



# OECD Responsible Business Conduct Policy Reviews

## PERU





# **OECD Responsible Business Conduct Policy Reviews: Peru**



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## Foreword

Promoting and enabling responsible business conduct (RBC) is a priority for policy makers wishing to ensure that business activities contribute to broad value creation and economic, environmental and social progress. Citizens increasingly expect that goods and services be produced and supplied responsibly in compliance with international RBC principles and standards.

The OECD Responsible Business Conduct Policy Review of Peru provides practical recommendations for strengthening the implementation of RBC principles and standards in a way that contributes to the improvement of Peru's economic and sustainability outcomes and supports the country's development objectives. Relevant RBC issues analysed in the Review will inform the development of Peru's National Action Plan on Business and Human Rights. The Review also makes recommendations for strengthening the role of the Peruvian National Contact Point for RBC as an agent of policy coherence.

The Review has been prepared by the OECD Centre for Responsible Business Conduct, under the supervision of Froukje Boele, Manager for Latin America and the Caribbean, and the overall guidance of Cristina Tébar Less, Acting Head of the Centre. The team that drafted the Review comprised Marie Bouchard, Nicolas Hachez and Stamatis Kotouzas. Significant contributions were received from Frédéric Wehrlé, Stephanie Venuti, Germán Zarama and Inmaculada Valencia.

Earlier drafts of the Review have benefitted from comments by Delegates and the Chair of the OECD Working Party on Responsible Business Conduct. Colleagues from different parts of the OECD Secretariat, including the Investment Division, the Public Sector Integrity Division and the Environmental Performance and Information Division, as well International Labour Organization and the Office of the United Nations High Commissioner for Human Rights, also provided valuable inputs.

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The information in the Review is current as of 1 June 2020.

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## Acronyms and abbreviations

AMPE	National Assembly of Regional Governments
ANGR	Association of Peruvian Municipalities
BIT	Bilateral Investment Treaty
BLEU	Peru-Belgium Luxembourg Economic Union
CAN	High-Level Anti-Corruption Commission
CITES	Endangered Species of Wild Fauna and Flora
CNTPE	National Council for Labour and Employment Promotion
CONFIEP	National Confederation of Business Institutions of Peru
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRA	Regional Anti-Corruption Commission
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
Due Diligence Guidance	OECD Due Diligence Guidance for Responsible Business Conduct OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector OECD-FAO Guidance for Responsible Agricultural Supply Chains OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector
Due Diligence Guidance for RBC	OECD Due Diligence Guidance for Responsible Business Conduct
ENCC	National Strategy on Climate Change
Escazú Agreement	Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean
ETEA	Economic and Trade Expansion Agreement
EU	European Union
FDI	Foreign Direct Investment
FONAFE	Peruvian Corporation of State-Owned Enterprises
FPIC	Free Prior and Informed Consent
FTA	Free Trade Agreement
GDP	Gross Domestic Product
GEIT	Special Labour Inspection Unit for Combating Forced and Child Labour
GHG	Greenhouse Gas
GRI	Global Reporting Initiative
GVC	Global Value Chain
IDB	Inter-American Development Bank
IFC	International Finance Corporation
ILO	International Labour Organization
ILO MNE Declaration	Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
INEI	National Institute of Statistics and Information
IPA	Investment Promotion Agency



ISDS	Investor-State Dispute Settlement
ISO	International Organization for Standardization
ITUC	International Trade Union Confederation
LAC	Latin America and the Caribbean
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MEF	Ministry of Economy and Finance
MINAM	Ministry of the Environment
MINEM	Ministry of Energy and Mines
MINJUSDH	Ministry of Justice and Human Rights
MSMEs	Micro, Small and Medium-sized Enterprises
MTPE	Ministry of Labour and Employment Promotion
NAP	National Action Plan on Business and Human Rights
NCP	National Contact Point for Responsible Business Conduct
NDC	Nationally Determined Contribution
OECD	Organisation for Economic Co-operation and Development
OGASA	General Office for Socio-Environmental Matters (MINAM)
OGGS	General Office of Social Affairs (MINEM)
OSCE	Peruvian entity in charge of supervising public procurement
OSINFOR	Agency for Supervision of Forest Resources and Wildlife
OTLA	Office of Trade and Labour Affairs (Department of Labour of the United States)
Petroperu	Peru's National Oil Company
PFI	OECD Policy Framework for Investment
PNCP	National Plan for Competitiveness and Productivity
ProInversión	Peru's Investment Promotion Agency
PSPC	Public Services and Procurement Canada
RBC	Responsible Business Conduct
RBCLAC	Responsible Business Conduct in Latin America and the Caribbean
SAI	Social Accountability International
SDGs	Sustainable Development Goals
Sector-specific Due Diligence Guidance	OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector OECD-FAO Guidance for Responsible Agricultural Supply Chains OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector
SEIA	National System of Environmental Impact Assessment
SGSD	Office of Social Management and Dialogue
SMEs	Small and Medium-sized Enterprises
SNMPE	National Society for Mining, Oil and Energy
SOE	State-Owned Enterprise
SSDS	State-to-State Dispute Settlement
SUNAFIL	National Labour Inspection Superintendency
The 2030 Agenda	The 2030 Agenda for Sustainable Development
The Guidelines	OECD Guidelines for Multinational Enterprises

The SOE Guidelines	OECD Guidelines on Corporate Governance of State-Owned Enterprises
TPA	Trade Promotion Agreement
TPP	Trans-Pacific Partnership
UN	United Nations
UN ECLAC	United Nations Economic Commission for Latin America and the Caribbean
UNCAC	United Nations Convention Against Corruption
UNCTAD	United Nations Conference on Trade and Development
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNOHCHR	Office of the United Nations High Commissioner for Human Rights
UNWG	United Nations Working Group on Business and Human Rights
UPR	Universal Periodic Review
U.S.	United States
USD	United States Dollars
WEF	World Economic Forum

## Executive summary

Over the last two decades, Peru has achieved significant socioeconomic progress. With an open economy relying on trade and international investment, a strong mining sector and a robust agriculture sector, it has become one of the fastest growing economies in Latin America and the Caribbean. The dynamism of Peru's economy results from the implementation of sound economic policies, combined with favourable external macroeconomic conditions. This economic development has been coupled with social progress. Between 2004 and 2015, nine million Peruvians were lifted out of poverty and the middle-class now represents an estimated 38% of the population.

Alongside this socioeconomic progress, the role of business in society has become a growing subject of interest in Peru, and with it, the expectation that business should act responsibly. Responsible business conduct (RBC) is the understanding that businesses should avoid and address adverse impacts on people, the planet, and society, while contributing to sustainable development. In response to demand from trade and investment partners for increased sustainability and a growing number of business-related adverse impacts, the Government, the private sector, and civil society have started taking steps to increase awareness and uptake of RBC standards. One significant step was Peru's adherence to the OECD Guidelines for Multinational Enterprises (the Guidelines) in 2008 and the establishment of a National Contact Point for RBC (NCP) in 2009. More recently, through its National Plan on Human Rights 2018-2021, the Government has committed to develop a National Action Plan on Business and Human Rights (NAP) to promote business respect of human rights. In parallel, several business associations have started promoting due diligence amongst their members to prevent and mitigate adverse impacts of their operations. Foreign due diligence regulations have also had an impact in Peru and concerned companies have increasingly sought to incorporate due diligence processes in their policies and management systems. Civil society organisations have likewise begun to develop programmes to promote RBC and risk-based due diligence approaches for companies.

Despite these positive developments, Peru still faces significant challenges in its path towards sustainable economic and social development. Due to a lack of diversification and a substantial reliance on mining and natural resources exports, the economy heavily depends on external macroeconomic conditions and faces low productivity growth. Inequalities remain high and vulnerabilities, such as informal employment, poor access to quality public services, and low levels of social protection, still affect an important part of the Peruvian population: 70% of Peruvian workers are informal and 80% of them belong to the so-called vulnerable group. In addition, social conflicts over human rights violations linked to large-scale projects and other business operations have contributed to erode trust in public institutions and the private sector. The Coronavirus (COVID-19) outbreak and the ensuing global economic, financial, and social crisis will most likely exacerbate these challenges in the coming years.

Peru has legal and regulatory frameworks in place to support the uptake of RBC standards. However, it still faces challenges in effectively enforcing these laws, regulations and policies.

For example, while Peru has a robust legal framework for the protection of human rights, its enforcement remains insufficient, particularly in remote regions of the country and with respect to informal workers. Additionally, social conflicts regularly emerge in respect of the human rights impacts of large-scale projects and with respect to the free, prior, and informed consultation of indigenous peoples. Moreover, Peru's network of judicial and

non-judicial remedy mechanisms faces difficulties in providing access to justice to all, and especially to vulnerable groups.

The Peruvian labour legal system is elaborate and comprehensive. Nevertheless, its complexity, coupled with institutional deficiencies, results in poor compliance rates and weak enforcement. The flaws of the labour inspection system notably impair the detection of labour rights violations and the enforcement of laws and regulations. Moreover, Peru's labour market is characterised by low levels of unionisation (only 6% of workers in the private sector are unionised) and collective bargaining coverage, with allegations of anti-union practices occurring frequently. The effective realisation of fundamental labour rights is further affected by the fact that two-thirds of workers and 90% of firms (especially, micro, small and medium sized enterprises) in the country are informal. Peruvian informal workers are outside the remit of labour law protection and have no effective access to freedom of association and collective bargaining. Child and forced labour and occupational accidents are also more prevalent among informal workers.

Peru has made noteworthy progress in environmental protection, governance, and justice. It was the first country in the region to enact an overarching climate change law and recently opened a dedicated environmental court, with plans to institute additional courts dedicated to environmental matters by 2021. Notwithstanding this progress, Peru still faces significant environmental impacts related to business activity, such as deforestation, illegal logging, as well as soil and water contamination resulting from mining operations.

Peru has also made significant efforts to reform its anti-corruption system and, in particular, to improve integrity in the public sector. However, elements of a functioning legal framework to promote integrity in the private sector are still missing, as guidance or trainings on compliance programmes and the detection of corruption are yet to be developed.

In addition to enforcing and further developing existing laws, regulations, and policies relating to human and labour rights, environment and anti-corruption, Peru can also incentivise responsible business practices through other economic policies.

One of them is public procurement, which accounts for more than half of government expenditure (50.7%) and 11.6% of Gross Domestic Product (GDP) in Peru. For now, it is timidly starting to be used to pursue policy objectives such as environmental and social sustainability or integrity. Actively seeking to prevent that government purchasing contributes to adverse impacts on people, the planet, or society could be a next step to promote responsible business practices.

State-Owned Enterprises (SOEs) can also play an important role in leading by example on RBC and enhancing the legitimacy of public policies. Currently, the 35 SOEs managed by the Peruvian Corporation of SOEs (*Fondo de Financiamiento de la Actividad Empresarial del Estado*, FONAFE) and *Petróleos del Perú* (Petroperu) are required to observe certain social and environmental standards. Nevertheless, in the absence of a coherent and overarching RBC strategy, most of them still do not pay sufficient attention to the prevention and mitigation of adverse impacts and their contribution to sustainable development.

RBC provisions in trade and investment agreements also have the potential to strengthen government policies on RBC, incite businesses to adopt RBC practices, and facilitate access to remedy for victims of adverse impacts. This is particularly pertinent for Peru as it conducts 92.2% of its trade through free trade agreements and its stock of inward foreign direct investment was equivalent to 46% of its GDP in 2018. Several of its recent trade and investment agreements contain provisions that promote RBC. However, these provisions

vary in nature, scope, and binding nature and, hence, do not fully serve their potential for wider uptake of RBC.

An important number of challenges therefore remain to be dealt with by Peru. Addressing them and building an enabling environment for RBC is of paramount importance for the country to keep up with its recent economic and social development and achieve sustainability outcomes. A strong RBC policy framework can contribute to further reinforce the performance of Peru's economy, allowing it to attract quality international investment and to strengthen its insertion in the global economy. It can also be instrumental to make further progress towards sustainable development and increased accountability, which can in turn contribute to rebuild trust in public institutions and the private sector.

This has become all the more important in light of the COVID-19 crisis and its economic, financial, and social consequences. Although the extent and full impact of the pandemic in Peru is not known yet, its economy and society will likely be hit severely. Considering the high number of informal workers in the country, the crisis will not only profoundly affect the activities of Peruvian businesses, but will also have far-reaching consequences on the livelihoods of its households.

Peru's readiness to be the first Adherent country to the Guidelines to undergo an RBC Policy Review shows a strong willingness to address these challenges and consolidate its path towards sustainable development. The process of the Review was carried out in close cooperation with the Government and, in particular, the NCP, and entailed consultations with local businesses and stakeholders. As such, it provided a first opportunity to raise awareness of the importance of RBC among a wide array of government entities, businesses and stakeholders. The Review now seeks to help the Government prioritise actions in order to inform the elaboration of its NAP and build an enabling environment for RBC. It provides actionable advice on several areas covered by the Guidelines and on policies that can shape business conduct in order to mainstream RBC in the main areas relevant to foster responsible practices. If endowed with the adequate resources and capacity, the Peruvian NCP can play an important role to strengthen the coherence of RBC policies. It can promote RBC across government entities and act as an agent of policy coherence, thereby supporting the Government in applying the recommendations formulated in the present Review.

## Introduction and overview

Promoting and enabling responsible business conduct (RBC) is of central interest to policy-makers wishing to ensure that business activities contribute to broad value creation and economic, environmental and social progress. There is a growing expectation that goods and services be produced and supplied responsibly in compliance with international RBC principles and standards. There is also increasing evidence that responsible business is more profitable and that RBC is key to attract and retain quality investment. Furthermore, the 2030 Agenda for Sustainable Development (the 2030 Agenda) calls for a stronger role of the private sector in the development process.

The OECD Guidelines for Multinational Enterprises (the Guidelines) set out the expectation that all businesses avoid and address the adverse impacts of their operations, while contributing to sustainable development of the countries in which they operate. They are the most comprehensive set of government-backed recommendations addressed to businesses in all major areas related to RBC, including, *inter alia*, human rights, employment and industrial relations, environment, and bribery and corruption. Although the recommendations contained in the Guidelines are addressed to businesses, they also entail a legal obligation for adhering governments to set up a National Contact Point for RBC (NCP) to promote the Guidelines and act as a non-judicial grievance mechanism.

In addition, governments also play an important role in promoting and enabling RBC. The Chapter on ‘Policies for enabling RBC’ in the OECD Policy Framework for Investment (PFI) (Chapter 7) is a useful reference for designing and implementing a strong RBC policy framework.<sup>1</sup> This includes ensuring ‘policy coherence’ with RBC, meaning that government policy action should consistently support and strengthen the expectations set out in the Guidelines. Such policy coherence requires ensuring an ‘enabling policy environment’ for RBC.<sup>2</sup> In practice, creating such enabling environment can be done in a variety of ways that can be grouped into two broad categories of policy action:

- *Regulating and enforcing for RBC*, i.e. directly regulating business conduct in areas covered by the Guidelines (e.g. human rights, employment and labour, environment, anti-corruption, and consumer interests). Enforcement requires that governments have sufficient capacity and resources to monitor compliance with laws and regulations and to respond to any infringements.
- *Leveraging and incentivising RBC*, i.e. enacting policies and regulations that make it easier or provide incentives for businesses to comply with the Guidelines. This not only means that governments should refrain from policies that contradict the Guidelines, but also that they should systematically consider how their policies may facilitate RBC-compliant behaviour by companies.

The present RBC Policy Review takes stock of RBC policies and practices in Peru and provides practical recommendations to strengthen them, with the aim that they, in turn, contribute to improve Peru’s economic and sustainability outcomes and support the country’s development objectives. Moreover, the Review seeks to inform the development process of the National Action Plan on Business and Human Rights (NAP), currently ongoing in Peru. The relevant RBC issues analysed in the framework of the present RBC Policy Review are planned to be taken into consideration in the future NAP. The Review also makes several recommendations aimed at strengthening the role of the NCP as an agent of policy coherence (yet it does not specifically analyse the NCP nor make recommendations aiming to strengthen or reform it structurally). The Review does not prescribe any preferred course of action. Rather, it explores ways in which the Government of Peru can more effectively support the implementation of the Guidelines, the related Due

Diligence Guidance and the PFI through policies, incentives, capacity building and policy coherence on RBC. As such, it may also be used as a resource document by government entities, businesses, trade unions, civil society and indigenous peoples to better understand the scope and potential to further strengthen RBC policies in Peru.

The OECD Secretariat prepared this RBC Policy Review in close cooperation with the Government of Peru, in particular with the NCP and the Ministry of Justice and Human Rights (MINJUSDH) in charge of developing the NAP. Peru transmitted a formal request for a RBC Policy Review to the OECD in July 2019. The development process of the RBC Policy Review included responses by the Government to a questionnaire prepared by the OECD Secretariat and inputs from multiple government entities involved in the elaboration of Peru's NAP. The OECD Secretariat also undertook a fact-finding mission in Peru between 23 and 27 September 2019, during which it met with officials from relevant ministries and government entities, as well as with representatives of business associations, trade unions, civil society and indigenous peoples (a list is set out in the Annex: Stakeholder Meetings). In the context of the mission, the OECD Secretariat also held a consultation meeting with representatives from OECD countries in Lima on 26 September 2019 to inform them about the Review and seek their input.<sup>3</sup> The draft of the Review was discussed by the OECD Working Party on Responsible Business Conduct during its meeting held on 3-4 March 2020. It was also reviewed by local business associations, trade unions and civil society organisations, which provided detailed comments on several aspects of the Review.<sup>4</sup>

This Review is part of the OECD's ongoing support to Peru, which aims, *inter alia*, to strengthen RBC policies and practices in the country. It is carried out in the context of the project "RBC in Latin America and the Caribbean" (LAC) (RBCLAC Project),<sup>5</sup> which is financed by the European Union (EU), and implemented jointly with the International Labour Organization (ILO) and the Office of the United Nations (UN) High Commissioner for Human Rights (UNOHCHR). The activities carried out by the OECD in the framework of this Project focus on strengthening government policies for RBC, helping businesses to conduct due diligence in priority sectors, and reinforcing NCPs in the LAC region.<sup>6</sup>

The Review is divided into five sections. Section 1 clarifies what is RBC and gives an overview of the main OECD instruments and tools on RBC. Section 2 provides the context for RBC policy development and implementation in Peru. Section 3 describes the policies enacted by Peru in selected areas covered by the Guidelines and provides recommendations for policy action in these areas. Section 4 explores how Peru could promote policy coherence by integrating RBC considerations into the Government's operations as an economic actor and in its trade and investment agreements. Section 5 concludes the Review with an overall assessment of the RBC landscape in Peru and provides recommendations to the Government to build an enabling environment for RBC in the country.<sup>7</sup>

## 1. What is Responsible Business Conduct?

RBC has a two-fold objective. On the one hand, it entails that all enterprises – regardless of their legal status, size, ownership structure or sector – make a positive contribution to economic, environmental and social progress in the countries in which they operate with a view to achieving sustainable development. On the other, it implies that enterprises avoid and address adverse impacts on people, the planet and society caused by their activities and/or prevent and mitigate adverse impacts directly linked to their operations, products or services through supply chains and/or business relationships. As these impacts cover a range of substantive areas, the scope of RBC is broad and crosscutting. Risk-based due diligence is central to identifying, preventing and mitigating actual and potential adverse impacts, and is thus a key element of RBC (OECD, 2015<sup>[1]</sup>).

RBC is increasingly relevant for the global agenda. It is a powerful tool to deal with the downsides of globalisation and foster the positive contribution of businesses to economic and sustainability outcomes. It can help attract responsible investment, facilitate insertion in global value chains (GVCs), minimise risks for businesses, and ensure the respect of stakeholder rights. It can also contribute to making progress towards sustainable development by maximising the private sector's contribution to the Sustainable Development Goals (SDGs) and mobilising the resources necessary for financing the implementation of the 2030 Agenda (OECD, 2016<sup>[2]</sup>).

### Box 1.1. RBC, Corporate Social Responsibility, and Business and Human Rights: Lost in translation?

Many businesses, governments and stakeholders are familiar with the term Corporate Social Responsibility (CSR), which has historically been used to describe business interactions with society.

Over the last years, CSR has increasingly been used alongside RBC and Business and Human Rights, with some using the terms interchangeably (e.g. the EU). How do these concepts relate to each other?

They all reflect the expectation that businesses should consider the impact of their operations, supply chains, and business relationships on people, the planet and society as part of their core business considerations and not as an add-on. This includes the need to avoid and address negative environmental and social impacts.

A key characteristic of CSR, RBC and Business and Human Rights is that they refer to corporate conduct beyond simply complying with domestic law and call on business to contribute positively to sustainable development while managing risks and impacts that may result from their activities. These concepts should not be understood to be equivalent to philanthropy.

Source:

ILO, OECD, UNOHCHR (2019), Responsible business – Key messages from international instruments, <https://mneguidelines.oecd.org/Brochure-responsible-business-key-messages-from-international-instruments.pdf>.



## 1.1. OECD instruments and tools on RBC

The OECD has developed an important number of instruments and tools aimed at fostering the adoption and implementation of RBC practices by businesses but also of RBC policies by governments.

### *The Guidelines and the NCPs*

The main instrument aimed at promoting the adoption of RBC practices by businesses is the Guidelines. The Guidelines are recommendations from governments to businesses on how to act responsibly<sup>8</sup> that cover all areas of potential business responsibility, including human rights, employment and industrial relations, environment, information disclosure, bribery and corruption, consumer interests, science and technology, competition, and taxation. The Guidelines were adopted in 1976 and last updated in 2011 to include a Chapter on human rights aligned with the UN Guiding Principles on Business and Human Rights (UNGPs), following the example of the Chapter on Employment and Industrial Relations, which is aligned with ILO's labour standards.

To date, 49 countries (of which 37 OECD members and 12 additional economies) – including Peru, Argentina, Brazil, Colombia and Costa Rica<sup>9</sup> – have adhered to the Guidelines, thereby committing to implement them and encourage their use.

Adherents to the Guidelines have the legal obligation to set up a NCP to further their implementation. NCPs have two main functions. On the one hand, they promote the Guidelines and handle enquiries to make them known among relevant stakeholders and across government entities. On the other hand, they serve as a grievance mechanism to resolve “specific instances”, that is cases relating to the non-observance of the recommendations contained in the Guidelines.

Up to now, the 49 existing NCPs have dealt with more than 500 specific instances arising in over 100 countries, thereby playing a critical role in ensuring that the Guidelines are implemented globally.

### *The Due Diligence Guidance*

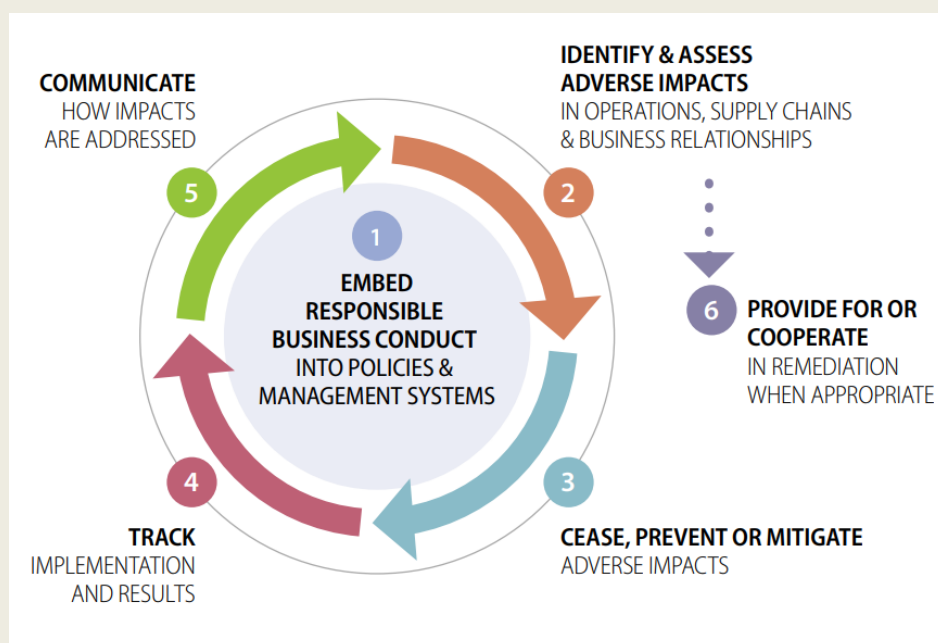
The Guidelines embed the expectation that enterprises carry out due diligence to identify, prevent and mitigate real and potential adverse impacts on people, the planet and society, and to account for how those impacts are addressed. Based on this expectation, the OECD has developed a range of instruments providing guidance on due diligence, with the aim of helping companies operating in different sectors understand and address RBC risks.

In 2018, the OECD issued a general Due Diligence Guidance for RBC to promote a common understanding among governments and stakeholders of due diligence for RBC. The Guidance defines a six-step process for due diligence (see Box 1.2), which is relevant for all types of enterprises operating in all countries and sectors of the economy (OECD, 2018<sub>[3]</sub>). As such, it also serves to implement the due diligence recommendations contained in the UNGPs and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the ILO MNE Declaration).

### Box 1.2. The due diligence process and supporting measures

Taking into account the fact that due diligence should be commensurate with risk and appropriate to a specific enterprise's circumstances and context, the Due Diligence Guidance for RBC establishes a six-step process to conduct due diligence that can be used by any enterprise irrespective of the location or sector of its operations.

This process consists in embedding RBC into the enterprise's policies and management systems (step 1) and undertaking due diligence by identifying actual or potential adverse impacts on RBC issues (step 2), ceasing, preventing or mitigating such impacts (step 3), tracking implementation and results (step 4), communicating how impacts are addressed (step 5), and enabling remediation when appropriate (step 6).



Source:

OECD (2018), Due Diligence Guidance for Responsible Business Conduct, <http://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>.

In addition to the general Due Diligence Guidance for RBC, the OECD has developed sector-specific Due Diligence Guidance for the minerals, extractives, agriculture, and garment and footwear sectors. This Guidance helps enterprises identify and address risks to people, the planet, and society that can be associated with business operations, products or services (see Box 1.3).

### Box 1.3. OECD sector-specific Due Diligence Guidance

The OECD has developed Due Diligence Guidance for four specific sectors, all of which have been embedded into OECD Council Recommendations:

- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD, 2016<sup>[4]</sup>)

- OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (OECD, 2017<sup>[5]</sup>)
- OECD-FAO Guidance for Responsible Agricultural Supply Chains (OECD/FAO, 2016<sup>[6]</sup>)
- OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (OECD, 2018<sup>[7]</sup>)

These OECD Council Recommendations recommend that adhering governments and their NCPs actively promote the use and observance of the Guidance by enterprises operating in and from their territories, but also take measures to support the adoption of risk-based due diligence frameworks for responsible supply chains, and ensure the widest possible dissemination of the Guidance (including among relevant government entities), and their use as resources by stakeholders.

As part of its work on RBC in the financial sector, the OECD has also developed papers on RBC for Institutional Investors (OECD, 2017<sup>[8]</sup>) and Due Diligence for Responsible Corporate Lending and Securities Underwriting (OECD, 2019<sup>[9]</sup>).

### *The Policy Framework for Investment*

Besides fostering the adoption and implementation of RBC practices by businesses, the OECD also encourages the adoption and implementation of strong RBC policy frameworks by governments through the PFI.<sup>10</sup> The PFI is designed to help governments maximise the development impact of investment (OECD, 2015<sup>[10]</sup>) and contains a chapter dedicated to policies for enabling RBC (Chapter 7). This Chapter has become a reference for designing and implementing strong RBC policy frameworks and coordinating government efforts on RBC (See Box 1.4).

#### **Box 1.4. Extracts from Chapter 7 of the PFI – Policies for enabling RBC**

Governments can enable RBC in several ways:

- Regulating – establishing and enforcing an adequate legal framework that protects the public interest and underpins RBC, and monitoring business performance and compliance with regulatory frameworks;
- Facilitating – clearly communicating expectations on what constitutes RBC, providing guidance with respect to specific practices and enabling enterprises to meet those expectations;
- Co-operating – working with stakeholders in the business community, worker organisations, civil society, general public, across internal government structures, as well as other governments to create synergies and establish coherence with regard to RBC;
- Promoting – demonstrating support for best practices in RBC;
- Exemplifying – acting responsibly in the context of the government’s role as an economic actor.

Source:

Policy Framework for Investment, <http://www.oecd.org/investment/pfi.htm>.

## 1.2. Alignment with international instruments

The OECD instruments and tools on RBC are aligned and complement the other international instruments on responsible business practices developed by the ILO and the UN, i.e. the ILO MNE Declaration and the UNGPs. Jointly, the Guidelines, the ILO MNE Declaration, and the UNGPs set the global expectations for RBC and have become a key reference for responsible business (ILO/OECD/UNOHCHR, 2019<sub>[11]</sub>).

The three instruments outline how enterprises can act responsibly. They all establish in this regard that any enterprise (regardless of its size, sector, operational context, ownership and structure) should make a positive contribution to the economic, environmental and social progress of the countries in which it operate, while avoiding and addressing adverse impacts on human and labour rights, the environment and society. This covers not only impacts that the enterprise may cause or contribute to through its own activities but also those impacts directly linked to its operations, products or services through its supply chains and/or business relationships. According to these instruments, enterprises should undertake due diligence to identify, prevent and mitigate adverse impacts and account for how those impacts are addressed. In addition, where enterprises identify that they have caused or contributed to adverse impacts, they are expected by the three instruments to provide access to remedy through legitimate processes (ILO/OECD/UNOHCHR, 2019<sub>[11]</sub>).

The OECD, the ILO and the UN each bring their own value-added to the implementation of the principles and standards contained in the Guidelines, the ILO MNE Declaration and the UNGPs based on their mandate and expertise: the OECD with its broad approach to RBC and the links to economic policies, the ILO with its tripartite structure and authority on international labour standards, and the UNOHCHR and the UN Working Group on Business and Human Rights (UNWG) with their expertise on Business and Human Rights and UN human rights mandates (ILO/OECD/UNOHCHR, 2019<sub>[11]</sub>).

## 2. Context for Responsible Business Conduct Policy Development and Implementation

This Section provides economic facts and figures, as well as an overview of the regulatory and institutional setting in Peru relevant to RBC, to better understand the opportunities and challenges associated with promoting and enabling responsible business practices in Peru.

