joint Standing Committee on Foreign Affairs, Defence and Trade, “Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia” (December 2017), ¶ 5.25 ([link](#)) (The Committee “consider[ed] that the reporting requirement should be consistent with the [UNGPs]”). See also, “Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities,” at 10, 29, 30, 40, 46–49, 51, 90, 93 ([link](#)) (drawing on the UNGPs to explain each mandatory criterion and referring extensively to the UNGPs).

²⁶⁷ Modern Slavery Bill Explanatory Memorandum, ¶ 127.

by the Act nor are there provisions under which litigation or any other type of enforcement action could be brought.²⁶⁸

178. In addition to this federal legislation, the Australian State of New South Wales has also introduced the Modern Slavery Act 2018 (NSW), but it has not entered into force as of the date of writing.²⁶⁹ The New South Wales Act strengthens the reporting requirement, the threshold for which appears to have been informed by the UNGPs,²⁷⁰ by potentially imposing a fine for failure to make a statement in compliance with the Act or where the statement is false or misleading.²⁷¹
179. Finally, there have been a number of civil lawsuits relating to BHR issues. Under Australia's criminal and civil law, it is possible to hold a corporation liable, either directly or indirectly, for a crime or tort that implicates adverse human rights impacts.²⁷² The recent *Kamasae v. Commonwealth*²⁷³ case, which concerned alleged human rights impacts by independent contractors running an immigration detention center, is an example of a case brought on this basis.²⁷⁴ The Australian government has separately initiated possible reforms to the corporate criminal responsibility regime,²⁷⁵ including a recommendation to introduce a "failure to prevent" model of criminal attribution to encompass certain transnational crimes involving the most egregious human rights violations.²⁷⁶

²⁶⁸ On compliance with the Act, page 57 of the Modern Slavery Bill Explanatory Memorandum explains: "*The Australian Government will not publish a list of entities required to report or introduce punitive measures for noncompliance with the reporting requirement. ... The reporting requirement is also intended to facilitate a collaborative 'race to the top' amongst business and punitive penalties may lead to a tick box compliance approach from reporting entities*".

²⁶⁹ Modern Slavery Act 2018 No. 30.

²⁷⁰ Standing Committee on Social Issues, "Modern Slavery Act 2018 and Associated Matters," ¶ 2.21 ([link](#)).

²⁷¹ Modern Slavery Act 2018 No. 30, s. 24. The New South Wales Act is broader than the Commonwealth Act, also establishing, for example, an Anti-slavery Commissioner. The objects of the Act are listed in s. 3.

²⁷² Stocktake on Business and Human Rights in Australia, at 20. See also, 88–96 which outlines the availability of access to remedy under Australia's criminal, civil, and administrative law.

²⁷³ *Commonwealth of Australia & Ors v. Kamasae & Ors* [2017] VSCA 121 (26 May 2017); *Kamasae v. Commonwealth of Australia & Ors* (Ruling on the settlement distribution) [2018] VSC 138 (27 March 2018). This high-profile class action was brought against the Commonwealth of Australia and two corporate contractors that operated the immigration detention center on Manus Island in Papua New Guinea concerning allegations of human rights abuses of asylum seekers detained in the center.

²⁷⁴ G. Holly, "Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: *Kamasae v. Commonwealth*", 19 MELB. J. INT'L L. 52 (2018), at 53–54. See also, Federal Court of Australia, "*Sanda v PTTEP Australasia (Ashmore Cartier)*" (Updated 22 July 2019) ([link](#)); Business & Human Rights Resource Centre, "*PTTEP Australasia Lawsuit (re Montara Oil Spill in Indonesia)*," ([link](#)).

²⁷⁵ Australian Law Reform Commission, "Corporate Criminal Responsibility: ALRC Report 136" (April 2020) ([link](#)) ("**ALRC Report**").

²⁷⁶ Allens, "The ALRC Recommendations on Criminal Responsibility and Transnational Offending — A Sign of Things to Come?" (30 September 2020) ([link](#)). The UNGPs are relied upon in the "Transnational Business" section of the ALRC Report: see 446, 449, 454, 462, 468, 491.

It is evident from the explanatory memorandum and other materials that the Modern Slavery Act draws heavily on the UNGPs. The explanatory memorandum to the Act explains that "[t]he mandatory criteria [for modern slavery statements] draw on terminology and concepts used in the business and human rights context, particularly in the [UNGPs]".

C. Japan

180. Japan set up its NCP in 2008,²⁷⁷ and in 2020 took a significant step towards the implementation of the UNGPs when it published its NAP for 2020–2025.²⁷⁸ However, as of December 2020, Japan has not incorporated the UNGPs into its domestic law, and there are no court decisions or quasi-judicial decisions referencing the UNGPs.
181. In addition to Japan's NAP and NCP, there have been other developments in Japan indicating that the importance of the UNGPs and BHR more generally is gaining headway. Government, lawyers and businesses in Japan are taking the lead on developing best practices based on the UNGPs.

(1) Court Decisions

182. There are no reported Japanese court decisions applying or discussing the UNGPs.

(2) NCP Decisions

183. As of December 2020, the Japanese NCP has published six decisions.²⁷⁹ In all of these cases, however, the Japanese NCP concluded that: (i) the complaints did not merit further consideration following its initial assessment, or (ii) even if further consideration were

²⁷⁷ According to Section I(B) of the Procedural Guidance for the Japanese National Contact Point (NCP) under the OECD Guidelines for Multinational Enterprises 2011 (revised in 2020), NCP formally involves three government ministries: (a) the Ministry of Foreign Affairs (OECD Division, Economic Affairs Bureau), (b) the Ministry of Health, Labor, and Welfare (International Affairs Division, the Office of the Minister) and (c) the Ministry of Economy, Trade and Industry (Investment Facilitation Division, Trade and Economic Cooperation Bureau), who cooperate with one another to handle complaints.

²⁷⁸ Japan's NAP on Business and Human Rights (2020–2025) (October 2020).

²⁷⁹ *Specific Instance Involving Toyota Motor Corporation and Toyota Motor Philippines Corporation*, Japan NCP, Final Statement (11 April 2019); *Specific Instance Involving Suzuki Motor Corporation and Suzuki Motor (Thailand) Co., Ltd.*, Japan NCP, Final Statement (23 June 2017); *Specific Instance Involving Tower Semiconductor Ltd. and Tower Jazz Japan, Ltd.*, Japan NCP, Final Statement (30 September 2016); *Specific Instance Involving Bridgestone Tire Indonesia*, Japan NCP, Initial Assessment (3 October 2014); *Specific Instance Involving Nestlé Japan Ltd.*, Japan NCP, Final Statement (2014); *Specific Instance at Top Thermo Mfg. (Malaysia) Sdn. Bhd.*, Japan NCP, Initial Assessment (16 February 2012).

merited, its potential involvement was limited due to the parties' unwillingness to mediate²⁸⁰ or because they had reached a settlement. In the *Nestlé* case, for instance, although the Japanese NCP concluded that the case merited further examination, it did not make any further recommendations as a result of the parties' settlement.²⁸¹

184. Nevertheless, in two out of the six decisions, while the Japanese NCP did not make any specific recommendations, it made a passing reference to the OECD Guidelines, noting that companies should seek to respect them.²⁸²
185. Although the UNGPs have not been cited in Japanese court or Japanese NCP decisions, there have been two recent court decisions concerning BHR that are worth noting. In *Heisei 24 Judgment No. 2231*, the Japanese Supreme Court found in favor of a hospital worker who claimed she had been demoted due to her pregnancy based on the Japanese Equal Employment Opportunity Act,²⁸³ nullifying a lower court ruling in October 2014. Significantly, on the back of this decision, the Ministry of Health, Labour and Welfare distributed employment guidelines in response to the Supreme Court's verdict.²⁸⁴ In *Heisei 26 Judgment No. 5258*, the Tokyo High Court awarded damages to a claimant who was refused membership in a local golf club on the basis of her transsexuality. The court held that the claimant enjoys equal rights protected "by the Japanese constitution law and international covenants on human rights".²⁸⁵

(3) Other Developments

186. As foreshadowed above, in October 2020, Japan published its NAP on BHR for 2020–2025. The NAP sets forth the measures that the government planned to adopt to implement the UNGPs in six areas: (i) labor rights; (ii) children's rights; (iii) rights related to the development of new technology; (iv) consumer rights; (v) equality rights; and (vi) foreigners' rights.²⁸⁶
187. Additionally, the government, lawyers and businesses in Japan have been leading the initiative to develop best practices based on the UNGPs. Government initiatives include: (i) the Ministry of Justice setting up a counseling service center where people can report human rights impacts

²⁸⁰ In *Suzuki*, four members of a labor union and a Thailand NGO filed a complaint against Suzuki Motor Corporation and its Thailand subsidiary alleging violations of the OECD Guidelines. Although the NCP conducted an initial assessment of the complaint, the NCP could not take any further action because the parties did not agree to partake in the NCP mediation process. *Specific Instance Involving Suzuki Motor Corporation and Suzuki Motor (Thailand) Co., Ltd.*, Japan NCP, Final Statement (23 June 2017), ¶ 6.

²⁸¹ *Specific Instance Involving Nestlé Japan Ltd.*, Japan NCP, Final Statement (2014).

²⁸² See *Specific Instance Involving Toyota Motor Corporation and Toyota Motor Philippines Corporation*, Japan NCP, Final Statement (11 April 2019), ¶ 5; *Specific Instance Involving Suzuki Motor Corporation and Suzuki Motor (Thailand) Co., Ltd.*, Japan NCP, Final Statement (23 June 2017), ¶ 6.

²⁸³ *Heisei 24 Judgment No. 2231*, Japanese Supreme Court (23 October 2014).

²⁸⁴ See Business and Human Rights Centre, "Japan: New guidelines finally outlaw "maternity discrimination" (2 April 2015).

²⁸⁵ *Heisei 26 Judgment No. 5258*, Tokyo High Court (1 July 2015), p 2.

²⁸⁶ Chapter 2, Japan's NAP on Business and Human Rights (2020–2025) (October 2020).

by phone or on social media,²⁸⁷ which may lead to further investigations;²⁸⁸ and (ii) the Japan International Cooperation Agency (“JICA”), establishing a mechanism that allows any residents to file complaints if they are affected by an enterprise’s noncompliance with the Guidelines for Environmental and Social Considerations, which integrates local human rights risks into businesses’ decision-making processes that relate to environmental and social considerations.²⁸⁹

188. The legal sector has also led on BHR initiatives. The Japan Federation of Bar Associations published its Guidance on Human Rights Due Diligence in 2015.²⁹⁰ Similarly, the Business and Human Rights Lawyers Network Japan²⁹¹ formulated the ‘Basic Actions’ in May 2020, which lists 10 actions that Japanese companies are expected to take to promote responsible business conduct based on the UNGPs, during and beyond the COVID-19 crisis.²⁹²



189. Other notable industry initiatives include: (i) the publication of the Tokyo 2020 Sustainable Sourcing Code for BHR protection by the Tokyo Organizing Committee of the Olympic and Paralympic Games, which includes a grievance mechanism that will deal with any complaints

²⁸⁷ Social media in Japan is referred to as “Social Networking Software (SNS)”, including but not limited to LINE, Twitter, and Facebook.

²⁸⁸ Japan Ministry of Justice, Information about Human Rights’ Consultation ([link](#)).

²⁸⁹ The Guidelines for Environmental and Social Considerations, or the “JICA Guidelines,” were updated in 2010 and seek to ensure both that companies give appropriate consideration to their environmental and social impacts and that JICA’s support for and examination of environmental and social considerations are conducted accordingly. See Japan International Cooperation Agency, *Guidelines for Environmental and Social Considerations* (April 2010).

²⁹⁰ Japan Federation of Bar Associations, Guidance on Human Rights Due Diligence (January 2015).

²⁹¹ The Business and Human Rights Lawyers Network Japan (BHR Lawyers) is an information-sharing network established through the collective action of lawyers, scholars, business persons and other legal specialists active in diverse areas ranging from business law practices to human rights advocacy. See BHR Lawyers, Our Goal ([link](#)).

²⁹² Business and Human Rights Lawyers Network Japan, *Impact of Covid-19 Crisis on Human Rights and Guidance on the Corresponding Business Activities* (27 April 2020).

regarding noncompliance with the Code;²⁹³ (ii) the publication by the Japanese Bank for International Cooperation of its Guidelines on Complaint Procedure in Relation to Environmental and Social Noncompliance, under which complaints will be investigated by an independent body;²⁹⁴ and (iii) in 2018, ANA Holdings' becoming the first Japanese company to publish a human rights report and guiding principles in accordance with the UNGPs.²⁹⁵

There are also several key pieces of legislation in New Zealand that advance the objectives of the UNGPs. The New Zealand Human Rights Commission, which is an independent Crown entity established under the Human Rights Act 1993, acts as New Zealand's National Human Rights Institution and plays an active role in promoting the UNGPs in New Zealand.

D. New Zealand

190. New Zealand has a robust BHR framework. Although New Zealand has not adopted legislation that specifically implements the UNGPs or an NAP,²⁹⁶ it has introduced soft law guidelines in relation to the UNGPs,²⁹⁷ and has set up an NCP.²⁹⁸
191. There are also several key pieces of legislation in New Zealand that advance the objectives of the UNGPs. The New Zealand Human Rights Commission, which is an independent Crown entity established under the Human Rights Act 1993,²⁹⁹ acts as New Zealand's National Human Rights Institution and plays an active role in promoting the UNGPs in New Zealand.

²⁹³ The Tokyo Organising Committee of the Olympic and Paralympic Games, Information about Tokyo 2020 Sustainable Sourcing Code and the relevant Grievance Mechanism ([link](#)).

²⁹⁴ Japan Bank for International Cooperation, *Guidelines on Complaint Procedure for Environmental and Social Noncompliance* (January 2015).

²⁹⁵ Keiko Asano, *Reasons why ANA Holdings is the First Japanese Company Issuing the Human Rights Report*, CORP. COMM. LAB (4 February 2020).

²⁹⁶ New Zealand Human Rights Commission, *Briefing to the Incoming Minister of Justice* (17 November 2017), ¶ 79 ([link](#)).

²⁹⁷ New Zealand Human Rights Commission, *Get started with the Guiding Principles on human rights* ([link](#)).

²⁹⁸ The OECD Guidelines for Multinational Enterprises form part of the OECD Declaration on International Investment and Multinational Enterprises and set out a series of recommendations to multinational enterprises operating within the signatory countries. As set out in the introduction to the OECD Guidelines, on 25 May 2011, the guidelines were amended to include: "A new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework". This new chapter is in Part I, IV of the OECD Guidelines.

²⁹⁹ The New Zealand Human Rights Commission's functions are set out in Section 5 of the Human Rights Act 1993 and include "to advocate and promote respect or, and an understanding and appreciation of, human rights in New Zealand society".

(1) Court Decisions

192. There are no reported New Zealand court decisions applying or discussing the UNGPs. This is likely because the UNGPs are not directly enforceable under any legislation in New Zealand. Furthermore, many of the objectives of the UNGPs have been achieved in New Zealand through primary legislation, such as the Human Rights Act 1993 (discussed in further detail below), which obviates the need to enforce or reference the UNGPs directly.

(2) NCP Decisions

193. New Zealand has designated its Ministry of Business, Innovation & Employment (“**MBIE**”) to act as its NCP. As part of this role, the MBIE adjudicates complaints regarding alleged breaches of the OECD Guidelines by multinational entities in New Zealand.³⁰⁰ As of 17 December 2020, the MBIE appears to have resolved at least five such complaints.³⁰¹ One complaint was initially resolved through mediation,³⁰² three of the claims were rejected by the MBIE,³⁰³ and one resulted in the respondent agreeing to publish an external social responsibility policy and undertake due diligence to monitor the human rights impacts of its business activities.³⁰⁴ The majority of these complaints related to the adequacy of the response of various insurance and construction companies to the damage caused to residential housing by the 2010 and 2011 Christchurch earthquakes. In one case, *Trade Union v. Australian multinational enterprise operating in New Zealand*,³⁰⁵ the complaint was rejected on the basis that the activity complained of had occurred in a foreign jurisdiction.
194. The MBIE reports on its NCP activities to the OECD Investment Committee on an annual basis.³⁰⁶ New Zealand has also provided a commitment to the OECD that the MBIE’s performance as the NCP will be subjected to a peer review in 2022.³⁰⁷

³⁰⁰ The complaints process operated by MBIE is a five-phase process under which MBIE will complete its initial assessment of the complaint within three months and release a final statement within 13-15 months: See [\(link\)](#).

³⁰¹ There are also several instances where complaints appear to have been filed with MBIE, but it is unclear whether they were resolved. For example: *WeCan v. IAG New Zealand Limited*, filed 11 November 2013 [\(link\)](#); *WeCan v. Fletcher Construction Company Limited*, filed 11 November 2013 [\(link\)](#).

³⁰² We note that the agreement was then revoked by the complainants, who subsequently withdrew their complaint a year later. The report of the complaint is available at [\(link\)](#).

³⁰³ *Mr. and Mrs. C v. Southern Response and New Zealand Permanent Trustees Limited*, complaint filed on 15 June 2015 [\(link\)](#) (complaint rejected as the respondents were not multinational enterprises); *New Zealand political party v. ANZ Banking Group*, complaint filed 2 October 2007 [\(link\)](#) (complaint rejected as it related to activity that did not occur in New Zealand; *Trade Union v. Australian multinational enterprise operating in New Zealand*, complaint filed 3 September 2009 [\(link\)](#) (complaint rejected because MBIE was not satisfied that the issues raised in the complaint merited further examination, although MBIE did encourage the parties to meet to discuss the issue).

³⁰⁴ *WeCan v. Arrow International*, complaint filed 17 June 2014 [\(link\)](#).

³⁰⁵ *Trade Union v. Australian multinational enterprise operating in New Zealand*, complaint filed 3 September 2009 [\(link\)](#).

³⁰⁶ [\(link\)](#).

³⁰⁷ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2019*: see [\(link\)](#), p 49.

(3) Other Developments

195. In addition to its NCP, New Zealand has a number of laws which provide a basis for BHR-related complaints. The most notable of these is the Human Rights Act 1993, which aims to “provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”. The Human Rights Act 1993 prohibits various forms of discrimination (e.g., gender, marital status) by both public and private entities.³⁰⁸ Complainants are entitled to lodge a complaint with the Human Rights Commission³⁰⁹ and can also bring proceedings before the Human Rights Review Tribunal.³¹⁰ From 2016 to 2019, the Human Rights Commission received a total of 4,336 complaints.³¹¹ For each of those years, between 74%–79% of complaints were dealt with, and in some cases resolved by the Human Rights Commission, and 9% of complaints were referred to the Human Rights Review Tribunal.³¹²
196. The UNGPs have had some influence on New Zealand’s general legislative process. The New Zealand Human Rights Commission frequently makes submissions to Select Committees charged with scrutinizing proposed bills. It has cited the UNGPs in submissions relating to bills concerning a number of issues including: employee rights, the protection of vulnerable and impoverished children and youths, the provision of education by for-profit private entities, consumer credit regulation,³¹³ residential tenancy protections,³¹⁴ and base erosion and profit-shifting taxation strategies by multinational corporations.³¹⁵
197. Finally, in order to promote compliance with the OECD Guidelines, the MBIE meets annually with representatives of several key private and public entities including the Ministry of Justice, the Ministry of Foreign Affairs and Trade, the Treasury, the Reserve Bank, the Inland Revenue Department, the New Zealand Council of Trade Unions, Business New Zealand, the Engineering, Printing and Manufacturing Union, the New Zealand Business Council for Sustainable Developments, and the Directors’ Institute.³¹⁶

³⁰⁸ Human Rights Act 1993, s. 21.

³⁰⁹ Human Rights Act 1993, s. 76 to 83.

³¹⁰ Human Rights Act 1993, s. 92B, 93–94.

³¹¹ New Zealand Human Rights Commission, *Annual Report Pūrongo ā Tau 2018–2019* ([link](#)), p 37.

³¹² *Id.*, p 42.

³¹³ New Zealand Human Rights Commission, *Submission to the Review of Consumer Credit Regulation*, 2 August 2018, p 2. See ([link](#)).

³¹⁴ New Zealand Human Rights Commission, *Submission on Residential Tenancies Amendment Bill (No. 2)*, document undated, p 5.

³¹⁵ New Zealand Human Rights Commission, *Submission to the Finance and Expenditure Committee on the Taxation (Neutralising Base Erosion and Profit Shifting) Bill*, document undated, p 8.

³¹⁶ Ministry of Business, Innovation & Employment ([link](#)).

E. South Korea

198. The Republic of Korea (“**Korea**”), as a civil law country, relies heavily on its legislation and legal framework to address BHR issues. As such, the UNGPs, which do not have force of law in Korea, have not been formally referenced in court decisions or decisions of other enforcement bodies. However, many of the principles outlined in the UNGPs are reflected in existing legislation, which the Korean Courts enforce. There are also soft law mechanisms and guidelines to ensure that companies respect human rights in the business context.

(1) Court Decisions

199. No Korean court decisions make formal mention or reference to the UNGPs. However, Korea has integrated many of the principles outlined in the UNGPs into its laws, which are in turn enforced by the Korean courts.
200. The Constitution provides Korea’s fundamental legal framework and protects basic human rights.³¹⁷ While private entities are not subject to human rights obligations under the Constitution, State agencies are obligated to uphold the rights outlined in the Constitution, and any violation can be brought before the Korean Constitutional Court for adjudication.³¹⁸ However, individuals are entitled to file claims to assert that a piece of legislation is unconstitutional because it does not sufficiently protect against adverse human rights impacts resulting from the actions of private entities.³¹⁹ For instance, a committee under the Industrial Technology Protection Act recently filed a constitutional complaint arguing that the revised Industrial Technology Protection Act infringed workers’ rights as it allegedly prevents them from knowing about hazardous substances in the workplace and suppresses their freedom to publicize hazardous workplace environments.³²⁰

³¹⁷ Korean Constitution, art. 6.1. Government obligations under the Constitution include, but are not limited to the right to be equal before the law and this right to enjoy personal liberty.

³¹⁸ Korean Constitutional Act, art. 68.

³¹⁹ See FAQ, Constitutional Court of Korea ([link](#)).

³²⁰ *Memorial for workers who died of industrial accidents in the semiconductor and electronic industries and press conference for requesting the Industrial Technology Protection Act*, OpenNet (4 March 2020) ([link](#)).



201. Apart from the Constitution, there is separate legislation enacted by the Korean government aimed at protecting fundamental human rights addressed by the UNGPs, including disability discrimination,³²¹ gender discrimination,³²² employment practices³²³ and social and environmental responsibility.³²⁴ Korean Courts routinely enforce these laws,³²⁵ which echo the UNGPs. For example, in 2019 the Korean Supreme Court found that gender discrimination in the Korea Electric Construction Association's employment policy, which limited the promotion of female workers without good reason, was in violation of the Labor Standards Act.³²⁶

³²¹ Labor Standards Act, Law No. 16415 (30 April 2019), art. 6; Act on the Employment Promotion and Vocational Rehabilitation of Persons with Disabilities, Act No. 15851 (16 October 2018), arts. 28-2. See also, Supreme Court [S. Ct.], 2015DU46321 (14 March 2019) (S. Kor.) (confirming antidiscrimination policies under the Labor Standards Act); Supreme Court [S. Ct.], 92NU15765 (9 April 1993) (S. Kor.) (determining that a company stipulation is invalid under art. 5 of the Labor Standards Act).

³²² Equal Employment Opportunity and Work-Family Balance Assistance Act, Act. No. 16558 (27 August 2019), arts. 7-11.

³²³ The Act on the Protection, etc. of Fixed-Term and Part-Time Employees, Act No. 15848 (16 October 2018), art. 8; The Act on the Employment, etc. of Foreign Workers, Act No. 16274 (15 January 2019), art. 22; Occupational Safety and Health Act, No. 14788 (18 April 2017), arts. 5, 125, 29, 105.

³²⁴ See, e.g., Industrial Development Act, Act No. 15178 (12 December 2017), art. 19, and Government Procurement Act, Act No. 14526 (17 January 2017), arts. 3-2.

³²⁵ See Supreme Court [S. Ct.], 2015DU46321 (14 March 2019) (S. Kor.) (confirming antidiscrimination policies under the Labor Standards Act); Supreme Court [S. Ct.], 2006DU3476 (28 July 2006) (S. Kor.) (confirming arts. 2(1) and 11(1) of the Equal Employment Act); Supreme Court [S. Ct.], 92NU15765 (9 April 1993) (S. Kor.) (determining that a company stipulation is invalid under art. 5 of the Labor Standards Act).

³²⁶ Supreme Court [S. Ct.], 2015DU46321, 14 March 2019 (S. Kor.) (confirming antidiscrimination policies under the Labor Standards Act).

(2) NCP Decisions

202. Korea's NCP, created under the auspices of the Ministry of Commerce, Economy, and Industry, is the body responsible for enforcing the OECD Guidelines.³²⁷ The Korean NCP has referred to the UNGPs and relied on the OECD Guidelines. For example, in its Initial Assessment of a complaint concerning the Jalaur River Multi-Purpose Project II, the Korean NCP analyzed whether a Korean bank took proper steps to ensure that the safety of indigenous peoples had been guaranteed and risks related to a potential earthquake properly mitigated before funding the Philippine government's construction of a public dam. The NPC directly referenced various UN instruments,³²⁸ including the UNGPs, as relevant instruments for addressing the complaint, as well as the OECD Guidelines.³²⁹ Ultimately, the Korean NCP did not consider the merits of the case in detail as the complaint was deemed to fall outside of its jurisdiction.³³⁰

(3) Other Developments

203. There are a number of developments in Korea which demonstrate its commitment to BHR issues generally.
204. Korea's Third NAP, issued by the Korean government in 2018, provides guidelines on how the government plans to enhance recognition of and provide education on human rights issues.³³¹ Section 8 of the Third NAP outlines nonbinding guidelines on BHR for Korean corporations. The guidelines encourage corporate responsibility for human rights, the establishment of corporate sustainability management measures, the introduction of public procurement processes that incorporate social responsibility principles, gender equality policies and the prevention of human rights impacts on local workers when South Korean companies operate overseas, among others.³³²

³²⁷ See OECD Guidelines for Multinational Enterprises (2011), at 3 ("The updated Guidelines and the related Decision were adopted by the 42 adhering Governments on 25 May 2011 at the OECD's 50th Anniversary Ministerial Meeting. Changes to the Guidelines include: A new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework").

³²⁸ See Bahrain Watch Initial Assessment of Complaint Regarding the OECD Guidelines for Multinational Enterprises (19 December 2014) (noting the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights as applicable legal precedent for the complaint); Samy Badibanga Nita Initial Assessment of the Korean NCP for the OECD Guidelines for Multinational Enterprises (12 October 2018) (same as above).

³²⁹ Jalaur River Multi-Purpose Project II Initial Assessment of the Korean NCP for the OECD Guidelines for Multinational Enterprises (18 January 2019).

³³⁰ *Id.* Here, the complainants' claim failed because they raised a claim against a government action, which did not fall within the scope of the Guidelines. Because of this jurisdictional issue, the NCP did not consider the merits of the case in any detail.

³³¹ See generally, Third NAP for the Promotion and Protection of Human Rights, Republic of Korea, 2018 to 2022, Chapter 8: Business and Human Rights.

³³² *Id.*

205. Separately, in 2001, the National Human Rights Commission (“**Korean HR Commission**”) was established and seeks to address any grievance that may not be fully resolved through existing legislation.³³³ The National Human Rights Commission Act grants the Korean HR Commission the authority to investigate any alleged violation of human rights by either national agencies or private corporations.³³⁴ For example, in 2018, the Korean HR Commission conducted an investigation into an insurance company and found that that a majority of the department heads fired were over 52 years old.³³⁵ Given this, the Korean HR Commission found that there was a practice of dismissing individuals based on age which constituted unjustifiable age discrimination, and recommended that the company implement policies to combat this discrimination.³³⁶
206. Unlike Korea’s NCP, which operates under the auspices of the Ministry of Commerce, Economy, and Industry, the Korean HR Commission is independent from all three branches of the Korean government.³³⁷ The Korean HR Commission’s guidelines are not binding. However, interference with or failure to comply with the Korean HR Commission’s investigation may result in a criminal or administrative fine.³³⁸
207. Furthermore, Korean courts have recognized the validity of the Korean HR Commission’s investigations in their decisions. For example, in 2008, the Seoul Administrative Court agreed with the decision of the Korean HR Commission that there had been unreasonable discrimination against a female worker based on gender, and that the Commission’s recommendation that the company compensate the female worker was valid under the law.³³⁹ The Korean HR Commission also has the authority to investigate and present recommendations or opinions on existing or proposed laws, institutions, policies, and practices and on the conclusion or implementation of international treaties on human rights.³⁴⁰
208. In 2014, the Korean HR Commission issued Guidelines for the Human Rights Management and Checklist (“**GHRMC**”), which targets business enterprises in Korea.³⁴¹ The Guidelines directly reference both the UNGPs and OECD Guidelines, and tailor these principles to the legal environment in Korea.³⁴² Even though these guidelines are not legally binding, they provide important guidance, including in relation to the establishment of human rights management systems, nondiscriminatory employment, prohibition of forced and child labor,

³³³ See National Human Rights Commission of Korea ([link](#)).

³³⁴ *Id.*

³³⁵ National Human Rights Commission of Korea Annual Report 2018 ([link](#)).

³³⁶ *Id.*

³³⁷ *Id.*, art. 3.

³³⁸ *Id.*, arts. 56, 63. Anybody who interferes with the commission’s investigation using force, fraud or concealment is subject to imprisonment up to five years or a fine up to 30 million KRW. Anybody who fails to comply with the investigation can be subject to administrative fines up to 10 million KRW.

³³⁹ Seoul Administrative Court [Seoul Admin. Ct.], 2007GUHAP45057 (12 June 2008).

³⁴⁰ *Id.*, arts. 19, 36-37.

³⁴¹ Guidelines for the Human Rights Management and Checklist (2014).

³⁴² *Id.*

protection of local residents' human rights, guarantee of environmental rights, and protection of consumer rights.³⁴³

209. In 2018, the Korean HR Commission created the Human Rights Management Manual for State-owned Enterprises to assist them in implementing human rights principles.³⁴⁴ This manual is not legally binding and has not been mentioned in court decisions, but provides a helpful four-step process for State-owned enterprises to implement the NAP into everyday business practices.³⁴⁵

F. Other Asia-Pacific Countries

(1) Malaysia

210. In Malaysia, the primary State-based vehicle for implementing the UNGPs is the National Human Rights Commission of Malaysia (also known as Suruhanjaya Hak Asasi Manusia Malaysia (“**SUHAKAM**”)), which was created in 1999. The SUHAKAM has been tasked with promoting human rights awareness, providing legislative advice, recommending international human rights instruments to the government and inquiring into complaints regarding adverse impacts on human rights. However, like its counterparts in other countries, SUHAKAM does not have enforcement authority.³⁴⁶
211. The SUHAKAM has been instrumental in introducing the UNGPs into Malaysia's policy and practices, and has encouraged the Malaysian government to develop an NAP.³⁴⁷ In February 2020, in collaboration with Pusat KOMAS (an anti-discrimination NGO) and the Penang Institute (a think tank), the SUHAKAM prepared a Code of Conduct for business enterprises, recognizing the three pillars of the UNGPs.³⁴⁸ The Code of Conduct states that it “does not impose any legal obligations” but demonstrates the growing recognition of the UNGPs in Malaysia.³⁴⁹
212. The UNGPs have been invoked in at least one formal proceeding before the SUHAKAM, which related to the operations of a Malaysian company outside Malaysia. This 2014

³⁴³ *Id.*

³⁴⁴ Human Rights Management Manual for State Owned Enterprises (2018).

³⁴⁵ *Id.* The steps for State-owned enterprises include: (i) establishing a human rights management System, in order to provide guidance on creating departments, committees, and trainings on human rights management; (ii) utilising human rights impact assessments, which is a tool used to complete the human rights due diligence proposed by UN Guiding Principles; (iii) implementing a human rights management system; (iv) ensuring that four categories of remedies are available for violation of the management system (judicial remedies, non-judicial remedies, internal and external processes of state-owned enterprise).

³⁴⁶ Input from SUHAKAM to the working group on business and human rights on the role of national human rights institutions in facilitating access to effective remedies for business-related human rights ([link](#)).

³⁴⁷ SUHAKAM Annual Report 2019 ([link](#)).

³⁴⁸ Code of Conduct for the Promotion of Equal Opportunities through the Elimination of Racial Discrimination (10 February 2020) ([link](#)).

³⁴⁹ *Id.*

complaint was filed by a group of nongovernmental organizations on behalf of Cambodian and Thai villagers in relation to the activities of Mega First Corporation Berhad (“**Mega First**”). The complaint accused Mega First of constructing a hydroelectric dam, the Don Sahong, in Laos without regard to dam’s impact on the migratory route of numerous fish species through the Mekong River and downstream fishing communities.³⁵⁰ Although the SUHAKAM eventually determined that it lacked extraterritorial jurisdiction, it urged the Malaysian government to “develop policies or guidelines to monitor Malaysian companies operating outside of Malaysia in order to ensure compliance with... Principle 3 of [the UNGPs]”, which sets out the State’s duty to protect by regulation and policy measures. The SUHAKAM also urged Mega First to uphold the UNGPs, particularly principles 11 to 29.³⁵¹ The case is a testament to the role Asian NHRIs can play in implementing the UNGPs.

Although the SUHAKAM eventually determined that it lacked extraterritorial jurisdiction, it urged the Malaysian government to “develop policies or guidelines to monitor Malaysian companies operating outside of Malaysia in order to ensure compliance with... Principle 3 of [the UNGPs]” which sets out the State’s duty to protect by regulation and policy measures.

(2) Myanmar

213. Myanmar has not yet begun developing an NAP, but there have been positive indications concerning the recognition of the UNGPs. For instance, the Myanmar government issued guidance in 2015 for companies investing and operating in the Thilawa Special Economic Zone, which includes guidance to ensure effective grievance mechanisms with reference to principles 29 and 31 of the UNGPs.³⁵² Those same principles were also mentioned in 2017 draft guidelines on public participation in Myanmar’s environment impact assessment processes.³⁵³
214. The Myanmar National Human Rights Commission has also begun calling for implementation of the UNGPs. In a statement issued by the Commission in July 2020, in relation to a landslide at a mining site in Myanmar, the Commission highlighted the

³⁵⁰ Complaint to SUHAKAM against Mega First Corporation Berhad (20 October 2014) ([link](#)).

³⁵¹ SUHAKAM Annual Report 2015 ([link](#)).

³⁵² Notice to Ensure the Responsible Investment in the Thilawa SEZ issued by the Thilawa SEZ Management Committee of Myanmar, notice no. 04/2015 (7 August 2015) ([link](#)).

³⁵³ Draft Guideline on Public Participation in Myanmar’s EIA Processes issued under authority granted to the Ministry of National Resources and Environmental Conservation (31 May 2017) ([link](#)). These draft guidelines were issued under authority granted to the Ministry of National Resources and Environmental Conservation (MONREC) but have not yet been approved by the Myanmar government.

importance of regulating mining companies and requiring them to conduct human rights due diligence in accordance with the UNGPs.³⁵⁴

(3) Other Countries

215. Among other countries in the Asia-Pacific region, Thailand is notable as it adopted an NAP in December 2019. The Bangkok courts also recently granted class action status to 700 Cambodian families suing a Thai sugar company, Mitr Phol, for alleged human rights impacts related to forced evictions in Cambodia. Amnesty International called the ruling “a watershed moment for human rights and corporate accountability in Southeast Asia”.³⁵⁵ The case is still ongoing.³⁵⁶
216. Other countries in the Asia-Pacific region are also gradually moving towards formally recognizing the UNGPs in local law. For instance, the Philippines Human Rights Commission has made recommendations to incorporate the UNGPs in the national Corporations Code³⁵⁷ and India’s Ministry of Corporate Affairs noted that the UNGPs were one of the key drivers for its latest revision to India’s national guidelines for responsible business conduct.³⁵⁸

³⁵⁴ Statement of the Myanmar National Human Rights Commission on Landslide in Hpakant, Hachin State Statement No. 8/2020 (3 July 2020) ([link](#)).

³⁵⁵ Amnesty International Public Statement ASA 39/2806/2020 (30 July 2020) ([link](#)), ([link](#)).

³⁵⁶ Although this is a positive development, in October 2020, the Thai government granted a human rights award to Mitr Phol, the same company at the center of the landmark ongoing case in Thailand, raising concerns about the government’s commitment to upholding human rights abuses — Human Rights Watch article (13 October 2020) ([link](#)).

³⁵⁷ Position Paper on the Amendment of the Corporation Code of the Philippines (12 February 2018) ([link](#)).

³⁵⁸ Ministry of Corporate Affairs press release (13 March 2020) ([link](#)).



VI. EUROPE

A. Overview

217. This chapter examines references to the UNGPs by judicial and quasi-judicial bodies in Europe.³⁵⁹ The UNGPs have had a significant impact in Europe and are likely to gain even more significance in the near future. The region leads the way in terms of existing and planned initiatives on human rights due diligence as well as reporting obligations. At the time of this report, 16 of the 27 jurisdictions covered in this chapter have adopted NAPs for implementing the UNGPs, and several other countries are in the process of developing one. Europe accounts for the highest regional concentration of NAPs adopted to date.
218. Based on research conducted for this report, only three countries (France, Sweden and Poland) report judicial or quasi-judicial references to the UNGPs in publicly available court decisions. However, the UNGPs have influenced several pieces of legislation, including EU Directive 2014/95/EU³⁶⁰ (“**Non-Financial Reporting Directive**”), which includes obligations to report on the impact of companies’ activities on human rights, and Regulation (EU) 2017/821³⁶¹ (“**Conflict Minerals Regulation**”), which lays down supply chain due diligence obligations for EU importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. Both instruments expressly refer to the UNGPs,³⁶² and are in line with the Pillar II principles.
219. More recently, on 7 December 2020, the EU implemented a new sanctions regime, Council Regulation (EU) 2020/1998, which allows the European Council to impose asset freezes and travel bans on State or non-State actors — including corporations — that it determines to have committed serious human rights violations.³⁶³
220. The UNGPs have also led to the adoption of several laws at the national level. This includes the ground-breaking 2017 French *Loi de Vigilance*, which requires companies to adopt and implement a vigilance plan identifying risks and preventing serious harm to human rights resulting from their activities and those of companies that they control directly or indirectly, as well as subcontractors or suppliers with which they have established commercial

³⁵⁹ This section excludes discussion of the United Kingdom and Ireland, which are discussed in a separate section.

³⁶⁰ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJEU L 330/1 (“**Non-Financial Reporting Directive**”).

³⁶¹ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] L 130/1 (“**EU Regulation 2017/821**”). See in particular art. 4(d).

³⁶² Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 references the UNGPs as an international framework that companies can rely upon in providing this information, while EU Regulation 2017/821 states that the “concept of responsible sourcing” is in line with the UNGPs.

³⁶³ Regulation (EU) 2020/1998 of the European Parliament and of the Council of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] LI 410/1 (“**EU Regulation 2020/1998**”).

- relationships.³⁶⁴ The 2019 Dutch *Child Labour Due Diligence Law*³⁶⁵ will enter into force in 2022 and require companies selling goods and services to Dutch end-users to determine whether there has been child labor in their supply chains. Germany is currently debating a draft proposal of a law similar to France’s *Loi de Vigilance*, while Belgium and Italy are also expected to strengthen their BHR legislative frameworks.
221. Also notable is Switzerland’s public *Responsible Business Initiative* (“**RBI**”), launched by a coalition of Swiss civil society organizations in 2015.³⁶⁶ The RBI demanded the introduction of BHR provisions into the Swiss Federal Constitution, with the aim of imposing mandatory due diligence obligations and civil liability on Swiss-based companies for human rights and environmental impacts that are caused abroad by companies under their control. The RBI was put to a referendum and was ultimately rejected on 29 November 2020 by a majority of Switzerland’s cantons. However, it received an overall majority of individual votes, and triggered a counterproposal from the Swiss Parliament,³⁶⁷ which should in principle be implemented in 2021. This counterproposal, while removing civil liability for adverse human rights impacts, will impose due diligence obligations on Swiss companies.
222. Although there are disparities with respect to the BHR legal landscape across Europe, the anticipated *EU Human Rights and Environmental Due Diligence* legislation, which was announced in April 2020 by the EU Commissioner for Justice, is expected to reflect the principles set out in Pillar II of the UNGPs,³⁶⁸ as endorsed by the *Loi de Vigilance*, and should harmonize, to some extent, the EU’s BHR efforts. It remains to be seen whether the forthcoming EU legislation will set up a liability framework, which would allow victims to obtain compensation for adverse human rights impacts, and in what circumstances.
223. In addition, in December 2020, the EU Council asked the Commission to launch an EU Action Plan focusing on sustainable global supply chains, promoting human rights, social and environmental due diligence standards and transparency, by 2021.³⁶⁹ The Council also called on Member States to step up their efforts to effectively implement the UNGPs, including through new or updated NAPs containing a mix of voluntary and mandatory measures.³⁷⁰

³⁶⁴ Code de Commerce, arts. L225-102-4 and 5.

³⁶⁵ Wet Zorgplicht Kinderarbeid.

³⁶⁶ The official text of the RBI is published in the Swiss Federal Gazette, FF 2020 5343, 30 June 2020 ([link](#)). For more information on the RBI, see the Swiss Coalition for Corporate Justice website ([link](#)).

³⁶⁷ The latest version of the official text of the Counterproposal published in the Swiss Parliament’s Official Bulletin, 16.077-2, 19 June 2020.

³⁶⁸ For more information on the EU Commissioner for Justice’s official commitment for an EU initiative on mandatory Human Rights and Environmental Due Diligence, see EUROPEAN COALITION FOR CORPORATE JUSTICE, Commissioner Reynders announces EU corporate due diligence legislation, Brussels, 30 April 2020 ([link](#)).

³⁶⁹ Human rights and decent work in global supply chains: the Council approves conclusions ([link](#)).

³⁷⁰ *Id.*



B. Western Europe

224. This section explores the local impact of the UNGPs in the Western European region, at the legislative, court, and NCP levels.
225. Western European countries have been the most active in the region in terms of BHR developments. As of the date of this report, all of these countries, except Austria, have launched NAPs, and NCPs in the region have been particularly active. While the UNGPs have only been cited in one decision of the French courts, they have had a significant impact on the development of local law across Western Europe, and will likely continue to do so in the near future.
226. The 2017 *Loi de Vigilance* and the 2019 Dutch *Child Labour Due Diligence* Law (not yet in force) mirror the UNGPs' Pillar II and are likely to serve as models for the upcoming EU-wide *Human Rights and Environmental Due Diligence* legislation, which will harmonize BHR due diligence obligations throughout the EU. While Switzerland is not part of the EU, the Swiss Parliament's counterproposal to the rejected 2020 RBI will also impose due diligence obligations on Swiss-based companies, as early as 2021.

(1) Austria

(i) Court Decisions

227. There are no publicly available decisions issued by Austrian judicial authorities which cite to or reference the UNGPs.

(ii) *NCP Decisions*

228. The Federal Ministry for Digital and Economic Affairs acts as the Austrian NCP.³⁷¹ Since its establishment in 2000, the Austrian NCP has only handled five complaints,³⁷² of which only two followed the adoption of the UNGPs in 2011: (i) KBA-Mödling AG and GPA-DJP and PRO-GE (2014) and (ii) Andritz Hydro GmbH and Finance and Trade Watch Austria et al. (2014).
229. While the KBA-Mödling AG case involved an employment dispute, the Andritz Hydro GmbH case focused on alleged adverse human rights impacts.
230. In April 2014, the Austrian NCP received a submission from nine NGOs alleging that Andritz Hydro GmbH had not observed the OECD Guidelines.³⁷³ The submission related to the company's supply of hydropower-turbines and its role in the construction and operation of the Xayaburi hydropower project in Lao People's Democratic Republic ("**Lao PDR**"). The complaint was based, in part, on arguments drawn from the human rights chapter of the OECD Guidelines, which mirrors several provisions of the UNGPs.³⁷⁴
231. On 27 June 2017, the NGOs EarthRights International, Finance & Trade Watch Austria and the company Andritz Hydro GmbH signed a joint statement,³⁷⁵ together with the Austrian NCP. The Austrian NCP also issued a final statement on 3 September 2018.³⁷⁶
232. The joint statement contemplated the continuation of all parties' efforts to improve the situation for local communities in the Mekong region. The company acknowledged its obligation to respect international human rights and environmental standards, as laid down in particular in the OECD Guidelines, in its due diligence procedures for all future projects. The joint statement included references to Chapter IV, paras. 2, 4, 5, and 6 of the OECD Guidelines, which endorse Principles 13(a), 15(a), 15(b)/17 and 22, respectively, of the UNGPs.³⁷⁷
233. The parties agreed to issue a follow-up statement, which was published on 15 October 2018.³⁷⁸ Both parties described the follow-up process as valuable and the statement reaffirmed Andritz

³⁷¹ OECD Guidelines for Multinational Enterprises - Austrian NCP ([link](#))

³⁷² OECD Guidelines for Multinational Enterprises, National Contact Point Peer Reviews, Austria 2019, ([link](#)).

³⁷³ Specific Instance Complaint Under the OECD Guidelines For Multinational Enterprises Regarding the Contributions of To Human Rights Abuse And Environmental Damage in Connection with the Xayaburi Hydropower Project in Lao PDR submitted 9 April 2014, ("**Andritz AG Complaint**") ([link](#)).

³⁷⁴ Specifically, Chapter IV, ¶¶ 2, 4, 5, and 6 of the OECD Guidelines are cited. The Andritz AG Complaint makes an explicit reference to the UNGPs, stating that Chapter IV, ¶ 2 "draws upon the UNGPs, which recognize the corporate responsibility to protect human rights" at ¶ 35.

³⁷⁵ Joint Statement issued on 27 June 2017 ([link](#)).

³⁷⁶ Final Statement issued on 27 June 2017 ([link](#)).

³⁷⁷ Joint Statement issued on 27 June 2017 at ¶¶ 2-3 ([link](#)).

³⁷⁸ Follow-Up Statement issued on 15 October 2018 ([link](#)).

Hydro GmbH's commitment to comply with Chapter IV of the OECD Guidelines, and therefore the UNGPs.³⁷⁹

(iii) Other Developments

234. As of January 2021, Austria has not enacted any laws implementing the UNGPs. Austria also has not yet established an NAP, despite a commitment that the federal government would do so in the 2013 coalition agreement between the Austrian Social Democratic Party (SPÖ) and the Austrian People's Party (ÖVP). As of the date of this report, the Austrian NAP remains a work in progress.
235. In 2016, a study commissioned by NGOs and trade-unions (*NeSoVe-Network for Social Responsibility and the Austrian Chamber of Labour for Vienna*)³⁸⁰ found that Austrian law needed updating to ensure that human rights are respected by Austrian businesses, their subsidiaries and suppliers, and to ensure that victims have access to justice. These findings have been used to promote changes to Austrian tort law.

(2) Belgium

(i) Court Decisions

236. There are no publicly available decisions issued by Belgian judicial authorities that cite to the UNGPs.

(ii) NCP Decisions

237. The Ministerial Committee for Economic and Social Coordination oversees the Belgian NCP.³⁸¹ Since 2000, the Belgian NCP has handled over 20 complaints, according to publicly available information,³⁸² of which eight cases were brought following the adoption of the UNGPs in 2011.
238. While most of these eight proceedings relate to employment and industrial relations, a 19 November 2020 decision, *International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Worker's Associations v. AB InBev*, is worth discussing.
239. On 2 April 2019, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Worker's Associations ("IUF") wrote to the Belgian NCP, alleging that AB InBev had not observed, among others, the human rights (Chapter IV) provisions of the OECD Guidelines, specifically, Chapter IV paras 1 and 2, which mirror Principles 11 and 13(a)

³⁷⁹ Follow-Up Statement issued on 15 October 2018 at ¶ 7 ([link](#)).

³⁸⁰ Menschenrechte ohne Grenzen ([link](#)).

³⁸¹ National Contact Point Rules of Procedure Coordinated Text (28 April 2017) ([link](#)). The NCP has a tripartite structure composed of representatives from the federal government, three employer organizations and three national cross-industry trade unions.

³⁸² OECD Guidelines for Multinational Enterprises, National Contact Point Peer Reviews, Austria 2019 ([link](#)).

of the UNGPs. The IUF's complaints related to collective bargaining negotiations and freedom of association in AB InBev's beverage manufacturing facility in Sonepat, India. The IUF claimed that anti-union practices and intimidation had led to the suspension of four unionists and workers.

240. On 24 June 2019, the Belgian NCP decided to accept the case and published its initial assessment,³⁸³ offering its good offices to the parties, who accepted.
241. After two mediation sessions, the Belgian NCP published its final statement on 19 November 2020, announcing that an agreement had been reached between the parties around three main points: (i) rapid reintegration of the four workers and recognition of their role as trade union representatives; (ii) cessation of local protest actions and picketing; and (iii) oversight of the agreement by the Belgian NCP.

(iii) Other Developments

242. Belgium does not currently have national legislation implementing the UNGPs. The Belgian NAP was adopted in 2017, in response to the call of the EC to EU Member States to draw up NAPs in order to implement the UNGPs. The plan also envisioned reaffirming Belgium's commitments to the OECD Guidelines and ILO instruments. The process was led by the Ministry of Foreign Affairs' Human Rights Directorate and the Ministry for Energy, Environment and Sustainable Development's Federal Institute for Sustainable Development ("IFDD"), which chairs the Interdepartmental Commission for Sustainable Development ("CIDD"). The CIDD's Working Group on Corporate Social Responsibility was charged with drafting the NAP and other related activities, such as dialogue with relevant stakeholders.
243. The current NAP is presently under review. In January 2020, an NBA process was initiated.³⁸⁴ This involved an assessment of existing regulatory frameworks, policies, structures, and actions in order to formulate and prioritize action items for a second NAP.³⁸⁵
244. Following consultation with various stakeholders, on 8 March 2021, Belgium's NBA was published.³⁸⁶ This report, which was commissioned by the IFDD, set out a number of key recommendations, including that the Belgian authorities: (i) develop a regulatory framework that combines initiatives to promote and support voluntary actions by companies, with consistent and coherent legislation that requires companies to systematically respect human rights across their operations and value chains; and (ii) implement reforms and policies to ensure that victims of adverse human rights impacts caused by Belgian companies or their partners in third countries, can access an effective remedy before competent Belgian authorities.

³⁸³ Statement from the Belgian NCP, 2019 ([link](#)).

³⁸⁴ Belgian NBA, Timing ([link](#)).

³⁸⁵ Belgian NBA ([link](#)).

³⁸⁶ Research Institute for Work and Society, University of Antwerp, et. al., "National Baseline Assessment: Business and Human Rights in Belgium — Main Report" (8 March 2021) ([link](#)).

(3) France

(i) Court Decisions

245. To date, the UNGPs have not been directly referenced in any published court decision. The dearth of references may, however, be explained by the fact that some of the UNGP's principles are guaranteed by constitutional norms and other binding law instruments, whether national or European.
246. Only one published decision indirectly refers to the UNGPs. On 4 June 2019, the Paris Administrative Court of Appeal affirmed a first instance decision annulling a local council's minutes dated 20 October 2016. The minutes, in essence, requested the withdrawal of ministerial circulars prohibiting the boycott of products imported from Israel. The minutes also stated that the town would avoid contracting with companies that do not apply the UNGPs when conducting activities in occupied areas in Israel. The regional prefect challenged the minutes before the administrative court. While the UNGPs were therefore cited in the underlying documents, they do not appear to have impacted the court's ruling. The court confirmed the first instance decision annulling the minutes based on violations of French administrative law, which were unrelated to the UNGPs.

(ii) NCP Decisions

247. The French NCP is housed at the Treasury Department of the Ministry of Economy and Finance.³⁸⁷ Since its establishment in 2000, the French NCP has handled over 30 specific cases, mostly involving employment and industrial relations. None of the complaints brought to the French NCP to date have directly referred to the UNGPs, instead focusing on the provisions of the OECD Guidelines and other sources of human rights obligations under international law, such as ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 United Nations Declaration on the Rights of Indigenous Peoples.³⁸⁸ However, one decision which directly considers the human rights chapter in the OECD Guidelines is worth noting.
248. In August 2015, the French NCP received a submission from the American NGO Americans for Democracy and Human Rights in Bahrain ("ADHRD"), regarding the sale of tear gas products by Alsetex, a subsidiary of the Etienne Lacroix Group, to the government of Bahrain.³⁸⁹
249. On 4 July 2016, the French NCP released its Report concluding that Alsetex did not contribute to adverse human rights impacts. The French NCP noted that:

³⁸⁷ OECD Guidelines for Multinational Enterprises - French NCP ([link](#)).

³⁸⁸ Final Statement of the French NCP on "EDF and EDF Renewables in Mexico" (10 March 2020) ([link](#)).

³⁸⁹ ADHRB v. Etienne Lacroix-Alsetex ("Alsetex Report") ([link](#)).

- (i) Alsetex had complied with the French government's export authorizations and had respected an embargo involving Bahrain since 17 February 2011;³⁹⁰
- (ii) The responsibility for the inappropriate use of tear gas rested with local security forces; Alsetex could not be held accountable for human rights impacts resulting from the allegedly disproportionate use of tear gas that it might have sold to Bahrain prior to February 2011;³⁹¹ and
- (iii) Alsetex had conducted due diligence as recommended by the OECD Guidelines.

250. The French NCP concluded that Alsetex complied with the OECD Guidelines and did not contribute to adverse human rights impacts in Bahrain.³⁹²

251. The French NCP further noted that "Alsetex does not yet have a human rights policy, but that it is in the process of drafting a policy for responsible business conduct. It welcomes this initiative and calls on Alsetex to take into account both the OECD Guidelines and ADHRD's comments in order to enhance the content of the policy, and then to disseminate it".³⁹³

(iii) Other Developments

252. On 27 March 2017, France adopted the *Loi de Vigilance*, in response to public outrage surrounding the "Rana Plaza" tragedy in 2013 and the proliferation of international BHR standards including the UNGPs. Without referring explicitly to the UNGPs, the *Loi de Vigilance* has in effect translated some of the key principles into hard law, primarily Pillar II and the due diligence obligations under Principles 15 through 24.

Without referring explicitly to the UNGPs, the Loi de Vigilance has in effect translated some of the key principles into hard law, primarily Pillar II and the due diligence obligations under Principles 15 through 24.

253. The *Loi de Vigilance* provides that businesses employing at least 5,000 employees in France or 10,000 employees worldwide must design, implement and publish annual vigilance plans, formulated with stakeholder participation, to prevent human rights impacts and environmental damage in their operations and supply chain. The vigilance plan must include human rights and environmental due diligence, risk mapping, appropriate actions to mitigate risks or prevent severe impacts, an alert and complaint mechanism within the company, and a system to supervise the implementation of these measures and evaluate their effectiveness.

³⁹⁰ *Id.*, at ¶ 4.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*, at ¶ 5.

Companies that fail to publish or implement their vigilance plan are subject to sanction, and may be held civilly liable if harm is caused as a result of the failure to properly implement an adequate plan.

254. The *Loi de Vigilance* has already given rise to litigation in France:

- (i) In 2019, six NGOs filed the first lawsuit under the *Loi de Vigilance* against French oil company Total, for allegedly failing to comply with its provisions in relation to oil exploration in Uganda. The civil court declared that it lacked jurisdiction over the dispute and referred the case to the commercial court,³⁹⁴ which was upheld on appeal.³⁹⁵ The case is ongoing and a decision on the merits is expected by 2022.
- (ii) In January 2020, 14 French local authorities and five French NGOs brought another claim against Total under the *Loi de Vigilance*.³⁹⁶ In their formal notice to Total, the applicants stated that it had failed to identify and take appropriate steps to mitigate climate risks associated with its business and, in particular, Total's vigilance plan "does not ensure that [the Total group] aligns with a trajectory compatible with the objectives of the Paris Agreement".³⁹⁷ The applicants asked the Nanterre court to order Total to update its diligence plan. No other submissions have been made to date.
- (iii) The most recent proceedings under the *Loi de Vigilance* were brought against French company EDF in October 2020.³⁹⁸ The allegations relate to EDF's plans to build a wind farm on the land of the indigenous Mexican community of Unión Hidalgo, and the applicants' claim that EDF failed to meet its due diligence obligations, and that impacted the right to free, prior and informed consent of local communities.

255. Similarly, a notification was served on a French multinational company, SUEZ, on 9 July 2020 by four NGOs. This formal notice sought a modification to SUEZ's plan so as to include detailed and adequate measures to mitigate and prevent the risk of adverse human rights impacts, including in relation to the contamination of the water supply near the city of Osorno in Chile, and the subsequent cutting off of the water supply for more than 10 days in that city.³⁹⁹ The NGOs have advised that "[a]ny failure to respond to this formal notice and to

³⁹⁴ "Total abuses in Uganda: French High Court of Justice declares itself incompetent in favour of the Commercial Court" (30 January 2020) ([link](#)).

³⁹⁵ "Total Uganda case in France: the Court of Appeal of Versailles remands the case to the commercial court" (11 December 2020) ([link](#)).

³⁹⁶ Letter of formal notice to comply to Total (19 June 2019), at ¶ 2 ([link](#)); see also *Notre affaire à tous*, ZEA, Sherpa, Les Eco Maires, Press kit on the formal notice to comply, including the letter of formal notice to comply to Total (18 June 2019) ([link](#)); see also Sabin Center ([link](#)).

³⁹⁷ Letter of formal notice to comply to Total (19 June 2019), at ¶ 2 ([link](#)); see also *Notre affaire à tous*, ZEA, Sherpa, Les Eco Maires, Press kit on the formal notice to comply, including the letter of formal notice to comply to Total (18 June 2019) ([link](#)).

