

# **39 Essex Chambers Business and Human Rights Seminar**

**6 June 2017**



[www.business-humanrights.org](http://www.business-humanrights.org)

**Business & Human Rights  
Resource Centre**

An independent non-profit  
international organisation

# What's on the horizon? Priority human rights challenges for business.

Phil Bloomer, Business and Human Rights Resource Centre

# A New Context of Chauvinist Nationalisms

- Achievements of Global Markets
- Global market failures and excesses
- Inequality and Ecological Crisis.
- Diminishing Social License to Operate of Global Markets

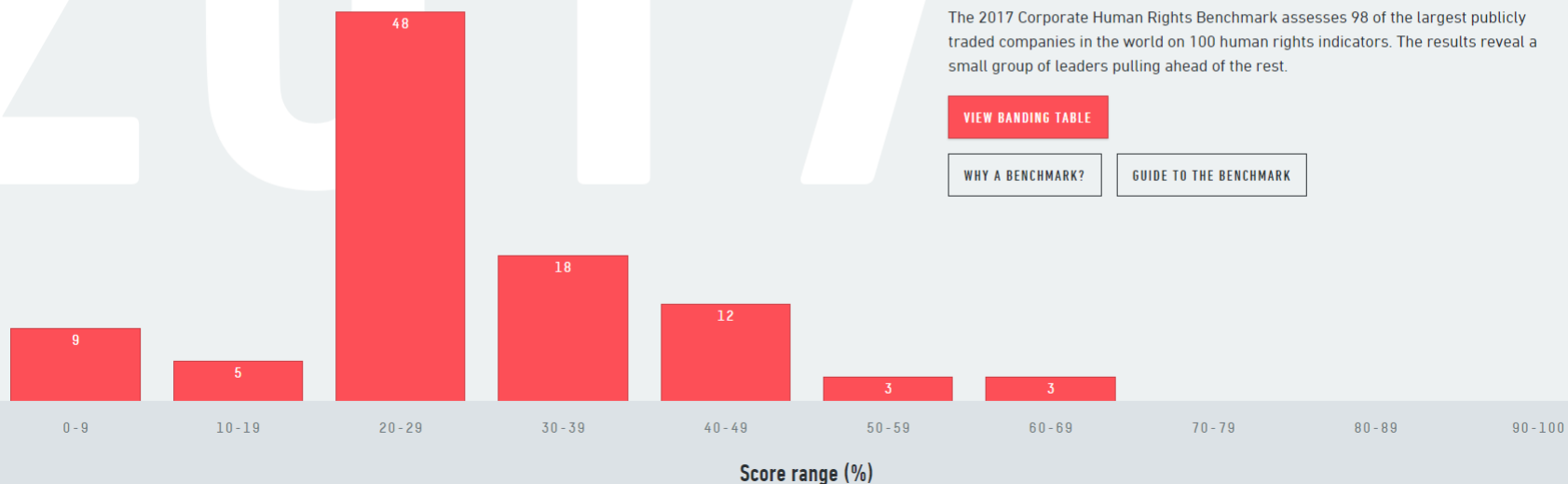
# Progress on the UN Guiding Principles

- Transformative power
- Steady but slow progress:
  - Governments' progress: National Action Plans; regulation/incentives; impunity
  - Business progress: Corporate Human Rights Benchmark.
  - Investors' progress.
  - Civil Society perspectives.



## OVERALL SCORES

No. of Companies (Total: 98)