### 2.1. Socio-economic background

Over the past two decades, Peru has emerged as an upper-middle income economy. Between 2004 and 2013, economic growth reached an average of 6.2% per annum with low inflation (World Bank, 2017<sub>[12]</sub>). From 2014 until today, the slowdown in global growth and the associated decline in trade and investment and in international commodity prices have had an impact on Peru's economy, which has nevertheless recorded growth rates above the LAC average. In parallel, between 2004 and 2015, nine million Peruvians escaped poverty, with the moderate poverty rate settling at 22% after a steady drop from 58% in 2004 (World Bank, 2017<sub>[12]</sub>). The middle class also expanded to now represent an estimated 38% of the Peruvian population, twice its share than in 2004 (OECD, 2019<sub>[13]</sub>).

However, some structural vulnerabilities remain and prevent Peru from moving onto the next stage of its development process. They notably stem from persistently low levels of productivity, declining levels of trust in, and the weaknesses of, public institutions, and growing challenges related to the environmental sustainability of the Peruvian economic model (OECD et al., 2019<sub>[14]</sub>). In addition, inequalities are still high and vulnerabilities are significant for a sizeable share of the population (OECD, 2019<sub>[13]</sub>). Indigenous peoples, for instance, are on average poorer than non-indigenous persons as poverty rates have fallen relatively less for them (World Bank, 2017<sub>[12]</sub>).

Peru's economy depends heavily on trade and international investment. The country conducts 92.2% of its trade through free trade agreements (FTAs) (OECD, 2019<sub>[15]</sub>) and roughly half of its trade is with countries that have also adhered to the Guidelines (World Bank, 2019<sub>[16]</sub>). In 2017, Peru's trade (exports plus imports) amounted to 49% of the country's Gross Domestic Product (GDP), with fuels and mining products (such as copper ore and gold) accounting for almost half of exports, agricultural products for 21%, and manufacturing for 10% (Discover Peru, 2019<sub>[17]</sub>). Mining and agriculture are thus two of the most significant economic sectors for Peru's export-oriented growth, as well as important sources of employment for the country (ILO, 2019<sub>[18]</sub>). In response to international demands for increased sustainability and RBC, these two sectors are highly regulated, but environmental, social, and governance risks remain fairly high, especially in informal activities. Although both outward and inward Foreign Direct Investment (FDI) stocks have been growing, FDI remains inward orientated. In 2018, the total stock of inward FDI in Peru amounted to USD 104 411 million, representing 46.4% of the country's GDP, and FDI inflows reached USD 6 175 million (UNCTAD, 2019<sub>[19]</sub>). The main channel Peru uses for linking into GVCs<sup>11</sup> remains the extraction and export of precious metals and mining products, which is an industry largely owned by foreign firms that has no export restrictions (OECD, 2017<sub>[20]</sub>).

Peru's economy is characterised by high and persistent levels of informality. Informal jobs are prevalent in the informal sector, but also reportedly exist in some formal companies and institutions (INEI, 2019<sub>[21]</sub>). In both cases, they tend to be associated with a significantly higher incidence of low pay and an exclusion from the protection of the labour law system (OECD, 2015<sub>[22]</sub>). As a result, informal workers face particularly high risks of adverse impacts on their human and labour rights. More than two-thirds of workers and almost 90% of firms in Peru are informal. Close to 80% of these informal workers are

considered to be in vulnerable employment<sup>12</sup> (with incomes between USD 4 and 10 per day) (OECD, 2019<sub>[13]</sub>).

The informal sector in Peru remains concentrated in micro and small productive units (OECD, 2019<sub>[13]</sub>). As much as 87% of all productive units were informal in 2012 (OECD, 2019<sub>[13]</sub>) and only 6% of these firms have access to the financial system (Government of Peru, 2019<sub>[23]</sub>). Of these informal firms, almost all have fewer than five workers (98.4%), suggesting a strong association between informality and firm size. Only 1.2% of Peru's firms have between 6 and 10 workers, and 0.3% of all firms have more than 11 workers (OECD, 2019<sub>[13]</sub>).<sup>13</sup> A large proportion of informality is not caused by a deliberate choice to circumvent regulations and gain advantage. Rather, it can be explained by a weak demand for formal goods and services resulting from the limited purchasing power of an important part of the population and subsistence considerations. In particular, the prevalence of informality among Micro, Small and Medium-Sized Enterprises (MSMEs) can be associated to the particular costs and barriers they face to becoming formal. Costs of formalisation, like those linked to tax policy and the associated book-keeping and filing procedures, can be particularly hard to overcome for MSMEs and even threaten their subsistence given their limited size, capacity and revenues (OECD, 2019<sub>[13]</sub>). Another driver of persistent informality across MSMEs is that some elements of the MSMEs legislation (mainly the Law on MSMEs approved in 2007) have not been implemented, such as the social protection regime for workers of MSMEs (OECD, 2019<sub>[13]</sub>).

In addition, Peru has witnessed an overall decline in levels of trust in public institutions. As much as 82% of the population had little or no confidence at all in the national government in 2017 (OECD, 2019<sub>[13]</sub>). Similarly, 87% of the population thought that corruption was widespread throughout public institutions in that same year (OECD, 2019<sub>[13]</sub>). This erosion of trust has implications. Notably, many citizens may feel disengaged from public duties such as paying taxes, as shown by the fact that, in Peru, only 31.7% of the population declares tax evasion as being never justifiable, well below the Latin American average of 48.1% (OECD et al., 2019<sub>[14]</sub>).

## 2.2. Regulatory and institutional context: public and private RBC initiatives

RBC has progressively emerged as a topic of interest in Peru. As in other countries, the rising awareness of RBC in Peru most likely stem from the increasing global uptake of RBC, as well as from the growing number of issues linked to domestic business-related adverse impacts, such as social conflicts, concerns over the protection of the environment and respect of human rights, and demands for more transparency and better governance (see Section 5).

Global indices indeed suggest that Peru can improve its performance in these areas (see Table 2.1).

**Table 2.1. Ranking in global indices**

Indicator	Country Ranking	Number of Countries
<a href="#">WEF Global Competitiveness Index (2019)</a>	65	141
<a href="#">World Bank Doing Business (2019)</a>	68	190
<a href="#">ITUC-CSI Global Rights Index (2019)</a>	Rating 4	139
<a href="#">Yale Environmental Performance (2018)</a>	64	180
<a href="#">RSF World Press Freedom (2019)</a>	85	180
<a href="#">Global Slavery Index (2018)</a>	118	167
<a href="#">WEF Global Gender Gap Index (2020)</a>	66	153

<a href="#">Transparency International Corruption Perception Index (2019)</a>	101	183
<a href="#">World Justice Rule of Law Index (2020)</a>	80	128

Government efforts to prevent and mitigate business-related adverse impacts have traditionally focused on sector-specific command-and-control policies (permission, prohibition, standard setting and enforcement). Peru has ratified a number of international instruments in the field of human and labour rights, protection of the environment and anti-corruption, which are relevant for the promotion of RBC (see Table 2.2). Although major government plans such as Peru’s National Development Plan (*Plan Bicentenario*) and the National Plan for Competitiveness and Productivity (*Plan Nacional de Competividad y Productividad*, PNCP) do not explicitly mention RBC, they recognise the role of the private sector in promoting sustainability and also provide entry points for strengthening RBC (see Section 5). Importantly, the National Plan on Human Rights 2018-2021 (*Plan Nacional de Derechos Humanos*) highlights the importance of promoting international standards on Business and Human Rights. However, despite the growing recognition of the role the private sector can play in delivering and financing the SDGs (OECD, 2019<sup>[24]</sup>), Peru’s implementation plan for the 2030 Sustainable Development Agenda is mostly focused on government action (Government of Peru, 2017<sup>[25]</sup>).

**Table 2.2. Peru’s adherence and ratification of key international instruments**

Instrument	Ratification or Adherence
<a href="#">OECD Guidelines for Multinational Enterprises</a>	Yes
<a href="#">9 Core UN Conventions on Human Rights</a>	9/9
<a href="#">UN Convention against Corruption</a>	Yes
<a href="#">Fundamental ILO Conventions</a>	8/8
<a href="#">Paris Agreement</a>	Yes
<a href="#">Convention on Biological Diversity</a>	Yes
<a href="#">Extractives Industries Transparency Initiative (EITI) Member</a>	Yes (Meaningful progress)
<a href="#">Voluntary Principles on Security and Human Rights</a>	No

Peru adhered to the Guidelines in 2008 and to the OECD Council Recommendation on the Due Diligence Guidance for RBC in 2018.<sup>14</sup> Peru also adhered to the OECD Council Recommendations on the Due Diligence Guidance for the minerals sector in 2011<sup>15</sup> and for the garment and footwear sector in 2017.<sup>16</sup>

The Government established an NCP in 2009. The NCP is located in Peru’s Investment Promotion Agency (IPA) (*ProInversión*). In accordance with the Guidelines, the Peruvian NCP’s mandate is twofold: promote the Guidelines and the related Due Diligence Guidance, and handle cases (referred to as “specific instances”) as a non-judicial grievance mechanism. The NCP has two part-time staff members and does not have an advisory body including other government entities and/or stakeholder representatives. Since its establishment, the NCP has dealt with four specific instances brought by NGOs and trade unions in relation to alleged violations of the general policies, disclosure, human rights, employment and industrial relations, environment, and competition chapters of the Guidelines in the mining and telecommunication sectors.

The fifth strategic track of the National Plan on Human Rights 2018-2021 consists in implementing international standards on Business and Human Rights, which is to be done through a NAP. The NAP development process is placed under the auspices of the Directorate General for Human Rights (*Dirección General de Derechos Humanos*) of the MINJUSDH. The process is meant to build on broad, participatory, consensual and decentralised consultation of government actors, businesses and civil society. For this

purpose, an inter-institutional committee coordinated by the Directorate General for Human Rights has been created. A methodology for the development of the NAP was adopted in September 2019 and, as result of the Coronavirus (COVID-19) outbreak and the ensuing crisis, the NAP is currently expected to be launched in the first quarter of 2021 (see Section 3.1.1 and Box 3.1).

Most private sector initiatives to promote responsible business practices have so far adopted CSR approaches. Private sector involvement in the CSR agenda in Peru is relatively strong as business associations respond to international demands for sustainability and are aware of the importance of acquiring a social license to operate. For example, the National Confederation of Business Institutions of Peru (*Confederación Nacional de Instituciones Empresariales del Perú*, CONFIEP) serves as the Technical Secretariat of the UN Global Compact in Peru, and has organised capacity-building activities on issues related to CSR and human rights in collaboration with foreign embassies, the UN Global Compact Secretariat and universities.<sup>17</sup> CONFIEP has also established the initiative Businesses for Education (*Empresarios por la Educación*), which focuses on improving access to education for the poor. Finally, the private sector is aware of the existence of the NCP, and the NCP is increasing its collaboration with CONFIEP and other business associations.

Notwithstanding the above, risk-based preventative approaches to RBC are also gaining prominence in the activities of major business associations. In March 2019, CONFIEP established a National Committee on Business and Human Rights, whose early focus was to take stock of the private sector's activities pertaining to RBC. According to a recent CONFIEP study on good human rights practices in Peru,<sup>18</sup> most Peruvian businesses have adopted corporate policies or declarations related to labour rights (86%), supply chains/providers (76%), and the environment (72%). The study also found that, while 45% of companies have adopted human rights commitments, the remainder have complementary policies in other areas relevant to RBC (CONFIEP, 2019<sub>[26]</sub>). Importantly, CONFIEP has developed recommendations on the implementation of risk-based due diligence which point to differentiated due diligence processes depending on the company's size and activities. The recommendations make specific reference to the Due Diligence Guidance for RBC (CONFIEP, 2019<sub>[27]</sub>) and follow the OECD framework for due diligence, but do not encompass remediation.

In addition, sectors affected by importers' due diligence regulations, such as the mining sector, are increasingly adopting RBC approaches. The National Society for Mining, Oil and Energy (*Sociedad Nacional de Minería, Petróleo y Energía*, SNMPE), for instance, has been active in this regard. In 2002, it adopted a Code of Conduct, which was subsequently developed throughout the years with the incorporation of new principles in 2016 and 2018. Through this Code of Conduct, SNMPE's members declare, among others, that their activities seek to contribute to sustainable development, promote and apply practices of environmental protection, and that said activities should be carried out in accordance with principles of corporate governance, transparency and anti-corruption, and respecting and promoting human rights (SNMPE, 2002<sub>[28]</sub>). Each year, the SNMPE carries out a monitoring survey to evaluate the degree of compliance of its members with the principles contained in its Code of Conduct (SNMPE, 2019<sub>[29]</sub>). More recently, in 2019, it developed a general model of human rights policy for its members, which is based *inter alia* on the Guidelines and the UNGPs, and integrates a risk-based due diligence approach. The SNMPE has also established a national dialogue platform for mining (*Minería de Todos*), which provides guidance on receiving complaints and responding to communities' demands (SNMPE, 2020<sub>[30]</sub>), as well as a communication platform, which presents the environmental and social projects developed by its members and their contribution to the SDGs (*COM-Unidad*) (SNMPE, 2020<sub>[31]</sub>).<sup>19</sup> Finally, as of 2019, the SNMPE, together with representatives of other business associations, mining companies, civil society, the



academia and several government entities, participates in an initiative launched by the Ministry of Energy and Mines (*Ministerio de Energía y Minas*, MINEM), entitled Centre of Convergence and Good Practices in the Mining/Energy Sector Rimay (*Centro de Convergencia y Buenas Practicas Minero Energeticas Rimay*) (Government of Peru, 2019<sup>[32]</sup>). This Centre, is in charge of, among others, establishing the strategic vision for mining in Peru 2030 (*Visión de la Minería en el Perú al 2030*), which consists in elaborating guidelines for the sustainable and inclusive development of mining activities in the country in the next decade and promoting good environmental practices in the mining/energy sector (Centro de Convergencia y Buenas Prácticas Minero Energéticas (Rimay), 2019<sup>[33]</sup>). Other private sector initiatives are also increasingly shifting to risk-based RBC approaches. For instance, Peru2021, an organisation comprising a network of businesses, aims to promote RBC using an approach that takes into consideration adverse impacts not only linked to business operations but also to business relationships (Peru2021, n.d.<sup>[34]</sup>). Bilateral Chambers of Commerce (such as the Spanish Chamber of Commerce and the Nordic Chamber of Commerce) also provide additional ad-hoc support for the adoption of RBC practices by Peruvian businesses through promotional events on due diligence.

Civil Society Organisations (CSOs) and trade unions in Peru are aware of the importance of RBC and increasingly demand that the Government take measures to effectively prevent and mitigate business-related adverse impacts. For instance, the Civil Society Platform on Business and Human Rights (*Plataforma de la sociedad civil sobre Empresas y Derechos Humanos*), which gathers several Peruvian CSOs,<sup>20</sup> promotes the Business and Human Rights agenda through different activities.<sup>21</sup> It has notably contributed to the NAP development process by submitting specific observations on the methodology adopted by the MINJUSDH<sup>22</sup> and participating in the multi-actor roundtables organised in this context. In addition, several advocacy organisations have developed specific programmes on Business and Human Rights, which often promote a risk-based due diligence approach,<sup>23</sup> including through activities that call on the Government to include RBC considerations in Peru's trade and investment agreements.<sup>24</sup> The fact-finding mission carried out by the OECD Secretariat in Peru revealed that, although CSOs and trade unions are aware of the existence of the Peruvian NCP, there is scepticism about its visibility.

### 3. Regulating and enforcing for Responsible Business Conduct

This Section analyses policies enacted by Peru on selected RBC issues covered by the Guidelines, namely human rights, labour rights, environment and anti-corruption and integrity.

#### 3.1. Human rights

Enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights. Chapter IV of the Guidelines on “Human Rights” draws on, and is aligned with, the UNGPs.<sup>25</sup> States have a primary duty to protect human rights. Businesses are expected to respect human rights independently of the state ability or willingness to fulfil its human rights obligations. Failure either to enforce relevant domestic laws or to implement international human rights obligations, or the fact that the State may act contrary to those laws and obligations, does not diminish the responsibility of businesses to respect human rights.

Concretely, Chapter IV requires companies to avoid causing, or contributing to, adverse human rights impacts in their own activities, and to seek to prevent or mitigate impacts to which they are directly linked through their supply chains and business relationships. This means that companies should have a policy commitment to respect human rights, carry out due diligence (notably by reference to the relevant Due Diligence Guidance), and to provide or cooperate with legitimate remediation processes where such adverse human rights impacts have occurred.

##### 3.1.1. Legal and institutional framework

###### *Legal framework*

At the international level, Peru is a party to all nine core international human rights instruments and seven optional protocols.<sup>26</sup>

At the national level, Article 44 of the 1993 Peruvian Constitution lists the protection of human rights as one of the primordial duties of the State. Title I, Chapter I of the Constitution recognises and protects the “fundamental rights of the person”, such as the right to life or freedom of thought and religion. Chapter II addresses economic and social rights, including the right to education and labour rights (see Section 3.2.1). Chapter III addresses political rights such as those associated with citizenship. The Constitution expressly states that the norms related to fundamental rights and freedoms it recognises should be interpreted in conformity with the Universal Declaration of Human Rights.<sup>27</sup> Peru’s Constitutional Court has recognised various fundamental rights that are not explicitly contemplated in the Constitution, including consumer rights (Constitutional Court, 2003<sub>[35]</sub>), the right to safe drinking water (Constitutional Court, 2006<sub>[36]</sub>), as well as the right to food (Constitutional Court, 2016<sub>[37]</sub>). Beyond the constitutional framework, Peru has also legislated in respect of human rights issues, such as the rights of indigenous peoples (Government of Peru, 2011<sub>[38]</sub>).

The MINJUSDH is tasked with promoting and disseminating human rights (Government of Peru, 2011<sub>[39]</sub>).<sup>28</sup> In July 2017, the UNWG visited Peru to review its efforts to implement the UNGPs, and addressed 26 recommendations to the Government (UN Human Rights Council, 2018<sub>[40]</sub>).<sup>29</sup> The UNWG found that Peru had made recent efforts to strengthen its legal framework for the protection of human rights, but also found a number of gaps that the Government should address “in particular concerning indigenous peoples’ rights to land and natural resources, the rights to a healthy environment and to health and the right to

freedom of expression and assembly.” The UNWG also recommended that Peru “reinforce mechanisms to monitor compliance with existing legislation and relevant human rights instruments, including ILO conventions.” (UN Human Rights Council, 2018<sub>[40]</sub>)

In order to further protect and promote human rights, Peru has adopted National Plans on Human Rights, the first one covering the period 2006-2011, the second one covering the period 2014-2016, and the third and current one covering the period 2018-2021 (Government of Peru, 2018<sub>[41]</sub>). The fifth strategic track of the current National Plan consists in implementing the international standards on Business and Human Rights (Government of Peru, 2018<sub>[41]</sub>).<sup>30</sup> This strategic track is explicitly rooted in the UNGPs, the Guidelines and the ILO MNE Declaration, and consists in one overarching strategic objective (“ensure that public and private enterprises comply with human rights in their domains of action”), to be implemented through one strategic action, i.e. progressively implement the UNGPs and other international standards, as complemented by binding international instruments.

### Peru’s National Action Plan on Business and Human Rights

The National Plan on Human Rights 2018-2021 notes that the abovementioned action will be implemented through the development of a NAP relying on a methodology, diagnosis and baseline that will be developed in a broad, participatory, consensual and decentralised manner, involving the Government, enterprises, trade unions, civil society and indigenous peoples (Government of Peru, 2018<sub>[41]</sub>).<sup>31</sup>

#### Box 3.1. Development of Peru’s NAP

Based on a participatory process involving 270 stakeholders’ submissions, the General Directorate for Human Rights of the MINJUSDH formalised the methodology for the development of the NAP in a vice-ministerial resolution published on 6 September 2019. In line with recommendation (c) of the UNWG’s report, such methodology is participatory and follows a two-step approach: (i) a diagnosis and a baseline assessment are produced in collaboration with local and international universities; and (ii) the NAP is being developed.

The methodology rests on the creation of an inter-institutional committee led by the MINJUSDH (Government of Peru, 2019<sub>[42]</sub>). The committee comprises 120 institutional actors from the executive, legislative and judicial branches, as well as business associations, CSOs, trade unions and indigenous peoples.

Government actors in the committee are grouped into an executive-branch working group that involves 36 entities, including the NCP. The Ombudsman (*Defensoria del Pueblo*), as well as regional governments and municipalities are also included.

Representation of stakeholders in the committee is broad and involves 11 business associations,<sup>1</sup> 25 CSOs, 8 organisations representing indigenous peoples, and 4 national trade unions. A number of these organisations are platforms active at the national level that group smaller organisations, such as CONFIEP (which represents 30 business associations) and Red Muqui (which represents more than 20 CSOs).

United Nations agencies and foreign embassies are also included. Moreover, the methodology states that the process will count on the technical and financial support of the RBCLAC Project (Government of Peru, 2019<sub>[42]</sub>).

Both steps of the NAP will be carried out through the organisation of multi-actor roundtables involving members of the committee. On the Government's side, the actors involved in the multi-actor roundtables to date are the executive branch, the National Assembly of Regional Governments (*Asamblea Nacional de Gobiernos Regionales, ANGR*), the Association of Peruvian Municipalities (*Asociación de Municipalidades del Perú, AMPE*), and the Ombudsman. These roundtables are meant as spaces for debate and reflection, and aim to enable all stakeholders reach a common understanding and, when possible, consensus on the issues, actions, indicators and measures that will form part of the NAP (Government of Peru, 2019<sup>[42]</sup>).

As a result of the delays created by the COVID-19 crisis, the timetable for the development of the NAP has been adjusted and is now as follows:

- Approval of methodology by multi-actor roundtables: August 2019;
- Capacity building of actors on the UNGPs and other international instruments: launched in February 2019 and to be carried out until the end of the NAP development process;
- Development of diagnosis and baseline assessment report through multi-actor roundtables: August 2019-August 2020;
- Preparation of the first draft of the NAP's matrix: June-August 2020;
- Bilateral meetings with relevant actors to gather views and suggestions on the draft matrix of the NAP: June-August 2020;
- Elaboration and approval of the NAP through multi-actor roundtables: August-December 2020;
- Public launch of the NAP and organisation of an international forum on Business and Human Rights: first quarter of 2021.

Note:

1. The Government specified that individual companies wishing to participate in the development process of the NAP were allowed to join the process.

The methodology for the development of the NAP also identifies five strategic policy areas (Government of Peru, 2019<sup>[42]</sup>), which are in line with the UNWG's recommendations:

- Promotion and dissemination of a culture of respect for human rights in the business field in accordance with the framework of the UNGPs and other international instruments;
- Design of public policies for the prevention of human rights violations in the business field;
- Design of public policies that promote business respect of human rights through accountability, research and sanctions for the impacts of their activities;
- Promotion and design of due diligence procedures to ensure the business respect of human rights;
- Design and strengthening of mechanisms guaranteeing access to remedy to those affected by human rights violations through judicial, administrative, legislative or other means (Government of Peru, 2018<sup>[43]</sup>).

According to the methodology defined for the development of the NAP (Government of Peru, 2019<sup>[42]</sup>), the Directorate General for Human Rights of the MINJUSDH leads the

NAP development process and coordinates the multi-actor roundtables. It was noted that, so far, the process has been dominated by the Directorate General and that it could be more multi-disciplinary. Stakeholders highlighted that there would be value in involving other ministries and government entities (in particular from the legislative and judicial branches) more actively. Given the horizontality of the NAP as a policy instrument, other ministries, in particular the ones in charge of economic policies, could contribute valuable expertise and perspectives on technical issues. This could result in better targeted measures to be included the NAP, which would in turn facilitate its implementation. In this regard, the MINJUSDH indicated that the involvement of the legislative and judicial branches in the NAP development process is currently under way, and that, in coordination with the Presidency of the Council of Ministers (*Presidencia del Consejo de Ministros*), it is working towards the constitution of a steering group (*Grupo Impulsor*) of seven ministries of particular relevance for RBC, with the aim of strengthening the involvement of the Government in the development and implementation of the NAP. In addition, the MINJUSDH also specified that the executive branch working group had recently provided input regarding seven technical reports submitted by academic actors.

The methodology further notes that the NCP must play “an important role in the process” (Government of Peru, 2019<sub>[42]</sub>). Although the NCP has been rather active so far, some trade unions are of the view that it could strengthen its participation in certain consultation processes. This is crucial to ensure that the NAP includes measures aimed at implementing Chapter IV of the Guidelines, and give the NCP a proper role in this regard, both in terms of promoting RBC among enterprises and stakeholders, and of acting as a non-judicial grievance mechanism.

Some business associations and CSOs have expressed concerns about the NAP development process and its future implementation. Business associations were concerned that the timetable for the development of the NAP was not reasonable and flexible enough to ensure an adequate discussion and the effective participation of all relevant stakeholders. They also raised concerns about the fact that the process was dominated by civil society and that some of their input was not adequately taken into account. Such input relates in particular to new requirements placed on business, the emphasis of the NAP on the mineral sector, and the insufficient focus of the Plan on the issue of informality, as it allegedly addressed only the labour aspects of informality, with no regard for its broader consequences. The MINJUSDH indicated in this regard that it sought to take all views into consideration, and published a document keeping track of how comments received have been integrated in the methodology (Government of Peru, 2019<sub>[44]</sub>). As a result of the integration of these comments, the impacts of informality are now mentioned as a transversal theme of the NAP (Government of Peru, 2019<sub>[42]</sub>), whereas actions related to the mineral sector reflect the impacts linked to this sector, as pointed out notably by the UNWG. Additionally, certain business stakeholders pointed out that the roundtable format was not always designed so as to ensure the formation of consensus through debate, but rather took the form of presentations by the authorities followed by Q&A with the audience. On the other hand, CSOs have been supportive of the process, though they insist that the NAP should come with resources enabling an effective implementation.

***Peru should strive to achieve the finalisation of the NAP according to the planned timeline. The NAP development process should ensure that participation of all government actors is as effective as possible, that stakeholders’ views are reflected evenly, and that all planned measures come with resources for their implementation. Moreover, Peru should ensure that the NAP builds on Peru’s commitment to the Guidelines, and give a role to the NCP in the Plan’s implementation that corresponds to and helps fulfil its mandate.***

Additionally, in November 2017, Peru was reviewed in the framework of the third cycle of Universal Periodic Reviews (UPR) by the UN Human Rights Council (UN Human Rights Council, 2017<sup>[45]</sup>). During the review, important progress regarding human rights protection was recognised, but a number of gaps were also identified. To address these gaps, the review resulted in 182 recommendations.<sup>32</sup> Of these 182 recommendations, six explicitly concern Business and Human Rights issues,<sup>33</sup> but numerous other recommendations can also have an impact on business respect for human rights, such as the ones on indigenous peoples' rights (particularly as regards land titles and Free Prior and Informed Consent, FPIC),<sup>34</sup> child labour,<sup>35</sup> or discrimination in the job market against, for instance, women,<sup>36</sup> ethnic minorities,<sup>37</sup> lesbian, gay, bisexual, transgender and intersex (LGBTI) persons,<sup>38</sup> or persons with disabilities.<sup>39</sup> Peru supported 177 of these recommendations (UN Human Rights Council, 2017<sup>[46]</sup>),<sup>40</sup> and committed to making every effort to implement them and to report on progress in due course (UN Human Rights Council, 2017<sup>[46]</sup>). However, some CSOs have raised concerns about the efficiency of these implementation efforts to date.

On top of the gaps in the coverage of human rights protection pointed out by the UPR and the UNWG, one of the challenges identified is the enforcement of the relevant constitutional and legal provisions aiming to protect human rights, for example, in case of infringements by business. Indicatively, pursuant to the World Justice Project's Rule of Law Index, Peru ranks 68<sup>th</sup> in the world, with a score of 0.49 on the regulatory enforcement factor (World Justice Project, 2020<sup>[47]</sup>). This is notably linked to the challenge of decentralisation (see Section 5), as Peru faces difficulties in ensuring enforcement of existing laws and policies on its entire territory. According to most stakeholders and to the Government itself, the presence of the State in remote areas is relatively limited, and enforcement of legislation is weak in those regions.

Moreover, another challenge linked to the enforcement of constitutional and legal human rights provisions against businesses where violations occur has to do with the fact that such enforcement almost exclusively targets the formal sector, whereas human rights violations in the informal sector are not only particularly severe, but also likely to be unreported or under-detected. For example, informal gold mining has been linked to issues such as “forced labour, poor and unsafe labour conditions, exploitation of children and human trafficking, lack of education, restricted freedom of movement, corruption of government officials, and an overall breakdown of society and general security”, but formalisation efforts in this sector have proven difficult. Between 2012 and 2017, only “16 out of 70,000 requests for formalization (benefitting altogether 631 informal miners) have been approved” under a new government scheme to formalise illegal mining (EBP, 2017<sup>[48]</sup>).

***Peru should increase institutional presence and enforcement capacity in terms of human rights protection, especially in (remote) regions, and in respect of the informal economy. Alongside its general efforts to bring firms out of informality, Peru should make active efforts to detect and address human rights violations in the informal sector.***

### *Institutional framework*

#### Judicial remedies

A legal framework requires an adequate institutional framework in order to be effective. The judicial system is particularly important in this regard to respond to human rights violations, including by businesses. Article 139 of the 1993 Peruvian constitution lays out a number of fundamental principles governing the judicial power, including the independence of the judiciary, respect for due process, the publicity of the judicial process or the motivation of judgments.

However, Peru's judicial system is generally considered slow (Government of Peru, 2019<sub>[23]</sub>), and civil society submissions to the 2017 UPR of Peru have pointed out that it was suffering from poor resource management (Government of Peru, 2019<sub>[23]</sub>). Additionally, in practice, Peru's judicial system struggles to provide access to justice for all (Bazán Vásquez and Pereira Noriega, 2012<sub>[49]</sub>), and the UPR yielded several recommendations aiming to improve access to justice for several groups at risk of human rights violations such as women, migrant workers, indigenous peoples and ethnic minorities, which Peru supported.<sup>41</sup> Moreover, the judiciary in Peru has been confronted with serious corruption scandals in recent years (Cordova Rampant, 2019<sub>[50]</sub>).<sup>42</sup> During its 2017 visit to the country, the UNWG noted the concerns from CSOs and local communities that the judicial system had a tendency to side with the more powerful party, and that cases were often litigated far from the place where the issues that prompted the proceedings occurred (UN Human Rights Council, 2017<sub>[45]</sub>).<sup>43</sup> As a result, Peru ranks fairly low in terms of the quality of civil and criminal justice in the World Justice Project's Rule of Law Index – ranked respectively 100<sup>th</sup> (with a score of 0.45) and 107<sup>th</sup> (with a score of 0.33) (World Justice Project, 2020<sub>[47]</sub>).

