Due Diligence: From Rhetoric to Practice

Monday 16 June 2014
15:30 to 19:45

British Institute of International and Comparative Law,
Charles Clore House,
17 Russell Square,
London WC1B 5JP

Funded by the Economic and Social Research Council as part of a seminar series coordinated by the University of Sheffield
Due Diligence: From Rhetoric to Practice

Panel 1: the Meaning of Due Diligence 1530-1700

- **Michael Addo**, UN Working Group on Business and Human Rights
- **Andrea Shemberg**, LSE and former Legal Adviser to John Ruggie
- **Dr James Harrison**, University of Warwick
- **Mark B Taylor**, Fafo Institute for Applied International Studies, Norway

Refreshment Break 1700-1730
Due Diligence: From Rhetoric to Practice
Implementing the UNGPs

Andrea Shemberg

LSE INVESTMENT & HUMAN RIGHTS PROJECT
THE UN GUIDING PRINCIPLES

"...the first global standard for preventing and addressing the risk of adverse human rights impact linked to business activity" (OHCHR)

"...a new overarching single point of reference for business and human rights...[that] provides a framework for implementing human rights in a business context..." (Thun Group)
In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.
RESEARCH INDICATED THAT:

• **MISMATCH B/T COMMITMENT & INTERNAL SYSTEMS** - EVEN AS COMPANIES WERE TAKING ON CSR AND OTHER HUMAN RIGHTS COMMITMENTS, MOST COMPANIES HAD NO SYSTEM IN PLACE TO UNDERSTAND ITS HUMAN RIGHTS IMPACTS, NOR TO BE ABLE TO DEMONSTRATE TO ITSELF OR OTHERS THAT IT IS RESPECTING RIGHTS

• **DRAWS ON ESTABLISHED PRACTICES/FAMILIAR CONCEPTS**: COMPANIES HAVE LONG CONDUCTED TRANSACTIONAL DUE DILIGENCE AND HAVE DEVELOPED MANAGEMENT SYSTEMS USED TO SATISFY THEMSELVES ABOUT RISK MANAGEMENT IN OTHER DOMAINS (CORRUPTION/ENVIRONMENT/DISCRIMINATION)

• **FACILITATES UPTAKE BY MANY ACTORS**: BASIS FOR A PROCESS STANDARD TO BE ADOPTED BY COMPANIES/ADVOCATES AND GOVERNMENTS - LENDS ITSELF TO REGULATORY REQUIREMENTS (SEE ALSO RESEARCH MARK TAYLOR) *

IDENTIFYING AND ADDRESSING ADVERSE HUMAN RIGHTS IMPACTS INTO A FAMILIAR RISK-BASED FRAME
WHAT IS UNIQUE ABOUT THIS CONCEPT?

• **GOES BEYOND MANAGING MATERIAL RISKS TO THE COMPANY ITSELF:** Regards risks the company’s activities and associated relationships may pose to the rights of individuals and communities.

• **NOT A MATTER OF CALCULATING PROBABILITIES:** Must meaningfully engage rights holders or others who legitimately represent them.

• **NOT A ONE-OFF TASK:** Must be conducted periodically

• **REQUIRES ‘KNOW AND SHOW’:** Must be able to satisfy internally and to external stakeholders that company is preventing, mitigating and remediating impacts.*

• **PREVENTION IS KEY:** Does not stop at understanding/information but actually focuses on prevention and being able to show efforts on prevention

• **RESPONSIBILITY IS BASED ALSO ON LINKAGE:** Responsibility separate from leverage (supply chain – OECD/multi-levels down)
TRANSFORMING A SOCIAL EXPECTATION INTO A RECOGNISED NORM

RISK-BASED DUE DILIGENCE IS FAMILIAR TERRITORY FOR BUSINESS, BUT HRDD EMBEDS ITS CONTENT AND SCOPE IN CLASSIC HUMAN RIGHTS DEFINITIONS ESTABLISHED IN THE REALM OF INTERNATIONAL PUBLIC GOVERNANCE. THIS GIVES OFFICIAL RECOGNITION TO A NORM THAT WAS PREVIOUSLY ONLY IN THE REALM OF SOCIAL EXPECTATIONS.
THE UN GUIDING PRINCIPLES & THE FINANCIAL SECTOR

I. Cause

Possible pressure or other third-party contribution

Enterprise

Third party

Affected person

II. Contribution

Enterprise

Third party

Affected person

III. No contribution, but linkage

Enterprise

Third party

Affected person

Linkage via operations, products or services

Direct Action

Prevent
Mitigate
Remediate

Build and exercise leverage
Due Diligence:
From Rhetoric to Practice

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Refreshment Break 1700-1730
BIICL Panel Discussion - Human Rights Due Diligence

Robin Brooks, Partner
Norton Rose Fulbright LLP
16 June 2014
M&A Due Diligence Methodology

Key questions

• What legal system(s) have jurisdiction over the transaction?
• Is the Buyer/Target/Seller listed?
• What are particular risks associated with the industry?

