



Legislating Human Rights Due Diligence

# Respecting Rights or Ticking Boxes?

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# 1

## Key Takeaways

Momentum to enact mandatory human rights due diligence (HRDD) legislation is building around the world. Such legislation is necessary to ensure corporations respect human rights and that victims of corporate abuse have access to justice and remedy. As a result, legislators must determine how to turn the normative standards for HRDD contained in the UN Guiding Principles and OECD Guidelines into binding, hard-law obligations. Despite their comprehensiveness, these authoritative instruments are principle-based and do not easily translate into law within different jurisdictions and legal traditions. They are formulated in an open and flexible manner as to allow for adaptability in their implementation and respond nimbly to dynamic environments. While some degree of flexibility is inherent in HRDD, it also poses additional risks in terms of misinterpretation or misrepresentation. If lawmakers do not achieve the right balance between practical flexibility and normative rigidity, there is a significant risk that HRDD laws will become, at best, a paper tiger that yields no real positive impact for people and, at worst, a new greenwashing technique behind which businesses can hide while continuing to do harm. In order to ensure this does not happen, this paper identifies 12 key interpretations of the norms that legislators must get right when establishing HRDD obligations.

The flexibility inherent in HRDD can be seen as a safeguard against a one-size-fits-all approach by ensuring that HRDD measures are risk-based and tailored to the specific risks and impacts of an individual company and its supply chains. When translating soft-law expectations into hard-law obligations for companies, it is important to preserve the original intent and spirit of these standards, keeping in mind that the ultimate objective is to achieve better outcomes for people in terms of increased respect for human rights and access to

justice and remedy. The authors of this briefing are convinced that to truly be effective, mandatory due diligence legislation must be accompanied by a robust liability regime and strong enforcement measures that guarantee accountability for failure to perform HRDD, as well as provide access to justice and remedy for the victims of corporate abuse. This briefing paper identifies several issues that have been misinterpreted in businesses' HRDD practices.

These are the key takeaways for each of 12 particular challenges we have identified:

→ **HRDD IS A STANDARD OF CONDUCT WHERE RESULTS MATTER**

It is important to specify that the purpose of HRDD is for companies to respect human rights. Due diligence then becomes a standard of conduct for achieving this purpose, it is essential that the adequacy of due diligence be measured using that same yardstick. Companies must demonstrate progress and results regarding specific risks and impacts. It is important to assess and adapt continuously, and when efforts do not result in the desired outcome, processes and actions need to be revised.

→ **THE BAR FOR “CONTRIBUTING” VS. BEING “DIRECTLY LINKED” TO IMPACTS IN THE SUPPLY CHAIN**

A company’s relationship to a human rights harm is not static and, depending on its own prevention and mitigation efforts, may change over time. Accordingly, the actions required from a company to carry out its responsibilities vary in relation to its mode of connection to the impact and should be revised if the situation does not improve. A company that is initially only “directly linked” to an adverse impact may shift to a relationship of “contributing to” the harm over time if the company fails to take appropriate action to seek to address the impact. Companies can “contribute to” impacts throughout the entire value chain, regardless of how many “tiers” away the harm occurs. Rather than tiers or proximity, factors such as foreseeability and effectiveness of due diligence should be considered in distinguishing between “contributing to” and “directly linked”.

→ **THE BAR FOR BEING “DIRECTLY LINKED” VS. “NOT LINKED” TO VIOLATIONS BY A SUPPLIER**

Companies cannot ignore abuses committed by business partners, even if these are not directly linked to their products or services, because of the risk that the practices that led to them may carry over into the companies own line of products or services. This has serious implications for the company’s due diligence responsibilities. The norms expect downstream brands and retailers to holistically assess their suppliers’ due diligence across its full range of activities and operations. In other words, human rights due diligence is not simply about tracking individual products or limiting due diligence to single product lines, but about adopting a proportionate, risk-based approach to identifying risks at all levels of the supply chain.

→ **ADEQUATE PROVISIONS FOR DISCLOSURE, COMMUNICATION, AND INFORMATION**

Legislators must make it clear in the law what information companies are expected to disclose at minimum on their due diligence to demonstrate to relevant stakeholders and rightsholders that their due diligence is adequate. This includes publicly communicating regarding human rights risks and impacts and how the company has prioritized them, as well as the HRDD processes that are used to address, mitigate and remedy them. This will also prevent the reduction of the communication step to mere reporting. Any legislation should shift the burden onto companies to actively seek ways to disclose HRDD information to the greatest extent possible, in a meaningful and user-friendly manner. Legislators should induce a change in companies’ default position from non-disclosure to disclosure. For this purpose, it is important to clarify the limits of non-disclosure agreements and provide a clear definition of the notion of “commercially sensitive” information.

→ **PRIORITIZATION IN HRDD PROCESSES, INCLUDING WITH REGARD TO PURCHASING PRACTICES**

Companies are expected to address all human rights impacts and risks, but if it is genuinely not possible for them to address all impacts and risks immediately or simultaneously, they can prioritize and sequence their actions. When companies do prioritize, this should be based on the severity of the impact and the likelihood of it occurring. In some cases, a company may be connected to an impact by virtue of its business model or due to systemic risks, or the company may have limited resources to address the impacts in question.



Workers putting chips on the circuit board in a factory in Jiangxi, China. | ©humphery/Shutterstock.com

Such challenges, however, do not provide a legitimate reason for not addressing a risk or impact.

Legislators should provide for additional clear and prescriptive standards in several sectors where purchasing practices are in play. Rather than allowing each company to individually set its own specific purchasing standards, some common rules would help align practices and ensure a level playing field. Legislators have increasingly started to limit contractual freedom within trade relationships, notably on issues such as payment terms, unilateral discounts and economic dependency. More clear-cut and prescriptive approaches to purchasing practices should accompany any HRDD legislation. Legislators should prohibit companies from buying under the cost of production and insist that they commit to existing orders, pay on time, provide reliable forecasting, as well as refrain from unfair trading practices.

#### → THE “DUE” IN DUE DILIGENCE: RESOURCE/ LEVERAGE CONSTRAINTS AND WHAT TO DO WITH SMALL AND MEDIUM-SIZE ENTERPRISES

To stay in line with the international normative standards, legislators should make it clear that all companies, large and small, have an obligation to respect human rights and conduct due diligence. In the implementation of HRDD legislation, regulators and courts can take a proportionate approach and account for factors such as leverage and size in terms of turnover and employees, particularly when evaluating the policies and processes of smaller companies, while still making it clear that these companies are required to perform some degree of due diligence.

#### → PREVENTION VS. MITIGATION

Legislators should place a strong emphasis on the preventative nature of HRDD and make it clear that prevention, mitigation and remediation do not exist on an equal footing. Prevention of harm is the purpose and first priority of due diligence. Mitigation and remediation are undertaken if prevention fails, not as a substitute. This is implicit in the business responsibility to respect human rights, but additional clarification on the purpose of due diligence, namely to prevent adverse impacts, is recommended.

#### → THE MEANING OF “MEANINGFUL” IN “MEANINGFUL STAKEHOLDER ENGAGEMENT”

Legislators should specify expectations for companies regarding meaningful stakeholder consultation as a necessary part of the quality of human rights due diligence. Such consultation should be diversified in relation to the specific rightsholders and other stakeholders and should be undertaken in an adaptable and continuous manner.

#### → RESPONSIBLE DISENGAGEMENT

As part of HRDD, companies should have a responsible exit plan in place and be prepared to use the credible threat of disengagement to increase leverage. Companies must also be prepared to act upon this exit plan and responsibly disengage, particularly in cases of severe impacts that are unlikely to be addressed through continued engagement. Legislation should be clear that a decision to not responsibly disengage from a business relationship that is repeatedly causing severe abuses may increase the company's degree of responsibility for the impact. When companies do disengage, they should contribute to the remediation of past impacts to which they contributed and prevent impacts from the disengagement itself.

#### → REMEDY, ESPECIALLY IN THE CASE OF CONTRIBUTION AND DIRECT LINKAGES TO HUMAN RIGHTS HARMS

Legislators should ensure that companies have an obligation to engage with rightsholders in a legitimate process with the aim of providing remedy. There are different expectations for companies depending on their relation to the harm. Legislators should ensure that one of the pathways to remedy is liability. In cases where several companies are involved, legislators should ensure the possibility of joint liability among several parties. Furthermore, rightsholders should also have access to collective remediation instruments.

#### → STATE OBLIGATIONS AND BUSINESS RESPONSIBILITIES: SEPARATE, BUT INTERLINKED

Companies should respect, encourage and support the state in executing its obligations. Policymakers should make sure that in cases of conflicting norms, companies are instructed to try to find ways to respect both laws and higher human rights standards. Companies cannot take over the state duties to protect and fulfil human rights but should abstain from actions that could endanger the realization of rights even if such risks are the result of state action.

#### → THE ROLE OF AUDITING AND CERTIFICATION IN HRDD

Legislators should clarify that the actual duty of due diligence and the responsibility to implement this duty lies and remains with the company itself. Legislation should state that audits and certification are not to be considered sufficient proof of human rights due diligence. Even though a company may in practice seek external assistance from social auditors or compliance firms or initiatives to carry out certain parts of the due diligence process, legislators should ensure the buck stops with the company itself. HRDD is by its very nature context-specific and tailored to an individual company.

## 2

# Introduction

The debate around mandatory human rights due diligence (HRDD) legislation is heating up around the world. We've now passed a decade since the UN Guiding Principles on Business and Human Rights (UNGPs) were unanimously adopted by the UN Human Rights Council and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) were updated with unanimous endorsement by the OECD Council.<sup>1</sup>

Both of these widely accepted international normative standards clearly state that companies have a responsibility to respect human rights, and to implement HRDD as the key strategy for companies to fulfil their responsibilities. More recently in 2018, the OECD published its Due Diligence Guidance for Responsible Business Conduct (OECD RBC Guidance) which further clarifies the due diligence framework, including recommended practical actions for companies during each step of the process (see Figure 1 at page 7). The OECD RBC Guidance has been endorsed by 50 governments and was written in close collaboration with CSOs, industry and governments. In addition, the OECD has provided even more detail within sector-specific guidance documents.<sup>2</sup>

A central tenet of HRDD as conceived in both the UNGPs and the OECD Guidelines is that it should be oriented towards preventing and mitigating risks to human rights (as opposed to legal or reputational risks to the company, which is the focus of traditional due diligence) and in doing so to focus on the most severe risks to people. Figure 1 visualizes the six-step risk-based due diligence process as conceived in the OECD Guidelines and UNGPs.

In reference to this widely recognized framework, a body of practice in HRDD has begun to emerge. At a minimum, the normative framework and authoritative guidance on the concept of HRDD has provided a common language that businesses, rightsholders, civil society organizations and states can use to discuss and debate the expectations of businesses and their responsibility for the negative impacts of their business operations. For some companies, these norms have helped to replace or complement a narrow philanthropic

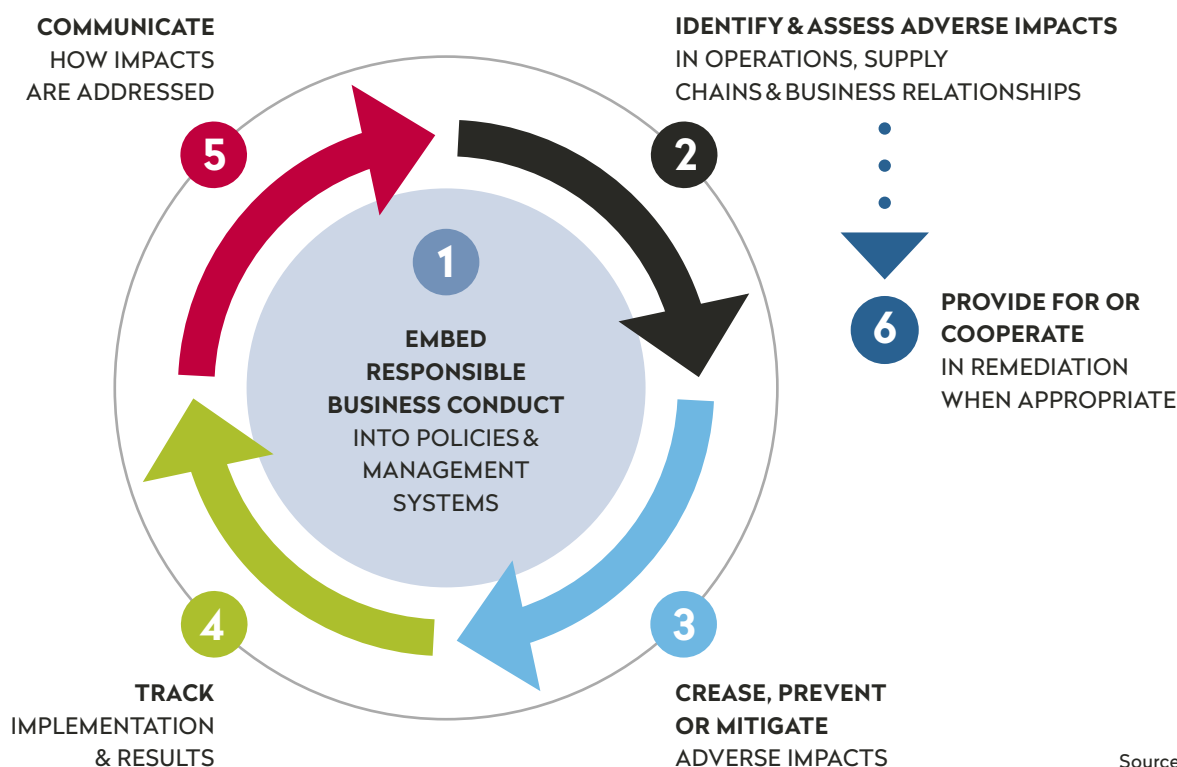
or corporate social responsibility (CSR) approach with a more comprehensive and rights-based perspective. However, despite the universal scope of the framework, its implementation has remained a predominantly voluntary exercise for companies in most countries, with only a few notable exceptions.<sup>4</sup> In the context of this largely voluntary corporate accountability regime, many business actors have only partially established and implemented an effective system of HRDD, and many have not undertaken to conduct HRDD at all. These businesses continue to cause, contribute to, and be linked to serious human rights abuses.

