Corporate Social Responsibility – Sustainable Business

Environmental, Social and Governance Frameworks for the 21st Century

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Rae Lindsay is a partner in the Litigation & Dispute Resolution practice at Clifford Chance LLP. She co-heads the firm's public international law and business and human rights groups. Rae has been admitted to the bars of Alberta, California, New York and Washington D.C., and as a solicitor in England and Wales. Rae's focus on business and human rights began in the early 2000s when she practised in the firm's New York office, and defended multinational corporations in litigation under the US Alien Tort Claims Act, involving allegations of violations of international law, including international human rights and humanitarian law. Clifford Chance provided pro bono support to the mandate of Professor John Ruggie, the UN Secretary General's Special Representative on the issue of human rights and transnational corporations and other business enterprises (2005–2011); and was among the first law firms to establish a business and human rights practice, recognizing the important role of lawyers in implementation of the UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in 2011. Rae is recognized by Chambers Global as a leading practitioner in business and human rights law. She advises clients on a broad range of business and human rights-related matters including policy development and implementation, risk management and due diligence, contracts and reporting, impact assessment and investigations, dispute avoidance and resolution, and crisis management. Her client engagements often involve advising on the intersection between soft law standards such as the UN Guiding Principles and principles of public and private international law, and domestic laws. Rae served as Co-Chair of the International Bar Association's Business Human Rights Committee in 2018 and 2019. She is now a member of the Committee's Advisory Board. Rae also serves as Treasurer of the British Branch of the International Law Association, as Co-Chair of trustees and International Advisory Council member of the Institute for Human Rights and Business and is a director of the Centre for Sports and Human Rights.

Roger Martella is Director and General Counsel for General Electric's Environment, Health and Safety operations worldwide. Prior to GE, Roger co-led Sidley Austin LLP's global environmental and climate change law practices. Prior to joining Sidley Austin,

Martella was General Counsel of the U.S. Environmental Protection Agency, a position for which he was unanimously confirmed by the United States Senate, and the Principal Counsel for Complex Litigation for the Justice Department's Natural Resources Section. Roger's passion is to improve environmental protections and rule of law for vulnerable populations around the world. He is Co-Chair of the International Bar Association's Climate Change Justice and Human Rights Model Statute working group, vice-chair of the American Bar Association's environmental rule of law initiative, which builds upon a treatise on international environmental law he co-edited, and founder of the China-EPA Environmental Law Initiative. Roger is a board member of the Environmental Law Institute and other environmental and climate change advocacy organizations and serves on the council of both the IBA's and ABA's environmental sections. Various legal publications have awarded Roger their top recognitions and halls of fame globally and domestically in the areas of environmental law, energy law, and climate change law. Roger graduated from Vanderbilt Law School, where he was editor in chief of the Vanderbilt Law Review, and Cornell University, where he studied environmental science. Roger participated in this project in his personal capacity, and the views expressed herein are not intended to reflect the views of any current or former employers and clients.

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In 1998, he became Interim Manager at the Ministry of Education of The Netherlands. From 2001 until August 2006, he was managing director of the Entrepreneurship Department of the Ministry of Economic Affairs.

From September 2006 until May 2013, he was managing director of the International Trade Policy & Economic Governance Department at the Ministry of Foreign Affairs of The Netherlands. His responsibilities concerned trade policy (WTO), investment policy, corporate responsibility and the regulation of trade in weapons and strategic goods.

In addition to his job, he wrote his PhD dissertation about the interaction between ministers and top civil servants. From 2010 to 2014, he was part-time Professor of Public Administration at the University of Amsterdam, Amsterdam, the Netherlands. He still teaches at several universities.

Roel was Chair of the OECD Working Party on International Investment and in that capacity chaired the sensitive negotiations on the 2011 revision of the OECD Guidelines for Multinational Enterprises on RBC. He chaired the Voluntary Principles for Security & Human Rights in the Extractives Industries in 2009 and 2013.

From June 2013 until June 2018, Roel served as Chair of the OECD Working Party on RBC, the intergovernmental committee overseeing the implementation of the OECD Guidelines for Multinational Enterprises. As such, he led the body of governments in charge of the OECD corporate responsibility work, including the sectoral programmes for the financial, mining, garment and agricultural sectors. In this capacity, he also chaired the Network of National Contact Points (NCPs) on RBC, which represents the unique grievance mechanism under the OECD Guidelines.

Currently, he is Ambassador of the Kingdom of The Netherlands to Argentina, Uruguay and Paraguay.

Irma S. Russell is the Edward A. Smith/Missouri Chair in Law, the Constitution, and Society at the University of Missouri – Kansas City School of Law, Kansas City, Missouri. Prior to her instalment at UMKC, she served as Dean of the University of Montana School of Law, Missoula, Montana, and as the NELPO Professor and Director of the National Energy-Environment Law & Policy Institute at the University of Tulsa College of Law, Tulsa, Oklahoma. Professor Russell served as chair of the ABA Section of Environment, Energy and Resources. She has also chaired the AALS Section of Natural Resources and Energy Law, the Professionalism Committee of the ABA Section of Legal Education and Admission to the Bar, and the AALS Sections of Professional Responsibility and Socio-Economics. She has also been a member of various professional and academic committees, including the ABA Dispute Resolution Publications Board, Dividing the Waters (an organization of judges and lawyers focused on issues of water adjudication in the Western United States), the Editorial Board of Natural Resources and Energy and the ABA Standing Committees on Professionalism and

Ethics and Professional Responsibility. Professor Russell's practice involved representation of potentially responsible parties, government entities, lenders and others on issues arising under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the National Environmental Policy Act (NEPA) and environmental issues such as wetlands designation and site mitigation. She was a founding chair of the Memphis Bar Association Environmental Law Section and served as Chair of the Tennessee Bar Association Environmental Section. Professor Russell earned her J.D. from the University of Kansas, Lawrence, Kansas, after which she clerked for the Honourable James K. Logan, United States Court of Appeals for the Tenth Circuit. She was engaged in private practice in Kansas, Missouri and Tennessee.

Martijn Scheltema is a partner in Pels Rijcken & Droogleever Fortuijn and member of the Dutch Supreme Court Bar since 1997. He is involved in international disputes. He is specialized in business and human rights issues. He has been involved in several landmark international human rights cases before the Dutch Supreme Court (e.g., *Srebrenica*, *SNS expropriation*, *Urgenda*).

As a professor at Erasmus University Rotterdam (The Netherlands), he is part of the Responsible Business Conduct Research Platform which is an initiative of the Erasmus School of Law, Rotterdam, The Netherlands, and the Rotterdam School of Management, Rotterdam, The Netherlands. He researches, among other things, effectiveness of multi-stakeholder initiatives (including their ADR capabilities) in the business and human rights and broader responsible business conduct arena.

Further related positions:

Chair of the independent binding dispute resolution mechanism of the Dutch and German Garment Industry Accords (concluded between the industry, NGOs and the government).

Co-Chair of the academic network of the OECD Guidelines for Multinational Enterprises connected with the Working Party for Responsible Business Conduct of the OECD.

Founding board member of ACCESS (www.accessfacility.org), an international institute based in the Hague focussing on non-judicial remedies.

Member of the American Bar Association Business and Human Rights Project.

His academic work includes over 100 publications.

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John was Senior Legal Adviser to the former Special Representative of the UN Secretary General for Business and Human Rights, Professor John Ruggie (who is Shift's chair).

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John is a senior program fellow of the Corporate Responsibility Initiative of the Harvard Kennedy School of Government and an executive fellow at the Hoffman Center of Business Ethics at Bentley University, Waltham, Massachusetts. He is a former deputy general counsel of National Grid and a graduate of Harvard Law School, Cambridge, Massachusetts, and Dartmouth College, Hanover, New Hampshire.

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London School of Economics and Political Science, London, England (1978-1983). In 1983, she accepted a senior research fellowship in the Faculty of Law of the University of Cambridge, before becoming Director of the Centre for Business and Public Sector Ethics in 1988. She was the Gourlay Visiting Professor in Ethics in Business, Trinity College, University of Melbourne, Australia, in 2014. Dr Thomas has given evidence and Conference assignments to distinguished bodies and is also a well-known author and editor. Her published books include *The British Philosophy of Administration; Espionage and Secrecy: The Official Secrets Act 1911-1989 of the United Kingdom; Government Ethics;* and *Environmental Ethics*. Dr. Thomas has originated five Modules on 'Ethics and Anti-Corruption', published by Centre for Business and Public Sector for Ethics, 2009 (2nd edition) and is listed in 'Who's Who in the World' 2004–2019 for her contribution to the betterment of contemporary society.

Robert C. Thompson is a retired lawyer living in New York. He graduated from Harvard College (AB 1963) and Harvard Law School (LLB 1967). He was formerly an associate general counsel of the U.S. Environmental Protection Agency and a partner in the international law firm of LeBouef, Lamb, Greene & MacRae, where he was the chairman of the environment, health and safety group. Following his retirement in 2000, he has devoted his time to international human rights matters. He is the co-author of:

Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating Unocal: The Expanding Web of Liability for International Crimes*, 40 George Washington International Law Review 841 (2009), available at: http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-1-Thompson.pdf

Claes Cronstedt, Jan Eijsbouts & Robert C. Thompson, *International Business and Human Rights Arbitration* (2018), available at: https://www.cilc.nl/cms/wp-content/uploads/2018/03/INTERNATIONAL-ARBITRATION-TO-RESOLVE-HUMAN-RIGHTS-DISPUTES-INVOLVING-BUSINESS-PROPOSAL-MAY-2017.pdf.

Thomas played an integral role in the set-up of ASEAN Corporate Social Responsibility Network (ACN) in 2010 and as CEO, continues to provide oversight and strategic direction for the organization. ACN was established to promote and enable responsible business conduct in ASEAN Member States.

Thomas was the lead writer of the baseline study on CSR and human rights in ASEAN for the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2014. Thomas has extensive experience in CSR, serving on various initiatives in the region and globally, including the Steering Committee of the ILO's Global Business Network on Forced Labour. He was also involved in the drafting of the ISO 26000, International Social Responsibility Guidance Standard.

