Business and Human Rights in Cambodia 2021

A compendium of instruments and materials, volumes I-III

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BUSINESS AND HUMAN RIGHTS IN CAMBODIA 2021

A compendium of instruments and materials

PART I

HUMAN RIGHTS FRAMEWORKS:

The Laws and Policies for Responsible Business Conduct

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OF HUMAN RIGHTS AND HUMANITARIAN LAW

BUSINESS AND HUMAN RIGHTS IN CAMBODIA
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Photo

Tailors work on a production line in a garment factory in Cambodia

Photo: Marcel Crozet / ILO

21 April 2016

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Short Table of Contents

TABLE OF CONTENTS FOR PART I: HUMAN RIGHTS FRAMEWORKS - THE LAWS AND POLICIES FOR RESPONSIBLE BUSINESS CONDUCT

RAOUL WALLENBERG INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW

Table of Contents

INTRODUCTION TO COMPENDIUM

The subject covered in this Compendium has developed very fast in the last 20 years. The idea that businesses have social responsibilities is not new; it has been discussed in universities since the 1960s under the name 'business ethics'. The notion of corporate social responsibilities (CSR) however became prominent in the 1990s as a response to criticism that economic globalization is not fair in how it spreads benefits and risks. Therefore ideas of CSR, corporate accountability, corporate citizenship, responsible business conduct and corporate sustainability, have attracted wide support, initially from civil society groups and then from some leading businesses and industry associations as well as governments and international organizations.

'Business and human rights' (BHR) is a smaller, specialized part of the broader CSR idea: it is focused on negative impacts from business activities without denying positive impacts, it is based on the authoritative international standards developed by states in human rights treaties, and often emphasizes the importance of legal accountability of businesses and states. Since it emerged in the early 1990s, BHR has emphasized the core idea that human rights are minimum entitlements for individuals and communities grounded in human dignity as well as principles necessary to create societies that are more just. Thus human rights grounded in international law have produced the necessary and globally relevant discourse of ethics and justice to challenge and guide business conduct. As this compendium shows, human rights are relevant to all industries, in all countries. They apply to the workplace (e.g. working hours, health and safety) and surrounding communities (e.g. right to land, right to security), and are meant to protect men, women and all groups in society at higher risk of harm (e.g. children, people with disabilities).

Some protections against business abuses already exist in national laws. When these laws are effective, BHR merely reinforces the importance of compliance with local laws. However, legal systems are not perfect as the laws have gaps and more often are not adequately enforced for a multitude of reasons. What makes BHR important is to put the spotlight on how businesses take advantage of these gaps (resulting in business impunity) at both international law and domestic law levels. BHR then stresses that such regulatory and governance gaps should be closed to ensure access to justice for victims and corporate compliance with human rights norms. This Compendium points to recent policy developments in international organizations (e.g., in the UN), in regions (e.g. the EU), and in advanced economies which all point to the conclusion that governments are increasingly willing to play a stronger role in promoting CSR and regulating businesses.

This is a significant change in the last 10 years. At the international level, the UN SDGs (2015) emphasize the role of the private sector in achieving the development goals and the importance of human rights as both means and ends of development. The UN has adopted the UNGPs (2011), marking the first time the UN member states have agreed to a CSR instrument. In another notable change, international economic agreements – both investment and trade agreements – that have been crucial to the liberalization of the global economy are increasingly referring to labour and human rights, and responsible business conduct. Also in this last decade, the European Union – the largest trading block in the world – is emerging as the most active regulatory space with a direct impact on transnational corporations (TNCs) based there and their global value chains. Finally, industrialized states where TNCs are domiciled have for some time promoted and supported the voluntary uptake of CSR and some seem ready to regulate CSR through incentives and sanctions. In this shifting legal and policy landscape, the UN is currently negotiating a BHR treaty that can harmonize and further enhance regulations in BHR.

Remarkable as they are, the solution to corporate unaccountability is not only a legal one. Many agree that law is part of the solution but much more is needed to achieve in practice responsible business conduct and effective enjoyment of human rights. There are many reasons why the law is a limited tool in BHR; one of them is that TNCs or global supply chains are so complex, dynamic, and mobile that they make a very difficult regulatory target. That means that they can and sometimes do escape jurisdiction of their home and host states, can successfully exploit competition among states for trade and investment, and have the resources and power to defend their interest against lawmakers and civil society critics. Nevertheless, businesses make their own calculations and respond to legal, economic and social pressures. That means business compliance with human rights norms and applicable laws depends on how strong these three sources of influence are and whether they reinforce each other or not. This explains why for the last 30 years some TNCs adopted CSR voluntarily, engaged in self-regulation, entered into multistakeholder initiatives and partnerships for development, and sometime even supported new laws on BHR. So understanding and teaching BHR often requires not only attention to law and legal expertise, but insights from other disciplines to understand how regulations emerge (the process of law-making and norm-making) and whether and how businesses respond to these norms (compliance with law and observance of human rights in practice). It is essential to recall that the entire BHR movement happened because of pressure from civil society organizations; which documented abuses and increased the visibility of corporate and governmental wrongdoing among fellow citizens, consumers, investors, companies themselves and the media.

Therefore, understanding and teaching BHR is often about placing the law, and compliance with it, in its proper context. From declaring human rights at the UN or in a national constitution to people actually enjoying their human rights that are affected by businesses is a long way that lawyers, political scientists, management scholars, sociologists and media specialists might want to travel together. This is why the Compendium has in mind teachers from these five academic disciplines. We hope the selection of materials is accessible and understandable to all five of them and that BHR can be a theme that can stimulate cross-disciplinary teaching and collaborations.

Aim and audiences of the compendium

The compendium is meant to be an aid for lecturers to prepare classes and seminars on business and human rights in Cambodia. A secondary audience could be *researchers* that are new to the topics but look for authoritative reference points from which to start reading and researching human rights aspects. Expected users are teachers from five disciplines: lecturers not only from law faculties, but also from political science, business administration, sociology, and media & communications.

Size and structure of the compendium

The Compendium is a 'cases and materials' type of book, and not a textbook. Therefore it is a resource not meant for students who would benefit from a more explanatory, introductory type of book.

The compendium runs for around 800 pages. As may be clearer from the introduction above, BHR is a recent, extremely diverse and highly dynamic area. It's an emerging scientific field in itself that combines many bodies of law (human rights law, constitutional law, labour law, civil law, criminal law, even environmental law and many others), covers all industries, all human rights, and all countries. The legal framework for BHR is only beginning to emerge now and it will take a long time to do so. Meanwhile one must account for business practice and civil society activism, which will allow one to understand what the specific responsibilities in BHR are, how they are implemented by businesses, and what monitoring mechanisms are being created. There is a lot of experimentation taking place, often by leading businesses, civil society and even governments working together. Academic works sometimes even struggle to keep pace with developments on the ground.

The compendium has 3 parts and 28 chapters. Part I covers the highly diversified legal framework in BHR, Part II is a deep dive into the systems companies set up to respect human rights, and Part III further contextualizes what corporate responsibility entails regarding specific human rights each of them with their own specificities. Each chapter is split into two sections – International materials and Cambodian sources – to ensure maximum relevance for teachers and students.

Part I. **Human rights frameworks** The laws and policies for responsible business conduct	**Part II.** **Human rights due diligence** The management of	**Part III.** **Human rights standards** The impacts of business on specific human rights

With so much material to cover and with due regard to the complexity of the issues, the authors of the compendium made some careful choices.

Compendium size: One choice was to allow the compendium to take its space and grow to 800 pages, but we advise the teachers to begin by reading only the chapters which are the most interesting for them. We could have produced a much smaller compendium instead of delivering 28 chapters out of which half are dedicated to specific human rights. For example, we could have eliminated some of those 14 chapters altogether, but that would also have reduced the choice for teachers with widely different backgrounds. Teachers should therefore use the compendium more as an encyclopedia and therefore 'pick and choose' materials as required by their teaching situation.

Chapter size: Another choice was to also let each chapter take its space and go to 20-30 pages if needed. We carefully selected materials for high quality: we aimed only for most recent materials from authoritative sources. But again, giving systematically a voice to 4 groups of sources – government, business, civil society, and academia – unavoidably took space. We worked systematically and included, for example, 1 – law and policy (international conventions, soft law instruments, reports from UN treaty body and special rapporteurs, national laws, judicial decisions); 2 – documents from businesses (e.g. corporate policies, examples of systems, CSR reports, industry guidance); 3 – materials from NGOs (e.g. case studies of corporate abuses, analysis, advocacy campaigns, collaborations with businesses); 4 – academic writings. These sources are referred to as 'Instruments' in the structure below

The state	The company	The civil society	The academia

Selection of passages: Yet another choice was in how we selected the most relevant and important part from each material. Far from an arbitrary and rushed selection, we tried to identify important and original ideas/data; we would expect teachers to find these worth highlighting in presentations and class discussions. We encountered a trade-off when making the selections: if too short, they become incomprehensible (leading the teacher either to the original source or more likely to stop using the compendium) and if too long, the compendium would grow vastly beyond its current significant length.

Structure of chapters: we chose to standardize the format of each chapter to create familiarity for teachers. The same components as well as the same order are used consistently throughout the chapters.

Introduction (summary of chapter by the compendium authors)
Main aspects (bullet points on key issues covered in the chapter)
Background (general and accessible information about the topic of the chapter)
Instruments (from 4 sources)
Questions (for class discussions)
Further readings

Support for teachers

In sum, each instrument was carefully selected for relevance and quality, and passages were excerpted to give the reader key aspects that should not be missed from any lecture/seminar. These key aspects and sources are the 'building blocks' and interesting bits – it is up to the teacher to select, emphasize and combine building blocks in the best way for their audience and academic discipline.

Taking these choices together, the major priority for the authors was to enable the teachers' choice of topics and angles, and to through careful selection highlight the most important aspects that would in our estimation save 50%-70% of preparation time for the teacher.

Further priorities have been about the searchability of the compendium. The compendium is long at around 800 pages. It will be uploaded on-line as an open access publication. The e-compendium will be available in PDF format enabling searches through keywords and possibly in Website format for easier and speedier navigation through chapters.

To increase usability and reader-friendliness we omitted references (footnotes and endnotes) in order to simplify and shorten the text. Readers are invited to consult the original materials to access all references.

Contributions and quality assurance

Radu Mares has drafted the sections containing international materials in all chapters. Cambodia-based authors, as identified in each chapter, have drafted the sections containing Cambodia-related materials. The sections containing Cambodia-related materials have benefited from internal peer review coordinated by Prof. Kenneth Paul Charman and Soy Kimsan, with contributions from Sao Socheata. An evaluation of the Compendium from a teacher perspective has also taken place during the *9th Annual Ten December Academy - Training School on Business and Human Rights* organised by the RWI in December 2020. Sen Mostafa, programme officer at RWI, has organised and coordinated the entire process that lead to the development of Cambodia-related sections. Elina Hammarström, research assistant at RWI, has proofread and formatted the entire manuscript.

PART

HUMAN RIGHTS FRAMEWORKS

THE LAWS AND POLICIES FOR RESPONSIBLE BUSINESS CONDUCT

1. INTERNATIONAL LAW ON BUSINESS AND HUMAN RIGHTS

Soy Kimsan, Radu Mares

Introduction

By ratifying a human rights treaty, states acquire obligations to respect and ensure human rights under international law. These obligations are commonly referred to as obligations to 'respect-protect-fulfil' human rights. That means states should use a combination of legal, policy, administrative and other measures to ensure that human rights are enjoyed in practice. That means the government is obliged to regulate the private sector – through preventive and remedial measures – so that companies are less likely to inflict harm and cannot operate with impunity. In practice however, states often fall short of creating the strong laws and institutions needed for protecting human rights. In view of this 'regulatory gap', societal pressure has grown on transnational and local businesses to respect international standards in their operations even when a state is unwilling or unable to safeguard human rights. This pressure has grown in the last 30 years and such increased attention to CSR has manifested itself in international soft law (see chapter 2), corporate self-regulation (see chapter 8) and private governance arrangements such as multistakeholder collaborative initiatives (see chapter 5). The UN indicates that it is desirable, and perhaps even legally expected, for states to regulate 'their' companies when they operate in other countries: this is the discussion about the 'extraterritoriality' of state obligations to protect human rights (see chapter 4). But extraterritorial jurisdiction is controversial as it can lead to abuses by powerful states and create tensions between sovereign states. There is however a better way, and since 2014 the UN has begun discussions – currently on-going – on a possible treaty on corporate accountability, which would be a development in hard law to address this 'gap' in international law. Finally, hard law exists in relation to trade and investment (see chapter 3) and such treaties are meant to facilitate international economic activities. However, these economic agreements have been criticized for encouraging business activities while neglecting their sometimes serious negative social and environmental impacts. At the national level, over 20 countries have developed National Action Plans on business and human rights where the government seeks to increase policy coherence and outline a variety of measures on corporate responsibilities and access to remedies (chapters 6 and 7). In sum, it is now well accepted that states can and should regulate and facilitate responsible business conduct, through both international law and national regulations. Importantly though, market competition – between companies, and between states – is an important dynamic that can influence states ability to regulate in the public interest and businesses' ability to self-regulate.

Cambodia has slowly transitioned to a full market economy and has sustained an average growth rate of 7-8% since 1998.[1] As a result, Cambodia has significantly reduced poverty and, eventually, become a lower middle-income country in 2015. While the country is aiming to achieve the upper middle-income status by 2030, its economic growth has in some ways proceeded without sufficient consideration on human rights.[2] Over the years, there have been reports of human rights violations perpetrated by businesses across different economic sectors, especially the

1 World Bank, *Overview: Cambodia,* https://www.worldbank.org/en/country/cambodia/overview

2 Human Rights *Council, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia,* A/HRC/42/60 (2019) https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Documents/A_HRC_42_60.docx.

land sector, often with the government's support or acquiescence. Yet, business and human rights is a relatively a new concept in Cambodia. For example, the government development policy, particularly the 2018 Rectangular Strategy – Phase IV tends to focus on promoting business activities and job creation,[3] while there are virtually no policy measures on business respect for human rights. Furthermore, the government perceives human rights issues as a brake to economic growth and a political maneuver by the opposition and civil society organizations. In recent years, there have seen successive crackdowns on independent media, human rights defenders and NGOs.[4] However, the government could instead see such actors as watchdogs to promote responsible business conduct and, thus recognize their valuable contribution to achieving a sustainable and inclusive economic growth for all in the country.

To date, Cambodia has ratified eight out of nine core international human rights treaties and the eight core ILO conventions. The government is therefore legally bound to respect, protect and fulfil human rights in its territory, including protecting Cambodian citizens from human rights violations by non-state actors such as businesses. Its legal obligations in relation to human rights are emphasized in Article 31 of the Constitution of the Kingdom of Cambodia, which incorporates international human rights standards directly into Cambodian law and practice. Once incorporated into domestic legal order, these internationally recognized human rights are protected through several bodies of law, including civil law, criminal law, labor law, administrative law, property law, social security law and many others. However, as in other countries, such laws may have deficiencies and gaps or may not be enforced rigorously (or at all). It is these regulatory and enforcement gaps that allow businesses to pursue profits with relative impunity for involvement in human rights abuses. Such abuses will call into question Cambodia's responsibility under international law for its failure to comply with its obligations under the human rights treaties it has chosen to ratify.

Main Aspects

- ✓ State obligations to respect, protect and fulfill human rights
- ✓ Extraterritorial obligations of states
- ✓ Progressive realization of socioeconomic rights
- ✓ Compatibility of human rights with different political and economic systems
- ✓ Privatization of public services
- ✓ Obligations of non-state actors under international law
- ✓ UN treaty on corporate accountability
- ✓ Sustainable Development Goals in the context of business and human rights
- ✓ Regulatory options regarding corporate human rights responsibilities
- ✓ Analytical framework to operationalize economic, social and cultural rights.
- ✓ Human rights in Cambodia
- ✓ Benefits of CSR for Cambodia
- ✓ International treaties and mechanisms applicable to Cambodia
- ✓ Relation between domestic law and international law
- ✓ National human rights mechanisms in Cambodia

3 Royal Government of Cambodia, *Rectangular Strategy – Phase IV* (2018) http://iric.gov.kh/rectangular-strategy-phase-iv-in-khmer/.

4 Human Rights Watch, *Cambodia - Events of 2018,* accessed 24 December 2020, https://www.hrw.org/world-report/2019/country-chapters/cambodia.

Background

UN Committee on Economic, Social and Cultural Rights, General Comment No. 13[5]

46. The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

47. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.

UN Committee on Economic, Social and Cultural Rights, General Comment No. 3[6]

8. The Committee notes that the undertaking "to take steps ... by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

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5 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education* (1999) http://www.refworld.org/docid/4538838c22.html

6 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (1990) http://www.refworld.org/docid/4538838e10.html

Instruments

International Covenant on Economic, Social and Cultural Rights[7]

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

UN Committee on Economic, Social and Cultural Rights, General Comment No. 24[8]

2. The Committee has previously considered the growing impact of business activities on the enjoyment of specific Covenant rights relating to health, housing, food, water, social security, the right to work, the right to just and favourable conditions of work and the right to form and join trade unions. In addition, the Committee has addressed the issue in concluding observations on States parties' reports, and in its first decision on an individual communication. In 2011, it adopted a statement on State obligations related to corporate responsibilities in the context of the Covenant rights. The present general comment should be read together with these earlier contributions. It also takes into account advances within the International Labour Organization and within regional organizations such as the Council of Europe. In adopting the present general comment, the Committee has considered the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011, as well as the contributions made to this issue by human rights treaty bodies and various special procedures.

Obligations to respect, to protect and to fulfil

10. The Covenant establishes specific obligations of States parties at three levels — to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State's national territory, and outside the national territory in situations over which States parties may exercise control. (…)

Obligation to respect

12. The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects. (…)

Obligation to protect

14. The obligation to protect means that States parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities. (…)

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7 International Covenant on Economic, Social and Cultural Rights (1966) www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

8 Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en.

16. The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights. States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners.

18. States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance through lowering the criteria for approving new medicines, by failing to incorporate a requirement linked to reasonable accommodation of persons with disabilities in public contracts, by granting exploration and exploitation permits for natural resources without giving due consideration to the potential adverse impacts of such activities on the individual and on communities' enjoyment of Covenant rights, by exempting certain projects or certain geographical areas from the application of laws that protect Covenant rights, or by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all. Such violations are facilitated where insufficient safeguards exist to address corruption of public officials or private-to-private corruption, or where, as a result of corruption of judges, human rights abuses are left unremedied.

21. The increased role and impact of private actors in traditionally public sectors, such as the health or education sector, pose new challenges for States parties in complying with their obligations under the Covenant. Privatization is not per se prohibited by the Covenant, even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong. Private providers should, however, be subject to strict regulations that impose on them so-called "public service obligations": in the provision of water or electricity, this may include requirements concerning universality of coverage and continuity of service, pricing policies, quality requirements, and user participation. Similarly, private health-care providers should be prohibited from denying access to affordable and adequate services, treatments or information. For instance, where health practitioners are allowed to invoke conscientious objection to refuse to provide certain sexual and reproductive health services, including abortion, they should refer the women or girls seeking such services to another practitioner within reasonable geographical reach who is willing to provide such services.

Obligation to fulfil

23. The obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment. Discharging such duties may require the mobilization of resources by the State, including by enforcing progressive taxation schemes. It may require seeking business cooperation and support to implement the Covenant rights and comply with other human rights standards and principles.

International Covenant on Civil and Political Rights[9]

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (…)

9 International Covenant on Civil and Political Rights (1966) www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

UN Human Rights Committee, General Comment No. 3[10]

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

UN, Guiding Principles on Business and Human Rights[11]

Introduction to the Guiding Principles

13. What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.

14. The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. (…)

10 Human Rights Committee, *General Comment No. 31 (2004) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en.

11 Human Rights Council, *UN Guiding Principles on Business and Human Rights* (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciples BusinessHR_EN.pdf

The State duty to protect human rights

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Commentary

States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.

The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.

4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

   (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

   (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

   (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

   (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Draft UN Treaty on Business and Human Rights[12]

Article 1. Definitions

2. "Human rights abuse" shall mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights. (…)

12 OEIGWG Chairmanship, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises,* Second Revised Draft (2020) www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

4. "Business activities of a transnational character" means any business activity described in paragraph 3 of this Article, when:

   a) It is undertaken in more than one jurisdiction or State; or

   b) It is undertaken in one State through any business relationship but a substantial part of its preparation, planning, direction, control, design, processing, or manufacturing, storage or distribution, takes place in another State; or

   c) It is undertaken in one State but has substantial effect in another State.

Article 2. Statement of purpose

1. The purpose of this (Legally Binding Instrument) is:

   a. To clarify and facilitate effective implementation of the obligation of States to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises in this regard;

   b. To prevent the occurrence of human rights abuses in the context of business activities;

   c. To ensure access to justice and effective remedy for victims of human rights abuses in the context of such business activities;

   d. To facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses in the context of business activities and provide access to justice and effective remedy to victims of such abuses.

Article 6. Prevention

2. (…) State Parties shall require business enterprises, to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations, as follows:

   a. Identify and assess any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships;

   b. Take appropriate measures to prevent and mitigate effectively the identified actual or potential human rights abuses, including in their business relationships;

   c. Monitor the effectiveness of their measures to prevent and mitigate human rights abuses, including in their business relationships;

   d. Communicate regularly and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships. (…)

Article 7. Legal liability

4. States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive criminal and/or administrative sanctions where legal or natural persons conducting business activities, have caused or contributed to criminal offences or other regulatory breaches that amount or lead to human rights abuses. (…)

6. State Parties may require legal or natural persons conducting in business activities in their territory or jurisdiction, including those of a transnational character, to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation. (…)

7. States Parties shall ensure that their domestic law provides for the liability of legal or natural or legal persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom it has a business relationship, from causing or contributing to human rights abuses, when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse. (…)

Article 14. Consistency with international law principles and instruments

1. States Parties shall carry out their obligations under this (Legally Binding Instrument) in a manner consistent with, and fully respecting, the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. (…)

5. States Parties shall ensure that:

   a. any existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that will not undermine or limit their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.

   b. Any new bilateral or multilateral trade and investment agreements shall be compatible with the State Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.

Article 15. Institutional arrangements

1. There shall be a Committee established in accordance with the following procedures:

   a. The Committee shall consist, at the time of entry into force of the present (Legally Binding Instrument), (12) experts. (…) The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence in the field of human rights, public international law or other relevant fields.

   b. The experts shall be elected by the State Parties (…)

2. State Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this (Legally Binding Instrument) (…)

4. The Committee shall have the following functions:

   a. Make general comments and normative recommendations on the understanding and implementation of the (Legally Binding Instrument) based on the examination of reports and information received from the State Parties and other stakeholders;

   b. Consider and provide concluding observations and recommendations on reports submitted by State Parties (…);

   c. Provide support to the State Parties in the compilation and communication of information required for the implementation of the provisions of the (Legally Binding Instrument); (…)

7. States Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument), to provide legal and financial aid to victims. (…)

ICAR, Human Rights Due Diligence: The Role of States[13]

This Report describes measures that States can adopt to ensure that businesses engage in human rights due diligence. The research that informs this report examined existing due diligence regimes from around the world in areas analogous to, or relevant for, human rights, such as labor standards, environmental protection, consumer protection, and the prevention and detection of financial crimes such as money laundering and bribery (corruption). The research also revealed that new State practice is emerging in the area of human rights due diligence specifically.

A key conclusion of this Report is that there is ample evidence that States already use due diligence in regulation as a means to ensure companies meet specified standards of behavior. The objective served by such regulation is to prevent adverse impacts or harms and to protect people, in part by clarifying standards of compliance for business enterprises. States already deploy due diligence in this manner in jurisdictions around the world. (…)

National and international due diligence regimes require business enterprises to implement due diligence across organizational and national boundaries. An examination of various national and international legal texts that rely on due diligence suggests due diligence is used by these different legal regimes to overcome the obstacles to effective regulation posed by complex corporate structures or trans-jurisdictional activities. (…)

The options described in the Report indicate at least four main regulatory approaches through which States can ensure human rights due diligence activities by business. Usually these approaches co-exist within the same jurisdictions and legal systems. The first approach imposes a due diligence requirement as a matter of regulatory compliance. States implement rules that require business enterprises to conduct due diligence, either as a direct legal obligation formulated in a rule, or indirectly by offering companies the opportunity to use due diligence as a defense against charges of criminal, civil or administrative violations. For example, the courts use business due diligence to assess business compliance with environmental, labor, consumer protection and anti-corruption laws. Similarly, regulatory agencies regularly require business due diligence as the basis upon which to grant approvals and licenses for business activities.

The second regulatory approach provides incentives and benefits to companies in return for their being able to demonstrate due diligence practice. For example, in order for business enterprises to qualify for export credit, labeling schemes or other forms of State support, States often require due diligence on environmental and social risks.

A third approach is for States to encourage due diligence through transparency and disclosure mechanisms. States implement rules that require business enterprises to disclose due diligence with the intention that markets and society will attempt to constrain any identified harms. For example, securities laws, consumer protection laws and reporting requirements for corporate social responsibility operate on the logic that information serves the interests and will prompt action by investors, regulators, and people who might be adversely affected by a business activity.

A fourth category involves a combination of one or more of these approaches. States regularly combine aspects of these approaches in order to construct an incentive structure that promotes respect by business for the standards set down in the rules and ensures that compliance can be assessed in an efficient and effective manner. For example, administrative rules governing environmental protection, labor rights, consumer protection or anti-corruption may require business due diligence as the bases for a license or approval, and may also require regular reporting disclosure of due diligence activities by business. Enforcement of such rules can combine a combination of administrative penalty (fines), criminal law sanctions and the possibility of civil action.

13 ICAR, ECCJ, *Human Rights Due Diligence: The Role of States* (2012) https://www.icar.ngo/publications/2017/1/4/human-rights-due-diligence-the-role-of-states.

Maastricht Principles on Extraterritorial Obligations of States[14]

3. All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.

8. Definition of extraterritorial obligations

Extraterritorial obligations encompass:

a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and

b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

UN, Guidance on National Action Plans on Business and Human Rights[15]

The value of National Action Plans on Business and Human Rights

The UNWG considers that NAPs, and the process to develop them, can provide for:

- Greater coordination and coherence within Government on the range of public policy areas that relate to business and human rights;
- An inclusive process to identify national priorities and concrete policy measures and action;
- Transparency and predictability for interested domestic and international stakeholders;
- A process of continuous monitoring, measuring and evaluation of implementation;
- A platform for ongoing multi-stakeholder dialogue; and
- A flexible yet common format that facilitates international cooperation, coordination, and exchanges of good practices and lessons learned.

The UNGPs as the foundation for NAPs

A NAP is an instrument to implement the UNGPs. In line with the UNGPs, NAPs must be based on international human rights standards and reflect the complementarity and interrelatedness of State obligations and business responsibilities in preventing, mitigating and remedying adverse business-related human rights impacts. NAPs as public policy strategies should, in the first instance, provide answers as to how States plan to implement their human rights obligations. (…)

Knox, The Ruggie Rules[16]

The chapter first analyzes Ruggie's response to the most fundamental legal issue presented to him: does the entire body of human rights law apply directly to corporations? Rejecting the approach taken by a group of UN experts two years earlier, Ruggie answered the question with an emphatic negative. International law supports his position; indeed, the opposite view is legally untenable. By itself, however, his restatement of existing law would not have

14 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011) http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=63.

15 UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (2016) http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

16 John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations* (2012) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916664

quelled the controversy over the relationship of human rights law and corporations. But Ruggie did not stop there. He offered a new Framework and Guiding Principles that attempt (1) to elaborate the legal duties of states to protect against human rights abuses by regulating corporate conduct, and (2) to set out responsibilities for corporations that are not binding but that nevertheless provide a basis for monitoring and remediating corporate misconduct. (…) Here, I look at their complicated relationship with human rights law, examining both how the Principles draw on existing law and whether they prepare the ground for the law to recognize direct corporate duties in the future.

Second, the chapter discusses three narrower issues: (a) Even if corporations are not bound by the body of human rights law, are they at least obliged to refrain from committing particularly heinous abuses that are defined as international crimes? (b) When can corporations be complicit in state violations of human rights law? and (c) Does the state duty to protect extend extraterritorially, to actions by corporations outside the territory of their home state? International law does not yet provide a definitive answer to any of these questions. This chapter describes Ruggie's positions: (a) corporations may be liable for committing international crimes; (b) corporations can be complicit in a state violation if they knowledgeably assist in its commission, even if they did not intend the violation to occur; and (c) the state duty to protect does not extend extraterritorially, although states should nevertheless encourage corporations to respect human rights abroad. These positions will help to inform, although they will certainly not end, the ongoing debate over how international law should address corporate abuses of human rights.

Developed countries have generally opposed extraterritorial human rights obligations, and developing countries may not always like the idea, either, in the context of a duty to protect (as opposed to a duty to assist). Olivier de Schutter states that "in general, it may be anticipated that control by the home States of the activities of transnational corporations will be resented as a limitation to the sovereign right of the territorial States concerned to regulate activities occurring on their territory, or as betraying a distrust of the ability of those States to effectively protect their own populations from the activities of foreign corporations."138 If Ruggie believed that stronger statements of legal obligation would have been opposed from both richer and poorer countries, then he may have felt that he could go no further than emphasizing, as he did, that states have the authority to regulate the extraterritorial conduct of their companies and that they should exercise that authority more often. As so often in international law, legal changes in this regard may follow from changes in the practice of states, rather than vice versa.

DIHR, The AAAQ Framework[17]

The development of the AAAQ frameworks relies on a review and mapping methodology in order to operationalise the selected ESC [economic, social and cultural] rights.

Availability identifies whether there is a sufficient amount of water available within a given geographical area (e.g. a country, a district or a village) and whether there is a regular supply of water over time. Thereby the availability criterion takes into account seasonal changes in water supply according to weather patterns as well as the regularity of supply on a daily basis. Availability is viewed from a supply perspective in terms of ensuring enough water is available at any given time in a specific location. (…)

Accessibility concerns the level of access and identifies who has access and thereby encompasses the human rights principles of non-discrimination, participation and accountability. There might be an abundance of water within a country or a district, but there are a variety of factors that influence rights holders' ability to access water. Accessibility is divided into four sub-criteria to help identify the barriers for accessing water

- Physical accessibility means that water must be within physical reach and that it can be accessed without physical threats.
- Economic accessibility is often referred to as Affordability and concerns the cost of accessing water and attention is given to whether the cost of water threatens the realization of other rights; e.g. if a family is forced to prioritise between water for the family and school fees for the children.

17 Danish Institute for Human Rights, *The AAAQ Framework and the Right to Water - International Indicators for Availability, Accessibility, Acceptability and Quality* (2014), p. 20-22, https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/aaaq_international_indicators_2014.pdf.

- Non-discrimination is a specific element of accessibility as well as an overarching human rights principle for all AAAQ criteria. In its simplest form, the non-discrimination criterion can be addressed through disaggregating data on the other AAAQ indicators based on prohibited grounds of discrimination. (…)
- Information accessibility concerns the accessibility of information on water related issues and should consider e.g. the frequency, medium, form and language of the information. In a broader perspective, information accessibility also relates to the openness and responsiveness of public institutions to the requests and needs for information about water governance institutions and processes. This includes provision of information about how and when rights holders can participate in policy and decision-making processes as well as establishment of mechanisms for feedback and complaints. (…)

Acceptability concerns subjective assessments of the rights holders' perceptions about water and the delivery of water. A distinction is made between consumer and cultural acceptability. Consumer acceptability includes the characteristics of the water (e.g. odour, taste and colour) as well as procedural considerations (e.g. the behaviour of water suppliers). Cultural acceptability refers to subjective perceptions based on the culture of individuals, minority groups and communities. (…)

Quality concerns the quality of water in objective, scientific terms and it is closely tied to international quality standards. Assessing the quality of water is highly complex and requires technical expertise on micro-organisms and chemicals that might pose a health risk. WHO and UNICEF are leaders in the field of water quality and have defined a set of core parameters for water quality (microbial quality, physical parameters and chemical parameters). (…)

Background (Cambodia)

Human Rights Council, General Human Rights Situation in Cambodia[18]

11. The 2030 Agenda for Sustainable Development explicitly recognizes that the promotion and protection of human rights is both a prerequisite to achieving the Sustainable Development Goals as well as a result. The principle of leaving no one behind is perhaps the clearest expression of this link. Indeed, respect for human rights is an integral part of ensuring lasting development and peace in Cambodia. Nevertheless, over the past year, government ministers, both during meetings and through the submission of official documents, have addressed comments to Special Rapporteur that prioritize peace, stability and development over human rights. Respect for rights and freedoms are enshrined in the Cambodian Constitution and Cambodia has ratified almost all the core human rights treaties. Human rights cannot be selectively respected or ignored, and they must never be sacrificed. Peace without justice is unsustainable; development without freedom leaves people behind.

89. The overall human rights situation in Cambodia has suffered over the past year. On one hand, the ongoing economic growth that Cambodia is enjoying has paved the way for improvements in the area of economic and social rights, in particular, social protection, minimum wage and maternity leave (…) The dissolution of Cambodian National Rescue Party (CNRP) and the imprisonment of its President, Kem Sokha, the banning of 118 CNRP officials from political activity for five years and the reallocation of CNRP seats to unelected representatives have seriously strained political rights. Developments in law, policy and practice, including amendment of the Constitution to introduce a lèse-majesté law, have targeted critical and dissenting voices and significantly curtailed fundamental freedoms. These developments are grave. For economic development to be sustainable, the indivisibility of rights dictates that respect for civil and political rights should accompany improvements in economic and social rights.

18 Rhona Smith, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia* (2018) https://cambodia.ohchr.org/sites/default/files/Annual-reports/Annual%20Report%202018%20of%20SR%20-%20A_HRC_39_73_EN.pdf

Instruments (Cambodia)

Constitution of the Kingdom of Cambodia[19]

Article 31: Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status. The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedoms of others.

