Impact of Disclosure Regulation on Forced Labour

Human rights and supply chain due diligence in a changing regulatory landscape

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Executive Summary

The international community is committed to ‘take immediate and effective measures to eradicate forced labour, end modern day slavery and human trafficking’, a goal set out in the Sustainable Development Goals that officially came into force in early 2016. Important regulatory initiatives, in the United States and the United Kingdom in particular, are expected to help bring about the necessary systemic change.

Businesses should be prepared to deliver on disclosure requirements set out in such regulation. More importantly, however, disclosure regulation should prompt companies to actively address the risk of forced labour throughout their value chains and should compel investors to hold them accountable for it, in line with the established notion of human rights due diligence. ISS’ research shows that companies are often willing to take measures, yet action is generally prompted by stakeholder pressure and, crucially, investor engagement.

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Reports about appalling working conditions, including slavery and conditions akin to slavery, in the supply chains that provide us with everyday products – from consumer electronics to seafood – have raised public awareness about the fact that slavery not only continues to exist, but constitutes a global problem. Human rights organizations have, over the past decade, engaged with various stakeholders on initiatives contributing to the eradication of what is widely referred to as modern-day slavery, seeking to prevent people from falling into any form of forced labour and to rehabilitate victims. The international community is committed to ‘take immediate and effective measures to eradicate forced labour, end modern day slavery and human trafficking’, a goal set out in the United Nation’s (UN) Sustainable Development Goals that officially came into force in early 2016. Important regulatory initiatives, in the United States (US) and the United Kingdom (UK) in particular, are expected to help bring about the necessary systemic change.

Expert organizations contend that few companies, if any, can claim with any degree of certainty that their value chains are not contaminated with slavery or slavery-like practices. Recent regulatory initiatives therefore focus on corporate due diligence, and require businesses and, by extension, their investors, to disclose measures taken to ascertain and prevent involvement in any form of slavery-like practices throughout their operations. Businesses should be prepared to deliver on these requirements. Disclosure regulation on modern-day slavery is but the latest in a series of efforts to raise the bar on human rights due diligence. The debate on human rights standards for multinational corporations and business in general has engaged an increasingly wide group of stakeholders since the early 2000s. The endorsement of the Guiding Principles on Business and Human Rights by the UN Human Rights Council in mid-2011 is, to date, the most significant outcome, although this by no means spells the end of the consultations. The relevance of the general standards set out in the Guiding Principles for the eradication of modern-day slavery is now being tested. Investor engagement will be crucial for achieving change.

‘Modern-day slavery’, forced labour and human trafficking

According to the Global Slavery Index produced by the Australia-based human rights group The Walk Free Foundation, 45.8 million people were in some form of modern-day slavery in 167 countries during 2016. The index defines modern-day slavery as ‘situations where one person has taken away another person’s freedom – their freedom to control their body, their freedom to choose to refuse certain work or to stop working – so that they can be exploited. Freedom is taken away by threats, coercion, abuse of power and deception. The net result is that a person cannot refuse or leave the situation’.

By contrast the International Labour Organization (ILO) estimates that almost 21 million people are victims of different forms of slavery, such as debt bondage, human trafficking, and forced domestic work. The ILO defines forced labour as those ‘situations in which persons are coerced to work through the use of violence or intimidation, or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities’.

1 Most recent estimates are for 2012. Note that the ILO drastically revised earlier estimates based primarily on improvements in methodology. According to 2005 estimates, there were 12.3 million victims of forced labour.
Proponents of the more narrow definition of ‘modern-day slavery’, one that is embedded in international legal instruments, argue that clear definitions are necessary to achieve change through targeted action. Beate Andrees, responsible for the ILO’s Special Action Programme to combat Forced Labour contends that ‘to call something “slavery” helps to raise attention and to galvanize action. But will it help the world’s poor and distressed to end their misery? The answer is no. Ending slavery or forced labour requires targeted action to change laws, to bring offenders to justice, to protect victims and to empower those at risk.’

Sixty-eight percent of the 21 million people the ILO estimates to be victims of different forms of slavery are subjected to forced labour in the private economy. A minority, 10 percent, are under state-imposed forms of forced labour. Forced sexual exploitation accounts for 22 percent of all victims. The forced labour industry is estimated to generate annual profits from unpaid wages and illegal recruitment fees of over US$150b across a wide range of businesses.²

Forced labor has been found to be endemic in certain industries, generally as a result of lack of governance and high levels of corruption, with police and government officials participating in human trafficking. Socially vulnerable groups, such as minorities and migrants, are often victims of deceptive recruitment practices that lead to coercive labour conditions. Migration within and/or across international borders, irregular migration in particular, has been identified as a key risk factor for all forms of forced labour. According to the ILO 44 percent of all victims of forced labour are migrants.

