



# The EU's engagement with the main Business and Human Rights instruments

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## **The EU's engagement with the main Business and Human Rights instruments**

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## Executive Summary

This report aims at analysing and assessing the activities of the European Union in respect of the Business and Human Rights international governance regime. More particularly, it seeks to take the measure of the EU's efforts to foster and track responses to five 'internationally recognised standards' which form the core of that regime, namely the UN Guiding Principles for Business and Human Rights, the UN Global Compact, the OECD Guidelines for Multinational Enterprises, the ISO 26000 Guidance Standard on Social Responsibility and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The EU has made a firm commitment to foster human rights-compliant business conduct, and has unequivocally endorsed these five instruments. It has also made them part of its overall Corporate Social Responsibility Strategy, of which the issue of Business and Human Rights is an important component. It is therefore useful to study whether the EU's endorsement translates into concrete support, and whether such support itself translates into increased awareness and compliance with these instruments by itself, its Member States, third countries, but also of course, by businesses.

Regarding the UN Guiding Principles, this report finds that this is the instrument with which the EU is most engaged. It has supported its development and addition at the UN, and now considers it the overarching instrument in the business and human rights regimes, the four others being ways to implement the Guiding Principles. Regarding concrete activities to foster implementation of this instrument, this report finds that, though the EU is very active in coordinating the response of its Member States, notably through the adoption of national action plans, it could do more to improve third country responses, notably by establishing a clearer link between its trade policy and this instrument, in the way that it has done for other types of objectives, such as sustainable development. In addition, the report finds that the EU is abdicating any ambition to proactively foster direct business responses to the UN Guiding Principles, as it considers that enterprises are in the lead in this regard, and that its role must necessarily be a marginal one, confined to soft promotion and coordination.

When it comes to the UN Global Compact and the ILO Tripartite Declaration, this report reaches similar conclusions, namely that they are very weakly embedded in the EU business and human rights policy. Beyond the formal endorsement and repetition in a number of instruments (most frequently external relations instruments) of such internationally recognised standards, there is very little by way of specific initiatives to foster and track responses to these two instruments.

In the case of the OECD Guidelines for Multinational Enterprises, this report finds that, as a quasi-member of the OECD, the EU is in a pre-eminent position to monitor the compliance of Member States' companies with the Guidelines to the extent that the Member States are OECD Members or adherents to the OECD Guidelines, and for which they must establish national contact points (NCPs) with a complaints mechanism. The EU tracking of responses to the OECD Guidelines could be made more effective, by dovetailing the OECD's peer-review mechanism with its own CSR peer review mechanism. It could also support the call for strengthening NCPs so as to improve their overall performance and operate more effectively as a mechanism for addressing business-related human rights complaints.

Since the EU is neither an ISO Member nor does it have observer status in this private international organisation, unlike its position in the OECD, it exercises only a marginal role with respect to the ISO 26000 Guidance Standard on SR. Consequently, this report finds that any EU tracking of responses to this CSR instrument is only as good as the information that Member State governments provide, and the situation is not helped, at the level of the European standards organisation, by CEN that has abdicated responsibility for ISO 26000 on the basis of the Vienna Agreement. As a public international organisation, the EU is also 'covered' by the guidance standard and it should consider conducting a review of its activities, to better align its SR practices with ISO 26000, as foreseen in the EU CSR Strategy.

The report's last chapter concerns three regulatory initiatives which the EU has recently taken in the framework of its business and human rights policy, and which concern non-financial reporting by companies, the sourcing of certain minerals, and public procurement. These regulatory initiatives were studied in a separate chapter because they do not seek to implement one instrument in particular, but rather the overall objective of fostering CSR, and also because they are quite isolated in the EU's policy which is made up rather of soft initiatives.

## List of abbreviations

3'T's	Tin, Tantalum and Tungsten
3TG	Tin, Tantalum, Titanium and Gold
ABNT	Associação Brasileira de Normas Técnicas
AFI	Air France Industries
AFNOR	Association Française de Normalisation
ARP	Accountability and Remedy Project
ASO	Austrian Standards Institute
BIAC	Business and Industry Advisory Committee (to the OECD)
BSI	British Standards Institute
CAG	Chairman's Advisory Group
CD	Committee Draft
CEDAW	Committee on the Elimination of Discrimination against Women
CEN	European Committee for Standardisation
CoE	Council of Europe
COHOM	European Council's Working Group on Human Rights
CoP	Communication on Progress
COPOLCO	ISO Committee on Consumer Policy
CR	Corporate Responsibility
CRC	Committee on the Rights of the Child
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DAC	Development Assistance Committee
DAG	Domestic Advisory Group
DEVCO	Directorate General of Development Cooperation

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DFA	Dodd-Frank Wall Street Reform and Consumer Protection Act
DG	Directorate General
DIS	Draft International Standards
DMA	Disclosure on Management Approach
DRC	Democratic Republic of Congo
DS	Danish Standards
EEAS	European External Action Service
EGNHRI	European Group of National Human Rights Institutions
ENP	European Neighbourhood Policy
EP	European Parliament
EU	European Union
FDIS	Final Draft International Standard
FRAME	Fostering Human Rights among European Policies
GRI	Global Reporting Initiative
GRI G4	Global Reporting Initiative Guidelines (4 <sup>th</sup> version)
GUF	Global Union Federation
HZN	Croatian Standards Institute
IAF	International Accreditation Forum
IDTF	Integrated Drafting Task Force
IFAN	International Federation of Standards Users
IHRB	Institute for Human Rights and Business
ILO	International Labour Organization
ISO	International Organization for Standardization
ISO/CS	International Organization for Standardization Central Secretariat
ISO/DEVCO	ISO Committee on Developing Country Matters

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ITUC	International Trade Union Confederation
LST	Lithuanian Standards Board
MDG	Millennium Development Goal
MNE	Multinational Enterprise
MoU	Memorandum of Understanding
MSS	Management Systems Standards
NAP	National Action Plan
NCP	National Contact Point
NEN	Nederlands Normalisatie-instituut
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NORMAPME	European Office of Crafts, Trades and SMEs for Standardisation
NSA	Non-State Actor
NSAI	National Standards Authority of Ireland
NSB	National Standard Body
NWIP	New Work Item Proposal
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OHCHR	Office of the High Commissioner of Human Rights
OJ	Official Journal
PPO	Post Publication Organization
PPO NIN	PPO National Standards Body Information Network
PPO SAG	Post Publication Organization Strategic Advisory Group (on Social Responsibility)
RAFI	Reporting and Assurance Frameworks Initiative
RSCM	Responsible Supply Chains of Minerals



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SAG	Strategic Advisory Group (on Social Responsibility)
SIS	Swedish Standards Institute
SME	Small and Medium-sized Enterprise
SMO	Small and Medium-sized Organisation
SOMO	Centre for Research on Multinational Corporations [Stichting Onderzoek Multinationale Ondernemingen]
SR	Social Responsibility
SMSG	Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
SSI	Standards Institution of Israel
SSRO	Service, Support, Research and Others
TC	Technical Committee
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TMB	Technical Management Board
TNC	Transnational Corporation
TUAC	Trade Union Advisory Committee
UEAPME	European Association of Craft, Small and Medium-sized Enterprises
UN	United Nations
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
UNGP	United Nations Guiding Principles on Business and Human Rights
UNHRC/HRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
US	United States

WBCSD	World Business Council for Sustainable Development
WG SR	Working Group on Social Responsibility
WTO	World Trade Organization

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## I. Introduction

### A. Research context

Business and human rights is now a well-established sub-field of human rights governance. The FRAME report on enhancing the contributions of EU institutions and Member States, NGOs, IFI and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors (D 7.2) noted in this regard that the EU's engagement with human rights in the business context has traditionally been seen through the lens of CSR. Business and Human Rights is however different, in that precisely, it deals with issues of the highest profile: human rights.

Although calls for a legalisation of the related duties or responsibilities of the actors involved (states, multinationals, SMEs) have so far always failed, a number of governance instruments have none the less emerged and gained authority over time, among a flurry of more or less successful attempts at establishing the gold standard for human rights-compliant business conduct.

The 2011 Communication on CSR of the European Commission<sup>1</sup> lists five 'internationally recognised' instruments, all non-binding or soft law which will form the basis of EU initiatives to advance Business and Human Rights. These instruments are the UN Global Compact,<sup>2</sup> the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,<sup>3</sup> the ISO 26000 Guidance Standard on Social Responsibility,<sup>4</sup> the revised OECD Guidelines for Multinational Enterprises<sup>5</sup> and the UN Guiding Principles on Business and Human Rights.<sup>6</sup> Each of these instruments sets out CSR standards or principles that seek to encourage businesses and/or other organisations to respect human rights in their ordinary every-day activities.

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<sup>1</sup> European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' COM (2011) 681 final, 6.

<sup>2</sup> The UN Global Compact was launched by former UN Secretary-General, Kofi Annan, at the World Economic Forum in Davos, Switzerland, on 31 January 1999. United Nations, 'United Nations Global Compact' <<http://www.unglobalcompact.org/>> last accessed on 21 March 2016.

<sup>3</sup> ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (204th Conference Session Geneva November 1977) as amended at (279th Conference Session Geneva November 2000) and (295th Conference Session Geneva March 2006).

<sup>4</sup> ISO 26000 is an international 'guidance' standard on social responsibility (SR). International Standards Organisation, 'ISO 26000' (ISO, 1 November 2010) <<http://www.iso.org/iso/socialresponsibility.pdf>> last accessed on 21 March 2016.

<sup>5</sup> OECD Guidelines on Multinational Enterprises adopted in 1976, revised in 2000 and 2011. See OECD, 'OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment' (OECD, 25 May 2011) <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> last accessed on 21 March 2016.

<sup>6</sup> United Nations Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31.

These five instruments may together be said to form what one may call a ‘global governance regime’<sup>7</sup> on business and human rights which is progressively solidifying, so that we might now be moving ‘beyond the beginning’ in this field, to paraphrase the title of a forthcoming book.<sup>8</sup> The regime, though it is more than inchoate, is still imperfect and the proponents of a binding approach are not disarming, as the recent Ecuadorian-South African initiative, on which the Human Rights Council voted in 2014 to establish an open-ended working group that will study the feasibility of a binding instrument on the matter, testifies.

This is, however, still science fiction at this time, and therefore this report will focus on the regime as it is currently composed of these five very different CSR instruments. These instruments respond to the same regulatory challenge, which the SRSB has articulated as follows<sup>9</sup>:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.

These initiatives of course differ in their origins; global as well as regional, public as well as private, organisations have authored them. Moreover, these instruments decisively differ in their approaches, as they all seek to generate different kinds of responses from businesses so as to ensure respect for human rights. These responses can range from compliance with a rigid standard; or flexible peer learning around loose principles. The responses to the standards also differ in what drives them, from pure enlightenment to simple mimicking of best practices, or the enhancement of a corporation’s business case by securing reputational gains.

These differences are part of the difficulty of making sense of the Business and Human Rights regime at present, but they can also be interpreted as opportunities. Namely, these five initiatives have a good chance of fitting most business situations, therefore leaving no gap in the regime. Moreover, they emulate and mutually reinforce each other, as they now refer to each other and are regularly updated in the light of the latest innovations of the regime.

However, the smooth and effective functioning of these instruments taken in combination will often require an ‘orchestrator’,<sup>10</sup> an authoritative entity which will be able to rely on these initiatives and induce

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<sup>7</sup> Larry Cata Backer, ‘From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance’ (2012) 25 Pac. McGeorge Global Bus. & Dev. L.J. 69, 79.

<sup>8</sup> Cesar Rodriguez-Garavito (ed.), *Business & Human Rights: Beyond the End of the Beginning* (Forthcoming 2015). See <http://business-humanrights.org/en/contributions-to-forthcoming-book-business-human-rights-beyond-the-beginning>.

<sup>9</sup> UN Human Rights Council, ‘Protect, Respect Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (2008) UN Doc A/HRC/8/5, para 3.

<sup>10</sup> Kenneth Abbott and others, *International Organizations as Orchestrators* (Cambridge University Press 2015).



corporations to use and implement them. As home to countless companies of all sizes and sectors, and as the world's largest trading bloc, the European Union has chosen to embrace the Business and Human Rights agenda, and to focus most of its efforts in the field on promoting these five instruments. The EU, in this regard, will only be successful if it is able, through hard or soft initiatives, to generate the right kind of response to each instrument from its EU Member States and corporations.

The purpose of this report is therefore to examine the 'tracking' of such responses, and more particularly to determine the EU's role and efforts in such tracking. 'Tracking responses' is therefore not only understood in a retrospective sense, i.e. recording what has been the reaction of addressees of CSR instruments, but also in a more proactive sense, i.e. actively promoting the uptake of such instruments.

This deliverable examines each of these instruments in turn. Each chapter begins by contextualising the CSR instrument at hand, seeking to ascertain its historical and institutional origins as well as its character. The individual chapters then proceed to discuss how each instrument has developed processes to track responses to global CSR initiatives, with particular emphasis on the place of human rights in such tracking exercises and the involvement of the EU and its EU Member States.

A final chapter is dedicated to three recent legislative initiatives that can be regarded as attempts by the EU to promote these CSR instruments, namely the new directives on procurement and on non-financial disclosure, as well as the proposed new regulation on conflict minerals.

The report closes with concluding remarks on the links between the different initiatives, and how the EU is fostering their interactions in forming the Business and Human Rights governance regime.

## **B. Research Objectives and Methodology**

The report relies primarily on desk-based research, which focuses on the examination of EU policy documents and reports concerning its activities, and those of the EU Member States, in the fields of CSR and Business and Human Rights. Such research is also informed by literature reviews, and the study of policy documents from other public and private international organisations, in particular those that have authored the standards examined.

It is interspersed with some qualitative, interview-based research, primarily to gather information about individual CSR instruments, which was conducted with representatives of relevant business, international and non-governmental organisations. During the course of preparing this report some interviews were conducted with EU officials from several Commission Directorates-General, in particular those dealing with enterprises and the internal market, employment and development cooperation, as well as from the European External Action Services (EEAS).

Some of the research is limited due to the fact that the ISO is a private international organisation whose Members both adopt and sell international standards, including ISO 26000. This meant that the tracking of responses concerning compliance with ISO 26000 was necessarily restricted by a private, members-

only area of the ISO web-site and a pay-wall, which includes retrieval of ISO 26000 at cost either from the ISO or one of its Members (National Standards Bodies) bookstores. However, in order to get some idea of the extent to which ISO 26000 is being taken up and implemented by EU Member States, all of which are ISO Members, it was possible to gain further information from ISO officials by means of a Skype interview.

## II. The UN Guiding Principles on Business and Human Rights

### A. The UN Guiding Principles as the Foundation of the Governance Regime on Business and Human Rights

#### 1. Background to the instrument

##### a) *UN Special Representative on Business and Human Rights (2005-2011)*

##### (1) Mandate and vision

The origin of the UN Guiding Principles on Business and Human Rights (UNGP or ‘the UN Guiding Principles’) dates back to 2005, when the former UN Commission on Human Rights adopted Resolution 2005/69, creating the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSR).<sup>11</sup> The mandate tasked the SRSR to ‘identify’ and ‘clarify’ existing standards on the responsibility and accountability of business enterprises for human rights.<sup>12</sup> The resolution did not provide the SRSR with some of the mechanisms entrusted to other UN Special Procedures, such as a procedure for individual complaints or urgent appeals, or the authorisation to conduct country visits. The resolution however, did request the SRSR to ‘consult on an ongoing basis with all stakeholders’.<sup>13</sup>

At an early stage of his mandate, the SRSR decided not to recommend negotiating an all-encompassing legal framework of human rights in order to create binding obligations for companies, which he considered was inconceivable at the time.<sup>14</sup> The context of the appointment of the SRSR was not conducive to such an endeavour. The SRSR entered into office right after the demise of the ‘draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’,<sup>15</sup> which were presented as a re-statement of existing international human rights norms and an application of a selection of international human rights obligations to corporations directly. The draft Norms failed to be adopted by the UN Commission on Human Rights in 2004, which noted that these Norms ‘had not been requested by the Commission and, as a draft proposal, have no legal standing’,

<sup>11</sup> UN Commission on Human Rights Resolution 69 (20 April 2005) UN Doc E/CN.4/RES/2005/69.

<sup>12</sup> *Ibid*, para 1.

*Ibid*, para 3.

<sup>14</sup> John Ruggie, ‘Treaty road not travelled’ (Ethical Cooperation, May 2008) <[http://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May\\_FINAL\\_JohnRuggie\\_may%2010.pdf](http://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf)> last accessed on 14 September 2015, 42. The SRSR noted that ‘a global treaty forcing companies to follow binding rules on human rights would not work and should not happen’ and based this assertion on three assumptions. *First*, a treaty negotiating process can be ‘painfully slow, while the challenges of business and human rights are immediate and urgent’. *Second*, it can risk ‘undermining effective shorter-term measures’ to raise the bar on companies. *Third*, a binding treaty would not resolve current enforcement challenges. *Ibid*, 42–43.

<sup>15</sup> UN Commission on Human Rights, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

thereby signaling a lack of consensus for an approach based on international human rights obligations directly applying to businesses.

A key distinguishing feature was the extensive consultative process that the SRSG pursued throughout his mandate. These consultations were open to all stakeholders and highly participatory, engaging a diversity of stakeholders including business enterprises at all stages of the mandate. The degree of stakeholder engagement was unprecedented, at least in the business and human rights domain. Since the UNGPs are a voluntary document, their legitimacy and effectiveness to a significant extent derives from the support and actual uptake by a wide range of stakeholders, and business enterprises especially. The consultative approach therefore was seen as imperative to garnering the support for both the development-process and the UNGPs.

## (2) UN Guiding Principles on Business and Human Rights

The UNGPs present concrete and practical guidance to governments and business enterprises on how to operationalise the ‘Protect, Respect, Remedy’ Framework. This framework rests on three foundational pillars: the *State duty to protect* against human rights abuses by third parties including business enterprises, the *corporate responsibility to respect* human rights and the need for effective *access to remedies for victims of business-related abuses*. These pillars are differentiated: the duties and responsibilities of States and business enterprises exist independently of, and do not jeopardise one another. They are also complementary; each pillar is an essential component of the framework that, as a coherent whole, makes for ‘an inter-related and dynamic system of preventative and remedial measures’. Apart from providing guidance to States and business enterprises, the UNGPs provide a minimum benchmark that allows stakeholders to better ‘assess, engage in and promote business respect and accountability for human rights’.<sup>16</sup> The UNGPs do not create new international human rights obligations, but derive normative force from their elaboration of existing standards and practices. The UNGPs depend on the engagement of all actors in order to accomplish a sufficient scale in effort, through coherent and cumulative action, that can generate systemic change.

The UNGPs reaffirm the primary obligation of States to respect, protect and fulfil human rights and fundamental freedoms in the context of business enterprises.<sup>17</sup> States must protect against human rights infringements by third parties, including business enterprises, within their territory and/or jurisdiction. States should take appropriate measures to prevent, investigate, punish and redress corporate abuse. In meeting their duty to protect, States should effectively enforce existing laws that are intended or have the effect of requiring business to respect for human rights and assess their adequacy periodically in order to ensure these laws provide the necessary coverage in light of prevailing circumstances. States should also, *inter alia*, set out clearly their expectation that all businesses in their territory and/or jurisdiction respect human rights, provide effective guidance on how business enterprises can meet their human rights responsibility, address vertical and horizontal policy in-coherences at the domestic level and

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<sup>16</sup> Ibid, para 9.

<sup>17</sup> Ibid, para 78.

promote respect for human rights through its commercial interactions.<sup>18</sup>

The corporate responsibility to respect human rights is a standard that is founded on international social expectations. It is in itself not a legally binding and enforceable standard under international human rights law.<sup>19</sup> The corporate responsibility to respect applies to companies irrespective of whether they have accepted or approved the norm. It is coined primarily as a negative responsibility, in that business enterprises must ‘do no harm’.<sup>20</sup> Business enterprises must however be pro-active in discharging their responsibility. They are expected to exercise ‘human rights due diligence’, i.e. ‘assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed’.<sup>21</sup> Where a business enterprise has caused or contributed to adverse human rights impact, they should actively engage in remediation.<sup>22</sup>

Several important features characterize the corporate responsibility to respect. First, the responsibility is broad in scope in that it applies to the entire spectrum of internationally recognised human rights that business enterprises are capable of impacting. Second, all business enterprises must uphold the responsibility ‘regardless of their size, sector, operational context, ownership and structure’. Third, business enterprises must benchmark their performance, at a minimum, to the International Bill of Human Rights and the principles of fundamental rights as codified in the eight ILO Labour Conventions. These instruments provide an authoritative list of international human rights standards and serve as a main, but not exclusive, reference for the substance of the corporate responsibility to respect.<sup>23</sup>

The UNGPs furthermore present an integrated set of redress methods that both States and business enterprises should apply to ensure that victims of human rights abuse have access to remedies.<sup>24</sup> The State obligation to provide effective remedy in case a human rights abuse has occurred is anchored in international human rights law. In cases where business-related human rights abuses have occurred within a State’s territory and/or jurisdiction, States must take appropriate steps ‘to investigate, punish and redress’ these abuses, through formal judicial mechanisms and complementary administrative, legislative and other State-based non-judicial grievance mechanisms. There is a complementary role for non-State based grievances mechanisms to provide remedies through ‘adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes’.<sup>25</sup>

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<sup>18</sup> UNHRC, ‘Report of the Special Representative of the Secretary-General’ (n 6), UNGPs 2, 3(c), 5 and 8. See further *ibid*, UNGPs 1–10 with Commentary and UN Human Rights Committee, ‘General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

<sup>19</sup> Nicola Jägers, ‘Will Transnational Private Regulation Close the Governance Gap?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 298.

<sup>20</sup> UNHRC, ‘Report of the Special Representative of the Secretary-General’ (n 6), UNGP 11.

<sup>21</sup> *Ibid*, UNGP 17.

<sup>22</sup> *Ibid*, UNGP 22.

<sup>23</sup> *Ibid*, UNGPs 12 and 14 with Commentary.

<sup>24</sup> *Ibid*, para 4.

<sup>25</sup> See generally *ibid*, UNGPs 25–31.

## *b) UN Working Group on Business and Human Rights (2011-present)*

### (1) Mandate and vision

The UN Human Rights Council (HRC) created the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (the 'UN Working Group') by Resolution 17/4 on 16 June 2011.<sup>26</sup> The HRC encourages the UN Working Group to undertake activities in support of promoting and assessing the uptake of the UNGPs<sup>27</sup> and to promote and support States and other relevant actors in their implementation activities.<sup>28</sup> Implicit to undertaking these activities is the recognition for the role of non-State actors in the implementation of the UNGPs as well as engagement of the UN Working Group with these actors. The HRC resolution mandates the UN Working Group to 'develop a regular dialogue and discuss areas of cooperation with Governments and all relevant actors'.<sup>29</sup>

### (2) Tracking business responses: imperatives

The UN Working Group pursues three work streams: global dissemination, promoting implementation, and embedding global governance frameworks.<sup>30</sup> The strategic considerations underlying these work-streams are: (a) the UNGPs as a common reference point in a diverse and rapidly evolving field; (b) enhancing access by victims of business-related human rights abuse to effective remedies; and (c) building an environment receptive for the UNGPs.<sup>31</sup> The UN Working Group indicates that it places the principle of multi-stakeholder consultation and input at the core of its philosophy. The underlying rationale is that the success of the mandate depends on whether the UNGPs become 'business-as-usual' for all stakeholders in business.<sup>32</sup>

## 2. Tracking business responses to the UNGPs

The UNGPs have been one of the most successful Business and Human Rights instruments to date. It is quite difficult to determine the response they receive, as they were not designed to be formally 'adopted' and do not comprise any built in monitoring system. Below we offer some reflections as to their actual uptake, before turning to the UN's and finally the EU's role in ensuring a high rate of response to the UNGPs.

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<sup>26</sup> UNHRC Res 17/4 (6 July 2011) UN Doc A/HRC/RES/17/4.

<sup>27</sup> Ibid, para 6(b).

<sup>28</sup> Ibid, para 6(c).

<sup>29</sup> Ibid, para 6(h).

<sup>30</sup> UNHRC, 'Report of the Working Group' (n **Error! Bookmark not defined.**), para 63. For a detailed account of the three work streams, see *ibid*, paras 64–74.

<sup>31</sup> Ibid, para 48.

<sup>32</sup> Ibid, para 75.

### a) Actual business responses<sup>33</sup>

The UN Working Group conducted a pilot survey in 2012<sup>34</sup> and circulated a questionnaire in 2013.<sup>35</sup> In the 2012 pilot survey, 117 individuals from business responded, of which 53% were European companies.<sup>36</sup> The survey found that 50% of respondents ‘had engaged with the work of the former [SRSG] between 2005 and 2011.’ 96% ‘had heard of the UNGPs’ and 86% stated ‘that they envisage future or on-going engagement and support for business and human rights at the United Nations and in other forums.’<sup>37</sup> In terms of implementation, the respondents provided information related to several indicators, notably that

- 74% had ‘a statement of policy to respect human rights’,
- 41% agreed or strongly agreed that they were ‘aware that we can have negative social impacts [...] but we do not actively assess these’,
- 66% agreed or strongly agreed that they engaged with ‘human rights experts and external stakeholders to understand their human rights impacts’,
- 82% agreed or strongly agreed that ‘[w]hen an actual or potential human rights impact is identified, we allocate responsibility [...] to resolve the issue and report on progress when necessary’,
- 54% tracked progress ‘through developing “qualitative and quantitative indicators [...]”’, and
- 64% agreed or strongly agreed that they provided ‘for remediation in cases where we cause or contribute to a human rights abuses [sic]’.<sup>38</sup>

The 2013-questionnaire was based on 153 business responses.<sup>39</sup> It came to somewhat similar conclusions as the 2012 pilot survey:

- 75% of respondents had heard of the UNGPs, notably more than half the companies had heard of the principles since 2010, and 20% had heard of them in 2012 or 2013,
- 57.5% had ‘a public policy statement on human rights’, and

<sup>33</sup> This section was researched and written by Peter Hjaltason.

<sup>34</sup> UN Working Group, ‘Report of Pilot Business Survey on Implementation of the Corporate Responsibility to Respect Human Rights’ (2 December 2012).

<sup>35</sup> UN Working Group, ‘Addendum: Uptake of the Guiding Principles on Business and Human Rights: findings from a 2013 questionnaire for corporations’ (28 April 2014) UN Doc A/HRC/26/25/Add.1. This section is based on the 2012/2013 surveys of the UN Working Group, though other surveys have been conducted by other public and private bodies and contain useful additional information e.g. a study by Shift on disclosure and study by the EU Commission on policy references to CSR instruments. See respectively Shift, ‘Disclosure relevant to the UN Guiding Principles on Business and Human Rights’ (June 2014), <<http://shiftproject.org/sites/default/files/Evidence%20of%20Corporate%20Disclosure%20Relevant%20to%20the%20UN%20Guiding%20Principles%20on%20Business%20and%20Human%20Rights.pdf>> accessed 13 May 2015; and EU Commission ‘An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles’ (March 2013) <[http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013\\_en.pdf](http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf)> accessed 22 April 2015..

<sup>36</sup> UN Working Group (n. 1), p. 2.

<sup>37</sup> *Ibid*, p. 3.

<sup>38</sup> *Ibid*, pp. 4–6.

<sup>39</sup> UN Working Group (n. 2), para. 13.

- More than half reported ‘that their company has engaged in activities related to respect for human rights’.<sup>40</sup>

The aim of the 2012-pilot survey and 2013-questionnaire was also to develop a survey methodology in order to conduct surveys that are more extensive.<sup>41</sup> However, no surveys soliciting information from business enterprises have been conducted since the 2013-questionnaire.<sup>42</sup>

Parallel to the 2012-pilot survey, a similar survey was carried out for States. Of the 193 UN Member States, 26 States responded to the survey. The UN Working Group noted that ‘no robust conclusions can be drawn due to the low response rate’ due to the ‘small sampling size’.<sup>43</sup> In any case, the survey found, *inter alia*, that

- 17 States had CSR policies,
- 17 worked with ‘particular industry groups, such as agribusiness and biofuels, extractives, telecommunication, consumer and retail, and private security to promote respect for human rights’,
- ‘some’ States supported ‘international multi-stakeholder initiatives’,
- 11 ‘offered dissemination and training on the Guiding Principles across its departments’,
- Several States had laws in place that ‘explicitly obligate businesses to respect human rights in the areas of non-discrimination (16 States), labour (15), the environment (12), corporate liability (10), property and access to land (10), privacy law (10), consumer protection (14), anti-bribery (12), and other due diligence requirements on business and human rights (4).’,
- 14 States had ‘explicit human rights provisions (including provisions related to environmental issues and labour) in their international trade and investment agreements’, while five States ‘said their export and foreign promotion policies included human rights specific provisions’,
- 14 States had legal systems allowing for ‘the prosecution of legal persons accused of committing or participating in human rights violations related to the conduct of business activities within the State’s borders’,
- 10 States’ legal systems also supported ‘extraterritorial jurisdiction’, and
- 11 States had non-judicial grievance mechanisms in place.<sup>44</sup>

The UN Working Group has pointed to a lack of systemic, comprehensive data to measure progress in the implementation of the UNGPs despite the many relevant measurement initiatives by States, companies and NGOs producing data. The effective implementation of the UNGPs is impossible without this data. As

<sup>40</sup> *Ibid*, paras 32, 37 and 40, respectively.

<sup>41</sup> UN Working Group, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (5 May 2014) UN Doc A/HRC/26/25, para. 30.

<sup>42</sup> For further information regarding the relevance, limits and potential of these questionnaires as tracking tools, see below, section 0.

<sup>43</sup> UN Working Group, ‘Addendum – Uptake of the Guiding Principles on Business and Human Rights: practices and results from pilot surveys of Governments and corporations’ (16 April 2013) UN Doc A/HRC/23/32/Add.2, paras 8 and 10. The UN Working Group writes that there was 26 respondents, but actually lists 28 respondents (Australia, Bahrain, Chile, Colombia, Denmark, Dominican Republic, Finland, France, Greece, Guatemala, Italy, Japan, Kazakhstan, Kyrgyz Republic, Latvia, Mauritius, Mexico, Norway, Portugal, Qatar, Romania, Russian Federation, Slovenia, Sri Lanka, Sweden, Switzerland, United States, and Yemen). *Ibid*, para. 8.

<sup>44</sup> *Ibid*, paras 15, 17, 27, 29, 32–33 and 35–37.



the business adage says, ‘if you can’t measure it, you can’t manage it’. This has prompted the UN Working Group to make the measuring of the implementation of the UNGPs a strategic priority.<sup>45</sup> In a recent report on this issue, the Working Group found, *inter alia*, that ‘[m]any existing initiatives focus overwhelmingly on the commitments of companies and States to implementing the Guiding Principles and, to some extent, on the processes needed to implement them’ but that this did not reflect ‘whether those abuses are being reduced in practice.’<sup>46</sup> It was also noted that pillar 3 lacked measurement initiatives compared to the other pillars.<sup>47</sup> Measurement was a priority theme at the fourth Forum on Business and Human Rights, in November 2015.<sup>48</sup>

### b) *Relevant factors that determine business responses*

In light of the above, the following factors can be identified as relevant in determining business responses to the UNGPs. These are therefore important for the EU to keep in mind if it wants to foster their implementation.

- Awareness and familiarity with the UNGPs: Responses may be determined by whether business enterprises have engaged with the work of the SRSB or have heard of the UNGPs.<sup>49</sup>
- Capacity: Capacity constraints (e.g. a lack of understanding of country-specific risks<sup>50</sup>) can complicate efforts to meet minimum requirements in certain situations, such as where human rights were ‘not part of local law or not applied in practice’.<sup>51</sup>

<sup>45</sup> UN Working Group, ‘Statement by Ms. Margaret Jungk, Chairperson, UN Working Group on the issue of human rights and transnational corporations and other business enterprises at the 70th session of the General Assembly, Third Committee, Item 72 (b & c)’ (17 October 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16660&LangID=E>, last accessed on 22 March 2016.

<sup>46</sup> UN Working Group, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (30 July 2015) UN Doc A/70/216, para. 87.

<sup>47</sup> *Ibid*, para. 88.

<sup>48</sup> *Ibid*, para. 85. About the Forum, see <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2015ForumBHR.aspx>.

<sup>49</sup> A 2013 questionnaire indicated that 75% out of 153 respondents had heard of the UNGPs. The same survey indicated that 20% had learned about the UNGPs in 2012 or 2013. UNHRC, ‘Addendum – Uptake of the Guiding Principles on Business and Human Rights: findings from a 2013 questionnaire for corporations’ (28 April 2014) UN Doc A/HRC/26/25/Add.1, para 32. See also UN Working Group, ‘Report of Pilot Business Survey on Implementation of the Corporate Responsibility to Respect Human Rights’ (2 December 2012) <[http://www.ohchr.org/Documents/Issues/Business/ForumSession1/Report\\_UNWGBusinessSurvey\\_Dec2012.pdf](http://www.ohchr.org/Documents/Issues/Business/ForumSession1/Report_UNWGBusinessSurvey_Dec2012.pdf)> last accessed on 19 September 2015, 4 and Institute for Human Rights and Business (IHRB), ‘State of Play: Human Rights in the Political Economy of States: Avenues for Application’ (Report, 18 March 2014) <[http://www.ihrb.org/pdf/2014-03-18\\_State-of-Play\\_HR-Political-Economy-States.pdf](http://www.ihrb.org/pdf/2014-03-18_State-of-Play_HR-Political-Economy-States.pdf)> last accessed on 25 September 2015, 21–22.

<sup>50</sup> UNHRC, ‘Addendum – Uptake of the Guiding Principles on Business and Human Rights’ (n 49), para 46.

<sup>51</sup> UN Working Group, ‘Report of Pilot Business Survey’ (n 49), 5.

- External forces: Exposure to external pressure from NGOs, media, politicians, consumers, investors and employees, as well as the costs and benefits that these external forces may inflict on companies for non-compliance can be determinant for business responses.<sup>52</sup>
- Type: Responses may vary depending on the business model (e.g. cooperative and partnerships) and whether the business is a publicly listed company or a private company.<sup>53</sup>
- Size: Research suggests that small and medium sized enterprises (SMEs) are less likely to respond to the UNGPs than larger entities.<sup>54</sup> Resource constraints and a lack of awareness are considered key challenge facing SMEs.<sup>55</sup>
- Business case: There are various benefits that drive business enterprises to respect human rights, such as ‘it is the right thing to do’ and ‘human rights are part of effective risks management’.<sup>56</sup>
- Country specific factors: Research suggests that the country of origin can explain business responses.<sup>57</sup> Similarly, factors specific to the country of operation can be determinant.<sup>58</sup>
- Sector: Responses may differ depending on the sector (e.g. extractive or apparel) to which a business enterprise belongs.<sup>59</sup>

### **3. Initiatives to track the uptake, implementation and compliance by business enterprises: the UN Working Group on Business and Human Rights in focus**

#### ***a) Tracking responses by the UN Working Group***

This section describes the initiatives that the UN Working Group owns and organises to track business responses as part of its central mandate.

<sup>52</sup> IHRB, ‘State of Play: Human Rights in the Political Economy of States’ (n 49), 19.

<sup>53</sup> Ibid, 20–21.

<sup>54</sup> European Commission, ‘An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles’ (March 2013) <<http://ec.europa.eu/DocsRoom/documents/10372/>> last accessed on 9 October 2015, 9.

<sup>55</sup> IHRB, ‘State of Play: Human Rights in the Political Economy of States’ (n 49), 20 and UNHRC, ‘Addendum – Uptake of the Guiding Principles on Business and Human Rights’ (n 49), paras 36 and 42.

<sup>56</sup> UNHRC, ‘Addendum – Uptake of the Guiding Principles on Business and Human Rights’ (n 49), 20–21.

<sup>57</sup> European Commission, ‘An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles’ (n 54), 10.

<sup>58</sup> UNHRC, ‘Addendum – Uptake of the Guiding Principles on Business and Human Rights’ (n 49), paras 45–47.

<sup>59</sup> Shift, ‘Disclosure relevant to the UN Guiding Principles on Business and Human Rights’ (June 2014) <<http://shiftproject.org/sites/default/files/Evidence%20of%20Corporate%20Disclosure%20Relevant%20to%20the%20UN%20Guiding%20Principles%20on%20Business%20and%20Human%20Rights.pdf>> last accessed on 25 September 2015, 7–8.

## (1) Pilot Corporate Questionnaire

The UN Working Group organized a pilot survey in 2012 and a questionnaire in 2013 in order to solicit information from business enterprises on their implementation of the corporate responsibility to respect human rights under the UNGPs (pillar 2).

As indicated above, the 2012 pilot study received 117 responses. According to the UN Working Group, the diversity in the responses suggested ‘a new, more global and diverse dialogue on business and human rights in the private sector’.<sup>60</sup> The results of the survey indicated ‘a strong trend in awareness and engagement by business with the UNGPs and dialogue at the international level including at the United Nations’.<sup>61</sup> Business enterprises furthermore seemed far more confident about having some practices in place to respect human rights than about the maturity and embeddedness of these practices.<sup>62</sup>

The follow-up 2013 questionnaire aimed to obtain a better understanding of progress achieved in how corporations were approaching the UNGPs and where the UN Working Group could best assist implementation efforts.<sup>63</sup> The conclusions of the survey confirmed that both internal and external factors motivated business enterprises in their responses to the Guiding Principles. The 2013 survey also found that one out of two respondents ‘were aware of the Guiding Principles, have a public statement of human rights, and have actively engaged in human rights activity’. Respondents cited moving ‘from policy to practice on human rights’ as a key challenge.<sup>64</sup>

New was the question on what areas of support would be most productive in enabling business’ to progress in their implementation of the corporate responsibility to respect human rights.<sup>65</sup> The business responses pointed to ‘training and educational opportunities’ and ‘effective government enforcement of local law’ and of ‘multi-stakeholder initiatives’ as top priorities for support.<sup>66</sup> The findings also indicated a demand for ‘learning material to document good practice in internal and external communications and human rights reporting’ and for ‘tools to disseminate the Guiding Principles’.<sup>67</sup>

The survey furthermore underscored the key role of business associations and networks in creating business interest in business and human rights. This finding led to the conclusion that ‘[a]pproaches that leverage business associations and networks to raise support and continue awareness-raising activities to

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<sup>60</sup> UNHRC, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (14 March 2013) UN Doc A/HRC/23/32, para 31.

<sup>61</sup> UN Working Group, ‘Report of Pilot Business Survey’ (n 49), 6.

<sup>62</sup> Ibid, 7.

<sup>63</sup> UNHRC, ‘Addendum – Uptake of the Guiding Principles on Business and Human Rights’ (n 49), para 53.

<sup>64</sup> Ibid, para 50.

<sup>65</sup> Ibid, para 2.

<sup>66</sup> Ibid, para 45.

<sup>67</sup> Ibid, para 53.

help ensure that corporations meet their responsibility to respect human rights are of integral strategic value to the Working Group'.<sup>68</sup>

## (2) Communication Procedures

The UN Working Group can receive information on specific cases of human right abuse or violation and, where appropriate, respond through a communication, i.e. an urgent appeal or an allegation letter, to make the State or business enterprises aware of the facts of the allegations and corresponding duties and responsibilities. Such information may be sought or retrieved from 'all relevant sources', including governments, business enterprises, NHRIs, civil society and rights-holders.<sup>69</sup> The communications are a means to encourage States and business enterprises to respond to concerns by taking preventative, investigatory or remedial measures conform the UNGPs. They raise concerns related to specific cases of actual or potential abuses or general trends that signal structural problems. The communications procedures provide opportunities for the UN Working Group to clarify concepts, expectations and obligations set out in UNGPs, to create awareness and opportunities for cooperation. The UN Working Group relies on the information to develop its own understanding of challenges and gaps in implementation and to inform its work, strategy and recommendations.<sup>70</sup> While the communications are sent confidentially, summaries of the communications are made public through the 'Communications Report of the Special Procedures' three times per year.<sup>71</sup>

## (3) Guidance and reports

The UN Working Group reports annually to the HRC and the UN GA, in which it addresses questions that have been brought to its attention, provides clarification on salient issues regarding the application of the UNGPs in specific areas and contexts of actual practice and provides recommendations for the effective operationalization of the UNGPs.<sup>72</sup> Such clarity can support and facilitate the implementation of the UNGPs by States, business enterprises and other relevant actors in practical contexts. In its reports to the UN GA, the UN WG has explored strategic developments in the embedding of the UNGPs in global governance frameworks, the challenges faced in addressing the impact of business related activities on indigenous people's rights, the employment of NAPs to implement the UNGPs and the measuring of the implementation of the UNGPs.

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<sup>68</sup> Ibid, para 54.

<sup>69</sup> UNHRC Res 17/4 (n 26), para 6(b).

<sup>70</sup> UNHRC, 'Outcome of the third session of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (25 January 2013) UN Doc A/HRC/WG.12/3/1, para 5.15.

<sup>71</sup> The most recent Communications report (Sept. 2015) notes that the UN Working Group sent a total of 28 communications and that the response rate was 57%. See <<http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx>>, accessed 26 October 2015.

<sup>72</sup> UNHRC, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (n.Error! Bookmark not defined.), para 60.

#### (4) Country visits

The UN Working Group may undertake country visits upon invitation from States.<sup>73</sup> The HRC has encouraged States ‘to reply favourably to request for visits by the UN Working Group’.<sup>74</sup> The UN Working Group’s method of work indicates that two official country missions will be carried out annually, which will be attended by two members of the UN Working Group each time. If additional funding permits, the UN Working Group may undertake additional country visits.<sup>75</sup>

Official country visits provide opportunities to disseminate the UNGPs and to support their implementation at national level.<sup>76</sup> The country visits facilitate ‘promoting constructive dialogue’ and allow for direct engagement with relevant stakeholders, *inter alia*, business enterprises and associations. Country visits are also conducted with the intention ‘to identify, exchange and promote good practices and lessons learned’.<sup>77</sup> Evidence of practical and operational relations in the respective country may be obtained that can inform its decision-making. To obtain such information, the UN Working Group also undertakes next to official visits and visits to Member States, field visits.<sup>78</sup>

#### (5) Engagement with stakeholders

The UN Working Group is authorized ‘[t]o develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors’. A non-exhaustive list identifies business enterprises as relevant stakeholders the UN Working Group can interact with, as well as other actors that can take up key roles in tracking business responses either directly, or indirectly through States.<sup>79</sup> Such dialogues allow the UN Working Group to retrieve input from stakeholders, and ‘solicit information, documentation, good practice, challenges and lessons learned’ related to business uptake on a regular basis.<sup>80</sup>

#### (6) Advocacy

The UN Working Group may not be able to ‘address individual cases of alleged business-related human rights abuse’.<sup>81</sup> However, it may ‘raise specific allegations that it determines to be particularly emblematic

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<sup>73</sup> UNHRC Res 17/4 (n 26), para 6(d).

<sup>74</sup> UNHRC Res 26/22 (15 July 2014) UN Doc A/HRC/RES/26/22, para 11.

<sup>75</sup> UNHRC, ‘Outcome of the third session of the Working Group’ (n 70), para 2.6.

<sup>76</sup> *Ibid*, para 4.

<sup>77</sup> *Ibid*, para 6.

<sup>78</sup> *Ibid*, para 3.9.

<sup>79</sup> UNHRC Res 17/4 (n 26), para 6(h). The UN Working group has undertaken structured engagement with ‘States, human rights mechanisms, intergovernmental bodies, relevant United Nations entities, regional and national human rights institutions, representatives of business, civil society organizations, representative of indigenous peoples [...] and representatives of impacted communities’. UNHRC, ‘Outcome of the third session of the Working Group’ (n 70), para 4.11.

<sup>80</sup> UNHRC, ‘Outcome of the third session of the Working Group’ (n 70).

<sup>81</sup> *Ibid*, para 5.16.

with relevant State authorities and companies, and request clarification or additional information as appropriate'.<sup>82</sup>

### *b) Support for tracking mechanisms by the UN Working Group*

This section describes a selection of external initiatives that are organised, conducted and funded by external stakeholders and that the UN Working Group engages with, promotes or supports, as well as relevant initiatives that it has referred to in its reports to the HRC and the UNGA.

A strategic consideration of the UN Working Group in its engagement with these initiatives is to seek consistency, convergence, coordination and clarity in the interpretations and understandings of the UNGPs advanced by different actors through different tools and initiatives in order to promote business uptake. Relevant imperatives are to ensure that the UNGPs continue to serve as the authoritative reference point around which expectations *converge*, and that interpretations do not undermine the *integrity* of the UNGPs but support their implementation. *Clarity* and *brevity* of dissemination tools is said to be key to their success. *Coordination* in the efforts of existing and new initiatives is promoted to ensure that efforts are not repetitive, fragmented or digressive but complementary and faceted.<sup>83</sup>

#### *(1) Voluntary reporting and assurance: improving disclosure and transparency*

The UN Working Group has affirmed the importance of disclosure and reporting for transparency and accountability.<sup>84</sup> The pressure on business enterprises to improve disclosure and performance on human rights is rising due to stock exchanges that require listed companies to disclose on, inter alia, human rights, as well as a result of legal requirements for mandatory disclosure.<sup>85</sup> The UN Working Group has noted 'a positive trend towards the introduction of legal provisions and other policies aimed at increasing transparency and thus incentivizing activity that respects human rights'<sup>86</sup> and has called on States to strengthen and clarify their existing and new reporting requirements.<sup>87</sup> The EU disclosure requirements for companies sourcing timber from primary forests has been highlighted as an example that States can draw from in this context.<sup>88</sup> The UN Working Group has welcomed the Directive on non-financial disclosure, and encouraged Member States of the European Union 'to ensure in their national legislation that companies effectively report on 'policies, risks and results' regarding respect for human rights by referring to human rights due diligence, such as outlined in Guiding Principles 17 to 21, and asks other States to follow suit'.<sup>89</sup>

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<sup>82</sup> Ibid, para 5.17.

<sup>83</sup> UNHRC, 'Report of the Working Group' (n **Error! Bookmark not defined.**), paras 49–55.

<sup>85</sup> UN Working Group, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (5 August 2014) UN Doc A/69/263, paras 58–60.

<sup>86</sup> Ibid, para 58.

<sup>87</sup> Ibid, para 60.

<sup>88</sup> Ibid, para 59.

<sup>89</sup> Ibid.

The UN Working Group has also encouraged the trend towards reporting on actual human rights impacts and the development of related indicators, noting the valuable contributions of the UNGPs Reporting Framework (UN Reporting Framework) and the Global Reporting Initiative (GRI) to defining comprehensive human rights reporting.<sup>90</sup>

The UN Reporting Framework is the first of a twin-set of guidance frameworks that the organisations Shift and Mazars have undertaken to develop through a joint project titled the 'Human Rights Reporting and Assurance Frameworks Initiative' (RAFI). Launched in 2015, the UN Reporting Framework 'provides clarity, for the first time, on how companies can report in a meaningful and coherent way on their progress in implementing their responsibility to respect human rights'.<sup>91</sup> This framework is aligned with the UNGPs and guides business enterprises on how to best disclose on their human rights policies, processes and performance in a manner that is feasible and can help them improve management systems.<sup>92</sup> To achieve this, it provides a set of overarching questions on how the company respects human rights and supporting guidance on how to answer the respective question.<sup>93</sup> Business enterprises are guided towards providing a balanced representation of its performance, in which the most 'salient' issues that impact human rights most severely are prioritized. They can rely on the UN Framework not only to improve their disclosure, but also to discharge and track progress regarding their responsibility (UNGP 20), as well as to review and improve their internal management (UNGP 19) and engage with stakeholders (essential to assessing risks and tracking progress). By setting a minimum benchmark, the UN Framework facilitates assessment and comparison of business' disclosure and performance by relevant actors, including investors and States.

The success of the UN Framework will depend on the support and uptake by relevant stakeholders. Uptake should be encouraged by the transparent and participatory nature of the UN Reporting Framework, having been developed through a consultative process that engaged over 200 diverse stakeholders from all regions of the world.<sup>94</sup> So far, at least five large companies - Unilever, Ericsson, H&M, Nestlé and Newmont – have adopted the UN Framework and have begun to apply it to their reporting, working in collaboration with Shift. A coalition of 77 investor groups representing almost USD 4 trillion assets under management affirmed its relevance as a tool 'to review companies understanding and management of human rights risks'.<sup>95</sup> Civil society voices have expressed their support for the UN Framework, while States

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<sup>90</sup> UN Working Group, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (note 41), 31

<sup>91</sup> Shift and Mazars, 'UN Guiding Principles Reporting Framework with Implementation Guidance' (February 2015) <[http://www.ungpreporting.org/wp-content/uploads/2015/02/UNGuidingPrinciplesReportingFramework\\_withimplementationguidance\\_Feb2015.pdf](http://www.ungpreporting.org/wp-content/uploads/2015/02/UNGuidingPrinciplesReportingFramework_withimplementationguidance_Feb2015.pdf)> last accessed on 19 September 2015, 14. The second set – the Assurance Framework – should be ready early 2016 and will provide guidance to assurance providers and internal auditors on the verification of reporting in line with the UN Reporting Framework. Ibid, 2.

<sup>92</sup> Ibid, 14.

<sup>93</sup> Ibid, 21.

<sup>94</sup> Ibid, 2.

<sup>95</sup> Shift and Mazars, 'First Comprehensive Guidance for Companies on Human Rights Reporting Launches in London' (UNGP Reporting Framework, 24 February 2015) <<http://www.ungpreporting.org/first-comprehensive-guidance-for-companies-on-human-rights-reporting-launches-in-london/>> last accessed on 19 September 2015. In the

have indicated to be considering ways to integrate the UN Reporting Framework into their policies, including through their NAPs.<sup>96</sup>

The GRI developed the G4 Sustainability Reporting Guidelines (G4 Guidelines) to assist companies in reporting on their human rights goals, performance and impacts.<sup>97</sup> The G4 Guidelines include the reporting principles and standard disclosures, which guide businesses in their decision-making with regards to defining the content and quality of their disclosure. The principle of materiality is key. It enables and encourages business enterprises to tailor their disclosure to cover that what is most material for the organisation. Material are those aspects that reflect the company's significant impact on, among other things, human rights and substantially influence the assessment and decision-making by stakeholders. The principle of materiality supports reporting that is feasible and resource-friendly by setting a minimum threshold requirement.<sup>98</sup>

The G4 guidelines assist business enterprises through the Disclosure on Management Approach (DMA). Under the DMA, companies can reflect on their approach to managing human rights.<sup>99</sup> Apart from generic guidance, the DMA provides aspect-specific guidance, inter alia on 'Supplier Human Rights Assessment' and 'Human Rights Grievance Mechanisms'. The human rights indicators elicit comparable information, both qualitative and quantitative, about results and outcomes that indicate change over time in relation to ten issues: Investment, Non-Discrimination, Freedom of Association and Collective Bargaining, Child Labour, Forced and Compulsory Labor, Security Practices, Indigenous Rights, Assessment, Supplier Human Rights Assessment and Human Rights Grievance Mechanisms.<sup>100</sup>

Research has shown that the GRI is the framework most frequently employed by European companies to develop reports, especially by large companies.<sup>101</sup> Large companies are also using the indicator system

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meantime, 82 investors representing US 4.8 trillion have expressed their support for the UNGPs by signing an investor statement, see: <[http://www.ungpreporting.org/early-adopters/investor-statement/.](http://www.ungpreporting.org/early-adopters/investor-statement/)>, accessed on 26 October 2015.

<sup>96</sup> UN Reporting Framework, 'UNGP Reporting Framework Update: Catalyzing and Accelerating Conversations' (undated) <<http://us7.campaign-archive1.com/?u=a193892aee5a224fa16269dcd&id=49896c6ce8&e=75f84b5d72>> last accessed on 14 October 2015.

<sup>97</sup> See generally GRI, 'An Introduction to G4: The next generation of sustainability reporting' (undated) <<https://www.globalreporting.org/resourcelibrary/GRI-An-introduction-to-G4.pdf>> last accessed on 19 September 2015. The UN Working Group highlighted that the G4 Guidelines have become the 'de facto standard for non-financial/corporate sustainability reporting' and that '[m]any companies have aligned themselves with the [GRI] format'. It also noted that the revision of the GRI Guidelines, which was ongoing at the time, sought to better align the Guidelines with the UNGPs. UN Working Group, 'Report of the Working Group' (n 84), para 29. The Guidelines also identifies links with the UNGPs. GRI, 'G4 Sustainability Reporting Guidelines: Reporting Principles and Standard Disclosures' (2013) <<https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>> last accessed on 20 September 2015, 89.

<sup>98</sup> Ibid, 17.

<sup>99</sup> Ibid, 46–47.

<sup>100</sup> Ibid, 70–75.

<sup>101</sup> European Commission, 'Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards



proposed by the GRI and are applying human rights indicators, although less frequently than indicators concerning other subject areas, notably the environment.<sup>102</sup>

## (2) Tracking business performance: improving measurement and comparability through indicators

Tracking is an integral part of the human rights due diligence process and aims at verifying the effectiveness of company's responses in addressing their human rights impacts. The tracking of business responses can create opportunities for States and business' to assess gaps in performance and accountability, and drive continuous improvements in the company's risk-management.<sup>103</sup> UNGP 20 expects business enterprises to rely on appropriate indicators in tracking their responses.<sup>104</sup> Not only quantitative, but also qualitative indicators should be used, which is important in part in order to verify that a company's own understanding about its human rights performance is accurate from the perspective of affected stakeholder groups. Tracking systems should draw on relevant internal and external perspectives, in particular the perspectives of the potentially affected stakeholders. Indicators can also help companies to communicate more effectively.<sup>105</sup>

The UN Working Group reports that business enterprises are applying varied methodologies and using both internal systems and external tools in their efforts to track their own performance and human rights impacts. It also recognizes a move towards collaborative approaches and unified standards for inspection for improving the management of supply chains.<sup>106</sup> The Human Rights Compliance Assessment tool is referred to as an example of an initiative that supports companies in aligning their policies and practices with expectations grounded in international human rights norms.<sup>107</sup>

Indicators are also identified by UNGPs 21 as relevant for companies when giving account for how and to what extent they discharge human rights due diligence by communicating this externally.<sup>108</sup> The potential of indicators to serve as a tool<sup>109</sup> to improve the measuring of business performance with regards to their

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disclosure of nonfinancial and diversity information by certain large companies and groups' (16 April 2013), SWD (2013) 127 final, 6. See also Centre for Strategy & Evaluation Services, 'Disclosure of non-financial information by Companies' (Final Report for the Directorate General for Internal Market and Services, December 2011) <[http://ec.europa.eu/finance/accounting/docs/non-financial-reporting/com\\_2013\\_207-study\\_en.pdf](http://ec.europa.eu/finance/accounting/docs/non-financial-reporting/com_2013_207-study_en.pdf)> last accessed on 9 October 2015.

<sup>102</sup> Centre for Strategy & Evaluation Services, 'Disclosure of non-financial information by Companies' (n 101), 20.

<sup>103</sup> UN Working Group, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (n 46), para. 7.

<sup>104</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UN 20(a).

<sup>105</sup> Ibid, Commentary to UNGP 20.

<sup>106</sup> UN Working Group, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (n 46), para. 29.

<sup>107</sup> Ibid, para. 31.