Article 36: (…) Khmer citizens of both sexes shall receive equal pay for equal work. (…) Khmer citizens of both sexes shall have the right to enjoy social security and other social benefits as determined by law. (…)

OHCHR Cambodia, UN Treaty-Based Bodies – Cambodia[20]

Cambodia has become party to the following core international human rights treaties and some of their optional protocols:

1. International Covenant on Economic Social and Cultural Rights (ICESCR)
2. International Covenant on Civil and Political Rights (ICCPR)
3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
4. Convention on the Elimination of Discrimination against Women (CEDAW) and its Optional Protocol
5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol
6. Convention on the Rights of the Child (CRC), its Optional Protocol on the sale of children, child prostitution and child pornography, and its Optional Protocol on the involvement of children in armed conflict
7. Convention on the Rights of Persons with Disabilities
8. Convention for the Protection of All Persons from Enforced Disappearance.

ILO Conventions - Cambodia[21]

Cambodia has been a member of ILO since 1969 and ratified all the fundamental conventions of ILO as follows:

1. Forced Labour Convention, 1930 (No. 29)
2. Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)
3. Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
4. Equal Remuneration Convention, 1951 (No. 100)
5. Abolition of Forced Labour Convention, 1957 (No. 105)
6. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
7. Minimum Age Convention, 1973 (No. 138)
8. Worst Forms of Child Labour Convention, 1999 (No. 182)

19 The Constitution of the Kingdom of Cambodia (1993) https://cambodia.ohchr.org/~cambodiaohchr/sites/default/files/Constitution_ENG.pdf.

20 OHCHR-Cambodia, *Treaty-Based Bodies,* updated 22 January 2017, accessed 20 January 2021, https://cambodia.ohchr.org/en/treaty-based-bodies.

21 A list of ILO conventions ratified by Cambodia can be accessed via https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103055.

[All States parties to a human rights treaty are obliged to submit regular reports to the United Nations on how the rights in the treaty are being implemented. These reports are reviewed by a committee of independent experts, often referred to as a "treaty body". The Committee examines each report and addressed its concerns and recommendations to the State party in the form of "concluding observations". The aim of this process is not to criticize governments, but to provide constructive advice on ways in which countries can make better progress towards ensuring that everyone can enjoy the rights set out in the treaty. The treaty body does not rely solely on information provided in the government's report to make its assessment. It is also open to submissions from national and international non-governmental organizational (NGOs) as well as United Nations agencies, such as WHO or ILO.][22]

CEDAW Committee, Concluding Observations[23]

40. (…) It remains concerned, however, about report that microfinancing institutions charge high interest rates, require land titles as collateral and target poor clients, the majority of whom are women, and that, in the event of default, the land seized is frequently of much higher value than the debt, without the difference being compensated, which leaves many rural women destitute and homeless.

41. The Committee recommends that the State party ensure that rural women have access to low-interest loans and financial credit by effectively regulating microfinancing institutions and establishing an oversight mechanism to prevent exploitative lending practices. It also recommends that the State party adopt measures to facilitate opportunities for rural women to establish not only micro, small and medium-sized enterprises but also large enterprises.

CERD Committee, Concluding Observations[24]

28. Bearing in mind its General Recommendation No. 23 on the rights of indigenous peoples (1997), the Committee welcomes the Government's development of a strategic plan for the development of indigenous peoples 2020-2024, and recommends that the state party [to] Protect indigenous people from attacks and intimidation, from government agents and private companies, as they seek to exercise their rights as it relates to communal lands (…)

31. The Committee notes efforts by the State party to prevent human trafficking, such as the National Plan of Action for Counter Trafficking (2019 – 2023), monitoring places of prostitution, and spreading information to business owners on issues related to trafficking. However, the Committee is deeply concerned that the State party remains a source, destination and transit country for human trafficking, in particular of women and girls, for purposes of sexual and labour exploitation. The Committee is particularly concerned about trafficking in children (art. 2 and 5).

CRC Committee, Concluding Observations[25]

26. The Committee notes that in the context of economic growth and increased domestic and foreign investment, the State party has taken positive measures to regulate the impact of business on child rights in the formal economy, such as the garment industry. The Committee is however concerned that the regulatory framework on the social and environmental responsibility of business corporations, both national and international, is not yet in place to prevent possible negative impact of their activities on children.

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22 OHCHR-Cambodia, *Treaty-Based Bodies,* updated 22 January 2017, accessed 20 January 2021, https://cambodia.ohchr.org/en/treaty-based-bodies.

23 Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations on the Sixth Periodic Report of Cambodia,* CEDAW/C/KHM/CO/6. (2019) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/KHM/CO/6&Lang=En.

24 Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations on the Combined Fourteenth to Seventh Reports of Cambodia,* CERD/C/KHM/CO/14-17 (2019) https://cambodia.ohchr.org/sites/default/files/Treaty-report/INT_CERD_COC_KHM_40808_E.pdf.

25 Committee on the Rights of the Child (CRC), *Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: Cambodia,* CRC/C/KHM/CO/2-3 (2011) https://www.refworld.org/docid/4ef1f0df2.html.

27. The Committee recommends that the State party continue to be vigilant about the compliance of its national law by local and foreign companies throughout its territory, and to establish and implement regulations to ensure that the business sector complies with international and domestic standards on corporate social and environmental responsibility, particularly with regard to child rights, in line with the United Nations Framework for Business and Human Rights which was adopted unanimously by the Human Rights Council in 2008, and which outlines the duty of States to protect against human rights abuses by businesses, corporate responsibilities to respect human rights, and the need for more effective access to remedies when violations occur.

72. The Committee urges the State party to:

    (b) Condemn and take active measures against individuals and enterprises that enable, facilitate or exacerbate sex tourism;

CRC, Concluding Observations [on Child Sex Tourism][26]

19. The Committee urges the State party to pursue its efforts to prevent child sex tourism and orphanage tourism and to protect children from becoming victims by strengthening its regulatory framework and awareness-raising measures, including in rural areas, and to take all necessary measures to ensure that all cases of child sex tourism and orphanage tourism are investigated and that alleged perpetrators are prosecuted and duly sanctioned. The Committee also recommends that the State party:

    (a) Conduct advocacy with the tourism industry and the media on the harmful effects of child sex tourism, widely disseminate the World Tourism Organization Global Code of Ethics for Tourism among travel agents and tourism agencies, and encourage these enterprises to become signatories to the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (…)

ILO, Committee of Experts Observations [on Forced Labour][27]

1. *Trafficking in persons.* The Committee previously noted the Government's indication that, within the framework of the National Action Plan of 2011-13 on the suppression of trafficking and sexual exploitation, it had monitored places where prostitution may occur; provided advice and rehabilitation to sex workers; and instructed over 700 business owners on issues related to sexual exploitation. It had also taken measures to inform recruitment agencies on the risks associated with the use of false documentation, as well as on the importance of providing pre-departure training for migrants. The Committee further noted the statistical information provided by the Government on the number of cases of trafficking in persons and sexual exploitation brought before the courts, as well as the number of victims identified and individuals accused. The Committee noted, in particular, that the number of victims of trafficking and sexual exploitation identified appeared to have decreased substantially during the period of implementation of the National Action Plan. However, no information was provided on the number of convictions, the penalties imposed on perpetrators or the specific action taken to protect and assist victims. (…)

2. *Vulnerability of migrant workers to conditions of forced labour.* While taking note of the measures undertaken by the Government, the Committee requests it to continue its efforts to ensure that all migrant workers are fully protected from abusive practices and conditions that amount to forced labour, and to continue providing information in this regard. The Committee also requests the government to continue providing information on the application in practice of Sub-Decree No. 190 of 2011 on labour migration and private recruitment agencies, as well as its supplementing Prakas, indicating the concrete results achieved.

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26 Committee on the Rights of the Child (CRC), *Concluding observations on the report submitted by Cambodia under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,* CRC/C/OPS/KHM/CO/1 (2015) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/OPSC/KHM/CO/1&Lang=En.

27 ILO Committee of Experts on the Application of Conventions and Recommendations, *Observation – Adopted 2017, Published 107th ILC Session (2018),* Forced Labour Convention, 1930 (No. 29) – Cambodia, https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3337487

Human Rights Committee, Concluding Observations[28]

5. While noting that international human rights treaties are part of Cambodian law and are directly applicable in Cambodian courts, the Committee is concerned at the apparently limited level of awareness of the provisions of the Covenant among the judiciary and the legal profession, resulting in a very small number of cases in which the provisions of the Covenant have been invoked or applied by courts in Cambodia (art. 2).

   The State party should take appropriate measures to raise awareness of the Covenant among judges, prosecutors, lawyers and the public at large to ensure that its provisions are taken into account before national courts.

CESCR Committee, Domestic Applicability of ICESCR in Cambodia[29]

12. The Committee regrets that, despite the constitutional guarantees, it has not been established that Covenant provisions can in practice be invoked before or directly enforced by the State party's national courts, tribunals or administrative authorities. In this regard, the Committee notes with concern, the lack of effective remedies for violations of human rights including economic, social and cultural rights, thereby undermining the State party's ability to meet its obligations under the international human rights treaties that it has ratified including the International Covenant on Economic, Social and Cultural Rights.

    The Committee draws the attention of the State party to its general comment No. 9 (1998) on the domestic application of the Covenant, and recommends that the State party take all appropriate measures to ensure the direct applicability of the Covenant provisions in its domestic legal order, including the conduct of training programmes for judges, lawyers and public officials. The Committee also requests the State party to include in its next periodic report detailed information on progress that has been made in this connection and on decisions of national courts, tribunals or administrative authorities giving effect to Covenant rights.

UN, Universal Periodic Review (UPR) Third Cycle[30]

[The UPR is a unique process that involves a periodic review of the human rights records of all 193 UN Member States. The UPR is a significant innovation of the Human Rights Council based on equal treatment for all countries. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situation in their countries and to overcome challenges to the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe.][31]

14. The United Nations country team indicated that business enterprises continued to have an important role in promoting the economic growth of Cambodia, which could affect the enjoyment of human rights, such as land and housing rights, rights in the workplace and gender equality, among other rights. That highlighted the Government's role to protect human rights. (…)

12. The United Nations country team stressed that Cambodia had experienced significant deforestation and forest degradation in recent years, the main causes of which included conversion to commercial agriculture, mining, economic and social land concessions, legal and illegal settlements and farmland, large-scale infrastructure and hydropower development, road construction, legal and illegal logging, fuelwood harvesting and forest fires.

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28 Human Rights Committee, *Concluding Observations on the Second Periodic Report of Cambodia*, CCPR/C/KHM/CO/2 (2015) https://cambodia.ohchr.org/sites/default/files/Treaty-report/CObs%20of%20UN%20Human%20Rights%20Committee%202015.pdf.

29 Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations of the Committee on Economic, Social and Cultural Rights – Cambodia* (2009) http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-KHM-CO-1.doc.

30 United Nations General Assembly. Report of the Office of the United Nations High Commissioner for Human Rights – Compilation on Cambodia. A/HRC/WG.6/32/KHM/2. 2019. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/337/25/PDF/G1833725.pdf?OpenElement

31 OHCHR-Cambodia. Frequently Asked Questions about the Universal Periodic Review. https://cambodia.ohchr.org/sites/default/files/FAQ%20on%20URP%20Fact%20Sheet%20-%20Final-EN%20Rev%20Oct2019%2CMR_Final.pdf

13. The Special Rapporteur on the situation of human rights in Cambodia highlighted issues with resettlement and compensation packages offered to persons and communities displaced by land concessions, including the adequacy of compensation and the appropriateness of relocation sites. She stressed that more needed to be done to ensure that compensation packages were fully understood by potential recipients and that all land disputes were resolved through a process free from threats, violence and intimidation.

14. The United Nations country team indicated that business enterprises continued to have an important role in promoting the economic growth of Cambodia, which could affect the enjoyment of human rights, such as land and housing rights, rights in the workplace and gender equality, among other rights. That highlighted the Government's role to protect human rights. (…)

C. Economic, social and cultural rights

1. Right to work and to just and favorable conditions of work

33. The United Nations country team noted that, in 2017, the Government had introduced improved social protection for workers and a lump-sum payment scheme for pregnant workers and had raised the minimum wage for workers in the textile and footwear industries by 11 per cent in 2018. It also noted that the Government had suspended the drafting of a controversial bill on labour dispute resolution. Despite all those efforts, the living conditions of people working in factories, particularly women, were still poor and net salaries low. Sexual harassment at the workplace continued to be a serious problem, which undermined women's rights and women's participation in the economy. (…)

5. Migrants, refugees, asylum seekers and internally displaced persons

59. In the context of meeting international labour standards and Goal 8 of the Sustainable Development Goals, the United Nations country team encouraged the Government to increase protection mechanisms for Cambodian migrants abroad, including domestic workers, and closely monitor labour agencies recruiting and deploying Cambodian migrant workers abroad.

UN Special Rapporteur for Cambodia, 2011 Report[32]

[The Special Rapporteur is an independent expert appointed by the United Nations Human Rights Council to follow and report on the human rights situation in Cambodia. She is not a United Nations staff member, does not receive a salary from the United Nations, and does not work for any government or interest group. Her task is to assess the human rights situation, report publicly about it, and work with the Government, civil society and others to foster international cooperation in this field. The Special Rapporteur undertakes regularly visits or missions to Cambodia and reports annually to the Human Rights Council. OHCHR provides her with logistical and technical assistance. The current Special Rapporteur is Ms. Rhona Smith (UK), who was appointed in March 2015.][33]

91. The Government is advised to exercise greater transparency in economic land concessions and other land deals involving Government officials or private enterprises, and is encouraged to strengthen the capacity and independence of the court system, the cadastral commissions, and the National Authority for Land Dispute Resolution so that they may exercise accountability, impartiality and greater efficiency in resolving disputes. (…)

32 Surya Prasad Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, A/HRC/18/46 (2011) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/153/63/PDF/G1115363.pdf?OpenElement.

33 OHCHR, *Special Rapporteur on the Situation of Human Rights in Cambodia* (2019) https://www.ohchr.org/en/hrbodies/sp/countriesmandates/kh/pages/srcambodia.aspx

93. When engaging in land deals either with the Government of Cambodia or other land owners, foreign Governments and international business organizations should bear in mind that they have a responsibility under international law to respect the human rights of the people of Cambodia. Sponsorship of the use of armed law enforcement officials to carry out an unlawful eviction is illegal under international law and should be made illegal in Cambodia as well.

UN Special Rapporteur for Cambodia, 2012 Report[34]

133. There can be a cost benefit to inclusive development planning and preventing conflict. The Government should not assume that they are helping businesses by not holding them to account. On the contrary, businesses that do not respect human rights or offer effective remedies when they contribute to adverse impacts run an increasing risk of facing human rights litigation, disruption in operations due to conflicts, or negative publicity by being associated with abuses. These circumstances can affect profit and threaten the sustainability of the business, and lower rates of investment translate into decreased tax revenue for the Government. (…)

216. Due consideration should be given to proposals by concessionaires with enhanced legal and regulatory requirements attached to their investments (such as third-party certification schemes and rigorous codes of conduct) which incorporate international standards of environmental and social sustainability. (…)

217. Companies of all sizes, structures and modes of operation, both domestic and foreign, and whether wholly or partly owned by the State, should address their human rights impact by practicing due diligence, including implementing measures to identify, prevent, and mitigate adverse human rights consequences and account for their business activities. (…)

222. Concession companies should take all measures to avoid environmental destruction in their operations, including preventing water contamination, soil deterioration, and unnecessary clearing of land or illicit logging. They should ensure that access to infrastructure, such as new roads on their concessions, is accessible to all surrounding communities and should refrain from blocking transportation within the boundaries of the concession. (…)

224. Concession companies – with use of revenue from concession activity – should increase their contributions to the local communities, including by providing social benefits such as health services, educational opportunities and environmental protection measures. (…)

236. The use of international grievance procedures and mechanisms, as well as national human rights institutions abroad, should be further explored by civil society actors in order to bring complaints of alleged human rights abuses of foreign owned or operated business enterprises implicated in human rights violations in Cambodia (whether the businesses are majority or minority shareholders). The possible role of the ASEAN Inter-Governmental Commission on Human Rights may be further examined.

UN Special Rapporteur for Cambodia, 2014 Report[35]

67. The Special Rapporteur consulted with a wide range of stakeholders during his last two missions about their views regarding the need, or desirability, of establishing an independent national human rights institution. An independent national institution that conforms to the Paris Principles is responsible for monitoring and advising the Government on all human rights matter and is empowered to investigate individual complaints has proven to be an effective protection mechanism in many countries, including within the Association of Southeast Asian Nations. He considers that such an institution could also prove useful in filling an important gap in Cambodia.

34 Surya Prasad Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia,* A/HRC/21/63/Add.1/Rev.1, (2012) https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session21/a-hrc-21-63-add1_en.pdf.

35 Surya Prasad Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia,* A/HRC/27/70 (2014), https://undocs.org/en/A/HRC/27/70.

73. Many individuals have told the Special Rapporteur that it is impossible for there to be a truly independent national institution in the current political context in Cambodia. However, the Special Rapporteur notes that one exception is the Arbitration Council, which has been able to preserve its independence and thus its credibility before the parties to most of the labour-management disputes brought to it. Although the results of arbitration are not binding, he understands that several major buyers and trade unions have accepted to be bound by the conclusions of the Arbitration Council. He further recommends that all those who have a stake in peaceful labour relations in Cambodia work together to ensure that the Council will continue to be adequately and sustainably resourced, with full guarantees for its continued independence.

UN Special Rapporteur for Cambodia, 2019 Report[36]

17. Cambodia is now in a distinct phase of development. Following years of strong economic growth and significant progress in poverty reduction, Cambodia has an ambition to be considered a high-income country by 2050. To help guide it towards realizing that vision, the Government has adopted phase IV of its "Rectangular Strategy" and the localization plan for the Cambodian Sustainable Development Goals and is now finalizing the national strategic development plan. These three documents are designed to provide a coherent development strategy for the country.

19. Human rights unequivocally anchor the 2030 Agenda for Sustainable Development and the Sustainable Development Goals. The 2030 Agenda explicitly states that it is grounded in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights treaties. Its implementation is to be consistent with the obligations of States under international law, including their human rights obligations. Many of the recommendations Cambodia has received in connection with treaty body reports, the universal periodic review and the reports and communications of special procedures mandate holders relate directly to the targets of the 2030 Agenda.

20. The Sustainable Development Goals are closely linked to civil, cultural, economic, political and social rights. They cover areas such as health, education, decent work, food, water and equality, as well as personal security, access to justice and fundamental freedoms. (…)

24. Underlining the importance of the principle of participation, the 2030 Agenda requires the implementation of the Sustainable Development Goals in a spirit of partnership, with the participation of all countries, stakeholders and people. Goal 17 emphasizes partnerships, including through encouraging and promoting "effective public, public-private and civil society partnerships" (target 17.17).

25. States should establish an accountability framework at the national, regional and global levels. That includes the voluntary review mechanism under the high-level political forum and participatory monitoring mechanisms at the national level. Accountability covers the actions of States and non-State actors, including the business sector, which should be guided by the Guiding Principles on Business and Human Rights. (…)

Worker's Information Center, Shadow Report under CEDAW[37]

The Law on Labour (Articles 239, 242 and 244) state that enterprises employing at least fifty workers shall have a permanent infirmary on the premises of the establishment. The infirmary shall be supplied with adequate materials, bandages and medicines to provide emergency care to workers in the event of accidents or occupational illness or sickness during work. (…)

The Law on Labour (Article 186) requires enterprises to set up a nursing room or day-care-centre if the enterprise employing minimum of one hundred women or girls. (…)

36 Rhona Smith, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia,* A/HRC/42/60 (2019) https://www.ohchr.org/en/hrbodies/sp/countriesmandates/kh/pages/srcambodia.aspx.

37 Worker's Information Center (WIC), *Shadow Report for Working Group 74th Session of CEDAW* (2019) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fKHM%2f37334&Lang=en.

Recommendations:

- The Ministry of Labour and Vocational Training (MoLVT) to ensure the permanent infirmary is functioning with enough medical supplies for sick workers, and guarantee the provision of nursing and childcare services for working mothers.
- MoLVT to ensure that factories provide women workers the right to sick leave as needed even if the leave is related to their monthly menstruation.
- MoLVT to work with all factories to set up a mechanism for sexual harassment reporting and addressing violations, and to ensure the collective bargaining for women workers to address such issues in a respectful and sensitive manner.

Solidarity Center Cambodia, Shadow Report under CEDAW[38]

Recommendations for Cambodia:

- Require the transnational companies operating in Cambodia conduct gender impact assessments and provide effective remedies in case of GBV/H. (…)

Recommendations for Cambodia:

- In instances of alleged pregnancy discrimination, the employer should bear the onus of proof. The current Arbitration Council's approach to cast the onus of proving discrimination on pregnant women must be reversed.
- Cambodia should ratify the ILO Convention 183 and domesticate its provisions, including 14 weeks of paid maternity leave and cash and medical benefits.
- A labor ombudsman mechanism should be established to allow workers to report unlawful working conditions outside of existing conciliation and arbitration process. Regulations should be issued that increase penalties for employers who fail to provide maternity benefits in accordance with the Labor Law.

CCHR, Business and Human Rights Handbook for Cambodia[39]

In Cambodia, where the business sector is plagued with a myriad of human rights concerns, the concept of business and human rights is especially crucial, yet it is a relatively new concept and many Cambodians are unfamiliar with this term.

The concept is particularly important for Cambodia's land sector, where the government has permitted large swathes of land to be leased for commercial interests through economic land concessions. Businesses often rely on false promises, intimidation and violence to secure land from vulnerable citizens. The violations do not end with land acquisition, either. In the aftermath of such land grabs, corporate actors, often with the collusion or complicity of state organs, continue to exploit the dispossessed through child labor, low wages, and denial of compensation.

Despite guarantees in domestic and international law, communities continue to have their land illegally taken away from them, for transfer to private companies for commercial agriculture (e.g. sugar and rubber plantations); and mining and energy projects, such as hydropower dams. Such business activities undermine the rights to adequate housing, food and water, and have long-term environmental and economic impacts.

38 Solidarity Center Cambodia (ACILS), *Alternative Report on Labor Rights and Gender for Submission to the United Nations Committee on the Elimination of Discrimination Against Women,* 74th Session (2019) https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KHM/INT_CEDAW_CSS_KHM_37341_E.docx.

39 Cambodia Center for Human Rights, *Business and Human Rights Handbook for Cambodia* (2016) https://cchrcambodia.org/admin/media/report/report/english/2016_Handbook_BHR_English.pdf.

The weak rule of law in Cambodia is certainly a factor that allows private companies to violate human rights in their business operations with ease.

The victims of business-based human rights abuses are often the most vulnerable in society who have few resources to stand up to such violations – the poor and disadvantaged, women, indigenous communities, and more generally those who are uneducated about their rights and the law.

CCHR, Fact Sheet: Business' Responsibility to Respect Human Rights[40]

Benefits of Implementing the United Nations Guiding Principles for the Cambodian Government

- Increased investor – confidence by promoting an environment that could facilitate foreign direct investment, especially from Western countries
- Risk mitigation – the Guiding Principles would mitigate the risks of the Cambodian government violating international human rights law
- Policy coherence – The Guiding Principles provide guidance to the government policy makers on paying due diligence to human rights
- Access to remedy – as the government is already obligated to ensure the availability of remedial mechanisms in accordance with international human rights law, the Guiding Principles provide a useful framework

Benefits of Implementing the United Nations Guiding Principles for the Cambodian Government

- Increased commercial reputation – implementing the Guiding Principles will assist businesses in complying with human rights which will greatly boost their reputations
- Government engagement – the Guiding Principles encourage dialogue between the government and businesses on key issues
- Risk mitigation – Implementing the Guiding Principles assists in alleviating the risks of litigation
- No opportunity costs – committing to human rights will prevent losses arising from employee protests, a lack of consumer satisfaction and non-compliance with buyer standards
- Increased productivity – committing to human rights will boost productivity if employees are satisfied, working in safe environments and have their rights secured
- Competitiveness – operationalizing the Guiding Principles and committing to human rights enhances a company's edge in the market
- Value chain development – buyers and suppliers benefit from improved relations and increased productivity when companies respect human rights
- Sustainability – with increased productivity and ethical business practices in place, businesses have greater chances to sustain and expand their economic activities
- Increased opportunities to expand and engage export markets – implementing the Guiding Principles creates openings for those markets which require certain standards in relation to traceability, sustainability, certification and good business practices (for example European and American markets)

40 Cambodia Center for Human Rights, *Fact Sheet: Business' Responsibility to Respect Human Rights* (2019) https://cchrcambodia.org/admin/media/factsheet/factsheet/english/2019-7-16-factsheet-business-responsibility-to-respect-HR-eng.pdf

Ly and Soy, National Human Rights Institution - Cambodia[41]

The main human rights bodies in Cambodia are: The National Assembly Commission on Human Rights (NACHR); the Senate Commission on Human Rights (SCHR); and the Cambodian Human Rights Committee (CHRC). Further, various ministerial departments, such as the Cambodian National Council for Women, the Cambodian National Council for Children and the Disability Action Council address human rights related issues in respect of specific groups of persons.

NACHR and SCHR are legislative human rights commissions composed of nine members and five members, respectively. The NACHR is attached to the National Assembly, while the SCHR is attached to the Senate. These commissions are primarily tasked with addressing human rights issues by monitoring the implementation of human rights and receiving peoples' complaints. However, both NACHR and SCHR appear to play a very limited role in resolving those complaints, as they can only address them to relevant authorities and the government for actions and solutions. These commissions can also initiate, draft, and review relevant proposals or laws to implement Cambodia's human rights obligations under domestic laws and international human rights treaties that Cambodia ratifies. They also have mandates to educate and raise awareness about human rights through various outreach programs and play a consultative to the government on relevant laws.

Within the executive framework, the government established the CHRC in order to promote and protect human rights in Cambodia. It carries out investigations into human rights violations and receives complaints. In solving human rights violations addressed in the complaints, CHRC coordinates with relevant authorities and the courts. It also conducts education and awareness raising outreach related human rights. Unlike NACHR and SCHR, CHRC is mainly responsible for preparing and submitting national reports on human rights for the United Nations monitoring bodies, particularly the Universal Periodic Review.

Soy, Legal Protection of Construction Workers: Lessons from Cambodia[42]

Economic development – a double-edged sword?

Increased globalization and norm diffusion since the late 1980s mean that businesses have a growing responsibility for the safeguarding of human rights. However, the lack of concerted efforts to control the surge of privatization, deregulation, and liberalization of trade reflects the inability or unwillingness of states to establish a responsive system of governance to effectively tackle the increasing impacts of business activities on human rights. The primary objective of economic development should be society-wide improvements, creating equal opportunities and empowering all people, so that they can become involved in the process and benefit from it. The success of economic development must not be defined simply by economic indicators such as Gross Domestic Product, but should be seen as a holistic process that incorporates "economic, social, political, cultural and environmental needs of people to promote improvement in the quality of life for all".

The impact of globalization on human rights has also been felt in Cambodia. In that context, 1993 can be seen as a significant milestone, with the adoption of a new constitution aimed at promoting liberal democracy and economic development, in an attempt to put the country's violent past behind it. Since then, Cambodia has ratified eight core human rights conventions. Economic and political development are closely linked: real economic growth is dependent on political stability, and high levels of political violence and human rights violations acted as a brake on Cambodia's economic growth, averaging 7.7% annually (ADB, 2017), with the garment, tourism, agriculture, and construction sectors the main drivers of the economy. Nevertheless, Cambodia remains one of the poorest countries in Asia, which raises the question: does the country's rapid growth actually serve the needs and interests of all people, especially those marginalized workers who participate in and contribute to the development process? The adverse effects of business activities on human rights have become a reality and have grown every more acute as economic growth continues.

41 Ratana Ly & Kimsan Soy, *National Human Rights Institution – Cambodia: Background Paper for Bilateral Human Rights Dialogue between Cambodia and Sweden* (2016) (The paper is available through email request to kimsan.soy@elbbl-cshl.org).

42 Kimsan Soy, 'Legal Protection of Construction Workers to Safe Working Condition: Lessons Learned from Cambodia', in Ronald Holzhacker and Dafri Agussalim, *Sustainable Development Goals in Southeast Asia and ASEAN: National and Regional Approaches,* (Leiden, Brill 2019) https://brill.com/view/title/38962. (The paper is available through email request to kimsan.soy@elbbl-cshl.org).

Cambodia government's position in business and human rights

(…) In these decades of steady economic development, there is a risk that technical solutions to fix loopholes in laws, regulations, and practices to protect workers from getting harmed are thwarted by the political reality in Cambodia. Economic growth often breeds a human rights 'governance gap', especially in a developing economy with institutionalized corruption like Cambodia, where the government shows no real interest in imposing more regulations and obligations on businesses to guarantee decent work. Furthermore, in their pursuit of national economic development, policy makers in any developing economy tend to adopt laws and regulations that attract investment and employment, while they also try to ensure that legal frameworks protect workers' rights, directly or indirectly, to decent work and a safe working environment. In Cambodia, the government seems to lack the capacity and the will to develop and apply such legal obligations for fear of losing investment; businesses are able to take advantage of this fear and exercise influence over the government and its policies. (…)

Karnavas, Bringing Domestic Cases into Compliance with International Standards[43]

Interplay of domestic and international law in Cambodia

The interplay between international law incorporated into the Constitution and domestic law in Cambodia supports the conclusion that the ECCC's jurisprudence is applicable in domestic courts because international law incorporated through the Constitution is also domestic law. Cambodia appears to adhere to a dualist (as opposed to a monist) system in its approach to implementing international law in its domestic legal order. As distinct from a monist system, where international law exists alongside the domestic law as equally applicable by courts, a dualist system considers international law to be separate from domestic law and only applies international law if it is directly incorporated into domestic law through a State's constitution or through implementing legislation. In Cambodia, international human rights principles have been explicitly incorporated into the domestic framework by the Constitution and are thus, at least in theory, applicable in domestic courts.

The Constitutional Council has recognized that, although a law may not violate the Constitution, a court must consider whether its application in a particular case would be incompatible with either provisions in the Constitution, other Cambodian law or international conventions recognized by Cambodia. In finding that a proposed amendment to the Law on the Aggravating Circumstances of Felonies was consistent with the Constitution, the Constitutional Council noted that the trial judge should rely not only on the proposed amended Article for a conviction, but also on "the laws". The term "laws" refers to "the national laws, including the Constitution which is the supreme law, all the laws that remain in force, and the international laws already recognized by the Kingdom of Cambodia…" Thus, despite the fact that international law does not appear to be directly enforceable in domestic courts, local judges, like ECCC judges, are constitutionally obliged to consider international human rights conventions and fair trial rights in applying and interpreting domestic law.

Questions

1. How do business activities contribute to violations of human rights in Cambodia?
2. Are there any Cambodian laws and policies established to regulate businesses' responsibility for human rights abuses?
3. Are there any legal requirement for businesses to carry out human rights due diligence or human rights impact assessment in Cambodia?

43 Michael G. Karnavas, *Bringing Domestic Cases into Compliance with International Standards* (2014) http://cambodialpj.org/article/bringing-domestic-cases-into-compliance-with-international-standards/.

4. To what extent do businesses in Cambodia implement the United Nations Guiding Principles on Business and Human Rights?

5. What measures has the Cambodian government taken to promote the respect of human rights by businesses operating in Cambodia? What (further) measures should it undertake to implement the UN Guiding Principles?

6. What are is the role of civil society organizations in holding businesses accountable for human rights violations? How does the task of NGOs change when business wrongdoing and state conduct both are a cause of human rights violations?

Further Readings

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2. INTERNATIONAL SOFT LAW ON CORPORATE SOCIAL RESPONSIBILITIES

Dany Channraksmeychhoukroth, Radu Mares

Introduction

Soft law instruments, or authoritative policy pronouncements from international organizations, are particularly important in the CSR area. The UN has tried to develop an international code for transnational corporations since the 1970s, and then attempted again in the early 2000s to develop human rights norms for transnational corporations; however none of these documents has ever been adopted, even as soft law. In contrast, the OECD and the ILO managed to develop such CSR instruments in the 1970s and have updated them periodically. It was only in 2011 that the UN managed to adopt its first soft law instrument, the Guiding Principles on business and human rights (UNGPs). The UNGPs were produced in a participatory manner, based on extensive evidence and research over a period of six years. The UNGPs marked a significant moment of convergence of numerous policy instruments – issued by states or private actors – around the ideas put forward by the UNGPs. The UNGPs are supported by states, businesses and a part of civil society, and suggest a feasible and somehow moderate view on the social responsibilities of companies. Although somehow general, the UNGPs have now become the reference point that is used by UN bodies, other international organizations such as the OECD and World Bank that have their own CSR instruments, national policymakers, trade unions and advocacy groups that measure corporate performance and promote human rights due diligence, various business sectors that further specify the UNGPs to the particularities of their own context, and several professions such as accountants and lawyers. The big question is whether the UNGPs have succeeded in facilitating hard law at the international level (see chapter 1) and national level (see chapter 4), new collaborations and partnerships as promoted by the Agenda 2030 (see chapter 5), better management systems within companies (see chapters 8-14), and more specific corporate guidance on various human rights (see chapters 15-29). Debate continues about the value of soft law: on the plus side, we now have more clarity on the roles and responsibilities of business regarding human rights; on the minus side, it is not clear how much soft law can shape corporate conduct given the imperatives of profit-making and market pressures. There continues to be a lack of remedies for victims of corporate abuse (see chapters 6-7). What new laws should be adopted to complement soft law and hold transnational businesses accountable remains a contested issue.

The responsibility to protect, respect and fulfil human rights has long been understood as a state's duty. It was only in the recent years that that the discussion on human right responsibilities of businesses began. Indeed, references to human rights obligations of businesses are almost unheard of in Cambodian legal instruments. However, other actors including NGOs, media, and consumers have encouraged or pressured businesses to become more accountable for the adverse human rights impacts of their operations. CSR remains poorly understood as a concept among relevant stakeholders in Cambodia. Practicing CSR helps companies to conduct their business in an ethical way[44], which is a new strategy to attract business partners and consumers. Importantly, involvement of other social actors pointing corporate human rights violations makes it more difficult for the state to ignore its obligations under human rights law. Overall, soft law instruments help the state identify principles and standards that businesses should meet and ways to achieve compliance with those standards.

