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Mandatory Human Rights Due Diligence: Legal developments and practical implications for Asia

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22 March 2023

This presentation

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1. Legal basis for human rights due diligence: United Nations Guiding Principles on Business and Human Rights 2011 ***(UNGPs)***

2. What is Due Diligence?

3. Domestic, extraterritorial mandatory Human Rights Due Diligence regulations ***(HRDD)***
   a. UK Modern Slavery Act 2015
   b. French Loi de Vigilance 2017
   c. Norwegian Transparency Act 2022
   d. German Supply Chains Act 2023
   e. Proposed EU Commission Directive on HRDD/Proposed EU Parliamentary Legislation on HRDD
   f. Summary

4. Practical implications for Asia
5. Doctrinal implications for Asia

UNGPs 2011: three pillars

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Pillar 1: The State duty to protect human rights against abuse by third parties, including business, through appropriate policies, legislation, regulations and adjudication.

Pillar 2: The corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved.

>> UNGP 15, business enterprises should respect human rights and have in place policies and processes appropriate to their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; **(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;** (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Pillar 3: Access to effective remedy, both judicial and non-judicial, for victims of business-related human rights abuse.

What is involved in HRDD?

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UNGP 7: In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

This Principle defines the parameters for human rights due diligence, while Principles 18 through 21 elaborate its essential components.

Practically speaking

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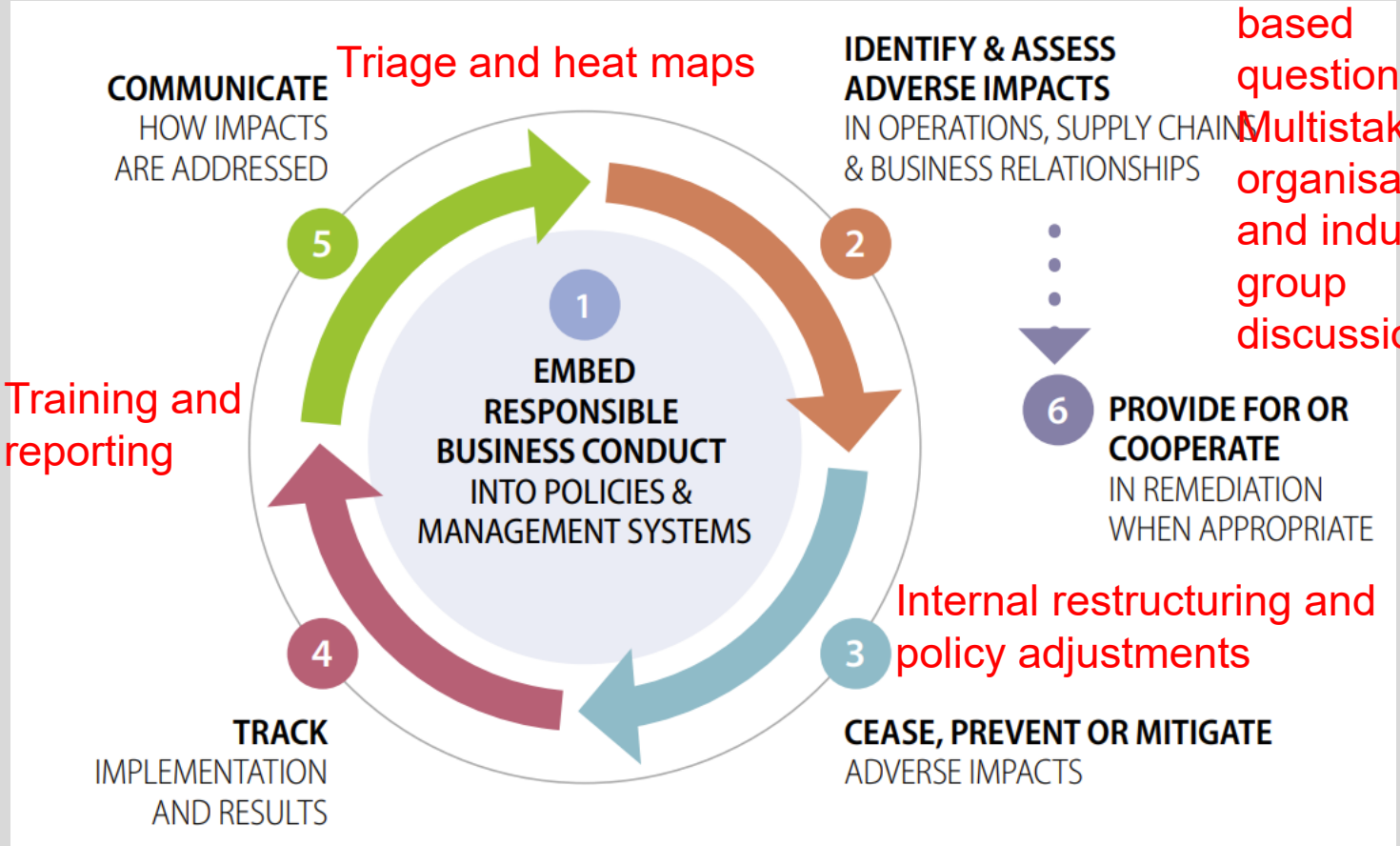
Audits to desk-based questionnaires
Multistakeholder organisations and industry group discussions



