

BRIEFING NOTE #13: 20th NOVEMBER 2017

**BUSINESS AND HUMAN RIGHTS
BETWEEN LAW, POLITICS AND THE ECONOMY**



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In recent years, the concept and regulatory implications of corporate social responsibility (CSR) have changed from being mainly an issue of private self-regulation to becoming increasingly juridified with normative guidance based in specific norms of conduct grounded in international law. The endorsement in 2011 by the United Nations (UN) Human Rights Council of the soft-law UN Guiding Principles on Business & Human Rights (UNGPs) and the Council's unanimous 'welcoming' in 2008 of the predecessor of the UNGPs, the UN Protect, Respect and Remedy Framework underscore that process. Both are based on three pillars: The State Duty to Protect, the Corporate Responsibility to Respect, and Access to Remedy for violations. Between them, UNGPs and the UN Framework clarify that states have an obligation under international law to protect against human rights abuse at the horizontal level (that is, human rights abuse caused to individuals or groups by a company or another individual), and that companies of all types and sizes have a responsibility to respect human rights. That responsibility requires companies both to comply with applicable national law and to self-regulate to fill governance gaps between national law and international law where the former is deficient, either in the letter of the law or in implementation. Both state and non-state actors must also ensure that victims have access to remedies. Business organisations should conduct human rights due diligence to identify, prevent and remedy adverse human rights impact, while states should provide guidance for businesses in that respect. With an emphasis on the risk caused by the company to society (rather than risk to the company), this approach is referred to as 'risk-based due diligence'.

In constructing the corporate responsibility to respect, the UNGPs and UN Framework referred explicitly to the concept of the social licence to operate (SLO). They apply SLO as an argument for responsible business conduct, connecting to social expectations and policy and bridging to public regulation, and moreover highlighting the economic implication for a company or sector that flow from society's views of its actions and impact. This formed part of a larger argumentative strategy to create political support for the UN Framework and UNGPs, which has had a bearing on how public regulators seek to regulate business

conduct beyond Human Rights to broader CSR policy concerns. The UNGPs have influenced other international instruments related to sustainability governance, in particular, OECD's Guidelines for Multinational Enterprises (MNEs). Amongst others, the 2011 revision of the Guidelines adopted the risk-based due diligence approach, expanding its application beyond human rights to cover environmental, labour and industry as well as some other issues. Risk-based due diligence as set out by the UNGPs and OECD's Guidelines stresses the value of stakeholder engagement as a means to proactively identify and manage adverse impacts. Guidance developed by the OECD in regard to the extractive sector also emphasizes stakeholder engagement as a modality to enhance the positive impacts that may be generated by business activity. For example, OECD's Guidelines include provisions on actions that companies should take to contribute to employment of locally-based labour and to capacity building.

OECD's Guidelines apply to companies that operate in or out of adhering states. Given that the majority of the world's MNEs are registered in OECD states, the Guidelines are therefore of relevance to such companies for their operation, for example, in Greenland, even though Greenland does not explicitly adhere to the Guidelines. For Greenland-registered companies, the UNGPs have similar significance.