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Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of its Subsidiaries?

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There is a global expectation that business should respect human rights. This expectation applies to all business enterprises, however structured, and wherever located. It includes groups of companies that operate as single economic units through legally separate parent companies and their subsidiaries located in different countries. One challenge for corporate counsel is to align this expectation with the separate legal status of parents and their subsidiaries.

In this context, corporate counsel for such groups are sometimes asked this question: how involved should a parent company become in the operations of a subsidiary that may pose a risk to human rights? Answering the question requires appreciating the full context of all the risks that may flow from taking such a position. In most cases, taking account of all circumstances, the legal and non-legal risks of taking a hands-off approach are likely to outweigh any benefit. To the extent that residual human rights risks remain, company lawyers can take positive steps to avoid or mitigate them by helping their clients reduce the likelihood of involvement human rights harm.

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UN Guiding Principles on Business and Human Rights

To provide background, one first must understand the role that human rights risks now play in contemporary business decision-making. In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (the ‘Guiding Principles’), following six years of multi-stakeholder consultation, pilot projects and research.¹ The Guiding Principles have become the global standard on business and human rights. They provide ‘a blueprint for the steps all states and business should take to uphold human rights’.²

The Guiding Principles comprise 31 principles, each with detailed commentary, based on three interdependent pillars: the state duty to protect human rights against abuse by third parties; the corporate responsibility to respect human rights throughout their operations and relationships; and the right of victims to effective state and non-state remedy.

Pillar I, the state duty to protect human rights, is grounded in the legal duty of states under international treaties and instruments through effective policies, legislation and adjudication.

Pillar II, the corporate responsibility to respect human rights, expects that companies will adopt and embed public human rights policies, will conduct human rights due diligence to identify and address their involvement in human rights harm and will remedy harm that they have caused or contributed to. This does not, by itself, create legal duties for companies; rather, it is based on an expectation of global society. Nevertheless, the responsibility to respect does not exist in a law-free zone, and even before the Guiding Principles it was reflected to varying degrees in the laws of most countries.

Pillar III, the need for access to effective remedy, recognises that both states and companies have a role to play in providing remedy for human rights harm. The state role is foundational; states are expected to reduce barriers to accessing remedy, including through both judicial and non-judicial mechanisms.

The uptake of the Guiding Principles has been swift and widespread.³ They are reflected or incorporated in laws and regulations, government policy

1 www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

2 Zeid Ra’ad Al Hussein, ‘Ethical Pursuit of Prosperity’ *The Law Society Gazette* (23 March 2015) www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.fullarticle.

3 IBA Practical Guide on Business and Human Rights for Business Lawyers (2016), Section 2, available at www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx (‘IBA Practical Guide’).

developments, international standard-setting bodies, public commitments by businesses to abide by the Guiding Principles and the increasing use of the Guiding Principles in judicial and public advocacy by civil society. A recent example among many is the 8 July 2017 reference by the G20 leaders to the Guiding Principles as a core standard to be used in achieving sustainable global supply chains.⁴

Companies can adversely affect all human rights. Examples include infringements of the right to education (when children work in the field all day), the right to water (when community water supply is polluted), the right to decent work conditions (when workers are exposed to excessive heat or hazardous chemicals) and the right to be free from non-discrimination (when women workers are harassed), to name a few.⁵ Human rights have become a core risk for companies,⁶ and, therefore, have become a matter for attention by corporate boards in the discharge of their fiduciary duty.⁷

Implications of the Guiding Principles for corporate groups

The Guiding Principles expect that business enterprises will respect human rights in their direct operations and in their ‘business relationships’.⁸ The term business relationship is broadly defined.⁹ It includes, among other entities and persons, suppliers under contract to a buyer, and subsidiaries owned by a parent. A business is expected to exercise or use leverage to influence the human rights performance of its business relationships. ‘If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage, there may be ways for the enterprise to increase it.’¹⁰ Leverage, as used in the Guiding Principles, means the ability of a business to influence the human rights performance

