



Meeting the Responsibility to Respect in Situations of Conflicting Legal Requirements¹

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The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption. In June 2006, the Global Compact Board established a Human Rights Working Group. The goal of the working group, whose inaugural chair was Mary Robinson, former UN High Commissioner for Human Rights and President of Ireland and currently is chaired by Mr. Pierre Sane, is to provide strategic input to the Global Compact's human rights work. The following is one of an ongoing series of notes on good business practices on human rights endorsed by the working group. Rather than highlighting specific practices of individual companies, Good Practice Notes seek to identify general approaches that have been recognized by a number of companies and stakeholders as being good for business and good for human rights.

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I. Introduction

The responsibility to comply with all applicable local, national, regional and international laws is a central tenet of the corporate responsibility to respect human rights. Yet sometimes local or national laws pose requirements that conflict with internationally recognized human rights, thereby making it difficult or impossible for business enterprises to meet their responsibility to respect human rights. Such conflicts can arise in many ways, including situations in which a locally enforced² law requires actions by business enterprises that are contrary to internationally recognized human rights—such as disclosure requirements on Internet Service Providers (ISP) that breach the right to privacy of internet users, the forced relocation of indigenous populations without due process or compensation, or prohibitions on the hiring of women or racial/ethnic minorities.

Conflicts such as these present business enterprises with both moral and legal dilemmas, potentially subjecting them to legal liability, for example via the U.S. Alien Tort Claims Act, or exposing them to adverse public opinion, as many businesses experienced when operating in South Africa during Apartheid.

The goal of this good practice note is to provide business enterprises with a non-exhaustive set of good practices for addressing situations in which local or national laws appear to conflict with internationally recognized human rights.³ The recommendations provided are based on research and a series of confidential interviews with experienced CSR practitioners who have worked with and for multinational firms operating in every region of the globe.

² This conflict could arise in one of two ways: either through a local law that conflicts with internationally recognized human rights or through a law that on its face does not pose a conflict, but that is enforced in a way that generates a conflict.

³ While only states are signatories to international and regional human rights treaties, participants in the UN Global Compact pledge to “support and respect the protection of internationally proclaimed human rights” (Principle One), which refers to the rights enshrined in international human rights treaties and law. Moreover, in its endorsement of the UN “Protect, Respect and Remedy” Framework, the UN Human Rights Council affirmed that while the international duty to protect human rights rests with states, business enterprises have a separate responsibility to respect human rights. Human Rights Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/RES/8/7 (June 18, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf. The UN Guiding Principles on business and human rights state that business enterprises have a responsibility to respect internationally recognized human rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. See, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles for the Implementation of the United Nations “Protect, Respect and Remedy” Framework* [hereinafter *Guiding Principles*], at 13-14, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

II. Identifying and Clarifying the Scope of a Potential Conflict:

- First Step: Define and embed the commitment to meet the responsibility to respect human rights into the business enterprise's legal and ethical policies

As affirmed by the UN “Protect, Respect, and Remedy” Framework on Business and Human Rights and by the Guiding Principles on business and human rights, business enterprises have a responsibility to respect human rights throughout their activities and business relationships.⁴ Moreover, participants in the UN Global Compact have made an additional commitment to support as well as respect human rights, and as the UN SRSG has acknowledged, in certain contexts (when a company stands in the shoes of a state—through privatization or otherwise), business enterprises may even have duties to protect human rights.⁵

In practical terms, this implies that business enterprises should have a human rights policy or statement of commitment—which will often be included in a corporate code of conduct—that expresses the corporation's commitment to meet the responsibility to respect human rights. The policy should be implemented through operational policies and procedures necessary to embed it throughout the business enterprise. In addition, the company should clarify how it will address human rights risks and negative impacts that do occur. The human rights policy can, if well-communicated and implemented, function both as a signal to external stakeholders of a company's commitment to human rights and as a visible internal reminder of, guide to, and reinforcement of its human rights responsibilities. For example, publicizing the human rights policy gives notice to host country governments of its commitment to operate with respect for human rights. Furthermore, when successfully operationalized within the firm, the human rights policy can act as a check on future behavior; for example, if the lure of short-term gains tempts the business enterprise to break with its commitment to human rights.

