



THE LONDON SCHOOL
OF ECONOMICS AND
POLITICAL SCIENCE ■



GUIDE TO IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IN INVESTMENT POLICYMAKING

THE LSE INVESTMENT & HUMAN RIGHTS PROJECT

The Investment & Human Rights Project (IHRP) is an initiative of the Laboratory for Advanced Research on the Global Economy (LAB), in the Centre for the Study of Human Rights, at the London School of Economics and Political Science.

The IHRP is committed to:

- ▶ Building awareness about how international investment works and how it relates to both positive and negative impacts on human rights;
- ▶ Creating constructive spaces for learning, research, discussion and the sharing of practical tools in the area of investment and human rights; and
- ▶ Facilitating and carrying out training and capacity building activities for civil society, representatives of governments, practitioners and other relevant groups on the relationship between investment and human rights.

Andrea Saldarriaga and Andrea Shemberg, who co-lead the IHRP, have unique expertise in human rights and investment. Andrea Shemberg was Legal Advisor to John Ruggie during his mandate as UN Special Representative of the Secretary-General on Business and Human Rights. She led his work on State-investor contracts and international investment agreements. Specifically, she was in charge of the Special Representative's four-year research and consultation process with States, companies and civil society to realise the UN Principles for Responsible Contracts (PRC).

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IHRP WORK ON THE UNGPs AND INVESTMENT POLICYMAKING

This Guide is one outcome of a larger IHRP research and capacity building project on the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in investment policymaking. In late 2015, the IHRP hosted workshops and dialogues in Colombia and Indonesia. This in-country work was aimed at providing recommendations for integrating investment policymaking in the respective National Action Plans on business and human rights (NAPs). The work was coordinated with the officials in each country leading on the development and implementation of the NAPs. The workshops explored how the UNGPs apply to investment policymaking, and what this implies in the context of each country. Each workshop was followed by stakeholder dialogues to discuss priority human rights issues related to investment and challenges related to implementing the UNGPs. The discussions engaged government, civil society, foreign government missions, the private sector, national human rights institutions and other interested stakeholders.

This Guide benefited from both the work in Colombia and Indonesia and discussions over the last year with experts in investment and human rights. This Guide is printed in English, Spanish and Bahasa Indonesia, and it is available online at the IHRP Learning Hub: <http://lse.ac.uk/investmenthumanrights>.

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Foreword

Human rights and investment

Economic growth, human rights, equality and development are inextricably linked. While economic growth can contribute to increased enjoyment of human rights, the 2008 global financial crisis and increasing competition for ownership and control of natural resources have in many places translated into the denial of access to employment, education, health, food, housing and other basic rights. They have also contributed to unprecedented flows of migrants and refugees. This denial of human rights continues to trigger civil unrest in many parts of the world, which in turn undermines the sustainability of long-term development and growth.

The misalignment between the scope and impact of economic forces and actors and the willingness and capacity of States to ensure the protection of human rights in the context of economic activities must be addressed. Foreign direct investment (FDI), in particular, presents a unique challenge for alignment, including with regard to corporate compliance, accountability and the responsibility to respect human rights.

Given the inextricable link between the global economy and human rights, OHCHR advocates for broad-based inclusion of human rights principles of transparency, accountability, participation, non-discrimination and human rights policy coherence within the trade, investment, economic, regulatory and development spheres. Specific to FDI, OHCHR is working to ensure that global, regional and national actors integrate international human rights principles and standards in investment policy.

Today, human rights standards are progressively being integrated into global policy documents, national development policies, UN Development Assistance Frameworks and international development planning.

However, limited awareness among State actors about how human rights standards apply in the economic sphere continues to impede integration.

This Guide is therefore an important step forward for ensuring that investment policymakers are both aware of the UN Guiding Principles on Business and Human Rights (UNGPs) and have practical assistance to understand how they apply across State functions that relate to investment. This unique Guide will be a welcome resource as States work to implement their UNGPs, and we look forward to the progress that this Guide will bring in helping States ensure the implementation of the UNGPs is fully integrated into investment policymaking.

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Contents

Introduction	4
PART I: WHY INVESTMENT POLICYMAKING SHOULD BE A PRIORITY AREA FOR STATES WHEN IMPLEMENTING THE UNGPs	4
1. Investment policymaking	4
2. State implementation of the UNGPs	4
3. Why focus on investment policymaking when implementing the UNGPs	6
PART II: IMPLEMENTING THE UNGPs STATE DUTY TO PROTECT IN THE CONTEXT OF INVESTMENT POLICYMAKING	8
1. Mapping investment policymaking	9
2. Six key issues for implementing the UNGPs in investment policymaking	14
3. Examples from state practice for implementation of the UNGPs in investment policymaking	31
Glossary of useful terms	38
Endnotes	39

THIS Guide

- ▶ Aims to help States better implement their State duty to protect (DtP) under the [UN Guiding Principles for Business and Human Rights](#) (UNGPs) across investment policymaking.
 - ▶ Highlights why investment policymaking should be a priority area for UNGP implementation.
 - ▶ Offers a practical Guide to implementation by (i) mapping the diverse State functions, instruments and actors that are relevant throughout the life cycle of an investment project; (ii) presenting six key issues that are most relevant for implementing the UNGPs in investment policymaking; and (iii) providing ideas and examples of measures for State implementation.
 - ▶ Is intended for government officials who are involved in all stages of investment policymaking and for those leading the implementation of the UNGPs; it is also intended for use by civil society, business enterprises and other stakeholders who can contribute to improving the ability of States to protect [human rights](#) in the context of investment.
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PART I – WHY INVESTMENT POLICYMAKING SHOULD BE A PRIORITY AREA FOR STATES WHEN IMPLEMENTING THE UNGPs

1 INVESTMENT POLICYMAKING

For the purpose of this Guide, ‘[investment policymaking](#)’ refers to the full range of State functions, instruments and actors at the domestic and international levels that make [foreign direct investment](#) (FDI) possible. This includes State activities relative to defining policies, negotiating [International Investment Agreements](#) (IIAs), creating laws and regulations, licensing and negotiating [State-investor contracts](#), enforcing investors’ rights as well as facilitating, promoting, financing and insuring FDI. This Guide looks at how to embed the protection of human rights in this set of activities.

2 STATE IMPLEMENTATION OF THE UNGPs

Under the State duty to protect, States are expected to take a number of actions to ensure the protection of human rights in the context of business activities (see box 1). These actions range from general regulatory and policy functions, to a number of actions required in specific contexts, such as (i) when the State is contracting for public services; (ii) when the State is conducting commercial transactions; (iii) when it offers support or owns business enterprises; (iv) or when companies domiciled in its territory or jurisdiction operate in a context of armed conflict. DtP also calls on States to guarantee policy coherence regarding business and human rights across State functions and among levels of administration, and to take adequate measures to ensure access to effective remedy.

The UNGPs and the work of the UN Special Representative of the Secretary-General for Business and Human Rights, John Ruggie, (SRSG) highlight investment as one key policy domain for the protection of human rights. For example, the SRSG conducted work on IIAs, developed a guidance tool for the negotiation of State-investor contracts (see box 2), and intervened in global policy discussions regarding transparency in [investor-State dispute settlement](#) (ISDS). The UNGPs also point to investment as an area where States should ensure policy coherence (UNGP Principles 8, 9 and 10). States should therefore consider Investment policymaking as an important context for UNGP implementation.

The UNGPs are based on 3 pillars:¹

- ▶ **The State duty to protect (DtP):** ‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’²
- ▶ **The corporate responsibility to respect (RtR):** ‘Business enterprises should respect human rights. This means that they should avoid infringing the human rights of others and should address adverse human rights impacts with which they are involved.’³
- ▶ **Access to remedy:** ‘As part of their duty to protect against business-related human rights abuses, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy.’⁴ Alongside the State’s efforts, businesses should provide for or cooperate in the remediation of adverse impacts on human rights as part of their responsibility to respect human rights.

The SRSRG developed an important guidance tool to help States and investors integrate the management of human rights risks into the negotiation of State-investor contracts. The *Principles for Responsible Contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators* (PRC) emphasises how the management of human rights risks will ‘contribute to ensuring the long-term sustainability and success of the [investment] project’.⁵ Investors and State representatives were involved in the development of the PRC to ensure its utility to an actual contract negotiation.

The negotiation process between a [host State](#) and a business investor offers a unique opportunity to identify, avoid and mitigate human rights risks. Managing such risks will help optimise the full range of benefits to be drawn from the investment and help ensure the potential negative impacts on people are avoided, mitigated or remedied. The issues addressed in the 10 principles to help guide the integration of human rights risk management into contract negotiations are listed below:

1. Project negotiations preparation and planning
2. Management of potential adverse human rights impacts
3. Project operating standards
4. Stabilisation clauses
5. Additional goods or service provision
6. Physical security for the project
7. Community engagement
8. Project monitoring and compliance
9. Grievance mechanisms for non-contractual harms to third parties
10. Transparency/Disclosure of contract terms

The UN Office of the High Commissioner for Human Rights (OHCHR) has created a self-study tool on the PRC geared to State negotiators, civil society, commercial negotiators and other stakeholders.⁶

3 WHY FOCUS ON INVESTMENT POLICYMAKING WHEN IMPLEMENTING THE UNGPs

There are also a number of policy and practical reasons why looking specifically at investment policymaking is of particular use to States as they move to implement the UNGPs.

First, **FDI poses unique governance challenges** that can contribute to creating the permissive environment for adverse human rights impacts to take place without fear of punishment or adequate sanctioning. These challenges require urgent and specific attention. If States do not place a specific focus on investment policymaking for FDI as they work to implement the UNGPs, these governance challenges may remain unaddressed.

For example, FDI is an important vehicle for the operation of multinational enterprises (MNEs), and MNEs pose at least two governance challenges for regulators due to the ‘separate legal personality’ between parent companies and subsidiaries. Parent companies and each subsidiary are subject to individual jurisdictions, even if the company works as a global group. Rules such as ‘separate legal personality’ were created to facilitate economic growth. However, as the SRSG has observed, ‘separate legal personality’ makes it very hard for any one jurisdiction to regulate the overall activities of the corporate group. Additionally, the cross-border nature of FDI, coupled with ‘separate legal personality’ rules make it more difficult to ensure access to adequate remedy when adverse human rights impacts occur.⁷

Focusing on investment policymaking for FDI, then, allows specific and urgent consideration of these unique governance challenges.

Secondly, **there is an opportunity to utilise existing momentum for policy reforms regarding FDI to drive UNGP implementation.**

Momentum is growing worldwide for meaningful policy reforms regarding investment policymaking, including with respect to a number of human rights-related issues.

Globally there is an important shift towards encouraging a more active State role in protecting the public interest and ensuring the management of social and environmental risks, including human rights risks, related to FDI. Not only have global and multilateral institutions noted that States are increasingly taking on this more active role; but they have also described this as a positive trend, which can help States to ensure that the full benefits from FDI are realised (see box 3). This shift is influencing global policy debates, including relating to the reform of IIAs and ISDS.

A number of policy priorities are pushing reforms related to FDI in domestic contexts. Spurred on by investor-State disputes, some States like South Africa and Indonesia have conducted policy reviews to determine the impact of their IIAs on their right to regulate in the public interest. While it is too soon to know the impact of Indonesia’s policy review, the review in South Africa has led to policy and regulatory changes to ensure the preservation of policy and regulatory space for the State. The government of Colombia, following the peace agreement with the Revolutionary Armed Forces of Colombia (FARC), will likely consider reforms to ensure FDI does not pose obstacles to reconciliation and peace building efforts. Finally, FDI will be one way that States will look to close the financing gap for the newly agreed Sustainable Development Goals (SDGs).⁸ This will likely drive FDI-related policy and regulatory changes, not only to increase FDI, but also to ensure that FDI contributes positively to achieving societal benefits.