## 2017 Results

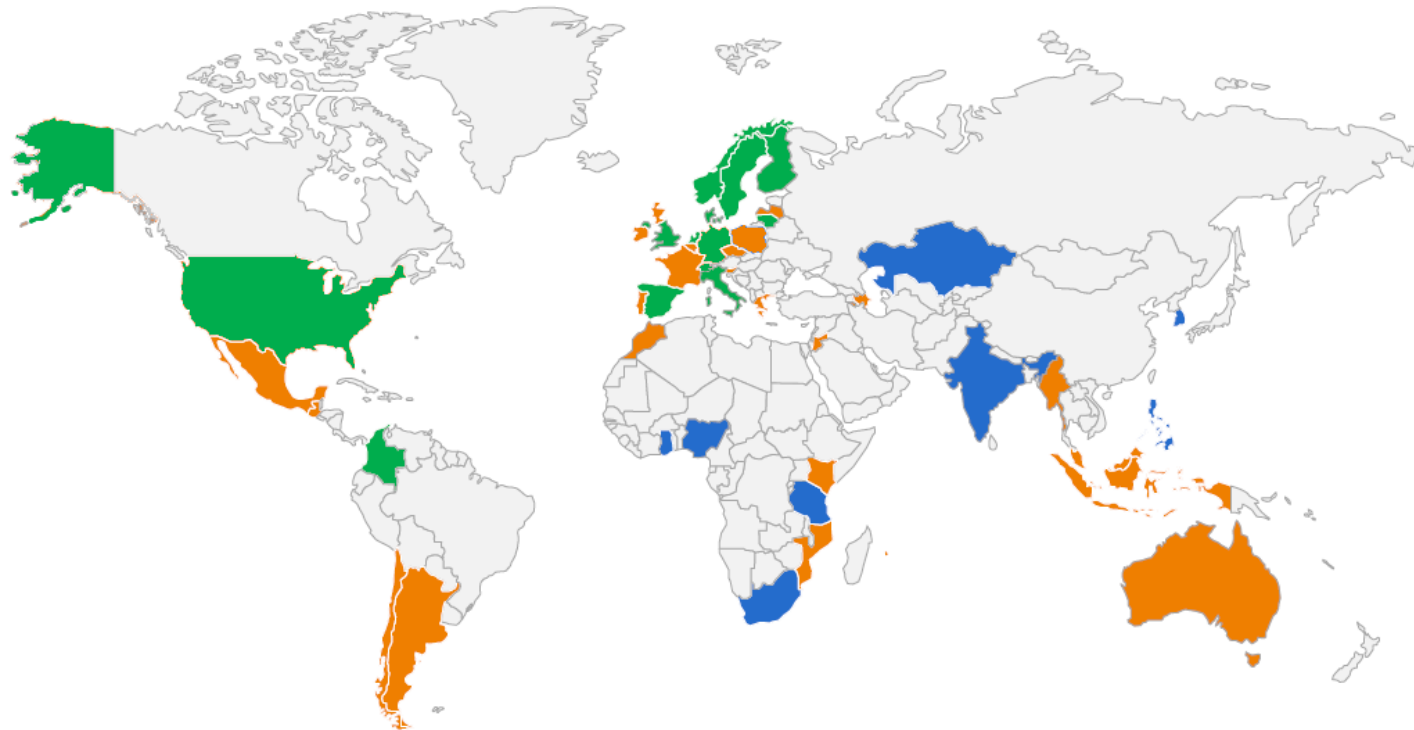
The 2017 Corporate Human Rights Benchmark assesses 98 of the largest publicly traded companies in the world on 100 human rights indicators. The results reveal a small group of leaders pulling ahead of the rest.

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[WHY A BENCHMARK?](#)

[GUIDE TO THE BENCHMARK](#)

## National Action Plans: 12 + Poland and France



**Keys:**

Published NAP

■ NAP in progress

■ NHRI / civil society action



# Human Rights Opportunities/Challenges:

- Measuring Progress and the Sustainable Development Goals:
  - Public Rankings of leaders and laggards
- Mandatory Transparency and Due Diligence, plus incentives
- Labour Rights:
  - Modern Slavery: trafficking, migrants, refugees
  - Living Wage, workers' voice, freedom of association
- Low Carbon Transition: fast and fair?
- Civic Freedoms and Human Rights Defenders

# Environmental litigation against companies

Justine Thornton QC

6 June 2017





October 12, 2014 5:52 pm

# Colombian farmers sue BP over oil pipeline's alleged impact

By Jane Croft

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BP is being sued for environmental damage that Colombian farmers allege the oil group caused to their land by building a pipeline.