Source: OECD Due Diligence Guidance for Responsible Business Conduct

Conceptually challenging

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- Due diligence is a *business* process of investigation conducted by businesses to identify and manage risk. Its purpose is to confirm facts, data and representations involved in commercial transaction to determine the value, price and risk of mergers and acquisitions, often carried out by lawyers.
- It is also well known in tort law. It is the basis for the development of a 'reasonable man' test in English common law, with equivalents in civil jurisdictions. In other words, *the opposite of negligence is diligence*.
- In international human rights law, due diligence is understood to mean that States must take reasonable precaution to prevent, punish, investigate harm.

UK Modern Slavery Act 2015

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- ***Scope:*** Human rights (human trafficking, slavery, enslavement and forced or compulsory labour).

- ***Targeted entities:*** 'commercial organisations' with annual turnover of £36 million or more (including the turnover of any subsidiaries).

- ***Meaning and coverage of supply chain:*** Commercial organisations (a body corporate or partnership (wherever incorporated, which carries on a business, or part of a business, in any part of the United Kingdom), that supplies goods or services)

- ***Legal obligation:*** The requirement is to publish a statement setting out the steps taken by the commercial organisation, in the last financial year, to ensure slavery and human trafficking is not taking place in any part of its business or any of its supply chains. The requirement can also be satisfied by a statement that the organisation has taken no such steps.
  - The statement needs to be approved by the board of directors (or equivalent) and signed by a director (or equivalent), then published on the organisation's website. Organisations are required to take any substantive steps to ensure slavery and human trafficking is not occurring in their business or supply chains.

- ***Enforcement:*** Victims of modern slavery are unable to bring any action against the company under s.54 of the Modern Slavery Act. But an injunction is possible to compel publication.

UK Modern Slavery Act 2015

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	Turnover 2019	Employees	Separate Webpage	Separate MSA statemen
Firms covered by Group MSA statement, 2018, 2019				
Babcock Aerospace Limited	£120m	2145	NO	NO
Babcock Airports Limited	£87m	864	NO	NO
Babcock Communications Limited	£39m	300	NO	NO
Babcock Critical Services Limited	£100m	676	NO	NO
Babcock DSG Ltd	£332m	1676	NO	NO
Babcock Integrated Technology Limited	£173m	866	NO	NO
Babcock Land Limited	£250m	1296	NO	NO
Babcock Marine (Clyde) Limited	£161m	1539	NO	NO
Babcock Marine (Rosyth) Limited	£196m		NO	NO
Babcock Marine Training Limited	£55m	887	NO	NO
Babcock Mission Critical Services Offshore Limited	£134m	432	NO	NO
Babcock Mission Critical Services Onshore Limited	£38m	204	NO	NO
Babcock Networks Limited	£73m	518	NO	NO
Babcock Rail Limited	£152m	896	NO	NO
Babcock Support Services Limited	£56m	357	NO	NO
Babcock Training Limited	£79m	1308	NO	NO
Babcock Vehicle Engineering Limited	£30m	326	NO	NO
Cavendish Nuclear Limited	£229m	1225	YES	NO
Devonport Royal Dockyard Limited	£705m	5541	NO	NO
Holdfast Training Services Limited	£108m		YES	YES
Rosyth Royal Dockyard Limited	£103m	1277	NO	NO
Sample of firms not covered by statement				
Babcock Mission Critical Services Limited	£13m	19	NO	NO
Babcock Mission Critical Services Leasing Limited	£7m	-	NO	NO
Babcock Mission Critical Services (Ireland) Limited	£3m	9	NO	NO
Babcock Mission Critical Services UK Limited	£2m	32	NO	NO
Babcock Mission Critical Services TopCo Limited	-	-	NO	NO
Babcock Mission Critical Services Design and Completions Limited	£9m	26	NO	NO
Babcock Integrated Technology (Korea) Ltd	£0.3m	-	NO	NO
Babcock Fire Training (Avonmouth) Limited	£3m	-	NO	NO
Babcock Skills Development and Training Limited	£16.8m	119	NO	NO
Cavendish Nuclear Manufacturing Limited	£5m	45	YES	NO
Babcock Learning and Development Partnership Llp	£15m	219	NO	NO
Babcock Information Analytics andSecurity Limited	£7m	49	NO	NO