In July 2019, Peru adopted a PNCP for the period 2019-2030 (Government of Peru, 2019<sub>[23]</sub>). The Plan's main objective is to increase Peru's competitiveness regionally and globally, as well as to raise economic productivity. However, some stakeholders, in particular trade unions, have raised concerns about the lack of consultation and dialogue, prior to the adoption of the Plan. The PNCP has nine Priority Objectives, including that of promoting institutional development (Objective 8). Central to this objective is the improvement of the administration of justice, with four dedicated measures out of 11 seeking to address this particular issue (Government of Peru, 2019<sub>[23]</sub>):

- Overall reform of the judicial system to tackle corruption;
- Use of IT technologies to expedite the judicial process;
- Creation of a public repository of judicial decisions to increase transparency;
- Programme to optimise the work of public prosecutors.

These measures should be implemented also with the aim of addressing the issues in the judicial system that are related to the protection of human rights and, in particular, of promoting access to justice in certain regions and among certain groups, as highlighted by the UNWG report of 2017. Another challenge highlighted by the UNWG in relation to access to remedy for human rights violations by business is that the Peruvian Criminal Code does not allow to hold legal persons responsible for criminal acts (UN Human Rights Council, 2018<sub>[40]</sub>). In light of the above, and consistent with the findings and recommendations of the UPR and the UNWG, ***Peru should ensure that barriers to judicial remedies for human rights violations by business, in particular in remote regions and for vulnerable groups are removed, and ensure sufficient resources are available for an effective functioning of the judiciary in this regard.***

### Non-judicial grievance mechanisms

Peru has established non-judicial grievance mechanisms to address human rights violations, including by businesses. In addition to the NCP, Peru has put in place the Ombudsman's Office (see Box 3.2).<sup>44</sup> In order to deal with social conflicts, including those arising from corporate activity and projects, the Office of Social Management and Dialogue (*Secretaría de Gestión Social y Diálogo*, SGSD) has also been created, as well as specialised offices in different ministries (see Section 3.1.2).

### Box 3.2. The Ombudsman

Title IV, Chapter XI of the 1993 Peruvian Constitution provides for the appointment of an Ombudsman, who is elected for a five-year term by the Congress of the Republic at a two-third majority vote. As an autonomous body with 38 offices across the country, the Ombudsman is responsible for defending the constitutional and fundamental rights of individuals and communities, supervise the fulfilment of its duties by the public administration and the efficient provision of public services throughout the country's territory. The Ombudsman may also challenge the constitutionality of laws before the Constitutional Court, and intervene in legal procedures on behalf of a person or group of people in defence of their fundamental rights. Additionally, the Ombudsman promotes the signature, ratification, adhesion and effective dissemination of international human rights treaties. The Ombudsman has competencies that allow it to initiate investigations regarding the irregular, arbitrary, and/or negligent exercise of its functions by the public administration and its agents that may affect the full validity of individual or collective constitutional and fundamental rights. Public sector entities are obliged to collaborate with it when required. The Ombudsman publishes reports containing exhortations and recommendations to the administration. These pronouncements have moral authority but are not binding, nor may the Ombudsman impose sanctions.

The mandate of the Ombudsman covers alleged violations of human rights by the public sector and public or private companies that provide public services. The Ombudsman cannot handle cases strictly related to the private sector's activities. However, in practice, the Ombudsman is often asked to address human rights issues that relate to business activities, for example in the context of extractive or mining projects (Defensoria del Pueblo, 2019<sup>[51]</sup>). During its visit, the UNWG noted that, although it was positive that the Ombudsman's Office was addressing Business and Human Rights issues, the knowledge of its staff regarding these issues should be strengthened, especially in more remote regions, so as to increase its role in relation to access to remedy (UN Human Rights Council, 2018<sup>[40]</sup>). Likewise, the UPR recommended to generally increase the resources of the Ombudsman's Office (UN Human Rights Council, 2017<sup>[45]</sup>).<sup>45</sup> Given the added value of non-judicial grievance mechanisms in providing remedy and resolving issues pertaining to business-related impacts on human rights, ***Peru should increase the capacity of the Ombudsman's Office to address alleged human rights violations by business within the limits of its mandate. The Ombudsman should also cooperate with the NCP to build capacity and expertise in this regard, and seek synergies between their respective case-handling functions. The NCP could also explore the possibility of cooperating with other non-judicial grievance mechanisms, such as those put in place by the Office of Social Management and Dialogue (SGSD).***

#### 3.1.2. Due diligence, preventative aspect of dealing with human rights impacts of business

Central to the Guidelines,<sup>46</sup> and particularly the human rights Chapter,<sup>47</sup> is the requirement that companies conduct due diligence to ensure that adverse impacts are correctly identified, tracked, prevented and/or addressed, and that the company provides for or cooperate in remediation where harm has occurred (OECD, 2018<sup>[52]</sup>). Peru routinely experiences human rights impacts by businesses, particularly in relation to large-scale



projects in certain sectors such as mining, extractives, or agriculture and fisheries (UN Human Rights Council, 2018<sub>[40]</sub>).

As reported by the UNWG, these large-scale projects regularly result in social conflicts over potential or actual human rights violations, such as impacts on health and the environment (e.g. contamination of water sources or land degradation), land-grabbing, issues related to indigenous peoples' rights, or lack of access to information about the projects. These conflicts themselves can also generate human rights violations in case of loss of life, injuries or excessive use of police force in repressing protests (UN Human Rights Council, 2018<sub>[40]</sub>; UN Human Rights Council, 2017<sub>[45]</sub>; Human Rights Watch, 2019<sub>[53]</sub>). The limited access to justice or non-judicial grievance mechanisms in many remote regions (see Section 3.1.1) where these projects are located also contributes to the persistence of these conflicts and violations. In this regard, business associations are of the view that the limited government presence and the lack of investment of public resources in infrastructure in these regions contribute to the social conflicts and often impede their management and resolution.

These conflicts and their underlying or corollary human rights violations could in many cases be averted if, with government support, more companies applied an effective due diligence process including meaningful engagement of stakeholders to large-scale projects (UN Human Rights Council, 2018<sub>[40]</sub>).<sup>48</sup> Addressing the current challenges in relation to human rights, social and environmental impacts assessments identified by the UNWG would also support the proper conduct of due diligence by companies by assisting in the identification, prevention and mitigation of potential adverse impacts (UN Human Rights Council, 2018<sub>[40]</sub>). The notion of due diligence focuses on identification, prevention, mitigation and remediation of (human rights) impacts that underlie or result from social conflicts. Therefore, there are obvious methodological links between the preventative approach to social conflict outlined in the PNCP and due diligence as laid out in the Guidelines and the related Due Diligence Guidance.

The NCP has a particular role to play in raising awareness of the notion of due diligence and related OECD guidance among enterprises, stakeholders and government officials, and in handling cases where due diligence has not been properly conducted.

To address the issue of social conflicts linked to large-scale projects, the Government has established the SGSD, which depends from the Council of Ministers (Government of Peru, 2018<sub>[54]</sub>). The SGSD is in charge of preventing and managing social conflicts, notably by providing dialogue mechanisms, which allow to reach collaborative solutions to issues. As of December 2019, the SGSD intervened in 143 cases of social conflict across the country, of which 41% were related to the mining sector and 12% to the oil and gas sector (Government of Peru, 2019<sub>[55]</sub>). Dialogue mechanisms were created in 84 of these cases (Government of Peru, 2019<sub>[55]</sub>), leading to the adoption of an important number of commitments. Of the 2050 commitments adopted as a result of those dialogue mechanisms, but not implemented as of December 2019, 1638 were incumbent upon the State, 384 upon companies and 28 upon civil society (Government of Peru, 2019<sub>[55]</sub>).

The SGSD has also put in place an early warning system to prevent social conflicts, but in practice, it has been more active in relation to crisis management. Recognising these limitations, Objective 8 of the PNCP on institutional development (see Section 3.1.1) contains a measure (measure 8.9) aimed at improving government action in respect of social conflicts, which should result in the creation of a platform of information and management of social conflicts operated by relevant public and private actors (Government of Peru, 2019<sub>[23]</sub>).

The Office of the Ombudsman likewise has a mandate to prevent and intervene in social conflicts. In particular, since 2004, the Office monitors social conflicts and reports about it in monthly publications. It has also established an early warning system (Defensoría del Pueblo, n.d.<sub>[56]</sub>). As of December 2019, the Office had identified 133 active and 51 latent social conflicts, of which 110 had given rise to acts of violence, and 127 were caused by socio-environmental issues, i.e. related to the control, use and access to the environment and its resources and involving political, economic, social and cultural components (Defensoría del Pueblo, 2019<sub>[57]</sub>). The mining sector (65.4%) and the extractives sector (15%) were the sectors most involved in these conflicts (Defensoría del Pueblo, 2019<sub>[57]</sub>). The Ombudsman intervened effectively in 124 of all cases (Defensoría del Pueblo, 2019<sub>[57]</sub>). With regard to the SGSD and the Ombudsman's Office's social conflict mandates, a central finding of the UNWG's 2017 country visit was "the need to further strengthen mechanisms for multi-stakeholder engagement when business-related decisions are made" (UN Human Rights Council, 2018<sub>[40]</sub>).

In addition to the SGSD and the office of the Ombudsman, some ministries have also created specialised offices in charge of handling and preventing social conflicts in their respective sectors (Defensoría del Pueblo, 2017<sub>[58]</sub>). For instance, in 2009, a General Office of Social Affairs (*Oficina General de Gestión Social*, OGGS) was established within the MINEM in order to, *inter alia*, promote dialogue and consultation mechanisms between companies and local communities, acting as mediator in some cases (Government of Peru, n.d.<sub>[59]</sub>). Likewise, in 2008, the Ministry of the Environment (*Ministerio del Ambiente*, MINAM) created a General Office for Socio-Environmental Matters (*Oficina General de Asuntos Socioambientales*, OGASA), which is in charge, among other things, of identifying, monitoring, and handling cases of social conflicts (Government of Peru, n.d.<sub>[60]</sub>). As of today, more than ten ministries possess offices of this type. However their location, organisation, budget and functioning vary from one ministry to another (Defensoría del Pueblo, 2017<sub>[58]</sub>). Besides their differences, these offices are not coordinated with respect to the methodology and the tools used and rarely cooperate with each other to share information (Defensoría del Pueblo, 2017<sub>[58]</sub>) (UNDP, 2014<sub>[61]</sub>).

***Peru should seek to prevent social conflicts arising from large-scale projects and other business operations, which are often related to risks of human rights violations and/or tend to create situations prone to such risks. The Government should actively encourage enterprises to conduct due diligence by using the Due Diligence Guidance and ensure, when necessary, that sufficient government presence is available on the ground to prevent and manage such conflicts. Concretely, the roll-out of measure 8.9 of the PNCP should rely as much as possible on the notion of due diligence and on the Due Diligence Guidance. The Government should ensure that the NCP participates in these efforts and receives sufficient resources to prioritise the promotion of due diligence among enterprises.*** Given that a large proportion of social conflicts emerges in relation to the mining and extractive sectors, the promotion of the particular Due Diligence Guidance relevant to these sectors should be prioritised, namely the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.

### 3.1.3. Rights-specific issues: indigenous peoples' and human rights defenders' rights

#### *Indigenous peoples' rights*

Indigenous peoples comprise a significant part of the Peruvian population. In addition to the discrimination they have historically faced in the country (reflected in lower access to employment, education and quality health services) (Committee on the Elimination of Racial Discrimination, 2018<sup>[62]</sup>), their living territories are very often in or around areas of large-scale operations, particularly mining and agroforestry. As such, indigenous peoples are particularly affected by these projects (International Work Group for Indigenous Affairs, 2019<sup>[63]</sup>).

Peru is a signatory to the UN Declaration on the Rights of Indigenous Peoples and a party to the Indigenous and Tribal Peoples Convention (ILO Convention No. 169). It has also adopted legislative and administrative measures to regulate the process of consulting indigenous peoples, as per ILO Convention No. 169 (Government of Peru, 2011<sup>[38]</sup>).<sup>49</sup>

#### **Box 3.3. Peru's legislation on free, prior, and informed consultation of indigenous peoples**

Peru's consultation law (Law No. 29785) was adopted in August 2011 and specifies the modalities of the FPIC (*consulta previa*) of indigenous peoples. The law states that the purpose of the consultation is to reach agreement with, or obtain the consent of, indigenous peoples regarding legislative or administrative measures that concern them (Article 3). Agreements reached with indigenous peoples under the law are binding and, in the absence of an agreement, the competent authorities should take measures so as to protect indigenous peoples' rights (Article 15). Decisions should reflect points of view exchanged during the consultations and state reasons in this regard. To date, consultations have taken place in relation to national laws, the creation of protected natural areas, infrastructure projects, oil and gas extraction projects, and mining projects.<sup>1</sup>

Note:

1. In 2017, Peru reported to the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) that 22 consultations had taken place since the entry into force of Law No. 29785. The Committee of Experts formulated recommendations in this regard, seeking notably to ensure that consultations are carried out in relation to all measures that may affect indigenous peoples' rights, and that Peru provide training to indigenous peoples, but also to government officials, on the FPIC's importance, purposes and methods.

See ILO (2018), Observation of the CEACR on the application of ILO Convention No. 169 by Peru, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3344391:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3344391:NO).

In practice, several issues have been noted in relation to the application of Peru's consultation law:

- Some self-identified indigenous peoples maintain that they have not been recognised in accordance with the criteria set in the law with respect to the right to consultation and that, in addition, they are not registered in the Ministry of Culture's indigenous communities' database created under the law;<sup>50</sup>
- The specific government entity that takes a measure affecting indigenous peoples' rights (such as the granting of a mining concession) is in charge of carrying out the

prior consultation process, which can lead to a perception of conflict of interest or lack of impartiality;<sup>51</sup>

- Agreements reached by affected communities with the Government through prior consultation are not consistently honoured (UN Human Rights Council, 2018<sub>[40]</sub>), though the Permanent Multi-sectorial Commission for the Application of the Right to Consultation (*Comisión Multisectorial Permanente para la Aplicación del Derecho a la Consulta Previa*) has recently started to monitor their implementation;
- Despite efforts to provide assistance to indigenous peoples in the framework of consultation processes, notably from the Vice-ministry of Inter-cultural Affairs (*Vice-Ministerio de Interculturalidad*), asymmetries in bargaining positions remain during these processes (World Bank, 2016<sub>[64]</sub>);
- Indigenous peoples' titles on their lands are often uncertain or not effectively protected, as evidenced by instances of land acquisition through coercion or deception in the context of large-scale operations in mining and transport (UN Human Rights Council, 2017<sub>[45]</sub>).<sup>52</sup>

### *Human Rights Defenders*

Human rights defenders represent and seek to defend the rights of stakeholders, including those potentially affected by business operations as well as by informal and illegal activities. As such, they should be protected by the Government and, when appropriate, consulted by companies in the context of due diligence. However, in Peru, human rights defenders, including environmental activists and indigenous leaders, have faced significant risks when voicing their concerns regarding adverse impacts of business operations and informal and illegal activities. These risks encompass threats, defamation, and harassment from state and non-state actors, including judicial harassment (Amnesty International, 2018<sub>[65]</sub>; UNOHCHR, 2020<sub>[66]</sub>). Attacks and deaths have also been reported (UN Human Rights Council, 2018<sub>[40]</sub>) (Defensoría del Pueblo, 2019<sub>[67]</sub>). In addition, the protection of human rights defenders by the Government has decreased as a result of recent legislative developments (UN Human Rights Council, 2018<sub>[40]</sub>). The risks incurred by human rights defenders were identified as particularly severe by the UPR, as no less than nine recommendations were formulated in this regard (UN Human Rights Council, 2017<sub>[45]</sub>),<sup>53</sup> including a specific recommendation to protect human rights defenders helping communities in relation to infrastructure and mining projects.<sup>54</sup>

To address this situation, the National Plan on Human Rights 2018-2021 proposed the creation of a mechanism for the protection of human rights defenders and the Government recently approved a Human Rights Defenders Protocol (*Protocolo para garantizar la protección de personas defensoras de Derechos humanos*) (Government of Peru, 2019<sub>[68]</sub>). This Protocol establishes early-warning systems, provides preventive measures for the protection of human rights defenders, and allows for their urgent protection, taking into account the overall context of illegality and informality in which the risks for human rights defenders materialise in Peru (Government of Peru, 2019<sub>[69]</sub>) (UN Human Rights Council, 2019<sub>[70]</sub>). In parallel, Peru also signed (but has not yet ratified) the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), the world's first international agreement that includes provisions on the protection of human rights defenders in environmental matters. The recent adoption of the Human Rights Defenders Protocol along with the potential ratification of the Escazú Agreement provide an enabling framework for the protection of human rights defenders in Peru.

\* \* \*

*Peru should ensure that indigenous peoples and human rights defenders are effectively protected against adverse impacts stemming from informal and formal business operations. This applies particularly to impacts linked to large-scale projects, especially in high-risk sectors such as mining, oil and gas, and agri-food.* In doing so, it should address the weaknesses identified in relation to the application of its consultation law. Peru should also increase the protection of human rights defenders and raise companies' awareness to the necessity of involving human rights defenders in due diligence processes. The NCP should play a role in this regard, through promotional activities, and by handling cases submitted by indigenous peoples and human rights defenders.

## Policy Recommendations

1. **Ensure that regulations protecting human rights are effectively enforced, and that remedies are available when violations caused by business occur, particularly in (remote) regions. The capacity and resources of judicial and non-judicial remedies to deal with human rights violations by business should be increased to that effect. Particular attention should be paid to violations by informal firms, in particular sectors (such as mining, oil and gas and agriculture), and against vulnerable groups such as indigenous peoples and human rights defenders.**
2. **Continue the development of the NAP according to the planned timeline, while ensuring participation of all relevant government actors and stakeholders. Clearly define institutional mandates and allocate respective resources and capacity for the NAP's implementation, including an active role for the NCP.**

### 3.2. Labour rights

Chapter V of the Guidelines on “Employment and Industrial Relations” aims to promote observance among enterprises of the international labour standards developed by the ILO, notably the fundamental principles and rights at work, as recognised in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (ILO 1998 Declaration). Other issues addressed in this Chapter of the Guidelines relate to the provision of adequate information to workers on company operations, ensuring consultation and cooperation between employers and workers, as well as providing the best possible conditions of work, including adequate wages and occupational safety and health at work.

#### 3.2.1. Legal and institutional framework

Peru has ratified 76 ILO Conventions, including the eight Fundamental Conventions and three of the four Governance Conventions (see Box 3.4). In addition, the 1993 Peruvian Constitution recognises the right to work, equitable and sufficient remuneration, protection against discrimination and arbitrary dismissal, as well as the right to organise, collective bargaining and strike.<sup>55</sup>

#### Box 3.4. ILO Fundamental and Governance Conventions ratified by Peru

##### ILO Fundamental Conventions

1. Forced Labour Convention, 1930 (No. 29);

2. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
3. Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
4. Equal Remuneration Convention, 1951 (No. 100);
5. Abolition of Forced Labour Convention, 1957 (No. 105);
6. Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
7. Minimum Age Convention, 1973 (No. 138);
8. Worst Forms of Child Labour Convention, 1999 (No. 182).

#### **ILO Governance Conventions<sup>1</sup>**

1. Labour Inspection Convention, 1947 (No. 81);
2. Employment Policy Convention, 1964 (No. 122);
3. Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

#### Note:

1. Peru has not yet ratified the following ILO Governance Convention: Labour Inspection (Agriculture) Convention, 1969 (No. 129).

Source: ILO, Ratifications for Peru, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102805](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102805).

To support these international and constitutional commitments, Peru has developed an extensive legal and regulatory framework governing labour rights. It has, for example, enacted detailed labour laws that, among others, establishes a minimum wage and working conditions (Government of Peru, 2019<sub>[23]</sub>), and regulates collective labour rights (Government of Peru, 2019<sub>[23]</sub>). Additionally, the Code on children and adolescents contains fairly detailed provisions allowing children, starting at age twelve, to work under strict conditions. Work in sectors of more heavy work, such as industry or mining, is prohibited under the age of sixteen (Government of Peru, 2000<sub>[71]</sub>).<sup>56</sup> The PNCP (see Section 2.2), as part of Priority Objective 5 (“create the conditions of a dynamic and competitive labour market for generating decent work”), contains a measure (measure 5.1) aimed at updating the legal framework governing labour rights (Government of Peru, 2019<sub>[23]</sub>). This Objective primarily intends to adjust labour regulations to new factors affecting the labour market such as digitalisation. As trade unions maintain that they were not adequately consulted in the process of elaboration of the PNCP, Peru should ensure that these adjustments are brought about through social dialogue and that labour rights protections are not weakened as a result thereof. This labour regulations’ update should also be viewed as an opportunity to tackle some of the challenges that Peru’s normative framework on labour rights has been facing over the years.

Studies have noted in particular that, while Peru’s legal framework on labour rights is very comprehensive, it is also complex and fragmented, with over 40 different applicable pieces of legislation as of 2015. This contributes to low levels of compliance with labour regulations (OECD, 2015<sub>[22]</sub>; UN Human Rights Council, 2018<sub>[40]</sub>). A 2015 OECD study underlined in this regard that “Peru is one of the countries in the world with the lowest level of compliance with labour regulations but it remains one of the most regulated labour markets [...]” (OECD, 2015<sub>[22]</sub>). Poor enforcement and oversight by national and local authorities have contributed to this trend (OECD, 2015<sub>[22]</sub>). In particular, business compliance with core labour standards, especially in the informal sector, remains

problematic: studies show that child and forced labour, discrimination and violations of trade union rights remain pervasive (see Section 3.2.2) (Orbie and Van den Putte, 2016<sup>[72]</sup>). Illustratively, Peru received a rating of 4 (on a scale of 5) in the 2019 Global Rights Index of the International Trade Union Confederation (ITUC), which corresponds to “systematic violations of [workers’] rights” (ITUC, 2019<sup>[73]</sup>).<sup>57</sup> Moreover, a number of labour regulations have reportedly been weakened in recent years, such as the ones on occupational health and safety (Orbie and Van den Putte, 2016<sup>[72]</sup>).

Labour rights issues in Peru are regularly the subject of concern and complaints before ILO’s supervisory bodies. Overall, there have been 194 complaints against Peru before the ILO Committee on Freedom of Association (14 of which are still active), and 12 representations for alleged violations of ILO Conventions.<sup>58</sup> These are relatively high numbers for the region. In 2017, a complaint was also filed by a number of CSOs against Peru for failing to comply with its labour and environmental commitments under the 2012 EU-Peru/Colombia/Ecuador FTA (see detailed analysis in Box 4.4) (Plataforma Europa Perú et al., 2017<sup>[74]</sup>). Likewise, Chapter V of the Guidelines was central in two out of the four cases handled by the Peruvian NCP.<sup>59</sup> This important number of complaints can be explained by the fact that several institutional issues affect the effectiveness of labour protection in Peru.

The Government, through the Ministry of Labour and Employment Promotion (*Ministerio del Trabajo y Promoción del Empleo*, MTPE), engages with trade unions and businesses on labour issues through the National Council for Labour and Employment Promotion (*Consejo Nacional de Trabajo y Promoción del Empleo*, CNTPE). The objective of this tripartite mechanism for social dialogue and labour consultation, chaired by the Minister of Labour, is to discuss and adopt policies on labour, employment promotion, job training, social protection, as well as to regulate minimum wages. However, the effectiveness of the CNTPE in delivering consensus has been limited. For instance, major trade unions recently walked out of the minimum wage discussions after months of negotiations.<sup>60</sup>

The Peruvian labour inspectorates also face issues affecting their functioning, which hinder the detection of labour rights’ violations and the enforcement of regulations. Peru’s labour inspection system, through which employers can be investigated and sanctioned (Government of Peru, 2016<sup>[75]</sup>), was enhanced in 2013 with the creation of the National Labour Inspection Superintendency (*Superintendencia Nacional de Fiscalización Laboral*, SUNAFIL) (Government of Peru, 2013<sup>[76]</sup>). The creation of SUNAFIL aimed to respond to enforcement challenges caused by the decentralisation process through which regional governments became competent for labour inspections, though they lacked capacity.<sup>61</sup> SUNAFIL performs its duties through regional branches responsible for planning and conducting labour inspections, but regional governments remain competent for inspecting MSMEs (Government of Peru, 2010<sup>[77]</sup>).

A recent study found that five factors limit the effectiveness of SUNAFIL: (i) underfunding; (ii) lack of independence from the Government; (iii) lack of independence from companies; (iv) limited sanctioning power; and (v) lack of authority (Orbie and Van den Putte, 2016<sup>[72]</sup>). Following its visit to Peru in 2017, the UNWG also reported on the need for SUNAFIL to have increased resources and a better presence in the field (UN Human Rights Council, 2018<sup>[40]</sup>). Trade unions also pointed out that complaints and investigations often suffered from important delays and resulted in the worker(s) involved being fired, and that investigations were generally not carried out in respect of violations of collective labour rights. In light of these challenges and the need to ensure enforcement of labour regulations, the PNCP includes a measure aimed at modernising the labour inspection system over the next 10 years (measure 5.8) (Government of Peru, 2019<sup>[23]</sup>). The measure specifies that labour inspectorates will increase their focus on MSMEs in light of

the prevalence of informality in this category of enterprises. Given the links between informality and labour rights violations (UN Human Rights Council, 2018<sup>[40]</sup>), this measure may positively impact business respect for labour rights (see Section 3.2.2). Additionally, the measure foresees legislative modifications aimed at increasing the inspectors' authority to intervene against violations and the use of digital technology to make the inspectorates more effective (e.g. by setting up an online reporting system for violations).

In addition to the measures contemplated in the PNCP, SUNAFIL already underwent some reforms and progressively increased its regional presence in order to cover all regions by 2019. Likewise, the number of labour inspectors more than doubled in the past three years (from 389 in 2017 to 849 in 2019) (Government of Peru, 2018<sup>[78]</sup>). SUNAFIL's enhanced presence in the regions increased substantially the number of labour inspections (both proactive and in response to complaints).<sup>62</sup> By contrast, regional governments, competent for inspecting MSMEs, have not allocated more resources to this task.<sup>63</sup> From 2014 to 2018, SUNAFIL also benefited from a USD 2,000,000 project of the U.S. Department of Labour aimed at strengthening it, which obtained mixed results.<sup>64</sup>

The resolution of labour disputes in Peru has also proven challenging due to the issues affecting the judicial system (see Section 3.1). To address this situation, the MTPE established a Directorate for the Prevention and Resolution of Labour Disputes and Labour Corporate Social Responsibility (*Dirección de Prevención y Solución de Conflictos Laborales y Responsabilidad Social Empresarial Laboral*), which managed to resolve 107 national and regional labour disputes, thereby reportedly benefiting over 190,000 workers (Government of Peru, 2019<sup>[79]</sup>). Moreover, the MTPE created Alternative Mechanisms for the Resolution of Labour Conflicts (*Mecanismos Alternativos de Solución de Conflictos Laborales*), through which the parties can seek to resolve their disputes without resorting to judicial proceedings. The efficiency of these mechanisms in resolving labour disputes remains limited as only about one in five disputes are resolved (99 of 532 processes in 2018) (Government of Peru, 2019<sup>[79]</sup>).

Even though Peru's legal and regulatory system governing labour rights is elaborate and comprehensive, its complexity, coupled with institutional deficiencies, results in weak enforcement and poor rates of compliance with labour regulations.

***Peru should ensure that it maintains a strong and participatory legal and regulatory system for the protection of labour rights. In particular, it should significantly increase its efforts to detect and address violations of labour rights by business, notably by increasing the staff, independence and authority of SUNAFIL.***

### 3.2.2. Rights-specific issues: fundamental labour rights

#### *Freedom of association and collective bargaining*

Peruvian law recognises the right to form trade unions without prior authorisation. The national legislation also provides that workers' affiliation to trade unions is free and voluntary. The Government, employers, or their representatives, are required to refrain from adopting conducts that “tend to coerce, restrict or impair, in any way, the right of workers to organise, and to intervene in any way in the creation, administration or maintenance of the trade union organizations they constitute.” (Government of Peru, 2003<sup>[80]</sup>)<sup>65</sup> However, the ILO Committee of Experts on the Application of Conventions and Recommendations has not only noted the existence of specific legal impediments limiting the recognition of the right to freedom of association and collective bargaining but also repeatedly signalled the existence of challenges to the realisation of these rights in practice (ILO, 2018<sup>[81]</sup>).



In practice, Peru has a very low number of unionised workers in the private and public sectors (6% of workers in the private sector and 15.9% in the public sector). Moreover, Peru has the lowest collective bargaining coverage rate among upper-middle income economies in Latin America (4.8% in 2018).<sup>66</sup> Allegations of anti-union practices, such as dismissal of trade union officials and sanctions against workers who unionise, also occur frequently (UN Human Rights Council, 2018<sub>[40]</sub>).<sup>67</sup>

Low unionisation rates, coupled with pervasive informality, contribute to the perpetuation of challenges, which impede attaining important agreements on labour policies. Collective agreements are particularly difficult to achieve because of lack of consensus between trade unions, business associations, and the Government. The effects of this unsuccessful social dialogue are evidenced for example by the fact that strike levels in Peru are not abating over the years (Government of Peru, 2020<sub>[82]</sub>).

