

BALANCING THE RESPONSIBILITY TO PROTECT VS. RESPECT
HUMAN RIGHTS IN CHALLENGING ENVIRONMENTS

DANCING ALONG THE EDGE



INTRODUCTION

Human rights risks have become increasingly urgent priorities for businesses and investors over the past few years, and that urgency has been further fueled by the challenges of the COVID-19 pandemic, increased awareness of gender inequality and racial injustice around the world, and growing concerns over human rights abuses in many countries.

The United Nations Guiding Principles on Business and Human Rights (UNGPs), which turn 10 years old this year, clarify that governments have a duty to protect human rights and businesses have a responsibility to respect human rights. But how does a business determine what is required to meet this standard, especially in cases where governments lack the ability or interest to protect the human rights of workers and host communities on whom businesses rely?

This joint analysis by Acorn International and Ropes & Gray addresses this important question.

THE RESPONSIBILITY TO PROTECT

OVERVIEW

Under international human rights standards, individual states (governments) carry the primary responsibility to protect their populations from adverse human rights impacts. This responsibility is one of the foundational principles of the UNGPs—“States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”

In the past few years, a number of jurisdictions have adopted, proposed or announced their intention to consider legislation requiring, or at least encouraging, companies to carry out human rights due diligence. There is increasing momentum

behind additional corporate human rights legislation, particularly in Europe. The COVID-19 pandemic and increasing reports of forced labor in various countries have emphasized the extreme vulnerability of many communities and workers in global supply chains, further supporting the case for legislative solutions.

CURRENT, PENDING AND PROPOSED LEGISLATION

Corporate human rights legislation continues to evolve. Over the past several years, these instruments have resulted in new obligations for global companies, and the velocity of new legislative proposals is increasing. Even companies that are not directly subject to corporate human rights legislation are being swept into its net through commercial requirements. Some of the more significant pieces of corporate human rights legislation are discussed below.

Disclosure-only Modern Slavery Legislation

The *California Transparency in Supply Chains Act (CTSCA)* was adopted in 2010. The CTSCA requires retail sellers and manufacturers doing business in California with more than \$100 million in annual worldwide revenues to publish a statement indicating the steps taken to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. The CTSCA requires disclosures related to five areas: verification, audits, certification, internal accountability and training.

The CTSCA was followed, in 2015, by the broader *UK Modern Slavery Act (UK MSA)*. The UK MSA requires companies doing business in the United Kingdom with annual consolidated revenues of £36 million or more to annually publish a statement indicating the steps taken during the year to ensure that slavery and human trafficking is not taking place in their business and supply chains. The UK MSA contains suggested disclosure topics that are broadly aligned with those of the CTSCA. The UK Government has announced that steps will be taken to strengthen the UK MSA, including by making reporting topics mandatory and adding penalties for non-compliance.

In 2018, Australia adopted the *Commonwealth Modern Slavery Act (Commonwealth MSA)*. This Act, which has an A\$100 million

compliance threshold, requires that an annual modern slavery statement addressing similar topics to those contemplated by the CTSCA and the UK MSA be submitted to a government regulator for inclusion in a modern slavery statement registry. A large number of global companies will be submitting their first statements under the Commonwealth MSA in the next few months. Modern slavery legislation with lower monetary thresholds is pending in *New South Wales* and had been proposed in *Tasmania*.

Although these are disclosure-only statutes—meaning they do not require subject companies to put in place policies or procedures or take specific steps to address modern slavery—they are driving enhancements to substantive compliance programs, including mechanisms that further access to remedy.

Trade-based Legislation

Legislation prohibiting companies from importing goods produced with forced labor is also in the ascendant. Although adopted decades ago, *Section 307 of the U.S. Tariff Act*, which prohibits importing goods into the United States that are produced using forced or convict labor, was reinvigorated in 2016. Enforcement of Section 307 continues to increase, with a diverse range of products from many countries being denied entry into the United States. A similar prohibition took effect under the Canadian Customs Tariff in July 2020. Under the United States-Canada-Mexico Agreement, the successor to NAFTA, Mexico also is required to adopt a prohibition on importing products produced with forced labor.

Section 307 of the Tariff Act has been expanded upon by the *Countering America's Adversaries Through Sanctions Act*, which creates a presumption that all North Korean labor is forced labor. Last year, a bill was passed in the U.S. House of Representatives—the *Uyghur Forced Labor Prevention Act*—which would create a similar presumption for Xinjiang labor. In addition, a bill was recently introduced in Australia that would prohibit importing into Australia goods from the Xinjiang Uyghur Autonomous Region, as well as goods from other parts of China that are produced using forced labor.

Mandatory Human Rights Due Diligence Legislation

The anti-human trafficking provisions of the *U.S. Federal Acquisition Regulation (FAR)* were significantly strengthened in 2015. These provisions prohibit forced labor in the performance of U.S. federal government contracts and, under certain circumstances, require contractors to adopt a tailored compliance plan and conduct due diligence. The FAR is significant in its efforts to address forced labor, because the U.S. federal government is the world's biggest purchaser of goods and services.

