



Freshfields Bruckhaus Deringer

Business and Human Rights

Navigating the legal landscape



United Nations
Global Compact



Uniting business for a better world

Business and human rights

Foreword

Rapid change in the legal landscape for business with regards to human rights has profound implications for how businesses across the globe approach human rights issues. Multinational companies are having to navigate increasingly complex human rights obligations whether by identifying human rights risk in their supply chains through due diligence, taking steps to mitigate such risks or making public disclosures. This report aims to provide guidance on this evolving legal landscape and the consequent legal human rights considerations that apply to multinational companies.

The audience for this report includes but is not limited to lawyers. This topic matters to corporate general counsel as well as executives tasked with embedding sustainability and human rights considerations in their business strategy; finance directors, who face increased scrutiny on environmental, social and governance indicators from their key shareholders; and operational and procurement teams, who must consider how to adapt their approach to reflect new forms of risk potentially affecting business operations and supply chains.

The report was developed by Freshfields Bruckhaus Deringer LLP, with input from the participants of the United Nations Global Compact Decent Work in Global Supply Chains Action Platform.



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About the United Nations Global Compact

As a special initiative of the UN Secretary-General, the **United Nations Global Compact** is a call to companies everywhere to align their operations and strategies with ten universal principles in the areas of human rights, labour, environment and anti-corruption. Launched in 2000, the mandate of the UN Global Compact is to guide and support the global business community in advancing UN goals and values through responsible corporate practices. With more than 10,000 companies and 3,000 non-business signatories based in over 160 countries, and more than 60 Local Networks, it is the largest corporate sustainability initiative in the world.

For more information, follow [@globalcompact](https://twitter.com/globalcompact) on social media and visit the website at [unglobalcompact.org](https://www.unglobalcompact.org)

About the UN Global Compact Decent Work in Global Supply Chains Action Platform

The UN Global Compact Decent Work in Global Supply Chains Action Platform builds an alliance of companies and partner organisations that are committed to respecting human rights and labour rights by leveraging their supply chains and taking collective action to address decent work deficits. This platform is building the case for improving decent work in global supply chains and demonstrates how labour rights and human rights are critical for achieving the Sustainable Development Goals (SDGs or Global Goals). The focus lies on fostering leadership, learning and sharing across sectors, establishing good practice, identifying and incubating innovative solutions and accelerating actions to address human rights and labour rights in global supply chains.

Freshfields Bruckhaus Deringer LLP is a participant in the UN Global Compact Decent Work in Global Supply Chains Action Platform. More information on platform activities and participants is available [here](#).



The Ten Principles of the UN Global Compact

Corporate sustainability starts with a company's value system and a principles-based approach to doing business. This means operating in ways that, at a minimum, meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption. Responsible businesses enact the same values and principles wherever they have a presence and know that good practices in one area do not offset harm in another. By incorporating the **Ten Principles of the UN Global Compact** into strategies, policies and procedures, and establishing a culture of integrity, companies not only uphold their basic responsibilities to people and the planet but maintain their social license to operate and ensure long-term success.

THE TEN PRINCIPLES OF THE UNITED NATIONS GLOBAL COMPACT



HUMAN RIGHTS

1. Businesses should support and respect the protection of internationally proclaimed human rights; and
2. Make sure that they are not complicit in human rights abuses.



LABOUR

4. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
5. The elimination of all forms of forced and compulsory labour;
6. The effective abolition of child labour; and
7. The elimination of discrimination in respect of employment and occupation.



ENVIRONMENT

7. Businesses should support a precautionary approach to environmental challenges;
8. Undertake initiatives to promote greater environmental responsibility; and
9. Encourage the development and diffusion of environmentally friendly technologies.



ANTI-CORRUPTION

10. Businesses should work against corruption in all its forms, including extortion and bribery.

The Ten Principles of the UN Global Compact are derived from:

The Universal Declaration of Human Rights

The International Labour Organization's Declaration on Fundamental Principles and Rights at Work

The Rio Declaration on Environment and Development

The United Nations Convention Against Corruption.

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Introduction

Respect for human rights is gaining significance in the business sector. One reason for this is that normative frameworks such as the UN Guiding Principles on Business and Human Rights (the UNGPs), the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, have recently led to legislation imposing mandatory human rights due diligence — some of which extends corporate liability across groups and supply chains; more explicit human rights reporting requirements; the framing of new and novel causes of action by claimants seeking corporate redress for failures to respect human rights; and an increased public focus on transnational companies' business operations and human rights conduct. Over the past decade, the trend has moved away from a voluntary responsible business conduct approach towards a mandatory corporate responsibility to respect human rights and other sustainability principles.

At the heart of so much legislation, litigation and guidance in this space are the UNGPs. Directed at states and companies, these Principles clarify their duties and responsibilities to protect and respect human rights in the context of business activities and to ensure access to an effective remedy for individuals and groups affected by such activities.

The UNGPs mirror the structure of the 2008 'protect, respect and remedy' framework and provide 31 principles for putting it into operation. They cover:

- 1) The state duty to protect human rights;
- 2) The corporate responsibility to respect human rights; and
- 3) Access to remedies for victims of business-related human rights abuses.

The OHCHR's 'Interpretive Guide' offers guidance to companies on how they should fulfil their responsibilities under the UNGPs. As well as advising on the correct approach to human rights policies and due diligence, it encourages companies to act upon any findings of adverse human rights impacts connected with its operations, including by using their leverage with business partners to mitigate such impacts and effect positive change.

The UNGPs have been highly influential in the growing global trend towards imposing legally binding human rights reporting obligations on companies as well as 'harder' obligations to proactively act to address human rights risks and mitigate impacts.

Although there are multiple different instruments around the world that impose such obligations, each with their own nuances and technicalities, there is a commonality between what they are trying to achieve: implementation of the UNGPs by states and businesses.

Against this backdrop, companies should consider what is legally required of them to safeguard the interests of rights-holders, what could expose them to litigation, reputational and financial risks and what this means for their existing compliance and corporate social responsibility (CSR) policies and procedures.

This report considers the key trends in the world of business and human rights and analyses key legal developments in the following jurisdictions: Australia, Canada, the European Union, France, Germany, Netherlands, Switzerland, the United Kingdom and the United States.

UNGPs:

Corporate responsibility to respect

To fulfil their corporate responsibility, companies are expected to:

1. **establish a policy commitment to respect human rights;**
2. **undertake ongoing human rights due diligence to identify, prevent, mitigate and account for possible impacts on human rights linked to their business operations; and**
3. **establish processes to enable remediation for adverse human rights impacts they cause or contribute to.**

Key risks and recommendations

There are three key areas of human rights-related risks for multinationals:

1 Legislative obligations and regulatory compliance risk

Trend: Companies are experiencing a global shift from self-regulation/voluntary reporting towards mandatory duties to report, and increasingly, to act.

We are seeing a continuing evolution of the legislative and regulatory environment in this space, with the focus shifting toward legal and regulatory accountability for failing to address human rights risks. Companies are increasingly subject to non-financial reporting obligations in the jurisdictions in which they operate, which often include disclosures on their human rights performance. There are several high-profile examples of national legislation that specifically mandate human rights-related reporting, including the United Kingdom and Australian Modern Slavery Acts, the Dutch Child Labour Due Diligence Law, the California Transparency in Supply Chains Act and the French Corporate Duty of Vigilance Law. Failure to comply with these obligations may lead to real legal risk for companies.

Listed companies around the world face additional requirements. For example, in the United Kingdom, companies listed on certain stock exchanges (including the London Stock Exchange, the New York Stock Exchange and NASDAQ) must provide a strategic report disclosing information about human rights issues affecting the company and its compliance with any human rights policy in place. Similar legislation is seen throughout the European Union, and certain Asian stock exchanges now require at least companies to produce CSR reports, if they meet certain thresholds.

Companies that enter into Government contracts should also be aware of developments in the world of public procurement. In some jurisdictions, such as the United States and the United Kingdom, there is an increasing awareness of the role that public procurement practices can play in addressing human rights risks in supply chains. Companies that bid for public contracts in these jurisdictions may soon find their supply chains and compliance with domestic human rights-related legislation under greater scrutiny.

Companies should be alert to this continuing shift from voluntary to mandatory requirements, especially as it coincides with the expanded enforcement of existing legal frameworks (eg the United States economic sanctions regime and section 1782 discovery) for holding corporations legally accountable for human rights violations.

Key recommendation

A global approach to compliance

To prevent human rights violations and mitigate legal risks, companies should track the human rights-related requirements and penalties in the jurisdictions in which they do business and review and adjust their existing compliance programmes accordingly. Companies should also be aware of the way risks are converging (eg the French Corporate Duty of Vigilance Law is grounded in a duty of care relating to both human and environmental rights).

A more holistic, multijurisdictional approach to compliance is the most effective way to minimise legal risk and remediate human rights violations found in business operations or supply chains.

Key recommendation

Proactively managing value chain risks

The corporate responsibility to respect human rights requires companies to prevent or mitigate any adverse impact that is directly linked to their operations, products or services through their business relationships. This means that companies should take steps to manage and mitigate human rights risks throughout their supply chains.

As well as proactively assessing risks in their value chains and implementing mitigating measures, the impact of these measures should be tracked on an ongoing basis, with updates and successes communicated throughout the company and with its business partners. Facilitating stakeholder engagement will increase transparency and understanding of human rights risks in the supply chain, making investigating and mitigating such risks far easier.

Key risks and recommendations

2 Civil litigation risk

Trend: Developments in national courts suggest that multinationals are increasingly likely to face civil liability for adverse human rights impacts caused by or connected with their overseas operations.

Claimants in a variety of contexts have been seeking — and, in some instances, finding — ways of introducing human rights-based principles and standards into their causes of action. For example, claimants have contended that the content of a company’s human rights policy may inform the responsibilities of the company to its employees (including, in certain circumstances, employees of overseas subsidiaries and joint venture companies) and other individuals impacted by the company’s activities. Breach of such responsibilities could potentially ground liability in tort and lead to significant awards in damages. Even if a company does not have such a policy, or it has a policy that is restricted to certain jurisdictions, claimants may contend that its absence or limitation in scope in and of itself grounds a claim.

While the ultimate success of these types of legal argument is uncertain, courts in several jurisdictions are beginning to allow them airtime. This can lead to severe reputational and cost consequences for companies that become embroiled in this kind of litigation — whatever its outcome.

This form of corporate risk has profound implications for global businesses’ human rights policies and due diligence processes, shaping not only what companies can and should be doing to address human rights risk, but also how they publicly describe their approach and the issues they encounter.

More disclosure, more challenges?