The responsibility to respect all human rights wherever they operate applies to all business enterprises, irrespective of their size, sector, operational context, ownership and structure. The rights encompassed are understood at a minimum to include the human rights expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at

⁴ See, *Guiding Principles*, at 13-22. See also reports of the UN Special Representative on Business and Human Rights to the Human Rights Council (2008-2011), available at www.businesshumanrights.org/SpecialRepPortal/Home.

⁵ See, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework*, ¶ 64, U.N. Doc. A/HRC/11/13, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

Work. Interviewees agreed that applying the *highest* standard of conduct for all of the enterprise's operations across the globe might actually be more efficient than applying separate standards for each jurisdiction. Business enterprises often tether their code of conduct to recognized international legal instruments such as the Universal Declaration of Human Rights as a default standard. Adopting a single global standard aligned with the UN Guiding Principles on business and human rights provides greater clarity for questions of compliance and demonstrates a corporation's commitment to the UN Global Compact (UNGC) principles.

➤ Second Step: Undertake human rights due diligence

Recognizing that these principles are inherently general and that no human rights policy can prepare for every eventuality, enterprises should effectively embed their human rights commitment into relevant policies and processes by developing a plan of action for how to deal with future issues and crises in a *rights-sensitive manner*. This is accomplished by undertaking human rights due diligence to identify, prevent, mitigate and account for how they respond to situations where national laws may conflict with internationally recognized human rights. In other words, business enterprises should have a protocol for how to address human rights conflicts in a way consistent with the enterprise's ethical and legal commitment to human rights. Even in the event that no such conflict arises, companies benefit from scenario planning and proactive yet flexible response preparation.

Business enterprises should also be prepared to adapt their policies in response to unforeseen circumstances, provided of course that they do not use this flexibility as a convenient escape hatch, relying upon it to compromise on internationally recognized human rights or rights-sensitive values whenever a conflict arises.

➤ Third Step: Clarify the scope of a potential conflict

Once a potential conflict has been identified, business enterprises should take steps to determine whether the local law actually conflicts with internationally recognized human rights. While it might superficially appear as if the domestic law in the country of operation compels breaches of internationally recognized human rights, further research and analysis may reveal that the conflict is overstated. For example there may exist a higher standard at a superior level of domestic law that arguably takes precedence or should play a more important role than previously assumed. Analysis might also identify other possible ways to ensure compliance with both standards. Likewise, what the enterprise perceives as the local law may actually be merely one of several interpretations of the law, given by a local official or by a local company.

For example, an executive from an international energy company described the company's experience with security personnel in an African country with inconsistent laws on the use of force. Since the laws on the books pointed to various and contradictory conclusions, the company worked with a host country NGO to provide a training program for security personnel that emphasized the interpretation of host country law consistent with the country's commitments under international and regional human rights conventions. As one interviewee explained, the most important factors in persuading security personnel to comply with the more stringent human rights laws were 1) focusing on support for these norms within host country law; and 2) the company's effort to provide universal human rights training in a culturally sensitive manner, often led by local nationals.⁶

As the above example demonstrates, a business enterprise may seek out an individual or NGO in the country who can help provide the local expertise and interpretation regarding the provision, such as expert local counsel or global counsel with good local experience and knowledge of the jurisdiction's laws.⁷ At a minimum, the enterprise should determine the boundaries of the law as comprehensively and clearly as possible in order to fully understand and maximize the opportunities to mitigate the effects of a potential conflict in a rights-sensitive manner.

III. When a Conflict Exists: Good Practices to Address or Mitigate a Conflict

Sometimes there is a situation in which there is an actual or direct conflict between host country and international law (e.g. where the law requires an action or state of affairs, but the international standard calls for an incompatible action or state of affairs). Where a business enterprise has identified such a situation, it needs to seek ways to honor the principles of internationally recognized human rights.⁸ The good practices discussed below identify a variety of measures that have been applied in such challenging circumstances. The relevance of the different measures will often depend on the context in which the conflict appears and whether the conflict arises from laws that are clear and well understood or laws that are ambiguous and thereby leave room for different interpretations. Not all measures will be equally appropriate for all business enterprises, and due consideration should be given to any risk affected stakeholders or personnel might face as a result of any of these measures.

⁶ For more detailed human rights guidance for the private security industry, see International Code of Conduct for Private Security Service Providers (ICoC), *available at* http://dcafdev.ethz.ch/content/download/1415/19562/version/3/file/INTERNATIONAL%20CODE%20OF%20CONDUCT_Final%20with%20Company%20Names.pdf.