44 Oxfam, Development and Partnership in Action (DPA) and Swedish International Development Agency (SIDA), *Corporate Social Responsibility in Cambodia: Examples of Good Practice* (2016) p. 1, https://businessdocbox.com/81928319-Agriculture/Corporate-social-responsibility-in-cambodia-examples-of-good-practice.html.

Main Aspects

- ✓ Corporate responsibility to respect human rights
- ✓ Private sector's contribution to development
- ✓ State obligation to protect human rights
- ✓ Protectionism and competitive advantage in international trade
- ✓ Relation between soft law and hard law
- ✓ Social dialogue and mature industrial relations
- ✓ 'Decent work' in a globalized economy
- ✓ Complicity in human rights abuses
- ✓ Relation of CSR with trade and development cooperation
- ✓ Ethics and a fair globalization
- ✓ Relation of CSR and compliance with law
- ✓ Definition of multinational enterprises
- ✓ ASEAN's CSR instruments

Background

UN High Commissioner of Human Rights, An Interpretive Guide[45]

Q 3. How are human rights relevant to businesses?

International human rights treaties generally do not impose direct legal obligations on business enterprises. Legal liability and enforcement for the infringement by businesses of international human rights standards are therefore defined largely by national law. However, the actions of business enterprises, just like the actions of other non-State actors, can affect the enjoyment of human rights by others, either positively or negatively. Enterprises can affect the human rights of their employees, their customers, workers in their supply chains or communities around their operations. Indeed, experience shows that enterprises can and do infringe human rights where they are not paying sufficient attention to this risk and how to reduce it.

Q7. Is the responsibility to respect human rights optional for business enterprises?

No. In many cases the responsibility of enterprises to respect human rights is reflected at least in part in domestic law or regulations corresponding to international human rights standards. For instance, laws that protect people against contaminated food or polluted water, or that mandate workplace standards in line with the ILO conventions and safeguards against discrimination, or that require individuals' informed consent before they take part in drug trials, are all different ways in which domestic laws can regulate the behaviour of enterprises to help ensure that they respect human rights. The responsibility to respect human rights is not, however, limited to compliance with such domestic law provisions. It exists over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses in all situations. It therefore also exists independently of an enterprise's own commitment to human rights. It is reflected in soft law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). There can be legal, financial and reputational consequences if enterprises fail to meet the responsibility to respect. Such failure may also hamper an enterprise's ability to recruit and retain staff, to gain permits, investment, new project opportunities or similar benefits essential to a successful, sustainable business. As a result, where business poses a risk to human rights, it increasingly also poses a risk to its own long-term interests.

45 UN Office of the High Commissioner of Human Rights, *The Corporate Responsibility to Respect Human Rights - An Interpretive Guide* (2011) http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.

Do enterprises have any additional human rights responsibilities?

The Guiding Principles set the baseline responsibility of all enterprises as respect for human rights wherever they operate. Beyond that, enterprises may voluntarily undertake additional human rights commitments—such as the promotion of certain human rights—for philanthropic reasons, to protect and enhance their reputation, or to develop new business opportunities. National laws and regulations may require additional activities by enterprises regarding human rights in some situations, as may contracts with public authorities for particular projects. For example, a contract with a State for the provision of water services may require a business enterprise to help fulfil the human right to water. Operational conditions may also lead enterprises to take on additional responsibilities in specific circumstances. For example, enterprises may identify a need to make social investments, such as in local health care or education, in order to achieve or maintain support for its operations from surrounding communities (a so-called social licence to operate). Supporting human rights also forms part of the commitment undertaken by signatories to the United National Global Compact.

Debate continues over whether there may be a responsibility for some enterprises in some situations to go beyond respect for human rights and also to seek to promote them. This falls beyond the scope of the Guiding Principles, which constitute a global standard of responsibility for all businesses in all situations and therefore focus on the responsibility to respect human rights. Respect for human rights is about an enterprise's core operations—how it goes about its daily business. It is not about voluntary activities outside its core operations, however welcome these may be.

Instruments

UN, Guiding Principles on Business and Human Rights[46]

These Guiding Principles are grounded in recognition of:

(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

(b) 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;

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

I. The State duty to protect human rights

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

II. The corporate responsibility to respect human rights

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

46 Human Rights Council, *UN Guiding Principles on Business and Human Rights* (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciples BusinessHR_EN.pdf.

15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

    (a) A policy commitment to meet their responsibility to respect human rights;

    (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

    (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

III. Access to remedy

25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

OECD, Guidelines for Multinational Enterprises[47]

I. Concepts and principles

2. Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honor such principles and standards to the fullest extent which does not place them in violation of domestic law. (…)

4. A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.

II. General policies

27. It is important to note that self-regulation and other initiatives in a similar vein, including the Guidelines, should not unlawfully restrict competition, nor should they be considered a substitute for effective law and regulation by governments. It is understood that MNEs should avoid potential trade or investment distorting effects of codes and self-regulatory practices when they are being developed.

III. Disclosure

32. Disclosure is addressed in two areas. The first set of disclosures recommendations calls for timely and accurate disclosure on all material matters regarding the corporation, including the financial situation, performance, ownership and governance of the company.

47 Organisation for Economic Co-operation and Development (OECD), *Guidelines for Multinational Enterprises* (2011) http://www.oecd.org/daf/inv/mne/48004323.pdf.

33. The guidelines also encourage a second set of disclosure or communication practices in areas where reporting standards are still evolving such as, for example, social, environmental and risk reporting.

IV. Human rights

40. Enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all rights should be the subject of periodic review. Depending on circumstances, enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments.

V. Employment and industrial relations

51. Paragraph 1 of this chapter is design to echo all four fundamental principles and rights at work which are contained in the ILO's 1998 Declaration, namely the freedom of association and right to collective bargaining, the effective abolition of child labor, the elimination of all forms of forced or compulsory labor, and non-discrimination in employment and occupation. These principles and rights have been developed in the form of specific rights and obligations in ILO Conventions recognized as fundamental.

VI. Environment

1. In particular, enterprises should… Establish and maintain a system of environmental management appropriate to the enterprise, including:

    a) Collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;

    b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance and resource utilization, including periodically reviewing the continuing relevance of these objectives; where appropriate, targets should be consistent with relevant national policies and international environmental commitments; and

    c) Regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.

VII. Combating bribery, bribe solicitation and extortion

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. In particular, enterprises should: (…)

2. Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. (…)

VIII. Consumer interests

When dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the quality and reliability of the goods and services that they provide. In particular, they should: (…)

2. Provide accurate, verifiable and clear information that is sufficient to enable consumers to make informed decisions, including information on the prices and, where appropriate, content, safe use, environmental attributes, maintenance, storage and disposal of goods and services. Where feasible this information should be provided in a manner that facilitates consumers' ability to compare products.

3. Provide consumers with access to fair, easy to use, timely and effective non-judicial dispute resolution and redress mechanisms, without unnecessary cost or burden.

4. Not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent or unfair.

XI. Taxation

1. It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.

ISO 26000 - Guidance on Social Responsibility[48]

6.3.1.2 Human rights and social responsibility

An organization's opportunity to support human rights will often be greatest among its own operations and employees. Additionally, an organization will have opportunities to work with its suppliers, peers or other organizations and the broader society. In some cases, Organizations may wish to increase their influence through collaboration with other organizations and individuals. Assessment of the opportunities for action and for greater influence will depend on the particular circumstances, some specific to the organization and some specific to the context in which is operating. However, organizations should always consider the potential for negative or unintended consequences when seeking to influence other organizations.

6.4.5 Labour practices issue 3: Social dialogue

Effective social dialogue provides a mechanism for developing policy and finding solutions that take into account the priorities and needs of both employers and workers, and thus results in outcomes that are meaningful and long lasting for both the organization and society. Social dialogue can contribute to establishing participation and democratic principles in the workplace, to better understanding between the organization and those who perform its work and to healthy labour-management relations, thus minimizing resort to costly industrial disputes. Social dialogue is a powerful means for managing change. It can be used to design skills development programmes contributing to human development and enhancing productivity, or to minimize the adverse social impacts of change in the operations of organizations. Social dialogue could also include transparency on social conditions of subcontractors.

48 International Organization for Standardization, *ISO 26000 - Guidance on Social Responsibility* (2010) not available online, only on purchase from ISO, http://www.iso.org/iso/catalogue_detail?csnumber=42546.

6.5.1.2 The environment and social responsibility

Environmental responsibility is a precondition for the survival and prosperity of human beings. It is therefore an important aspect of social responsibility. Environmental matters are closely linked to other social responsibility core subjects and issues. Environmental education and capacity building is fundamental in promoting the development of sustainable societies and lifestyles.

6.7.1.2. Consumer issues and social responsibility

Consumer issues regarding social responsibility are related to, among other matters, fair marketing practices, protection of health and safety, sustainable consumption, dispute resolution and redress, data and privacy protection, access to essential products and services, addressing the needs of vulnerable and disadvantaged consumers, and education. The UN Guidelines for Consumer Protection provide fundamental information on consumer issues and sustainable consumption. (…)

Consumer issue 3: Sustainable consumption

Current rates of consumption are clearly unsustainable, contributing to environmental damage and resource depletion. Consumers play an important role in sustainable development by taking ethical, social, economic and environmental factors into account based on accurate information in making their choices and purchasing decisions.

7.4.3. Building social responsibility into an organization's governance, systems and procedures

It is also important to recognize that the process of integrating social responsibility throughout an organization does not occur all at once or the same pace for all core subjects and issues. It may be helpful to develop a plan for addressing some social responsibility issues in the short term and some over a longer period of time. Such a plan should be realistic and should take into account the capabilities of the organization, the resources available and the priority of the issues and related actions.

ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises[49]

1 (…) Through international direct investment, trade and other means, such enterprises can bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology and labour. Within the framework of sustainable development policies established by governments, they can also make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of human rights, including freedom of association, throughout the world. On the other hand, the advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives and with the interest of the workers. In addition, the complexity of multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern either in the home or in the host countries, or in both.

Security of employment

32. Governments should carefully study the impact of multinational enterprises on employment in different industrial sectors. Governments, as well as multinational enterprises themselves, in all countries should take suitable measures to deal with the employment and labour market impacts of the operations of multinational enterprises.

49 International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)* (2017) www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

33. Multinational enterprises as well as national enterprises, through active employment planning, should endeavour to provide stable employment for workers employed by each enterprise and should observe freely negotiated obligations concerning employment stability and social security. In view of the flexibility which multinational enterprises may have, they should strive to assume a leading role in promoting security of employment, particularly in countries where the discontinuation of operations is likely to accentuate long-term unemployment.

34. In considering changes in operations (including those resulting from mergers, takeovers or transfers of production) which would have major employment effects, multinational enterprises should provide reasonable notice of such changes to the appropriate government authorities and representatives of the workers in their employment and their organizations so that the implications may be examined jointly in order to mitigate adverse effects to the greatest possible extent. This is particularly important in the case of the closure of an entity involving collective lay-offs or dismissals.

35. Arbitrary dismissal procedures should be avoided.

36. Governments, in cooperation with multinational as well as national enterprises, should provide some form of income protection for workers whose employment has been terminated.

ILO, Declaration on Fundamental Principles and Rights at Work[50]

The International Labour Conference

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

   (a) Freedom of association and the effective recognition of the right to collective bargaining;

   (b) The elimination of all forms of forced or compulsory labour;

   (c) The effective abolition of child labour; and

   (d) The elimination of discrimination in respect of employment and occupation.

5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow up.

International Finance Corporation (World Bank Group)

Policy on environmental and social sustainability[51]

12. IFC recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfill human rights. This responsibility means to avoid infringing on the human rights of others and to address adverse human rights impacts business may cause or contribute to. Meeting this responsibility also means creating access to an effective grievance mechanism that can facilitate early

50 International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow Up* (1998) http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

51 International Finance Corporation, *Policy on Environmental and Social Sustainability* (2012) www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Sustainability-Policy.

indication of, and prompt remediation of various project-related grievances. IFC's Performance Standards support this responsibility of the private sector. Each of the Performance Standards has elements related to human rights dimensions that businesses may face in the course of their operations. Consistent with this responsibility, IFC undertakes due diligence of the level and quality of the risks and impacts identification process carried out by its clients against the requirements of the Performance Standards, informed by country, sector, and sponsor knowledge.

13. IFC believes that women have a crucial role in achieving sound economic growth and poverty reduction. They are an essential part of private sector development. IFC expects its clients to minimize gender-related risks from business activities and unintended gender differentiated impacts. Recognizing that women are often prevented from realizing their economic potential because of gender inequity, IFC is committed to creating opportunities for women through its investment and advisory activities.

Performance standards[52]

3. Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project. (…)

In limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.

UN, Global Compact[53]

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: Make sure that they are not complicit in human rights abuses.

Labour

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

52 International Finance Corporation, *Performance Standard 1 – Assessment and Management of Environmental and Social Risks and Impacts* (2012) www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES.

53 United Nations Global Compact, *The Ten Principles of the UN Global Compact* (2004) https://www.unglobalcompact.org/what-is-gc/mission/principles.

Anti-corruption

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

Global Compact, Complicity[54]

Accusations of complicity can arise in a number of contexts:

- Direct complicity — when a company provides goods or services that it knows will be used to carry out the abuse
- Beneficial complicity — when a company benefits from human rights abuses even if it did not positively assist or cause them
- Silent complicity — when the company is silent or inactive in the face of systematic or continuous human rights abuse. (This is the most controversial type of complicity and is least likely to result in legal liability)

Complicity is generally made up of 2 elements:

- An act or omission (failure to act) by a company, or individual representing a company, that "helps" (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, and
- The knowledge by the company that its act or omission could provide such help

EU, White Paper on CSR[55]

Corporate social responsibility concerns actions by companies over and above their legal obligations towards society and the environment. Certain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility. (…)

By addressing their social responsibility enterprises can build long-term employee, consumer and citizen trust as a basis for sustainable business models. Higher levels of trust in turn help to create an environment in which enterprises can innovate and grow. (…)

The Commission puts forward a new definition of CSR as "the responsibility of enterprises for their impacts on society". Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:

- maximizing the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;
- Identifying, preventing and mitigating their possible adverse impacts.

The complexity of that process will depend on factors such as the size of the enterprise and the nature of its operations. For most small and medium-sized enterprises, especially micro-enterprises, the CSR process is likely to remain informal and intuitive.

54 United Nations Global Compact, *The Ten Principles of the UN Global Compact, Principle 2: Human Rights* (2004) https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2.

55 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - A Renewed EU strategy 2011-14 for Corporate Social Responsibility* (2011) http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0681&from=EN.

To identify, prevent and mitigate their possible adverse impacts, large enterprises, and enterprises at particular risk of having such impacts, are encouraged to carry out risk-based due diligence, including through their supply chains. (…)

The role of public authorities and other stakeholders

The development of CSR should be led by enterprises themselves. Public authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability.

Enterprises must be given the flexibility to innovate and to develop an approach to CSR that is appropriate to their circumstances. Many enterprises nevertheless value the existence of principles and guidelines that are supported by public authorities, to benchmark their own policies and performance, and to promote a more level playing field.

Trade unions and civil society organisations identify problems, bring pressure for improvement and can work constructively with enterprises to co-build solutions. Consumers and investors are in a position to enhance market reward for socially responsible companies through the consumption and investment decisions they take. The media can raise awareness of both the positive and negative impacts of enterprises. Public authorities and these other stakeholders should demonstrate social responsibility, including in their relations with enterprises.

Emphasising CSR in relations with other countries and regions in the world

Internationally recognised CSR guidelines and principles represent values which should be embraced by the countries wishing to join the European Union, and the Commission will therefore continue to address this in the accession process.

The Commission promotes CSR through its external policies. It will continue, through a mix of global advocacy and complementary legislation, to aim at disseminating internationally recognised CSR guidelines and principles more widely and enabling EU businesses to ensure that they have a positive impact in foreign economies and societies. The Commission will make relevant proposals in the field of trade-and-development. Furthermore where appropriate, it will propose to address CSR in established dialogues with partner countries and regions.

EU development policy recognises the need to support CSR. By promoting respect for social and environmental standards, EU enterprises can foster better governance and inclusive growth in developing countries. Business models that target the poor as consumers, producers, and distributors help to maximise development impact. The search for synergies with the private sector will become an increasingly important consideration in EU development cooperation and in EU responses to natural and man-made disasters. (…)

UN, Sustainable Development Goals[56]

67. Private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. We acknowledge the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. We call upon all businesses to apply their creativity and innovation to solving sustainable development challenges. We will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labour standards of the International Labour Organization, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements.

56 UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development* (2015) http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

68. International trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development. We will continue to promote a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system under the World Trade Organization, as well as meaningful trade liberalization. We call upon all members of the World Trade Organization to redouble their efforts to promptly conclude the negotiations on the Doha Development Agenda. We attach great importance to providing trade-related capacity-building for developing countries, including African countries, least developed countries, landlocked developing countries, small island developing States and middle-income countries, including for the promotion of regional economic integration and interconnectivity.

OECD, Principles of Corporate Governance[57]

The responsibilities of the board

A. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders. (…)

C. The board should apply high ethical standards. It should take into account the interests of stakeholders. The board has a key role in setting the ethical tone of a company, not only by its own actions, but also in appointing and overseeing key executives and consequently the management in general. High ethical standards are in the long term interests of the company as a means to make it credible and trustworthy, not only in day-to-day operations but also with respect to longer term commitments. To make the objectives of the board clear and operational, many companies have found it useful to develop company codes of conduct based on, inter alia, professional standards and sometimes broader codes of behaviour, and to communicate them throughout the organisation. The latter might include a voluntary commitment by the company (including its subsidiaries) to comply with the OECD Guidelines for Multinational Enterprises which reflect all four principles contained in the ILO Declaration on Fundamental Principles and Rights at Work.

ILO, Declaration on Social Justice for a Fair Globalization[58]

The Conference recognizes and declares that:

A. In the context of accelerating change, the commitments and efforts of Members and the Organization to implement the ILO's constitutional mandate, including through international labour standards, and to place full and productive employment and decent work at the centre of economic and social policies, should be based on the four equally important strategic objectives of the ILO, through which the Decent Work Agenda is expressed and which can be summarized as follows:

(i) *promoting employment by* creating a sustainable institutional and economic environment in which:

- individuals can develop and update the necessary capacities and skills they need to enable them to be productively occupied for their personal fulfillment and the common well-being;
- all enterprises, public or private, are sustainable to enable growth and the generation of greater employment and income opportunities and prospects for all; and
- societies can achieve their goals of economic development, good living standards and social progress;

(ii) developing and enhancing measures *of social protection* – social security and labour protection – which are sustainable and adapted to national circumstances, including:

57 G20/OECD, *Principles of Corporate Governance* (2015) http://www.oecd.org/corporate/principles-corporate-governance.htm.

58 International Labour Organization, *ILO Declaration on Social Justice for a Fair Globalization* (2008) http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf.

– the extension of social security to all, including measures to provide basic income to all in need of such protection, and adapting its scope and coverage to meet the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes;

– healthy and safe working conditions; and

– policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection;

(iii) promoting social dialogue and tripartism as the most appropriate methods for:

– adapting the implementation of the strategic objectives to the needs and circumstances of each country;

– translating economic development into social progress, and social progress into economic development;

– facilitating consensus building on relevant national and international policies that impact on employment and decent work strategies and programmes; and

– making labour law and institutions effective, including in respect of the recognition of the employment relationship, the promotion of good industrial relations and the building of effective labour inspection systems; and

(iv) respecting, promoting and realizing *the fundamental principles and rights at work,* which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives, noting:

– that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives; and

– that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.

B. The four strategic objectives are inseparable, interrelated and mutually supportive. The failure to promote any one of them would harm progress towards the others. To optimize their impact, efforts to promote them should be part of an ILO global and integrated strategy for decent work. Gender equality and non-discrimination must be considered to be cross-cutting issues in the abovementioned strategic objectives.

World Commission on the Social Dimension of Globalization, A Fair Globalization[59]

A stronger ethical framework

37 The governance of globalization must be based on universally shared values and respect for human rights. Globalization has developed in an ethical vacuum, where market success and failure have tended to become the ultimate standard of behaviour, and where the attitude of "the winner takes all" weakens the fabric of communities and societies.

38. There is today a deep-seated desire by people to reaffirm basic ethical values in public life, as seen, for example, in calls for a more "ethical globalization". Values are also the driving force behind the many public campaigns for universal causes, ranging from the abolition of child labour to the banning of landmines.

59 World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (2004) http://www.ilo.org/public/english/wcsdg/docs/report.pdf.

39. Cohesive societies are built around shared values, which create a moral and ethical framework for private and public action. Globalization has not yet created a global society, but the increased interaction between people and countries throws into sharp relief the urgent need for a common ethical frame of reference.

40. To a large extent, such a framework can already be found in the declarations and treaties of the multilateral system of the United Nations. They are enshrined, for example, in the Charter of the United Nations, the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work and, more recently, in the United Nations Millennium Declaration. These universal values and principles represent the common ground of the world's spiritual and secular beliefs. They must provide the foundation for the process of globalization. They should be reflected in the rules of the global economy, and international organizations should apply their mandates in accordance with them.

Mares, Business and Human Rights after Ruggie[60]

The SRSG work, with the 'Protect, Respect and Remedy' Framework (2008) and Guiding Principles (2011) as its peak, is multilayered and comprehensive. Instead of a dry, tedious description this introductory chapter will give the floor often to the SRSG: readers will find numerous quotations and references that will allow him or her to follow Ruggie's reasoning. Ruggie should be commended for the way he explained many of his choices through accessibly-written reports, working papers, academic journal articles, speeches, interviews and private exchanges with countless individuals. (…)

Although Ruggie has refused to call for an encompassing treaty on business and human rights and he concluded that businesses currently do not have legal obligations under international human rights law (IHRL), it would be a grave mistake to overlook his work as of marginal relevance to legal academics and professionals, to presume that his thinking was not informed by law. Instead there is a wealth of materials, analyses and entry points for lawyers interested in international law, human rights law, criminal law, company law, securities law, investment law, transparency laws and law of contracts. Also the broader issue of what role the law could and should play in international governance and in complex regulatory regimes is at the core of Ruggie's work.

Background (Cambodia)

Chhabara, Increasing Cambodia's Competitiveness through CSR[61]

Benefits of promoting CSR

The main advantages of corporate social responsibility can be summarised as:

1. Increased market access: Fairtrade, sustainable tourism, eco-tourism, organic products, toys, sports goods, sustainable timber etc.

2. Foreign investment: Socially Responsible Investing, investment in ethical production, sustainable tourism, social enterprises, microfinancing institutions, high quality foreign investment.

3. Integration with international markets: Corporate governance, intellectual property rights, ethical business practices, financial institutions and stock markets.

4. Robust development of private sector: New business opportunities, more enabling environment, increased access to markets and investment, human resources, competitive advantage.

60 Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress', in R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation*, Martinus Nijhoff Publishers (Leiden, Boston 2012) pp. 1-50, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389344.

61 Rajesh Chhabara, *Increasing Cambodia's Competitiveness through Corporate Social Responsibility,* UNDP (2008) pp. 101-102, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwju6aWRjaDrAhVZT30KHcR0AjgQFjAAegQIAhAB&url=http%3A%2F%2Fwww.csrworks.com%2Fimages%2FCSR-SWOT%2520Report.pdf&usg=AOvVaw2B_jHDTPlx0q7ZAjTwA-2c.

5. Socio-economic development: Private sector's enhanced role in alleviating rural poverty, human resources development, inclusive business or pro-poor business development, social enterprises.

6. Rural development: Organic farming, fair trade, sustainable tourism, microfinance institutions, access to alternative energy (solar power, bio-gas).

7. Climate change mitigation: Environmental initiatives, emission reduction programs, renewable energy, forest conservation, organic farming.

8. Enhanced reputation and brand image: For both the country and the enterprises. Improved ranking on international indices such as World Bank's Doing Business Index, World Economic Forum's Global Competitiveness Index, Transparency International's Corruption Perception Index.

9. Risk management: CSR is an excellent tool for managing risks which can potentially arise from negative media coverage of poor working conditions, and industrial action, workplace accidents, legal-action for non-compliance, environmental disasters, product safety and quality and community disputes.

Instruments (Cambodia)

ASEAN, Economic Community Blueprint[62]

B.2. Consumer protection

28. Consumer protection is an integral part of a modern, efficient, effective and fair market place. Consumers will demand the right of access to: adequate information to enable them to make informed choices, effective redress, and products and services that meet standard and safety requirements. Increased cross-border trade, use of e-Commerce and other new trading methods resulting from globalisation and technological advancement require governments to find innovative ways of protecting and promoting the interests of consumers. This will require comprehensive and well functioning national and regional consumer protection systems enforced through effective legislation, redress mechanisms and public awareness. (…)

B.6. Good governance

36. ASEAN recognises the need to continue engaging the various stakeholders to build a more dynamic AEC 2025. Strategic measures include the following:

    i. Promote a more responsive ASEAN by strengthening governance through greater transparency in the public sector and in engaging with the private sector; and

    ii. Enhance engagement with the private sector as well as other stakeholders to improve the transparency and synergies of government policies and business actions across industries and sectors in the ASEAN region. (…)

C.8. Minerals

63. Strategic measures include the following:

    i. Facilitate and enhance trade and investment in minerals;

    ii. Promote environmentally and socially sustainable mineral development;

    iii. Strengthen institutional and human capacities in the ASEAN minerals sector; (…)

62 ASEAN Secretariat, *ASEAN Economic Community Blueprint 2025* (2015) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiUzIXVhc_sAhXCfn0KHYpTCCoQFjAAegQIAxAC&url=https%3A%2F%2Fwww.asean.org%2Fstorage%2F2016%2F03%2FAECBP_2025r_FINAL.pdf&usg=AOvVaw0pK3C8JkRnM4BCwMtDJGZM.

D.5. Contribution of stakeholders on regional integration efforts

77. Enhanced engagement could be undertaken to provide for better transparency of ASEAN activities and progress in ASEAN integration. The stakeholders, including civil society organisations, can contribute to the integration efforts by communicating the initiatives undertaken by the governments on economic integration initiatives to the general public. These stakeholders could also contribute by providing feedback on the impact of the integration efforts on ASEAN peoples.

78. Strategic measures include the following:

    i. Continue to enhance engagement with stakeholders on economic issues to promote a better understanding of ASEAN economic integration initiatives;

    ii. Work closely with stakeholders towards promoting corporate social responsibility (CSR) activities; and

    iii. Enhance consultations with stakeholders on new initiatives.

ASEAN, Socio-Cultural Community Blueprint[63]

II. Characteristics and elements of the ASEAN socio-cultural community blueprint 2025

Engages and benefits the people

6. The ASEAN Community shall be characterised as one that engages and benefits its peoples, upheld by the principles of good governance.

7. It focuses on multi-sectoral and multi-stakeholder engagements, including Dialogue and Development Partners, sub-regional organisations, academia, local governments in provinces, townships, municipalities and cities, private-public partnerships, community engagement, tripartite engagement with the labour sector, social enterprises, government organisation, non-governmental organisation, civil society organisation (GO-NGO/CSO) engagement, corporate social responsibility (CSR), inter-faith and inter-cultural dialogue, with emphasis on raising and sustaining awareness and caring societies of ASEAN, as well as deepening the sense of ASEAN identity.

C.4. Sustainable consumption and production strategic measures

    i. Strengthen public-private partnerships to promote the adoption of environmentally-sound technologies for maximising resource efficiency;

    ii. Promote environmental education (including eco-school practice), awareness, and capacity to adopt sustainable consumption and green lifestyle at all levels;

    iii. Enhance capacity of relevant stakeholders to implement sound waste management and energy efficiency; and

    iv. Promote the integration of Sustainable Consumption and Production strategy and best practices into national and regional policies or as part of CSR activities. (…)

63 ASEAN Secretariat, *ASEAN Economic Community 2025* (2016) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwisqv6FhM_sAhWHdn0KHaUkBD0QFjAAegQIAxAC&url=https%3A%2F%2Fasean.org%2Fstorage%2F2016%2F01%2FASCC-Blueprint-2025.pdf&usg=AOvVaw0a1DNO8pOihgnLYnV7e8nu.HaUkBD0QFjAAegQIAxAC&url=https%3A%2F%2Fasean.org%2Fstorage%2F2016%2F01%2FASCC-Blueprint-2025.pdf&usg=AOvVaw0a1DNO8pOihgnLYnV7e8nu

III. Implementation and review

A.2. Implementation strategies

27. The implementation of the ASCC Blueprint 2025 shall employ strategies and approaches that will maximise the role of ASEAN Organs and Bodies, encourage stakeholder engagement and enhance capacity building mechanisms in disseminating relevant knowledge to the peoples of ASEAN. It shall promote the provision of platforms for relevant stakeholders and groups to fully participate in programmes, meetings and other initiatives of ASEAN Organs and Bodies, as well as the opportunities for partnerships and collaborations. It shall also promote public private partnerships (PPP), social entrepreneurship and CSR for inclusive and sustainable socio-cultural development. It will likewise develop capacity building mechanisms for relevant stakeholders in the ASCC who are able to cascade the relevant knowledge to the peoples of ASEAN. Furthermore, the ASCC will intensify strategies, work programmes and initiatives of sectoral bodies under the ASCC Pillar to narrow the development gap.

ASEAN, Political-Security Community Blueprint[64]

A.2. Strengthen democracy, good governance, the rule of law, promotion and protection of human rights and fundamental freedoms as well as combat corruption

A.2.2. Instil the culture of good governance and mainstream the principles thereof into the policies and practices of the ASEAN Community

v. Support the ASEAN Foundation to strengthen its collaboration with the private sector and other relevant stakeholders to instil corporate social responsibility; and

vi. Promote the sharing of experiences and best practices through workshops and seminars on leadership concepts and principles of good governance, aimed at setting baselines, benchmarks and norms.

ASEAN, Guidelines for Corporate Social Responsibility (CSR) on Labour[65]

Introduction

3. The promotion of CSR is called for in the ASEAN Political-Security Community (APSC) Blueprint 2025, ASEAN Economic Community (AEC) Blueprint 2025, and ASEAN Socio-Cultural Community (ASCC) Blueprint 2025, notably:

    - Support the ASEAN Foundation to strengthen its collaboration with the private sector and other relevant stakeholders to instill CSR (…);
    - Work closely with stakeholders towards promoting CSR activities (…);

5. The promotion of CSR will contribute to the achievement of the Sustainable Development Goals (SDGs) particularly Goal 8 to "Promote sustained inclusive and sustainable economic growth, full and productive employment and decent work for all".

64 ASEAN Secretariat, *ASEAN Political-Security Community Blueprint* 2025 (2016) https://asean.org/wp-content/uploads/2012/05/ASEAN-APSC-Blueprint-2025.pdf.

65 ASEAN Secretariat, *ASEAN Guidelines for Corporate Social Responsibility (CSR) on Labour* (2017) https://asean.org/wp-content/uploads/2017/12/21.-September-2017-ASEAN-Guidelines-for-CSR-on-Labour.pdf.

II. Purposes of the ASEAN CSR Model on Labour

6. This ASEAN Guidelines for CSR on Labour aims to serve as guidelines for the governments, enterprises/ establishments, employers' organisations and workers' organisations in ASEAN Member States, in line with national circumstances, to:

   6.1. Raise awareness of CSR among enterprises/ establishments in ASEAN Member States for the benefit of the peoples;

   6.2. Continuously and proactively encourage enterprises/establishments to incorporate CSR initiatives, human rights and decent work in their business practices;

   6.3. Promote compliance of core labour standards set forth in the national labour laws, ILO Conventions and other relevant international instruments; and

   6.4. Promote social dialogue among governments, employers' organisations and workers' organisations at all levels, and strengthen industrial relations. (…)

V. Definitions

9. This ASEAN Guidelines for CSR on Labour adopts the definition of CSR according to the ILO Governing Body (2006), which is a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law.

VI. Application

10. This ASEAN Guidelines for CSR on Labour is applied to enterprises/establishments, private or public, whose decisions and activities may have economic, social and environmental impacts, respecting national circumstances.

VIII. Guidance in implementing CSR

18. Implementing CSR for labour supports the fulfillment of international labour standards and human rights.

19. At national level, tripartism provides the framework to address this matter through social dialogue.

20. At enterprise/establishment level, commitments must be made and priority or action plan should be arrived at through social dialogue and stakeholder engagement.

21. Enterprises/establishments should plan their CSR initiative, report regularly on progress, and continue the process of improvement through social dialogue and stakeholder engagement.

22. Enterprises/establishments are encouraged to be part of CSR networks to further promote and embed CSR. They should promote continuity of CSR initiative. (…)

Government of Cambodia, Rectangular Strategy Phase III[66]

97. To address these challenges the Royal Government of the Fifth Legislature has set out two objectives: (1) to continue promoting the role of the private sector to be more active and dynamic as an engine for economic growth; and (2) to transform Cambodia to be an attractive and competitive destination for investment in the region, especially within the framework of ASEAN Economic Community.

98. To meet these objectives the Royal Government will focus on the following priorities: (…)

7. Further strengthening corporate governance to promote the health and growth of private sector and corporate social responsibility.

8. Strengthening the effectiveness of "Government-Private Sector Forum" to address the challenges faced by the private sector, while upgrading it to a platform for dialogue for recommending policy options and advice that will further promote the role of private sector as a stakeholder in development.

Government of Cambodia, Rectangular Strategy Phase IV[67]

4) Strengthening of private sector governance

In the sixth Legislature of the National Assembly, the Royal Government will focus on:

1. Carrying out studies and development of policy framework to enhance corporate governance to ensure proper management and good practice in the private sector.

2. Carrying out studies and preparation of the policy framework to augment Corporate Social and Environmental Responsibility to step up private sector's participation in addressing social issues and enhancing environmental protection, value of the social morality and national culture, together with enhanced protection of consumer rights and safety by pushing for the development and enactment of Consumer Protection Law.

3. Continued implementation of the public-private dialogue mechanism at both policy and technical levels, national and sub-national levels, to promote policy dialogues and jointly address challenges by enhancing the role of Chamber of Commerce.

