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Risky Business: Critical Reflections on the Sources of Information for Risk Analysis Under the German Supply Chain Law and Some Ramifications for Global South Stakeholders

By *Caroline Omari Lichuma**

Abstract: Like other mandatory Human Rights Due Diligence (mHRDD) laws, the German Supply Chain Law, the Lieferkettensorgfaltspflichtengesetz (LkSG), imposes a number of due diligence obligations on covered companies geared towards protection of human rights and the environment in the value chains of Transnational Corporations (TNCs). More specifically, as per Section 4(1) in-scope companies are expected to establish an effective and appropriate risk management system that will enable them to comply with their due diligence obligations. As part of establishing such a risk management system companies must “conduct an appropriate risk analysis...to identify the human rights and environment-related risks in its own business area and at its direct suppliers” (Sec 5. (1) LkSG). This contribution argues that a proper risk analysis is the cornerstone of an effective risk management system, and ultimately of compliance with due diligence obligations. It is therefore necessary to interrogate how covered companies carry out such risk analysis, and crucially, what sources of information they use for this purpose, as well as how they secure such information. Using the CSR Risk Check tool as an exemplar this contribution will critically analyze the pitfalls of carrying out risk analysis in ways that continue to entrench asymmetrical relations between Global North and Global South actors.

Keywords: LkSG, Risk Analysis, Market of Information, CSR Risk Check, BAFA

* LLB, University of Nairobi; LLM, New York University; PhD, Georg-August Universität Göttingen; Post-doctoral researcher, University of Luxembourg. Email: Caroline.lichuma@uni.lu. The author would like to thank the facilitators and participants of the 2023 BHR Young Researchers Summit for their insightful feedback on an earlier version of this paper; and the University of Dundee’s ISSR Global Scholar Grant 2023 which allowed me to work on the first draft of this paper during a research stay at the Dundee Law School.

A. Setting the Stage

A wave of mandatory Human Rights Due Diligence (mHRDD) laws is sweeping through the Business and Human Rights (BHR) regulatory landscape. Numerous countries in Europe have already enacted such laws, and others outside of Europe (such as Brazil¹ the United Kingdom,² and South Korea³) are contemplating passing their own mHRDD legislation. Significantly, the European Union, as a bloc, is at an advanced stage of the legislative process for the enactment of a Corporate Sustainability Due Diligence Directive (CSDDD). With the EU Commission, Council and Parliament having concluded the trilogues in December 2023, it is now anticipated that the CSDDD will be formally adopted some time in 2024.⁴

Germany adopted its mHRDD law in June 2021.⁵ The law entered into force on the 1st of January 2023 for companies in Germany with at least 3,000 employees. With effect from the 1st of January 2024, the law now also applies to companies in Germany with at least 1,000 employees. Section 19 of the LkSG identifies the Federal Office for Economic Affairs and Export Control, or *Bundesamt für Wirtschaft und Ausfuhrkontrolle* (BAFA), as the supervisory body for monitoring and enforcement of the Act. Consequently, BAFA occupies a unique position to contribute to the interpretation of the LkSG's provisions and has even been given the authority to issue handouts providing "cross-sectoral or sector-specific information, assistance and recommendations on compliance" with the Act.⁶

1 Clara Pacce *et al*, Mandatory Human Rights Due Diligence in Brazil (2022), <https://www.ibanet.org/Mandatory-human-rights-due-diligence-Brazil> (last accessed on 10 January 2024).

2 Latham Watkins, UK House of Lords Considers New Bill on Mandatory Human Rights and Environmental Due Diligence (2023), <https://www.latham.london/2023/12/uk-house-of-lords-parliament-considers-new-bill-on-mandatory-human-rights-and-environmental-due-diligence/>, (last accessed on 5 January 2024).

3 Antony Crockett / Rebecca Chin, South Korea Tables Mandatory Human Rights and Environmental Due Diligence Law (2023), <https://www.herbertsmithfreehills.com/insights/2023-09/south-korea-tables-mandatory-human-rights-and-environmental-due-diligence-law>, (last accessed 5 January 2024).

4 Council of the EU, Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights (2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/> (last accessed on 15 January 2024).

5 Act on Corporate Due Diligence Obligations in Supply Chains (LkSG), BGBl I 2021, 2959. Official English translation, https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile (last accessed on 25 May 2023).

6 LkSG, note 5, Sec. 20.

In preparation for the Act's entry into force BAFA issued its first Guidance note on Risk Analysis under the Act.⁷ More recently, and to its credit, BAFA published a risk database containing "information on human rights and environmental risks for specific sectors, countries and raw materials" and based on publicly accessible data.⁸ The database is not exhaustive and will be regularly updated and further developed by BAFA. Nevertheless, it is an important document that may be useful for covered companies as they carry out their risk analysis.

Risk analysis is identified as the basis of an appropriate and effective risk management system as required by Section 4 of the LkSG. Section 5 (4) of the LkSG requires risk analysis to be carried out both annually and on an event-based basis "if the enterprise must expect a significantly changed or significantly expanded risk situation in the supply chain."

Given the fundamental importance of a proper risk analysis within the due diligence architecture set up by the LkSG, it is important to critically interrogate the sources of information that companies may or should rely upon when carrying out such risk analysis in fulfillment of their obligations under the Act, and what sources they are actually using in reality. The nature and type of information used by covered companies in this regard has significant implications for whether and how the company will be able to adequately identify its risk areas, and even more important, what kind of due diligence measures they will thereafter put in place to prevent or mitigate adverse human rights and environmental impacts.

In a nutshell, the robustness of the due diligence measures can be argued to be directly proportional to the quality of information utilized in the risk analysis. Granted, it is no simple task to identify the sources of information that have this desired 'quality', especially for large companies with complex value chains that span several tiers. Risk analysis, particularly when properly done, will be an expensive process for covered companies. As BAFA acknowledges, "[t]he more complex the supply chains and the more suppliers a company has, the more time and human resources a company will have to allocate to the risk analysis process."⁹

Nevertheless, the modest claim of this contribution is that covered companies must do more to reduce the 'informational middlemen' between themselves and rightsholders such as workers, local communities and other affected or potentially affected stakeholders if they are to carry out a truly effective risk analysis. As long as companies continue to carry out their risk analysis on the basis of information that does not fully or adequately

7 Federal Office for Economic Affairs and Export Control (BAFA), Identifying, Weighting and Prioritizing Risks: Guidance on conducting a risk analysis as required by the German Supply Chain Due Diligence Act 'Lieferkettensorgfaltspflichtengesetz', 'LkSG', https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_risk_analysis.html?nn=18898410 (last accessed on 19 December 2022).