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- 4 G20 Leaders’ Declaration: Shaping an interconnected world (8 July 2017), available at http://europa.eu/rapid/press-release_STATEMENT-17-1960_en.htm.
 - 5 Monash University, Castan Centre for Human Rights Law, *Human Rights Translated 2.0 A Business Reference Guide* (2016), available at http://jmarketing.com.au/monash/Monash_HRT_Final.pdf.
 - 6 UN Global Compact and Linklaters, *Guide for General Counsel on Corporate Sustainability* (2015), available at <https://www.unglobalcompact.org/library/1351>.
 - 7 Equality and Human Rights Commission, ‘Business and human rights: a five-step guide for company boards’ (2016), available at www.equalityhumanrights.com/en/publication-download/business-and-human-rights-five-step-guide-company-boards.
 - 8 Guiding Principle 13.
 - 9 UN Office of the High Commissioner of Human Rights, *Interpretive Guide to the Corporate Responsibility to Respect Human Rights*, 2012 (‘Interpretive Guide’), available at www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.
 - 10 Guiding Principle 19, Commentary.

of a business relationship. It does not require a business to control the behaviour of a third party.

The Guiding Principles recognise that businesses are organised and structured in many ways. Multinational enterprises typically function as a single economic entity across national boundaries. But legally, they often comprise a group of multiple separate legal entities that are linked by equity ownership (eg, a parent company with one or more subsidiaries), or a network of contractual arrangements (eg, a producer-led production network or a buyer-led supply chain, or a joint venture).¹¹ And even within parent-led groups there are multiple permutations, including parents that are pure holding companies and parents that lead an integrated holding company system with shared policies, values and goals, and service companies for affiliated operating companies.

The Guiding Principles do not alter the separate legal status of companies. But the responsibility to respect human rights under the Guiding Principles ‘applies to all enterprises regardless of their size, sector, operational context, ownership and structure’.¹² A group’s organisational structure ‘simply affects how they go about ensuring that rights are respected in practice, for instance through their contractual arrangements, internal management systems, governance or accountability structures’.¹³

Therefore, in a business group organised as a buyer-led supply chain consisting of independent companies linked by contract, the buyer is expected to use its leverage to influence its suppliers to avoid human rights harm. Similarly, in a business group organised as a parent with multiple subsidiaries, the parent is expected to use its leverage to influence its subsidiaries to avoid human rights harm.

How leverage plays out in practice

To understand how leverage plays out in a parent-subsidary relationship, it is important to understand the steps that every business is expected to take to respect human rights. These steps may vary depending on whether the subsidiaries are wholly or partly owned.

Where the subsidiaries are wholly owned, the parent would be expected to promulgate a public commitment to respect human rights. Its purpose

11 John G Ruggie, *Multinationals as global institution: Power, authority and relative autonomy, Regulation and Governance* (2017), available at <http://onlinelibrary.wiley.com/store/10.1111/rego.12154/asset/rego12154.pdf?v=1&t=j3vzychl&cs=335b1dec7fc1525cf78c3b8115942eb0d3b6af11>.

12 Guiding Principle 14.

13 Interpretive Guide, Section 3.6.

is to embed respect for human rights throughout the corporate group, including itself and the subsidiaries that it owns. The commitment should be approved at the most senior level of the parent, be informed by relevant expertise, stipulate the parent's expectations of its personnel, its subsidiaries, its business partners and others directly linked to its operations, products, or services, be publicly available and communicated to relevant stakeholders and be reflected in operational policies and procedures necessary to embed it throughout the organisation.¹⁴ It can consist simply of a general commitment to respect internationally recognised human rights, include the human rights that are most at risk, and how it will account for its actions.¹⁵

However, the public commitment of a parent company is a relatively static document that serves a constant reference point for the business and its stakeholders. It is not the same as the operational policies and procedures that are needed to embed it throughout the corporate group, including its subsidiaries. Those policies and procedures are typically not public, are more detailed, more specific in focus and application and subject to more frequent change.¹⁶

The Guiding Principles do not mandate that a parent company of a corporate group assert operational control over the activities of its subsidiaries in order to implement its policy commitment, and prescribe each of the steps that a subsidiary must take to operationalise the policy. However, the Guiding Principles do expect that the parent will take appropriate steps to determine that its subsidiaries are respecting human rights, just as the Guiding Principles would expect that it do so for independent suppliers in its value chain.

