

The UN Guiding Principles on Business and Human Rights and the human rights of workers to form or join trade unions and to bargain collectively



Executive Summary

- The right to join or form a trade union and the right to bargain collectively are established human rights falling within the scope of almost every business enterprise in almost every situation or context.
- What is entailed in the exercise of these human rights is well understood and established in legitimate and authoritative processes.
- Business responsibility with respect to these human rights must be informed by four considerations: 1) the distinction between the state duty and the responsibility of business enterprises; 2) the ability of business enterprises to avoid the legal obligations of the employer; 3) the special role of fear in denying or “chilling” the exercise of these rights; and 4) the duty imposed on business enterprises by the right of workers to bargain collectively.
- For the most part CSR initiatives address these issues by redefining freedom of association and do not focus on the responsibility of business enterprises for their adverse impacts on these human rights..
- A business enterprise respects the rights of workers to form or join a trade union by not doing anything that would have the effect of discouraging workers from exercising this right.
- A business enterprise respects the the right of workers to collective bargaining by not refusing any genuine opportunity to bargain collectively.
- Due diligence for the right to form or join a trade union will involve identifying and preventing anti-union policies and practices as well as mitigating the adverse impacts on the exercise of this right by other business activities and decisions such as changes in operations.
- Due diligence for the right to bargain collectively will recognises that business enterprises must be prepared to bargain under a wider range of structures in countries where the law and practice does not provide a well-defined framework for bargaining.
- Industrial relations, a system which requires both trade unions and collective bargaining, can play important roles in both due diligence and in the remediation of adverse human rights impacts.

Introduction

The purpose of this paper is to set out the implications that the UN Framework for Business and Human Rights and the Guiding Principles on Business and Human rights have for business enterprises concerning the human rights of workers to form or join trade unions and to bargain collectively over the conditions under which they perform work. Because these human rights apply to persons that perform work, they are applicable to all economic activities and, hence, to all business enterprises. As Global Unions and workers' rights organisations, we expect business enterprises to apply the Guiding Principles, putting in place policies and due diligence processes that facilitate the avoidance of any adverse human rights impacts which their decisions and activities may have on workers seeking to form or join trade unions or to bargain collectively. We also expect that business enterprises remediate their adverse impacts on these human rights.

This paper consists of four parts:

Part 1

describes the nature of these human rights and the ways in which they can be adversely impacted by business enterprises.

Part 2

states what respect for these two rights means and sets forth the scope of responsibility

Part 3

considers the application of the UN Guiding Principles by business enterprises with respect to these human rights: Policy Commitment, Due Diligence, and Remediation.

Part 4

provides a summary of key points.

Part 1

Established rights whose meaning is understood

The UN Framework for Business and Human Rights and the Guiding Principles on Business and Human Rights do not establish any new human rights nor do they provide a specific list of those human rights that must be respected by business. The UN Framework and its Guiding Principles do require business to respect the “entire spectrum of internationally recognised 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 ILO’s Declaration on Fundamental Principles and Rights at Work.”¹

The right of workers to form or join trade unions is specifically included in all three instruments that comprise the International Bill of Human Rights: The Universal Declaration of Human Rights (Article 23); the International Covenant on Civil and Political Rights (Article 22); and the International Covenant on Economic, Social and Cultural Rights (Article 8). The ILO Declaration on Fundamental Principles and Rights at Work sets forth rights that all member states of the ILO must respect, promote and realise even if they have not ratified the relevant ILO conventions. The rights that are specified include freedom of association and the effective recognition of collective bargaining.

The right of workers to form or join trade unions cannot be realised unless trade unions are permitted to exist and conduct their activities. Trade union rights refer to those rights necessary for trade unions to exist as independent, representative organisations. They would include the right of establishment, of recognition and a freedom to carry out their functions without interference from the state or employers. In the context of the ILO, Freedom of Association also refers to the right of employers to form their own organisations.

There exists a good deal of understanding of what these rights mean in various contexts and specific instances. This is because these rights are elaborated by the International Labour Organisation in authoritative international instruments, the two most important of which are ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organise) and ILO Convention No. 98 (Right to Organise and Collective Bargaining). Both Conventions are accompanied by a considerable amount of authoritative guidance with respect to their meaning. In addition to the ILO Committee of Experts on the Application of Standards, which considers how countries implement these Conventions in national law, the ILO established an additional mechanism in 1951, the Committee on Freedom of Association of the ILO Governing Body, to examine

¹ Guiding Principle 12 The Corporate Social Responsibility to Respect Human Rights – An Interpretative Guide, Office of the High Commissioner of Human Rights available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf last accessed 28.10.2012

complaints against countries whether or not the country concerned has ratified these conventions. Both mechanisms provide authoritative guidance of what these rights mean in different situations.

There is considerable agreement over such issues as discrimination, intimidation and harassment of trade union activists and representatives, trade union recognition, the right to strike, and the protection of trade union representatives. ILO Convention No. 135 on the Protection and Facilities to be afforded to Workers' Representatives is an important complementary convention. It defines worker representatives and establishes that they must be protected and afforded facilities in order for them to carry out their functions. Other ILO instruments and the authoritative guidance that accompanies them, provide additional understanding of what is involved in protecting these rights.

Some consider collective bargaining to be a form of social dialogue. Social dialogue includes all types of negotiation, consultation or exchange of information between or among representatives of governments, employers and workers on issues of common interest relating to economic and social policy. However, collective bargaining is a human right. There is no human right to social dialogue.

