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NEWSLETTER ISSUE NO. 7 - NOVEMBER 2007

FROM OUR DESK

LAWHOUSE.DK TO DEVELOP IN-HOUSE CSR EXPERTISE IN THE WORLD BANK

Lawhouse.dk was selected in a competitive bid to assist the World Bank's legal department in building in-house CSR expertise to better assist the bank's operational teams with the preparation, negotiation and supervision of operations in Central America. Our concrete task will be to develop a manual for the Bank Lawyers on creating an enabling legal framework to promote diversity in the work force, based on best practices in CSR. The manual will build on an initial analysis of European and Nordic experiences compared with experiences in the context of a developing country; Honduras. The manual will eventually be disseminated among client countries in Spanish and English.

CONFERENCE WITH JOHN RUGGIE, UN'S SPECIAL REPRESENTATIVE ON BUSINESS & HUMAN RIGHTS

Lawhouse.dk partner and director, Sune Skadegaard Thorsen, organised, as Chair of the Danish Section of the International Commission of Jurists, the International Conference on Business and Human Rights 2007. The Conference, which took place on November 8-9, was prepared in close collaboration with John Ruggie's team and the Danish Ministry of Foreign Affairs, with funding from the Danish and the Canadian Ministry of Foreign Affairs and the Dreyer foundation. The conference formed part of Ruggie's series of international consultations and addressed the role of states in effectively regulating and adjudicating the activities of corporations with regard to human rights. The consultation in Copenhagen thus contributes to Ruggie's mandate to deliver recommendations for the UN approach to the strengthening the accountability of the private sector in relation to human rights. John Ruggie shall submit his recommendations in spring 2008 possibly for consideration at the Human Rights Council session in June 2008.

LAWHOUSE.DK CONTRIBUTES TO GREENLEAF'S 'CONSULTING FOR SUSTAINABLE BUSINESS'

Lawhouse.dk has been asked to contribute with an article to Greenleaf Publishing's 'Consulting for Sustainable Business'. The publication gathers articles from leading sustainability consultants on best practice consultancy across various CSR issues. Lawhouse.dk is contributing with an article on the value of human rights impact assessments, i.e. how human rights can inform social impact assessments for better protection and results for business, employees and communities – without becoming a 'Sisyphean challenge'. This involves building on existing company processes creating synergies and linkages between e.g. the process of country risk analyses

and the social (human rights) impact assessments.

CSR TRAINING OF LOCAL BUSINESS 2 BUSINESS & PUBLIC PRIVATE PARTNERSHIP COORDINATORS, DANISH MINISTRY OF FOREIGN AFFAIRS

In October Lawhouse.dk advisors Sune Skadegaard Thorsen and Troels Børrild facilitated a one-day training session on corporate social responsibility in the context of Public-private partnerships for the local coordinators from the Danish embassies. The workshop aimed at establishing a common understanding of CSR as a concept, provided training in an international best practice approach to CSR for public organisations based on international conventions and priorities for development and aimed at identifying needs for tools and capacity building locally and in the Ministry on the on-going work with CSR.

NEWS

GLOBAL

United Nations adopts Declaration on Rights of Indigenous Peoples

13 September 2007 – The General Assembly adopted a landmark declaration outlining the rights of the world's estimated 370 million indigenous people and outlawing discrimination against them – a move that followed more than two decades of debate.

The 'United Nations Declaration on the Rights of Indigenous Peoples' was approved after 143 Member States voted in favour, 11 abstained and four – Australia, Canada, New Zealand and the United States – voted against the text.

The Declaration, as a non-binding instrument, sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. The Declaration emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and

aspirations. It also prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them, and their right to remain distinct and to pursue their own visions of economic and social development.