As States look to implement reforms related to FDI, there is a key opportunity to use the existing momentum to integrate the implementation of the UNGPs, ensuring a coordination of policy objectives.

Lastly, a specific focus on investment policymaking is also useful for States because this will necessarily involve the participation of State actors who carry out key investment functions and who are generally far removed from human rights domains. This wider participation offers the opportunity to ensure that investment-related actors and instruments contribute to the State duty to protect, **ensuring greater overall policy coherence.** Involving the State actors relevant to investment policymaking in UNGP implementation can also help to identify innovative ways State actors can collaborate to reinforce policy priorities, either amongst themselves or with other stakeholders.

Despite FDI’s relevance to UNGP implementation and the advantages of focusing on investment policymaking, so far existing [national action plans](#) (NAPs) delineating State commitments to implement the UNGPs either do not address investment policymaking explicitly, or they do so only partially.

This Guide has been designed to help States give more focused attention to investment policymaking as they work to implement the UNGPs.

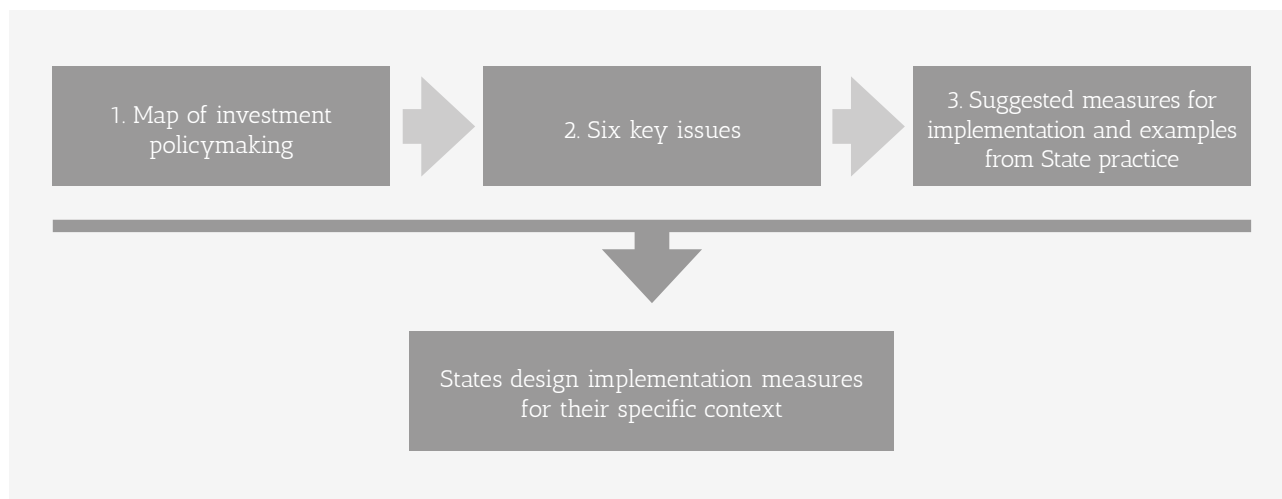
The 2015 **UNCTAD Investment Policy Framework for Sustainable Development** (2015 IPFSD) finds that States are increasingly playing a stronger role in sustainability issues. This trend is marked by States creating stronger social and environmental rules, more actively promoting sustainable development and placing more emphasis on the role of company responsibility for impacts on people and the planet. The IPFSD indicates that:

Governments have become decidedly less reticent about *regulating* and *steering* the economy. More and more governments are moving away from the hands-off approach to economic growth and development that prevailed previously ... A stronger role of the State also manifests itself with regard to other sustainability issues. New social and environmental regulations are being introduced or existing rules reinforced ... This trend reflects, in part, a renewed realism [among States] about the economic and social costs of unregulated market forces.⁹

The 2015 **OECD Policy Framework for Investment** (2015 OECD PFI) indicates that playing a more active role in regulating the economy does not mean discouraging investment. On the contrary, according to the 2015 OECD PFI this active role is precisely how a State can ensure investment drives broader value creation and sustainable development:

While it is the role of businesses to act responsibly, governments have a duty to protect the public interest and a role in providing an enabling framework for responsible business conduct [...] This point goes to the heart of the Policy Framework for Investment: to the extent that governments provide an enabling environment for businesses to act responsibly and meet their duty to protect the public interest from potential negative impacts of business activities, they are more likely to keep and attract high quality and responsible investors, minimise the risks of potential adverse impacts of investments, and ensure broader value creation and sustainable development.¹⁰

PART II: IMPLEMENTING THE UNGP STATE DUTY TO PROTECT IN THE CONTEXT OF INVESTMENT POLICYMAKING



To help States implement the UNGPs in the context of investment policymaking, this Guide offers three tools.

First, it offers a map of **investment policymaking** as an illustrative way to identify a range of functions, instruments and actors that may be relevant throughout the investment life cycle. The purpose of this mapping is twofold:

- ▶ **It lays out the range of functions that States perform relative to investment policymaking, helping users to identify the responsible actors** to engage in discussions around UNGP implementation and the range of **instruments** potentially relevant for the integration of the State duty to protect.
- ▶ By placing State functions, actors and instruments in various phases during a project's life cycle, **the mapping also allows users to consider how to integrate the protection of human rights from the earliest stages of an investment project.** Early planning and management of human rights risks help to ensure that financial projections, budgets and time lines are designed appropriately. This contributes to managing the expectations of States, investors and communities and individuals who may be impacted by the investment.

Secondly, this Guide **presents six key issues** relevant for implementing the UNGPs in investment policymaking. The six key issues reflect how the UNGPs can address the unique governance challenges that FDI poses to the protection of and respect for human rights.

Thirdly, this Guide provides **suggested measures for State implementation**, with **examples** from current State practice. These suggestions and examples help to illustrate how the key issues relate to specific government functions, instruments and actors and can be applied in practice.

This Guide should help users to **design the measures for implementation that are relevant for their particular State context**, taking into account priority business and human rights challenges and investment objectives.

1 MAPPING INVESTMENT POLICYMAKING

This section sets out the range of functions that States perform in investment policymaking. It identifies the actors that may be responsible for each function, lists some of the instruments they may use and places them in various phases during a project's life cycle. As noted above, the notion of investment policymaking used in this Guide includes regulatory and policy functions and a range of non-regulatory functions, such as promoting, facilitating, financing and insuring investment.

The UNGPs indicate that States should use their regulatory powers, as well as non-mandatory tools, to protect human rights and foster business respect for human rights. The commentary to UNGP 3 says that 'States should not assume that businesses [or investors] prefer, or benefit from, State inaction, and they should consider a **smart mix** of measures – national and international, mandatory and voluntary – to foster business respect for human rights.' Therefore considering the whole range of State functions in investment policymaking – including policy, regulatory and non-regulatory functions – is key for ensuring coherent implementation of the UNGPs. It is also important to make sure that State functions are considered at all administrative levels including international, national, regional, local and municipal.

Users should note that the description of the investment life cycle presented in this Guide is designed for illustrative purposes, and it is not specific to any one industry, type of investment or geography. **The State instruments and actors listed on the next pages do not form an exhaustive list. They are meant to help users start thinking about the range of instruments and actors that may be relevant in any given context.** The life cycle is designed to show State functions, so investor processes are not specified here. Finally, this description lays out sequential phases for purposes of illustration, but in any given context these functions will overlap in time and some are continuous processes.

The five phases of the investment life cycle illustrated on page 10 are:

Phase 1: Putting the policy and regulatory framework in place and preparing for investment

Phase 2: Promoting inward investment, and facilitating, financing and insuring outward investment

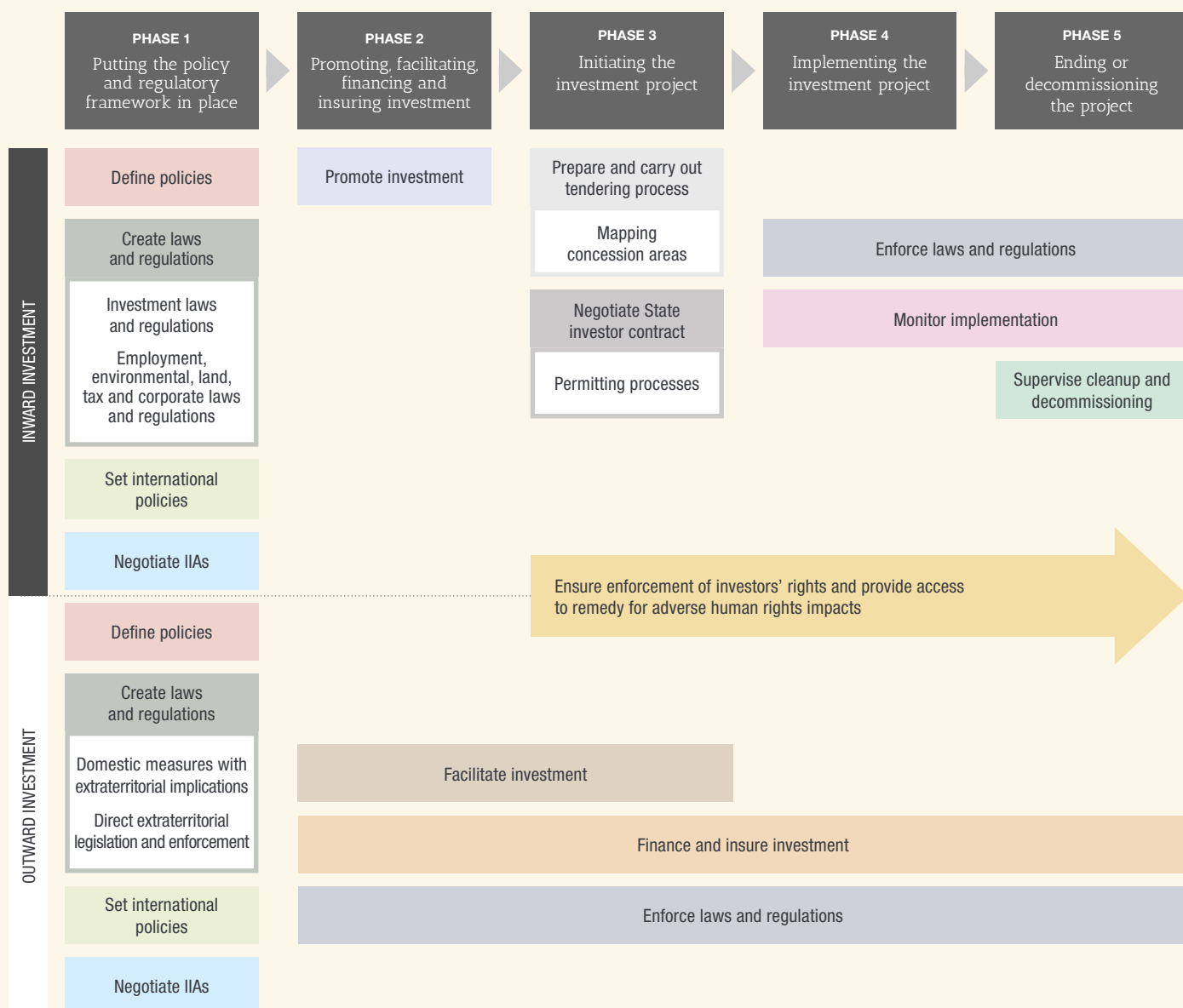
Phase 3: Initiating the investment project

Phase 4: Implementing the investment project

Phase 5: Ending the investment or decommissioning (where relevant) the project

For more a detailed description please see pages 12-13.

