

Human Rights Due Diligence: International Instruments

Research Paper #53

By Zoe McKnight

August 2018



This research paper (#53) is the first part of a three-part series on human rights due diligence (HRDD). The subsequent research papers that are part of this series provide a comparative scan of national pieces of legislation that mandate transparency or due diligence within company operations (Research Paper #54 – Human Rights Due Diligence: Legislative Scan) and provide recommendations for a Canadian approach to HRDD (Research Paper #55 – Human Rights Due Diligence: Recommendations for a Canadian Approach).

Executive Summary

Although Canada has endeavoured to protect international human rights in principle, in practice its actions are notably weak. Indeed, a 2018 report from the UN Working Group on business and human rights' mission in Canada observed "the absence of a coherent policy framework for the State duty to protect against business-related human rights abuses and promote effective business respect for human rights." Global governance gaps have not only allowed for human rights abuses to take place, but have also given many corporations relative impunity, and have left victims without redress or remedy.

CLC Research Paper #53 - Human Rights Due Diligence: International Instruments provides an overview of the various international principles and guidelines, to which Canada is a signatory and adherent, that have been created with the aim of filling these governance gaps. The instruments covered in this report include:

- United Nations Guiding Principles of Business and Human Rights;
- OECD Guidelines for Multinational Enterprises;
- OECD Due Diligence Guidance for Responsible Business Conduct; and
- ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

The intention of these instruments is to narrow and ultimately close those gaps, both at the state level and by enterprises themselves. Due diligence is considered the method with which enterprises should fulfill their responsibility to respect human rights. The process of due diligence is supported by these declarations, guidelines and conventions both in terms of its conceptual basis and practical application.

All are considered non-binding soft law but contain the express aim of persuading domestic governments to adopt parallel legislation.

The research paper also gives a brief overview of how the above international instruments apply to specific sectors that are of particular importance in Canada, including:

- the garment and footwear sector;
- the high-risk minerals sector;
- the financial sector; and
- the state-business nexus.

Despite widespread adherence to the above international instruments, their implications for human rights remain poorly understood around the world.

The paper aims to bring clarity and understanding to key aspects of these instruments with particular attention paid to: the primacy of human rights due diligence; liability vs. responsibility; stakeholder engagement; extraterritoriality; and the Canadian context.

The research paper finds that, while these international instruments contain separate provisions, they espouse a related, if aspirational, vision for the state duty to protect human rights, the corporate responsibility to respect human rights, and the shared obligation to remedy where a harm was not avoided. In this context, human rights are seen as not only inalienable but inseparable, and can be addressed by multinational enterprises operating in an increasingly global marketplace through a holistic process of due diligence that can identify, prevent, mitigate and account for how an enterprise addresses any adverse impacts arising from its global activities. The state duty to protect human rights emerges as the critical complement to this regime through laws and enforcement, and the provision of remedy where necessary.

Table of Contents

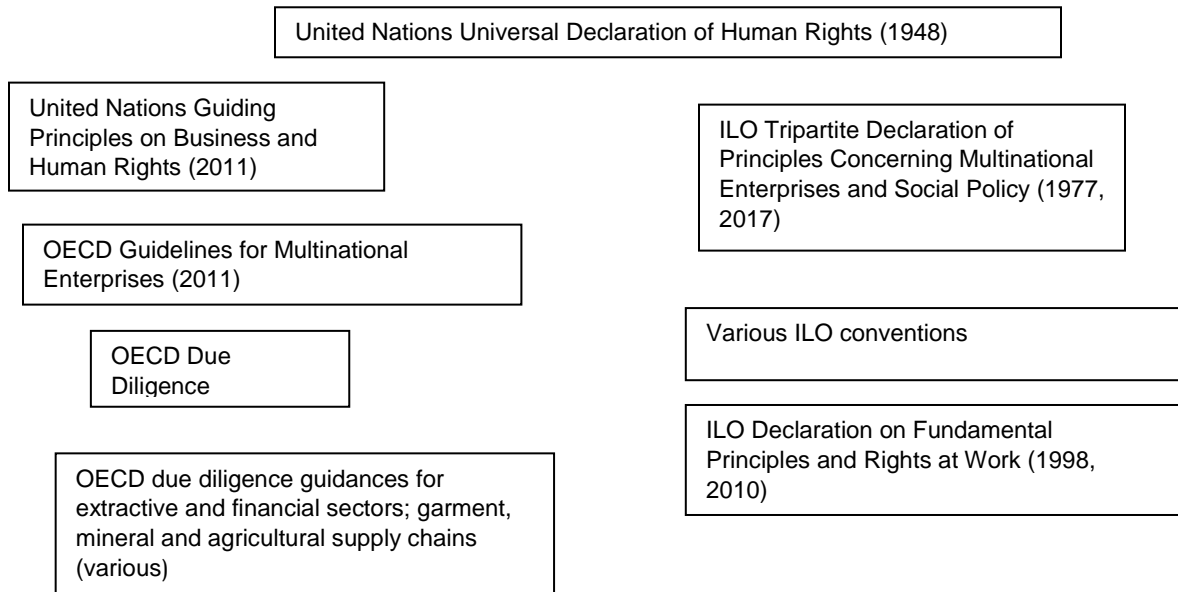
Introduction.....	4
United Nations Guiding Principles on Business and Human Rights	6
Primacy of human rights due diligence.....	9
Liability vs. responsibility.....	10
Stakeholder engagement.....	11
Extraterritoriality.....	12
Canadian context.....	13
OECD Guidelines for Multinational Enterprises	14
Liability vs. responsibility.....	19
Stakeholder engagement.....	19
Primacy of human rights.....	20
Extraterritoriality.....	20
Canadian context.....	21
OECD Due Diligence Guidance for Responsible Business Conduct	20
Liability vs. responsibility.....	24
Stakeholder engagement.....	26
Primacy of human rights.....	27
Extraterritoriality.....	28
ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy	25
Liability vs. responsibility.....	29
Stakeholder engagement.....	29
Primacy of human rights.....	30
Extraterritoriality.....	30
In brief:	
Garment and Footwear Sector.....	27
High-risk Minerals Sector.....	30
Financial Sector.....	32
State-Business Nexus.....	34
Conclusion.....	35
Annex 1: Glossary of terms.....	36
Works Cited.....	37

Introduction

With increasingly recognized international norms and soft law in addition to mounting examples of compulsory domestic legislation, the global community is moving toward a comprehensive answer to the question of responsibility for human rights in globalized business activity — an issue that has been debated since the 1990s.¹

This background report outlines the various international principles and guidelines that have emerged in response to what has been called the “governance gaps created by globalization” between economic forces and the ability of society to manage the adverse impacts of those forces.² The intention of these instruments, to which Canada is a signatory and adherent, is to narrow and ultimately close those gaps, both at the state level and by enterprises themselves. Due diligence is considered the method with which enterprises should fulfill their responsibility to respect human rights. The process of due diligence is supported by these declarations, guidelines and conventions both in terms of its conceptual basis and practical application.

The organization of the relevant instruments is seen below. All are considered non-binding soft law but contain the express aim of persuading domestic governments to adopt parallel legislation.



¹ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, A/HRC/17/31, March 21, 2011, accessed June 20, 2018, <https://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

² United Nations, *Protect, Respect and Remedy: A Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, A/HRC/8/5, April 7, 2008, accessed June 20, 2008, <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>, 3.

Canada is party to seven core international human rights treaties and has ratified all eight fundamental conventions of the International Labour Organization.³ However, serious allegations of human rights abuses by Canadian companies operating abroad continue to surface. A recent report described 30 targeted deaths, 403 injuries and 709 cases of “criminalizations” including arrests, detentions and charges, especially of protestors and dissenters, which were associated with Canadian extractive enterprises operating in Latin American between 2000 and 2015.⁴ Eight claims containing allegations of environmental or human rights abuses related to the activities Canadian companies operating abroad have been filed in Canadian courts, including five currently underway. To date, no such foreign plaintiff has been successful in a claim against a Canadian company in the Canadian justice system. Both alleged human rights violations associated with Canadian companies and the lack of access to remedy in Canada have been raised by international human rights treaty bodies.⁵

Thus Canada has endeavoured to protect international human rights in principle but in practice enforcement is notably weak. Indeed, a 2018 report from the UN Working Group on the issue of human rights and transnational corporations and other business enterprise observed during its mission in Canada “the absence of a coherent policy framework for the State duty to protect against business-related human rights abuses and promote effective business respect for human rights.”⁶

The internationally-recognized human rights referenced in the instruments refer to the United Nations Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. Various instruments related to due diligence for responsible business conduct have grown from these primary documents: the United Nations Guiding Principles on Business and Human Rights as the conceptual framework with the OECD Guidelines as the elaboration of their practical application in the form of due diligence, as well as ILO declarations and conventions as symbols of international consensus on human rights in relation to the activities of global corporate activity.

The UN Guiding Principles acknowledge the persistence of legislative shortcomings: laws and policies that govern business operations directly affect business behaviour, but their implications for human rights remain poorly understood around the world.

³ United Nations Working Group on the Issue of Human Rights, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on its Mission to Canada*, A/HRC/38/48/Add.1, April 23, 2018, accessed June 20, 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/116/38/PDF/G1811638.pdf?OpenElement>, 4.

⁴ Shin Imai, Leah Gardner, and Sarah Weinberger, *The 'Canada Brand': Violence and Canadian Mining Companies in Latin America*, Osgoode Legal Studies Research Paper, 17/2017, Osgoode Hall Law School, York University, (2016).

⁵ United Nations Working Group, Report of the Working Group, 2018, 6.

⁶ United Nations Working Group, Report of the Working Group, 2018, 19.

These are addressed below, both with particular attention paid to five key issues, including: the primacy of human rights due diligence; liability vs. responsibility; stakeholder engagement; extraterritoriality; and the Canadian context.

United Nations Guiding Principles on Business and Human Rights

In 2005, the United Nations Human Rights Council created the mandate for a Special Representative of the Secretary-General on the issue of human rights and transnational corporations. The special representative's final report in 2011 established the "Protect, Respect and Remedy" Framework, which became the authoritative focal point for international responsible business conduct and human rights due diligence.⁷

The Framework addresses the individual and shared responsibilities of both states and enterprises. It rests on three interdependent pillars, including the state duty to *protect* against human rights abuses by all third parties including business enterprises, the corporate responsibility to *respect* human rights and avoid infringing on human rights, and the need for access to state and non-state *remedy* when this duty or responsibility is breached. The Framework suggests each pillar is an equal, essential and interrelated component of a system of both preventive and remedial measures.⁸ The Framework reaffirms that, while the corporate responsibility to respect human rights is a basic expectation of society, the state duty to protect lies at the core of the international human rights regime that includes at a minimum the rights expressed in the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and Rights at Work.

