

Guidance on Human Rights Due Diligence

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Japan Federation of Bar Associations

Introduction

In response to the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (“Guiding Principles”), which were endorsed by the United Nations Human Rights Council in June 2011, we, the Japan Federation of Bar Associations, hereby publish, based on the Guiding Principles, our Guidance on Human Rights Due Diligence (“Guidance”) to assist Japanese corporations in satisfying their responsibility to respect human rights.¹

1. Purpose of the Guidance

In Japan, in keeping with the “corporate social responsibility” (CSR) movement, environmental stewardship and societal contributions were initially considered the central issues for business management. However, since the United Nations Human Rights Council’s unanimous endorsement of the Guiding Principles, which call on business enterprises to fulfill their responsibility to respect human rights, the issue of human rights has become a key business management issue, and modern corporations must seriously address this important responsibility.

The Guiding Principles use “internationally recognized human rights” as the basis for human rights that should be respected by business enterprises. In the international human rights arena, there is a substantial gap between the Guiding Principles and the current state of affairs in Japan, which has not ratified a number of international human rights treaties and/or conventions. Therefore, in order for Japanese corporations and other business enterprises to fulfill their responsibility to respect human rights based on the Guiding Principles, they need to create *organizations highly sensitive to human rights* through ongoing discovery of new risks and continuous organizational learning, knowing that there are endless human rights challenges they have not yet faced. This will prevent the occurrence of human rights issues that might interfere with the sustainable growth of businesses and society, making it important to discover where human rights challenges exist and rethink, based on the Guiding Principles, how those challenges are being addressed.

The Guiding Principles position the duty of business enterprises to respect “internationally recognized human rights” as *existing over and above compliance with national laws and regulations*, and ask enterprises to treat the risk of causing or contributing to a gross violation of human rights as a *legal compliance issue*. Accordingly, we, the Japan Federation of Bar Associations, whose membership comprises lawyers, decided to create this Guidance to assist both Japanese corporations and lawyers giving

1. In 2008, the Japan Federation of Bar Associations published the Corporate Social Responsibility (CSR) Guidelines, v. 2007. The Guidelines were later revised (v. 2009). This current Guidance for Human Rights Due Diligence is published as the result of activities extending from the Corporate Social Responsibility (CSR) Guidelines.

legal advice to such corporations regarding how best to address their duty to respect human rights and incorporate human rights obligations into their business operations and legal compliance practices, in accordance with the Guiding Principles.

2. Points to Note in the Guidance

In this Guidance, we use the term “human rights due diligence” used in the Guiding Principles. Because the term “due diligence” in Japanese corporate practices is generally used to refer to tasks performed when acquiring a business in order to investigate and assess the value and potential risks of the business from operational, financial, legal, contractual, human resources/labor and environmental perspectives, some people understand the ‘human rights due diligence’ to mean something similar to “a third-party certification process based on international standards.” However, this is incorrect.

The term “due diligence” originally means “actions or efforts carried out to exercise care appropriate to one’s position (in order to avoid or mitigate negative impacts).” In the Guiding Principles, the term “due diligence” refers to “systems and programs for decision-making and business operations used by corporate leadership to ensure that they exercise due care appropriate for their positions,” which provide criteria to determine whether or not corporate responsibility exists. This means, in other words, *internal controls regarding human rights risks*.

This Guidance describes in specific terms how companies should incorporate human rights initiatives into their internal control systems.

3. Features of the Guidance – CSR Clause Proposal

This Guidance provides a model CSR clause for supplier contracts as well as an in-depth discussion of its legal basis. A CSR clause is the clause that obligates the supplier in a supply contract to comply with CSR-compliant procurement practices and codes of conduct. Today, where the need for compliance with human rights and CSR responsibilities is rapidly increasing, a CSR clause can serve various functions as a legal tool that effectively promotes compliance with human rights and CSR responsibilities throughout the supply chain. Including a CSR clause into a supply contract can provide an important opportunity for corporate legal departments and top executives, with the legal support of attorneys, to implement human rights due diligence. It is hoped that companies will strongly consider including a CSR clause in their supply contracts, based on an accurate understanding of its legal rationale.

4. How to Use the Guidance

It is expected that this Guidance will serve as guidelines for companies and lawyers to follow when creating internal control systems to assess human rights risks and avoid or mitigate negative impacts based on the Guiding Principles. It is also expected that the Guidance will be used not only in corporate

business activities but also in transactions with parties such as suppliers, contractors, customers, borrowers and business partners, as well as in business acquisitions, as a means to evaluate whether or not the other party's activities are in compliance with its human rights responsibility and guide both parties toward optimal outcomes.

5. Process of Creation of the Guidance

In drafting this Guidance, we collaborated with nongovernment organizations (NGOs) active in the promotion of human rights and held numerous meetings with them to discuss important issues. The draft was reviewed by and finalized through dialogue with a number of Japanese companies that are members of the Global Compact Japan Network, as well as other interested parties such as the Business and Human Rights in Emerging Markets Study Group of the Institute of Developing Economies, Japan External Trade Organization (IDE-JETRO). We extend our sincere appreciation to the help and support offered by all participating parties.

6. Construction of the Guidance

The Guidance explains in **Chapter 1** the significance of the endorsement of the Guiding Principles by the United Nations Human Rights Council and provides an overview of the responsibility of business enterprises to respect human rights, as called for by the Guiding Principles. It then explains in specific terms the increasing need and importance of corporate efforts to respect human rights based on the Guiding Principles, and particularly the increased need for business enterprises to comply with their human rights-related and social responsibilities throughout the entire supply chain.

Chapter 2 describes specific methods that business enterprises should use to treat the responsibility to respect human rights as a legal compliance issue. The chapter first clearly identifies internationally-recognized human rights which must be respected by business enterprises based on the Guiding Principles, and illustrates the priorities and human rights rules that must be followed. It then describes a framework for identifying human rights risks in business activities and promoting assessment of their impacts.

Chapter 3 provides practical advice with regard to human rights due diligence. Clarification is provided via specific examples and questions and answers regarding how companies can integrate management practices and human rights considerations in order to incorporate solutions to human rights challenges into their business operations. Concrete steps to follow and important points in promoting human rights compliance in accordance with the three key component elements of the Guiding Principles are also discussed.

Chapter 4 provides examples of companies' compliance with their human rights responsibilities. Examples of implementation of human rights initiatives within the supply chain are first introduced. Also provided are specific examples of the fulfillment of corporate human rights responsibility focusing on various stakeholder groups, an overview of Women's Empowerment Principles and Children's Rights and Business Principles, and actual examples of companies successfully incorporating these principles into their business operations.

Chapter 5 proposes a model CSR clause for supplier contracts and discusses the legal rationale for the inclusion of such clause. The chapter discusses a preferred CSR clause and legal issues related thereto via comparison with a so-called OCE clause (Organized Crime Elimination clause), which many Japanese businesses have introduced into their supplier contracts.

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Chapter 1

Endorsement of the Guiding Principles and Need for Business Enterprises to Respect Human Rights

1.1. Endorsement of the Guiding Principles by the United Nations Human Rights Council

On June 16, 2011, the United Nations Human Rights Council unanimously approved the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (UN Doc A/HRC/17/31, March 21, 2011) (“Guiding Principles”). As the international standard to be met by all States and entities, the Guiding Principles have a significant practical impact on corporate activities.

In tandem with the increased globalization of business activities in such areas as resource development, agribusiness, factory labor and transnational distribution of products, the issue of business and human rights began to arise both in countries where business enterprises have headquarters (i.e., developed countries) and in countries into which they newly enter (i.e., developing countries), and came to the forefront of the global policy agenda in the 1990’s.

One early United Nations-based initiative was the drafting of a corporate code of conduct by an expert body formed under the auspices of the Commission on Human Rights. Because this code sought to utilize international law to impose on business enterprises the same range of human rights obligations that States have accepted for themselves under treaties they have ratified, it triggered resistance from the business community and did not come to fruition.

Dr. John Ruggie, who was appointed the United Nations Secretary-General's Special Representative for Business and Human Rights in 2005, received unanimous support from the Human Rights Council for a proposed United Nations “Protect, Respect and Remedy” Framework in 2008. This proposal came to be widely endorsed or employed by various State governments, business enterprises and associations, civil society and labor organizations, etc. The “Protect, Respect and Remedy” Framework was effectively incorporated into the ISO 26000 (“Social Responsibility Guidance Standard”) issued in 2010 by the International Organization for Standardization (ISO) and into the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises revised in 2011.

The United Nations Human Rights Council then requested that Dr. Ruggie develop specific principles for the implementation of the Framework. In response, Dr. Ruggie submitted the Guiding Principles to the Council. The Guiding Principles were unanimously endorsed by the Human Rights Council on June 16, 2011 (Resolution 17/4) and became an international standard applicable to all States and business enterprises.

1.2. General Principles and Scope of the Guiding Principles

1.2.1. General Principles

The Guiding Principles present the following three pillars in the general principles section.

(a) The State duty to protect human rights (Protect) – State’s existing obligations to respect, protect, and fulfill human rights and fundamental freedoms

Based on this pillar, States are required to formulate a national action plan.

(b) The corporate responsibility to respect human rights (Respect) – The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights

Based on this pillar, corporations and other business enterprises are required to formulate a human rights policy and implement human rights due diligence.

(c) Access to remedy (Remedy) – The need for rights and obligations to be matched to appropriate and effective remedies when breached

Based on this pillar, States are required to establish a national human rights institution and business enterprises grievance mechanisms.

1.2.2. Scope of Application

The Commentary to the General Principles Section of the Guiding Principles proclaims that the Guiding Principles *apply to all States and business enterprises*, both national and transnational, regardless of their size, sector, location, ownership, or structure.

1.3. Overview of the Corporate Responsibility to Respect Human Rights

As noted in Section 1.2 of this Guidance, the Guiding Principles provide that business enterprises should fulfill their responsibility to respect human rights. This corporate responsibility to respect human rights is described below.

1.3.1. Specifics of Human Rights to be Respected

Guiding Principle 12 proclaims that the responsibility of business enterprises to respect human rights refers to “internationally recognized human rights,” making it a responsibility that transcends national legal frameworks. While basic human rights predate the concept of a nation-state, the scope and extent of the guarantee of such rights vary from State to State based on the State’s legal system and institutions (such as its courts). However, the Guiding Principles regard human rights protected therein as “internationally recognized” and determines the extent of such rights without regard to national boundaries. As such, the Guiding Principles encompass all internationally recognized human rights, including those in so-called gray areas, or those that may not be recognized by national law provisions or in the jurisdiction where the business enterprise is founded or does business.

The Commentary to Principle 11 points out, “The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate . . . [which]

exists over and above compliance with national laws and regulations protecting human rights.” In essence, the responsibility of business enterprises to respect human rights is deemed to supersede the obligations to comply with relevant national laws and regulations. Principle 23 requires that business enterprises prioritize respect for internationally recognized human rights over compliance with applicable national laws, as shown below.^{2,3}

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 honor the principles of internationally recognized human rights when faced with conflicting requirements.

The requirement of the Guiding Principles that business enterprises treat their responsibility to respect human rights as superseding their obligation to comply with applicable national laws, as described below, provides a theoretical basis for Principle 23(c), which calls on enterprises to treat the risk of causing or contributing to gross human rights violation as a legal compliance issue in connection with “internationally recognized human rights.”

The human rights rules and internationally recognized human rights to be respected by business enterprises are specifically described in Chapter 2.

1.3.2. Basic Requirements of the Responsibility to Respect Human Rights

Principle 13 identifies two basic requirements that business enterprises must meet in order to discharge their responsibility to respect human rights. These requirements are:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts.

1.3.3. Corporate Commitments to Meet Their Responsibility to Respect Human Rights

Principle 15 requires that business enterprises make the three commitments shown below in order to meet the responsibility to respect human rights:

- (a) A policy commitment to meet the responsibility to respect human rights;

2. In connection with the corporate responsibility to respect human rights, ISO 26000 provides, “Recognition and respect for human rights are widely regarded as essential to the rule of law and to concepts of social justice and fairness and as the basic underpinning of the most essential institutions of society such as the judicial system. States have a duty and responsibility to respect, protect, and fulfil human rights. An organization has the responsibility to respect human rights, including within its sphere of influence (6.3.1.2).” It upholds the principles that “[a]n organization should respect human rights and recognize both their importance and their universality,” and “[a]n organization should respect and, where possible, promote the rights set out in the International Bill of Human Rights; and respect the universality of these rights, that is, that they are indivisibly applicable in all countries, cultures, and situations (4.8).” The Standard also states, “Various moral, legal, and intellectual norms are based on the premise that human rights transcend laws or cultural traditions. The primacy of human rights has been emphasized by the international community in the International Bill of Human Rights and core human rights instruments (6.3.1.1).”

3. OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context 2011 (the “OECD Guidelines for Multinational Enterprises”) also provides, “Respect for human rights is the global standard of expected conduct for enterprises independently of States (IV. Human Rights, Commentary 37).”

(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 impacts they cause or to which they contribute.

Chapter 3 provides practical advice in detail on implementing these human rights due diligence and other commitments.

1.3.4. Integration into Legal Compliance Operations

Principle 23(c) requires that business enterprises treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. Business enterprises need to implement and incorporate efforts to meet the responsibility to respect human rights into daily legal compliance operations.

Chapter 2 identifies in specific terms the methods that business enterprises can use to treat the responsibility to respect human rights as a legal compliance issue.

1.3.5. Human Rights Challenges in Business Activities

Human rights challenges exist at all levels and in all areas of business activities, and companies are required to meet the responsibility to respect human rights in all realms of such activities. They are required to take human rights into consideration in order to meet the responsibility to respect human rights in various situations, such obligations including ensuring that human rights are respected and any human rights abuse is appropriately handled in supply chains and value chains; correcting insufficient product or service considerations that infringe on consumers' human rights; mitigating negative impacts on society or environment within local communities; ensuring not contributing to any human rights infringement in conflict regions; upholding human rights goals identified in the MDGs (Millennium Development Goals)⁴ adopted at a United Nations General Assembly special session in 2000; abstaining from infringing on local community access rights to water resources and food resources through deforestation and biofuel development; and protecting personal information from inappropriate leaks and preventing violation of privacy.

Chapter 4 provides specific examples as to how fulfillment of the corporate responsibility to respect human rights can be achieved.

1.4. Binding Effect of the Guiding Principles on Business Activities

The Guiding Principles are non-binding guidelines that do not entail any sanctions. As such, they do not instantly serve as litigation grounds within and without States. However, the Guiding Principles are

4. Millennium Development Goals set eight goals as international development goals to be achieved by 2015: (1) Eradicate extreme poverty and hunger, (2) Achieve universal primary education, (3) Promote gender equality and empower women, (4) Reduce child mortality, (5) Improve maternal health, (6) Combat HIV/AIDS, malaria and other diseases, (7) Ensure environmental sustainability, and (8) Develop a global partnership for development. 21 targets and 60 indicators exist under these Goals.

an instrument unanimously approved and endorsed by the United Nations Human Rights Council as the international standard on business and human rights that should be respected by all States and business enterprises, and is highly influential. Accordingly, the Guiding Principles are currently being used around the globe as an official standard based on which to determine the extent of human rights respect and remedy business enterprises are expected to cover.

As described above, the Guiding Principles see the corporate responsibility to respect human rights as existing over and above compliance with the national laws and regulations, and require that business enterprises meet this responsibility as such. The human rights that business enterprises should respect include, as mentioned earlier, not only those rights identified in the statutory form by the State but also internationally recognized human rights. In other words, based on the Guiding Principles, it is strongly required that business enterprises not only comply with domestic statutory laws and regulations, but also respect internationally recognized human rights.

Japan has yet to ratify some of the international treaties and codes on human rights. In order for Japanese corporations to meet the responsibility to respect human rights under the Guiding Principles, they need to make efforts that exceed the conventional compliance operations that are geared toward domestic laws and regulations only.

Japan has a past example where responsibility framework to ensure corporate safety obligations was established through the accumulation of occupational accident cases, and this framework was subsequently put into statutory law as the Labor Contract Act. Based on this example, it is important for Japanese corporations to acknowledge that a broad human rights concept does exist in the international community and will come to constitute an accepted premise for domestic judgment and action criteria in the future, and to make proactive efforts in respecting human rights. That will help prevent the occurrence of human rights problems that would inhibit sustainable growth of businesses.

1.5. The Guiding Principles and Other International Codes and Standards

The Guiding Principles are an instrument unanimously approved and endorsed by the United Nations Human Rights Council and is highly influential. At the same time as the adoption of the Guiding Principles, various international codes and standards have been introduced or revised in recent years, as shown below, such that the corporate responsibility to respect human rights is incorporated in them. As can be seen from this trend, activities that take human rights into account are increasingly required of business enterprises.

- (1) Passage of the Dodd-Frank Act obligating business enterprises to report to the U.S. Securities and Exchange Commission on whether or not they use conflict minerals (July 2010)
- (2) Issuance of International Standard ISO 26000 “Guidance on Social Responsibility” by the International Organization for Standardization (November 2010)
- (3) Revision of the International Finance Corporation’s Performance Standards on Environmental and Social Sustainability (May 2011)

- (4) Adoption of the revised OECD Guidelines for Multinational Enterprises (May 2011)
- (5) United Nations Human Rights Council resolution related to the Guiding Principles on Business and Human Rights written by Dr. John Ruggie, Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (June 2011)
- (6) Issuance of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (June 2011)

1.6. Need for Business Enterprises to Respect Human Rights

1.6.1. Need to Respect Human Rights for Corporate Risk Management

As described above, triggered by the endorsement of the Guiding Principles as well as other standards, business enterprises are strongly required to conduct their business activities while making sure that they meet their human rights responsibility. Business enterprises deemed to be a threat to the health and culture of workers and/or local communities runs the risk of being dreaded as entities with no regards to human rights and placed under the supervision of citizen groups and/or government bodies, and eventually becoming dismissed by customers, consumers, and investors. Business enterprises must realize that our society has changed into one that does no longer tolerate the corporate attitude that employees and consumers should endure some difficulties thanking business enterprises for the provision of employment and wage or goods and services at reasonable prices.

Through the adoption of the Guiding Principles, compliance with international standards and other laws and regulations established in relation to human rights has become one of the essential conditions for a business enterprise to be accepted as a player in the marketplace and local community. Therefore, business enterprises need to regard making a decision to introduce or improve due diligence to avoid causing or contributing to human rights impacts as part of the basic risk management precautions. It is important for top management to first understand the gravity of impacts that could be caused by a human rights problem that occurs in connection with business activities. Human rights due diligence will never be successful without accomplishing this step.

1.6.2. Importance of Business Activities Having Positive Impacts on Human Rights

It is also important for business enterprises to not only avoid adverse impacts on human rights, but also to consider how to promote operations that have positive impacts on human rights.

Everybody is sensitive to impacts on their own health and daily living as well as that of their family. Well thought-out efforts for human rights will therefore be directly linked to the motivation of workers including suppliers, and the improvement of corporate branding.

In addition, if problems and obstacles that cannot be avoided using conventional methodology are removed, innovations may be made in technology, the business model, products and services, or the way of

doing business. The essence of corporate social responsibility (CSR) was not about social contribution or legal compliance; rather it was about seeking a new way of doing business in lieu of traditional models in order for the business enterprise to discharge their social responsibility. The same is now required in connection with human rights.

