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Business and Human Rights: Global Developments

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Business and Human Rights

In this update, we provide an overview of a number of recent international developments in the area of business and human rights ("BHR"). While public policy and corporate agendas have slowed in the past several months as a result of the response to the COVID-19 pandemic, there have been recent indications that key stakeholders—including governments, multinational corporations, and non-governmental organizations ("NGOs")—are now resuming their collective focus on BHR issues, with perhaps an even heightened awareness of the importance of protecting and promoting core human rights and strengthening the resilience and sustainability of global supply chains. These recent legislative, judicial, and regulatory developments, which are detailed below, reflect the growing legal and reputational pressures on commercial organizations to take steps to effectively identify and mitigate negative human rights impacts of their global operations and supply chains.

Since our last "global developments" alert, several European states and the European Union have advanced efforts to introduce transparency or mandatory human rights due diligence ("HRDD") requirements. In addition, human rights claims relating to the global operations of multinational corporations have progressed in the courts of several jurisdictions, premised on a range of novel legal grounds. We are also seeing increased regulatory enforcement actions that have a direct linkage to human rights issues, particularly in the United States.

I. Legislative Developments

European Union

In parallel with various national legislative proposals across European states, some of which are discussed below, there are movements to harmonize business and human rights requirements at the European Union level.

Most notably, on April 29, 2020, in a webinar hosted by the European Parliament's Responsible Business Conduct Working Group, EU Commissioner for Justice Didier Reynders announced that the European Commission will move swiftly to introduce a regulation on mandatory human rights and environmental due diligence for companies, with its legislative proposal to the European Parliament and Council expected in the first quarter of next year. This announcement built upon a series of earlier steps, including the December 2019 submission by the outgoing Finnish EU Council Presidency of an "Agenda for Action on Business and Human Rights" and the publication on February 20, 2020 of a long-awaited and wide-ranging study, commissioned by the EU Commission, regarding potential regulatory harmonization options for HRDD.

Consultations to inform the Commission's legislative proposal are expected to start in the coming months. See our recent alert for a detailed overview of the comments and commitments made by Commissioner Reynders.

Separately, in December 2019 the EU High Representative for Foreign Affairs and Security Policy announced that the EU had launched preparatory work for a global sanctions regime to address serious human rights violations at the EU level, which would constitute "the European Union equivalent of the so-called Magnitsky Act in the United States." If the EU implements a Magnitsky sanctions regime, we expect it would focus on asset-freezing sanctions and travel restrictions for designated parties, including individuals believed to be involved in human rights violations, and it would (as with other EU sanctions) be directly applicable in all EU Member States. The EU initiative does not appear to have progressed significantly in recent months, although a number of members of the European Parliament have recently issued public statements pressing the EU to continue with its Magnitsky initiative despite the general slowdown of legislative business at the EU due to COVID-19.

Germany

To date, the German Government has relied on voluntary commitments by companies to mitigate human rights impacts in their global operations. In its National Action Plan on Business and Human Rights ("NAP"), the German Government committed to take legal action if, by 2020, less than 50 percent of German companies with more than 500 employees had introduced an effective HRDD process. The Government recently published the results of its monitoring of these efforts, which revealed that only 20 percent of surveyed companies are voluntarily meeting the Government's HRDD expectations.

In the wake of these findings, both the Ministry of Labour and Social Affairs and the Ministry for Economic Cooperation and Development announced that they will consider a mandatory HRDD law. A draft version of the legislation that was leaked in early 2019 proposed robust sanctions for non-compliance with HRDD obligations, including substantial fines, imprisonment, and exclusion from public procurement processes in Germany. The German Government has received substantial criticism from some business groups and support from others regarding these initiatives. Notably, in a joint statement issued in December 2019 (here), 42 German companies and a working group of investors called for a mandatory human rights and environmental due diligence law to be enacted in Germany. The statement, which had been signed by 50 companies as of January 2020, argued that introducing such a law "would help create both legal certainty and a level playing field" and "pave[] the way for ambitious regulation at the European level."

In the wake of the COVID-19 pandemic, the German government halted the national process toward a supply chain law. It now seems likely that the German government might instead support the EU-level HRDD regulation announced by Commissioner Reynders. Such support would be significant, as Germany will take over the Council Presidency in July and could play an important role in moving the regulatory process in Brussels forward.

United Kingdom

A consultation concerning proposed measures to strengthen the reporting obligations under the Modern Slavery Act closed in September 2019, and the Government is continuing to analyze the public feedback. In the meantime, reform of the Act did not form part of the legislative

program announced in the Queen's Speech immediately following the General Election in December 2019.