Consistent with the Guiding Principles, subsidiaries can develop their own human rights commitments, and their own operational policies and processes to embed them in their businesses. However, the parent would still be expected to utilise internal controls (such as risk management, internal audit and the development of standardised procedures, processes, assessment and metrics), in order to assure itself that its subsidiaries are respecting human rights.¹⁷ Doing so would be an appropriate exercise of a parent's leverage for purposes of the Guiding Principles.

Where the parent does not own all the shares of its subsidiary (eg, it is a minority owner), it may not be able to exercise the same internal controls as a parent with total ownership. In the words of the Guiding Principles, it would

14 Guiding Principle 16.

15 Interpretive Guide, Q22.

16 *Ibid.*

17 OECD Guidelines for Multinational Enterprises (2011), I. Concepts and Principles, Commentary, paras 8–9, available at www.oecd.org/corporate/mne/1922428.pdf.

not have as much leverage. That is, its leverage may be limited to the selection of board members and budgetary approval, and might not extend to input on the promulgation of corporate-wide policies or the exercise of internal controls. However, this does not relieve the parent of the responsibility to exercise, or attempt to increase the leverage that it has, to try to influence the human rights performance of its subsidiaries. Doing so places a premium on incorporating a robust human rights due diligence process as part of its process of becoming a minority owner.

Parental liability

As a technical legal matter, a parent company is normally not legally liable for its subsidiaries' conduct, including conduct relating to human rights. In exceptional circumstances, the corporate veil can be pierced where the subsidiary is a mere alter ego of its parent, or is used for a wrongful purpose.¹⁸ However, parental liability cases are highly fact-specific. In the case of severe human rights harm (eg, business involvement in gross human rights abuses such as rape, murder and torture), the presence of emails from the parent to the subsidiary on the subject, could be highly influential to a court or jury in deciding whether the facts support an alter ego or similar claim.

Recently, the courts of England and Wales and Canada have begun to use a legal theory of 'direct liability' to determine that parent corporations could be liable for their subsidiary's human rights harm.¹⁹ Direct liability does not involve allegations that the subsidiary is a mere alter ego of the parent, or that the parent misused the subsidiary for a wrongful purpose. Rather, it requires proof that the parent had assumed de facto control over, or was so closely involved in, the subsidiary's operations that caused human rights harm.²⁰ The cases of *Chandler v Cape PLC*, [2012] EWCA (Civ) (England) and *Choc v Hudbay Minerals*, 2013 ONSC 1414 par 75 (Canada) – applied such a theory (in procedurally different postures and under different facts) to hold that parent mining companies can owe a legal duty of care directly to persons injured by the actions of their foreign subsidiaries in such circumstances.²¹ Recently, in *Lungowe, et al v Vedanta, et al* [2017] ESCA (Civ) 1528, the UK Court of Appeals allowed over 1,800 Zambian villagers to sue a UK parent company in the UK for water pollution by its Zambian subsidiary, holding

18 Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 Wash & Lee L Rev 1769, 1773 1834–1838, available at <http://scholarlycommons.law.wlu.edu/wlulr/vol72/iss4/5> ('Skinner').

19 Skinner, *ibid* 1832–1838.

20 *Ibid.*

21 *Ibid.*

that their factual allegations could possibly give rise to a duty of care owed by the parent directly to the villagers.²²

However, as noted above, the Guiding Principles do not expect that a parent company must control or be deeply involved in the operations of its subsidiaries. Rather, they only expect that the parent exercise or build leverage to influence the subsidiary's human rights conduct. Where risks to people are severe, a parent company should take highly affirmative, proactive and robust steps to ensure that its subsidiaries do not harm them, to avoid severe harm to the company itself. The alternative approach of taking a hands-off attitude, and ignoring the human rights impacts of its subsidiaries, will invite a large host of serious adverse consequences for the company that cannot be ignored. Ignoring the wider-risk context is not likely to serve the best interests of the company group, as a practical matter. In fact, it will dramatically increase both legal and non-legal risks for the entire corporate group, parent as well as subsidiaries.