<sup>109</sup> For a detailed assessment of existing human rights indicator systems, see Klaus Starl, Veronika Apostolovski, Isabella Meier, Markus Möstl, Maddalena Vivona and Alexandra Kulmer, in collaboration with Hans-Otto Sano and Erik André Andersen, 'Baseline Study on Human Rights Indicators in the Context of the European Union' (FRAME

respect for human rights<sup>110</sup> has attracted increasing interest.<sup>111</sup> Indicators feature in a wide range of initiatives that track responses by business enterprises, ranging from management tools, reporting standards and sustainability indices like the Dow Jones Sustainability Indices and the FTSE4Good Series to working methodologies, multi-stakeholders' certification schemes and ethical ratings.<sup>112</sup> An initiative called 'Measuring Corporate Respect for Human Rights' assesses the quality of the indicators that feature in these initiatives in providing reliable and valid measures of business' respect for human rights.<sup>113</sup>

Improving the measurement of company's human rights performance, but also their comparability, is a task which is currently undertaken, for instance, by the Geneva-based World Business Council on Sustainable Development (WBCSD), 'a CEO-led organization of forward-thinking companies that galvanizes the global business community to create a sustainable future for business, society and the environment.'<sup>114</sup> The WBCSD is supported by some 190 companies and their CEOs, of which 83 or 84 have a global presence, and has UN Observer Status.

One of the main projects of the WBCSD is called 'redefining value' and 'was established to integrate natural and social capital measurement and valuation into corporate performance management and decision-making and improve the effectiveness of non-financial internal and external reporting so that it progressively reflects the true value, profits and costs of a company.'<sup>115</sup> More in particular, the WBCSD is developing a methodology to value social capital<sup>116</sup> and is working with Shift on a rights-based approach for business. This is the so-called 'Human Rights Issue Brief' – in full, 'Scaling UP Action on Human Rights – Operationalizing the UN Guiding Principles on Business and Human Rights.'<sup>117</sup>

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report, 24 December 2014) <<http://www.fp7-frame.eu/wp-content/materiale/reports/12-Deliverable-13.1.pdf>> last accessed on 20 September 2015.

<sup>110</sup> There is no uncontested definition of indicators. De Felice has defined a business and human rights indicator as 'a "named collection of rank-ordered data that purports to represent the past or projected [human rights] performance" of a corporation and whose results are conveyed through a self-contained verbal or numerical expression, such as a count (257), a percentage (15 percent), or a verb (agree/not agree).' Damiano de Felice, 'Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities' (2015) 37 *Human Rights Quarterly* 511, 518. One of the defining features of indicators is that they can be used 'to evaluate' the performance of, inter alia, corporations 'by reference to one or more standards'. Kevin E. Davis, Benedict Kingsbury, and Sally Engle Merry, 'Introduction' in Kevin E. Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford University Press 2012) 6.

<sup>111</sup> See the blog on 'Measuring Business & Human Rights', <http://blogs.lse.ac.uk/businesshumanrights/>

<sup>112</sup> Damiano de Felice, 'Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities' (n. 110).

<sup>113</sup> See <http://business-humanrights.org/en/measuring-business-human-rights-0>

<sup>114</sup> WBCSD, 'About: Organisation' (undated), <<http://www.wbcds.org/about/organization.aspx>> accessed 30 March 2016.

<sup>115</sup> WBCSD, 'Our work: Redefining Values' (undated), <<http://www.wbcds.org/redefiningvalue.aspx>> accessed 30 March 2016.

<sup>116</sup> WBCSD, 'Social Capital' (undated), <<http://www.wbcds.org/socialcapital.aspx>> accessed 30 March 2016.

<sup>117</sup> WBCSR, 'Scaling up Action on Human Rights: Operationalizing the UN Guiding Principles for Business and Human Rights' (undated), <<http://www.wbcds.org/Pages/EDocument/EDocumentDetails.aspx?ID=16382&NoSearchContextKey=true>> accessed, 30 March 2016.

According to interviewed members of the WBCSD, the issue of measurement and benchmarking of human rights (and more broadly CSR) performance is gaining importance as part of risk management strategies. WBCSD is therefore tackling this issue 'quite aggressively'.<sup>118</sup>

### (3) Grievance mechanisms: detecting violations and trends in non-compliance

Operational-level grievance mechanisms are one means through which a company can provide remedy in case of human rights abuses. As stipulated in UNGP 22, the corporate responsibility to respect requires that business enterprises 'should provide for or cooperate' in remedying adverse human rights impacts that they have caused or contributed to.<sup>119</sup> The UNGPs affirm that operational-level grievance mechanisms can be relevant for tracking business responses, for at least two reasons. First, they can support business enterprises in the identification of their adverse human rights impacts as part of their ongoing human rights due diligence, and in addressing systemic problems that trends and patterns in complaints may reveal. Second, they can enable the early and direct handling and remediation of adverse impacts, thereby 'preventing harms from compounding and grievances from escalating'.<sup>120</sup>

Indicators also play a role in the process of providing remediation for actual adverse human rights impacts. The development of performance indicators may help assess and contribute to the effectiveness of these mechanisms.<sup>121</sup> Operational level grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue. Currently, there is no measurement framework that allows for a comprehensive assessment of the implementation of the UNGPs' effectiveness criteria for grievance mechanisms.<sup>122</sup> A variety of key performance indicators on grievance mechanisms exists, which companies have relied on to obtain measurements on their implementation.<sup>123</sup> Some researchers caution, however, that data retrieved on

<sup>118</sup> Interview, Geneva, 5 June 2015.

<sup>119</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UNGP 22.

<sup>120</sup> Ibid, Commentary to UNGP 29.

<sup>121</sup> Ibid, Commentary to UNGP 22

<sup>122</sup> CSR Europe has developed the Management of Complaints Assessment (MOC-A) tool that provides practical guidance on the application of the 8 effectiveness criteria set out in the UNGPs. A report by CSR Europe on this MOC-A tool notes that '87% of CSR Europe's members report already having a mechanism in place that deals with complaints coming from the workforce and 40% have started addressing complaints from communities in a systematic way.' See, <[http://www.csreurope.org/sites/default/files/Assessing%20the%20effectiveness%20of%20Company%20Grievance%20Mechanisms%20-%20CSR%20Europe%20%282013%29\\_0.pdf](http://www.csreurope.org/sites/default/files/Assessing%20the%20effectiveness%20of%20Company%20Grievance%20Mechanisms%20-%20CSR%20Europe%20%282013%29_0.pdf)> accessed 23 March 2015.

<sup>123</sup> Damiano de Felice, 'Measuring the effectiveness of grievance mechanisms: Between key performance indicators and engagement with affected stakeholders' (The London School of Economics and Political Science Blogs entry, 11 April 2014) <<http://blogs.lse.ac.uk/businesshumanrights/2014/04/11/damiano-de-felice-measuring-the-effectiveness-of-grievance-mechanisms-between-key-performance-indicators-and-engagement-with-affected-stakeholders/>> last accessed on 20 September 2015.

complaints should be interpreted with care.<sup>124</sup>

### c) *Promoting tracking practices by relevant actors by the UN Working Group*

The UN Working Group also engages with actors to promote the global dissemination of the UNGPs. Relevant in this regard is the strategic considerations of the UN Working Group to build an environment conducive for the uptake of the UNGPs. This entails fostering active demand by stakeholders for business to meet their responsibility to respect, inter alia by promoting dialogue between stakeholders, and empowering their voices. Stakeholder (investors, consumers, workers, trade unions; civil society and affected persons) are known to have an important role in supporting uptake.<sup>125</sup> Another consideration is the outreach to new audiences and actors that promote the dissemination and the implementation of the UNGPs and for these actors to be well equipped and aware. The UN Working Group also seeks to promote the business-case for human rights.<sup>126</sup>

The UN Working Group distinguishes three categories of actors that it prioritises in its engagement to promote the *dissemination* of the UNGPs; stakeholders that are not yet aware of the Guiding Principles (*new audiences*); networks and institutions that disseminate the Guiding Principles to large groups of relevant actors (*multipliers*) and those able to assist in the prompt implementation of the Guiding Principles, through for instance technical assistance, capacity building programs, or the empowerment of communities to demand implementation from business enterprises (*catalysts*).<sup>127</sup>

#### (1) National Action Plans

The UN Working Group has invited States to consider developing National Action Plans (NAPs) on business and human rights.<sup>128</sup> The UN Working Group explains NAPs as ‘evolving policy strategies developed by States to prevent and protect against human rights abuses by business enterprises in conformity with the

<sup>124</sup> Ibid. Michael Addo, member of the UN Working Group, noted as an example that ‘a low number of complaints received through a given grievance mechanisms can be the result of a lack of transparency, and not necessarily evidence of respect-full behaviour’. Michael Addo, ‘Key performance indicators and the Working Group on business and human rights’ (The London School of Economics and Political Science Blogs entry, 14 March 2014) <<http://blogs.lse.ac.uk/businesshumanrights/2014/03/14/michael-addo-key-performance-indicators-and-the-working-group-on-business-and-human-rights/>> last accessed on 20 September 2015. In this regard, the 2015 report of the UN Working Group to the UN GA includes a section on tracking human rights states the following in this regard: ‘[f]or individual cases, a number of databases also exist. The Company and Government Action Platforms, managed by the Business and Human Rights Resource Centre, offer information on both judicial and non-judicial grievance mechanisms. Based to a large extent on information available on the Centre’s website, the Corporations and Human Rights Database project has tracked over 1,400 cases of human rights abuses by business enterprises between 2000 and 2014, looking at the remedy avenues pursued and the outcomes achieved. A number of civil society organisations, including the International Federation for Human Rights, have collated cases and provided guidance for companies and States for redressing harms.’ See UN Working Group (n 46), para 48.

<sup>125</sup> UNHRC, ‘Report of the Working Group’ (n **Error! Bookmark not defined.**), para 60.

<sup>126</sup> Ibid, para 62.

<sup>127</sup> Ibid, para 64.

<sup>128</sup> The UN Working Group’s mandate to do so is stipulated in UNHRC Res 17/4 (n 26), para 6(c).

Guiding Principles’,<sup>129</sup> ‘through an inclusive process of identifying needs and gaps and practical and actionable policy measures and goals’.<sup>130</sup> NAPs can potentially accelerate and scale up implementation of the UNGPs by both States and business enterprises.<sup>131</sup> As at July 2015, the UN Working Group had identified 25 NAPs.<sup>132</sup>

The UN Working Group has developed a Guidance Document aimed at promoting effective NAP processes and encouraging stakeholders to develop and support such NAP processes.<sup>133</sup> The Guidance document presents five phases composed of 15 recommended steps, which present a model process for States to develop, implement and update a NAP. The focus of the guidance may be on strengthening State’s implementation of pillar 1 and 3 of the UNGPs, however the guidance also addresses business respect for human rights under pillar 2 and 3, which indicates that NAPs can also be a valuable tool for tracking business responses to the UNGPs.

The Guidance Document encourages the tracking of business responses by recommending that States engage with stakeholders during all the five phases of the process: Initiation; Assessment and consultation; Drafting of initial NAP; Implementation; and Update.<sup>134</sup> The understanding is that the process should be transparent and inclusive, one in which all relevant non-governmental stakeholders are able to participate and contribute, including victims of human rights abuses and business enterprises. Stakeholder engagement is not only rights-compatible, but also important to secure the buy-in by stakeholders, e.g. business enterprises, for the State measures.<sup>135</sup> In addition, because business enterprises may contribute knowledge on human rights challenges and potentially effective solutions, including in relation to accessing remedies, their engagement is seen as crucial.<sup>136</sup>

Also relevant is the recommendation by the Guidance Document that stakeholders undertake a baseline assessment in order to, inter alia, identify and map the potential and actual adverse corporate related human rights impacts that the companies domiciled in its jurisdiction may be involved in, irrespective of where the impact occurred, at home or abroad. This assessment informs the identification of gaps in State protection of human rights and of the laws, regulation and policies that are linked to these gaps. An evaluation of the extent to which business enterprises meet their responsibilities under pillars 2 and 3 of the UNGPs is part of this exercise. The assessments on adverse impacts and gaps in protection provide an evidential basis that States can built on to identify priority areas associated with the implementation of

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<sup>129</sup> UN Working Group, ‘Report of the Working Group’ (n 85), para 6.

<sup>130</sup> Ibid, para 2.

<sup>131</sup> Ibid, para 1.

<sup>132</sup> UN Working Group, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’, (n 46), para 22.

<sup>133</sup> UN Working Group, ‘Guidance on National Action Plans on Business and Human Rights’ (Version 1.0, December 2014) <[http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf)> last accessed on 20 September 2015, 1–2.

<sup>134</sup> See further *ibid*, 5–10.

<sup>135</sup> *Ibid*, 4.

<sup>136</sup> *Ibid*, 9.

the UNGPs in the national context, in a joint effort between States and stakeholders.<sup>137</sup> This baseline assessment furthermore should be up-dated in the final phase of the process to complement the evaluation of the effectiveness of the NAP in terms of its actual impact. The process of conducting these base-line studies and the engagement of relevant stakeholders, as well as the outcome of the assessment that should be made publicly available are relevant for tracking business responses, because both contribute to creating awareness and understanding on trends, practices and challenges in the business implementation of the UNGPs. The guidance furthermore recommends that stakeholders consider using the National Baseline Assessment (NBA) template developed by the Danish Institute for Human Rights (DIHR) and ICAR in cooperation with the UN Working Group.<sup>138</sup>

## (2) National Human Rights Institutions

National human rights institutions (NHRIs) have an important role in tracking business responses to the UNGPs.<sup>139</sup> Business enterprises are advised to consult and draw on the expertise of NHRIs in meeting their responsibility to respect human rights, for instance when assessing how to respond to human rights issues in country and local contexts.<sup>140</sup> NHRIs are identified as an example of a State-based grievance mechanism,<sup>141</sup> and an important role is foreseen for NHRIs in providing effective and appropriate non-judicial grievance mechanisms.<sup>142</sup> The UNGPs also recognise a supporting role for NHRIs in assisting States to align with their international human rights obligations, and in providing guidance on human rights to business enterprises.<sup>143</sup>

In 2012, the European Group of National Human Rights Institutions (EGNHRI) adopted the Berlin Action Plan on Business and Human Rights. This Action plan outlined priority areas for action by NHRIs individually and the EGNHRI members collectively in support of the implementation of the UN 'protect,

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<sup>137</sup> Ibid, 11–12

<sup>138</sup> The NBA template contains a set of concrete criteria, indicators and scoping questions that quiz a State on its laws, policies and other measures to meet its duty to protect as defined by the UNGP and other international standards related to business and human rights. Stakeholders can use this template to conduct a baseline assessment, and to systematically monitor and evaluate State's commitments and progress in implementing the UNGP based on an inclusive and transparent process. The template is part of a toolkit to develop, implement and review of NAPs, which was developed by DIHR and ICAR in collaboration with the UN Working Group and launched in August 2013. DIHR and ICAR, 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks' (2014) <<http://accountabilityroundtable.org/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>> accessed 8 April 2015, viii.

<sup>139</sup> See UN Working Group, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (n 46), para 94.

<sup>140</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), Commentary to UNGP 23.

<sup>141</sup> Ibid, Commentary to UNGP 25.

<sup>142</sup> Ibid, Commentary to UNGP 27.

<sup>143</sup> Ibid, Commentary to UNGP 2. See also International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'The Edinburgh Declaration' (adopted on 10 October 2010) <<http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/10th%20Biennial%20Conference%20of%20the%20ICC.aspx>> last accessed on 10 October 2015. The Declaration affirmed the relevance of NHRIs 'in addressing corporate-related human rights challenges at the international level, including through the ICC, and at the regional and national levels'. Ibid, para 12.

respect, remedy’ framework for the period of 2012–2015.<sup>144</sup> The Action Plan highlighted, amongst other relevant actions for NHRIs, undertaking a baseline study with reference to the UNGPs, and/or making recommendations for NAPs to implement the UNGPs. Other relevant measures were undertaking activities related to ‘monitoring, documentation, inquiries, complaints-handling, and education and outreach with stakeholders, including business enterprises’ with regards to national, regional or international policies with impacts at home or abroad, including in relation to human rights impacts of businesses and access to effective remedies.<sup>145</sup> With regards collective activities, the European Group resolved, *inter alia*, to undertake strategic outreach at the international level, to engage with regional and national institutions in the development of national baseline studies and NAPs, as well as to reach out to the UN Working Group on Business and Human Rights.<sup>146</sup>

### (3) Regional organisations

Multilateral institutions – including the EU – can assume an important role in promoting business respect for human rights, as well as in assisting States in meeting its duty to protect. This role is embedded in UNGP 10, which recognises that these institutions should promote shared understandings that align with the UNGPs and advance ‘international cooperation in managing business and human rights challenges’.<sup>147</sup>

The UN Working Group has sought collaboration with regional organisations, recognising their importance as multipliers in efforts to disseminate the UNGPs at regional level. In 2012, the UN Working Group encouraged ‘increased cross-regional exchange and dialogue, and coherent messaging to business enterprises between regions, given the transnational nature of business operations and relationships’.<sup>148</sup> It also recommended that ‘[i]nternational organizations, including regional bodies, should include business and human rights and the implementation of the UNGPs in the agenda of their institutions, and support dissemination, capacity-building and implementation efforts at the regional level, with all stakeholders’.<sup>149</sup>

In support of its efforts to promote the UNGPs at regional level, the UN Working Group initiated the regional forums on business and human rights in 2012, which are aimed at enabling discussion on challenges and lessons learned from the implementation of the UNGPs with actors and relevant stakeholders in the regional context.<sup>150</sup> The forums create transparency on the current situation, progress

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<sup>144</sup> EGNHRI, ‘Berlin Action Plan on Business and Human Rights’ (7 September 2012) <<http://business-humanrights.org/sites/default/files/media/plan-of-action-plan-bhr-workshop-0912-berlin.doc>> last accessed on 10 October 2015.

<sup>145</sup> *Ibid*, 3.

<sup>146</sup> *Ibid*, 4.

<sup>147</sup> UNHRC, ‘Report of the Special Representative of the Secretary-General’ (n 6), Commentary to UNGP 10.

<sup>148</sup> UN Working Group, ‘Report of the Working Group’ (n 84), para 33.

<sup>149</sup> *Ibid*, para 78.

<sup>150</sup> UNHRC, ‘Outcome of the third session of the Working Group’ (n 70), para 17. The first regional forum was convened in Medellin, Colombia in 2013, and the second in Addis Ababa, Ethiopia in 2014. The 2015 regional forum will take place in Asia. See further UNHRC, ‘Addendum – Report of the Regional Forum on Business and Human



made and challenges and opportunities faced.<sup>151</sup> In addition, they facilitate stakeholder engagement and the creation of knowledge on key business and human rights issues. The regional forums also provide capacity building opportunities through training on the UNGPs and a venue for informing stakeholders about relevant tools, mechanisms, methodologies, initiatives and resources.<sup>152</sup> Finally, the regional forums complement and inform discussions at the annual UN Forum on Business and Human Rights.<sup>153</sup>

#### (4) Multi-stakeholder initiatives

An important actor that the UN Working Group seeks engagement with to further the objectives of its mandate are multi-stakeholder initiatives. A multi-stakeholder initiative can be understood as a collaborative effort by States, NGOs and business enterprises along with other actors to set standards and implementation systems.<sup>154</sup> The actors involved in these initiatives assume a shared responsibility and cooperate in order to reap specific opportunities or to provide solutions to specific regulatory challenges that actors may not be able to solve individually, often in specific operational contexts. Multi-stakeholder initiatives feature mutual mechanisms for accountability and oversight.<sup>155</sup> The UNGPs suggests that multi-stakeholder initiatives can contribute to tracking business responses by committing to respect for human rights-related standards and through their standard-setting function, help identify, elaborate and further specify expectations regarding the application of the UNGPs in specific operational contexts. Multi-stakeholder initiatives should ensure the availability of effective remediation mechanisms, at the level of individual members and/or the collaborative level.<sup>156</sup>

The UN Working Group in its reports has referred to various initiatives that aligned their work with the UNGPs, including the Fair Labour Association and the Global Network Initiative.<sup>157</sup> States are recommended to consider becoming party of the Montreux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (Montreux Document), and join the International Code of Conduct for

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Rights for Latin America and the Caribbean' (24 April 2014) UN Doc A/HRC/26/25/Add.2 and UNHRC, 'Addendum – Report on the First African Regional Forum on Business and Human Rights' (2 April 2015) UN Doc A/HRC/29/28/Add.2.

<sup>151</sup> For instance, in the African region, the lack of awareness about the UNGPs among most of the SMEs, which make up 80 pct. of African companies, was identified as a key challenge. Other challenges were the 'complexity of supply chains, a lack of senior management buy-in and the costs related to human rights due diligence processes'. UNHRC, 'Addendum – Report on the First African Regional Forum on Business and Human Rights' (n 150), paras 51(b) and 53.

<sup>152</sup> See in relation to the African region, *ibid*, paras 2 and 5.

<sup>153</sup> See section II.A.4 below.

<sup>154</sup> Scott Jerbi, 'Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda' (2012) 94 *International Review of the Red Cross* 887.

<sup>155</sup> UNHRC, 'Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises' (9 February 2007) UN Doc A/HRC/4/035, paras 53–54.

<sup>156</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UNGP 30.

<sup>157</sup> Other initiatives are the Thun Group of banks and the International Council on Mining and Metals, Voluntary Principles on Security and Human Rights and the Extractive Industries Transparency Initiative. UN Working Group, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (N 82), para 28-29.



Private Security Providers (ICoC), including its Association (ICoCA).<sup>158</sup>

## (5) The UN Human Rights System

The UN Working Group seeks to promote an active role for the UN bodies as part of its efforts to embed the UNGPs into global governance frameworks, which it has recognised can play a significant role in encouraging or requiring business enterprises and States to implement the UNGPs.<sup>159</sup> These activities can contribute to building key strategic building blocks of a global business and human rights regime.<sup>160</sup>

### (a) Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights (OHCHR) serves as the focal point within the UN system for advancing the business and human rights agenda and for providing uniform guidance and clarification on issues relating the implementation of the UNGPs.<sup>161</sup> The OHCHR furthermore has an important role in the building of capacity on the business and human rights agenda within the UN and stakeholders, including business enterprises, in support of the implementation of the UNGPs.<sup>162</sup> In this role, it has engaged with business organisations and networks to enhance awareness and implementation of the UNGPs.<sup>163</sup>

In November 2014, the OHCHR launched the Accountability and Remedy Project (ARP). The project aims 'to develop recommendations and guidance for States on how to achieve a fairer and more effective

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<sup>158</sup> The EU and 23 EU Member States support the Montreux Document and the EU is a member of the Working Group of the ICoCA. UN Working Group, 'Guidance on National Action Plans on Business and Human Rights' (n 118), p.23. European Commission, 'Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD (2015) 144 final, 21.

<sup>159</sup> UNHRC, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (n. **Error! Bookmark not defined.**), para 72.

<sup>160</sup> UNHRC, 'Outcome of the seventh session of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (25 March 2014) UN Doc A/HRC/WG.12/7/1, para 2.

<sup>161</sup> In this role, the OHCHR has developed an interpretative guide on corporate responsibility to respect human rights as set out in the UN UNGPs, a comprehensive training package and a publication with frequently asked questions. UNHRC, 'Report of the Secretary-General on the challenges, strategies and developments with regard to the implementation of the resolution 21/5 by the United Nations system, including programmes, funds and agencies' (1 April 2014) UN Doc A/HRC/26/20, para 19.

<sup>162</sup> Capacity building activities have been undertaken at country level and directed at government officials, stakeholders upon request and the UN's own staff in country offices. UNHRC, 'Report of the Secretary-General on the contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights' (2 July 2012) UN Doc A/HRC/21/21, para 23.

<sup>163</sup> *Ibid*, para 23. Capacity building efforts have also been directed at national human rights institutions, NGOs, trade unions, human rights defenders, academics and other stakeholders. *Ibid*, para 68.

system of domestic law remedies in cases of business-related human rights abuses, particularly in cases of severe abuses'.<sup>164</sup>

The project is organised around six distinct, but interrelated components: domestic law tests for corporate accountability (good practices and guidance for States on assessing corporate legal liability for serious human rights abuses); the roles and responsibilities of interested States (good practices to guide States in managing cross-border cases and exploring models of international and bilateral cooperation); overcoming financial obstacles to legal claims (minimum steps and good-practice option for States to ensure that claimants are not prevented from bringing cases due to legal costs); criminal sanctions ("good-practice models" for States on criminal sanctioning of corporations for serious human rights abuses); civil law remedies ("good-practice models" for States in relation to civil law damages in cases of serious corporate human rights harm); practices and policies of domestic prosecution bodies (recommendations to States on addressing challenges faced by domestic prosecutors).<sup>165</sup>

### *(b) UN Fund*

The HRC mandated the UN Working Group to support the promotion of capacity building and usage of the UNGPs by businesses.<sup>166</sup> It has recognised that capacity building of all stakeholders can help 'to better prevent business-related human rights abuses, provide effective remedy and manage challenges in the area of business and human rights'.<sup>167</sup> A feasibility study was conducted on the possibility of establishing a global fund to enhance the capacity of stakeholders to advance the implementation of the UNGPs. The SRSG found that 'stakeholders across categories expressed support' for the fund, but that further consultation with stakeholders was still needed. He proposed that the OHCHR should lead the consultation process.<sup>168</sup> Based on the this process, the OHCHR recommended, *inter alia*, that the OHCHR should be mandated to undertake a pilot project to test the viability of a capacity-building fund in collaboration with the UN Working Group and other relevant UN system partners and then report to the HRC in three years.<sup>169</sup>

### *(c) Special procedures of the Human Rights Council*

Special procedures mandates can address business-related human rights situations and topics, and apply the UNGPs in their analysis.<sup>170</sup> Greater attention by the special procedures can contribute to the further

<sup>164</sup> UNHRC, 'Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses' (7 May 2015) UN Doc A/HRC/29/39, para 6.

<sup>165</sup> *Ibid*, para 13.

<sup>166</sup> UNHRC Res 17/4 (n 26), para 6(c).

<sup>167</sup> UNHRC Res 26/22 (n 74), preamble.

<sup>168</sup> UNHRC, 'Report of the Secretary-General' (n 161), paras 92–93. The full study is contained in UNHRC, 'Addendum 1 – Study on the feasibility of a global fund to enhance the capacity of stakeholders to implement the Guiding Principles on Business and Human Rights' (1 April 2014) UN Doc A/HRC/26/20/Add.1.

<sup>169</sup> UNHRC, 'Feasibility of a global fund to enhance the capacity of stakeholders to implement the Guiding Principles on Business and Human Rights' (29 April 2015) UN Doc A/HRC/29/18, para 22(a)–(b).

<sup>170</sup> UNHRC, 'Report of the Secretary-General' (n 162), para 19.

exploration of challenges that business encounter in their implementation of the UNGPs, which may be issue-, group- or sector- specific.<sup>171</sup> A significant number of special procedures mandates has responded to the call and has taken up the UNGPs in their reports.<sup>172</sup> For instance, the Special Rapporteur on the situation of human rights defenders urged non-State actors, *inter alia* business enterprises, ‘to respect, and ideally support, the activities of human rights defenders’ and noted that they should ‘refrain from infringing upon the rights of defenders and should use the UNGPs on Business and Human Rights to ensure their compliance with international human rights law and standards’.<sup>173</sup>

#### (d) UN treaty monitoring bodies

There is an important role for UN treaty monitoring bodies (e.g. the Committee on the Rights of the Child (CRC) and the Committee on the Elimination of Discrimination against Women (CEDAW)) to address and clarify States’ obligations within the context of business-related human rights issues as they apply to States under the international human rights treaties they have ratified.<sup>174</sup> Clarification can be provided through, among other things, reporting procedures, individual complaints procedures, general comments, statements and concluding observations.<sup>175</sup> General Comments inform and facilitate the efforts of treaty monitoring bodies in their monitoring and follow-up of State’s implementation of their duty to protect. The reporting procedures present opportunities for advocacy and dialogue on State and business implementation of the UNGPs,<sup>176</sup> as well as for the systematic and comprehensive collection and analysis of information on business and human rights.<sup>177</sup>

### (6) Non-Governmental Organisations

The UNGPs affirm an important role for NGOs in advancing the business and human rights agenda.<sup>178</sup> NGOs are indicated as a credible, independent expert resource that business enterprises should consider consulting when undertaking human rights impact assessments in situations where consultations with

<sup>171</sup> Ibid, para 35.

<sup>172</sup> Ibid, para 19. See specifically footnote 8 to the Report.

<sup>173</sup> UNHRC, ‘Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggy’ (23 December 2013) UN Doc A/HRC/25/55, para 106.

<sup>174</sup> UNHRC, ‘Report of the Secretary-General’ (n 162), para 36.

<sup>175</sup> Ibid, paras 19 and 36. See for instance CEDAW, ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’ (1 November 2013) UN Doc CEDAW/C/GC/30, paras 17(c) and 18 and CRC, ‘General Comment No. 16 (2013) on State obligations regarding the impact of business sector on children’s rights’ (17 April 2013) UN Doc CRC/C/GC/16.

<sup>176</sup> For instance, NGOs raised the issue of privatisation in education on children’s right to education in Morocco and Ghana and relied on the UN General Comment No. 16 (n 175) in support of their argument. International Service for Human Rights, ‘Fertile ground for corporate accountability advocates: CRC General Comment on business and children’s rights’ (19 November 2014) <<http://www.ishr.ch/news/fertile-ground-corporate-accountability-advocates-crc-general-comment-business-and-childrens>> last accessed on 22 September 2015.

<sup>177</sup> UNHRC, ‘Report of the Secretary-General’ (n 161), para 29.

<sup>178</sup> See also UN Working Group (n 46), paras 39-40.

potentially affected stakeholders themselves is not possible.<sup>179</sup> Business enterprises are also advised to draw on the expertise of NGOs when assessing how to respect the principles of internationally recognised human rights when operating in complex country and local contexts.<sup>180</sup>

The HRC has affirmed the importance of the role of NGO's within the context of the implementation of the UNGPs. The HRC by Resolution 26/22 recognised the valuable role of NGOs in 'promoting the implementation of the UNGPs and accountability for business-related human rights abuses and in raising awareness of the human rights activities and risks of some business enterprises and activities'.<sup>181</sup> In Resolution 26/9, the HRC emphasised the 'important and legitimate role' of NGOs inter alia 'in preventing, mitigating and seeking remedy' for adverse human rights impacts by business enterprises.<sup>182</sup>

The UN Working Group is mandated to engage with NGOs through different avenues. The HRC in Resolution 17/4 expressly refers to NGOs as relevant sources from which the UN Working Group may seek and retrieve information.<sup>183</sup> It also points to NGOs as relevant actors with whom the UN Working Group should develop a regular dialogue and discuss possible areas of cooperation.<sup>184</sup> The UN Working has referred to various avenues through which NGOs can enter into dialogue and share information with the UN Working Group.<sup>185</sup>

#### 4. Business and Human Rights Forum

One of the main mechanisms for tracking business responses is the UN Forum on Business and Human Rights (UN Forum).<sup>186</sup> The main purpose of the Forum is 'to discuss trends and challenges in the implementation of the UNGPs and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices'.<sup>187</sup>

The UN Forum serves as a potentially important venue for tracking business responses for at least three reasons. First, the multi-stakeholder approach of the UN Forum permits the UN Working Group as well as

<sup>179</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), Commentary to UNGP 18.

<sup>180</sup> Ibid, Commentary to UNGP 23.

<sup>181</sup> UNHRC Res 26/22 (n 74), preamble.

<sup>182</sup> UNHRC Res 26/9 (14 July 2014) UN Doc A/HRC/RES/26/9, preamble.

<sup>183</sup> UNHRC Res 17/4 (n 26), para 6(b).

<sup>184</sup> Ibid, para 6(h).

<sup>185</sup> UNHRC, 'Addendum – Uptake of the Guiding Principles on Business and Human Rights' (n 49), para 96. In 2012, SOMO developed a practical guide to help civil society organisations to apply the UNGPs in their corporate research, campaigning, engagement and advocacy. Mariëtte van Huijstee, Victor Ricco and Laura Ceresna-Chaturvedi, 'How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy: a guide for civil society organizations' (SOMO, November 2012) <[http://somo.nl/publications-en/Publication\\_3899](http://somo.nl/publications-en/Publication_3899)> last accessed on 22 September 2015.

<sup>186</sup> The Forum was created by HRC in its Res 17/4 (n 26), para 12. The UN Working Group guides the Forum as part of its mandated activities. Ibid, para 6(i).

<sup>187</sup> Ibid, para 12.

all other stakeholders to solicit information and achieve a common understanding of progress achieved, trends, gaps and challenges in, *inter alia*, business implementation of the UNGPs. Second, the Forum contributes to building capacity and awareness through information sharing on lessons learned on implementation practices and challenges. Third, the UN Forum serves as a catalyst for new initiatives that can play a role in tracking responses.

The Forum has grown not only in coverage of issues and scope, but also in terms of the number of participants, which gives it traction. Approximately 2000 participants attended the Forum in 2014. This number reflected a great diversity of stakeholder perspectives.<sup>188</sup> The theme of the 2015 Forum was 'tracking progress and ensuring coherence'. The UN Forum has also served as a venue for discussion on the development of a new treaty on business and human rights.

## B. The implementation of the UNGP in the context of EU policies

The EU has followed and contributed to the process leading to the adoption of the UNGPs on Business and Human Rights since its very start.<sup>189</sup> When the SRS issued the UNGPs in early 2011, the EU enthusiastically endorsed them. All EU Member States sitting in the HRC also supported the UNGPs when the HRC endorsed them on 16 June 2011.<sup>190</sup>

Likewise, the EU welcomed the setting up of the UN Working Group on Human Rights and Transnational Corporations in 2012, and declared that it 'look[ed] forward to cooperating with the Group in the effective implementation of the Guiding Principles by all relevant stakeholders' and 'welcome[d] the invitation from the UN Working Group to contribute to its work programme regarding key thematic priorities and activities.'<sup>191</sup>

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<sup>188</sup> The Forum counted, *inter alia*, 168 business enterprises, 67 business/industry associations and 848 civil society organisations (ECOSOC and non-ECOSOC accredited). UNHRC, 'Summary of discussions of the Forum on Business and Human Rights, prepared by the Chair, Mo Ibrahim' (5 February 2015) UN Doc A/HRC/FBHR/2014/3, para 7. Business participation is seen as insufficient, however, when compared to NGO attendance, and it has been noted that private-sector participation should be broadened to include, *inter alia*, SMEs. *Ibid*, para 9. Meanwhile, it has been argued (and criticised) that the Forum's structure does not allow NGOs to confront and criticise the private sector, possibly to keep business engaged. Conectas Human Rights, 'Forum ends with no substantial progress' (12 November 2013) <<http://conectas.org/en/actions/business-and-human-rights/news/10527-forum-ends-with-no-substantial-progress>> last accessed on 25 September 2015.

<sup>189</sup> European Commission, 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility' COM (2006) 136 final, 8.

<sup>190</sup> European Union Permanent Delegation to the United Nations Office and other international organisations in Geneva, 'EU Comments on the draft Guiding Principles for the implementation of the UN "Protect, Respect and Remedy" Framework' (Geneva, 31 January 2011) <<http://business-humanrights.org/sites/default/files/media/documents/ruggie/eu-comments-on-draft-guiding-principles-31-jan-2011.pdf>> last accessed on 9 October 2015.

<sup>191</sup> European Union Permanent Delegation to the United Nations Office and other international organisations in Geneva, 'Contribution of the European Union before the first session of the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises' (6 January 2012)

The EU then took steps towards the implementation of the UNGPs within its own internal and external policies, and since 2011, human rights form integral part of the EU's understanding of CSR, and the UNGPs are identified as one of the 'internationally recognised principles and guidelines' on which the EU's CSR policy relies in this regard.<sup>192</sup> As a result, other business and human rights tools on which the EU relies in its CSR policy, namely the OECD Guidelines for Multinational Enterprises, the UNGC, the ILO Tripartite Declaration and ISO 26000 are viewed as 'support for businesses in addressing the UNGPs.'<sup>193</sup>

The EU also took steps to foster and track positive responses to the UNGPs by its own institutions, EU Member States, businesses, and third countries.

Below we examine these initiatives, both in respect to the EU itself and to third parties, in order to assess the EU's overall contribution to the implementation of the UNGPs.

Let us note for completeness that the current debate on Business and Human Rights might be in the process of seeing beyond the UNGPs, as on 26 June 2014, a divided Human Rights Council adopted a Resolution co-sponsored by Ecuador and South-Africa, which revived the voluntary/mandatory debate which the UNGP proponents thought was settled. The Resolution proposed to discuss the '[e]laboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' and created an 'open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.'<sup>194</sup> All EU Member States sitting in the Council voted against the resolution.<sup>195</sup> The EU nonetheless decided to take part in the open-ended working group. However, the EU's reluctant participation in the process was severely criticised as it

refused to engage constructively in the UN Treaty process at the IGWG meeting last July. In Geneva, only 9 out of 28 Member States joined the EU delegation on the first day. They created broad discontent when they delayed the debate process by putting two new conditions on the table while discussing the work plan. The first condition was to place greater emphasis on the UNGPs, and the Chair accepted to have it reflected in the work plan. The second was that the future instrument should apply to local businesses as well and not only transnational corporations or other businesses

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<[http://eeas.europa.eu/delegations/un\\_geneva/documents/eu\\_statments/human\\_right/20120106\\_01\\_en.pdf](http://eeas.europa.eu/delegations/un_geneva/documents/eu_statments/human_right/20120106_01_en.pdf)>  
last accessed on 9 October 2015, 2.

<sup>192</sup> COM (2011) 681 final (n 1), 6.

<sup>193</sup> European Commission, 'Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD (2015) 144 final (n 158), 22.

<sup>194</sup> UNHRC Res 26/9 (n 182), para 1.

<sup>195</sup> The votes were: 20 in favour (Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam), 14 against (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, UK, USA) and 13 abstentions (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE). See Business & Human Rights Resource Centre, 'UN Human Rights Council sessions' (undated) <<http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions>> last accessed on 9 October 2015.

with a transnational character. This demand was highly political and predictably going to cause strong divisions between the states present. It has to be said that many civil society organisations and experts actually support the validity of EU's comment on enlarging the Treaty's scope. But the fact that the EU raised this concern as a pre-condition rather than in the session specially dedicated to the issue of scope, made it look like a manoeuvre to derail the process. To make matters worse, the EU remained silent during the following discussions on the Treaty's substance, and finally left the room on day two. This choice of action was considered by many present in Geneva as outrageously deconstructive.<sup>196</sup>

As indicated above, in the next sections we examine the different actors in respect of which the EU has sought to promote the UNGPs. However, let us first take a look at the EU policy framework in which these efforts are taking place, namely the EU's 'CSR Strategy'.

### 1. **A renewed EU CSR Strategy for CSR (2011-2014): Implementing the UNGP?**

The main instrument through which the EU Commission has communicated its response to the UNGPs is 'the renewed EU Strategy 2011-14 for Corporate Social Responsibility',<sup>197</sup> successor to two Commission Communications from 2002 and 2006.<sup>198</sup>

The 2011 strategy was launched against the backdrop of the financial and economic crisis, which had negative effects on the general level of trust in corporations. The crisis encouraged EU Member States to call on business enterprises to address these negative effects, including by taking responsibility for the adverse impacts of their operations on human rights, in conformity with international standards. The magnitude of these impacts had become increasingly visible through a number of high profile cases of human rights violations committed by business enterprises.<sup>199</sup> The EU renewed its CSR policy with the aim 'to create conditions favorable to sustainable growth, responsible business behavior and durable employment generation in the medium and long term'.<sup>200</sup> The EU was seeking to enhance the impact of its CSR policy notably to avoid a costly proliferation of diverging national policies, to confirm and strengthen the EU's leadership in the area of CSR and the EU's leverage in advancing its values and interests abroad.<sup>201</sup> The Strategy also takes a number of new stances for what concerns human rights.

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<sup>196</sup> European Coalition for Corporate Justice, 'Towards a legally binding instrument on Business and Human Rights' (3 September 2015) <<http://www.corporatejustice.org/ECCJ-intervention-at-EU-Parliament-Event-on-the-UN-Treaty-on-Business-and-Human.html>> last accessed on 9 October 2015.

<sup>197</sup> COM (2011) 681 final (n 1)

<sup>198</sup> See European Commission, 'Corporate Social Responsibility: A business contribution to Sustainable Development', 2 July 2002, COM(2002) 347 final; European Commission, 'Implementing the partnership for growth and jobs: Making Europe a pole of excellence on corporate social responsibility', 22 March 2006, COM(2006) 136 final. See also European Commission, 'Green Paper: Promoting a European Framework for Corporate Social Responsibility', 18 July 2001, COM/2001/0366 final.

<sup>199</sup> European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (Compendium, 31 October 2014) <<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7726>> last accessed on 9 October 2015, 7.

<sup>200</sup> COM (2011) 681 final (n 192), para 1.3.

<sup>201</sup> Ibid, 6.

First of all, the 2011 strategy makes clearer also that the EU's commitments and policies on business and human rights are framed as part of this broader CSR strategy and agenda for action. Whereas the first two installments of the EU's CSR Strategy, dated respectively 2002 and 2006, hardly did mention the issue of human rights, and rather focused on voluntary initiatives by business enterprises to 'integrate social and environmental concerns in their business operations and in their interaction with their stakeholders',<sup>202</sup> one of the main issues addressed by the 2011 strategy is '[t]he need to give greater attention to human rights, which have become a significantly more prominent aspect of CSR.'<sup>203</sup> The human rights responsibilities of business enterprises are therefore approached through the comprehensive lens of CSR.

The EU Commission – and this is probably the most important innovation of the 2011 strategy – redefined its understanding of CSR as 'the responsibility of enterprises for their impacts on society' after over 10 years of debate with civil society which was fiercely combating the characterisation of CSR as 'voluntary only'.<sup>204</sup> The absence of an express reference to CSR as *voluntary* marked a significant departure from the EU's previous definition of CSR.<sup>205</sup> The new definition accommodates for the recognition set out in the UNGPs that CSR is not a strictly voluntary exercise by nature.<sup>206</sup> The Commission however still maintains that '[t]he development of CSR should be led by enterprises themselves', the 'mandatory' element only being a complement to business initiatives, as '[p]ublic authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability.'<sup>207</sup>

The 2011 strategy explicitly recognises that managing the negative (human rights) impacts of business enterprises is part of CSR, thereby sending out a clear signal that CSR is more than philanthropic activities alone and that promoting positive impacts on human rights is in itself not sufficient for business enterprises to be socially responsible.<sup>208</sup> The language of '[i]dentifying, preventing and mitigating their possible adverse impacts' is clearly inspired by and aligns with the corporate human rights due diligence requirements as defined in UNGP 15(b). The communication furthermore encourages business enterprises to 'carry out risk-based due diligence, including through their supply chain' in order to

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<sup>202</sup> References to two Communications.

<sup>203</sup> COM (2011) 681 final (n 192), 5. In 2006, this was only mentioned in passing. COM (2006) 136 final (n 189), namely 4 and 10.

<sup>204</sup> See, for example, International Federation for Human Rights and Amnesty International, 'New EU Communication on Corporate Social Responsibility: a Missed Opportunity' (Press release, 24 March 2006) <<https://www.fidh.org/International-Federation-for-Human-Rights/globalisation-human-rights/business-and-human-rights/New-EU-Communication-on-Corporate>> last accessed on 9 October 2015.

<sup>205</sup> Previously CSR was explained as the voluntary integration of social and environmental concerns into business operations. European Commission, 'Green Paper: Promoting a European framework for Corporate Social Responsibility' COM (2001) 366 final, para 20.

<sup>206</sup> COM (2011) 681 final (n 192), 6.

<sup>207</sup> *Ibid*, 7.

<sup>208</sup> *Ibid*, 6. This is in line with the understanding advanced by the UNGPs that positive actions do not offset a failure by business enterprises to respect human rights. UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), Commentary to UNGP 11.



discharge their responsibility, addressing `large enterprises, and enterprises at particular risk of having such impacts` in this regard.<sup>209</sup>

With regard specifically to human rights, the alignment of the new EU definition of CSR with the UNGPs furthermore permits and facilitates more effective responses to the UNGPs. State measures that aim to promote CSR, and its human rights dimension in particular, can be better targeted at the adverse human rights impacts of business activities, and encourage business enterprises to pro-actively implement the UNGPs.<sup>210</sup>

Chapter 4 of the Strategy contains an `Agenda for Action` for the period of 2011-2014, which outlines the abovementioned `smart mix`<sup>211</sup> of voluntary policy measures and complementary regulation through which the EU Commission seeks to translate the EU CSR Strategy to practice. The agenda for example already outlines the legislative proposals `on the transparency of the social and environmental information provided by companies in all sectors`,<sup>212</sup> and the better integration of social considerations into EU Public Procurement Directives,<sup>213</sup> which have in the meantime been adopted (see below, Chapter VII). The Agenda contains a number of actions aiming to promote the implementation of the UNGPs, which are viewed as a lynchpin for the coherence of EU policies related to business and human rights.<sup>214</sup>

Given that the strategy expired in 2014, most of the actions outlined in the Agenda have been realised, often the result of joint undertakings by the different DGs having competences in the various areas touched by the agenda. DG Growth has assumed a leading role in this process,<sup>215</sup> and information on development and achievements in the realisation of these priority actions have been published on its website. Status updates of implementation of the EU CSR strategy overall have been communicated through an implementation table.<sup>216</sup> The coordination of the EU's implementation efforts has mainly proceeded through the Annual Review Meetings on CSR. Initiated by the EU Commission in 2011, these review meetings convene the High-Level Group of Member State Representatives on CSR,<sup>217</sup>

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<sup>209</sup> COM (2011) 681 final (n 192), 6.

<sup>210</sup> *Ibid*, 6.

<sup>211</sup> *Ibid*, 7.

<sup>212</sup> *Ibid*, 11.

<sup>213</sup> *Ibid*, 20.

<sup>214</sup> *Ibid*, para 4.8.2.

<sup>215</sup> An `inter-service group on CSR` has been created in the Commission in order to ensure coherence of the policy. According to the Commission's fact sheet on CSR (already dating back from 2009), the group `involves the following policy areas: environment; justice, liberty and security; internal market; health and consumer affairs; and external affairs (external relations, trade, aid and cooperation, and development).' European Commission, `Corporate Social Responsibility (CSR)` (MEMO/09/109, 16 March 2009) <[http://europa.eu/rapid/press-release\\_MEMO-09-109\\_en.htm](http://europa.eu/rapid/press-release_MEMO-09-109_en.htm)> last accessed on 9 October 2015. This information should be updated, notably to reflect creation of EEAS.

<sup>216</sup> European Commission, `The Corporate Social Responsibility Strategy of the European Commission: Results of the Public Consultation` (November 2014) <<http://ec.europa.eu/DocsRoom/documents/8021>> last accessed on 9 October 2015, Annex III.

<sup>217</sup> The `High-Level Group of Member States` representatives [...] meets every six months to share different approaches to CSR and encourage peer learning. The high-level group is a mechanism for the Commission to sound

representatives of organisations that are member of the multi-stakeholder Forum Coordination Committee and representatives from organisations responsible for internationally recognised CSR guidelines and principles at the end of each year to jointly monitor implementation of the EU CSR Policy.<sup>218</sup>

As indicated above, the most current EU CSR strategy expired in 2014, and for the moment, no new strategy is forthcoming, despite calls to that effect.<sup>219</sup> The Commission has conducted a public consultation on the evaluation of its CSR strategy in the second half of 2014, which notably identified the implementation record of the UNGPs (and notably the lack of convergence of NAPs) as a ‘shortcoming’ of the strategy.<sup>220</sup> To date, however, this feedback has not materialised into a new policy.

## 2. EU activities to track responses to the UNGPs

This section will survey the various measures which have been taken by the EU to track and foster government and business responses to the UNGPs, so as to test the depth and coherence of the EU’s business and human rights policy, by reference the extent to which it relies on the UNGPs.<sup>221</sup>

The following sections will take an actors-based approach. Since Business and Human Rights is a cross-cutting and multi-level type of issue which seeks to affect the activities and bottom line of several types of actors, it is quite natural that the responses of all those actors to the UNGPs be surveyed. The actors surveyed are EU Member States, businesses, the EU itself, and third countries.

### a) Tracking responses by the EU itself

The EU, as a powerful and closely integrated international organisation wielding a wide set of competences on behalf of its 28 Member States, is one of the addressees of the UNGPs, particularly under pillars 1 and 3 (‘State duty to protect’ and ‘Access to remedies’). The EU’s action is limited by its competences in this respect. As indicated by the Commission itself:

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out Member States on its own initiatives. The group is also a focus of major dissemination events.’ European Commission, ‘Corporate Social Responsibility (CSR)’ (n 215).

<sup>218</sup> In addition, the EU Commission and the EU Parliament have attended the Annual Review Meeting. European Commission, ‘Annual Review Meeting of the High-Level Group of Member States Representative on CSR and the European CSR Multi-Stakeholder Forum Coordination Committee’ (28 November 2012) <[http://www.ueapme.com/IMG/pdf/CSR\\_meeting\\_LH\\_281112.pdf](http://www.ueapme.com/IMG/pdf/CSR_meeting_LH_281112.pdf)> last accessed on 9 October 2015

<sup>219</sup> CSR Europe, ‘CSR Europe calls for the new EU CSR strategy 2015-2019 to support a move from CSR compliance to innovation’ (News release, 3 February 2015) <<http://www.csreurope.org/csr-europe-calls-new-eu-csr-strategy-2015-2019-support-move-csr-compliance-innovation>> last accessed on 9 October 2015.

<sup>220</sup> European Commission, ‘The Corporate Social Responsibility Strategy of the European Commission’ (n 216), 27.

<sup>221</sup> As such, this chapter may be considered as an amplification of Cristina Churruca Muguruza, Felipe Gómez Isa, Daniel García San José, Pablo Antonio Fernández Sánchez, Carmen Márquez Carrasco, Ester Muñoz Nogal, María Nagore Casas and Alexandra Timmer, ‘Report mapping legal and policy instruments of the EU for human rights and democracy support’, *FRAME Deliverable 12.1*, July 2014, available at [www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf](http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf), pp. 86-96.

“Business and human rights” is not a stand-alone issue; it touches upon a wide range of different legal and political areas, including but not limited to human rights law, labour law, environmental law, anti-discrimination law, international humanitarian law, investment and trade law, consumer protection law, civil law, and commercial law, corporate or penal law. The EU's regulatory competence, and hence the Commission's ability to act, varies according to the scope of competence awarded to the EU in respect of each of those areas.<sup>222</sup>

In this section we will critically examine some important examples of UNGPs implementation by the EU at its own level (therefore excluding actions which the EU is taking to *encourage* business and human rights progress in Member States, third States, or businesses). As indicated above, the EU has recently published a ‘Staff Working Document’ surveying the measures which it has been taking in order to implement the UNGPs along the three pillars (the ‘Staff Working Document’).<sup>223</sup>

The purpose of the Staff Working Document is to describe the status quo of the implementation of the UNGPs by the EU; to explain the competences of the EU ‘vis-à-vis’ Member States for the implementation of the UNGPs; to provide an update on EU activities in this regard; and to identify potential gaps in the implementation of the UNGPs.<sup>224</sup> It therefore seems quite clear that the Commission wants to avoid any misunderstanding by making clear that for most of the UNGPs, Member States are in the frontline, and the EU rather has competences ‘vis-à-vis’ EU Member States to encourage them to implement the UNGPs. Most interestingly the Staff Working Document clearly recalls that the EU has no standalone competence to act in the field of human rights, as human rights ‘guide’ EU policies but do not ‘extend’ them.<sup>225</sup>

The Staff Working Document then only identifies (in an exemplary fashion) a few fields in which it is clear that the EU has competence to implement the UNGPs directly, namely ‘external action’ (mistakenly citing Art. 21 TFEU instead of TEU), the right to equality and non-discrimination (citing Art. 10 TFEU); trade and development policies; and migrant workers’ rights.<sup>226</sup>

As it appears, the EU is (partly) competent in many if not most of the fields which are concerned by the different UNGPs. Where most of the competence is retained by Member States, the EU naturally takes a quite discrete position and will preferably act as a convener who will assist Member States in sharing best practices.<sup>227</sup> However, the Staff Working Document is not very rigorous in its determination of whether the EU, Member States or both have competence in relation to a guiding principle. For instance, UNGP 4

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<sup>222</sup> SWD (2015) 144 final (n 193), 4.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid, 2–3.

<sup>225</sup> Ibid, 4. See also Opinion 1/96 confirming this (see UCD report).

<sup>226</sup> SWD (2015) 144 final (n 193), 4–5.

<sup>227</sup> For example, for what regards the so-called ‘foundational principles of the state duty to protect, namely make sure to protect against corporate human rights abuse in their territory, and setting out clearly the expectation that corporations respect human rights, ‘The European Commission services primarily see their role in facilitating the sharing of experience and good practice regarding business and human rights between EU Member States. The EU role here does not duplicate the role of the UN Working Group or other existing mechanisms for sharing experience and good practice, but rather complements them.’ Ibid, 6.

(ensuring that that state-owned corporations or businesses which receive substantial support from the state respect human rights), is listed as concerning Member State-only competences, whereas the only associated implementing measure listed by the Document is one which was taken by the EIB.

In respect of those UNGPs for which the EU has a firm competence, the Commission report lists EU legislations which have been in place before the adoption of the UNGPs and which can be considered as in line with them, such as various pieces of legislation and policy on anti-discrimination in the workplace, data protection in the workplace, impact assessments, or judicial cooperation in matters of civil liability, which enable access to remedy by victims. The document then lists initiatives that the EU has taken to implement, expressly or not, the UNGPs since their adoption. Examples include the new 2014 directive regarding disclosure of non-financial information by corporations (see extensive discussion below),<sup>228</sup> and the new 'Environmental and Social Handbook' of the European Investment Bank.<sup>229</sup>

All in all, the Staff Working Document illustrates the fact that the EU is already quite well equipped to deliver on the UNGPs in the fields in which it is competent. One quite blatant gap in this record is the lack of clarity of how the EU is going to approach the issue of business and human rights in its new exclusive investment policy, conferred to it by the Treaty of Lisbon. The human rights risks associated with foreign direct investment, especially in weak governance zones have been well documented, as well as the role played by the current international investment regime, which chiefly seeks to impose duties on host states to protect foreign investors, while not conferring any corresponding duties on the investor – not even the obligation to respect human rights as a condition to invoke the protection of the treaty.<sup>230</sup> Many voices have risen to require that 'non-investment' issues such as respect for human rights by the investor, or the right for the host state to legislate in the public interest (notably to protect human rights), be preserved in investment treaties.<sup>231</sup>

To this day, the Union is yet to conclude a single investment treaty, and has not issued any clear statement as to how investor protection, the host state's right to regulate, and the human rights duties of investors would all be accommodated. The EU-Canada Comprehensive Economic and Trade Agreement is the most advanced international treaty negotiated by the EU and containing investment provisions<sup>232</sup> and it is silent

<sup>228</sup> European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1. See the explicit mention of the UNGPs in recital 9.

<sup>229</sup> Council of the European Union, 'EU Annual Reports on Democracy and Human Rights in the World 2013', 23 June 2014, 11107/14, p. 28.

