

Client Alert

Commentary

Latham & Watkins Environmental, Social & Governance Practice

November 21, 2022 | Number 3035

The Future of Human Rights Due Diligence: UNGPs and the Draft Treaty on Business and Human Rights

Human rights due diligence standards are being negotiated at the international level, which may complement or complicate national and regional regulations.

Latham & Watkins is pleased to introduce a series of Clients Alerts on ESG and value chains.¹ This series will address how the shifting ESG landscape is impacting global value chains and provide practical takeaways for companies looking to manage the risks and opportunities. The [first Client Alert](#) focused on increasing regulatory pressure in the US, Europe, and Asia and the resulting compliance challenges. This second Client Alert examines a revised UN draft treaty on business and human rights and offers practical guidance for companies to consider when implementing programs and policies regarding human rights due diligence.

On October 28, 2022, UN Member States concluded negotiations over a third revised draft of a proposed treaty on business and human rights (Draft Treaty).² If adopted, the Draft Treaty would impose legally binding obligations, including for UN Member States (or States Parties) to require business enterprises within their territory, jurisdiction, or otherwise under their control to undertake mandatory human rights due diligence (HRDD) throughout a company's operations.³ In his opening remarks at the negotiations, UN High Commissioner for Human Rights Volker Türk noted that the efforts of the Draft Treaty "were complementary to" the United Nations Guiding Principles on Business and Human Rights (UNGPs).⁴

The Draft Treaty's stated purpose – i.e., to clarify and facilitate the obligation of States to "respect, protect, fulfill and promote human rights" and, for businesses, to clarify and ensure their "respect and fulfillment" of human rights obligations – is similar in language to the "protect, respect, remedy" purpose of the UNGPs framework; the HRDD provisions in both documents also have significant similarities.⁵

Together, they provide a state of play at the international level regarding HRDD processes under international law. Although not legally binding, the UNGPs provide a helpful indication on where the HRDD field likely may be heading — as reflected by the various national and regional HRDD regulatory developments in recent years.

HRDD in the Draft Treaty

The Draft Treaty largely focuses on corporate legal liability (which has proven controversial⁶) and provisions regarding victims' access to remedy.⁷ However, the Draft Treaty also includes provisions on the prevention of human rights abuses. Namely, under Article 6, States Parties would be obligated to

"require business enterprises to undertake human rights due diligence, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships." These obligations would only come into effect if and when the Draft Treaty is finalized, adopted, and ratified. Many of these provisions align with the UNGPs, as explained further below.

The Draft Treaty elaborates that the mandatory HRDD process would need to include:

- identifying, assessing, and publishing any actual or potential human rights abuses that may arise from business activities, or from business relationships;
- taking steps to avoid, prevent, and mitigate actual or potential human rights abuses;
- monitoring the effectiveness of these measures; and
- communicating regularly to stakeholders, particularly to affected or potentially affected persons.

Under the Draft Treaty, States Parties would be obligated to ensure that their HRDD processes include a mandate for public reporting by companies on "non-financial matters." The Draft Treaty envisions that such public reporting would cover information about group structures and suppliers as well as policies, risks, outcomes, and indicators concerning how human rights, labor rights, and health, environmental, and climate change standards are integrated throughout operations and business relationships, including how HRDD is integrated into business relationship contracts. The Draft Treaty also would mandate adoption of enhanced HRDD measures in occupied or conflict-affected areas. Implementation of these provisions would be left to States Parties under Article 16.

After eight rounds of negotiations, the Draft Treaty continues to face substantial opposition among States Parties, and it is unclear if, when, or how the entire treaty process will conclude.⁸ Following the conclusion of this round of negotiations on October 28, participating States Parties were expected to provide comments on the negotiation session summary by November 14. The Draft Treaty is expected to be subsequently updated and circulated, and a program of work to be formulated for the next negotiation session.