8 BAFA, BAFA Risikodatenbank: Quellenübersicht (2023), https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/lksg_risikodatenbank.html (last accessed on 9 January 2024).

9 BAFA Guidance, note 7, p. 11.

reflect the actual situation on the ground it is doubtful whether their risk analysis and risk management systems will be sufficient to better protect human rights and the environment as envisioned by mHRDD laws. In fact, the use of inadequate information in risk analysis can be argued to be both a source as well as a consequence of cosmetic compliance with due diligence laws. That is, where companies base their risk analysis on low-quality or incomplete sources of information this may convey the appearance of taking action but ultimately such actions will fail to achieve the goals they are meant to achieve as relates to human rights and environmental outcomes.¹⁰

Although the LkSG identifies the objective of carrying out a risk analysis as gaining an understanding of the human rights and environmental risks of a company's business area as well as that of its direct suppliers,¹¹ it does not explicitly mandate that covered companies must consult potentially affected rights holders when carrying out such risk analysis. To be fair, Section 4 (4) requires the enterprise to give "due consideration to the interests of its employees, employees within its supply chains and those who may otherwise be directly affected in a protected legal position by the economic activities of the enterprise or by the economic activities of an enterprise in its supply chains." But, given the realities of asymmetrical power relationships between companies and rightsholders, is this enough? It is debatable whether this "due consideration" formulation is sufficient to compel companies to structure the risk analysis process in such a way that covered companies are compelled to obtain pertinent information from rightsholders.

Relatedly, Annex II of the BAFA Guidance note on Risk Analysis lists examples of sources of information that companies could consider for their risk analysis, including inter alia: the CSR Risk Check tool; Business and Human Rights Resource Centre; Country Reports from Multi-Stakeholder Initiatives; US State Department Country Reports on Human Rights, OECD Sectoral Guidance, among others. Glaringly absent is any specific reference to Global South rights holders. In light of BAFA's privileged position as the federal supervisory authority for the LkSG, this is no small omission. Rather, this failure to specifically recommend (or even mandate?) the involvement of Global South stakeholders in the risk analysis process is likely to have spillover effects onto how (in)efficient risk management and Human Rights Due Diligence (HRDD) processes are likely to be in reality. As BAFA itself has pointed out, "the results of the risk analysis play a central role in the overarching strategic and operational orientation as well as the practical implementation of both the risk management system and individual due diligence processes."¹²

This contribution posits that we are witnessing a 'marketization' of Business and Human Rights (BHR) information, with companies seeking, consuming, and even paying for vast amounts of information in order to comply with their mHRDD obligations under

10 *Ingrid Landau*, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, Melbourne Journal of International Law 20 (2019), p. 223.

11 LkSG, note 5, Sec. 5 (1).

12 BAFA Guidance, note 7, p. 4.

laws such as the LkSG. As Scheper and Zajak observe, “the collection, translation, selectivity and usage of information about human rights conditions, are heavily shaped and dominated by corporations and their business rationales, leading to an increasing marketization and commodification of information as a basis for human rights governance and policy decisions.”¹³ Implicit in this marketization is the playing out of power relations and epistemic hegemony between various Global North and Global South actors, in ways that unsurprisingly skewer the already unbalanced relationship in favor of the former at the expense of the latter. In this regard, the ‘service providers’ in this market of information are drawn primarily from actors in the Global North, and only to a limited extent from actors in the Global South, who continue to remain on the periphery of HRDD processes. This has implications for how robust and complete any risk analysis based on such information is likely to be. Arguably therefore, the deliberate failure to require companies to pay due attention to Global South voices within the context of their risk analysis as part of due diligence processes under the LkSG, is yet another example of the myriad ways through which due diligence laws made in the First World,¹⁴ continue to silence and invisibilize third world voices in matters that affect their quotidian realities, thus further disenfranchising already marginalized rightsholders in the Global South.

The core of this critique is that it is absolutely necessary for human rights and environmental risk analyses to be structured in a way that fully provides for the participation and engagement of historically subordinated rightsholders of the Global South, as well as their legitimate representatives as much as is practicably possible. After all, these risks do not arise in a vacuum. They are very much intertwined with both historical and current events that arguably have their roots in colonialism, neo-colonialism and neo-liberalism all of which continue to perpetuate an unjust and asymmetrical global order that has normalized extractive transnational corporate activity.

Following this brief introduction, the contribution will in Part B illuminate the importance of risk analysis in the HRDD architecture. Part C will discuss the trend towards expertization of HRDD and outline some of the sources of information currently available to covered German companies as per the BAFA guidance with a specific focus on the CSR Risk Check tool. Part D will thereafter offer some reflections on potential ways through which the market of information can be rebalanced in order to more fully include Global South actors as well as their representatives and highlight how such inclusion could potentially enhance the effectiveness of due diligence laws in reality. Part E will conclude.

- 13 Christian Scheper / Sabrina Zajak, Human Rights and Transparency Politics in Global Production Networks, in: Mathew Mullen et al. (eds.), *Navigating a New Era in Business and Human Rights* (2019), p. 33 https://media.business-humanrights.org/media/documents/files/documents/a_new_era_1_0.pdf (last accessed on 29 July 2023).
- 14 Caroline Omari Lichuma, (Laws) Made in the ‘First World’: A TWAİL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains, *ZaöRV* 81 (2021), p. 515.

