

Securing Business' Accountability

INTRODUCTION

The large-scale human rights abuses against indigenous people and environmental degradation arising from the operations of extractive companies such as Shell in the Niger Delta or Chevron in the Ecuadorian Amazon are just two notorious examples of the many which have been documented and handled by accountability mechanisms. Yet, for the handful of notorious cases where violations of human, environmental or social rights have been brought to justice, there are numerous accounts of violations that have gone unaddressed.

As with all other actors and commensurate to their specific role in society, business enterprises have human rights and environmental responsibilities. States are the primary duty-bearers to ensure human rights of all within their jurisdiction are respected, protected and when violated have access to redress and remedy. States also have environmental obligations with regard to the conservation of the environment and use of natural resources. However, for many reasons, whether motives of creating an attractive environment for private investment- including foreign direct investment, undue influence of powerful business enterprises- particularly trans-national/ large corporate entities, lack of an appropriate legal/judicial framework at the domestic/regional/international level, many human rights and environmental violations perpetuated by business enterprises go unaddressed.

As are the UN's Guiding Principles on Business and Human Rights, this paper is based on the recognition of:

- States' existing obligations to respect, protect and fulfil human rights, including the right to an environment adequate for health and well-being, and fundamental freedoms;
- The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights
- The need for rights and obligations to be matched to appropriate and effective remedies when breached.

This paper does not aim to provide a comprehensive overview of existing accountability mechanisms nor does it aim to provide an appraisal of how business enterprises in their various forms and functions can or should contribute to sustainable development in general. Categorising existing initiatives to secure business' human rights responsibility under the following headings: voluntary business or multi-stakeholder-led initiative, (individual or supra-union) state-led initiative, collective, and international state-led initiative, it briefly aims to provide a critical appraisal of each category. It also looks ahead to next steps towards universal and effective mechanisms to enforce business' human rights responsibility.

In the light of current efforts to bring business enterprises- particularly large corporations- into the sustainable development agenda, we feel that it is critical and urgent to put in place effective mechanisms to secure accountability of states and business enterprises and enforce remedies when they breach their obligations and responsibilities. With this paper we hope that this issue will get the attention that it deserves but so far has not been accorded in the current discussion.

CATEGORIES OF INITIATIVE

1. Voluntary business/multi-stakeholder-led initiatives

There are a number of voluntary initiatives through which business enterprises on their own, within a particular sector or across sectors, or with other stakeholders (such as Unions or NGOs) have aimed to “self-regulate.” Many of these initiatives, such as the Extractive Industries Transparency Initiative or the Code of Conduct by the International Council of Toy Industries have been the result of sustained campaigning by civil society. Public pressure, combined with sensitivity to negative publicity, have prompted corporations or corporate sectors to engage in such self-regulation.

The Equator Principles of the financial sector demonstrate the merits and limitations of business-led sector-wide standards. These principles were first adopted by 10 Private Banks in 2003 and have since been revised with a third version adopted in 2013. Signatories are required to integrate social and environmental criteria in project financing. However, many questions still remain including about the real motivation of their creators and signatories, the independent verifiability, the quality and adequacy of reporting and their limited scope¹. Many of the signatories including ABN Amro, Banca Intesa, Citigroup and First Boston have been exposed for their funding of controversial projects across the world².

Like the Equator Principles, voluntary business-led frameworks in general tend to be piecemeal, lack ambition to stay in line with the current standards to protect social, environmental and human rights and lack effective remedy mechanisms.

Another model of voluntary initiative is through multi-stakeholder action. The International Framework Agreement (IFA) for example is negotiated between a Transnational Corporation and a Global Union Federation. IFAs are usually based on the eight Core Labour Conventions of the International Labour Organisation (ILO) and sometimes also refer to the Universal Declaration of Human Rights. Redress for non-compliance is foreseen through a variety of mechanisms within a Company or as part of a joint mechanism between the Company and Union. As such an IFA is a valuable tool to further transnational representation of employee and trade union interests. It also offers an opportunity to ensure implementation of global agreements to secure social minimum standards. However it remains a voluntary initiative with success

depending on the resources available to unions and employee representation structures to conduct negotiations, company management interests and the national industrial relations tradition.