Thus, taking human rights into consideration could lead to strengthened corporate competitiveness as well as increased corporate value.

1.6.3. Various Benefits for Business Enterprise Respecting Human Rights

As described earlier, respecting human rights in accordance with the Guiding Principles can provide business enterprises with various benefits. The tables below show specific examples of benefits brought about to a company respecting human rights.

<High quality sustainable business activities>

Improved corporate social value	Example: Enterprises actively engaged in societal contribution through business activities, generating value to society and thereby increasing their corporate value and revenue
Improved employee motivation	Example: More motivated employees leading to increased productivity and improved hiring and retaining of competent employees (lower turnover)
Improved corporate branding	Example: Improvement in ranking and branding of the enterprise based on demonstrated leadership

<Reduced risks>

Operational risks	Example: Reduction in costs associated with strikes due to human rights issues (wage issues) and criticism of or attacks on business operations by NGOs and other citizen groups
Legal and financial risks	Example: Reduction in costs associated with human rights litigations (discrimination cases)
Reputational risks	Example: Prevention of deterioration of corporate brand or image caused by negative media campaigns on human rights abuses
Customer expectation risks	Example: Customers requesting information about enterprise’s human rights activities as a condition for purchase contracts; consumer boycott movement
Government and investor	Example: Government or investors requesting information

expectation risks	about legal compliance and business risks as a requirement for business license issuance or as a condition for investment
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<Winning new opportunities>

Global competitiveness	Example: Growth of diverse competent employees ready for global market
New business opportunities	Example: Qualifying for government procurement using respecting human rights as a vendor condition; expansion of suppliers and customers; new business development
Reduction of financing costs	Example: Obtaining favorable financing terms from financial institutions

1.7. Need for Human Rights Consideration throughout Supply Chain

It is now required that business enterprises not only ensure that they respect human rights in their own operations, but also secure human rights and CSR efforts throughout their supply chains.

As described below, in addition to the adoption of the Guiding Principles, various codes and standards in connection with co-called CSR procurement (alternatively also known as ethical procurement or responsible procurement) are currently rapidly being introduced globally, including the introduction and reinforcement of supply chain management regulations, expansion of the scope of required disclosure of non-financial information, and acceptance of CSR codes and standards in an increasing number of regions.

As a result, it is increasingly likely that CSR procurement become a legal obligation or equivalent duty in various areas of business activities. CSR procurement may come to represent an indissoluble legal violation risk or reputational risk for business enterprises.⁵

1.7.1. Introduction and Reinforcement of Supply Chain Management Regulations

(1) Conflict minerals rule

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in July 2010 (commonly known as the “Dodd-Frank Act”) sets out the conflict minerals rule. It defines conflict minerals as tin, tantalum, tungsten, gold produced in the Democratic Republic of the Congo and adjoining countries and requires that all U.S. corporations registered with the U.S. Securities and Exchange Commission (“SEC”) annually disclose and report on the use in their products of conflict minerals produced in the Democratic Republic of the Congo and adjoining countries.

5. For the current status of paradigm shift in CSR procurement, see: Sato Izumi, Takahashi Daisuke. “CSR Legal Strategies for Supply Chains (first half).” *NBL*, 2013, No.1001, p.10.

This rule was brought about from the humane/political perspective that, because armed groups engaged in mining operations are believed to subject workers and indigenous peoples to serious human rights abuses and are using proceeds from the sale of conflict minerals to finance regional conflicts in the Democratic Republic of the Congo and adjoining countries (Covered Countries), purchasing such minerals amounts indirectly to providing funds to such armed groups. The SEC issued a final rule that put into effect the conflict minerals rule in August 2012. Full-scale implementation of the conflict minerals rule started in January 2013 with the deadline for submitting the first report set as May 31, 2014.

Because due diligence must be exercised on the source and chain of custody of the minerals contained in products including the supply chain all the way up to the smelter, not only U.S. listed corporations but also Japanese corporations that supply materials to them must check if conflict minerals are used in their own supply chain. In some cases, small factories of family-run businesses in Japan are not an exception. While no penalties are imposed in connection with the new rule, human rights organizations are keeping a close watch. Failure to comply with the rule could lead to a consumer boycott or protest, which may impact an enterprise's business performance and stock price. As such, the conflict minerals rule has now become a major challenge in business operations.

In addition, business enterprises subject to the conflict minerals rule have a civil liability, and if found to be in non-compliance with the conflict minerals rule, an enterprise could be sued in civil court as a violator of the U.S. Securities Exchange Act. Moreover, regardless whether or not an enterprise is directly subject to the conflict minerals rule, if it makes a false representation regarding the source of the conflict minerals, it runs the risk of getting sued by consumers and/or customers for mislabeling, which is violation of the Unfair Competition Prevention Act or the Act against Unjustifiable Premiums and Misleading Representations.

In the European Union (EU), the European Commission and High Representative of the Union for Foreign Affairs and Security Policy published on March 5, 2014 the Joint Communication titled "Responsible sourcing of minerals originating from conflict-affected and high-risk areas," discussing countermeasures on trading of conflict minerals, which include a proposal for a regulation to set up a voluntary EU 'responsible importer' self-certification scheme.

(2) Other supply chain management regulations

In addition to the Dodd-Frank Act, other examples of regulations requiring business enterprises to control the entire supply chain located outside the State where the regulation was enacted are abound as shown below.

< Forced labor and human trafficking regulations >

One example of regulations against forced labor and human trafficking is the California Transparency in Supply Chain Act (SB 657), which passed the state legislature in September 2010 and took effect in January 2012. The Act requires that every retail seller and manufacturer doing business in the state of California and having annual worldwide gross receipts that exceed 100 million USD evaluate and audit their supply chains for the existence of slavery and human trafficking, require direct suppliers to comply with the laws regarding slavery and human trafficking, and disclose its efforts to eradicate slavery and human trafficking on the enterprise website. If a retail seller or manufacturer makes a false representation on the website, it runs the risk of getting sued by consumers and/or customers for mislabeling, which is violation of the Unfair Competition Law or the Fair Packaging and Labeling Act.

< Hazardous materials regulations >

In the European Union, the Directive restricting the use of certain hazardous substances in electrical equipment (RoHS Directive) was issued in March 2003 and put into force in July 2006. The RoHS Directive designates six substances – lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB), and polybrominated diphenyl ethers (PBDE) – as hazardous substances and restricts the use of these hazardous substances in certain electrical and electronic equipment. Along the lines of this Directive, the REACH Regulation (Registration, Evaluation, Authorization and Restriction of Chemicals) was adopted in December 2006 and has been in force June 2008. The REACH Regulation requires EU manufacturers and importers to register substances they produce or import in quantities over one ton per year (including those in the process of compounding). This registration requirement applies to substances used both in finished articles as well as components if they are expected to be released (such as fragrance ingredients). Authorization, restricted use or notification is also applicable depending on the situation. Business enterprises need to investigate for the use of these hazardous substances and other chemical substances through their supply chains in order to stay in compliance with these regulations, and business enterprises that export products to the EU market also need to be in compliance with these regulations. In June 2011, the RoHS Directive was amended to ensure tougher control, including an expansion of the scope of products subjected to the Directive, requirement for a CE Mark on the product indicating compliance, and a proposal of four candidate chemicals to be added to the list of hazardous substances. The RoHS Directive was put into EU Member States national laws entailing criminal sanctions by January 2013 and has been in full effect ever since. With this as the backdrop, business enterprises must ensure even more rigorous supply chain management.

< Illegally sourced plant and plant products regulations >

Regulations applicable to the entire supply chain have also been tightened in the area of illegally sourced plant and plant products. In the United States, the Lacey Act amended in 2008 prohibits any person from importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate or foreign commerce any plant and plant products taken, transported, or traded in violation of any law or regulation of the United States or in violation of any foreign law, and obligates importers who import plant and plant products into the United States to declare the scientific name of the plant and the name of the country from which the plant was harvested as well as the name of the article, and the value and quantity of the importation, which is tantamount to the imposition of a duty of care to check whether or not any illegally harvested plant or plant product is included throughout the entire supply chain. There have been news reports on a case in which the Lacey Act was applied against an importer who imported timber illegally logged overseas to the United States and incurred imposition of fines. The EU Timber Regulation came into effect in March 2013 in the European Union as well, prohibiting the placement of illegally logged wood and wood products on the EU market. The Regulation imposes on operators who place wood and wood products for the first time on the EU market the duty to carry out due diligence. At the same time, in order to ensure the traceability of the wood and wood products, vendors who are involved in the resale and processing within the supply chain are also required to document their suppliers and customers.

1.7.2. Non-Financial Information Disclosure Rules

(1) Trend in the European Union

In the European Union, the Accounts Modernization Directive was issued in 2003. Article 14 (a) 1 (b) of the Directive requires the disclosure of key non-financial performance indicators, including environmental and employment information, to the extent necessary for an understanding of the development, performance, and position of businesses. In order to enforce the Directive, national laws for the disclosure of non-financial information were implemented in all 27 Member States.

Furthermore, the policy guideline titled “A renewed EU strategy 2011-2014 for Corporate Social Responsibility” published in October 2011 by the European Commission renewed the definition of CSR as “the responsibility of enterprises for their impacts on society,” and states that the social issues covered by CSR include (i) human rights, (ii) labor and employment practices (such as training, diversity, gender equality, and employee health and well-being), (iii) environmental issues (such as biodiversity, climate change, resource efficiency, life-cycle assessment, and pollution prevention), (iv) combating bribery and corruption, (v) community involvement and development, (vi) the integration of disabled persons, (vii) consumer interests, including privacy, and (viii) employee volunteering.

The promotion of social and environmental responsibility through the supply chain, and the disclosure of non-financial information is recognized as important cross-cutting issues. Along these lines, the European Parliament adopted amendments to EU corporate law in April 2014. There are two major amendments. One is the expansion of the scope of non-financial information subject to disclosure, and the other is disclosure regarding the diversity in the membership of the board.

(2) Trend in United States

In the United States, the Sustainability Accounting Standards Board (SASB) was established in October 2012 as a sustainability version of the Federal Accounting Standards Board (FASB), which sets forth the corporate accounting standards of the United States. SASB formulates the standards for the disclosure of non-financial information that needs to be included in the financial report submitted to the U.S. SEC. In March 2013, the SASB published a draft of standards for the health care sector, and is aiming to develop industry-specific disclosure standards for 89 industries in 10 sectors within 2015.

(3) Trend in Global Reporting Initiative (GRI)

The Global Reporting Initiative, which provides international standards for CSR reporting, issued the latest “G4” guidelines in May 2013, requiring reports made in and after January 2016 to comply with the G4 guidelines.

These G4 guidelines integrate different sustainability standards and rules and are harmonized with the OECD Guidelines for Multinational Enterprises, United Nations Global Compact, Guiding Principles on Business and Human Rights, and other standards. G4 requires that business enterprises report with a focus on their most material aspects, and sets forth in-depth guidance on the disclosure on management approach (DMA). The business enterprise making the report must explain in detail about how it is managing the material aspects, and for each identified material aspect, whether impacts are occurring within or outside the organization and what these impacts are like. This requirement covers suppliers, logistics contractors, and consumers.

G4 also incorporates new reporting requirements regarding supply chains and requires disclosure about how the business enterprise selects and manages environmental and social issues with material impacts. In addition, disclosures which have been externally assured or verified must be clearly indicated.

(4) Integrated reporting

Integrated reporting, a framework that promotes a concise communication with stakeholders, mainly investors, about how the organization’s strategy, governance, performance, and prospects lead to the creation of value over short, medium, and long term against the backdrop of the organization’s external environment, is drawing interest. In an integrated report, financial and non-financial information in environmental, societal and governance (ESG) areas is explained as elements in the enterprise’s strategic

scenarios and outlook of their realization. Representative guidelines include the International Integrated Reporting Framework released in December 2013 by the International Integrated Reporting Council (IIRC), which was formed by the Prince of Wales' Accounting for Sustainability Project and the Global Reporting Initiative (GRI).⁶

(5) Trend in Japan

Not only in Europe and the United States but also in Japan, disclosure rules for non-financial information are gradually being implemented. The Law Concerning the Promotion of Business Activities with Environmental Consideration by Specified Corporations, etc. by Facilitating Access to Environmental Information and Other Measures (Environmental Consideration Promotion Law) (provisional translation), which was passed in 2004, requires that Japanese State and local governments disclose the status of their environmental consideration; specified business operators, such as independent administrative institutions, prepare and publish environmental reports; and large corporations make efforts in making environmental reports publicly available.

6. Based on the recognition that corporate reporting (financial and non-financial information) for the capital market has too much information, and investors are having a hard time knowing which information is important for investment decision-making, integrated reporting offers concise explanations on how the enterprise intends to sustainably increase its value, with such information as the external environment, strategy and organization, and sales performance and forecast, as the basis for detailed financial and non-financial information. The IIRC Framework lists as integrated report elements: organization overview and external environment, governance, business model, risks and opportunities, strategy and resource allocation, performance, and outlook.

Chapter 2

Corporate Responsibility to Respect Human Rights and Legal Compliance

2.1. Human Rights Rules to be Honored by Business Enterprises

According to Principle 23, in all contexts, business enterprises should (i) comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (ii) seek ways to honor the principles of internationally recognized human rights when faced with conflicting requirements; and (iii) treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. This chapter provides specific methods for business enterprises to handle the responsibility to respect human rights as a legal compliance issue.

When it comes to human rights rules to be honored by business enterprises, the basic attitude of major Japanese and international guidelines is that business enterprises should comply with all relevant laws and regulations applicable in the country or region in which they operate. The Guiding Principles additionally require that business enterprises respect international codes of conduct, various international standards, including those covering human rights, and internationally recognized human rights. In other words, business enterprises must meet the “responsibility to respect human rights.”⁷

In actual practice, business enterprises might need to make decisions as to whether they can lower the standard of compliance to the level of the laws and circumstances of the locality when such level is lower than that of the policy or standard of the corporate group that they belong to, or whether they can lower the standard of control than that of the corporate group or the headquarters because such level of control is not sought by local law. As explained below, Principle 23 clearly shows that business enterprises should decline such options in both cases.

7. The OECD Guidelines for Multinational Enterprises provides, “Obeying domestic laws is the first obligation of enterprises (I. 2).” It also says, “Enterprises should [act], within the framework of internationally recognised human rights, international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:... (IV. Human Rights).”

The Japan Business Federation’s Charter of Corporate Behavior revised in September 2010 emphasizes, “In line with the globalization of business activities, [a corporation should] comply with laws and regulations of the countries and regions where its business operations are based and respect human rights and other international norms of behavior.” According to the “Implementation Guidance (6th Edition),” in order to “[c]omply with codes of conduct of a corporation and applicable laws and regulations where its business operations are based and respect human rights and other international norms of behavior (8-1),” it is necessary to establish a system for checking not only whether the management strategy and business plans are in compliance with the related laws and regulations but also whether the corporation understands and respects the various international codes of conduct, including human rights.

ISO 26000 provides, “An organization should in situations where human rights are not protected, take steps to respect human rights and avoid taking advantage of the situation (4.8).” The corporate responsibility to respect human rights exists regardless of whether laws related to human rights protection have been enacted in the country or region in which a business enterprise operates.

2.2. International Codes of Conduct to be Honored by Business Enterprises

Let us first look at the specifics of international codes of conduct that business enterprises should honor, according to the Guiding Principles.

2.2.1. International Human Rights Treaties

The Universal Declaration of Human Rights adopted by the United Nations in 1948 forms the foundation of human rights laws, and it represents a yardstick by which to measure States' actions, and has the force of customary international law or its equivalent, which is binding on all States, individuals and organizations.

The International Bill of Human Rights is composed of the Universal Declaration of Human Rights as well as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted by the United Nations in 1966, and their Optional Protocols. In addition, the following international human rights documents serve as the international standard for universal human rights. These documents are binding on States that have ratified them.

There are some 30 key human rights treaties promulgated under the leadership of the United Nations. Japan has ratified only one-third of them.

<Major human rights treaties> * Indicates not ratified by Japan

International Covenant on Economic, Social and Cultural Rights; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* ; International Covenant on Civil and Political Rights; First Optional Protocol to the International Covenant on Civil and Political Rights* ; Second Optional Protocol to the International Covenant on Civil and Political Rights (aiming at the abolition of the death penalty)* ; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ; Convention on the Rights of the Child; Convention on the Rights of the Child on the Sale of Children; Child Prostitution and Child Pornography; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ; Convention on the Rights of Persons with Disabilities; International Convention for the Protection of All Persons from Enforced Disappearances

<Labor-related> * Indicates not ratified by Japan

Representative documents include the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work (1998) and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (issued in 1977 and final revision made in 2006).

The ILO Tripartite Declaration establishes the eight treaties in the following four areas (freedom of association and right to collective bargaining, prohibition of forced labor, effective abolition of child labor, and elimination of discrimination in respect of employment and occupation) as the core labor standards that must be complied with. There are 189 ILO-related treaties (as of March 2014), and Japan has ratified only 49 or about one quarter of them (Source: ILO Tokyo Office.)

Freedom of association and right to collective bargaining	Co87 – Freedom of Association and Protection of the Right to Organize Convention
	Co98 – Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively
Prohibition of forced labor	Co29 – Forced Labour Convention
	Co105 – Abolition of Forced Labour Convention *
Effective abolition of child labor	Co138 – Convention concerning Minimum Age for Admission to Employment
	Co182 – Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour
Elimination of discrimination in respect of employment and occupation	Co100 – Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value
	Co111 – Convention concerning Discrimination in Respect of Employment and Occupation*

2.2.2. International Codes of Conduct in the Guiding Principles

Principle 12 stipulates internationally recognized human rights as follows: “The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”

The Office of the United Nations High Commissioner defines human rights as follows:⁸ “Human rights are universal rights guaranteed by law in order to protect individuals and groups against acts that will

8. According to ISO 26000,
 “Human rights are inherent, inalienable, universal, indivisible and interdependent:
 – they are inherent, in that they belong to every person by virtue of being human;
 – they are inalienable, in that people cannot consent to giving them up or be deprived of them by governments or any other institution;
 – they are universal, in that they apply to everyone regardless of any status;
 – they are indivisible, in that no human rights may be selectively ignored; and
 – they are interdependent, in that realization of one right contributes to the realization of other rights (6.3.2.1) .”

impair the fundamental freedom or dignity of human beings.” (Source: “What are human rights?” – a commentary on the website of the Office of UN High Commissioner (OHCHR).)

The Commentary to Principle 12 states, “An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Tights at Work.”

The Commentary further points out, “Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, the responsibility to respect applies to all such rights,” and, “In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.”

The Commentary proceeds to state, “Depending on circumstances, business enterprises may need to consider additional standards.” For instance, enterprises should, even if not required by local laws and regulations, respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this regard, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. In situations of armed conflict, business enterprises should respect the standards set forth in international humanitarian law.

As shown above, “internationally recognized human rights” are currently those contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, as well as the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work), as pointed out in Principle 12. However, all human rights are subjected to periodic review, and depending on the circumstances, it may become necessary to consider additional standards.