³⁹⁸ European Center for Constitutional and Human Rights, Case Report (October 2020) ([link](#)).

³⁹⁹ "In wake of Osorno health emergency in Chile, SUEZ is served notice to amend vigilance plan" (9 July 2020) ([link](#)).

introduce appropriate measures will potentially result in legal action before French courts”.⁴⁰⁰ Formal notices have also been served on a number of other French companies, including Teleperformance (citing, *inter alia*, an alleged failure to identify and prevent specific human rights risks with regard to workers in foreign facilities)⁴⁰¹ and XPO Logistics (calling on XPO to “establish and implement a full and adequate Vigilance Plan”).⁴⁰²



256. Separately, on 26 April 2017, the French government adopted an NAP, which mirrors the UNGPs.⁴⁰³ The French NAP was drafted on the basis of recommendations issued by the National Consultative Commission on Human Rights (“**CNCDH**”), and work conducted by the CSR Platform (a body created by the French government in June 2013 to be a forum for dialogue and cooperation between a variety of stakeholders, including industry representatives, trade unions, NGOs, and government representatives).
257. The French NAP sets out, for each of the three pillars of the UNGPs, the recommendations issued by the CNCDH and the CSR Platform, the actions that have already been taken in France, and proposals for future actions to strengthen the implementation of the principles.
258. The NAP demonstrates that France has been actively participating in the promotion of BHR at the international level. As an example, France participated in the work carried out by the UN Working Group. France also promotes BHR and other environmental, social and governance (“**ESG**”) goals as a member of international organizations and groups (including the G7, G20, and OECD), and has undertaken to promote the UNGPs in its trade relations with other States. At the EU level, France has advocated for including human rights reporting requirements in the Non-Financial Reporting Directive.

⁴⁰⁰ *Id.*

⁴⁰¹ “UNI Global Union and Sherpa send formal notice to Teleperformance—calling on the world leader in call centers to strengthen workers’ rights” (18 July 2019) ([link](#)).

⁴⁰² XPO Logistics Europe—Formal Notice to Comply with the French Corporate Duty of Vigilance Law — Article L. 225-102-4.-I and II of the French Commercial Code (1 October 2019) ([link](#)).

⁴⁰³ France’s NAP ([link](#)).

259. At the national level, France's efforts include state and local commitment to promote and respect the UNGPs as lawmakers, employers and producers, and measures designed to enable the implementation of the UNGPs by public agencies. The NAP also details measures undertaken to promote respect for human rights in specific areas including agricultural and food, textile and garment, extractive, and financial sectors.
260. In addition, France undertook various actions to encourage businesses to respect human rights, notably by recommending adherence to the UN Global Compact and other voluntary initiatives such as ISO 26000. France also encourages businesses to implement human rights risk management measures.
261. Finally, the NAP details access to remedy through both judicial and nonjudicial mechanisms in France. It includes proposals for facilitating access to remedy, including procedural changes, and also suggests that more resources be allocated to the French NCP.

(4) Germany

(i) Court Decisions

262. There are no publicly available decisions issued by the German judicial authorities that cite to the UNGPs.

(ii) NCP Decisions

263. The German NCP is housed within the Federal Ministry of Economic Affairs and Energy in the Directorate-General for External Economic Policy.⁴⁰⁴ It receives support from the Interministerial Committee, which includes representatives from various ministries such as the Federal Ministry of Finance, the Federal Foreign Office and the Federal Ministry for the Environment, Nature Conservation, and Nuclear Safety, among others.⁴⁰⁵
264. The German NCP has been one of the most active in Europe. It has handled over 30 cases since its inception in 2000. According to publicly available information, 14 of these cases were brought following the adoption of the UNGPs in 2011. Six such cases related to alleged adverse human rights impacts, one of which is discussed below as an illustration.
265. In May 2013, the German NCP received a submission from Uwe Kekertiz, a member of the German Bundestag, alleging that fashion companies KiK Textilien and Karl Rieker had not observed the general policies and human rights provisions of the OECD Guidelines in relation to their operations in Bangladesh.⁴⁰⁶ The submission related to inadequate safety standards that allegedly caused the 2012 fire in the Tazreen factory, and claimed that the companies had failed to avoid adverse human rights impacts regarding the safety of employees at the factory

⁴⁰⁴ Germany's NCP ([link](#)).

⁴⁰⁵ *Id.*

⁴⁰⁶ The submission is not publicly available, but the Final Statement incorporates some of its language ([link](#)).

that were directly related to their business activities, contrary to Chapter II A. 11 and 12 and Chapter IV A. 2 and 3 of the OECD Guidelines. As this was the first time a Bundestag member had lodged a complaint with the German NCP, it received significant media attention in Germany.

266. After accepting part of the request for consideration, the German NCP led mediation talks with the companies and the complainant. Both companies co-operated fully in the mediation process. An agreement was reached and Karl Rieker committed to improve fire and building safety standards at its supplier factories.⁴⁰⁷

(iii) Other Developments

267. The UNGPs have not been incorporated into national legislation in Germany.
268. In 2016, the German government adopted its NAP, which is in line with the UNGPs.⁴⁰⁸ The German NAP provided that all companies should implement human rights due diligence by establishing processes that identify, prevent, and mitigate adverse human rights impacts associated with their business activities. It set a voluntary implementation goal of 50% of German companies with more than 500 employees by 2020. Between 2018 and 2020, the Federal Government reviewed the extent to which this goal had been met and concluded that binding legislation was required. The German government's coalition agreement also stated that if this review led to the conclusion that voluntary commitments remained insufficient, national legislative action would be taken and Germany would also advocate for further EU-wide regulation.
269. Against this backdrop, the German government recently adopted a draft human rights due diligence law, the so-called Supply Chain Act (*Lieferkettengesetz*),⁴⁰⁹ aimed at ensuring companies' compliance with human rights with respect to their business activities throughout their global supply chains. In the event of an infringement, companies will face substantial fines and may be excluded from public tenders for up to three years. The draft act is scheduled to enter into force in 2023 and will initially apply to companies with more than 3,000 employees (which will decrease to 1,000 employees in 2024).

⁴⁰⁷ *Id.*, at ¶¶ 5-6.

⁴⁰⁸ The Federal Government, National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights (2016-2020) ([link](#)).

⁴⁰⁹ Entwurf für Eckpunkte eines Bundesgesetzes über die Stärkung der unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in globalen Wertschöpfungsketten (Sorgfaltspflichtengesetz) (28 February 2021) ([link](#)).

(5) Luxembourg

(i) Court Decisions

270. There are no publicly available decisions issued by Luxembourgish judicial authorities that cite to the UNGPs.

(ii) NCP Decisions

271. The NCP in Luxembourg includes government representatives, trade union representatives, and business representatives and is situated within the Ministry of Economics.⁴¹⁰ Since 2000, the Luxembourgish NCP has only handled three proceedings, of which just one concerns human rights impacts and was rejected for jurisdictional reasons.

(iii) Other Developments

272. In March 2018, a coalition of 16 civil society organizations launched an initiative calling for the introduction of a duty of vigilance for companies headquartered in Luxembourg,⁴¹¹ expressly citing to the UNGPs. A December 2018 agreement,⁴¹² which committed Luxembourg's new coalition government to explore the possibility of due diligence legislation at the national level, supported binding and effective EU legislation on this subject, and welcomed the ongoing process at the UN level to develop a legally binding BHR treaty.
273. In December 2019, the Luxembourgish government adopted its second NAP,⁴¹³ updating its first NAP, which was adopted in June 2018.⁴¹⁴ The NAP sets out several actions at the national and EU level, including the implementation of pilot projects on human rights due diligence in State-owned companies,⁴¹⁵ further reflections on adopting national due diligence laws,⁴¹⁶ the introduction of human rights due diligence in public-private partnership mechanisms,⁴¹⁷ and the creation of due diligence training courses.⁴¹⁸

⁴¹⁰ Plan d'action national du Luxembourg pour la mise en oeuvre des Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'Homme (in French only) ("**Luxembourg NAP**") ([link](#)).

⁴¹¹ Initiative pour un devoir de vigilance au Luxembourg ([link](#)).

⁴¹² Accord de coalition (2018-2023) ([link](#)).

⁴¹³ Luxembourg NAP ([link](#)).

⁴¹⁴ National Action Plan of Luxembourg for the implementation of the United Nations Guiding Principles on Business and Human Rights (2018-2019) ([link](#)).

⁴¹⁵ Luxembourg NAP, at ¶ 22.

⁴¹⁶ *Id.*, at ¶ 27.

⁴¹⁷ *Id.*, at ¶ 30.

⁴¹⁸ *Id.*, at ¶ 34.

274. More recently, in December 2020, the Luxembourgish government commissioned a study at the University of Luxembourg on the feasibility of mandatory human rights due diligence legislation.⁴¹⁹

(6) Netherlands

(i) Court Decisions

275. The UNGPs were recently cited by the Hague District Court in the case of *Vereniging Milieudefensie v. Royal Dutch Shell Plc*,⁴²⁰ in which the court required the defendant to limit (or cause to be limited) the aggregate annual volume of all CO2 emissions into the atmosphere as a result of its business operations by at least 45% by the end of 2030, relative to 2019 levels.
276. In this case, the claimant based its request for the court's order on the argument that the defendant had a duty to prevent climate change, arising from the "unwritten standard of care" pertaining to social conduct found in Article 6 Section 162 of the Dutch Civil Code (which provides that "[a]n unlawful act can be attributed to the perpetrator if it is due to his fault or to a cause for which he is responsible by virtue of the law or generally accepted standards").⁴²¹
277. In determining the contours of the defendant's "unwritten standard of care", the Dutch court referred to the UNGPs. It described them as an authoritative and internationally-endorsed 'soft law' instrument on the responsibilities of States and businesses in relation to human rights.⁴²² As such, the court found that the UNGPs provide relevant guidance when interpreting the defendant's "unwritten standard of care". The court further found that it was irrelevant whether or not the defendant had itself committed to adopt the UNGPs, as a result of their "universally endorsed" nature and content.⁴²³
278. The Dutch court also addressed the defendant's argument that the UNGPs distinguished between the responsibility of States and that of businesses, and that while States are required and able to balance different societal interests, including the protection of human rights, this does not apply to businesses.⁴²⁴ The court found that businesses had an independent responsibility and obligation to respect human rights, and that this obligation applied in addition to national human rights laws and regulations.⁴²⁵

⁴¹⁹ "L'Université de Luxembourg mène une enquête auprès des entreprises sur la possibilité de légiférer un devoir de diligence" (2 December 2020) ([link](#)).

⁴²⁰ *Vereniging Milieudefensie v. Royal Dutch Shell Plc*, Hague District Court, C/09/571932 (Judgment of 26 May 2021) ([link](#)).

⁴²¹ World Intermediary Liability Map (WILMap), Center for Internet and Society at Stanford Law School, Netherlands Legislation, Article 6 Section 162 Dutch Civil Code ([link](#)).

⁴²² *Vereniging Milieudefensie v. Royal Dutch Shell Plc*, Hague District Court, C/09/571932 (Judgment of 26 May 2021) ([link](#)), ¶ 4.4.11.

⁴²³ *Id.*

⁴²⁴ *Id.*, ¶ 4.4.12.

⁴²⁵ *Id.*, ¶ 4.4.13.

(ii) *NCP Decisions*

279. The Dutch NCP is housed within the Ministry of Foreign Affairs.⁴²⁶ The Dutch NCP operates independently from the Dutch government and consists of four independent members and four advisory members from different ministries.
280. The Dutch NCP has been one of the most active in Europe. It has handled almost 40 cases since its inception in 2000, of which half were brought following the adoption of the UNGPs in 2011. Ten such cases involve alleged adverse human rights impacts.
281. The 2015 Bralima and Heineken complaint is an example where the UNGPs were referred to. On 14 December 2015, the Dutch NCP received a complaint from three individuals involving Bralima, a brewing company and subsidiary of Heineken, operating in the Democratic Republic of Congo (“DRC”),⁴²⁷ in relation to the dismissal of 168 employees in the DRC between 1999 and 2003.⁴²⁸



282. In its initial statement, the Dutch NCP determined that because the relevant facts occurred before the 2011 revision of the OECD Guidelines, the complaint would be considered under the 2000 OECD Guidelines.⁴²⁹ A mediation was conducted by the Dutch NCP and resulted in a confidential agreement between the parties.⁴³⁰

⁴²⁶ Germany's NCP ([link](#)).

⁴²⁷ Plainte contre la société Bralima (filiale de Heineken N.V en RDCongo) et Heineken N.V (basée à Amsterdam aux Pays-Bas) (14 December 2015) ([link](#)).

⁴²⁸ *Id.*

⁴²⁹ Initial Assessment: Specific Instance Former Employees of Bralima — Bralima and Heineken (28 June 2016), at ¶ 1 ([link](#)).

⁴³⁰ “Heineken & former employees in RDC reach agreement re labor rights dispute” (21 August 2017) ([link](#)).

283. Notably, the Dutch NCP’s Final Statement,⁴³¹ which provides for forward-looking recommendations for Heineken, including on how to conduct business and operate in volatile and conflict-affected countries, makes explicit reference to the UNGPs. Specifically, the Dutch NCP encourages Heineken’s commitment to “continue working on an internal analysis of Heineken’s existing policies and processes in the light of the Guidelines and the UN Guiding Principles on Business and Human Rights”.⁴³²
284. A second example where the UNGPs were cited by the Dutch NCP is the January 2018 complaint by the Obelle Concern Citizens (“OCC”), an indigenous people’s group in Nigeria, against the Shell Petroleum Development Company of Nigeria Limited (“SPDC”), a subsidiary of Royal Dutch Shell. This complaint concerned alleged adverse environmental impacts resulting from a gas fire eruption in 1998.
285. Initially, the OCC and SPDC attempted to address the matter under SPDC’s community feedback mechanism, but they were unable to resolve their dispute.⁴³³ SPDC also declined the Dutch NCP’s offer to facilitate a further mediation.⁴³⁴ In the Dutch NCP’s final statement, the Dutch NCP emphasized the importance of ensuring that SPDC’s grievance mechanism—its community feedback mechanism—functions in a manner consistent with the OECD Guidelines and the UNGPs.⁴³⁵ It further noted that “effective grievance mechanisms should deal with complaints in a manner that is legitimate, accessible, impartial, predictable, equitable, transparent and compatible with the OECD Guidelines and international human rights”.⁴³⁶

(iii) Other Developments

286. On 18 September 2020, the Dutch Socio-Economic Council recommended that the Netherlands enact a mandatory human rights due diligence law in line with the OECD Guidelines and the UNGPs.⁴³⁷ This recommendation follows the Dutch government’s recent publication of two reports on mandatory business and human rights risk standards. The first report recommends that voluntary commitments should be supplemented by mandatory instruments.⁴³⁸ The second report sets out different options for mandatory business and human rights legislation.⁴³⁹
287. With respect to the specific issue of child labor, the Dutch government adopted its *Child Labor Due Diligence Law (Wet Zorgplicht Kinderarbeid)* in May 2019, which is due to enter into force

⁴³¹ Final Statement: *Former Employees of Bralima v. Bralima and Heineken* (18 August 2017) ([link](#)).

⁴³² *Id.* at ¶ 5.

⁴³³ Final Statement *Obelle Concern Citizens (OCC) v. Shell Petroleum Development Company of Nigeria Limited (SPDC) and Royal Dutch Shell (RDS)* (27 February 2020) at p 7 ([link](#)).

⁴³⁴ *Id.*

⁴³⁵ *Id.*, at p 8.

⁴³⁶ *Id.*, at p 7.

⁴³⁷ Samen naar duurzame ketenimpact (September 2020) ([link](#)).

⁴³⁸ Dwingende en vrijwillige IMVO-maatregelen (26 March 2020) ([link](#)).

⁴³⁹ Opties voor afdwingbare IMVO-instrumenten ([link](#)).

in 2022. The legislation requires companies to investigate whether the production of their goods or services involves the use of child labor and to devise a plan to prevent child labor in their supply chains.⁴⁴⁰ It also imposes reporting obligations and provides for significant administrative fines and criminal penalties for noncompliance.

288. The Dutch NAP was adopted in 2013, and is currently being revised.⁴⁴¹ A national baseline assessment was published in August 2020 (in Dutch) by Utrecht University and the Netherlands Institute for Human Rights. The original plan was to complete the update before the end of 2020. However, the current status remains unclear.⁴⁴²
289. The Dutch government is also conducting a more general re-evaluation of its “Responsible Business Conduct” (“**RBC**”) policy. On 16 October 2020, the government sent an outline for this new policy to the Dutch House of Representatives, the keystone of which is the introduction of an obligation to exercise RBC (preferably to be established by the EU). It also includes measures to encourage businesses to take responsibility for the impact of their activities (or those of their business partners) on people and the environment abroad.⁴⁴³ Relatedly, the Dutch government has recently published a report evaluating a series of agreements, prepared by Dutch NGO Social and Economic Council, which aim to promote responsible business conduct in a variety of sectors by focusing on supply chain due diligence (“**RBC Agreements**”). Business entities can voluntarily become signatories to the RBC Agreements.⁴⁴⁴ The Dutch government has criticized the RBC Agreements for having a limited impact on supply chains and onerous implementation costs.⁴⁴⁵

On 18 September 2020, the Dutch Socio-Economic Council recommended that the Netherlands enact a mandatory human rights due diligence law in line with the OECD Guidelines and the UNGPs. This recommendation follows the Dutch government's recent publication of two reports on mandatory business and human rights risk standards.

⁴⁴⁰ Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid).

⁴⁴¹ Nationaal Actieplan bedrijfsleven en mensenrechten: Rapport over het Nederlandse beleid rondom de bevordering van eerbiediging van mensenrechten door het bedrijfsleven (10 December 2013) ([link](#)).

⁴⁴² Bedrijfsleven & mensenrechten: Een onderzoek naar de stand van de implementatie van de United Nations Guiding Principles on Business and Human Rights in Nederland ([link](#)).

⁴⁴³ Management Summary — Responsible Business Conduct ([link](#)).

⁴⁴⁴ Agreements on International Responsible Business Conduct ([link](#)).

⁴⁴⁵ Evaluation of the Dutch RBC Agreements (2014–2020) ([link](#)).

(7) Switzerland

(i) Court Decisions

290. To date, the UNGPs have not been referred to in any published court decision in Switzerland. The lack of reference to the UNGPs in Swiss case law may, however, be explained by the fact that some of these principles are already guaranteed by broader constitutional norms and other binding instruments.
291. Under Swiss law, the general principle is that human rights obligations do not have “horizontal effects”. In other words, they only apply to relationships between the State and individuals/companies, but not to relationships between individuals/companies unless they are enshrined in a specific “horizontal” norm. Accordingly, as a general matter, Swiss courts would not recognize a business’s responsibility to respect international human rights when analyzing its liability.

(ii) NCP Decisions

292. The Swiss NCP is housed within the State Secretariat of Economic Affairs (“SECO”) and is supported by an advisory board and inter-departmental ad hoc working groups.⁴⁴⁶
293. The Swiss NCP has handled over 20 cases since its inception in 2000, of which half were brought following the adoption of the UNGPs in 2011. Nine such cases involve alleged adverse human rights impacts, one of which cites to the UNGPs and is discussed below.
294. On 19 March 2015, Indonesian and Swiss NGOs filed a complaint against PT Holcim Indonesia, part of Swiss Holcim Ltd Group.⁴⁴⁷ The complainants alleged that Holcim Indonesia had put 826 households (about 3,000 persons) in Ringinrejo at risk of being evicted from land owned by Holcim that locals had been cultivating for the past 19 years. Holcim Indonesia planned to give this land to the Ministry of Forestry as compensation for forest areas that Holcim planned to use for mining and cement factories in Tuban, East Java.⁴⁴⁸
295. According to the complainants, Holcim failed to conduct human rights due diligence and engage with relevant stakeholders in order to provide meaningful opportunities for the views of the local communities to be taken into account before designating the land as compensation land.⁴⁴⁹ The complainants specifically noted that, based on the UNGPs, Holcim “has the responsibility to respect human rights, as well as, provide access to remedy for the victims”.⁴⁵⁰

⁴⁴⁶ Switzerland’s NCP ([link](#)).

⁴⁴⁷ ELSAM, Fransiscans International, Sitas Desa, PPAB, KPA, TuK Indonesia, and AURIGA Complaint (19 March 2015) (“ELSAM et. al. Complaint”) ([link](#)).

⁴⁴⁸ ELSAM et. al. Complaint, at ¶¶ 2-3.

⁴⁴⁹ *Id.*, at ¶ 2.

⁴⁵⁰ *Id.*, at ¶ 12.

296. The Swiss NCP's initial statement of 30 June 2015⁴⁵¹ also mentions the UNGPs in connection with Holcim's statement that it "has a group-wide human rights management system in place to implement the UN Guiding Principles on business and human rights".⁴⁵²
297. The Swiss NCP concluded that the issues raised merited further consideration, and brought the parties together for mediation with the help of an external mediator.
298. During the mediation, the parties could not reach agreement on the amount of land that the local communities needed to sustain their livelihoods. After a representative of the Swiss Embassy held bilateral exchanges between the parties in February and April 2017 in Jakarta, the Swiss NCP decided to conclude the complaint in June 2017.⁴⁵³ The Swiss NCP recommended that the parties continue with their dialogue and try to find a mutually satisfactory solution.⁴⁵⁴ The Swiss NCP asked both parties to report on progress.⁴⁵⁵ No such report has been made available to the public.

(iii) Other Developments

299. While Switzerland does not have any specific BHR laws, Swiss government and industry have been active in this area. Four areas of activity in particular are worth noting: (i) the Swiss NAP, (ii) the RBI and Swiss Parliament's Counterproposal; (iii) recent court cases; and (iv) industry initiatives.

(a) Swiss NAP

300. In December 2016, the Swiss government adopted an NAP setting out its plan for the implementation of the UNGPs over a four-year period.⁴⁵⁶ Fifty policies resulted from the NAP. Within this context the Swiss Federal Department of Foreign Affairs (FDFA) and SECO adopted Guidance on the implementation of the UNGPs within the commodity trading sector.⁴⁵⁷
301. In January 2020, the Swiss government adopted a revised NAP on CSR for the period 2020 to 2023,⁴⁵⁸ which will involve various stakeholders such as academic institutions, civil society organizations, and business associations. The NAP will aim at creating further human rights

⁴⁵¹ NCP of Switzerland, Initial Assessment, Specific Instance Regarding PT Holcim Indonesia Tbk. (30 June 2015) ("ELSAM et. al. Initial Assessment") ([link](#)).

⁴⁵² ELSAM et. al. Initial Assessment, at ¶ 3.

⁴⁵³ NCP of Switzerland, Final Assessment, Specific Instance Regarding PT Holcim Indonesia Tbk. (12 July 2017) ("ELSAM et. al. Final Assessment") ([link](#)).

⁴⁵⁴ ELSAM et. al. Final Assessment, at ¶ 7.

⁴⁵⁵ *Id.*, at ¶ 8.

⁴⁵⁶ Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights, (9 December 2016) ([link](#)).

⁴⁵⁷ Commodity Trading Sector Guidance on Implementing the UN Guiding Principles (2018) ([link](#)).

⁴⁵⁸ Position et plan d'action du Conseil fédéral concernant la responsabilité des entreprises à l'égard de la société et de l'environnement — État de la mise en œuvre 2017-2019 et plan d'action 2020-2023 (15 January 2020) ([link](#)).

due diligence policies and mechanisms while placing greater emphasis on the transparency of Swiss companies regarding their implementation of CSR measures.

302. The Swiss government has made its position clear: it “expects companies based and/or operating in Switzerland to act responsibly in accordance with international CSR standards and to fulfil their responsibility to respect human rights in all of their business activities, wherever they operate”.⁴⁵⁹

(b) The RBI and Swiss Parliament’s Counterproposal

303. Swiss law already contains certain provisions that might provide a basis for liability for adverse human rights impacts for Swiss companies and their management and employees. Larger Swiss companies are required to report nonfinancial information on an annual basis, which should cover human rights-related risks if they have the potential to impact a company’s operations and value.⁴⁶⁰ Listed companies must report price-sensitive information, which includes information as regarding reputational and liability risks, to SIX Swiss Exchange (Switzerland’s leading stock exchange). Board members may also come under scrutiny, as their duty of due care requires them to act as a reasonable board member would under the same circumstances, objectively assessed.⁴⁶¹ Accordingly, as international standards and best practice develop to include the assessment of human rights risks, directors may increasingly be exposed to potential claims in respect of related incidents.⁴⁶² Companies are already coming under scrutiny in areas which may overlap with human rights, including corruption, money laundering or terrorism, as illustrated by proceedings in Switzerland involving Argor-Heraeus SA,⁴⁶³ Lundin SA,⁴⁶⁴ and Kolmar Group AG⁴⁶⁵ or, abroad, involving Glencore.⁴⁶⁶
304. Over the past few months, Switzerland has taken steps to introduce specific BHR provisions into its legal framework. On 28 November 2020, the RBI, a popular initiative intended to modify the Swiss Constitution by introducing mandatory due diligence obligations and civil liability for Swiss companies for adverse human rights and environmental impacts, caused by companies under their control,⁴⁶⁷ was submitted to a popular vote. Although approved by a

⁴⁵⁹ Commodity Trading Sector Guidance on Implementing the UN Guiding Principles, (2018) at ¶ 3 ([link](#)).

⁴⁶⁰ Swiss Code of Obligation, art. 961c(2)(2).

⁴⁶¹ Decision of the Swiss Federal Supreme Court, 4A_120/2013, 27 August 2013, at ¶ 3.

⁴⁶² N. Bueno, “Diligence en matière des droits de l’homme et responsabilité de l’entreprise — Le point en droit Suisse,” Swiss Review of International and European Law (March 2019), pp 346 ff and 359.

⁴⁶³ Business & Human Rights Resource Center, Argor-Heraeus investigation (re Dem. Rep. of Congo), 20 November 2013 ([link](#)).

⁴⁶⁴ Lundin Energy AB, Lundin Sudan Legal Case 1999-2003 ([link](#)).

⁴⁶⁵ According to such complaint, Kolmar Group AG would have purchased gasoil which had been looted by a smuggling network, with the support of an armed group, at a time when Libya was torn apart by armed confrontation between rival factions. It is alleged that this would amount to pillage, a war crime under the Rome Statute of the International Criminal Court and Swiss criminal law. See Trial International, “Smuggling of Libyan gasoil: criminal complaint filed against Swiss trader,” 22 May 2020 ([link](#)).

⁴⁶⁶ Glencore statement on child labor allegations, 17 December 2019.

⁴⁶⁷ The official text of the RBI is published in the Swiss Federal Gazette, FF 2020 5343, 30 June 2020 ([link](#)).

majority of voters, it was rejected by a majority of Switzerland's Cantons. After the RBI was rejected, a counterproposal was prepared by the Swiss Parliament ("**Counterproposal**"),⁴⁶⁸ and this should in principle be implemented in 2021, provided it is not subject to a referendum (which is thought to be unlikely given the compromise it reflects between all of Switzerland's political parties).⁴⁶⁹

305. The Counterproposal sets out reporting and due diligence obligations for large "public interest" companies based in Switzerland, namely companies:
 - (i) that are listed on an exchange or have issued bonds, or that are regulated by the Swiss Financial Market Supervisory Authority (FINMA); and
 - (ii) have more than 500 employees and a balance sheet of CHF 20 million, or a turnover of CHF 40 million over two consecutive financial years, generated on their own or jointly with one or more Swiss or foreign companies under their control.
306. Companies that meet these criteria will be required to issue an annual nonfinancial report on environmental, social, human rights, and corruption risks.
307. The Counterproposal also provides for compulsory due diligence to be conducted by all Swiss companies which: (i) import or process minerals or metals, including tin, tantalum, tungsten, or gold from conflict or high-risk regions; or (ii) provide services or products that give rise to a risk of child labor in the supply chain.
308. As part of this compulsory due diligence, companies will be required to identify and categorize environmental, social, human rights, and corruption risks, and then implement a compliance system capable of preventing and mitigating these risks.
309. The Counterproposal does not provide for civil liability in case of adverse environmental, social, and human rights impacts. However, it does provide for criminal liability of up to CHF 50,000 if the impact in question was caused by negligence or up to CHF 100,000 if it was intentional.

(c) Developing Case Law and Regulatory Activity

310. Three recent cases reflect the increasing relevance of BHR and associated factors in the Swiss courts.
311. *First*, the Swiss Federal Supreme Court recently ruled that a local municipality may consider the environment as a criterion in the adjudication of public tenders. The local municipality had excluded a tenderer for garbage collection on the grounds that the travel distance for garbage

⁴⁶⁸ The latest version of the official text of the Counterproposal published in the Swiss Parliament's Official Bulletin, 16.077-2, 19 June 2020, available (in French) ([link](#)).

⁴⁶⁹ A popular referendum shall be organized if 50,000 signatures are collected within 100 days.

collection would be longer than for the other tenderers, which would have environmental impacts.⁴⁷⁰

312. *Second*, the courts in two recent criminal cases have considered the concept of “climate emergency” in the context of defenses to criminal prosecution.
313. The first case involved a 23-year-old defendant as well as a group of climate activists who were accused of having splattered the building of a Credit Suisse subsidiary in Geneva, Switzerland, with red handprints, as part of a campaign against Credit Suisse’s fossil-fuel investments. A lower court in Geneva ordered a fine of approximately CHF 300 against the 23-year-old defendant and required him to pay clean-up costs of approximately CHF 2,250.⁴⁷¹ The Court of Appeals overturned this sentence, ruling that the defendants’ actions were justified by the global warming emergency, and that they acted in conformity with Switzerland’s climate and global warming policies. As a result, it was legitimate for the defendants to break the relevant criminal laws,⁴⁷² pursuant to Article 17 of the Swiss Criminal Code (“SCC”), which provides that a person who commits a crime acts lawfully if by doing so they safeguard interests of a higher value. An appeal is pending before the Swiss Federal Supreme Court.
314. The second case concerned twelve climate activists who were accused of trespassing on Credit Suisse’s premises in Lausanne, Switzerland, to stage a theatrical performance of a tennis match, with the aim of urging Roger Federer to terminate his sponsorship ties with Credit Suisse. A court in Vaud had initially acquitted the activists of trespassing under Article 17 of the SCC, on the grounds that their actions were legitimized by the state of necessity resulting from global warming.⁴⁷³ The Court of Appeals of Vaud overturned this decision, holding that Article 17 SCC is not intended to protect collective interests and that the activists could have used legal means to protest against Credit Suisse.⁴⁷⁴ An appeal is pending before the Swiss Federal Supreme Court.

(d) Industry Initiatives

315. Finally, certain Swiss industries have adopted professional regulations which directly or indirectly cover human rights risks, for example:
 - (i) the Swiss Bankers Association has published a “Guideline for the integration of ESG considerations into the advisory process for private clients”, in which they suggest

⁴⁷⁰ Decision of the Swiss Federal Supreme Court 2P.342/1999, 31 May 2000, ¶¶ 3 c) aa).

⁴⁷¹ Decision of the Police Court of the canton of Geneva JTDP/245/2020, 20 February 2020.

⁴⁷² Decision of the Court of Appeals of the canton of Geneva AARP/339/2020, 14 October 2020.

⁴⁷³ Decision of the Renens Police Court PE19.000742, 13 January 2020.

⁴⁷⁴ Decision of the Court of Appeals of the canton of Vaud decision Jug/2020/333, 22 September 2020.

screening investments against minimum standards based on national or international standards and norms, which include the UNGPs;⁴⁷⁵ and

- (ii) the Swiss Funds & Asset Management Association and the Swiss Sustainable Finance Association jointly published “Sustainable Asset Management: Key Messages and Recommendations”, which presents an investment strategy that excludes companies for negative business conduct, such as breaches of global environmental, social, and corporate governance standards, including for systematic violation of human rights.⁴⁷⁶



C. Northern Europe

316. Countries in Northern Europe have been active in the area of BHR. As of the date of this report, all countries in this group, except Iceland,⁴⁷⁷ have launched NAPs, and most NCPs have been particularly active. The UNGPs have only been cited in one Swedish court decision, but they have influenced local legislation and ongoing government initiatives.

(1) Denmark

(i) Court Decisions

317. There are no publicly available decisions issued by Danish judicial authorities that cite to the UNGPs.

⁴⁷⁵ Guideline for the integration of ESG considerations into the advisory process for private clients, June 2020, p 11 ([link](#)).

⁴⁷⁶ Sustainable Asset Management: Key Messages and Recommendations of SFAMA and SSF, 16 June 2020 ([link](#)).

⁴⁷⁷ Given that Iceland has not yet adopted an NAP, and has an inactive NCP, it has not been given a separate section in this report.

(ii) *NCP Decisions*

318. The current Danish NCP was established in November 2012 as the Mediation and Complaints Handling Institution for Responsible Business Conduct.⁴⁷⁸ The law creating the Danish NCP established it as an independent body, housed within the Danish Business Authority, which is located within the Ministry of Business and Growth.⁴⁷⁹
319. Since 2012, the Danish NCP has received more than 10 applications, but most have been rejected for lack of jurisdiction or for not being covered by the OECD Guidelines.⁴⁸⁰ Of the few applications that resulted in a final statement, two specifically refer to the UNGPs.
320. *First*, in July 2014, the Danish NCP received a request for review by a Danish NGO alleging that Arla Foods, a Danish company had sold milk powder in developing countries such as the Ivory Coast, Nigeria, and Bangladesh.⁴⁸¹ The NGO raised certain alleged negative consequences of exporting subsidized European powdered milk to developing countries, where the local dairy sector primarily consists of small producers and peasant farmers. The NGO sought greater awareness on the part of Arla Foods of the need to exercise due diligence in order to identify and prevent potential negative impacts of its operations on human rights.
321. In September 2014, the company and the NGO entered into an agreement including a commitment by Arla to implement a proactive human rights policy (in compliance with the OECD Guidelines and the UNGPs) in its global operations, and report on the actual and potential adverse human rights impacts of the company's activities.⁴⁸² Arla agreed to introduce due diligence procedures and engage in a more systematic identification, prevention, and mitigation of actual and potential unintended consequences of its sales and operations on local farmers' business prospects and rights.⁴⁸³
322. *Second*, in December 2014, a complaint was filed by NGOs Clean Clothes Campaign Denmark and Active Consumers alleging that PWT Group, a clothing company, had not observed the OECD Guidelines chapters on General Policies, Employment and Industrial Relations, and Human Rights.⁴⁸⁴ More specifically, the applicants alleged that the company had failed to carry out due diligence in relation to its supplier, the textile manufacturer New Wave Style Ltd. New Wave Style was located in Rana Plaza, Bangladesh, which collapsed in April 2013, killing 1,138 people. Mediation was offered by the Danish NCP but did not lead to an agreement. As such, the Danish NCP examined the issues and concluded that PWT Group had not conducted

⁴⁷⁸ Denmark's NCP ([link](#)).

⁴⁷⁹ Denmark NCP Peer Review Report (June 2015) ([link](#)), at ¶ 7.

⁴⁸⁰ *Id.*, at ¶ 12.

⁴⁸¹ *Action Aid Denmark vs. Arla Foods Complaint*, 8 July 2014 ([link](#)).

⁴⁸² *Action Aid Denmark vs. Arla Foods Agreement*, 26 September 2014 ([link](#)).

⁴⁸³ *Id.*

⁴⁸⁴ Specific instance notified by Clean Clothes Campaign Denmark and Active Consumers regarding the activities of PWT Group (17 October 2016) ([link](#)).

appropriate due diligence, particularly as it did not provide any details on inspections that it had conducted at New Wave Style in 2012.

323. The Danish NCP concluded the case in October 2016,⁴⁸⁵ noting that “[d]ue diligence includes the obligation to identify, prevent and remedy existing and potential adverse impacts as described in the OECD Guidelines, which in this respect are aligned with the UNGP”.⁴⁸⁶ The Danish NCP also made detailed recommendations, including that PWT Group:⁴⁸⁷

- (i) Revise its management and risk assessment systems in order to implement due diligence processes in relation to its suppliers that are in line with Chapter II of the OECD Guidelines.
- (ii) Ensure that the company’s CSR policy complies with the OECD Guidelines.
- (iii) Review suppliers’ self-assessments in conjunction with an analysis of industry and country risks and, on this basis, select sites for inspection.
- (iv) Report these efforts and the measures carried out by the supplier to prevent potential risks.
- (v) Continue its efforts to systematically incorporate the company’s Code of Conduct into management and risk systems.
- (vi) Remain up-to-date on new guidelines on due diligence within its sector as a means of continuously developing the company’s work in this respect.

324. In January 2018, the Danish NCP published a follow-up statement noting the company had fully implemented its recommendations.⁴⁸⁸

(iii) Other Developments

325. In its Action Plan for Corporate Social Responsibility 2012–2015, published in March 2012,⁴⁸⁹ the Danish government included a number of initiatives to implement the UNGPs. Pursuant to the Danish Council for Corporate Social Responsibility’s recommendation, the Danish government decided to create a separate NAP on the implementation of the UNGPs. This NAP was developed by the Ministry of Industry, Business and Financial Affairs, as well as

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*, at ¶ 4.

⁴⁸⁷ *Id.*, at ¶ 9.

⁴⁸⁸ Specific instance notified by Clean Clothes Campaign Denmark and Active Consumers regarding the activities of PWT Group, Follow-Up Statement (17 October 2016) ([link](#)).

⁴⁸⁹ Danish Action Plan for Corporate Social Responsibility 2012–2015 ([link](#)).

the Ministry of Foreign Affairs, with the involvement of other ministries, including the Ministry of Employment, the Ministry of Education, and the Ministry of Justice.⁴⁹⁰

326. On the legislative side, Denmark has adopted two notable BHR-related statutes:

- (i) **12 June 2012 Amendment to the Financial Statements Act:** This amendment introduced mandatory reporting for the largest Danish companies on human rights impacts and climate reduction, regardless of whether these issues are addressed in their internal policies.⁴⁹¹
- (ii) **18 April 2020 Agreement on Aid Packages for Employees and Companies in Connection with the Gradual Reopening of Denmark:** Among other things, this legislation conditions receipt of COVID-19 government aid exceeding DKR 60 million (approximately USD 9.7 million) on compliance with the UNGPs.⁴⁹²

327. Finally, various Danish organizations have helped to produce a number of other BHR-related tools:

- (i) **CSR Compass:** This tool helps companies comply with international guidelines for responsible supply chain management. It was developed in collaboration with the UN Global Compact and partners from Danish civil society and industry organizations.⁴⁹³
- (ii) **Global Compact Self Assessment Tool:** This tool helps companies evaluate their performance and management of supply chain issues implicated by the UN Global Compact principles.⁴⁹⁴ It was co-developed by the Confederation of Danish Industry, the Industrialization Fund for Development Countries, the Danish Business Authority and the Danish Institute for Human Rights in association with the UN Global Compact Office.⁴⁹⁵

(2) Finland

(i) Court Decisions

328. There are no published judicial decisions that reference the UNGPs. The lack of judicial decisions might partly be explained by the fact that Finland's domestic legislation incorporates human rights and environmental protections which are similar to the UNGPs. In addition,

⁴⁹⁰ Danish NAP — Implementation of the UN Guiding Principles on Business and Human Rights ([link](#)).

⁴⁹¹ Implementation in Denmark of Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Text with EEA relevance ([link](#)).

⁴⁹² Business & Human Rights Resource Center, COVID-19 business aid: Danish Government & Parliament set conditionalities on tax & dividend payments and say companies should follow UNGPs ([link](#)).

⁴⁹³ CSR Compass website ([link](#)).

⁴⁹⁴ Global Compact Self Assessment Tool website ([link](#)).

⁴⁹⁵ *Id.*

Finland has ratified the most important international human rights treaties, as well as the Charter of Fundamental Rights of the EU, and has harmonized its national legislation with the requirements laid down therein.

(ii) *NCP Decisions*

329. The Ministry of Economic Affairs and Employment acts as the Finnish NCP, in collaboration with the Committee on Corporate Social Responsibility.⁴⁹⁶ Since 2006, the Finnish NCP has disclosed six complaints that have been raised before it. These can broadly be categorized into five distinct matters — (i) Botnia’s Uruguayan Mills Project complaint;⁴⁹⁷ (ii) the Pöyry Group complaint;⁴⁹⁸ (iii) the Stora Enso Complaint;⁴⁹⁹ (iv) the Nokia Complaint;⁵⁰⁰ and (v) the Kone Complaint.⁵⁰¹
330. Four of the five NCP complaints to date were brought following the adoption of the UNGPs in 2011—Pöyry Group, Stora Enso, Nokia, and Kone—but none explicitly raise the UNGPs. The Pöyry Group case, discussed below, is the only complaint specifically concerning human rights.⁵⁰²
331. In 2012, an international coalition of 14 civil society organizations brought a complaint to the Finnish NCP in connection with services provided by the Pöyry Group to the government of Lao PDR as a part of the preparations for construction of the Xayaburi hydroelectric dam.⁵⁰³ The complaint identified potential violations of Paragraphs 2 and 3 of the OECD Guidelines’ Chapter IV on Human Rights, which mirror Principles 13(a) and 13(b) of the UNGPs.⁵⁰⁴ It alleged that the project would have severe environmental and social impacts along the entire Lower Mekong Basin, including displacement of villagers and loss of fertile land, income, livelihoods, and food security in one of the world’s most productive freshwater fisheries. Pöyry Group, a Finland-based consulting firm, had been engaged by the Lao government to provide technical advice.
332. The complaint alleged that the services provided by Pöyry undermined the co-operative regional process regarding the use of Mekong trans-boundary water resources. The complaint also accused Pöyry of not contributing to sustainable development and failing to conduct appropriate due diligence. The complainants called on Pöyry to engage in dialogue with

⁴⁹⁶ Handling Specific Instances of the OECD Guidelines for Multinational Enterprises.

⁴⁹⁷ *CEDHA v. Botnia S.A.* (2006) and *CEDHA v. Finnvera plc* (2006).

⁴⁹⁸ *Siemenpuu et al v. Pöyry Group* (2012).

⁴⁹⁹ *The trade unions Association Génération Ferdinand Béghin and Syndicat CGT Arjowiggins Wizernes v. Stora Enso* (2016).

⁵⁰⁰ *Diego Becker and Gustavo Borrajo v. Nokia Corporation* (2020).

⁵⁰¹ *Haidir Hussien v. Kone Oyj, Kone Middle East* (2020).

⁵⁰² Pöyry Plc and the Xayaburi hydropower project in the Lao PDR; OECD’s guidelines for multinational enterprises; statement of the national contact point (10 June 2013) ([link](#)).

⁵⁰³ Siemenpuu Foundation Mekong Group’s Complaint, 11 June 2012 ([link](#)).

⁵⁰⁴ *Id.*, at ¶ 33.

relevant stakeholders and, where applicable, compensate those adversely impacted by the project.⁵⁰⁵

333. Based on the evidence provided, the Finnish NCP determined that Pöyry had not breached the OECD Guidelines.⁵⁰⁶ Interestingly, Finnwatch, an NGO advising the Finnish NCP on the matter, issued a statement disputing this finding and raising concerns about the NCP's process, including confidentiality provisions that did not allow the complainants to see or rebut the company's response to the allegations (a practice that has been deemed unacceptable by other NCPs).⁵⁰⁷



(iii) Other Developments

334. Since 2000, BHR has steadily gained prominence in Finland.⁵⁰⁸ The key government BHR initiative was MONIKA—the “Committee on International Investment and Multinational Enterprises”—established in 2001 by the Ministry of Trade and Industry in response to the OECD Guidelines. In 2008, the Finnish government replaced MONIKA with a broader consultative committee, which included representatives from several ministries and a broad range of stakeholders, including companies, business organizations, trade unions, and NGOs. At the operational level, the government has established several BHR policies, such as The Accounting Act, The State Pension Fund, The National Export Credit Agency (Finnvera), and The Finnish Fund for Industrial Cooperation (Finnfund). BHR efforts are generally led by the Ministry of Economic Affairs and Employment.

⁵⁰⁵ Pöyry Plc and the Xayaburi hydropower project in the Lao PDR; OECD's guidelines for multinational enterprises; statement of the national contact point (10 June 2013) ([link](#)).

⁵⁰⁶ *Id.*

⁵⁰⁷ Finnwatch, “Pöyry got off scot-free” (18 June 2013) ([link](#)).

⁵⁰⁸ A. Midttun, M. Gjølborg, A. Kourula, S. Sweet, and S. Vallentin: “Public Policies for Corporate Social Responsibility in Four Nordic Countries: Harmony of Goals and Conflict of Means”, *Business & Society* (2015), Vol. 54(4) 464–500, pp 479.

335. Finland has also taken active steps to implement the UNGPs. On 17 September 2014, Finland adopted its NAP.⁵⁰⁹ The key aims set out in the NAP were to prepare a legislative report, define the corporations' due diligence obligations, and outline the application of social criteria in public procurement processes. In fact, Finland's NAP is one of the few that comprehensively explains due diligence expectations of business, using definitions from the OECD Guidelines and the UNGPs.
336. On 2 September 2020, the Ministry of Economic Affairs and Employment finally published a legislative report entitled *Judicial Analysis on the Corporate Social Responsibility Act*.⁵¹⁰ The report explores suitable regulatory options for adopting a human rights due diligence law in Finland, as well as its scope of application, supervision, and possible sanctions. According to the report, business operations in Finland are already subject to various due diligence obligations, which require companies to assess and prevent human rights impacts and other risks associated with their operations. However, the report concludes that Finland could impose additional due diligence obligations on companies regarding the environment and human rights within the framework of the national legal system, which would cover companies' domestic as well as transnational activities.

(3) Norway

(i) Court Decisions

337. There are no publicly available decisions issued by Norwegian judicial authorities that cite to the UNGPs.

(ii) NCP Decisions

338. Since 2011, the Norwegian NCP has been an independent body made up of four experts. Its secretariat is located at the Section for Economic and Commercial Affairs at the Ministry of Foreign Affairs.⁵¹¹ Since 2000, the Norwegian NCP has received close to 20 complaints, one of which cites to the UNGPs.⁵¹²
339. In August 2014, the Norwegian NCP received a complaint from FIVAS, the Norwegian Association for International Water Studies and the NGO collation "Save Sarawak Rivers", alleging that Norpower, a subsidiary of Norconsult AS, had breached the general policies,

⁵⁰⁹ *National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights*, (Työryhmän ehdotus YK:n yrityksiä ja ihmisoikeuksia koskevien ohjaavien periaatteiden kansalliseksi toimeenpanoksi), the Ministry of Economic Affairs and Employment (2014).

⁵¹⁰ *Judicial Analysis on the Corporate Social Responsibility Act* ("Oikeudellinen selvitys yritysvastuulaista"), Ministry of Economic Affairs and Employment, 2 September 2020 ([link](#)).

⁵¹¹ Norway's NCP ([link](#)).

⁵¹² Norconsult Complaint, 22 August 2014 ([link](#)).

disclosure and human rights provisions of the OECD Guidelines in the Malaysian State of Sarawak.⁵¹³

340. The complaint related to the Murum and Baram hydropower projects, which are part of the Sarawak Corridor of Renewable Energy program initiated by the Malaysian government. Sarawak is one of the two Malaysian states on the island of Borneo, and its population consists of several indigenous groups. According to the complaint, many of these groups in the interior of Sarawak are affected by logging and large infrastructure projects. In particular, members of the Penan, Kenyah and Kayan communities have already been forced to relocate due to the construction of the Murum Dam or will be displaced if construction of the Baram Dam is approved.⁵¹⁴
341. Norconsult AS, through its subsidiary company NorPower, provided technical advice and assistance in relation to both the Murum and Baram projects. FIVAS's complaint contended that Norconsult was therefore linked to the alleged adverse human rights and environmental impacts of the dams. In particular, Norconsult allegedly failed to conduct appropriate due diligence to identify, prevent, and mitigate these impacts.⁵¹⁵
342. Interestingly, while FIVAS alleged violations of Chapter IV, paragraphs 1, 3-5 of the OECD Guidelines, which mirror several principles of the UNGPs, the complaint also included a reference to Principle 21 of the UNGPs, which provides that businesses should foster transparency and accountability by communicating externally about how they address human rights concerns. This principle is not directly embodied in the OECD Guidelines.⁵¹⁶
343. The mediation was successful and resulted in a joint agreement⁵¹⁷ and a commitment by Norconsult to respect the right to free, prior, and informed consent of indigenous communities affected by projects to which it is linked (in accordance with ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples). Norconsult also committed to implementing full human rights due diligence procedures in order to avoid and minimize the adverse impacts of major hydropower projects on human rights and the environment.⁵¹⁸

(iii) Other Developments

344. Norway has published a number of important white papers which have helped to promote human rights in the business context. In the first white paper,⁵¹⁹ published in January 2009 before the adoption of the UNGPs, the Norwegian government emphasized the importance of companies respecting human rights in all their activities, including children's, women's,

⁵¹³ Norconsult Complaint, 22 August 2014 ([link](#)).

⁵¹⁴ Norconsult Complaint, 22 August 2014 ([link](#)).

⁵¹⁵ Norconsult Complaint, 22 August 2014 ([link](#)).

⁵¹⁶ *Id.*, at ¶ 7.

⁵¹⁷ OECD Watch, *Fivas v. Norconsult* ([link](#)).

⁵¹⁸ *Id.*

⁵¹⁹ Report to the Parliament No 10, 2008-2009 ([link](#)).

and indigenous peoples' rights as formulated in international conventions, including the ILO core conventions.⁵²⁰

345. A second white paper, entitled "Opportunities for All: Human Rights in Norway's Foreign Policy and Development Cooperation" and published on 12 December 2014, covered human rights as a tool in foreign and development policy. This report included a chapter on business and human rights,⁵²¹ and specifically referenced the Norwegian government's expectation that companies apply the UNGPs. The Norwegian NAP builds on this white paper, as well as a mapping and gap analysis of government performance in relation to business and human rights.⁵²²
346. The Norwegian NAP was published on 12 October 2015 by the Ministry of Foreign Affairs.⁵²³ The drafting process was coordinated by the Ministry of Foreign Affairs, supported by an inter-ministerial group.
347. Although Norway has not passed any BHR legislation, two proposed statutes seek to expand the ambit of applicable regulation. On 28 November 2019, the Norwegian Ethics Information Committee—convened by the Norwegian government—published a draft statute on supply chain transparency, the "duty to know", and human rights due diligence reporting for corporations doing business in Norway. This statute imposes obligations on both government and industry, requiring companies to implement due diligence and disclosure obligations and national authorities to monitor compliance with these obligations.⁵²⁴
 - (i) **Duty to Know:** The Act imposes an obligation on covered enterprises to know of business and supply chain risks that might have an adverse impact on fundamental human rights and working standards. The Act defines "fundamental human rights" in accordance with the ICESCR, the ICCPR, and the ILO conventions. The duty to know would apply most stringently where the risks of adverse impact are the most severe; for example, if the risk relates to forced and child labor.
 - (ii) **Covered Enterprises:** The draft Act applies to all enterprises that offer goods and services in Norway (and not just those based in Norway). Large enterprises would be subject to more stringent due diligence and disclosure requirements.
 - (iii) **Stakeholder Monitoring:** The proposed Act creates a right to information on "how an enterprise conducts itself with regard to fundamental rights and decent work

⁵²⁰ Norwegian Ministry of Foreign Affairs, *Report No. 10 (2008-2009) to the Storting: Corporate Social Responsibility in a Global Economy* ([link](#)).

⁵²¹ Opportunities for All: Human Rights in Norway's Foreign Policy and Development Cooperation (Report to the Storting No. 10, 2014-2015) ([link](#)), at ¶¶ 57-61.

⁵²² M. B. Taylor, 'A Mapping and Gap Analysis: The State's Duty to Protect' (December 2013) ([link](#)).

⁵²³ Næringsliv og menneskerettigheter Nasjonal handlingsplan for oppfølging av FNs veiledende prinsipper, November 2017 ([link](#)).

⁵²⁴ Report from the Ethics Information Committee, 28 November 2019 ([link](#)).

within the enterprise and its supply chains”,⁵²⁵ which is implemented through an information request procedure and a right of appeal to the Danish Consumer Authority.

- (iv) **Penalties:** Under the proposed Act, the Norwegian Consumer Authority and Market Council would be empowered to impose penalties for failure to comply with the disclosure and right to information provisions of the Act.

348. In early 2020, members of the Norwegian parliament commenced work on modern slavery legislation to address labor, human trafficking, and modern day slavery. The legislation was to be modeled on the UK Modern Slavery Act of 2015.⁵²⁶

(4) Sweden

(i) Court Decisions

349. There is only one reported lower court case in Sweden which directly considers the UNGPs. The proceedings were brought by a pharmaceutical company, Paranova Läkemedel AB, against Jönköping County Council’s Procurement Unit.⁵²⁷ Paranova challenged a Swedish county council’s mandatory Code of Conduct for suppliers, which included social and environmental standards, and a requirement to carry out due diligence within a company’s supply chains. As an importer, Paranova argued that it had difficulty in obtaining information on its supply chains and argued that only drug manufacturers would be able to meet the requirements. It went on to argue that requiring importers to comply with these provisions of the Code of Conduct would negatively impact competition, as it would essentially exclude importers from the procurement process.
350. For its part, the county council claimed that its sustainability requirements were in compliance with the Swedish Public Procurement Act. It noted that the Code of Conduct was adopted in order to ensure that goods and services were produced in sustainable and responsible circumstances, and that the requirements stemmed from the UNGPs and the Global Compact, among other international standards. The county council explicitly referenced Principle 3 of the UNGPs and noted that a State’s “duty to protect” includes (i) enforcing laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and (ii) separately, encouraging, and where appropriate requiring, business enterprises to communicate how they address their human rights impacts. The county council also referred to Principle 6 of the UNGPs, which reflects a State’s obligation to promote

⁵²⁵ *Id.* Chapter 2, Section 7, p 6.

⁵²⁶ Business & Human Rights Resource Center, “Norway: Government to examine possible modern slavery law,” 14 January 2020 ([link](#)).

⁵²⁷ *Paranova Läkemedel AB v. Jönköping läns lansting Upphandlingsenheten*, Administrative court in Jönköping, Case no. 4773-17 (2018).

respect for human rights by business enterprises with which they conduct commercial transactions and highlighted the risk-based approach of the UNGPs.⁵²⁸

351. The court dismissed the complaint, holding that the county council's Code of Conduct was in compliance with the Swedish Public Procurement Act and international standards.⁵²⁹

(ii) *NCP Decisions*

352. Since 2003, the Swedish NCP has disclosed six complaints: (i) the Sandvik and Atlas Copco complaint;⁵³⁰ (ii) the Nordea complaint;⁵³¹ (iii) the KfW IPEX-Bank complaint;⁵³² (iv) the Statkraft complaint;⁵³³ (v) the Electrolux;⁵³⁴ and (vi) the Mölnlycke⁵³⁵ complaints.
353. Three of these cases, the Statkraft, Electrolux, and Mölnlycke complaints, were brought after the UNGPs were adopted in 2011. In the Electrolux and Mölnlycke complaints, the complainant referred to the UNGP's Pillar III safeguards on access to remedy and the NCP's important function as an available complaint mechanism.⁵³⁶ The complainants went on to state that the NCP's cases can provide guidance to stakeholders regarding the interpretation of the OECD Guidelines and, in such a way, contribute to their successful implementation.
354. The Swedish NCP issued final statements in three of the complaints (Atlas Copco, Nordea, and Statkraft). However, in each case, the NCP concluded that the companies had not failed to comply with the OECD Guidelines.⁵³⁷
355. The Statkraft complaint resulted in the Swedish NCP's only post-UNGPs final statement. In 2012, the Swedish and Norwegian NCPs received a submission from the Sámi reindeer herding collective in Jijnjevaerie Sámi Village, alleging that Statkraft AS, a Norwegian multinational enterprise, had not observed the general policies, human rights, and environment provisions of the OECD Guidelines in its plans to build a 460-turbine turbine wind farm on traditional reindeer herding ground in Sweden.⁵³⁸

⁵²⁸ *Paranova Läkemedel AB v. Jönköping läns lansting Upphandlingsenheten*, Administrative court in Jönköping, Case no. 4773-17 (2018).

⁵²⁹ *Paranova Läkemedel AB v. Jönköping läns lansting Upphandlingsenheten*, Administrative court in Jönköping, Case no. 4773-17 (2018).

⁵³⁰ *Attac Sweden and Friends of the Earth Sweden v. Sandvik and Atlas Copco* (2003).

⁵³¹ *CEDHA and Bellona v. Nordea* (2006).

⁵³² *Saami Council v. German bank KfW IPEX-Bank* (2010).

⁵³³ *Sámi reindeer herding collective in Jijnjevaerie Sami Village v. Statkraft AS* (2010).

⁵³⁴ *Swedwatch v. Electrolux* (2013).

⁵³⁵ *Arica Victims KB (a company representing 707 Chileans) v. Boliden Mineral* (2013).

⁵³⁶ *Sámi reindeer herding collective in Jijnjevaerie Sami Village v. Statkraft AS* (2010); *Swedwatch v. Electrolux* (2013).

⁵³⁷ *Attac Sweden and Friends of the Earth Sweden v. Sandvik and Atlas Copco* (2003); *CEDHA and Bellona v. Nordea* (2006); *Sámi reindeer herding collective in Jijnjevaerie Sami Village v. Statkraft AS* (2010).

⁵³⁸ *Sámi reindeer herding collective in Jijnjevaerie Sami Village v. Statkraft AS*, Complaint, 29 October 2012 ([link](#)).