4. Pushing for and encouraging private sector's reinvestment to enhance human capital development and innovation.

Government of Cambodia, National Strategic Development Plan[68]

Stock market and others

- Continue to develop the stock market through promotion of national listing and issuance of public stock.
- Develop a new law on corporate affairs, governance and responsibility. (…)

66 Royal Government of Cambodia, *Rectangular Strategy for Growth, Employment, Equity and Efficiency' Phase III* (2013) https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/genericdocument/wcms_237910.pdf.

67 Royal Government of Cambodia, *Rectangular Strategy for Growth, Employment, Equity and Efficiency: Building the Foundation Toward Realizing the Cambodia Vision 2050 Phase IV* (2018) http://cnv.org.kh/wp-content/uploads/2012/10/Rectangular-Strategy-Phase-IV-of-the-Royal-Government-of-Cambodia-of-the-Sixth-Legislature-of-the-National-Assembly-2018-2023.pdf.

68 Royal Government of Cambodia, *National Strategic Development Plan 2019-2023 (*2019) https://data.opendevelopmentcambodia.net/dataset/national-strategic-development-plan-nsdp-2019-2023/resource/bb62a621-8616-4728-842f-33ce7e199ef3.

1.4 Strengthening of private sector governance

4.27 In the sixth Legislature of the National Assembly, the RGC will focus on (…) (2) Undertaking studies aimed at supporting the preparation of a policy framework to promote the Corporate Social and Environmental Responsibility of the private sector in terms of addressing social and environmental protection issues, inculcating social morality in national culture, enhancing consumer rights protection and consumer safety with the enactment of a Law on Consumer Protection, (…)

Questions

1. What are the functions of soft law?
2. Is soft law capable to influence business conduct? If so, in what ways?
3. What would the benefits be for the company that has aligned their CSR policy with soft law?
4. Do stakeholder in Cambodia take notice and use international soft law instruments?
5. What is the relation between soft law and hard law? Are they complementary? Are they a substitute for each other?

Further Readings

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3. INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS

Vann Yuvaktep, Radu Mares

Introduction

International economic agreements are meant to facilitate the flow of capital, goods and services across national borders and to create a win-win for involved countries based on their competitive advantage. Trade and investment facilitation has advanced through the setting up of the World Trade Organization and free trade agreements (trade system), and thousands of bilateral investment treaties that protect the rights and interests of investors (investment system). However, as commendable as accelerated economic activity might be such agreements have not incorporated safeguards to protect the environment and affected people. Even more, rights arising from such economic agreements have strong enforcement mechanisms, whereas human rights are taken into account insufficiently, if at all. Therefore, criticism has been raised that agreements encourage reckless economic activities and a disregard for human rights protections. Recent developments indicate the criticism is being heard: more recent 'modern trade' agreements contain 'social clauses' that refer to labour rights and human rights. Also reforms of the investor arbitration system are being discussed. The sovereign right of states to regulate its social and environmental affairs without fear of economic penalties is being reaffirmed in newer trade and investment agreements. The OECD, UNCTAD and the EU are the leading organizations promoting a more sustainable economic system. Even with these notable developments, questions remain as to whether current reforms go far enough given that victims of abuse do not seem to acquire enforceable rights against investors and businesses affecting their rights.

For Cambodia's economy, international trade and investment have been unquestionably a major driver in the past decades. After Cambodia's last regime change in 1993, the government concluded bilateral investment treaties with Malaysia, Thailand, South Korea, China, Singapore, and Switzerland in the 1990s. Subsequent investment agreements followed with other nations such as Germany and France in the early 2000s. As of today, Cambodia has signed 27 bilateral investment treaties, of which 16 are in force and one, with Indonesia, has been terminated.[69] Most of the treaties have a standard clause permitting States to take measures necessary to protect the life of their citizens and the environment. This protection is vague and difficult to impose any obligation on States to ensure the respect and protection of human rights. Only the treaty with Turkey incorporates an aspirational protection of labour rights in the preamble, and only the one with Hungary requires State parties not to dilute environmental and labour protection standards to encourage investment. Additionally, Cambodia has been a member of the WTO since 2004. Cambodia has been granted preferential trade access with the EU, the US, and the ASEAN members. Recently though, allegations of and an investigation into human rights issues (both political and social rights) in Cambodia have prompted the EU and the US to begin proceedings to withdraw such preferential treatment. The ASEAN trade framework has been generally criticized because it lacks specific legal texts to ensure the upholding of human rights and labour protections.

69 See *Investment Policy Hub Website*, accessed 21 January 2021, https://investmentpolicy.unctad.org/international-investment-agreements/countries/33/cambodia.

Main Aspects

- ✓ Free trade agreements (FTAs)
- ✓ Bilateral investment treaties (BITs)
- ✓ Policy space (of states under economic law)
- ✓ Stabilization clauses (in state-investor contracts)
- ✓ (The state's) right to regulate
- ✓ Arbitration (investor-State disputes)
- ✓ Human rights impact assessments (of economic agreements)
- ✓ Investment contracts (investor-state contracts)
- ✓ Labour chapters (in FTAs)
- ✓ Trade and sustainable development chapters (FTAs)
- ✓ Core labour standards (ILO)
- ✓ Extraterritorial obligations of states
- ✓ Obligation to enforce laws
- ✓ Protectionism
- ✓ Civil society mechanisms
- ✓ Cooperation and institution building

Background

ILO, Social Dimensions of Free Trade Agreements[70]

An important part of the debate about making globalization more socially sustainable deals with the question of how to ensure that trade liberalization upholds or improves labour standards, rather than puts them at risk. In recent years, labour standards and other labour issues have increasingly been integrated into bilateral and regional trade agreements. Trade unions and civil society actors invest substantial resources in advocating for the inclusion of labour provisions in trade agreements and the issue is on the agenda of an increasing number of trade negotiators. There are widely divergent views on their effectiveness, however. While some consider them a panacea for improving labour standards and working conditions, others criticize them as mere window dressing or even disguised protectionism. (…)

There are a number of rationales for including labour provisions in trade agreements. From a social perspective the rationale is the safeguarding of social protection, while from an economic perspective labour provisions are tools against unfair competition, the main idea being that violations of labour standards can distort competitiveness ("social dumping") and should be addressed in a manner similar to that employed against other unfair trading practices.4 In addition, there is the concern that trade liberalization without the necessary safeguards may lead to a race to the bottom as regards labour standards. There is also a human rights rationale, whereby labour provisions can be used as a means of ensuring respect for labour-related human rights that reflect values universally accepted by the international community. Through cooperative activities and dialogue such provisions can also be used as a catalyst for improvement of labour standards by increasing the labour-related implementation capacity of the countries concerned. (…)

70 ILO, *Social Dimensions of Free Trade Agreements* (2013) http://www.ilo.org/global/research/publications/WCMS_228965/lang--en/index.htm (references omitted).

Trade agreements with labour provisions have increased significantly in the last two decades, both in absolute and relative terms. Fifty-eight trade agreements included labour provisions in June 2013, up from 21 in 2005 and 4 in 1995. Although labour provisions tend to be concentrated in North-South trade agreements, there is a modest but increasing trend to integrate labour provisions into trade agreements among developing and emerging countries (South-South trade agreements).

About 40 per cent of trade agreements that include labour provisions have a conditional dimension. This implies that compliance with labour standards entails economic consequences – in terms of an economic sanction or benefit. Conditional labour provisions are typical of many of the trade agreements concluded by the United States and Canada.

The remaining 60 per cent of trade agreements that include labour provisions are exclusively promotional in nature. These provisions do not link compliance to economic consequences but provide a framework for dialogue, cooperation, and/or monitoring and are found mainly in EU, New Zealand and South-South trade agreements that consider labour issues. (…)

OHCHR, Impact of Free Trade and Investment Agreements on Human Rights[71]

A number of free trade and investment agreements, such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), are currently being negotiated. A group of UN experts have issued the following statement to express concern about the secret nature of drawing up and negotiating many of these agreements and the potential adverse impact of these agreements on human rights.

While trade and investment agreements can create new economic opportunities, we draw attention to the potential detrimental impact these treaties and agreements may have on the enjoyment of human rights as enshrined in legally binding instruments, whether civil, cultural, economic, political or social. Our concerns relate to the rights to life, food, water and sanitation, health, housing, education, science and culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement. (…)

Observers are concerned that these treaties and agreements are likely to have a number of retrogressive effects on the protection and promotion of human rights, including by lowering the threshold of health protection, food safety, and labour standards, by catering to the business interests of pharmaceutical monopolies and extending intellectual property protection.

There is a legitimate concern that both bilateral and multilateral investment treaties might aggravate the problem of extreme poverty, jeopardize fair and efficient foreign debt renegotiation, and affect the rights of indigenous peoples, minorities, persons with disabilities, older persons, and other persons leaving in vulnerable situations. Undoubtedly, globalization and the many Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) can have positive but also negative impacts on the promotion of a democratic and equitable international order, which entails practical international solidarity.

Investor-state-dispute settlement (ISDS) chapters in BITs and FTAs are also increasingly problematic given the experience of decades related arbitrations conducted before ISDS tribunals. The experience demonstrates that the regulatory function of many States and their ability to legislate in the public interest have been put at risk.

We believe the problem has been aggravated by the "chilling effect" that intrusive ISDS awards have had, when States have been penalized for adopting regulations, for example to protect the environment, food security, access to generic and essential medicines, and reduction of smoking, as required under the WHO Framework Convention on Tobacco Control, or raising the minimum wage.

71 Office of the High Commissioner for Human Rights, *UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights* (2015) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E

ISDS chapters are anomalous in that they provide protection for investors but not for States or for the population. They allow investors to sue States but not vice-versa. (…)

Instruments

UN, Guiding Principles on Business and Human Rights[72]

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

Commentary

Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

Committee on Economic, Social and Cultural Rights, General Comment No. 24[73]

[State] Obligation to respect [human rights]

13. States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties. The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of any corrective measures that may be required. The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations. States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.

Extraterritorial obligation to respect

29. The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant. This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties, as well as to judicial cooperation.

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72 Human Rights Council, *UN Guiding Principles on Business and Human Rights, Seventeenth Session* (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf..

73 Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities,* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en.

WTO, Singapore Ministerial Declaration[74]

Core Labour Standards

4. We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

Role of WTO

6. In pursuit of the goal of sustainable growth and development for the common good, we envisage a world where trade flows freely. To this end we renew our commitment to:

    - a fair, equitable and more open rule-based system;
    - progressive liberalization and elimination of tariff and non-tariff barriers to trade in goods;
    - progressive liberalization of trade in services;
    - rejection of all forms of protectionism;
    - elimination of discriminatory treatment in international trade relations;
    - integration of developing and least-developed countries and economies in transition into the multilateral system; and
    - the maximum possible level of transparency.

EU, Trade for All: Towards a Responsible Trade and Investment Policy[75]

4.1.2. Promoting a new approach to investment

(…) investment protection and arbitration have triggered a heated debate about fairness and the need to preserve the right of public authorities to regulate both in the EU and in partner countries, in particular in the context of the TTIP negotiations.

Over the past 50 years, states set up a dense global web of more than 3,200 bilateral investment treaties (BITs) — 1,400 of them involving EU Member States — with the goal of protecting and encouraging investment.

The current debate has cast light on the risk of the abuse of provisions common to many of those agreements, as well as lack of transparency and independence of the arbitrators. (…) The question is not whether the system should be changed but how this should be done. While the status quo is not an option, the basic objective of investment protection remains valid since bias against foreign investors and violations of property rights are still an issue.

74 WTO, *Singapore Ministerial Declaration* (1996) https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

75 European Commission, *Trade for All: Towards an Effective and Responsible Trade and Investment Policy* (2015) https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

The Commission will:

- in a first step, include modern provisions in bilateral agreements, putting stronger emphasis on the right of the state to regulate, something which was not sufficiently highlighted in the past. EU bilateral agreements will begin the transformation of the old investor–state dispute settlement into a public Investment Court System composed of a Tribunal of first instance and an Appeal Tribunal operating like traditional courts. There will be a clear code of conduct to avoid conflicts of interest, independent judges with high technical and legal qualifications comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body;
- in parallel, engage with partners to build consensus for a fully-fledged, permanent International Investment Court;
- in the longer term, support the incorporation of investment rules into the WTO. This would be an opportunity to simplify and update the current web of bilateral agreements to set up a clearer, more legitimate and more inclusive system

5.2.3. A redefined relationship with Africa

Africa's ongoing transformation will have a significant impact on the world. The stakes are high both in terms of poverty eradication and new economic opportunities. Africa has been the fastest growing continent over the past decade. However, the key challenge is to make growth sustainable. This implies an effective agenda for economic transformation and industrialisation. Trade and investment will be instrumental in addressing those challenges. Africa still suffers from highly fragmented markets with high barriers between countries. There is a strong case for fostering regional integration and creating hubs that would benefit a whole region.

EU-Africa trade relations entered a new phase in 2014 with the conclusion of three regional Economic Partnership Agreements (EPAs) involving 27 western, southern and eastern African countries. It established a new dynamic partnership between the two continents, and paved the way to closer cooperation in the future. EPAs also support Africa's own regional integration and prepare the ground for wider African integration efforts.

Fulfilling the promise of these agreements will be a major deliverable for the next few years. Many challenges lie ahead, including ensuring that they deliver their potential in terms of development. EPAs can help make the business environment more predictable and transparent but much will depend on genuine domestic reforms. This lies in the hands of African countries but the EU is ready to continue supporting them. The available development aid can reinforce capacity and optimise the conditions for African countries to reap the benefits of effective EPA implementation, in a way that is consistent with their own development strategies.

Looking ahead, EPAs are also a bridge to the future. Current EPAs mostly cover trade in goods only. There is a strong rationale for progressively extending EPAs to other areas like services and investment. Facilitating and protecting investment will be fundamental as the next step to support growth on the continent.

EU-Vietnam FTA[76]

Chapter 15: Trade and Sustainable Development

Article 2: Right to regulate and levels of protection

1. The Parties recognise the right of each Party to determine its sustainable development objectives, strategies, policies and priorities, to establish its own levels of domestic protection in the environmental and social areas as it deems appropriate and to adopt or modify accordingly its relevant laws and policies, consistently with the principles of internationally recognised standards or the agreements, to which it is a party, referred to in Articles 3 and 4.

76 *EU-Vietnam Free Trade Agreement* (2016) http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

2. Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of domestic protection in the environmental and social areas and shall strive to continue to improve those laws and policies.

Article 3: Multilateral labour standards and agreements

2. Each Party reaffirms its commitments, in accordance with its obligations deriving from the membership of the ILO (…) to respect, promote and effectively implement the principles concerning the fundamental rights at work, namely:

   a) the freedom of association and the effective recognition of the right to collective bargaining;

   b) the elimination of all forms of forced or compulsory labour;

   c) the effective abolition of child labour; and

   d) the elimination of discrimination in respect of employment and occupation.

3. Each Party will make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions, and the Parties will regularly exchange information in this regard. (…)

5. Each Party reaffirms its commitment to effectively implement in its laws and practices the ILO Conventions ratified by Vietnam and the Member States of the European Union respectively.

6. The Parties recognise that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.

Article 9: Trade and investment favouring sustainable development

The Parties confirm their commitment to enhance the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions. (…)

(d) The Parties recognize that voluntary initiatives can contribute to the achievement and maintenance of high levels of environmental and labour protection and complement domestic regulatory measures. Therefore, each Party, in accordance with its laws or policies, shall encourage the development of and participation in such initiatives, including voluntary sustainable assurance schemes such as fair and ethical trade schemes and eco-labels.

(e) The Parties, in accordance with their domestic policies, agree to promote corporate social responsibility (CSR), provided that CSR-related measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade. Promotion of CSR includes among others exchange of information and best practices, education and training activities and technical advice. In this regard, each Party takes into account relevant internationally accepted and agreed instruments, that have been endorsed or are supported by the Party, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

Article 15: Institutional set-up and overseeing mechanism

2. The Parties shall establish a Specialised committee on Trade and Sustainable Development. (…)

3. The Specialised committee on trade and sustainable development on Trade and Sustainable Development shall (…) review the implementation of this chapter, including co-operative activities undertaken under Article 14. (…)

4. Each Party shall convene new or consult existing domestic advisory group(s) on sustainable development … [which] shall comprise independent representative organisations, ensuring a balanced representation of economic, social and environmental stakeholders, including among others employers' and workers' organizations, business groups, and environmental organizations. (…)

Article 16: Government Consultations

1. For any matter arising under this chapter where there is disagreement, the Parties shall only have recourse to the procedures established under Article 16 and Article 17. Except as otherwise provided in this Chapter, the Chapter XXX [Dispute Settlement] and its Annex III (Mediation) shall not apply to this Chapter (…)

3. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter. During consultations, special attention shall be given to the particular problems and interests of the developing country Party. Where relevant, the Parties shall give due consideration to the works of the ILO or relevant multilateral environmental organisations or bodies and may, by mutual agreement, seek advice from these organisations or bodies, or any other body or person they deem appropriate, in order to fully examine the matter.

Article 17: Panel of experts

1. If any matter has not been satisfactorily resolved by the Specialised committee on trade and sustainable development within 120 days, or a longer period agreed by both Parties, after the delivery of a request for consultations under Article 16.4, a Party may request, by delivering a written request to the contact point of the other Party, that a Panel of Experts be convened to examine that matter.

EU, Human Rights and Sustainable Development in the EU-Vietnam Relations[77]

The Agreement is the most ambitious and comprehensive FTA that the EU has ever concluded with a developing country, also with regard to sustainable development objectives and provisions. The FTA lives up to the commitments the Commission has taken in the new Communication on trade and investment strategy, according to which trade liberalisation, social justice, respect for human rights, and high labour and environmental levels of protection must go hand-in-hand. While trade policy has as a primary objective to deliver growth, jobs and innovation, it should also promote European and international values. (…)

Under Article 1 of the EU-Vietnam PCA [Partnership and Co-operation Agreement] both sides commit to respect democratic principles and human rights, as laid down in the UN General Assembly Universal Declaration of Human Rights and other relevant international human rights instruments.

The inclusion of this "human rights, democracy and rule of law clause" (in brief the "human rights clause", which is an essential element of the agreement) in the EU-Vietnam PCA, as in other EU agreements with third countries, is intended to promote the values and political principles on which the European Union is founded (Art. 2 of the Treaty on the European Union) and constitutes the basis for the EU's external policies, as stated in Article 21 of the Treaty on the European Union. (...)

77 European Commission, *Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement* (2016) http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154189.pdf

The "human rights clause" ensures that human rights are a subject of common interest and part of the dialogue between the parties, and serves as a basis for the implementation of positive measures. The EU sees one of the principal values of this clause to have a legally binding expression of their shared commitment to the promotion and protection of human rights. It gives the EU a clear legal basis for raising human rights issues and it makes it impossible for both parties to claim that human rights are a purely internal matter. (…)

If a party fails to fulfil its obligations under the PCA the other party is empowered to take "appropriate measures" (Article 57 "Fulfilment of Obligations"). Unless there is a material breach of the agreement the case must first be examined by the Joint Committee.

In case of a material breach, defined in the Joint Declaration on Article 57 as a violation of an essential element of the Agreement, the other party can take measures with immediate effect. That can include the introduction of an expedited dialogue.

As the commitments to human rights constitute an essential element under the PCA, in the event of violations in this regard by one party, Article 57 enables the other party to take "appropriate measures" against the offending party, including as a last resort the suspension of the agreement or parts thereof. (…)

A human rights clause is included in all political framework agreements (e.g. Association Agreements and Partnership and Co-operation Agreements) concluded by the EU with third countries since 1995, covering over one-hundred and thirty countries. Such clause is defined as an essential element of the agreements. The human rights clause included in the most recent agreements is based on the Council Conclusions on the common approach on the use of political clauses endorsed by COREPER in May 2009. (…)

European Commission, Human Rights Impact Assessments for Trade Policy[78]

Human rights considerations in trade and investment policy

The EU's trade policy is geared towards promoting free and fair openness to trade in the global market place. In combination with other instruments, it can contribute to the improvement of human rights in various countries.

As highlighted in the communication *Trade, Growth and Development,* openness to trade has been a key element of successful growth and development strategies; and sustainable development over a longer period supports the emergence of favourable conditions for human rights: e.g. rising levels of employment, better living standards, and increasing government resources that can be applied to human rights related goals.

Yet *Trade, Growth and Development* also underlines that while trade is a necessary condition for development, it is not sufficient. International trade can foster growth and poverty reduction, depending on the structure of the economy, appropriate sequencing of trade liberalisation measures and complementary policies such as domestic reforms and fair income distribution. International trade policy should be seen as one component in a jigsaw of policies and actions to address poverty and promote development: including, amongst others, co-operation at multilateral and bilateral levels, development aid and support, and political dialogues; paired with domestic policies in areas such as employment, social affairs, health, good governance, the rule of law and education, as well as corporate social responsibility (CSR) practices by the private sector, etc.

In consequence, when considering the impact of trade policies on human rights issues, the EU's overall relations with the country/ies concerned should be taken into account. This may include, for example, the existence of a political framework agreement (eg, a Partnership and Cooperation Agreement), or of human rights dialogue mechanisms. These instruments provide the main platforms for the EU to discuss human rights issues with its trade partners.

78 EU, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* (2015) http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[79]

[ratified by Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam]

Article 1: Incorporation of the Trans-Pacific Partnership Agreement

1. The Parties hereby agree that, under the terms of this Agreement, the provisions of the Trans-Pacific Partnership Agreement, done at Auckland on 4 February 2016 ("the TPP") are incorporated, by reference, into and made part of this Agreement…

Trans-Pacific Partnership Agreement[80]

Chapter 19: Labour

Article 19.3: Labour Rights

1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:

   (a) freedom of association and the effective recognition of the right to collective bargaining;

   (b) the elimination of all forms of forced or compulsory labour;

   (c) the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and

   (d) the elimination of discrimination in respect of employment and occupation.

2. Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Article 19.10: Cooperation

1. The Parties recognise the importance of cooperation as a mechanism for effective implementation of this Chapter, to enhance opportunities to improve labour standards and to further advance common commitments regarding labour matters, including workers' wellbeing and quality of life and the principles and rights stated in the ILO Declaration. (…)

Article 19.15: Labour Consultations

1. The Parties shall make every effort through cooperation and consultation based on the principle of mutual respect to resolve any matter arising under this Chapter.

2. A Party (requesting Party) may, at any time, request labour consultations with another Party (responding Party) regarding any matter arising under this Chapter by delivering a written request to the responding Party's contact point. The requesting Party shall include information that is specific and sufficient to enable the responding Party to respond, including identification of the matter at issue and an indication of the legal basis of the request under this Chapter. The requesting Party shall circulate the request to the other Parties through their respective contact points. (…)

79 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) 2018. www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents

80 https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents

12. If the consulting Parties have failed to resolve the matter no later than 60 days after the date of receipt of a request under paragraph 2, the requesting Party may request the establishment of a panel under Article 28.7 (Establishment of a Panel) and, as provided in Chapter 28 (Dispute Settlement)...

13. No Party shall have recourse to dispute settlement under Chapter 28 (Dispute Settlement) for a matter arising under this Chapter without first seeking to resolve the matter in accordance with this Article.

US-Central America Free Trade Agreement (CAFTA)[81]

Chapter Sixteen: Labor

Article 16.2: Enforcement of Labor Laws

1. (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. (…)

Article 16.6: Cooperative Labor Consultations

1. A Party may request consultations with another Party regarding any matter arising under this Chapter (…)

3. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter (…)

6. If the matter concerns whether a Party is conforming to its obligations under Article 16.2.1(a), and the consulting Parties have failed to resolve the matter within 60 days of a request under paragraph 1, the complaining Party may request consultations under Article 20.4 (Consultations) or a meeting of the Commission under Article 20.5 (Commission – Good Offices, Conciliation, and Mediation) and, as provided in Chapter Twenty (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter. (...)

7. No Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 16.2.1(a).

8. No Party may have recourse to dispute settlement under this Agreement for a matter arising under Article 16.2.1(a) without first pursuing resolution of the matter in accordance with this Article.

Compa et al, U.S. – Guatemala CAFTA Labor Arbitration[82]

Background

On April 23, 2008, the AFL-CIO and six Guatemalan trade unions filed a complaint – known formally as a "public submission" – with the U.S. Department of Labor's Office of Trade and Labor Affairs (OTLA) alleging that Guatemala was failing to effectively enforce its labor laws as required under Chapter 16 of the Dominican Republic - Central American Free Trade Agreement (DR-CAFTA). The complaint included five case studies where Guatemala failed to enforce its labor laws with regard to the right to freedom of association, to organize and to bargain collectively, as well as "acceptable conditions of work." It also highlighted the troubling rise in anti-union violence since the passage of the trade deal. (…)

81 *Central American-Dominican Republic Free Trade Agreement* (2005) https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

82 Lance Compa et al., *Wrong Turn For Workers' Rights – The U.S.-Guatemala CAFTA Labor Arbitration Ruling – and What to Do about It* (2018) https://laborrights.org/sites/default/files/publications/Wrong%20Turn%20for%20Workers%20Rights%20-%20March%202018.pdf.

In August 2011, after formal labor consultations between the two nations failed to yield results, the United States Trade Representative (USTR) filed for arbitration under the CAFTA dispute resolution chapter. This was the first time the United States ever brought a labor case to dispute settlement under a trade agreement. Shortly after this filing, USTR announced yet another delay while both governments negotiated a "labor enforcement plan," which was not signed until April 2013. Guatemala failed to implement key components of the plan and, over a year later, on September 18, 2014, USTR announced it would restart the arbitration process.

The U.S. filed its first written materials on November 3, 2014, and the first hearing before the arbitration panel took place on June 2, 2015, in Guatemala City. Beset with numerous delays, including the resignation of one of the arbitrators in the middle of the case, the panel's final decision was handed down on June 14, 2017 – nine years after the unions filed their submission.

Analysis

The Panel here made conclusive findings that Guatemala failed to effectively enforce its labor laws in violation of the central obligation of the CAFTA labor chapter. (…) However, two more hurdles remained: whether the violations reflected a sustained or recurring course of action or inaction, and whether they were in a manner affecting trade.

Panel's decision

The record evidence demonstrates that Guatemala's failure to effectively enforce its labor laws against one employer – Avandia – conferred some competitive advantage upon it. The evidence does not establish that the other seven failures to effectively enforce labor laws [affected trade]… [A]lthough we have found (on an arguendo basis) that Guatemala's failures to effectively enforce its labor laws constitute a sustained or recurring course of action or inaction, we have not found any evidence of such course itself having an effect on trade...

Conversely, while we have found one instance of a failure to effectively enforce labor laws to have been in a manner affecting trade (i.e., the Avandia case), that instance alone does not constitute a sustained or recurring course of inaction. (…)

The United States has proven that at eight worksites and with respect to 74 workers Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders, but not that these instances constitute a course of inaction that was in a manner affecting trade. The United States has not proven sufficient failures to adequately conduct labor inspections to constitute a course of action or inaction. The Panel has no jurisdiction over the other claims advanced by the United States in these proceedings, as they were not included in the panel request. We therefore conclude that the United States has not proven that Guatemala failed to conform to its obligations under Article 16.2.1(a) of the CAFTA-DR.

Author's recommendations

As the first case ever to proceed through the entire dispute resolution process under the labor chapter of any trade agreement, the arbitral panel's decision is a devastating setback for advocates of workers' rights in the global economy. It is even more harmful to workers themselves who seek protection under labor chapters in trade agreements. The panel's pinched, hyper-technical, trade-first, nit-picking-the-evidence approach sets a terrible precedent on many fronts. It calls into question the viability of all labor chapters, and undermines the progress, however slight, in the evolution of such labor rights provisions since the CAFTA agreement, such as the "May 10" template which strengthened standards, obligations, and enforcement mechanisms in agreements with Peru, Korea, Colombia and other countries. They all contain the "in a manner affecting trade" formulation which was the death warrant in this case.

Harisson, Governing Labour Standards through Free Trade Agreements[83]

A superficial account of labour provisions within EU FTAs [free trade agreements] tells a positive story. Trade agreements have been negotiated with relatively extensive substantive standards and procedural commitments. Representatives of the respective parties are meeting with their international counterparts and civil society meetings are occurring. But in terms of addressing substantive labour standards issues, this article has shown that TSD [trade and sustainable development] chapters have delivered little. Scholars have already argued that the EU has not sought to 'aggressively' export labour standards through its trade agreements. We show that neither have state officials in trading partners readily imported them. Rather, they have reluctantly accepted – or even actively softened – minimalist obligations around core labour standards. The weight of expectation has been loaded instead onto processes of dialogue, particularly via CSMs [civil society mechanism], widely considered as the key institutions for making progress on labour issues. However, CSMs are seriously hampered by various operational deficiencies as well as political marginalization within the broader institutional mechanisms and processes of the FTA.

Overall, we found no evidence that the existence of TSD chapters has led to improvements in labour standards governance in any of our case studies, nor did we find any evidence that the institutionalization of opportunities for learning and socialization between the parties was creating a significant prospect of longer-term change. These findings thus offer the most robust refutation to date of the hypothesis that labour provisions in EU FTAs are actively advancing workers' rights. And in contrast to more optimistic assessments, they also suggest that future normative influence is unlikely to be realized via TSD chapters in their current form.

Should the EU therefore seek to put more of its market power behind its labour governance strategy? Such an approach could in part be realized by the most common suggestion for reform from European interviewees involved in the labour movement, namely to increase the enforceability of the TSD chapter by giving the EU the ability to withdraw preferential access to its market if labour standards are violated. This would make the labour provisions more coercive, and in the shadow of sanctions, perhaps persuade trading partners to engage in more earnest dialogue and responsive action.

Yet some interviewees in case study countries averred from this approach, with unionists and allied researchers expressing concern about the dangers of labour standards being utilized as a form of disguised protectionism. We agree, then, with the comments made by one labour representative who noted that more must be done to assuage such concerns and explain how specific forms of conditionality could benefit labour struggles in trade partners. This demands consideration of a range of complex design issues including how a dispute is initiated, who it targets in relation to what labour-related allegations, who investigates those allegations, who decides on the kinds of corrective action and penalties, and what form of sanctions or fines are available to do this. Appropriately nuanced, a crude social clause founded on economic nationalism could thus be avoided.

UNCTAD, Investment Policy for Sustainable Development[84]

Core Principles for Investment Policymaking

The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.

1. Policy coherence: Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.

83 James Harisson et al., 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' in *Journal of Common Market Studies* (2018) https://qmro.qmul.ac.uk/xmlui/handle/123456789/36088.

84 UNCTAD, *Investment policy for sustainable development* (2015) http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

2. Public governance and institutions: Investment policies should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors.

3. Dynamic policymaking: Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.

4. Balanced rights and obligations: Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.

5. Right to regulate: Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.

6. Openness to investment: In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.

7. Investment protection and treatment: Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory.

8. Investment promotion and facilitation: Policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.

9. Corporate governance and responsibility: Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.

10. International cooperation: the international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism.

European Commission, EU-China Agreement (Sustainability Impact Assessment)[85]

Human rights impacts

At the outset, the SIA [Sustainability Impact Assessment] notes that the CAI's [Comprehensive Agreement on Investment] impact on human rights – either positive or negative – will largely depend on the soundness of the domestic legal frameworks and their compliance with international standards. In addition, since the Agreement does not include specific human rights provisions as it is limited to investment protection and market access, the SIA notes that its overall impact on human rights would be mainly indirect.

Having clarified these two points, the SIA then estimates that such indirect effect is likely to be positive although minimal, and it would mainly derive from the increased engagement of the Parties on labour- and environment-related aspects of investment following from the sustainable development provisions. An increase in FDI from the EU could also promote economic stability and growth, increase employment and, as a result, lead to better living standards and less poverty. Additionally, EU investors would be expected to value and protect human rights, especially as they often include CSR [corporate social responsibility] and RBC [responsible business conduct] practices in their business operations. With an increase in Chinese investment in the EU, these investors are expected to observe EU human rights as implemented in various pieces of legislation and hence no negative impacts are expected in the EU.

85 European Commission, *Position Paper on the Sustainability Impact Assessment in Support of Negotiations of an Investment Agreement between the European Union and the People's Republic of China* (2018) http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156863.pdf.

The SIA also finds that an institutional mechanism under the CAI might provide an opportunity for participation of non-state stakeholders in discussions on labour and environment related aspects of investment. The obligation to ensure transparency and to promote public participation and public information might also positively impact the right of freedom of expression, especially in China.

Finally, as mentioned above, the SIA points to the CAI's potential litigation risk. It echoes stakeholders' calls for China and the EU to retain sufficient policy space under the Agreement to undertake the necessary reform process to promote social inclusion, labour rights and the protection of human rights. On the other hand, the SIA notes that the right to regulate will be embedded in the Agreement and hence the policy space will be preserved.

Brazilian Model BIT[86]

Article 14 Corporate Social Responsibility

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.

2. The investors and their investment shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment:

    a) Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;

    b) Respect the internationally recognized human rights of those involved in the companies' activities;

    c) Encourage local capacity building through close cooperation with the local community;

    d) Encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers to;

    e) Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;

    f) Support and advocate for good corporate governance principles, and develop and apply good practices of corporate governance;

    g) Develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which its operations are conducted;

    h) Promote the knowledge of and the adherence to, by workers, the corporate policy, through appropriate dissemination of this policy, including programs for professional training;

    i) Refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;

    j) Encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and

    k) Refrain from any undue interference in local political activities.

86 (Brazil) *Model Cooperation and Facilitation Investment Agreement* (2015) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.

Ruggie, Principles for Responsible Contracts (State-Investor Contract Negotiations)[87]

The 10 principles that can help guide the integration of human rights risk management into contract negotiations are listed below: (…)

4. Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.

Key implications of Principle 4 for the negotiations:

It is legitimate for business investors to seek protections against arbitrary or discriminatory changes in law. However, stabilization clauses that "freeze" laws applicable to the project or that create exemptions for investors with respect to future laws, are unlikely to satisfy the objectives of this Principle where they include areas such as labor, health, safety, the environment, or other legal measures that serve to meet the State's human rights obligations.

