FAST INSIGHT 8

Remedy and reparations for modern slavery and human trafficking

About FAST

Finance Against Slavery and Trafficking (FAST) is a global public-private partnership mobilizing the financial sector to fight modern slavery and human trafficking. The FAST Blueprint (September 2019) sets out five Goals and thirty Actions for financial sector actors to address modern slavery and human trafficking. This Insight focuses on financial sector action on remedy and reparations, in line with FAST Goal 4.

Victims of modern slavery and human trafficking are entitled to an effective remedy

- The Palermo Protocol, 2014 ILO Forced Labour Protocol, Council of Europe Convention and EU Trafficking Directive all explicitly recognize the right of trafficking victims to compensation.
- The UN Guiding Principles on Business and Human Rights, and the OECD Guidelines on Multinational Enterprises, with which important national legislation such as the Australian *Modern Slavery Act 2018* (Commonwealth Act) align, also address expectations on businesses to provide or enable remedy to those suffering adverse human rights impacts, such as the effects of modern slavery and human trafficking.
- In reality, access to an effective remedy has been the exception, not the rule, for victims of trafficking and modern slavery. Victims often lack access to grievance mechanisms, and even where they do have such access these processes rarely lead to compensation, restoration or other forms of effective remedy.
- A recent study of compensation cases in Europe found that while roughly two-thirds of the trafficking cases studied resulted in compensation awards, only around 1 in 10 cases resulted in actual pay-outs. This remedy gap prolongs trauma and heightens the risk of re-victimization. So providing remedy is also a prevention measure.
- A recent decision in the England and Wales High Court of Justice established an important precedent for assessing civil damages for victims of modern slavery.

More Information

- FAST Blueprint, pp. 103-110.
- La Strada International, Justice at Last Policy Paper (2019). See also, Justice at Last.
- OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, UN Doc. A/HRC/32/19 (10 May 2016).

- Dutch International Responsible Business Conduct (IRBC) Agreements: Dutch Banking Sector Agreement (DBA), Discussion paper: working group enabling remediation (May 2019)
- Balogh & Ors v Hick Lane Bedding Ltd, EWHC 114 (2021)

Some financial institutions are beginning to take action to remedy slavery

- Some financial sector entities have begun to acknowledge their historic involvement in enabling slavery and are now seeking to provide reparations for resulting harms. Entities that cause or contribute to modern slavery are expected to provide effective remedy, as set out in the UN Guiding Principles on Business and Human Rights.

- In 2005, JPMorgan Chase filed a formal disclosure statement acknowledging the historical involvement of one of its predecessor banks in slavery in Louisiana, and set up a USD 5 million scholarship scheme as a form of reparations. In 2020, Lloyd's of London, the insurance market, committed to making reparations payments to black and minority ethnic groups to address the role of a founder in trans-Atlantic slavery. It is also undertaking further internal research.

- This action may be taken through cooperation with judicial remedies, for example by facilitating financial investigations or freezing assets. Financial institutions have a unique role to play in revealing trafficking organizations, perpetrators, gatekeepers and victims through transactions analysis. They can also help prosecutors demonstrate the profit motive and knowledge of traffickers.

- Financial transaction evidence can reduce the burden on victims by obviating the need for testimony and providing corroborating evidence. Financial investigations also open the door to broader charging and higher penalties, and have the potential to provide for restitution and compensation to victims, through asset confiscation.

- Collaborative initiatives such as The Knoble are emerging that aim to facilitate financial cooperation with law enforcement for prevention and remedy. The Knoble, a global non-profit network of experts preventing financial crime that harms vulnerable people, uses network collaboration, integrated data and technology, proven practices, and repeatable execution to increase prosecution and risk for offenders.

State-based non-judicial remedies are considering financial institutions' involvement in remedy slavery

- OECD National Contact Points (NCPs) and complaints mechanisms set up by development banks are increasingly being asked to deal with complaints relating to the involvement of financial actors in human rights harms, including some related to modern slavery.

- Between 2007 and 2011, local communities in Indonesia filed complaints through the Compliance Advisor/Ombudsman for the IFC and Multilateral Investment Guarantees Agency, relating to Wilmar, one of the worlds' biggest palm oil companies, over land rights. Mediations resulted in agreements whereby the Wilmar subsidiary company relinquished some land, mostly planted with palm, to communities who now use it to support their livelihoods.

- In 2013, victims of forced labour filed a complaint with the World Bank's independent accountability mechanism, the Inspection Panel, alleging the Bank was financing forced and child labour in an agricultural-enterprise support project in Uzbekistan. In response, World Bank management promised to implement measures to mitigate risks of perpetuating forced and child labour in its projects. This led to engagements by donors and the ILO that have reduced forced labour cases by several hundred thousand per year.

Expectations of a financier's involvement in remedy can depend on its own prior conduct

- Over time a business's linkage to modern slavery risks arising through clients or downstream partners can evolve into contribution to those risks. For example, failure to conduct expected due diligence may facilitate a borrower's causation of, or contribution to, modern slavery or human trafficking, changing the risk and responsibility picture for the lender.

- As Professor John Ruggie, author of the UN Guiding Principles, explains: "There is a continuum between contribution and linkage. A variety of factors can determine where on that continuum a particular instance may sit [including] the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it."

- In a recent OECD National Contact Point Specific Instance (case) brought on behalf of Cambodian families forcibly displaced by Phnom Penh Sugar, an Australian project financier, ANZ Bank, agreed to remedy adverse impacts arising from the project. ANZ conceded that while it had encouraged the sugar company to remedy the adverse impacts, the efforts were not successful. ANZ agreed to pay its profits to the affected communities. The Australian NCP concluded that when a bank "has gained revenue" from client's activities that cause negative impacts, "the payment of the revenues to those parties may be one way a bank can act responsibly."

