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# The Business and Human Rights Review

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Autumn 2017 | Issue 5

## Opening up on responsible business practice

An interview with Paul Lister  
of Associated British Foods

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**The role and responsibilities of businesses in championing LGBT equality**

Sarah Foster and Lynn Pasterny of Stonewall

**Advising banks on human trafficking risks**

An interview with Nick Bryan-Brown of Blackpeak Group

**Wise counselling on global supply chains**

John F Sherman III

**An Argentine perspective on the social license to operate**

Guillermo Malm Green

**Business and human rights in diplomacy and politics**

An Interview with Eva Biaudet

**Introducing the French Corporate Duty of Due Diligence Law**

Valentin Bourgeois and Jérémie Nataf

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# Foreword

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**David Flechner**  
Partner, Allen & Overy LLP



*This edition of The Business and Human Rights Review once again brings together diverse voices to discuss the role that business can play in protecting, respecting and promoting human rights across the world.*

Global supply chains and employment in supply chains continue to grow, with the ILO estimating that there are now over 453 million formal sector jobs relating to global supply chains. The risk of human rights impacts in these networks remains a challenge. Dealing with these risks is all part of a day's work for Paul Lister, Director of Legal Services at Associated British Foods, an international food, ingredients and retail group, with 130,000 employees and operations in 50 countries and subsidiary companies including Primark. Paul talks to us on page six about his approach to ethical trade which involves engaging from the "bottom up" with a factory, jurisdiction or supplier at the micro-level as well as pushing for overarching legal and policy reform. While investing in the developing world is a positive step, he stresses that companies need to properly recognise and prepare to meet the challenges that flow from it.

From the political and diplomatic sphere, Eva Biaudet, currently a Member of the Finnish Parliament and formerly Special Representative and Co-ordinator for Combating Trafficking in Human Beings at the Organisation for Security and Co-operation in Europe (OSCE), discusses on page 36 the OSCE's strong focus on awareness and checking of supply chains. She highlights that companies can gain a competitive advantage by committing to robust checks and reports, and, given the scale of the challenge, companies taking positive steps have the opportunity to stand out. Nicholas Bryan-Brown, who works as an adviser with banks and companies, notes on page 18 that although there is increasing awareness of the prevalence of modern slavery in global supply chains, companies should approach it as a specific threat that needs actively to be addressed.

Practical help on dealing with supply chain risks comes from John F Sherman, III, General Counsel of Shift and former adviser to Professor John Ruggie. He outlines on page 22 a new set of International Bar Association Guidance Documents which will further help business lawyers and their clients navigate such risks. They identify practice areas where wise counselling in legal advice and services can increase a client's ability to respect human rights, including in relation to corporate governance and risk management, reporting and disclosure, disputes and contracts. He emphasises that business lawyers have a potential role to play in helping their clients to avoid involvement in adverse human rights impacts in their operations and in their business relationships, including in supply chains.

As Chile introduces its first National Action Plan on Business and Human Rights, which also incorporates the UN Sustainable Development Goals, in neighbouring Argentina there are recent examples of court challenges against major projects based on human and environmental rights protected by the country's Constitution. Guillermo Malm-Green on page 30 discusses this legal uncertainty and the importance for business in developing a social license to operate when developing new projects. He argues that the traditional role of lawyers has expanded and now lawyers should understand not only the law but also the political and social circumstances that surround a business.

We take a closer look on page 42 at the new French "corporate duty of vigilance", which reflects the global trend towards increased scrutiny of the measures taken by multinationals to prevent and mitigate human rights abuses in their supply chains domestically and internationally.



We discuss the “vigilance plan” which an affected company is required to produce and implement, aimed at identifying and preventing the potential human rights violations and environmental harm caused by a company’s activities, those of its affiliates or entities under its “control”.

This is another example of a law targeting local companies as well as the activities of foreign affiliates, suppliers and subcontractors, giving it an extraterritorial remit comparable to that of the UK Bribery Act.

Finally, in this edition we look at the growing momentum of business involvement in LGBT rights, exemplified by the inclusion of LGBT rights for the first time on the agenda at the World Economic Forum in 2015.

Lynn Pasterny and Sarah Foster from Stonewall, Europe’s largest LGBT campaigning organisation, note on page 12 that the imperative for employers to engage with LGBT rights is multifaceted: there is both a human rights

case as well as a business case for doing so. In their article, Pasterny and Foster provide a timely reminder that although companies wield vast economic power and have enormous potential to influence both policy and social attitudes beyond the workplace, despite the best intentions, companies also have the potential to do harm. As such, Pasterny and Foster outline nine key objectives for business in creating an inclusive workplace, emphasising the necessity for employers to take a structured approach which places LGBT people at the heart of any intervention and always draws on local expertise.

The common thread running through contributions to this edition is that – whether from business, civil society, financial institutions, the legal profession, local community groups, government – we all play a part in furthering the protection and realisation of human rights. We hope this publication further contributes to this dialogue.

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# Opening up on responsible business practice

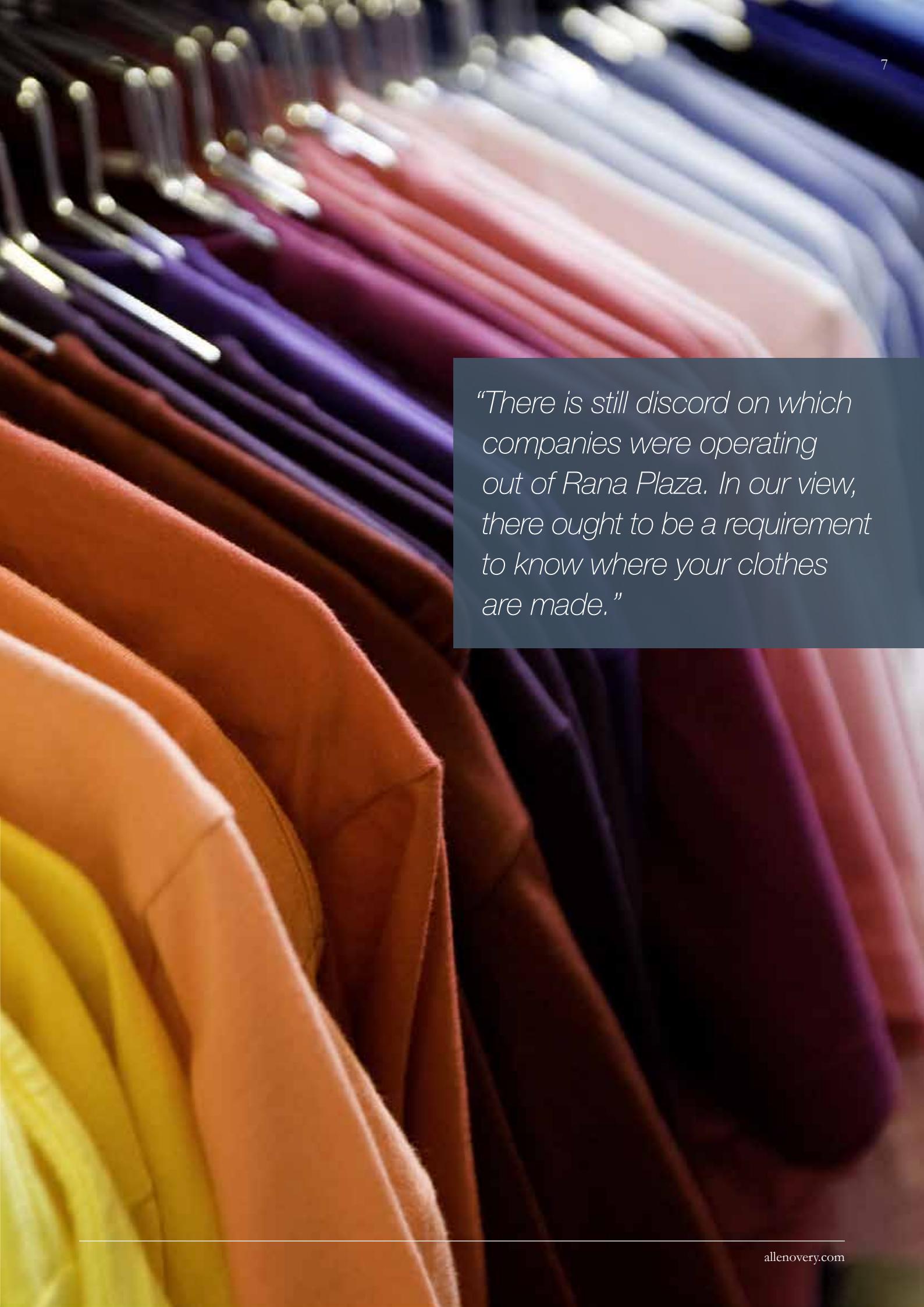
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An interview with Paul Lister  
of Associated British Foods



*Paul Lister is Director of Legal Services at Associated British Foods, a diversified international food, ingredients and retail group, with 130,000 employees and operations in 50 countries and subsidiary companies including Primark, Twinings, ABSugar and Speedibake. Paul is responsible for Primark's CSR and ethical trade strategy and for establishing Primark's Ethical Trade & Environmental Sustainability team, which comprises more than 80 people based in their key sourcing countries. Prior to joining ABF in January 2001, Paul was Associate General Counsel of Diageo plc. He holds a law degree from University College London and is a qualified solicitor in England & Wales.*

*Paul talks to us about Primark's approach to ethical trading and strategies to improve working conditions for garment workers in developing markets.*



*"There is still discord on which companies were operating out of Rana Plaza. In our view, there ought to be a requirement to know where your clothes are made."*

**ABF has expansive operations, and yet Primark draws the most attention in terms of worker conditions. What is your biggest challenge in overseeing such a large network across the developing world?**

As a starting point, Primark's business model is the key to understanding its approach to what we call Ethical Trade and Environmental Sustainability and dealing with the inherent challenges therein. Our low prices are achieved through virtually no advertising spend. Bulk purchasing enables considerable savings and our overheads are kept to a minimum. This gives us the freedom to channel significant resource towards ethical and sustainable practices, as opposed to cutting corners or not taking ethics seriously. You can read more about this on the [Primark ethics website](#).

Primark's key challenge starts with its very approach to Ethical Trade, which is 'bottom up', looking at processes and reporting mechanisms at the individual business or factory level. This inevitably demands more resource, as you are dealing with quite disparate challenges depending on which part of the supply chain you are looking at, the factory location, and so on. This approach is in direct conflict with one which is purely 'top down' or policy-based. In our view, taking the latter approach cannot in and of itself bring about real change or impact – you need to engage with the particular factory, jurisdiction or supplier at the micro-level as well as pushing for overarching legal and policy reform.

As we do not own any factories, another big challenge is managing risk arising from third parties and having adequate systems in place to protect workers and enable red flags to be raised. You need the ability to put in place the full gamut of prevention and response mechanisms, including regular auditing, worker helplines, effective whistleblower protections, ongoing training for employees and regular factory visits from our Ethical Trade Team.

**Primark has been a member of the Ethical Trading Initiative since 2006, and achieved ETI Leadership in 2011; ranking it in the top five per cent of member brands. Primark is also a member of Germany's Textilbündnis and a founder member of ACT (Action, Collaboration, Transformation). In recent times, Primark has been prominent in speaking about its responsible business practices. Why do you think it is important for companies to open up about these processes?**

It may sound obvious, but the starting position among competitors has to be a shared view that investing in the developing world is a good thing, while recognising and preparing to meet the challenges that flow from it. Enabling wealth-creation will naturally lead to ethical and sustainability issues for all retailers, from our direct competitors to Bond Street retailers alike.

*We are all sharing the same factory space and encountering parallel issues and concerns. On that basis, the benefits of collaboration are self-evident – you need transparent and open stakeholder discussions to pool resource and knowledge effectively.*

In addition to the external and reputational pressure, which is not new, there is now increased internal pressure, with employees and future employees asking questions about ethics policies, so there is an additional business case for collaborating to raise standards.

In Primark's own experience, representing this intent publicly via our Ethics website has been particularly successful – the site's high hit rate demonstrates the interest in how we reconcile low prices with high ethical standards through our business model.