Comments:

The declaration has been underway for decades and is still considered highly controversial. Indigenous Peoples are with the declaration moving towards a clearer recognition of their rights; rights that provide for special recognition due to the past atrocities that indigenous populations have been subjected to. It appears evident that the Indigenous Peoples (IPs) decade which was prolonged for another decade has meant a great leap forward in recognizing IPs rights. The first decade provided for focus and funds to build capacities with both international and national IPs' organisations; IPs are increasingly heard although there is still ample room for improvement. For business the declaration is a clear indication that increased recognition of the special situation of IPs requires considerations beyond those required in relation to

communities in general. A continuous point of discussion relates to the concept of Free, Prior and Informed 'Consent' as opposed that that of 'Consultation'.

UN Special Rapporteur calls for moratorium on 'pure' biofuels

The United Nations' Special Rapporteur on the Right to Food, Jean Ziegler, called for a 5 year moratorium on pure bio-fuels on Friday, 26th October, 2007. In a press conference at UN headquarters Ziegler suggested that the creation of 'pure fuels' or bio-fuels to protect the environment and reduce oil dependence was not a bad idea, but its negative impact on hunger would be catastrophic. When tons of maize, wheat, beans and other food staples are converted to fuel, food prices rise and arable land is lost to food production. Last year, the price of wheat doubled and that of maize quadrupled.

He stated that, currently, 31 of 53 African States had to import food. As prices rise, the poorest countries cannot pay, and the poorest people, generally living without access to subsistence farming, can not purchase the more expensive foodstuffs.

The amount of corn that needs to be burned to make enough ethanol to fill a single car's fuel tank can fill a child for an entire year.

Warning that converting arable land to pure fuel production is a crime against humanity, the rapporteur called for a 5-year moratorium on such activity. He offered the use of non-food agricultural products that could grow in soil unfit for food production as an alternative source of biofuels, citing a project in Rajasthan, India, where the Mercedes company is growing jatropha for biodiesel in arid land. Following a moratorium, such projects could be evaluated and new fuels produced.

<http://www.biofuelreview.com/content/view/1293/>

Comments:

The case illustrates well that a non-holistic approach to social responsibilities may lead to unwarranted risks. Considering only the mainstream focus on environmental issues could lead to one-eyed projections for investments; in this case in relation to bio-fuel. From an environmental point of view bio-fuel contains promising opportunities; however, and not judging the validity of the objections raised by Jean Ziegler, it should be obvious that the human rights impact of decisions need to be taken into account; and the impact on the right to food may in this case be detrimental.

Joint Open NGO Letter to UN Special Representative on Business and Human Rights

The mandate of Special Representative on Business & Human Rights, John Ruggie,

is entering its final phase. In spring 2008 Ruggie is to deliver his final recommendations to the UN Human Rights Council. This can be seen from the intensifying NGO interest and advocacy regarding recommendations pointing towards increased regulation on the human rights responsibilities of business. On October 10, 151 NGOs and individuals thus signed an open letter to Ruggie urging him to inter alia: 1) help to deepen the focus by the UN on actual situations relating to human rights and business, especially with regard to the perspective of victims. 2) analyze the factors driving the failure of states to adequately discharge their duty to protect, 3) assess the inherent limitation of voluntary initiatives 4) help to spread awareness of the compelling need for global standards on business and human rights.

Ruggie responded by clarifying the scope of his mandate, his previous work and his approach to the recommendatory phase. The response can be found by following this link <http://www.reports-and-materials.org/Ruggie-response-to-joint-NGO-letter-15-Oct-2007.pdf>

Ruggie has in addition to his UN mandate furthermore been asked by the International Finance Corporation to examine the impacts of investment agreements on human rights in emerging markets.

Open letter: http://www.escri-net.org/actions_more/actions_more_show.htm?doc_id=548976

IFC: <http://www.ethicalcorp.com/content.asp?ContentID=5423>

Comments:

The work of the UN SRGS will enter its, for the time being, final and most interesting stage; the recommendations. The key constituencies are awaiting the recommendations with great expectations and John Ruggie has had an incredibly tight schedule this autumn to seek input from Governments, business and NGOs. The final key consultation will take place in Geneva on the 4th and 5th December and will be concerned with the duty for corporations to respect human rights. Governments' duties to protect from corporate abuse were on the agenda in a two day consultation in Copenhagen 8th and 9th November, confer above. Based on the SRGS' second report, but also the novelty of the subject especially from governments' perspective, the most probable outcome will be a list of recommendations that point towards useful steps for the various stakeholders towards a common goal that the individuals' rights will enjoy better and more effective protection. Several recommendations must be expected in relation to the various actors reflecting the opinion of the SRGS that one 'silver bullet' does not exist to address the challenge of corporate human rights abuses.