Going forward, the achievement of human rights as well as global goals like the Sustainable Development Goals requires more than self-regulatory processes.

2. State-led³ initiatives

States have the primary responsibility to protect and defend the rights of all within their jurisdiction from being impinged upon by all actors including business enterprises. A clear instrument to do so is through the legal framework. Many countries have National Human Rights Commissions that serve as mechanisms to monitor respect and protection of human rights, and to a limited extent also provide avenues for redress of human rights violations. Countries have generally adopted specific legislation for environmental protection and conservation, even though effective enforcement and redress mechanisms often lag behind.

Most countries also have standards and specific or general legislation to regulate companies and their activities' impact on human rights and the environment. The Companies Law Act 2006 in the UK, for example, requires company directors to consider the impacts of their business operations on the community and the environment and requires that publicly listed companies report on environmental, social, community, employee and supply chain matters.

For a variety of reasons some of which have been mentioned above countries across the world have proven themselves unwilling to put in place sufficiently far reaching legislation or even enforce existing legislation. In a paper published in 2007 by the European Coalition on Corporate Justice (ECCJ), Human Rights expert Olivier De Schutter states that where the State is unwilling or unable to ensure the protection of people's rights from violations by corporate actors and where this leads to abuses by private persons being left unpunished and leave victims without remedies, other States have a moral and sometimes a legal, responsibility to do so when sought⁴. Two examples provided by De Schutter in the ECCJ paper are:

1. The US Alien Torts Claims Act of 1789 that was revived in 1980 and has allowed foreign victims of serious human rights abuses committed by corporations having sufficiently close links to the U.S. to seek

damages

2. The EU's Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or the "Brussels I" Regulation, which is to be replaced by the so-called "Recast Resolution in 2015". Under this regulation, EU member states national jurisdictions are competent to receive civil proceedings against persons, including corporations not domiciled in the EU (after entrance into force of the new Recast Resolution), that are civilly liable for certain acts, wherever these take place, and even if the damage occurs or is caused outside the territory of the Member States, but not outside the EU. The European Parliament explicitly called for the Regulation to cover litigation for violations committed abroad, especially in developing countries where European multinationals operate⁶.
3. As pointed out by De Schutter, some countries have included provisions allowing for investigation and prosecution of international crimes in their criminal legislation to comply with requirements of international humanitarian law, the Convention against Torture or the Rome Statute of the International Criminal Court⁷. These provisions apply whether or not the perpetrators or the victims are nationals of the State concerned and may apply where perpetrators are legal persons as well.

Even though such legislation does exist, they remain exceptions. As De Schutter highlights: "if the home States of transnational corporations are not incentivized to move in the direction of exercising extraterritorial jurisdiction on the companies of their nationality operating outside the national territory, they will not do so spontaneously. In isolation, each State may fear that the adoption of an extraterritorial statute will lead transnational corporations to reincorporate elsewhere. Collective action is required."

3. State action at the multilateral level

The OECD's Voluntary Guidelines for Multinational Enterprises apply to the 34 OECD members and 11 non-OECD countries. Adherent states are required to put in place a mechanism, National Contact Points (NCPs) to promote and implement the Guidelines. NCPs are to "assist enterprises and their stakeholders to take appropriate measures to further the observance of the Guidelines. They provide a mediation and conciliation

platform for resolving practical issues that may arise with the implementation of the Guidelines⁸."