⁷ The Danish Institute for Human Rights, for example, provides tools and country-specific applications of a due diligence framework with regard to human rights risks.

⁸ For an interactive discussion on potential approaches to human rights challenges generally, see THE HUMAN RIGHTS AND BUSINESS DILEMMAS FORUM, <http://human-rights.unglobalcompact.org/>.

➤ Lobby national government

If the human rights due diligence identifies a potential conflict between host country law and international human rights standards, the business enterprise may engage with the host government to determine whether this could be avoided.⁹ If the local law is ambiguous, the enterprise may try to promote an interpretation that is consistent with internationally recognized human rights, as described in the preceding section using the example of training private security personnel.

Interviewees noted that it is common practice for business enterprises to engage with governments to seek tax benefits and other legal measures that would improve the profitability of a potential investment; however, engagement on human rights issues is far less common. While negotiating with government officials clearly depends on the specific issue and the realistic prospects for a change in position, interviewees were divided on the utility of negotiating with the local government: one acknowledged that doing so may “only [make] things worse” and suggested instead that the business enterprise should encourage governmental authorities in the home country [of a transnational business enterprise] to lead a campaign for human rights. Conversely, a multinational mining company includes specific guidelines in its human rights policy encouraging executives to lobby governments privately in support of human rights issues. It might also be noted that in several iconic human rights-related cases, including from the extractive industry and the information technology industry, officials of the enterprises involved publicly stated regret at failure to engage earlier and more effectively on human rights.

Some business enterprises have a considerable impact on the local economy—and by extension, the political debate—within the countries in which they operate. One of the interviewees noted, however, that the strategy of lobbying government officials might not be as practical for less influential enterprises. Enterprises that lack influence on their own might consider encouraging industry associations to lobby on their behalf, or work through ad hoc groups of like-minded enterprises or existing or new multi-stakeholder initiatives.

Another interviewee opined that encouraging business enterprises to negotiate exceptions or favorable interpretations to national law might create a dangerous precedent. That is, promoting this type of private diplomacy may also weaken national institutions and the rule of law, as well as corporate accountability, by creating an incentive to discuss matters of public concern behind closed doors. Lobbying is not a “first-best” solution, but it may be one of the few pragmatic

⁹ See also UN Global Compact Note, “How Business Can Encourage Governments to Fulfill Their Human Rights Obligations,” *available at* http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Governments&HumanRights_Good_Practice_Note.pdf

routes available to business enterprises committed to upholding UN Global Compact principles in challenging environments.

➤ Employ contractual remedies

Another potential avenue for addressing a possible conflict between local law and internationally recognized human rights is the increasingly common practice of explicitly addressing the potential conflict contractually. For example, by including language in a host government agreement that requires compliance with specific international human rights standards or by specifying an array of steps a local supplier or partner must take to respond to and mitigate the negative human rights impact of a conflict.

Some interviewees noted that at least historically, business enterprises have relied on contracts to limit, not expand, the enterprise's human rights and environmental obligations—although other interviewees noted that contractual approaches are increasingly popular in part because of their larger role in helping manage risk and attempting to proactively minimize social, reputational, and legal liability.

For example, contracts sometimes specify the penalties for breach, such as liquidated damages, and include dispute resolution provisions such as the applicable law, venue, and dispute resolution body. Providing for damages in this way may give the business enterprise a path to use damage proceeds to compensate victims in order to both mitigate damage to the company's reputational interests and provide a rights-based remedy to individuals who may be unlikely to obtain redress under their domestic legal system. When addressing human rights grievances, either individually or through collective mechanisms, business enterprise procedures should be based on certain criteria, as established by the Guiding Principles on business and human rights.¹⁰

Multinational enterprises increasingly demand compliance with environmental and human rights standards in their contracts with suppliers, perhaps most visibly in the retail and consumer goods industries but also in other industries (e.g. energy, financial, telecom). This practice of referencing human rights as well as environmental standards may be seen as a development (to suit modern needs and expectations) of the longstanding and typical practice of including anti-corruption clauses in international business contracts across various industries and types of transactions. This approach can be appropriate for situations where the potential conflict arises from laws that are either unclear, not enforced or merely provides lower standards that it is possible for the business enterprise to

¹⁰ The Guiding Principles recommend that non-judicial grievance mechanisms, in order to be effective, should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and, for operational-level mechanisms, based on engagement and dialogue. *Guiding Principles* at 26.

exceed, as opposed to situations where the conflicting law is unambiguous and actively enforced.