356. The complainant argued that if the project proceeded as planned, it would severely restrict the community's ability to pursue reindeer husbandry, which was the basis of their economic and cultural survival. The project would also force Jijnjevaerie Sámi village members to abandon their herding practices and forcefully dislocate them from the environment that provided them with their cultural identity.⁵³⁹
357. The Sámi reindeer herding collective acknowledged that Statkraft had consulted with the community during the planning stages of the wind power plant, but alleged that "meaningful engagement" had not taken place.⁵⁴⁰ The complainant further alleged that Statkraft had failed to take adequate steps to prevent the potential adverse impacts of the wind farm. The complainant demanded that Statkraft engage in meaningful consultations and that all appropriate steps be taken to prevent adverse impacts on the environment and reindeer herding practices.⁵⁴¹



358. In 2013, the Swedish and Norwegian NCPs finalized their initial assessment and accepted the case, with Norway taking the lead. After the complaint was filed, the parties renewed their dialogue and the NCPs decided to defer the case to allow the parties to find a mutually acceptable solution. An informal meeting between the parties was held with the Swedish NCP to discuss a set of proposals made by the Jijnjevaerie Sámi village on how to mitigate the potential damage.⁵⁴²
359. After the dialogue failed to produce an agreement, the Norwegian NCP resumed its lead role in handling the case. It hosted the first official meeting between the parties in November 2013 to discuss the terms of reference for mediation. The mediation facilitated by the Norwegian NCP

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Sámi reindeer herding collective in Jijnjevaerie Sami Village v. Statkraft AS* (2012) ([link](#)).

⁵⁴² *Id.*

was concluded in June 2014 without resulting in an agreement between the parties. The NCPs' final statement was issued in February 2016.⁵⁴³ The NCPs did not find grounds for concluding that Statkraft had failed to comply with the OECD Guidelines, but provided recommendations for how Statkraft could work in a manner that even more clearly promoted indigenous people's rights and the implementation of the OECD Guidelines.⁵⁴⁴

(iii) Other Developments

360. Like Finland, the Swedish government began promoting human rights in the business context relatively early.⁵⁴⁵ Sweden launched a BHR initiative called Globalt Ansvar ("Swedish Partnership for Global Responsibility") in 2002, which was renewed in 2014. It was established to strengthen Swedish companies' work on human rights, labor standards, environmental protection and anti-corruption, and it was based on the principles of the UN Global Compact and the OECD Guidelines. The initiative also functions as Sweden's NCP.
361. In 2007, Sweden became the first country to demand sustainability reports from State-owned enterprises.⁵⁴⁶ The reports must comply with guidelines from the Global Reporting Initiative ("GRI"). Responsibility lies with the Department of Trade and Industry.
362. In 2015, the Swedish government adopted a new and more ambitious BHR policy linked to trade and exports.⁵⁴⁷ This policy describes the government's expectations for companies' sustainability efforts and recommendations as to how these efforts should be pursued. It is based on international conventions and policies regarding human rights, core labor standards, environment, and corruption that establish a global standard for human decency in business.
363. Also in 2015, Sweden became the sixth country to adopt an NAP in line with the UNGPs.⁵⁴⁸ The government set clear expectations that companies operating in Sweden or abroad should comply with the UNGPs and other relevant guidelines in this area, and review their due diligence and redress mechanisms. The NAP marked the beginning of Sweden's work to implement the UNGPs on a national level and included over 50 ongoing and planned measures.⁵⁴⁹ These include:
 - (i) The introduction of new legislation on (i) sustainability reporting for large companies,
 - (ii) clearer sustainability criteria in the Public Procurement Act, and
 - (iii) stronger legal protection for whistleblowers.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ A. Midttun, M. Gjølberg, A. Kourula, S. Sweet, and S. Vallentin: "Public Policies for Corporate Social Responsibility in Four Nordic Countries: Harmony of Goals and Conflict of Means", *Business & Society* (2015), Vol. 54(4) 464–500, pp 475.

⁵⁴⁶ Regeringskansliet, *Guidelines for external reporting by state-owned companies* (2007) ([link](#)).

⁵⁴⁷ Politik för hållbart företagande (2015), skr. 2015/16:69.

⁵⁴⁸ Action plan for business and human rights (2015) ([link](#)).

⁵⁴⁹ A. Linde, Minister for EU Affairs, and M. Damberg, Minister for Enterprise and Trade Innovation: "Follow-up of Sweden's action plan for business and human rights" (2018) ([link](#)).

- (ii) Via Business Sweden, the government has provided additional support in the area of sustainable business, including human rights, when conducting trade-promoting visits abroad.
- (iii) The Ministry for Foreign Affairs has produced an online course in CSR for all of its embassies, to allow them to help companies with sustainability work abroad. The Ministry for Foreign Affairs has also produced country-specific reports on human rights, democracy, and the rule of law.
- (iv) The government has strengthened its focus on human rights in the management of State-owned companies, for example, through revised ownership policies, competence-enhancing measures, and the adoption of the UNGPs.
- (v) The government has launched the Global Deal, a partnership aimed at promoting social dialogue and good labor market relations, including freedom of association and collective bargaining.
- (vi) The government has developed its cooperation with China regarding CSR to now also include business and human rights, equality, and working conditions, and it has secured funding for the CSR center at the Chinese embassy. CSR has also been discussed with other countries and international organizations such as the EU.
- (vii) The government has produced a communication to the Riksdag with clear expectations regarding sustainable business. The Swedish Agency for Public Management has also been commissioned to evaluate Sweden's compliance with the UNGPs as the foundation for continued policy development.

Also in 2015, Sweden became the sixth country to adopt an NAP in line with the UNGPs.

364. Sweden's legislative framework, such as its legislation on rights at work and on discrimination, seeks to ensure that an individual's human rights are respected by third parties, including business enterprises. Sweden has a number of criminal law provisions for the protection of human rights regardless of the context in which an offense is committed, including in the business context.⁵⁵⁰

D. Southern Europe

365. In Southern Europe, Italy and Spain have led in the implementation of the UNGPs. Both Italy and Spain have launched NAPs and have relatively active NCPs. Neither Greece nor Portugal, however, has to date launched NAPs, nor have their NCPs been as active. On the other hand, both Greece and Portugal have seen other recent policy developments on the BHR front.

⁵⁵⁰ Action plan for business and human rights (2015) ([link](#)).

(1) Greece

366. The Greek government had signaled in 2017 that it was exploring an NAP, but efforts seem to have stalled.⁵⁵¹
367. Greece has developed a national CSR policy, which makes reference to the UNGPs but adopts a traditional understanding of CSR, mainly focusing on companies' voluntary contributions to community development, charity, and other social and environmental efforts.⁵⁵²
368. In comparison, many large Greek corporations have updated their internal policies to reflect the UNGPs, explicitly citing them in their documents.⁵⁵³ Private sector initiatives, such as CSR Hellas⁵⁵⁴ and Capital Link CSR,⁵⁵⁵ also aim to encourage businesses to pursue BHR objectives.

(2) Italy

(i) Court Decisions

369. There are no publicly available decisions issued by Italian judicial authorities that cite to the UNGPs.

(ii) NCP Decisions

370. The Italian NCP consists of a single department at the General Directorate for Industrial Policy and Competitiveness, which is part of the Ministry of Economic Development.⁵⁵⁶
371. The Italian NCP has handled almost 20 cases since its inception in 2002, of which half were brought following the adoption of the UNGPs in 2011. One illustrative case in which the UNGPs were cited is discussed below.
372. On 11 March 2016, the NGO Survival International Italy (the Italian branch of Survival International Charitable Trust) submitted a complaint to the Italian NCP regarding the activities of the Italian enterprise Salini Impregilo SpA, on behalf of the indigenous peoples of the Lower Omo Valley in Ethiopia and Lake Turkana in Kenya.
373. According to the complainant, the design, construction, and management of the Gibe III dam in the Omo Valley resulted in the breach of the OECD Guidelines' human rights provisions in respect of the indigenous peoples. More specifically, the submission alleged that the company

⁵⁵¹ European Parliament Directorate-General for External Policies, Policy Department, "Implementation of the UN Guiding Principles on Business and Human Rights", 6 January 2017 ([link](#)).

⁵⁵² Government of Greece, "National Policy Framework on corporate social responsibility", 2014 ([link](#)).

⁵⁵³ See, e.g., OTE Group, "Code of Human Rights & Social Principles", ([link](#)); Titan, "Integrated Annual Report: Building our Future Together", 2017 ([link](#)); and Atlantis, "Human Rights and Labour Conditions", ([link](#)).

⁵⁵⁴ CSR Hellas ([link](#)).

⁵⁵⁵ Capital Link CRS ([link](#)).

⁵⁵⁶ Italy's NCP ([link](#)).

had failed to carry out a proper environmental impact assessment and that the affected communities had not been adequately consulted nor asked for their prior consent to the project. The communities were also alleged to have lost or risked losing their basic livelihoods and to have been denied the right to development.

374. On 12 January 2017, the Italian NCP met the parties separately, and Salini signed terms of reference for a conciliation procedure. The Italian NCP concluded the case on 8 June 2017. Thereafter, a final statement was released including the Italian NCP's findings on the case and recommendations to Salini. The NCP's recommendations included implementing mitigation measures in favor of the local communities according to the provision of the OECD Guidelines and the UNGPs.⁵⁵⁷

(iii) *Other Developments*

375. Italy was one of the first countries to adopt an NAP, starting consultations as early as 2013 and publishing its first NAP in 2016.⁵⁵⁸ Following a mid-term review, Italy issued a revised NAP in 2018.⁵⁵⁹ The priorities identified in the NAP are:
- (i) promoting human rights due diligence processes, aimed at identifying, preventing, and mitigating potential risks, with a particular focus on small and medium-sized enterprises (“SMEs”);
 - (ii) tackling *caporalato* (undocumented labor), especially in the agricultural and construction sectors, and other forms of exploitation, forced labor, child labor, slavery, and irregular work;
 - (iii) promoting fundamental labor rights with particular regard to global production processes;
 - (iv) strengthening Italy's role in international cooperation on human rights;
 - (v) tackling discrimination, inequality, and promoting equal opportunities; and
 - (vi) promoting environmental protection and sustainability.

⁵⁵⁷ *Survival International v. Salini Impregilo*, Final Statement, 8 June 2017, at ¶ 13 ([link](#)).

⁵⁵⁸ Italy's NAP, 2016-2021 ([link](#)).

⁵⁵⁹ *Id.*



376. On the legislative front, Decree No. 231 of 8 June 2001 on the administrative liabilities of companies and the adoption of CSR was aimed at promoting human rights and preventing potential adverse impacts. Decree No. 231 introduced provisions (i) regulating the relationship between companies and their stakeholders, and (ii) sanctioning enterprises that commit specific offenses, including crimes against the person (as defined in the Universal Declaration of Human Rights), whether through the company’s own personnel or through third parties acting on behalf of the company.
377. Although Decree No. 231 does not expressly provide for mandatory due diligence, it creates a strong incentive to adopt the compliance model set out in Decree No. 231 (“**231 Model**”), as implementing an adequate compliance program may provide a defence against corporate administrative liability. A draft proposal introducing mandatory compliance requirements for all limited companies over an annual profit threshold is currently pending in the Italian parliament.⁵⁶⁰
378. While acknowledging the potential benefits of Decree No. 231, a November 2019 report from the Fédération Internationale pour les Droits Humains⁵⁶¹ made a number of recommendations to the Italian government, including:
- (i) To make the adoption of the 231 Model compulsory for large companies with a certain annual turnover and for SMEs operating in high-risk contexts;
 - (ii) To introduce greater transparency obligations—in particular, companies should be required to fully disclose to potentially affected stakeholders their 231 Model, or at

⁵⁶⁰ L.D. no. 231/2001 ([link](#)).

⁵⁶¹ Italian Legislative Decree No. 231/2001: A model for Mandatory Human Rights Due Diligence Legislation, November 2019 ([link](#)).

least the procedures implemented to prevent adverse human rights or environmental impacts;

- (iii) To extend the list of human rights impacts that can trigger liability under Decree No. 231 by including war crimes, crimes against humanity and genocide, enforced disappearance, extrajudicial execution, intentional murder, the use of child soldiers, forced eviction, forced displacement of people, sexual and gender-based violence;
- (iv) To include adequate mechanisms to ensure meaningful consultations with relevant stakeholders; and
- (v) To ensure that the law unequivocally recognizes the corporations' civil liability for violations of Decree No. 231.

379. Separately, on 11 November 2019, 50 academics and experts published an open letter to the Italian government encouraging it to “adopt a policy process towards the adoption of effective legislation on human rights due diligence,”⁵⁶² expressly referring to Pillar II of the UNGPs.

(3) Portugal

380. Portugal has yet to launch an NAP. The Portuguese National Human Rights Committee⁵⁶³ and the Directorate-General for Economic Activities⁵⁶⁴ are officially in charge of promoting the OECD Guidelines and the UNGPs. The Centre for Public Administration and Public Policies has also conducted a comprehensive overview and analysis on the implementation of the UNGPs in Portugal.⁵⁶⁵

381. A National Enquiry on Responsible Business Conduct and Human Rights in Portugal was conducted in 2018. The enquiry revealed that less than one in five companies have human rights due diligence processes and only 47% of companies are aware of the UNGPs.⁵⁶⁶

(4) Spain

(i) Court Decisions

382. There are no publicly available decisions issued by Spanish judicial authorities that cite to the UNGPs.

⁵⁶² Open Letter to the Italian Institutions on the issue of Business and Human Rights, 11 November 2019, at ¶ 3 ([link](#)).

⁵⁶³ Portuguese Human Rights Committee ([link](#)).

⁵⁶⁴ Portuguese Directorate-General for Economic Activities, ([link](#)).

⁵⁶⁵ The “Business And Human Rights In Portugal” project was coordinated by Professor Isabel Cabrita, Centro de Administração e Políticas. Públicas.

⁵⁶⁶ I. Cabrita, “Key Findings of ther First National Survey in Portugal,” 3 February 2021, ([link](#)).

(ii) *NCP Decisions*

383. The Spanish NCP is an interministerial collegiate body attached to the Ministry of Economy and Competitiveness.⁵⁶⁷ Since 2001, a total of seven NCP complaints with Spain as the Lead NCP have been brought.⁵⁶⁸ Of these seven matters, only one focused on adverse human rights impacts.
384. On 2 December 2013, a trade union submitted a complaint to the Spanish NCP.⁵⁶⁹ It referred to events that had allegedly taken place in Latin American branches of a Spanish company, which in the union's opinion violated the OECD Guidelines. The complaint was accepted for further examination on 3 March 2014.
385. Despite constructive engagement between the parties, the Spanish company rejected mediation because the trade union did not agree to suspend a publicity campaign that it was waging against the company. Nevertheless, working conditions improved in Colombia and Chile.⁵⁷⁰
386. A final statement was released by the Spanish NCP in July 2017, which recommended that the Spanish company carry out due diligence in addition to the measures that it had undertaken in response to the NCP process (such as investigating the trade union's complaints and implementing a responsible business conduct policy).⁵⁷¹
387. On 31 July 2018, the company submitted a report to the NCP to explain what further measures it had implemented in response to the final statement. As at the date of writing, the report is still under review by the Spanish NCP secretariat.

(iii) *Other Developments*

388. On 29 July 2017, Spain published an NAP relevant to the implementation of the UNGPs ("*Plan de Acción Nacional de Empresas y Derechos Humanos*").⁵⁷²
389. The NAP states that it reflects "Spain's commitment to protect human rights, as a specific manifestation of its broader commitment to the protection and promotion of human rights, including against any negative impact that business activity could have on them, and in providing victims with an effective remedy".⁵⁷³ Spain's NAP includes clear and comprehensive expectations and guidance for Spanish companies. In particular, Spain expects behavior

⁵⁶⁷ Spain's NCP ([link](#)).

⁵⁶⁸ OECD Database ([link](#)).

⁵⁶⁹ Human rights issues in the workplace involving a Spanish Security Services company in Brasil, Colombia, Paraguay, Peru and Chile (2 December 2013) ([link](#)).

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

⁵⁷² Plan de Acción Nacional de Empresa y Derechos Humanos ([link](#)).

⁵⁷³ *Id.*, at p 3.

consistent with a company's responsibility to respect human rights both at home and abroad.⁵⁷⁴ The NAP states that many companies in Spain have already incorporated their responsibility to respect human rights into their business strategy and that a large number of Spanish companies have reinforced their commitment to respect human rights through their adherence to the United Nations Global Compact.⁵⁷⁵

390. As a result of the NAP, and various other actions that the Spanish government has taken in this area, a large number of Spanish companies have been taking action in the field of BHR, including by adopting specific internal policies and regulations. In this regard, the "*Pacto Mundial Red Española*"⁵⁷⁶ published a document entitled "Business and Human Rights: actions and success stories in the framework of Agenda 2030" in 2019, which sets out actions undertaken at a business level to respect human rights and some success stories from Spanish companies.
391. In addition to the NAP, Spain has taken other initiatives to reduce adverse business impacts on human rights.⁵⁷⁷ For example, the Spanish Agency for International Development Cooperation, which is attached to the Ministry of Foreign Affairs and Cooperation, has designed a "Protocol for the management of public-private partnerships for development", with a focus on human rights, which includes a series of exclusion and assessment criteria in relation to partner or participant companies. The exclusion criteria include, for example (i) direct or indirect use of child labor; (ii) forced labor or slave labor; (iii) anti-union practices; (iv) actions classified as bribery or corruption; and (v) environmentally damaging activities.

E. Central and Eastern Europe

392. By contrast to the rest of the European continent, the vast majority of countries in Central and Eastern Europe ("CEE") has seen less progress on the BHR front. Only four (Czech Republic, Lithuania, Poland, and Slovenia) out of 11 countries have adopted NAPs.
393. While all 11 countries within the region have NCPs, complaints have been limited and are limited to: the Czech Republic (6),⁵⁷⁸ Hungary (3),⁵⁷⁹ Latvia (1),⁵⁸⁰ and Poland (6).⁵⁸¹ According

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

⁵⁷⁶ Since its creation in 2000, the *Pacto Mundial* has been the UN's initiative that has connected human rights with the business sector and, since 2011, it has also been a key player in promoting and encouraging the implementation of the UNGPs.

⁵⁷⁷ Business & Human Rights Resource Center, Spain ([link](#)).

⁵⁷⁸ Only one complaint concerns human rights.

⁵⁷⁹ All three complaints concern labor rights.

⁵⁸⁰ The complaint, brought against the Latvian judicial system, was rejected as falling outside the scope of the OECD Guidelines.

⁵⁸¹ Only one complaint concerns human rights.

to one commentator, most NCPs in the CEE region “have been notoriously underfunded and underequipped”.⁵⁸²

(1) Czech Republic

394. There are no publicly available decisions issued by Czech judicial authorities that cite to the UNGPs.
395. On the policy front, a BHR action plan was adopted by the government in April 2014. In 2017, the Czech Republic adopted its NAP,⁵⁸³ which recommends that businesses consider introducing internal due diligence mechanisms to identify and eliminate human rights risks and introduce procedures for handling potential adverse human rights impacts.
396. The Czech Republic’s NCP comprises government representatives from various ministries including Finance, Labour and Social Affairs, Foreign Affairs, Environment, Justice, as well as Industry and Trade. It also involves representatives from the Czech National Bank, workers representatives, and members of the NGO sector.⁵⁸⁴
397. The only BHR-related complaint to the NCP involved a submission on 24 May 2018 by a Czech NGO alleging that a Czech company sourced textile products from a factory located in Myanmar suspected of breaching labor rights.⁵⁸⁵



⁵⁸² J. Letnar Čerňič, “Mapping Business and Human Rights in Central and Eastern Europe,” 11 December 2020 ([link](#)).

⁵⁸³ *Id.*

⁵⁸⁴ OECD Watch, Czech Republic ([link](#)).

⁵⁸⁵ Complaint to the Czech NCP, Czech NGO v. Czech Company: Labour rights violation in supply chain of Czech reseller, 24 May 2018 ([link](#)).

398. The Czech NGO stated that the company did not conduct due diligence to identify and prevent the adverse impacts on the labor rights of workers based in Myanmar. The company objected to the allegations, stating that it had performed sufficient due diligence corresponding to the volume of its purchase order, the size of the company, and its international business operations.⁵⁸⁶
399. After an initial assessment, the Czech NCP decided that the complaint merited further examination and has offered the NCP's good offices. Both parties accepted the offer but the resolution of this complaint is still pending.⁵⁸⁷

(2) Hungary

400. There are no publicly available decisions issued by Hungarian judicial authorities that cite to the UNGPs. The only publicly available NCP decision did not refer to the UNGPs.⁵⁸⁸
401. Although Hungary has not adopted an NAP, it has adopted a BHR action plan which encourages nondiscriminatory employment. Since the UNGPs were endorsed in June 2011, Hungary has prioritized reforms on tax avoidance, discrimination, rights of minorities, and relations with security providers and has sought to strengthen the activities of the Hungarian NCP.⁵⁸⁹

(3) Latvia

402. There are no publicly available decisions issued by Latvian judicial authorities that cite to the UNGPs.
403. Although Latvia has not adopted an NAP, governmental authorities elaborated a Memorandum on CSR in 2010. The Memorandum promotes compliance with labor law, protection and promotion of human rights, sustainable exploitation of natural resources, and raises awareness of the risk of corruption.⁵⁹⁰

(4) Lithuania

404. There are no publicly available decisions issued by Lithuanian judicial authorities that cite to the UNGPs.
405. Lithuania adopted an NAP in February 2015.⁵⁹¹ In July 2018, Lithuania conducted a review of its NAP and stated that it plans "to draw up the second NAP on business and human rights in

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.*

⁵⁸⁸ Hungarian NCP Statement on Mr. Imre Horgosi vs. Visteon Hungary Ltd case, 20 February 2007 ([link](#)).

⁵⁸⁹ Business & Human Rights Resource Centre, Hungary ([link](#)).

⁵⁹⁰ Business & Human Rights Resource Centre, Latvia ([link](#)).

⁵⁹¹ Lithuania's Action Plan on the Implementation of the UNGPs ([link](#)).

2018 following the guidelines of the [OECD] and the [UN]”.⁵⁹² However, the revised NAP has not yet been published.

(5) Poland

406. One quasi-judicial decision referring to the UNGPs was identified in Poland. The decision was issued by the National Appeals Chamber, which hears complaints in public procurement matters, on 12 November 2015.⁵⁹³
407. The case concerned a tender for cleaning services organized by the Polish Post Office (“**PPO**”). The Polish Cleaning Chamber of Commerce (“**PCCC**”) appealed the procurement notice and terms of reference for the tender. In its opinion, the PPO had infringed the Polish Public Procurement Act by, among other things, failing to include a requirement that cleaners must work under an employment contract signed with the contractor or subcontractor as well as inspection and sanctions to ensure compliance.⁵⁹⁴
408. In this regard, the PCCC referred to the UNGPs, which emphasize that public procurement is an instrument for States to ensure that fundamental human rights are respected in the workplace.⁵⁹⁵ The PCCC further pointed out that it is particularly important for the States’ contracting authorities to take action to support social objectives, especially as public procurement involves the use of public funds.⁵⁹⁶
409. The National Appeals Chamber rejected the PCCC’s appeal, finding that there had been no violation of the Polish Public Procurement Act and that the UNGPs did not contain any requirements related to employment contracts.⁵⁹⁷
410. On 6 August 2018, the Polish NCP received a complaint from an NGO called the Development Yes — Open Pit Mines No! Foundation, concerning the alleged nonobservance of the OECD Guidelines by Group PZU S.A., a multinational enterprise operating in the financial sector.⁵⁹⁸ The complainant alleged that the company did not include information regarding the environmental impacts of its business and other climate-related matters in its nonfinancial statement for 2017.⁵⁹⁹

⁵⁹² Voluntary National Review on the Implementation of the UN 2030 Agenda for Sustainable Development in Lithuania, 2018 ([link](#)).

⁵⁹³ Judgment of the National Appeals Chamber, KIO 2350/15, 12 November 2015.

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ Development Yes — Open Pit Mines No! Foundation & Group PZU S.A. ([link](#)).

⁵⁹⁹ *Id.*

411. On 8 November 2018, the Polish NCP accepted the case for further examination and the parties agreed to the NCP's offer of good offices.⁶⁰⁰ Following meetings between the company and the NGO, with the Polish NCP present, an agreement was reached between the parties.⁶⁰¹
412. On 26 July 2019, the Polish NCP published its final statement, recommending that the company continue implementing human rights and environmental protection policies, and continue to make the relevant disclosures in its nonfinancial statements.⁶⁰²
413. Poland launched its NAP in 2017.⁶⁰³ In addition, businesses in Poland are becoming increasingly aware of the expectation that they respect human rights, including in relation to the environment. The Warsaw Stock Exchange has published the Respect Index, a stock index of socially responsible companies, which groups companies that operate with the high BHR standards.

(6) Romania

414. There are no publicly available decisions issued by Romanian judicial authorities that cite to the UNGPs.
415. Although Romania has not yet developed an NAP, its 2030 National Strategy for Sustainable Development⁶⁰⁴ includes relevant objectives in this regard: (i) Objective 8, regarding job opportunities and economic development, which covers plans for employing youth, supporting growth of start-ups and SMEs, and maintaining a dialogue between the State and the private sector and between employer and employee; (ii) Objective 10, which focuses on reducing inequalities and combating discrimination; and (iii) Objective 16, regarding peace, justice, and efficient institutions, which covers plans for improving public administration, transparency, and access to justice and security, among others.
416. Romania has also adopted ISO 26000 International Standard on Social Responsibility under the supervision of the Romanian National Standards Body, "Asociația de Standardizare din România" ("ASRO"). ASRO has published various brochures explaining the ISO 26000 standard and how it is relevant to companies. In one of its recent publications, dated 22 June 2020, ASRO described ISO 26000 as the most important standard for companies in terms of social responsibility reporting.⁶⁰⁵

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.*

⁶⁰² Polish OECD NCP Final Statement of alleged breach of the OECD Guidelines for Multinational Enterprises Warsaw, 26 July 2019 ([link](#)).

⁶⁰³ Polish National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights 2017–2020, 29 May 2017 ([link](#)).

⁶⁰⁴ Strategia Națională pentru DEZVOLTAREA DURABILĂ a României 2030 ([link](#)).

⁶⁰⁵ 7 standarde esențiale pentru orice companie ([link](#)).

417. Anecdotal evidence suggests that there is a certain level uptake of the UNGPs and the ILO instruments within the Romanian private sector, as they have been integrated into the Romanian operations of key multinational enterprises such as OMV Petrom,⁶⁰⁶ Atlas Copco,⁶⁰⁷ or Procter & Gamble.⁶⁰⁸ There is also a growing trend towards implementing BHR standards by Romanian enterprises.⁶⁰⁹

(7) Slovenia

418. There are no publicly available decisions issued by Slovenian judicial authorities that cite to the UNGPs.
419. Slovenia adopted an NAP in November 2018,⁶¹⁰ which aims to strengthen activities designed to ensure that human rights are respected in business activities throughout the value chain and to develop cooperation between the State, business enterprises, business associations, unions, NGOs, and other stakeholders. An annex to the NAP sets out guidelines on conducting human rights due diligence for business enterprises.

(8) Ukraine

420. There are no publicly available decisions issued by Ukrainian judicial authorities that cite to the UNGPs.
421. Ukraine has taken some steps to implement the UNGPs in recent years. As early as in 2014, the Ukrainian Ministry of Foreign Affairs encouraged Ukrainian companies to follow the UNGPs.⁶¹¹
422. Ukraine completed an NBA in 2019.⁶¹² The NBA observed that “[n]umerous policy and legislative gaps ... point to the lack of coordinated government policy regarding business and human rights. Business practice that does not comply with international standards of corporate responsibility in the sphere of human rights, as well as a number of problems related to employment, environment protection, anti-discrimination, tax, combatting corruption, healthcare and other matters indicate the lack of a human rights lens in relevant government policies and business activities”.⁶¹³

⁶⁰⁶ OMV Petrom website ([link](#)).

⁶⁰⁷ Atlas Copco website ([link](#)).

⁶⁰⁸ Procter & Gamble website ([link](#)).

⁶⁰⁹ C.a R. Popescu and G. Popescu, “An Exploratory Study Based on a Questionnaire Concerning Green and Sustainable Finance, Corporate Social Responsibility, and Performance: Evidence from the Romanian Business Environment,” J. Risk Financial Manag, 2019, ¶ 45.

⁶¹⁰ Nacionalni akcijski-načrt Republike Slovenije za spoštovanje človekovih pravic v gospodarstvu, November 2018 ([link](#)).

⁶¹¹ Ukrainian Ministry of Foreign Affairs ([link](#)).

⁶¹² Ukrainian NBA ([link](#)).

⁶¹³ *Id.*

423. On 1 July 2020, the Cabinet of Ministers of Ukraine approved an action plan for the implementation of a “state policy in the sphere of promotion of the development of socially responsible business in Ukraine until 2030,”⁶¹⁴ which lists promoting the UNGPs as one of the government’s priorities. The implementation of the UNGPs will also be supported by the Ombudsman (Ukrainian Parliament Commissioner) for Human Rights.⁶¹⁵

⁶¹⁴ Statement from the Cabinet of Ministers of Ukraine, 1 July 2020, ([link](#)).

⁶¹⁵ Statement from the Ukrainian Ombudsman, 3 December 2019, ([link](#)).



VII. LATIN AMERICA

A. Overview

424. This chapter examines the use of the UNGPs, as well as consideration of business and human rights issues more generally, by national courts in Latin America. We also look at the decisions of NCPs in respect of complaints filed under the OECD Guidelines. Finally, we outline local efforts to promote implementation of the UNGPs in the public and private sector. Our research focuses on the jurisdictions of Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, and Peru.
425. Our research indicates that the Constitutional Court of Colombia has been at the forefront of judicial efforts to implement the UNGPs, in particular corporate due diligence obligations. Significantly, the Colombian Court has noted that the UNGPs are an interpretive tool to be used in cases involving BHR. Further, the Colombian Court has held that corporate compliance with due diligence obligations (as contained in the UNGPs and other international instruments) is directly relevant to assessing fulfilment of the State's obligation to guarantee the right to prior consultation.
426. The Constitutional Court of Peru has also cited the UNGPs, in support of its prior constitutional jurisprudence concerning an obligation of CSR. These cases have largely concerned labor and union rights of workers as well as the rights of indigenous communities impacted by the mining and extractives sector.
427. Finally, we are aware of a decision of an Argentine labor court of appeal citing the UNGPs in a claim for compensation brought against a company in connection with the forced disappearance of one of its employees during the military dictatorship. We note, however, that this decision was ultimately overturned on appeal before the Argentine Supreme Court, which did not reference the UNGPs in its judgment.
428. More generally, the courts of Chile, Mexico, and Brazil have been active in recognizing the need for corporations (both public and private) to respect human rights.
429. It is worth noting that, while the growing interest and development of case law concerning the issue of BHR in the region is encouraging, concerns remain about access to reparation for victims of human rights abuses across Latin America more generally. In particular, victims can face significant practical obstacles that may prevent them from bringing or continuing proceedings as well as difficulties in enforcing any decisions that are handed down. These access-to-justice challenges are also tied to a related issue in the region, namely the targeting of human rights defenders.⁶¹⁶

⁶¹⁶ UN Human Rights Council, "Cuarta Consulta regional para América Latina y el Caribe: Mirando hacia el futuro: acciones para fomentar una conducta empresarial responsable", 8 June 2020, at ¶ 15.



430. All of the jurisdictions examined have established NCPs and all, apart from Costa Rica (where no complaints appear to have been publicly submitted), have had complaints submitted to them alleging breaches of the human rights provisions in the OECD Guidelines. The largest number of complaints appears to have been made and resolved in Brazil, followed by Chile, Colombia, Argentina, Peru, and Mexico. Decisions in favor of complainants have been reached in Argentina, Colombia, and Brazil.
431. As with court decisions concerning BHR, NCP complaints have centered around issues concerning mining and extractives projects, rights of indigenous populations, environmental rights, and labor relations. Aside from a limited number of decisions issued by the Chilean and Brazilian NCPs, NCPs in the region generally did not discuss the expected standards of conduct required under the OECD Guidelines.
432. Only Colombia and Chile have adopted an NAP, and both are set to adopt their second NAPs in 2021. Argentina has prepared a finalized NAP that remains subject to government review. Peru is in the process of developing an NAP for implementation in 2021; Costa Rica has indicated that this is a priority under its national human rights policy; and Brazil has stated that it is in the process of gathering further information for the future development of an NAP. Mexico was in the process of developing an NAP to be launched in 2018; however, this appears to have stalled.
433. In the interim, and in the absence of an NAP, each of Argentina, Peru, Costa Rica, Mexico, and Brazil have national human rights programs, plans or policies that specifically address BHR. Further, the Brazilian government, through its National Secretariat of Global Protection of the Ministry of Women, Family and Human Rights, has also undertaken activities to encourage implementation of the UNGPs, including the creation of nonbinding national guidance for medium and large companies based on the UNGPs.
434. Finally, our research indicates that across the region, national human rights bodies—whether human rights institutes or ombudsman offices—have played a crucial role in promoting respect by business for human rights and developing awareness and understanding of the UNGPs. Steps taken by the NHRIs and ombudsman offices have included participating in

legal proceedings to bring the UNGPs to the attention of the national courts, releasing recommendations or guidance notes, and carrying out training for the public and private sector on the UNGPs and BHR.

B. Argentina

435. To date, the UNGPs have primarily been the subject of policy development and action in Argentina, including various efforts by the local Ombudsman (*Defensor del Pueblo de la Nación*) to engage with the public and private sector concerning implementation of the UNGPs.
436. A recent judgment of the IACtHR involving Argentina (*Spoltore v. Argentina*)⁶¹⁷ referred to the UNGPs and was discussed in a number of legal publications and the press in Argentina.⁶¹⁸ Further details concerning this case are provided in Section XI.B. of this report concerning the decisions of the IACtHR.
437. Although Argentina finalized a draft NAP in 2019 after engaging in a series of public consultations, it appears that the NAP has not yet been adopted by the government.

(1) Court Decisions

438. We have identified one judgment, issued by the National Chamber of Labour Appeals, where the UNGPs and the OECD Guidelines were cited. We have not identified any other federal, provincial, or local court judgments which have cited the UNGPs.
439. The “Ingenieros” case concerned an employment law claim brought against Techint S.A. in respect of the forced disappearance on 5 May 1977 of the complainant’s father, who was an employee of the company. The complainant alleged that Techint S.A. was complicit in the disappearance as the illegal detention by paramilitary groups took place on company grounds. On 27 February 2012, the National Chamber of Labour Appeals upheld an appeal against a lower court decision dismissing the claim on the basis that it had been brought out of time.⁶¹⁹ The two majority judges wrote separate judgments in support of their decision that procedural rules concerning limitation periods do not apply to compensation claims which are linked to crimes against humanity. One of the concurring judges, Doctor Luis Anibal Raffaghelli, noted that the obligation of companies to support and respect the protection of human rights had become a global standard of conduct, citing the UNGPs and the OECD Guidelines. The judge stated that this obligation included internationally recognized human rights as well as principles relative to fundamental rights established by the ILO Declaration. Further, the judge indicated that where companies detect, through due diligence or otherwise, that they

⁶¹⁷ I/A Court H.R., *Case of Spoltore v. Argentina*, Judgment of 9 June 2020, Series C No. 404.

⁶¹⁸ See, e.g., G. Valente, “Caso “Spoltore vs. Argentina” : Histórica Sentencia de la Corte IDH sobre derechos humanos laborales”, LA DEFENSA ([link](#)); G. Trigilia, “La Corte Interamericana de Derechos Humanos condenó al Estado argentino por la duración excesiva de un proceso de indemnización por enfermedad”, PALABRAS DE DERECHO, 30 August 2020.

⁶¹⁹ The National Chamber of Labour Appeals (*Cámara Nacional de Apelaciones del Trabajo*) gave an initial judgment on 2 February 2012 upholding the appeal brought by the complainant.

may cause or contribute to negative impacts on human rights, they must remedy the situation (referring to Principles 22 and 17 of the UNGPs and Chapter IV.6, 14 and 46 of the OECD Guidelines). Where *potential* impacts are identified, the company must take preventive or mitigation measures, whereas in the case of *actual* impacts, remedial measures must be undertaken, along with preventive measures to ensure that no new harm is caused.⁶²⁰

440. The Argentine Supreme Court ultimately overturned the decision of the National Chamber of Labour Appeals, finding that civil compensation claims that are linked to alleged crimes against humanity *are* subject to certain limitation periods and that, in this case, the claim had been filed out of time.⁶²¹ The Supreme Court did not refer to the UNGPs.
441. As the “Ingenieros” case demonstrates, BHR has become an important focus of the country’s transitional justice movement.⁶²² Since the end of the military dictatorship in Argentina in 1983, lawyers and researchers have collected evidence of corporate involvement in human rights violations during the military junta, in particular, abuses committed against workers and trade union leaders.⁶²³ Following a Supreme Court decision in 2005 overruling amnesty laws that had stayed punishment for crimes against humanity committed by the State during the junta, scrutiny of the role of corporations and their executives during the junta has increased.
442. As there is no corporate criminal responsibility regime in Argentina, criminal investigations in this area have largely focused on the actions of business executives and the military. In 2015, the Ministry of Justice and Human Rights (*Ministerio de Justicia y Derechos Humanos de la Nación*) and a number of nongovernmental organizations released a report detailing 25 instances where companies in Argentina were alleged to have been directly involved in human rights violations, some of which were the subject of ongoing criminal investigations.⁶²⁴
443. One of the key cases discussed in the report concerned the alleged kidnapping and torture of 24 employees, some of whom were trade union delegates, of Ford Motor Argentina, which took place at the company’s factory in Buenos Aires on the day of the military coup in August 1976. It was alleged that the subsidiary’s officers had provided the victims’ personal data to agents of the dictatorship and had permitted the use of the factory for the illegal detention, interrogation, and torture of the employees by members of the military. The criminal investigation into this matter, which began in 2002, culminated in the prosecution and

⁶²⁰ National Chamber of Labour Appeals (*Cámara Nacional de Apelaciones del Trabajo*), *I., M.G. c/T. SA Compañía Técnica Internacional s/Accidente – Ley Especial*, Sala V, 27 February 2015. We were unable to locate a published copy of the judgment and reviewed the text of the judgment on the website of an online legal review *Tu Espacio Jurídico* ([link](#)).

⁶²¹ Supreme Court (*Corte Suprema de Justicia de la Nación*), *I., M.G. c/T. SA Compañía Técnica Internacional s/Accidente – Ley Especial*, CNT 9616/2008/1/RH1, 9 May 2019.

⁶²² L. A. Payne and G Pereira, “La complicidad corporativa en las violaciones de derechos humanos: ¿una innovación en la justicia transicional de Argentina?” in *Derechos Humanos y Empresas: Reflexiones desde América Latina* (2017).

⁶²³ V. Basualdo, “The Ford case, 40 years later” 18 February 2019 ([link](#)).

⁶²⁴ Ministerio de Justicia y Derechos Humanos de la Nación, Centro de Estudios Legales y Sociales –y Facultad Latinoamericana de Ciencias Sociales, “Responsabilidad empresarial en delitos de lesa humanidad: represión a trabajadores durante el terrorismo de Estado”, November 2015 ([link](#)).

conviction on 11 December 2018 of the former Head of Manufacturing and Head of Plant Security of Ford Motor Argentina along with a former Head of the Military Institutes of the Army. The two executives were found guilty of the crimes of illegal detention and aggravated torture and were sentenced to 10 years and 12 years imprisonment, respectively.⁶²⁵

(2) NCP Decisions

444. Argentina has established an NCP through the Foreign Ministry (*Ministerio de Relaciones Exteriores*), which has published 13 reports on NCP complaints since 2004,⁶²⁶ with two further cases currently pending.⁶²⁷ None of the NCP decisions explicitly refer to the UNGPs or discuss substantive aspects of the obligation of businesses to respect human rights or the State's obligation to protect human rights.

(3) Other Developments

445. In September 2019, the Ministry of Justice released a finalized draft of an NAP (*Primer Plan Nacional de Acción Argentino en Empresas y Derechos Humanos*) following a period of public consultation.⁶²⁸
446. The NAP states in its introductory section that it is based on the UNGPs and is intended to foster a corporate culture that respects human rights.⁶²⁹ The NAP references the UNGPs throughout and includes projects to educate companies and trade associations on the content of the UNGPs. The NAP was preceded by various consultations with stakeholders and sets out a list of specific projects and initiatives in areas such as occupational health, child labor, anti-discrimination and gender equality in the workplace; environmental matters and matters relating to indigenous communities; and judicial and alternative resolution of disputes involving the UNGPs. Many of the projects involve education and training, development of governance, and support for various stakeholders in the implementation of the UNGPs.
447. However, as at the date of this report, it appears that the NAP remains subject to further revision by governmental authorities, without any set date for its adoption.⁶³⁰ We have been unable to identify any further information as to when this NAP will be adopted.
448. Outside of the NAP, the Argentine Ombudsman has played a significant role in promoting the UNGPs and corporate respect for human rights more generally. For example, pursuant to a

⁶²⁵ Federal Oral Tribunal N° 1 of San Martín (*Tribunal Oral Federal N° 1 de San Martín*), *Müller, Pedro y otros s/privación ilegal de la libertad*, Causa N° 2855, 11 December 2018.

⁶²⁶ Argentine NCP ([link](#)).

⁶²⁷ NCP, "Acta de Acuerdo: Recalde / ACCOR", 5 March 2009 ([link](#)); NCP, "Declaración Final del Punto Nacional de Contacto Argentino Sobre la Instancia Específica Entre la Unión Obrera Molinera Argentina y la Empresa Cargill S.A.", 31 July 2007 ([link](#)).

⁶²⁸ Primer Plan Nacional de Acción Argentino en Empresas y Derechos Humanos, September 2019 ([link](#)).

⁶²⁹ Primer Plan Nacional de Acción Argentino en Empresas y Derechos Humanos, September 2019, at ¶ 4 ([link](#)).

⁶³⁰ S. Broncanelli, "¿Por qué Argentina aún no tiene un Plan Nacional de Acción en Empresas y Derechos Humanos", *Fundeps*, 27 November 2020 ([link](#)).

resolution issued in 2017, the Ombudsman established a program on BHR to provide information and guidance on the UNGPs and the application of human rights to businesses.⁶³¹ As part of this program, the Ombudsman provided advice to Jujuy Energía y Minería Sociedad del Estado (JEMSE), a State-owned mining company, on the inclusion of a human rights clause in its international tender document. This clause required the bidder to agree to comply with the UNGPs and other human rights instruments.⁶³² On the basis of that clause, the bidder, its staff and any sub-contractors would be required to swear an affidavit as part of the bidding process concerning their “obligation and commitment to respect and comply with human rights standards set out by the United Nations” (citing, among other instruments, the UNGPs) and to “take all necessary steps to mitigate risks and avoid impacts even before they occur”. While a breach of the clause would not give rise to any contractual remedy, the Ombudsman indicated that incorporation of international human rights standards into the contractual documentation would effectively require the bidder to institutionalize compliance with human rights standards, primarily through due diligence processes, as well as making provision for continuous monitoring and reparation. In the event of a breach, the Ombudsman stated that the parties could adopt an appropriate method of remediation such as mediation, without having to proceed to litigation.⁶³³

449. The Argentine Ombudsman has directly addressed the state of BHR in the country and discussed the UNGPs and the corporate obligation to respect human rights in its more recent annual reports. It has also held and participated in BHR events at which various stakeholders have been able to put forward their views as to best practices concerning corporate responsibility to respect human rights.⁶³⁴
450. The “Pacto Global Red Argentina” is another prominent initiative in Argentina which is dedicated to promoting BHR.⁶³⁵ It is the largest CSR initiative in Argentina with a membership of more than 550 business entities and more than 120 NGOs. The network has a particular focus on sustainable development and the UNGPs. It arranges workshops and seminars and releases publications and guides on various aspects of CSR, including respect for and promotion of human rights.

⁶³¹ Defensor del Pueblo de la Nación, Resolution 12/17, 3 February 2017 ([link](#)).

⁶³² Defensor del Pueblo de la Nación, “Cláusula de respeto por los Derechos Humanos y su vinculación con la Agenda 2030, los Principios Rectores sobre Empresas y Derechos Humanos y las Directrices de la OCDE para Empresas Multinacionales”, 1 July 2019 ([link](#)).

⁶³³ Defensor del Pueblo de la Nación, “Clausula de respeto por los Derechos Humanos y su vinculación con la Agenda 2030, los Principios Rectores sobre Empresas y Derechos Humanos y las Directrices de la OCDE para Empresas Multinacionales”, 1 July 2019 ([link](#)).

⁶³⁴ See, e.g., Defensoría del Pueblo de la Nación, “Informe Anual 2019”, 2019, at ¶¶ 124-129; Defensoría del Pueblo de la Nación, “Informe Anual 2018”, 2018, at ¶¶ 118 - 121; Defensoría del Pueblo de la Nación, “Informe Anual 2017”, 2017, at ¶¶ 116 - 117; Defensoría del Pueblo de la Nación, “Jornada sobre Empresas y Derechos Humanos”, 17 August 2017 ([link](#)).

⁶³⁵ El Pacto Global Red Argentina ([link](#)).

...the Argentine Ombudsman has played a significant role in promoting the UNGPs and corporate respect for human rights more generally. For example, pursuant to a resolution issued in 2017, the Ombudsman established a program on BHR to provide information and guidance on the UNGPs and the application of human rights to businesses.

C. Brazil

451. Our research indicates that, to date, the UNGPs have primarily been the subject of policy development and action in Brazil. Notably, this has included the creation of nonbinding national guidance that encourages compliance with the UNGPs by large and medium-sized enterprises through a certification system. Brazil has indicated that it is working on holding a public consultation (encompassing business, civil society, and government agencies) to gather relevant data for the development of an NAP in line with the UNGPs.

(1) Court Decisions

452. We have not identified any national court judgments which have cited the UNGPs or other related international soft-law mechanisms concerning BHR.
453. BHR issues have nevertheless been the subject of legal proceedings in Brazil, notably in respect of the collapse of the Fundão dam in the district of Mariana, Minas Gerais. In November 2015, two tailings dams at the iron ore mine of Samarco Mineração S.A. (“**Samarco**”), a joint venture between BHP Billiton and Vale S.A. (“**Vale**”), burst. Two downstream villages were flooded with tailings slurry, killing 19 people and leaving thousands homeless, unemployed, and without access to clean water after local supplies became contaminated with toxins. The incident, referred to as the worst environmental disaster in Brazil, also led to contamination of the Rio Doce (with waste particles from the dam even reaching the Atlantic Ocean), death of local fish populations, and destruction of local forestry.
454. Brazilian prosecutors have filed various proceedings against the three companies and their executives since 2016, which have not yet proceeded to trial.⁶³⁶ In June 2018, Samarco, Vale, and BHP Billiton entered into a settlement agreement to suspend a US\$5.3 billion claim brought by Brazilian authorities for two years, pending further negotiations as to compensation. Brazilian prosecutors subsequently announced in October 2018 that they had reached agreement with Samarco, Vale, and BHP Billiton to provide compensation to relatives of the 19 people killed in the disaster and to those who lost their properties.

⁶³⁶ The disaster has also been the subject of class action proceedings in the U.S., Australia, and the UK.

455. However, in October 2020, Brazilian state and federal prosecutors asked a court to reopen the proceedings, alleging that BHP Billiton, Vale, and Samarco had failed to make payments in accordance with the settlement agreement.⁶³⁷
456. The disaster has also been the subject of complaints filed by IndustriALL Global Union and Building and Wood Worker's International with NCPs in Brazil, Australia, and the United Kingdom for failure to comply with the human rights provisions of the OECD Guidelines.⁶³⁸ The Brazilian NCP's statement concerning the complaint has not been publicly released.
457. Another recent case of interest has been the announcement by Volkswagen in September 2020 of a "Conduct Adjustment Agreement" entered into between a Brazilian subsidiary of Volkswagen Group, Volkswagen do Brasil, and the public prosecutor's office to pay donations and compensation totaling BRL36 million (approximately US\$6.5 million) to victims of human rights violations during the Brazilian military rule. In its public announcement, Volkswagen noted that it was "the first foreign company to transparently come to terms with its past during the military dictatorship in Brazil". The company stated that it had commissioned an independent study in 2016 which had concluded that individuals from site security at Volkswagen do Brasil had cooperated with the former military regime, but that there was no clear evidence that this cooperation was institutionalized within the company. Nevertheless, Volkswagen concluded that its employees "could have been exposed to human rights violations" and accordingly "coming to terms with the company's history and the investigation of the incidents during the military regime is also an important concern for Volkswagen's workforce".⁶³⁹

⁶³⁷ Business & Human Rights Resource Center, "BHP & Vale lawsuit (re dam collapse in Brazil, filed in Brazil)", 30 October 2020 ([link](#)).

⁶³⁸ OECD Guidelines for Multinational Enterprises database, 26 March 2018 ([link](#)).

⁶³⁹ Volkswagen Press Release, "Volkswagen do Brasil signs agreement on historical reappraisal of the military regime", 24 September 2020 ([link](#)).



(2) NCP Decisions

458. The Brazilian NCP was established in 2003 as an inter-ministerial body composed of seven ministries and the Central Bank.⁶⁴⁰ In January 2019, with the restructuring of the federal public administration,⁶⁴¹ the Brazilian NCP function was transferred to the Executive Secretariat of the Foreign Trade Chamber of the Ministry of Economy (*Secretaria-Executiva da Câmara de Comércio Exterior do Ministério da Economia*). As at the date of this report, 38 complaints have been publicly reported, of which 21 complaints have been concluded, eight rejected, and nine remain pending.⁶⁴² Of the 38 complaints, 18 concern alleged breaches of the human rights provisions of the OECD Guidelines. None of the publicly available NCP decisions explicitly refer to the UNGPs, and the majority (save as highlighted below) do not discuss substantive aspects of the obligation of businesses to respect human rights or the State obligation to protect human rights.
459. The Brazilian NCP's most recent decision was issued on 5 June 2020. The decision is notable for its discussion of the corporate obligation to carry out human rights due diligence, in particular where it is alleged that the company ought to have taken steps to require contractual counterparties and local authorities to conduct due diligence. The complaint concerned the dredging activities of Van Oord Marine Ingenuity ("**Van Oord**"), which had

⁶⁴⁰ Ministry of Economy, Ministry of Justice and Public Security, Ministry of Foreign Affairs, Ministry of Mines and Energy, Ministry of Environment, Ministry of Women, Family and Human Rights, and Ministry of Transparency, Supervision and Control.

⁶⁴¹ MP n° 870/2019, converted into Law n° 13,844/2019.

⁶⁴² Brazilian Ministry of Economy, "Instâncias específicas — alegações de inobservância das Diretrizes da OCDE," 8 January 2021 ([link](#)).

been hired by the Port of Suape in 2011 to carry out works to enable the expansion of a shipyard at Suape's industrial port complex. The complaint, which was brought by two NGOs and communities of fishermen and shellfish collectors in the Suape region, alleged that the dredging had caused environmental damage including the destruction of coral reefs and mangrove forests.⁶⁴³ According to the complainants, these dredging operations had seriously affected local fish populations and increased flooding in the area, causing traditional fishermen and small-scale farmers to lose their homes and livelihoods, for which they had received insufficient compensation.

460. The complaint further alleged that Van Oord, in conjunction with the Suape Port Authority, had failed to: (i) conduct appropriate due diligence in order to prevent and mitigate human rights impacts; (ii) provide local stakeholders with timely information about the project's adverse impacts; and (iii) meaningfully engage with stakeholders on business decisions that directly impacted them, in violation of the OECD Guidelines, Chapters II (General Policies), III (Disclosure), IV (Human Rights), and VI (Environment). In this context, the complainants argued that Van Oord had failed to prevent or mitigate adverse impacts from their operations not only due to its own failure to properly investigate potential adverse impacts but also because the company had not taken measures, in accordance with Chapter II, item 12 of the OECD Guidelines, to influence local authorities and the Suape Port Authority to review the studies and prior impact reports which had been carried out, implement action plans to mitigate the negative effects of the works, and to ensure that the affected communities were heard during the various phases of the project.

461. After hearing both parties, the Brazilian NCP issued a final statement concluding that:

- (i) It was not within the Brazilian NCP's mandate to make a determination as to whether Van Oord or the Suape Port Authority had acted consistently with the OECD Guidelines, and the NCP did not have legal authority to investigate, prosecute or adjudicate issues submitted to it. Rather, the Brazilian NCP's mandate was limited to providing the parties with mediation tools so they could amicably resolve the issues identified and, when appropriate, recommendations as to best practices aligned with the OECD Guidelines;⁶⁴⁴
- (ii) Although the OECD Guidelines recommend that companies conduct due diligence in order to identify, prevent or mitigate adverse impacts of their operations, supply chains and other business relationships on human rights, this recommendation should be assessed against the level of influence that companies have on the conduct of others; and

⁶⁴³ NCP, "Declaração Final", 5 June 2020.

⁶⁴⁴ NCP, "Declaração Final", 5 June 2020, at ¶¶ 33-37.

- (iii) In this case, the business relationship between Van Oord and the Suape Port Authority was limited in scope, as is typical of a subcontracting relationship, and was not ongoing such as to allow any effective influence over the Suape Port Authority's conduct.⁶⁴⁵



462. Taking into consideration the agreements reached between the parties after three rounds of private mediation, the Brazilian NCP recommended that Van Oord adopt certain remedial measures, including: (i) installing artificial corals in order to remedy damage assessed as irreparable to the local ecosystem; (ii) equipping fishermen's vessels to improve the safety and productivity of traditional fishing; (iii) implementing a health program aimed at people in the region; and (iv) implementing a program to monitor water quality in the region as well as a project to provide professional training to people who had been excluded from the labor market.⁶⁴⁶

⁶⁴⁵ NCP, "Declaração Final", 5 June 2020, at ¶¶ 42-44.

⁶⁴⁶ NCP, "Declaração Final", 5 June 2020, at ¶ 48.

(3) Other Developments

463. Despite recommendations from the UNHRC and the UN Working Group, the Brazilian government has not yet adopted an NAP. In December 2015, the UN Working Group visited Brazil to review the efforts of the Brazilian government, business enterprises and other stakeholders to prevent and strengthen protection against business-related human rights abuses in line with the UNGPs. At the end of its visit, the UN Working Group made 28 recommendations to Brazil, calling for action not only from government but also from private and State-owned enterprises⁶⁴⁷ and Brazilian civil society.⁶⁴⁸ In particular, the UN Working Group identified a need for improved coordination and multi-stakeholder dialogue on BHR issues and welcomed Brazil's plans to develop an NAP.⁶⁴⁹
464. In 2017, the UN Universal Periodic Review Working Group ("UPRWG") recommended, among other things, that Brazil should develop an NAP that would: (i) take into account the UNGPs; (ii) prevent development projects from violating the rights of traditional populations, indigenous peoples, and workers and causing damage to the environment; and (iii) ensure effective remedy with meaningful consultation to affected communities.⁶⁵⁰
465. Although it has not yet adopted an NAP, the Brazilian government has nevertheless taken steps to promote implementation of the UNGPs through the establishment of the National Guidelines. The National Guidelines are applicable to medium and large companies (those with a gross annual revenue of more than BRL 4,800,000.00 or approximately US\$1 million), including multinational companies operating in Brazil, pursuant to Decree No. 9,571 of 21

⁶⁴⁷ The UN Working Group recommended that all business enterprises, including private enterprises and State-owned enterprises: (i) Comply with their responsibility to respect international human rights by adopting a human rights policy and carrying out human rights due diligence to identify, prevent, mitigate, and account for how they address adverse human rights impacts; (ii) In assessing actual or potential adverse human rights impacts, ensure meaningful consultation with potentially affected individuals and communities, paying attention to potentially vulnerable or marginalized groups, and ensuring that they have timely and complete information about proposed projects or changes that may affect them and the capacity to put forward their opinions; (iii) Pay particular attention to how human rights risks affect women, children and men differently, especially regarding construction and infrastructure projects involving access to land and the resettlement of communities; (iv) Establish and run operational grievance mechanisms in line with Guiding Principle 31, in order to identify and address adverse impacts; (v) Engage in the development of an NAP on business and human rights; (vi) Engage with the Global Compact Network Brazil and business associations to promote understanding of and to learn from the experiences of implementing the Guiding Principles; (vii) Ensure greater focus on safety and contingency plans, particularly companies operating mines and infrastructure development projects, and draw on the United Nations Environment Programme technical report No. 41, "APELL for Mining: Guidance for the Mining Industry in Raising Awareness and Preparedness for Emergencies at Local Level" ([link](#)).

⁶⁴⁸ The UN Working Group recommended that civil society organizations: "(a) Continue to raise awareness about the respective obligations and responsibilities of the Government and of business enterprises under international human rights law to prevent and address adverse human rights impacts related to the operations of business enterprises; (b) Consider holding human rights awareness-raising events for government agencies that focus on economic and commercial matters; (c) Continue to champion the rights of affected communities and human rights defenders; (d) Engage in developing an NAP on business and human rights through multi-stakeholder dialogue, including the voices of affected communities and human rights defenders" ([link](#)).

⁶⁴⁹ UN Human Rights Office of the High Commissioner, "Statement at the end of visit to Brazil by the United Nations Working Group on Business and Human Rights," 16 December 2015 ([link](#)).

⁶⁵⁰ UN, "Draft report of the Working Group on the Universal Periodic Review — Brazil," 17 May 2017, at ¶ 15 ([link](#)).

November 2018.⁶⁵¹ They are based on the UNGPs and contain a series of nonbinding recommendations indicating how public and private entities should incorporate the duty to respect human rights into their activities, monitor compliance with the duty and provide reparation for adverse human rights impacts. The National Guidelines do not provide for any sanction but rather seek to ensure compliance through a certification system. In particular, companies that voluntarily implement the National Guidelines may receive a “Business and Human Rights Seal”, via an act of the National Secretariat of Global Protection of the Ministry of Women, Family and Human Rights (*Secretaria Nacional de Proteção Global do Ministério da Mulher, da Família e dos Direitos Humanos*) (“SNPG/MMFDH”).