## TIME FOR BINDING, HARD-LAW OBLIGATIONS

Thus, clearly the time has come to turn the voluntary, soft-law expectations for HRDD into binding, hard-law obligations. Lawmakers across multiple jurisdictions have or are intending to regulate corporate behavior with respect to its human rights impacts, as well as to increase access to justice and remedy. The international soft-law framework developed by the UN and OECD provides a solid basis for the emerging trend of making risk-based human rights due diligence mandatory throughout several jurisdictions. Hence, the authors assert that these standards should serve as the basis and as a guide for due diligence legislation.

However, despite their relative comprehensiveness, these authoritative instruments are principle-based and do not easily translate into law within different jurisdictions and legal traditions. Instead, they are formulated in an open and flexible manner as to allow for adaptability in their implementation. This flexibility can be seen as a safeguard against a one-size-fits-all approach by ensuring that due

FIGURE 1 – OVERVIEW OF THE RISK-BASED DUE DILIGENCE PROCESS



diligence measures are both risk-based and tailored to the specificities of an individual company, including their operations, supply chains, risks, and impacts. When translating this into legislation, this flexibility provides judges and regulators with the space and the tools to focus their inquiries on factual circumstances and concrete impacts, as well as to evaluate companies' actions in light of the impacts and effects those actions have had on the ground. However, while some degree of flexibility is inherent in the risk-based nature of HRDD, which is designed to respond nimbly to dynamic environments, it also poses additional risks in terms of misinterpretation or misrepresentation. This briefing paper identifies several issues that have been misinterpreted in businesses' HRDD practices. All the concepts and elements of due diligence discussed in this paper can be found in the UNGPs, OECD Guidelines and/or due diligence guidance issued by either the UN or OECD. However, sometimes there is a lack of clarity in the formulation of the standard, and sometimes the standards are clearly formulated, yet misinterpreted or incorrectly implemented, by businesses in practice.<sup>5</sup>

Therefore, it is clear that establishing the appropriate balance between practical flexibility and normative rigidity is essential. When translating soft-law expectations into hard-

law obligations for companies, it is important to preserve the original intent and spirit of these standards, keeping in mind that the ultimate objective is to achieve better outcomes for people in terms of increased respect for human rights and access to justice and remedy. As HRDD is codified into legislation, it is also important to assess how the existing international framework has been and is being interpreted and put into practice by businesses thus far. If lawmakers do not achieve the right balance, there is a significant risk that HRDD law will become, at best, a paper tiger that yields no real positive impact for people and, at worst, a new greenwashing technique behind which businesses can hide while continuing to do harm. As Quijano and Lopez have argued, there is a "risk of creating the appearance of progress with hollow HRDD laws that, while doing little to change the status quo in practice, will effectively bring legislative efforts to an end [and a] risk of inadvertently providing companies with a tool that they hitherto did not have to show respect for human rights and rebut charges of liability with little bearing on effective respect for human rights on the ground".<sup>6</sup> In order to ensure this does not happen, this paper undertakes to identify key interpretations of the norms that legislators must "get right" when establishing company due diligence obligations.

**The 12 issues, one per subsection in the following section of the paper, are as follows:**

- **HRDD IS A STANDARD OF CONDUCT WHERE RESULTS MATTER**
- **THE BAR FOR “CONTRIBUTING” VS. BEING “DIRECTLY LINKED” TO IMPACTS IN THE SUPPLY CHAIN**
- **THE BAR FOR BEING “DIRECTLY LINKED” VS. “NOT LINKED” TO VIOLATIONS BY A SUPPLIER**
- **ADEQUATE PROVISIONS FOR DISCLOSURE, COMMUNICATION, AND INFORMATION**
- **PRIORITIZATION IN HRDD PROCESSES (WITH A BOX ON PURCHASING PRACTICES)**
- **THE “DUE” IN DUE DILIGENCE: RESOURCE/ LEVERAGE CONSTRAINTS AND WHAT TO DO WITH SMALL AND MEDIUM-SIZE ENTERPRISES**
- **PREVENTION VS. MITIGATION**
- **THE MEANING OF “MEANINGFUL” IN “MEANINGFUL STAKEHOLDER ENGAGEMENT”**
- **RESPONSIBLE DISENGAGEMENT**
- **REMEDY, ESPECIALLY IN THE CASE OF CONTRIBUTION AND DIRECT LINKAGES TO HUMAN RIGHTS HARMS**
- **STATE OBLIGATIONS AND BUSINESS RESPONSIBILITIES: SEPARATE, BUT INTERLINKED**
- **THE ROLE OF AUDITING AND CERTIFICATION IN HRDD**

For each of these areas, the paper first lays out what the norms say and what’s at stake. We then point to where things can and do go wrong in practice, highlighting areas in the formulation of the norms that are susceptible to misinterpretation by businesses. We then explain how they should be correctly interpreted in both theory and practice, as well as what the policy implications are. Identifying and understanding these challenges is crucial, and lawmakers may need to go into considerable detail when determining the correct interpretation or meaning of certain concepts in order to ensure that due diligence is carried out effectively. Thus, providing additional elucidation of some concepts may prove crucial to ensuring that the legislative instantiations of international norms exert their full potential to achieve robust, positive impacts on both company practice and on the subsequent situation on the ground for rightsholders,

such as workers and communities. Each sub-section thus concludes with the key takeaways for policymakers.

This briefing paper’s insights are based upon the practical experiences of civil society organizations around the globe with HRDD practices and interpretations in the past decade across various sectors. Lessons are drawn from public domain campaigning, private negotiations, and bargaining to establish contractual agreements. In addition, the paper draws upon extensive experience with filing, negotiating, and arguing cases before courts and state-based non-judicial mechanisms, including cases before OECD National Contact Points (NCPs). Many of the examples used in the paper are taken from the manufacturing industry, but the core issues and concepts in question apply to the entire business sector.

The authors of this briefing are convinced that to truly be effective, mandatory due diligence legislation must be accompanied by a robust liability regime and strong enforcement measures that guarantee accountability for failure to perform due diligence, as well as provide access to justice and remedy for the victims of corporate abuse. While due diligence is an essential prerequisite for responsible business conduct, the UNGPs are clear that companies should not assume that HRDD on its own will protect them from liability for causing or contributing to harm.<sup>7</sup>

Hence, robust administrative, civil, and criminal liability is necessary to ensure the meaningful adoption and implementation of due diligence on a wide scale, and it is incumbent upon states, as part of their duty to protect human rights under Pillar 1 of the UNGPs, to develop such liability regimes to accompany due diligence legislation. However, given that the focus here is on the interpretation of key conceptual issues within the normative standards for responsible business conduct, a detailed analysis of the merits, details, and necessity of liability is beyond the scope of this briefing.<sup>8</sup>



## 3

# Getting HRDD right

## 3.1 – HRDD is a standard of conduct where results matter



### WHAT'S AT STAKE

HRDD is a standard of conduct for companies that has as its main aim the prevention of human rights impacts.<sup>9</sup> The key steps for companies when performing HRDD include: identifying, ceasing, preventing, mitigating, tracking, communicating, and remediating human rights impacts.<sup>10</sup> A key point of discussion in the design of HRDD legislation concerns the relation between the obligation to carry out certain procedural steps of HRDD and the expected results of these HRDD processes. The debate is frequently dominated by these competing visions of HRDD as either a process-based or a result-oriented obligation, though in many ways, this is a false dichotomy – HRDD is both.



### WHAT CAN GO WRONG IN PRACTICE

Human rights due diligence is sometimes mistakenly characterized as a standalone process that can be evaluated without taking its results into consideration, therefore only entailing a means-only obligation. This mischaracterization occurs most frequently when addressing adverse impacts in value chains. As a consequence of this process-only understanding of HRDD, the results of HRDD processes are not considered in the assessment of the quality or adequacy of HRDD.

Such interpretations may be the result of a compliance culture that is overly concerned with process and meeting minimum requirements of the law. In addition, confusion with the more traditional use of the term due diligence in business and finance, particularly with regard to risk management during mergers and acquisitions, can lead to a one-off process that focuses on risk to business and will address human rights risks only if they pose a material risk to the company. In this context, due diligence can refer to a set of one-off transactional processes undertaken prior to a business deal or investment to manage risks to the company and protect the company's reputation and financial interests. However, this process-oriented and business-centered con-

ception of due diligence is inadequate for use in the context of corporate human rights violations and environmental harm.

If this mischaracterization is codified into law, companies will be able to prioritize whichever issues are most economically beneficial to the business while the human rights outcomes of HRDD processes are rendered irrelevant, so long as a company ticks certain boxes and fulfils procedural requirements related to due diligence. This approach is not only at odds with the UNGPs and the concept of a standard of conduct,<sup>11</sup> but it also signals to companies that it is acceptable for them to remain linked to an ongoing impact indefinitely, even if no progress is made in preventing, mitigating or remediating the impact, as long as the company continues to follow the indicated procedural steps. HRDD is, in its essence, a concept that is distinct from both traditional due diligence, and a hands-off, minimalistic, compliance-focused approach. It is thus inappropriate and ineffective to apply the metrics used to define and measure the latter to HRDD as a concept *sui generis*.<sup>12</sup>



### GETTING IT RIGHT

HRDD should be understood as a standard of conduct in which process and results are equally important. HRDD is an ongoing, result-oriented, and iterative exercise whose adequacy is inextricably tied to its primary aim of preventing negative impacts and ensuring that if impacts do occur, that they are remediated. Hence, while the debate is often framed in terms of a binary choice between either a focus solely on process/means or solely on outcomes/results, this is in actuality a false dichotomy, as the UNGPs and OECD Guidelines intend for HRDD to focus on both. Due diligence obviously implies an engagement of means, but those means are employed to achieve a certain result, namely the respect for human rights. It is thus crucial that not only a company's HRDD process, but also the outcomes it delivers for people, are taken into account when assessing the quality or adequacy of its due diligence.

The idea of a standard of conduct is not new, and there are in fact many legal standards that involve assessing the quality or adequacy of a (legal) person's conduct relative to a specific risk by considering both the underlying objective of the standard (to prevent harm) and how the (legal) person strives to uphold it in practice. It may be helpful to consider an example that highlights why and how the outcomes of due diligence are relevant to assessing the reasonableness of a company's efforts. Consider how we assess the standard of 'driving safely' under road safety law; it is about the process of how a person drives the car, but quite clearly the assessment of whether the driver is indeed driving "safely" will not only be based on whether the driver checks the mirrors, stops at red lights, and wears a seatbelt. It will also be based on whether the driver actually has any accidents or harms others. In other words, we would consider both *how* the driver drove and the *outcome* of the driving. Within the field of business and human rights, similar standards of conduct have entered into company obligations, such as occupational health and safety in general, or fire and building safety in particular.

Therefore, any legal definition of a corporate HRDD duty, as well as the penalties and liabilities for violating human rights, must first and foremost define the objective of the expected standard of behavior, i.e., respect for human rights. Furthermore, it must make clear that the success in achieving that objective is the yardstick by which the process of HRDD will be measured. In practice, if there have been negative impacts on human rights despite the HRDD being undertaken, that is an indication that the HRDD process may have been insufficient.

The UNGPs and OECD Guidelines helpfully clarify that the outcomes that are relevant here are *outcomes for human rights*. Having a HRDD process in place – for example, by drafting a policy commitment, carrying out audits or conducting training for staff – is thus not a "result" in and of itself. These HRDD process elements are important, but they should be understood as indications of intent. These elements can and should be measured and evaluated in light of the goal of ensuring respect for human rights. The aim of achieving results in terms of respect for human rights is built into both the conceptual and procedural architecture of due diligence.

Conceptually, the "due" in due diligence refers to the notion that the action (i.e., diligence) required should be commensurate with the severity of the risk or impact at hand, as well as with what is needed to effectively address that risk or impact. HRDD is an ongoing and iterative exercise that involves reacting to new developments and situations as they emerge. Priorities and courses of action are to be constantly (re)evaluated and corrected where necessary. If the intended result of the HRDD process has not been achieved, the company is expected to take additional steps, again with the aim of achieving the intended outcome of respect for human rights.<sup>13</sup> In other words, what is "due" in regard to a risk of severe adverse impact is action that can reasonably be ex-

pected to either effectively prevent the risk from resulting in an impact, effectively mitigate and remediate the impact in the event that prevention fails, or – in the case of risks caused by business relationships – to ensure the company does not contribute to or find itself in the position of being directly linked to an impact that is not being addressed, either by not entering into or responsibly disengaging from the business relationship that is linked to the impact. In this regard, what is considered reasonable may also evolve.

This means that as our knowledge about what works and what does not when addressing particular risks evolves over time, we need to constantly evaluate whether our current understanding of what constitutes due in due diligence is effective and appropriate to the severity of the risks involved. This helps to ensure that HRDD is not merely reduced to repetitive cycles using the same processes that do not bring any change in outcomes for people. Indeed, effective HRDD entails demonstrating progress in addressing and achieving results regarding specific risks and impacts, ensuring that lessons are being learned and processes are being continually adapted in cases where efforts do not result in the desired outcome. If a severe risk or impact persists in spite of the company's diligence, eventually this diligence will be judged to be no longer adequate to the situation. This means, for example, that a company cannot continue endlessly to source from Bangladesh or Pakistan without seeing actual improvements on fire and building safety.

#### KEY TAKEAWAYS FOR POLICYMAKERS

**It is important to specify that the purpose of HRDD is for companies to respect human rights. Due diligence then becomes a standard of conduct for achieving this purpose, it is essential that the adequacy of due diligence be measured using that same yardstick. Companies must demonstrate progress and results regarding specific risks and impacts. It is important to assess and adapt continuously, and when efforts do not result in the desired outcome, processes and actions need to be revised.**

### 3.2 – The bar for “contributing” vs. being “directly linked” to impacts in the value chain



#### WHAT'S AT STAKE

The international HRDD framework delineates three different ways of understanding the relationship between a business and a human rights impact: (1) A business may cause an impact, (2) a business may contribute to an impact, (3) and business may be directly linked to an impact (see Figure 2). These three types of relationships between a business and an impact entail different expected courses of action for companies. Sometimes, determining which category or type of relationship a company falls into is straightforward. However, in cases where several actors along the value chain of a company are also involved, it is not always clear cut. This is particularly the case when it comes to distinguishing between the categories of “contributing to” and “directly linked”.