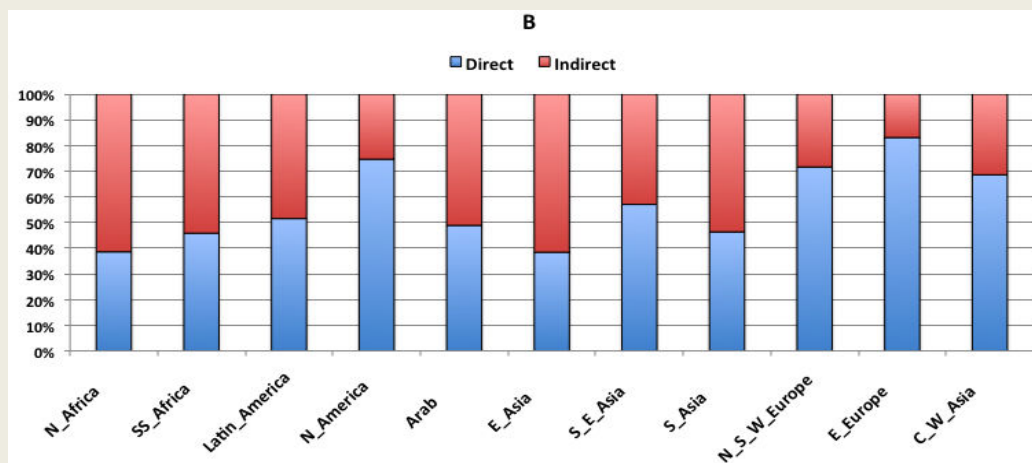
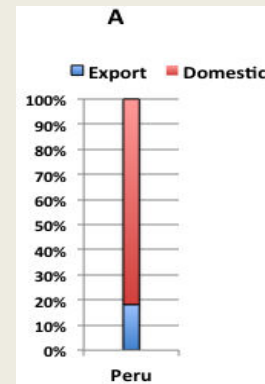
Freedom of association and collective bargaining are at the core of Chapter V of the Guidelines and instrumental in achieving all labour rights. *Peru should strengthen its efforts to guarantee the full application in law and practice of the right to freedom of association and collective bargaining as recommended by ILO's supervisory bodies. The NCP should prioritise the promotion of the objectives of Chapter V of the Guidelines with businesses, employers' organisations and trade unions to support these efforts.*

### *Child labour*

Child labour remains pervasive in Peru and is prevalent in the informal sector. Peruvian law allows children aged 12-14 to do light work, without specifying the activities in which they may work (even though, as indicated above, children under 16 are not allowed to work in certain sectors such as industry or mining). Following its 2017 visit to Peru (see Section 3.1.1), the UNWG, following the recommendation of the Committee on the Rights of the Child, recommended to raise the minimum age for admission to employment to 15 (UN Human Rights Council, 2018<sub>[40]</sub>). An estimated 1.9 million children between the ages of 5 and 17 are engaged in labour in Peru (INEI, 2015<sub>[83]</sub>). The Government estimates that 1.2 million are engaged in hazardous child labour (58% of these in agriculture, fishing or mining) and that 70,000 children aged between 10 and 17 may experience forced labour (ILO/Government of Peru, 2015<sub>[84]</sub>). In order to tackle this issue, the Government set up in 2003 the National Steering Committee for the Prevention and Eradication of Child Labour (*Comité Directivo Nacional para la Prevención y Erradicación del Trabajo Infantil*). This Committee – which is a multi-sectorial body housed in the MTPE and composed of national and regional government entities and representatives of businesses and workers – supports and monitors the legislative and policy efforts to eradicate child labour (Government of Peru, 2003<sub>[85]</sub>). The Government also increased criminal penalties for subjecting children to forced labour, and issued a protocol to strengthen child labour inspections and sanctions (Government of the United States, 2017<sub>[86]</sub>). The UNWG, while it welcomed these developments, recommended to ensure that these measures be effectively implemented, notably by providing sufficient resources and institutional capacity, and by monitoring employers' practices (UN Human Rights Council, 2018<sub>[40]</sub>). Eradicating child labour, however, is also conditioned by the availability of decent jobs for adults (ILO, 2018<sub>[87]</sub>), as well as by the effectiveness of formalisation policies, as child labour has been documented as being prevalent in the informal sector (EBP, 2017<sub>[48]</sub>).

### Box 3.5. Child labour in local v. global supply chains

Figure A indicates that 18% of child labour from Peru is estimated to contribute to exports to other regions and that 82% of child labour in Peru therefore remains in the domestic market.<sup>1</sup> This proportion is lower in Peru than the average figure for the Latin America and Caribbean region (22-78%). For what concerns child labour going into global supply chains, on average across world regions, approximately 60% of child labour is embodied in exports of intermediate products while around 40% is associated with final products. Figure B shows that, for instance, 25% of child labour that ends up in exports to North America is associated with indirect trade in goods and services. Indirect children content of exports of a specific industry, corresponds to those originating from other, upstream domestic industries within a country/region that are incorporated “indirectly” in the exports of that industry (i.e. this includes, for example, children that are working in the agriculture sector, which then supports food production for export).



Figures:

A. Estimate of child labour for exports and domestic demand in Peru.

B. Ratio of child labour in final consumption across world region.

Note:

1. The domestic market in Peru and across the region is dominated by a high incidence of informality. Informality is more frequent among own-account workers, domestic workers and contributing family workers, and child labour is usually more prevalent within these categories.

Source:

Author calculations based on data from <https://www.ilo.org/ipeinfo/product/viewProduct.do?productId=29155> and the OECD Inter-Country Input-Output table (2018 revision).

### Forced labour

An estimated 80,000 people are trapped in forced labour in Peru, most commonly linked to illegal logging and gold mining in the Amazon basin, where women are also trafficked for sex work (Walk Free Foundation, 2018<sub>[88]</sub>; UN Human Rights Council, 2018<sub>[40]</sub>). Following a warehouse fire that killed several workers in conditions of forced labour in Lima in 2017, the Government launched a major campaign against modern slavery, which led to the

classification of forced labour as a crime in the Criminal Code (Government of Peru, 2017<sub>[89]</sub>).<sup>68</sup> In addition, it adopted the National Plan to Combat Forced Labour 2019-22 (*Plan Nacional para la Lucha contra el Trabajo Forzoso 2019-2022*), which aims to eradicate the phenomenon by, among else, eliminating risk factors, promoting early detection, and improving horizontal institutional coordination (Government of Peru, 2019<sub>[90]</sub>). Moreover, the Government established a Special Labour Inspection Unit for Combating Child and Forced Labour (*Grupo Especializado de Inspectores para prevenir y erradicar el Trabajo Infantil y Forzoso*, GEIT-TIF) within SUNAFIL (Government of Peru, 2018<sub>[91]</sub>) and launched cooperation processes with ILO, the U.S. Department of Labour, and the Brazilian Government to strengthen labour inspections with a specific focus on the detection of forced labour.

### *Non-discrimination*

A major challenge for Peru in terms of non-discrimination in employment and occupation relates to ensuring the effective implementation of equality of opportunity and treatment for men and women (ILO, 2019<sub>[92]</sub>; UN Human Rights Council, 2018<sub>[40]</sub>).

The country still faces a significant labour market gender gap, being ranked 66<sup>th</sup> in the Global Gender Gap Index, and has one of the wider educational attainment gender gaps in the region (WEF, 2020<sub>[93]</sub>). Between 2007 and 2018, the rate of economic activity for men was of 81%, while that of women was of 64% (a women participation deficit of 17%). The regional distribution of this gap is higher in the jungle (20%) and coastal departments (18%). According to national statistics, working women in Peru on average earned 67.9% as much as men (INEI, 2015<sub>[94]</sub>). To tackle this issue, Peru recently adopted a law prohibiting wage discrimination between women and men (Government of Peru, 2017<sub>[95]</sub>). The applicability of this law to SMEs depends on a ministerial resolution setting out guidelines on how to categorise job positions and avoid wage discrimination within job categories (Government of Peru, 2018<sub>[96]</sub>), which was adopted in May 2019 (Government of Peru, 2019<sub>[97]</sub>). Inspections were set to begin in July 2019 for large companies and in December 2019 for SMEs. However, capacity issues in labour inspectorates (see section 3.2.1) and with respect to the creation and diffusion of tools to support enterprises in this regard may delay inspections.

The quality of employment in Peru also varies depending on gender. Self-employed and unpaid workers (family workers) continue to be predominantly female. As a result, there is a greater percentage of women in the poorest quintile of workers (ILO, 2017<sub>[98]</sub>). Finally, Peruvian women continue to face sexual harassment at the workplace. To address this problem, the Government has disseminated a handbook on preventing and sanctioning sexual harassment (Government of Peru, 2011<sub>[99]</sub>).

Following its visit to Peru in 2017, the UNWG also highlighted issues with regard to the discrimination of persons with disabilities and LGBTI people (UN Human Rights Council, 2018<sub>[40]</sub>).

***The Government should ensure that labour laws and regulations are enforced, particularly with regard to the key issues of forced and child labour, and of non-discrimination. It should also make sure that relevant authorities (at the central and regional level) have sufficient capacity and resources to monitor business compliance and respond to any infringements. In particular, the Government should ensure that the NCP is sufficiently visible and accessible, and has sufficient specialised knowledge and capacity to promote observance of the Guidelines with respect to these issues and to effectively handle related cases.***

### 3.2.3. Informality

The high and persistent levels of informality in Peru severely affect the effective realisation of all fundamental labour rights and hence condition the achievement of RBC objectives, particularly those contained in Chapter V of the Guidelines. Informality is an important factor linked to all the rights-specific issues presented above (ILO, 2015<sub>[100]</sub>).

Almost 90% of firms and two-thirds of Peruvian workers are informal. Individuals from poor rural areas, the least educated, women and teenagers are more likely to have an informal occupation (OECD, 2019<sub>[13]</sub>). Informal workers are outside the remit of labour law protection and prone to extreme low pay and unsafe working conditions (OECD, 2015<sub>[22]</sub>). The occurrence of forced labour and child labour is intrinsically linked to informality. The lack of organisation and collective bargaining of informal workers affect the improvement of their working conditions.

Informality also raises important concerns regarding the enforcement of occupational health and safety standards. On average, around 20,000 Peruvians suffer from occupational accidents at work each year (Government of Peru, 2018<sub>[101]</sub>). The sectors with most occupational accidents are construction, mining, manufacturing, and agriculture (Government of Peru, 2018<sub>[101]</sub>). Considering the magnitude of labour informality in these sectors (in particular in the agriculture sector), the number of occupational health and safety cases are most likely significantly higher.

As indicated above, the fifth Priority Objective of the PNCP seeks to improve the labour market, and one of the policy tracks to achieve this Objective includes measures aimed at addressing informality. While this Objective seems motivated by the desire to improve productivity, it also has the potential to increase business respect for labour rights. Next to the measure aimed at improving labour inspections (see Section 3.2.1), another measure of the PNCP seeks to tackle informality by focusing on MSMEs over the next five years (measure 5.4). This measure foresees a review of the normative framework applicable to MSMEs (as the Plan notes that very few eligible firms use the dedicated regime for micro-enterprises to hire workers), and the creation of programmes to help companies in the process of formalisation (Government of Peru, 2018<sub>[43]</sub>).

Another way through which Peru could address informality is by requiring that companies in the formal economy conduct due diligence not only with respect to their activities but also to their supply chains and business relationships, in particular when these relationships include informal firms. Formal companies' leverage on informal firms may help prevent and address adverse impacts on labour rights caused by the latter, or even incentivise informal firms to transition toward the formal economy. The NCP has a particular role to play in this regard, as its mandate includes promoting the Guidelines and the related Due Diligence Guidance, and handling cases involving companies that fail to conduct effective due diligence.

***The Government's efforts to tackle informality should be designed so as to promote business respect for labour rights and RBC, for example by actively promoting due diligence along supply chains and business relationships. They should also aim to help MSMEs transition toward the formal economy and, in doing so, comply with the Guidelines. The NCP should in this regard develop a thematic focus on the consequences of informality for RBC objectives, and include specific activities on this theme in its promotional plan, e.g. on promoting the Guidelines with MSMEs.***

## Policy recommendations

3. **Guarantee the full application in law and practice of the fundamental labour rights as recommended by ILO's supervisory bodies. Enforcement of labour laws and regulations requires that relevant authorities (at the central and regional level) have sufficient capacity and resources to monitor business compliance and respond to any infringements. This also includes increasing efforts to detect and address business violations of labour rights by increasing the staff, independence and authority of SUNAFIL.**
4. **Design efforts to tackle informality so as to promote business respect for labour rights and RBC, for example by actively promoting due diligence along supply chains and business relationships, and by supporting MSMEs to transition toward the formal economy and, in doing so, comply with the Guidelines.**

### 3.3. Environment

Chapter VI of the Guidelines on the “Environment” calls on enterprises to take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. This entails sound environmental management that aims to control both direct and indirect environmental impacts (which includes impacts on public health, safety and thereby related human rights); establishing and maintaining appropriate environmental management systems; improving environmental performance; being transparent about the environmental impacts and risks (which implies reporting and communicating with stakeholders). It also entails being proactive in avoiding environmental damage; working to improve the level of environmental performance in all parts of companies’ operations, even where this may not be formally required; and training and education of employees with regard to environmental matters. Other parts of the Guidelines (e.g. the chapters on disclosure and on consumer interests) are also relevant to environmental impacts, and in particular, impacts related to greenhouse gas (GHG) emissions. For example, the Guidelines make reference to expectations to set targets that are consistent with international commitments; disclosure of social and environmental risks; reporting with a particular focus on GHG emissions; providing access to information, and informing consumers of the environmental and social impact of their decisions.

#### *3.3.1. Business interactions with the natural environment: trends and key risks*

Peru is a megabiodiverse country, with the second largest extent of Amazon forest, and more than half of its surface covered by forest. Peru’s biodiversity contributes to the national economy across sectors, including through the regulation of the water cycle providing water for agriculture as well as hydroelectric power generation, and through income from ecotourism and the commercialisation of native species and their by-products. Trade in native species has been expanding, and in 2013 generated earnings in excess of USD 218 million (OECD/UN ECLAC, 2017<sub>[102]</sub>).

GHG emissions in Peru are low due to the availability of hydroelectric power and natural gas, whose importance in the country’s energy mix has increased steadily over the past decade (OECD/UN ECLAC, 2017<sub>[102]</sub>). Nevertheless, half of the country’s emissions – that is an estimated 59 million metric tons of carbon<sup>69</sup> – are due to deforestation caused by changes in land use brought about principally by the use of slash-and-burn techniques by

small-scale farmers, as well as large-scale highway and hydroelectric or mining infrastructures (OECD/UN ECLAC, 2017<sub>[102]</sub>). Because of its geographical characteristics, Peru is particularly vulnerable to climate change and to the risk of natural disasters (OECD/UN ECLAC, 2017<sub>[102]</sub>).

Peru ranks 64 out of 180 in the 2018 Yale Environmental Performance Index, which ranks countries' performance on high-priority environmental issues in two areas: protection of human health and protection of ecosystems. Compared to other upper-middle-income countries in South America, Peru's environmental performance is only second to Colombia. However, Peru receives low scores for important indices, including forests and agriculture. This highlights risks and impacts related to deforestation, as well as risks of inefficient crop production, as country-wide environmental threats also intersect with or, are driven by, business activity (see Section 3.3.4 for further discussion on drivers related to deforestation and environmental impacts of the mining sector (including but also extending beyond deforestation)). Overall, the estimated costs of environmental damage amount to 4% of Peru's GDP (OECD/UN ECLAC, 2017<sub>[102]</sub>), with environmental degradation disproportionately affecting the most vulnerable groups of the population (World Bank, 2007<sub>[103]</sub>).

### 3.3.2. *Legal and institutional framework*

Peru has demonstrated significant progress in environmental law and governance. The country has ratified a number of major multilateral environmental agreements<sup>70</sup> and has strengthened its domestic policy framework for environmental protection considerably over the last decade (OECD/UN ECLAC, 2017<sub>[102]</sub>).

The 1993 Peruvian Constitution provides for the fundamental right to live in a healthy and balanced environment, and places a duty on the Government to promote the conservation of biodiversity, the creation of natural protected areas, and the sustainable use of the Amazon. Importantly, the right to a healthy environment recognises the inter-linkages between human rights and the environment (see Section 3.1) and opens avenues for access to justice with respect to environmental rights infringements. Peru has also developed a significant body of environmental law, including the overarching 2005 General Law on the Environment (Law No. 28611) (Government of Peru, 2005<sub>[104]</sub>), which establishes the National System of Environmental Impact Assessment (*Sistema Nacional de Evaluación de Impacto Ambiental*, SEIA), administered by the National Environmental Authority (MINAM).<sup>71</sup> The General Law on the Environment also establishes the environmental rights of Peruvian citizens, including access to information in a timely manner and participation in environmental management and decision-making processes.<sup>72</sup> Notwithstanding these provisions, improvements could be made to strengthen environmental governance processes, including public participation and the FPIC of indigenous peoples (see Box 3.3), which are key in the protection of environmental rights. Some CSOs have indeed raised concerns about a supposed relaxation of environmental standards and, in particular, the alleged lack of public consultation to modify environmental impact assessments.

In addition, Peru is the first country in Latin America that has enacted an overarching Climate Change Law. The 2018 Framework Law on Climate Change (Law No. 30754) (Government of Peru, 2018<sub>[105]</sub>) establishes the principles and general provisions governing policies aimed to adapt to and mitigate climate change in Peru.<sup>73</sup> In particular, it provides that climate change considerations should be incorporated into policies, strategies, plans, programs, and investment projects at all government levels (UN Human Rights Council, 2019<sub>[70]</sub>).<sup>74</sup> The Framework Law on Climate Change also mentions several instruments for the management of climate change.<sup>75</sup> These instruments include, among others, the

National Strategy on Climate Change (*Estrategia Nacional ante el Cambio Climático*, ENCC)<sup>76</sup> and Peru's Nationally Determined Contribution (NDC),<sup>77</sup> which outline the country's mitigation and adaptation targets and priorities, as submitted under the Paris Agreement. Peru has committed to reduce 30% of its GHG emissions by 2030, based on the projected business as usual scenario. This commitment is comprised of a 20% reduction to be implemented through domestic investment and expenses, from both public and private resources (non-conditional proposal), and a 10% reduction subject to the availability of international financing and favourable conditions (Government of Peru, 2015<sub>[106]</sub>).

With respect to adaptation and climate resilience, the NDC identifies priority economic sectors for adaptive action (such as agriculture, forestry, and fishing) and also highlights the need for private sector finance and investment for adaptation as well as reaching the mitigation target. Building climate resilience and adaptive capacity of supply chains across a number of sectors is critical in addressing adverse climate-related risks and impacts of business operations. *The Government should encourage business to ensure that expectations relating to climate change adaptation and resilience, as well as GHG emission reductions targets, are being identified, addressed and implemented as part of supply chain due diligence processes – particularly with respect to identified priority sectors.*

The Agency for Environmental Assessment and Enforcement (*Organismo de Evaluación y Fiscalización Ambiental*, OEFA), which is affiliated with the MINAM, is responsible for ensuring compliance with environmental regulations in Peru. Its functions include monitoring, inspection and enforcement, spanning investigation of offences, imposition of sanctions, and application of incentives (Government of Peru, 2020<sub>[107]</sub>). In addition, the Office for Management of Socio-environmental Conflicts (*Coordinación de Gestión Socioambiental*) of the OEFA is responsible for (among other functions): developing dialogue and negotiation strategies to prevent, handle, and resolve socio-environmental conflicts related to the OEFA's mandate; and implementing early warning mechanisms and preventative actions (Government of Peru, 2020<sub>[108]</sub>). The OEFA also houses a Tribunal for Environmental Enforcement (*Tribunal de Fiscalización Ambiental*), which is in charge of resolving appeals against administrative rulings made by the OEFA and its subdivisions (Government of Peru, 2020<sub>[109]</sub>). The institutional framework and the current practices of the OEFA were recently analysed by the OECD in the framework of a review of the regulatory enforcement and inspections in the environmental sector of Peru (OECD, 2020<sub>[110]</sub>). Through the formulation of a range of recommendations, this review aims at enhancing the OEFA's capacity to carry out inspection and enforcement activities so that they effectively contribute to the achievement of environmental objectives. It notes, in particular, that the OEFA's approach to environmental risk assessment and management could be further strengthened (OECD, 2020<sub>[110]</sub>). The review also indicates that the mechanisms developed by the OEFA to foster compliance with environmental regulation, such as the Registry of Good Environmental Practices, could be supported by additional incentives (OECD, 2020<sub>[110]</sub>). A number of these recommendations are aligned with RBC principles and standards and are of particular relevance to foster the implementation of RBC practices in relation to the environment. Incentivising businesses to comply with environmental regulations and to identify, prevent, and mitigate the adverse impacts of their operations on the environment is indeed at the core of RBC.

### 3.3.3. Environmental Justice

Peru has made significant progress in relation to environmental justice. In 2018, it opened its first court dedicated to environmental matters in the judicial district of Madre de Dios (*Juzgado Especializado en materia Ambiental del Distrito Judicial de Madre de Dios*)

(Government of Peru, 2018<sub>[111]</sub>), a key step in strengthening the country's rule of environmental law. The court was created as part of the strategic axes of Peru's 2009-2018 Institutional Development Plan for the Judiciary (*Plan de Desarrollo Institucional del Poder Judicial 2009-2018*) pertaining to the environment and in an effort to implement the constitutional right to enjoy a balanced environment adequate for the development of life and the objective of sustainable development.<sup>78</sup> It was opened in the Department of Madre de Dios in response to the numerous cases of illegal mining, deforestation, environmental degradation, and illicit trade in wildlife that occurred in this Department over recent years (Government of Peru, 2018<sub>[112]</sub>).<sup>79</sup> The Judiciary recently announced that additional courts dedicated to environmental matters will be created in other judicial districts of the country by 2021 (Government of Peru, 2019<sub>[113]</sub>). With the opening of new courts dedicated to environmental matters, there is *a need to continue building the institutional capacity of the environmental judicial system, to ensure access to justice*.

In September 2018, Peru became a signatory to the Escazú Agreement,<sup>80</sup> the region's first environmental treaty and the world's first treaty to include provisions relating to the protection of environmental human rights defenders. The Escazú Agreement follows the three pillars of protection of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which is expressly referenced in the Guidelines. Although the Escazú Agreement has 21 signatories, it will only come into force upon ratification by at least 11 Parties.<sup>81</sup> For the time being, Peru has not yet ratified this Agreement.

Access to environmental information in Peru is governed by the 2003 Law on Transparency and Access to Public Information,<sup>82</sup> which is binding on government entities and enable citizens to inform themselves of the measures adopted by the Government and exercise oversight. However, reports show that the majority of complaints filed against municipalities relate to lack of transparency.<sup>83</sup>

Environmental rights-related impacts in Peru (which are regularly associated with adverse environmental impacts of large-scale projects and often impact indigenous peoples (see Section 3.1.3)) highlight the need to *ensure robust regulatory protections and enforcement to prevent infringements by business activities to the right to a healthy environment and to ensure that the rights of environmental human rights defenders are protected. This includes protecting avenues for access to environmental information, public participation processes, as well as access to environmental justice through the judicial system. The Government should prioritise ratifying the Escazú Agreement as a first step in ensuring the aforementioned protections*.

In addition, and similar to the recommendations made with respect to human rights (See Section 3.1), the Government should raise awareness among businesses to ensure that the above environmental rights-related protections are taken into consideration in their due diligence processes; particularly when identifying and addressing adverse environmental risks and impacts.

#### ***3.3.4. Cross-sector environment related risks and impacts of business activities: deforestation and biodiversity damage***

Deforestation as a result of business activities in Peru is increasing. Between 2001 and 2018, the country experienced a 3.7% decrease in tree cover (Global Forest Watch, 2018<sub>[114]</sub>) resulting mainly from land use change by small-scale farmers in search of larger areas for agriculture, livestock raising, and export agriculture. Although the use of forest for commercial and industrial purposes is only allowed pursuant to a system of concessions, authorisations, permits, adjustable duties (based on volume and value of products), and



forest management plans,<sup>84</sup> deforestation remains a critical issue in Peru (OECD/UN ECLAC, 2017<sub>[102]</sub>).

In light of Peru's biodiversity, the country's rich ecosystemic, genetic and biological heritage offer opportunities for business including biotrade, ecotourism, and the development of new areas of international business competitiveness linked to biodiversity (OECD/UN ECLAC, 2017<sub>[102]</sub>). To safeguard this biodiversity and ensure that it is used and interacted with sustainably and in accordance with RBC standards and principles, ***the Government could promote the consideration of biodiversity-related dependencies, risks and impacts through risk-based due diligence processes.***

With respect to the challenges related to land use change due to the expansion of the agricultural frontier, ***addressing deforestation could be supported by enforcing the existing regulatory framework and building the capacity of enforcement institutions, particularly at the regional and local levels.*** For example, the central government could facilitate regional governments' access to monitoring tools (such as satellite imagery), and build capacity for environmental zoning and planning so that regional governments manage to enforce environmental regulation and, where applicable, sanction infractions.

Linked to deforestation challenges, some of Peru's biggest sawmills are reportedly processing high rates of illegal timber and there have been allegations of timber-laundering, with companies falsifying documents for export markets (Global Witness, 2019<sub>[115]</sub>). To address the issue of illegal logging, the PNCP foresees measures aimed at guaranteeing the legal origin of forest products through tools integrated into a Control Module for the National System of Forest and Wildlife Information (*Módulo de Control del Sistema Nacional de Información Forestal y de Fauna*, MC SNIFFS) (Government of Peru, 2019<sub>[23]</sub>). The PNCP's proposal will build on the existing enforcement efforts of the Agency for Supervision of Forest Resources and Wildlife (*Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre*, OSINFOR)<sup>85</sup>. To ensure RBC with respect to forest products, ***the Government should continue to strengthen enforcement of biodiversity and forestry related regulation, as well as to ensure compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which includes provisions on both legal and illegal trade. This could imply incentivising the use of products from responsibly managed forests<sup>86</sup> and promoting due diligence in accordance with the Due Diligence Guidance; taking into account risks associated with illegal logging and trade.***

### ***3.3.5. Sector-specific environmental related risks and impacts of business activities: mining sector***

Peru faces significant environmental risks related to mining operations. Over recent years, most large-scale mining companies operating in the formal sector have improved their processes for the protection of the environment (OECD/UN ECLAC, 2017<sub>[102]</sub>). They now generally comply with environmental quality standards and some of them have even developed good environmental practices, such as recycling and reusing water and helping local communities better manage water resources (SNMPE, 2019<sub>[116]</sub>). However, some medium-scale mines, as well as small-scale and artisanal mining, and informal and illegal mining activities, still resort to production methods that contaminate water, soil and air with heavy metals and chemicals, thereby affecting people's health and quality of life (OECD/UN ECLAC, 2017<sub>[102]</sub>). In addition, this type of mining activities often takes place in protected natural areas and buffer zones.

In particular, informal and illegal mining activities in Peru have been linked not only to forest clearing but also to mercury pollution, causing irreversible impacts to life, and mass

destruction of soil and vegetation. Although the Government has ratified the Minamata Convention on Mercury and has managed to decrease imports of mercury, informal and illegal mining (especially of gold), which are responsible for most mercury pollution, are still expanding in fragile and environmentally sensitive areas of the country, particularly in the Department of Madre de Dios (OECD/UN ECLAC, 2017<sub>[102]</sub>). As mineral supply chains are increasingly affected by importers' due diligence regulations, improving the environmental due diligence and related practices of mining activities in Peru will be key for sustaining market access. The Government should seek to promote compliance with mining regulations but also to *incentivise due diligence in accordance with the Due Diligence Guidance, and to promote clarity and uniformity on due diligence expectations, and in particular, those contained in the OECD Guidance for Meaningful Stakeholder Engagement in the Extractives Sector - especially with respect to adverse environment-related risks and impacts.*

## Policy recommendations

5. **Ensure robust regulatory protections and enforcement to prevent infringements of the right to a healthy environment by business activities, for example, by strengthening institutional capacities and protecting avenues for access to environmental information, public participation processes, as well as access to environmental justice through both judicial and non-judicial grievance mechanisms (see also recommendations in Section 3.1).**
6. **Encourage businesses to ensure that expectations relating to climate change adaptation and supply chain resilience, as well as GHG emission reductions targets, are being identified, addressed and implemented as part of their supply chain due diligence processes – particularly with respect to identified priority sectors.**
7. **Incentivise businesses to ensure that climate change, biodiversity and environmental rights are taken into consideration in their due diligence processes, particularly when identifying and addressing adverse environmental risks and impacts.**

### 3.4. Anti-corruption and integrity

The Guidelines recognise the important role of the private sector in combating bribery. Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage, and should also resist the solicitation of bribes and extortion. In this respect, Chapter VII on “Combating Bribery, Bribe Solicitation and Extortion” calls on enterprises to develop and adopt adequate internal controls, ethics and compliance programmes, or measures for preventing and detecting bribery through a risk-based approach. For governments, combating bribery, bribe solicitation and extortion is important as they can erode democratic institutions, discourage investment, and undermine citizen welfare, trust in public institutions, and sustainable development.

Like other countries in Latin America, Peru has suffered for decades from systemic corruption that has reached the highest tiers of its executive, judicial and legislative systems. Despite several attempts made by past governments to reduce corruption, Peru remains one of the countries in Latin America that suffers from the highest levels of perception of corruption as evidenced by its rankings in corruption-related indices. Peru ranked 91<sup>st</sup> (out of 141 countries) in the Incidence of Corruption Index of the World

Economic Forum (WEF)'s 2019 Global Competitiveness Report.<sup>87</sup> According to the same report, based on a survey to business people, corruption was considered as the third most important obstacle to doing business in Peru, surpassed only by inefficient government regulations and restrictive labour regulations. Likewise, Peru ranked 101<sup>st</sup> (out of 183 countries), and scored 36 out of a total of 100 in 2018 (compared to 38 in 2012), in Transparency International's 2019 Corruption Perceptions Index.<sup>88</sup> Peru's worst rating in the World Justice Project's 2020 Rule of Law Index was also for absence of corruption (111<sup>th</sup> out of 128 countries).<sup>89</sup> In the same vein, citizen-focused indices, such as the Latinobarómetro, suggest that most Peruvians consider government actions against corruption as either ineffective (37%) or very ineffective (18%).<sup>90</sup>

To address the issue of corruption, Peru has ratified key international instruments against corruption in general and bribery more particularly (see Box 3.6) and, since 2000, its anti-corruption system has undergone a series of reforms focusing mostly on the public sector (OECD, 2017<sub>[117]</sub>). In 2010, Peru established a High-Level Anticorruption Commission (*Comisión de Alto Nivel Anticorrupción*, CAN), which brings together several institutions from the public and private sectors, trade unions, and civil society, to improve the integrity system across the country. The CAN's functions and objectives is to prevent and fight corruption by coordinating actions, combining efforts, and proposing medium- and long-term policies to the main public institutions in the country (Government of Peru, n.d.<sub>[118]</sub>). In addition, in 2017, Peru established a Secretariat for Public Integrity (*Secretaría de Integridad Pública*, SIP) within the Presidency of the Council of Ministers to foster the coherence of the country's integrity system. The SIP is in charge of ensuring the general coordination of the CAN and bringing it technical support. It also steered the latest national anti-corruption strategy, which led to the adoption by the Government in 2018 of the National Integrity and Fight Against Corruption Plan 2018-21 (*Plan Nacional de Integridad y Lucha Contra la Corrupción 2018-2021*) (Government of Peru, 2018<sub>[119]</sub>). The SIP and the CAN have also played an active role in promoting and supporting the establishment of Regional Anti-Corruption Commissions (*Comisiones Regionales Anticorrupción*, CRAs) in all 25 Peruvian regions to develop regional anti-corruption plans and respond to context-specific challenges, as well as in implementing Offices of Institutional Integrity (*Oficinas de Integridad Institucional*) throughout the public administration (OECD, 2019<sub>[120]</sub>).