The *French Corporate Duty of Vigilance Law* was adopted in 2017. This law requires large French companies (and some other multinationals with large French operations) to assess and address adverse human rights and environmental impacts attributable to their own operations and those of suppliers with which they have an established commercial relationship. Subject companies are required to publish and report on the implementation of their vigilance plans. The law also includes a stakeholder enforcement mechanism, with actions already pending against several companies.

A *Dutch Child Labor Due Diligence Law* was approved by the U.S. Senate in 2019 and is awaiting adoption. Under this legislation, companies selling goods or services to Dutch end-users will be required to exercise due diligence to determine whether the goods or services have been produced with child labor. If there is a reasonable suspicion of child labor, the company must adopt and implement a plan of action. Subject companies also will be required to prepare a declaration indicating that they exercise due diligence. The law contemplates monetary penalties for non-compliance.

Mandatory human rights due diligence is also in the process of being adopted in *Switzerland*. Although a constitutional amendment calling for a broad mandatory human rights due diligence obligation recently failed, a narrower obligation pertaining to child labor and conflict minerals will be implemented.

At press time, the European Commission's proposal for mandatory human rights due diligence legislation is eagerly awaited. This legislation is expected to be a game changer, since it will likely require mandatory human rights due diligence by a large number of EU- and non-EU-based companies operating across the *European Union*. In addition to requiring companies to assess human rights impacts and take remedial actions, the legislation ultimately adopted is expected to provide for access to remedy. On March 10, 2021, the European Parliament voted by a large majority to approve a report recommending legislation for consideration by the European Commission. The European Commission is expected to table a draft Directive in June 2021.

Meanwhile, in *Germany*, a legislative proposal has been agreed to and is expected to be voted on in Parliament before the September federal election. As proposed, this legislation would require human rights due diligence starting in 2023.

Several other European countries are also in various stages of moving toward mandatory human rights due diligence legislation, including, among others, *Finland, Norway, Sweden* and the *United Kingdom*.

POSSIBLE LEGAL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

Legal liability for adverse human rights impacts continues to evolve, with the boundaries being tested in many countries across a range of theories of liability. A few notable examples, which are just the tip of the iceberg, are highlighted below.

In 2019, the UK Supreme Court allowed to proceed a claim brought by Zambian villagers against a UK-based parent entity arising out of alleged adverse environmental impacts caused by one of its foreign subsidiaries; the case was settled in early 2021. In a 2020 case, the Canadian Supreme Court held that a private corporation could be held liable for violations of customary international law. In the United States, a decision from the Supreme Court concerning the application of the Alien Tort Statute to domestic corporations is pending. Also in the United States, a class-action lawsuit has been filed against several large electronics companies under the Trafficking Victims Protection Reauthorization Act, alleging that the defendants and their supply chains are part of a venture engaged in the mining of cobalt using forced labor. More recently, a claim under the same statute was made against several fast-moving consumer goods companies alleging child and forced labor in cocoa harvesting in Côte d'Ivoire.

Enforcement activity under Section 307 of the U.S. Tariff Act also is rapidly increasing. As noted earlier, Section 307 prohibits importing into the United States goods produced using forced or prison labor. In addition to the goods being denied entry into the United States, which has a commercial impact, violations of Section 307 can result in civil or criminal penalties.

Claims based on responsible sourcing disclosures also are increasing. For example, in the United States, cases have been brought under both the federal securities laws and consumer protection statutes arising out of alleged misstatements in disclosures relating to ethical sourcing practices. A disclosure-based suit also was filed in France against a large global electronics company.

As additional mandatory human rights due diligence legislation is adopted, the potential for liability will further increase. Redress for victims is a core component of proposals in several jurisdictions.

THE RESPONSIBILITY TO RESPECT

OVERVIEW

Businesses' responsibility to respect human rights is articulated in the UNGPs as follows: "*Business enterprises should respect human rights. This means that they should avoid infringing*

on the human rights of others and should address adverse human rights impacts with which they are involved." This responsibility is a global standard of expected conduct for all business enterprises wherever they operate, and it exists independently of governments' abilities and/or willingness to fulfil their own responsibility to protect human rights. Although the UNGPs are not legally enforceable on business enterprises, many companies, especially larger companies, have adopted policies that expressly align with the UNGPs.

However, demonstrating respect for human rights and addressing adverse human rights impacts is not limited to adopting a policy. It also requires companies to put in place due diligence processes to identify, prevent, mitigate and account for how they address their impacts on human rights, including processes to enable the remediation of adverse human rights impacts they cause or to which they contribute.

THE BLURRED LINE

The role of businesses and that of governments can sometimes become a bit blurred when it comes to the "do not harm" approach at the heart of the UNGPs. As mentioned earlier in this paper, the government's duty to protect human rights and the responsibility of business to protect exist independently of each other. Therefore, regardless of what governments are doing, companies still have a responsibility to respect human rights.