For instance, where the human rights of individuals belonging to specific groups or populations that require particular attention may be adversely impacted, and the rights of indigenous peoples; women; national or ethnic, religious, and linguistic minorities; children; persons with disabilities; and migrant

workers and their families, are at stake, or in situations of armed conflict, business enterprises should also respect the standards of international humanitarian law (refer to the Commentary to Principle 12).⁹

ISO 26000 states that the core subjects of social responsibility include, in addition to human rights, organizational governance, labor practices, the environment, fair business practices, consumer issues and community involvement and development, and they are interdependent with human rights issues. It is advisable to extensively examine whether or not the lack of initiatives on these core subjects is contributing to the occurrence of human rights problems.

2.3. Code of Conduct for Business Enterprises When No Applicable Domestic Laws Exist

Principle 12 points out, “The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”

In other words, where no applicable domestic laws exist, business enterprises are required to honor the “international codes of conduct” listed above. The corporate responsibility to respect human rights exists regardless whether or not the country or region in which they operate has domestic laws regarding the protection of human rights. Because business enterprises are required not only to “comply” with human rights rules but also to “respect” human rights, even where no relevant domestic laws exist, they are held responsible for acts that are not in compliance with international human rights standards or other international codes.

2.4. Code of Conduct for Business Enterprises When Domestic Laws Do Not Provide Appropriate Human Rights Protection

Where relevant domestic laws exist but are enforced poorly or in an unfair manner, human rights protection may not be appropriately ensured by government or judicial authorities. In such circumstances, business enterprises are still expected to honor the international codes of conduct, and when this is difficult, they should at least make sincere efforts to do so.¹⁰

9. It must be remembered that, along with the Global Compact, a voluntary corporate initiative that connects corporate activities and human rights, proposed in 2000 by Mr. Kofi Annan, the seventh UN Secretary-General, the MDGs (Millennium Development Goals) were also adopted at the Special Session of the United Nations General Assembly of the same year as a CSR code of conduct. The MDGs are: (1) Eradicate extreme poverty and hunger, (2) Achieve universal primary education, (3) Promote gender equality and empower women, (4) Reduce child mortality, (5) Improve maternal health, (6) Combat HIV/AIDS, malaria and other diseases, (7) Ensure environmental sustainability, (8) Develop a global partnership for development. These Goals simultaneously lead to respecting human rights.

10. ISO26000 provides, “In situations where the law or its implementation does not provide for adequate environmental or social safeguards, an organization should strive to respect, as a minimum, international norms of behavior (4.7),” and, “in situations where the law or its implementation does not provide for adequate protection of human rights, [an organization should] adhere to the principle of respect for international norms of behavior (4.8).”

Believing that acting in accordance with the international codes of conduct leads not only to a loss of business to competitors but also to higher operating costs, some business leaders think that compliance with human rights principles is an unacceptable excuse to shareholders for lower performance. However, in view of the benefits to other stakeholders, such as employees, consumers who purchase the products, community residents who want to maintain the environment and their living standards, and citizens who are unhappy with the dishonest accumulation of wealth by a privileged handful of people, sincere efforts in respecting human rights can lead to the sustainable growth of the enterprise.

2.5. Code of Conduct for Business Enterprises When Domestic Laws or their Enforcement Conflict with International Human Rights Codes of Conduct

Principle 23 provides that business enterprises should “(b) [s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements,” and its Commentary points out, “[A]ll business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.”¹¹

In actual practice, business enterprises may have to decide what to do when, despite their efforts to respect human rights to the extent possible, the situation cannot be avoided or improved. As described below, the Guiding Principles expanded responsibility stating, “Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties” (Principle 17, Commentary). Continuing business operations while recognizing the fact that adverse human rights impacts remain despite efforts to avoid or improve them, i.e., when the business enterprise does not exercise its influence despite its ability to do so, can lead to the problem of “complicity.” Suspension of business operations need to be an option. The extent to which management chooses to recognize human rights risk is thus an important business decision.

2.6. International Codes of Conduct as Legal Compliance Target

Principle 23 provides that business enterprises should “(c) [c]omply with all applicable laws and respect internationally recognized human rights, wherever they operate,” and its Commentary comprehensively states, “[A]ll business enterprises have the same responsibility to respect human rights wherever they operate.” The responsibility to respect human rights does not envision any exceptions in which responsibility would be exempt.

11. ISO 26000 provides, “In countries where the law or its implementation conflicts with international norms of behavior, an organization should strive to respect such norms to the greatest extent possible (4.7),” and, “Organizations have a responsibility to respect all human rights, regardless of whether the state is unable or unwilling to fulfil its duty to protect (6.3.2.2).”

Given that “[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions,” as stated in the Commentary to Principle 12, compliance with domestic laws does not exempt business enterprises from the responsibility to respect human rights. In this way, as far as corporate responsibility to respect human rights is concerned, legal compliance need to be viewed comprehensively, taking into consideration international codes of conduct, such as international human rights standards, in addition to relevant domestic laws.

The basic attitudes of the key Japanese and international guidelines agree in that business enterprises must comply with the relevant law provisions applicable to the country or region where they operate. At the same time, they require that business enterprises respect the international codes of conduct, various international standards including human rights standards and internationally recognized human rights.

As shown above, as far as corporate responsibility to respect human rights is concerned, legal compliance need to be understood in a comprehensive manner, taking into consideration international human rights standards and other international codes of conduct, in addition to relevant national laws.^{12,13, 14,15}

2.7. Extraction of Human Rights Issues in Business Activities (Issues Needing Impact Assessment)

A framework of analysis is shown below that can serve as a guide when picking significant human rights challenges inherent in business activities and pursuing their impact assessments in practicing the responsibility to respect human rights in accordance with the Guiding Principles.

12. ISO 26000 provides, “In situations where the law or its implementation is in conflict with international norms of behavior and where not following these norms would have significant consequences, an organization should, as feasible and appropriate, review the nature of its relationships and activities within that jurisdiction (4.7),” meaning that a business enterprise should review its business activities in some situations in order to respect the international norms of behavior.

13. ISO 26000 upholds “respect for the rule of law” as one of the “principles of social responsibility” (4.6). The rule of law assumes that laws and regulations are codified through appropriate procedures, made public, and implemented appropriately. Individuals, organizations and governments must follow the law. The Standard also upholds “respect for international norms of behavior” as another principle, and provides, “[A]n organization should respect international norms of behavior while adhering to the principle of respect for the rule of law (4.7).” In connection with yet another principle, “respect for human rights,” it says, “[I]n situations where the law of its enforcement does not provide adequate protection for human rights, [an organization should] adhere to the principle of respect for international norms of behavior (4.8).”

14. The OECD Guidelines for Multinational Enterprises state, “Obeying domestic laws is the first obligation of enterprises (I. 2),” and, “Enterprises should [act], within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate, and relevant domestic laws and regulations (IV. Human Rights).”

15. The Japan Business Federation’s Charter of Corporate Behavior, revised in September 2010, emphasizes, “In line with the globalization of business activities, [a corporation should] comply with laws and regulations of the countries and regions where its business operations are based and respect human rights and other international norms of behavior.” According to the “Implementation Guidance (6th Edition),” in order to “[c]omply with codes of conduct of a corporation and applicable laws and regulations where its business operations are based and respect human rights and other international norms of behavior (8-1),” it is necessary to establish a system for checking not only whether the management strategy and business plans are in compliance with related laws and regulations, but also whether the corporation understands and respects the various international codes of conduct, including human rights.

2.7.1. Scope of Target Human Rights

It is first necessary to understand the basic concept of the second chapter of the Guiding Principles, “The Corporate Responsibility to Respect Human Rights.” The key points are shown below.

- (1) Business enterprises should avoid infringing on the human rights of others and should take adequate measures for the prevention, mitigation, and remediation of the adverse human rights impacts with which they are involved. (Principle 11)**

This international standard is universally expected of business enterprises regardless how large or small they are or where they operate. This is a responsibility that exists over and above compliance with national laws and regulations, and is distinguished from legal responsibility and enforcement issues in connection with national laws.

- (2) The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights (adopted by the United Nations General Assembly in 1948) and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work (adopted by the 86th International Labour Conference in 1998). (Principle 12)**

The responsibility to respect human rights encompass all internationally recognized rights. Some human rights must be the focus of heightened attention if they are at greater risk than others in particular industries or circumstances.

All human rights should be subject to periodic review because situations can change. When the human rights of individuals belonging to specific groups or populations, such as indigenous peoples; women; national, ethnic, religious or linguistic minorities; children; persons with disabilities and migrant workers and their families, may be adversely impacted, those human rights should be accorded greater importance.¹⁶

2.7.2. Reasons for Taking Internationally Recognized Human Rights into Account

The Guiding Principles are based on the concept that “business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights” (Principle 12, Commentary).

Many Japanese corporations have difficulty understanding that there are human rights issues other than the prohibition of discrimination in recruitment and human resource management, dealings regarding

16. ISO 26000 provides, “[O]rganizations should nevertheless respect international norms of behavior, such as those reflected in the Universal Declaration of Human Rights, the Johannesburg Declaration on Sustainable Development and other instruments (3.3.2),” and, “An organization should respect and, where possible, promote the rights set out in the International Bill of Human Rights (4.8).” This is consistent with the Guiding Principles. “6.3 Human rights” of “6 Guidance on social responsibility core subjects” of the Standard has more specific descriptions, which are useful as a reference. However, as perceptions of human rights can change depending on one’s position, circumstances, and passage of time, such descriptions do not necessarily apply in all situations.

union activities, and the prevention of and remedies for health hazards and harassment in the workplace, as well as the notion that the company itself or the corporate group it belongs to is facing the risk of causing human rights problems. However, as clarified below, business enterprises have no choice but to take the entire spectrum of internationally recognized human rights into account.¹⁷

(1) Globalization of business activities

As business activities become increasingly globalized, including the sourcing of raw materials and components, manufacturing, the sale of products and services, entry into business partnerships, and mergers and acquisitions, potential human rights problems are growing increasingly diverse.

(2) Expansion of scope of responsibility

The scope of corporate responsibility is now expanded to encompass activities within the value chain in addition to those of the business enterprise itself and its subsidiaries.

(3) Responsibility for complicity

Continuing business activities or receiving profits without taking any countermeasures while knowing of the existence of human rights abuses or oppression is now socially disapproved of constituting complicity with human rights abuses.

17. (a) and (b) above are mentioned in ISO 26000 in its introductory section “3.2 Recent trends in social responsibility,” and are incorporated in the subsequent sections as a basic premise. (c) is explained in “6.3.5 Avoidance of complicity.” The explanation given in ISO 26000 is slightly different from the “avoidance of complicity” in the Guiding Principles (refer to 3.4.3.3 of this Guidance).

Chapter 3

Practical Advice for Human Rights Due Diligence

3.1. Basic Understanding of the Guiding Principles

3.1.1. The Guiding Principles as Standards

Japanese corporations of a certain size or larger have a corporate philosophy and code of conduct shared among executives and regular employees, and in carrying out their business operations, they utilize internal control systems that consist of company rules, job descriptions, education and training, daily management procedures, emergency response procedures and the like. Various management concepts are incorporated into these management mechanisms at each level of control.

What the Guiding Principles seek is continuous review and implementation of corrective action with regard to the human rights aspect of the systems. In other words, the Guiding Principles demand that the three elements of corporate human rights protection – human rights policy, human rights due diligence, and remediation – be organically incorporated in the entire business management system, consisting of: (i) supervision by the Board of decision-making practices and the performance of duties; (ii) deliberation and approval of projects and measures through management meetings and the approval process; (iii) daily management by relevant departments and divisions of the business enterprise; and (iv) problem reporting and risk management processes.

Whether to bracket these elements into a single human rights control mechanism or incorporate them into separate control mechanisms or systems while ensuring that they are in effect and applied consistently throughout all operations is up to each business enterprise. Each business enterprise can also decide whether to receive assistance and/or assessments from external experts, considering its size, circumstances and goals.

As such, the Guiding Principles are not rule-based guidance but rather principle-based guidelines. While the Guiding Principles simply indicate the direction to take and the key points in their interpretation, the specific measures are left to the discretion of the business enterprise.

3.1.2. Meaning of Due Diligence

Another point to note is the proper understanding of the term “due diligence.” Because in business practices, this term is used to mean investigating and evaluating the value and potential risks of a property or business to be acquired from the perspectives of business, financial, legal, contractual, human resources/labor, and environmental impact, some people think that “human rights due diligence” means “a third party certification process based on international standards.” However, this is incorrect.

The term “due diligence” originally means “actions or efforts carried out to exercise care appropriate to one’s position (in order to prevent or mitigate adverse impacts).” In the Guiding Principles, the term “due diligence” refers to “systems and programs for decision-making and business operations used by corporate leadership to ensure that they exercise due care appropriate for their positions.” It comprises essentially *internal controls regarding human rights risks*, and provides criteria based on which to evaluate whether or not corporate responsibility exists. This can be considered substantially synonymous with the Board’s duty of care as a good manager under the Japanese Corporations Act (Article 330), and the duty under that act to establish and maintain internal control systems based on said duty of care (Article 348, paragraph 3, item 6 and Article 362, paragraph 4, item 6).

Being a management mechanism or program, the human rights due diligence process naturally tracks the PDCA cycle comprising (i) identification of the target issue; (ii) identification and evaluation of risks; (iii) formulation of measures and plans; (iv) implementation of the measures and plans; (v) monitoring and making improvements; and (vi) evaluation of effectiveness. It is up to each business enterprise to determine the level of the organization at which this cycle should be implemented and how the implementation should be carried out.

However, the evaluation criteria for human rights issues used in decision-making or management processes requiring due care often vary depending on the culture, customs and the social circumstances. Japanese corporations that have been doing business in accordance with shared values and customs in an island nation tend to overlook this fact. It is therefore dangerous to judge based on one’s own experience only. Moreover, the “human rights risk” in connection with decision-making or management processes requiring due care is, under the Guiding Principles, based on internationally recognized human rights. When it comes to defining a human rights issue, there is a big gap between Japan, which has not ratified some major international human rights conventions and treaties, and the rest of the world.

Therefore, assuming that there are a limitless number of human rights challenges that a business enterprise has not yet experienced, creating *an organization highly sensitive to human rights* through ongoing discovery of new risks and continuous organizational learning will lead to sustainable growth of the business enterprise and society. This is the purpose of identifying where human rights challenges exist and reviewing how they are being addressed, based on the Guiding Principles.

3.2. Three Component Elements and Five Core Elements of the Guiding Principles

Principle 15 provides that business enterprises should have policies and processes in place that are appropriate to their size and circumstances in order to meet their responsibility to respect human rights, and identifies, as the key three component elements thereof, (a) a policy commitment to meet the company's responsibility to respect human rights; (b) a human rights due-diligence process to identify, prevent,

mitigate and account for how the company addresses its impacts on human rights; and (c) processes to enable the remediation of any adverse human rights impacts it causes or to which it contributes.

These component elements can be broken down to the following *five core elements*.

The first core element is derived from component element (a). It is a policy commitment (creation of a human rights policy) (see section 3.3).

The second core element is derived from component element (b), and constitutes a focused review of the company’s own business operations in the human rights due diligence process (periodic review) (see sections 3.4.1, 3.4.2).

Specifically, business enterprises should (i) conduct human rights due diligence research and identify human rights risks; (ii) continuously and systematically monitor, evaluate and remediate human rights risks (either actual or potential) as part of risk management; (iii) internally, increase the human rights sensitivity of the enterprise itself and its employees (including the building of internal systems), and externally, tighten control of its project areas and supply chains; (iv) establish an impact assessment process; and (v) decide who is going to be responsible for each task.

The third core element also comes from component element (b), and is the specific remediation phase in a human rights due diligence process (see section 3.4.3).

In more specific terms, it includes: (i) the creation of a platform for solving problems, and (ii) the building of cooperative communities and promotion of communication with various stakeholders.

The fourth core element also belongs to component element (b). It is the tracking and reporting (including public announcements) of the status of implementation of human rights due diligence (see 3.4.4 , 3.4.5).

The fifth core element is derived from component element (c), and is a remediation process (remedies) for the adverse impacts (see 3.5).

The following sections describe the key points in the implementation of a due diligence process in accordance with the Guiding Principles and their Commentaries.

3.3. Formulation of a Human Rights Policy

Principle 16. (Policy Commitment)

As the basis for embedding the responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

- (a) Is approved at the most senior level of the business enterprise;
- (b) Is informed by relevant internal and/or external expertise;
- (c) Stipulates the enterprise’s human rights expectations of personnel, business partners, and other parties directly linked to its operations, products or services;

- (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; and
- (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

3.3.1. Need for the Creation of a Human Rights Policy

The Guiding Principles establish the requirement of a “policy commitment” at the beginning of the “Operational Principles” section (Guiding Principle 16 and thereafter). It is made clear that as the basis for embedding their responsibility to respect human rights, companies should express their commitment to meet this responsibility through a policy statement that satisfies the five requirements of (a) approval at the most senior level of the business enterprise; (b) incorporation of internal and/or external expertise; (c) a clear statement of the business enterprise’s human rights expectations from concerned parties (personnel, business partners and other parties directly linked to the operations, products or services of the business enterprise); (d) public availability and communication to all relevant parties; and (e) reflection in operational policies and procedures.

3.3.2. Requirements of a Human Rights Policy

3.3.2.1. Expression Requirements (content, terminology, etc.)

The Guiding Principles provide that a “stipulation of the business enterprise’s human rights expectations of concerned parties (personnel, business partners and other parties directly linked to the operations, products or services of the enterprise)” is one of the requirements of a human rights policy, and this stipulation must cover the business enterprise’s concerns both in terms of content and terminology. Specifically, the following elements need to be covered:

- (i) The enterprise’s attitude toward respecting human rights;
- (ii) The enterprise’s human rights expectations of its stakeholders;
- (iii) Expression of support for international human rights codes and standards;
- (iv) Applicable scope of the policy;
- (v) Link to the corporate philosophy and other internal rules (code of conduct, CSR policy, etc.);
- (vi) Dialogue and discussion with stakeholders (i.e., rights holders);
- (vii) Remediation process in the event of a human rights violation (remedies)

3.3.2.2. Creation Process Requirements

The human rights policy is to be written internally and approved at the most senior level of the business enterprise, such as the Board of Directors. However, it is recommended that drafting only by employees and/or stakeholders under the direct influence of top management be avoided because the

drafting process would suffer from insufficient understanding of the perspectives of vulnerable people prone to being impacted by the business operations or of the global human rights standards.

As the Guiding Principles require that the policy statement be “[i]nformed by relevant internal and/or external expertise,” in view of the fact that the “human rights” addressed in the policy will be the “human rights” referred to in international standards, it is essential to receive advice from external experts after determining the basic content of the policy.

3.3.2.3. Perspectives to be Incorporated

When drafting a human rights policy to be based on an understanding of global standards on business and human rights, the company’s unique perspectives, such as its traditional values that have been carried forward since its founding, as well as impacts that need particular attention, should be incorporated in the policy. When doing so, the considerations for the company’s unique stakeholders should be addressed, but it is also important to examine past incidents that have involved the company or its competitors and incorporate lessons learned. By doing so, the human rights policy can serve the purpose of preventing the recurrence of future human rights problems.

Assuming that the company’s internal or external situations might change after the policy is put in place, it is important to include the perspective of alerting future management and responsible employees. For instance, it is preferable to include language that can effectively communicate key points in human rights compliance when dealing with new operational elements or foreign cultures. The company may experience this when starting a new business, expanding business overseas or doing M&A activity. The human rights policy should be able to serve as the backbone for management decision-making until it is blended into the corporate culture.

