

MODERNIZING INTERNATIONAL TRADE LAW TO SUPPORT INNOVATION AND
SUSTAINABLE DEVELOPMENT

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**IMPLEMENTING THE BUSINESS AND HUMAN RIGHTS LEGAL FRAMEWORK:
HOW COULD UNCITRAL BRIDGE THE GAP?**

Angelica Bonfanti¹, Riccardo G. Cajola²

1. Introduction

The realization of sustainable development and the implementation of the Sustainable Development Goals call for the respect of socially responsible standards of conduct and human rights by corporations throughout their supply chains. Several international legal instruments have been adopted during the past decades in the field of business and human rights (B&HR). Among them, the OECD Guidelines for Multinational Enterprises³ and the UN Guiding Principles on Business and Human Rights (UNGPs)⁴. The latter, adopted by the UN Special Representative of the Secretary General, Prof. John Ruggie, in 2011, endorsed by the UN Human Rights Council and widely supported by the international community, can be currently considered as the leading instrument in this field.

It is here submitted that, as part of its support to the implementation of the Sustainable Development Goals⁵, UNCITRAL could usefully contribute to integrate the legal discipline of international trade with the international legal principles on business and human rights. The two legal fields are strictly connected, in so far as international processes of production of traded goods and business transactions often involve human rights considerations. The UNCITRAL contribution to the legal discourse on B&HR would be not only desirable but also particularly welcome in this specific moment. In fact, up to now only few States have adopted National Action Plans (NAPs) and domestic legislation implementing the UNGPs internally. The adoption by UNCITRAL of a legal tool providing guidelines and/or model rules to follow when drafting NAPs and domestic legislation in this field, would certainly be helpful to States willing (and internationally required) to bridge the gap between international trade and the protection of human rights.

On a practical level, the authors submit that UNCITRAL might consider instituting a specific Working Group on B&HR, elaborating a legal tool providing States with guidelines and model

¹ PhD, Associate Professor in International Law, University of Milan (angelica.bonfanti@unimi.it). The research leading to this publication has been co-funded by the Erasmus+ Programme of the European Union (Jean Monnet Module 564952-EPP-1-2015-1- IT-EPPJMO-MODULE on “EU Law on Business and Human Rights”). The European Commission’s support for the production of this publication does not constitute an endorsement of the content which reflects the views only of the author. The Commission and EACEA cannot be held responsible for any use which may be made of the information contained therein.

² LL.M., Special Projects Officer, International Sales Committee, International Bar Association (rgc@cajola.com). This Article is the result of joint efforts and discussions of the authors. Angelica Bonfanti has written paras. 1, 2 and 5. Riccardo Cajola has written para. 3. The authors have jointly elaborated para. 4.

³ Available at: <http://mneguidelines.oecd.org/guidelines/>.

⁴ Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁵ Available at: <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

rules and, if this might be the case, supporting the amendment of (or negotiation of a Protocol to) the CISG as to integrate explicitly the human rights concerns within the conventional framework.

This paper develops the relevant analysis throughout 4 sections: after having examined the legal framework on B&HR (para. 2), and focused on practical examples of what business are currently doing to comply with responsible standards of conduct (para. 3), it deals with the weaknesses of the current approach, suggests suitable model rules and contract clauses that States might rely on when implementing domestically the B&HR commitments (para. 4), and proposes to amend the CISG as to make it compliant with the UNGPs (para. 5).

2. The international legal framework on B&HR: the UNGPs

As mentioned above, the main international legal instrument setting principles and standards in the field of B&HR are the UNGPs. The UNGPs are a three-pillar soft law tool, addressing recommendations to States and corporations⁶. Pursuant to the first pillar, States have the duty to protect human rights from violations connected to business activities. This principle clearly recalls the international obligation of States to protect human rights, both by way of abstaining from violating them directly and implementing the necessary positive measures to avoid that inter-private violations of human rights (i.e. committed by private operators, including corporations) occur against individuals under their jurisdiction. Pursuant to Principle no. 1 these measures include “steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”. Thus, States are called to enact the legislation and procedures adequate to prevent and combat corporate human rights violations. More specifically “States should: (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”.

It is here submitted that among the legislative reforms that States might enact in order to implement the UNGPs there is the obligation to introduce within contracts clauses providing for the respect of human rights throughout the supply chain, in compliance with the UNGPs. This legal means would have the effect of making business enterprises accountable to respect human rights throughout their operations, even when carried out abroad. In this context, the draft by UNCITRAL of model contractual clauses and model rules addressed to States willing to amend their contract laws as to implement the principles set forth by the UNGPs would be very useful and appreciable.