Recent global events have magnified the focus on the role of business in respecting human rights and, in some cases, helping to protect those rights. The COVID-19 pandemic has highlighted the vulnerability of workers. Additionally, civil rights protests around the world in 2020 have led to companies reassessing their role in the protection of human rights. The increasing focus on Xinjiang labor practices and the recent coup in Myanmar also are causing many companies to reassess their role.

Under what circumstances may companies feel compelled to "dance along the edge" of the delicate and blurred respect/protect boundary to take a more active role in protecting human rights? Our experience has shown that this most often occurs when the host government is unable or unwilling to protect the rights of those on whom the company depends for sustainable operations. Three examples from extractives industries illustrate how companies have responded in these circumstances.

Both governments and companies have a role in providing access to remedy, whether through judicial or non-judicial mechanisms.

- Chevron faced criticism for operating in Myanmar because its critics felt this was empowering the national government and its record of human right abuses. Rather than cutting ties with the government, as initially recommended by some of its shareholders, Chevron followed a policy of engagement and implemented several initiatives, such as the training of local private security forces on the UN Voluntary Principles on Security and Human Rights and of government officials on their duty to protect human rights under the UNGPs. These measures eventually led the shareholders to withdraw their proposal.
- At times, governments and companies can and should work together to provide remedy and address stakeholders' concerns. Newmont Mining had a history of dispute with a particular community surrounding one of its mines in Mexico, and those disputes often resulted in road blockages and business stoppages. In April 2019, the company urged the government to form a multi-stakeholder dialogue process to address some of the concerns. The initiative resolved a number of issues and subsequently led to the signing of an agreement with the community, with one of the most important points of the agreement being that future disputes would be resolved through dialogue rather than through hostile actions. This could not have been accomplished without the government's convening role.
- An international steel producer had a clear business driver to move beyond the traditional respect-protect barrier when one of its most important suppliers was accused by the Brazilian government of employing "conditions analogous to slavery." The government lacked the means to provide the worker rights training and ongoing assessment needed to remove the supplier from its labor "dirty list," so the steel producer stepped in with an independent assessment followed by training, grievance mechanisms and an internal auditing program needed to fill gaps identified in the assessment and provide assurance of fair working conditions.

Forced labor in supply chains is a particularly important human rights risk, often prompting companies to step in to protect workers' rights. This issue is increasingly well documented, underscoring the widespread nature of forced labor globally.

ACCESS TO REMEDY

OVERVIEW

Access to remedy is the third pillar of the UNGPs: "*As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. [...] To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.*"

As described above, both governments and companies have a role in providing access to remedy, whether through judicial or non-judicial mechanisms. Remedy for those harmed by business-related adverse human rights impacts is an area of significant stakeholder focus, since many states do not provide effective access to remedy. This is often due to a lack of national legislation, lack of direct liability within a national legal framework, and/or weak legal and judicial enforcement mechanisms.

IN PRACTICE

When business enterprises are involved in adverse human rights impacts, victims often struggle to access remedies, whether through judicial or non-judicial mechanisms. There are both practical and legal challenges that prevent victims from accessing remedies. Victims often lack access to information about available mechanisms and how to use them. Sometimes, the mechanisms are not accessible to them physically (e.g., due to long travel distances in rural areas) or linguistically (e.g., interpretation is not available). Victims also often cannot afford to bear the potential financial costs associated with accessing these mechanisms.

A concern often heard from businesses is that by becoming involved with access to remedy, especially by workers and communities in supply chains, they may be taking on legal liability. This is a valid concern that needs to be appropriately considered. However, as corporate legal liability for adverse human rights impacts continues to evolve, failing to adequately establish or participate in non-state-based grievance mechanisms

is likely to become the riskier course of action. This will place increasing pressure on businesses to establish and facilitate access to remedy mechanisms that are, among other things, transparent, accessible and effective.

We are already seeing many businesses start to take a more critical look at access to remedy, and expect this trend to accelerate over the next few years. Among other things, we expect many companies will start to take or expand on the following:

- Assessments of (1) human rights risks that their own activities may cause or contribute to and (2) those risks that are directly linked to their operations, products or services by their business relationships
- Greater collaboration with stakeholders and multi-stakeholder initiatives
- Assessing the adequacy and effectiveness of existing access to remedy mechanisms, including operational-level grievance mechanisms
- Assessing processes and strategies for addressing issues that require remediation and ongoing human rights compliance monitoring
- Tracking key performance indicators to measure the effectiveness of mechanisms and strategies to provide access to remedy and support continuous improvement

CONCLUSION

Although the line between the state's responsibility to protect and a business's responsibility to respect human rights seems to be clearly defined in the UNGPs, the balance between the two is often blurred in practice. Indeed, we have found that it is when governments are unable or unwilling to protect human rights that businesses have felt the need to adopt that responsibility, whether temporarily or for longer periods of time. Managing these challenges will become increasingly complex and important as new human rights legislation is adopted, litigation

and enforcement risk increases, and societal expectations regarding the role of business continue to evolve. Companies that have developed the competencies and confidence to navigate the delicate balance between respecting and protecting human rights in issues that impact their business will find lower risk and more resilient access to opportunities in the face of these increasing requirements and expectations.

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