Increased legal risks of a hands-off approach

In addition to parental liability claims, there is a wide range of legal risks for corporate groups whose members are involved in human rights abuses. Such claims include direct claims by abuse victims against subsidiaries, state criminal investigations and prosecutions, shareholder claims against directors for harm to the company arising from involvement in such abuse, claims by shareholders and others for not reporting on, or misrepresenting their human rights performance under applicable regulations, claims based on breach of commitments to contract counterparties and lenders to maintain appropriate standards of conduct, etc. Whatever the claim, conducting human rights due diligence may help to lessen the group's legal exposure. The commentary to Guiding Principle 17 states, 'Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse'. By taking a hands-off approach towards the involvement of its subsidiaries in human rights impacts, the parent of a group enterprise would have a very difficult time making this argument.

22 See, Norton Rose Fulbright, *Lungowe v Vedanta appeal highlights important points regarding parent company liability*, (November 2017), available at http://www.nortonrosefulbright.com/knowledge/publications/158040/emlungowe-v-vedantaem-appeal-highlights-important-points-regarding-parent-company-liability?utm_source=vuture&utm_medium=email&utm_campaign=update%3a%20%20lungowe%20v%20vedanta_09%20november%202017.

MANDATORY HUMAN RIGHTS DUE DILIGENCE RISKS

This would be particularly true in jurisdictions that mandate human rights due diligence. Several countries have enacted, or are actively considering, such mandates:

- *France.* The 2017 French Duty of Vigilance Law requires large French companies to establish and implement an effective human rights vigilance plan. The law was inspired by, and mostly tracks, the components of the human rights due diligence process of the Guiding Principles. The operations of a parent company's subsidiaries are to be included in the plan. Injury caused by a company's failure to implement an effective plan can subject the company to civil tort liability.²³ A hands-off approach in such cases would greatly increase a parent company's legal exposure.
- *The Netherlands.* In 2017, the Dutch Parliament adopted a bill requiring companies selling goods and services to Dutch end-use customers to exercise a duty of care to prevent child labour in their supply chains. It requires them to identify whether child labour exists in their supply chains, and if so, to issue a plan of action and issue a statement of the due diligence they have performed to address the problem. The penalty for non-compliance is a maximum fine of up to €820,000 or alternatively, ten per cent of their annual turnover. The bill is subject to approval by the Dutch Senate, and, if approved, will not be effective until 2020.²⁴
- *Switzerland.* In 2015, a coalition of 80 NGOs launched a popular initiative to request an amendment to the Federal Constitution that would require Swiss companies to respect internationally recognised human rights and international environmental standards, including with respect to their activities abroad. This would apply to companies under their control, which could include subsidiaries and business relationships, to be determined by the facts on a case-by-case basis.²⁵ Under the initiative, Swiss companies would be required to carry out human rights due diligence, and would be liable for damages resulting from violations of human rights and international environmental standard violations, including violations caused by companies they control. They can avoid liability by proving that they took all due care

23 Anna Triponel and John F Sherman, III, *Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law* (May 2017), available at <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=e9dd87de-cfe2-4a5d-9ccc-8240edb67de3>.

24 Stibbe, *Bill adopted by Dutch Parliament introducing a duty of care to prevent child labour* (22 May 2017), available at <https://www.stibbe.com/en/news/2017/may/bill-adopted-by-dutch-parliament-introducing-a-duty-of-care-to-prevent-child-labour>.