<sup>230</sup> Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?' (2009) 3 Human Rights and International Legal Discourse 301.

<sup>231</sup> See Howard Mann, Konrad von Moltke, Luke Eric Peterson, Aaron Cosbey, 'IISD Model International Agreement on Investment', April 2005 <[https://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf)>, Arts. 14 and 21.

<sup>232</sup> See Consolidated CETA Text, 26 September 2014, <[http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)>. The final text has been negotiated and agreed to by the EU Commission and the Canadian Government, and is now being submitted for approval by the Council of the EU and the European Parliament. See generally <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>.

on the issue of investor's respect for human rights, to the exception of a clause (inserted upon request by Canada) entitled 'denial of benefits' and which States:

A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:

investors of a non-Party own or control the enterprise; and the denying Party adopts or maintains measures with respect to the non-Party that:

are related to maintenance of international peace and security;

and prohibit transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.<sup>233</sup>

This article is supplemented by an interpretative declaration which goes:

With respect to Article X.15 (Denial of Benefits-Investment), Article Y (Denial of Benefits – CBTS) and Article XX (National Security Exception –Exceptions), the Parties confirm their understanding that measures that are 'related to the maintenance of international peace and security' include the protection of human rights.

This article would therefore extend the reach of restrictive measures adopted by one of the parties to the investments made by the sanctioned country in one of the parties through an investor of the other party which it owns or control. However, beyond this quite specific case, there is no mention of the fact that an investor might be denied benefits if it itself violates human rights in the host country.

This enormous gap is however not referenced by the Staff Working Document, and in fact, the Document does not properly focus on identifying clear gaps, or on proposing clear remedies, although this was clearly stated as one of its purposes (see above). The discussion as to the gaps is confined to the 2-page conclusion, and is dealt with in very general terms, identifying, for example 'practical' problems to litigate human rights abuses by corporations domiciled in the EU and outside of it.<sup>234</sup> In any event, no actual gaps are pinpointed, and no 'roadmap' for future implementation is set forth.<sup>235</sup>

In respect of the implementation of the UNGPs, the internal dynamics of the EU institutions play an important role. Commission DG Growth is clearly in the lead, having for example written the 2011 strategy on CSR. However, many other actors are competent and must be engaged with, such as the EEAS for

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<sup>233</sup> Consolidated CETA Text (n 232), Clause X15.

<sup>234</sup> SWD (2015) 144 final (n 193), 34.

<sup>235</sup> Although admittedly the Staff Working Document serves as a 'stocktaking exercise on where the European Union stands in terms of implementing the UNGPs [...] a situational analysis of the political, judicial and non-judicial framework conditions in the EU [...] not a policy document, but a technical staff working document of descriptive nature' (*Ibid.*, p. 2) and its purpose is therefore not to make normative proposals.

everything which concerns the external promotion of the UNGPs. DG Growth has set up a CSR coordination group that gathers all DGs involved, including on business and human rights. An interviewed official<sup>236</sup> has confided that when the UNGPs and the 2011 CSR strategy were released, there was a lot of enthusiasm in the services to collaborate on these issues. However, the field is so fragmented that the various actors have soon been discouraged and have returned to following their own course, so that coordination has returned to minimal level. A strong political signal is therefore needed to ensure that coordinated action is again picking up, in a way which also fosters ‘policy coherence’ as commended by UNGP 8.

*b) Tracking responses by Member States: National Action Plans on the implementation of the UNGPs*

As indicated above, the EU sees its most decisive intervention in the implementation of the UNGPs as an enabler and coordinator of direct implementing actions by Member States. In this regard, the EU has particularly insisted for Member States to establish ‘action plans’. Its 2011 strategy in this regard foresees two types of action plans. First:

Plans or national lists of priority actions to promote CSR in support of the Europe 2020 strategy, with reference to internationally recognised CSR principles and guidelines and in cooperation with enterprises and other stakeholders, taking account of the issues raised in this communication.<sup>237</sup>

And second, ‘national plans for the implementation of the UN Guiding Principles’,<sup>238</sup> as encouraged by the UN Working Group (see above). In 2012, the Council reiterated the call to EU Member States to issue specific action plans on the implementation of the UNGPs by 2013 in its EU Action Plan on Human Rights and Democracy.<sup>239</sup>

The Commission therefore encourages Member States to adopt both an action plan on CSR, and one on Business and Human Rights. This doubling up is confusing in several respects. First of all, the Commission recognised clearly, as was indicated above, that Business and Human Rights was part of its conception of CSR. Second, the NAP on CSR called for by the Commission ought to refer to ‘internationally recognized CSR principles and guidelines’, amongst which the Commission lists the UNGPs. Therefore, one fails to see why there should be an action plan on the UNGPs separate from the ‘general’ Action Plan on CSR. And indeed, Member States have only erratically abided by this double requirement.<sup>240</sup>

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<sup>236</sup> Interview date: 10 June 2015.

<sup>237</sup> COM (2011) 681 final (n 192), 13.

<sup>238</sup> Ibid, 14.

<sup>239</sup> Council, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’ (Doc No 11855/12, 25 June 2012) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf)> last accessed on 9 October 2015, para 25(c).

<sup>240</sup> For its part, the UN Working Group has not expressed itself in favour of either a NAP on CSR or on a NAP on the UNGPs specifically. It has noted the following: ‘In evolving policy strategies to implement the Guiding Principles, Governments may see fit to develop a stand-alone document dedicated to business and human rights, or include chapters in broader government strategies or action plans, for example on human rights, corporate social

The UK was the first to publish a NAP on business and human rights in September 2013. Several other EU Member States have followed suit, though we are far from a comprehensive EU-wide coverage in this regard. According to the Staff Working Document:

Several governments have adopted CSR statements or policies that mention human rights. To date, six Member States (United Kingdom, Netherlands, Italy, Denmark, Finland and Lithuania) have published their plans and at least seven more EU Member States are currently preparing national action plans on business and human rights.

Likewise, more than half of the EU Member States [...] have adopted National Action Plans on CSR, which incorporate human rights issues. Several other Member States are also preparing national action plans on CSR, with final versions expected to be released in 2015 and 2016.<sup>241</sup>

As we can see, NAPs – either CSR or specifically on the UNGPs – are in different stages of development. Some are still at the stage of intentions, other are in an early drafting phase, while others would be close to finalized. Some CSR NAPs have however been in existence for a while and have already undergone review and been updated. Some NAPs on the UNGPs are also currently undergoing review, or are scheduled for review in the near future.<sup>242</sup> To sum up, all EU Member States except for one have developed, formally committed to, or started to develop a NAP on CSR,<sup>243</sup> but timings and practices greatly diverge as to this.

Yet, the EU and its Member States are seen as precursors in the development of NAPs on the UNGPs,<sup>244</sup> and the usefulness of such a tool is undeniable.<sup>245</sup> The NAPs on business and human rights, or NAPs that address business and human rights within the context of CSR, allow for planning ahead and provide clarity on approaches and activities of EU Member States in relation to business and human rights, and in

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responsibility or national development. The UN Working Group does not offer set advice on the best option, as long as the national action plan seeks to implement the Guiding Principles in a comprehensive and coherent manner and is the result of a process characterized by the elements defined in this report.’ See UN Working Group, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’, (n 85), para 29.

<sup>241</sup> SWD (2015) 144 final (n 193), 7.

<sup>242</sup> The UK started a process to review its NAP on business and human rights in March 2015. The UK Plan of Action entitled ‘Good Business: Implementing the UNGPs on Business and Human Rights’ is available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236901/BHR\\_Action\\_Plan\\_-\\_final\\_online\\_version\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf)> last accessed on 9 October 2015.

<sup>243</sup> Luxemburg has no formal plans to develop a formal NAP. European Commission, ‘Corporate Social Responsibility: National Public Policies in the European Union’ (n 199), 14.

<sup>244</sup> To date, only EU Member States have adopted NAPs specific to business and human rights. OHCHR, ‘State national action plans’ (undated) <<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>> accessed 29 October 2015..

<sup>245</sup> European Commission, ‘Notes: Corporate Social Responsibility European Annual Review Meeting’ (20 December 2013) <<http://www.asktheeu.org/en/request/1168/response/4544/attach/11/FINAL%20Notes%20CSR%20HLG%20meeting%2020%20December%202013.pdf>> last accessed on 9 October 2015, 6.

response to the UNGPs.<sup>246</sup> However, NAPs also may suffer from significant weaknesses. A NAP may not provide a complete picture of all activities that a State plans or undertakes, or an accurate depiction of the state of actual implementation of the planned measures. Also NAPs do not say much regarding the effectiveness of such measures, and whether they actually trigger appropriate business responses, in part because most NAPs have not been subject to monitoring or revision. The policy actions that EU Member States outline in these NAPs nevertheless provide an indication of the approaches, priorities and measures that EU Member States select and how and to what extent these potentially respond to the country specific factors that shape business responses to the UNGPs in the EU context.

In order to guide States in the development of their NAPs, the UN Working Group has issued a document entitled 'Guidance on National Action Plans on Business and Human Rights'<sup>247</sup> (see above, section II.A.3.c)(1)). Likewise, the European Group of National Human Rights Institutions published a similar piece entitled 'Implementing the UNGPs on Business and Human Rights: Discussion paper on national implementation plans for EU Member States'. This discussion paper relates to both process and content and explicitly picks up on the EU Commission's invitation to EU Member States to develop NAPs for the implementation of the UNGPs.<sup>248</sup>

The process-related recommendations highlight amongst other aspects, that EU Member States should undertake a base-line study and gap analysis of their legislations and policies with reference to the UNGPs. The purpose is 'to provide a credible, transparent basis for national UNGPs implementation plans that set clear and strategic milestones'. EU Member States should ensure 'periodic monitoring and reporting on progress, according to verifiable criteria'. An important consideration apart from accountability, is to support 'effective mainstreaming of the UNGPs into international monitoring and reporting processes'. The process should be transparent, participatory and adequately resourced.<sup>249</sup>

The paper furthermore outlines a number of content-based specifications for NAPs.<sup>250</sup> The paper specifies that NAPs should be comprehensive, meaning that they should address all relevant issues under all three pillars of the UN Framework. Moreover, the paper calls for NAPs to 'include reasonably precise targets and objectives, that are achievable within reasonable time frames, to which easily understandable and verifiable performance indicators are attached, and with phased milestones for delivery, wherever appropriate.'<sup>251</sup>

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<sup>246</sup> The state of play has been well-documented and analyzed in a Compendium issued in 2014, which was preceded and informed by a peer review process on CSR and a questionnaire. European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (n 199).

<sup>247</sup> UN Working Group, 'Guidance on National Action Plans on Business and Human Rights' (n 133).

<sup>248</sup> EGNHRI, 'Berlin Action Plan on Business and Human Rights' (n 144) and the text accompanying n 144–146.

<sup>249</sup> European Group of National Human Rights Institutions, 'Implementing the UNGPs on Business and Human Rights: Discussion paper on national implementation plans for EU Member States' (June 2012) <<http://business-humanrights.org/sites/default/files/media/eu-nhris-paper-on-national-implementation-plans-for-ungps-210612-short.pdf>> last accessed on 9 October 2015, 1, 3–4.

<sup>250</sup> *Ibid*, 2.

<sup>251</sup> *Ibid*, 5.



It is not the purpose of this report to analyze this guidance in detail, but an examination of existing EU NAPs indicates that they already meet certain key elements outlined by the guidance with regard to both the NAP process and outcome. For instance, the observation that the identification of priorities actions should be based on base-line assessments has found resonance with EU Member States. Denmark, for example, included in its NAP a systematic baseline survey of government measures aimed at implementing the UNGPs, with a view to identifying gaps.<sup>252</sup> Likewise, Germany recently conducted such a baseline study<sup>253</sup> for the NAP it is currently developing.<sup>254</sup> Some EU Member States like the Netherlands have held multi-stakeholder consultations and/or interviews at different stages of the process with more than 50 relevant stakeholder groups, including business enterprises.<sup>255</sup>

With regard to the substance, an EU Compendium (see below) of EU Member States Business and Human Rights practices evidences that many EU Member States have integrated the full range of the UNGPs into their national policy frameworks and commonly address the key thematic issues of supply chain management, support for SMEs, reporting and public procurement.<sup>256</sup> Moreover, it would seem that EU Member States are putting the smart mix approach into practice, which the UNGPs recommends and the EU Commission supports and encourages.<sup>257</sup> This is illustrated by the mix of different types of instrument that EU Member States employ, ranging from legal instruments to partnering instruments to promote business respect for human rights.<sup>258</sup>

<sup>252</sup> The Danish Government, 'Danish National Action Plan – implementation of the UN Guiding Principles on Business and Human Rights' (March 2014) <[http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark\\_NationalPlanBHR.pdf](http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf)> last accessed on 9 October 2014, 24ff.

<sup>253</sup> Deutsches Institut für Menschenrechte, 'National Baseline Assessment' (30 April 2015) <[http://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/Publikationen/Weitere\\_Publikationen/National\\_Baseline\\_Assessment\\_Umsetzung\\_der\\_UN-Leitprinzipien\\_fuer\\_Wirtschaft\\_und\\_Menschenrechte.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Weitere_Publikationen/National_Baseline_Assessment_Umsetzung_der_UN-Leitprinzipien_fuer_Wirtschaft_und_Menschenrechte.pdf)> last accessed on 9 October 2015.

<sup>254</sup> See process description here: Auswärtiges Amt, 'Nationaler Aktionsplan "Wirtschaft und Menschenrechte"' (24 September 2015) <[http://www.auswaertiges-amt.de/DE/Aussenpolitik/Aussenwirtschaft/Wirtschaft-und-Menschenrechte/NAPWiMr\\_node.html](http://www.auswaertiges-amt.de/DE/Aussenpolitik/Aussenwirtschaft/Wirtschaft-und-Menschenrechte/NAPWiMr_node.html)> last accessed on 9 October 2015. On the development of NAP processes focused on measurement, see UN Working Group (n 46), para 72.

<sup>255</sup> Permanent Mission of the Kingdom of the Netherlands to the UN, 'National Action Plan on Business and Human Rights' (5 February 2014) <[http://www.netherlandsmission.org/binaries/content/assets/postenweb/v/verenigde\\_staten\\_van\\_amerika/the-permanent-mission-to-the-un/actionplanbhr.pdf](http://www.netherlandsmission.org/binaries/content/assets/postenweb/v/verenigde_staten_van_amerika/the-permanent-mission-to-the-un/actionplanbhr.pdf)> last accessed on 9 October 2015, 3.

<sup>256</sup> See below section 0.

<sup>257</sup> The Commission recognised in the EU CSR Strategy that States should 'play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation'. COM (2011) 681 final (n 192), 7.

<sup>258</sup> The EU Commission distinguishes between the following types of instruments: legal instruments that require CSR practices through the application of legislative, executive and judicial power, economic and financial instruments that drive CSR practices by using financial incentives and market forces, informational instruments that disseminate knowledge on CSR, partnering instruments that aim at voluntary cooperation between stakeholders, and hybrid instruments that combine two or more of these instruments. European Commission, 'Compendium of public CSR policies in the EU 2011' (6 April 2011) <<http://ec.europa.eu/social/main.jsp?langId=nl&catId=89&newsId=1012>> last accessed on 9 October 2015, 10.

As indicated above, it is not the purpose of this report to evaluate the substance of EU and Member State measures for implementing the UNGPs, but rather to identify the extent to which there is a dynamic in place to track whether or not they are implemented. In this regard, the EU has put in place two interesting instruments aimed at evaluating NAPs with the particular aim of evaluating their potential for implementing the UNGPs. The two initiatives are a peer review mechanism, and an EU-wide compendium of Member States' CSR practices, which we analyze in turn.

### (1) Peer review mechanism

The EU Commission committed in its EU CSR Strategy to 'create with Member States in 2012 a peer review mechanism for national CSR policies.'<sup>259</sup> The EU organised seven peer review sessions of NAPs between October 2013 and October 2014, involving all EU Member States over the course of 7 days of meeting, involving four Member States each day. These peer reviews aimed at facilitating learning amongst EU Member States on national CSR policies and measures. While focused on CSR more broadly, it was also intended for discussion on the UNGPs.<sup>260</sup> The peer review process also allowed the EU Commission to form an understanding of the state of play in the development of national CSR policies, and to identify common and country specific themes. Reports on the peer review were made publicly available on the Commission's website.<sup>261</sup>

Member States also perceived the process as useful, as it created opportunity to support the exchange of best practices, policy approaches and mutual learning.<sup>262</sup> One interviewed official however indicated that the peer-review exercise was 'not extensive' and that it 'just scratched the surface.' No commitments were made by Member States regarding future practice, and no formal recommendations or conclusions were adopted or any plans made for follow-up. Some ideas for further action have none the less been raised, for instance to consolidate the peer review process by looking at formal benchmarking or setting targets for different activities or policy areas.<sup>263</sup>

Next to the formal peer review, the Commission also hosts a high-level group of Member State Representatives which meets 2 or 3 times annually to share their activities. However, these two meetings typically have a very full agenda, which by the participants' admission does not allow much time for Member States to learn from each other.<sup>264</sup>

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<sup>259</sup> COM (2011) 681 final (n 192), para 9.

<sup>260</sup> European Commission, 'Notes: Corporate Social Responsibility European Annual Review Meeting' (n 245), 5.

<sup>261</sup> European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (n 199), 7.

<sup>262</sup> European Commission, 'Notes: Corporate Social Responsibility European Annual Review Meeting' (n 245), 5.

<sup>263</sup> Interview of EU Official, 15 April 2015.

<sup>264</sup> Ibid.

## (2) Compendium on CSR National Public Policies in the EU

The EU Commission in 2014 issued a new Compendium on CSR National Public Policies in the EU.<sup>265</sup> This publication follows previous editions of the EU Compendium on CSR policies, issued in 2006, 2007 and 2011 respectively.<sup>266</sup> The Compendium takes as a starting point the EU understanding of CSR as outlined in the EU CSR strategy, ‘the responsibility of enterprises for their impacts on society’. The main objective is to analyse the state of play in the development of proposed EU Member State policy actions on CSR, including in relation to business and human rights.<sup>267</sup> It provides transparent information on actions taken and progress achieved by the European Commission towards the implementation of its EU CSR Strategy, the policy approaches of EU Member States on CSR, including the state of play of their NAPs, and the rationales for the priorities set by NAPs.

The Compendium includes thematic sections covering a wide range of CSR aspects, and reflect on common approaches and practices related to human rights. The thematic sections that are especially relevant for human rights are global CSR approaches, CSR in SME’s, human rights and responsible supply chain management, social and employment policies, CSR reporting and disclosure, and sustainable public procurement.<sup>268</sup> The Compendium includes an Annex that provides complementary information on measures taken or planned by each EU Member State and links to relevant documents. Furthermore, it is based on the findings of the seven abovementioned CSR peer reviews, a questionnaire,<sup>269</sup> and the existing NAPs on CSR and the UNGPs.

The Compendium points to various country specific factors – cultural, economic, institutional and political – that EU Member State consider in their national priority setting. Some are especially relevant for shaping policies and priorities on business and human rights.<sup>270</sup> One of these factors is the structure of the economy, in terms of the number and share of multi-national companies, SMEs and micro-economies. States that are the seat of many multinational enterprises may focus on different problems and measures than countries that have a relatively higher number SMEs. States that are home to business enterprises that experience higher vulnerability to brand risks due to exposure to foreign trade or because they have complex supply chains with participating units in less economically developed countries tend to have more advanced policies.<sup>271</sup> The level of institutionalised stakeholder engagement and awareness of CSR is another factor. States with less institutionalised and developed stakeholder structures may give priority to strengthening their stakeholder engagement structures and capacity before developing human rights policies.<sup>272</sup>

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<sup>265</sup> European Commission, ‘Corporate Social Responsibility: National Public Policies in the European Union’ (n 199), 7.

<sup>266</sup> European Commission, ‘Compendium of public CSR policies in the EU 2011’ (n 258).

<sup>267</sup> European Commission, ‘Corporate Social Responsibility: National Public Policies in the European Union’ (n 199), 7.

<sup>268</sup> *Ibid*, 8.

<sup>269</sup> *Ibid*, 12.

<sup>270</sup> *Ibid*, 13.

<sup>271</sup> *Ibid*, 13.

<sup>272</sup> *Ibid*, 14.

Also relevant is the prevailing understanding of CSR in the country in question. The Compendium indicates that legislative approaches are more common in countries that place greater emphasis on the *responsibility* of business enterprises. This suggests that a national definition of CSR that expressly refers to the *responsibility* of companies, rather than merely to CSR as a voluntary activity, may lend itself more easily to the development of a regulatory approach. With regard to existing policy and regulatory frameworks, it was noted that the presence of State-owned enterprises might affect CSR policies and approaches where the social responsibility of these enterprises tends to be treated differently than for other entities. This is the case notably, but not exclusively in Nordic countries. With regard to the structure of policy making, where the policy-making structure of States is multi-layered, this can translate into more complicated CSR policies involving more levels of governance.<sup>273</sup>

The Compendium furthermore reflects on thematic priorities related to business and human rights that emerge across many EU Member States and elaborates on initiatives by EU Member States in these thematic areas. One finding is that EU Member States have a tendency to ‘integrat[e], disseminat[e] and shap[e]’ their UNGP actions within their broader CSR policy,<sup>274</sup> thereby mirroring the EU approach. A strong thematic area is the support to SMEs in the development of CSR approaches. Some States opt for a holistic approach and seek to support SMEs in meeting their human rights responsibilities through a combination of different types of instruments (FR, DE).<sup>275</sup>

EU Member States also tend to focus on company reporting and disclosure requirements.<sup>276</sup> This may be partly in anticipation of the new EU Directive on Non-Financial Disclosure<sup>277</sup> that will need to be implemented by EU Member States by 2017 (see below, section \_\_\_\_). This Directive explicitly aligns with the UNGPs as it integrates an aspect of the corporate human rights due diligence requirement and is expected to further scale up and improve disclosure practices across the EU, at least in relation to the disclosure of certain large enterprises.

### *c) Tracking responses by businesses*

This section addresses the EU’s actions to track and foster business responses to the UNGPs, that is, the discharge by business of its ‘responsibility to respect’ human rights. The EU has made quite clear that it had less of a mandate to act in this respect:

Owing to the fact that the private sector is the leading actor behind the second pillar, the role of the European Union is limited in terms of implementation. Nonetheless, as demonstrated in both

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<sup>273</sup> Ibid, 14.

<sup>274</sup> Ibid, 20–22.

<sup>275</sup> Denmark established Regional Business Development Centres that provides holistic services to regional and local businesses in the form of inter alia week campaigns to raise awareness, courses on supply chain management, guidance on due diligence, stakeholder dialogues, seminars and workshops. Ibid, 16–19.

<sup>276</sup> Ibid, 8.

<sup>277</sup> Directive 2014/95/EU (n.228).

the first and third pillars, the European Commission and European External Action Service (EEAS) have been proactive in supporting activities that can facilitate the progress of responsible business conduct among enterprises registered in the European Union.<sup>278</sup>

The EU therefore places itself at the margins of the corporate responsibility to respect (the so-called ‘pillar II’ of the UNGP), as a ‘facilitator of progress.’ Quite tellingly, the Staff Working Document on implementing the UNGPs only devotes less than one page to the second pillar, against 16 for the first one and 11 for the third one. Moreover, the Annex to the SWD, consisting in an ‘Overview of Actions and Policies Relevant to the Implementation of the UNGPs on Business and Human Rights’ purely and simply skips pillar II.

This voluntarily low profile is not necessarily warranted either by the logic of the UNGPs, or the competences of the EU. The EU has a broad competence – shared with Member States (see Art. 4 TFEU) – to ensure the functioning of the internal market (see Art. 26 TFEU). This notably includes the competence to harmonise legislations to ensure that differences do not hinder the enjoyment of one of the four freedoms (see Art. 114 TFEU).<sup>279</sup> Already in its first Communication on CSR, the Commission was concerned that variations in CSR standards in the Member States might disrupt the functioning of the internal market,<sup>280</sup> and therefore harmonising at EU level some of the requirements associated with corporate human rights due diligence makes perfect sense.<sup>281</sup>

In some instances, the EU has not shied away from taking binding regulatory measures in the field of CSR also for the benefit of the functioning of the internal market. The new directive on non-financial disclosure<sup>282</sup> (see discussion below) for example explicitly refers in its preamble to the necessity to harmonise at Union level the disclosure requirements placed on certain companies, not only to foster CSR practices (among which the uptake of the UNGPs), but also to improve the functioning of the internal market.

Recently, some Member States have however been taking bold steps towards legislating in relation to the due diligence requirement of the UNGPs. The most high-profile example is France’s *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*, which was voted by the lower chamber and is now examined a second time by the Senate after it firmly rejected it in first

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<sup>278</sup> European Commission, ‘Implementing the UN Guiding Principles on Business and Human Rights – State of Play’ SWD (2015) 144 final (n 158), 22.

<sup>279</sup> See generally Isidora Maletić, *The Law and Policy of Harmonisation in Europe’s Internal Market* (Edward Elgar, 2013).

<sup>280</sup> ‘[T]he proliferation of different CSR instruments (such as management standards, labelling and certification schemes, reporting, etc.) that are difficult to compare, is confusing for business, consumers, investors, other stakeholders and the public and this, in turn, could be a source of market distortion. Therefore, there is a role for Community action to facilitate convergence in the instruments used in the light of the need to ensure a proper functioning of the internal market and the preservation of a level playing field.’ European Commission, ‘Corporate Social Responsibility: A business contribution to Sustainable Development’ COM (2002) 347 final, 8.

<sup>281</sup> See already a reflection about harmonising CSR standards at the level of the EU market as a whole even before the adoption of the UNGPs in Olivier De Schutter, ‘Corporate Social Responsibility European Style’ (2008) 14 *European Law Journal* 203, 222–223.

<sup>282</sup> Directive 2014/95/EU (n 228).

reading.<sup>283</sup> Should such legislations proliferate in the future, the EU might be forced to take harmonising instruments to avoid further distortions in the functioning of the internal market. To date, however, the EU has limited itself to keeping an eye on the implementation of Pillar II of the UNGPs and issuing guidance in this regard, to the exception of the regulatory measures discussed below (section VII.A).

In March 2013, the EU Commission issued a study of Policy References made by 200 randomly selected large EU Companies to internationally recognised CSR Guidelines and Principles. This survey was issued as part of a project to monitor commitments made by European enterprises with more than 1,000 employees to take account of internationally recognised CSR principles and guidelines.<sup>284</sup> The study indicated that a very low number of 5 out of 200 sample EU Companies made a policy reference to the UNGPs. A larger percentage of 23% referred to the Universal Declaration of Human Rights.<sup>285</sup> The study indicated that company references to any of the internationally recognised CSR Guidelines and Principles vary per country of origin. Out of the 3% of all sample companies that referred to the UNGPs, making most reference to the UNGPs were the sample countries from the Denmark, France, the Netherlands and Sweden.<sup>286</sup> The EU study on Policy References made by large EU Companies indicated that companies with +10.000 employees are more likely to refer to internationally recognised CSR instruments. Some 5 percent of sample companies with + 10.000 employees referred to the UNGPs, while sample companies with less than 10.000 employees refer to the UNGPs three times less.<sup>287</sup>

Other interesting examples of instruments adopted to support the implementation of the UNGPs by businesses are the three sectorial guides for corporations in the oil and gas sector,<sup>288</sup> Information and Communication Technology,<sup>289</sup> and Employment and Recruitment Agencies,<sup>290</sup> which by their very titles are intended to implement UNGP 3(c) on 'Provid[ing] effective guidance to business enterprises on how to respect human rights throughout their operations.'<sup>291</sup>

However, significant attention in the EU regarding CSR in general and the UNGPs in particular has been devoted to small and medium enterprises (SMEs). This was already the case in the 2006 Communication

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<sup>283</sup> See <<http://www.senat.fr/dossier-legislatif/pp14-376.html>>.

<sup>284</sup> European Commission, 'An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles' (n 54).

<sup>285</sup> *Ibid*, para 3.2.3.

<sup>286</sup> *Ibid*, 6–10.

<sup>287</sup> *Ibid*, 9.

<sup>288</sup> Shift and IHRB, 'Oil and gas sector guide on implementing the UN guiding principles on business and human rights' (2013) <<http://bookshop.europa.eu/en/oil-and-gas-sector-guide-on-implementing-the-un-guiding-principles-on-business-and-human-rights-pbNB0413166/>> last accessed on 9 October 2015.

<sup>289</sup> Shift and IHRB, 'ICT sector guide on implementing the UN guiding principles on business and human rights' (2013) <<http://bookshop.europa.eu/en/ict-sector-guide-on-implementing-the-un-guiding-principles-on-business-and-human-rights-pbNB0413165/>> last accessed on 9 October 2015.

<sup>290</sup> Shift and IHRB, 'Employment & recruitment agencies sector guide on implementing the UN guiding principles on business and human rights' (2013) <<http://bookshop.europa.eu/en/employment-recruitment-agencies-sector-guide-on-implementing-the-un-guiding-principles-on-business-and-human-rights-pbNB0413164/>> last accessed on 9 October 2015.

<sup>291</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UN Guiding Principle 3(c).

on CSR, and has been confirmed after that, to the effect that

[t]he particular challenges for small and medium-sized enterprises (SMEs) in implementing the UNGPs led the Commission services to publish a guide for SMEs entitled "My Business and Human Rights"<sup>292</sup> in several languages in the form of a handbook in March 2013, including:

- Six basic steps expected of companies according to the UNGPs;
- Questions to be posed in 15 different business situations that might carry a risk of negative impacts on human rights;
- A list of human rights risks and brief examples of how enterprises could have a negative impact if they are not careful<sup>293</sup>

*d) Tracking responses by third countries: EU activities to promote the UNGPs in relations with other countries and regions in the world*

FRAME has already conducted extensive research on the various foreign policy instruments at the disposal of the EU. As per its own treaties, the EU establishes itself as a global actor who intends to play by a values-based agenda. All its external relations, therefore, should aim to promote human rights, amongst other values (Art. 21 TEU). There is no reason to believe that such commitment should not encompass the broader business and human rights agenda, and the latter is indeed slowly but surely becoming a fixture in EU external relations.<sup>294</sup> The Action Plan on Human Rights and Democracy (2015-2019), for example includes an Action 18 entitled 'Advancing on Business and Human Rights', which specifically aims at promoting the UNGPs, and lists a number of avenues to do so.

According to a FRAME Mapping of EU External Relations instruments,<sup>295</sup> the tools at the disposal of the EU are very diverse, ranging from soft diplomatic instruments (statements, declarations, démarches) to more established and structured ones (political dialogues, involvement in multilateral settings). Likewise, the EU also uses international legal instruments, such as bilateral or plurilateral treaties with a more or less wide-ranging material scope (Free Trade Agreements, Association Agreements), unilateral legislations (e.g. the Generalized Scheme of Preferences) or unilateral measures (restrictive measures such as embargoes or asset freezes). The EU also establishes deep-lying partnerships with a number of strategic partners, notably through what is called the European Neighborhood Policy. The EU finally conducts on the ground operations in the field of its CFSP and CSDP.

<sup>292</sup> GLOBAL CSR and BBI International, 'My business and human rights: A guide to human rights for small and medium-sized enterprises' (1 January 2014) <<http://ec.europa.eu/DocsRoom/documents/10375/>> last accessed on 9 October 2015 (footnote added).

<sup>293</sup> SWD (2015) 144 final (n 193), 11. Footnote omitted.

<sup>294</sup> Though progress is still possible, cf. Gosia Pearson, 'The Emergence of Business and Human Rights in the EU's External Relations' (OxHRH Blog, 3 March 2015) <<http://ohrh.law.ox.ac.uk/the-emergence-of-business-and-human-rights-in-the-eus-external-relations/>> last accessed on 9 October 2015.

<sup>295</sup> Susanne Fraczek, Beáta Huszka, Claudia Hüttner, Zsolt Körtvélyesi, Balázs Majtényi and Gergely Romsics, 'Report on mapping, analysing and implementing instruments' (FRAME report, 6 January 2015) <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> last accessed on 9 October 2015.

In most of these contexts and instruments, more or less explicit traces can be found of references to business and human rights, or at least CSR. Unfortunately the scope of this study does not allow for a comprehensive survey of such references, not to mention any analysis of their impact or effectiveness. This section will therefore only provide illustrative examples of the ways through which the EU has sought to track responses to the UNGPs and foster their implementation in third countries, either by third country governments, or by corporations operating in third countries.

In the field of trade, FRAME research has studied in-depth how the vast network of EU trade agreements included human rights elements.<sup>296</sup> This is done chiefly by way of inclusion of so-called ‘human rights clauses’ which define abidance by human rights by the parties as an ‘essential element’ of the treaty relationship allowing the other party to take ‘appropriate’ measures in case that element happened to disappear (i.e. in case of human rights violations).<sup>297</sup> Human rights are generally substantiated by reference to human rights instruments, such as the Universal Declaration of Human Rights.

FRAME Deliverable 9.1 surveyed all trade agreements currently in force in the EU, and human rights clauses in none of them refer to a business and human rights instrument, UNGPs or else.<sup>298</sup> Historically, trade agreements actually did not refer at all to corporate social responsibility of business and human rights issues until very recently.<sup>299</sup>

In this regard, ‘new generation agreements’ include so-called ‘sustainable development chapters’, in which references to business and human rights can be found. Such new generation agreements have so far entered into force with South Korea, Colombia and Peru, Cariforum, and Central America. Sustainable development chapters seek to establish a dialogue-based and formalized mechanism to foster sustainable development, including labour rights. Such issues are defined in reference to international texts and standards, which so far have never included the UNGPs,<sup>300</sup> though arguably some standards are also encompassed in the UNGPs.<sup>301</sup> Therefore, although according to reports ‘[t]he EU *continued* promoting CSR practices within the framework of trade and sustainable development chapters of its Free Trade Agreements, including those concluded with the Republic of Korea and with Colombia and Peru’,<sup>302</sup> so far no EU trade agreement references the UNGPs, not even the most recent one with Canada, which is not yet in force.<sup>303</sup> However, they have been picked up by the ‘Domestic Advisory Groups’ (DAG) set up in

<sup>296</sup> Laura Beke, David D’Hollander, Nicolas Hachez and Beatriz Pérez de las Hera, ‘Report on the integration of human rights in EU development and trade policies’ (FRAME report, 30 September 2014) <<http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf>> last accessed on 9 October 2015.

<sup>297</sup> See generally *ibid*, 62.

<sup>298</sup> *Ibid*, Annex II.

<sup>299</sup> See for example Art 11 of ‘Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part’ (signed 10 May 2010) <[http://eeas.europa.eu/korea\\_south/docs/framework\\_agreement\\_final\\_en.pdf](http://eeas.europa.eu/korea_south/docs/framework_agreement_final_en.pdf)> last accessed on 9 October 2015.

<sup>300</sup> ILO Tripartite Declaration is included.

<sup>301</sup> Joshua Waleson, ‘Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards Sustainable Trade and Investment’ (2015) 42 *Legal Issues of Economic Integration* 143, 153.

<sup>302</sup> Council of the European Union, ‘EU Annual Reports on Democracy and Human Rights in the World 2012’, 13 May 2013, 9431/13, 89, *emphasis added*.

<sup>303</sup> ‘Consolidated CETA Text’ (draft, 26 September 2014) <[http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)> last accessed on 9 October 2015.



relation to recent agreements' sustainable development chapters. These groups are composed for each party of civil society, business, social partners and other experts from relevant stakeholder groups. The EU DAG under the EU-Korea agreement has recently seized the issue of CSR, explicitly including the implementation of the UNGPs,<sup>304</sup> and has raised it at the September 2015 EU-Korea civil society forum, which agreed to continue discussing the issue, notably the establishment of NAPs in both Korea and the EU.<sup>305</sup>

In the framework of the Cotonou Agreement, which contains no reference at all to CSR and does not comprise a sustainable development chapter, the ACP-EU Joint Parliamentary Assembly has taken upon itself to address the topic, and to reference the different instruments discussed in this report, although only in passing.<sup>306</sup>

In the field of development it was made clear in different Commission Communication that the private sector was essential in fostering economic growth in developing countries, and that businesses should adopt CSR best practices in order to eradicate poverty and ensure sustainable development.<sup>307</sup> The 2011-2014 CSR Strategy states that '[b]y promoting respect for social and environmental standards, EU enterprises can foster better governance and inclusive growth in developing countries.'<sup>308</sup> Likewise, contains an Action aiming to '[p]romote international CSR guidelines and principles through policy dialogue and development cooperation with partner countries, and enhance market reward for CSR in public procurement and through promotion of sustainable consumption and production.'<sup>309</sup> In all these Communications, the UNGPs are part of the internationally recognised standards which are to be promoted, alongside the other instruments discussed in this report. This constitutes a further refinement to the two overarching EU Development Policy documents, i.e. the European Consensus on

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However, reference is made to the OECD Guidelines for Multinational Enterprises and 'internationally recognized standards'. Ibid, preamble and Art 3.

<sup>304</sup> EU Domestic Advisory Group under the EU-Korea FTA, 'Opinion on the European Union's vision and practice of Corporate Social Responsibility (CSR)' (Brussels, 10 November 2014) <[www.eesc.europa.eu/resources/docs/eu-dag-opinion-on-csr\\_en.pdf](http://www.eesc.europa.eu/resources/docs/eu-dag-opinion-on-csr_en.pdf)> last accessed on 9 October 2015, para 4.

<sup>305</sup> The Civil Society Forum under the EU-Korea Free Trade Agreement, 'Conclusions' (10 September 2015) <[http://www.eesc.europa.eu/resources/docs/eu-korea-csf-conclusions\\_september-2015\\_en\\_final-version.pdf](http://www.eesc.europa.eu/resources/docs/eu-korea-csf-conclusions_september-2015_en_final-version.pdf)> last accessed on 9 October 2015.

<sup>306</sup> ACP-EU Joint Parliamentary Assembly, 'Resolution on private sector development strategy, including innovation, for sustainable development' (ACP-EU/101.700/14/fin, Strasbourg, 3 December 2014) <[http://www.europarl.europa.eu/intcoop/acp/2014\\_strasbourg2/pdf/1042709en.pdf](http://www.europarl.europa.eu/intcoop/acp/2014_strasbourg2/pdf/1042709en.pdf)> accessed 18 October 2015, 3

<sup>307</sup> European Commission, 'A Global Partnership for Poverty Eradication and Sustainable Development after 2015' COM (2015) 44 final, 13.

<sup>308</sup> COM (2011) 681 final (n 192) 14-15.

<sup>309</sup> European Commission, 'A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries' COM (2014) 263 final, 12 (Action 10).

Development,<sup>310</sup> and the Agenda for Change,<sup>311</sup> which both expressed support for CSR but without much elaboration.<sup>312</sup>

In terms of practical implementation of such support for the UNGPs the thematic European Instrument for Democratisation and Human Rights is tasked to protect and promote human rights notably through initiatives related to ‘corporate social responsibility, in particular through the implementation of the UN Guiding Principles on Business and Human Rights.’<sup>313</sup> This is confirmed in the EIDHR’s Multiannual Indicative Programme (MIPs) for 2014-2017.<sup>314</sup> According to the Commission, this mandate is being translated into practice with the help of the Human Rights focal points located in EU Delegations.<sup>315</sup> Country-specific MIPs however typically do not include actions in relation to the UNGPs, with limited exceptions such as the MIPs for Ecuador, Peru and Colombia 2014-17.<sup>316</sup>

Perusal of the EU Annual Reports on Democracy and Human Rights in the World however give a panorama of the different kinds of projects which the EIDHR is conducting on the ground in the field of Business and Human Rights, though it is not always clear whether the Instrument seeks to promote the UNGP or other instruments.<sup>317</sup>

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<sup>310</sup> European Parliament, Council and Commission, ‘Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: “The European Consensus” ’ [2006] OJ C46/1.

<sup>311</sup> European Commission, ‘Increasing the impact of EU Development Policy: an Agenda for Change’ COM (2011) 637 final.

<sup>312</sup> See respectively paras. 88 and 3.

<sup>313</sup> European Parliament and Council Regulation (EU) No 235/2014 of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L77/85, Art 2(1)(b)(xiii).

<sup>314</sup> European Commission, ‘Instrument for Democracy and Human Rights Worldwide: Multiannual Indicative Programme (2014-2017)’ <<http://www.eidhr.eu/files/dmfile/EIDHRWorldwideMultiannualIndicativeProgramme2014-20172.pdf>> accessed 19 October 2015, 15.

<sup>315</sup> SWD (2015) 144 final (n 193), 19.

<sup>316</sup> EEAS and European Commission, ‘Multiannual Indicative Programme (MIP) 2014-2017: Ecuador’ (1 January 2014) <[https://ec.europa.eu/europeaid/sites/devco/files/mip-ecuador-2014-2017\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/mip-ecuador-2014-2017_en.pdf)> accessed 17 October 2015, 7; EEAS and European Commission, ‘Multiannual Indicative Programme (MIP) 2014-2017: Peru’ (1 January 2014) <[https://ec.europa.eu/europeaid/sites/devco/files/mip-peru-2014-2020-180814\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/mip-peru-2014-2020-180814_en.pdf)> accessed 18 October 2015, 4; and EEAS and European Commission, ‘Multiannual Indicative Programme (MIP) 2014-2017: Colombia’ (1 January 2014) <[https://ec.europa.eu/europeaid/sites/devco/files/mip-colombia-2014-2017\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/mip-colombia-2014-2017_en.pdf)> accessed 18 October 2015, 5.

<sup>317</sup> Council of the European Union, ‘EU Annual Reports on Democracy and Human Rights in the World 2014’, 22 June 2015, 10152/15, 258: ‘Rwandan organisations are supported financially by the European Instrument for Democracy and Human Rights (EIDHR). Projects included: trade unions’ compliance with the UN Human Rights Council’s Guiding Principles on Business and Human Rights; [...]’; Council of the European Union, ‘EU Annual Reports on Democracy and Human Rights in the World 2014’, 22 June 2015, 10152/15; Council of the European Union, ‘EU Annual Reports on Democracy and Human Rights in the World 2013’, 23 June 2014, 11107/14, 99: ‘The EIDHR signed a project to protect and support indigenous and rural women in Latin America against the impact of mining and other extractive industries. This project covers Ecuador, Peru, Bolivia and Venezuela in South America, Guatemala and El Salvador in Central America, and Mexico. [...] A group of female activists visited the institutions of the European Union as part of the project, to give visibility to the issue of business and human rights.’; Council of the European Union, ‘EU Annual Reports on Democracy and Human Rights in the World 2012’, 13 May 2013, 9431/13, 105: ‘The EIDHR supports

Other EU Development Instruments do not seek to implement the UNGPs, except for the Development Cooperation Instrument, the legal basis of which includes the promotion of CSR as one area of action,<sup>318</sup> and which launched regional SWITCH projects, aimed at facilitating the transition to sustainable consumption and production, under the Thematic programme ‘Civil Society Organisation and Local Authorities.’ The SWITCH programmes do not explicitly reference the UNGPs, but are discussed by the Staff Working Document as implementing them.<sup>319</sup>

Business and human rights have also been made part of ‘softer’ external relations instruments such as political and human rights dialogues, which are regular meetings held at various administrative or leadership levels between the EU and third countries governments with the aim of discussing certain issues, amongst which human rights. The depth of the discussion and the effectiveness of dialogues in promoting EU human rights priorities have varied widely.<sup>320</sup> However, one can note that the issue of business and human rights has become a recurring theme in human rights dialogues.<sup>321</sup> One can cite, for instance, the recent dialogues with Mexico,<sup>322</sup> Indonesia,<sup>323</sup> or South-Africa.<sup>324</sup> As a follow up to the 2013 EU-African Union Human Rights dialogue,<sup>325</sup> the two organisations even organised a ‘joint seminar’ in

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actions led by civil society organisations aimed at promoting respect for human rights by European companies operating outside the EU. In 2012 the EU continued its support for the Clean Clothes Campaign, an alliance of organisations from 15 European countries, implementing projects to increase respect for economic and social rights in the global supply chains of international garment companies in over 30 countries. Two more projects funded under the EIDHR cover the question of business and human rights. A global project targeting 70 countries aims to reinforce the capacity of local land-rights defenders to defend their rights over natural resources, to counter the lack of transparency regarding contracts between states and private companies, and to engage with governments and extractive industries in countries with conflicts over resource extraction. Similarly, a project on defenders of indigenous rights in South-East Asia provides for a study on corporate social responsibility, human rights and indigenous peoples. Another EIDHR project that includes the question of business and human rights is the Latin American Mining Monitoring Programme, which supports rural indigenous women in promoting and defending their rights, as affected by the mining industry.’

<sup>318</sup> European Parliament and Council Regulation (EU) No 233/2014 of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ 77/44, Annex I, para A.II(b)(xiii).

<sup>319</sup> See <<http://www.switch-asia.eu/news/financing-the-switch-to-green-smes-across-asia-africa-and-the-mediterranean/>>, and SWD (2015) 144 final (n 193), 12.

<sup>320</sup> FRAME Work Package No 15 – Deliverable No 1 (forthcoming).

<sup>321</sup> SWD (2015) 144 final (n 193), 20.

<sup>322</sup> EU Delegation to the UN, ‘EU and Mexico hold bilateral Human Rights Dialogue’ (20 March 2014) <[http://eu-un.europa.eu/articles/en/article\\_14768\\_en.htm](http://eu-un.europa.eu/articles/en/article_14768_en.htm)> last accessed on 9 October 2015.

<sup>323</sup> EU Delegation to the UN, ‘4th Indonesia – European Union Human Rights Dialogue Joint Statement’ (18 November 2013) <[http://eu-un.europa.eu/articles/en/article\\_14256\\_en.htm](http://eu-un.europa.eu/articles/en/article_14256_en.htm)> last accessed on 9 October 2015.

<sup>324</sup> Here it is part of the ‘general topics’ addressed each time, see Council, ‘Council conclusions on the establishment of a Human Rights Dialogue with South Africa’ (3199th FOREIGN AFFAIRS Council meeting, 19 November 2012) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/foraff/133571.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/133571.pdf)> last accessed on 9 October 2015, para 3.

<sup>325</sup> AU-EU Human Rights Dialogue, ‘Joint Communiqué’ (10th AU-EU Human Rights Dialogue, 20 November 2013) <[http://www.africa-eu-partnership.org/sites/default/files/documents/10th\\_au-eu\\_dialogue\\_communique\\_en.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/10th_au-eu_dialogue_communique_en.pdf)> last accessed on 9 October 2015.

Addis Ababa on the implementation of the UNGPs.<sup>326</sup> A similar initiative had been undertaken with CELAC in 2013,<sup>327</sup> and continued in 2014.<sup>328</sup>

An interviewed official also mentioned that EU Delegations were also being briefed about the UNGPs and CSR in general, and encouraged to raise this in their dealings with host governments.<sup>329</sup> Likewise, EU Special Representative for Human Rights (EUSR) Stavros Lambrinidis has addressed the issue of Business and Human Rights in several instances during visits to third countries.<sup>330</sup> The EUSR also regularly participates in the UN Forum on Business and Human Rights.<sup>331</sup>

There was also a case whereby an EU Member State, namely the UK, was consulted and has been assisting a third country – Colombia – in setting up its NAP.<sup>332</sup> This was, however, not done in conjunction with the EU.<sup>333</sup>

The EU is also active in conflict situations, along with its Member States, where recourse is often had to so-called ‘private military companies’ for outsourcing often delicate and human rights sensitive tasks and missions. A now archived FP-7 project, Priv-War, has evidenced that no regulatory framework was currently in place to ensure that such private military companies hired by the EU or its Member States abided by human rights or generally accepted standards of CSR such as the UNGPs.<sup>334</sup> The project made

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<sup>326</sup> EU Delegation to the UN, ‘EU-AU Joint Statement on Business and Human Rights’ (16 September 2014) <[http://eeas.europa.eu/delegations/african\\_union/press\\_corner/all\\_news/news/2014/20140916\\_1\\_en.htm](http://eeas.europa.eu/delegations/african_union/press_corner/all_news/news/2014/20140916_1_en.htm)> last accessed on 9 October 2015.

<sup>327</sup> European Commission, EEAS and CELAC, ‘EU-CELAC seminar on Corporate Social Responsibility, Brussels, October 11: Indicative Agenda’ (11 October 2013) <[http://www.ueapme.com/IMG/pdf/131008\\_Agenda\\_EU-CELAC\\_Seminar\\_on\\_CSR.pdf](http://www.ueapme.com/IMG/pdf/131008_Agenda_EU-CELAC_Seminar_on_CSR.pdf)> accessed 17 October 2015.

<sup>328</sup> Council of the European Union, ‘EU Annual Reports on Democracy and Human Rights in the World 2014’, 22 June 2015, 10152/15, 85.

<sup>329</sup> Interview 10 June 2015.

<sup>330</sup> For example, in September 2013, the EUSR ‘chaired the first ever EU-China Roundtable on Business and Human Rights, which gathered over 50 participants from EU and Chinese authorities, business, academia and other stakeholders, to discuss the implementation of the UN’s Strategic Framework and Guiding Principles on Business and Human Rights, exchange best practices, and explore possible future cooperation between China and the EU in this field.’ EU Delegation to the UN, ‘EU Special Representative for Human Rights Lambrinidis visits China’ (20 September 2013) <[http://eu-un.europa.eu/articles/en/article\\_13960\\_en.htm](http://eu-un.europa.eu/articles/en/article_13960_en.htm)> last accessed on 9 October 2015.

<sup>331</sup> Council of the European Union, ‘EU Annual Reports on Democracy and Human Rights in the World 2014’, 22 June 2015, 10152/15, 86; Council of the European Union, ‘EU Annual Reports on Democracy and Human Rights in the World 2012’, 13 May 2013, 9431/13, 11.

<sup>332</sup> Foreign & Commonwealth Office, ‘Colombia - Country of Concern’ (Corporate report, published 12 March 2015) <<https://www.gov.uk/government/publications/colombia-country-of-concern--2/colombia-country-of-concern#business-and-human-rights>> last accessed on 9 October 2015.

<sup>333</sup> Interviewed official, 10 June 2015

<sup>334</sup> Nigel D White and Sorcha MacLeod, ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’ (2008) 19 *European Journal of International Law* 965. See also Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms* (Hart Publishing 2012).

substantial recommendations, which to date have not been taken up,<sup>335</sup> beyond support for the Montreux Document (see above Section A.3.c)(4)).<sup>336</sup>

In multilateral settings, as indicated above, the EU has been a firm supporter of the UNGPs and has contributed to the work of the UN Working Group and the UN Forum on Business and Human Rights, at least until it stopped matching its priorities (see above, section II.B.2.a)).<sup>337</sup>

## C. Conclusion

The 2011 Commission CSR strategy and following policy documents have clearly placed the UNGPs at the heart of the EU's Business and Human Rights agenda, and rightly so, as the UNGPs have unequivocally established themselves as the foundation of the entire regime, on which all particular initiatives should build.<sup>338</sup>

There is widespread perception that the EU's strategy for implementing the UNGPs is by and large successful. As stated in the Staff Working Document on the implementation of the UNGPs:

A public consultation on the Commission's CSR Strategy in 2014 confirmed support for the Commission's continued role in fostering the implementation the UNGPs at EU level, with 81% of respondents considering this as important or very important. Broken down by stakeholder type, these figures show 78% support from industry representatives, 83% of SMEs and 91% of civil society organisations. In terms of successful implementation, over half of the respondents (54%) believed that such actions had been well implemented to date, whereas 13% believed that the Commission was not successful in promoting the UNGPs.<sup>339</sup>

Based on our assessment above, it is perhaps useful to come back to what we identified as the factors which could influence business responses to the UNGPs in a positive or negative way (see above, section II.A.2.b)), and assess more systematically the extent to which the EU is weighing on each factor in an appropriate and promising manner.

With regard to awareness and familiarity with the UNGPs, the EU has consistently sought to raise the UNGPs with relevant actors – Member States, Business and third countries – and has established specific policies in this respect: working on NAPs with Member States; publishing guidance for large or small

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<sup>335</sup> PRIV-WAR, 'Priv-War Recommendations for EU Regulatory Action in the Field of Private Military and Security Companies and their Services' (March 2011) <[http://priv-war.eu/wp-content/uploads/2013/03/Priv-War\\_Recommendations-FINAL-.pdf](http://priv-war.eu/wp-content/uploads/2013/03/Priv-War_Recommendations-FINAL-.pdf)> last accessed on 9 October 2015.

<sup>336</sup> SWD (2015) 144 final (n 193), 21.

<sup>337</sup> Doug Cassel, 'Treaty Process Gets Underway: Whoever Said It Would Be Easy?' (Business & Human Rights Resource Centre, 12 July 2015) <<http://business-humanrights.org/en/treaty-process-gets-underway-whoever-said-it-would-be-easy>> last accessed on 9 October 2015.

<sup>338</sup> Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights -- Foundations and Implementation* (Martinus Nijhoff Publishers 2012).

<sup>339</sup> SWD (2015) 144 final (n 193), 2.

companies (sometimes in a sectorial way); and ‘mainstreaming’ Business and Human Rights and the UNGPs with third countries. The EU has therefore made a visible effort to increase awareness and understanding of the guidelines in this respect, though of course progress can always still be made.

In terms of capacity, there is little the EU can do to increase the capacity of other actors to take up and implement the UNGPs beyond raising awareness and helping them take the measure of their obligations, as underlined in the above paragraph. We might however point out that a capacity problem might be present within the EU itself, namely in the form of coordination costs between the different services involved. As indicated, CSR and Business and Human Rights are a cross-cutting issue, which touches upon many Union competences. DG Growth is in the lead for the definition of policies, and an inter-service group exists on CSR, but interviews have shed light on a severe deficit of coordination and leadership in this regard, evidenced notably by the lack of a new CSR strategy to replace the expired 2011-2014 plan. Another sign of such difficulties is the fact that the 2012 Action Plan on Human Rights and Democracy foresaw in Action 25 (b) to ‘[p]ublish a report on EU priorities for the effective implementation of the UNGPs.’ This report never came about, as was confirmed by an interviewed EU official, because coordination was too difficult.<sup>340</sup>

Regarding exposure to external forces, there is ample evidence that the EU is exposed to many stakeholder points of view, and seeks to reach out to the latter, notably through its Multi-Stakeholder forum on CSR. Interviewed officials have confirmed that they were very careful to consult stakeholders prior to issuing policy and viewed themselves as ‘brokers of opinion,’ while acknowledging as well that, depending from DG to DG, contacts were sometimes more intense with certain constituencies, like industry in the case of DG Growth.<sup>341</sup> So far, however the voice of Business seemed to be covering that of civil society, which was advocating a more affirmative and less ‘hands off’ strategy for CSR and Business and Human Rights.<sup>342</sup> The deletion of the purely voluntary character of CSR in the 2011 strategy was in this regard a big victory for civil society, but the imbalance remains, as could be perceived at the 2015 Multi-Stakeholder forum, generally dominated by Business.<sup>343</sup> The negative and unconstructive stance taken by the EU regarding the UN discussions on a binding instrument for Business and Human Rights denote in this regard that the EU is still not prepared to hear all of civil society’s demands (see above, section 0).