The International Bill of Human Rights includes: the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

While states retain the discretion to decide the measures they will take to fulfill their duty to protect, UN treaty monitoring bodies have recommended the measures of prevention, investigation, punishment and access to redress, and have indicated both regulation and adjudication of corporate activity can be appropriate.⁹ International law requires states protect the human rights abuses within their jurisdiction, and treaty monitoring bodies have increasingly encouraged home states to take regulatory action aimed at preventing abuse by their domestic companies operating overseas.¹⁰ This issue of extraterritoriality is addressed below.

⁷ United Nations, Guiding Principles, 2011, 3.

⁸ United Nations, Guiding Principles, 2011, 4.

⁹ United Nations, Protect, Respect and Remedy, 2008, 7.

¹⁰ United Nations, Protect, Respect and Remedy, 2008, 7.

The Framework provides instruction with which states and enterprises can reduce or compensate for “governance gaps” that have historically and increasingly under globalization provided “a permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”¹¹ With the recognition that enterprises are specialized organs of society with specialized roles and responsibilities, due diligence helps those enterprises fulfill and discharge their responsibility to respect human rights.¹²

CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS. The due diligence tool applies equally to all enterprises, whether operating in areas of low or high state institutional capacity to enforce domestic laws and regulations that protect human rights. The scope of due diligence may vary according to an enterprise’s activities, the region and context in which it operates but should remain based on 31 Guiding Principles, to be followed as a coherent whole. The principles of protect, respect and remedy are intended to apply to all states and all enterprises, multinational and domestic, regardless of size, sector, location, ownership and structure, including state-owned enterprises in both home and host states. Parent companies and subsidiaries alike are expected to respect human rights, though the implementation of due diligence may vary with the level of control and ownership exerted by the parent company, which nonetheless is expected to exert whatever leverage it has for the purposes of following the Guiding Principles.¹³

Several Principles directly address the corporate responsibility to respect human rights and the operationalization of due diligence to meet this challenge. A foundational principle (15) indicates “enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”¹⁴

Operational principles 16-21 outline specifically how an enterprise can implement due diligence measures. The Framework does not use the language of “supply chain” but does maintain the responsibility to protect human rights extends beyond an enterprise’s direct operations and activities to include all business relationships with other parties. Corporate “activities” are understood to include both actions and omissions. “Business relationships” are understood to include relationships with business partners, entities

¹¹ United Nations, *Protect, Respect and Remedy*, 2008, 3.

¹² United Nations, *Guiding Principles*, 2011, 6.

¹³ John F. Sherman, “Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of Its Subsidiaries?” *Business Law International* 19, no. 1 (January 2018), accessed July 9, 2018, https://www.shiftproject.org/media/resources/docs/ParentalLiability_BLI_Sherman-January2018.pdf.

¹⁴ United Nations, *Guiding Principles*, 2011, 15.

throughout the value chain, and any other non-State or State entity directly linked to its business operations, products or services.”¹⁵

The actual human rights due diligence process should include: an express commitment embedded in company policy and practices, assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. This process should cover all potential adverse impacts through an enterprise’s own activities or those to which it could be directly linked through its operations, products or services by its business relationships; is acknowledged to vary with the complexity and size of the business enterprise, the nature and context of operations, the risk of severe human rights impacts; and should be ongoing, recognizing that human rights risks may change over time.¹⁶

STATE DUTY TO PROTECT. Several principles address this directly. States should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps (Principle 3),¹⁷ though these laws are rendered weak and even meaningless unless states take steps to investigate, punish and redress business-related human rights abuses when they do occur within their territory or jurisdiction, whether through judicial, administrative, legislative or other appropriate means” (Principle 25),¹⁸ and these remedies should be accessible in both the enterprise’s home or host state. The Framework recommends states reduce barriers to remedy, including situations where claimants face a denial of justice in a host state and cannot access home state courts regardless of the merits of the claim (Principle 23). This is aligned with Principle 2 — home states should take steps to prevent abuse abroad by business enterprises within their jurisdiction, as advocated by some treaty bodies.

KEY ISSUE: PRIMACY OF HUMAN RIGHTS DUE DILIGENCE: The “baseline responsibility” of all companies, regardless of specific operations, is to respect human rights, which forms part of an enterprise’s social licence to operate.¹⁹ The Guiding Principles do not create any new international law obligations but confirm existing standards and practices for states and enterprises within “a single, logically coherent and comprehensive template” and establishes “a common global platform for action.”²⁰ Initial contemplations for the Framework arose in the 1990s during an unprecedented worldwide expansion of multinational and transnational economic activity — globalization — resulting in

¹⁵ United Nations, Guiding Principles, 2011, 14.

¹⁶ United Nations, Guiding Principles, 2011, 5.

¹⁷ United Nations, Guiding Principles, 2011, 8.

¹⁸ United Nations, Guiding Principles, 2011, 22.

¹⁹ United Nations, Protect, Respect and Remedy, 2008, 17.

²⁰ United Nations, Guiding Principles, 2011, 5.

increasing awareness of the impact of business on human rights by civil society and by the United Nations.²¹

KEY ISSUE: LIABILITY VS. RESPONSIBILITY: “The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.”²² In other words, the Framework suggests the bedrock legal obligation to protect human rights remains with the state, including the obligation to determine legal liability, while enterprises retain the responsibility to respect those rights. Under foundational principle 25, “states should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”²³

Under Principle 14, enterprises must avoid causing or contributing to adverse human rights impacts through their own activities and address impacts that do occur, and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they did not cause or contribute to the adverse impacts.²⁴

Historically and currently, victims of human rights abuses have had difficulty obtaining remedy or redress from multinational enterprises. “As a technical legal matter, a parent company is normally not legally liable for its subsidiaries’ conduct, including conduct relating to human rights. In exceptional circumstances, the corporate veil can be pierced where the subsidiary is a mere alter ego of its parent, or is used for a wrongful purpose.”²⁵

But remedy can be sought and obtained in a process separate from legal or judicial recourse. Under operational principle 28, states should “facilitate adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes” of remedy, and under principle 29, enterprises should, in order to quickly address and remediate grievances, “establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”²⁶ The latter can be administered alone or in collaboration with stakeholders.

An enterprise that contributes to or is perceived as contributing to an impact could be considered complicit in a human rights violation, even where the actual harm is committed by a third party, if the enterprise knew or reasonably should have known

²¹ United Nations, Guiding Principles, 2011, 3.

²² United Nations, Guiding Principles, 2011, 14.

²³ United Nations, Guiding Principles, 2011, 27.

²⁴ United Nations, Guiding Principles, 2011, 14.

²⁵ Sherman, Should a Parent Company Take a Hands-Off Approach?, 2018, 28.

²⁶ United Nations, Guiding Principles, 2011, 31.

about the harm. Complicity has both legal and non-legal meanings, and the Framework proposes due diligence as a method to avoid charges of complicity by showing an enterprise took steps to avoid involvement with an alleged human rights abuse.²⁷ The issue of complicity was largely dropped from the OECD Guidelines.

(A related notion in the 2008 version of the Special Representative's report was "sphere of influence," which the final Framework argues not only conflates leverage and impact, but erroneously suggests an enterprise could be held responsible for the actions of every entity over which they have some influence even in cases where the enterprise did not cause or contribute to the impacts of those actions. The 2011 final report does not mention "sphere of influence," which should be considered an obsolete term in this context.)

KEY ISSUE: STAKEHOLDER ENGAGEMENT. The Framework itself was drafted after extensive stakeholder engagement, including governments, enterprises and associations, individuals and communities directly affected by the activities of enterprises around the world, civil society, and legal and policy experts.²⁸ Thus, the participation of trade unions and worker representatives is implicit, but not explicit. The Framework does not specifically identify trade unions as stakeholders and does not make a distinction between home and host country stakeholders.

Multiple principles address the issue of stakeholder engagement during the due diligence process. States should encourage enterprises to communicate with stakeholders on issues of how they address their human rights impacts (Principle 3); states should cooperate with multilateral institutions and other stakeholders in achieving policy coherence, using the Principles as a common reference point (Principle 10); enterprises should disseminate their express commitment to fulfill human rights responsibilities to affected stakeholders (Principle 16); enterprises should undertake meaningful consultation with potentially affected groups and relevant stakeholders when identifying and assessing actual or potential adverse human rights impacts of their operations or business relationships, including drawing on external experts (Principle 18); enterprises should draw on feedback from stakeholders when tracking and verifying whether adverse human rights impacts are being addressed (Principle 20); enterprises should account for how they respond to human rights adverse impacts, especially when raised by affected stakeholders, by communicating this externally while not raising new risks for those stakeholders (Principle 21); states should consider facilitating non-state-based (i.e. adjudicative or dialogue-based) grievance mechanisms, including those administered by enterprises alone or with stakeholders (Principle 28); enterprises should administer operational-level grievance mechanisms alone or in collaboration with relevant stakeholders, which can complement wider stakeholder engagement and

²⁷ United Nations, Guiding Principles, 2011, 17.

²⁸ United Nations, Guiding Principles, 2011, 4.

collective bargaining processes but do not replace either, and neither undermine the legitimate role of trade unions in addressing labour-related disputes, nor preclude access to other grievance mechanisms (Principle 29); both state-based and non-state-based non-judicial grievance mechanisms should be seen as legitimate by stakeholders, and should, at the operational level, be designed and operated in consultation with the stakeholder groups for whose use they are intended (Principle 31).

KEY ISSUE: EXTRATERRITORIALITY. The Guiding Principles suggest that, under international law, states are not currently required to regulate the extraterritorial activities of enterprises domiciled in their territory or jurisdiction — but are not prevented from doing so.

Legally distinct corporate entities are subject to the laws of the countries in which they are based and operate. Some states, especially in developing countries, lack the institutional capacity to enforce national laws and regulations against transnational firms operating on their territory, or feel constrained out of concern for a competitive advantage.

