

Delivering value and managing risks: how human rights are relevant for business

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Mounting pressure on businesses to gain clarity on their social and environmental footprint will challenge corporate operations in 2019. New risks are present but there are also opportunities for companies willing actively to engage.

Drivers for change are coming from many directions:

- **Growth of legal risks:** new laws with mandatory reporting, issue-specific litigation, sector norms and sanctions.
- **Wider stakeholder pressures:** benchmarking and increased activism from investors, shareholders, customers and civil society.
- **Global issues:** conflicts, climate change, environmental disasters and sustainable development.

Below we highlight six areas where human rights will feature prominently on board agendas in 2019.

Role of investors

ESG information will influence investor decisions.

Financial institutions and private investors are increasingly incorporating human rights into the environmental, social and governance (ESG) standards now influencing investment. The market is adding content to the “S” in ESG. Issues including modern slavery, worker and community health and safety, and freedom of expression are perceived as material to financial performance. Investors will need to keep abreast of evolving international frameworks, including the UN Principles for Responsible Investment and the European Commission’s Action Plan on sustainable finance.

Reporting on High-risk supply chains

Corporate response to high-risk supply chains is under scrutiny.

A range of mandatory reporting obligations require board level engagement, e.g.:

- In the UK, Government and civil society pressure is being exerted on organisations to issue compliant Modern Slavery Act 2015 statements to show how they address slavery in supply chains. An independent review of the Modern Slavery Act is expected in March 2019, alongside public disclosure of non-compliant companies.

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- Australia's Modern Slavery Act is now in force, with reporting obligations for companies operating in Australia with a turnover of more than AUS\$100m.
 - In France, the implementation of the French Duty of Vigilance law for the largest French companies requires risk-mapping of issues in the supply chain, a plan to manage risk and reporting back on its implementation.
 - The Netherlands and Switzerland appear poised to introduce further reporting requirements on human rights due diligence in 2019.
 - USA's Global Magnitsky sanctions designations increase the compliance burden on companies to ensure they are not doing business with parties blacklisted for serious corruption or human rights violations.

Companies will need to identify potential risks, probe whether their policies and procedures are proportionate to the severity of risks and, outside their integrated supply chains, consider what commercial influence they can deploy in mitigation. Top of mind for many companies will be how to react appropriately in response to increasing (and in some cases, increasingly robust) requirements, and rising transparency expectations. This may be relevant even to companies not technically caught by current legislation. Conducting appropriate due diligence in a manner informed by the UN Guiding Principles on Business and Human Rights will be essential.

Focus on Corporate Accountability

Parent company tort litigation

A series of claims filed against parent companies for harms allegedly caused by foreign subsidiaries.

Current actions in the UK, US, Canada and France have exacerbated a troubling tension between increasing transparency about global corporate activity and supply chains and creating litigation risks. It remains to be seen whether disclosure-based suits in the US have a chilling effect on modern slavery disclosures and other statements of corporate commitment. In 2019, several judgments are expected that will give greater guidance to companies on liability in general and steps they should take to avoid and mitigate harm which could raise the stakes in how companies look at, and are judged on, these issues.

Climate Change Litigation

An increased sense of global urgency around climate change impacts and the development of national laws and international commitments are driving a growth in climate change litigation.

In 2018, there were nearly 1,000 ongoing climate change related cases internationally. Many of these cases indicate a trend linking environmental harms to adverse human rights impacts. In the Netherlands, the court determined that the Dutch government had breached the European Convention on Human Rights by failing to pursue a more ambitious greenhouse gas emissions reduction target for the end of 2020. In Colombia, the court ruled that the government's failure to reduce emissions from deforestation in the Amazon had breached fundamental constitutional human rights. In Australia, climate change was one of the grounds that the New South Wales Land and Environment Court used to uphold a refusal for planning permission for an open-cut coal mine. Recently, in the UK, the High Court ruled that the government's planning policy on shale gas was unlawful because of failure to take into account new scientific and technical evidence relating to greenhouse gas emissions. Public consultation on the policy was also ruled as "unfair and unlawful". Further landmark rulings expected in 2019 could impact the landscape of litigation, where success for the claimants would be expected to encourage the filing of similar lawsuits. One example is the much-publicised US constitutional case, *Juliana v United States*, where 21 individual youth plaintiffs are suing the US government on the grounds that it has failed to protect the rights of young people by promoting and subsidising the use of fossil fuels despite knowing their effect. Another proceeding to watch is the Philippines' Human Rights Commission investigation into the corporate responsibility of 47 fossil fuel companies for climate-related human rights impacts. The findings of the Commission are expected to be published in June 2019.

Operating in conflict zones and institutionalising prevention of mass atrocities

Harnessing the power of the private sector in prevention efforts receives fresh focus.