B. Risk Analysis as the Foundation of Proper HRDD Under the LkSG

The LkSG imposes a number of due diligence obligations on covered companies. As per Section 3 (1), covered companies are expected to: establish a risk management system; designate a responsible person(s); perform regular risk analyses; issue a policy statement; implement preventive measures in its area of business as well as that of its direct suppliers; take remedial action; establish a complaints procedure; implement due diligence measures with regards to substantiated knowledge of risks at indirect suppliers; document and report on compliance. Arguably, in order for covered companies to meet their due diligence obligations, they must in the first instance map their risk terrain by carrying out a risk analyses so as to identify the areas of their operations and those of direct suppliers that are likely to give rise to human rights and environmental risks. Whereas companies are granted a certain level of discretion in the carrying out of their risk analysis and in the prioritization of risks, “the concrete design and choice of method is subject to the condition of reasonableness.”¹⁵ The question of what reasonableness means in this context will determine how broad corporate discretion actually is in reality. The intention behind risk analysis within the framework of mHRDD laws is not to identify risks to the covered company itself, e.g., compliance risks, financial risks, or even reputational risks. Rather, the focus of risk analysis in this context is more outward-looking, “to identify whether and to what extent these people (groups of people) [rightsholders] or the environment may be harmed by the company’s own business activity and/or through its business relationships with suppliers.”¹⁶ These risks are influenced by factors such as the company’s business activities, its products and services, the countries and sectors in which the company operates, and the (in)adequacy of its existing prevention and mitigation measures.¹⁷

Risk analysis as contemplated by the LkSG is not a one-and-done activity. Rather, it is an on-going process to be conducted at specified intervals in order to allow the company to adapt its risk management and due diligence processes depending on the outcomes of such risk analysis. In the first instance, covered companies must carry out an annual risk analysis of their own operations as well as those of their direct suppliers. In the second instance, an ad-hoc risk analysis must be carried out in two situations. Firstly, whenever a significantly expanded or changed risk situation in the supply chain exists, for example, as a result of the introduction of new products or projects.¹⁸ Secondly, where there is substantiated knowledge of a violation of a human rights-related or environment-related obligation in the

15 BAFA Guidance, note 7, p. 5.

16 Ibid., p. 8.

17 Global Compact Network Germany and Others, *Assessing Human Rights Risks and Impacts: Perspectives From Corporate Practice* (2016), https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Weitere_Publikationen/HRIA_Assessing_Human_Rights_Risks_and_Impacts_Perspectives_from_corporate_practice.pdf (last accessed on 25 July 2023), p. 11.

18 LkSG, note 5, Sec. 5 (4).

operations of the company's indirect suppliers.¹⁹ Substantiated knowledge means that “a company has factual indications that a violation of a human rights-related or environmental obligation at indirect suppliers appears possible.”²⁰ Such knowledge may come from diverse sources, including, for example “a complaints channel, media reports or reports from non-governmental organizations. It may also come up in discussions of various cases or issues in existing industry initiatives.”²¹ Without such substantiated knowledge covered companies have no immediate obligation to carry out risk analysis in the context of their indirect suppliers. As a sidenote, this distinction between the expectations as regards direct suppliers versus indirect suppliers in the LkSG is problematic. Given the reality that most covered companies with multiple tiers of suppliers in their value chains are likely to have numerous indirect suppliers, the LkSG sets the stage for a proactive risk analysis within the context of direct suppliers, and a reactive one where indirect suppliers are involved, which has implications for whether the risk analysis in the latter cases is going to be too little too late for the many vulnerable rightsholders in the invisible tiers of the supply chain.

Ultimately therefore, there is an expectation that as a consequence of risk analysis, both annual and ad-hoc, the covered companies will be in a position to better plan for identified human rights and environmental risks within their due diligence processes. In a sense however, it may be argued that given the over focus of due diligence laws on process rather than outcomes, such risk analysis seems to be more about reducing the company's compliance risk under the LkSG rather than ensuring positive human rights and environmental outcomes in the supply chains.

As to the steps involved in the risk analysis, BAFA identifies three steps. In the first instance, companies should carry out an abstract assessment of risks (abstract risk assessment) focusing on sector specific risks and country specific risks. The intention here is to identify companies or branches which by virtue of their location or sector are likely to be more exposed to risk. For example, whereas country specific risks could include the nature of the government, the existence of conflicts or wars, corruption, or even questions of human rights abuses by the government; sector specific risks could include questions such the use of child labour in certain industries as well as labourers working without protective equipment. Secondly, the companies should engage in a concrete identification, weighting, and prioritization of risks (concrete risk assessment). Building on the abstract risk assessment, the expectation here is that companies will focus on the specific contexts of areas with increased risk exposure in order to get more detailed information. As the BAFA guidelines clarify, “the abstract risk assessment is designed to identify which of the company's own subsidiaries/ branch offices/sites have increased risk exposure and should be subject to the concrete risk assessment as outlined in Step 2.”²² Finally, companies

19 Ibid., Sec. 9 (3) (1).

20 BAFA Guidance, note 7, p. 8.

21 Ibid.

22 Ibid., p. 13.

should gradually roll out the concrete risk assessment to all the pertinent branches and sites, and not just in the high-risk areas, and should seek to build awareness of the specific human rights and environmental-related risks throughout its business area.

Over time therefore, risk analysis will have the effect of rendering the activities of the company as well as those of its suppliers more transparent.

C. Expertization of HRDD and Sources of Information for Carrying out Risk Analyses

1. *Lost in Translation: The Role of Experts in the Translation of Human Rights Norms Into Corporate Contexts*

Given the fairly novel nature of the requirements imposed by mHRDD laws upon covered companies, it is no surprise that such companies are turning to “experts” for assistance in order to meet their obligations under the pertinent laws. After all, “human rights were not designed with corporations in mind.”²³ Arguably therefore, there is a learning curve as companies try to embed HRDD within the context of their business areas and supply chains. This learning curve is even steeper where covered companies are compelled to do so within the context of hard obligations under mHRDD laws, as compared to the softer obligations imposed by the UN Guiding Principles on Business and Human Rights (UNGPs),²⁴ or the OECD Guidelines for Multinational Enterprises.²⁵ In light of these difficulties it is foreseeable that companies require the assistance of experts to translate their HRDD obligations and put them into practice in the organizational context.²⁶

A central aspect of this process of translation is ‘the ‘people in the middle’—that is “those who translate the discourses and practices from the arena of international law and legal institutions to specific situations.”²⁷ Such translators are able to take the ideas and practices of one category of actors and communicate them to another category of actors in terms that the latter group is likely to accept. In the context of mHRDD these people in the middle are capable of moving between human rights and corporate discourses and may thus be argued to occupy a “liminal position.”²⁸ That is, “they are capable of flexibly and easily moving between transnational and local cognitive styles, worldviews,

23 Marisa McVey et al., “Traduttore, Traditore?” Translating Human Rights into the Corporate Context, *Journal of Business Ethics* 182 (2022), p. 573.

24 UN OHCHR, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect, Remedy’ Framework” (2011) https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (last accessed 15 January 2024).

25 OECD, “OECD Guidelines for Multinational Enterprises on Responsible Business Conduct” (2023) https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en (last accessed 15 January 2024).

26 McVey et al, note 23, p. 573.

27 Ibid., p. 576.

28 Ibid.

logics, values, norms, meanings and conceptions.”²⁹ The translation of mHRDD norms necessarily involves the transformation and communication of abstract yet complex human rights and environmental information into the corporate managerial form, in order to make it easier for corporate actors to be able to understand and implement such human rights and environmental requirements within their idiosyncratic corporate contexts.³⁰ In this regard such translators often face what has been referred to as the ‘resonance dilemma’.³¹ This is the recognition that in order to be embraced in the corporate context, human rights norms will, to some extent, need to ‘resonate’ with existing corporate norms, failing which companies may be unwilling to fully adapt their practices to comply with human rights ideals. Consequently, the promotion of wider acceptability of human rights norms in the corporate context may sometimes, quite paradoxically, compel these experts to abandon explicit human rights language in order to frame HRDD obligations in a way that is more likely to resonate with covered companies. For example, this may be done through an over focus on due diligence as process rather than on realization of human rights and protection of the environmental as normative ideals. This may in turn have the unintended consequence of contributing to cosmetic compliance with mHRDD laws, where covered companies seek to implement HRDD processes without caring too much about human rights and environmental outcomes.

These external experts who help companies with the processes of translation could be referred to as, ‘Professional Service Providers (PSPs)’ and may include, “consulting firms, lawyers, financial advisors, accountants”³² among others. Such experts have many and varying goals,³³ which has implications for how and why this process of translation of HRDD from an abstract concept to an organizational reality takes place in practice. As Ramasastry notes, for instance, advising on BHR has become a profit-making endeavor,³⁴ with advisory services on how to comply with the mushrooming mHRDD laws within Europe becoming a booming business. For example, currently, there is a mushrooming of online tools and services geared towards offering covered companies easy to use IT-supported templates for identifying and analyzing information as part of the risk analysis process.³⁵

29 Ibid.

30 *Scheper / Zajak*, note 13, p. 36.

31 *Sally Engle Merry / Peggy Levitt*, Remaking women’s human rights in the vernacular: The resonance dilemma’ in: Lars Engberg-Pedersen et al.(eds.), *Rethinking gender equality in global governance: The delusion of norm diffusion* (2019), p. 150.

32 *Anita Ramasastry*, Advisors or Enablers? Bringing Professional Service Providers into the Guiding Principles’ Fold, *Business and Human Rights Journal* 6 (2021), p. 295.

33 *Enrico Partiti*, Polycentricity and Polyphony in International Law: Interpreting the Corporate Responsibility to Protect Human Rights, *International and Comparative Law Quarterly* 70 (2021), p. 136.

34 *Ramasastry*, note 32, p. 295.

35 *Melanie Wündsch*, *Risikoanalyse der Lieferkette: Perspektiven aus dem Globalen Süden Kommen zu Kurz*, *Reflexion Deutsches Institut für Menschenrechte* (2023), p. 6.

Such templates are rather generic and include both country specific as well as sector specific information that may be useful for the user companies. Other than the CSR Risk Check Tool that will be discussed in detail in this contribution, other such tools include Nexis Due Diligence Spotter,³⁶ the EU Due Diligence Toolbox,³⁷ the Conflict Minerals Reporting Template,³⁸ Due Diligence Compass,³⁹ among others.

Unfortunately, “the translation of human rights into the corporate context also has the potential to displace rightsholder experience”⁴⁰ given the axiomatic fact that, for the most part, the experts who assist covered Global North companies in such translation are very specific individuals or organizations, who are shaped by and integrated into the knowledge production structures of the Global North. Without any clear mandate for covered companies to involve rightsholders in HRDD processes, such processes are likely to be undertaken without the meaningful engagement of such rightsholders. Consequently, advisory services given to help companies comply with mHRDD laws may paradoxically result in advice or service provision that is directly or indirectly contrary to the interests of rightsholders.⁴¹ Granted, these Global North actors may sometimes have partnerships with Global South actors. However, the mere existence of such partnerships does not always mean that the interests of Global South rightsholders are properly considered and factored into the decisions taken.⁴² As Sénit and Biermann have pointed out in a comparable context,

*“Procedural rules for civil society participation in global sustainability governance are heavily biased against people in LDCs [Least Developed Countries] and from the Global South more generally. They lead to a larger representation in global sustainability governance of those communities that speak English, that have access to the internet, that have the means for professional organization including salaried staff, and that can afford regular travel to, and living costs in, New York and Other UN cities. Overall, this favors the rich middle class in the industrialized countries, from North America to Europe, Japan, and Australia.”*⁴³

36 Lexis Nexis, Nexis Diligence Spotter, <https://www.lexisnexis.com/en-sg/products/diligence-spotter> (last accessed on 20 September 2023).

37 EU Commission, Due Diligence Toolbox, https://single-market-economy.ec.europa.eu/sectors/raw-materials/due-diligence-ready/due-diligence-toolbox_en (last accessed on 20 September 2023).

38 Responsible Minerals Initiative, Conflict Minerals Reporting Template, <https://www.responsiblemineralsinitiative.org/reporting-templates/cmrt/> (last accessed 20 September 2023).

39 Helpdesk for Business and Human Rights, Due Diligence Compass, <https://kompass.wirtschaft-entwicklung.de/en/due-diligence-compass/downloads> (last accessed on 20 September 2023).

40 McVey *et al.*, note 23, p. 574.

41 Ramasastry, note 32, pp. 296-297.

42 Carole-Anne Sénit / Frank Biermann, In Whose Name are you Speaking? The Marginalization of the Poor in the Global Civil Society, *Global Policy* 12 (2021), pp. 581-591.

43 *Ibid.*, p. 586.

This under-representation and misrepresentation of Global South rightsholders in the global economy is not a simple question of logistics that could be easily resolved by increased financial and human resources. It is tied to deeper structural issues such as the historically rooted reasons and colonial underpinnings that explain the unequal power relations, information asymmetries and vested capital interests between Global North and Global South actors. In any event, even where Global South activists are able to participate in the processes of information collection and translation, this does not always result into satisfactory outcomes. To wit:

*"Even if activists try to produce alternative knowledge through their transnational 'networks of labour activism' ..., the process of translating information through standardization and quantification often looks similar, as activist groups must compete for public legitimacy in the presentation of information with companies. This again can feed back negatively into the activist networks and cause frictions between workers or local trade unions and their allies from abroad – as they no longer feel their grievances and claims represented."*⁴⁴

In addition, where experts provide BHR advice to covered companies without themselves embedding respect for human rights and preventing harm to rights-holders within their consultancy services, it is likely that the advice given in these contexts might inevitably focus on reducing the compliance risk of covered companies (and perhaps justifying the hefty consultancy fees such companies have paid!) rather than on contributing to the achievement of positive human rights and environmental outcomes.

II. Sources of Information for Risk Analyses

A separate but closely related concern is the question of the sources of information utilized by companies such as those covered under the LkSG, and the experts assisting them, to carry out their risk assessments as part of the due diligence process.

In order to meet their obligations under the Act covered companies must first identify their risk areas and need copious amounts of information to do so. Such information may be collected through a combination of desk-top research as well as on-site field visits to identified company or suppliers' locations.⁴⁵ BHR experts play a useful role here, in assisting the companies to identify pertinent information necessary for companies to carry out their risk analysis. In this regard, the BAFA guidelines on risk analysis offer some insights on potential sources of information available to such companies, or the experts advising them. The guidelines encourage companies "to gather basic information about their corporate structure, purchasing organizations as well as supply chains and business

⁴⁴ Scheper / Zajak, note 13, p. 36.

⁴⁵ Mark B. Taylor et al., Due Diligence for Human Rights: A Risk Based Approach, Corporate Social Responsibility Initiative Working Paper No. 53, Harvard University (2009), p. 9.

relationships in an effort to gradually increase transparency within the supply chain.”⁴⁶ As regards the corporate structure such information could include: names of affiliate companies over which influence is exercised; contact persons; company facilities or sites; types of products or services; sales volume as well as number of employees. For the purchasing policies this includes information about what raw materials, products, and services the company purchases; sourcing countries for each of these purchases; number of direct suppliers per category and/or per country as well as volumes involved. In terms of the nature of and scope of the company’s business activity pertinent information could include: an overview of the most significant products or services the company manufactures, sells, or markets in terms of revenue; details of the company’s supply chains and the most important business relationships in terms of volume; details of countries where the company operates or sources its materials. In terms of collecting information, and especially as this relates to high-risk suppliers, the goal of the company should be to progressively increase transparency. Information about operating or manufacturing sites, number of employees and information about employee representation would be useful in this regard. Given the complexities of acquiring all this information, especially where the company in question has multiple tiers in its supply chain, it is likely that it will take time before all of this information is available. Thus, covered companies should use all the human and financial resources at their disposal to begin this process of accumulating the necessary information over time.

Annex II of the BAFA guidelines, titled “[o]verview of selected implementation tools available to identify human rights and environment-related risks” outlines sources of information that may assist covered companies in their risk analysis. These include: the CSR risk check tool;⁴⁷ business and human rights resource centre;⁴⁸ human rights and business country guides;⁴⁹ country reports from multi-stakeholder initiatives; US state department country reports on human rights; indexes and rankings; websites and reports from non-governmental organizations and governmental organizations, among many others. While these are only recommendations for covered companies to use within the context of their risk analysis, and are by no means an exhaustive list, concerns may nonetheless be raised about whether there is an implicit privileging of certain sources of information at the expense of others, which in turn has implications for the risk analysis carried out on the basis of such information.

46 BAFA Guidance, note 7, p. 10.

47 MVO Nederland, CSR Risk Check Tool, <https://www.mvorisicochecker.nl/en> (last accessed on 5 July 2023).

48 Business and Human Rights Resource Centre, <https://www.business-humanrights.org/en/> (last accessed on 5 July 2023).

49 Human Rights and Business Country Guides, <https://globalnaps.org/human-rights-and-business-country-guides/> (last accessed on 5 July 2023).

III. Spotlight on the CSR Risk Check Tool

The CSR Risk Check tool was commissioned by the Dutch Ministry of Foreign Affairs and developed by a company called MVO Nederland and Shopworks. There is a German version of the tool commissioned by the National Action Plan (NAP) helpdesk on Business and Human Rights, a free support service of the German Federal government.⁵⁰ Users first select whether they are a company or a government agency. They are then able to generate templates that give a generic summary of the country and sector specific risks that they are likely to be prone to, after inputting some basic information into the risk check tool. In step 1, the company will input information about a product or a part/material of a product that they produce or purchase, or a service that they provide. In step 2, the company will select the country of origin. In step 3, the company can create a user account, although this is not necessary in order to get the generated feedback document, which is in PDF form. It is also possible to carry out an interactive check geared towards accessing information that will help user companies increase their influence on their supply chain partners, both direct suppliers as well those suppliers further down the chain.⁵¹

The feedback document is divided into a number of sections identifying the risks that a particular company is likely to face based on the input variables, as well as advice for mitigating the identified risks. Risks are analyzed under several categories including: fair business practices (corruption and market distortion/competition); human rights and ethics (government influence, conflicts and security, community impact); Labour rights (freedom of association, labour conditions such as contracts and working hours, health and safety at work); environment (climate and energy, biodiversity and deforestation, water use and water availability, air pollution, soil and water contamination). In each specific section the source of both the risk information as well as the suggested advice for the company is displayed.

The CSR risk check website states that at present 3,473 data sources underpin the functioning of the tool, although this number is likely to increase as more data sources are added onto the website. A cursory review of these data sources reveals that the information is obtained from primarily Global North sources, including, rather (un)surprisingly, western media outlets such as ABC news, BBC news and CNN.⁵² Even blog sites such as the popular US Buzzfeed are included as a source of data. Given well documented concerns about the biased reporting by western media of events in the Global South, one may legitimately question whether the use of such data sources in a predictive tool such as

50 CSR Risk Check (German Version), <https://wirtschaft-entwicklung.de/en/helpdesk-on-business-human-rights/csr-risk-check/> (last accessed on 5 July 2023).

51 CSR Risk Checker, Supply Chain Influence Checklist, <https://www.mvorisicochecker.nl/en/supply-chain-influence-checklist> (last accessed on 10 August 2023).

52 CSR Risk Checker, Data Sources, <https://www.mvorisicochecker.nl/en/data-sources> (last accessed on 15 January 2024).

the CSR risk check implicitly brings with it certain biases that may dilute the veracity of results. To be fair, some of the data sources are derived from the Global South and include, inter alia: newspaper reports from Global South news outlets such as the Ghanaian Times and Al-Jazeera; research works from Global South Researchers and even information from government agencies such as the Anti-Corruption Bureau of Malawi (for example). As the project managers of the CSR risk check tool have themselves acknowledged, the biggest challenge plaguing the operation of the tool is data availability. There is more publicly available information on historically problematic areas such as “child labor in cocoa farming in West Africa or about the working conditions of textile workers in Asia” which have been widely researched on and reported upon. However, other equally important risk areas are under researched, which means that public information in these areas is unavailable.⁵³

As to how the CSR risk check tool is expected to work, the website explains, “[t]he CSR Risk Check shows briefly described risks identified by us related to countries and/or products & services, on 22 themes. We extract the information on risks (and the related advices) from public online sources so we can refer you to the original source for more information.”⁵⁴ Some concerns may be raised about a risk analysis tool whose entire premise rests on information that comes from ‘public online sources’. Firstly, there is likely to be a time lag between human rights and environmental risks existing in the company context, and this information becoming public knowledge. A primary reliance on a risk check tool that solely utilizes publicly available information means that the company could always be playing catch-up, only being able to update its risk profile once pertinent risk information becomes publicly available. This can be contrasted to the situation if companies were compelled to, in the first instance, seek out information from rightsholders, who may have more current and up to date knowledge of risk situations on the ground, given the fact that such risk situations are an implicit part of their quotidian realities. Secondly, only online sources feed into the CSR risk check tool. This indirectly privileges those voices who have access to the internet and other electronic modes of data dissemination. What about the many Global South rightsholders who lack the know-how as well as the logistical capacity to share pertinent information online? Thirdly, even more worrisome, the CSR risk check website stresses that “we check to what extent the information is independent and the author (person or organization) must be recognizable and reliable.”⁵⁵ But what does recognizability or reliability mean in this context? Do these kinds of requirements create hurdles for Global South actors with useful information to contribute to these risk analysis processes? Such problematic requirements obviously tilt the balance in favor of certain providers of information and away from others.

53 CSR Risk Check, Q & A About the CSR Risk Check, <https://www.mvorisicochecker.nl/en/qa-about-csr-risk-check> (last accessed on 5 September 2023).

54 CSR Risk Check, note 47, FAQs, <https://www.mvorisicochecker.nl/en/faq> (last accessed on 5 July 2023).

55 Ibid.

This contribution argues that where companies do not do enough to obtain information from rightsholders and/or their legitimate representatives, relying instead on informational middlemen primarily in the Global North, a lot will be lost in the process of identifying and incorporating risk areas into due diligence processes targeted at preventing and remediating human rights and environmental risks. Consequently, where both the LkSG as well as the BAFA guideline fail to explicitly require companies to put in place mechanisms to carry out their risk analysis directly in concert with rightsholders, they inadvertently tilt the market of information in favour of Global North suppliers of such information. This has ramifications for whether the risk management processes implemented by companies will be able to respond to the specific needs of rightsholders affected or potentially affected by the activities of covered companies as well as their business partners. This is the case particularly for rightsholders deeper in the supply chain, in the less visible tiers, who often (if not always) go unheard. The structures of exploitation in place condemn workers in lower tiers of the supply chains to the violence of capitalism. Such workers experience multiple and intersecting violations including forced labour, below minimum wages and abusive working conditions.⁵⁶ Obviously, given the precarity of their material conditions, these rightsholders are quite simply unable to leverage their way into the kind of risk analysis processes that could actually have an impact on their lived realities. Given the asymmetries that exist between covered companies and such rightsholders, it is imperative that regulation and regulators do more to compel companies to put in place structures that will ensure that companies at least try to create direct channels of communication with rightsholders. Unless such clear signalling comes from the law makers and regulators it is unlikely that companies will go out of their way to fully engage with rightsholders in the obtaining of information and carrying out of risk analysis as part of due diligence processes.

D. Rebalancing the Market of Information

I. An Unbalanced Market of Information

As previous sections of this contribution have demonstrated, in order to meet the requirements under the LkSG, covered companies must carry out annual as well as ad-hoc risk analyses. The proper fulfilment of these obligations hinges on the identification and analysis of information that will allow the companies to assess their human rights and environmental risks, as well as those of their suppliers. This contribution argues that as things currently stand there exists a market of information with covered companies being consumers of such information, while numerous stakeholders function as suppliers of the information. Unfortunately, however, given the underlying power relations and other asymmetries between Global North and Global South actors this market can be said to be

56 Benjamin Selwyn, Why Global Value Chains Should be Called Global Poverty Chains, Developing Economics blog (2023), <https://developingeconomics.org/2023/01/13/why-global-value-chains-should-be-called-global-poverty-chains/> (last accessed on 1 July 2023).

an imperfect market given its privileging of information from the former at the expense of the latter.

In performing human rights risk analyses covered companies may either engage external experts or utilize internal staff for this purpose. Before the era of mHRDD laws and the mandatory obligations flowing from them, such corporate risk assessment procedures would be done confidentially, given the often-sensitive nature of such information. However, in this new age of hardened HRDD obligations there is an expectation of transparency in how covered companies carry out their risk analysis as a foundation to complying with their due diligence obligations. Given the nascent stage of the implementation of mHRDD laws, only time will tell how covered companies actually end up carrying out their risk analyses and what kinds of information they will use for this purpose. In this regard, future research in this area could seek to empirically examine the sources of information that underpin risk analyses by covered companies. However, given that all of this is not taking place in a vacuum, the already alluded to background conditions of power and inequalities between Global North and Global South actors will undoubtedly structure the processes of information exchange and utilization among in-scope companies, the BHR experts assisting them to comply with their mHRDD duties and stakeholders such as rightsholders.

In order to further contextualize these concerns, this contribution offers some critical insights into the method used to check the reliability of the data sources underpinning the CSR Risk Check tool. On request through an email address: csrcheck@mvonederland.nl, interested persons can receive a document summarising information about this method. The document, titled 'reliability scheme CSR risk check' gives details about three variables: independence, reliability score and actuality:

"a) For independence, the data source in question must receive a score of greater than or equal to zero (≥ 0). In order to award this score, four sub-variables are considered. These are: purpose – what is the main purpose of the publication (A score of 1 is awarded for data that is classified as scientific research and as government informing of OECD-countries. A score of 0 is awarded for government informing of non-OECD countries, reports from NGOs and CSOs, and data whose purpose is unknown or unclear. A score of -1 is awarded for personal profiles such as blogs as well as for data whose publication serves a commercial or financial interest); financing (A score of 1 is awarded for data financed by an organization which the author is not connected to, excluding advertising. A score of 0 is awarded where the financing is from an organization connected to the author. A score of -1 is awarded where there are advertisements on the website linked to the content of the publication); cooperation in the writing or publication of the data (A score of 1 is awarded to peer-reviewed academic articles and to publications written or supported by multiple different types of organizations); and objectivity for which a maximum score of 1 is awarded.

b) For reliability, the data source in question must receive a score of greater than or equal to one (≥ 1). This depends on the type of publication (A score of 1 is awarded to academic articles, book chapters and to reports whether physical or pdf. A score of zero is awarded to web pages, newspaper articles, summaries, and magazines); who the author is (A score of 1 awarded if the author is known); the origin of the information (A score of 1 is awarded where it is known where the author got his information); the date of publication (A score of -1 is given where the date of publication is unknown).

c) For actuality, there is no required minimum score. Data sources will be awarded a score of 1 where they are not more than 5 years old, and where they are a classic source, although the meaning of the term classic in this regard is not defined.

At the end of the computation a data source will be considered reliable if it has a score that is greater than or equal to 3 (≥ 3)."

Arguably, the reliability schematic underpinning the CSR risk check tool implicitly privileges information generated in the Global North and by Global North actors, while simultaneously making it harder for information generated by Global South actors to be considered as reliable.⁵⁷ This can be inferred from the higher scores awarded to, for example, academic publications, as compared to the lower scores awarded to reports from NGOs or CSOs. But, and this is a big BUT, how representative is scientific knowledge in terms of distribution between Global North and Global South academics? It is not without justification that there currently exist calls to 'decolonize knowledge'.⁵⁸ The dominance of English in learning, teaching and research impacts the ability of many Global South actors to participate in knowledge production for global consumption. In addition, the universalisation of dominant western frameworks of knowledge production and validation also raises some concerns. For instance, the need for academic work to comply with certain standards, such as citation requirements, in order to be considered truly scientific implicitly means that not everyone (from the Global South) will be able to get a seat at the knowledge production table. Relatedly, on the question of financing, there is evidence that "research funding has been disproportionately available in the world, with North America and Western Europe displaying the highest Gross Domestic Expenditure on Research and Development (GERD)".⁵⁹

57 Wündsche, note 35, p. 8.

58 Lata Narayanaswamy, Why it is time to turn the decolonial lens onto the institutional structures of Higher Education, *Convivial Thinking* (2019), <https://convivialthinking.org/index.php/2019/07/07/why-it-is-time-to-turn-the-decolonial-lens-onto-the-institutional-structures-of-higher-education/> (last accessed on 28 July 2023).

59 Romina Istrate, The long read on decolonizing knowledge: How western Euro-centrism is systematically preserved and what we can do to subvert it, *Real KM* (2020), <https://realkm.com/2020/03/11/the-long-read-on-decolonising-knowledge-how-western-euro-centrism-is-systemically-preserved-and-what-we-can-do-to-subvert-it/> (last accessed on 28 July 2023).

This has implications for which voices are more likely to be heard within the context of research and knowledge production.

To be clear, this is not a blanket condemnation of tools such as the CSR Risk Check Tool. Admittedly, this tool and other similar ones offer a useful starting point for the carrying out of an abstract risk analysis, that will help covered companies obtain some initial information. Nevertheless however, the modest claim of this contribution is that such foundational information must thereafter be deepened within the context of the more concrete risk analysis that will follow. This necessitates the robust involvement of Global South actors and the full consideration of Global South sources of information.

II. Finding a New Balance?

While the concerns articulated above afflict the production of scientific knowledge generally, this contribution argues that such concerns can be extrapolated to the generation of risk analysis information necessary to comply with mHRDD obligations. As things stand, there exists an asymmetry between Global North and Global South sources of information for the risk analysis that forms the foundation of due diligence processes.