Relevant legal frameworks and industry practices

Deal specific issues

Target specific issues

Human rights considerations

• E.g.
  • Legal frameworks – international and local
  • Reporting requirements?
  • Industry specific human rights standards and issues
M&A Due Diligence Methodology

Relevant legal frameworks and industry practices

Deal specific issues

Target specific issue

Key questions

- Is the deal structured as a joint venture?
- How are the transaction and any follow on projects financed?
- Are the World Bank and/or other development banks financing the transaction?

Human rights considerations

- E.g.
  - Historical human rights record of the JV partner
  - IFC Performance Standards / Equator Principles
  - Relevant stakeholders / potentially affected groups?
M&A Due Diligence Methodology

Relevant legal frameworks and industry practices

Deal specific issues

Target specific issues

Key questions

- What is the nature of the Target’s business?
- Are any critical government licences or consents required by the Target?
- Who is the ultimate owner of the Target?
- What are the Target’s dealings with third parties?
- Does the Target have a human rights policy?

Human rights impacts (actual or potential)

- Impact on local communities, e.g.
  - Indigenous rights
  - Security
  - Environment
- Supply chain, e.g.
  - Human trafficking

Key questions

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Panel 2: The Application of Due Diligence 1730-1900

• Professor Robert McCorquodale, British Institute of International and Comparative Law
• Rae Lindsay, Clifford Chance LLP, London
• Margaret Wachenfeld, Institute for Human Rights and Business
• Rachel Wilshaw, Oxfam

Reception 1900-
HUMAN RIGHTS DUE DILIGENCE
SOME CASE STUDIES from Oxfam

British Institute of International and Comparative Law
16th June 2014

Rachel Wilshaw – Ethical Trade Manager Oxfam (rwilshaw@oxfam.org.uk)
UNILEVER LABOUR RIGHTS STUDY

Basis:
Collaborative study leading to independent report, funded by Oxfam.

Objective 1:
Assess Unilever’s management of labour standards, taking into account international standards and local conditions
– case study in Viet Nam.

Objective 2:
Develop a set of principles to guide Unilever and other companies in ensuring respect for labour rights.
FRAMEWORK USED TO ASSESS UNILEVER’S MANAGEMENT OF LABOUR STANDARDS

4 relevant principles were taken from the UN Framework on Business and Human Rights and used to assess Unilever’s policies and management processes:

1. Commitment
2. Integration in the business and implementation with suppliers
3. Tools and processes for due diligence
4. Remediation by grievance mechanisms

We also used other frameworks as reference points including ILO Tripartite Declaration, OECD Guidelines for MNEs, ISO 26000, Global Compact Principles, and ETI.
THEMATIC FOCUS

4 labour issues were chosen which are of high importance to workers but difficult for companies to measure and manage:

1. Freedom of association and collective bargaining
2. Living Wage
3. Working hours
4. Contract labour (precarious work)
FINDINGS – POLICIES AND MANAGEMENT PROCESSES

1. Commitment
   • High eg adoption of UN Framework, resolution of OECD complaints, staff proud of values.
   • Gaps in policy and in the Sustainable Living Plan.

2. Integration in business and implementation with suppliers
   • Good leverage and long term relationships but sourcing practices contributed to low wages and precarious work.

3. Tools and processes for due diligence
   • Good transparency and stakeholder engagement at global level.
   • Gap in tracking effectiveness of due diligence, little engagement in VN.

4. Remediation via grievance mechanisms
   • Workers not aware of global hotline and lacked confidence to use local one.
GAPS BETWEEN POLICY AND THE REALITY ON THE GROUND: UVN FACTORY

GRIEVANCE MECHANISMS

- Workers said they could not raise issues with management.
  “We truly want the company to create a mechanism for us to report our concerns. The union cannot do this job because the union leaders are paid by the company. They only listen to us without reporting to the management. The other channels such as hotline and emails are too sensitive for us to use.”

WAGES AND BENEFITS

- “All Unilever’s analysis shows that where there are good conditions and empowerment of employees, the factory has the best results.”

Compare and contrast with:

- “We cannot live on the current salary. Therefore, after working hours (usually my sift ends at 2pm) in the factory, I have to work as a waitress in a café from 3-9 pm to have enough money to cover all family costs.”
- “I worked for Unilever since 2002 and now have three kids. However, my two elder sons dropped out of school because I could not afford the school fees.”
FINDINGS – VIET NAM SUPPLY CHAIN

Suppliers selected as being ‘high risk’ for labour issues but good UL leverage

Supplier survey (48 suppliers)
• 28 said they were asked to commit to the Supplier Code; the rest said labour issues never mentioned.
• Only 1 in 8 thought time would be given to improve if an issue was found.