Prior to ACN, he was the founding Executive Director of the Singapore Compact for Corporate Social Responsibility (CSR), the national CSR society in Singapore, now operating as the Global Compact Network Singapore. He was the Co-Chair of the National Tripartite Initiative for CSR, formed in 2004 and initiated the formation of Singapore Compact for CSR. He was the Singapore focal point for UN Global Compact.

Thomas had been active with trade unions, cooperatives, the consumer movement and social enterprises and also served as a nominated member of Parliament in Singapore.

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Lene holds a Master's in Law from the University of Copenhagen.

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Elizabeth Wild worked on CSR issues in the oil and gas industry for many years, most recently in BP, where she led its central social responsibility and human rights team. This team created BP's standards and strategies on key social and human rights topics; provided technical support to businesses and functions; monitored external expectations on CSR performance; contributed to sustainability reporting; and provided expertise and recommendations to executives and board members. The team worked

extensively with other companies and IPIECA, the industry's environmental and social industry association, to develop and promote good CSR practice in the industry. Elizabeth led IPIECA's social working group for three years. She is now an independent consultant. She recently chaired an independent panel of social, human rights, environmental, climate change and investment specialists who provided feedback on the oil and gas industry's revision of its sustainability reporting guidance.

Elizabeth has a degree in French & German, a postgraduate diploma in interpreting & translation, and a master's degree from the Cambridge Institute for Sustainability Leadership, Cambridge, England. She is a conservation volunteer with the Surrey Wildlife Trust.

Jennifer Wills is the founder of J. Wills Career Coaching, a career coaching firm for environmental and sustainability professionals. Jennifer was an attorney with the U.S. Environmental Protection Agency where she spent fifteen years advising and problem-solving with clients. In addition, she has served as a Brookings Institution Fellow in the U.S. Senate where she advised on energy and environment issues and worked with constituents to improve their living and work environments. In addition, Jennifer is faculty with Virginia Tech's Center for Leadership in Global Sustainability where she advises executive masters students on career transitions and teaches International Environmental Law and Policy.

Jennifer has an M.A. in Natural Resources with a focus on global sustainability from Virginia Tech, a J.D. from the University of Kentucky, Lexington, Kentucky, and a B.A. in Biology from the University of Louisville, Louisville, Kentucky.

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Dr Cheri Young is an attorney of the High Court in South Africa, practising in banking and finance law. She obtained her LLB and PhD from the University of Cape Town, Cape Town, South Africa, and has completed a postdoctoral research fellowship at the University of Cape Town, Cape Town, South Africa, furthering her research interests in natural resources law and governance, and property law and theory. His Prior experience includes: AW Mellon Fellow, UCT (2011-2012); Reviewer, African Mining Legislation Atlas (2015); UCT Future Water Institute (2016-2018); and Chair of Mineral Law in Africa(2015-2018).

Peter Zalzal is Special Projects Director and Lead Attorney, at the Environmental Defense Fund. Peter has worked to help design and defend climate and air quality policies at the federal and state level, including the first generation of federal climate policies adopted in the wake of the Supreme Court's decision in *Massachusetts v. EPA* – the Endangerment Finding and Clean Car standards. Peter's work has also focused on

advocating for and defending policies to reduce pollution from major sources in the transportation and oil and gas sector. This work has had a strong focus on partnership and innovation, including collaboration with a wide range of stakeholders to pursue effective climate and air quality solutions. Peter has an undergraduate degree from the University of North Carolina, Chapel Hill, and a law degree from Boston University, Boston, Massachusetts.

Dr Jennifer Zerk is a freelance writer, researcher and analyst specializing in law and corporate social responsibility. She holds an LLM in international economic law from the University of London and a PhD in International Law from the University of Cambridge. She is a regular contributor and adviser in relation to UK and EU policy initiatives and consultations. Internationally, she is a respected and sought after consultant, commentator and speaker. She has advised on a number of significant law reform and policy initiatives in the business and human rights field including, most recently, as lead legal consultant on the Accountability and Remedy Project of the Office of the UN High Commissioner for Human Rights. She is an associate fellow in the International law Programme at the Royal Institute of International Affairs (Chatham House).

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CHAPTER 21

The Regulation of Multinational Labour and Employment Practices Through a Galaxy of Norms

Elise Groulx Diggs, Brian Burkett & Mitt Regan

Due to the profound effects of globalization on the nature of work, the regulation of labour and human rights matters is increasingly becoming a transnational issue. A wide range of initiatives has emerged in recent years with the common objective of establishing labour and human rights norms and enforcement mechanisms. These initiatives are occurring at all levels, including at the individual enterprise, industry, national, and supranational levels. They seek not only to proactively prevent substandard labour conditions and human rights abuses but also reactively to redress violations. In particular, many initiatives seek to prevent or address labour and human rights abuses that occur along complex supply chains or are caused by subsidiaries or entities indirectly controlled by multinational enterprises. There has been a clear shift in the characterization of these initiatives and norms over the past decade from 'soft' law to 'hard' law. This chapter reviews a number of norms designed to regulate labour and human rights at the transnational level. It proposes a perspective, supported by an analytical tool called the Galaxy of human rights norms, that can be used to assess Norms – both hard law and soft law – together. This approach complements the classic compliance approach in a single national jurisdiction and affords a more complete picture of the compliance and reporting obligations across multiple jurisdictions. The Galaxy provides a framework to help professional practitioners – labour lawyers, CSR, sustainability experts – advise business corporations on human rights issues, a new and emerging field of legal practice.

§21.01 INTRODUCTION

Labour and human rights matters throughout much of the twentieth century and the beginning of the twenty-first century have generally been treated as falling within the regulatory oversight of the local or national government where an employer's activities are situated. However, globalization has created profound changes in the nature of work. Growth in the number and size of multinational enterprises (hereinafter 'MNEs') has led to complex corporate structures and expansive global supply chains. The use of global supply chains has resulted in an environment where MNEs are directly employing fewer workers and the setting of labour and human rights standards has been transferred to numerous subsidiaries or smaller distinct organizations along a global supply chain. Wide variation in the setting and regulation of working conditions has resulted in a 'governance gap'[1] with respect to the prevention of, and accountability for, substandard labour conditions and direct and indirect human rights abuses.

The recognition of this 'governance gap'[2] has led to the relatively rapid emergence of a range of initiatives with a common objective of establishing labour and human rights norms together with enforcement mechanisms. These initiatives have occurred at all levels, including at the MNE level and at supranational organizations, such as the United Nations (UN). The initiatives seek to not only proactively prevent substandard labour conditions and human rights abuses but also reactively redress violations when they occur. Over the course of the past decade, these norms have started to transform from 'soft' law, which includes voluntary private transnational norms and non-binding rules outside national laws, to binding and enforceable 'hard law' at both the national and international levels.

The combination of 'soft' and 'hard' laws that regulate the conduct of businesses has resulted in what Elise Groulx Diggs, Mitt Regan, and Beatrice Parance refer to as a 'galaxy' of business and human rights norms (hereinafter 'BHR Galaxy').[3] This BHR Galaxy is comprised of: enforceable legal obligations under national law, private voluntary standards, corporate and multilateral codes of conduct, guiding principles and declarations from international organizations, a proposed binding international business and human rights treaty, and other sources.

The norms that form the BHR Galaxy can be conceptualized as occupying distinctive concentric rings around a core ring of enforceable 'hard' law, expanding outward to include various forms of 'soft' law.[4] The metaphor of a galaxy underscores that these norms are not organized in a hierarchical fashion and that those in one ring

1. John Ruggie, *Promotion and Protection of All Human Rights Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 1, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement (accessed 25 Oct. 2019).
2. Claes Cronstedt & Robert C. Thompson, *A Proposal for an International Arbitration Tribunal on Business and Human Rights*, 57 Harvard I.L.J. 66, 66 (2016).
3. Elise Groulx Diggs, Mitt Regan & Beatrice Parance, *Business and Human Rights as The Galaxy of Norms*, 50 (2) G.J.I.L. 309 (2019), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3216&context=facpub (accessed 13 Sep. 2019).
4. *Ibid.* at 314. A figure of the galaxy and of the concentric rings follows the conclusion of this chapter.

may exert 'gravitational influence' on those in another in a way that can blur the distinction between 'hard' and 'soft' law. Many of the developments in the BHR Galaxy have significant implications for businesses in respect of their domestic and international activities and their workforces.

This chapter identifies a smaller galaxy of norms – still evolving – that are designed to govern (or regulate) labour conditions in complex global supply chains and, in particular, to expose cases of serious human rights abuses (including 'modern slavery') and mitigate the risk of their occurrence. This Galaxy not only blends hard law and soft law but also builds tighter links between three traditionally distinct domains of international rule-making: (1) the body of international labour law articulated in the conventions and declarations negotiated at the International Labour Organization (ILO) in Geneva, (2) 'voluntary' soft law guidelines of Responsible Business Conduct (CSR) for Multinational Enterprises developed under the umbrella of the OECD Investment Committee (OECD Guidelines),[5] (3) international human rights conventions, declarations, and guidelines primarily issued by the UN Human Rights Council in Geneva and also shaped at times by the UN Secretary General and the UN General Assembly. The most recent UN guidance for business corporations is the UN Guiding Principles for Business and Human Rights (UNGPs), approved by the Member States of the UN Human Rights Council in 2011. The UNGPs explicitly incorporate the ILO's core Conventions as part of 'internationally recognized human rights'.[6]

These three 'planetary systems' thus are linked together in the larger BHR Galaxy, reinforcing an international consensus endorsed and promoted by three multilateral institutions concerning the 'rules of the game' governing labour standards in global supply chains. Some areas of the BHR Galaxy may not provide the precision and certainty of national legislation or international treaties – a critique of 'soft law' often voiced by lawyers. However, these norms often play a critical role in setting baseline standards of 'responsible' business conduct and building consensus (even though imperfect) among the stakeholders in the international economy, states, business enterprises, financial markets, labour organizations, and civil society. They also help to launch more quickly the processes of addressing 'governance gaps' that can do serious harm, for example, to workers concerned about workplace safety.