25 Swiss Coalition for Corporate Justice, SCCH, *Responsible Business Initiative*, Art 101a, available at <http://konzern-initiative.ch/initiativtext/?lang=en>.

to avoid the harm, and that the damage would have occurred regardless.²⁶ Taking a hands-off approach towards human rights harm caused by a subsidiary would preclude assertion of such a defence. The Swiss initiative has received more than the required number of signatures for submission to the Federal Council and Parliament. In January 2017, the Federal Council rejected the initiative; it will now go through the Swiss Parliament, which can accept or reject it, or make a counter-proposal. If the initiative is not withdrawn, it will be put to regular vote.²⁷

- *UK.* In 2017, a joint committee of both houses of Parliament issued a report, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*. It recommends that ‘companies that have not undertaken that human rights due diligence [be barred] from all public-sector contracts’ and that ‘the Government brings forward legislation to impose a duty on all companies, including parent companies, to prevent human rights abuses, with failure to do so becoming an offence, along the lines of the relevant provisions of the Bribery Act 2010’.²⁸

OTHER LEGAL RISKS

Even in jurisdictions that do not mandate human rights due diligence, taking a hands-off approach to the human rights risks of subsidiaries may also be in tension with the corporate group’s ability to comply with other legal and contractual requirements, such as reporting requirements imposed by the state, breach of contractual commitments owed to other businesses and, recently, asset seizure.

Violation of reporting requirements

For example, public disclosure laws and regulations are increasingly and specifically requiring disclosure of a company’s human rights policies, processes, risks and performance. These laws and regulations respond to increasing demands from regulators, investors, shareholders, workers and civil society organisations for accurate information on companies’ social and economic performance. Some include enhanced sustainability reporting generally, and requiring attention to human rights. Others focus on types of human rights abuses. Examples include the UK Modern Slavery Act, which

²⁶ *Ibid* Art 101c.

²⁷ The Federal Council and Parliament can accept or reject the initiative or make a counterproposal. If the initiative is not withdrawn, it will be put to a popular vote. *Ibid*.

²⁸ House of Lords, House of Commons, Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, available at <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>.

requires that commercial organisations operating in the UK prepare a slavery and human trafficking statement that may include information about its due diligence processes in relation to slavery and human trafficking in its supply chain.²⁹ Other examples include the European Parliament's Directive on Disclosure of Nonfinancial and Diversity Information,³⁰ the California Transparency in Supply Chain Act of 2010³¹ and the US Federal Acquisition Regulation, 'Combating Trafficking in Persons'.³² In 2017, the Australian Parliament commenced a formal inquiry into whether that country should adopt an equivalent to the UK Modern Slavery Act.³³

Breach of contractual commitments

The effect of regulations requiring disclosure about the management of human rights risks in company supply chains pushes the same expectations into business-to-business relationships, requiring their suppliers and other partners to respect human rights in accordance with the Guiding Principles. Even FIFA, which is the governing body of world football, the world's largest and richest sport, is moving to require its business partners and suppliers to comply with the Guiding Principles, including in future FIFA World Cup tournaments.³⁴ This requirement has the potential of enormous knock-on effects on all entities doing business with football associations worldwide. A parent company that takes a hands-off approach towards its subsidiaries may find it difficult to comply with this requirement and, if so, may expose itself to legal claims.

29 UK Modern Slavery Act 2015, Part 6, s 54(4) and (5), available at www.legislation.gov.uk/ukpga/2015/30/contents/enacted.

30 Directive 2014/95/EU (2014), available at https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en.

31 Cal Civ Code s 1714.43 (2010), available at www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.pdf.

32 Combating Trafficking in Persons, etc, FAR Subpart 22.17 and Part 52 (2012), available at https://www.acquisition.gov/far/html/Subpart%2022_17.html.

33 Business and Human Rights Resource Centre, *Inquiry into the establishment of a Modern Slavery Act in Australia*, available at <https://business-humanrights.org/en/inquiry-into-establishment-of-a-modern-slavery-act-in-australia>.

34 See FIFA's new Human Rights Policy and June 2017 Activity Update, available at www.fifa.com/governance/news/y=2017/m=6/news=fifa-publishes-landmark-human-rights-policy-2893311.html.

