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Growing Global Efforts to Combat Human Rights Abuses in Supply Chains

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In this article, the author explains that multinational employers, particularly those with international supply chains, need to be mindful of, and take steps to minimize, potential legal exposure arising from abusive labor practices and conditions outside the United States that are recognized by many nations as forms of modern slavery.

On June 17, 2021, the U.S. Supreme Court issued its opinion in two important business and human rights cases concerning the U.S. Alien Tort Claims Statute ("ATS"). In *Nestle USA, Inc. v. Doe I* and *Cargill, Inc. v. Doe I*, plaintiffs asserted claims against Nestlé USA, Inc., the U.S. affiliate of Swiss-based Nestlé ("Nestlé") and Cargill, Inc. ("Cargill"), alleging that they are liable under the ATS for aiding and abetting forced labor, child slavery and torture from their headquarters in the United States through their commercial relationships with cocoa producers in the Ivory Coast, despite knowing of those producers' widespread use of child labor. Nestlé and Cargill had appealed the opinion by the U.S. Court of Appeals for the Ninth Circuit holding that that the two U.S. corporations could be held liable under the ATS for aiding and abetting human rights violations abroad by virtue of their corporate conduct in the United States.[1] The Supreme Court reversed the Ninth Circuit, holding that the ATS does not apply extraterritorially where all of the conduct that the defendants allegedly aided and abetted occurred outside the United States and the only alleged U.S. domestic conduct was the defendants' general corporate activity in the United States. The Court noted that, to plead facts sufficient to a domestic application of the ATS, a plaintiff must allege more domestic conduct than just general corporate activity.

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In the absence of those types of factual allegations, lawsuits against U.S. corporations seeking redress for human rights violations occurring overseas will likely be prohibited and victims of human rights abuses arising from exploitative employment conditions will need to find friendlier jurisdiction to seek redress. Nonetheless, the *Nestlé USA* and *Cargill* cases highlight increased international attention to human rights for workers. In that context, multinational employers, particularly those with international supply chains, need to be mindful of, and take steps to minimize, potential legal exposure arising from abusive labor practices and conditions outside the United States that are recognized by many nations as forms of modern slavery.

Modern slavery exists today in many forms, including forced labor, involuntary servitude, debt bondage, human trafficking, and child labor. According to the Walk Free Foundation's Global Slavery Index, published with input from the United Nations' International Labour Organization and the International Organization for Migration, as of 2016, an estimated 40.3 million men, women and children were trapped in modern slavery, including 24.9 million people who were victims of forced labor including in global supply chains. Slavery is, of course, not the only issue affecting global supply chains. As tragically demonstrated by the 2012 fire at the Tazreen Fashions garment factory in Bangladesh that killed at least 111 people, and the 2013 Rana Plaza building collapse in Bangladesh that killed over 1,130 people and injured more than 2,500 people, substandard and unsafe working conditions in factories in which goods are manufactured by low-cost labor can result in the same types of risks.

This is a highly visible issue for multinational companies, whose shareholders, employees, NGOs, and other stakeholders are demanding be addressed. Customers and counterparties are increasingly sensitive to how companies conduct themselves – recent surveys show that larger sections of the public are more likely to make key purchasing decisions, from selecting their clothes and coffee provider to choosing their employer, based on a proven record of ethical and sustainable conduct. More specifically, for business leaders and sales departments, it is a topic on which customers are asking their vendors to take action through supplier codes of conduct and other measures. For marketing departments, it is an avenue to distinguish the company from its competitors. All of those constituencies are clamoring before legal requirements are broached and champions of corporate social responsibility even weigh in.

On August 19, 2019, the heads of nearly 200 U.S. companies, through the Business Roundtable, announced that they are committing to a move away from the idea that the main purpose of a company is to maximize shareholder value, in favor of the interests of all of its stakeholders, including employees, suppliers and broader society, encompassing a commitment to dealing fairly and ethically with its supply chain. There is another important reason for multinational companies to be proactive – this trend has translated into the regulatory arena. An increasing number of national governments around the world have proposed or enacted

legislation to address this issue, thus creating new areas of potential legal exposure to multinational companies.

UNITED STATES

In the United States, on the federal level, Section 307 of the Tariff Act of 1930 prohibits the importation of goods mined, produced or manufactured, wholly or in part, in any foreign country by forced labor, including convict labor, forced child labor and indentured labor. Regulations promulgated by Customs and Border Protection ("CBP") allow for the issuance of withhold release orders, requiring detention of goods at ports of entry when CBP agents reasonably believe that an importer is attempting to enter goods made with forced labor. Individual states in the United States have also enacted statutes. California enacted the California Transparency in Supply Chains Act of 2010, under which companies with over $100 million in gross sales who do business in California are required to disclose on their websites any efforts taken to eradicate human trafficking from their supply chains.

