

Human Rights & Responsible Business Conduct



International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores
The Global Voice of Business

August 2018



Editorial

I WISH TO draw your attention to three points that merit special attention.

First, you will notice that we have changed the name of this newsletter (& the IOE's Policy Working) to "Human Rights & Responsible Business Conduct" to reflect the growing prominence of those terms and the focus of the IOE's work at the international level.



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Second, the IOE continues to be at the coalface of global policy-making and implementation efforts on human rights and, as such, this newsletter provides important updates on the IOE's work and some of its planned activities for 2019. For example:

- The IOE is currently preparing its response to the recently-released "zero draft UN Treaty" on human rights violations in the context of any business activities of a transnational character;
- The IOE recently released a paper on "State policy responses on human rights due diligence" (available in [English](#) and [Spanish](#)); &
- The IOE plans a series of workshops / events in Spain in April 2019 (tbc) to explore: (a) what support SMEs need to respect human rights; and (b) what support national employers' organizations need to provide tools and services to help their members respect human rights and comply with relevant laws and standards.

Third, we are concerned about the impact of global organisations' repeated engagement with just a small number of individual companies on this agenda. The tendency to limit engagement, panel discussions and input to easily identifiable companies can create a misleading impression that the broad business perspective is being reflected when, in fact, only a handful of business voices (sometimes just 1-2 global brands or retailers from 1-2 regions) are heard. This risks perpetuating an echo chamber effect and creating one-size-fits-all policies and tools that are disconnected from many business realities. Such a challenge is not easily overcome. We urge that all stakeholders work together to ensure the inclusion of a diverse mix of business and employer perspectives covering all regions.

Onwards!

Mthunzi Mdwaba

Chair, IOE Policy Working Group

Update on the IOE's work



Paper on "State policy responses on human rights due diligence"

In May, the IOE published a paper on "State policy responses on human rights due diligence" in response to the increased focus by policy-makers on this topic. We observe a growing narrative which asserts that for States to meet their human rights duties they should create new regulation to mandate companies to carry out human rights due diligence (either in full, or in the form of public disclosure) on their activities and supply chains. This approach to policy-making raises many risks, challenges which the IOE paper notes.

- Click to read the [English version](#)
- Click to read the [Spanish version](#)

The IOE paper includes:

- Twelve risks, concerns and challenges regarding the move towards mandatory human rights due diligence laws:
 - i. It is crucial not to blur State duties and business responsibility;
 - ii. Foreign-imposed legal "solutions" are unlikely to address deep-rooted and complex human rights challenges in many States;
 - iii. Laws can represent a de facto embargo, undermine business engagement in regions with developmental challenges, and run counter to the UNGPs' spirit;
 - iv. Laws encourage companies to take a passive, risk-averse approach that limits the potential for creative partnerships and transformative impact;
 - v. It is not easy or necessarily desirable to translate the human rights due diligence process into laws;
 - vi. There are important questions and concerns over judicial interpretation and enforcement;
 - vii. Laws unfairly target a select number of companies and misunderstand the nature of global business;
 - viii. Concerns over how legal compliance measures will impact on different types of companies up and down the value chain, especially SMEs;
 - ix. Laws on specific human rights topics pre-judge company due diligence efforts;
 - x. A spaghetti soup of laws creates confusion and potential misalignment of standards and approaches;
 - xi. Laws often ignore the role of States as an economic actor in their own right; and
 - xii. No evidence that laws have any impact on a critical stakeholder group: end consumers / high-street shoppers.
- The importance of voluntary action and soft-law standards.
- Suggestions for future policy responses.
- Annex: Examples of legal developments and other measures that have regulatory effect.



IOE-MEDEF-Sodexo International Business & Human Rights Conference (Paris)

Some 100+ business representatives participated in the IOE's sixth "International Business and Human Rights Conference" in Paris in April. The one-day conference, convened jointly with MEDEF and Sodexo, examined important elements of the corporate responsibility to respect human rights, such as: state policy making on business and human rights; human rights due diligence; supply chain risk management; stakeholder engagement; access to remedy; and business' contribution to the Sustainable Development Goals (SDGs).