The first part of this chapter provides an overview of the historical development of international labour and human rights standards by the ILO as well as the origin of the underlying human rights principles and standards that inform the framework of the BHR Galaxy. The second part of this chapter provides an overview of a subset of norms that are designed to govern labour standards and, in particular, to mitigate the risk of substandard work, working conditions and human rights violations in the labour market. This subset of norms is set out in such a way that the reader can trace its transformation from 'soft' law into 'hard' law.

5. Organization for Economic Cooperation and Development, *Policy Framework for Investment*, https://www.oecd.org/investment/toolkit/policyareas/responsiblebusinessconduct/ (accessed 2 Jul. 2019).
6. United Nations Human Rights Office of the High Commissioner, *United Nations Guiding Principles on Business and Human Rights,* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed 1 Jul. 2019).

§21.02 INTERNATIONAL LABOUR LAW AND THE ROLE OF THE ILO

The ILO, the only tripartite UN Agency, is the key supranational institution in the field of global labour standards. The ILO's primary role is to develop international standards in consultation with representatives of governments, workers, and employers.

Since its creation under the Treaty of Versailles in 1919, the ILO's mandate has been the promotion of social justice and internationally recognized human and labour rights. The ILO articulates international labour standards in the form of Conventions and Recommendations. Conventions are international treaties subject to ratification by Member States and incorporation into domestic jurisdictions as required by treaty law. Recommendations are non-binding guidelines applicable to national policy and activity.

The ILO became a prominent actor in global economic and social issues after the World Trade Organization (WTO) officially acknowledged the link between economic development and social progress and entrusted the ILO with responsibility for the social and labour dimension of global trade liberalization at its 1996 Singapore Conference.[7] Responding to this significant role, in 1998 the ILO established the Declaration on Fundamental Principles and Rights at Work (Fundamental Declaration).[8] The Fundamental Declaration commits Member States to respect and promote the fundamental principles and rights set out in the ILO's eight core Conventions.[9] These principles and rights are expressed in four categories in the Fundamental Declaration: (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of forced or compulsory labour, (3) the abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation. The commitment of Member States to respect and promote the principles and rights in the four categories applies whether or not the Member State has ratified the relevant ILO Conventions. As a result, an important aspect of the Fundamental Declaration is its universal application to all ILO Member States.

The Fundamental Declaration was adopted as a promotional instrument with the intent that the principles and rights underpinning it would provide guidance for national and international action.

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7. World Trade Organization, *Singapore Ministerial Declaration,* https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (accessed 1 Jul. 2019).
8. The International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work, adopted by the 85th session of the International Labour Conference, Geneva, 18 June 1998*, https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (accessed 1 Jul. 2019).
9. The eight core ILO Conventions are the: (1) Forced Labour Convention, 1930 (No. 29); (2) Abolition of Forced Labour Convention, 1957 (No. 105); (3) Freedom of Association an Protection of the Right to Organise Convention, 1948 (No. 87); (4) Right to Organise and Collective Bargaining Convention, 1949 (No. 98); (5) Equal Remuneration Convention, 1951 (No. 100); (6) Discrimination (Employment and Occupation) Convention, 1958 (No. 111); (7) Minimum Age Convention, 1973 (No. 138); and (8) Worst Forms of Child Labour Convention, 1999 (No. 182).

Following the adoption of the Fundamental Declaration, there was a growing realization that a top-down approach to developing labour standards must be accompanied by on-the-ground initiatives. As a result of this recognition, the then ILO Director General Juan Somavia introduced the Decent Work Agenda in 1999 (Agenda).[10] The Agenda was intended as a means for states to implement the principles outlined in the Fundamental Declaration. However, the Agenda recognized that domestic implementation of the Fundamental Declaration would have to take into account each nation's particular circumstances, including its level of development. The Fundamental Declaration can be viewed as providing a floor upon which decent work initiatives can be developed to help countries according to their own needs and priorities.

Decent work is a flexible concept that provides a framework for eradicating poverty, promoting equality, and enabling individuals to realize personal and communal aspirations. The ILO's Agenda is comprised of four main strategic objectives: (1) realization of standards and the fundamental principles and rights at work, (2) creation of employment and income, (3) enhancing social protection, and (4) strengthening the social tripartite system and dialogue.

The most innovative quality of the Agenda rests in the connection it draws between international labour standards and the reform of domestic systems. The Agenda has a particularly practical objective: to facilitate the identification by each ILO Member State of areas in need of reform and to assist each state in developing home-grown solutions consistent with decent work principles.

The principal means for realizing the Agenda among Member States is through the creation of Decent Work Country Programmes (DWCPs). Essentially, DWCPs are initiatives aimed at pursuing the goal of decent work by creating a coherent and integrated decent work programme at the level of the individual Member State. As of September 2019, fifty-one countries had approved DWCPs, whereas forty-one countries were in the drafting process.[11]

The concepts enshrined in the Agenda continue to be promoted and reaffirmed, including in the ILO's June 2019 Centenary Declaration.[12] As part of the ILO's efforts to further develop its human-centred approach to the future of work, it has stated that it will direct its efforts to, among other things, eradicating forced and child labour and promoting decent work for all. Further, the Centenary Declaration recognizes that safe and healthy working conditions are fundamental to decent work.

The fundamental principles and standards set out in ILO instruments, and particularly the Fundamental Declaration and the Agenda, have been incorporated into

10. The International Labour Organization, *Report of the Director-General: Reducing the decent work deficit - a global challenge*, https://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm (accessed 9 Sep. 2019).
11. The International Labour Organization, *Status of DWCP Development by Region as at 15 Sep. 2019*, https://www.ilo.org/wcmsp5/groups/public/@ed_mas/@program/documents/genericdocument/wcms_630738.pdf (accessed 9 Sep. 2019).
12. The International Labour Organization, *ILO Centenary Declaration for the Future of Work adopted by the Conference at its One Hundred and Eighth Session*, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711674.pdf (accessed 9 Sep. 2019).

other fundamental documents that establish international business and human rights (BHR) standards applicable to both states and MNEs. The following sections review the ways in which the ILO's core principles and standards have been adopted by other supranational organizations and levels of governance.

§21.03 THE INCORPORATION OF THE PRINCIPLES AND RIGHTS OF THE FUNDAMENTAL DECLARATION AND THE DEVELOPMENT OF BHR STANDARDS

[A] The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

In 2003, the United Nations Commission on Human Rights (UN Commission) adopted the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Draft Norms).[13] Distilled from existing international instruments and standards, including the Fundamental Declaration, the UN Draft Norms set out the responsibilities of business enterprises to 'promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law'.[14]

Under the UN Draft Norms, the responsibilities of business enterprises extended throughout 'their respective spheres of activity and influence' and included: ensuring equality of opportunity and non-discriminatory treatment, a prohibition on using forced or compulsory labour, providing remuneration that ensures an adequate standard of living for workers and their families, carrying out activities in a manner that preserves the environment of the states in which they operate, ensuring freedom of association and effective recognition of the right to collective bargaining.[15]

The UN Draft Norms represented a philosophical shift in the way in which BHR standards were to be incorporated in business activities. In contrast to purely voluntary initiatives, which focused on MNEs' commitments to corporate social responsibility and labour standards, the UN Draft Norms were arguably the first attempt to establish an international framework for mandatory BHR standards and norms of conduct applicable to all business enterprises. Under the UN Draft Norms, business enterprises would have been required to periodically report on implementation of the Norms and would have been subject to periodic monitoring and verification by the UN. In effect, the UN Draft Norms sought to impose the same international legal obligations that are owed by states in respect of human rights directly on businesses.

13. United Nations Commission on Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, https://digitallibrary.un.org/record/500351?ln=en (accessed 2 Jul. 2019).
14. *Ibid.* at 3.
15. *Ibid.*

The UN Draft Norms drew widespread criticism from business organizations, particularly in response to the proposed binding nature and the creation of a monitoring mechanism to oversee the activities of businesses. As a result, the UN Commission affirmed in 2004 that the UN Draft Norms would have no legal status and that no monitoring of business conduct would occur. While not legally binding, the UN Draft Norms remain a consultative document that businesses can use to identify their responsibilities in relation to human rights.

[B] The United Nations Guiding Principles on BHR

Following the failure of the UN Draft Norms to achieve consensus, there still existed broad-based support by workers' organizations and non-governmental organizations (NGOs) for a universal declaration on human rights standards applicable to businesses. These organizations called on the UN Commission to adopt a new approach to creating a human rights framework for businesses. In April 2005, the UN Commission adopted a resolution, which requested that the UN Secretary General appoint a Special Representative on business enterprises and human rights.[16]

In July 2005, Professor John Ruggie from the Kennedy School of Government at Harvard University was appointed as Special Representative and given the task of: (a) identifying and clarifying standards for corporate social responsibility and accountability for MNEs and other business enterprises relating to human rights, (b) elaborating on the role of states in regulating MNEs and other business enterprises with respect to human rights, (c) developing materials and methodologies for undertaking human rights impact assessments of the activities of MNEs and other business enterprises, and (d) compiling a compendium of best practices of states, MNEs, and other business enterprises.[17]

In 2008, Ruggie introduced the 'Protect, Respect, and Remedy' framework (hereinafter 'Framework'). The Framework is articulated around three core pillars: (1) Pillar One: the state duty to protect against human rights abuses by third parties, including businesses; (2) Pillar Two: the corporate responsibility to respect human rights; and (3) Pillar Three: the need for access to effective remedies for those whose rights are infringed.[18]

The Framework was later 'operationalized' by the 2011 UN Guiding Principles on Business and Human Rights (UNGPs), which were unanimously endorsed by the UN Human Rights Council, the successor to the UN Commission, in June 2011.[19] The UNGPs are a set of principles outlining how states and business enterprises can respectively discharge their obligations and responsibilities to prevent, address, and remedy business-related human rights impacts. The UNGPs apply to all business

16. United Nations Commission on Human Rights, *Human Rights Resolution 2005/69,* https://www.refworld.org/docid/45377c80c.html (accessed 24 Oct. 2019).
17. *Ibid.* at 1.
18. United Nations Commission on Human Rights, *Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises*, https://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx/69 (accessed 1 Jul. 2019).
19. Organization for Economic Cooperation and Development, *supra* n. 5.

enterprises, both transnational and otherwise, regardless of their size, sector, location, ownership, and structure.