The second pillar of the UNGPs establishes the corporate responsibility to respect human rights. Pursuant to Principle no. 11 “The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate”. It is clearly stated that, in so far as “business enterprises can have an impact on virtually the entire spectrum of internationally

⁶ The UNGPs have been widely commented by legal literature. *Inter alia* see: R. Mares, The UN guiding principles on business and human rights: foundations and implementation, Leiden, 2012 ; J. Ruggie, Just business: multinational corporations and human rights, W.W. Norton & Company, 2013 and the references in A. Bonfanti, Imprese multinazionali, diritti umani e ambiente. Profili di diritto internazionale pubblico e privato, Milano, 2012.

recognized human rights”, their responsibility “refers to internationally recognized 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 International Labour Organization’s Declaration on Fundamental Principles and Rights at Work”. The International Bill of Human Rights includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, coupled with the principles concerning fundamental rights in the ILO core conventions and the Declaration on Fundamental Principles and Rights at Work. However, depending on circumstances, business enterprises may need to take additional standards into account.

Pursuant to Principle no. 15 UNGPs, “In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”

Principle no. 16 UNGPs call business enterprises to express their commitment to meet their human rights responsibility through a statement of policy that: “(a) Is approved at the most senior level of the business enterprise; (b) Is informed by relevant internal and/or external expertise; (c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise”. Thus, the UNGPs recommend business enterprises to adopt and publish codes of conduct, in line with the specific requirements above described.

As regards the human rights due diligence, Principle no. 17 UNGPs acknowledges that “the process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve”. It is recommended that human rights due diligence “be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements”. In case of large numbers of entities involved in the value chains, “business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence”. As regards the effects arising from the implementation of HR due diligence processes, “they should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses”.

The authors submit that corporations might strengthen their compliance with their responsibility to respect human rights through the insertion, within contracts entered into with suppliers, of clauses explicitly referring, on the one hand, to their commitment to respect the UNGPs and comply with human rights protection - as codified within their codes of conduct - and, on the other hand, to the enactment of adequate processes of human rights due diligence and remediation of any adverse impacts.

3. B&HR in the supply chain: how multinational corporations have been including responsible standards of conduct within codes and contracts.

In recent years corporations have been implementing a variety of best practices in order to make the supply chain aware and responsible for the implementation of ethical standards of conduct.

Even though these best practices clearly demonstrate that business enterprises are moving towards progressive accountability for human rights protection, nevertheless, as it will be shown below, implementing the UNGPs within contracts would better call for the systemic introduction of standard clauses referring to the UNGPs and relying specifically on the requirements and procedures set forth by them.

Currently we can find different approaches to the respect of ethical standards of conduct and the protection of human rights, as we may consider:

(1) **Codes of Conduct** – An example of this is the following supplier code of conduct:

“As reflected in our Code of Conduct, our company is committed to high standards of integrity and sustainability. We have a zero tolerance policy when it comes to unethical business behavior, such as bribery, corruption and forced labor. We expect all of our suppliers to adhere to similar standards and to conduct their business ethically. As a supplier, you must comply with all applicable laws and regulations, the requirements set out in this Supplier Code of Conduct and your contractual obligations to us.”

Code of Conduct - “This Supplier Code of Conduct defines the main principles underlying your business activities as one of our suppliers. More specific guidance, including information on hazardous substances and conflict minerals and where to go for questions, is available on www.brandowner.com/supplying or www.brandowner.com/integrity.

A. Human rights - As a supplier to us, you shall:

- (i) Respect the personal dignity, privacy and rights of each individual;
- (ii) Refuse to make any person work against his or her will; and
- (iii) Prohibit behavior including gestures, language and physical contact, that is sexual, coercive, threatening, abusive or exploitative.