Some governments are focused on institutionalizing the prevention of mass atrocities and managing business operations in conflict zones. Governments and law enforcement authorities increasingly see links between mass atrocity crimes in conflict zones and other serious crimes including slavery, corruption, money laundering, or sanctions avoidance. This issue is moving beyond a compliance issue to a board agenda item, especially for businesses operating or considering acquisitions in conflict-prone regions. Institutionalization also means helping states to engage in ongoing monitoring and direct and meaningful deterrence prior to the point of crisis management or intervention. Some states are encouraging public-private partnerships to deliver solutions in difficult areas, working with business to deliver stable solutions and support the rule of law. Non-state efforts to articulate the corporate role in conflict-affected areas and encourage implementation of practical tools in the form of international principles and guidelines at scale continues.

Transparency and benchmarking

The role of benchmarks as a catalyst for improving transparency and performance.

There has been a rapid expansion in the number of human rights and sustainability indices and metrics projects worldwide. The field is no longer small or easy to understand, and corporate engagement and strategies have been far from uniform. Some benchmarked companies view the ratings and rankings mechanisms as valuable opportunities to build transparency on corporate issues and action. Others engage in a far more limited fashion, if they engage at all.

By better understanding benchmarks that are being developed, businesses will have an opportunity to respond, as well as engaging with the creators of benchmarks to ensure their methodologies are sound and reflect business realities.

Corporate responses will no doubt shift as investors, shareholders, customers, regulators and other stakeholders begin to consider and apply the information and analysis furnished by benchmarks more seriously. The prominence of benchmarks will increase in 2019 as new benchmarks are introduced (e.g. by the World Benchmarking Alliance, The Maturity Institute) and methodologies become more focused and sophisticated.

Sector initiatives

Technology, financial services and extractives sectors have seen industry-specific challenges and new initiatives to engage with distinct concerns.

Technology

Technology companies are seen as forces for both good and bad in the area of human rights. On the one hand, technology has the potential to be a positive means of advancing human rights: freedom of expression is enhanced as information of abuses can be shared quickly and widely, local communities and international groups are empowered as they can mobilise and communicate cheaply and effectively. The use of blockchain may be transformative to encourage responsible sourcing and reduce child labour or human trafficking in supply chains.

On the other hand, technology companies are accused of restricting fundamental rights of privacy and ownership of personal data, and technology may facilitate the monitoring and repression of rights.

The use of technology to improve access to justice for individuals is under consideration in many countries, while the contribution of AI to the future of society is a matter of intense debate. Investors, activists and benchmarks track indicators relating to governance, privacy, security and expression, and some leading tech companies have formed the Global Network Initiative to consider these issues.

2019 will be a year where tech companies remain very much in the spotlight; media scrutiny will be high and focus will be on increasing regulation worldwide.

Financial Institutions

Over 90 financial institutions now publicly commit to the Equator Principles, setting the standard for social and environmental due diligence in project finance. In 2019, the Equator Principles will be updated again to include distinct human rights due diligence.

In addition, 28 banks joined forces with the UN Environment Programme Finance Initiative (UN EPFI) in 2018 to launch a global public consultation on defining the Principles for Responsible Banking. The financial services sector is seeing a broader transition towards the identification and mitigation of adverse human rights impacts from financial products and services. The UN EPFI Principles are currently under consultation, welcoming sector input on the relationship with the UN Guiding Principles on Business and Human Rights.

Financial Institutions typically experience negative human rights impact through the funding or investment of projects controlled by its customers, with the risk of “causing or contributing” to a human rights impact (as distinguished from “direct” or “indirect” impact in the UN Guiding Principles). Increasing numbers of responsible lenders undertake supplementary due diligence to ensure they are alert to possible human rights violations. The Dutch Banking Sector Agreement offers an opportunity for banks to improve their human rights due diligence, in line with the UN Guiding Principles.

Financial institutions also face the additional challenge of balancing client confidentiality with transparency. Supply chain and value chain risk management will present the biggest challenges.

Extractives

Extractives companies face heightened focus on rights of indigenous people, health and safety, security and workforce rights.

In the mining and metals sector, growing emphasis on ethics and sustainability issues from commercial customers, investors, regulators and industry initiatives continues to drive disclosures and technological advancements in supply chain practices.

Despite some lingering uncertainty regarding the future and enforcement of the US Conflict Minerals Rule, by and large companies are continuing to report and in many cases conduct due diligence on the use and provenance of 3TG and derivative metals in their products. Some will soon face similar compliance obligations pursuant to the EU Conflict Minerals Regulation, which takes effect in 2021 and differs in certain respects from the US rule (e.g., subject companies, geographic scope of inquiry).

Meanwhile the London Metals Exchange joins other exchanges that have become advocates for ESG reporting, poised to roll out responsible sourcing protocols developed in conjunction with market participants.

Companies are increasingly applying industry transactional experience to responsible supply chain management, including new technologies piloted such as blockchain. In an area where standards have trailed technology, there are important considerations including revisions to corporate codes and contractual provisions, regulatory access and information security. As our [Insight](#) last year demonstrated, blockchain could allow companies to demonstrate and emphasize the sustainability attributes of their products with obvious effects on diligence, disclosure and purchasing decisions.

The [Global Battery Alliance](#), launched in 2017, is an example of the international community's effort to operate on a multi-stakeholder level to engage high-risk value chains and accelerate movement towards socially responsible, environmentally sustainable activities.

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