



RP Legal & Tax

Human Rights Due Diligence

INTERNATIONAL TRADE CONTRACTS AND SUSTAINABILITY

Turin, 28 April 2023



How might business activity impact human rights?

Business actions can potentially affect all recognized rights

Examples include:

- Rights of workers, such as freedom of association and collective bargaining (e.g. union action)
- Rights to equal opportunity and non-discrimination
- Right to privacy (e.g. consumer data protection issues)
- Rights of vulnerable groups, such as Indigenous Peoples (e.g. rights to cultural property)

The Governance Gap

- Remedies in host States (countries where the investment takes place) are often difficult to obtain because of weak governance and low regulatory standards.
- Remedies in home countries often unavailable for high barriers (including procedural ones) to remedies for victims.

.....“Problems without passport” (Kofi Annan).....

Evolution of the legal framework on business and human rights

1970s-2003 Early regulation of business

- Code of Conduct for Transnational Corporations
- OECD Guidelines for Multinational Enterprises
- Global Compact
- The Norms



2003-2011 Birth of BHR

- UN Guiding Principles on Business and Human Rights



2011-2022 Beyond the UNGPs

- Domestic/EU BHR legislation
- Business and Human Rights Treaty



Evolution of the legal framework on business and human rights

- In 1973, the UN Economic and Social Council (ECOSOC) appointed a Group of Eminent Persons to study the impact of TNCs on economic development and international relations, and to advise the UN on this issue. In 1974, establishment of a **permanent Commission and a Centre on TNCs** to study the feasibility of producing a multilateral agreement on TNCs, perhaps in the form of a code of conduct. After over 20 years of negotiations, “**no consensus was possible**” and UNCTC was dismantled in 1993.
- In **1976**, publication of **OECD Guidelines for Multinational Enterprises**, an annex to the OECD Declaration on International Investment and Multinational Enterprises. Non-binding guidelines, revised in 1979, 1982, 1984, 1991, 2000 and 2011.



Evolution of the legal framework on business and human rights

- In 1998 the **Working Group on the Working Methods and Activities of Transnational Corporations** was established by a Sub-Commission of the UN Commission on Human Rights. This resulted in the 2003 '**Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**'. This far-reaching document imposed direct obligations on TNCs and an enforcement mechanism (including monitoring by NGOs and TNCs themselves). Abandoned in 2005.
- In **1999**, UN Secretary-General Kofi Annan launched a UN partnership mission called the **Global Compact**. This is a voluntary multi-stakeholders partnership, embracing ten principles of good international corporate practice (e.g. human rights, labour standards, the environment, and anti-corruption).

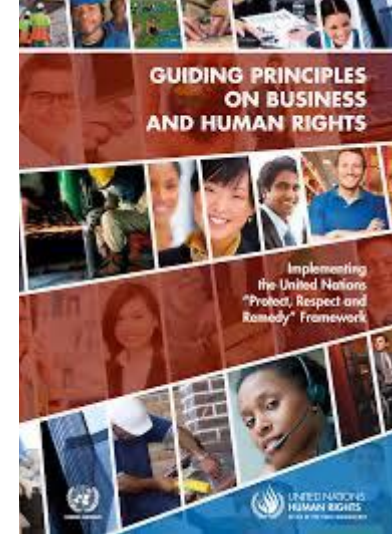


Evolution of the legal framework on business and human rights

- 2005: Harvard Professor, John Ruggie, appointed as **Special Representative of the UN Secretary General** to “identify” and “clarify” standards and submit his “views and recommendations”.
- 2008: UN Human Rights Council adopts Ruggie’s **Protect, Respect, Remedy Framework**.
- 2011: UN Human Rights Council unanimously endorsed the **UNGPs**; Ruggie’s mandate ended and a Working Group on BH was established.



UN Guiding Principles on Business and Human Rights

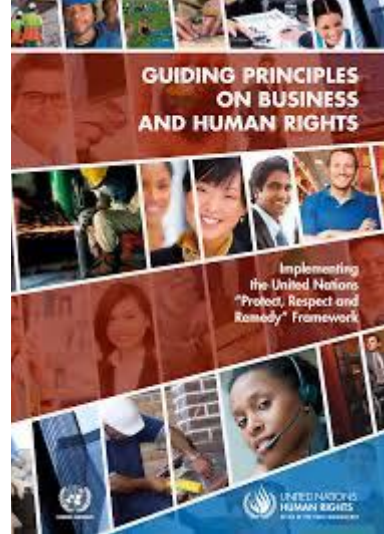


“The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it could be improved.” (J. Ruggie)

Authoritative global baseline.....

UN Guiding Principles on Business and Human Rights

- I. The State duty to protect human rights
- II. The corporate responsibility to respect human rights
- III. The need for rights and obligations to be matched to appropriate and effective remedies when breached



UN Guiding Principles on Business and Human Rights

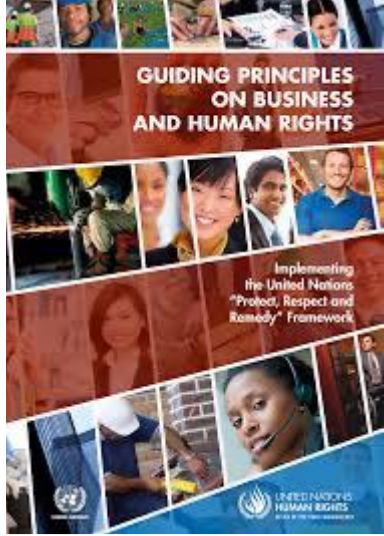
To meet their responsibility to **respect human rights**, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A **policy commitment** to meet their responsibility to respect human rights;
- (b) A **human rights due-diligence process** to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the **remediation** of any adverse human rights impact they cause, or to which they contribute.

