

Corporate Human Rights Strategy and Legal Risk: Lessons from Anti-Corruption

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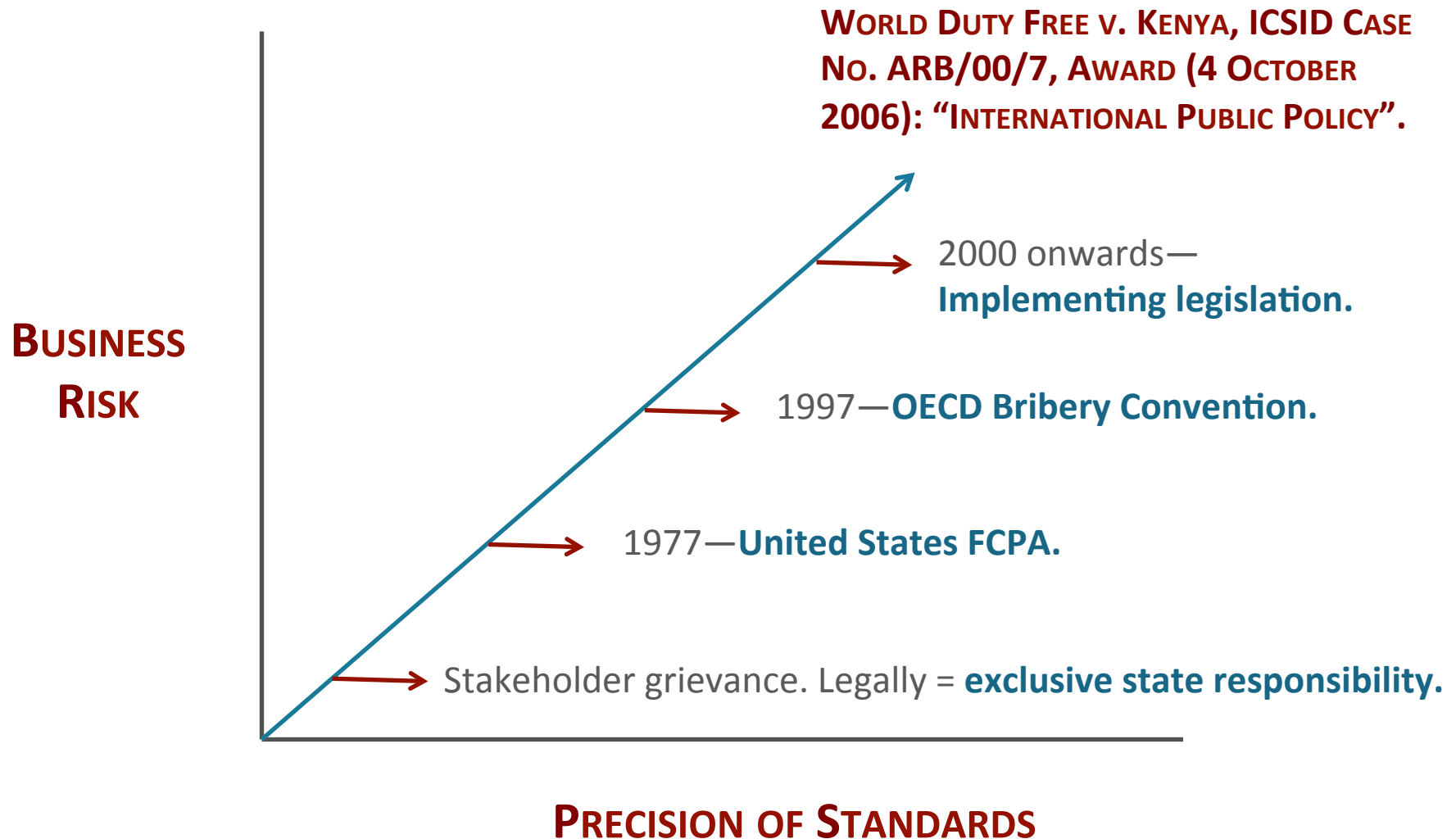


enodo rights
human rights consulting for business

OVERVIEW

1. **Evolution of anti-corruption and legal risk** has lessons for human rights and legal risk.
2. ***Guiding Principles on Business and Human Rights*** provide precise and systematic definition of business human rights obligations.
3. Systematic definition and widespread endorsement reshapes legal expectation of **reasonable resource companies**.
4. Anti-corruption regulators provide insight regarding **how arbitrators and judges will need to evaluate resource companies**.