FIVE PHASES OF THE INVESTMENT LIFE CYCLE



MAPPING STATE FUNCTIONS, INSTRUMENTS, ACTORS

PHASE	INWARD INVESTMENT			OUTWARD INVESTMENT	
	STATE FUNCTION	INSTRUMENTS	ACTORS	INSTRUMENTS	ACTORS
PHASE 1 PUTTING THE POLICY AND REGULATORY FRAMEWORK IN PLACE	Define policies	National development plans Investment policy/strategies National action plans for UNGPs	Ministries of economic affairs, trade Central bank Economic planning agencies	National development plans Investment policy/strategies National action plans for UNGPs	Ministries of economic affairs, trade Central bank Economic planning agencies
	Create laws and regulations	Investment laws and regulations Other laws and regulations, such as those relative to employment, environmental preservation, land usage and ownership, tax, corporate and tendering	Ministries of economic affairs, trade and foreign affairs Investment coordination agency Parliament/legislature Various sectoral ministries (mining, oil and gas, infrastructure, land, forestry, agriculture and environment...) Local authorities	Domestic measures with extraterritorial implications Direct extraterritorial legislation and enforcement	Ministries of economic affairs, trade and foreign affairs Investment coordination agency Parliament Financial regulators
	Participate in setting international policies	International treaties Normative standards Good practice guidance	Ministries of economic affairs, trade and foreign affairs	International treaties Normative standards Good practice guidance	Ministries of economic affairs, trade and foreign affairs
	Negotiate IIAs	IIAs, interpretive notes and protocols that guide IIA interpretation	Ministries of economic affairs, trade and foreign affairs	IIAs, interpretive notes and protocols that guide IIA interpretation	Ministries of economic affairs, trade and foreign affairs

		INWARD INVESTMENT		OUTWARD INVESTMENT	
PHASE	STATE FUNCTION	INSTRUMENTS	ACTORS	INSTRUMENTS	ACTORS
PHASE 2 PROMOTING, FACILITATING, FINANCING AND INSURING INVESTMENT	Promote investment	Investment roadshows Diplomatic and economic missions Brochures and marketing material	Investment promotion agency Ministry of foreign affairs, embassies, consulates Ministries of trade, economic affairs, trade Various sectoral ministries (mining, oil and gas, infrastructure, land, forestry, agriculture and environment...)		
	Facilitate investment			Diplomatic and economic missions, Letters of support, toolkits and training materials for officials in embassies	Investment promotion agency Ministries of foreign affairs, embassies, consulates Ministries of economic affairs and trade
	Finance and insure			Political risk and other insurance, Government guarantees and loans	Export credit agencies Development banks Central banks Ministries of economic affairs and trade Specialised insurance agencies
PHASE 3 INITIATING THE INVESTMENT PROJECT	Prepare and carry out tendering processes	Maps used to determine concession areas, preservation areas, land use and other relevant maps Tendering documents	Land registries Technical, administrative agencies Local authorities Various sectoral ministries or agencies (mining, oil and gas, infrastructure, land, forestry, agriculture, environment...) Investment coordinating bodies Local authorities		
	Negotiate State -investor contracts	Permits Community engagement and free, prior and informed consent processes Human rights impact assessments Environment and social impact assessments and management plans State-investor contracts	Various sectoral ministries or agencies (mining, oil and gas, infrastructure, land, forestry, agriculture, environment...) Local authorities		
	Ensure enforcement of investors' rights	Judicial mechanisms Non-judicial mechanisms (e.g. ISDS, mediation)	Judges Local and national courts/tribunals Arbitrators Arbitral institutions Various ministries and agencies (economy, trade, foreign affairs) Attorney general	Judicial mechanisms Non-judicial mechanisms (e.g. ISDS, mediation)	Judges Local and national courts/tribunals Arbitrators Arbitral institutions
	Ensure access to remedy for individuals and communities adversely affected	Judicial mechanisms Non-judicial mechanisms (e.g. OECD NCP, ombudsperson, administrative processes, mediation)	Judges Local and national courts/tribunals OECD NCPs Ombudspersons National human rights institutions	Judicial mechanisms Non-judicial mechanisms (e.g. OECD NCP, ombudsperson, administrative processes, mediation)	Judges Local and national courts/tribunals OECD NCPs Ombudspersons National human rights institutions
PHASE 4 IMPLEMENTING THE INVESTMENT PROJECT	Enforce laws and regulations	Administrative processes Judicial processes	Various sectoral ministries or agencies (mining, oil and gas, infrastructure, land, forestry, agriculture, environment...) Regulatory bodies	Administrative processes Judicial processes	Various sectoral ministries or agencies (mining, oil and gas, infrastructure, land, forestry, agriculture, environment...) Regulatory bodies
	Monitor implementation	Audits Inspections Reports	Various sectoral ministries or agencies (mining, oil and gas, infrastructure, land, forestry, agriculture, environment...) Local authorities		
PHASE 5 ENDING OR DECOMMISS- SIONING THE PROJECT	Supervise cleanup or decommissioning	Audits Inspections Reports	Various sectoral ministries and specialised agencies		

Phase 1: Putting the policy and regulatory framework in place and preparing for investment. This phase includes the functions that have to do with the creation of policies, laws, regulations and even applicable international treaties that will form the policy and legal framework under which all investment will take place. When designing measures for UNGP implementation relative to these functions, States should consider their roles relative to inward and outward investment as well as their role as members of multilateral institutions.

a. States define policies that relate to inward and outward investment

Investment policies reflect strategic choices as to the kind of investments the State wants to attract, support and finance. They should ideally guide all other actions of the State including regulating, promoting or facilitating investment. Relevant State actors may include economic planning agencies, ministries of economy and trade or the central bank. Investment policies can be standalone documents or delineated in national economic or development plans. Investment policies may also be determined by multilateral organisations, such as in the case of the European Union. Those State actors that determine policies for human rights are also relevant here. While States often define investment policies in isolation from their human rights commitments, fostering discussion between these and other policy domains relevant to human rights will help States implement the UNGPs.

b. States create laws and regulations that will apply to outward and inward investments

States create generally applicable or sector-specific investment laws. States also create laws and regulations within the general regulatory framework that would also apply to investors, such as those for environmental protection, labour, land usage, health and safety, disclosure and the like. The management of human rights risks is most appropriately addressed and incentivised in this general regulatory framework where it can apply to all investors equally.

Regarding outward investment, States can also adopt domestic regulatory measures with extraterritorial implications. Examples of this include requirements to report on human rights due diligence measures in host State contexts. Within the parameters of international law, States can also adopt what the UNGPs call 'direct extraterritorial legislation', such as criminal laws that apply to the State's investors, no matter where the investors' actions take place.

A diversity of actors can be involved in adopting laws and regulations including parliaments, a range of government ministries and agencies (mining, oil & gas, agriculture, land, forestry, infrastructure, environment), the investment coordination agency and local authorities (at regional and municipal levels).

c. States participate in setting international policies and rules

As members of multilateral organisations or international financial institutions, States take part in activities that can

influence a number of aspects regarding the rules and norms underpinning international investment. For example, State representatives participate in setting rules and norms for substantive issues within IIAs through UN agencies like the UN Commission on International Trade Law (UNCITRAL) and UNCTAD. They help develop international rules for how [export credit agencies](#) support investment through fora like the Working Party on Export Credits and Credit Guarantees (or Export Credits Group) of the OECD. They also participate in decisions about social and environmental standards for lending to specific investment projects through their representation at the World Bank Group or in the context of regional development banks. These rules and norms can take many forms such as treaties, voluntary commitments or even good practice guidance.

International human rights law obligations continue to apply to States participating in such institutions. UNGP 10 refers to what the duty to protect requires in these settings. Participation in such organisations is usually a function performed by ministries of foreign affairs or specific ministries such as economy and trade. State representatives from various agencies may also be involved in technical issues discussed in multilateral contexts, such as social and environmental specialists from State lending or credit institutions.

d. States sometimes negotiate IIAs that relate to inward and outward investment

IIAs provide investors with additional guarantees to protect the investment and typically offer access to dispute resolution in international arbitration settings (or ISDS). The negotiation of IIAs generally sits with the ministries of foreign affairs, economy or trade.

Phase 2: Promoting inward investment, and facilitating, financing and insuring outward investment. This phase includes the functions that relate to identifying, creating and facilitating investment opportunities. This includes promotion efforts to attract inward investment and a range of activities to facilitate and support outward investment.

a. States promote inward investment and facilitate outward investment

States use [investment promotion agencies](#) (IPAs) or economic and diplomatic missions, through either formal or informal processes to present and foster interest in investment opportunities in the country or to encourage outward investors. To do so, IPAs prepare websites, marketing materials, informational brochures, road shows and events. In addition, high-ranking State officials, including at times heads of State, write diplomatic letters of support, go on missions to meet diplomatic or business leaders of [home States](#) to promote investment in their country or to promote their own investors for outward opportunities.

b. States finance and insure outward investment

States provide significant support through financing, offering

credits, government guarantees, credit insurance or political risk insurance to domestic companies not only for export activities but also for engaging in overseas projects that channel FDI flows. This role is usually given to export credit, development banks or similar agencies.

Phase 3: Initiating the investment project. This phase includes all of the processes in which the State engages to initiate a particular investment project. This may include tendering or other processes to determine which investor will win an available opportunity, the negotiation of State-investor contracts or licensing agreements, permitting processes and the like. Processes to create investment opportunities, such as mapping and designing concession areas, would also be included in this phase.

- a. A number of instruments and actors may be relevant in the initial phase of investment. In preparation for investments, the State may **map concession areas** and areas for environmental preservation or other State priorities. The State actors involved in land management, plus those that determine land ownership and usage rules are also relevant here. These could include land registration bodies at the national and local levels and technical administrative agencies, such as those involved in mapping. The State may engage in a **tendering process** where would-be investors make offers to the State for an investment opportunity. Sometimes investors initiate negotiations themselves by making offers to host States, and negotiations of contracts ensue directly or prompt a tendering process.
- b. A key function is the **negotiation of concession agreements, State-investor contracts** or other agreements that define the respective rights and responsibilities of the investor and the State. Permitting processes needed before the investor carries out specific activities, including environmental permits, are also relevant. At this stage it is also important to carry out initial impact assessments that are geared to identify human rights-related risks, based in part on engagement with potentially affected communities. Ideally, requirements for such assessments would be required by law and applied to all investors. Diverse entities can be involved in these functions, including ministries and agencies across government (mining, oil, agriculture, forestry, infrastructure, environment) and local authorities (at regional and municipal levels).

Phase 4: Implementing the investment project. This phase includes the State functions necessary for monitoring the implementation of the investment project and the enforcement of the laws and regulations. These functions ensure the conditions of the investment are fulfilled by the investor and the State. State functions in charge of ensuring that adverse impacts by the investment are adequately addressed, such as those carried out by national human rights institutions, would also be relevant here.

- a. Throughout the life cycle of the investment, States **enforce applicable laws and regulations** regarding inward and

outward investments generally through administrative agencies and regulatory bodies at national, regional and municipal levels.

- b. States **monitor implementation** of investment projects in their jurisdiction. In addition to State-inspections and auditing, a number of approaches can be used to monitor projects where State capacity is lacking including self-reporting or use of civil society organisations or multi-stakeholder initiatives to monitor investment projects. Administrative agencies, national, regional and municipal levels of government are generally involved at this stage. Coordination and collaboration between and among these agencies is important. Agencies that require environmental, social and/or human rights impact assessments and management plans have a particularly central role here.
- c. States **ensure the enforcement of investors' rights** through a number of processes such as administrative or judicial proceedings and arbitration tribunals. Relevant instruments might include State-investor contracts, IIAs or national legislation. Relevant actors might include judges, arbitral bodies, and administrative bodies with adjudicatory authority. In the case of a dispute between the State and the investor, the agencies and ministries that may be involved in defending the State are also relevant here. These could include foreign affairs, trade or economic affairs agencies and ministries, the office of the attorney general and other specialised agencies.
- d. Today, access to remedy is not typically considered part of investment policymaking. However, key Issue 2 suggests that mechanisms to **ensure access to remedy for adverse human rights-related impacts** should be designed alongside policy measures to protect investors. Entities involved could include State-based judicial entities, administrative bodies, ombudspersons or other entities with dispute resolution functions, such as national human rights institutions or [OECD National Contact Points](#). State entities that can foster non-State-based dispute resolution facilities are also relevant.