3.3.2.4. Perspective of Internal Binding Effect

Because one of the five requirements for the human rights policy is “approval at the most senior level of the business enterprise,” the policy needs to have the highest level of binding effect, equal to that of employment rules. At the same time, this binding effect naturally needs to be linked with disciplinary rules applied in case of a violation of the policy. In other words, if an employee violates the human rights policy, the employee needs to be subjected to an unfavorable performance review, guidance for improvement, and/or disciplinary action.

What is important here is to provide employees with a list of unacceptable behavior in advance, provide the violating individual an opportunity to explain, and learn an organizational lesson from the experience. The difficulty in dealing with business and human rights is that in some cases it is not appropriate to blame the violating employee for neglecting human rights because the offense could have resulted in part due to a disparity in values, past corporate behavior, politics within the organization or

other factors. It is important for the management to lead the organization by setting an example of humble self-scrutiny and learning, without placing undue pressure on front-line employees.

3.3.2.5. “Public Availability” Options

Since the Guiding Principles provide that the human rights policy should be “publicly available and communicated internally and externally to all personnel, business partners and other relevant parties,” the human rights policy must not only be in writing, but must also be made public to permit anyone inside or outside the business enterprise to easily access it. Public access is important because it is necessary to provide people who might be affected directly or indirectly by the company’s activities with an opportunity to communicate with the company, so the company can (a) ensure consistency in its impact assessments, business activities, and tracking and investigation of outcomes, which take place after the creation of the human rights policy, and (b) use the information obtained from its communications with stakeholders in the remediation of the negative impacts and in the implementation of corporate grievance mechanisms. Typically, the human rights policy is made available on the official homepage of the company’s website.

Some top executives may not be willing to publicize the human rights policy because they fear being blamed and held responsible when the business enterprise violates the publicized human rights policy. However, what society wants from business entities is that they make sincere efforts to implement its policies and take corrective action in good faith when a problem is identified. Rather than fearing that failures will not be tolerated, executives should lead their enterprises with a strong determination to make continuous improvement.

3.3.2.6. Reflection in Operational Policies and Procedures

Since the Guiding Principles provide that the human rights policy should be “reflected in operational policies and procedures,” the human rights policy should not be separate from the rest of the company’s policies and procedures. It must be reflected in its operational policies and procedures in order for it to be integrated into its business activities.

Given the Commentary to Principle 16 that “[t]hrough these and any other appropriate means, the policy statement should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights,” it is insufficient to simply have a human rights policy in place. Ongoing efforts are required to ensure that the human rights policy takes root and is reflected in the behavior of each employee. Because people’s memories and interest fade, and executives, employees and other stakeholders are replaced over time, it is essential that human rights measures be carried out “on an ongoing basis.”

The Commentary to Principle 16 also states, “[j]ust as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect

human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.”

Business enterprises should consider a system to evaluate the actions taken by their various departments and to provide necessary support to ensure that there are no substantial variations in human rights compliance among departments, and that all departments meet their responsibility to respect human rights to the same degree. This system can take the form of supervision by the Board or Executive Council, or a committee or department dedicated to human rights monitoring and guidance for the entire organization.

<Q&As>

Q. Is it necessary to formulate and make publicly available a human rights policy separate from other policies and standards?

A. It is not necessary for the human rights policy to be a stand-alone policy, so long as the corporation’s human rights concept and attitude are communicated clearly and concisely.

Q. Should we establish an internal committee dedicated to human rights issues?

A. If sufficient consideration is given to human rights issues in decision-making or through supervision by management or incorporation in operational processes, it is not always necessary to form an internal committee.

3.3.3. Introduction and Improvement of Human Rights Compliance

3.3.3.1. Determining the Scope of Application (corporation and its subsidiaries, suppliers, and affiliates in Japan and abroad)

The human rights policy must be adhered to not only by the business enterprise itself but also by its Japanese and overseas subsidiaries (which may include affiliates and other companies in which the business enterprise is invested). It is very important to examine in the due diligence process prior to finalizing a merger or acquisition, or making an investment, whether the target business can conform to the company’s human rights policy. In particular, it is important to determine the scope of application regarding suppliers. In other words, companies need to decide to what extent their suppliers’ potential and actual negative impacts should be subjected to human rights risk assessment and remediation.

When determining this scope of application, it is important to bear in mind that human rights due diligence begins with the identification of potential impacts of the business enterprise’s operations on a wide range of rights holders.

The perspective in this activity should be not *risks to the business enterprise* but risks to *the people* potentially impacted by the enterprise’s business activities.

When prioritizing the identified risks, it is important to assess the impacts based on two criteria: one is the severity of the impact (whether the impact would lead to the death of one or more persons, whether the status quo can be restored, etc.), and the other is the probability of the impact occurring.

Only through this process can business enterprises objectively identify material risks and properly prioritize them. At the same time, the Guiding Principles do not demand that business enterprises respond in a uniform way to the risks identified and prioritized. As set forth in Principle 17, companies need to offer an appropriate response based on the relationship between the human rights impact and its activities. That is, the appropriate response varies depending on whether the enterprise caused or contributed to the impact through its own activities, or the impact is directly linked to its operations, products or services by its business relationships.

The basis for determining the nature of the connection between a human rights impact and the business enterprise is determining whether the impact is directly linked to the enterprise's operations, products or services or has to do with a first-tier supplier.

Business entities tend to focus on the connection between an adverse impact and their own operations or business dealings, but according to the human rights due diligence process set forth in the Guiding Principles, such a connection should be taken into account only when deciding on how to respond to the prioritized impact. While the severity of the human rights impact determines the degree of responsibility of the offending entity, the leverage possessed by the business partner determines the possible countermeasures. Section 3.4.3.4 of this Guidance should be referred to for details on how this leverage may be utilized.

<Q&As>

Q. How far up the supply chain should a corporation go as far as human rights due diligence is concerned?

A. In view of the number of suppliers and confidentiality of proprietary information, realistically speaking, it is assumed that due diligence should cover only first-tier suppliers. However, where a very serious adverse impact is envisioned, it is important from a safety point of view to conduct due diligence up to second-tier and upstream suppliers. But because it is impossible to conduct human rights due diligence for all suppliers, a corporation ultimately needs to make a management decision on the extent of the risk that it is willing to take, after implementing risk assessment using the criteria set forth in the Guiding Principles.

3.3.3.2. Two Levels of Compliance: Absolute Minimum and Going Beyond

One difficulty with human rights is that the existence of a human rights infringement is determined based on the subjective perceptions of the aggrieved person. Accordingly, while preventing human rights abuses that patently violate anyone's notion of humanity constitute the "absolute minimum" level of

obligation, a large gray zone exists above and beyond that level. One can assess a business enterprise’s sensitivity to human rights by looking at the mandatory obligation level that it sets for itself.

In actual operations, human rights measures will be determined and implemented assuming that the persons who might be impacted have a typical or average concept of human rights. It is important here that entities obtain and adequately reflect information from external expertise and/or stakeholders in what constitutes an “average” concept of human rights. Decisions should not be made hastily based solely on what is accepted internally within the company. If a business enterprise advocates ethical decisions and actions that surpass the thinking of the average person, they will naturally be welcomed by society, and could lead to enhanced corporate value.

3.3.3.3. Policy to Secure Transparency and Professionalism

Addressing human rights in business operations is not a mere internal activity; such operations are “interactions with society” involving repeated identification of risks and improvement of strategies.

At the same time that many business enterprises are expanding their areas of operation within an increasingly fierce competitive environment, human rights awareness is increasing globally. Consequently, human rights challenges are unavoidable as a practical matter. The enterprise’s human rights policy must seek transparency and professionalism, which requires periodic review by external experts. This is critical for the human rights policy to function not merely as a billboard to show that the enterprise is not lying or hiding anything, but as a means to enhance corporate value.

3.4. Human Rights Due Diligence Process

3.4.1. Unified Understanding of Human Rights Due Diligence

Principle 17. (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. The process should include assessing actual and potential human rights impacts, integrating and acting on the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.

The three pillars of the corporate responsibility to respect human rights are “a policy commitment,” “human rights due diligence,” and “remediation.” The Guiding Principles are often seen as “global human rights due diligence rules,” but to be accurate, human rights due diligence is just one of the goals of the Guiding Principles.

Human rights due diligence is not aimed at detecting illegal activity or inhibiting business operations. As described above, the term “due diligence” originally means “actions or efforts carried out to exercise care appropriate to one’s position (in order to avoid/reduce negative impacts).” In the Guiding Principles, the term “due diligence” also refers to “systems and programs for decision-making and business operations used by the corporate leadership to ensure that they exercise due care appropriate for their positions.”

The Commentary to Principle 17 provides a supplemental explanation that human rights due diligence can be included within broader enterprise risk-management systems; human rights due diligence should be initiated as early as possible in the development of a new activity or relationship; business enterprises should identify general areas where the risk of adverse human rights impacts is most significant and prioritize them; particular attention should be paid to “complicity;” and taking reasonable steps should help business enterprises address the risk of legal claims against them. A shared understanding of this correct definition of due diligence among Board members, managers, regular employees and suppliers prior to the commencement of due diligence activities is more likely to lead to success.

3.4.2. Assessing Impacts from Business Activities

3.4.2.1. Purpose of Impact Assessment

Principle 18. (Impact Assessment)

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- (a) Draw on internal and/or independent external human rights expertise;
- (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

Human rights due diligence begins by identifying and assessing the adverse human rights impacts in which business enterprises may be involved through their own activities. The impact assessment in connection with the business enterprise’s own activities is the starting point of human rights due diligence, but does not complete the process. Because it is a process, as set forth in the Guiding Principles, we must keep in mind that human rights due diligence comprises a series of steps.

Attention should then be paid to Principle 11, which states that “[b]usiness 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.” The Guiding Principles assume that “corporate activities cannot be free from the possibility of causing adverse human rights impacts.”

Japanese corporations tend to regard it as taboo to consider the possibility that adverse human rights impacts may be caused by their activities. Measures to mitigate impacts on the socially vulnerable are rarely discussed at the senior executive level. On the contrary, it is often observed that Japanese corporations enforce excessive conformity and acceptance of such impacts. This tendency should be eliminated.¹⁸

The Commentary to Principle 18 provides that business enterprises should assess the human rights context prior to a proposed business activity, where possible; the processes for assessing human rights impacts should include all internationally recognized human rights as a reference point; assessments of human rights impacts should be undertaken periodically throughout the life of an activity or relationship; and business enterprises should seek to understand the concerns of potentially affected stakeholders by consulting them directly, and in situations where such consultation is not possible, they should consider reasonable alternatives, such as consulting credible, independent expert resources.

The key point here is that everyone involved in management should be proactive in directly consulting with the potentially affected stakeholders or, alternatively, with expert resources, such that the findings will be reflected in subsequent business processes. If senior executives dump this obligation onto a junior executive charged with human rights affairs or treat it merely as a gesture to be displayed in the CSR report, the business enterprise faces the risk of being criticized by society for being “deceptive.”

3.4.2.2. Impact Assessment Methodology

“Business activity impact assessment” refers to investigation carried out prior to the commencement of a business activity in order to forecast and evaluate the severity and probability of a potential adverse impact on human rights arising in connection with the business activity.

In actual corporate business operations, some people might think that there is no way to determine in advance the level of severity and probability of the occurrence of adverse impacts on human rights in the context of a business activity. One could say that with the success of this effort depends in large part on how imaginative the enterprise is. However, some hints exist to increase an enterprise’s imaginativeness.

18. The ISO 26000 defines “social responsibility” as “responsibility of the organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behavior (2.18).” The notion that an organization’s decisions and activities have both positive and negative impacts has become a commonly-accepted view worldwide.

The first hint lies in the “policy commitment” described in the previous section. When its human rights policy is being drafted, more than a few business enterprises have already identified the scope of human rights that could be affected by their business activities. It is only natural, for example, for an IT company to focus on the human rights in connection with protection of personal information, or for an aircraft component manufacturer to focus on product safety.

The second hint arises from the various international human rights standards such as the Universal Declaration of Human Rights. For example, the Declaration lists various freedoms including physical freedom, prohibition of torture and slavery, freedom of thought and expression, and the right to take part in the government of one’s country, as well as various social rights including the right to education, the right to form and to join trade unions, and the right to an existence consistent with human dignity. Learning what types of human rights are generally recognized is a key prerequisite to human rights impact assessment.

The third hint can be found in precedent. Past examples in which other business enterprises were held accountable for human rights abuses can provide a great deal of information. Press archives are a useful source of information, and communications with external experts can also be quite helpful, as discussed below.

The frequency of situations thought to require a human rights impact assessment plays a major role in how burdensome business enterprises feel about such assessments. According to the Guiding Principles, “[b]ecause human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship” (Principle 18, Commentary).

However, in a number of situations, it may be difficult to conduct an impact assessment with limited resources. In reality, we can only regard the above quote as an ideal. Nevertheless, in addition to regular business activities, it is helpful to envision the following situations in which an impact assessment might be called for:

- Commencement of manufacturing of a new product, or launch of a new business;
- Formation of a joint venture;
- Merger, acquisition or liquidation of a business;
- Commencement of franchising or licensing;
- Making an investment

3.4.2.3. Typical Risk Areas to be Considered in Impact Assessments

Potential adverse human rights impacts that need to be assessed in a human rights due diligence exist in every value chain. Since human rights issues are relevant to activities of all groups and departments of a business enterprise, *areas of caution*, in which human rights challenges may be embedded, should be shared by both leadership and regular employees.

In this Guidance, the human rights challenges relevant to business activities in general and those specific to different business activities are shown separately with reference to actual examples of abuses previously identified. Needless to say, these are merely illustrative examples of typical abuses, and they do not list all possible types of human rights infringements.

<Business operations in general>

Stakeholder	Example of typical problem
Employee	Enterprise discriminates or gives unfavorable treatment in hiring, promotion, or retirement without reasonable grounds, such as the employee’s performance skills and attendance
	Enterprise does not ensure a minimum level of wages, hours and benefits, or does not offer a social insurance/pension plan needed for the employee to live with dignity
	Enterprise does not improve hazardous work environments, long working hours, abusive supervision or child labor, thereby inflicting mental and physical pain on frontline workers
	When working conditions are determined, enterprise denies workers the right to organize or right to bargain collectively and imposes unfairness on workers by taking advantage of its superior position as an employer
Supplier	In supplier management, enterprise does not pay sufficient attention to the supplier’s performance regarding human rights, including environmental preservation and protection of workers, consumers and residents, creating potential problems in the enterprise’s product procurement and its relationships with customers
	Enterprise does not take action despite receiving a whistleblower’s report or other information on a supplier’s actions creating a negative human rights impact
Customer	When providing information on merchandise or services, enterprise prioritizes ease of marketing by intentionally concealing or avoiding disclosure of unfavorable information that would affect consumers’ choices

	When receiving consumer complaints, enterprise does not provide contact information, respond in a responsible manner or make sufficient efforts to prevent the recurrence of the problem, misleading consumers into continuing to purchase products that cause human rights impacts
Community	Enterprise focuses only on its own interests, thereby imposing costs on the community
	When entering into overseas markets, in alliance with the local government, enterprise suppresses or is complicit in the suppression of community members opposing such entry
Shareholder	When a human rights or environmental proposal is presented by a shareholder, enterprise dismisses it as a minority opinion
	The enterprise's image is damaged by poor handling of human rights issues or insufficient disclosure of information, reducing the company's stock price and good will

<New business or facility>

Stakeholder	Example of typical problem
Employee	Enterprise recruits factory workers from rural areas and forces them to live in anxiety and isolation with uncertain working conditions, or fails to provide necessary training or support
Supplier (Contractor)	Enterprise pushes for tight deliveries without consideration for safety, forcing contractor employees to engage in hard and dangerous construction work, etc.
Community	The opening of a facility adversely impacts the surrounding natural environment, water sources and biodiversity, destroying local traditional industries
	A new business or facility faces community opposition in the planning phase because it would destroy the local culture, tradition, and lifestyle, and adversely affect social bonds, family relationships, or the ethics or health of the community
	A new business or facility faces community opposition in the planning phase because it would drive away indigenous people or cause health hazards to neighboring residents

<Research/development/design>

Stakeholder	Example of typical problem
Customer	The product design/development lacks sufficient consideration for safety and causes

	or may cause harm to the person or health of users
	The product design/development lacks sufficient consideration for people with disabilities and/or the elderly, or its use is difficult or dangerous
Community	When the product is discarded, it cannot be disposed of in the community or causes significant environmental pollution

<Procurement/production>

Stakeholder	Example of typical problem
Employee	A dirty work environment, dangerous work, and/or long hours are left uncorrected in the production stage, subjecting employees to health hazards or serious injury
	Enterprise allows child labor to occur because of inadequate age verification of workers, whether inadvertent or deliberate
Supplier	Enterprise places priority only on cost and delivery time in materials procurement, contributing to forced labor, low wages, dangerous work, long hours, child labor, and other forms of human rights abuses by the supplier, or to adverse impacts on the living environment of the community through depletion of natural resources, destruction of the natural environment, air, water, or soil pollution, or inadequate waste disposal
Customer	Enterprise places priority only on cost and delivery time in materials procurement, or uses raw materials or additives of unknown safety, endangering the lives and health of local residents
Communities	Enterprise endangers the lives and health of local residents through air or water pollution, or through traffic hazards created by emissions of vehicles associated with its business operations

<Marketing/service>

Stakeholder	Example of typical problem
Customer	Product labeling is deceptive, causing consumers to purchase wrong products
	Enterprise uses a fraudulent or threatening marketing model, causing consumers to purchase against their will or to suffer anxiety

<Recovery/recycling/disposal>

Stakeholder	Example of typical problem
Community	Due to inappropriate waste disposal practices, enterprise pollutes soil and rivers, endangering the health of local residents and driving them away

<Corporate merger/acquisition/split>

Stakeholder	Example of typical problem
Employee	Personnel measures associated with the M&A transaction deprive employees of reasonably expected benefits of continued employment and/or promotion
Shareholder	Enterprise inherits human rights problems from the M&A target due to inadequate due diligence prior to the M&A
Community	Enterprise perpetuates existing adverse community impacts due to inadequate due diligence prior to the M&A

<Business termination/dissolution>

Stakeholder	Example of typical problem
Employee	Personnel measures associated with termination/dissolution provide inadequate assistance with respect to job security or future employment, seriously impacting the lives of employees and their families
Community	Impact mitigation measures associated with termination/dissolution are inadequate, causing serious damage to the lives and living environment of local residents

<Investment >

Stakeholder	Example of typical problem
Shareholder	Enterprise places priority only on its own interests, indirectly contributing to (or being complicit in) human rights abuses and/or corruption at the local level, thereby reducing company value

<Franchising/trademark licensing>

Stakeholder	Example of typical problem
Shareholder	Enterprise indirectly causes human rights abuses by a franchisee or licensee as a result of the franchise/license contract, thereby reducing company value

<Public relations/advertising>

Stakeholder	Example of typical problem
Shareholder	Enterprise is accused of insulting the local culture, religion, or history, giving rise to a boycott, thereby reducing company value

<Social contribution>

Stakeholder	Example of typical problem
Shareholder	Humanitarian assistance extended by enterprise in a conflict area becomes hijacked by local government officials or armed forces, who demand illegal taxes or divert support to the purchase of weapons, thereby reducing company value

These are only examples. Japanese corporations should use the information that can be derived from these examples and decide the scope of an impact assessment accordingly, based on the nature and scale of the corporations' business, organization, and history.