In the introduction to the Guiding Principles, the Special Representative writes that the worst forms of human rights abuses related to corporate activities occur, predictably, in areas where governance challenges are greatest, especially in the developing world. These governance gaps are “are at the root of the business and human rights predicament.”²⁹

The home states of transnational firms may be reluctant to regulate the overseas activities of these companies “because the permissible scope of national regulation with extraterritorial effect remains poorly understood.”³⁰ In addition, experts continue to disagree on whether international law requires home states to actively prevent corporate human rights abuses abroad by companies based in their territory. However, there is a greater consensus that those states are not prohibited from extraterritorial regulation, if some basis of jurisdiction exists and if the actions of the home state “meet an overall reasonable test,” including non-intervention in internal affairs of other states.³¹ “Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home states to take regulatory action to prevent abuse by their companies overseas.”³² Therefore, greater legal understanding of the state duty to protect human rights at the national and international levels remains necessary.

The Guiding Principles themselves do not otherwise address the issue of extraterritoriality.

²⁹ United Nations, Guiding Principles, 2011, 6.

³⁰ United Nations, Guiding Principles, 2011, 6.

³¹ United Nations, Guiding Principles, 2011, 7.

³² United Nations, Guiding Principles, 2011, 7.

KEY ISSUE: THE CANADIAN CONTEXT.

In Canada, courts are beginning to use the concept of “direct liability,” which requires neither a “mere alter ego” nor wrongful purpose, but rather “requires proof that the parent had assumed de facto control over, or was so closely involved in, the subsidiary’s operations that caused human rights harm.”³³ This was invoked in *Choc v. Hudbay Minerals* 2013 ONSC 1414 when the Ontario Superior Court of Justice found mining company Hudbay did owe a duty of care to Maya-Q’eqchi’ villagers affected by the actions of the security personnel of its subsidiary companies operating in Guatemala; the case is now proceeding on its merits. Amnesty International intervened in the case to argue that international law including the UN Guiding Principles indicate the possibility of parent company liability.

Generally, however, the responsibility of companies for their or their subsidiaries’ overseas acts or omissions is largely governed by various non-binding international instruments, such as the Guiding Principles. The Maastricht Principles on Extraterritorial Obligations of states in the area of Economic, Social and Cultural Rights, which do not establish new elements of human rights law, but clarify states’ extraterritorial obligations on the basis of existing international law, do go further in this regard, in particular Articles 24 and 25. The commentary on Article 24 states: “The duty of the state to protect human rights by regulating the conduct of private actors extends to situations where such conduct may lead to violations of human rights in the territory of another state... The general obligation to exercise influence on the conduct of non-state actors where such conduct might lead to human rights being violated outside the state’s national territory has been emphasized by various UN human rights treaty bodies.”³⁴ Article 25 specifically addresses the extraterritorial duty of the state: “states must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances ... c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the state concerned.”³⁵

The Maastricht Principles were drafted by an international panel of experts, jurists and former special rapporteurs of the United Nations Human Rights Council. The Principles are largely used by civil society organizations to call on states to recognize extraterritorial jurisdiction as interpreted by the Maastricht Principles.

³³ Sherman, Should a Parent Company Take a Hands-Off Approach?, 2018, 28.

³⁴ Olivier De Schutter et al., “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,” *Human Rights Quarterly* 34 (2012), 1136.

³⁵ De Schutter et al, Commentary to the Maastricht Principles, 2012, 1137.

OECD Guidelines for Multinational Enterprises

The OECD Guidelines represent the only multilaterally-endorsed comprehensive code of conduct for business, which 48 countries including Canada have committed to promote. The document provides enterprises with structured but general guidelines to develop due diligence policies and processes tailored to their own operations in a global context consistent with applicable laws and internationally recognized standards.

For the purposes of the Guidelines, due diligence is broadly defined 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.”³⁶ (The OECD Due Diligence Guidance and related, sector-specific guidances take a more detailed practical approach.)

Although the Guidelines themselves are unenforceable at the domestic level, they do represent the shared values and common understanding of the governments of states from which a large share of international direct investment originates; adhering governments commit to promoting the Guidelines domestically and jointly recommend to multinational enterprises operating on or from their territories the observance of those Guidelines while obeying domestic laws.³⁷

In terms of the state duty to protect human rights within its territory, the Guidelines explicitly build on the UN Framework which holds, in Principle 1, fulfilling this obligation requires “taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication,” and that states “should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”³⁸ Otherwise, the Guidelines leave aside the state duty to protect human rights and instead describe the expected behaviour and responsible business conduct of multinational enterprises, as recommended by adhering governments, including Canada.

The Guidelines cover numerous areas of risk for responsible business conduct and all major aspects of corporate behaviour.³⁹ The 2011 version includes a chapter on implementing the United Nations Guiding Principles Framework through due diligence, for human rights as well as employment and industrial relations, among other concerns. Like the Framework, the Guidelines cover all sectors; all forms of ownership, whether private, state or mixed; all entities within the multinational enterprise, whether parent company or subsidiary; large, small, and medium-size enterprises alike; and the

³⁶ OECD, *OECD Guidelines*, 2011, 23.

³⁷ OECD, *OECD Guidelines for Multinational Enterprises*, publication, 2011, accessed June 20, 2018, <http://dx.doi.org/10.1787/9789264115415-en>, 3.

³⁸ United Nations, *Guiding Principles*, 2011, 6, 8.

³⁹ OECD, *OECD Guidelines*, 2011, 37.

multitude of complex business arrangements and organizational forms that have developed with deepening international investment.⁴⁰ Different entities are expected to conduct the due diligence appropriate to their organizational capacity, their size, their roles within a corporate structure — i.e., whether parent company or subsidiary — and the context in which they operate, but are expected to coordinate with one another to facilitate effective observance of the Guidelines. Finally, the Guidelines reflect good practice for all enterprises, both domestic and international in scope.

As a matter of general policy under the Guidelines, enterprises should contribute to economic, environmental and social progress with a view to achieving sustainable development and respecting the internationally recognized human rights of those affected by their activities. Some of the methods with which to achieve these goals are the development and application of “self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate,” such as risk-based due diligence, in order to *identify*, *prevent* and *mitigate* actual and potential adverse impacts, and to *account for* how these impacts are addressed.

Under the Guidelines, risk is outward-facing. This means not risks to the survival or success of the business but risks to people, the environment and society.⁴¹ Risk is detected by examining the gap between the best practices outlined in the Guidelines and the circumstances associated with direct operations, supply chains and business relationships. Potential impacts (risks) are addressed by prevention or mitigation, and actual impacts (harms) are addressed by remediation. Critically, due diligence can help enterprises avoid the risks in the first place.

Enterprises must consider three broad categories of corporate-human rights interaction: they should a) avoid *causing* or b) *contributing to* adverse impacts on human rights through their own activities, and *address* such impacts when they occur. If c) *directly linked to* an adverse impact through their own operations, products or services through business relationships, enterprises should seek to *prevent* or *mitigate* the actual or potential harm, even if the enterprise’s own activities did not cause or contribute to the adverse impact.⁴²

Contributing to an adverse impact should be interpreted as a substantial contribution, such as “an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions.”⁴³ The Guidelines do

⁴⁰ OECD, OECD Guidelines, 2011, 17-18.

⁴¹ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, publication, 2018, accessed June 20, 2018. <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>, 15.

⁴² OECD, OECD Guidelines, 2011, 20.

⁴³ OECD, OECD Guidelines, 2011, 23.

not provide criteria, meaning courts and other adjudicating bodies would likely be left to determine whether a contribution was trivial or substantial.

Illustrative examples are found in the OECD Guidance, released in 2018. An enterprise that prevents its workforce from forming a union, engages in forced labour or reprisals against civil society actors would be *causing* an adverse impact on human rights; an enterprise that, due to last-minute ordering, pressures a supplier to rapidly ramp up production, which results in excessive overtime dangerous working conditions, would be seen as *contributing to* adverse impacts; an enterprise that sources material in its supply chain that is created using child labour would be *directly linked to* human rights violations through its business relationship. In general, an enterprise causes human rights adverse impacts through its own operations and is directly linked through business relationships. Contribution can occur in either context.⁴⁴

Business relationships should be interpreted as including partners and entities in the supply chain and any other state or non-state entity directly linked to operations, products or services. Enterprises should use leverage to encourage business partners, suppliers and sub-contractors to apply the principles of responsible business conduct in their practices. The Guidelines acknowledge that relationships in a supply chain can take a variety of forms including franchising, licensing, sub-contracting and others, and entities in the supply chain may themselves be multinational enterprises and thus considered covered by the Guidelines if they operate in or from an adhering state, meaning they should conduct due diligence as well.

Chapter IV on human rights confirms the state duty to protect human rights and responsibility of enterprises to respect human rights. Remedy is a joint responsibility. The corporate responsibility to respect exists independently of a state's ability or willingness to protect human rights, which, at a minimum, include the International Bill of Human Rights, the Universal Declaration of Human Rights and the instruments through which it has been codified: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, and the rights set out in the ILO's Declaration on Fundamental Principles and Rights at Work.

The Guidelines provide a six-step general, flexible, practical application of that responsibility by recommending all enterprises:

1. avoid infringing human rights and address any adverse impacts when they occur;
2. avoid causing or contributing to the adverse human rights impacts address any adverse impacts when they occur;

⁴⁴ OECD, OECD Due Diligence Guidance, 2018, 71.

3. seek to prevent or mitigate adverse impacts directly linked to their activities (operations, products, services or omissions) through business relationships, using leverage and influence;
4. create a policy commitment to protect human rights;
5. carry out due diligence appropriate to the enterprise's size, nature and context of its operations, taking into consideration the severity of risk for adverse human rights impacts;
6. provide for or cooperate with legitimate processes of remediation where the enterprise is determined to have caused or contributed to adverse human rights impacts.⁴⁵

All points are further elaborated in the OECD's Due Diligence Guidance and sector-specific guidances.