Stabilization clauses, if used, should not contemplate economic or other penalties for the State in the event that the State introduces laws, regulations or policies which: are implemented on a non-discriminatory basis; and (b) reflect international standards, benchmarks or recognized good practices in areas such as health, safety, labor, the environment, technical specifications or other areas that concern human rights impacts of the project. (…)

Brief explanation: Stabilization clauses

31. Contractual stabilization clauses aim to mitigate the risks to business investors from changes in law. Not all investment contracts have these provisions, but research shows that where they do exist the breadth of their application, and their provisions for mitigating the impacts of new laws on investors, vary greatly.

32. Business investors view project financing predictability and consistency as a primary concern, as most large investments are long term and of an irreversible nature. This makes them vulnerable to changes in the rules governing their projects over time. (…)

34. However, the comparative research carried out by the Special Representative showed that, depending on the way the stabilization clause was drafted, it may have the potential to unduly constrict the policy space States need to meet their human rights obligations. The research found that those contracts negotiated with developing country governments were (1) typically much broader in their coverage than those agreed with developed country governments; and (2) they were much more likely to include exemptions for or award compensation to business investors for compliance with future laws--even in areas that are directly related to protecting human rights, such as health, environmental protection, labor and safety.

38. Additionally, necessary investor protection against arbitrary and discriminatory changes in law can be fashioned to not interfere with the State's *bona fide* efforts to meet its human rights obligations. In certain circumstances, in particular for fixed-tariff projects, the parties to the contract can integrate a number of mechanisms to manage the material and economic consequences of changes in the law. These can specify procedures to facilitate the efficient and effective resolution of issues as they arise, such as formula for appropriate risk-sharing or procedures and requirements for the parties to negotiate in good faith regarding mitigating any impacts of changes in the law. (…)

87 John Ruggie, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators,* Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (2011) http://www2.ohchr.org/training/business/8_Support_%20doc_UNPrinciplesForResponsibleContracts.pdf.

Richard & Luke, Human Rights in Investment Law: Where to after Urbaser?[88]

So why is *Urbaser [Urbaser S.A. v Argentina]* so significant? After all, it is just one in a long line of cases in which Argentina has unsuccessfully invoked the human right to water as part of its defence. For example, in *Suez v Argentina,* the tribunal considered Argentina's obligation to protect the right to water and held that it was not incompatible with its obligations towards foreign investors. Similarly, in SAUR International v Argentina, the tribunal held that although Argentina could nationalize a public service, such as the water supply, in order to safeguard human rights, it still had to pay compensation when doing so. More broadly, investment tribunals have considered a range of human rights issues in determining investment treaty claims, including indigenous rights *(Glamis Gold Ltd v USA),* arbitrary arrest and detention *(Biloune v Ghana)*, the right to access the courts *(Mondev v USA)* and migrant rights *(Channel Tunnel v France and the UK)*, among many others. Be that as it may, the *Urbaser* decision is significant for two reasons. First, as already mentioned, the tribunal accepted that a corporation could be bound by human rights standards. Second, this was the first time a tribunal has accepted jurisdiction over a human rights counterclaim (Argentina's claim that Urbaser had threatened the right to water).

It is true that the permissive language of the Spain-Argentina BIT, which allows either the investor or the state to a dispute to commence an arbitration, helped the tribunal to assert jurisdiction over Argentina's counterclaim in *Urbaser.* But to state that this was the only relevant factor misses the point, which is that in bringing its counterclaim, Argentina availed itself fully of the legal tools available to it. This leads conveniently into the next point: recent investment treaties suggest that states are increasingly seeking to balance the rights and obligations arising from investment treaties and human rights instruments.

Traditionally, very few, if any, BITs have referred to human rights. Limited provisions on human rights are, however, found in certain "model" BITs – the 2012 US Model BIT, for example recognises labour rights – however this is not mirrored in the treaties currently in force. But the indications are that things might be changing. At the end of 2016, just before the tribunal in Urbaser rendered its decision, Morocco and Nigeria signed a new BIT. The Morocco-Nigeria BIT has not yet entered into force, meaning that it is not strictly binding on the parties yet, however, it contains unprecedented and explicit recognition of the human rights obligations of Morocco and Nigeria and prioritizes the protection of human rights over the creation of a favourable climate for foreign investment. For example, the BIT prohibits Morocco and Nigeria from lowering labour, public health and safety standards in order to encourage investment. Investors, on the other hand must *"strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices."*

Schill & Djanic, Public Interest-Based Justification of International Investment Law[89]

Critics consider international investment law (IIL) and investor–State dispute settlement (ISDS) to be a threat to global public interests, such as environmental protection, labour standards, public health or human rights, and portray them as one-sidedly protecting foreign investors and undermining public policies that are adopted for the benefit of local populations and the international community as a whole. They also dismiss economic justifications of the system as unfounded. The present article suggests a different approach to the justification of IIL, arguing that, properly construed, IIL can be justified as a system that, on aggregate, promotes global public interests.

First, the article shows how IIL and ISDS form part of the legal infrastructure that is necessary for the functioning of the global economy under a rule of law framework. Aimed at supporting global economic growth and welfare, this helps further not only economic, but also non-economic, global public interests, such as sustainable development.

88 Caroline Richard and Elliot Luke, *Human Rights in International Investment Law:* Where to After Urbaser? (2017) https://sustainability.freshfields.com/post/102enaj/human-rights-in-international-investment-law-where-to-after-urbaser.

89 Stephan W. Schill and Vladislav Djanic, 'Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law' in *ICSID Review - Foreign Investment Law Journal* (2018) https://academic.oup.com/icsidreview/advance-article/doi/10.1093/icsidreview/six025/4898138#115897976.

Second, the article argues that IIL and ISDS do not turn a blind eye to the conflicts that can arise between economic and non-economic public interests. Instead, IIL and ISDS have numerous, although admittedly imperfect and as of yet insufficiently utilized, mechanisms at their disposal for alleviating ensuing tensions, thus allowing both economic and non-economic global public interests to be advanced at the same time.

Krajewski, Establishing Investor Obligations[90]

International investment law and international human rights law are two distinct fields of international law. Even if one subscribes to the view that they may have a common root in the customary law protecting aliens, the two regimes rest on different legal sources, contain different legal principles and are applied and administered in different institutional settings. (…)

International investment law rests on a web of thousands of bilateral investment treaties and other treaties with investment protection provisions.16 It contains general standards of protecting foreign investors and their investment, including compensation for expropriation as well as guarantees of fair and equitable treatment and nondiscrimination of the investor. Investment treaties are applied by ad hoc tribunals established at the request of a foreign investor and based on the claim that the host state treated the investor in a manner which violates the term of the respective investment agreement.

In contrast, human rights law is enshrined in global and regional human rights treaties which contain rights of individuals and respective obligations of states to respect, protect and fulfil those human rights. International human rights treaties are applied by regional human rights courts or special bodies established on the basis of human rights treaties. (…)

The preceding analysis reveals a sobering result: it cannot be assumed that a new human rights treaty will contain directly binding obligations for business entities. Similarly, recent treaty-making practice in investment law also does not seem to move towards including clear and precise binding human rights obligations for investors. Finally, investment tribunals remain extremely reluctant to develop such obligations on the basis of existing international law. If they consider such approaches, the doctrinal basis is not clear. As a consequence, it seems unlikely that investor obligations to respect human rights will emerge in the foreseeable future in international treaty-making or treaty-application.

(…) investment treaties incorporate references to domestic laws and may even oblige the states to effectively regulate businesses in a domestic and international setting. If relevant domestic laws are then incorporated into an investment treaty with the aim to allow a state to either base a counter-claim on the non-compliance of a domestic law by the investor or use such non-compliance to reduce the amount of the damages, international investment law and tribunals may indirectly contribute to the establishment of human rights obligations of investors. Finally, states should increasingly refer to international standards of investor responsibilities in their investment treaties. This would the allow investment tribunals to rely on standards such as the UNGPs or the OECD Guidelines when interpreting and applying the terms of investment agreements.

The emerging pluralistic regime of investor obligations consisting of domestic legislation, international soft law standards and binding international treaty norms could form the basis of a web of clear and effective provisions establishing investor responsibilities on safe legal grounds. (…)

90 Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' in B*usiness and Human Rights Journal, vol. 5* (2020) www.researchgate.net/publication/338751469_A_Nightmare_or_a_Noble_Dream_Establishing_Investor_Obligations_Through_Treaty-Making_and_Treaty-Application (footnotes omitted).

Background (Cambodia)

European Commission, Report on EBA Beneficiaries[91]

Since 2017 (…) The [European] Commission had for many years raised its concerns on issues related to Economic Land Concessions (ELCs) in the sugar sector, recommending the establishment of an independent and transparent mechanism in order to deal with claims for compensation arising from the granting of ELCs for sugar cane plantations.

Following the deterioration of democracy, human rights and labour rights in Cambodia, the EU concerns covered the following main areas: a) political rights and the shrinking of the democratic space; b) freedom of expression and freedom of association; c) labour rights; and d) concerns over land issues arising from ELCs in the sugar sector. (...)

Economic Impact of EU Tariff Preferences under EBA

(…) In terms of socio-economic development, the percentage of the population living under the poverty line has steadily declined from 50.1% in 2007 to 13.5% in 2014.

In 2014, the EU became the first Cambodian export market, ahead of the US. The EU market currently accounts for more than one-third of Cambodia's exports, particularly garment, footwear and bicycles. The EU ranked as the second biggest trade partner of Cambodia (after China), accounting for 17.3% of the country's total trade (China 23.8%). Cambodia is the EU's 56th largest trading partner (accounting for 0.2% of the EU's total trade). In 2018, Cambodian exports to the EU registered a record of €5.3 billion (compared to €3 billion in 2014), concentrated on garments at 73.4% of total exports, footwear 12.7%, bicycles 5.7%, and rice 3%. Total trade in goods between the two partners equalled €6.2 billion. Over 95% of these exports entered the EU market under EBA tariff preferences (one of the highest ratios of any EBA beneficiary country). Overall, Cambodia is the second largest user of EBA preferences, after Bangladesh. In January 2019, the EU imposed – under the GSP regulation - safeguard measures on Indica rice from Cambodia and Myanmar for three years, thus introducing normal customs duties on this product for the first year (€175 per tonne), and then progressively reducing it to €150 per tonne in year two, and €125 per tonne in year three.

Key Concerns (...)

Freedom of association and of peaceful assembly. Restrictions to freedoms of assembly and association, including a shrinking of the space for civil society, remain a cause of concern. Procedural requirements going beyond the law are creating additional obstacles to legitimate work of civil society organizations. Some positive steps took place such as the Instruction of the Ministry of Interior to repeal the 'three-day notice requirements' and the establishment of a Government Working Group under the Ministry of Interior to consult with civil society. However, no concrete actions were taken to amend restrictive provisions of the Law on Associations and Non-Governmental Organizations (LANGO). Harassment and intimidation of journalists, human rights defenders, trade union members and workers, land and environmental activists continued to be reported by the UN and civil society organisations.

Non-discrimination, land and housing rights. Dispossession with no or inadequate compensation of families living or working on land designated as Economic Land Concessions related to sugar farming constitutes a violation of the relevant international conventions: International Covenant on Economic, Social and Cultural Rights (ICESCR), Committee on the Elimination of Racial Discrimination (CERD) and ICCPR. The EU recognises the actions taken by the Cambodian authorities to resolve these issues, but continues to be concerned over lack of transparency in the process, and the lack of a clear set of criteria for establishment of the validity of claims and the appropriate level of compensation.

91 European Commission, *Report on EU Enhanced Engagement with three Everything But Arms Beneficiary Countries: Bangladesh, Cambodia and Myanmar* (2020), https://ec.europa.eu/transparency/regdoc/rep/10102/2020/EN/SWD-2020-19-F1-EN-MAIN-PART-1.PDF.

Instruments (Cambodia)

Turkey-Cambodia Agreement on Protection of Investments[92]

The Government of the Republic of Turkey and the Government of the Kingdom of Cambodia (…)

Agreeing that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investment and will contribute to maximizing effective utilization of economic resources and improve living standards; and

Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labor rights;

Article 4 (General Exceptions)

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures:

   (a) designed and applied for the protection of human, animal or plant life or health, or the environment;

   (b) related to the conservation of living or non" living exhaustible natural resources.

Hungary-Cambodia Agreement on Protection of Investments[93]

Article 2 (Promotion and protection of investments)

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and, shall admit such investments in accordance with its laws and regulations.

2. Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

3. The Contracting Party shall not encourage investment by lowering domestic environmental, labour or occupational health and safety legislation or by relaxing core labour standards. Where a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding any such encouragement.

Cambodia Trade Integration Strategy[94]

4.2 Joining the CP-TPP [Comprehensive and Progressive Agreement for Trans-Pacific Partnership]

The CP-TPP agreement is a modern FTA encompassing a series of WTO-Plus disciplines both in terms of coverage and in depth. The preliminary analysis of the CP-TPP with respect to market access and rules of origin is similar to RCEP in the sense that the CP-TPP may not bring to Cambodia additional market access to what has been already been granted under different arrangements thanks to the current LDC status or as member of the ASEAN FTAs with dialogue partners. The complex rules of origin of the CP-TPP especially in the garment sector does not reflect the present capacity of the Cambodian garment industry. (…)

92 *Agreement Between the Government of The Republic of Turkey and The Government of The Kingdom of Cambodia on the Reciprocal Promotion and Protection of Investments* (2018) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5833/download.

93 *Agreement between Hungary and the Kingdom of Cambodia for the Promotion and Reciprocal Protection of Investments* (2016) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5988/download.

94 Inter-Ministerial Committee (Task Force), *Cambodia Trade Integration Strategy 2019-2023* (2019) https://cambodiancorner.files.wordpress.com/2019/12/cambodia-trade-integratio-strategy-2019-2023-1.pdf.

(…) It is noteworthy that the investment chapter includes several reform-oriented elements. For example, it refines definitions of investor and investment; clarifies the meaning of key standards to preserve regulatory space (e.g. clarifying that a government's failure to respect an investor's legitimate expectations does not automatically amount to a breach of the minimum standard of the treatment) …; contains a clause recognizing that parties should not relax health, safety and environmental standards and reaffirms Corporate Social Responsibility (CSR)-related obligations. (…)

Cambodia Industrial Development Policy[95]

E. Labor Market and Industrial Relations

Industrial relations is still a major challenge for industrial development not only in Cambodia but also in almost all countries going through a transition from agriculture/rural to industry/urban setting. A proper management of such transition can lay the foundation for attracting investments in the future, especially to ensure better working conditions, high productivity and reasonable wage for the workforce. The process would require careful and systematic solutions based on the applicable regulatory framework so as to strengthen social investment needed to reduce wage-rise pressure in order to maintain competitiveness of the economy.

This factor is even more important when Cambodia joins the ASEAN Economic Community where a carefully managed labor mobility can ensure the investment competitiveness of the country. An adequate development and effective implementation of the regulatory framework is thus necessary. Such a regulatory system combined with a proper labor market management such as workers orientation prior to starting their jobs, awareness of rights and obligations of employers/employees, reasonable demand for working conditions, are crucial and should be widely implemented to ensure stability and effectiveness of the labor market. (…)

European Commission, Temporary Suspension of Trade Preferences for Cambodia[96]

What is the Everything But Arms trade arrangement?

The Everything But Arms (EBA) arrangement is part of EU's Generalised Scheme of Preferences (GSP) for developing countries. Under EBA, the EU grants unilaterally duty free and quota free access to its single market for all products - except arms and ammunition – to all the States classified by the United Nations as Least Developed Countries (LDCs).

The EBA arrangement, as the GSP scheme as a whole, aims to assist developing countries in their efforts to reduce poverty, promote good governance, and support sustainable development by helping them to generate additional revenue through international trade.

The access to this arrangement is conditional upon the beneficiary country respecting the principles of 15 core United Nations (UN) and International Labour Organisation (ILO) Conventions on human rights and labour rights (laid down in Annex VIII Part A of the GSP Regulation). (...)

Why is the EU targeting Cambodia and not other GSP beneficiaries with poor human rights records?

The Foreign Affairs Council in its Conclusions from February 2018 identified Cambodia and Myanmar for enhanced engagement under the EBA on the basis of the seriousness of their alleged violations (as testified by the most recent UN and ILO reports), as well as on the basis of their substantial trade with the EU. (…)

95 Royal Government of Cambodia, Cambodia Industrial Development Policy 2015-2025 (2015), unofficial translation, https://policy.asiapacificenergy.org/sites/default/files/IDP-English-Version-FINAL1.pdf.

96 European Commission, *Fact Sheet: EU Triggers Procedure to Temporarily Suspend Trade Preferences for Cambodia* (11 February 2019) https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_988; see also, Annex VIII Part A of the GSP Regulation, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R0978.

Cambodian Chamber of Commerce, et al., Press Release on EBA Decision[97]

Phnom Penh, Cambodia – The Cambodian Chamber of Commerce and signatories, as representatives of the Cambodian private sector, regrets the decision taken by the European Commission to partially withdraw preferences granted to the Kingdom of Cambodia under the Everything but Arms (EBA) arrangement, following the review it initiated on 12 February 2019. (…)

Looking forward, Cambodia will continue to benefit from trade preferences for 80% of its exports to the European Union. Therefore, we respectfully call on the European Commission and the Royal Government of Cambodia to continue to engage in dialogue on the issues raised by the Commission's review. We have full trust in the resilience of the Cambodian people, and are committed to working with those most affected by this decision to mitigate the potential damage to trade and investment, and the Kingdom's reputation. We will continue to work closely with international brands and development partners to strengthen and promote the values of human and labour rights in Cambodia, in accordance with international best practices. The decision by the Commission, while regrettable, is viewed by the private sector as an opportunity to initiate further structural reforms that strengthen legal compliance and reduce unfair competition, which will help to accelerate the diversification of Cambodia's economy, export markets and sources of investment. The Cambodian private sector is dedicated to working with all investors, development partners and the Royal Government of Cambodia to review and implement additional measures and legislation that will enable a more conducive environment for all businesses, employees and Cambodian society.

Unions in Cambodia Urge EU Not to Withdraw EBA Benefit[98]

[…] Cambodian union leaders attending IndustriALL Global Union's trade and workers' rights training on 4-5 November in Phnom Penh expressed grave concern over the enormous impact of a suspension of the EBA scheme, as foreign investors have said they may move garment production to other countries, risking thousands of jobs in the process. […]

The Vice President of the Federation of Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) Mann Senghak added: "Cambodian trade unions must urgently put aside any differences and unite to send a strong message to the EU that the trade preference scheme is of paramount importance for the survival of millions of Cambodian people dependent on the industry." […]

Joint Letter from Companies to the Prime Minister of Cambodia on EBA Matter[99]

We are companies that source from Cambodia. Our work with suppliers in Cambodia contributed to the USD $9.5 billion in garment, footwear, and travel goods exported from Cambodia last year. Many of the companies signing this letter have been sourcing from Cambodia since the garment sector was established in Cambodia in the mid-1990s.

The success of Cambodia's garment sector has gone hand-in-hand with Cambodia's adoption and adherence to high labor standards such as those set by the International Labor Organization (ILO). When the Multifibre Arrangement (MFA) was being phased out, there was concern that Cambodia's garment sector would not survive, but European, Canadian, HK, and American companies kept buying from Cambodia largely based on your government's strong commitment to higher labor standards that were embodied in your government's implementation of the ILO Better Factories Cambodia (BFC) program.

97 Cambodian Chamber of Commerce, et al., *Press Release: The Cambodian Private Sector Regrets the Decision by the European Commission to Partially Withdraw Preference Granted to the Kingdom of Cambodia under Everything but Arms Arrangement* (14 February 2020) https://www.business-humanrights.org/sites/default/files/documents/20200214_EBA-Decision-Private-Sector-Response.pdf.

98 IndustriALL, *Unions in Cambodia Urge EU Not to Withdraw EBA Benefit* (25 November 2019) http://www.industriall-union.org/cambodia-unions-urge-eu-not-to-withdraw-eba-benefit.

99 Adidas et al, *Joint Letter to Prime Minister of Cambodia on the Concerns Related to the EBA* (2 May 2019) https://media.business-humanrights.org/media/documents/files/documents/20190502_Letter_of_20_brands_to_PM_Cambodia_-_FINAL.pdf.

Since 2001, the Cambodian Government's strong support for the BFC and implementation of strong labor standards has enabled first the garment sector, and now the footwear and travel goods sectors, to grow exponentially. Today, exports of garments, footwear, and travel goods account for more than one third (43 percent) of Cambodia's total Gross Domestic Product (GDP). This represents half of Cambodia's total exports. The preferential trade benefits that Europe, Canada, and the United States have implemented over this same period continue to be an important factor in many company's sourcing decisions.

We are concerned that the labor and human rights situation in Cambodia is posing a risk to trade preferences for Cambodia. Recently the European Union announced its decision to review Cambodia's Everything but Arms (EBA) benefits. Members in the U.S. Congress have introduced bills that would require the U.S. Government to review Cambodia's Generalized System of Preferences (GSP) benefits based on the declining respect for labor standards, including freedom of association, and other issues related to respect for human rights issues in Cambodia.

Many of the signatories to this letter have previously raised these concerns through multiple channels with your government. We are attaching a November 1, 2018, letter that details recommendations that we believe, if implemented, could demonstrate real progress toward respecting trade unions and civil society, and keeping Cambodia's trade benefits in place. To date, we have not received any response to that letter. We look forward to hearing back from you and working with you to ensure a bright future for Cambodia's workers and the Cambodian economy overall.

ADHOC, Joint Statement on the EU's Decision on Cambodia's Access to EBA[100]

We, the undersigned Non-Governmental Organisations, Associations, Trade Unions, Members of the Cambodian Civil Society, and citizens are deeply concerned about the launch of the European Union (EU) Commission's procedure to temporarily suspend Cambodia's access to its Everything But Arms (EBA) trade agreement.

The EU has indeed expressed its concerns over the crackdown on democracy and human rights including the repression of the political opposition, media and civic space in light of the general elections of July 2018. The EU has repeatedly reminded Cambodia that respect for human rights and fundamental freedoms, including labour rights was a crucial part of the granting of EU trade preferences. In July 2018, the European Union assessed the human rights and labour rights situation in Cambodia in response to serious concerns about the undermining of democracy, respect for human rights and the rule of law in Cambodia and requested the Royal Government of Cambodia (RGC) to fulfil some conditions in addition to bringing back democracy and the respect of human rights in the country. On 11 February 2019, in view of the RGC's failure in fulfilling its obligations under the EBA agreement and the continuing deterioration of the human rights situation in Cambodia, the EU Commission officially announced the beginning of the tariff preferences removal process.

As defenders of fundamental rights and labour rights, we fully understand the European Union' position and decision. However, we are deeply worried that the EBA suspension will directly and negatively impact Cambodian people's welfare and livelihood.

We believe that this situation can be avoided if the RGC takes appropriate steps to fulfil its obligations towards its citizens and effectively implement the Cambodian Constitution, especially Article 31 stating that "The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human rights, and all the treaties and conventions related to human rights, women's rights and children's rights (...) ", Articles 41 and 42 which guarantee the fundamental freedoms of association, expression and assembly, as well as Article 52 stating that " (...) The State shall give priority to the improvement of the living conditions and welfare of citizens".

100 Cambodian Human Rights and Development Association (ADHOC), *Joint Statement on the EU's Decision to Start the Process of Suspending Cambodia's Access to its Preferential Everything But Arms (EBA) Agreement* (19 March 2019) https://www.adhoccambodia.org/joint-statement-on-the-eus-decision-to-start-the-process-of-suspending-cambodias-access-to-its-preferential-everything-but-arms-eba-agreement/.

Amfori, Call on the European Commission to Persuade Cambodia on EBA[101]

(…) [As] the leading business association for open and sustainable trade, amfori cannot ignore the serious shortcomings in human and labour rights that exist. With that in mind, amfori is:

- calling on the European Commission to make every effort to ensure that its investigation against Cambodia results in significant improvements to the conditions in the country.
- urging the Cambodian government to consider the serious economic and social impact that will occur should it lose its EBA status and to cooperate fully with the investigation and put into practice all the changes required to avoid this.
- advising companies with business links to Cambodia to engage in direct dialogue with the government, and local authorities, and support a satisfactory outcome of the investigation process

Amfori believes that the investigation will achieve a mutually beneficial solution with Cambodia meeting the conditions required to retain its EBA preferences so that the livelihood of its workers in the garment and footwear industry will not be affected. The consequences of removing preferences would almost certainly be a fall in exports which would result in a lowering of development and employment. However, amfori would support any such decision, as a last resort, to lend credibility to the GSP system and show that penalties, as well as advantages, can occur.

Lawreniuk, Up in Arms[102]

Um Dina, General Secretary of the Coalition of Free Trade Union of the Woman's Textile, explained the anxiety and panic this is causing among garment and footwear workers: "The government said Cambodia will learn to live by itself. But the problem is that workers are those who will suffer hardship." […]

In the current climate of harassment, intimidation and fear, the union movement's ability to organise national mobilisations to press for change, as seen in the past, is severely curtailed. The workers, [unionist] Sokny says, "will tell you they are afraid. They will not go to take the road again, to demonstrate again. They are scared to God to be killed like them at the Veng Sreng shooting."

But amidst the apprehension, there are glimmers of hope. Dina points to how brave some of the union folks and garment workers are, especially the women – some have gone so far as to make blatant requests for change on the Prime Minister's Facebook page. (…)

"I think the anger of the Cambodian workers at the factory can ignite the problem. One day, there can be unrest. … Do you want more of us to die? I don't want that. Only the workers, when they rise up, [will create] unrest, social unrest in Cambodia."

Kiyoyasu Tanaka, EBA Scheme & the Future of Cambodia's Garment Industry[103]

Losing EBA benefits: A lesson from Myanmar

The potential impact of EBA suspension on the Cambodian economy is of great interest to policy makers and academics. For example, how much will the EBA suspension reduce garment exports? While there are a number of economic approaches to predict the potential impact, the precise magnitude often crucially depends on underlying assumptions in economic models such as an elasticity of substitution, import demand elasticity, and so on. Thus, the predicted impact can vary, casting doubts on the credibility of economic forecasts.

101 Amfori, *amfori Calls on the European Commission to Intensify its Efforts to Persuade Cambodia to Implement the Improvements Needed for it to Retain its Trade Preferences* (2018) https://www.amfori.org/sites/default/files/Statement%20-%20Possible%20removal%20of%20EBA%20for%20Cambodia%20-%20Jan.%202019%20%28002%29.pdf.

102 Sabina Lawreniuk, 'Up in Arms' in *Southeast Asia Globe* (11 March 2020) https://southeastasiaglobe.com/up-in-arms/.

103 Kiyoyasu Tanaka, *The EU's EBA Scheme and the Future of Cambodia's Garment Industry* (2020) https://www.iseas.edu.sg/wp-content/uploads/2015/11/ISEAS_Perspective_2020_14.pdf.

An alternative but unexplored approach is to draw from the recent experience of Myanmar. The EU suspended trade preferences for Myanmar in 1997 for forced labour, and re-established EBA preferences in 2013. While Cambodia's recent economic environment is quite different from late-1990s Myanmar, it is reasonable to assume similar economic environments in these countries for the 2010s. From the re-establishment of EBA preferences for Myanmar, possible lessons can be drawn by looking at how much Myanmar's garment exports increased after 2013. (…)

The loss of EBA preferences is likely to produce a substantial negative impact on the Cambodian economy, such as the closure of garment factories and job cuts for garment workers. Since female workers account for the majority of garment employment, this would particularly affect poor female workers from rural regions. A very rough estimate suggests that at least 60,000 jobs in garment factories would be lost.

Heng & Po, Cambodia and China's Belt and Road Initiative[104]

Furthermore, considering bilateral relations between Cambodia and the US under the Sinocentric world, Carl A. Thayer, emeritus professor at the University of New South Wales, argues that Chinese support will buffer Cambodia under Prime Minister Hun Sen's leadership against domestic pressure by civil society groups and external pressure from the US to address inadequacies of democratic and human rights issues. Such action has led former US Secretary of State Hilary Clinton to advise Cambodia not to be too dependent on any country. Therefore, Cambodia must raise important matters related to the Mekong issues with China. However, Bae and Kim (2014) argue that such a pattern will be likely to continue even without Chinese assistance. (...)

However, Cambodia's total acceptance of China's Belt and Road Initiative can be a mixed blessing, considering a strong likelihood that Cambodia may fall into the Chinese debt trap and China's sphere of influence. In addition, Chinese investments and development assistance, outside or inside the BRI framework, which very often target the few Cambodian elites, not the general public, may facilitate corruption and nepotism, further the exploitation of natural resources, and worsen human rights records in Cambodia. More importantly, as Cambodia enthusiastically supports China's BRI and continue to receive China's "no string attached" aid and loans, its foreign policy will be undermined and formulated in favor of China's broader interests and influence in the regional and international arena.

Amnesty International, Human Rights, Trade and Investment Matters[105]

A further innovation linking trade with labor rights occurred in 1993, when the United States incorporated a requirement that labor rights be respected as a condition of the North American Free Trade Agreement (NAFTA). (…) In 2002, the US Congress mandated that executive branch negotiators must include labor rights provisions in all future trade agreements. The United States also pioneered a novel incentive-based approach in a bilateral textile agreement with Cambodia. (...)

In its textile trade agreement with Cambodia, the United States agreed to allow increased amounts of textiles to be imported from Cambodia if Cambodia implemented "a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards" … The agreement was originally negotiated for a three-year term, from 1999 to 2003, and was subsequently extended until the end of 2004. Through the agreement, the United States not only granted an initial quota to Cambodia, but also pledged to increase the quota by 14% each year that working conditions in Cambodian factories were found to "substantially comply with such labor law and standards". The US included these labor rights provisions partly as a reaction to increasing public anti-sweatshop and anti-globalization activism. (…) When the agreement was negotiated, these provisions were without precedent and appeared to herald a new era for a more rights-respecting international trade regime. By incentivizing improved conditions, the Cambodian agreement created the regulatory framework for a "race to the top".

104 Kimkong Heng & Sovinda Po, *Cambodia and China's Belt and Road Initiative: Opportunities, Challenges and Future Directions* (2017) https://www.researchgate.net/publication/332141726_Cambodia_and_China's_Belt_and_Road_Initiative_Opportunities_Challenges_and_Future_Directions.

105 Amnesty International, *Human Rights, Trade and Investment Matters* (2006) http://www.jussemper.org/Newsletters/Resources/HRTradeInvestmentMatters.pdf.

The Cambodian agreement focused on textiles because of an anomaly in the international trade regime, which allowed countries such as the United States to control textile imports through select quotas from different countries rather than treating all trading partners on the same terms. With relatively low capital investment and without a need for highly skilled workers, textiles were seen as a good entry-level manufacturing opportunity for poor countries to enter the global market. (…)

When the Cambodian agreement was signed, conditions in the country's factories were generally regarded as very poor, on a par with similar conditions in other countries such as China, Bangladesh and El Salvador. As in many other countries, most of the factories in Cambodia were owned by Taiwanese and Hong Kong enterprises, and most of the workers were young women from the countryside. Cambodia agreed to the strict provisions of the trade agreement because the country, one of the poorest in the world, was almost entirely dependent on foreign aid and the goodwill of foreign donors.

The Cambodian Labor Code underwent substantial revision to meet international standards. However, the question remained of how improvements were to be undertaken and enforced. After the first year of the agreement, the United States agreed only to increase Cambodia's quota by 9%, primarily to recognize that Cambodia had ratified core International Labor Organization (ILO) conventions and registered a labor federation. The United States would not have relied on Cambodia's poorly resourced and corrupt labor inspectorate for an assessment of improvements. (...)

Questions

1. How do international trade and investment agreements incorporate human rights clauses?
2. What are the implications of EU's EBA/GSP for governmental and corporate responsibilities toward human rights law compliance in Cambodia?
3. What have the responses been from the civil society, trade unions, and business associations regarding the withdrawal of trade preferential tariffs from Cambodia?
4. How should Cambodia prepare itself when concluding investment agreement after the withdrawal of EBA?
5. What should Cambodian Trade Agreements focus on that they are not focusing on now?
6. How is the Belt and Road Initiative affecting businesses' responsibilities toward human rights law compliance?
7. Is it of advantage to Cambodia to lobby for an ASEAN-wide trade agreement?
8. What would be the impression when looking at the bilateral investment agreements concluded by Cambodia?
9. What are the implications of a US preferential trade deal on governmental and corporate responsibilities toward human rights law compliance in Cambodia?

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4. NATIONAL LAWS WITH EXTRATERRITORIAL EFFECTS

Tann Boravin, Radu Mares

Introduction

In the last 10 years, developed states have increasingly adopted laws regulating the conduct of 'their' companies operating internationally. The main type of law has been reporting regulations that oblige companies to be transparent about their policies, impacts and remedial measures wherever they operate. This is a significant break with the past when many industrialized states – including the EU – argued that CSR is by definition voluntary and therefore there is no place for 'hard law' to promote CSR. The first country to go one step further was France as its law since 2017 requires French companies to not only practice increased transparency but also to adopt special management plans to protect human rights even when operating in other countries through their subsidiaries and contractors. However, victims still struggle to sue transnational companies in their home countries. Notably, the US used to be the leading state when it came to opening its courts to foreign plaintiffs; however in 2013 the US Supreme Court interpreted narrowly a rather unique American law (Alient Tort Claims Act) making it much more difficult for foreign claimants to sue in the US. As it stands, plaintiffs are seeking justice particularly in common law countries such as the UK and Canada, from where some progressive judgements have come, but increasingly also in a number of EU countries (Netherlands, France). Importantly, in 2020 the EU announced that it will adopt a law on CSR (mandatory human rights due diligence) which will be applicable in all EU member states and will have effects globally, including in Cambodia. Access to remedies remains a big challenge in 'business and human rights' area (see chapters 6-7) and involves many human rights aspects (for example, chapters 15-18, 25-29). States can also have extraterritorial impacts through their public procurement regulations that can create a market for sustainable goods, or can set conditions to those companies that require state financial support. These types of regulations are in addition to other roles that states can play to promote CSR (see chapters 2 and 5). Questions about jurisdiction can arise but such concerns can be addressed by carefully distinguishing between types of jurisdiction and paying close attention to the content of the laws at hand.