Four essential considerations

What it means for business to respect the human right of workers to form or join trade unions and for the human right of workers to bargain collectively can only be determined after taking four things into account:

Clarifying the distinction between what government can do, on one hand, with what enterprises can do on the other;

Recognising the increasing ability of business enterprises to avoid the legal obligations of the employer;

Acknowledging the special role that fear can play in denying or in “chilling” the exercise of these rights; and

Accepting that there is a duty imposed on enterprises by the right of workers to bargain collectively.

1.1 State Duty vs Business Responsibility

One of the most important contributions of the UN Framework on Business and Human Rights and the Guiding Principles to human rights discourse is that it establishes a clear distinction between the state duty to protect against human rights abuse and the business responsibility to respect human rights. The state duty and the business responsibility are different and independent. The state duty to ensure that businesses operating within their territory/jurisdiction respect human rights cannot be avoided by transferring authority to enterprises. Business enterprises must fulfil their responsibility to respect human rights even where the state does not protect these rights. The UN Framework and Guiding Principles are not based on the precondition that the state will do its duty.

In order to function properly, trade unions require respect for a range of civil and political rights. In 1970, the International Labour Conference adopted a resolution that reaffirmed the link between trade union rights and many of the civil and political rights found in the International Bill of Human Rights. The rights specifically identified in this resolution included: the security of the person; freedom from arbitrary arrest and detention; freedom of opinion and expression including through media; freedom of assembly; the right to a fair trial; and the right to the protection of property of trade unions. The resolution stated that “the absence of these civil liberties removes all meaning of the concept of trade union rights.” Business enterprises cannot replace the role of the state in guaranteeing or protecting these rights. *This fact does not mean that business enterprises have no obligation to respect human rights where the state fails to do its duty.*

Respecting human rights does not mean replacing the role of the state nor acting as if the state role is unimportant. Today many voluntary private initiatives seek to show that it is possible to ethically do business in countries where the government does not protect such human rights as the right to join or form trade unions or to bargain collectively. This mainly takes the form of supply chain codes of labour practice adopted by sourcing companies and applied to their suppliers. The implementation of these codes result in “social audit reports” or even “certification” that the workers’ freedom of association is respected even in countries where the state does not permit or severely restricts this right. It is not possible to audit for the recognition of freedom of association. For example, even when workers are consulted during an auditing process, it is meaningless to ask whether they believe that they have the freedom to associate when there is no practical means for them to do so. This practice has had the effect of redefining the human right for the purpose of showing to the public that there are no violations of human rights. The UN Framework and its Guiding Principles, having clarified the difference between the state and business, provide an imperative for sourcing companies and CSR supply chain initiatives to stop redefining human rights and to focus on the responsibilities of business enterprises.

1.2 Avoiding the legal obligations of the employer

Despite a range of different legal systems, the employment relationship is a universal concept which recognises that workers, in a position of subordination and dependency to the person or enterprises for whom they perform work, are in an inherently unequal power relationship. For this reason a distinct form of law (employment law or labour law) based on the recognition of an employment relationship, seeks to balance this unequal power by creating a range of rights and obligations intended to protect the worker while recognising the mutual obligations of both employers and employees. The employment relationship remains one of the most important means by which society protects its interest in fairness and in the stability of economic relationships as well as in the respect for human rights at work.

The obligation of an employer to recognise a trade union and to bargain collectively is mainly established in law by the existence of an employment relationship. The employment relationship is the legal construct used to identify the potential parties to collective bargaining. Therefore, the employment relationship can be the essential part of workers' legal claims with respect to the right to collectively bargain or to have their trade union recognised.

An increasing amount of work is now being performed outside of a direct, ongoing employment relationship that protects these rights. This work is, instead, being performed in triangular relationships where an intermediary, such as an agency or labour broker, supplies workers, recognised as employees of the intermediary, to a user enterprise where they work alongside employees of the "user enterprise". In these situations, the introduction of multiple employers at the same workplace can effectively deny genuine collective bargaining. Changes in business operations can also be used by business enterprises to end collective bargaining structures and relationships. Sub-contracting arrangements are used to increase the distance between workers and the legal entity which controls their wages and working conditions so that meaningful collective bargaining is not possible.

Sometimes employers seek to evade the obligations that the law places on employers by disguising the existence of an employment relationship such as by treating the worker as being self-employed. Temporary work, including casual work and seasonal work, as well as work performed under fixed term or short term contracts, is often based on relationships that make it practically impossible for the workers concerned to exercise their rights to join or form trade unions and to bargain collectively.

In addition to the barriers to collective bargaining created by problems with employment relationships, such work creates fear and insecurity which chills the exercise of the right to join or form a trade union. An environment of fear and retaliation is difficult to overcome and often blocks reasoning as well as action.

1.3 The role of fear

Both governments and business enterprises can violate the workers' right to form or join trade unions for various reasons. Some governments severely restrict trade union rights for political reasons and sometimes this is done with the complicity of employers. In addition to legal restrictions on trade union activities, some governments subject individual trade unionists to surveillance, arrest, and detention for what should be activities that the state has a duty to protect. Opposition to trade unions and trade union activists by governments as well as by business enterprises, can be extreme involving violence and other forms of intimidation, and in some cases even murder.

Some business enterprises aggressively fight unionisation to avoid any limit to their management power which might result from collective bargaining. They dismiss, demote or otherwise discriminate against workers in order to thwart trade union organising. This intimidation can be effective. In many countries the

protection of the law and the possibility of remedy are inadequate to protect workers seeking to organise. The power of the employer can mean that workers seeking to exercise these human rights are putting their livelihoods, and the economic security of their families, at risk.