EVOLUTION OF CORPORATE RESPONSIBILITY: ANTI-CORRUPTION



EVOLUTION OF CORPORATE RESPONSIBILITY: HUMAN RIGHTS



THE *GUIDING PRINCIPLES* DEFINE BUSINESS'S HUMAN RIGHTS OBLIGATIONS

- ***Guiding Principles on Business and Human Rights*** are the dominant standard. Only sector-wide and rights-wide business and human rights framework. Broad public-sector and private-sector endorsement.
 - ✓ UN Human Rights Council.
 - ✓ International Chamber of Commerce.
 - ✓ OECD Guidelines on Multinational Enterprises.
 - ✓ IFC Performance Standards.
 - ✓ International Council on Mining and Metals.
 - ✓ IPIECA.
 - ✓ American Bar Association.
 - ✓ Equator Principles.
 - ✓ Thun Group of Banks.
 - ✓ United Kingdom National Action Plan.
 - ✓ EU Non-Financial Reporting Requirements.
- *Guiding Principles* framework **defines “business respect for human rights” for businesses in every industry.**

THE *GUIDING PRINCIPLES* PROVIDE OBJECTIVE STRUCTURE

- **Not about new corporate obligations.**
- Structured and systematic way to **process social impacts** in a way that can be explained to independent observers.

What to look for

Human rights
impacts
(distinct from
all social
grievance)