Under the first pillar, the UNGPs provide that states must better understand how to enforce their duty to protect against human rights abuses, including through non-traditional means such as corporate laws. The UNGPs highlight that states are uniquely positioned to foster corporate cultures in which respecting human rights is an integral part of doing business.[20] With respect to the second pillar, the UNGPs emphasize that it is critical for companies to consider how internationally recognized rights, including the labour standards articulated in the Fundamental Declaration, relate to their business operations. The UNGPs state that businesses should have in place certain policies and processes, including: (a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights; and (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[21] With respect to the third pillar of the UNGPs, this builds on the principle that state regulation proscribing certain corporate conduct must be accompanied by mechanisms to investigate, punish, and remedy abuses. The UNGPs state that efforts must be undertaken to bolster judicial and non-judicial processes – at the business enterprise, state, or international level – to effectively address and remedy breaches of human rights standards.[22]

The UNGPs are not intended to create new international legal obligations. Rather, the UNGPs are a widely recognized, authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. The UNGPs have been met with considerable support from states, business enterprises, and civil society.

In 2011, key provisions of the UNGPs were incorporated into a human rights chapter in the OECD Guidelines for Multinational Enterprises (hereinafter 'OECD MNE Guidelines'),[23] and its due diligence principles were incorporated into the OECD MNE Guidelines as applicable to all areas of CSR to which the OECD MNE Guidelines are relevant.

20. *Ibid.* at 8.
21. *Ibid.* at 15–16.
22. *Ibid.* at 30.
23. Organization for Economic Cooperation and Development, *Guidelines for multinational enterprises*, https://www.oecd.org/corporate/mne/oecdguidelinesformultinationalenterprises.htm (accessed 25 Jun. 2019). The OECD MNE Guidelines are recommendations addressed by governments to MNEs operating in or from adhering countries. They provide non-binding principles and standards for CSR in a global context consistent with applicable laws and internationally recognized standards. The OECD MNE Guidelines express the shared values of the governments of countries from which a large share of international direct investment originates and which are home to many of the largest MNEs. The OECD MNE Guidelines are supported by a unique implementation mechanism of National Contact Points (NCPs). NCPs are government agencies established to promote and implement the OECD MNE Guidelines. NCPs also provide a mediation and conciliation platform.

§21.04 IMPLEMENTING THE UNGPs AND THEIR UNDERLYING PRINCIPLES

Since the introduction of the UNGPs, there have been increasing efforts to implement their core principles, and BHR principles more generally. These initiatives are occurring in both the public and private spheres and are taking place at various levels including: international level, national level, industry-wide level, supply chain-wide level, the business enterprise level, and the workplace level. While many of the early initiatives related to the implementation of the UNGPs were voluntary undertakings at the business or industry level, there has been a recent shift towards the implementation of the UNGPs through the adoption of new legislation establishing mandatory legal requirements, as outlined below. In addition, a body of jurisprudence is emerging from the court systems of various Organisation for Economic Co-operation and Development (OECD)countries regarding such issues as extraterritorial jurisdiction, parent corporation liability for harms related to operations of their subsidiaries and the extension of the traditional doctrine of 'duty of care' to new categories of victims of human rights and labour rights violations.[24]

As the body of law expands, the ILO Conventions and human rights soft law instruments continue to be key reference points and serve as tools of interpretation for the courts. As explained above, this process of norm building is eroding the traditional distinctions between 'soft' and 'hard' law, and between voluntary and mandatory responsibilities.

The following is an overview of the various 'soft' and 'hard' law BHR Galaxy norms in the labour realm that are intended to: (1) ensure that human rights standards that relate to the world of work are respected and adhered to and (2) provide mechanisms that address any violation of those standards.

[A] 'Voluntary' or 'Soft' Law BHR Initiatives

Norms, often characterized as 'soft law', play a critical role in setting baseline standards of 'responsible' business conduct and building consensus (even though imperfect) among the stakeholders in the international economy: states, business enterprises, labour organizations, and civil society. They also help to launch more quickly the processes of addressing 'governance gaps' that can result in serious harm, for example, to workers. The following sections are intended to provide an overview of a number of 'voluntary' or 'soft' law initiatives that aim to provide a floor of labour and workplace health and safety standards and to provide for enforcement mechanisms when an employer or supplier falls below that floor.

24. Douglas Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 Bus. & Human Rights J.179, 189 (2016).

[1] International Framework Agreements

Emerging first in Europe in the late 1980s, International Framework Agreements (IFAs) are agreements negotiated at a global level between Global Union Federations (GUFs) and MNEs. IFAs commit the signatory MNE to respect international core labour standards throughout its global operations and usually also set out broad minimum standards and policies that apply to the MNE's global workforce.[25] In many cases, IFAs also create an obligation for MNEs to inform subsidiaries, suppliers, contractors, and subcontractors of the IFA and its contents. In addition, some IFAs provide for informal dispute resolution mechanisms in the event a subsidiary or associated enterprise is found not to be respecting the IFA.

IFAs are not a substitute for direct negotiations between companies and workers at the national or workplace level. Rather, IFAs provide a framework for negotiations and a minimum floor of standards.

The common thread running through all IFAs is that they reference the ILO's eight core Conventions and the Fundamental Declaration. Many IFAs include general provisions regarding union recognition and social and environmental responsibility. In many cases, IFAs go further than local industry norms or legal requirements in establishing social equity principles. For example, an IFA may extend the grounds of prohibited discrimination to include sexual orientation and disability, even where such protection is not provided under local law.

The key sectors in which IFAs have been signed are the service, utilities, energy, mining, and manufacturing industries. Over 110 IFAs have been signed, covering approximately 9 million workers.[26] IFAs have historically been almost exclusively between GUFs and MNEs based in Western Europe. Notably, however, non-European based MNEs are increasingly entering into IFAs.[27]

A general critique of IFAs is that many lack both an effective internal enforcement mechanism and governance from a supranational legal framework. Although external monitors, such as NGOs, and internal monitors, such as employees and managers, can work together to ensure an IFA is enforced, no supranational organization or other mechanisms exist to settle disputes that may arise.[28] Accordingly, the success of an IFA is often based simply on the parties' commitment to compliance.[29]

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25. International Organisation of Employers, *International Framework Agreements - An Employer's Guide*, http://apirnet.ilo.org/resources/ifas-an-employers-guide (accessed 3 Jul. 2019).
26. Cesar F. Rosado Marzan, *Labor's Soft Means and Hard Challenges: Fundamental Discrepancies and the Promise of Non-Binding Arbitration for International Framework Agreements*, 98 Minnesota L. Rev. 1749, 1761 (2014).
27. *See also* examples of non-European based IFAs, which include: Fonterra's, the New Zealand-based dairy cooperative, agreement with the New Zealand Dairy Workers Union and International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) (2002), and American-based banana company Chiquita with IUF and the Coordination of Latin American Banana Workers' Unions (2001).
28. Renée-Claude Drouin, *Promoting Fundamental Labor Rights Through International Frame-work Agreements: Practical Outcomes and Present Challenges*, 31 Comp. Labor Law & Pol'y J. 591, 629 (2010).
29. *Ibid.* at 612.

To address this critique, a small number of IFAs in recent years have included dispute resolution processes. References to mediation and arbitration can be found in a number of IFAs. The IFA between IndustriALL Global Union and Tchibo, for example, provides that where the parties are unable to resolve a dispute, the parties agree to seek the assistance of the ILO for mediation and dispute settlement.[30] In the event of continued disagreement between the parties, the ILO is permitted to issue binding recommendations.[31] While some IFAs stop short of including the detailed grievance resolution processes traditionally seen in collective bargaining agreements, the inclusion of sections related to dispute resolution by a third-party mediator, facilitator, or adjudicator in recent IFAs suggests a growing emphasis on addressing the principles of the third pillar of the UNGPs, providing effective access to remedies.

[2] Industry or Supply Chain Codes of Conduct

Global supply chains are an important feature of globalization. However, the growth of outsourcing via global supply chains, particularly in the 1990s and 2000s, has created significant labour implications. Global supply chains have created a situation where the direct employment of workers has been transferred from an MNE to a complex network of smaller business enterprises along the supply chain. This shift has resulted in a transfer of control with respect to labour and human rights standards from MNEs, who largely control supply chains, to related or unassociated businesses along the supply chain. This transfer of direct employment from MNEs to smaller business enterprises along the supply chain has also resulted in shifting legal risks from MNEs to the smaller direct employers.[32]

In reaction to the new reality created by global supply chains, investors[33] and customers are increasingly demanding BHR standards be adopted not only by business

30. IndustriALL Global Union, *Global Framework Agreement between Tchibo and IndustriALL Global Union*, http://www.industriallunion.org/sites/default/files/uploads/documents/GFAs/Tchibo/tchibo_gfa2016_eng.pdf (accessed 1 Jul. 2019). Article 20 of the IFA between Tchibo and IndustriALL Global Union provides that: 'In case the Parties are unable to reach a mutual solution that is appropriate to remedy the breach and satisfactorily to the Parties, the Parties shall agree to seek the assistance of the ILO for mediation and dispute settlement. The Parties shall agree to abide by the final recommendations of the ILO.'
31. *Ibid*.
32. David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It*, 9 (Harvard University Press 2014).
33. Investor demand for socially responsible investing has, in part, led to the development of the Equator Principles. The Equator Principles are a risk management framework adopted by 104 financial institutions worldwide. They are intended to be used to determine, assess and manage environmental and social risk in financing infrastructure and industrial projects and to establish minimum due diligence and monitoring standards. The Equator Principles commit members to fulfilling responsibilities to respect human rights in accordance with the UNGP and to supporting the objectives of the 2015 Paris Agreement on climate change. Notably, the Equator Principles require mandatory grievance mechanisms for certain infrastructure and industrial projects. The grievance mechanisms are designed for use by communities and workers affected by a particular project.