### Box 3.6. Key international instruments against corruption and bribery ratified by Peru

Peru's actions have been guided to some extent by its obligations under the Inter-American Convention against Corruption and the United Nations Convention Against Corruption (UNCAC), which were ratified by the Peruvian Congress in April 1997 and November 2004 respectively.

Most recently, in July 2018, Peru became the 44<sup>th</sup> Party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Additionally, Peru has adhered to the OECD Council Recommendations on: (i) the principles of public governance of public-private partnerships; (ii) the principles for transparency and integrity of lobbyists; and (iii) the guidelines for managing conflicts of interest in the public sector.

Peru has taken additional steps to strengthen its public integrity system. For example, it enacted several laws aimed at better safeguarding the integrity of its civil service. Following good practices, Peru also adopted provisions to protect whistle-blowers who report instances of corruption in the public sector. Pursuant to these provisions, whistle-

blowers receive identity protection, may not be dismissed, have a gradual reduction of potential sanctions if they are co-responsible, and may receive an award (Government of Peru, 2010<sub>[121]</sub>).<sup>91</sup> Complaints and protection measures are handled by the Comptroller of the Republic (*Contraloría General de la República*).<sup>92</sup> Additional standards and procedures to facilitate and encourage corruption complaints made in good faith and sanction complaints made in bad faith have been established (Government of Peru, 2017<sub>[122]</sub>).<sup>93</sup> In criminal cases for instance, the court system provides further protection that includes, among others, police protection, change of residence, and temporary residence abroad (Government of Peru, 2016<sub>[123]</sub>).<sup>94</sup>

However, it is only recently that the Peruvian authorities have recognised the important role that the private sector may play in combating corruption in general and bribery more specifically. Until the introduction in 2016 of the Law No. 30424 on Transnational Active Bribery, which establishes corporate administrative liability for transnational bribery (Government of Peru, 2016<sub>[124]</sub>),<sup>95</sup> the authorities had made only timid efforts to encourage the development of good practices in the corporate sector. For their part, some local business organisations had been encouraging the adoption of measures, such as ethics codes and other corporate measures, aimed at preventing corruption, for some years. CONFIEP, for instance, adopted a code of conduct in 2015 through which the business associations related to it affirm their commitment to reject any act of corruption (CONFIEP, 2015<sub>[125]</sub>). Likewise, the Anti-corruption Private Council (*Consejo Privado Anticorrupción*), comprised of 17 private institutions, has sought to promote and implement ethical values to eradicate corruption, as well as transparency and good corporate governance.<sup>96</sup> However, these initiatives remained limited.

Since the enactment of Law No. 30424, the Government has taken steps to raise awareness among companies of their role in preventing corruption. The Law, which is part of a wider business-focused anti-corruption legislative process, requires Peruvian companies to have prevention models in place. These models should be tailored to the legal person's nature, risks, needs, and characteristics, and includes adequate measures to ensure a proper prevention against corruption, such as mechanisms of control and reporting procedures (Government of Peru, 2016<sub>[124]</sub>).<sup>97</sup> Additionally, the National Policy on Integrity and the Fight Against Corruption (*Política Nacional de Integridad y Lucha contra la Corrupción*) indicates that professional associations, business associations, and unions are responsible for approving effective codes of ethics and autonomous disciplinary instances within their institutions (Government of Peru, 2017<sub>[126]</sub>).<sup>98</sup> Going a step further, the Peruvian authorities have taken legislative action to curb private-to-private corruption through the adoption of a legislative decree that establishes criminal liability for acts of corruption affecting commercial relations and fair competition between companies (Government of Peru, 2018<sub>[127]</sub>).<sup>99</sup>

Despite these encouraging developments, important elements of a functioning anti-corruption framework are still missing. For example, beyond witness protection, no comprehensive framework exists in Peru to guarantee whistle-blower protection for corporate employees who report suspicions of bribery to law enforcement authorities in good faith and on reasonable grounds. Additionally, measures to engage companies in the prevention of corruption have now been adopted, but guidance and training on the adoption of corporate compliance programmes will be essential to ensure the effectiveness of the new legal framework. ***The Government will need to guide and assist companies in their efforts to prevent and detect irregularities related to corruption or arising from conflicts of interest. Peru's NCP could play an important role in this endeavour, contributing to the Government's efforts to raise businesses' awareness.***

The Guidelines provide guidance on processes and systems – such as internal controls, ethics and compliance programmes – that companies can implement to address bribery. Peru could also make use of the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance: this additional guidance can be a useful reference for promoting, designing and implementing strong corporate compliance programmes and internal reporting mechanisms, including for companies active on foreign markets (OECD, 2010<sup>[128]</sup>).

*In cooperation with businesses and other relevant organisations, the Government has a key role in assisting companies in engaging in preventive efforts and in detecting irregularities related to corruption or arising from conflicts of interest through risk-based due diligence. Additionally, the Government could develop guidelines and other forms of guidance that strengthen prevention efforts. The Government could also consider taking additional steps to facilitate the reporting of suspicions of corruption to the public authorities, including by enhancing and promoting the protection of private and public sector employees who report in good faith such suspicions, in order to encourage them to report without fear of retaliation. In its efforts to improve integrity in the public and private sectors, the Government should also continue strengthening applicable rules and ensuring effective enforcement.*

## Policy recommendation

8. **Assist companies in engaging in preventive efforts against corruption in general and bribery more specifically through risk-based due diligence. Provide support to business through the development of guidelines and other forms of guidance, and enable the reporting of suspicions of private sector corruption to the public authorities without fear of retaliation.**

## 4. Leveraging and incentivising Responsible Business Conduct

One way to further promote and enable RBC is through the integration of RBC principles and standards – such as the Guidelines – in policy areas that have a bearing on the conduct of businesses. As set out in the PFI, to ensure an enabling environment for businesses to act responsibly, it is fundamental that governments promote policy coherence and ensure alignment of policies relevant to RBC (OECD, 2015<sub>[1]</sub>). Two areas in which Peru can promote policy coherence is by integrating RBC considerations into the Government’s operations as an economic actor and in its trade and investment agreements.

### 4.1. Exemplifying RBC as an economic actor

As emphasised by the PFI, in order to promote and enable responsible business practices, it is key that governments lead by example and follow RBC principles and standards when acting as economic actors (OECD, 2015<sub>[1]</sub>). By doing so, not only can governments impose the observance of these RBC principles and standards on businesses through legal and regulatory requirements, they also enhance the legitimacy of RBC policies, thereby incentivising businesses to follow their example and, in turn, adopt responsible practices. Peru could exemplify RBC by integrating considerations pertaining to RBC in its activities as procurer of goods, services, and works, and as owner of enterprises.

#### 4.1.1. RBC in public procurement policies and processes

Public procurement plays a significant role in national economies. Through the acquisition of goods, services, and works to carry out their functions and deliver services to citizens, governments are the largest consumers in the global market place. In most countries, public procurement represents an important part of taxpayers’ money, government expenditure, and GDP (OECD, 2019<sub>[129]</sub>). This is particularly true in Peru, where public procurement accounts for 50.7% of government expenditure and 11.6% of GDP (OECD, 2017<sub>[130]</sub>). At the same time, there are growing expectations on governments to carry out public procurement not only efficiently but also with high standards of conduct in order to ensure the quality of public service delivery and to pursue public welfare objectives.

Public procurement thus constitutes a powerful policy instrument, which, if used strategically, can help pursue broader policy objectives beyond mere efficiency and economy. Among others, public procurement can help promote sustainable development and RBC by contributing to create reliable supply chains and minimise adverse impacts on people, the planet, and society. The Coronavirus (COVID-19) outbreak – as a result of which many procuring entities have had to procure healthcare supplies with extreme urgency and corresponding risks of adverse impacts in supply chains – has shown the importance of implementing RBC principles and standards in public procurement to identify, prevent, and mitigate adverse impacts. Where appropriate in light of national priorities and circumstances, public procurement policies and processes should therefore be designed and conceived as policy levers to foster RBC.

A number of OECD instruments recognise the role public procurement can play in fostering RBC. The PFI highlights that governments can promote RBC by including public procurement criteria related to RBC (OECD, 2015<sub>[1]</sub>). Likewise, the OECD Recommendation on Public Procurement notes the growing interest that public procurement be used not only to achieve efficiency and economy but also to foster broader policy objectives, such as RBC (OECD, 2015<sub>[131]</sub>).<sup>100</sup> It recommends that Adherents evaluate the use of public procurement as a method of pursuing broader policy objectives

in line with national priorities, develop an appropriate strategy for the integration of such objectives in procurement systems, and employ appropriate impact assessment methodology to measure the effectiveness of procurement in achieving these objectives (OECD, 2015<sup>[131]</sup>).

Public procurement in Peru is governed by Law No. 30225 (Government of Peru, 2019<sup>[132]</sup>) and its corresponding Regulation (Government of Peru, 2018<sup>[133]</sup>) (the Public Procurement Law and Regulation).<sup>101</sup> The Public Procurement Law and its Regulation are part of a larger legal and regulatory framework that applies to all procurement activities in Peru (goods, services and works), including those of State-Owned Enterprises (SOEs) (except the national oil company, Petroperu) (OECD, 2017<sup>[130]</sup>). The general stated objective of this legal and regulatory framework is to maximise value for money of invested public resources and promote results-based management so that public procurement is carried out under conditions offering the best price-quality ratio and has a positive impact on citizens' lives.<sup>102</sup> To this effect, several overarching principles, such as free competition, equality of treatment, transparency, and efficiency, are at the core of Peru's public procurement system.<sup>103</sup> Additional principles governing public procurement processes and policies in Peru include, among others, the principle of "environmental and social sustainability", which aims at ensuring that public procurement policies and processes contribute to environmental and social protection, as well as to human development (OECD, 2017<sup>[130]</sup>).<sup>104</sup>

The principle of "environmental and social sustainability" is reflected in the competition criteria to evaluate bidders' technical offers for goods, services and works, which are mostly based on the price but can also comprise other considerations, such as environmental and social sustainability.<sup>105</sup> For instance, the latest model tender documentation for the procurement of works issued by the Peruvian entity in charge of supervising public procurement (*Organismo Supervisor de las Contrataciones del Estado*, OSCE) specifies that, in addition to the price which accounts for 93 points out of 100 in the evaluation process of a bidder's offer, the procuring entity can take into account the following additional criteria: (i) "environmental and social sustainability"; (ii) "social protection and human development"; and (iii) "integrity in public procurement"<sup>106</sup> (Government of Peru, 2019<sup>[134]</sup>).<sup>107</sup> If adopted, these criteria account for the remaining seven points of the evaluation process, which the bidder can obtain by presenting relevant certifications. For example, under the "environmental and social sustainability" criterion, the bidder can obtain up to three additional points if it shows that it has developed, among others, social accountability and environmental management systems conforming to the relevant Social Accountability International (SAI) standard, International Organization for Standardization (ISO) norm or the equivalent Peruvian Technical Norm.<sup>108</sup> Likewise, under the "integrity in public procurement" criterion, the bidder can obtain up to two additional points if it presents a certification attesting that it has put in place an anti-bribery management system conforming to the relevant ISO norm or the equivalent Peruvian Technical Norm.<sup>109</sup>

The Public Procurement Law and its Regulation also prohibit the participation in public procurement of companies or individuals convicted of bribery and other offences.<sup>110</sup> In addition, bidders must include in their offers a sworn declaration attesting that they have not incurred in corrupt practices, and that they undertake not to participate in such practices and to respect the principle of integrity.<sup>111</sup> This anti-corruption declaration at the tender stage is complemented by the mandatory inclusion of anti-corruption clauses in the contracts concluded by Peru's procuring entities.<sup>112</sup> Pursuant to such clauses, the winning bidder must, among others, declare and guarantee that it has not made any payments or offered any benefits in relation to the contract and undertake not to commit corrupt

practices during the performance of the contract. The violation of the obligations contained in these clauses gives the procuring entity the right to terminate the contract automatically.<sup>113</sup>

The analysis of Peru's public procurement legal and regulatory frameworks shows that the Government has started to develop strategies to use public procurement as a method to pursue broader policy objectives pertaining to RBC, such as environmental and social sustainability and integrity. However, under the Public Procurement Law and its Regulation, taking into account environmental and social criteria in the evaluation and selection process of bidders is not compulsory. It depends on the decision of the procuring entity and is limited by the fact that it must not hinder the participation of suppliers (OECD, 2017<sub>[130]</sub>).<sup>114</sup> Moreover, when such criteria are taken into consideration, they only account for a minor part of the evaluation score and their influence on procurement decisions is, hence, limited. Likewise, procurement entities in Peru are not obliged to require bidders to present quality certifications (OECD, 2017<sub>[130]</sub>). As a matter of fact, there is limited information on the goods, services and works purchased in accordance with environmental and social criteria in Peru and their impact on public procurement practices remains mostly unknown (OECD, 2017<sub>[130]</sub>). In addition, requirements pertaining more directly to RBC, such as the conduct of due diligence or the disclosure of non-financial information by potential contractors and/or suppliers, do not figure in Peru's public procurement legal and regulatory frameworks. As a result, Peru's procuring entities are not incited to take them into account as criteria to evaluate and select bidders and/or to control contractors/suppliers.

***Peru could foster the use of public procurement as a policy lever for RBC. In this regard, Peru could consider developing a strategy to further take into account RBC considerations when purchasing goods, services and/or works.***

***For this purpose, Peru could first develop a two-stage approach aimed at progressively integrating RBC-related concerns in its procurement policies and processes.*** This is how the Swedish National Agency for Public Procurement designed its policy to ensure responsible supply chains for procured goods and services (see Box 4.1). During the first stage, Peru could consider defining the “environmental and social sustainability” criterion existing in the Public Procurement Law and its Regulation as a compulsory factor to evaluate bidders' offers for sectors where risks may be prevalent and specifying precisely what is entailed by this criterion. It could also contemplate giving more weight in the evaluation process to the “environmental and social sustainability”, “social protection and human development”, and “integrity” criteria currently mentioned as additional optional evaluation factors in its model tender documentation for the procurement of goods, services and works. As part of the second stage, Peru could consider including RBC requirements, such as the conduct of due diligence or the disclosure of non-financial information, as additional criteria to be taken into account during the tendering and contracting processes. In this regard, referring to the Guidelines, the Due Diligence Guidance for RBC and/or the sector-specific Due Diligence Guidance in Peru's public procurement policies and processes could be helpful. In addition, Peru could incite its procuring entities to require bidders in specific sectors to present RBC-related certifications as part of the tendering and contracting processes, as was recently done in Canada (see Box 4.1).

The inclusion of RBC-related criteria in Peru's public procurement policies and processes would contribute to clarify the Government's expectations vis-à-vis RBC and encourage the uptake of RBC practices by businesses. If used strategically, public procurement can indeed serve as a tool to communicate the expectation that businesses should prevent and mitigate actual and potential adverse impacts not only in their operations but also in their supply chains and other business relationships. This implies clarifying that due diligence



extends beyond the activities of winning bidders and immediate contractors and/or suppliers, to also encompass subcontractors and/or suppliers, including informal ones. Such a clarification could even create incentives for the formalisation of informal suppliers dealing with contractors and/or suppliers of Peru's procuring entities, thereby supporting the Government's efforts to reduce informality in the labour market.

#### **Box 4.1. Examples of integration of RBC considerations in public procurement policies and processes**

##### **Sweden's requirements under the ILO core Conventions and sustainable supply chains**

The Swedish National Agency for Public Procurement recently designed a policy to promote fair working conditions in the supply chains through which it procures goods and services by means of a two-stage approach. Pursuant to this policy, procuring entities in Sweden have the obligation to set labour law requirements in accordance with ILO's Fundamental Conventions as part of their contracting processes when there is a risk of unfair working conditions (base level) and the possibility, in addition to these mandatory requirements, to include additional requirements in the areas of human rights, labour rights, environmental protection and anti-corruption (advanced level) (Government of Sweden. National Agency for Public Procurement, 2019<sup>[135]</sup>).

##### **Canada's requirements for the ethical procurement of apparel**

Canada's central purchasing body, Public Services and Procurement Canada (PSPC), launched in September 2018 an initiative to guarantee that, within the federal procurement supply chain, apparel is acquired from suppliers who operate in an ethically and socially responsible manner. According to this initiative, suppliers selling apparel to government entities must self-certify that they and their first-tier subcontractors comply with local laws and international standards on labour and human rights (including freedom from child labour, forced labour, discrimination and abuse, and access to fair wages and safe working conditions) (Government of Canada, 2018<sup>[136]</sup>). The certification is coupled with a requirement to provide information regarding the name of the manufacturers, suppliers and subcontractors who manufactured the garment, as well as their location and country of origin. Suppliers in violation of their certification risk having their contract terminated for default. (OECD, 2019, p. 29<sup>[137]</sup>)

*Second, the Government could consider taking measures to raise the awareness of its public procurement officials to the importance of integrating RBC considerations in their policies and processes and build their capacity to deal with RBC-related criteria and certifications with the support of the NCP.* Leveraging RBC through public procurement often requires a change of culture and practices among procuring entities. The development of model tender documentation incorporating RBC-related criteria, the organisation of trainings and conferences on responsible public procurement, and the participation in international cooperation initiatives aimed at sharing best practices and exchanging tools and information on responsible practices in public procurement, could support public procurement officials in this regard. The NCP could play an active role in this context by developing and organising training activities for Peru's public procurement officials on RBC, with a specific focus on the Guidelines and the related Due Diligence Guidance.

*Finally, Peru could consider putting in place programmes to monitor the integration of RBC-related criteria and certifications in its public procurement processes and policies and verify the compliance of its contractors and/or suppliers with such criteria and certifications.* It could also contemplate developing a methodology to measure the results of these criteria and certifications in promoting the uptake of responsible practices among businesses dealing with Peruvian procuring entities.

## Policy recommendation

9. **Foster the use of public procurement as a policy lever for RBC by elaborating a strategy to strengthen progressively the inclusion of RBC considerations in Peru's public procurement policies and processes, for example through a staged approach. This strategy could also include actions aimed at reinforcing public procurement officials' knowledge of and capacity to deal with RBC-related criteria and certifications with the support of the NCP. In addition, it could encompass measures to monitor the uptake of and compliance with RBC-related criteria and certifications, as well as their impact on business practices.**

### *4.1.2. RBC in policies regarding the governance of State-Owned Enterprises*

SOEs can play an important role in the economy (OECD, 2017<sub>[138]</sub>). In many countries, they are responsible for the provision of essential public services, having a direct impact on citizens' lives (OECD, 2015<sub>[139]</sub>). In addition, SOEs increasingly engage in trade and investment (OECD, 2016<sub>[140]</sub>) and have become important actors in GVCs outside their territories (OECD, 2015<sub>[139]</sub>). In fact, today, 102 of the world's largest 500 enterprises are state-owned (OECD, 2019<sub>[141]</sub>).

In Peru, however, the SOE sector is not as prominent as in other countries of the LAC region as a result of an important privatisation process in the 1990s (IDB, 2018<sub>[142]</sub>). To date, Peru has around 40 SOEs, which mainly operate in the public utility and infrastructure sectors, i.e. electricity, infrastructure, transportation, finance and services, among others (FONAFE, 2019<sub>[143]</sub>).

Given SOEs' capacity to promote or hamper economic and social development (OECD, 2015<sub>[139]</sub>), ensuring that they operate in accordance with good governance practices and RBC principles and standards is fundamental to ensure their positive contribution to the economy (OECD, 2015<sub>[139]</sub>) and reduce their actual or potential adverse impacts on people, the planet, and society. This is all the more important as SOEs often operate in sectors where risks may be prevalent (OECD, 2019<sub>[141]</sub>).

Several OECD instruments acknowledge the importance of SOEs complying with RBC principles and standards. The Guidelines apply to all enterprises, regardless of their ownership and legal status, and the PFI recognises that governments should ensure that the practices of their SOEs exemplify RBC (OECD, 2015<sub>[1]</sub>).<sup>115</sup> In addition, the OECD Guidelines on Corporate Governance of SOEs (the SOE Guidelines) contain a chapter dedicated to "Stakeholder relations and responsible business".

This chapter recommends, among others, that SOEs observe high standards of RBC with respect to the environment, employees, public health and safety, and human rights, in accordance with relevant international principles and standards. To this effect, governments should disclose publicly their expectations regarding RBC of SOEs in a clear and transparent manner and establish mechanisms for the implementation of such expectations (OECD, 2015<sub>[139]</sub>). The SOE Guidelines also recommend that SOEs observe

high standards of transparency and disclose relevant financial and non-financial information. This includes information on any material foreseeable risks incurred in their operations, in particular financial and operational risks, but also human rights, labour, environment, corruption and tax-related risks, as well as the measures taken to manage such risks (OECD, 2015<sub>[139]</sub>).

With the exception of Petroperu, which is overseen by the MINEM and the Ministry of Economy and Finance (MEF), in Peru, all SOEs are part of the holding group of the State, the Peruvian corporation of SOEs (*Fondo de Financiamiento de la Actividad Empresarial del Estado*, FONAFE) (Government of Peru, 2004<sub>[144]</sub>).<sup>116</sup> FONAFE was created in 1999 to institute a centralised model of management for 35 SOEs in which the Government holds sole or majority control or which have been entrusted to it, as well as three enterprises put into liquidation (FONAFE, 2019<sub>[145]</sub>). The contribution of these SOEs to Peru's economy is not negligible: in 2018, the enterprises handled by FONAFE represented 2.4% of the country's GDP (FONAFE, 2018<sub>[146]</sub>). Among other responsibilities, FONAFE regulates and supervises the activities of these SOEs, and draws up their corporate governance and management rules (FONAFE, 2019<sub>[147]</sub>).

Among the core principles of FONAFE figure efficiency, austerity, continued improvement and social responsibility (FONAFE, 2019<sub>[143]</sub>). As a result, FONAFE has a department of CSR (FONAFE, 2019<sub>[148]</sub>), which is responsible for improving the relations of the SOEs with their stakeholders and for aligning the policies of these enterprises with the 2030 Agenda and the SOE Guidelines, as well as for implementing such Guidelines (FONAFE, 2019<sub>[149]</sub>). In addition, strengthening CSR is one of the core objectives of FONAFE's Corporate Strategic Plan for 2017-2021, which foresees a number of concrete actions for that purpose, notably: (i) aligning the social responsibility plans of the SOEs to the CSR Guidelines and policies; (ii) preparing sustainability reports; (iii) improving the management of social and environmental issues; and (iv) strengthening external communication with main stakeholders (FONAFE, 2019, p. 37<sub>[147]</sub>).

In order to implement these actions, FONAFE has issued CSR Guidelines, which define CSR as “an ethic and transparent behaviour, which generates social value throughout the enterprise, taking into consideration stakeholders' expectations and transcending compliance with norms, with the aim of contributing to the enterprise's sustainability, that of society and of its surroundings [...]” (FONAFE, 2019<sub>[150]</sub>). These Guidelines aim to guide the formulation, approval, follow-up and monitoring of the CSR plans and programmes of all the SOEs managed by FONAFE (FONAFE, 2019<sub>[150]</sub>). To this effect, they recommend, among several preliminary steps, that the SOEs carry out a mapping of their stakeholders and a materiality assessment (FONAFE, 2019<sub>[150]</sub>). Additionally, they indicate that the CSR plans must contain specific programmes for each stakeholder, as well as a specific list of activities with deadlines and entities in charge. These plans must be approved by FONAFE and are subject to quarterly compliance reporting. The CSR Guidelines also require that the SOEs establish a CSR committee in charge of the management of the CSR plan and issue annual sustainability reports (FONAFE, 2019<sub>[150]</sub>). FONAFE has also developed a tool to evaluate the degree of implementation of CSR by the SOEs it manages (FONAFE, 2018<sub>[151]</sub>). According to FONAFE's 2018 Annual Report, most of these enterprises have reached the second level of implementation of CSR practices. Pursuant to said tool, this means that they “maintain reluctance with respect to CSR but are starting to implement changes and show advances in their internal organisation towards the adoption of CSR practices” (FONAFE, 2019<sub>[152]</sub>). To address this situation, FONAFE organised two “social responsibility meetings” (*Encuentros de Responsabilidad Social de la Corporación*) in 2017 and 2019, which gathered experts and representatives from SOEs, the private sector, and international organisations, to promote the

implementation of CSR practices among the SOEs it manages and report on the progress made in this regard (Stakeholders, 2019<sub>[153]</sub>).

Social and environmental responsibility is also among the core principles of Petroperu, whose stated goal is “to be a mixed-capital energy company, acknowledged for its transparency, efficiency and social and environmental responsibility” (Petroperu, 2020<sub>[154]</sub>). To achieve this goal, Petroperu adheres to several RBC principles and standards, such as those of the Guidelines (which are published on its website) and has developed several RBC-related policies, including a social management policy.

Pursuant to this social management policy updated in September 2018, Petroperu gives the same degree of priority to social aspects as to operational and economic ones and abides by the Equator Principles, the Environmental and Social Performance Standards of the International Finance Corporation (IFC), the Global Compact Principles, and the Universal Declaration of Human Rights. It also undertakes several commitments, such as, for instance: (i) integrating social responsibility in its supply chain to manage stakeholders, implement best corporate practices, and promote ethical behaviour, the respect for human rights, and transparency; (ii) incorporating the preventive management of social impacts and risks generated by its activities in its decision-making processes; (iii) building strong and constructive relationships with its stakeholders; and (iv) establishing an efficient, accessible and culturally appropriate grievance mechanism to address stakeholders’ concerns. These commitments are compulsory for the directors and workers of Petroperu but also for its contractors and subcontractors (Petroperu, 2018<sub>[155]</sub>). In this context, Petroperu launched a due diligence process in 2018 to analyse the risks and impacts of its activities on human rights (Petroperu, 2019<sub>[156]</sub>). In addition, since 2007, Petroperu publishes detailed annual sustainability reports. The 2018 version was, for instance, prepared in accordance with the standards of the Global Reporting Initiative (GRI) and based on a stakeholders’ mapping and a materiality assessment (Petroperu, 2019<sub>[156]</sub>). It discloses information, for example, on Petroperu’s environmental performance, the way it addresses environmental risks, the complaints submitted by local communities, and the results of its materiality assessment (Petroperu, 2019<sub>[156]</sub>).

The above analysis shows that Peru already includes some RBC considerations in the governance of its SOEs and requires them to observe RBC principles and standards in their policies and practices. However, such policies and practices differ between Petroperu and FONAFE and the recent evaluation mentioned above shows that, to date, most of the SOEs managed by FONAFE still do not pay sufficient attention to RBC issues (FONAFE, 2019<sub>[152]</sub>). In addition, FONAFE’s CSR Guidelines do not include important aspects of RBC, such as due diligence or detailed requirements regarding disclosure of non-financial information.

***In light of this, Peru could consider strengthening the inclusion of RBC considerations in the policies applying to its SOEs by developing a coherent and overarching strategy to promote their contribution to economic, environmental and social progress, while preventing and mitigating the adverse impacts of their operations, supply chains and business relationships on people, the planet, and society.***

***For this purpose, Peru could first consider communicating, in a clear and transparent manner, its expectations regarding the RBC policies and practices that all its SOEs – i.e. Petroperu and those managed by FONAFE – should develop and stressing the importance of aligning with the recommendations contained in the Guidelines and conducting risk-based due diligence for that purpose.*** To further build a coherent approach among its SOEs, Peru could consider reinforcing the use of the concept of RBC in Petroperu’s policies and processes and modifying FONAFE’s approach to include risks and impacts management in the core business operations of the SOEs it manages, and not

as an add-on. This would imply, for Petroperu, generalising risk-based due diligence in its RBC practices to extend it to other areas than human rights so as to also cover environment, labour rights, and anti-corruption. As to FONAFE, it would entail reforming its CSR Guidelines to align them with the recommendations contained in the MNE Guidelines and integrate risk-based due diligence. The conduct of due diligence by Peruvian SOEs could be promoted through an express reference to the Guidelines and the related Due Diligence Guidances in their policies and processes.

In addition, Peru could contemplate strengthening the disclosure requirements applicable to the SOEs managed by FONAFE, by requiring that any material foreseeable risks, including human rights, labour, environment, corruption and tax-related risks, be disclosed, as well as the measures taken to manage such risks. All of this would contribute to the implementation of the objective of FONAFE's Corporate Strategic Plan to strengthen CSR.

*To ensure effective implementation of its overarching strategy on RBC by all its SOEs, Peru could, as a second step, take measures to raise the awareness of SOEs' officials about the importance of the inclusion of RBC considerations in their policies and practices and build their capacity to carry out due diligence with the support of the NCP.* Such measures should focus on increasing the understanding that RBC can help SOEs not only maximise positive contributions to society and improve stakeholder relationships, but also protect their reputation and create more value (by, among others, identifying opportunities to reduce costs, strengthening management of company-specific business and operational risks, decreasing exposure to systemic risks, etc.) (OECD, 2018, p. 16<sub>[52]</sub>). The development of partnerships and/or collaboration programmes with the private sector and, in particular, with businesses operating in similar sectors that have successfully implemented RBC practices and benefited therefrom, could support SOEs' officials in progressively integrating RBC in SOEs' policies and practices. The Peruvian NCP could also provide useful support in this regard by organising training activities for officials of Peru's SOEs on RBC, the Due Diligence Guidance for RBC, the relevant sector-specific Due Diligence Guidance, as well as on the SOE Guidelines.