## THE WEEK'S BEST IN COMPANIES



### Barclays power transition ANALYSIS

Staley pick puts investment banking at the core

### Beer domination ANALYSIS

Behind-the-scenes look at AB Inbev's £68bn deal

### Lloyds share sale ANALYSIS

Move pits retail investors against big institutions

### Changed world in Valley COMMENT

Dell-EMC deal is sign old guard of IT left behind





## Oil spills

# Shell announces £55m payout for Nigeria oil spills

Settlement avoids London High Court case and will be split with £35m paid directly to affected individuals and £20m for the Bodo community

● [A brief history of oil in Nigeria](#)



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# Nigerian oil pollution claims against Shell cannot be heard in UK, court rules

Campaigners hoped case would pave way for lawsuits to be brought against corporations for actions abroad

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# Jurisdiction of the English Courts

- Do English Courts have jurisdiction to hear the claims against UK domiciled parent company and foreign subsidiary. In particular - should English claim be stayed pending foreign proceedings?
- 3 recent High Court cases –all on appeal
- Environmental damage and/or personal injury re mining/tea production rioting/oil spills

# 3 Recent Cases

- Lungowe v Vedanta Resources [2016] (Court accepted jurisdiction)
- Okpabi v Royal Dutch Shell [2017] (Court refused jurisdiction)
- AAA v Unilever [2017] (Court refused jurisdiction on the facts)

# In summary:

- Key issue: Do the claims against parent and subsidiary have arguable merit both in substance and with regard to limitation. in claim against parent company?
- Legal basis for parent company liability: Chandler v Cape [2012]. Parent has superior knowledge and ought to have foreseen subsid would rely on knowledge and practices unsafe – fact specific.

# Disclosure of the facts

- Disclosure of company documents is vital for Claimants to establish whether/how much control the MPC had over the subsidiary

# Case management decisions on route to trial

- See decisions by Foskett J on ‘the fraught issue of e disclosure’.
- Vilca v Xtrata [2016] EWHC 389
- Vilca v Xstrata Ltd [2016] EWHC 946
- Vilca v Xstrata Ltd [2016] EWHC 1824
- Vilca v Xtrata [2016] EWHC 2757



# Disclosure and proportionality

- Judicial recognition of the importance of abuses being aired despite large costs of disclosure compared with potential quantum

“the very fact that lives were lost and serious injuries occurred is enough to weigh heavily in the balance even if the damages recoverable are relatively modest. ..something more than lip service to the [Voluntary Principles on Security and Human Rights] is demanded” (Vilca v Xtrata [2016] EWHC 389)

# Challenging claims to bring

“The central area of Antioquia has been and remains a wild and lawless place.. Jorge Mieles, the first claimant .. was killed in 2010; three employees of one of the Claimants ... were killed in 2009; one of the witnesses for the trial, who was due to give evidence by video-link, disappeared and apparently has gone into hiding; and Snr Ramirez, who did give evidence by video-link, had been shot in the neck during regional violence though, as the Claimants put it “this did not appear to impact on his ability to give testimony”” (Arroyo v Equion Energia (BP Colombia [2016] EWHC 1699 (TCC)

# Climate change litigation

- UN report on the state of climate change litigation May 2017

Zealand and Spain have both seen about one-fifth as many as Australia (16 and 13 respectively); countries and the number of countries where cases have been filed have grown in the past few years: a

Region	Country	Number of cases*
International Court of Justice		1
Inter-American Commission on Human Rights		1
United Nations Framework Convention on Climate Change		1
Africa	Nigeria	1
	South Africa	1
Asia Pacific	Australia	80
	New Zealand	16
	India	2
	Micronesia	1
	Philippines	1
	Pakistan	2
Europe	(Court of Justice of the EU)	40
	United Kingdom	49
	Spain	13
	Belgium	1
	Germany	3
	Norway	1
	Switzerland	1
	Austria	1
	Czech Republic	1
	France	4
	Ireland	1
	Netherlands	1
	Sweden	1
	Ukraine	2
Latin America and Caribbean	Colombia	1
North America	United States of America	654
	Canada	13

*\*The numbers shown here reflect our tally of climate change cases across jurisdictions as of March 2017. It is possible that these numbers omit one or more cases that have already been filed or decided but have not yet come to our attention.*

and there have been four or fewer cases filed in

<sup>15</sup> Sabin Center for Climate Change Law, Non-U.S. Climate Change Litigation: Non-U.S. Jurisdiction, <https://perma.cc/8CKE-KMQU> (accessed Mar. 3,

# Climate change litigation cont

- ‘Big’ cases are US and Dutch - e.g - seeking more aggressive national climate change policies
- UK cases focus on particular projects like expansion of airports
- Air pollution is the forerunner of climate change and is litigious in the U.K  
(ClientEarth v Government + challenges to development projects)

# MODERN SLAVERY ACT 2015

Jenni Richards QC

6 June 2017

[Jenni.Richards@39essex.com](mailto:Jenni.Richards@39essex.com)