3.4.2.4. Who should Lead Impact Assessments?

Arguments often take place in business enterprises regarding which department should be the main player in undertaking a human rights impact assessment. It is often contended that it should be department responsible for ensuring organizational compliance with CSR obligations, such as the CSR department, but a CSR department is not necessarily the most effective in undertaking a human rights assessment. Since human rights challenges must be viewed from a variety of perspectives, there is a risk that, unless performed by personnel who are familiar with actual workplace conditions and are in day-to-day contact with workers or community residents, the findings of an assessment might turn out to be very shallow. It is therefore desirable for Human Resources to take the lead if a potential human rights abuse exists in connection with employees, for Materials Management to be in charge if a potential human rights abuse exists at the supplier level, and, where the potential for human rights violations exists in connection with customers, the relevant department or division should implement the assessment in collaboration with the CSR department. In other words, the CSR department should act as a human rights coordinator between the departments.

As shown above, given limited resources and the natural division of responsibilities within an organization, it is not easy to undertake impact assessments of both new and existing aspects of all business activities. It may be unavoidable at the beginning that impact assessment is carried out only for certain activities that are selected on a discretionary basis. However, this discretion should not be intended or applied to preclude assessment of potential human rights issues. Activities whose risks are well established should be specified as subjects for impact assessment while taking into consideration of the amount of sales, the nature of the business or product, the area in which the activity takes place, and the social environment in which suppliers operate.

Subject matter	Lead function
Employees	Human Resources
Products/services	Materials Management/Sales/Production
Suppliers	Materials Management
Business decisions	Business Planning
Risk management, compliance	Operations/Audits

3.4.3. Integration into Business Activities

3.4.3.1. Integration of Impact Assessment Findings

Principle 19. (Impacts)

In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:

- (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
- (ii) Internal decision-making, budget allocations, and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to:

- (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products, or services by a business relationship;
- (ii) The extent of its leverage in addressing the adverse impact.

One of the elements of a human rights due diligence process is to take necessary action to prevent or mitigate the adverse impacts identified as a result of an impact assessment regarding a business activity.

Principle 19 provides that “[i]n order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.” At this stage, relevant operational departments and divisions of the enterprise are expected to take the lead. In the case of global enterprises, it is particularly important to take the various local characteristics into consideration. This is because for example, the extent of the potential for human rights abuse greatly varies from country to country. In the areas of child labor, forced labor, wages, and occupational safety and health in particular, there will be operational locations for which not simply the average local standard, but rather the global standard, or the perspective of such a standard, should be applied. One effective approach is for an enterprise to establish clear classification of countries and regions depending on their susceptibility to the occurrence of human rights abuses.

Simple examples of “appropriate action” include suspending the launch of a new business if it might engender a human rights issue, or discontinuing sales of an existing product if it is causing human rights impacts.

However, a profitable business activity is rarely discontinued in actual business operations: the normal option is to take necessary action to eliminate the impact while continuing the activity. However, in reality, it is not easy to actually take action to eliminate the impact: more often, the response is aimed only at mitigating or reducing the impact. For example, let us consider the impact of a traffic accident caused by

a company-owned car. In a country or region where traffic rules are not strictly observed, the accident violates not only the victim's right to life but also the driver's right to safety at work. Efforts to resolve this problem would include: (i) fitting company-owned cars with a speed governor; (ii) issuing a call for safety by the top management; and (iii) publicly recognizing employees with safe driving records. Any of these steps would be useful from the perspective of human rights due diligence. It would not be possible, however, to eliminate all traffic accidents overnight. Regardless, it is not unreasonable for an enterprise to set a goal of reducing the number of traffic accidents involving a company-owned car to zero. Setting such a goal serves a similar purpose to setting a goal of no workplace accidents at a plant.

3.4.3.2. Internal Decision-Making, Budget Allocation, and Monitoring

Given that PDCA is a business process itself, similar to human rights impact assessment, it is desirable that, if the potential for human rights abuses exists in connection with employees, Human Resources take the lead in the formulation and implementation of preventive action. If the potential for human rights violations exists with suppliers, Materials Management should be the main player, and if the same potential exists in connection with customers, the relevant department should lead the action in collaboration with the CSR department.

The implementation of human rights due diligence measures will ultimately entail additional costs to the business enterprise. Therefore, it is also important that management take the initiative in ensuring that decision-making processes officially approve appropriate action, that budgets cover the costs, and that the implementation of the measures adopted is monitored.

The PDCA cycle integrated into business operations naturally includes education and training. This education and training should improve employees' ability to carry out impact assessments and inculcate the basic attitudes required when taking action. Human rights challenges cannot be addressed by a binary response; they encompass elements that depend on personal values and experience. It is therefore important to recruit personnel whose values are consistent with those of the enterprise. Job applicants may be asked questions regarding their attitude toward human rights during the recruitment process, for example, so that their attitude can be reflected in the results of the evaluation.

It is also important to have an employee orientation mechanism to ensure that the responsibility to respect human rights is embedded into the culture of the organization. To this end, in addition to general human rights education, enterprises can encourage their employees to participate in volunteer activities geared toward supporting the socially vulnerable. Incorporation of incentives within the personnel structure for human rights advocacy and disincentives for human rights infringement is another possibility.

3.4.3.3. Complicity

The Guiding Principles contain the passage, “[q]uestions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties” (Principle 17, Commentary). This issue of complicity is a critical factor that makes the identification of concerns difficult in human rights impact assessments. Even if concerns are identified, it may be questioned how an enterprise can use its influence on another party (i.e., the entity causing harm).

In the Guiding Principles, the relationship between a human rights impact and a business enterprise is classified into three categories: (i) situations where the enterprise is directly causing a human rights impact; (ii) situations where the enterprise is contributing to a human rights impact; and (iii) situations where the enterprise has a business relationship with an entity that is causing a human rights impact. Categories (ii) and (iii) comprise the “complicity” group.¹⁹ Although these two categories are difficult to distinguish from each other, among situations where a business enterprise purchases goods or services from a supplier, situations in which the degree of the human rights impact is dependent on the enterprise’s decision-making or activities fall under category (ii). One example would be a situation where the causal relationship is obvious, as in the case where a sudden increase in orders from a business enterprise causes illegal labor at its upstream suppliers.

3.4.3.4. Use of Leverage

Based on the issue of “complicity” described in the preceding paragraph, the Commentary to Principle 19 provides that business enterprises should take the necessary steps to cease or prevent human rights impacts, and use their leverage to mitigate any remaining impact to the greatest extent possible. When the enterprise has “the ability to effect change in the wrongful practices of any entity that causes harm,” they are required to utilize it effectively. For example, where improper labor practices exist in connection with a supplier’s workers, an enterprise can provide the supplier with opportunities to learn and improve while reviewing its business relationship with that supplier, and if no improvement is made by the supplier, it can warn the supplier about an upcoming termination of their business relationship. Since the enterprise’s brand image is tarnished by the problematic actions of the other entity, the enterprise’s action could be considered as a business decision to protect its own value.

The Commentary also does not require absolutely uniform responses, but rather states that a business enterprise should weigh the situation from diverse perspectives, including the degree of leverage that the enterprise has over the entity concerned, the level of importance of the enterprise’s business relationship with the entity, the severity of the abuse, and whether terminating the relationship with the entity would have adverse human rights consequences.

19. The term “complicity” appears only three times in the Guiding Principles, but it is characteristic that the use of this term is limited to “cases where a business enterprise is contributing to human rights impacts.” It should be noted that this use of the term is from a totally different perspective than (1) direct complicity, (2) beneficial complicity, and (3) silent complicity, the three forms of complicity described in ISO 26000.

In addition, the Commentary provides that where the business enterprise lacks leverage over the entity causing an adverse impact, it should give the entity an incentive for remediation, or put pressure on it in collaboration with other actors, and that if these measures do not work, the enterprise should terminate the relationship with the entity, taking into account credible assessments of the potential adverse human rights impacts of doing so. The Commentary concludes that when the relationship is crucial to the enterprise, and immediate remediation of the abuse or termination of the relationship is not feasible, it should be prepared to accept any consequences – reputational, financial or legal – of the continuing connection while making sure that it can demonstrate its ongoing efforts to mitigate the impact.

<Q&As>

- Q. How can a corporation exercise its leverage?
- A. According to the Guiding Principles, the corporation should first work towards resolving the problem. If that does not work, then the corporation should decide whether to continue the relationship with the entity concerned. If the corporation decides to remain in the relationship, it should document its ongoing efforts for improvement while realizing the various risks of the continued connection.
- Q. Should a corporation terminate its relationship with a supplier that has a human rights problem?
- A. A decision should be made in a comprehensive manner, taking into account the severity of the adverse human rights impact, the ease of finding a reasonable alternative source, the reputational risk that the corporation would be exposed to, and the supply interruption risk that could arise from a downturn in the supplier’s business. The Guiding Principles do not seek a uniform response.

The “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas” recommends that a business enterprise’s “risk management strategy” should be i) continuing trade with the refiner (i.e., supplier) throughout the course of measureable risk mitigation carried out by the refiner; ii) temporarily suspending trade with the refiner while the refiner is pursuing ongoing measurable risk mitigation, or iii) disengaging with a refiner in cases where mitigation does not appear feasible or where the refiner has failed to respond to the risk.

3.4.4. Tracking Effectiveness

Principle 20. (Tracking)

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

- (a) Be based on appropriate qualitative and quantitative indicators;
- (b) Draw on feedback from both internal and external sources, including affected stakeholders.

The responsibility to respect human rights requires that tracking be performed to determine whether the enterprise’s human rights policies are being implemented optimally and whether it has

responded effectively to the identified human rights impacts, and to drive continuous improvement through PDCA cycles. Business enterprises should make particular efforts to track the effectiveness of their response to impacts on individuals from groups or populations that may be at a heightened risk of vulnerability or marginalization.

It is widely recognized that human rights issues have many qualitative factors, and therefore it is not easy to set goals or measure outcomes. There exist no international standards that offer key performance indicators applicable to human rights due diligence processes and the Guiding Principles do not provide any useful indicators either.

Two types of indicators are feasible: (i) those that demonstrate the level of resources invested in human rights initiatives or the degree of effort devoted to due diligence processes (e.g., the actual number of supplier audits conducted, the percentage of employees who receive training on human rights and other codes of conduct, or the percentage of employees who have access to remediation procedures); and (ii) indicators that present the outcomes of remediation efforts and the number of incidents of human rights abuse (e.g., the number of code of conduct violations, the percentage of employees who have experienced harassment or discrimination as obtained by an employee survey, or the number of contracts terminated due to concerns for human rights impacts). Each indicator needs to be adjusted according to the enterprise’s particular business characteristics.

The Commentary to Principle 20 encourages the integration of tracking mechanisms into relevant internal processes, such as performance contracts (contracts establishing goals, deadlines, and efficiency criteria), reviews, surveys and audits. The Commentary further points out that feedback obtained from “operational-level grievance mechanisms” provided as remediation tools is also useful.

3.4.5. External Communication and Organizational Learning

3.4.5.1. External Communication

Principle 21. (External Communication)

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

- (a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences;
- (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved;
- (c) In turn not pose risks to affected stakeholders or personnel or pose risks to legitimate requirements of commercial confidentiality.

In human rights due diligence processes implemented voluntarily by business enterprises, external communication of information is significant in providing a measure of transparency and accountability to individuals or groups who may be impacted, as well as to other relevant stakeholders, including investors.

Where concerns are raised by affected stakeholders or their representatives in particular, it is effective to report how the enterprise recognizes and addresses human rights impacts. For example, memories are still fresh that the US Dodd-Frank Act made it a duty of listed American corporations to submit a Conflict Minerals Report whenever necessary.

It is not easy to establish key performance indicators (KPIs) for human rights due diligence, as described above, but information to be incorporated in external communication should not be limited to KPIs. External communication should rather be seen as a comprehensive tool to discharge the enterprise's responsibility of transparency and accountability, showing how it is addressing human rights due diligence.

With respect to the information that should be communicated, the Commentary to Principle 21 only says, "[t]he reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights," but this should not be interpreted in a limited way. In view of the purpose of discharging the responsibility of transparency and accountability, it is desirable to report on the three pillars, i.e., a "policy commitment," "human rights due diligence," and "remediation." For "human rights due diligence," disclosure of information such as what types of impact assessments were done, how the enterprise recognizes the risks of human rights abuses, and what new measures were taken²⁰ is most significant, in addition to the reporting of KPIs, even if the description of the information is qualitative. However, adequate consideration must be given in the disclosure to ensure that the affected stakeholders are not exposed to any secondary risks. When excessive demands for disclosure are made under the pretext of assessing human rights impacts, it is recommended that an enterprise deal with them with the assistance of an objective third party, for example, while ensuring transparency and accountability.

At present, most external communication in connection with human rights due diligence takes place in corporate responsibility/sustainability reports. There are no rules limiting human rights reporting to this format, however. Today, external communications regarding human rights are not limited to periodic formal reports; the use of websites should be considered. In addition, when concerns regarding human rights impacts are raised by stakeholders or their representatives, it is also important that the subject matter be addressed at regular face-to-face meetings. The Commentary to Principle 21 clearly states, "[c]ommunication can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports."

20. According to the report "Corporate Human Rights Reporting: An Analysis of Current Trends" published as part of the joint project of the Global Reporting Initiative (GRI), UN Global Compact, Realizing Human Rights: The Ethical Globalization Initiative in 2009, recent progress in external communication regarding human rights includes: (i) stakeholder inclusion, (ii) policies and procedures implementation reporting (e.g., reporting on supply chains and reporting on company-level grievance mechanisms), and (iii) reporting on positive contributions to human rights. At the same time, the report also lists as challenges and weaknesses (i) equating community as philanthropy, (ii) lack of performance reporting and impact reporting, and (iii) lack of balance in reporting on positive and negative impacts.

Outside of Japan, some independent reports on human rights issues are issued separately from CSR/sustainability reports. These include reports on initiatives to prevent human rights abuses in supply chains and reports on the progress of measures taken in connection with mining operations.

The Commentary to Principle 21 states, “[i]ndependent verification of human rights reporting can strengthen its content and credibility.” While this is valid advice, it should be understood that there is no fully-established method of independent verification of human rights reporting at present.

<Q&As >

Q. Is it acceptable to report on human rights issues using a few pages in a CSR report?

A. As long as it constitutes official reporting, any medium will suffice, whether an annual report, consolidated report, CSR report, or an official website. When providing the information, attention should be paid to the importance of the information, its relationship to other information, the credibility of the source, and the consistency and comparability of the information. Each corporation should determine the amount and specificity of the information it provides based on its attitude toward accountability.

Q. Is disclosing dilemma situations effective?

A. If it effectively and accurately communicates how a corporation is addressing human rights issues, disclosure of dilemma situations could be used. However, caution should be heeded: an excessive emphasis on the corporation’s remediation efforts could be negatively interpreted as an excuse for not actually resolving the problem.

3.4.5.2. Collaboration with NGOs

While non-profit/non-government organizations range in size from global entities to groups focusing on the particular needs of specific communities, human rights and other sustainability-related organizations tend to share some common traits:

- (1) they emphasize strategic, innovative, and mobile actions, and actively undertake campaigns that will lead to the dissemination of information (presentation of issues) and promotion of social movements;
- (2) they carry out operations through the provision of services, with the ultimate goal of policy change through cooperation with the government and/or integration of sustainability into market functions through collaboration with businesses; and
- (3) they focus on strengthening themselves organizationally by networking with other NPOs/NGOs and ensuring the satisfaction of their supporters, and through fundraising efforts.

Because a number of human rights organizations are experts in protecting the interests of civil society, they are highly influential in countries outside Japan, based on the trust and support they enjoy, and these groups have provided models for social change. It is not uncommon for Western corporations to cooperate with these groups in their corporate decision-making or employ them as expert advisors. Socially-conscious entrepreneurs, who start enterprises aimed at providing solutions to serious social or

environmental issues, may be said to complement these NPOs/NGOs and help to increase the connection between businesses and NPOs/NGOs.

Since NPOs/NGOs have strong horizontal connections with one another, if one such organization has a negative impression of a business enterprise, that impression can be amplified, increasing the risk to the enterprise. Building cooperative relationships with NPOs/NGOs with which an enterprise has exchanged inquiries/responses or entered into a dialogue can create a form of security for the enterprise. It is important that these organizations be treated with respect and transparency. For example, business enterprises might ask for their advice on how they should respond in case of an accident or controversy. It is also important for enterprises to ask to participate on committees formed to remedy corporate human rights violations in an effort to demonstrate their integrity.

3.4.6. Remediation of Adverse Impacts

Principle 22. (Remediation of Adverse Impacts)
When business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

If, through its human rights due diligence process or other means, an enterprise identifies an adverse impact on people potentially affected by its business activities or a risk of contributing to an adverse impact, the enterprise is required to actively engage in remediation by itself or in cooperation with other organizations or agencies. The grievance processes described below can be effective means of enabling remediation, but they are not the only available mechanisms.

The Commentary to Principle 22 points out that if adverse impacts are directly linked to the business enterprise by a business relationship, the enterprise itself is not required to carry out remediation but is responsible for taking a role in remediation, and where crimes are alleged, the enterprise should cooperate with judicial authorities.

The section of Principle 22 that is related to the Commentary to Principle 17 defines human rights risks as the business enterprise’s *potential adverse human rights impacts* and provides that these potential impacts should be addressed through prevention or mitigation while actual impacts – those that have already occurred – should be the subject of remediation according to Principle 22.

3.5. Process of Remediation of Adverse Impacts (Remedy)

3.5.1. Agent in Remedy

3.5.1.1. State Duty to Protect Human Rights

Needless to say, States are the primary agents responsible for protecting human rights, as provided by Principle 1, which states that “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.” It is a State’s duty under international human rights law to prevent and address human rights violations.

In general, it has been argued that although States have a duty to protect human rights, because it is a standard of conduct required of States, they are not responsible per se for human rights abuses by private actors. However, States may breach their international human rights obligations when such violations can be attributed to them, or when they fail to take appropriate steps to prevent, investigate, punish, and redress private actors' abuses. Accordingly, States' duties under international human rights law are deemed to include the obligation to protect their citizens from human rights violations committed by third parties, including business enterprises.

3.5.1.2. Access to Effective Remedy

Providing access to an effective remedy for human rights infringements has both procedural and substantive aspects. The procedural aspect requires that grievance mechanisms be available. The Commentary to Principle 25 provides, “[p]rocedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.” The substantive aspect requires that the remedy to be provided “counteract or make good any human rights harms.” The Commentary to Principle 25 lists the remedy as including “apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.”

3.5.2. Grievance Mechanisms

3.5.2.1. State-based Grievance Mechanisms

While State-based grievance mechanisms may be judicial or non-judicial, they constitute the foundation for a wider range of mechanisms by which to remedy human rights violations.

3.5.2.2. Non-State-based Grievance Mechanisms

Principle 29. (Operational-level Grievance Mechanisms)
To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

While the Guiding Principles address both State-based and non-State-based grievance mechanisms, since this Guidance is geared toward businesses, this Guidance will focus on the latter.