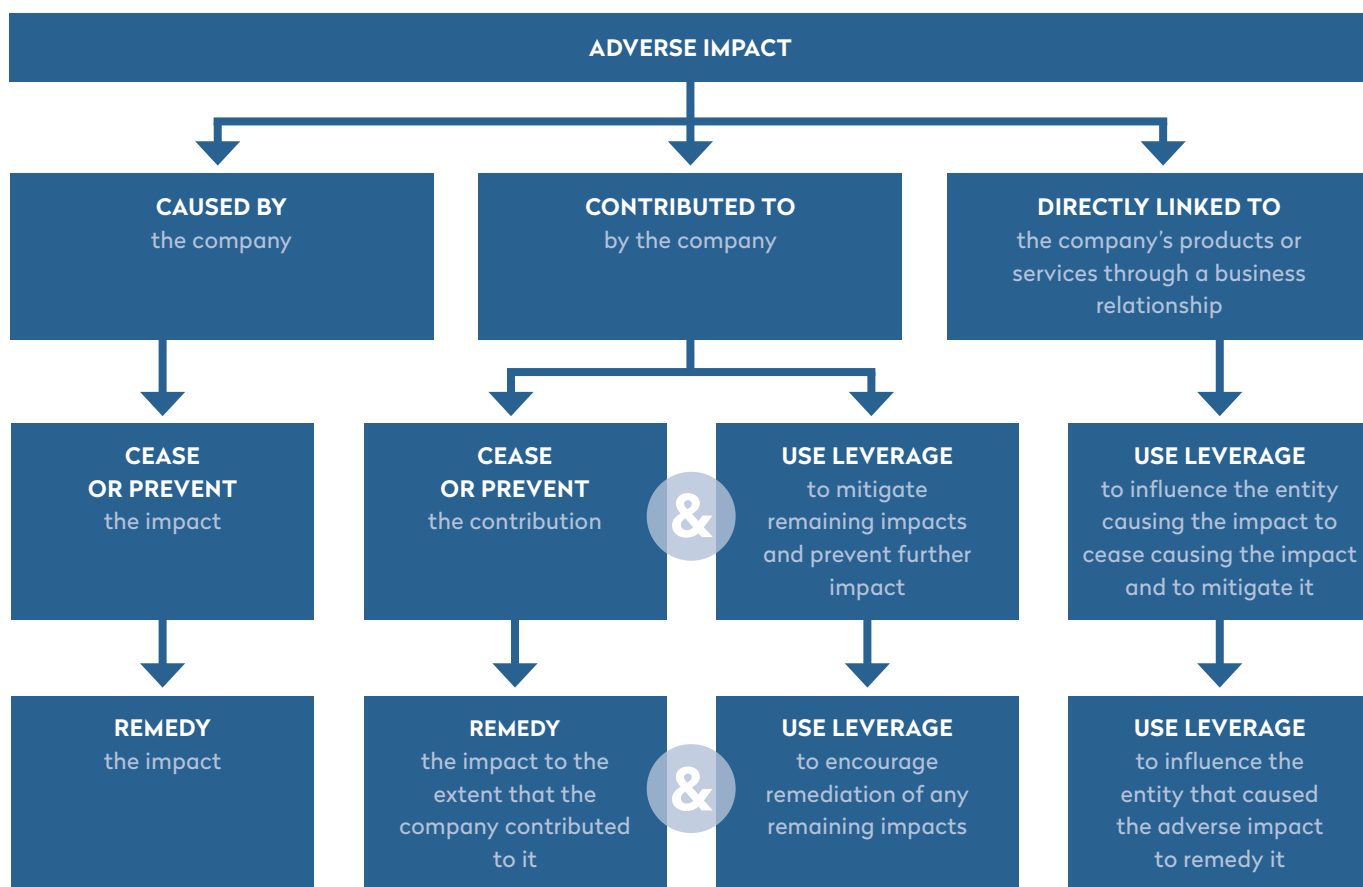


#### WHAT CAN GO WRONG IN PRACTICE

If a company *caused* an adverse impact, it must stop the activity that causes the impact and remedy the impact. In scenarios where a company *contributes* to an impact, it should halt its contribution to causing harm and contribute to remediation. A company’s obligations are much less clearly delineated in cases where it is *directly linked* to an impact. In such cases, the company is expected to “use leverage” to seek to influence the behavior of the entity causing the impact. However, the assessment of what leverage exists and how to wield it correctly for HRDD purposes often remains very subjective. Equally, regarding expectations to provide access to remedy, scenarios involving “direct linkage” contain few clear obligations for the company in question.

Because the category of “direct linkage” involves less direct and clear expectations for a company than the category of

FIGURE 2 – COMPANY RELATIONSHIP TO ADVERSE IMPACTS AND EXPECTED BEHAVIOR



Source: SOMO, modified from OECD<sup>14</sup>

“contributing,” particularly when concerned with halting the contribution to harm and contributing to remedy, it is attractive for companies. In consequence, they frequently go to great lengths to expand the application of the concept “directly linked” as far as possible, while at the same time limiting the application of the concept of “contributing to.” This is not to say that there are not situations where it is legitimate to classify a company as “directly linked”, particularly where the causes of the harm are complex and many actors are involved. However, if direct linkage and the harm itself are maintained over an extended period of time, this assessment may change, particularly if the company does not revise its own processes.

Some consumer-facing companies (incorrectly) argue that adverse impacts caused beyond the range of activity of their own corporate group (such as by a supplier or plantation owned by a third party) should always fall into the “directly linked” category. They claim that their contributions in such cases can never rise to the level of “significant, not trivial” that is required by the OECD Guidelines to qualify as a “contributing” scenario. For example, retailers in the garment sector have argued that they could not be considered to be contributors to impacts caused by suppliers or clients that are thousands of kilometers away and many tiers removed in the value chain.<sup>15</sup> In a similar vein, some banks have also asserted that they could never be considered to be causing or contributing to the adverse impacts that may arise from their clients’ operations.<sup>16</sup>



### GETTING IT RIGHT

The UNGPs and OECD Guidelines state clearly that all companies have a responsibility to respect human rights and address potential and actual adverse human rights impacts within their own operations and within their business relationships and value chains. Beyond this shared standard of responsibility, the normative guidance principles illustrate three responsibility scenarios for addressing adverse impacts of companies, depending on whether they caused the impact, contributed to it, or are directly linked to it through a business relationship. Different types of action expected of the company in the context of HRDD depend on this categorization. While companies may cause impacts when they act alone in their own operations, companies are either contributing to or directly linked to impacts that occur within the value chain, as these impacts by nature involve at least one other actor (e.g. another company). Figure 2 at page 11 depicts the three types of relationships a company may have to an adverse impact and how the company should address the impact based on its relationship to it.

The international framework clarifies that for a company to be “contributing” to an impact, there needs to be an element of “causality.” According to the OECD, this element of causality must be “substantial,” meaning “not minor or trivial”.<sup>17</sup> The OECD indicates that various factors can be used to assess whether an activity constitutes a non-trivial contribution, including:

1. The degree to which the activity increased the risk of the adverse impact occurring,

2. The degree of foreseeability of the adverse impact, and
3. The degree to which any of the enterprise’s activities actually mitigated the adverse impact or decreased the risk of it occurring.

Importantly, “activities” include both actions (i.e., actively doing something) and omissions (i.e., failing to do something that should have been done).<sup>18</sup> These elements are highly interrelated, gradational and non-binary, meaning that they need not be answered either with yes or no, but rather can be answered in degrees. Each factor is explained in more detail in Box 1 (see at page 13).

In that sense, the categorical qualification of “directly linked” for scenarios in which impacts are present in the context of investments or multiple “tiers” in supply chains is contrary to guidance provided by the UN OHCHR<sup>19</sup> and OECD<sup>20</sup>. The UN OHCHR has clarified that determinations of contribution under the UNGPs do not turn on clear-cut classifications of “which tier in the supply chain’ the harm occurs” or whether there is “sufficient proximity” between the company and the harm, as some businesses argue. Indeed, the authoritative body has confirmed that there are in fact situations in which companies, such as retailers and banks, may be “contributing” to abuses by clients and suppliers, even those that are far removed or many tiers away.<sup>21</sup>

In the example of banks, the UN OHCHR considers that many of the impacts associated with a bank’s financial products and services may fall into the “directly linked” category. However, it also identifies scenarios where a bank can be considered as “contributing to” or “causing.” Furthermore, the UN OHCHR clearly highlights that there is a continuum between “contributing to” and having a “direct link,” within which a bank’s involvement with an impact may effectively shift over time, depending on its own actions and omissions in response to human rights abuse to which it was initially only linked.

### KEY TAKEAWAYS FOR POLICYMAKERS

**A company’s relationship to a human rights harm is not static and, depending on its own prevention and mitigation efforts, may change over time. Accordingly, the actions required from a company to carry out its responsibilities vary in relation to its mode of connection to the impact and should be revised if the situation does not improve. A company that is initially only “directly linked” to an adverse impact may shift to a relationship of “contributing to” the harm over time if the company fails to take appropriate action to seek to address the impact. Companies can “contribute to” impacts throughout the entire value chain, regardless of how many “tiers” away the harm occurs. Rather than tiers or proximity, factors such as foreseeability and effectiveness of due diligence should be considered in distinguishing between “contributing to” and “directly linked”.**

Box 1

## Differentiating between “contributing to” and “directly linked”

The OECD Due Diligence Guidance for Responsible Business Conduct lists three factors to be taken into account:

### **Factor 1: The degree to which the business activity**

increased the risk of the impact occurring or continuing. A company can contribute to an impact if its activities increase the risk of an impact occurring, recurring or continuing. This can happen either in combination with the activities of another entity (including non-state actors), or if an action or omission by the company encourages or makes it easier for another entity to cause harm.<sup>22</sup> In the context of HRDD, this means that a failure to (seek to) prevent, mitigate or remediate an (ongoing) impact may be seen as an omission that contributes to or makes it easier for another entity to cause or contribute to an impact. In supply chain relationships, this is especially the case when an omission is combined with the “action” of repeated and significant purchases of a product known to be associated with the impact.

Considerations of leverage and the strength of the business relationship are also important here: did the company have leverage (i.e., the ability to effect change) that it declined or failed to use? Did the business relationship involve the exchange of significant amounts of money or a significant volume of goods or services over a considerable period of time? Did the company have an internationally well-regarded reputation that may have legitimized the other entity’s actions? Did the company send signals that the entity causing or contributing to the impact could have interpreted as encouragement (e.g., by remaining silent as severe, foreseeable impacts continued unabated)? An answer of “yes” to any of these questions may increase the degree to which the company’s actions increased the risk of the impact (re)occurring.

### **Factor 2: The foreseeability of the impact**

This factor concerns the extent to which the company could or should have known about the adverse impact or the potential for adverse impact.<sup>23</sup> The company does not necessarily have to have in fact foreseen the occurrence or continuation of the adverse impact in cases where it could or should have reasonably done so.

### **Factor 3: The degree to which any of the enterprise’s activities actually mitigated the adverse impact or decreased the risk of it occurring or continuing**

This factor has to do with the adequacy and effectiveness of a company’s HRDD. If a company is conducting ade-

quate HRDD that is appropriate to the scope and complexity of its risk profile, this “should help it effectively identify risks and prevent them from occurring”.<sup>24</sup> In addition to examining what impact or effect the company’s activities had on actually mitigating impacts, also important in assessing this factor is the feasibility of improvements in the future (i.e., whether there is a credible prospect that any due diligence activities will actually mitigate or decrease the risk). In situations where there is no credible prospect of improvement or where efforts have proven ineffective or have failed over many years, the continuation of the same efforts or activities cannot be said to be adequate. In this regard, a company’s decision to continue business operations with or make new purchases from a business relation where an adverse impact, caused or contributed to by this relation, continues or reoccurs is relevant in assessing the adequacy of its HRDD.<sup>25</sup>

The OECD states that if a company continues to maintain a business relationship with a supplier that causes or contributes to an adverse impact without taking measures that effectively mitigate the impact, then the company may be considered to be facilitating an ongoing, unremediated impact because of inadequate due diligence.<sup>26</sup> The severity of the impact is also important when determining the degree of adequacy of HRDD. The more severe the impact, the higher the standard for measuring the effectiveness and adequacy of the due diligence activities must be. Severe impacts must be addressed quickly and demand a higher degree of effectiveness for the company to avoid being considered as contributing to the impact.

Importantly, the level of responsibility is not static, and the company’s relationship to the impact may change over time depending on its efforts to effectively prevent or mitigate the impact. A company that was initially “directly linked” to an adverse impact through a business relationship may, after deciding to remain in that relationship despite the failure of HRDD to actually reduce or remediate impacts, be considered to be “contributing” to the ongoing adverse impact.<sup>27</sup> The OECD Due Diligence Guidance provides examples of how a downstream retailer’s purchasing practices can transform its relationship to an adverse impact caused by a supplier from being “directly linked” to “contributing to”, as well as how a private equity investor can shift from being “directly linked” to “contributing” to adverse impacts on health and safety of workers within the context of a specific project.<sup>28</sup>

### 3.3 – The bar for being “directly linked” vs. “not linked” to human rights abuses through a business relationship



#### WHAT'S AT STAKE

In addition to the distinction between “contributing” and “directly linked” discussed above (chapter 2.2.), another crucial distinction can be seen in the norms and the implementation of due diligence by businesses between adverse impacts that are directly linked, and those that are not linked, to a company’s products or services through a business relationship. As illustrated in Figure 2, the norms expect companies whose operations, products or services are directly linked to an actual or potential adverse impact to seek to address the impact. Companies are not expected to seek to address risks or adverse impacts to which they have no direct link. The norms state that the scope of responsibility is determined by a link between the impact and the company’s products and services, and not by a link only between the impact and the company’s business partners. The UNGPs state: “a responsibility to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships”.<sup>29</sup>

Sometimes, the distinction between “directly linked” and “not linked” is clear; for example, the clothes sold by a garment retailer are not linked to adverse impacts associated with the mining of rare earths for electric vehicles, which means that the garment retailer is not expected to seek to address those risks. But there are other situations in which the distinction is much finer. For example, imagine a clothing retailer that sources its t-shirts from a supplier, which also produces handbags for other customers in an adjacent factory, but still belongs to the same corporate group. The production of the t-shirts does not involve any labor rights violations; however, in the factory producing the handbags, company managers openly and egregiously abuse workers’ rights and assault any workers who complain or try to form a union. The immediate problem is thus with the handbags, not the t-shirts, which are the retailer’s product and to which the retailer is directly linked through a (series of) business relationship(s). Nevertheless, companies cannot ignore these abuses, as there is a significant risk the practices may carry over into the company’s own product lines. This heightened risk then has serious implications for the company’s due diligence responsibilities.