466. The National Guidelines include recommendations to companies to: (i) implement a publicly accessible code of conduct, approved by the company’s management; (ii) create internal mechanisms to report complaints intended to identify, prevent, and provide reparation for human rights impacts; and (iii) disseminate the UNGPs, OECD Guidelines, ILO conventions, and other international legal instruments on human rights protection within the company.
467. There is no particular body within the Brazilian government that has specific responsibility for BHR. The discussion regarding implementation of the UNGPs is being led by the SNPG/MMFDH, although there are others bodies with significant BHR-related responsibilities.⁶⁵² The SNPG/MMFDH has taken steps to disseminate the UNGPs to government, the private sector, and civil society and to incorporate the UNGPs into its strategic planning.⁶⁵³ For example:
 - (i) In November 2017, the MMFDH’s National Secretariat of Citizenship (*Secretaria Nacional de Cidadania do Ministério dos Direitos Humanos*), in partnership with the Center for Human Rights and Business of the Getúlio Vargas Foundation School of Law (*Centro de Direitos Humanos e Empresas da Fundação Getúlio Vargas*), published the booklet “Implementing the UNGPs on Business and Human Rights: the State’s duty to protect and the responsibility of companies to respect human rights”. The booklet had three main objectives: (i) to provide clarification regarding the UNGPs, the duty of States to protect human rights and the responsibility of companies to respect these rights; (ii) to identify issues to be considered in relation to the implementation of the UNGPs; and (iii) to suggest next steps for the implementation of the UNGPs in Brazil.⁶⁵⁴

⁶⁵¹ UN, “Draft report of the Working Group on the Universal Periodic Review — Brazil,” 17 May 2017, at ¶ 17. See also Brazil, Decree No. 9,571, 21 November 2018 ([link](#)).

⁶⁵² Business & Human Rights Resource Centre, Brazil section ([link](#)).

⁶⁵³ Conectas Direitos Humanos, “Recomendações do Grupo de Trabalho da ONU sobre Empresas e Direitos Humanos no Brasil: Status da implementação pelo governo e empresas,” May 2018, at ¶ 50.

⁶⁵⁴ Ministério dos Direitos Humanos, Secretaria Nacional de Cidadania, “Implementando os Princípios Orientadores sobre Empresas e Direitos Humanos da ONU: O dever do Estado de proteger e a obrigação das empresas de respeitar os Direitos Humanos,” November 2017.

- (ii) In February 2019, the SNPG/MMFDH issued a preliminary Plan of Response to the Recommendations of the UN Working Group (“**Plan of Response**”) identifying, through independent research and public consultation, the main challenges to the implementation of the UNGPs in Brazil and mapping out existing best practices.⁶⁵⁵ The main goal of the Plan of Response was to identify, update, and organize information provided by public and private institutions on initiatives relating to the UNGPs as well as related international and domestic standards.⁶⁵⁶
- (iii) The Plan of Response highlighted various initiatives undertaken by Brazilian governmental bodies to implement the UNGPs. These included a public hearing, coordinated by the Office of the National Ombudsman (*Procuradoria Federal dos Direitos do Cidadão*) in November 2017⁶⁵⁷ and the publication in November 2018 of an open letter entitled “Companies for Human Rights”, signed by seven companies partly owned by the government (Petrobras, Correios, Banco do Nordeste, Caixa, BNDES, Banco do Brasil, and Eletrobras), to promote respect for human rights in their business plans and the implementation of the National Guidelines.⁶⁵⁸

D. Chile

468. Chile has made strides towards meaningful implementation of the UNGPs through adoption of an NAP, an active NCP, and efforts by the Ombudsman to promote the UNGPs within the public and private sector. Chile’s Supreme Court has handed down decisions finding that private and public corporations have caused adverse human rights impacts, although these decisions have not cited the UNGPs.

(1) Court Decisions

469. The Chilean Supreme Court (*Corte Suprema de Chile*) and other judicial mechanisms have not cited the UNGPs or other related international standards concerning BHR.⁶⁵⁹ The Supreme

⁶⁵⁵ Ministry of Women, Family and Human Rights, “Levantamento das Recomendações do Grupo e Trabalho da ONU sobre Empresas e Direitos Humanos ao Estado brasileiro — Plano de Respostas às Recomendações do Relatório GTEDH-ONU,” 8 February 2019 ([link](#)).

⁶⁵⁶ Ministry of Women, Family and Human Rights, “Levantamento das Recomendações do Grupo e Trabalho da ONU sobre Empresas e Direitos Humanos ao Estado brasileiro — Plano de Respostas às Recomendações do Relatório GTEDH-ONU,” 8 February 2019, at ¶ 8.

⁶⁵⁷ Ministry of Women, Family and Human Rights, “Levantamento das Recomendações do Grupo e Trabalho da ONU sobre Empresas e Direitos Humanos ao Estado brasileiro — Plano de Respostas às Recomendações do Relatório GTEDH-ONU,” 8 February 2019 at ¶ 15. See also Federal Public Prosecutor’s Office, “Direitos Humanos e Empresas: Qual é a política pública que o Brasil precisa?” November 2017.

⁶⁵⁸ Ministry of Women, Family and Human Rights, “Levantamento das Recomendações do Grupo e Trabalho da ONU sobre Empresas e Direitos Humanos ao Estado brasileiro — Plano de Respostas às Recomendações do Relatório GTEDH-ONU,” 8 February 2019 at ¶ 16. See also Ministry of Human Rights, “Carta Aberta — Empresas pelos Direitos Humanos,” November 2018 ([link](#)).

⁶⁵⁹ Ministry of Foreign Affairs, “Investigación Jurisprudencial sobre Derechos Humanos y Empresas”, 29 December 2017 ([link](#)).

Court has, however, handed down a number of cases where it has found private and public corporations liable for adverse human rights impacts.

470. The *Dirección de Estudios de la Corte Suprema* (a unit of the Chilean Supreme Court which investigates and publishes reports on aspects of the administration of justice and judicial power) (“**DECS**”) has released at least two publications examining the BHR-related jurisprudence of the Chilean Supreme Court. Its most recent report, dated 27 March 2020, was a response to questions from the Regional Representative for South America of the United Nations High Commissioner for Human Rights in connection with a study called “Human Rights and Business: Access to Reparation Mechanisms”. The study was conducted within the framework of the project “Responsible Business Conduct in Latin America and the Caribbean”, jointly developed by the ILO and the OECD.
471. In response to questions concerning local judicial decisions involving BHR, the report stated:
 - (i) There have been three Supreme Court cases where the Court has found a company liable under the equivalent of tort law (*la responsabilidad civil extracontractual*) and, in doing so, has expressly referred to the impact of the company’s conduct on fundamental rights.⁶⁶⁰
 - (ii) Two judgments from local environmental tribunals have established a link between environmental damage and other rights, in particular the right to property (which the Court has found may be constrained by the right to live in an environment free of contamination). Two Supreme Court cases have also established a relationship between the right to live in an environment free of pollution and the right to life and physical and mental integrity.
 - (iii) The DECS did not identify any cases finding public/State-owned companies liable for human rights breaches.
 - (iv) There have, however, been 17 cases against companies providing public services and three cases against concessionary companies concerning their liability for adverse human rights impacts. The DECS highlighted a case where the Supreme Court found a health insurance company contractually liable for failing to pay incapacity allowance to a worker without any legal justification. The Supreme Court stated that the ability of individuals to exercise the right to protection of health depended upon the conduct of this type of company. The Court found that public service companies are often entrusted with transcendent functions related to the health of the Chilean population and that they must therefore be conscious of the social role of their business activities and discharge their obligations diligently and responsibly.

⁶⁶⁰ Dirección de Estudios de la Corte Suprema, “Respuesta a Cuestionario Empresas y derechos humanos: Acceso a mecanismos de reparación”, 23 March 2020 ([link](#)).

- (v) Of the 106 cases reviewed, 43 of the cases before the Supreme Court confirmed the lower courts' findings of violations and confirmed the protective measures ordered by the lower courts. Of those 43 cases, the rights most frequently invoked were property rights, the right to life and physical and mental integrity, and the right to live in a pollution-free environment.
472. Finally, the DECS referenced a study finding that the Chilean public generally believed that they had limited access to justice. The DECS also noted that vulnerable populations (e.g., children, immigrants, indigenous people) were subject to heightened access to justice issues. However, these barriers were not particular to BHR-related actions against companies.
473. An earlier report was published by the DECS in December 2017, analyzing trends in BHR-related jurisprudence of the Chilean Supreme Court. The report specifically referenced the UNGPs as incorporating “new standards for the protection, respect and realization of human rights”. The DECS noted that that all companies, regardless of their size, sector, operational context, ownership, and structure have an obligation to respect human rights.⁶⁶¹ In carrying out its review of existing jurisprudence, the report stated that the UNGPs had not yet directly permeated the jurisprudence of the Chilean Supreme Court. However, the Supreme Court had nevertheless examined cases concerning the obligation of corporations to respect human rights and the standards that they must meet to fulfil this duty. In this regard, the report noted that the Supreme Court had determined cases where a complainant had alleged breaches by companies of the constitutional right to freedom of expression, dignity and the right to protection of one’s image, in particular the right to be forgotten.⁶⁶² The report noted that some of these cases may involve a “collision of constitutional guarantees” where, for example, a corporation’s right to freedom of expression and the public interest must be weighed against an individual’s rights to dignity and protection of one’s image, and the right to be forgotten.
474. The DECS’s report noted that the impact of corporations on economic, cultural, and social rights had been recognized in the Supreme Court’s jurisprudence concerning labor rights. Further, the report indicated that the Supreme Court had considered cases involving discrimination by corporations against persons with disabilities in breach of Chilean anti-discrimination legislation. These cases were relevant to identifying the standards that corporations must meet as part of their obligation to respect human rights.

⁶⁶¹ Ministry of Foreign Affairs, “Investigación Jurisprudencial sobre Derechos Humanos y Empresas” (29 December 2017) ([link](#)).

⁶⁶² See, e.g., Supreme Court (*Corte Suprema*), Rol N. 33.280-2016, Judgment, 3 October 2016; Supreme Court (*Corte Suprema*), Rol N. 22.243-2015, Judgment, 21 January 2016; Supreme Court (*Corte Suprema*), Rol N. 11.746-2017, Judgment, 9 August 2017; Supreme Court (*Corte Suprema*), Rol N. 16.940-2016, Judgment, 6 July 2016; Supreme Court (*Corte Suprema*), Rol N. 36.694-2017, Judgment, 6 November 2017; Supreme Court (*Corte Suprema*), Rol N. 2.202-2012, Judgment, 18 January 2013.

...the Supreme Court had considered cases involving discrimination by corporations against persons with disabilities in breach of Chilean anti-discrimination legislation. These cases were relevant to identifying the standards that corporations must meet as part of their obligation to respect human rights.

(2) NCP Decisions

475. Chile has established its NCP through the Under-Secretary for International Economic Relations (*Subsecretaría de Relaciones Económicas Internacionales*). We have located 15 publicly available complaints, 12 of which were pending as of December 2020. None of the Chilean NCP's decisions explicitly refer to the UNGPs, and the majority do not discuss substantive aspects of the obligation of businesses to respect human rights or the State's obligation to protect human rights.
476. Five of the cases at least partially concerned the OECD Guidelines' human rights provisions.⁶⁶³ A number of the decisions reiterate the importance of complying with the human rights standards set out in the OECD Guidelines, even where the Chilean NCP's final decision has been to reject the complaint or where an agreement has been reached between the parties. For example:
- (i) In a complaint regarding environmental and property damage allegedly caused by the construction of an electricity line, the Chilean NCP found that the complainant had not adequately particularized any violations of the OECD Guidelines. However, the Chilean NCP noted that it was "strange" that the company had not provided any evidence that the OECD Guidelines had been incorporated into its internal procedures. The Chilean NCP therefore urged the company to take steps to do so.⁶⁶⁴
 - (ii) Similarly, a settlement was reached between a Chilean subsidiary of Starbucks and a trade union concerning a complaint that Starbucks had engaged in anti-union labor practices, which rendered determination of the complaint moot. The Chilean NCP nevertheless commented upon the substance of the complaint in its final statement, and recommended that Starbucks modify its CSR policy to take account of the issues that had been raised.⁶⁶⁵

⁶⁶³ NCP, "Declaración Final Sobre el Caso Escapes Santander - Minera Escondida Limitada", 2013; NCP, "Declaración Final: Empresa Eléctrica Española & Empresa Nacional", 15 April 2015; NCP, "Declaración Final: Starbucks & Sindicato y CUT", 1 June 2015; NCP, "Declaración Final: Ripley & Asociaciones de Sindicatos", 18 June 2015; NCP, "Declaración Final del Punto Nacional de Contacto Chile: Maersk & Sindicato No. 1", 1 April 2019.

⁶⁶⁴ NCP, "Declaración Final: Empresa Eléctrica Española & Empresa Nacional", 15 April 2015.

⁶⁶⁵ NCP, "Declaración Final: Starbucks & Sindicato y CUT", 1 June 2015.

(3) Other Developments

477. In August 2017, Chile launched its NAP.⁶⁶⁶ The NAP's purpose is to establish "in Chile of a culture of respect of human rights in business activities, with the objective of preventing negative impacts and, to the extent possible, enhancing the positive effects business may have in society".⁶⁶⁷ The specific objectives set out in the NAP are to: (i) contribute to the strengthening of coherent BHR policies; (ii) generate space for national dialogue; (iii) prevent potential negative impacts on human rights that may be caused by business activities; (iv) promote due diligence with respect to potential human rights impacts; and (v) create reparation and dispute resolution mechanisms. The NAP designates responsible government institutions and creates a monitoring and evaluation framework to assess implementation of the NAP as well as issues for consideration in the second NAP.
478. In May 2020, Chile issued a roadmap to update the NAP.⁶⁶⁸ It had been reported that a final version of the updated NAP would be ready for adoption by March 2021,⁶⁶⁹ however, we are not aware of any further developments in this regard as at the date of this report.
479. Prior to publication of the NAP, Chile's Council of Social Responsibility for Sustainable Development (*Consejo de Responsabilidad Social para el Desarrollo Sostenible*) within the Ministry of the Economy (*Ministro de Economía*) had developed a National Plan on Social Responsibility which addressed BHR issues.
480. Chile's NHRI, the *Instituto Nacional de Derechos Humanos*, is responsible for assessing implementation of the NAP, pursuant to a National Baseline Assessment. The NHRI has also collaborated with Chile's NCP to develop its dispute resolution framework and releases annual reports assessing implementation of Chile's NAP and compliance by the NCP and other BHR institutions with Chile's obligations under the UNGPs.⁶⁷⁰ In this regard, the Chilean NHRI has made a number of recommendations to the State and to public and private companies concerning the UNGPs, including:
- (i) In its 2013 Annual Report, the Chilean NHRI recommended that the State, in particular the executive branch, revise its BHR policies and practices in accordance with the UNGPs, taking into account the three pillars. Further, the Chilean NHRI recommended that the legislature review the judicial and regulatory framework relating to BHR to identify gaps to ensure the due protection of human rights in the context of business activities. The Chilean NHRI also urged State-owned companies to incorporate principles concerning human rights due diligence into their corporate

⁶⁶⁶ Plan de Acción Nacional de Derechos Humanos y Empresas de Chile, August 2017.

⁶⁶⁷ Plan de Acción Nacional de Derechos Humanos y Empresas de Chile, August 2017, at ¶ 26.

⁶⁶⁸ Subsecretaría de Derechos Humanos, "Hoja de Ruta: Segunda Versión Plan de Acción Nacional de DDHH y Empresa", May 2020 ([link](#)).

⁶⁶⁹ Globat NAPs website ([link](#)).

⁶⁷⁰ J. Schonsteiner, Draft of "El Plan de Acción Nacional sobre Derechos Humanos y Empresas de Chile: un balance sobre su impacto discursivo y real" BRAZILIAN J. OF INT'L L. (2018).

policies and noted that it was considered best practice for private companies also to do so.⁶⁷¹

- (ii) In its 2016 Annual Report, when discussing the right to an environment free of contamination in its general recommendations, the Chilean NHRI reiterated to the executive branch the need to ensure that businesses take the UNGPs into account.⁶⁷²
- (iii) In its 2018 Annual Report, when discussing natural resources, corporations and human rights, the Chilean NHRI urged the Executive to accelerate implementation of Chile's NAP. It also reiterated to the Legislature the need to harmonize the legislative framework concerning the environment with laws regulating different sectors of the economy, specifically mining, energy, fishing and agriculture, in order to ensure the adoption of international norms, taking into account the SDGs and the UNGPs. In particular, the Chilean NHRI recommended including a human rights perspective in legislative initiatives concerning the environment. The Chilean NHRI also reiterated its recommendation that State-owned and private companies should incorporate human rights due diligence into their corporate policies in the context of their responsibility to respect human rights.⁶⁷³
- (iv) In its 2018 Report on its Mission to the Zone of Quintero and Puchuncaví, the Chilean NHRI stated that it recommended that Chile, as part of its duty to protect all inhabitants, remind public and private companies of their duty to respect the human rights of the communities where they carry out their activities. The Chilean NHRI noted that it was important that local companies incorporate the UNGPs into their policies, in particular Principle 17 concerning the obligation to carry out due diligence, which required companies to incorporate risk management into their processes that is not limited to risks for the company but also encompasses risks for those whose rights may be affected.⁶⁷⁴

E. Colombia

481. The Colombian Constitutional Court (*Corte Constitucional*) has cited to and elaborated upon the UNGPs in at least six judgments since 2016. Since the implementation of its NAP in 2015, the Colombian Ombudsman (*Defensoría del Pueblo*) has taken an active role in promoting awareness and implementation of the UNGPs in the country.

⁶⁷¹ NHRI, "Informe Anual 2013: Situación de los Derechos Humanos en Chile", December 2013, at ¶ 271.

⁶⁷² NHRI, "Informe Anual 2016: Situación de los Derechos Humanos en Chile", December 2016, at ¶ 299.

⁶⁷³ NHRI, "Informe Anual 2017: Situación de los Derechos Humanos en Chile", December 2017, at ¶ 163.

⁶⁷⁴ NHRI, "Informe Misión de Observación Zona de Quintero y Puchuncaví, 11-13 septiembre 2018", 1 October 2018, at ¶ 23.

(1) Court Decisions

482. The Colombian Constitutional Court has well-developed precedent dating back to the 1990s concerning BHR, notably addressing the right to prior consultation where indigenous communities are impacted by the activities of extractive companies.⁶⁷⁵ Since Colombia's adoption of its NAP in 2015,⁶⁷⁶ the Constitutional Court has explicitly referenced the UNGPs in at least six cases and noted that the UNGPs constitute an "interpretive tool" that the Court may use in cases concerning BHR. Significantly, the Court has effectively incorporated the due diligence standards contained in the UNGPs (and other international law instruments) into its judicial precedent, by establishing that compliance with these standards is directly relevant to assessing whether the State has breached the right to prior consultation.
483. The earliest of the six cases in which the Court has made reference to the UNGPs concerned a challenge filed by a mining company against a public consultation procedure (*la consulta popular*) which had been undertaken by a municipal authority seeking to establish whether the local population agreed with the company's operations in the area.⁶⁷⁷ The judgment largely examined Colombian judicial precedent concerning competence to invoke the public consultation procedure, which the Court ultimately found the municipal authority did not have in the circumstances. However, an annexure to the written decision notes that a delegate of the Colombian Ombudsman appeared before the Court at the hearing and drew the Court's attention to the importance of the UNGPs as a mechanism to prevent and mitigate the impacts of business activities on human rights.
484. The Ombudsman also invited the Court to draw attention to the fact that the UNGPs should be taken into account when mining and extractives projects are being contemplated and undertaken, in particular the need to consult with local communities, undertake due diligence, and establish reparation mechanisms. It appears that the Court did in fact take this into account. While the Court did not explicitly cite to the UNGPs in its decision, it made orders requiring the Mining and Energy Ministry, the Ministry for the Environment and Sustainable Development, and other related public authorities and bodies to strengthen strategies and clauses in their policies and concession contracts concerning the mining and hydrocarbon sector to ensure public participation, transparency of information, coordination of social action, and social investment. The Court also ordered the relevant ministries and public authorities to demand that companies active in the mining sector respect human rights and

⁶⁷⁵ The detailed discussion of judicial precedent in this area since 1992 contained in The Ninth Chamber of the Constitutional Court (*La Sala Novena de la Corte Constitucional*), *Acción de Tutela para Proteger Derecho a la Salud y Ambiente Sano de Comunidad Indígena Frente a Actividades Extractivas de Carbon*, Sentencia T-614/19 ("**Sentencia T-614/19**"), 16 December 2019. See also, e.g., The Plenary Chamber of the Constitutional Court (*La Sala Plena de la Corte Constitucional*), *Acción de Tutela instaurada por la Organización de los Pueblos Indios de la Amazonía Colombiana OPIAC contra la Presidencia de la República y otros*, Sentencia SU.383/03, 13 May 2003.

⁶⁷⁶ Part (3) of this section.

⁶⁷⁷ The Plenary Chamber of the Constitutional Court (*La Sala Plena de la Corte Constitucional*), *Acción de Tutela instaurada por Mansarovar Energy Colombia Ltda., contra el Tribunal Contencioso Administrativo del Meta*, Sentencia SU.095/18, 11 October 2018.

undertake due diligence to manage environmental and social risks arising from their operations and to expand dialogue with the local municipal authorities where they operate.

In Sentencia T-732/16, the Constitutional Court relied explicitly on the UNGPs to find that corporations have an obligation to respect human rights ... The Constitutional Court noted that private parties were subject to obligations not to interfere with the enjoyment of human rights and, in particular, corporations must respect the protection of the environment and the rights of persons who live in surrounding areas and who may be affected by the corporations' activities. The Constitutional Court discussed the UNGPs in detail, describing them as an "interpretive tool", citing in particular Principle 4 concerning the obligation of States to take additional preventative measures in respect of public companies, as well as Principles 15 and 17 concerning the corporate obligation to carry out due diligence.

485. In *Sentencia T-732/16*, the Constitutional Court relied explicitly on the UNGPs to find that corporations have an obligation to respect human rights.⁶⁷⁸ In that case, the plaintiff's house had been damaged to the point of near collapse as the result of operations related to the construction of a new oil pumping station. The plaintiff alleged that his rights to adequate housing, to life, and to humane treatment had been adversely impacted by the defendant company. The Constitutional Court upheld the lower court's findings that the plaintiff's rights had been violated but overturned its finding that only the State could be held liable for those violations. The Constitutional Court noted that private parties were subject to obligations not to interfere with the enjoyment of human rights and, in particular, corporations must respect the protection of the environment and the rights of persons who live in surrounding areas and who may be affected by the corporations' activities. The Constitutional Court discussed the UNGPs in detail, describing them as an "interpretive tool", citing in particular Principle 4 concerning the obligation of States to take additional preventative measures in respect of public companies, as well as Principles 15 and 17 concerning the corporate obligation to carry out due diligence.
486. With respect to Principle 15, the Constitutional Court stated that the obligation of due diligence requires corporations to identify the negative human rights impacts that their activities may cause or to which they may contribute.

⁶⁷⁸ The Fifth Review Chamber of the Constitutional Court (*La Sala Quinta de Revisión de la Corte Constitucional*), *Acción de tutela instaurada por José Eliecer Díaz Bohórquez contra el Oleoducto Central Andino – Ocesa – y el Consorcio de Tierras Boyacá*, Sentencia T-732/16, 19 December 2016.

487. Further, the Court noted that corporations must consider involving independent experts and communicating with local populations who may be affected by their activities, especially those which are vulnerable or marginalized. The Constitutional Court stated that the obligation of due diligence requires corporations to take ongoing steps before, during and after carrying out their activities in order to investigate potential impacts, monitor them, respond to any complaints, and act in conformity with their obligations to respect human rights and remediate any damage caused. The Constitutional Court concluded that as the company had contributed to the damage to the plaintiff's house, it had a responsibility to fix the situation. Accordingly, the Constitutional Court ordered the company to take steps to either repair the house or, if that was not possible, to rebuild the house elsewhere.
488. The decision of the Constitutional Court in *Sentencia SU123/18* is particularly significant with respect to the Court's elaboration of the right to prior consultation and the obligation to carry out due diligence. The case concerned an indigenous group, which alleged that their rights to prior consultation, to democratic participation, to equality, and to ethnic and cultural integrity had been breached as a result of hydrocarbon exploration and production activities next to their traditional lands. The parent companies of the defendant operating company argued, among other things, that the operating company had relied upon a certificate issued by the Ministry of the Interior (incorrectly) stating that there were no indigenous communities in the project area. The judgment seeks to unify the prior jurisprudence of the Constitutional Court concerning the right to prior consultation, in particular as it pertains to indigenous communities. In doing so, the Constitutional Court noted that the right to prior consultation is a fundamental right which protects indigenous peoples and tribes and that it cannot be renounced or waived. This has the following implications:
- (i) The objective of prior consultation is to try to achieve, in a genuine manner, the consent of indigenous and tribal communities concerning matters that affect them;
 - (ii) The principle of good faith must guide the parties involved;
 - (iii) The method of consultation must permit the active and effective participation of the affected peoples;
 - (iv) The consultation must be an intercultural dialogue, in which the State must take the measures necessary to reduce any inequalities of power;
 - (v) During the process, the indigenous group does not have a veto power, nor does the State have the power to arbitrarily impose a measure on the group over its objections;
 - (vi) The consultation must be flexible and adapted to the needs of the particular case;
 - (vii) The consultation must be informed, which requires that indigenous and tribal groups be given sufficient information to exercise their judgment; and

(viii) The consultation must respect ethnic and cultural diversity in order to permit both parties to reach a satisfactory agreement.

489. The Constitutional Court stated that, while the obligation of prior consultation falls on the State, it should be assessed in light of the State's and of corporations' obligations to carry out due diligence, as contained in Principle 17 of the UNGPs, other international instruments, and decisions of the IACtHR. Examining whether the companies involved met the standard of due diligence required of them would assist in determining whether the right to prior consultation had been breached, as well as determining the corresponding judicial remedy. The Court noted that the first step is to verify whether the corporation acted diligently in protecting the rights of the indigenous group, based on the standards set out in international instruments and judgments. The second step is to verify, based on the principle of proportionality, whether and what type of consultation and participation measures were required. The level of participation required—whether basic participation, prior consultation or free, prior informed consent—would depend on how significantly the rights of the indigenous community would be affected. Prior consultation would be sufficient in most cases, except for cases where the community's rights would be heavily impacted (and free, prior, and informed consent was therefore necessary).
490. In the circumstances, the Constitutional Court found that reliance on the ministerial certificate was no defense to the operating company's failure to meet the requisite standards of due diligence. It had failed to identify communities that would be potentially affected by its activities (which was particularly egregious given the existence of State documents recording the presence of the indigenous group in the area) and then failed to consult with the community. The Court also highlighted that the operating company had committed numerous subsequent breaches because it had failed to inform and consult with the community as the conditions and stages of the project changed or progressed.
491. The decision in *Sentencia SU123/18* (and that case's discussion of the obligation of due diligence in the UNGPs) was subsequently cited and affirmed in three cases of the Constitutional Court, all of which concerned, among other rights, the right to prior consultation.⁶⁷⁹

⁶⁷⁹ The Seventh Chamber of Review of *tutelas* of the Constitutional Court (*La Sala Séptima de Revisión de tutelas de la Corte Constitucional*), *Acción de tutela interpuesta por Julio Manuel Viloria Ujueta, como Gobernador Mayor del Resguardo Indígena Mokaná de Tubará, y Digno Santiago Gerónimo, como Gobernador Mayor de la Regional Indígena Mokaná del Atlántico, contra la Agencia Nacional de Tierras – ANT, Alcaldía Municipio de Tubará, Gobernación del Atlántico, Concesión Costera Cartagena-Barranquilla, Consorcio Vía al Mar, Proyecto Urbanización Complejo Campestre Jwaeirruko Unidad Residencial y Club el Poblado (jurisdicción de la parcialidad indígena de Juarúco), Relleno Sanitario los Pocitos, Parque Ambiental los Pocitos, Ecosol, Horno Crematorio Tecniaza, Fabrica de Llantas "Michelin", Ladrillera Cuatro Bocas, Oficina de Registro de Instrumentos Públicos de Barraquilla y otros que resulten vinculados a las pretensiones*, Sentencia T-011/19, 22 January 2019, The Ninth Review Chamber of the Constitutional Court (*La Sala Novena de Revisión de la Corte Constitucional*), *Acción de tutela para proteger derecho a la salud y ambiente sano de comunidad indígena frente a actividades extractivas de carbón*, Sentencia T-614/19, 16 December 2019 and The Fourth Chamber of Review of the Constitutional Court (*La Sala Cuarta de Revisión de la Corte Constitucional*), *Acción de tutela: Instaurada por Jhon Jairo Hurtado Hurtado y Katherine Caro Usuriaga (T-7.466.000) y Beatriz Mosquera*

(2) NCP Decisions

492. Colombia's NCP has received six complaints since it was established, one of which was partially accepted by the Colombian NCP, four of which were rejected, and one of which was retracted before the Colombian NCP could engage in an evaluation of its merits.⁶⁸⁰
493. In July 2016, Colombia's NCP partially accepted a case on behalf of three labor organizations against U.S. company Drummond regarding its carbon extraction practices in Cesar, Colombia. Ultimately, the Colombian NCP agreed to examine any claims related to alleged human rights impacts.⁶⁸¹ Despite four rounds of mediation, the parties were unable to reach an agreement. In its final decision, the NCP did not make any findings on the facts but gave recommendations to both Drummond and the complainant, including that Drummond take steps to implement the OECD Guidelines in its daily operations (in particular, Chapter IV on human rights and Chapter V on employment and labor).⁶⁸²

(3) Other Developments

494. The Colombian government has established a variety of agencies to implement the UNGPs. In 2011, it set up the National System of Human Rights and International Humanitarian Law ("**National System**") to coordinate policies at the national and local levels to apply international human rights and humanitarian law. Between 2013 and 2014, the government not only released its first Guidelines for a Public Policy on Business and Human rights in consultation with the National System but was also at the forefront of hosting regional fora to discuss Latin America's implementation of BHR standards.⁶⁸³
495. Colombia adopted its NAP in 2015 in consultation with its Ombudsman's Office, the UNDP, and various civil society actors in the country.⁶⁸⁴ Notably, the NAP establishes an Inter-Institutional Task Force on Human Rights and Business along with an Advisory Commission

Hernández y Reinaldo Romaña Agualimpia (T-7.474.979), contra el Ministerio del Interior, la Autoridad Nacional de Licencias Ambientales, Ministerio del Medio Ambiente Desarrollo Sostenible, Occidental de Colombia LLC y Alcaldía de Arauquita, Sentencia T-422/20, 28 September 2020. Note that in Sentencia T-422/20, the Court found that the right to prior consultation did not arise for the community in question on the facts of the case.

⁶⁸⁰ Colombian NCP ([link](#)).

⁶⁸¹ NCP, "Declaración Final de Instancia Específica ante el Punto Nacional de Contacto de Colombia de las Líneas Directrices de la OCDE para Empresas Multinacionales: Queja contra la Empresa Multinacional Drummond Company INC., por parte de la asociación sindical: Sindicato Nacional de Trabajadores Enfermos y Discapacitados del Sector Minero SINTRADEM, Federación General de Trabajo CGT Seccional Cesar, Confederación General de Trabajo Colombia — CGT", November 2018, at ¶ 7.

⁶⁸² NCP, "Declaración Final de Instancia Específica ante el Punto Nacional de Contacto de Colombia de las Líneas Directrices de la OCDE para Empresas Multinacionales: Queja contra la Empresa Multinacional Drummond Company INC., por parte de la asociación sindical: Sindicato Nacional de Trabajadores Enfermos y Discapacitados del Sector Minero SINTRADEM, Federación General de Trabajo CGT Seccional Cesar, Confederación General de Trabajo Colombia — CGT", November 2018, at ¶ 8.

⁶⁸³ National Action Plan on Human Rights and Business, December 2015, at ¶ 5.

⁶⁸⁴ National Action Plan on Human Rights and Business, December 2015, at ¶ 5.

to assess Colombia's progress with regards to implementation of the UNGPs.⁶⁸⁵ Colombia is due to release a new NAP in 2021; however, as of the date of this report, it has not been published.

496. Finally, and as indicated above, the Colombian Ombudsman has been actively involved in promoting the UNGPs. This has included participating in the hearings of a number of the Constitutional Court cases outlined above and also publication of annual reports. In particular, since 2017, the Ombudsman has directly addressed the state of BHR in the country and made recommendations concerning the implementation of the UNGPs by the State and corporations on at least four occasions.⁶⁸⁶

F. Costa Rica

497. Our research indicates that, to date, the UNGPs have primarily been the subject of policy development and action in Costa Rica, rather than judicial or quasi-judicial consideration. No local court decisions have been identified which discuss the UNGPs, nor have there been any reported NCP complaints or decisions. Costa Rica has indicated that the development of an NAP on Business and Human Rights is a high priority item as part of its broader 2017 – 2030 National Social Responsibility policy (*Política Nacional de Responsabilidad Social*) ("**NSR Policy**").

(1) Court Decisions

498. We have not identified any national court judgments which have cited the UNGPs or other related international soft law mechanisms concerning BHR.⁶⁸⁷ It appears, nevertheless, that

⁶⁸⁵ N. Bernaz, "The Colombian National Action Plan on Business and Human Rights: from Regional Milestone to Effective Local Implementation," RIGHTS AS USUAL (16 August 2018).

⁶⁸⁶ Defensor del pueblo, "XXIV Informe del Defensor del Pueblo al Congreso de la República", 2017, at ¶¶ 132 - 133, 212 - 218; Defensor del pueblo, "XXV Informe del Defensor del Pueblo al Congreso de la República", 2018, at ¶¶ 95 - 98; Defensor del pueblo, "XXVI Informe del Defensor del Pueblo al Congreso de la República", 2019, at ¶¶ 126 - 132; Defensor del pueblo, "XXVII Informe del Defensor del Pueblo al Congreso de la República", 2019, at ¶¶ 196 - 200.

⁶⁸⁷ We have identified cases where human rights breaches have been alleged which involve corporations, however it appears that the Court has focused on the State obligation to fulfil human rights rather than the obligation of business to respect such rights. For example, in a judgment of 1 August 2008, the Constitutional Chamber of the Supreme Court of Costa Rica (*Sala Constitucional de la Corte Suprema de Costa Rica*) considered the unauthorized use of a commercial, privately operated rubbish dump. Standard Fruit Company de Costa Rica SA held a license to use the area for organic waste from packing and production of its bananas and had permitted part of the area to be used by the local community for ordinary waste resulting in an eventual contamination of the dump. The Court noted the obligation of the company to maintain the sanitary condition of the site in accordance with the license granted to it; however it stated that this responsibility had to be guided and supervised by the State. In the circumstances, the State had violated the community's right to a clean environment and health by failing to take necessary measures to address contamination of the site. As to the company, the Court noted that if it wished to continue providing the waste disposal service to the community as part of its CSR policy, it should take steps to bring operation of the dump into line with the law (i.e., obtain the relevant license) and adopt the measures necessary to do so. See Constitutional Chamber of the Supreme Court of Justice (*Sala Constitucional de la Corte Suprema de Justicia*), Sentencia n° 12016 Exp. No. 08-005283-0007-CO, 1 August 2008.

the national judiciary has been active in participating in regional conferences concerning the issue.⁶⁸⁸

(2) NCP Decisions

499. While Costa Rica established its NCP in 2013 through the Ministry of Foreign Trade (*Ministerio de Comercio Exterior*), to date, no complaints have been publicly reported or determined.



(3) Other Developments

500. The UNGPs have been considered by the Costa Rican government as one of the key sources of its NSR Policy, along with other international and national initiatives.⁶⁸⁹ Development of the NSR Policy began in 2014, led by the Ministry of Trade, Industry and Commerce (*Ministerio de Economía, Industria y Comercio*) (“**MEIC**”). After community consultation, the final NSR Policy was released in November 2017, with the objective of promoting social responsibility among companies, the State and public and private sector organizations. The government has stated that the link between the UNGPs and the NSR Policy is important not only in terms of its application to companies and public and private organizations operating in Costa Rica but also its application to global supply chains where the risk of noncompliance with the UNGPs may be much higher (given that such organizations may be located outside of the jurisdiction and therefore State control).⁶⁹⁰

⁶⁸⁸ See, e.g., approvals permitting judicial staff to attend related conferences including Acta de Consejo Superior N° 042 – 2015, Art. XIII, Documento N° 4494-15, 5 May 2015; Acta de Consejo Superior N° 074 – 2016, Art. XII, Documento N° 8769-16, 4 August 2016; Acta de Consejo Superior N° 110 – 2016, Art. XXI, Documento 8769, 13726-16, 8 December 2016 and Acta de Consejo Superior N° 093 – 2016, Art. LXXXIV, Documento 8769-16, 11311-16.

⁶⁸⁹ Política Nacional de Responsabilidad Social de Costa Rica 2017 – 2030, 2017, at ¶ 8.

⁶⁹⁰ Política Nacional de Responsabilidad Social de Costa Rica 2017 – 2030, 2017, at ¶ 12.

501. The NSR Policy is supported by related policy documents including a social responsibility incentive plan, a guide to social responsibility, a capacity building plan for government officials, and strategies for companies exporting to Europe that focus on the integration of sustainability criteria into global value chains.⁶⁹¹
502. Separately, in 2014, the MEIC released a voluntary code concerning responsible business practices for value chains (*Código de Prácticas Responsables con la Cadena de Valor*).⁶⁹²
503. Costa Rica has not developed a specific NAP on BHR, however the development of such an NAP is listed as a high priority item in the action plan issued in support of the NSR Policy.⁶⁹³
504. The UNGPs and the “Protect, Respect, Remedy” framework have also been employed or considered on occasion by the Costa Rican Ombudsman (*La Defensoría de los Habitantes*) (“DLH”), both in assessing complaints regarding private sector provision of public services and in publishing general guidance for the public. For example, the 2011-2012 Annual Report of the DLH contains a detailed explanation of the UNGPs and their application, particularly to private sector provision of public services, along with example case studies that the DLH had been investigating in the health sector, highway tolls, public transport, public housing, private education, and the increasing privatization of security services.⁶⁹⁴
505. More recently, in its 2015-2016 Annual Report, the DLH recommended the adoption of a law that would provide for reparation for damage caused to individual or community users by certain public service providers and the government body responsible for regulating the price of public services (*Autoridad Reguladora de Servicios Públicos*), for example where prices have been incorrectly calculated. The DLH noted that this concept was based on the UNGPs and the “Protect, Respect Remedy” framework.⁶⁹⁵
506. At a regional level, as a member of the IberoAmerican Federation of Ombudsmen (*Federación Iberoamericana del Ombudsman*), the DLH has also been party to guidance papers published in 2018 and 2019 concerning the incorporation of a BHR perspective into Ombudsman functions in relation to the mining industry as well as environmental impact studies for mining projects.⁶⁹⁶

⁶⁹¹ MEIC website on Social Responsibility ([link](#)).

⁶⁹² MEIC, *Código de Prácticas Responsables con la Cadena de Valor*, 15 December 2014. The publicly available Code on the MEIC website indicates that seven companies signed up to the Code on 15 December 2014.

⁶⁹³ Política Nacional de Responsabilidad Social de Costa Rica 2017–2030, 2017, at ¶ 42. The publicly available Code on the MEIC website indicates that seven companies signed up to the Code on 15 December 2014.

⁶⁹⁴ La Defensoría de los Habitantes, “Informe Anual de Labores 2011–2012”, June 2012, at ¶¶ 33–65.

⁶⁹⁵ La Defensoría de los Habitantes, “Informe Anual de Labores 2015–2016” June 2016, at ¶ 316.

⁶⁹⁶ Federación Iberoamericana del Ombudsman, “Recomendaciones para la Incorporación del Enfoque de Empresas y Derechos Humanos en la Gestión Defensorial en Contextos Mineros: Experiencias Institucionales de las Oficinas del Ombudsman de Bolivia, Brasil, Chile, Colombia, Ecuador, Paraguay, Perú y Portugal”, August 2018 and Federación Iberoamericana del Ombudsman, “Recomendaciones para la Incorporación del Enfoque de Derechos Humanos en la Evaluación de Impacto Ambiental en Proyectos Mineros”, November 2019.

G. Mexico

507. No local Mexican judicial decisions directly citing or applying the UNGPs were identified through our research. However, as analyzed below, the Mexican courts have handed down judicial precedents holding private entities liable for breaches of human rights in certain instances.
508. In 2017, Mexico began developing an NAP through its “National Business and Human Rights Program” (*Programa Nacional sobre Empresas y Derechos Humanos*). The draft was the subject of a consultation process with various sectors of society.⁶⁹⁷ However, to date, this Program has not been implemented.⁶⁹⁸ On 10 December 2020, the Interior Ministry (*Secretaría de Gobernación*) published a new 2020-2024 National Human Rights Program (*Programa Nacional de Derechos Humanos*), which includes, as one of its strategic priorities, encouraging the adoption of the UNGPs.⁶⁹⁹
509. There have also been significant efforts locally, led primarily by the Mexican National Human Rights Commission (“**Mexican NHRC**”), to promote and educate the general public and public authorities about BHR, including through the issuance of nonbinding recommendations to public authorities concerning compliance with the UNGPs.

(1) Court Decisions

510. The UNGPs have not been directly applied by Mexican courts. Mexican courts have, however, found private entities liable for breaches of human rights.
511. In general, Mexican courts have recognized as part of their jurisprudence that human rights norms are applicable in the context of relationships between private parties (which can include corporations).⁷⁰⁰ In a 2018 decision, the First Chamber of the Supreme Court (*Primera Sala de la Suprema Corte de Justicia de la Nación*) recognized the existence of “human right torts”, where the claimant proves the existence of an unlawful act (the breach of the human right) and that damage (material or nonmaterial) has been caused as a consequence. In that specific case, the Court analyzed the damage caused by acts of domestic violence, which it

⁶⁹⁷ Secretaría de Gobernación, “Abordar los Derechos Humanos en todos los espacios y entornos: Grupo de trabajo sobre empresas y #DDHH”, 17 March 2017 ([link](#)).

⁶⁹⁸ Secretaría de Gobernación, “Abordar los Derechos Humanos en todos los espacios y entornos: Grupo de trabajo sobre empresas y #DDHH”, 17 March 2017 ([link](#)).

⁶⁹⁹ Secretaría de Gobernación, “Programa Nacional de Derechos Humanos 2020–2024”, 10 December 2020 ([link](#)).

⁷⁰⁰ First Chamber of the Supreme Court of Justice of the Nation (*Primera Sala de la Suprema Corte de Justicia de la Nación*), *Derechos Fundamentales. Su Vigencia en las Relaciones entre Particulares*, *Semanario Judicial de la Federación*, Décima Época, Libro XIII, October 2012, Tomo 2, at ¶ 798, 1a./J. 15/2012 (9a.), 159936 (MEX) and First Chamber of the Supreme Court of Justice of the Nation (*Primera Sala de la Suprema Corte de Justicia de la Nación*), *Derechos Fundamentales Contenidos en Tratados Internacionales. Gozan eficacia en las Relaciones entre Particulares*, *Semanario Judicial de la Federación*, Décima Época, Libro XVII, February 2013, Tomo 1, at ¶ 799, 1a. XLI/2013 (10a.), 2002746 (Mex).

considered to be a breach of the right to live in an environment free of violence, as well as the right to life and personal security.⁷⁰¹

512. “Human rights torts” may be the subject of specific reparation procedures created by the legislature. By way of example, such a procedure has been created by legislative decree, which seeks to protect the rights to dignity and freedom of expression. Pursuant to this procedure, individuals can file claims against other individuals or the State where they believe that these rights have been breached. Furthermore, they can seek economic reparation for the damage caused, as well as a public apology published by the same means and under the same conditions as the original publication.
513. Even in the absence of any special procedures, material or nonmaterial damages for human rights violations may be claimed through ordinary civil proceedings.
514. Most cases regarding businesses and human rights in Mexico have, however, arisen through *amparo* constitutional protection proceedings. *Amparo* proceedings are a type of constitutional proceeding which traditionally could be filed against public authorities regarding breaches of constitutional provisions and human rights violations. In 2013, the Amparo Law (*Ley de Amparo*) was reformed to, *inter alia*, broaden the definition of “defendant authority” to include private entities whose functions are regulated by law and who perform acts equivalent to those of public authorities which affect the rights of third parties.
515. Since the reform, Mexican courts have analyzed whether private entities can be considered as defendant authorities and if they can therefore be held liable for human rights violations under the Amparo Law.

Most cases regarding businesses and human rights in Mexico have, however, arisen through amparo constitutional protection proceedings. Amparo proceedings are a type of constitutional proceeding which traditionally could be filed against public authorities regarding breaches of constitutional provisions and human rights violations.

516. In 2014, the First Chamber of the Supreme Court analyzed whether a construction company could be held liable for breaching the right to an adequate standard of living and housing, in relation to a property construction agreement.⁷⁰² The Supreme Court held that construction

⁷⁰¹ Direct Amparo on Appeal 5490/2016, Primera Sala de la Suprema Corte de Justicia de la Nación. Nonbinding precedent VIOLACIÓN A DERECHOS HUMANOS PUEDE DAR LUGAR A SU REPARACIÓN ECONÓMICA EN LA VÍA CIVIL O ADMINISTRATIVA, Primera Sala de la Suprema Corte de Justicia de la Nación, Semanario Judicial de la Federación, Décima Época, Libro 61, December 2018, Tomo I, at ¶ 468, 1a. CCXIX/2018 (10a.), 2018866 (MEX).

⁷⁰² First Chamber of the Supreme Court of Justice of the Nation (*Primera Sala de la Suprema Corte de Justicia de la Nación*), Amparo Directo en Revisión 3516/2013, 22 January 2014.

companies are required to respect human rights related to adequate standards of living and housing and that they should take all necessary measures to guarantee that their projects respect these rights. The Supreme Court considered that failure to do so could constitute a breach of contract, regardless of the express terms of the construction agreement between the parties. The Court also expressly concluded that the right to an adequate standard of living and housing was not limited to public housing.

517. Finally, it is worth mentioning that judgments of the IACtHR are binding on Mexican judges, as long as they are “more favorable to the person” (i.e., would result in a decision that is more favorable to the relevant party than the application of local law).⁷⁰³ Hence, to the extent that IACtHR precedents discuss or cite to the UNGPs, these may also apply in Mexico.

(2) NCP Decisions

518. As a member of the OECD, Mexico has established an NCP to promote the OECD Guidelines and to handle complaints against companies that the OECD Guidelines have not been observed.
519. Our research has identified five publicly available complaints presented to Mexico’s NCP,⁷⁰⁴ of which only two have addressed alleged human rights violations. However, both cases were terminated without analyzing the merits of the complaints or reaching a final decision.
520. In September 2011, a group of labor syndicates led by UNI Global Union filed a complaint against América Móvil, a Mexican transnational corporation in the telecommunications sector. The complaint alleged noncompliance with the OECD Guidelines on general policies, human rights, and employment and industrial relationships arising from alleged anti-union activities in Central America. In June 2012, the Mexican NCP closed the complaint at the preliminary stage on the basis that certain of the alleged facts were disputed, there was also a dispute related to the application and interpretation of the laws of El Salvador and Nicaragua, there were pending legal proceedings concerning the same subject matter, and the NCP faced difficulties in investigating and effectively resolving the conflict. In 2013, the claimants filed a new request which was dismissed on the basis that it contained no new elements.⁷⁰⁵
521. In 2012, the NGO ProDESC filed a complaint with the NCPs of Mexico and Canada against Excellon, a Canadian mining company, regarding its Mexican operations. The complaint alleged that Excellon had failed to comply with the OECD Guidelines applicable to disclosure of information, human rights, environment, employment and industrial relationships. The case was handled by the Mexican NCP, who closed the complaint in November 2012 without

⁷⁰³ Plenary of the Supreme Court of Justice of the Nation (*Pleno de la Suprema Corte de Justicia de la Nación*), *Jurisprudencia Emitida por la Corte Interamericana de Derechos Humanos. Es Vinculante para los Jueces Mexicanos Siempre que Sea Más Favorable a la Persona*, *Semanario Judicial de la Federación*, Décima Época, Libro 5, April 2014, Tomo I, P./J. 21/2014 (10a.), at ¶ 204, 2006225 (MEX).

⁷⁰⁴ Secretaría de Economía, “Responsabilidad Social Empresarial”, 10 June 2015 ([link](#)).

⁷⁰⁵ NCP, “Instancia Específica América Móvil”, 28 June 2012, 18 September 2013 ([link](#), [link](#), [link](#)).

issuing a final statement. The Mexican NCP took this decision on the basis that: (i) the parties were not willing to negotiate due to the existence of parallel judicial proceedings; (ii) the Mexican NCP had not found sufficient evidence to substantiate the complaint; (iii) certain issues were considered to be public policy issues that could not be mediated; and (iv) Excellon had decided not to participate in the proceedings.⁷⁰⁶

(3) Other Developments

522. On 10 December 2020, the Mexican Interior Ministry published the 2020-2024 National Human Rights Program. The strategic priorities identified in this program include (i) the promotion of policies aimed at preventing and reducing the negative impacts of public, private or mixed business activity; (ii) encouraging the adoption of the UNGPs and the OECD Guidelines; (iii) promoting and protecting human rights in the context of business enterprises; (iv) promoting human rights due diligence, whistleblower protections and satisfactory working standards; (v) harmonization of the regulatory framework with human rights standards; and (vi) creating public policy tools that prevent and guarantee reparation of damages for human rights breaches in the BHR context.
523. The Mexican NHRC has also been active in its efforts to promote BHR issues in Mexico. In particular, it has issued a number of nonbinding recommendations to public authorities concerning noncompliance with the UNGPs in a broad range of matters over the past four years. While these recommendations are directed to public authorities, the Mexican NHRC may compel government authorities to require individuals and private entities involved in adverse human rights impacts to prevent and remedy such impacts and to adopt all necessary measures to adapt their practices and activities to the highest human rights standards. Where public authorities consent to, or refuse to investigate, illegal acts of private entities, the Mexican NHRC may investigate them.

The Mexican NHRC has also been active in its efforts to promote BHR issues in Mexico. In particular, it has issued a number of nonbinding recommendations to public authorities concerning noncompliance with the UNGPs in a broad range of matters over the past four years.

524. Recommendations issued by the Mexican NHRC that cite to the UNGPs include:
- (i) **Recommendation 56/2016:** Violation of the right to collective property and prior consultation in relation to the construction of the “Toluca-Naucaupan Highway”. The UNGPs were cited in the context of the State’s obligation to conduct social and environmental impact assessments in relation to Article 14 of the Convention on Biological Diversity, to examine the possible damage or impact that an infrastructure

⁷⁰⁶ NCP, “Instancia Especifica Excellon”, 28 November 2012 ([link](#), [link](#)).

project could have on the use and enjoyment of traditional territories by indigenous peoples.⁷⁰⁷

- (ii) **Recommendation 10/2017:** Violation of the rights to a healthy environment, water, sanitation and access to information in relation to the contamination of the Atoyac and Xochiac rivers. The UNGPs were cited in the context of the issuance of concessions for the exploitation and use of water which were likely to contaminate natural resources. This recommendation made specific reference to Principles 1, 3 a), 11, 13 a) and b), 15, 22 and 25 but did not otherwise elaborate upon obligations of private entities to respect human rights.⁷⁰⁸
- (iii) **Recommendation 60/2017:** Violation of rights to work, social security, an adequate standard of living and the rights of children in relation to the general working conditions of agricultural laborers in the state of Coahuila. This recommendation contained a section generally addressing the three pillars of the UNGPs, as well as the Report of the UN Working Group on its mission in Mexico. However, it did not elaborate upon the obligations of private entities to respect human rights.⁷⁰⁹
- (iv) **Recommendation 67/2017:** Violation of the rights to a healthy environment as well as legal certainty and the rule of law, in relation to the removal of mangroves for the construction and development of the “Malecón Cancún” (Tajamar Project) in Quintana Roo. The UNGPs were cited with regard to the State’s obligation to comply with international human rights standards, to prevent companies from causing or contributing to violation of human rights, and to ensure reparation and due diligence procedures. This recommendation made specific reference to Principles 11, 12, 13, 17, and 23, but did not otherwise elaborate upon the obligations of private entities to respect human rights.⁷¹⁰
- (v) **Recommendation 2/2018:** Violations of the rights of persons with disabilities in relation to public transport. The UNGPs were cited in the context of the State’s obligation to guarantee the observance of human rights and to ensure that private companies respect those rights through the adoption of adequate public policies and

⁷⁰⁷ Comisión Nacional de Derechos Humanos, “Recomendación 56/2016 sobre el caso de vulneración al derecho a la propiedad colectiva en relación con la obligación de garantizar el derecho a la consulta previa de las comunidades indígenas afectadas con la construcción de la « autopista Toluca-Naucalpan”, 9 December 2016.

⁷⁰⁸ Comisión Nacional de Derechos Humanos, “Recomendación 10/2017 sobre la violación a los derechos humanos a un medio ambiente sano, saneamiento del agua y acceso a la información en relación con la contaminación de los ríos Atoyac, Xochiac, y sus afluentes; en agravio de quienes habitan y transitan en los municipios de San Martín Texmelucan y Huejotzingo, en el estado de Puebla; y en los municipios de Tepetitla de Lardizábal, Nativitas e Ixtacuixtla de Mariano Matamoros, en el estado de Tlaxcala”, 21 March 2017.

⁷⁰⁹ Comisión Nacional de Derechos Humanos, “Recomendación 60/2017 sobre el caso de la violación a los Derechos Humanos al trabajo, a la seguridad social, a un nivel de vida adecuado y al interés superior del niño en agravio de V1 y V2, personas jornaleras agrícolas en el Estado de Coahuila de Zaragoza”, 27 November 2017.

⁷¹⁰ Comisión Nacional de Derechos Humanos, “Recomendación 67/2017 sobre el caso de la violación a los derechos humanos a un medio ambiente sano, a la seguridad jurídica y al principio de legalidad, por la remoción de manglar para la realización del desarrollo “Malecón Cancún” (Proyecto Tajamar) en Quintana Roo”, 5 December 2017.

enforcement actions.⁷¹¹ This recommendation made specific reference to Principle 3 of the UNGPs. In particular, it stated that NHRIs have an important role to play in assisting States to determine whether its laws are consistent with its human rights obligations and are effectively implemented, as well as providing human rights advice to companies and other non-State actors. The recommendation required the Ministry of Communications and Transport to enter into discount agreements with transport companies to benefit people with disabilities.

- (vi) **Recommendation 15/2018:** Violations of human rights in relation to acts of human trafficking of indigenous agricultural laborers of Mixtec origin in vulnerable conditions located in the state of Colima. This recommendation referred to a private company's alleged breaches of agricultural laborers' labor rights, and stated that private companies should respect and refrain from infringing human rights. Moreover, they must address any negative human rights impacts in which they are involved. The recommendation referred to Principles 1, 11, 12, 13, 14, 15, 17, 18, 22, and 25 of the UNGPs.⁷¹²
- (vii) **Recommendation 17/2018:** Violation of the right to collective property and prior consultation, in relation to the construction of the Guayamas el Oro segment of the Sonora gas pipeline. The UNGPs were cited in the context of the Ministry of Energy's failure to protect the human rights of indigenous persons arising as a result of a private construction company's failure to conduct adequate due diligence. This recommendation made specific reference to Principle 17 of the UNGPs.⁷¹³
- (viii) **Recommendation 34/2018:** Violation of rights as a result of the formation of a sinkhole in the Mexico-Cuernavaca highway. The UNGPs were cited to support a private construction company's obligation to meet international due diligence standards, investigate alleged adverse human rights impacts, and address the consequences of those impacts including by adopting preventative measures against future impacts.⁷¹⁴

⁷¹¹ Comisión Nacional de Derechos Humanos, "Recomendación 2/2018 sobre el caso de violaciones a los derechos humanos de V1 y V2, personas en condición de discapacidad, por la falta de accesibilidad y movilidad en el transporte público de pasajeros, debido a la falta de descuentos en las tarifas", 9 February 2018.

⁷¹² Comisión Nacional de Derechos Humanos, "Recomendación 15/2018 sobre el caso de las violaciones a diversos derechos humanos por actos de trata de personas en agravio de jornaleros indígenas de origen mixteco en condiciones de vulnerabilidad localizados en un ejido del municipio de Colima, Colima", 30 April 2018.

⁷¹³ Comisión Nacional de Derechos Humanos, "Recomendación 17/2018 sobre el caso de vulneración al derecho humano a la consulta previa, libre, informada, culturalmente adecuada y de buena fe en afectación a los derechos humanos de la propiedad colectiva e identidad cultural, del Pueblo Mayo y la Tribu Yaqui, por el Gasoducto Sonora, segmento Guaymas el Oro", 15 June 2018.

⁷¹⁴ Comisión Nacional de Derechos Humanos, "Recomendación 34/2018 sobre el caso de la construcción del libramiento de la autopista México-Cuernavaca, conocido como "paso exprés", y posterior socavón ocurrido el 12 de julio de 2017, en Cuernavaca, Morelos, que derivó en violaciones a los derechos humanos de V1 a V7", 8 October 2018.

This was the only recommendation released by the Mexican NHRC which addresses the substantive content of the UNGPs, specifically Principle 15 concerning the obligation to carry out human rights due diligence. In the recommendation, the Mexican NHRC states that human rights due diligence is critical for private entities to identify risks associated with their operations and to prevent those risks from materializing.