Necessary compliance with human rights disclosure regimes may present its own litigation risks. The increased transparency required of companies by human rights disclosure legislation and other regulatory reporting requirements may expose companies to increased attention and scrutiny from claimants, who have tested judicial appetites for disclosure-based causes of action. Even in cases where a company wishes to highlight its human rights endeavours and commitments, the possibility of an unfavourable verdict in the court of public opinion may dissuade further transparency beyond what is legally required.

Key recommendation

Reviewing human rights-related policies and due diligence

To limit exposure to litigation, companies should align their human rights policies and due diligence with international standards and engage in business relationships with suppliers who have equally robust policies and procedures in place. Key resources include:

- [UNGP on Business and Human Rights: Implementing the United Nations ‘Protect, Respect, Remedy’ Framework 2011](#)
- [OECD Guidelines for Multinational Enterprises 2011 \(OECD Guidelines\)](#)
- [Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, MNE Declaration, 2017](#)
- [Frequently Asked Questions about the UNGPs on Business and Human Rights 2014](#)
- [The Corporate Responsibility to Respect Human Rights: An Interpretive Guide 2012](#)

Companies caught in the push-pull of disclosure and corporate risk can mitigate the dilemma through careful and ongoing drafting, review and adjustment of their human rights policies, codes of conduct, due diligence and compliance processes. This will help to ensure that disclosures remain current and accurate when compared with corporate actions, and that corporate actions comply with the current legal — and perhaps, societal — landscape.

Persistent, consistent and robust implementation is the best approach; companies may defend themselves against human rights claims by pointing courts to effective compliance programmes and existing internal controls aimed at preventing and detecting human rights violations.

Key risks and recommendations

3 Reputational risk and business disruption

Trend: Companies are finding their approach to human rights issues under increasing scrutiny by civil society, investors, shareholders and consumers

Human rights issues, particularly those not handled proactively and with great sensitivity, pose considerable reputational risks. This is hardly a new phenomenon, but more onerous human rights reporting requirements coupled with greater engagement by civil society means that issues are more likely to come to light. This has knock-on effects by increasing the likelihood of shareholder activism and/or action and litigation.

An increasing number of investors are making decisions with reference to environmental, social and governance considerations. The rise of corporate human rights benchmarking and more active monitoring by civil society is making it easier for them to do so. Poor-performing companies risk investor criticism and even divestment.

Finally, companies should recognize the business disruption that can result from a failure to address human rights risks and/or comply with relevant legal obligations. A media scandal involving human rights violations committed by an overseas supplier may lead to significant disruption in supply chains and, by failing to address certain risks, businesses can lose access to entire markets (see commentary on the United States Tariff Act [below](#)).

Multinational companies should be aware of the potential reputational and financial repercussions of failing to address human rights-related risks and/or being linked with overseas human rights abuses.

Key recommendation

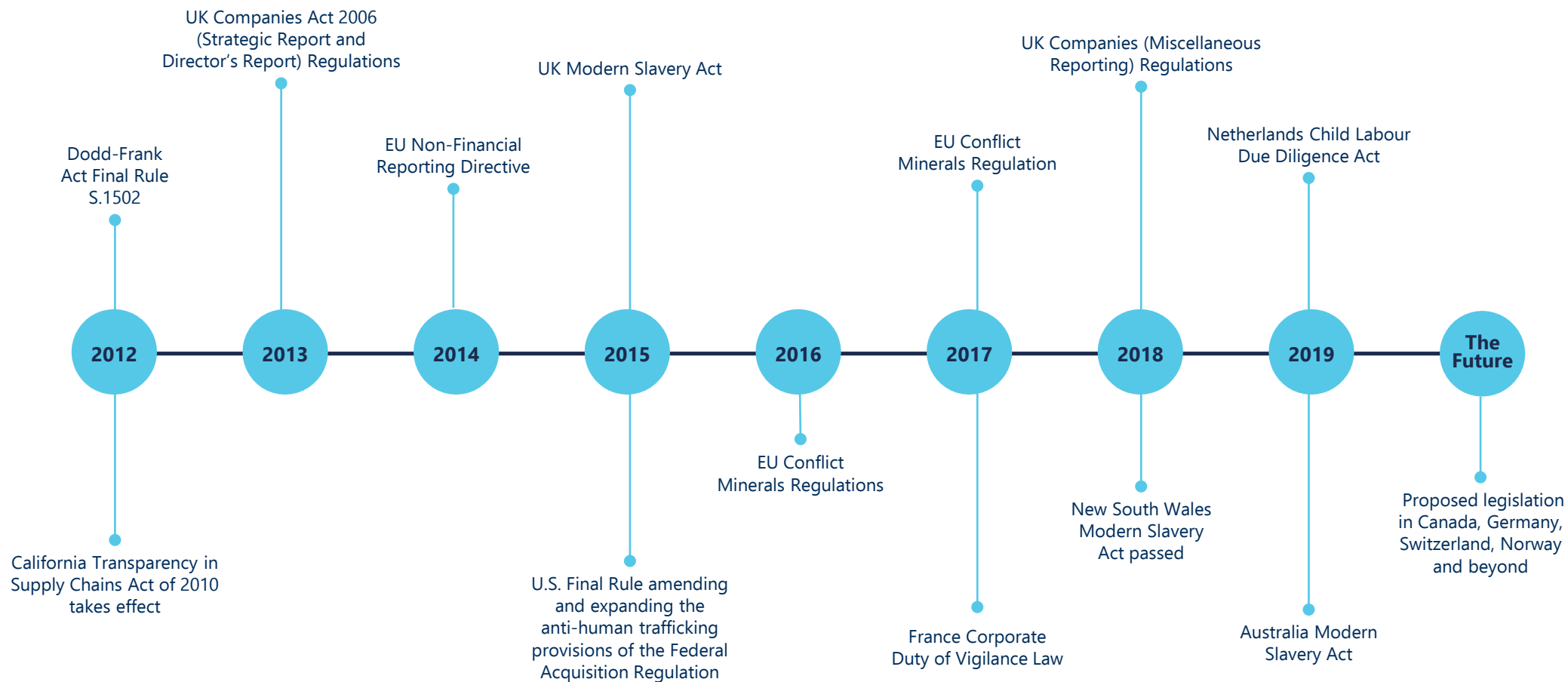
Bolstering crisis management and non-judicial grievance mechanisms

Negative repercussions may be avoided or alleviated by putting in place an ongoing human rights due diligence process which includes assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed.

If a company does discover the existence of human rights risks or impacts in its supply chain — or within its own operations — having a crisis management plan already in place will help it to quickly address and remedy the situation.

The UNGPs require companies to have non-judicial grievance mechanisms in place to address complaints or disputes involving businesses and their stakeholders. This mechanism allows a rights-holder to bring their complaint against the company so that it will be heard and, ultimately, settled. These grievance mechanisms can be mediation-based, adjudicative or based on the needs of the public or the parties involved. Companies are advised to establish operational-level grievance mechanisms which are present locally at the level of operation.

Timeline: the national laws implementing the UNGPs



Jurisdictions covered:

Australia

Canada

European Union

France

Germany

Netherlands

Switzerland

United Kingdom

United States



Australia

Summary

Australia has recently introduced mandatory human rights due diligence legislation: the federal Modern Slavery Act 2018, which came into force in January 2019. Modelled on the United Kingdom Modern Slavery Act 2015, the Australian Act requires companies with revenue of over AU\$100m to publish an annual modern slavery statement, which will be added to a centralised database.

The government of New South Wales had previously endorsed a similar bill and is now considering whether a separate NSW Modern Slavery Act is constitutional and/or necessary in light of the federal Act.

Human rights due diligence legislation

Federal Modern Slavery Act 2018

Australia's federal Commonwealth Modern Slavery Act 2018 (the 'Australian MSA'), which came into effect on 1 January 2019, requires organisations with a consolidated revenue of AU\$100m or above to issue annual 'Modern Slavery Statements'. These must:

- report on the risks of modern slavery in the organisation's operations and supply chains; and
- outline what actions, if any, have been taken to assess and address those risks.

The annual statements must be approved by the organisation's boards of directors or equivalent bodies, and then signed by either a director or designated member respectively. Reporting entities will be required to provide an annual Modern Slavery Statement to the responsible minister.

The Australian MSA does not explicitly require businesses to conduct human rights due diligence or to remedy harm, nor does it create direct legal liability for companies that continue to cause harm via supply chains. That said, its provisions on mandatory reporting criteria for modern slavery statements require companies to disclose information on their due diligence and remediation practices. This creates an expectation that entities will undertake these actions as part of their reporting process, and in this way goes one step further than the United Kingdom Modern Slavery Act (which only requires the disclosure of 'steps taken to prevent modern slavery').

Unlike the United Kingdom Modern Slavery Act, the Australian MSA also requires the Australian Government to make all Modern Slavery Statements available online through a central government-managed register, making it easier for interested parties to determine which companies are complying with the law and allowing for non-compliant companies to be 'named and shamed.'

New South Wales Modern Slavery Act 2018

Prior to the introduction of the Australian MSA, the government of New South Wales approved (but did not enact) its own Modern Slavery Act on 21 June 2018.

If and when it comes into effect, the New South Wales Modern Slavery Act (NSW MSA) will require commercial organisations: (i) with at least one employee in New South Wales; (ii) that provide goods or services for profit; and (iii) which have a total annual turnover of at least AUS\$50m, to publish an annual modern slavery statement. The Act also provides for the imposition of fines of up to AUS\$1.1m on reporting entities that fail to prepare a statement, fail to make their statements public, or provide false or misleading information.

The NSW Government released a draft Modern Slavery Amendment Bill 2019, which suggests amendments to the NSW MSA (including clarifying that not-for-profit organisations are also considered 'commercial organisations').

In an effort to address questions surrounding the coexistence of the Australian MSA and the NSW MSA, the NSW Government has released a draft Modern Slavery Regulation 2019 (the 'NSW Regulation') and a corresponding Explanatory Paper. This clarifies what the NSW MSA modern slavery statement would need to describe, including the risks of modern slavery in the operations and supply chain of the organisation and the actions taken to assess and address those risks (including due diligence and remediation processes). This would ensure that the NSW MSA and the Australian MSA set out the same minimum mandatory criteria for the content of modern slavery statements. The NSW Regulation expressly describes the NSW MSA as a 'corresponding law' to relieve businesses of duplication in terms of reporting requirements. The NSW Regulation will commence on the same day as the NSW MSA.

The Legislative Council Standing Committee on Social Issues was tasked with leading an inquiry into the NSW MSA, the draft Modern Slavery Amendment Bill and the NSW Regulation. As part of its review, the Committee considered whether parts of the NSW MSA are rendered unconstitutional or unnecessary by the Australian MSA. The Committee published its final report on 25 March 2020, in which it recommended that with appropriate harmonisation, the NSW Act should commence on or before 1 January 2021.