Asset seizure

Very recently, the UK Adopted the Criminal Finances Act of 2017, which authorises the UK prosecutors to seize property obtained by or ‘in connection with’ gross human rights abuse, regardless of when the property was obtained.³⁵ The term ‘in connection with’ includes ‘profiting from’ gross human rights abuses. The law does not require proof of intent and does not permit a defence that the company took reasonable steps to avoid profiting from such harm. As a result, avoiding sanction will ‘require heightened diligence and meaningful human rights impact assessments’. The law’s application is not limited to funds obtained by a bank from a kleptocrat foreign dictator (the classic example), but in the words of two commentators, could conceivably extend to goods, such as ‘ore mined from a patch of land that was seized by a company off the back of torture and abuse. That ore is the tainted product of a crime, and any company purchasing it is profiting from the abuse’.³⁶ It remains to be seen how far up the chain of a corporate group the UK prosecutors will go. But rather than test the law’s reach, it would be highly prudent for UK parents of foreign subsidiaries to ensure that their subsidiaries avoid profiting from such abuses.

Non-legal risks

In any event, when faced with severe human rights harm caused by, contributed to or directly linked to its subsidiary’s operations, legal issues may be the least of a parent company’s worries.³⁷

DELAY, DISTRACTION AND DISRUPTION

Involvement in human rights harm can be very expensive for a corporate group. Significant numbers of extractive projects are delayed, disrupted or otherwise affected by conflict with local communities, most often in relation to impacts on their lives and livelihoods. Research shows that the most frequent costs from such conflicts arise from lost productivity – typically US\$20m per week in net present value terms resulting just from delay and lost

35 Available at www.legislation.gov.uk/ukpga/2017/22/pdfs/ukpga_20170022_en.pdf.

36 Richard Rogers and Shasho Todorov, *New UK law: Liability for ‘profiting from’ gross human rights abuses*, The FPCA Blog (4 September 2017), available at www.fcpablog.com/blog/2017/9/4/new-uk-law-liability-for-profiting-from-gross-human-rights-a.html.

37 See Shift, Business, *Human Rights and the Sustainable Development Goals: Forging a Coherent Strategy* (2016), a paper commissioned by the Business and Sustainable Development Commission, available at <https://www.shiftproject.org/resources/publications/business-human-rights-sustainable-development-coherent-strategy> (‘Shift SDG paper’).

production on a US\$3–5bn capital expenditure project. The greatest costs are the opportunity costs in terms of the lost value linked to future projects, expansion plans or sales that did not go ahead, and the most overlooked costs come from staff time being diverted to managing conflict with communities.³⁸

Research has also shown similar patterns in relation to community protest over commercial land acquisition and use, with rapid increases in the levels of related risk around the world. In 54 per cent of 360 cases studied, there was a materially significant impact on the companies concerned. Costs flowed from ‘delays, increased compensation payments, new or higher regulatory costs, higher resource costs, higher insurance premiums, unplanned capital expenditure, loss of license and inflated legal costs’.³⁹

After a year of labour protests in Cambodia in 2013, with more than 130 strikes over the poverty wages paid to its 400,000 mostly female garment workers, the Garment Manufacturers Association estimated losses of US\$200m and anticipated drastic cuts in orders from buyers going forward. The CEOs of several brands wrote to the government to urge negotiations including wage rises, and the CEO of H&M flew to Phnom Penh to discuss the matter with the Prime Minister.⁴⁰

REPUTATIONAL LOSS

Involvement in human rights harm can seriously erode a corporate group’s reputation. For reputational purposes, assessment of a corporate group’s human rights performance is typically conducted at the group level, and much more rarely at the level of its individual legal constituent parts.⁴¹ 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. 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. The last risk appears to be increasing, be it in attracting millennials as corporate level employees, or retaining workers in retail stores or supplier factories. As mobile technology starts to empower even the poorest workers to share TripAdvisor-style ratings on their workplaces, these dynamics will only increase.⁴²

38 Rachel Davis and Daniel Franks, ‘Costs of Company-Community Conflict in the Extractive Sector’ (CSR Initiative, Harvard Kennedy School, 2014) http://shiftproject.org/sites/default/files/Costs%20of%20Conflict_Davis%20&%20Franks.pdf.

39 Shift SDG paper, n 36 above.

40 *Ibid*, fn 30.

41 Eg, CHRB: Corporate Human Rights Benchmark, 2017 Consultations, available at <https://www.corporatebenchmark.org>, and UNGP Reporting Database, available at <https://www.ungpreporting.org/reportingdatabase>.

42 *Ibid* fns 31–35.