The Queen's Speech did, however, reference the Government's intention to develop a sanctions regime to address human rights abuse. The Foreign Affairs Committee of the House of Commons has pressed the UK Government to be proactive in establishing and implementing a Magnitsky-style sanctions regime, and UK Foreign Secretary Dominic Raab has stated that the Government intends to do so following the end of the Brexit transition period, which is currently scheduled to conclude on 31 December 2020.

The UK Government introduced a new Procurement Policy Note in September 2019, which requires central government departments, their executive agencies, and non-departmental public bodies to apply accompanying guidance—*Tackling Modern Slavery in Government Supply Chains*—to identify and manage modern slavery risks arising in connection with existing public contracts, and all new procurement activity from October 1, 2019. The Government also recently published its first Modern Slavery Act statement (voluntarily, rather than as a result of mandatory requirements), which outlined a number of its risk mitigation initiatives, particularly in the public procurement context.

Norway

On November 28, 2019, the Norwegian Ethics Information Committee—a panel of experts that was appointed by the Norwegian Government to examine whether it is possible and advisable to require businesses to disclose certain human rights-related information—called for innovative business and human rights legislation. The Committee's legislative objective is to enable consumers to better understand how their product choices affect human rights and labor conditions around the world, including the rights of workers to organize and bargain collectively.

The legislative proposal includes a novel right that would allow any person to obtain information about the steps an in-scope enterprise takes to prevent or reduce adverse impacts on human rights and working conditions. The proposal also includes expansive corporate transparency and HRDD obligations, including a duty to identify salient risks that might have an adverse impact on fundamental human rights and working standards. If implemented, the proposal would increase the pressure on in-scope businesses to trace product origins and implement risk assessment and mitigation systems.

Switzerland

In 2016, the Swiss Citizens' Initiative for Corporate Liability (the "Konzernhaftungsinitiative") secured over 100,000 signatures. The Citizens' Initiative seeks an amendment to the Swiss Federal Constitution that would establish a mandatory corporate due diligence regime for violations of human rights and environmental standards. The proposed due diligence obligation would be backed by a civil liability regime under which harmed persons would be able to sue for damages in Swiss courts. The Initiative is now likely to be put to a national referendum in line with Switzerland's legislative process.

Since late 2017, and with renewed activity in recent months, the Swiss government and two Swiss parliamentary chambers (the National Council and the Council of States) have attempted to come to a consensus on a counter-proposal to the Citizens' Initiative. A substantive counter-proposal could, theoretically, prevent the Citizens' Initiative from reaching a public vote. To date,

however, the two chambers have not been able to reach a joint position, with disagreements centering on the degree of liability and scope of due diligence obligations.

United States

The Uyghur Human Rights Policy Act of 2020 was introduced earlier this month with broad bipartisan support, and it has now passed both the Senate and the House of Representatives overwhelmingly. It will very likely be signed into law by the President. The bill draws attention to alleged human rights violations against ethnic Uyghurs in China, and would impose property-blocking and visa-blocking sanctions on foreign individuals and entities responsible for human rights abuses in China's Xinjiang Uyghur Autonomous region. It also requires various reports to Congress, including on human rights abuses in Xinjiang and the Chinese government's acquisition and development of technology to facilitate internment and mass surveillance in Xinjiang.

The near unanimous support for this bill signals the increased scrutiny by Members of Congress on the human rights situation in China, particularly with respect to Uyghur Muslims. There is other pending legislation with regard to Uyghur human rights currently before Congress that, if passed, would take even more robust and novel actions, including targeting some multinational corporations. This heightened focus on the role of multinationals that are allegedly benefiting from Uyghur forced labor has also been driven in recent months by high-profile attention of international think tanks and NGOs. Of particular note, in March 2020, a bipartisan and bicameral group of Members of Congress introduced the Uyghur Forced Labor Prevention Act, which would require companies importing goods into the United States to obtain a certification from the U.S. Government that the goods were not produced using forced labor by Uyghurs in Xinjiang. This would create a rebuttable presumption that all goods manufactured in Xinjiang are made with forced labor, unless the commissioner of U.S. Customs and Border Protection ("CBP") can certify otherwise. That bill also takes the unusual approach of expressly listing a number of multinationals "that are or have been suspected of directly employing forced labor or sourcing from suppliers that are suspected of using forced labor." The prospects of this bill's passage will depend in part on how the business community responds to the proposed legislation, as well as the committees in each chamber reviewing its implications.

Any legislation that is ultimately signed into law by the President involving the issue of Uyghur human rights would likely elicit a strong reaction and potential retaliation from the Chinese government, which holds the view that such actions infringe upon China's sovereignty.