## Policy recommendation

- 10. Strengthen the inclusion of RBC considerations in Peruvian SOEs' governance by developing a coherent and overarching strategy to promote their contribution to economic, environmental, and social progress, while preventing and mitigating the adverse impacts of their operations, supply chains and business relationships on people, the planet and society. This strategy could imply communicating, in a clear and transparent manner, the Government's expectations regarding the RBC policies and practices that all Peruvian SOEs should develop and stressing the importance of aligning with the recommendations contained in the Guidelines and conducting risk-based due diligence for that purpose. It could also entail raising the awareness of SOEs' officials to the importance of the inclusion of RBC considerations in SOEs' policies and practices and building their capacity to carry out due diligence with the support of the NCP.**

## 4.2. Including RBC considerations in trade and investment agreements

By integrating RBC considerations in trade and investment agreements, governments can further promote policy coherence and ensure alignment of policies relevant to RBC. The inclusion in trade agreements and investment treaties of RBC-related provisions (i.e.

provisions dealing with areas covered by the Guidelines) and/or RBC clauses (i.e. clauses encouraging businesses to adopt RBC practices) serves various RBC purposes.

First, RBC-related provisions in trade and investment agreements have the potential to influence domestic legal and regulatory frameworks and foster the adoption and implementation of RBC policies. This is notably the case of provisions providing for the incorporation and dissemination in the domestic framework of internationally recognised principles and standards in areas covered by the Guidelines and/or the enforcement of domestic laws in such areas. Second, RBC-related provisions and/or RBC clauses can influence businesses' behaviour and foster RBC practices. An example are provisions through which the signatories commit to encourage businesses to observe RBC principles and standards and adopt RBC practices. Finally, RBC-related provisions fostering regulatory cooperation and/or intergovernmental consultations in areas covered by the Guidelines can facilitate access to remedy for victims of adverse impacts. Likewise, the possibility that governments may have in some investment arbitration cases to bring actions against investors, when the conditions to bring such counterclaims under the applicable rules are met, constitute another avenue through which remedies can possibly be obtained in case of harms linked to investors' operations.

These considerations are particularly important for Peru, whose economy is export oriented and relies on FDI. To take advantage of such a reliance on trade and investment and improve the performance of its economy, Peru must build and enabling environment for RBC and be perceived both as a safe place to source from and a reliable investment destination. Integrating and enforcing RBC-related provisions and/or RBC clauses in its trade agreements and investment treaties can help achieve this objective.

#### **4.2.1. RBC in trade agreements**

Over the last twenty years, Peru has concluded over 25 trade agreements<sup>117</sup> with a wide variety of countries in different regions.<sup>118</sup> In line with global trends in this field (Gaukrodger, 2020<sub>[157]</sub>), the inclusion of RBC-related provisions and RBC clauses in Peru's trade agreements has evolved over the years (see Box 4.2) and varies in terms of nature, scope, and binding nature.

#### **Box 4.2. Evolution over time of the inclusion of RBC considerations in Peru's trade agreements**

The first trade agreements concluded by Peru, mainly between 2000 and 2005, did not contain any RBC-related provisions and RBC clauses.<sup>1</sup> RBC-related provisions first appeared in Peru's trade agreement network in 2006, with the conclusion of the Trade Promotion Agreement (TPA) with the United States (U.S.), Peru's current second export and import partner. Several other trade agreements concluded later on by Peru include RBC-related provisions and RBC clauses<sup>2</sup> but this is not systematic.

Notes:

1. 1969 Andean Subregional Integration Agreement (Cartagena Agreement or Andean Pact); 2000 Peru-Cuba Economic Complementation Agreement; 2003 Peru-Thailand Free Trade Agreement (FTA); 2005 Peru-MERCOSUR Economic Complementation Agreement.

2. See, for instance, 2011 Peru-Korea FTA and 2012 EU-Peru/Colombia/Ecuador FTA.

Whereas RBC-related provisions first appeared in Peru's trade agreement network with the 2006 Peru-U.S. TPA, several trade agreements concluded by Peru after 2006 contain no RBC clauses and almost no RBC-related provisions. This is the case of the 2006 Peru-Chile

FTA and the 2008 Peru-Singapore FTA, but also of seven out of eight trade agreements concluded by Peru between 2009 and 2011,<sup>119</sup> which include the FTA with China, Peru's current first import and export partner. Likewise, the 2012 Peru-Venezuela Partial Trade Agreement, the 2012 Pacific Alliance Framework Agreement and its Additional Protocol, and the 2015 Peru-Honduras FTA do not contain any elaborated RBC-related provisions. These agreements merely contain aspirational preamble declarations, articles on integrity in public procurement, exceptions aimed at preserving the signatories' right to adopt public welfare measures, and commitments to respect and preserve indigenous' peoples' traditional knowledge on biological diversity, among others.

In contrast, the 2006 Peru-U.S. TPA mentioned above, the 2008 Peru-Canada FTA, the 2011 Peru-Korea FTA, and the 2012 EU-Peru/Colombia/Ecuador FTA are Peru's early trade agreements that, with entire chapters dedicated to labour, environment, anti-corruption or trade and sustainable development, contain most elaborated RBC-related provisions and even some RBC clauses. These provisions and clauses serve different RBC purposes. For instance, the provisions that proscribe the loosening or weakening of labour and environmental laws and regulations to attract trade – such as Article 18.2 of the 2011 Peru-Korea FTA<sup>120</sup> – reinforce the domestic legal systems in areas covered by the Guidelines and, hence, contribute to strengthen government policies that underpin RBC. The same occurs with provisions that foster regulatory cooperation and intergovernmental consultations in areas covered by the Guidelines. This is notably the case of the provisions that establish consultation and cooperation mechanisms under the 2006 Peru-U.S. TPA<sup>121</sup> and the 2012 EU-Peru/Colombia/Ecuador FTA<sup>122</sup> to ensure the implementation of the labour and environment chapters of the TPA and the trade and sustainable development chapter of the FTA. These mechanisms have indeed contributed, through regulatory cooperation and intergovernmental consultations, to reinforce the signatories' domestic frameworks in key areas for RBC (see Box 4.3).

#### **Box 4.3. RBC-related cooperation and consultation processes under Peru's trade agreements**

Trade agreements have a role to play in enabling and/or strengthening government policies that underpin RBC. Through provisions that facilitate regulatory cooperation and/or intergovernmental consultations, they contribute to reinforce legal and regulatory domestic frameworks in areas covered by the Guidelines. The examples below are illustrative:

- In accordance with the consultation mechanisms foreseen in the environment chapter of the Peru-U.S. TPA,<sup>1</sup> the U.S. initiated consultations in 2019 with the Peruvian Government about a 2018 Supreme Decree that moved the OSINFOR to an alleged subordinate position under the MINAM.<sup>2</sup> The OSINFOR being in charge of controlling compliance with the obligations contained in the licences granted to private operators, there were concerns that this move could undermine its independence, as well as its control and enforcement functions aimed at combatting illegal trade in timber and wildlife products.<sup>3</sup> Following intergovernmental consultations and the referral of the matter to the Environmental Affairs Council established under the TPA,<sup>4</sup> the Peruvian Government annulled the Supreme Decree and retained the Agency's original location.<sup>5</sup>
- Pursuant to the provisions of Title IX of the EU-Peru/Colombia/Ecuador FTA, the EU and Peru, Colombia, and, more recently, Ecuador, have cooperated on

different matters pertaining to trade and sustainable development, including RBC. RBC was mentioned as a cooperation area during the first meeting of the Sub-Committee on Trade and Sustainable Development in 2014<sup>6</sup> and the signatories' commitment to promote RBC practices has been implemented through monitoring during the last two meetings of said Committee in December 2018 and October 2019 and the different activities developed in the framework of the RBCLAC Project. These activities include capacity-building, research, convening of stakeholders and peer learning, with the aim of strengthening government policies for RBC, helping business to conduct due diligence in priority sectors, and strengthening access to remedy.<sup>7</sup>

Notes:

1. As per the environment chapter of the Peru-U.S. TPA (Chapter 18), a signatory may request consultations with the other signatory to resolve any matter arising under said chapter and, if these consultations are unfruitful, bring the matter before the Environmental Affairs Council established by the TPA. The Council shall then attempt to resolve it through procedures such as good offices, conciliation, or mediation. See 2006 Peru-U.S. TPA, Chapter 18 (Environment), Article 18.12 (Environmental Consultations and Panel Procedure).
2. Government of the United States (2020). Office of the United States Trade Representative, Press Release: "USTR successfully resolves concerns raised in first-ever environment consultations under the Peru-United States TPA".
3. 2006 Peru-U.S. TPA, Chapter 18 (Environment), Annex 18.3.4 (Forest Sector Governance), Article 3(h)(iii).
4. Government of the United States (2020). Office of the United States Trade Representative, Press Release: "USTR successfully resolves concerns raised in first-ever environment consultations under the Peru-United States TPA".
5. Supreme Decree No. 066-2019-PCM of 2019 that overrules Supreme Decree No. 122-2018-PCM.
6. European Commission (2014), EU-Peru and Colombia Trade Agreement, Joint Statement of the Sub-Committee on Trade and Sustainable Development dated 6 February 2014, p. 6.
7. Comité de Comercio del Acuerdo Multipartes EU-Colombia-Ecuador-Perú (2018), Acta del Subcomité de Comercio y Desarrollo Sostenible – 10, 11 y 12 de diciembre de 2018; Comité de Comercio del Acuerdo Multipartes EU-Colombia-Ecuador-Perú (2019), Acta del Subcomité de Comercio y Desarrollo Sostenible – 21, 22 y 23 de octubre de 2019.

Other noteworthy provisions found in these early agreements are those allowing public submissions in relation to the signatories' commitments in areas covered by the Guidelines, which contribute to facilitate access to remedy for victims of adverse impacts. These public submissions can trigger intergovernmental consultations that have the potential to resolve RBC-related matters. The provisions establishing the entities in charge of considering public submissions under the 2006 Peru-U.S. TPA<sup>123</sup> and the 2012 EU-Peru/Colombia/Ecuador FTA<sup>124</sup> recently served this purpose. Several CSOs filed submissions before the U.S. contact point for labour matters under the TPA and the Sub-committee on Trade and Sustainable Development of the FTA to complain about alleged violation of Peru's labour commitments (see Box 4.4).

#### **Box 4.4. RBC-related complaints under Peru's trade agreements**

By allowing public submissions, trade agreements can facilitate access to remedy for victims of adverse impacts. These submissions, which are generally triggered by irresponsible business behaviour, can lead to intergovernmental consultations and regulatory cooperation that have the potential to resolve RBC-related issues, as shown by the examples below:



- On the basis of a complaint submitted pursuant to the labour chapter of the Peru-U.S. TPA, the Office of Trade and Labour Affairs (OTLA) of the U.S. Department of Labour and the Peruvian Government cooperated between 2015 and 2018 to assess the allegations of CSOs and trade unions relating to Peru's labour commitments under the TPA.<sup>1</sup> They alleged, among others, that the unlimited use of short-term contracts enabled employers not to renew the contracts of workers that had attempted to exercise their right to freely associate, and that, by permitting this practice, Peru violated its commitments under Article 17.2 of the TPA.<sup>2</sup> After monitoring labour conditions in Peru and carrying out several progress reviews of the implementation of its recommendations,<sup>3</sup> the OTLA found that Peru had adopted measures that, if fully implemented, could contribute to implement its recommendations. However, it also underlined that, for a number of areas, the Government still had to take additional steps to address fully its recommendations.<sup>4</sup>
- In accordance with Title IX of the EU-Peru/Colombia/Ecuador FTA on Trade and Sustainable Development, the European Commission and the Peruvian Government cooperated between 2017 and 2019 to assess a complaint submitted by CSOs from Peru and the EU<sup>5</sup> in relation to Peru's labour and environmental commitments under the FTA.<sup>6</sup> Like the submitters of the complaint under the Peru-U.S. TPA, these organisations alleged, among others, that Peru had failed to protect workers against the employers' practice of not renewing temporary contracts on grounds of unionisation and that, as a result, it had violated its commitments under Article 269 of the FTA.<sup>7</sup> They also claimed that the relaxation of social and environmental requirements to attract investment in key sectors of the Peruvian economy breached Article 277 of the FTA.<sup>8</sup> After several exchanges, a fact-finding mission, and various meetings,<sup>9</sup> the European Commission and the Peruvian Government reached an agreement<sup>10</sup> identifying the policy initiatives on which Peru should build to deliver progress and effectively resolve the concerns raised in the complaint.<sup>11</sup>

Notes:

1. Under the labour chapter of the 2006 Peru-U.S. TPA (Chapter 17), the signatories commit to designate a contact point tasked with, among other things, handling submissions from the public on matters related to the labour chapter. The OTLA of the U.S. Department of Labour is the contact point for the U.S. See 2006 Peru-U.S. TPA, Chapter 17 (Labour), Article 17.5 (Institutional Arrangements).

2. International Labour Rights Forum et al. (2016), 2006 Peru-U.S. TPA. Public submission to the OTLA under Chapters 17 (Labour) and 21 (dispute settlement) regarding the alleged failure of the Peruvian Government to comply with the labour commitments under the 2006 Peru-U.S. TPA.

3. Government of the United States (2016), 2006 Peru-U.S. TPA. Public Report of Review of U.S. Submission 2015-01 (Peru), pp. 2, 16-18.

4. Government of the United States (2016), 2006 Peru-U.S. TPA. Second Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labour's Public Report of Review of Submission 2015-01 (Peru).

5. Europe-Peru Platform et al. (2017), Complaint against the Peruvian Government for failing to fulfil its labour and environmental commitments under the 2012 EU-Peru/Colombia/Ecuador FTA.

6. Like the contact points under the Peru-U.S. TPA, the Sub-committee on Trade and Sustainable Development established by the 2012 EU-Peru/Colombia/Ecuador FTA is in charge of handling submissions from the public on any matter related to Title IX. See 2012 EU-Peru/Colombia/Ecuador FTA, Title IX (Trade and Sustainable Development), Article 280 (Institutional and Monitoring Mechanism).

7. Europe-Peru Platform et al. (2017), Complaint against the Peruvian Government for failing to fulfil its labour and environmental commitments under the 2012 EU-Peru/Colombia/Ecuador FTA.

8. Ibid.

9. European Commission (2018), Letter from C. Malström, EU Trade Commissioner, to R. Valencia, Minister of Foreign Trade and Tourism of Peru, dated 30 July 2018; Government of Peru (2018), Letter from R. Valencia, Minister of Foreign Trade and Tourism of Peru to C. Malström, EU Trade Commissioner, dated 29 August 2018; Government of Peru (2018), Response to the complaint submitted by Europe-Peru Platform et al. in relation to an alleged failure to fulfil labour and environmental commitments under the EU-Peru/Colombia/Ecuador FTA dated 5 October 2018.

10. European Commission (2018), Report on the implementation of Free Trade Agreements for the period 1 January 2018 – 31 December 2018, p. 54; Comité de Comercio del Acuerdo Multipartes EU-Colombia-Ecuador-Perú (2018), Acta del Subcomité de Comercio y Desarrollo Sostenible – 10, 11 y 12 de diciembre de 2018.

11. Among these initiatives are: the reinforcement of the labour inspection system; the possibility of converting short-term contracts into indefinite-term contracts in case of fraud; the strengthening of the SEIA; and the improvement of the National Environmental Evaluation and Control System (*Sistema Nacional de Evaluación y Fiscalización Ambiental*). See Comité de Comercio del Acuerdo Multipartes EU-Colombia-Ecuador-Perú (2018), Acta del Subcomité de Comercio y Desarrollo Sostenible – 10, 11 y 12 de diciembre de 2018.

The trade agreements concluded recently by Peru are the most comprehensive in terms of RBC-related provisions and RBC clauses. The 2018 Peru-Australia FTA, the 2016 Trans-Pacific Partnership (TPP), and the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (which integrates the substantive provisions of the TPP)<sup>125</sup> all contain lengthy chapters dedicated to labour,<sup>126</sup> environment<sup>127</sup> and anti-corruption.<sup>128</sup>

These chapters include several types of RBC-related provisions, which serve different purposes. For instance, the provisions of the anti-corruption chapters contribute to enabling and/or strengthening government policies that underpin RBC. These provisions contain commitments from the signatories to not only adopt and maintain measures to combat and sanction corruption,<sup>129</sup> but also to enforce such measures.<sup>130</sup> In addition, they include undertakings regarding the promotion of integrity among public officials<sup>131</sup> and the participation of the private sector and civil society in the fight against corruption.<sup>132</sup> Moreover, the labour and environment chapters of the TPP and the CPTPP also include RBC clauses through which the signatories commit to encourage the observance of RBC principles and standards by businesses in relation to labour<sup>133</sup> and environmental issues.<sup>134</sup> Given that these provisions and clauses are subject to the general dispute resolution mechanisms of the agreements,<sup>135</sup> they foster the incorporation and dissemination of RBC-related principles and standards in the signatories' domestic frameworks and the enforcement of related domestic laws. However, as these agreements have not yet entered into force in general or for Peru, their dispute settlement mechanisms have not been used.

#### 4.2.2. RBC in investment treaties

Overall, Peru has concluded approximately 50 investment treaties<sup>136</sup> – mainly bilateral investment treaties (BITs) between 1991 and 2008, and investment chapters integrated in comprehensive trade agreements over recent years.<sup>137</sup> In line with global trends in this field (Gordon, Pohl and Bouchard, 2014<sub>[158]</sub>) (Gaukrodger, 2020<sub>[157]</sub>), the inclusion of RBC-related provisions and RBC clauses in Peru's investment treaties has evolved over the years (see Box 4.5) and varies in terms of nature, scope, and binding nature.

### Box 4.5. Evolution over time of the inclusion of RBC considerations in Peru's investment treaties

The first BITs concluded by Peru in the 1990s did not include any RBC-related provisions or RBC clauses. RBC-related provisions appeared for the first time in the Peru-El Salvador BIT concluded in 1996.<sup>1</sup> However, the inclusion of these type of provisions only started generalising with Peru's most recent BITs concluded in the late 2000s.<sup>2</sup> The incorporation of RBC-related provisions in Peru's investment treaties further progressed with the conclusion of comprehensive trade agreements integrating investment chapters, which started substituting BITs around the mid-2000s. All the investment chapters contained in the comprehensive trade agreements signed by Peru recently contain some kind of RBC-related provisions, as well as RBC clauses for some of them.<sup>3</sup>

Notes:

1. 1996 Peru-El Salvador BIT, Article 5 (Performance Requirements), Paragraph 3. The Peru-Singapore BIT concluded in 2003 contains a similar provision specifying that it shall not limit the signatories' right to apply any prohibition or restriction or any other measure aimed at protecting public health or preventing diseases in animals and plants. See 2003 Peru-Singapore BIT, Article 11 (Prohibitions and restrictions).

2. See, for instance, 2005 Peru-Belgium Luxembourg Economic Union (BLEU) BIT; 2006 Peru-Canada BIT; 2007 Peru-Colombia BIT.

3. See, for instance, 2006 Peru-U.S. TPA, Chapter 10 (Investment); 2006 Peru-Chile FTA, Chapter 11 (Investment); 2008 Peru-Singapore FTA, Chapter 10 (Investment); 2008 Peru-Canada FTA, Chapter 8 (Investment); 2009 Peru-China FTA, Chapter 10 (Investment); 2010 Peru-EFTA FTA, Chapter 5 (Investment); 2010 Peru-Korea FTA, Chapter 9 (Investment); 2011 Peru-Mexico FTA, Chapter 11 (Investment); 2011 Peru-Panama FTA, Chapter 12 (Investment); 2011 Peru-Costa Rica FTA, Chapter 12 (Investment); 2011 Peru-Guatemala FTA, Chapter 12 (Investment); 2016 Peru-Brazil Economic and Trade Expansion Agreement (ETEA), Chapter 2 (Investment); 2018 Peru-Australia FTA, Chapter 8 (Investment); 2014 Pacific Alliance Additional Protocol, Chapter 10 (Investment); 2016 TPP, Chapter 9 (Investment).

Although the inclusion of RBC-related provisions started generalising with the BITs concluded by Peru in the late 2000s, these treaties do not contain very elaborated RBC-related provisions. Except for the 2005 Peru-Belgium Luxembourg Economic Union (BLEU) BIT, which contains broad provisions dedicated to labour<sup>138</sup> and environment,<sup>139</sup> the most noteworthy provisions of these treaties are those that prohibit the loosening or weakening of environmental and/or labour legislations to attract investment, as they have the potential to reinforce the domestic frameworks of the signatories in areas covered by the Guidelines.<sup>140</sup> What is particularly noteworthy of these provisions is that they are subject to government consultations and to State-to-State Dispute Settlement (SSDS).<sup>141</sup>

Likewise, the investment chapters contained in the first comprehensive trade agreements concluded by Peru do not include any elaborated RBC-related provisions. This is notably the case of the first investment chapter in Peru's treaty network, contained in the 2006 Peru-U.S. TPA, which does not include more sophisticated RBC-related provisions than the ones inserted in the latest BITs concluded by Peru.<sup>142</sup> This is also true of the investment chapters included in the FTAs concluded by Peru between 2008 and 2011.<sup>143</sup> Except for the investment chapter of the Canada-Peru FTA that contains an RBC provision subject to government consultations and SSDS (but not to Investor-State Dispute Settlement (ISDS)),<sup>144</sup> these chapters merely include general exceptions allowing the signatories to adopt measures to protect human, animal or plant life or health, commitments not to loosen environmental standards to attract investments, and annexes specifying that non-discriminatory measures to protect health, safety and the environment shall not be considered as tantamount to expropriation. The general exceptions allowing the signatories

to adopt measures to protect human, animal or plant life or health contained in the 2008 Peru-Canada FTA were notably analysed by an arbitral tribunal in the first investment arbitration in Latin America in which the consideration of social and environmental issues was decisive for the case's outcome,<sup>145</sup> namely the *Bear Creek Mining Corporation v. Peru* case (see Box 4.6).

#### Box 4.6. RBC-related issues under Peru's investment treaties

##### **The *Bear Creek Mining Corporation v. Peru* case**

A growing number of investment arbitration cases evidences how investment protection can contribute to limit the governments' right to regulate in the public interest and in RBC-related areas and raises the question of whether treaty protection should be denied to investors that fail to abide by RBC principles and standards. The *Bear Creek Mining Corporation v. Peru* case,<sup>1</sup> one of the first arbitrations in Latin America in which social and environmental issues were decisive for the outcome of the award, is one of these cases.

The dispute arose out of the investment of a Canadian mining company – Bear Creek Mining Corporation (Bear Creek) – in a silver mining project in an area inhabited by various indigenous communities.<sup>2</sup> A few months after the issuance of Supreme Decree 083<sup>3</sup> that granted Bear Creek the rights to acquire and operate the mining concessions,<sup>4</sup> the project started facing growing opposition due to concerns about its potential environmental impact and the distribution of its benefits amongst local communities.<sup>5</sup> The social conflict culminated with strikes, road blockades, and massive protests.<sup>6</sup> In order to restore public order, the Government announced several measures, including the revocation of Supreme Decree 083, which eliminated Bear Creek's rights over the concessions.<sup>7</sup> Bear Creek subsequently started several legal actions,<sup>8</sup> including an arbitration against Peru based on the 2008 Peru-Canada FTA.<sup>9</sup>

In its award rendered on 30 November 2017, the arbitral tribunal deemed that the two main reasons invoked by Peru to justify the revocation of Supreme Decree 083 could not be upheld.<sup>10</sup> On the one hand, it considered that the alleged illegality of the public necessity declaration contained in Supreme Decree 083 did not withstand scrutiny.<sup>11</sup> On the other hand, it found that Bear Creek was not responsible for the social unrest as all its outreach activities had been carried out with the Government's approval, support, and endorsement.<sup>12</sup> On this basis, the arbitral tribunal held that the revocation of Supreme Decree 083 was a measure tantamount to expropriation<sup>13</sup> and decided to grant compensation to Bear Creek.<sup>14</sup> However, it limited the compensation to the amounts actually invested by Bear Creek and rejected its claims for compensation based on future profitability.<sup>15</sup> The arbitral tribunal indeed considered that, in light of the magnitude of the social unrest and the fact that many government approvals and environmental permits still had to be obtained, there was little prospect that the project would obtain the social license needed to proceed in the future.<sup>16</sup>

This award is noteworthy on several counts. First, it shows that States' interpretative guidance on RBC-related provisions aimed at preserving policy space for non-discriminatory regulation may be necessary. The arbitral tribunal indeed considered that the exception inserted in the Peru-Canada FTA to preserve the signatories' rights to adopt measures necessary to protect human, animal or plant life or health<sup>17</sup> “[...] does not offer any waiver from the obligation [...] to compensate for the expropriation”.<sup>18</sup> This interpretation has divided commentators due to its potential impact on the exception's utility to safeguard governments' right to regulate.<sup>19</sup> Second, the award

highlights that failing to address social and environmental issues upfront and in an adequate manner can be costly for both the government and the investor. In the case of Peru, the endorsement of Bear Creek’s deficient community outreach activities and relations led the arbitral tribunal to consider that the expropriation was not justified by the social unrest and, hence, to hold the Government responsible and award compensation to the investor. As to Bear Creek, its incapacity to ensure a constructive dialogue with the local communities and to obtain their support and consent undermined the viability of the project and severely affected the amount of compensation received.

Notes:

1. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21.
2. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (*Bear Creek v. Peru Award*), para. 123.
3. *Bear Creek v. Peru Award*, para. 149.
4. *Ibid.*, para. 149.
5. *Ibid.*, paras. 152 et seq.
6. *Ibid.*, paras. 172 et seq.
7. *Ibid.*, paras. 201-202.
8. *Ibid.*, paras. 207 et seq.
9. *Ibid.*, para. 9.
10. *Ibid.*, para. 414.
11. *Ibid.*, paras. 395-399.
12. *Ibid.*, paras. 412-414.
13. *Ibid.*, paras. 415-416.
14. *Ibid.*, paras. 603-604.
15. Out of the USD 522 million claimed by Bear Creek, the tribunal only awarded it USD 18.2 million. See *Bear Creek v. Peru Award*, para. 738.
16. *Ibid.*, paras. 599-600.
17. *Ibid.*, paras. 475-477.
18. *Ibid.*, para. 477.
19. See, for instance, Paine J., “Bear Cree Mining Corporation v. Republic of Peru – Judging the social license of foreign investments and applying new style investment treaties”, *ICSID Review*, Vol. 33, No. 2 (2018), pp. 340-348, p. 347; Hepburn J., “Analysis: Bear Creek tribunal declines to infer legality requirement, considers interpretative annex on indirect expropriation, and views treaty’s general exceptions clauses as ruling out other exceptions”, *Investment Arbitration Reporter*, 4 December 2017.

Only the investment chapters of the most recent FTAs signed by Peru contain, in addition to the RBC-related provisions described above, more elaborated RBC-related provisions and RBC clauses. For instance, the investment chapters of the 2014 Pacific Alliance Additional Protocol, the 2016 TPP, the 2018 CPTPP, the 2016 Peru-Brazil Economic and Trade Expansion Agreement (ETEA), and the 2018 Peru-Australia FTA all contain RBC clauses. However, they vary in scope and binding nature. The RBC clauses of the TPP and the Peru-Australia FTA are general and merely reflect the signatories’ undertaking to encourage enterprises to abide by RBC standards,<sup>146</sup> but they are not excluded from ISDS. By contrast, the RBC clauses of the Pacific Alliance Additional Protocol and the Peru-Brazil ETEA are much broader,<sup>147</sup> but explicitly excluded from dispute settlement. In the investment chapter of the Pacific Alliance Additional Protocol, the signatories commit to identify and share best practices to implement the undertakings of the Guidelines and foster enterprises’ contribution to sustainable development.<sup>148</sup> However, this clause is contained in a section of the investment chapter that arbitral tribunals are prevented from taking into consideration when rendering a decision in an investment arbitration (and that is also

excluded from the general dispute resolution mechanism of the FTA).<sup>149</sup> As to the RBC clause contained in the investment chapter of the Peru-Brazil ETEA, it affirms that investors and their investments shall make their best efforts to comply with a long list of RBC principles detailed in the clause.<sup>150</sup> Nevertheless, this clause is also excluded from SSDS (and ISDS, as it does not exist under this investment treaty).<sup>151</sup>

In addition, the investment chapters of the 2016 Peru-Brazil ETEA and the 2018 Peru-Australia FTA contain RBC-related provisions that can promote the adoption of RBC practices by businesses as they condition the access to the treaty's benefits to the respect of RBC-related requirements. Article 2.14 of the Peru-Brazil ETEA for instance specifies that the signatories shall not be forced to protect an investment, the establishment or operation of which is tainted by corruption or illegal acts.<sup>152</sup> However, this provision is explicitly excluded from SSDS (and ISDS).<sup>153</sup> As to Article 8.20 of the Peru-Australia FTA, it precludes the possibility for an investor to submit a claim to ISDS (and, hence, to seek compensation) if its investment was established through corruption or illegal conduct.<sup>154</sup>

Finally, the investment chapters of the TPP and the CPTPP also contain provisions that could contribute to facilitate access to remedy by victims of adverse impacts. Article 9.19 of said chapters indeed expressly authorises counterclaims,<sup>155</sup> thereby giving the possibility to States, albeit under very restrictive conditions, to bring an action against an investor on behalf of communities or individuals affected by the adverse impacts of the operations of said investor.

\* \* \*

The above analysis of Peru's trade agreements and investment treaties shows that the inclusion of RBC-related provisions and RBC clauses in these agreements started relatively recently and that this practice varies from one agreement to another. Although RBC-related provisions are present in several of Peru's trade agreements and most of the investment treaties it concluded after 2008, some agreements include more sophisticated RBC-related provisions than others and RBC clauses when others do not. In addition, there exist important differences between agreements regarding the consequences that the RBC-related provisions and the RBC clauses may have, as some explicitly exclude them from dispute settlement and others give no indication in this regard. The likely result is that many of the RBC-related provisions, as well as the RBC clauses, may not be fully implemented. As a matter of fact, to date, only few cases have dealt with the implementation of RBC-related commitments under Peru's trade agreements or the application of RBC-related provisions under its investment treaties and none with RBC clauses.

This state of affairs may result from different factors. It may stem from the fact that, to date, Peru has not developed a comprehensive national strategy on RBC encompassing different policy areas, as shown, for instance, by the fact that it does not expressly include RBC considerations in the prioritisation criteria of its investment promotion policy (see Box 4.7). It may also be that the incorporation of RBC-related provisions and/or RBC clauses in Peru's trade and investment agreements has not been a priority for the Government to date and/or that Peru has not yet developed a model FTA or BIT integrating such provisions or clauses. Inheriting RBC-related provisions and/or RBC clauses from different trade and investment partners has the advantage of getting exposure to different approaches. However, the acceptance of provisions and clauses designed by others and the resulting lack of a coherent approach create legal uncertainty and corresponding risks both for the Government and businesses.

