

Comparing National Action Plans implementing the UN Guiding Principles on Business and Human Rights: Comparison of European countries and the United States of America

Niebank, Jan-Christian

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Analysis

Comparing National Action Plans implementing the UN Guiding Principles on Business and Human Rights

Comparison of European countries and the United
States of America

Jan-Christian Niebank

The German Institute for Human Rights

The German Institute for Human Rights is the independent National Human Rights Institution of Germany. It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organizations. It is financed by the German Federal Parliament (Deutscher Bundestag). In addition, the Institute is specifically mandated to monitor the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established Monitoring Bodies for these purposes.

Author

Jan-Christian Niebank is a researcher and policy adviser in the international department of the German Institute for Human Rights. His main areas of expertise include the State duty to protect against human rights abuses by companies, the corporate responsibility to respect human rights and the need for greater access to effective remedy for rights-holders. Most recently he worked intensively on coal mining in Colombia, the garment sector in Asia and land rights in Côte d'Ivoire, with corresponding research stays on site.

This analysis reflects the views of the German Institute for Human Rights.



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Contents

Summary	7
<hr/>	
1 Introduction	8
<hr/>	
2 Development of the Action Plan	9
<hr/>	
2.1 Coordination within the government	9
2.2 Participation of all stakeholders	9
2.3 National Baseline Assessment	11
2.4 Transparency	11
3 UNGP-conformity of content	13
<hr/>	
3.1 Focus and weighting of the three pillars	13
3.2 Specific measures with a clear timeframe and responsibilities	14
3.3 Smart mix of voluntary and binding measures	15
3.4 Domestic and extraterritorial dimension	17
3.5 Political coherence/ state-business nexus	18
3.6 Prioritisations	20
3.6.1 Conflict areas	21
3.6.2 Marginalised and particularly vulnerable groups	22
3.7 Effectiveness of remedy	23
3.8 Support for companies	24
4 Implementation	27
<hr/>	
4.1 Monitoring and reporting/follow-up	27

4.2	Timeframe and assessment of implementation progress	28
5	Conclusion	30
<hr/>		
5.1	General trends	30
5.2	Conclusions for new and updated NAPs	31
6	Bibliography	33
<hr/>		
	Annex: National Action Plans analysed	34
<hr/>		

Summary

The analysis compares the National Action Plans (NAPs) of several European countries and the United States of America. The NAPs' development process, the conformity of their contents with the UN Guiding Principles on Business and Human Rights (UNGPs) and the structures for implementing the plans are compared and, as far as possible, the German efforts to implement the UNGPs

are classified and evaluated. The comparison identifies numerous weaknesses, but also examples of successful implementation in the countries examined. A number of general trends can be observed across countries from which lessons learned can be drawn for new and further developments of NAPs.

1 Introduction

Companies often do not sufficiently fulfil their responsibility to respect human rights in global supply and value chains. When their activities have adverse impacts on human rights, rights-holders lack the means to effectively enforce their rights and obtain access to remedy. So far, states have not provided sufficient protection for rights-holders against human rights abuses by corporate activities.

With its Resolution 17/4 of 16 June 2011, the Human Rights Council of the United Nations adopted the Guiding Principles for Business and Human Rights (UNGPs).¹ The aim of the UNGPs is to improve standards and practices relating to business and human rights in such a way as to achieve tangible results for affected individuals and local communities. To date, 24 countries worldwide, most of them in Europe, have adopted National Action Plans (NAPs) to implement the UNGPs;² the German government presented its NAP in December 2016.³

The aim of the following analysis is to identify general trends, strong and innovative NAP practices as well as negative examples. For this purpose, 18 European NAPs and the NAP of the USA are considered.⁴ The latter was included due to the importance of US companies in global supply and value chains. For selected aspects in the categories 1) development process, 2) content and 3) implementation, first the target is presented: what are the requirements for measuring NAPs in this area? What is the expectation of a good NAP? Then the current situation is examined: what are the overall findings? Which NAP illustrates these findings? Which NAP stands out positively or negatively?

The conclusion summarises trends that can be observed across countries. In addition, important lessons learned for new and further developments of NAPs are presented.

1 The German translation is available on the website of the Global Compact Network Germany: https://www.globalcompact.de/wAssets/docs/Menschenrechte/Publikationen/leitprinzipien_fuer_wirtschaft_und_menschenrechte.pdf (accessed 6 November 2019)

2 All NAPs submitted worldwide so far can be downloaded here: <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed 6 November 2019); <https://globalnaps.org/> (accessed 6 November 2019);

3 The German NAP is available on the website of the Federal Foreign Office: <https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte> (accessed 6 November 2019)

4 Cf. Annex: National Action Plans examined

2 Development of the Action Plan

2.1 Coordination within the government

Target: As soon as a government (or the lead ministry) has made a formal commitment to launch an NAP process, a framework should be set up for coordination and regular communication between the relevant government agencies. One option is to set up a formal interministerial working group where work on developing the NAP is performed. One or several government agencies should be selected to lead the process. The leading agency should be mandated *inter alia* to coordinate cooperation within the government and with non-governmental stakeholders and to be responsible for the drafting process.⁵

Current situation: With the exception of **Finland** (Ministry of Economic Affairs and Employment) and **Georgia** (Office of the Prime Minister), it was the foreign ministries who were responsible for developing all NAPs submitted thus far - either alone (**Ireland, Italy, the Netherlands, Poland, Spain, Sweden**) or together with one or several other ministries. In **France**, the Special Representative for Corporate Social Responsibility (CSR) based in the Foreign Ministry headed the process. In **Belgium**, the Foreign Ministry and the Ministry of Energy, Environment and Sustainable Development led the process jointly and in **Denmark, Switzerland** and the **UK**, the foreign and economics ministries shared responsibility. In the **Czech Republic**, the Foreign Ministry and the Human Rights Ministry had the lead in the development phase. In **Lithuania**, responsibility was shared between the Economics, Justice, Labour and Foreign Ministries.

Furthermore, in almost all countries examined, interministerial coordination bodies were set up (with the exception of **Spain**), although these varied in size.

In **Germany**, the Federal Foreign Office was the lead ministry for the NAP but was assisted by the Federal Ministry of Labour and Social Affairs, the Federal Ministry of Economic Cooperation and Development, the Federal Ministry of Justice and Consumer Protection, the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety and the Federal Ministry for Economic Affairs and Energy. These six ministries formed a steering group together with stakeholders from German business associations, trade unions and non-governmental organisations. The German Institute for Human Rights and econsense, the Forum for Sustainable Development of German Business, were advisory members.

2.2 Participation of all stakeholders

Target: From beginning to end, the process to draw up the NAPs should be a participatory one, that is, one that facilitates ownership of and participation in decisions and opinion-forming processes. For a rights-compatible approach, it is crucial to take account of the views and needs of affected individuals and groups. The legitimacy and effectiveness of the process ultimately depends on the level of involvement of relevant stakeholders. They feed in comprehensive knowledge about the challenges and potentially effective solutions to enable the state to perform its duty to protect. National Human Rights Institutions (NHRI), business representatives, trade unions, civil society organisations as well as representatives of population groups who could be particularly vulnerable and affected, such as children, women, indigenous populations, ethnic minorities and persons with disabilities, ought to participate. To ensure such participation,

⁵ UNWG (2016), p. 6.

dialogue opportunities should be created through which non-state actors can be consulted and due account be taken of their views and needs.⁶ Possible formats include workshops, online consultations, public hearings, targeted interviews or written opinions. Based on the results of these consultations, government actors involved in the NAP process should jointly identify priority areas to be dealt with in the NAP.⁷ As soon as a draft NAP has been drawn up, it should be discussed with the relevant stakeholders. An efficient way of doing this can be to invite written comments on the draft. Where possible, persons affected by company-related human rights abuses or actors who legitimately present their concerns ought to be able to participate in this process.⁸

Current situation: Participation was possible in the development phase of all NAPs but the degree of participation differed greatly from country to country. Stakeholder consultations of various degrees were held in all of the countries examined. What is striking is the neglect of disadvantaged and particularly vulnerable rights-holders throughout the consultations. In hardly any of the NAP processes examined did such persons or groups participate directly or there were no public sources indicating their participation.