- In another NCP Specific Instance, this time in Switzerland, the NCP consented to conducting arbitration proceedings regarding the business relationship between UBS, the Swiss bank, and the Chinese technology company Hikvision, alleged to be involved in forced labour schemes. UBS is alleged to be involved in the technology company through passive investment in the MSCI China Index Fund, with UBS managing shares in the name of unknown investors as a "nominee shareholder". UBS has reportedly increased its holdings even after allegations of Hikvision involvement in forced labour became well known.

More Information

- John G. Ruggie, Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context (21 February 2017).
- OHCHR, OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector (2017).
- Australian NCP, EC & IDI v. ANZ Group & ANZ Royal (2018). See also Triponel Consulting, Overview (March 2020).
- OECD Watch, The state of remedy under the OECD guidelines: understanding NCP cases concluded in 2018 through the lens of remedy (June 2019).

- National Contact Point of Switzerland, Initial Assessment Specific Instance regarding UBS Group AG submitted by the Society for Threatened Peoples Switzerland (20 January 2021).
- BSR, Seven Questions to Help Determine When a Company Should Remedy Human Rights Harm (January 2021).

Financial sector entities can use leverage to ensure the ecosystem offers effective remedy

- Where financial sector entities are linked to modern slavery or human trafficking harms, but do not cause or contribute to them, they may not be expected to provide remedy, but they may choose to enable it.

- Financial sector entities can use leverage to enable remedy. ABN Amro requires its corporate clients in high-risk sectors to have grievance mechanisms in place. Grievance mechanisms do not need to be specific to modern slavery but must be able to capture human rights related complaints.

- Use of leverage can also extend to policy advocacy. For example, in March 2021, Amalgamated Bank, a US, union-owned bank, endorsed a US bill that would create a commission to explore reparations for African-American slavery.

- Some financial actors enjoy their greatest leverage upfront – for example in organizing a syndicated loan, or in putting together a deal. This is their best opportunity to embed effective grievance and remedial mechanisms in the deal ecosystem. A failure to do so may risk increased exposure for the financial institution should harms occur, because their involvement with harm may move from one of 'linkage' to one of 'contribution'.

- Use of leverage has been considered by OECD NCP processes. In Brazil, fishermen in the State of Pernambuco alleged that the Dutch dredging company Van Oord and the Dutch export credit agency Atradius DSB failed to comply with the OECD Guidelines in two dredging projects. The Dutch NCP clarified that Atradius DSB had a responsibility to use its leverage in its business relationships to seek to prevent and mitigate the harms caused by the dredging activities (*Suape et al. vs. Atradius Dutch State Business*).

- In 2014, a complaint was brought simultaneously to the Dutch, Norwegian and the Republic of Korea OECD NCPs, concerning a steel plant and infrastructure development project in India. The plant was to be constructed by POSCO, a South Korean firm, with funding from the Dutch pension fund ABP and the Norwegian Government Pension Fund Global. Fund asset managers in both the Netherlands (APG) and Norway (NBIM) were also drawn in. The complaint called on the pension funds to seek to prevent or mitigate adverse impacts directly linked to their operations through their financial relationships with POSCO. APG worked with a coalition of investors to encourage POSCO to adopt a grievance mechanism and address alleged adverse human rights impacts (*KTNCW et al v. POSCO*).

- There is also a growing push for companies to take an 'ecosystems' approach to remedy. This treats the provision of remedy as a shared responsibility for different actors in the ecosystem in which an affected stakeholder operates. This approach means moving from a reactive footing – waiting for harms to occur – to a more proactive one, ensuring appropriate remedial mechanisms are in place before harms occur.

- Client confidentiality remains a barrier to banks opening grievance mechanism processes to allow complaints against clients, because banks may be unable to identify their clients. However, some innovators, such as ABN Amro, are working with stakeholders to develop independent bank-level grievance mechanisms open to affected stakeholders.

More Information

- Dutch International Responsible Business Conduct (IRBC) Agreements: Dutch Banking Sector Agreement (DBA), Discussion paper: working group enabling remediation (May 2019).
- OECD, Due Diligence for Responsible Corporate Lending and Securities Underwriting (October 2019).
- ABN AMRO, Human Rights Report 2020 (March 2021).

Company and non-State grievance mechanisms remain significantly under-utilized

- Both international norms and domestic disclosure regimes point to the importance of company and non-State grievance mechanisms. In Australia, for example, one recent analysis found that 70 per cent of corporate Modern Slavery Statements under the Modern Slavery Act 2018 (Cth) nominate a reporting system available for modern slavery grievances.

- Yet the real question is whether these systems are effective and being used. The same research suggested that just 3 per cent of those same Modern Slavery Statements pointed to those grievance mechanisms being used. There is extensive guidance available in the business and human rights sphere for companies looking to develop effective operational grievance mechanisms – a requirement under the UNGPs – but that guidance has not yet been well implemented in the financial sector.

- One recent study of the use of grievance mechanisms found that although "not designed to specifically detect and remedy modern slavery practices, they are taking into account, and to varying degrees applying, the UNGPs effectiveness criteria to ensure that they are trusted, used and can help to resolve modern slavery complaints." It also found, however, that "businesses need to improve trust and accessibility," and argues that "[b]uilding the legitimacy of grievance mechanisms" will help improve accessibility (Global Compact Network Australia 2021: 10).

More Information

- FairSupply, Modern Slavery Statement Trends: Tranches 1-4 (2021).
- Shift, Remediate (2014) and Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights (2014).
- Global Compact Network Australia, Effective Modern Slavery Grievance Mechanisms: A Case Study Publication for Business (March 2021) and Implementing Effective Modern Slavery Grievance Mechanisms: A Guidance Note for Business (March 2021).

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