Open discussion with competitors does bring with it the challenge of protecting commercially sensitive information, but as the demand for transparency increases and there is more information in the public domain (whether you or someone else is putting it out there), the information deemed to be 'commercially sensitive' shifts, and strategies for managing the risk emerge.

**Can you explain more about Primark's Ethical Trade strategy? How are you working with governments in the UK and beyond?**

Working with governments can prove effective but it really does depend on the level of engagement. In some countries, the relevant laws are already in force but governments in less developed countries often lack the resource (and sometimes the will) to enforce legal standards.

An example of such a gap between law and practice is around enforcing a higher minimum wage (to rise annually in line with inflation, in theory levelling the playing field). Trade unions and retailers alike from a range of jurisdictions are engaged in collective bargaining around sustainable wage discussions through the Action Collaboration Transformation (**ACT**) initiative<sup>1</sup>, but change here is incremental, even where some of the countries have the legislation in place. On the other hand, legislative reform can bring about big and sudden shifts in this space – take the UK Modern Slavery Act. For the time being, it is primarily aimed at increasing reporting and transparency, but the expectation is that obligations under it will increase over time.

**Factories used by Primark employ about 750,000 people, which impacts 2.4 million people factoring in families. Clearly, it is important to retain jobs and work with factories to improve worker conditions, rather than withdrawing business and losing jobs altogether. Can you give an example of where you have identified an issue of concern and then worked with a factory to fix it?**

Agreed, it is rare to de-list a factory and this is always a last resort. If we find serious systemic issues, we can opt to withdraw completely, but this is not a decision to take lightly given the risk to workers' livelihoods.

We audit all our factories before they become suppliers and while they are keen for our business. This is the point at which we have the best leverage to raise standards or secure required modifications through a corrective action plan. Modifications we have required as part of that process include building a fire escape, and we also invest in training and changes to internal policy. We have over 80 people now working in the field to visit factories, in some cases on a fairly constant basis, to ensure that the improvements coming out of our corrective action plans are being carried out. Often, other companies push the financial burden of the audit onto supplier factories, but we pay for all our audits as we want ownership and directorship of them. The practical benefit is direct access for us to quality confidential conversations with factory workers, which are not required to be shared with the factory owner.

Another issue of concern for all retailers is subcontracting which throws up interesting questions in terms of supply chain liability risk. In order to manage risk and monitor ethical practices effectively, as a bare minimum we need to know where our products are being made – which at Primark we do.

But what level of knowledge ought companies to have in relation to sub-contracting? Where should they draw the line, for example, in relation to investigating and dealing with unauthorised sub-contracting? And should regulation play a role in all this, as has happened in the areas of anti-bribery and corruption? The development of these issues will be interesting to follow.

**The Rana Plaza building collapse in 2013 which killed over 1,100 workers was obviously a wake-up call for textile companies. It led to Primark becoming a signatory to the Accord on Fire and Building Safety in Bangladesh, a five-year independent, legally binding agreement between over 200 global brands, retailers and trade unions designed to build a safe Bangladeshi garment industry. What has this Accord achieved to date? Is there scope for more such accords or collaborations?**

The Accord itself has looked at a lot of buildings in Bangladesh, and identified various issues including in other countries in the region where high-rise factories are common, such as Pakistan. Building safety and integrity became a priority where it was less of a live issue before Rana Plaza. Primark engaged structural engineers to work with factory owners at an operational level rather than requiring a level of technical compliance that is often lost on them and results in a failure to comply because they do not understand their obligations.

The Accord was a huge stepping stone to collaboration on a confidential basis, and crucially was not the dangerous or drastic action it had been presented as. It demonstrated the tangible value of information-sharing and arguably led to the ACT, which is a key soft power tool.

### Four years since the Rana Plaza collapse, do you think practices have changed enough?

I think it is inaccurate to single out Rana Plaza as the first 'catalyst' for change. There was already a lot of ongoing work. It certainly raised the profile of structural integrity problems, but some issues were unique to Bangladesh, such as the accepted standards for construction.

### Providing remedies for victims of labour exploitation has proved challenging. Do you think there should be greater industry collaboration to support access to remedy? If so, what kind?

Local differences around legal remedies are a real challenge – ie whether, as a matter of local law, workers are being treated fairly. The complex nature of most supply chains is the other challenge – practically, it is more difficult to pursue a third-party supplier for remedy, even if they are ostensibly liable. By way of example, there is still discord on which companies were operating out of Rana Plaza. In our view, there ought to be a requirement to know where your clothes are made.

### Primark has been singled out for showing leadership on compliance with the UK Modern Slavery Act. As global action on eliminating modern slavery looks set to accelerate, with more jurisdictions introducing or considering laws relating to supply chain transparency, do you see any benefit in coordinated global action on this – perhaps an effective international standard?

There could be value in an international standard, but the progress needs to be incremental. If countries develop different standards in parallel, in practice there will be more forms to fill in and more disparate standards to comply with. Personally, I favour the practical approach, working on the ground in the key countries.

There needs to be a commitment to some minimum standard of protection, but in practice, a global standard is a tall order. The UN Guiding Principles on Business and Human Rights and National Action Plans are important statements of intent but are too high-level as a vehicle to bring about industry-specific change. There is a risk

that policies are not reflective of the day-to-day issues on the ground in the relevant countries, and therefore not enforced. We undoubtedly need an initial step in terms of the overarching framework, but if everybody takes different steps it makes compliance difficult. Take the example of the ETI – Primark delayed in joining the Textilbündnis<sup>2</sup> in Germany until we knew that it was compatible with our membership of the ETI. High-level standards absolutely do have a role and Primark's code of conduct, itself based on international standards, reflects that. I think a workable international standard on supply chain transparency is going to be a long and iterative process.

*"But what level of knowledge ought companies to have in relation to sub-contracting? Where should they draw the line, for example, in relation to investigating and dealing with unauthorised sub-contracting? And should regulation play a role in all this, as has happened in the areas of anti-bribery and corruption?"*



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1. Read more at <http://www.ethicaltrade.org/act-initiative-living-wages>
  2. Read more at <http://www.textilbuendnis.com/>

# The role and responsibilities of businesses in championing LGBT equality

Sarah Foster, Head of Global Workplace Programmes,  
Lynn Pasterny, Global Workplace Programmes Officer, Stonewall



*Stonewall is Europe's largest LGBT campaigning organisation, working for a world where LGBT people are accepted without exception. Stonewall runs the world's leading global employers' forum on LGBT equality, and works with over 100 multinational organisations to advance equality within their workplaces and the markets in which they operate.*

Human rights campaigners everywhere have long worked, and continue to work, towards equality for lesbian, gay, bi and trans (LGBT) people. This includes efforts to challenge both hostile legal frameworks and attitudes within communities. More recently, businesses have started to join this conversation. Many are considering how to better support LGBT employees in light of the discrimination they face globally. Some also wish to contribute to LGBT rights beyond the workplace. The growing momentum of business involvement is exemplified by

LGBT rights making it onto the agenda for the first time at the World Economic Forum in 2015.<sup>1</sup>

There remains much to be done to achieve equality for LGBT people. While there has undoubtedly been progress in the last century, this has not been linear. We have seen advancements as well as regressions, sometimes within the same country. We have also witnessed examples of disparity between legal rights and social attitudes, and in acceptance of gay identities as opposed to lesbian, bi or trans identities.

Since 1990, 40 countries have decriminalised homosexuality and over 30 have outlawed homophobic hate crimes. As of 2017, 22 countries recognise same-sex marriage. Yet having sex with someone of the same sex remains illegal in 72 countries, and is punishable by death in eight.<sup>2</sup> In more than half the world, LGBT people may not be protected from discrimination by workplace law. Most governments deny trans people the right to legally change their name and gender from those that were assigned to them at birth.<sup>3</sup>



*The imperative for employers to engage with this topic is multi-faceted: there is both a human rights case, as well as a business case for doing so.*

Globally, LGBT people are subject to physical and sexual violence by both state and non-state actors, as well as discrimination in education, health and social care and employment. Many LGBT people are rejected by family and from other forms of social assistance. A quarter of the world's population believes that being LGBT and intersex should be a crime and nearly one fifth disagrees that human rights should be applied to everyone, regardless of their sexual orientation or gender identity.<sup>4</sup>

The imperative for employers to engage with this topic is multi-faceted: there is both a human rights case, as well as a business case for doing so.

The Universal Declaration of Human Rights explicitly states that “every individual and every organ of society” should strive to promote respect for human rights. The UN Guiding Principles on Business and Human Rights, adopted in 2011, outline the responsibility of businesses to respect human rights. This includes

the need to prevent, address and remedy human rights abuses caused by their activities. The responsibility extends to all businesses and exists independently of the willingness or capacity of states to meet their own legal obligations in this regard.

LGBT people are affected by, and need to be protected from, general human rights abuses. In addition, LGBT people face discrimination because they are LGBT. UN bodies have repeatedly confirmed that the human rights obligation to protect everyone from discrimination includes discrimination on grounds of sexual orientation and gender identity. In 2011, a report of the UN High Commissioner for Human Rights stated that “the fact that someone is LGBT does not limit their entitlement to enjoy the full range of human rights”.<sup>5</sup> The Office of the UN High Commissioner for Human Rights is currently in the process of providing guidance on the applicability of the Guiding Principles on Business and Human Rights with regards to LGBT

people. This guidance will set out clearly the responsibility businesses have to address the discrimination LGBT people face globally.

In addition to this, employers also have a business incentive for championing LGBT equality. As summarised in the Open for Business report,<sup>6</sup> there is a strong and persistent correlation between LGBT inclusion and a range of indicators, including economic growth, business performance and individual productivity, as well as measures of entrepreneurialism, innovation and non-corruption. LGBT-inclusive workplaces are better able to recruit and retain talented staff and are more productive. In many contexts, LGBT-inclusive businesses are also favoured by customers and clients.<sup>7</sup> This growing body of research has led to an increasing focus on workplace equality within businesses globally.

The increasing recognition of the role of employers to champion LGBT rights presents a huge opportunity.

However, where employers only champion LGBT equality within their own workplaces, they risk contributing to a different kind of inequality. They risk compounding the impact of social and economic inequality where only LGBT people who work for certain employers will have access to an environment in which their rights are respected.

It is therefore evident that businesses have an additional role beyond just creating equal and inclusive workplaces.

Companies wield vast economic power and have huge potential to influence both policy and social attitudes beyond the workplace. There have been a number of examples of organisations publicly demonstrating this power.

For example, both PayPal and Deutsche Bank recently halted plans to invest in North Carolina to protest proposed restrictions on bathroom access for trans people in the state.<sup>8</sup> This move was largely welcomed by the LGBT community.