From a public session following the consultation in Copenhagen a few key messages emerged: Firstly, the SRGS does not accept that corporations pick and choose between the rights that they choose respect – corporations will have to ensure that they do not violate any basic human right. In light of this statement it is obvious that

the common trend of reducing human rights in supply chain management to a few human rights, namely core labour rights, is not adequate. Similar considerations will have to be adopted when developing due diligence and impact assessment tools. Secondly, the SRGS clearly stated that his mandate does not cover environmental responsibilities. The SRGS thus continues to follow a strict logic to his mandate not agreeing to include rights that were not yet acknowledged universal; indeed environmental impact may have dire consequences for human rights, but such violations should be addressed through the lenses of the rights to life, to health and to a safe and healthy working environment. As mentioned in an earlier edition of this newsletter we agree entirely to this logic adding that the inclusion of a direct reference to the environment in the UN Draft Norms created an unnecessary challenge.

ASIA

India

Supreme Court sets conditions for Vedanta mine

The Supreme Court set new conditions on Britain's Vedanta Resources and its Indian unit Friday 25 October before allowing it to mine bauxite in sacred, forested hills in the east of the country. At an earlier hearing, Vedanta had promised to invest 1.12 billion rupees (USD28.4 million) to develop the poor region, but a three-judge bench said it wanted this commitment to be made by the firm's Indian unit, Sterlite Industries. Thousands of tribal people allege that the mine will destroy the hills they consider sacred, force

them from their homes and destroy their livelihoods, which are based on farming millet, hunting and collecting fruits and spices from the forests. Environmentalists say the open-cast mine would also wreck the rich biodiversity of the remote hills and disrupt key water sources that supply springs and streams in the area and feed two rivers that irrigate large areas of farmland. The court asked Sterlite to pay five percent of its annual profits from mining throughout India to the state government to be ploughed into developing the region. It also asked the company to deposit 500 million rupees with the state government, and specify how many local people would be employed in the projects. Activists were disappointed with the ruling whereas the government stated that other industrial projects in the area had contributed positively to the life of tribal people, providing direct and indirect employment and other opportunities.

<http://in.reuters.com/article/topNews/idINIndia-30177620071026>

Comments:

The case illustrates well that courts around the world are challenged to consider corporate impact on communities. This case also illustrates how Indian courts are ready to consider rights of tribal peoples, who, with reference to the new UN Declaration mentioned above, may enjoy greater protection in the future. Finally, economic, social and cultural rights are actually assessed by the Supreme Court countering the prevailing flawed notion in many Western societies, including Denmark, that these rights cannot be considered judiciable. Similar assessments have been used

by the South African courts. The International Commission for Jurists is expected to release a report spring 2008 on the 'Judiciability of Economic, Social and Cultural Rights'.

China

Changshuo Technology and job seeker with hepatitis B settle for RMB 5000 compensation on court hearing

On October 24, the first ever court case regarding hepatitis B discrimination in China was heard in Shanghai Nanhui People's Court. The court ordered the defendant, Changshuo Technology [part of Asus], to pay the plaintiff RMB 5000 (approx. USD 676) as compensation. However, the court ruled that Changshuo's rescinding of the employment contract with the plaintiff was acceptable as it was clearly stipulated in the employment contract that 'anyone failing the body check shall not be employed'.