Click [here](#) to read the summary of the discussions held under the Chatham House rule.



IOE's Policy Working Group on Human Rights & Responsible Business Conduct

The Policy Working Group met in June at the end of the International Labour Conference in Geneva to discuss policy developments on human rights, as well as the challenges and opportunities facing national employers'

organizations and their members to advance respect for human rights. The discussions covered topics ranging from the UN Treaty process to the myriad business and human rights challenges in different jurisdictions and the actions being taken by national employers' organizations to support implementation of the UN Guiding Principles on Business & Human Rights. For example, one member – **ANDI** in Colombia – has a Working Group of some 40 company members that meets monthly to discuss how to implement the corporate responsibility to respect human rights.

NB: The next meeting of the Policy Working Group is scheduled to be held during the November ILO Governing Body. Members will receive a separate communication ASAP on the exact date and time. Dial-in access will be available to those members who cannot attend in person.

IOE plans for 2019

As part of the IOE's ongoing work to support national employers' organizations and their members on human rights, we are planning a series of workshops/events in Madrid (hosted jointly with CEOE) – scheduled for early April (TBC) – on the following:

- Workshop on giving SMEs the right tools & support to respect human rights (closed event).
- Workshop on the types of support national employers' organisations need to provide tools and services to help their members respect human rights (closed event).
- The IOE's seventh "International Conference on Business & Human Rights" (open multi-stakeholder event).

More information about these workshops/events will be made public in the coming months. If you have any questions, please contact Peter Hall (hall@ioe-emp.com).





UN Treaty process (IGWG chaired by Ecuador)

The draft Treaty has many provisions that would allow victims to gain access to justice and remedy including by making extraterritorial claims against a company. It would oblige States to pass laws mandating companies with business activities of a transnational character to undertake human rights due diligence throughout their activities. Legal liability would also apply to natural and legal persons and cover civil, criminal and administrative liability.



- Click [here](#) to read the "zero draft Treaty."
- Click [here](#) to visit the webpage for the IGWG fourth session.
- Click [here](#) to read the IOE's initial comments on the zero draft Treaty ([password access only](#)).

- **Monday 27th August (COB):** Please email Peter Hall (hall@ioe-emp.com) with your comments on the "**zero draft Treaty**" and your suggestions for the IOE's response to this text by this date.
- **Friday 31st August – 2.30pm Geneva time (CEST):** The IOE will host a webinar with members to discuss the "zero draft Treaty" and tactics. To register, email: humanrights@ioe-emp.com



Ex-Chilean President Michelle Bachelet appointed next UN Human Rights Chief

In August, the UN General Assembly backed Secretary-General Antonio Guterres's choice of former Chilean President Michelle Bachelet to be the next UN High Commissioner for Human Rights.

Ms. Bachelet replaces the outspoken Zeid Ra'ad Al Hussein who steps down at the end of August after deciding not to stand for a second term, citing a lack of support from big States such as the USA, China and Russia.

Ms. Bachelet, a pediatrician who was a victim of torture under the dictatorship of Augusto Pinochet, served as Chile's first female leader from 2006 to 2010 and, again from 2014 to 2018 after a term leading the "UN Women" agency.

UN Forum on Business & Human Rights



2018 United Nations Forum on Business and Human Rights
Geneva, 26-28 November

- **Date:** 26-28 November 2018
- **Location:** Palais des Nations, Geneva
- **Central theme:** "Business respect for human rights – building on what works." A major focus of the Forum will be on "human rights due diligence."
- **Concept note:** Click [here](#) to read.
- **Useful info:**
 - The IOE has pitched sessions on SMEs and informality (we await confirmation from the Forum organisers on which have been accepted into the draft programme).
 - Expect a number of events in the margins of the Forum, including the annual business-only networking event in the evening of Monday 26 November (@ the ILO – tbc).



UN Working Group publishes report on trade diplomacy & human rights

In June, the UN Working Group on Business and Human Rights presented its report to the Human Rights Council entitled: "Trade promotion and human rights - how States should use economic diplomacy to incentivize business respect for human rights." The report (A/HRC/38/48) calls on

States to better use their leverage and deploy the powerful tools of export credit, trade promotion and trade advocacy in support of their commitments under the UNGPs. Click [here](#) for a summary.