    The Equator Principles were updated in November 2019, and all participating financial institutions are required to comply with any changes by July 1, 2020.

enterprises delivering an end product but also through each business enterprise participating in the production and distribution of that product. In response, many MNEs and other stakeholders have voluntarily adopted MNE-specific, multilateral or industry codes of conduct, and oversight mechanisms. The Responsible Business Alliance (RBA) Code of Conduct (hereinafter 'RBA Code'), described below, is an example of an industry-wide code of conduct that applies to both participant MNEs and their suppliers.

[a] RBA Code of Conduct

First launched in 2004, the RBA Code establishes standards to ensure that working conditions in the electronics industry or industries in which electronics is a key component and its supply chain are safe, that workers are treated with respect and dignity, and that business operations are environmentally responsible and conducted ethically.[34] In alignment with the UNGPs, the provisions of the RBA Code are derived from key international human rights standards, including the Fundamental Declaration. The sixth and most recent version of the RBA Code was released in 2018. The RBA Code presents us with a good example of what is included in Ring 4 of the BHR Galaxy Model that is designed to cover private voluntary initiatives.[35]

The RBA Code can be voluntarily adopted by any business in the electronics sector and subsequently applied by that business to its supply chains and subcontractors, including providers of contract labour. To adopt the RBA Code, a business must declare its support for and actively pursue conformance with it and its standards in accordance with a management system set out therein.

The RBA Code outlines standards for labour, health and safety, and the environment. The RBA Code's standards with respect to labour include: (1) all work must be voluntary or freely chosen; (2) the use of child labour in any stage of manufacturing is prohibited; (3) there is to be a cap on the maximum number of working hours; (4) compensation must comply with all applicable wage laws, including those relating to minimum wages, overtime, and legally mandated benefits; (5) there is to be no harsh and inhumane treatment of workers; (6) workforces should be free of harassment and unlawful discrimination; and (7) participants shall respect the right of all workers to form and join trade unions, to bargain collectively, and to engage in peaceful assembly.

Participants are required to adopt or establish a management system whose scope is related to the content of the RBA Code. The management system must be designed to ensure: (1) compliance with applicable laws, regulations, and customer requirements related to the participant's operations and products; (2) conformance

Equator Principles, (July 2020), https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf (accessed March 18, 2020).

34. Responsible Business Alliance, *Responsible Business Alliance Code of Conduct, Version 6.0 (2018)*, http://www.responsiblebusiness.org/media/docs/RBACodeofConduct6.0_English.pdf (accessed 9 Sep. 2019).
35. Diggs, Regan & Parance, *supra* n. 3, at 332 and following.

with the RBA Code; and (3) identification and mitigation of operational risks related to the RBA Code.

Elements of a management system include, but are not limited to: (1) a process to identify the legal compliance, environmental, health and safety and labour practice, and ethics risks associated with the participant's operations; (2) a determination of the relative significance of each risk and implementation of appropriate procedural and physical controls to monitor the risks; (3) written performance objectives, targets, and implementation plans to improve the participant's social and economic performance; (4) ongoing processes, including an effective grievance mechanism to address violations of practices and conditions covered by the RBA Code; (5) periodic self-evaluations to ensure conformity with legal and regulatory requirements; and (6) a process to communicate RBA Code requirements to suppliers and to monitor their compliance with the RBA Code.

[3] Other Multi-Stakeholder Initiatives

Voluntary and employer-led initiatives that seek to ensure industry-wide compliance with a core set of labour and human rights standards have become increasingly common over the past two decades. What has been slower to develop are initiatives advanced through bilateral or multilateral participation. However, it appears likely that we will begin to *see* a greater number of voluntary bilateral or multilateral initiatives related to human rights and labour standards in the upcoming years. Set out below is an example of a multi-stakeholder initiative designed with the intention of creating safer workplaces for employees in the garment manufacturing industry.

[a] The Bangladesh Accord

A multi-stakeholder initiative incorporating access to remedy is the 'Accord on Fire and Building Safety in Bangladesh' (hereinafter 'The Bangladesh Accord').[36] The Bangladesh Accord presents another good illustration of what is comprised in Ring 4 of the BHR Galaxy Model.[37] The Bangladesh Accord was initially developed as a result of the April 2013 tragedy at the Rana Plaza garment manufacturing facility in Dhaka, Bangladesh, where 1,134 people were killed and approximately 2,500 injured due to a structural collapse.

With approximately 190 signatory companies, the Bangladesh Accord is a legally binding, enforceable agreement between GUFs, local unions, and MNEs in the garment industry, with respect to workplace standards in those MNEs' supply chains. In essence, the Bangladesh Accord requires signatory companies to take certain steps that seek to implement and maintain safety standards within their Bangladeshi suppliers' workplaces. In broad terms, it relies on a regime that moves successively through

36. Accord on Fire and Building Safety in Bangladesh, https://bangladeshaccord.org (accessed 9 Sep. 2019).
37. Diggs, Regan & Parance, *supra* n. 3, at 332 and following.

workplace inspection, reporting, and remediation and training to ensure suppliers' adherence to acceptable workplace safety standards.

The Bangladesh Accord requires that all factories producing for signatory companies undergo regular safety inspections provides for the establishment of joint labour-management safety committees who are trained and informed with respect to essential workplace safety, and includes mechanisms to monitor remediation progress and for workers to file complaints about substandard conditions. It also incorporates a strong and binding adjudication mechanism in respect of disputes over its interpretation and application.[38]

The Bangladesh Accord provides that disputes will be arbitrated in accordance with the UNCITRAL Model Law on International Commercial Arbitration (hereinafter 'Model Law').[39] Two arbitrations have been initiated under the Bangladesh Accord's adjudication mechanism before the Permanent Court of Arbitration (PCA).[40] IndustriALL Global Union and UNI Global Union commenced arbitrations under the Bangladesh Accord and the UNCITRAL Arbitration Rules against two global fashion brands in 2016. Both of the arbitrations initiated under the Bangladesh Accord have settled on a confidential basis.[41]

[4] BHR Clauses in Commercial Contracts

The American Bar Association (ABA) Business Law Section has formed a 'Working Group to Draft Human Rights Protections in International Supply Contracts' (hereinafter 'Working Group'). The Working Group is part of a larger effort to achieve

38. On 19 May 2019, the Bangladesh Supreme Court accepted a Memorandum of Understanding between the Bangladesh Accord Steering Committee and the Bangladesh employers' association in the ready-made garment industry, the Bangladesh Garment Manufacturers and Exporters Association (BGMEA). The Memorandum of Understanding stipulates that the Bangladesh Accord will continue to operate in Bangladesh for a transition period of 281 days, during which time brands, unions, and the BGMEA will establish a new institution called the RMG Sustainability Council, which will take over the Bangladesh Accord's tasks in 2020. *See also* Accord on Fire and Building Safety in Bangladesh, *Accord Reaches Resolution on Continuation of Its Work in Bangladesh*, https://bangladeshaccord.org/updates/2019/05/19/accord-reaches-resolution-on-continuation-of-its-work-in-bangladesh (accessed 6 Jul. 2019).
39. United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (accessed 1 Jul. 2019). The Model Law was adopted by the United Nations Commission on International Trade Law on 21 Jun. 1985. The Model Law was developed to address considerable disparities in national laws on arbitration with the intention that national governments would adopt the law into domestic legislation on arbitration. It covers all stages of the arbitral process from arbitration agreements to the recognition and enforcement of the arbitral award.
40. The PCA is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. The PCA has 121 contracting parties. Headquartered at the Peace Palace in The Hague, the Netherlands, the PCA facilitates arbitration, conciliation, fact-finding, and other dispute resolution proceedings among various combinations of states, state entities, intergovernmental organizations, and private parties.
41. Permanent Court of Arbitration, *PCA Press Release: Settlement of Bangladesh Accord Arbitrations*, https://pca-cpa.org/en/news/pca-press-release-settlement-of-bangladesh-accord-arbitrations/ (accessed 7 Jul. 2019).

widespread implementation of the ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor as well as other human rights protections.[42] The aim of the Working Group is to develop legally enforceable template contract clauses for inclusion in commercial agreements, such as supply contracts and purchase orders, that integrate business enterprises' corporate policies on human rights and are sensitive to the legal and commercial risks that businesses face.

The Working Group has recognized that while the adoption of BHR policies at the corporate level is important and admirable, there are limitations to the practical effects of these policies. The foundational idea behind the Working Group's present work is to move businesses' human rights commitments from corporate policy statements to the actual contractual documents where those policies may have a greater impact.[43] The Working Group proposes that the integration of businesses' BHR policies into commercial agreements through enlightened contractual terms may potentially change the behaviour of buyers and suppliers when combined with effective remedies for their violation and a willingness to enforce the terms.

The Working Group's template contract clauses are designed to be compatible with businesses' policies with respect to any human rights-related subjects, including worker safety, anti-discrimination, and anti-trafficking. The template clauses also account for businesses' reasonable desire to minimize litigation risk and liability exposure while remaining compliant with generally applicable laws. Examples of the proposed template clauses drafted by the Working Group include: representations, warranties, and covenants on abusive labour practices; rejection of goods and cancellation of an agreement where the buyer has reason to believe the supplier violated agreed-upon human rights standards; revocation of acceptance upon the buyer's discovery of the supplier's non-compliance with agreed-upon human rights standards; remedies in the event of a breach of agreed-upon human rights standards.

Adoption of the Working Group's template contract clauses into commercial contracts would be entirely voluntary and subject to negotiation between contracting parties.

The Business and Human Rights Advisory Board Project of the ABA Center for Human Rights (Advisory Board) is also working to draft a set of comprehensive contractual clauses to address these same issues in the management of global supply chains. The Advisory Board is in the process of coordinating its efforts with those of the Working Group of the ABA Business Law Section.