Chapter V treats employment and industrial relations as distinct considerations for multinational enterprises, with an acknowledgement that labour rights are human rights. The Guidelines provide an eight-step practical application of that acknowledgement and recognition by recommending all enterprises:

1. respect the right of workers to establish or join the trade unions and/or representative organizations of their choosing and to recognize those for the purposes of collective bargaining and negotiations; to contribute to the abolition of child labour and forced labour; be guided by the principles of equality and non-discrimination;
2. provide facilities, as required, to workers representatives to support collective bargaining; provide information to workers and representatives as needed for meaningful negotiation on the conditions of employment; provide information to workers and representatives enabling them to obtain a fair view of the enterprise;
3. promote consultation and cooperation between employers and workers and representatives on matters of mutual concern;
4. observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country; if comparable employers do not exist in the host country, i.e. in developing countries, then provide the best possible wages, benefits and conditions of work, adequate to satisfy the needs of workers and their families;
5. to the greatest extent practicable, employ local workers and provide training with a view to improving skill levels, in co-operation with worker representatives;
6. provide reasonable notice of changes to operations that would have major effects on employment, in particular closures that would result in layoffs or dismissals, to workers and representatives;

⁴⁵ OECD, OECD Guidelines, 2011, 31.

7. not threaten to transfer the operating unit from the host country nor transfer workers to other entities in other countries in order to unfairly influence negotiations with worker representatives or to hinder the right to organize;
8. enable authorized worker representatives to negotiate on collective bargaining or labour-management issues.⁴⁶

The Guidelines rely on the ILO as the competent body to set international labour standards, and promote the standards and principles of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, which are universal and apply to all people in all states, regardless of that state's level of development, and which all ILO member states have agreed to espouse, including, namely: freedom of association and right to collective bargaining; the elimination of all forms of forced or compulsory labour; the elimination of child labour; and the elimination of discrimination in respect of employment and occupation.⁴⁷ The Guidelines explicitly echo these rights, as well as the principles set out in the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. While the latter describes employment relationships, the Guidelines suggest no formal employment need exist to trigger the responsibility to respect human rights through due diligence.⁴⁸

Finally, the Guidelines are supported by National Contact Points, a unique network of agencies established by adhering governments, including Canada, to promote the Guidelines and provide a non-judicial forum for mediation and issue resolution. National Contact Points assist enterprises and stakeholders in their attempts to implement the Guidelines and the principles therein. The role and function of National Contact Points are taken up in greater detail in the OECD Due Diligence Guidance for Responsible Business Conduct.

KEY ISSUE: LIABILITY VS. RESPONSIBILITY: The language of complicity does not appear in the Guidelines. Instead, enterprises are encouraged to avoid *causing* or *contributing to* adverse impacts on all matters covered by the Guidelines including human rights, through their own activities, *address* such impacts when they occur, and seek to *prevent* or *mitigate* an adverse impact when *directly linked to* operations, products or services through business relationships, even if the enterprise itself did not cause or contribute to the adverse impact. The complex issue of an adverse impact "directly linked" to an enterprise's operations, products or services through its business relationship with another entity does not shift responsibility from the latter but rather does encourage the enterprise to use leverage to prevent or mitigate the harm. Causing or contributing to an

⁴⁶ OECD, OECD Guidelines, 2011, 36-37.

⁴⁷ International Labour Organization, "ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up," International Labour Organization, June 18, 1998, accessed June 20, 2018, <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

ILO, "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), 5th Edition," United Nations, March 2017, accessed June 20, 2018, https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

adverse impact does present the responsibility to provide for or cooperate with legitimate processes of remediation.

KEY ISSUE: STAKEHOLDER ENGAGEMENT. A key element of the Guidelines, stakeholder engagement is characterized by good faith and two-way communication. The Guidelines make clear enterprises must respect the right of workers to establish or join trade unions and representative organizations of their own choosing, and to have either recognized for the purpose of collective bargaining, negotiation, or other matters related to the terms and conditions of employment. The Guidelines do not differentiate between home and host country trade unions or representatives and emphasize worker choice in representation.

According to the Trade Union Advisory Committee (TUAC) to the OECD, 191 cases involving a trade union have been submitted to NCPs worldwide since 2001 in 23 different OECD countries, seven adhering non-OECD countries and 35 non-OECD countries.⁴⁹ The vast majority (87.4 per cent) have cited Employment and Industrial Relations provisions in the complaints. Four of those have involved Canada as host state; three were closed without a positive outcome for complainants.⁵⁰ In the fourth, a hotel chain operating in Canada and Benin was found by the French NCP to be non-compliant with the OECD Guidelines and though the Benin hotel workers won the right to collective bargaining, the company actually intensified its anti-union activity against Canadian union supporters.⁵¹

KEY ISSUE: PRIMACY OF HUMAN RIGHTS DUE DILIGENCE. Along with human rights, the Guidelines offer due diligence recommendations for various risk areas that could be impacted by an enterprise's operations, including the environment, bribery and corruption, consumer interests, science and technology, and competition. The Guidelines note that the nature and extent of any due diligence undertaken will reflect the risk and severity of the potential and actual adverse impacts. Because the Guidelines are a risk-oriented instrument, the potential severity of human rights adverse impacts — including loss of life — would suggest the primacy and priority of their associated due diligence. Under the UN Guiding Principles, an enterprise's due diligence process will be measured against the benchmarks set by the ILO's core conventions and the International Bill of Human Rights.⁵²

KEY ISSUE: EXTRATERRITORIALITY. The Guidelines make clear obeying domestic laws is an enterprise's first obligation.⁵³ "Governments have a right to prescribe the conditions

Trade Union Advisory Council, "Key Statistics. Trade Union Cases in Numbers: Which Provisions of the Guidelines? In Which Sectors? With What Success?" *TUAC OECD MNE Guidelines*, 2017, accessed August 7, 2018, <http://www.tuacoeedmneguidelines.org/statistics.asp>.

⁵⁰ Trade Union Advisory Council, *Key Statistics*, 2017.

⁵¹ Trade Union Advisory Council, *Key Statistics*, 2017.

⁵² United Nations, *Protect, Respect and Remedy*, 2008, 17.

⁵³ OECD, *OECD Guidelines*, 2011, 17.

under which multinational enterprises operate within their jurisdictions, subject to international law. The entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries.”⁵⁴ In cases of conflicting requirements between adhering countries and third parties, governments are encouraged to cooperate in good faith. Although subsidiaries are subject to the domestic laws of the jurisdictions in which they were incorporated, compliance and control systems of the parent company should extend to these subsidiaries.⁵⁵

KEY ISSUE: CANADIAN CONTEXT. Canada, along with all OECD states, is one of 48 governments adhering to the Guidelines. Canada’s National Contact Point (NCP) is a committee of seven federal departments, chaired by Global Affairs Canada, which serves as a forum for promotion of the Guidelines and for the resolution of issues arising from their implementation. In addition, Canada recently announced the creation of an office of an independent Ombudsperson for Responsible Enterprise, which replaces the Extractive Sector Corporate Social Responsibility Counsellor, and which is expected to receive an official mandate later this year. While civil society organizations reportedly exhibit a good understanding of the UN Guiding Principles on which the Guidelines are based, only a small group of government officials and very large multinational enterprises demonstrate an awareness of state and business responsibilities in the domain of responsible business conduct.⁵⁶

Despite the existence of Canada’s NCP, the non-judicial mechanism for remedy envisioned at the heart of the OECD Guidelines, “victims of human rights abuses continue to struggle in seeking adequate and timely remedies against Canadian businesses,” according to the UN Working Group on the issue of human rights and transnational corporations and other business enterprise.⁵⁷ Canada’s NCP is chaired by a senior representative of Global Affairs Canada, the Director General of the Trade Commissioner Service — Operations, which is perceived by stakeholders as potentially not fully independent given that it is located within a ministry responsible for promoting overseas trade and investment, and has no external advisory or oversight body and lacks the confidence of civil society organizations.⁵⁸ The Working Group recommended the Canadian government increase the resources, efficacy and independence of the National Contact Point to provide, in concert with the incoming Ombudsperson for Responsible Enterprise. The Working Group also noted that the differentiation of roles among Canada’s NCP and incoming Ombudsperson remains unclear.

A 2016 report, jointly released by civil society organizations OECD Watch, MiningWatch Canada and Above Ground, criticized Canada’s NCP for “consistently (failing) to

⁵⁴ OECD, OECD Guidelines, 2011, 18.

⁵⁵ OECD, OECD Guidelines, 2011, 22.

⁵⁶ United Nations Working Group, Report of the Working Group, 2018, 5.

⁵⁷ United Nations Working Group, Report of the Working Group, 2018, 16.

⁵⁸ United Nations Working Group, Report of the Working Group, 2018, 17.

provide complainants with effective remedy,” at least for the extractive sector, where the NCP mechanism is intended as part of the federal government’s corporate social responsibility strategy to address the “most serious and protracted conflicts involving the oil, gas and mining sector.”⁵⁹ The Canadian NCP is empowered to promote the Guidelines by disseminating information about the Guidelines and by handling complaints regarding breaches. It was announced in 2014 that companies refusing to participate in an NCP process risk the withdrawal of federal trade advocacy support, including government financing. It’s estimated the NCP handled 29 cases between 2000 and 2016 and took the lead in 19.⁶⁰

The report alleges the Canadian NCP responses to complaints have been characterized by delays, non-binding recommendations with no follow-up or enforcement, lacking coherence, and opaque decision-making, even for alleged egregious human rights abuses or negligence causing death.⁶¹ Companies are not obligated to participate in the process. The report criticizes the NCP for failing to operate transparently or independently, failing to institute independent oversight, for introducing a non-OECD provision that complainants should be willing to accept participation in dialogue to resolve the matter, for failing to make determinations on whether companies have breached specific OECD Guidelines, for not introducing penalties for non-compliance with the Guidelines, and for generally failing to improve the conditions of the complainants, which in some cases worsened.⁶² When the NCP dismisses a complaint for failing to meet its criteria, the claim is inferred to have no merit, which may not be true and is not technically implied by the dismissal. Yet the NCP is one of the only avenues for redress and remedy available to the victims — or their representatives, or an independent interested party such as an NGO or trade union — of human rights violations as a result of the actions of Canadian companies operating abroad.

OECD Due Diligence Guidance for Responsible Business Conduct

The purpose of this new instrument, released in 2018, is to provide practical support for the implementation of the OECD Guidelines with a plain language elaboration of recommendations for due diligence through which enterprises can prevent, avoid and address adverse impacts. The Guidance also addresses the implementation of the ILO Tripartite Declaration and the UN Guiding Principles. The Guidance incorporates the specific practices detailed in earlier OECD instruments for conflict minerals, agriculture, garment and footwear, extractives and finance sectors, and provides a blueprint for due

⁵⁹ Above Ground, MiningWatch, and OECD Watch, *Canada Is Back, But Still Far Behind: An Assessment of Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises*, report, November 2016, accessed July 24, 2018, https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf, 1.