Australia

Key human rights-related private litigation

Over the past decade, several large corporations have found themselves embroiled in human rights-related legal disputes in the Australian courts. Many of these disputes — often brought by foreign claimants — have related to adverse human rights impacts allegedly caused by or connected with a company's operations in the Australian mining sector (with environmental harm often closely entwined with human rights issues) or security sector.

However, extraterritorial cases in Australian courts relating to human rights abuses are only available in very limited circumstances. Even when they do proceed, they are rarely successful, in large part due to the considerable legal, procedural and cost hurdles they encounter. As a result, there have been calls for the Australian Government to impose legislation containing a specific civil cause of action for communities harmed by a company's actions (similar to the French Corporate Duty of Vigilance Law).

Canada

Summary

Canada has been the site of a number of recent developments in the human rights space. In January 2018, Canada announced the creation of the role of the Canadian Ombudsperson for Responsible Enterprise, which is tasked with monitoring Canadian companies' human rights abuses abroad. The first Ombudsperson was appointed by the Canadian government in April 2019. So far, the impact of this development has been limited, with some questioning the ability of the office to effectively investigate abuses and respond to complaints however, it is illustrative of an increasing commitment by Canada to address human rights issues in the business context.

Beyond that, Canada has proposed modern slavery and supply chain-transparency legislation and Canadian courts have adjudicated several high-profile cases alleging human-rights abuses committed by multinational companies. These actions have been rooted in tort law, alleging duties of care owed by overseas parent companies to stakeholders affected by the actions of a subsidiary or on-the-ground personnel.

Human rights due diligence legislation

Proposed Modern Slavery Act/supply chains legislation

In February 2019, Canada announced 'a process to consult on possible supply chain legislation' as part of its response to an October 2018 Report of the House of Commons Standing Committee on Foreign Affairs and International Development, with the feedback informing any future supply chain transparency legislation/initiatives in the country.

The All-Party Parliamentary Group to End Modern Slavery and Human Trafficking announced a draft Transparency in Supply Chains Act in April 2019. As of June 2020, this Act has yet to be tabled in the Senate or published by the House of Commons.

It is reported that the proposed Act will provide for:

- a reporting requirement for prescribed businesses;
- a duty of care for prescribed businesses;
- the creation of an ombudsperson and compliance committee; and
- a system for receiving and investigating complaints of modern slavery from whistle-blowers, as well as providing protections for whistle-blowers.

Key human rights-related private litigation

Canadian mining companies have been the defendants in a collection of human rights cases concerning the alleged conduct of their overseas affiliates. In these cases, amongst other commonalities, non-Canadian plaintiffs have sued a Canadian multinational corporation for human rights abuses committed, as alleged, outside of Canada and, thus far, been permitted to proceed with their claims.

In one case, several Guatemalan plaintiffs launched a civil suit in the Supreme Court of British Columbia, in relation to alleged violence carried out by security personnel of a large Canadian mining company during a protest against a mine in Guatemala. The case was the first in which foreign plaintiffs sought justice against Canadian companies for incidents alleged to have occurred abroad. A settlement was reached with the plaintiffs in 2019, with the company issuing a public apology to the victims and the local community.

In another recent case, the Supreme Court ruled in March 2020 that a case brought by three Eritreans against a Canadian mining company, involving alleged human rights abuses they suffered when working at one of its gold mines in Eritrea, could continue in Canadian courts. In the absence of a settlement, this litigation may be the first of its kind to go to full trial.

European Union

Summary

Across the European Union, the impact and influence of the Non-Financial Reporting Directive (2014/95/EU) and accompanying guidelines remains strong and Member States have implemented the Directive in a variety of ways. Companies also have less than a year to become compliant under the [European Union Conflict Minerals Regulation](#), which will have implications for companies both in and out of the European Union and will become effective on 1 January 2021.

Support for European Union-wide legislative action on mandatory human rights due diligence has been growing for some years, driven by Member States who already have developed national legislation on this topic.

Human rights due diligence legislation/non-financial reporting obligations

EU Non-Financial Reporting Directive

In 2014, the European Parliament adopted Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups, more commonly known as the Non-Financial Reporting Directive (EU Directive). The EU Directive requires certain large companies to issue statements reporting on the impact of their business activities on a number of non-financial issues, including in respect of human rights. It does not require companies to address reported impacts, although failing to report can result in sanctions (with such sanctions to be determined by each individual European Union Member State). The deadline for European Union Member States to implement the EU Directive via their respective national laws was in December 2016.

The European Commission recently published a consultation to collect the views of stakeholders regarding suggested revisions of the EU Directive. This consultation has now closed, and the EU Commission is expected to propose changes to the EU Directive resulting in more stringent disclosure rules.

EU Conflict Minerals Regulation

The 2017 European Union Conflict Minerals Regulation directly imposes mandatory due diligence requirements on certain importers of gold, tantalum, tin, and tungsten into the European Union, and encourages voluntary due diligence reporting by large manufacturers and sellers. The Regulation has an effective date of 1 January 2021.

Proposed EU-wide human rights due diligence legislation

For now, there are no specific European Union-wide requirements for companies and financial institutions to identify, prevent, mitigate and account for human rights abuses and environmental damage of their operations.

However, in recent years, momentum has been growing for the introduction of European Union-wide legislation on mandatory human rights due diligence. In December 2019, the Council of the European Union published an ‘[Agenda for Action on Business and Human Rights](#)’ which, among other things, highlighted the fragmented landscape of existing regulatory measures in this space and recommended the development of EU-wide initiatives to address this.

On 24 February 2020 the European Commission published its final report on the ‘[Study of Due Diligence Requirements Through the Supply Chain](#)’. In this study, most stakeholders considered that the current European Union regimes – which often rely on voluntary measures – have failed to change the way businesses manage their social, environmental and governance impacts, and that harmonised, European Union-wide due diligence rules would be beneficial for businesses.

The Commission has since announced that it will present a legislative proposal on mandatory human rights and environmental due diligence in early 2021. The envisaged legislation will be cross-sectoral, covering the entire supply chain, and will include companies of all sizes (with certain exceptions for small and medium sized enterprises). Whilst the question of civil liability is yet to be determined, the draft legislation will provide for sanctions and corresponding enforcement authorities.

France

Summary

France's Corporate Duty of Vigilance law has been of particular interest worldwide since it was passed in 2017, with its required 'vigilance plans' and express provision for civil liability making it the current highwater mark in mandatory human rights due diligence legislation. Even without the fines originally featured in the law, the possibility of any sort of corporate civil liability and/or monetary compensation for rights holders sets the Duty of Vigilance law apart from other similar national laws at this time.

Human rights-related lawsuits in France have also been in the news recently, including some brought pursuant to the Corporate Duty of Vigilance law itself.

Human rights due diligence legislation

The Corporate Duty of Vigilance Law

The 2017 French *loi n° 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Corporate Duty of Vigilance Law) requires French companies that, at the end of two consecutive financial periods, employ:

- at least 5,000 employees within the company itself and in its direct or indirect subsidiaries, where the head office is located in France; or
- at least 10,000 employees within the company itself and in its direct or indirect subsidiaries, where the head office is located in France or abroad, to create annual 'vigilance plans'.

These plans must detail the steps the company will take to detect environmental and human rights-related risks and to prevent human-rights violations and environmental harm resulting from the acts of the company, or a subsidiary, subcontractor, or supplier. More specifically, the French law requires companies to:

- identify their human rights risks and implement mechanisms to assess their subsidiaries, subcontractors and/or suppliers;
- carry out measures designed to mitigate or prevent various human rights violations; and
- establish an alert/warning system to detect the risks of human rights violations.

Injunctive measures may be ordered against companies who fail to comply with the Corporate Duty of Vigilance Law. A non-compliant company may also be required to compensate victims for any harm relating to the company's non-compliance with the Corporate Duty of Vigilance Law.

As well as placing relatively onerous obligations on in-scope companies, the French Corporate Duty of Vigilance Law differs from 'narrower' due diligence legislation in other jurisdictions, such as the United Kingdom Modern Slavery Act, in that it requires disclosures on multiple human rights risks, and on other issues (including environmental issues).

Key human rights-related private litigation

A recent wave of high-profile human rights-related litigation in French courts demonstrates increasing NGO activism in this space.

In a first-of-its-kind development, several Non-Governmental Organisations (NGOs) recently initiated proceedings against a French multinational under the Corporate Duty of Vigilance Law for failing to update and implement its environment and human rights vigilance plan in Uganda. In January 2020 the Nanterre High Court, where the claim was brought, refused to hear the claim on jurisdictional grounds, holding that the claim should be brought in the Commercial Court instead. While the NGOs were considering appealing this decision, the current status of the case is unclear.

NGO claimants have also been using consumer law to bring human rights-related claims in French courts; for example, companies have been sued for 'misleading advertising' where they have declared themselves to have high ethical standards but human rights abuses have been discovered in their supply chains.

Recently, the French courts have also seen criminal cases brought against French-headquartered banks for alleged complicity in human rights abuses overseas, including in relation to war crimes.

Germany

Summary

Germany does not currently impose human rights due diligence or reporting obligations on companies. The German Government initially advocated a voluntary approach to implementing the UN Guiding Principles on Business and Human Rights in its National Action Plan (NAP). But Government's plan is now changing. In June 2020, a position paper (by the Ministry for Economic Cooperation and Development and the Ministry of Labour and Social Affairs) on key elements for a Supply Chain Due Diligence Act (Sorgfaltspflichtengesetz) was leaked. The expected law would require German companies with more than 500 employees to take adequate steps to prevent, mitigate and remedy adverse human rights impacts in their business activities and supply chains. In-scope companies may face civil liability for damages regarding any violation of the law's requirements.

The German Government carried out two surveys on German companies with more than 500 employees on whether they voluntarily integrate core elements of human rights due diligence into their business processes. The results of both rounds of the survey (which just finished) certified German companies' poor performance in their human rights efforts. These results are now paving the way for further legislative action, as the current German Government had already agreed on mandatory regulations in its coalition agreement if companies fail to implement appropriate voluntary measures to protect human rights.

In recent years, Germany has also seen approximately 30 high-profile National Contact Point (NCP) complaints and human rights-related civil claims.

Human rights due diligence legislation

The proposed criteria for the projected Due Diligence Act are based on the requirements of the UN Guiding Principles for Business and Human rights and the OECD Guidelines for Multinational Enterprises. It would require companies that are based in Germany and have more than 500 employees (approximately 7,280 corporates are affected) to analyse whether their activities have a potential or actual adverse impact on internationally recognised human rights. Alongside such a comprehensive risk analysis, the companies would be expected to take adequate preventive measures and provide access to remedies. Only companies with business-steering decisions made in Germany fall within the scope of the planned legislation.