On June 24, 2021, pursuant to Section 307, CBP issued an immediate Withhold Release Order ("WRO") on silica-based products manufactured by Xinjiang-based Hoshine Silicon Industry Co., Ltd. ("Hoshine") and its subsidiaries operating in China's Xinjiang Uyghur Autonomous Region. CBP issued the WRO based on information reasonably indicating that Hoshine uses forced labor to manufacture silica-based products. Hoshine is one of the world's largest producers of metallurgical silicon which is processed into polysilicon and used in the production of solar panels. Because Hoshine is one the world's largest producer of silicon metal, the overall impact of the WRO is expected to be widespread; imports of solar panels or products containing them could be detained because CBP may suspect they incorporate materials produced by Hoshine or its subsidiaries. The Xinjiang Uyghur Autonomous Region has been under intense international scrutiny because of China's use of forced labor against Muslim minority groups in the region.

In addition to the WRO, also on June 24, 2021, the U.S. Department of Labor added polysilicon from China to its list of goods produced with forced labor and the U.S. Department of Commerce added Hoshine and four other Chinese entities to the Entity List for participating in China's campaign of forced labor against Muslims in the XUAR. Inclusion on this list does not prevent trade in a product, but does provide a warning to businesses to take extra caution to ensure that their supply chains are free of such products made with forced labor.

GERMANY

On March 3, 2021, the German Federal Cabinet adopted an act on corporate due diligence obligations in supply chains, referred to as the "Supply

Chain Act." The Supply Chain Act is expected to be adopted by the legislature during summer 2021 and to become effective on January 1, 2023. For German companies, new human rightsrelated due diligence standards are defined for risk management, particularly for their international supply chains. The goal is to improve the protection of work-related human rights as well as the environment through targeted prevention and remediation measures. The due diligence obligations are structured as "best efforts obligations." According to the legislative grounds, companies should not be subject to an obligation concerning a specific result. Put another way, companies are not required to guarantee that no human rights or environmental rights are violated in their supply chains. They are required, however, to demonstrate that they have implemented the statutorily-defined due diligence obligations in a manner that is appropriate and practicable with regard to the individual situation of the respective company.

The Act would apply to companies, regardless of their legal form, whose head office, principal place of business, administrative headquarters, or registered seat is in Germany, and generally with more than 3,000 employees (including temporary staff and employees at subsidiaries). From January 1, 2024, onwards, the scope of application should be expanded to companies with more than 1,000 employees. The Act defines the term "supply chain" broadly, encompassing:

- All products and services of a company;
- All steps, both domestically and abroad, for the manufacturing of the products and the rendering of the service, beginning with the raw material extraction, and all the way to delivery to the ultimate customer;
- The activity of the company in its own business area, domestically and abroad;
- The activities of direct suppliers; and
- The activities of indirect suppliers.

Corporate due diligence obligations focus on labor-related human rights risks. Nature conservation and environmental protection are mainly, but not solely, covered from a human rights perspective. The Act identifies, as human rights risks, situations in which there are likely violations, in particular, of the following prohibitions (collectively referred to as "Human Rights"):

- Prohibition of forced labor and slavery;
- Prohibition of child labor including the areas of prostitution, pornography, and drug trafficking;

- Prohibition of non-compliance with occupational labor protection under national law in case of danger of accidents or work-related health hazards;

- Prohibition of disregard of freedom of coalition (establishment of and activity in and by labor unions);

- Prohibition of unequal treatment (for example, on the basis of descent or religion);

- Prohibition of causing certain damage to nature and the environment that adversely affects people's livelihoods or is harmful to health; and

- Prohibition of the manufacture of mercury-added products and the production and use of certain banned chemicals.

The Act primarily establishes responsibility of the companies for their own business areas as well as in relation to direct suppliers. For to indirect suppliers, only reduced due diligence obligations on an *ad hoc* basis in the context of risk management.

The following duties of care in particular are of central importance under the Act:

- Companies must set up an appropriate and effective system of risk management and anchor it through organizational measures, including clear responsibilities in business processes, the goal of which is to recognize human rights risks, prevent the violation of legal protections, or, in any case, to end or to minimize it.