⁶⁰ Above Ground et al, *Canada is Back*, 2016, 2.

⁶¹ Above Ground et al, *Canada is Back*, 2016.

⁶² Above Ground et al, *Canada is Back*, 2016, 20.

diligence best practices that can be adapted according to geography, context and the nature of an enterprise's operations. Due diligence may not only help enterprises maximize positive returns to society but also decrease exposure to certain inherent risks and meet local legal requirements.⁶³

Among the principles of due diligence set out in the Guidance and elsewhere is that of flexibility: "The due diligence process is not static, but ongoing, responsive and changing. It includes feedback loops so that the enterprise can learn from what worked and what did not work. Enterprises should aim to progressively improve their systems and processes to avoid and address adverse impacts."⁶⁴

The Guidance outlines a six-step process enterprises can follow to pursue due diligence that builds on the OECD Guidelines.

1. embed responsible business conduct into the enterprise's policies and management systems;
2. identify actual or potential adverse impacts on RBC issues in operations, supply chains and business relationships;
3. cease, prevent or mitigate adverse impacts the enterprise causes, may cause, contributes to or may contribute to;
4. track implementation and results;
5. communicate how impacts are addressed;
6. enable remediation where appropriate.⁶⁵

This is conceptualized as a feedback loop in which the knowledge gleaned from due diligence practices are reintegrated into policies and management systems, which may in turn better identify, prevent or mitigate adverse impacts. Each step accords with multiple "practical actions" enterprises can take, as appropriate, to enact their due diligence.

Of note, the Guidance provides a non-exhaustive list of examples of adverse impacts where other instruments do not. Human rights adverse impacts might include: forced labour; wage discrimination; gender-based violence; failing to engage with Indigenous groups; reprisals against civil society activists or human rights defenders; restricting access to clean water.⁶⁶ Adverse impacts to employment and industrial relations might include: failing to respect the right of workers to establish or join unions and have unions or representatives of their choosing recognized for the purpose of collective bargaining; failing to engage in constructive negotiations on the terms and conditions of employment; child labour; discrimination on the basis of race, colour, sex, religion, political opinion, nationality, social origin or other status; failing to replace hazardous substances or inappropriate machinery; failing to pay wages that meet the basic needs

⁶³ OECD, OECD Due Diligence Guidance, 2018, 16.

⁶⁴ OECD, OECD Due Diligence Guidance, 2018, 17.

⁶⁵ OECD, OECD Due Diligence Guidance, 2018, 21.

⁶⁶ OECD, OECD Due Diligence Guidance, 2018, 38.

of workers; threatening to move operations in order to hinder workers from establishing or joining unions.⁶⁷

KEY ISSUE: LIABILITY VERSUS RESPONSIBILITY. The Guidance reiterates that obeying domestic laws in the jurisdiction in which the enterprise operates and/or where it is domiciled is the first obligation. If domestic laws and regulations conflict with the standards of the OECD Guidelines and the Guidance for their interpretations, due diligence can help those enterprises honor the principles of the international instruments. These are not meant to establish legal liability, and domestic courts are expected to establish their own tests for considering accountability, harm and remedy.⁶⁸ “Domestic law may have specific approaches or rules for determining relationship to impact for the purpose of informing legal liability.”⁶⁹

The Guidance clarifies the distinctions between causing, contributing to and being directly linked to adverse impacts. An enterprise “causes” an adverse impact if the enterprise's activities or omissions on their own are sufficient to result in the impact; an enterprise “contributes to” an impact if its *activities in combination with* the activities of other entities cause the impact, or if its activities cause, facilitate or incentivise another entity to cause an adverse impact, where the contribution is substantial and not just the mere existence of a business relationship; direct “linkage” is defined by the relationship between the adverse impact and the enterprise’s products, services or operations through another entity, such as a supplier.⁷⁰

These variations determine responsibility. An enterprise causing harm is responsible to cease, prevent and remedy the harm. An enterprise contributing to harm is responsible for ceasing, preventing and mitigating. An enterprise directly linked to harm is responsible for using its leverage to influence the entity causing the harm to cease, prevent or mitigate.⁷¹

Enterprises operating in states or regions where systemic issues prevent the effective protection of human rights are not responsible for those issues, but are still required to respect human rights in their own operations and supply chains. Effective due diligence can help an enterprise decrease its exposure to systemic risks through early identification, whether the risks are inherent to geography, political context, industry, sector, or other factors. While systemic risks stem from root causes beyond an enterprise’s immediate control, they nevertheless increase the risk of human rights abuses in business operations or supply chain, especially those arising from a host government’s failure to protect human rights through the enforcement of laws and

⁶⁷ OECD, OECD Due Diligence Guidance, 2018, 40.

⁶⁸ OECD, OECD Due Diligence Guidance, 2018, 89.

⁶⁹ OECD, OECD Due Diligence Guidance, 2018, 72.

⁷⁰ OECD, OECD Due Diligence Guidance, 2018, 71.

⁷¹ OECD, OECD Due Diligence Guidance, 2018, 72. See Figure 2.

regulations. The corporate responsibility to respect human rights exists regardless of a state's willingness or ability in this context, and the Guidance provides multiple examples of how enterprises can seek to address these issues, including cross-sector collaboration, applying pressure to government through leverage, engaging with home governments to encourage home states to adopt responsible business conduct policies. Within the host country, an enterprise will likely have to increase their efforts to monitor and prevent adverse impacts and must be prepared to be transparent about the choice to operate in those states or regions and consider whether it is actually possible to responsibly continue operating in or source from such contexts. "Enterprises retain responsibility to address adverse impacts that they cause or contribute to, even when operating in contexts where systemic issues are prevalent."⁷² In fact, the Guidance envisions addressing systemic issues as part of the due diligence process to prevent or mitigate human rights abuses to which it is directly linked.⁷³

This builds on Principle 7 of the UN Guiding Principles addressing the state-business nexus, which provides that states should "help ensure" enterprises operating in conflict zones do not contribute to ("are not involved with") human rights violations, in particular sexual and gender-based violence, which are at heightened risk in conflict zones. Not only should states deny access to public funding to enterprises involved in such violations, but host states especially should ensure domestic policy, law and enforcement are effective in addressing this risk. However, host states may lack institutional capacity to do so, and the home state of a transnational enterprise should assist corporations and host states alike to address human rights abuse. Thus, the state and enterprise duty to protect and respect human rights is not absolved in conflict zones where the risk of adverse human rights impacts exist independent of business activity.⁷⁴

The Guidance reiterates that the OECD Guidelines do not establish liability. However, if enterprises operate in countries where the state does not fulfill its duty to protect human rights, the enterprise's responsibility to respect international human rights remains intact and is not absolved of its responsibility to provide or permit remedy where it causes or contributes to an adverse impact.⁷⁵

KEY ISSUE: STAKEHOLDER ENGAGEMENT. An essential characteristic of due diligence is stakeholder engagement, which the Guidance defines as: "persons or groups who have interests that could be affected by an enterprise's activities. Examples of stakeholders include workers, workers' representatives, trade unions (including Global Unions), community members, civil society organisations, investors and professional industry and trade associations."⁷⁶ For human rights and other collective rights, the Guidance

⁷² OECD, OECD Due Diligence Guidance, 2018, 75.

⁷³ OECD, OECD Due Diligence Guidance, 2018, 77.

⁷⁴ United Nations, Guiding Principles, 2011, 9.

⁷⁵ OECD, OECD Due Diligence Guidance, 2018, 89.

⁷⁶ OECD, OECD Due Diligence Guidance, 2018, 18 and footnote 2.

also refers to “rightsholders,” who may or may not be workers. Engagement is two-way, involves information sharing and relies on the good faith of all parties.

Enterprises are encouraged to engage stakeholders, especially trade unions and worker representatives during various stages of due diligence, in particular: information gathering/scoping phase, especially for human rights impacts; when seeking to cease, prevent or mitigate human rights impacts by developing and implementing corrective action plans; when tracking the implementation and results of due diligence; when communicating how impacts the enterprise causes or contributes to are being addressed, information specific to rightsholders should be relayed in a timely, culturally sensitive and accessible manner; and if the enterprise identifies an adverse impact, they should consult and engage with impacted rightsholders and their representatives in determining of remedy. When it comes to remedy, operational-level grievance mechanisms to report human rights abuses are encouraged, in development with worker representatives, and should align with core criteria of legitimacy, accessibility, predictability, equitability, compatibility with the OECD Guidelines for MNEs, transparency and dialogue-based engagement.⁷⁷ These should be considered separate from grievance mechanisms determined by collective agreements.

Stakeholders may also include: affected local communities, workers under informal arrangements, consumers and end-users, as well as non-governmental organizations, governments and investors, depending on the enterprise, its activities and the context in which it operates.

The Guidance also reveals the intended significance of domestic National Contact Points, a built-in non-judicial grievance mechanism created by all adhering governments to the Guidelines. While NCPs undertake activities promoting the Guidelines, they should also contribute to the resolution of issues arising from their implementation or failure to implement on the part of an enterprise. “Any individual or organisation can bring a specific instance (case) against an enterprise to the NCP where the enterprise is operating or based regarding the enterprise’s operations anywhere in the world. NCPs facilitate access to consensual and non-adversarial procedures, such as conciliation or mediation, to assist the parties in dealing with the issues.”⁷⁸ NCPs can offer final reports, statements and recommendations. The Guidelines do not offer other potential roles for the NCP, such as fault-finding or determination of Guideline breaches.

KEY ISSUE: PRIMACY OF HUMAN RIGHTS DUE DILIGENCE. Regarding human rights impacts, “the OECD Guidelines for MNEs state that in the case of human rights, severity is a greater factor than likelihood in considering prioritization. Thus, where prioritization is necessary, enterprises should begin with those human rights impacts that would be most severe, recognising that a delayed response may affect remediability. For

⁷⁷ OECD, OECD Due Diligence Guidance, 2018, 35.