The court's judgment raises grave concern as it is contradictory to the "Advice regarding Protection of Employment Rights of Hepatitis B Carriers" issued jointly by the Labour and Social Security Department, and the Health Department on 18 May, and the Employment Promotion Law enacted by the National People's Congress Standing Committee (NPCSC) on August 30. The law stipulates that any employer shall not refuse employment on the ground of being carriers of communicable diseases.

The plaintiff may, upon legal advice, appeal to a higher court.

<http://www.reports-and-materials.org/Changshuo->

[Technology-hep-B-settlement-24-Oct-2007.doc](#)

Comments:

Corporate focus has primarily rested on HIV/AIDS. It is obvious that a range of communicable diseases need to be included in corporate health initiatives and that the full range of diseases shall be taken into account when designing basic protection for individuals both in relation to discrimination and to privacy by governments. The case both illustrate the efforts in China to regulate more closely private enterprises in relation to the right to health, but also the great challenges facing the enormous country in terms of ensuring adequate implementation of such regulation.

USA

Trial regarding inhuman and degrading treatment of asylum seekers by private detention center

A clinical professor of law at Rutgers School of Law–Newark and co-director of the Rutgers Constitutional Litigation Clinic, presented opening arguments in September 2007 in the first case to apply international human rights standards to a U.S. corporation for events that took place on U.S. soil. *Jama et al. v. Esmor Correctional Services, Inc.* will be heard in Newark by Senior District Judge Dickinson R. Debevoise, U.S. District Court for the District of New Jersey.

The plaintiffs represented by the clinical professor of law and the Rutgers clinic are nine political asylum seekers who, while awaiting processing of their asylum claims in an Elizabeth, New Jersey detention centre run by the company Esmor, allegedly were subjected to

horrific physical and psychological abuse.

The plaintiffs will seek to establish that they endured cruel, inhuman, and degrading treatment as those terms are defined under international law. In a landmark 2004 decision, Judge Debevoise ruled that abuses committed in the U.S. against political asylum seekers can be prosecuted as human rights violations under customary international law using the 1789 statute, the Alien Tort Claims Act. Judge Debevoise has also ruled that the jury may apply the international law doctrine of command responsibility, which imposes liability on superiors, such as Esmor and its officers, when they know or should have known about subordinates' violations of international law but fail to prevent or remedy the violations. In addition, the prosecutors will present evidence that the plaintiffs' rights under the Religious Freedom Restoration Act were violated and that the defendants negligently hired, retained, supervised, and trained the guards at the Elizabeth detention facility.

The abuse against the *Jama* plaintiffs took place in 1994 and 1995. They have been represented since 1996 by Constitutional Litigation Clinic faculty and students.

<http://www.newark.rutgers.edu/news/index.php?sId=viewArticle&ArticleID=5967&prevTitle=Top+Stories&prevURL=index.php>

Comments:

Taking over government responsibilities such as running detention centres or prisons is still a relatively uncharted area under the business and human rights agenda. It must be foreseen that direct corporate obligations in relation to

human rights will be better defined in coming years; however, it is equally evident that human rights obligations for private sector actors cannot encompass the same obligations as for states; they will become more narrowly defined. However, a special situation appears when governments outsource their core functions, as presented in the case above, or when states run business directly as it is the case with a range of Oil and Gas corporations. Would the broader government obligations automatically fall on such entities? Or should governments be able to reduce its core human rights obligations simply by privatising as many functions as possible? The present lack of clarity on private sector obligations in relation to human rights renders this discussion abstract, but the dilemma needs to be addressed when further developing responsible business behaviour in relation to human rights.

The Blackwater case. House Bill Would Allow Prosecution of Contractors

The US House of Representatives approved a bill in October 2007 that would bring all United States government contractors in the Iraq war zone under the jurisdiction of American criminal law. The measure would require the F.B.I. to investigate any allegations of wrongdoing.

The House bill expands a law that in 2000 brought military contractors working with American troops overseas under jurisdiction of United States criminal law. That law has rarely been used and might not apply to companies like Blackwater, which was hired by the State Department to guard diplomats and could argue

that its work is not tied directly to war operations.