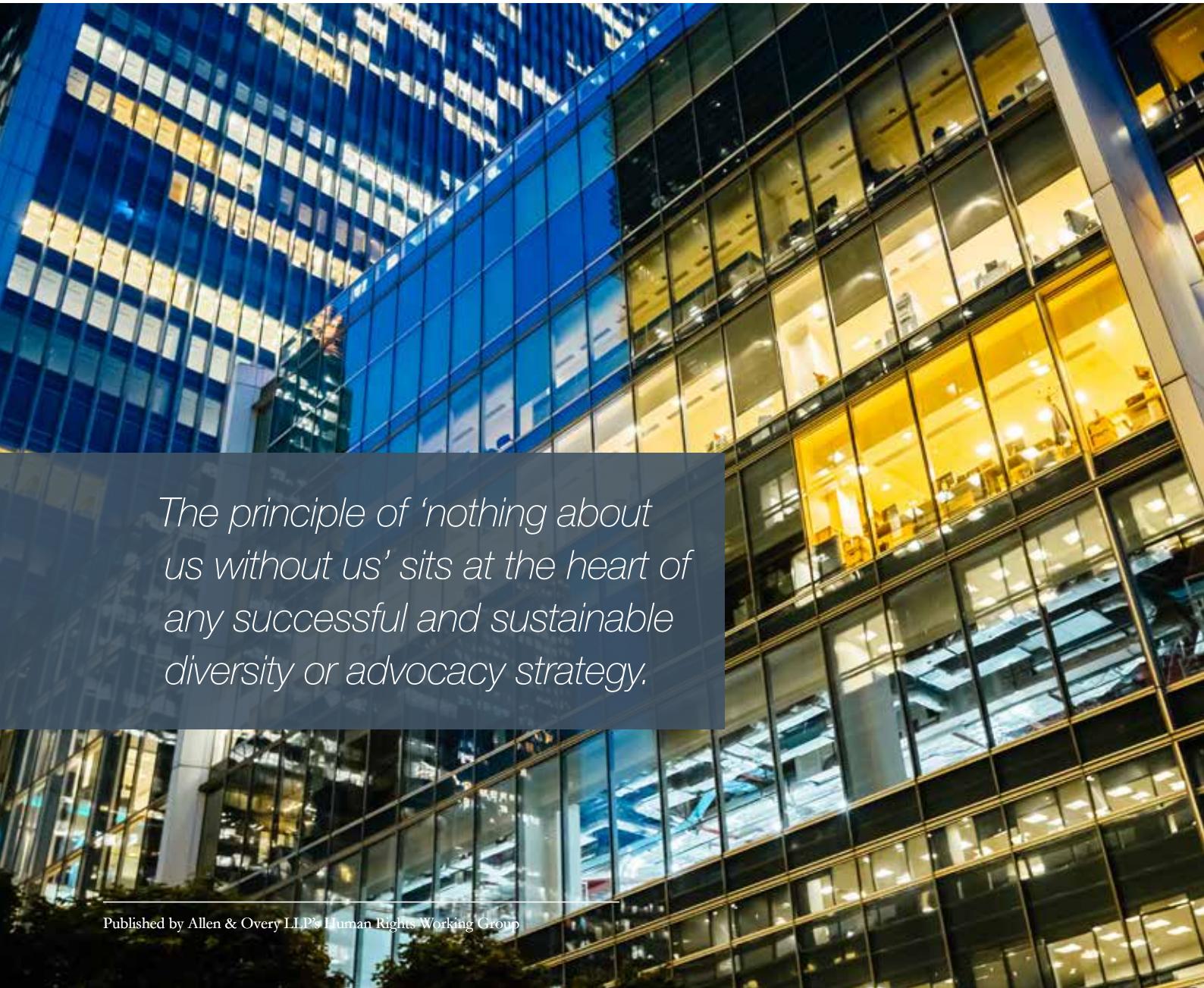
However, when exercising such power businesses must be aware of their potential to do harm, despite best intentions. There are instances when this kind of advocacy has not been welcomed.

For example, civil society representatives criticised certain British business leaders for speaking out against the anti-homosexuality bill in Uganda in 2013.

In this case, where LGBT rights were already being positioned as a Western, neo-colonial agenda, intervention by British companies was seen to confirm rather than challenge the stance of those leading the legislative change.

Such interventions can risk worsening the situation for LGBT people.

In order to exert influence effectively, business must work in partnership with LGBT civil society organisations, and with each other, to build a coherent voice and strengthen the movement overall. The principle of ‘nothing about us without us’ sits at the heart of any successful and sustainable diversity or advocacy strategy.



*The principle of ‘nothing about us without us’ sits at the heart of any successful and sustainable diversity or advocacy strategy.*

Stonewall works with more than 100 multinational employers to help them embed these principles in their working practices. This sits alongside Stonewall's wider international work with LGBT human rights defenders and UK and international governmental bodies. Through engaging with these different stakeholder groups, Stonewall has identified nine key objectives which businesses seeking to contribute to LGBT equality should work towards:

### ***Understanding local context***

When developing LGBT workplace equality initiatives, organisations should begin by learning about the local and global context for LGBT people. This should involve consulting diverse in-country or regional LGBT organisations, legal experts and other employers to shape the work the organisation undertakes. Employers should seek to build long-term partnerships with LGBT civil society.

### ***Employment policies***

To protect LGBT employees where the law may not, employers should explicitly ban discrimination and bullying on the grounds of sexual orientation and gender identity in global or local employment policies. Where benefits such as pensions or private health plans apply to families and partners, these should cover same-sex partners. Formal guidelines should be established to support trans staff seeking to transition while in employment.

### ***Training***

Employers should provide all-staff training on diversity and inclusion that includes LGBT content.

### ***Staff engagement***

Where it is safe to do so, employers should establish engagement mechanisms, such as staff networks, to support and raise the visibility of the LGBT community. Parallel programmes to engage 'allies' – non-LGBT champions of LGBT inclusion – can be particularly effective in areas where people may not feel comfortable, or where it may not be safe, to be 'out' as LGBT Allies also work to engage the workplace at large on LGBT issues.

### ***Leadership***

Formal mechanisms should be established to appoint leaders as champions for LGBT equality globally and locally. Where leaders advocate externally, it is vital to consult LGBT human rights organisations with local expertise.

### ***Procurement***

Businesses should expect suppliers and contractors to uphold principles of non-discrimination. They can also share good practice with suppliers and contractors to advance equality throughout their supply chains.

### ***Monitoring***

Capturing and analysing demographic data on the sexual orientation and gender identity of staff is an effective way of tracking the impact of diversity and inclusion initiatives. Legal and cultural sensitivities with regards to capturing staff demographic data are varied, and employers must engage legal experts and LGBT organisations to ensure an appropriate approach.

### ***Global mobility***

All mobile employees should be provided with information on the situation for LGBT people in assignment countries before working abroad. Employers should also support LGBT individuals to plan their assignment safely. Where an LGBT person is unable to take on an assignment based on their sexual orientation or gender identity, this should not have a negative impact on their career.

### ***Fulfil human rights responsibilities***

Organisations should fulfil their human rights responsibilities as articulated in the UN Guiding Principles on Business and Human Rights.

Stonewall's benchmarking tool, the Global Workplace Equality Index, outlines these key components for creating an inclusive workplace and contributing to the advancement of equality for LGBT people. Organisations serious about fulfilling their human rights responsibilities to LGBT people and better reaching their business potential can and should use this tool to plan their approach to advancing equality.

The increased engagement of business in the movement for LGBT equality undoubtedly presents an opportunity. Central to this is the necessity for employers to take a structured, strategic and principled approach which places LGBT people at the heart of any intervention and draws on the expertise of local movements. By taking this approach, employers can form an important part of the global movement towards acceptance without exception for LGBT people everywhere.

# Case Study

## *Barclays' LGBT Inclusion Journey in India*

In India, Barclays is one of the largest British employers. It employs over 23,000 people spread across banking, technology and shared services operations. Since 2012, Barclays has expanded its LGBT diversity strategy to India.

The development of the legal situation for LGBT people in India has not been linear.

In 2009, the Delhi High Court had declared a British colonial law that criminalised sex between men unconstitutional.

However, this judgment was overturned by India's Supreme Court in 2013, rendering sex between people of the male sex a criminal offence once again. The Supreme Court took the position that striking down the legal provision was a matter for the legislature, not the courts.<sup>10</sup>

On the other hand, a different panel of Supreme Court judges advanced the rights of transgender people in 2014. It was held that trans people should be legally recognised as a separate 'third gender' on official documentation.

Additionally, it was held that trans people are entitled to a gamut of social benefits and legal rights.<sup>11</sup>

While the judgments enable some members of the trans community to gain legal recognition of their gender, it still fails to legally recognise the gender of trans people who identify as 'male' or 'female' rather than a 'third gender'.

The legal and political situation has required a thoughtful and responsive approach from Barclays in rolling out LGBT initiatives.



Business leaders and employees in India proactively sought out advice from employees in other regions, the central D&I team in London, and other companies who had experience in launching diversity initiatives there. It also established partnerships with local NGOs Community Business, Mingle and the Humsafar Trust, and became a sponsor of India's first LGBT film festival in Mumbai.

Barclays started to engage its staff by celebrating the International Day Against Homophobia, Biphobia and Transphobia (also known as IDAHOBIT,

celebrated annually on 17 May) with a series of all-staff messages and awareness-raising events. Following the success of these celebrations, leaders invited colleagues to formally become allies to the LGBT community. They organised an online 'jam' where colleagues could ask questions and discuss LGBT issues. Branded ally lanyards were distributed for employees to wear as a visible demonstration of their support.

The allies programme, alongside consistent messaging in support of IDAHOBIT for a number of years, laid the

foundations for Barclays to officially launch an LGBT staff network in India in 2016.

It is clear that progress in this space must be mindful of the complexities, local, legal and otherwise, of the LGBT rights journey. Barclays seeking out support and guidance from the local LGBT campaigning organisation, the Humsafar Trust, built a sustainable programme through which both LGBT employees and allies can now work together with the organisation to champion LGBT equality in the workplace and beyond.

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8. See C Jenkins, North Carolina governor tweaks transgender law after backlash, 12 April 2016, accessed on 31 March 2017 from: <http://www.reuters.com/article/us-north-carolina-lgbt-governor-idUSKCN0X92ER>
9. To be 'out' is when an LGBT person is generally open about their sexual orientation and gender identity. This can be in regard to a specific time or space.
10. Human Rights Watch, 2016, India: Supreme Court Ruling Undermines LGBT Rights, accessed on 6 June 2017 from: [www.hrw.org/news/2013/12/12/india-supreme-court-ruling-undermines-lgbt-rights](http://www.hrw.org/news/2013/12/12/india-supreme-court-ruling-undermines-lgbt-rights)
11. BBC, 2014, India court recognises transgender people as third gender, accessed on 6 June, 2017 from: [www.bbc.co.uk/news/world-asia-india-27031180](http://www.bbc.co.uk/news/world-asia-india-27031180)

# Advising banks on human trafficking risks

## An interview with Nick Bryan-Brown of Blackpeak Group



*Nick Bryan-Brown is one of the founders of the Blackpeak Group, an investigative research and risk advisory firm focused on uncovering critical risk-related information for its clients. Blackpeak's range of work includes investigative due diligence, fraud and whistleblowing, anti-money-laundering or counter-terrorism financing ("AML/CTF") investigations, intellectual property disputes and business intelligence research.*

We asked Nick some questions about his clients' increasing focus on modern slavery issues.

### Tell us a bit more about Blackpeak.

We were founded in Asia and much of our business has an Asian focus, although we operate globally. I oversee Blackpeak's legal and compliance functions. We work with our clients to investigate corruption, money laundering and modern slavery; having witnessed the scale of the problem in Asia, we devote significant time to our pro bono work in this area.

### What types of businesses tend to use your services?

Our client base includes investment banks, multinational and other companies, private equity funds, international and local law firms, hedge and sovereign wealth funds, as well as a range of professional services firms and public sector institutions. Modern slavery is a major problem in Asia where, as I have

mentioned, our business is primarily focused. Companies are becoming more aware of the risks involved in specific sectors and countries in the region. As a result, the business investigation market is growing rapidly and an increasing number of companies are using our services to protect themselves, their management and employees and their clients.

### To what extent do Blackpeak's due diligence investigations generally tend to cover human rights issues? Does that vary between sectors?

Even five years ago, we were rarely asked to focus on modern slavery issues unless a particular concern had arisen as part of transactional due diligence or a client on-boarding process. More often, we would be asked to work under more general parameters, such as looking for "reputational concerns" or evidence of "bribery and corruption".

However, banks and companies (particularly those with long supply chains) have become increasingly aware of modern slavery. We are now regularly asked by our clients to consider this issue, particularly where the underlying business, assets or management are in countries or sectors where modern slavery is more prevalent.

*What is still lacking is a clear system of modern slavery guidance (for example, a detailed checklist), which banks and corporations could use when conducting due diligence. Together with one of our NGO partners, Liberty Asia, we are working with clients to help them develop such systems and to help them understand that, in many cases, desktop or public domain research is insufficient to get to grips with the challenge.*

**Have you seen a discernable culture change in recent years of businesses becoming more concerned with guidelines such as the UN Guiding Principles on Business and Human Rights? Could you cite any examples?**

I would say that banks have become far more concerned with compliance, even compared to a few years ago. Many have invested in more effective controls to avoid AML/CTF and similar issues. Deal teams now have less say than the legal/compliance function over when and how investigative research is undertaken and what decisions are taken based on that research.

*That said, there is still a gap in the approach to what are seen as hard issues – such as AML, for example – and what is sometimes seen as the softer, more aspirational, issue of modern slavery. The former is subject to clear and specific procedures whereas modern slavery is more often the subject of information and education programmes and “big picture” reporting.*

Indeed, the UK Modern Slavery Act (“MSA”) is an example of the difference in approach at a legislative level. Whilst a very welcome initiative, it is limited in scope and effect when compared to equivalent AML regulation, as it requires only reporting and does not provide any system of, say, excluding non-compliant goods or fines for major failures in modern slavery checks.