Source: FAME database and company websites.

Element/Feature	2016[18]	2017[19]	2018[20]	2019[21]
Length of substantial statement (words)[22]	392	499	733	1,123
Coverage	"Babcock"	"Babcock"	"This statement relates to Babcock international group PLC covering all business regions operating companies and business units throughout the world including wholly owned and partly owned subsidiaries."	As 2018
Clarity over which companies are covered	No. Document has generic Babcock logo only.	No. Document has generic Babcock logo only.	Statement gives detailed list of subsidiary companies covered by the statement.[23]	As 2018.
Discussion/definition of business	"Our business is principally involved in the delivery of highly technical and complex engineering services to pre-dominantly governmental or blue chip customers, about 90% of whom are located in the UK, Europe, North America or Australasia."	"Our business is principally involved in the delivery of highly technical and complex engineering services to pre-dominantly governmental or blue chip customers, about 90% of whom are located in the UK, Europe, North America, Australia or New Zealand."	"Our business is principally involved in the delivery of highly technical and complex engineering services to predominantly governmental or blue chip customers about 90% of whom are located in the UK Europe North America Australia or NZ. Over 50% of our cost base is via third party suppliers and our customers rely on our ability to provide a robust and effective supply chain."	Our business is principally involved in the delivery of critical, complex engineering services which support national defence, save lives and protect communities. We operate in three key markets: Defence; Aerial Emergency Services and Nuclear, from four sectors: Marine, Land, Aviation and Nuclear, providing services to pre-dominantly governmental or blue chip customers, approximately 90% of whom are located in the UK, Europe, North America, Australia or New Zealand.
Discussion/definition of supply chain			"Over 50% of our cost base is via third party suppliers and our customers rely on our ability to provide a robust and effective supply chain".	Expenditure via 3rd party suppliers accounts for a significant part of our turnover and our customers rely on us to provide a robust and effective supply chain. We have over 10,000 suppliers (many of whom are small and medium sized enterprises) and have strategic relationships with around 300 of them. Each sector categorises their suppliers into tiers: • Strategic Suppliers: Supplier collaboration is strategically focused supporting mutual growth • Preferred Suppliers: These are business selected suppliers with whom we have scale trading relationships. Collaboration delivers added value and enhanced performance • Key Suppliers: These are important suppliers who are key to effective business operations • Mandatory Suppliers: These are entities with whom we must transact (for example local or national tax authorities and customer specified suppliers) In addition to sector specific activities we have a Group-led category management approach for common expenditure across Babcock group. These leads provide subject matter expertise into Business Units and Bids and support supplier development activities in the following areas: • Plant & General Engineering • Facilities Management • Corporate Services • IT • Construction
Assertion of virtue	"we are committed to conducting our dealings… with the utmost integrity"	ADDS to existing sentence: "…utmost integrity ***and as such we are committed to supporting the elimination of acts of modern slavery.***" (emphasis added).	As 2017	REWORDS existing sentence: "… utmost integrity and as such we are ***steadfast in our support for the elimination of modern slavery in all its forms.***"

Hsin, L., New, S.J., Pietropaoli, I. and Smit, L. (2021). Accountability, Monitoring and the Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis. London: Modern Slavery Policy and Evidence Centre

New, Steve and Hsin, Lisa, Deconstructing Modern Slavery Statements: A Detailed Analysis of Arcadia Group and Babcock International (January 18, 2021).

