

# Human Rights as Foundation of Stakeholder Capitalism – Policy Measures to Promote Corporate Responsibility to Respect Human Rights

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## Introduction

The executive chairman of the World Economic Forum has called Covid-19 a litmus test for stakeholder capitalism. As the pandemic brings about drastic changes in society, companies are being expected to fulfil an even greater social responsibility. With globalization spreading in both scope and degree, the impact of corporate activity is extending beyond national borders, to places where businesses operate overseas and to the people involved in supply chains. Risks to the human rights of people are appearing as actual issues, so how should companies identify and address these issues?

In a statement issued in April 2020, the UN Working Group on Business and Human Rights noted, “While masks may be disposable, workers are not,” and added “The pandemic will eventually pass. States and business actors must use this moment to not revert to business as usual, but to forge a new normal based upon the globally agreed standard provided by the Guiding Principles.”

This article looks at business and human rights, an issue that is currently emerging as a greater concern in society, and examines how companies are addressing the issue, and what government policy measures should guide these companies efforts. It will also discuss what policies are needed in Japan to ensure that Japanese companies fulfill their responsibility to respect human rights.

## Guiding Principles Require a “Smart Mix”

The UN Guiding Principles on Business and Human Rights reaffirm in unequivocal terms the duty of national governments to protect human rights, and define corporate responsibility to respect human rights. Since being unanimously endorsed by the UN Human Rights Council in 2011, leading companies have been working to fulfill their responsibility to respect human rights by formulating policies on human rights as their social responsibility, and carrying out human rights due diligence by adopting processes to identify, prevent, mitigate, and account for the adverse impacts of their corporate activities on people’s rights. At the same time, various countries have been searching for effective policies measures and regulations to promote companies’ respect for human rights.

The Guiding Principles stipulate, in meeting their duties, national governments should implement the following policy measures to

ensure that companies meet their responsibility to respect human rights:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

The Guiding Principles note that national governments should not assume that companies prefer or benefit from government inaction, and governments should consider a smart mix of measures – domestic and international, mandatory and voluntary – to foster companies’ respect for human rights. What is the appropriate mix of “hard” and “soft” measures to foster a company’s responsibility to respect human rights? The combination of policy options to use legal regulation and to leave to companies’ voluntary initiatives to do so, needs to be developed as a smart mix within the context of each country.

## Making Human Rights Due Diligence Mandatory

This year marks the 10th year since the unanimous endorsement of the Guiding Principles, and Europe is rapidly pushing forward in terms of hard measures. To date, European countries including the United Kingdom, France, and the Netherlands have introduced their own laws regarding human rights due diligence. With increasing interest among citizens, organizations, and policymakers in having companies bear greater social responsibility, the European Union saw the need for a more coherent and strategic direction, and in December 2019 the government of Finland, which held the presidency of the Council of the EU at the time, called for the formulation of a common EU framework for human rights due diligence. Based on the European Green Deal announced in the spring of 2020 and the Commission’s Communications on the Covid-19 Recovery Plan, a new initiative was launched for sustainable corporate governance that includes mandatory due diligence for

fostering companies' responsibility to respect human rights – including workers' rights – across entire value chains throughout all of Europe, and social responsibility.

The objectives of this legislation are to make companies focus on the creation of long-term sustainable value, rather than short-term profit, to align the interests of companies, shareholders, managers, stakeholders and society, and to help companies to manage sustainability-related matters such as social rights, human rights, climate change and the environment in their operations across value chains. The new EU trade strategy announced in February 2021 also clearly states that mandatory environment, human rights and labor due diligence is an important element in ensuring sustainable and responsible supply chains. Legislation of mandatory due diligence is also being tied into revision of the non-financial reporting directives.

The Guiding Principles explains that laws and policies like corporate and securities laws, which govern the creation and ongoing operations of companies and directly shape business behavior, should provide sufficient guidance to enable companies to respect human rights, with due regard to the role of existing governance structure like the board of directors. The EU's move to mandatory due diligence in corporate law is indeed the embodiment of the Guiding Principles. With the period for public consultation having ended in February 2021, the legal proposals are scheduled for submission around the time that this article is to be published. In March in Germany, the government adopted a draft bill which obliges German companies to ensure observing human rights throughout their supply chain in response to the result that the target for the voluntary implementation of human rights due diligence by companies set in the 2016 National Action Plan on Business and Human Rights was not achieved. Making due diligence mandatory in Europe can be seen as a way in which the development of a smart mix of policies has crystallized.