As NCPs are set up within the government apparatus, it may give rise to questions of government interest to protect national corporations when accused of violations by parties from other countries. Moreover, as the establishment of the NCPs remains the onus of the adherent state, implementation remains inconsistent. With their emphasis on mediation, NCP processes put a lot of emphasis on confidentiality. The (negative) incentive of bad publicity that moves a lot of corporations to action if the process were to take place in the public domain is therefore missing from the NCPs. Finally, as a mechanism only adhered to by a small set of countries, instances of corporate violations remain unaddressed in many countries. As a mechanism created by an organization of industrialized countries, they do not respond to the urgent need for a universal mechanism to secure corporate accountability for rights' violations.

In view of the absence of adequate universal mechanisms to secure accountability of business enterprises for their human rights responsibilities and the broadening discussions of their role in the Post-2015 framework, there is an urgent need for the UN to agree on mechanisms to secure their accountability under the Post-2015 framework.

4. State action at the international level

State action at the international level to uphold business' human rights responsibility- whether through the World Bank Group's Inspection Panel (scrutinizing investment in Public Sector projects) or the Compliance Advisor Ombudsman (scrutinizing investment in Private projects) or the UN's Global Compact remain limited in scope and effectiveness. The effectiveness of the World Bank's accountability mechanisms hinges on the willingness of the Bank's management to take their recommendations in account and act upon them. The World Bank management's lack of serious response in numerous instances, most recently in reports on investigations into the Eskom energy project in South Africa, the Tata Mundra hydropower projects in India and the Dinant palm oil project in Honduras demonstrates the weakness of its accountability mechanisms.

In the case of the UN's Global Compact, member companies commit to align their operations and

strategies with the Global Compact's ten principles. Any individual, group or organisation can register a complaint against a member company for the company's alleged abuse of the Compact's overall aims and principles. However, the grievance mechanism is considered more of a means to move member companies to respond to the complaint rather than as a full-fledged mechanism that the grievance is followed through to resolution. Beyond this fundamental weakness, criticism of the Global Compact include concerns that companies use it merely to profile themselves, the lack of ambition in standard setting and lack of adequate verification of the annual reporting of its members.

TOWARDS EFFECTIVE UNIVERSAL ACCOUNTABILITY MECHANISMS

In 2011 an important step towards a universal mechanism to enforce business' responsibility for human right was taken at the international level when the UN Human Rights Council endorsed a set of Guiding Principles on Business and Human Rights. The Guiding Principles are based on the UN's "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex) consisting of three pillars:

- State duty to protect human rights
- Business responsibility to respect human rights
- Access to remedy for victims of business-related abuses.

An important aspect of the guiding principles is its emphasis of business' responsibility to carry out human rights due diligence policies and measures in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts (Principles 17–21). This includes requirements to assess actual and potential human rights impact, integrate and act upon the findings, track responses, and communicate how impact is addressed. When business enterprises identify that they have caused or contributed to adverse impact, the principles require that they provide for or cooperate in the remedial action through legitimate processes (Principle 22).

The state, as part of its duty to protect against business-related human rights abuses, is required to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that those affected have access to effective remedy (Principle 25).

In relation to non-judicial grievance mechanisms

(Principle 31), the Guiding Principles further state that in order to ensure the effectiveness of such mechanisms, they should be legitimate and accountable for fair conduct; accessible to all intended stakeholders; predictable; equitable; transparent; rights-compatible by ensuring that outcomes and remedies accord with internationally recognized human rights; a source of continuous learning; and based on engagement and dialogue with intended stakeholders as the means to address and resolve grievances.

By creating a global platform for action, the universally applicable principles are intended to be an important first step towards the universal enforcement of business' human rights responsibility.

Already moving forward in 2013, Ecuador (supported by several UN member states) spearheaded an initiative in the Human Rights Council to advance a binding instrument to regulate transnational corporations. It signals a shift towards a much stronger recognition of business responsibilities towards human rights. This initiative should be supported and further developed, especially fully incorporating environmental obligations, in the context of the Post-2015 negotiations and SDGs.