B. Fair labor conditions - You shall ensure fair labor conditions. In particular, you will:

- (i) Refrain from employment discrimination based on gender, age, ethnicity, nationality, religion, disability, union membership, political affiliation or sexual orientation;

- (ii) Respect the rights of employees to freely associate and bargain collectively;
- (iii) Not tolerate or use child labor in any stage of your activities other than in accordance with all applicable laws and regulations;
- (iv) Not use any forced labor, including but not limited to involuntary prison labor, victims of slavery and human trafficking and allow all employees the choice to leave their employment freely upon reasonable notice;
- (v) Compensate employees fairly and follow local wage regulations and / or collective agreements, and where these do not exist, compensate employees so at the minimum they can meet their basic needs;
- (vi) Ensure that working hours, including overtime, do not exceed applicable legal requirements, and where such requirements do not exist, we recommend that working hours not exceed sixty hours per week including overtime; and
- (vii) Ensure that employees are allowed at least one uninterrupted day off per week.

C. Health, safety and environmental management - You shall provide a safe and healthy workplace for all of your employees and shall conduct your business in an environmentally sustainable way. In particular, you will:

- (i) Formally appoint a competent person to manage health, safety and environmental programs and improvements;
- (ii) Establish appropriate organizational structures and procedures for the effective management of health, safety and environmental risks; and
- (iii) Ensure that all workers are sufficiently aware of these risks and appropriately trained on the implementation of control measures.

D. Material compliance and conflict minerals – At our company, we are determined to comply with regulatory and customer requirements regarding the prohibition and restriction of substances, including hazardous substances and conflict minerals. Therefore, suppliers shall ensure that the goods provided to us are in compliance with requirements covered under the scope of all relevant regulations. In particular, you will:

- (i) Declare to us substances which are listed in the “List of Prohibited and Restricted Substances” and contained in the goods you supply to us;
- (ii) Implement a policy regarding conflict minerals and exercise due diligence to investigate the source of these minerals; and
- (iii) Respond in a timely manner to our requests for evidence of your compliance with these requirements.”⁷

(2) **Forms of Institutional communication** – Hereunder is an example of this:

“Supplier Accountability and Compliance – We are committed to responsible business practices and to high standards of ethical behavior. We also hold our suppliers to high

⁷ From ABB Supplier Code of Conduct, Version 2.1| 4, published 16.05.2016, at new.abb.com/about/supplying/code-of-conduct.

standards of excellence defined in governing laws, recognized international standards and conventions, and global best practices such as these.

- (i) The United Nations (U.N.) Declaration of Human Rights
- (ii) The U.N. Convention on the Rights of the Child
- (iii) Fundamental conventions of the International Labor Organization (ILO)
- (iv) Electronic Industry Code of Conduct (EICC)
- (v) International Organization for Standardization (ISO 14001)
- (vi) Occupational Health and Safety Assessment Series (OHSAS 18001)
- (vii) Our Code of Conduct
- (viii) The benchmark of other corporations and industries across the globe
- (ix) The reporting standards of the Global Reporting Initiative

Meeting our supplier principles is a condition of doing business with us. We implement these standards through three primary means:

1. Reinforcing the general requirement that Suppliers meet or exceed all applicable laws and recognized international standards;
2. Ensuring adoption of our core policy commitments by defining and enforcing Supplier requirements; and
3. Requiring active participation in our Supplier Engagement, Capability Building and Assessment Programs.”⁸

(3) Contractual provisions in product supply agreements – A standard provision is often the following:

“The manufacturer represents, warrants and undertakes to the brand owner and each buyer of his supply chain that:

- it shall in performing its obligations under this agreement strictly comply with all relevant legal requirements in force; and it shall at all times possess and strictly comply with all required licenses and other governmental or official approvals, permits or authorizations;
- the products shall strictly comply with all relevant legal requirements in force including those in all European countries and all other countries which it has been notified of, or is aware of, in which any of the brand owner group of companies will sell the products.”

The above provision is usually coupled with an undertaking from the agreement parties to comply with the brand owner code of conduct, which is generally annexed to the agreement in the following terms:

“Business Partner Code - We are committed to working with our business partners to achieve high standards and to provide greater transparency on how we work together.

Maintaining high standards together - To meet the expectations our consumers have of our brands as high quality, reliable products, we form close working relationships –

⁸ From Dell Supplier Accountability Approach and Standards, at www.dell.com/supplierresponsibility.

many of them long-term – with our business partners. In support of this approach, we have developed a Business Partner Code that is compatible with our Code of Business Principles. The Code makes clear the standards to which we expect our business partners to adhere. It contains 10 principles covering business integrity and responsibilities relating to employees, consumers and the environment.

We started to introduce the Code by writing to all those suppliers with whom we have a direct relationship ('first-tier suppliers'). In keeping with our company's partnership approach, we work together with our partners, first to establish how compatible their standards are with ours and then, where necessary, to agree on measures and timescales to achieve the desired performance levels.