The Mexican NHRC considered that, in the infrastructure sector, there should be a preliminary phase to identify through environmental and social studies the existence and extent of potential negative impacts that the project may have on human rights. Companies must then adopt specific measures to mitigate or reduce identified risks (e.g., adaptation or modification of the design of the project and utilization of other materials).

In addition, the Mexican NHRC concluded that it is essential to communicate the risks and the measures adopted to workers and the local community and to document the monitoring of these measures while the work is being performed.

Finally, the Mexican NHRC considered that companies have a duty to cooperate with investigations when they cause or contribute to adverse human rights impacts, including by producing all evidence in their possession, such as documents, graphs and databases, and making available any personnel with knowledge of the facts.

(ix) General Recommendation No. 37 on respect and observance of human rights in the activities of private companies, addressed to all Mexican public authorities:

The reference to the UNGPs in this general recommendation had a three-fold objective to: (i) establish public and private companies' obligation to respect and observe human rights in their activities in Mexico; (ii) present proposals for public policies aimed at aligning the relationship between the State and companies in relation to human rights; and (iii) present proposals for specific BHR-related legislative amendments.⁷¹⁵

Through General Recommendation No. 37, the Mexican NHRC requested various Mexican public authorities to:

- Take the necessary action to promote public policies aimed at consolidating respect for human rights in all business activities and all sectors of the economy.
- Take the necessary action to modify the General Law of Commercial Corporations and the Law of the Stock Market, among others, to include rules regarding respect for human rights in business activities.

⁷¹⁵ Comisión Nacional de Derechos Humanos, "Recomendación general sobre el respeto y observancia de los derechos humanos en las actividades de las empresas", 21 May 2019.

- Take the necessary action for the design, elaboration and approval of an NAP, in line with the UNGPs.
- Require public and private companies to: (i) comply with BHR-related laws; (ii) commit to respect human rights; (iii) undertake corporate due diligence processes; and (iv) adopt mechanisms for reparation of human rights impacts.
- Incorporate the obligation to respect human rights into contracts between public authorities and private companies as well as the issuing of permits, concessions, authorizations or licenses to carry out business activities.

525. The Mexican NHRC also organizes and participates in forums, events,⁷¹⁶ training of public officials⁷¹⁷ and the implementation of public policies⁷¹⁸ related to the UNGPs.

526. In its 2020 work plan, Mexico's NCP recognized that it is essential for it to continue the wide dissemination of the OECD Guidelines and the UNGPs, and to promote specific actions that can be implemented by companies to advance socially responsible management.⁷¹⁹

H. Peru

527. We have identified two judgments of the Constitutional Court of Peru (*Tribunal Constitucional*) that cite to the UNGPs. More broadly, the Peruvian Constitutional Court has developed a line of jurisprudence over the past two decades recognizing that businesses have an obligation to respect human rights.

⁷¹⁶ For example: (i) On 25 and 26 January 2019, the Mexican NHRC participated in the Colloquium on Corporate Responsibility and Human Rights organized by "Universidad Autónoma de Nuevo León" and "Universidad de Monterrey" with a presentation on the Responsibility of the State and Companies with regard to Human Rights; (ii) On 25 May 2019, it participated in the seminar entitled "Good practices in the business and human rights field for the mining sector" organized by the Canadian Embassy, where the role of the Human Rights National Commission as a non-jurisdictional mechanism for redressing human rights violations was discussed; and (iii) On 18 and 19 December 2019, it participated in the technical workshop "Challenges and opportunities for the adoption and implementation of National Action Plans on Business and Human Rights in Latin America and the Caribbean", organized by the Ministry of Foreign Affairs of Chile and the Danish Institute of Human Rights in Santiago, Chile, with the aim of promoting and strengthening local processes of implementation of the Guiding Principles through NAP.

⁷¹⁷ For example: (i) On 7 August, 5 September and 2 October 2019, 342 public officials from the Ministry of Communications and Transport were given training on the UNGPs. This was done to comply with the sixth recommendation of Recommendation 2/2018; (ii) On 16 October 2019, 92 people from different government institutions and agencies, as well as public companies, were trained on the "UN Guiding Principles on Business and Human Rights with an intercultural perspective". This was done to comply with Recommendations 56/2016, 26/2016, 10/2017, 67/2017, 3/2018, 11/2018 and 17/2018; (iii) On 7 November 2020, 49 public officials, from the Ministry of Energy and the Mexican Public Oil Company (PEMEX) were trained on "The United Nations Guiding Principles on Business and Human Rights in the Framework of Major Energy Projects".

⁷¹⁸ For example: (i) In January 2018, it sent observations to the proposal of the National Program on Business and Human Rights being developed by the General Office of Public Policy on Human Rights of the Ministry of the Interior as a National Action Plan on Business and Human Rights; and (ii) In June 2019, it made comments and observations on the document "National Strategy for the Implementation of Agenda 2030. This is an initial document for consultation regarding the actions and indicators for measuring compliance by the Mexican State with sustainable development objectives 4, 8 and 9 of Agenda 2030, with a BHR perspective and approach.

⁷¹⁹ *Secretaría de Economía Punto Nacional de Contacto de México*, "Plan Anual de Trabajo 2020", 2020 ([link](#)).

528. Our research indicates that the Peruvian Ombudsman (*La Defensoría del Pueblo*) has taken an active role in promoting the UNGPs through its public recommendations to both government and private enterprises. The government has also been undertaking a consultative process for development of an NAP on Business and Human Rights, to be implemented in 2021.

(1) Court Decisions

529. We have identified one decision that the Peruvian Constitutional Court issued on 22 September 2020 which contains a reference to the UNGPs. The case was brought by a college of lawyers against the government, challenging the constitutionality of a legislative decree amending the Peruvian Tax Code. In a separate judgment, Judge Espinosa-Saldaña Barrera stated that the importance of corporations (independent of their size) and citizens carrying out vital work to strengthen the national economy was undeniable. However, the importance of this effort did not exclude corporations' responsibility in respect of certain duties and commitments. In this regard, the judge noted that the Court had looked at and followed in special detail documents such as the UNGPs, even though they constituted soft law. The judge stated that the UNGPs recognize the role of corporations as members of society, which are required to comply with applicable laws and to respect human rights.⁷²⁰
530. More generally, the Constitutional Court has developed a line of jurisprudence recognizing a CSR duty by reference to national law and international soft law including the nascent UNGPs (albeit as set out in the 2008 report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations).⁷²¹ In *Sindicato Unificado de Trabajadores de la Electricidad y Actividades Conexas de Lima y Callao (Sutrel)*, handed down on 24 January 2012, the Constitutional Court considered an *amparo* action brought by an electricity workers' trade union.⁷²² The union alleged subcontracting fraud by the company Edelnor S.A.A. which had transferred some of its functions and work to Cam Perú SLR while failing to recognize the union and taking steps to prevent the union from participating in collective bargaining. The union argued that Edelnor had breached the right to work, equality and nondiscrimination, and the right to freedom of association and collective bargaining.

⁷²⁰ Constitutional Court (*Tribunal Constitucional*), *Voto Singular del Magistrado Espinosa-Saldaña Barrera, Caso de la forma de cómputo del plazo de prescripción de obligaciones tributarias*, Exp. No. 00004-2019-PI, at ¶ 68.

⁷²¹ In its final report dated 9 May 2018, the UN Working Group noted that Peruvian national courts have increasingly made reference to international standards in cases where businesses are involved. See UNHRC, "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru", 9 May 2018, at ¶ 18.

⁷²² Constitutional Court (*Tribunal Constitucional*), *Sindicato Unificado de Trabajadores de Electricidad y Actividades Conexas de Lima y Callao (SUTREL)*, Exp. No. 02111-2010-PA/TC, 24 January 2012.



531. In his reasoning, Judge Eto Cruz noted that the principle of CSR is well established in Peruvian constitutional jurisprudence and had become an important part of developments on the international stage. Judge Cruz referred to the OECD Guidelines, the ILO Declaration and the UN Global Compact and provided a detailed explanation of Professor John Ruggie’s “Protect, Respect, Remedy” framework, which was being developed in the context of his mandate as the UN Special Representative for Business and Human Rights. Judge Cruz concluded that effective CSR is a constitutional duty and that the defendant companies had acted in a manner incompatible with their duty to respect the fundamental rights of their workers.
532. Other examples of this line of jurisprudence concerning the CSR duty include decisions upholding companies’ obligations (primarily in the mining and extractives sector) to consult indigenous communities directly affected by mining projects,⁷²³ to respect the environment, and to follow the principle of prevention to avoid environmental damage and social conflict in order to minimize the impacts on the local community.⁷²⁴ The Constitutional Court has also

⁷²³ Constitutional Court (*Tribunal Constitucional*), *Asociación Interétnica de Desarrollo de la Selva Peruana*, Exp. No. 06316-2008-PA/TC, 11 November 2009 and 24 August 2010. The *amparo* proceedings were ultimately declared inadmissible given the lack of proof of the existence of the relevant community without prejudice to the inalienable right of indigenous communities and tribes to consultation. See also Fourth Constitutional Court of the Superior Court of Lima (Cuarto Juzgado Constitucional de la Corte Superior de Lima), *Zebelio Kayak Jempekit, Santiago Manuin Valera, Wrays Pérez Ramírez, Ananías Shawit Kasen*, Exp. No. 32365-2014, 28 March 2017 where the Court cancelled an oil exploration and exploitation contract on the grounds of breach of the right to prior consultation and consent.

⁷²⁴ Constitutional Court (*Tribunal Constitucional*), *Jaime Hans Bustamante Johnson*, Exp. No. 03343-2007-PA/TC, 19 February 2009. In this case, the Constitutional Court held that the company’s activities relating to the final stage of exploration and exploitation had to remain suspended until they could be brought into compliance with the regional conservation objectives. See also Constitutional Court (*Tribunal Constitucional*), *José Miguel Morales Dasso y más de 5000 ciudadanos*, Exp. No. 0048-2004-PI/TC, 1 April 2005.

indicated that companies involved in the extractives industry must implement participation mechanisms for local communities in relation to both the company's activities and the profits that it generates, and must establish internal mechanisms to prevent or resolve social conflicts arising from their activities.⁷²⁵

(2) NCP Decisions

533. The Peruvian government established its NCP through a private investment promotion agency, Proinversión, which is attached to its Ministry of the Economy and Finance, on 16 April 2010. To date, there have been four public decisions issued by Proinversión which have either dismissed the complaints filed or declined to make any determination, which has led commentators to question the independence and effectiveness of the Peruvian NCP.⁷²⁶ None of the decisions discuss the substantive content of the obligations contained in the OECD Guidelines.

(3) Other Developments

534. Peru has enacted a National Human Rights Plan for 2018-2021 (*Plan Nacional de Derechos Humanos 2018-2021*) which seeks to implement the international standards set out in the UNGPs, including the creation of an NAP. Development of the NAP has been led by Peru's Ministry of Justice and Human Rights (*Ministerio de Justicia y Derechos Humanos*) on an ongoing basis since 2018, with various rounds of community consultation undertaken as to its content and scope. The COVID-19 pandemic, along with the current political, social and economic crisis in Peru has, however, delayed this process.⁷²⁷
535. The UNGPs have nevertheless been employed and considered on occasion by the Peruvian Ombudsman both in assessing complaints regarding private sector provision of public services and in publishing general guidance for the public about BHR. By way of example, this has included:
- (i) Adopting a resolution on 7 November 2018 concerning the management of road concessions in light of the South American floods in 2016 and 2017 (*La gestión de riesgos en la concesiones viales: Lecciones del fenómeno El Niño Costero*), where the Ombudsman recommended that existing legislation be modified to incorporate the

⁷²⁵ Constitutional Court (*Tribunal Constitucional*), *Jaime Hans Bustamante Johnson*, Exp. No. 03343-2007-PA/TC, 19 February 2009.

⁷²⁶ See UNHRC, "Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Peru", 9 May 2018, at ¶ 19, where the UN Working Group noted that the NCP mechanisms were relatively unknown to those most at risk of human rights abuses. The UN Working Group stated that NCPs should enjoy a greater independence and be empowered to handle complaints in a genuinely impartial manner.

⁷²⁷ "Empresas y derechos humanos: Un escenario complejo para América Latina", *La República* (18 November 2020) ([link](#)).

principle of “Management of risks with a focus on rights [of persons affected by disasters]”, in compliance with existing law and the UNGPs.⁷²⁸

- (ii) Recommending that a local district take steps with respect to companies providing telecommunication infrastructure services, so that those companies incorporated respect for fundamental human rights into their operations, including abstaining from physical and verbal violence, and implementing reparation measures for those whose rights were negatively impacted.⁷²⁹



- (iii) Publicly calling for a government body to reduce the length of an initial investigation into the death of two workers at a McDonalds in Lima. The Ombudsman referred to the UNGPs and the principle that companies must prevent their activities from causing or contributing to negative human rights impacts, in particular on the rights to life, humane treatment and health.⁷³⁰

⁷²⁸ Defensoría del Pueblo, “Resolución Defensorial No. 016-2018-DP”, 7 November 2018.

⁷²⁹ Defensoría del Pueblo, “Vigésimo Segundo Informe Anual de la Defensoría del Pueblo 2018”, May 2019, at ¶¶ 106-107.

⁷³⁰ Defensoría del Pueblo, “Nota de Prensa No. 395/OCII/DP/2019: Defensoría del Pueblo demanda a Sunafil Reducir Plazo para Concluir Investigaciones en Relación a la Muerte de los Jóvenes en las Instalaciones de McDonald’s”, 20 December 2019.

VIII. MENA, KAZAKHSTAN AND RUSSIA

A. Overview

536. When the UNHRC unanimously endorsed the UNGPs in 2011, Bahrain, Qatar, and Saudi Arabia were serving as members of the UNHRC and Russia had sponsored the resolutions recommending endorsement, while Jordan and Turkey were co-sponsors.⁷³¹ To date, however, implementation of the UNGPs in the Middle East, North Africa, Russia and Kazakhstan has been limited. The UNGPs have not appeared in decisions issued by judicial or quasi-judicial bodies, with the exception of a passing reference by an Israeli court to an *amicus curiae* submission that itself referred to the UNGPs.
537. While NCPs in the region have served in both lead and supporting capacities for several complaints, little information is publicly available with respect to their treatment. Countries have also been slow to implement NAPs, with only Jordan and Morocco in the process of, or having committed to, developing NAPs, and a civil society group having initiated steps to develop one for Kazakhstan. Turkey has also recently announced the drafting of national guidelines in accordance with the UNGPs.
538. It is noteworthy that Egypt and Palestine have actively participated in UN efforts to develop an instrument on business and human rights and have encouraged the adoption of a binding treaty, while Russia's representatives in the same group have recommended that it would be more efficient for the instrument to have an advisory, rather than binding, character.
539. More generally, legal reforms over the last decade in Bahrain, Lebanon, Qatar, and Saudi Arabia have sought to amend the *kafala*, or sponsorship system. This system comprises a framework of laws and practices that govern the relationship between employers and migrant workers, often limiting migrants' freedom of movement, right to terminate employment, or right to change employers. As the Special Rapporteur on the human rights of migrants, François Crépeau, noted in his report on his Mission to Qatar in 2014, the UNGPs require businesses to avoid and mitigate activities which cause human rights impacts linked to their operations, and the "private sector can play an important role in ending the abuse and exploitation of migrants".⁷³² As such, government efforts to change this system reflect the country's positive obligation to protect against human rights abuse in their territory pursuant to UNGPs Principle 1.
540. Finally, governments in the region have held conferences on the UNGPs and BHR issues more broadly and have indicated support for the UNGPs. Civil society and other local entities also

⁷³¹ European Parliament, Implementation of the UN Guiding Principles on Business and Human Rights, p 50 ([link](#)); John G. Ruggie, "Guiding Principles' for the Business & Human Rights Treaty Negotiations: An Open Letter to the Intergovernmental Working Group" (9 October 2018) ¶ 1 ([link](#)).

⁷³² UN General Assembly, "Report of the Special Rapporteur on the human rights of migrants, François Crépeau," Human Rights Council, 26th Session (23 April 2014).

have advocated for greater respect for BHR through activism, and by issuing their own corporate governance standards.

...legal reforms over the last decade in Bahrain, Lebanon, Qatar, and Saudi Arabia have sought to amend the kafala, or sponsorship system ... As the Special Rapporteur on the human rights of migrants, François Crépeau, noted in his report on his Mission to Qatar in 2014, the UNGPs require businesses to avoid and mitigate activities which cause human rights impacts linked to their operations, and the "private sector can play an important role in ending the abuse and exploitation of migrants". As such, government efforts to change this system reflect the country's positive obligation to protect against human rights abuse in their territory pursuant to UNGPs Principle 1.

B. Kingdom of Bahrain

(1) Court Decisions

541. There do not appear to be any court decisions which have addressed the UNGPs or BHR issues more generally in Bahrain.

(2) NCP Decisions

542. As Bahrain is not an OECD member and has not committed to the OECD Guidelines, it has not set up an NCP.

(3) Other Developments

543. The Bahraini government and civil society have sought to promote human rights in the business context, including by holding discussions on these topics at conferences and local events. In February 2018, the Bahraini NHRI organized an international forum on business management and human rights, which was sponsored by several private entities and institutes. In her opening speech, the National Human Rights Foundation President stated that human rights and business management are a national priority.⁷³³
544. Bahrain was also one of the first Gulf States to take steps to dismantle the *kafala* system. In 2009, the Bahraini government officially announced that it would repeal the *kafala* system, instituting instead a policy of government (and not private) sponsorship for migrants through the Labour Market Regulatory Authority ("LMRA") and allowing migrant workers to change

⁷³³ MENAFN, "Bahrain — Launch of the International Forum on Business and Human Rights" (1 March 2018) ([link](#)).

employment without their employer's consent after a three-month notice period. In practice, however, workers were still required to have a private individual or company assume responsibility for their stay in the country⁷³⁴ and the *kafala* system was not fully abolished. The government scaled back these reforms in 2011, requiring migrant workers to stay with their employer for at least a year until they can change jobs without employer consent.⁷³⁵

545. In 2012, Bahrain adopted Law No. 36 of 2012 governing labor in the private sector, which provided rights and protections for workers without any distinction between Bahraini and foreign workers, including sick days, annual leave, and increased fines for abusive employers.⁷³⁶
546. On 28 March 2018, Bahrain's NHRI submitted its 2017 annual report "on the progress achieved in the human rights situation" to the King of Bahrain. The annual report identified the LMRA's new "flexible labor permit"—or flexi permit—as a significant reform to the *kafala* system which, if properly implemented, will give workers the option to sponsor themselves. On 15 October 2018, the UN adopted Bahrain's flexible work permit model as an international best practice.⁷³⁷

C. Arab Republic of Egypt

(1) Court Decisions

547. There do not appear to be any court decisions which have addressed the UNGPs in Egypt.

(2) NCP Decisions

548. Egypt set up an NCP in 2008.⁷³⁸ To date, Egypt has not served as lead NCP with respect to any complaints.⁷³⁹ In 2013, Egypt and Tunisia's NCPs did support the U.S. NCP in connection with a complaint filed by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association against Mondelez International, alleging that Mondelez had breached the OECD Guidelines relating to general policies, employment, and industrial relations in Egypt and Tunisia.⁷⁴⁰

(3) Other Developments

549. While Egypt has not developed an NAP, the country has supported efforts led by Ecuador, which chaired an open-ended intergovernmental working group on transnational

⁷³⁴ *Id.*

⁷³⁵ *Id.*

⁷³⁶ *Id.*, p 2.

⁷³⁷ European Centre for Democracy and Human Rights, "Advocating for Human Rights in the Gulf Region: Bahrain — Migrant workers' rights, June 2019," p 4 ([link](#)).

⁷³⁸ Decree No. 179 of 2008.

⁷³⁹ OECD, "Annual Report on the OECD Guidelines for Multinational Enterprises 2018," 2019, p 11 ([link](#)).

⁷⁴⁰ OECD, "Activities of National Contact Point for the OECD Guidelines for Multinational Corporations," 2014, p 107 ([link](#)).

corporations and other business enterprises with respect to human rights at the UN,⁷⁴¹ to draft and implement a binding business and human rights treaty. In 2020, in the sixth session of the UN Working Group, the Egyptian delegation reiterated its support for a legally binding process to promote business and human rights that would complement and advance the UNGPs, noting that it was “no longer sufficient to rely on voluntary, soft-law instruments that are not enforceable”,⁷⁴² and urging States to “move beyond hiding behind the UNGPs”.⁷⁴³ Notably, the Egyptian delegation also indicated Egypt’s receptiveness to judicial remedies for human rights violations.⁷⁴⁴

550. In 2004, a UN Global Compact Network was launched in Egypt by the Mansour Group, a private family-owned multinational conglomerate, and the UNDP to promote business and human rights in Egypt.⁷⁴⁵ In 2015, the Global Compact Network in Egypt became an independent entity.⁷⁴⁶ In 2019, the Egyptian Financial Regulation Authority announced that it had joined the UN Global Compact Network.⁷⁴⁷
551. In 2018, the Egyptian government set up a Permanent Human Rights Committee pursuant to the Prime Ministerial Decree No. 2396 of 2018.⁷⁴⁸ The Decree notes Egypt’s intention to seek cooperation with the UN, specialized agencies, other countries, and intergovernmental organizations to obtain technical and financial support for the purpose of institution building. It is presently unclear whether this law will address BHR.

⁷⁴¹ Business & Human Rights Resource Centre, “Binding Treaty” (undated) ([link](#)).

⁷⁴² OHCHR, “Sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Egypt, General Statement” (26–30 October 2020) ([link](#)).

⁷⁴³ Business & Human Rights Resource Centre, “Day 1 Summary: UN Treaty on Business & Human Rights negotiations kick off amid global uncertainties” (27 October 2020) ([link](#)).

⁷⁴⁴ OHCHR, “Sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Egypt, General Statement” (26–30 October 2020) ([link](#)) (welcoming “the exercise of jurisdiction with respect to claims brought by victims, irrespective of their nationality or place of domicile, arising from acts or omissions that result or contribute to human rights abuses, including in the courts of the state where the human rights abuse occurred”).

⁷⁴⁵ United Nations Secretary-General, “Secretary-General’s Message to the Launch of the Global Compact in Egypt [delivered by Mr. S. Iqbal Riza, Chef de Cabinet]” (9 February 2004) ([link](#)). Arab Council for Social Responsibility, “Our Partners” ([link](#)); see also the Global Business Initiative on Human Rights, “Cairo, Egypt—Global Business Initiative on Human Rights Roundtable” (9 December 2010) ([link](#)). This was a roundtable which was held in Cairo in 2010. The speakers were Prof. John Ruggie and Youssef Mansour. It was an “exchange among senior business leaders in relation to human rights in a business context”.

⁷⁴⁶ Arab Council for Social Responsibility, “Our Partners” ([link](#)).

⁷⁴⁷ Financial Regulation Authority, “Financial Regulatory Authority (FRA) in Egypt joins the UN Global Compact — Monday 21/1/2019” (21 January 2019); see also Financial Regulatory Authority, “Letter of Commitment to the UN Secretary General” (13 January 2019) ([link](#)).

⁷⁴⁸ Prime Ministerial Decree No. 2396 of 2018.

In 2020, in the sixth session of the UN Working Group, the Egyptian delegation reiterated its support for a legally binding process to promote business and human rights that would complement and advance the UNGPs, noting that it was “no longer sufficient to rely on voluntary, soft-law instruments that are not enforceable”, and urging States to “move beyond hiding behind the UNGPs”.

D. State of Israel

(1) Court Decisions

552. The Israeli Supreme Court has referred to the UNGPs in one judgment, summarizing the position of an international organization serving as *amicus curiae* in those proceedings. This is the only Israeli court decision that we have identified that references the UNGPs. Israeli courts have, however, referred to the social obligations of businesses, and Israeli jurisprudence prioritizes constitutional and human rights including in the business context.
553. In *Human Rights Watch v. Minister of Interior*,⁷⁴⁹ the Israeli Supreme Court affirmed a judgment dismissing the petition of Human Rights Watch and Mr. Omar Shakir against the Minister of Interior’s refusal to renew Mr. Shakir’s residence and work permits in Israel. The Minister’s decision was taken pursuant to the Entry into Israel Law, in view of his activities to promote boycotts of the State of Israel.⁷⁵⁰
554. The appellants challenged the Minister’s decision, as well as the constitutionality of the Entry into Israel Law, which restricts the entry of people involved in boycott activities against Israel.⁷⁵¹
555. During the course of the proceedings, several entities, including Amnesty International, intervened as *amicus curiae*. Amnesty International, in support of Mr. Shakir, expressed the view that the establishment of Israeli settlements violates international law and human rights. It referred to the UNGPs, stating that “a reasonable interpretation of the UNGPs implies that business companies should refrain from conducting any activities in these settlements”.⁷⁵² As such, Amnesty International opined that a call for business entities to respect international law is not a call for a boycott, and that in any event those who promote and support such calls should be allowed to express their views freely.⁷⁵³

⁷⁴⁹ I.A.M. 2966/19 *Human Rights Watch and Omar Shakir v. The Minister of Interior and others* (11 May 2019) ([link](#)).

⁷⁵⁰ *Id.* ¶¶ 1–2, 23–24.

⁷⁵¹ *Id.* ¶ 3.

⁷⁵² *Id.* ¶ 7 (unofficial translation from Hebrew)

⁷⁵³ *Id.*

556. Amnesty International's submissions, including its reliance on the UNGPs, were noted in the judgment of the Israeli Supreme Court, which dismissed the appeal on the grounds that the Minister's decision was within the bounds of his authority, reasonableness and proportionality.⁷⁵⁴

(2) NCP Decisions

557. The Israeli Ministry of Economy and Industry set up an NCP in 2002. To date, at least two NCP complaints have been lodged with Israel serving as the lead NCP, neither of which concerned the human rights provisions of the OECD Guidelines.⁷⁵⁵

(3) Other Developments

558. While it appears that the implementation of the UNGPs by the Israeli legal system is limited, many of the principles embodied in the UNGPs are addressed in Israeli law and jurisprudence.

559. For example, Israeli courts have referred to the social responsibility of a business's management bodies (such as its directors and managers). As noted by the Israeli Supreme Court, "it appears that the evolving modern trend is that the company and its managers operating for it must take into account not only the good of the shareholders [...] but also the good of the company's employees, its consumers and the general public as a whole".⁷⁵⁶

560. The imposition of social responsibilities on the business sector was also strengthened through the enactment of the Basic Law: Human Dignity and Liberty, which provides that human rights are an inherent enforceable part of the "public order" that applies to every legal person, including corporations.⁷⁵⁷

561. In addition, Israeli courts have adopted an "indirect applicability" model, according to which the duty to respect human rights applies to private entities through private law doctrines such as good faith, public policy, negligence, and reasonableness, which in turn refer to concepts such as human dignity, liberty, property, privacy, and freedom of occupation.⁷⁵⁸

⁷⁵⁴ *Id.* ¶ 23

⁷⁵⁵ OECD Database, "Mining activities in the Democratic Republic of Congo," 1 October 2003 ([link](#)); OECD Watch, "UN Panel of Experts vs. Israeli MNE operating in the DRC," 1 October 2003 ([link](#)); OECD Database, "Oversea Gas Mining Land Facilities in Israel," 28 May 2010 ([link](#)); OECD Watch, "Group of Individuals vs. US MNE Operating in Israel," 28 May 2010 ([link](#)).

⁷⁵⁶ D.N. 7/81 *Penider, investment, development and Construction Company Ltd. and Yosef Pnini v. David Castro* (14 December 1983) (P.D. 37(4) 673), p 695 (unofficial translation from Hebrew).

⁷⁵⁷ Basic Law: Human Dignity and Liberty (5752 - 1992).

⁷⁵⁸ See, e.g., I.A. 90/08 *Tali Isakov Inbar v. The state of Israel — The Commissioner on Employment of Women Law and others* (8 February 2011), ¶ 8; T.E. (Tel Aviv) 1044/08 *Organization of postal agents and 44 postal agents v. Israel Post Company Ltd.* (25 January 2016), pp 198–199; Ali Bukspan, "Class Actions, The Purpose of the Company and the Perception of Stakeholders in the Modern Corporate Age — The Fund for Financing Class Actions as a Magnifying Glass," 24 *Journal of Law and Business* 111, pp 136–137 (2020).

E. Hashemite Kingdom of Jordan

(1) Court Decisions

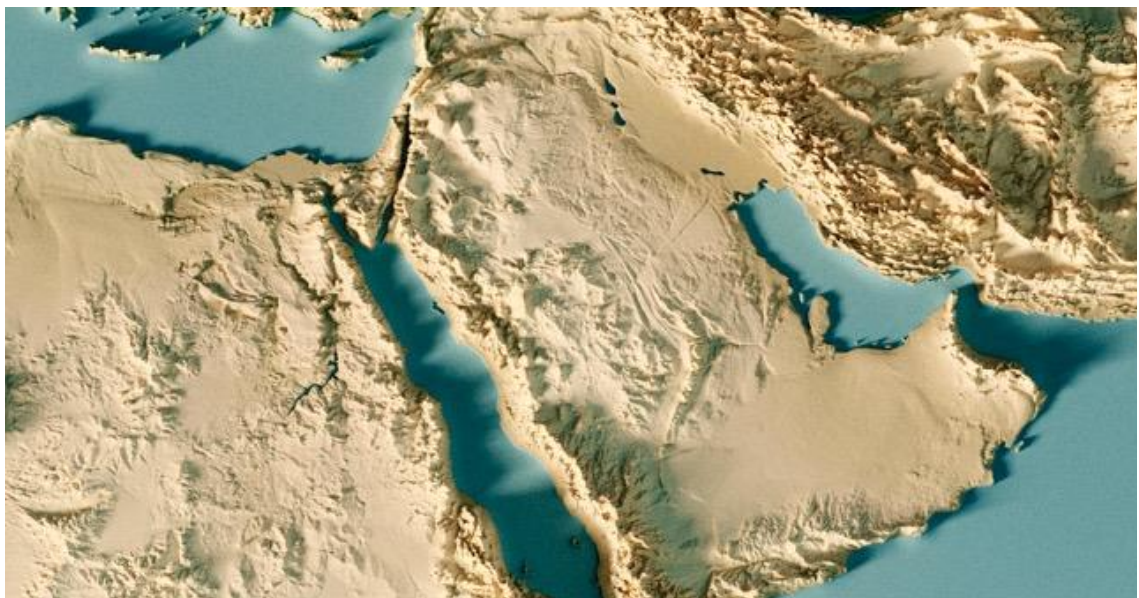
562. There are no decisions issued by any Jordanian judicial authorities that cite to the UNGPs or similar international guidelines.

(2) NCP Decisions

563. While an NCP has been established in Jordan, it appears that there have been no complaints to date in which Jordan served either as lead NCP or in a supporting capacity.

(3) Other Developments

564. While Jordan is in the process of developing, or has committed to develop, an NAP,⁷⁵⁹ it is not clear how much, if any, progress has been made. The 2013 OECD Investment Policy Review takes note of Jordan's efforts to improve respect for human rights by enterprises, including a strategy aimed at improving the framework for employment and labor relations and the requirement that certain companies undertake environmental impact assessments.⁷⁶⁰ The review noted, however, that the government "will need to further take steps to guarantee respect for human rights by enterprises and to encourage them to play a role and adopt [relevant] policies".⁷⁶¹



565. There have also been efforts by the Jordanian government, enterprises, and NGOs to integrate responsible business conduct into their operations. In 2011, the National Corporate

⁷⁵⁹ OHCHR, "State national action plans on Business and Human Rights," ([link](#)).

⁷⁶⁰ OECD, Investment Policy Reviews: Jordan 2013 (2013), p 15 ([link](#)) (executive summary).

⁷⁶¹ *Id.* p 29.

Governance Task Force (created by the Companies Control Department in the Ministry of Industry and Trade) developed a Corporate Governance Code based on the OECD Principles of Corporate Governance.⁷⁶²

566. On 9 April 2019, the Jordanian Prime Minister issued a memorandum to all ministries for the purposes of implementing the recommendations in Jordan's UPR, which were endorsed by the Jordanian government and included increasing efforts to improve CSR in the private sector.⁷⁶³ The Director of the Prime Minister's Human Rights Department affirmed the importance of the UPR and Jordan's objectives, saying "these endorsed recommendations will serve the interests of the nation and its welfare, by enhancing the status of human rights in Jordan".⁷⁶⁴

F. Republic of Kazakhstan

(1) Court Decisions

567. There do not appear to be any judicial or quasi-judicial decisions that reference the UNGPs or other similar guidelines.

(2) NCP Decisions

568. The Ministry of National Economy performs the role of the NCP in Kazakhstan, which was established in 2020 and serves as a collegial advisory body governed by the Constitution, laws and regulations of Kazakhstan, and the OECD Guidelines and Declaration.⁷⁶⁵ It does not appear that the NCP has issued any decisions, although it has held a series of online seminars on responsible business conduct and issued an action plan to promote the NCP and its ability to resolve various issues.⁷⁶⁶

(3) Other Developments

569. Kazakhstan is in the process of implementing international guidelines for the protection of human rights, including in the BHR context. In 2008, the former President of Kazakhstan encouraged businesses to embrace social responsibility and supported the implementation of the UN Global Compact. That same year, the Ministry of Labor and Social Protection of the Population, together with socially oriented businesses in Kazakhstan, entered into an agreement to promote the UN Global Compact in the context of social and labor relations.⁷⁶⁷

⁷⁶² Companies Control Department, Jordanian Corporate Governance Code.

⁷⁶³ Jordan Times, "Jordan committed to implementing human rights recommendations" (10 April 2019) ([link](#)).

⁷⁶⁴ *Id.*

⁷⁶⁵ National Contact Point Qazaqstan, "Responsible Business Conduct: OECD Guidelines and National Contact Points (2020)", p 9 ([link](#)).

⁷⁶⁶ Economic Research Institute Qazaqstan, NCP Events ([link](#)); Action Plan for the National Contact Point (2020) ([link](#)).

⁷⁶⁷ Speech of the former President of the Republic of Kazakhstan Mr. Nursultan Nazarbayev at the Republican Forum for the Issues of Social Responsibility of Business (24 January 2008) ([link](#)).

In 2013, the implementation of the UNGPs in Kazakhstan was discussed during an International Expert-Practical Conference.⁷⁶⁸

570. In addition, Kazakhstan holds an annual CSR competition called “Paryz”,⁷⁶⁹ has approved the ISO 26000-2010 “Guidance on Social Responsibility”,⁷⁷⁰ and has adopted the “Concept of Social Development until 2030” which promotes CSR initiatives.⁷⁷¹ Kazakhstan has not yet adopted an NAP, although an independent institute, the Legal Policy Research Center (a nonpolitical think tank) has been encouraging the government to do so since 2015.⁷⁷² The Center has expressed its readiness to provide the government with a full set of recommendations for developing an NAP and has conducted a study, “A Brief Survey of Research on the Cost of Human Rights Violation in the Energy Sector of the Republic of Kazakhstan”. The Centre has also conducted a “Human Rights Impact Assessment”, as a pilot project, in one of the subsidiaries of Samruk-Energy JSC, a state-owned energy company.

G. Lebanese Republic

(1) Court Decisions

571. No judicial or quasi-judicial decisions citing to the UNGPs have been issued in Lebanon. However, several court judgments refer to corporations’ obligation to respect human rights, including in the context of freedom of trade and discrimination. For example, in a decision issued on 13 January 2020, a Lebanese court explicitly dealt with the issue of corporate responsibility to respect human rights in the context of freedom of trade,⁷⁷³ referring to the general principles enshrined in the UDHR in respect of economic freedom. A decision issued by the Labour Arbitration Council on 29 June 1994 addressed corporate responsibility to respect human rights in the context of the retirement age for women in Lebanon, and made explicit references to ILO Convention 111/1977 which prohibits discrimination based on sex and has been incorporated into Lebanese law.⁷⁷⁴

(2) NCP Decisions

572. As Lebanon is not an OECD member and has not committed to the OECD Guidelines, it has not set up an NCP.

⁷⁶⁸ Materials for the International Expert-Practical Conference on Implementation of UNGPs (21 February 2013) ([link](#)).

⁷⁶⁹ Publication with information on the “Paryz” competition in 2020 (22 June 2020) ([link](#)).

⁷⁷⁰ K. Kabatova, “Corporate social responsibility in Kazakhstan: government agencies, business and civil sector as key participants in the construction a systematic approach to CSR” (2016), p 17 ([link](#)).

⁷⁷¹ Decree of the Government of the Republic of Kazakhstan No. 396, dated 24 January 2014, on Adoption of the Concept of Social Development of the Republic of Kazakhstan until 2030 and the Plan of Social Modernization until 2016.

⁷⁷² T. Zinovich, “Business and Human Rights. How to Implement and Develop Standard of CSR in Kazakhstan?” (2017) ([link](#)).

⁷⁷³ See, e.g., Judgment in Case No. 5 of 13 January 2020, presiding before the Judge of Urgent Matters in Zahle (Rita Haro).

⁷⁷⁴ See, e.g., Decision of the Labour Arbitration Council No. 253 (29 June 1994).

(3) Other Developments

573. There is evidence that the Lebanese government and civil society have made efforts to engage with BHR best practices, although recent initiatives have had mixed success.
574. Advocacy efforts to dismantle the *kafala* system in Lebanon have led to recent legal reforms aimed at improving the working conditions of foreign domestic workers. Migrant workers who work in Lebanon under *kafala* sponsorship are protected by a specific set of laws.⁷⁷⁵ The former Minister of Labor and the ILO established a Working Group on Kafala Reform in April 2019, which developed a revised Standard Unified Contract for the Employment of Domestic Workers (“**Standard Unified Contract**”) and aligned with national and international standards, including the ILO Domestic Workers Convention. On 8 September 2020, Caretaker Minister of Labor Lamia Yammine issued a revised Standard Unified Contract, which allows workers to resign and change employers, permits domestic workers to leave the household during their weekly day off and annual leave, relieves workers of recruitment fees and related costs, and prohibits employers from withholding wages and confiscating personal documentation, such as passports.⁷⁷⁶
575. On 14 October 2020, however, Lebanon’s Shura Council suspended the implementation of the revised Standard Unified Contract in response to a challenge brought by the Syndicate of the Owners of Recruitment Agencies. The Shura Council did not refer to the rights of migrant domestic workers in its decision, but instead cited “severe damage” to the interests of the complainant.⁷⁷⁷
576. Although Lebanon adopted an Ombudsman Law in 2005, the Ombudsman has not yet been appointed. In 2016, Lebanon’s parliament approved the establishment of a NHRI,⁷⁷⁸ but it is not clear that the NHRI has addressed any BHR-related complaints to date.

H. Kingdom of Morocco

(1) Court Decisions

577. There do not appear to be any judicial or quasi-judicial decisions that apply or refer to the UNGPs.

(2) NCP Decisions

578. Morocco has established an NCP based within the Moroccan Investment and Export Development Agency, comprised of representatives of ministerial departments and public

⁷⁷⁵ “Lebanon’s new domestic worker contract: end to ‘kafala slavery?’” (13 September 2020) ([link](#)).

⁷⁷⁶ International Labour Organization, “Lebanon takes crucial first step towards dismantling Kafala in Lebanon,” Press release (10 September 2020) ([link](#)).

⁷⁷⁷ Human Rights Watch, “Lebanon: Blow to Migrant Domestic Worker Rights” (30 October 2020).

⁷⁷⁸ Alkarama, “Lebanon: Parliament Approves Law Instituting a National Human Rights Institution and a National Preventive Mechanism Against Torture” (28 October 2016) ([link](#)).

bodies.⁷⁷⁹ There are four reported complaints that were submitted to the NCP between June 2016 and May 2019. In the first two cases, the NCP declined to conduct further examinations after publishing its initial assessments.⁷⁸⁰ On 23 December 2020, the NCP issued final statements in the third case, which concerned consumer rights.⁷⁸¹ In the fourth case, the NCP emphasized the importance of respecting the rights of employed workers to form and join unions and collective agreements, and encouraged the company to continue its efforts to comply with international standards, including the OECD Guidelines.⁷⁸²

(3) Other Developments

579. In December 2017, Morocco adopted its NAP for Democracy and Human Rights (2018-2021), a vast reform package that contains a chapter on BHR.⁷⁸³ The first objective noted in the chapter is to “[e]laborate and adopt a national action plan on business and human rights involving all stakeholders”, including Morocco’s Parliament, the Ministry of State for Human Rights, democracy and human rights institutions, trade unions, labor, and civil society organizations.⁷⁸⁴ Other objectives include:

- (i) Encourage companies to set up a general internal code of conduct on human rights;
- (ii) Mainstream respect for human rights into business in law and practice; and
- (iii) Promote the role of the company in assessing the impact of its activities on human rights.⁷⁸⁵

580. A taskforce comprised of representatives from key ministries and local organizations was established to monitor implementation of the NAP.⁷⁸⁶

581. In addition to these efforts, Morocco’s NHRI has campaigned to raise awareness of UNGPs among Parliament, businesses, civil society, and public bodies. For instance, in May 2016, the NHRI signed an agreement with the General Confederation of Moroccan Enterprises to promote respect for human rights in Moroccan companies, prioritizing the implementation of

⁷⁷⁹ Moroccan NCP, “Who we are” ([link](#)).

⁷⁸⁰ OECD Database, “Human rights, disclosure and consumer interests involving a Swiss insurance company operating in Morocco” (18 March 2016) ([link](#)); OECD Database, “Audit company and individual in Morocco” (2 June 2016) ([link](#)).

⁷⁸¹ OECD Database, “Individual & Royal Air Maroc” (27 May 2019).

⁷⁸² OECD Database, “Moroccan company and Democratic Confederation of Labour concerning labor rights” (21 November 2018).

⁷⁸³ National Action Plans on Business and Human Rights, “Morocco,” ([link](#)).

⁷⁸⁴ Kingdom of Morocco, “National Action Plan for Democracy and Human rights 2018-2021” (December 2017), p 56 ([link](#)).

⁷⁸⁵ *Id.*

⁷⁸⁶ In February 2021, representatives from Finland, Sweden and the UK met with the Moroccan taskforce under the auspices of the Council of Europe to share their experiences and lessons learned from the implementation of their respective NAP.

the UNGPs.⁷⁸⁷ In addition, in December 2017, the NHRI assisted in organizing the North Africa and Middle East Regional Conference on Business and Human Rights, which was hosted in Morocco. One objective of the conference was to promote dialogue and cooperation on BHR in light of the UNGPs.⁷⁸⁸

In December 2017, Morocco adopted its NAP for Democracy and Human Rights (2018-2021), a vast reform package that contains a chapter on BHR. The first objective noted in the chapter is to "[e]laborate and adopt a national action plan on business and human rights involving all stakeholders", including Morocco's Parliament, the Ministry of State for Human Rights, democracy and human rights institutions, trade unions, labor, and civil society organizations.

I. State of Palestine

(1) Court Decisions

582. It does not appear that any Palestinian court decisions have discussed or referenced the UNGPs.
583. The Palestinian government has recently endorsed an effort by the OHCHR to create a database of business enterprises engaged in activities in relation to Israeli settlements in the Occupied Palestinian Territory.⁷⁸⁹ The OHCHR's interim report recalled the obligations of the State of Israel and home States of transnational corporations, as well as business enterprises themselves, to ensure that they act in conformity with the UNGPs.⁷⁹⁰ In its final report issued

⁷⁸⁷ European Parliament, "Implementation of the UN Guiding Principles on Business and Human Rights" (2017), p 51 ([link](#)).

⁷⁸⁸ Studies in Human Rights, "North Africa and Middle East Regional Conference on Business and Human Rights" ([link](#)).

⁷⁸⁹ Human Rights Council, "Database of all business enterprises involved in the activities detailed in paragraph 96 of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem," Report of the UN High Commissioner for Human Rights, A/HRC/43/71 (28 February 2020) ("2020 Database Report"); Al-Araby, "Palestinian leaders demand that companies operating in the settlements close their headquarters and branches" (13 February 2020) ([link](#)) (Secretary of the Executive Committee of the Palestine Liberation Organization, the late Saed Erekat, stated that "The United Nations issuance of a list of companies operating in settlements constitutes a victory for Palestinian rights and international law" (unofficial translation from Arabic)).

⁷⁹⁰ Human Rights Council, "Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem," Report of the UN High Commissioner for Human Rights, A/HRC/37/39 (1 February 2018), ¶¶ 27, 31, 36, 39.

in 2020, the OHCHR identified 112 business enterprises⁷⁹¹ and invited them to engage with the OHCHR in line with the UNGPs, a copy of which was annexed to the report.⁷⁹² In November 2020, the Palestinian Minister of Justice stated that the Palestinian government intends to prosecute companies appearing in the database.⁷⁹³ As of the time of writing, it does not appear that any court cases have yet been filed.

(2) NCP Decisions

584. As Palestine is not an OECD member and has not committed to the OECD Guidelines, it has not set up an NCP.

(3) Other Developments

585. Several Palestinian endeavors indicate efforts to promote human rights among businesses through governmental initiatives, business initiatives, and Palestinian civil society.
586. In 1993, the Independent Commission for Human Rights was established by Presidential Decree No. 59, which serves as the State's national human rights institute and ombudsman. It has authority to deal with cases of human rights violations and complaints related to abuse of power, and can take cases to court.⁷⁹⁴ However, it does not appear that BHR issues have been addressed in this context.
587. Since 1995, a group of "tripartite constituents" comprised of the Ministry of Labor, the Palestinian General Federation of Trade Unions, and the Palestinian Federation of Chambers of Commerce, Industry and Agriculture, has worked with the ILO to promote the ILO's Decent Work agenda.⁷⁹⁵ Recent efforts to advance this agenda have resulted in a legal framework for occupational safety and health that was passed by the Palestinian Cabinet in 2019,⁷⁹⁶ a mechanism for resolving labor disputes including the development of a hotline service to promote safe working conditions,⁷⁹⁷ and awareness campaigns to combat workplace discrimination.
588. Palestine has also participated in the UN Working Group's process to develop a legally binding instrument on business and human rights. In the sixth session of the UN Working Group, Palestine recommended that the instrument "affirm the primacy of human rights over trade,

⁷⁹¹ 2020 Database Report ¶¶ 6; 31. The report emphasized that the work done by the OHCHR to create the database "is not and does not purport to constitute a judicial or quasi-judicial process of any kind". *Id.*, ¶ 19.

⁷⁹² *Id.*, ¶ 27.

⁷⁹³ Xinhua Arabic News, "Palestinian Minister: We will prosecute companies operating in Israeli settlements" (17 November 2020) ([link](#)).

⁷⁹⁴ Independent Commission for Human Rights, "About Us" ([link](#)).

⁷⁹⁵ ILO, "The Palestinian Decent Work Programme 2018–2022" (April 2018), p 4 ([link](#)).

⁷⁹⁶ ILO, "The situation of workers of the occupied Arab territories" (2019), ¶ 114 ([link](#)).

⁷⁹⁷ DWP 2018–2022, p 21.

investment, development, environment, and climate as well as business agreements”⁷⁹⁸ and include language to reflect the immediate and long-term measures that would be taken in support of victims who seek remedies under the instrument, as well as the monitoring of such remedies.⁷⁹⁹

589. Palestinian businesses have been active in the context of the UN Global Compact. For example, the Bank of Palestine became signatory to the Compact in 2011.⁸⁰⁰
590. Finally, the Palestinian NGO Al-Haq is active nationally in raising awareness of business and human rights in Palestinian society through encouraging dialogue between political, economic, and civil society actors, including legal practitioners and academics. Al-Haq received the 2019 Human Rights and Business Award at the 8th Annual UN Business and Human Rights Forum.⁸⁰¹

J. State of Qatar

(1) Court Decisions

591. There are no decisions issued by any Qatari court or quasi-judicial authority which cite to the UNGPs or relevant business and human rights guidelines.

(2) NCP Decisions

592. As Qatar is not an OECD member and has not committed to the OECD Guidelines, it has not set up an NCP.

(3) Other Developments

593. There have been efforts to promote BHR through governmental and business initiatives in Qatar, including efforts to abolish the *kafala* system.
594. The Qatari government has articulated its support for the UNGPs and has provided a forum for regional discussions on the topic. In a 2015 speech before the closing session of the 4th Annual UN Forum on Business and Human Rights, H.E. Director of the Foreign Ministry’s Human Rights Committee Sheikh Khalid bin Jassim Al-Thani reaffirmed that Qatar would

⁷⁹⁸ OHCHR, “Sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Permanent Observer Mission of the State of Palestine Comments on Preamble Part and Articles 1&2” (26–30 October 2020) ([link](#)).

⁷⁹⁹ OHCHR, “Sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Permanent Observer Mission of the State of Palestine Comments on Articles 3&4” (26–30 October 2020) ([link](#)).

⁸⁰⁰ Bank of Palestine, “Bank of Palestine Joins United Nations Global Compact, Endorsing Universal Principles on Environment, Labor, Human Rights, and Anti-Corruption,” ([link](#)).

⁸⁰¹ Al-Haq, “Al-Haq Attends 8th Annual UN Forum on Business and Human Rights, Receives the Human Rights and Business Award” (3 December 2019) ([link](#)).

“spare no effort” to actively promote the UNGPs.⁸⁰² Qatar also hosted the 2016 Asia Regional Forum on Business and Human Rights, bringing together 400 participants from 60 countries to address a wide range of issues particularly relevant to the region, including the rights of migrant workers, impact of large-scale land acquisitions, forced and child labor and human trafficking, the right to privacy in the digital domain, access to remedy through judicial and nonjudicial mechanisms, human rights defenders, and indigenous peoples’ rights.⁸⁰³ On 18 April 2016, Qatar’s Chamber of Commerce and Industry hosted a capacity-building workshop led by the Global Business Initiative on Human Rights and the International Organisation of Employers for business representatives attending the Asia Regional Forum, which provided an introduction to recent developments and the expectations of businesses as set out in the UNGPs.⁸⁰⁴



595. On 17 October 2019, the Qatari Minister of Labor announced that Qatar would amend the *kafala* system.⁸⁰⁵ The new legislation eliminated the “No Objection Certificate”,⁸⁰⁶ where a migrant worker’s employer was required to issue before the worker could switch jobs. Qatar’s Minister of the Interior Department⁸⁰⁷ also signed a decree allowing workers to leave the country temporarily or permanently without the permission of their employers. In addition, the Council of Ministers endorsed a new law adopting the first nondiscriminatory minimum wage in the Middle East,⁸⁰⁸ applicable to all nationalities and sectors, including domestic

⁸⁰² Ministry of Foreign Affairs, “Qatar Reaffirms Support for UN Guiding Principles on Business and Human Rights” (18 November 2015).

⁸⁰³ Human Rights Council, “Report of the Working Group on issues of human rights and transnational corporations and other business enterprises on the Asia Forum on Business and Human Rights,” A/HRC/32/45/Add.2 (30 May 2016), pp 3–4.

⁸⁰⁴ GBI, “Business and Human Rights Capacity Building Workshop” (18 April 2016) ([link](#)).

⁸⁰⁵ BBC News, “Qatar Amends the ‘Kafala’ System for Foreign Workers” (16 October 2019) ([link](#)).

⁸⁰⁶ Faras Ghani, “Qatar moves to announce abolishment of kafala system” (17 October 2019) ([link](#)); ILO, “Landmark labor reforms signal end of kafala system in Qatar” (16 October 2019) ([link](#)).

⁸⁰⁷ ILO, “Landmark labor reforms signal end of kafala system in Qatar” (16 October 2019) ([link](#)).

⁸⁰⁸ *Id.*

workers who have previously been excluded from such reform measures. The minimum wage is to be determined on the basis of a joint study by the ILO and the Ministry of Administrative Development, Labor and Social Affairs.

596. These reforms came into effect on 30 August 2020, when Qatar adopted Law No. 19 of 2020 and Law No. 17 of 2020.
597. The National Human Rights Committee of Qatar (“**Qatar NHRC**”) holds seminars and workshops to highlight the responsibility of all sectors, companies, media and society in addressing issues such as the environment, labor rights, human trafficking and conditions of safety and health care.⁸⁰⁹ For example, in April 2019 the Qatar NHRC held a conference with the OHCHR, the European Parliament, and the Global Alliance of NHRIs on national, regional and international mechanisms to combat impunity for gross violations of human rights law and serious violations of international humanitarian law, and to ensure accountability.⁸¹⁰ The Qatar NHRC also advances proposals for legal reform to promote the implementation of the UNGPs at a national level.⁸¹¹

K. Russian Federation

(1) Court Decisions

598. There do not appear to be any decisions of Russian courts or quasi-judicial authorities applying or directly referencing the UNGPs or other aligned soft law standards.

(2) NCP Decisions

599. As Russia is not an OECD member and has not committed to the OECD Guidelines, it has not set up an NCP.

(3) Other Developments

600. Russian law provides for standard human rights protections, but has not imposed specific responsibilities on businesses to respect human rights. There is, however, a clear trend to promote the voluntary adoption of responsible business conduct practices through nonbinding guidance documents adopted by state authorities, such as the Ministry of Economic Development,⁸¹² or through professional associations and organizations such as the

⁸⁰⁹ European Parliament, “The Role of Non-EU National Human Rights Institutions in the Implementation of the UN Guiding Principles on Business and Human Rights,” 2012, pp 48–49 ([link](#)).

⁸¹⁰ OHCHR, International Conference on National, regional and international mechanisms to combat impunity and ensure accountability under international law, Agenda (14–15 April 2019) ([link](#)).

⁸¹¹ European Parliament, “The Role of Non-EU National Human Rights Institutions in the Implementation of the UN Guiding Principles on Business and Human Rights” (2012), p 20 ([link](#)).

⁸¹² See, e.g., Brochure of the Ministry of Economic Development of the Russian Federation: International Standards of Responsible Business Conduct OECD. Recommendation for Russian Companies (2020) ([link](#)); GOST-R ISO 26000-2012. National Standard of the Russian Federation. Guidance on Social Responsibility (2012) (implemented for voluntary use by a decree of the Federal Agency for Technical Regulation and Metrology).

Russian Union of Industrialists and Entrepreneurs.⁸¹³ Best business practices are also developed through educational programs and the encouragement of “nonfinancial” reporting by businesses.⁸¹⁴

601. In addition, the Presidential Council for Civil Society and Human Rights (which advises the Russian President) participates in UN initiatives and discussions on business and human rights,⁸¹⁵ promotes the UNGPs in Russia,⁸¹⁶ and encourages the government to adopt an action plan on human rights.⁸¹⁷ At the regional level, local governments may enter into tripartite agreements with local employer associations and trade unions, which impose social responsibilities on employers.⁸¹⁸
602. Recently, Russia has been involved in the UN’s OEIWG on Transnational Corporations and Other Business Enterprises with Respect to Human Rights. Russia has consistently suggested, among other things, (i) limiting the scope of any instrument to the activities of transnational corporations, (ii) ensuring that its provisions do not duplicate other international legal instruments or contradict national legislation, and (iii) that any BHR instrument might be more efficient in the form of recommendations or guidelines.⁸¹⁹

L. Kingdom of Saudi Arabia

(1) Court Decisions

603. It appears that courts and tribunals in Saudi Arabia have not referred to the UNGPs in judicial decisions.

⁸¹³ See, e.g., Social Charter of the Russian Business adopted by the Russian Union of Industrialists and Entrepreneurs (2008) ([link](#)).

⁸¹⁴ See, e.g., Standards of the Trade and Industry Chamber of the Russian Federation: Social Reporting of Businesses and Organisations Registered in the Russian Federation General Provisions (2006) ([link](#)); Russian Union of Industrialists and Entrepreneurs: Basic Indicators of Performance. Recommendations for Using in Management and Non-Financial Corporate Reporting (2008) ([link](#)).

⁸¹⁵ See, e.g., Presidential Council for Civil Society and Human Rights, “Tatiana Margolina Participates in the UN Forum on ‘Business and Human Rights’ (2 December 2019) ([link](#)).

⁸¹⁶ See, e.g., Presidential Council for Civil Society and Human Rights, “Head of CHR Participates in the Section ‘Business and Human Rights’ at the National Forum on Sustainable Development” (22 May 2019) ([link](#)); “Head of CHR Mikhail Fedotov Participates in a Round Table ‘Russian Business and Human Rights’” (20 December 2018) ([link](#)).

⁸¹⁷ See, e.g., RIA Novosti, “President Putin Supported the Idea of Developing Action Plan for Human Rights” (11 December 2018) ([link](#)); RIA Novosti, “Government Rejects Development of the Human Rights Action Plan” (10 July 2019) ([link](#)).

⁸¹⁸ See, e.g., Tripartite Agreement for 2019–2021 between Moscow Government, Moscow Association of Trade Unions and Moscow Association of Employers (1 October 2018) ([link](#)).

⁸¹⁹ OHCHR, Fourth (15–19 October 2018), Fifth (14–18 October 2019) and Sixths (26–30 October 2020) sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights,” ([link](#)).

(2) NCP Decisions

604. As Saudi Arabia is not an OECD member and has not committed to the OECD Guidelines, it has not set up an NCP.

(3) Other Developments

605. Over the last few years Saudi Arabia has initiated several legal reforms that will likely strengthen the business and human rights environment in the country.
606. In 2017 the Saudi Capital Market Authority adopted a set of corporate governance regulations based on the Saudi Companies Law. The regulations include a requirement that companies establish a policy that “guarantees a balance between its objectives and those of the community for purposes of developing the social and economic conditions of the community”.⁸²⁰ The principles also require company boards to propose social initiatives, link company performance with the initiatives, and disclose social initiative plans to employees, the community, and in periodic reports.⁸²¹
607. Saudi Arabia has recently made changes to its *kafala* system, aimed at easing restrictions for some foreign workers. On 4 November 2020, the Ministry of Human Resources and Social Development launched a labor reform initiative, which aimed to “enhance the contractual relationship between workers and employers”, and “support the Ministry’s vision of establishing an attractive job market, empowering and developing labor competencies and developing the work environment in the Kingdom”. The initiative included digital documentation of contracts, job mobility, eased the exit and re-entry visa issuance procedure for all expatriate workers in the private sector, and included “specific control measures put in place to take into account the rights of both parties of the contractual relationship”. The Saudi Press Agency noted that the initiative will enhance the competitiveness of the Saudi labor market, reduce disputes, increase productivity within the private sector, and “elevates the labor regulations to international practices in line with signed labor conventions”.⁸²² The reform came into effect on 14 March 2021.⁸²³
608. Saudi Arabia’s Human Rights Commission accepts complaints from victims of human rights abuses, conducts reviews of prisons, and has a mandate to advise the government about drafting, signing and disseminating information about international treaties and human rights standards.⁸²⁴

⁸²⁰ Capital Market Authority, Corporate Governance Regulations, art. 87.