# The scale of the problem

- *“Modern slavery is a gross injustice. It is a violation of human rights that impacts millions around the world and it is a reality that affects thousands in the UK. Until all in society acknowledge the damage this crime causes and the role it plays in our everyday life, the suffering of men, women and children across the United Kingdom and beyond will continue. Victims of modern slavery are robbed of their right to life and liberty. The children working in the mines of the Democratic Republic of Congo to produce cobalt for smartphone batteries. The Eastern European men exploited in shocking conditions in car washes across the UK. The young girls trafficked to work as tea pickers in the fields of Assam. The domestic slaves abused in wealthy London residences. The Nigerian women and girls trafficked across the Sahara to work as sex slaves in Europe. These are all individuals – someone’s mother, father, brother, sister, daughter or son – with a freedom and a future that must be fought for. Ending their suffering requires a coordinated national and international response across law enforcement, civil society, international development, humanitarian work and the private sector.”*
- Independent Anti-Slavery Commissioner, Annual Report, October 2016.

# The scale of the problem

- **45,800,000 people live in slavery today** (Global Slavery Index 2016)
- **13,000 potential victims of slavery are in the UK** (Home Office 2014)
- **21,000,000 people are victims of forced labour** (ILO 2012)



# Modern Slavery Act 2015

- In **7 parts**
- **Part 1** creates offences of holding another person in slavery or servitude, requiring another person to perform forced or compulsory labour and arranging or facilitating the travel of another person with a view to that person being exploited (human trafficking)
- Liable on conviction on indictment to imprisonment for life
- Court has the power to confiscate assets
- Court has the power to make slavery and trafficking reparation orders (effect of which is to require the person to pay compensation to the victim of the offence for any harm resulting from that offence)
- Court may order the forfeiture of a land vehicle, ship or aircraft

# Modern Slavery Act

- **Part 2** makes provision for the introduction of civil prevention orders to enable prohibitions to be imposed on convicted individuals or on individuals who have not been convicted but are involved in slavery or trafficking. **Rationale** is to enable law enforcement bodies and courts to take tougher action against those involved in trafficking and to protect individuals from the harm caused by slavery or trafficking by preventing future offending.
- **Criteria:** where court is satisfied that there is a risk that the person may commit a slavery or human trafficking offence and it is necessary to make the order for the purpose of protecting persons generally or particular persons from physical or psychological harm
- **Effect** is to prohibit the person from doing anything described in the order and can include prohibition on foreign travel
- **Interim** slavery and trafficking prevention orders may be made as well as **Slavery and trafficking risk orders** (where no conviction)
- **Guidance:** *Guidance on Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders under Part 2 of the Modern Slavery Act 2015 (April 2017)*

# Modern Slavery Act 2015

- **Part 3** is concerned with maritime enforcement and provides additional powers for law enforcement in England and Wales to tackle suspected human trafficking or slavery at sea
- Includes powers to stop and board a ship and to direct the vessel be taken to a port in England and Wales or elsewhere and detained there
- Powers to search a vessel and any person or object on that vessel
- Power to require a person on the vessel under investigation to give information about themselves or about anything on the vessel
- Powers of arrest where reasonable grounds to suspect a slavery or human trafficking offence has been committed on the vessel under investigation
- Power to use reasonable force where necessary in order to perform these functions
- Powers of hot pursuit in UK waters

# Modern Slavery Act 2015

- **Part 4** creates the post of the Independent Anti-Slavery Commissioner
- **Functions** are to encourage good practice in the prevention, detention, investigation and prosecution of slavery and human trafficking offences and in the identification of victims of those offences
- **Requirement** to prepare a strategic plan and submit an annual report
- **Co-operation:** Commissioner may request a specified public authority to co-operate with him and the specified public authority must so far as reasonably practicable comply with such a request

