Freshfields Bruckhaus Deringer

Five trends to watch

Business and Human Rights



Key trends at a glance



1.

The legal and regulatory environment will continue to evolve and expand



2.

Companies will continue to innovate and collaborate in implementing the corporate respect for human rights



3.

The claims and disputes environment will continue to take a new shape



4.

Human rights will occupy a larger space in the environmental discourse (and vice versa)



5.

Conceptualizing human rights in the digital age

Five trends to watch in business and human rights

Keeping pace with the changes and expectations being placed on business is as challenging as ever. For the second year, we report what we are seeing as the major trends in business and human rights affecting corporations and financial institutions.

Focus sharpens on operationalizing the UN Guiding Principles

While operations and business contexts will differ, human rights issues are becoming a key part of legal and litigation risk management for which companies are enlisting their legal teams' support and expertise. Failure to demonstrate respect for human rights, and to implement policies and processes to identify, prevent and address negative human rights impacts, can have serious implications. A well-managed approach toward greater alignment with the UN Guiding Principles on Business and Human Rights (UNGP) can strengthen a company's ability to manage risks, and drive business value.

Companies are developing approaches to integrate human rights considerations into their business plans and decision-making processes, using the UNGP as a roadmap while committing to or endorsing other voluntary standards and guiding principles, streamlining efforts to reduce regulatory risk, and reporting changes and results. Although there is no "one-size-fits-all solution" for every company, businesses are generally taking the following steps:

First, identifying and understanding their key human rights risks across geographic areas, business activities and business relationships. Second, crafting a risk-based approach to, on a systematic and prioritized basis, address their most severe human rights risks and mitigate, prevent and remediate abuses. Third, locating and applying leverage in business relationships, through both contractual terms and non-contractual mechanisms. Fourth, customizing and enhancing business policies and processes, including remediation mechanisms, and applying them as appropriate to various contexts. Fifth, publishing data and refining disclosures in reference to existing laws and non-regulatory initiatives.

Helpfully, for the most part, companies are able to build on what they have already developed. They are adapting existing policies and procedures on environmental, health and safety protection, workplace equality and the recognition of organized labor. They are modifying due diligence practices and remediation processes designed to manage risk in the anti-bribery and corruption, anti-money laundering, antifraud and sanctions space. In the process, they are, in an iterative fashion, improving their approach to guarding against social harm and helping to deliver responsible human rights performance.

We now explore five key trends in business and human rights.

1. The legal and regulatory environment will continue to evolve and expand

Last year, corporations worked to navigate developments in existing national laws and regulations targeting modern slavery and broader human rights issues. This year, we predict ongoing evolution and expansion of the legal and regulatory framework as the international focus on accountability for the human rights impacts of global activity continues to grow.

Companies should be considering what is legally required of them, and whether and how disclosures and compliance regulatory obligations can be synthesized and harmonized into global solutions. Recent and proposed trends in corporate reporting and due diligence include:

France

This year, companies required by the French Corporate Duty of Vigilance Law to establish and effectively implement vigilance plans encompassing French SA, SCA, SE and SAS companies, and employing more than 5,000 employees through their French direct or indirect subsidiaries or more than 10,000 employees through their French and foreign direct or indirect subsidiaries - will, from the first full financial period commencing after March 28, 2017, publish vigilance plans and information with respect to their effective implementation in annual reports. By way of derogation for the first year, initial vigilance plans are expected to be established from

March 28, 2017 and published in the annual report regarding the financial period during which the law was published, but without reference to effective implementation. The law requires companies to complete a risk mapping exercise, to implement a mechanism to regularly assess the situation of its subsidiaries, subcontractors and/or suppliers with which the company has an established commercial relationship, to carry out any measures adapted to mitigate risks or prevent serious human rights violations, and to establish an alert and warning system regarding the existence or occurrence of risks.