Regarding factors linked to the type, size, business case and sector of corporations, the EU has, to a large extent, tried to avoid having a ‘one-size-fits-all’ approach, and to take into account the particular challenges experienced by different segments of the economy in differentiated initiatives. The EU for instance issued guidance for SMEs, sectorial guides on the UNGPs (through many sectors remain to be explored), or even binding legislations addressing corporations of a certain size (the non-financial

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<sup>340</sup> Interview 10 June 2015.

<sup>341</sup> Interviewed EU officials, 15 April 2015.

<sup>342</sup> Olivier De Schutter, ‘Corporate Social Responsibility European Style’ (n 281). Ibid.

<sup>343</sup> Wolfgang Benedek, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan, Stuart Wallace, ‘Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors’, *FRAME Deliverable 7.2*, March 2015 <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>>, 5.

disclosure directive, see below) or certain sectors (minerals, see below). Although complete and differentiate coverage in this regard is probably impossible to achieve, we would encourage the EU to keep issuing specific guidance tailor-made to particular challenges. The responsibility for that lies with DG Growth.

Finally, with regard to country-specific factors, the EU is pushing its Member States to adopt NAPs, which will arguably take account of local specificities, while still trying to ensure a certain degree of EU coordination through compendiums and peer reviews. Abroad, the EU is also trying to include UNGPs elements in its relations with third countries, but the strategy seems much more *ad hoc* in this regard. Notably, it is a pity that the EU deprives itself from considerable leverage to promote the UNGPs by failing to link them to trade conditionality.

### III. The UN Global Compact

#### A. Background to the instrument

##### 1. Principles and Membership

The UN Global Compact (UNGC) was formally launched on 26 July 2000 by then UN Secretary General Kofi Annan, who had made an appeal thereto at the World Economic Forum in Davos, in 1999. Recognising that the goals of business enterprises and of the UN can be mutually supportive, as previous cooperation had demonstrated, Annan challenged business enterprises to join him 'in taking our relationship to a still higher level.' The proposition was that 'you, the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles, which will give a human face to the global market.'<sup>344</sup> The context and problem that Annan sketched in his speech and to which the UNGC is a response, were similar to what the UNGPs described as the main challenges in business and human rights, i.e. the governance gaps that the rise of the global economy has posed to society.<sup>345</sup> An international framework 'for doing business under the conditions of globalisation' could address this problem. The UNGC provides a principled framework serving twin purposes, namely to '(a) enable business and nonbusiness actors to create, discuss, modify and extend a set of shared values within the global marketplace and (b) allow corporations to implement these values into their operations by sharing ideas and best practices'.<sup>346</sup>

The UNGC is therefore a pragmatic response to governance failures in that it seeks to find a balance between that what is ideally expected and politically achievable.<sup>347</sup> The UNGC is of a fundamentally different nature than the other instruments examined in this report. Whereas the other instruments seek to set standards for CSR and Business and Human Rights, the UNGC is a learning platform which seeks to gather corporations of all types and sizes around ten principles, so as to share best practices and learn from each other on how to turn them into reality.<sup>348</sup> The ten principles encompass the whole field of CSR and concern human rights, labour standards, the environment, and anti-corruption. The principles are informed by the following foundational documents: The Universal Declaration of Human Rights; The International Labour Organization's Declaration on Fundamental Principles and Rights at Work; The Rio Declaration on Environment and Development; The United Nations Convention Against Corruption. The principles read as follows:

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<sup>344</sup> United Nations, 'Secretary-General proposes global compact on human rights, labour, environment, in address to world economic forum in Davos' (1999) <<http://www.un.org/apps/news/story.asp?NewsID=49884#.Vavaa1T8LIU>> accessed 19 July 2015.

<sup>345</sup> Andreas Rasche, 'A Necessary Supplement': What the United Nations Global Compact Is and Is not' (2009) 48 *Business and Society*, 515.

<sup>346</sup> *Id.*, 518.

<sup>347</sup> *Ibid.*, 515.

<sup>348</sup> John G Ruggie, 'Global\_governance.net: The Global Compact as Learning Network' (2001) (n 377), 372.



- Human Rights
  - o Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
  - o Principle 2: make sure that they are not complicit in human rights abuses.
- Labour
  - o Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
  - o Principle 4: the elimination of all forms of forced and compulsory labour;
  - o Principle 5: the effective abolition of child labour; and
  - o Principle 6: the elimination of discrimination in respect of employment and occupation.
- Environment
  - o Principle 7: Businesses should support a precautionary approach to environmental challenges;
  - o Principle 8: undertake initiatives to promote greater environmental responsibility; and
  - o Principle 9: encourage the development and diffusion of environmentally friendly technologies.
- Anti-Corruption
  - o Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.<sup>349</sup>

One can note from the outset that there are two components to Principle 1 of the UNGC: the corporate responsibility to support and respect human rights. The first component, the responsibility to respect, aligns with the UNGPs. To respect human rights entails that business enterprises should not infringe on human rights, i.e. 'do no harm'. The UNGPs are said to elaborate on this component. The UNGC recognises that in addition to respecting human rights, business enterprises must *support* the promotion of human rights by making positive contributions to their realisation in ways that are relevant for their business. Business enterprises can affect human rights positively through for instance 'core business activities, social investment and philanthropy, public policy engagement and advocacy, and partnerships and collective action', which can be undertaken alone or in partnership with others. Although the UNGC predates the UNGPs, it is accepted that the latter may serve as authoritative framework that business enterprises can refer to when seeking further conceptual and operational clarity on both human rights principles of the UNGC. The relationship between the UNGPs and the UNGC is mutually reinforcing.<sup>350</sup>

The UNGC is a network-model organisation that promotes constructive engagement between business and market leaders in the first place, but also other actors, including academic institutions, business and industry associations, cities/municipalities, civil society organisations/non-governmental organisations,

<sup>349</sup> See generally <[http://nbis.org/nbisresources/sustainable\\_development\\_equity/un\\_global\\_compact.pdf](http://nbis.org/nbisresources/sustainable_development_equity/un_global_compact.pdf)>.

<sup>350</sup> UN Global Compact, OHCHR, 'The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments July 2011 (Updated June 2014)' (2014) <[https://www.globalcompact.de/sites/default/files/jahr/publikation/gps\\_gc\\_note.pdf](https://www.globalcompact.de/sites/default/files/jahr/publikation/gps_gc_note.pdf)> accessed 28 May 2015. See also Report of the Secretary-General on the contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights, A/HRC/21/21, (2012) and Corrigendum, A/HRC/21/21/Corr.1 available at: <<http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>> accessed 28 March 2015. Para 14.

labour unions, and public sector organisations. Businesses and stakeholders may join the UNGC simply by submitting a Letter of Commitment from their highest executive officer, and by filling an online application form.<sup>351</sup>

Upon joining, business enterprises commit to voluntarily embrace, support and enact within their sphere of influence the set of ten core principles. These principles may be uncontested, however they are formulated in abstract language. This open-endedness allows business enterprises to respond flexibly<sup>352</sup> to its varying circumstances. Rather than prescribing expected conduct, business enterprises are invited to add context-specific content to the principles.<sup>353</sup> The Principles are said to serve as a yardstick<sup>354</sup> for learning and discussion through which best practices can be shared and innovative solutions can be found. Business enterprises that seek to translate the principles into practice can benefit from these discussions and learn how to implement the principles.<sup>355</sup> The UNGC allows for flexibility with regards to approach.<sup>356</sup> It can also contribute to building a consensus on the meaning of the principles within a specific context, and henceforth help constitute social norms of expected conduct.

The UNGC thus relies on the virtuous cycle of social learning and accumulating business experiences in order to arrive at a common understanding of these Principles and desired best practices. It seeks to affect change in corporate behavior through long-term learning and the internalisation of the principles in business enterprises, through confrontation with best practices.<sup>357</sup> It is a supplement to, but not a substitute for, national or international regulation.<sup>358</sup>

In sum, the UNGC is an entirely voluntary instrument which bets and relies solely on peer learning (and pressure), based upon the assumption that 'through leading by the power of good example, member companies will set a high moral tone operating throughout the world. The overall thrust of the Global Compact is to accent the moral purpose of business [...].'<sup>359</sup> Needless to say, this approach has been fiercely criticised by those who do not believe that business will be able to enlighten itself and improve in the absence of strong accountability mechanisms. The UNGC has been accused of assisting signatory business enterprises with half-hearted CSR performances in 'blue-washing' their public image by associating themselves with the blue flag of the UN.<sup>360</sup>

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<sup>351</sup>

See

<[https://www.unglobalcompact.org/docs/how\\_to\\_participate\\_doc/Online\\_Application\\_Guideline\\_Business.pdf](https://www.unglobalcompact.org/docs/how_to_participate_doc/Online_Application_Guideline_Business.pdf)>.

<sup>352</sup> Andreas Rasche, "A Necessary Supplement": What the United Nations Global Compact Is and Is not` (2009) 48 *Business and Society*, 524.

<sup>353</sup> *Id.*, 523.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.*, 523

<sup>356</sup> *Ibid.*, 523.

<sup>357</sup> John G Ruggie, 'Global\_governance.net: The Global Compact as Learning Network' (2001) 7 *Global Governance* 371.

<sup>358</sup> Andreas Rasche, "A Necessary Supplement": What the United Nations Global Compact Is and Is not` (2009) 48 *Business and Society*, 515, 522.

<sup>359</sup> Oliver F Williams, 'The UN Global Compact: The Challenge and the Promise' (2004) 14 *Business Ethics Quarterly* 755, 756–759.

<sup>360</sup> Peter Utting, 'Regulating business via multi-stakeholder initiatives: A preliminary Assessment', in UN Non-

The UNGC is indeed a popular tool, and its participant base has grown to 8,519 business participants and 4,995 non-business participants in 2016.<sup>361</sup>

The UNGC has established a number of mechanisms to pursue its stated purpose and foster exchange of best practices amongst businesses and other stakeholders. The UNGC engages actors through three types of mechanisms that function at the local/regional and global level. These mechanisms are *dialogue events* organised to identify new and emergent issues related to the 10 UNGC Principles,<sup>362</sup> *partnerships* that facilitate active collaboration between business, civil society, and governments, often in support of the issues discussed at these dialogues, and *learning events* that allow participants to learn from existing solutions and good practices.<sup>363</sup> Local networks ensure engagement at the local level, and assume an important role in translating abstract principles local contexts and in finding innovative context specific solutions.<sup>364</sup> These networks are complemented by Global Action Networks that aim to engage various stakeholders on responsible business practices.<sup>365</sup> Examples are such networks are the Principles for Responsible Management Education (PRME) and the Principles for Responsible Investment (PRI).<sup>366</sup>

## 2. Fostering exchange and learning

It is not the purpose of this report to examine the UNGC in each and every detail. Suffice it here to say that, as a learning platform aiming to stimulate the exchange of best practices, the UNGC has put in place myriad mechanisms and initiatives to assist corporations in doing so.<sup>367</sup>

First of all, the governance structure of the UNGC is highly participatory, and is made up of a number of bodies that aim at constantly improving the UNGC's functioning, such as the triennial Global Compact

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Governmental Liaison Service, *Voluntary Approaches to Corporate Responsibility: Readings and a Resource Guide*, 2002

<[http://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/35F2BD0379CB6647C1256CE6002B70AA/\\$file/uttngls.pdf](http://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/35F2BD0379CB6647C1256CE6002B70AA/$file/uttngls.pdf)>, 16; Evaristus Oshionebo 'The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth From Realities' (2007) 19 Florida Journal of International Law 1; Daniel Berliner & Aseem Prakash 'From norms to programs: The United Nations Global Compact and global governance', (n 387) 149.

<sup>361</sup> The UN Global Compact posts figures on new signatories, COPs, delisting and total participants in its monthly bulletin. See the monthly bulletin of March 2016 at: <<http://bulletin.unglobalcompact.org/t/ViewEmail/r/CE61F263F7AB2FD32540EF23F30FEDED/415880C100A6DF2B6CBD507C784BD83B>> accessed 25 March 2016.

<sup>362</sup> Andreas Rasche, 'A Necessary Supplement': What the United Nations Global Compact Is and Is not' (2009) 48 Business and Society, 518-19.

<sup>363</sup> *Id.*, 518-19.

<sup>364</sup> *Ibid.*

<sup>365</sup> Georg Kell, '12 Years Later: Reflections on the Growth of the UN Global Compact' (2013) 52 Business and Society 1, 2.

<sup>366</sup> *Ibid.*

<sup>367</sup> For more information, see the 2013 UNGC activity report, which elaborates on the governance bodies and the initiatives mentioned. For information on all relevant initiatives and activities, see <<http://business-humanrights.org/en/documents/un-global-compact-human-rights-tools-guidance-local-network-activities>>.

Moreover, a conference was recently organised by UNGC+15. The agenda items reflect the UNGC initiatives that are most relevant in Europe. See <<http://www.gc15europe.org/timeline/#toggle-id-4>>.

Leaders' Summit. UNGC Local Networks are clusters of national actors aiming to advance the ten principles in their particular domestic context.<sup>368</sup>

Second, specialised bodies define particular guidance documents in relation to particular issues associated with Business and Human Rights. The UNGC Advisory Group on Supply Chain Sustainability for instance 'provides input to the overall strategy and work done by the UNGC on the issue of supply chain sustainability.'<sup>369</sup> More fundamentally for our purposes, the Human Rights and Labour Working Group (HRLWG) provides guidance on respect and support for the UNGC's human rights and labour principles by identifying, developing and disseminating good practices.<sup>370</sup> The Human Rights Working Group merged with the Labour Working Group in June 2011, and was renamed to its current name. The group has a multi-stakeholder composition of expert representatives from business participants, which make up 2/3 of the members, GC local networks, investors, civil society organisations, academics and business networks. Operating under the auspices of the UNGC Board, it performs various functions to advance the human rights and labour principles of the UNGC, in support of the overall mandate of the UNGC. Amongst other objectives, it seeks to advance respect and support for these principles within the framework of the UNGC, and provides advice on practical ways to overcome obstacles to business respecting them. It aims to provide advice to the Global Compact Office on its work streams, support the efforts of local networks, enhance synergies and cooperation with other initiatives, make recommendations to Global Compact participants and businesses generally on relevant topics, and to act as a platform for collective action in related to these principles.<sup>371</sup>

Third, collaborative projects have been established between the UNGC and some of its partners to stimulate progress. For example, Global Compact 100 (UNGC and Sustainalytics) is an index of representative UNGC companies, which has consistently shown a higher rate of return than regular stock market indexes.<sup>372</sup> The Human Rights and Business Dilemma's Forum (UNGC & Verisk Maplecroft) is 'designed to stimulate discussion about the dilemmas responsible multi-national companies may face in their efforts to respect and support human rights when operating in emerging economies.'<sup>373</sup> UNGC CEO Water Mandate 'mobilizes business leaders to advance water stewardship, sanitation, and the Sustainable

<sup>368</sup> On these two bodies, see UN Global Compact, 'Our Governance' (undated) <<https://www.unglobalcompact.org/about/governance>> accessed 30 March 2016.

<sup>369</sup> UN Global Compact, 'Advisory Group on Supply Chain Sustainability' (undated) <<https://www.unglobalcompact.org/what-is-gc/our-work/supply-chain/supply-chain-advisory-group>> accessed 30 March 2016.

<sup>370</sup> See <https://www.unglobalcompact.org/what-is-gc/our-work/social/human-rights/working-group>

<sup>371</sup> See UN Global Compact, 'UN Global Compact Human Rights and Labour Working Group (HRLWG) Terms of Reference', November 2013, [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Human\\_Rights\\_Working\\_Group/TOR\\_HRWG.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/TOR_HRWG.pdf).

<sup>372</sup> UN Global Compact, 'Global Compact 100', (undated), <<https://www.unglobalcompact.org/take-action/action/global-compact-100>> accessed 30 March 2016.

<sup>373</sup> <http://hrbdf.org/> For example, the Forum addresses the dilemma of Gender Equality in the following way: 'What should a company do when its internal policies prohibit gender discrimination and promote gender equality, yet local cultural, legal or business norms permit and promote discrimination against women within some of the countries where it operates?'

Development Goals – in partnership with the United Nations, governments, peers, civil society, and others.<sup>374</sup>

Fourthly, the UNGC also collaborates and implements joint projects with other UN agencies, such as the Women’s empowerment principles (UN Women & UNGC),<sup>375</sup> the Children’s rights and business principles (UNICEF, UNGC & Save the Children),<sup>376</sup> or the Business Reference Guide to the UN Declaration on the Rights of Indigenous peoples (UNGC and multiple partners).<sup>377</sup>

Finally, more practical tools to the attention of businesses for the purpose of assessing their own practices were also developed, such as case studies of good practices like the ‘Embedding human rights in business practice series’ or the Global Compact Self-Assessment Tool.<sup>378</sup>

#### *a) UNGC Communication on Progress Framework*

The above initiatives are however only peripheral to the core mechanism allowing for exchange, learning, and, to some degree, accountability regarding the UNGC ten principles: the Communications on Progress (CoPs). CoPs are public communications by business enterprises to stakeholders (e.g. investors, consumers, civil society, governments etc.) on the progress achieved in implementing the 10 principles of the Global Compact.<sup>379</sup> CoPs are one of the few formal requirements that business enterprises must meet to become and remain a member of the UNGC. All business participants make a commitment to communicate annually through a CoP upon joining the UNGC. Business participants are required to submit a CoP within one year of joining, and after having submitted their first CoP, annually. Business enterprises that fail to meet the deadline for submission and do not qualify for a grace period extension, are designated as non-communicating, and will be expelled if they remain non-communicating for more than one year.<sup>380</sup> CoPs must be made publicly available on the website of the UNGC and be shared with stakeholders.

The policy allows some flexibility to business enterprises regarding the format in which to communicate on their implementation of the Principles. The CoP can either be integrated into the company’s main

<sup>374</sup> UN Global Compact, ‘The CEO Water Mandate’ (undated), <<http://ceowatermandate.org/what-we-do/mission-governance/>> accessed 30 March 2016.

<sup>375</sup> UN Global Compact, ‘Women’s Empowerment Principles’ (undated), <<http://weprinciples.org/>> accessed 30 March 2016.

<sup>376</sup> UNICEF, ‘CSR: introduction to the principles’ (undated), <<http://www.unicef.org/csr/12.htm>> accessed 30 March 2016.

<sup>377</sup> UN Global Compact, ‘A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples’ (2013), <[https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/IndigenousPeoples/BusinessGuide.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf)> accessed 30 March 2016.

<sup>378</sup> Un Global Compact, ‘Global Compact Self-assessment Tool’ (undated), <<http://www.globalcompactselfassessment.org/>> accessed 30 March 2016.

<sup>379</sup> *Basic Guide Communication on Progress*, UN Global Compact, 2012, available at: <[https://www.unglobalcompact.org/docs/communication\\_on\\_progress/Tools\\_and\\_Publications/COP\\_Basic\\_Guide.pdf](https://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_Basic_Guide.pdf)> accessed 21 July 2015.

<sup>380</sup> Ibid. p.5.

stakeholder communications, or be created as a stand-alone document.<sup>381</sup> Participants are encouraged to report in accordance with the GRI Sustainable Reporting Guidelines (see above, section 3 b)(1).<sup>382</sup> Each CoPs must contain at least the following three specific elements<sup>383</sup>:

1. A statement by the chief executive expressing continued support for the Global Compact and renewing the company's ongoing commitment to the initiative and its principles.
2. A description of practical actions (e.g. disclosure of any relevant policies, procedures, activities) that the company has taken (and plans to take) to implement the Global Compact principles in each of the four issue areas (human rights, labour, environment, anti-corruption).<sup>384</sup>
3. A measurement of outcomes (i.e., the degree to which targets/performance indicators were met, or other, qualitative or quantitative, measurements of results).

There are several objectives to the CoP that should give it significance as a mechanism to track business progress towards achieving the ten UNGC principles. The preparation of a CoP, first, enables business enterprises to improve their business practices, not only with regards to disclosure, but also the implementation of the UNGC Principles. Business enterprises must communicate systematically and periodically. This encourages business enterprises to regularly assess and increase the effectiveness of their sustainability strategy, which may lead to a more effective integration of human rights into business strategies, operations and corporate culture.<sup>385</sup> Second, CoPs are aimed at improving the transparency and accountability of business practices to stakeholders. Business enterprises should be transparent and disclose publicly to stakeholders on the process and outcomes of integration. In this regard, CoPs are said to serve as a 'platform for transparency and integrity'.<sup>386</sup> The cost associated with the exposure to pressure for poor performance or egregious action can spur companies to action.<sup>387</sup> Third, CoPs contribute to the wide diffusion of data on corporate human rights performance.<sup>388</sup> Fourth, CoPs can facilitate learning. By promoting the sharing and adoption of best practices on both implementation and reporting, CoP are said to act 'as a platform for learning and progress'.<sup>389</sup>

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<sup>381</sup> Ibid. p.5.

<sup>382</sup> The UN Global Compact and the GRI are complementary initiatives. Their collaboration has been institutionalised through a Memorandum of Understanding (renewed in May 2013).

<sup>383</sup> *Basic Guide Communication on Progress*, UN Global Compact, 2012, available at: <[https://www.unglobalcompact.org/docs/communication\\_on\\_progress/Tools\\_and\\_Publications/COP\\_Basic\\_Guide.pdf](https://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_Basic_Guide.pdf)> accessed 21 July 2015. p.5.

<sup>384</sup> In cases where a COP does not address one or more of the four issue areas, an explanation must be provided ("report or explain").

<sup>385</sup> UN Global Compact (2012), 'Comprehensive Guide: Communication on Progress and Differentiation' <[https://www.unglobalcompact.org/docs/communication\\_on\\_progress/Tools\\_and\\_Publications/COP\\_Comprehensive\\_Guide.pdf](https://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_Comprehensive_Guide.pdf)> accessed 4 June 2015. p. 7

<sup>386</sup> Ibid. p. 7

<sup>387</sup> Daniel Berliner and Aseem Prakash, 'From norms to programs: The United Nations Global Compact and global governance' (2012) *Regulation & Governance* 6, 153.

<sup>388</sup> UN Global Compact (2012), 'Comprehensive Guide: Communication on Progress and Differentiation' (n 385). p. 7

<sup>389</sup> Ibid p. 7

While potentially a relevant tracking mechanism for responsible business practice, limitations to the CoPs have been brought to public attention by NGOs, academia and the media and should temper expectations.<sup>390</sup> Non-reporting is a key problem. Business enterprises' failure to report has been explained in relation to the laxity of the CoP policy which previously, allowed business enterprises to not communicate for four full years before being sanctioned with exclusion.<sup>391</sup> The policy was updated in 2009, in part to challenge and eliminate free-riders.<sup>392</sup> More stringent deadlines apply today, as described above. Business enterprises can be expelled from the UNGC if they remain non-communicating for more than a year. This CoP policy has resulted in a total of 5,107 participants being expelled for a failure to communicate on progress, as of May 2015.<sup>393</sup>

Another point of critique is the poor substantive quality of the CoP reports.<sup>394</sup> Studies point to a prevailing trend towards reporting that is fairly comprehensive, but lacking in substantive quality.<sup>395</sup> The quality of reporting on human rights was said to have lagged behind in comparison to reporting on the other UNGC.<sup>396</sup> There is tendency among business enterprises not to provide detailed information on their progress on human rights. Reasons are 'the perceived complexity and breadth of the topic as well as the lack of practical reporting guidance, which leads to a significant variance in format and content'.<sup>397</sup>

The findings of the 2013 Global Compact Annual Implementation Survey indicate that reporting on human rights remains insufficient. Only 29% out of the total of 8,000 company members of the UNGC indicate that they publicly disclose on human rights policy and practices.<sup>398</sup> This is despite the fact that the UNGC has issued practical reporting guidance to business enterprises on how to improve their reporting on their implementation of the human rights principles in the context of the CoP (see below).<sup>399</sup> These figures corroborate the suggestion that there would be 'a gap between intention (i.e. signing up to the Global

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<sup>390</sup> Ruggie 371.

<sup>391</sup> Daniel Berliner and Aseem Prakash, 'From norms to programs: The United Nations Global Compact and global governance' (n 387), 152.

<sup>392</sup> Georg Kell, '12 Years Later: Reflections on the Growth of the UN Global Compact' (2013) 52 *Business and Society* 1, 31-52.

<sup>393</sup> The UN Global Compact posts figures on new signatories, COPs, delisting and total participants in its monthly bulletin. See the monthly bulletin of March 2015 at: <<http://bulletin.unglobalcompact.org/t/ViewEmail/r/FE7FBDBA9248E7662540EF23F30FEDED/07F7AEA9C3A51E76FCACEB58A033025D>> accessed 27 March 2015.

<sup>394</sup> Daniel Berliner and Aseem Prakash, 'From norms to programs: The United Nations Global Compact and global governance' (n 387), 152.

<sup>395</sup> UN Global Compact, 'Human Rights Communication on Progress Guidance', <[https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/HR\\_COP\\_Reporting\\_Guidance.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/HR_COP_Reporting_Guidance.pdf)> accessed 28 May 2015.

<sup>396</sup> Ibid.

<sup>397</sup> Ibid.

<sup>398</sup> The rate of disclosure tends to be higher for large companies (40%) than for SMEs with less than 250 employees (18%). UN Global Compact, 'Global Corporate Sustainability Report' (2013), <[https://www.unglobalcompact.org/AboutTheGC/global\\_corporate\\_sustainability\\_report.html](https://www.unglobalcompact.org/AboutTheGC/global_corporate_sustainability_report.html)> accessed 30 May 2015. p.8, 16

<sup>399</sup> UN Global Compact, 'Human Rights Communication on Progress Guidance', (n 395).

Compact) and practice (i.e. publishing a human rights policy statement as called for in the UNGPs)<sup>.400</sup>

The UNGC furthermore does not monitor itself. It befalls on civil society to evaluate business performance and to issue a complaint to the UNGC, which can serve as a basis for further investigations. While there is a complaint system that allows members of the public to bring ‘systematic and egregious abuses’ by business participants to the attention of the UNGC, this system is said to be ‘unresponsive and lacking transparency’.<sup>401</sup>

The UNGC introduced the Differentiation Programme in 2011 to reinforce the CoP process by differentiating between business participants on the basis of their level of advancement in CoP.<sup>402</sup> The programme distinguishes between three categories, each reflecting different levels of advancement by business enterprises. COPs that meet the minimum requirements by communicating annually at the highest executive level, on all four principles, and to stakeholders through the COP platform, are ‘GC Active’. CoPs that fall below the minimum threshold are ‘GC Learner’.<sup>403</sup> CoPs that exceed the minimum requirements by adopting and reporting in more detail on their implementation of advanced criteria and best practices are ‘GC Advanced’. As per 1 January 2014, external assurance is a requirement for GC Advanced COPs.<sup>404</sup> Business participants risk being expelled from the UNGC if they fail to submit a comprehensive CoP before the deadline, or the end of the ‘learner’ grace period of 12 months, which the Global Compact grants once to first-time reporters.<sup>405</sup>

The UNGC has issued a basic and comprehensive guide to help companies report progressively through a CoP.

### 3. Actual uptake of the UNGC

At the end of 2015, the UNGC counted 13,239 members roughly representing businesses for 2/3 and other stakeholders for 1/3. Among those, 5,037 participants – businesses and other stakeholders taken together - were from the EU, showing that the UNGC is comparatively popular in the EU.<sup>406</sup>

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<sup>400</sup> IHRB, ‘State of Play Human Rights in the Political Economy of States: Avenues for Application’ (March 2014) <[http://www.ihrb.org/pdf/2014-03-18\\_State-of-Play\\_HR-Political-Economy-States.pdf](http://www.ihrb.org/pdf/2014-03-18_State-of-Play_HR-Political-Economy-States.pdf)> accessed 23 April 2015.

<sup>401</sup> Daniel Berliner and Aseem Prakash, ‘From norms to programs: The United Nations Global Compact and global governance’ (n 387), 152.

<sup>402</sup> UN Global Compact (2012), ‘Comprehensive Guide: Communication on Progress and Differentiation’(n 385).

<sup>403</sup> Ibid. p.9

<sup>404</sup> *Making the Connection: Using the GRI G3.1 Guidelines to Communicate Progress on The UN Global Compact Principles*, UN Global Compact, available at: <https://www.unglobalcompact.org/library/306>, accessed 21 July 2015. P.8.

<sup>405</sup> UN Global Compact (2012), ‘Comprehensive Guide: Communication on Progress and Differentiation’, (n 385), p.9

<sup>406</sup> See UN Global Compact, ‘Our Participants’ (undated) <<https://www.unglobalcompact.org/what-is-gc/participants>> accessed 30 May 2016.



The UNGC undertakes an annual survey to gather data on the progress of implementing the 10 UNGC Principles by business enterprises. This mechanism was first conducted in 2007 with the specific aim 'to help the Global Compact better understand, and benchmark, how corporate participants are taking steps to advance their commitment to the Global Compact and implement the Ten Principles'.<sup>407</sup>

Despite its supposedly annual character, the last available survey took place in November/December 2012. 1,712 companies from 113 countries responded to the online survey. While the response rate was only 25% percent, the survey respondents were considered as generally representative of the Global Compact participant base.<sup>408</sup> The survey solicited information on business actions on the Ten Principles, including human rights and labour, the management practices to embed sustainability throughout the organisation, and supply chain sustainability. The survey also interrogated business enterprises on their 'efforts to contribute to global priorities through core business practices, philanthropy, advocacy and partnerships'<sup>409</sup>. The UNGC published the findings of the survey in the 2013 Global Corporate Sustainability Report.<sup>410</sup>

One of the principal findings of the study was a gap between policy commitment and action with respect to the state of corporate sustainability more generally. While business enterprises are making commitments, defining goals and setting priorities on corporate sustainability, and thus take the first steps of the Management Model, they stop short on the following steps, which concern implementing, measuring and communicating sustainability.<sup>411</sup> This gap also exists in the area of human rights. While out of a total of 1,712 survey respondents, 72% said to integrate human rights within an overall corporate code, only a small portion undertakes human rights risk-assessment and impact assessment, 21% and 13% respectively. A mere 29% of business enterprises indicated to monitor and evaluate human rights performance.<sup>412</sup> Business enterprises said to communicate on human rights policies and processes at the same rate of 29%.

The study also found that the majority of business enterprises takes action to define expectations for their suppliers, with regards to human rights (53%) and labour (49%), but the rate of actual implementation is much lower, 28% respectively in both areas.<sup>413</sup> The survey furthermore did not find progress in the implementation and measuring activities since 2008, while these actions are essential in driving adherence to the Global Compact down the supply chain.<sup>414</sup>

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<sup>407</sup> UN Global Compact, 'Global Corporate Sustainability Report' (2013), <[https://www.unglobalcompact.org/AboutTheGC/global\\_corporate\\_sustainability\\_report.html](https://www.unglobalcompact.org/AboutTheGC/global_corporate_sustainability_report.html)> accessed 30 May 2015. p.6

<sup>408</sup> Ibid. p.6

<sup>409</sup> Ibid. p.6

<sup>410</sup> See above, UN Global Compact, 'Global Corporate Sustainability Report' (n 407).

<sup>411</sup> Ibid. p.12

<sup>412</sup> Ibid. p.8

<sup>413</sup> Ibid. p.19

<sup>414</sup> Ibid.

## B. EU Contribution to tracking and fostering responses to the UNGC

Intuitively, one can argue that there is less sense for an international organisation like the EU to deeply engage with the UNGC beyond generally expressing its support for it. The UNGC is a tool which is made for dialogue between businesses themselves and between businesses and their stakeholders, with a very weak state dimension.

The EU's 2011 CSR strategy in this regard lists the UNGC as one of the 'internationally recognised CSR principles and guidelines' which it invites EU businesses to commit to.<sup>415</sup> As indicated above, the UNGC is viewed by the EU as a tool to 'support for businesses in addressing the UNGP'<sup>416</sup> and more in particular its second pillar, the 'corporate responsibility to respect.' Yet, the EU furthermore adds that '[o]wing to the fact that the private sector is the leading actor behind the second pillar, the role of the European Union is limited in terms of implementation.'<sup>417</sup> As a result, the extent of the EU's commitment to foster the UNGC is limited to general references to it in the form of those made in the 2011 CSR Strategy or the 2015 Staff Working Document on the implementation of the UNGPs. The EU, for example, does not make a financial contribution to the UNGC, though some of its Member States do.<sup>418</sup> Let us take a brief look at the concrete actions which the EU has taken to materialise its support of the UNGC.

### a) Endorsements

Specific endorsements of the UNGC by the EU have been made in political contexts, as well as in legal contexts.

Political endorsements have for example included a position taken by the Council of the EU prior to the UNGA High-Level Plenary Meeting in New York in September 2010, to the effect of 'increasing the [EU's and its Member States'] efforts to mobilise the private sector and engage with business to help accelerate progress towards the MDGs including by promoting the UNGC [...]'.<sup>419</sup> Likewise, the EU has also participated in UNGC events, such as the Global Compact Leaders Summit of 2010, where the Commissioner for Industry and Entrepreneurship made the following statement on behalf of the EU:

I wish to underline our commitment to international dialogue on corporate social responsibility, bilaterally with other countries and regions, and also in multilateral fora such as the UN Global

<sup>415</sup> COM (2011) 681 final (n 1), p. 13. This was welcomed by the UNGC itself: UN Global Compact 'Global Compact Welcomes New European Commission Strategy for Corporate Social Responsibility' 28 October 2011, <<https://www.unglobalcompact.org/news/157-10-28-2011>> accessed 30 March 2016.

<sup>416</sup> European Commission, 'Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD (2015) 144 final (n 158), p. 22.

<sup>417</sup> *Id.*

<sup>418</sup> UN Global Compact, 'Our Finances' (undated) <<https://www.unglobalcompact.org/about/finances>> accessed 14 October 2015. <<https://www.unglobalcompact.org/about/finances>> accessed 30 March 2016

<sup>419</sup> [Doc. No. 11080/10](#), para. 26.

Compact. The European Union has much to learn from other regions and countries, and we also have interesting experiences of our own to share.<sup>420</sup>

Endorsements have also been made as the UNGC was referenced as a best practice in EU policy documents, such as European Parliament resolutions,<sup>421</sup> Commission Communications,<sup>422</sup> International summit documents.<sup>423</sup> Finally, some EU legislations are benchmarked against the UNGC. For instance, the EU Directive on non-financial disclosure imposes on EU Member States the obligation to permit business enterprises to rely on the UNGC in meeting their disclosure requirements under the Directive.<sup>424</sup> Also one of the conditions to obtain the European Ecolabel in relation to certain products is precisely compliance with the UNGC ten principles.<sup>425</sup>

All of this confirms that the EU considers the UNGC as a CSR tool of a certain standing, though it also considers that it can only rely on it marginally.

### *b) Activities aimed to track and encourage participation in the UNGC*

Over the years, the EU has sought to keep track of its corporations which had committed to the UNGC, and to encourage uptake and participation.

Studies have for example been conducted to identify which EU Member States rely on the UNGC in their own CSR policies. This was done for example in the Compendium on Member States CSR policies,<sup>426</sup> or in the 2014 and 2015 EU Accountability Reports on Financing for Development.<sup>427</sup>

Events have also been organised which have involved and discussed the UNGC. For example, in 2009 and 2010, the Commission hosted a series of 5 multistakeholder workshops on company disclosure of environmental, social and governance information, in which the UNGC was discussed, and where UNGC officials were present.<sup>428</sup> Likewise, the first European Multistakeholder Forum on CSR (2004) recognised the UNGC as an important reference in CSR.<sup>429</sup>

<sup>420</sup> Excerpts from Speech of EU Commission Vice-President Tajani to the Leaders' Summit of the United Nations Global Compact, New York, 23 June 2010, SPEECH/10/331.

<sup>421</sup> European Parliament resolution on the relations between the European Union and the United Nations [\[2004\] OJ C 96E/79](#), para. 30 (only Global Compact).; See also [\[2012\] OJ CE 99/101](#), para. 30.

<sup>422</sup> Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility COM(2006) 136 final, p. 8; Green Paper – EU development policy in support of inclusive growth and sustainable development COM(2010) 629 final, para. 3.1.

<sup>423</sup> ACP-EU Joint Parliamentary Assembly Resolution on HIV/AIDS [\[2002\] OJ C 78/66](#), para. 7.

<sup>424</sup> Directive [2014/95/EU](#) as regards disclosure of non-financial and diversity information by certain large undertakings and groups, recital 9.

<sup>425</sup> See decisions [\[2014\] OJ L 320/46](#) Criterion 11 and [\[2014\] OJ L 174/45](#) Criterion 26.

<sup>426</sup> Above, n \_\_.

<sup>427</sup> [SWD\(2014\) 235 final](#), p. 63. [SWD\(2015\) 128 final](#), p. 121.

<sup>428</sup> [http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item\\_id=3723](http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=3723)

<sup>429</sup> (Final Report, 29 June 2004), p. 6.

### c) Channeling the UNGC in external relations

As indicated above, the EU seeks to promote CSR through its external relations.<sup>430</sup> This also includes promoting the uptake of the UNGC in third countries, though this seems to be done in a much less comprehensive and systematic manner than for the UNGPs or the OECD Guidelines. In this regard, Action 25 (d) of the Action Plan on Human Rights and Democracy states that the EU shall '[a]im at systematically including in EU trade and investment agreements the respect of internationally recognised principles and guidelines on Corporate Social Responsibility, such as those contained in [...] the UNGC.<sup>431</sup>

This is already the case in a number of recent agreements partaking of the European Neighbourhood Policy (ENP), such as the 2014 Association Agreements with Moldova and Ukraine, which contain trade chapters but have yet to fully entered into force.<sup>432</sup>

Again in the framework of its ENP, the EU is also including references to the UNGC in the 'Action Plans' it negotiates with neighbouring countries. For instance, the proposed EU-Morocco Action Plan 2013-2017,<sup>433</sup> notably foresees, under its 'strengthen fundamental social rights and core labour standards' item, to 'promote corporate social responsibility and the development of business practices complying with the United Nations Global Compact.'<sup>434</sup>

In the field of trade and development, the EU-ACP Joint Parliamentary Assembly established by the Cotonou Agreement has, as indicated above, picked up on CSR despite the lack of any reference to that effect in the Agreement itself. Remarkably, the UNGC is the only instrument which is not only mentioned, but also described in more detail.<sup>435</sup>

The UNGC is also generally included in EU dialogues and diplomatic exchanges with third countries when those include agenda items on Business and Human Rights. When that is the case, the EU typically seeks to promote 'internationally recognised CSR guidelines and principles' as a cluster in which the UNGC has a place, alongside the other instruments addressed in this report.<sup>436</sup> We were not able to find an instance in which the UNGC was the sole topic of discussion.

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<sup>430</sup> COM (2011) 681 final (n 1), 14.

<sup>431</sup> Ref to AP. (cross ref to above).

<sup>432</sup> Respectively [\[2014\] OJ L 260/4](#) art. 35 and [\[2014\] OJ L 161/3](#) art. 422. The trade pillar is now applied temporarily pending ratification of the full agreement by the EU Member States.

<sup>433</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=JOIN:2013:0006:FIN:EN:PDF>; Adoption was apparently done in December 2013: [http://europa.eu/rapid/press-release\\_MEMO-13-1163\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1163_en.htm).

<sup>434</sup> *Id.*, p. 34.

<sup>435</sup> See above, (n.306) recital J.

<sup>436</sup> See for example most recent EUSR Lambrindis' visit to Brazil: [http://eeas.europa.eu/delegations/brazil/press\\_corner/all\\_news/news/2015/20150917\\_01\\_en.htm](http://eeas.europa.eu/delegations/brazil/press_corner/all_news/news/2015/20150917_01_en.htm)

## C. Conclusion

The UNGC is a very particular actor in the world of CSR and business and human rights. Its normative added value is voluntarily limited, and it explicitly seeks to foster exchanges, peer review and learning amongst business and their stakeholders. There is no place made in it for states or international organisations, contrary to what is the case in, e.g., the UNGPs or the OECD Guidelines.

Moreover, the UNGC is a tool which is primarily aimed at helping businesses make progress on the front of the 'Corporate Responsibility to Respect' human rights (Pillar II of the UNGPs), about which the EU has declared – rightly or wrongly – that it had little to no competence.

Therefore, whereas the EU endorsement of the UNGC is unequivocal and finds its place in the EU's most high profile human rights policy documents, such as the Action Plan on Human Rights and Democracy, or the EU CSR Strategy, from the point of view of the concrete actions taken by the EU to foster uptake and track responses to the instruments, there is little to be found beyond the language. Quite tellingly, EU support for the UNGC seems to go so little beyond lip service that the sentence '[t]he EU also supported additional initiatives at the multilateral level, eg the UNGC (ie the business platform –launched by then UN Secretary-General Kofi Annan –bringing together companies that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, the environment and anti-corruption).' was literally copy-pasted from the 2010 to the 2011 versions of the EU Annual Report on Democracy and Human Rights in the World.<sup>437</sup>

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<sup>437</sup> See Council of the European Union, 'EU Annual Report on Human Rights and Democracy in the World 2010', 47; comp. with Council of the European Union, 'EU Annual Report on Human Rights and Democracy in the World 2011', 80.

## IV. OECD Guidelines for Multinational Enterprises

### A. OECD Guidelines for Multinational Enterprises (MNEs) as CSR instrument

#### 1. Background to the instrument

The OECD has been existence for more than for fifty years,<sup>438</sup> during which time it has pursued a leading role as an inter-governmental organisation that is broadly concerned with policy-making in the field of international economic activity of both a public and private character. Within this broader institutional setting the OECD undertakes the regulation of investment of transnational corporations (TNCs) [otherwise known as MNEs] and other business enterprises and it is within this setting that the OECD Guidelines for MNEs were originally developed. Of note too is the fact that the European Commission takes part in the work of the OECD<sup>439</sup> not merely as an observer but is also able ‘to participate in any OECD meeting with the exception of committees dealing with the internal organisation of the OECD, and it has an automatic right to speak.’<sup>440</sup>

The OECD currently has 34 Member countries,<sup>441</sup> which includes 21 of the 28 EU Member States. Only Bulgaria, Croatia, Cyprus, Malta and Romania are not OECD Members. Latvia is fairly advanced with its accession negotiations for OECD Membership<sup>442</sup> while Lithuania has been invited to open formal OECD accession talks and an accession road map was established in 2015.<sup>443</sup> This has a bearing on the development and potential application of the OECD Guidelines for MNEs as a CSR instrument in some EU

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<sup>438</sup> Founded as the Convention on the Organisation for European Economic Co-operation (OEEC), done at Paris on 16 April 1948, in force (after a period of provisional application) 28 July 1948, 469 UNTS 12735, it was later superseded by the Convention on the Organisation of Economic Co-operation and Development (OECD), done at Paris 14 December 1960, in force 30 September 1961, 888 UNTS 179.

<sup>439</sup> In accordance with Supplementary Protocol No. 1 to the Convention on the Organisation of Economic Co-operation and Development, done at Paris, 14 December 1960, second recital.

<sup>440</sup> Jan Wouters and Maarten Vidal, ‘The OECD Model Tax Convention Commentaries and the European Court of Justice: Law, Guidance, Inspiration?’ Katholieke Universiteit Leuven, Faculty of Law, Institute for International Law, Working Paper No. 109 – Jul 2007, 6, para. 6 <<https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP109e.pdf>> 9 October 2015.

<sup>441</sup> As of 1 October 2015, Australia, **Austria, Belgium**, Canada, Chile, **Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary**, Iceland, **Ireland, Italy**, Israel, Japan, Korea, **Luxembourg**, Mexico, **Netherlands**, New Zealand, Norway, **Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden**, Switzerland, Turkey, **United Kingdom** and United States are OECD Member countries (EU Member States that are OECD Member countries are indicated in bold).

<sup>442</sup> The OECD Council took a decision in May, 2013 to launch accession talks with Latvia <<http://www.oecd.org/about/membersandpartners/>> accessed 24 September 2015.

<sup>443</sup> On 9 April 2015 the OECD Council agreed to open membership discussions with Lithuania (and Costa Rica) <<http://www.oecd.org/about/membersandpartners/costa-rica-and-lithuania-invited-to-open-formal-oecd-accession-talks.htm>> accessed 24 September 2015.

Member States. It should, however, be noted that a number of non-OECD countries work with the organisation as partner countries on various issues. For the OECD Guidelines for MNEs there are currently 10 non-OECD countries that adhere to this CSR instrument, including EU Member States Latvia, Lithuania and Romania.<sup>444</sup> This means that only EU Member States Bulgaria, Croatia, Cyprus and Malta are neither OECD Members nor partner countries and are therefore not bound by the OECD Guidelines for MNEs; thus, for those Member States there can be no tracking of their responses to this instrument.

The OECD manages its core relationship with OECD Members and partner countries through a set of formal and informal institutional bodies. First, in terms of formal institutional bodies, there is the OECD Investment Committee that provides a forum for discussing current issues among policy makers and administrators from OECD Member and non-OECD Member countries, as well as an exchange of views with business, labour, NGOs and other groups through consultation procedures, roundtables and conferences. It maintains oversight responsibility for the 1976 Declaration and four Decisions on International Investment and Multinational Enterprises, including the OECD Guidelines for MNEs, for which it conducts periodic reviews of country experiences with the Guidelines' provisions.

It also provides a forum for dispute resolution under the relevant OECD instruments, which is taken up in the aforementioned 'Declaration and Decisions'. This latter activity is conducted by the Committee's Working Party for Responsible Business Conduct, which in the case of the OECD Guidelines for MNEs means assisting OECD National Contact Points (NCPs) to carry out their activities and to make recommendations as to how they can improve their performance. Finally, the Committee prepares, when necessary, statements of 'clarifications' or interpretation of the instrument for which it is responsible, including the OECD Guidelines for MNEs.<sup>445</sup>

Secondly, there are two informal institutional bodies. One is the Business and Industry Advisory Committee (BIAC), which is an independent international business association whose primary purpose is to advise government policymakers at the OECD and related fora on a diverse range of issues related to globalisation and the world economy.<sup>446</sup> BIAC promotes the interests of OECD business and industry by engaging, understanding and advising policy makers on a broad range of issues, by ensuring that the needs of these two sectors are adequately addressed in OECD policy decision instruments that influence national legislation and assisting with implementation of Guidelines for MNEs in OECD Member countries.<sup>447</sup>

The other is the Trade Union Advisory Committee (TUAC) to the OECD, which acts as the interface for trade unions with the organisation and takes the lead for trade unions on the OECD Guidelines for MNEs.

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<sup>444</sup> The non-OECD Member countries that adhere to the OECD Guidelines for MNEs are: Argentina, Brazil, Colombia, Jordan, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia.

<sup>445</sup> A brief overview of the role and function of the OECD Investment Committee is available at <<http://www.oecd.org/daf/inv/oecdinvestmentcommittee.htm>> accessed 24 September 2015.

<sup>446</sup> The Business and Industry Advisory Committee to the OECD or BIAC can be found here <<http://biac.org/>> accessed 24 September 2015.

<sup>447</sup> For the range of policy areas with which the BIAC's engages the OECD see <<http://biac.org/policy-groups/>> accessed 24 September 2015.

<sup>448</sup> It coordinates trade union input into policy-making on the OECD Guidelines for MNEs, compiles information on trade union cases, some involving complaints before one or more OECD NCPs, undertakes policy research on key issues, provides information and promotional tools, and conducts training on the OECD Guidelines for MNEs. A large majority of TUAC affiliates<sup>448</sup> are associated with the International Trade Union Confederation (ITUC); most European affiliates, however, belong to the European Trade Union Confederation (ETUC). TUAC works closely with these international trade union organisations as well as with the ILO and Global Union Federations (GUF) to ensure effective trade union input into both OECD sectoral work and the development of normative instruments, such as the OECD Guidelines for MNEs.

Finally, the OECD maintains close relationship with parliamentarians, notably through its Global Parliamentary Network<sup>449</sup> and long-standing links with the Council of Europe.<sup>450</sup> The organisation also has close contacts with many other CSOs, including an NGO by the name of OECD Watch, which is actively monitoring the OECD's work and especially the OECD Guidelines for MNEs. OECD Watch is a global network with more than 100 members in 50 countries.<sup>451</sup> It is a recognised stakeholder in the OECD Investment Committee and acts as a channel for bringing the perspectives and interests of NGOs and disadvantaged communities into OECD policy discussions, including development and implementation of the OECD Guidelines for MNEs. The OECD Watch network maintains an online database of all Guidelines cases filed by NGOs and publishes a Quarterly Case Update, including developments in, and an analysis of, NCP cases.

#### *a) OECD's role in the development of the Guidelines for Multinational Enterprises (MNEs)*

The OECD Guidelines for MNEs<sup>452</sup> is one of the four annexes attached to the OECD Declaration on International Investment and Multinational Enterprises,<sup>453</sup> which is a broad political commitment that was adopted by OECD Governments in 1976 (and subsequently updated) to facilitate direct investment among OECD Members.<sup>454</sup> From the very outset in 1976, it was a requirement of accession to the Organisation

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<sup>448</sup> The Trade Union Advisory Committee to the OECD or TUAC can be found here <<http://www.tuac.org/en/public/tuac/index.phtml>> 24 September 2015.

<sup>449</sup> For details of the OECD Global Parliamentary Network, see <http://www.oecd.org/parliamentarians/> accessed 24 September 2015.

<sup>450</sup> The Council of Europe is the leading human rights organisation, responsible for the protection of human rights in Europe, and under whose aegis the European Court of Human Rights operates, see further <<http://www.coe.int/en/>> accessed 24 September 2015.

<sup>451</sup> A full list of OECD Watch Members is available at <<http://oecdwatch.org/organisations-en>> accessed 24 September 2015.

<sup>452</sup> OECD Guidelines for Multinational Enterprises, adopted 21 June 1976, subsequently updated in 2000 and 2011 <<http://mneguidelines.oecd.org/text/>> accessed 8 October 2015.

<sup>453</sup> OECD Declaration on International Investment and Multinational Enterprise, first adopted on 21 June 1976 and subsequently reviewed in 1979, 1984, 1991, 2000 and most recently on 25 May 2011 <<http://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm>> accessed 8 October 2015.

<sup>454</sup> The other three annexes, through which adhering countries commit to (a) treating foreign-controlled enterprises in at least the same way as national ones (National Treatment for Foreign-Controlled Enterprises, adopted on 21 June 1976, subsequently amended on 17 May 1984 (also known as the 'National Treatment Instrument')



that new Members would be required to adhere to the OECD Declaration on International Investment and Multinational Enterprises and the attendant Decisions,<sup>455</sup> i.e. they would thereafter be bound by the four Annexes, including the OECD Guidelines for MNEs. Now – as then – it also means that despite the Guidelines' voluntary character MNEs, which are headquartered in a country that has signed up to the Guidelines, is expected to apply them. Conversely, an MNE that is headquartered in a country, which is not an OECD Member or has not otherwise adhered to the Guidelines for MNEs (this includes EU Member States - Bulgaria, Croatia, Cyprus, Malta), is not bound by them.

The OECD Guidelines for MNEs have undergone two major amendments since their initial publication in 1976. The first revision was in 2000<sup>456</sup> when new chapters on corruption and consumer interests were included for the first time. In the case of corruption, enterprises were assigned an important function in dealing with corrupt practices, with special reference<sup>457</sup> to the OECD Anti-Bribery Convention<sup>457</sup> which is legally binding at the national level within OECD Member jurisdictions. Going beyond the Convention itself, the first revision of the OECD Guidelines for MNEs also covered illegal donations to political parties or candidates for public service. Significant too was the updating of the chapter on employment to fully cover the four main areas of ILO core labour standards: freedom of association and recognition of the right to collective bargaining, freedom from all forms of forced labour, abolition of child labour and non-discrimination in employment, all of which were set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.<sup>458</sup>

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<<http://www.oecd.org/daf/inv/investment-policy/nationaltreatmentinstrument.htm>> accessed 8 October 2015; (b) avoid imposing conflicting requirements on enterprises from different countries (Conflicting Requirements Imposed on Multinational Enterprises, adopted 21 June 1976, subsequently revised 4-5 June 1991 (also known as the 'Conflicting Requirements Decision') <<http://www.oecd.org/daf/inv/investment-policy/conflictingrequirementsimposedonmultinationalenterprises.htm>> accessed 8 October 2015); and (c) improve cooperation on measures affecting international direct investment (International Investment Incentives and Disincentives, adopted 21 June 1976, subsequently revised 13 June 1979 (also known as the 'International Investment Incentives and Disincentives Decision') <<http://www.oecd.org/daf/inv/investment-policy/internationalinvestmentincentivesanddisincentives.htm>> accessed 8 October 2015).

<sup>455</sup> See the OECD Declaration on International Investment and Multinational Enterprises, adopted 21 June 1976, as subsequently amended through 25 May 2011, which refers to 'Adhering Governments'. As a footnote makes clear, all OECD Members are 'Adhering Governments'; so too are a number of non-OECD countries that have subscribed to the Declaration. <<http://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm>> accessed 8 October 2015.

<sup>456</sup> OECD Guidelines for Multinational Enterprises, attached to the OECD Declaration on International Investment and Multinational Enterprises, adopted 27 June 2000 <<http://www.oecd.org/corporate/mne/1922428.pdf>> accessed 9 October 2015.

<sup>457</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted 17 December 1997, in force 15 February 1999, 37 ILM 1 (1998) (OECD Anti-Bribery Convention), to which all OECD Member countries and 7 non-OECD Members are party <[http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)> accessed 9 October 2015.

<sup>458</sup> ILO Declaration on Fundamental Principles and Rights at work and Follow-up (86th International Labour Conference Geneva June 1998).

However, the most significant revision to the OECD Guidelines for MNEs was the second one in 2011 when the Guidelines were updated<sup>459</sup> to include for the first time a chapter on the human rights responsibilities of MNEs and guidance on supply chain responsibility<sup>460</sup> as well as including corporate due diligence as a general operational principle under the Guidelines.<sup>461</sup> While the OECD Guidelines for MNEs remain a non-binding instrument, their 2011 revision resonates strongly with Ruggie's emphasis on due diligence, as part of a business enterprise's duty to respect human rights and to limit adverse human rights impacts, which is wholly consistent with the UN Guiding Principles.<sup>462</sup>

Other revisions that were made in the 2011 version of the OECD Guidelines for MNEs include an updating of the Guideline on 'Employment and Industrial Relations'<sup>463</sup> to take account of developments in ILO practice since the last revision of the Guidelines on 2000,<sup>464</sup> and revisions to the Guideline on 'Anticorruption'.<sup>465</sup> At the procedural level major changes were introduced concerning the functioning of the NCP mechanism in OECD Member countries.<sup>466</sup>

## 2. Overview of the OECD Guidelines for Multinational Enterprises 2011

The following section contains a brief overview of the OECD Guidelines for MNEs, following their second revision in 2011, which introduced a new Chapter IV on Human Rights. It was developed in parallel with the UN Guiding Principles,<sup>467</sup> and concurrently with ISO 26000,<sup>468</sup> whose adoption and publication preceded the OECD Guidelines for MNEs by six months.

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<sup>459</sup> OECD Declaration on International Investment and Multinational Enterprises, adopted 25 May 2011, with attached the 'OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment' [hereinafter 2011 revised OECD Guidelines for MNEs]. A total of 42 OECD Member adhered to the 2011 revision, as did the following non-OECD Member countries: Argentina; Brazil; Egypt; Latvia; Lithuania; Morocco; Peru; and Romania <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

<sup>460</sup> Ibid, Chapter IV.