⁸²¹ Capital Market Authority, Corporate Governance Regulations, art. 88.

⁸²² Saudi Press Agency, “Ministry of Human Resources and Social Development Launches Labor Reforms for Private Sector Workers” (4 November 2021).

⁸²³ Alarabiya News, “Saudi Arabia’s Labor reforms to ‘kafala’ sponsorship system come into effect” (14 March 2021).

⁸²⁴ Statute of Human Rights Commission of the Saudi Arabia at art. 5 ([link](#)).

M. Republic of Tunisia

(1) Court Decisions

609. There do not appear to be any judicial or quasi-judicial decisions that apply or reference the UNGPs in Tunisia.

(2) NCP Decisions

610. In 2018, Tunisia formally re-established its NCP by decision of the Minister for Development, Investment and International Cooperation.⁸²⁵ The NCP has a tripartite structure comprised of representatives from the State, businesses, and trade unions.⁸²⁶ While no complaints have been submitted to Tunisia's NCP, Tunisia has supported the NCPs of the U.S. and France in two separate instances.⁸²⁷

(3) Other Developments

611. The Tunisian government and civil society have made efforts to engage with BHR best practices, particularly following the civil unrest in Tunisia in late 2010 that sparked the Arab Spring. For instance, the Tunisian government, the ILO and trade union groups signed a Memorandum of Agreement for the implementation of the Decent Work Country Programme 2017-2022.⁸²⁸ One of the stated priorities is a global reform of social protection in Tunisia.⁸²⁹

N. Republic of Turkey

(1) Court Decisions

612. The Turkish judiciary has not yet engaged in an analysis of the UNGPs. Turkish courts have, however, recognized businesses' human rights obligations pursuant to binding treaties, as well as to other nonbinding principles.
613. For example, in a 2017 decision, the Court of Cassation found that a company violated its nondiscrimination obligations, noting that discrimination is prohibited under Turkish law, and recognizing (without applying) similar prohibitions in the UDHR, ECHR, European

⁸²⁵ OECD, "Annual Report on the OECD Guidelines for Multinational Enterprises 2019" (2020), p 38 ([link](#)).

⁸²⁶ *Id.*, p 37.

⁸²⁷ OECD Database, "Health and safety concerns in Egypt and Tunisia" (14 March 2013) ([link](#)); OECD Database, "Perenco, and Avocats Sans Frontières (ASF) and I Watch" (26 July 2018) ([link](#)).

⁸²⁸ ILO, "One more step towards decent work in Tunisia" (21 July 2017) ([link](#)).

⁸²⁹ *Id.*

Social Charter, Treaty Establishing the European Economic Community, as well as the ILO Conventions and Recommendations.⁸³⁰

614. In 2016, Turkey established the Human Rights and Equality Institution of Turkey (“**TIHEK**”), a national human rights institution that has the authority to decide victims’ applications and impose fines in relation to the prohibition of discrimination, and to review cases of human rights violations and discrimination *ex officio*. The TIHEK likewise has not referred to the UNGPs, although it has decided complaints against private companies, particularly in discrimination cases, where it has looked to international human rights instruments to determine the applicable legal framework.⁸³¹

(2) NCP Decisions

615. Turkey has established an NCP, which is based in the Ministry of Industry and Technology. Complaints are submitted to the Ministry’s General Directorate of Incentives and Foreign Investment.⁸³²
616. While the Turkish NCP has increasingly offered its good offices to disputing parties for mediation, it has not yet decided a complaint on its merits. Most recently, the Turkish NCP received a complaint filed by groups advocating for the rights of women fish processors in Senegal against a Turkish steel manufacturer, requesting that the NCP urge the company to comply with its OECD obligations after the company allegedly failed to adequately conduct due diligence to assess the impact of its planned mining and steel complex on land used by the fish processors.⁸³³ This complaint is currently pending.

⁸³⁰ Hukuk Dairesi, 23.1.2017, File No. 2016/2979, Decision No. 2017/506. The Court of Cassation has used the identical sentence identifying Turkey’s international obligations in at least 29 other decisions.

⁸³¹ See, e.g., TIHEK Decision No. 2018/97 (15 October 2018) (ECHR, European Council Directive of 27 November 2001 on establishing a general framework for equal treatment in employment and occupation); TIHEK Decision No. 2019/22 (9 April 2019) (CERD, ECHR); TIHEK Decision No. 2019/62 (12 November 2019) (CRPD); TIHEK Decision No. 2020/176 (11 August 2020) (UDHR, ICESCR, CEDAW, ILO Discrimination (Employment and Occupation) Convention (C111)); TIHEK Decision No. 2020/8 (14 January 2020) (ICESCR, CEDAW, ILO Discrimination (Employment and Occupation) Convention (C111), ILO Maternity Protection Convention (C183), Beijing Declaration and Platform for Action, “General Comments” of the UN bodies, decisions of the European Court of Human Rights).

⁸³² Republic of Turkey Ministry of Industry and Technology, “Specific Instance Review Procedure” ([link](#)).

⁸³³ OECD Watch, “LSD et al. v. Tosyali Holding Ltd” (28 August 2020).



(3) Other Developments

617. In the last few years Turkey has sought to promote greater business respect for human rights. Although Turkey has not yet drafted an NAP specific to business and human rights,⁸³⁴ in March 2021 President Erdoğan unveiled a Human Rights National Action Plan, which reported that the government is preparing national guidelines that take into consideration the UNGPs.⁸³⁵
618. Turkey's Capital Markets Board ("**CMB**") has encouraged respect for human rights among business enterprises through a set of corporate governance principles. For instance, in 2014, Turkey's CMB issued a Communiqué that outlined disclosure requirements for listed companies, including a set of Corporate Governance Principles that recognized that:
- (i) "Corporations shall be sensitive toward their social responsibilities and comply with regulations and ethical rules with respect to environment, consumers, public health;

⁸³⁴ Altug Ozgun & Atakan Gungordu, "Business & Human Rights Series: 02 An Overview of Turkish Legal Framework" ICLG (26 November 2020) ([link](#)).

⁸³⁵ Address by His Excellency President Recep Tayyip Erdoğan on the Occasion of the Announcement of the Human Rights Action Plan (2 March 2021).

- (ii) Corporations shall support and respect internationally recognized human rights; and
- (iii) Corporations shall combat any kind of corruption including embezzlement and bribery”.⁸³⁶

619. In October 2020, the Turkish CMB revised the Communiqué to provide that listed companies must report on their compliance with a set of “sustainability principles” in their annual reports, and explain any departures from these principles as well as the effect of this noncompliance on their environmental and social risk management.⁸³⁷ The framework of “sustainability principles” draws on the SDGs and includes the formulation of a “Corporate Human Rights and Employee Rights Policy” and compliance with the UDHR, ILO Conventions ratified by Turkey, and human rights and environmental legislation (with a particular emphasis on prohibition of discrimination). The framework also calls on companies to identify the international reporting standards they have adopted as well as the international organizations and principles of which they are members or signatories.⁸³⁸

⁸³⁶ Capital Markets Board of Turkey, The Communiqué on Corporate Governance (II-17.1), published in the Official Gazette (3 January 2014) numbered 28871, Section 3.5.2.

⁸³⁷ Capital Markets Board of Turkey, Sustainability Principles Compliance Framework ([link](#)); The Communiqué (II-17.1.a) Amending the Communiqué on Corporate Governance (II-17.1), published in the Official Gazette (2 October 2020) numbered 31262.

⁸³⁸ Capital Markets Board of Turkey, Sustainability Principles Compliance Framework ([link](#)).

IX. UNITED KINGDOM AND IRELAND

A. Overview

620. The UK was the first country to adopt an NAP in September 2013 and the government has continued to make new commitments in the BHR field. However, there has been a limited application of the UNGPs by the English courts and other quasi-judicial bodies.
621. Similarly, the Irish government has published an NAP and commissioned an independent review to highlight gaps in the BHR legislation and provide recommendations for improvement.

B. United Kingdom

(1) Court Decisions

622. A search of UK case law reveals that the UNGPs have never been referenced in a judgment issued by the courts of England and Wales or Scotland. However, the UNGPs are increasingly being cited by litigants before the UK courts.

(i) Vedanta

623. Possibly the first case in which the UNGPs have been cited before the English courts is *Dominic Liswaniso Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* (“**Vedanta**”). This claim was brought by 1,826 Zambian citizens who were allegedly affected by pollution and environmental damage caused by copper mining operations in Zambia. The claims were brought under common law rules of negligence and Zambian environmental statutes. The defendants were the Zambian company operating the mine, Konkola Copper Mines, and its UK-incorporated holding company, Vedanta Resources.



624. The case focused on whether the English court had jurisdiction over the claim. At first instance, the court found that the claimants could sue in England and Wales pursuant to Regulation (EU) No. 1215/2012 (“**Brussels Recast Regulation**”), which governs, among other things, questions of jurisdiction in civil and commercial matters within the European Union. This was because the claimants had established an arguable case that the UK-domiciled parent company had control over the relevant activities in Zambia.⁸³⁹ The defendants appealed this decision.
625. The claimants invoked the UNGPs before the Court of Appeal,⁸⁴⁰ in response to an argument that the claims constituted an abuse of the Brussels Recast Regulation. In their effort to show that the claims were not an abuse of EU law, the claimants referred to a 2015 EC document implementing the UNGPs, which re-affirms “access to the courts of EU Member States in actions against (parent) companies domiciled in the [EU]”.⁸⁴¹ The Court of Appeal upheld the first instance judgment, but made no reference to the UNGPs.
626. In the defendants’ subsequent appeal to the UK Supreme Court, the claimants again invoked the UNGPs, arguing that the common law should recognize that a parent company has responsibility for the acts and omissions of their subsidiaries abroad, especially when this relates to human rights and the environment. In this context, the claimants referred to the UNGPs as part of increasingly robust internationally agreed standards alongside the OECD Guidelines. The claimants argued that these internationally agreed standards reflect growing consensus about the appropriate level of accountability of parent companies exercising substantial control over subsidiaries engaged in activities that may harm the environment.⁸⁴²
627. The UK Supreme Court dismissed the defendants’ appeal and affirmed the common law position that it is “well arguable” that a parent company may engage in a “sufficient level of intervention [...] in the conduct of operations” of its foreign subsidiary such as potentially to establish a legal duty to individuals abroad who are injured as a result of the activities of that foreign subsidiary.⁸⁴³ The judgment made no reference to the UNGPs.

⁸³⁹ *Lungowe v. Vedanta Resources plc* [2016] EWHC 975 (TCC).

⁸⁴⁰ *Lungowe v. Vedanta Resources plc* [2017] EWCA Civ 1528.

⁸⁴¹ European Commission, “Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights — State of Play” (14 July 2015), p 25 ([link](#)).

⁸⁴¹ *Lungowe v. Vedanta Resources plc* [2016] EWHC 975 (TCC).

⁸⁴¹ *Lungowe v. Vedanta Resources plc* [2017] EWCA Civ 1528.

⁸⁴¹ European Commission, “Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights — State of Play” (14 July 2015), p 25 ([link](#)).

⁸⁴² *Lungowe v. Vedanta Resources plc* [2019] UKSC 20, at [61].

⁸⁴³ *Lungowe v. Vedanta Resources plc* [2019] UKSC 20, at [61].

(ii) *Okpabi v. RDS*

628. The UNGPs also featured in *His Royal Highness Okpabi v. Royal Dutch Shell Plc* (“**Okpabi**”).⁸⁴⁴ These claims were initiated by members of the Ogale and Bille communities in Nigeria in relation to oil pollution that allegedly affected their land and waters, under common law rules of tort. The defendants were Royal Dutch Shell (“**RDS**”), a holding company registered in the UK and the ultimate parent company of the Shell group of companies, and the Shell Petroleum Development Company of Nigeria (“**SPDC**”), a Nigerian subsidiary carrying out oil exploration activities in Nigeria. The proceedings, to date, concern the defendants’ challenge to the jurisdiction of the English courts.
629. The first instance court found that the English courts did not have jurisdiction over the claims.⁸⁴⁵ The High Court distinguished this case from *Vedanta* including on the basis that “the relationship between [RDS] and the many thousands of claimants in the Niger Delta is not a close one” and “the notion of SPDC relying upon RDS for anything in relation to its operations in Nigeria is somewhat fanciful”.⁸⁴⁶
630. The claimants invoked the UNGPs before the High Court by reference to the same EC document mentioned above in *Vedanta*,⁸⁴⁷ to advance the argument that claimants should have access to the courts of EU Member States in claims against parent companies. The judgment made no reference to the UNGPs.
631. The claimants’ appeal against the High Court judgment was dismissed,⁸⁴⁸ as the Court of Appeal found that there was no evidence demonstrating that RDS had exercised material control over SPDC’s operations.⁸⁴⁹ The Court of Appeal judgment did not refer to the UNGPs.
632. In their subsequent appeal to the UK Supreme Court,⁸⁵⁰ the claimants invoked the UNGPs, as reflected in the UK’s 2013 NAP. They argued that the NAP affirmed the UK government’s expectation that businesses operating from its territory should adhere to UNGPs’ standards, regardless of where they conduct their activities. The claimants also argued that the UNGPs reflect a prevailing trend toward holding parent companies accountable for the harmful acts of their subsidiaries.
633. Several NGOs intervened in the appeal in order to make submissions about the relevance of soft law. In support of the claimants’ appeal, the University of Essex’s submission stated that:

⁸⁴⁴ Debevoise is counsel of record to the defendants in these proceedings.

⁸⁴⁵ *His Royal Highness Okpabi v. Royal Dutch Shell Plc* [2017] EWHC 89 (TCC).

⁸⁴⁶ *His Royal Highness Okpabi v. Royal Dutch Shell Plc* [2017] EWHC 89 (TCC), [114], [116]

⁸⁴⁷ European Commission, “Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights—State of Play” (14 July 2015) ([link](#)).

⁸⁴⁸ B. Rigby, “Human rights and legal risks” ICLG (12 June 2018) ([link](#)).

⁸⁴⁹ *Okpabi v. Royal Dutch Shell plc* [2018] EWCA Civ 191, ¶ 121 ([link](#)); Andrew Sanger, “Transnational Corporate Responsibility in Domestic Courts: Still out of Reach?,” *AJIL Unbound* 113 (2019) ([link](#)).

⁸⁵⁰ *Okpabi v. Royal Dutch Shell plc* [2021] UKSC 3.

“The UN Guiding Principles on Business and Human Rights have been embraced by the UK government as indicative of the standard of conduct expected by corporate actors. ... We think greater clarity is needed regarding when and how international standards, can, do, and should contribute to an analysis of the existence of a duty of care and/or conduct that gives rise of a breach of an existing duty”.⁸⁵¹ The OECD Guidelines were also mentioned in relation to the argument that parent companies are responsible for the conduct of their subsidiaries abroad.⁸⁵²

634. Similarly, submissions by the International Commission of Jurists and NGO Corporate Responsibility (CORE) submitted that, by publicly committing to the UNGPs, RDS had held itself out as “adhering to international standards that would require it to monitor, control and mitigate the conduct of its subsidiaries” and “exercising a degree of supervision and direction over SPDC [which] supports the proposition that RDS has (at least arguably) assumed responsibility for monitoring and controlling SPDC, such as to give rise to a duty of care”.⁸⁵³
635. For their part, the defendants argued that although the UNGPs set out guidance for governments and businesses when dealing with important societal issues, international standards were not strictly relevant to the appeal and, in any case, did not form part of English or Nigerian common law. They also argued that treating parent and subsidiary companies as a single enterprise, as urged by the claimants and NGOs, was at odds with settled common law principles.
636. The UK Supreme Court issued its judgment in this case on 12 February 2021.⁸⁵⁴ The Court allowed the claimants’ appeal and the case will now continue on its merits. However, yet again, the judgment did not make any reference to the UNGPs.

(iii) *Kalma & Ors*

637. Finally, the case *Kadie Kalma & Ors v. African Minerals Limited, African Mineral (SL) Limited, Tonkolili Iron Ore (SL) Limited* (“**Kalma**”) illustrates the courts’ approach to other international BHR standards. The claims were brought by 142 individuals who alleged that they had been harmed by the Sierra Leonean Police (“**SLP**”) during two major outbreaks of unrest and violence connected to the defendants’ iron ore mine. Although the alleged acts took place in Sierra Leone, the English court agreed to hear the case.
638. In advancing the case that the defendant companies should be held responsible for the actions of the SLP, the claimants relied on a number of international BHR norms and standards. The first instance judge noted that the defendant had publicly committed to the Equator Principles, the UN Global Compact and the Voluntary Principles on Security and Human Rights

⁸⁵¹ University of Essex, “Rule 15 submission to the Supreme Court by Concerned Academics and Practitioners regarding *Okpabi and others v Royal Dutch Shell Plc and another*” UKSC 2018/0068” (4 May 2018).

⁸⁵² Rule 15 submission to Supreme Court of the United Kingdom by Amnesty International.

⁸⁵³ Written submissions of the International Commission of Jurists and the Corporate Responsibility (CORE) Coalition Limited, dated 29 May 2020, ¶ 35.4 (cf. *Vedanta*, §53) ([link](#)).

⁸⁵⁴ *Okpabi v. Royal Dutch Shell plc* [2021] UKSC 3 ([link](#)).

(“VPSHR”),⁸⁵⁵ the latter being a set of guidelines designed to minimize human rights abuses in extractive activities.⁸⁵⁶ However, the High Court found, among other things, that these international standards did not operate to fix the defendants with liability and that the facts did not provide a basis to attribute liability for the actions of the local police to the defendants.

639. The claimants’ appeal was dismissed by the Court of Appeal.⁸⁵⁷ Notably, the Court stressed the “general” nature of the BHR standards on which the claimants relied, noting for example that nothing in the VPSHR make companies generally liable for the unlawful acts of the police forces of the host countries in which they are operating.⁸⁵⁸



(2) NCP Decisions

640. This section considers the key UK NCP decisions of the 84 decisions available on the OECD Watch’s online case database.⁸⁵⁹ It considers these decisions in the following time periods: (i) 2000-2010, from the establishment of the UK NCP up to the year preceding the publication of the UNGPs; and (ii) 2011-2020, from the year of the publication of the UNGPs to 2020.
641. During the period which pre-dated the UNGPs, only two 2010 complaints included references to the nascent UNGPs. Since 2011, reference to the UNGPs has increased, to support arguments primarily based on the OECD Guidelines. The 2019 *Focus v. Ascent Resources plc* complaint⁸⁶⁰ is an exception, where the complainant expressly refers to the UNGPs.

⁸⁵⁵ *Kalma & Ors v. African Minerals Ltd & Ors* [2018] EWHC 3506 (QB), ¶ 309 ([link](#)).

⁸⁵⁶ The Voluntary Principles on Security and Human Rights ([link](#)).

⁸⁵⁷ *Kalma & Ors v. African Minerals Ltd & Ors* [2020] EWCA Civ 144 ([link](#)).

⁸⁵⁸ *Kalma & Ors v. African Minerals Ltd & Ors* [2020] EWCA Civ 144, ¶ 151 ([link](#)).

⁸⁵⁹ OECD Watch, National Contact Point United Kingdom ([link](#)).

⁸⁶⁰ *Focus v. Ascent Resources plc* (November 2019) ([link](#)).

(i) NCP Decisions (2001-2010)

642. There were two 2010 complaints in which the UNGPs were referenced, both of which were initiated by the same complainant, the European Center for Constitutional and Human Rights (“ECCHR”): (i) *ECCHR, Sherpa & UGF v. ICT Cotton*,⁸⁶¹ and (ii) *ECCHR, Sherpa & UGF v. Cargill Cotton*.⁸⁶² The ECCHR issued a complaint relating to the alleged use of child labor in the cotton industry in Uzbekistan, the ECCHR argued that the only adequate measure to conclude the complaint would be for the company to cease doing business in Uzbekistan, and that this was supported by the UNGPs Principle 19.⁸⁶³ Principle 19 provides that “[i]n order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes and take appropriate action”. Commentary on the Principle states that “[w]here a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm”.⁸⁶⁴ Both complaints were concluded by agreement between the parties.⁸⁶⁵

“Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm”.

(ii) NCP Decisions (2011 onwards)

643. Since 2011, there has been an emerging trend to include references to the UNGPs in complaints before the UK NCP, in support of arguments made under Chapter IV of the OECD Guidelines.⁸⁶⁶

⁸⁶¹ *ECCHR, Sherpa & UGF v. ICT Cotton* (December 2010) ([link](#)).

⁸⁶² *ECCHR, Sherpa & UGF v. Cargill Cotton* (December 2010) ([link](#)).

⁸⁶³ *ECCHR, Sherpa & UGF v. ICT Cotton* Evaluation (May 2013) ([link](#)) and *ECCHR, Sherpa & UGF v. Cargill Cotton* (May 2013) ([link](#)).

⁸⁶⁴ UNGPs Principle 19.

⁸⁶⁵ *ECCHR, Sherpa & UGF v. ICT Cotton*, Final Statement (11 July 2011) and *ECCHR, Sherpa & UGF v. Cargill Cotton*, Final Statement (11 July 2011).

⁸⁶⁶ OECD “2011 Update of the OECD Guidelines for Multinational Enterprises” (25 May 2011), ¶¶ 31–34, ([link](#)).

644. The UNGPs were referred to in the following cases from this period:

- (i) In *Amnesty International and Friends of the Earth v. Shell*,⁸⁶⁷ a complaint relating to the alleged impact of the oil industry on the environment and human rights in the Niger Delta, the complainants referenced UNGPs Principle 17⁸⁶⁸ as part of a wider discussion relating to a report prepared by the United Nations Environmental Programme on pollution.
- (ii) In *IAC & WDM v. GCM Resources plc*,⁸⁶⁹ a complaint relating to a coal mine which allegedly would displace tens of thousands of people in and around Bangladesh, the NCP made references to the UNGPs. In its Final Statement,⁸⁷⁰ the NCP included the UNGPs as part of the international standards to which the company needed to commit.⁸⁷¹
- (iii) In *Privacy International et al. v. Gamma International*,⁸⁷² a complaint related to the alleged supply of surveillance equipment to police and security services in Bahrain, the NCP stated in its Initial Assessment that “[t]he NCP notes that the UN Guiding Principles on Business and Human Rights make distinctions between the responsibilities of states and businesses that will be particularly relevant in a case where a State is the customer of a business. The NCP does not consider that these distinctions affect its Initial Assessment decision, but will consider them as part of any further examination of the issues”.⁸⁷³ However, the NCP failed to set out what that further examination might be. Although the UK NCP was unable to verify the allegation that Gamma International was linked to human rights abuses in Bahrain, it recommended that Gamma International participate in industry best practice schemes and discussions, as well as reconsider its communication strategy to offer transparent and consistent engagement.
- (iv) In *Reprieve v. British Telecommunications plc*,⁸⁷⁴ a complaint concerning telecommunications services provided to a U.S. military communications base in the UK that allegedly supports operations by unmanned aircraft (drones) from the U.S. base in Djibouti, the complainant included a reference to the UNGPs by stating “Chapter IV elaborates on the general principles set out in Chapter II. This Chapter

⁸⁶⁷ *Amnesty International and Friends of the Earth v. Shell* (December 2011) ([link](#)).

⁸⁶⁸ UNGPs Principle 17 raised in the Complaint in the context of the UNEP report showing that “*Shell has failed to act with due diligence in relation to the actual and potential human rights impact of the company’s operations*”.
Amnesty International and Friends of the Earth v. Shell, Complaint (January 2011), p 27 ([link](#)).

⁸⁶⁹ *IAC & WDM v. GCM Resources plc*, Final Statement (November 2014), ¶ 8 ([link](#)).

⁸⁷⁰ *IAC & WDM v. GCM Resources plc*, Final Statement (November 2014), ¶¶ 54–55 ([link](#)).

⁸⁷¹ *IAC & WDM v. GCM Resources plc*, Final Statement (November 2014), ¶¶ 65–72 ([link](#)).

⁸⁷² *Privacy International et al. v. Gamma International* (February 2013) ([link](#)).

⁸⁷³ *Privacy International et al. v. Gamma International*, Initial Assessment (June 2013) ¶ 27 ([link](#)).

⁸⁷⁴ *Reprieve v. British Telecommunications plc* (July 2013) ([link](#)).

draws on the UN Framework for Business and Human Rights and is in line with the Guiding Principles for its Implementation (‘UNGPs’).⁸⁷⁵

- (v) In *WWF v. SOCO*,⁸⁷⁶ a complaint concerning alleged oil exploration in Virunga National Park which is prohibited under international agreements and DRC law, the complainant referred to the UN Principles for Responsible Contracts, which is an addendum to the UNGPs,⁸⁷⁷ UNGPs Principle 18 (which provides that “[i]n order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships”),⁸⁷⁸ and made detailed submissions on UNGPs Principle 17 (which provides for human rights due diligence).⁸⁷⁹ In contrast, the UNGPs were only referenced in passing by the NCP in its Initial Assessment: “[b]oth parties (and the NCP) note the advice in the UN Guiding Principles that human rights due diligence should occur at an early stage and develop alongside a company’s activities”.⁸⁸⁰
- (vi) In *Lawyers for Palestinian Human Rights v. G4S*,⁸⁸¹ a complaint concerning certain facilities and operations in Israel and along the Separation Barrier in which security equipment and services provided by G4S were allegedly used in breach of international human rights laws and principles, the complainant issued a press release after the NCP released its Final Statement, in which it cited to the UNGPs as the basis for the OECD Guidelines: “[t]he human rights chapter (Chapter IV) of the OECD Guidelines, which LPHR’s complaint draws on, is firmly based on the United Nations Guiding Principles on Business and Human Rights (UNGPs)”.⁸⁸²
- (vii) In *UK Lawyers for Israel v. PwC*,⁸⁸³ the complaint contended that PwC had “failed to convey to the organisations for whom it prepares the audit report that the PA [Palestinian Authority] is consciously expending funds on the salaries of terrorists and their families, with the deliberate aim and/or effect of promoting and glorifying acts of terrorism and thereby (i) harming the peace process between Israel and Palestine, as well as (ii) the prospects of Palestinian citizens to establish flourishing civil institutions”.⁸⁸⁴ The complaint references the UK government’s publication

⁸⁷⁵ *Reprieve v. British Telecommunications plc*; Complaint to NCP (July 2013), ¶ 6.5 ([link](#)).

⁸⁷⁶ *WWF v. SOCO* (October 2013) ([link](#)).

⁸⁷⁷ *WWF v. SOCO*, Complaint filed with UK NCP (October 2013), Section 5.2 ([link](#)).

⁸⁷⁸ *WWF v. SOCO*, Complaint filed with UK NCP (October 2013), Section 5.3 ([link](#)).

⁸⁷⁹ *WWF v. SOCO*, Complaint filed with UK NCP (October 2013), Section 5.3 ([link](#)).

⁸⁸⁰ *WWF v. SOCO*, NCP Initial Assessment (February 2014) ¶ 27 ([link](#)).

⁸⁸¹ *Lawyers for Palestinian Human Rights v. G4S* (November 2013) ([link](#)).

⁸⁸² *Lawyers for Palestinian Human Rights*; Press Release (July 2016), ¶ 8 ([link](#)).

⁸⁸³ *UK Lawyers for Israel v. PwC* (December 2016) ([link](#)).

⁸⁸⁴ *UK Lawyers for Israel v. PwC*, Complaint filed with the NCP (December 2016), ¶ 73 ([link](#)).

“Good Business: Implementing the UN Guiding Principles on Business and Human Rights”, published in September 2013.⁸⁸⁵

- (viii) In *Human Rights Law Centre and Raid v. G4S*,⁸⁸⁶ the complaint “allege[d] that G4S Australia Pty Ltd (G4S) has been responsible for significant breaches of the OECD Guidelines in relation to conditions and alleged abuse of detainees at the Manus Island Regional Processing Centre”.⁸⁸⁷ The complaint references G4S’s commitment to applying the UNGPs across all of its businesses.⁸⁸⁸
- (ix) In *BIRD v. HPG*, *BIRD v. Jaguar Land Rover*, and *BIRD v. Rolex*,⁸⁸⁹ the Bahrain Institute for Rights and Democracy (“**BIRD**”) filed three complaints with the UK NCP alleging that the companies had failed to take into account the possible human rights impacts of its business relationship with the Bahraini government as a sponsor of the Royal Windsor Horse Show and did not adopt appropriate due diligence process. BIRD made references to UNGPs Principles 17 and 18 to provide context to its Chapter IV claims.⁸⁹⁰ In all three Initial Assessments, the NCP referred to the UNGPs but only in relation to the complainant’s submissions.⁸⁹¹
- (x) In *IDI, EC, and LICADHO v. Bonsucro*,⁸⁹² the complainants alleged that Bonsucro failed to hold a member company, Mitr Phol, accountable after the Thai sugar giant “grabbed” the land of 700 Cambodian families, leaving them homeless and destitute. The UNGPs were referenced throughout the submissions to support the Chapter IV claim. Specifically, the complaint included references to UNGPs Principle 11 (the responsibility of enterprises to respect human rights); UNGPs Principles 17 to 21 (referring to the due diligence that companies should carry out when assessing actual and potential human rights impacts); and UNGPs Principles 30 and 31 (outlining

⁸⁸⁵ *UK Lawyers for Israel v. PwC*, Complaint filed with the NCP (December 2016), ¶ 141 ([link](#)): “Attention is also drawn to the UK Government’s Publication “Good Business: Implementing the UN Guiding Principles on Business and Human Rights” (“Good Business”), published September 2013. In that document, the UK Government reiterates its commitment to the Guidelines and also to the facilitation of dispute resolution, in particular by elevating the risk of causing or contributing to gross human rights abuses by MNEs to a “legal compliance issue”, rather than as a mere moral obligation (Good Business, p13)”).

⁸⁸⁶ *Human Rights Law Centre and Raid v. G4S* (September 2014) ([link](#)).

⁸⁸⁷ *Human Rights Law Centre and Raid v. G4S*, Complaint filed with the NCP (September 2014), p 4 ([link](#)).

⁸⁸⁸ *Human Rights Law Centre and Raid v. G4S*, Complaint filed with the NCP (September 2014), p 5 ([link](#)): “G4S is committed to applying the UN Guiding Principles on Business and Human Rights (2011) across all of its businesses, and those principles are adopted as the basis for human rights monitoring and reporting throughout G4S”.

⁸⁸⁹ *BIRD v. Rolex* (April 2018) ([link](#)).

⁸⁹⁰ *BIRD v. HPG*, Complaint Filed with NCP (April 2018), ¶¶ 68–69 ([link](#)); *BIRD v. Jaguar Land Rover*, Complaint Filed with NCP (April 2018), ¶¶ 68–69 ([link](#)); *BIRD v. Rolex*, Complaint Filed with NCP (April 2018) ¶¶ 68–69 ([link](#)).

⁸⁹¹ *BIRD v. HPG*, Initial Assessment (8 November 2018), ¶ 28 ([link](#)); *BIRD v. Rolex*, Initial Assessment (8 November 2018), ¶ 28 ([link](#)); *BIRD v. Jaguar Land Rover*, Initial Assessment (8 November 2018), ¶ 28 ([link](#)).

⁸⁹² *IDI, EC, and LICADHO v. Bonsucro* (March 2019) ([link](#)).

standards for grievance mechanisms and calling upon industry multi-stakeholder and other collaborative initiatives to provide effective grievance mechanisms).⁸⁹³

- (xi) In *Focus v. Ascent Resources plc*,⁸⁹⁴ the complaint concerned hydraulic fracturing activities by Ascent Resources plc in Slovenia. The complainants referred to UNGPs Principles 12, 13, 15, and 23 to allege that Ascent Resources plc has failed to comply with the OECD Guidelines in relation to environmental and health hazards, lack of due diligence, poor engagement with stakeholders, and improper lobbying activities in Slovenia.⁸⁹⁵
- (xii) In *Lawyers for Palestinian Human Rights v. J.C. Bamford Ltd.*,⁸⁹⁶ a complaint related to the JCB's alleged sale of heavy machinery products to Israel's military authorities and private contractors for use in demolitions and settlement-related construction in Palestine, the complainant relied upon the commentary to UNGPs Principle 25,⁸⁹⁷ as well as the human rights chapter of the OECD Guidelines (Chapter IV).⁸⁹⁸
- (xiii) In *RAID et al. v. Glencore UK*,⁸⁹⁹ a complaint concerning Glencore UK Ltd's oil operations at the Badila oilfield in southern Chad and an alleged toxic wastewater spill on 10 September 2018, the complainant demanded that Glencore implement a stakeholder engagement mechanism in accordance with UNGPs Principle 21.⁹⁰⁰

(3) Other Developments

645. The UK has taken active steps to implement the UNGPs. It was the first country to adopt an NAP in September 2013, which adopts the same three-pillar structure as the UNGPs, outlines how the UK plans to improve access to remedies for human rights abuses resulting from business activity, and has resulted in new business and human rights obligations within the UK.⁹⁰¹ It was subsequently updated in 2016.⁹⁰² The UK government has since pledged to publish an annual report on BHR developments at both the national and corporate level.⁹⁰³

⁸⁹³ *IDI, EC, and LICADHO v. Bonsucro*, Initial Assessment (September 2019), ¶ 27 ([link](#)).

⁸⁹⁴ *Focus v. Ascent Resources plc* (November 2019) ([link](#)).

⁸⁹⁵ *Focus v. Ascent Resources plc*, Complaint filed with the NCP (November 2019), ¶ 31 ([link](#)).

⁸⁹⁶ *Lawyers for Palestinian Human Rights v. J.C. Bamford Ltd* (December 2019) ([link](#)).

⁸⁹⁷ *Lawyers for Palestinian Human Rights v. J.C. Bamford Ltd*, Complaint filed with NCP (December 2019), Section 11.3 ([link](#)).

⁸⁹⁸ *Lawyers for Palestinian Human Rights*; Press release issued at acceptance of complaint (October 2020), ¶ 9 ([link](#)).

⁸⁹⁹ *RAID et al. v. Glencore UK* (September 2020) ([link](#)).

⁹⁰⁰ *RAID et al. v. Glencore UK*, Complaint filed with the NCP (September 2020), p 42 ([link](#)).

⁹⁰¹ "State national action plans on Business and Human Rights", Office of the United Nations High Commissioner for Human Rights ([link](#)).

⁹⁰² UK Government "Good Business: Implementing the UN Guiding Principles on Business and Human Rights: Updated May 2016" (May 2016), pp 21–22 ([link](#)).

⁹⁰³ UK Government "Good Business: Implementing the UN Guiding Principles on Business and Human Rights: Updated May 2016" (May 2016), pp 24 ([link](#)).

646. The introduction of the Modern Slavery Act 2015⁹⁰⁴ represented a material step in the UK's fulfilment of Pillar I of the UNGPs. The Modern Slavery Act obliges organizations to publish a statement outlining the steps that they are taking to ensure that their organization and supply chains are free from modern slavery. The Companies Act 2006 was also amended in 2013. Under Section 414, companies must prepare a strategic report, including information about "environmental matters (including the impact of the company's business on the environment)" and "social, community and human rights issues", "including information about any policies of the company in relation to those matters and the effectiveness of those policies".⁹⁰⁵ The UK government is also: (i) implementing the OECD "Common Approaches" to encourage more thorough environmental and social due diligence; (ii) raising awareness of the Voluntary Principles Initiative, a collaboration between governments, NGOs and multinational extractive companies, offering guidance on responsible human rights practices in high-risk and conflict-affected areas; and (iii) developing partnerships with other countries implementing the UNGPs.⁹⁰⁶
647. In 2017, the UK Joint Committee on Human Rights released a report entitled "*Human Rights and Business 2017: Promoting responsibility and ensuring accountability*", calling for new legal obligations, greater enforcement and a more transparent and accessible route to justice.⁹⁰⁷ One of the report's primary recommendations, which is yet to be adopted, is the creation of a criminal offense of "failure to prevent human rights abuses" similar to the offences contained in the Bribery Act 2010.⁹⁰⁸ The UK government has made amendments to broaden the scope of certain statutory instruments, namely the Proceeds of Crime Act 2002⁹⁰⁹ and the Sanctions and Anti-Money Laundering Act 2018,⁹¹⁰ to capture human rights abuses. In 2020, the British Institute of International and Comparative Law proposed a civil right of action for human rights abuses.⁹¹¹ The report also called for the government to better equip the UK NCP to deal with apparent breaches of human rights.⁹¹²

⁹⁰⁴ Modern Slavery Act (2015) ([link](#)).

⁹⁰⁵ Companies Act (2006), s. 414C. ([link](#))

⁹⁰⁶ UK Government, "UK National Action Plan on implementing the UN Guiding Principles on Business and Human Rights: progress update, May 2020" (27 May 2020) ([link](#)).

⁹⁰⁷ Joint Committee on Human Rights, "Human Rights and Business 2017: Promoting responsibility and ensuring accountability" (4 April 2017) ([link](#)).

⁹⁰⁸ Joint Committee on Human Rights, "Human Rights and Business 2017: Promoting responsibility and ensuring accountability" (4 April 2017) ([link](#)).

⁹⁰⁹ Proceeds of Crime Act (2002), Ch 3 ([link](#)).

⁹¹⁰ Sanctions and Anti-Money Laundering Act (2018), Magnitsky amendment ([link](#)).

⁹¹¹ British Institute of International and Comparative Law, "A UK Failure to Prevent Mechanisms for Corporate Human Rights, Harms" (11 February 2020) ([link](#)).

⁹¹² Joint Committee on Human Rights, "Human Rights and Business 2017: Promoting responsibility and ensuring accountability" (4 April 2017) ([link](#)).

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C. Ireland

(1) Court Decisions

648. There are no Irish court decisions which referred to the UNGPs. The Irish courts do not appear to have dealt with BHR issues more generally.

(2) NCP Decisions

649. The Irish NCP has published five complaints. None of the complaints make reference to the UNGPs, instead focusing on the provisions of the OECD Guidelines and other sources of international law.

(3) Other Developments

650. In 2014, during the 26th Session of the UNHRC the Irish government stated that “Ireland is strongly committed to the UN Guiding Principles on business and human rights and to supporting the work of the UN Working Group on human rights and transnational corporations and other enterprises. In the three short years since the unanimous endorsement of the UN Guiding Principles by the UNHRC, much has been achieved. However there is a lot more to do”.⁹¹³
651. These efforts culminated in the Irish government’s publication of its NAP, the National Plan on Business and Human Rights 2017-2020, in November 2017.⁹¹⁴ The Irish NAP “demonstrates in a clear, tangible way this government’s commitment to promoting responsible business practice at home and overseas and was developed ... in close cooperation with other government departments, state agencies, business enterprises and civil society organisations”.⁹¹⁵

⁹¹³ Human Rights Council, “26th Session: Ireland—Explanation of Vote: Elaboration: of international legally binding instrument on TNCs and Other Business Enterprises with respect to human rights,” ([link](#)).

⁹¹⁴ Government of Ireland, “National Plan on Business and Human Rights 2017–2020,” 2017, ([link](#)).

⁹¹⁵ Government of Ireland, “National Plan on Business and Human Rights 2017–2020,” 2017, p 5, ([link](#)).

652. The aim of the Irish NAP is to promote responsible business practices in Ireland and overseas. It sets out key commitments to ensure policy coherence across government and initial priorities for the BHR Implementation Group,⁹¹⁶ including to:⁹¹⁷

- (i) “[C]ommission a study to conduct a comprehensive baseline assessment of the legislative and regulatory framework pertaining to business and human rights as it applies in Ireland”.
- (ii) “Establish a ‘Business and Human Rights implementation group’, which will consist of representatives from government, the business community and civil society, and will meet twice a year to review the implementation of the National Plan over the first three years”.
- (iii) “Convene a forum on Business and Human Rights within two years of the adoption of the National Plan. This will bring together stakeholders including government, the business community and civil society and will facilitate the exchange of views on progress in delivering on the National Plan”.
- (iv) “Amend the terms of reference of the interdepartmental Committee on Human Rights to include the monitoring of the National Plan”.
- (v) “Include Business and Human Rights as a regular item on the agenda of the DFAT [Department of Foreign Affairs and Trade] NGO [nongovernmental organization] standing Committee on Human Rights”.

653. The “comprehensive baseline assessment”⁹¹⁸ was scheduled to be published six months after the launch of the Irish NAP, and was ultimately published in March 2019 by an independent management consultancy group, ReganStein.⁹¹⁹ In addition to identifying gaps in the BHR legislative framework in Ireland, it includes recommendations such as conducting further research into access to remedies as well as exploring the possibility of developing the role of the Irish NCP.⁹²⁰

654. The inaugural meeting of the Business and Human Rights Implementation Group took place on 16 January 2019.⁹²¹ At that meeting, Simon Coveney T.D.,⁹²² reaffirmed the government’s commitment to protecting and promoting human rights both at home and overseas and

⁹¹⁶ Government of Ireland, “National Plan on Business and Human Rights 2017–2020,” 2017, Section 3, pp 16–19, ([link](#)).

⁹¹⁷ Government of Ireland, “National Plan on Business and Human Rights 2017–2020,” 2017, Section 3, pp 16–19, ([link](#)).

⁹¹⁸ Government of Ireland, “National Plan on Business and Human Rights 2017–2020,” 2017, Section 3, pp 16–19, ([link](#)).

⁹¹⁹ ReganStein, “National Plan on Business and Human Rights: Baseline Assessment of Legislative and Regulatory Framework” (March 2019) ([link](#)).

⁹²⁰ ReganStein, “National Plan on Business and Human Rights: Baseline Assessment of Legislative and Regulatory Framework” (March 2019), Section V, pp 52–55 ([link](#)).

⁹²¹ Press Office, Department of Foreign Affairs, Government of Ireland, “Tánaiste addresses Inaugural Meeting of Business and Human Rights Implementation Group” (16 January 2019) ([link](#)).

⁹²² Simon Coveney T.D., Minister for Foreign Affairs and Trade for Ireland (2017–present).

emphasized the complementarity between the protection of human rights and the promotion of economic growth, trade and investment.⁹²³

655. However, a recent report conducted by Trinity College Dublin on Irish business compliance with the UNGPs assessed twenty-two of the largest Irish companies using the corporate human rights benchmark methodology,⁹²⁴ and concluded that Irish multinational companies were lagging behind other multinationals in their recognition and compliance with the UNGPs, particularly with regard to their awareness of the UNGPs and embedding human rights due diligence into their policies and public declarations.⁹²⁵

⁹²³ Press Office, Department of Foreign Affairs, Government of Ireland, “Tánaiste addresses Inaugural Meeting of Business and Human Rights Implementation Group” (16 January 2019) ([link](#)).

⁹²⁴ This methodology was created by Corporate Human Rights Benchmark Ltd, a not-for-profit company created to publish and promote the corporate human rights benchmark (“**CHRB**”). The CHRB was launched in 2013 as a multi-stakeholder initiative drawing on investor, business and human rights, and benchmarking expertise from six organizations: APG Asset Management, Aviva Investors, Business & Human Rights Resource Centre, EIRIS Foundation, the Institute for Human Rights, and Business and Nordea Wealth Management.

⁹²⁵ B. Finlay Hogan, M.L. Rhodes, S. P. Murphy and M. Lawlor, Trinity College Dublin, “Irish Business and Human Rights: Benchmarking compliance with the UN Guiding Principles” (8 November 2019), p 29 ([link](#)).



X. UNITED STATES & CANADA

A. Overview

656. While the UNGPs have been cited by litigants and *amici curiae* in court proceedings, no court within the U.S. federal judicial system has relied on the UNGPs as the basis of a decision. Notwithstanding that, there have been a number of noteworthy developments in the area of BHR. In 2016 the U.S. published an NAP on responsible business conduct, which details the U.S. government's various commitments and initiatives to further responsible business conduct.⁹²⁶ Since then, the U.S. government has enacted several new policies and issued guidelines on topics such as environmental protection, supply chain risks, and human trafficking.⁹²⁷
657. The U.S. has also been active in BHR on the international front. In 2017, the U.S. co-sponsored a resolution to extend the mandate of the UN Working Group to promote the UNGPs.⁹²⁸ In 2018, the U.S. launched a framework for preventing human trafficking in supply chains.⁹²⁹
658. Similarly, while the Canadian courts have on a number of occasions emphasized the importance of human rights in the business context, they have not explicitly relied on the UNGPs in reaching their decisions. Outside of court decisions, Canada has been active on the BHR front. Canada was one of the countries that co-sponsored the UNGPs, and the Canadian Government has regularly referred to the UNGPs in guidance documents to the business sector.⁹³⁰

B. United States

(1) Court Decisions

659. No court in the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, or Eleventh Circuits has referenced the UNGPs in an opinion.

⁹²⁶ U.S. Dep't of State (16 December 2016) ([link](#)).

⁹²⁷ See, e.g., Environmental Protection Agency, "Electronic Product Environmental Assessment Tool (EPEAT)" (2017) ([link](#)); Bureau of Economic and Business Affairs, "Managing Risks to Women in Supply Chains" (8 August, 2019) ([link](#)); Department of Labor, "Comply Chain: Business Tools for Labor Compliance in Global Supply Chains" (2017); Bureau of Democracy, Human Rights, and Labor, "U.S. Government Efforts To Advance Business and Human Rights in 2017" (27 November 2017); Bureau of Democracy, Human Rights, and Labor, "U.S. Government Efforts to Advance Business and Human Rights in 2019" (27 January 2020) ([link](#)).

⁹²⁸ See Bureau of Democracy, Human Rights, and Labor, "U.S. Government Efforts to Advance Business and Human Rights in 2017" (27 November 2017).

⁹²⁹ See Office to Monitor and Combat Trafficking in Persons, "Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains" (24 September 2018).

⁹³⁰ See, e.g., Government of Canada, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (2014) ([link](#)); Global Affairs Canada, "COVID-19 and Responsible Business Conduct" (8 January 2021) ([link](#)); The Canadian Trade Commissioner Service, "Spotlight on Social Responsibility" (24 February 2020) ([link](#)).

660. Courts in the First and Third Circuits have referenced the UNGPs in the following court decisions.

- (i) ***Acuna-Atalaya v. Newmont Mining Corp.***: In early 2020, the U.S. District Court for the District of Delaware (in the Third Circuit) mentioned the UNGPs in its Memorandum Opinion in *Acuna-Atalaya v. Newmont Mining Corp.*⁹³¹ Specifically, the court noted that one of the parties to the case “appear[ed] to have engaged in serious corporate reforms,” in part because it had “endorsed and adopted established human rights frameworks such as the [UNGP]s and the [VPSHR], in addition to a series of internal policies and standards”.⁹³² The court’s observation was made in the context of a *forum non conveniens* analysis, in which the court assessed the adequacy of Peru as an alternative forum and the alleged risks that the corporate defendant might corrupt the Peruvian courts. The court’s final decision did not address the substance of the plaintiff’s BHR complaint.
- (ii) ***Tomasella v. Nestlé USA, Inc. et al.***: The First Circuit used the UNGPs as reference guidelines, though the court did not ultimately rely on them in reaching its final decision. A U.S.-based consumer had brought a class action against three major chocolate manufacturers, alleging violations of a Massachusetts state statute prohibiting unfair and deceptive trade practices. Specifically, Tomasella alleged that the companies had failed to disclose that their chocolate products likely contained cocoa beans farmed using child and slave labor.⁹³³ According to Tomasella, the defendants’ “undisclosed participation” in a supply chain in which child labor is prevalent “offends established and internationally recognized public policies against the use of child and slave labor”, such as ILO Convention No. 182 and the United Nations’ 1948 Universal Declaration on Human Rights”.⁹³⁴ The court dismissed Tomasella’s arguments, noting that it had “reason to doubt that Massachusetts state law would look to broad notions of international law,” but that even if it did, Tomasella had “not provided sufficient information in her pleadings to establish that such packaging disclosures fall within the penumbra of the UDHR or ILO Convention No. 182”.⁹³⁵

In a footnote, the court further explained that

“[n]ot even the United Nations’ Guiding Principles on Business and Human Rights—a set of guidelines delineating the corporate responsibility to respect human rights that references the UDHR and ILO Convention No.

⁹³¹ 2020 WL 1154783, No. CV 17-1315 (D. Del. Mar. 10, 2020), *aff’d* as modified sub nom. *Acuna-Atalaya v. Newmont Mining Corp.*, No. 20-1765, 2020 WL 7311315 (3d Cir. Dec. 11, 2020).

⁹³² *Id.*, at p 13.

⁹³³ *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60, 67 (1st Cir. 2020).

⁹³⁴ *Id.*, at p 67.

⁹³⁵ *Id.*, at p 81.

182—extend to point-of-sale disclosures on products that implicate human rights violations.... Rather, the Guiding Principles encourage businesses to make “publicly available” a policy statement “express[ing] their commitment to meet this responsibility,” and when their “operations [...] pose risks of severe human rights impacts” to “communicate this externally” by “report[ing] formally on how they address [the impacts]”.⁹³⁶

661. The UNGPs are more commonly cited in submissions by parties and *amici curiae* before U.S. courts. For example:

- (i) **Wirth v. Mars, Inc.:** The plaintiffs sued Mars, Inc. and others for violations of California’s consumer protection laws for not disclosing on their product labels that some of the products originating from Thailand may have been produced using forced labor. In their complaint before the District court, the plaintiffs argued that “Defendants’ material omissions and failure to disclose are all the more appalling considering that Defendants have identified the protection of human rights, including the elimination of all forms of forced or compulsory labor, as an integral part of their human rights policies”.⁹³⁷ The plaintiffs pointed to defendants’ own corporate policies, codes of conduct, and guidance documents to business partners, with the references to the UNGPs and other international human rights instruments and the principles enshrined therein showing that, “Defendants recognize that the use of slave labor [...] is wrong”.⁹³⁸ The District court dismissed all of the plaintiffs’ claims and the Ninth Circuit affirmed the dismissal.⁹³⁹ Neither the District court, nor the Circuit court on appeal, referenced the UNGPs or other international legal instruments.⁹⁴⁰
- (ii) **Hodsdon v. Mars, Inc.:** In *Hodsdon v. Mars, Inc.*, a case related to *Wirth*, the plaintiff and defendants made near-identical arguments during the various stages of pleading.⁹⁴¹ The District court in *Hodsdon*, unlike that in *Wirth*, engaged the international human rights issues albeit on a limited basis. Without citing the UNGPs by name, in dismissing the complaint, the District court concluded that plaintiff’s general references to the “statements of international nongovernmental organizations and U.S. legislators relative to the horrors of child labor” “[a]bsent [] any reference to specific legislative or regulatory acts” could not satisfy the unfairness prong required for the domestic law claims.⁹⁴² The Ninth Circuit, in affirming the

⁹³⁶ *Id.*, at p 81 n. 18 (internal citations omitted).

⁹³⁷ 2015 WL 6087455, at 6 (C.D.Cal.) (Complaint).

⁹³⁸ *Id.*, at pp 17–21.

⁹³⁹ *Id.*

⁹⁴⁰ *Id.*

⁹⁴¹ *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 867 (9th Cir. 2018). See *Hodsdon v. Mars, Inc.*, 2015 WL 9256061, at pp 6–15 (N.D.Cal.) (Mot. Dismiss); 2015 WL 9437597, at p 5 (N.D.Cal.) (Opp. Mot. Dismiss); 2015 WL 9943060, at p 9 (N.D.Cal.) (Repl. Mot. Dismiss); 2016 WL 5369173, at p 55 (C.A.9) (Appellant Br.); 2016 WL 7212205, at p 55 (C.A.9) (Appellee Br.); 2017 WL 564184, at p 22 (C.A.9) (Appellant Repl.).

⁹⁴² *Hodsdon*, 162 F. Supp. 3d at p 1027.

lower court's dismissal, concluded that the "challenged action" of failure to disclose on labels was "too far removed" from the "legislative policy ['against child and slave labor'⁹⁴³]" and "there is not a close enough nexus between [the two]".⁹⁴⁴

- (iii) ***Calhoun v. Google***: The third case, *Calhoun v. Google*, is a nationwide data privacy class action brought against Google regarding its personal data collection practices. The case is still in the pre-summary judgment stage. The plaintiffs relied on the UNGPs and other international principles to demonstrate the defendant's public representations regarding its commitment to safeguarding human rights. In this case, Google acknowledged privacy as a human right by stating that:

"Google has also publicly declared privacy to be a human right. In 2004 in a letter from Google's founders to shareholders at the IPO (included with the Company's S-1 Registration Statement filed with the SEC), Google declared its goal to "improve the lives of as many people as possible". This letter appears today on Google's website on a page touting the company's commitment to be guided by "internationally recognized human rights standards", including specifically the human rights enumerated in three documents: The UDHR, the UNGPs, and the Global Network Initiative Principles. All three of these documents confirm that privacy is a human right and a violation of privacy rights is a violation of human rights".⁹⁴⁵

On 17 March 2021, the U.S. District Court for the Northern District of California issued an order partially granting and partially denying the defendant's motion to dismiss without citing to the UNGPs or other international legal documents.⁹⁴⁶ It remains to be seen whether the District court and the Circuit court will choose to engage with the plaintiffs' human rights-based claims and whether references to the UNGPs and other international soft law instruments will gain traction.

662. The practice of relying upon the UNGPs in court submissions is not limited to the parties themselves. On several occasions, *amici curiae* have incorporated the UNGPs into their submissions.

663. For example, in *Nestlé USA, Inc. v. Doe*,⁹⁴⁷ several *amici curiae* filed briefs that called for relief based upon the UNGPs.⁹⁴⁸ The claim was brought under the Alien Tort Statute ("ATS") and

⁹⁴³ *Id.*, at p 861.

⁹⁴⁴ *Id.*, at pp 865-867.

⁹⁴⁵ Complaint at ¶¶ 203-08, *Calhoun v. Google LLC*, 2020 WL 4368895 (N.D. Cal.) (No. 5:20-CV-05146).

⁹⁴⁶ *Calhoun v. Google LLC*, No. 20-CV-05146, 2021 WL 1056532 (N.D. Cal. Mar. 17, 2021).

⁹⁴⁷ *Nestlé USA, Inc. v. Doe*, No. 19-416, slip op. (Jun. 17, 2021).

⁹⁴⁸ Petition for a Writ of Certiorari, *Nestlé USA, Inc. v. Doe*, 2019 WL 4747982 (U.S.) (No. 19-416).

concerned questions of extraterritoriality and corporate liability arising out of allegations “that [unnamed Malian citizens were] forced ... to work in Ivorian-cocoa farms in West Africa”.⁹⁴⁹ Specifically, the respondents alleged, *inter alia*, that the petitioner Nestlé USA, Inc. “[knew] these [farms] use[d] child slave labor yet deliberately continue[d] to aid them in order to secure cocoa at the low cost it demands”, thereby contributing to violations of international human rights.⁹⁵⁰

664. Tony’s Chocolonely, a Dutch chocolate company which submitted an *amicus* brief in support of the respondents, argued that “[c]ompanies that comply with international and domestic law have nothing to fear from corporate and aiding and abetting liability under the Alien Tort Statute, even if they source from countries with poor human rights records”.⁹⁵¹ To demonstrate this, it noted its own “due diligence system ... which complie[d] with the [OECD Guidelines] and other international standards, including the [UNGPs]...”.⁹⁵² Tony’s Chocolonely’s brief concluded that the steps it took “resulted in verifiable improvements in poverty and child labor in the cocoa farming communities from which [it] source[d]”.⁹⁵³



665. Similarly, Katherine Gallagher of the Center for Constitutional Rights, who submitted a brief on behalf of various international human rights organizations, argued that “ensuring the legal accountability of business enterprises and access to effective remedy for persons affected by ... abuses is a vital part of a State’s duty to protect against business-related human rights abuses”.⁹⁵⁴ She praised the U.S. for taking steps such as implementing its NAP, which “promote[d] awareness and implementation of the [UNGPs]”⁹⁵⁵ and further cited the UNGPs

⁹⁴⁹ *Id.*, at p 4.

⁹⁵⁰ Brief in Opposition at p 4, *Nestlé USA, Inc. v. Doe*, 2019 WL 6840721 (U.S.) (No. 19-416).

⁹⁵¹ Brief of Tony’s Chocolonely as *Amicus Curiae* in Support of Respondents at p 2, *Nestlé USA Inc. v. Doe; Cargill Inc. v. Doe*, 2020 WL 6292570 (U.S.) (Nos. 19-416, 19-453).

⁹⁵² *Id.*, at p 4.

⁹⁵³ *Id.*, at pp 4–5.

⁹⁵⁴ Brief of International Human Rights Organizations as *Amici Curiae* in Support of Respondents and Affirmance at p 14, *Nestlé USA, Inc. v. Doe; Cargill, Inc. v. Doe*, 2020 WL 6291308 (U.S.) (Nos. 19-416, 19-453).