UK

Attention is currently focused on what effect Brexit will have on human rights law, including the contours of the EU Withdrawal Bill and its implications for the application of EU-based human rights protections in UK law. Companies publishing UK Modern Slavery Act 2015 statements should be aware of recent correspondence from the UK anti-slavery commissioner to FTSE 100 companies articulating shortcomings in corporate reporting, as well as earlier guidance from the UK government clarifying what best practices in corporate reporting require. We continue to track UK parliamentary recommendations to enact corporate human rights legislation based on the UK Bribery Act corporate offense. Finally, the UK Criminal Finances Act 2017 is expected to generate new risks for companies operating overseas, where involvement in or connection with gross human rights abuses perpetrated against those blowing the whistle on public officials or human rights defenders can now result in seizure and forfeiture of corporate assets derived from such actions.

EU

The effects of national legislation introduced in response to the EU Non-Financial Reporting Directive will continue to be felt across Europe, requiring certain companies to report on environmental, social, human rights and governance issues. Companies caught by the EU Conflict Minerals Regulation – some 600 and 1,000 EU importers of tin, tungsten,



tantalum and gold minerals and metals or 3TG – still have time to conduct minerals diligence and prepare disclosures; the regulation does not take effect until January 2021. Unlike the US conflict minerals rule, which is the focus of ongoing legislative debate, the EU rule places mandatory obligations on importers of 3TG but not product manufacturers and sellers, as the US rule does.

US

Supply chain transparency is not yet a legal requirement in the US outside of California, where eight class action lawsuits have been brought against companies citing their modern slavery statements against them, alleging in essence that the statements were misleading to consumers by implying that products were slavery-free. We meanwhile continue to track efforts to effect a change in Regulation S-K, which lays out reporting requirements for various filings to the US Securities and Exchange Commission, requiring issuers to disclose information on public policy and sustainability matters. Finally, companies that import goods from overseas, particularly North Korea,

are advised to take note of new guidance from US Customs and Border Protection and individual letters sent to some companies requesting information on their forced labor compliance programs. The US forced labor law was recently amended to include a rebuttable presumption that goods mined, produced or manufactured with a North Korean nexus are ineligible for import unless an importer can prove through clear and convincing evidence that North Korean forced labor was not involved in the production.

Future legislation

Efforts to enact modern slavery reporting requirements elsewhere are advancing at different stages, with Australia's proposal for a rule proceeding through parliamentary committees, and a proposal in Canada gaining traction as a matter of public policy debate though the proposal has not quite matured into any formal legislative agenda. In Hong Kong, a member of the legislature has submitted to the Chief Executive a draft bill for consideration, which is modeled after the UK Modern Slavery Act of 2015 in terms of imposing on an eligible corporation, amongst other requirements, the yearly duty to make an anti-slavery and anti-human trafficking statement. It seeks to criminalize slavery, servitude and forced or compulsory labor as well as human trafficking in furtherance of such exploitation. In Switzerland, citizens could vote to amend the constitution and require businesses, including Swiss-based multinationals, to conduct due diligence across supply chains this year. In the Netherlands, a child labor due diligence bill that would require companies to publicly report on whether child labor is present in their supply chains and take steps to eradicate it is still under consideration in the Senate. Companies will continue to innovate and collaborate in implementing the corporate respect for human rights

2.



Last year, discussion shifted from defining the corporate responsibility to respect human rights to what, practically speaking, embedding respect for human rights in corporate operations and supply chains entails. This year, we predict corporations will exercise increasing ownership over their paths and continue to innovate and collaborate in integrating the corporate respect for human rights into core business practices. In the process, they will leverage new technologies, partnerships, and benchmarking and reporting platforms.

New technologies

Big data analytics and information technologies have matured in other domains and are in the early stages of being leveraged in the human rights context. Examples include companies' use of predictive analytics in responsible sourcing, smart phone scanning technology for supply chain evaluation and management purposes, and mobile phone surveys to provide victims of human rights violations with a channel to voice concerns. Going forward, we expect companies to continue to embrace next generation tools to improve transparency and accountability in complex supply chains and use them to enhance, or even replace, traditional approaches.

Partnerships

Cross-sector business alliances and strategic partnerships with governments, civil society organizations, trade unions and employee associations continue to prove instrumental to improving supply chain practices. Businesses are using them to develop common principles and goals, conduct joint supplier assessments and audits, commission pilot heat-mapping and due diligence initiatives in high-risk areas, and deploy and share training materials. One of the drivers of supply chain partnerships is the lack of transparency of social and environmental impacts along the supply chain. For instance, in a recent survey by The Sustainability Consortium, less than one-fifth of the 1,700 suppliers surveyed said they have a comprehensive view of their supply chains' sustainability performance. More than half reported being unable to determine sustainability issues in their supply chains.