Other business enterprises conduct more subtle anti-union campaigns, in some cases with the assistance of consultants who specialize in helping enterprises thwart union organizing efforts. These campaigns exploit the fact that, because of their economic dependence on their employers, workers are particularly attuned to the intended implications of employer statements about unionisation. They are particularly sensitive to negative consequences they might suffer were they to incur their employers' displeasure by forming or joining a union. In the workplace context, statements by employers that purport to convey facts or opinions about unionisation can, without the need for overt threats of retaliation, convey to workers the intended message that they will pay a price if they choose to unionise. These more subtle campaigns can be as effective in intimidating workers considering whether to form or join a union as anti-union campaigns that involve actual dismissals and other overt acts of retaliation.

Even if the business enterprise or the government takes a neutral stand, workers often are afraid to speak out and organize themselves in sectors which have a predominantly female workforce, or large segments of otherwise vulnerable groups of workers, such as migrant workers – both foreign and 'internal'. Fear operates as a significant deterrent to unionisation for workers in precarious employment relationships. Positive action will be needed to create a climate that will convince workers that they are free to exercise their rights.

The role of fear in preventing the realisation of the right to form or join trade unions is often present and even decisive but it is not easy to measure. The absence of a trade union presence in a business enterprise is not an indicator that workers do not want to join a trade union or to bargain collectively.

1.4 The duty to bargain

Business enterprises cannot respect the right to collective bargaining by merely refraining from doing harm. Respecting the rights of workers to bargain collectively means accepting that there is a duty to bargain where workers want to exercise this right. Although collective bargaining must be voluntary if it is to be genuine, this does not mean that business enterprises can refuse to collectively bargain because they "voluntarily" chose not to do so. It is only necessary that the outcome be voluntarily agreed by the parties. Legally mandated bargaining by independent parties is not a violation of a human right. The right to collective bargaining applies to workers not enterprises.

If a business enterprise is to respect the right of workers to bargain collectively, then it must accept that it has a duty to bargain. This is the essence of what it means to bargain in good faith. Accepting the duty to bargain means that the business enterprise must accept reasonable times and venue for bargaining, participate in meetings, give serious consideration and a response to proposals,

and provide reasons for its responses. Moreover, the business enterprises should make every reasonable attempt to reach agreement.

Part 2

The meaning of respect and the scope of responsibility

The Meaning of Respect

The UN Framework and Guiding Principles establish that the responsibility of business enterprises is to “Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts where they occur” and to “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.”

What it means for any business enterprise to respect these two rights can be expressed in the form of principles. These principles are based on the relationship of the business enterprises with respect to adverse impacts and take into account the four considerations that have been listed above:

Principle One: A business enterprise should not do anything that would have the effect of discouraging workers from forming or joining a trade union.

The unequal power relationship between employer and worker, and the ease by which it is possible to thwart the exercise of a human right through intimidation, requires a high level of diligence if these rights are to be respected. Business enterprises should be scrupulous in refraining from anti-union behaviour and in expecting other business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services to do the same. The decision to unionise is for the workers to make freely without duress. Intimidation cannot be fairly characterised as freedom of speech. The fact that a country’s laws permit an enterprise to campaign against unionization does not mean that it is appropriate for an enterprise to do so, any more than it is appropriate for an employer to refuse to bargain because no duty to bargain is established in national law. No communication should be made to workers intended to influence their decision to form or join a trade union.

Since fear and intimidation can discourage workers from forming and joining a trade union, business enterprises in exercising due diligence should adopt an open and positive attitude toward trade unions.

Principle two: A business enterprise should not refuse any genuine opportunity to bargain collectively with workers even where it is not legally obligated to do so.

This does not mean that the institutional framework for collective bargaining in a country is avoided – it only means that where this framework is inadequate to protect the right to collective bargaining, then the business enterprise will not take advantage of this inadequacy. Nor does this principle mean that business

enterprises should establish substitutes for trade unions and collective bargaining. The opportunities that must not be avoided should be genuine opportunities. This will be based on the self-organisation of workers into independent and representative organisations. An example of this would be the decision of multinational companies to engage the unofficial trade unions of black workers in apartheid South Africa even though these companies were not required to do so.

The international organisation of production can pose insurmountable obstacles for workers to collectively bargain with the real decision makers that determine the conditions under which they work. This creates responsibility for business enterprises with lengthy or complex supply chains. Actions to fulfil this responsibility can mean putting pressure on suppliers, but they can also include engaging with workers' representatives directly, or both. Just as complicated relationships are necessary to facilitate real collective bargaining at national level, the integrated global economy needs to find ways to connect rights holders and their representatives with the relevant owners and managers. (See BOX below).

FOA Protocol Indonesia

On June 6th 2011 a protocol on freedom of association was signed by Indonesian trade unions, Indonesian sportswear employers and multinational sportswear brands including Adidas, Nike, Puma, Pentland, New Balance and Asics. This protocol provides these companies with a practical set of guidelines on how to uphold and respect the rights of workers to join together into trade unions and to collectively bargain decent pay and better working conditions.

The agreement covers such areas of implementation as trade union recognition; non-victimisation of trade union officers and members; a non-intervention pledge on the part of employers into trade union activities,; the provision of access for full time trade union officials from outside the factory; rights to facilities for a workplace trade union and a duty on employers to engage in collective bargaining with the recognised trade union.