How far to look

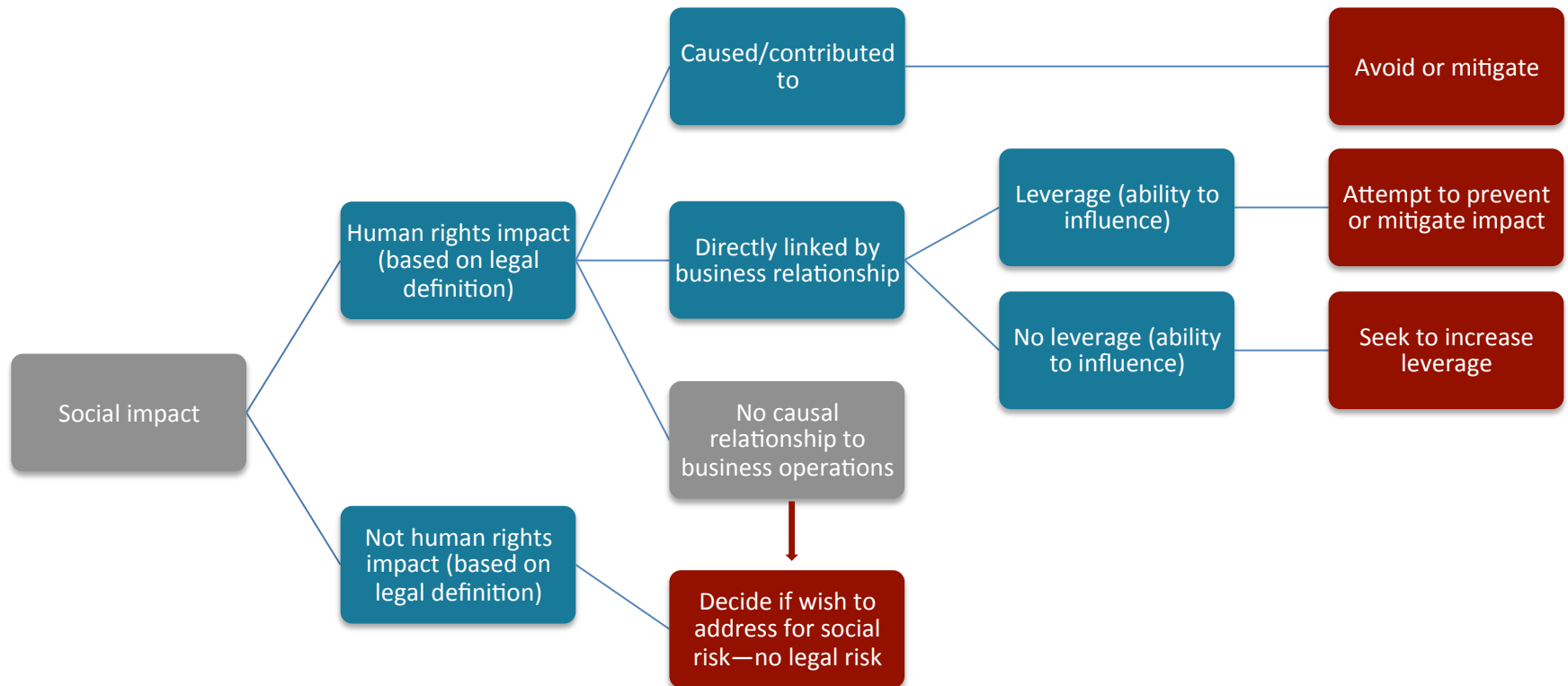
With which
the company
is involved

How to respond

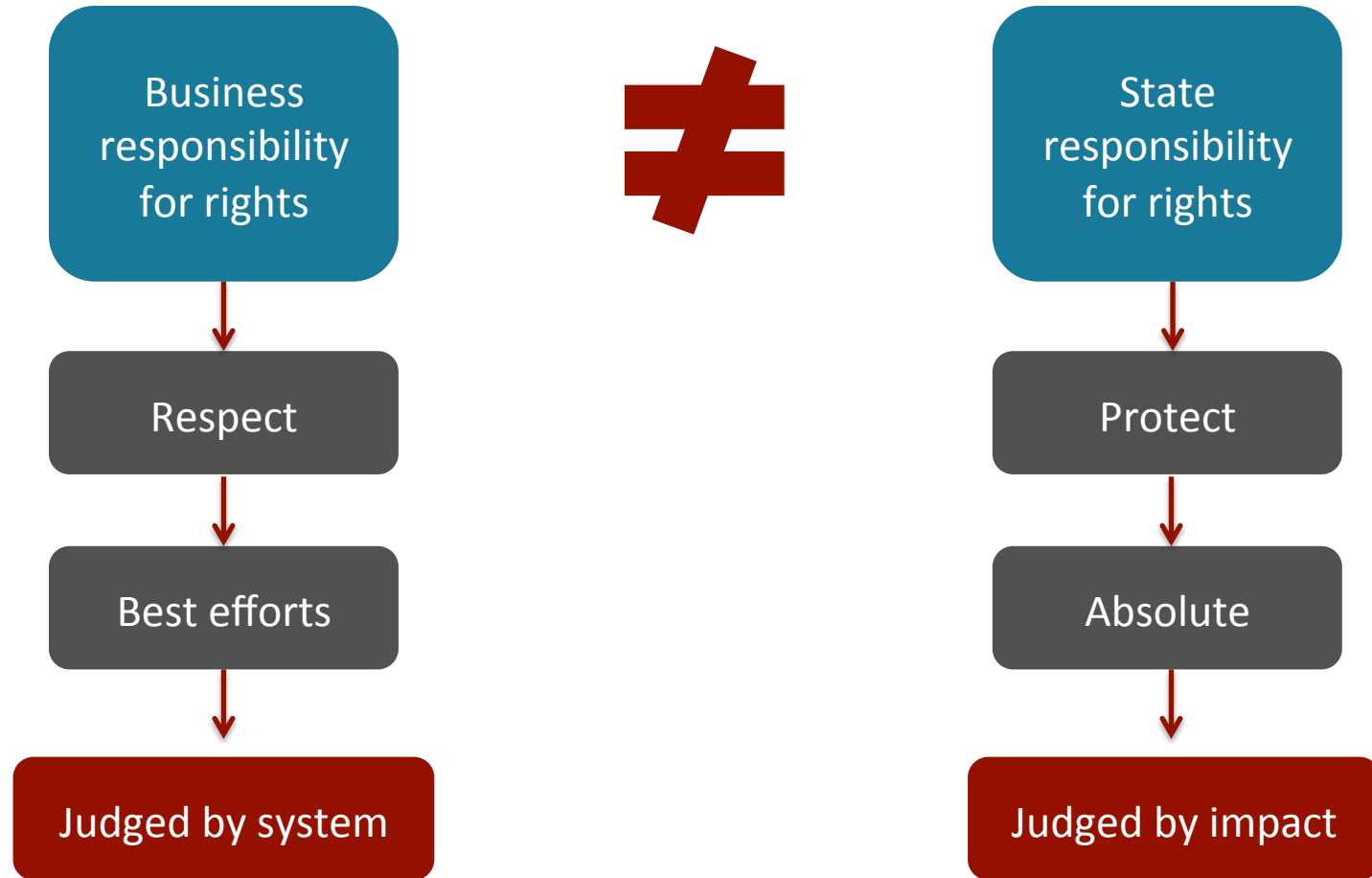
Based on
involvement,
operating
context and
risk