UNICEF publishes a "discussion paper" on operational-level grievance mechanisms

In June, Unicef published a **discussion paper** on operational-level grievance mechanisms. The paper suggests ways in which companies can make and run operational-level grievance mechanisms that are fit for children. The IOE provided substantive **comments** on the draft, with input from members. Some of our points were taken on board but, unfortunately, not all.



Our concerns centre on the unrealistic expectations the discussion paper sets on what a single company can be expected to do especially given that: (a) many infringements of children's rights typically occur far upstream in the supply chain whereby a harm could be directly linked to a company's operations, products or services by their business relationships; (b) infringements are often systemic to society and not unique to one company; and (c) the paper largely ignores the role of Governments, whose job it is to create an enabling environment to ensure people's fundamental welfare and dignity.

OECD update



- **New Due Diligence Guidance for Responsible Business Conduct:** In May, the OECD published a new **Due Diligence Guidance for Responsible Business Conduct** to give companies a practical and more accessible accompaniment to the OECD's MNE Guidelines. The Government-backed guidance was developed during a two-year multi-stakeholder process with direct input from **BIAC**. A key point to note is that parties involved in this process understood that the Guidance would not be used as a basis for future legislation.

- **OECD blog: What will it take to push responsible business conduct?** This blog looks at how governments can encourage international standards on responsible business conduct in business activities and supply chains.
- **New briefing paper by OECD Watch on "State of Remedy" under the OECD Guidelines:** In June, OECD Watch released a **briefing paper** that examines how effective National Contact Points (NCPs) were in providing effective access to remedy in 2017.



Alliance 8.7 update (ILO)

Alliance 8.7 - the ILO's global partnership to eradicate forced labour, modern slavery, human trafficking and child labour - has two action groups, one on supply chains and the other on migration.

- Click [here](#) to visit the new database that maps global initiatives on forced labor and human trafficking in supply chains.
- Alliance 8.7 also works closely with the new **ILO Global Business Network on Forced Labour**

Sustainable Development Goals (SDGs)

There are various efforts to translate the SDGs to business, especially as they concern respect for human rights. Two recently released documents help show companies: (i) how to take a principled, human rights-based approach to their SDG strategies and activities; and (ii) how to integrate the SDGs into corporate reporting.



15 practical examples of how business contributes to the SDGs through respect for human rights

In June, Shift and the WBCSD published **a compendium** of 15 real-life cases of how companies and multi-stakeholder initiatives are contributing to the Sustainable Development Goals (SDGs) by putting people first. These examples provide inspiration for other companies to harness innovation, leadership, influence, and partnerships to tackle negative human rights impacts and maximize positive outcomes for people, in line with the SDGs.

Business reporting on the SDGs

In July, the Global Compact and GRI launched a **practical guidance tool** for companies to integrate the SDGs into corporate and sustainability reporting. The guide helps businesses of all sizes to prioritize SDG targets to act and report on, to set related business objectives, and to measure and report on progress. It also weaves together risk management and new business models that can contribute to the advancement of the SDGs.



Spotlight on new business practice portal

Global Business Initiative (GBI) has launched a free **business practice portal** for corporate responsibility professionals and other business practitioners working to implement respect for human rights. The online portal provides helpful videos, case studies, lessons learned and insights drawn from GBI members' experience working to implement respect for human rights within their own companies. Topics that are covered on the portal include: managing business relationships; dealing with grievances; training; and using leverage.



National regulatory & other developments



Australia: The Australian Parliament continues to discuss a proposed **Modern Slavery Act**, and in August the Legal and Constitutional Affairs Committee held public hearings on the proposed law before it reports back to the Senate by 24 August.



The proposed bill includes a reporting requirement for large businesses based/operating in Australia, which have an annual consolidated revenue of more than A\$100 million, to publish an annual statement on the risks of modern slavery in their operations and supply chains and their actions to address those risks. As drafted, the bill would affect approximately 3,000 companies, and their annual slavery statements would have to be signed off at the board level and be published within six months of the publication of their annual reports. The law would also be reviewed after three years to see if it is working.