⁹⁵⁵ *Id.*

- as part of “the consistent and increasingly concrete effort at the international level ... to strengthen the regulatory framework for transnational business operations”.⁹⁵⁶
666. Four other *amici curiae* submitted briefs referring to the UNGPs, with three supporting the respondents and one supporting the petitioner.
 667. In its judgment of 17 June 2021, the U.S. Supreme Court dismissed the suit as an impermissible extraterritorial application of the ATS.⁹⁵⁷ In particular, the Court found that corporate decision-making in the U.S., including the decision to purchase cocoa beans from unrelated, foreign third parties which allegedly aided and abetted human rights violations, was insufficient to establish a permissible domestic application of the ATS.⁹⁵⁸
 668. The Supreme Court did not refer to the UNGPs in its judgment.⁹⁵⁹ Nevertheless, the *amicus* briefs submitted in the course of the proceedings represent a willingness by companies, human rights organizations, former government officials, and other organizations to include the UNGPs in legal advocacy—notably, before the nation’s highest court.
 669. The limited use of the UNGPs in U.S. jurisprudence is best understood in the context of BHR litigation more broadly. In the U.S., judicial enforcement of international human rights norms relies on legislative implementation of ratified treaties and judicial recognition of human rights norms which have attained the status of customary international law.
 670. To date, the U.S. has joined relatively few human rights treaties and has yet to sign or ratify some of the most significant instruments, such as the ICESCR, the CEDAW, and the Convention on the Rights of Persons with Disabilities (“**CRPD**”). Further, most of the human rights treaties the U.S. has ratified, including all three of the core conventions, are non-self-executing. This means that, pursuant to reservations, understandings, and declarations (“**RUDs**”) attached to the ratifying instruments, the treaties are not actionable in U.S. domestic courts as a source of right without implementing legislations. In 2008, the U.S. Supreme Court entrenched the practice of treating international treaties as non-self-executing in *Medellín v. Texas*.⁹⁶⁰ Pursuant to the case, ratified treaties are presumptively non-self-executing. The presumption is rebutted only if the treaty itself “conveys an intention that it be self-executing and is ratified on these terms”.⁹⁶¹ The U.S. usually does not enact implementing

⁹⁵⁶ *Id.*, at p 20; see also *id.*, n.22 (“The U.N. Guiding Principles are rooted in international law, principles of State responsibility in public international law and human rights law.”); *id.*, at pp 28, 29 (noting that the UNGPs address the issue of a corporation’s complicity “to adverse human rights impacts committed by primary perpetrators and explains that civil actions can be based on a corporation’s alleged contribution to human rights norms”).

⁹⁵⁷ *Nestlé USA, Inc v. Doe*, No. 19-416, slip op. (Jun. 17, 2021).

⁹⁵⁸ *Nestlé USA, Inc v. Doe*, No. 19-416, slip op. at pp 4-5 (Jun. 17, 2021).

⁹⁵⁹ *Nestlé USA, Inc v. Doe*, No. 19-416, slip op. (Jun. 17, 2021).

⁹⁶⁰ *Medellín v. Texas*, 552 U.S. 491 (2008).

⁹⁶¹ *Id.*, at p 505.

legislations after ratification, instead taking the position that existing domestic laws already sufficiently implement the treaties' provisions.⁹⁶²

671. Even in the absence of a legislatively implemented treaty, however, federal courts of the U.S. may sometimes rely on international norms as a source of right. An important difference between judicial and legislative implementation is that the former does not depend on the existence of binding international agreements. Instead, the norms could originate from influential soft law instruments such as the UDHR, the OECD Guidelines, and the UNGPs.
672. While debates remain as to whether federal courts have the constitutional authority to announce customary international law as general common law,⁹⁶³ the prevailing view is that judicial application of international law requires a statutory basis.⁹⁶⁴ The primary statutory basis for domestic application of customary international law is the ATS, which permits federal courts to entertain civil claims “by an alien for a tort [...] committed in violation of the law of nations”.⁹⁶⁵ This authorization has, however, been significantly scaled back by the Supreme Court in a triad of landmark decisions. *First*, in *Sosa v. Alvarez-Machain*, the court interpreted “law of nations” as international norms “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”, namely “violation of safe conducts, infringement of the rights of ambassadors, and piracy”.⁹⁶⁶ *Second*, in *Kiobel v. Royal Dutch Petroleum Co.*, the court held that the ATS only permitted claims for violations that occur within the U.S.⁹⁶⁷ This decision is supported by the recent *Nestlé USA, Inc v. Doe* case, where the Supreme Court held that the ATS did not extend to suits alleging that general corporate activity in the U.S. aided and abetted violations of the law that occurred overseas through unrelated, foreign third parties.⁹⁶⁸ *Third*, most recently, in *Jesner v. Arab Bank, PLC*, the court held that “foreign corporations may not be defendants in suits brought under the ATS”,⁹⁶⁹ thus foreclosing the use of the ATS by federal courts to hold foreign corporations accountable under international BHR norms. However, in *Nestlé USA Inc. v. Doe*, the Supreme Court left open the question of whether the ATS should be limited to claims against natural persons (as opposed to corporations) and neither affirmed nor overturned *Jesner* on this point.⁹⁷⁰

⁹⁶² See, e.g., U.S. State Dep’t, “Memo for Executive Branch Agencies” (2010) ([link](#)); U.S. Council for International Business, “Issue Analysis – U.S. Ratification of ILO Core Labor Standards” (April 2007) ([link](#)).

⁹⁶³ A. Bellia Jr. and B. Clark, “The Federal Common Law of Nations,” 109 COLUM. L. REV. 1, 93 (2009).

⁹⁶⁴ See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1, 18 (D.C. Cir. 2010) (discussing scholarly and judicial treatment of the question whether federal courts have independent authority to announce customary international law as general common law).

⁹⁶⁵ Alien Tort Statute, 28 U.S.C. § 1350; see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 884 (2d Cir. 1980) (holding that § 1350 provides federal jurisdiction over cases for torture perpetrated under color of official authority).

⁹⁶⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724, 725 (2004).

⁹⁶⁷ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

⁹⁶⁸ *Nestlé USA, Inc v. Doe*, No. 19-416, slip op. (Jun. 17, 2021).

⁹⁶⁹ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).

⁹⁷⁰ *Nestlé USA, Inc v. Doe*, No. 19-416, slip op. (Jun. 17, 2021).

(2) NCP Decisions

673. The U.S. NCP for responsible business conduct is a dispute resolution and mediation body within the Bureau of Economic and Business Affairs of the U.S. Department of State. Complaints before the U.S. NCP have occasionally invoked the UNGPs as a source of guidance.⁹⁷¹
674. The U.S. has issued a total of 22 NCP Final Statements since the UNGPs were issued. Of these, five of the Final Statements explicitly reference the UNGP. In most cases, these statements involve a brief note similar to the following:
- “[The OECD Guidelines] recognize that there are practical limitations on the ability of enterprises to effect change in the behavior of their suppliers, related to, among other issues, product characteristics, the number of suppliers and the structure and complexity of the supply chain. Nonetheless, enterprises may influence their suppliers, such as through contractual arrangements, voting trusts, and participation in industry-wide collaborative efforts with other enterprises with which they share common suppliers. The UNGPs refer to this as increasing leverage”.⁹⁷²
675. In two other complaints, the U.S. NCP recommended that the businesses involved in the dispute review and incorporate the UNGPs and OECD Guidelines into their corporate policies.
676. For example, in Specific Instance between the Community Legal Education Center of Cambodia (“CLEC”) / EarthRights International (“ERI”) and American Sugar Refining Inc., the NCP noted that the “issues raised by CLEC and ERI pertain to matters addressed in the human rights chapter of the [OECD] Guidelines and in the UNGP”⁹⁷³ and recommended that American Sugar Refining Inc. “conduct a corporate human rights policy review process, consistent with the recommendations of the [OECD Guidelines] and the [UNGPs]”.⁹⁷⁴
677. Likewise, in the Final Statement on the Specific Instance between the International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Association and Starwood Hostels & Resorts Worldwide for conduct in the Maldives and Ethiopia issued by the U.S. NCP in 2016, the NCP explained that it had “reviewed the Human Rights Policy and the Supplier Code of Conduct” of Starwood Hotels. Noting that neither document made reference to the guidance set forth in the OECD Guidelines and UNGPs, the NCP

⁹⁷¹ U.S. National Contact Point for the OECD Guidelines for Responsible Business Conduct, “Final Statement, Specific Instance Between International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF) and Cargill Incorporated Regarding Operations in Turkey” (20 March 2020) ([link](#)).

⁹⁷² *Id.*; see also U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises, “Final Statement, Specific Instance between the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF) and PepsiCo, Inc.” (15 April 2016) ([link](#)).

⁹⁷³ Final Statement on the Specific Instance between Community Legal Education Center of Cambodia (CLEC)/EarthRights International (ERI) and American Sugar Refining Inc. (ASR) (20 June 2013) ([link](#)).

⁹⁷⁴ *Id.*

recommended “that Starwood review these documents and incorporate them, as appropriate, into the company’s Global Citizenship Policies”.⁹⁷⁵

(3) Other Developments

678. In 2016, the U.S. published its NAP on Responsible Business Conduct, marking “the first time the U.S. government has undertaken a whole-of-government process to focus, improve, and expand its efforts to promote” responsible business conduct.⁹⁷⁶ The Responsible Business Conduct: First National Action Plan for the United States of America (“**U.S. NAP**”)⁹⁷⁷ sets out five categories of action:
- (i) leading by example, which describes the U.S. commitment to advocating for global policies to fight corruption and human trafficking and to promote labor and human rights standards;
 - (ii) collaborating with stakeholders, which describes the U.S. government’s facilitation of multi-stakeholder initiatives involving businesses, civil society, and governments or academics;
 - (iii) facilitating responsible business conduct by companies, which “encourages businesses to treat tools like the OECD Guidelines and the [UNGPs] as a floor rather than a ceiling for implementing responsible business practices”;
 - (iv) recognizing positive performance, which describes the importance of recognizing companies that maintain high human rights standards; and
 - (v) providing access to remedy, which acknowledges that— “[a]s set out in the UN Guiding Principles”—countries must take steps to establish mechanisms for those who have suffered human rights abuses to seek remedies.
679. The U.S. NAP specifically references the UNGPs, noting the U.S. government’s intent to disseminate the UNGPs among companies, civil society groups and others, in addition to hosting a UNGPs Workshop Series.
680. While the U.S. NAP endorses the UNGPs and reveals the country’s commitment to the BHR agenda, commentators have raised three criticisms. *First*, the U.S. NAP does not adopt the UNGPs’ three-pillar structure and emphasizes Pillar II, i.e., encouraging and facilitating businesses’ voluntary respect for human rights, with much lighter commitments to Pillars I

⁹⁷⁵ U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises, “Final Statement, Specific Instance between the International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Association (IUF) and Starwood Hostels & Resorts Worldwide for conduct in the Maldives and Ethiopia” (12 May 2016) ([link](#)).

⁹⁷⁶ U.S. NAP, Introduction.

⁹⁷⁷ U.S. Dep’t of State, “Responsible Business Conduct: First National Action Plan for the United States of America” (16 December 2016) ([link](#)).

and III, i.e., improving regulation to protect human rights and ensuring access to remedies.⁹⁷⁸ *Second*, the NAP is almost exclusively extraterritorial in focus and devotes little attention to domestic business practices.⁹⁷⁹ *Third*, despite the recommendation by the UN Working Group following its 2013 country visit,⁹⁸⁰ the U.S. did not conduct a national baseline assessment as a part of its development of the U.S. NAP.

681. Nevertheless, since launching the U.S. NAP, the U.S. has enacted several new policies aimed at enhancing responsible business. For example:

- (i) In 2018, the Environmental Protection Agency updated the Federal Acquisition Regulations with new requirements to ensure that the government only procures products meeting environmental performance criteria.⁹⁸¹
- (ii) In 2019, the State Department released a set of recommended actions aimed at enhancing companies' respect for women's rights while addressing supply chain risks.⁹⁸²
- (iii) In 2020, the State Department issued due diligence guidance for U.S. exporters of items with surveillance capabilities to prevent the misuse of these items in human rights abuses.⁹⁸³

682. The U.S. has also carried out an array of program initiatives geared toward addressing human rights concerns in specific areas or industries. For example, in 2017, the U.S. Agency for International Development ("**USAID**") launched the Seafood Alliance for Legality and Traceability ("**SALT**"), which enables collaboration among stakeholders to address fishing-related human rights issues like human trafficking.⁹⁸⁴ Several U.S. agencies have developed tools to improve supply chain and sourcing management so as to root out child labor, forced labor, and human trafficking.⁹⁸⁵ USAID has launched several programs aimed at helping U.S.

⁹⁷⁸ See International Corporate Accountability Roundtable, "Assessment of the United States NAP on Responsible Business Conduct" (March 2017) ([link](#)).

⁹⁷⁹ *Id.*

⁹⁸⁰ See UN Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: United States of America, 6 May 2014, A/HRC/26/25/Add.4.

⁹⁸¹ See Environmental Protection Agency, "Electronic Product Environmental Assessment Tool (EPEAT)" (2017) ([link](#)).

⁹⁸² See Bureau of Economic and Business Affairs "Managing Risks to Women in Supply Chains" (8 August 2019) ([link](#)).

⁹⁸³ See U.S. Dep't of State, U.S. Department of State Guidance on Implementing the "'UN Guiding Principles' for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities" ([link](#)).

⁹⁸⁴ See "USAID, USAID Announces Global Alliance to Promote Legal and Sustainable Seafood" (6 October 2017) ([link](#)).

⁹⁸⁵ See, e.g., Department of Labor, Comply Chain: Business Tools for Labor Compliance in Global Supply Chains (2017) ([link](#)); Bureau of Democracy, Human Rights, and Labor, "U.S. Government Efforts to Advance Business and Human Rights in 2017" (27 November 2017); Bureau of Democracy, Human Rights, and Labor, "U.S. Government Efforts to Advance Business and Human Rights in 2019" (27 January 2020) ([link](#)).

investors secure legitimate land rights in developing countries, improve the lives of communities in the investment areas, and reduce project risks.⁹⁸⁶

683. Further, the U.S. has engaged in various forms of collaborations with other countries to promote international human rights. For example, the U.S. co-sponsored a resolution in 2017 extending the mandate of the UN Working Group to promote the UNGPs.⁹⁸⁷ In 2018, the U.S. launched a framework for preventing human trafficking in supply chains—Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains—along with Australia, Canada, New Zealand, and the UK.⁹⁸⁸
684. Finally, the UNGPs have also been cited in proceedings before the Securities and Exchange Commission (“SEC”). For example, in a “no-action letter”, shareholders of Amazon.com Inc. requested that Amazon publicly disclose, in accordance with SEC requirements, compliance with international human rights standards.⁹⁸⁹ Amazon described its commitment to protecting human rights, including its Global Human Rights Principles and Supply Chain Standards, which it said were in part “guided by the United Nations Guiding Principles on Business and Human Rights”.⁹⁹⁰

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⁹⁸⁶ See Bureau of Democracy, Human Rights, and Labor, “U.S. Government Efforts to Advance Business and Human Rights in 2017” (27 November 2017) ([link](#)); Bureau of Democracy, Human Rights, and Labor, “U.S. Government Efforts to Advance Business and Human Rights in 2018” (19 November 2018) ([link](#)).

⁹⁸⁷ See Bureau of Democracy, Human Rights, and Labor, “U.S. Government Efforts to Advance Business and Human Rights in 2017” (27 November 2017).

⁹⁸⁸ See Office to Monitor and Combat Trafficking in Persons, “Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains” (24 September 2018).

⁹⁸⁹ *Amazon.com Inc.*, 2020 WL 433849, at p 24 (S.E.C. No-Action Letter Feb. 7, 2020).

⁹⁹⁰ *Id.*, at p 12.

C. Canada

(1) Court Decisions

685. Two Canadian court decisions cite to the UNGPs. The first is *Choc v. Hudbay Minerals Inc.*,⁹⁹¹ a case involving a group of indigenous plaintiffs in an action against Canadian mining company, Hudbay Minerals, and its wholly controlled subsidiaries. The plaintiffs alleged that security personnel under the control of Hudbay committed human rights abuses in the vicinity of an open-pit mining project in eastern Guatemala.⁹⁹² These allegations were brought under a theory of direct negligence on the part of the parent company.⁹⁹³
686. The Ontario Superior Court of Justice dismissed the defendants' motion to strike the pleadings for failure to disclose a reasonable cause of action in negligence, noting that one aspect of the applicable test was whether there were sufficient policy considerations to support recognizing a duty of care in the circumstances.⁹⁹⁴ The court stated that there were "clearly competing policy considerations" and held that it was not plain and obvious that there was no duty, based on the plaintiffs' arguments that: (i) recognizing a duty was in line with the federal government's encouragement of Canadian companies to meet the expected "high standards of corporate social responsibility"; (ii) recognizing a duty would support the government's goal of reducing risks of human rights abuses by Canadian enterprises abroad; and (iii) that tort law should evolve in line with globalization, the costs of which should not be disproportionately borne by local communities.⁹⁹⁵
687. The court also analyzed Amnesty International's submission as intervenor, noting that Amnesty International referred to the OECD Guidelines, the ILO's standards on corporate responsibility, and the United Nations' Protect, Respect, and Remedy Framework under the UNGPs.⁹⁹⁶ The court stated that "[t]hese documents have emphasized the heightened risk of becoming complicit in human rights violations in certain environments, such as conflict-affected areas".⁹⁹⁷ While the court did not explicitly reference the UNGPs in coming to its conclusion that the defendants may owe a duty of care to the plaintiffs, its thorough review of Amnesty International's submission citing to the UNGPs and other international BHR standards is notable.

⁹⁹¹ *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.

⁹⁹² *Id.* at ¶ 4.

⁹⁹³ *Id.* at ¶ 50.

⁹⁹⁴ *Id.* at ¶ 57.

⁹⁹⁵ *Id.* at ¶¶ 73–74.

⁹⁹⁶ *Id.* at ¶¶ 32–34.

⁹⁹⁷ *Id.* at ¶ 34.



688. Another case in which a Canadian court referenced the UNGPs is *Das v. George Weston Limited*.⁹⁹⁸ This case involved allegations that Canadian company Loblaw's purchased clothes from a manufacturing factory in Rana Plaza.⁹⁹⁹ The plaintiffs commenced a class action against Loblaw's and Bureau Veritas, a consulting services firm that Loblaw's had retained to conduct a social audit of factories in Bangladesh from which Loblaw's sourced clothes.¹⁰⁰⁰ As in *Choc v. Hudbay Minerals*, the question was whether it was plain and obvious that the defendants owed a duty of care to the plaintiffs, which in this case included injured garment workers and the immediate family of garment workers that died in the collapse.¹⁰⁰¹ The Ontario Superior Court of Justice held that, in this case, that the plaintiffs were not owed a duty of care, based in part on the lack of proximity between the plaintiffs and defendants. Loblaw's did not own the manufacturing factory and the purchaser-supplier relationship gave rise to a more attenuated nexus than the parent-subsidary relationship. In this case, the UNGPs were included in a directly quoted summary of the plaintiffs' statement of claim but were not otherwise referenced in a decision that focused on tort law principles.
689. There is a general trend of increasing use of the UNGPs within party submissions, intervenor submissions, and other documents admitted as evidence. In this context, the UNGPs have been cited to as internationally recognized BHR standards.
- (i) In *Choc v. Hudbay*, for example, Amnesty International filed a Motion to Intervene on 7 January 2013 based on its expertise in BHR issues, including specific reference to the

⁹⁹⁸ *Das v. George Weston Limited*, 2017 ONSC 4129.

⁹⁹⁹ *Id.* at p 1.

¹⁰⁰⁰ *Id.* at p 3.

¹⁰⁰¹ *Id.* at p 2.

UNGPs’ “Protect, Respect and Remedy” Framework.¹⁰⁰² In its later submissions as Intervenor, Amnesty International cited extensively to the UNGPs.¹⁰⁰³ Amnesty International’s submission stated: “the UN Guiding Principles have swiftly become the authoritative global standard for business and human rights” and that “the Special Representative’s mandate [was to] elaborate and clarify widely accepted *existing* standards”.¹⁰⁰⁴

- (ii) In *Das v. Weston*, the plaintiffs’ theory for demonstrating a duty of care rested on the company’s internal standards, its audit and inspection of the companies in Bangladesh, international industry standards, and international standards advanced by the UNGPs, the OECD Guidelines, the MNE Declaration, and the ISO 26000, among other international standards.¹⁰⁰⁵

690. In the *Araya v. Nevsun* proceedings before the Supreme Court of Canada in 2019, Amnesty International Canada and the International Commission of Jurists filed a Factum of the Joint Interveners that referenced the UNGPs.¹⁰⁰⁶ The intervenors’ factum argued in favor of the right to an effective remedy for human rights violations, including the recognition of civil claims based on injury resulting from conduct that violates customary international human rights law.¹⁰⁰⁷ In support of this argument, the intervenors made repeated reference to the UNGPs, which “emphasize that the right to an effective remedy imposes both procedural and substantive obligations”.¹⁰⁰⁸ In a footnote, the jointly filed factum states that “[i]t is important to note that the [UNGPs] have become the authoritative global standard for business and human rights”.¹⁰⁰⁹ In a separate intervenor factum filed by Miningwatch Canada, the UNGPs are also briefly referenced.¹⁰¹⁰ The Supreme Court agreed that customary international law is incorporated in Canadian common law, without reference to the UNGPs.¹⁰¹¹
691. Notably, in the *Araya v. Nevsun* proceedings, the corporate defendants also referenced the UNGPs in its submissions. They argued that Canadian policy preferred multilateral standards over lawsuits in the BHR context, stating that “Canada is a party to, or its policies are aligned with, multilateral and multi-stakeholder initiatives including the [OECD Guidelines] and the [UNGPs]”.¹⁰¹²

¹⁰⁰² Factum of the Moving Party, Amnesty International, at ¶¶ 1-2, *Choc v. Huidbay Minerals Inc.*, CV-10-411159.

¹⁰⁰³ Factum of the Intervenor, Amnesty International Canada, ¶ 3, *Choc v. Huidbay Minerals Inc.*, CV-10-411159.

¹⁰⁰⁴ *Id.* at ¶ 17.

¹⁰⁰⁵ *Das v. George Weston Limited*, 2017 ONSC 4129, ¶ 133.

¹⁰⁰⁶ Factum of the Joint Interveners, Amnesty International Canada and the International Commission of Jurists, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

¹⁰⁰⁷ *Id.* at ¶¶ 3, 16.

¹⁰⁰⁸ *Id.* at ¶ 8.

¹⁰⁰⁹ *Id.* at n. 21.

¹⁰¹⁰ Factum of the Intervener Miningwatch Canada, ¶ 15, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

¹⁰¹¹ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (CanLII).

¹⁰¹² Factum of the Appellant Nevsun Resources Ltd., ¶ 37, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

(2) NCP Decisions

692. Canada's NCP is a committee chaired by Global Affairs Canada, the department of the Canadian government that manages Canada's diplomatic and consular relations.
693. Since the formal inception of the UNGPs on 16 July 2011, Canada's NCP has issued a total of 13 Final Statements. Of these, two of the Final Statements explicitly reference the UNGPs.
694. The Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region, issued by the Canadian NCP in 2013, includes references to multiple international standards on corporate accountability and human rights, including the UNGPs. This NCP complaint followed a large landslide in 2013, which hit part of the Gyama Valley and resulted in the deaths of 83 mine workers living in the mining camp. The complainants alleged that the landslide was a manmade disaster related to mining activities and that the company had ignored warnings and local protests. The complainants sought dialogue with China Gold to urge the company to align with the OECD Guidelines. The Canadian NCP determined that the community had a viable claim but China Gold did not respond to a request for information and did not accept the NCP's offer to use its "good offices" for dialogue and mediation. In its Final Statement, the Canadian NCP stated that it is "hereby reiterated that the Government of Canada expects that Canadian companies will promote Canadian values and operate abroad with the highest ethical standards".¹⁰¹³ The Final Statement also noted that Canadian companies are expected to "meet or exceed" widely recognized international standards, including the OECD Guidelines, and that the Government of Canada had issued a national strategy paper entitled "Doing Business the Canadian Way: A Strategy to Advance CSR in Canada's Extractive Sector Abroad". This paper explicitly references the UNGPs, alongside the OECD Guidelines, the VPSHR, the International Finance Corporation's Performance Standards on Social & Environmental Sustainability, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and the Global Reporting Initiative.
695. The Final Statement of the Canadian NCP on the Notification dated 1 March 2011, concerning the Porgera Joint Venture Mine in Papua New Guinea, pursuant to the OECD Guidelines for Multinational Enterprises,¹⁰¹⁴ issued in 2015, also references the UNGPs. The complainants alleged that mining operations in Papua New Guinea involved the destruction of homes and evictions, among other things, and requested compliance with the OECD Guidelines and the UNGPs.¹⁰¹⁵ The NCP set up a mediation process which resulted in a jointly produced, confidential Agreed Action. In its final recommendations, the Canadian NCP

¹⁰¹³ Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region (8 April 2015) ([link](#)).

¹⁰¹⁴ Final Statement of the Canadian National Contact Point on the Notification dated 1 March 2011, concerning the Porgera Joint Venture Mine in Papua New Guinea, pursuant to the OECD Guidelines for Multinational Enterprises (16 January 2014) ([link](#)).

¹⁰¹⁵ *Id.*

reiterated that all parties should review international standards and best practices and report semiannually to one another, this time singling out the IFC's Environmental, Health, and Safety Guidelines, but not the UNGPs.

(3) Other Developments

696. Canada co-sponsored the UNGPs,¹⁰¹⁶ and the government of Canada regularly references the UNGPs as internationally recognized guidelines in its announcements and guidance to the business sector, including in Global Affairs Canada's update on responsible business during the COVID-19 era and the Trade Commissioner Service's 2020 guide on social responsibility.¹⁰¹⁷
697. Canada is also one of ten governments that are members of the VPSHR.¹⁰¹⁸ In addition, Export Development Canada, Canada's credit export agency, signed onto the Equator Principles in 2007 and became a member of its steering committee in 2011.¹⁰¹⁹
698. Other nonbinding adjudicatory bodies for BHR complaints include the Canadian Ombudsperson for Responsible Enterprise and the Office of the Extractive Sector CSR Counsellor. The Ombudsperson is explicitly tasked with implementing the UNGPs in reviewing allegations of human rights abuses that arise from the operations of Canadian companies abroad and to offer informal mediation services, though lacking independent investigatory powers.¹⁰²⁰ The CSR Counsellor is tasked with advising extractive companies and other stakeholders on best CSR practices abroad.¹⁰²¹
699. In 2014, Canada published "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector". The 2014 CSR strategy introduced the UNGPs into Canada's CSR approach, and included a statement that Canada will promote the UNGPs to Canadian extractive companies operating abroad as a "fundamental document", noting that the UNGPs are "widely-recognized international CSR performance and reporting guidelines".¹⁰²² Global Affairs Canada is currently undertaking a review of the 2014 CSR Strategy. It conducted a stakeholder consultation in 2020 and continues to plan for updates to Canada's responsible business conduct strategy during the five-year period of 2021-2026.¹⁰²³ Findings from the 2020 review were published in a statement by Global Affairs Canada, which highlighted that Canada's next steps include aligning Canada's approach with

¹⁰¹⁶ Government of Canada, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (2014) ([link](#)).

¹⁰¹⁷ Global Affairs Canada, "COVID-19 and Responsible Business Conduct" (8 January 2021) ([link](#)); The Canadian Trade Commissioner Service, "Spotlight on Social Responsibility" (24 February 2020) ([link](#)).

¹⁰¹⁸ The Voluntary Principles Initiative, Government Members ([link](#)).

¹⁰¹⁹ Government of Canada, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (2014) ([link](#)).

¹⁰²⁰ Government of Canada, "Office of the Canadian Ombudsperson for Responsible Enterprise" ([link](#)).

¹⁰²¹ Government of Canada, "Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor" ([link](#)).

¹⁰²² Government of Canada, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (2014) ([link](#)).

¹⁰²³ Global Affairs Canada, "Responsible Business Conduct Abroad," 8 January 2021 ([link](#)).

the rights of Indigenous peoples and the 2030 Agenda for Sustainable Development, as well as strengthening the resources and tools allocated to the Canadian Ombudsperson for Responsible Enterprise and Canada's NCP.¹⁰²⁴

700. In 2015, Natural Resources Canada, the Canadian government's department responsible for natural resources, also issued a CSR Checklist that stated that the "[UNGP]s are] the key mechanism to help guide companies to build in respect for human rights into their day-to-day practices and corporate structures".¹⁰²⁵
701. More recently, a Modern Slavery Act bill (Bill S-211) was proposed and is currently under review. It underwent its Second Reading at the Senate on March 30, 2021 and was referred to the Senate Committee on Banking, Trade and Commerce.¹⁰²⁶ The bill does not explicitly reference the UNGPs, but incorporates international principles such as fundamental labor rights, the ILO conventions, and the Worst Form of Child Labour Convention, in order to initiate legislation imposing supply chain reporting obligations related to modern slavery.¹⁰²⁷

¹⁰²⁴ Global Affairs Canada, "What we heard report—Canada's strategy for responsible business conduct abroad," 6 January 2021 ([link](#)).

¹⁰²⁵ Government of Canada, Corporate Social Responsibility Checklist for Canadian Mining Companies Working Abroad (2015) ([link](#)).

¹⁰²⁶ Parliament of Canada, LEGISinfo, Senate Public Bill S-216 ([link](#)).

¹⁰²⁷ Senate of Canada, 1st Session, 43rd Parliament, 68 Elizabeth II, 2019-2020, Bill S-211, An Act to Enact the Modern Slavery Act and to amend the Customs Tariff ([link](#)).



XI. INTERNATIONAL COURTS, TRIBUNALS, TREATY BODIES

A. Overview

702. This chapter addresses the implementation of the UNGPs in the judicial and quasi-judicial work of various regional and international dispute resolution or monitoring mechanisms, including: (i) the Inter-American Human Rights system; (ii) regional African bodies; (iii) the ECtHR; (iv) the ILO; (v) international arbitral tribunals; (vi) international criminal tribunals; and (vii) UN human rights bodies.
703. The use and analysis of the UNGPs varies greatly across the different mechanisms. The Inter-American and African mechanisms most frequently reference and rely upon the UNGPs in interpreting States' obligations in the realm of business and human rights. Both systems have a robust foundation of business and human rights jurisprudence that pre-dates the adoption of the UNGPs, which mainly concerns the impact of extractive industries on indigenous peoples' rights. Courts and other mechanisms within these systems seem to have welcomed the UNGPs as a tool to affirm and clarify the obligations of both States and corporations.
704. The ECtHR, in contrast, has not explicitly relied on the UNGPs in its jurisprudence. It has addressed issues related to business and human rights, but with a focus on the State's responsibility to protect its citizens. Various other international mechanisms, including the ICJ and WTO dispute settlement bodies, do not appear to have referenced the UNGPs in deciding cases before them. The jurisprudence of international criminal tribunals provides one notable exception: in the first-ever prosecution of a company by an international criminal tribunal, the Appeals Chamber of the Special Tribunal of Lebanon relied on the UNGPs in finding that international human rights obligations apply equally to legal entities as well as natural persons.
705. Several references to the UNGPs were found in submissions to and decisions of international arbitral tribunals, particularly tribunals hearing investor-State disputes. Arbitral tribunals' reliance on the UNGPs in assessing responsibility and awarding damages has thus far been limited, primarily due to the UNGPs' soft law status. Parties and tribunals have, however, looked to the UNGPs as interpretive aids to support the position that both States and private investors must respect human rights obligations when carrying out commercial activities. Recent developments, such as the Hague Rules on Business and Human Rights Arbitration, also indicate that the UNGPs may play an increasingly important role in the future arbitrations.



706. Finally, this chapter surveys the use of the UNGPs by UN human rights mechanisms other than the UN Working Group. Several references to the UNGPs were found in UPR assessments from States and civil society organizations. Generally, the references reflected recommendations on implementing or strengthening the implementation of the UNGPs. No references were found to the UNGPs in the jurisprudence of the human rights treaty bodies, but they have been cited briefly in General Comments by the Committee on Economic, Social and Cultural Rights (“**CESCR**”) and the Committee on the Rights of the Child (“**CRC**”) as relevant standards to be considered in assessing the impact of business activities on human rights and on children’s rights in particular.

B. Inter-American Human Rights System

(1) Overview

707. This section analyzes decisions and communications by the two bodies of the Inter-American human rights system—the IACtHR and the Inter-American Commission on Human Rights (“**IACHR**”)—that refer to the UNGPs. Our research indicates that although the IACtHR and IACHR have made limited references to the UNGPs, they rely heavily upon its underlying principles.
708. The Inter-American human rights system was established in 1948 with the adoption of the American Declaration of the Rights and Duties of Man. It was not until 1959, however, that the Organization of American States (“**OAS**”) created the IACHR. Since its inception, the IACHR has held 134 sessions, carried out 69 human rights visits to 23 member states, published 44 country reports, and processed 12,000 cases.¹⁰²⁸ The IACtHR was created in 1969

¹⁰²⁸ See IACHR, “What is the IACHR?” ([link](#)).

upon the adoption of the ACHR to supplement the work of the IACHR. As of 2020, 25 of the 35 OAS member states have ratified the ACHR.¹⁰²⁹

(2) Trends Related to the Use of UNGPs in the Inter-American Human Rights System

709. The Inter-American human rights system is a regional and international leader in the development and implementation of the business and human rights framework. The IACtHR and IACHR have incorporated principles relating to business and human rights in their decisions, reports, and commentaries for decades.¹⁰³⁰ In 1987, the IACtHR affirmed that all individuals within the jurisdiction of a state have the right to access justice, even when their rights have been violated by non-state actors such as businesses.¹⁰³¹ More explicitly, in 2009 the IACtHR found that states must be held responsible for the actions of private entities when the state has knowledge that such an entity poses a real risk to human rights.¹⁰³²
710. Over the years, both the IACtHR and IACHR have relied on an array of regional and international standards to address states' responsibility to protect against human rights violations committed by businesses. Those standards not only include the ACHR, but also the UN Declaration on the Rights of Indigenous Peoples,¹⁰³³ ILO Convention 169,¹⁰³⁴ ILO Convention 155,¹⁰³⁵ observations by the CESCR,¹⁰³⁶ the CRC,¹⁰³⁷ and the Protocol of San Salvador.¹⁰³⁸ As a result, the Inter-American system has developed a robust legal BHR framework, which is now augmented by the UNGPs.
711. In this regard, the IACHR has asserted that the UNGPs reflect the minimum standards to which States within its jurisdiction must aspire.¹⁰³⁹

¹⁰²⁹ See OAS, "American Convention on Human Rights" ([link](#)).

¹⁰³⁰ See, e.g., *Velásquez Rodríguez v. Honduras*, IACtHR, Judgment on Preliminary Objections, 26 June 1987, ¶ 91.

¹⁰³¹ *Id.*

¹⁰³² *González y otras v. México*, IACtHR Series C No. 205, Judgment on Preliminary Objections, Merits, Reparations and Costs, 16 November 2009, ¶ 284.

¹⁰³³ *The Kaliña and Lokono People v. Suriname*, IACtHR Series C No. 309, Judgment on Merits, Reparations and Costs, 25 November 2015, ¶ 248; *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR Series C No. 245, Judgment on Merits and Reparations, 27 June 2012, ¶ 185; *The Saramaka People v. Suriname*, IACtHR Series C No. 172, Judgment on Preliminary Objections, Merits, Reparations, and Costs, 28 November 2007, ¶ 137.

¹⁰³⁴ *The Kaliña and Lokono People v. Suriname*, IACtHR Series C No. 309, Judgment on Merits, Reparations and Costs, 25 November 2015, ¶ 248; *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR Series C No. 245, Judgment on Merits and Reparations, 27 June 2012, ¶ 185; *The Saramaka People v. Suriname*, IACtHR Series C No. 172, Judgment on Preliminary Objections, Merits, Reparations, and Costs, 28 November 2007, ¶ 137.

¹⁰³⁵ INFORME No. 25/18 CASO 12.428 (Report No. 25/18 Case 12.428): Empleados de la fabrica de fuegos en Santo Antonio de Jesus y sus Familiares (Employees of firework factory in Santo Antonio de Jesus and their relatives.), ¶¶ 103–104.

¹⁰³⁶ *Id.*, ¶ 155.

¹⁰³⁷ *Id.*, ¶ 110.

¹⁰³⁸ *Id.*, ¶ 111.

¹⁰³⁹ IACHR, *Empresas y Derechos Humanos: Estándares Interamericanos* (November 2019), ¶ 142 (discussing Pillar 3 of UNGPs as describing the minimum standards that States must aspire to).

(3) Inter-American Court of Human Rights Decisions

712. Despite a long history of addressing business and human rights issues in the context of extractive industries, indigenous peoples' rights, and labor rights, the IACtHR has only published three decisions that explicitly bring the UNGPs to bear in the IACtHR's analysis. This relatively low number reflects the fact that the IACtHR had already developed a robust legal framework with regard to business and human rights principles, and reinforces the IACHR's assertion that the UNGPs serve as a minimum standard, strengthened by the Inter-American legal framework and other relevant guidelines.

(i) Direct Application of the UNGPs

713. *The Kaliña and Lokono People v. Suriname* was the first decision of the IACtHR to explicitly reference the UNGPs.¹⁰⁴⁰ In this case, which related to Suriname's 75-year concession to mining company Suralco, the IACtHR drew on the UNGPs to reiterate the State's responsibility for protecting against human rights violations related to business activities in its jurisdiction and to that companies must also act in accordance with the UNGPs to respect and protect human rights.¹⁰⁴¹ More specifically, the IACtHR used the UNGPs to support its assertion that the State must engage in ensuring and supervising "an independent social and environmental impact assessment" prior to allowing private companies to begin mining.¹⁰⁴² The IACtHR held that Suriname's failure to do so in this case constituted a violation of the ACHR.¹⁰⁴³ The IACtHR ultimately concluded that the mining activities of Suralco not only had a significant negative impact on the area's ecosystem, but also that Suriname was ultimately responsible when those activities adversely impacted the rights of local indigenous peoples.¹⁰⁴⁴
714. More recently, Judge Patricio Freire's concurring opinion in *Spoltore v. Argentina* laid out the status of the UNGPs in the IACtHR's legal framework stating that "[t]his Court has incorporated into its conventional legal understanding the 'Guiding Principles on business and human rights'".¹⁰⁴⁵ Judge Freire went on to cite to Principle 1 of the UNGPs, that *States* should protect against violations of human rights committed by third parties and businesses within their jurisdictions, as well as Principle 11 that *businesses* must respect human rights. Despite their soft law status, Judge Freire relied on the UNGPs in conjunction with the ACHR to agree with the IACtHR's conclusion that Argentina was responsible for a violation of the right to

¹⁰⁴⁰ *The Kaliña and Lokono People v. Suriname*, IACtHR Series C No. 309, Judgment on Merits, Reparations and Costs, 25 November 2015.

¹⁰⁴¹ *The Kaliña and Lokono People v. Suriname*, IACtHR Series C No. 309, Judgment on Merits, Reparations and Costs, 25 November 2015, ¶ 224.

¹⁰⁴² *Id.*, ¶ 226.

¹⁰⁴³ *Id.*, ¶ 226.

¹⁰⁴⁴ *Id.*, ¶¶ 227, 283, 305.

¹⁰⁴⁵ *Spoltore v. Argentina*, IACtHR, Judgment on Merits, Reparations and Costs, 9 June 2020, ¶ 3.

judicial protection and for violations of the rights to adequate working conditions, which resulted from the actions of Mr. Spoltore's employer.¹⁰⁴⁶

715. Finally, the IACtHR has mentioned the UNGPs in its consultative capacity. In such cases, the IACtHR may publish advisory opinions in response to petition by a member State. In its Advisory Opinion OC-23/17, in response to Colombia's questions regarding its obligations to protect the right to life in relation to the environment, the IACtHR referred to the UNGPs to reiterate States' obligations to develop adequate and independent supervisory mechanisms to protect human rights in the context of private businesses.¹⁰⁴⁷ It further noted that businesses must prevent, mitigate, and be accountable for any of their activities that negatively impact human rights.¹⁰⁴⁸ Ultimately, the IACtHR concluded that Colombia must follow the UNGPs in addressing human rights violations that might result from the environmental activities of private businesses.¹⁰⁴⁹

Judge Freire went on to cite to Principle 1 of the UNGPs, that States should protect against violations of human rights committed by third parties and businesses within their jurisdictions, as well as Principle 11 that businesses must respect human rights.

(ii) Application of Underlying Principles

716. The IACtHR has also relied upon the principles underlying the UNGPs in several of its decisions without explicit references to the UNGPs themselves. This includes references to the State's and private entities' responsibility for human rights violations in the course of business activities.¹⁰⁵⁰ In addition, the IACtHR has asserted the importance of corporate due diligence

¹⁰⁴⁶ *Id.*, ¶¶ 102, 135.

¹⁰⁴⁷ Advisory Opinion OC-23/17, IACtHR Series A No. 23, Judgment, 15 November 2017, ¶ 154 (citing to Principle 5 of the UNGPs).

¹⁰⁴⁸ *Id.*, ¶ 155 (citing to Principles 11–15, 17, 18, 22, and 25 of the UNGPs).

¹⁰⁴⁹ *Id.*, ¶ 155 (citing to Principles 11–15, 17, 18, 22, and 25 of the UNGPs).

¹⁰⁵⁰ See, e.g., *Lagos del Campo v. Peru*, IACtHR, Judgment on Preliminary Objections, Merits, Reparations and Costs, 31 August 2017; *Linda Loayza López Soto y Familiares (Venezuela)*, IACtHR Informe de Fondo No 33/16, 29 July 2016, ¶ 163 (enumerating the principle that a state can be responsible for the actions of private entities when that state has knowledge of a real risk to human rights with regard to that private entity, and the state must additionally adopt reasonable means to avoid that risk); *González y otras v. México*, IACtHR Series C No. 205, Judgment on Preliminary Objections, Merits, Reparations and Costs, 16 November 2009, ¶ 284; *Trabajadores de la Hacienda Brasil Verde v. Brasil*, IACtHR Series C No. 318, Judgment on Preliminary Objections, Merits, Reparations and Costs, 20 October 2016, ¶ 323; *López Soto y otros v. Venezuela*, IACtHR Series C No. 362, Judgment on Merits, Reparations and Costs, 26 September 2018, ¶ 140; *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR Advisory Opinion OC-18/03 (2003), ¶ 148; *Muelle Flores v. Perú*, IACtHR Series C No. 375, Judgment on Preliminary Objections, Merits, Reparations and Costs, 6 March 2019, ¶ 139; *Escaleras Mejía y otros v. Honduras*, IACtHR Series C No. 361, Judgment, 26 September 2018, ¶¶ 67, 68 (stating that the Court recognizes the fundamental importance of protecting human rights defenders from any repercussions stemming from their opposition of the environmental damages that businesses may impose); Advisory Opinion OC-18/03, IACtHR Series A No. 18, Judgment, 17 September 2003, ¶¶ 140, 151 (describing that state and employers, including private employers, must respect and protect the rights of workers, whether they work in the public or private sector of society); see also Principles 1, 11.

prior to any investment or development project, in line with Principles 4, 15, and 17–21 of the UNGPs.¹⁰⁵¹ It has also determined that the State must implement an appropriate participatory process with communities who may be affected by their investment projects, in line with Principle 18 of the UNGPs.¹⁰⁵² Lastly, the IACtHR has asserted the need to ensure judicial and non-judicial remedies for those impacted by business activities.¹⁰⁵³

(4) Inter-American Commission on Human Rights Reports

717. The IACHR has also published several references to the UNGPs, most recently in its 2020 Report on Business and Human Rights. Though these reports are not binding decisions, they demonstrate the IACHR’s understanding and implementation of the UNGPs in its work.
718. In its 2020 report, the IACHR recognizes the UNGPs as providing a minimum baseline for global standards, highlighting that the UNGPs are not intended to be the “last word” but rather the “end of the beginning,” by establishing a global platform for action upon which further action can be taken.¹⁰⁵⁴ The IACHR considers that the governing documents of the Inter-American system establish standards consistent with the UNGPs, and as a result, it has adequately implemented the UNGPs in its understanding of business and human rights in the region.¹⁰⁵⁵ Other IACHR reports referencing the UNGPs include its Corruption and Human Rights Report,¹⁰⁵⁶ its Report on Indigenous Communities,¹⁰⁵⁷ and its report on Canadian Mining in Latin America.¹⁰⁵⁸ Finally, its case report on *Empleados de la fabrica de fuegos en*

¹⁰⁵¹ See, e.g., *The Saramaka People v. Suriname*, IACtHR Series C No. 172, Judgment on Preliminary Objections, Merits, Reparations, and Costs, 28 November 2007, ¶ 129; *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR Series C No. 245, Judgment on Merits and Reparations, 27 June 2012, ¶¶ 157, 204–206; see also Principles 4, 15, 17–21.

¹⁰⁵² See *The Saramaka People v. Suriname*, IACtHR Series C No. 172, Judgment on Preliminary Objections, Merits, Reparations, and Costs, 28 November 2007, ¶¶ 129, 133–134; *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR Series C No. 245, Judgment on Merits and Reparations, 27 June 2012, ¶¶ 185, 201; see also Principle 18.

¹⁰⁵³ See, e.g., *The Saramaka People v. Suriname*, IACtHR Series C No. 172, Judgment on Preliminary Objections, Merits, Reparations, and Costs, 28 November 2007, ¶ 194(a); *Velásquez Rodríguez v. Honduras*, IACtHR, Judgment on Preliminary Objections, 26 June 1987, ¶ 91; *Maldonado Ordóñez v. Guatemala*, IACtHR Series C No. 311, Judgment on Preliminary Objections, 3 May 2016, ¶ 108; *Barrios Altos v. Perú*, IACtHR Series C No. 75, Judgment, 14 March 2001, ¶ 48; *The Yakye Axa Indigenous Community v. Paraguay*, IACtHR Series C No. 125, Judgment on Merits, Reparations and Costs, 17 June 2005 ¶¶ 215(a), 217, 225 (describing the Court’s decision to order reparations from the State on behalf of individuals whose rights had been violated by private companies); *The Sawhoyamaya Indigenous Community v. Paraguay*, IACtHR Series C No. 146, Judgment on Merits, Reparations and Costs, 29 March 2006, ¶¶ 212, 239; *The Xákmok Kásek People v. Paraguay*, IACtHR Series C No. 214, Judgment on Merits and Reparations, 24 August 2010, ¶¶ 281(a), 286; *Albán Cornejo v. Ecuador*, IACtHR Series C No. 171, Judgment on Merits, Reparations and Costs, 22 November 2007, ¶ 119 (requiring State supervision, at a minimum, to protect public services industries, and to prosecute based on violations of human rights where necessary); see also Principles 26–31.

¹⁰⁵⁴ IACHR, *Empresas y Derechos Humanos: Estándares Interamericanos* (November 2019), ¶¶ 8–9.

¹⁰⁵⁵ IACHR, *Empresas y Derechos Humanos: Estándares Interamericanos* (November 2019), ¶¶ 81, 86, 142, 177 (referencing Principles 3, 5, 25 and Pillars 2 and 3 of the UNGPs while asserting the Inter-American human rights system’s use of equivalent standards).

¹⁰⁵⁶ IACHR, *Corruption and Human Rights in the Americas: Inter-American Standards*, 6 December 2019, ¶ 174.

¹⁰⁵⁷ *Pueblos Indígenas, Comunidades Afrodescendientes y Recursos Naturales: Protección de derechos humanos en el contexto de actividades de extracción, explotación y desarrollo*. OEA/Ser.L/V/II. Doc. 47/15, 31 de diciembre de 2015, ¶¶ 52, 56.

¹⁰⁵⁸ IACHR, *The Impact of Canadian Mining in Latin America and Canada’s Responsibility*, at pp 27, 43.

Santo Antonio de Jesus y sus Familiares cites to Principle 1 of the UNGPs to determine State responsibility for violations of human rights by businesses, along with Principle 25 to determine that States must provide means of redress and accountability against those companies.¹⁰⁵⁹

C. Regional African Mechanisms

(1) Overview

719. This section analyzes decisions and communications by various regional African mechanisms, including the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights ("ACtHPR"), and the ECOWAS Court of Justice.
720. The African mechanisms have long been concerned with business and human rights issues. The similarities between the African Charter and the UNGPs are striking; for example, they both contain the "do no harm" principle.¹⁰⁶⁰ Overall, the different African mechanisms view the UNGPs favorably. They have been active in producing literature referring to the UNGPs, highlighting the significant role they have played in furthering the development of business and human rights and citing to them as a key part of the legal framework. Where the mechanisms refer to the UNGPs, they tend to prioritize the State's Pillar I obligations over businesses' Pillar II obligations. Cases referencing or reflecting the UNGPs have been less common; they generally concern interactions between companies engaged in the extractive industries and indigenous groups.

(2) African Commission on Human and Peoples' Rights

(i) Commission Decisions

721. The African Charter established the African Commission in 1987.¹⁰⁶¹ Article 45 of the African Charter details the mandate of the African Commission to include the "protection of human and peoples' rights", "the promotion of human and peoples' rights" and "to interpret all the provisions of the present Charter". Article 60 of the African Charter requires the African Commission to "draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the

¹⁰⁵⁹ INFORME No. 25/18 CASO 12.428 (Report No. 25/18 Case 12.428): Empleados de la fabrica de fuegos en Santo Antonio de Jesus y sus Familiares, Brasil, ¶¶ 100, 155.

¹⁰⁶⁰ African Commission on Human and Peoples' Rights, "Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)", p 4 ([link](#)).

¹⁰⁶¹ Organization of African Unity, African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) ([link](#)).

provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members”.

722. The African Commission has not issued any decisions that directly reference the UNGPs. However, *SERAC v. Nigeria* is regularly cited as a case where it upheld principles in line with the UNGPs. Moreover, the African Commission has produced various reports, comments and notes where the UNGPs are discussed.¹⁰⁶²
723. *SERAC v. Nigeria*, a case decided by the African Commission in 2001 (i.e., a decade before the endorsement of the UNGPs), has been “heralded as a landmark decision of the African Commission”.¹⁰⁶³ It concerned an allegation by the Ogoni people that the Nigerian government had directly participated in unsustainable oil development practices in Ogoniland. The claimants alleged that the State-owned Nigerian National Petroleum Company “caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people”.¹⁰⁶⁴ They argued that reserves were exploited “with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards”.¹⁰⁶⁵ The case also considered acts of intimidation against, and the eviction of, Ogoni people from their lands without community consultation.
724. The African Commission held that Nigeria had violated the following articles of the African Charter:
- (i) **Article 2:** the right to enjoy the rights and freedoms recognized and guaranteed in the African Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status;
 - (ii) **Article 4:** the right to life;
 - (iii) **Article 14:** the right to property;
 - (iv) **Article 16:** the right to physical and mental health;
 - (v) **Article 18(1):** the right to the protection of the family;
 - (vi) **Article 21:** the right to freely dispose of wealth and natural resources, exercised without prejudice to the obligation of promoting international economic cooperation

¹⁰⁶² *Social and Economic Rights Action Centre (SERAC) & Another v. Nigeria* (2001) AHRLR 60 (ACtHPR 2001) (“*SERAC v. Nigeria*”).

¹⁰⁶³ African Commission on Human and Peoples’ Rights, “Report of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa” ([link](#)).

¹⁰⁶⁴ *SERAC v. Nigeria*, ¶ 1.

¹⁰⁶⁵ *Id.*, ¶ 2.

based on mutual respect, equitable exchange and the principles of international law;
and

(vii) **Article 24:** the right to a healthy environment.

"[G]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments".

725. Although *SERAC v. Nigeria* does not mention the UNGPs, it is notable for highlighting principles that are reflected in the UNGPs, in particular the State's Pillar I obligations. The judgment echoed UNGPs Principle 1 (the State's obligation to protect against human rights abuse within its territory and/or jurisdiction by third parties, including business enterprises); UNGPs Principle 2 (the State's obligation to clearly establish the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations); and UNGPs Principle 3 (the State's obligation to exercise adequate oversight in order to meet their international human rights obligations when a State contracts with business enterprises to provide services that may impact upon the enjoyment of human rights). This is demonstrated by the following extract from the African Commission's judgment (among others): "[G]overnments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments".¹⁰⁶⁶

(ii) Other Developments

726. The African Commission has also produced many materials that reference the UNGPs.

727. In 2009, the African Commission established the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa ("**AC Working Group**") "to address allegations of human rights violations committed in the extractive industries sector in Africa".¹⁰⁶⁷ The legal framework of the AC Working Group references the following three guiding standards: (i) the African Charter; (ii) the principles reflected in *SERAC v. Nigeria*; and (iii) the nascent UNGPs.¹⁰⁶⁸ The AC Working Group has highlighted that "the UN Guiding

¹⁰⁶⁶ *Id.*, ¶ 57.

¹⁰⁶⁷ African Commission on Human and Peoples' Rights, "Report of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa" ([link](#)), ¶ 2.

¹⁰⁶⁸ *Id.*, ¶¶ 9–11.

Principles on Business and Human Rights are also relevant to the extractive industry sector in Africa given that several African States are parties to this instrument. In this regard, they made the commitment to implement the reference framework, including to “protect, respect and remedy”, a framework which underlines these principles”.¹⁰⁶⁹

728. Other African Commission reports also mention the UNGPs. The Final Communiqué on the National Dialogue on the Rights of Indigenous Peoples and Extractive Industries, issued in 2019, recommends that business enterprises “ensure adherence with the UN Guiding Principles on Business and Human Rights frameworks . . . [and] in particular, ensure that indigenous peoples’ rights are protected and respected and remedies availed for violations”.¹⁰⁷⁰ One of the recommendations in the Final Communiqué is to establish a tribunal to address human rights violations of indigenous communities, to ensure that there is adequate access to justice in such circumstances. The communiqué also recommends that businesses “apply a Human Rights Based Approach to development by for instance widely consulting indigenous peoples before coming up with new projects”.¹⁰⁷¹
729. An African Commission Advisory Note (“**AC Advisory Note**”) developed “to assist . . . in the present ongoing process in the United Nations for a Binding Instrument on Business and Human Rights” in 2019, highlighted that it drew “on the existing standards and principles at the African and global levels, including those established by the African Commission, the IFF report of the AU, the African Mining Vision and the UN Guiding Principles on Business and Human Rights”.¹⁰⁷² The AC Advisory Note also underlined that:

“while it is the duty and primary responsibility of States to protect human rights and ensure that companies do not violate them, it is also the responsibility of business enterprises, as entities whose operations carry major social, economic and environmental impacts, to put in place measures that ensure respect for human rights and to contribute positively to the realization of the right to development . . . [and that] at the very least this requires that business enterprises must respect human rights and prevent human rights harms from occurring”.

730. The AC Advisory Note also stated that “this was firmly established in the UN Guiding Principles on Business and Human Rights as the “duty of care” or the “do no harm” principle”.¹⁰⁷³

¹⁰⁶⁹ *Id.*, ¶ 11.

¹⁰⁷⁰ African Commission on Human and Peoples’ Rights, “National Dialogue on the Rights of Indigenous Peoples and Extractive Industries” ([link](#)).

¹⁰⁷¹ *Id.*

¹⁰⁷² African Commission on Human and Peoples’ Rights, “Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)” ([link](#)).

¹⁰⁷³ *Id.*

731. While the African Commission’s General Comment No. 3, published in November 2015, did not explicitly reference the UNGPs, it highlighted how “States must hold to account private individuals and corporations ... that are responsible for causing or contributing to arbitrary deprivations of life” and that “the State also has an obligation to protect individuals from violations or threats at the hands of other private individuals or entities, including corporations”.¹⁰⁷⁴
732. Some African Commission publications have further considered the interrelation between the African Charter and the UNGPs. The State Reporting Guidelines state that UNGPs Principle 11, the “do no harm principle”, is reflected in Articles 24 and 28 of the African Charter, and that the obligations of businesses towards right holders are grounded in Article 27 of the African Charter, which “provides for the duties of individuals” and its sub-provision 2, which lays down the obligation to exercise rights “with due regard to the rights of others”.¹⁰⁷⁵ The State Reporting Guidelines went on to reason that “if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies”.¹⁰⁷⁶
733. Notably, the AC Advisory Note states that the current legal regime (including the UNGPs) “is relevant, [but] remains inadequate to address not only the major power imbalance between transnational corporations and States but also the imbalance between the scope of obligation of transnational corporations and the gravity of the impact of their operations and the scale of power they wield. These gaps can only be rectified through a binding international framework”.¹⁰⁷⁷

(3) African Court on Human and Peoples’ Rights

734. The ACtHPR was established by Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, (“**African Charter Protocol**”), which was adopted by the Member States of the then Organization of African Unity in June 1998. The African Charter Protocol entered into force on 25 January 2004. The ACtHPR was established to ensure the protection of human and peoples’ rights in Africa.¹⁰⁷⁸ Its mandate is to complement and reinforce the functions of the African Commission.¹⁰⁷⁹

¹⁰⁷⁴ African Commission on Human and Peoples’ Rights, “General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)” (“**General Comment No. 3**”) ([link](#)).

¹⁰⁷⁵ African Commission on Human and Peoples’ Rights, “State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment” (“**State Reporting Guidelines**”) ([link](#)), ¶ 56.

¹⁰⁷⁶ *Id.*

¹⁰⁷⁷ African Commission on Human and Peoples’ Rights, “Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)” ([link](#)).

¹⁰⁷⁸ African Commission on Human and Peoples’ Rights, “Homepage”([link](#)).

¹⁰⁷⁹ African Commission on Human and Peoples’ Rights, “About Us”([link](#)).