[5] International BHR Arbitration

International arbitration has long been used to resolve international commercial disputes. In addition, arbitration at the domestic level is consistently used to resolve

42. David Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains - Protecting Workers and Managing Company Risk*, 1, https://www.wcl.american.edu/impact/lawwire/human-rights-protections-in-international-supply-chains-protecting-workers-and-managing-company-risk/ssrn-id3194819/ (accessed 7 Jul. 2019).
43. *Ibid*. at 2.

labour disputes. However, the use of international arbitration as a mechanism to resolve human rights and/or labour standards disputes has been infrequent. This may, in part, result from the fact that the current rules of arbitration were written without a focus on the special requirements of human rights/labour standards disputes.[44]

A private group of international practising lawyers and academics have formed the Business and Human Rights Arbitration Working Group (Arbitration Working Group) aimed at creating an international private judicial dispute resolution avenue available to parties involved in BHR issues. The Arbitration Working Group believes that parties to international human rights disputes, generally MNEs and the victims of human rights violations, need a private system that can function in regions where national courts are unlikely to provide effective adjudication. The creation of this international dispute resolution avenue for resolving disputes involving BHR is intended to contribute to respecting the guidance set out in the third pillar of the UNGPs, providing effective access to remedy.

The Arbitration Working Group has developed rules designed for international BHR arbitration (hereinafter 'The Hague Rules'). The Hague Rules are intended to take into account the special requirements of human rights disputes to ensure: (1) greater transparency of proceedings and awards, (2) that numerous victims are able to aggregate their claims, and (3) that arbitrators chosen are prominent experts in BHR matters.

The Hague Rules can be used in a number of contexts. They can, for example, be the rules selected by the parties to a human rights dispute to be used in an arbitration, the procedure for which is determined by the parties themselves – i.e., ad hoc arbitration. Alternatively, the parties can agree to use The Hague Rules for arbitration that is administered with the assistance of an arbitration institution. Further, the parties can select an arbitration institution that has adopted The Hague Rules as its own optional rules.

The Hague Rules were officially launched on December 12, 2019.[45] They are based on the UNCITRAL Arbitration Rules, with certain modifications to account for issues that are likely to arise in the context of BHR disputes. The scope of The Hague Rules is not limited by the type of claimant(s) or respondent(s) or the subject matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under The Hague Rules. Parties can include business entities, individuals, labour unions and organizations, states, and civil society organizations. The Hague Rules do not define 'business' or 'human rights'. Rather, the Arbitration Working Group has stated that such terms should be understood as broadly as the meaning the same terms have under the UNGPs.[46]

Because consent remains the cornerstone of arbitration, submission to BHR arbitration is a voluntary decision. Consent can be established before a dispute arises

44. Claes Cronstedt, Jan Eijsbouts & Robert C. Thompson, *International Business and Human Rights Arbitration*, 2, http://www.l4bb.org/news/TribunalV6.pdf (accessed 2 Jul. 2019).
45. Center for International Legal Cooperation, *The Hague Rules of Business and Human Rights Arbitration*, https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (accessed March 19, 2020).
46. *Ibid*. at 1.

– e.g., in contract clauses or in an IFA – or after a dispute arises – e.g., in a submission agreement. The Hague Rules contain model arbitration clauses for parties to adopt or modify. The Arbitration Working Group has proposed that supply contracts and purchase orders could, for example, include clauses that would require business partners to observe specified international human rights norms in addition to escalation clauses that would require binding arbitration under The Hague Rules should prior steps to remedy non-compliance be unsuccessful. The Arbitration Working Group has further suggested that contracts could include clauses that provide potential victims with the right to enforce the human rights clauses. In addition, the Arbitration Working Group has suggested that MNEs could include so-called perpetual clauses into commercial contracts that require suppliers and contractors throughout the entire supply chain to insert the same provisions into their own contracts.[47] Finally, the rules can be used in conflicts arising out of multi-stakeholder initiatives or in disputes related to "mega-sports" events.

[B] Evolution Towards 'Hard Law' Norms

Over the past decade, there has been a focus on transforming human rights and labour standards from voluntary initiatives into mandatory and binding legal standards. This new legal trend is also illustrated in Rings 1 and 2 of the BHR Galaxy Model.[48] Significant activity has occurred in recent years at the judicial, state, and supranational level. This activity has resulted in the imposition of enforceable measures that companies must take to ensure compliance with legal requirements. An overview of both existing and contemplated mandatory 'hard' law standards follows.

[1] National Action Plans and Domestic Legislation

As a mechanism to implement the UNGPs, the UN Working Group on BHR recommends that all states develop a National Action Plan (NAP). In the area of BHR, a NAP is an evolving policy strategy developed by a state to protect against adverse human rights impacts by business enterprises in conformity with the UNGPs.[49] For a NAP to be effective, the UN Working Group on Business and Human Rights suggests that four criteria are essential: (1) it must be founded on the UNGPs, (2) it must be context-specific and address the state's actual and potential adverse human rights impacts, (3) it must be developed in inclusive and transparent processes, and (4) it must be regularly reviewed and updated.[50]

Approximately twenty-three states have adopted NAPs, while many other states are in the development phase. As a general rule, these plans are statements of

47. Claes Cronstedt, Jan Eijsbouts & Robert C. Thompson, *supra* n. 43.
48. Diggs, Regan & Parance, *supra* n. 3, at 319 and following.
49. UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf (accessed 24 Oct. 2019).
50. *Ibid.* at 3.

government policy and therefore fall into the category of 'soft' law. However, in parallel with the development of NAPs, several states have enacted legislation that provides for mechanisms to establish legal duties for corporations to respect human rights. This domestic legislation is also included in the BHR Galaxy of Norms. Examples from three European states are discussed below.[51]

Two of these countries have legislated specifically on issues of modern slavery and child labour, part of the subject matter of the ILO core Conventions. Legislation in the third country was triggered by heated political controversy concerning the Rana Plaza building collapse, which raised the issue of workplace safety in the garment manufacturing industry.

[a] United Kingdom's NAP and Modern Slavery Act

The United Kingdom (UK) was the first state to launch a NAP on BHR in September 2013.[52] The UK NAP explicitly establishes the state's expectations of businesses with respect to human rights. Specifically, the UK NAP sets out key principles that UK companies should comply with, including: (1) treating the risk of causing or contributing to gross human rights abuses as a legal compliance issue; (2) adopting appropriate due diligence policies to identify, prevent, and mitigate human rights risks and committing to monitoring and evaluating implementation; (3) emphasizing the importance of behaviour in line with the UNGPs to their supply chains in the UK and overseas; (4) adopting or participating in grievance mechanisms which are transparent, equitable, and predictable to enable the remediation of any adverse human rights impacts they caused or contributed to; and (5) reporting on human rights issues and risks as appropriate and as part of their annual reports.[53]

51. While we have provided examples from three European states, it is important to note that initiatives focused on mandatory human rights due diligence are ongoing across Europe. Notably, in October 2019, civil society organizations across the European Union ("EU") called for EU-wide human rights and environmental due diligence legislation. In addition, a number of other European states are considering national legislation requiring human rights due diligence and/or mandatory human rights reporting. States currently considering this type of legislation include: Austria, Germany, Finland, Denmark, Switzerland, Sweden and Norway. In fact, Norway has developed draft legislation which includes obligations in respect of supply chain transparency, rights related to the provision of information on companies' human rights impact, and mandatory due diligence requirements.

    Based on these recent developments in Europe, it appears likely that legislatively-imposed obligations in respect of human rights will become far more common in the coming years.

    Business & Human Rights Resource Centre, *National movements for mandatory human rights due diligence in European countries*, https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries (accessed March 18, 2020).

52. National Action Plans on Business and Human Rights, *United Kingdom*, https://globalnaps.org/country/united-kingdom/ (accessed 7 Jul. 2019). The UK's plan, first published in 2013, was updated in 2016.

53. Secretary of State for Foreign and Commonwealth Affairs, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf (accessed 3 Jul. 2019).

In parallel, due to a sustained campaign of political pressure by UK civil society, the UK introduced the *Modern Slavery Act*, which came into force on 26 March 2015.[54] The *Modern Slavery Act* prohibits slavery, servitude, forced or compulsory labour, and human trafficking.[55] Businesses covered by the *Modern Slavery Act* are required to produce a 'slavery and human trafficking' statement for each financial year setting out what steps they have taken to ensure that slavery and human trafficking is not taking place in its business and supply chains. The *Modern Slavery Act* applies to businesses: (a) carrying on any part of its business in the UK, (b) supplying goods or services in any sector, and (c) with a global annual turnover of GBP 36 million.[56] The reporting requirements in the *Modern Slavery Act* were inspired partially by legislation adopted in California in 2010 and that came into force in 2012.[57]

[b] France's NAP and 'Duty of Vigilance' Law

France adopted a NAP in 2017[58] but started its consultation process as early as 2013. The French NAP sets out actions to be undertaken by the state to either encourage or require businesses to adhere to standards related to human rights. As part of its NAP, France stated that it would implement legislation requiring some larger businesses to disclose due diligence plans addressing subsidiary and subcontractor risks at each level of a supply chain.[59]

Following the Rana Plaza tragedy in 2013 and after an intense political debate, in February 2017, France enacted new legislation[60] that imposes a 'duty of vigilance'[61] on businesses with a substantial presence in France. Businesses covered by the legislation are required to establish and implement a 'vigilance plan'. The 'vigilance plan' should state the measures a business has taken to identify and prevent the occurrence of human rights and environmental risks resulting from its activities, the activities of the