#### WHAT CAN GO WRONG IN PRACTICE

Companies frequently mistakenly conclude that “not linked” means that they can ignore risks that exist with business partners. In the t-shirt example, the retailer argues that because it does not purchase or sell any handbags and there is no direct link between the brand’s products (t-shirts) and the abuses, the retailer can completely ignore the

abuses within the handbag production line. Some NCPs<sup>30</sup> have even mistakenly rejected OECD Guidelines complaints in this situation, arguing that because the company is not directly linked to a specific impact (which may be true), it is not worth having a discussion with relevant stakeholders about strengthening the company’s due diligence in relation to the clear risks associated with activities that could easily be directly linked in the future. This discussion, which is absolutely appropriate and necessary, is not about expanding the scope of responsibility to the other impacts, but about a proportionate, risk-based response to the situation in relation to its own production lines and activities.

Companies often argue, usually in response to corporate accountability campaigns, that they are allowed to do business with partners who cause adverse human rights impacts, as long as those partners do not cause such impacts while producing their products. In the garment example, a retailer purchasing t-shirts may claim that it is not directly linked to the abuses in the supplier’s handbag production line (which, again, may be true) and that they can thus ignore them in their purchasing of t-shirts (which is not true). Similar arguments have been used for even more fungible product lines or subcontracting. In another example, a bank may say it can provide project finance for a mining operation, knowing that the mining company involved has a poor human rights record at another mine, as long as no human rights abuses occur within the mine that it is financing. Again, in this situation the bank is expected to be on high alert and be conducting robust due diligence and remains exposed to reputational or other implications of remaining in the relationship.



#### GETTING IT RIGHT

Companies cannot ignore abuses committed by business partners, if these are not directly linked to their products or services, as they pose significant risks and have serious implications for the company’s due diligence responsibilities. The focus of due diligence is notably on assessing the risk management systems of the company itself, as well as those of suppliers or other business relationships. Within the framework of the norms, companies should be identifying their most significant risks across their operations and business relationships and, as part of their due diligence, assessing the nature and extent of actual and potential impacts associated with those parties. The emphasis of human rights due diligence is thus on the business practices of the supplier, not on the narrow and limited focus of DD for individual products or product lines.

In the example given above, while there may not be a direct link between the labor rights abuses in the handbag production line and the t-shirt retailer’s products, this does

not mean that this situation has no consequences for the retailer's due diligence. Instead, the company should clearly identify and be aware of adverse impacts in other business areas of the business partners' activities or operations, as this indicates the risk that such bad practices and abuse could be the result of a management strategy that may be involved in the production of the company's own products. UNGP 18 calls for the consideration of all risks in which an enterprise may be "involved either through their own activities or as a result of their business relationships".<sup>31</sup>

Risks and impacts involving a business partner should cause alarm and provoke greater efforts on the part of a company to investigate whether it is truly as immune to the connection to these impacts as it may appear. According to the norms, companies are supposed to assess their business partners' due diligence, and if impacts are occurring within the business partner's operations, even in a different unit, this should raise red flags about the quality of the partner's due diligence. A human rights breach in the handbag factory today is thus likely to be followed by a human rights breach in the t-shirt factory tomorrow, as the company may be using the same management strategy and related management systems.

A nuanced reading of the norms reveals that the "general spirit" of the OECD Guidelines and UNGPs is to have a very expansive notion of business responsibility, as demonstrated by the fact that businesses have responsibilities that extend beyond what they themselves cause or contribute to. The norms expect businesses to take a robust approach to their

responsibility, meaning that they should genuinely try to find out whether there are severe harms that could be connected to their operations or value chain and creatively consider what to do about them.<sup>32</sup> Because due diligence is intended to be commensurate with risk, and knowledge of impacts caused by the business partner in another factory obviously indicates a heightened risk, the retailer will need to increase the vigor and thoroughness with which it conducts due diligence in regard to its business partner.

#### KEY TAKEAWAYS FOR POLICYMAKERS

**Companies cannot ignore abuses committed by business partners, even if these are not directly linked to their products or services, because of the risk that the practices that led to them may carry over into the company's own line of products or services. This has serious implications for the company's due diligence norms expect downstream brands and retailers to holistically assess their suppliers' due diligence across its full range of activities and operations. In other words, human rights due diligence is not simply about tracking individual products or limiting due diligence to single product lines, but about adopting a proportionate, risk-based approach to identifying risks at all levels of the supply chain.**



Factory worker on a copwinder weft assembly line loom in Johannesburg, South Africa. | © Sunshine Seeds/Shutterstock.com

### 3.4 – Adequate provisions for disclosure, communication, and information



#### WHAT'S AT STAKE

Under the HRDD framework, companies must communicate how they have addressed their human rights impacts to their stakeholders and rightsholders. The normative framework does not specify in detail what specific information companies should communicate. Companies themselves – jointly with their stakeholders, if they're behaving responsibly – must decide what kind of information is relevant and will be communicated to the public, as well as to specific stakeholders and rightsholders. What form should this communication take within a robust HRDD framework? This is particularly relevant in relation non-disclosure and confidentiality agreements.



#### WHAT CAN GO WRONG IN PRACTICE

Companies often prefer to convey readily available information as opposed to information that is relevant from an HRDD perspective.<sup>33</sup> Companies are also free to choose their preferred modalities of communication, which risks reducing the obligation to communicate their HRDD to a superficial annual reporting exercise. In practice, companies frequently prefer the modalities associated with sustainability and non-financial reporting, with shareholders as the primary target audience, rather than modalities that make most sense from an HRDD or rightsholders perspective.

A challenging aspect of the duty to communicate HRDD lies in its relation to companies' confidentiality commit-



Factory worker piling circuit boards in Jiangxi, China. | © humphery/Shutterstock.com



ments and obligations. The current international framework does recognize that there are some (legal) restrictions on the information companies can disclose, thus accommodating “legitimate needs” linked to commercial confidentiality and other competitive or security concerns. Yet, companies often themselves determine the restrictions<sup>34</sup> regarding which information is treated as confidential. In practice, companies often retain their authority as the architects, judges, and executioners that decide on what is considered confidential, and attempt to justify the withholding of relevant information about risks or impacts by declaring them “commercially sensitive” and/or by invoking client/supplier confidentiality. This widespread practice, however, is at odds with the objective of HRDD to ensure that public information is available about a company’s due diligence processes, as well as with the societal interests of disclosure.



### GETTING IT RIGHT

Communication is crucial for the quality of due diligence and thus warrants its own separate step within the framework of HRDD. The OECD Due Diligence guidance makes clear that communicating about due diligence “is part of the due diligence process itself”.<sup>35</sup> Companies must disclose relevant details – such as findings on human rights risks and abuses arising from within their operations – to demonstrate that their procedures are adequate. A company that cannot disclose sufficient information to demonstrate to interested stakeholders that its due diligence was adequate has failed to conduct appropriate HRDD.<sup>36</sup>

After witnessing confusion between the duties of communicating and reporting, the UNGPs<sup>37</sup> and the OECD Due Diligence Guidance provided useful and nuanced guidance for the different target groups by stating that “an enterprise should account for how it identifies and addresses actual or potential adverse impacts and should communicate accordingly. Information should be accessible to its intended audiences (e.g. stakeholders, investors, consumers, etc.) and be sufficient to demonstrate the adequacy of an enterprise’s response to impacts”.<sup>38</sup>

Annual reporting can provide important data and information in a systematic way, and as such, it clearly has its value. However, the expectation to communicate within a human rights due diligence context is broader and differs fundamentally from reporting (e.g., non-financial reporting, sustainability reports, shareholder communications) in terms of scope, frequency and method.

Furthermore, the alleged tension between HRDD communication and confidentiality loses its relevance in light of the actual information sought out by stakeholders and rightsholders. Much of the information that stakeholders require in order to have trust in the underlying due diligence process, along with what the international norms call for, would fall outside the domain of these exceptions for “commercially sensitive” material or other specific legal provisions. Specific human rights risks can be identified, and the progress

in addressing these tracked, without necessarily revealing commercially sensitive information. Rather than thinking in terms of what information cannot be provided, the OECD Due Diligence Guidance expects companies to think creatively about how relevant information can be provided to stakeholders. The Guidance contains many examples of how companies can communicate about sensitive topics in ways that respect their confidentiality agreements and obligations. For example, when signing a contract with a business partner, the company should limit the scope of, or refuse to allow the insertion of, a non-disclosure agreement.<sup>39</sup> Companies can also redact names of individuals at risk. Moreover, alternative solutions should be negotiated in good faith to replace particular, individual clauses that may prevent a company from publicly communicating its HRDD processes.

Noteworthy is that recognized practices of disclosure continue to evolve and are often specific to a sector. For example, in the garment sector, the practice of disclosing data on supplier companies is rapidly becoming more common.<sup>40</sup> While supplier data may not be the most relevant information for the purposes of human rights due diligence, in several sectors and contexts it is highly relevant information, allowing, for example, rightsholders to identify supply chain links.<sup>41</sup> Legislators should mandate the accurate disclosure of supply chain information, as well as release any relevant information held by the authorities themselves (e.g., customs data).

### KEY TAKEAWAYS FOR POLICYMAKERS

**Legislators must make it clear in the law what information companies are expected to disclose at minimum on their due diligence to demonstrate to relevant stakeholders and rightsholders that their due diligence is adequate. This includes publicly communicating regarding human rights risks and impacts and how the company has prioritized them, as well as the HRDD processes that are used to address, mitigate and remedy them. This will also prevent the reduction of the communication step to mere reporting. Any legislation should shift the burden onto companies to actively seek ways to disclose HRDD information to the greatest extent possible, in a meaningful and user-friendly manner. Legislators should induce a change in companies’ default position from non-disclosure to disclosure. For this purpose, it is important to clarify the limits of non-disclosure agreements and provide a clear definition of the notion of “commercially sensitive” information.**

### 3.5 – Prioritization in HRDD processes



#### WHAT'S AT STAKE

Human rights due diligence allows for an appropriate prioritization when addressing risks and impacts. However, the exercise of prioritization is fraught. While the UN Guiding Principles and OECD Due Diligence Guidance clearly see prioritization as a way to sequence and provide a way to address the most severe risks, they nonetheless maintain that companies should address all their adverse human rights impacts.

It is not rare for companies to be connected to thousands of risks, and they often claim that it is simply not feasible to address all of them and that they must make choices, prioritizing a few risks/impacts at a time. A number of factors might impact this exercise of prioritization, including the size, complexity and geographical scope of business operations; the (sometimes limited) resources of the companies themselves; the systemic nature of the issues; and the actual ability of the company to effectively exercise leverage over their supply chain.



#### WHAT CAN GO WRONG IN PRACTICE

In practice, the flexibility offered by the norms gives significant room for companies to determine how to prioritize the issues themselves. Companies are obviously hesitant to prioritize impacts that, if properly addressed, would entail a significant financial burden or even threaten their existence (such as impacts associated with the company's business/pricing/purchasing model). Especially when companies are operating in a context of structural and systematic human rights violations, there is reluctance to deal with entrenched "difficult" risks. As a result, key structural enabling rights (such as the right to organize and bargain collectively), ensuring a living wage and addressing climate change, as well as more costly interventions like fire and building safety, are deprioritized in favor of the low-hanging fruit of impacts that are easier to address.

Some companies limit their efforts to only a fraction of their operations and supply chains, selected either by following a geographical hot-spot analysis; applying an existing high/low risk country categorization; or because of opportunistic reasons, such as established relations, proximity, or because of existing initiatives by other actors that can be joined.

Limited and insufficient leverage are also justifications used for the de-prioritization of risks and ignoring of impacts when companies are operating in high-risk environments where harms are systemic and widespread. If harmful business and purchasing practices are common to a particular sector, companies often argue that these cannot be changed by individual actions, and so should be ignored in favor of those impacts over which they have more control.

This inaccurate reading of the international HRDD framework would mean that structural human rights problems and their root causes – for example, the lack of a living wage, pesticide use or climate change – will never be addressed by companies' HRDD processes. Instead, companies will continue to shift risk and burden onto impacted communities, workers and host governments.



#### GETTING IT RIGHT

Both the UN and OECD standards place an expectation upon companies to prioritize risks and impacts based on their "severity," that is, how grave, widespread, and hard to remedy they are (scale, scope and irremediability), as well as how like they are to occur. The risks that score highest on the scale of severity and likelihood are considered to be the most "salient" and should therefore be prioritized by companies.

The UN Guiding Principles (in particular principle 24) make clear that while due diligence does allow companies some degree of flexibility in the prioritization of their efforts, all impacts should eventually be "addressed." However, where necessary, there should be prioritization for those that are the most severe or where delayed response would make them irremediable. The OECD Due Diligence Guidance makes it clear that *actual* impacts (as opposed to risks) that a company is causing or contributing to must *always* be prioritized. In the context of prioritization, the Guidance clarifies that: "Where an enterprise is causing or contributing to an adverse impact on RBC issues, it should always stop the activities that are causing or contributing to the impact and provide for or cooperate in their remediation".<sup>42</sup>

The UNGPs in particular stipulate that prioritization is important only for sequencing, and thus should not be used as a means of allowing companies to decide never to address risks. The commentary to UN Guiding Principle 24, as well as the UN OHCHR's Interpretative Guide<sup>43</sup>, clearly state that companies are always expected to (eventually) address all risks and impacts. Indeed, the principle essentially refers to the sequence of responses if not all impacts can be addressed at once. Where it is not feasible to address all identified impacts at once, companies can prioritize the order in which they take action based on the impacts that are most severe and/or whether a delayed response would make them irremediable. While companies may need to prioritize addressing their most severe or harmful impacts first, they are still expected to address all their risks and impacts.