Canada

On February 5, 2020, Senator Miville-Dechêne—an independent senator, rather than a member of the governing party—introduced proposed modern slavery legislation. If passed, Bill S-211, a fresh iteration of a prior bill (Bill C-423) originally tabled in December 2018, would:

- require in-scope entities to report on steps they have taken to prevent and reduce the risk of forced or child labor being used at any step in the production of their goods, whether in Canada or internationally;
- introduce powers for "designated persons" to enter company sites to verify compliance with the legislation, and to require corrective measures to ensure compliance; and

- amend the Customs Tariff to include a power to prohibit the importation of goods manufactured or produced wholly or partly through forced or child labor (similar to the U.S. CBP powers discussed below).

Whereas equivalent transparency legislation—in the UK, Australia, and California—has been criticized by some commentators for a perceived lack of "teeth," the Canadian bill includes significantly stronger enforcement mechanisms. For example, non-compliance with the reporting obligations would constitute a criminal offense punishable by a fine of up to CAD 250,000 (approximately USD 180,000 at the time of writing). It would also be an offense to knowingly make any false or misleading statement. An in-scope entity would be able to benefit from a defense to certain offenses committed by agents or employees by establishing that it exercised due diligence to prevent the commission of the offense. The Bill is currently being debated in the Canadian Senate and it is unclear whether it will become part of the Government's legislative agenda.

II. Judicial Developments

Canada: Supreme Court of Canada dismissed Nevsun's motion to strike

Three Eritrean nationals started proceedings in British Columbia against Canadian mining company Nevsun Resources Ltd. on behalf of over 1,000 individuals allegedly compelled to work at the Bisha mine in Eritrea, which was owned and operated by an Eritrean corporation in which Nevsun held a majority stake. The claim was initially brought as a class action but is currently proceeding on behalf of three individual claimants, as the Chambers Judge in the trial court denied the proceeding the status of a representative action. The Eritrean workers have claimed that they were indefinitely conscripted through the Eritrean military service into a forced labor regime in which they were subjected to "violent, cruel, inhuman and degrading treatment." They are seeking damages for breaches of domestic torts (including conversion, battery, unlawful confinement/false imprisonment, conspiracy and negligence) and customary international law prohibitions against forced labor; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.

Nevsun brought a motion to strike the pleadings on the bases that: (i) the "act of state" doctrine prevents domestic courts from assessing the sovereign acts of a foreign government (in this instance, sovereign acts relating to Eritrea's National Service Program); and (ii) the claimants had no reasonable prospect of success with respect to the claims based on customary international law. The Chambers Judge in the trial court and the British Columbia Court of Appeal dismissed Nevsun's motions to strike. In a judgment delivered on February 28, 2020, a majority of the Supreme Court of Canada upheld these decisions and allowed the Eritrean workers' claims to proceed.

The majority judgment held that the act of state doctrine is not a part of Canadian common law and does not serve as a bar to the Eritrean workers' claims. Conversely, the majority held that customary international law does form part of Canadian common law and that it may be possible for Canadian law to recognize a direct remedy for a breach of customary international law. Questions as to the scope and application of this potential cause of action were left open for the lower courts to develop.

The lower courts had also previously rejected Nevsun's challenges on the basis of *forum non conveniens*, holding that Nevsun had not established that Eritrea was the appropriate forum and there was a meaningful risk of an unfair trial occurring in Eritrea. This point was not appealed to the Supreme Court.

United States: Cases regarding supply chain labor standards

Plaintiffs in various U.S. states, including Texas, DC, and California, have filed claims against certain multinationals under the Trafficking Victims Protection Reauthorization Act (the "TVPRA"), alleging that those corporations have benefited from human rights abuses in their international supply chains. These cases reflect a new strategy by activists, using the TVPRA as a vehicle for litigating human rights abuse claims in the United States premised on conduct that occurred abroad. This novel legal strategy is due in part to the winnowing of the Alien Tort Statute by U.S. courts as an effective vehicle to bring allegations of human rights abuses against multinationals for extraterritorial actions. These recent TVPRA cases will therefore be closely scrutinized by the human rights community as initial court proceedings move forward.

The Netherlands: Dutch Supreme Court rules in the Urgenda climate change case

On December 20, 2019, the Dutch Supreme Court upheld an order requiring the Dutch Government to achieve a greenhouse gas emission reduction of 25% by 2020, rather than the 20% reduction that the Government had initially envisioned.

