



**Expert Meeting of North American Corporate and
External Counsel:
Exploring Human Rights Due Diligence**

MEETING SUMMARY

Friday, April 30, 2010 at Lovells LLP, 590 Madison Ave, New York

Legal experts and corporate representatives from over a dozen North American-based multinationals met to provide their perspectives on the ongoing work of Professor John Ruggie, the Special Representative of the UN Secretary-General on Business and Human Rights (SRSG) to operationalize the UN “Protect, Respect, Remedy” Framework. The meeting focused on the corporate responsibility to respect human rights, which requires companies to undertake a process of human rights due diligence (HRDD). The meeting was held under the Chatham House rule.

Below are some key themes that emerged from the discussion:

1. Understandings of due diligence as an essential part of **corporate risk management** have evolved over the past twenty years, from an activity conducted at a relatively low level in a company to one that not only involves senior management but for some issues (such as the prevention of criminal conduct, anti-corruption, or protection of the environment) also includes consideration of impacts on external stakeholders. A number of due diligence systems are mandated by law; others represent accepted best practice. Most are dynamic systems that continue to respond to new challenges.
2. Participants felt that HRDD was not particularly new in terms of process for companies, but rather in terms of substance. There were calls for **further clarity** about the meaning and implications of human rights in a business context to assist companies, multi-stakeholder initiatives, and other third-party standard-bearers in developing the necessary policies, procedures and metrics. Some participants whose companies had adopted human rights policies avoided the term “human rights” in their initial efforts to translate the implications of that policy internally. Others raised concerns about this: while lawyers generally need to “take their clients as they find them” so initial avoidance of the term may be understandable, this needs to form part of a process intended to lead to framing and understanding issues in human rights terms. One participant commented that the introduction of new systems or concepts into companies sometimes can generate “cultural antibodies”, which need to be addressed.
3. Some participants felt that directors should not be **personally liable** for the company’s negative human rights impacts, except where the board fails in its

obligation to oversee the existence and implementation of procedures reasonably designed to prevent human rights abuses. Some observed that the risks of such negative impacts should already form part of normal decision-making by the board and management, and others noted that the company and its management may be directly liable for the failure to implement such procedures, even where the board itself may not be liable. Questions were raised about the extent to which human rights impacts always translate into risks to the company (as opposed to risks to the rights-holder), and whether senior corporate decision-makers needed further incentives to take such risks into account or whether the challenge now was encouraging greater consideration of such risks at the operational level. One participant advocated adopting an approach akin to the 'precautionary principle' in the environmental sphere in relation to corporate decision-making about human rights risks.

4. Participants discussed whether companies should endeavor to cultivate a **“compliance” culture** in relation to human rights. A range of approaches were mentioned: from treating human rights as a “lens” to be applied across a company’s operations to embedding human rights-related requirements into functional areas in the same way as is done in regard to, eg, anti-corruption, so that human rights “becomes boring” for companies as they focus on implementing HRDD as a compliance obligation, rather than engaging in interesting but less productive debates about whether companies have human rights responsibilities. Participants debated - without reaching a clear consensus - whether compliance-based and performance-based approaches to HRDD are contradictory, complementary, or sequential. One participant commented that stakeholders can (unintentionally) encourage superficial compliance by focusing on specific elements, such as a public human rights policy, without regard to implementation or impact. There was strong support for the view that companies should endeavor to go above and beyond the requirements of national law where it falls below international standards, but some participants felt that greater clarification of appropriate standards and responses was still needed.
5. **Stakeholder engagement** is critical, but can be challenging. Communicating with stakeholders was seen as an essential part of HRDD, not just at the beginning of a business cycle but throughout. However, participants cited a number of challenges including: managing changing expectations and perceptions of those affected by company operations; working with governments and communities who lack capacity, and determining what the company’s appropriate role is in relation to building that capacity; and ensuring an appropriate level of concern for stakeholder perspectives among the company’s partners (potentially including state entities), contractors and suppliers. The need for engagement that actually empowers the local stakeholders and is not merely a “show” was also raised.
6. Participants discussed the purposes, benefits and risks of **transparency and reporting**. In general, disclosure of the company’s human rights-related policies and procedures should be unproblematic. But there was debate about whether impact assessments, whether conducted by the company or a third party, would suffer if subject to disclosure, and what benefits and risks their disclosure would bring about. Of course, where actual or potential impacts meet regulatory definitions of ‘materiality’, then they should already be being reported.

Participants agreed that the benefits and risks of reporting vary according to the purpose and intended audience. It was suggested that companies should aim to ensure that their reporting is “fit for purpose”. A number of participants felt that companies might need time to understand and assess their human rights impacts but would eventually become comfortable with greater disclosure, seeing that the benefits outweighed potential risks. Those benefits may include: improved stakeholder trust; possibly being able to effect change in the behavior of governments and other actors; a sense of shared experiences and learning among companies; and enabling an enhanced collective focus on, and accountability for, human rights impacts within the company (in the sense of being able to accurately assess performance). A few participants stressed that the discussion should not lose sight of how companies in fact act on the information that their due diligence and reporting produces.

7. A number of potential means for **incentivizing companies to conduct HRDD** were explored. Participants discussed the utility of requiring companies to report on violations: one participant suggested that if a company’s human rights policy adopted a “zero tolerance” approach to particular issues (eg, child labor), then all such violations should be reported, but in other cases, it may be constructive to report on the type of violation and associated company response, rather than specific numbers. Participants discussed a variety of legal and policy options for incentivizing HRDD, including “safe harbor” provisions (such as “innocent purchaser” provisions in the environmental clean-up context or protection for some incorrect “forward looking statements” by public companies in the securities context). Concern was raised about providing a complete defense in cases where a violation had occurred; the use of “affirmative defenses”, or otherwise switching the burden of proof (at least in relation to punitive if not compensatory damages), was suggested as a more appropriate alternative. Participants also discussed listing requirements (in relation to corporate policies and risk exposure) and the utility of regulatory guidance from securities and other relevant agencies (such as the EPA’s policies on “self-policing” and the SEC’s guidance on climate change) in relation to human rights risks. The need for reliable assessment, certification, or verification criteria in relation to the above options was also flagged. Finally, stakeholder education and heightened public awareness were seen as central to ensuring positive reinforcement when companies do discover violations and then endeavor to respond and remediate them appropriately.