### **Banning Products Tainted by “Forced Labor”**

Enacting laws prohibiting the importation of products tainted by forced labor and other human rights violations is one policy measure for promoting human rights due diligence at companies. Companies in countries with laws that explicitly prohibit the importation of forced labor-produced goods into its markets are guided by what kinds of actions they should take.

In the United States, Section 307 of the Tariff Act of 1930 prohibits

the importation of goods made by forced labor or indentured labor. The 2015 revision to this code repealed the “consumptive demand” exception. This makes companies responsible for ensuring that they do not import goods made by forced labor, and the Department of Labor has issued guidance for companies supply chain management. In the summer of 2020, the Department of State, Department of the Treasury, Department of Commerce, and Department of Homeland Security issued an advisory to businesses and individuals regarding reputational, economic, and legal risks related to the infringement of the human rights in Xinjiang.

With the implementation of the Canada-United States-Mexico Agreement (CUSMA), Canada has also revised its Customs Tariff Act to prohibit the importation of goods made by forced labor. Global Affairs Canada and the Trade Commissioner Service are advising Canadian companies and their stakeholders about the legal and reputational risks posed to companies whose supply chains engage with entities possibly implicated in forced labor. Canadian companies active abroad are expected to act responsibly in accordance with the Guiding Principles and the OECD Guidelines for Multinational Enterprises, and in cases where there is a lack of good-faith cooperation with the National Contact Point (NCP: the dispute resolution mechanism under the OECD Guidelines) or the Canadian Ombudsperson for Responsible Enterprise, they can be found to be in violation of the Export and Import Permits Act and have trade advocacy support withdrawn, and future financial support from Export Development Canada frozen. Exports are also assessed with respect to human rights based on how the product, service, or technology will be used. This sends a clear signal that it is essential for a company to conduct thorough due diligence to address inherent risks.

The strong policy reasons for sending a coherent and consistent message to companies include ensuring predictability for companies and preserving the government's own reputation. Unless they have their own firm policies in place, companies that do not receive clear policies and messages from their government are subject to being swayed by policy measures of other countries.

### **Policy Coherence in Business & Human Rights**

According to the Questionnaire Survey on the Implementation of Keidanren's Charter of Corporate Behavior in the Covid-19 Era carried out by Keidanren in the summer of 2020, while 36% of the

289 responding companies replied that they are implementing programs based on the Guiding Principles, 31% also replied that they had not begun carrying out human rights due diligence. In Chapter 3 of Japan's National Action Plan on Business and Human Rights, which was launched in October 2020, it is stated that the government expects Japanese companies, regardless of their size, industry, etc., to respect internationally recognized human rights and the principles related to the fundamental rights set forth in the ILO Declaration on Fundamental Principles and Rights at Work, and to introduce processes for human rights due diligence based on the Guiding Principles and related international standards, and engage in dialogue with their stakeholders including in their supply chains. The government actions planned to promote companies' initiatives in domestic and overseas supply chains and human rights due diligence based on the Guiding Principles is limited to disseminating the Action Plan and awareness raising about human rights due diligence. In contrast with the EU's move to make due diligence mandatory, Japan is leaving it to the voluntary initiative of companies.

How should we create an enabling environment for companies to respect human rights? Making human rights due diligence mandatory is one method, for example, but it is meaningless if such legislation ends with setting another check-box list or a format. The Japanese government needs to create an environment and build frameworks that will enable companies to fulfil their social responsibility and respect human rights. This requires a common understanding and coordinated action by governmental departments and agencies that shape business practices, in areas including corporate law, securities law, investment, export credit, insurance, trade, and labor. In particular, the removal of systemic risks that cannot be alleviated or eliminated by individual companies needs to be carried out by the government, and this requires cooperation with other countries. An example of this would be policy measures that ensure that labor laws in trading partner countries meet international standards. This will help to ensure Japanese companies are not involved in human rights infringement through transactions with counterparts in trading partner countries. The sustainability clauses in the EU's free trade agreements call for engagement with partner countries, and Japan is one of those partner countries. A coherent policy approach in commerce and trade, foreign affairs, and labor policies is needed, which will lead to enhancing companies' competitiveness, resilience, and sustainability by fulfilling their social

responsibility.

