

Outside Counsel

Expert Analysis

Top 10 Developments in Business And Human Rights in 2018

Legal developments in the field of business and human rights continued to be dynamic and expanding in 2018, through national legislation, common law and transnational tort suits, new soft law instruments and drafting exercises, institutional innovation, and a treaty drafting exercise at the UN.

While potential corporate exposure was narrowed in the United States by the Supreme Court ruling in *Jesner v. Arab Bank*, elsewhere norms were tightened and the risk of liability for non-compliance may have risen. Companies operating in multiple national jurisdictions are well advised to keep abreast of these trends.

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The compliance by businesses with their human rights obligations continued to deepen in 2018. Here are some of the key cases

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and legislative developments in the field.

OECD Due Diligence Guide

In May the Organization for Economic Co-operation and Development published the OECD Due Diligence Guide for Responsible Business Conduct. Covering due diligence for human rights, employment and indus-

trial relations, the environment, bribery and extortion, consumer interests, and disclosure, the Guide is meant to be supplemented by industry and company-specific procedures. Its human rights chapter is designed to be consistent with the UN Guiding Principles on Business and Human Rights. The OECD Guide is required reading for business executives and counsel responsible for anticipating, avoiding and mitigating potentially adverse impacts of business activities on human rights.

Swiss Human Rights Due Diligence Bill

In June the lower house of the Swiss Federal Assembly, responding to a more sweeping citizen initiative proposal, approved a bill by which large Swiss companies would be required to carry out human rights due diligence and risk being held legally liable, if they do not, for human rights violations committed by their overseas subsidiar-

ies over which they exercise actual control. If enacted, the law would be broadly similar to the French *Loi de Vigilance* adopted in 2017, and would be the second such law globally. At year's end, the upper house of the Federal Assembly had not yet acted on the measure.

Canadian Ombudsman

In January Canada's Minister of International Trade announced an innovative approach to BHR: the creation of an independent Canadian Ombudsperson for Responsible Enterprise. The Ombudsperson will investigate alleged human rights abuses linked to Canadian corporate activity abroad; assist in collaboratively resolving disputes between affected communities and Canadian companies; and independently investigate, report, recommend, remedy and monitor implementation. The Ombudsperson will initially focus on the mining, oil and gas, and garment sectors, and later expand to other business sectors. The Ombudsperson will be guided by, among other norms, the OECD Guide and the UN Guiding Principles (see above).

UK: Tort Liability of Parent Companies

Recent years have seen significant monetary settlements of common law tort suits in the United Kingdom against British parent

companies for negligent supervision of the activities of their foreign subsidiaries allegedly harming human rights and the environment. The UK Supreme Court has yet to rule on the legal theory underlying these cases. In 2018, the Supreme Court accepted for review the case of *Lungowe v. Vedanta Resources plc* [2017] EWCA Civ 1528, in which

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the Court of Appeal allowed a suit to proceed against a British parent company for alleged failure to supervise its copper mining subsidiary in Zambia adequately, resulting in contamination allegedly harming the persons and property of over 1,800 Zambians. The case will be argued in January 2019, and could prove to be a landmark on parent company liability in human rights cases.

U.S.: No ATS Jurisdiction Over Foreign Corporations

In *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018), the U.S. Supreme Court by a 5-4 vote further narrowed the jurisdictional reach of the Alien Tort Statute (ATS) over alleged violations of human rights by business. In *Kiobel v. Royal Dutch Shell*, 569 U.S. 108 (2013), the court previ-

ously ruled that the ATS does not reach torts committed outside the United States, unless they touch and concern the United States with sufficient force. In *Jesner*, the court held that there is no ATS jurisdiction over suits against foreign corporations, even if their alleged tortious acts are sufficiently connected to the United States.

Australian Modern Slavery Act

In November, Australia's Parliament passed the world's second national Modern Slavery Act. It will require large businesses (and government departments) to report annually on human trafficking, forced labor and similar violations in their own activities and in their supply chains, and on steps they take to combat these practices. The Act is broader than the British Modern Slavery Act, but narrower than the similar Act adopted by the State of New South Wales which, unlike the federal Act, imposes penalties of over A\$1 million for failure to report. The Australian government says that civil penalties for non-reporting may be considered when the federal Act comes up for review in three years.

Draft Treaty on Business and Human Rights

After four years of tortoise-paced talks in Geneva, the Ecuadorian chair of the UN Intergov-

ernmental Working Group to draft a “legally binding instrument” on business and human rights published the first draft of a proposed treaty in July and of an optional protocol in August. However, the Working Group session in October was marked by the absence of States such as the United States, Australia and Canada; a statement by the European Union that it was not prepared to engage on substance; and active participation by relatively few States. Although a revised draft and Working Group session are scheduled in 2019, the future of the project is highly uncertain.

Human Rights Arbitration Rules

Under international trade and investment treaties, foreign companies regularly sue States before international arbitration panels for violating the rights of investors. Although these cases often affect human rights, neither the State nor its citizens generally have the right to initiate arbitrations against the companies. In November a drafting committee, chaired by former International Court of Justice Judge Bruno Simma, published for consultation the “elements” of The Hague Rules on Business and Human Rights Arbitration. Among other innovations, the Rules could be used to allow persons whose

human rights are allegedly violated to initiate arbitration proceedings against companies.

Peruvian Climate Change Suit in Germany

The impact of climate change is increasingly understood as a major human rights issue. In 2018, following a favorable decision by a German appeals court in 2017, review of expert evidence began in a suit brought by a Peruvian farmer against Germany’s largest electric utility company for carbon emissions allegedly contributing to 0.5 percent of global warming, thereby causing glaciers in the Andes to melt, endangering the farmer’s home and causing him to purchase flood insurance. *Lliuya v. RWE AG*. If the suit succeeds, it could open—yes—the floodgates for transnational climate change litigation.

‘Chevron v. Ecuador’ Arbitration

The litigation in Ecuador against Chevron for alleged contamination of the Amazon before 1992 by a subsidiary of Texaco (which in 2001 became a subsidiary of Chevron) has been a cause célèbre in certain human rights circles. However, contending that a \$9 billion Ecuadorian judgment against Chevron was the product of fraud, the company brought

an arbitration against Ecuador under the United States-Ecuador Bilateral Investment Treaty. In August 2018, the arbitral tribunal ruled unanimously for Chevron, holding that the Ecuadorian judgment was vitiated by pervasive fraud, bribery, extortion and other gross misconduct, and that Texaco’s subsidiary complied with its agreed share of environmental remediation before leaving Ecuador in the 1990s. The arbitration now proceeds to the damages phase. (Disclosure: King & Spalding represents Chevron in the arbitration.)