Moreover, the modern slavery team in many banks operates separately from the AML/CTF team, and suspicious activity reports (“SARs”) and other established procedures are not always incorporated into the anti-modern-slavery system.

There is a risk of the UN Guiding Principles and relevant state-level legislation being seen as lacking teeth. It is easy for senior management to agree positive sounding principles and, although I believe that companies are now taking modern slavery more seriously, more of a carrot and stick approach may be required to make sure these principles are put fully into practice. That might include new sanctions where companies repeatedly fail to address modern slavery issues (including in their supply chains). If this is to happen, time and money must also be invested by governments and regulators.

**We have read your recent article, “From High Seas To High Finance: What Banks Need To Know About Human Trafficking” (2016) and, clearly, trafficking is a risk for banks and other businesses.**

**Are there particular industries where you would say human trafficking is most prevalent?**

Human trafficking and forced labour is a well-known problem in the fishing industry in Asia (not least in Thailand and Indonesia) but it also affects many other industries. These include agriculture (for example, the production of palm oil in Malaysia and Indonesia); manufacturing (particularly in the clothing and footwear industries in countries such as Pakistan, Laos, Vietnam and Cambodia, as well as the electronics industry in Malaysia);

the construction sector (including large numbers of North Korean workers in China and elsewhere); and the hospitality industry/domestic work (particularly richer countries like Hong Kong and Singapore). That said, we have encountered modern slavery issues in a range of industries where one might not necessarily expect to find them and identified finance or controlling entities in first world countries. One can never be sure that there is not a problem.

**Why is it important for banks and other financial institutions to know about human trafficking? What do they need to do to prevent becoming implicated?**

*The key thing for banks and other financial institutions to acknowledge is how prevalent the problem is and to commit to doing something about it beyond setting out general policies. In the same way as with AML, wherever there is an evident risk (because of sector, geography or specific information), investigative due diligence must be carried out as a matter of course.*

This includes investigation of complex or lengthy supply chains, as that problem cannot be addressed just through desktop research and detailed supplier agreements. No company or bank should be blamed for every problem in its supply chain but, if it can demonstrate that it has undertaken appropriate due diligence and put tough risk measures in place – such as SARs and the temporary suspension of accounts or business (as with AML) or the suspension or dismissal of non-compliant suppliers – it will be able to defend its reputation and protect itself from legal or regulatory action.



*“As modern slavery is now clearly identified as a predicate offence for money laundering by the Financial Action Task Force, the UK Government and others, the need for banks (in particular) to use their existing AML procedures and systems is clear.”*



## **What resources and indicators can banks and other financial institutions use to evaluate the human trafficking risk in a specific transaction or investment?**

At present, there are different teams within banks, such as client on-boarding, transactional due diligence, AML and anti-slavery that sometimes operate independently. Integrating them more effectively, especially in relation to information access and procedures would be of significant help.

Clearer rules on risks that require additional investigation are less developed in the area of modern slavery than, say, for AML and there is often a lack of an analysis template that will allow busy compliance and risk teams to know when they need to dig deeper and, where appropriate, involve outside investigators.

Most companies now have comprehensive supplier agreements covering the FCPA, Bribery Act and similar compliance risks.

*What is needed is for companies not just to rely on those contracts but to carry out effective due diligence and audits (incorporating human rights issues alongside AML/CTF), adopt red flag identification and action plans, as well as whistleblower procedures leading to cessation of business or closure of accounts where required and SARs or their equivalent being filed where relevant.*

## **How does Blackpeak go about investigating instances of human trafficking?**

Although database research (both public and proprietary) forms a part of any investigation, a professional investigation firm can provide specialist knowledge and techniques to detect indications of trafficking or slavery. This includes looking at supply chains where a bank or company may not, through conventional means, be able to detect that there is a problem.

Undetected activities by suppliers and distributors may put a company at risk of infringing modern slavery regulations. Similarly, there may be allegations made against a company's factory, brand or employees that do not specifically name the company itself.

We use human source and field enquiries to help detect and confirm any relationship between allegations and the company in question and to verify any specific allegations made. For instance, we may be able to access local source networks (whether former employees, competitors, suppliers, NGOs or citizen groups), which are familiar with a particular industry or network of infringing companies. We may also conduct discreet site visits or covert interviews to detect undisclosed risks and connections. Cyber-security and investigation measures can also be of significant use.

## **To what extent do you think that businesses have a role to play in ending practices such as trafficking and modern slavery?**

There is no one action that will improve society's approach to modern slavery. Senior management in large companies and banks have the biggest role to play. Many have committed to the UN Guiding Principles and are subject to legislation like the MSA. Most of them already have the capacity to identify and address major risks to their business (including using firms like Blackpeak where required). They need to take the logical step of applying those systems and procedures in a comprehensive way to the threat of modern slavery.

But businesses aren't the only stakeholders with a role to play. It is also my view that anti-slavery organisations and NGOs can help by identifying counterparties, victims (individual or groups), specific assets (such as plant, ships and so on that are used by suspicious firms or individuals), as well as local journalists or victim groups who may have taken an interest and be well placed to assist. The more information that can be supplied, the more specific that information is, the easier it is to access, the greater the opportunity for us to identify it and for clients to act on it.

Regulators have a key role to play, moving beyond information gathering to more active strategies.

The UK government has done more than most in passing the MSA and setting out its Modern Slavery Strategy in 2015 with its Pursue, Prevent, Protect, Prepare approach.

The next test will be the effectiveness of the National Crime Agency and the Independent Ant-Slavery Commissioner in following through on this strategy, as well as other countries creating their own domestic programmes.

## **How do you see businesses' focus on human rights issues such as trafficking developing in the future?**

As I have said, there is still a problem with modern slavery being seen as a "big picture", good intentions issue rather than as a specific threat that needs actively to be addressed. The MSA, though welcome, requires reporting and transparency rather than specific action and with failure for such action being subject to AML-type sanctions.

A combination of media, shareholder, investor group and government pressure, as well as senior management focus, combined with greater regulatory oversight with financial sanctions as a last resort, will, I believe, help to develop better modern slavery procedures.

For Blackpeak's clients, particularly the banks but also large companies, a key tool should be to integrate their modern slavery team more closely with their better-established AML/enhanced due diligence functions, so that it becomes a standard part of the risk mitigation process whereby risks can be clearly identified and addressed.

As modern slavery is now clearly identified as a predicate offence for money laundering by the Financial Action Task Force, the UK Government and others, the need for banks (in particular) to use their existing AML procedures and systems is clear.

Most banks, but not all, are moving in this direction. The key aims and benefits of this approach were highlighted in an excellent report by the OSCE in 2014 and it is one we wholeheartedly support.

# Wise counselling on global supply chains

## The IBA Practical Guide on Business and Human Rights for Business Lawyers

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by John F. Sherman, III



*John F. Sherman, III was chair of the IBA Business and Human Rights Working Group, which authored the Practical Guide for Business and Lawyers on Business and Human Rights, and the companion Reference Annex. He was senior legal advisor to Professor John Ruggie, former Special Representative of the United Nations (UN) Secretary General on Business and Human Rights, and author of the UN Guiding Principles on Business and Human Rights. John is currently the General Counsel and Legal Advisor to Shift<sup>1</sup>, an independent, non-profit center of learning and expertise on business and human rights.*

*There is an urgent need for business lawyers to provide wise counsel to their clients on human rights.*

This is particularly true for legal advice on the global supply chain contracting process, due to the risk of severe human rights impacts to huge numbers of persons working in the vast array of supply chain business relationships around the world.

Recognising the critical role that business lawyers play in helping their clients navigate the growing human rights risks to society and to business of a globalised economy, in 2016, the International Bar Association (**IBA**) issued two guidance documents on this subject: A Practical Guide for Business Lawyers on Business and Human Rights (the **Practical Guide**), and a companion Reference Annex that dives more deeply into the details (the **Reference Annex** and together with the Practical Guide, the IBA Guidance Documents)<sup>2</sup>.

The IBA Guidance Documents are designed for business lawyers and provide further detail on and suggested application of the 2011 UN Guiding Principles on Business and Human Rights (**Guiding Principles**)<sup>3</sup>.

This article addresses the unique role of lawyers in advising and rendering services with respect to business supply chains in the context of these publications.

## Drafting the IBA Guidance Documents

The IBA Guidance Documents resulted from 18 months of consultations between lawyers around the world. The documents explore the content, the uptake, and the implications of the Guiding Principles for business lawyers across disciplines, including in house counsel and external law firms. They describe the background, content, and uptake of the Guiding Principles.

They identify practice areas where wise counselling in legal advice and services can increase a client's ability to respect human rights, including in relation to corporate governance and risk management, reporting and disclosure, disputes, contracts and commercial agreements. All business lawyers who practice in these areas have a potential role to play in helping their clients to avoid involvement in adverse human rights impacts in their operations and in their business relationships, including in their supply chains.

The Guiding Principles are important for business lawyers even though they are not legally binding by themselves. They have enjoyed wide global uptake, and are regarded as the global authoritative standard on business and human rights. They are increasingly reflected in public policy, in law and regulation, in commercial agreements, in global, industry-specific or issue-specific standards, in international standards that influence business behaviour, in the advocacy of civil society organisations, and in the policies and processes of companies worldwide.<sup>4</sup>

## Respecting human rights in global supply chains

*Under the Guiding Principles, a business has a responsibility to respect human rights not only in its own activities but also in its business relationships. Business relationships include suppliers at all tiers of its value chain. The responsibility of a business for an adverse human rights impact depends on its mode of involvement. If it causes an impact, it is expected to cease those actions and remediate the impact.*

If it contributes to an impact with another (such as a supplier at any level of its supply chain tier), it is expected to cease its contribution, to use or build leverage to mitigate the risk of any future impact, and to contribute to the remedy of the impact. If it did not cause or contribute to the impact, but is linked to the impact by its operations, services or products, it is expected to use or try to build leverage to try to mitigate the risk of future impacts.<sup>5</sup>

In a globalised economy, production processes are highly fragmented and spread out among a large and complex international network of business relationships. In 2013, global trade in intermediate goods – unfinished goods moving across borders to a further step in their processing – was greater than trade in all other non-oil traded goods combined. About 80% of global trade is linked to the international trade of transnational corporations.<sup>6</sup>

As supply chains have grown, so has employment in those chains. According to the International Labour Organisation, in 40 countries representing 85% of world gross domestic product, there are 453 million formal sector jobs relating to global supply chains, not including informal work or non-standard work, such as embroidery work carried out in homes, unpaid family work, artisanal and small scale mining, and so on.<sup>7</sup>

*Although globalised trade has benefited many by providing jobs and increasing welfare, huge numbers of people are harmed when businesses do not respect human rights in their value chains. There are approximately 168 million child workers worldwide, with 85 million occupied in hazardous forms of work. More than 2.3 million people die every year from occupational accidents or work-related diseases.*

The numbers grow further when taking into account communities that lose livelihoods, access to health, clean water and other human rights as a result of the growing, harvesting or extraction of commodities for global supply chains.<sup>8</sup>

## *Increasing legal requirements regarding human rights impacts in supply chains*

The 2013 collapse of the Rana Plaza factory in Bangladesh caused the death of over 1,100 workers who were assembling garments destined for European and U.S. brands. This tragedy prompted a robust debate in the French Parliament, which in February 2017 enacted a Plan of Vigilance Law, requiring the largest French companies to put into place an “effective vigilance plan” to identify and prevent serious human rights risks, including those associated with their subsidiaries, subcontractors or suppliers.<sup>9</sup>