Meetings with various stakeholder groups were held using in part existing multi-stakeholder advisory forums (**Denmark**). In the **Netherlands**, an external advisor in addition conducted detailed interviews with businesses, civil society, academia and governmental implementing agencies based on stakeholder-mapping.⁹ In the case of the **US** NAP, the lack of participation of particularly disadvantaged and vulnerable groups was lamented as was the fact that no multi-stakeholder steering group or similar advisory forum was set up.¹⁰

There were particularly stark differences when it came to the level of participation after the NAPs

were drafted. **Denmark** and **Italy** only sent their drafts to some selected stakeholders. According to de Felice et al. (2015), these did however include human rights NGOs. By way of comparison, **Sweden** and **Finland**, on the other hand, uploaded their NAP drafts onto their government websites where people were invited to comment. The governments of **Finland**, **Spain** and **Switzerland** asked stakeholders in writing for feedback on their draft NAPs. In the **UK** and the **Netherlands**, the drafts were not available to the public until the official NAPs were published.¹¹

In **Germany**, the NAP was developed in two phases: a consultation phase and a drafting phase. Following a conference to launch the process attended by business representatives, trade unionists, policymakers, the administration, members of civil society and academics, the German Institute for Human Rights drew up a National Baseline Assessment (cf. 2.3 of the analysis) to show the status of implementation of the UNGPs in Germany and what remains to be done to complete implementation. The findings of the report were discussed at a plenary meeting and key action areas identified. Consultations with experts were then held for each of these twelve action areas. The findings from the consultations fed into a further plenary meeting at the end of 2015, thus concluding the consultation phase. All in all, the process for drafting and subsequent coordination between the other ministries took six months longer than originally envisaged. After the Action Plan had been drawn up, a phase of several weeks in which members of the steering group and the general public could comment had originally been planned. As it took longer than expected to produce the draft, there was then not enough time for the phase inviting comments in late 2016. Following a process lasting around two years, the Cabinet adopted the National Action Plan for Business and Human Rights on 21 December 2016. Persons affected by human rights abuses along

6 Ibid. (2016), p. 4

7 Ibid. (2016), p. 8

8 Ibid. (2016), p. 5

9 Felice et al. p. 56

10 ICAR (2017), p. 38, 39.

11 Felice et al. p. 56

supply and value chains of German companies, or their direct representatives, had with one exception¹² no opportunity to participate directly.

2.3 National Baseline Assessment

Target: Based on an initial mapping of the country-specific priorities, shortfalls on implementing the UNGPs both by the state and by companies should be examined (National Baseline Assessment, NBA). The government should sketch out the various laws, regulations and policies that it had introduced in pillars I and III of the UNGPs (UNGPs 1-10, 25-28, 30 and 31) and subsequently identify gaps in the protection regime. The same is true for companies active or domiciled in the territory of the country and their contributions relating to the UNGPs in pillars II and III (UNGPs 11-24 and 28-31). This also includes assessing the extent to which companies are exercising due diligence in the field of human rights and creating grievance mechanisms to ensure effective remedy at operational level. The United Nations Working Group on Business and Human Rights (UNWG) recommends following the methodology of the Baseline Assessment Template of the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR).¹³ As part of this assessment, relevant stakeholders should be invited to participate and make contributions. To ensure the assessment provides comprehensive information as a basis for the further development of the NAP, the UNWG encourages governments to consider cooperating with their NHRI or other independent external experts. The government should make the findings of the assessment available to the public.

Current situation: Most countries failed to produce an NBA at the start of the NAP process. These include the **UK** (NAPs 2013 and 2016),

Denmark, Finland, Sweden, Switzerland, France and Poland.

In **Norway**, the **Czech Republic, Italy and Georgia**, an NBA was drawn up. Other states carried out preliminary studies on relevant laws and directives, for example, in the form of internal (that is unpublished) mappings (the **Netherlands**), a background memo (**Finland**) or a “stocktake” (**United States**). None of these documents met the standards of a comprehensive NBA. It is in part not clear whether the NBA level was reached, for example, regarding the gap analysis in the case of **Belgium**.

In **Germany**, the German Institute for Human Rights was commissioned to produce the NBA. When drawing up the National Baseline Assessment, it used the methodology recommended by the UNWG, ICAR and the DIHR and interviewed the stakeholders involved about issues important to them which should be dealt with in the subsequent stages of the process. Most stakeholders welcomed the National Baseline Assessment as a good starting point. German business associations however wanted a more comprehensive depiction of what German companies are already doing in this field and criticised the large number of issues to be examined collated in the study.

2.4 Transparency

Target: : Government agencies should draw up a workplan. As soon as all competent government agencies have given their consent, the plan should be published and circulated amongst relevant non-governmental stakeholders. The plan should be updated regularly throughout the process and those involved should be notified of changes to the plan.¹⁴ The government should also regularly share information and findings of analyses and consultations with all relevant stakeholders. The

12 In hearing 9 on the promotion of foreign trade and investment and human rights taking the example of export credit guarantees, investment guarantees and guarantees for untied loans, a Colombian human rights defender (Movimiento Rios Vivos) took the floor. <https://www.auswaertiges-amt.de/blob/273848/d34556a405554fcb386e441ecdc05d5f/expertenanhoerung9a-data.pdf> (accessed 6 November 2019)

13 UNWG (2016), p. 7-8

14 Ibid., p. 6

scope for stakeholder involvement, for example, commenting on drafts, should be clear.¹⁵

Current situation: In terms of the NAP consultation processes, the level of transparency varied. In many NAP processes, transparency was lacking, which had a negative influence on the level of participation. The **Spanish** NAP is a positive example as the Foreign Ministry published a workplan at the beginning of the process and updated it regularly. In the case of the **Italian** NAP process, ICAR noted that the process would have benefited from greater transparency; the Italian government published neither a budget, nor terms of reference nor the timeframe for the NAP process. ICAR draws similar conclusions for **Switzerland**. In the **Danish** NAP process, transparency suffered most due to shifting deadlines which were often

not communicated, but also due to the fact that concrete timeframes for possible consultations were not disclosed and/or only little information about the internal debates was available. The **US** NAP lacked transparency in the drafting, revising and publication stages due to the timeframe not being made public.¹⁶

In **Germany**, the Federal Foreign Office published a process proposal presenting scope for stakeholder participation and a timeframe.¹⁷ However, the process for drafting and subsequent coordination with the other ministries took a total of six months longer than originally envisaged. Those who had participated in the consultation phase were not aware of how the findings of the consultations or the input from the plenary meetings were to feed into the ongoing process.

¹⁵ Ibid., p. 4.

¹⁶ Felice et al. p. 57, ICAR (2017), p. 38.

¹⁷ <https://www.auswaertiges-amt.de/blob/267104/9d5643b6e8a292a1ad22c10c8baf62eb/141106-ausgestaltungnapwimr-data.pdf> (accessed 6 November 2019)

3 UNGP-conformity of content

3.1 Focus and weighting of the three pillars

Target: The UN Guiding Principles are made up of three pillars and 31 principles. The first pillar highlights the responsibility of the state under international law to protect and implement human rights. States have a duty to protect all people living on their territory and should express the clear expectation that their companies also respect human rights abroad.¹⁸ The second pillar outlines the independent responsibility of companies. Through due diligence, they are to ensure that human rights are respected in all their activities. A distinction is to be made here between human rights due diligence and Corporate Social Responsibility (CSR). For the former, the focus is on dealing with the human rights risks and impacts that a company produces or to which it is connected through its business relations rather than on unrelated voluntary activities to support and promote human rights. The third pillar puts the spotlight on those affected and their right to remedy. The state and companies need to set up grievance mechanisms which those affected can use and which guarantee adequate compensation in the event of loss or damage.

Current situation: All NAPs refer to the UNGPs as the authoritative document they are based on, and adopt the pillar structure. The NAPs that have been submitted do not focus on the three pillars of the UNGPs in equal measure. The weighting indicates where the state sees a need for action and spheres of influence for improved human rights protection. All NAPs contain clarification of the expectation of the government that companies

respect human rights (based on the UNGPs 11-24 and 28-31). However, not all spheres of the UNGPs are dealt with in equal depth. Neglect of the third pillar is particularly striking.

There are many different approaches in terms of structure. The **United States** presented its results in a table, **France** and **Poland** used longer narrative formats, **Denmark** used bullet-points, while other countries such as **Switzerland** used formats combining text and tables. The **Danish** NAP also included a “principle-for-principle approach” in annexes 1 and 2 showing the previous, current and in the case of pillars I and III a small number of future steps relevant for the implementation of the respective UNGP. Many NAPs outline the background and the context of the NAP. Often there is a brief introduction to the UNGPs and some clarification on how the NAP is related to the government’s other political strategies, such as national development plans, CSR strategies, NAPs on human rights in the broader sense or strategies on specific topics.

While the **German** NAP does not follow the UNGPs principle for principle, its structure is clearly aligned to the three-pillar principle. Based on pillar II of the UNGPs, it describes initially the expectations of the Federal Government when it comes to corporate diligence. The depiction of the requirements set out in the UNGPs is however in part incomplete. It lacks, for example, the responsibility of companies to remedy adverse impacts they cause or to which they contribute by reversing damage done and compensating those affected (UNGPs 15 and 22). The fact that financial services as opposed to other banks or insurance companies are excluded from due diligence

18 Extraterritorial obligations arise when a State Party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or jurisdiction. Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, para. 28.

runs contrary to the UNGPs. In the fields of action listed thereafter, the state duty to protect (pillar I) and access to remedy (pillar III) are addressed.