# Modern Slavery Act 2015

- **Part 5** is concerned with the protection of victims
- **Section 45** provides a defence for slavery or trafficking victims who commit an offence (the person is not guilty if the person was compelled to do the act which constitutes the offence and the compulsion is attributable to slavery or exploitation)
- **Section 46** extends legislative provisions relating to special measures to victims of offences under Part 1
- **Section 47** extends the provisions of civil legal aid services to individuals who are the victim of slavery, servitude or forced or compulsory labour (victims of trafficking are already eligible)
- **Section 48** provides for independent child trafficking advocates
- **Section 49** requires the Secretary of State to issue guidance about identifying and supporting victims of modern slavery & **section 50** empowers the SOS to make regulations providing for assistance and support to be provided to victims
- **Section 51** creates a presumption about age: where public authorities have reasonable grounds to believe that a person may be a victim of human trafficking and has reasonable grounds to believe the person may be under 18, the authority must assume the person is under 18 until an age assessment has been carried out
- **Section 52** imposes a duty of notification about suspected victims of slavery or human trafficking
- **Section 53** requires the Immigration Rules to make provision for leave to remain to be granted to overseas domestic workers who were victims of slavery or trafficking

# Modern Slavery Act 2015

- **Part 6** is concerned with transparency in supply chains
- **Section 54(1)** requires a commercial organisation falling within section 54(2) to prepare a slavery and human trafficking statement for each financial year of the organisation
- **Section 54(2) & (3)**: commercial organisation falls within the section if (a) supplies goods or services and (b) has a total turnover of not less than a prescribed amount [currently, £36 million] (and the definition in **section 54(12)** is of a body corporate or partnership which carries on business or part of a business in any part of the UK)
- **Section 54(4)**: a “slavery and human trafficking statement” is (a) a statement of the steps that the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business, or (b) a statement that the organisation has taken no such steps.
- Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 defines what is meant by turnover and prescribes the amount which triggers the s. 54 duty

# Slavery and human trafficking statements

- **Section 54(5)** gives guidance as to the information that may be included in such a statement. i.e. information about:
  - The organisation's structure, its business and its supply chains
  - Its policies in relation to slavery and human trafficking
  - Its due diligence processes in relation to slavery and human trafficking in its business and supply chains
  - The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place and the steps it has taken to assess and manage that risk
  - Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate
  - The training about slavery and human trafficking available to its staff
- **Section 54(6)** requires that the statement be approved by the board of directors or equivalent (or in the case of an LLP by members; and in the case of a partnership, by a partner)
- **Section 54 (7)** requires the organisation to publish its statement on its website and to include a link to the statement in a prominent place on the website's homepage (or if no website, then to supply a copy on written request: **section 54(8)**)
- **Section 54(10)** provides that the duties imposed on commercial organisations under s. 54 are enforceable by the SOS bringing civil proceedings in the High Court for an injunction

# Section 54(9) guidance

Transparency in Supply Chains etc.  
A practical guide



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# Section 54(9) guidance

- The guidance, issued in October 2015, explains what is meant by carrying on a business in the UK. Whilst the court will be the final arbiter, the government expects a *“common sense approach”* and that *“organisations who do not have a demonstrable business presence in the UK will not be caught by the provision”*.
- The guidance contains detailed advice as to the structure and content of the statement, taking each of the categories of information set out in section 54(5) and listing the information which could be included by reference to those categories.
- The guidance refers to the advice in the UN Guiding Principles on Business and Human Rights
- Due diligence procedures should be proportionate to the identified modern slavery risk, the severity of the risk and the level of influence a business may have
- Compliance with section 54 does not turn on how well a statement is written or presented

# Potential impact of section 54

- “The role that the private sector can play in tackling modern slavery, within the UK and across the globe, cannot be underestimated. Section 54 of the Modern Slavery Act, with its reporting requirement for large businesses operating in the UK, has forced the business community to discuss the topic of slavery openly to an extent that has not occurred since the days of the 19<sup>th</sup> century abolitionists. While the Modern Slavery Act has undoubtedly pushed modern slavery up the agenda and into the boardrooms of large businesses, this is just the first step. There is still much more to be done to ensure that companies produce statements that both comply with the Act’s obligations and point to decisive action being taken, as opposed to merely being a ‘tick box’ exercise. Here the role of consumer and investor pressure is crucial.”
- Independent Anti-Slavery Commissioner, 2016 report.