What's next for MSA?

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- *Lungowe v Vedanta Resources plc* [2020] AC 1045
- *Okpabi v. Royal Dutch Shell Plc* [2021] UKSC 3

- Amendments subject to second reading in House of Commons
  - Public procurement
  - Mandatory reporting requirements
  - State-run registry

- 'Failure to Prevent' proposal
- 1 July 2021 – call for a new due diligence law with liability.

- Commonwealth influence: Australian Modern Slavery Act 2018 and bilateral trade agreement with New Zealand

- Possible commission on Modern Slavery

French *Loi de Vigilance* 2017

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- ***Scope:*** human social and environmental rights

- ***Targeted entities:*** 5,000 employees at the end of two consecutive fiscal years by the company located in France; 10,000 employees at the end of two consecutive fiscal years by companies with direct or indirect subsidiaries in France or abroad.

- ***Meaning and coverage of supply chain:*** Public limited companies and their direct and indirect subsidiaries, as well as their subcontractors or suppliers.

- ***Legal obligation:*** Implement and update the compliance program on their website. The vigilance plan must include five measures:
  - A risk mapping.
  - Procedures for regular due diligence of subsidiaries, subcontractors or suppliers.
  - Appropriate actions to mitigate risks or prevent serious harm.
  - A mechanism for collecting disclosures on the existence or occurrence of risks.
  - A system for monitoring the measures implemented and assessing their effectiveness

- ***Enforcement:*** The company may be held civilly liable by the competent court. A company may be given formal notice to comply by NGOs. If the company does not comply with this time limit, the competent court may, at the request of any person having an interest in the matter, order, if necessary under penalty, to comply with the regulation. The competent court may also sentence the company to pay damages to the “victim” and order the publication, distribution or posting of the decision.

What's next for *loi de vigilance*

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- "Established business relationships": temporal ("prolonged"), quantitative ("significant") and qualitative ("regular", "stable") factors cumulatively. The judges must apply a "test of legitimate belief" by the terminated party that the relationship would have carried on.
- *Friends of the Earth France; Survie and four Ugandan civil society organisations (AFIEGO - Africa Institute for Energy Governance; CRED - Civic response to Environnement and Development; NAPE - The National Association of Professionnal Environmentalists / FoE Uganda; NAVODA - Navigators of developpement association) v TOTAL S.A.* (February 2023)
- *ClientEarth and Surfrider Foundation Europe v* Danone (filed in January 2023) demand penalty of € 100,000 per day if it delays the issuance of a new plan beyond six months

Norwegian Law on Transparency

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- ***Scope:*** Human rights and labour rights

- ***Targeted entities:*** Medium-sized and large Norwegian companies (exceeding two of these three thresholds: NOK 70m turnover, NOK 35m balance sheet, 50 employees) ▪ Medium-sized and large non-Norwegian companies operating in Norway (exceeding two of these three thresholds: NOK 70m turnover, NOK 35m balance sheet, 50 employees)

- ***Meaning and coverage of supply chain:*** Public limited companies and their direct and indirect subsidiaries, as well as their subcontractors or suppliers.

- ***Legal obligation:*** Publish annual reports on company's website for the purpose of embedding responsible business conduct into the company's policies; identify and assess actual and potential impacts; implement measures to cease, prevent or mitigate impacts based on prioritisations; track implementation and results; communicate with affected stakeholders how impacts are addressed; provide for or co-operate in remediation.

- ***Enforcement:*** Victims are unable to bring any action against the company. Any person can file a request for information about a company's DD before the company. The company must answer within three weeks or two months, depending on the request. The Consumer Agency has the power to monitor compliance and may: request confirmation that a relationship has ceased, issue prohibitions or injunctions and issue fines.