Prioritization is therefore only justified when it is not feasible or possible to address all risks and impacts at once and should be used only for the purposes of sequencing a company's response to risks, not for excluding certain risks from being addressed altogether. As a starting point, compa-



Hard working women in the stone industry in Jaflong, Bangladesh. | © Road Provides/Shutterstock.com

nies should seek to address all their risks and impacts simultaneously, and only in exceptional cases, i.e., where this is not justifiably “possible” or “feasible,” they may prioritize certain risks and impacts for immediate action. The onus is on companies to explain why it may not be feasible or possible in certain circumstances to address all risks and impacts at once, and claiming to have “limited resources” is not a valid excuse (see section 2.4 below).

UNGP 24 defines prioritization in reference to impact, regardless of the specific leverage the company may have. The question of leverage does not affect a company’s responsibility; rather, it only serves as an indicator to evaluate the extent to which a company may be able to address human rights and environmental risks and impacts – on an individual, company-based level, as well as on the structural level of systems and root causes.

The normative framework expects companies not just to align their own business activities with human rights standards,<sup>44</sup> but also to address the structural, systemic and root causes of their human rights risks and impacts. Hence, a lack of leverage cannot be an excuse for not implementing an adequate HRDD process. Companies should initially seek to increase their leverage over time,<sup>45</sup> and if adverse impacts prove to be inevitable and the system intractable, companies

must consider disengagement.<sup>46</sup> If a company lacks leverage to affect improvements, it should seek to increase its leverage by collaborating with other companies, amending contracts, using public disclosure and, if appropriate, threatening disengagement. This applies to situations in which a company is “directly linked” to an adverse impact, as well as when it is “contributing” to harm.<sup>47</sup>

#### KEY TAKEAWAYS FOR POLICY MAKERS

**Companies are expected to address all human rights impacts and risks, but if it is genuinely not possible for them to address all impacts and risks immediately or simultaneously, they can prioritize and sequence their actions. When companies do prioritize, this should be based on the severity of the impact and the likelihood of it occurring. In some cases, a company may be connected to an impact by virtue of its business model or due to systemic risks, or the company may have limited resources to address the impacts in question. Such challenges, however, do not provide a legitimate reason for not addressing a risk or impact.<sup>48</sup>**

## Purchasing Practices and Prioritization

The normative framework for HRDD expects companies to identify and proactively address structural and root causes of impacts. Companies tend to prioritize addressing specific, acute problems and negative impacts at the level of individual actors (e.g., manufacturing facilities), usually after harms have occurred: audits are then conducted, corrective action plans are formulated, and grievance mechanisms are established.

However, some companies, and sometimes entire sectors, employ a business model that relies on aggressive purchasing practices that fuel these abuses, which often fall outside the scope or focus of “responsible business conduct” assessments. Through such practices as increased pressure on delivery times, late order confirmations, low prices, post-hoc discounts and unfavorable payment terms, companies can contribute to pushing suppliers into a range of human rights abuses, such as paying poverty wages,<sup>49</sup> wage withholding and theft, overtime, unsafe factories, precarious contracts and anti-union activity.

### GETTING IT RIGHT

The UN OHCHR’s Interpretative Guidance and the OECD Due Diligence Guidance for the Garment & Footwear sector explicitly identify brands’ purchasing practices (such as short lead times, precarious contracts, and aggressively low pricing associated with fast fashion) as the driver of some risks and adverse impacts in supply chains. Furthermore, the normative framework explicitly flags purchasing practices as a “risk factor” within business models<sup>50</sup> and recommends a management approach for preventing the contribution to harm via purchasing practices, which

includes assessment, control measures and red-flag systems.<sup>51</sup>

Companies are expected not to use excessive outsourcing and overly complex supply chains that shift responsibility onto other entities. The OECD Guidance expects companies to explore ways to simplify supply chains and strengthen a limited number of small supply chain relationships to minimize risk and to cease harmful purchasing practices. In some instances, this may actually require the questioning of a whole business model: for example, that of fast fashion, which utilizes ruthless purchasing practices, as well as loose and flexible supply chains and subcontracting.<sup>52</sup> Indeed, some supply chains may be organized in such a way that is incompatible with HRDD obligations, and thus would require serious rethinking.

### KEY TAKEAWAYS FOR POLICYMAKERS

**Legislators should provide for additional clear and prescriptive standards in several sectors where purchasing practices are in play. Rather than allowing each company to individually set its own specific purchasing standards, some common rules would help align practices and ensure a level playing field. Legislators have increasingly started to limit contractual freedom within trade relationships, notably on issues such as payment terms, unilateral discounts,<sup>53</sup> and economic dependency. More clear-cut and prescriptive approaches to purchasing practices should accompany any HRDD legislation. Legislators should prohibit companies from buying under the cost of production and insist that they commit to existing orders, pay on time, provide reliable forecasting, as well as refrain from unfair trading practices.**

### 3.6 – The “due” in due diligence: resource/leverage constraints and what to do with small and medium-size enterprises



#### WHAT'S AT STAKE

How much effort and resources are companies required to put into due diligence? The current framework is clear that the “due” in due diligence means “commensurate with risk” (i.e., proportionate and appropriate to the risk). The more severe the risk, the more due diligence efforts are required from a company. If the risk is less severe, the due diligence efforts can be less stringent.

However, especially with regard to the due diligence expectations of small and medium-sized enterprises (SMEs) with limited resources and leverage, the issue of cost often

arises. The question of whether or not companies have sufficient resources to conduct the due diligence necessary to truly prevent and remediate impacts is essential for the effectiveness of due diligence overall. Related to this is the question as to what companies should do if they do not have sufficient resources.



#### WHAT CAN GO WRONG IN PRACTICE

Companies stress that limited resources and leverage mean that they cannot do everything; they must make choices, prioritizing a few risks/impacts at



Worker checking cotton thread lines for a copwinder weft assembly line loom in Johannesburg, South Africa. | ©Sunshine Seeds/Shutterstock.com

a time. Some companies are directly linked to thousands of risks, and they claim they do not have the resources to address all of them. For some, this is a self-fulfilling prophesy – the companies themselves choose to dedicate few or limited resources to HRDD, which unsurprisingly results in them having too few resources to address their risks. Some argue that they need flexibility in determining their own priorities based on where they can have the most positive impact.

Using this flawed reasoning, companies seek to justify de-prioritizing amorphous, structural human rights impacts, even if they are severe, because the actions of any one company will not have any or sufficient influence. Given practical resource and leverage constraints, this would mean that some impacts may never be addressed by a company that too generously interprets the flexibility afforded by the normative framework.

Nevertheless, it is often argued that only large multinational companies with commensurate leverage should be required to conduct due diligence. SMEs might not be able to invest the required resources in due diligence and at the same time remain competitive. And even large companies have limits on what they can do with the finite pool of resources available to them.

According to this argument, companies' due diligence obligations should be tied to their means, and indeed, companies frequently claim that the “due” in due diligence should be understood as commensurate with the size, situation, means and leverage of the company. Although companies may correctly point to the fact that the actions that a company takes in fulfilling its due diligence obligations can be tailored to the company's size and circumstances, they often conveniently forget that they are responsible, in one form or another, for addressing all of their impacts and risks regardless of the size of the company.<sup>54</sup>



#### GETTING IT RIGHT

The international standards apply to all companies irrespective of size, sector or position in a value chain. Although the size of an enterprise may impact the nature and extent of its due diligence, it is the severity of the impact, not the size of the enterprise that determines which actual due diligence measures need to be employed. This is what the “due” in due diligence means. A small company engaged in an activity that involves a high degree of salient risk is expected to proportionally dedicate more resources and efforts to due diligence than a large company whose activities are not associated with any salient risks.

For each activity a company plans to undertake, the company should ensure it has “adequate resources” to ensure its due diligence is commensurate with the risks posed by that particular activity.<sup>55</sup> If resources are tight for the company, this does not absolve the company from its obligation to perform due diligence commensurate with the risks, but this may affect how it carries out that duty.<sup>56</sup> In this sense, a lack of resources to conduct effective due diligence for a particu-

lar activity is not a legitimate reason in itself from the perspective expressed in the norms. In case of resource constraints, the OECD Guidance provides a few options, such as entering into collaborative efforts, making careful decisions in the context of prioritization, or deciding not to engage in (or to disengage from) the activity in the first place.

The framework does recognize the often significant leverage constraints faced by many small businesses, but also encourages SMEs to overcome these constraints as part of their due diligence. In order to do so, the framework suggests that SMEs can utilize “contractual arrangements, pre-qualification requirements, voting trusts, license or franchise agreements, and also...[use] collaborative efforts to pool leverage in industry associations or cross-sectoral initiatives”.<sup>57</sup>

At the same time, the assumption that SMEs always have insufficient resources and less leverage in their supply chains is not always correct. Sometimes SMEs have even more leverage in their own supply chains than larger companies, especially if they hold fewer business relations with smaller suppliers where they buy a higher percentage of the production, or they make a vital product / provide a vital service.

#### KEY TAKEAWAYS FOR POLICYMAKERS

To stay in line with the international normative standards, legislators should make it clear that all companies, large and small, have an obligation to respect human rights and conduct due diligence. In the implementation of HRDD legislation, regulators and courts can take a proportionate approach and account for factors such as leverage and size in terms of turnover and employees, particularly when evaluating the policies and processes of smaller companies, while still making it clear that these companies are required to perform some degree of due diligence.

### 3.7 – Prevention vs. mitigation



#### WHAT'S AT STAKE

Human rights due diligence is about both prevent and addressing adverse impacts. The latter includes both mitigation and remedy where appropriate. The normative framework is clear that prevention should take precedence over mitigation and remediation in due diligence. However, companies frequently incorrectly argue that causing impacts but then mitigating and/or remediating them can be considered an equally valid aim and result of due diligence. This leaves the misleading and detrimental impression that there exists an acceptable level of human rights abuse that must be tolerated in order to keep business and the economy afloat. Legislation should ensure that HRDD is not only reduced to mitigation and remediation, but that it also enhances its preventative dimension.



#### WHAT CAN WRONG IN PRACTICE

Under the motto “business must go on,” companies have time and again asserted that they cannot be expected to prevent all human rights impacts, and that it is fine to go ahead with an activity (i.e., a project, investment, purchase, or transaction) that may cause or contribute to impacts as long as the company tries to later mitigate those impacts and provide remedies. In this vein, it is sometimes argued that the mitigation of an impact is more cost-effective than preventing it. As a result, business activities which risk causing harm or have caused harm are pursued instead of prevented.



#### GETTING IT RIGHT

The norms clearly frame due diligence as about preventing potential adverse impacts and mitigating and addressing actual adverse impacts. However, the expectations of prevention, mitigation and remediation do not exist on an equal footing. According to the UNGPs, HRDD is geared towards preventing (future) harms, while recognizing that existing impacts deserve remedy. The OECD Guidance on RBC defines the preventative nature of due diligence as one of its key characteristics and preventing impacts the primary purpose of due diligence. It states that the “purpose of due diligence is first and foremost to avoid causing or contributing to adverse impacts on people, the environment and society, and to seek to prevent adverse impacts directly linked to operations, products or services through business relationships. When involvement in adverse impacts cannot be avoided, due diligence should enable enterprises to mitigate them, prevent their recurrence and, where relevant, remediate them.”



Uber Eats food delivery courier on a scooter in Bucharest, Romania. | ©LCV/Shutterstock.com

The appropriateness and adequacy of a company’s due diligence steps in relation to a given risk therefore become framed by its capacity to prevent harm (versus merely minimizing harm or remediating harm after it has occurred). Mitigation, in contrast, is about reducing the severity of a risk. Although this would seem to be a beneficial approach within a risk-mitigation strategy, for the adequacy of due diligence, it would need to be evaluated in a context where prevention proved impossible in the functioning of different due diligence steps (i.e. risk-based identification, prioritization). Remediation, in turn, is about providing remedy for an actual impact.

#### KEY TAKEAWAYS FOR POLICYMAKERS

**Legislators should place a strong emphasis on the preventative nature of HRDD and make it clear that prevention, mitigation and remediation do not exist on an equal footing. Prevention of harm is the purpose and first priority of due diligence. Mitigation and remediation are undertaken if prevention fails, not as a substitute. This is implicit in the business responsibility to respect human rights, but additional clarification on the purpose of due diligence, namely to prevent adverse impacts, is recommended.**

### 3.8 – The meaning of “meaningful” in “meaningful stakeholder engagement”



#### WHAT'S AT STAKE

Meaningful stakeholder engagement is an essential component of due diligence and is required at all stages of the process. Its added value is emphasized when assessing and tracking impacts. Failing to holistically and meaningfully engage in good faith with a range of (potentially affected) rightsholders and other stakeholders and constitutes a due diligence failure. However, what does “meaningful” mean in practice? In particular, which stakeholders must be included in the engagement process, and how?



#### WHAT CAN GO WRONG IN PRACTICE

The modes and methods employed when a company engages stakeholders are generally largely left up to the company itself. Because truly meaningful consultation with rightsholders can be complicated and resource intensive, many companies chose to consult only or primarily with a limited selection of easily reached stakeholders in a one-off exercise, either before or after activities take place, depending on what is most convenient. Others settle for simply gathering second-hand opinions (such as from international experts or civil society organizations) without any interaction with the rightsholders who are actually affected by their activities. This runs counter to the ongoing and holistic character of due diligence.



#### GETTING IT RIGHT

The normative framework considers direct engagement and consultation with people whose human rights have been infringed upon, harmed, or are at risk of harm as an essential component of HRDD.<sup>58</sup> Meaningful stakeholder engagement is required at all stages of the process and failing to engage in good faith with a range of (potentially affected) stakeholders constitutes a due diligence failure. The framework also recognizes that stakeholders, and especially impacted rightsholders, do not constitute a homogeneous group. Instead, rightsholders and other stakeholders differ in terms of their degree of visibility, possible modes of inclusion, and vulnerability. Consider the difference in visibility between a formal employee on payroll a tier 1 supplier compared to an informal worker at a tier 3 factory or a home worker. Many of the latter are particularly vulnerable and face higher risks of mistreatment due to the intersection of their gender, legal status, caste, religion, age, illiteracy, non-unionization, etc.