GUIDING PRINCIPLES PROVIDE LENS TO PROCESS SOCIAL IMPACTS

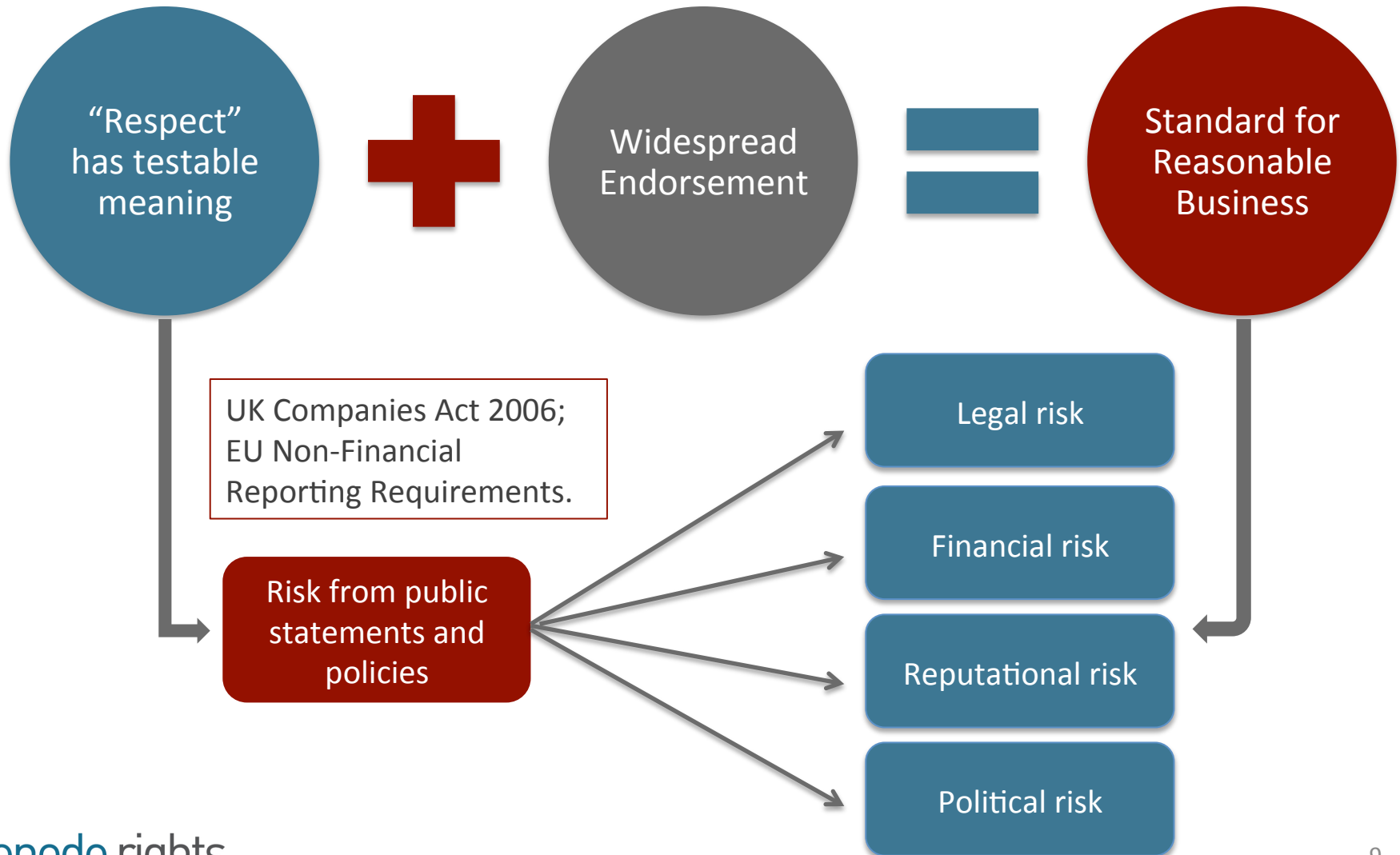
- **The definitions provide** a roadmap for decision-making based on the nature of the right impacted and the link to business operations.
- Also allow for **testing against an objective standard**.