As several interviewees noted, the UN Global Compact has positively cited other prominent examples of this approach, including the contract documents for the Baku-Tbilisi-Ceyhan (BTC) pipeline. Facing pressure from local communities and international human rights advocates to apply consistently high standards, BP acquiesced, and its 'Prevailing Legal Regime' (PLR) between Azerbaijan, Georgia, and Turkey explicitly stated BP's commitment to apply the same (high) human rights standards across the three countries.¹¹

Stabilization clauses in host government agreements, particularly in emerging markets, have frequently required the host government to "freeze" social and environmental protections within the country, subject to recovery for economic damage. Although business enterprises have included these types of stabilization clauses to protect their investment from unforeseen risk, the unfortunate effect has often been to prevent the local government from improving or enforcing human rights and environmental standards, while also adding to the overall risk of the transaction for the corporation and the parties concerned. It is thus essential to ensure that host government agreements do not prevent host governments from improving the implementation of human rights and environmental standards within their territory—or even worse, allow retrogression of existing standards.

- Enlist the support of influential third party organizations or individuals

Another strategy to address a conflict between local law and internationally recognized human rights is to enlist the support of influential third-party organizations or individuals. Business enterprises can also work with other enterprises or through trade associations to express their concerns about local laws that infringe upon internationally recognized human rights. One interviewee noted that business enterprises have also protested trade association actions that risked undermining rights. For example, during 2006, several major multinational enterprises criticized efforts by non-national business organizations to oppose a proposed labor law in China, which was designed to strengthen worker protections.

To date, perhaps the most common form of engagement with third party organizations to promote human rights (apart from multi-stakeholder initiatives themselves) consists of corporate philanthropy to NGOs active in the country. This does not address the conflict between local law and internationally

¹¹ Gare Smith, *The BTC Pipeline Case Study: Following through on Global Compact Commitments*, in EMBEDDING HUMAN RIGHTS IN BUSINESS PRACTICE I 70 (2004), available at http://www.unglobalcompact.org/issues/human_rights/Business_Practice.html.

recognized human rights in the short term, but may have some impact over a longer period of time.

➤ Enlist the support of officials in the corporation's home country

In the case of transnational business enterprises, an enterprise may also be able to lobby officials in its home country to act through more formal diplomatic channels to pressure the host country for change. Our interviews confirmed that this practice is already in use. Alternatively, a business enterprise may spur its home country diplomatic corps into action by taking a public stance on human rights. For example, by deciding to relocate certain of their servers, Internet companies have placed Internet freedom on the diplomatic agenda.

Seeking home country diplomatic support may be less helpful, however, when the human rights abuses at issue are not easily detected, and when the home country is not necessarily committed to a rights-sensitive resolution of the issue. In other words, if the enterprise's home country has a strong political or diplomatic incentive to avoid confrontation with the host country on its human rights record, then the corporation may not be able to depend on the home country for assistance.

➤ Use parallel means to honor the principles of internationally recognized human rights

Sometimes a conflict of laws may be overcome by adapting to local regulations in a manner consistent with the spirit of internationally recognized human rights. The recent ISO 26000 Guidelines for Guidance on Social Responsibility would support this view:

In countries where the law or its implementation significantly conflicts with international norms of behaviour, an organization should strive to respect such norms to the greatest extent possible.¹²

As an example, business enterprises operating in countries that enforce legal restrictions on the right of workers to organize and to collective bargaining have developed workers' councils that handle many of the same issues trade unions typically address. In other words, business enterprises are sometimes able to be more creative in seeking to meet the objectives behind an internationally recognized human right without violating the letter of a local law that imposes a conflicting requirement, thereby still meeting their responsibility to respect human rights and their commitments under the Global Compact. Where parallel means have been deployed, business enterprises should be able to demonstrate their efforts in this regard to ensure accountability to their relevant stakeholders.

¹² Draft International Standard ISO/DIS 26000, Guidance on Social Responsibility ¶ 713-714 (2009).

Critics of this approach have two major concerns, both of which are well illustrated using the practice of establishing parallel structures for freedom of association. First, some are skeptical that the practice provides any type of meaningful substitute for actual unions. Interviewees observed that in countries that lack a history of unionization, local management tended to not be convinced of the value of soliciting worker input. Moreover, workers are often reluctant to challenge the existing hierarchy. As a result, while parallel structures may be effective in providing management with limited information on worker grievances, our interviewees were not aware of many examples in which these organizations have been able to actively negotiate for meaningful concessions from management. Businesses that are serious about honoring their human rights and Global Compact commitments should actively make it possible for workers' councils to operate independent of management influence or control.