Business partner code

There shall be compliance with all applicable laws and regulations of the country where operations are undertaken

- a. There shall be respect for human rights, and no employee shall suffer harassment, physical or mental punishment, or other form of abuse
- b. Wages and working hours will, as a minimum, comply with all applicable wage and hour laws, and rules and regulations, including minimum wage, overtime and maximum hours in the country concerned
- c. There shall be no use of forced or compulsory labor, and employees shall be free to leave employment after reasonable notice
- d. There shall be no use of child labor, and specifically there will be compliance with relevant ILO standards
- e. There shall be respect for the right of employees to freedom of association
- f. Safe and healthy working conditions will be provided for all employees
- g. Operations will be carried out with care for the environment and will include compliance with all relevant legislation in the country concerned
- h. All products and services will be delivered to meet the quality and safety criteria specified in relevant contract elements, and will be safe for their intended use
- i. There shall be no improper advantage sought, including the payment of bribes, to secure delivery of goods or services to our companies.
- j. The right to collective bargaining is implicit in the recognition of freedom of association. In line with its own long-standing practice and its adherence to the United Nations Global Compact, our companies expects its suppliers to recognize the right to collective bargaining (where allowable by law)."⁹

(4) **General terms and conditions in product supply agreements** – In some other situations, the brand owner may ask the supplier and its sub-contractors to accept its general contractual conditions, which refer to its best practices, due diligence, processes and code of conduct in the following way:

“Conformity, Integrity – The supplier shall supply the goods and services in conformity with all the applicable statutory regulations, guidelines and codes of conduct.

⁹ Based on Unilever Business Partner Code, at https://www.unilever.com/Images/4394-cobp-code-policies-booklet-external.v12_tcm244-409220_en.pdf

The supplier and its sub-contractors shall strictly comply with the brand owner list of prohibit substances and subject to restrictions, reporting obligations and other requirements relating to the “Conflict Minerals”, which are available on its institutional web site at www.brandowner.com – Supplying – Material Compliance or otherwise, and shall provide the client with the documents, the certificates and declarations, as required. Whatever statement released by the supplier to the client (directly or indirectly) with reference to the material used for or relating to the products or services, shall be considered as a contractual statement.”¹⁰

(5) **Standard contract clause for ethical standards and human rights** – Some corporations not only divulge their commitment and that of the suppliers to respect the international standards, but also include in their communications the related contractual provisions. Here is an example of it:

“Human Rights Statement - We believe that governments have the responsibility to define and enforce a legal human rights framework that accords with international laws and agreements, such as the Universal Declaration of Human Rights. We support the UN Guiding Principles on Business and Human Rights, recognizing that businesses should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. We support and are committed to upholding the Universal Declaration of Human Rights and the core labor standards set out by the International Labor Organization. We are also a signatory to the UN Global Compact.

However, companies cannot unilaterally resolve all the issues that arise – a partnership approach, working with others who have the mandate, competence and capacity to facilitate change is essential. We are guided by our own values and ethics in circumstances where there is uncertainty or conflicts of priority. There are some areas of human rights observance where we have direct responsibilities.

As an employer we are:

- (i) committed to providing a fair salary and good conditions of employment;
- (ii) committed to providing a healthy, safe and secure work place for all employees and contractors;
- (iii) committed to exercising high standards of integrity in dealing with and protecting the Personally Identifiable Information (PII) of employees
- (iv) opposed to discrimination at work and committed to promoting diversity;
- (v) committed to promoting the personal development and dignity of every individual employee;
- (vi) respectful of the right of employees to join an independent trade union, the right to collectively bargain, and of freedom of association;
- (vii) opposed to all forms of slavery and exploitative child labor and will work with appropriate partners to address this problem responsibly wherever we encounter it.

As a purchaser of raw materials, manufactured goods and services around the world we strive to conduct business with third-party suppliers who share our commitment to high ethical standards and operate in a responsible and ethical manner towards their

¹⁰ From ABB General terms and conditions for purchase of goods and/or services (2016-1 STANDARD), at new.abb.com/docs/librariesprovider64/vdp-vnp/vnp-aj.pdf?sfvrsn=2

employees and their own suppliers. See Appendix 1 for the human rights clause in our standard contract.