- Part of the risk management is the appropriate risk analysis for ascertaining the risks for the protected legal positions in the company's own business area and with direct suppliers. The risk analysis must take place at least once a year. The results must be communicated to the board of management.

- Companies must adopt a policy statement on their human rights strategy, out of which, among other things, it must be evident how the company meets its obligations and what risks it has identified.

- Companies must take appropriate preventive measures in their own business areas and *vis-à-vis* direct suppliers, for example, in the form of training sessions, risk-based control measures,

or contractual assurances concerning compliance with human rights standards.

In the event that a company determines, within its own business area or at direct suppliers, that a violation of human rights standards has occurred or is imminent, it is required to take remedial measures in order to prevent, stop, or minimize such violation. Depending on the severity of the violation, and in the case of lack of success through remedial measures, the company can even be obligated to end the business relationship. In addition, companies are required to establish an impartial grievance procedure that brings to notice any indications of human rights risks and violations in their own business areas, and at direct suppliers as well as indirect suppliers. The confidentiality of the identity, and the protection from discrimination or punishment must be ensured in favor of those users availing themselves of the procedure.

With regard to indirect suppliers, the Act sets forth special due diligence requirements, besides the inclusion of notifications in the grievance procedure. Should a company obtain substantiated knowledge about a possible violation of a legal protection or an environment-related obligation at indirect suppliers, a company is required, as the occasion warrants, among other things, to conduct a risk analysis, take appropriate prevention measures, and create and implement a concept for the minimization and avoidance of the violation.

Companies are also required to document continuously their fulfillment of these due diligence requirements and to preserve this documentation. They must also explain, in a publicly accessible report, which human rights risks were identified, and which remedial measures were taken.

The Act sets out potential administrative fines that are scaled according to the type of violation. Fines of up to EUR 800,000 can be imposed. For legal entities and associations of persons, the fine range is increased for specific administrative offenses, so that fines of up to EUR 8 million can be imposed. If a company's average annual turnover exceeds EUR 400 million, fines of up to two percent of the worldwide average annual turnover of the economic entity (including group companies) could be imposed. Depending on the amount of the legally enforceable fine, companies can be barred from awarding public contracts for up to three years.

The Act does not contain any special regulations with regard to the applicable law to any civil law claims, or with regard to the (international) jurisdiction of German courts. Injured persons whose exceedingly important legal protections are violated are, however, permitted to authorize a domestic trade union or non-governmental organization for the judicial assertion of their claims in Germany. With the statutory recognition of this special representative action, the risk of human rights-related civil lawsuits against German companies would generally be increased.

CANADA

In October 2020, a Modern Slavery Act was introduced in the Canadian Senate. Like modern slavery acts in other jurisdictions, the Modern Slavery Act would apply broadly. An "entity" would be subject to the Act to the extent it engages in any of the following activities:

- Produces or sells goods in Canada or elsewhere. For purposes of the Act, the production of goods would include the manufacturing, growing, extraction and processing of goods;

- Imports into Canada goods produced outside Canada; or

- Directly or indirectly controls an entity engaged in any of the foregoing activities.

A covered entity under the Act is a corporation or trust, partnership or other unincorporated organization that meets any of the following requirements:

- Is listed on a stock exchange in Canada;

- Has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years has at least CAN$20 million in assets; has generated at least CAN$40 million in revenue; or employs an average of at least 250 employees; and

- Is prescribed by regulations.

The proposed Act would not require subject entities to adopt substantive policies or procedures to address modern slavery. Like similar legislation in other jurisdictions, including California, Australia and the United Kingdom, the Act is intended to enhance modern slavery compliance programs through transparency. Covered entities would be required to submit annual reports to the Minister of Public Safety and Emergency Preparedness that describe the steps the entities have taken during the preceding year to prevent and reduce the risk that forced labor or child labor is used at any step of the production of goods in Canada or elsewhere by the entity or of goods imported into Canada by the entity. The Minister also would be required to maintain an electronic registry containing the reports provided to it. The registry would be required to be made available to the public on the Department of Public Safety and Emergency Preparedness website.

Entities that fail to submit a report in accordance with the Act are subject to fines up to CAN$250,000. In addition, any person or entity that knowingly makes a false or misleading statement or knowingly provides false or misleading information to the Minister or the Minister's designee to administer and enforce the Act is subject to fines up to CAN$250,000. An officer, director or agent of the entity who directed, authorized, assented to, acquiesced in or participated in the commission of an offense also could be held liable for the offense.

