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International Organisation of Employers
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CSR & HUMAN RIGHTS NEWSLETTER

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In this newsletter

Editorial

Dear Reader

The 4th Annual UN Forum on Business and Human Rights on 16-18 November saw more participants, more panels and events, and more business representation than in previous years. This shows that the treaty process has not led to the disengagement of business from the implementation of the UN Guiding Principles; that companies in discussion with stakeholders do try to find responses to pressing issues, such as access to remedy and human rights at mega sport events; and that more trust is developing between stakeholders. These are highly positive developments of which we as the global business community can be proud.

The IOE was directly engaged at the Forum – as panellists, organisers and co-sponsors of side-events. I would especially like to thank the Chair of the IOE Policy Working Group on CSR & Human Rights, Mthunzi Mdwaba, who joined from South Africa to participate in the closing panel; Erol Kiersepi, CEO of Santa Farma, who participated in several events, including the high-level opening panel; and Michael Congiu and Brent Wilton from our partner companies Littler and the Coca-Cola Company respectively. Many of the panels can still be watched via UNTV by clicking on this link.

The next high-level UN event on business and human rights will be the Asian regional forum on business and human rights on 18 and 19 April 2016 in Qatar. I encourage business representatives from the region to save these dates and to consider participating. We can only ensure that these forums develop practical and relevant approaches to business and human rights if the business community is well represented.

I would also like to take this early opportunity to let you know that the IOE is organising two high-level conferences on business and human rights with CBI and Eversheds in London on 27 April, and on 22 September in Atlanta with the Coca-Cola Company and USCIB. You are most welcome to join these IOE network events, where the exchange of experience between peers is the main objective. More information will be circulated in due course.

The end of the year has seen some important developments for business and human rights: the French Senate rejected the controversial draft law on compulsory human rights due diligence (more on page 2) and the Drafting Group on business and human rights of the Council of Europe finalised its work on a standard on business and human rights (more on page 6). For our part, the IOE Secretariat organised a workshop on supply chain management in Bangkok jointly with the ILO Bureau for Employers' Activities (ACT/EMP). The workshop, which brought together buyers and suppliers from around the world, showed that the approaches of suppliers and buyers are actually not so divergent: the principle means of improving working conditions in producing countries is to optimise the implementation and enforcement of fundamental social and ecological standards at national level. As a follow-up to this meeting I am planning to publish regular blogs on the issue in the run-up to the discussion on Decent Work in Global Supply Chains at the 2016 International Labour Conference.

I wish you a happy holiday season and look forward to seeing you next year at one of the many up-coming events.

Yours sincerely,

Linda Kromjong
Secretary-General

Draft French due diligence law rejected by Senate

The controversial French draft law on human rights due diligence by companies, as adopted in the National Assembly (by a left-wing majority) on 30 March 2015 was rejected outright in the Senate (by a right-wing majority) on 18 November. The draft will now return to the National Assembly for a review. It is very likely that it will follow the same process: adoption at the National Assembly and rejection in the Senate. The procedure foresees then a new review by a joint committee. The whole process might not succeed before the end of the current term.

This piece of legislation was proposed by left-wing members of the French parliament with the aim of avoiding another Rana Plaza-type tragedy and making sure that MNEs take their responsibilities seriously with respect to due diligence in their supply chain.

According to the current draft:

- Only enterprises with 5,000 and more employees are covered (excluding the state and local entities)
- The requirement is to put in place a preventive "due diligence" plan to avoid causing or contributing to harm as a result of the company's own economic activity, or that of their subsidiaries and global supply chain. The scope of "due diligence" however is not specified in more detail
- In the event of no preventive plan being established, civil liability can ensue, and the company fined up to 10 million Euros
- The right to bring an action is open to NGOs

MEDEF has major concerns for the impact on France's competitiveness and attractiveness as an investment destination, since this type of system does not exist anywhere else in the world. MEDEF is also concerned by the legal risk, since the scope and boundaries of due diligence are not defined. Finally, MEDEF does not regard this punitive approach to be constructive. The right to bring an action is open to NGOs, meaning the aim is not only to remedy any damages, but to point out companies' failures. It exceeds the ordinary rules of civil liability.

The rejection of the draft law is a positive step, although the plenary discussions were very ideological. The Minister of the Economy, Emmanuel Macron, stepped back slightly from the government's official supportive position. He acknowledged the need to take into account the negative externalities of business but stated that the issue of due diligence required a European debate. Indeed, the transposition into national legislation of the Directive 2014/95/EU of 22 October 2014 on the disclosure of non-financial and diversity information by certain large undertakings and groups could be an important first step in order to foster due diligence plans. The European directive foresees the implementation of the principle "comply or explain" which is a strong incentive. Another way could be to give more strength and more visibility to the National Contact Point's recommendations. The French NCP has been reviewing seven complaints against French companies since 2011 and has been issuing recommendations leading to win-win situations.