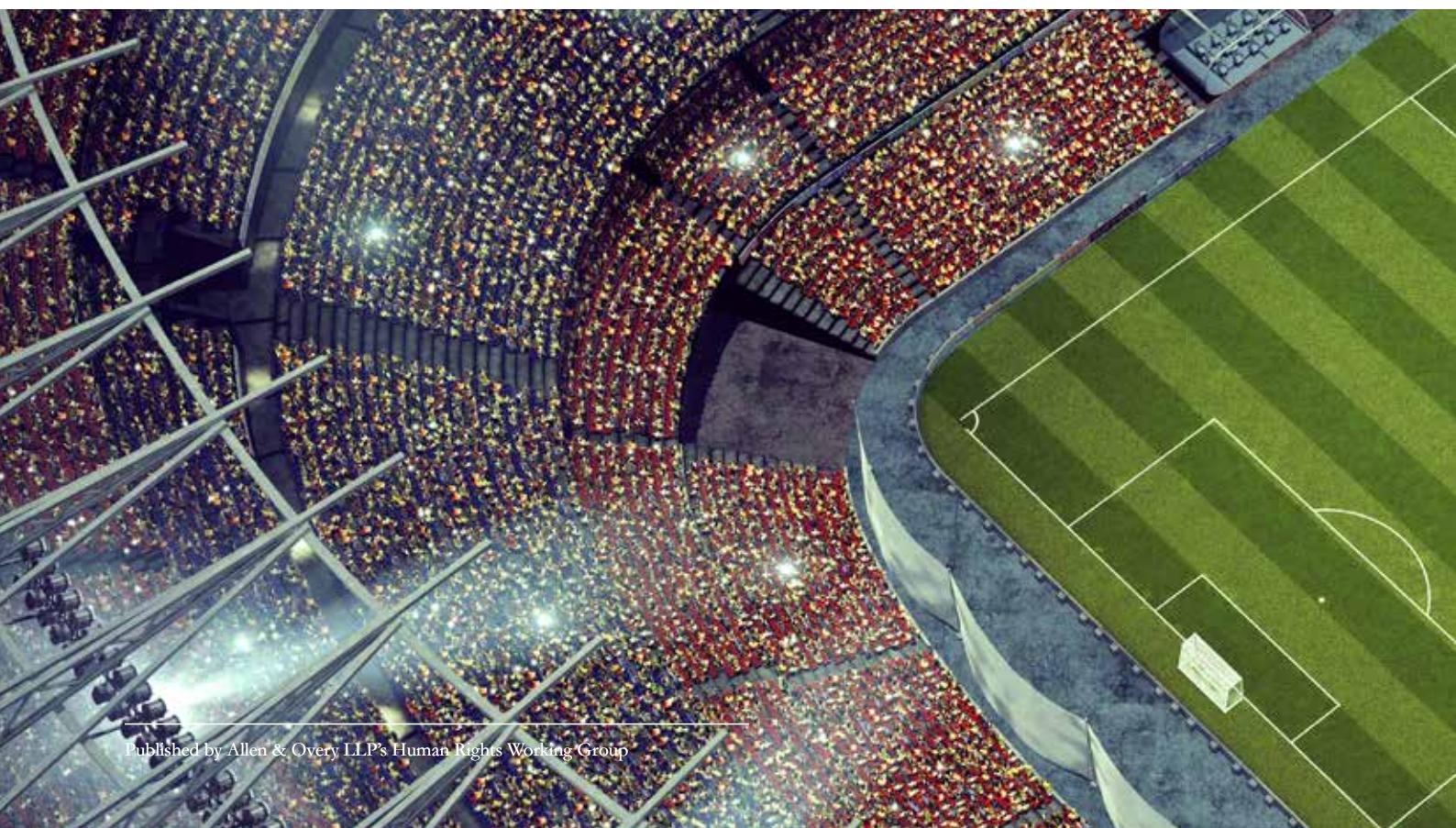
*The French law is the most recent example of laws around the world that address human rights impacts in global supply chains.*

### *Other examples include:*

- The California Transparency in Supply Chains Act 2010, Cal Civ Code s 1714.43, requiring retail companies with worldwide gross receipts of over USD100 million and annual California sales of more than USD500,000 doing business in California, to disclose their efforts to eliminate human trafficking and slavery from their supply chains.
- The UK Modern Slavery Act 2015, requiring over 12,000 UK companies to publicly describe the efforts they have taken (including due diligence and other processes) to ensure that such slavery and human trafficking are not taking place in their supply chains.
- The US. Federal Acquisition Regulation, “Combatting Trafficking in Persons”, FAR Subpart 22.17 and Part 52 (2012), requiring all US Government contractors to take detailed actions to eliminate human trafficking at all levels of their supply chains, including the development and implementation of compliance plans, with significant sanctions for non-compliance.

As the Reference Annex notes, ignoring human rights risks can have significant consequences for companies.<sup>10</sup> For example, it is estimated that over one-third of the market capitalisation of FTSE 350 companies can be attributed to reputation, which stories about company involvement in human rights impacts in supply chains can damage.<sup>11</sup> Reputational harm could affect important relationships not only with consumers, but also business partners, lenders, and investors, as well as reduce the company’s ability to recruit and retain employees. Involvement in adverse human rights impacts can also result in significant operational costs, such as the estimated loss of USD200 million by garment manufacturers resulting from more than 130 strikes in Cambodia by over 400,000 mostly female garment workers protesting poverty wages, due to cancelled orders from buyers.<sup>12</sup>

Increasingly, large business enterprises are requiring their suppliers and other participants in their value chain to respect human rights.



Lawyers representing parties in these transactions must pay attention to these requirements. For example, in July 2015, the *Fédération Internationale de Football Association*, otherwise known as FIFA, announced that as a prominent part of its new reforms, it will “recognise the provisions of the [Guiding Principles] and will make it compulsory for both contractual partners and those within the supply chain to comply with these provisions”.<sup>13</sup> Discussions of adverse human rights impacts associated with its World Cup game had increased sharply following its selections in 2010 of Russia for 2018 and Qatar for 2022.

Football is the world’s largest sport. The worldwide scope of FIFA’s business and its value chain is enormous. FIFA consists of 209 national football associations. The FIFA pyramid encompasses 265 million players and five million referees, and has a fan base of 3.5 billion people. It generates revenues of USD33 billion, or 40% of all sports revenue globally. FIFA administers World Cup events through oversight and management of a large network of direct and indirect relationships, including its member associations, contractors, licensees, commercial sponsors, broadcasters, and host cities and other levels of governments.<sup>14</sup>

These agreements and arrangements reflect significant legal input. As a result, they are adding a new human rights punch to the *Lex Mercatoria* of commercial legal practice, as lawyers around the world address the implications of complying with FIFA’s new human rights requirements.<sup>15</sup>

### *Providing legal advice and services in the supply chain contracting process*

David Rivkin, the immediate past President of the IBA, observed that the “overarching message” of the Practical Guide is that business lawyers “cannot now – if we ever could – conceive of our role exclusively as technical specialists in black-letter law. Rather, our clients need us to be wise counsellors, who integrate legal, ethical and business concerns in all our advice. Embracing that role should not, of course, come at the expense of our entrenched and unique professional obligations to our clients. But we serve our clients best by ensuring that we are able to advise them on what is legal and what is right.”<sup>16</sup>

*Lawyers are often heavily involved in the different areas of the supply chain contracting process, including procurement, risk identification, negotiation, drafting, monitoring, termination, and renewal. Through their involvement in this process, lawyers can play a critical role in helping a business increase its leverage, in order to incentivise another party to respect human rights.<sup>17</sup>*

*For example, in July 2015, the *Fédération Internationale de Football Association*, otherwise known as FIFA, announced that as a prominent part of its new reforms, it will “recognise the provisions of the [Guiding Principles] and will make it compulsory for both contractual partners and those within the supply chain to comply with these provisions”.*

Supply chain contracts were among the first to receive attention for human rights purposes based on safety and labour violations in the global supply chains in the apparel and electronic industries, among others.<sup>18</sup>

A common response of lawyers is to focus first on negotiating terms requiring the supplier to adhere to human rights standards, often by reference to the buyer's standard terms and conditions. While getting the contract language right is critical, it is not enough to ensure that human rights are respected. A holistic approach would likely be more effective; it might involve the following, among other factors:

**– Assessing the managerial and financial capacity of the supplier to perform the contract** and meet the contract's human rights standards; otherwise, a supplier with insufficient capacity may be incentivised to cheat or use unauthorised subcontractors.

**– Using dialogue to build appropriate expectations of human rights** prior to the negotiation of the contact. Merely putting boilerplate language in a contract or incorporating a buyer's supply chain code by reference into a contract does not ensure that the buyer reads or understands them.<sup>19</sup>

**– Identifying the most severe impacts on human rights** that may result from the contract's performance; which will vary according to the sector and operating context.

A “severe” impact can be characterised by its scale, scope and irremediable nature. Severity of impact, not the location of the supplier in the business supply chain's tier, is the predominant factor in prioritising the sequence of company response. Thus, parties negotiating first-tier supply chain contracts need to be aware of and attempt to address foreseeable severe risks that may arise from subcontractors and other remote tier suppliers.<sup>20</sup>

**– Drafting relevant risk-based standards of performance into the contract** based on these risks, which should be combined with provisions that leave flexibility to encompass unanticipated human rights risks that may arise during contract performance, audits, or renewal, or during the supplier's own human rights due diligence.

**– Where practicable, drafting appropriate representations and warranties for a supplier**, with appropriate judicial and non-judicial accountability mechanisms that extend its responsibility to respect down the chain to its suppliers and subcontractors, and require them to exercise human rights due diligence.

**– Understanding and accounting in the contract for potential gaps** between applicable law and international human rights standards; for example, requiring the supplier to comply with applicable health, safety, environmental and labour laws may not be sufficient if such laws do not exist, are not enforced, or are in tension with human rights standards.<sup>21</sup>

**– Monitoring human rights contract performance** effectively by using contractual performance audits as opportunities to develop collaborative, dialogue and engagement-driven and capacity-building approaches, rather than exclusively relying on top-down compliance approaches that may encourage cheating on standards or the use of unauthorised subcontractors.<sup>22</sup>

**– Ensuring that the supplier uses effective operational level grievance mechanisms** to identify and address human rights impacts before they escalate, and to act as a feedback mechanism.<sup>23</sup>

Considering the huge number and wide variety of contractual relationships in global supply chains, it is highly unrealistic to expect that each contract will be tailor-made for the parties. Standardisation of contract terms is inevitable and desirable, but the basic principles relevant to addressing their human rights impacts should be kept in mind.

## Going forward

Recent events underscore the timeliness of the IBA Guidance Documents. In his February 2017 address to the G-20 Labour and Employment meeting, former Special Representative on Business and Human Rights to the UN Secretary General, John Ruggie, author of the Guiding Principles, cited former UN Secretary General's 1999 warning that without strong social pillars, globalisation will be “vulnerable to backlash from all the ‘isms’ of our post-cold war world: protectionism; populism; nationalism; ethnic chauvinism; fanaticism; and terrorism.” Ruggie added, “Today we neither need, nor should we want, any additional evidence of Annan’s prophetic insight. We see it all around us.”<sup>24</sup>

The vulnerability of a globalised economy to backlash from its failure to work for everyone in society is real. This poses serious threats to both people and to businesses. Now, more than ever, businesses need wise counselling from their lawyers on how to respect human rights in their supply chains.

The IBA Guidance Documents are a good place for lawyers to start.