"Protect, Respect, Remedy" Framework of the UNGPs

Compared to the Draft Treaty, the UNGPs have been more openly received by UN Member States with advanced economies. Indeed, the US Department of State issued guidance in 2020 encouraging American businesses to integrate HRDD, in line with the UNGPs, into their export compliance programs in order to identify and mitigate human rights risks.⁹ At the Draft Treaty negotiations this year, the United States stated that while it remains concerned about the Draft Treaty text as a whole, it continues to believe in "a less prescriptive approach, more akin to a framework agreement, that builds upon the UNGPs."¹⁰

The UNGPs broadly establish a "protect, respect, remedy" framework whereby States have a primary duty to protect human rights and businesses have a responsibility to respect them. Under this framework, an HRDD process would be used to identify, prevent, mitigate, and account for how a company addresses its impacts on human rights.¹¹ This is a four-step process that includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking the efficacy of the company's response, and communicating how impacts are addressed.¹²

While the UNGPs are not legally binding, they were endorsed by consensus at the UN Human Rights Council. Moreover, the UNGPs are increasingly incorporated into regulations and government-issued guidance, as well as in commercial agreements and company policies and processes, around the world.¹³ Additionally, “[s]hareholder resolutions increasingly call on companies to implement the [UNGPs], and some of the world’s largest asset managers have cast votes in favour of human rights due diligence in the past two years.”¹⁴ Arguably, the uptake of the UNGPs, which were endorsed 10 years ago, has been “swift and widespread, compared to other complex and contested areas, such as climate change.”¹⁵

Best Practices From the UNGPs and Draft Treaty

Despite some notable differences between the two documents, the Draft Treaty and the UNGPs have instructive similarities.¹⁶ First, both texts recognize the important role of business entities in conducting HRDD. In the UNGPs, HRDD is a key tool to identify, prevent, mitigate, and account for adverse human rights impacts; similarly, in the Draft Treaty, HRDD would serve the function of fulfilling States Parties’ obligations to ensure that business enterprises respect internationally recognized human rights and prevent and mitigate human rights abuses.¹⁷ Second, the scope and component parts of the HRDD process look similar across both documents. HRDD involves not just a business’s own operations, but also its business relationships, which implicates suppliers, distributors, and partners across a company’s value chain. In both documents, HRDD also includes assessing and accounting for actual and potential human rights impacts. Stakeholder engagement by way of meaningful consultations with affected groups and individuals also features in both documents.

These criteria pose significant practical challenges for companies, especially when consistent and accurate data may be unavailable across complex supply chains or companies may not own or control their value chains. That said, companies can consider deploying a variety of methodologies to effectuate a constructive due diligence process, and one that is tailored to the specific industry, product, geography, and other applicable contextual factors. For example, the supply chains for polysilicon (an essential material for semiconductors and for the photovoltaic sector) extend considerably into the Xinjiang region of China, and therefore are likely to be especially impacted by the Uyghur Forced Labor Prevention Act (UFLPA). Labor shortages present other risks, particularly in countries where the cost of labor is lower.¹⁸

Despite international pushback against the Draft Treaty, many regional and national authorities have recently passed HRDD laws and related disclosure that draw upon the foundational principals captured in the voluntary UNGPs, which as noted above, have a number of similarities to the Draft Treaty. The European Commission’s proposed ban on products made from forced labor (explained in this Latham [blog post](#)) and the UFLPA (explained in this Latham [blog post](#)) are notable examples. More recently, on September 13, 2022, Japan published its “Guidelines on Respecting Human Rights in Responsible Supply Chains,” which, although not legally binding, provide guidance to all business enterprises engaging in business activities in Japan.¹⁹ Looking ahead, the German Supply Chain Act, which imposes human rights and environmental due diligence obligations on certain large companies incorporated in Germany, will come into force on January 1, 2023.²⁰ Under the circumstances, companies may want to familiarize themselves with the UNGPs and consider what their principles would look like in practice.

UNGP Guidance: HRDD in Practice

Broadly speaking, HRDD programs aim to leverage the findings of human rights assessments to create policies and procedures for managing risks and remedying harm. An HRDD assessment would generally focus on the scope, severity, and remediability of the potential harm,²¹ and the company’s ability to manage human rights risks, including through evaluation of any gaps in existing policies, procedures, and practices.²² Depending on the objectives, corporate-wide assessment may be used to identify human

rights risks across the entire value chain, or instead, a more targeted assessment that is market-, product-, or site-specific may be appropriate. The UNGPs note that where it may be unreasonably difficult to conduct due diligence, business enterprises can identify general areas where the risk of adverse human rights impacts is most significant and prioritize these.²³ Regardless of the approach, meaningful engagement with stakeholders, such as employees, customers, shareholders, and regulators, would be increasingly necessary. The voluntary UNGPs also envision that stakeholder engagement will incorporate in some way principles of diversity, equity, and inclusion to identify differentiated human rights impacts and develop measures to appropriately address these impacts.