3.2 Specific measures with a clear timeframe and responsibilities

Target: Governments should ensure that their actions are specific, measurable and realistic. For each planned activity outlined in the NAP, the government should clarify (1) the specific aim, (2) the steps to be taken, (3) clear delineation of responsibilities of the relevant agencies, (4) a timeframe to implement the steps and (5) indicators to assess implementation and impact.¹⁹

Current situation: All NAPs submitted thus far focus too much on describing steps taken, although in particular some of the more recent NAPs contain more commitments to future steps, for example, the NAPs submitted by **Italy** and **Norway**. Where future steps are formulated, these are however often too vague, lack a timeframe and contain unclear responsibilities and no information on concrete steps planned by the state. This makes it incredibly difficult for those involved to adequately monitor whether the state has implemented steps to which it had committed in the NAP framework.²⁰

The NAP submitted by the **Netherlands** is largely a review document with very little in the way of forward-looking statements which themselves are very vague. The **Danish** NAP also contains few future-oriented steps. Of the 50 commitments or political instruments presented in the **Swiss** NAP, only very few are in fact new steps. The first NAP presented by the **UK** (2013) is particularly vague. In **Lithuania's** NAP, it remains in part unclear whether the actions outlined are past, present or future steps. In contrast, the second NAP presented by the **UK** (2016) differentiates clearly.

When it comes to the action points laid out in the **US** NAP, information on the timeframe for implementation is largely lacking. One positive aspect of the US NAP is however that it makes plain what department or authority is responsible for the implementation of individual action points. The implementing department or agency is indicated in a separate column of the NAP. The **Italian** NAP names the leading implementing agency for each political instrument in an annex. Steps outlined in the **Finnish** NAP also do contain at least clear responsibilities and deadlines, even if the steps are otherwise often vague. Also in the **Swiss** NAP, responsibilities are at least clear. The **Swedish** NAP lacks timeframes (one of the 27 measures contains an indication of the timescale); responsibilities and many steps are vague. The situation is similar in the **British** NAP (2016): none of the 16 government commitments in the NAP expressly indicate what government agency or department is to be mandated with implementation. Similarly, none of the commitments include a timeframe within which they have to be fulfilled.²¹

The **Norwegian** NAP contains various forward-looking steps in the fields of trade, conflict areas, corruption, security, indigenous rights, responsible investment, resource extraction and public procurement. However, there is lack of detail, quantifiable targets, success criteria and of a set timeframe. Most of the steps involve the government committing to vague activities such as “improving”, “strengthening” or “continuing”.

The steps in the **German** NAP also reveal the deficits reflected in all countries. The document does not detail direct responsibilities, while specific timeframes are almost always lacking. Instead, the interministerial committee only systematically assigned responsibilities to the relevant lead ministries at a later point in the form of an implementation catalogue. In many cases, issues to be examined are merely identified (business monitoring, subsidies, instruments for cooperation with the business sector in the field of development policy, introduction of a

¹⁹ UNWG (2016), p. 12.

²⁰ ICAR (2017), p. 5.

²¹ ICAR (2017), p. 215

certification mark). With the systematic use of the sections “current situation” and “measures”, the German NAP succeeds in differentiating clearly between the present situation and steps to be taken in the future.

3.3 Smart mix of voluntary and binding measures

Target: The UNGPs make plain that states have a range of legal, political and economic instruments at their disposal in order to guarantee that businesses respect human rights. States should not presume that businesses always prefer or benefit from inaction on the part of the state. States should instead use a wide range of national and international, binding and voluntary steps to promote the respect of human rights by businesses. The choice of measures is limited by the principles of effectiveness and proportionality: should voluntary measures prove insufficient to effectively protect rights-holders, states must, as part of their duty to protect human rights, close the regulatory gaps or deficits by means of legally binding measures to guarantee the respect of human rights by companies. The principles underpinning the state’s duty to protect can therefore necessitate on the one hand sanctions based on legal requirements and on the other incentives, for example, through advisory support and capacity-building.

Current situation: None of the NAPs meet the requirements here. On the contrary, the most significant deficit of all the NAPs submitted is that they do not sufficiently explore regulatory options in order to guarantee appropriate protection of human rights and access to remedial measures. None of the NAPs adopted thus far contain the commitment to introduce statutory human rights due diligence. Instead, reference is merely made to existing laws. Most of the action points contained in the NAPs assessed focus primarily on incentives, awareness-raising measures, training, research and other voluntary steps, while not enough attention is paid to binding steps.

Italy is considering extending certification as well as training for businesses and government agencies (in the field of public financing and lending). **Spain** also proposes soft law instruments: expectations are to be clearly communicated to businesses, awareness-raising and training programmes launched, corporate codes of conduct promoted and business networks set up. In the **Swedish** NAP, two of the 27 measures are aimed at legal regulation of business activities. These however merely involve EU directives to be implemented in any case. The remaining steps are in the fields of training, awareness-raising and support for the Human Rights Reporting and Assurance Frameworks Initiative (RAFI). In pillar II, the **Danish** NAP relies entirely on guidelines and advisory services, as well as corporate self-regulation. The **US** NAP also serves as a prime example of the reluctance to initiate binding measures. It focuses largely on supporting voluntary measures and dialogue formats, as well as on making available guidelines, PR work and financing for initiatives on corporate governance.

Often, issues to be examined are merely identified. For example, the NAP by the **Netherlands** plans to examine whether existing regulations on human rights due diligence by companies are compatible with the UNGPs. The Finnish NAP also postpones the decision on whether legislative steps are necessary by planning to commission a study on the three pillars of the UNGPs, current legislative gaps and concrete proposals on how to proceed.²²

Finland and **Switzerland** position themselves particularly clearly for voluntary measures to implement corporate responsibility for human rights. Switzerland relies on awareness-raising measures, information events, guidelines and internet presence. The Finnish NAP provides for more dialogue, training and research and refers to requirements to be implemented in any event based on European law, such as the EU Directive on non-financial reporting. Sector-specific round-table talks are to serve as learning platforms for businesses on due diligence processes. Central

22 ICAR (2017), p. 18.

risks as well as sufficient risk management and due diligence programmes are to be drawn up for each sector. Businesses are encouraged to publish non-financial data and information on their social and environmental impact.

A particularly negative aspect of the **Norwegian** and **British** NAPs (2013 and 2016) is that there is a strong focus on promoting Corporate Social Responsibility (CSR). This reveals a lack of

understanding that, as part of its duty to protect, the state must ensure that companies are operating in line with the due diligence elements listed in pillar II of the UNGPs.

Sweden relies on bilateral Memoranda of Understanding with other states (for example, China in the field of business and human rights). Alongside measures such as exchange platforms, e-learning tools and training courses, **France** plans to involve

Background: Legislation beyond the NAP context

Beyond the NAP context, increased statutory regulation of corporate responsibility can be observed, above all in terms of transparency demands and requirements for human rights due diligence in selected sectors.

At **EU** level, two pieces of legislation serve as examples: the Conflict Minerals Regulation 2017/821 due to enter into force in 2021 identifies due diligence obligations for importers of tin, tantalum, tungsten and gold. The Regulation aims to prevent the minerals trade financing conflicts and human rights being abused when extracting and processing minerals along the supply chain.²³ Furthermore, the CSR Directive 2014/95 requires certain larger companies to publish a report containing information on the impact of their operations and commenting as a minimum on environmental, social and labour issues, the respect of human rights and the fight against corruption and bribery.

The most comprehensive regulation to date has been adopted in **France**: companies with 5000 or more employees have to publish and implement a due diligence plan (“plan de vigilance”). The businesses have to outline how verifying human rights due diligence, also along supply and value chains, is anchored in their business practice. In the case of inadequate due diligence plans, sanctions in the form of fines and claims for damages under civil law are planned.

In the **UK**, certain large companies have to submit a declaration in the form of a report once a year indicating what measures have been undertaken to prevent slavery and human trafficking in their business processes. The Californian Transparency in Supply Chains Act and the Australian Modern Slavery Bill pursue the same goal.

In May 2019, the Senate of the **Netherlands** after lengthy discussions endorsed the Child Labour Due Diligence Law which had been adopted by the lower chamber in February 2017. The law will enter into force in 2020 and aims to combat exploitative child labour in supply chains.

In the **United Nations**, the introduction of binding human rights due diligence for multinationals in the form of an international agreement is being discussed (treaty process). In June 2014 at the initiative of Ecuador and South Africa, the UN Human Rights Council agreed to set up an open-ended intergovernmental working group (OEIGWG) to elaborate a legally binding international instrument to regulate the activities of transnational corporations in the field of human rights. From 14 to 18 October 2019, the OEIGWG met for the 5th round of negotiations to discuss the preparatory work carried out to date (revised draft of 16 July 2019).

²³ The Dodd-Frank Act 1502 is a non-European example of increasing regulation in the raw materials sector. It requires certain companies to disclose on a yearly basis whether so-called conflict minerals which are required in their manufacturing processes originate from the Democratic Republic of the Congo or its neighbouring countries.

its foreign missions more strongly to guarantee French companies are respecting human rights abroad.