*The vulnerability of a globalised economy to backlash from its failure to work for everyone in society is real. This poses serious threats to both people and to businesses.*

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1. <http://www.shiftproject.org>
2. Both IBA Guidance Documents were drafted by the IBA Business and Human Rights Working Group. The IBA Council endorsed the Practical Guide. The companion Reference Annex, which supplements and tracks the Practical Guide, was not submitted to the Council. Both are available at <http://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx>
3. Available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
4. Practical Guide, p. 13.
5. Guiding Principle 13; see also, Practical Guide at pp. 19-21.
6. Business, Human Rights and the Sustainable Development Goals: Forging a Coherent Vision and Strategy, A paper from Shift commissioned by the Business and Sustainable Development Commission, p.7, available at <http://www.shiftproject.org/resources/publications/business-human-rights-sustainable-development-coherent-strategy/>. (Shift Paper)
7. Id., p. 7.
8. Id., p. 9.
9. The French Constitutional Court declared the law to be constitutional on March 23, 2017. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&dateTexte=&categorieLien=id>
10. Reference Annex, p. 19.
11. See, Reputation Dividend, The 2013-2014 UK Reputation Dividend Study, 2014, available at [http://reputationdividend.com/files/2413/9029/4988/2013-14\\_UK\\_Reputation\\_Dividend\\_Report.pdf](http://reputationdividend.com/files/2413/9029/4988/2013-14_UK_Reputation_Dividend_Report.pdf), cited in Shift Paper at n. 31.
12. See, Zsombor Peter and Hui Reaksmei, Garment Strike Cost Industry USD200 Million, GMAC Say, The Cambodia Daily, 7 January 2014, online at <https://www.cambodiadaily.com/archives/garment-strike-cost-industry-200-million-gmac-says-50222/>, cited in Shift paper at n 30.
13. <http://m.fifa.com/about-fifa/news/y=2015/m=7/news=fifa-executive-committee-sets-presidential-election-for-26-february-20-2666448.html>
14. See, John G. Ruggie, "For the Game. For the World." FIFA and Human Rights, (2016), available at <https://www.hks.harvard.edu/centers/mrcbg/programs/crit/research/reports/report68>
15. See, John G. Ruggie and John F. Sherman, III, Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice, Journal of International Dispute Settlement, (October 2015), Oxford University Press.
16. David W. Rivkin, Forging the Path as Wise Counselors, (September 2016), available at <http://www.shiftproject.org/resources/viewpoints/forging-the-path-as-wise-counselors/>
17. Reference Annex, p. 26.
18. Id, p. 28.
19. Reference Annex, p. 29.
20. Office of the High Commissioner on Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), pp. 8, 13, and 21, [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf)  
See also, Reference Annex, pp. 11-13.
21. Practical Guide, p. 22.
22. Reference Annex, p. 29.
23. Reference Annex, p. 10.
24. John G. Ruggie, *Making Economic Globalization Work for All: Achieving Socially Sustainable Supply Chains*, Keynote Address, G20 Labour & Employment Meeting, Hamburg, Germany, <http://www.shiftproject.org/media/resources/docs/Hamburg-Keynote-2017.pdf>





# An Argentine perspective on the social license to operate

An interview with Guillermo Malm Green, Brons & Salas



*Guillermo Malm Green is a senior partner at Brons & Salas Law Firm in Buenos Aires, Argentina, whose practice focuses on corporate law, mergers and acquisitions, and environmental law. We talk to Guillermo about his experience of changing civil society expectations and the social license to operate in South America.*

**Over the past decades we have seen mounting social and media pressure on businesses to respect human rights and the environment. How do you see the relationship between human rights law and environmental law?**

**Is environmental protection a human rights issue; and what difference does its classification make?**

Human rights and environmental protection are closely related. A right to environmental protection is enshrined in the Argentine Constitution. However, as this protection is not implemented in national legislation, there has been a debate as to whether it is self-executing. Recent case law has determined it is enforceable on the basis that it falls within the overall concept of human rights. As a human right,<sup>1</sup> Courts may enforce this protection despite the fact that it is not set forth in a formal law that regulates all the aspects

for which this protection may be sought. We believe that this is a trend across Latin America, and Uruguay and Brazil are heading in the same direction.

Section 43 of the Argentine Constitution established a fast-track proceeding called “*amparo*” for the protection of constitutional rights against any acts of authorities or third parties that may damage such rights. An *amparo* action may also be filed in connection with rights protecting the environment. This was recognized by the Argentine Supreme Court in the case entitled “Martinez Sergio Raúl v. Agua Rica LLC Sucursal Argentina et al. on *amparo* action”. The Court held that environmental protection cases should be analyzed broadly, taking into account the fact that the priority is to prevent future damage. It therefore took a flexible approach in order to avoid a strict and overly-technical application of procedural rules that would prevent the granting of protection under the *amparo* action filed.

This interpretation of constitutional rights has consequences for businesses and legal advice in general, namely a broad approach to applying formal law, and the application of, and reference to, soft law (even in case law).

According to Section 41 of the Argentine Constitution:

“All inhabitants have the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it... The authorities shall provide for the protection of this right, for the rational use of natural resources, for the preservation of natural and cultural heritage and of biodiversity, and for environmental information and education.”



In short, where there might not be formal regulation of business activities, there are general principles and provisions that are used as guidelines to apply or interpret specific legislation.

Indeed, non-legal principles, such as those of the “UN Conference on Sustainable Development Rio +20” and the 2015 “Laudato Si” Papal Encyclical are mentioned to support cases, even though they are not considered formal law.<sup>2</sup>

This situation also has practical implications. One case that has been of particular significance in the mining industry relates to a gold mining project. Although the company had obtained all the formal permits to exploit a mining project, it did not obtain the support of the local community. A group of citizens concerned about the proximity of the project to their community started demonstrations against the mining activities on the basis that they were afraid of the negative impact on their lives. They successfully challenged the

application of the formal law based on human and environmental rights granted by the Constitution.

In related legal proceedings, the court found that the company did not deal effectively with the complaints by civil society. As a result the mining project still remains unexploited and no mining activities may be carried out within the jurisdiction of the province where these events took place.

**How do you view the balance between these social demands and the legal standards currently in place? Does the law provide sufficient tools to protect human rights and environmental interests?**

Social demands change and develop faster and in a more dynamic way than laws and regulations. Television, internet and the media provide greater access to information and trigger citizen participation and opinions on aspects of industry that have been traditionally reserved to regulators. The public

demands information not only in connection with the effects of the products that are consumed but also regarding the entire production chain.

While the development of the formal law may lag behind these trends, it nevertheless provides tools to protect human rights and environmental interests. One such tool is the right to information on environmental matters, which is afforded by the Argentine Constitution and has been held to be self-executing.

*Perhaps in part due to the changing sense of civil society expectations, Argentine courts have been more willing to use these constitutional rights to accept claims by NGOs and citizens on the issue of access to environmental information.*



For example, in the case entitled “Mendoza, Beatriz Silvia *et al.* v. National Government *et al.* on Damages derived from environmental contamination”, the Supreme Court ordered a digital reporting system accessible to the public that would contain up-to-date reports, lists, schedules and costs relating to the remedial actions ordered to address environmental pollution in the La Matanza-Riachuelo Basin. The Supreme Court’s decision confirmed that environmental information is of vital importance in order to ensure the environmental protections set out in the Constitution.

### **Are there any movements or initiatives to clarify the legal position? How do you see this area developing in the future?**

Yes, there are and it is a growing area. Several industries have been deeply affected by the uncertainty associated with the broad interpretation of constitutional principles, and they have called for more specific regulation.

As a result, many companies active in the extractive industries (ie mining, oil & gas, fishing), agrochemicals, pharmaceuticals and electronics sectors are developing their own “best practices” or frameworks intended to self-regulate their activities.

For example:

- A code of conduct for suppliers has been prepared by the textile and shoe industry, with specific regulations regarding use of child and immigrant labour, workplace quality, etc.<sup>3</sup>
- Under the “best practices” of the mining industry, companies operating in areas where indigenous communities are located must consider and respect such communities.<sup>4</sup>
- There is an initiative to develop best practices on environmental matters for the mining industry. This initiative is very recent and it is known as the “New Mining Federal Agreement”, which is currently under discussion before the Argentine Congress.

Self-regulation is a good start. However, a uniform and industry-accepted national law is preferable. The ultimate objective would be to have legislation passed at the national level, and thereafter for each province to adhere to such law.

### **How has this affected the challenges faced by investors, who have traditionally liaised with governments and state representatives? Are there specific sectors where this has been a particular concern?**

Investors used to make a decision to proceed with a specific transaction on the basis of a financial analysis. Now they also have to weigh up whether a given investment project has approval by the community where the project will be located (the so-called “social license”). Greater recognition is given to stakeholders (such as NGOs, local communities, media, suppliers and customers) that must be duly taken into account when developing a new project.

*"Investors used to make a decision to proceed with a specific transaction on the basis of a financial analysis. Now they also have to weigh up whether a given investment project has approval by the community where the project will be located (the so-called "social license")."*

If these stakeholders support the project, it may be said that it enjoys “social license”. The “social license” aims at maximizing the relative benefits for the community where the project is located and the affected communities that are in close proximity.

This can be done in a variety of ways, such as fostering open dialogue and transparency, giving communities a high level of participation in environmental controls, developing infrastructure and integration with other productive sectors of the country and region, promoting education to create new job opportunities, promoting local supply and production, etc. It is focused on a good cooperative relationship among the community, the company and the government during the operation of the project, the plans for its closure, and ultimately the remediation or reutilization of the site for other activities.

These “new stakeholders” have greater involvement in a range of matters both in the long- and short-term. This has been a particular concern in the

pulp & paper, mining and hydrocarbons industries, especially with respect to project finance. For example, the construction of a pulp plant in Uruguay was delayed when a financial group from the Netherlands withdrew support in 2006, after being targeted by several NGOs opposing the project, for alleged violation of policies and rules for responsible investment and human rights due diligence.<sup>5</sup> Nobody wants to finance a project that may be permitted in theory, but in actual practice may not work due to social constraints and challenges.

**What changes have you seen in the approach of businesses, for example, with respect to key stakeholders consulted or processes followed?**

There is a growing idea that the person who “places the product in the market” is responsible for all matters associated with that product until its final consumption or disposal.

Although this may not be specified by law, the trend is moving in that direction. In the absence of specific statutes, companies generally adopt self-regulations to enact corporate best practices, including in relation to environmental issues.

*Responsible companies are developing controls in the production chain, designing recycling programs and, in general, making room for stakeholders' participation.<sup>6</sup> But the legal means to implement the practices based on these trends are not always in place.*

As an example, due to demands by civil society, a public program for the collection and disposal of batteries was established in Buenos Aires in 2008.

However, the disposal program was not implemented due to the absence of a legal framework. Similarly, some companies in the electronics sector have developed sophisticated disposal programs, but in order to implement them, they need changes, for example, in the hazardous waste law, which is outdated.

**Could you provide a few examples of businesses that have developed an exemplary “social license” to operate?**

Some Argentine companies in extractive industries have developed a good social license. In particular, the beverage, electronics, battery and pharmaceutical industry sectors have made significant progress in this area.

- One of these companies is extracting natural resources in an area that belongs to an indigenous community. Since the beginning of the project, it has had a good commercial relationship with the community, which has been facilitated by a strong corporate social responsibility (CSR) program and compliance with international initiatives and associations that promote best practices and CSR in the mining sector, such as ICMM and the International Cyanide Code.
- Another company is still operating a mining project in the Argentine province of San Juan, even after an environmental accident, due to the good reputation and social license it obtained from the community.

*The selection of good leaders is a key element for the success of this entire process. Successful companies recognise that the cultural dimensions of affected communities and other stakeholders require the participation of different professionals.*

Companies usually have different levels of spokespersons to communicate with different levels of interlocutors. These leaders are very knowledgeable about the cultural dimensions of the specific communities in question. We have seen that the community matters are often best handled by local people with a good reputation; language skills are also essential.

**Are there any key features of these relationships that could be replicated by other businesses, and in other industries?**

Each industry has its own particular features. Broadly speaking, the goal is to give certain balanced benefits to key groups, depending on the needs of the various stakeholders. But, in general, the principal factor is to keep a close relationship with authorities, an open-door policy regarding periodic controls, and provide information to the community. And have excellent PR!

**What is the role of lawyers in this changing environment? How has this affected the nature of legal advice, and relevant considerations?**

Lawyers should understand not only the law but also the political and social situation that surrounds the business. Lawyers should guide the client through a changing environment: they must be translators of the other aspects that may influence business decisions.

They must interact with public relations companies, sometimes as the spokespersons, and liaise with the community, politicians and Courts. Their traditional role has expanded and they must truly understand the business, as well as the social and media landscape in which it operates.

Human rights due diligence is still in its early stages in Argentina. Often, legal M&A teams pay relatively little attention to this area. Lawyers will need to start incorporating the analysis of human rights risks into their M&A practices, including risks not only to the company, but also to the people and local societies. However, it is hard to give legal opinions on these matters, since many of the aspects that may influence a project are not purely legal. As a result, a lawyer must become deeply involved in the business aspects of the project, in order to accurately and comprehensively present the situation and relevant risks to financiers and clients.