ILO statistics reveal that forced labour continues to exist across sectors, such as agriculture, including fishing and forestry, construction, manufacturing, mining, utilities, and domestic work. Industries that attract low- or unskilled workers have been found to have an exceptionally high exposure to forced labour. The US Department of Labor (DoL) produces a List of Goods Produced by Child Labor or Forced Labor as mandated by the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005. The list contains goods and countries that the DoL’s Bureau of International Labor Affairs (ILAB) identified as having a significant incidence of child labour and/or forced labour. The 2014 list comprised 136 goods and 74 countries.³

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International law

Slavery is an international crime and is illegal in all countries. The 1926 League of Nations Slavery Convention, or the Convention to Suppress the Slave Trade and Slavery, confirmed the international community’s commitment to ‘bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms’. The convention recognized that the use of compulsory or forced labour may develop into conditions analogous to slavery, but it was the outcome of negotiations between anti-slavery advocates and colonial States and therefore conceded that compulsory or forced labour may be exacted for public purposes and required that ‘in territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice’.

This set the framework for the 1930 ILO Forced Labour Convention (ILO 29) which reinforced the commitment to ‘suppress the use of forced or compulsory labour in all its forms within the shortest possible period’, and the 1957 ILO Abolition of Forced Labour Convention (ILO 105) which requires States to never impose forced labour as ‘a means of political coercion or education, punishment for expressing political views or participating in strikes, mobilising labour for economic development, for labour discipline, or for racial, social, national, or religious discrimination’. Within the framework of the UN, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery specifically addressed practices similar to slavery, or debt bondage, serfdom, the sale of wives, and child servitude.

The principle that no one shall be held in slavery or servitude is embedded in international human rights law, most importantly in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights. In spite of the long series of commitments by the international community to work towards the elimination of slavery and all forms of forced labour, the practice persists unabated on a wide scale and under new forms. Recognizing this, in mid-2014 the ILO adopted an additional instrument, the Protocol to the Forced Labour Convention of 1930, setting out new obligations to prevent forced labour, to protect victims, and to provide access to remedy. It also addresses modern-day practices such as human trafficking. The protocol will enter into force in late 2016. Only seven countries have ratified the protocol so far: the Czech Republic, France, Mali, Mauritania, Niger, Norway, and the United Kingdom (UK).

Implementation of the prohibitions and commitments set out in the above international instruments is monitored by UN and ILO bodies. Of particular importance within the UN framework are the Human Rights Committee, a group of independent experts tasked with monitoring the implementation of the International Covenant on Civil and Political Rights, the Special Rapporteur on contemporary forms of slavery - including its causes and consequences, and the Special Rapporteur on trafficking in persons, especially women and

Sources: UN, UN Treaty Collection; ILO, Ratifications of ILO Conventions.
children. Within the ILO framework, States Parties are required to submit reports reviewed annually by a
Committee of Experts. Additionally, under Art. 26 of the ILO Constitution, complaints can be lodged against
State Parties for non-compliance with a convention. Such a complaint was presented in 1996 against the
government of Myanmar for non-observance of the Forced Labour Convention. The recommendations issued
by the Commission of Inquiry established to follow up on the complaint played an important role for the
country’s international isolation.

And yet, recent statistics – whether produced by the ILO or by the Global Slavery Index – show that
implementation and monitoring mechanisms established at international, regional, and national levels to
prevent forced labour in all its forms are inadequate. Targeted efforts in Brazil, and more recently in
California and the UK, have therefore attracted significant attention not only by those directly impacted, but
equally by human rights experts and legislators in other countries that see them as models to follow.

Supply chain due diligence

Conditions analogous to slave labour have been found to be pervasive in Brazil’s rural economy, in particular
in cattle-farming, swine-herding, the cultivation of cotton, maize, soya, rice, beans and coffee, the extraction
of latex and wood, and charcoal production. The government officially recognized the existence of slave
labour in the country in 1995 and initiated a series of multi-stakeholder efforts to prevent people from falling
into forced labour and to rehabilitate victims (over 50,000, according to Ministry of Labour estimates). Key
initiatives are the establishment of the National Commission to Eradicate Slave Labour (CONATRAE) to
coordinate efforts, and the National Pact for the Eradication of Slave Labour to engage industry. Brazil also
set up a Special Mobile Inspection Group under the Ministry of Labour and labour courts in most affected
areas. One of the most powerful measures, the public release by the Ministry of Labour of a Dirty List of
businesses proven to employ forced labor was temporarily suspended for well over one year. In June 2016,
on the eve of the 2016 Olympic Games, the Supreme Court lifted an injunction issued in December 2014
following a complaint by a trade association that the Dirty List denied due process to employers.