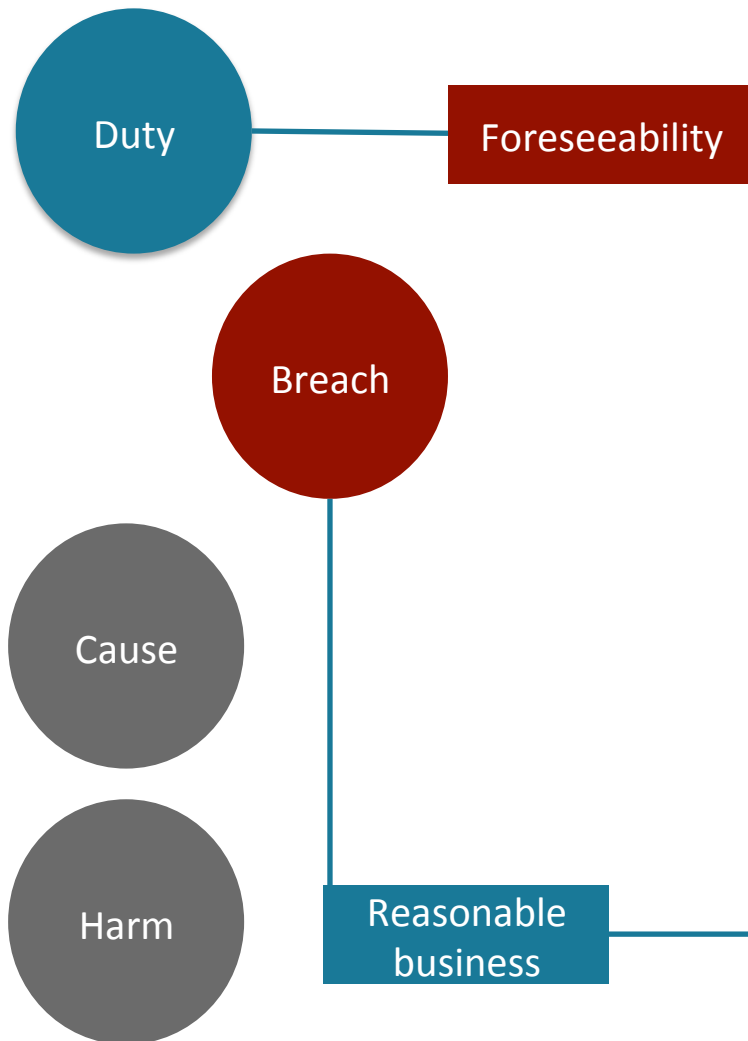
CORPORATE RESPECT FOR HUMAN RIGHTS IS A SYSTEM



