



Understanding Human Rights Due Diligence

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What is Human Rights Due Diligence (HRDD)?

- ▶ Introduced through the UN Guiding Principles on Business and Human Rights (UNGPs), which were adopted by the UN Human Rights Council on June 16, 2011. The UNGPs, and the HRDD provisions, are non-binding guidelines. Notably, this followed a previous initiative to articulate **binding rules** that had failed to garner sufficient support within the then-Human Rights Commission.
- ▶ The HRDD provisions of the UNGPs are under Pillar 2, which sets forth the responsibilities of companies to “respect” (as opposed to a state duty to “protect” – Pillar 1)
- ▶ HRDD needs to be seen against the backdrop of the previous decades of largely unsuccessful efforts to hold corporations accountable, including various CSR initiatives.

Elements of HRDD



GP 17 provides that, “In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence.”

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.

HRDD is further elaborated in GPs 18-21

UNGPs at 10 Years



- ▶ Has voluntary HRDD made a significant difference?
 - ▶ Often criticized as a box-checking exercise that does not meaningfully improve on previous CSR approaches, including reliance on compliance audits
 - ▶ HRDD is process oriented rather than outcome oriented
 - ▶ Consultation with trade unions and workers throughout HRDD process still negligible
 - ▶ MNEs often fail to identify salient HR risks, and fail to put measures in place to prevent or remedy violations
 - ▶ HRDD has not fundamentally changed the companies own purchasing practices which can at the very least contribute to human rights risks

Influence of HRDD Approach



- ▶ The HRDD framework has been subsequently incorporated into the guidance adopted by other intergovernmental organizations:
 - ▶ the 2011 revision of the OECD Guidelines for Multinational Enterprises
 - ▶ the 2017 revision of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
- ▶ The Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises, established by the UN Human Rights Council, has since 2014 sought to negotiate a treaty which would require member states to adopt laws mandating human rights due diligence, though the treaty still faces substantial opposition from many countries.

From HRDD to “m”HRDD

- ▶ HRDD has also been incorporated into the domestic legislation in France and Germany and is pending in other jurisdictions, making it mandatory for at least a subset of MNEs. An EU-wide directive is now under consideration.
- ▶ France: Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Duty of Vigilance Law (2017))
- ▶ Germany: Lieferkettensorgfaltspflichtengesetz (Law on Supply Chains) (2021)
- ▶ Norway: Norwegian Law on Transparency
- ▶ EU: proposed directive on Corporate Sustainability Due Diligence (2022)

Issues Concerning Access to Justice



- ▶ Limited personal scope (only MNEs of a certain size)
- ▶ Civil remedies
- ▶ Burden of Proof / Evidence
- ▶ Due diligence plan as a (full/partial) defense
- ▶ Damages available v cost of litigation



Parting Thoughts



- ▶ It is worth repeating that all of the initiatives, including the billions spent each year on plans and policies, audits, and compliance would be wholly redundant if states simply guaranteed the fundamental rights of workers, as envisaged at the founding of the ILO in 1919, and employers respected those rights in practice.
- ▶ Repressing labor rights has been a strategy to gain comparative advantage over other countries by artificially lowering the cost of labour – often at the insistence or at least acquiescence of MNEs.
- ▶ Perhaps what is ultimately needed is for trade unionism, like capital, to be freed from the limitations of national jurisdictions. The lack of a meaningful legal infrastructure for transnational union organising, collective bargaining, strikes and dispute settlement along supply chains is perhaps the most meaningful gap in global labour governance today.