⁷⁸ OECD, OECD Due Diligence Guidance, 2018, 90.

example, if a potential adverse impact can result in loss of life, it may be prioritised even if it is less likely.”⁷⁹

Because due diligence is risk-based, enterprises prioritize the most severe and/or likely and/or irremediable risks across all domains described by the Guidelines, before moving to lesser risks. This prioritization is also ongoing, and new or emerging adverse impacts may take precedence. “Through the due diligence process, an enterprise should be able to adequately respond to potential changes in its risk profile as circumstances evolve (e.g. changes in a country’s regulatory framework, emerging risks in the sector, the development of new products or new business relationships).”⁸⁰ The Guidance does recognize it will not always be feasible for an enterprise to address all risks at once. If an enterprise is causing or contributing to a human rights adverse impact, it should stop those activities and provide for or cooperate with remediation.⁸¹ The Guidance does not suggest a timeline for this process.

KEY ISSUE: EXTRATERRITORIALITY. As part of the duty to protect human rights, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and jurisdiction, those affected have access to effective remedy. The OECD Guidance does not otherwise deal with the concept of jurisdiction or extraterritoriality.

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

To reach its stated objective of realizing social progress and decent work for all, the ILO Tripartite Declaration builds on international labour conventions and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Tripartite Declaration offers principles and guidelines to multinational enterprises, governments, and employers’ and workers’ organizations in home and host countries in the areas of employment, training, conditions of work and life and industrial relations. The principles reflect good practice for both national and multinational enterprises and were updated in 2017 for the 5th edition to the Declaration, which was first approved by the ILO in 1977.

Decent work was identified as a goal of the 2030 Agenda for Sustainable Development, which was adopted by 193 UN member states, including Canada. The aim of the Tripartite Declaration is to encourage enterprises’ positive contribution to economic and social progress and the realization of decent work for all, as well as resolving some of the issues that result from multinational business operations. That contribution is supported by state actions such as laws and policies and by the three-way cooperation

⁷⁹ OECD, OECD Due Diligence Guidance, 2018, 45.

⁸⁰ OECD, OECD Due Diligence Guidance, 2018, 17.

⁸¹ OECD, OECD Due Diligence Guidance, 2018, 17.

between governments, employers' and workers' organizations and multinational enterprises.

Similar to the other responsible business conduct instruments, the Tripartite Declaration sets out principles in the fields of employment, training, conditions of work and life, and industrial relations which governments, employers' and workers' organizations and multinational enterprises are encouraged to follow on a voluntary basis, and gives primacy to national laws and regulations.⁸² But membership in the ILO denotes an obligation to respect, to promote and to realize the fundamental rights including freedom of association and the right to collective bargaining, elimination of forced or compulsory labour, abolition of child labour and elimination of discrimination in employment or occupation. Fulfilment of human rights obligations in the Tripartite Declaration follows the UN Guiding Principles: state duty to *protect* human rights, enterprise responsibility to *respect* human rights, and the joint imperative to match rights to remedies in the case of rights violations.

Similarly, and following the OECD Guidelines, enterprises must avoid causing or contributing to adverse impacts through their own activities and address impacts when they occur; seek to prevent or mitigate adverse impacts directly linked to their operations, products or services through business relationships, even if they did not cause or contribute to the harm. In order to identify, prevent, mitigate and account for how they address these actual and potential human rights adverse impacts, enterprises should carry out due diligence.⁸³

KEY ISSUE: LIABILITY VERSUS RESPONSIBILITY. The Tripartite Declaration does not address the issue of liability and relies on the United Nations Guiding Principles for definitions and obligations under the “Protect, Respect, Remedy” Framework.

KEY ISSUE: STAKEHOLDER ENGAGEMENT. The Tripartite Declaration specifically differentiates between workers' organizations and employers' organizations, though together they form one element of the three-way cooperation described in the document. The Tripartite Declaration refers to workers' organizations in both home and host countries. Workers' organizations are to be engaged during various aspects of this cooperation: by enterprises when determining consistency with the national law and development priorities of host countries; by enterprises when attempting to gauge human rights risks; by enterprises when determining operational employment plans and thereafter regarding employment decisions; by governments when developing and enacting a national policy and plan of action to eliminate forced and compulsory labour; by enterprises when considering changes to operations affecting employment; by enterprises when developing training and skills development programs; when managing

⁸² ILO, Tripartite Declaration, 2017, 3.

⁸³ ILO, Tripartite Declaration, 2017, 5.

health and safety protocols. Moreover, and more generally, “(in) multinational as well as in national enterprises, systems devised by mutual agreement between employers and workers and their representatives should provide, in accordance with national law and practice, for regular consultation on matters of mutual concern,” apart from collective bargaining.⁸⁴ This may also include “voluntary conciliation and arbitration machinery” that operates for the prevention and settlement of industrial disputes.⁸⁵

Freedom of association and the right to organize are broadly protected under the general principles of the Tripartite Declaration, which also highlights ILO Convention No. 87, Article 5, the importance of permitting workers’ organizations “to affiliate with international organizations of employers and workers of their own choosing,” whether inside the workplace or the host country, or not.⁸⁶ Workers should also have the right to have representative organizations of their own choosing recognized for the purpose of collective bargaining.

KEY ISSUE: PRIMACY OF HUMAN RIGHTS DUE DILIGENCE. The Tripartite Declaration again borrows from the Guiding Principles and the OECD Guidelines regarding human rights due diligence: Enterprises, including multinational enterprises, should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.”⁸⁷

KEY ISSUE: EXTRATERRITORIALITY. The Tripartite Declaration does not address the issue of jurisdiction or extraterritoriality.

In brief: Garment and Footwear Sector

Workers in the garment and footwear sector, characterized by low-skilled, labour-intensive work with short lead times, are often particularly vulnerable to human rights violations, demonstrated most dramatically by the Rana Plaza collapse in 2013, killing 1,130 people, mostly young women including children, in one of the world’s largest industrial disasters. Human rights and labour abuses are prevalent throughout international supply chains in this sector, compounded by “stages of the production process spread across diverse countries, short lead times and short term buyer-supplier relationships, (which) can reduce visibility and control over an enterprise’s supply chain

⁸⁴ ILO, Tripartite Declaration, 2017, 15.

⁸⁵ ILO, Tripartite Declaration, 2017, 16.

⁸⁶ ILO, Tripartite Declaration, 2017, 13.

⁸⁷ ILO, Tripartite Declaration, 2017, 5.

and can create challenges for enterprises to meet their responsibilities.”⁸⁸ This may include raw material and fibre producers, material manufacturers and processors, components manufacturers, footwear and garment manufacturers, brands, retailers and their intermediaries. In Canada, clothing manufacturing amounted to \$12.9 billion CAD in imports in 2017.⁸⁹ Proposed class-action lawsuit *Das v. George Weston Limited*, filed in Ontario against Joe Fresh apparel and parent company, Canadian retailer Loblaws — which bought clothing from a supplier that subcontracted manufacturing from a company operating from Rana Plaza — was dismissed in 2017 due to a statute of limitation in Bangladeshi law. The trial judge also found there was no direct cause of action linking Loblaws to the collapse and that the company had no obvious duty of care.⁹⁰

The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector supports the implementation of the OECD Guidelines for Multinational Enterprises and the due diligence recommendations of the UN Guiding Principles on Business and Human Rights and is aligned with the ILO Declaration on Fundamental Principles and Rights at Work and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. The Guidance incorporates all the essential elements of due diligence: embedding responsible business conduct in policies and management systems; identifying actual and potential harms; cease, prevent or mitigate harm in an enterprise’s own operations and in its supply chain; track effectiveness; communicate effectiveness and outcomes; provide for or cooperate in remediation when appropriate.⁹¹ The OECD Guidelines are designed to be flexible and adaptable to various sectors while maintaining these core processes and principles on which they are based; namely, the state duty to protect human rights and the corporate responsibility to respect human rights.

To that end, this Guidance suggests due diligence must be conducted with the sector-specific risks in mind. In the garment and footwear sector, these include: child labour; discrimination; forced labour; hours of work; occupational health and safety; the right to establish or join a trade union and representative worker organisation and right to collective bargaining; inadequate compensation; hazardous materials; discrimination; and others.⁹² These bundled risks also demonstrate the inseparable nature of human rights and the compound risks faced by workers in various sectors. It should be noted the Guidance does not rank risks, but states due diligence should identify risk by

⁸⁸ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, publication, 2017, accessed August 7, 2018, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Garment-Footwear.pdf>, 17.

Statistics Canada, "Canadian Industry Statistics - Clothing Manufacturing," 2017, accessed August 8, 2018, <https://www.ic.gc.ca/app/scr/app/cis/summary-sommaire/315>.

⁹⁰ *Das v. George Weston Limited*, 2017 ONSC 4129 (Ontario Superior Court of Justice May 7, 2017).

⁹¹ OECD, *Garment and Footwear Sector*, 2017, 24.

⁹² OECD, *Garment and Footwear Sector*, 2017, 38.

severity and likelihood. Forced labour is one of several human rights violations prevalent in this sector.

To address such risks, an enterprise conducting due diligence in this sector should not only articulate its own commitments but the expectations of suppliers, licensees, subcontractors and intermediaries, including a commitment to responsible sourcing practices. Subcontracting to third parties is common practice in this sector but increases risks while decreasing transparency, which requires more vigilant due diligence, such as rigorous prequalification.⁹³

Critical to effective due diligence in this sector is communication, including industry collaboration and stakeholder engagement.⁹⁴ Engaging with potentially affected stakeholders such as employees, workers and trade unions and representative organizations of the workers' choosing can help an enterprise assess risks in its own operations and suppliers and can contribute to policy-making, awareness-raising, operational-level grievance mechanisms, monitoring, and corrective action plans to protect the rights of workers.⁹⁵ Not only can and should enterprises involve workers and their representatives, including trade unions, in due diligence, but enterprises "may also directly enter into agreements with trade unions: (i) to facilitate worker involvement in the design and implementation of due diligence processes, (ii) to implement standards on workers' rights and hold enterprises accountable to them, or (iii) to raise grievances against enterprises in relation to workers' rights. Collaboration may be contractually binding or voluntary.⁹⁶ Global framework agreements serve to uphold the rights of workers across a company's international supply chain, regardless of host country standards; freedom of association protocol agreements establish a joint understanding and commitment between trade unions and enterprises within a certain context, whether a single brand or supplier, or at the regional or sectoral level.⁹⁷

The Guidance is clear that any responsible business conduct policy should establish the enterprise will not tolerate anti-worker policies and actions in its own operations and in its supply chain; however, the enterprise's ability to respect labour rights is more likely to be affected by the institutional and legal environment in which it operates than by any product line or stage of supply chain. Enterprises should use leverage, including sectoral-level collaboration, to influence suppliers that demonstrate anti-worker or anti-union behaviour, consider suspending orders if conditions do not improve, or disengage if risks and harms are severe.⁹⁸

⁹³ OECD, Garment and Footwear Sector, 2017, 38.