The sector risk analyses announced in the CSR Policy Letter by the **Netherlands** but further developed in the NAP are an innovative and promising initiative. They include carrying out a study to define the sectors with the highest risk of human rights abuses. As a next step, the government is planning agreements between business and other stakeholders to tackle these risks with the companies active in these sectors. Five of these innovative agreements, including on the textile, banking and gold sector, have already been concluded. Similarly, but lagging behind the Netherlands NAP, the **German** NAP stipulates that a study is to be carried out to identify high-risk sectors and regions of particular relevance to the supply and value chains of German businesses. Based on this study, multi-stakeholder forums are then to be held to draw up sector-specific guidelines and examples of good practice.

The **German** NAP is generally weighted towards voluntary steps and in the legislative field points to steps which are being developed in any case without a direct link to due diligence (combating abuses of temporary agency work and abuses of work and services contracts), as well as to requirements under European law which need to be implemented in any case (EU Directive on the protection of whistleblowers). However, compared to other NAPs, the Federal Government particularly spells out its clear expectations of companies. Going further than the other NAPs, the German NAP also introduces a process which could potentially result in binding due diligence for companies: namely the objective that at least half of all companies in Germany with more than 500 employees will have incorporated the core elements of human rights due diligence into their business processes by 2020. A survey is planned here. If the business monitoring reveals this objective has not been met, the Federal Government will consider further action, which may culminate

in legislative measures. Furthermore, the introduction of a certification mark into German law to be used to certify compliance with certain human rights standards in the supply and value chains is to be examined.

3.4 Domestic and extraterritorial dimension

Target: States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises (UNGP 1). States should however also set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations, that is, also along supply and value chains (UNGP 2).

Current situation: Most NAPs reveal an imbalance when it comes to dealing with domestic and extraterritorial situations. Most of the NAPs assessed focus on combating corporate human rights abuses abroad with the exception of the **Italian, British, Swedish** and **Danish** NAPs, which also take more account of the domestic dimension. The **US** NAP applies only to extraterritorial situations; domestic issues are not dealt with.²⁴ The NAPs of **Switzerland, Norway** and **Finland** focus almost exclusively on the impact of their companies abroad.²⁵ The **Lithuanian** NAP, in contrast, deals exclusively with the domestic dimension.

The **Danish** NAP reveals plans to set up an inter-ministerial working group to examine whether legal provisions in relevant fields should and could contain extraterritorial commitments.²⁶

The **German** NAP pays too little attention to domestic issues. Although in the hearings and in the National Baseline Assessment of the German Institute for Human Rights, far-reaching problems were identified for various sectors in Germany (construction sector, meat industry, etc.), for example, the violation of health and

24 ICAR (2017), p. 39

25 Ibid., p. 6

26 Ibid., p. 14.

safety regulations, the use of forms of fictitious self-employment and the employment of persons without secure residence status in Germany, the NAP lacks a clear commitment to tackle possible national risks and problematic areas. Instead, the German NAP merely mentions existing activities (Federation-Länder Working Group to develop a strategic concept on human trafficking, draft legislation to combat abuses of temporary agency work and outsourcing, extending whistleblower protection in the German legal system).

3.5 Political coherence/ state-business nexus

Target: States should ensure that all governmental agencies that shape business practices are aware of and observe the state's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support (UNGP 8). States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the state, or that receive substantial support and services from state agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence (UNGP 4). States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights (UNGP 5). States should promote respect for human rights by business enterprises with which they conduct commercial transactions (UNGP 6). States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through investment treaties or contracts (UNGP 9).

Current situation: Many NAPs examined the sphere of public procurement. The **Dutch, Finnish** and the first **British** NAP (2013) include

measures to ensure that goods and services procured through public contracting are not produced in a manner that violates human rights. The **Danish** NAP is somewhat more concrete and contains the commitment to include clauses on the protection of employee rights in all governmental contracts for building projects.²⁷ The **Finnish** NAP contains the commitment to add the field dealing with social aspects of procurement decisions to the database for public contracts (HILMA). Furthermore, guidelines on socially compatible procurement are to be added to procurement guidelines and contracts. The **French** NAP sets specific target requirements for social and environmental clauses. These targets can be particular tendering specifications in the terms and conditions, selection criteria for choosing tenders and/or compliance clauses for social or environmental development to be applied to the successful tenderer. In **Switzerland**, the federation is considering setting up a national platform for sustainable public procurement. This platform would be designed to promote sustainable public procurement and ensure exchange of information between the various levels of government in this field. The **Italian** NAP mentions drawing up a "human rights clause" to be included in all public procurement tenders and contracts, in particular if the company is working abroad or using foreign suppliers.

The **German** NAP does not stipulate binding minimum requirements for human rights in procurement law. It merely contains the mandate to examine the extent to which binding minimum standards in the field of human rights can be laid down when next revising EU procurement directives. A step-by-step plan is to be drawn up. No timeframe has been specified for this measure. Furthermore, the German NAP relies on training to increase the knowledge of those involved in procurement.

Some NAPs deal with state-owned or state-controlled companies. **Finland's** NAP prescribes that most state companies start to assess and report on human rights risks throughout their entire

²⁷ Ibid., p. 14

production chain. Furthermore, a separate grievance mechanism is being set up to register human rights abuse by state companies.²⁸ The **Swedish** NAP also contains remarks on state companies but only includes the vague goal of carrying out processes on human rights due diligence. On this question, the **German** NAP is one of the weakest in Europe. With regard to state-owned companies, it does not include any measures and points merely to the Public Corporate Governance Code of the Federation, a code addressed to enterprises in which the Federation holds a majority stake, providing recommendations for good corporate governance, and simply advocates training courses in companies in which the Federation holds a direct majority stake.

In the sphere of **trade policy**, many European NAPs include the commitment to work towards a greater weighting of human rights within the EU.²⁹ Within the EU, the **Netherlands** is pushing for clear provisions on the relationship between trade, investment and sustainability in trade agreements and is calling for monitoring and implementation mechanisms. Furthermore, it calls for civil society organisations to play a key role in any such agreement. **Denmark, Finland, France** and the **UK** (2016) support human rights clauses in EU trade agreements. **France** also emphasises the importance of human rights impact assessments and demands that the chapters on sustainable development in EU free trade agreements have to be binding and enforceable within the framework of dispute resolution mechanisms in the agreements. **Spain** advocates including references on the respect of human rights in more general terms.

Finland agrees to strengthen human rights assessments in third countries while negotiating EU trade and investment agreements and pledges to help monitor their implementation. Furthermore, a study is planned on how human rights and labour rights are taken into account in free trade agreements of the EU, the United States and some other countries (regarding regulation, monitoring mechanisms, dispute resolution and

implementation). **Italy** advocates a system of “human rights credits” which could be linked to the introduction of a special tariff for goods imported from countries and/or manufactured by companies which do not respect fundamental human rights norms.

Belgium remains very vague and refers to greater account being taken of sustainable development, including human rights, in free trade agreements.

Non-EU states also examine the topic of trade – albeit less intensively: **Norway** would for example like to ensure that the respect of human rights is included in bilateral free trade and investment agreements. **Switzerland** supports the inclusion of human rights clauses in its free trade and investment protection agreements. The **United States** merely endeavours to encourage responsible corporate governance in the context of free trade agreements.

The **German** NAP pledges to support the systematic introduction of sustainability chapters into free trade agreements. However, the topic of sustainability does not cover the entire spectrum of human rights risks connected to trade and investment agreements. The NAP does not consider the fact that there is a protection gap because investment law and human rights are at odds in practice. There is a lack of concrete proposals, for example for human rights clauses. Furthermore, the NAP provides for activities to improve human rights impact assessments on trade and investment agreements as well as to support developing countries in their efforts to improve trade opportunities. None of these measures include a time-frame or concrete goals.

In the field of **the promotion of foreign trade and investment**, none of the NAPs propose upgrading the respect of human rights due diligence to a binding criterion, the focus being instead on “taking more account” thereof. The **Swedish** NAP highlights the commitment of Business Sweden (Trade and Invest) to respect the

28 Ibid., p. 18

29 Trade policy is an exclusive EU competence. This means the EU and not the member states legislates on trade matters and concludes international trade agreements.

UNGPs and to inform and encourage companies on this matter. The Swedish Export Credits Guarantee Board is furthermore being mandated to draw up recommendations on human rights, working conditions, environment, corruption and internet freedom based on OECD requirements for granting government support. The **Swiss** NAP outlines that in high-risk cases the Swiss Export Risk Insurance demands that applicants carry out a human rights due diligence verification in line with the UNGPs and the expectations vis-à-vis companies outlined in the NAP. The **Spanish** government wants to conduct awareness-raising and training campaigns on the UNGPs with all government authorities and other state institutions which support efforts to strengthen the Spanish economy's international profile. In the field of foreign trade and investment, **Norway** sees the risk of harming the country's credibility and reputation. Human rights due diligence pursuant to the UNGPs is therefore already an integral part of credit and guarantee activities of its export loan institutions.