The Act also would amend Canada's Customs Tariff to prohibit the importation into Canada of goods that are mined, manufactured or produced wholly or in part by child labor (as defined in the Act), or to prescribe the conditions under which those goods may be prohibited. The Customs Tariff already contains a similar prohibition on goods involving forced labor that became effective on July 1, 2020 as part of the US-Mexico-Canada Agreement – NAFTA's successor.

NETHERLANDS

On May 14, 2019, the Dutch Senate enacted a Child Labor Due Diligence Law that imposes obligations on companies selling goods or services to Dutch consumers as well as companies otherwise doing business in the Netherlands to take certain steps to prevent child labor in their supply chains. The Dutch law requires companies doing business in the Netherlands or those who provide goods or services to Dutch consumers – including only through online means, if there is explicit targeting of the Dutch market – to assess their supply chains to identify any child labor risks and then develop diligence and action plans to address and mitigate any such risks they find. The Dutch law goes beyond the other jurisdictions in the scope of its applicability in that it further requires covered companies to look beyond direct suppliers in their assessments and plans, similar to the Australian law described above. Companies subject to the Dutch law must submit declarations regarding their plans and efforts, which will be publicly posted. Noncompliant companies are subject to administrative fines if a complaint is lodged against them for failure to report or adhere to their own plans, a feature not present in United Kingdom or Australian laws. Persons having standing to file such a complaint includes a wide range of actors, allowing any stakeholder with concrete evidence that a company's goods or services were produced with child labor to submit such a complaint. The law expected to become effective in 2022.

UNITED KINGDOM AND AUSTRALIA

The United Kingdom enacted the United Kingdom Modern Slavery Act in 2015, which is modeled on the California state described above.

The United Kingdom Modern Slavery Act requires certain large companies doing business in the United Kingdom to release reports on the steps they taken to consider the risks associated with suspected human trafficking or forced labor in their businesses and throughout their supply chains. Australia passed a similar Modern Slavery Act at the end of November 2018. France also enacted what has been called the "Vigilance Law" in 2017, which requires large French companies to establish an annual "vigilance plan," including measures intended to prevent violations of human rights in their own activities as well as in those of their subsidiaries and throughout their supply chains. Under the Vigilance Law, companies that fail to publish or fail to follow their plans may be required to compensate those who have suffered as a result of a company's noncompliance.

UNITED NATION'S ASPIRATIONAL STANDARDS

In addition to statutes, a number of aspirational standards have been promulgated by non-government actors. For example, the United Nations Guiding Principles on Business and Human Rights ("UNGPs") have been widely recognized as the gold standard. The UNGPs are not legally binding, but widespread business acceptance to them has resulted in their increasing influence and importance. The UNGPs require businesses to respect human rights, including conducting assessments through due diligence of actual and potential human rights impacts arising from their own conduct or that to which they contribute or are directly linked through their business relationships (including suppliers and customers). Companies are expected to act based on the results of their assessments, to track the effectiveness of their efforts and communicate openly about them. The UNGPs set the standard for international corporate best practices, with courts and regulators using them as a reference point with increasing frequency. In light of this increase in regulatory activity in this area, companies should closely examine whether they have an obligation to take action under these new laws.

CONCLUSION

Identifying and managing potential human rights issues for large multinational companies with complex global supply chains, can be daunting, and must be based on an organizational commitment to creating a culture that respects human rights. Companies should consider the following steps to the extent they have not yet done:

- Publishing supplier codes of conduct that are aligned with both statutory and aspirational standards;

- Codifying their minimum expectations of suppliers;
- Requiring suppliers to ensure that their own suppliers adhere to those codes and policies;
- Publishing supplier codes of conduct which are aligned with both statutory and aspirational standards, codifying their minimum expectations of suppliers;
- Mapping suppliers to gain a better understanding of their supply chain, and adopting a risk-based approach to focus efforts on higher risk supplies or jurisdictions;
- Including human rights-related red flags into supplier selection processes;
- Including contractual protections, and seeking transparency in the form of audit, access and reporting obligations;
- Expanding existing risk management systems to include supply chain risks; and
- Undertaking in-depth human rights impact assessments on high risk parts of their supply chain.

NOTE

1. In a 2013 opinion, *Kiobel v. Royal Dutch Petroleum Co.*, the U.S. Supreme Court held that non-U.S. corporations could not be sued under the ATS for conduct occurring outside the United States due to the presumption against extraterritoriality of U.S. statutes; in a 2018 opinion, *Jesner v. Arab Bank, PLC*, the Court held that foreign corporations may not be defendants in suits brought under the ATS because of the foreign relations problems this could cause.