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THE IMPLICATIONS FOR BUSINESSES OF THEIR FAILURE TO RESPECT HUMAN RIGHTS

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OVERVIEW

- Laws and standards in the area of business and human rights
- Corporate Responsibility to Respect Human Rights under the UN Guiding Principles on Business and Human Rights and the role of lawyers
- Human rights risks related to the Mining Sector
- Consequences of failing to address human rights risks



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RELEVANT LAWS AND STANDARDS



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- International human rights treaties
- Domestic law
- UN Guiding Principles on Business and Human Rights
- Other international standards (e.g. the OECD Guidelines on Multinational Enterprises, IFC Performance Standards and UN Global Compact)
- Industry standards (e.g. ICMM Position Statement on Indigenous Peoples and Mining)

THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (1)

What are they?

- A set of guidelines for States and business enterprises to prevent and address human rights abuses committed in the course of business operations
- 31 foundational and operational principles applicable to all States and all business enterprises, regardless of size, sector, location, ownership and structure
- Not legally binding

Where do they come from?

- Product of six years' work (2005-2011) by Professor John Ruggie, the Special Representative of the Secretary General on Business and Human Rights
- Prof. Ruggie given a mandate to *“identify and clarify standards of corporate responsibility and accountability with regard to human rights and to elaborate on the role of State regulation in this area”*
- First phase of mandate (2005-2008): development of the “Protect, Respect and Remedy” framework
- Second phase of mandate (2008-2011): development of the Guiding Principles

THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2)

What do they do?

Implement the UN “Protect, Respect and Remedy Framework”

- State duty to **protect** human rights
 - UNGP 1: “*States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*”
- Corporate responsibility to **respect** human rights
 - UNGP 11: “*Business enterprises should respect human rights. This means that they should **avoid infringing on the human rights of others** and should **address adverse human rights impacts with which they are involved***”
- Access to **effective remedies** by victims of human rights abuses
 - UNGP 25: “*As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy*”

CONVERGING INTERNATIONAL STANDARDS

- OECD Guidelines for Multinational Enterprises
- IFC Performance Standards
- Equator Principles
- UN Global Compact
- Global Reporting Initiative
- Industry Initiatives (Thun Group of Banks, ICMM)



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CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS



WHAT DOES THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS ENTAIL?

- Understanding the potential adverse impact of business activities on human rights
- Addressing adverse human rights impacts – i.e. prevent, mitigate, remedy
- Action to be taken depends on whether the company has **caused, contributed to** or is **directly linked with** an adverse impact (proximity to impact)
- Applies to **own activities and activities of business partners** (suppliers, contractors, joint venture partners)
- Build and use **“leverage”** to influence human rights performance of suppliers/contractors and other business partners
- **Reporting and transparency** are encouraged – “knowing and showing” rather than “naming and shaming”
- CSR/philanthropic activities **do not offset** adverse impacts

HOW DOES A COMPANY MEET ITS RESPONSIBILITY TO RESPECT HUMAN RIGHTS?

(1) Policy Commitment and Embedding

- UNGP 16: *“As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy”*
- Must be **actively communicated** and **embedded in operational policies and procedures**
- Requirements to comply with human rights policy included in contracts (e.g. with suppliers, joint-venture partners etc)

HOW DOES A COMPANY MEET ITS RESPONSIBILITY TO RESPECT HUMAN RIGHTS?

(2) Human Rights Due Diligence (UNGPs 17-21)

- Identifying and assessing impacts (GP 18)
- Integrating and taking action (GP 19)
 - Including using leverage to influence actions of suppliers, sub-contractors and other business partners
- Tracking responses (GP 20)
- Communicating human rights performance externally (GP 21)

HOW DOES A COMPANY MEET ITS RESPONSIBILITY TO RESPECT HUMAN RIGHTS?