In the field of foreign trade and investment promotion, the **German** NAP aims to give human rights, which have previously been an element of the environmental and social impact assessment, more specific consideration and a higher profile in assessment procedures. Furthermore, there are also plans to introduce human rights due diligence reports into the assessment procedures of the insurance instruments for foreign trade in cases very likely to have a major impact in terms of human rights.

In the field of **development policy**, the **Swiss** NAP states that, in the case of Public Private Development Partnerships, the authorities are to evaluate human rights due diligence taking account of the impact on human rights, labour rights, state structures and the environment. The **French** Development Agency undertakes to implement a number of regulations concerning business and human rights including taking account of human rights when selecting projects to finance. Financing contracts issued by the French Development Agency contain binding due diligence

clauses which oblige the contracting partners to respect ILO core labour standards.

The **German** NAP includes primarily plans for evaluations or general strategies instead of concrete measures, however key topics are dealt with. The range of instruments for cooperation with business is to be examined to assess compatibility with the UNGPs. The situation of particularly vulnerable groups and human rights defenders in the field of business and human rights is to be strengthened, while efforts are to be made to ensure that the UNGP requirements are also applied by development cooperation implementing organisations. The UNGPs are to serve as the basis for further evaluations, monitoring and the potential further development of implementing organisations' grievance procedures. There are also plans to track the reform processes in international financial institutions with a view to ensuring that their operations are even more sharply focused on human rights. The Federal Government is furthermore planning to promote NAP processes in developing countries and emerging economies.

3.6 Prioritisations

Target: An NAP should focus on relevant thematic or sector-specific human rights issues. Such issues might include, for instance, women's rights, children's rights, indigenous and minorities' rights, labour rights, anti-trafficking and anti-slavery, security and conflict as well as and information and communication technologies (ICT).³⁰

Current situation: Hardly any NAP contains evidence that priorities are being set to tackle highly problematic constellations in the area of human rights. Some NAPs have no particular thematic or sector-specific focus at all. These include the NAPs of the **UK** (2013), the **Netherlands** and **Switzerland**. The **Italian** NAP, in contrast, as a result of the NBA, prioritises promoting due diligence, reducing the exploitation of vulnerable groups, promoting basic labour rights, strengthening development cooperation, combating

30 ICAR (2017), p. 33

discrimination and environmental protection.³¹ Some NAPs, such as that of the **United States**, prioritise specific topics (chiefly corruption prevention, forced and child labour, human trafficking, transparency and public procurement), without indicating the basis for doing so.

Generally speaking, issues concerning marginalised and vulnerable groups (primarily children, women and human rights defenders/whistleblowers, but also indigenous peoples, migrant workers and persons with disabilities) feature particularly often. They are, however, treated with varying degrees of intensity. Almost all NAPs also focus on conflict areas. The most frequently mentioned business sectors are raw materials, finance/banking, information and telecommunications technology, security, agriculture and the construction industry. Risks and negative impacts were mainly dealt with in the areas of equality and non-discrimination, workers' rights including the freedom of association, environment/climate and forced labour/modern slavery.³²

The **German** NAP also fails to state clearly which human rights problems need to be tackled as a matter of urgency. The degree to which a particular topic is mentioned or dealt with does not necessarily mean that it is being prioritised.

3.6.1 Conflict areas

Target: Because the risk of gross human rights abuses is heightened in conflict-affected areas, states should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to

cooperate in addressing the situation; (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses (UNGP 7).

Current situation: Many NAPs focus on conflict areas. France plans to raise awareness amongst companies of conflict minerals. The Foreign Ministry intends to publish recommendations for companies operating in conflict or high-risk areas. **Norway** also plans to strengthen dialogue between its foreign missions and businesses on the increased human rights risks in conflict areas. According to the **Swedish** NAP, embassies are to collate information on human rights problems connected to Swedish companies, particularly in conflict areas. The **US** NAP outlines plans to play a greater role in reducing land conflicts in West Africa, including by strengthening the capacities of civil society organisations when it comes to enforcing land rights. In East Africa, corporate governance is to be strengthened by increased involvement of stakeholders in the resource extraction sector.

The **Italian** NAP contains three measures concerning conflict areas: promoting the relevant OECD Guidelines (Risk Awareness Tool for Multi-national Enterprises in Weak Governance Zones, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas) also in the SME sector, integrating the more stringent requirements in development cooperation activities (awareness-raising and capacity-building), as well as economically empowering women in post-conflict countries in line with UN Security Council Resolution 1325. The **Spanish** government also wants to involve its missions abroad in efforts to make companies aware of risks. In line with Resolution 1325, businesses are to be given instruments and guidance on how to deal appropriately with the risks of sexual and gender-based violence. In government contracts with private security services, human rights clauses are to be included in line with the

31 Ibid, p. 34

32 Danish Institute for Human Rights (2018), p. 21

UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) and the UN Code of Conduct for Law Enforcement Officials (1979) and the Arms Trade Treaty (2013).

Some NAPs, including those submitted by the **Czech Republic, Finland** and **France**, comment on the EU Conflict Minerals Regulation which enters into force in 2021. It stipulates binding due diligence obligations for the upstream sector (mine to smelters/ refiners, thus including the bottleneck of the minerals supply chain) and for the importers of metallurgical products. In line with the regulation, the **German** NAP also cites the aim of preventing the use of proceeds from the sale of tin, tantalum and tungsten, of their respective ores and of gold to fund armed struggles in conflict and high-risk areas.

3.6.2 Marginalised and particularly vulnerable groups

Target: The UNGPs demand that attention be paid to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalised, and due regard be taken of the different risks that may be faced by women and men. An NAP should thus focus particularly on tackling the impact of business on the most marginalised groups. These may include children, women, ethnic, religious or other minorities, LGBTI persons, persons with disabilities, indigenous peoples, older people, migrant workers and their families, people affected by poverty, including the homeless, rural or geographically isolated communities and persons working in the informal economy. An NAP should identify these persons and communities unequivocally as rights-holders and cite measures to be taken by the state to ensure these people and communities can assert and exercise their human rights.

Current situation: There are varying levels of concentration on vulnerable and marginalised groups such as children, women, indigenous peoples, persons with disabilities as well as LGBTI persons. Often, however, concrete steps to perform the state duty to protect are lacking.

The **Italian** NAP commits to improve the inclusion and working conditions of persons with

disabilities. Furthermore, companies are to receive increased training on inclusion, diversity, gender, the empowerment of women and LGBTI rights. **Spain** plans to develop awareness-raising programmes to protect particularly vulnerable population groups. An awareness-raising campaign is underway to avoid discrimination in public and private companies and to provide information for companies and high-risk sectors on the ILO Convention 169 on Indigenous and Tribal Peoples and on the UN Declaration on the Rights of Indigenous Peoples. Also in the **Finnish** NAP, various vulnerable groups are addressed, with special tailored action points being formulated. The **French** NAP mentions that, prior to authorising or financing projects in the fields of development cooperation and the promotion of foreign trade and investment, stringent CSR assessments are to be carried out also examining the impact on particularly vulnerable population groups. **Germany** also wants to take specific action to step up the protection of human-rights defenders also when applying the UNGPs. Turning to development policy, the Federal Government reaffirms its commitment to the rights of vulnerable groups, such as indigenous peoples, children and young people or persons with disabilities. At the domestic level, more is to be done to combat human trafficking for the purpose of exploitative employment.

Of all vulnerable groups, children receive the most attention in the NAPs. Children's rights are dealt with particularly thoroughly in the NAPs submitted by **Belgium, Sweden** and **Spain**. They focus above all on raising awareness in businesses. In particular, the aim is to raise companies' awareness of the Children's Rights and Business Principles developed by UNICEF, the UN Global Compact and Save the Children and the General Comment No. 16 adopted by the Committee on the Rights of the Child. The NAP of the **Netherlands** contains no direct reference to children's rights but does however recognise the problem of child labour (for example, trade and investment agreements, CSR risk check).

Other NAPs do deal with children's rights but do so simply by reviewing past steps: **Italy** reviews the UNICEF Business Lab Project, the **US** NAP lists past and current measures in the field of child labour (multi-stakeholder initiatives cocoa,

Department of Labor reports and toolkits) and **Poland** and **Switzerland** report on initiatives to protect children in tourism and the hotel industry. Many NAPs, including those submitted by **Germany**, **France** and the **UK**, are low on substance. Children are simply listed with other groups without formulating specific measures. The **British** NAPs of 2013 and 2016 for example only contain the vague pledge to work “on raising awareness and tackling the negative impacts of business activity” on particularly vulnerable groups. There is however absolutely no indication as to what steps will be or have been taken to protect children better.

3.7 Effectiveness of remedy

Target: As part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy (UNGP 25). Judicial and non-judicial grievance mechanisms at state level should form the basis of a more comprehensive remedy system. As part of such a system, grievance mechanisms at operational level can provide possibilities for redress and settlement at an early stage. States should ensure that there are no legal, practical or procedural hindrances preventing access to legal remedy. Non-judicial grievance mechanisms have to satisfy the effectiveness criteria contained in UNGP 31: they must be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning. Operational-level mechanisms must additionally be based on exchange and dialogue with rights-holders.