GUIDING PRINCIPLES AND CORPORATE RISK



UNDERSTANDING THE EMERGING LEGAL RISKS: TORT LAW



CHOC V. HUDBAY, 2013 ONSC 1414: “the plaintiffs have pled all material facts required to establish the constituent elements of their claim of direct negligence as against Hudbay, **separate and distinct from any claims framed in vicarious liability as against it.**”

GUERRERO & OTHERS V. MONTERRICO METALS PLC AND RIO BLANCO COPPER SA, [2009] EWHC 2475 (QB)

GARCIA, ET AL. V. TAHOE RESOURCES, SUPREME COURT OF BC (18 JUNE 2014)

Guiding Principles = only viable due diligence framework

US STATE DEPT.; OECD GUIDELINES; ICC; IPIECA; ICMM; UK NATIONAL ACTION PLAN.

COMMON LAW AS SUBSTITUTE FOR ALIEN TORT STATUTE

- **State common law** provides an avenue for transnational tort claims on broader grounds than ATS.
 - **FILARTIGA V. PENA-IRALA, 630 F.2D 876, 885 (2D CIR. 1980)**: "It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction." (citations omitted)
 - **DOE V. UNOCAL CORP., Nos. BC 237980, 2002 WL 33944506 (CAL. SUPER. CT. JUNE 11, 2002)** after ATS claims dismissed, plaintiffs able to assert all claims as state common law tort claims in the state court case. Logic applies to virtually every ATS case. Ultimately settled after discovery.
 - **DOE I V. EXXON MOBIL CORP., 393 F. SUPP. 2D 20 (D.D.C. 2005)**, D.C. district court applied D.C. and Delaware law to activities occurring solely in Indonesia--deemed US interests outweighed those of Indonesia: the US **"has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries."**