The protocol is binding on all parties at all factories producing goods in the footwear and apparel supply chains of the signatory sportswear brands in Indonesia, and is in the process of being adopted as a benchmark and incorporated into their local compliance policy. Suppliers are obliged to disseminate the content of the protocol and its implementation to their sub-contractors. The implementation of the protocol will be subject to periodic review between the sportswear brands, trade unions and supplier companies.

The Scope of Responsibility

The UN Framework and Guiding Principles establish that responsibility of business enterprises for adverse impacts on human rights is recognised in three ways: 1) by causing adverse impacts; 2) by contributing to adverse impacts; and 3) by being linked to adverse impacts through a business relationship. This third way captures the situation where the adverse impact is caused by another business enterprise or entity but can be linked to the business. The second and third ways that responsibility is recognised are particularly appropriate for considering labour practices in supply chains. Contributing to adverse impacts would include being one of several parties causing the adverse human rights impact. This means that the existence of other customers does not eliminate responsibility for the adverse impacts caused by the business relationship between a business enterprise and its supplier.

Contributing to adverse impacts may also mean causing or encouraging, or enabling another party to violate human rights. An example would be the imposition of inadequate compensation on suppliers that cause the suppliers to violate the human rights of workers to bargain collectively. Responsibility cannot be limited to any “tier” in the supply chain. Responsibility is created by the adverse impact.

Moreover, responsibility is not determined by the amount of leverage the business enterprise may have over its supplier. The amount of “leverage” of a business enterprise is not a consideration where the business enterprise has caused an adverse impact. The Guiding Principles are clear that leverage is only a factor in how a business enterprise addresses its responsibility when it contributes to, or is linked to, an adverse impact. In cases where the business enterprise has caused an adverse impact, then it must stop doing harm and remediate the harm that it has done. Leverage comes into play where, for example, the business enterprise has contributed together with other business enterprises to adverse impacts, such as in the course of sourcing from the same supplier. The business enterprise can seek to increase its ability to address these adverse impacts, for example, by working with the other business enterprises that have also contributed to the adverse impacts.

In cases where the enterprise has neither caused nor contributed to, but is linked to adverse impacts, it should use its leverage so that the entity causing the adverse impact changes its wrongful practices.

The responsibility of business enterprises under the Guiding Principles extends to the adverse human rights impacts with which they are involved wherever these impacts occur. This means business enterprises have responsibilities with respect to the workers in their supply chain that they must address. This includes the failure of their suppliers to respect workers’ human rights.

The following section sets out what it means for any business enterprise to respect the right of workers to join or form a trade union and to bargain collectively.

Part 3

The application of the UN Guiding Principles by business enterprises with respect to these human rights: Policy Commitment, Due Diligence, and Remediation

3.1. A Policy Commitment

A policy commitment on the right of workers to form or join trade unions and collective bargaining requires, in the first instance, a *statement of intent* and a *robust policy document*. In line with UN Guiding Principle No. 16, this should be approved at the most senior level of the business enterprise. Informed by relevant internal and/or external expertise, it should stipulate the enterprise's human rights expectations of its own personnel, other business enterprises directly linked to its business operations, products or services, and be both publicly available and communicated internally and externally..

A draft policy commitment is provided in the box below.

(Company name) recognizes that all the workers performing work for the company.... have the right to form and join unions of their choosing without distinction, and without prior authorization. It further acknowledges that this right should not be restricted based on occupation, sex, colour, race, beliefs, nationality, political opinion, age, migrant status, contract type, probationary or training status, or location in export processing zones. (company name) will refrain from any practices likely to discourage workers performing work on its behalf from exercising their human right to join or form trade unions and to bargain collectively the conditions under which they work. (company name) will not refuse any genuine opportunity to bargain collectively with workers who want to do so, irrespective of whether they are employed directly or by other business enterprises directly linked to its business operations, products or services, and will endeavour to ensure that work on behalf of the business enterprise is performed within a legal framework where the right to form or join a trade union and to bargain collectively can be protected.

3.2. Due Diligence

The concept of “due diligence” in the UN Framework and its Guiding Principles is considered to be an on-going process undertaken by a business enterprise to identify, prevent, mitigate and account for how it addresses actual and potential adverse human rights impacts.

The best way to identify actual and potential adverse impacts on specific human rights is to first understand how adverse impacts are caused by business enterprises. This section will consider the most important ways that adverse impacts are caused for each of the two human rights under consideration.

An important consideration is that many business enterprises would prefer not to deal with a trade union representing their workforce and do not want to bargain collectively. However, the management of business enterprises may not fully appreciate the extent to which opposing trade union organising and collective bargaining can constitute a direct violation of human rights.

Anti-union behaviour by management can instil fear that effectively prevents workers from exercising these rights. Where there has been anti-union behaviour by management, the presumption that workers do not want to be represented by a trade union is unwarranted. Due diligence must reflect an understanding that anti-union behaviour can have adverse impacts.

The adverse impact of anti-union behaviour by the business enterprise itself would, by definition, be caused by the business enterprise. Anti-union behaviour by a business enterprise can have impacts in its business relationships such as in its supply chain. Moreover, a business enterprise may cause or contribute to anti-union behaviour in its supply chain where suppliers believe that anti-union behaviour is necessary to meet its contractual obligations with respect to price or deadlines, or enter into or continue a business relationship with the enterprise.

It is widely understood that due diligence means that actions should be commensurate with the risk involved. Less appreciated is that the risk is not the risk to the reputation of the business enterprise but the risk to workers who wish to exercise their human rights.