# Modern Slavery Act 2015

- **Part 7** contains provisions relating to:
  - interpretation
  - regulation-making powers and
  - the Gangmasters and Labour Abuse Authority
  - Commencement and extent

# Article 4, ECHR

- Section 1(2) of the Modern Slavery Act provides that references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 ECHR
- Article 4 provides that “No one shall be held in slavery or servitude” and that “No one shall be required to perform forced or compulsory labour”.
- No provision for exceptions and no derogation is permissible even in the event of public emergency
- Article 4.3 delimits scope of forced and compulsory labour – doesn’t include, e.g., military service or service exacted in the case of an emergency or calamity threatening the life or well-being of the community
- In interpreting Article 4, court will rely on other international conventions
- ECtHR has confirmed that trafficking falls within the scope of Article 4: *Rantsev v Cyprus, M v Italy & Bulgaria*
- Leading case on definition of servitude or slavery: *Siliadin v France*
- Leading cases on forced or compulsory labour: *Van der Mussele v Belgium, CN and V v France*

# Article 4 ECHR

- Article 4 also imposes positive obligations
- The **obligation to put in place an appropriate legislative and administrative framework**, requiring member states to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude and forced or compulsory labour (*Rantsev v Cyprus*)
- Positive obligations in relation to trafficking must be considered within the context of the requirements of the Palermo Protocol and Anti-Trafficking Convention. The safeguards in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims. As well as the criminal law measures, Article 4 requires states to put in place adequate measures regulating businesses often used as a cover for human trafficking.
- The **positive obligation to take operational measures** i.e. the *Osman* duty to take operational measures to protect victims or potential victims of Article 4 treatment, where the authorities are or ought to be aware of circumstances giving rise to a credible suspicion that an individual is or was at real and immediate risk of being subjected to Article 4 treatment.
- The **procedural obligation to investigate**: a duty to investigate where there is a credible suspicion that an individual's rights under the article have been violated. Does not depend on a complaint from the victim or next of kin. See also *O v Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB).

# Independent Anti-Slavery Commissioner

- Five current priorities:
  - (1) victim identification and care
  - (2) law enforcement and criminal justice
  - (3) partnerships
  - (4) private sector engagement
  - (5) international collaboration
- The areas of focus for private sector engagement are:
  - Engagement with business leaders to ensure they understand the requirements of section 54 of the Modern Slavery Act and act accordingly
  - Working closely with Seafish, a non-departmental public body set up to raise standards across the seafood industry in order to tackle slavery, and with others in the fishing industry

# Investment and Human Rights

Deok Joo Rhee QC

# *Investment and sustainable reporting*

Surge in sustainability reporting instruments worldwide

- Over the last 10 years an increase from 60 (in 2006) to 383 (in 2016).
- As at 2016: 65% mandatory, 35% voluntary. Recent growth in voluntary reporting (28% in 2013).
- Of particular importance to investors.

Stock exchanges and financial market regulators.

- Responsible for almost one third (29%) of all instruments.
- Financial regulators second after governments.
- 'For profit' stock exchanges more active.

Emerging markets

- In 2016, almost half of all identified instruments in emerging markets (including Hong Kong, Shanghai, Singapore, Kuala Lumpur).
- A means of attracting FDI?



# Coverage of reporting instruments

## 'Large' companies

- Almost half (44%) apply to 'large' companies (30% listed; 14 both listed and unlisted).
- 'large' – eg over 500 employees (EU Non-Financial Reporting Directive), by equity (over CDN\$1 billion in Bank of Canada Act) or by turnover (over US\$ 160 million in Companies Bill of India).

## All companies

- Around 40% apply to all companies (without distinction).
- Most of these (84%) issued by governments.

## SMEs

- Predominant focus on 'large' companies.
- But, SMEs often critical role in Global Value Chains (GVCs)
- A handful of countries (eg Chile and Spain) have introduced initiatives to encourage SMEs to take on reporting.

# *Drivers: corporate liability?*

## Some inroads

- Chandler v Cape plc [2012] EWCA Civ 525; Thompson v The Renwick Group plc [2014] EWCA Civ 635
- Choc v Hudbay Inc, 2013 ONSC 1414 para 27
- Garcia v Tahoe Resources Inc 2017 BCCA39

