

Part I: Introduction

Chapter One: Background and Project Overview

Globalisation, Business Relationships and Human Rights

This Report takes stock of a range of efforts employed by companies to address the human rights impacts associated with their business relationships (the Report). Behind the big picture of globalisation lies a complex array of individual business relationships, each with specific commercial objectives. This Report begins to explore the implications of the UN Guiding Principles on Business and Human Rights⁴ (Guiding Principles) for these relationships, looking at how responsible business commitments and practices are being integrated at the micro level.

Globalisation and business relationships

A defining characteristic of 21st century globalisation is the dramatic growth and increasing complexity of business relationships, including those that cross borders. This web of commercial transactions affects companies on every scale, and means that businesses have a direct or indirect relationships with hundreds and sometimes tens of thousands of enterprises that are not under their direct control or ownership. Nor is this the only complexity. Though business relationships are most commonly presented as bilateral, in reality a single product, service or project can involve numerous enterprises in a web of multilateral business ties.

The feature of economic globalisation that is most frequently discussed is the way in which businesses have managed risks and rewards by outsourcing activities that traditionally they undertook themselves. In 2010, cross-border non-equity business relationships (through which companies coordinate the activities of other companies without owning a stake in them) are estimated to have generated over \$2 trillion of sales.⁵ These relationships are evident in a wide range of industries and take different forms, including contract manufacturing and farming, service outsourcing, franchising and licensing, management contracts, and supply chains. In the same year, approximately 80% of the 18-21 million workers employed through these arrangements were in developing and transition economies.⁶ Capital flows across borders, in the form of mergers and acquisitions (M&As), joint ventures (JVs), and foreign direct investment, have also grown dramatically. Some 145 cross-border M&As were reported in South Asia alone in 2011, a 131% increase in value over the previous year, as well as 1,045 green field foreign

4 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/ HRC/17/31, 21 March 2011. At: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

5 United Nations Conference on Trade and Development (UNCTAD), World Investment Report – Non-Equity Modes of International Production and Development (2011), p. xix. At: <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>.

6 *Op.cit.*, p. xix-xx. At: <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>.

direct investment projects involving transnational corporations.⁷ All sectors are involved in these relationships. Joint ventures are common in the oil and gas and mining sectors, but they have also multiplied in the automobile, telecommunications, technology and apparel sectors.

Investment is not simply moving from OECD to non-OECD countries. Chinese investment into the European Union tripled between 2006 and 2009, and tripled again by 2011 to \$10 billion (€7.4 billion).⁸ In the last decade, South-South trade and investment has also been on an upward trajectory. Political leaders from ASEAN regularly discuss investment and trade links with their peers in Latin America.⁹

“Downstream” relationships show a similar trend as companies extend their customer-base across many continents. This includes relationships with diverse types of actors, from the individual newly middle-class, or “Bottom of the Pyramid” consumer, to large public institutions.

Business relationships and human rights

Business relationships can spur economic growth, improve efficiency, provide access to technologies and services, and generate opportunities for formal, safer employment. Through their commercial relationships, enterprises can transmit and implement new business practices and innovations. This has been true across a range of core business areas, for example in quality management, lean manufacturing, just-in-time production, and more recently in the spread of ethical and responsible practices (most clearly in health and safety, environment, and anti-corruption).

At the same time, the urgency to address the human rights impacts of business has emerged, for the most part, *precisely in the context of business relationships* – in particular in relation to supply chains. This is not surprising. Business transactions are now frequent in regions where the rule of law is limited or fragile, and where regulatory and policy frameworks are silent or regressive with regard to international human rights standards. Business partners may have very diverse values, levels of capacity, or commitment to legal compliance or international standards of responsible behaviour.

Examples of adverse human rights impacts associated with business relationships include child labour rights abuses in supply chains, violent abuse by security forces, pricing

7 United Nations Conference on Trade and Development (UNCTAD), World Investment Report – Towards a New Generation of Investment Policies (2012), p. xLvi. At: <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

8 The Rhodium Group, China Invests in Europe: Patterns, Impacts and Policy Implications (2012), p. iii. At: http://rhgroup.net/wp-content/uploads/2012/06/RHG_ChinaInvestsInEurope_June2012.pdf.

9 Association of South-East Asian Nations. Note the *ASEAN Latin Business Forum 2012 on July 9-10, 2012* – <http://www.asean-latin2012.com/index.html>; ASEAN Foundation/Inter-American Development Bank project *Sharing of Knowledge between Southeast Asian and Latin American Countries on Trade and Investment* – <http://www.asean-latin2012.com/sharing-of-knowledge-asean-and-latin-america.html>.

regimes that undermine minimum wage commitments, misuse of technology resulting in human rights abuses, violent appropriation of land by government partners, abuse of migrant workers by labour providers, abuses of the right to privacy of customers, and unclear remedies for victims following changes of ownership. Consequences have included civil society campaigns, media criticism, and court cases that seek accountability and assignment of liability between business partners. A significant percentage of OECD National Contact Point (NCP) cases and Alien Tort Statute¹⁰ cases have involved business relationships. The investment community (from institutional investors to shareholder activists) has also taken a keen interest in business relationships.