In recent years there has been a burgeoning industry of enterprises selling “social auditing” of supply chain workplaces. This has become the standard Corporate Social Responsibility (CSR) practice in such labour intensive industries as garment and footwear, electronic assembly and agriculture. The social auditing approach is controversial for various reasons. Disappointing results with “check list” auditing has led to the

promotion of new approaches based on involving workers directly in workplace investigations, changing the purchasing practices of sourcing business enterprises or in capacity building for suppliers and local organisations including trade unions. An integrated approach which includes the promotion of mature industrial relations is needed to replace the narrow social auditing model.

It is important that “social auditing” not be seen as a substitute for public labour inspection. However social audits can be seen as a form of due diligence, provided that current practices and assumptions are changed in order to bring them into line with the UN Framework and the Guiding Principles. This would require a better appreciation of the implications of the distinction between the state duty and the responsibility of business. Today, social auditors attest that freedom of association is respected in countries where the government does not adequately protect this right or where its exercise is illegal. How business enterprises cause adverse impacts on the realisation of these rights is overlooked. Moreover, a much better understanding is developing of the weaknesses in the techniques used by social auditors which only rarely take account of the fear of workers as a factor, failing to recognize when workers have been coached or intimidated into giving particular responses to audits or excluding workers entirely from the process.

Due diligence is more than identifying actual and potential adverse impacts. Transparency with respect to its business relationships can be critical to an enterprise seeking to practice due diligence. In industries characterized by complex and lengthy supply chains due diligence involves disclosure of the supply chain by the sourcing business enterprise.

Due diligence also means avoiding these impacts and mitigating them where they are not avoided.

The following consideration of due diligence is based on the assumption that most anti-union behaviour can be avoided. There will be other situations where business activities have an adverse impact on these human rights that are not the result of anti-union behaviour. For instance, changes in operations may result in workers losing their collective bargaining relationship. The responsibility of business enterprises for adverse impacts of these rights is not removed because the decisions were made for purely economic reasons. However, in these situations the mitigation and remediation of these adverse impacts may be more appropriate.

3.2.1. Due Diligence and the Right to Form or Join a Trade Union

Due diligence with respect to the right to form or join a trade union must be based on an understanding of how adverse impacts on this human right are caused. The three most important ways are: 1) The failure of the state to perform its duty to protect the right; 2) The active violation of this right by employers; and 3) The organisation of economic activity that prevents this right from being realised.

1. The failure of the state to perform its duty

The failure of a state to protect workers who seek to form or join a trade union or to bargain collectively is not limited to inadequate legislation or its application. Governments place obstacles in the way of workers joining trade unions and restrictions on trade union activities for various reasons, including at the instigation of employers. In extreme cases trade unions are repressed. State failure can include: putting in place legal or administrative obstacles for the registration of trade unions; providing an inadequate framework for the organisation of collective bargaining; and failing to provide remedy for workers whose rights are violated.

Due diligence involves identifying countries in which the business enterprise conducts activities or where its business relations, such as its suppliers, conduct activities and where the government does not adequately protect the right of workers to join or form a trade union.. Although there are a few countries where trade unions are completely banned, in most countries workers will have some ability to organise. The purpose of this aspect of due diligence would be to understand the extent to which the business enterprise can respect this human right. In many countries where the state does not do its duty, business enterprises will have considerable room to respect this right without contravening the law. For example, in countries where enterprises are not obliged to recognise a union, unless the union has first complied with requirements which are so onerous in nature as to effectively deny workers their right to be represented by a trade union, the enterprise may choose to recognise the trade union without obliging it to fulfil such requirements, if workers have freely chosen to join it.

2. Active violations by employers

For various reasons many business enterprises seek to avoid dealing with trade unions. Opposition to trade unions by management can take on a strong emotional and ideological character. Instead of accepting trade unions as representative organisations, management treats trade unions as “third parties” that inject themselves between the management and the employees. A wide range of policies and practices are used by business enterprises to discourage workers from seeking to form or join trade unions or to avoid having to recognise a trade union. Many of these policies and practices are intended to instil fear

which can be an insurmountable obstacle for workers in forming or joining a trade union. All of the policies and practices described in this section constitute violations of human rights. They include:

Interrogation or surveillance of workers concerning their support for trade unions;

Surveillance of trade union activities;

Intimidation of workers by threatening the loss of their livelihood;

Intimidation of vulnerable workers such as migrant workers;

Physical intimidation of trade union supporters;

Screening for trade union supporters during recruitment;

Creating, circulating or using “blacklists” of trade union supporters

Dismissal of trade union supporters;

Discrimination against trade union supporters through demotions, less favourable assignments, less favourable conditions of work, reduction of wages, benefits, opportunities for training, transfers, and relocation;

Non-extension of employment contracts to trade union supporters on fixed term and temporary employment;

Interference in the decision process by which workers choose whether to be represented by a trade union or by which they choose among different trade union organisations;

Anti-union campaigns and “union avoidance” activities, including by engaging professional consultants;

Actively pursuing legal and administrative delays in the process by which trade unions obtain recognition;

Isolation of workers from trade union organisers/ representatives, including where workers live on premises owned by the company or where work is performed in places where access is restricted such as private business complexes or export processing zones (EPZs);

All of the above constitute deliberate violations of a human right.

In addition to the above list there is a range of activities that involve the employer establishing or promoting alternatives to trade unions.

Sometimes employers create joint labour management committees, employee councils or other structures that require worker representatives. The danger is that these structures and the “worker representatives” serving on them become substitutes for independent and representative trade union structures. They can

also become obstacles for workers seeking to form or join their own organisations.