Under the Due Diligence Act, any violations of the requirements would create a cause of action and provide the basis for damage claims brought by private parties before the German courts. However, the liability risk for companies would be limited to damage that was foreseeable and avoidable if appropriate due diligence had been carried out. Liability is limited to essential legal interests such as life, body, health, freedom, property and the general right of personality (which under German constitutional law encompasses a number of rights that protect various aspects of an individual's personality). There is no shift of the burden of proof, which will lie with the claimant. Moreover, the Due Diligence Act's obligations shall be read as obligations to act instead of obligations to succeed.

In addition to civil liability, a responsible federal authority shall be competent to impose administrative fines for serious violations. The imposition of such fines may also lead to exclusion from public procurement for a certain period of time; accordingly an internal debarment list will be introduced.

A first legislative draft by the government on the Due Diligence Act is expected in August 2020. It is also announced that Germany will prominently place the topic of business and human rights on its agenda for the European Union's Council presidency in the second half of 2020.

Key human rights-related private litigation

In January 2017, a claim was filed against a German discount chain by victims of a fire at an overseas manufacturing site. The claim was based on an alleged breach of the duty of care owed by the company regarding the workplace safety at the manufacturing site of one of its main suppliers.

Criminal proceedings have also been brought against the manager of a German-owned multinational after employees of its African subsidiary were implicated in a clash between armed forces and local villagers which saw several civilians beaten, raped or arbitrarily arrested. The manager was accused of having aided and abetted these abuses through omission by failing to provide clear instructions to its subsidiaries on how to react in the event of a dispute between local communities.

The former claim was dismissed on statute of limitations grounds (a decision recently reaffirmed by a Higher Regional Court), while the latter was dismissed due to a failure to establish causality. However, these cases illustrate an appetite amongst claimants for initiating this kind of cross-border claim in the German courts.

A notable ongoing case is *Lliuya v RWE*. In 2015, a Peruvian farmer sued RWE in German courts for damages, claiming that by operating its coal power plants, the energy company has contributed to global warming and associated glacial melting close to the farmer's village. The farmer alleges that his house consequently faces the risk of flooding and seeks compensation from the company for preventive safeguarding measures. The claim was dismissed at first instance. In November 2017 the Appellate Court issued an interim decision to further investigate (i) the threat the farmer's house is allegedly exposed to and (ii) the causality and joint responsibility of the energy company

Netherlands

Summary

The Dutch Senate passed a due diligence law in May 2019 that will require companies to carry out due diligence with respect to child labour in their supply chains. The law, which will apply to companies that sell goods or services to Dutch end-users, will also require companies to submit a statement to an as-yet-unspecified regulatory authority, disclosing that they have carried out due diligence in their supply chains. Non-compliance with the law's reporting duties could result in civil fines; repeat violations of the due diligence provisions of the law could result in additional fines and could even lead to criminal sanctions (including imprisonment) against the responsible corporate director.

The law is expected to enter into force in 2022. This three-year period will allow the Government to prepare a General Administrative Order that appoints the regulator and fleshes out the obligations of companies under the Act in more detail. Although the law pertains specifically to child labour (bringing it in parallel, if only in subject matter, with India's Child Labour (Prohibition and Regulation) Amendment Act, 2016), its due diligence requirements are in fact quite broad. To mitigate the risks, and avoid non-compliance, global companies should determine whether they are (or could be) subject to the pending legislation well in advance of 2022. If so, they should familiarise themselves with the ILO-IOE Child Labour Guidance Tool for Business, with which the Act's due diligence obligations are aligned.

Outside of the legislative context, the Dutch courts have heard high-profile human rights complaints against both multinational firms and the Dutch government.

Human rights due diligence legislation

Child Labour Due Diligence Act

In May 2019, the Dutch Senate adopted a child labour due diligence law that will require companies to:

- report on their child labour-related supply chain due diligence practices; and
- take steps to address any risks identified.

Companies will be required to issue their first due diligence disclosure statements six months after the law becomes effective. As drafted, these statements need only be submitted once; there is no annual duty.

Originally expected to enter into force on 1 January 2020, the Child Labour Due Diligence Act was officially published in the Dutch Government Gazette on 13 November 2019 but is now not expected to enter into force until 2022. One reason for this is that the Dutch Government first needs to resolve several important elements of the law (including appointing a regulator and clarifying the obligations under the Act), in the form of General Administrative Orders.

The law applies not only to companies registered in the Netherlands, but also to non-Dutch companies that supply products or services to Dutch end-users at least twice in a year. Currently, there are no specific exemptions for certain categories of companies, such as SMEs. The Act will require covered companies to investigate whether, and create a plan of action where, there is a reasonable suspicion of child labour existing in their supply chains. In this

way, it goes a step beyond simple reporting obligations and brings it more in line with the French Corporate Duty of Vigilance law.

Compliance with the Act will be monitored and enforced by a specific, as-yet-unnamed regulatory authority. Non-compliance with the reporting duties may result in civil fines. Repeat violations of the Act's requirements may result in additional fines and, in some circumstances, responsible directors could even be imprisoned. Third-party complaints will play a key role in monitoring and enforcing non-compliance with the Act; the regulatory authority will consider sanctions against a purportedly non-compliant company only if – after first complaining to the relevant company directly – a third party submits a complaint to the regulatory authority along with concrete evidence of child labour in the company's supply chain.

Netherlands

Key human rights-related private litigation

The Netherlands is at the forefront of the trend for cross-border litigation against multinationals based on alleged human rights violations overseas.

In 2019, for example, a Dutch court **found it had jurisdiction** to hear a case (related to the Kiobel litigation in the United States) brought against *Royal Dutch Shell* regarding the deaths of Nigerian activists in the 1990s.

While not a private action, the high-profile Urgenda case in the Netherlands illustrates the increasing crossover between human rights and climate change. Urgenda, an NGO acting on behalf of Dutch citizens, commenced civil proceedings against the Dutch state, arguing that it has not been doing enough to prevent climate change. In October 2018, the Court of Appeal of The Hague ruled that by failing to achieve its climate goals, the Government had violated its duties under the European Convention on Human Rights (ECHR) with respect to the right to life and to private life, confirming the June 2015 decision of the District Court of The Hague. The Court ordered the Dutch Government to decrease carbon emissions by at least 25 percent by the end of 2020. This decision was upheld by the Dutch Supreme Court on 20 December 2019.

Relatedly, in 2018 the NGO Friends of the Earth initiated proceedings against Shell for allegedly violating ECHR rights to life and private life, on the basis that its CO₂ emissions are undermining global efforts to reduce global warming.

These cases are a pertinent example of the increasing convergence between human rights issues and climate change — something that we can expect to see more of as the rate of climate change-related cases grows.

Switzerland

Summary

In Switzerland, the introduction of a mandatory human rights due diligence law is subject to intense public debate dating back to 2016. The Swiss Parliament is currently considering various iterations of the 'Swiss Responsible Business Initiative', conflicting drafts of which propose varying degrees of mandatory human rights due diligence and potentially civil liability for human rights violations linked to operations in other jurisdictions. If the two chambers of the Swiss Parliament are not able to agree on an amended counterproposal, a national referendum on the Swiss Responsible Business Initiative will be held in 2021 at the latest.

The Swiss OECD National Contact Point has heard some high-profile cases involving companies headquartered in Switzerland, including consumer goods companies, banks and NGOs.

Human rights due diligence legislation

The Swiss Parliament has debated several different proposals that would make human rights due diligence mandatory and hold Swiss-headquartered companies liable for violations of human rights and environmental standards by their subsidiaries abroad.

Responsible Business Initiative

The first proposal, the Swiss Responsible Business Initiative (*Konzernverantwortungsinitiative*), was submitted by a Swiss coalition of civil society organisations in October 2016. Applying to companies registered or with their principal place of business in Switzerland, it would introduce obligations to respect international human rights and environmental standards and to carry out due diligence to identify and address adverse human rights impacts. Companies could also find themselves liable for damages for violations of human rights standards caused by their overseas subsidiaries and other entities under their control.

National Council Proposal

In response, the lower chamber of the Swiss Parliament (National Council) adopted a counterproposal in June 2018. This softened some of the demands of the original initiative by:

- reducing the scope from all companies (other than low-risk SMEs) to companies that exceed two of the following three criteria: (i) a balance sheet total of CHF 40m, (ii) turnover of CHF 80m, or (iii) at least 500 employees. Smaller companies engaged in particularly risk-prone activities would also be covered;
- providing that Swiss companies would only be liable for their legally controlled subsidiaries (the original initiative provided for liability with respect to economically controlled entities, including, in certain circumstances, subcontractors and suppliers); and
- providing that Swiss parent companies would only be liable for damages to life and limb or property abroad caused by their subsidiaries, and not for all human rights or environmental standards violations, as provided for in the original initiative.

After being scrutinized by the Legal Affairs Committee of the Council of States, the counterproposal was rejected by the Council of States in March 2019. In September 2019 the Council of States refused to adopt an amended version of the National Council proposal.

Council of States Proposal

In December 2019, the Council of States adopted a separate, narrower counter-proposal. This would apply to Swiss public companies that, alone or together with companies controlled by them, have 500 full-time employees and exceed (i) a balance sheet total of CHF20m; or (ii) a turnover of SFr40m, in two consecutive years.

In-scope companies would be required to report publicly on their due diligence measures in respect of conflict minerals and child labour. However, they would not be liable for any human rights violations identified.

In March 2020, the National Council and Council of States again voted in support of their respective proposals. In June 2020, a parliamentary committee recommended the adoption of the Council of States' proposal, and this was ultimately adopted by the Swiss Parliament on 9 June 2020.

However, Swiss civil society has criticised the Council of States' proposal, and as a result there is likely to be a national referendum on the Swiss Responsible Business Initiative (in its original, expansive form) in 2021 at the latest.

If a majority of both the electorate and the cantons vote in favour of the Swiss Responsible Business Initiative, it will be incorporated into federal law. If the Initiative fails, the Council of States' counterproposal will become law.

Regardless of which proposal is adopted and incorporated into Swiss law, any companies that operate in Switzerland, or that provide goods and services to Swiss companies, are likely to be affected.

United Kingdom

Summary

The United Kingdom has been the backdrop of several key human rights developments in recent years.

The Modern Slavery Act 2015, in particular, was a ground-breaking piece of legislation. The first national law of its kind, it placed legal obligations on certain companies to report on the actions taken to identify and mitigate modern slavery risks in their business and supply chains. While still a relatively new addition to the statute book (and currently under review by legislators), the Act has become a precedent for other jurisdictions contemplating introducing similar obligations and has inspired the introduction of mandatory reporting legislation in Australia and Canada.