A meaningful HRDD process recognizes the diversity of impacted stakeholders and designs its risk analysis processes to specifically identify the most vulnerable, yet least visi-

ble, stakeholders and the risks they face. In turn, stakeholder engagement can only be deemed “meaningful” if it acknowledges the diversity of impacted rightsholders and other stakeholders, as well as their visibility and capacity to engage in a consultation process. In particular, the circumstances of the most vulnerable stakeholders must be considered.<sup>59</sup>

The normative framework provides a significant level of detail and guidance on what “meaningful” stakeholder engagement looks like. It is characterized by two-way communication and good faith by the company, as well as timely sharing and accessibility of information in terms of both physical accessibility and clarity to all parties. Importantly, it is not a one-off endeavor, but must occur in an ongoing manner throughout the due diligence process.<sup>60</sup>

When tracking progress, HRDD measures should be evaluated (through continuous consultation) not just for outcomes that impact the main target groups, but also for unintended negative consequences for portions of the target group, as well as third parties. Grievance mechanisms should be equally accessible to all affected persons regardless of gender, religion, social status etc., and their specific vulnerabilities and needs for protection against retaliation must be taken into account.

Critically, companies’ obligations under due diligence laws must work in concert with (and go beyond) engagement in situations where consultation is a right in and of itself. The most prominent examples of this are unions and workers’ rights to freedom of association, as well as indigenous people’s right to free, prior and informed consent.

#### KEY TAKEAWAYS FOR POLICYMAKERS

**Legislators should specify expectations for companies regarding meaningful stakeholder consultation as a necessary part of the quality of human rights due diligence. Such consultation should be diversified in relation to the specific rightsholders and other stakeholders and should be undertaken in an adaptable and continuous manner.**



### 3.9 – Responsible disengagement



#### WHAT'S AT STAKE

The international framework foresees that sometimes companies might have to disengage from problematic business relationships as part of their human rights due diligence. Indeed, if efforts to cease, prevent, mitigate and remediate negative impacts caused by a business partner have failed, and if there is no credible prospect that they will succeed in the future, the only responsible alternative for a company is likely to disengage or divest.<sup>61</sup> When it comes to responsible disengagement, however, a number of important questions remain. How long can a company claim that continued engagement with a problematic supplier will eventually lead to an improvement? How should the potential negative impacts of withdrawal from a business relationship be weighed against continuing infringements of human rights? If the company does decide to disengage, how should it go about contributing to the remediation of impacts to which it may have contributed while in the business relationship? In short, what does it mean to disengage “responsibly”?



#### WHAT CAN GO WRONG IN PRACTICE

The normative framework leaves open some crucial questions related to disengagement, particularly related to when to disengage. The OECD instruments designate disengagement as a “last resort”, but this is less clear in the UNGPs. The OECD’s “last resort” language is unhelpful, particularly because many companies are very reluctant to disengage from their business relationships in their efforts to respect human rights, and they can argue that it is better to continue to engage (or keep “a seat at the table”) with the supplier even if engagement has thus far failed to produce any results and there is no credible prospect of change. Other companies have drafted their contracts in ways which restrict the reasons for termination of the business relationship to the supplier’s failure to deliver the quality of product or service expected within the agreed-upon time frame. And often companies simply have an economic interest in continuing business as usual without disrupting the relationship.

Companies will also often disengage for reasons that pertain to business imperatives as opposed to disengaging within the context of an actual due diligence process. In consequence, businesses often echo the language of disengagement as a “last resort” in order to justify maintaining business relationships with suppliers who have been abusing human rights for some time, and then disengage as soon as orders or projects are finished.

An additional problem related to responsible disengagement but from a different angle is that companies use the

normative encouragement to “consider disengagement” to disengage irresponsibly after severe human rights abuses by suppliers have been publicly exposed. A “cut-and-run” disengagement can potentially lead to severe and unremediated negative impacts for workers and communities (e.g., unpaid wages, an abandoned mine or factory left behind by a company that has departed in haste). This adds new impacts while the initial (exposed) human rights abuses remain unremediated.



#### GETTING IT RIGHT

According to the international framework, as part of due diligence, if a company identifies an adverse impact, it should engage with business partners to prevent, mitigate or remediate that impact. If engagement fails to prevent and remediate the impact, the company should consider responsibly disengaging, taking into account the severity of the impact; the results of previous attempts to address impacts; the likelihood of preventing and remediating impacts in the future; the consequences of not disengaging; and the potential adverse impacts of the disengagement itself. Responsible disengagement from a business relationship causing human rights abuses is a prospect that companies should always consider and have on the table as an option. A credible prospect of disengagement can be a powerful tool for preventing, mitigating and remediating adverse impacts by incentivizing business partners to improve their human rights and environmental performance.

While the decision to disengage should not be taken lightly, companies should consider and communicate the prospect of disengagement at the beginning of a business relationship, including when screening possible trading patterns, drafting specific contractual clauses, and equally to agree on a process for triggering such a clause, in order to generate and maintain leverage.<sup>62</sup> The framework stipulates that companies should disengage from a business relationship or project not merely after mitigation efforts have failed but, in some cases, proactively, when the risk or impact is serious enough to warrant disengagement. If the company decides not to disengage, it must be prepared to accept the reputational and legal consequences. The norms are also clear that a decision to not responsibly disengage from a supplier that is repeatedly contributing to severe abuses may “shift” the company’s relationship to those impacts from “directly linked” to “contributing” (see also section 2.2).

As part of the decision to disengage, the company should factor in the consequences by considering credible assessments of potential adverse human rights impacts of doing so. If disengagement will indeed cause or contribute to negative impacts, the company must disengage responsibly, taking action to prevent or remediate the impacts generated by



The Bangladesh Accord is a best practice example in the context of due diligence. | © Kristof Vadino/CCC

the action of disengaging.<sup>63</sup> It is important to note that in order to disengage responsibly, the disengaging company must contribute to the remediation of all previous adverse impacts to which it contributed, even if the company disengages from the business relationship through which it contributed to the impact. Disengagement does not absolve a company from its remediation responsibilities.

The Accord on Building and Fire Safety in Bangladesh provides one of the best practice examples of how responsible disengagement in the context of due diligence is supposed to work.<sup>64</sup> The Bangladesh Accord's Escalation Protocol includes a clearly defined, pre-communicated and credible prospect of collective responsible disengagement by all Accord signatories from a supplier that repeatedly fails to meet the Accord's standards. When disengagement is deemed necessary, the Accord seeks to do so responsibly. For example, in the event of a temporary disengagement, brands are expected to temporarily pay workers' salaries. In the event of full disengagement, workers in the factory receive a notification informing them that the factory is unsafe, and that the brands that were sourcing from the factory are expected to make "reasonable efforts" to find alternative employment for the workers. A supplier from which the Accord

has disengaged remains blacklisted for 24 months, after which time the supplier can apply for requalification with the Accord. This provides an incentive for the supplier to improve factory conditions and re-engage.

#### KEY TAKEAWAYS FOR POLICY MAKERS

As part of HRDD, companies should have a responsible exit plan in place and be prepared to use the credible threat of disengagement to increase leverage. Companies must also be prepared to act upon this exit plan and responsibly disengage, particularly in cases of severe impacts that are unlikely to be addressed through continued engagement. Legislation should be clear that a decision to not responsibly disengage from a business relationship that is repeatedly causing severe abuses may increase the company's degree of responsibility for the impact. When companies do disengage, they should contribute to the remediation of past impacts to which they contributed and prevent impacts from the disengagement itself.

### 3.10 – Remedy, especially in cases where companies are contributing to or are directly linked to harm



#### WHAT'S AT STAKE

Is HRDD purely preventative or is remedy an integral step in due diligence? The UNGPs, being a policy framework, treat due diligence as part of the second pillar (corporate responsibility to respect), whereas access to remedy is the third pillar and comprises a joint responsibility between states and companies. The second pillar of the UNGPs does address companies' responsibility to remediate, and notes that actual impacts should be a subject for remediation.<sup>65</sup> The OECD Guidance considers remedy to be a core aspect of the six-step due diligence framework. Indeed, according to the OECD Guidance, enterprises are expected to provide for or cooperate in the remediation of adverse impacts that they cause or contribute to.<sup>66</sup> [see Step 6.1(a) of the RBC DDG here].

The international framework on HRDD includes an obligation for businesses enterprises that have caused harm to remedy the resulting impact, which also includes the provision of an adequate remedy process. However, in cases where companies have contributed to or have been directly linked to human rights violations, the scope of companies' responsibility to remedy impacts is less clear.



#### WHAT CAN GO WRONG IN PRACTICE

In practice, in situations where several companies have contributed to a harm, the norms stipulate that companies must provide for a remedy that is proportionate to their contribution to the harm. Unfortunately, companies frequently disagree among themselves, as well as with the affected rightsholders, on how to apportion and deliver the remedy. Instead, companies will often determine the extent of their own contribution to the harm, and thus the form and extent of the remedy, based on parameters that are convenient for themselves and that minimize their contribution to the remedy. As a result, these arrangements are often insufficient and unlikely to result in the best outcome for impacted communities and workers.

Despite the positive role companies that are directly linked to human rights violations can and should play in encouraging and enabling remedy, such companies frequently point to the fact that the international framework on HRDD only stipulates a duty to provide for or cooperate in remedy for companies that either caused harm to human rights or contributed to adverse business activities and use this to wash their hands of the situation without making any efforts in relation to remedy.



#### GETTING IT RIGHT

Notwithstanding some subtle differences within the principles of the HRDD framework, it is clear that all companies which have contributed to a harm should provide for or cooperate in remediation through legitimate processes. The contributing company should provide for remediation that is proportional to its responsibility.<sup>67</sup> However, to address the issue of companies using different interpretations to apportion their responsibility, it is important for all companies involved to agree on the same parameters of the remedy, as well as on how to apportion their individual contributions. In addition to providing for remedy, the company must equally use its leverage to prevent or mitigate any remaining impact.

When it comes to the role of "directly linked" companies in remedy, the normative framework makes it clear that the companies can and should play a role, both in remediation as well as other actions, such as seeking to mitigate the impact and prevent it from happening again. The UNGPs make clear that appropriate action will vary according to the extent of the leverage that the company has in addressing the adverse impact.<sup>68</sup> In these contexts, companies can and should use their leverage to compel the business relationship to initiate a remedy-oriented process, especially as this could lead to future prevention or mitigation.<sup>69</sup> Combined with the expectation that companies take proactive measures to prevent further impacts caused by business relationships, or ensure non-recurrence, companies cannot reasonably justify a lack of engagement regarding a supplier's failure to remedy adverse impacts. In addition, when using leverage does not result in the supplier remediating the problem, the directly linked company should consider disengaging responsibly or risk moving into the "contributing" category and thus itself becoming responsible for contributing to remediating the ongoing negative impacts (see also section 2.2).

#### KEY TAKEAWAYS FOR POLICY MAKERS

**Legislators should ensure that companies have an obligation to engage with rightsholders in a legitimate process with the aim of providing remedy. There are different expectations for companies depending on their relation to the harm. Legislators should ensure that one of the pathways to remedy is liability. In cases where several companies are involved, legislators should ensure the possibility of joint liability among several parties. Furthermore, rightsholders should also have access to collective remediation instruments.**

### 3.11 – State obligations and business responsibility: separate, but interconnected



#### WHAT'S AT STAKE

While the UNGPs set out a policy framework to clarify the respective roles and responsibilities of states and companies, in practice these can nonetheless be confused, shifted onto the other party, and incorrectly attributed. Such confusion may even lead to new and additional impacts on rightsholders.



#### WHAT CAN GO WRONG IN PRACTICE

Despite the fact that the international framework clearly separates the roles of states and companies, companies have frequently misunderstood their responsibilities with respect to those of states. This happens in at least the three following ways:<sup>70</sup>

First, some companies have shifted their own responsibility onto states by invoking a state's role as primary duty bearer. In this manner, the lack of state action is used to justify the company's own inaction.

Secondly, companies have evaded their responsibilities by blindly following a state's laws or instructions that pose a risk of causing or contributing to human rights violations. Although this relation between the corporate duty to respect and the limits posed by a state can be subtle, it sometimes is more explicit as in the case of China, for example, where national law prohibits workers from forming or joining union federations of their own choosing, as well as countries like the United States and Australia, which have openly violated indigenous peoples' right to free, prior and informed consent (FPIC). Both of these human rights are recognized by the UNGPs and OECD Guidelines.

Thirdly, companies have taken on the role of states in guaranteeing human rights. An example is the practice where companies conduct the FPIC process in order to move a project forward.<sup>71</sup> In situations like these, the FPIC processes are often confused with the "consultation" part of HRDD, even though FPIC and HRDD are separate obligations attributed to separate actors. Whereas HRDD is an expectation and (increasingly) an obligation for companies, FPIC is a clearly defined right of indigenous peoples and guaranteed by states under international law and, in some cases, national law.<sup>72</sup>



#### GETTING IT RIGHT

The UNGPs and OECD Guidelines clearly specify that the obligations resting on states and companies run parallel to, yet exist independently of, each other. This parallelism means that in cases where a company identifies gaps in a state's fulfilment of its human rights obligations in its operations or business relationships and thus

sees a risk of violation of these rights, the company must encourage the state to fulfil its obligations, rather than allow itself to become complicit in the violation or try to implement the state obligations itself. In fact, the UNGPs clear up any misunderstandings concerning the question of the relationship between states and companies: "The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights".<sup>73</sup>

With regard to companies blindly following and hiding behind the laws or instructions of a government (e.g., as a contractor), the OECD Guidelines helpfully clarify that companies have an obligation to obey domestic laws, but when these laws fall below internationally recognized human rights standards, companies should "seek ways to honour such [higher] principles and standards to the fullest extent".<sup>74</sup> The UNGPs echo this: "In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements; (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate".<sup>75</sup>

In situations where companies veer into the government territory and role of guaranteeing human rights, companies who identify gaps in a state's human rights protections (such as when FPIC is not performed up to standard) and thus identify a risk that human rights violations may occur, should use their leverage to encourage the state to eliminate such risks. Companies should encourage and support the state in the execution of its obligations to guarantee FPIC. At the same time, companies must abstain from actions that could endanger the realization of this right.

#### KEY TAKEAWAYS FOR POLICYMAKERS

**Companies should respect, encourage and support the state in executing its obligations. Policymakers should make sure that in cases of conflicting norms, companies are instructed try to find ways to respect both laws and higher human rights standards. Companies cannot take over the state duties to protect and fulfil human rights but should abstain from actions that could endanger the realization of rights even if such risks are the result of state action.**

### 3.12 – The role of auditing and certification in HRDD



#### WHAT'S AT STAKE

The UNGPs and OECD Guidelines expect companies to carry out risk-based, proportionate due diligence across their operations and value chains. In practice, companies often outsource the implementation of this obligation to third-party operators, such as social audit and certification schemes. What are the limitations of such an externalization of tasks and responsibilities in HRDD?