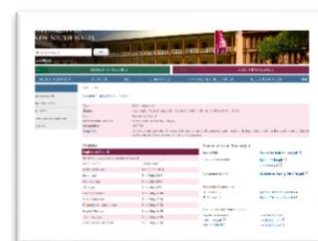
For its part, the government said it will also start publishing an annual statement on possible modern slavery risks in commonwealth procurement with the Home Affairs department producing the annual statement on behalf of the government.

The government has committed A\$3.6m to establish a "modern slavery business engagement unit" to be housed within the Home Affairs Department. The unit will advise Australian businesses on the best way to address slavery in their supply chains and operations.

While the bill has broad support across different stakeholder group, the Government faces criticism for committing \$3.6m to set up the "modern slavery business engagement unit" instead of establishing an independent Anti-Slavery Commissioner to help victims, as the UK Modern Slavery Act did and as a separate New South Wales Act has done (see below).

The submission of the Australian Chamber of Commerce and Industry (ACCI), dated July 20, to the Legal and Constitutional Affairs Legislation Committee can be found by clicking [here](#) (no. 66).

In June, a separate Modern Slavery bill was passed by the New South Wales state Parliament (known as "**the NSW Act**") that requires commercial organisations with at least one employee in NSW, and who have a total annual turnover of at least \$(A)50 million, will be required to publish an annual modern slavery statement. There is no clear timetable as to when the new law will come into force.



The challenge for business of having two similar laws in Australia is that the reporting requirements in the NSW Act look set to overlap with and differ from the proposed federal Modern Slavery bill. The new NSW Act goes beyond the federal proposals in a number of important respects by providing penalties for non-compliance, establishing an Anti-Slavery Commissioner and controls around NSW government procurement. This is likely to lead to continuing attention on whether these aspects of the NSW Act should be incorporated at the federal level.



Bangladesh: In April, Bangladesh's High Court decided to instruct the Government not to extend the **Accord on Fire and Building Safety in Bangladesh** after its expiration on 31st May. Weeks later, the High Court **extended** the so-called Transition Accord's inspection period for six more months (until the end of December). In July, the State Minister for Labour and Employment **said** the Bangladesh Government wants the Accord and Alliance to end their activities by December adding that the country's Remediation Coordination Cell (RCC) is well-equipped to ensure safety of the garment factories.



Accord signatory brands have warned that premature shutdown of the agreement would make them reconsider their sourcing in Bangladesh. In July, partners of the Compact for Continuous Improvements in Labour Rights and Factory Safety in the RMG and Knitwear Industry in Bangladesh (**the Compact**) – including representatives from EU, US and Canadian governments, member of European Parliament, the ILO and brands and trade unions – urged the Bangladesh Government to ensure the Accord operations continue until the country's RCC is deemed ready by the multi-stakeholder Transition Monitoring Committee.

The separate **Alliance for Bangladesh Worker Safety**, which oversees factories in Bangladesh supplying to 28 global apparel brands including Gap Inc., Nordstrom, Macy's, Target and Walmart, is still negotiating whether it can continue its work after it expires this year.



Ecuador: In July, Ecuador's highest court upheld a \$9.5 billion ruling against oil company Chevron for decades of rainforest damage. While plaintiffs celebrated the decision of the constitutional court, saying that it should pave the way for indigenous tribes to receive compensation for oil spills that contaminated groundwater and soil in the Amazon home, the ruling was also seen as largely symbolic because Chevron no longer operates in or has any assets in Ecuador. This means that Ecuador's government will have to continue pressing its case and pursue assets owned by the California-based company in foreign courts, where it so far has had little luck.

Chevron was sentenced in Ecuador over environmental damage, blamed on Texaco which Chevron acquired in 2001, in the country's rainforest during oil operations from 1964 to 1990. Chevron did not deny that pollution had occurred, but blamed it on state-run Petroecuador, with which Texaco worked in a consortium. It has refused to pay the settlement on the grounds that it was the result of fraud and bribes and it has argued that a 1998 agreement Texaco signed with Ecuador after a \$40 million cleanup absolves Chevron of liability.