There have also been key case law developments in the United Kingdom courts. Court decisions such as that of the Supreme Court in *Lungowe v Vedanta* have clarified the jurisdictional barriers for certain kinds of cross-border claim, potentially paving the way for United Kingdom-based parent companies to be sued in tort for the human rights impacts of their overseas affiliates' operations.

Human rights due diligence legislation and reporting obligations

UK Modern Slavery Act 2015

The United Kingdom Modern Slavery Act 2015 (UK MSA) requires any commercial enterprise that:

- carries on part of its business in the United Kingdom (regardless of where it is incorporated);
- supplies goods or services; and
- has a global turnover of £36m or more to produce a 'slavery and human trafficking statement.'

This statement, which must be approved by the company board, signed by a director, and published on the company's homepage, must describe the steps taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its own business.

If a business fails to produce a slavery and human trafficking statement for a particular financial year, the Secretary of State may seek an injunction through the High Court requiring the organisation to comply. If the organisation fails to comply with the injunction, it will be in contempt of a court order, which is punishable by an unlimited fine.

The United Kingdom Government has published guidance setting out the requirements of the UK MSA explaining how companies covered by the Act can publish a compliant modern slavery statement. It has recently been updated with more exacting requirements.

In 2018, the United Kingdom Government announced a review of the UK MSA to consider the operation and effectiveness of the Act. A final report was presented to Parliament in May 2019,

recommending, inter alia, strengthened sanctions for non-compliance with the UK MSA. In its response to this report in July 2019, the Government confirmed that it would implement some of these recommendations, including establishing a central repository for modern slavery statements. It also announced that it would launch a public consultation to explore ways to strengthen transparency in supply chains, and confirmed that it was prepared to subsequently make legislative changes.

The Government has also published guidance to help public authorities identify and mitigate modern slavery risks in their supply chains. Central government departments, their executive agencies and non-departmental public bodies must follow this guidance when examining both existing public contracts and when conducting future public procurements.

The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013

These regulations require UK listed companies to include non-financial information in a strategic report to the extent necessary for an understanding of the development, performance or position of the company's business, including information relating to human rights issues.

The Companies (Miscellaneous Reporting) Regulations 2018

These further require companies to include a 'section 172(1) statement' in their strategic report. The statement must set out how, when performing their duties under section 172 of the Companies Act 2006, directors have considered the matters set out in section 172(1)(a) to (f) of the Act, which may include the interests of employees and the impact.

United Kingdom

Key human rights-related private litigation

As well as the introduction of mandatory human rights legislation, UK-based companies should be aware of important developments with respect to parent company liability in English tort law. A number of recent cases indicate that companies may, in certain circumstances, be liable for the human rights impacts of their affiliates' operations. It is still early days for this line of case law. The decisions only concern whether that point is arguable, such that English courts have jurisdiction to hear the claim, but it is indicative of the courts' increasing willingness to contemplate such liability. Even at this embryonic stage, these developments have clear implications for the structure and compliance programmes employed by multinational corporations with headquarters (or substantial management operations) in the United Kingdom.

In *Lungowe v Vedanta*, the Supreme Court was asked to consider whether a UK-based parent company might owe a duty of care to people affected by the actions of a Zambian subsidiary. It found that published materials, in which a UK-based parent company asserted responsibility for the establishment of group-wide environment and sustainability standards, made it at least arguable that the parent company had such a duty of care. The Supreme Court therefore declared that the English courts have jurisdiction to hear the case. The case will now proceed to substantive trial.

The courts have grappled with similar issues in several other cases, including *AAA v Unilever* (concerning responsibility for the protection of a subsidiary's employees against political unrest in Kenya) and *Okpabi v Shell* (concerning environmental damage in the Niger delta). In both cases, the Court of Appeal recognized the possibility of a duty of care where a UK-based parent company manages or intervenes in the relevant activity of the subsidiary but ruled that there was no arguable duty of care in either case. The decision in the *Okpabi* case was appealed, with the appeal heard by the Supreme Court on 23 June 2020.

These cases illustrate the need for multinational companies to consider the potential legal implications of group-wide policies on matters such as the environment and human rights, and emphasises the need to take care – and be mindful of emerging legal risks – when drafting and implementing such policies. Companies may wish to put high-level group policies in place and provide latitude to local subsidiaries to implement these; but must, of course, balance this with the need to ensure they are properly (and consistently) implemented among their operating entities, such that they are effective in managing human rights risks.

This case law underlines the challenge that businesses face in finding an approach which balances, on one hand, aspirational and effective sustainability initiatives, good corporate governance and transparency; and on the other, emerging legal risks for the company and the possibility of claimant and court scrutiny of relevant materials.

United States

Summary

California remains the trailblazer in the United States with respect to mandatory human rights reporting legislation. Although there is currently no federal equivalent to the California Transparency in Supply Chains Act, companies should be aware of proposed federal legislation as well as of other existing regimes that may impact their obligations and legal risk (eg the deployment of economic sanctions to curb human rights abuses).

Meanwhile, claimants continue to pursue remedies for alleged human rights abuses and related wrongs, with implications for how domestic and multinational companies manage their operations and risk. Of particular note are a string of disclosure-based human rights cases brought by claimants taking issue with what companies have stated (or not) on their product labels and in their CSR statements, supplier codes and human rights policies, making it especially important for companies to carefully consider – and consistently update – what it states publicly about its practices.

Human rights due diligence legislation and reporting obligations

California Transparency in Supply Chains Act of 2010

The California Transparency in Supply Chains Act of 2010 came into effect in 2012. Under the Act, retailers or manufacturers (regardless of where they are incorporated) doing business in the State of California, with annual worldwide gross receipts of more than US\$100m, are required to report on their websites specific actions taken to eradicate slavery and human trafficking in their direct supply chains for tangible goods offered for sale. The exclusive remedy for violations of the 2010 Act is an action for injunctive relief brought by the California Attorney General, although, as noted below, private claimants have brought actions in relation to disclosures under the Act.

The Act was the first of its kind and has ushered in a wave of human rights due diligence legislation, including the United Kingdom Modern Slavery Act 2015, which was modelled on the California Act. There is currently no federal equivalent of the Californian Act.

There are a number of other important pieces of legislation and regulations that companies should be aware of if they are based in, or do business in, the United States.

Breaching these legal instruments could have important implications for the business and may lead to civil claims.

Alien Tort Statute: United States jurisdiction over non-United States victims of human rights abuses

The federal Alien Tort Statute (ATS) gives U.S. courts jurisdiction to hear lawsuits filed by non-United States citizens for torts committed in violation of international law, including certain violations of human rights. In 2018 a United States Supreme Court decision foreclosed ATS claims against foreign corporations; however, whether the statute could ultimately serve as a basis for corporate liability at all remains an unresolved question, and lower courts remain divided on this point.

Recent decisions illustrate this divide. In the January 2019 case *Alvarez v Johns Hopkins University*, a judge for the District of Maryland found that United States corporations could be liable under the ATS for violations of international law outside of the United States (in this case, in Guatemala). By contrast, in *Doe v. Exxon Mobil Corp.*, a decision issued in June 2019, a judge in Washington, D.C. concluded that United States corporations are not subject to ATS jurisdiction because ‘international law does not extend liability for human rights violations to corporations.’ Claims may nevertheless still be brought against corporate directors, officers and employees, who may be the beneficiaries of indemnification arrangements and/or corporate insurance policies.

Section 307 Tariff Act of 1930: Forced and convict labour

Section 307 of the Tariff Act of 1930, as amended, prohibits the importation of products produced, in whole or in part, by forced labour, indentured labour or convict labour in the United States. United States Customs and Border Patrol is required to detain incoming shipments of products when information indicates that they contain goods that have been produced with forced labour. If further investigation confirms this, the products must be excluded from the American market and if necessary, the importer will be referred to Immigration and Customs Enforcement for criminal investigation. The Trade Facilitation and Trade Enforcement Act of 2015, signed by President Trump on 24 February 2016, repealed the ‘consumptive demand’ clause in [section 307](#), which had exempted goods derived from forced labour where domestic production could not meet United States demand.

United States

Section 1502 Dodd Frank Act: Conflict minerals

Section 1502 of the Dodd-Frank Act — implemented by Rule 13p-1 of the Securities Exchange Act — requires listed companies to comply with certain due diligence obligations related to the origin and supply chain of a narrow list of covered ‘conflict’ minerals associated with ongoing conflict in the Democratic Republic of the Congo. If a company does identify such minerals in its supply chains, it becomes subject to certain due diligence and reporting obligations to mitigate the risks.

Federal Acquisition Regulation: Forced labour and anti-trafficking

Since 2015, the Federal Acquisition Regulation, the principal set of rules applied to Government procurement in the United States, has prohibited bidders for public contracts from engaging in severe forms of trafficking, acquiring products produced using forced or child labour, and charging employee recruitment fees. Successful bidders for federal contracts above a certain threshold must provide pre-contract award certification attesting that they have a compliance plan in place and annually submit certification that they have conducted due diligence to identify and prevent any prohibited activities; and confirm either (i) that no prohibited activities have occurred or (ii) that appropriate remedial or referral action has been taken.

Proposed legislation

- **Corporate Human Rights Risk Assessment, Prevention and Mitigation Act of 2019:** To require public companies to file an annual report with the Security and Exchange Commission (SEC) to (i) identify, analyse, and rank human rights risks and impacts in their operations and value chains; and (ii) rank the ‘gravity’ of human rights risks and impacts. In July 2019, the Act was introduced in the House, but it has yet to reach a vote in either the House or the Senate.
- **ESG Disclosure Simplification Act of 2019:** To require public companies to analyse the relationship between environmental, social and governance (ESG) and their long-term business strategy. The Act specifically calls for public companies to clearly describe the link between ESG and business strategy, and to describe processes that are used to determine the impact of ESG on business strategy. In September 2019, the Act was introduced in the House, but it has yet to reach a vote in either the House or the Senate.
- **The Washington Transparency in Agricultural Supply Chains Act 2019:** To require certain large retail sellers of agricultural products doing business in Washington State to obtain from their suppliers, on an annual basis, information concerning violations of certain employment laws and incidents of slavery. Each covered retailer is then required to disclose (i) certain information received from their suppliers and (ii) the retailer’s efforts to address employment law compliance and workers’ human rights in its supply chains.

The United States has also seen the increased, and increasingly entangled, intersection of human rights and economic sanctions, with the use of human rights-related economic sanctions being imposed more broadly by the United States Government. Companies should be aware of the business implications of recently implemented human rights-related sanctions regimes, including the 2016 Global Magnitsky Human Rights Accountability Act and provisions under the Countering Americas Adversaries Through Sanctions Act (CAATSA), both of which have introduced additional pressures on businesses to scrutinize their business relationships.