### Box 4.7. Inclusion of RBC considerations in Peru's investment promotion policy

As highlighted in the PFI, the principles of inclusive and sustainable growth cut through several areas of investment policy. For example, as part of national planning, countries can define their overarching socio-economic objectives and the role that investment, including FDI, should play in achieving them. This, in turn, can translate into a specific design of countries' investment policies, including those for investment promotion and facilitation.

Investment promotion and facilitation policies aim, on the one hand, to promote a country or a region as an investment destination and, on the other, to make it easy for investors to establish or expand their investments. They can encompass activities of IPA, investment incentives, special economic zones (SEZs), and initiatives aiming to reduce the overall administrative burden (e.g. administrative simplification efforts, a single window for investment, and broader regulatory reforms). The OECD Investment Policy Reviews analyse in detail these various aspects and help countries identify needed reforms.<sup>1</sup> The OECD FDI Qualities Indicators also help countries identify the role that FDI plays in sustainable development and the role of policies in helping to shape outcomes.<sup>2</sup>

Due to their role as the first contact point for investors and possible policy advocates, IPAs can play a prominent role in promoting RBC. Many such agencies have explicit RBC mandates: 37% in the LAC region compared to 9% in OECD countries (Volpe Martincus and Sztajerowska, 2019<sub>[159]</sub>) (OECD, 2018<sub>[160]</sub>). In addition, such agencies tend to target investment projects with certain socio-economic impacts: for example, impact on employment and innovation are two most frequently used prioritisation criteria in OECD and LAC countries. Finally, IPAs may take into account investors' RBC footprint when assisting firms, although this is still not a common practice. In 30% of cases of IPAs, action is taken when an investor is found in breach of RBC obligations, but only in OECD countries. The issue of how IPAs can meaningfully support promotion of RBC deserves policy-makers' attention, and can form a basis for useful peer-to-peer exchanges.

In the case of Peru, ProInversión, the national IPA, is also the NCP. The agency was created as an autonomous technical government agency in 2002, and has since undergone reforms. It has a large number of mandates – 12 in total, compared to the median of 6 in LAC and OECD countries. Besides promoting foreign and domestic investment and RBC, it reportedly promotes regional development, innovation and green investment, and negotiates public concessions, trade and investment agreements, access to promotional mechanisms and Public-Private Partnerships, among others. While it has less developed prioritisation criteria to give priority to certain sectors, source countries, projects, and/or investors and evaluation systems than other IPAs, it collaborates with a large number of stakeholders to achieve its objectives (over 20 different public and private institutions). In that respect, it can be well-positioned as a platform for bringing together diverse sets of views and undertaking policy advocacy in favour of RBC.

Notes:

1. For the full list of OECD Investment Policy Reviews, consult the OECD's website at: [www.oecd.org/investment/countryreviews.htm](http://www.oecd.org/investment/countryreviews.htm).

2. The OECD FDI Qualities Indicators are available on the OECD's website at: [www.oecd.org/investment/fdi-qualities-indicators.htm](http://www.oecd.org/investment/fdi-qualities-indicators.htm).

In light of this, *Peru could consider taking steps towards the adoption of a more proactive role regarding the inclusion of RBC considerations in its trade and investment agreements. More specifically, it could consistently address RBC in its trade and investment negotiations, with the aim of systematically including RBC-related provisions and/or RBC clauses in its trade agreements and investment treaties* (as is done with provisions aimed at protecting disadvantaged minorities and ethnic groups, which are present in almost all of the trade agreements concluded by Peru). Peru could also contemplate, when negotiating trade agreements and investment treaties with other Adherents to the Declaration on International Investment and Multinational Enterprises, suggesting the inclusion of references to the OECD RBC instruments. One way to do so could be to determine priorities in terms of RBC-related provisions and/or RBC clauses inclusion and draw up model provisions and/or chapters ahead of future negotiations.

Including RBC considerations in its trade and investment agreements would allow Peru not only to enable and strengthen its policies for RBC, but also to help businesses abide by RBC principles and standards and adopt RBC practices, as well as to facilitate access to remedy for victims of adverse impacts, all of which is key to leverage RBC. The RBC-related provisions and RBC clauses of these agreements could indeed be used by the Government as a lever to raise awareness and build capacity on RBC for businesses operating in and from its territory and other stakeholders. Given its proximity with *ProInversión*, the NCP could play an important role in this regard. It could further strengthen its position as an information centre on RBC-related provisions and/or RBC clauses contained in Peru's trade and investment agreements, as well as provide trainings for businesses and public officials on the rationale and potential consequences of such provisions and clauses. It could also seek to influence the agenda of future negotiations of such agreements so that they address RBC.

## Policy recommendation

- 11. Take steps towards the adoption of a more proactive role regarding the inclusion of RBC considerations in Peru's trade and investment agreements, with the aim of systematically including RBC-related provisions and/or RBC clauses in trade agreements and investment treaties.**



## 5. Conclusions and moving forward

Building an enabling environment for RBC is key for Peru to achieve economic and sustainability outcomes.

Designing and implementing a strong RBC policy framework could first improve the performance of Peru's economy. It could contribute to not only attract responsible investment key for growth and development, but also facilitate Peru's insertion in the global economy in the long term, thereby triggering broader value creation.

Investors increasingly base their investment decisions on an analysis of countries' legal and regulatory frameworks and take into consideration whether said frameworks are aligned with internationally recognised principles and standards, including on RBC (OECD, 2016<sup>[2]</sup>). Likewise, multinational enterprises are expected, and in some cases even have the legal obligation, to adopt RBC practices and conduct risk-based due diligence to assess country and supplier risks in order to avoid adverse impacts of their operations, supply chains, and business relationships on people, the planet, and society. In light of this, multinational enterprises increasingly decide to conduct business in countries with lower risks of adverse impacts and/or with suppliers that observe internationally recognised environmental and social principles and standards (OECD, 2016<sup>[2]</sup>).

Considering the reliance of the Peruvian economy on international investment and trade, it is important for Peru to build an enabling environment for RBC in order to develop comparative advantages and be perceived as both a reliable investment destination and a safe place to source from. In the same vein, the adoption of RBC practices by Peru's businesses is key to strengthen their linkages with multinational enterprises and support their access to export markets and participation in GVCs. Observing RBC principles and standards would also reduce operational, reputational, and financial risks and create additional opportunities for Peruvian companies to become suppliers of choice in GVCs. From an economic standpoint, Peru accordingly has much to gain from promoting and enabling RBC.

Designing and implementing a strong RBC policy framework could also improve Peru's sustainability outcomes and promote social cohesion.

Although the Agenda 2030 explicitly recognises the role of businesses in delivering and implementing the SDGs, there is growing evidence that more needs to be done to meaningfully integrate the SDGs in business models and ensure that the private sector maximise its contribution to sustainable development. At the same time, integrity, transparency, accountability, and inclusiveness have become key concerns in today's societies, notably in view of the recent social unrest in the region. In Peru, irresponsible business practices leading to conflicts with local communities have had a corrosive social effect, eroding trust in the institutions and the private sector and leading to growing demands for stronger accountability.

Building an enabling environment for RBC is therefore also key for Peru to make further progress towards sustainable development and increased accountability. Such an environment can help mobilise and channel quality investment so that it supports the SDGs and contributes to the well-being of the Peruvian people. In addition, carrying out due diligence can help Peruvian businesses understand their impacts on the SDGs and make sure that they do not undermine said Goals through their own operations, supply chains and other business relationships. Promoting and enabling RBC can also increase accountability and help restore trust in public institutions and the private sector. By promoting transparency, empowering stakeholders, and improving access to remedy, RBC can

contribute to guarantee that stakeholders' rights are respected while making sure that businesses are held accountable, which is particularly important for vulnerable sections of the Peruvian population and can contribute to reinforce social cohesion.

### **What are the main challenges for RBC in Peru?**

Peru has taken active steps to promote RBC. In line with regional peers, it has already subscribed to most international instruments underpinning RBC principles, and has adopted legal and regulatory measures to ensure the implementation of such principles. Despite advances in several policy areas that are relevant to RBC, Peru still faces challenges in building an enabling environment for RBC.

The first main challenge faced by Peru pertains to the enforcement of existing laws, policies, and regulations, which is key to promote and enable RBC. This entails having sufficient capacity and resources to monitor compliance and respond to infringements, but also strengthening the judiciary so that it can provide access to justice for all and effective remedy. In Peru, this is complicated by the decentralisation process, which has led to shared and/or delegated competencies for regulation and enforcement between the central, regional, and local government levels, including for the promotion of labour rights and the protection of the environment. The results of regional and local governments taking on responsibilities in areas of major importance for RBC have been heterogeneous and conditioned by the respective subnational authority's technical and other capacities. In this context of multi-level governance, building management capacity and increasing resources of regional and local governments is of paramount importance. Likewise, increasing institutional coordination and clarifying the mandates of the different levels of government is key to ensure that Peru's multi-level governance does not lead to regulatory and enforcement issues in areas covered by the Guidelines.

The second main challenge faced by Peru pertains to the high and persistent levels of informality in the country. Informality has not only a pervasive impact on economic activity, it is also a major obstacle to promote and enable RBC, as informal activities often have adverse impacts on people, the planet, and society. Tackling informality is one of the Priority Objectives of Peru's PNCP, which seeks to address it through targeted measures for MSMEs aimed at increasing competitiveness and productivity in Peru. However, these measures could also be devised as a means of achieving RBC objectives. The fight against informality and the promotion of due diligence can be mutually reinforcing. Ensuring that formal firms conduct due diligence in their activities, supply chains and business relationships can incentivise informal firms to transition to the formal economy and contribute towards the prevention of adverse impacts. Likewise, strengthening the link between FDI and RBC may foster the creation of business linkages between foreign investors and the domestic industry and thus support the formalisation of firms in Peru, particularly MSMEs.

### **What should the Government do to promote and enable RBC in Peru?**

Enabling businesses to contribute positively to economic, environmental and social progress, while preventing adverse impacts requires coordinated and coherent government action. However, the implementation of RBC policies as an integrated set at national level still represents a major challenge for many countries, including Peru. Achieving policy coherence entails promoting uniformity and clarity around RBC expectations designed, monitored, and implemented by different parts of government. Peru should therefore seek to mainstream RBC principles and standards in its domestic policies, regulations, and initiatives, including in its major economic and development plans, in coordinated and coherent fashion.

For instance, the Government's main economic plan for the next decade, the PNCP, aims to address several challenges which have a bearing on RBC, such as informality, enforcement, and multi-level governance. Integrating RBC considerations in this Plan would contribute to greater policy coherence and help build an enabling environment for RBC. Specific recommendations on how to include RBC in the PNCP have been included throughout this Review.

Likewise, the development of the NAP is a key step to foster policy coherence and promote RBC. RBC often goes beyond human rights issues, and in particular in the context of Peru, is interlinked with the promotion of labour standards, environmental protection and anti-corruption. The NAP can become an important tool through which the Government can unify national efforts to provide an overarching policy framework for RBC, ensure coordination and coherence within the Government, involving all relevant ministries and agencies that are relevant for RBC, and institutionalise stakeholders' engagement and dialogue on RBC.

Effective RBC policy development and implementation also requires buy-in from multiple actors. To achieve this, the Government should work across internal government structures, as well as with other governments to create synergies and establish coherence with regard to RBC, but it should also engage meaningfully with the business community, trade unions, civil society organisations and indigenous peoples. The Government can play a unique convening role and facilitate collective initiatives to promote RBC among businesses and stakeholders. Additionally, the Government should facilitate and support companies' efforts to comply with regulatory regimes through effective communication with businesses and relevant stakeholders.

Finally, building an enabling environment for RBC implies the active involvement of the NCP in its role as agent of policy coherence and promoter of RBC across government. Concretely, the unparalleled expertise of NCPs in relation to RBC and the Guidelines places them in an ideal position to advise on the adoption or revision of RBC-related policies, inform colleagues of the Guidelines' requirements and the corresponding government role, but also train and build capacity of relevant actors on RBC, and raise awareness of RBC with stakeholders. In order to ensure that the Peruvian NCP is able to play such role, Peru should take steps to strengthen its NCP.

## **Policy recommendations**

Regulating business conduct in areas covered by the Guidelines and ensuring compliance with regulations and policies enacted in these areas is key to design and implement a strong RBC policy framework. Enacting policies and regulations that facilitate or incentivise business compliance with the Guidelines through the integration of RBC principles and standards in policy areas that have a bearing on businesses is also fundamental in this regard. To support Peru in the design and implementation of a strong RBC policy framework, this RBC Policy Review formulates a number of policy recommendations. Many of these recommendations are addressed to the NCP directly, or will require the active involvement of the NCP to be implemented. This is in line with the role of NCPs as agents of policy coherence and as promoters of RBC across government.

## Regulating and enforcing for RBC

### Human Rights

1. Ensure that regulations protecting human rights are effectively enforced, and that remedies are available when violations caused by business occur, particularly in (remote) regions. The capacity and resources of judicial and non-judicial remedies to deal with human rights violations by business should be increased to that effect. Particular attention should be paid to violations by informal firms, in particular sectors (such as mining, oil and gas and agriculture) and against vulnerable groups such as indigenous peoples and human rights defenders.
2. Continue the development of the NAP according to the planned timeline, while ensuring participation of all relevant government actors and stakeholders. Clearly define institutional mandates and allocate respective resources and capacity for the NAP's implementation, including an active role for the NCP.

### Labour Rights

3. Guarantee the full application in law and practice of the fundamental labour rights as recommended by ILO's supervisory bodies. Enforcement of labour laws and regulations requires that relevant authorities (at the central and regional level) have sufficient capacity and resources to monitor business compliance and respond to any infringements. This also includes increasing efforts to detect and address business violations of labour rights by increasing the staff, independence and authority of SUNAFIL.
4. Design efforts to tackle informality so as to promote business respect for labour rights and RBC, for example by actively promoting due diligence along supply chains and business relationships, and by supporting MSMEs to transition toward the formal economy and, in doing so, comply with the Guidelines.

### Environment

5. Ensure robust regulatory protections and enforcement to prevent infringements of the right to a healthy environment by business activities, for example, by strengthening institutional capacities and protecting avenues for access to environmental information, public participation processes, as well as access to environmental justice through both judicial and non-judicial grievance mechanisms.
6. Encourage businesses to ensure that expectations relating to climate change adaptation and supply chain resilience, as well as GHG emission reductions targets, are being identified, addressed and implemented as part of their supply chain due diligence processes – particularly with respect to identified priority sectors.
7. Incentivise businesses to ensure that climate change, biodiversity and environmental rights are taken into consideration in their due diligence processes, particularly when identifying and addressing adverse environmental risks and impacts.

## Anti-corruption and integrity

8. Assist companies in engaging in preventive efforts against corruption in general and bribery more specifically through risk-based due diligence. Provide support to business through the development of guidelines and other forms of guidance, and enable the reporting of suspicions of private sector corruption to the public authorities without fear of retaliation.

## Leveraging and incentivising RBC

### Public procurement

9. Foster the use of public procurement as a policy lever for RBC by elaborating a strategy to strengthen progressively the inclusion of RBC considerations in Peru's public procurement policies and processes, for example through a staged approach. This strategy could also include actions aimed at reinforcing public procurement officials' knowledge of and capacity to deal with RBC-related criteria and certifications with the support of the NCP. In addition, it could encompass measures to monitor the uptake of and compliance with RBC-related criteria and certifications, as well as their impact on business practices.

### State-Owned Enterprises

10. Strengthen the inclusion of RBC considerations in Peruvian SOEs' governance by developing a coherent and overarching strategy to promote their contribution to economic, environmental, and social progress, while preventing and mitigating the adverse impacts of their operations, supply chains, and business relationships on people, the planet, and society. This strategy could imply communicating, in a clear and transparent manner, the Government's expectations regarding the RBC policies and practices that all Peruvian SOEs should develop and stressing the importance of aligning with the recommendations contained in the Guidelines and conducting risk-based due diligence for that purpose. It could also entail raising the awareness of SOEs' officials to the importance of the inclusion of RBC considerations in SOEs' policies and practices and building their capacity to carry out due diligence with the support of the NCP.

### Trade and investment agreements

11. Take steps towards the adoption of a more proactive role regarding the inclusion of RBC considerations in Peru's trade and investment agreements, with the aim of systematically including RBC-related provisions and/or RBC clauses in trade agreements and investment treaties.

## Reinforcing the role of the National Contact Point for RBC as an agent of policy coherence

12. Reinforce the role of the Peruvian NCP as agent of policy coherence and as promoter of RBC across government, including the following specific recommendations:

- Ensure that the NCP puts in place strong engagement mechanisms with other government entities and stakeholders, e.g. by putting in place an inter-ministerial and multi-stakeholder advisory body to the NCP. The NCP currently does not have one, which impairs its visibility and ability to meet the challenge of acting as an agent of policy coherence in Peru and play a central role in implementing the recommendations of this Review.
- Ensure that the NCP has sufficient resources and capacity to be able to play an effective role in the implementation of the recommendations of this Review. In particular, the NCP should receive regular specialised training on the key RBC issues, which this review has highlighted, such as the promotion of due diligence, access to remedy, the pervasive informality context in Peru or the gaps in the protection of core labour rights.
- Involve the NCP in the development of the NAP and allocate a clear and key role to the NCP in the implementation of NAP objectives linked to the Guidelines and the related Due Diligence Guidance.
- Create a partnership between the NCP and the Ombudsman to help the latter build capacity with regard to RBC issues and seek synergies between their respective case-handling functions. The NCP could also explore the possibility of cooperating with other non-judicial grievance mechanisms, such as those put in place by the Office of Social Management and Dialogue (SGSD).

## Annex: Stakeholder Meetings

During the RBC Policy Review fact-finding mission, the OECD met with representatives of the following government entities and stakeholders:

### **Government of Peru**

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FONAFE

Ministry of Agriculture and Irrigation

Ministry of Economy and Finance

Ministry of Justice and Human Rights

Ministry of Labour and Labour Promotion

Office of Social Management and Dialogue of the Presidency of the Council of Ministers

Office of the Ombudsman

Perú Compras

Secretariat for Public Integrity of the Presidency of the Council of Ministers

### **Business Associations and Private Sector**

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Lima Chamber of Commerce

Minsur

National Confederation of Private Enterprises (CONFIEP)

National Society of Mining, Oil and Energy (SNMPE)

Newmont Yanacocha

### **Trade Unions**

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Central Autónoma de Trabajadores del Peru (CATP)

Central Unitaria de Trabajadores del Perú (CUT)

Confederación de Trabajadores del Perú (CTP)

Confederación General de Trabajadores del Perú (CGTP)

Sindicato Corlinsa

### **Civil Society Organisations**

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Centro de Políticas Públicas y Derechos Humanos - Perú Equidad

Cooperación

Coordinadora Nacional de Derechos Humanos

Derecho, Ambiente y Recursos Naturales (DAR)

Red GE – Globalisation with Equity

Red Muqui

WWF Peru

### **Indigenous Peoples**

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Confederación de Nacionalidades Amazónicas del Perú (CONAP)

## Notes

<sup>1</sup> The text of the OECD Policy Framework for Investment (PFI) is available in English and Spanish on the OECD's website at: [www.oecd.org/investment/pfi.htm](http://www.oecd.org/investment/pfi.htm).

<sup>2</sup> “While it is the role of businesses to act responsibly, governments have a duty to protect the public interest and a role in providing an enabling framework for responsible business conduct.” See OECD (2015), Policy Framework for Investment 2015 Edition, Chapter 7, <http://dx.doi.org/10.1787/9789264208667-en>.

<sup>3</sup> Delegations from the following OECD Members participated in the consultation meeting held in Lima on 26 September 2019: Austria, Canada, France, Greece, Poland, Portugal, Spain, Switzerland, Sweden, The Netherlands, and the United States.

<sup>4</sup> On the business associations' side, the draft of the Review was reviewed by the National Confederation of Business Institutions of Peru (*Confederación Nacional de Instituciones Empresariales del Perú*, CONFIEP) and the National Society for Mining, Oil and Energy (*Sociedad Nacional de Minería, Petróleo y Energía*, SNMPE). On the stakeholders' side, the Central Unitaria de Trabajadores del Perú (CUT) and the Centro de Políticas Públicas y Derechos Humanos - Perú Equidad provided comments on the Review.

<sup>5</sup> The overarching objective of the Responsible Business Conduct in Latin America and the Caribbean Project (RBCLAC Project) is to promote smart, sustainable, and inclusive growth in the European Union (EU) and in Latin America and the Caribbean (LAC) by supporting responsible business conduct (RBC) practices in line with internationally recognised principles set out in the UN, ILO and OECD instruments. In the framework of the RBCLAC Project, the activities of the OECD focus on three mutually reinforcing pillars: (i) strengthening government policies for RBC; (ii) helping businesses to conduct due diligence in priority sectors (in Peru, agriculture and mining/extractives); and (iii) improving access to remedy through the strengthening of National Contact Points for RBC (NCP). For more information, consult: <https://mneguidelines.oecd.org/rbclac.htm>.

<sup>6</sup> The activities of the OECD pertaining to the NCPs under the RBCLAC Project consist in providing tailored capacity-building to the seven NCPs in the LAC region. In this context, the OECD Secretariat and the Government of Peru will define a roadmap of actions aimed at strengthening the Peruvian NCP. The implementation of this roadmap and of the recommendations contained in the present RBC Policy Review will be mutually reinforcing and will contribute to build an enabling environment for RBC in Peru.

<sup>7</sup> As the elaboration of this RBC Policy Review precedes the Coronavirus (COVID-19) outbreak and the ensuing crisis, the Review only refers to the crisis incidentally.

<sup>8</sup> The OECD Guidelines for Multinational Enterprises (the Guidelines) are part of the OECD Declaration on International Investment and Multinational Enterprises [OECD/LEGAL/144]. The text of the Declaration, including the Guidelines, is available on the OECD's website at <http://mneguidelines.oecd.org/mneguidelines/>.

<sup>9</sup> The 49 Adherents to the Guidelines are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom and the United States.

<sup>10</sup> In 2015, the PFI became the subject of an OECD Council Recommendation [OECD/LEGAL/0412], which recommends that OECD Members and non-Members adhering to the Recommendation use, as appropriate, the PFI, in particular to facilitate coherence at all levels of government for better policy formulation and implementation. The text of the OECD Council Recommendation is available on the [Compendium of OECD Legal Instruments](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0412) at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0412>.

<sup>11</sup> About 70% of international trade today involves global value chains (GVCs) as services, raw materials, parts, and components cross borders, often numerous times. Once incorporated into final products they are shipped to consumers all over the world. For more information, consult: <https://www.oecd.org/trade/topics/global-value-chains-and-trade/>.

<sup>12</sup> Own-account workers and contributing family workers are two status in employment categories regarded as vulnerable employment. They are less likely to have formal work arrangements, social security coverage and to benefit from social dialogue. In addition, vulnerable employment is often associated with poor working conditions.



See ILO (2018), “Paid employment vs. vulnerable employment”, *Spotlight on work statistics*, No. 3, June 2018, [https://ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms\\_631497.pdf](https://ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_631497.pdf).

<sup>13</sup> In Peru, the employment share by enterprise size is as follows: 38.9% is self-employed; 35% work in micro enterprises (2-9 persons); 7.4% in small enterprises (10-49 persons) and 18.8% in medium or large enterprises (50+ persons). See ILO (2019), *Small matters – Global evidence on contributions to employment by the self-employed, micro-enterprises and SMEs*, [https://www.ilo.org/infostories/en-GB/Stories/Employment/SMEs#power-of-small/employmenthttps://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_723282.pdf](https://www.ilo.org/infostories/en-GB/Stories/Employment/SMEs#power-of-small/employmenthttps://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_723282.pdf).

<sup>14</sup> Peru adhered to the OECD Council Recommendation on the OECD Due Diligence Guidance for RBC [OECD/LEGAL/0433] on 30 May 2018. The text of the Recommendation is available on the [Compendium of OECD Legal Instruments](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0443) at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0443>.

<sup>15</sup> Peru adhered to the OECD Council Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas [OECD/LEGAL/0386] on 25 May 2011. The text of the Recommendation is available on the [Compendium of OECD Legal Instruments](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0386) at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0386>.

<sup>16</sup> Peru adhered to the OECD Council Recommendation on the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector [OECD/LEGAL/0437] on 17 May 2017. The text of the Recommendation is available on the [Compendium of OECD Legal Instruments](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0437) at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0437>.

<sup>17</sup> Among the recent capacity-building activities organised by CONFIEP are: the conference on “International CSR trends and Business and Human Rights” (“*Tendencias internacionales en RSE y la temática Empresas y Derechos Humanos*”), co-organised in 2019 with the Embassy of Sweden; the workshop on “Prior consultation in the context of the UN Guiding Principles on Business and Human Rights” (“*Consulta previa en el marco de la Debida Diligencia de los Principios Rectores sobre Empresas y Derechos Humanos*”), organised in 2016 with the Regional Centre for the Support of the Global Compact in Latin America and the Caribbean; and the seminar on “Investments and Human Rights” (“*Las inversiones y los Derechos humanos*”), organised in 2015 with the company Newmont and the Universidad Privada del Norte. See CONFIEP (2019), *Guía para el sector empresarial peruano sobre empresas y derechos humanos*, <https://www.confiep.org.pe/wp-content/uploads/2019/12/Gui%CC%81a-para-el-sector-empresarial-peruano-sobre-empresas-y-derechos-humanos.pdf>.

<sup>18</sup> In the framework of the “First study on good human rights practices in Peru” (*Primer Estudio sobre Buenas Practicas referidas a los Derechos humanos en el Perú*), CONFIEP surveyed 262 companies operating in several sectors. See CONFIEP (2019), Press release “Así es como CONFIEP apoya a las empresas formales para enfrentar el futuro del trabajo”, <https://www.confiep.org.pe/noticias/actualidad/asi-es-como-confiep-apoya-a-las-empresas-formales-para-enfrentar-el-futuro-del-trabajo/>; ILO (2019), Press release “OIT apoya a CONFIEP en la promoción del comportamiento empresarial responsable en Perú”, [https://www.ilo.org/lima/sala-de-prensa/WCMS\\_670179/lang--es/index.htm](https://www.ilo.org/lima/sala-de-prensa/WCMS_670179/lang--es/index.htm).

<sup>19</sup> For more information on the RBC-related initiatives developed by the SNMPE, consult the chapter on Peru in the forthcoming publication “Regional Diagnostics of Minerals and Extractive Sectors in Latin America”.

<sup>20</sup> The Civil Society Platform on Business and Human Rights (*Plataforma de la Sociedad Civil sobre Empresas y Derechos Humanos*) is comprised of the following CSOs: *CooperAcción*; *Centro de Políticas Públicas y Derechos Humanos - Perú Equidad*; *Derecho Ambiente y Recursos Naturales*; *Diakonia*; *Codehica*; *Instituto del Bien Común*; *Red Muqui*; *Coordinadora Nacional de Derechos Humanos*; *Aprodeh*; *Red de Globalización con Equidad*; and Earth rights International.

<sup>21</sup> For instance, the Civil Society Platform on Business and Human Rights organised a forum on Business and Human Rights in Peru. See PLADES (2020), Press release “Foro público empresas y derechos humanos en el Perú”, <http://www.plades.org.pe/ultimas-noticias/foro-publico-empresas-y-derechos-humanos-en-el-peru/>.

<sup>22</sup> Civil Society Platform on Business and Human Rights (2019), *Observaciones al documento presentado por el Ministerio de Justicia sobre la metodología del proceso de elaboración del Plan Nacional de Acción sobre Empresas*

y Derechos Humanos, <http://cooperacion.org.pe/wp-content/uploads/2019/06/Observaciones-al-documento-de-la-metolog%C3%ADa-del-proceso-presentado-por-el-MINJUS-PSEDH-10042019-1.pdf>.

<sup>23</sup> For example, a CSO which is part of OECD Watch – the *Programa Laboral de Desarrollo* (PLADES) – conducted an investigation on the implementation of large hydroelectric projects in Peru. See PLADES, *Grandes proyectos hidroeléctricos en el Perú*, <http://www.plades.org.pe/publicaciones/grandes-proyectos-hidroelectricos-en-el-peru/>.

<sup>24</sup> This is notably the case of the *Centro de Políticas Públicas y Derechos Humanos – Perú Equidad*, which advocates for the inclusion and the respect of RBC considerations in Peru’s trade and investment agreements. See *Centro de Políticas Públicas y Derechos Humanos – Perú Equidad* (2019), <https://www.equidad.pe/empresas>.

<sup>25</sup> The United Nations Guiding Principles on Business and Human Rights (UNGPs) are a set of 31 principles for States and businesses to prevent, address and remedy business-related human rights abuses. They are built upon three pillars: (i) the State responsibility to protect human rights against violations by business; (ii) the responsibility of businesses to respect human rights; and (iii) access to remedy for violations of human rights by businesses. They were endorsed in 2011 by the United Nations Human Rights Council.

<sup>26</sup> For more information on Peru’s ratification status, consult the United Nations Treaty Database at: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=136&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=136&Lang=EN). According to Article 55 of the 1993 Peruvian Constitution, the international human rights instruments to which Peru is a party form part of Peruvian law.

<sup>27</sup> 1993 Peruvian Constitution, fourth final and transitory provision.

<sup>28</sup> Law No. 29809 of 2011 regarding the organisation and functions of the Ministry of Justice and Human Rights, Article 5.

<sup>29</sup> The Report of the Working Group on Business and Human Rights (UNWG) on its mission to Peru contains six recommendations addressed to businesses and four to civil society organisations. See UN Human Rights Council (2018) Report of the UNWG on its mission to Peru, paras. 91-92, <https://www.ohchr.org/Documents/Issues/Business/A.HRC.38.48.Add.2.pdf>.

<sup>30</sup> National Plan on Human Rights 2018-2021, pp. 165 et seq.

<sup>31</sup> *Ibid.*, pp. 167-169.

<sup>32</sup> See UN Human Rights Council (2017), Report of the Working Group on the Universal Periodic Review (UPR) – Peru, para. 111, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/368/23/PDF/G1736823.pdf?OpenElement>.

<sup>33</sup> *Ibid.*, recommendations 41 to 45.

<sup>34</sup> *Ibid.*, recommendations 172, 155, 164, 171, 175, 170, 162.