German Supply Chains Act

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- ***Scope:*** Human rights, labour rights, and the environment (narrow list of standards: Stockholm, Minamata and Basel conventions only)

- ***Targeted entities:***Very large German companies (≥3,000 employees in Germany; thereafter from 2024, ≥1,000 employees) ▪ Very large non-German companies operating in Germany (≥3,000 employees in Germany; thereafter from 2024, ≥1,000 employees)

- ***Meaning and coverage of supply chain:*** Own operations and subsidiaries (full obligations). Direct suppliers (full obligations to identify, prevent and mitigate). Indirect suppliers (companies are required to identify, prevent and mitigate impacts only if they obtain "substantiated knowledge" of abuses)

- ***Legal obligation:*** Publish annual report on the company's website and submit to authorities. Obligation is to establish a risk management system; designate a responsible person within the company; perform regular risk analyses; issue a policy statement; lay down preventive measures in own operations, subsidiaries and vis-à-vis direct suppliers; take remedial action; establish a complaints mechanism; implement due diligence obligations with regard to risks at indirect suppliers in case of "substantiated knowledge" of abuses; and document and report

- ***Enforcement:*** No new civil cause of action created (explicitly states that a breach of due diligence obligations does not lead to civil liability) Enables injured parties to bring civil proceedings in Germany. New Public regulator with 65 FTE staff has the power to review the reports, to conduct risk-based inspections at its own initiative or on claims raised by affected parties. Public regulator may order the company to: comply within a specific timeline, issue fines (up to 2% of annual turnover) for failure to conduct DD (incl. exclusion from public procurement)

EU Commission proposal

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- ***Scope:*** Human rights, labour rights, and the environment (narrowly defined)

- ***Targeted entities:*** Very large EU companies (>500 employees and >€150m turnover worldwide). Very large non-EU companies operating in the EU (>€150m turnover in the EU). Large EU companies in high-risk sectors: agriculture, garment and minerals (>250 employees and >€40m turnover worldwide). Large non-EU companies in high-risk sectors: agriculture, garment and minerals (>€40m turnover in the EU)

- ***Meaning and coverage of supply chain:*** Own operations and subsidiaries. 'Established business relationships' (direct and indirect relationships that are or are expected to be lasting, not negligible and not merely ancillary) in all tiers of the global value chain, upstream and downstream. SME clients are excluded from financial institutions' due diligence

- ***Legal obligation:*** Publish annual due diligence strategy (as per EU CSRD) or an annual statement (for companies not subject to EU CSRD). Obligation to integrate due diligence into the company's policy, including a code of conduct; identify potential and actual impacts (only severe impacts for not very large companies in high-risk sectors); prevent impacts via prevention plans, contractual assurances, third-party audits, investments and SME support; the possibility to suspend contractual relations; cease or minimize impacts via corrective plans, contractual assurances, third-party audits, investments and SME support; and establish a complaints mechanism. No climate due diligence requirements, but an obligation to adopt a climate transition plan. Financial institutions' due diligence need only be conducted before providing the service. **Company directors have a duty to put in place and oversee due diligence**

- ***Enforcement:*** No liability for harms caused by indirect partners if the company (1) sought contractual assurances, (2) verified compliance therewith and (3) it was reasonable to expect these measures would be adequate to prevent the harm. EU law is overriding mandatory (applies even if the harm occurred abroad). National supervisory authorities may initiate investigations at their own initiative or following substantiated concerns by third parties. National supervisory authorities may - order the cessation of infringements abstention from repetition, remedial action - impose fines (incl. exclusion from public support).

Practical implications

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These domestic statutes transcend geographical boundaries as they trickle through supply contracts and corporate policies. They are capable of unexpected and unforeseen practical effects.

- Investment and BHR
- Increase in cost and workload
- Audit fatigue
- Data gathering and processing
- Shortening supply chains and divestment
- New industry
- Geopolitical tensions

Legal implications

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These regulations also cut across doctrinal classifications in law, which requires careful analysis and a wide-lens approach.

- Get ready for more cross-border litigation (civil procedure and interlocutory disputes on admissibility, forum and applicable law)
- Contractual modifications
- Administrative law consequences
- Markets and interpretations of due diligence in securities exchange rules and financial regulation
- Corporate criminal liability
- Directors' duties
- Shareholder rights
- Competition law
- Banking secrecy

Be a fox

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- HRDD will have an impact on business in the coming years, on law, and more broadly, the way we do things. It should be at the back of every legal transaction and part of legal and commercial education.
- We will see a continued proliferation of consultants and advisors
- We will start to worry about the data gathered and how that data may be analysed
- Given the patchy nature of domestic statutes, it may be sensible to aim for the most stringent requirement.
- UN Treaty on Business and Human Rights
- Watch this space…