BUSINESS AND HUMAN RIGHTS
TOWARDS UNIVERSAL CORPORATE RESPONSIBILITY FOR WESTERN COMPANIES?

ABA Congress in Paris: **Noëlle Lenoir, July 20, 2023.**

30 years ago, **John Ruggie**, professor at Harvard in Human Rights ("**HR**") and International Affairs, then appointed as UN SG's Special Representative for Business/HR, launched a movement to ensure ethical conduct of corporations expanding in countries at risk whose democratic standards are particularly low.

It turns out that this initiative as part of a broader movement known as corporate social responsibility ("**CSR**") has changed the international economic order in radically transforming the corporate liability regimes in democratic countries. It's a civilizational evolution.

On the whole, it is positive and furthermore it is inescapable.

It reflects the search for a new balance between multinationals that expand without borders and political forces that want to ensure "**responsible capitalism**» to use an expression common in Europe:

- Let's first talk about **the trend towards multinationals taking on global responsibilities** that were previously confined to national governments.

- Second, it is essential at the same time to examine **the risks of instrumentalization of justice in defense of HR** and to think about how to avoid it**.**

A. HR's protection worldwide as part of the CSR a groundbreaking trend

a) From recommendations…

In the first place, International Organizations focused their attention on issuing **recommendations addressed primarily to governments, but also in an unprecedented way to companies**. The most topical are the **UN** Guiding Principles on Business and HR and the **OECD** Guidelines for Multinational Enterprises, both published in 2011.

These recommendations urge States to enforce laws that require businesses to respect HR, and periodically to assess the adequacy of such laws. They also ask companies to conduct HR due diligence and to remediate negative impacts they have caused or contributed to.

Interestingly, the OECD Guidelines set up **a non-judicial grievance procedure based on National Contact Points for Responsible Business Conduct** ("**NCPs**") to handle complaints to fostering compromise between the parties and/or issuing recommendations.

This system - non-mandatory norms and an equally non-mandatory amicable dispute resolution mechanism – has been overall a success. However, associations involved in the defense of HR have asked to switch to hard law.

Europe has heard the call and is currently experiencing an upsurge in CSR legislation, resulting in an increase of actions brought against companies.

b) … To judicialization

What we are witnessing is indeed essentially a growing judicialization of complaints about HR violations by companies across the world. These lawsuits are based on Common Law principles ("**duty of care**") or on legislation such as the 2017 French law on **duty of vigilance**.

A few examples from civil case law are illustrative of that trend:

- **Canada Supreme Court**: ***in Nevsum Resources Ltd v Araya*, of 2020-02-28 (2020 SCC 5)**, Eritrean plaintiffs had alleged to have been subject to forced labor in a mine in complicity with the government. Even though the damage was suffered in Eritrea, the Court by reference to customary international law allowed the case to proceed against this Canadian mining company, opening the way for **civil lawsuits against companies for HR abuses committed abroad**.

- **UK Supreme Court**: in ***Vedanta Resources PLC v Lungowe*, of 2019-04-10 (UKSC 2017/0185),** Zambian citizens seeking compensation for breach of duty in connection to the discharge of toxic substances into waterways from a mine had sued the British parent company of the Zambian operator of the mine. Since the parent company had supervised the group-wide policies on environmental management, the Court admitted England as the "**proper place in which to bring the claim**". The fact that the claimants had no access to substantial justice in Zambia was also in favor of this solution. This means that **a company which makes public a HR policy assumes a duty of care while implementing it**.

- **US Supreme Court**: the Alien Tort Statute ("**ATS**") of 1789 which grants federal courts "jurisdiction of any civil action by an alien for a tort committed in violation of a US law or treaty of the US, began from the mid-1990s onwards to be invoked to hold US companies liable for HR violations committed abroad. This was the scenario in the ***Kiobel v. Royal Dutch Petroeum* case of 2013-04-17 (569 U.S. 108)**. While Nigerian national residing in the US had sued *Shell* holding and its Nigerian subsidiary for abetting HR violations in Nigeria, the Court refused to examine the appeal on the merits as **there is no presumption of extraterritoriality**. In short, the US Supreme Court considered that the ATS was passed without any indication that its authors had intended it to make the US a legal forum for the enforcement of international norms. However, certain State courts (e.g., New York) accept this type of appeal.

- **Paris Court in France**: actions have been brought against industrial companies and banks based on **the duty of vigilance law**, for abetting HR abuses in countries where the company's subsidiaries or suppliers are located. To date, **these actions have been declared inadmissible on procedural grounds**. However, there is no slowdown to be expected in litigation based on the duty of vigilance law in France.