<sup>461</sup> Peter Muchlinski, 'The 2011 Revision of the OECD Guidelines for Multinational Enterprises: Human Rights, Supply Chains and the "Due Diligence" Standard for Responsible Business', A4ID, Advocates for International Development, November 2011, 3 <<http://www.a4id.org/resource/human-rights-supply-chains-and-%E2%80%9Cdue-diligence%E2%80%9D-standard-responsible-business>> 9 October 2015.

<sup>462</sup> UNHRC, 'Report by Special Representative John Ruggie on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc A/HRC/17/31, 16, Guiding Principle 17; see further section II of this report.

<sup>463</sup> 2011 revised OECD Guidelines for MNEs, Chapter V. Employment and Industrial Relations, 35-41 <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

<sup>464</sup> The revision takes into account the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, which was most recently revised in 2006, see section VI of this report.

<sup>465</sup> 2011 revised OECD Guidelines for MNEs, Commentary to Chapter VII. Combating Bribery, Bribe Solicitation and Extortion, 48-50 <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

<sup>466</sup> 2011 revised OECD Guidelines for MNEs, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, 67-69, especially at 68 <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

<sup>467</sup> See section of II this report

<sup>468</sup> See section V of this report

*a) Scope and character of the OECD Guidelines for MNEs*

The OECD Guidelines for MNEs are a set of voluntary 'principles and standards of good practice that are consistent with applicable laws and internationally recognised standards.'<sup>469</sup> They take the form of recommendations that are addressed by governments to MNEs (or TNCs) and other business enterprises, operating in and from the 44 countries that adhere to the Guidelines (this includes the 34 OECD Members together with a further 10 non-OECD Members that are partner countries, which are also known as 'adherents' to the Guidelines).<sup>470</sup>

In this context, it should be noted that the OECD Guidelines remain voluntary for MNEs and other business enterprises,<sup>471</sup> i.e. they are not legally enforceable, but the actual 'Declaration on International Investment and Multinational Enterprises' to which the Guidelines are annexed, is a decision of the OECD Council, which is binding upon OECD Members under Article 5(a) of the OECD's founding instrument.<sup>472</sup> It means that OECD Member countries are obliged to implement this decision and to take such measures as are necessary for its implementation under the Guidelines.

Additionally, some of the 'matters covered by the Guidelines may also be regulated by national law or international commitments',<sup>473</sup> as is common in the field of labour standards and human rights protection. OECD Member countries and adherent countries are required to establish NCPs in order to track compliance with the Guidelines,<sup>474</sup> which is something that has not always happened in practice.

Moreover, as a non-binding or soft law CSR instrument, the weakness of the OECD Guidelines for MNEs lies in their lack of enforceability.<sup>475</sup> However, it does not prevent their invocation as persuasive authority before international courts and tribunals, nor their potential to contribute to the emergence of hard law norms in the area of business responsibility, including as part of a regulatory 'smart mix'.<sup>476</sup>

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<sup>469</sup> Ibid, I. Concepts and Principles, 17, para. 1.

<sup>470</sup> Argentina, Brazil, Colombia, Jordan, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia.

<sup>471</sup> 2011 revised OECD Guidelines for MNEs, I. Concepts and Principles, 17, para. 1. <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

<sup>472</sup> Convention on the Organisation for Economic Co-operation and Development, done at Paris 14 December 1960, entry into force 30 September 1961, 888 UNTS 179, Article 5(a).

<sup>473</sup> 2011 revised OECD Guidelines for MNEs, I. Concepts and Principles, 17, para. 1. <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

<sup>474</sup> Ibid, 18, para. 11.

<sup>475</sup> Jernej Letnar Čerňič, 'The 2011 Update of the OECD Guidelines for Multinational Enterprises', (February 10, 2012) 16(4), ASIL insights, under 'Analysis and Conclusion'.

<sup>476</sup> See Mary E Footer, 'Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-Affected Areas: Towards a Normative Framework?' in Jernej Letnar Čerňič and Tara Van Ho (eds), *Human Rights and Business: Direct Human Rights Obligations of Corporations* (The Hague, Wolf Legal Publishers, 2015), 179, 227-228.

## b) Core CSR principles, including human rights and due diligence

The most recent 2011 revision of the OECD Guidelines for MNEs contains voluntary principles and standards that cover CSR principles, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. As with the development of ISO 26000, the second revision of the Guidelines is aligned with UNSRSG Ruggie's 'Protect, Respect, Remedy' framework, which ultimately led to the UN Guiding Principles for Business and Human Rights,<sup>477</sup> the latter of which operationalises that framework. Evidence of Ruggie's influence on the OECD Guidelines for MNEs is the inclusion of 'enterprise responsibilities to respect human rights, responsibilities relating to the operation of transnational supply chains and the adoption of due diligence as a mechanism for ensuring observance of the human rights and other responsibility standards in the Guidelines.'<sup>478</sup>

### (1) Human rights chapter

For the first time in the OECD Guidelines for MNEs a new chapter IV on 'Human Rights', which mirrors the second pillar of the UN Guiding Principles on '[T]he Corporate Responsibility to Respect Human Rights',<sup>479</sup> is taken up in the second revision of 2011.<sup>480</sup> It is unequivocal in its statement as to the shared responsibility of states and business enterprises when it comes to the protection of human rights. Even so, the language of an enterprise's obligations, which is set out below, is not framed in mandatory terms.<sup>481</sup>

#### IV. Human Rights

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

<sup>477</sup> UNHRC, Seventeenth Session 21 March 2011 'Report by Special Representative John Ruggie on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc A/HRC/17/31.

<sup>478</sup> Peter Muchlinski, 'The 2011 Revision of the OECD Guidelines for Multinational Enterprises: Human Rights, Supply Chains and the "Due Diligence" Standard for Responsible Business', A4ID, Advocates for International Development, November 2011, 7 <<http://www.a4id.org/resource/human-rights-supply-chains-and-%E2%80%9Cdue-diligence%E2%80%9D-standard-responsible-business>> 9 October 2015.

<sup>479</sup> UNHRC, Seventeenth Session 21 March 2011 'Report by Special Representative John Ruggie on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', II. The corporate responsibility to respect human rights, 13-22 (2011) UN Doc A/HRC/17/31.

<sup>480</sup> 2011 revised OECD Guidelines for MNEs, IV. Human Rights, 31-34 <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

<sup>481</sup> Jernej Letnar Čeranič, 'Corporate Responsibility for Human Rights: A Critical analysis of the OECD Guidelines for Multinational Enterprises' (2008) 3 *Hanse Law Review* 71, 81.

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

However, what Chapter IV does make clear is that MNEs and other business enterprises should ‘respect human rights’ with the aim to ‘avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’<sup>482</sup> and that they should have a human rights policy.<sup>483</sup> More specifically, MNEs should ‘within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations’<sup>484</sup> ensure that they ‘carry out human rights due diligence appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts’<sup>485</sup> (see section 2. b)(2) for further aspects of due diligence in the OECD Guidelines). The Commentary to Chapter IV also makes clear that the ‘enterprise’s leverage over the entity concerned’ should be taken into consideration when determining the severity of the situation.<sup>486</sup>

The ‘Commentary on Human Rights’ for Chapter IV applies more cautious language<sup>487</sup> when it recommends that MNEs and other business enterprises should implement a process of human rights due diligence, which may fall within their broader enterprise risk management system. This should include assessing ‘the actual and potential human rights impacts’ of the business activity, integrating and acting upon the findings, tracking responses and communicating how such human rights impacts are

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<sup>482</sup> Ibid, 31, para. 1, which reflects UNGP 11.

<sup>483</sup> Ibid, 31, para 4, which is taken up in UNGP 15.

<sup>484</sup> Ibid, introductory text, or chapeau, to Chapter IV, which reflects UNGP 12.

<sup>485</sup> 2011 revised OECD Guidelines for MNEs, para. 5.

<sup>486</sup> Ibid, Commentary on Human Rights, 33, para. 43.

<sup>487</sup> See Jernej Letnar Čerňič, ‘Corporate Responsibility for Human Rights: A Critical analysis of the OECD Guidelines for Multinational Enterprises’ (2008) *Hanse Law Review* 71, 80.

addressed.<sup>488</sup> In this regard, due diligence should be an ‘on-going exercise, recognising that human rights risks may change over time as the enterprise’s operations and operating context evolve.’<sup>489</sup>

MNEs and other business enterprises also have a business responsibility that runs with their transnational supply chains to ‘seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.’<sup>490</sup> The ‘Commentary on Human Rights’ makes it clear that this includes ‘complex situations where an enterprise has not contributed to an adverse human rights impact’, including ‘relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services.’<sup>491</sup>

Alongside the specific chapter on Human Rights, MNEs and other business enterprises are encouraged, under the heading General Policies,<sup>492</sup> to ‘engage in or support, where appropriate, private or multi-stakeholder initiatives and social dialogue on responsible supply chain management while ensuring that these initiatives take due account of their social and economic effects on developing countries and of existing internationally recognised standards.’<sup>493</sup>

## (2) Due diligence

In terms of due diligence the OECD Guidelines go further than the UN Guiding Principles if only because the concept has been taken up as one of the ‘General Policies’ of action for furthering the observance of standards in the Guidelines.<sup>494</sup> In fact, the OECD Guidelines for MNEs extend the concept to cover all issues taken up in the Guidelines, except for science and technology, taxation and competition.<sup>495</sup>

According to the General Policies section of the OECD Guidelines, MNEs should conduct ‘risk-based due diligence’ by, for example ‘incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts’.<sup>496</sup> While they should ‘avoid causing or contributing to [such] adverse impacts ... through their own activities’ they should also “seek to prevent or mitigate an adverse impact where they have not contributed’ to it but where that impact is

<sup>488</sup> 2011 revised OECD Guidelines for MNEs , Commentary on Human Rights, 34, para. 45, which corresponds to UNGP 17 on due diligence that forms part of the ‘Operational Principles’.

<sup>489</sup> Ibid.

<sup>490</sup> 2011 revised OECD Guidelines for MNEs , 31, para. 3, which reflects UNGP 18.

<sup>491</sup> Ibid, Commentary on Human Rights, 33, para. 43.

<sup>492</sup> 2011 revised OECD Guidelines for MNEs , II. General Policies, Section A., 19-26.

<sup>493</sup> Ibid, II. General Policies, Section B, 20, para. 2.

<sup>494</sup> Peter Muchlinski, ‘The 2011 Revision of the OECD Guidelines for Multinational Enterprises: Human Rights, Supply Chains and the “Due Diligence” Standard for Responsible Business’, A4ID, Advocates for International Development, November 2011, 7 <<http://www.a4id.org/resource/human-rights-supply-chains-and-%E2%80%9Cdue-diligence%E2%80%9D-standard-responsible-business>> 9 October 2015.

<sup>495</sup> Ibid, 18.

<sup>496</sup> 2011 revised OECD Guidelines for MNEs, II. General Policies, Section A, 20, para. 10. <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

nevertheless ‘directly linked to their operations, products or services.’<sup>497</sup> The latter is an indirect reference to the responsibility of enterprises for impacts arising in all their business relations, including in their supply chains.<sup>498</sup>

Due diligence, for the purposes of the OECD Guidelines is defined under the ‘Commentary on General Policies as ‘the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems.’<sup>499</sup> This is language that resonates with the concept of human rights due diligence, which forms part of a corporation’s or other business enterprise’s duty to respect human rights under the UN Guiding Principles.<sup>500</sup>

## **B. Functional and sector specific emanations of the OECD Guidelines for Multinational Enterprises**

Before turning to the actual evidence on CSR responses to the OECD Guidelines for MNEs, attention is drawn to the fact that there are two other instruments that relate to MNEs within the corpus of CSR instruments at the OECD that have something to say about the responsibility of MNEs and other business enterprises to respect human rights in their activities, including their supply chains.

### **1. OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones**

In 2006, prior to the adoption of the second revision to the OECD Guidelines, the OECD Council adopted an instrument known as the ‘Risk Awareness for Multinational Enterprises in Weak Governance Zones’ or OECD Risk Awareness Tool.<sup>501</sup> It is seen as a complement to the OECD Guidelines for MNEs.

The OECD Risk Awareness Tool was developed, following a request from the G8 Ministers at the Gleneagles Summit, held in July 2005.<sup>502</sup> It came as something of a belated response to the report by the

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<sup>497</sup> Ibid. paras, 11 and 12.

<sup>498</sup> Id. para. 13 urges enterprises to “encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*”.

<sup>499</sup> 2011 revised OECD Guidelines for MNEs, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, II. General Policies, Commentary, 23, para. 14 *in extenso* <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

<sup>500</sup> Due diligence is dealt with in UNGP 17, and its operationalisation in UNGP 18 to 20.

<sup>501</sup> OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, adopted by the OECD Council, 8 June 2006 [OECD Risk Awareness Tool] <<http://www.oecd.org/corporate/mne/weakgovernancezones-riskawarenesstoolformultinationalenterprises-oecd.htm>> accessed 9 October 2015.

<sup>502</sup> Gleneagles Summit Meeting, 6-8 July 2005 <<http://www.g8.utoronto.ca/summit/2005gleneagles/>> accessed 9 October 2015.

UN Group of Experts on the illegal exploitation of natural resources in the DRC,<sup>503</sup> which had been brought to the attention of the UN Security Council in 2002.

### *a) Scope and character of the OECD Risk Awareness Tool*

The OECD Risk Awareness Tool is a non-binding CSR instrument. Its primary aim is to help companies investing in countries where host state governments are unwilling or unable to assume their responsibilities. It acts as a self-referential learning tool by proposing ‘a list of questions that companies might ask themselves when considering actual or prospective investments in weak governance zones’.<sup>504</sup> ‘Weak governance zones’ are defined as ‘investment environments in which public sector actors are unable or unwilling to assume their roles and responsibilities in protecting rights (including property rights)’.<sup>505</sup>

One of the principal means of identifying weak governance zones is the presence of ‘serious violations of human rights and international humanitarian law and endemic violent conflict’.<sup>506</sup> However, in practice there have often been little or no follow up when serious violations occur, with one or two exceptions (see section C. below on tracking responses to the OECD Guidelines for MNEs).

A possible explanation for this is the way in which the OECD Risk Awareness Tool has been conceived. It is designed to help MNEs and other business enterprises address risk and to deal with the type of ethical dilemmas they are likely to face in weak governance zones. It therefore provides a series of ‘Questions for consideration’ in numbered sections, as follows:

- Obeying the Law and Observing International Instruments (section 2);<sup>507</sup>
- Heightened Managerial Care (section 3);<sup>508</sup>
- Political Activities (section 4);<sup>509</sup>
- Knowing Clients and Business Partners [and dealing with public sector officials] (section 5);<sup>510</sup>
- Speaking out about Wrongdoing (section 6);<sup>511</sup> and
- Business Roles in Weak Governance Societies – A Broadened View of Self-Interest (section 7).<sup>512</sup>

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<sup>503</sup> Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, attached to letter from the UN Secretary-General to the President of the Security Council, S/2002/1146 (16 October 2002).

<sup>504</sup> OECD Risk Awareness Tool, I. Introduction, 13.

<sup>505</sup> Ibid, Appendix 1, 42.

<sup>506</sup> Ibid, third bullet point.

<sup>507</sup> Ibid, 15-19.

<sup>508</sup> Ibid, 21-24.

<sup>509</sup> Ibid, 25-26.

<sup>510</sup> Ibid, 27.

<sup>511</sup> Ibid, 29-30.

<sup>512</sup> Ibid, 31-33.



The overall aim of the OECD Risk Awareness Tool is to encourage MNEs and other business enterprises to question whether they are obeying the law and observing international instruments. It also encourages them to take heightened care in managing investment in areas where weak governance is known to exist, to make sure they know their clients and business partners and to speak out about wrongdoing.

### *b) The OECD Risk Awareness Tool in terms of accountability and legitimacy*

The OECD Risk Awareness Tool is mostly seen as a sustainability management standard, which can be used for reporting purposes in specific circumstances. However, there is no obligation for MNEs or other business enterprises in the extractive industries, whose operations are in weak governance zones, to undertake any form of monitoring or impact assessment of their business operations. It does not even call for the minimum form of impact assessment by MNEs and other business enterprises, along the lines of a SWOT (Strengths, Weaknesses, Opportunities and Threats) Analysis.

The lack of any form of reporting purpose, or materiality, has proven to be a drawback for MNEs and other business enterprises in taking the OECD Risk Awareness Tool seriously. It also appears that a further and more specific institutional response from the OECD across the entire supply chain for certain mining sectors involving Tin, Tantalum, Titanium and Gold (3TG), which are minerals that are used extensively in the electronics and automobile industries, may have partially eclipsed the purpose of the OECD Risk Awareness Tool (see next section).

## **2. OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Due Diligence Guidance)**

In 2010 the OECD developed a collaborative, government-backed, CSR instrument called the 'Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas' or OECD Due Diligence Guidance. Its significance for this report lies in the fact that the OECD Due Diligence Guidance is specifically referenced in the EU Draft Conflict Mineral Regulation (see section VIIB below).

The OECD Due Diligence Guidance arose out of a multi-stakeholder initiative on the responsible supply chain of minerals from conflict-affected areas that involved the OECD and eleven Member States of the International Conference of the Great Lakes Region or ICGLR<sup>513</sup> The initiative was later joined by Brazil, Malaysia and South Africa, as well as industry and civil society organisations (CSOs).

While the OECD Due Diligence Guidance may be a non-binding instrument, it is specific in its scope and application, and in terms of due diligence from the mining of raw minerals upstream to the smelter stage

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<sup>513</sup> The International Conference on the Great Lakes Region (ICGLR) is an inter-governmental organisation, established pursuant to the Declaration on Peace, Security and Development in the Great Lakes Region in Dar-es-Salaam, Tanzania, 20 November 2004. It comprises: Angola, Burundi, the Central African Republic, the Republic of Congo, the Democratic Republic of Congo (the DRC), Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia. <<http://www.icglr.org/index.php/en/>> accessed 10 October 2015.

and further downstream to the consumer. In other words, it operates throughout the value chain. Significant too is the fact that it contains two detailed Supplements: one on 'Tin, Tantalum and Tungsten'<sup>514</sup> and another on 'Gold' (see next paragraph).

#### *a) Scope and character of the OECD Due Diligence Guidance*

The second edition of the OECD Due Diligence Guidance from 2012<sup>515</sup> has benefitted substantially from Ruggie's work on due diligence in the supply chain<sup>516</sup> and what was eventually to become Guiding Principle 17 on 'human rights due diligence'.<sup>517</sup> It further builds on, and is consistent with, the principles and standards contained in the OECD Guidelines for MNEs (see section A. above) and the OECD Risk Awareness Tool (see section B.1 above).

The OECD Due Diligence Guidance provides a framework for detailed due diligence as a basis for 'responsible global supply chain management of tin, tantalum, tungsten, their ores and mineral derivatives, and gold'. Its main emphasis is on conducting due diligence throughout the 3TG supply chain, involving all the processes from extraction through to transport, handling, trading, processing, smelting, refining and alloying, manufacturing, or the selling of products that contain minerals from conflict-affected and high risk areas.<sup>518</sup> In the OECD context, '...the term supply chain refers to the system of all the activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers.'<sup>519</sup>

The concept of risk-based due diligence in OECD terms is understood as 'the steps companies should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions.'<sup>520</sup> This is very much in step with Guiding Principle 17, seeking as it does to get companies to engage in an active and reactive process to ensure that 'they respect human rights and do not contribute to conflict.'<sup>521</sup> The OECD Due Diligence Guidance also takes a more holistic view towards human rights diligence when it states that this can help companies ensure that they 'observe

<sup>514</sup> The first 'Supplement on Tin, Tantalum and Tungsten' was issued as a Supplement to the OECD Due Diligence Guidance on RSCM in 2010 [hereinafter 3'T's Supplement].

<sup>515</sup> The revised (second edition) of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas [hereinafter OECD Due Diligence Guidance], was approved by the OECD Recommendation on the Due Diligence Guidance, adopted by the OECD Council, 25 May 2011 and subsequently amended on 17 July 2012 to include a reference to the Supplement on Gold [hereinafter Gold Supplement], 61-118. The 3TG Supplement was retained as a supplement to the second edition of the OECD Due Diligence Guidance at 631-60 [hereinafter 3'T's Supplement].

<sup>516</sup> See, for example: the SRSG's Discussion Paper, 'The Corporate Responsibility to Respect Human Rights in Supply Chains', 10<sup>th</sup> OECD Roundtable on Corporate Responsibility, 30 June 2010 <<http://www.oecd.org/corporate/mne/45535896.pdf>> accessed 10 October 2015.

<sup>517</sup> See section II of this report.

<sup>518</sup> OECD Due Diligence Guidance, 14.

<sup>519</sup> Ibid.

<sup>520</sup> Ibid, 8.

<sup>521</sup> Ibid.

international law and comply with domestic laws, including those governing the illicit trade in minerals and United Nations sanctions'.<sup>522</sup>

In the specific context of responsible 3TG supply chain management, 'risks' are defined in relation to the potentially adverse impacts of a company's operations. They may result either from a company's own activities or its relationships with third parties, including suppliers and other entities in the supply chain.<sup>523</sup> However, the OECD Due Diligence Guidance goes further than Guiding Principle 17. It speaks of external impacts in terms of 'harm to people' and internal impacts in terms of reputational damage, or legal liability for the company, or both, and notes the possibility of the interdependency of external and internal impacts.<sup>524</sup>

This approach is supported by Annex I to the OECD Due Diligence Guidance that offers a 'Five-Step Framework for Conducting Risk-Based Due Diligence'.<sup>525</sup> It consists of the following: i) establishing strong company management systems, based on due diligence, control and transparency, for example through a chain of custody or traceability system, and strengthened supplier relationships; ii) identifying and assessing risk in the supply chain; iii) designing and implementing a strategy to respond to identified risks, i.e. a risk management plan; iv) carrying out independent third party audits, and; v) reporting on supply chain due diligence. This Five-Step Framework effectively proscribes industry-wide cooperation in order to build capacity to conduct due diligence while the costs of specific due diligence tasks must be shared within the industry.

Companies should devise a risk management strategy that either continues, or temporarily suspends, trade while pursuing on-going measurable risk mitigation, or else disengages with a supplier when attempts at mitigation have failed or where a company deems risk mitigation unfeasible or unacceptable.<sup>526</sup> This is intended to help them to consider their ability to influence and, where necessary, take steps to build leverage<sup>527</sup> over suppliers who can most effectively prevent or mitigate the identified risk. Where companies decide to pursue risk mitigation efforts while continuing to trade, or temporarily suspending it, they should consult with suppliers and affected stakeholders, including local and central government authorities, international organisations, CSOs and affected third parties so as to agree on measurable risk mitigation strategies.<sup>528</sup>

Of note is the fact that the OECD Due Diligence Guidance encourages companies in the mining sector to participate in industry-driven initiatives on responsible supply chain management. It also suggests that companies and other business enterprises should build partnerships with international organisations and

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<sup>522</sup> Ibid, 13.

<sup>523</sup> Ibid.

<sup>524</sup> Ibid, and see box on this page where this is also highlighted.

<sup>525</sup> Five-Step Framework for Risk-Based Due Diligence in the Mineral Supply Chain, Annex I to the OECD Due Diligence Guidance, 17-19 [hereinafter Five-Step Framework].

<sup>526</sup> OECD Due Diligence Guidance, 14, and Five-Step Framework, 18 at 3.B).

<sup>527</sup> The idea of building leverage over a supplier is consistent with paragraph (b)(ii) of UNGP 19.

<sup>528</sup> Five-Step Framework, 8 at 3.B).

CSOs. Furthermore, they should seek to integrate the Model Supply Chain Policy, contained in Annex II<sup>529</sup> into their existing policies and management systems, including the development of risk management plans.<sup>530</sup>

Of note is the fact that the Model Supply Chain Policy places serious human rights abuses – associated with the extraction, transport and trade of minerals when operating in conflict-affected and high risk areas – at the top of its list. Human rights abuses may encompass: ‘any forms of torture, cruel, inhuman and degrading treatment’; ‘any forms of force or compulsory labour’; ‘the worst forms of child labour’; ‘other gross human rights violations, such as widespread sexual violence’; and ‘war crimes or serious violations of international humanitarian law, crimes against humanity or genocide.’<sup>531</sup>

The Model Supply Chain Policy also deals with managing the risk of serious abuses, including through the direct and indirect action of non-state armed groups as well as public and private security forces, even if it leads to the suspension of trade or the cessation of dealings of 3GT with a particular supplier.<sup>532</sup> This is what John Ruggie has previously described as ‘making human rights a standard part of enterprise risk management’ in order to ‘reduce the incidence of corporate-related human rights harm’.<sup>533</sup>

Finally, companies are encouraged to draw on ‘Suggested Measures for Risk Mitigation and Indicators for Measuring Improvement’, contained in Annex III,<sup>534</sup> when designing conflict and high-risk sensitive strategies for mitigation in their risk management plans and measuring progressive improvement.

### *b) OECD Due Diligence Guidance Supplements on Tin, Tantalum and Titanium and Gold*

The Supplement on Tin, Tantalum and Tungsten or 3T’s Supplement<sup>535</sup> adopts the same Five-Step Framework, as the OECD Due Diligence Guidance, when conducting a risk-based human rights due diligence in the supply of 3T’s from conflict-affected or high-risk areas, according to different positions of supply in the supply chain. In other words, it distinguishes between the roles of, and the corresponding due diligence recommendations addressed to, upstream and downstream companies in the supply chain.

Additionally, the second edition of the OECD Due Diligence Guidance on RSCM introduced a Supplement on Gold (Gold Supplement).<sup>536</sup> This was found to be necessary due to gold’s peculiar nature, compared to

<sup>529</sup> Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Risk Areas, Annex II to the OECD Due Diligence Guidance, 20-24 [hereinafter Model Supply Chain Policy].

<sup>530</sup> OECD Due Diligence Guidance, 15, and Five-Step Framework, 18 at 3.B), and 3.C).

<sup>531</sup> Model Supply Chain Policy, para.1, and fn.152, 20-21.

<sup>532</sup> Ibid, paras. 3 and 4 and 5-10, at 21-22 and 22-23 respectively.

<sup>533</sup> Protect, Respect, Remedy Framework, para.85.

<sup>534</sup> Suggested Measures for Risk Mitigation and Indicators for Measuring Improvement’, Annex III, ECD Due Diligence Guidance, 25-29 [hereinafter Suggested Measures for Risk Mitigation].

<sup>535</sup> 3T’s Supplement’, now taken up in the second edition of the OECD Due Diligence Guidance, 31-60.

<sup>536</sup> Supplement on Gold, issued as Supplement to the second edition of the OECD Due Diligence Guidance, 61-118 [hereinafter Gold Supplement].

other minerals, which arises from its fungibility combined with its complicated and non-linear supply.<sup>537</sup> Other difficulties in the gold supply chain include the problem of establishing a chain of custody where gold is constantly being recycled, including gold that originates from conflict-areas and is introduced into the supply chain as 'recycled/scrap', thereby masking its provenance.

As in the case of the 3'T's Supplement, the Gold Supplement adopts the Five-Step Framework for conducting risk-based human rights due diligence in the gold supply chain so as to avoid contributing to conflict and serious abuses of human rights when sourcing from conflict-affected or high-risk areas. However, there are some differences in terms of the supply chain.

One is the issue of so-called 'Recyclable Gold', reference to which has already been made and which is distinguishable from 'Mined Gold'.<sup>538</sup> It only falls under the Gold Supplement insofar as it is 'a potential means of laundering gold that has been mined in conflict-affected and high-risk areas in order to hide its origin'.<sup>539</sup> Besides, the Gold Supplement deals differently with what it terms 'gold investment products (ingots, bars, coins, and grain in sealed containers) held in bullion bank vaults, central bank vaults, exchanges and refineries', which may qualify as so-called 'Grandfathered Stocks'.<sup>540</sup> Where the two Supplements further differ is in distinguishing between the different roles, and corresponding due diligence recommendations, addressed to upstream and downstream operations in the supply chain.

As with the 3'T's Supplement, the Gold Supplement also encourages companies and other business enterprises to participate in responsible supply chain initiatives, provided they are consistent with the OECD Due Diligence Guidance on RSCM.<sup>541</sup> The Gold Supplement suggests that companies in the supply chain should build partnerships with international organisations and CSOs.<sup>542</sup> They should also seek, as part of their risk assessment and risk management plans, to integrate the Model Supply Chain Policy in Annex II and its recommendations, into their existing policies and management systems.<sup>543</sup>

Due to the vulnerability of artisanal and small-scale miners when gold mining operates in the absence of an enabling regulatory environment, there is a special Appendix I to the Gold Supplement on 'Suggested measures to create economic and development opportunities for artisanal and small-scale miners' (Suggested measures for ASM).<sup>544</sup> Apart from mine assessments, the Appendix suggests ways of formalising the ASM of gold by means of legalising operations, mapping transport routes, improving traceability / chains of custody, financial support and supporting grievance mechanisms.

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<sup>537</sup> Mary E Footer, 'Shining Brightly? Human Rights and the Responsible Sourcing of Diamond and Gold Jewellery from High-Risk and Conflict-Affected Areas', (2012) 6(1), *Human Rights & International Legal Discourse*, 159, 165.

<sup>538</sup> See under 'Gold Sources' in the Gold Supplement, 67 for 'Mined Gold' and 68 for 'Recyclable Gold'.

<sup>539</sup> Gold Supplement, 62.

<sup>540</sup> Ibid, under 'Gold Sources', for the definition of 'Grandfathered Stocks', 68 and the explanation at 62 concerning their treatment.

<sup>541</sup> See: 'Introduction and Scope', Gold Supplement, *ibid*, 63 and fn.3.

<sup>542</sup> *Ibid*, 64.

<sup>543</sup> *Ibid*, with reference to the Model Supply Chain Policy, and supporting text.

<sup>544</sup> 'Suggested measures to create economic and development opportunities for artisanal and small-scale miners' Gold Supplement, Appendix I, 114-118.

While the OECD Due Diligence Guidance, and its twin Supplements on the 3T's and Gold, provide useful guidance for companies and other business entities on how to meet their duty of human rights due diligence in the 3TG supply chain – potentially forming a counterpart to the state's duty to protect – it neither compels nor obliges companies to monitor their supply chains. Instead, the OECD Guidance is more about instilling in the business community a culture of conducting human rights due diligence throughout their supply chains as a matter of course, thereby applying the baseline norm of the Guiding Principles not to infringe upon the rights of others.

In normative terms this may be a less than satisfactory outcome. However, changing the behaviour of companies and other business enterprises is the first step towards the development of a normative approach that may lead to the imposition of binding legal obligations on companies and other business enterprises. Furthermore, various industry and business-driven supply chain initiatives have sought to deliver better tracking and traceability upstream, at the smelter and downstream in the 3TG supply chain.<sup>545</sup> The important thing to note about such industry- and business-driven initiatives is that they work with, and benefit from, reference to the OECD Due Diligence Guidance on RSCM.

## **C. Tracking responses to the OECD Guidelines for Multinational Enterprises**

### **1. Tracking responses to the responses of OECD Members and adherents to the OECD Guidelines for MNEs**

The primary means for tracking the responses to the OECD Guidelines for MNEs is through the system of National Contact Points or NCPs, which is an institutional development that the OECD introduced in 1984 after eight years of experience with the original Guidelines.<sup>546</sup> All governments of the 34 OECD Member countries and the 10 adherents must establish an NCP to promote the Guidelines and handle complaints against companies that have allegedly failed to adhere to Guidelines' standards.

#### **a) NCPs' tracking of responses to the OECD Guidelines**

The NCPs are government offices that are assigned the task of furthering the 'effectiveness' of the OECD Guidelines for MNEs.<sup>547</sup> Their core function is to promote adherence to the Guidelines by disseminating information about them and providing a dispute resolution mechanism, and by handling 'specific

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<sup>545</sup> Mary E Footer, 'Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-Affected Areas: Towards a Normative Framework?' in Jernej Letnar Čerňič and Tara Van Ho (eds), *Human Rights and Business: Direct Human Rights Obligations of Corporations* (The Hague, Wolf Legal Publishers, 2015), 179.

<sup>546</sup> John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and implementation Challenges' Corporate Social Responsibility Initiative, Working Paper No. 66, May 2015, 2 <<http://www.ksg.harvard.edu/index.php/content/.../1/.../workingpaper66.pdf>> accessed 10 October 2015.

<sup>547</sup> 2011 revised OECD Guidelines for MNEs, I. Concepts and Principles, 18, para. 11 and Procedural Guidance, 71, at I. <<http://oecd.org/daf/inv/mne/48004323.pdf>> accessed 8 October 2015.

instances' of alleged breaches of the Guidelines.<sup>548</sup> NCPs are also required carry out other obligations such as engaging in peer learning,<sup>549</sup> and participating in the OECD Investment Committee's work on the Guidelines and related topics.<sup>550</sup>

Governments adhering to the Guidelines have some degree of flexibility in structuring their NCP in a manner that fits their domestic situation.<sup>551</sup> This gives rise to some considerable diversity among OECD Members and adherents. In some countries, the NCP is housed in a single agency or ministry, such as the ministry of economy or ministry of trade and commerce. In other countries, NCPs are inter-agency and/or ministry bodies.

Although specific structures may vary, all NCPs must be organised in such a way that enables them to handle the broad range of issues covered by the Guidelines. Furthermore, all NCPs are required to operate impartially and to be 'functionally equivalent' by fulfilling a number of core criteria. Ideally, the NCP has staff with seniority and authority. They can also include or seek the assistance of independent experts as well as representatives from civil society and business in carrying out their functions.<sup>552</sup> NCPs are expected to develop and maintain relationships with the business community, worker organisations, and other interested parties that are able to contribute to effective implementation of and adherence to the Guidelines.<sup>553</sup>

Nevertheless, the extent to which NCPs track responses to the Guidelines lacks consistency. At the OECD Ministerial Council Meeting in June, 2015, the importance of continuing efforts to further strengthen the performance of NCPs was stressed. In a Joint Statement issued by BIAC, TUAC and OECD Watch, the three bodies most closely associated with the OECD Guidelines for MNEs supported strengthening 'the performance of NCPs, in particular those that have to catch up, including through the exchange of best practices and the organisation of peer reviews.'<sup>554</sup> In particular, they called on the OECD to provide the necessary resources to fund an effective peer review programme for OECD Member and adherent governments to ensure that their NCPs are adequately equipped and staffed so that they can fulfil the objectives of the Guidelines.<sup>555</sup>

### ***b) NCPs and the OECD Guidelines dispute resolution mechanism***

NCPs are charged with handling complaints concerning alleged breaches of the Guidelines by an enterprise although it should be noted that NCPs do not exercise a right of initiative in this respect, i.e.

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<sup>548</sup> Ibid, 68, para. 1 and Procedural Guidance, 72, at C. *Implementation in Specific Instances*.

<sup>549</sup> Ibid, para. 2 and Procedural Guidance, 72, at B. *Information and Promotion*.

<sup>550</sup> Ibid, para. 3 and Procedural Guidance, 74-75, at II. *Investment Committee*.

<sup>551</sup> 2011 revised OECD Guidelines for MNEs, Procedural Guidance, 71, at A. *Institutional Arrangements*.

<sup>552</sup> Ibid, para. 4.

<sup>553</sup> Ibid, para. 1.

<sup>554</sup> Joint Statement of BIAC, TUAC and OECD Watch, Calling for an effective peer review mechanism and adequately equipped NCPs, October 2015 <[http://oecdwatch.org/publications-en/Publication\\_4238/at\\_download/fullfile](http://oecdwatch.org/publications-en/Publication_4238/at_download/fullfile)> accessed 31 October 2015.

<sup>555</sup> Ibid.

they do not usually take up cases on their own initiative. Instead, they handle cases when requested to do so by those stakeholders, usually individuals or communities or other CSOs who have been adversely-impacted by the activities of an MNE or other business enterprise.

The Guidelines' complaint process is intended to resolve alleged breaches of the Guidelines through conciliation and mediation, in other words facilitating dialogue between the parties. NCPs can handle complaints regarding alleged breaches of the OECD Guidelines for MNEs by a multinational enterprise that have taken place in their own country. NCPs can also handle complaints about companies from their country that are allegedly involved in breaches of the Guidelines overseas.

### *c) The NCP Specific Instance procedure*

A 'specific instance' is the official term in the OECD Guidelines for MNEs for a case or complaint about a company's alleged breach of the Guidelines.<sup>556</sup> The 'Specific Instance' procedure is focused on resolving disputes primarily through mediation and conciliation. However, there are also other means that can be used by anyone who can demonstrate an 'interest', broadly defined, in the alleged violation.

As a result CSOs, including NGOs and trade unions have used the complaint process to address adverse social and environmental impacts, including human rights violations, arising out of corporate misconduct. NGOs have also used the complaint process to raise awareness about the fact that enterprises are expected to uphold internationally recognised standards, including demonstrating their respect for human rights, and, at a very minimum, 'do no harm' wherever they operate.

The Specific Instance Procedure involves several stages. The first stage comprises an initial assessment of the complaint that begins once the complaint has been formally submitted to an NCP. At this stage the NCP must conduct an initial assessment to determine if the case merits further examination.<sup>557</sup>

The second stage of the procedure is mediation (the actual term is 'good offices'), which starts once the NCP in question has decided the case merits further examination.<sup>558</sup> At this stage the NCP will try to bring the complainants and the MNE or other business enterprise together to resolve the case through a process focused on mediation and conciliation. In order to assist the NCP in this process resort may be had to 'advice from relevant authorities, and/or representatives of the business community, worker organisations, other nongovernmental organisations, and relevant experts'.<sup>559</sup> The NCP may also consult with the NCP in the other country or countries concerned<sup>560</sup> and it can seek the guidance of the Investment Committee, if there is any doubt over the interpretation of the Guidelines.<sup>561</sup>

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<sup>556</sup> Procedural Guidance, 72, at C. *Implementation in Specific Instances*.

<sup>557</sup> Procedural Guidance, 72, at C. *Implementation in Specific Instances*, para. 1.

<sup>558</sup> Procedural Guidance, 72, at C. *Implementation in Specific Instances*, para. 2.

<sup>559</sup> *Ibid*, para. 2(a).

<sup>560</sup> *Ibid*, para. 2(b).

<sup>561</sup> *Ibid*, para. 2(c).



The third stage is the one that leads to the final statement. It involves the NCP issuing a final statement about the complaint and mediation process, even where ‘the NCP decides that the issues raised do not merit further consideration.’<sup>562</sup> Irrespective of the outcome, the final statement should outline the alleged breaches and how the NCP dealt with the case. Where the parties have reached agreement on the issues raised then information in the final statement should demonstrate how ‘the NCP initiated in assisting the parties and when agreement was reached’ although it is only bound to disclose information concerning the content of that agreement where the parties involved have agreed to this, thereby potentially endowing the whole process with a degree of ‘privity’.<sup>563</sup>

Where the parties do not reach agreement or when a party is unwilling to participate in the procedure then the final statement must still describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. It will also make recommendations on the implementation of the Guidelines if appropriate.<sup>564</sup>

#### *d) NCP’s tracking of human rights complaints under the OECD’s Guidelines on Multinational Enterprises*

This section reflects on the experience to date with the OECD National Contact Points (NCPs) in terms of human rights complaints. The survey dates from the 2000 revision of the Guidelines, which breathed new life into the moribund NCP dispute settlement mechanism. It also briefly touches upon some of the individual EU Member States’ experiences with their own NCP complaints process.

##### *(1) Experience with the OECD National Contact Points: the Ruggie-Nelson study*

Based on a comprehensive survey of approximately 300 cases that have appeared in the NCP system since 2001,<sup>565</sup> there is some evidence-based material concerning the tracking of complaints before OECD NCPs. Relying on three separate sources for such evidence, namely the OECD Specific Instance Database,<sup>566</sup> the OECD Watch Case Database<sup>567</sup> and the Trade Union Advisory Committee or TUAC Database,<sup>568</sup> because none of the three contain a comprehensive record of all cases submitted to the NCPs, a report undertaken by former UNSRG John Ruggie and Tamaryn Nelson, on the issue of ‘Human Rights and the OECD

<sup>562</sup> Procedural Guidance, 72, at C. *Implementation in Specific Instances*, para. 3.(a).

<sup>563</sup> *Ibid*, para. 3(b).

<sup>564</sup> *Ibid*, para. 3(c).

<sup>565</sup> This section relies on the results from the study by former UN SRSR Professor John Ruggie and Tamaryn Nelson of the John F Kennedy School of Government, Harvard University: see John Ruggie and Tamaryn Nelson, ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and implementation Challenges’ Corporate Social Responsibility Initiative, Working Paper No. 66, May 2015 <<http://www.ksg.harvard.edu/index.php/content/.../1/.../workingpaper66.pdf>> accessed 10 October 2015.

<sup>566</sup> OECD Database of Specific Instances <<https://mneguidelines.oecd.org/database/>> accessed 10 October 2015.

<sup>567</sup> OECD Watch Case Database <<http://oecdwatch.org/cases>> accessed 10 October 2015.

<sup>568</sup> Trade Union Advisory Committee or TUAC Database <<http://www.tuacoecdmneguidelines.org/cases.asp>> accessed 10 October 2015.

Guidelines for Multinational Enterprises' (hereinafter the Ruggie-Nelson study),<sup>569</sup> has tracked some of the responses to this instrument.

For the period 2000 to 2012/2013 there was a steady increase in the number of cases referred to the NCPs, with a sharp rises in the years 2002/2003, 2206/2007 and 2010/2011 and onwards to 2012/2013. Thereafter, the year 2013/2014 saw a lower admissibility rate.<sup>570</sup> The majority of complaints arose before NCPs in the home countries of MNEs, where they are headquartered. The EU Member States with the highest number of complaints before their NCPs were the UK (with 29 complaints), France and Germany (with 13 complaints) and Netherlands (with 9 complaints).<sup>571</sup>

While the substance of the complaints varied, the Ruggie-Nelson study note that historically human rights issues, which came before the NCPs, were usually workplace complaints, referencing ILO standards.<sup>572</sup> Broader human rights issues were only mentioned briefly and were usually brought under the 'General Policies' heading of the 2000 revision of the Guidelines for MNEs.<sup>573</sup> The Ruggie-Nelson study notes that with the 2011 revision of the Guidelines, which included a new Chapter IV on 'Human Rights', there was a higher number of complaints in the period 2012/2013 with a total of 38 cases for all NCPs, of which 32 addressed human rights issues.<sup>574</sup> This progression was repeated in the period 2013/2014 when a slightly lower of number of 34 complaints came before all NCPs but 27 addressed human rights issues.<sup>575</sup>

Besides, as the Ruggie-Nelson study reveals that the introduction of Chapter IV into the OECD Guidelines has expanded the scope of human rights cases because 'under the Guidelines they now include *all* internationally recognized rights, not merely those a host government has ratified.'<sup>576</sup> The study emphasises that while cases involving labour rights have not disappeared, the number of complaints before NCPs has decreased and instead issues 'related to community consultations, impeding or destroying sources of livelihood, health and housing, as well as the security of the person and private rights, have increased.'<sup>577</sup>

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<sup>569</sup> John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and implementation Challenges' Corporate Social Responsibility Initiative, Working Paper No. 66, May 2015, 7 <<http://www.ksg.harvard.edu/index.php/content/.../1/.../workingpaper66.pdf>> accessed 10 October 2015.

<sup>570</sup> Ibid, 8, with reliance on figures 1 and 2.

<sup>571</sup> Ibid, 12.

<sup>572</sup> Ibid.

<sup>573</sup> OECD Guidelines for Multinational Enterprises, attached to the OECD Declaration on International Investment and Multinational Enterprises, adopted 27 June 2000, Chapter II, 'General Policies' <<http://www.oecd.org/corporate/mne/1922428.pdf>> accessed 9 October 2015.

<sup>574</sup> John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and implementation Challenges' Corporate Social Responsibility Initiative, Working Paper No. 66, May 2015, 7 <<http://www.ksg.harvard.edu/index.php/content/.../1/.../workingpaper66.pdf>> accessed 10 October 2015.

<sup>575</sup> Ibid.

<sup>576</sup> Ibid, 14.

<sup>577</sup> Ibid.

Other issues of note, is that there has been a diversification in the industry sectors involved in recent complaints. Whereas once this was more concentrated on complaints involving the extractive industries and manufacturing the former has given way to the latter and now manufacturing dominates with an increase in the number of NCP complaints involving business relationships, including supply chains.<sup>578</sup>

Another issue that the Ruggie-Nelson study picked up is the fact that the ‘two top human rights provisions cited by complainants before NCPs’ relate to due diligence. The provision with which it is most readily associated is that MNE’s should ‘avoid causing or contributing to adverse human rights impacts and address such impacts when they occur’<sup>579</sup> and ‘[Ca]rry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.’<sup>580</sup>

However, what the Ruggie-Nelson study does not dwell on is whether the NCP complaints mechanism offers an effective remedy for human rights complaints involving MNEs. Currently, not all NCPs are active in addressing such complaints and many of them dismiss a complaint at the initial assessment stage without going to the merit, as is evident from the four complaints that are highlighted in the next section. The matter of an effective remedy before the OECD NCPs also forms a minor part of the investigation under the ‘Accountability and Remedy Project (ARP), which was launched by the UN High Commissioner for Human Rights in late 2014 and is due to complete in June 2016<sup>581</sup> and based upon which it might be possible to gain a better idea of overall MNE compliance with the Guidelines in terms of respect for human rights.

## (2) EU Member States’ NCP’s experiences with human rights complaints

The Ruggie-Nelson Study cites the case of the NGO *Americans for Democracy & Human Rights in Bahrain (ADHRB)* and *Formula One*<sup>582</sup> that was brought before the UK NCP in 2014, as an example of due consideration for human rights due diligence, in the sense referred to in the Chapter IV of the OECD Guidelines. The UK NCP accepted ‘as meriting further examination issues relating to [Formula One]’s management systems, due diligence, human rights policy and communications with stakeholders and business partners.’<sup>583</sup> However, the NCP did not accept other part of the complaint against Formula One.

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<sup>578</sup> Ibid.

<sup>579</sup> OECD Guidelines for Multinational Enterprises, attached to the OECD Declaration on International Investment and Multinational Enterprises, adopted 27 June 2000, Chapter IV, para 2, <<http://www.oecd.org/corporate/mne/1922428.pdf>> accessed 9 October 2015.

<sup>580</sup> Ibid, Chapter IV, para 5.

<sup>581</sup> See OHCHR programme of work to enhance accountability and access to remedy in cases of business involvement in human rights abuses <<http://www.ohchr.org/EN/Issues/Business/Pages/OverviewOfProjects.aspx>> 3 accessed 31 October 2015.

<sup>582</sup> UK NCP Initial Assessment, *Americans for Democracy & Human Rights in Bahrain (ADHRB)* and *Formula One World Championship, Management Ltd., Issues for Further Examination*, October 2014, 7-10 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/366898/bis-14-1171-uk-ncp-assessment-complaint-by-americans-for-democracy-and-human-rights-in-bahrain.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366898/bis-14-1171-uk-ncp-assessment-complaint-by-americans-for-democracy-and-human-rights-in-bahrain.pdf)> accessed 30 October 2015.

<sup>583</sup> Ibid, 7-10 (with summary at 3).

In addition to *ADHRB* and *Formula One*, there have been two further human rights complaints before the UK NCP in 2014/2015. One involves the *Reprieve* and *British Telecommunications PLC (BT)*, in which the advocacy NGO *Reprieve* claims that BT has breached the General Policies, and Human Rights provisions of the OECD Guidelines for MNEs because the company provides a communications cable between United States military facilities in the UK and Djibouti, thus linking it to human rights impacts of US military operations in Yemen.<sup>584</sup> The other is a complaint by an (unnamed) NGO alleging that a US subsidiary of a UK-based company in the security sector had breached the human rights provisions of the OECD Guidelines in Cuba, by contracting with the US Navy to provide support services to the Guantanamo Bay Naval Base in Cuba, in a manner that was inconsistent with human rights obligations under the OECD Guidelines, as well as with the parent company's own human rights policy.<sup>585</sup>

Another case concerned a specific instance complaint before the Dutch NCP, involving human rights due diligence, which was notified by two NGOs, *Friends of the Earth Europe* and *Friends of the Earth Netherlands/Milieudéfensie* regarding the activities of Rabobank and its business relationship with Bumitama Agri Group (BGA) operating in Indonesia.<sup>586</sup> A further one before the Danish NCP concerned a request for review by a Danish NGO alleging that a Danish company had breached the human rights provisions of the OECD Guidelines by selling milk powder in developing countries including the Ivory Coast, Nigeria, and Bangladesh.<sup>587</sup>

## 2. EU tracking of responses to the OECD Guidelines for MNEs

The EU's tracking of responses to the OECD Guidelines is of a very different character. From an institutional perspective, the EU is an OECD observer and its relationship with the Organisation is under the auspices of the European External Action Service (EEAS). Aside from this, the EU contributes to the tracking of responses to the Guidelines through its peer review of national CSR policies and by holding high level meetings of EU Member State governments on the matter of CSR.

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<sup>584</sup> UK NCP Initial Assessment, complaint by Reprieve against BT - equipment provided to US defence agency, January 2015 <<https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-by-reprieve-against-bt-equipment-provided-to-us-defence-agency>> accessed 30 October 2015.

<sup>585</sup> UK NCP Initial Assessment, complaint by an NGO against a company in the security sector, December 2014 <<https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-by-a-uk-ngo-against-a-company-in-the-security-sector>> accessed 30 October 2015.

<sup>586</sup> Ministry of Foreign Affairs, OECD Guidelines for Multinational Enterprises, Initial Assessment, Friends of Earth, Friends of the Earth Netherlands/Milieudéfensie – Rabobank, 16 December 2014, <<http://www.oecdguidelines.nl/notifications/documents/publication/2015/1/6/ncp-initial-assessment-rabobank---milieudéfensie>> accessed 30 October 2015.

<sup>587</sup> Danish National Contact Point, Annual Report The Mediation and Complaints-Handling Institution for Responsible business Conduct (the Danish NCP), 2014, 4 <<http://businessconduct.dk/specific-instance-resolved>> accessed 30 October 2015.

***a) EU tracking of responses to the OECD Guidelines for MNEs as a function of its OECD observer status***

The EU maintains a permanent delegation to the OECD, at ambassadorial level under the auspices of the European External Action Service (EEAS). This means that the EU Ambassador to the OECD and his staff are able to contribute to the work programme of the OECD and to take part in the OECD Ministerial Council Meetings and be involved with various OECD specialised committees such as the Investment Committee that oversees the functioning of the Guidelines, as one of the annexes attached to the OECD Declaration on International Investment and Multinational Enterprises.<sup>588</sup>

As noted earlier the EU representative to the OECD is not entitled to vote on the adoption of legal texts by the OECD Ministerial Council but it may be elected as a member of the bureau of subsidiary bodies. This means that the EU can participate fully in the preparation of texts, including legal acts, with an unrestricted right to make proposals and amendments. The EU perceives its quasi-membership of the OECD as offering many benefits to the EU, and especially to EU Member States that are not OECD Members or adherents. One area in which EU can track responses to the Guidelines is through the OECD NCP peer review process, the results of which are published annually.<sup>589</sup>

***b) The EU CSR Peer Review and High-Level Meeting approach to tracking responses to OECD***

The EU is also committed to tracking responses to the OECD Guidelines for MNEs on the basis of its CSR Strategy in which it has sought to 'create with Member States in 2012 a peer review mechanism for national CSR policies'.<sup>590</sup> The most recent CSR peer review was limited to seven of the 28 Member States (Denmark, Finland, France, Italy, Netherlands, Sweden and UK) and it focused very broadly on a range of CSR instruments even though the OECD Guidelines was one of them. The CSR peer review was conducted by means of four separate rounds of meetings with the seven EU Member States between October 2013 and October 2014. It was very short, covered a broad range of questions and did not look in detail at what Member States were doing in the field of CSR.<sup>591</sup>

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<sup>588</sup> OECD Declaration on International Investment and Multinational Enterprise, first adopted on 21 June 1976 and subsequently reviewed in 1979, 1984, 1991, 2000 and most recently on 25 May 2011 <<http://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm>> accessed 8 October 2015.

<sup>589</sup> OECD, Activities of National Contact Points for the OECD Guidelines for Multinational Enterprises", in *Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business Conduct by Sector* (OECD Publishing, 2014) <<http://dx.doi.org/10.1787/mne-2014-4-en>> accessed 31 October 2015.

<sup>590</sup> COM (2011) 681 final (n 1), 13, para 9.

<sup>591</sup> Interview with EU official on 15 April 2015.

While the individual Member States reports are available,<sup>592</sup> the information arising from those reports and the results of a questionnaire, which the Commission previously sent out to *all* Member States,<sup>593</sup> were combined and published together in the updated Compendium on CSR National Public Policies in the EU.<sup>594</sup> The 2014 Compendium is of a generic character in terms of tracking responses to all five of the CSR instruments taken up in the EU CSR Strategy. It contains only limited information about the extent to which the Commission is monitoring the commitments of European enterprises to international CSR guidelines and principles.

Based on a March 2013 analysis of 200 randomly selected European businesses (with over 1000 employees),<sup>595</sup> the Commission claims in the 2014 Compendium that 68% of the businesses sampled refer to 'corporate social responsibility' or an equivalent term in their activities while 40% of them refer to at least one international CSR instrument in their corporate strategies.<sup>596</sup>

However, in the case of the OECD Guidelines for MNEs those claims have to be weighed against the fact that in the corporate survey the analysis was only 'based on publicly available information found on company websites, including company annual or CSR/Sustainability reports, business principles or codes of conduct' and findings in relation to the expectations of the Commission as to the percentage of companies that refer to at least one of the UNGC, the OCED Guidelines for MNEs and ISO 26000.<sup>597</sup> In other words, this somewhat superficial analysis did not differentiate further as to the percentage of companies that chose one of those three CSR instruments over another and thus there were no individual results for the OECD Guidelines let alone any information concerning business compliance in Member States with this CSR instrument. In none of the ten Member States – Czech Republic, Denmark, France, Germany, Italy, Netherlands, Poland, Spain, Sweden and UK – whose companies were surveyed to determine the level of reference to CSR instruments, did the OECD Guidelines for MNEs feature very prominently.<sup>598</sup>

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<sup>592</sup> The seven Peer Review reports on CSR in Denmark, Finland, France, Italy, Netherlands, Sweden and the UK are available from the DG Employment, Social Affairs and Inclusion web-site <<http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=CSRprreport&mode=advancedSubmit&langId=en&policyArea=&type=0&country=0&year=0>> accessed 29 October 2015.

<sup>593</sup> European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (n 199)

<sup>594</sup> Ibid.

<sup>595</sup> European Commission, An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles (March 2013) <<http://ec.europa.eu/DocsRoom/documents/10372/attachments/1/.../en/.../native>> accessed 39 October 2015.

<sup>596</sup> European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (n 199), 10 <<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7726>> accessed 29 October 2015.

<sup>597</sup> European Commission, An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles (March 2013) 5 and 7 <<http://ec.europa.eu/DocsRoom/documents/10372/attachments/1/.../en/.../native>> accessed 39 October 2015.

<sup>598</sup> Ibid, 11-15.

## D. Conclusion

The revised 2011 edition of the OECD Guidelines for Multinational Enterprises is one of the leading instruments for CSR and business and human rights. Important in this respect is the inclusion of a new Chapter IV on 'Human Rights', in addition to some language in the 'General Policies' section, of the 2011 edition of the Guidelines.