REDUCED ACCESS TO CAPITAL MARKETS

Involvement in human rights harm may scare off investors in the corporate group. Investors are starting to face complaints where their investments are seen to support projects that run roughshod over local communities or workers and their human rights. Many investors are stepping up their own due diligence to identify where they might be involved with severe human rights impacts through their investment decisions. And increasing numbers of investors are prepared to reconsider or rule out an investment based on human rights risks.⁴³ Significant investor divestment has occurred based on company involvement in human rights abuses,⁴⁴ most recently following the murder of an environmental activist in the Honduras who had campaigned against a hydroelectric project in that country.⁴⁵

Lowering a parent company's human rights risk profile

Perhaps the best way for a parent to lower its human rights risk profile, including both legal and non-legal risks, is to reduce its subsidiaries' involvement in human rights harm in the first place. Rather than urge parent companies to turn a blind eye to such involvement, lawyers can play a positive role in helping their clients avoid it altogether. The IBA's Practical Guide on Business and Human Rights for Business Lawyers⁴⁶ and its companion Reference Annex⁴⁷ describes opportunities for lawyers, both internal and external, to do so in many legal practice areas. These areas include, but are not limited to, corporate governance and enterprise risk management, reporting and disclosure, dispute resolution and contracts and agreements.

The IBA followed up in 2017 by issuing an interactive, web-based handbook for lawyers on business and human rights, which outlines the steps that lawyers can take in M&A and corporate restructuring, and in commercial transactions, to enable them to identify and address human rights risks in those transactions.⁴⁸ As the Guiding Principles observe, a parent company will be deemed to inherit the human rights responsibilities

43 *Ibid* fns 36–38.

44 *Ibid* fns 40–46.

45 'Backers of Honduran dam opposed by murdered activist withdraw funding' *The Guardian* (4 June 2017) <https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-bertha-caceres>.

46 Note 3, above.

47 *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers* (2016), available at <http://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx>.

48 Available at <https://www.ibanet.org/Handbook-for-lawyers/Chapter-1.aspx>.

of a newly acquired subsidiary, however the acquisition is structured legally.⁴⁹ Failing to take human rights risks into account can contribute to the failure, or unexpectedly high cost, of mergers and acquisitions.

Therefore, M&A counsel can add significant value by advising their clients to bring a human rights lens to the acquisition process. This means moving beyond assessing a target company's legal compliance history, to identifying and addressing actual or potential harm to people arising from the target's past business and its future as a new member of the corporate group. To do so, counsel should to help their clients understand and identify the target's connection to human rights harm, allocate responsibility within the M&A team for identifying such risk, and address human rights during contractual negotiations, and post-closing.⁵⁰ These opportunities, if seized by counsel and client working together, can help to increase the likelihood of the acquisition being successful.

Conclusion

At the end of the day, it is critically important for lawyers and their clients to understand the overall context of legal advice. As the American Bar Association has observed: 'Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant'.⁵¹ When operating in an area of mixed hard and soft law, such as the responsibility to respect human rights, companies are well advised to request that their lawyers act as wise counsellors as well as technical legal experts.⁵²

Considering the need for business organisations to manage human rights as a strategic risk, lawyers who advise parent companies to take a hands off-role, without carefully considering the likely risks of doing so, legal and non-legal, effectively abdicate the wise counsellor role. They may reduce the theoretical probability of one legal risk, but in doing so they will expose their clients to a host of other legal and non-legal risks that are more likely to occur in practice and can cause greater damage to their business.

49 Guiding Principle 17, Commentary.

50 Reference Annex, Section 3.3.3. See also, Anna Triponel, *What do Human Rights have to do with Mergers and Acquisitions?* (Jan. 2016) http://shiftproject.org/sites/default/files/Shift_M&Aarticle_Jan2016.pdf.

51 Comment on ABA Model Rule of Professional Conduct 2.1, available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/comment_on_rule_2_1_advisor.html.

52 IBA Practical Guide, n 3 above; see also Ben Heineman, William Lee and David Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century* (Center on the Legal Profession, Harvard Law School, 2014), available at https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf.