

## Labor and Human Rights: Supply Chain Governance

During the webinar *The New ESG: How COVID-19 Has Permanently Altered the ESG Conversation*, we asked attendees “Do you regularly audit the business practices being used in your supply chain?” In response, only 37% of participants answered “Yes.”

While these results are hardly surprising, we have begun to see companies experience pressure to address the potential human rights violations in their supply chains, particularly when they fail to responsibly source or reasonably audit their use of labor/materials. Historically, claims arising from such failures have not frequently been brought in domestic courts due to jurisdictional barriers. However, expectations that companies regulate their own supply chains have increased, and courts are now more willing to entertain lawsuits brought after lapses in oversight. Going forward, companies should consider taking a more proactive approach towards implementing supply chain diligence programs.

Included below are two class actions currently pending in U.S. and Canadian courts, which serve as examples of the kinds of allegations that can be brought against corporations for possible failures to monitor their supply chains:

### *Nevsun Resources v. Araya*

#### Canada - Allegations of Forced Labor in Eritrean Mining Operations

Three Eritrean miners sued Nevsun in 2014 on behalf of a class of 1000+ persons, alleging that they had been conscripted by Eritrea’s military service and then forced to mine a property owned by Nevsun, indefinitely. The mine in question was 60% owned by Nevsun and operated, and 40% owned, by an Eritrean sub-contractor (notably owned by Eritrea’s ruling party).

#### **The plaintiffs’ claims, each based on Canadian common law, include:**

- Violations of customary international law, including prohibitions against forced labor, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.
  - These claims were brought on the theory that customary international law is automatically incorporated into Canadian common law through a legal doctrine called adoption.
- Domestic torts, including conversion, battery, unlawful confinement, conspiracy and negligence.

#### **In February 2020, the Canadian Supreme Court rejected Nevsun’s defenses on appeal, allowing the claims to proceed:**

- The majority’s opinion held that courts retain the ***discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for international law.***
  - Courts are generally barred from assessing actions committed by foreign governments.
- The Canadian Supreme Court did not strike any of the claims brought by the plaintiffs, including the violations of customary international law (which are generally not brought against private actors):
  - The Canadian Supreme Court agreed with plaintiffs that ***a private actor’s breach of customary international law could constitute a breach of Canadian domestic law through Canada’s doctrine of adoption.***
  - The majority agreed that private actors could be held responsible for these breaches, even if customary international law has not traditionally placed such obligations on individuals (normally international law provides rights to individuals and states, but provides obligations only to states).

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## *Doe 1 et al. v. Apple Inc.*

### US – Allegations of Forced Child Labor in Democratic Republic of the Congo

In late 2019, more than a dozen unnamed plaintiffs sued major U.S. corporations that use cobalt in the production of lithium-ion batteries, including Apple, Alphabet, Inc. (parent of Google), Dell, Microsoft, and Tesla, on behalf of a proposed class. Plaintiffs alleged that each defendant is knowingly benefiting from the use of forced child laborers in cobalt mines in the Democratic Republic of Congo (the “DRC”). The claims are factually based on various media reports on child labor use in DRC mining operations, Department of Labor human rights reports, and the defendants’ use of “model” mining programs that do not go far enough in ensuring that child labor is not involved in the supply chain.

The case remains in the earliest stages of litigation, with the counsel for the defendants only having appeared in the case in late March. The parties have stipulated to a briefing schedule for any Motion(s) to Dismiss that will extend into September of this year.

#### **The plaintiffs’ claims, based on U.S. statutory law or on common law, include:**

- Violations of the Trafficking Victims Protection Reauthorization Act (the “TVPRA”), 18 U.S.C. § 1595 *et seq.*
  - A violation of the TVPRA is found for anyone who: (1) knowingly benefits (2) from participation in a venture which has engaged in the providing or obtaining of labor or services by means of forced labor (3) in knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means.
  - The statute provides for both civil and criminal actions.
    - A criminal violation of the TVPRA is punishable by fine and imprisonment ranging up to 20 years or life, depending on the severity of the violation.
  - Unlike the common law claim at issue in *Nevsun*, the TVPRA specifically provides for extra-territorial jurisdiction for U.S. courts.
- Common law claims such as unjust enrichment, negligent supervision, and intentional infliction of emotional distress

### **ESG Takeaways:**

Claims like the above demonstrate how private corporations may increasingly be held accountable for failures to monitor or regulate the business practices in their supply chains. Allegations against a company will inevitably result in the entire supply chain program being put under a microscope. If no active policy is in place, the risks posed by allegations of human rights violations increase significantly.

Companies with operations in countries with poor human rights records should consider putting in place various measures to protect their own supply chains from inadvertent participation in abusive business practices. Specifically, they should consider measures such as auditing supplier practice and material sourcing practices, implementing a responsible supply chain policy, addressing any unique rights concerns posed by their specific areas of operation, and exercising heightened precautions in areas where human rights violation are common.

As the trend towards globalization continues, companies would be well-advised to expect the actions that they (or their suppliers) take abroad to be relevant to their operations at home.