1. **Introduction** to the *Research Handbook on Global Governance, Business and Human Rights*

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1. **INTRODUCTION**

Increased globalization and the rise of global value chains have resulted in companies organizing their activities across the globe. Sometimes this is done in an integrated corporate form, with daughter and sister corporations taking the form of SPVs – Special Purpose Vehicles. Sometimes companies resort to a web of contractors, sub-contractors and sub-sub-contractors. Global production and economic activity are taking place through global value chains linking different production activities in different countries.¹ This mode of operation leads companies to operate in, and source from, countries with varying regulatory frameworks related to the protection of human rights. It is not uncommon for lax human rights standards to be a conscious factor in corporations’ location and manufacturing decisions. This, coupled with host countries’ frequent unwillingness or incapacity to enforce the protection of human rights, means grave human rights abuses committed by companies are sadly not infrequent. Poor working conditions of workers in factories worldwide, leading to suicides among the workers; the widespread use of child labour in cocoa farms; forced labour and slavery in construction and fishing industries; the killing of union leaders who try to organize social protest; secret surveillance and monitoring of political dissidents on behalf of authoritarian governments; destruction of homes and farmlands to make way for extraction of natural resources; exporting of toxic sludge to poor communities: examples of abuse are rife.

To be sure, human exploitation for economic gain is not a new phenomenon. As Beckert eloquently argues, slavery, among other forces, became ‘central to the forging of a new global economic order and eventually the emergence of capitalism’.² Likewise, the use of child labour was crucial for the expansion of industrial production during the industrial revolution and many children were employed in, for example, the cotton industry. These forms of human rights violations, and many others, persist to this day.³

Over the past few decades several transnational regulatory initiatives have emerged to address these issues. They aim to provide some kind of global governance of business and human rights. According to Thomas Weiss, global governance is the sum of laws, rules, norms and institutions that define trans-border relations between states, intergovernmental organiza-

³ Ibid., pp.188–90.
tions, nongovernmental organizations, market actors and citizens. This complex set of actions tries to address transnational challenges – such as human rights abuses by companies – which go beyond a single state’s capacity to solve. Global governance consists of many different types of actors and initiatives which sometimes pursue different objectives. Some initiatives focus more on norm-setting and the development of frameworks, while others concentrate on implementation or enforcement. This shift towards the global governance of business and human rights signals a further institutionalization of the business and human rights agenda in global affairs. An important development is that attention to business and human rights is shifting from a theme of voluntary corporate social responsibility to one that emphasizes more concrete obligations and is studied in international relations and international law, regulatory governance and other public policy-related disciplines. One might say there has been a shift in focus, from an initial marketing and business ethics approach to a harder legal approach.

As a result, along with the rise of global governance initiatives in the area of business and human rights, the academic scholarship on business and human rights has proliferated and has expanded beyond the scope of corporate social responsibility research. New journals have emerged, attention in established journals has increased and several new books on the subject have been published in different fields. In this way, research on business and human rights has grown into a multidisciplinary sub-field in its own right.

This Handbook comprehensively discusses key global governance initiatives in the realm of business and human rights on two levels. The first level is that of specific initiatives which operate across economic sectors. The second is that of economic sectors in which different specific initiatives operate which can complement more general initiatives.

2. BUSINESS AND HUMAN RIGHTS INITIATIVES

In the first part of this Handbook we discuss several initiatives which span across different economic sectors. For each we provide an introduction to the initiative (definition, emergence and development) and how it aims to achieve human rights protection. Next, each chapter provides a literature review and evaluation of current research on the initiatives, with a specific focus on evaluation of the effectiveness of these initiatives. The chapters’ final sections focus on contemporary issues and debates concerning the initiative, draw attention to central questions that remain unanswered and propose new and emerging directions for future research that appear promising.

We organize the different chapters according to three components of regulatory global governance. There are several ways to conceptualize regulatory global governance. In one conceptualization, Abbott and Snidal focus on rule development, rule implementation and rule enforcement. Although most global governance institutions perform all three functions, some focus more on one of the three functions than on the other two. In the context of this volume we first concentrate on initiatives which develop (normative) principles, rules and frameworks to address business and human rights issues. Next, we consider initiatives which mainly focus

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on the implementation of international commitments and rules. Finally, we introduce initiatives which aim to enforce commitments through complaint or grievance mechanisms. For each we provide an introduction and further conceptualization and introduce each chapter with a focus on the potential and limitations of these initiatives.

2.1 Principles, Rules and Frameworks

The core normative framework forming the foundation for governance structures for business and human rights comes on the one hand from core human rights conventions and on the other hand from various International Labour Organization (ILO) conventions, most importantly the ILO Declaration on Fundamental Principles and Rights at Work. The core human rights documents include the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The ILO conventions include a large number of different conventions. Since its creation in 1919, the ILO has introduced a system of international labour standards aimed at ‘promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity’. In 1998 the ILO’s International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work in an effort to renew and foster a strong and universal commitment to the values of the organization. In the declaration ILO Member States commit themselves to respect and promote principles and rights in four categories, which together form the fundamental principles and rights at work: (1) freedom of association and effective recognition of the right to collective bargaining; (2) elimination of all forms of forced or compulsory labour; (3) effective abolition of child labour; and (4) elimination of discrimination in respect of employment and occupation. These commitments exist regardless of whether a particular Member State has ratified the relevant core conventions. The other conventions contain obligations for states in order to protect human and labour rights.

The application of these state commitments has been gradually translated into approaches that more directly target (multinational) companies.

One of the first initiatives to develop a framework of guidelines and principles for company conduct, including with regard to human and labour rights commitments, was the Organisation for Economic Cooperation and Development’s (OECD) Guidelines for Multinational Enterprises (OECD Guidelines), launched in 1976. In their initial formulation, the OECD Guidelines did not really include human rights commitments. Until they were revised for the fifth time in 2011, there was just a single general reference to human rights which stated that enterprises should ‘[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments’. The 2011 revision, however, introduced a new chapter on human rights with more robust

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guidelines for businesses in line with the UNGPs, discussed below. What sets the OECD Guidelines apart is their implementation architecture, based on the establishment of National Contact Points. This is discussed extensively in the chapter by Kari Otteburn and Axel Marx, to which we return in the section on grievance mechanisms.