The OECD instrument has acquired a further important dimension with the adoption in 2012 of a revised OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (otherwise known as OECD Due Diligence Guidance). Not only is this referenced in the US Dodd-Frank Act with respect to the potential sourcing of conflict minerals from the DRC but the EU Conflict Minerals Regulation also makes reference to it.

Another element of this instrument is its system of NCPs, which each OECD Member and adhering government must put in place in order to track responses by MNEs to the Guidelines. Not only are the NCPs required to promote the Guidelines and monitor compliance with them by MNEs, whether as the home or host state of the particular enterprise, but they must also deal with complaints against companies that have allegedly failed to adhere to the Guidelines' standards, including on human rights.

One means of tracking the performance of NCPs has been through the OECD Ministerial Council that reviews their activities on an annual basis. More recently, there has been a call from the BIAC, TUAC and OECD Watch, each of which tracks compliance with the OECD Guidelines for their particular sector or in the public interest. They have recently called for a strengthening of the NCPs to improve their overall performance. This requires the OECD to provide the necessary resources to fund an effective peer review programme and for the OECD Member and adherent governments to ensure that their NCPs are adequately equipped and staffed.

As far as the EU is concerned the tracking of responses to this particular OECD instrument proceeds slightly differently to the other four CSR instruments that are examined in this report. While the EU has tracked responses to the OECD Guidelines for MNEs as part of its CSR peer review, under the EU CSR Strategy, its exceptional quasi-membership of the OECD provides a unique platform on which to observe and more closely track CSR response of all Member States, including those that are not OECD Members or adherents to the Guidelines.



## V. ISO 26000 Guidance Standard on Social Responsibility (SR)

### A. ISO 26000 Guidance Standard on SR as CSR instrument

#### 1. Background to the instrument

ISO 26000 Guidance Standard on Social Responsibility (ISO 26000) differs in two important respects from the other four CSR instruments that are considered in this report. Its scope of social responsibility extends beyond the corporate sphere – in the usual sense of CSR – to cover *all* organisations and it is an instrument of private regulation even though its scope extends to both public and private organisations. Furthermore, ISO 26000 emanates from a private international organisation, whose standards have are available commercially and against which third-party certification is the norm. Consequently, the tracking of responses to ISO 26000 proceeds somewhat differently to the other four instruments and the EU is not particularly active in this domain, as explained in section B. below.

To begin with the ISO is an unusual type of non-state actor. While its name might suggest that it is an inter-governmental organisation, in fact the ISO is a world-wide federation or ‘network’ of 162 national standardising bodies (NSBs).<sup>599</sup> Often described as a ‘hybrid’ organisation since it is both an IGO and an NGO,<sup>600</sup> the ISO considers itself to be an international NGO (or INGO) that ‘forms a bridge between the public and private sectors’.<sup>601</sup>

Some but not all NSBs are non-state actors; their form varies considerably from one country to the next. Among some EU Member States, all of which are represented in the ISO, the NSB is a private sector organisation (sometimes a non-profit organisation), which has been established by national partnerships or industry and commerce associations.<sup>602</sup> In others Member States government officials dominate the composition of the NSB<sup>603</sup> or else the NSB is under the control of the state.<sup>604</sup> A further manifestation is a

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<sup>599</sup> The ISO itself prefers to use the term ‘network’ in describing the form that its membership takes <[http://www.iso.org/iso/home/about/iso\\_members.htm?membertype=membertype\\_MB](http://www.iso.org/iso/home/about/iso_members.htm?membertype=membertype_MB)> accessed 25 June 2015.

<sup>600</sup> Naomi Roht-Arriaza, “‘Soft Law’ in a ‘Hybrid’ Organization: The International Organization for Standardization’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International System*, (Oxford 2000), 265.

<sup>601</sup> See ‘About ISO’, <<http://www.iso.org/iso/about.htm>> accessed 26 July 2015.

<sup>602</sup> An example is the British Standards Institute (BSI), which was founded in 1901, as the first national society for standards; see Craig N Murphy and JoAnne Yates, *The International Organization for Standardization (ISO): Global governance through voluntary consensus* (Routledge 2009), 11. Today, the BSI operates as a Royal Charter Company, i.e. it is a non-profit distributing company; any profits that it does make, as a commercial entity, are ploughed back into the business; see further <<http://www.bsigroup.com/en-GB/about-bsi/governance/>> accessed 26 July 2015.

<sup>603</sup> An example of a European Member State NSB, which is largely staffed by government officials, is the Lithuanian Standards Board (LST), which is under the authority of the Ministry of Environment; see <[http://www.iso.org/iso/about/iso\\_members/iso\\_member\\_body.htm?member\\_id=1897](http://www.iso.org/iso/about/iso_members/iso_member_body.htm?member_id=1897)> accessed 26 July 2015.

<sup>604</sup> An example is the National Standards Authority of Ireland (NSAI), which is an autonomous state agency that operates under the National Standards Authority of Ireland Act 1996, and is responsible to the Minister of Enterprise, Trade and Employment; see further <<https://www.nsai.ie/>> accessed 27 July 2015.



hybrid NSB, which is staffed by trade association and industry officials yet counts government experts among its membership, or is overseen by the government.<sup>605</sup>

There are varying degrees of participation by NSB's in the ISO's work, depending upon their category of membership. There are currently 119 'Full Members' or 'Member Bodies', whose NSBs participate and vote in ISO technical and policy meetings, thereby influencing the development of ISO standards.<sup>606</sup> Full Members adopt and sell ISO International Standards nationally. Irrespective of their NSB's composition and/or their public/private character all EU Member States are Full Members of ISO.<sup>607</sup>

#### *a) ISO's role in standard-setting and the development of ISO 26000 as CSR instrument*

Until recently the ISO's main goal was to promote the creation and implementation of uniform standards that were highly specific to a particular good, service, material or process and more recently to promote so-called 'management systems standards' or MSS.<sup>608</sup> ISO 26000 sets itself apart from these traditional forms of uniform standard-setting by providing, for the first time, a standard that is *only* intended to be a 'guidance standard'. Thus, ISO 26000 does not contain any specific requirements with which the addressees of the standard must comply nor is it possible for an organisation to certify against it. Nevertheless, ISO 26000 does allow for the integration of social responsibility into an organisation's sustainable management system,<sup>609</sup> thereby including human rights and labour practices as two of its core subjects.<sup>610</sup> This factor, along with the inclusion of other core subject matter on, for example the environment, fair operating practices and consumer issues, marks it out as a CSR instrument.

As with any other ISO standard, the process of developing ISO 26000<sup>611</sup> began with the creation of a Technical Committee (TC), the membership of which was drawn from *interested* NSBs. This factor underscores not only the voluntariness of the standard but also the voluntary, participatory nature of ISO 26000's development process. Under the direction of the TC, negotiations were conducted and drafts of the proposed standard were prepared in various sub-committees and working groups, the latter of which were made up of independent experts who were deemed not to represent their national positions.

<sup>605</sup> For example, the Association Française de Normalisation (AFNOR), founded in 1926, is a national standards body under the law of 1901, which consists of nearly 2500 member companies. It is recognised by the public authorities who entrust the Ministry in charge of industry with the task of ensuring inter-ministerial coordination and control functions; see further <<http://www.afnor.org/fr>> 27 July 2015

<sup>606</sup> Two other categories are ISO Correspondent Members, of which there are 38, and ISO Subscriber Members, of which there are five countries; see <[http://www.iso.org/iso/about/iso\\_members.htm](http://www.iso.org/iso/about/iso_members.htm)> accessed 26 July 2015.

<sup>607</sup> See the ISO web-site for up-to-date information about its membership at

<sup>608</sup> For example, ISO 9000 on quality management standards and ISO 14000 on environmental regulation.

<sup>609</sup> Robert B Pojasek, 'ISO 26000 Guidance on Social Responsibility' (2011) 20(3) Environmental Quality Management 86, 91-92.

<sup>610</sup> Craig N Murphy and JoAnne Yates, *The International Organization for Standardization (ISO): Global governance through voluntary consensus* (Routledge 2009), 2.

<sup>611</sup> The ISO standard-setting process goes through five stages: preparatory, committee, enquiry, approval and publication stages; see Rebecca Schmidt, 'The ISO 26000 Process as a Model for Public-Private Cooperation in a Fragmented Transnational Regulatory Space', IRPA Working Paper GAL Series n. 5/2013, 16 <[www.irpa.eu](http://www.irpa.eu)> accessed 30 July 2015.

Thereafter, as is the practice with all new ISO standards, the sub-committees and the individual experts in the working groups met at regular intervals to discuss the comments on further Working Drafts<sup>612</sup> until broad agreement or 'consensus'<sup>613</sup> was reached on a draft international standard (DIS), based on a so-called 'Committee Draft' (or CD in ISO terminology). Broad agreement meant that as with any other ISO standard, ISO 26000 needed to pass through the enquiry stage as a DIS whereupon it was forwarded to all NSBs. They were given a period of three months to vote on editorial comments, followed by the approval stage when, from 12 July 2010 for a period of two months, ISO 26000 was circulated as a final draft international standard (FDIS). Final approval of the FDIS was announced on 13 September 2010, whereupon ISO 26000 came into being.

**b) *Status: non-certifiable and not for regulatory or contractual use***

From the outset one of the key issues was whether it would be possible to certify against the new SR standard, ISO 26000, as would normally be the case with ISO standards. Despite differing views among nominated experts and the verification industry in favour of firms being able to certify against the proposed guidance standard,<sup>614</sup> a consensus was eventually reached during the standard's development that ISO 26000 should be '[A] guidance document, and therefore not a specification document against which conformity can be assessed.'<sup>615</sup>

In the end, publication of ISO 26000 brought with it a clear instruction label that it could not be used for certification purposes or for regulatory or contractual use. Instead, ISO 26000 is a voluntary guidance standard and contains no specific requirements with which the addressees of the standard must comply. It means that the standard cannot be used as a basis for audits, conformity tests and certificates, or for any other kind of compliance statements.

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<sup>612</sup> Ibid.

<sup>613</sup> The ISO defines a standard as a 'document, established *by consensus* and approved by a recognized body that provides, for a common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.' [emphasis added]; see further *ISO/IEC Guide 2: 2004: Standardization and Related Activities – General Vocabulary* (2004), section 3.2.

<sup>614</sup> Pavel Castka and Michaela A Balzarova, 'A critical look on quality through CSR lenses: Key challenges stemming from the development of ISO 26000' (2007) 24(7) *International Journal of Quality and Reliability Management*, 738.

<sup>615</sup> Recommendations to the ISO Technical Management Board, ISO/TMB AG CSR N32 [2004], 1 <[http://iso26000.jsa.or.jp/\\_files/doc/2004/sagreconmmendation\\_eng.pdf](http://iso26000.jsa.or.jp/_files/doc/2004/sagreconmmendation_eng.pdf)> accessed 30 July 2015.

## 2. Overview of ISO 26000

The International Standard ISO 26000 *Guidance on social responsibility* contains seven main clauses, two Annexes<sup>616</sup> and a Bibliography.<sup>617</sup> Considered by many during the development process to be excessively long (126 pages) and complex in nature,<sup>618</sup> ISO 26000 provides a fairly comprehensive if not entirely satisfactory account of SR. Its introductory sections make the case for SR. Recognising the work that has previously been done (most obviously in the CSR sphere) ISO 26000 aims to develop an international consensus on SR. It provides guidance on translating the principles of SR across seven core subjects into effective actions and ‘refining’ existing best practices.<sup>619</sup> More altruistically, it aims to disseminate information globally for ‘the good of the international community’.<sup>620</sup>

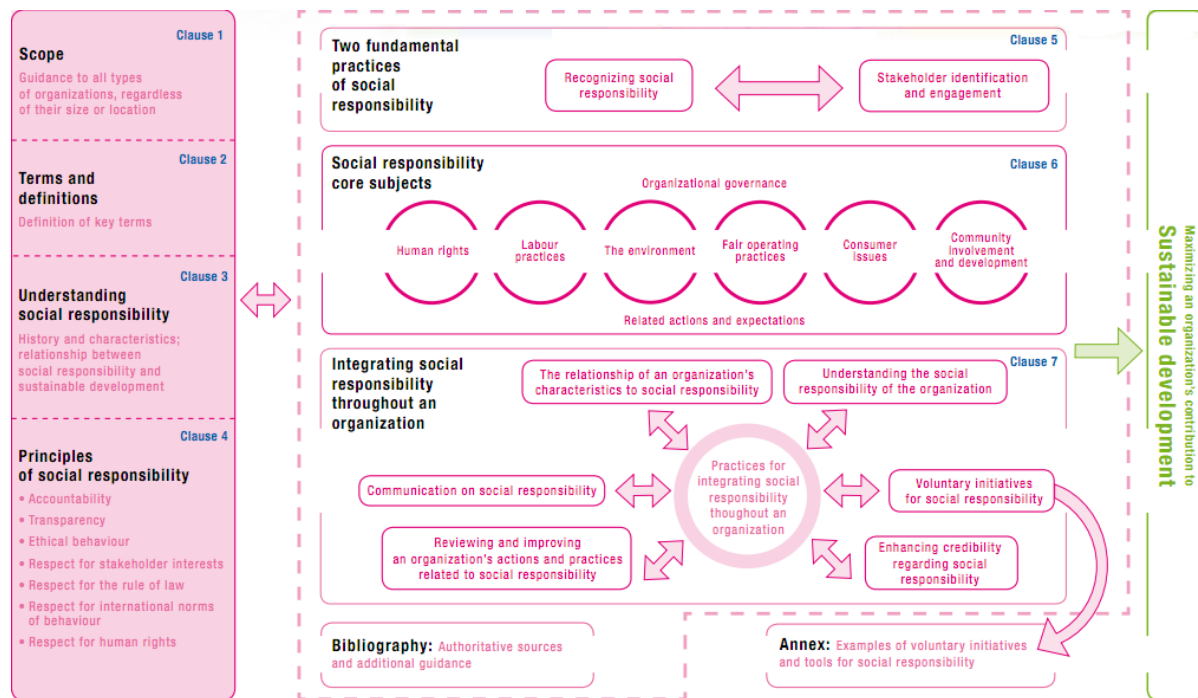


Figure 1: Schematic overview of ISO 26000 (Source: ISO Project Overview, 2010).

<sup>616</sup> Annex A: Examples of voluntary initiatives and tools for social responsibility’ and Annex B: Abbreviations, ISO 26000, Guidance on Social Responsibility (first edition) 2010-11-01, ISO, Geneva, at 85-86, and 98 respectively.

<sup>617</sup> Ibid, 99-106.

<sup>618</sup> See IFAN who, in commenting on the first review of ISO 26000, have suggested a future, simplified and revised version of no more than 50 pages, ‘IFAN Position on a possible revision of ISO 26000:2010’, C.1, at 2, IFAN No 14-2013, December 2013; see link to document from <[http://www.26k-estimation.com/html/review\\_of\\_iso\\_26000\\_2010\\_.html](http://www.26k-estimation.com/html/review_of_iso_26000_2010_.html)> accessed 13 August 2015.

<sup>619</sup> Halina Ward, ‘The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy’ (2011) 12(2) Theoretical Inquiries in Law, 666, 682.

<sup>620</sup> ISO 26000 Project Overview (ISO 2010), 3 <[http://www.iso.org/iso/iso\\_26000\\_project\\_overview.pdf](http://www.iso.org/iso/iso_26000_project_overview.pdf)> accessed 31 July 2015.

With reference to fig. 1 above, the content of Clauses 1 through 7 (sub-sections *a*) through *f*)) is briefly explained. Particular attention is paid in sub-section *f*) to the development of Clause 6.3 on human rights and briefly to Clause 6.4 on labour practices, which are two of the core subject matter areas for ISO 26000.

### *a) Scope*

The scope of ISO 26000 is broad, as is evident from the range and type of organisation it covers (see fig. 1 above). Its intention is to provide a ‘harmonized, globally relevant guidance’ on SR<sup>621</sup> for both private and public sectors organisations of *all* types, ‘regardless of their size or location, whether operating in developed or developing countries’.<sup>622</sup> The guidance standard on SR is, however, framed and limited by a series of statements that are taken up in Clause 1 of ISO 26000, namely that it is not an MSS nor is certification permitted.<sup>623</sup>

Its scope is further limited by a statement concerning the standard’s implications under the rules of the WTO, which states that ‘it is not intended to be interpreted as an “international standard”, “guideline” or “recommendation”, nor is it intended to provide a basis for any presumption or finding that a measure is consistent with WTO obligations.’<sup>624</sup> Moreover, it cannot form ‘the basis for legal actions, complaints, defences or other claims in any international, domestic or other proceeding, nor is it intended to be cited as evidence of the evolution of customary international law.’<sup>625</sup>

### *b) Terms and definitions*

Clause 2 provides definitions of key terms (see fig. 1 above), of which the following are singled out as most significant for the purposes of this report. The first is ‘**social responsibility**’, which is defined as

- responsibility of an **organization** for the impacts of its decisions and activities on society and the **environment**, through transparent and **ethical behaviour** that
- contributes to **sustainable development**, including health and the welfare of society;
  - takes into account the expectations of **stakeholders**;
  - is in compliance with applicable law and consistent with international norms of behaviour; and
  - is integrated throughout the **organization** and practised in its relationships.<sup>626</sup>  
[reference to specific sub-clauses omitted]

<sup>621</sup> *ISO 26000 Project Overview* (ISO 2010), 3 <[http://www.iso.org/iso/iso\\_26000\\_project\\_overview.pdf](http://www.iso.org/iso/iso_26000_project_overview.pdf)> accessed 31 July 2015.

<sup>622</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, vi, ISO, Geneva.

<sup>623</sup> *Ibid*, Clause 1.

<sup>624</sup> *Ibid*.

<sup>625</sup> *Ibid*.

<sup>626</sup> *Ibid*, Clause 2.18, to which is appended NOTE 1 to entry: Activities include products, services and processes. Note 2 to entry: Relationships refer to an organisation's activities within its **sphere of influence**.

There is a sufficiently broad definition of '**organization**' to cover any 'entity or group of people and facilities with an arrangement or responsibilities, authorities and relationships and identifiable objectives'.<sup>627</sup> Due to disagreement about the definition of the term 'organisation' during the development of the standard, two clarifications were issued upon adoption of ISO 26000. One addresses the issue of deference to the role of the state.<sup>628</sup> The other concerns reference to small and medium-sized organisations (SMOs),<sup>629</sup> which was added at the insistence of NORMAPME, the overarching body, representing the interests of 'European small and medium enterprises in standardization'.<sup>630</sup>

'**Organisational governance**' is the 'system by which an **organisation** makes and implements decisions in pursuit of its objectives'<sup>631</sup> (see further section 2.e) below). The '**impact of an organisation**' is understood as an '**impact** positive or negative change to society, economy or the **environment**, wholly or partially resulting from an organization's past and present decisions and activities'.<sup>632</sup>

**International norms of behaviour** are dealt with extensively in Clause 4, which covers the principles and practices of SR (see section 2.d) below). It extends to 'expectations of socially responsible organizational behaviour', and implicitly introduces the notion that such behavioural norms apply '*in the absence of* adequate legally binding social or environmental safeguards at national level'.<sup>633</sup> Critically, it is virtually impossible to establish what the content of the norms is.<sup>634</sup>

A similar issue arises with the definition of '**sphere of influence**', which is intrinsic to the UNGC<sup>635</sup> and is carried over into ISO 26000 (see section 2.d) below). It means the 'range/extent of political, contractual, economic or other relationships through which an **organization** has the ability to affect the decisions or activities of individuals or organizations'<sup>636</sup> with two explanatory notes.<sup>637</sup>

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<sup>627</sup> Ibid, Clause 2.12.

<sup>628</sup> Ibid, Clause 2.12, to which is appended NOTE 1 to entry: For the purposes of this International Standard, organisation does not include government acting in its sovereign role to create and enforce law, exercise judicial authority, carry out its duty to establish policy in the public interest or honour the international obligations of the state.

<sup>629</sup> Ibid, Clause 2.12, to which is appended NOTE 2 to entry: Clarity on the meaning of small and medium-sized organizations (SMOSs) is provided in 3.3 and Box 3, under Clause 3.3, *ibid*, 8.

<sup>630</sup> NORMAPME is the European Office of Crafts, Trades and Small and Medium-sized Enterprises for Standardization, founded by UEAPME in 1996.

<sup>631</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, ISO, Geneva, Clause 2.13.

<sup>632</sup> Ibid, Clause 2.9.

<sup>633</sup> Halina Ward, 'The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy' (2011) 12(2) *Theoretical Inquiries in Law*, 666, 694.

<sup>634</sup> Ibid.

<sup>635</sup> See section III of this report.

<sup>636</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, 4, ISO, Geneva, Clause 2.19.

<sup>637</sup> Ibid, NOTE 1 to entry: The ability to influence does not, in itself, imply a responsibility to exercise influence, and NOTE 2 to entry: Where this term appears in this International Standard, it is always intended to be understood in the context of the guidance in 5.2.3. [Social responsibility and an organization's sphere of influence] and 7.3.3 [An organization's sphere of influence].

There are some further more specific definitions in ISO 26000 that one might expect to find in the protection of human rights. They include ‘**gender equality**’ which is defined as ‘equitable treatment for women and men’<sup>638</sup> with an explanatory note,<sup>639</sup> and the term ‘**vulnerable groups**’ is also defined. It means a ‘group of individuals who share one or several characteristics that are the basis of discrimination or adverse social, economic, cultural, political or health circumstances, and that cause them to lack the means to achieve their rights or otherwise enjoy equal opportunities’.<sup>640</sup>

### *c) Principles and practices of SR*

For ISO 26000 the focus of social responsibility – and thus in turn CSR – emanates from its concern with making sustainable development the predominant goal of SR, which is taken up in Clause 4.<sup>641</sup> However, that same part of the instrument goes on to explain in detail what is meant by the seven basic ‘Principles of Social Responsibility’ namely: Accountability; Transparency; Ethical behaviour; Respect for stakeholder interests; Respect for the rule of law; Respect for international norms of behaviour; and Respect for human rights (see fig. 1 above).

They are combined with two fundamental practices in the field of SR, which are taken up in Clause 5 of the International Standard (see fig. 1 above). The first practice involves ‘Recognising socially responsibility’,<sup>642</sup> which is set out as three relationships, namely, ‘between the organization and society’, ‘between the organization and its stakeholders’ and ‘between the stakeholders and society’.<sup>643</sup>

One way for an organisation to effectively identify its social responsibility is to become familiar with the seven core subjects of SR (see section 2.d below). Another way is to take account of the fact that ‘[A] socially responsible organisation ... accepts responsibility for addressing the impacts of its decisions and activities though transparent and ethical behaviour’. A third way, is where an organisation has the ability to affect the behaviour of parties with which it has a relationship because those parties fall within its ‘sphere of influence’. This may include parts of the value chain or supply chain as well as formal and informal associations in which the organisation participates.

This approach to SR, whereby an organisation’s SR is determined by the degree of control or influence it has over another’s conduct, reflects a ‘leverage-based approach’ to corporate responsibility,<sup>644</sup> which is founded on the concept of sphere of influence. The term sphere of influence was introduced into the SR discourse by the UNGC,<sup>645</sup> the architects of which were Professor John Ruggie and George Kell. However,

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<sup>638</sup> Ibid, Clause 2.8.

<sup>639</sup> Ibid, NOTE 1 to entry: This includes equal treatment or, in some instances, treatment that is different but considered equivalent in terms of rights, benefits, obligations and opportunities.

<sup>640</sup> Ibid, Clause 2.26.

<sup>641</sup> Ibid, Clause 4.1.

<sup>642</sup> Ibid, Clause 5.2.

<sup>643</sup> Ibid, Clause 5.2.1.

<sup>644</sup> Stepan Wood, ‘The Case for Leverage-Based Corporate Human Rights Responsibility’ (2012) 22(1), Business Ethics Quarterly, 63-98, 64.

<sup>645</sup> See section III of this report.

when it came to its potential inclusion in DIS 26000 Ruggie, who was by this time the UN Special Representative to the UN Secretary General (UNSRSG) on Business and Human Rights, cautioned against it. He was of the view that there were ‘discrepancies between the evolving conception of “spheres of influence” within his own process [‘Protect and Respect, Remedy Framework’], and that adopted within parts of the ISO 26000 text that did not specifically address human rights’,<sup>646</sup> other than Clause 6.3 on human rights (see section 2.d below). In particular, Ruggie was concerned about ‘the “conflation of influence and responsibility in parts of the Guidance document”’.<sup>647</sup> This was seen as being ‘contrary to the UN framework on the corporate responsibility to respect human rights, particularly as it relates to the due diligence necessary to discharge this responsibility.’<sup>648</sup>

Unfortunately, this is one of the few moments in the parallel development of three of the five CSR instruments under review, namely the UNGPs, the OECD Guidelines for MNEs and ISO 26000, where potential overlaps and inconsistencies between the instruments was addressed. However, Ruggie’s intervention had no impact on the FDIS which includes the sphere of influence approach, which is seen as reflecting broad societal expectations and is consistent with due diligence. Instead, its inclusion is perceived as simple and intuitive and builds on existing ISO standards. It is seen as avoiding a false distinction between supporting human rights and avoiding abuses; rather it is part of the solution to business and human rights problems.<sup>649</sup>

The second practice in Clause 5.3 focuses on ‘Stakeholder Identification and Engagement’<sup>650</sup> with specific sections on ‘Stakeholder identification’ and ‘Stakeholder engagement’, both of which are seen as essential to addressing an organisation’s SR.<sup>651</sup>

#### *d) Core subjects of SR, including respect for human rights and labour practices*

The organising principle for ISO 26000 is ‘organizational governance’ (Clause 6.2).<sup>652</sup> This is clear from fig. 2 below where it is the main focus of the standard, around which are grouped a further six core subjects: human rights (Clause 6.3); labour practices (Clause 6.4); the environment (Clause 6.5); fair operating

<sup>646</sup> Halina Ward, ‘The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy’ (2011) 12(2) *Theoretical Inquiries in Law*, 666, at 696.

<sup>647</sup> Note on ‘sphere of influence’ in DIS 26000, which was taken up in ISO/TMB WG SR N 186, which includes the *Copenhagen Key Topics Discussion Document – ISO/TMB/WG SR – IDTF N111*, 11 (4 May 2010), <<http://isotc.iso.org/livelink/livelink?func=ll&objId=8742970&objAction=browse&viewType=1>> accessed 16 September 2015.

<sup>648</sup> Ibid; see Adrian Henriques, Chair of the UK NSB, the British Standards Institute (BSI) UK Mirror Committee, *ISO and the Concept of “sphere of Influence”* 1 (2010) <[www.henriques.info/.../Sphere%20of%20Influence%20-%20Ruggie%20](http://www.henriques.info/.../Sphere%20of%20Influence%20-%20Ruggie%20)> accessed 16 September 2015.

<sup>649</sup> Stepan Wood, ‘In Defence of the Sphere of Influence’, Institute for Research and Innovation in Sustainability (IRIS) York University, Toronto. Blog, May 2010, ><http://www.irisyorku.ca/2010/05/in-defence-of-the-sphere-of-influence/>> accessed 16 September 2015.

<sup>650</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, ISO, Geneva, Clause 5.3.

<sup>651</sup> Ibid, Clause 5.3.2.

<sup>652</sup> Ibid, Clause 6.2.



practices (Clause 6.6); consumer issues (Clause 6.7); and lastly, community involvement and development (Clause 6.8).<sup>653</sup> The core subject matter is treated holistically and as (mutually) interdependent. The text of the core subject begins with a descriptive ‘Overview’ of the theme of the relevant Clause. It then proceeds to outline ‘Principles and considerations where needed. This is followed by a series of ‘Related actions and expectations’. There follows a brief discussion of the following three core subjects: Clause 6.2 on Organization governance; Clause 6.3 on Human rights; and Clause 6.4 on Labour practices.



Figure 2: The seven core subjects – specific numbers refer to corresponding Clause numbers in ISO 26000 (Source: ISO)

<sup>653</sup> ISO 26000 Project Overview (ISO 2010), 4 <[http://www.iso.org/iso/iso\\_26000\\_project\\_overview.pdf](http://www.iso.org/iso/iso_26000_project_overview.pdf)> accessed 31 July 2015.



## (1) Clause 6.2 Organizational governance

Aside from being the organising principle behind ISO 26000, the concept of ‘Organizational governance’ is literally central to the other six core subjects (see fig. above). In ISO terminology organisational governance is also understood as ‘the system by which an organization makes and implements decisions in pursuit of its objectives.’<sup>654</sup> As with other clauses in ISO 26000, the scope of organisational governance comprises both the formal and informal – in terms of governance mechanisms – and in terms of the differing size and ‘the types of organisation and environmental, economic, political, cultural and social context in which it operates.’<sup>655</sup> Clause 6.2 proceeds to cover ‘Organizational governance and social responsibility’<sup>656</sup> and ‘Principles and considerations’,<sup>657</sup> among the latter of which ‘leadership’ has a role to play while due diligence may inform and organisation’s ability to address issues of social responsibility.<sup>658</sup> Finally, ‘Decision-making processes and structures’ are dealt with under this core-subject.<sup>659</sup>

## (2) Clause 6.3 Human rights

When it comes to Clause 6.3 on human rights this is one of the longest sections of ISO 26000. Coverage of human rights is broken down into three main areas: ‘Overview of human rights’; ‘Principles and considerations’; and a much longer section on ‘Human rights issues’ followed by one on ‘Related actions and expectations’.

The ‘Overview of human rights’ with its section on ‘Organizations and human rights’ sets out the premise that ‘[H]uman rights are the basic rights to which all human beings are entitled’ and then elaborates on the types of human rights that are covered, i.e. civil and political rights as well as economic, social and cultural rights with examples from each of those two categories.<sup>660</sup> This is further endorsed by reference to the ‘primacy of human rights’ that has been emphasised by the international community in the International Bill of Human Rights and core human rights instruments, which are taken up in Box 6, i.e. a listing of all the major human rights conventions along with the Universal Declaration of Human Rights.<sup>661</sup> For users of ISO 26000, the listing technique is not particularly helpful because it gives no indication as to the scope and content of the fundamental human rights that are so covered.

Of note, however, is the fact that the additional section on ‘Human rights and social responsibility’ in Clause 6.3.1.2 has been developed with the ‘Ruggie framework for human rights and the due diligence-

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<sup>654</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, ISO, Geneva, Clause 6.2.1.1.

<sup>655</sup> Ibid.

<sup>656</sup> Ibid, Clause 6.2.1.

<sup>657</sup> Ibid, Clause 6.2.2.

<sup>658</sup> Ibid.

<sup>659</sup> Ibid, Clause 6.2.3.

<sup>660</sup> Ibid, Clause 6.3.1.1.

<sup>661</sup> Ibid.

based approach for companies' in mind,<sup>662</sup> with its emphasis on the importance of human rights for the rule of law, social justice and fairness. It can be criticised on the ground that Clause 6.3.1.2 emphasises the duty (but not the obligation<sup>663</sup>) and the responsibility of states to 'respect, protect and fulfil human rights.'<sup>664</sup> At the same time it only states that an organisation 'has the responsibility to respect human rights, including within its sphere of influence',<sup>665</sup> which is partly in line with the UN Guiding Principles.<sup>666</sup> However, it does not take heed of Ruggie's earlier criticism that this is contrary to the UN framework on the corporate responsibility to respect human rights because the Guidance on SR conflates the two concepts of 'sphere of influence' and 'responsibility' (see section 2.c) above) and, as will be recalled, the sphere of influence was eventually omitted from the UNGPs. Instead, the emphasis in the UNGPs is on the need for business enterprises to 'address adverse human rights impacts with which they are involved'<sup>667</sup> – an issue that Clause 6.3.1.2 on 'Human rights and social responsibility' does not mention.<sup>668</sup>

The next section of Clause 6.3 on 'Human Rights', covers 'Principles and considerations', noting that all human rights are fundamental in character, i.e. they are 'inherent, inalienable, universal, indivisible and interdependent'.<sup>669</sup> Where ISO 26000 does reflect the UN Guiding Principles is with respect to the lengthy section on 'Human rights issues' that covers *inter alia* 'Due diligence',<sup>670</sup> 'Human rights risk situations',<sup>671</sup> 'Avoidance of complicity',<sup>672</sup> and 'Resolving grievances'.<sup>673</sup>

Noteworthy in this respect is the inclusion in Clause 6.3.3 on 'Due diligence' of specific language relating to the responsibility of organisations to conduct *human rights due diligence*, which must include identifying, preventing and addressing 'actual or potential human rights impacts resulting from their activities or the activities of those with which they have relationships'.<sup>674</sup> This partially echoes the language of Guiding Principle 17 of the UNGPs that calls for business enterprises 'to identify, prevent, mitigate and account for how they address their adverse human rights impacts' by means of a process that 'should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.'<sup>675</sup>

<sup>662</sup> Adrian Henriques, 'ISO 26000: a standard for human rights?' (2010) 1(1) Sustainability Accounting, Management and Policy Journal, 103, 104.

<sup>663</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UNGP 1.

<sup>664</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, 24, ISO, Geneva, Clause 6.3.1.2.

<sup>665</sup> Ibid.

<sup>666</sup> UNHRC, 'Report by Special Representative John Ruggie on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc A/HRC/17/31, 13, UNGP 11.

<sup>667</sup> Ibid.

<sup>668</sup> Ibid, Clause 6.3.1.2.

<sup>669</sup> Ibid, Clause 6.3.2.1.

<sup>670</sup> Ibid, Clause 6.3.3.

<sup>671</sup> Ibid, Clause 6.3.4.

<sup>672</sup> Ibid, Clause 6.3.5.

<sup>673</sup> Ibid, Clause 6.3.6.

<sup>674</sup> Taken up in a 'Description of the issue' of [due diligence] in Clause 6.3.3.1, ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, 25, ISO, Geneva.

<sup>675</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UNGP 17.

While Clause 6.3.3 on Due diligence is not as expansive as Guiding Principle 17 and related Guiding Principle 18, with their respective commentaries,<sup>676</sup> there is a call for ‘Related actions and expectations’ with respect to an organisation’s exercise of due diligence to include such matters as having ‘a human rights policy for the organization’, ‘means of assessing how existing and proposed activities may affect human rights’, ‘means of integrating the human rights policy through the organisation’, ‘means of tracking [human rights] performance over time’, and ‘actions to address the negative impacts of ... [an organisation’s] decisions and activities’.<sup>677</sup>

More specifically the section of Clause 6.3 on human rights issues contains further terminology and explanation concerning substantive human rights protection. This includes ‘Discrimination and vulnerable groups’,<sup>678</sup> ‘Civil and political rights’,<sup>679</sup> ‘Economic, social and cultural rights’,<sup>680</sup> and ‘Fundamental principles and rights at work’.<sup>681</sup> The latter provision in ISO 26000 endorses the ILO Declaration on Fundamental Principles and Rights at Work,<sup>682</sup> with specific reference to the issue of ‘Child labour’, which is also highlighted in a separate Box 7.<sup>683</sup>

### (3) Clause 6.4 Labour practices

Clause 6.4 on Labour Practices is also one of the seven core subjects (see fig. 2 above). It too is broken down into a series of sub-sections that encompass ‘Overview of labour practices’,<sup>684</sup> ‘Principles and considerations’<sup>685</sup> and, as with Clause 6.3 on Human rights, a set of five issues specifically on ‘Labour practices’ to include ‘Employment and employment relationships’,<sup>686</sup> ‘Conditions of work and social protection’,<sup>687</sup> ‘Social dialogue’,<sup>688</sup> ‘Health and safety at work’,<sup>689</sup> and ‘Human development and training in the workplace’.<sup>690</sup> It should be noted that the development of Clause 6.4 on Labour practices in ISO 26000 was based on a particular view of SR in the field of business and industry, which was an ‘exercise of compliance with legal and social norms as well as the product of a dialogue between the firm and its stakeholders.’<sup>691</sup>

<sup>676</sup> Ibid, Principles 17 and 18, at 16-18.

<sup>677</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, 25, ISO, Geneva, Clause 6.3.3.2.

<sup>678</sup> Ibid, Clause 6.3.7.

<sup>679</sup> Ibid, Clause 6.3.8.

<sup>680</sup> Ibid, Clause 6.3.9.

<sup>681</sup> Ibid, Clause 6.3.10.

<sup>682</sup> ILO, ‘ILO Declaration on Fundamental Principles and Rights at Work and Follow-up’, (n.**Error! Bookmark not defined.**).

<sup>683</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, ISO, Geneva, Box 7 – Child labour.

<sup>684</sup> Ibid, Clause 6.4.1.

<sup>685</sup> Ibid, Clause 6.4.2.

<sup>686</sup> Ibid, Clause 6.4.3.

<sup>687</sup> Ibid, Clause 6.4.4.

<sup>688</sup> Ibid, Clause 6.4.5.

<sup>689</sup> Ibid, Clause 6.4.6.

<sup>690</sup> Ibid, Clause 6.4.7.

<sup>691</sup> Corinne Gendron, ‘Social Responsibility and International Law: Reflections about Labour Issues’ (2013) 2 *Revue de l’Organisation Responsable / Responsible Organization Review*, 49, 53.

Development of the ISO guidance standard on SR also called for comprehensive collaboration with the ILO, which is an international organisation with a tripartite structure (governments, workers and employers) that has primary responsibility for setting international labour standards. With the issue of Labour practices (and not 'Labour Standards') the ISO came under considerable pressure to cooperate comprehensively with the ILO on developing this particular Clause in what was to become ISO 26000: 2010. ILO-ISO cooperation was sealed in 2005 with a Memorandum of Understanding (MoU) on Social Responsibility (see section 4 *a*) below).

From the very outset the ILO had a near veto on 'ensuring that any ISO International Standard in the field of SR' would be 'consistent with and complement the application of international labour standards worldwide, including fundamental rights at work.'<sup>692</sup> This is also reflected in ISO 26000 under the heading 'Organization of labour practices' where the very notion of 'labour practices' endorses the tripartite structure of the ILO, including 'the recognition of worker organizations and representation and participation of both worker and employer organizations in collective bargaining, social dialogue and tripartite consultation to address social issues related to employment', as set out in a separate Box 8.<sup>693</sup>

#### *e) Significance of Annex A on Social Responsibility*

A further point to note about this CSR instrument is that it contains an Annex with some 'Examples of voluntary initiatives and tools for social responsibility', which is labelled as '(informative)'.<sup>694</sup> Despite its somewhat innocuous title, Annex A proved extremely controversial during early discussions about its content. This is undoubtedly due to the fact that development of ISO 26000 – in parallel with the second revision of the OECD Guidelines for MNEs and the UNGPs – created 'a certain competition between social responsibility norms and their place in an overall marketplace of norms.'<sup>695</sup> The degree of institutional competitiveness<sup>696</sup> that exists in the fragmented regulatory space of CSR is exemplified in the structure of Annex A, which contains:

- a Table A.1 with 'Examples of cross-sectoral initiatives' for SR, which in turn is broken down into those cross-sectoral initiatives for SR that are: 1. Intergovernmental Initiatives, e.g. the UNGC; 2. Multi-stakeholder Initiatives, e.g. Amnesty International Human Rights Principles

<sup>692</sup> Memorandum of Understanding between the International Labour Organization and the International Organization for Standardization in the Field of Social Responsibility, 4 March 2005 [hereinafter ISO-ILO MoU] Article 1.1 <<http://www.ilo.org/empent/Informationresources/WCMS.../lang.../index.html>> accessed 20 August 2015.

<sup>693</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, ISO, Geneva, Clause 6.4.1.1,

<sup>694</sup> Ibid, Annex A (informative), being 'Examples of voluntary initiatives and tools for social responsibility.'

<sup>695</sup> Halina Ward, 'The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy' (2011) 12(2) *Theoretical Inquiries in Law*, 666, 684.

<sup>696</sup> For an examination of 'institutional competitiveness' in the marketplace, see Martin Marcussen and Lars Bo Kaspersen, 'Globalisation and Institutional Competitiveness' (2007) 1 *Regulation and Governance*, 183, 184.

for Companies; and 3. Single Stakeholder Initiatives, e.g. World Business Council for Sustainable Development (WBCSD);<sup>697</sup> and

- a Table A.2 with ‘Examples of and sectoral initiatives’ for SR that are list a variety of international and transnational initiatives in specific sectors of business and industry such as: Agriculture; e.g. Global Gap; Clothing, e.g. Clean Clothes Campaign; Extractive Industries, e.g. Extractive Industries Transparency Initiative (EITI) and Finance/Investment, e.g. the Equator Principles or the Principles for Responsible Investment (PRI);<sup>698</sup>

Each of those sets of examples of cross-sectoral and sectoral initiative for SR needs to be read against the six of the core subjects (contained in Clauses 6.2 through 6.8) and the practices for integrating social responsibility (contained in Clauses 5.2 and 5.3 as well as 7.2 through 7.7). This is no mean feat, given not only the length of ISO 26000 but also its complex and intricate web of factual and normative information, which calls for some deciphering.

Experts were also worried about the possible listing of certifiable initiatives within the Annex because were this to happen it might inadvertently imply that ISO 26000 *itself* somehow endorsed certification as a means of verifying the adoption of ISO 26000.<sup>699</sup> Eventually, explanatory text was added in Box 16, denouncing any initiative to certify against ISO 26000.<sup>700</sup> Specifically, the ‘[I]mplementation of any tool or initiative listed in Annex A – including those that involve certification – cannot be used to claim conformity to ISO 26000 or to show its adoption or implementation.’<sup>701</sup>

## B. Tracking responses to ISO 26000 Guidance Standard on SR

Tracking responses to ISO 26000 Guidance Standard on SR proceeds somewhat differently to the other four CSR instruments examined in this report. As was noted at the outset, ISO 26000 is a private initiative and its scope is broader than just CSR since its focus on social responsibility is intended to cover *all* organisations not just those in the corporate sphere. If taken to its logical conclusion this also means that ISO 26000 should be applied to the EU itself (see section 2. c) below). ISO 26000 is also an instrument of private regulation, whose scope extends to both public and private organisations but whose standards have traditionally been adopted and sold nationally. Moreover, ISO standards are usually capable of third-party certification even though this has been categorically ruled out for ISO 26000 (see 1. b) above).

<sup>697</sup> ISO 26000, *Guidance on Social Responsibility* (first edition) 2010-11-01, ISO, Geneva, Table A.1 – Examples of cross-sectoral initiatives.

<sup>698</sup> Ibid, Table A.2 – Examples of sectoral initiatives.

<sup>699</sup> Halina Ward, ‘The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy’ (2011) 12(2) *Theoretical Inquiries in Law*, 666, 684.

<sup>700</sup> *Guidance on Social Responsibility* (first edition) 2010-11-01, ISO, Geneva, Box 16, which is taken up in Clause 7.8.4, ISO 26000.

<sup>701</sup> Ibid.

As a consequence, the primary focus in this section is on tracking the adoption and implementation of ISO 26000, which takes place at the institutional level within the ISO and its federation of NSBs, i.e. through the ISO Members themselves. That applies equally to the 28 EU Member States, which are all Full ISO Members. A secondary focus is on the extent to which the EU contributes to tracking and fostering responses to ISO 26000 by means of its peer review of National Action Plans on CSR, through the European Committee for Standardisation (CEN)<sup>702</sup> and the potential application of ISO 26000 to the EU as a ‘covered’ organisation.

### **1. Tracking responses to the adoption and implementation of ISO 26000 by the ISO and the Post Publication Organisation (PPO)**

Until now the main focus on tracking responses to ISO 26000 has been largely in the sphere of ISO activities. This exercise is directed towards tracking the adoption and implementation of the standard by individual NSBs and its dissemination and response among business organisations in individual ISO Member countries.

#### ***a) Tracking responses to confirmation, revision or withdrawal of ISO 26000***

In line with its normal practice, the ISO has carried out a systematic review of ISO 26000 to determine whether the standard is still current or whether it needs revising. This is normally done every five years after publication of an international standard, or three years after publication if the standard is considered to be an important one, which is the case with ISO 26000.

The periodic review of a published ISO standard requires individual NSBs to inform the organisation whether it has been adopted in their country, translated, used in support of national legislation, etc. The ISO also goes through a formal process of asking its Members whether they wish to keep the standard ‘as is’, to revise/amend it, or to withdraw it. This happened in October 2013 when the ISO/Central Secretariat (ISO/CS) sent a letter to all ISO NSBs and other so-called ‘D-Liaison organizations’, which ‘make a technical contribution to and participate actively in the work of a working group’,<sup>703</sup> and had participated in the

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<sup>702</sup> European Committee for Standardisation (= Comité Européen de Normalisation or CEN), <<https://www.cen.eu/Pages/default.aspx>> accessed 29 September 2015.

<sup>703</sup> The ‘D-Liaison organisations’ that were involved in developing ISO 26000 and subsequently are: AccountAbility; African Institute of Corporate Citizenship (AICC); American Industrial Hygiene Association (AIHA); Business and Industry Network; European Commission; Ecologists Linked for Organizing Grassroots Initiatives and Action (ECOLOGIA); European Foundation for Quality Management (EFQM); EIRIS Foundation and Ethical Investment Research Services (EIRIS); International Real Estate Federation (FIABCI); Forum Empresa/Ethos Institute; Fair Labor Association (FLA); Global Reporting Initiative (GRI); International Association of Business Communicators (IABC); International Chamber of Commerce (ICC); International Council of Mining and Metals (ICMM); Institute for Energy and Environment of the French speaking countries (IEPF); International Federation of Standards Users (IFAN); International Institute for Environmental and Development (IIED); International Institute for Sustainable Development (IISD); International Labour Organization (ILO); Latin-American Institute for Quality Assurance (INLAC); Inter-American CSR Network; International Organization of Employers (IOE); International Petroleum Industry

development of ISO 26000.<sup>704</sup> Following more than 18 months of deliberations among ISO Members the voting period, by which consensus is reached, ended on 17 March 2014.

At the end of the review process, the NSBs' voting pattern provides some idea as to the extent to which ISO 26000 has been adopted, translated and/or used in support of national legislation and thus, whether ISO Members wish to 'confirm', 'confirm and correct', 'revise/amend' or 'withdraw' it. The results from the 2013/2014 exercise reveal that of the 117 Members, entitled to participate in the review, only 34 did so, of which 20 voted in favour of confirmation;<sup>705</sup> one for 'confirm and correct',<sup>706</sup> with eight suggesting revision or amendment of ISO 26000<sup>707</sup> but none voting for its withdrawal. Based on these results, ISO 26000 was confirmed and the standard will be kept unchanged for a further three years before another systematic review commences.<sup>708</sup>

The main concern around conducting a periodic review of the viability of ISO 26000 centred on the fact that it has been in existence for a relatively short period of time<sup>709</sup> and therefore any practical experience with it was somewhat limited. The independent International Federation of Standards Users (IFAN), which has been monitoring the further development of the standard, voiced concern that a revised ISDO 26000 should be developed 'on the basis of: a) a systematic evaluation of that increased experience; b) the outcome of a research project (yet to be conducted) on "Globally Agreed Set of Societal Values;" and c) an investigation of the relevance of ISO 26000 in the context of practiced sustainability management.'<sup>710</sup>

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Environmental Conservation Association (IPIECA); ISEAL (International Social and Environmental Accreditation and Labelling) Alliance; International Trade Union Confederation (ITUC); European Office of Crafts, Trades and Small and Medium-sized Enterprises for Standardisation (NORMAPME); Organization for Economic Cooperation and Development (OECD); International Association of Oil and Gas Producers; Red Puentes; Social Accountability International (SAI); Transparency International; UN Environmental Programme (UNEP); UN Division for Sustainable Development (UNSD); UN Conference on Trade and Development (UNCTAD); UN Global Compact; UN Industrial and Development Organization (UNIDO); World Business Council on Sustainable Development (WBCSD); World Health Organization (WHO); and the World Savings Banks Institute (WBSI) / European Savings Banks Group (ESBG).

<sup>704</sup> Letter from Kevin McKinley, Deputy Secretary-General, ISO to the ISO Member Bodies, 2013-10-15, concerning '<ISO 26000 Systematic Review', with a three page explanation as to how the process works (with link), [http://www.26k-estimation.com/html/review\\_of\\_iso\\_26000\\_2010\\_.html](http://www.26k-estimation.com/html/review_of_iso_26000_2010_.html) accessed 8 August 2015.

<sup>705</sup> Of the 20 ISO Members voting in favour, only 11 EU Member States' NSBs took part, namely Austria (ASI), Belgium (NBN), Croatia (HZN), Finland (SFS), Germany (DIN), Ireland (NSAI), Italy (UNE), Poland (PKN), Spain (AENOR), Sweden (SIS) and the UK (BSI).

<sup>706</sup> This was the Swiss NSB, NSV <[http://www.26k-estimation.com/html/review\\_of\\_iso\\_26000\\_2010\\_.html](http://www.26k-estimation.com/html/review_of_iso_26000_2010_.html)> accessed 8 August 2015.

<sup>707</sup> Two EU Member States' NSBs – AFNOR for France and NEN for the Netherlands voted for the revision or amendment of ISO 26000 <[http://www.26k-estimation.com/html/review\\_of\\_iso\\_26000\\_2010\\_.html](http://www.26k-estimation.com/html/review_of_iso_26000_2010_.html)> accessed 8 August 2015.

<sup>708</sup> Recommendations of the PPO SAG to the ISO/TMB, PPO SAG N34, publicly available at <[http://www.26k-estimation.com/html/review\\_of\\_iso\\_26000\\_2010\\_.html](http://www.26k-estimation.com/html/review_of_iso_26000_2010_.html)> accessed 8 August 2015.

<sup>709</sup> Independent International Federation of Standards Users (IFAN) Position on a possible revision of ISO 26000:2010, B.1, at 1, IFAN No 14-2013, December 2013 <[http://www.26k-estimation.com/html/review\\_of\\_iso\\_26000\\_2010\\_.html](http://www.26k-estimation.com/html/review_of_iso_26000_2010_.html)> 9 accessed August 015.

<sup>710</sup> Ibid.





### *b) Tracking responses to adoption and implementation of ISO 26000 through the Post Publication Organization (PPO)*

At the eighth and final meeting of the Working Group on Social Responsibility, held in Copenhagen in May 2010,<sup>711</sup> a Post Publication Organization (PPO) for ISO 26000 was established. The PPO's governance structure broadly replicates the twin mechanism of the leadership of the Working Group on Social Responsibility and its Advisory Group in the development stage of the standard, which have become the PPO Secretariat (also known as the 'PPO Leadership Secretariat' or simply the 'PPO Leadership') and the PPO Stakeholder Advisory Group (PPO SAG)<sup>712</sup> respectively. There is also a PPO NSB Information Network (PPO NIN)<sup>713</sup> that recreates 'a network akin to the mirror committees, with a maximum number of two members per country.'<sup>714</sup>

The role of the PPO is principally to advise the ISO on the interpretation of ISO 26000 and make proposals, as necessary, for revising it as well as to encourage ISO Members to gather information on bad and good practices in using the standard.<sup>715</sup> Additionally, the PPO carries out an annual user survey, which is intended to find out more information about the use and dissemination of ISO 26000. Unlike some other ISO standards, at the PPO stage of ISO 26000, the ISO also had to tackle the 'challenge of maintaining stakeholder networks, the engagement of NSBs and their stakeholders, and the commitment and role of MoU partners, like the ILO and the UNGC',<sup>716</sup> both of which are described hereunder (see sections 3. a) and 3. b) below).

### *c) Tracking responses to ISO 26000 through the PPO annual survey*

On a day-to-day basis, the PPO Leadership is mostly concerned with gathering information from the PPO SAG and the PPO NIN and conducts meetings on a regular basis with all the participating NSBs. Issues that have been discussed to date include: the matter of certification, verification, and claims about ISO 26000; the terms of reference, objectives and operational guidance for the PPO; the adoption of ISO 26000 throughout the world; a survey of national NSB implementation of ISO 26000; examples of how ISO 26000 has been used; Rio+20; good and bad practices with respect to the standard; and the holding of an International ISO 26000 Forum in Geneva in 2012.<sup>717</sup>

<sup>711</sup> ISO/TMB/WG SR, Post Publication Organization, 2010-05-21, Doc. ISO/TMB/WG SR N 192 rev 1, 1 <<http://isotc.iso.org/livelink/livelink?func=ll&objId=8742970&objAction=browse&viewType=1>> accessed 7 August 2015.

<sup>712</sup> The PPO Stakeholder Advisory Group (PPO SAG) has 38 Members' delegates and 27 alternates plus the 4-Member Secretariat.

<sup>713</sup> PPO National Standards Body Information Network (PPO NIN) **counts** 64 members from 36 NSBs.

<sup>714</sup> Janelle M Diller, 'Private Standardization in Public International Lawmaking' (2012) 33(3) Michigan Journal of International Law, 481, 513.

<sup>715</sup> Ornella Cilona, '[Trade union involvement in non-technical standardization](#)' (Spring-Summer 2013) 7 HesaMag, 28, 29, <[www.etui.org/content/download/9787/87810/file/EN-HesaMag-07.pdf](http://www.etui.org/content/download/9787/87810/file/EN-HesaMag-07.pdf)> accessed 31 July 2015.

<sup>716</sup> Janelle M Diller, 'Private Standardization in Public International Lawmaking' (2012) 33(3) Michigan Journal of International Law, 481, 512.

<sup>717</sup> For details, see ISO 26000 International Workshop 5-9 November 2012 - Palexpo, Geneva, Switzerland <[http://www.iso.org/iso/iso26000\\_workshop2012\\_presentations](http://www.iso.org/iso/iso26000_workshop2012_presentations)> accessed 13 August 2015.

As for tracking responses to ISO 26000, the PPO has undertaken an annual survey of NSBs in both 2011<sup>718</sup> and 2012 concerning PPO activities. The annual survey relates *inter alia* to documents produced for ISO 26000 in the PPO phase, including things like, 'Operating guidelines for ISO 26000 PPO', the 'ISO 26000 Communication protocol', advising Members to exercise caution in communicating about the international standard,<sup>719</sup> 'How the ISO 26000 PPO identifies good examples of ISO 26000 usage and tools', 'Discussions on the proposed IWA on self-declaration ISO 26000' and a 'Draft template for the presentation of good examples of ISO 26000'.

More detailed responses to ISO 26000 are sought in a core set of questions for individual NSBs, such as:

- whether ISO 26000 has been adopted as a national guidance standard on SR in an ISO Member country;
- whether other national standards on SR and/or sustainability standards have been developed and, if so, whether before or in parallel with ISO 26000;
- what tools or promotional activities have been developed in support of ISO 26000;
- whether the NSB maintains a local mirror committee on SR, or equivalent, related to ISO and/or related standards or tools;
- the level of interest in ISO 26000 so far compared to other standards;<sup>720</sup>
- whether there are examples of good and bad practices in the ISO Member country; and
- suggestions for supporting local activities related to the implementation of ISO 26000.

In the annual survey for 2012 a couple of additional questions for developing countries were added to the survey by the ISO Committee on Developing Country Matters (ISO/DEVCO), and ISO Members were consulted to see whether there was any demand for developing a new standard on certification.<sup>721</sup> There was no annual survey for 2013 (and possibly 2014) but it was during this period that the ISO/CS conducted a systematic review of ISO 26000 (see section 1. b) above).