Cambodia is not a 'home country' to large transnational companies (TNCs), but is a 'host' country where subsidiaries and suppliers of TNCs based in industrialized states (US, EU, China etc). Therefore, Cambodia has not adopted laws to protect human rights in other countries, that is, laws with extraterritorial effects. Instead, Cambodia has been on the receiving end of such extraterritorial laws. Extraterritorial jurisdiction is the situation when a state extends its legal power beyond its territorial borders. Consequently, the promotion and protection of human rights in the context of business in Cambodia is not only a conceptual issue but also a political discourse on the extraterritorial application of human rights law and treaties. The Cambodian government, in most cases, expresses its unwelcoming remarks by either explicitly rejecting or remaining silent. On the other hand, civil society organizations, including human rights organizations, play a more active role in invoking the respect of domestic laws concerning human rights and due diligence of the home states. It is important to understand the responses of various actors in Cambodia to such extraterritorial laws on CSR, and place this discussion in a larger context of Cambodia's compliance with human rights treaties and cooperation with oversight mechanisms in the UN. In other words, this is a discussion about sovereignty and protection of human rights and it takes place in the 'business and human rights' area, but also in the broader international human rights system in which Cambodia participates.

Main Aspects

- ✓ Home states and their obligations (respect and protect human rights)
- ✓ Jurisdiction: legislative (or "prescriptive"), executive ("enforcement") and judicial ("adjudicatory")
- ✓ Extraterritoriality: direct extraterritorially (jurisdiction over foreign companies) versus extraterritorial effects (jurisdiction over national companies with operations abroad)
- ✓ Corporate transparency
- ✓ Regulations on conflict minerals
- ✓ Slavery in supply chains
- ✓ Corruption and anti-bribery
- ✓ Taxation and revenues from natural resources
- ✓ Transboundary issues
- ✓ Land rights
- ✓ Rights of indigenous peoples
- ✓ Child labour
- ✓ Right to health
- ✓ Environmental protection
- ✓ Civil and criminal liability
- ✓ Parent companies, subsidiaries and supply chains
- ✓ Human rights due diligence
- ✓ National sovereignty and political interference

Background

UN Special Representative, Further Steps[106]

Extraterritorial jurisdiction

46. All States have the duty to protect against corporate-related human rights abuses within their territory and/or jurisdiction. In several policy domains, including anti-corruption, anti-trust, securities regulation, environmental protection and general civil and criminal jurisdiction, States have agreed to certain uses of extraterritorial jurisdiction. However, this is typically not the case in business and human rights.

47. Legitimate issues are at stake and they are unlikely to be resolved fully anytime soon. However, the scale of the current impasse must and can be reduced. To take the most pressing case, what message do States wish to send victims of corporate-related abuse in conflict affected areas? Sorry? Work it out yourselves? Or that States will make greater efforts to ensure that companies based in, or conducting transactions through, their jurisdictions do not commit or contribute to such abuses, and to help remedy them when they do occur? Surely the latter is preferable.

106 John Ruggie, *Business and Human Rights: Further Steps toward the Operationalization of the "Protect, Respect and Remedy" Framework,* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/14/27 (2010) http://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf.

48. In the heated debates about extraterritoriality regarding business and human rights, a critical distinction between two very different phenomena is usually obscured. One is jurisdiction exercised directly in relation to actors or activities overseas, such as criminal regimes governing child sex tourism, which rely on the nationality of the perpetrator no matter where the offence occurs. The other is domestic measures that have extraterritorial implications; for example, requiring corporate parents to report on the company's overall human rights policy and impacts, including those of its overseas subsidiaries. The latter phenomenon relies on territory as the jurisdictional basis, even though it may have extraterritorial implications.

49. Thus, extraterritoriality is not a binary matter: it comprises a range of measures. Indeed, one can imagine a matrix, with two rows and three columns. Its rows would be domestic measures with extraterritorial implications; and direct extraterritorial jurisdiction over actors or activities abroad. Its columns would be public policies for companies (such as CSR and public procurement policies, export credit agency criteria, or consular support); regulation (through corporate law, for instance); and enforcement actions (adjudicating alleged breaches and enforcing judicial and executive decisions). Their combination yields six types of "extraterritorial" form, each in turn offering a range of options. Not all are equally likely to trigger objections under all circumstances.

Instruments[107]

UN, Guiding Principles on Business and Human Rights[108]

I. The State duty to protect human rights

States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

Commentary

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

107 *Note:* see hard law (on extraterritoriality in general), and reporting and slavery chapters (on distinct laws).

108 Human Rights Council, *UN Guiding Principles on Business and Human Rights, Seventeenth Session* (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

US, Kiobel v Shell[109]

[Alien Tort Claims Act (ATCA)/Alien Tort Statute (ATS): The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.][110]

Petitioners, Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute [ATS], alleging that respondents—certain Dutch, British, and Nigerian corporations—aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. (…) [Court asks] whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States. (…)

In contending that a claim under the ATS does not reach conduct occurring in a foreign sovereign's territory, respondents rely on the presumption against extraterritorial application, which provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none" (…) The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." (…) It is typically applied to discern whether an Act of Congress regulating conduct applies abroad (…), but its underlying principles similarly constrain courts when considering causes of action that may be brought under the ATS. Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in this context, where the question is not what Congress has done but what courts may do. (…)

The presumption is not rebutted by the text, history, or purposes of the ATS. Nothing in the ATS's text evinces a clear indication of extraterritorial reach. Violations of the law of nations affecting aliens can occur either within or outside the United States. And generic terms, like "any" in the phrase "any civil action," do not rebut the presumption against extraterritoriality. (…)

[ATS] does not suffice to counter the weighty concerns underlying the presumption against extraterritoriality. Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. (…)

The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U. S. law that carries foreign policy consequences not clearly intended by the political branches. (…)

Applying U. S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign (…)

Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. (…) (listing recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). Moreover, accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.

109 *Kiobel v. Royal Dutch Petroleum Co.,* 133 S.Ct. 1659 (United States) (2013) https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf.

110 United States, *Alien Tort Claims Act* (ATCA) (1789), https://www.law.cornell.edu/uscode/text/28/1350#:~:text=The%20district%20courts%20shall%20have,treaty%20of%20the%20United%20States.

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. (…) Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

California, Transparency in Supply Chains Act[111]

Businesses may inadvertently promote human trafficking through their supply chains. In 2013, the U.S. Department of Labor's Bureau of International Labor Affairs identified 122 goods (from 72 countries) believed to be the product of forced or child labor. These goods range from everyday items like coffee, cotton and shoes to more complex products such as carpets, minerals, or furniture. (…)

California, which boasts the world's seventh-largest economy and the country's largest consumer base, is unique in its ability to address this issue, and as a result, to help eradicate human trafficking and slavery worldwide. (…)

The California Transparency in Supply Chains Act (the "Act") provides consumers with critical information about the efforts that companies are undertaking to prevent and root out human trafficking and slavery in their product supply chains – whether here or overseas.

This Act requires large retailers and manufacturers doing business in California to disclose on their websites their "efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale." The law applies to any company doing business in California that has annual worldwide gross receipts of more than $100 million and that identifies itself as a retail seller or manufacturer on its California tax return. Companies subject to the Act must post disclosures on their Internet websites related to five specific areas: verification, audits, certification, internal accountability, and training.

The California Transparency in Supply Chains Act does not mandate that businesses implement new measures to ensure that their product supply chains are free from human trafficking and slavery. Instead, the law only requires that covered businesses make the required disclosures – even if they do little or nothing at all to safeguard their supply chains. Companies subject to the Act must therefore disclose particular information within each disclosure category, and the Act offers companies discretion in how to do so.

UK, Modern Slavery Act[112]

2.3 The Act specifically states that the statement must include 'the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business'. When the Act refers to ensuring that slavery and human trafficking is not taking part in any part of its supply chain, this does not mean that the organisation in question must guarantee that the entire supply chain is slavery free. Instead, it means an organisation must set out the steps it has taken in relation to any part of the supply chain (that is, it should capture all the actions it has taken).

2.4 The provision requires an organisation to be transparent about what is happening within its business. This means that if an organisation has taken no steps to ensure slavery and human trafficking is not taking place they must still publish a statement stating this to be the case.

111 Kamala D. Harris, *The California Transparency in Supply Chains Act - A Resource Guide* (2015) https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf; United States, California Transparency in Supply Chains Act (2010) https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf.

112 UK Home Office, *Transparency in Supply Chains - A practical guide* (2015) www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf; United Kingdom, Modern Slavery Act (2015) http://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted.

Failure to comply

2.6 If a business fails to produce a slavery and human trafficking statement for a particular financial year the Secretary of State may seek an injunction through the High Court (…) requiring the organisation to comply. If the organisation fails to comply with the injunction, they will be in contempt of a court order, which is punishable by an unlimited fine. (…)

2.8 We expect organisations to build on their statements year on year and for the statements to evolve and improve over time. However, a failure to comply with the provision, or a statement that an organisation has taken no steps, may damage the reputation of the business. It will be for consumers, investors and Non-Governmental Organisations to engage and/or apply pressure where they believe a business has not taken sufficient steps.

Responding to an incidence of modern slavery

9.7 Organisations can benefit from working collaboratively with others – such as industry bodies and multi-stakeholder organisations – to improve industry-wide labour standards and to advocate for improved laws and policies in sourcing countries, where appropriate. This could be more likely to achieve long-term change than working alone.

France, Corporate Duty of Vigilance Law[113]

Article 1

Any company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory… must establish and implement an effective vigilance plan.

The plan shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls …, as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship...

The plan shall be drafted in association with the company stakeholders involved, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level. It shall include the following measures:

1. A mapping that identifies, analyses and ranks risks;
2. Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;
3. Appropriate action to mitigate risks or prevent serious violations;
4. An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned;
5. A monitoring scheme to follow up on the measures implemented and assess their efficiency.

113 ECCJ, *French Corporate Duty Of Vigilance Law: Frequently Asked Questions* (23 February 2017) http://corporatejustice.org/news/405-french-corporate-duty-of-vigilance-law-frequently-asked-questions.

The vigilance plan and its effective implementation report shall be publicly disclosed and included in the report (...)

When a company does not meet its obligations in a three months period after receiving formal notice to comply with the duties laid down in I, the relevant jurisdiction can, following the request of any person with legitimate interest in this regard, urge said company, under financial compulsion if appropriate, to comply with its duties.

Article 2

According to the conditions laid down in Articles 1240 and 1241 of the Civil Code, the author of any failure to comply with the duties specified in Article L. 225-102-4 of this code shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid.

US, Dodd–Frank Act[114]

Section 1502: Conflict Minerals

It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein (…)

Disclosures Relating To Conflict Minerals Originating In The Democratic Republic Of The Congo

[Businesses shall]… disclose annually… whether conflict minerals … did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report (…)

Strategy and map to address linkages between conflict minerals and armed groups

The Secretary of State, in consultation with the Administrator of the United States Agency for International Development, shall submit to the appropriate congressional committees a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products. [The strategy shall include the following]:

(i) A plan to promote peace and security in the Democratic Republic of the Congo by supporting efforts of the Government of the Democratic Republic of the Congo, including the Ministry of Mines and other relevant agencies, adjoining countries, and the international community, in particular the United Nations Group of Experts on the Democratic Republic of Congo, to

  (I) monitor and stop commercial activities involving the natural resources of the Democratic Republic of the Congo that contribute to the activities of armed groups and human rights violations in the Democratic Republic of the Congo; and

  (II) develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving the natural resources of the Democratic Republic of the Congo to reduce exploitation by armed groups and promote local and regional development.

(ii) A plan to provide guidance to commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products and on their suppliers to ensure that conflict minerals used in the products of such suppliers do not directly or indirectly finance armed conflict or result in labor or human rights violations.

114 United States, *Dodd–Frank Wall Street Reform and Consumer Protection Act* (2010) http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

(iii) A description of punitive measures that could be taken against individuals or entities whose commercial activities are supporting armed groups and human rights violations in the Democratic Republic of the Congo.

EU, Regulation on Conflict Minerals[115]

Preamble

(1) Although they hold great potential for development, natural mineral resources can, in conflict-affected or high- risk areas, be a cause of dispute where their revenues fuel the outbreak or continuation of violent conflict, undermining endeavours towards development, good governance and the rule of law. In those areas, breaking the nexus between conflict and illegal exploitation of minerals is a critical element in guaranteeing peace, development and stability.

(7) This Regulation, by controlling trade in minerals from conflict areas, is one of the ways of eliminating the financing of armed groups. The Union's foreign and development policy action also contributes to fighting local corruption, to the strengthening of borders and to providing training for local populations and their representatives in order to help them highlight abuses.

(10) Union citizens and civil society actors have raised awareness with respect to Union economic operators not being held accountable for their potential connection to the illicit extraction of and trade in minerals from conflict areas. Such minerals, potentially present in consumer products, link consumers to conflicts outside the Union. As such, consumers are indirectly linked to conflicts that have severe impacts on human rights, in particular the rights of women, as armed groups often use mass rape as a deliberate strategy to intimidate and control local populations in order to preserve their interests. (…)

Article 1

1. This Regulation establishes a Union system for supply chain due diligence ('Union system') in order to curtail opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, their ores, and gold. This Regulation is designed to provide transparency and certainty as regards the supply practices of Union importers, and of smelters and refiners sourcing from conflict-affected and high-risk areas.

2. This Regulation lays down the supply chain due diligence obligations of Union importers of minerals or metals containing or consisting of tin, tantalum, tungsten or gold (…)

'Supply chain due diligence' means the obligations of Union importers of tin, tantalum and tungsten, their ores, and gold in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high- risk areas to prevent or mitigate adverse impacts associated with their sourcing activities.

EU, Non-Financial Reporting Directive[116]

Article 19a: Non-financial statement

1. Large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including:

115 European Union, *Regulation (EU) 2017/821 of the European Parliament and of the Council laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas* (2017) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821&from=ES.

16 European Union, *Directive 2014/95/EU regarding disclosure of non-financial and diversity information by certain large undertakings and groups* (2014) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095.

(a) a brief description of the undertaking's business model;

(b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;

(c) the outcome of those policies;

(d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;

(e) non-financial key performance indicators relevant to the particular business.

Where the undertaking does not pursue policies in relation to one or more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so.

European Parliament, Recommendations on Corporate Due Diligence[117]

1. Considers that voluntary due diligence standards have severe limitations and that the Union should urgently adopt minimum requirements for undertakings to identify, prevent, cease, mitigate, monitor, disclose, account, address and remediate human rights, environmental and governance risks in their entire value chain; believes that this would be beneficial for stakeholders, as well as for businesses in terms of harmonization, legal certainty and a level playing field; stresses that this would enhance the reputation of EU undertakings and of the Union as a standard setter;

2. Recalls that due diligence is primarily a preventative mechanism and that companies should be first and foremost required to identify risks or adverse impacts and adopt policies and measures to address them; highlights that if an undertaking causes or contributes to an adverse impact it should provide for a remedy;

3. Stresses that human rights abuses and breaches of social and environmental standards can be the result of a company's own activities or of those of its business relationships; underlines therefore that due diligence should encompass the entire value chain;

4. Considers that the scope of any future mandatory EU due diligence framework should be broad and cover all undertakings governed by the law of a Member State or established in the territory of the Union, including those providing financial products and services, regardless of their size or sector of activity and of whether they are publicly owned or controlled undertakings; (…)

6. Underlines that due diligence strategies should be aligned with the Sustainable Development Goals and EU policy objectives in the field of human rights and the environment, including the European Green Deal, and EU international policy;

7. Stresses that due diligence should not be a 'box-ticking exercise' and that due diligence strategies should be in line with the dynamic nature of risks; considers that those strategies should cover every actual or potential adverse impact although the severity of the risk should be considered in the context of a prioritisation policy;

8. Highlights that sound due diligence requires that all stakeholders be involved and consulted effectively and meaningfully; (…)

10. Considers that, to enforce due diligence, Member States should designate national authorities to share best practices as well as to supervise and impose sanctions, including criminal sanctions in severe cases;

117 European Parliament, *Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)) (11 September 2020) https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.

11. Considers that company-level grievance mechanisms can provide effective early-stage recourse, provided they are legitimate, accessible, predictable, equitable, transparent and human rights-compatible; (…)

EU, Directive 2013/34/EU on the Annual Financial Statements[118]

44. In order to provide for enhanced transparency of payments made to governments, large undertakings and public-interest entities which are active in the extractive industry or logging of primary forests should disclose material payments made to governments in the countries in which they operate in a separate report, on an annual basis. Such undertakings are active in countries rich in natural resources, in particular minerals, oil, natural gas and primary forests. (…)

45. The report should serve to help governments of resource- rich countries to implement the EITI principles and criteria and account to their citizens for payments such governments receive from undertakings active in the extractive industry or loggers of primary forests operating within their jurisdiction. The report should incorporate disclosures on a country and project basis. (…)

EITI Principles[119]

2. We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development.

5. We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.

8. We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.

EU, Directive on the Activities and Supervision of Pension Funds[120]

Article 21: General governance requirements

1. Member States shall require all IORPs [institutions for occupational retirement provision] to have in place an effective system of governance which provides for sound and prudent management of their activities. That system shall include an adequate and transparent organisational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information. The system of governance shall include consideration of environmental, social and governance factors related to investment assets in investment decisions, and shall be subject to regular internal review.

Article 41: Information to be given to prospective member

1. Member States shall require IORPs to ensure that prospective members who are not automatically enrolled in a pension scheme are informed, before they join that pension scheme, about: … (c) information on whether and how environmental, climate, social and corporate governance factors are considered in the investment approach; (…)

118 European Union, *Directive 2013/34/EU of the European Parliament and of the Council on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings* (2013) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0034.

119 Extractive Industry transparency Initiative, *The EITI Standard* (2016) https://eiti.org/document/eiti-standard-2019.

120 European Union, *Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the Activities and Supervision of Institutions for Occupational Retirement Provision* (IORPs) (2016) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L2341.

EU, Directive on the Encouragement of Shareholder Engagement[121]

(14) Effective and sustainable shareholder engagement is one of the cornerstones of the corporate governance model of listed companies, which depends on checks and balances between the different organs and different stakeholders. Greater involvement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies, including as regards environmental, social and governance factors, in particular as referred to in the Principles for Responsible Investment, supported by the United Nations. In addition, greater involvement of all stakeholders, in particular employees, in corporate governance is an important factor in ensuring a more long-term approach by listed companies that needs to be encouraged and taken into consideration.

Article 3g: Engagement policy

1. Member States shall ensure that institutional investors and asset managers either comply with the requirements set out in points (a) and (b) or publicly disclose a clear and reasoned explanation why they have chosen not to comply with one or more of those requirements. (a) Institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy. The policy shall describe how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, conduct dialogues with investee companies, exercise voting rights and other rights attached to shares, cooperate with other shareholders, communicate with relevant stakeholders of the investee companies and manage actual and potential conflicts of interests in relation to their engagement.

EU, Regulation on Sustainability Disclosures in the Financial Services Sector[122]

Article 10: Transparency of the promotion of environmental or social characteristics and of sustainable investments on websites

1. Financial market participants shall publish and maintain on their websites the following information for each financial product (…):

   (a) a description of the environmental or social characteristics or the sustainable investment objective;

   (b) information on the methodologies used to assess, measure and monitor the environmental or social characteristics or the impact of the sustainable investments selected for the financial product, including its data sources, screening criteria for the underlying assets and the relevant sustainability indicators used to measure the environmental or social characteristics or the overall sustainable impact of the financial product; (…)

US, Foreign Corrupt Practices Act[123]

It shall be unlawful for any issuer [business subject to this US law] … or for any officer, director, employee, or agent of such issuer [to make] an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to

121 European Union, *Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement* (2017) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0828.

122 European Union, *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector* (2019) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2088&from=EN.

123 U.S. Department of Justice, *A Resource Guide To The U.S. Foreign Corrupt Practices Act* (2015) https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf; United States, Foreign Corrupt Practices Act of 1977 (FCPA) https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf.

(1) any foreign official for purposes of

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business (…)

The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

Historical Background

Congress enacted the FCPA in 1977 after revelations of widespread global corruption in the wake of the Watergate political scandal. SEC [Securities and Exchange Commission] discovered that more than 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials to secure business overseas. SEC reported that companies were using secret "slush funds" to make illegal campaign contributions in the United States and corrupt payments to foreign officials abroad and were falsifying their corporate financial records to conceal the payments.

Congress viewed passage of the FCPA as critical to stopping corporate bribery, which had tarnished the image of U.S. businesses, impaired public confidence in the financial integrity of U.S. companies, and hampered the efficient functioning of the markets. As Congress recognized when it passed the FCPA, corruption imposes enormous costs both at home and abroad, leading to market inefficiencies and instability, sub-standard products, and an unfair playing field for honest businesses. By enacting a strong foreign bribery statute, Congress sought to minimize these destructive effects and help companies resist corrupt demands, while addressing the destructive foreign policy ramifications of transnational bribery.

The FCPA: Anti-bribery Provisions

The FCPA addresses the problem of international corruption in two ways: (1) the anti-bribery provisions… prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business and (2) the accounting provisions… impose certain record keeping and internal control requirements on issuers, and prohibit individuals and companies from knowingly falsifying an issuer's books and records or circumventing or failing to implement an issuer's system of internal controls. Violations of the FCPA can lead to civil and criminal penalties, sanctions, and remedies, including fines, disgorgement, and/or imprisonment.

Maastricht Principles on Extraterritorial Obligations of States[124]

9. Scope of jurisdiction.

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

124 *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (2011) http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=63.

b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;

c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive

10. Limits to the entitlement to exercise jurisdiction.

The State's obligation to respect, protect and fulfil economic, social and cultural rights extraterritorially does not authorize a State to act in violation of the UN Charter and general international law.

Commentary

While Principle 9 sets forth the basis for the mandatory application of human rights obligations to a state's conduct that has extraterritorial effect, Principle 10 recalls that the duty of the state to respect, protect, and fulfill human rights outside its national territory should not be invoked as a justification for the adoption of measures that violate the UN Charter or general international law. Article 2 (4) of the UN Charter imposes on UN member states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Moreover, as described in greater detail under Principles 24 and 25 regarding the duty to protect human rights extraterritorially through regulation, the sovereignty of the state on the national territory of which a situation occurs that another state seeks to influence, as well as the principle of the equality of all states, may impose limits to the scope of the duty of that other state to contribute to the full realization of human rights.

25. Bases for protection.

States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:

a) the harm or threat of harm originates or occurs on its territory;

b) where the non-State actor has the nationality of the State concerned;

c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;

d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-state actor's activities are carried out in that State's territory;

e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.

European Commission, Corporate Social Responsibility: Overview of Progress[125]

Public procurement

The 2014 Public Procurement Directives101 expand possibilities for EU contracting authorities to use sustainable procurement criteria in their tenders102.

125 European Commission, *Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress* (2019) https://ec.europa.eu/docsroom/documents/34963.

Promotion of quality criteria, and in particular sustainability criteria, is a priority for the Commission's policy on public procurement, as highlighted in the Communication on public procurement "Making Public Procurement work in and for Europe"103 of October 2017.

The use of Green Public Procurement (GPP)/ Socially Responsible Public Procurement (SRPP) in public purchasing can create additional market opportunities for sustainable products, promote supply chain due diligence and encourage the market to shift towards more environmentally friendly and socially responsible solutions. To support the use of these criteria, the Commission has taken a number of actions. EU guidance exists in the field of GPP and SRPP. (The latter will be updated in 2019 to reflect the 2014 Directives).

Furthermore, the Commission has produced GPP criteria in over 20 sectors, which are periodically updated through scientific research and a consultation process. The Commission is also engaged in awareness-raising actions on the importance of sustainable procurement and in the dissemination of good practices to inspire procurement initiatives at national level.

Augenstein & Dziedzic, State Obligations under the European Convention[126]

Abstract

This study examines State obligations to prevent and redress corporate-related human rights violations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. It discusses the evolving jurisprudence of the European Court of Human Rights in two areas of international legal doctrine of particular relevance to the business and human rights debate: the application of international human rights obligations to non-state actors (the public-private divide); and the jurisdictional scope of international human rights treaties (the territoriality-extraterritoriality divide). (…)

Part B systematises the case law of the European Court of Human Rights (ECtHR) on the public-private divide in terms of two categories of State obligations: negative obligations to respect human rights in relation to corporations acting as state agents; and positive obligations to protect human rights in relation to corporations acting as third parties. Part C discusses the ECtHR's approach to the extraterritorial dimension of State obligations to prevent and redress corporate-related human rights violations. The study discusses cases of direct extraterritorial jurisdiction (acts 'performed' outside the State's territory) and extraterritorial effects cases (acts 'producing effects' outside the State's territory), and their respective relevance to the business and human rights domain.

Conclusions

While the ECtHR's approach to extraterritorial human rights protection has significantly evolved over the past years, it remains premised upon an essentially territorial notion of jurisdiction. While, accordingly, the extraterritorial application of the European Convention remains the exception, the Court has given State obligations to secure human rights 'to everyone within their jurisdiction' (Article 1 ECHR) an increasingly broad interpretation that encompasses acts performed outside the State's territory and acts producing effects outside the State's territory. The category of acts performed outside the State's territory is of limited value to the business and human rights domain because it requires the physical presence of State agents on the territory of another State. While extraterritorial effects cases appear more promising in this regard the ECtHR has not (yet) endorsed the view of the UN Treaty Bodies according to which a State's exercise of authority and control over a corporation domiciled within its territory is sufficient to establish a jurisdictional link with a victim located outside its borders.

126 Daniel Augenstein and Lukasz Dziedzic, State Obligations to Regulate and Adjudicate *Corporate Activities Under the European Convention on Human Rights,* EUI Department of Law Research Paper No. 2017/15 (2017) https://ssrn.com/abstract=3100186.

Methven O'Brien, The Home State Duty to Regulate TNCs[127]

The notion that states have extraterritorial human rights obligations is one basis upon which calls are made for an international treaty on business and human rights. In particular, it has been claimed that "home" states of transnational corporations (TNCs) have a duty to protect against human rights abuses occurring on the territory of a "host" state that may be breached by a failure to regulate TNCs' extraterritorial activities. At the same time, advocates of such a duty often criticise the UN Guiding Principles (UNGPs) for failing to reflect this obligation to its full extent.

This paper challenges the claim that such a home state duty to regulate TNCs' extraterritorial human rights impacts can be said currently to exist. Specifically, through a systematic analysis of principles and authorities relating to the various legal building blocks needed to get such a duty off the ground, it demonstrates that extraterritoriality advocates only appear to reach their desired conclusions because, at each step in their argument, the true position in existing international law is subtly misinterpreted or misrepresented. Incidentally, it is affirmed that the UNGPs' evaluation of the status quo regarding states' competence to regulate extraterritorially remains substantially a correct one. (…)

This paper … summarises arguments made by "extraterritoriality advocates". It then proceeds to dispute them, with reference, in turn, to the issues of jurisdiction; attribution and responsibility; and positive obligations by demonstrating, in respect of each, a lack of legal authority and flaws in the analysis of extraterritoriality advocates for the conclusions they advance.

Each state's general jurisdiction is primarily territorial: extraterritorial exercise of jurisdiction is the exception that makes the norm. This canonical rule may be observed in operation across general public international law jurisdiction's three dimensions, legislative (or "prescriptive"), executive (or "enforcement") and judicial ("adjudicatory").

As regards prescriptive jurisdiction, even if the "overlap" of municipal laws is today no rare occurrence, the right to make laws remains in principle territorially bounded, "in the sense that a state by definition has the prerogative to legislate for persons present in its own territory" and, by implication, not for others who, after all, lack formal and also usually substantive opportunities to influence its government.

Yet states may enact rules affecting the rights and duties of parties beyond their borders without consent from other states, where there is some "connecting factor" between the state and the target of its regulatory efforts. Such a link may be provided, for example, by nationality, whereby a state is allowed to attempt to control the conduct of its nationals ("active personality") or to protect them ("passive personality") even when abroad; by damage to the vital interests of the state ("protective principle"); or by damage to the international community as a whole, implicitly affecting the state as one of its members ("universality"). Beyond these permitted scenarios, extraterritorial legislation is likely to draw controversy as an interference with other states' economic, social and other interests. (…) One state may not exercise jurisdiction on the territory of another without consent, invitation or acquiescence (…)

Skogly, Extraterritoriality: Universal Human Rights without Universal Obligations[128]

In international human rights discourse, the concept of universalism has been key since the adoption of the UN Charter in 1945, and the labelling of the 1948 Declaration as the Universal Declaration of Human Rights (UDHR) signifies the importance of this concept. (…) Yet, in the development of human rights law and its implementation through national and international bodies, the concept of universalism has been rather one-sided: it concerns human rights enjoyment, but not human rights obligations. (…)

127 Claire Methven O'Brien, *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Case of Extraterritorial Overreach?* University of Groningen Faculty of Law Research Paper 2016-31 (2016) https://ssrn.com/abstract=2854275.

128 Sigrun I. Skogly, *Extraterritoriality: Universal Human Rights without Universal Obligations* (2010) https://eprints.lancs.ac.uk/id/eprint/26177/1/Microsoft_Word_-_Monash_-_Extraterritoriality_-_Final_draft.pdf.

However, this way of looking at obligations has in recent times been questioned by a number of actors in the international human rights community. Academics, policy makers, non-governmental organisations (NGOs), and international institutions have begun to question the logic of this approach, and indeed the legal justifications for it. (…) Thus, the altered approach is to address whether states have obligations in regard to the human rights effects on individuals in other states as a result of actions and omissions in their international cooperation or foreign policy. (…)

This increased interaction and interdependence of states in the international community has resulted in a debate that questions whether states have obligations that go beyond their national borders, and include human rights problems caused by the actions or omissions of one state in the territory of another state. The question raised is whether the foreign state fails to comply with legal obligations if its actions or omissions result in human rights violations abroad. This debate concerns questions that have been addressed through the use of different terms: extraterritorial obligations, transnational obligations, international obligations, or global obligations, to mention the most common.

Background (Cambodia)

European Commission, Withdrawal of Preferential Access to EU Market[129]

The European Commission (EC) has decided to withdraw part of the tariff preference granted to Cambodia under the European Union's Everything But Arms' (EBA) trade scheme due to the serious and systemic violations of the human rights principles enshrined in the International Covenant on Civil and Political Rights.

The Royal Government of Cambodia, Statement on Temporary Withdrawal of EBA[130]

The RGC considers their decision as an extreme injustice when the EC disregards the concrete measures and substantial progresses made by the RGC in its adherence and commitment to the implementation of the 15 UN and ILO Conventions, which are the pre-conditions to the continuation of the EBA unilateral trade preferences, (…).

The RGC is of the view that the EC has not acted on the principles of 'good faith' and 'fairness'. While many countries receiving the EU trade preferences have not fully complied with these international conventions and to which the EC has closed a blind eye, the EC hiding behind its political agenda has unfairly imposed and expected the 'perfect implementation' of these Conventions from Cambodia. (…) The EC has not shown due respect to Cambodia's sovereignty when their EBA demands are tantamount to acts of interference with the political development in the country. (…)

The EC has not shown due respect to Cambodia's sovereignty when their EBA demands are tantamount to acts of interference with the political development in the country. (…)

All these arguments notwithstanding, the government is committed to continue enhancing the democratic space, human rights and labour rights. However, we are as much determined to protect our peace, stability, independence and sovereignty at all cost.

129 European Commission, *Commission Decides to Partially Withdraw Cambodia's Preferential Access to the EU marke*t (2020) https://trade.ec.europa.eu/doclib/press/index.cfm?id=2113#:~:text=The%20European%20Commission%20has%20decided,on%20Civil%20and%20Political%20Rights.

130 Ministry of Foreign Affairs and International Cooperation, *Statement of the Royal Government of Cambodia in Response to the European Commission's Decision to Launch the Formal Procedure for the Temporary Withdrawal of the Everything But Arms (EBA) Preferences for Cambodia* (2019) https://pressocm.gov.kh/wp-content/uploads/2019/02/20190212-Ministry-Foreign-Affairs-International-Cooperation-ENG.pdf.

Transparency International Cambodia, Business Brief[131]

Facilitation Payments

One of the most common forms of corruption is "Facilitation Payments". Facilitation payments are a small bribe paid to access a routine government service that companies and citizens at large have a legal right to access without additional payments. (…)

Surprisingly, facilitation payments are an exemption under the US Foreign Corrupt Practices Act (FCPA). The FCPA states that its anti-bribery prohibition "shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action". The scope of this exemption has, however, become very narrow and opaque. By looking at recent corruption cases under the FCPA, it becomes clear that what traditionally has been accepted as exemption is now subject to a more stringent interpretation. This stringent interpretation increases legal risks for companies who allow facilitation payments in their policy framework. In order for companies to protect themselves against legal risks, a policy prohibiting facilitation payments is strongly recommended. (…)

Under the UK Bribery Act (2010), facilitation payments are strictly prohibited regardless the size and frequency. As previously mentioned facilitation payments are an exemption under the FCPA but the scope of that exemption is becoming much narrower. In conclusion, companies are facing an increasing legal risk by having a policy that allows facilitation payments. (…)

This is especially important in a business environment like Cambodia where facilitation payment has been seen as a way to encourage government officials to work by supplementing their low salary.

Instruments (Cambodia)

Ministry of Labour, Ministry to Probe Child Labor [re UK Modern Slavery Act][132]

"We will start investigating. The ministry issued a statement preventing [this issue of child labour]. We will review what the report says."

"In the past, we didn't know about it. After knowing about it, we will inspect the locations mentioned in the report. If it is true, we will take the necessary legal action to put a stop to it," (…)

(…) the ministry issued a statement warning it will mete out fines and take other legal action against brick kilns which use child labour or commit other violations.

Chheang Suyheang, the president of two brick kiln associations representing more than 100 factories in Kandal province, denied the existence of child labour in brick factories.

"There is no impact on them. Their hands and feet do not fall into the machines or [get] cut off like before because there is no child labour in the brick [industry] and we do not allow minors to work because the organisation has strengthened," he said.

Suyheang acknowledged that every "brick family" has borrowed money from the kiln owners. This is because they can quickly pay off their bank and microfinance loans.

131 Transparency International Cambodia, *Business Brief* (2017) http://ticambodia.org/library/wp-content/files_mf/1493710589BusinessBriefEnglish.pdf.