As a science-based company we believe that the rights, dignity and safety of people using our products, both during and after their development, are paramount. We monitor rigorously the safety of our products to protect patients' well-being, and that of people involved in the R&D and manufacturing of products. We are committed to ensuring that the human rights of people taking part in our clinical research are protected, including through the informed consent process and procedures to protect patient privacy. We are committed to patient-centered promotional practices, which are ethical, responsible and principled.

As a marketer of pharmaceutical products with lifesaving and enhancing properties, we will strive to make them as widely available as possible while running our business in a sustainable way. Our contribution to improving healthcare in developing countries through providing vaccines and medicines at affordable prices, investing in stronger healthcare systems and developing an appropriate product range is vital in supporting this principle. So too is our undertaking to continue to supply medicines in all countries where they are requested, sharing the judgment of the UN that people should not be denied access to medicines because of the regime operating in the country. It may, however, be necessary to cease to trade in countries when required to by law or where it becomes impossible to act in accordance with our own values and ethics.

As a company whose success depends on the fruits of innovation, we recognize and respect the intellectual property of others while seeking respect for our own intellectual property. We believe that all humanity should share in the benefits of science and will work to make that possible through our own activities and in partnership with governments and others, particularly where life is at risk and suffering is greatest.

As a global corporate citizen, we will play our part in promoting the development of science, education and the community generally. We will respect the law and behave with honesty and integrity in all aspects of public life and demonstrate responsible leadership.

As a member of local communities, we will respect and promote the rights of all those within our sphere of influence in host communities.

Appendix 1: Human rights clause in our standard contract

Our supplier contracts contain a human rights clause (below) which is based on the International Labor Organization's conventions and the UN's Universal Declaration of Human Rights.

We may amend the exact wording of the clause during negotiations with suppliers or during translation to suit local law. These changes will not reduce the contractual impact or intent of the clause.

Our standard contract clause for ethical standards and human rights:

Unless otherwise required or prohibited by law, the Supplier warrants, to the best of its knowledge, that in relation to the supply of goods or services under the terms of this Agreement:

1. It does not employ, engage or otherwise use any child labor in circumstances such that the tasks performed by any such child labor could reasonably be foreseen to cause either physical or emotional impairment to the development of such child;
2. It does not use forced labor in any form (prison, indentured, bonded or otherwise) and its employees are not required to lodge papers or deposits on starting work;
3. It provides a safe and healthy workplace, presenting no immediate hazards to its employees. Any housing provided by the Supplier to its employees is safe for habitation. The Supplier provides access to clean water, food, and emergency healthcare to its employees in the event of accidents or incidents at the Supplier's workplace;
4. It does not discriminate against any employees on any ground (including race, religion, disability or gender);
5. It does not engage in or support the use of corporal punishment, mental, physical, sexual or verbal abuse and does not use cruel or abusive disciplinary practices in the workplace;
6. It pays each employee at least the minimum wage, or a fair representation of the prevailing industry wage (whichever is the higher) and provides each employee with all legally mandated benefits;
7. It complies with the laws on working hours and employment rights in the countries in which it operates;
8. It is respectful of its employees' right to join and form independent trade unions and freedom of association;
9. The Supplier agrees that it is responsible for controlling its own supply chain and that it shall encourage compliance with ethical standards and human rights by any subsequent supplier of goods and services that are used by the Supplier when performing its obligations under this Agreement.

The Supplier shall ensure that it has ethical and human rights policies and an appropriate complaints procedure to deal with any breaches of such policies.

We reserve the right upon reasonable notice (unless inspection is for cause, in which case no notice shall be necessary) to enter upon the Supplier's premises to monitor compliance by the Supplier of the warranties set out in the clause above and the Supplier shall, subject to compliance with law, furnish our company with any relevant documents requested by us in relation thereto. This sub-section will only be required where there is no general right of audit elsewhere within the Agreement."¹¹

¹¹ From Glaxo Smith Kline Human Rights Statement, at www.gsk.com/media/890484/human-rights-statement.pdf.

4. Achievements and failures of the examined best practices, and the path towards a better coordination with the UNGPs

As above mentioned, business enterprises are increasingly developing best practices to grant compliance with ethical standards of conduct throughout their supply chain.

Even though significant examples can be found, nonetheless these best practices still rely on the voluntary approach of single business enterprises and are the outcomes of case-by-case negotiation of contracts with suppliers. This makes the trend in favor of contractual commitment to respect human rights throughout the supply chain very interesting, but still fragmented.