Current situation: Although the general discussion on pillar III is better in the more recent NAPs, most of the NAPs assessed only deal with access to remedy to a limited extent. In most of the NAPs which deal more thoroughly with pillar III, there is a lack of detail on the commitments entered into by the state to improve access to legal remedy and to remove domestic hurdles barring access to legal remedy in the case of corporate human rights abuses at home and abroad.

The **Italian** NAP recognises a need to reform due to hurdles (duration of civil claims, lack of class actions, financing, need to provide additional training for judges and lawyers) and plans to identify further hurdles. **Switzerland** wants to examine measures to remove practical and procedural hurdles when it comes to accessing Swiss courts and also to include the recommendations of the OHCHR Accountability and Remedy Project. **France** focuses intensively on possible procedural hurdles (burden of proof, relationship between parent company/subsidiary, lack of collective actions, trial costs, dangers for whistleblowers) and commits to removing these hurdles without however undertaking concrete steps. **Finland's** priority is to inform those affected of their rights. The **German** NAP also fails to recognise the problem of hurdles in the sphere of judicial remedy and merely plans to publish a multilingual brochure on access to justice for injured parties in Germany.

When it comes to non-judicial grievance mechanisms, a particular focus is on the National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises. The NAP of the **Netherlands** gives the NCP the authority to carry out sectorwide evaluations in particularly weighty cases. In **Finland**, more information is to be made available on NCP procedures while further development of the work of the NCP is announced. The **Swedish** NAP lists concrete steps to strengthen the OECD NCP. The **Swiss** NAP provides for Swiss foreign missions lending greater and systematic support when it comes to mediation. On the NCP, the **French** NAP announces increased dialogue with civil society and an optimisation of internal rules (annual information events, annual dialogue meetings with civil society, access to experts). The **US** NAP also contains the pledge of improving the performance of the NCP. The **German** NAP provides for using the NCP as an effective non-judicial grievance mechanism also to implement the UNGPs. The NCP is thus to be restructured and strengthened. Companies submitting applications in the field of foreign trade and investment promotion are expected to participate in grievance procedures against them before the German NCP as part of due diligence.

Most of the NAPs contain little information on remedy mechanisms at corporate level. In **Spain**, the government will support the development of practical guidelines and collate a selection of successful methods for setting up grievance mechanisms in companies following the criteria anchored in Guiding Principle 31.

3.8 Support for companies

Target: In meeting their duty to protect, states should provide effective guidance to business enterprises on how to respect human rights throughout their operations (Commentary principle 3 UNGP). Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards. Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalisation, recognising the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families (Commentary, UNGP 3).

Current situation: All NAPs deal intensively with the question of how to enable businesses to improve their human rights due diligence by providing state support. Most of the NAPs propose improving businesses' knowledge and awareness of the problem by providing guidelines and training and by communicating examples of good practice by enterprises engaging in successful human rights due diligence. There are many different approaches here but some trends and patterns can be identified.

Many NAPs recognise the need to provide information and improve awareness of sustainable supply chain management with a stronger focus on the sectoral level. Often, the NAPs identify a particular need to support SMEs (for example, the NAPs submitted by **Italy, Belgium, Finland**). As a minimum, all states intend to increase awareness of guidelines drawn up at the international level.

For example, the **Czech** NAP relies on publishing recommendations and model codes of conduct published by the OECD, the EU bodies, the Council of Europe and the ILO, as well as examples of good practice from the business world. Often, it is considered advantageous for businesses active in the same sector or in the same geographical area to share experience and good practice. Particular value attaches to dialogue and training formats (cf. for example NAPs adopted by **France** and **Norway**). When it comes to support measures, some NAPs set certain priorities. **Belgium** and **Italy** deal with children's rights. Italy wants to support UNICEF so that businesses recognise risks for children and include children's rights in their due diligence procedures and management practice.

Advisory services and training are planned in various forms in all NAPs. The channels vary. **Finland** prioritises improving information flows and training and, in particular, plans to provide tailor-made training for SMEs working in high-risk sectors. The most important channel for this kind of support is Team Finland, an independent unit working to promote foreign trade and investment. When it comes to awareness-raising and training, **Spain** plans to cooperate inter alia with the National Contact Point of the OECD Guidelines for Multinational Enterprises, with business associations, networks linked to the Global Compact and civil society organisations. Many NAPs see their foreign missions in a supporting role: **Belgium** plans to equip its diplomats with the tools and knowledge they need to ensure that Belgian businesses take account of the human rights impact of their extra-territorial activities. The Belgian foreign missions are to receive a practical toolbox to improve the way in which they provide businesses with information. The toolbox will also contain information on grievance mechanisms which will enable the Belgian diplomatic network to provide businesses, victims of possible abuses and other interested parties with improved information on access to legal remedy in Belgium. The **Italian** diplomatic and consular network is also to raise awareness of the UNGPs among businesses operating abroad. The Italian Foreign Ministry is developing a strategy to implement this process (including advocacy measures, watchdog activities and match-making between businesses). **Czech** foreign missions are

to provide guidance on questions concerning the rule of law, human rights and corruption risks. In **Spain**, the government plans to use its foreign missions to provide companies with information on the risks of their operations and their relations, particularly in areas affected by conflict. Danish embassies in emerging economies are also advising **Danish** businesses and their local partners on how to shoulder their social responsibility in a range of export markets.

The **Danish** NAP provides remarkably little information on what future measures are planned. It contains considerable information on existing support (in particular training, advisory services and multi-stakeholder dialogue), but only a vague commitment to extending the support offered. This suggests that given the relatively elaborate spectrum of existing support measures, the country considers little further action to be necessary. The **Norwegian** NAP also keeps its comments very general and refers to strengthening advisory services and dialogue with businesses on human rights. However, companies with international activities applying for public funding or services are to receive appropriate and coherent information and guidance on human rights due diligence. Alongside training and advisory services, France focuses on cooperative multi-actor approaches. The aim is to use dialogue geared to the needs of businesses including SMEs to develop instruments and initiatives and facilitate the sharing of good practice.

Three NAPs refer to particularly concrete (albeit not new) tools for businesses: in the **Netherlands**, a “risk check” was developed for companies wanting to carry out a human rights due diligence evaluation. Depending on the sector and the country in which a business is operating, this internet tool provides information on possible social impacts.³³ Attention is to be drawn here also to the **Danish** CSR compass, a free online tool that helps

businesses implement responsible supply chain management.³⁴ The **US** administration helps companies eradicate forced labour and child labour by developing a list of specific goods manufactured in certain countries where production probably involves child labour and/or forced labour.³⁵ Furthermore, the Public-Private Alliance for Responsible Minerals Trade provides a platform to support conflict-free procurement from the DRC and the Great Lakes Region in Africa in partnership with US businesses and civil society.³⁶

All in all, the **US** NAP contains in part very specific support measures. In the field of development cooperation, first mover industry partners in the agricultural sector receive financial and technical assistance from USAID to reduce risks in land investment and make their investments more sustainable. This step helps implement the analytical framework for investment in African agriculture³⁷ which also aims to involve local communities, including indigenous peoples. In parallel, further implementation assistance is to be provided on the Dodd-Frank Act, section 1502, to help businesses ensure that their products are not financing armed conflict directly or indirectly or leading to violations of labour law or human rights.

There is a comparable level of detail in the **Spanish** NAP. SMEs are to receive particular support and efforts are to be made to promote the establishment of sectoral learning forums. Priority is to attach to businesses in which the state has a stake or for which it provides financial, diplomatic or other support, or those whose activities entail particular risks for vulnerable groups. The Spanish NAP identifies some strategic focal points including the avoidance of discriminatory practices and the protection of indigenous peoples. Practical guidelines are to enable businesses to provide grievance mechanisms at operational level which satisfy the effectiveness criteria laid down in UNGP 31. Furthermore, codes of conduct for

33 <https://www.mvorisicochecker.nl/en> (accessed 6 November 2019)

34 <http://www.csrcompass.com/> (accessed 6 November 2019)

35 <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods> (accessed 6 November 2019)

36 <http://www.resolv.org/site-ppa/about-the-ppa/> (accessed 6 November 2019)

37 https://www.growafrica.com/sites/default/files/Analytical-framework-for-land-based-investments-in-African-agriculture_0.pdf (accessed 6 November 2019)

self-regulation are to be promoted. These codes of conduct are to draw on the Global Code of Ethics for Tourism drawn up by the World Tourism Organization (WTO) or the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism, as well as the relevant ILO Conventions.