132 Mech Dara, 'Ministry to Probe Child Labour', *Phnom Penh Post* (19 October 2018) https://www.phnompenhpost.com/national/ministry-probe-child-labour.

NagaCorp, Code of Conduct [re US Foreign Corrupt Practice Act][133]

Statement of Principles

NagaCorp Ltd. (NagaCorp) is committed to maintaining high ethical standards in all of our operations and business activities. This involves each of us – employees, officers and members of the Board of Directors alike – fostering and maintaining NagaCorp's reputation for integrity, honesty and transparency. With this in mind, NagaCorp is dedicated to a zero-tolerance policy with regard to involvement in corruption or bribery activities of any type. This policy document is intended to help employees of NagaCorp and all its subsidiaries achieve a better understanding of corruption and bribery, and how to avoid them.

Corruption in the workplace involves the abuse of power for personal gain. Acts of corruption include bribery, kickbacks, rebates, fraud, extortion and embezzlement. Corruption in any form, commercial or political, is forbidden in all NagaCorp business dealings. No NagaCorp funds may be used, either directly or indirectly, for any bribe or other unlawful payment anywhere or under any circumstance. The purchase or sale of goods and services on behalf of NagaCorp must not lead to employees or their families receiving personal kickbacks or rebates. Kickbacks and rebates can take many forms and are not limited to direct cash payments or credits in connection with a particular transaction. Such practices are not only unethical, but in many cases are also illegal.

Background

NagaCorp is the largest hotel, gaming and leisure operator in Cambodia and the company has been listed on the Hong Kong Stock Exchange since 2006. NagaCorp is in compliance with best international standards and practices in dealing with anti-corruption and anti-bribery issues which include, but are not limited to, Cambodian law, Hong Kong Stock Exchange list requirements, the Organization for Economic Cooperation and Development, the United Nations Convention Against Corruption and the principles supporting the Foreign Corrupt Practices Act.

International Standards Regarding Anti-Corruption and Anti-Bribery

To combat the damaging effects of bribery in international business transactions, the United States Congress passed the Foreign Corrupt Practices Act (FCPA) in 1977. The law established substantial penalties for persons and corporations making payments to foreign government officials, political parties and candidates for public office in order to obtain or retain business.

The FCPA has had a major impact on how U.S. companies conduct business overseas. However, in the absence of similar legal prohibitions by key trading partners, U.S. businesses were put at a significant disadvantage in international commerce. Their foreign competitors continued to pay bribes without fear of penalties, resulting in billions of dollars in lost sales to U.S. exporters. In 1988, Congress amended the FCPA as part of a broad legislative effort to strengthen the global competitiveness of American businesses. These measures were enacted as part of the Omnibus Trade and Competitiveness Act of 1988. The 1988 amendments were aimed at reaffirming Congressional commitment to stemming transnational corporate corruption.

The scope of FCPA is quite broad and it applies to American corporations, corporations that trade in the U.S. securities market, nationals, citizens, and residents. Foreign corporations and their officers are also covered by the Act if the corrupt conduct occurs on U.S. territory.

OECD Anti-Bribery Convention

The Organization for Economic Cooperation and Development (OECD) was founded in 1961 to stimulate economic progress and world trade. The Anti-Bribery Convention requires its parties to criminalize the bribery of foreign public officials in international business transactions.

133 NagaCorp, *Code of Conduct and Anti-Corruption* (2020) https://www.nagacorp.com/eng/cg/sectionB1.php.

The Anti-Bribery Convention is the only legally binding instrument globally to focus primarily on the supply of bribes to foreign public officials in international business transactions. All Convention countries must make the bribery of foreign public officials a criminal offense. They are obligated to investigate credible allegations and, where appropriate, to prosecute those who offer, promise or give bribes to foreign public officials and to subject those who bribe to effective, proportionate and dissuasive penalties. At the same time, Parties to the Convention undertake to provide "prompt and effective legal assistance" to other Parties investigating offenses within the scope of the Convention. They are also required to deny the tax deductibility for such bribes.

Normington, It's the End of the Year, the Global Magnitsky Sanctions Are Here[134]

In what's become something of a festive tradition over the past few years, the US Treasury Department has released new designations of individuals and entities sanctioned under the Global Magnitsky Act[135] – essentially a Santa's list of the corrupt and serious human rights abusers.

The Global Magnitsky Human Rights Accountability Act (known as the Global Magnitsky Act for short) allows the US government to sanction perpetrators of serious human rights abuses and corruption outside of the country, denying them visas and freezing their US-based property and interests in property.

Council for the Development of Cambodia, Press Statement on US Sanctions[136]

The Council for the Development of Cambodia (CDC) voices great disappointment with the announcement by the US Department of the Treasury regarding its decision to impose sanctions on the Union Development Group Co., Ltd (UDG) that invested in the development of a resort in Botumsakor and Kirisakor districts, Koh Kong province, for alleged reasons that do not reflect the facts. (…)

> Allegation that UDG is a Chinese State-owned entity. (…)
>
> Allegation that the allocation of land over 10,000 hectares to UDG for development exceeded the time of land concession permitted by law. (…)
>
> Allegation that UDG has forced people from their land. (…)
>
> Allegation that the development has devasted the environment. (…)
>
> Allegation that the UDG's investment project could be used as a military base. (…) Therefore, the Council for the Development of Cambodia is of the view that the US Department of the Treasury's sanctions will not only cause damages to the UDG, but could also seriously affect the livelihood of blameless local people and the business and investment climate of the Kingdom of Cambodia as a whole.

The Chinese Embassy in Cambodia, Statement on the US Sanctions[137]

The U.S. Government fabricated the fact, unreasonably accused and used its own domestic law to impose sanction on the project of Chinese enterprise in the territory of Cambodia. This is the act of using power for severe oppression. The oppression of the U.S. on the lawful investment of the Chinese enterprise in Cambodia does not only affect interest and human rights of enterprise, but also a complete violation of sovereignty of Cambodia.

134 Mark Normington, 'It's the End of the Year, the Global Magnitsky Sanctions Are Here', *Global Witness* (31 December 2019) https://www.globalwitness.org/en/blog/its-the-end-of-the-year-the-global-magnitsky-sanctions-are-here/?gclid=CjwKCAiAn7L-BRBbEiwAl9UtkMXNCgrME7A2YlXXLKI68rdf9yb4jq_4jUnwPmWE8EEk3p1-eiqCrRoCxp0QAvD_BwE.

135 United States, *Global Magnitsky Human Rights Accountability Act* (2016) https://www.congress.gov/bill/114th-congress/senate-bill/284/text.

136 Council for the Development of Cambodia, *Press Statement (CDC Disappointed with U.S. Treasury Department's Decision To Impose Sanctions On UDG)* (20 September 2020) https://www.information.gov.kh/detail/496303.

137 Chinese Embassy in Cambodia, *Statement on the U.S. Sanctions against Chinese-funded enterprises in Cambodia, Press Release* (16 September 2020) http://kh.china-embassy.org/chn/dssghd/t1815352.htm. .

The Chinese embassy in Cambodia opposes and emphatically condemns this act. We insist that the US side revise this method immediately and lift its sanctions totally.

European Court of Justice, GMAC v Commission [re EBA][138]

The applicant claims that the Court should:

— annul the Commission's Delegated Regulation (EU) 2020/550 of 12 February 2020 (…) with regard to the temporary withdrawal of the GSP preferences for all customs codes that are affecting GMAC members (…)

In support of the action, the applicant relies on two pleas in law.

1. First plea in law, alleging that the Contested Regulation violates the principle of proportionality and the requirement of consistency between the Union's policies and activities. The Commission allegedly failed to properly assess the proportionality of the partial temporary withdrawal of customs preferences for the Cambodian garments, footwear and travel goods sectors. C 287/42 EN Official Journal of the European Union 31.8.2020
2. Second plea in law, alleging a violation of the applicant's procedural rights due to the Commission's failure to provide adequate reasoning pursuant to Article 296(2) TFEU, corresponding to a violation of the right to good administration.

H&M, Comments on EU Trade Preference Withdrawal for Cambodia[139]

H&M Group strongly agrees with the EU's aim to address serious human and civil rights violations in Cambodia. We have had consultations with the government on labour rights and freedom of association, and also to express concerns about the human rights situation. We are, together with local and international stakeholders, as well as other brands, continuously working to develop a sustainable textile industry. While there are clear signs of progress, challenges remain. […]

The partial withdrawal of the EBA will have a negative impact on the employment of the people in the textile industry. […]

We fully recognise the complexities for the EU in balancing the need to influence Cambodia towards becoming a country where human and civil rights are respected, and to support job creation and poverty alleviation through inclusive economic growth.

ECBA, Statement on EC's Cambodia Decision[140]

EBCA supports the EU's commitment to high social and labour standards and condemns any violations against human and labour rights and strongly encourages the Cambodian authorities to continue work on the Commission's conditions for a decision reversal in accordance with Article 20 of the Generalised System of Preferences (GSP) Regulation. (…)

We urge the Cambodian authorities to commit to a better respecting of human and worker rights, as well as allowing more room for domestic political debate. We also would call upon the Commission to establish a clear roadmap and timeline for the Royal Government of Cambodia in order to track progress over the coming months. We would likewise ask for transparency and predictability from the Commission in their decision-making processes, as EBCA is committed to finding a positive solution for all parties involved.

138 European Court of Justice, *Garment Manufacturers Association in Cambodia v Commission* (Case T-454/20) (16 July 2020) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020TN0454&from=GA.

139 H&M, *Comments on EU trade preference withdrawal for Cambodia* (2020) https://hmgroup.com/media/news/general-news-2020/h-m-group-comments-on-eu-trade-preference-withdrawal-for-cambodi.html

140 European Branded Clothing Alliance, *Statement on European Commission's Cambodia Decision* (2020) https://www.ebca-europe.org/policy-priorities/international-trade/details/statement-on-european-commission-s-cambodia-decision.html.

Inclusive Development International, Case Brief [re Mitr Phol Sugar Case][141]

On March 28, 2018, a group of Cambodians who were forcibly displaced and dispossessed to make way for a sugarcane plantation owned and operated by Mitr Phol Sugar Corporation filed a class action lawsuit against the company in the Civil Courts of Bangkok, Thailand, where Mitr Phol is domiciled.

In January 2008, the Cambodian Ministry of Agriculture, Forestry and Fisheries (MAFF) granted three 70-year economic land concessions (ELCs) for industrial sugarcane production in the Samrong and Chongkal districts of Oddar Meanchey province to the three companies linked to Mitr Pohl.

Throughout 2008-2009, the plaintiffs and group members were forced to give up their land for the Angkor Sugar Company concession. Affected households lost extensive rice fields, plantation/orchard land, and grazing land as well as the associated crops that sustained their livelihoods. (…) Common property resources, including community-managed forests, were also lost or degraded as a result of Mitr Phol's plantation development.

In May 2013, Cambodian NGOs Equitable Cambodia and LICADHO submitted a complaint on behalf of 602 affected families to the National Human Rights Commission of Thailand. Following an investigation by the Thailand Human Rights Commission between 2013 and 2015, the defendant submitted a request to the Cambodian government to cancel its economic concessions in Cambodia. All three concession agreements were cancelled on August 9, 2015. It appears that the defendant closed Angkor Sugar as a company that year as well.

Amnesty International, Cambodian Villagers Sue Mitr Phol to Thai Court[142]

This case is significant from a regional business and human rights perspective as it could set an important precedent by enabling cross-border accountability for human rights abuses involving corporate actors in Southeast Asia. The submission by Amnesty International seeks to assist the court by setting out relevant international legal principles and standards, including Thailand's obligations in relation to the right to remedy, access to justice, and non-discrimination in the context of transnational corporate abuses of human rights. (…)

"Today's ruling is a watershed moment for human rights and corporate accountability in Southeast Asia. The decision rightly recognises that national borders must not provide corporations with a free pass to act with impunity, nor should they pose a barrier to anyone seeking justice for alleged human rights abuses."

"After a decade-long battle, the hundreds of affected Cambodian families will finally have their day in court after years of struggle and destitution. A powerful message has been sent to corporate actors across the region that they will be answerable for their conduct."[143]

CCHR, Asia's First Transboundary Class Action on Human Rights Abuses[144]

The transboundary class action Hoy Mai & Others vs. Mitr Phol Co. Ltd. is the first of its kind in Southeast Asia. (…)

For Thailand and the region, the decision changes the legal landscape, providing that class action legislation can be used in transboundary cases and to protect some of the region's most vulnerable people. "The importance of this legal precedent cannot be overstated," said Natalie Bugalski, Legal Director for Inclusive Development International. "This is a David vs Goliath case that will redefine access to justice for the victims of corporate abuse in Southeast Asia and beyond."

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141 Inclusive Development International, *Case Brief: Class Action Lawsuit by Cambodian Villagers Against Mitr Phol Sugar Corporation* (2 April 2018) https://media.business-humanrights.org/media/documents/files/documents/Mitr-Phol-Class-Action-Case-Brief.pdf.

142 Amnesty International, *Thailand: Eviction Cambodian Villagers Sue Sugar Giant Mitr Phol; Amnesty International Submits Third Party Intervention to Thai Court* (30 July 2020) https://media.business-humanrights.org/media/documents/files/documents/Public_Statement_AI.pdf.

143 Amnesty International, *Cambodia/Thailand: Court ruling on Mitr Phol watershed moment for corporate accountability in SE Asia* (31 July 2020) https://www.amnesty.org/en/latest/news/2020/07/court-ruling-mitr-phol-case-watershed-moment-for-se-asia-corporate-accountability/.

144 Cambodian Center for Human Rights (CCHR), *Thai Appeal Court decision paves the way for Asia's first transboundary class action on human rights abuses* (31 July 2020) https://cchrcambodia.org/index_old.php?title=Thai-Appeal-Court-decision-paves-the-way-for-Asia-s-first-transboundary-class-action-on-human-rights-abuses&url=media/media.php&p=alert_detail.php&alid=80&id=5&lang=eng.

It is also a key test of corporate accountability. Mitr Phol is the biggest sugar supplier in the region and has counted some of the world's largest consumer brands, including Nestle, Coca-Cola, Pepsi, Mars Wrigley and Corbion, as past and current customers. While Coca-Cola took initial steps to investigate the allegations against Mitr Phol, it failed to use its leverage to compel the company to provide redress to the victims in Cambodia. Instead, in 2018, Coca-Cola informed Inclusive Development International that it no longer sourced sugar from Mitr Phol. It has never reported the termination of the supply relationship publicly. Mitr Phol is also a member of the sugar industry's "sustainability" certification body Bonsucro, which is under scrutiny by the UK National Contact Point for the OECD (a government body that monitors the operations of British businesses overseas) for failing to hold Mitr Phol accountable for its abuses against these communities.

Earth Rights International, No Fish, No Food [re Don Sahong Dam][145]

A coalition of local, regional and international NGOs, filed a complaint today with the Human Rights Commission of Malaysia (SUHAKAM), requesting investigation of the impacts of the Malaysian-built Don Sahong Dam project on behalf of Thai and Cambodian communities faced with losing their main food source and the extinction of an endangered dolphin population. The complaint asks SUHAKAM to ensure that the Malaysian project developer, Mega First Corporation Berhad, complies with international human rights standards, including the responsibility to respect the rights to life and livelihood and the obligation to meaningfully engage with and inform affected communities. (…)

Middleton, NHRI, Extraterritorial Obligations and Hydropower in SEA[146]

Despite the political challenges it faces, SUHAKAM is recognized as having made some progress on indigenous rights to land, on establishing a business and human rights agenda, and on maintaining its engagement with civil society. (…)

Given that domestic access to justice in some countries in Southeast Asia such as Laos, Cambodia, and Myanmar are extremely weak, civil society organizations have sought to make cross-border investments more accountable through utilizing arenas within the home countries of investors rather than the location of investment. This effort has led to the emergence of ETOs, especially in Thailand. The nascent practice of ETOs reflects a wider global trend in which transnational obligations are increasingly referenced in international human rights pronouncements. ETOs are, however, not universally endorsed, including due to the difficulties of conducting extraterritorial investigations.

Questions

1. What is extraterritorial application of human rights laws and why it can be problematic?
2. What are the effects of extraterritorial application of domestic laws? Do they succeed in increasing protection for human rights?
3. How do stakeholders in Cambodia view extraterritorial laws in the area of business and human rights? Are they generally supportive or concerned about such laws?
4. What can lawmakers do to address concerns about their extraterritorial laws?
5. What types of extraterritorial jurisdiction can you identify? Are some types more problematic than others?

145 Earth Rights International, *No fish, No Food: NGO Coalition Files Complaints Against Don Sahong Dam Developer* (2014) https://earthrights.org/blog/no-fish-no-food-ngo-coalition-files-complaint-against-don-sahong-dam-developer/.

146 Carl Middleton, 'National Human Rights Institutions, Extraterritorial Obligations and Hydropower in Southeast Asia: Implications of the Region's Authoritarian Turn', *Current Research on Southeast Asia* (2020) https://aseas.univie.ac.at/index.php/aseas/article/view/2684/2296.

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5. MULTISTAKEHOLDER INITIATIVES (COLLABORATIVE GOVERNANCE)

Radu Mares

Introduction

Collaborations – or partnerships – involving diverse private actors, and sometimes even public actors, to address social and environmental issues have multiplied since the 1990s. There have been hundreds of partnerships covering all kinds of social issues in numerous industries. The UN maintains an SDG database containing thousands of partnerships. The perhaps most high profile and likely most criticized partnership is the UN Global Compact (see chapter 2), which legitimized a closer cooperation between the UN and the business sector. Since the creation of the Global Compact, many UN resolutions have backed the idea of partnership. Today, the UN SDG database lists over 5000 examples of partnerships for development. There is also ample guidance available to civil society groups as well as organizations like the UN on how to partner with businesses. Surprisingly though, rather little is known about the impacts of partnerships and how effective they have been in achieving their stated goals. Indeed a closer look at the UN SDG database shows a large majority of partnerships are silent about their impacts and perhaps some are not moving forward as expected. At the same time, given the limited reach of the law in the globalized economy and the different forms of ineffectiveness of public governance, partnerships are increasingly seen as a necessary form of collaborative governance. Companies also recognize that even though collaborations increase complexity, partnering with other companies, stakeholders and even governments is the only way to make a systemic impact when dealing with complex issues (e.g. child labour, living wages) (see chapters 15-29). Increasingly also advocates find that joining forces with likeminded progressive actors within the corporate and governmental sectors can increase impact. Notably, some CSR partnerships have evolved towards higher standards (e.g. EITI), stricter requirements (e.g. Global Compact) and even binding arbitration for non-compliance (Bangladesh Accord). However, concerns remain about 'privatizing' public functions through partnerships and the real risk of critics and independent voices being coopted and neutralized by powerful corporations given the power differentials between business and stakeholders. Concerns have also been raised about the possible effect of preventing the adoption of much needed regulation, and the risk that partnership will 'whitewash' abusive corporations. Furthermore, partnerships are very resource intensive so approaching them with a realistic and fully informed mindset is indispensable.

Cambodia has experience with multistakeholder partnerships, especially due to its successful export-oriented garment industry. One of the most notable partnerships globally – Better Factories Cambodia – was created in Cambodia due to a unique trade agreement with the United States, adopted in the 1990s, which generated special benefits for Cambodian garment exports in return of setting up a labour protection system with the help of the ILO and World Bank/IFC. In recent years, Cambodia is also a pilot country for the innovative ACT partnership (Action, Collaboration, Transformation) dedicated to improving wages. The lessons learned in Cambodia inform other partnerships to protect worker rights, as proven by Better Factories Cambodia that has inspired the Better Work partnerships in several other countries.

Main Aspects

- ✓ Types of partnerships
- ✓ Tools for managing partnerships
- ✓ Factors of success (what it takes to set up partnerships)
- ✓ Contributions of businesses in partnerships (funds, knowledge, networks, access, reach)
- ✓ Partnerships as means to achieve SDGs
- ✓ Partnerships as a way of changing business conduct and entire industries
- ✓ Risk to reputation and integrity (for NGOs entering partnerships)
- ✓ Selection of partners (exclusionary criteria and due diligence)
- ✓ Measuring and communicating impacts (of partnerships)
- ✓ Partnerships and democratic governance
- ✓ Legitimacy of partnerships (input and output legitimacy)
- ✓ Learning in partnerships (single, double, and triple loop learning)
- ✓ Partnerships and profitability and competitiveness of businesses
- ✓ Competition law (potential concerns about partnerships)

Background

Brouwer, How to Design and Facilitate Multi-Stakeholder Partnerships [147]

What are Multi-Stakeholder Partnerships (MSPs)?

There are many different ways for groups to work together to solve a large and complex problem, or exploit a promising new opportunity. And people use many different words to describe these types of partnerships and interactions and the processes involved, from coalitions, alliances, and platforms, to participatory governance, stakeholder engagement, and interactive policy-making. We use the term 'multi-stakeholder partnership' (MSP) as an overarching concept which highlights the idea that different groups can share a common problem or aspiration, while nonetheless having different interests or 'stakes'.

We see MSPs as a form of governance – in other words, a way in which groups of people can make decisions and take action for the collective good, be it at local, national, or international scale. A central part of our vision is the role of MSPs as a platform where stakeholders can learn together in an interactive way, where people can speak and be heard, and where everybody's ideas can be harnessed to drive innovation and find ways forward that are more likely to be in the interests of all.

Characteristics of an MSP

When we talk about multi-stakeholder partnerships, we don't mean 'one-off' workshops or simple multi-actor gatherings. We mean a semistructured process that helps people to work together on a common problem over a shorter or longer time. (…) In practice, MSPs will be very diverse. But a well-functioning MSP is likely to have all or most of the following characteristics:

147 Herman Brouwer et al. *The MSP Guide: How to Design and Facilitate Multi-Stakeholder Partnerships* (2016) www.mspguide.org/sites/default/files/case/msp_ guide-2016-digital.pdf.

Shared and defined 'problem situation' or opportunity: The stakeholders need to share a tangible concern or focus that brings them together. All groups will need to have some sense of why it is worthwhile for them to invest time and energy in the MSP. However, although stakeholders need a common concern in order to start an MSP, the real nature and focus of their concerns and what the group sees as the real problems and opportunities will only fully emerge during the process of developing the MSP.

All the key stakeholders are engaged in the partnership: One of the key features of effective MSPs is that all those who have an influence on or are affected by the situation that sparked the process are involved from the start. Leaving out key groups or involving them too late can quickly undermine an MSP. But as the MSP evolves, the focus may change, meaning that new groups may need to be included and others may drop out. An effective MSP is gender aware, it ensures the voices of women and men, the young and the older are all being heard.

Works across different sectors and scales: For most MSPs, the underlying causes of problems and the opportunities for solutions will be found across different disciplines; across the workings of business, government, and civil society; and across different scales from local to national, and even global.

Follows an agreed but dynamic process and timeframe: Stakeholders need to have some understanding of the process that they are being invited to join and how long it is going to take, before they will commit themselves to take part. But the process needs to be flexible and respond to changing needs. The process and timeframe will evolve over the course of the MSP, but at any one point in time, stakeholders need to have full information about the expected process.

Involves stakeholders in establishing their expectations for a good partnership: Partnerships need to develop clear rules about how people will work together – for example, in terms of communication, decision making, leadership, and responsibilities. But these rules will only work if they are developed and agreed on by those involved. Too often in partnerships, the expectations are not discussed and agreed, which can lead to unnecessary misunderstanding and conflict.

Works with power differences and conflicts: Different stakeholder groups will come to a partnership with different levels of power related to their wealth, status, political connections, knowledge, and communication abilities. If those with most power dominate and those with less power feel excluded or overpowered, the partnership is unlikely to be constructive. Likewise, if conflicts are not recognised and are left 'under the table' to fester, they are likely to become a destructive influence on the partnership process.

Fosters stakeholder learning: The human capacity for innovation and creativity comes from our ability to learn. We can look back and analyse why things may have failed or succeeded, and we can imagine how things could be better. To learn, we have to question and challenge our beliefs and assumptions and think of alternatives. Good MSPs provide a supportive environment with interactive learning processes where people can move beyond their own fixed ideas and positions to see things differently and from the perspective of others.

Balances bottom-up and top-down approaches: Perhaps, in an ideal world, everybody would be involved in all decisions all of the time. But this is simply not feasible, and societies have evolved different mechanisms for delegating decision-making. MSPs need to find a balance between working with structures and decisions that come from the top and supporting input from a wide diversity of stakeholders that comes from the bottom.

Makes transformative and institutional change possible: Most of the issues and challenges we face in the world today are deep-seated. They lie in a mismatch between how the world is now and our past ideas, cultural attitudes, dominant technologies, decision-making mechanisms, and legal frameworks. 'Business as usual' will not help, and we need to focus on transformative change to remove underlying institutional blockages.

OECD, Successful Partnerships[148]

Hundreds of partnerships have been formed worldwide during the past two decades. Some of them lasted only a short period; others have been operating a long time. Some concentrate on narrow local targets while others ambitiously try to co-ordinate broad policy areas in large regions where millions of people live and work. There are partnerships primarily oriented towards business circles and others focused on labour market or social issues. "Bottom up" can be seen as a key principle here, but it is good to remember that a good number of partnerships have been created as part of a central government strategy to support the delivery of programmes at the local level. Many studies have been carried out on the subject, which demonstrate that a partnership is a valuable instrument or "organisational" model to overcome weaknesses of the policy and governance framework. Nonetheless, partnerships face several obstacles: they are difficult to set up and maintain, they require political will and resources, and results are not likely to come overnight.

A Partnership is likely to be ineffective if…

- Partners do not share the same values and interests. This can make agreements on partnership goals difficult.
- There is no sharing of risk, responsibility, accountability or benefits.
- The inequalities in partners' resources and expertise determine their relative influence in the partnership's decision making.
- One person or partner has all the power and/or drives the process.
- There is a hidden motivation which is not declared to all partners.
- The partnership was established just to "keep up appearances''.
- Partnership members do not have the training to identify issues or resolve internal conflicts.
- Partners are not chosen carefully, particularly if it is difficult to "de-partner".

Instruments

UN, Sustainable Development Goals[149]

Goal 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development

Multi-stakeholder partnerships

17. 16 Enhance the Global Partnership for Sustainable Development, complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the Sustainable Development Goals in all countries, in particular developing countries

17. 17 Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships

Means of implementation and the Global Partnership

60. We reaffirm our strong commitment to the full implementation of this new Agenda. We recognize that we will not be able to achieve our ambitious Goals and targets without a revitalized and enhanced Global Partnership and comparably ambitious means of implementation. The revitalized Global Partnership will facilitate an intensive global engagement in support of implementation of all the Goals and targets, bringing together Governments, civil society, the private sector, the United Nations system and other actors and mobilizing all available resources.

148 OECD, *Successful Partnerships – A Guide* (2006) www.oecd.org/cfe/leed/36279186.pdf.

149 UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development,* A/RES/70/1 (2015) http://www.un.org/ga/search/view_doc.as p?symbol=A/RES/70/1&Lang=E.

62. This Agenda, including the Sustainable Development Goals, can be met within the framework of a revitalized Global Partnership for Sustainable Development (…) It relates to domestic public resources, domestic and international private business and finance, international development cooperation, international trade as an engine for development, debt and debt sustainability, addressing systemic issues and science, technology, innovation and capacity-building, and data, monitoring and follow-up.

UN, Partnerships for SDGs Platform[150]

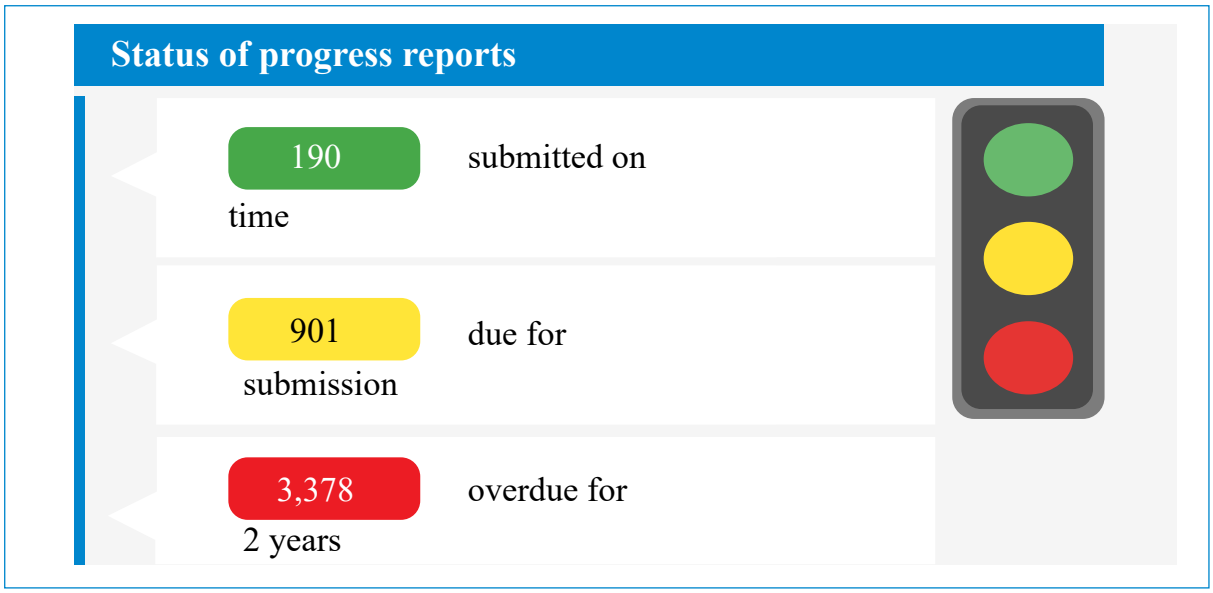
The Partnership for SDGs platform is open to all stakeholders, including Member States, civil society, local authorities, private sector, scientific and technological community, academia, and others, to register a voluntary commitment or multi-stakeholder partnership which aims to drive the implementation of the 2030 Agenda and the 17 Sustainable Development Goals (SDGs) and to provide periodic updates on progress.

Criteria for Registration: The Partnership for SDGs online platform welcomes registration of partnerships and voluntary commitments [that meet] The SMART criteria:

- Specific: Registered initiatives should aim for concrete deliverables, contributing to specific goals and targets under the 2030 Agenda. In the case of multi-stakeholder partnerships, each partner should have a clear role to play.
- Measurable: To facilitate review of progress, registered initiatives should set measurable progress indicators.
- Achievable: Registered initiatives should set attainable goals and strive to deliver results.
- Resource-based: Initiatives should have a secured resource base, rather than merely project proposals,
- Time-bound: Deliverables should be time-specific.

Registered initiatives are encouraged to maintain up-to-date information and periodically self-report progress once a year through the online platform, focusing on how the initiative has contributed to the achievement of specific goals and targets in the 2030 Agenda.

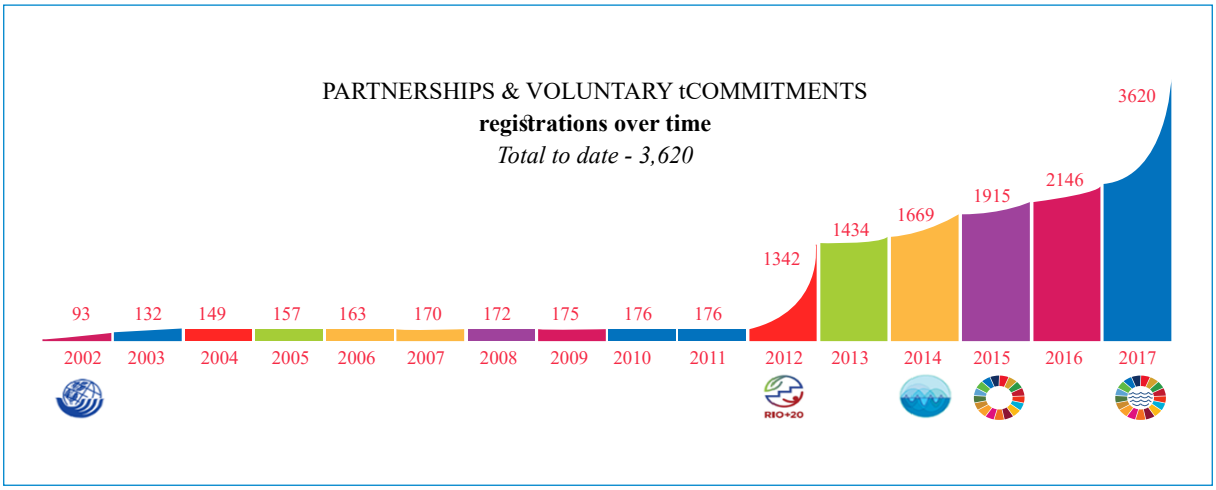
Number of partnerships (Status by 31.03.2020)[151]



150 UN, Partnerships for *SDGs online platform* (2019) https://sustainabledevelopment.un.org/partnerships.

151 UN Sustainable Development Goals Partnerships Platform, https://sustainabledevelopment.un.org/partnerships.

Evolution of partnerships over time[152]



UN, Guidelines on Cooperation between UN and Business[153]

1. The Business Sector1 has played an active role in the work of the United Nations since its inception in 1945 and a number of organizations of the UN system have a successful history of co-operating with the Business Sector. Recent political and economic changes have fostered and intensified the search for collaborative arrangements. There is a recognition that many of the world's most pressing problems are too complex for any one sector to face alone. (…)

3. The relationship with the Business Sector has become more important as the role of business in generating employment and wealth through trade, investment and finance for development has increasingly been recognized. UN Member States also stress the importance of private investment in development. The Business Sector can bring key resources to the fore – knowledge, expertise, access and reach – that are often critical to advance UN goals. (…)

5. Strategic engagement with the Business Sector and other stakeholders is proving to be an effective method for advancing United Nations goals. Collaboration has evolved based on an understanding that although the UN's goals are quite distinct from those of the Business Sector, there are overlapping objectives including building markets, combating corruption, safeguarding the environment, increasing food security, and ensuring social inclusion.