Sometimes these practices are not intended to discourage workers from forming or joining trade unions. They can also be part of an effort to show that freedom of association is respected in countries where the government does not protect this right. This has the effect of redefining freedom of association in these situations so that the term refers to practices that seek to achieve the positive effects of industrial relations, but without respecting the relevant human rights.

ILO Convention No. 135 (Workers' Representatives) provides important guidance on this issue. It defines "Worker representatives" as

"(a) trade union representatives, namely representatives designated or elected by trade unions or by members of such unions; or (b) elected representatives, namely representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned."

Where there is reason to believe that the business enterprise is misusing worker representative structures to avoid or hinder trade unions, the business enterprise should make a clear written and verbal statement to workers that they have the right to join the trade union, and that the worker representative structure in question does not replace this. Business enterprises should work with trade unions and workers' rights organizations to see to it that the language and delivery is appropriate.

Where the business enterprise identifies any of the above human rights violations in its own operations or in those of business enterprises directly linked to its business operations, products or services, then they must be stopped. Actions to remediate the adverse impacts must also be taken. In line with Article 1 Convention No. 98 and Article 1 Convention No. 135, under which workers and their representatives "shall enjoy protection against acts of anti-union discrimination", business enterprises should publicise their commitment to these principles (which can be enshrined in national law, corporate codes of conduct and global framework agreements), verbally (for instance at workforce assemblies) and in written form (for instance issued with the wage slip).

The following examples illustrate types of instruments which can be agreed:

Statement issued by Russell Athletic to the workers in its Honduran factories

“(Company name) respects the right of workers to form or affiliate to organizations of their choice, including trade unions, and to negotiate a collective bargaining agreement. (Company name) respects the right of workers to form or join trade unions, and to negotiate collective agreements, and will not interfere in any way in these worker activities. (Company name) will not intervene in workers’ decisions to become members of an organization, or in their participation in any organization. Company employees will not be subject to any discrimination or disciplinary or punitive action. Any supervisor or manager who fails to adhere to this policy will be disciplined. (Company name) guarantees that the representatives of said organizations can have access to its employees. Further, (company name) will implement each agreement that it makes with workers’ organizations.”

Statement issued by the Managing Director of Compagnie Mauricienne de Textile Ltée to its employees

Compagnie Mauricienne de Textile Ltée (CMT), in accordance with national and international law and the codes of conduct of its buyers governing freedom of association, hereby guarantees all employees of Compagnie Mauricienne de Textile Ltée (CMT) the right to join or to form a union of their choice for the purposes of bargaining collectively with Compagnie Mauricienne de Textile Ltée (CMT) on working terms and conditions.

Compagnie Mauricienne de Textile Ltée (CMT) will not discriminate against any employee nor victimise any employee for exercising this right. Furthermore Compagnie Mauricienne de Textile Ltée (CMT) will adopt a positive attitude towards any trade union organisers granted access for the purposes of talking about the benefits of trade union membership.

Compagnie Mauricienne de Textile Ltée (CMT) also undertakes to permit the formation of an organising committee in the factory free of hindrance or interference or victimisation of the members of such a committee.

Trade Union Access Agreement

Representatives of a union who are not employed in the workplace, but whose union has members, or workers aspiring to become members, in the workplace shall be granted access to provide information and answer workers' questions about the union provided that this does not impair the enterprise's efficient operation. When workers reside on the premises of the factory, company or industrial zone, suitable arrangements shall be made to allow onsite access after working hours, even if the trade union does not have members employed by the factory. The parties should discuss practical arrangements for such meetings in advance of the period of access actually beginning. Consideration should be given to establishing an agreement, preferably in written form, on such access arrangements. Such an agreement could include:

- the union's programme for where, when and how it will access the workers on site and/or during their working time; and***
- a mechanism for resolving disagreements, if any arise, about implementing the agreed programme of access.***

3. The Organisation of economic activity

Employers actions can have adverse impacts on the realisation of the right to form or join a trade union where the intention to thwart the exercise of this right is not always clear or is not present. As noted earlier, one of the most important considerations is the ability of employers to avoid the legal obligations of the employer, including those involving recognition of trade unions.

Increasingly the organisation of economic activity is interfering with the right of workers to join unions. Increasingly complex supply chains and outsourcing of work enable business enterprises to avoid any obligations to the people who perform work on their behalf. In some cases workers lose their trade union recognition and their collective bargaining relationship when their work is contracted out to another business enterprise.

Due diligence should seek to determine whether work is being performed within an institutional and legal framework in which the right of workers to join or form trade unions is respected and can be protected. Due diligence should first seek to identify situations where work is not being performed in a direct, open-ended and legally-recognised employment relationship. Any use of fixed term or temporary work must be according to criteria that justify these arrangements

only on exceptional basis. Moreover there must always be an identifiable and legally recognised organisation capable of fulfilling the responsibilities of the employer.

Because in national practice the legal framework for collective bargaining is based on the employment relationship, workers who are employed through intermediaries such as employment agencies are effectively denied their right to bargain collectively with the enterprise that controls the conditions of their employment. Due diligence should seek to determine whether there is excessive or inappropriate use of labour supplied through intermediaries, which can be also used to weaken or destroy existing collective bargaining structures in the workplace.

Workers considered as being self-employed are effectively denied their right to bargain and hence may have little reason to join a trade union. Due diligence should seek to discover whether what should be an employment relationship is being disguised as self-employment. Workers performing work on a temporary basis are likely to be discouraged from joining or forming a trade union. Due diligence should seek to identify and eliminate inappropriate or excessive use of temporary work such as fixed term contracts and casual labour.