Phase 5: Ending the investment or decommissioning (where relevant) the project. This phase is particularly relevant when an investment project must be decommissioned and environmental cleanup and mitigation of social risks is necessary. For some projects – in particular in infrastructure, mining and energy – a required phase for closing or decommissioning includes cleanup and removal obligations, as well as dismantling of facilities. These functions may be carried out by the ministries or agencies that monitored the implementation of the investment project, or depending on the project, it may be the remit of a specialised agency (e.g. for nuclear plants).

2. SIX KEY ISSUES FOR IMPLEMENTING THE UNGPs IN INVESTMENT POLICYMAKING

The six key issues presented in this Guide are based on the authors' extensive experience in investment and business and human rights, including leading the SRSG's work on investment during his mandate.

They reflect how the UNGPs can address the unique governance challenges that FDI poses to the protection of and respect for human rights. The key issues are designed to help government representatives and other interested stakeholders to understand how the UNGPs apply to investment-related functions. As the UNGPs are intended to be read as a coherent whole, each key issue reflects several of the UNGP principles.

The key issues benefit from lessons learned during workshops and dialogues conducted in Colombia and Indonesia that were carried out to contribute to the development of the NAP in each country.

Each key issue is presented in two parts. The first part explains the relevance of the issue to investment. The second part offers suggestions for implementation. Part 3 below offers examples from current State practice. The six key issues are:

1. **Managing human rights risks**
2. **Ensuring access to remedy**
3. **Preserving policy space**
4. **Setting and managing expectations**
5. **Improving transparency**
6. **Managing conflict & post-conflict contexts**

KEY ISSUE 1: Make the management of human rights risks an integral part of investment policymaking and a key component of investment protection

Relevant UNGP Principles

Principle 2 (setting expectations), Principle 3 (regulatory and policy functions), Principle 4 (State-business nexus), Principles 11 to 24 (the corporate responsibility to respect – in particular Principles 17 to 21 on human rights due diligence). See also the Principles for Responsible Contracts.

Exploring key issue 1

According to the UNGPs, the corporate responsibility to respect human rights applies to all business enterprises, in all contexts. Therefore, business enterprises who engage in FDI have a responsibility to respect human rights wherever they operate. To meet their responsibility to respect, business enterprises 'should avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved.' To do this, they should have in place (i) a policy commitment to respect human rights; (ii) a human rights due diligence process to manage their human rights risks; and (iii) processes to enable remediation.¹¹

A business enterprise's human rights risks are any risks that its operations may lead to one or more adverse human rights impacts.¹² While human rights impacts refer to impacts on people, these impacts can quickly turn into risks for the business enterprise. This may be more likely when investors are foreign – where factors such as local resistance to foreign presence or the business enterprise's lack of familiarity with local history, culture or language can exacerbate tensions.

As noted by the SRSG '[l]ocal communities' reactions to [human rights-related] impacts can quickly escalate from complaints to protests and road blockades, raising the risks of the company or its security providers using heavy-handed tactics that can lead to even more serious impacts, such as injury or even deaths.'¹³ In 2010 the SRSG reported on a Goldman Sachs study of 190 projects operated by major international oil companies. The study showed that start-up time for new projects nearly doubled in the previous decade, with delays being caused by "technical and political complexities".¹⁴

An independent analysis of a sub-set of those projects, also reported on by the SRSR, found that:

non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category. One international oil major [...] estimated that it may have experienced a US\$6.5 billion value erosion over a two-year period from stakeholder-related risks.¹⁵

Risks to human rights can therefore lead to serious consequences to the companies involved—as well as to the communities themselves, governments and broader society. As human rights risks pose serious challenges to the stability and sustainability of investment activities, **managing such risks should be an integral part of how States and companies approach protecting investments** (see box 4). Specifically, States should consider whether the legal tools designed to protect investors, including IIAs, are adequate given the threat to investment from human rights risks (see box 5).

Increasingly, incentives and necessary requirements to manage social and environmental risks, including human rights risks, are seen as enablers for the smooth operation of business and necessary components of a good investment climate. They can also help States realise the full range of economic and social benefits of inward investment, while minimising potential adverse impacts. Indeed, according to the 2015 OECD PFI, **‘[s]ustainability and responsible investment are integral parts of a good investment climate and should be factored in from the beginning and not as an after-thought’**.¹⁶ The PFI also recognises that States have a duty to ‘provide an enabling environment for business to act responsibly and meet their duty to protect the public interest from potential negative impacts of business activities.’¹⁷ To the extent that States do this, it says, they

... are more likely to keep and attract high quality and responsible investors, minimise the risks of potential adverse impacts of investments, and ensure broader value creation and sustainable development ...¹⁸

UNGP Principle 17 defines the parameters of **human rights due diligence** needed to manage a business enterprise’s human rights risks. Human rights due diligence is an on-going process that needs to go beyond simply identifying and managing material risks for the company itself, to include risks to right-holders. Principles 18 through 21 elaborate its essential components, namely (i) assessing actual and potential human rights impacts; (ii) integrating and acting upon the findings; (iii) tracking responses; and (iv) communicating how impacts are addressed.

Incentives and necessary requirements to ensure the appropriate **management of human rights risks by investors, including through due diligence, should be integrated into investment policymaking**. A number of States have adopted measures to require due diligence with regard to issues such as consumer protection, environmental protection, or the prevention of money laundering and human trafficking. These measures might provide useful models for further human rights due diligence requirements.¹⁹

Companies recognise the importance of managing human rights risks through due diligence

Box 4

Excerpt from the International Council on Mining and Metals (ICMM) Report on *Integrating human rights due diligence into corporate risk management processes*.²⁰

In business, the first step to effectively and responsibly managing any issue is to develop a sufficient understanding of it – this is as true for human rights as for any other issue of relevance to business. ICMM members accept the business case for managing human rights issues responsibly: above all, it can help build a strong social licence to operate and relationships with communities, customers and other stakeholders based on trust ...

Conversely, it is increasingly evident that failure to effectively manage human rights issues ... carries significant financial, legal and reputational risks. Such risks may manifest themselves in production shutdowns due to health and safety concerns, disruption of business and potential harm to employees and others due to community protest. There may be reputational and legal risks related to the actions of security forces in responding to such situations. Failure to effectively address human rights risks can lead to significant costs in terms of the management time required to respond to crises, and may impact a company's ability to access resources elsewhere or receive funding/insurance from some financial institutions or export credit agencies. Company practices and approaches will be judged by stakeholders (including investors) ...

All ICMM member companies are committed to carrying out human rights due diligence ... With the universal endorsement of the UN Guiding Principles and their mainstreaming into other international and domestic standards, the expectations of adequate human rights due diligence have been clearly established.

Protecting investments and protecting people

Box 5

IAs are considered 'investment protection' vehicles. They are currently designed to protect investors against undue governmental interference, or political risk. Yet, if the stability and sustainability of investments today can be threatened by the adverse environmental and human rights impacts they may cause, and related stakeholder risks, this raises a number of questions regarding whether IAs are an adequate vehicle to keep investment safe.

The first set of questions this raises relates to the scope of IAs. Is it still appropriate to narrowly protect investments against political risk without addressing human rights risks? The question of scope also leads to considerations about how to integrate the management of environmental and social risks – including human rights risks – into IAs. Would this necessitate the integration of investor responsibilities in IAs? And if so, would this change the rules about who can bring a claim under an IA?

Beyond questions of scope, the recognition that human rights risks must be managed to keep investment safe poses more profound questions about whether the structure and design of current IAs may actually create unintended risks for investment. For example, do IAs create obstacles for ensuring the management of human rights risks by threatening the State's ability to protect the public interest? Furthermore, do IAs and ISDS contribute to animosity against foreign investors by creating at least the perception that the human rights of people adversely impacted by investment are less protected than the rights of foreign investors? Finally, does the lack of transparency in ISDS work against good governance efforts that are meant to improve the investment climate?

These are just some of the questions that should be explored when States look at IA reform.

KEY ISSUE 1 IN PRACTICE: Ideas for State implementation

To integrate the management of human rights risks in investment policymaking and to make it a key component of investment protection, States can:

- a. Ensure that investment laws and other related regulation, such as the relevant rules for licensing and permits, require appropriate human rights risk management, including through human rights due diligence.
- b. Benchmark existing State-investor contracts, licensing agreements or contract models against the PRC to identify whether the contracts appropriately support the management of human rights risks in investment (see box 2).
- c. At a minimum, include non-discriminatory requirements and incentives for investors to engage in human rights due diligence in IIAs. States are also encouraged to consider whether the structure and design of IIAs themselves might shift if the management of human rights risks is a key component of investment protection (see box 5).
- d. Pursue protocols or interpretative notes for the State's existing IIAs that require arbitrators to consider the conduct of the investor when deciding an investment dispute – including their responsibility to respect human rights. States can also actively engage with judges, arbitrators and arbitral institutions to explain the corporate responsibility to respect human rights. This will help to ensure that adjudicators understand the requirements of managing human rights risks, including human rights due diligence, and appropriately reflect this in the assessment of investors' rights.
- e. Require State-based entities that facilitate, finance and insure outward investors to carry out their own human rights due diligence processes and to (i) benchmark the State-investor contracts underpinning investment projects against the PRC; and (ii) require investors to have human rights risk management processes in place (see example 1).
- f. Consider requiring private financial institutions to demand that their clients have human rights risk management processes in place when funding investment projects (see example 2).
- g. Provide information and guidance to inward investors regarding contextual issues, such as the social, cultural or historical, that can facilitate identification and understanding of human rights risks and their management. This would be in addition to regulatory requirements to manage human rights risks. (see example 3).
- h. Work with outward investors to incentivise, encourage and support efforts to manage human rights risks when investing abroad, in particular through State embassies and missions abroad. This can include offering information and advice and facilitating exchanges of good practices and peer learning (see examples 8 and 13).
- i. Pledge to support and endorse multilateral normative standards and/or multi-stakeholder initiatives that can help to improve the management of human rights risks in the context of investment.

KEY ISSUE 2: Ensure access to effective remedy for people adversely impacted in the context of FDI projects as an integral part of investment policymaking

Relevant UNGP Principles

Principle 3 (regulatory and policy functions), Principle 22 (remediation) and Principles 25 to 31 (or pillar III on access to remedy). See also the Principles for Responsible Contracts.

Exploring key issue 2

Ensuring access to effective remedy is an essential component of the State duty to protect. UNGP 25 provides that ‘States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when [business-related human rights abuses] occur within their territory and/or jurisdiction those affected have access to effective remedy.’ Providing access to remedy includes having in place State-based judicial and non-judicial processes and fostering non-State based grievance mechanisms to deal with business-related human rights harms. Providing for or cooperating in the remediation of adverse impacts on human rights is part of the business responsibility to respect human rights.