Earlier in July, an appeals court in Argentina rejected an attempt by Ecuador to collect the multi-billion-dollar damages, echoing earlier rulings by courts in Canada, Gibraltar and Brazil. In 2014, a US court of appeals in New York also denied Ecuador's request, arguing that the original judgment was obtained through bribery, coercion and fraud.



In an added twist, the lawyer who spent years pursuing the multibillion-dollar litigation against Chevron Corp was separately suspended in July from practicing law in New York by a US state appeals court. A five-judge panel of the Appellate Division, First Department in Manhattan found attorney Steven Donziger (pictured left) guilty of professional misconduct.

Link to news stories: [the Seattle Times](#), [Business Day](#), and [Reuters](#).



European Union: There are **renewed calls** for the EU to develop a law to tackle child labour and deforestation in the cocoa and coffee sectors. At a hearing in July, policy-makers and NGOs told the European Parliament that years of voluntary action by coffee and chocolate companies had failed to spur widespread change. They added that the EU should set mandatory standards, including due diligence legislation forcing companies to look for child labor and deforestation within their supply chains, otherwise the 2025 deadline for eliminating child labour - which was self-imposed by the international community - will not be achieved.

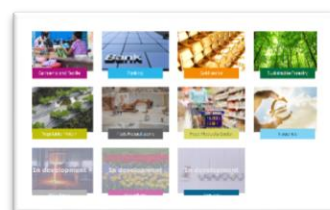
Different stakeholders also claim that a new law would even out the playing field for companies since it would mandate the whole sector to improve its practices.

Earlier this year, the European Commission published a feasibility study concluding that legislation was needed to tackle deforestation effectively.



Netherlands: Since 2014, the Dutch government has been active in developing sector-based agreements on how to address risks relating to international responsible business conduct.

The multi-stakeholder **Agreements on International Responsible Business Conduct** (IRBC) currently cover eight sectors, with three more in development. They are voluntary agreements, but they involve a firm commitment on the part of the partners to achieve two main goals: (i) to improve circumstances in high risk areas such as child labour, low wages, human rights and environmental pollution within a period of 3-5 years after signing the agreement; and (ii) to offer a collective solution to problems that businesses are unable to solve on their own.



Sectors with an agreement:

- Garments and Textiles
- Banking
- Gold
- Sustainable Forestry
- Vegetable Protein
- Pilots Natural Stone
- Food Products
- Insurance



Sector agreements being developed:

- Metallurgy
- Floriculture
- Pensions





Switzerland: In June, the Swiss House of Representatives approved a "**counter proposal**" to a "**popular initiative**" on responsible business conduct (that was spearheaded by **civil society**). The counter proposal, developed by the Legal Affairs Committee of the National Council to reach a compromise between relevant stakeholders, would establish a law mandating certain companies headquartered in Switzerland to respect human rights and the environment throughout their global operations by obliging them to carry out human rights due diligence.

The scope of the law would cover companies that meet at least two of the following thresholds: 500 employees, annual sales of CHF 80 million, and/or total assets of CHF 40 million. Smaller companies whose activities pose particular risks to human rights could also be included. It is estimated that 10,000-15,000 companies in Switzerland would be covered. The proposal also specifies that companies can only be held legally liable for activities of legal subsidiaries and injuries to life and limb or property.

TOTAL / TOTALE	
Ja / Oui / Si	121
Nein / Non / No	73
Enth. / Abst. / Ast.	2

Next steps: The counter proposal will move to the Senate for a vote. If both chambers agree to adopt the counter proposal, it's likely the popular initiative will be withdrawn.

Link to news stories: [Swiss Info](#) (English) & [AGEFI](#) (French).