Garance Pineau, Deputy Director Social Affairs, MEDEF

OHCHR project on access to remedy – first draft recommendations launched

The Office of the High Commissioner for Human Rights (OHCHR) is conducting an initiative on enhancing accountability and access to remedy in cases of business involvement in human rights abuses. In June 2014, the UN Human Rights Council tasked OHCHR with developing recommendations to increase access to remedy in cases of human rights violations perpetrated by business. The recommendations will be adopted by the UN Human Rights Council in June 2016.

OHCHR has presented a first report with draft recommendations on how to make domestic legal responses fairer and more effective for victims of business-related human rights abuses, particularly in the most severe cases. In a response, the IOE acknowledged that the OHCHR work is a valuable initiative that could play an important role in improving access to remedy. That the focus is on "building up" domestic legal frameworks and institutions - rather than seeking to impose an international legal standard - is an important recognition of the role that weak domestic governance structures play in causing and/or contributing to human rights abuses.

However, it is clear that the project can only be a component in a broader scheme to improve access to remedy. In view of the fact that, in many cases, weak judicial systems are the root cause of insufficient access to remedy, measures are necessary to support governments to improve their judicial systems as well as to increase peer pressure on governments to start undertaking the necessary reforms of judicial systems.

Moreover, as the various panels in the last UN Forum on Business and Human Rights have shown, next to judicial mechanisms, non-judicial mechanisms can play a critical role in providing easily-accessible and non-bureaucratic access to remedy to victims. Thus, the OHCHR access to remedy project, focusing on a very limited part of possible measures to improve access to remedy, needs at least to show the wider context of what the challenges are and what the areas of activities are that needs to be tackled as a priority to improve access to remedy.

Key demands for the IOE are that the project fully recognize that there cannot be a "one-size-fits-all" model for corporate legal liability across domestic legal systems. The project should not seek to reform mature and well-functioning domestic legal systems for the sake of achieving consistency. The aim cannot be to harmonize national systems. Furthermore, the project must not introduce new forms of liability for incidents in the supply chain in which enterpreises are not directly complicit.

Based on the comments received, OHCHR will revise the draft recommendations and re-issue them for public consultation.

Matthias Thorns

Lawsuits involving Business Activities abroad: The Canadian Experience

Most corporations in today's globalized economy function on an international scale in various ways, including through supply chains. This reality has brought with it increased discussion of corporate influence and responsibility for activities abroad. Running parallel to this dialogue on social responsibility is the question of legal responsibility for wrongdoing by businesses operating globally and access to remedies for victims whose own nations may not provide meaningful recourse.

Many will be familiar with the Kiobel v. Royal Dutch Petroleum[1] decision from the United States Supreme Court which narrowed the types of claims of wrongdoing in foreign jurisdictions that can be considered by American courts in respect of the Alien Tort Statute. As a result, it is expected that fewer lawsuits of this kind will be filed in the United States. It is not as clear that the same trend is taking place in Canada.

In 2011 and 2012, in respect of allegations of negligence and complicity in human rights violations by Canadian-based mining companies with operations or subsidiaries abroad, Canadian courts struck out the claims of Ecuadorian plaintiffs for failure to disclose a reasonable cause of action and declined jurisdiction to hear the claims of Congolese plaintiffs on the basis that Canada was not an appropriate forum.[2] Based on these decisions, it seemed unlikely that cases of foreign wrongdoing would pass beyond preliminary challenges in Canada and prospective claimants were accordingly discouraged from launching claims.

However, in the 2013 decision in Choc v Hudbay Minerals Inc.,[3] an Ontario court dismissed a motion to strike brought by Hudbay Minerals in response to several claims filed by Guatemalan plaintiffs. The plaintiffs claimed, by way of a negligence action, that security forces working for Hudbay's Guatemalan subsidiaries had committed a variety of human rights abuses (specifically, a shooting, a killing, and gang rapes in the vicinity of a mining project). The court's procedural decision was overwhelmingly considered by legal commentators to be a marked and significant shift in the approach taken by Canadian courts.