Key human rights-related private litigation

There have been numerous human rights-related causes of action brought in the United States, with claims arising in everything from common law tort to the Trafficking Victims Protection Reauthorization Act (TVPRA) to the ATS. Notable claims have involved negligence cases alleging a breach of a duty of care by corporates and claims for failing to disclose alleged slave labour in supply chains.

Companies required to make statements under the California Transparency in Supply Chains Act have faced litigation in California federal court, with claimants challenging the scope of the corporate defendants’ disclosures.

There is likely to be continued litigation in this space, especially as human rights-related legislation continues to be passed, interpreted and applied, both in the United States and abroad.

National action plans on business and human rights

More and more countries are developing National Action Plans on Business and Human Rights (NAPs) as part of the State responsibility to disseminate and implement the UNGPs.

NAPs are policy documents, in which a government articulates priorities and actions that it will adopt to support the implementation of international, regional, or national obligations and commitments with regard to a given policy area or topic. In NAPs on business and human rights, governments set out their existing commitments to promoting human rights and the steps they have already taken to encourage businesses to consider and address the human rights impacts of their operations. They also articulate the actions they propose to take to promote the implementation of the UNGPs. As of November 2019, 24 countries had adopted NAPs, while 16 others have committed to or are already developing their own.

In some cases, the commitments within a country's NAP are very ambitious: the French NAP, for example, sets out the government's intention to promote 'the notion of due diligence at the European level to encourage the creation of a common framework based on the legislative framework adopted in France'. Others, such as that of the United Kingdom, contain more modest commitments such as to 'facilitate dialogue between business people, parliamentarians and civil society on the implementation of the business and human rights agenda.'

Proposals in respect of corporate human rights due diligence often feature heavily in these NAPs. One of the 'action points' set out in the French NAP is to 'monitor the implementation of legislation requiring some companies to disclose due diligence plans addressing subsidiary and subcontractor risks at each level of the supply chain, and, if necessary, take measures to enforce this legislation.' The German NAP, meanwhile, is currently being used as the primary tool for encouraging businesses to carry out human rights due diligence in the absence of a national law requiring the same. The NAP explains that 'the Federal Government expects all

enterprises to introduce the process of corporate due diligence' and goes on to say that if fewer than 50 per cent of all German-based enterprises with more than 500 employees have failed to implement human rights due diligence in their corporate processes by 2020, the Government will consider further action (including introducing legislation).

In Sweden, the focus on public procurement in the NAP has contributed to the introduction of new statutes ensuring that potential suppliers for public contracts meet strict requirements regarding environmental, social and labour law obligations. Under this legislation suppliers may be excluded from public tenders if they are convicted of offences including human trafficking, forced labour, slavery or child labour.

The Colombian NAP has proved particularly successful: a report published in August 2018 reported that Colombia is advancing on 86 per cent of the actions in its NAP. The NAP clearly identifies implementation measures, with a responsible governmental entity allocated to each area of implementation, while a government website details up-to-date information for the implementation of each NAP action point. The NAP has been particularly successful in offering information to stakeholders including corporates on the corporate due diligence process.

NAPs can serve as statements of intent as to future action and are a useful indicator of a country's legislative priorities in respect of human rights; however, they should be treated with caution. While many NAPs are a product of lobbying on the part of civil society and the international community, they ultimately reflect the current priorities of the government at the time and are therefore subject to changes in the political landscape.



UN Photo/Logan Abossi

National contact points

Several international bodies and national authorities have taken steps to encourage adherence to the UNGPs. For example, the UNGPs have been incorporated into Section IV of the OECD Guidelines. While the OECD Guidelines are not legally binding, each OECD nation must establish a National Contact Point (NCP) to handle complaints (or 'specific instances' as they are officially called) that arise when the OECD Guidelines have been breached. NCPs can hear complaints brought by individuals or by NGOs against private enterprises with respect to their human rights impacts and provide a platform for parties involved to discuss and solve issues.

Statements, including recommendations, put forward by NCPs are technically non-binding, although they lead to reputational and potential follow-on litigation risk, especially in countries with more active NCPs. While not currently a significant area of human rights-related risk for multinationals, the NCP mechanism is one of the few non-legal conflict resolution mechanisms available at the international level, meaning that global companies should remain aware of their existence and of developments in this space, particularly given NCPs may be situated within government departments with which businesses may interact (in the United Kingdom, the Department for Business, Energy and Industrial Strategy, and in the United States, the State Department).

As at May 2019, all 48 countries that adhered to the OECD Guidelines had established an NCP, and 450 cases had been received by NCPs between 2000 and 2019. Between the 2011 revision of the OECD Guidelines and 2019, cases with a human rights element accounted for over 50 per cent of all cases received by NCPs. Of the 450 cases, six NCPs (the United Kingdom, the United States, Netherlands, Brazil, France and Germany) received 49 per cent of all cases filed between 2000 and 2019.

Example: United Kingdom NCP

There have been over 30 complaints to the UK's NCP involving companies across various sectors, including extractives, sport/leisure, technology and financial institutions. A number of these complaints have led to mediation between the parties and the issuance of recommendations by the NCP. Examples include a complaint brought by a conservation NGO against a UK-based oil & gas company with respect to its exploration activities in the Democratic Republic of Congo. After mediation, the company agreed to refrain from further oil exploratory work and to honour its commitments to local inhabitants to continue its social programmes.

More generally, the UK NCP has provided alleged victims with a potential non-judicial access to a remedy, alongside the traditional routes of civil and criminal law. The UK Parliament's Joint Committee of Human Rights has, however, highlighted that the NCP is currently 'largely invisible' and lacks the resources and profile needed to fulfil its role.

Example: France NCP

The French NCP has a tripartite structure, bringing together members from three categories: companies, trade unions and government agencies. This is viewed as a strength in that it provides the opportunity for broad representation.

One notable French NCP case concerned a submission made by a trade union in relation to working conditions in a hotel in the United States. The process concluded in 2017 with a settlement between the parties, which included an agreement that due diligence measures, in line with OECD guidelines, would be put in place to address labour issues at the hotel.



Other means of redress

Operational Grievance Mechanisms

Operational-level grievance mechanisms (OGMs) provide an alternative channel for individuals and communities who may be adversely impacted by a business to raise grievances and obtain redress. The UNGPs (Principles 29 and 31) recommend that businesses establish or participate in effective OGMs.

Aims and outcomes

OGMs enable businesses to:

- address any adverse social and environmental impacts, make reparations and provide redress at an early stage; and
- analyse patterns and trends in complaints and identify any potential human rights issues, thereby forming part of an effective due diligence process.

The structure and operation of OGMs is flexible and can be adapted to a business and its needs. OGMs can be administered by businesses — alone or in collaboration with others — including relevant stakeholders, and can operate at different levels of a business and a supply chain.

The UNGPs provide ‘effectiveness criteria’ for businesses to inform the design and management of OGMs, which include ensuring accessibility and transparency. The principles also provide that while OGMs provide an alternative mechanism for redress they should not undermine or in any way limit access to existing legitimate trade unions and other judicial and non-judicial grievance mechanisms.

Example OGMs

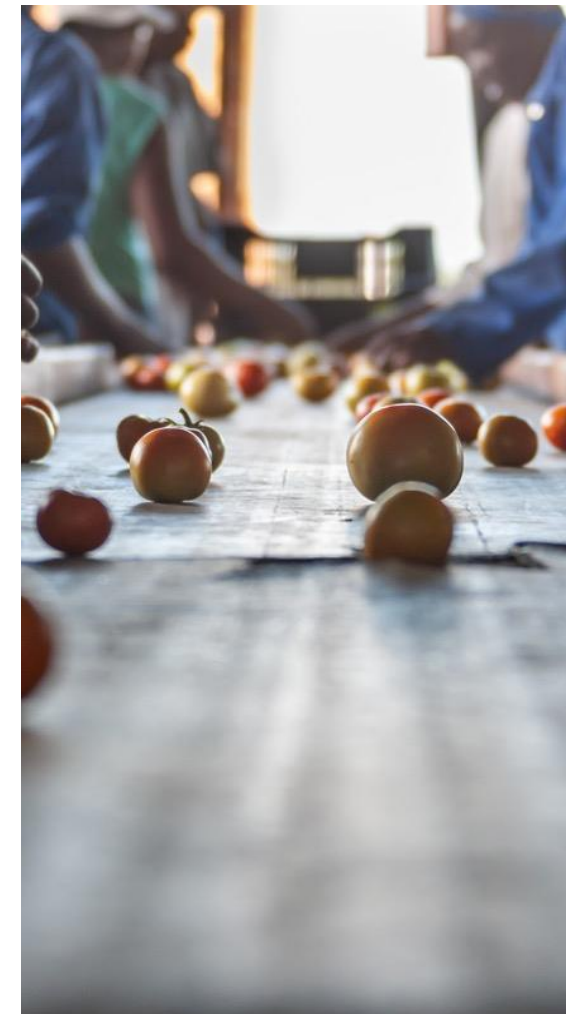
Many businesses across a variety of sectors have set up OGMs, such as hotlines for workers in their supply chains and third-party complaints systems (intended for unions, NGOs and affected communities).

OGMs are particularly widespread in the oil and gas sector. IPIECA — the global oil and gas association for environmental and social issues — has created [guidance](#) based on pilot programmes on how best to plan and implement OGMs in the sector. This includes taking steps to prevent conflicts of interest within the OGM, clearly communicating how the process works and respecting the confidentiality of those involved. The NGO ‘Shift’ has also published guidance on how to create an ‘internal ecosystem’ for remediation that includes establishing whistle-blower and supply chain hotlines, open door policies, employee ombudsman processes and stakeholder engagement.

Institutional grievance mechanisms

Global institutions have also developed grievance mechanisms for individuals and communities affected by businesses or projects connected to their remit. The Compliance Advisor Ombudsman (CAO), for example, provides an independent accountability mechanism for projects supported by the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) (the private sector arms of the World Bank Group).

The CAO offers mediation services for any individual or community affected by social or environmental issues relating to an IFC or MIGA project. Third parties with relevant cultural and linguistic skills assess complaints and work with the stakeholders to develop a jointly agreed strategy for resolving the issues raised.



United Nations special procedures and other investigatory powers

The United Nations special procedures

The United Nations Human Rights Council (UNHRC) appoints special procedures (either as individuals called ‘Special Rapporteurs’ or ‘Independent Experts’, or as working groups), who are independent human rights experts who report and advise on human rights mandates from a thematic or country-specific perspective. These themes include the rights of indigenous peoples, trafficking, and business and human rights.

Either at the request of the Human Rights Council, at the initiative of the mandate-holders or in response to individual cases of alleged violations, special procedures carry out country visits to analyse the human rights situation at the national level. Following visits, special procedures report their findings to the UNHRC and the UN General Assembly, publicly attributing responsibility and issuing recommendations to Member States and other national actors. special procedures also have the power to: (i) issue public statements attesting to and raising public awareness of specific human rights situations; (ii) communicate directly with States on alleged human rights violations by sending urgent appeals or letters of allegation; (iii) convene expert consultations, seminars and conferences; and (iv) offer technical assistance or mediation.