The Commentary to Principle 29 explains that “[o]perational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise, and they are typically administered by a business enterprise alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the business enterprise directly assessing the issues and seeking remediation of any harm.”

Operational-level grievance mechanisms perform two key functions: first, they support the identification of adverse human rights impacts as part of an enterprise’s ongoing human rights due diligence and by analyzing trends and patterns in complaints, enterprises can also identify systemic

problems and adapt their practices accordingly; second, they make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the enterprise, thereby preventing harms from compounding and grievances from escalating.

Since these operational-level grievance mechanisms aim to identify legitimate concerns of people who may be adversely impacted and to counteract or remedy the impacts, the format required for the filing of complaints or grievances should not be overly demanding. In addition, while these grievance mechanisms represent a problem-solving process with stakeholders, they are not a substitute for labor-related dispute resolution systems, judicial grievance mechanisms, or any other specialized public mechanisms, and they should not be administered in a way to preclude or limit access to these mechanisms.

3.5.3. Corporate Grievance Mechanism

3.5.3.1. Corporate Grievance System

The handling of grievances filed with enterprises may vary depending on whether or not the enterprise’s business operations deal directly with consumers. Nevertheless, even where an enterprise’s business operations are not directly linked to consumers, this does not mean that no grievance mechanisms are needed. Such mechanisms are necessary nonetheless because the products of the enterprise will be ultimately used by consumers and enterprises should also give consideration to the impacts that their plants and factories may have on their surrounding areas.

3.5.3.2. Requirements for Corporate Grievance Mechanism

Principle 31. (Requirements for Grievance Mechanism)
In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving mechanisms and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances.

Principle 31 provides detailed criteria with respect to design, revision, and assessment that grievance mechanisms should meet in order to be effective. Care must be taken because poorly designed or implemented grievance mechanisms may leave the affected stakeholders feeling underserved and their sense of grievance may be strengthened.

Eight criteria are listed. Operational-level grievances must be (a) legitimate, (b) accessible, (c) predictable, (d) equitable, (e) transparent, (f) rights-compatible, (g) a source of continuous learning, and (h) based on engagement and dialogue.²¹ The Commentary to Principle 31 provides supplementary explanations of each of these criteria.

Among these, the criterion that poses particular difficulty for Japanese corporations in the handling of grievances would be (h), i.e., “based on engagement and dialogue.” It is not just or acceptable for a business enterprise to unilaterally determine the outcome of a complaint while it is the subject of complaints. A condescending attitude on the part of the enterprise aggravates the situation and increases the negative impact on its business and corporate brand. Where adjudication is needed, a legitimate, independent third-party mechanism should be employed. Due to these concerns, consulting the stakeholder groups on the design and performance of a grievance mechanism can help serve the common interest of both parties: that will help ensure that the mechanism meets the needs of the stakeholders, that the mechanism will actually be used, and that the mechanism will work successfully.

3.5.3.3. Consumer Grievance System

When we discuss consumer issues, we first need to recognize the basic human rights relevant thereto, including the right to safety, the right to be informed, the right to choose, the right to be heard, the right to redress, the right to consumer education, and the right to a healthy environment, as set out in the core tenets of ISO 26000, as well as the right to privacy (Article 12, the Universal Declaration of Human Rights), adoption of a precautionary approach (Rio Declaration on Environment and Development), promotion of gender equality and empowerment of women (cessation of perpetuation of gender stereotypes based on the Universal Declaration of Human Rights and the Millennium Development Goals), and promotion of universal design.

In connection with consumer dispute resolution, the ISO quality management package includes three guidance standards: ISO 10001 for customer satisfaction, ISO 10002 for handling of complaints, and ISO 10003 providing guidance for organizations regarding an effective and efficient external dispute-resolution process for complaints that have not been resolved internally. These standards together provide a systematic approach to the prevention and handling of customer complaints and dispute resolution.

21. ISO 26000 lists seven attributes that remedy mechanisms need to be effective: (a) legitimacy, (b) accessibility, (c) predictability, (d) equitability, (e) rights-compatibility, (f) clarity and transparency, and (g) being based on dialogue and mediation (6.3.6.2).

Additionally, we must also keep in mind that issues relating to community involvement and development are also highly relevant to complaint handling. ISO 26000 identifies a number of issues relevant to community involvement and development, including community involvement, education and culture, employment creation and skills development, technology development and access, wealth and income creation, health, and social investment.

<Q&As >

- Q. How should a corporation respond to unreasonable complaints?
- A. Corporations should determine whether the complainant's demand is unreasonable using an impartial third-party assessment provided by external counsel. If the demand is criminal in nature, corporations should collect evidence and seek assistance using applicable judicial mechanisms. In addition, the supervisor and colleagues should assist the employee who is the direct contact with the complainant to ensure that the burden and stress of handling the complaint is shared equitably.

Chapter 4

Corporate Responsibility to Respect Human Rights - Examples

4.1. Corporate Case Studies

The report published in March 2013 by the Business Policy Forum of Japan, on the state of the corporate responsibility to respect human rights in business operations in emerging countries, recognizes the human rights risks of business operations and provides the results of investigations of cases where business enterprises were held responsible for human right abuses. Examples of how business enterprises are trying to meet their responsibility to respect human rights in their supply chain are shown in Attachment I, cited from the annex to the above report, entitled “Examples – Japanese and Foreign Enterprises’ Initiatives to Respect Human Rights.”²²

4.2. Human Rights Policy Development - Example of Japanese Corporation

As an example of human rights policy development by a Japanese corporation based on the Guiding Principles, Attachment II shows the human rights policy of Hitachi Group, which was publicized in May 2013. This corporate human rights policy clearly indicates the relevant challenges and the direction being followed by international conglomerates in light of business globalization and the development of international standards regarding business and human rights.

4.3. Examples of Corporate Initiatives to Respect Human Rights Focusing on Specific Stakeholder Groups

Human rights measures taken in connection with the corporate responsibility to respect human rights as provided by the Guiding Principles increasingly focus on specific stakeholder groups such as women, children, and indigenous people.

4.3.1. Women’s Empowerment Principles²³

The Women’s Empowerment Principles (WEPs) were created in 2010 as a product of collaboration between UN Women and the United Nations Global Compact. The WEPs focus on areas that are essential for enterprises in promoting gender equality in the workplace, marketplace and community.

The WEPs were created based on the recognition that gender equality is an important human rights challenge for businesses. Eventhough equality between men and women is a universal and global principle and a fundamental and inherent human right, women are still facing discrimination, marginalization and/or behind the scenes off from progress. On the other hand, recent research findings that diversity in the social roles of men and women contributes to improved business performance suggest that private and public interests are compatible. The creation of the WEPs was based on the recognition that a policy based on

22. The Attachment includes descriptions deemed related to supply chains and cited from “1. Corporations Investigated via Interview” and “3. Corporations Investigated via Documentation” shown in Attachment I “Examples – Japanese and Foreign Corporations’ Initiatives to Respect Human Rights” (pp. 49-105) attached to the “Study Report on Respecting Human Rights in Business Operations in Emerging Countries” (http://www.bpfj.jp/act/download_file/68127081/12058495.pdf) issued by the CSR Study Group of Business Policy Forum, Japan.

23. See the UN Women Japan Liaison Office Website <<http://japan.unwomen.org/weps/>> for more details on the Women’s Empowerment Principles (WEPs).

well-planned actions and purposes is required in order to fully utilize the talents, skills, experience and vitality of women.

The WEPs consist of the following seven principles:

- Women’s Empowerment Principles (WEPs)
1. Establish high-level corporate leadership for gender equality
 2. Treat all women and men fairly at work – respect and support human rights and nondiscrimination
 3. Ensure the health, safety and well-being of all women and men workers
 4. Promote education, training and professional development for women
 5. Implement enterprise development, supply chain and marketing practices that empower women
 6. Promote equality through community initiatives and advocacy
 7. Measure and publicly report on progress to achieve gender equality

The WEPs provide a “gender “lens”” (perspective) through which business enterprises should research and analyze their current practices, standards and reporting disclosure behavior. They provide guidance for enterprises in streamlining their existing policies and operations or creating needed new ones in view of their actual business practices to realize women’s empowerment. The WEPs asks chief executive officers (CEOs) of businesses that support the WEP to sign the CEO Statement of Support.

4.3.2. Children’s Rights and Business Principles²⁴

Save the Children, the United Nations Global Compact, and the United Nations Children's Fund (UNICEF) jointly launched the Children’s Rights and Business Principles in March 2012. Ten principles comprise the Children’s Rights and Business Principles and provide a comprehensive framework for efforts that enterprises should make in respecting and supporting the rights of children in the workplace, marketplace and community.

- Children’s Rights and Business Principles
- All business should:
- Principle 1: Meet their responsibility to respect children’s rights and commit to supporting the human rights of children.
 - Principle 2: Contribute to the elimination of child labour, including in all business activities and business relationships.
 - Principle 3: Provide decent work for young workers, parents and caregivers.
 - Principle 4: Ensure the protection and safety of children in all business activities and facilities.
 - Principle 5: Ensure that products and services are safe and seek to support children’s rights through them.
 - Principle 6: Use marketing and advertising that respect and support children’s rights.
 - Principle 7: Respect and support children’s rights in relation to the environment and to land acquisition and use.
 - Principle 8: Respect and support children’s rights in security arrangements.
 - Principle 9: Help protect children affected by emergencies.

24. For more details on the Children’s Rights and Business Principles, see the Japan Committee for UNICEF Website <http://www.unicef.or.jp/library/pres_bn2014/pres_14_15.html>.

Principle 10: Reinforce community and government efforts to protect and fulfill children's rights..

It can be seen from these ten principles that the connection between business activities and children does not lie only in the often-cited prohibition of child labor. Children have various connections with businesses as stakeholders, i.e., as workers, consumers, and community residents, and these connections extend not only to an enterprise's activities but also to its domestic and overseas value chains. As shown above, the Children's Rights and Business Principles do not stop with the prohibition of child labor: they ask that businesses provide decent work for young workers, parents, and caregivers. In other words, the Children's Rights and Business Principles aim not only to protect "children" themselves but also encompass a wide range of people including young workers and parents, to ensure children are protected. The Children's Rights and Business Principles also call on businesses not only to ensure that products and services are safe for children, but also to support children's rights through these products and services. In its human rights due diligence, an enterprise should not only identify negative areas where it fails to respect human rights, but also should incorporate positive actions to respect human rights into its business operations as part of its corporate social responsibility.

While the Children's Rights and Business Principles focus on the responsibility and role of businesses in respecting and supporting children's rights, the Guiding Principles provide for the corporate responsibility to respect human rights in general, and these two sets of principles complement each other.

Unlike the United Nations Global Compact's Ten Principles and the Women's Empowerment Principles (WEPs), the Children's Rights and Business Principles do not include a mechanism for a CEO to express the enterprise's commitment. However, the Principles call on businesses around the world to follow them. Specifically, business enterprises are expected to voluntarily cooperate in raising awareness, express commitment to the Principles in their basic policies, comply with the Principles in their business activities, report on their compliance in their existing reporting system (publication of CSR reports or integrated reports), and make efforts to share good practices with other enterprises.

4.3.3. Japanese Corporation Example

While yet to come to fruition, Ajinomoto Group's Ghana Nutrition Improvement Project is shown in Attachment III as an example of corporate efforts to observe the Women's Empowerment Principles and the Children's Rights and Business Principles.

Chapter 5

Integrating a CSR Clause in Supplier Contracts²⁵

5.1. Purpose of Proposing Model CSR Clause

This chapter proposes a model CSR clause for supplier contracts that obligates the supplier to comply with the CSR procurement guidelines, code of conduct and other relevant standards. It also provides an overview of the legal grounds for the inclusion of a CSR clause.

As was made clear in Chapter 1, business enterprises are increasingly required to ensure that they fulfill their human rights and social responsibilities throughout their supply chains. As described in Chapter 3, the Guiding Principles provide in the commentaries that one of the purposes of human rights due diligence is to ensure that business enterprises do not contribute to any human rights infringements committed by their suppliers or others. In reality, as shown in Chapter 4, many enterprises are already making efforts to meet their human rights and social responsibilities in their supply chains.

Many business enterprises include a CSR clause in their contracts with suppliers as a legal tool to effectively ensure that human rights and social responsibilities are fulfilled throughout their supply chains. According to a 2009 survey carried out by the Japan Business Federation, 39% of Japanese business respondents said that they had integrated some type of CSR clause into their contracts with suppliers.²⁶ Furthermore, Japanese corporations are increasingly asked by their overseas customers to include a CSR clause in contracts that they enter into as a supplier.

However, there has been very little discussion from a legal perspective regarding the specific terms and desired performance of a CSR clause. If a CSR clause is written in an abstract or declarative fashion, substantial efforts from supply chain partners in meeting human rights and social responsibilities cannot be expected. On the other hand, where the CSR clause is excessively burdensome on the supplier, it may be misused by the business enterprise as a means to evade responsibility and shift blame onto the supplier.

Accordingly, this Guidance examines the elements of a desirable CSR clause, which will be presented as a model CSR clause below, by taking into account the various challenges faced by supply chains in meeting their human rights and social responsibilities, as well as by comparing the CSR clause to a clause that a large number of Japanese corporations have already adopted to eliminate the influence of organized crime groups (“Organized Crime Exclusion” clause or “OCE” clause).

The inclusion of a CSR clause will provide a trigger for human rights due diligence to be conducted with the involvement of the corporate legal department and top leadership under the legal

25. The model CSR clause and its commentary in this chapter were prepared based on: Sato Izumi, Takahashi Daisuke. “CSR Legal Strategies for Supply Chains.” *NBL*, 2013, No. 1001, p.10. / *NBL*, 2013, No. 1002, p.49 / *NBL*, 2013, No. 1003, p.32, and, Takahashi Daisuke. “CSR Legal Strategy for Global Age.” *Security Analysts Journal*, August 2014, p.58, as well as reviews and discussions at the Japan Federation of Bar Associations. In drafting the model CSR clause, we received valuable feedback and comments from various Japanese member companies of the Global Compact Network Japan, as well as from Amnesty International Japan, the Institute of Developing Economies-JETRO Research Project “Business and Human Rights in Emerging Markets,” and the Material Transactions Seminar (organized by Toshio Miyajima, administered by Shojihomu Co., Ltd.). We sincerely extend our gratitude to all parties for their involvement and support.

26. Japan Federation of Economic Organization (Keidanren). “Results of Survey on CSR (Corporate Social Responsibility) 2009”

guidance of lawyers. It is strongly recommended that business enterprises and lawyers providing legal assistance consider the inclusion of a CSR clause in their supplier contracts by using the model CSR clause proposed in this chapter in order to promote the fulfillment of the enterprise's human rights and social responsibilities throughout the supply chain.

5.2. Need to Meet Human Rights and Social Responsibilities in Supply Chains and Effectiveness of CSR Clause

5.2.1. Increasing Visibility of Human Rights Abuse Risks in Emerging Countries

The risk that a business enterprise will become the target of strong social disapproval for contributing to violations of human rights is rapidly increasing, especially in connection with its supply chains in emerging and developing countries. Japanese society and international communities are increasingly demanding that Japanese corporations ensure compliance with their human rights obligations throughout their global supply chains.

The collapse of a sewing factory in Bangladesh in April 2013, which resulted in more than 1,100 deaths and over 2,500 injured victims, was a horrific catastrophe that shocked the world, including Japan. This incident drew attention to the terrible working conditions suffered by the workers of the sewing factory, and shone a spotlight on human rights infringements committed by businesses in emerging countries. It was revealed that many apparel companies from advanced countries, including Japan, were outsourcing production to this sewing factory. They became the focus of criticism for having taken part in these human rights abuses. At the same time, the criticism helped the outsourcing enterprises to strongly recognize the need to respect human rights in their supply chains.²⁷

Following the incident, the Accord on Fire and Building Safety in Bangladesh²⁸ was established in May 2013. This Accord legally binds member enterprises. It requires them to contribute large sums of money, which are used to conduct safety inspections of sewing factories and provide remedies if any safety problems are found, in order to improve the working environment of sewing factories. Although some US corporations have refused to sign the Accord on the ground that it subjects them to unlimited liability,²⁹ more than 150 apparel companies from twenty countries have signed it.³⁰ In addition, in response to the incident, the European Union, Bangladesh government and the International Labour Organization issued a Joint Statement in July 2013.³¹ This Joint Statement also clearly refers to the need for responsible business behavior on the part of multinational corporations with regard to their supply chains.

In a number of emerging and developing countries, the rule of law is not fully embraced, and laws and regulations for the protection of human rights are not quite established. Even where laws and regulations exist, they are sometimes not enforced. Therefore, the risk of human rights abuses by businesses is particularly high in emerging and developing countries. Even when a Japanese corporation is not the cause

27. "Factory Collapse in Bangladesh, Storm of Protest Spills over Japanese Corporations." *The Nikkei*, April 28, 2013

28. Accord on Fire and Building Safety in Bangladesh

29. Some US corporations formed the Bangladesh Alliance for Worker Safety to counteract the Accord. <http://www.bangladeshworkersafety.org/>

30. <http://www.bangladeshaccord.org/>

31. Joint Statement "Staying Engaged: A Sustainability Compact for continuous improvements in labor rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh"

of human rights impacts, it is facing an increasing risk of being held legally and socially liable for human rights impacts caused by its supplier on the basis of its contribution to such impacts.

5.2.2. Paradigm Shift in CSR Procurement

In recent years, CSR procurement, or the fulfillment of corporate social responsibility throughout the supply chain, is being upgraded in some industries from a voluntary standard to the level of a legal obligation or its equivalent. In other words, a paradigm shift is occurring in CSR procurement.³²

The conflict minerals regulations introduced in the United States in particular made CSR procurement a legal obligation, which had a great impact on businesses worldwide. Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,³³ which became law in July 2010, sets forth the conflict minerals provisions that require US public companies to disclose and report the use of conflict minerals originating in the Democratic Republic of the Congo or an adjoining country. The US Securities and Exchange Commission adopted the final rules that embody the provisions in August 2012,³⁴ such that the conflict minerals regulations began to be fully enforced in January 2013. As a result, it became necessary for not only US companies, but also for any Japanese corporation that is a supplier of a US company, to determine whether a conflict mineral is used in the supply chain. In addition to the US conflict minerals regulations described above, regulations concerning supply chain management have been introduced or reinforced in recent years in various CSR areas including forced labor,³⁵ chemical substances,³⁶ illegal logging,³⁷ and bribery.³⁸

Furthermore, the influence of international codes and standards covering CSR is increasing, including, in addition to the Guiding Principles, ISO 26000, the United Nations Global Compact, the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. In particular, the renewed EU strategy for Corporate Social Responsibility published in October 2011³⁹ requires that European companies comply with these international codes and standards and provides that their compliance must be monitored. Thus, European companies as well as business enterprises of other countries urgently need to ensure full compliance with these international codes and standards.