A growing number of companies recognise the business case for working with partners to integrate responsible business practices. Potential benefits include: reduced operational disruption; efficiency gains; diminished reputational risks (of actual or perceived involvement in human rights abuse); improved access to capital and markets; and the avoidance of legal claims. As a result, some companies have taken action to establish socially sustainable business practices and value chains with their business partners in many sectors, and this is increasingly reflected in policy commitments, codes of conduct, and company assessments and audits. Collective action has been part of the same effort to address human rights in the context of business relationships. Multistakeholder initiatives (such as the Fair Labour Association, the Voluntary Principles on Security and Human Rights, the Kimberley Process, the Global Network Initiative, and the Roundtable on Sustainable Palm Oil) have set standards in certain domains, while specific industries have come together for the same purpose (the Electronics Industry Citizenship Coalition, the International Council on Mining and Metals, the International Petroleum Industry Environmental Conservation Association, and the AIM Progress Program for Responsible Sourcing).

This Report seeks to take stock of these efforts, in the new context that has been created by the United Nations “Protect, Respect, Remedy” Framework (PRR) and Guiding Principles.

The United Nations Protect, Respect, Remedy Framework and Guiding Principles on Business and Human Rights

The UN Framework and Guiding Principles

By adopting the UN PRR Framework and Guiding Principles, governments have reaffirmed their duty to protect against rights abuses involving third parties, including business. Equally important, the UN PRR Framework and Guiding Principles confirm that companies have an independent responsibility to respect human rights. This means that companies have a responsibility to act with due diligence, to avoid infringing the human rights of others, and to address adverse human rights impacts with which they are involved. A company’s responsibility encompasses adverse human rights impacts with which it becomes involved through its business relationships.

10 USC › Title 28 › Part IV › Chapter 85 › § 1350.

This is a key message of the UN PRR Framework¹¹ for business and human rights. The PRR Framework was proposed by Professor John Ruggie, then UN Special Representative for Business and Human Rights (SRSG), and adopted unanimously by the UN Human Rights Council in 2008. It sets out three pillars:

- **Pillar I. The State duty to protect human rights** – against abuses by third parties, including businesses, by means of policies, regulation, and adjudication.
- **Pillar II. The corporate responsibility to respect human rights** – meaning companies should act with due diligence to avoid infringing the rights of others and address adverse human rights impacts with which they are involved.
- **Pillar III. Access to remedy** – which addresses the need for greater access by victims to effective remedies, both judicial and non-judicial.

After completing the PRR Framework in 2008, the SRSG developed the Guiding Principles to facilitate its implementation. These too were adopted unanimously by the UN Human Rights Council, in June 2011.¹² A new UN Working Group on Business and Human Rights was created to lead efforts to disseminate and implement the Guiding Principles and guide the work of an annual forum on business and human rights that will promote international dialogue and cooperation.¹³ Both the PRR Framework and the Guiding Principles enjoy the support of many of the world’s leading business organisations, as well as many civil society organisations, academic experts, and trade unions.

The Framework reinforces norms based on international legal principles and social expectations, providing a foundation for national and international policy and rulemaking, and an authoritative framework for business behaviour. Critically, the PRR Framework emphasises both the obligations of governments and the responsibilities of companies, each having an independent but complementary role. This sends a clear message that a state’s failure to protect human rights does not relieve a business of its responsibility to respect.

The Guiding Principles make clear that a company may be involved with an adverse human rights impact as a consequence of its own activities or through its business relationships. They affirm that companies have a responsibility to respect human rights in both cases, and provide guidance on how to prevent and address such impacts. The Guiding Principles put business relationships squarely on the business and human rights map.

11 Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008. At: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

12 Resolution adopted by the Human Rights Council, 17/4 Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4, 6 July 2011. At: <http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf>.

13 At: <http://www.business-humanrights.org/Documents/UNWorkingGrouponbusinesshumanrights>.

Convergence and alignment

The Guiding Principles have rapidly become an authoritative focal point and have been incorporated into a range of other standards. The OECD Guidelines for Multinational Enterprises were revised in 2011 and now specifically address human rights. Building on the Guiding Principles, they also include business relationships.¹⁴ The OECD's NCPs hear complaints about "specific instances"¹⁵ of corporate implementation of the OECD Guidelines: since business relationships were at the heart of many past complaints, they are likely to become even more prominent as a result. The convergence of standards around the Guiding Principles can be seen in other areas too: in the International Standards Organisation's ISO 26000;¹⁶ in references to the PRR Framework in the updated Performance Standards of the International Finance Corporation (IFC, World Bank Group);¹⁷ in the OECD's Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, which was recently updated¹⁸ and in national legislation and other national and regional initiatives.