Some of the common themes among ISO Members that emerged from the 2012 annual survey concerned: the potential for certification despite the impossibility of certifying against the standard (51% of

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<sup>718</sup> See 'The 2011 survey of post publication activities related to ISO 26000 survey', ISO 26000 PPO SAG N 07 <<http://media.iso26000bloggen.se/2011/12/N07-PPO-SAG-ISO-26000-Survey-Presentation1.pdf>> 13 August 2015.

<sup>719</sup> ISO 26000 Communication protocol, ISO 26000 PPO SAG, 2012-04-12, ISO 26000 PPO sag n 15 rev 1 <[www.iso.org/iso/n15\\_rev\\_1\\_ppo\\_sag\\_-\\_communication\\_protocol.pdf](http://www.iso.org/iso/n15_rev_1_ppo_sag_-_communication_protocol.pdf)> accessed 13 August 2015.

<sup>720</sup> It is unclear whether this comparative survey includes other ISO standards that are CSR or SR-related, e.g. the MSS of ISO 9000 and ISO 14000, or whether it is more generic to include other international standards and instruments such as the UN Global Compact or the OECD Guidelines on Multinational Enterprises.

<sup>721</sup> ISO 26000 Post Publication activities and the 2012 survey, presented at a workshop, held at Palexpo, Geneva, 5-9 November 2012, slide 12 <[www.iso.org/iso/iso26000\\_workshop2012\\_presentations?II](http://www.iso.org/iso/iso26000_workshop2012_presentations?II)> accessed 17 August 2015.

responses); the development of education and training on ISO 26000 as a guidance standard (25% of responses); and implementation-related and other issues (each of which garnered 12% of responses).<sup>722</sup>

#### *d) Tracking the adoption of ISO 26000 as a national standard*

For the ISO one of the most important issues, in terms of tracking the responses of various stakeholders to the reception and implementation of ISO 26000 is the extent to which NSBs have adopted it as a national standard. In 2012, out of the 74 ISO Members that responded to an enquiry on this matter, 44 Members had adopted ISO 26000 as a national standard and had done so without changes (this was compared to 36 Members that had adopted ISO 26000 in 2011).<sup>723</sup>

As of November 2012, two years after publication, 23 EU Member States, had adopted ISO 26000 as a national standard. They are Austria (ASI); Belgium (NBN); Bulgaria (BDS); Croatia (Croatian Standards Institute or HZN); Czech Republic (UNMZ); Denmark (DS); Estonia (EVS); Finland (SFS); France (the AFNOR); Germany (DIN); Hungary (MSZT); Ireland (NSAI); Italy (UNI); Lithuania (LVS); Malta (MCCAA); Netherlands (NEN); Poland (PKN); Portugal (IPQ); Romania (ASRO); Slovakia (SOSMT); Spain (AENOR); Sweden (SIS); and the UK (BSI).<sup>724</sup>

A further 17 ISO Members stated in the annual survey for 2012 that they were planning to adopt, or were in the process of adopting, ISO 26000 while a further 13 ISO Members reported that they had either decided not to or were as yet undecided.<sup>725</sup> Five EU Member States, all of which are ISO Members, have so far not adopted ISO 26000 as a national standard, for reasons that are unclear. They are Cyprus, Greece, Latvia, Luxembourg and Slovenia. One possible explanation offered by ISO officials is that individual ISO Members can choose whether to support a particular standard but they are not bound to do so.<sup>726</sup>

It should also be recalled that ISO is an international NGO, whose mandate is to develop private standards but whose business model users have a commercial interest in developing and utilising those standards. In other words, ISO 26000 is not in the public domain despite the fact that the majority of its substantive content is drawn from authoritative inter-governmental documents, such as UN Conventions and Declarations. The consequence of this is that, unlike the other four CSR instruments, which are reviewed in this report, ISO charges for its standards, including the ISO 26000 Guidance Standard on SR.<sup>727</sup> In fact, ISO's business model has been seen as a potential barrier to wider dissemination and use of ISO 26000,<sup>728</sup>

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<sup>722</sup> Ibid, slide 20.

<sup>723</sup> Ibid, slide 13.

<sup>724</sup> Ibid, Slide 14.

<sup>725</sup> Ibid.

<sup>726</sup> Skype interview with ISO officials, 13 August 2015.

<sup>727</sup> ISO standards are either made available through the ISO/CS store or are sold through the NSBs. Some NSBs like the government-run Standards Institution of Israel (SII) make no charge for ISO 26000 whereas purchase of the International Standard from the ISO/CS store is priced at CHF 198 (equivalent to € 184).

<sup>728</sup> Janelle M Diller, 'Private Standardization in Public International Lawmaking' (2012) 33(3) Michigan Journal of International Law 481, 514.

which is generally unavailable except at cost. The same is true for its copyright policy,<sup>729</sup> which was already put in place at the draft DIS stage.<sup>730</sup>

Somewhat unsurprisingly then, one of the standard questions on the annual survey to all ISO Members is the following: ‘What are the annual sales of ISO 26000?’ The answers are used to gauge the take up of a particular standard locally. From the 2012 annual survey it appears that the French NSB, AFNOR, followed by the Dutch NSB, NEN, and the Czech NSB, HZN, had sold the most copies of ISO 26000.<sup>731</sup>

ISO Members were also surveyed as to whether their NSBs had maintained a local mirror committee on SR, or an equivalent for ISO 26000 or other related standards or tools. In the 2012 annual survey a full 62 of the 74 (84% of responses) confirmed this (compared to 62% of responses in 2011). Many ISO Members reported that their local mirror committees met twice a year.<sup>732</sup>

Finally, ISO Members were consulted as to whether their NSB’s perceived a demand in their country for the development of a new International Standard, related to SR that would allow for conformity assessment. Some 68 of the 74 ISO Members (92% of responses) expressed some but not a significant interest in the idea.<sup>733</sup>

Overall, and based on the information received from the NSBs, the results of the 2012 annual survey have led the PPO Leadership Secretariat to conclude that there is a growing demand for the adoption of ISO 26000 as a national standard – at least during the first two years since its publication.<sup>734</sup>

#### *e) Tracking responses of EU national standardisation bodies (NSBs) to ISO 26000*

Inevitably, the pattern of adoption, implementation and usage of ISO 26000 in different ISO Member countries varies based on a range of factors, including the term for its adoption and implementation. As a result there are some ISO Members that are more active in the field of standardisation generally. Even so, it is difficult to gain an accurate picture of what NSBs are doing in support of ISO 26000 and the extent

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<sup>729</sup> The phrase ‘© ISO 2006-All rights reserved’ was placed on the cover of the draft DIS; see ISO WG SR, *Guidance on Social Responsibility*, Doc. ISO/TMB/WG SR N 55, ISO/WD 26000 (Mar. 28, 2006).

<sup>730</sup> From the beginning a copyright notice for the draft DIS was inserted, ‘referencing ISO’s rules on copyright protection and its customary exception for reproduction of working drafts or CDs for use by participants in the ISO standards development process’, as explained by Janelle M Diller, ‘Private Standardization in Public International Lawmaking’ (2012) 33(3) *Michigan Journal of International Law* 481, 514.

<sup>731</sup> ISO 26000 Post Publication activities and the 2012 survey, presented at a workshop, held at Palexpo, Geneva, 5-9 November 2012, slide 18 <[www.iso.org/iso/iso26000\\_workshop2012\\_presentations?II](http://www.iso.org/iso/iso26000_workshop2012_presentations?II)> accessed 17 August 2015.

<sup>732</sup> *Ibid*, slide 21.

<sup>733</sup> *Ibid*, slide 22.

<sup>734</sup> ISO 26000 Post Publication activities and the 2012 survey, presented at a workshop, held at Palexpo, Geneva, 5-9 November 2012, slides 19 and 23 <[www.iso.org/iso/iso26000\\_workshop2012\\_presentations?II](http://www.iso.org/iso/iso26000_workshop2012_presentations?II)> accessed 17 August 2015.

to which adoption of ISO 26000 is taking place,<sup>735</sup> due mostly to the fact that information about ISO 26000 remains behind the ISO pay-wall. From information that is publicly available on the ISO web-site and elsewhere, including from official EU sources, it appears that to date, the majority of EU Member States have adopted ISO 26000 as a national standard. Following an extensive search, it appears that only Cyprus, Greece, Latvia, Luxembourg and Slovenia have not yet done so.

### (1) Best practice by EU NSBs arising from implementation of ISO 26000

In some instances the role of NSBs in ensuring a successful adoption of the published standards has been extensive, as for example in the case of the NEderland Normalisatie-instituut or NEN (the Dutch NSB) it has developed a guide to 'The implementation of SR: Best Practices and Tools for ISO 26000'.<sup>736</sup>

Similarly, in Denmark, Dansk Standard or DS (the Danish NSB) has developed DS 49001:2011 – Social responsibility management system<sup>737</sup> and DS 49004:2011 Guidance on social responsibility.<sup>738</sup> Both Danish standards mirror the general intention of ISO 26000 in setting out its requirements and offering guidance on SR with implementation through national standardisation.

Meanwhile, France has taken a slightly different approach on evidencing best practice. When it came to the adoption of ISO 26000 as a national standard, the Association Française de Normalisation or AFNOR (the French NSB) issued an experimental standard – XP X 30-027 (2010): Rendre crédible une démarche de responsabilité sociétale basée sur l'ISO 26000 (How to ensure credibility of implementation of ISO 26000).<sup>739</sup> A few years later, it proposed another experimental standard – XP X 30-029 (2013): Responsabilité sociétale - Déterminer la priorité des domaines d'action de l'ISO 26000 (Determining the priority of ISO 26000 issues).<sup>740</sup>

<sup>735</sup> The ISO/CS has worked on encouraging take-up of ISO 26000 through such things as an on-line facility, involving 'Free tools', an 'Issues matrix' and a 'Stakeholder-communication matrix' see <[http://www.iso26000bestpractices.com/free\\_tools](http://www.iso26000bestpractices.com/free_tools)> accessed 25 September 2015.

<sup>736</sup> 'The implementation of SR: Best Practices and Tools for ISO 26000', NEN, 2015 <[www.nen.nl](http://www.nen.nl)> and for a preview <[http://www.iso26000bestpractices.com/read\\_preview](http://www.iso26000bestpractices.com/read_preview)> accessed 25 September 2015.

<sup>737</sup> DS 49001:2011 – Ledelsessystem for samfundsmæssigt ansvar - Kravbeskrivelse (Social responsibility management system) < <https://webshop.ds.dk/en-gb/standard/ds-490012011>> accessed 27 September 2015.

<sup>738</sup> DS 49001:2010 Vejledning i samfundsmæssigt ansvar (Guidance on social responsibility) [now updated to DS 49001:2011 Vejledning i samfundsmæssigt ansvar (Guidance on social responsibility)] <https://webshop.ds.dk/en-gb/standard/03-100-01-company-organization-and-management-in-general/ds-vejledning-490042011>> accessed 27 September 2015.

<sup>739</sup> XP X30-027 Décembre 2010, Développement durable - Responsabilité sociétale - Rendre crédible une démarche de responsabilité sociétale basée sur l'ISO 26000 <<http://www.boutique.afnor.org/norme/xp-x30-027/developpement-durable-responsabilite-societale-rendre-credibile-une-demarche-de-responsabilite-societale-basee-sur-l-iso-2600/article/655025/fa166220>> accessed 27 September 2015.

<sup>740</sup> XP X30-029 Août 2013, Responsabilité sociétale - Déterminer la priorité des domaines d'action de l'ISO 26000 <<http://www.boutique.afnor.org/standard/xp-x30-029/social-responsibility-determining-the-priority-of-iso-26000-issues/article/813936/fa172075>> accessed 27 September 2015.

## (2) Equivocal practice by EU NSBs arising from implementation of ISO 26000

From the very beginning there was concern about the potential misuse of certification by business to create false representations of their CSR performance should ISO 26000 come into being. Some ISO Members and independent experts were against the development of a certifiable standard for fear that it would create a market for consultants seeking to profit from this new area of ISO activity.

However, following publication of ISO 26000, the General Assembly of the independent International Accreditation Forum (IAF), whose members accredit certification bodies as competent to issue certifications, resolved ‘that there will not be any accredited certification to ISO 26000 [...]’.<sup>741</sup> Since ISO 26000 makes it clear that ‘it is not intended or appropriate for certification, any certification would be a misuse of the standard’. Therefore the IAF strongly urged Certification Bodies ‘not to promote or provide certification to ISO 26000’. Similarly, ‘Accreditation Bodies and Certification Bodies were requested to report any misuse or need for certification, to the ISO Central Secretariat.’

While ISO 26000 is not certifiable there is still potential for misuse due to coercive pressure from the certification industry whose reputation has been tarnished due to the activities of some ‘certification bodies and an army of their auditors’.<sup>742</sup> Immediately prior to the 2010 launch of the guidance standard the OECD’s Business Industry Advisory Committee (BIAC), when commenting on the FDIS, expressed a major concern about the creation by NSBs of certifiable derivatives of ISO 26000.<sup>743</sup>

The ISO PPO annual survey of 2012 suggested that there were only a few cases of misuse of ISO 26000, mainly involving companies that wrongfully claimed to be ‘certified according to the requirements in ISO 26000’ or else stated that they were using the ‘ISO 26000 management system’.<sup>744</sup> However, in practice the picture may be somewhat different. For example, in the case of CWK-SCS Division der Coop Genossenschaft<sup>745</sup> and Air France Industries (AFI),<sup>746</sup> it appears that both have been certified against ISO 26000 by Swiss TS and Bureau Veritas respectively, despite the prohibition against it.

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<sup>741</sup> IAF Resolution 2010–10, IAF/ISO Joint Communiqué on Certification to ISO 26000 <[www.iaf.nu/.../IAFMLAMC16Rev5List\\_ofDocuments\\_for\\_peer\\_evaluation\\_purposes\\_30\\_Oct\\_12.doc](http://www.iaf.nu/.../IAFMLAMC16Rev5List_ofDocuments_for_peer_evaluation_purposes_30_Oct_12.doc)> accessed 19 August 2015.

<sup>742</sup> Pavel Castka and Michaela A Balzarova, ‘Social responsibility standardization: Guidance or reinforcement through certification?’ (2008) 27 *Human Systems Management* 27 (2008) 231, 240; see also Adrian Henriques, *Standards for Change? ISO 26000 and sustainable development* (International Institute for Sustainable Development, London, 2012), 1, 18.

<sup>743</sup> OECD Business and Industry Advisory committee (BIAC) Comments and Position regarding the FDIS of ISO 26000 ‘Guidance on Social Responsibility’, 9 September 2010, Doc. ISO/FDIS 26000, 4.

<sup>744</sup> ISO 26000 Post Publication activities and the 2012 survey, presented at a workshop, held at Palexpo, Geneva, 5–9 November 2012, slide 18 <[www.iso.org/iso/iso26000\\_workshop2012\\_presentations?II](http://www.iso.org/iso/iso26000_workshop2012_presentations?II)> accessed 17 August 2015.

<sup>745</sup> Guido Gürtler at <[http://www.26k-estimation.com/html/misconceptions\\_and\\_misuse.html#case-SWISS-TS-CWK-SCS](http://www.26k-estimation.com/html/misconceptions_and_misuse.html#case-SWISS-TS-CWK-SCS)> accessed 27 September 2015, reported in Adrian Henriques *Standards for Change? ISO 26000 and sustainable development* (International Institute for Sustainable Development, London, 2012), 1, 18

<sup>746</sup> Press Release ‘Air France Industries World’s First MRO to Adopt ISO 26000’, Paris/Amstelveen, 10 January 2011, which explains that ‘an “evaluation” against ISO 26000 standard guidelines has been conducted in the AFI facilities in France from 2 to 5 November 2010. The results were considered by Bureau Veritas Certification (BVC) through its

Other practice reveals that some certification bodies, e.g. RINA Services S.p.A, the Italian-based assessment body, are offering to 'attest' to the use of ISO 26000, rather than to certify against it.<sup>747</sup> In RINA's case, this involves applying objectively measurable criteria to assess the extent to which an organisation has adopted 'socially responsible behaviour in relation to the core subjects: governance, human rights, labour practices, the environment, fair operating practices, consumer issues, community involvement and development.'<sup>748</sup> However, while the most recent version of rules, applicable to the verification of an organisation's integration/application of social responsibility throughout its structure, are referred to as 'Rules for Assessment of the Implementation Level of ISO 26000',<sup>749</sup> the actual process goes under the heading 'Rules for Certification', which arguably is misleading.<sup>750</sup>

It is also by no means certain that certifiability will always leave the underlying intent of ISO 26000 unchanged.<sup>751</sup> This is evident from the CSR norm ONR 192500,<sup>752</sup> adopted by the Austrian Standards Institute (ASO). Austria claims that 'the Austrian Standard for CSR is to give organisations a baseline framework for CSR.'<sup>753</sup> The English-language version of ONR 192500 explains that the standard 'describes the process of integration and sustainable implementation of social responsibility in an organization as well as contextual requirements and recommendations'. However, it goes on to say that it 'can be used for self-declaration and/or certification by independent third parties'.<sup>754</sup> It even boasts that '[A]n organization can use the certification on the successful implementation of this document to guarantee its stakeholders that it is complying with standards above the minimum requirements prescribed by legislation' and in this respect it falls into the stereotypical CSR mode of doing something more than is required by law.<sup>755</sup>

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methodology CAP 26000 ...'  
<[http://www.afiklmem.com/AFIKLMEM/en/g\\_page\\_news/PressReleases\\_10012011\\_ISO26000.html](http://www.afiklmem.com/AFIKLMEM/en/g_page_news/PressReleases_10012011_ISO26000.html)> accessed 29 September 2015.

<sup>747</sup> Adrian Henriques, *Standards for Change? ISO 26000 and sustainable development* (International Institute for Sustainable Development, London, 2012), 1, 18.

<sup>748</sup> 'Assessment to ISO 26000', RINA <<http://www.rina.org/en/our-services/inspection-site-supervision/inspection/assessment-to-iso-26000>> accessed 29 September 2015.

<sup>749</sup> 'Rules for Assessment of the Implementation Level of ISO 26000', RINA, valid from 29th December 2014, CHAPTER 4 – ASSESSMENT OF THE IMPLEMENTATION LEVEL OF ISO 26000

<<http://www.rina.org/en/Lists/PageAttachments/RulesISO26000.pdf>> accessed 29 September 2015.

<sup>750</sup> 'Rules for Certification' <<http://www.rina.org/en/search?q=ISO%2026000>> accessed 29 September 2015.

<sup>751</sup> Adrian Henriques, *Standards for Change? ISO 26000 and sustainable development* (International Institute for Sustainable Development, London, 2012), 1, 18.

<sup>752</sup> ONR 192500:2011-11-01 Gesellschaftliche Verantwortung von Organisationen (CSR) or Social Responsibility of Organizations (CSR) <<https://shop.austrian-standards.at/search/Details.action?dokkey=404780>> accessed 29 September 2015.

<sup>753</sup> European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (Compendium, 31 October 2014), Annex: CSR practices in Member States: Austria, 60, <<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7726>> accessed 29 October 2015.

<sup>754</sup> ONR 192500:2011-11-01 Social Responsibility of Organizations (CSR), 'Foreword', 4 <<https://shop.austrian-standards.at/search/Details.action?dokkey=404780>> accessed 29 September 2015.

<sup>755</sup> Ibid.



## 2. EU tracking of responses to the adoption and implementation of ISO 26000

The EU contributes in at least three different ways to the tracking of responses concerning the adoption and implementation of ISO 26000 by business and other organisations. It does so indirectly by conducting a peer review of national CSR policies and by holding high level meetings of EU Member State governments on the matter of CSR. A secondary focus is on the role of the European Committee for Standardisation (CEN),<sup>756</sup> which is primarily responsible for the development of European standards and technical specifications related to goods, services and processes in the European Single Market. The third is the potential application of ISO 26000 to the EU itself because the standard covers the SR of *all* organisations, irrespective of their size and/or their public and/or private character, i.e. the EU is a ‘covered organisation’.

### *a) The EU CSR Peer Review and High-Level Meeting approach to tracking responses to ISO 26000*

There are problems for the EU in tracking responses to ISO 26000. To begin with the EU is not an ISO Member nor does it enjoy observer status in this private international organisation. Hence any tracking exercise can only be conducted at a distance and is reliant to the degree to which EU Member States, all of whom are ISO Members, have adopted and are implementing ISO 26000 and, more importantly, communicate this information to the Commission.

A further limitation on the exercise is that the EU has chosen to track responses to ISO 26000, on the basis of its CSR Strategy in which it has sought to ‘create with Member States in 2012 a peer review mechanism for national CSR policies’.<sup>757</sup> The actual results of that peer review, which was carried out in 2013-2014, and aimed at facilitating learning among EU Member States on national CSR policies and measures, have been somewhat meagre.<sup>758</sup>

As we have already seen with respect to the OECD Guidelines for MNEs, the most recent CSR peer review was limited to seven of the 28 Member States (Denmark, Finland, France, Italy, Netherlands, Sweden and UK) and it focused very broadly on a range of CSR instruments even though ISO 26000 was one of them. Moreover, the 2014 Compendium, which is a report by the Commission on ‘Corporate Social Responsibility: National Public Policies in the European Union’ is far too generic and contains too little information about the extent to which the Commission is monitoring the commitments of European enterprises to international CSR guidelines and principles.

Nevertheless, the Annex to the 2014 Compendium provides some examples from individual Member States. This includes Denmark and the Netherlands, which were two of the seven countries in the CSR peer review, and one country, Belgium that was not. When it comes to the Netherlands, the NEN, which

<sup>756</sup> For information about CEN <<https://www.cen.eu/Pages/default.aspx>> accessed 29 September 2015.

<sup>757</sup> COM (2011) 681 final (n 1),13, para 9.

<sup>758</sup> See section II.B.1. above with respect to the CSR peer review concerning the UNGPs



is the Dutch NSB, declared that it had developed a form of self-declaration for business organisations to enable them to demonstrate compliance with ISO 26000.<sup>759</sup> In the case of Denmark, it reported that the Danish government, in partnership with other Nordic governments, had adopted a Nordic CSR strategy (in the Nordic Council) that focuses on creating partnerships to improve responsible business in the Nordic countries.<sup>760</sup> The Nordic CSR strategy also seeks to promote ISO 26000 by raising awareness among local CSR stakeholders and strengthening the existing Nordic ISO network.<sup>761</sup>

A further point to note is that the Nordic Strategy anticipates that a potential outcome might be support for implementation of ISO 26000 in governmental organizations.<sup>762</sup> Similarly, the Belgium government launched an information campaign on ISO 26000, together with the Belgian Bureau for Standardisation (NBN).<sup>763</sup> It has also operated a pilot project to support the implementation of ISO 26000 in combination with the Global Reporting Initiative (GRI) in four governmental agencies.<sup>764</sup>

### ***b) The role of the European Committee for Standardisation (CEN) in tracking responses to ISO 26000***

The European Committee on Standardisation (better known by its French name: Comité Européen de Normalisation or CEN),<sup>765</sup> has 31 national members (all the 28 EU Member States together with three of the EFTA countries – Iceland, Norway and Switzerland). CEN provides a platform for the development of European standards and technical specifications in relation to various kinds of products, materials, services and processes. Its standards are specifically designed to meet the evolving needs of European businesses and other organisations, including reinforcing the Single Market as well as supporting economic growth, and the spread of new technologies and innovation.

The CEN makes no reference ISO 26000 despite the fact that its work is linked to the ISO through the Vienna Agreement on Technical Co-operation between ISO and CEN,<sup>766</sup> which recognises the primacy of

<sup>759</sup> European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (Compendium, 31 October 2014), Annex 1, CSR practices in Member States, 88. <<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7726>> accessed 29 October 2015.

<sup>760</sup> Ibid, 66.

<sup>761</sup> Nordic Council of Ministers, *Nordic Strategy for Corporate Social Responsibility – supporting Nordic businesses for tomorrow*, 2012 <<http://norden.diva-portal.org/smash/get/diva2:701351/FULLTEXT01.pdf>> accessed 29 October 2015, 11.

<sup>762</sup> Ibid.

<sup>763</sup> European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (Compendium, 31 October 2014), Annex 1, CSR practices in Member States, 61 <<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7726>> accessed 29 October 2015.

<sup>764</sup> *Social responsibility in government organizations through ISO 26000 and GRI: Final report of the pilot project ordered by the Federal Public Planning Services for Sustainable Development*, Sustenuto (2012) <<http://www.iso.org/iso/livelinkgetfile?lIINodeId=410120&lIVolId=-2000>> accessed 29 October 2015.

<sup>765</sup> European Committee on Standardisation (= Comité Européen de Normalisation or CEN), <<https://www.cen.eu/Pages/default.aspx>> accessed 29 September 2015.

<sup>766</sup> International Organization for Standardization (ISO) and European Committee for Standardization (CEN) Agreement on Technical Cooperation, June 1991 (known as the 'Vienna Agreement') <[http://www.boss.cen.eu/ref/Vienna\\_Agreement.pdf](http://www.boss.cen.eu/ref/Vienna_Agreement.pdf)> accessed 29 September 2015.

international standards. However, the Vienna Agreement also recognises that particular needs (for example, of the Single European Market) might require the development of standards for which a need has not been identified at the international level. On this basis, the CEN and the ISO have agreed to prioritise their work depending on the nature of it.<sup>767</sup>

This has led to the development of ‘two essential modes for collaborative development of standards: [one] under ISO lead and the [other] under CEN lead, in which documents developed within one body are notified for the simultaneous approval by the other.’<sup>768</sup> While CEN’s lack of interest in a guidance standard on SR may be explained by this pragmatic division of labour and shared responsibility between the two organisations in the field of standard setting it hardly serves well the further development of ISO 26000, as a CSR instrument in the European domain, particularly given the CEN’s focus on international standards in the Single Market.

### *c) ISO 26000 and its application to the EU as an organisation*

In seeking to better align European and global approaches to CSR, with a focus on internationally-recognised CSR principles and guidelines, the Commission, in its 2011 Communication on CSR states that the EU will ‘take account of the ISO 26000 Guidance Standard on Social Responsibility in its own operations’.<sup>769</sup> However, despite an extensive search of available EU web-sites and a question related to this matter, during an interview that we conducted with an EU official for this report,<sup>770</sup> we are of the view that so far no steps have been taken to ensure that the EU, or any of its institutional bodies, has sought to align its SR practices with ISO 26000.

## **3. Tracking the consistency of ISO 26000 with other CSR initiatives**

A further point to note about the tracking of responses to ISO 26000 is the fact that the ISO has reached agreement with the ILO, the UNGC, the Global Reporting Initiative (GRI)<sup>771</sup> and the OECD to ensure that there is consistency between the ISO 26000 Guidance Standard and other CSR initiatives. Consistency is an important aspect in terms of measuring the impact of ISO 26000 in line with reporting standard requirements.

### *a) ILO-ISO cooperation over ISO 26000*

The ILO-ISO MoU sets out the terms for cooperation between the two organisations whereby ISO’s development of a guidance standard on SR had to be ‘consistent with and complement the application of

<sup>767</sup> Vienna Agreement, *ibid*, Article 2.

<sup>768</sup> *Ibid*.

<sup>769</sup> COM (2011) 681 final (n 1), 13, para 4.8.1 at Point 10.

<sup>770</sup> Interview with EU official on 15 April 2015.

<sup>771</sup> The Global Reporting Initiative (GRI) is a network-based non-governmental organisation that aims to drive sustainability and Environmental, Social and Governance (ESG) reporting through its Sustainability Reporting Framework.

international labour standards'.<sup>772</sup> Some of the provisions of the ILO-ISO MoU, which frame the ILO's role in the ISO 26000 process, include firstly, the fact that, in outlining the relationship between ILO standards and ISO 26000, it opts for a hierarchy whereby, in case of conflict, ILO standards will prevail.<sup>773</sup> Moreover, for any ISO standard in the field of SR, 'the provisions of ILO instruments [will] serve as the authoritative and definitive source of reference, and minimum base line for any elements which relate to international labour standards'.<sup>774</sup>

Second, the ILO-ISO MoU regulates the ILO's participation in the standard setting process at various stages of the development, and any future revisions, of ISO 26000.<sup>775</sup> Indeed, the ILO shall participate in 'all other ISO bodies concerned with any ISO International Standard in the field of SR' and it shall do so 'through the appropriate ISO mechanisms, by its tri-partite constituency, [and] at ILO's request'.<sup>776</sup>

Third the ILO-ISO MoU underscores the level of cooperation between the two organisations, primarily mandated by the ILO. It includes the ISO's commitment to support the ILO by: facilitating 'greater awareness and wider observance of international labour standards in accordance with their object and purpose, and their interpretation by the competent' ILO bodies;<sup>777</sup> and by complementing 'the role of governments in ensuring compliance with international labour standards'.<sup>778</sup> Effectively, this latter aspect is tantamount to the ISO agreeing to cooperate with the ILO so as to increase the effectiveness of the latter's own CSR instruments with the help of a private actor.<sup>779</sup>

### *b) UN Global Compact Ten Principles and ISO 26000*

As in the case of the ILO, cooperation between the ISO and another CSR initiative, the UNGC with its ten universally accepted principles in the area of human rights, labour, environment and anti-corruption,<sup>780</sup> was dealt with on the basis of a MoU.<sup>781</sup> In the UNGC-ISO MoU there is specific recognition that ISO 26000 would need 'to be consistent with and complement the Global Compact ten universal principles'<sup>782</sup> and

<sup>772</sup> Memorandum of Understanding between the International Labour Organization and the International Organization for Standardization in the Field of Social Responsibility, 4 March 2005 [hereinafter ISO-ILO MoU], Article 1.1 <<http://www.ilo.org/empent/Informationresources/WCMS.../lang.../index.html>> accessed 20 August 2015.

<sup>773</sup> ILO-ISO MoU, *ibid*, Articles 2.1 and 2.3.

<sup>774</sup> *Ibid*, Article 6.1.

<sup>775</sup> *Ibid*, Article 2, paragraphs 1 and 2 *in extenso*.

<sup>776</sup> *Ibid*, Article 5.

<sup>777</sup> *Ibid*, Article 2.2.1.

<sup>778</sup> *Ibid*, Article 2.2.2.

<sup>779</sup> Rebecca Schmidt, 'The ISO 26000 Process as a Model for Public-Private Cooperation in a Fragmented Transnational Regulatory Space', IRPA Working Paper GAL Series n. 5/2013, 23 <[www.irpa.eu](http://www.irpa.eu)> accessed 30 July 2015.

<sup>780</sup> See section III of this report.

<sup>781</sup> Memorandum of Understanding between the United Nations Global Compact Office and the International Organization for Standardization (ISO), 6 and 9 November 2006, ISO/TMB/WG SR N 82 [hereinafter UNGC-ISO MoU], <<http://www.csrquest.net/.../MoU%20ISO%20UN%20Global%20Compact.pdf>> accessed 29 September 2015.

<sup>782</sup> UNGC-ISO MoU, Article 1.1 and Article 2.1.

'to be mutually supportive of each other.'<sup>783</sup> Apart from representing itself, the UNGC took upon itself to address the concerns of 'core UN agencies which form part of the Inter-Agency-Team, other than the ILO' in the development and promotion of ISO 26000.<sup>784</sup>

The UNGC-ISO MoU was followed up in 2011, in the post publication stage of ISO 26000,<sup>785</sup> by a so-called 'linking document', which specifically seeks to map the relationship between the core ISO 26000 subject areas – human rights, labour practices, the environment, fair operating practices, consumer issues, community involvement – and the Global Compact's 10 Principles.<sup>786</sup> The publication, which was launched by the UNGC, aims to provide not only an overview of key linkages between both initiatives but also to demonstrate that there is a clear consistency between the two, as is evident from the fact that all the UNGC Principles are included in ISO 26000.

### *c) MoU between OECD and ISO in the area of social responsibility*

A further MoU was entered into between the OECD and ISO<sup>787</sup> but at a slightly later phase of the ISO 26000 development process than the ILO-ISO MoU and the UNGC-ISO MoU. The purpose of the OECD-ISO MoU is 'to establish between the parties co-operation with a view to ensuring that the ISO International Standard on Social Responsibility and ISO activities relating thereto are consistent and complement the OECD Guidelines for Multinational Enterprises.'<sup>788</sup> To that end, the OECD-ISO MoU largely mirrors the MoU between the UNGC and ISO, including such matters as the involvement of the OECD both in the development of ISO 26000 and its periodic review 'for confirmation, revision or withdrawal'.<sup>789</sup>

Not unlike the ILO-ISO MoU, the ISO in its relations with the OECD has committed itself to 'facilitate greater awareness and wider observance of the OECD Guidelines in accordance with their object and purpose.'<sup>790</sup> Once again, this could be conceived as a move on the part of another inter-governmental organisation to increase the effectiveness of its existing CSR instrument – the OECD Guidelines for Multinational Enterprises - with the help of a private actor. This is endorsed by a facilitation clause in the OECD-ISO MoU that makes provision not only for the 'full participation of the OECD in the relevant Working Group activities and related bodies, whether formal or informal, relating to the IS on SR'<sup>791</sup> but

<sup>783</sup> Ibid, Article 1.2.

<sup>784</sup> Ibid, Article 2, paragraphs 3 and 4.

<sup>785</sup> Maria Lazarte, 'Building bridges: Aligning SR efforts for greater leverage', *ISO Focus*, March 2011, 14-15 <<http://www.iso.org/iso/livelinkgetfile-isocs?nodeId=15879256>> accessed 29 September 2015.

<sup>786</sup> *An introduction to linkages between UN Global Compact principles and ISO 26000 core subjects*, UN Global Compact Office, New York, November 2010 <[https://www.unglobalcompact.org/docs/news.../8.../UNGC\\_ISO\\_Final.pdf](https://www.unglobalcompact.org/docs/news.../8.../UNGC_ISO_Final.pdf)> accessed 29 September 2015.

<sup>787</sup> Memorandum of Understanding between the Organisation for Economic Co-operation and Development (OECD) and the International Organization for Standardization (ISO) in the area of social responsibility, 5 May 2008, ISO/TMB/WG SR N 144 [hereinafter OECD-ISO MoU] <<http://www.oecd.org/corporate/mne/45330481.pdf>> accessed 29 September 2015.

<sup>788</sup> OECD-ISO MoU, Article 1.1.

<sup>789</sup> Ibid, Article 1.2.

<sup>790</sup> Ibid, Article 2.7.

<sup>791</sup> Ibid, Article 4.1.

also for ‘relevant ISO representatives’ to be afforded the opportunity to participate ‘in the appropriate OECD bodies relating to the further development of the OECD Guidelines’.<sup>792</sup>

#### d) *Global Reporting Index (GRI) G4 and ISO 26000*

Significant for the further development of ISO 26000, and the tracking of responses to this CSR instrument, is the fact that the GRI and ISO have continued to build on a GRI and ISO ‘linkage document’, which was first developed in 2010.<sup>793</sup> They subsequently entered into a MoU<sup>794</sup> in which the two organisations agreed to cooperate to ensure that business can better implement ISO 26000 into its sustainability reporting, within the GRI framework.<sup>795</sup>

The aim of the fourth edition of the linkage document, which is now termed a ‘bridging document’, is to relate the SR guidance given in ISO 26000 to the reporting guidance provided by GRI.<sup>796</sup> The GRI/ISO bridging document does this by means of two separate tables:

- ‘Table 1 - Linkage table between GRI Standard Disclosures and ISO 26000’<sup>797</sup> that provides a series of cross-references between the GRI reporting methodology (Standard Disclosures) is set against the Guidance Standard on SR. Specifically, the linkage table shows how the GRI Standard Disclosures relate to the ISO 26000 core subjects (and their individual clauses), including a Sub-Category on ‘Human Rights’; and
- ‘Table 2- Linkage table between ISO 26000 Clauses and GRI Reporting Principles and Standard Disclosures’<sup>798</sup> that provides a similar series of cross references between specific ISO 26000 core subject, including ‘Human rights’ at 6.3, and GRI’s reporting methodology. However, in this table human rights issues such as ‘Due diligence’, ‘Human rights risk situations’, ‘Avoidance of complicity’, ‘Resolving grievances’, ‘Discrimination and vulnerable groups’, ‘Civil and political rights’, ‘Economic, social and cultural rights’ and Fundamental principles and rights at work’ gain more prominence. So too do ‘Labour practices at 6.4 where benchmarking under the GRI Principles and Standard Disclosures takes place against sub-sections of Clause 6.4, namely

<sup>792</sup> Ibid, Article 4.2.

<sup>793</sup> *GRI and ISO 26000: How to Use the GRI Guidelines in Combination with ISO 2600* (GRI, November 2010), details of which are available at <<https://www.globalreporting.org/information/about-gri/gri-history/Pages/GRI's%20history.aspx#sthash.hq2axj7B.dpuf>> accessed 8 October 2015.

<sup>794</sup> The MoU between the GRI and the ISO of 5 September 2011, is not publicly available. According to a press release it ‘is intended to leverage the activities of the two organisations related to reporting and benchmarking by business and on sustainable development by sharing information on ISO standards and GRI programmes ...’ , <<https://www.globalreporting.org/information/news-and-press-center/Pages/PR-ISO-and-Global-Reporting-Initiative-increase-cooperation-on-sustainable-development.aspx>> accessed 8 October 2015.

<sup>795</sup> Fabrizio Cafaggi, Andrea Renda and Rebecca Schmidt, ‘Transnational Private Regulation’ in *International Regulatory Co-operation: Rules for a Global World*, vol. 1 (OECD, Paris, 2013), 1, 25.

<sup>796</sup> *GRI G4 Guidelines and ISO 26000:2010 – A guide on how to use the GRI G4 Guidelines and ISO 26000 in conjunction* <[http://www.iso.org/iso/iso-gri-26000\\_2014-01-28.pdf](http://www.iso.org/iso/iso-gri-26000_2014-01-28.pdf)> accessed 8 October 2015.

<sup>797</sup> Ibid, ‘Table 1 – Linkage table between GRI G4 Guidelines and ISO 26000:2010’, 14-23.

<sup>798</sup> Ibid, ‘Table 2 – Linkage table between ISO 26000:2010 and GRI G4 Guidelines’, 25-39.

‘Employment and employment relationships’, ‘Conditions of work and social protection’, ‘Social protection’, ‘Health and safety at work’ and ‘Human development and training in the workplace’.

From the point of view of tracking CSR responses by organisations generally, and business organisations in particular, the GRI/ISO bridging document has much to offer in that it presents an organisational overview, by means of a grid system, of principles and standard disclosures in non-financial reporting, which are then set against the ISO 26000 clauses and vice-versa. However, the GRI/ISO linkage document contains a caveat for Table 1, whereby the utility of the GRI Standard Disclosures methodology for ISO 26000 is incomplete and potentially does not satisfy the scope of the core subjects and their related clauses under ISO 26000.

In this respect, Table 2 is also deficient in that ISO 26000 includes a range of SR issues, against which a number of expectations concerning stakeholders’ interests are listed under the heading ‘Related actions and expectations’ However, in the area of Human rights (Clause 6.3) and Labour practices (Clause 6.4) this does not appear to be the case. What will undoubtedly become more important is the degree to which such a linkage or bridging document will measure up to other accountability standards currently being developed in the field of business and human rights, such as the RAFI.<sup>799</sup>

### C. Conclusion

At first sight ISO 26000 Guidance Standard on CSR does not appear to fit the mould of a CSR and business and human rights instrument. Its origins lie in the world of private standard-setting for business and industry although some of its more recent mass management systems (MSS) standards have begun to depart from this tradition. Nevertheless, ISO 26000 sets itself apart from classical ISO standards by offering, for the first time in the history of the organisation, a guidance standard on social responsibility. Significant in this respect is the fact that ISO 26000 moves beyond the other four instruments under study in this report by extending its scope and coverage to *all* organisations, both public and private (and potentially including the EU itself), which the other CSR instruments do not. A further characteristic that distinguishes ISO 26000 from traditional ISO standards is the fact that it is not possible for third parties to certify (or benchmark) against it.

Its normative value lies potentially in its materiality element, i.e. the extent to which it allows for disclosure of all material matters, based on a very detailed and comprehensive overview of what social responsibility entails, which is set out in its core subject matter, including for Human rights (Clause 6.3) and Labour practices (Clause 6.4). Thus, the lack of certifiability of ISO 26000 may ultimately count for less overall where it is possible to demonstrate the standard’s worth as a part of a reporting mechanism.

The GRI-ISO bridging document, the purpose of which is to relate the SR guidance given in ISO 26000 to the reporting guidance provided by GRI, could yet prove to be an asset in tracking responses to this CSR instrument, particularly if it were to measure up to the disciplines of other non-financial reporting frameworks, such as the emerging accountability framework on business and human rights offered by

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<sup>799</sup> See section II.3. b) (1) of this report.

RAFI. However, it should be noted that despite the attractiveness of the GRI Standard Disclosures methodology, it is currently incomplete for ISO 26000 and more attention needs to be given to the specific clauses on Human rights and Labour practices in the standard itself.

In terms of tracking responses to ISO 26000, this has proven a difficult exercise in light of the restricted availability of information from ISO Members. However, some NSBs have been more forthcoming – on their own or else through EU Member State governments in the EU CSR peer review – about how they are addressing ISO 26000 compliance. Additionally, the ISO has already conducted a periodic review of ISO 26000 to determine whether the standard should be confirmed, revised or withdrawn, and is actively following up with individual NSBs through its PPO annual survey.

Where there is the least amount of activity in terms of tracking CSR responses is in the EU sphere itself, which can be explained on account of a number of factors. One is that the EU is neither an ISO Member nor does it have observer status in this private international organisation. Therefore, any tracking exercise in respect of ISO 26000 is only as good as the information that EU Member State governments provide. The position of CEN, as *the* European standards organisation, has been written out of existence by the Vienna Agreement with the ISO, which sections off the field of international/regional standard setting and removes any CEN responsibility for ISO 26000; any tracking exercise is therefore non-existent in terms of this particular European-wide standard-setting body. Finally, the role of the EU, which is a public international organisation and thus ‘covered’ by ISO 26000, is called into question when tracking its own response. Thus far, there is no evidence to show that the EU, or any of its institutional bodies, has sought to align its SR practices with ISO 26000, as foreseen in the EU CSR Strategy.



## VI. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

### A. Background to the instrument

#### 1. Origins and latest developments

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (hereinafter ‘the MNE Declaration’) was adopted by the Governing Body of the International Labour Office in 1977 as one of the very first statements on CSR. The MNE Declaration was amended several times, lastly in 2006. The mindset governing the adoption of the MNE Declaration was that of the necessity to manage the Multinational Enterprises’ (MNEs) role and impact in social and economic globalisation. The MNE Declaration recognises that MNEs make an important contribution ‘to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of basic human rights, including freedom of association, throughout the world.’<sup>800</sup> However, the MNE Declaration also warns that ‘the advances made by multinational enterprises in organising their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives and with the interest of the workers.’<sup>801</sup> Therefore, the aim of the MNE Declaration is to provide principles and recommendations to Governments, MNEs and workers ‘to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise.’<sup>802</sup> The Declaration is structured around five areas, for which recommendations on particular themes are developed. The structure of the MNE Declaration is as follows:

Summary of the MNE Declaration	
Areas	Themes
<b>General Policies</b>	
<b>Employment</b>	Employment promotion
	Equality of opportunity and treatment
	Security of employment
<b>Training</b>	
<b>Conditions of work and life</b>	Wages, benefits and conditions of work
	Minimum age
	Safety and health
<b>Industrial relations</b>	Freedom of association and the right to organize
	Collective bargaining
	Consultation
	Examination of grievances
	Settlement of industrial disputes

Table 1: Summary of the MNE Declaration

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Point 1 of the declaration

*Id.*

, point 2.



The MNE Declaration relies on, and is benchmarked against, a comprehensive list of ILO Conventions and Recommendations which are relevant to the operations of multinational enterprises.<sup>803</sup> The MNE Declaration also refers to the 1998 ILO Tripartite Declaration on Principles and Rights at work as well as to the Universal Declaration of Human Rights.<sup>804</sup>

## 2. Tracking responses and uptake

As indicated above, the MNE Declaration does not work on the basis of formal adoption or endorsement but is meant to be ‘observe[d] on a voluntary basis’ by governments, employers and workers.<sup>805</sup> As a result, it is difficult to assess the extent to which it is actually being taken up and implemented by its addressees. The ILO has however put in place a strategy aimed at ensuring proper promotion, implementation, follow up and tracking of responses to the MNE Declaration.

Such strategy was overhauled in 2014 by the ILO Governing Body based on recommendations formulated by a ‘Tripartite Ad Hoc Working Group to review the follow-up mechanism of the MNE Declaration,’ which it had established in 2010.<sup>806</sup> The new strategy revolves around actions to raise awareness of the MNE Declaration, and the collection of information on the effect given to the MNE Declaration.

In the following paragraphs, we examine the most important mechanisms implementing this strategy.

### a) Institutional mechanisms

First of all, a the Multinational Enterprises and Enterprises Engagement Unit (ENT/MULTI) of the Enterprises Department of the ILO was made explicitly responsible for the promotion and follow-up of the MNE Declaration, and of the coordination of all ILO CSR-related activities. In that role, the Unit receives direct guidance from ILO constituents through decisions taken in the MNE Segment of the Policy Development section of the ILO's Governing Body (formerly the Subcommittee on Multinational Enterprises).<sup>807</sup> The Unit organises capacity building and training activities with the International Training Center of the ILO, conducts research and provides country-level assistance on issues covered by the MNE Declaration.<sup>808</sup>

The Unit also operates an ILO Helpdesk for Business on International Labour Standards, which describes itself as the ‘one-stop shop for company managers and workers on how to better align business operations

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Annexes

Addendum II.

<sup>805</sup> *Id.* para 7.

<sup>806</sup> ILO Governing Body, ‘Implementation strategy for the follow-up mechanism of and promotional activities on the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), 320<sup>th</sup> Session, Geneva, 13–27 March 2014, GB.320/POL/10.

<sup>807</sup> ‘Multinational Enterprises (MULTI)’ (13 October 2015) <<http://www.ilo.org/empent/units/multinational-enterprises/lang--en/index.htm>> [accessed 30 March 2016](#).

<sup>808</sup> *Id.*

with international labour standards and build good industrial relations.<sup>809</sup> To that end, the Helpdesk publishes detailed information and fact sheets on such issues as child labour; collective bargaining; discrimination and equality; employment promotion; forced labour; freedom of association and the right to organise; general policies; occupational safety and health (OSH), security of employment; wages and benefits; and working time.<sup>810</sup>

Finally, the MNE Declaration is equipped with an authoritative mechanism for the interpretation of the MNE Declaration. Governments or representative workers' or employers' organisations may interrogate the International Labour Office on any disagreement as to the terms of the MNE, and the request will be settled by the ILO Governing Body. The interpretation procedure is appended to the Declaration itself.<sup>811</sup>

### *b) Awareness raising and capacity building*

As indicated above, raising awareness and building capacity in governments, businesses and workers is one of the two main axes of the implementation strategy of the MNE Declaration. Several tools have been put in place for that purpose. Below we describe the most noteworthy ones.

First, the ILO has launched an E-learning Module on the MNE Declaration, which contains a general presentation and further resources on the Declaration, but perhaps most interestingly examples of successful implementation, based on real-life cases.<sup>812</sup> The ILO also organises more in-depth training courses on the MNE declaration.<sup>813</sup>

The ILO naturally also publishes a number of guidance documents and tools on the implementation of the MNE Declaration, such as 'The MNE Declaration: What's in it for Workers?'<sup>814</sup> or the abovementioned 'fact sheets' prepared by the helpdesk. Additionally, the ILO is trying to engage its stakeholder in a more targeted manner, and in this regard is attempting to include items based on the MNE Declaration in its country- and sector-specific activities.<sup>815</sup>

Finally, the ILO is setting up

a global network with focal points from departments at ILO headquarters, Regional Offices and Decent Work Technical Support Teams. The focal points will be trained on how to lead awareness raising with regard to the MNE Declaration among the tripartite constituents and multinational

<sup>809</sup> ILO, 'ILO Helpdesk for Business on International Labour Standards' (28 September 2015) <<http://www.ilo.org/empent/areas/business-helpdesk/lang--en/index.htm>> accessed 30 March 2016.

<sup>810</sup> *Id.*

<sup>811</sup> ILO, 'ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy' (n.3), Appendix III.

<sup>812</sup> ILO, 'Training: An introduction to the MNE Declaration' (undated) <<https://ecampus.itcilo.org/course/view.php?id=21>> accessed 30 March 2016.

<sup>813</sup> See e.g. ILO, 'Multinational enterprises, development and decent work: Report on the promotion and application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in the Americas' (18th American Regional Meeting, Lima, Peru, 13–16 October 2014) <[http://www.ilo.org/wcmsp5/groups/public/--ed\\_norm/--relconf/documents/meetingdocument/wcms\\_311677.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_norm/--relconf/documents/meetingdocument/wcms_311677.pdf)> accessed 30 March 2016.

<sup>814</sup> ILO, 'The ILO MNEs Declaration: What's in it for Workers?' (2011) <[http://www.ilo.org/wcmsp5/groups/public/--ed\\_dialogue/---actrav/documents/publication/wcms\\_152797.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_dialogue/---actrav/documents/publication/wcms_152797.pdf)> accessed 14 October 2015.

<sup>815</sup> See ILO Governing Body, above n. 806, p. 2-3.

enterprises and provide technical assistance at the request of constituents at the country level on matters such as national consultations, policy advice, sharing of good practices from other countries and the establishment of national tripartite committees. They will also facilitate the collection of information on national experiences that can be incorporated into global tools and shared at ILO Regional Meetings.<sup>816</sup>

### c) *Collection of information*

It has always been the intention of the ILO to track responses to the MNE Declaration, and therefore to keep an eye on implementation and progress. Therefore, the introduction to the MNE declaration states that '[p]eriodic surveys are conducted to monitor the effect given to the Declaration by MNEs, governments, and employers' and workers' organizations.' Until 2006, the surveys were based on reports submitted by governments after consultation with employers and workers and on responses to questionnaires submitted by all stakeholders, which were then summarised in final reports. However, the procedure was severely criticised as it appeared that responses submitted were mostly reporting on the fact that the MNE was complied with, and often praised MNEs for their efforts in that respect. Whenever problems were reported, the corporation involved was not identified, thereby stripping the survey of any value for accountability.<sup>817</sup>

Following the 2014 overhaul of the MNE Declaration follow up strategy, the surveys are no longer based solely on stakeholder submissions, but aggregate several sources of information, namely information already available in the ILO Knowledge Management Gateway; new data generated following capacity building for national statistical offices; research; and information collected directly from the tripartite constituents, through a short questionnaire rotating annually across the four regions.<sup>818</sup> These four data collection methods can also be used as stand-alone tools.

Surveys are therefore now conducted on a regional basis, and the first exercise since the reform concerned the Americas.<sup>819</sup> Even though the survey only concerns the Americas and is only based on questionnaires and not the other collection data methods outlined above, a number of take-home points should be underlined.

First of all, it appears that awareness of the MNE Declaration is generally lower than that of other high profile instruments such as the UNGP or the OECD Guidelines, although no numbers are offered to substantiate this point.<sup>820</sup> Second, responses have evidenced that not all areas covered by the MNE

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<sup>816</sup> *Id.*, para 11, p. 3.

<sup>817</sup> Jernej Čerňič, 'Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (2009) 6 *Miskolc Journal of International Law* 24, 29.

<sup>818</sup> ILO Governing Body, above n. 806, p. 4-5.

<sup>819</sup> ILO, 'Report on the promotion and application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in the Americas', 18<sup>th</sup> American Region Meeting, 13-16 October 2014 (2014), <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_311677.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_311677.pdf)>, last accessed 30 March 2016.

<sup>820</sup> *Ibid.* p. 47.

Declaration were deemed equally relevant by stakeholders. As shown in Table 2 below, while divergences amongst the different stakeholders regarding most of the themes are limited, with differentials usually below 20%, there is an important gap as to the relevance of two of the principles which coincide with two of the most emblematic labour rights, namely freedom of association and collective bargaining, for which the differential between employers and workers are above, respectively, 40 and 50%.

Areas		Average	Governments	Employers' organizations	Workers' organizations
Employment	Employment promotion	69	78	67	68
	Equality of opportunity and treatment	50	67	53	45
	Security of employment	47	44	53	45
Training	Training	48	67	60	39
Conditions of work and life	Wages, benefits and conditions of work	60	67	40	66
	Minimum age	27	33	20	29
	Safety and health	52	56	53	50
Industrial relations	Freedom of association and the right to organize	65	67	33	76
	Collective bargaining	63	56	27	79
	Consultation	34	33	33	34
	Examination of grievances	23	22	13	26
	Settlement of industrial disputes	42	44	27	47
Others		16	11	20	16
None		5	11	0	5

Table 2: Relevance of Areas of the MNE Declaration<sup>821</sup>

Finally, capacity seems to be lacking regarding active promotion of the MNE declaration, as just above one third of the respondents (39%) have been able to organise events and activities to promote the principles of the MNE Declaration.<sup>822</sup>

## B. EU engagement in support of the ILO MNE Declaration

After this very brief introduction of the MNE Declaration, this section will examine the different ways in which the EU has contributed to the implementation of the MNE Declaration and sought to track responses to it by its Member States, businesses and workers' associations.

<sup>821</sup> ILO, 'Multinational enterprises, development and decent work: Report on the promotion and application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in the Americas' (18th American Regional Meeting, Lima, Peru, 13–16 October 2014), p.29 <[http://www.ilo.org/wcmsp5/groups/public/--ed\\_norm/---relconf/documents/meetingdocument/wcms\\_311677.pdf](http://www.ilo.org/wcmsp5/groups/public/--ed_norm/---relconf/documents/meetingdocument/wcms_311677.pdf)> accessed 14 October 2015.

<sup>822</sup> Ibid. p. 44.

## 1. Background: EU-ILO relations

The EU and the ILO have a long-standing relationship, which was established in 1958, and has in 2004 become a 'Strategic Partnership'.<sup>823</sup> The object of the Strategic Partnership is multifold, but has especially revolved around the EU's support for the ILO's 'Decent Work Agenda'.<sup>824</sup> It is not the purpose of this report to discuss the EU-ILO partnership in detail, but it should be underlined that these two organisations have at times partnered up on issues related to Business and Human Rights.

Perhaps the most visible joint initiative taken by the EU and the ILO in this field is the EU-ILO Sustainability Compact in Bangladesh, which was launched as a response to the Rana Plaza factory collapse in 2013. The Compact commits Bangladesh, the ILO and the EU to close cooperation and implementing actions in a number of areas:

1. Respect for labour rights, in particular freedom of association and the right to collective bargaining,
2. Structural integrity of the buildings and occupational safety and health, and
3. Responsible business conduct by all stakeholders engaged in the [ready-made garment] and knitwear industry in Bangladesh<sup>825</sup>

The EU offered assistance<sup>826</sup> through some of its existing development cooperation initiatives with Bangladesh, such as the EU-funded 'Technical and Vocational Education and Training' (TVET) project, implemented by the ILO<sup>827</sup> and the 'Better Work and Standard' (BEST) programme with Bangladesh,<sup>828</sup> and stated its readiness to provide additional capacity building and financial resources as part of the EU's future development assistance for the years 2014-2020. However, the European social partners in the textile and clothing sector are implementing a pilot project supported by the EU on 'Harmonisation Guidelines for Implementation and promotion of Corporate Social Responsibility in the European Textile and Clothing Industry'. It aims to develop a risk assessment and management linked to CSR compliance.<sup>829</sup>

<sup>823</sup> Memorandum of Understanding - Establishment of a strategic partnership between the International Labour Organisation and the European Commission in the field of Development, 15 July 2004, [https://ec.europa.eu/europeaid/sites/devco/files/memorandum-of-understanding-ec-ilo-2004\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/memorandum-of-understanding-ec-ilo-2004_en.pdf), accessed 30 March 2016.