⁹⁴ OECD, Garment and Footwear Sector, 2017, 51.

⁹⁵ OECD, Garment and Footwear Sector, 2017, 71.

⁹⁶ OECD, Garment and Footwear Sector, 2017, 30.

⁹⁷ OECD, Garment and Footwear Sector, 2017, 30.

⁹⁸ OECD, Garment and Footwear Sector, 2017, 150.

In brief: High-risk Minerals Sector

Companies operating in the minerals sector may face risks in supply chains because of the process of mineral extraction, trade and handling which may hold inherently higher risks of significant adverse impacts, such as financing or fuelling conflict or exacerbating the conditions of conflict.⁹⁹ The mineral supply chain is complex and involves multiple actors related to the upstream extraction, transport, handling, trading, processing, smelting, refining and alloying, to manufacturing and sale further downstream. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas recognizes that circumstances may pose particular challenges to due diligence but those circumstances are what make responsible sourcing practices more critical. Systemic risks from conflict or high-risk sectors do not absolve an enterprise from its responsibility to respect human rights and not contribute to conflict.

The Guidance suggest a five-step framework for due diligence in these areas: establish strong company management systems; identify and assess risk in the supply chain; design and implement a strategy to respond to identified risks; carry out independent third-party audit of supply chain due diligence at identified points in the supply chain; report on supply chain due diligence. At the heart of due diligence in this sector is a system of controls and transparency over the mineral supply chain, including a chain of custody or a traceability system and collaboration with suppliers, and a risk management plan that provides for continuing trade, suspending trade, and disengaging from trade if the risk level is deemed unacceptably high.

A model RBC policy would include such a statement as: “While sourcing from, or operating in, conflict-affected and high-risk areas, we will neither tolerate nor by any means profit from, contribute to, assist with or facilitate the commission by any party of: i) any forms of torture, cruel, inhuman and degrading treatment; ii) any forms of forced or compulsory labour, which means work or service which is exacted from any person under the menace of penalty and for which said person has not offered himself voluntarily; iii) the worst forms of child labour; iv) other gross human rights violations and abuses such as widespread sexual violence; v) war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide.”¹⁰⁰ Such a policy would prohibit any direct or indirect support to armed groups or other groups who illegally control mines, routes or financial flows. No matter their location within the supply chain or its pre-existing risk profile, companies should conduct due diligence designed to ensure they do not contribute to human rights abuses or conflict.

⁹⁹ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, publication, 2016, accessed August 7, 2018, <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>, 14.

¹⁰⁰ OECD, *Minerals from Conflict-Affected and High-Risk Areas*, 2016, 21.

The Guidance includes specific direction for enterprises involved in the supply chains of commodities tin, tantalum, tungsten and gold, and addresses upstream operations from the mine — both artisanal and large-scale enterprises — to smelters and refineries and local traders, and downstream operations from intermediary traders, manufacturers and retailers. This distinction is made due to the fact that tracing minerals is nearly impossible after smelting or other forms of processing such as recycling, meaning that internal control mechanisms and industry collaborations are necessary to responsible supply chain management.

The Guidance does not address trade union involvement but notes enterprises should create risk management plans with stakeholder input, and address due diligence capacity in cooperation with “relevant international organizations, NGOs, stakeholders and other experts.”¹⁰¹

Due diligence in this high-risk sector has particular significance in Canada. Eight civil claims have been filed in Canadian courts that contain allegations of environmental or human rights abuses related to the overseas operations of Canadian extractive companies. The majority involve Canadian mining companies operating in Latin America and Africa. To date, none have been successful. The UN Working Group on the issue of human rights and transnational corporations and other business enterprises “observed that the issue of human rights and Canadian extractive companies operating abroad has been a critical issue in Canadian policymaking for more than a decade,” with little legislative progress.¹⁰² The extractive sector was an area of focus for the Working Group because of its economic impact: Canada is home to more than half of the world’s mining companies; mining/oil and gas extraction accounts for seven per cent of Canada’s total GDP; the mining sector is the largest private sector employer in Canada.¹⁰³ The office of the Extractive Sector Corporate Social Responsibility Counsellor was recently replaced by the Ombudsperson for Responsible Enterprise, although the role and auspices of the latter are yet to be determined.

The Working Group described Canada’s Extractive Sector Transparency Measures Act, a law that came into effect in 2015, as “an example of an important transparency measure,” but observed the government could do more to assess the need for human rights disclosure and due diligence in other sectors of the economy as well.¹⁰⁴ This Act applies to corporations, trusts, partnerships or other entities involved in the commercial development of oil, gas or minerals that are a) listed on a Canadian stock exchange, or b) have a place of business in Canada, do business in Canada or have assets in Canada, and meet two of the following requirements in their two most recent financial years: i) have at least C\$20 million in assets, ii) generated at least C\$40 million in

¹⁰¹ OECD, Minerals from Conflict-Affected and High-Risk Areas, 2016, 45.

¹⁰² United Nations Working Group, Report of the Working Group, 2018, 6.

¹⁰³ United Nations Working Group, Report of the Working Group, 2018, 15.

¹⁰⁴ United Nations Working Group, Report of the Working Group, 2018, 7.

revenue, iii) employ an average of at least 250 employees. Applicable companies must report payments related of more than \$100,000 CDN, related to the relevant commercial development, to any government in Canada or abroad, or any government-established trust, board, commission, corporation, body or authority in Canada or abroad. Companies report these payments to Natural Resources Canada. There are no other transparency or due diligence requirements in the Act.

In brief: Financial Sector

Investors are charged with the responsibility of respecting human rights and should implement due diligence in order to avoid both reputational and financial risks but also, and crucially, to prevent adverse impacts of their investments on society and even positively contribute toward the attainment of sustainable development goals.

While the OECD Guidelines apply generally to all industries and all economic sectors, they do not make specific reference to the financial sector directly.¹⁰⁵ Embedding responsible business conduct into an investment institution's policies and management is not a formal component of due diligence under the OECD Guidelines.¹⁰⁶ While the terminology "due diligence" in the context of investment most often refers to the assessment of legal and financial risk prior to financial investment, risk assessment in the context of responsible business conduct is always outward-facing and should be considered the actual or potential adverse impacts of an investment on human rights, labour, the environment or other issues addressed by the Guidelines, not the risk to the enterprise or investment.

The OECD guidance "Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises" is a tool with which investors can respect human rights in practice by implementing the Guidelines, the UN Guiding Principles and the UN-endorsed, voluntary Principles for Responsible Investment. The latter provides that companies, among other actions, will: incorporate environmental, social and governance (ESG) issues into investment analysis and decision-making processes; seek disclosure on ESG issues from investees and similarly disclose efforts to incorporate how ESG issues are addressed in investment activities.¹⁰⁷ The OECD has established that for the purposes of the Guidelines, the investor and investee company, including minority

¹⁰⁵ OECD, *Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises*, publication, 2017, accessed August 7, 2018, <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>, 7.

¹⁰⁶ OECD, *Responsible Business Conduct for Institutional Investors*, 2017, 21.

¹⁰⁷ PRI, *Principles for Responsible Investing: An Investor Initiative in Partnership with UNEP Finance Initiative and the UN Global Compact*, publication, 2007, accessed August 7, 2018, https://www.unglobalcompact.org/docs/issues_doc/Financial_markets/PRI_Brochure_electronic_version.pdf.

shareholding, can be considered a “business relationship” and can be *directly linked to* adverse impacts caused or contributed to by the companies in which they invest as a result of the investment ownership or management of shares of those companies.

In other words, an investor can be directly linked to human rights violations through a portfolio.¹⁰⁸ Because of this direct linkage, investors are expected to use *leverage* to influence the companies in which they invest to prevent or mitigate adverse impacts to human rights, in accordance with the Guidelines. Similarly, because investors do not typically cause or contribute to adverse impacts, they are not expected to address or remedy harms, unless they wield significant managerial control over the operations of the enterprise.¹⁰⁹

Leverage should not be limited to direct engagement but should be understood in the broadest possible terms, and can include such measures as simply directing capital towards more responsible companies or influencing industry collaboration on specific issues. Investors are not expected to conduct due diligence on behalf of companies in which they invest, but rather to identify, prevent and mitigate risks to responsible business conduct in their own portfolios. The Guidelines suggest an approach based on likelihood and severity, and in developing the rationale for this prioritization, investors are encouraged to consult with relevant stakeholders, which include but are not limited to their beneficiaries or clients, but may also include worker representative organisations and civil society familiar with the issue of human rights and responsible business conduct.¹¹⁰

Investment bodies already have robust risk management frameworks in place, which can be utilized to incorporate the analysis of human rights and other concerns under the Guidelines. In fact, under the rules of fiduciary duty, investors must act in the financial interests of their clients or beneficiaries; responsible business conduct and due diligence are increasingly considered integral to determining these financial interests, as RBC risks can also have financially material repercussions.¹¹¹

A recent analysis from the UN Environment Programme Finance Initiative demonstrated that, in Canada, fiduciary duties inform the parameters of investment decision-making and institutional investment such as pension plans and while investment managers have been active on long-term responsible investing and do consider corporate governance in risk assessment, they often pay less attention to environmental and social issues.¹¹² Apart from federally regulated pension funds, Canadian provinces are also responsible for pension regulation and oversight; in Ontario, pension funds must

¹⁰⁸ OECD, *Responsible Business Conduct for Institutional Investors*, 2017, 13.

¹⁰⁹ OECD, *Responsible Business Conduct for Institutional Investors*, 2017, 20.

¹¹⁰ OECD, *Responsible Business Conduct for Institutional Investors*, 2017, 25.

¹¹¹ OECD, *Responsible Business Conduct for Institutional Investors*, 2017, 23.

