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For more information,  
contact:

Viren Mascarenhas

+44 20 7551 2104

+1 212 556 2138

[vmascarenhas@kslaw.com](mailto:vmascarenhas@kslaw.com)

Douglass Cassel

+1 212 556 2361

[dcassel@kslaw.com](mailto:dcassel@kslaw.com)

Peter Hood

+44 20 7551 2107

[phood@kslaw.com](mailto:phood@kslaw.com)

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## King & Spalding

London

LLP

125 Old Broad Street

London EC2N 1AR

Tel: +44 20 7551 7500

New York

1185 Avenue of the Americas

New York, New York 10036-4003

Tel: +1 212 556 2100

# New Legal Obligations of Companies to Respect Human Rights in Latin America

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The business “responsibility to respect” human rights in Latin America, until recently, was governed mainly by soft law, namely the United Nations *Guiding Principles on Business and Human Rights* (“**UNGP’s**”). Two new legal developments in 2021, however, have now “hardened” the former soft law. As a result, Korean companies investing or operating in Latin America are exposed to additional legal and business risks in those jurisdictions.

These risks are similar to those stemming from a new generation of mandatory due diligence legislation coming into force in Europe (see our note on the proposed **EU Directive**). Korean companies with a global footprint can seek to mitigate these risks through the implementation of a single set of global systems and processes to identify and address human rights and climate risks associated with their supply chain, operations, products and services.

## INTER-AMERICAN COURT OF HUMAN RIGHTS JUDGMENT IN MISKITO DIVERS V. HONDURAS

The Inter-American Court of Human Rights is empowered by the American Convention on Human Rights (“ACHR”) to issue legally binding judgments against Latin American States which accept its contentious jurisdiction (nearly all except Cuba and Venezuela). In *Miskito Divers v. Honduras* (August 31, 2021), the Court made the following landmark rulings:

**Mandatory human rights regulation:** “States must establish regulations requiring companies to implement actions aimed at ensuring respect for the human rights” in the ACHR and its Protocol on economic, social and cultural rights.

**Prevention and Redress:** “Under these regulations, businesses must ensure that their activities do not cause or contribute to human rights violations, and must adopt measures to redress such violations.”



**Policies, Due Diligence and Grievance Procedures:** States must adopt measures to ensure that businesses have: “a) appropriate policies for the protection of human rights; b) due diligence processes for the identification, prevention and correction of human rights violations, ...; and c) processes that allow businesses to remedy human rights violations that result from their activities, especially when these affect people living in poverty or belonging to vulnerable groups.”

**Effective Remedies:** States must “ensure the existence of judicial or extrajudicial mechanisms that provide an effective remedy” for business-related human rights violations.

**Prevention by Business:** “Businesses should adopt, at their own expense, preventive measures to protect the human rights of their workers, as well as measures aimed at preventing their activities from having a negative impact on the communities in which they operate or on the environment.”

### ESCAZÚ AGREEMENT ON THE ENVIRONMENT

The Escazú Agreement is a multilateral treaty which came into force on April 22, 2021. It includes detailed provisions on access to environmental information, public participation in environmental decision-making processes, and access to justice in environmental matters, in Latin America and the Caribbean.

As of June 2022, the thirteen states parties include important investment destination countries such as Argentina, Chile, Ecuador, Mexico, and Panama (among others). Brazil, Colombia, and Peru are also signatories and may join the treaty in the near future.

Among the treaty's key provisions are the following:

**Right to a Healthy Environment:** “Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement.”

**Precautionary Principle:** The precautionary principle, adopted by the Agreement, cautions in effect that, in case of scientific doubt, the course of action more favorable to the environment should be favored.

**Access to Environmental Information:** The public must have access to environmental information from public authorities, including information about environmental permits and environmental impact statements for private companies.

**Public Participation:** “Each Party shall guarantee mechanisms for the participation of the public in decision making processes, ... with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including when they may affect health.” Public authorities “shall make efforts to identify the public directly affected by the projects or activities that ... may have a significant impact on the environment and shall promote specific actions to facilitate their participation.”

**Access to Justice:** States parties must ensure access to “judicial and administrative mechanisms” to challenge any decision related to access to environmental information, public participation, or any other “decision, action or omission that .... could affect the environment adversely.” Precautionary and interim measures must be available to “prevent, halt, mitigate or rehabilitate” environmental damage. Measures to facilitate the production of evidence of environmental damage should include “reversal of the burden of proof and the dynamic burden of proof.”

**Redress:** Redress may include “restitution ..., restoration, compensation ... financial penalty, satisfaction, guarantees of non-repetition, assistance for affected persons and financial instruments to support redress.”

### IMPLICATIONS FOR BUSINESS

Latin American States are required to implement the Inter-American Court's ruling and the Escazú Agreement in national legislation. Specific details of pending legislation are not yet known but they will likely mirror the mandatory human rights



due diligence legislation that we are seeing in other jurisdictions, such as the proposed EU Directive. Meanwhile, now is the time for prudent and responsible businesses to get ahead of the curve and plan to meet the new requirements. Otherwise, when the laws are implemented, companies may face serious, unanticipated legal consequences for failures to meet the business “responsibility to respect” human rights, including environmental human rights.

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