‘As a result of the criminal natures of slavery and human trafficking, these crimes are often hidden from view
and are difficult to uncover and track. […] Consumers and businesses are inadvertently promoting and
sanctioning these crimes through the purchase of goods and products that have been tainted in the supply
chain.’ This recognition is the basis for the California Transparency in Supply Chains Act (SB 657) endorsed in
September 2010 and effective since early 2012. The law requires companies to disclose activities undertaken,
if any, to address risks of slavery and human trafficking in their supply chains with the aim of providing
consumers with information that enables them to make educated decisions. Importantly, the law does not

\[\text{\textsuperscript{4}}\text{ ILO Special Action Programme to Combat Forced Labour, Fighting Forced Labour: The Example of Brazil, 2009}
\[\text{\textsuperscript{5}}\text{ Migalhas, STF libera divulgação de lista suja do trabalho escravo, May 2016,}
http://www.migalhas.com.br/Quentes/17,M1239944,61044-STF+libera+divulgacao+de+lista+suja+do+trabalho+escravo.\]
\[\text{\textsuperscript{6}}\text{ Senate Bill No. 657, URL http://www.state.gov/documents/organization/164934.pdf.}\]
mandate that companies undertake activities to combat slavery and human trafficking, but prompts companies to engage on these issues by mandating detailed disclosure.

This approach mirrors disclosure requirements set out under section 1502 of the *Dodd Frank Wall Street Reform and Consumer Protection Act* passed by US Congress in mid-2010.\(^7\) Section 1502 mandates companies to determine and disclose whether their products are contaminated with so-called ‘conflict minerals’ in a report to the US Securities and Exchange Commission (SEC). The law aims to undermine financing of armed groups known to commit grave human rights abuses and fuel conflict in eastern Democratic Republic of the Congo (DRC) by supporting informed decisions by consumers and raising awareness among companies.\(^8\) While certain aspects of the SEC rule have been challenged, the disclosure requirement remains in place and has been effective since 13 Nov 2012.\(^9\) The humanitarian concerns that triggered section 1502 in the US also resulted in a broad, multi-stakeholder consultation under the auspices of the Organisation for Economic Co-operation and Development (OECD) that not only produced significant guidance for companies, through the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, but also strengthened stakeholders’ understanding of and commitment to human rights due diligence.\(^10\)

<table>
<thead>
<tr>
<th>Regulation</th>
<th>Date</th>
<th>Scope</th>
<th>Key requirements for business</th>
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<tbody>
<tr>
<td>California Transparency in Supply Chains Act</td>
<td>Adopted: Oct 2010</td>
<td>Retailers or manufacturers with business in California, annual worldwide gross receipts &gt;$100m filing with California Franchise Tax Board</td>
<td>Disclose via &quot;conspicuous link&quot; on company’s main website activities undertaken, if any, to address risks of slavery and human trafficking in supply chains. Activities to be covered: verification of product supply chains, audit of suppliers, certification of suppliers, internal accountability standards and procedures, training for employees and management.</td>
</tr>
<tr>
<td>UK Modern Slavery Act 2015</td>
<td>Adopted: Mar 2015</td>
<td>Companies incorporated in the UK or operating in the UK with an annual turnover &gt;£36m (incl. subsidiaries)</td>
<td>Published statement approved by director or equivalent on company’s website about steps taken, if any, during the financial year to ensure that slavery and human trafficking are not taking place in any part of the business or in the supply chain.</td>
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An important recent development in the US was the adoption of the US Trade Facilitation and Trade Enforcement Act of 2015 (HR644) in February 2016. Section 910 of the act removed part of the Tariff Act of 1930 which had previously made it legal to import goods produced by convict labour, and/or forced labour, and/or indentured labour as long as the goods could not be produced in sufficient quantities in the US to meet US consumptive demand. It further requires the Commissioner of US Customs and Border Protection to report annually on the implementation of the law by stating what has been denied entry into the US. The imported goods are subject to exclusion or seizure by the US Customs and Border Protection (CBP) and violation of the regulation may lead to criminal prosecution. Experts say that it will also provide enforcement agencies with ‘more latitude to investigate companies suspicious of forced and child labor’. To date, the CBP has issued three withhold orders issued this year under the amended act.11

These developments influenced the debate about forced labour and the importance of corporate due diligence in the UK leading up to the adoption in 2015 of the Modern Slavery Act 2015.12 Section 54 of the law sets out similar requirements to the California Transparency in Supply Chains Act, requiring that companies publish an annual statement on their efforts, if any, to tackle slavery or trafficking in their business or supply chain. The practical guidance for Transparency in Supply Chains mandated by the law and published by the UK Secretary of State emphasizes the business benefits of human rights due diligence: ‘protecting and enhancing an organisation’s reputation and brand; protecting and growing the organisation’s customer base as more consumers seek out businesses with higher ethical standards; improved investor confidence; greater staff retention and loyalty based on values and respect; and developing more responsive, stable and innovative supply chains’.13

Similarly, the European Union’s (EU) Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (the non-financial reporting directive) enacted on 22 October 2014, while not explicitly aimed at forced labour, requires publicly listed European companies and groups with more than 500 employees to provide a review of policies, principal risks, and outcomes concerning its respect for human rights and social and employee aspects. As EU member states work towards transposing the directive into national law, the European Commission has begun working on non-binding guidelines on how to report non-financial information by December 2016.

