

BHRRC and WBA jointly submit public comments to Japan's draft HRDD Guidelines

In March 2022, the Ministry of Economy, Trade and Industry (METI) created the "Study Group on Guidelines for Respecting Human Rights in Supply Chains" to establish a cross-industry guideline for human rights due diligence. Prior to the finalising development of the guideline around September, public comments were solicited from 8-29 August for [the draft guidelines](#).

We, the Business and Human Rights Resource Centre (BHRRC) and the World Benchmarking Alliance (WBA), hereby submit joint comments on the Draft Guidelines on Respect for Human Rights in Responsible Supply Chains (the Guidelines) issued by the METI.

- Comment on section 1: Introduction

The release of the Guidelines is a crucial first step toward the realization of responsible business conduct of Japanese companies. Nevertheless, [previous benchmarking analyses](#) on Japanese companies conducted by the WBA and the BHRRC respectively reveal the limitation of voluntary human rights due diligence (HRDD) by companies. As our organisations highlighted in a [policy note](#) submitted to the Japanese Government in May 2022, while some Japanese companies are demonstrating leadership on HRDD, most are lagging behind.

In particular, there are significant gaps in HRDD processes and stakeholder engagement. Nearly two-thirds (64%) of Japanese companies assessed by WBA failed to demonstrate the three initial steps of a HRDD process (namely identifying, assessing, integrating and acting on risks and impacts), and 85% of the Japanese companies assessed did not demonstrate stakeholder engagement.

The limits of market-based and non-legislative approaches to improve corporate respect for human rights are clear, and mandatory HRDD is necessary to close the accountability gap. For example, after official monitoring showed that German companies' voluntary implementation of due diligence guidance from the National Action Plan on Business & Human Rights was insufficient, the German Federal Government started a legislative process and the Supply Chain Due Diligence Act will enter into force in 2023.

Building on the evidence presented by our organisations, the Japanese government should show its commitment to mandatory HRDD in the Guidelines to further facilitate human rights implementation for Japanese companies.

For companies to compete on a level playing field, due diligence legislation should be implemented with requirements extending into companies' full value chains (including both up-stream suppliers of products and services and down-stream customers and business relationships). There is an opportunity for Japan to demonstrate its leadership in finding policy solutions to improve company performance on human rights.

- Comment on section 1.1: Background and purpose of the establishment of the Guidelines

The consultation process of the Guidelines fails to engage with stakeholders effectively by not disclosing the discussions that took place during the drafting process and setting a tight schedule for public comments.

The draft Guidelines were published only three weeks before the deadline for public comments, which fails to provide adequate time for stakeholders to develop their thoughts and opinions. Our organisations therefore believe that the consultation period should be extended to allow all stakeholders, including vulnerable or marginalised groups, to provide input. In addition, the Government should be transparent about any future process related to the Guidelines.

the Japanese government should monitor companies' implementation of the Guidelines and report publicly on their compliance. The body or authority tasked with overseeing implementation should have an adequate budget and staffing.

The monitoring process should be time-bound, specific and effective. The Japanese government should consult with affected stakeholders, civil society organisations and other stakeholders to design, establish and implement the monitoring process. The Guidelines should further include an independent complaints mechanism to monitor companies' implementation progress. This mechanism should fulfil the requirement for state or non state-based grievance mechanisms set out by the UNGPs.

The mechanism should also be complementary to the [National Contact Point](#) (NCP) established under the OECD system, but remain separate, with the necessary powers to receive and investigate complaints from affected stakeholders based in Japan and other countries.

We believe the introduction of the Guidelines gives the momentum for the government to establish the National Human Rights Institution (NHRI) for better protection of human rights. The mechanism could be facilitated by the NHRI, which is yet to exist despite [the Paris Principles](#), which were adopted by consensus at the UN General Assembly.

- Comment on section 1.3: Target business enterprises of the Guidelines and target scope of efforts for respecting human rights

The Guidelines should include businesses supported and owned by public funds, such as through official development assistance (ODA) in their target to align with the UNGPs (Guiding Principle 4). Since 2021, several CSOs found out the involvement of the Japan International Cooperation Agency (JICA), Japan Overseas Infrastructure Investment Corporation for Transport & Urban Development (JOIN) and Japan Bank for International Cooperation (JBIC) in Myanmar projects that [allegedly](#) fund the military junta.