CONCLUSION

Our analysis of existing models to secure business' responsibility for human rights leads to the conclusion that they have not systematically and universally fulfilled even the minimum objective of ensuring that business "does no harm." At a time where there is a rapidly increasing effort to crowd-in business and private finance in the formulation and implementation of the Post-2015 framework and SDGs, countries must implement the UN Guiding Principles on Business and Human Rights in domestic legislation as a matter of urgent priority. Action should be taken towards international implementation of the principles, including through specific action to enforce due diligence requirements of business enterprises.

Going further, the Post-2015 framework and SDGs should advance the efforts of Ecuador and other UN member states to put in place a universally applicable, binding instrument to regulate transnational corporations.

Additionally, the Post-2015 framework and SDGs should incorporate the following:

- Universal enforcement of binding business

financial and non-financial information reporting requirements that are publicly available in accessible formats.

- Universal enforcement of effective regimes (through taxes, sanctions etc.) to curb unsustainable business practice at the national level and, as a next step multilaterally/internationally
- Cooperative action to ensure adequate systems of legal protection and remedy at all levels (national, regional and international, as appropriate)
- Commitment to replace laws so as to allow replacing a narrowly defined “fiduciary duty” with a wider definition of responsibility to human rights

FURTHER READING

- “Corporate influence in the Post-2015 process” Global Policy Forum, Bread for the World and MISEREOR.
- “Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda” The Centre for Economic and Social Rights (CESR) and the Office of the High Commissioner for Human Rights
- Joint statement of over 300 NGOs: Human Rights for All Post-2015 (10 December 2013): <http://sustainabledevelopment.un.org/content/documents/5123joint.statement.dec10.pdf>
- The full text of the UN Guiding Principles on Business and Human Rights:
- <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>
- The joint statement, issued by Ecuador, see the Business and Human Rights website: http://www.businesshumanrights.org/media/documents/parallel_event_human_rights_and_transnational_corporation_rev_4.pdf. The initiative is backed by a broad CSO campaign: <http://www.stopcorporateimpunity.org/>
- Ruggie’s response to the Ecuador statement: <http://business-humanrights.org/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>

and environment protection. The shareholder value theory that has largely driven the investment decisions of listed companies has failed even in its own terms, yet it continues to determine the way investments and companies’ performance are assessed.

- Effective enforcement mechanisms starting at the national level and extending up to international organisations to ensure policy coherence of national/regional/international policy and practice with human rights, SDGs, international development commitments and climate change adaptation and mitigation targets.

NOTES

1. See for instance, Bank Track, Tiny Steps Forward on the Outside Job, Comments on the Equator Principles III Official Draft, October 2012. http://www.banktrack.org/manage/ems_files/download/tiny_steps_forward_on_the_outside_job/121010_tiny_steps_forward_bt_comments_on_epiii_final.pdf
2. ABN Amro, Banca Intesa and Citigroup in the Baku-Tbilisi-Ceyhan (BTC) pipeline project and First Boston in the Sakahlin II pipeline in the northern Pacific
3. State level could refer to a single state or a collective of states within a supranational union e.g. EU
4. Olivier De Schutter. Towards Corporate Accountability for Human and Environmental Rights Abuses. A Discussion paper for the ECCJ. 2007 http://somo.nl/publications-nl/Publication_1905-nl
5. EC 1215/2012 applicable from 10 January 2015
6. European Parliament resolution on the Commission Green Paper on Promoting a European framework for 7. Corporate Social Responsibility (COM(2001) 366 – C5-0161/2002 – 2002/2069(COS)) (30 June 2002). (As cited in De Schutter 2007)
7. De Schutter 2007
8. www.oecd.org/corporate/mne/ncps.htm

ABOUT THIS DOCUMENT

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The paper was drafted by a subgroup within the ETF with the purpose of strengthening the capacities of the ETF on the issue of the accountability of the private sector in the context of discussions about the Post-2015 framework.