A 2014 study commissioned by the OHCHR found that the ‘present system of domestic law remedies [for business and human rights cases] is patchy, unpredictable, often ineffective and fragile.’²¹ The study also highlighted the very low number of business enterprises prosecuted in national courts for their alleged involvement in [gross human rights abuses](#).²²

In the context of FDI, ensuring access to remedy can be especially challenging for States because such cases may involve a cross-border element. For example, the alleged adverse human rights impact may relate to material actions or decisions that took place outside the jurisdiction. According to the OHCHR

[c]ross-border cases give rise to a particular set of difficulties for domestic law enforcement bodies, prosecutors and victims ... These comprise legal challenges (such as establishing personal and subject-matter jurisdiction, identifying the correct set of legal rules to apply to the case and problems relating to enforcement) and many practical and logistical issues associated with gathering information and the availability of witnesses.²³

These difficulties are exacerbated in weak governance contexts. Victims of alleged human rights abuse are therefore left more vulnerable where there is a cross-border element, as may often be the case in the context of FDI.

The cross-border nature of FDI can also make investors vulnerable to the risk of host State partiality, in particular in weak governance contexts. Over the past 60 years, international investment law has developed to mitigate these vulnerabilities through a network of over 3,000 IIAs. IIAs provide broad investment protections and access to ISDS, in an effort to guarantee efficient and objective enforcement of investor rights. However, no such similar legal developments have been made to ensure access to remedy for individuals and communities adversely impacted by international investment activities, despite the unique challenges that FDI poses.

Moreover, IIAs and ISDS may compound the vulnerability of those who suffer adverse impacts from foreign investment activities. Critics claim that ISDS can constitute an additional challenge to access to remedy. ISDS is often an opaque process, without guarantees that individuals adversely impacted either by investment activity or the outcome of the arbitral proceeding will know that the proceeding is taking place, or will be able to participate in it. Accordingly, critics claim that investment tribunal decisions can quash or render worthless the rights of individuals or communities, even where they pursue remedy in a parallel adjudication process.²⁴

The apparent disparity between the protection for investors and the protection for people adversely impacted by investment is helping to fuel a worldwide legitimacy crisis where publics, and even some governments, are calling into question the use of IIAs and ISDS. This crisis has prompted diverse efforts for reform, including at the national and international levels. The legitimacy crisis is also contributing to conflict and opposition from

communities and civil society to foreign investment,²⁵ and it is prompting initiatives for stronger rules to hold companies accountable, including through a business and human rights treaty.²⁶

Community opposition to FDI translates into risks for investors. State action to ensure individuals and communities have access to remedy in FDI contexts provides investors a more stable investment climate by providing predictable and legitimate channels for discontent to be expressed.

States should ensure that access to remedy is an integral part of investment policymaking. This will help the State to consider policy solutions to mitigate against the unique vulnerabilities created by FDI of both investors and communities and individuals potentially adversely impacted by investment activities.

KEY ISSUE 2 IN PRACTICE: Ideas for State implementation

To ensure access to effective remedy for individuals and communities adversely impacted in the context of FDI projects is an integral part of investment policymaking, States can:

- a. Review existing judicial mechanisms available to ensure that they provide access to effective remedy, including in the context of FDI. States should identify potential legal and practical obstacles for access to remedy in this context and work towards removing such obstacles.
- b. Give national human rights institutions the powers to hear human rights-related claims related to FDI projects. Domestic law can help guarantee foreign investors participate in the claims processes.
- c. Communicate and make information available to inward investors about judicial or non-judicial mechanisms with which they are expected to cooperate to help ensure access to effective remedies for persons who allegedly suffer adverse human rights impacts from the investment activities.
- d. Inform outward investors of the clear expectation that they cooperate with legitimate judicial and non-judicial mechanisms when their investment activities have had alleged adverse impacts on human rights.
- e. Support the development, use and maintenance of legitimate and effective grievance mechanisms for human rights abuses occurring abroad by investors domiciled or operating in their territory and/or jurisdiction. These mechanisms could range from conciliation or mediation, such as the OECD National Contact Point process, to criminal laws that allow prosecution for involvement in gross human rights abuses.
- f. Consider passing legislation or supporting a multilateral agreement that expressly provides jurisdiction for national courts to hear civil claims brought by foreign litigants alleging gross human rights abuses by investors domiciled in the State, where access to remedy in the claimants' home jurisdiction is not provided.
- g. Require that inward investors provide operational-level grievance mechanisms in line with the UNGPs.
- h. Consider including provisions in future IIAs that facilitate 'home state' jurisdiction for some classes of human rights impacts (such as those amounting to significant losses to person or property) resulting from their investment activity, where access to remedy in the claimant's home jurisdiction is not provided. (see example 4).
- i. Oblige State-based institutions that finance, insure or otherwise support outward investment projects to (i) to consider the investor's human rights performance, including its willingness to cooperate in remediation processes for alleged adverse human rights impacts, in its decisions for support; and (ii) to require investors to have operational-level grievance mechanisms in place (see example 5).

KEY ISSUE 3: Pursue economic growth and investment goals, while ensuring that the policy and regulatory framework for investment provides the State adequate domestic policy space to meet its human rights obligations

Relevant UNGP Principles

Principle 1 (the State duty to protect human rights), Principle 8 (policy coherence), Principle 9 (maintaining adequate policy space to meet human rights obligations). See also the Principles for Responsible Contracts.

Exploring key issue 3

To meet their international human rights legal obligations, States must respect, protect and fulfil human rights. To do so, States use a wide range of measures including setting policies, passing and implementing laws and regulations, putting in place administrative measures and adjudicating through judicial and non-judicial processes. For example, labour, environmental and health and safety laws are all measures that contribute to meeting the State's human rights obligations. When States regulate investment activities to ensure that those activities do not cause adverse impacts on people or the environment, this contributes to the State's meeting its international human rights obligations and the duty to protect as described in the UNGPs. To regulate appropriately in response to contextual changes and public needs and goals over time, States need to have a range of policy options available.

The SRSG found, however, that State-investor contracts may unduly constrain these policy options. Specifically, he found that these contracts are sometimes drafted in a way to give investors blanket exemptions from existing or new laws, or direct compensation for compliance with new laws, throughout the life of an investment – even in relation to social or environmental issues such as labour law and health and safety. In the case of contractual exemptions, the State would then be unable to apply new regulations to the investor (see box 6). The SRSG also expressed concern that IIAs can be used to limit the policy space of the State needed to meet its human rights obligations. In addition to IIAs, domestic law is also sometimes drafted so as to unduly restrict the State's policy space in the context of investment. The threat to the States' policy space is greater in the case of foreign investment where both State-investor contracts and IIAs may be applicable – in addition to domestic law – and where access to international arbitration may also be offered (see boxes 6 and 7).

Government officials dealing with economic issues and investment often have little or no awareness of the State's human rights obligations. This lack of awareness makes it difficult for them to spot potential human rights impacts of the agreements they are negotiating. This can result in the State undertaking conflicting obligations or unwittingly constraining its policy space needed to meet its human rights obligations.

UNGP Principles 8 and 9 directly address these problems. Principle 8 addresses States measures to ensure that government officials dealing with economic issues and investment are aware of the State's human rights obligations when fulfilling their respective mandates. Principle 9 requires that States maintain adequate policy space to pursue policies and adopt regulations to meet their human rights obligations when they pursue business-related policy objectives, such as attracting FDI or encouraging the exploration and exploitation of their own natural resources.

States should ensure, therefore, that investment policy and regulatory measures (including State-investor contracts and IIAs) provide adequate investor protection, while not interfering with the State's *bona fide* efforts to implement policies, laws, regulations, administrative measures or adjudicative efforts, in a non-discriminatory manner, to meet its human rights obligations.

Stabilisation clauses

Box 6

A 2009 joint study of the SRSG and the International Finance Corporation found that certain State-investor contracts provide exemptions to investors from – or compensate the investor for the costs of compliance with – new laws, even where those laws are aimed at promoting environmental, social or human rights goals. The contracts in the study represent a range of industries including oil, gas, mining, infrastructure and energy. The exemptions and rights to compensation in the study are contained in contractual clauses sometimes called ‘stabilisation clauses’ or ‘change of law’ clauses. Other differently titled clauses may have a similar effect.

Subsequent to publishing this study, the SRSG carried out three years of consultations to develop the *Principles for Responsible Contracts (PRC)*. As described in box 2, the PRC guides States and investors on a range of contractual issues, and covers stabilisation clauses at Principle 4. According to the PRC, State-investor contracts should not offer protections (such as exemptions) for investors from future changes in law that could potentially interfere with the State’s *bona fide* and non-discriminatory policy, regulatory, administrative or adjudicative efforts to meet its human rights obligations. Preserving policy space is a necessary function of effective governance. Additionally, contractual exemptions may offend the principle of non-discrimination where they are negotiated either on a case-by-case basis or only to foreign investors to the exclusion of domestic investors. Indeed, the OECD Guidelines for Multinational Enterprises also aim to curtail the investor’s acceptance of *ad hoc* or contractual exemptions from future changes in law related to human rights or other issues.²⁷

Policy space and IIAS

Box 7

While not stated in human rights terms, the current global debate on how to reform IIAs has focused in part on the State’s ‘right to regulate’ or its right to formulate policy addressing public interest issues, including human rights. This concern has been highlighted in the media and in protests regarding several investment agreement negotiations such as the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States and the Trans-Pacific Partnership Agreement (TPP), which has a number of Pacific-Rim signatories and the US and Australia. The right to regulate has also been key to the review of IIAs in Ecuador, the United States, South Africa and Indonesia, among other countries.

Investment negotiators in a number of contexts have put forward proposals to address concerns about the State’s ‘right to regulate’. These include placing references to the ‘right to regulate’ in the preamble of the treaties and adding language to clarify the scope of treaty protections. Yet the efficacy of these proposals is still untested. It is unclear if the problem can be resolved definitively with slight textual revisions or if a one-size-fits all approach will address this issue in all contexts. Moreover, the policy discussions regarding the ‘right to regulate’ have still failed to reflect the fact that in the context of human rights, States have a ‘duty’ to use their policy space to meet their international human rights obligations.

States should actively support research on (i) how to ensure that IIAs do not unduly constrain policy space, and (ii) how IIAs can support investor respect for human rights. In the meantime, in the context of IIA negotiations, States can, at a minimum, consider advice from international organisations like UNCTAD, which offers some guidance on mitigating risks to the ‘right to regulate’ in the 2015 IPFSD.

KEY ISSUE 3 IN PRACTICE: Ideas for State Implementation

To ensure they are preserving adequate policy space to meet their human rights obligations, States can:

- a. Adopt a high-level policy commitment that the State will not pass laws or regulations or sign State-investor contracts or IIAs that unduly constrain the policy space for States to pursue *bona fide* efforts to meet its human rights obligations in a non-discriminatory manner. States can also pledge to amend such provisions where they exist.
- b. Identify and assess the potential impact that existing investment laws and regulations might have on the State's capacity to exercise its policy space to meet its human rights obligations. For example, ensure that no blanket exemptions are given to investors for laws or future changes in laws in the areas of health, safety, environmental protection, labour or the like. Where such laws and regulations exist, or the language of existing laws can be interpreted to constrain the policy space of the State in areas related to human rights, States can seek reforms to better ensure the State's adequate policy space to pursue its human rights obligations.
- c. Offer special training and information sharing for government officials dealing with economic issues and investment on the State's international human rights obligations, as well as on business and human rights (including the nature and scope of the State duty to protect and the corporate responsibility to respect).
- d. Ensure that government departments responsible for human rights work closely with teams negotiating IIAs and State investor contracts to guard against the possibility that such agreements unduly constrain the policy space of the State.
- e. Benchmark existing State-investor contracts, licensing agreements or contract models against the PRC to identify whether they unduly constrain the capacity of the State to pursue *bona fide*, non-discriminatory efforts to meet its human rights obligations.
- f. Review existing IIAs to ensure they cannot be interpreted to unduly constrain the State's capacity to exercise its policy space to meet its human rights obligations. Where such agreements can be used to constrain the policy space of the State in areas related to human rights, the State can pursue protocols to ensure a tailored interpretation of such provisions, while offering necessary assurances to investors.
- g. Ensure that future IIAs do not include broad language that can be interpreted to interfere with the State's *bona fide* efforts to implement policies, laws, regulations, administrative or adjudicative measures in a non-discriminatory manner, to meet its human rights obligations.
- h. Ensure that investment promotion work does not include offers of exemptions or promises for investor protection that could unduly constrain the State's policy space to meet its human rights obligations.
- i. Oblige State-related agencies that finance or insure outward investors to require that project documentation does not contain provisions that potentially constrain the host State's adequate policy space to meet its human rights obligations.