The scope of non-financial information that must be disclosed by businesses, such as environmental, social and governance information, is also expanding.⁴⁰ In Europe, the European Parliament adopted in April 2014 a Directive that required public-interest entities of a certain size or larger

32. For details of conflict minerals regulations and their impact on business operation, see: Sato Izumi, Takahashi Daisuke. "CSR Legal Strategies for Supply Chains (first half)." *NBL*, 2013, No. 1001, p.10

33. Dodd-Frank Wall Street Reform and Consumer Protection Act

34. www.sec.gov/rules/final/2012/34-67716.pdf

35. California Transparency in Supply Chain Act (SB 657).

36. EU RoHS Directive: Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, EU REACH Regulation: Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals

37. The Lacey Act (16 U.S.C. §§ 3371–3378), Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market

38. US FCPA: Foreign Corrupt Practices Act of 1977 (15 U.S.C. § 78dd-1, et seq.), UK Bribery Act 2010

39. A renewed EU strategy 2011-14 for Corporate Social Responsibility

40. EU Directive concerning non-financial information, US Sustainability Accounting Standards Board (SASB), G4 of Global Reporting Initiative (GRI)

to expand their reporting of non-financial information to include information relating to environmental matters, societal and employee matters, respect for human rights, anti-bribery and corruption issues, and diversity in the board of directors.⁴¹

In December 2013, the International Integrated Reporting Council published the International Integrated Reporting Framework⁴² for integrated reporting of financial and non-financial information. Business enterprises are now called on to report how non-financial matters affect the creation of long-term value, and CSR information is becoming increasingly important for investors.

Given the paradigm shift continuing in CSR procurement as shown above, CSR risks are increasing for enterprises with inadequate CSR efforts, meaning that the legal and reputational risks of non-compliance are becoming increasingly significant. To avoid these risks, Japanese corporations need to redefine CSR procurement as a priority in compliance and risk management and make company-wide compliance, ensuring collaboration among the top leadership, Legal Affairs, Materials Management, Human Resources, and Public/International Relations.

5.2.3. Functions and Effectiveness of CSR Clause

While it is increasingly necessary to ensure that human rights and social responsibilities are met in supply chains as described above, a CSR clause in supplier contracts can have a number of other functions, including:

(1) Demonstration of Commitment to Compliance

The business enterprise and the supplier can both demonstrate their commitment to the promotion of CSR procurement and human rights due diligence through the inclusion of a CSR clause in their contract.

(2) Prevention

The business enterprise may be able to prohibit the supplier from entering into any business relationships with companies who are in violation of its CSR code of conduct. At the same time, it will be easier for the enterprise to demand corrective action from the supplier if it breaches the CSR code of conduct.

(3) Legal ground

The business enterprise can terminate a contract with a supplier that is violating the CSR code of conduct based on the CSR clause and assert the violation as the ground for such termination in court. When the enterprise suspends its business relationship with the supplier, the termination of the contract may not be acknowledged in the absence of a compelling reason, based on the “continuous contract” doctrine and the enterprise may face the risk of being held liable for damages to the supplier.⁴³ However, in recent court cases, the validity of the termination based on “continuous contract” has been determined based on the terms of that contract.⁴⁴ It therefore will be easier to obtain judicial acceptance of the termination by including a CSR clause that clearly lists the grounds for contract termination.

41. http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm

42. International Integrated Reporting Council. “International Integrated Reporting Framework”

43. For more information on continuous contracts and their termination, see: Kato, Shintarou et al. “<Round Table> Continuous Contracts and Their Termination.” *Hanrei Times*, No.1058, 2001, p.4

44. Masuda Jun. “Practice of Continuous Contracts under the Principle of Freedom of Contract.” *NBL*, 2013, No. 993, p.46

(4) Promotion of information sharing

In addition to the three functions described above, a CSR clause can serve to promote information-sharing between the business enterprise and the supplier through the introduction of the information-sharing tools described below. In order to promote the protection of human rights and social responsibilities in a supply chain through proactive joint efforts by both the enterprise and the supplier, it is essential for both parties to continuously share information and engage in back-and-forth communication. It is, however, extremely difficult for an enterprise to carry out human rights due diligence and CSR procurement for all suppliers in its supply chain in a one-size-fits-all fashion. Adjustments must be made according to the type and degree of risk, and in order to accurately assess which suppliers involve increased risk, the enterprise needs to communicate with them.

5.3. Desirable CSR Clause – Comparison with OCE Clause

What provisions should the CSR clause set out in the supplier contract in order to effectively achieve these functions? This issue is discussed below by comparing the model CSR clause to an OCR clause (organized crime exclusion clause).

5.3.1. Overview of OCE Clause

Before comparing a CSR clause and an OCE clause, let us first review (i) relevant laws and ordinances and how they are executed, as well as (ii) the substance and (iii) functions of a typical OCE clause.

(1) Relevant laws and ordinances and how they are administered

The inclusion of an OCE clause into contracts was recommended by the Anti-Racketeering Committee of the Japan Federation of Bar Associations, the police, the Centers for the Removal of Criminal Organizations, and industry associations, as an effective tool for breaking free from any relations with antisocial forces including organized crime groups. A model clause has been published.⁴⁵ The government guidelines “Guidelines on How Enterprises can Prevent Victimization by Antisocial Forces” were issued in June 2007. These guidelines clearly refer, in their Notes section, to the effectiveness of having an OCE clause. Prefectural ordinances on the elimination of organized crime groups came into effect in all prefectures by October 2011, providing that businesses should make efforts to include an OCE clause in their contracts.⁴⁶ Thanks to these references in the guidelines and legislation, OCE clauses are increasingly included in business contracts in various industries and business relationships.

(2) Content of an OCE Clause

An OCE clause generally includes: (i) a covenant (each party to the contract promises that it is not related to any antisocial forces such as organized crime groups); (ii) a provision concerning the right to

45. For details concerning OCE theories, legal practices and model OCE clauses, see: First Tokyo Bar Association’s Anti-Racketeering Committee. “Industry-specific Anti-Racketeering Practice: Theories and Application of ‘Organized Crime Exclusion Clause.’” *Kinzai Institute for Financial Affairs*, 2003; Tokyo Bar Association’s Anti-Racketeering Special Committee. “Organized Crime Exclusion and Corporate Practices.” *Shojihomu*, 2011; and Takahashi Daisuke et al. “Measures against Antisocial Forces in Global Era.” *NBL*, 2012, No. 991, p.12 / *NBL*, 2013, No. 993, p.72

46. Articles 24 and 25 of Tokyo Prefecture’s Ordinance for Exclusion of Organized Crimes

terminate the contract (a provision providing that either party can terminate the contract in the event that the other party is found to have breached the covenant by belonging to an antisocial force such as an organized crime group); and (iii) a provision concerning release from liability for damages (a provision providing that if the contract is terminated based on any of OCE clause provisions, the terminating party is not liable for any damages suffered by the breaching party).

(3) Functions

An OCE clause has three functions: (i) it serves to demonstrate the parties' commitment to compliance – business enterprises can demonstrate that they are exercising due diligence to ensure compliance with organized crime elimination ordinances by having an OCE clause in their contracts; (ii) it prevents unwanted involvement – enterprises can cause organized crime groups to hesitate entering into a business relationship with them by having an OCE clause in their contracts; and (iii) it operates as a legal justification – enterprises are able to terminate the contract in the event that the other party is found to be part of an organized crime group based on the OCE clause, and can assert the relevant provision of the OCE clause as the ground for the termination.⁴⁷

The functions of an OCE clause to demonstrate compliance and prevent unwanted involvement are held in high regard on a practical level, such that OCE clauses are integrated into contracts in connection with various industries and business relationships. Although the function to serve as a legal justification was previously questioned due to the lack of judicial precedent, some recent court cases have found contract termination based on an OCE clause justified,⁴⁸ proving that this function is also gradually being recognized as effective.

5.3.2. Comparative Analysis of CSR Clause and OCE Clause

As shown above, a CSR clause can serve functions similar to those of an OCE clause, those functions being to (i) demonstrate the parties' commitment to compliance, (ii) prevent unwanted behavior, and (iii) provide a legal ground for contract termination. In order for a CSR clause to have the same effect as an OCE clause, it is helpful to write the CSR clause while referring to the provisions of the model OCE clause. However, there are some differences between CSR clauses and OCE clauses: the goal of the former is to ensure that human rights and social responsibilities are met throughout the supply chain, while that of the latter is to preclude any influence from organized crime groups. It is naturally necessary to consider these differences when drafting a CSR clause.

(1) Need for stepwise approach

Given the differences between CSR clauses and OCE clauses as described above, it is not appropriate to immediately terminate a contract in all cases where the supplier breaches the CSR code of conduct, as it might be with an OCE clause. It is recommended that the CSR provisions set forth a stepwise

47. First Tokyo Bar Association's Anti-Racketeering Committee. "Industry-specific Anti-Racketeering Practice: Theories and Application of 'Organized Crime Exclusion Clause'." *Kinzai Institute for Financial Affairs*, 2003, p.67 and p.212

48. For example, on August 31, 2011, the Osaka District Court upheld a contract termination based on an OCE clause where a hotel management company cancelled an agreement with a former member of an organized crime group for a wedding ceremony and reception and held the hotel management company harmless in contract or tort. (*Financial Law Jijou*, No.1958, p.118)

approach where the aggrieved party first demands corrective action, and if no correction is made by the breaching party, the aggrieved party is given the option to terminate the contract.

First of all, there is a difference between a CSR clause and an OCE clause concerning the degree of social disapproval the violation may entail. The CSR code of conduct requirements extend to various areas including human rights, labor and environment, and the degree of societal censure of the violation differs depending on the area in which the violation occurred and the specific facts. Not all cases of violation of a CSR code of conduct risk the same degree of social criticism as the violation of an OCE clause.

Secondly, in CSR procurement, the business relationship between the business enterprise and the supplier are often of a continuous nature. Therefore, if the business enterprise terminates the contract without a just cause, the termination may not be sustained due to the continuous contract doctrine.

Third, in CSR procurement, it is often difficult for the business enterprise to find an alternative supplier. Because of this difficulty and the costs of quickly finding a substitute supplier in actual operations, caution should be exercised when terminating a contract.

Fourth, the Commentary to Principle 19 provides that a stepwise approach should be taken when an enterprise has contributed to human rights impacts caused by its supplier or other type of business partner. The Commentary states that if the enterprise has the leverage to prevent or mitigate the adverse impact, it should first exercise it, and if it lacks the leverage to prevent or mitigate the adverse impact and is unable to increase its leverage, the enterprise should consider ending the relationship. The commentary goes on to say that it is necessary to take into account the potential adverse human rights impacts of ending the relationship.

The International Chamber of Commerce (ICC) has published a model Anti-Corruption Clause that makes the parties to a contract commit to compliance with the Rules on Combating Corruption.⁴⁹ This Anti-Corruption Clause also provides for a steps approach where, instead of immediate contract termination when a breach is found, the aggrieved party first requests corrective action, and can then exercise its right to terminate the contract if no correction is made.

(2) Need for continuous information sharing

It is particularly hoped that a CSR clause, unlike an OCE clause, will operate to promote information-sharing between the business enterprise and the supplier in order to ensure fulfillment of the enterprise's human rights and social responsibilities throughout the supply chain. In order for a CSR clause to promote information-sharing, the CSR clause preferably imposes on the supplier a duty to report on its compliance of the CSR code of conduct, a duty to notify the business enterprise of its violations of the CSR code of conduct, and the right of the enterprise to conduct inspections and audits of the supplier. It is also desirable for a CSR clause to impose on the business enterprise a duty to provide the supplier with a reasonable amount and depth of information when the supplier requests explanations regarding the specifics of the CSR code of conduct.

(3) Need for vigilance throughout the supply chain

49. <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Anti-corruption-Clause/>

Many human rights impacts by businesses occur at the upstream end of a supply chain. In order to avoid these impacts, CSR procurement and human rights due diligence need to occur throughout the supply chain. This requires a system that makes not only first-tier suppliers but also second-tier and further upstream suppliers comply with the CSR code of conduct.

Since second-tier and upstream suppliers do not directly supply goods or services to the enterprise, it is difficult for the enterprise to enforce their compliance with the CSR code of conduct. Accordingly, it is preferable that the CSR clause include a provision that commits the first-tier supplier to having second-tier and upstream suppliers comply with the CSR code of conduct.

Where the first-tier supplier has no leverage over the second-tier or upstream suppliers, however, it would be difficult for the first-tier supplier to enforce compliance with the CSR code of conduct. Therefore, the CSR clause should require that the first-tier supplier enforce compliance on the second-tier and further upstream suppliers to the extent of its leverage over them. The ICC Anti-Corruption Clause also provides that the parties agree to take reasonable measures to ensure that their third-party agents comply with anti-bribery rules, subject to their control or influence.

5.3.3. Modification from the Perspective of Corporate Responsibility to Respect Human Rights in the Supply Chain

With a narrowly-drafted CSR clause that is intended to apply only to CSR procurement in the supply chain, it is sufficient to simply obligate the supplier to comply with the CSR code of conduct. By contrast, however, if the CSR clause is intended to ensure not only CSR procurement but also the responsibility to respect human rights in the supply chain, the narrower CSR clause must be modified.

When doing so, the drafter could include the obligation to comply with certain human rights standards in addition to the CSR code of conduct. However, human rights standards can be more abstract than the CSR code of conduct. When these standards lack specificity, it becomes difficult to determine whether or not there has been compliance due to the absence of meaningful metrics, in which case the CSR clause may have no real substance.

In order to overcome this difficulty in articulating the human rights standards with which compliance is required, it is useful to include a provision that forces the supplier to implement human rights due diligence processes. It is easier to objectively determine whether or not a certain process has been implemented than whether or not an abstract standard has been upheld. This type of provision is similar to the ICC Anti-Corruption Clause, which specifically obligates each party to put in place and maintain a corporate anti-bribery compliance program.

5.4. Model CSR Clause

Article XXX (CSR Clause) 1. <u>Purpose</u> In order to fulfill its corporate social responsibilities (CSR) and its responsibility to respect human rights, the Purchaser has formulated a CSR Code of Conduct and is in compliance therewith, and has established a human rights policy and has been conducting human rights due diligence where appropriate. In view of the need to fulfill their social and human rights responsibilities throughout
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the supply chain, and in order to promote their joint efforts in this regard, the Purchaser and the Supplier hereby agree to the following provisions.

2. Compliance with the CSR Code of Conduct

In order to fulfill its corporate social responsibility jointly with the Purchaser, the Supplier undertakes that it will comply with the CSR Code of Conduct shown separately in the Attachment. The Supplier also undertakes to take appropriate actions with its own suppliers (limited to those related to the products, materials or services subject to this Basic Business Agreement; and if the supply chain covers multiple tiers of suppliers, all of such suppliers [hereinafter referred to as “Related Suppliers”]) to ensure that they are in compliance with the CSR Code of Conduct, subject to its level of influence over such Related Suppliers. Provided, however, the Supplier will not immediately be held in breach of this clause if any of the the Related Suppliers deviates from the CSR Code of Conduct; the Supplier shall be deemed in breach of this clause only in the event where the Supplier does not take appropriate action after it knows or should know about a violation by its Related Supplier.

3. Implementation of Human Rights Due Diligence

The Supplier undertakes that, promptly after the execution of this Basic Business Agreement, in cooperation with the Purchaser, it will put in place a human rights policy and implement human rights due diligence to fulfill its responsibility to respect human rights. The Supplier also undertakes to take appropriate action in connection with its Related Suppliers to have them take similar measures, subject to the level of the Supplier’s influence over them. Provided, however, this does not mean that the Supplier will immediately be held in breach of this clause when any of the Related Suppliers does not carry out human rights due diligence: The Supplier shall be deemed in breach of this clause only in the event where the Supplier does not take appropriate action after it knows or should know about the absence of implementation by its Related Supplier. When conducting human rights due diligence, the Supplier and its Related Suppliers shall refer to the “Guidance on Human Rights Due Diligence” issued by the Japan Federation of Bar Associations.

4. Purchaser’s Obligation to Provide Information

When the Supplier requests information regarding Supplier’s compliance with the CSR Code of Conduct, as provided in Paragraph 1, or regarding the implementation of human rights due diligence, as provided in Paragraph 2, the Purchaser shall provide the Supplier with a reasonable amount and depth of relevant information.

5. Supplier’s Obligation to Report

The Supplier shall be obligated to periodically report to the Purchaser on the status of compliance with the CSR Code of Conduct and implementation of human rights due diligence by the Supplier and its Related Suppliers. The Supplier shall, at the Purchaser’s request, submit unbiased supporting materials to certify the integrity of the report.

6. Supplier’s Obligation to Notify

If the Supplier learns of a breach of the CSR Code of Conduct or of a material human rights impact

caused by the Supplier or its Related Supplier, the Supplier shall immediately notify the Purchaser of such fact.

7. Purchaser's Right to Inspect/Audit

The Purchaser or a third party selected by the Purchaser may inspect or audit the Supplier's and its Related Suppliers' status of compliance with the CSR Code of Conduct and implementation of human rights due diligence, and the Supplier shall cooperate with such inspection or audit.

8. Request for Corrective Action

If the Supplier commits a breach hereof as described in Paragraph 2 or 3, the Purchaser may request that the Supplier take corrective action. The Supplier shall, within XXX weeks from the day it receives such request from the Purchaser, submit to the Purchaser a written report that describes the cause of the breach and prescribes a corrective action plan, and correct the breach within a reasonable period of time.

9. Right to Terminate When Request for Corrective Action is not Met

If the Supplier does not correct the breach described in Paragraph 2 or 3 within a reasonable period of time and the material breach continues despite the Purchaser's request for corrective action as set forth in the preceding Paragraph, the Purchaser may terminate this Basic Business Agreement or any other individual agreement in whole or in part, unless the Supplier's failure to correct the breach is excused or justified.

10. Hold Harmless

In the event that the Purchaser terminates the whole or part of this Basic Business Agreement or any other individual agreement in accordance with the provisions of the preceding Paragraph, the Purchaser shall be held harmless from any resulting damages that may be incurred by the Supplier.

11. Revision of CSR Code of Conduct

The Purchaser may revise the CSR Code of Conduct when it deems such revision socially useful or when it obtains the Supplier's prior consent. In the former case, the Purchaser must inform the Supplier of the details of the revision.

5.5. Overview of Model CSR Clause

This model CSR clause is prepared on the assumption that a CSR clause is included in a basic business agreement between a Purchaser and a Supplier.⁵⁰ It is also assumed that the "Purchaser" is the business enterprise and the "Supplier" is the supplier company.⁵¹

It must be noted that the model clause is only a sample, and various issues are contained in it as described below. Each enterprise should, while using this model clause as the basic draft, have in-depth discussions regarding its contents among relevant departments within the enterprise, as well as with suppliers, taking into account their materials procurement operations.

5.5.1. Paragraph 1. Purpose

50. The CSR clause could be executed in the form of a memorandum separate from the basic business agreement.

51. Since a basic business agreement including a CSR clause is commonly offered by the enterprise to the supplier, some people say "Purchaser" could be substituted by "Our Company" and "Supplier" by "Your Company."

Paragraph 1 clearly states that the purpose of the CSR clause is to continuously promote joint efforts by the Purchase and the Supplier to ensure fulfillment of their social and corporate responsibilities to respect human rights throughout the supply chain. It clarifies that it is not sufficient for the Supplier to act passively upon the Purchaser's request: emphasis is placed on the importance of the Supplier to proactively engage in efforts to respect human rights and CSR.