The special procedures have previously interacted primarily with states but are now directly examining business conduct in the context of their investigations.

Other investigatory powers

A working group on business and human rights was established in 2011 in order to oversee the dissemination and implementation of the UNGPs. One of the ways the working group achieves this is by conducting field work, and it has worked with the special procedures to investigate allegations of human rights violations linked to businesses.

From time to time, the UNHRC may also create specific mandates which touch upon the interaction between business and human rights. For example, the Independent International Fact-Finding Mission to Myanmar has published a report on possible links between multinational businesses and the Government of Myanmar.

A United Nations Treaty on Transnational Business and Human Rights?

Since 2014, a United Nations working group has been working towards a legally binding treaty that would regulate the activities of transnational corporations by reference to international human rights law. This would not apply directly to companies but would instead require signatory States to establish a domestic legal framework aimed at regulating the human rights impacts of multinationals. In July 2019 a draft of the treaty was published, but it is widely acknowledged that a lot of work is needed before the treaty can be adopted.



UN Photo/Jess Hoffman

Conclusion

The UNGPs have acted as a catalyst for heightened scrutiny of the corporate responsibility to respect human rights. Businesses are taking voluntary steps to mitigate and address human rights risks and countries are increasingly transforming international human rights norms and standards into ‘hard’ national laws. With legislative proposals at an advanced stage in many jurisdictions and increasing momentum behind regional and international instruments in this space, this trend is set to continue.

Respect for human rights is now, for many businesses, not only a core aspect of responsible business conduct, but a key concern from a legal compliance and litigation risk management perspective. Multinational companies, particularly those operating in certain high-risk sectors or regions, should recognise the human rights risks in their business operations and global supply chains, and appreciate the significant legal, financial and reputational repercussions of failing to mitigate them. Given the increasing convergence between human rights and climate change claims, companies should also take into account how their impact on the environment links to human rights risks in their operations and the communities they operate in.

Importantly, the steps a company takes to manage human rights risk should relate not only to the company’s own business operations, but also to its entire supply chain. Companies should draw on the human rights policy, due diligence and remediation framework set out in the UNGPs to proactively prevent human rights violations.

What constitutes an appropriate approach to UNGP compliance depends on a range of factors and will differ significantly from business to business. A high-level guide to applying the UNGP framework, which may be adjusted appropriately depending on the circumstances, is set out in [Annex 1](#).

As this report shows, business and human rights is an incredibly fast-evolving field. This report shows only a snapshot of key developments and companies are well-advised to monitor any significant developments in jurisdictions where they operate.



Annex 1

Next steps for business: Implementing the UNGPs business and human rights framework in the supply chain

The Guiding Principles for Business and Human Rights: Implementing the 'Protect, Respect, Remedy' Framework outlines the steps all companies should take to ensure they fulfil their corporate responsibility to respect human rights. These steps are detailed below. Human rights-related risks will of course vary according to the nature of each company and its operations, and the appropriate response will depend on each company's particular circumstances.

To respect human rights effectively, companies should establish:

- a policy commitment
- human rights due diligence; and
- a remediation process.

Phase 1: A Policy Commitment

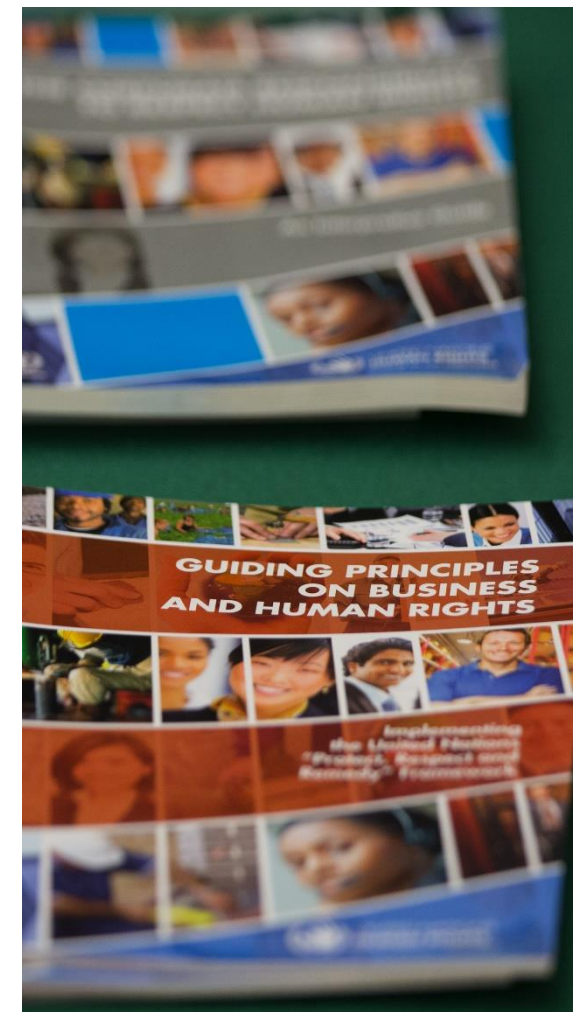
Companies should have a human rights policy in place which identifies its human rights commitments and governance structure and its expectations for suppliers and business partners.

The commitment should:

- be approved at the most senior level of the business;
- be approved by individuals with relevant internal and/or external expertise;
- stipulate the company's human rights expectations of staff, business partners and other parties directly linked to its operations, products or services;
- trigger the development of internal procedures and systems necessary to meet the commitment in practice;
- be publicly available and communicated internally and externally to all staff, business partners and other relevant parties; and
- be reflected in operational policies and procedures necessary to embed it throughout the business.

In disseminating the commitment to the public, a company should consider:

- whether the commitment is widely accessible, especially to its key stakeholders;
- whether and how the commitment is communicated to entities with which the business has a relationship (eg business partners, suppliers, organisations in the value chain); and
- whether and how the commitment is communicated to employees.



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Next steps for business: Implementing the UNGPs business and human rights framework in the supply chain

Phase 2: Human rights due diligence

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights' due diligence. The process, which is an ongoing risk management process, should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities or which may be directly linked to its operations, products or services by its business relationships;
- will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts and the nature and context of its operations; and
- should be ongoing, recognising that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Companies must remember that due diligence:

- is preventive;
- differentiates between impacts which are contributed to or directly linked to business activities but does not shift responsibilities;
- assesses impacts from the point of view of rights-holders rather than the material risks to the business;
- should involve meaningful consultation with all affected stakeholders and ongoing communication;
- can be adapted to a company's circumstances, size and context; and
- involves multiple dynamic processes and objectives. Methodologies and tools include risk identification, mapping and prioritisation, human rights impact assessments and tracking and reporting.

I. Mapping and Saliency

A company should:

- map its supply chain and operations;
- identify risks (considering direct and indirect causes and access to rights under current systems);
- prioritise risks (ranking risks by severity, likelihood and the degree of attention required); and
- analyse the data and identify next actions:
 - what actions should be taken to address each impact;
 - how to prioritise each action depending on the severity of each risk;
 - who is responsible for carrying out these actions; and
 - suitable policies to integrate the findings.

Importantly, an enterprise's human rights risks are the risks that its operations pose to the enjoyment of human rights by others. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.

The most salient human rights for a business enterprise are those that stand out as being most at risk. This will typically vary according to its sector and operating context. The UNGPs make clear that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise, but the most salient rights will logically be the ones on which it concentrates its primary efforts.



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Next steps for business: Implementing the UNGPs business and human rights framework in the supply chain

A business enterprise's human rights risks are any risks where its operations may lead to one or more adverse human rights impacts. They therefore relate to its potential human rights impact.

Traditional risk assessments factor in both the consequences of an event (its severity) and its probability. In the context of human rights risk, severity is the predominant factor, but probability may be relevant in helping prioritise the order in which potential impacts are addressed in some circumstances.

A key part of managing human rights risks is to ensure the business has a sufficiently well-developed picture of its supplier landscape such that the business is able to understand which parts it should subject to further scrutiny and so that appropriate risk-management systems and processes can be applied where they are needed most.

II. Human Rights Impact Assessment

The UNGPs acknowledge that human rights due diligence can be included within broader enterprise risk-management systems.

However, sometimes enhanced human rights due diligence in the form of a tailored human rights impact assessment may be appropriate. The scope of any such assessment can vary, but they are often deployed when a business considers a particular supplier, supply chain, product or business line to be high risk from a human rights perspective and wants to gain a deeper understanding of the specific adverse impacts that are occurring, or which may arise.

A typical human rights impact assessment includes.

- Phase 1: Planning and scoping
- Phase 2: Data collection and baseline development
- Phase 3: Analysing impact
- Phase 4: Impact mitigation and management
- Phase 5: Reporting and evaluation

III. Integrate and act on findings

Integration is the process by which a company:

- Collects the results related to a specific risk or impact;
- Determines which employees/functions are responsible for dealing with each human rights concern; and
- Ensures the adoption of effective measures to address each risk or impact.

A company does this by:

- Integrating commitments into internal controls and systems;
- Assigning responsibility for human rights impacts to the appropriate level and function;
- Embedding human rights into appropriate decision-making mechanisms, budget allocation and oversight systems; and
- Developing a risk mitigation and management plan.

How a business should act also depends on the relationship of the business to the impact (UNGP 19).

- If a company has caused or may cause a negative human rights impact, it should cease and remediate the impact or prevent the impact.
- If a company has contributed or may contribute to a negative human rights impact, it should cease and remediate the impact or prevent the impact. It should also use leverage over other contributors to mitigate the impact as much as possible.
- If the negative human rights impact is directly linked to a company's operations, products or services by a business relationship, appropriate action depends on whether leverage over the entity could be exercised, the severity of the abuse and the importance of the relationship.

Prevention and mitigation efforts are forward-looking — they are focused on attempting to stop potential impacts from becoming actual impacts and to reducing their severity. Where this involves third parties, companies can use their leverage over those third parties to change their behaviour.



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Next steps for business: Implementing the UNGPs business and human rights framework in the supply chain

IV. Tracking and reporting

Tracking of performance should be based on appropriate qualitative and quantitative metrics and feedback from relevant stakeholders (external and internal) and inform and support continuous improvement.

Some commonly used tools and methodologies of measuring and tracking performance include.