Benchmarking

Lastly, engagement with benchmarking mechanisms and other platforms, including the UNGP Reporting and Assurance Frameworks, will continue to function as the new transparency mechanism – informing businesses what stakeholders are interested in and driving businesses to test their programs on various issues. Over time, pressure from external constituencies will catalyze a shift from simply fulfilling minimum requirements to furnishing more comprehensive compliance narratives. Companies will continue to grapple with possible exposure to creating a duty of care in the process, creating possible tension between corporate legal and compliance teams.

3. The claims and disputes environment will continue to take a new shape



Companies working to implement the UNGP and seeing results must be mindful of the third and final chapter of Ruggie, sometimes referred to as the "forgotten pillar," or Chapter III. It describes principles and mechanisms for grievance and redress to be considered and implemented by states.

The UNGP, correspondingly, require companies to provide remedy to victims of human rights abuses through participation in judicial and non-judicial dispute resolution processes, and to cooperate in the establishment of or participation in operational-level grievance mechanisms. The access to remedy that states are obligated to make available encompasses both statebased and non-state and judicial and non-judicial mechanisms. Companies should be mindful of these expectations and the larger, dynamic and evolving approaches to access to justice being discussed worldwide,

and beginning to be considered at national levels, for example in France under last year's Corporate Duty of Vigilance Law discussed above.

State-based judicial remedial processes

We expect continued exploration of hard-edged judicial action, particularly in multinational corporations' home courts, seeking to bring civil and criminal human rights-related claims against corporations, as well as individual corporate directors and officers. States are legislating to accommodate human rights-specific processes within their existing judicial frameworks. Under the French law, any interested party with standing to sue can ask a competent court to instruct a company to craft, publish and effectively implement a human rights due diligence plan or face a civil fine; a company can additionally be sued for damages through a civil action for harm that could have been avoided by that company's compliance with the law. A recent report from the UK Parliamentary Joint Committee on Human Rights contains a recommendation to impose a duty on all companies to prevent human rights abuses through effective due diligence

across their subsidiaries and supply chains, and provisions for civil and criminal liability on companies (including parents) for failure to prevent abuses, modelled on the UK Bribery Act. As recently noted here, we continue to track efforts to pursue judicial remedies for direct and indirect involvement in alleged human rights abuses under a variety of existing laws in the US, the UK, Canada and other jurisdictions.

State-based or supported non-judicial mechanisms

Efforts to establish access to remedy outside the scope of courtroom litigation also continue, with dialogue focused on the diversity and efficacy of mechanisms currently available in some jurisdictions, including but not limited to: statutory complaints mechanisms, government labor rights inspectorates, ombudsperson offices, mediation and conciliation services, court-sponsored arbitration and specialized tribunals, national human rights institutions, and of course the OECD National Contact Point (NCP) complaint system. According to OECD data, human rights cases have been the most prevalent form of complaint since 2011, and recent filings in



government-run NCPs indicate increasing proficiency and innovation among claimants (mainly NGOs and individuals) and their representatives. We do, though, note a drop-off in the number of complaints last year and questions from several corners as to their overall utility – which itself points to demand for a broader range of state-sponsored redress mechanisms in the non-judicial field. Of special interest is the development of more formal business and human rights arbitration processes, and in particular the international arbitration process provided for under the Accord on Fire and Building Safety in Bangladesh, the binding dispute resolution mechanism contained in the new Dutch Agreement on Sustainable Garment and Textile, and the possible role for the Permanent Court of Arbitration in business and human rights disputes backed by model rules designed for international business and human rights arbitration. A move forward on an arbitral route for addressing grievance and redress raises some key issues for businesses and their legal advisers – whether it can provide remedies that are about behavioral change, rather than just financial redress, and arbitral awards that are enforceable as national judgments (e.g., the New York Convention on the Recognition and Enforcement of Arbitral Awards) and acceptable to businesses and conducive to achieving creative and enduring solutions to rights holders' claims.