The **German** NAP contains various measures to support businesses. The Federal Government wants to markedly step up advisory services for businesses provided by the German missions abroad also by involving key actors in the field of foreign trade and investment promotion. A helpdesk on business and human rights is to be set up at the newly created Agency for Business and Economic Development based at the Federal Ministry for Economic Cooperation and

Development. In addition, the Federal Government plans to make available more information and present good business practices on a central website (www.csr-in-deutschland.de). Training and dialogue offered by the German Global Compact Network, as well as support provided by the ILO, are to be extended (ILO Helpdesk for Business on International Labour Standards). In cooperation with business networks, more practice days for SMEs are to be offered nationwide. Furthermore, a study is to identify high-risk sectors and regions particularly relevant to the supply and value chains of German business. Based on this study, sectoral dialogue is planned with all relevant stakeholders to draw up sector-specific guidelines and best practice examples on human rights due diligence.

4 Implementation

4.1 Monitoring and reporting/follow-up

Target: A successful NAP needs to identify the actors responsible for implementing the individual measures and the Action Plan as a whole. The unit within the government which coordinated the drawing up of the Action Plan can also be mandated to organise regular reviews. What is more, ICAR recommends setting up an independent monitoring mechanism following the example of the national mechanism for the UN Convention on the Rights of Persons with Disabilities. In many countries, this function is performed by the National Human Rights Institution. A similar independent monitoring mechanism could also be mandated to evaluate the NAP. What is important is that the monitoring is done independently.

In the future, mechanisms created for this purpose in individual countries could also cooperate transnationally by engaging in dialogue, information exchange and the sharing of good practice. Furthermore, ICAR proposes they cooperate closely with the UN Working Group. At international level, states could also integrate their reporting on NAP implementation into the Universal Periodic Review process of the UN Human Rights Council – both as reviewed and reviewing state. At the same time, states should feed relevant implementation steps into their reporting to the specialist committees of the UN human rights conventions. Regional peer review and report formats can also be used to feed back on the implementation of the UNGPs.

Current situation: The NAPs submitted only contain monitoring mechanisms in part. The NAPs which do provide for such structures reveal some

shortfalls. For example, responsibilities are often unclear which ultimately restricts the effect of an NAP as it prevents ownership of the measures contained therein and makes it difficult to establish who is responsible for non-compliance with the NAP. There is also little reference to cooperation with international bodies.

The NAP of the **Netherlands** contains neither a follow-up procedure for the implementation of commitments entered into in the NAP nor a time-frame for updating it. The same holds true for the **Lithuanian** NAP. Neither does the **Swedish** NAP contain information on what follow-up steps are to be taken to ensure that the commitments entered into in the NAP are implemented effectively. In the case of most of the planned measures, it is neither agreed which government agency is responsible for implementation nor which is responsible for overall monitoring. Vague monitoring and implementation commitments and a lack of reporting obligations are also a major shortfall of the **Norwegian** NAP. For most of the measures planned in the NAP, no government authority responsible for monitoring and implementation is identified. The **US** NAP likewise presents only very vague information on monitoring and follow-up and lacks commitment to update the NAP.³⁸ Although the second **British** NAP (2016) contains the pledge that the Foreign and Commonwealth Office (FCO) will report on progress made on NAP implementation, the British government did not commit to producing a third version of the NAP. The NAP states, admittedly, that a steering group bringing together representatives of civil society and business will meet regularly to monitor NAP implementation, but does not specify who currently belongs to the group or how often it will meet.

38 ICAR (2017), p. 38, 39

In connection with the monitoring and follow-up of the **Italian** NAP, the government commits to setting up an interministerial working group for business and human rights which is to cooperate with an advisory body made up of relevant non-governmental stakeholders such as companies, trade unions, civil society organisations, human rights activists and academics with a view to monitoring NAP implementation. Although the NAP provides a framework for monitoring and reporting which also includes vulnerable stakeholders, it does not go so far as to identify a framework for reporting on implementation or to commit to updating the NAP in the future. In **Poland**, a mid-term review of the NAP was carried out in 2018 with a complete update scheduled for 2020.³⁹ In **Georgia**, progress on implementation is to be monitored by the Council of Ministers on Human Rights, while reports are also to be presented to parliament.⁴⁰

The **Spanish** NAP is relatively elaborate. It provides for an interministerial monitoring commission responsible for monitoring NAP implementation.⁴¹ It is to present an annual report assessing implementation of NAP measures and issuing recommendations on how to update it. To this end, the monitoring commission will draw up a monitoring plan for each measure, describing in detail the measure itself, the competent ministry, the department or authority, implementation indicators and an implementation plan. Once a year, the commission will present a report on NAP implementation to the Spanish parliament. Communication channels are being established so that all stakeholders – civil society, businesses, trade unions, universities, etc. – can play a role and contribute to evaluation. On the basis of this evaluation, the monitoring commission will help draw up an updated NAP. This draft must be presented before the three-year plan expires. The **French** NAP commissions the National Consultative Commission on Human Rights (CNCDH) with monitoring and reporting on progress made on implementation.⁴² This is particularly positive

because it satisfies a key prerequisite for independent evaluation of progress made. A positive feature of the **Swiss** NAP is that it clearly states what government agency is in each case responsible for monitoring the implementation of the political instruments included in the NAP. The NAP is to be reviewed every four years, starting in 2020. A group is to be appointed to accompany implementation made up of representatives of the federal administration, business, civil society and academia.

According to the **German** NAP, the monitoring system is to be supported by a permanent interministerial committee with the Federal Foreign Office as the lead ministry. The latter, along with the other ministries involved, will be allocated the staff and budget required for their additional tasks. The NAP steering group, comprising representatives of business, civil society and trade unions, will be integrated into the existing National CSR Forum of the Federal Government as the Working Group on Business and Human Rights. The Working Group will track the activities of the interministerial committee with regard to NAP implementation and make recommendations for action to the Federal Government. The interministerial committee will report regularly on implementation progress to the CSR Forum. In Germany, a review to update the current NAP is also planned. Part of the evaluation architecture of the German NAP is also business-based monitoring (cf. target 2020-500-50 in section 3.3 of the analysis).

4.2 Timeframe and assessment of implementation progress

Target: An NAP should include a timeframe for reporting on implementation progress. Evaluation can take place at various levels – from inputs (resources), outputs (products/activities) and outcomes (results) to the degree to which aims

39 Leigh Davis/McVey, p. 3

40 Ibid., p. 4

41 Ibid., p. 3

42 Ibid., p. 3

Evaluation questions	Evaluation level
Have the planned measures achieved or contributed to the intended change?	Highly aggregated impact at level of aims
Have planned measures been implemented effectively?	Achieving results that are described in quantitative or qualitative terms
Have planned measures been implemented efficiently?	Cost/benefit analysis
Have the planned measures been implemented?	Review/activity report

have been achieved.⁴³ The degree to which aims have been achieved can only be monitored and evaluated if a target – that is an aspired change – is formulated clearly and if it is plausible for the measures to affect the change intended.

Current situation: Generally, there is often no way of assessing implementation progress because many measures are not sufficiently specific and lack clear responsibilities and timeframes. Furthermore, several NAPs contain mandates for evaluations without a direct link to adopted measures, for example in the case of the **Swedish** baseline study to compare Swedish legislation with the requirements laid down in the UNGPs. There is no direct connection between this baseline study and impact assessment of implementation progress. Most states plan a general evaluation. There are however individual aspects for which impact can be assessed.

The **Italian** NAP includes plans for the Working Group on Business and Human Rights to conduct a mid-term review in 2018 in the form of an assessment of successes and persistent gaps in the protection regime. **Switzerland** plans to update and revise the NAP once every legislative term on the basis of an external analysis of the Swiss situation in the field of business and human rights and by identifying possible shortfalls in

implementing the UNGPs. In **Sweden**, the human rights clauses in the policy instruments of the Swedish Export Credits Guarantee Board, the Swedish Export Credit Corporation, Swedfund and other relevant state players are to be used to carry out ongoing reviews to identify whether further improvements are required in their human rights work.

Many of the 69 measures in the **German** NAP can only be evaluated by means of a review or activity report. Impact cannot be assessed unless the wording is made more specific. This applies above all to steps containing formulations such as “continue to promote” or “continue to be engaged”. One exception which serves as a positive example is the NAP’s objective for at least half of all companies in Germany with more than 500 employees to have integrated the elements of human rights due diligence into their business processes by 2020. From 2018, this is to be reviewed by means of an annual survey conforming to current scientific standards. The survey will be conducted on the basis of a representative sample to establish the number of businesses that have introduced the elements of due diligence listed in chapter III of the German NAP and will include qualitative interviewing on the substantive depth of these measures and the challenges encountered during their implementation in companies.

43 See also the usual questions in the international sphere concerning relevance, efficiency, effectiveness, impact and sustainability of measures: <http://www.oecd.org/dac/evaluation/dacriteriaforevaluatingdevelopmentassistance.htm> (accessed 6 November 2019)

5 Conclusion

5.1 General trends

Even the very process to draw up the NAP resulted in more coordination within governments, while varying degrees of consultations have enabled them to familiarise themselves with the views of all stakeholders. In this way, new contacts have been set up, cooperation projects launched and expertise tapped.

