



- I. Sustainability and Overseas Expansion of Japanese Companies – Three Aspects of an Essential Mindset –
- II. Sustainability and Overseas Expansion of Japanese Companies – Overview of Business and Human Rights –

Nov 27,
2020

I. Sustainability and Overseas Expansion of Japanese Companies – Three Aspects of an Essential Mindset – Junko Watanabe

At a time when environmental and human rights concerns are continually gaining prominence in our global society, Japanese companies, and investors therein, are wisely staying abreast of concepts such as “Environmental, Social and Corporate Governance” (ESG),¹ climate change countermeasures, Business & Human Rights, and the like, especially when considering overseas expansion into least developed and emerging countries (collectively herein, “LDC”).² Each of these concepts can be considered to fall under the broad umbrella of sustainability. However, as “sustainability” encompasses many factors and is sometimes difficult to grasp due to lack of uniformity, for example among the various ESG investment protocols, many Japanese companies still struggle with identifying a proper approach to such issues.

In this article, three aspects of the Japanese company mindset necessary for successful overseas business are suggested. This will be accomplished against the backdrop of today’s rapidly changing external business environment and the understanding that business in LDC is not only key to realizing global sustainability but also encompasses significant market opportunity. Subsequent articles will discuss individual issues in this vein with greater detail.

1. Necessity of adopting a sustainability-based perspective in international business
2. The need to understand international law and differing jurisdictions, beyond local law
3. The need for collaboration with other departments, including legal departments

¹ ESG factors are used as a combined metric for determining the sustainability, and thus long-term profitability, of a company or investment.

² The author acknowledges that the terms “least developed countries” and “emerging countries” are not favored by all and adopts this phrasing solely for the purpose of recognizing the United Nations definitions for use in this article, i.e. “low income countries confronting severe impediments to sustainable development” that are “highly vulnerable to economic and environmental shocks” (see: <https://www.un.org/development/desa/dpad/least-developed-country-category.html>).

This newsletter was written by its authors and does not reflect the views or opinion of Nishimura & Asahi. In addition, this newsletter is not intended to create an attorney-client relationship or to be legal advice and should not be considered to be a substitute for legal advice. Individual legal and factual circumstances should be taken into consideration in consultation with professional local counsel prior to taking any action related to the subject matter of this newsletter.

1. Necessity of adopting a sustainability-based perspective in international business

The private sector is playing an increasingly important role in achieving global sustainability. Such impact is visible in and partly due to the fact that the turnovers of some of the world's largest corporations, with supply chains that span around the world, are greater than the GDPs of many LDC. As such, there are accompanying expectations; namely that the private sector will play a larger role in helping achieve the "Sustainable Development Goals" (SDGs)³ in comparison with their predecessor, the "Millennium Development Goals". In this spirit, the Japanese government has been promoting solutions to social issues in other countries through business collaborations with Japanese companies.⁴ Such efforts are made in response to the growing global awareness that the Official Development Assistance (ODA) conventionally carried out between developed and developing countries, attempting to solve economic and social problems, is not enough. Furthermore, as ESG investment is attracting global attention, Japanese companies are also working to sustainably improve corporate value by increasingly incorporating SDG-related elements into their management strategies.

As a result, the issues that Japanese companies need to consider when expanding overseas are changing significantly. Although business expansion by Japanese companies into LDC has been an ongoing trend over the past few decades, key determinants of destination regions, countries, and business models have been attributed to the perceived potential for growth in the size of the economy and associated market of the destination country. In order to attract foreign investment, governments of LDC that want to improve their economies promote their GDP growth rates to the world every year; it has been quite natural for Japanese companies, as foreign investors, to use such information as the basis for investment decisions.

However, from a sustainability perspective, economic indicators such as GDP and its growth rate are merely two of many indicators for assessing the quality of life of a people and do not necessarily reflect the magnitude of their needs and long-term well-being. This is because "income redistribution" does not necessarily work in a way that correlates well with a country's overall economic strength as measured by GDP. Rather, as many LDC experience set-backs due to government corruption, obsession with short-term GDP growth rates, and "free-trade" exacerbated competition,⁵ many social issues remain unaddressed, such as poverty and environmental problems. This creates a reality quite different from the image generated by attractive GDP figures. As a result, the gap between the rich in most developed countries and the poor in LDC is widening.⁶ There are even claims that global poverty rates are getting worse, despite intergovernmental cooperation over the past decades.⁷

The "S" (society) in both the SDGs and ESG is a very broad concept that supposedly targets all countries, but when viewed through the lens of SDG programs and ESG investment in practice, it is clear that social issues in LDC are the major priority. The United Nations Development Programme ("UNDP") predicts that by 2030 the market opportunities created by the SDGs will reach 1,200 trillion yen per year worldwide,^{8,9} and more than 50% of those opportunities will be in least developed countries. One factor driving the emergence of new businesses behind such opportunity is the acceleration of the digital revolution by the Covid-19 crisis. With this acceleration, many anticipate the number of newly accessible businesses in developing markets will begin to increase at a faster rate,

³ International goals the 193 UN member countries agreed in 2015 to achieve in the 15 years from 2016 through 2030; see <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>; especially paragraphs 39, 41, 52, 60, and 67.