### **Japan's Role as Leader for Responsible Supply Chains in Asia**

Joint research carried out by the Institute of Developing Economies of the Japan External Trade Organization (IDE-JETRO) and the International Labour Organization (ILO) in 2020 analyzed Japanese automotive parts manufacturers in Thailand as an example of a responsible supply chain. It was observed that these Japanese companies respect local culture, emphasize dialogue and attach a high value to management-labor communication, and that a high level of quality, cost, delivery (QCD) is achieved by building trust between these companies and their suppliers. It was found that Japanese companies are in a position to respect human rights, especially workers' rights, to promote decent work, and to contribute to the sustainable development goals (SDGs) in both their own business operations and in their supply chains.

Supporting and strengthening suppliers and business relationships in terms of operational practices of respecting human rights, management transparency, accountability, and constructive management-labor relations leads to their own resilience, sustainability, and the enhancement of corporate value throughout the supply chain. Responsible business conduct brings about sustainable and inclusive growth over the long term in the place where the business operates.

Japanese companies have a significant role to play in countries where human rights are not fully guaranteed, especially in Asia. Japanese companies are able to go beyond simply observing local laws and regulations, to increase management transparency and accountability, and to share good practices of strengthening corporate governance, and constructive management-labor relationships with their business partners in the region. Accountability, transparency, the rule of law, and human rights are elements that form a foundation from which to achieve responsible business operations. Rules related to economic activity must be rules that maintain a foundation for responsible businesses. The Japanese government and Japanese companies should be actively involved in the formation of those rules.

## Corporate Social Responsibility Called into Question – Myanmar

The extreme turmoil in Myanmar that followed the military coup on Feb. 1, 2021, has raised questions regarding the social responsibility of companies operating in the country. The national action plans on businesses and human rights adopted by countries like the UK (2013, revised in 2016), the Netherlands (2013), and the US (2016) list Myanmar as a country where their companies have to be sensitized to the importance of human rights impacts. Countries like Myanmar, as a Special Rapporteur on the situation of human rights in Myanmar has been appointed, do not have adequate frameworks for the protection of human rights, and are places where companies are particularly prone to be linked to adverse impacts on human rights, which is why European governments and the US government have advised their own companies to be responsible. The Myanmar Centre for Responsible Business (MCRB) was established in 2013 in Yangon, with funding from the governments of the UK, the Netherlands, Denmark, Norway, and Switzerland, to promote responsible business conduct.

Under this current situation, companies operating in Myanmar have posted a statement on the MCRB website expressing their concern and calling for a resolution based on dialogue and reconciliation. The statement notes, “As investors, we inhabit a ‘shared space’ with the people of Myanmar, including civil society organisations, in which we all benefit from respect for human rights, democracy and fundamental freedoms – including freedom of expression and association – and the rule of law. The rule of law, respect for human rights, and the unrestricted flow of information all contribute to a stable business environment.” Companies are expected to avoid contributing or being linked to human rights violations and to play a role in cultivating a society where human rights are protected, not only in their own country but also in overseas countries where they operate or procure parts and materials. They have a responsibility to embody the fact that respect for human rights and the rule of law are indispensable for the creation of a stable, prosperous business environment over the long term. What is being called into question in this case is not a company’s legal responsibility, but rather its social responsibility exactly.

## Conclusion – What Do Stakeholders Desire?

Why do companies respect human rights? Why do we need to design institutions that promote respect for human rights? It is affirmed that the role of government policy measures is to create a level playing field that maintains fair competitive conditions and to guide the cultivation of markets in which companies that respect human rights are successful. At this point, companies need to reconfirm that the significance of respecting human rights is to maintain markets and a society in which they continue to exist as subjects, rather than as objects of regulation. The responsibility not to infringe human rights and to respect human rights is not only out of concern for vulnerable persons in a supply chain or of addressing the risk to the company of being implicated in association with the use of forced labor or child labor. The company itself enjoys the benefits of a society where human rights are respected. The fact that these values are shared is what gives meaning to various policy measures that legally mandate things like due diligence as a concrete action for respecting human rights. If these values are not shared, why do companies respect human rights in the first place?

A company’s sustainability and growth are inseparable from the interest of its stakeholders including employees, suppliers, customers, and the communities in which it operates, meaning that social responsibility, fairness, and a long-term perspective to create value are needed. Maintaining a free, open society is essential for meaningful engagement with stakeholders. Respect for human rights enhances a company’s competitiveness and corporate value, while at the same time intrinsically underpinning a sustainable society that makes the company’s existence itself possible. It should be remembered that the SDGs seek to realize the human rights of all people as stated in its Preamble of the Agenda 2030 for Sustainable Development. **JS**

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