- Third-party audits
- Impact assessment
- Grievance mechanisms
- Awareness-raising and training
- Industry association engagement
- Interviews, surveys and field visits

Once companies have identified their human rights impacts and taken steps to mitigate them, they should communicate the results, progress and further actions. This communication should:

- be in a form and frequency that reflects the company's human rights impacts and that is accessible to its intended stakeholders;
- provide enough information to enable stakeholders to evaluate the adequacy of the company's response to the particular human rights impact involved; and
- not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Phase 3: Remedy

The Guiding Principles require that, where a business identifies that it has caused or contributed to adverse human rights impacts, it should provide for or co-operate in remediation through legitimate processes.

There may be times when the business needs to address adverse impacts or considers using any leverage it has available to encourage others to do so. Remedy can take several different forms, so that the remedy is appropriate to the harm caused or contributed to. Specialist (including local) input may be required to ensure any response is appropriate.

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.

Some organisations have put in place compensation schemes for affected persons, while in other cases an apology or implementation of a particular practical measure for the benefit of a community or other affected group may be more appropriate.



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Next steps for business: Implementing the UNGPs business and human rights framework in the supply chain

In order to ensure their effectiveness, non-judicial grievance mechanisms should be:

- Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- Rights-compatible: ensuring that outcomes and remedies accord with internationally recognised human rights;
- A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; and
- Operational-level mechanisms should also be based on engagement and dialogue, after consulting the stakeholder groups for whose use they are intended on their design and performance.



Annex 2

Human rights due diligence legislation by jurisdiction

	Jurisdiction	Law	Date	Area of Focus	Scope/Obligations	Penalties	Comments
IN FORCE	California, USA	California Transparency in Supply Chains 2010	1 January 2012	<ul style="list-style-type: none"> Slavery and human trafficking in supply chains 	Applies to: retailers or manufacturers doing business in the State of California with annual worldwide gross receipts over \$100m. Reporting obligation: report on website with specific actions taken to eradicate slavery and human trafficking in supply chains.	Injunctive relief.	
	European Union	Directive on Non-Financial Reporting 2014	Deadline for implementation: December 2016	<ul style="list-style-type: none"> Human rights Environmental risks 	Applies to: large undertakings and groups. Reporting obligation: statement in annual report on respect for human rights and environmental matters.	Varies depending on the national regime.	Countries have taken different approaches to implement the directive with some, eg France, adopting more stringent requirements than others.
	United Kingdom	Modern Slavery Act 2015	29 October 2015	<ul style="list-style-type: none"> Slavery and human trafficking in supply chains 	Applies to: commercial enterprises doing business in the UK, supplying goods or services and with global turnover of £36m or more. Reporting obligation: annual statement outlining steps taken to address slavery and human trafficking in business and supply chain.	Injunction requiring company to publish a statement.	Government review of legislation in 2018 recommended that sanctions for non-compliance were strengthened.
	France	Corporate Duty of Vigilance Law 2017	28 March 2017	<ul style="list-style-type: none"> Human rights Environmental risks 	Applies to: French companies (i) headquartered in France, with 5,000+ employees, or (ii) headquartered abroad, with 10,000+ employees. Obligation to create a 'vigilance plan': detailing steps the company will take (i) to detect environmental/human rights-related risk, and (ii) to prevent human-rights violations/environmental harm resulting from the acts of the company, its subsidiaries, subcontractors, suppliers.	Injunctive measures. Compensation for victims for any harm relating to the company's non-compliance with the law.	
	Australia	Federal Modern Slavery Act 2018	1 January 2019	<ul style="list-style-type: none"> Modern slavery 	Applies to: organisations with consolidated revenue of AUS\$100m or above. Reporting obligation: annual statement on risks of modern slavery in operations and supply chains and actions taken to assess and address the risks.	Government can publicly name non-complying entities and can require remedial action to ensure compliance.	

Annex 2

Human rights due diligence legislation by jurisdiction

	Jurisdiction	Law	Area of Focus	Scope/Obligations	Penalties	Comments
PROSPECTIVE	European Union	EU-wide human rights due diligence legislation	<ul style="list-style-type: none"> Human rights Environment 	<p>Will apply to: companies of all sizes (with some exceptions for smaller companies).</p> <p>Due diligence obligation: would require due diligence on potential human rights and environmental impacts of the company's operations.</p>	Not yet known.	Proposal expected in early 2021.
	Netherlands	Child Labour Due Diligence Bill 2019	<ul style="list-style-type: none"> Child labour 	<p>Will apply to: companies that supply products or services to Dutch end users at least twice a year.</p> <p>Reporting obligation: one-off statement disclosing due diligence undertaken to identify child labour risk in supply chains.</p> <p>Obligation to create 'action plan': where there is a reasonable suspicion of child labour.</p>	Civil fines and possibility of director imprisonment.	Expected to come into force in 2022. Implementing laws still need to be passed to designate the authority which will carry out the role of regulator and to set out the specific requirements for the action plan.
	New South Wales, Australia	New South Wales Modern Slavery Act 2018	<ul style="list-style-type: none"> Modern slavery 	<p>Would apply to: companies (i) with at least one employee in New South Wales; (ii) providing goods or services for profit; and (iii) with annual turnover of at least AUS\$50m.</p> <p>Proposed reporting requirement: annual statement detailing steps taken to eliminate modern slavery from supply chains.</p>	Fines of up to AUS\$1.1m.	There is an ongoing enquiry into whether the legislation is unconstitutional or unnecessary as a result of the Australian MSA.
	Germany	Due Diligence Act	<ul style="list-style-type: none"> Human rights 	<p>Would apply to: companies based in Germany with more than 500 employees.</p> <p>Obligation: undertake a comprehensive risk analysis of potential adverse effects of company's activities on human rights; implementing prevention measures and providing access to remedies.</p>	Civil liability and potential for damages claims and fines.	

Annex 2

Human rights due diligence legislation by jurisdiction

	Jurisdiction	Law	Area of Focus	Scope/Obligations	Penalties	Comments
PROSPECTIVE	United States	Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019	<ul style="list-style-type: none"> Human rights risks 	<p>Would apply to: public companies under the Securities Exchange Act 1934.</p> <p>Proposed reporting requirement: file annual report with US Securities and Exchange Commission to identify, analyse and rank human rights risks and their impacts in operations and value changes.</p>	No penalties are currently envisaged by the draft bill.	Discussion draft of the bill introduced by US House of Representatives in July 2019.
		Business Supply Chain Transparency on Trafficking and Slavery Act 2018	<ul style="list-style-type: none"> Modern slavery and trafficking in supply chains 	<p>Would apply to: any issuer that has annual worldwide global receipts in excess of \$100m.</p> <p>Proposed reporting requirement: annual report on measures taken to identify and address conditions of forced labour, slavery, human trafficking and child labour in its supply chains.</p>	No penalties are currently envisaged by the draft bill.	The bill expired at the end of the 115 th Congress in January 2019, but Rep. Maloney has committed to re-introducing the bill in the 116 th Congress, which ends on 3 January 2021.
		Washington Transparency in Agricultural Supply Chains Act	<ul style="list-style-type: none"> Modern slavery, trafficking and workers' rights in agriculture 	<p>Would apply to: retail sellers of agricultural products doing business in Washington state with annual gross receipts of \$200m or more.</p> <p>Proposed reporting requirement: annual disclosures on actions taken to: identify risks of slavery, peonage and trafficking in supply chains; comply with employment law obligations; and respect human rights.</p>	Fines of up to \$7,000, punitive damages for wilful violations and declaratory or injunctive relief.	It is unclear whether the bill will ever be passed.
	Canada	Due-diligence and transparency in supply chains, against forced/child labour	<ul style="list-style-type: none"> Trafficking and forced/child labour in supply chains 	<p>Would apply to: any entity operating within or importing into Canada.</p> <p>Proposed requirement: annual disclosure on policies and operational risk regarding child labour and steps taken to manage those risks.</p>	Fines of up to CAD\$250,000 and possibility of criminal conviction for directors.	The private bill was first introduced in 2018.
	Switzerland	Responsible Business Initiative/Council of States Counterproposal	<ul style="list-style-type: none"> Human rights/conflict minerals and forced labour 	<p>Would apply to: companies registered or doing business in Switzerland.</p> <p>Proposed requirement: public reporting of due diligence measures, and possibly an obligation to address adverse human rights impacts.</p>	Not yet known, but possibly damages for overseas human rights violations	The scope and obligations of the new Swiss law will depend on the outcome of the national referendum, and whether the Responsible Business Initiative or the Council of States proposal is adopted.

Annex 3

Human rights and labour rights as a basis for the UNGPs

Principle 12 of the Guiding Principles provides that the relevant rights are those expressed in the UN International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. These instruments set out a list of human rights and labour rights, including (not exhaustively) the following rights.

- Freedom of association and the effective recognition of the right to collective bargaining.
- The elimination of all forms of forced or compulsory labour.
- The effective abolition of child labour.
- The elimination of discrimination in respect of employment and occupation.
- Rights to liberty and security of the person.
- Right to enjoy just and favourable conditions of work.
- Right to social security, including social insurance.
- Right to health.
- Right to an adequate standard of living.

This is not an exhaustive list, and careful consideration should be given to the kinds of rights that may be engaged, or any particular national or international human rights standards that may apply, in every transaction. Moreover, it should be borne in mind that many of these rights are not absolute and infringements can, in certain circumstances, be justified. This must be assessed on a case-by-case basis.

The UN Global Compact actively works to promote these human and labour rights, by calling on companies to respect them and to ensure they are not complicit in human rights abuses. To support companies in doing so, the UN Global Compact offers engagement opportunities and promotes [tools and resources](#) aligned with the UNGPs.



Annex 3

Human rights and labour rights as a basis for the UNGPs

As a major international law firm with a dedicated global business and human rights practice, the first international law firm to become a signatory to the United Nations Global Compact and drawing on our experience assisting with the research that led to the development of the UN Guiding Principles on Business and Human Rights, Freshfields can help.

We regularly advise large multinational companies and public authorities on the full suite of issues arising out of the UN Guiding Principles. The heightened global expectation that companies across sectors should respect international human rights and their evolution from business norms into ‘hard law’ (ie the introduction of new modern slavery and human rights-related reporting regulations around the world, emerging litigation risks and the continued development of the OECD National Contacts Points complaint procedures) is where our work is focused.

We also advise on operational human rights compliance issues:

- human rights policies and procedures, in light of fast-moving regulatory and litigation risks;
- internal and external capacity building and reporting requirements;
- the impact of national legislation such as the United Kingdom Modern Slavery Act 2015 and the 2017 French Corporate Duty of Vigilance Law; and
- grievance and remediation processes.

Our practice is global in scope. The contribution of a dedicated, cross-disciplinary team of experienced partners and associates across the network provides a unique strength and depth of advice to our clients. With offices in 17 countries, we have teams monitoring international human rights law developments in real time, and we also provide insights on a regularly published [sustainability and human rights blog](#).

See [here](#) for more information about the team.



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