Due diligence provides an opportunity to demonstrate respect for a wide range of human rights that are protected by labour and employment law.

A global agreement on the importance of the employment relationship

In December 2010 three Global Union Federations signed a Global Framework Agreement with French-based multinational GDF SUEZ. One of the clauses in this agreement recognises the importance of work performed in a recognised employment relationship. The clause reads as follows: ***“GDF SUEZ recognizes the importance of secure employment for both the individual and for society through a preference for permanent, open-ended and direct employment. GDF SUEZ and all sub-contractors shall take full responsibility for all work being performed under the appropriate legal framework and, in particular, shall not seek to avoid obligations of the employer to dependent workers by disguising what would otherwise be an employment relationship or through the excessive use of temporary or agency labour... Companies will ensure that workers are not classified as self-employed when working under conditions of direct employment (bogus self-employment). GDF SUEZ expects its partners to apply comparable principles and regards this to be an important basis for a lasting business relationship”.***

The three Global Union Federations are: Building and Wood Worker’s International (BWI); International Federation of Chemical, Energy, Mine and General Workers’ Union (ICEM - now IndustriALL); and Public Services International (PSI).

In exercising due diligence, the business enterprise should identify situations where actions have been taken to avoid a direct open-ended and legally-recognised employment relationship with the intention of discouraging workers from exercising their right to join or form trade unions. They should also identify situations where actions taken by the business enterprise have resulted in an adverse impact on the right to join a trade union even though this was not the intention. In both instances the business enterprise has a responsibility because of the adverse impacts that are created. With respect to changes in operations where transfers or restructuring have adverse impacts on these human rights, the business enterprise needs to mitigate these adverse impacts. In this respect the international expectations of responsible behaviour set forth in the OECD Guidelines for Multinational Enterprises (Chapter V, Paragraph 6) and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and social policy (Paragraph 26) are especially important.

3.2.2. Due Diligence and the right to collective bargaining

Due diligence with respect to the right to bargain collectively must be based on an understanding of the wide range of activity that this human right encompasses and what is essential in order for this right to be realised. The scope of collective bargaining is wide. It includes all negotiations that take place between a business enterprise and a trade union to determine working conditions, terms of employment and procedural matters. It can involve multiple business enterprises and/or employer organizations, and it can include workers in an entire sector or in a specific (global) supply chains. The outcome of collective bargaining is usually in the form of written agreements that are intended to be binding on both parties, whether or not they are enforceable in courts. The failure to implement an agreement can mean that there is a failure to respect this right.

The human right to bargain collectively belongs to workers and it is for this reason that the legal framework for collective bargaining in many systems set conditions under which employers are obliged to bargain. The outcome of collective bargaining is arrived at voluntarily by the parties, but it is not optional for business enterprises to enter into bargaining.

In order to respect the right to collective bargaining, the business enterprise must not refuse any genuine opportunity to bargain collectively. In countries where the law and practice does not provide a well-defined framework for bargaining, then the business enterprise must be prepared to bargain under a wider range of structures. No groups of workers, including, for example, workers in Export Processing Zones, workers with temporary fixed-term contracts, workers supplied by an agency or migrant workers, should be deprived of their

right to bargain collectively. In situations where the law prohibits some categories of workers, such as migrant workers, from joining recognised trade unions, the business enterprise should explore other means to respect their rights.

Among others, the business enterprise should explicitly mention migrant workers in policy statements, and that references to migrant workers should focus on their human rights and not their legal status, and that standards applied to migrant workers are based on international instruments and not just on national law, which often offers less protection to migrant workers.

The business enterprise must bargain in good faith, and exercise due diligence that the business enterprises in its supply chain do the same. This means that the business enterprise must accept that it has a duty to bargain. The duty to bargain in good faith means making every effort to reach an agreement through genuine and constructive negotiations. Refusing to respond to claims and unjustified delays in holding negotiations violate the right to collective bargaining.

Business enterprises should not undermine trade union(s) by negotiating directly with individual workers or by offering better terms to non-union members under individual agreements. Nor should the business enterprise create other structures, formal or informal, outside of the collective bargaining relationship to deal with problems or issues that should be dealt with by management and the trade union, including through collective bargaining. The business enterprise should not bargain with worker representatives in structures that were not created for the purpose of collective bargaining. The business enterprise should not reach agreements with non-representative labour organisations in order to avoid genuine collective bargaining.

The business enterprise must provide facilities to enable collective bargaining to take place. Workers must have the ability to meet with their representatives to decide their positions. The business enterprise must provide the workers or their representatives with sufficient information to enable the workers to have a true and fair view of the performance of the entity or of the enterprise as a whole.

Collective bargaining can take place at various levels depending on national law and practice. The right to bargain collectively applies regardless of which level or levels that have been agreed between representative organisations of workers and employers. For example, collective bargaining may take place at the enterprise level or at the sectoral (industry) level or some combination of levels.

Business enterprises should accept that the right to collective bargaining involves a broad scope of substantive subjects including at least wages, working time and the conditions under which work is performed. This would include procedures for information and consultation, dispute resolution and the facilities to be provided workers' representatives. Business enterprises should not seek to place limits on the subjects of bargaining that would restrict this right.