*“Lawyers should understand not only the law but also the political and social situation that surrounds the business.”*

1. *Mendoza Beatriz Silva et al. v. State of Argentina et al.* M.1569.XL (Supreme Court of Argentina, 8 July, 2008) and *Native Community of the Wichi Hoktek T’Oi People v. Environment and Sustainable Development Secretariat C.1205.XXXVIII* (Supreme Court of Argentina, 11 July, 2002).
2. For example, in *Minera del Oeste SRL et al v. Provincial Government in re: Unconstitutionality Action Expte- N° CUIJ: 13-02843392-6(012174-9058901)* (Supreme Court of the Province of Mendoza, December 16, 2015) and *Majul, Julio Jesus v. City of General Belgrano et al. in re: Amparo Action Expte - N° 10078* (First instance judgement by Judge Marcelo Arnolfi, September 12, 2015).
3. The Code of Conduct and Manual for the Textile and Fashion Industry (*Código de Conducta y Manual para los Textiles y la Moda*) is the local chapter of the sector’s initiative submitted on May 3, 2012 by the United Nations Global Compact in the Copenhagen Fashion Summit.
4. The Good Practices Manual of the Mining Industry is the result of the debate and consensus of, among others, the Argentine Ministry of Labor, Employment and Social Security, and the Argentine Association of Mining Workers. The ICMM (International Council on Mining and Metals) has also prepared the Indigenous Peoples and Mining Good Practice Guide.
5. Center for Human Rights and Environment (CEDHA) press release dated April 12, 2006.
6. For example, voluntary take-back actions or other strategies to dispose of used products (where the company assumes costs for client’s registration with environmental agencies as hazardous waste generator and costs related to transportation and final disposal of products considered hazardous waste by local regulations).

# Business and human rights in diplomacy and politics

## An interview with Eva Biaudet



*Eva Biaudet is already able to look back on 18 years of a rich and varied diplomatic and political career. She has served as a diplomat at the Organisation for Security and Co-operation in Europe (OSCE), as a civil servant, and as the Ombudsman for Minorities and Non-Discrimination in Finland. At the OSCE, Eva held the role of Special Representative and Co-ordinator for Combatting Trafficking in Human Beings. She then served as a member of the United Nations Permanent Forum (UNPF) on Indigenous Issues, initially as vice-chair of the forum and later as a rapporteur of the UNPF sessions. We spoke to Eva about how the intersection of business and human rights has presented itself in the different positions she has held.*

**One of the main responsibilities of your role at the OSCE was to advise governments around the world on implementation of anti-slavery initiatives. At the time, how much of a focus was there on involving the private sectors in these jurisdictions in the anti-slavery dialogue?**

*Involving the private sector (both businesses and NGOs) has always been of the utmost importance for the implementation of anti-slavery initiatives and related government commitments.*

Governments and public authorities, such as the police, rely heavily upon NGOs when it comes to protecting and offering services for victims. This requires authorities to support NGOs both with resources and information, to ensure a trustful dialogue, which is in the best interest of the victim. There is a risk, however, that authorities rely too one-sidedly on NGOs, or have competing priorities that clash with the ones of NGOs, which could impact their ability to protect victims. There is therefore a balance to be struck between co-operation and independent leadership.

At the start of my time at OSCE, private companies were only occasionally in the spotlight, and had not been fully integrated in the anti-slavery dialogue. However, this is changing and there are already some examples of businesses

participating in this sphere. For example, there are initiatives with large airlines, airports or tourism providers fighting human trafficking or child sex tourism; or newspapers, advertising agencies, online banking or modelling agencies making important contributions to fight forced prostitution. The cocoa and chocolate industry has also stepped up when fighting forced and unpaid labour on cocoa plantations in African countries. Many other – often smaller and local – companies can be seen providing one-off, event-based contributions or sponsorships. The initiatives these companies are trying to take are good, however the effects are often not far-reaching enough and remain moderate.



I have found that good, continuous work can be mostly achieved by encouraging cooperation between companies and NGOs. To name an example, Finnwatch, a Finnish civil society organisation focusing on corporate responsibility, started with monitoring companies and introducing accountability-related initiatives. Today, however, a good number of big companies are cooperating with Finnwatch through a constant dialogue, trying to develop anti-trafficking and anti-exploitation awareness, policies and accountability procedures for their supply chain.

The cocoa industry created a policy paper working with the International Labour Organisation on labour exploitation.<sup>1</sup> However, the problem with fair trade standards in general is that they rarely include human rights aspects. The

cocoa industry also faces other problems, such as being a world-wide bulk trade, which means that most of the cocoa butter is impossible to trace. But the attention on this industry is clearly having an effect. Companies, such as the small but high quality Finnish chocolate company FAZER, are starting to promise to make all cocoa products traceable within a few years and are investing in on-site education for adolescents and farmers.

In Sweden, hotel and restaurant businesses have committed to a no trafficking, no prostitution and no porn policy. This was implemented after numerous instances of workers in the hotels being abused by hotel clients, as well as to make the hotels more family friendly and to promote gender equality.

**Do you think there is a trend towards greater private-sector involvement, ie through a focus on supply chains?**

Absolutely, yes. Supply chain accountability was high on the agenda when negotiating ministerial OSCE commitments – however it is difficult to make strong recommendations on responsibility as you move further down the supply chain. This is something that companies are increasingly aware of, as any company or entity in their supply chain, however remote, will still be in their production matrix, and is therefore connected to the product and the brand.

The OSCE therefore puts a strong focus on awareness and checking supply chains. Clients and customers today want to see this happen – and new reporting obligations, such as the ones seen

appearing in the UK under the Modern Slavery Act, will only continue to grow. It would therefore be the smart thing for organisations to do to gain a competitive advantage by committing to strong checks and reports, and we see examples of companies having done this who then became actively and heavily involved in anti-slavery initiatives. Overall, however, the supply chain question is still a big challenge (which is why companies taking positive steps can really stand out at the moment).

**The OSCE is the organisation that developed out of the US Marshall Fund after World War Two. As such, do you feel that the OSCE provides a greater focus on public-private partnerships? Which successful initiatives against modern slavery have you seen/supported/founded that involved the private sector?**

The OSCE has a strong focus on public-private partnerships but faces some challenges on the implementation of this in practice. Most OSCE projects involved NGOs which in turn cooperated with local companies.

*The OSCE sometimes seems to be like a large untapped resource for large corporations to raise their human rights profile. The advantage of the OSCE is that they can address very difficult issues and be bold.*

However, the OSCE is not a norm-making body, such as the Council of Europe or the European Union. The recommendation commitment therefore depends ultimately on political will. OSCE recommendations are not meaningless, however. Participating states pay a lot of attention to the language and exact wording of the recommendations. New recommendations use language from earlier recommendations and it takes a lot of negotiating to advance and strengthen this wording.

One of the reasons why so much emphasis is placed on the wording of non-binding OSCE recommendations is that these can often later serve as basis for legally binding texts. The Council of Europe Convention on Action against Trafficking in Human Beings is the most modern and far reaching legally binding instrument – and the work of the OSCE that preceded it had big influence on its drafting.

The OSCE functions in three dimensions: a) political-military security, b) economics and environment, and c) human rights. These do not in practise have equal bearing in international diplomacy. In my mind, the economic dimension is the weakest. Diplomats are not business people and their work is by its nature intergovernmental. NGOs fit sometimes more easily into this sphere, because they also often work with governments. One can talk about the importance of public-private partnerships in theory, but if there are limited connections between OSCE and the world of business, it is difficult to create touchable results.

**Why should businesses worry about slavery and human trafficking? What risks do businesses face in ignoring trafficking and modern slavery?**

Businesses should worry about these issues for all the normal reasons – preventing human rights abuses, fighting corruption and organised crime, and strengthening the rule of law are all our collective responsibility. In addition, businesses (or entities in their supply chain) are in danger of being used as a platform for criminal activities such as money laundering or trafficking. These issues need to be kept in mind when outsourcing functions or relying on cheap suppliers. Legal and reputational risks are both high in this context.

Another aspect of this businesses should be concerned about are acts of their employees in accessing prostitution or the products of other exploitation. I am thinking of business trips in particular, when employees travel to societies with low levels of human rights protection or equality laws.

**Should more countries introduce legislation like the UK's Modern Slavery Act to require business to actively report on their supply chains? Do you see value in greater regulation on this issue?**

I do think regulation on company reporting and responsibility should be increased. When there is a fair and realistic possibility to be diligent, a due diligence requirements must be inclusive of ensuring that active and systematic measures are taken to prevent trafficking, and even lesser exploitation – by companies, suppliers and employees.

It seems to me that EU legislation against issues like terrorism and money laundering has the strictest legal consequences for companies. The EU is also trying to address human trafficking, but a bigger focus on this topic is needed. Sometimes there are even counter-productive side effects that regulating larger issues can bring about: for example, if a foreigner cannot have a

bank account he/she may have to resort to illegitimate companies to send money home. Or if asylum seekers or illegal immigrants are not allowed to work, they have to work illegally to survive. For people in this position, there is a real risk for exploitation.

We know that advanced legislation on labour security and labour protection such as in the Nordics may work better for identifying human trafficking. There is legislation in the Nordics requiring legal accountability for hired or subcontracted personnel. This is very difficult if the exploitation is really planned and organised. We have seen trafficking situations in Denmark and in Finland that involved real tax-paying and existing bank accounts, which were really in the hands of the trafficker. In Finland trafficked people in the labour market have been legally staying in the country. The abuse often stems from exploiting their weak social and economic status and isolation. The victims do not know their rights or the rules, for example the right to be referred into care after being rescued as a trafficking victim in Sweden

*Ultimately, legislation is just one tool, but there also needs to be resources allocated to investigating the crime, identifying and protecting victims and addressing the market.*

**Indigenous issues can be an important and potentially delicate topic for businesses operating in certain parts of the world. Given your work with the UNPF on Indigenous Issues, how would you advise businesses to approach scenarios that involve indigenous rights?**

It is important for businesses to educate themselves about the rights of Indigenous Peoples in the areas in which they operate. There may be collective rights to lands and traditional livelihoods that are not indicated in legislation or fully recognised by their government.

Companies achieve better results if they are considerate of the local populations wherever they operate, irrespective of whether the relevant government does or not.

*The most important principle is that of free prior and informed consent. This means that Indigenous Peoples have a right to participate in decisions that affect them and their culture and livelihoods.*

Dialogue often gives better results both in preparing for and operating business activities, and may help to avoid conflicts and legal proceedings. Indigenous Peoples furthermore may have collective rights that need to be considered, in addition to their individual rights.

The UNPF can provide information, recommendations on a general level. They also have many recommendations on extractive industries. They could perhaps serve as a bridge for dialogue in particular cases. They can also give technical support on procedures and guidelines.

There are many Indigenous Organisations in different countries that can provide support. The basic rule is to involve Indigenous people's representative bodies when planning to work on areas or in livelihoods that affect their rights, their culture and their lives.

**Coming back to a national setting, how does the dialogue with the private sector differ from the international one? Are there any initiatives/programmes that you would wish to see adopted by Finnish companies?**

The dialogue with the private sector in Finland is very active. In particular, Finnish companies that operate abroad have included human rights organisations like Finnwatch and Amnesty International in monitoring and reviewing processes.

This level of openness seems to create trust and respect, even when complications happen or crimes in supply chains are revealed and need to be addressed. Yet, these developments have not progressed at the same rate in all areas. In particular, the global protection of child labour rights and human trafficking for labour, as well as environmental rights need more work.

Domestically, I would like to see Finnish companies give greater consideration to the promotion of Indigenous Peoples' rights.

Generally, the Finnish Ombudsperson for Minorities cooperates with companies by developing inclusive practises and identifying discrimination. The Ombudsperson is an esteemed public officer and has the status to invite private and public actors to cooperate. Furthermore, the Ombudsperson reports on human trafficking directly to the parliament once every four years.

If companies are not willing to cooperate, the Ombudsperson can take legal action on behalf of the victim. To name an interesting example of positive impact, we can look at certain taxi companies, who have declared their companies discrimination-free zones.

These companies invited the Ombudsperson to staff training on non-discrimination, on hate speech and on non-discrimination in recruiting specifically.

I would also emphasise the importance of standards set in public procurement. We have seen improved standards included relating to human rights and due diligence means.

However, often companies and public buyers (ministries and local municipalities) do not include criteria on non-discrimination or gender equality in their procurement processes. Hence these contracts can rarely be cancelled on such violations.