A second concern with parallel structures is that sidestepping potential conflicts between internationally recognized human rights and domestic law may delay pressure for regulatory change. That is, by not confronting suspect laws openly and directly, business enterprises risk signaling that the offending domestic law is acceptable or uncontroversial. This is a difficult argument to prove one way or the other, not least because it hinges on the public policymaking process in the host country (notwithstanding the fact that in today's interdependent world few policies are made in complete isolation).

At a minimum, corporations should evaluate carefully whether a creative parallel structure could achieve the objectives contemplated by internationally recognized human rights, and does not merely pay lip service to them without achieving the substance contemplated by the rights. In doing so, corporations must exert due diligence to ensure the parallel structures do not create adverse human rights impacts, including by validating a problematic status quo.

➤ Exhaust local judicial and procedural remedies

Another good practice identified is for business enterprises to exhaust local judicial remedies to challenge local or national laws that conflict with internationally recognized human rights. Doing so may prove cumbersome in practice, but has the advantage of registering the business enterprise's concerns about the law in question and its impact on human rights.

Following formal procedures for requests to comply with local law is another measure that may help resolve any ambiguity about the scope of the request. It also increases the likelihood that government officials making such requests are authorized to do so; in other words, that the official is acting within the scope of his/her authority.

For example, several global ISPs have now implemented a strict policy for handling requests for information from authorities. Although state officials regularly demand information immediately, the enterprises now require all requests to be submitted in writing and to be stamped with an official government seal. In addition, as one interviewee described company practice, all requests are sent to the company's home office before approval was given. This is consistent with the recommendations of the Global Network Initiative to obtain "clear written communications from the government that explain the legal basis for government restrictions to freedom of expression, including the name of the requesting government entity and the name, title and signature of the authorized official."¹³

While an interviewee admitted that in that company's case this strategy did not prevent the company from having to comply with requests—whether legitimate or not—it lengthened the process, created a written record of the exchange, and ensured that the enterprise's headquarters were made aware of all requests, perhaps positively affecting incentives for the requesting authority to have legitimate cause.

➤ Implement mechanisms to ensure transparency

Another strategy business enterprises may use to mitigate or prevent a conflict between domestic law and internationally recognized human rights is to encourage and participate in mechanisms to ensure greater transparency in the enterprise's relations with the government. The value of this approach is that it signals to the government, to competitors, and to relevant stakeholders that the enterprise is serious about its commitment to respect international human rights, environmental, anti-corruption, and labor standards. Furthermore, for the government, transparency increases the cost, in terms of international opprobrium and related negative consequences of having in place national laws that conflict with internationally recognized human rights.

In order to improve transparency, information can be provided at the enterprise level, such as Google's new Government Requests tool, which provides lists of the number of government requests for information for most countries in which it operates.¹⁴

Secondly, at the industry level, business enterprises may adhere to a reporting mechanism such as the Extractive Industries Transparency Initiative, or be subject to laws (such as the requirement in the 2010 U.S. financial reform

¹³ Implementation Guidelines, GLOBAL NETWORK INITIATIVE <http://www.globalnetworkinitiative.org/implementationguidelines/index.php> (last visited Feb. 18, 2011).

¹⁴ Not all countries are included in the Google Transparency Report, For a complete explanation of exceptions, see FAQ – GOOGLE TRANSPARENCY REPORT <http://www.google.com/transparencyreport/faq/#removalrequests> (last visited Feb. 18, 2011).

legislation)¹⁵ that require certain companies to disclose financial dealings with governments to the general public. The Global Network Initiative is another example of an industry-focused transparency mechanism, as it requires Information Communications Technology (ICT) member companies to report on their progress in respecting freedom of information and privacy rights. Likewise, signatories to the Equator Principles, an industry code of conduct for project financing, commit to report annually on their implementation of the Principles.

Lastly, multi-sectoral multi-stakeholder initiatives—such as the Global Reporting Initiative and the UN Global Compact (including its Communications on Progress)—provide still other forums for encouraging greater business transparency in compliance with international human rights standards.