B. How to avoid the instrumentalization of justice and the legal system

a) The risk of instrumentalizing the justice system

Suing companies in Europe for HR violations is facilitated by the **transparency obligations imposed on them under EU legislation**. The consequence is that companies are liable for what is written for instance in their activity report and what is said by their managers.

That is not going to change - on the contrary: indeed, extra-financial reporting has just been considerably reinforced by the CSRD – for **Corporate Sustainability Reporting Directive** - of December 14, 2022. The scope of this Directive – to enter into force as of 2024 - is **extraterritorial** in the sense that corporations present in the EU with their parent company outside the EU, may be required to issue CSRD extra-financial report including in relation to non-EU companies that themselves have no business in the EU.

In addition, companies will be required not only to report with respect to their own operations, but also to their **direct and indirect business relationships in the upstream and/or downstream value chain (suppliers/clients)** on environmental, social, **HR**, and governance data.

It's even more of a sea change that the CSRD Directive will be followed by the CS3D Directive – for **Corporate Sustainability Due Diligence Directive** - currently being debated. It's no secret that disagreements run deep between both legislators, the Council of ministers (Member States) and the EU Parliament. This Directive confirms that companies are obliged to fulfill due diligence obligations within the group and their value chain. It also sets up a new regime of liability in the event a group has failed to carry out its due diligence obligations. Sanctions may be administrative (notably penalties imposed by an *ad hoc* independent national agency to be designated in each Member State) or civil (in accordance with the civil liability law of each Member State). The text does not cover the possibility of corporate criminal liability, as Germany does not recognize the principle of legal person's criminal liability.

This legislation is **inspired by the French law on the "devoir de vigilance" of 2017** which has given place to many lawsuits against companies in France. For the time being, only the legal person is sued, but it could change.

Indeed, the main divergence between the EU Parliament and the Council regarding the CS3D concerns **director's duties**. While the Council have removed the provision proposed by the EU Commission imposing a duty on directors to oversee the due diligence actions of their companies, the EU Parliament wants to keep it so that directors can be held personally liable for breach of this duty.

b) b) To better manage strategic litigation

It must be acknowledged that the lawsuits brought against companies by NGOs on the basis of the duty of vigilance/duty of care have a wide variety of motivations, both judicial and extra-judicial. Many NGOs mention **strategic litigation** on their website to say that they use judicial proceedings to bring about changes apart from compensation for any damage: it may be for instance to obtain passing a new law or to pressure a company through a media campaign on the proceedings to leave a country or renounce producing/exporting/importing certain products.

As emphasized by the High Court of London in a ruling May 12, 2023, on the action brought by the NGO *ClientEarth* against *Shell* - ***ClientEarth v Shell Plc & Ors*.[2023] EWHC 1137 (Ch**) - legal action may be a means "***to publicize and advance one's own policy agenda***" that goes beyond the aims of litigation. For instance, a German NGO in Berlin is pressuring French defense industries of France through this time a criminal complaint with the Paris Court in June 2022 to obtain an end to arms sales to Saudi Arabia and the United Arab Emirates.

Against this background, the proposals by the Greater Paris/Economic capital's Legal Commission and the European Commission for **NGO transparency** come at just the right time to re-establish what lies at the heart of the right to appeal, namely the principle of equality of arms. An increasing number of stakeholders agree that the transparency imposed on companies must find its equivalent in the transparency imposed on associations that denounce their actions and take them to court, whatever the merits of the legal action. The highest European authorities (the European Court of Auditors and the European Commission) have expressed the view that exemplarity is necessarily a two-way street. Various proposals are made which include:

- The Greater Paris's proposal to "*harmonize the conditions under which associations can take legal action in the EU and set requirements for financial transparency and governance*".
- Following the *QatarGate*, the EU Commission's proposal of disclosure by NGOs of non-EU fundings.

Many associations have expressed their opposition to this reform, but the refusal of transparency is not sustainable in the long term.

The second major transformation brought about by CSR, and more specifically companies' obligations to protect human rights, **concerns the role of practicing lawyers:**

- **In terms of advice**, CSR considerably strengthens **the lawyer's preventive role**. It is the duty of lawyers as well as in-house counsels to alert the company in particular when it plans to set up business in a high-risk country to the legal risks associated with such a move. Compliance has become lawyers' second nature and it's a delicate exercise since the rules are generally vague and unclear.

- **When it comes to litigation**, a lawyer who specializes in disputes involving corporate responsibility for HR cannot be confined to national law and must be equally **skilled in international and comparative law,** and this is an excellent point in this age of globalization!