Just as the right to join or form a trade union implies that trade unions have a right to exist and to conduct their activities, the right to bargain collectively implies that there is a right of workers to collectively withhold their labour. The right to strike (and to take other forms of industrial action) is recognised by the International Labour Organisation as falling within the right of trade unions to organise their activities under Article 3 of Convention No. 87. Prohibition is linked only to specific and exceptional circumstances or categories of workers. Allowable restrictions include obligations to give notice or to make decisions to strike by secret ballot. The right to strike is often provided for in national constitutions or laws, although there are many countries that do not protect this right.

There is no principle under which an employer decides on whether there is a right to strike. The maintenance of the employment relationship is a normal legal consequence of the recognition of the right to strike. In any event, business enterprises should not hire workers to replace those on strike. Moreover, workers should not be sanctioned by the business enterprise for participating in legitimate strikes. Business enterprises should refrain from using private security guards to intimidate striking workers either physically or by conducting surveillance of striking workers or of trade union activities.

3.3. Remediation, Remedy and Grievance Mechanisms

The third policy and practice set out in Principle No.15, and elaborated in Principle No. 22 of the Guiding Principles, is that business enterprises have processes in place to enable remediation of the adverse impacts that they cause or contribute to. Principles No. 15 and No. 22 are part of the “second pillar” of the UN Framework which concerns the Business responsibility to respect. Remedy is also the subject of the third pillar of the UN Framework.

In countries where the law that protects the right to form or join a trade union and that provides the framework for collective bargaining is applied, there are usually legal remedies for the violation of these rights. Examples of such remedies would include the reinstatement or compensation of workers discriminated against or dismissed for trade union activity. Remedies in cases where the employer had refused to recognize the trade union or refused to bargain could include court orders requiring the employer to recognize the trade union or to bargain. Business enterprises should lead in promptly respecting the orders and comply with the legal requirements.

Business enterprises should remediate the adverse impacts that they caused or contributed to even where they are not required to do so. Business enterprises should rehire workers who were dismissed because of their trade union activities and they should endeavour to undo any discrimination against trade union supporters that have taken place. Of course, rehiring workers unfairly dismissed will not undo the damage caused by the act of dismissing them in the first place. Other actions to redress the intimidation that was created will also be necessary.

Business enterprises that have sought to avoid dealing with trade unions or to bargain collectively by conducting anti-union campaigns should undertake to inform all of the workers concerned that this is not company policy and that their right to form or join trade unions will be fully respected. This should be taken seriously, with action adequate to address the fear that the anti-union behaviour generated.

Industrial relations and grievance mechanisms

Industrial relations is a term that describes a system based on the independence of two parts of the business, management and workers, and is dependent on the existence of representative workers' organizations (trade unions). Industrial relations is, in itself, one of the most important non-state grievance mechanisms concerning business behaviour. Collective agreements often spell out procedures for dispute resolution that can provide remediation for rights violations. Sometimes collective agreements can provide the basis for workers' legal claims. Effective industrial relations are based on respect for the human rights under consideration here. Even when specific problems or issues are not subject to formal processes, the change in the power relationship between the employer and the workers where a trade union exists contributes to the respect of human rights.

The UN Guiding Principles recognise the importance of industrial relations and collective bargaining. The commentary to Principal No. 29 states that:

“Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.”

In recent years, practices have developed of using relationships based on industrial relations to address adverse impacts on the human rights of workers including the right to join or form trade unions or to bargain collectively. There are a number of formal agreements between multinational enterprises and Global Union Federations (GUFs). Global Union Federations are international trade union organizations that have, as affiliates, trade unions that represent workers in specific economic sectors or occupations. These agreements, referred to as Global Framework Agreements, constitute a formal relationship between a multinational company and the trade union organization. The agreements are intended to provide an additional means to solve problems that that may arise. Global Framework Agreements include reference to the human rights addressed by the ILO Declaration of Principles on the Fundamental Rights at Work. Among these are the two human rights dealt with here. References to the UN Framework and the Guiding Principles are being included in some agreements and are being considered in other discussions.

Often, when there is good communication between a company and a GUF, with or without a framework agreement, the GUF provides an independent source of

information about what is happening inside the company and, to some extent, in those business enterprises directly linked to its business operations, products or services. If the relationship functions well, it can be an important contributor to due diligence.

Part 4

Summary

1. The right to join or form a trade union and the right to bargain collectively are established human rights falling within the scope of almost every business enterprise in almost every situation or context.
2. What is entailed in the exercise of these human rights is well understood and established in legitimate and authoritative processes.
3. Business responsibility with respect to these human rights must be informed by four considerations: 1) the distinction between the state duty and the responsibility of business enterprises; 2) the ability of business enterprises to avoid the legal obligations of the employer; 3) the special role of fear in denying or “chilling” the exercise of these rights; and 4) the duty imposed on business enterprises by the right of workers to bargain collectively.
4. For the most part CSR initiatives address these issues by redefining freedom of association and do not focus on the responsibility of business enterprises for adverse impacts on these human rights.
5. A business enterprise respects the rights of workers to form or join a trade union by not doing anything that would have the effect of discouraging workers from exercising this right.
6. A business enterprise respects the rights of workers to collective bargaining by not refusing any genuine opportunity to bargain collectively.
7. Due diligence for the right to form or join a trade union will involve identifying and preventing anti-union policies and practices as well as mitigating the adverse impacts on the exercise of these rights by other business activities and decisions such as changes in operations.
8. Due diligence for the right to bargain collectively recognises that business enterprises must be prepared to bargain under a wider range of structures in countries where the law and practice does not provide a well-defined framework for bargaining.
9. Industrial relations, a system which requires both trade unions and collective bargaining, can play important roles in both due diligence and in the remediation of adverse human rights impacts.