- Push the boundaries of legal compliance: subtle and not so subtle forms of “corporate civil disobedience”

In exceptional circumstances, corporations have been known to push the boundaries of legal compliance in contexts where national law conflicts with internationally recognized human rights. The most well-known example of outright “corporate civil disobedience” is that of the Sullivan Principles, the voluntary code of conduct adopted by foreign companies operating in South Africa during apartheid which committed signatories to resist *de jure* racial discrimination there. The Sullivan Principles served as a catalyst for legislative action in the United States. In 1986, the U.S. Congress passed the Comprehensive Anti-Apartheid Act, incorporating many of the Sullivan Principles into U.S. law, restricting the extraterritorial activities of U.S. companies.

On a smaller scale, some interviewees confirmed that rights-based non-compliance occurs quite frequently outside the view of local authorities. For example, one executive noted that for the enterprise’s offices in a country with a very restrictive dress code for women, female employees often remove their headscarves indoors in order to work more comfortably. There is no official company policy on this issue and the scarves remain within arms’ length of each employee in case the local authorities arrive for an inspection.

Interviewees noted that restrictions on female employment in certain countries are commonly a matter of state-enforced social practice as well as formal law. Businesses that do not comply with local practices—even if not enshrined in law—may find themselves subject to selective regulation, such as unannounced audits or the denial of work visas. For example, in certain countries, the religious police enforce customary religious norms against the intermingling of the sexes. As a result, female CEOs can preside over businesses with predominantly female employees, for example, but cannot easily work alongside men. Although this restriction is not enshrined in written law, it is enforced by the religious police

¹⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203, H.R. 4173 § 1504 (2010).

acting under color of law. As one of the interviewees explained, there are certain areas of the capital that are “inaccessible even to a woman with a[n elite consulting firm] business card.”

In response, business enterprises concerned by this type of discrimination, and the potential loss of talent from not employing women, have sometimes resorted to creating mostly-female divisions within the enterprise. For example, the marketing or human resources department may consist solely of women in a local office otherwise dominated by male employees. This practice does not meet the standard established by international human rights law,¹⁶ but it does appear to enable the circumvention of some of the restrictions placed on women and their right to work (if subject to criticisms similar to those pertaining to parallel mechanisms, above).

Another sensitive issue involves laws that criminalize homosexuality. Although business enterprises tend not to state their policies on these issues openly, our interviews suggested that a type of corporate “don’t ask, don’t tell” policy is often the norm. Some business enterprises state explicitly in their code of conduct that discrimination on the basis of sexual orientation will not be tolerated.¹⁷ However, our interviews to date have not unearthed detailed information (perhaps understandably, given the civil disobedience aspects) regarding public or even private policies on specifically how business enterprises implement non-discrimination on the grounds of sexual orientation when operating in countries that criminalize homosexuality.

IV. Emerging Practices

The following section identifies emerging practices that, although not widely established, may be employed in the future to address conflicting legal requirements.

➤ Rely on international trade remedies

One emerging practice to deal with a conflict of laws is to treat certain domestic human rights violations as a trade barrier. For example, some have argued that Internet censorship (a violation of freedom of speech) is equivalent to a barrier in the trade of physical goods.¹⁸ In other words, although international trade bodies such as the WTO would be unlikely to adjudicate a claim that domestic law

¹⁶ See, e.g. Convention on the Elimination of All Forms of Discrimination against Women.

¹⁷ See, e.g. RIO TINTO, *The Way we Work* 12 (2009); STATOIL, *Human Rights and Labour Standards* (2008); GOODYEAR, *Policy on Global Human Rights* (2009).

¹⁸ Scott Morrison, *Google Executive: Internet Censorship is A 'Trade Barrier'*, Real Time Market News: Dow Jones, Sept. 2010.

violates international human rights law, a human rights issue that *also* represents a trade barrier may fall under the purview of the WTO.

For advocates of corporate social responsibility, trade remedies have the obvious advantage of holding states accountable for dubious practices (especially since the states are typically parties to the major human rights treaties). Critics of this approach argue, however, that human rights, environmental, and anti-corruption issues are best addressed in another forum—in other words, that trade should be “de-linked” from social issues.

On the other hand, the mere threat of action might itself motivate the host state to moderate its policies, thereby achieving the same outcome while avoiding the lengthy delays. No examples have been identified of a specific trade action in which the alleged barrier consisted primarily of formal human rights abuses, but increasing attention to the issue suggests this may emerge as a good practice in the near future.