735. The ACtHPR has made no explicit mention of the UNGPs in any of its judgments and has not endorsed the UNGPs. In fact, it does not appear to have entered any judgments related to business and human rights.
736. However, in June 2014, the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“**Malabo Protocol**”). This created the African Court of Justice and Human and Peoples’ Rights, which will subsume the African Court on Human and Peoples’ Rights.¹⁰⁸⁰ The Malabo Protocol is significant as it states that the criminal section of the African Court of Justice and Human and Peoples’ Rights will be able to determine criminal corporate responsibility, as well as State responsibility, for human rights violations. According to Article 46C of the Malabo Protocol, entitled ‘Corporate Criminal Liability’, “the Court shall have jurisdiction over legal persons, with the exception of States”. The court will be the first international court with jurisdiction to establish corporate criminal liability for violations of international human rights obligations.¹⁰⁸¹

(4) ECOWAS Court of Justice

737. The judicial organ of the ECOWAS is the ECOWAS Court of Justice. The ECOWAS Court of Justice is charged with resolving disputes related to the ECOWAS treaty, protocols, and conventions. It gained “jurisdiction to determine case[s] of violation[s] of human rights that occur in any Member State” in 2005 with the implementation of Supplementary Protocol A/SP.1/01/05. Corporations and individuals can submit complaints alleging human rights violations by ECOWAS or its Member States to the ECOWAS Court of Justice.¹⁰⁸²
738. The jurisprudence of the ECOWAS Court of Justice is notable for one landmark case that made reference to the UNGPs and contains extensive discussion about the accountability of companies before human rights bodies: *SERAP v. Nigeria*.¹⁰⁸³
739. *SERAP v. Nigeria* has many factual similarities to the case of *SERAC v. Nigeria*, discussed at Section XI.C.(2) above. The plaintiff alleged a “violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution”.¹⁰⁸⁴ The ECOWAS Court of Justice held that

¹⁰⁸⁰ The new court has not yet begun operating, because no States have ratified the Malabo Protocol.

¹⁰⁸¹ See N. Bernaz, “Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty,” *Hum Rights Rev* (2020) ([link](#)); J. Kyriakakis, “Article 46C: Corporate Criminal Liability at the African Criminal Court” in C. Jalloh, K. Clarke, & V. Nmeihelle (Eds.), *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges* (at 793–837), Cambridge: Cambridge University Press (2019).

¹⁰⁸² International Justice Resource Center, “Economic Community of West African States Court of Justice” ([link](#)).

¹⁰⁸³ *SERAP v. Federal Republic of Nigeria*, ECOWAS ECW/CCJ/APP/08/09, Judgment, 14 December 2012 (“*SERAP v. Nigeria*”) ([link](#)).

¹⁰⁸⁴ *Id.*, ¶ 4.

Nigeria's failure to prevent environmental degradation, and to hold third parties responsible for it to account, violated the following two provisions of the African Charter:

- (i) Article 1: "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them"; and
- (ii) Article 24: the right to a healthy environment.

740. The ECOWAS Court of Justice held that the measures Nigeria had taken to respond to the crisis were insufficient to prevent continued environmental degradation in the region, and ordered it to "take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger delta"; "take all measures that are necessary to prevent the occurrence of damage to the environment"; and to "take all measures to hold the perpetrators of the environmental damage accountable".¹⁰⁸⁵
741. Aside from Nigeria and the second defendant (the Attorney General of the Federal Republic), the other defendants in the case were corporations. The corporate defendants filed preliminary objections to the ECOWAS Court of Justice's jurisdiction, arguing that they could not be sued before the ECOWAS Court of Justice because they were not parties to any ECOWAS legal instruments.¹⁰⁸⁶ This led the ECOWAS Court of Justice to give a considered analysis "of one of the most controversial issues in International Law which relates to the accountability of Companies, especially multinational corporations, for violation or complicity in violation of Human Rights especially in developing countries ... the paradox[es] ... that States and individuals can be held accountable internationally, while companies cannot".¹⁰⁸⁷ The ECOWAS Court of Justice cited a previous case, *Peter David v. Ambassador Ralph Uwechue*, which established "that only Member States and Community Institutions can be sued before it for alleged violation of Human Rights".¹⁰⁸⁸ The ECOWAS Court of Justice took note of its finding in this previous case that "the international regime of Human Rights imposes obligations on States For the dispute between individuals on alleged violation of Human Rights as enshrined in the African charters on Human and Peoples' Rights, the natural and proper venue before which the case may be pleaded is the domestic court of the State party where the violation occurred".¹⁰⁸⁹ The ECOWAS Court of Justice extended the same reasoning to the current case and held that "neither individuals nor corporations are parties to the

¹⁰⁸⁵ *Id.*, ¶ 121.

¹⁰⁸⁶ *SERAP v. Nigeria*, Ruling on Preliminary Objections by the Defendants, Suit No: ECW/CCJ/APP/08/09 and RUL. No: ECW/CCJ/APP/07/10 (ECOWAS, 10 December 2010), ¶ 64.

¹⁰⁸⁷ *Id.*, ¶ 65

¹⁰⁸⁸ *Id.*, ¶ 71.

¹⁰⁸⁹ *Id.*, ¶ 72.

treaties that the international Tribunal with jurisdiction over human rights are empowered to enforce”.¹⁰⁹⁰

742. As part of this discourse on corporate accountability in international human rights law, the judgment made reference to the development of the UNGPs generally by stating: “the need to make corporations internationally answerable has led to some initiatives, namely the nomination of Special Representative of the Secretary General of the United Nations whose Report titled “Protect, Respect and Remedy: A framework for Business and Human Rights” (The Ruggie Report) is one of the greatest reference on the accountability of multinationals for Human Rights violation in the world”.¹⁰⁹¹

D. The European Court of Human Rights

(1) Overview

743. The ECtHR has jurisdiction to hear claims brought by citizens of Member States of the Council of Europe against those Member States, as well as claims between Member States, with regard to alleged violations of the ECHR.
744. The ECtHR has heard cases relating to business and human rights, even before the UNHRC endorsed the UNGPs in 2011. In these decisions, the ECtHR draws on its own jurisprudence. As such, there appear to have been no references to date to the UNGPs in ECtHR decisions. Rather, the UNGPs and relevant ECtHR decisions appear to reflect consistent aims; that is, to ensure that States protect against human rights abuses by businesses within their territories.¹⁰⁹² Nevertheless, opportunities have arisen for the ECtHR to consider applying the UNGPs to advance this objective.¹⁰⁹³

(2) Court Decisions

745. The case of *M. Özel and Others v. Turkey* (“*Özel*”) is the leading decision of the ECtHR in the BHR context.¹⁰⁹⁴ The applicants in *Özel* were eight Turkish nationals who lodged complaints with the ECtHR against the Republic of Turkey. The case related to the destruction of apartment blocks by the 1999 Izmit earthquake. In 1994, the Municipal Council of Çınarcık had approved the construction of apartment blocks by private property developers in an earthquake hazard zone. When the 1999 earthquake hit and the blocks were destroyed, family members of the applicants were injured or killed. The Yalova public prosecutor and a group of technical experts found that concrete used to construct the apartment blocks was deficient, and two officers of the property development company were convicted of causing the victims’

¹⁰⁹⁰ *Id.*, ¶ 73.

¹⁰⁹¹ *Id.*, ¶ 68.

¹⁰⁹² C. Methven O'Brien, *Business and Human Rights: a handbook for legal practitioners* (2018), at p 17.

¹⁰⁹³ L. Verdonck, “It is time for the European Court to step into the business and human rights debate: A comment on *Özel & Others v. Turkey*,” Strasbourg Observers Blog (7 December 2015).

¹⁰⁹⁴ *M. Özel & Others v. Turkey*, ECtHR Apps 14350/05, 15245/05, 16051/05, Judgment, 17 November 2015 ([link](#)).

deaths (five individuals had been prosecuted). The applicants were unable to bring criminal proceedings against the Çınarcık officials who had approved construction in 1994.



746. The applicants alleged that Turkey had breached Article 2 (the right to life) of the ECHR on two grounds:¹⁰⁹⁵

- (i) The Çınarcık Municipal Council, by authorizing the construction of the apartment blocks in an earthquake hazard area, had failed to protect the lives of Turkish citizens; and
- (ii) The failure to prosecute public officials and convict the remaining company officers responsible for the victims' deaths, which was the result of the State's failure to conduct a proper investigation.

747. The ECtHR found that Turkey had violated Article 2 based on ground (ii).¹⁰⁹⁶ In reaching its decision, the ECtHR emphasized the State's obligation to protect citizens' lives. The ECtHR reasoned that Article 2 required the State to protect the lives of its citizens "in the context of any activity, whether public or not."¹⁰⁹⁷ Authorizing construction in the hazard area meant that the State had to supervise and inspect the construction of the apartment blocks by the

¹⁰⁹⁵ *Id.* ¶¶ 139-145.

¹⁰⁹⁶ The complaint based on ground (i) was time-barred; see *id.* ¶ 178.

¹⁰⁹⁷ *Id.*, ¶ 170.

property development company.¹⁰⁹⁸ When the blocks collapsed during the earthquake, the State was responsible for failing to protect the lives of the victims.

748. The ECtHR further held that the State had failed to conduct a proper investigation in connection with its responsibility in ground (i).¹⁰⁹⁹ This entailed the obligation to convict, where justified, any public or private individual who the investigation determined was responsible for the deaths of the victims.¹¹⁰⁰ Those responsible should have been tried in proceedings that satisfied “the positive obligation to protect lives through the law”.¹¹⁰¹ Due to “unnecessary delays” that led to the convictions of only two of the five accused, the State failed to fulfil this obligation.
749. Recent academic commentary has characterized the ECtHR’s decision in *Ozel* as “adopting the United Nations Guiding Principles’ approach to business and human rights.”¹¹⁰² The commentary criticizes the ECtHR, however, for failing to directly address two fundamental business and human rights issues: (i) the extent to which corporate conduct, as opposed to State conduct, could be considered a violation of human rights law; and (ii) the enforcement of corporate accountability.¹¹⁰³ By framing business and human rights issues through Turkey’s duty to protect, the ECtHR did not address businesses’ concurrent duty to respect human rights.

E. The International Labour Organization

(1) Overview

750. The ILO is a UN agency responsible for setting international labor standards. These standards take the form of binding Conventions or nonbinding Recommendations. There are almost 200 ILO Conventions, of which eight have been designated by the ILO’s Governing Body, its executive body, as “fundamental”.¹¹⁰⁴
751. The ILO’s framework document is the ILO Constitution,¹¹⁰⁵ which established the ILO Governing Body.¹¹⁰⁶ Pursuant to Article 26(1) of the ILO Constitution, States parties have the right to file complaints with the International Labour Office (a body subsidiary to the ILO

¹⁰⁹⁸ *Id.*, ¶ 175.

¹⁰⁹⁹ *Id.*, ¶ 188.

¹¹⁰⁰ *Id.*, ¶ 189.

¹¹⁰¹ *Id.*, ¶ 190.

¹¹⁰² L. Verdonck, “It is time for the European Court to step into the business and human rights debate: A comment on *Özel & Others v. Turkey*,” Strasbourg Observers Blog (7 December 2015) ([link](#)).

¹¹⁰³ *Id.*

¹¹⁰⁴ See ILO, “Conventions and Recommendations” ([link](#)). The designation of an ILO Convention as “fundamental” appears to have no specific legal effect, but rather reflects that the Convention contains fundamental workers’ rights.

¹¹⁰⁵ ILO Constitution ([link](#)).

¹¹⁰⁶ ILO Constitution, art. 7(1), which provides that the ILO Governing Body is to consist of 28 government representatives, 14 employer representatives and 14 workers’ representatives.

Governing Body) if another State party is not “effectively” observing its obligations under any of the ILO Conventions. A complaint can be referred to a Commission of Inquiry, which in turn will produce a report.¹¹⁰⁷ No complaints or reports were found, however, that referenced the UNGPs or related principles.

752. The ILO adopted the MNE Declaration in 1977, a “soft law” instrument negotiated between governments, workers’ and employers’ representatives, and multinational enterprises, intended to guide enterprises on inclusive, responsible and sustainable workplace practices.¹¹⁰⁸ The guidelines in the MNE Declaration are founded on the principles and international labor standards contained in the ILO’s Conventions and Recommendations.¹¹⁰⁹



753. The MNE Declaration addresses the “labor dimension” of CSR. In that sense, the guidelines therein can be understood as precursor principles to the UNGPs.¹¹¹⁰ The ILO has issued some more recent publications on CSR in which it specifically highlights its view that corporations’ involvement in such policies and processes is ultimately voluntary.¹¹¹¹

¹¹⁰⁷ ILO Constitution, art. 28.

¹¹⁰⁸ ILO, “Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy”, (5th edition, 2017) ([link](#)).

¹¹⁰⁹ *Id.*

¹¹¹⁰ See the ILO Helpdesk factsheet on the MNE Declaration (in which it states that “[t]he MNE Declaration provides the most comprehensive framework for enterprises in relation to the labor dimension of CSR”) ([link](#)).

¹¹¹¹ See the ILO Helpdesk factsheet on Corporate Social Responsibility (stating that “CSR is voluntary—enterprises voluntarily adopt socially responsible conduct by going beyond their legal obligations”) ([link](#)).

F. International Criminal Tribunals

(1) Overview

754. There are seven international criminal tribunals: the International Criminal Court (“ICC”), the International Criminal Tribunal for Rwanda (“ICTR”), the International Criminal Tribunal for Yugoslavia (“ICTY”), the International Criminal Tribunal Residual Mechanism (“ICTRM”), the Special Tribunal for Lebanon (“STL”), the Special Court for Sierra Leone (“SCSL”), and the Extraordinary Chambers for the Courts of Cambodia (“ECCC”).
755. Overall, the international criminal tribunals have said little on the UNGPs. This is perhaps unsurprising because international criminal prosecutions are almost entirely limited to natural persons. For example, the ICC has not established corporate liability, although there have been discussions to expand the ICC’s jurisdiction to include legal persons.¹¹¹² France proposed an addition to the ICC Draft Statute of 1998 that would have subjected legal entities to the ICC’s jurisdiction “if the crimes were committed on behalf of such legal persons or by their agencies or representatives”.¹¹¹³ However, the proposal was rejected, in part, because there was “not yet universally recognized common standards for corporate liability”.¹¹¹⁴
756. In 2014, a company was prosecuted for the first time before an international criminal tribunal—the STL—in *Prosecutor v. New TV*.¹¹¹⁵ Notably, this case is the only international criminal tribunal decision that has referenced the UNGPs and appears to be the only case before an international criminal tribunal to prosecute a corporate entity.

(2) Decisions

757. In *Prosecutor v. New TV*, the STL prosecutor charged Al Jadeed, a television station also known as New TV, and Karma Khayat, the deputy head of news at Al Jadeed, with two counts of contempt for allegedly knowingly and willfully interfering with the administration of justice.¹¹¹⁶ The contempt order alleged that Al Jadeed and Ms. Khayat interfered with the STL’s administration of justice when the station (i) broadcast episodes in which Al Jadeed claimed it had interviewed confidential witnesses in the ongoing *Ayyash et al.* case, concerning the assassination of former Lebanese prime minister, Rafic Hariri, and then (ii) failed to remove

¹¹¹² S. Nam, “Reducing the Governance Gap for Corporate Complicity in International Crimes,” 45 BROOK. J. INT’L L. 193, 226, 236 (27 December 2019) ([link](#)).

¹¹¹³ Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents p 18, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013) ([link](#)).

¹¹¹⁴ *Id.* (quoting K. Ambos in “Commentary on the Rome Statute of the International Criminal Court” (O. Triffterer ed., 2nd ed. 2008)).

¹¹¹⁵ *Prosecutor v. New TV S.A.L.*, STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (2014); Nadia Bernaz, *Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty: Necessary but Insufficient*, Business & Human Rights Resource Centre (14 October 2015) ([link](#)).

¹¹¹⁶ *Prosecutor v. New TV S.A.L.*, STL-14-05/II/CJ, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Incident, 31 January 2014, ¶¶ 41, 49, 67.

the videos from the internet pursuant to the STL's order.¹¹¹⁷ Al Jadeed argued that STL did not have jurisdiction over the corporate media entity, and the judge agreed.¹¹¹⁸ The Appeals Panel overturned the judge's decision by a two-to-one majority, finding that the STL *does* have jurisdiction over legal persons.¹¹¹⁹

758. At issue in the case was whether the meaning of “person” in Rule 60 *bis* of the STL's rules (which provides jurisdiction to hold contempt proceedings, including over “any person” that engages in certain actions) included legal persons as well as natural persons.¹¹²⁰ In determining the meaning of “person” in Rule 60 *bis*, the Appeals Panel considered the UNGPs Principles 7(d), 26, and 23(a), along with other principles of international law and the object and purpose of the STL and Rule 60 *bis*.¹¹²¹ The Appeals Panel found that international human rights standards and their corresponding obligations apply equally to legal entities as well as natural persons, as evidenced by the UNHRC's adoption of the UNGPs.¹¹²² The Appeals Panel stated that the adoption of the UNGPs “represents a concrete movement on an international level backed by the United Nations for, *inter alia*, corporate accountability”.¹¹²³ Although the Appeals Panel noted that the UNGPs are nonbinding, it found that the UNGPs were evidence of “an emerging international consensus” regarding corporate accountability for human rights.¹¹²⁴ This provided a basis for the Appeals Panel's interpretation of Rule 60 *bis* that judicial remedies are not barred against legal persons despite the fact that some national laws limit the applicability of criminal law to legal persons.¹¹²⁵ As a result, the Appeals Panel's decision allowed the television station Al Jadeed to be prosecuted as a corporate entity by the STL.¹¹²⁶ Ultimately, the STL found Al Jadeed not guilty on both counts.¹¹²⁷
759. Scholars have debated the significance of the decision, as it did not involve the prosecution of a “core crime” under the STL's statute. Some suggest the decision “represents a significant

¹¹¹⁷ *Id.*, at ¶¶ 31–49; *Special Tribunal for Lebanon Acquits Journalist, TV Station of Contempt*, International Justice Resource Center (17 March 2016) ([link](#)).

¹¹¹⁸ *Prosecutor v. New TV S.A.L.*, STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014, ¶ 5.

¹¹¹⁹ *Id.*, ¶¶ 91–93.

¹¹²⁰ *Id.*, ¶ 2.

¹¹²¹ *Id.*, ¶ 46, n. 89.

¹¹²² *Id.*, ¶¶ 46–47, n. 89.

¹¹²³ *Id.*, ¶ 46.

¹¹²⁴ *Id.*

¹¹²⁵ *Id.*, ¶ 48.

¹¹²⁶ *Id.*, ¶¶ 91–93.

¹¹²⁷ *Prosecutor v. New TV S.A.L.*, STL-14-05/T/CJ, Public Redacted Version of Judgment, 18 September 2015, ¶ 51. The acquittal was reaffirmed by a subsequent judgment on appeal. *Prosecutor v. New TV S.A.L.*, STL-14-05/A/AP, Public Redacted Version of Judgment on Appeal, 8 March 2016, ¶ 93.

development in international criminal law”,¹¹²⁸ while others argue this prosecution is unlikely to amount to a “compelling precedent”.¹¹²⁹

The Appeals Panel stated that the adoption of the UNGPs “represents a concrete movement on an international level backed by the United Nations for, inter alia, corporate accountability”. Although the Appeals Panel noted that the UNGPs are nonbinding, it found that the UNGPs were evidence of “an emerging international consensus” regarding corporate accountability for human rights.

G. Arbitral Tribunals

(1) Introduction

760. This section analyzes international arbitration awards that reference the UNGPs.
761. It is possible to identify two main trends regarding the role of the UNGPs in international arbitration. *First*, the UNGPs are generally used as aids of interpretation to suggest the existence of certain human rights obligations that bind investors and States. However, the underlying investment treaty remains the deciding factor in any decision. *Second*, the significance of the UNGPs to a tribunal’s decision-making tends to be rather limited, both due to their soft law status and procedural hurdles that may prevent a tribunal from relying on them in reaching its decision.

(2) Decisions

762. The UNGPs and related instruments have been cited in arbitral submissions and awards to support the proposition that both the State and private investors must respect human rights obligations in the course of carrying out foreign investments. In *Bear Creek Mining Corporation v. Peru*,¹¹³⁰ a non-disputing party submission filed by the Association of Human Rights and the Environment (“**DHUMA**”) together with Dr. Carlos Lopez (“**DHUMA Submission**”) relied heavily on the UNGPs to argue that investors are obliged to obtain a

¹¹²⁸ S. Nam, *Reducing the Governance Gap for Corporate Complicity in International Crimes*, 45 BROOK. J. INT’L L. 193, 194–95 (27 December 2019) ([link](#)).

¹¹²⁹ Hughes-Jennett *et al.*, “Corporate Responsibility for International Crimes”, Chatham House (19 May 2015) (arguing this prosecution is unlikely to amount to a “compelling precedent”) ([link](#)).

¹¹³⁰ *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21. In this case, the investor argued the respondent State failed to protect its mining project. The investor’s mining project was strongly opposed by local communities. To address this, the respondent State prohibited mining in nearby areas, which also had the effect of revoking rights originally granted to the investor.

- “social license” for their projects.¹¹³¹ Such an obligation requires the investor to address the concerns of local stakeholders.¹¹³² The Columbia Center on Sustainable Investment made a similar submission, arguing that the UNGPs require investors to carry out human rights due diligence,¹¹³³ to consult affected indigenous communities and, in some cases, to obtain their consent.
763. The respondent State agreed with the DHUMA Submission, arguing the claimant had failed to obtain a social license for its mining project as required under Peruvian law, which incorporated the international standards reflected in the UNGPs and related instruments.¹¹³⁴ As a result, (i) under domestic law, the claimant could be required to conduct additional outreach or the investment process could be suspended entirely, at the discretion of the State; and (ii) under the investment treaty, the investor’s claims were rendered inadmissible.¹¹³⁵
764. The tribunal rejected the respondent’s arguments, holding that the alleged illegality of an investment is not sufficient to deny admissibility of the claim, though it could be a relevant factor in the examination of the merits.¹¹³⁶ On the merits, the tribunal noted that the claimant could have improved its community outreach, but that the respondent’s awareness and endorsement of claimant’s outreach activities precluded it from arguing that those efforts were insufficient in order to justify an expropriation of the investment.¹¹³⁷ The tribunal found no contributory fault on the claimant’s part and awarded the claimant damages based on the amount it had invested in Peru.¹¹³⁸ One member of the tribunal dissented in part, however, and argued that the amount of damages awarded to the claimant should be halved due to its failure to engage properly with local communities.¹¹³⁹
765. Likewise, in *Copper Mesa v. Ecuador*¹¹⁴⁰ the respondent State objected to the tribunal’s jurisdiction over a subset of the claims under the “unclean hands” doctrine. The respondent argued that the conduct of the claimant breached human rights standards reflected in

¹¹³¹ *Amicus Curiae* Brief submitted by the Association of Human Rights and the Environment – Puno and Mr. Carlos Lopez PhD (non-disputing parties), *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, at pp 12–16 (citing UNGPs Principles 17–21).

¹¹³² *Amicus Curiae* Brief submitted by the Association of Human Rights and the Environment – Puno and Mr. Carlos Lopez PhD (non-disputing parties), *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, at pp 12–16.

¹¹³³ Submission as an “Other Person” pursuant to article 836 and annex 836.1 of the Peru–Canada FTA by The Columbia Center on Sustainable Investment, *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, at pp 3–4 (citing UNGPs 11, 13 and 15).

¹¹³⁴ *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶¶ 256–266.

¹¹³⁵ *Id.*

¹¹³⁶ *Id.*, ¶ 335.

¹¹³⁷ *Id.*, ¶¶ 404–414.

¹¹³⁸ *Id.*, ¶¶ 569, 604.

¹¹³⁹ *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, Partial Dissenting Opinion of Professor Philippe Sands QC, ¶ 4.

¹¹⁴⁰ *Copper Mesa Mining Corp. v. Ecuador*, PCA Case No. 2012–02. In this case, the claimant had invested in several companies operating mining concessions in Ecuador. The respondent State then revoked the concessions and the claimant argued this revocation was unlawful and caused the claimant to lose the value of its investments.

international public policy, the UN Global Compact, the OECD Guidelines and the Voluntary Principles on Security and Human Rights.¹¹⁴¹ The tribunal rejected the respondent's objections to jurisdiction and admissibility, noting that the claimant's alleged misconduct had taken place openly many years ago, and yet the respondent State had not raised any complaints or otherwise taken any action against the claimant until the arbitration was filed.¹¹⁴² Instead, the tribunal folded consideration of the State's allegations into the merits.¹¹⁴³

766. On the merits, the tribunal held that the claimant's misconduct—namely, its violent response to local protestors at one of its mining concessions—contributed to its losses, and reduced damages by 30% with regard to that particular concession.¹¹⁴⁴
767. In *Urbaser SA & Anor v. Argentine Republic*, an arbitral tribunal accepted jurisdiction over a State's counter-claim based on the investor's alleged human rights obligations for the first time.¹¹⁴⁵ The UNGPs and related instruments were cited as support for the proposition that investors must respect human rights in their operations. The tribunal emphasized that "corporate social responsibility" is accepted under international law as a "standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation".¹¹⁴⁶ As a result, "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law".¹¹⁴⁷ The tribunal also found that investment treaties cannot be interpreted in a vacuum but must be construed in harmony with other applicable rules of international law, including international human rights law.¹¹⁴⁸
768. Ultimately, however, the tribunal rejected the respondent's counterclaim. The tribunal recognized the existence of the human right to water asserted by the respondent, but found that it only imposed a positive obligation on the State. The claimant's obligation to provide

¹¹⁴¹ *Copper Mesa Mining Corp. v. Ecuador*, PCA Case No. 2012-02, Award, 15 March 2016, ¶ 5.29.

¹¹⁴² *Id.*, ¶¶ 5.63–5.64.

¹¹⁴³ *Id.*, ¶¶ 6.97–6.102.

¹¹⁴⁴ *Id.*, ¶ 6.133.

¹¹⁴⁵ *Urbaser SA & Anor v. Argentine Republic*, ICSID Case No. ARB/07026, Award, 8 December 2016. In this case, the investor operated a concession in Buenos Aires that supplied water and sewage services. Following the Argentine financial crisis of 2001/2002, the respondent State took emergency measures that caused losses to the concession company. The investor brought a claim under the Spain-Argentina BIT and the respondent State brought a counter-claim, arguing the investor's failure to provide adequate investment in the concession violated international human rights obligations, in particular the right to water.

¹¹⁴⁶ *Id.*

¹¹⁴⁷ *Urbaser SA & Anor v. Argentine Republic*, ICSID Case No. ARB/07026, Award, 8 December 2016, ¶ 1195 (citing UNGPs 11, 12, 13 and 23).

¹¹⁴⁸ *Id.* ¶ 1200. See also *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, 18 September 2018, ¶¶ 736–747 (In considering Costa Rica's counter-claims that investor had breached environmental law obligations, the tribunal agreed with the *Urbaser* tribunal that "it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law. It is particularly convincing when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment"; although ultimately dismissed the counter-claims on other grounds).

water and sewage services flowed from its contract with the State, and thus was grounded in domestic rather than international human rights law.¹¹⁴⁹ The tribunal indicated that the result would be different “in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties”.¹¹⁵⁰

769. Other tribunals have taken a different approach, and viewed the UNGPs and related instruments to be of limited relevance to international investment law. In *South American Silver v. Bolivia*,¹¹⁵¹ the respondent raised an “unclean hands” defense, arguing that the claimant’s alleged human rights violations, which included breaches of indigenous communities’ rights to self-determination and to a healthy environment, rendered its claims inadmissible.¹¹⁵² The respondent argued that the tribunal should consider the UNGPs and the OECD Guidelines in the interpretation of the underlying bilateral investment treaty (“BIT”), “within applicable customary business practices and as evidence of international public order”.¹¹⁵³ The claimant, however, argued that such instruments could not be relied on by the tribunal as they were not customary international law.¹¹⁵⁴
770. The tribunal focused on the BIT to guide its resolution of the dispute.¹¹⁵⁵ The tribunal agreed that, in accordance with customary principles of treaty interpretation, other applicable rules of international law may be considered in interpreting the BIT, but this must be done “cautiously, in order to prevent the tribunal from exceeding its jurisdiction and applying rules to the dispute which the Parties have not agreed to”.¹¹⁵⁶ The tribunal thus rejected respondent’s argument that the tribunal should prioritize or even apply soft law rules like the UNGPs in interpreting the BIT, because those rules “do not constitute customary law”.¹¹⁵⁷
771. In *Gabriel Resources v. Romania*,¹¹⁵⁸ an *amicus curiae* brief was submitted, arguing that both the claimant and the respondent had disregarded the human rights of local residents. The *amicus*

¹¹⁴⁹ *Id.*, ¶ 1210.

¹¹⁵⁰ *Id.*

¹¹⁵¹ *South American Silver v. Bolivia*, PCA Case No. 2013-15. In this case, the claimant argued the respondent had expropriated its mining investments and failed to pay prompt, just and adequate compensation for the unlawful expropriation, provide fair and equitable treatment to the claimant’s investment, and provide full protection and security to foreign investors and their investors.

¹¹⁵² *Id.*, ¶¶ 309, 321.

¹¹⁵³ *South American Silver v. Bolivia*, PCA Case No. 2013-15, Respondent’s objections to jurisdiction, admissibility and counter-memorial on the merits, ¶ 220 (citing Principles 11 and 12); *South American Silver v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 200.

¹¹⁵⁴ *South American Silver v. Bolivia*, PCA Case No. 2013-15, Claimant’s reply to the respondent’s counter-memorial on the merits and response to the respondent’s objections to jurisdiction and admissibility, ¶ 247.

¹¹⁵⁵ *South American Silver v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, ¶ 208.

¹¹⁵⁶ *Id.*, ¶ 216.

¹¹⁵⁷ *Id.*, ¶ 217.

¹¹⁵⁸ *Gabriel Resources v. Romania*, ICSID Case No. ARB/15/31. In this case, the claimant sought to establish Europe’s largest gold mine in Romania. Having obtained the licences and made some initial investment, the respondent then stopped the project due to opposition from local villagers and wider campaign groups. The claimant then commenced arbitration against the respondent. The claimant also made reference to business and human rights

argued that the claimant had failed to carry out appropriate due diligence on the feasibility of the project, including consultations with local communities, and had failed to respect the rights of affected communities and thus had not obtained a social license.¹¹⁵⁹ The *amicus* referred explicitly to Principle 18 of the UNGPs, which calls for meaningful consultations with potentially affected people and other relevant stakeholders.¹¹⁶⁰

772. While the tribunal allowed the *amicus curiae* application in part, it excluded the parts of the submission that relied on witness testimonials or dealt with legal matters or other matters outside of the competence of *amici*.¹¹⁶¹
773. A similar approach was adopted by the tribunal in *Pac Rim v. El Salvador*.¹¹⁶² An *amicus curiae* brief submitted by the Center for International Environmental Law (“**CIEL**”) argued that the arbitration would effectively “punish [the respondent] for fulfilling its own international law obligations to protect citizens’ human rights,” as set forth in the Tripartite Declaration, the UN Global Compact, and the OECD Guidelines, among others.¹¹⁶³ While the tribunal admitted the brief, it ultimately refused to consider CIEL’s submission in reaching its decision.¹¹⁶⁴

(3) Other Developments

774. In the future, the UNGPs and related instruments may play a more important role within the context of international arbitration, as the result of a number of developing BHR-related trends.
775. First, direct references to the UNGPs and similar instruments are increasingly being incorporated into investment treaties.
776. For example, the Morocco-Nigeria BIT contains an article on post-establishment obligations which obliges States and investors to “uphold human rights in the host State” and “act in accordance with the core labor standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998”.¹¹⁶⁵ Another example is the Netherlands, which, in October 2018, revised its model BITs to allow for reductions in investor compensation for

standards, arguing that it had complied with the OECD Guidelines and the UN Global Compact through modern and environmentally responsible techniques.

¹¹⁵⁹ *Gabriel Resources v. Romania*, ICSID Case No. ARB/15/31, *Amicus Curiae* Submission by Alburnus Major, Centrul Independent pentru Dezvoltarea Resurselor de Mediu and Greenpeace Romania, at pp 1-10 ([link](#)).

¹¹⁶⁰ *Id.*, at p 4.

¹¹⁶¹ *Gabriel Resources v. Romania*, ICSID Case No. ARB/15/31, Procedural Order No. 19, 7 December 2018, ¶ 75(1)(b).

¹¹⁶² *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12. In this case, the claimant acquired mining licenses to conduct exploratory activities in concession areas before applying for the necessary exploitation concessions having discovered high-grade gold reserves. The respondent refused to grant this concession and the claimant commenced arbitration.

¹¹⁶³ *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Submission of *Amicus Curiae* Brief by the Center for International Environmental Law, at p 12.

¹¹⁶⁴ *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, ¶ 3.30.

¹¹⁶⁵ Morocco-Nigeria BIT, art. 18.

noncompliance with the UNGPs.¹¹⁶⁶ The Netherlands has since obtained authorization from the EC to re-negotiate some of its BITs with non-EU countries, including the United Arab Emirates, Turkey, and Argentina.

777. *Second*, there is also a noticeable trend towards dedicated BHR arbitration instruments and procedures.



778. For example, the Accord on Fire and Building Safety in Bangladesh (“**Bangladesh Accord**”) is a first-of-a-kind agreement between global retailers and trade unions,¹¹⁶⁷ which was developed in response to the 2013 Rana Plaza building collapse.¹¹⁶⁸ The Bangladesh Accord covers more than 1,600 factories and 2 million workers in Bangladesh.¹¹⁶⁹ It is the first example of an arbitration procedure being integrated into an international framework to resolve business and human rights disputes.¹¹⁷⁰
779. Another key development is the publication of the Hague Rules on Business and Human Rights Arbitration (“**Hague Rules**”) in December 2019.¹¹⁷¹ The Hague Rules are intended to

¹¹⁶⁶ Article 23, Netherlands Model Investment Agreement, 2018.

¹¹⁶⁷ Rumbidzai Maweni, “Arbitrating Human Rights Disputes: The Proposal for Business and Human Rights Arbitration Rules and Lessons Learned from the Bangladesh Accord Arbitrations,” Columbia Center on Sustainable Investment (10 July 2019).

¹¹⁶⁸ Bangladesh Accord ([link](#)).

¹¹⁶⁹ Rumbidzai Maweni, “Arbitrating Human Rights Disputes: The Proposal for Business and Human Rights Arbitration Rules and Lessons Learned from the Bangladesh Accord Arbitrations,” Columbia Center on Sustainable Investment (10 July 2019).

¹¹⁷⁰ Article 5, Accord on Fire and Building Safety in Bangladesh, 2013. See also Article 3, Transition Accord on Fire and Building Safety in Bangladesh, 2018.

¹¹⁷¹ Center for International Legal Cooperation, “The Hague Rules on Business and Human Rights Arbitration” ([link](#)).

provide a non-State based mechanism for resolving disputes between rights-holders, businesses and suppliers, where they have consented to arbitrate their disputes. The Hague Rules are based on the United Nations Commission on International Trade Law (“**UNCITRAL**”) Arbitration Rules, with the Permanent Court of Arbitration as the default authority, and can be incorporated into arbitration clauses in multilateral agreements.¹¹⁷² The tribunal will apply the substantive law chosen by the parties and can take into account trade practices and any relevant business and human rights standards.¹¹⁷³

780. The Hague Rules include a number of specific features, including: (i) transparency; (ii) opportunities for interested third parties and States to take part; and (iii) an emphasis on multi-party claims, with claims of significant commonality being heard together.¹¹⁷⁴
781. A final interesting development is a press release issued by the International Federation of Association Football (“**FIFA**”) in July 2015 stating that all contractual partners and those within its supply chain must comply with the UNGPs.¹¹⁷⁵ The UNGPs may therefore play an important role in sports arbitrations in the future, particularly if similar organizations follow FIFA’s approach.

H. UN Human Rights Bodies

(1) *Charter Body—UN Human Rights Council*

782. The UNHRC can hear disputes submitted via its complaints procedure. The complaints procedure allows for the submission of communications by individuals, groups, or NGOs that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations. The violations must show “consistent patterns of gross human rights violation”.
783. Individual complaints to the UNHRC are confidential, and therefore the searches conducted returned no evidence of references to the UNGPs. Once it is determined that there has been a “consistent pattern of gross human rights violations” by a particular State, the Council discusses the complaints in closed meetings. These discussions are noted in UNHRC sessions; however, due to the confidential nature of the procedure, details of the complaints and the discussions are not provided unless the UNHRC decides to discontinue reviewing the case under the confidential procedure and take up public consideration. Since the adoption of the UNGPs, this has only happened once, in relation to Eritrea in 2012.¹¹⁷⁶ The discussions did not mention the UNGPs.

¹¹⁷² The Hague Rules, ¶ 6 of the commentary to art. 1.

¹¹⁷³ The Hague Rules, art. 46(4).

¹¹⁷⁴ Since the Hague Rules were promulgated very recently, no cases could be found that have applied them.

¹¹⁷⁵ FIFA Executive Committee Sets Presidential Election for 26 February 2016 and Fully Supports Roadmap for Reform (20 July 2015) ([link](#)).

¹¹⁷⁶ UNHRC Resolution 21/1, Situation of human rights in Eritrea ([link](#)).

784. Outside of its complaints procedure, the UNHRC has actively sought to strengthen implementation of the UNGPs, making formal recommendations that the OHCHR promote the implementation of Pillar III.¹¹⁷⁷ Searches of the UNHRC website also returned various references to the work of John Ruggie and the adoption and development of the UNGPs framework. Finally, there were a number of other references relating to the UNGPs in the context of States' UPRs.

(2) The Universal Periodic Review Working Group

785. The UPRWG periodically reviews the human rights records of all 193 UN Member States. These reviews are published in the UNHRC's Annual Reports and contain a number of references to the UNGPs, from both the States and stakeholders.¹¹⁷⁸

- (i) Sierra Leone (Report 18/2): the Human Rights Commission of Sierra Leone, commenting as a stakeholder, "hoped that the development of action plan on human rights and the rights of children would include measures to implement the new UN Human Rights Council Guiding Principles on Business and Human Rights".¹¹⁷⁹
- (ii) Zambia (Report 22/2): Edmund Rice International Limited, speaking also on behalf of Franciscans International, the International Volunteerism Organization for Women, Education and Development and Istituto Internazionale Maria Ausiliatrice delle Salesiane di Don Bosco as stakeholders, urged Zambia to follow the UNGPs.¹¹⁸⁰
- (iii) Italy (Report 28/2): Kuwait, as a State Commentator, thanked Italy for its NAP on the UNGPs, which Italy had submitted to the EC.¹¹⁸¹
- (iv) Australia (Report 31/2): the delegation stated that Australia would undertake a national consultation on the implementation of the UNGPs in 2016.¹¹⁸²
- (v) Niger (Report 32/2): the Indian Council of South America, commenting as a Stakeholder, referred to the recommendation made by Switzerland to Niger to ensure that mining companies respected human rights. It recommended that Niger ensure that the recommendation was implemented in accordance with the UNGPs.¹¹⁸³

¹¹⁷⁷ See, e.g., UN Human Rights Council, "Resolution Adopted by the Human Rights Council" A/HRC/RES/26/22 (15 July 2014) ([link](#)); UN Human Rights Council, "Resolution adopted by the Human Rights Council on 30 June 2016" A/HRC/RES/32/10 (15 July 2016) ([link](#)); UN Human Rights Council, "Resolution adopted by the Human Rights Council on 6 July 2018" A/HRC/RES/38/13 (18 July 2018) ([link](#)); UN Human Rights Council "Resolution adopted by the Human Rights Council on 17 July 2020" A/HRC/RES/44/15 (23 July 2020) ([link](#)).

¹¹⁷⁸ United Nations Human Rights Council, Basic Facts about the UPR ([link](#)).

¹¹⁷⁹ Human Rights Council, Report of the Human Rights Council on its eighteen session, ¶ 439 ([link](#)).

¹¹⁸⁰ Human Rights Council, Report of the Human Rights Council on its twenty-second session, ¶ 699 ([link](#)).

¹¹⁸¹ Human Rights Council, Report of the Human Rights Council on its twenty-eighth session, ¶ 408 ([link](#)).

¹¹⁸² Human Rights Council, Report of the Human Rights Council on its thirty-first session, ¶ 775 ([link](#)).

¹¹⁸³ Human Rights Council, Report of the Human Rights Council on its thirty-second session, ¶ 580 ([link](#)).

(vi) Mozambique (Report 32/2): there was discussion of an ongoing joint initiative involving the government and civil society, based on the UNGPs. A number of activities had been implemented, including training workshops and a baseline study on business and human rights in Mozambique. Those activities would lead to the development of an action plan that would provide for, among other things, the accountability of stakeholders.¹¹⁸⁴

(vii) Papua New Guinea (Report 33/2): Franciscans International commended Papua New Guinea for its efforts to protect and promote the human rights of its citizens. Among other things, it recommended that Papua New Guinea monitor, review regularly and report publicly on the operations of extractive industries, to ensure that the UNGPs were being followed.¹¹⁸⁵

I. UN Treaty Bodies

(1) Overview

786. Currently, there are nine core international human rights treaties, and one optional protocol, from which ten treaty bodies have been established (the tenth being the Subcommittee on Prevention of Torture) to monitor implementation of the core international human rights treaties. The treaty bodies are composed of independent experts of recognized competence in human rights, who are nominated and elected for fixed renewable terms by State Parties.¹¹⁸⁶

(2) Committees' Comments and Observations

787. No direct references to the UNGPs were found in the jurisprudence of the UN treaties bodies. Five of the ten treaty bodies—the CESCR, the CRC, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the CEDAW and the Committee on the Elimination of Racial Discrimination—have referenced the UNGPs in their concluding observations on various country reports, while only the CESCR and the CRC have made reference to the UNGPs in General Comments.

(i) Committee on Economic, Social and Cultural Rights

788. In General Comment No. 24 (2017) on State obligations under the ICESCR in the context of business activities, the CESCR noted: “[i]n adopting the present general comment, the Committee has considered the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011”.¹¹⁸⁷ General Comment No. 24 is focused on State parties’

¹¹⁸⁴ *Id.*, ¶ 580.

¹¹⁸⁵ *Id.*, ¶ 593.

¹¹⁸⁶ UN Human Rights Treaty Bodies include the Human Rights Committee; the Committee on Economic, Social and Cultural Rights, CEDAW, the Committee Against Torture, the Committee on the Rights of the Child; the Committee on Migrant Workers; the Committee on the Rights of Persons with Disabilities; the Committee on Enforced Disappearances; and the Subcommittee on Prevention of Torture ([link](#)).

¹¹⁸⁷ UN CESCR General Comment No. 24, UN Doc. E/C.12/GC/24 (10 August 2017).

obligations under the ICESC and therefore deals with the conduct of private actors such as business entities only indirectly, but its recommendations largely track the “Protect, Respect, Remedy” framework established by the UNGPs. As an earlier draft of the General Comment notes: “[t]he urgent need to prevent and address the adverse impacts of business activities on human rights is well reflected in various legal instruments and standards adopted by the international community. Most notably, the Human Rights Council adopted in 2011 the Guiding Principles on Business and Human Rights that implement the ‘Protect, Respect and Remedy’ Framework proposed by the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises”.¹¹⁸⁸

789. In addition, the CESCR’s concluding observations on Norway (2020),¹¹⁸⁹ Kazakhstan (2019),¹¹⁹⁰ New Zealand (2018),¹¹⁹¹ Australia (2017),¹¹⁹² and Finland (2020)¹¹⁹³ each specifically reference the UNGPs. The UNGPs are generally noted in the context of encouraging the relevant State to adopt an NAP on business and human rights, and a general concern regarding the absence of a regulatory framework that ensures full respect of economic, social, and cultural human rights by the State and private parties operating in the State.
790. Finally, the CESCR’s concluding observations on a further 13 States do not specifically reference the UNGPs, but either encourage better implementation of an NAP on business and human rights, or at least draw attention to General Comment No.24, referenced above: Denmark (2019),¹¹⁹⁴ Switzerland (2019),¹¹⁹⁵ Cameroon (2019),¹¹⁹⁶ Germany (2018),¹¹⁹⁷ Niger (2018),¹¹⁹⁸ Spain (2018), Mexico (2018),¹¹⁹⁹ Colombia (2017),¹²⁰⁰ Korea (2017),¹²⁰¹ Russia (2017),¹²⁰² the Netherlands (2017),¹²⁰³ Liechtenstein (2017),¹²⁰⁴ and Belgium (2020).¹²⁰⁵

¹¹⁸⁸ General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, Draft prepared by Olivier De Schutter and Zdzislaw Kedzia, Rapporteurs, UN Doc. E/C.12/60/R.1 (17 October 2016) ([link](#)).

¹¹⁸⁹ UN CESCR, Concluding observation on the sixth periodic report of Norway, E/C.12/NOR/CO/6 (2 April 2020) ([link](#)).

¹¹⁹⁰ UN CESCR, Concluding observation on the second periodic report of Kazakhstan, UN Doc. E/C.12/KAZ/CO/2 (29 March 2019) ([link](#)).

¹¹⁹¹ UN CESCR, Concluding observation on the fourth periodic report of New Zealand, UN Doc. E/C.12/NZL/CO/4 (1 May 2018) ([link](#)).

¹¹⁹² UN CESCR, Concluding observation on the fifth periodic report of Australia, UN Doc. E/C.12/AUS/CO/5 (11 July 2017) ([link](#)).

¹¹⁹³ UN CESCR, Seventh periodic report submitted by Finland under articles 16 and 17 of the Covenant, due in 2020, UN Doc. E/C.12/FIN/7 (23 April 2020) ([link](#)).

¹¹⁹⁴ UN CESCR, Concluding observation on the sixth periodic report of Denmark, UN Doc. E/C.12/DNK/CO/6 (12 November 2019) ([link](#)).

¹¹⁹⁵ UN CESCR, Concluding observation on the fourth periodic report of Switzerland, UN Doc. E/C.12/CHE/CO/4 (18 November 2019), ([link](#)).

¹¹⁹⁶ UN CESCR, Concluding observation on the fourth periodic report of Cameroon, UN Doc. E/C.12/CMR/CO/4 (25 March 2019) ([link](#)).

¹¹⁹⁷ UN CESCR, Concluding observation on the sixth periodic report of Germany, UN Doc. E/C.12/DEU/CO/6 (27 November 2018) ([link](#)).

¹¹⁹⁸ UN CESCR, Concluding observation on the initial report of Niger, UN Doc. E/C.12/NER/CO/1 (4 Jun. 2018) ([link](#)).

(ii) *Committee on the Rights of the Child*

791. In General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, the CRC stated: "[t]he Committee recognizes the relevance of the United Nations 'Protect, Respect and Remedy' Framework and [the UNGPs...] and of the ILO Tripartite Declaration of Principles concerning Multinationals and Social Policy. Other documents, such as the [OECD Guidelines], the Global Compact, the United Nations Study on Violence against Children and the Children's Rights and Business Principles have been useful references for the Committee".¹²⁰⁶
792. 29 concluding observations of the CRC make explicit reference to the UNGPs: Austria (2020),¹²⁰⁷ Bosnia and Herzegovina (2019),¹²⁰⁸ Mozambique (2019),¹²⁰⁹ Australia (2019),¹²¹⁰ Republic of Korea (2019),¹²¹¹ Côte d'Ivoire (2019),¹²¹² Singapore (2019),¹²¹³ Malta (2019),¹²¹⁴ Cabo Verde (2019),¹²¹⁵ Japan (2019),¹²¹⁶ Guinea (2019),¹²¹⁷ Belgium (2019),¹²¹⁸ Bahrain (2019),¹²¹⁹

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- ¹¹⁹⁹ UN CESCR, Concluding observation on the combined fifth and sixth periodic reports of Mexico, UN Doc. E/C.12/MEX/CO/5-6 (17 April 2018) ([link](#)).
- ¹²⁰⁰ UN CESCR, Concluding observation on the sixth periodic report of Colombia, UN Doc. E/C.12/COL/CO/6 (19 October 2017) ([link](#)).
- ¹²⁰¹ UN CESCR, Concluding observation on the fourth periodic report of the Republic of Korea, UN Doc. E/C.12/KOR/CO/4 (19 October 2017) ([link](#)).
- ¹²⁰² UN CESCR, Concluding observation on the sixth periodic report of the Russian Federation, UN Doc. E/C.12/RUS/CO/6 (16 October 2017) ([link](#)).
- ¹²⁰³ UN CESCR, Concluding observation on the sixth periodic report of the Netherlands, UN Doc. E/C.12/NLD/CO/6 (6 July 2017) ([link](#)).
- ¹²⁰⁴ UN CESCR, Concluding observation on the combined second and third periodic reports of Liechtenstein, UN Doc. E/C.12/LIE/CO/2-3 (3 July 2017) ([link](#)).
- ¹²⁰⁵ UN CESCR, Concluding observation on the fifth periodic report of Belgium, UN Doc. E/C.12/BEL/CO/5 (26 March 2020) ([link](#)).
- ¹²⁰⁶ UN CRC, General comment No. 16 (2013) on State Obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16 (17 April 2013) ([link](#)).
- ¹²⁰⁷ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Austria, UN Doc. CRC/C/AUT/CO/5-6 (6 March 2020) ([link](#)).
- ¹²⁰⁸ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Bosnia and Herzegovina, UN Doc. CRC/C/BIH/CO/5-6 (6 December 2019) ([link](#)).
- ¹²⁰⁹ UN CRC, Concluding observations on the combined third and fourth periodic reports of Mozambique, UN Doc. CRC/C/MOZ/CO/3-4 (27 November 2019) ([link](#)).
- ¹²¹⁰ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Australia, UN Doc. CRC/C/AUS/CO/5-6 (1 November 2019) ([link](#)).
- ¹²¹¹ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of the Republic of Korea, UN Doc. CRC/C/KOR/CO/5-6 (24 October 2019) ([link](#)).
- ¹²¹² UN CRC, Concluding observations on the second periodic report of Côte d'Ivoire, UN Doc. CRC/C/CIV/CO/2 (12 July 2019) ([link](#)).
- ¹²¹³ UN CRC, Concluding observations on the combined fourth and fifth periodic reports of Singapore, UN Doc. CRC/C/SGP/CO/4-5 (28 June 2019) ([link](#)).
- ¹²¹⁴ UN CRC, Concluding observations on the combined third to sixth periodic reports of Malta, UN Doc. CRC/C/MLT/CO/3-6 (26 June 2019) ([link](#)).
- ¹²¹⁵ UN CRC, Concluding observations on the second periodic report of Cabo Verde, UN Doc. CRC/C/CPV/CO/2 (27 June 2019) ([link](#)).

Lao's People Democratic Republic (2018),¹²²⁰ Angola (2018),¹²²¹ Seychelles (2018),¹²²² Spain (2018),¹²²³ Sri Lanka (2018),¹²²⁴ Guatemala (2018),¹²²⁵ Marshall Islands (2018),¹²²⁶ Mongolia (2017),¹²²⁷ Cameroon (2017),¹²²⁸ Bhutan (2017),¹²²⁹ Central African Republic (2017),¹²³⁰ New Zealand (2016),¹²³¹ Chile (2015),¹²³² Germany (2014),¹²³³ Malta (2013),¹²³⁴ and Egypt (2011).¹²³⁵

793. These concluding observations typically emphasize the State's responsibility to comply with international human rights standards with regards to children's rights — with one particular State, Kenya (2016), instructed to be “guided by” the UNGPs.¹²³⁶ They also highlight particular

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- ¹²¹⁶ UN CRC, Concluding observations on the combined fourth and fifth periodic reports of Japan, UN Doc. CRC/C/JPN/CO/4-5 (5 March 2019) ([link](#)).
- ¹²¹⁷ UN CRC, Concluding observations on the combined third to sixth periodic reports of Guinea, UN Doc. CRC/C/GIN/CO/3-6 (28 February 2019) ([link](#)).
- ¹²¹⁸ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Belgium, UN Doc. CRC/C/BEL/CO/5-6 (28 February 2019) ([link](#)).
- ¹²¹⁹ UN CRC, Concluding observations on the combined fourth to sixth periodic reports of Bahrain, UN Doc. CRC/C/BHR/CO/4-6 (27 February 2019) ([link](#)).
- ¹²²⁰ UN CRC, Concluding observations on the combined third to sixth periodic reports of Lao People's Democratic Republic, UN Doc. CRC/C/LAO/CO/3-6 (1 November 2018) ([link](#)).
- ¹²²¹ UN CRC, Concluding observations on the combined fifth to seventh periodic reports of Angola, UN Doc. CRC/C/AGO/CO/5-7 (27 June 2018) ([link](#)).
- ¹²²² UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Seychelles, UN Doc. CRC/C/SYC/CO/5-6 (5 March 2018) ([link](#)).
- ¹²²³ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Spain, UN Doc. CRC/C/ESP/CO/5-6 (5 March 2018) ([link](#)).
- ¹²²⁴ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Sri Lanka, UN Doc. CRC/C/LKA/CO/5-6 (2 March 2018) ([link](#)).
- ¹²²⁵ UN CRC, Concluding observations on the combined fifth and sixth periodic reports of Guatemala, UN Doc. CRC/C/GTM/CO/5-6 (28 February 2018) ([link](#)).
- ¹²²⁶ UN CRC, Concluding observations on the combined third and fourth periodic reports of the Marshall Islands, UN Doc. CRC/C/MHL/CO/3-4 (27 February 2018) ([link](#)).
- ¹²²⁷ UN CRC, Concluding observations on the fifth periodic report of Mongolia, UN Doc CRC/C/MNG/CO/5, (12 July 2017) ([link](#)).
- ¹²²⁸ UN CRC, Concluding observations on the combined third to fifth periodic reports of Cameroon, UN Doc. CRC/C/CMR/CO/3-5 (6 July 2017) ([link](#)).
- ¹²²⁹ UN CRC, Concluding observations on the combined third to fifth periodic reports of Bhutan, UN Doc. CRC/C/BTN/CO/3-5 (5 July 2017) ([link](#)).
- ¹²³⁰ UN CRC, Concluding observations on the second periodic report of the Central African Republic, UN Doc. CRC/C/CAF/CO/2 (8 March 2017) ([link](#)).
- ¹²³¹ UN CRC, Concluding observations on the fifth periodic report of New Zealand, UN Doc. CRC/C/NZL/CO/5 (21 October 2016) ([link](#)).
- ¹²³² UN CRC, Concluding observations on the combined fourth and fifth periodic reports of Chile, UN Doc. CRC/C/CHL/CO/4-5 (30 October 2015) ([link](#)).
- ¹²³³ UN CRC, Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4 (25 February 2014) ([link](#)).
- ¹²³⁴ UN CRC, Concluding observations on the second periodic report of Malta, UN Doc. CRC/C/MLT/CO/2 (18 June 2013) ([link](#)).
- ¹²³⁵ Considerations of reports submitted by States parties under article 44 of the Convention, UN Doc. CRC/C/EGY/CO/3-4 (15 July 2011) ([link](#)).
- ¹²³⁶ UN CRC, Concluding observations on the combined third and fifth periodic reports of Kenya, UN Doc. CRC/C/KEN/CO/3-5 (21 March 2016) ([link](#)).

industry areas where children's rights are under particular threat, such as the exploitation of children in the tourism sector, with Australia and Cabo Verde among those countries advised to improve their protections.

794. A total of 62 States' concluding observations mention General Comment No. 16, referenced above.¹²³⁷ These recommendations generally include recommendations such as: (i) adopting and implementing regulations to ensure that the business sector complies with international standards, (ii) ensuring effective monitoring of the regulations and appropriate sanctions for violations, (iii) establishing a child protection framework, and (iv) requiring companies to undertake and publicly disclose assessments of the environmental, health-related and other impacts of their business activities on children's rights. In specific cases, like the United Kingdom (2016),¹²³⁸ the Committee, with reference to General Comment No. 16 (2013), has recommended that the State "[i]ntegrate an explicit focus on children's rights, including the requirement for businesses to undertake child-rights due diligence, in the revised version of its first National Action Plan on Business and Human Rights".

(iii) Other Committees

795. As regards the remaining committees:

- (i) The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families has included two references to the UNGPs in its concluding observations: Guatemala (2019)¹²³⁹ and Madagascar (2018)¹²⁴⁰. Both observations point to specific instances of concern for migrant workers and recommend the strengthening of regulatory frameworks in line with the UNGPs.
- (ii) The CEDAW has made one explicit reference to the UNGPs in its concluding observations in respect of Luxembourg (2018), where the Committee encouraged the adoption of an NAP on business and human rights on the basis of the UNGPs.¹²⁴¹ More generally, the CEDAW has encouraged States to incorporate gender perspectives into their NAPs on business and human rights in several concluding observations.¹²⁴²

¹²³⁷ M. Sydygaliev, Memo on influence of the UN Guiding Principles Business and Human Rights on UN treaty bodies based on concluding observations (10 September 2020).

¹²³⁸ UN CRC, concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/5 (12 July 2016) ([link](#)).

¹²³⁹ The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Concluding observations on the second periodic report of Guatemala, UN Doc. CMW/C/GTM/CO/2 (2 May 2019) ([link](#)).

¹²⁴⁰ The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Concluding observations on the initial report of Madagascar, UN Doc. CMW/C/MDG/CO/1 (15 October 2018) ([link](#)).

¹²⁴¹ UN CEDAW, Concluding observations on the combined sixth and seventh periodic reports of Luxembourg, UN Doc. CEDAW/C/LUX/CO/6-7 (14 March 2018) ([link](#)).

¹²⁴² See, for example, UN CEDAW, the concluding observations on the eighth periodic report of Ethiopia, UN Doc. CEDAW/C/ETH/CO/8, (14 March 2019) ([link](#)).

- (iii) The Committee on the Elimination of Racial Discrimination notes the UNGPs in one concluding observation in respect Ireland (2020),¹²⁴³ where it highlighted instances of discrimination by an Irish-domiciled company at a Colombian mine, recommending that Ireland stop purchasing coal from the mine and lend its support to an inquiry.

¹²⁴³ UN CERD, Concluding observations on the combined fifth to ninth periodic reports of Ireland, UN Doc. CERD/C/IRL/CO/5-9 (23 January 2020) ([link](#)).