Shortly after the launch of the OECD Guidelines, the ILO launched its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Tripartite Declaration), which was first adopted in 1977 and then amended in 2000, 2006 and 2017. The principles embedded in the Tripartite Declaration have a broader scope than only human and labour rights and offer guidelines in areas such as employment, training, conditions of work and life and industrial relations. Like the OECD Guidelines, the focus on human and labour rights in the 2017 amended version also fully aligns with and incorporates the UNGPs.9

Human rights principles are also included in the United Nations Global Compact, which is a non-binding commitment made by companies to adopt sustainable policies and to report on the implementation of these policies. Currently approximately 13,000 companies have signed up to the UN Global Compact. Research on the Global Compact has focused on the drivers for companies to sign up to the Compact, the impact of the Compact and the factors affecting the impact.10 Most debate has focused on the limited effectiveness of the Compact due to its absence of verification mechanisms,11 although some authors argue that this criticism is based on a misunderstanding of what the Compact is.12 The Global Compact, alongside the ILO Tripartite Declaration and the OECD Guidelines (see chapter 11), was one of the earlier attempts to develop a framework specifically geared towards companies. It was announced in 1999 by the then UN Secretary-General Kofi Annan. In these early approaches, human and labour rights were included alongside a series of other issue areas such as environmental protection, the governance of resources and anti-corruption. More recently new approaches have emerged that have almost exclusively focused on human and labour rights protection, and which are extensively introduced and discussed in this volume.

The most crucial new approach was introduced by the UN through the UNGPs, which are referred to in many chapters in this volume. The HRC’s adoption of the UNGPs in June 2011 constituted a new development in the debate on business and human rights. The UNGPs are built on the ‘Protect, Respect and Remedy’ Framework and consist of 31 principles with regard to business and human rights issues. The UNGPs introduce three pillars of action that need to be taken. The first pillar focuses on the state’s duty to protect against human rights abuses, the second on corporate responsibility to respect human rights and the third on the victims’ right to access an effective remedy where their human rights are harmed. For each pillar the UNGPs set out a number of principles around which public policy or regulatory action can be taken. As a result, the UNGPs form the cornerstone of many recent developments in the area of business

and human rights. Three are extensively discussed in this volume. The first focuses on the development of a binding international treaty on business and human rights. The second looks at operationalization of the principles on the regional level. The third looks at operationalization of the principles on the national level through national action plans.

Radu Mares (chapter 2) focuses on the global level and examines the treaty currently being drafted by an Intergovernmental Working Group of the United Nations intended to regulate the conduct of multinational corporations, particularly in the arena of human rights, following a 2014 Human Rights Council Resolution. Subject to intense debate, the draft treaty has undergone several rounds of revision as the drafters attempt to balance different opinions and political feasibility, while at the same time responding to governance gaps that undergird the primary purposes of the treaty. In the end, the constellation of which governance gaps are prioritized over others, the treaty scope and design and the approach to legalization will have major implications for the ultimate efficacy of the treaty. The author therefore assesses the negotiation, design and efficacy of other treaties ratified at the multilateral level that address, in some way, corporate conduct, such as the UN Convention against Corruption, the WHO Framework Convention on Tobacco Control and the ILO Maritime Labour Convention, and others, in order to derive lessons for the draft BHR treaty, including inter alia with regard to scope, legalization, participation and inclusion of different stakeholders, addressing power imbalances and garnering sufficient support from the business sector.

Claire Methven O’Brien (chapter 3) considers the role of regional systems of human rights protection in business and human rights governance. According to the author, business and human rights governance within regional systems emanates and is exerted via four mechanisms: (i) judicial and quasi-judicial bodies; (ii) thematic mandates; (iii) dedicated business and human rights initiatives and (iv) programmatic approaches and dialogue. O’Brien suggests that the European, American and African regional systems on which she focuses display some degree of activity in each of the described mechanisms, but such activity is determined or limited inter alia by the mandates of relevant bodies, underlying norms, local politics and the strength of civil society. Although regional human rights systems would be well situated to contextualize international business and human rights norms to regional specificities and could thereby contribute to norm development and effective implementation of international business and human rights norms, the author notes that regional systems appear to lag behind other fora, including individual states and the multilateral level. The limited attention paid to business and human rights so far in regional systems is reflected in both the limited case law concerning business and human rights and the few non-judicial (such as capacity-building, monitoring or promotional) activities undertaken.

Finally, Carmen Márquez Carrasco (chapter 4) links the global to the national level and examines the UNGPs and the National Action Plans (NAPs) that many states have adopted to implement them in the decade since the UNGPs were first endorsed by the HRC. The author notes that a clear global alignment around the UNGPs is in evidence at all levels of governance, consolidating what was once a more disparate and uncoordinated policy field. The NAPs have been seen to be effective in raising awareness, triggering governments’ commitments to the implementation of UNGPs and allowing for increased policy coherence on business and human rights among different governmental organs. Despite these benefits, the author notes that, as public administration instruments, NAPs seem able to do little to change the conduct of businesses and may even allow governments to cover up practices that are counter to the UNGPs and the business and human rights agenda. Though NAPs have improved since the
first generation was established early on, due in large part to concrete guidance that was subsequent-ly put forth, the effectiveness of the NAPs is seen as uneven and progress has been slow. Additionally, despite the UNGPs’ success in consolidating and reinforcing international norms for both business and governments with regard to business and human rights, the author maintains that the UNGPs are nevertheless a weak instrument when it comes to holding businesses accountable for human rights violations.

2.2 State and Non-state Implementation Mechanisms for Human Rights Commitments

Alongside the initiatives which focus on developing frameworks on business and human rights, several others focus more on approaches to implementation of corporate human rights commitments. These initiatives aim to introduce a set of procedures that allow or require companies to take human rights concerns and commitments into account in their day-to-day operation. They can be broadly classified into two groups. On the one hand, there are a number of regulatory initiatives by states that put obligations on companies in terms of reporting or putting in place procedures and systems to prevent or address human rights abuses and concerns. Reporting initiatives take the form of regulations that put requirements on companies to provide more transparency on possible human rights violations in their value chain. They are typically captured under the heading of ‘transparency measures’. In terms of procedures, an increasing number of states are introducing so-called due diligence requirements on companies with regard to one or more specific human rights concerns. These due diligence requirements oblige companies to put management systems in place which allow for the identification, prevention and/or remediation of human rights issues in the company. In addition, more and more states, through their public procurement policies, aim to address human rights concerns. On the other hand, there are a number of non-state-based initiatives which aim to introduce a set of management practices and procedures into companies that allows them to address human rights concerns in their value chain.