54. Elise Groulx Diggs, Catherine Meredith & Vera Padberg, *The Modern Slavery Act 2015: corporate reporting requirements to tackle slavery in supply chains*, Doughty Street International, http://www.doughtystreetinternational.com/blog/modern-slavery-act-2015-corporate-reporting-requirements-tackle-slavery-supply-chains (accessed 21 Oct. 2019).
55. Modern Slavery Act 2015, c. 30 (26 Mar. 2015).
56. *Ibid.* at s. 54.
57. California Transparency in Supply Chains Act S.B. 657, 2010 Cal. Stat. 556 (1 Jan. 2012), codified at CAL. CIV. CODE §1714.43.
58. National Action Plans on Business and Human Rights, *France*, https://globalnaps.org/country/france/ (accessed 3 Jul. 2019).
59. Ministère des Affaires Étrangères et du Développement International, *National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights*, https://www.ohchr.org/Documents/Issues/Business/NationalPlans/NAP_Actions_France_EN.pdf (accessed 3 Jul. 2019).
60. Code De Commerce Art. L. 225-102-4 (27 Mar. 2017). The French law applies to the following companies: (a) companies headquartered in France that employ at least 5,000 employees in France, or at least 10,000 employees worldwide (including through direct and indirect subsidiaries); or (b) foreign companies headquartered outside of France, with French subsidiaries, if those subsidiaries employ at least 5,000 employees in France.
61. Beatrice Parance & Elise Groulx, *Regards croisés sur le devoir de vigilance et le duty of care [Comparative law analysis of the Duty of vigilance and the Duty of Care]*, 145 journal de droit international 21 (2018) (Fr.).

businesses it controls, and the activities of subcontractors and suppliers on whom it has significant influence. The plan must include the following: (a) a map that identifies, analyses, and ranks risks; (b) procedures to regularly assess the situation of subsidiaries, subcontractors, or suppliers with whom the business maintains an established commercial relationship; (c) appropriate action to mitigate risks or prevent serious violations; (d) a mechanism to alert a company of the existence or materialization of risks; and (e) a monitoring scheme to follow up on the measures implemented and assess their efficiency.[62]

Businesses have a 'duty of vigilance' to adopt and publish an effective plan of vigilance that has been developed using a sound process. The legislation provides that if businesses fail to fulfil their 'duty of vigilance', they can be held liable by courts for the damage that the execution of their obligations could have prevented.[63]

[c] Netherlands' NAP and Child Labour Law

In 2014, the Netherlands launched its NAP. In May 2019, the Dutch Senate adopted a 'Child Labour Due Diligence Law'.[64] The law, expected to come into force in 2022, applies to companies registered in the Netherlands and to any company that delivers its goods or services to the Dutch market twice or more a year. It requires that companies determine if there is a 'reasonable presumption' that the good or services produced in their supply chains have been produced with child labour. In making this determination, companies are referred to the 'Child Labour Guidance Tool for Business' published by the ILO and the International Organization of Employers. If investigation indicates a reasonable presumption that child labour is being used, a company is required to create an action plan to eliminate this practice that is consistent with international guidelines, such as the UNGPs or the OECD's MNE Guidelines.[65]

[2] Proposed UN Treaty on BHR

Since 2011, following endorsement of the UNGPs by the UN Human Rights Council, efforts have intensified at the international level to implement them. However, a group of states from the Global South, led by Ecuador and South Africa together with a number of NGOs, have criticized and challenged the voluntary nature of these efforts.

At the request of these states and to address their concern, the UN Human Rights Council established an intergovernmental working group in June 2014 with a mandate to 'elaborate an international legally binding instrument to regulate, in international

62. Diggs, Regan & Parance, *supra* n. 3, at 349.
63. Parance & Groulx, *supra* n. 60.
64. *Wet zorgplicht kinderarbeid*, 14 May 2019.
65. MVO Platform, *Update: Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law*, 3 Jun. 2019: https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/ (accessed 15 Sep. 2019).

human rights law, the activities of transnational corporations and other business enterprises'.[66]

In July 2019, the intergovernmental working group released a revised draft of a 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (hereinafter 'Revised Treaty').[67] The scope of the proposed treaty is broad, applying to violations of human rights in the context of business activities of a transnational character. The Revised Treaty clearly defines business activities of a transnational character as any business activity undertaken: (a) in more than one national jurisdiction or state; or (b) in one state through any contractual relationship, but a substantial part of its preparation, planning, direction, control, designing, processing, or manufacturing takes place in another state; or (c) in one state but has a substantial effect in another state.

The Revised Treaty clearly articulates that business enterprises are responsible for not only respecting human rights but also for preventing or mitigating any adverse human rights impacts that are directly linked to their operations, products, or services as a result of their business relationships, including contractual relationships. Under the Revised Treaty, a contractual relationship refers to any relationship between natural and legal persons to conduct business.

Under the Revised Treaty, states would be obliged to introduce domestic legislation similar to France's 'duty of vigilance' law and the Dutch 'Child Labour Law'. Specifically, states would be required to introduce domestic legislation requiring mandatory human rights due diligence for persons within their jurisdiction or control that carry on transnational business activities. Under this legislation, companies would be required to monitor, identify, assess, prevent, and report on actual or potential human rights and environmental impacts.

In addition, states would be required to ensure that businesses may be held criminally, civilly, or administratively liable under domestic law for violations of human rights undertaken in the context of business activities of a transnational character. Domestic legislation would have to provide for the liability of businesses for their failure to prevent a business enterprise with which they have a contractual relationship causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, regardless of where the activity takes place. Domestic legislation of this nature would essentially import the common law 'duty of care' into legislation that establishes criminal, civil, or administrative liability.

66. UN Human Rights Council, *A/HRC/RES/26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 2, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement (accessed 19 Jul. 2019).

67. OEIGWG Chairmanship, *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, revised draft 16.7.2019*, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (accessed 19 Jul. 2019).

The proposed treaty could have significant implications for businesses with transnational activities. However, negotiations are ongoing, and it remains unclear, whether, when, and in what form a legally binding instrument may be adopted.

The rule-making process that emerges from the implementation of treaties is a good example of the circular movement described in the BHR Galaxy. Treaties are part of soft law in the sense that they usually are not directly enforceable between private parties as a legal matter, but the soft law turns into hard law as states incorporate in their domestic law the obligations they have contracted when they ratify treaties.

[3] Recent Court Decisions

In recent years, domestic courts in a number of states have been asked to determine the appropriate forum for disputes involving alleged international human rights violations with respect to labour standards. The primary question the courts have been asked to consider is whether an MNE's home jurisdiction – i.e., where the MNE is domiciled or headquartered – is the appropriate forum for the adjudication of claims that are alleged to have occurred at the MNE's foreign operations. In addition, courts in the state where a parent business is domiciled or headquartered have been asked to determine whether to impose liability on the parent business for the alleged actions of subsidiaries or contractors that occurred in a different state. A few examples of the recent domestic court cases involving issues of international BHR with respect to labour standards follow.

In 2016, a regional court in Dortmund, Germany, accepted jurisdiction to hear the claims of four Pakistani-based plaintiffs against German retailer, KiK. In addition, the German court granted legal aid to the plaintiffs. The claims related to a 2012 fire in Pakistan's Ali Enterprises Textile Factory that killed more than 250 people. KiK was the factory's main customer. The plaintiffs argued that because KiK demanded that its Pakistani suppliers adhere to a Code of Conduct that it had established on workplace safety, it had a legal obligation to supervise the suppliers' compliance with the Code of Conduct. The plaintiffs sought compensation directly from KiK, arguing that KiK contributed to the incident by failing to enforce workplace laws and safety standards and that KiK should bear the legal responsibility for the fire safety deficiencies in the factory. In January 2019, the German court dismissed the case on the basis that, under Pakistani law, the statute of limitations for the victims' right to compensation had expired. As a result, the question of whether KiK was liable for the fire was not directly answered.[68]

However, in a process unrelated to the lawsuit initiated against it in Dortmund, Germany, KiK agreed to pay a total of USD 5.15 million to the affected families and survivors following a negotiation facilitated by the ILO. In January 2018, it was announced that, as part of an agreement facilitated by the ILO, families of the victims would receive a monthly pension from the amounts provided by KiK. In May 2018, the

68. Business & Human Rights Resource Centre, *KiK lawsuit (re Pakistan)*, https://www.business-humanrights.org/en/kik-lawsuit-re-pakistan (accessed 9 Sep. 2019).

families of 209 victims of the Ali Enterprises Textile Factory incident began receiving long-term compensation provided by KiK.[69]

Canadian courts have experienced a growing number of claims related to alleged international human rights violations. While none of the Canadian cases have been determined on the merits, the reviewing courts have confirmed that, in some cases, Canadian courts may have jurisdiction to hear and determine claims that arise from alleged violations of internationally recognized human rights and labour standards outside of Canada.

In April 2015, a CAD 2-billion class action against George Weston Ltd. and its subsidiaries (hereinafter 'Loblaws') was filed in Ontario by surviving garment factory workers and the families of deceased workers of the 2013 Rana Plaza factory collapse in Bangladesh. The plaintiffs in *Das v. George Weston Limited*[70] alleged that Loblaws knew of the 'deplorable history of factory disasters in Bangladesh' and voluntarily undertook the responsibility of ensuring that the buildings in which its garments were manufactured were safe and structurally sound. The plaintiffs additionally alleged that Loblaws was careless and in breach of its own corporate standards and international standards when it failed to ensure that prior audits were sufficient to address the particular safety concerns that prevailed at the relevant time in Bangladesh.

In 2018, the Ontario Court of Appeal upheld the lower court decision which found that the plaintiffs had failed to meet the requirements of a cause of action in negligence, in part due to the fact that the workers in the Rana Plaza factory were not employees of Loblaws. The Ontario Court of Appeal also found that there was no reasonable cause of action, in part because Loblaws had no direct control over the local manufacturers. The plaintiffs sought to appeal to the Supreme Court of Canada in August 2019 but it declined to hear the matter.

An action similar to the one brought against Loblaws in Ontario was brought against J.C. Penney, The Children's Place, and Walmart in the Superior Court of the State of Delaware.[71] In July 2015, victims of the Rana Plaza factory collapse filed complaints against the three companies for negligence and wrongful death. The plaintiffs alleged that the three defendant companies acted negligently in failing to ensure safe and healthy working conditions for garment factory employees at Rana Plaza.