The increasing number of references to the Guiding Principles in these and other standards, as well as in business contracts, industry association policies, corporate guidance, and multistakeholder initiatives suggest that a culture of expectation is forming. By extension, given the alignment of standards, businesses are far more likely to face consistent expectations about their responsibility regarding human rights from business partners as well as from governments, investors, and wider society.

Project Description

Overview

In its first *State of Play Report* (2011), which provided a general overview of human rights due diligence, the Institute for Human Rights and Business (IHRB) found that

14 See OECD Guidelines for Multinational Enterprises, 2011 Edition, Page 33, Paragraph 43. At: <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>. See Chapter Two of this report for an overview of how the Guiding Principles treat business relationships.

15 "Specific instances" refers to the process by which NCPs help to resolve issues that relate to implementation of the *Guidelines* and arise in specific company operations. NCPs offer a forum for discussion and are expected to assist the business community, worker organisations, other non-governmental organisations, and other interested parties to resolve such problems in an efficient and timely manner, in accordance with applicable law. OECD Guidelines on Multinational Enterprises, Procedural Guidance, Section C, p. 72.

16 At: <http://www.iso.org/iso/home/standards/iso26000.htm>.

17 See IFC, Performance Standard 1- Assessment and Management of Environmental and Social Risks and Impacts. At: http://www1.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES. See also Guidance Note, Footnote, GN6. At: http://www1.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_FullDocument.pdf?MOD=AJPERES.

18 Recommendation Of The Council On Common Approaches For Officially Supported Export Credits And Environmental And Social Due Diligence (The "Common Approaches"). At: <http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=TAD/ECG%282012%2958&doclanguage=en>.

“the contractual relationships between a company and the state, or directly with other companies are increasingly a key area of focus for human rights due diligence”.¹⁹ This second *State of Play* Report follows up that observation, focusing on six types of business relationship:

- Joint Ventures.
- Mergers, acquisitions and disposals.
- Suppliers and service providers.
- Licensing and franchising.
- Direct customers.
- Investor-state relationships.

Because the links between business relationships and human rights are not well understood or widely debated except in the context of supply chain relationships, IHRB and the Global Business Initiative on Human Rights (GBI) wanted to know more about what companies are doing to implement their responsibility to respect human rights in these business relationships.

Significant as the above relationships are, they comprise only one part of all the relationships of a company. A wider and deeper study would be needed to cover all the business relationships in which companies typically engage, including relationships for inputs and outputs, that manage recruitment of staff and workers, deliver professional services (legal, accounting, back office, consulting, lobbying, tax), and provide finance.

Aims

This “State of Play” Report:

- **Maps current action.** It indicates what a select group of companies is doing to address human rights in their business relationships.
- **Identifies operational challenges.** It names some of the challenges that businesses face when they address human rights impacts in the context of their business relationships.
- **Gives practical examples.** It sets out the approaches that companies are using and, adopting an “open source” approach, suggests what is possible and what tools are available.
- **Opens a discussion.** It reviews how business relationships are defined and framed in the Guiding Principles, discusses how difficult concepts are being interpreted and implemented, and indicates where a systematic effort is needed across all three pillars of the UN PRR Framework.

¹⁹ Institute for Human Rights and Business, “The ‘State of Play’ of Human Rights Due Diligence – Anticipating the Next Five Years”, Volume One: General Overview (2011), p. 31. At: http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf.

Key choices

IHRB, GBI and participating companies made two key choices in designing the project. They decided to:

- **Look beyond contracts.** The project extended its research beyond the content of contracts between business partners, because contracts often do not provide a full picture of the business relationship. Though contracts (or chains of contractual relationships) are the primary means through which businesses formally engage with other entities, they are not the only one. The Guiding Principles and this Report discuss a wide range of actions that companies undertake within and beyond contracts with their business partners.
- **Consider the “life cycle” of relationships.** The Report looks at the beginning, middle and end of business relationships. This is consistent with the Guiding Principles and with the way in which business relationships work in practice.

Methodology

The Report is based on a dialogue with fourteen companies, and a small advisory board, which are identified in the acknowledgements. Information was gathered in confidential interviews and during two confidential roundtables of two days each. While the number of companies that participated is very small, they are large organisations, have a wide geographic spread, and are often considered global leaders in their fields.

The Report only scratches the surface of the complexities of a company’s business relationships, and only begins to suggest how human rights can be integrated in them. It does not attempt to assess the actual human rights impacts of business relationships, positively or negatively, and is not intended to be a legal or normative analysis. Since it is based on discussions with a small sample of companies over a short period, it is not exhaustive.

Observations are based on the information gathered and no attempt has been made to force consensus where it did not exist. Where differences of practice or opinion emerged, this is indicated to the extent possible. Readers should note, therefore, that specific observations do not necessarily apply to particular companies that participated in the research – still less to companies that did not.

The Report has been written by the IHRB and the GBI secretariat, without external editorial control or influence. The IHRB and GBI secretariat accept full responsibility for its content, which does not implicate in any way the companies that participated in the research, members of GBI, the advisors to the project, or the project’s funders.