The Guidelines should also articulate the responsibility of companies to respect human rights in all of their business relationships. As the UNGPs indicate, business relationships include a company's relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or service.

On the definition of "downstream," the Guidelines should explicitly include risks and impacts in the end-use phase. This clarity is relevant to the use of social media and messaging apps nowadays, as

shown in [an analysis by the Human Rights Watch](#) on actions taken by social media and messaging apps in Russia's invasion of Ukraine.

The Guidelines should specify that leverage over a business relationship is only one of the factors to be considered for determining what constitutes appropriate action. The Guidelines should therefore articulate that companies have a responsibility to respect human rights regardless of the extent of their leverage. The UNGPs highlight that companies may increase their leverage if it is lacking, and that they should consider ending business relationships responsibly if unable to do so (Guiding Principle 19).

- Comment on section 2.1.2.1: the Scope of “human rights”

The Guidelines have set a limited scope to define “human rights.” The material scope should cover all relevant environmental and human rights impacts and relevant international instruments. In particular, the guidelines should include The UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Indigenous Peoples as well as climate change impacts as an explicit due diligence aspect.

The Guidelines should also mention relevant rights to human rights defenders (HRDs), such as freedom of opinion and expression and the right to gain access to information. [Research](#) conducted by the BHRRC shows that between 2015 and 2021, at least 47 attacks against HRDs across the globe were connected to Japanese companies and financiers.

The Guidelines lack reference to free, prior and informed consent (FPIC) is a human right enshrined in ILO Convention No. 169 and UN Declaration on the Rights of Indigenous Peoples. A reference to FPIC should be mentioned in the body text, instead of where it is mentioned in the current draft as a footnote.

The Guidelines should also include climate change impacts and recognise the UNGA resolution recognizing the right to a clean, healthy and sustainable environment as a human right in the body text instead of a footnote.

The interrelation of human rights and environmental agendas, as well as the necessity for companies to implement due diligence covering both aspects, have been well- established. For instance, the recent Corporate Sustainability Due Diligence Directive proposed by the European Commission, clearly mandated comprehensive human rights and environmental due diligence for companies. Including an environmental perspective is critical for Japanese companies in particular. In 2018, Rainforest Action Network [pointed out](#) that Tokyo 2020's timber supplier Korindo violated the health rights of people at the construction site by using fire to clear land.

- Comment on section 2.2.1: Management's commitment is significant

While management level commitment is important to meet the responsibility to respect human rights, the Guidelines lack reference to board responsibility. It is also important that companies' policy commitments are managed as part of the board's role and responsibility. The development and implementation of a company's approach to human rights should be guided from the top of the business, which for larger companies is the Board.

Companies need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel, business models and strategies, as well as procurement practices or lobbying activities where human rights and the environment are at stake. A Board committee is often the best placed to ensure such coordination.

Since 2017, WBA's Corporate Human Rights Benchmark (CHRB) has been assessing and ranking high risk sectors on their human rights performance. The [methodologies](#) look at board level accountability as a critical aspect of respect for human rights – guided by the UN Guiding Principles' expectation that a company's approach be guided from the top of the business. In WBA's most recent benchmarks and analysis we found:

- Companies with **board-level policy commitments to respect human rights** performed much better than companies not making a commitment (27% vs 9%). demonstrating that board level commitments are a critical step towards better performance.
- Companies with a named **board member or committee with oversight and expertise** on human rights performed far better on the benchmark than companies without competent oversight (40% vs 14%).
- Companies with CEO or **board level remuneration** tied to human rights issues scored 57%, while companies who didn't link human rights to remuneration scored 21%.
- Overall rankings and scores for human rights due diligence were both positively correlated with performance on top-level governance indicators.

Adequate board oversight is critical to identify, prevent, mitigate and account for adverse human rights and environmental impacts by companies, it is therefore essential that the Guidelines highlight the importance of such top-down oversight.

- Comment on section 2.2.3: Dialogues with stakeholders are important for activities to respect human rights

The Guidelines should emphasise that effective engagement with stakeholders is essential for activities to respect human rights to align with the UNGPs (Guiding Principle 17), instead of suggesting that these dialogues and consultations are voluntary and optional.