One way to rebalance this state of affairs is to make it mandatory for covered companies to put into place mechanisms and processes that will ensure that rightsholders are an integral part of information gathering for the risk analysis process specifically, and for due diligence more generally. This will necessitate the active and deliberate carving out of spaces for rightsholders to share information with the company, both orally as well as in writing. This may be done by requiring covered companies to set up special risk analysis committees whose membership will include a fixed number of workers, individuals from local communities as well as other affected rightsholders as the case may be, in addition to internal company representatives. Where necessary, the legitimate representatives of rightsholders can also be included in these committees. The task of such committees could be to provide an open forum for rightsholders to share pertinent information with the company about any actual and potential human rights and environmental risks as and when they arise (and even before!), given the intimate knowledge that such rightsholders have about company and supplier activities on the ground. Whenever the committee meets, detailed minutes should be kept indicating the various participants as well as their contributions. The recommendations of the committee could form a useful input to the information used by the company to carry out its risk analysis, and to meeting its due diligence obligations more generally, thus offering a counter-hegemonic alternative to dominant practices that exclude Global South rightsholders from due diligence processes.

This kind of worker driven committee model is not entirely unknown in the BHR landscape. The model adopted in the Bangladesh Accord (now referred to as the International Accord for Health and Safety in the Textile and Garment Industry) shares some similarities with the proposal made by this contribution. To be sure, there are significant differences between a private contract tool such as an Enforceable Brand Agreement like the Bangladesh

Accord, and the risk analysis committee proposed herein. Nonetheless, a number of useful insights can be drawn from any counterstrategy to the dominant approaches favoured by TNCs that involve giving rightsholders like workers a central place in the quest to improve labour rights in transnational supply chains.

The Bangladesh Accord is an independent, legally binding agreement between brands and trade unions to work towards a safe and healthy garment and textile industry in Bangladesh.⁶⁰ Over 200 lead firms entered into a legally binding agreement with two global trade unions, UNI global union and IndustriALL global union, as well as with 8 Bangladeshi trade unions. Created after the tragic Rana plaza factory building collapse in April 2013.⁶¹ The Accord seeks to ensure a safe working environment where risks to workers that can be prevented with reasonable health and safety measures are proactively dealt with. One of the core tenets of the Bangladesh Accord is the recognition that “safe workplaces cannot be assured in the long term without the active participation of the people who work in them.”⁶² The Accord is governed by a steering committee “which shall have equal representation chosen by the trade union signatories and company signatories (maximum 3 seats each) and a representative chosen by the International Labor Organization (ILO) acting as a neutral chair and independent advisory member.”⁶³ Decisions are made on the basis of consensus or through majority votes. The most striking feature of the Accord is its elevation of the interests of workers and their empowering, including the prominent place given for such workers to refuse to undertake work, without discrimination or loss of pay, where they have reasonable grounds to believe that there are security concerns, even where such information is not yet known by the signatory company in question.⁶⁴ In addition, there are mandatory training requirements covering basic safety procedures and precautions and creating spaces for “workers to voice concerns and actively participate in activities to ensure their own safety.”⁶⁵ The Accord also harnesses the power and influence of the lead firms over their suppliers to leverage such suppliers into meeting their obligations to the workers with whom they have contractual relationships.⁶⁶ This is an important way to cascade obligations from the top tiers of the supply chain to the lower, less-visible tiers where violations are more likely to occur. A final noteworthy aspect of the Bangladesh

60 Accord on fire and building safety in Bangladesh, <https://bangladeshaccord.org> (last accessed on 26 July 2023).

61 *Ben Vanpeperstraete*, *The Rana Plaza Collapse and the Case for Enforceable Agreements with Apparel Brands* in: Miriam Saage-Maaß et al. (eds.), *Transnational Legal Activism in Global Value Chains: Interdisciplinary Studies in Human Rights* (2021), p. 137.

62 2018 Accord on fire and building safety in Bangladesh, <https://bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf> (last accessed on 26 July 2023), p. 1.

63 *Ibid.*, p. 2.

64 *Ibid.*, p. 4.

65 *Ibid.*, p. 5.

66 *Ibid.*, p. 6.

Accord is its emphasis on transparency and public reporting of information relating to suppliers, factories as well as any progress on remediation of identified concerns.⁶⁷

Granted, the Bangladesh Accord is an exception rather than the rule given the nascent practice of enforceable supply chain agreements. However, mHRDD laws can borrow from the successes of the Bangladesh Accord as regards their centering of rightsholders in due diligence processes. The quality of risk analysis and the information gathered from such analysis will be significantly improved where covered companies are able to lessen the informational gap between themselves and rightsholders such as workers. Due diligence laws, and the guidance elucidating upon their implementation, can catalyze the bridging of this gap where they explicitly require that covered companies come up with innovative ways to by-pass informational middlemen and get as close as possible to the rightsholders most likely to be negatively impacted by business activities.

E. Conclusion

The power relations and ensuing asymmetries that plague our global order are brought into stark relief in the market of BHR information. As covered companies seek and consume the vast amounts of information necessary for them to comply with the HRDD obligations under due diligence laws such as the German LkSG, there is a high likelihood that there is an overrepresentation of both BHR experts as well as information sources from the Global North. This has implications for the robustness of the risk analysis carried out on the basis of such information, as well as on the efficiency of due diligence processes more generally.

This contribution has sought to begin a discussion on the imperative of law makers and statutorily mandated supervisory bodies such as BAFA to do more to rebalance this unequal relationship between Global North and Global South actors by requiring covered companies to do more to reduce their (over)reliance on informational middlemen, and to reduce the gap between themselves and rightsholders.

At the end of the day, given the fact that what are mere human rights and environmental risks to covered companies are the lived realities of rightsholders such as labourers, local communities and others, any normatively defensible and legitimate process of risk analysis must start and end with such rightsholders. These rightsholders have the knowledge and experience necessary to give covered companies a fuller picture of the human rights and environmental risks that they face, as well as the measures necessary to address them.⁶⁸ It is a form of epistemic injustice to fail to properly include Global South rightsholders in mHRDD processes, particularly risk analysis procedures.⁶⁹

67 Ibid, p. 5.

68 Katherine McDonnell, *Epistemic Injustice and Remedy: Can BHR Ever Really ‘Centre’ Rights holders*, *Australian Journal of Human Rights* 29 (2023), p. 85.

69 Ibid.

So long as the informational gap between Global South rightsholders and Global North companies continues to exist, mHRDD obligations will continue to focus on corporate processes rather than bettering the human rights and environmental realities of vulnerable and disenfranchised rightsholders.



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