⁴ Developed Corporation Charter approved by the Japanese cabinet on February 10, 2015 <<https://www.mofa.go.jp/mofaj/gaiko/oda/files/000072774.pdf>>

⁵ Some consider free trade and foreign investment entered into under the guise of promoting economic development and driving solutions to social challenges as actually creating competitive scenarios that leave local businesses at a disadvantage, worsening some social issues.

⁶ Thomas Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor' 18 *Leiden Journal of International Law* (2005) 717; John Linarelli, Margot E Salomon and M Somarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) chapter 7

⁷ Jason Hickel, 'The true extent of global poverty and hunger: questioning the good news narrative of the Millennium Development Goals' *Third World Quarterly* (2016) 37:5, 749-767

⁸ UNDP website, 'More than philanthropy: SDGs are a \$12 trillion opportunity for the private sector' <<https://www.undp.org/content/undp/en/home/blog/2017/8/25/More-than-philanthropy-SDGs-present-an-estimated-US-12-trillion-in-market-opportunities-for-private-sector-through-inclusive-business.html>>

⁹ Total of the 60 largest market opportunities in four areas: Food and Agriculture, Cities, Energy and Materials, and Health and Well-being (Business and Sustainable Development Commission, 'Better Business Better World' (2017)) <<https://sustainabledevelopment.un.org/content/documents/2399BetterBusinessBetterWorld.pdf>>

given that such business models were often avoided under more traditional cost/benefit equations. Against this background, Japanese companies need a mindset that sees them seeking out new business models that are aimed at solving real needs, paying attention to factors beyond superficial economic growth rates and “well-established” markets.

In addition, sustainability and ESG investment are important concepts, not only from the perspective of creating positive business opportunities, but also from the perspective of reducing the negative impacts that can arise in the course of a company’s business. The latter encompasses the most pressing issues that all companies need to address immediately. When Japanese companies expand into LDC, they can contribute by creating new jobs and sharing know-how through their business, but it is also important to realize that foreign operations of multinational companies and the influx of foreign capital do not have solely positive effects on the countries they operate in, as seen in the Rana Plaza incident of 2013, which resulted in more than 100 deaths.

If we apply the concept of sustainability management, which is required of all companies in this century, to overseas business, it means that companies that benefit from doing business in a host country have a responsibility to support those in such countries who do not benefit from it directly (and even may be negatively impacted indirectly). The concept of “Business & Human Rights” (e.g., human rights of workers in a company’s supply chain, indigenous peoples’ rights in the communities or locations in which a company operates, environmental protection, etc.), which is quickly becoming a prominent ESG issue for Japanese companies, is also based in ideas geared toward avoiding or mitigating the negative impacts that may arise through or in connection with a company’s business. In addition to the moral considerations, failure to adequately address these issues can expose companies to a variety of risks. Traditionally, the most obvious risks have been the risk of disinvestment from institutional investors, the operational costs of dealing with complaints from victims of human rights violations and civil society groups, and the risk of consumer boycotts, among other non-legal risks. However, legal risks are also becoming more pronounced as many countries lead the way in the promotion of hard laws addressing issues of Business & Human Rights.¹⁰

2. The need to understand international law and differing jurisdictions, beyond local law

Traditionally, primary legal support for businesses in LDC involves examination of the laws and regulations of individual countries, analysing risks associated therewith, and incorporating corporate strategies based on the results. However, especially since the late 2010s, various areas of international law that directly relate to social issues in LDC have been dynamically changing, including some areas of law crucial to the external environments in which companies must operate. Some of the frameworks impacting these environments include, for example, “Business & Human Rights” and developments in free trade agreements. Progress is also expected to be made in developing international standards for the evaluation of ESG investments, which are necessary for businesses to obtain appropriate evaluations in financial markets. As advances in international law, specifically arrangements between countries, are to be reflected in each country’s national laws, it will be increasingly necessary in the future to monitor state-level international discussions when considering international business strategies in anticipation of future hard-law movements.