USA: There have been various developments in the US courts in recent months, notably by the Supreme Court on class actions and non-union workers:

- In May, the US Supreme Court **ruled** that employers can require as a condition of employment that workers waive their right to participate in class action lawsuits, meaning that workers who take a case against an employer to court must do so as individuals. The ruling is seen as a blow to possible future class actions concerning the #MeToo movement on sexual harassment.
- In June, the US Supreme Court **ruled** that public-sector employees cannot be forced to pay fees/dues to public-sector unions to cover the costs of collective bargaining. The court overruled 41 years of precedent in deciding that requiring employees to pay fees violates their First Amendment rights. Until now, 22 states had in place a so-called "fair share" provision, which required people represented by unions who did not choose to be members of these unions to pay fees to cover the cost of the unions' collective bargaining activities. By contrast, 28 so-called "right-to-work" States barred employers from including "fair share" requirements in employment contracts. The case (*Janus v. AFSCME*) is **seen** by many as the most significant court decision affecting collective bargaining in the USA in decades.
- In August, Missouri voters **rejected** a proposal to pass a "right-to-work" law, which would have allowed employees in union-represented companies to decline to pay non-member dues to support collective bargaining efforts.





Other Updates

UK Court of Appeal - parent company liability

The UK Court of Appeal has made a number of recent decisions on UK parent company liability. Notably in July in a case involving Unilever Plc and Unilever Tea Kenya Limited, it confirmed earlier judgements that a UK parent company does not generally owe a duty of care to those who may have been affected by the activities and operations of its foreign subsidiary.



Under English law, a duty of care arises where there is proximity, foreseeability and where it is fair, just and reasonable to impose such a duty.

Hogan Lovells **noted** that the Court did not adopt the formulation for parent company liability adopted by a differently constituted bench of the same court in similar cases involving Vedanta and Shell. Instead, it noted that there were two types of case in which a parent company duty of care might arise:

- i. where the parent has in substance taken over the management of the relevant activity of the subsidiary; and
- ii. where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.



Analysis: The formulation adopted in Unilever is not necessarily inconsistent with the formulation adopted in Vedanta and Shell (which noted that a parent company duty of care might arise, inter alia, where the parent had devised a policy material to the harm or where it controlled the operations that gave rise to the harm). However, businesses seeking to understand a possible duty of care and manage risk accordingly must now reconcile these different formulations.

Corporate Human Rights Benchmark

The second rank (the "2018 Benchmark") will come out on 12th November. The CHRB is also developing a new Methodology to cover ICT companies. In May, the CHRB team launched its **2018 Progress Report** that focuses on the progress CHRB has made towards achieving its objectives, highlights where improvements can be made and also looks ahead to the next iteration of the benchmark.

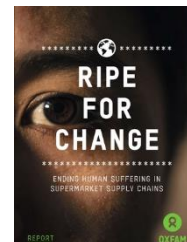


KnowTheChain

In June, KnowTheChain released its new **ICT Rank** on the action of 40 global technology companies to address forced labour in their supply chains. Intel, HP, Apple, and Hewlett Packard Enterprise led the rank.

Oxfam launches "Behind the Barcodes" campaign

In June, Oxfam kicked off a new "**Behind the Barcodes**" campaign to highlight the systemic nature of human and labour rights issues in the food supply chain and show how action by supermarkets, governments, citizens, small-scale farmers and workers could lead to a decent and dignified standard of living for millions of people.



New John Ruggie report on Millennials & Sustainable Investing

John Ruggie, author of the UNGPs, and Emily Middleton have published a working paper on "**Money, Millennials & Human Rights: Sustaining Sustainable Investing**" in which they look at the social component of ESG Investing.

Important 2018 events



13-14 September (Atlanta): IOE-USCIB-USCC "10th Atlanta Business & Human Rights Conference" - hosted by Coca-Cola

- IOE, USCIB and USCC convene a two-day conference on "collaboration through partnerships to address business & human rights trends & developments"
- Contact: Peter Hall - hall@ioe-emp.com

8-9 October (Madrid): IOE Global Forum on the Sustainable Development Goals

- Contact: Pierre Vincensini - vincensini@ioe-emp.com

15-19 October (Geneva): Fourth Session of the UN Inter-Governmental Working Group on transnational corporations and other business enterprises (UN Treaty Process)

- Click [here](#) to read the "zero draft Treaty" (released July 2018).
- Click [here](#) to visit the webpage for the fourth session.

26-28 November (Geneva): UN Forum on Business & Human Rights

- Central theme: "Business respect for human rights – building on what works"
- Monday evening (26th Nov): Business-only networking event (ILO).

10 December: 2018 Human Rights Day & 70th anniversary of the signing of UDHR

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