The Guidelines should highlight that companies need to identify and disclose the categories of stakeholders whose human rights are at risk due to their activities. In the WBA's 2022 Social Baseline Assessment, **85% of the assessed 67 Japanese companies did not disclose the categories of stakeholders whose human rights have been or may be affected by their activities, or provide at least two examples of engaging in dialogue with those stakeholders in the last two years.**

Meaningful stakeholder engagement can help companies understand the perspectives and priorities of those who are or may be affected, improve the quality of human rights and environmental impact analyses, and manage identified impacts. By engaging with them, the companies can address stakeholder concerns early and effectively, proactively address risks and prevent adverse human rights and environmental impacts from occurring or escalating.

- Comment on section 2.2.5: It is important that each business enterprise engages in efforts to respect human rights together.

The Guidelines should mention that companies need to take human rights considerations into account when deciding to *engage* or *terminate* business relationships. Supplier engagement goes beyond a ‘command and control’ logic and includes training, joint problem solving and consultations with affected stakeholders, incentives (e.g. price premiums, increased orders, or longer contracts) and support to business relationships to meet human rights and environmental requirements.

[As BHRRC’s report on gender-based violence and harassment at Indian garment factories shows](#), adequate due diligence also requires analysis of and adjustments to the company’s own purchasing and pricing practices if they are found to contribute to human rights and environmental risks in the value chain.

The Guidelines should also emphasise that passing general human rights requirements to suppliers and requiring them to further cascade these up or down value chains through contract clauses alone, which are then ‘controlled’ by third-party auditors, is insufficient to ensure respect for human rights. The Guidelines should note that this could lead to companies’ overreliance on social audits, which often fail to capture negative risks and impacts. [Research conducted by the European Center for Constitutional and Human Rights](#) on the collapse of Rana Plaza shows that social audits failed to reveal serious human rights violations including child labour, discrimination against women, the absence of trade unions and forced overtime.

- Comment on section 3: Human rights policy

The Guidelines should require companies to have a policy commitment that refers to the importance of HRDs and whistle blowers, mentions specific risks and makes a commitment to zero tolerance for attacks and reprisals against HRDs throughout their operations and value chains and to being part of creating a safe and enabling environment for HRDs and whistle blowers.

- Comment on section 3.2: Points for attention after establishing a human rights policy

The Guidelines should require companies to provide training on their human rights policies internally to deepen their workers’ understanding. In addition to training on companies’ human rights policies, companies should raise awareness of human rights and environmental agendas relating to their businesses.

The Guidelines should give clearer guidance on specific measures that companies can take to conduct training, such as partnerships with NGOs and e-learning courses provided by relevant organisations. Findings from WBA’s 2019 Corporate Human Rights Benchmark (CHRB), show that **companies that disclosed information on training workers on their human rights commitments, including relevant managers, received an average score of 57%, more than four times that of companies that did not disclose information on such trainings** (and for which the average total score was 13.4%).

- Comment on section 4.1: identification and assessment of adverse impacts under HRDD

The Guidelines should be clear that companies must engage with stakeholders, and that this engagement should be conducted during key moments in the company's activities (e.g. policy change, market entry, new projects) as well as ongoing.

Stakeholder engagement should also be effective, accessible, safe, gender-sensitive, and transparent.

Companies should be required to actively engage, consult and involve rightsholders at all stages of their due diligence process throughout operations, value chains, including risk identification and analysis, as well as measures to prevent and mitigate adverse impacts.

Companies should also address possible risks and reprisals arising from stakeholders' participation in consultations, or in any other aspect of the company's due diligence process, as shown in [BHRRC's report on attacks against HRDs](#).

- Comment on section 4.1.2.2: Vulnerable stakeholders during the process to identify and assess adverse impacts

The Guidelines should be clear on the definition of "foreigners." This term could be expanded to cover 'migrants working in Japan' and 'stakeholders outside Japan in supply-chains'. The scope of the guidance covers impact beyond Japan and without a clear definition of "foreign" vulnerable stakeholders, therefore the interpretation might be limiting.

- Comment on section 4.2.1: Types of measures to be considered to prevent or mitigate adverse impacts

In the example given under 4.2.1.1, the Guidelines should highlight that companies must engage and take the opinions of stakeholders into account before terminating a business relationship. If a negative impact occurred while the company had a business relationship with the business partner, companies should use their leverage to prevent and mitigate adverse impacts.