The NAPs submitted contain some examples of innovative practices and measures which other countries may consider adopting. This includes, for example, the bilateral Memoranda of Understanding with other states in the field of business and human rights in **Sweden**, the focus on political coherence and the involvement of foreign missions in **France**, the comprehensive mapping of non-judicial grievance mechanisms planned in **Spain** or the mandate of the NCP of the **Netherlands** to carry out sectorwide assessments in particularly serious cases. Existing instruments which do not originate from the NAP context could be exchanged and facilitate learning from one another: in the field of support for companies, the **Netherlands** (risk check), **Denmark** (CSR compass) and the **United States** (in particular the annual list of goods produced through child or forced labour and the Child Labor Cocoa Coordinating Group) have developed tools which enable companies to identify their human rights risks more easily along supply chains. In the field of statutory human rights due diligence, a valuable foundation is provided by the experience gained during implementation in **France** (Loi de Vigilance) and in the **UK** (Modern Slavery Act).

Due account was not however taken of the perspective of affected rights-holders. Furthermore, there was often a lack of transparency and predictability in the development process. In part, procedures were not clear or not adequately publicised or a predictable timeframe for the individual stages in the procedure was lacking.

While the content and focal points of the NAPs of course vary greatly, the following general conclusions can be drawn:

- Many of the measures are very vague.
- Access to effective remedy has been consistently neglected thus far.
- No NAP achieves the smart mix of voluntary and binding steps but there are however individual innovative measures which can be replicated.
- Domestic and extraterritorial situations and problem constellations are not dealt with in equal measure.
- Many NAPs fail to attach priority to gross human rights abuses suffered by particularly vulnerable groups.
- NAPs outline many support elements for businesses.

All states examined provide for varying mechanisms for monitoring and reporting. A problem all NAPs share is the difficulty in assessing measures which are mostly very vague in their wording.

In the spectrum of NAPs submitted, the **German** NAP is to be considered one of the better ones despite grave shortfalls. This is due above all to the clearly formulated expectation directed at all German companies that they anchor human rights due diligence in their business processes in the coming years. The target for the proposed assessment of progress by 2020 (at least 50% of all companies with more than 500 employees) also goes beyond that of other NAPs. Another positive aspect is the plan to identify relevant branches and sectors in which further-reaching multi-stakeholder forums can be set up with a view to moving forward with UNGP implementation specific to

individual branches and sectors. In all implementation measures, the governance structure made up of the interministerial committee and the Working Group on Business and Human Rights facilitates continuous stakeholder involvement.

5.2 Conclusions for new and updated NAPs

When it comes to updating or drawing up new NAPs, it will be important to adopt certain minimum standards and quality criteria as a guide:

- NAPs should be based on human rights and not CSR. The state's role as a duty-bearer and the role of those at risk from the impact of business activity as rights-holders must be clear.
- Mandates to evaluate have to be completed in advance. An NBA helps identify gaps and fields where action is needed and creates early clarity on the impact of the existing state toolbox. Prior decisions based on ideology favouring voluntary or binding measures are to be avoided. Attaching priority to the effective protection of rights-holders while respecting the proportionality principle means it is possible to use both approaches in complementary fashion.
- The existing legal and political framework should be outlined only briefly to provide context and also to present the status quo of UNGP implementation by providing a baseline. NAPs need to focus on closing gaps. In particular, measures are to be formulated with clear responsibilities assigned, a timeframe and specific aims underpinned by indicators. To this end, the entire spectrum of the UNGPs (all pillars, all principles, home and abroad) has to be

dealt with and at the same time priorities set indicating which problems are the most serious and which groups of persons are to benefit from special protection.

- It is especially important to continually involve rights-holders from affected groups and communities as these have at their disposal information and experience particularly relevant to an NAP process. It is important to bear in mind that a lack of resources and capacities, intimidation and/or fear of reprisals can prevent effective participation. Appropriate steps should be taken here.⁴⁴

Particular importance attaches to the **EU** in two different ways when it comes to implementing the UNGPs. Firstly, it should promote cooperation, exchange and agreement on shared goals for the member states in the field of business and human rights. It should therefore monitor progress made at member state level and provide member states with the opportunity to compare their efforts and learn from the experience of others. In particular, identifying quantitative and qualitative indicators and benchmarks would enable member states to assess the impact of agreed measures. The European Union Agency for Fundamental Rights recommends using the open method of coordination (OMC) for the field of business and human rights.⁴⁵ By means of such a forum for institutionalised cooperation, member states would be in a position to implement EU law in the field of business and human rights consistently and coherently and would benefit from incentives for improved NAP content.

Secondly, the EU also needs to identify areas where it has to take action and apply instruments to implement the UNGPs:

⁴⁴ The Danish Institute for Human Rights recommends the following steps: provision for confidential or anonymous submissions; providing financial support for travel and other consultation attendance costs; interpretation of materials and proceedings into minority languages; protection against negative repercussions for participation; and arrangements for local or stakeholder-specific dialogue events, such as gender-segregated events; and specific outreach to children and other groups. cf. Danish Institute for Human Rights (2018), p. 17

⁴⁵ EU Fundamental Rights Agency, 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level', FRA Opinion 1/2017, p. 66-67, <https://fra.europa.eu/en/opinion/2017/business-human-rights> (accessed 6 November 2019).

- The EU could step up existing legal instruments in the field of business and human rights, for example the CSR Directive⁴⁶, the Conflict Minerals Regulation⁴⁷ or those in the field of procurement. Furthermore, the EU-wide introduction of corporate due diligence should be examined.⁴⁸
 - In the sphere of trade agreements with third countries, where the EU has exclusive competence, measures should be taken to increase political coherence (human rights impact assessments, human rights clauses, maintaining policy space to protect human rights in third countries).
 - A further EU-wide priority should be an enabling environment for human rights defenders and other civil society actors along global supply chains. Specific steps should be taken here to implement the EU Guidelines on Human Rights Defenders specifically in the field of business and human rights. The work carried out by the UN Working Group on Business and Human Rights provides guidance here.⁴⁹
 - In the field of financial or political support for companies, for example through the European Investment Bank (EIB), the European Fund for Sustainable Development (EFSD), business diplomacy and support for SMEs and foreign investment, specific measures should be taken to ensure corporate due diligence.
 - In the field of remedy, EU law needs to help victims of corporate human rights abuse to assert their rights in transnational cases. To this end, barriers should be broken down based on the recommendations of the European Union Agency for Fundamental Rights (FRA)⁵⁰
- An EU Action Plan to implement the UNGPs could make an important contribution to realising these two dimensions – coordination of member states' efforts on the one hand and independent measures within the framework of EU competences on the other.

46 cf. Proposals by the Alliance for Corporate Transparency, http://www.allianceforcorporatetransparency.org/assets/2018_Research_Report_Alliance_Corporate_Transparency-66d0af6a05f153119e7cffe6df2f11b094affe9aaf4b13ae14db04e395c54a84.pdf (accessed 6 November 2019).

47 cf. Proposals by Germanwatch, <https://germanwatch.org/sites/germanwatch.org/files/Study%20Governance%20of%20Mineral%20Supply%20Chains%20of%20Electronic%20Devices.pdf> (accessed 6 November 2019).

48 Businesses are increasingly advocating a European level playing field, cf. <https://www.euractiv.com/section/economy-jobs/interview/companies-will-support-eu-law-on-due-diligence-but-need-assurances-on-liability> (accessed 6 November 2019).

49 cf. <https://www.ohchr.org/en/issues/business/pages/hrdefenderscivicspace.aspx> (accessed 6 November 2019)

50 When it comes to access to courts in member states, financial hurdles could be lowered through the right of associations and collective rights to initiate proceedings. The provisions of applicable law pursuant to the Rome II Regulation could be reformed so that not just the law of the place of damage is applicable. In the field of non-judicial remedy, the creation of an OECD NCP at European level could be considered.

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Annex: National Action Plans analysed

Country	Date of publication	Valid until
Belgium	June 2017	2020
Denmark	March 2014	unclear
Germany	December 2016	2020
Finland	September 2014	2016
France	April 2017	unclear
Georgia	March 2018	2020
Ireland	November 2017	2019
Italy	December 2016	2021
Lithuania	February 2015	2 nd NAP was announced for 2018.
The Netherlands	December 2013	unclear
Norway	October 2015	unclear
Poland	May 2017	2020
Czech Republic	October 2017	2022
Sweden	August 2015	2017
Switzerland	December 2016	2020
Spain	July 2017	unclear
United Kingdom I	September 2013	2016
United Kingdom II	May 2016	unclear
United States of America	December 2016	unclear

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German Institute for Human Rights
Zimmerstraße 26/27 | 10969 Berlin, Germany
Tel.: 030 259 359-0 | Fax: 030 259 359-59
info@institut-fuer-menschenrechte.de
www.institut-fuer-menschenrechte.de

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German Institute for Human Rights

Zimmerstraße 26/27
10969 Berlin

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