Thus, the first contribution UNCITRAL – through a newly instituted working group on Business and HR - might perform in this field consists in adopting model rules and standard contract clauses that States might recall within their NAPs and embody within their contract laws, conditioning the validity or the effective implementation of contracts entered into between parent companies and suppliers/contractors to the compliance with the UNGPs and the respect of human rights. For instance, UNCITRAL might suggest conditioning the formation, validity and performance of contracts entered into with suppliers to:

- the explicit reference to the UNGPs and their respect and implementation throughout the supply chain;
- a specific, explicit and wide reference to the respect of human rights, as internationally required by Principle no. 11 UNGPs;
- the publication of codes of conduct, in compliance with Principle 16 UNGPs;
- the implementation of human rights due diligence processes, in line with the requirements specifically set forth by Principle 17 UNGPs;
- the enactment of internal remediation processes and grievance procedures, in line with the UNGPs;

The text of the relevant UNGPs' Principles could either be recalled or explicitly quoted. In any case, the standards thereby indicated would acquire the status of contractual terms. In case of material breach and lack of implementation by suppliers, the latter would be civil liable.

It is here submitted that the newly adopted UNCITRAL model rules might also recommend enforcing contractual sanctions. Contracts with suppliers should make explicit reference to them. For instance, the UNCITRAL model rules and the proposed standard contract clauses might include provisions involving nullity, voidance, suspension or termination of contracts in case of lack of compliance with the UNGPs. Moreover they should explicitly refer to the right of parent corporations to claim the suppliers' civil liability for not complying with their contractual commitment to respect human rights and the UNGPs and should recognize the parent corporations' right to compensation for the breach of contract duties by suppliers, including for reputational damages arising therefrom.

5. Integrating the UNGPs within the CISG

Besides suggesting the adoption by UNCITRAL of model rules and model contract clauses, the authors here submit that UNCITRAL might also consider amending the CISG in order to adapt it to the concerns here discussed.

As a starting point, it should be kept in mind that, even though the CISG does not explicitly deal with the compliance of international sale contracts with human rights, nonetheless many of its provisions can be interpreted as extending to them. In fact, the CISG, as all international treaties, shall be interpreted on the basis of the rules enshrined in the Vienna Convention on the Law of Treaties¹². Among them, Art. 31.3.c calls for a systemic interpretation, suitable to take into account “the other relevant rules of international law applicable between the parties”, thus including the rules on the international protection of human rights and, up to a certain extent, the UNGPs.

It is worth noting that both the Preamble and Art. 7 CISG may lead to interpret it in the light of the international principles on human rights protection. As regards the former, it makes reference to “the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order” and acknowledges that uniform rules on international sale of goods, which take into account the different social, economic and legal systems, can contribute to the removal of legal barriers in international trade and promote the development of it. As regards Art. 7, it clarifies that “(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade; (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”. Some scholars state: “the observance of good faith in international trade ought to be considered a moral or ethical standard to be followed by businesspersons, projecting ethical values in international sales contracts”.¹³ Likewise it can be assumed that the general principles on which the CISG is based include the international legal principles on the protection of human rights.¹⁴

Similar issues arise from Art. 9, pursuant to which the parties are bound “by any usage to which they have agreed and by any practices which they have established between themselves” and any usage of which they “knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”. Can the participation to international ethical initiatives (such as the UNGPs) be considered as giving rise to an agreed usage or an established practice between the parties? Lacking this condition, can the respect of human rights within corporate and business activities be considered to amount to a usage in international trade “widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”?¹⁵

Given these premises, it is worth focusing on Art. 35 CISG, which requires: “The seller must deliver goods which are of the quantity, quality and description required by the contract [...]”. This provision can be interpreted as addressing not only the goods’ physical qualities, but also “all factual and legal circumstances concerning the relationship of the goods to their surroundings”,¹⁶

¹² Vienna Convention on the Law of Treaties, 23 may 1969, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

¹³ Kröll, Mistelis, Perales Viscasillas (eds.), UN Convention on Contracts for the International Sale of Goods (CISG). Commentary, Munchen, 2011, p. 120.

¹⁴ S. Wilson, Ethical Standards in International Sales Contracts: Can the CISG Be Used to Prevent Child Labour?, Submitted for LLB (Honours) Degree, Victoria University of Wellington, 2015, p. 20 ff. Available at: <http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/4622/thesis.pdf?sequence=2>.