Because the Justice Department has been reluctant to prosecute crimes under the 2000 law, Congress last year approved a measure that also brought Defense Department contractors in the war zone under the Uniform Code of Military Justice, potentially subjecting them to court martial. But no prosecutions have been brought under that provision, according to watchdog groups who also said it could be unconstitutional.

But legal experts said that even if the legislation was adopted, it could prove extremely difficult to prosecute cases as it has been under existing laws. Under the law adopted in 2000, only two criminal cases have originated in Iraq, the experts said, one involving a contractor accused of possessing child pornography and another accused of attempted rape. In the attempted rape case, both the reported victim and the accused were Americans.

Under the law, responsibility for the cases falls to prosecutors in the defendant's home jurisdiction, meaning that law enforcement officials must conduct difficult and expensive investigations overseas, under dangerous conditions, then transport evidence and witnesses back to the United States.

A human rights lawyer who has been heavily involved in efforts to develop legislation that would hold contractors accountable, said in an interview that the House bill had closed an important loophole that might have allowed Blackwater employees to argue that their work was unrelated to the war effort because the company has a contract to

protect State Department diplomats not just in Iraq but around the world.

But he expressed frustration that officials had not been more proactive in prosecuting crimes in Iraq that the legal situation remains gray.

http://www.nytimes.com/2007/10/04/washington/05cong.html?_r=1&oref=slogin

As demonstrated below the Aliens Torts Claims Act may act as a better tool for addressing the challenges of private actors' human rights abuses.

Blackwater USA, the private military contractor whose heavily armed personnel allegedly opened fire on innocent Iraqi civilians in Nisoor Square in Baghdad on September 16, was sued by an injured survivor and three families of men killed in the incident, according to the legal team representing the civilians.

Filed in Washington, D.C. federal court by Talib Mutlaq Deewan and the estates of the deceased men – Himoud Saed Atban, Usama Fadhil Abbass, and Oday Ismail Ibraheem – the lawsuit claims that Blackwater and its affiliated companies violated U.S. law and “created and fostered a culture of lawlessness amongst its employees, encouraging them to act in the company's financial interests at the expense of innocent human life.”

The complaint alleges that Blackwater violated the federal Alien Tort Claims Act in committing extrajudicial killing and war crimes, and that Blackwater should be liable for claims of assault and battery, wrongful death, intentional and negligent infliction of emotional

distress, and negligent hiring, training and supervision.

The lawsuit seeks compensatory damages for death, physical, mental, and economic injuries, and punitive damages.

<http://www.ccr-ny.org/v2/newsroom/releases/pReleases.asp?ObjID=p3GB0kZue4&Content=1126>

Comments:

Interestingly the most effective address of alleged corporate abuse appeared to be civil litigation and not pursuing criminal persecution. In addition, the Blackwater scandal illustrates well the intersection between corporate and public obligations as discussed above. How are mercenaries held to account for abuses? Similar challenges occur in states where it is necessary to hire private security firms or places where corporations are obliged to use police or military units as security.

AFRICA

Anglo American sued for R20m

Former gold miners suffering from a debilitating lung disease want their former employers to compensate them for pain and suffering. The case was brought by 10 former miners against the Anglo American Corporation in the Johannesburg High Court in August 2004. No date has yet been set for the trial.

This is billed as a test case by their legal team. If the eight surviving miners, and the widows of two who have died since the case was filed, win the R20-million they are claiming, the implications would be significant. Mining

houses have recruited migrant workers for decades from areas such as the former Transkei, KwaZulu-Natal, QwaQwa, Zambia and Mozambique. In the past 20 years an estimated one million workers have left the industry.

About half of these are believed to be living with the occupation-related lung disease silicosis, or phthisis (silicosis and tuberculosis).

The miners claimed in court papers that Anglo American knew that silica dust inhalation could cause debilitating lung diseases and argued that their condition could have been prevented had proper health and safety measures, including the issuing of masks and the provision of adequate ablution facilities for black miners, been implemented.