¹¹² UN Environment Programme Finance Initiative, *Fiduciary Duty in the 21st Century*, publication, 2015, accessed August 7, 2018. http://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf.

disclose how environmental, social and governance factors are incorporated into investment policies. “However, there was also a sense that Canadian asset owners lag behind their European counterparts, both in relation to the level of attention paid to environmental and social issues and in relation to the monitoring and oversight of their investment managers’ activities on responsible investment.”¹¹³ One constraint was seen as the interpretation of fiduciary duty in relatively short-term, financial terms.¹¹⁴ Indeed, the analysis noted: “the systematic adoption and implementation of responsible investment is hindered by the lack of regulatory guidance or court decisions on how it aligns with fiduciary duty.”¹¹⁵

It should also be noted that the worldwide paucity of reliable information on RBC risk poses a challenge for investors: of an estimated 80,000 multinational enterprises, only between 5,000 and 8,000 publish environmental or social performance reports — and related monitoring and enforcement has also been questioned. As such, “it may be difficult for investors to gain a full understanding of RBC risks facing a company in their portfolio and whether they are being adequately addressed.”¹¹⁶

In brief: State-Business Nexus

Under the UN Guiding Principles considering the “state-business nexus,” the state duty to protect human rights extends to its own activities: “States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.”¹¹⁷

Failure to do so could lead to circumstances in which a state may find itself in violation of its own international law obligations if an enterprise controlled by a state or associated with a state is found to violate human rights, especially if that enterprise is taxpayer-funded, state-run or relies on statutory authority for its operations. Enterprises that operate at greater distance from the state may still be linked formally or informally to government, including export credit agencies, official investment insurance agencies, international development agencies, development finance institutions and others. If these agencies do not consider the actual and potential human rights impacts of beneficiary enterprises, they may face reputational and legal risk. “Given these risks, States should encourage and, where appropriate, require human rights due diligence by

113 UNEPFI, *Fiduciary Duty*, 2015, 39.

114 UNEPFI, *Fiduciary Duty*, 2015, 40.

115 UNEPFI, *Fiduciary Duty*, 2015, 40.

116 UNEPFI, *Fiduciary Duty*, 2015, 27.

117 United Nations, *Guiding Principles*, 2011, 6.

the agencies themselves and by those business enterprises or projects receiving their support.”¹¹⁸ The duty to protect human rights is extended even when states privatize services through contracts, which should include government expectations that the private company respect human rights, and through oversight of such third-party enterprises, and through procurement.¹¹⁹ Home states should not only ensure all state agencies are aware of their international obligations toward human rights, but should foster cooperation among development agencies, foreign and trade ministries and export finance institutions both at home and abroad, and “attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.”¹²⁰

The OECD Guidelines for Multinational Enterprises also suggest state-owned multinational enterprises are subject to the same recommendations as their privately-owned counterparts and are often subject to even greater scrutiny. The OECD Guidelines on Corporate Governance of State-Owned Enterprises specifically tailored to these entities, and should be considered the “internationally agreed standard for how governments should exercise the state ownership function.”¹²¹ To this end, state-owned enterprises should observe “high standards of responsible business conduct, including with regards to the environment, employees, public health and safety, and human rights,” with actions guided by various international enterprises including the OECD Guidelines for Multinational Enterprises, which contain the ILO Declaration on Fundamental Principles and Rights at Work and the UN Guiding Principles on Business and Human Rights.¹²² Risk management reporting should include human rights and labour.¹²³

Conclusion

In conclusion, while these international instruments contain separate provisions, they espouse a related, if aspirational, vision for the state duty to protect human rights, the corporate responsibility to respect human rights, and the shared obligation to remedy where a harm was not avoided. In this context, human rights are seen as not only inalienable but inseparable, and can be addressed by multinational enterprises operating in an increasingly global marketplace through a holistic process of due

¹¹⁸ United Nations, Guiding Principles, 2011, 7.

¹¹⁹ United Nations, Guiding Principles, 2011, 8.

¹²⁰ United Nations, Guiding Principles, 2011, 9.

¹²¹ OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition*, publication, 2015, accessed August 7, 2018, <https://www.oecd-ilibrary.org/docserver/9789264244160-en.pdf?expires=1533658475&id=id&acname=guest&checksum=6094C48FBCF20C36C0D1D02FC3295611>, 3.

¹²² OECD, *OECD Guidelines on Corporate Governance*, 2015, 60.

¹²³ OECD, *OECD Guidelines on Corporate Governance*, 2015, 65.

diligence that can identify, prevent, mitigate and account for how an enterprise addresses any adverse impacts arising from its global activities. The state duty to protect human rights emerges as the critical complement to this regime through laws and enforcement, and the provision of remedy where necessary.

Annex 1: Glossary of terms

“Due diligence” refers to the policies and process with which an entity can identify, prevent, mitigate and account for how it addresses adverse impacts, especially in the context of human rights. The process includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.¹²⁴ Human rights due diligence is “an on-going, proactive and reactive, and process-oriented activity; it is to be carried out throughout the entire life-cycle of operations, products and services because circumstances change and so will adverse impacts.”¹²⁵

“Adverse impact” is synonymous with harm. In the context of international human rights laws, an actual adverse impact refers to harm or negative consequences to workers, human rights, the environment, bribery, consumers and corporate governance. A potential adverse impact refers to the risk of harm or negative consequences in these areas. Adverse impacts may be associated with associated with an enterprise’s operations, supply chains and other business relationships. Potential adverse impacts, or risks, are outward-facing; that is, not risks to the enterprise’s operations or its market position but rather risks to the people, environment and society that enterprises cause, contribute to, or to which they are directly linked.

“Multinational enterprise” is understood in broad terms. “A precise definition of multinational enterprises (MNEs) is not required for the purposes of the OECD Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways ... The OECD Guidelines are addressed to all the entities within the MNE (parent companies and/or local entities).”¹²⁶

“Human Rights” refers to internationally recognized human rights — understood, at a minimum, as those expressed in the International Bill of Human Rights and the

¹²⁴ United Nations, Guiding Principles, 2011, 20.

¹²⁵ OECD, Responsible Business Conduct for Institutional Investors, 2017, 16.

¹²⁶ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, publication, 2017, accessed August 7, 2018, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Garment-Footwear.pdf>, 18.

principles concerning fundamental rights set out in the International Labour Organization's Declaration of Fundamental Principles and Rights at Work.

"Remediation" is a corrective process, supported and enabled by due diligence practices, that provides judicial and non-judicial remedy for adverse impacts. These substantive outcomes or remedies counteract or "make good" adverse impacts and may be based on recognized laws, standards, precedents or stakeholder preferences. The right to remedy is derived from the state duty to protect human rights; however, if a state does not or cannot fulfil this duty, this does not absolve an enterprise of its responsibility to provide remedy.¹²⁷

Works cited

Above Ground, MiningWatch, and OECD Watch. *Canada Is Back, But Still Far Behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises*. Report. November 2016. Accessed July 24, 2018. https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf.

De Schutter, Olivier, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman. "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights." *Human Rights Quarterly* 34 (2012): 1084-169.

Imai, Shin, Leah Gardner, and Sarah Weinberger. *The 'Canada Brand': Violence and Canadian Mining Companies in Latin America*. Osgoode Legal Studies Research Paper 17/2017. Osgoode Hall Law School, York University. 2016. 1-132.

International Labour Organization. "ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up." United Nations. June 18, 1998. Accessed June 20, 2018. <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>.

International Labour Organization. "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), 5th Edition." United Nations. March 2017. Accessed June 20, 2018. https://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm.

¹²⁷ OECD, *Garment and Footwear Sector*, 2017, 94.

- OECD. *OECD Due Diligence Guidance for Responsible Business Conduct*. Publication. 2018. Accessed June 20, 2018. <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.
- OECD. *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*. Publication. 2017. Accessed August 7, 2018. <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Garment-Footwear.pdf>.
- OECD. *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. Publication. 2016. Accessed August 7, 2018. <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>.
- OECD. *OECD Guidelines for Multinational Enterprises*. Publication. 2011. Accessed June 20, 2018. <http://dx.doi.org/10.1787/9789264115415-en>.
- OECD. *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition*. Publication. 2015. Accessed August 7, 2018. <https://www.oecd-ilibrary.org/docserver/9789264244160-en.pdf?expires=1533658475&id=id&accname=guest&checksum=6094C48FBCF20C36C0D1D02FC3295611>.
- OECD. *Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises*. Publication. 2017. Accessed August 7, 2018. <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>.
- Das v. George Weston Limited, 2017 ONSC 4129 (Ontario Superior Court of Justice May 7, 2017).
- PRI. *Principles for Responsible Investing: An Investor Initiative in Partnership with UNEP Finance Initiative and the UN Global Compact*. Publication. 2007. Accessed August 7, 2018. https://www.unglobalcompact.org/docs/issues_doc/Financial_markets/PRI_Brochure_electronic_version.pdf.
- Sherman, John F. "Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of Its Subsidiaries?" *Business Law International* 19, no. 1 (January 2018): 23-36. Accessed July 9, 2018. https://www.shiftproject.org/media/resources/docs/ParentalLiability_BLI_Sherman-January2018.pdf.

Statistics Canada. "Canadian Industry Statistics - Clothing Manufacturing." 2017. Accessed August 8, 2018. <https://www.ic.gc.ca/app/scr/app/cis/summary-sommaire/315>.

Trade Union Advisory Council. "Key Statistics. Trade Union Cases in Numbers: Which Provisions of the Guidelines? In Which Sectors? With What Success?" *TUAC OECD MNE Guidelines*. 2017. Accessed August 7, 2018. <http://www.tuacoecdmneguidelines.org/statistics.asp>.

United Nations. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*. A/HRC/17/31. March 21, 2011. Accessed June 20, 2018. <https://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

United Nations. *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*. A/HRC/8/5. April 7, 2008. Accessed June 20, 2008. <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

UN Environment Programme Finance Initiative. *Fiduciary Duty in the 21st Century*. Publication. 2015. Accessed August 7, 2018. http://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf.

United Nations Working Group on the Issue of Human Rights. *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on its Mission to Canada*. A/HRC/38/48/Add.1. April 23, 2018. Accessed June 20, 2018. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/116/38/PDF/G1811638.pdf?OpenElement>.

lgl/cope225