KEY ISSUE 4: Clearly set out the expectation that outward investors respect human rights; and manage the expectations of investors and of the communities and individuals directly impacted by investment activity

Relevant UNGP Principles

Principle 1 (the State duty to protect human rights), Principle 2 (setting expectations), Principle 3 (general regulatory and policy functions), Principle 8 (policy coherence), Principle 9 (maintaining policy space), and Principles 11 to 24 (the corporate responsibility to respect). See also the Principles for Responsible Contracts.

Exploring key issue 4

Setting out the State's expectations for outward investors

The duty to protect primarily reflects the State's role in protecting people in their own territory or jurisdiction from adverse impacts of business activities. However, the UNGPs also recognise that States can play an important role in fostering respect for human rights by business enterprises domiciled in the State but operating in other State contexts—as is the case in outward investment. This role for home States is especially relevant where the host State is unable to meet its own duty to protect, either because of on-going conflict or other governance challenges.

UNGP 2 provides that the home State's role in this regard is to 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.' UNGP 2 also describes the range of measures that can help States set out their expectations. These include (i) non-regulatory actions such as articulating their expectations directly when interacting with investors; (ii) incentivising investors to demonstrate their commitment to respect human rights in foreign contexts; (iii) providing access to contextual information about the human rights challenges in the host State; (iv) or conditioning governmental support, financing, insurance or guarantees on the investor's commitment to managing human rights-related risks.

Several forms of regulation can also communicate the home State's expectations of investors when operating abroad. States can articulate this expectation in their NAPs. In addition, domestic measures with extraterritorial implications are being used by some States, such as requiring reporting on human rights due diligence outside the home State. Within international law's parameters, States can also enact direct extra territorial legislation and enforcement, which would include, for example, criminal law sanctions for actions perpetrated abroad by home State investors. The entire range of measures regarding **outward investors** should be considered when States implement the UNGPs.

Managing the expectations of inward investors

Considering **inward investment**, State conduct should consistently set out and reinforce two messages to inward investors. First, States should put investors on notice that it has a duty to protect human rights, and it will use its policy space to meet this duty. Secondly, States should express their expectation that investors meet their responsibility to respect human rights as they carry out activities in the State's jurisdiction. State conduct that conveys these two messages clearly and consistently, including through regulatory measures, has two major advantages. It will help the State manage the investor's expectations – a subject often relevant to State-investor disputes under IIAs – thereby helping to avoid or defend against investors' claims. Additionally, such clarity fosters a more stable investment climate by facilitating the investors' management of human rights risks in investment projects. Those investors who are striving to respect human rights will look favourably upon State conduct that facilitates their responsibility to respect.

Managing the expectations of communities and individuals potentially impacted by investment activity

States, in their investment policymaking, should also adequately address the expectations of communities and individuals who may reap positive benefits and/or who may suffer adverse impacts from investment. Unmet expectations of positive impacts, as well as unexpected adverse impacts, can lead to tensions between investors and communities. As described in key issue 1 of this Guide, these tensions, in turn, can lead to serious problems for investors such as work stoppages and even violence.

States should ensure that its role to manage the expectations of communities potentially impacted by investment is integrated throughout investment policymaking. The PRC addresses several ways that States and investors can properly manage the expectations of communities and individuals within the State-investor contract negotiation context. For example, Principle 7 of the PRC discusses managing expectations of communities explicitly. Yet the State can pursue a number of measures aside from what it agrees in State-investor contracts to help manage expectations. Increasing State transparency and access to information for the public about future investments is one positive step. Legislative requirements for investors to disclose information about issues that can bring adverse impacts can also be useful. Unlike contracts, legislative measures would apply to all investors and therefore avoid any perception of discrimination.

KEY ISSUE 4 IN PRACTICE: Ideas for State implementation

To set out the State's expectations that outward investors respect human rights, States can:

- a. Set out in investment policies or NAPs the expectation that business enterprises domiciled in their territory and/or jurisdiction and investing abroad meet their responsibility to respect human rights. Specify in investment policies or NAPs what regulatory and other measures will support this expectation (see examples 8 and 10).
- b. Require state-based entities that facilitate, finance and insure outward investors to carry out their own human rights due diligence processes and to condition support on the investor's demonstrated commitment to respect human rights, including through due diligence processes, in the context of the investment (see example 1).
- c. Adopt domestic measures with extraterritorial implications such as requiring reporting on human rights due diligence outside the home State (see example 9).
- d. Use their overseas missions to inform outward investors of the clear expectation that they cooperate or participate in legitimate judicial and non-judicial mechanisms when their investment activities have had alleged adverse impacts on people's human rights.

To manage the expectations of inward investors, States can:

- a. Ensure that legal and administrative requirements and incentives provide consistent messaging regarding the State's duty to protect and the investor's responsibility to respect.
- b. Ensure promotional activities and documentation that States produce to invite and attract investments communicate the expectation that investors meet their responsibility to respect human rights. Even early, informal manifestations can help clarify expectations.
- c. Use the PRC guidance to ensure that State-investor contracts or other licensing agreements (i) appropriately reinforce the State's ability to use its policy space to meet its human rights obligations, and (ii) reinforce the investor's responsibility to respect human rights.

To manage the expectations of communities and individuals directly impacted by investment, States can:

- a. Provide information and assistance to inward investors in their efforts to engage with communities and individuals who may be impacted by the investment.
- b. Put in place requirements for community engagement prior to the implementation of investment projects that are in line with international standards, including where relevant, free, prior and informed consent.
- c. Work at all levels of government, including in particular at the local level, to create processes to carry out transparent and meaningful engagement with communities, geared towards protecting human rights and appropriately managing expectations.

KEY ISSUE 5: Improve transparency across State functions that relate to investment

Relevant UNGP Principles

See mainly Principle 1 (the State duty to protect), Principle 3 (regulatory and policy functions), Principle 8 (policy coherence), Principle 25 (access to remedy), Principle 26 (State-based judicial mechanisms), Principle 28 (non-State-based grievance mechanisms) and Principle 31 (effectiveness criteria for non-judicial grievance mechanisms). See also the Principles for Responsible Contracts.

Exploring key issue 5

Transparency, meaning the availability and accessibility of information as well as the openness of decision-making processes, is a cross-cutting issue in the UNGPs. According to the SRSR 'where human rights and other public interests are concerned, transparency should be a governing principle, without prejudice to legitimate commercial confidentiality.'²⁸ This has resonance across investment policymaking. It means that where investment will impact human rights or other public interests, the State should be open and transparent and require the same of its investors. For example, transparency should be a governing principle when States are designing the process for negotiating IIAs or determining the rules under which arbitrations are conducted. Transparency should also be a governing principle for determinations about whether and how environmental and social impact assessments, management plans and State-investor contracts are disclosed. Finally, transparency should be a governing principle for investment permitting and tendering processes.

The work of the SRSR addresses transparency with respect to a number of specific international investment issues. For example, the PRC at Principle 10 indicates that State-investor contracts should be public and available (see box 8). The SRSR repeatedly called on States to improve transparency in the adjudication of investment disputes between States and investors (see box 9). The UNGPs also highlight transparency as essential to effective processes for addressing adverse human rights impacts.

Transparency is in and of itself important, but it is also a necessary precondition for the exercise of accountability. Without access to clear, accurate and up-to-date information, it is impossible to judge whether State and investor commitments have been met in the context of an investment project.

Transparent and participatory processes in investment policymaking also carry benefits for investors. As noted by the 2015 OECD PFI, when policy reforms are undertaken, transparency and consultations help investors mitigate regulatory risks by providing them with greater certainty.²⁹ In addition, increased transparency in all facets of investment policy can foster trust between government and citizens, and it can improve the State's reputation among investors.

Aside from the State's duties regarding transparency, the UNGPs also refer directly to the need for companies to communicate externally how they are addressing their adverse human rights impacts. States should consider ways to ensure companies do so.

State-investor contract disclosure Box 8

The PRC explains that “States should disclose information when the public interest is impacted,”³⁰ such as when an investment project presents high risks for human rights. Contract disclosure, according to the PRC, “...is one way the State and business investors can pursue their respective human rights obligations and responsibilities. States can facilitate disclosure by standardising disclosure rules amongst competitors.”³¹

In the extractive industries, contract disclosure is a growing practice. Several States have established specific websites where their license agreements and State-investor contracts are published. These websites represent good practice.³²

A 2015 study found that investors in the extractive industries are also beginning to speak out in favour of contract publication. Industry representatives argue that publishing State-investor contracts increases trust with stakeholders, supports their ‘social license’ to operate and assists in setting and managing citizen expectations.³³

Other initiatives to make contracts public include www.resourcecontracts.org for oil, gas and mining contracts and www.openlandcontracts.org for land, agriculture and forestry contracts.

Transparency in IIAs and ISDS Box 9

The negotiation and conclusion of IIAs has typically been a State practice not open to public scrutiny. However, growing global concerns have pushed governments to start considering giving access to information about the negotiation of IIAs. In particular, the European Commission has opened a process for public consultation for the negotiation of the TTIP. In addition, some governments have undertaken consultative processes for the revision of their model bilateral investment treaties or investment policies more generally, including South Africa, the US and India.

In addition, in the context of ISDS, the UNCTRAL ‘Rules on Transparency in Treaty-based Investor-State Arbitration’ (UNCITRAL Rules on Transparency) came into effect on 1 April 2014; and (ii) the UN ‘Convention on Transparency in Treaty-based Investor-State Arbitration’ (UN Convention on Transparency) was opened for ratification on 17 March 2015.³³

- ▶ **UNCITRAL Rules on Transparency:** These are intended to provide a transparent procedural regime for arbitration that includes the publication of documents, open hearings, and the possibility for the public and non-disputing treaty parties to make submissions during the arbitration. The Rules can only be incorporated in IIAs that are signed after 1 April 2014, leaving outside the more than 3,000 investment treaties concluded before that date.
- ▶ **UNCITRAL Convention on Transparency:** The Convention offers the possibility that States adhering to it apply the Rules to all arbitrations arising under their investment treaties concluded before 1 April 2014.

KEY ISSUE 5 IN PRACTICE: Ideas for State implementation

To improve transparency across investment policymaking, States can:

- a. Adopt a high-level policy commitment to ensure transparency in the formulation of investment policies and regulations that govern investment, recognising explicitly that these policies and regulations affect the public interest and have an impact on people's rights.
- b. Put in place transparent and participatory processes regarding investment-related regulatory decisions that impact the public interest and people's rights.
- c. Publish or require the publication of investment-related documents that pertain to the management of human rights risks of investment. This could include State-investor contracts, social and environmental impact assessments and management plans, specific plans such as 'oil spill response plans' or management plans for decommissioning a mining or oil and gas site (see examples 11 and 14).
- d. Require that investors communicate externally to those who are at risk of adverse impacts from the investment on how they are managing human rights risks over the lifetime of the investment.
- e. Set reporting requirements on human rights performance for companies that operate internationally (see example 9).
- f. Make the negotiation of IIAs public, including providing access to relevant documents and negotiation drafts.
- g. Improve transparency of State-investor investment dispute settlement processes by signing and ratifying the UN Convention on Transparency. This would ensure that the 2014 UNCITRAL Rules on Transparency become applicable in eventual investment arbitrations in which the State is involved based on IIAs signed before 1 April 2014 (see box 9).
- h. Ensure that the UNCITRAL Rules on Transparency are applicable to all State-investor disputes in which it is involved relating to IIAs signed after 1 April 2014 (see box 9).
- i. Oblige state-related agencies that finance or insure outward investors to disclose project documentation that can relate to the management of human rights risks as part of the process of financing, insuring or the provision of other services to outward investors.