Deep dive (3 suppliers – soap, plastic packaging, paper packaging)
• Two suppliers in ‘deep dive’ were found to pay wages just above minimum. One had seriously excessive hours; another (after contract signed) reduced its labour force and had a high ratio of temporary labour.
• The third supplier had good practices: multi-skill training, better wages, a range of effective grievance mechanisms, high satisfaction, low turnover.
<table>
<thead>
<tr>
<th>Policies and management processes for labour rights</th>
<th>Global level</th>
<th>Viet Nam level</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Principle 1 (Commitment):</strong> A company should show its commitment to respect for human rights, including labour rights, by expressing their commitment in a public statement.</td>
<td>Green</td>
<td>Green</td>
</tr>
<tr>
<td><strong>Principle 2 (Integration of the policy in the business and implementation with suppliers):</strong> The policy is reflected in operational policies and processes necessary to embed it throughout the business enterprise.</td>
<td>Yellow</td>
<td>Yellow</td>
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<tr>
<td><strong>Principle 3 (Tools and processes for due diligence)</strong></td>
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<td><strong>Principle 3.1 (Risk assessment):</strong> Companies need to identify and assess the nature of actual and potential impact on the rights of people either by their own activities or as a result of their business relationships.</td>
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<tr>
<td><strong>Principle 3.2 (Acting on findings):</strong> The company uses the findings internally to adapt policies and processes to prevent or mitigate potential impact it may contribute to and integrates them across relevant internal functions and processes. The company acts upon the findings of actual impact which it has caused or contributed to.</td>
<td>Yellow</td>
<td>Yellow</td>
</tr>
<tr>
<td><strong>Principle 3.3 (Tracking effectiveness):</strong> The company should track the effectiveness of their response to address adverse human rights impacts.</td>
<td>Red</td>
<td>Red</td>
</tr>
<tr>
<td><strong>Principle 3.4 (Transparency):</strong> A company should communicate externally how impacts are addressed.</td>
<td>Yellow</td>
<td>Yellow</td>
</tr>
<tr>
<td><strong>Principle 3.5 (Stakeholder engagement):</strong> A company should identify and consult stakeholders.</td>
<td>Green</td>
<td>Green</td>
</tr>
<tr>
<td><strong>Principle 4 (Remediation via grievance mechanisms):</strong> The company ensures remediation through legitimate processes, such as an effective grievance mechanism to identify impact and to address grievances.</td>
<td>Yellow</td>
<td>Yellow</td>
</tr>
</tbody>
</table>
Unilever Responsible Sourcing Policy


- The Policy seeks to embed the UN Fundamental Principles for Human and Labor Rights in the way Unilever does business.

- Continuous Improvement Ladder and specific benchmarks: 3 performance levels – Mandatory Requirements, Good Practice and Best Practice.

- Evolution from a Supplier Code focused on ‘doing no harm’ to a policy that promotes “doing good”.

- Specific coverage on women’s rights, land rights and new mechanisms for dealing with grievances.

- The Policy is expected to be a journey and to evolve over time.
SOMO Report: Using Grievance Mechanisms

Accessibility, predictability, legitimacy and workers’ complaint experiences in the Electronics Sector

- China
  - Foxconn – 20 respondents
  - Foxlink – 20 respondents
  - Johnson Electric – 20 respondents

- India
  - Flextronics – 15 respondents
  - Foxconn – 15 respondents
  - Nokia – 15 respondents
  - Salcomp – 14 respondents
  - Wintek – 15 respondents

- Mexico
  - Flextronics – 18 respondents
  - Foxconn – 10 respondents
  - Jabil – 20 respondents
  - The Philippines – 59 workers from 24 companies

- Thailand
  - Fisher and Paykel – 20 respondents
  - Hoya Glass Disk – 18 respondents
  - LTEC Fujikura – 20 respondents
  - Sony – 18 respondents
  - Toshiba – 20 respondents

http://somo.nl/publications-en/Publication_4059
Using Grievance Mechanisms (SOMO)

• **UN Guiding Principles**
  • Companies should provide access to remedies for individuals, workers and/or communities who may be impacted by their activities by establishing a grievance mechanism (GM) to handle complaints.
  • A study by SOMO examined:
    1) respondents’ awareness of complaint channels,
    2) how they learned about GMs,
    3) their ability to complain anonymously,
    4) their understanding of their factories’ GM processes after a complaint is filed, and
    5) levels of trust in their factories’ GMs.
Case study: Foxconn

• **Accessibility**: workers were not always aware of more than one channel and thought that anonymous complaints either were not accessible or would not result in any change

• **Predictability**: workers not aware of the process once a complaint has been filed

• **Legitimacy**: a very large majority of respondents in the study did not trust their factories’ GMs.

• **Complaint experiences**: Out of 107 complaints, only 35 were satisfactorily resolved.
Hotlines and grievance mechanisms: concerns

• Many fail to provide genuine access to remedies
• May undermine victims’ ability to seek legal remedies and the role of trade unions in resolving problems between workers and companies

However
• When legal action is not possible, grievance mechanisms may help to resolve harmful business activities by requiring specific remedies, helping to mediate settlements, generating public awareness and/or persuading decision makers to take corrective actions.
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