<sup>824</sup> See generally J Orbie and others, 'JESP Symposium: The European Union's Global Social Role' (2009) 19 Journal of European Social Policy 99.

<sup>825</sup> Government of Bangladesh, European Commission and ILO, 'Staying engaged: A Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh' (joint statement, 8 July 2013) <[http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151601.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151601.pdf)> accessed 14 October 2015.

<sup>826</sup> Ibid, 6.

<sup>827</sup> The Technical and Vocational Education and Training (TVET) Reform Project is a Government of Bangladesh initiative, assisted by the International Labour Organisation and funded by the EU (2008-2015), available at: <[http://www.ilo.org/dhaka/Whatwedo/Projects/WCMS\\_106485/lang-en/index.htm](http://www.ilo.org/dhaka/Whatwedo/Projects/WCMS_106485/lang-en/index.htm)> accessed 6 March 2015.

<sup>828</sup> The Better Work & Standards programme can be found at: <<http://www.best-bd.org/>> accessed 6 March 2015.

<sup>829</sup> 'Staying engaged: for continuous improvements in labour rights and factory safety in the ready-made garment and knitwear industry in Bangladesh, Bangladesh Sustainability Compact – follow-up meeting' Implementation

While the initiative references the MNE Declaration, it does not root any implementing action of the Compact firmly in it.<sup>830831</sup>

Most recently as well, the EU joined the ‘New initiative to improve labour rights in Myanmar’ which had been launched in November 2014 by the Republic of the Union of Myanmar, the United States of America, Japan, Denmark and the ILO,<sup>832</sup> as an instrument to ‘1) improve Myanmar’s system of labour administration through a multi-year labour law reform and capacity building plan (labor reform plan); and 2) foster strong relations among businesses, workers, civil society organisations, and the Government of Myanmar through a stakeholder consultative mechanism.’<sup>833</sup> This new initiative does on the contrary not reference the MNE Declaration.

## 2. EU explicit support for the MNE Declaration

As indicated multiple times above, the EU is frequently referring to a cluster of ‘internationally recognised principles and guidance’ on CSR, which it seeks to promote. This cluster of instruments which includes the ILO MNE Declaration is notably mentioned in the Action Plan on Human Rights and Democracy (2015-2019), and in the 2011 CSR Strategy.

As was already shown in the discussion of the UNGC (above, section III.B), dedicated references to one of these instruments (except for the UNGPs) are quite rare, and the ILO MNE Declaration is no exception: it is usually referred to in conjunction with the ISO 26.000, the OECD guidelines, the UNGPs and the UNGC. As a matter of fact, despite the EU-ILO Strategic Partnership, an interviewed official confirmed that there was little to no dialogue between DG Employment and the ILO on the particular issues raised by the MNE Declaration, and that their relationship on that subject was ‘anecdotal.’<sup>834</sup>

In terms of the EU relying on the MNE Declaration in its policies, the results of our search are quite slim. Like the Global Compact, the MNE Declaration is mentioned in the recitals of the new Directive on non-

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review and progress stocktaking, Brussels, 20 October 2014, 4, available at: [http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc\\_152853.pdf](http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152853.pdf) accessed 6 March 2015.

<sup>830</sup> Ibid.

<sup>831</sup> This paragraph originates from the FRAME 7.2 report, see Wolfgang Benedek, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan, Stuart Wallace, ‘Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors’, Section III.I.3., p. 71-72 (FRAME report, 31 March 2015) <http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf> accessed 30 March 2016.

<sup>832</sup> ILO, ‘New initiative to improve labour rights in Myanmar’ (statement, 14 November 2014) [http://www.ilo.org/yanon/info/public/speeches/WCMS\\_319811/lang--en/index.htm](http://www.ilo.org/yanon/info/public/speeches/WCMS_319811/lang--en/index.htm) accessed 14 October 2015.

<sup>833</sup> Ibid.

<sup>834</sup> Interview 15 April 2015.

financial disclosure.<sup>835</sup> It is also, unsurprisingly, mentioned on European Parliament's resolution on the Decent Work Agenda.<sup>836</sup>

Likewise, the EU has organised events which recognised the importance of the MNE Declaration, alongside others, like the 2004 Multi-Stakeholder Forum on CSR (see above). It has also participated in events dedicated to the MNE Declaration. It notably participated in a Symposium in 2013 in which the participants 'agreed that international organisations should work more closely together at the country level to try to ensure a greater positive impact of foreign direct investment on development in line with the provisions of the MNE Declaration.'<sup>837</sup>

For the rest, Action 24 (d) of the Action Plan 2015-2019 also suggests to include references to the MNE Declaration alongside the other instruments examined in this report, and this was done in the same way as for the UNGC (see above III.B.c)).

### C. Conclusion

The MNE declaration is peculiar in the collection of Business and Human Rights instruments, as it keeps the focus strictly on some aspects of labour rights (contrary to, for example, the UNGPs which very clearly state that *all* human rights are relevant to business<sup>838</sup>), and function in the tripartite manner which is the trademark of the ILO. The most recent developments, and notably the overhaul of the follow up strategy of the MNE Declaration have evidenced that the ILO was still looking for the best method to make the Declaration effective and relevant.

As far as the EU's involvement with the instrument is concerned, we can only conclude that, beyond the lip service paid to the Declaration as part of a cluster of CSR instruments, there is very little that the EU is doing to specifically track responses to the MNE Declaration or promote its uptake. For example, while the EU is investing considerably in the transition in Myanmar, and while the comprehensive framework for this process sets the 'adoption of sustainable and responsible business standards, such as Decent Work,' as a goal, there is no mention of the MNE Declaration in this context.<sup>839</sup>

This is all the more surprising that the EU and the ILO are engaged in an otherwise fruitful Strategic Partnership. Moreover, as evidenced by the recent Staff Working Document on the implementation of the UNGPs, the EU is very engaged in the labour dimension of CSR, notably with a number of directives combating discrimination in the workplace or migrant workers' rights.<sup>840</sup> This perhaps goes to show that,

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<sup>835</sup> Directive 2014/95/EU (n.228), Recital 9.

<sup>836</sup> European Parliament resolution on promoting decent work for all [2008] OJ C 102E/321, para. 48

<sup>837</sup> ILO Governing Body, 'Promotion of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy: Activities report for 2003' (289th Session, Geneva, March 2004, GB.289/MNE/1), para. 2.

<sup>838</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UNGP 12.

<sup>839</sup> Council of the European Union, 'EU Annual Reports on Democracy and Human Rights in the World 2014', 22 June 2015, 10152/15, 302.

<sup>840</sup> European Commission, 'Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD (2015) 144 final (n 158), p. 4-5.

so far, the MNE Declaration, despite its long standing character, has kept a lower profile than the other instruments discussed in this report.



## VII. EU support for tracking CSR responses: regulatory and “smart mix” measures

The above examination of the UNGPs, the UNGC, the OECD Guidelines, ISO 26000 and the MNE Declaration have evidenced that the EU was intent on picking up on these various instruments. Its preferred means of action in this regard are generally soft. We can categorise such initiatives as follows:

- Incentives: the EU provides soft incentives to other actors to adopt and implement CSR tools. This is for example the case when the EU includes CSR instruments as part of an FTA’s sustainable development chapter;
- Guidance: the EU publishes documents in order to help other actors comply with a CSR tool. The EU has for example made an effort to help SMEs navigate the CSR field.
- Coordination: the EU acts as a broker to help different parties share best practices and align initiatives. Examples are the EU Multi-Stakeholder Forum on CSR, or the Peer review of the CSR and Business and Human Rights National Action Plans prepared by Member States.

Remaining quite faithful to its historical approach, the EU has therefore been quite reluctant to legislate in this area, and has only very rarely done so. In the last few years, however, the EU has taken three legislative initiatives which are breaking new ground in this regard, and can be regarded as implementing and fostering the right responses by Member States and Corporations to the five instruments studied in this report.

Below we examine these three initiatives in turn.

### A. Directive on non-financial disclosure: facilitating tracking through disclosure

On 22 October 2014, the European Council and the European Parliament adopted the Directive 2014/95/EU amending Directive 2013/34/EU [on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings] as regards disclosure of non-financial and diversity information by certain large undertakings and groups (hereinafter ‘the non-financial reporting directive’ or ‘the directive’).<sup>841</sup> This Directive came into force in December 2014, and should be transposed into national legislation by December 2016.<sup>842</sup> EU companies should start reporting as from 2017. The EU Commission is expected to publish non-binding guidelines on methodology for reporting on non-financial information by the end of 2016, which will be aimed at facilitating the disclosure of information by undertakings.<sup>843</sup> The Directive complements the existing mandatory disclosure regimes under the UN Accounting Directive [on the annual financial statements, consolidated financial statements

<sup>841</sup> Directive 2014/95/EU, (n. 228)

<sup>842</sup> Denmark was the first EU Member State to implement the new EU Directive by adopting an amendment to the Danish Financial Statements Act on 21 May 2015. See <<http://csrgov.dk/file/557863/implementation-of-eu-directive.pdf>> accessed 29 March 2015.

<sup>843</sup> Directive 2014/95/EU (n.228), Art. 2, Recital 17.

and related reports of certain types of undertakings]<sup>844</sup> and the Transparency Directive [on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market]<sup>845</sup>, which require EU-listed companies, active in the extractive industry or the logging of primary forest, to provide information about payments made to governments, large undertakings and public-interest entities. These Directives, which were both amended in 2013, are of a horizontal character and will be discussed below.

Currently, there are no processes in place to track compliance by companies with the Directive once mandatory reporting begins in 2017 at EU level, hence the tracking will take place elsewhere by States and other actors. The following section will therefore focus on the potential of the Directive to foster active demand by States and other actors for EU corporations to respond to the five CSR instruments. The Directive makes extensive reference to these instruments, as its recital 9 reads as follows:

In providing [the] information [required by the directive], undertakings which are subject to this Directive may rely on national frameworks, Union-based frameworks such as the Eco-Management and Audit Scheme (EMAS), or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN 'Protect, Respect and Remedy' Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organisation for Standardisation's ISO 26000, the International Labour Organisation's Tripartite Declaration of principles concerning multinational enterprises and social policy, the Global Reporting Initiative, or other recognised international frameworks.

This section will reflect on the role of mandatory disclosure in facilitating the tracking of business responses more generally. It will then examine the content of the disclosure obligations of the Directive in order to determine to what extent these reflect and create (legal) incentives for business enterprises to disclosure and act in alignment with the expectations set out in these CSR instruments. The focus will be on alignment with the expectation set out in the UNGPs that business enterprises respect human rights, which the other international CSR instruments are aligned to. In this regard, this section will shed some light on how the Directive fosters State and business responses to the UNGPs, and in particular UNGP 3(d) and UNGP 17 & 21 and, also by adding conceptual and operational clarity on these principles, potentially contributes to the efforts by States, business enterprises and other actors to track responses to these CSR instruments in the EU context. The aim of the Directive is to 'increase the relevance,

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<sup>844</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19.

<sup>845</sup> Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC [2013] OJ L 294/13, para. 7.

consistency and comparability of information disclosed by certain large undertaking and groups across the Union'.<sup>846</sup> Statistics showed an increase in the total number of reports issued, reaching up to 4000 in 2010 and covering 80% of the world's largest companies, as well as a documented increase in the uptake of the GRI guidelines in these reports.<sup>847</sup> While reporting practices thus improved, they were still deemed inadequate in terms of both quantity and quality. The total number of reports accounted for only 6% of the total of 42,000 EU large companies, the majority of which originated from only four EU member states (UK, DE, ES, FR). Stakeholders perceived the information disclosed as lacking in materiality and balance. Companies tended to cover the positive rather than the negative, and to not reflect on performance, or aspects that were relevant to stakeholders, e.g. on risk management and human rights. Reports were seen as insufficiently timely, as they were not issued consistently and annually. Reports were often not subject to independent verification, hence the accuracy and reliability of information was questioned. The comparability of information was compromised due to what most perceived as 'poor' key performance indicators.<sup>848</sup>

The EU regime on the disclosure of non-financial information, comprising of the 4<sup>th</sup> and 7<sup>th</sup> Accounting Directives, was formulated in too open-ended language to impose a clear legal obligation on companies, hence creating insufficient legal incentives for companies to comply.<sup>849</sup> Also national regulation and markets both failed to fill the regulatory gap. Markets had been insufficient to move companies, in part because there is no uncontested evidence that the long-term benefits of being more transparent outweigh the short-term costs, which can be significant and more discernable and imminent than the long-term benefits of disclosure.<sup>850</sup> Fragmentation in national legislations imposing diverse disclosure requirements on companies complicated efforts to compare and benchmark the performance of companies across the Internal Market. By harmonising a proliferation of national legislations, the Directive sought to lift transparency to a similarly high level across the EU. Greater coherence in disclosure requirements across the EU can alleviate the cost for companies operating in multiple countries.

The Directive aims to drive improvement in the performance of business enterprises through transparency. The importance of transparency and comparability of information is related to how it affects the capacity of business enterprises and other stakeholders to measure, monitor and manage the performance of undertakings and their impact on society more generally.<sup>851</sup> Disclosure can affect the performance of businesses by facilitating *inter alia* better measurement and management of risks and

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<sup>846</sup> Directive 2014/95/EU (n.228), Recital 21.

<sup>847</sup> SWD(2013) 127 final (n.101), p. 10.

<sup>848</sup> Ibid, p.10-11

<sup>849</sup> Ibid, p.12

<sup>850</sup> EU Commission, 'Executive Summary of the Impact Assessment' (Commission Staff Working Document) SWD (2013)128 final, para 2.1. p, 2-3

<sup>851</sup> Directive 2014/95/EU (n.228) Recital 3

opportunities, which can lead to better results.<sup>852</sup> <sup>853</sup> It also affects the accountability of business enterprises in terms meeting the demands civil society organisations and right-holders for publicly disclosed information to assess corporate impacts and due diligence. It also affects the efficiency of capital markets by meeting the demands of investors for comparable and accurate information to measure and compare the performance of companies and to take better-informed decisions. Disclosure can make change in business behavior and markets visible and manageable, and can facilitate the channeling of this change towards the goal of creating a 'sustainable global economy by combining long-term profitability with social justice and environmental protection'.<sup>854</sup> Transparency is perceived as 'a "smart lever" to strengthen citizen and consumer trust and confidence in the Single Market and to encourage sustainable economic growth'.<sup>855</sup>

The non-financial reporting directive sets legal requirements for certain large undertakings and groups to disclose information on, *inter alia*, human rights, and defines a minimum legal benchmark regarding the content of this disclosure. The Directive applies to public interest entities that are individual undertakings or parent undertakings of a large group, having an average number of more than 500 employees during the financial year, in the case of a group on a consolidated basis.<sup>856</sup> For the purpose of the Directive, public interest entities are defined as listed companies, credit institutions, insurance undertakings, and entities designated by Member States as public interest entities.<sup>857</sup> Disclosure operates through the inclusion of a non-financial statement in the management report, or in the case of a group, a consolidated non-financial statement in the consolidated management report. The non-financial statement must cover the information necessary for an understanding of not only the undertaking's or group's economic standing, but also the impact of its activities on public interest issues, relating to, as a minimum, 'environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters'. The Directive seeks to introduce a minimum legal threshold to ensure that undertakings and groups provide information that is sufficient to provide the public and authorities with a fair and comprehensive overview of its human rights policies, outcomes and risk-management.<sup>858</sup>

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<sup>852</sup> SWD (2013)128 final (n **Error! Bookmark not defined.**), 5.2. A study based on an analysis of the cost/benefit assessment of mandatory reporting requirements showed that European companies perceived identifying and controlling risks an important, although not the most important benefit of transparency. The companies said that the main benefits of transparency were enhancing the credibility of the company and improving transparency of reporting. Also enhancing the brand image of products was considered very important, while improvements of the brand image, internal culture and the ability to react with stakeholders was considered important. European Commission, DG Internal Market and Services, 'Disclosure of non-financial information by Companies' (Final Report, 2011) <[http://ec.europa.eu/finance/accounting/docs/non-financial-reporting/com\\_2013\\_207-study\\_en.pdf](http://ec.europa.eu/finance/accounting/docs/non-financial-reporting/com_2013_207-study_en.pdf)> accessed 8 march 2015. p.27-30

<sup>853</sup> COM(2011) 681 final (n 1), p.11, para 4.5.

<sup>854</sup> Directive 2014/95/EU (n 228), Recital 3

<sup>855</sup> SWD(2013) 127 final (n 101). p. 2

<sup>856</sup> Directive 2014/95/EU (n 228), Art. 19a.1.

<sup>857</sup> European Parliament and Council Directive 2006/43/EC of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013], Art. 2.1.

<sup>858</sup> Directive 2014/95/EU (n 228), Art 1(1) inserting Article 19a, Art 1(3) inserting Article 29a, Recital 5 and 7.

Where respect for human rights is concerned, the disclosure requirements align, in general terms, with the expectations set out in the UNGPs, and more specifically the responsibility to communicate as set out in UNGP 17 and 21.<sup>859</sup> The minimum disclosure requirements that are built on the due diligence concept illustrate this.

More specifically, the undertakings or groups subject to the Directive should describe, at a minimum: (a) the undertaking or group's business model; (b) the human rights policies pursued by the undertaking or group relating these matters, including its due diligence processes implemented; (c) the outcome of those policies; (d) the 'principal' human rights risks that may be linked to the undertaking's or group's operations, including 'where relevant and proportionate' its business relationships, products or services, and how these risks are managed; and (e) relevant non-financial key performance indicators.<sup>860</sup>

The undertakings that are subject to the Directive should report on matters that reflect the 'principal' human rights risks that are linked to the undertaking or group's operations.<sup>861</sup> If these 'principal' risks are linked to a company's business relationship, products or service, the company must disclose where 'relevant and appropriate'.<sup>862</sup> When risks are sufficiently 'principal' that they give rise to a disclosure obligation, or what counts as 'relevant and proportionate' is not clear. The Directive suggests that this provision should be contextualized in relation to the undertaking's or group's duty to disclose on the due diligence processes implemented. Recital 8 notes that 'the non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts'.<sup>863</sup> In practice, this entails that undertakings and groups should assess the activities of subsidiary entities or other business relationships down their supply and sub-contracting chains to know the potential and actual human rights risks that they may be involved in order to disclose these risks and how it manages these risks.<sup>864</sup>

The Directive does not provide a definition of due diligence, and in the absence of greater clarity on also other key concepts, there is a reasonable possibility that the disclosure obligations are not articulated in sufficiently clear language in order to translate into national legal requirements that impose clear legal obligations on companies that require, or have the effect of requiring business enterprises to disclose and act in correspondence with the expectations set out in the UNGPs.

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<sup>859</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UNGP 17.

<sup>860</sup> Directive 2014/95/EU (n.228), Art 1(1) inserting Art. 19a, Art 1(3) inserting Article 29a.

<sup>861</sup> Recital 8 suggests that 'principal' is determined in relation to the severity of impacts that are likely to materialise or that have already materialised. Business enterprises should disclose on issues that reflect principal risks of severe impacts. The severity of such impacts should be determined in relation to the 'scale and gravity' of these impacts. Ibid, Recital 8.

<sup>862</sup> Directive 2014/95/EU (n.228), Art 1(1) inserting Art. 19a. 1(d), Art 1(3) inserting Article 29a. 1(d)

<sup>863</sup> Directive 2014/95/EU (n.228), Recital 6.

<sup>864</sup> UNHRC, 'Report of the Special Representative of the Secretary-General' (n 6), UNGP 21.

The Directive imposes on EU Member States an obligation to allow undertakings and groups the choice to rely on national, Union-based or international frameworks in order to meet their disclosure obligations pursuant to the Directive. By expressly referring to the UNGPs, the UNGC, the OECD Guidelines, ISO 26000 and the ILO MNE Declaration as examples of internationally recognized frameworks that undertakings may use in their reporting, the Directive acknowledges the value of these instruments and implicitly encourages their uptake by business enterprises. The Directive furthermore confers on EU Member States the obligation to require that undertakings specify which framework they have relied on. This requirement should make the uptake of these instruments explicit and may facilitate the tracking of business responses to these initiatives.<sup>865</sup> If companies choose to rely on an international framework, and make this explicit, the Directive leaves EU Member States the option to require that the information disclosed in conformity with the respective standard specified be verified by an independent assurance service provider.<sup>866</sup> The requirement that undertakings describe non-financial performance indicators can create incentives for undertakings to seek and use human rights indicators. It can incentivise business enterprises to sign up to the GRI and to rely on the human rights indicators suggested in their disclosure, for instance the G4 sustainability reporting guidelines (above, section II.A.3.b)(1)).<sup>867</sup>

There are various provisions in the Directive that permit or require EU Member States to leave a certain degree of flexibility for companies under their national disclosure requirements in terms of how to disclose and what information to include in the non-financial statement. For instance, certain discretion results from the 'comply or explain' modality of disclosure, i.e. when a company does not pursue a human rights policy, it need not adopt such a policy but rather provide a 'clear and reasoned' explanation for why this is the case.<sup>868</sup> The Directive does not prescribe how this explanation should be drawn up, which leaves further flexibility to companies to decide how to formulate this explanation. The Directive also permits EU Member States to exempt an undertaking from its obligation to disclose through a non-financial statement, provided that the undertaking publishes a separate report for the financial year that covers the minimum required information and certain conditions are met.<sup>869</sup> EU Member States may also exempt a parent or a subsidiary undertaking from its obligation to disclose, if this undertaking is included in the consolidated financial statement or separate report of another undertaking.<sup>870</sup> SMEs are exempted from the applicable scope of the Directive altogether, for the reason that the disclosure requirements would place a too great a burden on these entities.

The Directive furthermore leaves considerable discretion for undertakings that are subject to the Directive to determine the content and the extent of disclosure. Some argue that flexibility has positive effects on

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<sup>865</sup> Directive 2014/95/EU (n.228), Recital 9

<sup>866</sup> Directive 2014/95/EU (n.228), Recital 6

<sup>867</sup> The G3 sustainability guidelines were revisited in 2006 to bring the substantive areas on human rights into alignment with the UNGPs. The latest version G4 sustainability guidelines include 10 performance indicators on human rights. See section II.A.3.b)(1).

<sup>868</sup> Directive 2014/95/EU (n.228), Art 1(1) inserting Article 19a.1. Art 1(3) inserting Article 29a.1.

<sup>869</sup> Directive 2014/95/EU (n.228), Article 19a.4. The separate report should be published with the management report or made publicly available on the undertaking's website, no later than six months after the balance sheet date.

<sup>870</sup> Directive 2014/95/EU (n.228), Art 1(1) inserting Article 19a.3., Art 1(3) inserting Article 29a.3.

the quality of the information disclosed, in that it allows for responsiveness to the multi-dimensional nature CSR, the diversity of CSR policies, and demands by investors, consumer and other stakeholder for comparable information that can be easily accessed. The European parliament considered that ‘high flexibility of action’ was desirable in this regard.<sup>871</sup> This flexibility could however also limit the Directive’s potential of affecting and driving improvement in the reporting practices of undertaking in the interest of human rights were it does not create strong legal incentives for companies to provide a sufficient, complete and accurate account of the impacts of its activities relating respect for human rights. Also to be noted is that the Directive does not set a requirement that disclosure on respect for human rights should be owed principally to right-holders and that their views should be taken into account in the process of disclosure in order to verify that this disclosure provides an understanding of the company’s human rights impact that is relevant and accurate from a right holder perspective.

As noted above, the Directive provides that States should permit, but not require that business enterprises disclose on the basis of the instruments discussed in this report. If undertakings were to rely on one of these instruments in their reporting, and to make this explicit, the information disclosed might not be subject to verification for conformity with the said instruments. The Directive stipulates that EU Member States must ensure that a statutory audit or audit firm checks the report, but only to determine whether the non-financial statement or the separate report has been provided.<sup>872</sup> There is no requirement for this audit to determine the conformity between the statement and the actual practices of the undertaking. The Directive confers on EU Member States an option to require business enterprises to subject the information in the non-financial statement or report to verification by an independent assurance service provider.<sup>873</sup>

The Directive does not provide sanctions for non-compliance, but confers on EU Member States the obligation to ensure that appropriate rules are in place for the purpose of liability for the drawing up and publishing of the management report in accordance with the Directive. The Directive notes that these liability rules should be applicable to the members of the administrative, management and supervisory bodies of an undertaking, which are generally responsible for drawing up these reports. Art. 33 of the Directive stipulates:

1. Member States shall ensure that the members of the administrative, management and supervisory bodies of an undertaking, acting within the competences assigned to them by national law, have collective responsibility for ensuring that:
  - (a) the annual financial statements, the management report, the corporate governance statement when provided separately and the report referred to in Article 19a(4); and

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<sup>871</sup> European Parliament, Resolution of 29 January 2013 on ‘Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery’, 2012/2097(INI), 29 January 2013.

<sup>872</sup> Directive 2014/95/EU (n.228), Art 1(1) inserting Art. 19a 5, Art 1(3) inserting Article 29a.5.

<sup>873</sup> Directive 2014/95/EU (n.228), Art 1(1) inserting Art. 19a 6, Art 1(3) inserting Article 29a.6.

(b) the consolidated financial statements, the consolidated management reports, the consolidated corporate governance statement when provided separately and the report referred to in Article 29a(4),

are drawn up and published in accordance with the requirements of this Directive and, where applicable, with the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002.’

The liability for non-financial disclosure thus falls to the national laws of the EU Member States, which furthermore have discretion to determine the extend of this liability.<sup>874</sup> Liability could arise in situations where the non-financial statement or the alternative separate report is missing.

More tracking is occurring in the context of the EU Accounting Directive<sup>875</sup> and the Transparency Directive.<sup>876</sup> These Directives were amended in 2013 to require in part that EU-listed companies, which are active in the extractive industry or the logging of primary forest, provide for enhanced transparency on payments made to governments, large undertakings and public-interest entities. Both amended Directives are intended to complement the initiative of the EU’s Forest Law Enforcement, Governance and Trade Action Plan (EU FLEGT)<sup>877</sup> and the provisions of the EU Timber Regulation.<sup>878</sup> The latter instrument requires traders of timber products to exercise due diligence when supplying the EU market so as to prevent the entry and circulation of illegally logged wood in the EU.<sup>879</sup>

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<sup>874</sup> Directive 2014/95/EU (n.228), Recital 41.

<sup>875</sup> Directive 2013/34/EU (n. 844), para. 44.

<sup>876</sup> Directive 2013/50/EU (n. 845), Recital. 7.

<sup>877</sup> The legal basis for FLEGT is Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2005] OJ L 347/1 and Commission Regulation (EC) No 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2008] OJ L 277/23.

<sup>878</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, [2010] OJ L 295/23.

<sup>879</sup> This paragraph originates from the FRAME 7.2 report, see [Wolfgang Benedek, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan, Stuart Wallace, ‘Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors’, Section III.I.3., p. 69-70 \(FRAME report, 31 March 2015\) <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>> accessed 30 March 2016.](http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf)



## B. EU Draft Conflict Mineral Regulation: encouraging supply chain due diligence and tracking practices by business enterprises

The mandatory reporting requirement found in the Accounting and Transparency Directives, with respect to extractives and logging, has not been carried through in the minerals sector. This is despite the fact that already in 2010 the European Parliament had called on the Commission and Council to follow the US lead in introducing a piece of mandatory legislation on the responsible sourcing of minerals such as tin, tantalum and tungsten and gold (known collectively as '3TG') from conflict-affected areas,<sup>880</sup> along the lines of the Section 1502 of the Dodd-Frank Act.

Instead, there has been a fragmented response. In 2013 DG Trade organised a public consultation to gauge responses as to whether an EU conflict minerals initiative should follow the EU Timber Regulation in requiring that the business entity first placing a selected mineral (processed or not) on the EU market must provide evidence of having carried out due diligence on that mineral. However, the proposed EU Regulation on conflict minerals,<sup>881</sup> which was launched in 2013, relies on a system of 'self-certification as a responsible importer', i.e. self-regulation, rather than introducing a mandatory reporting rule on the sourcing of 3TG from conflict-affected and high risk areas.<sup>882 883</sup>

On 5 March 2014, the European Parliament and the Council presented a new Proposal for a Regulation regarding the creation of a Union system for due diligence self-certification by responsible importers of conflict minerals.<sup>884</sup> In May 2015, the European Parliament caused an about turn by voting in support of a mandatory EU certification scheme. The discussions on this Proposed Regulation are ongoing and no regulation has been adopted thus far. In this section we focus on EU Commission's attempt to introduce a voluntary self-certification scheme and the proposed amendments by the EU Parliament.

Impetus for this EU initiative are the cases of illegal mineral sourcing and trading supporting the activities of illegal armed groups and militia in the Eastern part of the Democratic Republic of Congo (DRC) and the associated human rights abuses and serious violations of international humanitarian law. This problem

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<sup>880</sup> European Parliament Resolution of 7 October 2010, on failures in protection of human rights and justice in the Democratic Republic of Congo, C371 E/5, 20.12.2011, para.14.

<sup>881</sup> Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for a supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high risk areas, COM(2014) 111, 2014/0059 (COD), Article 3.

<sup>882</sup> This paragraph originates from the FRAME 7.2 report, see Wolfgang Benedek, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan, Stuart Wallace, 'Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors', Section III.I.3., p. 69-70 (FRAME report, 31 March 2015) <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>> accessed 30 March 2016.

<sup>883</sup> See Mary E Footer, 'Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-affected Areas: Towards a Normative Framework?' in Jernej Letnar Čerňič and Tara van Ho (eds) *Direct Human Rights Obligations of Corporations*.

<sup>884</sup> Commission Proposal for a Regulation of the European Parliament and of the Council (EU) of 5 March 2014 on setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas COM/2014/0111 final.

has been addressed by the UN Security Council Resolution 1952 (2010),<sup>885</sup> the UN Group of Experts on the DRC and the G-7. The problem is not limited to the DRC and surrounding countries, but occurs in other regions of the world as well.<sup>886</sup> The proposed regulation is inspired by the US Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA), adopted in 2010, which affects EU companies directly and indirectly, either because they are dually listed in the EU/US, or because they are included in the supply chain of US listed companies and face requests for disclosure on their due diligence.<sup>887</sup>

The Proposed Regulation was set out to address one of the main underlying problems, which is the lack due diligence by companies in the *upside* part of the supply chain, and by smelters/refiners in particular. A study showed that out of a total number of 300 smelters for tin, tantalum and tungsten only 16-18% conduct due diligence. The rate for an estimated number of 150 refiners of gold is higher, 40%-89% respectively.<sup>888</sup> Smelters / refiners are a key segment in the mineral supply chain because they are at the last stage in the chain where the minerals` origin can be traced and responsible supply behavior leveraged.<sup>889</sup> Their lack of due diligence complicates efforts of downstream users to comply with their due diligence responsibility as these depend on smelters and refiners for essential information on the origin of metals and trading routes.

Existing initiatives by EU Member States, third countries and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Due Diligence Guidance) have not provided a sufficient solution. The individual actions by EU Member States have not affected the due diligence performance of smelters and refiners to a sufficient extent. Their measures have been oriented down-stream rather than up-stream, and hence have not targeted the most effective aspect of the supply chain. These measures have also not leveraged a sufficient volume of trade. The US DFA and the voluntary OECD Due Diligence Guidance have not met with a sufficient level of compliance, in part of the difficulties facing EU down-stream users in identifying and leveraging greater transparency from smelters and refiners.<sup>890</sup> Regional and local efforts to certify products and validate mines are

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<sup>885</sup> UN Security Council Res 1952 (2010) S/RES/1952 (2010) available at <<http://www.refworld.org/docid/4cf765db2.html>> accessed 5 June 2015.

<sup>886</sup> Impact Assessment accompanying the document: Proposal for a Regulation of the European Parliament and the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas. SWD(2014) 53 final. p.19.

<sup>887</sup> Ibid. p.13

<sup>888</sup> Ibid. p.22

<sup>889</sup> Ibid. p.21.

<sup>890</sup> Detecting smelters and refiners is complicated due to, inter alia the complexity of supply chains and a lack of organisational capacity among SMEs in particular to exercise due diligence. Information should furthermore be accurate and be provided in an ongoing and timely manner as supply chains change rapidly. Suppliers may furthermore not be allowed or willing to disclose information, either because they are under a contractual obligation not to provide sensitive information, or out of concern for the economic repercussions of revealing the origin of their minerals. Operators may lack leverage because smelters and refiners are in a better bargaining position, due to language barriers or a lack of awareness and/of ethical concern about human rights due diligence. Impact Assessment accompanying the document: Proposal for a Regulation of the European Parliament and the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas. Ibid, p.25

fragmented and said to undermine efforts for reconstruction and social cohesion, as well as for formalising the small-scale mining sectors.<sup>891</sup> The EU can add value by creating a ‘critical mass’ and ‘leverage’ at the global level and ensuring harmonised treatment and clarity for business enterprises, including a better co-ordination of ongoing due diligence responses across the EU.<sup>892</sup>

The Proposed Regulation seeks to encourage companies to ‘source responsibly’ with the aim of, among other things, minimising the financing of armed groups and security forces through mineral proceeds in conflict-affected and high-risk areas.<sup>893</sup> The specific objectives of the proposed regulation are to enhance the transparency and visibility of the due diligence practices of EU global smelters/refiners through the EU list, as well as to create awareness among their governments about due diligence and the importance of improving due diligence compliance. The Proposal seeks to create certainty and transparency downstream and to enable down-stream users to differentiate and switch between suppliers on the basis of *inter alia*, the “EU responsible importer certificate”, as well as to create financial incentives for promoting due diligence practices among downstream users. Other objectives are to promote the uptake of the OECD Guidelines and to foster demand for ethically and legitimately sourced minerals from due diligence compliant smelters/refiners.<sup>894</sup>

The Proposed Regulation establishes a voluntary self-certification system for EU importers of certain minerals and metals to source responsibly from conflict-affected and high-risk areas.<sup>895</sup> The types of metals and minerals covered are tin, tantalum, tungsten, their ores and metals, and gold. These minerals may originate from any ‘conflict-affected and high-risk area’ in the world.<sup>896</sup> An importer seeking self-certification as a ‘responsible importer’ would have to declare adherence to ‘supply chain due diligence’, which entails a set of obligations that draw from and align with the OECD Due Diligence Guidance.<sup>897</sup>

An importer, according to Art. 3-7 of the Proposed Regulation, should: (a) create a management system, including by setting out a supply chain policy that uphold the standards set out by the OECD Due Diligence Guidance, creating a company-level grievance mechanism and operating a chain of custody or supply chain traceability system for both the minerals and metals; (b) identify and assess risks in its mineral supply chain and implement a strategy to respond to the identified risks; (c) carry out independent third-party audits of supply chain due diligence, and; (d) disclose annually to Member State’s competent

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<sup>891</sup> Ibid. p.28.

<sup>892</sup> Ibid. p.21.

<sup>893</sup> Other objectives are to end market distortions in terms of reduced demand and prices for the formal mineral sectors in the DRC and surrounding countries and to promote the uptake of the OECD Guidelines and facilitate the implementation of due diligence conform this framework by EU downstream enterprises. Commission Proposal for a Regulation of the European Parliament and of the Council (EU) of 5 March 2014 on setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas COM/2014/0111 final. p.6.

<sup>894</sup> Ibid. p.4

<sup>895</sup> Ibid.

<sup>896</sup> The term ‘conflict-affected and high-risk areas’ is interpreted broadly as ‘areas in a state of armed conflict, fragile post-conflict, as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systemic violations of international law, including human rights abuses. Ibid. Art.2.

<sup>897</sup> OECD Due Diligence Guidance

authorities information on the identity of all smelters and/or refiners supplying them and independent third-party audit assurances. In order to create transparency and certainty with regards to supply chain due diligence, the EU in consultation with the OECD would annually publish a list of responsible smelters and refiners on the basis of the information provided.

The certification scheme would allow for the monitoring of business responses. The concept of 'supply chain due diligence'<sup>898</sup> aligns with the UNGPs, hence the certification scheme could also contribute to the clarification and implementation of the due diligence responsibility of EU importers as defined in the UNGPs, within the particular operational context of 'conflict-affected and high-risk areas' and in relation to commercial activity of sourcing conflict-minerals and metals.<sup>899</sup> The certification scheme would be voluntary however, hence its success would depend on the participation of business enterprises. Incentives for companies to seek certification should come from the cost/benefit ratio of due diligence of compliance.<sup>900</sup> Analysis suggests that due diligence compliance would not be unduly burdensome on companies and that benefits would exceed the costs of due diligence compliance, which calculated estimates indicate are relatively low.<sup>901</sup>

Critics have discarded the proposed voluntary EU certification scheme as too weak however. NGOs and others have pointed to several shortcomings.<sup>902</sup> Some have indicated that the proposed scheme would have too little impact on too few companies. According to Global Witness, the 400 EU importers (smelters/refiners, traders, and manufacturers) that would be targeted by the proposed regulation amount to only 0.05% of the total of companies using and trading these minerals in the EU. The regulation would have little impact on their sourcing behavior it argues.<sup>903</sup>

One of the main reasons for the EU Commission not having opted for a legal approach was that business enterprise might avoid sourcing from conflict-affected and high-risk areas, this being the least risky and

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<sup>898</sup> SWD(2014) 53 final, (n. 886) p.8

<sup>899</sup> The proposed regulation is consistent with and contributes to EU policy on CSR and its objective of mitigating potential adverse impacts on society. Commission Proposal for a Regulation of the European Parliament and of the Council (EU) of 5 March 2014 on setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas COM/2014/0111 final. p.3.

<sup>900</sup> SWD(2014) 53 final, (n. 886) p.48

<sup>901</sup> Ibid. p.47.

<sup>902</sup> See for example, Business and Human Rights Resource Centre 'Proposed EU regulation on conflict minerals: commentaries & media coverage' <<http://business-humanrights.org/en/conflict-peace/conflict-minerals/proposed-eu-regulation-on-conflict-minerals-commentaries-media-coverage>> accessed 30 January 2015; Global Witness 'Proposed EU law will not keep conflict resources out of Europe, campaigners warn' (London, 5 March 2014) <<http://www.globalwitness.org/sites/default/files/library/Press%20release%20-%20Proposed%20EU%20law%20will%20not%20keep%20conflict%20resources%20out%20of%20Europe.pdf>> accessed 5 March 2014; Mary Footer, 'Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-affected Areas: Towards a Normative Framework?' in Jernej Letnar Černič and Tara van Ho (eds) *Direct Human Rights Obligations of Corporations* (Wolf Publishing 2015).

<sup>903</sup> EuroActive, 'Parliament adopts relaxed measures on conflict minerals', 16 April 2015, <<http://www.euractiv.com/sections/development-policy/parliament-adopts-relaxed-measures-conflict-minerals-313810>> 8 June 2015.

burdensome in terms of the compliance costs. Some European companies indirectly affected by Section 1502 of the DFA and expected to provide evidence of due diligence had diverted away from the region.<sup>904</sup> Such diversion and the resultant fall in demand for minerals could be detrimental for the legitimate trade and may worsen market distortion for minerals from the Great Lakes Region.

The European Parliament in May 2015 voted 402 to 118 with 171 abstentions in support of a mandatory EU certification scheme. The vote was unexpected. The European Parliament requested a binding approach in line with the DFA in its 2010 resolution previously however. The proposed scheme requests `all Union importers` to get certified, including companies that use the respective minerals in their manufacturing process. It also introduces mandatory third-party audit check of due diligence. The proposed scheme potentially affects 880,000 companies, including many SMEs. It extends beyond the amendments proposed by the International Trade Committee of the European Parliament to create mandatory compliance for smelters and refiners only. According to some, this intervention would have been `hopelessly ineffective`, targeting a mere 20 companies.<sup>905</sup> The next steps are informal talks with EU member States to seek final agreement on the proposed law and approval by the EU Commission.

### **C. Directive on procurement: creating regulatory space for States to consider human rights in public procurement**

Public procurement<sup>906</sup> is an important nod in the EU's internal market fabric, as European contracting authorities spend approximately 18 per cent of GDP on procuring works, goods and services.<sup>907</sup> The legal public procurement regime performs a coordinating function, as it ensures that procurement procedures align with principles of the Treaty and serve the goals of effective competition, non-discrimination and the effective allocation of public funds. Public procurement has also been recognized as a `powerful lever for achieving specific goals.'<sup>908</sup> On 11 February 2014, the Council adopted a new set of public procurement Directives to regulate the national public procurement laws and policies of EU Member States, which includes Directive 2014/23/EU on the award of concession contracts,<sup>909</sup> Directive 2014/24/EU on public

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<sup>904</sup> Commission Proposal for a Regulation of the European Parliament and of the Council (EU) of 5 March 2014 on setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas COM/2014/0111 final. p. 2. The impact assessment indicated that an estimated number of 15,000-200,000 EU companies had been affected by being in the supply-chain of US-listed companies.

<sup>905</sup> London Mining Network, `European Parliament surprise vote for stronger conflict minerals regulation` 21 May 2015, <<http://londonminingnetwork.org/2015/05/european-parliament-surprise-vote-for-stronger-conflict-minerals-regulation/>> accessed 6 June 2015.

<sup>906</sup> Procurement entails `the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose`, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art.1.2

<sup>907</sup> EU Commission `Single Market Act, Twelve Levers to Boost Growth and Strengthen Confidence "Working Together to Create New Growth` (Communication) COM(2011) 206 final. p.19.

<sup>908</sup> European Parliament News, `New EU-procurement rules to ensure better quality and value for money` (2014)

<sup>909</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, *OJ L* 94, 28 March 2014, pp.. 1-64.

procurement<sup>910</sup> and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal sectors.<sup>911</sup> One of the main imperatives for the revision of the Public Procurement Directives was to leverage public procurement in support of advancing common societal goals.

This section reflects on the extent to which the revised and consolidated EU Public Procurement Directives encourage States to create incentives for business enterprises to respect human rights by abiding by the CSR instruments discussed in this report, notably through the inclusion of human rights due diligence conditionality in their national public procurement legislation (UNGP 6), in their contracts with private service providers and through adequate oversight of their activities (UNGP 5).

The new Directives overhaul Directive 2004/17/EC applicable to the sectors water, energy, transport and postal services<sup>912</sup> and Directive 2004/18/EC for the award of public works contract, public supply contracts and public service contracts<sup>913</sup>. These former Directives provided contracting authorities with the ability to consider social interests in their procurement decisions at different stages of the procurement process. The Directives permitted a contracting authority to exclude bidders for social considerations,<sup>914</sup> including when considering an offer abnormally low,<sup>915</sup> apply social criteria in awarding a contract,<sup>916</sup> and to lay down special conditions of a social nature governing the performance of a contract.<sup>917</sup> The permissibility for meeting the social needs of the public had to be interpreted strictly. As indicated by the Court of

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<sup>910</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ L 94*, 28 March 2014, pp. 65-242

<sup>911</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, *OJ L 94*, 28 March 2014, p. 243-374.

<sup>912</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (2004) *OJ L 134/1*.

<sup>913</sup> Directive 2004/18/EC of the European Parliament and of the Council, 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (2004) *OJ L 134/114*.

<sup>914</sup> This is explicit in Art 45 of Directive 2004/18/EC: A bidder may be excluded if it '(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority.' Moreover, it is implicit to recital 43 of the same directive; Non-observance of national provisions implementing the Council Directives 2000/78/EC(15) and 76/207/EEC(16) concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.' *ibid*.

<sup>915</sup> *Ibid*. Art 55. See also Directive 2004/17/EC (n. 912), Art. 57.1

<sup>916</sup> *Ibid*. As stipulated in Art. 53 'Contract Award Criteria', the contracting authorities shall base an award either on the criteria of most economically advantageous or the lowest price only. With respect the former, Art 53(a) does not explicitly refer to social concerns as an criteria, however the illustrative list suggests that it is not excluded either. See also Directive 2004/17/EC (n. 912), Art 55

<sup>917</sup> *Ibid*. Directive 2004/18/EC (n. 913), Art 26; 'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.' *ibid*. See also, Directive 2004/17/EC, (n. 912), Art 38

Justice,<sup>918</sup> notably related to award criteria, the social criteria was to be linked to the subject-matter of the contract, not retain an ‘unrestricted freedom of choice on the contracting authority’, be mentioned explicitly, and be in compliance with the fundamental principles.<sup>919</sup> Also, these conditions could not make the performance of a contract directly or indirectly discriminatory.<sup>920</sup>

The new Directives extend the leeway for States to use public procurement in support of advancing social policies. Procurement authorities may take social considerations into account at various stages of the procurement process. The contracting authorities may lay down technical specification for performance and/or functional requirements that concerns the social characteristics of a work, service or supply, provided that these are sufficiently precise to allow for a determination of the subject matter and awarding of the contract.<sup>921</sup> The authorities may, in the technical specifications, require a specific label as proof that the required characteristics are adhered to, although certain conditions apply.<sup>922</sup> With respect to criteria for qualitative selection, a bidder may be excluded based on the awareness of any violation of obligations of EU environmental, social and/or labor law, national law, collective agreements or international law provisions listed in Annex X,<sup>923</sup> which lists eight ILO Labor Conventions.<sup>924</sup> The CSR instruments discussed in this report are on the contrary not mentioned.

With respect to the award of a public contract, contracting authorities must apply the criterion of the ‘most economically advantageous tender’ (MEAT). The cost-effectiveness approach may include the best price-quality ratio. Apart from price and cost, qualitative social characteristics are amongst the criteria that may be weighed into this ratio, provided that there is a link to the subject matter of the public contract.<sup>925</sup> The social characteristics reflecting qualitative aspects of the tender submission thus can be balanced against the other MEAT criteria when reaching an award decision. Directive 2014/24/EU also provides the option of using a cost-effectiveness approach, e.g. a life-cycle costing approach to determine the lowest bidder in a tender procedure. Whether next to environmental costs, also social costs could be linked to the life cycle over a product, service or work is not clear. Contractors may continue to set

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<sup>918</sup> See, for example *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* ECJ C-513/99 (2002) (A municipality which organises a tender procedure for the operation of an urban bus service is entitled to take account of ecological considerations concerning the bus fleet offered)

<sup>919</sup> Directive 2004/18/EC (n. 913), Recital 1 and 46

<sup>920</sup> Directive 2004/18/EC (n. 913), Recital 33

<sup>921</sup> Directive 2014/24/EU (n.910), Art 42. See also Art 40 3.(a) of Directive 2014/25/EU (n. 911).

<sup>922</sup> As such, the Directives clarify some of the legal ambiguity involving the usage of labels, stipulating the conditions that need to be fulfilled, eg that the label requirements ‘only concern criteria which are linked to the subject-matter of the contract’, that these criteria ‘are based on objectively verifiable and non-discriminatory criteria’ and that ‘the labels are established in an open and transparent procedure in which all relevant stakeholders [...] may participate.’ Directive 2014/24/EU (n.910), Art 43. See Directive 2014/25/EU (n. 911). See also *European Commission v. The Netherlands* C-368/10, (2012). Art. 61

<sup>923</sup> Directive 2014/24/EU (n.910), Art 57 and Art 18.2. See Directive 2014/25/EU (n. 911), Art 80 and Art. 36.2.

<sup>924</sup> Directive 2014/24/EU (n.910), Annex X. Directive 2014/25/EU (n. 911), Annex XIV.

<sup>925</sup> Directive 2014/24/EU (n.910), Art 67. Directive 2014/25/EU (n. 911), Art.82.

conditions based on social considerations with respect to the performance of a contract.<sup>926</sup> Contracting authorities must furthermore ensure that subcontractors abide by the EU and national laws.<sup>927</sup>

Public procurement offers opportunities to leverage the purchasing power of States to incentivize business enterprises with whom they contract to respect human rights.<sup>928</sup> The UNGP 6 affirms this potential, indicating that public procurement activities provide States – individually and collectively – with ‘unique opportunities to promote awareness of and respect for human rights’ by enterprises that it conducts commercial transactions with. ‘States should promote respect for human rights by business enterprises with which they conduct commercial transaction’. The European Parliament saw the revision of the Public Procurement Directives as an opportunity to create greater conformity between public procurement and the international human rights standards ‘laid down in the relevant OECD and UN guidelines and principles’, in order to enhance policy coherence at EU level.<sup>929</sup> In this context, the European Parliament suggested to draw on the advice of the EHRI, which amongst other aspects indicated the need to better integrate human rights considerations into public procurements procedures and laws in order to accommodate greater opportunities for public purchasers to procure from those who demonstrate the best human rights record.<sup>930</sup>

While compliance with human rights when undertaking public procurement is mandatory for States, the actual integration of human rights considerations into their public procurement decisions is discretionary. The EU Public Procurement Regime does not create a legal obligation for States to pursue human rights objectives through its procurement laws and policies. States may consider human rights issues in its laws and policies to the extent this does not conflict with the Directive and the principles of TFEU.

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<sup>926</sup> Directive 2014/24/EU (n.910), Art 70. Directive 2014/25/EU (n. 911)., Art 87.

<sup>927</sup> Directive 2014/24/EU (n.910), Art. 71. Directive 2014/25/EU (n. 911)., Art 88.

<sup>928</sup> Robert Stumberg, A. Ramasastry and M. Roggensack, ‘Turning a Blind Eye: Respecting Human Rights in Government Purchasing’ (2014) International Corporate Accountability Round Table, <<http://icar.ngo/wp-content/uploads/2014/09/Procurement-Report-FINAL.pdf>> accessed 11 June 2015.

<sup>929</sup> European Parliament, Resolution of 29 January 2013 on ‘Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery’, 2012/2097(INI), 29 January 2013. Para 34.

<sup>930</sup> The European Parliament also expressed itself in favour of impact assessments for potential incoherence with the UNGPs as well as for coordination with the UN Working Group to ensure interpretations align with the UNGPs. European Parliament, Resolution of 29 January 2013 on ‘Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery’, 2012/2097(INI), 29 January 2013. para 34.



## VIII. Conclusions

This report set out to analyse and assess the activities of the European Union and its Member States in respect of the business and human rights international governance regime. It took as its starting point the 2011 Communication on CSR of the European Commission,<sup>931</sup> which lists five ‘internationally recognised’ instruments – the UN Guiding Principles for Business and Human Rights, the UNGC, the OECD Guidelines for Multinational Enterprises, the ISO 26000 Guidance Standard on Social Responsibility and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy – all of which are non-binding or ‘soft law’ but which form the basis for EU initiatives to advance business and human rights.

While each of these instruments operates internationally and sets out CSR standards and principles that seek to encourage businesses and/or other organisations to respect human rights in their ordinary everyday activities, none of them is a creature of EU policy or regulation. This latter aspect has been addressed more recently by three regulatory initiatives, which the EU has taken in the framework of its business and human rights policy, and which concern non-financial reporting by companies, the sourcing of certain minerals, and public procurement.

The emphasis in the five CSR instruments, however, is on their voluntariness and the extent to which they are able to raise awareness among business and other organisations about the impacts of their activities on human rights and to avoid infringing on the rights of others. The means for achieving this varies from one instrument to the other but all focus on promoting ethical business practice and awareness about the human rights impacts of business by means of peer review, knowledge exchange and mutual learning.

While the EU considers CSR to be a transversal and cross-cutting issue, the actual regulatory and policy space for CSR in the European Union is multi-dimensional. It involves many different actors, at the levels of business, government and civil society, each of which participates in a vast multi-stakeholder forum of competing CSR norms, of which human rights-compliant business conduct is but one element. As a result the EU regulatory and policy space in which these five CSR instruments operate is both highly fragmented and differentially situated as between the five internationally recognised standards.

It is also clear that though the EU has made a firm commitment to foster business and human rights awareness both at home and abroad, and has unequivocally endorsed the five instruments, as part of its overall CSR strategy, there remains a considerable gap in translating that endorsement into concrete support, and thereby increasing awareness and compliance with these instruments by the EU itself, by the Member States, in third countries, but also of course, by businesses. This issue has manifested itself in the exercise of tracking EU responses to the five instruments, which leads to some further conclusions in respect of each one.

When it comes to the UN Guiding Principles, this report finds that this is the instrument with which the EU is most engaged. The EU has endorsed its development and monitored its implementation at the UN

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<sup>931</sup> COM (2011) 681 final (n 1), 681.

level assiduously. It now considers it to be the overarching instrument in the business and human rights regime, the other four instruments being ways for business to consider in implementing the Guiding Principles. However, when it comes to concrete activities to foster implementation of the Guiding Principles the EU is very active in coordinating the responses of its Member States, notably through the adoption of national action plans but it could do more to improve third country responses. This could be achieved, for example, by establishing a clearer link between its trade policy and this CSR instrument, in the way that it has done for other types of objectives, such as sustainable development.

Additionally, and somewhat surprisingly the report finds that the EU is relinquishing any ambition to proactively foster direct business responses to the UN Guiding Principles. This is because it considers that business enterprises are in the lead in this regard and its role must necessarily be a marginal one, confined to soft promotion and coordination.

Regarding the UNGC and the ILO Tripartite Declaration, this report reaches similar conclusions, namely that they are very weakly embedded in the EU business and human rights policy. Beyond their formal endorsement in the EU's CSR strategy and repetition in a number of instruments (most frequently external relations instruments) of such internationally recognised standards, there is very little by way of specific initiatives to foster and track the responses to either of them.

When it comes to the OECD Guidelines for Multinational Enterprises, the EU is caught in the institutional and policy web of another inter-governmental organisation that is responsible for the development of the Guidelines and their second revision in 2011, which brought with it a new Chapter IV on Human Rights. However, this CSR instrument has acquired renewed importance in the EU sphere with the linked instrument – the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas – which is referenced in the proposed EU regulation on the sourcing of certain minerals from conflict zones.

As a quasi-member of the OECD, with a permanent mission to the organisation, the EU is in a pre-eminent position to monitor the compliance of Member States' companies with the Guidelines, to the extent that the Member States are OECD Members or adherents to the OECD Guidelines, and for which they must establish national contact points (NCPs) with a complaints mechanism. One means of doing this is through the OECD's own peer-review mechanism, to which the EU has access through its participation in the work of the organisation and which could be better dovetailed with its own CSR peer review mechanism. Another is for the EU to wield some of its soft power in supporting the call for a strengthening of NCPs so as to improve their overall performance and operate more effectively as a mechanism for addressing business-related human rights complaints.

In the case of the ISO 26000 Guidance Standard on Social Responsibility, the EU exercises the most marginal of roles to the point of non-existence. The EU is neither an ISO Member nor does it have observer status in this private international organisation. This means that any tracking of responses to this CSR instrument is only as good as the information that the Member State governments provide and the matter is not helped, at the level of the European standards organisation, by CEN that has abdicated responsibility for ISO 26000 on the basis of the Vienna Agreement. As a public international organisation, the EU is also

covered by ISO 26000 whose scope extends to the responsibility of *all* organisations. It should, therefore, consider conducting a review of its activities, to better align its SR practices with ISO 26000, as foreseen in its own EU CSR Strategy.

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