UNDERSTANDING THE EMERGING LEGAL RISKS: INTERNATIONAL LAW

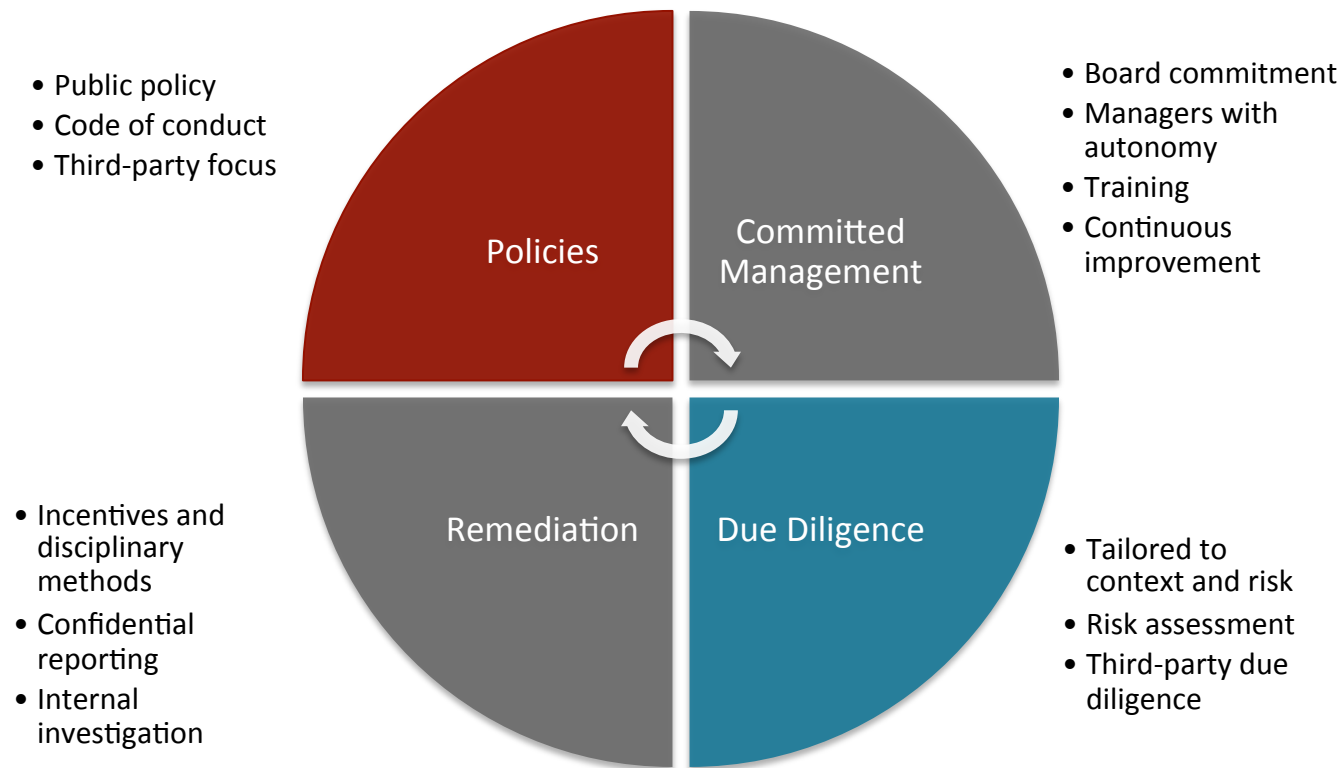
- **Bilateral investment treaties** protect investors against expropriation and other risks. Offer protection of international tribunals in case of dispute with state. Failure to comply with *Guiding Principles* arguably ground to deny investors' treaty protection.
- **INCEYSA VALLISOLETANA, S.L. V. REPUBLIC OF EL SALVADOR, ICSID CASE NO. ARB/03/26, AWARD (2 AUGUST 2006)**: Investment must be “**in accordance with law**”, including “principles of international law”.
- **WORLD DUTY FREE V. KENYA, ICSID CASE NO. ARB/00/7, AWARD (4 OCTOBER 2006)**: Investment must accord with “**international public policy**”, which is based on “an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.” Also referred to as “good morals” and “ethics of international trade”; should be interpreted to protect “citizens making up one of the poorest countries in the world.”
- **PLAMA CONSORTIUM LTD. V. REPUBLIC OF BULGARIA, ICSID CASE NO. ARB/03/24, AWARD (27 AUGUST 2008)**: Oil refinery investment in Bulgaria. Claim regarding regulatory interference. Claim dismissed for Plama's violation of the principle of good faith; the principle that no one can benefit from his own wrong; and, **international public policy against fraud**.

UNDERSTANDING THE EMERGING LEGAL RISKS: DIRECTOR AND OFFICER LIABILITY

- **Director and officer liability risks flow from exposure to the other commercial legal risks, to the extent they result in serious losses or drops in share price.**
- **STONE V. RITTER, 911 A.2D 262 (DEL. 2006):** Case involved a derivative suit based on fines imposed on AmSouth Bank for employees' failure to comply with anti-money-laundering regulations. Court held that a **director may breach his or her duty of loyalty by failing to implement an effective monitoring and reporting system or by consciously failing to oversee that system's operations "thus disabling themselves from being informed of risks or problems requiring their attention."** The significance of framing the issue as a breach of the duty of loyalty is that the corporation cannot then indemnify the director as it can for breach of duty of care.
- **YUILLE V. B. & B. FISHERIES (LEIGH), LTD. AND BATES (THE "RADIANT"), [1958] 2 LLOYD'S REP. 596:** **Directors can be personally liable for torts when expressly or impliedly procured the commission of the tortious act.** Tort case brought against company and director by employee injured on duty. Alleged that shipping vessel was not seaworthy and that director knew or ought to have known of deficiency. Court held the director liable.