Business & Human Rights is an emerging area of international law, promoted by many European countries as worthy of ascension to hard law status, that directly affects businesses in LDC, and has even begun to be incorporated into the legal systems of some developing countries (for example, Thailand’s National Action Plan on Business & Human Rights). In this field, simply complying with the local laws LDC is not enough, it is necessary to conduct business in accordance with international standards. Therefore, Japanese companies will need to respond to the increase in the number of issues that need to be addressed across all of their efforts, in addition to those that specifically need to be handled by the legal affairs department of each local subsidiary. As sustainability and ESG investment continue to increase in importance on an international scale, there is a dynamic trend toward the creation of a common global framework which incorporates these various emergent fields of law on a grand scale. This has led to the expectation

¹⁰ See my next article “Sustainability and Overseas Expansion of Japanese Companies - Overview of Business and Human Rights”.

that there will be an increase in the number and types of issues that cannot be resolved by working with local counsel in each country on a case-by-case basis.

3. The need for collaboration with other departments, including legal departments

Sustainability has been often considered a part of a company's Corporate Social Responsibility ("CSR") activities, and CSR departments often played a central role in following-up on these activities. However, as mentioned above, as international frameworks for various sustainability and ESG investment areas are rapidly being developed, the number of areas directly related to legal issues is increasing. In other words, climate change issues and Business & Human Rights, for example, increasingly involve legal risks (regulatory risks and conflict risks), and therefore legal departments need to be proactively involved. In order to formulate new business strategies and develop new business models, as described in the first part of this newsletter, further cooperation with planning departments and overseas business divisions is also necessary. Company-wide collaborative approaches to social issues addressed through business are the style of sustainability management that will be required from now on.

As described above, a sustainability-based perspective is extremely important for businesses targetting expansion within LDC, and as the private sector is increasingly called upon to take the lead in addressing social issues, it is essential to understand and adopt the appropriate mindset (described in forthcoming newsletters).

*Breakdown of 1,200 trillion yen in annual market opportunities created by the SDGs by 2030

	 Food and Agriculture	 Cities	 Energy and Materials	 Health and Well-Being
1	Reducing food waste in value chain	Affordable housing	Circular models - automotive	Risk pooling
2	Forest ecosystem services	Energy efficiency - buildings	Expansion of renewables	Remote patient monitoring
3	Low-income food markets	Electric and hybrid vehicles	Circular models - appliances	Telehealth
4	Reducing consumer food waste	Public transport in urban areas	Circular models - electronics	Advanced genomics
5	Product reformulation	Car sharing	Energy efficiency - non-energy intensive industries	Activity services
6	Technology in large-scale farms	Road safety equipment	Energy storage systems	Detection of counterfeit drugs
7	Dietary switch	Autonomous vehicles	Resource recovery	Tobacco control
8	Sustainable aquaculture	ICE vehicle fuel efficiency	End-use steel efficiency	Weight management programs
9	Technology in smallholder farms	Building resilient cities	Energy efficiency - energy intensive industries	Better disease management
10	Micro-irrigation	Municipal water leakage	Carbon capture and storage	Electronic medical records
11	Restoring degraded land	Cultural tourism	Energy access	Better maternal and child health
12	Reducing packaging waste	Smart metering	Green chemicals	Healthcare training
13	Cattle intensification	Water and sanitation infrastructure	Additive manufacturing	Low-cost surgery
14	Urban agriculture	Office sharing	Local content in extractives	
15		Timber buildings	Shared infrastructure	
16		Durable and modular buildings	Mine rehabilitation	
17			Grid interconnection	

(Cited from Business and Sustainable Development Commission, 'Better Business Better World' (January 2017))



Junko Watanabe

Attorney-at-Law

E-mail: j_watanabe@jurists.co.jp

Registered as a qualified lawyer in Japan in 2011 and joining Nishimura & Asahi in 2012, Junko Watanabe began her career as a member of the corporate practice group, acquiring experience in domestic and international M&A, general corporate matters, domestic and international litigation, and arbitration. Thereafter, Junko further specialized via her work with the Southeast Asian practice team involving cross-border M&A, joint-venture, regulation research, and labor dispute matters, among others, as well as via her Master's studies in international human rights law at the London School of Economics and Political Science in 2019/20. Junko is currently seconded to Ashurst LLP's London office.

II. Sustainability and Overseas Expansion of Japanese Companies – Overview of Business and Human Rights –

Junko Watanabe

With the growing international awareness of sustainability, the days of “Human Rights” being considered irrelevant to corporate activities are coming to an end. Did you know that more than 90% of the SDGs, adopted by the UN General Assembly in 2015, relate to international human rights?¹ Human rights are also a key part of the “S” (society) element of ESG investment, and the ESG element that has come into the greatest focus due to the Covid-19 crisis;² as unemployment in supply chains around the world has skyrocketed, starvation deaths are predicted to reach 12,000 per day this year, surpassing even the death toll from the virus itself.³

In the past, actions addressing societal issues progressed slowly due to the difficulty of developing metrics to measure corporate performance and lack of strict regulations. However, awareness of institutional investors is rapidly changing in the Covid-19 crisis. For example, the United Nations-supported Principles for Responsible Investment (“PRI”) highlight the need to raise investor awareness of human rights issues to the same level as environmental issues.⁴ BlackRock, one of the largest U.S. asset management companies, has also pointed out the importance of disclosing information concerning human rights due diligence and other efforts to address human rights risks.⁵ In addition, human rights issues are closely related to the “E” (environment) element of ESG, including climate change issues.