UNGP 15



UN Guiding Principles on Business and Human Rights



Due Diligence | Overview



Human Rights Due Diligence: In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.

Communications (Principle 21)

"In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally"

Assessing Impacts (Principle 18)

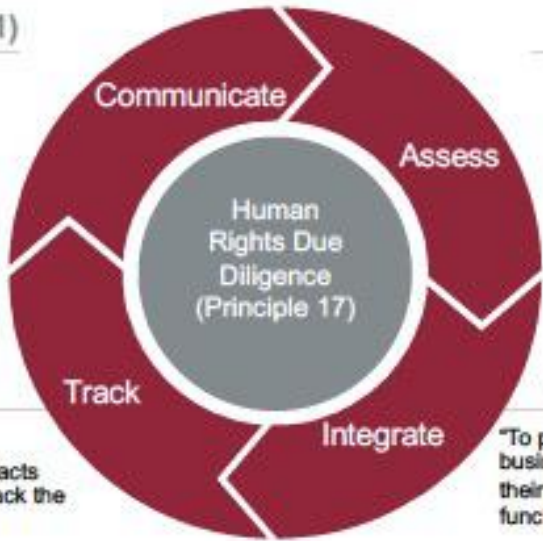
"To gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts"

Tracking (Principle 20)

"In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response"

Integration and Action (Principle 19)

"To prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes"



EU Draft Directive on Corporate Sustainability Due Diligence



#CorporateSustainability



❖ 23 February 2022: European Commission released its Proposed Directive on Corporate Sustainability Due Diligence.

Article 1: Subject-matter

“This Directive lays down rules :

- (a) on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their **own operations, the operations of their subsidiaries, and the value chain operations** carried out by entities with whom the company has an **established business relationship** and,
- (b) on liability for violations of the obligations mentioned above.

EU Draft Directive on Corporate Sustainability Due Diligence



Article 2: Scope

The Directive applies to companies which are formed in accordance with the legislation of a Member State and which fulfil one of the following conditions:

- a) the company had **more than 500 employees** on average and had a **net worldwide turnover of more than EUR 150 million** in the last financial year for which annual financial statements have been prepared;
- b) the company did not reach the thresholds under point (a), but had **more than 250 employees on average** and had a **net worldwide turnover of more than EUR 40 million** in the last financial year for which annual financial statements have been prepared, provided that at least 50% of this net turnover was generated in one or more **'high impact' sectors – textile, agriculture and extractives**.



EU Draft Directive on Corporate Sustainability Due Diligence



Article 2: Scope

The Directive also applies to companies which are formed in accordance with the legislation of a **third country**, and fulfil one of the following conditions:

- (a) generated a net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year;
- (b) generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more 'high impact' sectors – textile, agriculture and extractives.

EU Draft Directive on Corporate Sustainability Due Diligence



Article 4: Due diligence

“Member States shall ensure that companies conduct human rights and environmental due diligence as laid down in Articles 5 to 11 (‘due diligence’) by carrying out the following actions:

- (a) **integrating** due diligence into their policies in accordance with Article 5;
- (b) **identifying** actual or potential adverse impacts in accordance with Article 6;
- (c) **preventing and mitigating** potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8;
- (d) establishing and maintaining a **complaints procedure** in accordance with Article 9;
- (e) **monitoring** the effectiveness of their due diligence policy and measures in accordance with Article 10;
- (f) publicly **communicating** on due diligence in accordance with Article 11.

EU Draft Directive on Corporate Sustainability Due Diligence



Article 17: Supervisory authorities

“Each Member State shall designate **one or more supervisory authorities** to supervise compliance with the obligations laid down in national provisions adopted pursuant to Articles 6 to 11 and Article 15(1) and (2) (‘supervisory authority’).

Article 18: Powers of supervisory authorities:

Member States shall ensure that the supervisory authorities have **adequate powers and resources** to carry out the tasks assigned to them under this Directive, including the power to request information and carry out **investigations** related to compliance with the obligations set out in this Directive.”

Article 20: Sanctions

“Member States shall lay down the rules on sanctions applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The **sanctions provided for shall be effective, proportionate and dissuasive.**”

EU Draft Directive on Corporate Sustainability Due Diligence



Article 22: Civil Liability

”Member States shall ensure that companies are **liable for damages** if:

- (a) they failed to comply with the obligations laid down in Articles 7 and 8 and;
- (b) **as a result of this failure an adverse impact** that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 **occurred and led to damage**.

Liability Defense: where a company has implemented a sustainability due diligence “it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an **indirect partner** with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.”

EU Draft Directive on Corporate Sustainability Due Diligence



On April 25, 2023 with 19 votes against 3 and 3 abstentions, MEPs on the Legal Affairs Committee adopted their position on so-called corporate sustainability due diligence.

- MEPs want **more companies to be covered by the rules**: including companies with more than 250 employees and a worldwide turnover higher than 40 million euro.
- They call for **finances of at least 5% of net worldwide turnover** and non-compliant third-country companies would be banned from public procurement.
- Directors of companies with over 1000 employees will be directly responsible for this step, which in turn will affect the variable parts of their pay, such as bonuses.

Next steps

- Vote in the plenary on June 1 and trilogue.