KEY ISSUE 6: Institute special measures for investment in conflict-affected and post-conflict areas

Relevant UNGP Principles

Principle 2 (setting expectations), Principle 3 (regulatory and policy functions), Principle 7 (supporting business respect for human rights in conflict-affected areas), Principles 8 and 9 (policy coherence), Principles 17 to 21 (human rights due diligence), Principle 23 (issues of context) and Principles 22 and 25 to 31 (access to remedy).

Exploring key issue 6

The UNGPs explicitly recognise that both States and companies need to put in place special measures to address the specific challenges that arise in conflict-affected areas. UNGP 23 delineates the company's responsibilities in this regard. For States, the UNGPs recognise that conflict-affected areas are often characterised by a lack of or weak institutions and regulatory frameworks. Host governments often are not in a position to ensure the protection of people, and regulating and protecting investment is also challenging. Under these circumstances, investors are at heightened risk of causing or contributing to gross human rights abuses.

The UNGPs address measures States can put in place for investment in conflict-affected areas in Principle 7. The commentary lays out a range of administrative, policy, legal and adjudicative steps home and host States can take to support business respect for human rights in conflict affected areas. In addition, the SRSG report *Business and human rights in conflict-affected regions: challenges and options towards State responses* (the Conflict Report) is dedicated to this issue and lays out additional recommendations.³⁵

The UNGPs and the Conflict Report emphasise the need for States to warn enterprises of the heightened risk of being involved with gross human rights abuses in conflict-affected areas. Setting the clear expectation that investors meet their responsibility to respect human rights is paramount in the context of conflict. Business enterprises entering as foreign investors may not fully appreciate the complexity of the situation in which they will operate, in particular with respect to the risk to be involved in gross human rights violations. Host governments, in particular investment promotion agencies, may be unwilling to clearly communicate the risks for fear that this will discourage investment at the time when it is most needed. Yet, offering transparent and trustworthy information to investors is part of creating an enabling investment climate. Hiding significant risks from investors can create a number of problems that arise from investors' unmet expectations (see key issue 4).

States should also consider the challenges that **post-conflict** scenarios pose for the implementation of their State duty to protect. Risk to populations and communities might be lower after the cessation of the majority of hostilities, but these contexts still present unique challenges and complexities linked to efforts to transition to peace and to reconcile the wrongs perpetrated during conflict.

In post-conflict scenarios, questions arise as to the appropriate role of business enterprises in peace building, reconstruction and reconciliation. There may be strong policy arguments for asking investors to positively support efforts to build peace where their activities can compliment or buttress State activity and hasten recovery efforts. The UNGPs set the baseline expectation for business enterprises in all contexts, which is that they must avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. According to the UNGPs then, States, at a minimum, should work to ensure that investors in post-conflict contexts do not place obstacles in the way of efforts to reconcile and remediate past wrongs and build peace.

Finally, post-conflict scenarios are periods of rapid transformation during which States have an acute need to use their policy space to transform institutions, reform regulations and remediate past abuses. As States develop investment policy frameworks to attract investment and push economic recovery, including through laws, State-investor contracts and IIAs, they should make special efforts to preserve adequate policy space to consolidate transitional efforts and reforms (see key Issue 3).

KEY ISSUE 6 IN PRACTICE: Ideas for State implementation

Addressing the challenges posed by conflict-affected areas and post-conflict scenarios relates to all of the key issues in this Guide and potentially permeates all State functions in the context of investment policymaking.


UNGP Principle 7, its commentary and the Conflict Report present a number of suggested measures that States can implement, in particular for States with outward investors who operate in areas affected by conflict.


In addition to those measures, States can:


- a. Ensure that domestic laws regulating investment, State investor contracts and IIAs preserve the policy space necessary to meet the State's human rights obligations, specifically in relation to pursuing peace building, reconstruction and reconciliation efforts in post-conflict environments.
- b. Ensure that investors have in place operational-level grievance mechanisms adapted to the particular situation of conflict. For example, such mechanisms may require additional measures to ensure the privacy and confidentiality of complaints and grievance processes.
- c. Ensure that while promoting foreign investment the State clearly informs investors about the conflict and warns of the heightened risks that investors may have regarding gross human rights abuses (see example 12).
- d. Ensure that IPA activities and other promotional activities do not create unrealistic expectations with respect to the situation of conflict and post-conflict and the capacity of the host State to undertake commitments with foreign investors. These promises and expectations may carry a risk in the context of State-investor litigation (see key issue 4).
- e. Engage early with outward investors to provide information on potential human rights risks, and offer assistance to help them assess and address the heightened risk of involvement in gross human rights abuses. This could include pointing investors to existing recommendations and Guidelines for businesses that operate in conflict-affected areas.
- f. Help investors access legitimate and credible initiatives that offer recommendations and guidance for businesses operating in conflict-affected areas (see example 13).
- g. Offer special training for the members of economic missions of embassies in conflict-affected areas and ensure the availability of relevant information to outward investors regarding the conflict or post-conflict efforts.


3. EXAMPLES FROM STATE PRACTICE FOR IMPLEMENTATION OF THE UNGPs

The following examples from current State practice follow the mapping in this Guide. Each example lists the relevant State functions, instruments, actors and key issues to help demonstrate how all of these relate in practice.

Example 1
Country: Norway 
State Function(s): Finance investment
Instrument(s): Government guarantees
Actor(s): The Norwegian Export Credit Guarantee Agency (GIEK)
Relevant key issue(s): 1 Managing human rights risks 4 Setting and managing expectations
<p>In 2013, GIEK adopted a new <i>Environmental and Human Rights Policy</i>. The Policy describes GIEK’s environmental and human rights due diligence process:</p> <p>GIEK’s due diligence process is based on (1) identifying actual or potential environmental and human rights impacts, (2) assessing actual or potential negative impacts, (3) acting to seek to prevent, mitigate and remediate those impacts through the appropriate exercise of leverage, (4) accounting for how those impacts are addressed through follow-up and monitoring, and (5) communicating with and disclosure to relevant stakeholders on the management of impacts.</p> <p>The IFC Performance Standards (2012) along with World Bank Group’s Environmental Health and Safety Guidelines are used as the primary point of reference for benchmarking all projects and deliveries to projects. Assessments are carried out in accordance with the expectations of the UN Guiding Principles on Business and Human Rights....</p> <p>There is a minimum requirement that the projects GIEK is to support have appropriate and robust management systems to identify, prevent, mitigate and account for potential negative environmental and human rights impacts, and to remediate them where appropriate.³⁶</p>

Example 2
Country: Peru 
State Function(s): Create laws and regulations; finance investment
Instrument(s): Banking regulations
Actor(s): Superintendency of Banks, Insurance and Private Pensions Funds (SBS)
Relevant key issue(s): 1 Managing human rights risks
<p>In response to growing social conflict in Peru around major investment projects, particularly in the extractive industries and forestry, the SBS issued a regulation to strengthen environmental and social due diligence in the financial sector. The SBS found that social conflict generated important risks for clients. Risks included reducing the credit worthiness of projects and creating, in turn, risks for the financial institutions and for the Peruvian financial system more generally.</p> <p>This regulation requires that financial institutions ensure their clients assess risks, create management plans and consider mechanisms for managing relations with communities and conflict resolution. It also requires periodic reporting on the social and environmental risks banks are assuming. According to Shift, the organisation that advised the SBS in formulating the regulation, the regulation incorporates important human rights approaches in areas including community engagement and addressing grievances, reflecting important features of human rights due diligence as laid out in the UNGPs.³⁷</p>

Example 3
Country: Colombia 
State Function(s): Define policies; promote investment
Instrument(s): NAP on Business and Human Rights; investment promotion materials/information
Actor(s): Council to the President for Human Rights (CPHR); investment promotion agencies
Relevant key issue(s): 1 Managing human rights risks 4 Setting and managing expectations
The Colombian NAP, adopted on 9 December 2015, includes an important commitment to provide companies, including inward investors, with information that can facilitate their management of human rights risks. The NAP requires human rights and local authorities (including the CPHR) to gather and consolidate information and analyses of the socio-political context in Colombia aimed at helping public and private companies to identify their human rights risks in their areas of operation. The NAP requires the CPHR to provide this information to the governmental agencies in charge of promoting foreign investment in Colombia. ³⁸

Example 4
Country: India 
State Function(s): Negotiate IIAs
Instrument(s): IIAs
Actor(s): Ministry of Trade
Relevant key issue(s): 2 Ensuring access to remedy
The draft model text for the Indian Bilateral Investment Treaty included the following provision, which sought to ensure home State jurisdiction for claims against foreign investors for human rights-related harms. While this provision did not survive in the final iteration of the text, it provides a useful example to provoke discussion.
Article 13: Home State Obligations
13.1 Without prejudice to the jurisdiction of the Courts located in the Host State, Investors and its Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.
13.2 The Home State shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State. ³⁹

Example 5

Country: Canada



State Function(s): Facilitate investment; finance & insure investment; ensure access to remedy for adverse human rights-related impacts

Instrument(s): CSR strategy; OECD National Contact Point processes

Actor(s): Global Affairs Canada (formerly, Department of Foreign Affairs, Trade and Development); Natural Resources Canada; the CSR Counsellor's office; Export Development Canada (EDC)

Relevant key issue(s):
2 Ensuring access to remedy
4 Setting and managing expectations

The Canadian CSR strategy for the extractive industry now contains a number of disincentives for companies who choose not to participate in dialogue processes over grievances for adverse impacts of business activities either through the CSR Counsellor's office or the OECD National Contact Point in Canada. These include:

- ▶ publishing the names of companies who choose to not participate;
- ▶ loss of Trade Commissioner Services economic diplomacy support;
- ▶ loss of Government of Canada advocacy support abroad; and
- ▶ non-participation will be a factor considered in future decisions of Export Development Canada financing or other support.⁴⁰

Example 6

Country: UK



State Function(s): Define policies; negotiate IIAs; participate in setting international policies

Instrument(s): NAP on Business and Human rights; international treaties; IIAs; State-investor contracts

Actor(s): UK Foreign and Commonwealth Office (FCO) and the Department for Business, Innovation & Skills (BIS)

Relevant key issue(s):
3 Preserving policy space

The 2013 UK NAP includes a provision that expressly addresses the maintenance of policy space for States to meet their human rights obligations:

The Government will do the following to reinforce its implementation of its commitments under Pillar 1 of the UNGPs ...