¹⁵ Ibid., 19.

¹⁶ I. Schwenzer (ed.), Commentary on the UN Convention on the International Sales of Goods (CISG), 3 ed., Oxford, 2010, 572-573. See also: I. Schwenzer, B. Leisinger, Ethical Values and International Sales Contracts, in C. Cranston, J.

including the production methods used to manufacture the goods. Therefore, if the parties have contractually agreed on the utilization of responsible production methods (i.e., which respect human rights and comply with the UNGPs) - either explicitly or through the recall of the code of conduct - thus the delivery of products so obtained might be considered as part of the latter's contractual obligations.

However, in case of lack of explicit contractual recall, it is much harder to consider the seller as contractually obliged to follow responsible manufacture processes and civil liable for not complying with this. In fact, pursuant to Art. 35.2 CISG “Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement [...]”. In this context the utilization of production methods which do not comply with the UNGPs and disregard the protection of human rights might be relevant only if it affects the purpose for which the goods are used. Without entering into the details of this provision, it is worth noting that if the buyer's purpose consists in re-selling the goods, their manufacture through production processes in violation of human rights might negatively impact their use, especially in case the buyer is specialized in fair trade, is publicly committed to respect ethical standards of conduct, or has adhered to international ethical initiatives (e.g. the UNGPs, the Global Compact, etc.)¹⁷.

Likewise, Art. 8 might be interpreted as to include the respect of human rights within the production processes. Art. 8.1 concerns the parties' statements and conduct, and provides that they must be interpreted in accordance with the party's intent where the other party knew or could not have been unaware what that intent was. According to Art. 8.3 “In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties”. Can the buyer's intent to buy goods obtained through responsible manufacture processes be relevant pursuant to Art. 8?¹⁸ Under which conditions?

Another problematic issue concerns Art. 74. In fact, in case of material breach and lack of implementation of suppliers' obligations, Art. 74 provides for the right of buyers to be awarded full compensation of damages. However, the cases here at stake, involving the lack of respect of human rights throughout the supply chain, often involve not only financial losses but also reputational damages, the compensation of which under Art. 74 is highly problematic¹⁹.

In the light of the developed legal analysis, the authors submit that UNCITRAL might consider amending the CISG as to make it include solutions to the issues connected with B&HR and the implementation of the UNGPs. This might be obtained either through the amendment of the relevant provisions of the CISG, or the conclusion of an Annex to the CISG specifically focused on “International Sales of Goods and the Respect of Human Rights”, collecting the amendments.

Ramberg, J. Ziegel (eds.), *Commercial Law Challenges in the 21st Century*. Jan Hellner in memorium, Stockholm Centre for Commercial Law Juridiska institutionen, 2007, 249-275, also available at: <http://cisgw3.law.pace.edu/cisg/biblio/schwenzer-leisinger.html>.

¹⁷ S. Wilson, *Ethical Standards in International Sales Contracts*, cit. p. 31 ff.

¹⁸ *Ibid.*, p. 8 ff.

¹⁹ *Ibid.*, p. 43 ff.

More specifically, UNCITRAL should evaluate amending several provisions, including Arts. 7, 8, 9, 35, 74 and the Preamble, as to make explicit reference to the UNGPs; moreover, it should fill the gaps of the CISG by providing answers to questions concerning the parties' obligation to respect human rights, the characterization of corporate respect of human rights as a usage of international trade law, the contractual value of codes of conduct, the application of the fit-for-purpose criterion to goods obtained through manufacture processes in violation of human rights, the conditions and limits of the buyers' right to compensation for similar breaches of contracts etc..

Finally, UNCITRAL should evaluate extending the CISG's field of application to the validity of contracts - now excluded under Art. 4²⁰. If the rationale behind this exception consists in leaving the solution of the related matters to the domestic rules, it is worth noting that many of the principles on the protection of human rights have acquired the status of customary international law. Thus the most fundamental human rights shall be respected and implemented by the whole international community. Practically this means that contracts allowing the resort to production processes in violation of human rights shall be considered unlawful for lack of compliance with *ordre public*, regardless of the specific consequences (e.g. nullity/annulment) practically provided for by the single domestic legal systems.

²⁰ On this topic see M. B. Lopez, Resurrecting the Public Good: Amending the Validity Exception in the United Nations Convention on Contracts for the International Sale of Goods for the 21st Century, in *Journal of Business & Securities Law*, 2010, 133.