The guidelines should also highlight that companies need to consider whether ending the business relationship may result in any adverse human rights impacts.

- Comment on section 4.3.1: Tracking methods of the company efforts

The Guidelines should encourage worker or stakeholder-driven monitoring. This approach is based on workers or other affected stakeholders' participation, and ensuring that they are fully engaged, in the monitoring processes, recognising that workers themselves have the best knowledge of actual and potential risks and impacts on the ground. [benchmark assessment by KnowTheChain](#), points out that Japanese companies lack worker-led HRDD process.

- Comment on section 4.4.1.1: Basic information for disclosure

Disclosure of information concerning responsible business conduct is paramount to the transparency of business activities and allows stakeholders to access key relevant information and engage with the company, e.g., for early warning. The Guidelines should ask companies to disclose supplier lists, including for the lower tiers of their supply chains, and the sourcing countries of high-risk commodities or raw materials. This would demonstrate that they can “know and show” where their raw materials come from and are aware of associated risks, as well as the data on the composition of supply chain workforce which shows that companies know who is making their products and understand the risks they face.

- Comment on section 5: Remedy

The Guidelines should clarify that companies' human rights due diligence could not be used as a defence against civil liability.

As [articulated by the Working Group on Business and Human Rights](#), evidentiary burdens to prove proper due diligence must be placed on companies and not victims/claimants. Victims seeking justice have a limited ability to uncover the information that is necessary to establish a parent or lead company's liability. Victims should not have to take on the burden of proving a parent or lead company's alleged failure and its connection to the harm they suffered, but rather the parent or lead company should be required to prove it took all due care.

In addition, the Guidelines should emphasize that stakeholder engagement need to be prioritised at all stages of a remediation process.

- Comment on section 5.1: Grievance mechanism

The Guidelines should give more detailed guidance for companies on grievance mechanisms.

Below are recommendations on what the Guidelines should include:

- Companies should establish or participate in a third-party or shared mechanism, accessible to all workers to raise complaints or concerns related to the company.
- Companies should ensure that the mechanism is effectively available to all external individuals and communities and takes into account accessibility specifically for marginalised groups,
- Access to the companies' mechanism should not preclude access to judicial or other non-judicial grievance mechanisms.
- Companies should ensure that workers in their supply and value chain have effective access to either the companies' own mechanism to raise complaints or concerns about human rights and environmental issues at the level of business partners and suppliers. This can include requirements for and support to suppliers to set up or participate in a mechanism; mere contractual cascading of such provision however risks being ineffective, and substantive lead firm engagement is key.
- Companies need to prohibit retaliation for raising complaints or concerns, as well as establish measures to prevent retaliation (for example, through guaranteeing anonymity when complaints or concerns are raised or carrying out assessments of and addressing risks of retaliation).

- Companies also need to ensure that workers/ rights holders or their legitimate representatives are involved in the design, implementation and operation of the grievance mechanisms.
- Companies should disclose quality data on the use of grievance mechanisms to stakeholders through clear describing to stakeholders how complaints are received, processed and addressed. They should also describe how those making complaints are informed throughout the process as well as how complaints may be escalated or withdrawn.
 - Comment on section 5.2: State-based remedy mechanism

The Guidelines should give clearer guidance on state-based judicial remedy.

The Guidelines should clarify that remediation requirements for companies must be backed up by a robust civil liability regime to ensure victims of abuse, located in and outside Japan, have access to legal remedies for harms, including reversed burden of proof, and judicial remedies.

The Guidelines should also commit to the effectiveness of state based non-judicial mechanisms such as the NCP.

About WBA

World Benchmarking Alliance is an international non-profit organisation that publishes free and publicly available benchmarks on how the world's most influential companies contribute to tackling the biggest sustainability challenges of our time, in line with the Sustainable Development Goals. WBA have recently published [Social Baseline Assessment](#) of 1,000 companies (published January 2022) and five years of our [Corporate Human Rights Benchmarks](#).

About BHRRRC

Business & Human Rights Resource Centre is an international NGO which tracks the human rights impacts of over 10,000 companies in over 180 countries, making information available on our 10-language website.

[KnowTheChain](#) benchmarks current corporate practices, develops insights and provides practical resources to inform investor decisions and enable companies to operate more transparently and responsibly