➤ When to consider divestment/disengagement

In some cases, none of the above options may provide an adequate means to manage the risk that compliance with local law would put a business enterprise in breach of its responsibility to respect human rights. Particularly in circumstances where such a conflict may lead to business involvement in gross human rights abuses, the question of divestment or disengagement may arise as a last resort. Likewise, in countries with exceptionally severe challenges to the rule of law, conflicts between internationally recognized human rights and the demands of national authorities operating under color of law may be so widespread that the suggested mitigation steps outlined above would be inadequate.

Critics of divestment point to the problem of alternative demand (or for trade, supply). Said differently, if one company chooses not to invest in a country as a result of the conflict between national law and international human rights standards, will that not just invite a less ethically focused business to step in and fill the void? This concern animates the Norwegian government’s white paper, “Corporate Social Responsibility in a Global Economy,” which advocates engagement in “countries that pose challenges,” unless the country is the subject of an international boycott.¹⁹ Business enterprises may want to weigh whether their continued presence in the country would result in a “net human rights gain or loss.”

The main debate, however, concerns where to draw the dividing line—not whether divestment should ever be considered. Several factors can be

¹⁹ Corporate social responsibility in a global economy (abridged version), Abridged version of Report No. 10 (2008-2009) to the Storting (Jan. 29, 2009), *available at* http://www.regjeringen.no/nb/dep/ud/dok/rapporter_planer/rapporter/2009/csreport_short.html?id=582764.

suggested to consider in determining when divestment may be the most prudent course of action. These include whether countries “are subject to international sanctions; have been accused of genocide, war crimes and/or crimes against humanity; refuse access to a neutral body such as the International Committee of the Red Cross; or do not respect popular sovereignty and where there has been a clear expression of popular sentiment against any foreign commercial activities.”²⁰ Additional “no-go countries” would include those where there are gross and systematic human rights violations and no effective independent judicial or other legal institutions.²¹ The ethical guidelines for the Norwegian sovereign wealth fund (“Government Pension Fund—Global”) prohibit investments in a far broader range of circumstances, but contain a particular emphasis on violations of international humanitarian law (the “laws of war”).

These factors apply not only to situations where there may be a conflict of law, but also to situations where there is a particularly high risk of becoming involved in human rights abuse more generally. The larger set of countries with gross human rights abuses often includes the smaller subset of those with *de facto* or *de jure* conflicts of law. The Nazi regime and the South African regime under Apartheid, for example, not only took actions amounting to gross human rights abuse and crimes against humanity, but also institutionalized those practices in extensive legal regimes that pervasively affected the lives and human rights of the populace.

Under such circumstances, corporate decision-makers may want to reevaluate whether the business opportunity is as lucrative as it appears. Corporate leaders should determine whether investment in the country would run the risk of incurring legal or social liability for human rights abuses. In addition, a company’s employee recruitment efforts and access to capital as well as its other important stakeholder relations may suffer tremendously if the company is linked to human rights abuses abroad. One of our interviewees called this the “barbecue” test: what is your response to the perfunctory “so, what do you do?” inquiry at friendly social gatherings. “If you’re not proud of who you’re working for, then there’s a problem.”

From a financial perspective, if the conflict with international human rights standards is caused by political instability, as with a military coup, rebel group, or repressive government taking power and passing repressive laws, business leaders should consider whether their investments in the country would be subject to a considerable political risk premium. Interviewees noted that systemic human rights violations should be explicitly considered as one element in that political risk analysis. A regime that demonstrates a lack of respect for

²⁰ Jonathon Hanks, *Understanding the Implications of the Global Compact Human Rights Principles for Petrochemical Investment Activities in Developing Countries: A Case Study of Sasol*, in EMBEDDING HUMAN RIGHTS IN BUSINESS PRACTICE II 52 (2007), available at http://www.unglobalcompact.org/newsandevents/news_archives/2008_03_27.html.

²¹ See, also UN GLOBAL COMPACT-PRI, GUIDANCE ON RESPONSIBLE BUSINESS IN CONFLICT-AFFECTED & HIGH-RISK AREAS: A RESOURCE FOR COMPANIES & INVESTORS (2010), available at http://www.unglobalcompact.org/Issues/conflict_prevention/guidance_material.html.

international human rights concerns is unlikely to assertively enforce the rule of law more generally, further jeopardizing a company's investments. A company should consider whether such a government would prove equally reluctant to enforce, for example, the protection of private property or prohibition on corruption.