While concluding that the plaintiffs' claims that Hudbay was directly liable for its subsidiaries' security forces' conduct were "novel," the court ultimately concluded that it was not plain and obvious that they would fail. In reaching this conclusion, the court noted a variety of international legal and corporate social responsibility standards put forward by Amnesty International, an intervenor on the motion, including the OECD Guidelines for Multinational Enterprises, the UN Protect, Respect, and Remedy Framework, and the UN Guiding Principles on Business and Human Rights, as well as public statements made by Hudbay affirming its compliance with such international standards.

Following the Hudbay decision, many expected that Canadian courts would see an influx in claims of this kind. While it is too soon to tell whether the number of claims will substantially increase, it is also unclear whether plaintiffs' claims will have greater success going forward. Indeed, the 2015 decision in Garcia v Tahoe Resources Inc.[4] casts doubt on the presence of a permanent shift in the approach of Canadian courts to such claims.

In Tahoe Resources, a British Columbia court declined jurisdiction to hear the case of seven Guatemalan farmers who brought a claim of negligence and battery for injuries they were alleged to have suffered at the hands of security personnel hired by Tahoe Resources. The court found that Guatemala was the more appropriate forum based on a number of factors, including the fact that the events alleged, the evidence thereof, and the associated injuries and losses took place in Guatemala and, further, that Tahoe Resources did not carry on business in British Columbia (despite being incorporated in that province).

1 133 S.Ct. 1659 (2013).
2 Piedra v Copper Mesa Mining Corporation, 2011 ONCA 191; Anvil Mining Ltd. c. Association canadienne contre l'impunité, 2012 QCCA 117.
3 2013 ONSC 1414.
4 2015 BCSC 2045.

While Tahoe Resources was decided on the question of the court's jurisdiction, the court stated in obiter that it was "far from clear" that the plaintiffs' claim that the company was directly liable would succeed. In making this comment, the court in Tahoe Resources appears to have stepped back from Hudbay somewhat, making it unclear whether Hudbay signals a lasting trend in Canada.

We are aware of two high-profile claims having been filed in Canadian courts following the Hudbay and Tahoe Resources decisions:

- In November 2014, a claim was filed against Nevsun Resources Ltd., a copper mining company with a mine in Eritrea. The plaintiffs, three Eritreans now residing in Canada as refugees, alleged that Nevsun Resources was complicit in the use of forced labour and inhumane treatment in the construction of its mine by a local contractor. As of writing, the parties have appeared before the courts for preliminary proceedings on trial management matters.[5]

- In April 2015, a CAD$2-billion class action against Loblaw Companies Ltd., its parent company, and its subsidiary Joe Fresh Apparel Inc. was filed in Ontario by surviving garment workers, and the families of deceased garment workers, of the Rana Plaza factory collapse in Bangladesh. The plaintiffs, whose claims have yet to be heard in court, allege that Loblaw was aware of a "significant and specific risk" to the workers in the garment factory in which its garments were made.

Undoubtedly, developments in Hudbay, the first case of its kind to move beyond jurisdictional challenges and motions to dismiss and proceed on the merits, and the claims against Loblaw and Nevsun Resources will be closely monitored by the legal and business community in Canada and abroad. We will provide updates regarding relevant developments on this emerging issue as they occur.

Brian W. Burkett, Partner, Fasken Martineau DuMoulin LLP

Draft OECD General Guidance on Risk-Based Due Diligence for Responsible Business Conduct

The OECD has launched a first concept note on General Guidance on Risk-Based Due Diligence for Responsible Business Conduct. The aim of this initiative is to develop a common approach to due diligence in order to mainstream due diligence processes across business operations and to provide a common reference point on due diligence for business subject to domestic obligations and international expectations.

There is also the idea that the general guidance could include due diligence modules that address cross-cutting issues, such as wages, forced labour, informal workers, etc. Moreover, additional clarification could be developed on how the general guidance may be applied to specific sectors.

The first discussion paper is out for comment. A revised text will be discussed at the next meeting of the OECD Working Party on Responsible Business Conduct in March 2016. This initiative has special significance also for the IOE, since the G7 committed to bring an application of a common due diligence understanding into the 2016 ILC discussion.

Matthias Thorns

Editors' Note:

IOE members and partner companies are invited to contribute articles on CSR and human rights developments in their countries or enterprises, to share information on conferences and publications within the global business community, as well as to use this newsletter to exchange worldwide experience and best practice.

Please contact Matthias Thorns (thorns@ioe-emp.org) with your submissions.