Once the risks are identified and prioritized, including any gaps in governance, an effective due diligence program will look to develop recommendations so that assessment findings are integrated across all relevant functions of the business and responsibility for implementing such recommendations is assigned. Action to address human rights impacts may depend on many variables, including the degree to which a company causes or contributes to an adverse human rights impact, through its direct actions or through its supply chains.²⁴ Companies committing to appropriate action will need to allot sufficient resources to not only implement but also monitor mitigation measures through appropriate accountability and oversight. The UNGPs urge that due consideration also be given to communicating to internal stakeholders and, possibly, the general public, as to how the company is addressing issues identified through its due diligence process.

Regarding business legal practice, the UNGPs may be relevant in the areas of corporate governance; reporting, internal controls, and disclosure; procurement, contracts, and agreements; land acquisition; resource exploration and extraction; and labor and employment. Public disclosure laws and regulations — including in the US, EU, UK, France, Denmark, and India — are increasingly requiring disclosure of a company's human rights policies, processes, and performance. In-house and outside counsel can advise companies on those disclosure laws and regulations as well as the design and implementation of compliance controls, risk management systems, and policies and procedures. Relatedly, lawyers can work to ensure that the company appropriately structures its supply chain agreements to help prevent and mitigate human rights impacts.

Conclusion

Under the voluntary UNGPs, companies are responsible for human rights impacts to not only investors but also society at large. That same principle is reflected in recent and upcoming national and regional ESG legislation. An HRDD program can be one tool used to achieve these objectives, while also growing a company's enterprise value and strengthening its overall sustainability in this shifting regulatory landscape.

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Endnotes

¹ In this Client Alert series, the term “value chains” is used in a general, colloquial sense to encompass not only value chain concepts pertaining to consumers, but also to encompass supply chains in the fullest sense (i.e., not only direct suppliers, but also upstream and downstream suppliers and other supply chain actors, ranging from retailers to end users to post-end user entities, such as recyclers).

² In 2014, the UN's Human Rights Council adopted a resolution to establish an intergovernmental working group on “transnational corporations and other business enterprises with respect to human rights” with a mandate to elaborate on a legally binding treaty. Since then, the intergovernmental working group and participating UN Member States have met seven times. This year, they deliberated on the third revised draft of the treaty.

³ Countries bound by an international agreement are referred to as States Parties.

⁴ The UN High Commissioner for Human Rights noted that the UNGPs call for “a smart mix of measures,” i.e., both national and international, mandatory and voluntary, measures to foster business respect for human rights. See Human Rights Council, “Report on the Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights” (October 28, 2022). Available here: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8>. The Office of the UN High Commissioner (OHCHR) in its website states that “OHCHR believes the treaty and the UN Guiding Principles on Business and Human Rights (UNGPs) can be and should be mutually reinforcing and complementary.” See <https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process>.

⁵ Article 2 of the Draft Treaty states that the treaty’s purpose is to clarify and facilitate the obligation of States to “respect, protect, fulfill and promote human rights” and, for businesses, to clarify and ensure their “respect and fulfillment” of human rights obligations.

⁶ In 2020, the US Mission in Geneva issued a press release declining participation in that year’s draft treaty negotiations over procedural and substantive concerns including “its imposition of binding obligations on all parties; its extraterritorial application of domestic laws; and its broad criminal liability for an undefined range of human rights abuses.” See

<https://geneva.usmission.gov/2020/10/26/the-u-s-governments-opposition-to-the-business-and-human-rights-treaty-process/>.

The United States participated in the negotiation for the second time this year, but made the statement that the Draft Treaty “remain[s] prescriptive” with “overly broad jurisdictional provisions, unclear liability provisions, and potential criminalization of an ill-defined range of human rights abuses.” See Oral Statement of the United States. See also Oral Statement of Japan for arguments against the Draft Treaty along similar lines. Available here: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8/oral-statements>.

⁷ One of the main stated purposes of the Draft Treaty is to ensure access to justice and effective, adequate, and timely remedy for victims of human rights abuses in the context of business activity. Under Article 8, States Parties are obligated to ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities and under Article 9, jurisdiction for relevant claims shall vest where the alleged human rights abuse occurred, or where the act or omission contributing to the abuse occurred; where the legal or natural persons alleged to have committed the abuse are domiciled, or where the victim is a national of or is domiciled. Proponents of the Draft Treaty argue that it would fill gaps in international law, especially around victims’ access to justice and remedy, and that a binding treaty would provide legal certainty and enforceability that non-binding soft laws do not. See Human Rights Council, “Report on the Eighth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights” (October 28, 2022).

⁸ See footnote 6.

⁹ “On September 30, 2020, the US Department of State issued non-binding “Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities” (the Guidance). The Guidance acknowledges that human rights risks exist when products or services are exported to foreign government or private end-users that have close relationships with governments that do not demonstrate respect for human rights or the rule of law. “Downstream” human rights impacts can include stifling of dissent, intimidation of minority communities, and arbitrary or unlawful interference with privacy. <https://www.cov.com/-/media/files/corporate/publications/2020/10/business-and-human-rights-global-developments.pdf>.

¹⁰ Oral Statement of the United States, available here: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session8/oral-statements>.

¹¹ Principle 15(b).

¹² Principles 18, 19, 20, and 21, respectively.

¹³ Examples include: the 2013 revisions to the UK Companies Act requiring listed companies to report human rights issues where necessary to understand the company’s business; the 2015 UK Modern Slavery Act; the European Parliament’s 2014 Directive requiring 6,000 large public enterprises to report on their human rights performance; government policy developments, including the Recommendations of the Committee of Ministers of the Council of Europe on human rights and business in 2016; the issuance of National Action Plans on business and human rights; the endorsement of the UNGPs by the G7 Leaders in 2015; and international standard-setting bodies (such as the OECD Guidelines for Multinational Enterprises). <https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4>.

¹⁴ <https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>.

¹⁵ Even before the UNGPs were endorsed, much of their content was already legally required under domestic law in areas such as antidiscrimination, workers’ rights, workplace and public health and safety, and privacy. <https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4>.

¹⁶ For example, in terms of difference, the Draft Treaty obligates States Parties to ensure public reporting of non-financial matters, while the UNGPs expect public reporting only “where risks of severe human rights impacts exist.” Article 6.4(e); Principal 21. The Draft Treaty obligates States Parties to ensure that HRDD requirements are integrated into “contracts regarding their business relationships,” while the UNGPs offer more flexible guidance for businesses to ensure that their “human rights policy commitment has been embedded into all relevant business functions.” Article 6.4(f); Principal 19.

¹⁷ UNGP Principle 17 versus Draft Treaty, Article 6.2.

¹⁸ If passed, the EC’s HREDD proposal could bring companies in certain “high impact sectors” under its regulatory scope. These sectors have been identified as having high risk of adverse impact, and are namely (i) textiles, clothing, and footwear, (ii) agriculture, food products, forestry, and fisheries, and (iii) mineral resources (including crude petroleum, coal, and gas). Companies in these sectors may want to understand sector-specific human rights risks and seek out due diligence methodologies tailored to their needs.

¹⁹ The Guidelines recommend that Japanese companies (1) establish a human rights policy; (2) conduct human rights due diligence, and (3) establish a grievance mechanism for individuals to seek remedies for adverse impacts caused by the company. The Guidelines are a result of a study group on guidelines for respecting human rights in supply chains that was hosted by Japan’s Ministry of Economy, Trade and Industry in March, followed by a period of public comments. The human rights due diligence recommendations in the Guidelines closely follow those of the UNGPs.

²⁰ Under the Act, companies are required to analyze the risks within their supply chains (such as risk regarding child labor, forced labor, and worker safety), including risks with direct suppliers, and also to take steps to remedy and provide grievance mechanisms for identified impacts on human rights. Indirect suppliers are also covered if the company finds “substantiated knowledge” of a potential abuse.

²¹ Principle 14.

²² Principle 19.

²³ Principal 17.

²⁴ <https://www.bsr.org/en/our-insights/report-view/human-rights-assessments-identifying-risks-informing-strategy>.