The plaintiffs argued that the law of Delaware should apply to the claims of negligence and wrongful death. The Delaware court disagreed and held that Bangladeshi law would apply. In reaching the decision that Bangladeshi law would apply, the court noted that the injury occurred in Bangladesh, the conduct causing the injury occurred in Bangladesh, and the relationship between the parties was centred in Bangladesh. The only factor that even slightly pointed to the application of Delaware law was the defendant's place of incorporation. As a result of the one-year limitation period under Bangladeshi law, the actions were time-barred.

69. *Ibid.*
70. 2017 ONSC 4129.
71. *Rahaman v. J.C. Penny Corp.*, C.A. No. N15C-07-174 MMJ (Del. Super. Ct. 4 May 2016).

With respect to the plaintiffs' claims that the three defendant companies owed them a duty of care, the parties agreed that Delaware law governed the dispute. The Delaware court found that the plaintiffs failed to establish a prima facie case of negligence and wrongful death in part on the basis that the three defendant companies: (1) were not the plaintiffs' direct employer, (2) did not have a 'special relationship' with the plaintiffs, and (3) did not sanction illegal conduct. As a result, the court granted the defendants' request to dismiss the action.

In 2017, the British Columbia Court of Appeal upheld a lower court decision that a lawsuit against Canadian mining company Nevsun Resources could proceed in Canada.[72] The plaintiffs allege that, through a chain of subsidiaries, Nevsun Resources entered into a commercial venture with the government of Eritrea for the development of a gold, copper, and zinc mine in Eritrea. The plaintiffs allege that Nevsun Resources engaged the Eritrean military and was complicit in the use of forced labour at the mine. The plaintiffs claim to have fallen victim to forced labour, slavery, torture, cruel, inhumane or degrading treatment and crimes against humanity. Notably, the plaintiffs are claiming that Nevsun Resources breached principles of international law and seek damages based on customary international law. The British Columbia Court of Appeal determined that the plaintiffs' claims based on customary international law raise arguable, difficult, and important points of law and should proceed to trial so that they can be considered in their proper legal context. Nevsun Resources appealed to the Supreme Court of Canada.

The Supreme Court of Canada dismissed Nevsun's appeal in February 2020.[73] Importantly, it stated that the "act of state doctrine" - which provides that domestic courts do not have jurisdiction to adjudicate upon the lawfulness of the sovereign acts of a foreign state - has no application in Canada.

In addition, the Supreme Court held that customary international law is automatically adopted into Canada's domestic law without any need for legislative action. It stated that customary international law must be treated with the same respect as any other domestic law.

The Supreme Court ultimately held that it was not "plain and obvious" that Canada's domestic law cannot recognize a direct remedy for a breach of customary international law. Rather, it stated that a compelling argument can be made that because customary international law forms part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied. In fact, appropriately remedying these violations may require different and stronger responses than typical domestic tort claims.

The Supreme Court allowed the Eritrean workers' claims based on customary international law to proceed in the lower courts.

In *Garcia v. Tahoe Resources Inc.*,[74] the British Columbia Supreme Court declined jurisdiction to hear the case of seven Guatemalan farmers who brought a claim of negligence and battery for injuries they allege to have suffered at the hands of security

72. *Araya v. Nevsun Resources*, 2017 BCCA 401.
73. *Araya v. Nevsun Resources*, 2020 SCC 5.
74. 2015 BCSC 2045.

personnel hired by Tahoe Resources. However, the British Columbia Court of Appeal overturned the decision, finding that three factors weighed against Guatemala being a suitable jurisdiction for the hearing of the civil suit: (1) the difficulties that the plaintiffs would face due to limited discovery procedures in Guatemalan courts; (2) the fact that the one-year limitation period for bringing a civil suit in Guatemala had long expired and the lack of clarity on whether the plaintiffs would be permitted to bring their claim in Guatemala; and (3) the risk that the plaintiffs would not receive a fair trial of the issues in Guatemala against 'a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state'.

Tahoe Resources' subsequent application for leave to appeal was dismissed by the Supreme Court of Canada,[75] potentially affording significant precedential value to the decision of the British Columbia Court of Appeal. This opened the door for the plaintiffs to pursue their claims in British Columbia. However, on 30 July 2019, Pan American Silver Corporation, which recently purchased Tahoe Resources, announced that it reached a confidential settlement with the plaintiffs out-of-court. In a news release, the corporation offered an apology to the victims and acknowledged that the incident infringed the farmers' human rights.[76]

A key issue in many of these court cases, as well as in debates relating to human rights due diligence required by the UNGPs, is the legal doctrine of 'duty of care'. Essentially, this doctrine in common law countries imposes a legal responsibility on corporations to identify and minimize (or prevent) foreseeable harms from business operations. This doctrine has been confirmed to apply, in appropriate factual circumstances, to parent companies whose overseas subsidiaries are alleged to have been involved in violations of human rights and labour rights: *see* recent court decisions in the UK and the US. The duty on companies to undertake due diligence to identify and prevent violations is reflected in legislation on child labour in the Netherlands and the 'duty of vigilance' in France. The duty of care and the duty of vigilance both occupy Ring 3 of the BHR Galaxy in setting up a norm of behaviour, but the 'Duty of Vigilance' legislation also occupies Ring 1 in creating hard law obligations enforceable by courts.

§21.05 CONCLUSION

As is evident from the catalogue of initiatives above, there is a significant push towards creating a new set of institutions, instruments, and principles that seek to establish new labour and human rights standards and enforcement mechanics both within and across state boundaries. The wide range of activities related to the regulation of business enterprises, with respect to labour and human rights standards,[77] has significant

75. 2017 CarswellBC 1553.
76. Pan American Silver, *Pan American Silver Announces Resolution of Garcia v. Tahoe Case*, https://www.panamericansilver.com/news/news-releases/detail/84/2019-07-30-pan-american-silver-announces-resolution-of-garcia-v-tahoe-case (accessed 9 Sep. 2019).
77. In the April 2019 decision, *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors.*, [2019] UKSC 20, the UK Supreme Court determined that a claim by Zambian villagers against UK-based mining company Vedanta and its Zambian subsidiary Konkola Copper Mines (KCM) can proceed to trial in the UK courts. Residents of a Zambian village brought proceedings

implications for both workers and businesses. While the voluntary adoption of labour and human rights standards and self-regulation of compliance with those standards was previously the norm, there is a recent trend towards codifying labour and human rights standards in legally enforceable or 'hard' law mechanisms, including commercial contracts, as well as, state and international laws. While the transition from 'soft' to 'hard' law mechanisms primarily occurred in labour-intensive industries over the past few decades, it has become significantly more pronounced in the corporate/financial sector in recent years.[78] It is clear that this trend towards mandatory human rights obligations will impact significantly more industries and businesses in the years to come.

This evolution towards legally binding and enforceable standards, and the merging of 'hard' and 'soft' law, may significantly increase the potential liability of business enterprises for direct and indirect violations of internationally recognized labour and human rights standards.

The UNGPs and recent developments in the field of BHR have given new strength to the ILO's core labour Conventions by embedding them in a broader set of human rights guidelines developed by the UN, the OECD, and other international organizations. There is also an emerging trend where soft law is gradually merging with hard

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in the UK courts against both Vedanta and KCM, claiming that waste discharged from a copper mine owned and operated by KCM had polluted local waterways, causing personal injury, damage to property, and other damages.

The UK Supreme Court was also asked to consider whether there was a triable issue against parent company Vedanta. Did Vedanta owe a duty of care to the third parties allegedly injured as a result of the waste discharge by the subsidiary, KCM? The UK Supreme Court upheld the lower court's decision that there was a real issue to be determined on this question. This would depend in the circumstances on assessing whether Vedanta had sufficiently intervened in the management of the mine owned by KCM such that it assumed a duty of care to the claimant villagers. Some of the relevant facts in this case included that Vedanta: (1) had published a sustainability report which emphasized how its board of directors had oversight over subsidiaries; (2) provided health, safety, and environmental training to its subsidiaries; (3) published various public statements emphasizing its commitment to addressing environmental risks; and (4) exercised some control over KCM.

78. For example, in January 2020, the Dutch National Contact Point under the OECD Guidelines has declared admissible a complaint filed by Friends of the Earth groups in the Netherlands, Liberia and Indonesia against ING bank regarding human rights and environmental abuses at palm oil plantations run by companies financed by ING Groep NV. The parties claim that the Dutch lender continued to finance firms in the palm oil industry even after they alerted ING of potential human rights and environmental abuses. The case represents one of the first times that a National Contact Point is being asked to consider whether a financial actor has "contributed to" abuses at palm oil plantations that it finances but does not directly control. The case will likely consider the October 2019 guidance developed by the OECD on Due Diligence for Responsible Corporate Lending and Securities Underwriting. This document confirms that financial institutions can contribute to harms through general corporate lending practices and provides guidance for harm avoidance.

ING, ING to enter NCP-facilitated dialogue with NGOs on palm oil, https://www.ing.com/Newsroom/News/ING-to-enter-NCP-facilitated-dialogue-with-NGOs-on-palm-oil.htm (accessed March 19, 2020).

Organisation for Economic Cooperation and Development, Due Diligence for Responsible Corporate Lending and Securities Underwriting, https://mneguidelines.oecd.org/Due-Diligence-for-Responsible-Corporate-Lending-and-Securities-Underwriting.pdf (accessed March 19, 2020).

law in all kinds of ways as outlined, in a broader set of voluntary or non-voluntary human rights mechanisms at all levels of governance, in the BHR Galaxy. Examples can be found in the decisions of courts in the UK and Canada which have accepted the possibility of a duty of care of parent corporations towards third parties suffering injury as a result of acts or omissions of their subsidiaries, in cases involving infringements of human rights.

It behoves all businesses, domestic and international, to take careful note of the emerging trajectory within the BHR paradigm. The BHR Galaxy, as it continues to grow and evolve, will provide an important tool to enable a better understanding and anticipation of legal risks and hence influence positively how business respects human rights in the coming years.

BHR Galaxy - 2019