5 Araya v. Nevsun Resources Ltd., 2015 BCSC 1209, 2015 BCSC 2164.

From "Soft-Law" to "Hard-Law"? News from the Regulatory Front

There has been an increasing amount of regulatory activity imposing "hard law" ramifications for alleged human rights abuses. This activity has corresponded with parallel activity among and by civil society and the UN OHCHR, in particular the UN OHCHR's Accountability and Remedy Project that continues to progress in earnest. Civil society's efforts here, at least in part, have been motivated by a perceived regulatory gap in effective access to remedy. What cannot be disregarded, however, is that any perceived regulatory gap is being narrowed. The following are some examples:

Anti-Trafficking Developments

In the United States (US), the Federal Acquisition Regulation (FAR) was amended in March, 2015 to place increasing responsibilities on entities doing business with the US government to ensure that trafficking is eradicated from all levels of their supply chains. The UK Modern Slavery Act, for its part, imposes similar obligations upon certain companies that have, among other factors, a sufficient presence in the UK. Although these anti-trafficking schemes are focused on maintaining and demonstrating appropriate due diligence, they also have remediation components that highlight opportunities for companies to develop or enhance their own company-level grievance mechanisms for legal compliance and greater consistency with the United Nations Guiding Principles on Business and Human Rights (UNGP).

Common Law "Duty of Care" Cases

One theory that has been percolating under common law in Canada and, to a lesser extent, in the US, is that companies should be held to standards of care pursuant to certain transnational non-binding human rights instruments like the UNGP.[6] If these novel standards of care are accepted by courts, a topic of continued debate and uncertainty, liability for common-law negligence theoretically may follow.

The Alien Tort Statute (ATS) and its Progeny

The conventional wisdom is that the ATS has been considerably narrowed by the US Supreme Court's decision in Kiobel. Right or wrong, the ATS remains a viable avenue for human rights litigation despite the Kiobel Court's instructions that the ATS can only be applied if the alleged conduct bears a sufficient nexus to the US.[7] Moreover, a recently-enacted California law, AB15, may expand liability for companies with sufficient presence in California for civil actions that, by way of example, allege "assault, battery, or wrongful death, when the conduct would also constitute torture, genocide, a war crime, an attempted extrajudicial killing, or a crime against humanity, as defined."[8] The scope of this statutory development remains unclear.

Consumer Fraud Cases

In August and September, 2015, six class-action lawsuits were filed in California alleging that corporate defendants misled consumers in California about the absence of slavery within their respective supply chains. This novel theory targeted corporate defendants' alleged failure to abide by their own corporate representations, including supplier codes of conduct, as well as disclosures pursuant to the California Transparency in Supply Chains Act. These cases remain pending.[9]

These recent developments deserve additional monitoring and may portend additional activity in this space along with, of course, the continued dialogue about a treaty that is being furthered by the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

Michael Congiu, Shareholder, Littler

6 For more analysis on these cases, see https://www.littler.com/files/2015_9_insight_in_canada_foreign_workers_seek_to_use_international_norms.pdf
7For more analysis on ATS developments, see https://www.littler.com/files/press/pdf/2014_9_ASAP_Ninth_Circuit_Case_Portends_Implications_Alien_Tort_Claims_Act_Liability.pdf
8 http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB15
9 For more analysis on these cases, see https://www.littler.com/files/2015_10_insight_california_laws_are_being_used_to_advance_human_rights_claims_based_on_global_supply_chain_activities.pdf

IOE marked Human Rights Day 2015 with an article by Secretary-General, Linda Kromjong

Click on the link to access : **Business and Human Rights: gaining traction, but SMEs crucial to keeping up the momentum**

Council of Europe's standard on business and human rights finalised

The Council of Europe (CoE) has been engaged in drafting a non-binding treaty to address perceived gaps in the implementation of the UN Guiding Principles on Business and Human Rights. The CoE is not the European Union, but an international organisation of 47 countries with its headquarters in Strasbourg, France. The Drafting Group on Business and Human Rights of the CoE has now adapted a draft non-binding standard on business and human rights.

Ensuring the perspective of business was taken into account, the IOE participated in every meeting of the drafting group, including the sixth and final meeting on 2 – 4 November 2015, when the draft standard on business and human rights was finalised. The new instrument is expected to be adopted by the Committee of Ministers at its next meeting, in Spring 2016. The implementation of the Standard will be examined by the Committee of Ministers three years after its adoption.

The Standard is very much focused on the third pillar of the UN Guiding Principles (access to remedy), and especially on promoting extraterritorial jurisdiction. However, it does not go beyond the UNGPs, nor does it pave the way for new mandatory obligations on reporting and due diligence.