They also charge that the company knew that levels of silica underground were often at such high levels that they posed a material risk to miners, and that preventive measures and required standards were consistently ignored, flouted or denied.

According to the plaintiffs the case has two aims: the establishment by the gold mining industry of a proper compensation fund for silicosis victims, and an effective system of medical monitoring against silicosis and TB for all former gold miners.

http://www.iol.co.za/index.php?set_id=1&click_id=15&art

[id=vn20070930090754591C491908](http://www.ft.com/cms/s/0/3027922e-54c4-11dc-890c-0000779fd2ac.html)

Comments:

South African courts are very active ensuring that corporations are tried for alleged human rights violations and the mining industry has been continuously under fire. One of the interesting features under the South African bill of rights is the fact that economic, social and cultural rights are included. To the embarrassment of many Northern countries the courts in South Africa find economic, social and cultural rights judiciable. Only a few years back a Danish Committee to evaluate the implementation of UN human rights conventions in our dualistic system found that the International Covenant on Economic, Social and Cultural Rights was not suited for implementation due to its perceived lack of judiciability, confer comment above.

EUROPE

UK

Cutting red tape 'could weaken HSE'

Moves to slash red tape could weaken the Health and Safety Executive's authority to inspect premises and tackle careless employers, ministers have been warned. A draft code aimed at reducing

bureaucracy proposes lighter regulation for compliant businesses and tougher enforcement for rogue employers.

But unions and the Centre for Corporate Accountability, a charity that promotes workplace safety, fear the proposals could inhibit the health and safety of workers. They fear that it would allow even more safety failures to be undetected and allow those breaches which are detected – even when they are serious – to escape criminal accountability.

At the heart of concerns is the requirement that regulators "allow or even encourage economic progress and only intervene when there is a clear case for protection". The draft code says enforcement should be targeted against those that "deliberately or persistently" flout the law.

<http://www.ft.com/cms/s/0/3027922e-54c4-11dc-890c-0000779fd2ac.html>

Comments:

It will be interesting to follow a development where a government based on obvious economic concerns from corporations seeks to find more cost-effective approaches in implementation of basic human rights protection; approaches that, on the other hand, may open for more abuses. Balancing economic considerations with human rights protection will continue to challenge systems thinking for governments.

UP-COMING EVENTS

Global Compact Implementation Workshop for Senior Managers

26-30 November, Turin, Italy. Contact: Jeff Senne (senne@un.org)

Employee Engagement for a Sustainable Business

3-4 December, London. www.ethicalcorp.com/employee-engagement/6

CSR at the Global Level: What Role for the EU?

7 December, Brussels. https://secure.destree.be/ei/docs/csr/csr_prog_eng.pdf

The Climate Change Summit 2008

12-13 February, London. www.ethicalcorp.com/climate

The Global Reporting Summit

3-4 March, Berlin. www.ethicalcorp.com/globalreporting

LITERATURE/LINKS

Corporate Social Responsibility: Readings and Cases in a Global Context

by [Andrew Crane: D](#)

http://www.amazon.com/Corporate-Social-Responsibility-Readings-Context/dp/0415424291/ref=sr_1_10/103-2200271-5835800?ie=UTF8&s=books&qid=1193995111&sr=1-10

Development Issues in Global Governance: Public-Private Partnerships and Market Multilateralism (Warwick Studies in Globalisation)

by [Bull & Mcneill](#)

http://www.amazon.com/Development-Issues-Global-Governance-Multilateralism/dp/0415393159/ref=sr_1_57/103-2200271-5835800?ie=UTF8&s=books&qid=1193995783&sr=1-57

The New Corporate Accountability: Corporate Social Responsibility and the Law

by [Doreen McBarnet](#) (Editor), [Aurora Voiculescu](#) (Editor), [Tom Campbell](#) (Editor)

http://www.amazon.com/New-Corporate-Accountability-Social-Responsibility/dp/0521868181/ref=sr_1_58/103-2200271-5835800?ie=UTF8&s=books&qid=1193995783&sr=1-58



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