[e]nsure that agreements facilitating investment overseas by UK or EU companies incorporate the business responsibility to respect human rights, and do not undermine the host country's ability to either meet its international human rights obligations or to impose the same environmental and social regulation on foreign investors as it does on domestic firms.⁴¹

Example 7

Country: South Africa



State Function(s): Define policies; create laws and regulations; negotiate IIAs

Instrument(s): Investment policy; IIAs

Actor(s): South Africa Department of Trade and Industry

Relevant key issue(s):
3 Preserving policy space

In 2010 the South African government concluded a three-year review of its bilateral investment treaties (BITs). The review confirmed, among other things, that the existing BITs may allow what amount to direct challenges to legitimate, constitutional and democratic policymaking. South Africa terminated some existing BITs, offered partners an opportunity to re-negotiate BITs, and the Government has been working to develop a new Foreign Investment Law. The latest proposed law was presented in August 2015. According to Xavier Carim, the Former Deputy Director General of the Department of Trade and Industry for the Republic of South Africa, the proposed law 'adds no new obligations on investors; [and] it ensures South Africa remains open to foreign investment Importantly, it reaffirms the Government's right to regulate.'⁴²

Example 8

Country: UK



State Function(s): Define policies; facilitate investment

Instrument(s): NAP on Business and Human Rights; tool kits and training materials on business and human rights for embassies

Actor(s): UK Foreign and Commonwealth Office (FCO) and the Department for Business, Innovation & Skills (BIS)

Relevant key issue(s):
4 Setting and managing expectations

The introduction to the 2013 NAP signed by both the Secretary of State for Foreign Affairs and the Secretary of BIS expresses that the NAP '... sends a clear message of [the UK Government's] expectation about business behaviour, both in the UK and overseas.'

In addition, as part of the NAP commitments, the FCO human rights department is liaising with UK Trade and Investment to help UK companies investing overseas to understand their responsibility to respect human rights and the human rights risks they face. For example, a human rights specialist from the UK FCO office in London travelled to Colombia as part of a UK Trade delegation to speak to a large audience of UK businesses at a mining convention. The human rights specialist addressed a number of issues including:

- ▶ the UK Government's expectations that UK business in Colombia respect human rights;
- ▶ the need for UK business to pro-actively manage human rights risks in the country; and
- ▶ the opportunities for support available from the UK government to help UK business in Colombia meet their responsibility to respect.⁴³

The FCO also supports a number of embassies and trade missions by providing tools and resources to communicate the UK business and human rights NAP and policy. For example, the Business and Human Rights Toolkit aims to 'give guidance to political, economic, commercial and development officers in overseas missions on how to promote good conduct by UK companies operating overseas.'⁴⁴

Example 9

Country: US



State Function(s): Create laws and regulations

Instrument(s): Domestic measures with extraterritorial implications

Actor(s): Treasury Department's Office of Foreign Assets Control

Relevant key issue(s):

1 Managing human rights risks

4 Setting and managing expectations

5 Improving transparency

As part of setting expectations for outward investors regarding human rights, the US Government has put in place the 'Burma Reporting Requirements for Responsible Investment'. The Reporting Requirements require US persons (individuals or entities) investing more than \$500,000 in Burma to provide two reports each year (one public and one with information only disclosed to government) detailing the policies and procedures it has in place and carries out '[...] with respect to human rights, workers' rights, environmental stewardship, land acquisition, and other key areas for human rights due diligence in the Burma context.'⁴⁵

Example 10

Country: Denmark



State Function(s): Define policies; facilitate investment

Instrument(s): NAP for Corporate Social Responsibility; advisory services of the Trade Council

Actor(s): Minister for Business and Growth and Minister for Trade and Development Cooperation

Relevant key issue(s):


1 Managing human rights risks

4 Setting and managing expectations


The 2014 Danish NAP summarises the initiatives on business and human rights that the Danish Government has taken since the UN endorsement of the UNGPs in June 2011. Among these are two relevant examples:

In the National Action plan for CSR [Corporate Social Responsibility], the Danish Government sets out clear expectations to Danish companies that they must take responsibility to respect human rights when operating abroad- especially in developing countries where there can be an increased risk of having an adverse impact on human rights....

The Trade Council under the Ministry of Foreign Affairs advises Danish companies and their local partners on how they should handle their social responsibility in a number of export markets. The advisory services include human rights due diligence.⁴⁶

Example 11
Country: Liberia 
State Function(s): Negotiate State-investor contracts
Instrument(s): State-investor contracts
Actor(s): Various ministries and members of the parliament (House and Senate) in collaboration with civil society, development partners (foreign governments and institutions) and the private sector
Relevant key issue(s): 5 Improving transparency
Liberia's Extractive Industries Transparency Initiative (LEITI), is a multi-stakeholder initiative in collaboration with the Government. The LEITI website, among other things, makes State-investor contracts from various sectors, including forestry, mining, agriculture and oil, publicly available. Additionally, and importantly, LEITI is now working to simplify the language of the contracts to be more accessible to people, also offering summaries of contract terms that are highly relevant to people and the public interest. ⁴⁷

Example 12
Country: Colombia 
State Function(s): Define policies
Instrument(s): NAP on Business and Human Rights
Actor(s): Council to the President for Human Rights (CPHR); Ministry of Post Conflict
Relevant key issue(s): 1 Managing human rights risks 6 Managing conflict & post-conflict contexts
The Colombian NAP includes a number of provisions to account for the impact that post-conflict and peace building efforts can have in the operation of businesses in Colombia.
The NAP acknowledges that a post-conflict scenario can increase social conflict relating to business operations. Hence, the NAP indicates that there is a need for a coordinated effort from the State, businesses, unions, civil society and the international community to improve the management of human rights risks by businesses and ensure access to effective remedy in case adverse impacts occur.
Accordingly, one of the NAP goals is to 'contribute to achieving lasting peace in Colombia'. Moreover, among its action items, the NAP includes the commitment that the CPHR work with the Ministry of Post Conflict to promote the human rights and peace building agenda for the private sector with the support of the chambers of commerce. ⁴⁸

Example 13
Country: Switzerland 
State Function(s): Facilitating investment
Instrument(s): Engagement with investors through government embassies
Actor(s): Ministry of Foreign Affairs; Swiss embassy in Colombia
Relevant key issue(s): 1 Managing human rights risks 4 Setting and managing expectations
<p>Following the invitation of the Swiss Embassy in Bogota, a group of Swiss companies operating in Colombia – including Nestle, ABB, UBS, Novartis, Roche and Holcim – made official their commitment to incorporate human rights and international humanitarian law issues in their operations. During 2011 they drafted a document entitled ‘Promise of Value by Swiss Companies in Colombia’ whereby ‘[o]n the grounds of Swiss values, Swiss companies established in Colombia are committed to incorporate human rights and international humanitarian law in their operations...’ Since then, with the support of the Swiss government, the companies have focused their efforts on elaborating a conceptual framework to clearly state ways to implement the UNGPs in their operations.⁴⁹</p>

Example 14
Country: Mongolia 
State Function(s): Negotiate State-investor contracts
Instrument(s): State-investor contracts
Actor(s): Ministry of Finance; Ministry of Mineral Resources and Energy; Ministry of Nature, Environment and Tourism
Relevant key issue(s): 1 Managing human rights risks 4 Setting and managing expectations 5 Improving transparency
<p>The State-investor contract for a large mine project was published in full and is available online. Beyond transparency of the contract itself, the agreement sets out the State’s expectations for the investor in terms of transparency of project-related information and community engagement. For example, in part 4 of the agreement on Regional Development it includes these provisions:</p> <p>4.6 The Investor shall conduct all of its local and regional socio-economic development programs and activities based on principles of transparency, accountability and public participation.</p> <p>4.7 The Investor shall continue to prepare, conduct, implement, update on an appropriate basis, and make public socio-economic baseline studies, socio-economic impact assessments, socio-economic risk analyses, as well as multi-year communities plans, community relations management systems, policies, procedures and guidelines, and mine closure plans, all of which shall be produced with community participation and input and be consistent with international best practice.⁵⁰</p>

GLOSSARY OF USEFUL TERMS

Export credit agency (ECA): ECAs are government-backed institutions that provide official financing assistance in direct support of its country's exports. ECAs support their national government's industry, trade promotion and foreign aid strategies and operate under government mandates to fulfil key policy objectives linked to growth and job creation. These agencies also sometimes provide insurance cover for risks in situations where the coverage from private insurance companies are restricted.

Foreign direct investment (FDI): The OECD defines FDI as cross-border investment by a resident entity in one economy with the objective of obtaining a lasting interest in an enterprise resident in another economy. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the direct investor on the management of the enterprise.⁵¹

Gross human rights abuses: As the OHCHR *Corporate Responsibility to Respect Interpretive Guide* explains: "[t]here is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups."⁵²

Home State: The State of origin of the investor.

Host State: The State where the investment activity takes place.

Human rights: The Guide uses the term 'human rights' to refer to all internationally recognised human rights, including those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO's Declaration on Fundamental Principles and Rights at Work. Human rights therefore relate as much to accessing essential food, water and shelter for life as they do to accessing education, healthy working conditions and freedom from torture and slavery.

International Investment Agreement (IIA): IIAs refers to treaties signed by States to promote and protect foreign investment. IIAs often grant investors the right to enforce such protections through international arbitration, also known as Investor-state dispute settlement (ISDS). IIAs include bilateral investment treaties, and Free Trade Agreements and economic partnership agreements where they incorporate investment provisions.

Investment policymaking: In this Guide, 'investment policymaking' refers to the full range of State functions, instruments and actors at the domestic and international levels that make foreign direct investment (FDI) possible. This includes State activities relative to defining policies, creating laws and regulations, negotiating International Investment Agreements (IIAs), licensing and negotiating State-investor contracts, enforcing investors' rights as well as facilitating, promoting, financing and insuring FDI.

Investment Promotion Agency (IPA): The World Association on Investment Promotion Agencies defines IPA as 'any agency, government body or other entity whose prime function is to promote any country, political subdivision of a country ... as a destination for or as source of investments.'⁵³

Investor-State dispute settlement (ISDS): ISDS refers to the mechanism to solve investment disputes arising out of a breach of the investment provisions in IIAs before international arbitration tribunals. ISDS is also generally called investment arbitration.

National Action Plan (NAP): The UN Working Group on Business and Human Rights defines a NAP as an 'evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the [UNGPs]'.⁵⁴ It is a policy instrument for States to disseminate and implement the UNGPs.

OECD Guidelines for Multinational Enterprises:

The Guidelines are recommendations addressed by governments to multinational enterprises operating in or from countries that adhere to the OECD Declaration on International Investment. They provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.⁵⁵

OECD National Contact Point (NCP): Governments adhering to the OECD Declaration on International Investment are obliged to set up NCPs whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the Guidelines in specific instances.⁵⁶

State-investor contract: is an agreement between the State, or an entity representing the State, where an investment will take place (host state), and the business investor or investors. These contracts underpin investment projects in a number of industry sectors such as agriculture, infrastructure, energy, oil, gas or mining. These contracts can be called by several names such as: Host Government Agreements; Host Country Agreements; Investment Agreements; Production Sharing Agreements; and Concession Contracts, or License Agreements.

United Nations Guiding Principles on Business and Human Rights (UNGPs): The UNGPs are the authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. The UN Human Rights Council unanimously endorsed the UNGPs in 2011. Since then they have enjoyed wide uptake and are increasingly being reflected in policy, laws and regulations, in international standards that influence business behaviour, in civil society advocacy and in the policies and practices of companies worldwide. The Principles are based on a tripartite framework: the State duty to protect human rights, the corporate responsibility to respect human rights and the need to ensure access to remedy.

END NOTES

- 1 The full text of the UNGPs in English is available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Other languages available at: <http://business-humanrights.org/en/un-guiding-principles-on-business-and-human-rights-1>.
- 2 UNGP Principle 1, above n 1.
- 3 UNGP Principle 11, above n 1.
- 4 UNGP Principle 25, above n 1.
- 5 The full text of the PRC is available at: http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf.
- 6 Available at: <http://www.ohchr.org/EN/Issues/Business/Pages/trainingmodules.aspx>.
- 7 JG Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York, Norton 2013) xxxiii.
- 8 UNCTAD, *Investment Policy Framework for Sustainable Development* (2015) 20, available at: http://investmentpolicyhub.unctad.org/Upload/Documents/FINAL_WEB_POLICY_FRAMEWORK_30_NOV_2015.pdf.
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