<sup>35</sup> *Ibid.*, recommendation 144.

<sup>36</sup> *Ibid.*, recommendation 138.

<sup>37</sup> *Ibid.*, recommendation 156.

<sup>38</sup> *Ibid.*, recommendations 33 and 36.

<sup>39</sup> *Ibid.*, recommendation 149.

<sup>40</sup> Two recommendations that Peru did not support, while not explicitly rejecting them, are recommendations 43 and 44 made by the Netherlands and Switzerland to respectively apply for membership and adhere to the Voluntary Principles on Security and Human Rights. Peru’s explanation for not supporting these recommendations was the following: “[T]he Voluntary Principles on Security and Human Rights do not constitute legal human rights obligations for States, but rather voluntary commitments that companies are free to adopt, irrespective of the possible adherence by the State on whose territory they are operating. That shall not however preclude the due consideration of all academic contributions and good business practices during the development of a national action plan on business and human rights, pursuant to the National Human Rights Plan (2018–2021).” See UN Human Rights Council (2018), Report of the Working Group on the UPR -- Peru -- Views on conclusions and/or

recommendations, voluntary commitments and replies presented by the State under review, para. 7, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/049/24/PDF/G1804924.pdf?OpenElement>.

It is worth mentioning that a multi-stakeholder working group on the Voluntary Principles on Security and Human Rights was created in 2010 in Peru to promote the implementation of the Principles. It gathers around 40 institutions, including government entities, embassies, and companies among which figure several members of the SNMPE. See Working Group on the Voluntary Principles on Security and Human Rights of Peru (n.d.), Respuesta a las preguntas orientativas del Grupo de Trabajo sobre la utilización de mercenarios como medio de violar los derechos humanos y obstaculizar el ejercicio de los pueblos a la libre determinación, [https://www.ohchr.org/Documents/Issues/Mercenaries/WG/PrivateMilitarySecurity/PeruvianWG\\_SP.pdf](https://www.ohchr.org/Documents/Issues/Mercenaries/WG/PrivateMilitarySecurity/PeruvianWG_SP.pdf); and Socios Perú et al. (n.d.), Diez pasos para promover los Principios Voluntarios de Seguridad y Derechos Humanos: el modelo peruano del Grupo de Trabajo, [http://www.securityhumanrightshub.org/sites/default/files/publications/Diez\\_pasos\\_para\\_promover\\_los\\_PV.pdf](http://www.securityhumanrightshub.org/sites/default/files/publications/Diez_pasos_para_promover_los_PV.pdf).

<sup>41</sup> Report of the Working Group on the UPR – Peru, recommendations 81, 113, 126 and 179.

<sup>42</sup> In terms of corruption in the judiciary, Peru scores 0.45 for the civil justice and 0.33 for the criminal justice in the 2020 Rule of Law Index of the World Justice Project, well below average in the LAC region and among upper middle-income countries. See World Justice Project (2020), 2020 Rule of Law Index, <https://worldjusticeproject.org/rule-of-law-index/country/Peru>.

<sup>43</sup> The UNWG makes the following corresponding recommendation: “(x) Remove barriers to effective judicial remedies, in line with policy recommendations made by the Office of the United Nations High Commissioner for Human Rights and the Working Group, and provide assistance to vulnerable groups to ensure that they can access judicial mechanisms in an accessible, affordable, adequate, timely and non-discriminatory manner” (footnotes omitted). See UN Human Rights Council (2018) Report of the UNWG on its mission to Peru, para. 90 (x), <https://www.ohchr.org/Documents/Issues/Business/A.HRC.38.48.Add.2.pdf>.

<sup>44</sup> 1993 Peruvian Constitution, Article 162.

<sup>45</sup> See Report of the Working Group on the UPR – Peru, recommendation 55.

<sup>46</sup> Guidelines, Chapter II, para. A.10.

<sup>47</sup> Ibid., Chapter IV, para. 5.

<sup>48</sup> The Report of the UNWG on its mission to Peru references the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector. See UN Human Rights Council (2018) Report of the UNWG on its mission to Peru, para. 2, <https://www.ohchr.org/Documents/Issues/Business/A.HRC.38.48.Add.2.pdf>.

<sup>49</sup> See, for instance, Law No. 29785 of 2011 on the right to prior consultation of indigenous and natives peoples recognised in ILO Convention No. 169. This law is further implemented by a regulation contained in Supreme Decree No. 001-2012-MC. Articles 6 and 16 of ILO Convention No. 169 notably seek to implement the principle of “free, prior, and informed consent” (FPIC), whereby indigenous peoples should be consulted prior to taking measures that affect them, and give consent to measures having great impact such as relocation.

<sup>50</sup> Law No. 29785 of 2011 on the right to prior consultation of indigenous and natives peoples recognised in ILO Convention No. 169, Article 20.

<sup>51</sup> Illustrative of this, the Ministry of Energy and Mines (MINEM) recently filed an appeal against a court order that annulled oil exploration and exploitation activities because the affected communities’ rights to prior consultation had been violated. See Superior Court of Lima, 4<sup>th</sup> Constitutional Court, Decision No. 13 in the case No. 32365-2014, 28 March 2017, <https://ia801606.us.archive.org/26/items/343584494Lote116Sentencia1raInstancia/343584494-Lote-116-Sentencia-1ra-Instancia.pdf>. The Superior Court of Lima upheld the initial decision. See Superior Court of Lima, 2<sup>nd</sup> Civil Chamber, Decision No. 18 in the case No. 32365-2014, 3 March 2018, [https://fr.scribd.com/document/386651171/Rsol-32365-2014-0-1801-JR-CI-04#download&from\\_embed](https://fr.scribd.com/document/386651171/Rsol-32365-2014-0-1801-JR-CI-04#download&from_embed).

<sup>52</sup> See Report of the Working Group on the UPR – Peru, recommendations 164-169.

<sup>53</sup> Ibid., recommendations 66, 70, 68, 71, 72, 73, 74, 67, 69.

<sup>54</sup> See, Ibid., Recommendation 68, submitted by the Czech Republic, which reads as follows: “Create and implement a specific mechanism that will provide comprehensive assistance and protection to human rights defenders, and include them in its design, especially those human rights defenders that help communities affected by mining and hydroelectric projects.”

<sup>55</sup> 1993 Peruvian Constitution, Title I, Chapter II.

<sup>56</sup> Code of children and adolescents, Article 51. 1. b).

<sup>57</sup> According to the International Trade Union Confederation (ITUC)'s Global Rights Index, a rating of "1" corresponds to "sporadic violations of rights" and a rating of "5" corresponds to "no guarantee of rights".

<sup>58</sup> For more information, consult Peru's country profile page on ILO's website at:

[https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110\\_COUNTRY\\_ID:102805](https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102805).

<sup>59</sup> See specific instance titled "Employment conditions in Peru" (2009),

<http://mneguidelines.oecd.org/database/instances/pe0002.htm> and specific instance titled "Glencore/Perubar S.A. and Central Única de Trabajadores del Perú (CUT)" (2009),

<http://mneguidelines.oecd.org/database/instances/pe0004.htm>.

<sup>60</sup> In late May 2019, CGTP and CUT – two of the country's leading trade unions – decided not to participate in the CNTPE final discussions about the definition of a minimum wage. The discussions had recommenced in January 2019 after a government effort to reinstate social dialogue. See Government of Peru (2019), Press release "Consejo Nacional de Trabajo encargó a Comisión Especial retomar reuniones sobre institucionalización del cálculo del salario mínimo", <http://www2.trabajo.gob.pe/cntpe/consejo-nacional-de-trabajo-encargo-a-comision-especial-retomar-reuniones-sobre-institucionalizacion-del-calculo-del-salario-minimo/>.

<sup>61</sup> This situation had led to a complaint before the ILO. For more information, consult ILO (2014), Report of the Committee set up to examine the representation alleging non-observance by Peru of the Labour Inspection Convention, 1947 (No.81), made under Article 24 of the ILO Constitution by the Autonomous Workers' Confederation of Peru (CATP),

[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012\\_COMPLAINT\\_PROCEDURE\\_I D,P50012\\_LANG\\_CODE:3073329,en](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_I D,P50012_LANG_CODE:3073329,en).

<sup>62</sup> For region-disaggregated data of labour inspections, consult SUNAFIL's website at:

<https://www.sunafil.gob.pe/estadistica>.

<sup>63</sup> There are 75 labour inspectors in regional governments, a figure that has not changed since 2017. See

Government of Peru (2018), Resolución de Presidencia del Consejo Directivo No. 07-2018-SUNAFIL/PCD,

<https://www.sunafil.gob.pe/noticias/item/6673-resolucion-de-presidencia-del-consejo-directivo-n-07-2018-sunafil-pcd.html>.

<sup>64</sup> According to the Final Performance Evaluation of the U.S. Department of Labour, objective No. 1 (enhance the National Labour Inspection Superintendency (*Superintendencia Nacional de Fiscalización Laboral*, SUNAFIL)'s capacity) obtained a moderate level of achievement, objective No. 2 (enhance inspectors' capacity) an above moderate level of achievement, and objective No. 3 (improved labour inspection) a low level of achievement. See Government of the United States (2019), Final Performance Evaluation: Building the Capacity of the Peruvian Labor Inspectorate Building Union Capacity to Reduce Precarious Employment in Peru,

[https://www.dol.gov/sites/dolgov/files/ILAB/evaluation\\_type/final\\_evaluation/Peru\\_Multi-Project\\_Evaluation%20Report\\_Final\\_non-PII\\_Section%20508.pdf](https://www.dol.gov/sites/dolgov/files/ILAB/evaluation_type/final_evaluation/Peru_Multi-Project_Evaluation%20Report_Final_non-PII_Section%20508.pdf).

<sup>65</sup> Law No. 25593 of 2003 regarding collective labour relations, Article 4.

<sup>66</sup> The collective bargaining coverage rate conveys the number of employees whose pay and/or conditions of employment are determined by one or more collective agreement(s) as a percentage of the total number of employees. Peru's coverage rate (5%) is well below Brazil's (70%), Argentina's (50%), Chile's (18%), Colombia's (16%), and Mexico's (10%). See ILO (2020), Statistics on collective bargaining,

<https://ilostat.ilo.org/topics/collective-bargaining/>.

<sup>67</sup> The numbers of complaint procedures related to freedom of association cases in Peru are as follows: active: 15; follow-up: 19, and closed: 161. See Peru's country profile page on ILO's website at:

[https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110\\_COUNTRY\\_ID:102805](https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:102805).

<sup>68</sup> See Legislative Decree No. 1323 of 2017, Article 2, which strengthens the combat against femicide, family violence and gender violence by adding new Articles 153-C (on slavery) and 168-B (on forced labour), among others, to the Peruvian Criminal Code.

<sup>69</sup> Monitoring of the Andean Amazon Project (2018), Deforestation in the Andean Amazon,

<https://maaproject.org/2018/sintesis3/>.

<sup>70</sup> Among else, Peru has ratified the Paris Agreement, the UN Convention on Biodiversity, the UN Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the principles of the Rio Declaration on Environment and Development.

<sup>71</sup> Law No. 28611 of 2005, General Law on the Environment, Article 24.

<sup>72</sup> Ibid., Articles II and III.

<sup>73</sup> Law No. 30754 of 2018, Framework Law on Climate Change, Article 1.

<sup>74</sup> Ibid., Article 4.

<sup>75</sup> Ibid., Article 12.

<sup>76</sup> Ibid., Articles 12 and 13.

<sup>77</sup> Ibid., Articles 12 and 14.

<sup>78</sup> Government of Peru (2018), Administrative Resolution No. 033-2018-CE-PJ, which creates a court dedicated to environmental matters in the Judicial District of Madre de Dios, Preamble, <https://busquedas.elperuano.pe/normaslegales/crean-juzgado-especializado-en-materia-ambiental-con-sede-en-resolucion-administrativa-n-033-2018-ce-pj-1616519-1/>.

<sup>79</sup> Government of Peru (2018), Press Release of the Judiciary “Court dedicated to environmental matters in Madre de Dios will function as of 1 April”, [https://www.pj.gob.pe/wps/wcm/connect/cortesuprema/s\\_cortes\\_suprema\\_home/as\\_inicio/as\\_enlaces\\_destacados/as\\_imagen\\_prensa/as\\_notas\\_noticias/2018/cs\\_n-juzgado-especializado-materia-ambiental-en-madre-de-dios-funcionara-desde-1-de-abril](https://www.pj.gob.pe/wps/wcm/connect/cortesuprema/s_cortes_suprema_home/as_inicio/as_enlaces_destacados/as_imagen_prensa/as_notas_noticias/2018/cs_n-juzgado-especializado-materia-ambiental-en-madre-de-dios-funcionara-desde-1-de-abril). See also International Union for Conservation of Nature (2018), “Peru to Launch First Environmental Court in April 2018”, <https://www.iucn.org/news/world-commission-environmental-law/201803/peru-launch-first-environmental-court-april-2018>.

<sup>80</sup> UN Treaty Collection (2020), Status of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-18&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=en).

<sup>81</sup> To date, 22 countries have signed the Agreement but only 8 have ratified it. See UN Treaty Collection (2020), Status of the Escazú Agreement, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-18&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=en)

<sup>82</sup> Law No. 27806 of 2003 on Transparency and Access to Public Information.

<sup>83</sup> Defensoría del Pueblo (2017), Reporte de Conflictos Sociales No. 155, <https://www.defensoria.gob.pe/modules/Downloads/conflictos/2017/Reporte-Mensual-de-Conflictos-Sociales-N-155---Enero-2017.pdf>.

<sup>84</sup> The duties are paid to the National Forestry and Wildlife Service (*Servicio Nacional Forestal y de Fauna Silvestre*, SERFOR) and the revenue gained is used for forestry protection, monitoring and oversight, the promotion of afforestation, and recovery of degraded systems.

<sup>85</sup> OSINFOR is an independent entity under the Office of the President of the Council of Ministers and tackles issues related to illegal logging.

<sup>86</sup> Center for International Environmental Law (2019), Authorised to steal – Organised crime networks launder illegal timber from the Peruvian Amazon, <https://www.ciel.org/wp-content/uploads/2019/08/Authorized-to-Steal-August-2019-updated.pdf>.

<sup>87</sup> World Economic Forum (2019), The 2019 Global Competitiveness Report, p. 459, [http://www3.weforum.org/docs/WEF\\_TheGlobalCompetitivenessReport2019.pdf](http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf).

<sup>88</sup> Transparency International (2019), 2019 Corruption Perceptions Index, <https://www.transparency.org/en/cpi/2019/results/per>.

<sup>89</sup> World Justice Project (2020), 2020 Rule of Law Index, <https://worldjusticeproject.org/rule-of-law-index/country/Peru>.

<sup>90</sup> Latinobarómetro (2017), Latinobarómetro Libro de Codigos 2017 – Estudio No. Perú\_v20181701, p. 21, [javascript:DescargaDocDC\('8489','Latinobarómetro Libro de Codigos 2017 Perú\\_v20181701'\)](javascript:DescargaDocDC('8489','Latinobarómetro Libro de Codigos 2017 Perú_v20181701')).

<sup>91</sup> Law No. 29542 of 2010 on the protection of the claimant in the administrative field and effective collaboration in the criminal field, Article 8.

<sup>92</sup> *Ibid.*, Article 4.

<sup>93</sup> Legislative Decree No. 1327 of 2017 that establishes measures to protect those who denounce corruption acts in good faith and sanction corruption claims made in bad faith, Article 1.

<sup>94</sup> Criminal Procedure Code, Article 248(2).

<sup>95</sup> Law No. 30424 of 2016, which regulates the administrative responsibility of legal persons for transnational active bribery, Article 1.

<sup>96</sup> Anti-corruption Private Council (n.d.), <https://plataformaanticorrupcion.pe/sector-privado/consejo-privado-anticorrupcion-confiep/>.

<sup>97</sup> Law No. 30424 of 2016, which regulates the administrative responsibility of legal persons for transnational active bribery, Article 17.

<sup>98</sup> National Policy on Integrity and the Fight against Corruption, specific objective 1.4, p. 65.

<sup>99</sup> Legislative Decree No. 1385 of 2018 that sanctions corruption in the private sphere, Article 1. According to this Decree, sanctions may be imposed on companies or individuals that accept, receive, or demand, any kind of wrongful donation, promise or other advantage to carry out an action that favours another party in the acquisition of goods or merchandise, in the hiring of commercial services and in commercial relations.

<sup>100</sup> “Broader policy objectives” refers to any of a variety of objectives such as sustainable green growth, the development of small and medium-sized enterprises, innovation, standards for responsible business conduct or broader industrial policy objectives, which governments increasingly pursue through use of procurement as a policy lever, in addition to the primary procurement objective.

<sup>101</sup> The Public Procurement Law was adopted in 2014 and last modified in 2019 by Legislative Decree No. 1444. The latest version of its Regulation was approved in 2018 by Supreme Decree No. 344-2018-EF and recently modified by Supreme Decree No. 377-2019-EF.

<sup>102</sup> Law No. 30225 of 2014 on Public Procurement, Article 1.

<sup>103</sup> *Ibid.*, Article 2.

<sup>104</sup> *Ibid.*, Article 2.

<sup>105</sup> Regulation of the Law No. 30225 on Public Procurement of 2018, Articles 51.2 and 51.3.

<sup>106</sup> These criteria are also mentioned as potential additional requirements in the model tender documentation for the procurement of goods and in the model tender documentation for the procurement of services. See Government of Peru (2019), Model tender documentation for the procurement of goods approved by Directive No. 001-2019-OSCE/CD and Government of Peru (2019), Model tender documentation for the procurement of services approved by Directive No. 001-2019-OSCE/CD.

<sup>107</sup> Government of Peru (2019), Model tender documentation for the procurement of works approved by Directive No. 001-2019-OSCE/CD, Chapter IV “Evaluation Factors”, Sections B, C and D under “Other Evaluation Factors”.

<sup>108</sup> The relevant Social Accountability International (SAI) standard and International Organization for Standardization (ISO) norm are SA 8000:2014 and norm ISO 14001:2015. See Government of Peru (2019), Model tender documentation for the procurement of works approved by Directive No. 001-2019-OSCE/CD, Chapter IV “Evaluation Factors”, Sections B.2 and B. 3.

<sup>109</sup> The relevant ISO norm is ISO37001:2016. See Government of Peru (2019), Model tender documentation for the procurement of works approved by Directive No. 001-2019-OSCE/CD, Chapter IV “Evaluation Factors”, Section D.

<sup>110</sup> Law No. 30225 of 2014 on Public Procurement, Article 11(m) and (n).

<sup>111</sup> Regulation of the Law No. 30225 on Public Procurement of 2018, Article 52.

<sup>112</sup> Law No. 30225 of 2014 on Public Procurement, Articles 32 and 40.

<sup>113</sup> Regulation of the Law No. 30225 on Public Procurement of 2018, Article 138.4.

<sup>114</sup> Law No. 30225 of 2014 on Public Procurement, Article 16.

<sup>115</sup> This is also the case of the UNGPs, which provide that “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.” See UNGPs, Principle 4.

<sup>116</sup> Law No. 28840 of 2006 for strengthening and modernising Petroperu, Article 3.

<sup>117</sup> The expression “trade agreements” in the present Review covers bilateral and regional trade agreements of different types, including customs unions, economic partnerships agreements, and comprehensive trade agreements with investment chapters. However, for the purposes of the present analysis, the provisions of these investment chapters are analysed in subsection 4.2.2.

<sup>118</sup> Government of Peru (2020), List of Peru’s trade agreements.

<sup>119</sup> The 2011 Peru-Korea Free Trade Agreements (FTA) contains detailed RBC-related provisions in its chapters dedicated to labour and environment, with noteworthy elements such as provisions establishing the signatories’ undertakings to promote the compliance by enterprises operating on their territory of environmental guidelines as well as joint measures to limit or reduce the adverse effects of climate change. See 2011 Peru-Korea FTA, Chapter 19 (Environment), Articles 19.7 (Environment and enterprise) and 19.8 (Climate change). On the contrary, the 2009 Peru-China FTA, the 2019 Peru-European Free Trade Association (EFTA) FTA, the 2011 Mexico-Peru FTA, the 2011 Peru-Panama FTA, the 2011 Peru-Costa Rica FTA, the 2011 Peru-Guatemala, and the 2011 Peru-Japan Economic Partnership Agreement (EPA) do not include elaborated RBC-related provisions and no RBC clause.

<sup>120</sup> Article 18.2 of the 2011 Peru-Korea FTA provides as follows: “[t]he Parties shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, their laws or regulations implementing Article 18.1, in a manner substantially affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with the principles as stated in the ILO Declaration.” The FTA also contains a similar provision that prohibits the lowering or weakening of environmental laws and regulations. See 2011 Peru-Korea FTA, Chapter 18 (Labour), Article 18.2 (Application and enforcement of labour law) and Chapter 19, Article 19.5 (Application and enforcement of environmental law)

<sup>121</sup> 2006 Peru-U.S. Trade Promotion Agreement (TPA), Chapter 18 (Environment), Articles 18.6 (Environmental Affairs Council), 18.8 (Submission on Enforcement Matters), 18.12 (Environmental Consultations and Panel Procedure) and Chapter 17 (Labour), Articles 17.5 (Institutional Arrangements) and 17.7 (Cooperative Labour Consultations).

<sup>122</sup> 2012 EU-Peru/Colombia/Ecuador FTA, Title IX (Trade and Sustainable Development), Article 280 (Institutional and Monitoring Mechanism).

<sup>123</sup> 2006 Peru-U.S. TPA, Chapter 17 (Labour), Article 17.5 (Institutional Arrangements), Paragraph 5.

<sup>124</sup> 2012 EU-Peru/Colombia/Ecuador FTA, Title IX (Trade and Sustainable Development), Article 280 (Institutional and Monitoring Mechanism).

<sup>125</sup> 2018 Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), Article 1 (Incorporation of the Trans-Pacific Partnership Agreement).

<sup>126</sup> 2018 Peru-Australia FTA, Chapter 18 (Labour); 2016 Trans-Pacific Partnership (TPP), Chapter 19 (Labour); 2018 CPTPP, Chapter 19 (Labour).

<sup>127</sup> 2018 Peru-Australia FTA, Chapter 19 (Environment); 2016 TPP, Chapter 20 (Environment) ; 2018 CPTPP, Chapter 20 (Environment).

<sup>128</sup> 2018 Peru-Australia FTA, Chapter 25 (Transparency and Anti-Corruption); 2016 TPP, Chapter 26 (Transparency and Anti-Corruption); 2018 CPTPP, Chapter 26 (Transparency and Anti-Corruption).

<sup>129</sup> 2018 Peru-Australia FTA, Chapter 25 (Transparency and Anti-Corruption), Article 25.7 (Measures to Combat Corruption); 2016 TPP, Chapter 26 (Transparency and Anti-Corruption), Article 26.7 (Measures to Combat Corruption); 2018 CPTPP, Chapter 26 (Transparency and Anti-Corruption), Article 26.7 (Measures to Combat Corruption).

<sup>130</sup> 2018 Peru-Australia FTA, Chapter 25 (Transparency and Anti-Corruption), Article 25.9 (Application and Enforcement of Anti-Corruption Laws); 2016 TPP, Chapter 26 (Transparency and Anti-Corruption), Article 26.9

(Application and Enforcement of Anti-Corruption Laws); 2018 CPTPP, Chapter 26 (Transparency and Anti-Corruption), Article 26.9 (Application and Enforcement of Anti-Corruption Laws).

<sup>131</sup> 2018 Peru-Australia FTA, Chapter 25 (Transparency and Anti-corruption), Article 25.8 (Promoting Integrity Among Public Officials); 2016 TPP, Chapter 26 (Transparency and Anti-Corruption), Article 26.8 (Promoting Integrity Among Public Officials); 2018 CPTPP, Chapter 26 (Transparency and Anti-Corruption), Article 26.8 (Promoting Integrity Among Public Officials).

<sup>132</sup> 2018 Peru-Australia FTA, Chapter 25 (Transparency and Anti-Corruption), Article 25.10 (Participation of Private Sector and Society); 2016 TPP, Chapter 26 (Transparency and Anti-corruption), Article 26.10 (Participation of Private Sector and Society); 2018 CPTPP, Chapter 26 (Transparency and Anti-corruption), Article 26.10 (Participation of Private Sector and Society).

<sup>133</sup> 2016 TPP, Chapter 19 (Labour), Article 19.7 (Corporate Social Responsibility); 2018 CPTPP, Chapter 19 (Labour), Article 19.7 (Corporate Social Responsibility).

<sup>134</sup> 2016 TPP, Chapter 20 (Environment), Article 20.10 (Corporate Social Responsibility); 2018 CPTPP, Chapter 20 (Environment), Article 20.10 (Corporate Social Responsibility).

<sup>135</sup> 2018 Peru-Australia FTA, Chapter 25 (Transparency and Anti-corruption); 2016 TPP, Chapter 19 (Labour), Article 19.15 (Labour Consultations), Paragraph 12; Chapter 20 (Environment), Article 20.23 (Dispute Resolution); Chapter 26 (Transparency and Anti-corruption), Article 26.12 (Dispute Settlement); and 2018 CPTPP, Chapter 19 (Labour), Article 19.15 (Labour Consultations), Paragraph 12; Chapter 20 (Environment), Article 20.23 (Dispute Resolution); Chapter 26 (Transparency and Anti-corruption), Article 26.12 (Dispute Settlement).

<sup>136</sup> The expression “investment treaties” in the present Review covers bilateral investment treaties (BITs) and the investment chapters contained in comprehensive trade agreements. For the purposes of the present analysis, the provisions contained in the other chapters of comprehensive trade agreements are analysed in subsection 4.2.1.

<sup>137</sup> Government of Peru (2020), List of Peru’s investment treaties.

<sup>138</sup> 2005 Peru- Belgium Luxembourg Economic Union (BLEU) BIT, Article 6 (Labour).

<sup>139</sup> 2005 Peru-BLEU BIT, Article 5 (Environment).

<sup>140</sup> 2005 Peru-BLEU BIT, Article 5 (Environment), Paragraph 2 and Article 6 (Labour), paragraph 2; 2006 Peru-Canada BIT, Article 11 (Health, Safety and Environmental Measures); 2007 Peru-Colombia BIT, Article 9 (Health, Safety and Environmental Measures); 2008 Peru-Japan BIT, Article 26 (Health, Safety, Environment and Labour Measures).

<sup>141</sup> 2005 Peru-BLEU BIT, Article 12 (Resolution of disputes between the signatories relating to the interpretation or the application of the treaty); 2006 Peru-Canada BIT, Section D (State-to-state dispute settlement procedures); 2007 Peru-Colombia BIT, Section D (Final Dispositions); 2008 Peru-Japan BIT, Article 17 (Dispute Settlement between Contracting Parties).

<sup>142</sup> Among the RBC-related provisions contained in the 2006 Peru-U.S. TPA are: (i) exceptions for public welfare measures; (ii) a provision entitling the signatories to adopt, maintain, and enforce measures to ensure that investment activity is undertaken in a manner sensitive to environmental concerns; (iii) a provision allowing for the submission of expert reports for health, safety or environmental issues in Investor-State Dispute Settlement (ISDS); and (iv) an annex specifying that, in general, measures to protect public health, safety and the environment cannot be considered as being tantamount to expropriation. See 2006 Peru-U.S. FTA, Chapter 10 (Investment), Articles 10.9 (Performance Requirements), 10.11 (Investment and Environment), 10.24 (Expert Reports) and Annex 10.B (Expropriation).

<sup>143</sup> The investment chapters contained in the FTAs concluded by Peru with Chile, Singapore, Canada, China, the EFTA, Korea, Mexico, Panama, Costa Rica and Guatemala contain similar RBC-related provisions to that included in the investment chapter of the 2006 Peru-U.S. TPA. See 2006 Peru-Chile FTA, Chapter 11 (Investment); 2008 Peru-Singapore FTA, Chapter 10 (Investment); 2008 Peru-Canada FTA, Chapter 8 (Investment); 2009 Peru-China FTA, Chapter 10 (Investment); 2010 Peru-EFTA FTA, Chapter 5 (Investment); 2010 Peru-Korea FTA, Chapter 9 (Investment); 2011 Peru-Mexico FTA, Chapter 11 (Investment); 2011 Peru-Panama FTA, Chapter 12 (Investment); 2011 Peru-Costa Rica FTA, Chapter 12 (Investment); 2011 Peru-Guatemala FTA, Chapter 12 (Investment).

<sup>144</sup> 2008 Peru-Canada FTA, Chapter 8 (Investment), Articles 810 (Corporate Social Responsibility) and 817 (Investment Committee).

<sup>145</sup> *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21.



<sup>146</sup> 2016 TPP, Chapter 9 (Investment), Article 9.17 (Corporate Social Responsibility); 2018 Peru-Australia FTA, Chapter 8 (Investment), Article 8.17 (Corporate Social Responsibility).

<sup>147</sup> 2014 Pacific Alliance Additional Protocol, Chapter 10 (Investment), Article 10.30 (Social Responsibility Policies); 2016 Peru-Brazil ETEA, Chapter 2 (Investment), Article 2.13 (Corporate Social Responsibility).

<sup>148</sup> 2014 Pacific Alliance Additional Protocol, Chapter 10 (Investment), Article 10.30 (Social Responsibility Policies).

<sup>149</sup> *Ibid.*, Article 10.30 (Social Responsibility Policies).

<sup>150</sup> This list includes, among others: contributing to economic, social and environmental progress to achieve sustainable development, respecting the human rights internationally recognised of the persons involved in the company's activity, fostering local capacity building through a stretch cooperation with local communities, etc. See 2016 Peru-Brazil ETEA, Chapter 2 (Investment), Article 2.13 (Corporate Social Responsibility).

<sup>151</sup> *Ibid.*, Article 2.21 (Dispute Settlement between the Parties).

<sup>152</sup> *Ibid.*, Article 2.14 (Measures on Investment and the Fight Against Corruption and Illegality).

<sup>153</sup> *Ibid.*, Article 2.21 (Dispute Settlement between the Parties).

<sup>154</sup> 2018 Peru-Australia FTA, Chapter 8 (Investment), Article 8.20 (Submission of a Claim to Arbitration), Paragraph 2.

<sup>155</sup> 2016 TPP, Chapter 9 (Investment), Article 9.19 (Submission of a claim to arbitration); 2018 CPTPP, Chapter 9 (Investment), Article 9.19 (Submission of a claim to arbitration).

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