(3) Remediation and Grievance Mechanisms

- UNGP 22: *“Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or co-operate in their remediation through legitimate process”*
- Co-operation and participation in judicial and non-judicial mechanisms
- Operational-level grievance mechanisms
 - Legitimate, accessible, predictable, equitable, transparent, rights-compatible, based on engagement and dialogue
- Feeds into human rights due diligence: feedback from stakeholders

ROLE OF LAWYERS

- Advising on where domestic legal frameworks may fall short of international standards
- Advising on corporate human rights policies and related corporate governance / compliance issues and best practice
- Advising clients on human rights due diligence, generally and in relation to specific transactions:
 - Identifying sector / country risks (desk based risk assessment)
 - Defining scope / terms of reference for detailed assessment / due diligence
 - Advising on risk mitigation and risk allocation – human rights risks, commercial risks and legal risks
 - Conducting investigations
 - Negotiating and drafting human rights provisions for contracts – e.g. performance requirements, government undertakings, warranties and indemnities
- Designing grievance mechanisms
- Crisis management and dispute resolution



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HUMAN RIGHTS RISKS RELATED TO THE MINING SECTOR



INTERNATIONALLY RECOGNISED HUMAN RIGHTS

- Universal Declaration of Human Rights
 - International Covenant on Civil and Political Rights
 - International Covenant on Economic, Social and Cultural Rights
- ILO Declaration on Fundamental Principles and Rights at Work
 - Eight Core Conventions covering four areas: (i) freedom of association and right to collective bargaining; (ii) elimination of forced and compulsory labour; (iii) abolition of child labour; and (iv) elimination of discrimination
- Additional UN standards for particular groups e.g. indigenous peoples

WHAT ARE SOME OF THE POTENTIAL HUMAN RIGHTS RISKS RELATED TO THE MINING SECTOR?

Example Issues	Potentially relevant human rights
Security	<ul style="list-style-type: none"> • Right to life, liberty and security of person • Right not to be subjected to torture, cruel, inhumane and/or degrading treatment or punishment • Right to freedom from arbitrary arrest and exile • Right to freedom of assembly
Resettlement	<ul style="list-style-type: none"> • Right to life, liberty and security of person • Right to freedom of movement • Right to own property • Right to an adequate standard of living
Employees and supply chain workers	<ul style="list-style-type: none"> • Right to just and favourable conditions of work • Right to non-discrimination • Right to organise and participate in collective bargaining • Freedom from forced and compulsory labour
Water and ecosystems	<ul style="list-style-type: none"> • Right to life • Right to health • Right to adequate standard of living
Indigenous peoples and other community issues	<ul style="list-style-type: none"> • Right to participate in cultural life • Right to self determination • Rights of minorities • Right not to be arbitrarily deprived of property • Right to hold opinions, freedom of information and expression
Artisanal and small scale mining	<ul style="list-style-type: none"> • Right to freedom of movement • Right to work • Right to life, liberty and security of person

** Adapted from the ICMM guidance on Integrating human rights due diligence into corporate risk management processes, March 2012*



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CONSEQUENCES FOR BUSINESS OF FAILING TO ADDRESS HUMAN RIGHTS RISKS



WHAT ARE THE CONSEQUENCES FOR FAILING TO ADDRESS HUMAN RIGHTS RISKS? (1)

- **Legal**

- Human rights litigation
- Criminal prosecution
- Breach of contractual commitments and withdrawal of licences/concessions
- Increasing use of non-judicial mechanisms to bring claims against companies (e.g. OECD NCP process, Ombudsmen, National Human Rights Institutions)
- Possible breach of directors' duties
- Ability of company to comply with reporting requirements

WHAT ARE THE CONSEQUENCES FOR FAILING TO ADDRESS HUMAN RIGHTS RISKS? (2)

- **Operational**
 - Lost productivity due to delay caused by conflict with communities/workers
- **Reputational**
 - Allegations of involvement in human rights abuses can harm a company's reputation
- **Economic**
 - Impact on ability to access financing / new business opportunities
 - Impact on ability to sell assets where there is a legacy of human rights abuse
 - Impact on share price, shareholder activism and divestment

ARBITRATION: PROTECTION OF INVESTORS AND/OR PROTECTION OF HUMAN RIGHTS

- Same legal treaty value (no hierarchy)
- Necessity as a defence (States)
- Stabilisation clauses – revisitation/review of contracts/law
- Fair and Equitable treatment
- Amici curiae

CONCLUDING THOUGHTS

- Treaty v buy-in from lawyers
- Not voluntary and not soft



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