“Business & Human Rights” is an issue for both domestic and foreign businesses, regardless of industry. However, in least developed and emerging countries (hereinafter “LDC”), the problem is currently more serious due to the lack of well-established legal systems, widespread economic vulnerability, and complex racial and culture-associated issues, which require companies with overseas operations to pay close attention.

This article will provide an overview of Business & Human Rights and the current international trends in this field. Then the Japanese government’s response (formulation of a national action plan) and the latest trends in the efforts of Japanese companies to address these issues will be reviewed.

- More than 90% of the SDGs’ 169 targets are related to human rights
- Covid-19 crisis has shed new light on the “S” (society) element of ESG
- The Japanese government, following the lead of other countries, announced a national action plan (October 2020)
- Sustainability-focused hard law is rapidly advancing, especially in Western countries
- Negotiations on a Business & Human Rights Treaty to develop an international framework are ongoing

¹ Sarah Rattray, ‘Human rights and the SDGs - two sides of the same coin’ (United Nations Development Programme website, 5 July 2019) <[² As a result of the covid-19 crisis, for example, more than 800,000 workers in Indonesia and more than 150,000 workers in Cambodia have been laid off and lost their jobs this year, which is a serious problem, especially in emerging countries with high economic vulnerability. \(International Labour Organization, ‘The supply chain ripple effect: How COVID-19 is affecting garment workers and factories in Asia and the Pacific’ \(Oct, 2020\)\) <\[³ Oxfam, ‘The hunger virus: how COVID-19 is fuelling hunger in a hungry world’ \\(Oxfam website, 9 July 2020\\) <\\[⁴ Sarah Simpkins, ‘Investors weak on human rights: PRI’ \\\(InvestorDaily, 17 July 2020\\\) <\\\[⁵ BlackRock Investment Stewardship Global Quarterly Stewardship Report \\\\(Q1 2020\\\\) <\\\\[© Nishimura & Asahi 2020\\\\]\\\\(https://www.blackrock.com/corporate/literature/publication/blk-qrly-stewardship-report-q1-2020.pdf>></p></div><div data-bbox=\\\\)\\\]\\\(https://www.investordaily.com.au/markets/47475-investors-weak-on-human-rights-pri>></p></div><div data-bbox=\\\)\\]\\(https://oxfamlibrary.openrepository.com/bitstream/handle/10546/621023/mb-the-hunger-virus-090720-en.pdf>></p></div><div data-bbox=\\)\]\(https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/briefingnote/wcms_758626.pdf>></p></div><div data-bbox=\)](https://www.undp.org/content/undp/en/home/blog/2019/human-rights-and-the-sdgs---two-sides-of-the-same-coin.html#:~:text=Over%2090%20percent%20of%20the.correspond%20to%20human%20rights%20obligations.&text=Currently%2C%2079%20of%20all%20193.achieved%20this%20milestone%20since%202015.>></p></div><div data-bbox=)

1. Overview of Business and Human Rights

The United Nations Guiding Principles on Business & Human Rights (“Guiding Principles”), unanimously endorsed by a resolution of the United Nations Human Rights Council in 2011, have led to the recognition of Business & Human Rights as an issue of international importance.⁶ Although the Guiding Principles are not legally binding, it is important for businesses to understand them, as they form the basis for all subsequent international guidelines, as well as the treaties, laws and policies enacted by individual countries, such as Japan (described below). In traditional discussions of international human rights law, the protection of a citizenry’s human rights is considered an obligation of a country’s government (without directly interfering with other countries, as they are obliged to protect their own nationals’ human rights). However, with globalization and the emergence of multinational corporations, there has been an increase in the number of cases where private companies are causing serious violations of human rights, not only in their own countries but also in other countries where they do business. The Guiding Principles was therefore formulated with a focus on corporate responsibility to ensure that “internationally recognized human rights” are respected.