Matthias Thorns

IOE signs joint statement on Human Rights and Mega-Sporting Events

On 19 and 20 November the Institute for Human Rights and Business (IHRB), the Swiss Government and Wilton Park organised a meeting aimed to build consensus on the need for specific measures of ensuring mega-sporting events (MSEs) meet the potential of their founding values with regard to human rights and social inclusion, as well as contributing to sustainable development. One idea being explored was for an independent centre for human rights learning and methods of oversight and accountability in the delivery of MSEs. Such an initiative would respond to growing calls to enhance the social benefit and to minimise adverse human rights impacts of MSEs by providing a venue for knowledge transfer, capacity-building and accountability across sporting traditions.

The meeting explored various approaches and gleaned interest from specific stakeholders in trialling specific projects, including testing the feasibility of embedding human rights due diligence within MSE candidature procedures and host city contracts. There was a strong call to "stop talking and start doing" and participants expressed their firm support, as well as the need for the engagement of all the relevant MSE organisers such as IOC, FIFA and the Commonwealth Games Federation, all of whom were represented at the meeting.

Speaking of the IOE's engagement in the discussions, Linda Kromjong said: "The IOE, as the global voice of businesses, has a key role to play in addressing human rights issues associated with global events of all kinds. Business has a keen interest in ensuring sustainable MSEs and looks forward to being part of the solution."

The IOE was also one of the joint signatories, with ILO, ITUC and OHCHR, of a statement in support of the organisers' aims for this event, in which they committed to actively engage in the discussions and further joint action in line with their respective mandates. The Statement can be found here.

Matthias Thorns

New capacity-building tools on CSR and business & human rights

A number of capacity-building tools have been developed on CSR and Business & Human Rights in recent months targeted to an employers' audience. In a nutshell these are:

eLearning Module on CSR and Business & Human Rights Instruments

What is it?

- Computer-based self-learning tool
- Introduction to CSR and Business & Human Rights instruments for Employers' Organizations' staff and members
- Interactive and comprehensive learning approach through videos, quizzes, graphics etc.
- Starting point for companies that want to engage with such instruments or get inspired

Content?

- Overview of main instruments at European and international level on CSR and Human Rights (UN Guiding Principles; OECD Guidelines; ILO MNE Declaration; UN Global Compact; ISO 26000; EU CSR Strategy)
- Main points of convergence and differences between the instruments
- Step-by-step approach to companies' engagement

Published in June 2015. Available in English on http://lempnet.itcilo.org -> Resources / Online Training Modules. The French and Spanish versions will be released in 2016.

Guide on CSR and Human Rights – what does it mean for companies in supply chains?

What is it?

- Publication
- Provide practical guidance for companies on the UN Guiding Principles on Business and Human Rights (UNGPs)
- For companies in supply chains, notably SMEs and buyer companies

Content?

- Business Case to clarify
  - why it is important for SMEs to get involved with CSR and Business & Human Rights
  - growing importance of CSR and human rights in buyer supplier relations
- Step-by-step guidance for SMEs on how to develop and implement:
  - a policy commitment
  - Human Rights due diligence
  - effective grievance mechanisms
- Guidance for Buyers to inform about
  - Code of Conduct
  - engagement with suppliers
  - auditing and training
  - corrective measures
  - termination policies
- Short list of resources
  - list of human rights
  - further sources of guidance

Published in October 2015. Available in English on http://lempnet.itcilo.org -> Resources / Training Guides.

These tools have been developed by the ITCILO Programme for Employers' Activities (ACTEMP-Turin) in cooperation with the IOE, BDA, MEDEF, Confindustria and BUSINESSEUROPE. For more information, please contact Jeanne Schmitt, Senior Programme Officer, ITCILO, at: j.schmitt@itcilo.org

Coming in 2016: Compendium of good practices from Employers' Organizations in the field of CSR and Business & Human Rights

DON'T MISS: IOE-CBI-EVERSHEDS Conference on Business and Human Rights, 27 April, London

IOE, CBI and EVERSHEDS are jointly organising on 27 April 2016 a conference for business representatives and company practitioners on business and human rights.

Key themes are:

- Implementing the UK Anti-Slavery Act: Successes, Challenges and Solutions
- Draft UN Human Rights Council recommendations to improve access to remedy – progress or a missed opportunity?
- Beyond doing no harm – Companies' engagement in the SDGs
- GRI, RAFI & Human Rights Benchmark project – What is really relevant?
- Due Diligence requirements – what developments at national and European level?

Please register with Anetha Awuku (awuku@ioe-emp.org) by 18 April 2016.

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