Implications for investors

Human rights groups have raised concerns about the limitations of the California Transparency in Supply Chains Act and the UK Modern Slavery Act 2015. Under both pieces of legislation, companies can comply by stating they have taken no steps to address the risk of forced labour in any form in their business and supply

chain. Additionally, while both require companies to publish statements on their website, they fail to mandate a specific report format, and neither requires companies to include the information in key financial filings. Enforcement is yet to be tested. In early 2015, California’s Attorney General notified over 1,700 companies that the State would enforce the act. To date, however, compliance has been poor. The UK Act came into force in late October 2015, with first reports to be published during 2016.

The risk of damage to a company’s reputation and loss of investor confidence can be expected to play a significant role in encouraging companies to comply with or even go beyond legal requirements. On behalf of institutional investors, ISS-Ethix systematically monitors the performance of over 15,000 companies globally across all human rights issues, including forced labour, human trafficking, and modern-day slavery, under its Norm-Based Screening service. The following section provides a couple of practical examples of situations that have been investigated and are actively monitored.

We have over the past five years investigated well over 100 allegations of corporate involvement, direct and indirect, in forced labour within various industries and across different countries. Companies are often willing to take measures to address poor human rights due diligence, yet action is generally prompted by stakeholder pressure and, crucially, investor engagement. In this context, the general notion of corporate human rights due diligence – as reflected in recent targeted legislation on forced labour – has been significantly reinforced by the endorsement of the Guiding Principles on Business and Human Rights by the UN Human Rights Council in mid-2011, and has been formally endorsed by a large number of multi-national companies. Human rights due diligence, as set out under the Guiding Principles, is ‘an on-going risk management process that a reasonable and prudent company needs to follow in order to identify, prevent, mitigate and account for how it addresses its negative human rights impacts. It includes four key steps: assessing actual and potential human rights impacts, integrating and acting on the findings, tracking responses, and communicating how impacts are addressed’. Where companies fail to acknowledge their responsibility to take preventive and corrective measures, they face serious reputational risk, and potential operational and legal risks.


### Cotton from Uzbekistan

**Background**

Allegations of the systematic mobilisation of children and adults by the state during the annual cotton harvest have plagued Uzbek’s cotton sector since the 1970s. In April 2014 Uzbekistan entered a two year multilateral agreement, titled the Decent Work Country Programme of the Republic of Uzbekistan (DWCP), with the ILO aimed at improving its application of the 13 ILO Conventions that it has ratified. Under the DWCP, Uzbekistan has committed to the development and application of a national strategy for ensuring that employment conditions within the agricultural industry comply with the ILO fundamental standards, including C105 on the Abolition of Forced Labour.

The ILO’s Committee of Experts on the Application of Conventions and Recommendations’ (CEACR) February 2016 report stated ‘that certain indicators of forced labour were observed, such as the withholding of wages, abusive working and living conditions and excessive overtime’ at the annual cotton harvest.

**Examples of companies facing controversies**

Cotton importers such as Cargill Inc, Olam International Ltd, and POSCO DAEWOO Corp.

Companies in other sectors with operations in Uzbekistan have confirmed sponsorship of the cotton harvest in country.

### Seafood from Thailand

**Background**

Since 2012 the Thai seafood industry has been plagued with reports of forced labour and trafficking. ISS-Ethix’s communications with the relevant stakeholders, including the Environmental Justice Foundation (EJF), a British based NGO that has been active in highlighting conditions in the Thai seafood industry, have indicated that the issues are not isolated to the supply chain of one retailer, but rather industry wide.

Working conditions in the industry were brought to the forefront in June 2014 by the British national newspaper, The Guardian, which reported that its investigation into the Thai seafood industry uncovered trafficking and forced labour in the fishmeal supply chains of numerous consumer retail chains. The six month investigation highlighted that annually thousands of migrants, with the assistance of employment brokers, migrate to Thailand through various ports where ‘boat captains purchase workers [...] and keep them on fishing vessels’, which operate in the international waters outside Thailand. Former captives that were interviewed by the Guardian described life on the boats as consisting of ‘20-hour shifts, regular beatings, torture and execution-style killings.’

**Examples of companies facing controversies**

Seafood distributors Thai Union Group Public Co. Ltd (Thai Union Group) and Charoen Pokphand Public Co. Ltd (CP Foods)

Retailers, such as Wal-Mart Stores, Inc. and Tesco Plc.
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