The Guiding Principles require companies (1) to avoid causing or contributing to negative impacts on human rights through their business activities and to take action when such impacts occur, and (2) to prevent or mitigate negative impacts on human rights that are directly related to their products and services (even if they do not contribute to them) through business relationships.⁷ To this end, companies are required to (1) make a commitment based on their own corporate policies to fulfil their responsibility to respect human rights, (2) conduct regular human rights due diligence to take responsibility for identifying, preventing, mitigating, and addressing negative impacts on human rights, and (3) ensure that they do not engage in any activities that have negative impacts or, upon discovering that they have caused or contributed to such impacts, that relief procedures are in place.⁸

It is important to note that while Japanese companies have traditionally tended to view human rights issues only as issues related to their own employees, the Guiding Principles, as described in (1) and (2) above, impose a broader range of responsibilities on companies, such as taking responsibility for the employees of suppliers in their value chains. The Guiding Principles also cover respect for the human rights of local community members in the place of operation (e.g., the human rights of local peoples forced to relocate due to natural resource exploitation by large-scale infrastructure projects) (**Expansion of Scope of People Addressed**). In addition, it is not sufficient to simply reference the national laws of each country, but rather “internationally recognized human rights,” i.e. a very wide range of rights, such as those noted in the Universal Declaration of Human Rights and international human rights covenants (**Expansion of Legal Sources to be Followed**).⁹ Particularly in LDC, there are often gaps between domestic laws and “internationally recognized human rights”, such as legal working hours, minimum working age and freedom of association, etc. In such cases, it is not enough to investigate and respond to domestic laws that fall below international human rights standards. In some cases, there may be no corresponding domestic law in the first place. Therefore, when conducting human rights due diligence in the context of business and human rights, it is not enough to seek the advice of a locally qualified lawyer in each jurisdiction, rather companies’ efforts should be confirmed by a lawyer who has an accurate understanding of international human rights law.

2. Trend of Introducing Hard Laws

Although the Guiding Principles described above are only soft law and not enforceable, hard law concerning Business & Human Rights has been rapidly advancing in recent years, particularly in Western countries. Examples include the California Transparency in Supply Chains Act, the Modern Slavery Act in the United Kingdom and Australia, and the French Duty of Vigilance Law. The Dutch Child Labour Due Diligence Act contains strict provisions with criminal penalties for executives of companies that provide goods or

⁶ UN Special Representative (Ruggie), Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework

⁷ Principle 13

⁸ Principle 15

⁹ Principle 12

services to Dutch end-users without complying with the law, regardless of the country of incorporation of the company.¹⁰ It has also been announced that the European Commission will submit a draft directive in the first half of 2021 to make human rights due diligence mandatory for companies within the EU and for all companies with a business presence in the EU.¹¹ In addition to such foreign legislation (not necessarily limited to companies establishing local entities in EU countries), Japanese companies operating in Asia and especially LDC need to be aware of such countries' respective regulations.

However, there are subtle differences in the legal systems of each country, including the scope of companies regulated and penalties imposed. Although it is necessary to follow-up on the status of legislation in each country, in light of the movement toward the adoption of a treaty as described in section 3 below, the most efficient way for companies to avoid human rights violations in their operations is to conduct substantive (and proper) human rights due diligence concerning Business & Human Rights. This is ultimately the best way forward through the mess of similar regulations in various jurisdictions.

3. Movement towards a Business & Human Rights Treaty

Traditional international human rights law has made states the obligated parties and has not dared to provide any means of compulsory redress in case of their non-compliance (the idea is to emphasize the sovereignty of each state and allow flexibility in accordance with the political and economic circumstances of each country). Also, in terms of the content of the obligations of states, the obligation to prevent human rights violations in other countries by companies with headquarters in the country concerned was not clearly recognized. However, it has become a subject of international debate as human rights violations by corporations across borders are becoming more serious. Against that background, a Business & Human Rights Treaty is currently being negotiated with the aim of developing a common global framework to ensure corporate responsibility. The first draft (Zero Draft) was published in July 2018,¹² and in August 2020, the Intergovernmental Working Group established by the UN Human Rights Council released a second draft amendment.¹³

Under the Second Amendment, each State Party is required to enact national legislation to make companies (including multinational corporations) with headquarters located in its territory or jurisdiction conduct human rights due diligence in order to ensure that internationally recognized human rights are respected by such companies who can then be held accountable for human rights violations arising from their business activities or relationships.¹⁴ It should be noted that the implementation of human rights due diligence does not immediately exempt a company from liability;¹⁵ this is intended to ensure that mere mechanical and superficial human rights due diligence does not exempt a company from liability.

While it will take some time for the draft convention to be finalized and for all parties to have national laws on Business & Human Rights in place, we can expect to see more hard laws throughout the world in the future.

4. Conflict Risk

In parallel with the trend toward hard law enactment, there has been an increasing number of lawsuits brought against companies in

¹⁰ Kamerstukken I, 2016/17, 34 506, A.

¹¹ It was mentioned during the speech made by European Commissioner for Justice Didier Reynders, in the webinar held by Responsible Business Conduct Working Group of the European Union <<https://vimeo.com/413525229>>

¹² Open-Ended Intergovernmental Working Group (OEIWG), Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Zero Draft (16 July 2018) <<https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf>>

¹³ OEIWG, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Second Revised Draft (6 August 2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>

¹⁴ The previous amendment was narrowly limited to "contractual relationships," which has been expanded in the second amendment in response to criticism.

