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## 1. Introduction

Following [the previous article](#), this article provides commentary on the significance of respecting human rights (1.2), scope of "human rights" (2.1.2.1), and "efforts to respect human rights" (2.2) in the Japanese Government's Human Rights Due Diligence Guidelines (the "**Guidelines**").

## 2. The Significance of respecting human rights (1.2)

The Guidelines proclaim that "all business enterprises have the corporate responsibility regardless of their size, sector, operational context, ownership, and structure", and "business efforts to respect human rights should, needless to say, aim to prevent, mitigate, and remedy adverse human rights impacts from business activities<sup>1</sup>" (1.2, paras. 1 and 2).

In addition, the Guidelines indicate that as a result of continuing to meet their responsibility to respect human rights, business enterprises can, *inter alia*, maintain and acquire corporate value (para. 2), reduce management risks such as boycotts (para. 3), further strengthen responses to foreign regulations concerning human rights (para. 4), and benefit from improvement of the corporate brand image (para. 5).

Even though the Guidelines enumerate the various benefits above, those benefits are but the "result" of performing the responsibility to respect human rights (paras. 2, 5, and 6). It should always be recalled that **the purpose of respecting human rights is to prevent, mitigate, and remedy adverse impacts on human rights.**

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<sup>1</sup> It has been pointed out in the public comments that "all in all, the tone of the draft is too business enterprise oriented...(omitted) the Guidelines should be organized in such a way that stresses the utmost importance of 'addressing the risk of abuses' and 'contribution to a socially sustainable globalization', true to the UN Guiding Principles," (Ministry of Economy, Trade and Industry, "[Result of the public comment on the draft of the guidelines on respecting human rights in responsible supply chains](#)", p.11 (only in Japanese)). The sentence, "business efforts to respect human rights should, needless to say, aim to prevent, mitigate, and remedy adverse human rights impacts from business activities" has been presumably inserted to respond to such remarks.

### 3. Scope of “human rights” (2.1.2.1)

#### (1) “Human rights” to be respected by business enterprises

In the Guidelines, the phrase “human rights to be respected by business enterprises” refers to internationally recognized human rights, and includes, at a minimum, those expressed in the International Bill of Human Rights, and the principles concerning fundamental rights as stated in the “ILO Declaration of Fundamental Principles and Rights at Work” (2.1.2.1 para. 1).

The Guidelines refer to “freedom from forced labour or child labour, freedom of association, the right to collective bargaining, freedom from discrimination in employment and occupation, freedom of movement and residence, freedom from discrimination on the grounds of race, disability, religion, social origin, sex or gender”, as examples of “internationally recognized human rights” (para. 2).

However, the list of human rights above is not exhaustive, and we have to bear in mind that “human rights to be respected by business enterprises” also include such human rights as follows:<sup>2</sup>

- Right not to be subjected to imprisonment for inability to fulfil a contract (Art. 11, International Covenant on Civil and Political Rights).
- Right to privacy (Art. 17, *Id.*)
- Rights to freedom of thought, conscience and religion (Art. 18, *Id.*)
- Rights to freedom of opinion and expression (Art. 19, *Id.*)
- Rights to freedom from war propaganda, and freedom from incitement to racial, religious or national hatred (Art. 20, *Id.*)
- Right to freedom of assembly (Art. 21, *Id.*)
- Rights of protection of the family and the right to marry (Art. 23, *Id.*)
- Rights of protection for the child (Art. 24, *Id.*)
- Rights to participate in public life (Art. 25, *Id.*)
- Rights of minorities (Art. 27, *Id.*)
- Right to social security, including social insurance (Art. 9, International Covenant on Economic, Social and Cultural Rights)
- Right to a family life (Art. 10, *Id.*)
- Right to take part in cultural life, to benefit from scientific progress, and of the material and moral rights of authors and investors (Art. 15, *Id.*)

As emphasized above, we have to pay attention to the fact that **the corporate responsibility to respect human rights is applicable to every internationally recognized human right.**<sup>3</sup>

In addition, it is necessary to address those human rights based on the order of priority (2.2.4), which requires each company to consider appropriate measures “in light of its situation and other factors” (para. 4). This prioritization should be given by considering individual circumstances, as described in paragraph 4.1.3 of this

<sup>2</sup> Annex I of the “[The Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#)” (hereinafter, “the Interpretive Guide”) provides a comprehensive list of human rights as stated in the International Bill of Human Rights and ILO Declaration of Fundamental Principles and Rights at Work.

Also, the report below is a useful reference material, since it carefully examines the relationship between business and individual human rights as stated in the International Bill of Human Rights.

[Castan Centre for Human Rights Law, Office of the High Commissioner for Human Rights, United Nations Global Compact, Human Rights Translated 2.0: A Business Reference Guide, 2017](#)

<sup>3</sup> The Interpretive Guide, pp.12-13

Guideline. For example, Guideline 2.1.2.1 states that suppliers in countries and regions with weak protection of human rights “need to pay particular attention” to forced labour and child labour, and that priority “may” be given to them (it is worth noting that such prioritization is advised only “in general” (para. 2)).

## (2) The Relationship between the Corporate Responsibility to Respect Human Rights and Compliance with Applicable Laws

The Guidelines also point out that compliance with national laws and regulations does not necessarily imply that the corporate responsibility to respect human rights has been satisfied (2.1.2.1 para. 4). In this regard, Principle 23 of the UN Guiding Principles stipulates as follows:<sup>4</sup>

23. In all contexts, business enterprises should:
  - (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
  - (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
  - (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

The principle above means that **business enterprises should operate in accordance with the internationally recognized standard of human rights, and that it is not sufficient to merely follow the national laws in a country where such a standard has not been established**.<sup>5</sup> The UN Guiding Principles also remark that the corporate responsibility to respect human rights exists over and above compliance with national laws and regulations protecting human rights.<sup>6</sup> Those provisions have been adopted to cope with the governance gap with respect to human rights, especially the problem of fragmentation of human security under the sovereign state system.

Therefore, business enterprises have the responsibility to respect internationally recognized human rights even in a country where related national laws are non-existent or insufficient.<sup>7</sup> Using the Guidelines’ expression, if the laws and regulations of a country do not appropriately protect internationally recognized human rights, business enterprises “will need to seek ways to respect internationally recognized human rights to the greatest extent possible.” (2.1.2.1 para. 4).

## 4. Efforts to respect human rights (2.2)

In this part (2.2), the Guidelines list some factors for the performance of the corporate responsibility to respect human rights. Here is an overview of this part. In-depth analyses for each factor will be provided in forthcoming articles.

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<sup>4</sup> Principle 23 of [the UN Guiding Principles](#)

<sup>5</sup> The Interpretive Guide, p.77

<sup>6</sup> Commentary of Principle 11 of the UN Guiding Principles

<sup>7</sup> The Interpretive Guide, p.77

**(1) Management’s commitment is extremely important (2.2.1)**

In this section (2.2.1), the Guidelines emphasize that management’s (including top executives) commitment to and continuous engagement in efforts to respect human rights are “essential”, especially since such efforts should pervade every aspect of business enterprise activities.

The UN Guiding Principles also require that the commitment to meet the corporate responsibility to respect human rights be approved at the most senior level of the business enterprise,<sup>8</sup> reflecting management’s belief in the importance of the commitment.

**(2) Adverse impact potential exist within every business enterprise (2.2.2)**

The Guidelines state in this section (2.2.2) that business enterprises should engage in efforts to respect human rights, **on the assumption of the existence of any potentially adverse impact within any business enterprise at all times**. This statement is a reminder that corporate responsibility to respect human rights is applicable to every sector,<sup>9</sup> and that human rights due diligence should be ongoing.<sup>10</sup>

**(3) Dialogues with stakeholders are important for efforts to respect human rights (2.2.3)**

This section (2.2.3) describes the significance of dialogues with stakeholders in the efforts to respect human rights, including human rights due diligence. The term “dialogues with stakeholders” in the Guidelines is used in the same sense as “stakeholder engagement”, which refers to the “ongoing process of interaction and dialogue between a business enterprise and its stakeholders<sup>11</sup>”. **Dialogues with stakeholders are characterized by two-way communication, and the good faith of all parties is vital for the dialogues to be meaningful.**<sup>12</sup>

**(4) Having an approach to addressing adverse human rights impacts sequentially based on the order of priority is important (2.2.4)**

In this section (2.2.4), it is stated that in light of the fact that it is difficult for business enterprises to immediately implement all efforts, given the limitations of their resources, they should prioritize the most serious adverse impacts on human rights.<sup>13</sup>

As for how to prioritize the adverse impacts, the Guidelines emphasize that (i) business enterprises should recognize the final goal of their efforts to respect human rights (namely, business enterprises have to implement all the efforts required by the Guidelines), and that (ii) each business enterprise needs to consider appropriate measures based on its own situation since there is no single answer.<sup>14</sup>

For business enterprises, it is important to recognize that “as soon as the most severe impacts are addressed, the enterprise should turn to those with the next greatest severity and so on until it has addressed

<sup>8</sup> Principle 16(a) of the UN Guiding Principles

<sup>9</sup> The Interpretive Guide, pp.12-13

<sup>10</sup> Principle 17(c) of the UN Guiding Principles

<sup>11</sup> Footnote 22 of the Guidelines

<sup>12</sup> [OECD Due Diligence Guidance for Responsible Business Conduct](#), pp.18-19

<sup>13</sup> Principle 24 of the UN Guiding Principles

<sup>14</sup> Such understanding is implied by Footnote 39 of the Guidelines stating, “it is an example of the idea of priority order in cases where there are multiple adverse impacts with high priority. This does not necessarily mean ruling out other ideas.”

all its actual and potential impacts on human rights<sup>15</sup>, “addressing the issues deemed the most severe in no way implies that other human rights impact identified through the enterprise’s due diligence process do not need to be addressed<sup>16</sup>”, and that **the prioritization is only a passing point of a continuing process to respect human rights.**

In considering “appropriate efforts in light of its status, etc.” (para. 4), it is essential to note that prioritization should be made while recognizing that the situation regarding adverse impacts changes over time.<sup>17</sup>

#### **(5) It is important that each business enterprise cooperates in respecting human rights (2.2.5)**


The Guidelines point out in this section (2.2.5) that it is important for business enterprises to implement efforts to respect human rights in cooperation with their business partners, and examples of such initiative are suggested (paras. 1 and 2).

It is also mentioned that when a business enterprise unilaterally imposes an excessive burden on its business partners, it may be in violation of the Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors<sup>18</sup> and the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade<sup>19</sup> (para. 3).

In addition, the mode of cooperation among companies may include not only efforts with suppliers but also collaboration and cooperation among competitors. Competition law issues also need to be taken into account in such horizontal relationships.<sup>20</sup>

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<sup>15</sup> The Interpretive Guide, p.82

<sup>16</sup> The Interpretive Guide, p.84

<sup>17</sup> Principle 17(b) and (c) of the UN Guiding Principles

<sup>18</sup> Tentative English translation of the Act is available [here](#).

<sup>19</sup> Tentative English translation of the Act is available [here](#).

The Guidelines refer to the Small and Medium Enterprise Agency’s [Guidelines for Promoting Appropriate Subcontracting Transactions](#) (only in Japanese) in this respect.

<sup>20</sup> Regarding the relationship between the efforts to respect human rights and competition law, OECD Due Diligence Guidance for Responsible Business Conduct, pp.53-54 is also a handy reference.