The Supreme Court interpreted the state's obligation to protect human rights under the European Convention on Human Rights ("ECHR") broadly. Specifically, the Supreme Court held that the Government's Article 2 ECHR (right to life) obligations apply where there is a direct threat to individuals, or to society as a whole. The Court also held that the Government's Article 8 ECHR (right to private and family life) obligations apply where damage to the environment threatens the private lives of individuals. The Court concluded that the Netherlands has positive obligations under the ECHR to take "reasonable and appropriate" preventative measures to protect against climate change, even if it is not certain that such threats will materialize. The Dutch Government has the discretion under the Court's ruling to determine what measures it considers to be reasonable and appropriate to protect against climate change.

While this ruling involved claims against a state rather than a corporation, the judgment is noteworthy for its broad interpretation of rights under the ECHR, particularly as they relate to climate change. The extent to which similar reasoning could be successful against a corporate defendant will likely depend on the national forum and the extent to which companies can be held liable under the ECHR and similar conventions or international climate change agreements (e.g., the Paris Agreement).

III. Regulatory Developments

Enforcement actions in the United States by Customs and Border Protection

Over the past year, CBP significantly ramped up enforcement of the forced labor prohibitions contained in Section 307 of the Tariff Act of 1930. This increased enforcement comes on the heels of the 2016 repeal of the "consumptive demand" exemption under the Trade Facilitation and Enforcement Act of 2015, which previously allowed for the importation of goods made with

forced labor where consumer demand in the United States for those goods exceeded the capacity of domestic production.

CBP's Office of International Trade, spurred by intensified Congressional oversight and public reporting, has adopted an aggressive approach to forced labor issues. Whereas only 39 Withhold Release Orders ("WROs"), which block the import of offending products into the U.S., were issued in the more than 50 years between 1953 and 2015 (and none at all between 2001 and 2015), 15 have been issued between 2016 and now. In 2019, CBP issued seven WROs, and another two earlier this month. Recent WROs have also generally been broader in scope than those issued in the past, covering a wide range of sectors and including regional and country-wide bans of products from a range of countries. Impacted products have included food, art supplies, toys, gold from artisanal mines, diamonds, rubber gloves, tobacco, and cotton. Companies importing goods into the United States should pay close attention to these developments and determine whether there are any risks in their operations or supply chains that could prompt CBP scrutiny or create other regulatory, operational, criminal, or public relations issues.

CBP also recently has begun transitioning members of Customs Trade Partnership Against Terrorism (C-TPAT)—which was originally created to develop customs-to-business counter-terrorism partnerships aimed at securing supply chains and facilitating trade with low risk of links to terrorist groups—to maintain trade and social compliance programs to help combat forced labor in supply chains. These programs must meet certain key components, including risk and impact assessments, monitoring, development and implementation of policies, and remediation of violations. Participation in them, however, would further expedite product entry into the United States while minimizing the risk of post-entry audit.

U.S. draft human rights guidance for exporters of surveillance technology

On September 4, 2019, the U.S. Department of State ("DOS") published draft *Guidance for the Export of Hardware, Software and Technology with Surveillance Capabilities and/or Parts/Know-How* (the "Guidance"). While noting the vast potential economic, defense and societal contributions of technological development, the draft Guidance stated that, in the hands of government or government-aligned authorities, certain technologies can lead to potential and actual adverse human rights impacts, including on the rights to privacy, freedom of expression, religion and belief, and association and peaceful assembly.

The Guidance is designed to assist U.S. exporters of hardware, software, and other technologies with surveillance capabilities with the implementation of the UN Guiding Principles on Business and Human Rights ("UNGPs"). Among other recommendations, the Guidance set out best practices with respect to assessing and mitigating the risks that technology could be linked to adverse human rights impacts, such as due diligence of government customers. Please see our earlier post for additional detail.

DOS invited public comment on the draft Guidance and is now assessing those comments and revising the Guidance. It is unclear to what extent, if any, the final Guidance will be incorporated into the U.S. regulatory or licensing process, whether by DOS or other agencies with export control responsibilities such as the U.S. Department of Commerce.

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Covington is one of the few international law firms that has strong expertise in the area of Business and Human Rights. Our unique team draws upon attorneys and policy experts across four continents with deep human rights backgrounds. We regularly advise clients with respect to human rights due diligence, best emerging practices in their policies and procedures, political risk mitigation, and litigation. This is done in the context of internationally recognized standards, including the UN Guiding Principles on Business and Human Rights, as well as domestic regulatory and legal regimes.

If you have any questions concerning the material addressed in this client alert, or would like further information about our Business and Human Rights capabilities, please contact the following members of our firm.

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