In this Handbook we extensively discuss these mechanisms. We start with state-led initiatives, beginning with transparency measures, since these measures preceded most of the due diligence legislation put in place more recently. Finally with regard to state-led initiatives, we focus on public procurement and human rights. Next, we turn our attention to non-state-based mechanisms. Here we first focus on voluntary sustainability standards as a major tool to address human rights concerns in the value chain. Next, we discuss the recently developed ISO standard.

In chapter 5, Olga Martin-Ortega addresses the role that transparency and transparency measures can play in addressing human rights abuses in value chains and delves into the crucial question of whether transparency fosters accountability. In addition, the chapter explores the link between transparency and due diligence in global value chains. The author argues that transparency is not equivalent to human rights due diligence, notwithstanding the fact that many of today’s transparency initiatives require the disclosure of companies’ human rights due diligence policies. The core of the chapter focuses on the initiatives which establish obligations to disclose specific information regarding the possible negative impacts of companies in their global value chain. It starts from the premise that transparency is a potential useful tool to hold companies to account for human rights abuses, but also highlights that this transparency–accountability nexus does not always play out. This argument is built on an
extensive analysis of different national and European Union instruments which impose disclosure obligations and non-regulatory initiatives such as those led by civil society. It concludes with a discussion of contemporary issues regarding transparency, particularly relating to its effectiveness. The author also argues that further strengthening of transparency approaches is needed if they are to play an effective role in fostering compliance with human rights.

Robert McCorquodale (chapter 6) provides an overview of the current and proposed legal initiatives which refer to human rights due diligence, with norms of expected conduct for businesses lying at the heart of the UNGPs (discussed in detail in chapter 4). Taking the international arena as a starting point, the author assesses the inclusion of human rights due diligence in the OECD Guidelines for Multinational Enterprises 2011 (extensively examined in chapter 11), the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2017, the International Finance Corporation’s (IFC) Performance Standards 2012 and Equator Principles 2013 and, finally, the Draft Treaty 2019 on business and human rights (further developed in chapter 2). Continuing the analysis at the regional level (complementing the analysis provided in chapter 3), McCorquodale highlights the European Union as the only organization to have passed specific legislation on human rights due diligence, in particular the EU Timber Regulation 2010 (EUTR) and the EU Conflict Minerals Regulation 2014 (EUCMR), though the enforcement of both remains in the hands of national legal systems. At the national level, the French Duty of Vigilance Act 2017 and the Netherlands Child Labour Due Diligence Act 2019 are singled out as the only two pieces of national legislation which specifically provide for human rights due diligence, together with a sub-national piece of legislation (that is, the California Transparency in Supply Chains Act 2010) and a detailed proposed piece of legislation in Switzerland – albeit the area is under constant development and more initiatives are being rolled out across jurisdictions. Overall, McCorquodale shows that while these initiatives have mostly followed the UNGPs’ jargon on human rights due diligence, they have managed to include environmental concerns in the equation, have significantly enlarged the scope of businesses covered by due diligence (to comprise subsidiaries, suppliers and others in a business relationship, as well as those outside the territory of a state) and have increased the levels of accountability. However, future research is needed to fully grasp the impacts of business activities on, for example, climate change or vulnerable groups, and to entirely comprehend and automatize the link between human rights due diligence, liability and access to remedies for victims. Ending on a positive note, chapter 6 points out that in spite of the effect of the liability of businesses still having to be established, and the dear need for well-targeted and concise legislation, an increasing number of businesses acknowledge the need to undertake human rights due diligence and to be accountable for it.

Finally, we turn to the power of states to affect business and human rights in their role as ‘consumers’. Beyond the independent value in the purchase of the goods, services and works needed for the correct functioning of the public welfare machinery, Sope Williams-Elegbe (chapter 7) highlights that public procurement systems have been used by governments to achieve secondary or horizontal objectives, most notably those pertaining to environmental, social, economic or human rights agendas. Williams-Elegbe observes that a genuine global consensus has been forged around using procurement to promote human rights compliance, recognized in the UNGPs (chapter 4), the OECD Guidelines (chapter 11) and ISO standards (chapter 10). Additionally, she provides a historical account of the nexus between public procurement and human rights: a nexus which is rooted in the development of fair labour rights (especially the right to freedom from servitude and modern slavery), the right to equality and
the right to fair administrative procedures. Equally, chapter 7 considers in succession the array of mechanisms used to incorporate human rights issues into a procurement framework (that is, eligibility criteria, technical specifications, exclusion and debarment, set-asides, transparency and disclosure requirements). The chapter also dissects the challenges resulting from the linkage of public procurement and human rights (that is, the lack of prioritization, legal and policy incoherence, the complexity of global supply chains, the uneven integration of human rights and the barriers to accessing effective remedies). Such obstacles have proven difficult to overcome and overall have impeded an effective deployment of public procurement as a tool for the promotion of human rights. Williams-Elegbe concludes with a series of recommendations for further research, which include the observance of human rights by state-owned enterprises (SOEs), the systematic assessment of human rights impacts of development finance institutions and the quantification of the existing gap between legislation and the enforcement of human rights breaches through remedies.

Among non-state-based initiatives, so-called voluntary sustainability standards (VSS) and ISO 26000 are probably the most significant implementation mechanisms.

The volume contains two chapters on VSS. VSS have grown in number and importance over the past five decades and have become a key instrument for companies to govern their global value chains on a range of sustainability issues, including human and labour rights. The United Nations Forum on Sustainability Standards defines VSS as ‘standards specifying requirements that producers, traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, the environmental impacts of production, community relations, land use planning and others’. They consist of a diversity of initiatives and are also captured under terms such as ‘eco-labels’, ‘sustainability certificates’, ‘multi-stakeholder initiatives’, ‘private standards’, ‘ethical trade initiatives’ and others. Examples include the Forest Stewardship Council, the Roundtable on Sustainable Palm Oil, Fairtrade, the Marine Stewardship Council, the Better Cotton Initiative and many more. Depending on the database, one can identify more than 450 VSS. In chapter 8, Andreas Rasche reviews the emerging landscape of VSS in the business and human rights field. He starts by defining ‘voluntary standards’ and distinguishing them from legal sanctions and social norms. Next, he captures the diversity of VSS and proposes a taxonomy to classify the landscape of standards for business and human rights. The taxonomy distinguishes standards based on their mode of governance as well as purpose and nicely illustrates the diversity of VSS. Subsequently he focuses on three bodies of literature, captured under the heading of the ‘3Is’, on input to standard setting, the institutionalization of standards and their impact. This discussion on the one hand shows some of the key challenges with which VSS are confronted, namely ensuring proper representation in the standard-setting process and proving and improving their impact. On the other hand, the discussion considers the institutionalization of VSS and identifies one of the main trends with regard to VSS, namely their increased integration in other governance initiatives and arrangements. VSS are indeed increasingly integrated in regulatory measures, trade policies and procurement policies, among others. In the academic literature this is further analysed under the heading

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of ‘public–private interactions’ and ‘hybridization’ of governance. Key challenges of VSS, namely their limited impact and difficulties in increasing their effectiveness, are addressed by Elizabeth A. Bennett (chapter 9). Bennett focuses on the question of whether voluntary standards, certifications and labels promote human rights, and if so, how. The chapter highlights the mixed and highly context-specific findings about effectiveness, identifies the conditions under which VSS are more likely to be effective and examines key debates about their current and potential role in promoting human rights. A key contribution of this chapter lies in the examination of the conditions under which VSS are more likely to be successful in promoting human rights. Bennett focuses on eight sets of factors that can impact effectiveness: (1) governance, representation and the standards-setting process; (2) standards’ content, scope and implementation; (3) auditing; (4) suppliers’ experiences; (5) behaviour of buyers and brands; (6) consumer discretion and demand; (7) supplier country conditions; and (8) relationships among relevant actors. Understanding of how these (combinations of) conditions influence the effectiveness of VSS is crucial for understanding the potential contribution VSS can make to protecting human rights in global value chains.

Stéphanie Bijlmakers (chapter 10) examines the impact of the International Guidance Standard on Social Responsibility (ISO 26000) on human rights, ten years after the international standard – which provides companies with direction on social responsibility and sustainable development – was published. Her analysis comprises a detailed account of the developments that cascaded into the creation of ISO 26000 and highlights the unprecedented (though highly contested) multi-stakeholder consultation that the International Standardization Organization (ISO) coordinated with the aim of legitimizing the ensuing standard. Chapter 10 also offers a detailed literature review on the emergence, development and effectiveness of the ISO standard. The review points to the lack of innovation brought about by ISO 26000: the standard merely reflects (and at times, even distorts) the principles enshrined in the Universal Declaration of Human Rights and the expectations set out in the UNGPs (chapter 4) without further interpreting or clarifying them. Additionally, the language used in ISO 26000 is considered to be too generic and symbolic, rendering it inapplicable or hardly pertinent to the specificities of different industries and sectors. All in all, that ISO 26000 is not distributed freely; that it can only be purchased online; that it does not set requirements, nor is it certifiable; and, chiefly, that it remains voluntary, casts doubt on its effective social impact, especially in developing countries. Moreover, chapter 10 emphasizes that the global governance of business and human rights is an ever-changing field and that ISO 26000 has potentially become outdated since its publication more than ten years ago, putting it at a disadvantage when compared with other competing global schemes on social responsibility. While a realignment with the UNGPs, the UN 2030 Agenda and the SDGs is essential, Bijlmakers warns that a revision of the standard and a search for consensus on its new formulation would entail an enormous effort and deployment of resources that may not be matched by any significant impact on the ground. The weakness of ISO 26000 (stemming from its dependence on uptake and implementation by companies) and the difficulties involved in revising the standard lead the author to ask if those efforts could be better spent on alternative and more promising social responsibility schemes.

2.3 Grievance/Enforcement

In the final section of the first part we focus on complaint and grievance mechanisms established to hold companies to account for human rights violations. In the case of severe human rights abuses, companies can be brought before courts and existing judicial mechanisms can be used to hold companies to account. There is quite an amount of literature focusing on the use of judicial mechanisms to hold mostly multinational companies to account for human rights abuses in third countries. This literature has focused on specific case studies as well as some comparative studies. Many of these cases concern human rights abuses conjoined with environmental pollution.16 Probably the most famous case is the civil liability case against Royal Dutch Shell and its Nigerian subsidiary (SPDC) for oil spill incidents in the Niger Delta which was brought before a Dutch court by four Nigerian farmers and the Dutch NGO Milieudefensie.17 In another case, the Swedish company Boliden was sued in Sweden by inhabitants of Arica (Chile) for its alleged responsibility for knowingly dumping toxic waste near their homes in the 1980s.18 Similar cases of toxic dumping concern the Trafigura company and the dumping of 500 tons of hazardous waste in Abidjan in Côte d’Ivoire19 and pollution and environmental damage caused by the Nchanga copper mine owned and operated by a subsidiary of the Vedanta company in Zambia.20

Besides environmental justice-related cases, there are also cases of human rights violations in factories. An example is Jabir and Others v KiK, a case related to the deaths of several hundreds of workers resulting from alleged negligence of health and safety requirements.21 A 2015 comparative study revealed that approximately 40 foreign direct liability cases were brought

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before European courts between 1990 and 2015, 35 of which were filed in six countries: Belgium, France, Germany, the Netherlands, the UK and Switzerland. Of these 35 cases, on which the study focused, only three resulted in a final judicial decision finding the defendant company liable.22 Similar results were found in a study by Marx and colleagues which also analysed 35 cases, 12 in depth.23

These single case studies and comparative studies on the use of judicial mechanisms provide ample evidence of the many legal and practical barriers to hold companies to account for human rights abuses in third countries. There are three main legal barriers. The first is the attribution of legal responsibility among members of a corporate group in complex global value chains.24 When these members are separate legal entities it is often difficult to hold the parent company to account, or liable, for human rights abuses. A second and third barrier relate to access to justice in the country in which the human rights abuse occurred and the country in which the headquarters of the company is based. Concerning access to justice in countries in which the abuse occurred, claimants are frequently confronted with the fact that the judiciary is not able or willing to hold companies accountable for their human rights abuses. This inability or unwillingness is created by several hurdles, which include fear of losing foreign direct investment, an underdeveloped justice system, lack of respect for the rule of law, weak enforcement mechanisms, lack of judicial independence, issues of corruption among state officials, or lack of measures to ensure the protection of victims and human rights defenders from intimidation and threats or reprisals.25 Access to the court in the country in which the company is headquartered is sometimes made difficult by the doctrine of forum non conveniens, which can ‘prevent a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is the more appropriate venue for the case due to the location of the parties, witnesses, evidence, and given that the local court is more familiar with the local law, which is often the law applied in the case’.26 Besides legal barriers, claimants are often also confronted with practical and procedural barriers which include the costs of bringing a claim to court and of securing effective legal representation and difficulties in accessing the information necessary to prove a claim.27 In order to address these challenges, non-judicial grievance

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mechanisms were set up to hold companies to account for human rights violations or even pre-empt the use of judicial mechanisms.

Probably the most established non-judicial mechanism is embedded in the OECD’s aforementioned Guidelines for Multinational Enterprises. In chapter 11, Kari Otteburn and Axel Marx consider the role of the OECD’s Guidelines in protecting rights-holders from business-related human rights abuses, including providing accountability and remedy in case of violations. The Guidelines are one of the only government-backed multilateral instruments that apply directly to firms and are supported and enforced by a unique complaint mechanism referred to as ‘National Contact Points’ (NCPs), which are mandated to handle complaints against firms of 50 adhering states regarding their activities anywhere in the world – even extraterritorial activities – providing broad global reach. Otteburn and Marx extensively discuss the use of NCPs and show that there are quite a number of specific instances related to human rights abuses, and that this number has increased in recent years. However, as the authors show, the system suffers from a lack of predictability due to considerable institutional diversity among NCPs, a lack of enforceability given the voluntary nature of the Guidelines, and generally limited resources and visibility, leading to under-utilization of the mechanism and limitations as to its effectiveness. Moreover, the NCPs are seen as not adequately responding to the specific needs of marginalized or vulnerable groups as they often fail to address the sometimes considerable power imbalances between parties and only in rare cases succeed in providing some sort of remedy to victims.

Chapters 12 and 13 focus on two other convergent and complementary grievance mechanisms. Both chapters are dedicated to the analysis of the role played by National Human Rights Institutions (NHRIs) in the business and human rights arena and, more specifically, in the implementation of the UNGPs (chapter 4). While chapter 12 by Linda C. Reif provides a discussion and overview of the different types of NHRI and their activities, chapter 13 by Jernej Letnar Černič zooms in on a specialized type of NHRI: Human Rights Ombudsman Institutions.

Reif starts by listing the different types of bodies that fall under the large umbrella of NHRIs: domestic human rights commissions, human rights institutions and Human Rights Ombudsman Institutions. Depending on their degree of compliance with the UN Paris Principles on NHRIs (Paris Principles) – which set minimum standards for their independence, jurisdiction, functions and powers – NHRIs are awarded an A-status or a B-status by the Global Alliance of National Human Rights Institutions (GANHRI). As the author points out, Paris Principles-compliant NHRIs perform a major role in the implementation of the UNGPs since accredited NHRIs are classified as an important type of state-based non-judicial grievance mechanism that can enhance victims’ access to effective remedies and complement judicial remedies.

Chapter 12 adopts a two-tier approach to NHRIs’ work, the activities of which are divided into business and human rights promotion and business and human rights protection. On the one hand, promotion activities encompass advising governments on implementing international human rights obligations and reforming domestic law; providing advice, guidance and assistance for businesses and victims; researching, training and raising awareness on business and human rights; participating in the elaboration of NAPs; and collaborating with international human rights bodies, other NHRIs and domestic human rights actors. On the other hand, protection activities focus on individual complaints-handling (generally against state-owned enterprises, though a growing number have mandates which extend to private enterprises);
conducting own-initiative investigations and public inquiries; and community mediation and involvement in human rights litigation. Reif concludes with a discussion on the contemporary issues affecting NHRIIs, such as the absence of systematic and accurate research on their activities, their overloaded agendas and the lack of priority given to business and human rights, and, above all, the near-invisibility of NHRIIs in the second revised draft of the BHR treaty. Most importantly, the generally limited mandates of NHRIIs (a theme that is taken on in chapter 13 regarding Ombudsman Institutions) have resulted in a lack of coercive remedial powers, which are regrettably accentuated by jurisdictional gaps and by funding constraints. This relative weakness, Reif asserts, can only be overcome via capacity-building.

In chapter 13, Jernej Letnar Černič takes a closer look at one specific type of NHRI, the Human Rights Ombudsman Institutions, whose potential in the field of business and human rights has largely remained unexplored. With the aim of understanding the precise scope of the mandates of these institutions and how they fulfil their role as human rights defenders, chapter 13 first traces the normative sources of Human Rights Ombudsman Institutions. Černič finds that directly binding legal sources at the international level for Ombudsman Institutions do not exist. Conversely, soft law instruments do refer to them (see the Commentary to the UNGPs) and set universal standards for their functioning (see Paris Principles). Chapter 13 offers a comparison of the mandates of Human Rights Ombudsman Institutions across different countries, which sheds light on the fact that their role has largely been one of promotion rather than one of protection of human rights against business-related abuse. The relative weakness of Ombudsman Institutions, explains Černič, stems mainly from the meagre nature of their legal mandate as well as from their limited de jure and de facto independence and impartiality of functioning.

The comparison exercise demonstrates that most Ombudsman Institutions lack clear and direct competences to handle complaints. However, some have proactively interpreted their mandate in a broad manner to also cover the private sector (or, at least, key sectors within) in a mandate-stretching move also acknowledged by Reif. Furthermore, Černič shows that only very few Ombudsman Institutions have developed full-fledged quasi-judicial supervisory mechanisms for right-holders to turn to in cases of alleged abuses by business. While certainly improvable, the Ombudsman Advisory Mechanism of the International Financial Corporation of the World Bank is presented as a possible model for the deployment of Ombudsman supervision mechanisms at the domestic level.

Making a similar argument to Reif’s, Černič suggests that, overall, Human Rights Ombudsman Institutions have the potential to protect human rights from business-related abuses, but in order to do so effectively their mandates must be reinforced and the provision of access to remedies should be strengthened.

3. SECTOR CASE STUDIES IN BUSINESS AND HUMAN RIGHTS

In the second part of the Handbook we switch focus from specific initiatives to economic sectors. Human rights abuses can differ between sectors and sector-specific initiatives can emerge. These chapters start by exploring key human rights issues in different economic sectors. Next, they focus on the use of different instruments to address issues particular to the
sector. The chapters also try to identify new and emerging directions for future research. In total we focus on five different sectors.

Justine Nolan (chapter 14) outlines the unique human and labour rights challenges endemic to the textile, clothing and footwear sector, which are only partially mitigated by the ad hoc regulatory framework currently in place. The harmful purchasing practices and fragmented supply chains that characterize much of the industry as a result of ‘fast fashion’ have given rise to instability and diminishing profit margins for suppliers, leading in turn to the widespread use of child, forced and temporary labour; poor wages and working conditions; sexual harassment and violence against women; occupational health and safety concerns; and repression of collective action and organizing. In the absence of an overarching international regulatory regime, two voluntary governmental mechanisms have been established at the international level, including sector-specific due diligence guidelines for the garment and footwear sector developed by the OECD and the ILO Better Work programme. In addition, a number of private initiatives have been put in place, such as Global Framework Agreements signed by global union federations and companies, sector-specific multi-stakeholder initiatives such as the Fair Wear Foundation and worker-driven social responsibility (WSR) initiatives such as the Bangladesh Accord and the Lesotho Agreements. A few national public–private initiatives with domestic focus, such as the 2016 Dutch Agreement on Sustainable Garments and Textiles and the German ‘Green Button’ (Grüner Knopf) certification standard, have also been established. Nolan discusses and assesses all these initiatives. She argues that the ad hoc and patchwork nature of the current regulatory framework is over-reliant on voluntary initiatives, such as social audits, and has so far failed to address problems or prevent serious incidents. Moreover, the initiatives are often narrowly focused on a particular issue or region, causing fragmentation into issue-specific silos. Nolan contends that holistic reform is needed which involves collaboration between all stakeholders, including between suppliers and buyers as well as between companies, civil society, workers and workers’ representatives.

An in-depth analysis of the electronics sector is provided by Peter Pawlicki in chapter 15. By discarding the idealized image of a cutting-edge and aseptic production chain promoted by brand companies, the chapter sheds light on the recurrent violations of human rights, labour rights and environmental rights occurring at the workplaces of electronic manufacturing. The chapter traces the history of the electronics industry to understand its present key features, such as the enormous complexity of the supply chain (resulting from contradictory forces: fragmentation and relocation to low-wage and underregulated countries on the one hand; concentration to secure high profit margins on the other), its cyclicality (peaking around the Christmas season), its standardization efforts, its enormous speed and flexibility (sometimes at the expense of human rights) and its traditionally hard anti-union stance. The fragmentation incurred by the supply chain, Pawlicki sustains, has regrettably been matched by fragmented responsibilities regarding human rights protection and has led to multiple forms of forced labour (such as labour under the threat of punishment, confiscation of identity documents, threats of expulsion and debt bondage) and to inadequate protection of workers’ health (especially linked to semiconductor manufacturing, a field which remains opaque and tainted by trade secrets due to ever-changing chemical compositions). To expose these human rights violations and to seek long-term promotion of specific standards, Pawlicki maintains that the strategy of naming and shaming is particularly useful. Only by making workers’ voices heard and by creating a real social dialogue (one example being the Silicon Valley Toxic Coalition (SVTC)) can these grievances be canalized and subsequently eased via regional or national
regulations or international conventions. Impactful regulatory instruments singled out by the author include the 2003 EU Directive on Restriction of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) and the 2012 Directive on Waste from Electrical and Electronic Equipment (WEEE), and, up to a certain point, the California Transparency in Supply Chains Act (CTSCA) of 2011. Alongside regulation, socially responsible public procurement (SRPP) (see also chapter 7) is highlighted as a tool to increase the transparency and traceability of supply chains in the electronics industry, although a delicate balance must be struck: should the social requirements be too strict, none or very few bidders will submit. As far as CSR initiatives are concerned, the author is pessimistic regarding their weight in the electronics industry: not only did these initiatives arrive belatedly in comparison to other global industrial sectors – the Electronics Industry Citizenship Coalition (EICC), now rebranded as the Responsible Business Alliance (RBA), was only established in 2004 – but they seem to have more of a whitewashing and greenwashing purpose than an actual interest in upgrading working conditions (for instance, the EICC Code of Conduct trails behind ILO minimum standards). Pawlicki concludes that strong local institutions and local civil society have more transformative potential regarding the situation of workers than any specific private regulatory system.

Ana Luiza de Gama e Souza (chapter 16) provides an analysis of human rights concerns in the agro-chemical sector and how they are addressed. The indiscriminate use of pesticides and other biotechnologies in agricultural practices is a risk factor for the violation of human rights. Data shows that the use of these contaminants has increased in recent decades, as well as the number of diseases and deaths due to direct or indirect contamination by pesticides and the persistent contamination of the environment due to the use of these substances in agriculture. De Gama e Souza assesses the heightened risks in the agro-biochemical–technological food market (ABCTF) that have been brought about by significant changes in seed, chemical and biotechnology and a high level of market consolidation. New technologies of genetic modification incorporated into the practices of the seed and chemical industries, with emphasis on chemical-resistant seeds that are offered in the market as an integrated cultivation solution – a pesticide-resistant seed package combined with the pesticide to be used – condition farmers’ practices to these solutions, and usage of these technologies has rapidly increased in recent decades. Despite the considerable risks to the human rights of adequate food, health and a sustainable environment, the chapter demonstrates that existing state regulation and other governance initiatives – most of which remain voluntary – have so far proven inadequate to align the practices of companies in the agro-chemical sector with human rights, or to hold companies accountable for human rights abuses. Beyond the ‘typical’ challenges related to regulating extensive global supply chains, discussed previously, the ABCTF market presents additional regulation challenges due to the high level of market concentration and the considerable power of the three global companies that control the market. This market consolidation reduces competitiveness in the field, gives the companies significant power over state regulatory agencies and consequently dampens the corporate interest in developing truly innovative technologies that contribute to reducing or eliminating the negative impacts of available technologies. Finally, in the last part of the chapter, a new horizon for research in the field of peace studies is presented: the corporate agency for sustainable peace, which shows promise in the sense of enabling the identification, analysis and publicization of ‘good’ corporate practices that can be reproduced and change the dynamics in the market.
David Segall focuses on the construction sector, monumental both in size (currently employing as much as 7 per cent of the global workforce) and in value (accounting for approximately 15 per cent of global GDP). Partly grounded in research conversations carried out by the author with migrant workers in the Arab Gulf region and South Asia, Segall’s chapter offers a glimpse into the daily challenges faced by low-wage construction workers, such as occupational safety, exploitation related to the undocumented status of many workers, deceiving practices during the recruitment stage, wage withholding and a substandard living environment – each of these issues being discussed separately. With regard to worker safety, most jurisdictions have by now passed targeted laws or regulations, mainly drawn from ISO-relevant protocols (see chapter 10). If serious accidents still occur, it is due not to the absence of standards or legal instruments but to the lack of implementation and enforcement. Another issue commonly raised by low-wage construction workers is ‘on-time and in-full payment’ – which seems to be the exception rather than the norm. Furthermore, recruitment processes based on false promises – an abusive practice known as ‘contract substitution’, often linked to the payment of substantial ‘recruitment fees’ by the workers to the recruitment firms or subagents – leaves low-wage construction workers with very few options: working more for less or returning home, potentially indebted or ruined. All in all, human rights issues affecting low-wage construction workers seem to be further aggravated by their migrant status: by seizing migrant workers’ passports upon arrival, employers (or housing supervisors often linked to them) get to entirely control their employees’ movements.

According to Segall, the root causes of the exposed issues affecting low-wage construction workers can be divided into three groups. First, there is the inter-regional and international nature of the construction labour market, which exploits the lack of jurisdictional alignment and of effective law enforcement. Second, global and regional inequality and related labour supply-and-demand dynamics allow construction companies to ‘shop around’ for the cheapest recruiters and workforce. Third, due to the increasingly horizontally consolidated but vertically fragmented landscape of the global construction industry, exemplified by conglomeration and outsourcing, it is difficult to attribute responsibility for human rights violations. Hence, there is no agreement as to who should bear responsibility for the plight of low-wage construction workers or upon whom the responsibility for action shall fall. The path forward, Segall maintains, consists of activists, politicians, academics and especially workers themselves having a honest dialogue on how the system can be restructured, particularly in respect of recruitment fees, on-time payment and living conditions.

A final chapter switches attention from primary (agriculture) and secondary (manufacturing) goods to services and shows that in the service sector too there are significant human rights concerns which need to be addressed. With regard to the financial sector, the chapter by Marta Bordignon brings attention to the fact that although the sector contributes to human rights violations, primarily through financing or supporting business activities carried out by others that result in human rights violations, a lack of clarity surrounding the sector’s human rights obligations leads to problems of implementation and enforcement. The author notes that although failing to address these human rights risks could result in long-term financial and reputational damage to the financial institutions, banks and holding companies making up the sector, a vast majority of these institutions have largely failed to fulfil the expectations laid out by the UNGPs, particularly developing adequate human rights due diligence policies, establishing an effective grievance mechanism and implementing sufficient human rights reporting. However, despite the general absence of binding, legal obligations on the financial sector,
self-regulation in the sector has grown in importance and a growing number of large financial institutions have voluntarily adopted a risk-management framework – the Equator Principles – that was developed by a group of banks and that includes expectations for managing environmental and social risks. Nevertheless, the author points out that direct applicability of human rights norms and principles to financial institutions, a better recognition of the sector’s potential for complicity in human rights violations and improved policy coherence are needed.

4. BUSINESS, HUMAN RIGHTS AND GLOBAL GOVERNANCE

What do the different contributions tell us about the current global governance of business and human rights? On the basis of the different contributions, we observe two main trends.

A first trend is that we observe the emergence of a business and human rights global governance regime with a rather strong normative core embedded in the UNGPs. In global governance research, regimes arise through the proliferation of actors and institutions involved in international rule-making and implementation. Ruggie and others have referred to this as polycentric governance of business and human rights, which means that key governance components (rule development, monitoring and enforcement) are shared between multiple organizations that have diverse memberships – in number and nature – and operate at different scales. Different organizations and institutions in regime complexes or polycentric governance arrangements can relate to one another in different ways. The interactions can vary. Conceptually, the potential spectrum of regime complexity can be considered on a continuum going from one end in which the regime has a clear, hierarchical structure steered by a leading international organization, to the other in which the regime consists of very fragmented collections of organizations with no identifiable core and weak or non-existent linkages between the different organizations. In between there is a range of regime complexes with different levels of interaction between organizations. Henning and Pratt develop this further and propose a framework for the analysis of global governance regimes based on two dimensions, namely hierarchy relations and institutional differentiation. Hierarchy relations refer to the extent to which organizations in a regime recognize other organizations. In a hierarchical regime, there is a leading organization with regard to one or more of these key governance functions (rule development, implementation and enforcement). Institutional differentiation refers to the extent to which organizations in a regime differ in the functions they perform. In some regimes one can observe, to a degree, a division of labour between organizations. It is clear that the emerging business and human rights regime has a strong core, in terms of rule-making and setting norms, which relies on the UNGPs and which spills over into different initiatives.

Many chapters in this Handbook describe the central role of the UNGPs and their spill-over into other initiatives. In this sense the business and human rights regime is a rather hierarchical one. The business and human rights regime is also differentiated in the sense that several initiatives focus on a core governance function. The UNGPs focus strongly on the creation of a normative core of international rules and principles; several initiatives, such as VSS and ISO, concentrate on implementation; and other initiatives focus to an extent on rule enforcement. This is not to argue that each of these initiatives solely concentrate on one of these functions. The OECD Guidelines and their NCPs or VSS, for example, focus on all three, but their main ‘added value’ lies in one of the functions: enforcement for NCPs and implementation for VSS.

However, this Handbook also shows that besides the core prominence of the UNGPs and activities related to UNGPs, the field of business and human rights is, to a degree, scattered, and contains many different and small initiatives. This is clearly shown in the chapters which deal with VSS, but also in our analysis of different sectors. Justine Nolan identifies fragmentation and the lack of coherence as one of the more important challenges. According to Peter Pawlicki, this fragmentation is very much linked to the fragmentation of economic production processes and global value chains, and hence is difficult to tackle. So, the question arises as to how more consolidation and coordination can be achieved.

A second observation that emerges is the so-called increasing legalization of the regime. Based on an analysis of two legal developments – litigation and new legislative initiatives in the field of business and human rights – Bright and colleagues recently argued that the voluntary human rights responsibility of companies is increasingly turning into a legal duty for companies to respect human rights. This shift from soft to hard law is also documented to different degrees in some contributions in this Handbook. Abbott and Snidal distinguish soft and hard law on three dimensions: obligation, precision and delegation. Obligation refers to the degree to which actors are legally bound by international rule(s) or commitment(s). Precision refers to the degree to which the rules are defined in a sufficiently precise manner in order to assess the implementation of rules. Finally, delegation refers to the degree to which third parties have been granted authority to enforce the rules, resolve disputes and potentially amend the rules. Each dimension is a matter of degree and gradation and international rules and commitments score differently on each dimension.

On these three dimensions, the business and human rights global governance regime is evolving from a soft law approach to a more hard law approach. In terms of obligation and precision, it is clear that the UNGPs (chapter 4), the OECD Guidelines (chapter 11) and a possible binding treaty (chapter 2) provide more precise rules and clear obligations for states and companies. These international rules are referred to and operationalized in new national regulatory initiatives (chapters 5 and 6) and institutions (chapters 12 and 13) which add to the precision and increased obligation of compliance with rules in the business and human rights field. Compared to the early initiatives in the field of business and human rights, such

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as the United Nations Global Compact, these new international and national initiatives are far more developed and precise, containing sufficient detail to assess their implementation. Delegation in the business and human rights regime is also expanding with the emergence and further development of non-state actors. One can observe the growth of so-called intermediary organizations and initiatives which aim to implement international commitments and rules. Bijlmakers discusses the potential of ISO 26000 (chapter 10). Rasche (chapter 8) and Bennett (chapter 9) provide extensive analyses of the contribution which non-state market-based initiatives such as voluntary sustainability standards can make. Rasche refers to the institutionalization of VSS, indicating their consolidation as an intermediary in the business and human rights regime. Otteburn and Marx (chapter 11) detail the increasingly important role the OECD Guidelines and NCPs are playing in implementing human rights commitments. In particular, the strong growth in the number of ‘specific instances’ related to business and human rights is a sign of the growing importance of this intermediary.

This legalization of the regime is welcomed by some, including some within the business community. In particular, they expect mandatory legislation to fill in some of the gaps in the current regime, including many of those pointed out throughout the following chapters, such as challenges to enforcement and effectiveness of voluntary sustainability standards (chapter 9); state-based non-judicial mechanisms’ lack of competence to award binding remedies to victims (chapter 13; chapter 11), a lack of alignment between mechanisms, such as between the UNGPs and ISO 26000 (chapter 10), and the lack of consequences for non-compliance with transparency measures (chapter 5).

However, the evolution of the business and human rights global governance regime is not unfolding without fierce debate. Overall, the existing governance system gravitates around a strong normative core, but offers less in terms of sanctions for companies that fail to meet their obligations or redress for those who are affected. There is strong pressure by many policy-makers, business actors and others who would like to keep the status quo and who have opposed more stringent regulation at national and regional levels. They argue that the focus should be on enhanced guidance for implementing voluntary guidelines and approaches, and on ‘incentives instead of penalties’. How these tensions will play out will constitute a major research agenda for the future, especially as more and more cases of human rights violations

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by companies receive media attention and policy-makers worldwide develop mandatory legislation.

5. CONCLUSION

The global governance of business and human rights is slowly taking shape. This Handbook aims to take stock of where we stand with regard to research on some of the major global governance initiatives related to business and human rights. Global governance is not approached from a purely transnational perspective, only focusing on initiatives that operate across borders, but also includes national initiatives which aim to operationalize and implement global frameworks.

The aim of the Handbook is not to be exhaustive but to zoom in on some key initiatives in the area of business and human rights and provide an extensive discussion of current research and literature. We ordered the different contributions of Part I according to some key governance activities such as rule-making, rule implementation and rule enforcement. Part II focuses on developments in specific sectors, since the ways in which initiatives will play out will differ from sector to sector. In addition, taking a look at different sectors allows for the identification of specific initiatives.

All contributions identified areas for future research. Some of them are specific to certain initiatives and sectors; some hold across different initiatives. Early research and literature on the different initiatives focused on the emergence, development and institutional or regulatory design of many of these initiatives. On this front, significant research progress has been made. Looking to the future, two key areas for research can be identified. First, research can focus on the further institutionalization of the different initiatives. Institutionalization research can focus on how the different initiatives interact and feed into one another. The many cross-references in the Handbook show that there are many interlinkages between the different initiatives. The precise nature of these interlinkages and their effects need further research. This fits within a broader global governance literature that looks at public–private interactions and global governance regimes. A second line of research needs to focus on the effectiveness of these initiatives. Several contributions identified effectiveness as a key area of research, focusing not only on the impact, operationalized in different ways, of these initiatives but also on gaining a better understanding as to the conditions under which these initiatives tend to be more or less effective. Here more empirical research is needed, in terms of both qualitative and quantitative research. This research can also lead to insights on how the global governance regime on business and human rights can be consolidated. Some initiatives that prove to be ineffective might be abandoned and new, more effective initiatives might

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emerge. With the different contributions in this Handbook we hope to contribute to the further development of this research agenda.