¹⁵ The second draft (n13) Article 8.7

specific countries and regional courts on the basis of Business & Human Rights claims on an international scale. In particular, when a multinational corporation does business in an LDC and commits human rights violations there, lawsuits are frequently filed where the head office of the company is located. This is because there are restrictions on the neutrality, experience, and enforceability of local courts and other dispute resolution institutions, which are unique to LDC.

For example, in April 2019, the jurisdiction of a parent company was challenged in the U.K. courts on the grounds that water pollution had been caused by a subsidiary of the U.K. company operating in Zambia and that the health and human rights of approximately 1,800 local residents in Zambia had been harmed. The U.K. Supreme Court acknowledged the potential liability of the U.K. parent company for the subsidiary's business, not only based on supervisory obligations, but also based in reasonable expectations of the management of the subsidiary arising from their corporate policy on group management.¹⁶ In addition, there is a growing number of cases wherein a subsidiary does not directly cause human rights violations. Companies have been sued abroad for their *de facto* influence over suppliers and subcontractors in the value chain (e.g., a Swedish company that contracted with a waste disposal company in Chile was sued based on allegations that the disposal company had caused health problems for 700 Chileans by dumping mining waste). The Swedish court suggested that the Swedish company's continuation of the contract after it became aware of the facts should have been considered problematic and it should have used its influence over the waste disposal company to rectify the issue.¹⁷ Other cases include a Canadian court case in February 2020, in which the Canadian company was found civilly liable for human rights violations (such as forced labor) by a secondary supplier of the Canadian company's Eritrean subsidiary;¹⁸ a case in which hundreds of people were killed or injured in a fire at a textile factory in Pakistan and a German company, which was a major customer of the factory in question, was sued in a German court on the grounds that it owed a duty of care to ensure a safe working environment.¹⁹

In these cases, the plaintiffs are not necessarily bringing the case with the sole intention of winning, but rather bringing the case to the public's attention and expecting a government to play a role in bridging the gap between the current legal framework and the needs of society, while at the same time putting *de facto* pressure on the companies to do so. Thus, coupled with the increasing number of lawsuits in the area of Business & Human Rights worldwide, it is becoming more important to properly conduct human rights due diligence, as advocated by the Guiding Principles, in order to properly defend against disputes when they arise.

Similarly, Japanese companies should be aware of the possibility of being sued in Japanese courts, as well as the courts of host countries of their overseas business, for human rights violations in LDC that occur in connection with their business.

5. Japan's National Action Plan on Business & Human Rights

Japan's Business & Human Rights National Action Plan is a policy document that outlines the country's future commitments and the measures it has already taken, along with its priority areas, to ensure that companies in the country are adequately addressing the human rights impacts of their business. In order to disseminate and implement the Guiding Principles mentioned in section 1. above, the UN Working Group on Business & Human Rights has encouraged all countries to develop a plan, and since 2013, 24 countries, including the United Kingdom, Italy, the Netherlands, Norway, the United States, Germany, France, and Thailand have already formulated and announced such plans. The number of countries that have committed to develop national action plans in the future or that are in the process of doing so exceeds 20, and includes India, Indonesia, Malaysia, Myanmar, Pakistan and Mongolia in Asia.²⁰

¹⁶ [Vedanta Resources PLC and another v. Lungowe and others \[2019\] UKSC 20](#)

¹⁷ Arica Victims KB v. Boliden Mineral AB

¹⁸ Nevsun Resources Ltd. v Araya [2020] SCC 5

¹⁹ Jabir and Others v KiK extilien und Non-Food GmbH [2019] 7 O 95/15

²⁰ United Nations Human Rights Office of the High Commissioner website, 'State national plans on Business and Human Rights' <<https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx>>

The Japanese government announced their “Business & Human Rights Action Plan (2020-2025)” on 16 October 2020,²¹ after nearly four years of discussions with stakeholders and collection of public comments by the working group (since announcement of the commitment to do so in 2016). The objectives of the plan are to (1) protect and promote human rights in the international community and society as a whole, (2) ensure consistency in related policies, (3) ensure and enhance the international competitiveness and sustainability of Japanese companies, and (4) contribute to the achievement of the SDGs. The objectives of avoiding and managing corporate risk factors, and obtaining high praise from global investors and others are also mentioned in (3).

The report also identifies five priority areas of particular importance as below, with the only issue listed of substantive importance specific to the context of LDC being “(d) Respect for Human Rights in Supply Chains”.