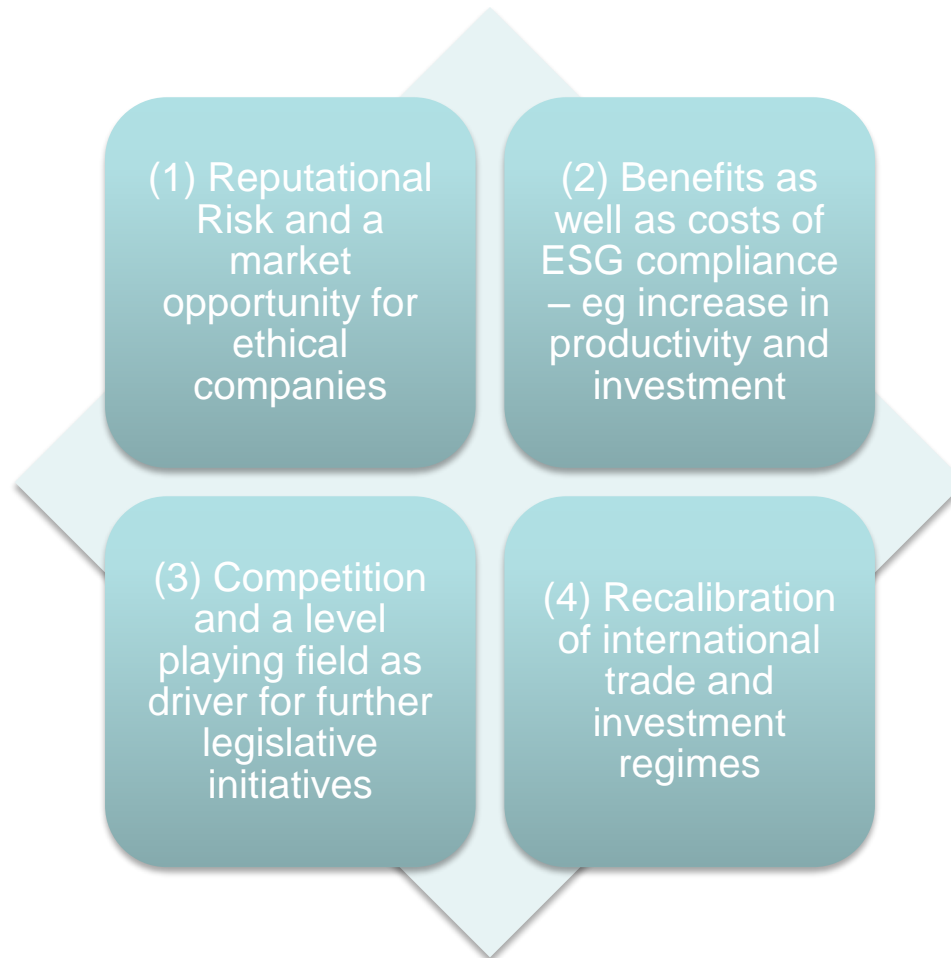
## UK Bribery Act 2010

- In the last 5 years, successful SFO prosecutions of 3 British companies, and 10 individuals for bribery and corruption overseas.
- 3 Deferred Prosecution Agreements with British companies - \$25m financial penalty plus SFO's costs, financial orders of £6.6m, and £497.25m plus interest and SFO's costs.

## Future?

- MOJ consultation on corporate economic crime (Jan 2017).
- EP Resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries.
- Legally binding treaty on business and human rights.

# *The wider context: sticks, carrots and levers*



# *A more intense scrutiny*

## Corporate law and director's duties

- Liability for incorrect statements made during the process of listing a company regarding human rights risks (EU Prospectus Directive 2003/71/EC)
- Potential liability of company directors for misleading information in annual reports under s 414C(7)(b) Companies Act. (NB arguments in *Sharp and Others v Blank and Others* [2015] EWHC 3220 (Ch).)

## Legal implications of voluntary standards

- *Vilca & Ors v Xstrata Limited* [2016] EWHC 389, paras 25, 90-91.

## Legal implications of due diligence

- Eg whether a parent company 'knew or ought to have known'.
- May extend beyond corporate group to supply chain – Californian litigation.
- Human rights due diligence as a defence (eg under the UK Bribery Act 2010, s 7(2)).

# *Increasing prevalence of investor obligations*

## Bilateral investment treaties

- Call for greater articulation of fundamental investor obligations in revised investment agreements.
- Possibility of human rights counterclaims to investment treaty claims: *Urbaser v Argentina*

## EU FTAs

- Post Lisbon - incorporation of investment chapters in EU FTAs.
- Call for the inclusion of binding sustainable development chapters in FTAs.

## Post-Brexit UK

- Economic imperatives in keeping in line with EU requirements.
- Ensuring UK's place in Global Value Chains likely to be a driving factor.
- See House of Lords House of Commons Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability.'