Grievance mechanisms

There are, finally, the different options and new practices based in mediation and conciliation occurring at the operational level, including community-driven and enterprise-supported grievance mechanisms, which companies might find useful and where industry and best practices continue to develop. These are different types of resolutions or arrangements with endless possibilities that can be tailored to different circumstances. While the range and variations of potential mechanisms and processes described here and above are so far largely ad hoc and exploratory, if one thing is clear it is that companies actively trying to operationalize the UNGP must have a plan in place to offer their preferred ways of addressing grievances and remediation. They must be prepared to consider claims in new forms of tribunals and new forms of claims. They should understand what the suite of available options is – and there is advantage in initiative.

Even companies that are passive on the UNCP should be aware of impending developments that are likely to create new dispute management regimes and which, either because of state intervention or commercial pressure, they may not be able to ignore.

4.

Human rights will occupy a larger space in the environmental discourse (and vice versa)

Achieving consensus on the precise relationship between negative human rights impacts and environmental issues has proved historically elusive, but we predict that disclosure, due diligence and litigation trends could cause the connection points to grow, affecting both corporations and financial institutions.

Due diligence

Many companies have, in seeking to identify, understand and address their salient human rights risks for reporting and compliance purposes, already acknowledged the potential risks to life, health or property that can arise from business operations that result in industrial pollution, accidents or disasters. In the M&A context, some companies are heat-mapping high-risk locations, sectors and supply chain risks when evaluating target companies and their subsidiaries in addition to the due diligence they already perform on anti-bribery and corruption, money laundering and environmental risks - looking not just at the environmental effects of the target company but also what downstream effects they may have on affected communities' rights.

In the M&A context, some companies are heat-mapping high-risk locations.

Disputes

Attention is currently focused on the mounting, high-profile lawsuits brought against energy companies taking issue with their actions to address the risks posed by climate change. While still early stages, we note the emergence of some climate-related disputes that embrace a distinct human rights element. Last year, discussion at the Bonn Climate Talks focused in significant part on emerging trends in climate change litigation brought against energy companies, seeking to link their business operations with climate change that then adversely impacted affected communities' human rights and also to prevent business activity. The outcome of these cases will have a considerable effect on the discussion as to handling the consequences of climate change from both a legal and political standpoint, and we predict that an increasing number of disputes, both lawsuits and NCP complaints, could link the alleged contributions to climate change by business, and the resulting consequences on the health, safety and living conditions of local communities.

Financial sector

Increasing regulatory focus and pressure from mainstream investors have already prompted a number of financial institutions and investment advisers to tackle the challenges associated with climate change and, increasingly, human rights risks. In recent months, both the chief executives of BlackRock and Vanguard, the world's two largest asset managers, have urged CEOs to focus more on long-term growth plans and risk, rather than quarterly reports, which is likely to facilitate proactive action to address human rights and climate risks. They are doing so from a number of angles. Advisory, financing and direct investment teams are integrating environmental and social due diligence as part of normal course due diligence requirements on an increasing basis. Transactions that may have significant environmental or social risks (including reputational) are elevated for enhanced review and business selection discussion. And the asset management industry has responded to clients' demands for new socially responsible, ESG and impact investing vehicles.



5. Conceptualizing human rights in the digital age

Data privacy and data protection concerns, and the dangers posed by cybercrime and government surveillance, are increasingly being discussed as critical factors in safeguarding the fundamental rights of individuals – rights that include but are not limited to the right to a private life, freedom of expression, freedom of association and assembly. While by no means an exhaustive list, we present the following observations and developments that are expected to create new risks as well as opportunities for businesses.



Evolving role for tech businesses

The unfolding role played by tech businesses represents one of the most complex we have seen in the human rights space. On the one hand, some tech businesses have come under fire for the mechanisms by which they obtain, process, use and store data in the course of their commercial operations, prompting heated discussion on what appropriate engagement with rights holders entails and how tech companies should balance the sometimes competing rights to privacy and expression. In other contexts, the tech sector has been cast as the protector of human rights, arising both from the powerful tools they provide to human rights advocates and defenders, and also based on their responses to requests from governments and security organizations for user data, with debate particularly high-pitched in jurisdictions where the local operating environment or legal landscape may create continuing conflict with international human rights norms. Continued interest and dialogue in this space are inevitable, in particular as government and private sector actors seek to balance competing considerations and values.