#### WHAT CAN GO WRONG IN PRACTICE

The audit and certification industry has gradually emerged in recent decades as a consequence of public pressure on companies to improve their human rights performance.<sup>76</sup> Auditors and certifiers are tasked by companies to identify and address their labor rights and human rights risks for them. Increasingly, they also set standards and monitor companies' risk management practices.

Yet, the standards and processes of auditor and certification companies have often not (yet) been brought into alignment with the normative framework, concepts, and expectations of HRDD. They continue to identify impacts and risks through standardized systems of audits and certification. Often, they can only insufficiently register human rights violations and risks at the level of the factory floor, project, or farm. In particular, impacts related to power relations (e.g., gender-based violence, the right to join or form a union, or forced labor) are rarely detected, as these are risks where remedial action might be expensive (e.g., fire and building safety).<sup>77</sup>

Most problematically, social audits frequently neglect to examine how a company is “involved with the actual or potential adverse impacts identified in order to determine the appropriate responses,” as is expected by the normative framework.<sup>78</sup> In particular, issues such as price pressures or other harmful business practices of third parties (including the company who commissioned the audit) are obscured.



#### GETTING IT RIGHT

The international normative framework for HRDD expects companies to have their own strategies and systems in place to ensure respect for human rights. The framework does not require companies to rely on third-party supplier audits,<sup>79</sup> and companies remain responsible for the quality of process.

First and foremost, due diligence (including the supplier assessments) should be risk-based. The OECD Guidance clearly states that the efforts should be commensurate to the severity and likelihood of the adverse impact.<sup>80</sup> Thus, the

higher the risk, the more extensive the required due diligence should be (see also section 2.5).

Secondly, the OECD Due Diligence Guidance specifies that when audit companies are performing these assessments, both their nature and methodology should correspond to the human rights risks that are to be evaluated. This effectively cautions against a one-size-fits-all approach to assessing specific impacts, even at the facility level. In order to ensure this alignment, the OECD Guidance includes a control mechanism, namely that if actual findings do not correspond to the risks that were expected, this should not lead to the conclusion that there are no impacts. Instead, the question must be raised as to whether the methodology is appropriate or should be adapted.

Given the notorious under-reporting, under-detecting and under-remediating of human rights risks and impacts, social audits and certification regimes are not suited to be the exclusive basis of (parts of) the due diligence strategy. It is therefore important to acknowledge the difference in what (social) audits and certifications can and cannot concretely deliver. A company should thus not solely rely on information provided by specific audits and certificates, but should complement these with their own risk identification actions, such as interviews, workshops, grievance mechanisms, and engagement with civil society organizations and other stakeholders. Indeed, this is an essential part of “meaningful” stakeholder engagement discussed in section 3.8 above. Audit and certification information should be seen merely as one source of information and should be integrated and triangulated with other assessments to ensure that companies grasp the actual and most salient impacts through their HRDD processes.

#### KEY TAKEAWAYS FOR POLICY MAKERS

**Legislators should clarify that the actual duty of due diligence and the responsibility to implement this duty lies and remains with the company itself. Legislation should state that audits and certification are not to be considered sufficient proof of human rights due diligence.<sup>81</sup> Even though a company may in practice seek external assistance from social auditors or compliance firms or initiatives to carry out certain parts of the due diligence process, legislators should ensure the buck stops with the company itself. HRDD is by its very nature context-specific and tailored to an individual company.**

## 4

# Conclusion

As the momentum for mandatory due diligence legislation gathers steam around the world, we have now passed the 10th anniversary of the unanimous adoption of the UNGPs and revised OECD MNE Guidelines, the central pillars of the ‘human rights due diligence’ framework. In the past decade, a practice of HRDD has emerged around this widely recognized framework. The current authoritative framework for HRDD should be the starting point and basis for mandatory HRDD legislation and corporate accountability more broadly. Taking the standards as a starting point, integrating the due diligence framework as well as the core characteristics of due diligence set out in the framework provides significant advantages during a legislative process. Through this framework, a number of key principles, concepts, and practical steps for implementing due diligence and ensuring responsible business conduct have already been tested and widely endorsed by governments. Legislators do not need to reinvent the wheel.

At the same time, legislators need to be mindful that the consensual adoption of the normative framework was to a certain extent made possible by leaving some key elements vague and open to multiple interpretations. As a result, on some of these contentious issues states, business and civil society offer differing interpretations. However, when making HRDD mandatory, these cannot remain vague.

This briefing has sought to inform policymakers and legislators about challenges to consider in current and future efforts to legislate in the area of human rights due diligence. All the concepts and elements of due diligence discussed in this paper are found in the UNGPs, OECD Guidelines, and guidance documents. While this normative framework provides a solid starting base, some of the key concepts and principles contained in the framework are too often misunderstood, misinterpreted, or incorrectly implemented by businesses in practice. Identifying and understanding these challenges is crucial, and lawmakers may need to enter into explicit detail about the correct interpretation or meaning of certain concepts in order to ensure due diligence is carried out effectively.

More concretely, any mandatory HRDD legislation should define HRDD as a standard of conduct in which results matter (see section 2.1). Businesses must not be allowed to freely choose on which human rights risks they want to focus their due diligence, but their efforts should instead focus on the most salient human rights violations and risks. This prioritization according to severity does however not mean that only the riskiest business activity must be examined and improved. On the contrary, the prioritization should merely be understood as a way for a business to sequence its attempts to address all of its impacts and risks, including those in the value chain (section 2.5).

Beyond misunderstanding the role and process of prioritization, another frequent problem that arises in the implementation of due diligence is that businesses have sought to evade their responsibility to conduct HRDD by overly stretching the concept of “directly linked” in order to minimize the category of and avoid ever being considered as “contributing” to an impact. Legislators must thus make clear that the standard of conduct requires action and mea-

asurable results in situations where a business is “directly linked” to abuse, as well as when it is causing and contributing to impacts. In addition, the connection between a business and a human rights risk is subject to constant change, and company that is initially “directly linked” to an impact may, over time and depending on its own actions or omissions in addressing the impact, “shift” into a situation of “contributing to” that impact (section 2.2). Furthermore, the bar between “directly linked” and “not linked” to an impact should not be confused with the existence of a legal relationship, and it should be clear that companies cannot ignore impacts caused by a business partner just because those impacts are not directly linked to the company’s products. Rather, HRDD should focus attention holistically on the quality of the business partner’s own due diligence (section 2.3).

Recognizing the risk-based nature of HRDD, legislators and policymakers should take the opportunity to counteract businesses’ tendencies to neglect the preventive dimension of HRDD and skip straight to mitigation of human rights harms (section 2.6). Once harm has occurred, companies in all categories of relationship to the harm – cause, contribute, and directly linked – have obligations and responsibilities with regard to remediation, whether it be to remedy the impact directly, contribute to remediation, or use leverage to encourage other parties to remediate (section 2.9).

In the process of preventing, mitigating, and remedying human rights risks and violations, the UNGPs and OECD Guidelines specify that businesses must communicate their goals and progress in addressing the impacts. Any new legislation must thus ensure that businesses do not restrict their own possibilities of communication by including non-disclosure clauses in contracts. In addition, the obliga-

tion to conduct HRDD and adequately communicate about the process must not be confused with social auditing and reporting obligations (sections 2.4 and 2.11). Whereas the latter is often a box-ticking exercise, the former involves meaningful engagement with the affected workers and communities, thereby shifting the attention away from companies’ financial and reputational risks to peoples’ human rights that are at risk of being harmed by a business relation (sections 2.7 and 2.11).

Finally, two further issues warrant special attention of policy makers. If all efforts to improve the human rights situation, businesses should disengage or divest responsibly from the relationship or situation. Responsible disengagement means that companies must remediate all impacts they have caused or to which they have contributed to prior to disengaging, and that they must consider the negative impacts of the disengagement itself and seek to prevent, mitigate and remedy them (section 2.8). Finally, all these business obligations run in parallel to the state’s duty to protect human rights and should neither hide behind, nor replace or supersede this duty (section 2.10).

Providing additional detail and clarification of certain concepts will be necessary to ensure that the legislative turn of the international norms realizes their full potential for having a positive impact on company practice and subsequently the situation on the ground for workers and communities. Thus, when translating the soft-law expectations into hard-law obligations for companies, it is important to preserve the original intent and spirit of these standards, keeping in mind that the ultimate objective is to achieve better outcomes for people in terms of increased respect for human rights and greater access to justice and remedy.



Garment workers in a factory in Cambodia during Covid-19 crisis. | ©Khem Savonara/Khmer Times, Cambodia

## 5

## Glossary

CSOs	Civil Society Organisations
HRDD	Human Rights Due Diligence
mHRDD	Mandatory Human Rights Due Diligence
OECD	Organisation for Economic Co-operation and Development
OECD Garment Guidance	OECD Due Diligence Guidance for Responsible Supply Chains in the Garment & Footwear Sector
OECD MNE Guidelines	OECD Guidelines for Multinational Enterprises
OECD RBC Guidance	OECD Due Diligence Guidance for Responsible Business Conduct
OECD Stakeholder Engagement Guidance	OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector
Rightsholder	Any individual or group with collectively recognized rights whose individual or collective human rights are (at risk of) being impacted by corporate activity
Stakeholder	Any individual or group that has a stake or interest in a particular company's due diligence (in relation to a specific issue/impact or more generally)
UNGPs	United Nations Guiding Principles on Business and Human Rights



# Endnotes

- 1 The UN Guiding Principles on Business and Human Rights were unanimously adopted in 2011 by the UN Human Rights Council. This policy framework was developed by the UN Special Rapporteur on Business and Human Rights, the late John Ruggie. The policy framework clarifies the role of both states and companies when regarding to human rights. States remained the prime duty bearer for human rights, while companies have a responsibility to respect. The framework also includes a separate pillar on Remedy, as here both governments and companies have responsibilities. In response, the OECD adapted its Guidelines for Multinational Enterprises which is a standard of conduct for companies in relation to a number of issues including Human Rights. Later, as part of its work on conflict minerals, the OECD developed specific guidance to further elaborate expectations towards companies active in the minerals sector. Such sectoral Guidances were equally developed for other sectors culminating in a horizontal Due Diligence Guidance for Responsible Business Conduct.
- 2 The Guidances include Due Diligence for Responsible Corporate Lending and Securities Underwriting (2019), Due Diligence Guidance for Responsible Business Conduct (2018), Due diligence guidance on stakeholder engagement in extractive industries (2017), OECD Due Diligence Guidance for Responsible Supply Chains in the Garment & Footwear Sector (2017), Practical actions for companies to identify and address the worst forms of child labour in mineral supply chains (2017), OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011).
- 3 OECD, 2018, Due Diligence Guidance for Responsible Business Conduct, p.21.
- 4 To date, these include the loi n° 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre in France, the Gesetz über unternehmerische Sorgfaltspflichten in Lieferketten in Germany and the Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold in Norway.
- 5 The authors note, and encourage legislating a standard of conduct for companies on Human Rights and Environmental Due Diligence, as is envisaged in several jurisdictions. However, although there are equally challenges related to environment, especially using environmental impacts beyond the International Bill of Human Rights as the French law does. Without diminishing its importance, it goes beyond the scope of this publication.
- 6 Quijano G and Lopez C (2021) Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword? Business and Human Rights Journal, Vol 6 , Issue 2 , June 2021 , pp. 241 – 254. DOI: <https://doi.org/10.1017/bhj.2021.7>.
- 7 UN (2011) UN Guiding Principles on Business and Human Rights, Principle 17, including commentary.
- 8 See for example Garcia Esteban A and Patz C (2021) Suing Goliath. Available at: <https://corporatejustice.org/wp-content/uploads/2021/09/Suing-Goliath-FINAL.pdf>.
- 9 UN (2011) UN Guiding Principles on Business and Human Rights, Principle 15 and OECD (2011) OECD Guidelines on Multinational Enterprises, Chapter IV.
- 10 UN (2011) UN Guiding Principles on Business and Human Rights, Principle 15 and OECD (2011) OECD Guidelines on Multinational Enterprises, Chapter IV.
- 11 In view of our previous example, this would amount to exonerating a driver from liability for speeding, traffic accidents and driving through a red light, when a driver fastened his or her seatbelt and checked the mirrors.
- 12 See for example Ruggie J, Sherman J (2017) The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale. European Journal of International Law, vol 28, Issue 3, pp. 921-928. DOI: 10.1093/ejil/chx047; Bonnitcha J and McCorquodale (2017) The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman III. European Journal of International Law, Vol. 28, Issue 3 pp. 929-933. DOI: 10.1093/ejil/chx048.
- 13 This is part of the "dynamic" nature of due diligence that aims at "continuous improvement" in addressing specific impacts. See OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p.17.
- 14 OECD (2018) Due Diligence Guidance for Responsible Business Conduct, p.72. SOMO added a "remedy layer" at the bottom of the figure to clarify responsibilities related to remedy in the various relationship scenarios.
- 15 This argument was made by Adidas to the German NCP in a recent OECD Guidelines case. OECD Watch case database, "CCC et al vs Adidas" Available at: [https://complaints.oecdwatch.org/cases/Case\\_499](https://complaints.oecdwatch.org/cases/Case_499).
- 16 In a position paper from 2017, the Thun Group of Banks made the argument that banks can never be considered to be causing or contributing to the adverse impacts that may arise from their clients' operations. In the meantime, the Thun group paper was rescinded and revised to be less categorical on this point. In addition, some banks have actually recognized situations in which they could be considered to be contributing. The original Thun Group paper can be found here: [www.business-human-rights.org/sites/default/files/documents/2017\\_01\\_Thun%20Group%20discussion%20paper.pdf](http://www.business-human-rights.org/sites/default/files/documents/2017_01_Thun%20Group%20discussion%20paper.pdf).
- 17 UNOHCHR (2017) OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector. p. 5-6; OECD (2011) OECD Guidelines for Multinational Enterprises, p. OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 71.
- 18 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 70.
- 19 UNOHCHR (2017) OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector.
- 20 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p.70-71.
- 21 UNOHCHR (2017) OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector.
- 22 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 70.
- 23 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 70.
- 24 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 71; OECD (2019) Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises, 2019, p. 44.
- 25 OECD (2019) Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises, 2019, p. 44.