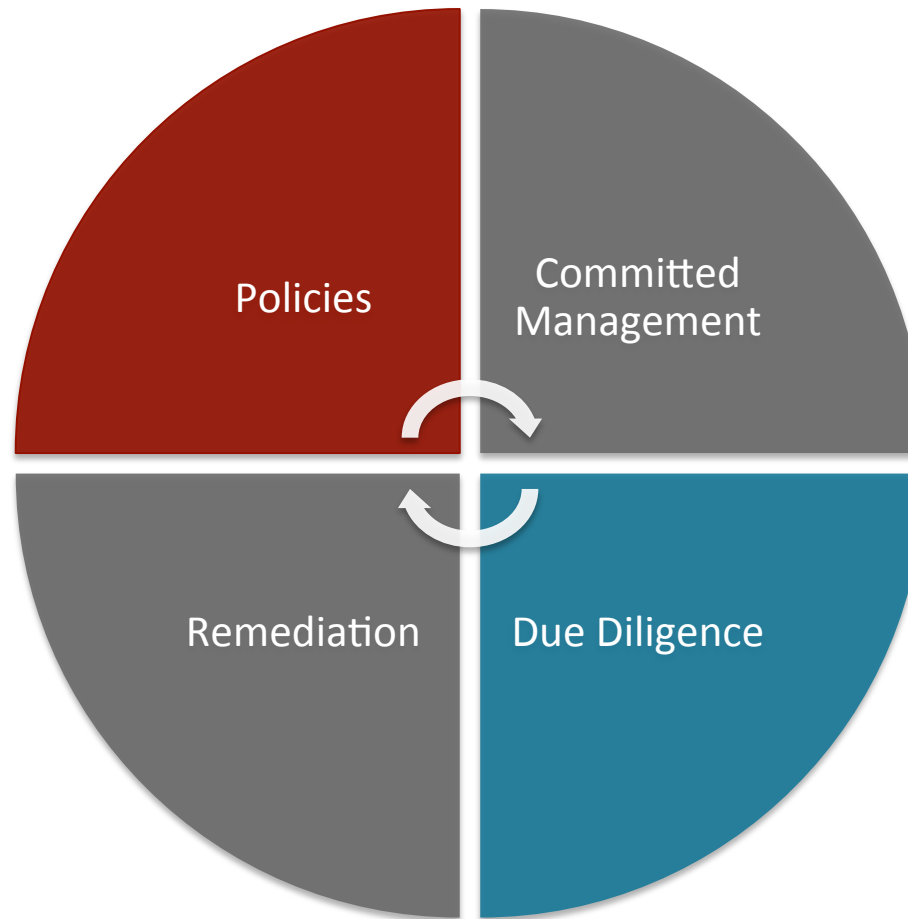
JUDGING RESPECT FOR HUMAN RIGHTS: LESSONS FROM ANTI-CORRUPTION

- Learn from how **regulators assess corporate compliance with anticorruption regulation. Similar evolution** from government focus to business focus.
- **Companies need to be ready to explain their CSR strategy with reference to their system.**



JUDGING RESPECT FOR HUMAN RIGHTS: LESSONS FROM ANTI-CORRUPTION

- Public policy incorporating *Guiding Principles*
- Code of conduct
- Third-party focus
- Committed to all human rights



- Board commitment
- Managers with business and human rights expertise
- Training
- Continuous improvement

- Incentives and disciplinary methods
- Confidential reporting
- Grievance mechanism
- Response framework based on involvement link
- Prioritization process based on risk to rights holders

- Tailored to context and risk
- Rights-focused Impact assessment, using involvement links
- Third-party due diligence on business relationships
- Reporting

CONTACT INFORMATION AND FURTHER READING

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corporate human rights strategy
→ with a legal edge