I would like to see greater weight placed on non-price criteria in public procurement decision-making.

In theory these have to be taken into account, but it is not yet happening as much as it should. By including indicators such as client responses and personnel responses, this should give us better insights and the ability to exclude companies that are not performing well.

Today the internet and social media are helpful in giving anyone information about company performance. This influences the market a lot. I see more and more developed reporting on ethical investments, banking, production and manufacturing. I recently received a quite advanced ethical financing and sustainability report by a company, which incorporated human rights compliance and enhancement. I saw this as a great example of how issues like this count in the market.

**In your opinion, how can international businesses get ahead of their competitors by promoting minority rights?**

International businesses should be proactive, realising that inclusion in all dimensions is something that they can benefit from. This may avoid the costs of legal proceedings, but also enlarge the pool of personnel and customers by creating a more dynamic and inclusive business landscape.

Businesses can also gain a competitive advantage by being one step ahead, and better prepared to deal with unexpected circumstances or legal developments.

*Global trade seems to have many enemies today, which will harm economies both near and far. By working to avoid and prevent exploitation, discrimination and human rights violations, businesses can demonstrate the advantages of trade and open borders – and dispel public fears of unscrupulous, anonymous companies without accountability for their actions.*





1. ILO, "Rooting out child labour from cocoa farms: child labour monitoring, a partnership of government and communities", Policy Paper No. 4 (2007) available at [www.ilo.org/ipecinfo/product/download.do?type=document&id=6447](http://www.ilo.org/ipecinfo/product/download.do?type=document&id=6447).

# Introducing the French Corporate Duty of Due Diligence Law

Valentin Bourgeois and Jérémie Nataf,  
Associates, Allen & Overy Paris



*A new duty of vigilance imposed on French major corporates.*

The French law on the duty of vigilance of parent companies and ordering customers<sup>1</sup> (the Law) was enacted on 29 March 2017. It originates, principally, from the Rana Plaza collapse<sup>2</sup> and other recent human and environmental disasters related to the outsourcing of work to countries where standards of regulations are particularly low. Pursuant to parliamentary debates, one main goal of the Law is to “make French companies operating on a transnational level accountable for their businesses’ management and to allow the victims to obtain compensation in case of injury to human and environmental rights”.<sup>3</sup>

The Law establishes a new category of obligations imposing on large French corporates a duty to detect and prevent the risks of serious violations of human rights, fundamental freedoms and of environmental damage, in France and abroad. Comparable legislative efforts have recently been made in the UK and the U.S.<sup>4</sup>, including in the form of mandatory disclosure and reporting regimes, requiring companies to disclose the actions they take (if any) to prevent human rights violations in their supply chains.

The Law, however, goes further, by making it mandatory for large multinational corporations to effectively adopt, make public and implement a set of ‘vigilance measures’ as part of a program, which aims to detect and prevent the main human and environmental risks arising out of their business activities (1).

For the time being, the duty to maintain a robust vigilance program is only imposed on a limited number of French companies which are either registered in France or whose parent company is registered in France (2). Although the Law initially provided for massive fines against targeted companies not complying with the new duty, the latter will eventually expose themselves, mainly, to civil claims (3).



## A limited scope

The Law only applies to companies with a staff comprising, during two consecutive financial years:

- at least 5,000 employees based in France, taking into account the employees of the French parent company and of its direct or indirect subsidiaries with registered offices located in France; or

– at least 10,000 employees worldwide, including employees of the French parent company and of its direct or indirect subsidiaries which registered offices are located both in France and abroad.

Unofficial sources suggest that around 200 groups of companies would be subject to the Law. While this may seem relatively narrow in scope, one should

bear in mind that each company falling under the scope of the Law (the Targeted Company) has to account for the impact of: its own operation; the operation of the companies that it controls, whether directly or indirectly<sup>5</sup>; and the operation of the suppliers and subcontractors with which it has an “established business relationship” according to French law, ie a relationship characterised by a certain degree of continuity and stability.

## The vigilance program

Pursuant to the Law (article 1), Targeted Companies must establish, publish and implement a vigilance program (plan de vigilance) which entails:

*“reasonable vigilance measures allowing the identification of risks and prevention of serious harm to human rights and fundamental freedoms, to the health and safety of individuals and to the environment, as a result of the business activities of the parent company, of the companies that it controls (...) and of the operation of sub-contractors and suppliers with whom these companies have an established commercial relationship (...).”*

The vigilance program should be designed by the company’s stakeholders and, where relevant, it may integrate multi-party initiatives according to the sectors and territories in which the entities of the group operate. Both the program and a report setting out its effective implementation must be published and included in the company’s annual report.

The vigilance program shall mandatorily include:

- A risk-mapping that aims at identifying, analysing and ranking the relevant risks;
- In light of the mapping exercise, procedures enabling the regular monitoring and assessment of the group’s subsidiaries, sub-contractors and suppliers, as regards the oversight and prevention of the risks identified;
- Appropriate tools and measures aimed at mitigating the risks and preventing serious violations;
- A whistle-blower mechanism as well as a full process enabling the reporting of alerts and warnings dealing with potential or actual risks, which must be developed in consultation with the representative trade union organisations of the company; and
- A monitoring system enabling the company to track down the relevant implementation of the program’s measures and the assessment of their effectiveness.

For the purpose of designing and developing the vigilance program as part of a wider compliance set-up, Targeted Companies may find relevant guidance within international standards of conduct, such as the UN Guiding Principles on Business and Human Rights or the OECD Guidelines to Protect Human Rights and Social Development.

## A limited exposure

Right after the enactment of the Law, a variety of its provisions were referred to the French Constitutional Council (*Conseil Constitutionnel*) by Members of Parliament who considered, in particular, that in the absence of relevant thresholds specifically defining the ‘seriousness’ of the violations to fundamental rights that vigilance measures must prevent, the sanctions prescribed by the draft of the initial Law should be declared null and void.

As of 23 March 2017, the Constitutional Council partially granted the motion, by declaring that given the vagueness of certain concepts relied on by the Law, the provisions which would have enabled courts to impose civil fines on targeted entities violating the Law did not comply with the principle of “legality and proportionality of penalties”<sup>6</sup> and should therefore be removed from the Law.<sup>7</sup>

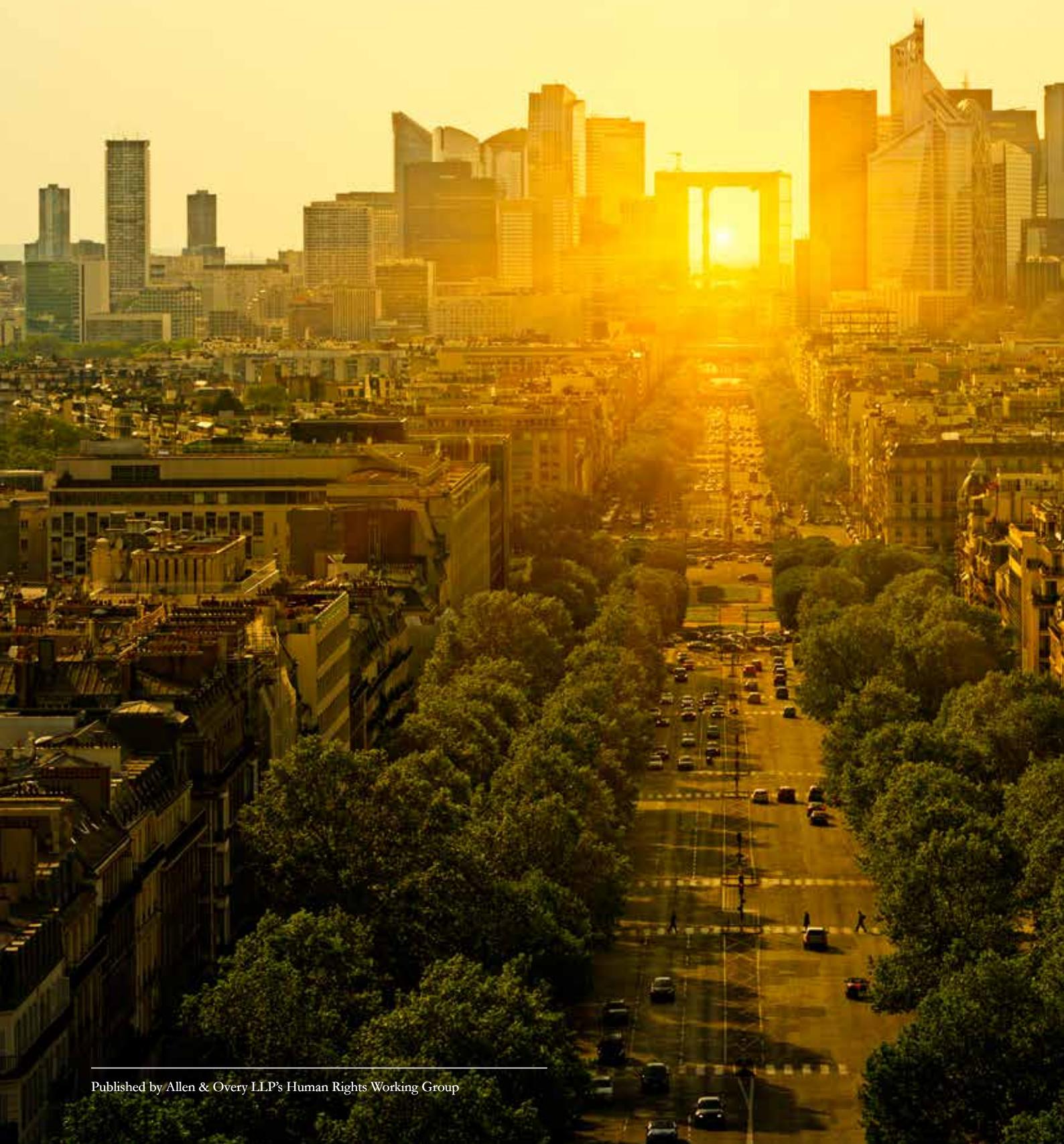
As a result, Targeted Companies which fail to establish and implement an effective vigilance program could expose themselves to both:

- Preventive actions: any person justifying a cause of action (*intérêt à agir*) may request a Targeted Company to comply with the Law, by formal notice. Legal persons with a cause of action would typically be NGOs whose object and purpose is to protect human rights or the environment. Should the Targeted Company fail to meet its duty after a three-month period from the notice, the court may then issue an injunction to comply against it, under the threat of a daily fine the amount of which is fixed by the judge on a case-by-case basis.

- Civil claims: failure to abide by the Law amounts to a civil tort. Hence, where the failure of a Target Company to implement a proper vigilance program has caused loss or damage, the injured parties may seek compensation against it. Moreover, the Judge may order that its decision be made public (press, radio, etc.), thereby damaging the Targeted Company’s reputation.

*The Litigation team at Allen & Overy Paris will be closely monitoring further developments regarding the Law. We look forward, as always, to helping you navigate the changing landscape of French legal requirements and to offering our assistance in crafting internal compliance regimes which protect your business interests in France and abroad.*

1. *Loi n° 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*
2. In April 2013, the Rana Plaza factory, a building located in Bangladesh and containing workshops producing garments for numerous Western clothing companies, collapsed, killing over 1,000 workers.
3. Text no. 2578 submitted to the Assemblée Nationale on 11 February 2015 (unofficial translation).
4. See the UK Modern Slavery Act 2015 or the California Transparency in Supply Chains Act 2010.
5. Article L. 233-16 of the French Commercial Code provides, in relevant part: “[s]ole control of a company exists: 1° When a majority of its voting rights are held by another company; 2° When a majority of the members of its administrative, executive or supervisory bodies are designated by another company for two successive financial years. The consolidating company is deemed to have effected such designations if, during that financial year, it held a fraction of the voting rights greater than 40%, and if no other partner, member or shareholder directly or indirectly held a fraction greater than its own; 3° When a dominant influence is exerted over the company by virtue of a contract or the terms and conditions of its constitution, where the applicable law allows this.” (official translation)
6. This constitutional principle is guaranteed by Articles 8 and 9 of the French Human Rights Declaration, which is part of the French Constitution.
7. French Constitutional Council, 23 March 2017, no. 2017-750DC.





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