- menting the OECD Guidelines for Multinational Enterprises, 2019, p. 45.
- 26 OECD (2019) Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises, 2019, p. 46.
- 27 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 71.
- 28 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, pp. 70–71; OHCHR (2017) UNOHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector. pp. 6–7.
- 29 UN (2011) UN Guiding Principles on Business and Human Rights, Principle 13. See also Principle 17.
- 30 See, for example, the Italtel case rejected by the Italian NCP, [www.oecdwatch.org/complaint/fidh-jfi-and-redress-vs-italtel/](http://www.oecdwatch.org/complaint/fidh-jfi-and-redress-vs-italtel/). The case is described in detail in the report, Under a Watchful Eye, [www.somo.nl/under-a-watchful-eye](http://www.somo.nl/under-a-watchful-eye).
- 31 UN (2011) UN Guiding Principles on Business and Human Rights, Principle 18. Principle 19 then specifies what action business are expected to take as a result of the findings depending on their relationship to the risk.
- 32 UN OHCHR (2013) Request from the Chair of the OECD Working Party on Responsible Business Conduct, paragraph 14.
- 33 O' Connor C, Labowitz S (2017) Putting the "S" in ESG: Measuring Human Rights Performance for Investors. NYU Stern Center for Business and Human Rights. Available at: <https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/58cad912e58c6274180b58b6/1489688854754/Metrics-Report-final-1.pdf>.
- 34 It is worth noting many companies are the architect of the limits they themselves face. Companies negotiate themselves or sometimes even impose non-disclosure clauses on business partners, making it a contract violation for them to disclose specific relevant material such as their suppliers' identities. A notable example of such a non-disclosure clause is to be found in the social audit sector, which is often proffered as a key strategy to identify risks and impacts, while at the same time effectively precluding the different parties from disclosing the social auditing report. See also chapter 2.12 on social auditing.
- 35 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 19.
- 36 Guidance suggests that this information includes "RBC policies, information on measures taken to embed RBC into policies and management systems, the enterprise's identified areas of significant risks, the significant adverse impacts or risks identified, prioritised and assessed, as well as the prioritisation criteria, the actions taken to prevent or mitigate those risks, including where possible estimated timelines and benchmarks for improvement and their outcomes, measures to track implementation and results and the enterprise's provision of or co-operation in any remediation". OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 33.
- 37 UNGP 21 clarifies that that information provided in 'accounting for' how impacts are addressed should be accessible and sufficient do demonstrate the adequacy of the actions.
- 38 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 19.
- 39 J. Wilde-Ramsing and G. Quijano (2018) The OECD Due Diligence Guidance for Responsible Business Conduct: A briefing for civil society organisations on the strongest elements for use in advocacy, June 2018, OECD Watch, SOMO and Amnesty International; See also OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, Step 4– Step 5: "Concrete, relevant, measurable risk reporting on specific risks, impacts, actions and outcomes is both integral to, and an effective marker of, effective due diligence. If done well, it provides a crucial tool for investors, beneficiaries and other stakeholders to understand how RBC commitments are put into practice; track the effectiveness of measures adopted; and monitor progress in relation to specific impacts/risks and outcomes. Setting targets, as well as tracking public reporting on due diligence processes, findings and plans, is part of the due diligence process itself, and should be integrated accordingly".
- 40 Several companies have aligned with minimum standard for supply chain disclosure established by the Transparency Pledge: [transparencypledge.org](http://transparencypledge.org). The Open Apparel Registry provides an accessible and widely used database on supply chain links in the sector: [openapparel.org](http://openapparel.org).
- 41 In the garment sector, for example, this practice is now relatively widespread amongst brands and retailers, to the extent that brands and retailers use the publicly available information to normalize, validate and improve their own data. While most clothing brands and retailers limit themselves to publishing only general information on first tier suppliers, several other retailers responded by acknowledging the additional demands of civil society and already have gone beyond the requirements by both tracing and disclosing facilities beyond the CMT phase. Other brands have decided to go into depth and disclose detailed and disaggregated information, such as wage levels at individual workplaces. It is therefore important that legislators mandate the accurate disclosure of supply chain information, as well as release relevant information held by the authorities themselves (e.g., customs data).
- 42 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 17.
- 43 UN (2011) UN Guiding Principles on Business and Human Rights, Principle 24 commentary. See also UNOHCHR (2012) The corporate responsibility to respect Human Rights An Interpretive Guide Q87-Q89.
- 44 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct pp 30–31, also see Q37 and Q36.
- 45 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct Step 3.2.
- 46 The authoritative framework states that if insufficient leverage is held, companies need to actively seek to increase it. This is in contrast to earlier guidance such as the Global Compact, which relied on the concept of "sphere of influence," which qualified the scope of all 10 Global Compact principles. Although "sphere of influence" is not defined in detail by international human rights standards, it tends to include the individuals to whom the company has a certain political, contractual, economic or geographic proximity.
- 47 See also the section on "Companies have a role in enabling partners to comply with their responsibilities" in J. Wilde-Ramsing and G. Quijano (2018) The OECD Due Diligence Guidance for Responsible Business Conduct: A briefing for civil society organisations on the strongest elements for use in advocacy, June 2018, SOMO, OECD Watch, and Amnesty International.
- 48 Wilde-Ramsing J and Quijano G (2018) The OECD Due Diligence Guidance for Responsible Business Conduct: A briefing for civil society organizations on the strongest elements for use in advocacy", June 2018, SOMO, OECD Watch, and Amnesty International.
- 49 See ILO (2017) Purchasing practices and working conditions in global supply chains: Global Survey results. For example, it highlighted that generally inaccurate technical specifications were associated with a wage reduction of 22%.
- 50 OECD (2018) OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. pp 49–50.
- 51 The suggested assessment may include engaging with a supplier to understand if and how its purchasing practices may be contributing to harm, through tracking indicators or root cause analysis. Control measures are measures which create the expectation of action, regardless of whether a company has identified specific contributions to harm, as well as the expectation to develop pricing models which account for the cost of wages etc., and clear ways of working – i.e., on order deadlines etc. Red-flag systems provide procedures to follow in case where purchasing practices could contribute to harm. See OECD (2018) OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. pp 73–74.
- 52 The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector indeed highlights business models and sourcing models as risk factors key to identifying risk and relationship to risk. Certain business models may mean that a company is more exposed to a wider range of risks of harm in their supply chain. Examples of mitigating business model factors/actions in garment could be reducing number of seasons, product lines, or introducing greater circularity (depending on the risk identified).
- 53 See for example Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.
- 54 UN (2011) UN Guiding Principles on Business and Human Rights, Principle 14.
- 55 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 16–18; Section 1.2 (f)); and Question 6 of the Annex.
- 56 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 23.
- 57 OECD (2018) OECD Due Diligence Guidance for Responsible Business Conduct, p. 18. See also Schone Kleren Kampagne (2021) Why all companies need to be included in due diligence and corporate accountability legislation. Available at: [www.somo.nl/](http://www.somo.nl/)

- [wp-content/uploads/2021/07/SKC-SME-report-2021-1.pdf](https://www.somo.nl/wp-content/uploads/2021/07/SKC-SME-report-2021-1.pdf).
- 58 In the context of actual or potential impacts on human rights, the (potentially) affected stakeholders (or rightsholders) hold specific importance to the extent that UN Guiding Principle 18 places (potentially) affected stakeholders at the forefront and the UNGPs constantly refer to them. See also UN-OHCHR (2012) *The corporate responsibility to respect Human Rights An Interpretive Guide*, p. 43 and box 5 in particular.
- 59 In order to allow for a meaningful engagement, companies need to “identify and seek to remove potential barriers to stakeholder engagement (e.g. language, culture, gender and power imbalances, divisions within the community, etc.) ...” OECD (2018) *OECD Due Diligence Guidance for Responsible Business Conduct*, p. 51.
- 60 In consequence also grievance mechanisms must be equally accessible to all affected persons regardless of gender, religion, social status etc., and take their specific vulnerabilities and needs for protection against retaliation into account.
- 61 See also Wilde-Ramsing J and Quijano G (2018) *The OECD Due Diligence Guidance for Responsible Business Conduct: A briefing for civil society organisations on the strongest elements for use in advocacy*, OECD Watch and Amnesty International.
- 62 SOMO (2016) *Should I stay or should I go?* Discussion paper, April 2016. Available at: [www.somo.nl/should-i-stay-or-should-i-go-2](http://www.somo.nl/should-i-stay-or-should-i-go-2). SOMO, ECCHR and PAX (2020) *Responsible disengagement in the time of corona*. Discussion paper, April 2021. Available at: [www.somo.nl/responsible-disengagement-in-the-time-of-corona](http://www.somo.nl/responsible-disengagement-in-the-time-of-corona) and PAX (2021) *Responsible disengagement from coal as part of a just transition*. Available at: [www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition](http://www.somo.nl/responsible-disengagement-from-coal-as-part-of-a-just-transition).
- 63 Indeed, such a decision is considered like any other business decision, so all other considerations relating human rights due diligence enter again in play, like e.g. taking into account how this decision might impact specific groups, including groups who might be more vulnerable.
- 64 *Accord on Building and Fire Safety in Bangladesh*, <https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf>.
- 65 UN (2011) *UN Guiding Principles on Business and Human Rights*, Principle 22. See also the commentary to Guiding Principle 19 and UNOHCHR (2012) *The corporate responsibility to respect Human Rights An Interpretive Guide Q32*.
- 66 OECD (2018) *OECD Due Diligence Guidance for Responsible Business Conduct Step 6.1*.
- 67 UNOHCHR (2017) *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector*. p. 12.
- 68 UN (2011) *UN Guiding Principles on Business and Human Rights*, Principle 19 and commentary. See also UNOHCHR (2017) *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector*. p. 13.
- 69 The international framework does call for leverage in order to prevent or mitigate adverse impacts (see UNGP 19) and strictly speaking they do not call for leverage to be used to compel third parties to provide remedy. However, in practice, the remediation of existing impacts is often intrinsically linked with future prevention and mitigation.
- 70 Specifically of interest is the complaint that OECD Watch filed against the Australian NCP/government in which the OECD Investment Committee stated that it is important to “carefully distinguish the enterprise responsibility to respect human rights and the due diligence requirements that accompany that, from the broader State duty to protect human rights.” As such the problem lies not so much in the normative framework as such, but more in how this gets interpreted and put into practice.
- 71 FPIC This is a specific right of Indigenous Peoples and Local Communities, such as rural and forest dwelling communities (including afro-descendant or peasant communities). This right is intimately linked to the right to self-determination and the principles of non-discrimination. Indigenous Peoples and Local Communities can either grant, deny or later withdraw consent in any decision that affects their lives in a broader sense, referred to as “development” – including if it affects their ancestral lands and resources, as well as their spiritual or cultural traditions.
- 72 ECCHR (2019) *Civil society space in renewable energy projects. A case study of the Unión Hidalgo community in Mexico*. Available at: [www.ecchr.eu/fileadmin/Publikationen/ECCHR\\_PP\\_WINDPARK.pdf](http://www.ecchr.eu/fileadmin/Publikationen/ECCHR_PP_WINDPARK.pdf).
- 73 UN (2011) *UN Guiding Principles on Business and Human Rights*, Principle 11 and commentary.
- 74 OECD (2011) *Guidelines on Multinational Enterprises Chapter 1 paragraph 2*.
- 75 UN (2011) *UN Guiding Principles on Business and Human Rights*, Principle 23 and commentary.
- 76 The activities, scope and focus of different initiatives vary widely, as do their approaches to due diligence.
- 77 See for a more detailed analysis: Clean Clothes Campaign (2019) *Fig Leaf for Fashion. How social auditing protects brands and fails workers*. Available at: <https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view>; MSI Integrity (2020) *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, Available at: [www.msi-integrity.org/wp-content/uploads/2020/07/MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](http://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf); LeBaron G Lister J and Dauvergne D (2017) *Governing Global Supply Chain Sustainability through the Ethical Audit Regime*. *Globalizations*, Volume 14, no. 6, pp. 958–975. <https://doi.org/10.1080/14747731.2017.1304008>; Locke R (2013) *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*. New York, Cambridge University Press; Clean Clothes Campaign (2005) *Looking for a quick fix: how weak social auditing is keeping workers in sweatshops*. Available at: <https://cleanclothes.org/file-repository/resources-publications-05-quick-fix.pdf/view>.
- 78 The OECD Due Diligence Guidance for Responsible Business Conduct clearly states that identification means to “[s]pecifically, assess whether the enterprise: caused (or would cause) the adverse impact; or contributed (or would contribute) to the adverse impact; or whether the adverse impact is (or would be) directly linked to its operations, products or services by a business relationship”. OECD (2018) *OECD Due Diligence Guidance for Responsible Business Conduct*, p. 27.
- 79 For example, the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector expects to undertake a scoping exercise to do a high-level mapping of supply/value chains and identify where most significant impacts lie. They then carry out deeper-diver risk assessments of prioritized suppliers and business relations. In the garment sector, which is a sector with significant risk, the OECD explicitly recommends “supplier assessments for the identification of each risk”.
- 80 The OECD Due Diligence Guidance for Responsible Business Conduct, p. 17.
- 81 See also joint Open letter to EU policymakers on social audit failures by 15 CSOs, September 2021. Available at [https://cleanclothes.org/file-repository/social-auditing-open-letter-to-eu-policymakers\\_final\\_130921.pdf/view](https://cleanclothes.org/file-repository/social-auditing-open-letter-to-eu-policymakers_final_130921.pdf/view).

## Clean Clothes Campaign

**CLEAN CLOTHES CAMPAIGN (CCC)** is a global network dedicated to improving working conditions and empowering workers in the global garment and sportswear industries. CCC was founded in the Netherlands in 1989 as Schone Kleren Campagne. Today it brings together over 230 organisations including: trade unions, women's and feminist groups, homebased workers' organisations, consumer advocacy NGOs and many others, in garment-producing as well as consumer market countries. CCC educates and mobilises consumers, lobbies companies and governments, and offers direct solidarity support to workers as they fight for their rights.

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