It also clearly states that the inclusion of the CSR clause is based on the premise that the Purchaser itself has put it in place and is in compliance with the CSR Code of Conduct, has drafted a human rights policy and is conducting human rights due diligence. This indicates that the inclusion of the CSR clause is not for the purposes of shifting the burdens of compliance with social and human rights responsibilities from the Purchaser to the Supplier.

This paragraph does not set forth specific rights and obligations of the parties, but serves as guidance for the interpretation of the other provisions.

5.5.2. Paragraph 2. Compliance with the CSR Code of Conduct

Paragraph 2 is a commitment provision concerning compliance with the CSR Code of Conduct, in a fashion similar to an OCE clause. In addition, in order to ensure CSR procurement throughout the supply chain, it provides that the Supplier, who is a first-tier supplier, undertakes to take "appropriate action" in accordance with its "level of influence" to ensure that second-tier and upstream suppliers comply with the CSR Code of Conduct (as in Paragraph 3, Implementation of Human Rights Due Diligence).

(1) "Level of influence"

The Commentary to Principle 19 serves as a useful reference for what constitutes the "level of influence" of the Supplier over Related Suppliers contained in Paragraphs 2 and 3. The Commentary provides that where an enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Here the term "leverage" is defined as the power "considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm." Such "leverage" may generally depend on the size of the enterprise or the percentage of the enterprise's orders in its supplier's total sales. However, the Commentary to Principle 19 says that if the enterprise lacks leverage, there may be ways for the enterprise to increase it. It lists examples such as offering capacity-building or other incentives to the related entity, or collaborating with other actors.⁵²

(2) "Appropriate action"

For the "appropriate action" that the Supplier can take to ensure compliance with the CSR Code of Conduct or implementation of human rights due diligence as set forth in Paragraph 2 or 3, respectively, inclusion of a CSR clause by the Supplier in its contracts with its direct suppliers (Related Suppliers) is one effective mechanism. However, the inclusion of a CSR clause is not essential to ensure "appropriate action," nor does it automatically constitute such "appropriate action."

(3) "CSR Code of Conduct"

52. For ways for business enterprises to increase their leverage, see Shift, "Using Leverage in Business Relationships to Reduce Human Rights Risk: Shift Workshop Report No 4." 2013

The specifics of the CSR Code of Conduct to be complied with by the Supplier are not set forth in this paragraph; such specifics are thought to vary depending on the risks that each enterprise faces. The CSR Code of Conduct is to be provided in the Attachment. It is recommended that various international codes and standards be referred to in drafting a CSR Code of Conduct, including ISO 26000, the United Nations Global Compact, the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, as well as this Guidance for Human Rights Due Diligence.

5.5.3. Paragraph 3. Implementation of Human Rights Due Diligence

Paragraph 3 provides for a commitment by the Supplier to put in place a human rights policy in accordance with the Guiding Principles (Principle 16) and to carry out human rights due diligence (Principle 17) in order to ensure that human rights are respected in the supply chain. It is recommended that business enterprises refer to this Guidance when conducting human rights due diligence.

(1) Creating human rights policy

Section 3.3 of this Guidance elaborates on the details on the creation of a human rights policy.

(2) Conducting human rights due diligence

A human rights due diligence process includes three core elements as described in Section 3.2 of this Guidance. The first core element is the focused review of the enterprise's own business operations in the human rights due diligence process (periodic review) (see 3.4.1, and 3.4.2). Specifically, enterprises should (i) conduct human rights due diligence research and extract human rights risks; (ii) continuously and systematically monitor, evaluate and remediate the human rights risks as part of risk management; (iii) internally, increase human rights sensitivity of the enterprise itself and its employees, and externally, tighten control of its project areas and supply chains; (iv) establish an impact assessment process; and (v) decide who is going to be responsible for each task. The second core element is a specific remediation phase in the human rights due diligence process (see 3.4.3). In more specific terms, it includes (i) the creation of a platform for solving problems and (ii) the building of cooperative communities and promotion of communication with various stakeholders. The third core element is the tracking and reporting (including public announcements) of the implementation status of the human rights due diligence process (see 3.4.4 and 3.4.5).

(3) Securing remediation

In addition to the creation of a human rights policy and implementation of human rights due diligence, Principles 15 and 22 call on business enterprises to have in place processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. However, securing remediation is only needed when it has been found that an enterprise caused or contributed to an adverse impact. According to the Guiding Principles, where adverse impacts have occurred that the enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the enterprise itself is not required to provide for remediation, and it

may suffice if it cooperates with judicial mechanisms (see 3.4.6). Consequently, the model CSR clause does not include a provision that provides for remediation as something that the Supplier needs to carry out immediately after the execution of the Agreement.

5.5.4. Paragraphs 4 - 7. Tools for Promoting Communication

Paragraphs 4 through 7 provide tools for promoting continuous communication between the Purchaser and the Supplier.

Paragraph 4 sets out the flow of information from the Purchaser to the Supplier, i.e. The Purchaser's obligation to provide detailed information concerning its CSR Code of Conduct and the implementation of human rights due diligence.

On the other hand, Paragraphs 5 through 7 discuss the flow of information from the Supplier to the Purchaser. Paragraph 5 sets forth the Supplier's obligation to report; Paragraph 6 sets forth the Supplier's obligation to notify; and Paragraph 7 establishes the Purchaser's right to inspect/audit. Paragraph 5 requires that the Supplier submits to the Purchaser unbiased materials that support the integrity of the Supplier's reporting in order to avoid a situation where the Supplier attempts to evade compliance with the CSR Code of Conduct by simply promising such compliance.

5.5.5. Paragraphs 8 and 9. Stepwise Approach in the Event of Breach

Paragraphs 8 and 9 respectively provide that the Purchaser is entitled to request corrective action if the Supplier is in breach and to terminate the Agreement if no corrective action is taken. They set forth a stepwise approach, taking into consideration the differences between CSR and OCE clauses.

Based on Paragraph 9, the right to terminate only comes into effect when a material breach as set forth in Paragraph 2 or 3 continues. "Material breach" includes circumstances where the violation of the CSR Code of Conduct is very likely to give rise to social disapproval or where the Supplier has caused or contributed to a material human rights impact.

5.5.6. Paragraph 10. Hold Harmless

Similar to an OCE clause, paragraph 10 sets forth the Supplier's obligation to hold the Purchaser harmless from liability for damages in the event that the Agreement is terminated.

5.5.7. Paragraph 11. Revision of the CSR Code of Conduct

Paragraph 11 provides that the CSR Code of Conduct can be revised by the Purchaser from time to time based on changes in the legal and/or social circumstances or in the risks it faces. Since it is not practical to require the Supplier's advance consent in every such situation, Paragraph 11 enables for revisions to be made simply by notification to the Supplier, when the revision is socially appropriate.

5.6. Challenges Contained in the Model CSR Clause

As described below, the model CSR clause entails a number of thorny issues. Business enterprises should pay attention to these points in drafting their CSR clause and ensure that they are addressed in the final draft.

5.6.1. Risk of Violating the Subcontract Act and/or the Antimonopoly Act

If the Purchaser attempts to use advantageous contractual position over the Supplier to demand compliance with CSR procurement and human rights obligations in a way that imposes an excessive burden on the Supplier, such a demand could be deemed as an “abuse of buying power” and/or “demanding provision of unreasonable economic benefits” in violation of the Subcontract Act (Articles 4. (1). (v) and 4. (2). (iii), respectively), and/or an “abuse of dominant bargaining position” in violation of the Antimonopoly Act (Articles 19 and 2 (9) (v)). When promoting social and human rights responsibilities through supply chains, care must be taken to ensure that the Purchaser is not regarded as unlawfully bullying the Supplier or dodging responsibility by shifting responsibility to the Supplier.

Similarly, when including a CSR clause in a supplier contract, it is important that the Purchaser does not seek to unilaterally impose excessive obligations on the Supplier.

The model CSR clause may be objected to as comprising primarily one-sided provisions that obligate the Supplier to comply with the CSR Code of Conduct and implement human rights due diligence. However, in the modern commercial context, where societal demands that business enterprises ensure compliance with social and human rights responsibilities in their supply chains are substantial, and the legal and reputational risks of noncompliance are high, the Purchaser’s demand that the Supplier meet its social and human rights responsibilities would seem acceptable, unless the demand is unreasonable and imposes an excessive burden on the Supplier. While we tried to make the model clause as equitable as possible, some elements of one-sidedness are unavoidable due to the nature of CSR procurement, i.e. The Purchaser demanding CSR from the Supplier. Generally speaking, even if the Purchaser was also obligated to comply with the CSR Code of Conduct and conduct human rights due diligence in the same manner, it is quite unlikely that the Supplier would demand corrective action from the Purchaser or terminate the Agreement if the Purchaser were found to be in breach.

We believe that the bigger problem is not the one-sidedness of the clause, but the potential situation in which the Purchaser fails to communicate with the Supplier in advance and imposes compliance with its CSR Code of Conduct while disregarding the reality of the Supplier’s actual procurement operations. The Purchaser needs to discuss the matter adequately with the Supplier prior to the inclusion of a CSR clause, and obtain the Supplier’s understanding and advance consent to the extent possible. As one of the legal mechanisms to promote such communication, Paragraph 4 of the model clause obligates the Purchaser to provide adequate information on the compliance with its CSR Code of Conduct and the implementation of human rights due diligence.

In addition, Paragraph 1 of the model clause promises that the Purchaser has formulated and is in compliance with a CSR Code of Conduct and has created a human rights policy and has been implementing human rights due diligence where appropriate, so that the Purchaser does not demand compliance with an impossible CSR code of conduct or unreasonable implementation of human rights due diligence.

As shown above, the model clause is designed such that it cannot serve as a tool for the Purchaser to evade responsibility and shift the blame onto the Supplier.

Where compliance with the Purchaser’s CSR Code of Conduct and/or the implementation of human rights due diligence would cause the Supplier to incur additional costs, the Supplier should include part of those costs in the prices of the goods or services that it sells to the Purchaser, so that the Purchaser

also partially bears the cost. Another option in reducing the Supplier's costs would be for the Purchaser to offer a reasonable amount of assistance to the Supplier.

5.6.2. Difficulty in Ensuring Compliance with the CSR Code of Conduct by Second-Tier and Upstream Suppliers

The model CSR clause provides for a commitment by the Supplier, which is the first-tier supplier, to ensure compliance with the CSR Code of Conduct by second-tier and upstream suppliers in order to have CSR procurement assured throughout the entire supply chain. Some may think this provision puts too much of a burden on the Supplier.

However, because many material human rights impacts involve workers or the environment at the beginning of a supply chain, a CSR clause would accomplish little in terms of preventing human rights impacts, unless the Purchaser sought fulfillment of its social and human rights responsibilities throughout the supply chain. Since the Purchaser is not in a direct contractual relationship with second-tier and upstream suppliers and thus cannot demand CSR from them, the only possible means of ensuring fulfillment of CSR across the entire supply chain is to create a system in which the Supplier, a first-tier supplier, demands CSR compliance from second-tier suppliers, second-tier suppliers demand the same from third-tier suppliers and so on, so that CSR procurement is sequentially incorporated into all operations throughout the supply chain. It is therefore unavoidable to have the first-tier supplier promise CSR compliance by second-tier and upstream suppliers.

However, the first-tier supplier cannot control everything that second-tier suppliers do, and it would be unreasonable for the first-tier supplier to be held liable for conducts committed by a third party that is out of the supplier's control. This is the reason why Paragraphs 2 and 3 of the model CSR clause qualify the Supplier's obligations, providing that the first-tier supplier, i.e. The Supplier, must take appropriate action to ensure compliance with the CSR Code of Conduct and implementation of human rights due diligence by the second-tier and upstream suppliers, "subject to its level of influence" over them.

It is also hardly acceptable for the Supplier to be immediately held liable for breach of the CSR clause when a second-tier or upstream supplier with which it may not be in a direct business relationship is in violation of the CSR Code of Conduct. Paragraphs 2 and 3 of the model clause, therefore, provide that the Supplier shall be deemed in breach of the CSR clause only when it does not take appropriate action when it knows or should know of the non-compliance.

5.6.3. Serious Violation of the CSR Code of Conduct

Paragraphs 8 and 9 of the model CSR clause prescribe a stepwise approach in which, in the event of a violation of the CSR Code of Conduct, the Purchaser first needs to request corrective action, and, if the Supplier takes no corrective action, the Purchaser can exercise its right to terminate the Agreement. It is possible, however, to allow the Purchaser to exercise its right to terminate immediately in the same manner as in an OCE clause if the ground for the termination is a serious violation that entails an increased risk of strong social disapproval, comparable to a violation of an OCE clause.

Examples of serious violations that entail a high risk of strong social disapproval include, in general, use of conflict minerals, use or release of toxic chemicals in excess of permitted levels, use of

illegally logged timber, involvement in forced or child labor, and bribery of public officials. At the same time, in the area of conflict minerals, for example, many enterprises are not yet able to adequately identify the country or source of origin, and it may not be practical to include this as one of the grounds for immediate termination of the contract. In case of overseas suppliers, they operate according to laws and customs that are different from Japan. Therefore, even if a supplier commits a violation based on one of the causes listed above, it may not be possible to draw the immediate conclusion that that violation will give rise to social disapproval and therefore immediate termination is called for.

Because of this reasoning, the model clause does not provide for the Purchaser's right to immediately terminate the Agreement when it learns that the Supplier is in a serious violation of the clause. Since each Purchaser faces different risks and varies in their procurement operations, the Purchaser needs to ensure in-depth communication with the Supplier and determine on a case-by-case basis whether or not a serious violation exists that requires immediate termination.

5.6.4. Unspecified Elements regarding Corrective Action

Paragraphs 8 and 9 of the model CSR clause provide for corrective action to be taken by the Supplier within "a reasonable time period" when it is found to be in breach of the CSR Code of Conduct, but it does not specify "a justifiable reason" that excuses the Supplier's failure to take corrective action.

From the perspective of predictability and legal stability, it would be preferable to clarify "a reasonable time period" and "a justifiable reason" in specific terms. However, since it is quite likely that a "reasonable time period" and "a justifiable reason" vary substantially from enterprise to enterprise based on the nature of the Purchaser's business and the type of CSR violation committed by the Supplier, it is often difficult to quantify or specify those concepts.

Under these circumstances, it is useful to require the Supplier to submit to the Purchaser a report on the cause of the CSR violation and a corrective action plan within a certain period of time. It then becomes possible for both parties to agree, based on the report and via discussions between them, on a schedule and method to be used by the Supplier in taking the corrective action. It is important to create an environment where the Supplier can voluntarily take corrective action in this way.

Where the Supplier is a small or medium-sized company or is located in a developing country, it may lack the capacity to correct its CSR violations even if it wants to. In a case like this, the Purchaser may need to provide a Supplier lacking the knowledge or capacity for CSR compliance with periodic training and/or assistance in taking corrective action.

5.6.5. Issues with the Supplier's Obligation to Report

In order to promote information-sharing between the parties, the Purchaser must demand that the Supplier report on its CSR procurement compliance. Paragraph 5 of the model clause provides that the Supplier must report to the Purchaser on the status of its compliance with the CSR Code of Conduct and submit "unbiased materials" to support the integrity of the report. Each enterprise needs to determine, based on its procurement operations, the format to be used for the report and the type of supporting materials needed in order to promote information-sharing.

However, the Purchaser should also be sure to avoid excessively burdening the Supplier with demands for reports and materials. Where the Supplier has business relationships with more than one Purchaser, if the reporting format varies from Purchaser to Purchaser, that would add to the burden of the Supplier. If this is the case, all enterprises belonging to the same corporate group or even the same industry may need to standardize the format. Alternatively, a government agency could take the initiative in standardizing the format.

The check sheet attached to the *Guidebook for Promotion of CSR in Supply Chains (2006)* issued by the Japan Electronics and Information Technology Industries Association (JEITA) may be used for reference purposes. This check sheet employs a questionnaire that can be used by the Supplier to perform self-evaluation regarding its progress with CSR compliance. The check sheet, however, consists of 46 pages of mostly abstract questions, where each question is to be answered by choosing either “good,” “poor” or “average.” It would be quite difficult for the Supplier to candidly evaluate its CSR compliance based solely on this check sheet. This check sheet is useful as a means of communication between the Purchaser and the Supplier, but if it has room for improvement to be used for reporting the Supplier’s status of compliance with the CSR Code of Conduct, .

5.6.6. Issues with the Purchaser’s Right to Inspection/Audit

Even if the Purchaser is successful in making the Supplier promise compliance with the CSR Code of Conduct via a CSR clause, the Purchaser cannot accomplish the intended goals of the provision if it totally depends on the Supplier’s voluntary reporting on its compliance status. It is essential that the Purchaser understand the real situation by taking advantage of its right to inspect or audit the Supplier as set forth in Paragraph 7 of the model clause, and visit the Supplier’s premises to ask front-line workers questions and check their written procedures and records.

However, it is almost impossible for any Purchaser to conduct on-site inspections/audits of all of its Suppliers. The Purchaser, therefore, should assess the risks of noncompliance for each Supplier based on the amount of business that they have with the Purchaser, and create an audit/monitoring plan consistent with the results of the assessment. In doing so, it is naturally important to ensure that the inspector or auditor be sufficiently knowledgeable and skilled to conduct fair and high-quality inspections or audits.

Many business enterprises tend to prioritize their OEM contractors and key component suppliers, with a focus on protecting their corporate brand. If these OEM contractors or component suppliers are located in a region that is unsafe or does not share a common language with the Purchaser, many obstacles are likely to be encountered during the course of an inspection or audit.

Determining how the results of the inspection or audit should be utilized is also important. Unless keeping the Agreement in place is expected to lead to serious problems, it is recommended that the Purchaser request step-by-step improvements through mutual understanding, based on its right to request corrective action as set forth in Paragraph 8 of the model clause, and not demand immediate termination. By requesting continuous improvement, the Purchaser can build a trusting relationship between the parties.

Sharing the results of inspections or audits within a corporate group is also on the increase. When this is done, however, it is recommended that the Purchaser obtains the Supplier’s advance consent to share

the inspection or audit results with the Purchaser's affiliated companies in order to comply with the Personal Information Protection Law, as well as its general duty of confidentiality.

5.6.7. Binding Power of a Revised CSR Code of Conduct

Under Paragraph 11, in some situations the Supplier may be bound by a revised CSR Code of Conduct even if the Purchaser makes the revision without obtaining the Supplier's prior consent. Some might question the wisdom of this provision.

Article 10 of the Labor Contracts Act, for example, provides that a change made to an enterprise's employment rules that is against the workers' interests, will be deemed effective even if the change was made without the workers' prior consent, so long as the employer informs them of the change and the change is reasonable. Although employment rules between an employer and its workers differ substantially from a CSR Code of Conduct between a Purchaser and a Supplier, periodic revisions to the CSR Code of Conduct are necessary in response to changes in the legal or social circumstances or risks that the Purchaser faces. Therefore, pursuant to Article 10 of the Labor Contracts Act, we believe that the CSR clause can provide that the CSR Code of Conduct may be revised without the Supplier's prior consent if the revision is reasonable and the Supplier is notified of the revision and informed of the details of the revision.

In order to help the Supplier to willingly stay in compliance with the revised CSR Code of Conduct, however, it would be more beneficial for the Purchaser to have a good communication with the Supplier at the inception of the revision to the extent possible, so that the Supplier's understanding and consent can be obtained along the way.