The unfolding role played by tech businesses represents one of the most complex we have seen in the human rights space.

66

Digital Geneva Convention

Turning to cybersecurity, we continue to track corporate and regulatory efforts to encourage greater cooperation in responding to global threats, including a proposed "Digital Geneva Convention." The idea took root last year, when Microsoft issued a call to action to bring about an agreement between nation-states pursuant to which countries would commit to safeguard civilians from state-sponsored cyberattacks and aid the private sector in preventing, containing and responding to cyberattacks. In addition, Microsoft is urging the tech sector to sign a Tech Accord promoting a more peaceful and secure internet by memorializing shared principles and behaviors, and the establishment of a neutral body to examine and assign responsibility for cyberattacks, similar to the role played by the International Atomic Energy Agency in the nuclear nonproliferation context.

EU General Data Protection Regulation

The contours of the European data protection regime continue to take shape with the EU General Data Protection Regulation (GDPR), which comes into force on May 25, 2018. It will give individuals greater rights and control over their personal data and, in doing so, tip the balance of power – from companies that derive value from data to individuals. Companies will need to give careful attention to whether they can justify processing personal data, and the bar for a valid consent has been raised considerably. Regulators are also given greater powers under the GDPR, and it will apply directly to many foreign companies that target the EU market from overseas. Freshfields has published extensively on the implications of GDPR: see here.

Companies will need to give careful attention to whether they can justify processing personal data

Freshfields' global business and human rights practice

Addressing human rights concerns is becoming not just a CSR priority but also a core part of corporate compliance, alongside anti-bribery and corruption considerations. A changing legal landscape in relation to business and human rights issues is prompting many global companies to evaluate, develop responses to, and respect human rights as a legal obligation.

As a major international law firm with a dedicated global business and human rights practice, the first international law firm to sign 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" (i.e., 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 UK 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 <u>human rights blog</u>.

We would be pleased to sign you up for our blog and to tell you more about our practice. You can also search "Freshfields human rights" to find out more.

Meet the team



Paul Bowden Partner London T +44 20 7832 7273 E paul.bowden @freshfields.com



Daniel Braun Partner Washington, DC **T** +1 202 777 4528 E daniel.braun @freshfields.com



Jonathan Isted Partner London **T** +44 20 7832 7320 E jonathan.isted @freshfields.com



Ben Juratowitch Partner Paris T +33 1 44 56 33 43

E ben.juratowitch @freshfields.com

Deba Das Senior Associate London T +44 20 7427 3574 E deba.das @freshfields.com











Boris Kasolowsky Partner Frankfurt **T** +49 69 27 30 87 47 E boris.kasolowsky @freshfields.com

Dimitri Lecat Partner Paris **T** +33 1 44 56 55 14 E dimitri.lecat @freshfields.com

Aaron Marcu Partner New York **T** +1 212 284 4954

E aaron.marcu @freshfields.com

Emily Holland

Senior Associate

Washington, DC

T +1 202 777 4537

E emily.holland

Partner

London



@freshfields.com





Alison Smith Partner London

T +44 20 7785 5829 E alison.smith @freshfields.com

Caroline Stroud Partner London

T +44 20 7832 7602 E caroline.stroud @freshfields.com

Will Thomas Partner London

T +44 20 7832 7073 **E** william.thomas @freshfields.com

Michael Quayle Associate London

T +44 20 7427 3601 E michael.quayle @freshfields.com







(

freshfields.com

This material is provided by the US law firm Freshfields Bruckhaus Deringer US LLP and the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organized under the law of England and Wales) (the UK LLP) and by the offices and associated entities of the UK LLP practicing under the Freshfields Bruckhaus Deringer name in a number of jurisdictions, together referred to in the material as "Freshfields." For regulatory information please refer to www.freshfields.com/support/legalnotice.

Freshfields Bruckhaus Deringer US LLP has offices in New York City and Washington, DC. The UK LLP has offices or associated entities in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates and Vietnam.

This material is for general information only and is not intended to provide legal advice. Prior results do not guarantee a similar outcome.