

Commodities Trading Sector Guidance on Implementing the UN Guiding Principles: Comments on Draft Guidance¹

It is very positive and encouraging to see Switzerland taking the lead on the application of UNGPs in the commodities sector. The following provides a few ways in which I believe the Draft Guidance could be improved.

General comments:

“Business enterprises”. The Draft Guidance refers alternately to “companies” or “firms” while the UNGPs generally refer to “business enterprises”. The Draft Guidance might clarify in the “Objectives” section on page 6 that it refers to all “business enterprises active in commodities trading”, or similar.

Worked examples. While the worked examples of due diligence in the Draft Guidance are useful, care should be taken to frame them appropriately. These examples of actual practice are not necessarily examples of best practice: this could be noted in the Draft Guidance, potentially along with suggestions for improvements. Otherwise there is a risk that market participants will construe the examples as a formula which can simply be replicated, rather than performing the analysis to identify, prevent, mitigate and account for the impacts of business activities promoted by the UNGPs.

Specific comments

P.6 & 8 – Application. The guidance correctly specifies that UNGPs and guidance apply to all companies “regardless of their area of activity or size”. This is very positive and essential to include.

P.8 – Companies’ activities and business relationships. In the context of commodity trading, the key relationships are frequently those with State-Owned Enterprises selling commodities on behalf of resource-rich nations. It would be helpful to include SOEs in the list of example “relationships”, which currently lists only private sector entities.

P.14 – Causation, contribution and direct linkage. Helpfully, the Guidance unpicks the concepts of causation, contribution and direct linkage and disaggregates the implications of each from a due diligence perspective. The examples provided in Box 7, however, imply a higher threshold for “causation” and “contribution” than is arguably the case:

- Where a state authority has used violent or repressive means to facilitate a business activity, there may be a close enough nexus to a business enterprise to constitute “causation” (particularly if the enterprise is funding the state’s activities). In extreme cases, therefore, a causal nexus may exist whether or not the business enterprise directly employed the abusers.
- In the example given of “contribution”, a business enterprise could “contribute” to actual or potential adverse impacts just by employing storage facility providers with a poor record, whether or not the enterprise recommended the firm. As pointed out in the following “directly linked” description, a business enterprise could be “contributing” to an adverse impact by “omission”, rather than design.

¹ [https://www.ihrb.org/uploads/reports/Consultation_Draft - The Commodities Trading Sector, Implementing the UNGPs - March 2018.pdf](https://www.ihrb.org/uploads/reports/Consultation_Draft_-_The_Commodities_Trading_Sector_Implementing_the_UNGPs_-_March_2018.pdf)

Ideally, the draft guidance should avoid picking examples which implicitly set too high a threshold for “causation” or “contribution”; as a minimum, it should specify that the examples given are very clear examples of each and it will always depend on the facts of the case.

P.17-19 – Policy Commitment. Box 9 of the Draft Guidance correctly points out that a business entity’s policy on human rights must be more than simply a statement: it must be proactively embedded in procedures and decision-making at an operational level. It would be helpful to further flesh this out in Section iv on page 19.

Boxes 11-15 – Supplier contracts. The Draft Guidance helpfully describes how business enterprises should build human rights commitments into their sub-contractor, supplier and service provider relationships. It should emphasize that these commitments be structured to with a view to continuous review, improvement and addressing of issues uncovered, rather than simply a contractual claim to damages or to right to exit the contract. As pointed out on p.40, the goal of human rights due diligence is to prevent adverse impacts, and if necessary mitigate or remediate them, not to apportion liability between the contract partners (and walking away from a business relationship should be the last resort).

P.25-26 – Understanding operating context. The Draft Guidance correctly points out the importance of assessing the operating context. Businesses operating in states with weak governance environments – for example with high levels of corruption or weak rule of law – will run considerably higher risk of causing, contributing to or being directly linked to human rights abuses.

P.29 – Due diligence on the spot market. I would argue that the description of the spot market understates the opportunity for buyer due diligence. While such transactions may indeed be higher risk for trading firms, the Draft Guidance should not imply that such due diligence is impossible or unnecessary in this context.

P.48 – Operational level grievance mechanisms. The Draft Guidance correctly points out that “complainants should be free to choose which available channels they wish to use”. This could be put in stronger terms, adding that operational-level grievance mechanisms should never be structured in a way which compromises citizens’ legal rights or requires they surrender recourse under domestic justice systems.

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