- (a) Promoting understanding and raising awareness of Business & Human Rights among the government, government-related organizations and local public bodies
- (b) Promoting understanding and raising awareness of Business & Human Rights among corporations
- (c) Promotion of understanding and awareness of human rights in society as a whole
- (d) Development of a system to promote respect for human rights in supply chains
- (e) Development and improvement of relief mechanisms (judicial and non-judicial remedies)

According to the sectoral content of the action plan, efforts in domestic and international supply chains are considered to be the most important issues in relation to corporate responsibility. Initiatives by governments are also mentioned in relation to dissemination of action plans for Japanese companies operating overseas businesses and raising awareness of human rights due diligence.

However, the level of commitment noted within national action plans differs from country to country. For example, in Germany’s action plan, it commits to making human rights due diligence legally mandatory if less than 50% of companies with 500 or more employees have conducted human rights due diligence by 2020.²² In comparison, Japan’s action plan does not explicitly mention future legislation, or its possibility, in connection with Business & Human Rights, and the gap between current Japanese policies and international standards has not been sufficiently analysed (e.g., Thailand’s national action plan specifies a deadline for clearing each target and indicators for measuring its achievement (along with milestones, such as whether the current legislation on worker protection is sufficient) and to analyse the gap between actual conditions and internationally required standards in considering revision of the relevant laws and regulations).²³ However, it is a significant step forward for Japan in the sense that it is the first official document committed to the international community including a clear message to promote future initiatives by Japanese companies. Thus, Business & Human Rights will be an increasingly important issue for Japanese companies to address. The period of this action plan is five years, and it will be revised after the five years with an interim review of Japanese companies’ efforts to take place in three years.

6. Latest Trends in the Efforts of Japanese Companies Addressing Human Rights

According to the “Results of the Second Survey on the Charter of Corporate Behavior” released by Keidanren (Japan Business Federation) on 13 October 2020,²⁴ only more than 30% of the companies surveyed responded that they “have made progress with efforts related to Business & Human Rights in line with the Guiding Principles”. Approximately 60% of companies are not taking any action, including those that have understood the Guiding Principles but have not incorporated them into their activities yet. Further,

²¹ Japan’s National Action Plan on Business and Human Rights (2020-2025) <<https://www.mofa.go.jp/mofaj/files/100104121.pdf>>

²² The German National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020 <<https://globalnaps.org/country/germany/>> After that, in July 2020, Germany announced its intention to enact a mandatory human rights due diligence law by the end of 2021.

²³ First National Action Plan on Business and Human Rights (2019-2022) <<https://mk0globalnapsvllfq4.kinstacdn.com/wp-content/uploads/2017/11/nap-thailand-en.pdf>>

²⁴ Keidanren, “Results of the Second Survey on the Charter of Corporate Behavior” (Oct 13 2020) <<https://www.keidanren.or.jp/policy/2020/098.html>>

the Corporate Human Rights Benchmark (CHRB), an international initiative on Business & Human Rights founded by institutional investors and human rights NGOs, rated the world's leading companies last year. Fifteen of the eighteen companies scored below the overall average score of 200 companies.²⁵

However, compared to the results of the same survey in 2018,²⁶ there has been progress in the measures taken by companies in Japan that are promoting the initiatives. For example, as a measure marking the increasing focus on the sustainability of supply chains, the number of companies that have been identifying and addressing human rights risks (e.g., forced labor and child labor) at the second tier supplier onward has increased. The most common reasons given by those companies for promoting their initiatives were “[Business & Human Rights is] becoming mainstream in international business” (79%), “legislation and guideline development in foreign countries” (65%), and “dealing with investors and rating agencies” (63%). It indicates that, while there is no related hard law in Japan yet, we can say that the companies that have begun to make substantial efforts to improve their international reputation are typically the first to improve investor evaluations at the international scale.

According to the results of the above survey, 70% of companies have already formulated or plan to formulate a corporate policy on respect for human rights. Therefore, it can be said that awareness of human rights among Japanese companies is increasing; however, it is necessary for each company to develop strategies, keeping in mind that human rights due diligence is insufficient without a substantive process of identifying, addressing, evaluating and improving the potential impact of the company's business on human rights.



[Junko Watanabe](#)

Attorney-at-Law

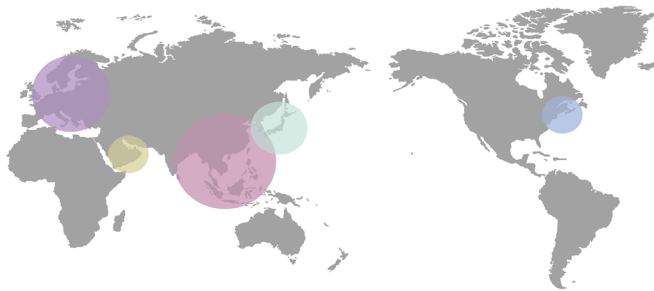
E-mail: j_watanabe@jurists.co.jp

Registered as a qualified lawyer in Japan in 2011 and joining Nishimura & Asahi in 2012, Junko Watanabe began her career as a member of the corporate practice group, acquiring experience in domestic and international M&A, general corporate matters, domestic and international litigation, and arbitration. Thereafter, Junko further specialized via her work with the Southeast Asian practice team involving cross-border M&A, joint-venture, regulation research, and labor dispute matters, among others, as well as via her Master's studies in international human rights law at the London School of Economics and Political Science in 2019/20. Junko is currently seconded to Ashurst LLP's London office.

²⁵ CHRB website '2019 Results' <<https://www.corporatebenchmark.org>>

²⁶ Keidanren, "Results of the Survey on the Charter of Corporate Behavior" (July 17 2018) <https://www.keidanren.or.jp/policy/2018/059_kekka.pdf>

Nishimura & Asahi has 18 offices throughout Japan and in the markets that matter, with Asia as the starting point.



New York

Nishimura & Asahi NY LLP

Tel +1-212-830-1600

E-mail info_ny@jurists.co.jp

Managing Partner Katsuyuki Yamaguchi
Vice Managing Partner Megumi Shimizu

Dubai

Tel +971-4-386-3456

E-mail info_dubai@jurists.jp

Masao Morishita

Tokyo

Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124 Japan

Tel +81-3-6250-6200 +81-3-6250-7210 (Nishimura & Asahi LPC Principal Office)

Nagoya

Tel +81-52-533-2590

LPC Partner Hiroki Fujii

Osaka

Tel +81-6-6366-3013

LPC Partners Hiromune Usuki
Taisuke Igaki
Yuichiro Hirota
Masanori Ban

Fukuoka

Tel +81-92-717-7300

LPC Partners Tsuneyasu Ozaki
Kengo Takaki
Yasuko Maita

Frankfurt (main office)

**Nishimura & Asahi Europe
Rechtsanwaltsgesellschaft mbH**

Tel +49-(0)69-870-077-620

Düsseldorf (branch office)

**Nishimura & Asahi Europe
Rechtsanwaltsgesellschaft mbH**

Tel +49-(0)211-5403-9512

E-mail info_europe@eml.jurists.co.jp

Co-representatives Noriya Ishikawa
Dominik Kruse

Bangkok

Tel +66-2-168-8228

E-mail info_bangkok@jurists.jp

Partner for Hideshi Obara
Thailand Partners* Chavalit Uttasart
(SCL Nishimura)
Jirapong Sriwat

Beijing

Tel +86-10-8588-8600

E-mail info_beijing@jurists.jp

Chief Representative Azusa Nakashima
Representative Masashi Shiga

Shanghai

Tel +86-21-6171-3748

E-mail info_shanghai@jurists.jp

Chief Representative Toshihiro Maeda
Representative Takashi Nomura

Singapore

Tel +65-6922-7670

E-mail info_singapore@jurists.jp

Co-representatives Masato Yamanaka
Shintaro Uno
Partner Masataka Sato

* We also provide legal services relating to Singapore law through Bayfront Law LLC, which operates the Nishimura & Asahi-Bayfront Law Alliance.

Hanoi

Tel +84-24-3946-0870

E-mail info_hanoi@jurists.jp

Partner for Hikaru Oguchi
Vietnam offices
Representative Taro Hirokawa

Ho Chi Minh City

Tel +84-28-3821-4432

E-mail info_hcmc@jurists.jp

Partner for Hikaru Oguchi
Vietnam offices
Representative Kazuhide Ohya
Vietnam Partners* Vu Le Bang
Ha Hoang Loc

Taipei

Nishimura & Asahi Taiwan

Tel +886-2-8729-7900

E-mail info_taipei@jurists.jp

Co-Representatives Ing-Chian Sun
Sheng-Chieh Chang

Jakarta*¹

Walalangi & Partners

Tel +62-21-5080-8600

E-mail info@wplaws.com

Representative Luky Walalangi

Rosetini & Partners Law Firm

Tel +62-21-2933-3617

E-mail info_jakarta@jurists.jp

Counsel Noriaki Machida

Yangon

Tel +95-1-8382632

E-mail info_yangon@jurists.jp

Representative Yusuke Yukawa
Vice Representative Isamu Imaizumi

Okada Law Firm (Hong Kong)*²

Tel +852-2336-8586

E-mail s_okada@jurists.co.jp

Representative Saori Okada

*1 Associate office *2 Affiliate office
* Please note that we are not engaged in a Gaikokuho Kyodo Jigyō (the operation of a foreign law joint enterprise).

Public Relations Section, Nishimura & Asahi

Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124, JAPAN

E-mail: newsletter@jurists.co.jp URL: <https://www.jurists.co.jp/en>