6. (…) Partnership may be defined as a voluntary and collaborative agreement or arrangement between one or more parts of the United Nations system and the Business Sector, in which all participants agree to work together to achieve a common purpose or undertake a specific task and to share risks, responsibilities, resources, and benefits. (…)

18. From an operational standpoint, there are three broad categories of partnerships among others:

    a) *Core business operations and value chains:* This category involves mobilizing the innovative technologies, processes, financing mechanisms, products, services and skills of the Business Sector to create wealth and employment and develop and deliver affordable goods and services. The UN and a Business Sector partner may jointly support the development of integrated value chains in market sectors that offer the prospects of sustainable growth and transition to better remunerated forms of employment. Another type may include collaboration that aims to increase access to important goods and services that contribute to reducing poverty (i.e. 'bottom of the pyramid' investment opportunities).

152 UN Sustainable Development Goals Partnerships Platform, *Partnerships and Voluntary Commitments over Time* (2017) https://sustainabledevelopment.un.org/content/documents/26213sdgs.fw_2.fw.png.

153 UN, *Guidelines on Cooperation between the United Nations and the Business Sector* (2015) www.un.org/ar/business/pdf/Guidelines_on_UN_Business_Cooperation.pdf

b) *Social investments and philanthropy:* This category involves different types of resource-mobilization support and utilizes a range of resources from the Business Sector including cash as well as core competencies. This may include financial support as well as pro-bono goods and services, corporate volunteers as well technical expertise and support.

c) *Advocacy and policy dialogue:* This modality relates to initiatives that promote and advance a specific cause in support of the UN goals or promoting multistakeholder dialogue on issues related to the purposes and activities of the UN. These partnerships may include promoting a concept of corporate responsibility; working with companies to bring about change in their internal business practices to align with UN goals; and developing norms or guidelines to engage stakeholders in support of UN goals.

Choosing a partner

9. The United Nations Global Compact provides an overall value framework for cooperation with the Business Sector [principles on human rights, labour, the environment and anti-corruption]. UN entities should use them as a point of reference when developing their own guidelines, including guidelines for choosing a Business Sector partner. (…)

   b) In considering such collaborations and partnerships, the UN will seek to engage with Business Sector entities that:

      i) demonstrate responsible citizenship by supporting the core values of the UN and its causes as reflected in the Charter and other relevant conventions and treaties;

      ii) demonstrate a commitment to meeting or exceeding the principles of the UN Global Compact by translating them into operational corporate practice within their sphere of influence including and not limited to policies, codes of conduct, management, monitoring and reporting systems.

   c) The UN will not engage with Business Sector entities that are complicit in human rights abuses, tolerate forced or compulsory labour or the use of child labour, are involved in the sale or manufacture of anti-personnel landmines or cluster bombs, or that otherwise do not meet relevant obligations or responsibilities required by the United Nations. (…)

   e) The UN should not partner with Business Sector entities that systematically fail to demonstrate commitment to meeting the principles of the UN Global Compact. However, the UN may consider collaboration specifically intended to address this failure of commitment.

10. UN entities may establish additional eligibility and exclusionary criteria for screening companies appropriate to their specific mission and advocacy role.

UN, Enhanced Cooperation between UN and the Private Sector[154]

(…) With fewer than 5,000 days remaining to achieve the 2030 Agenda, the United Nations must urgently rise to the challenge of unlocking the full potential of collaboration with the private sector and other partners. While there is strong consensus across the United Nations system that achieving the Sustainable Development Goals requires a significant scale-up of alliances and partnerships, in particular with the private sector, there is also widespread acknowledgement that greater efforts are required to achieve that objective. Across the United Nations system, partnership approaches are evolving towards deeper and more strategic collaboration focusing on innovation, scalability and impact.

154 UN, *Enhanced Cooperation between the United Nations and all Relevant Partners, in Particular the Private Sector,* Report of the Secretary-General (2017) https://undocs.org/A/72/310.

5. On the basis of information provided by the 37 United Nations entities that contributed data to the present report, there are over 1,500 business partnerships under way across the United Nations system. Bilateral partnerships dominate the landscape, with over half of reported partnerships involving only one company partner. Short-term collaboration also remains the norm: 79 per cent of all partnerships between the United Nations and businesses reportedly last fewer than five years. As that data suggests, more concerted efforts may be required to develop further scalable business partnership models, including models designed to better engage multiple partners over an extended period of time, more systematically measure impacts and more effectively advance the 2030 Agenda for Sustainable Development.

6. There is universal consensus among entities in the United Nations system that new alliances and partnerships will be critical to achieving the 2030 Agenda for Sustainable Development, and increasing recognition that the private sector is one of the most critical partners in boosting United Nations capacity to deliver on the Sustainable Development Goals. A large majority of United Nations entities believe that achieving the Goals will not be possible without significant scaling up of partnerships between the United Nations and business. However, there is also widespread recognition that the United Nations is not yet adequately positioned to engage business for maximum impact: just a quarter of United Nations entities feel that the United Nations is doing enough to engage the private sector.

11. Looking to the future, the United Nations system sees five critical routes to accelerate the impact of partnerships with business. First, move away from donation-based partnerships, which the majority of United Nations entities feel will assume less importance over the next three to five years, and build more strategic business relationships. Second, shape more innovation-based partnerships that leverage core private sector competencies and technologies. Third, increase focus on multi-stakeholder partnerships, which agencies expect to more than double in number during the next three to five years. Fourth, connect and convene wider ecosystems of actors. Fifth, expand opportunities for engaging micro, small and medium-sized enterprises for greater local impact.

15. One example of a United Nations-driven multi-stakeholder partnership mobilizing action among governments, multilateral organizations, the private sector and civil society is the Every Woman, Every Child initiative. Since 2015, more than 60 government commitments and 150 multi-stakeholder commitments to improving the health of women, children and adolescents have been made by Every Woman, Every Child partners, representing over $27 billion in commitments. More than 7,000 individuals and organizations informed the drafting process for the Global Strategy for Women's, Children's and Adolescents' Health (2016-2030).

Driving a strategic pivot towards transformational partnerships

19. As the United Nations enters an era of increasing resource constraints, there is a risk of regressing towards older models of collaboration. United Nations entities may feel pressure to direct what limited resources are available for private sector partnerships towards fundraising efforts, at the expense of building and scaling up transformational partnerships, which require greater staff time and resources to develop but have exponentially greater potential to drive progress towards the 2030 Agenda for Sustainable Development. A majority of entities in the United Nations system that contributed to the present report acknowledged that their ability to engage in transformational and innovative partnerships was limited by resource constraints, and that there was a tension between the need to diversify funding sources in the current resource-constrained environment and the opportunity to build relationships, coalitions and other forms of collaboration designed to influence a broader range of actors and achieve greater and more long-lasting effects.

20. In spite of that tension, the United Nations is striving to be more strategic and agile in focusing limited resources on issues and opportunities where the Organization can be most relevant and effective. Agencies, funds and programmes are becoming more adept in communicating their strategic interests and refining their value propositions for partners. (…)

22. Achieving the 2030 Agenda for Sustainable Development requires significant transformation in the Organization's approach to financing. To secure the trillions of dollars of investment needed to achieve the Sustainable Development Goals, greater effort is required to unlock new financial flows, especially from mainstream institutional investors. The United Nations system recognizes that the time is right for a strategic pivot towards approaches that go beyond mobilizing private sector funds for the Organization's own work to instead facilitating financial innovations which can leverage public and private investment in the Goals while reinforcing responsible business growth. That was a key theme at the United Nations Private Sector Forum in 2017, where CEOs, investors and leaders from government, civil society and the United Nations system explored ways to increase collaboration and unlock prosperity by financing the 2030 Agenda.

Addressing partnership skill sets, integrity and coordination gaps

28. A third of the partnership professionals who shared insights for the present report indicated that a lack of coordination across the United Nations system was one of the most pressing challenges to effective partnership. The United Nations system recognizes the benefits of increasing inter-agency collaboration on partnerships; however, there are a variety of challenges to such cooperation, including inter-agency competition for partners, a lack of common tools and templates and confidentiality barriers to disclosing partner names and partnership details. The United Nations system recognizes an urgent need to embrace a more coordinated, and less internally competitive, approach to partnerships, in particular given the growing opportunities to engage companies in multiple partnerships across the Organization and the corresponding need to urgently combat the perception that unfortunately persists among many companies that the United Nations is a challenging partner to work with. (…)

Since 2013, the Food and Agriculture Organization of the United Nations (FAO) has actively pursued greater engagement with the private sector. The FAO Strategy for Partnerships with the Private Sector (2013) supported the organization's transition from a historically risk-averse view of partnerships towards a risk-managed approach. To institutionalize partnership knowledge, seminars were held and enabling tools and training were created, including a handbook on private sector partnerships, an internal database of lessons learned and best practices and other capacity-building materials. At the same time, streamlined due diligence processes were introduced, which have led to improved efficiency for due diligence decisions (reducing the time taken for such decisions from several months to two to four weeks) and the generation of 120 new partnerships, 80 of which were with the private sector. FAO credits the success of the programme to the significant encouragement from the Director General and senior management, which created a positive environment for engaging in those efforts.

32. While the partnership opportunity space continues to expand, a diversity of United Nations approaches to partner selection and due diligence continue to undermine efforts to effectively safeguard the integrity of the Organization. Divergent approaches and standards for screening and engaging business partners can yield inconsistent decision-making on partner selection across different agencies, which may heighten integrity or reputational risks for the whole Organization.

33. Most United Nations entities conduct due diligence independently, and fewer than a third seek advice from colleagues in other agencies when gathering information on potential corporate partners. Due diligence exclusionary criteria also vary. For example, 61 per cent of United Nations entities exclude companies in the tobacco industry from partnership consideration as a policy measure; 19 per cent of United Nations entities view companies from that sector as high-risk prospective partners but do not exclude them from partnership consideration; and 20 per cent do not have specific policies in place that apply to the tobacco industry.

Measuring and communicating partnership outcomes

49. Taking action in the following four key areas can help address barriers to capturing and communicating partnership results and better tracking the contribution of partnerships towards the 2030 Agenda for Sustainable Development. First, partnership metrics and goals should be clearly defined from the outset to provide clear benchmarks for measuring impact. Second, a common baseline is needed across the United Nations system to set principles and minimum expectations for partnership reporting. Third, performance management criteria for partnership practitioners should incorporate partnership metrics to reward and encourage best practices. Fourth, strong partnership advocates at all levels of the Organization must be cultivated and must continue to champion collaboration and best practices.

UN, Global Compact[155]

The world's largest corporate sustainability initiative

10,833	**156**	**71,779**
COMPANIES	COUNTRIES	PUBLIC REPORTS

Statistic collected on 1 June, 2020.

Vision

At the UN Global Compact, we aim to mobilize a global movement of sustainable companies and stakeholders to create the world we want. That's our vision. To make this happen, the UN Global Compact supports companies to:

- Do business responsibly by aligning their strategies and operations with Ten Principles on human rights, labour, environment and anti-corruption; and
- Take strategic actions to advance broader societal goals, such as the UN Sustainable Development Goals, with an emphasis on collaboration and innovation.

Ten Principles [human rights, labour, environment and anti-corruption]

De-listing and re-joining Policy[156]

- Failure to communicate on progress (…)
- Failure to engage in dialogue (…)
- Egregious or systematic abuse of the Ten Principles (...)
- Failure to meet their annual financial commitment (…)

155 UN, *Global Compact* www.unglobalcompact.org

156 UN, Global Compact, *De-Listing and Re-Joining Policy* (last update February 2020) www.unglobalcompact.org/docs/about_the_gc/De-listing%20and%20re-joining%20policy_UNGC_Jan%202019.pdf

Extractive Industry Transparency Initiative[157]

The EITI Standard requires countries to publish timely and accurate information on key aspects of their natural resource management, including how licences are allocated, how much tax, royalties and social contributions companies are paying, and where this money ends up in the government at the national and local level. By doing so, the EITI seeks to strengthen public and corporate governance, promote understanding of natural resource management, and provide data to inform and drive reforms to curb corruption and improve accountability.

Oversight by the multi-stakeholder group[158]

The EITI requires effective multi-stakeholder oversight, including a functioning multi-stakeholder group that involves the government, companies, and the full, independent, active and effective participation of civil society.

The key requirements related to multi-stakeholder oversight include: (1.1) government engagement; (1.2) industry engagement; (1.3) civil society engagement; (1.4) the establishment and functioning of a multi-stakeholder group; and (1.5) an agreed work plan with clear objectives for EITI implementation, and a timetable that is aligned with the deadlines established by the EITI Board.

Better Work, Independent Assessment[159]

The Better Work programme, a joint initiative of the International Labour Organization (ILO) and the International Finance Corporation (IFC), a member of the World Bank Group, has been working since 2007 to improve working conditions and promote competitiveness in global garment supply chains. As a result of their participation in Better Work, factories have steadily improved compliance with ILO core labour standards and national legislation covering compensation, contracts, occupational safety and health and working time. This has significantly improved working conditions while enhancing factory productivity and profitability.

To further understand the impact of its work, Better Work commissioned Tufts University to conduct an independent impact assessment. Since the programme's inception, Tufts' interdisciplinary research team has gathered and analysed nearly 15,000 survey responses from garment workers and 2,000 responses from factory managers in Haiti, Indonesia, Jordan, Nicaragua and Vietnam. (…) The Tufts University impact assessment research is unique in that it has established an unprecedented level of in-depth information for the garment industry on the link between labour conditions and profitability, including first-hand perceptions from workers and detailed business data from managers. (…)

The researchers used different evaluation strategies to measure the impact of the programme. These included a strategy to isolate the impact of the programme using randomized intervals of time – reflecting factories' different periods of exposure to Better Work services – as well as a randomized controlled trial to evaluate the impact of training supervisors. (…) The research methods used are also helping to improve the effectiveness of other research on sustainable development issues. Collecting data through audio-assisted tablet surveys is innovative and ensures that all workers, including low literacy workers or those who might have been reluctant to share experiences with physical interviewers, can express their opinions in a structured way. New technologies of this kind, such as ACASI, have since become widely used in the development community to collect beneficiaries' views on their experiences.

157 Extractive Industry Transparency Initiative (EITI), *Factsheet* (2018) https://eiti.org/document/eiti-factsheet.

158 Extractive Industry Transparency Initiative (EITI), *The EITI Requirements,* https://eiti.org/eiti-requirements.

159 International Labour Organisation (ILO), *Progress and Potential: How Better Work is Improving Garment Workers' Lives and Boosting Factory Competitiveness: A summary of an independent assessment of the Better Work programme* (2016) https://betterwork.org/dev/wp-content/uploads/2016/09/BW-Progress-and-Potential_Web-final.pdf.

Conclusions

Better Work works: Factory-level evidence across all countries shows that the Better Work programme is having a significant and positive impact on working conditions. This includes reducing the prevalence of abusive workplace practices, increasing pay and reducing excessive working hours, and creating positive effects outside the factory for workers and their families. These effects occur while increasing the competitiveness of firms. The combination of services that Better Work provides to factories is critical in achieving its objectives. It is also clear that monitoring compliance matters. The researchers demonstrated that factories make improvements around the time of assessments, but these improvements may not increase indefinitely. Better Work's regular monitoring of compliance with ILO standards and national legislation therefore plays a pivotal role. Furthermore, there is initial indication that social dialogue plays an important part in improving workers' outcomes, provided that certain conditions are in place. In particular, having women representatives and fair elections for worker representatives are fundamental to ensuring effective social dialogue.

Empowering women is critical: Having female representatives on the PICCs [Performance Improvement Consultative Committees] and training female supervisors are key strategies for achieving better working conditions and improving productivity.

Improving working conditions is an investment, not a cost: There is strong evidence demonstrating that improving working conditions is not a financial burden for a factory; on the contrary, it is a critical component of its success. Factories where workers report better working conditions, where compliance is higher and where supervisors are well equipped for their jobs are more productive and more profitable. Abusive treatment such as verbal abuse or sexual harassment are not only morally deplorable but also associated with poor business performance.

A holistic approach is needed to address global supply chain pressures: Sourcing practices create inherent challenges in achieving decent work in supplier factories. They influence worker wellbeing directly by adversely affecting working hours and pay. They also influence supervisor stress and behaviour, by creating unpredictability in production schedules. When managers and supervisors are under pressure, they are unable to act upon the information and evidence they receive, including the observation that exploitative working conditions are bad for business. Establishing a 'business case' for high quality jobs therefore requires all stakeholders – brands, retailers, factories, policymakers, NGOs and workers and their representatives – to develop a holistic approach to finding solutions across the global supply chain.

Impact of advisory services and social dialogue: The available analysis sheds some light on the way PICCs work and the characteristics that drive their effectiveness. However, it is important to further explore the interplay between PICCs, trade unions, worker voice and representation and broader social dialogue. This area of work will be strengthened upon completion of the current data collection in Cambodia, which is designed to isolate the impact of the different core services provided by Better Work.

Accord on Fire and Building Safety in Bangladesh

Achievements (by May 2018)[160]

After the Rana Plaza building collapse in April 2013, IndustriALL Global Union and UNI Global Union, 8 IndustriALL affiliates and over 43 clothing companies set out to advance a safe RMG industry in Bangladesh by signing the five-year legally-binding Accord on Fire and Building Safety in Bangladesh ('2013 Accord'). This agreement was ultimately signed by over 220 companies and by May 2018, it had contributed to significantly safer workplaces for millions of Bangladeshi garment workers.

160 Accord on Fire and Building Safety in Bangladesh, *Achievements 2013 Accord* (2018) https://bangladeshaccord.org/resources/press-and-media/2018/07/20/achievements-2013-accord.

2013 Accord in a nutshell:

- Company signatories: 222
- 1,600 RMG factories covered
- 2 million workers covered
- Initial fire, electrical and structural inspections at >2000 factories
- Public disclosure of all initial inspection reports and Corrective Action Plans (CAPs)
- 25,000 follow-up fire, building, electrical safety inspections
- Safety Committee and Safety Training program at >1000 factories
- 200 Health and Safety complaints resolved

Safety remediation

In February 2014, the Accord embarked on a large-scale fire, electrical and structural inspection program across all garment factories producing for its company signatories. Under the 2013 Accord, the Accord engineers inspected more than 2,000 RMG factories and identified over 150,000 safety hazards. As of 31 May 2018:

- 85% of the safety hazards identified during initial inspections across all Accord factories, had been fixed.
- 150 Accord factories completed the safety remediation.
- 857 Accord factories had completed >90% of the remediation. (…)

Between 2013 – 2018, the Accord, required 50 factory buildings– to (temporarily) evacuate, as the structural inspections revealed a severe and imminent risk of structural failure. In such cases, the Accord Chief Safety Inspector submitted the inspection results to the Government of Bangladesh' Review Panel* and required the responsible Accord company signatories to ensure the factory owner evacuates the building and stops Accord company production until it is determined the building is safe for re-occupancy. In over 200 factories, immediate load reduction measures were required such as removal of storage or emptying of water tanks to prevent the risk of a building collapse and continue (partial) production.

*The Review Panel was established through the Ministry of Labour and Employment (MoLE) led National Plan of Action for inspections which lead to determinations that a building evacuation or suspension to operations is required.

Brand commitment to ensure remediation at supplier factories is financially feasible

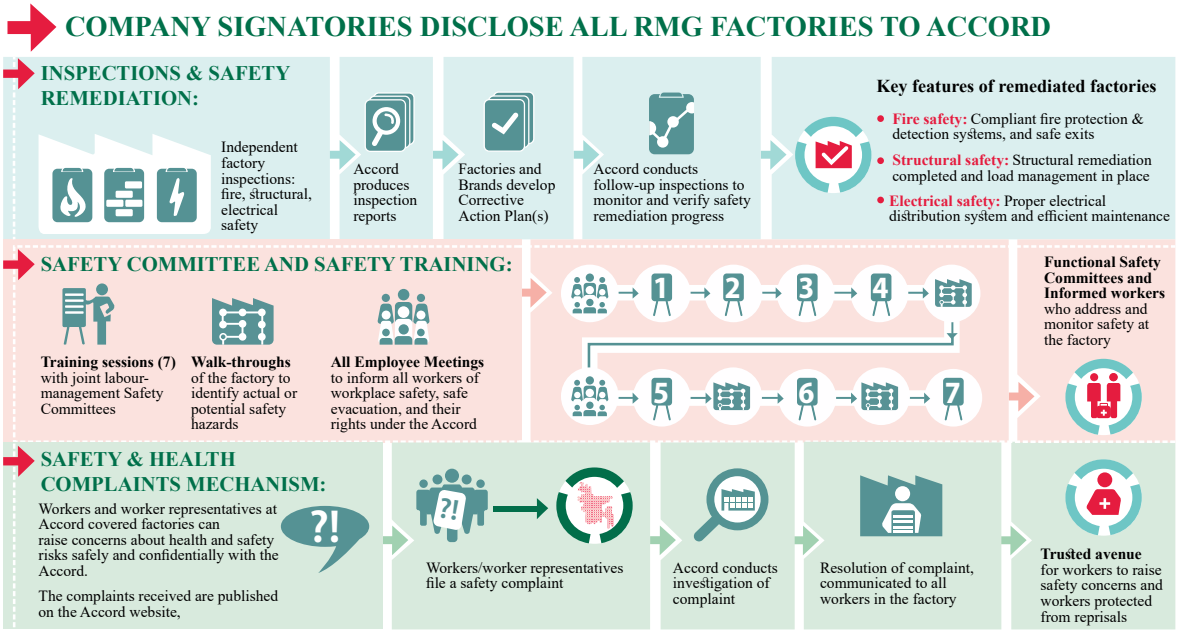
When signing the Accord, companies commit to negotiating commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with the remediation requirements. Under the 2013 Accord, signatory companies used various types of financial assistance to make it financially feasible for their supplier factories to remediate including guaranteed order volumes for longer periods, higher volumes, order pre-payment to improve cash-flows, access to funding or direct cash assistance. (…)

2018 Transition Accord[161]

Key features:

- Legally-binding agreement between brands & trade unions
- Independent safety inspections & remediation program
- Brand commitment to ensure safety remediation is completed & financially feasible
- Disclosure of inspection reports & corrective action plans
- Safety Committee and Safety Training Program
- Safety and Health Complaints Mechanism
- Protection of right to refuse unsafe work
- Ongoing promotion of right to Freedom of Association to advance safety
- Optional listing of home textiles and fabric & knit accessory suppliers
- Transition of Accord functions to a national regulatory body

How the Accord works to make garment and textile factories in Bangladesh safe



Netherlands, Agreement on Sustainable Garment and Textile[162]

The aims of the arrangements in this Agreement are:

- to achieve substantial progress towards improving the situation for groups experiencing adverse impacts in respect of specific risks in the garment and textile production or supply chain within 3-5 years;

161 The Accord on Fire and Building Safety in Bangladesh, *How the Accord Works* (2018) https://bangladesh.wpengine.com/wp-content/uploads/2020/10/How-the-Accord-works-flowchart.pdf.

162 *Agreement on Sustainable Garment and Textile* (2016) www.ser.nl/-/media/ser/downloads/engels/2016/agreement-sustainable-garment-textile.pdf.

- to provide individual enterprises with guidelines for preventing their own operation or business relationships from having a (potential) adverse impact in the production or supply chain and for resisting it if it does arise;
- to develop joint activities and projects to address problems that enterprises in the garment and textile sector cannot resolve completely and/or on their own.

The Parties have identified nine specific themes by mutual agreement and in discussion with stakeholders which currently merit the priority attention of enterprises in the garment and textile sector operating in the Netherlands in terms of international responsible business conduct (…):

1. Discrimination and gender;
2. Child labour;
3. Forced labour;
4. Freedom of association;
5. Living wage;
6. Safety and health in the workplace;
7. Raw materials;
8. Water pollution and use of chemicals, water and energy;
9. Animal welfare.

Due diligence

The Parties agree that enterprises must conduct due diligence in order to put their social responsibility into practice. The Parties therefore expect individual enterprises that support the Agreement to sign a Declaration in which they state that:

- they will conduct a due diligence process, which is consistent with their size and business circumstances, within one year after signing the Agreement;
- they will present an annual action plan as part of their due diligence process to the secretariat of the Agreement on Sustainable Garment and Textile (hereinafter "AGT
- Secretariat") for assessment/approval and declare themselves to be in agreement with the process of assessment, possible improvement and approval by the AGT Secretariat;
- in their annual action plan:

• they will explicitly discuss:

  o the insight that they have gained into their production or supply chain through the due diligence process and the possible impacts in their supply chain in terms of the UNGPs and the OECD Guidelines;

  o how their own purchasing process (delivery times, pricing, duration of contracts, etc.) contributes to potential (risks of) adverse impacts and measures to be taken to mitigate them;

  o the policy and the measures they pursue with regard to the nine themes prioritised by the Parties and how they will participate in the collective projects formulated by the Parties for these themes which are consistent with the substantial risks found in these themes;

- setting quantitative and qualitative objectives in terms of improvements for the duration of the Agreement, broken down into objectives after 3 and 5 years. (…)

- they will agree to the procedure and rulings of the complaints and disputes mechanism (see below) which the Parties have established under this Agreement and to arbitration in the event that the quality of their action plan is still in dispute after the matter has been dealt with by the Complaints and Disputes Committee.

Policy coherence and the role of government

Agreements on international responsible business conduct are part of a wider government policy in the area of responsible business conduct, sustainable development and trade, and development cooperation. (…) By signing this Agreement, the Dutch government makes the following commitments:

1. To place the subject of multi-stakeholder collaboration in the garment and textile sector firmly on the agenda within the EU and to promote it. (…)

2. To make the maximum contribution to ensuring that it becomes clear to enterprises in practical terms what options they have or what constraints apply when entering into mutual agreements (…). This, and more, will be put into effect in the amended Policy Rule on Competition and Sustainability. (…)

3. The Dutch government will during the term of the Agreement endeavour to make agreements with the relevant local and/or national government in countries in which textiles and garments are purchased by Dutch enterprises (…).

4. Embassies will commit themselves to assisting the signatories of this Agreement to implement their policy on international responsible business conduct, mainly by providing information [and] putting Dutch enterprises in contact with local authorities and stakeholders (…).

5. Where an enterprise submits an application for financial or other government support from existing instruments for international trade activities, the Dutch government acknowledges that it will be easier for participating enterprises to demonstrate that they satisfy the criteria on international responsible business conduct (…);

6. (…) the Dutch government will encourage [public authorities] to do their purchasing in accordance with the OECD Guidelines (…). By setting a good example as a government and purchasing in a socially responsible way, the government will help to create a market for sustainable innovative products and production processes. (…)

Agreements on international responsible business conduct offer businesses the opportunity at sector level, together with the government and other parties to find solutions for these complex problems in a structured way, thereby increasing their influence ("leverage"). (…) The Agreement concerns the actions of Dutch enterprises or enterprises operating in the Dutch market. (…) By entering into this Agreement, the parties are not endeavouring to restrict the market or reduce competition. It is not their intention to restrict competition on the garment and textile market to the disadvantage of consumers.

At most two and a half years after signature of the Agreement, an independent evaluation (mid-term review) will be conducted to assess both the progress and the operation of the Agreement and ascertain whether it is possible or necessary to establish a supervisory board to oversee the Agreement. This will be followed, after five years, by a (final) review. If it is found on these occasions that the number of participating enterprises [35 in 2016, 100 in 2018, 200 in 2020] and/or the results do not meet expectations, additional measures can be taken. These can also be of a more binding nature, where it will be ascertained whether legislation and regulations would be an option.

Tewes-Gradl, Proving and Improving the Impact of Development Partnerships[163]

The number of development partnerships has grown significantly over the last decade. The partnership approach has been fuelled by global trends, including economic globalisation, the increased attention paid by companies to low-income markets in developing countries, increased scrutiny of companies' business practices, stagnating official development assistance (ODA), and increasingly collaborative forms of governance. Consequently, we can expect even greater use of partnerships in the future.

Challenges to measuring results in partnerships

Challenges in defining a joint approach to the measurement of partnership results arise from differences in public- and private-sector partners' objectives for results measurement. While donors and companies have a shared interest in demonstrating and improving the results of their partnerships, their interests diverge in terms of what and how to measure, and they have different expectations as to who should do what. Interests also differ with regard to the overarching goal, the focus in measurement, time horizons and communication preferences. Aligning these diverging interests and designing a measurement approach that works for all parties is critical to any effective partnership.

Partnerships are typically implemented under a fixed time frame – often three years – and with a fixed budget. Hence, there is often a perception that time and money are too limited to allow for proper results measurement. And project managers on both sides find it difficult to spend time on measurement.

Results measurement is often perceived as very resource-intensive. Indeed, some methods require significant time and funding. The confusing array of guidelines and information on results measurement can also absorb considerable time, as project managers feel they need weeks or months of study before they can even begin to understand the landscape. Practitioners tend to feel overwhelmed by the terminology and technicality of the subject matter. Few receive training or know where to find effective support.

The differences in objectives, mutual lack of capacities and the multiplicity of guidelines and information on results measurement result in 12 common challenges associated with results measurement. (…)

Challenges to measuring within partnerships, with corresponding good practices

↓ CHALLENGES | GOOD PRACTICES ↓

ACTORS: WHO MEASURES	
Partners have different perspectives	Develop a common understanding by drafting the results chain together
Partners end up with the lowest common denominator	Manage diverging objectives
Project managers lack results-measurement skills	Share responsibilities and involve measurement experts
Partners start from scratch with each project	Share insights across projects
INDICATORS: WHAT TO MEASURE	
Costs can be significant	Select a few manageable indicators
Measuring ultimate outcomes is complex	Recognise the importance of intermediate outcomes
Overwhelming number of available indicators	Use standard reporting indicators
Unclear how to measure partnership itself	Reflect on partnership as an instrument
PROCESS: HOW TO MEASURE	
Confusing array of tools and methods	Draw on established practices
Measurement perceived as a burden	Embed measurement from the start
Baseline often forgotten	Use a baseline to design project
Projects change over time	Stay flexible

163 Christina Tewes-Gradl et al., *Proving and Improving the Impact of Development Partnerships – 12 Good Practices for Results Measurement* (2014) www.endeva.org/wp-content/uploads/2014/11/Endeva_2014_Proving_and_improving_the_impact_of_development_partnerships__1_-2.pdf.

MSI Integrity, Evaluation of Multi-Stakeholder Initiatives[164]

MSI Integrity investigates[165] whether, when, and how multi-stakeholder initiatives (MSIs) protect and promote human rights and the environment. We have a particular interest in how MSIs include, empower, and impact affected communities.

Despite the proliferation of MSIs addressing business and human rights issues, there remains a limited understanding of the effectiveness of MSIs. Systematic evaluation of the institutional effectiveness of MSIs, or the factors that affect an MSI's human rights impacts, is scarce and underdeveloped. Many MSIs themselves are unsure whether they have had any meaningful impact or how they can set up structures to better protect human rights. In addition, there has been little effort to consolidate evidence, lessons learned, or good practice across different MSIs regarding their institutional design and features.

The MSI Evaluation Tool and Evaluation Methodology provide a framework to evaluate multistakeholder initiatives (MSIs) and the effectiveness of their institutional design, structure, and operational procedures. They draw together current research and practical understandings about MSI structures and processes, recognizing that MSI design features — such as good governance and robust accountability mechanisms — influence an initiative's effectiveness and potential to achieve positive impacts. (…)

The Tool was originally developed to assess whether global standard-setting MSIs have been designed in a manner to effectively protect and promote human rights. MSIs have become one of the most popular global instruments for addressing business and human rights issues, yet there is little research or understanding into whether these initiatives have actually been successful or effective as rights protection tools. (…)

The Tool is divided into seven sections, which reflect the seven core areas of MSI design that have been linked to effectiveness. The seven core areas are: (1) Scope and Mandate (2) Standards (3) Internal Governance (4) Implementation (5) Development and Review of the MSI (6) Affected Community Involvement (7) Transparency and Accessibility.

Each core area is made up of a comprehensive set of indicators related to the structures and processes that influence an MSI's effectiveness. Users of the MSI Evaluation Tool can assess if the initiative includes these indicators by following the five-step Evaluation Methodology to consider whether the structures and frameworks of an initiative have been designed in a way that is capable of leading to positive outcomes and impacts.

The MSI Evaluation Tool is made up of a detailed set of questions that are tied to indicators related to the institutional design, structures, and processes that influence an MSI's effectiveness. There are three categories of indicators, which differentiate the most critical design aspects from more innovative, experimental ones. The three categories of indicators are:

- Essential Elements: these indicators are related to features that are necessary, but not sufficient, for an MSI to have the potential to be effective as a human rights instrument. Essential Elements are marked in bold typeface in the MSI Evaluation Tool.
- Good Practices: these indicators relate to features that will enhance the effectiveness of the MSI and its potential to protect human rights.

164 Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity), *MSI Evaluation Tool, For the Evaluation of Multi-Stakeholder Initiatives* (2017) www.msi-integrity.org/wp-content/uploads/2017/11/MSI_Evaluation_Tool_2017.pdf.

165 Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity) www.msi-integrity.org.

- Innovative Practices: these indicators reflect novel features of MSI design that have been employed by at least one MSI, or are based on expert theory, and are anticipated to improve or optimize an MSI's capacity to protect human rights.

By focusing on the design features that influence an MSI's effectiveness, the Tool enables users to evaluate an initiative's potential to have an impact. Evaluations into the impacts, practices, outputs, or outcomes of MSIs are important and much-needed, but necessitate complex and extensive methodologies, as well as access to a level of resources and information that may be beyond the reach of many organizations and individuals. In future years, MSI Integrity plans to contribute to the development of workable methodologies for these types of impact evaluations. In the interim, the MSI Evaluation Tool should also assist those attempting to measure impact by first providing an understanding of how an MSI is structured and intended to operate.

Brouwer, How to Design and Facilitate Multi-Stakeholder Partnerships[166]

The theory behind MSPs

MSPs emerge because stakeholders find that they need to collaborate for change to happen. But there are deeper reasons behind the increasing need for them in the present day. These reasons become clear if you look at recent theories about governance, complex adaptive (human) systems, the human mind (cognition), and innovation. The insights from these theories are embedded throughout the guide, and especially in the principles in Section 4. (…)

Seven principles that make MSPs effective

Principle 1: Embrace systemic change

Principle 2: Transform institutions

Principle 3: Work with power

Principle 4: Deal with conflict

Principle 5: Communicate effectively

Principle 6: Promote collaborative leadership

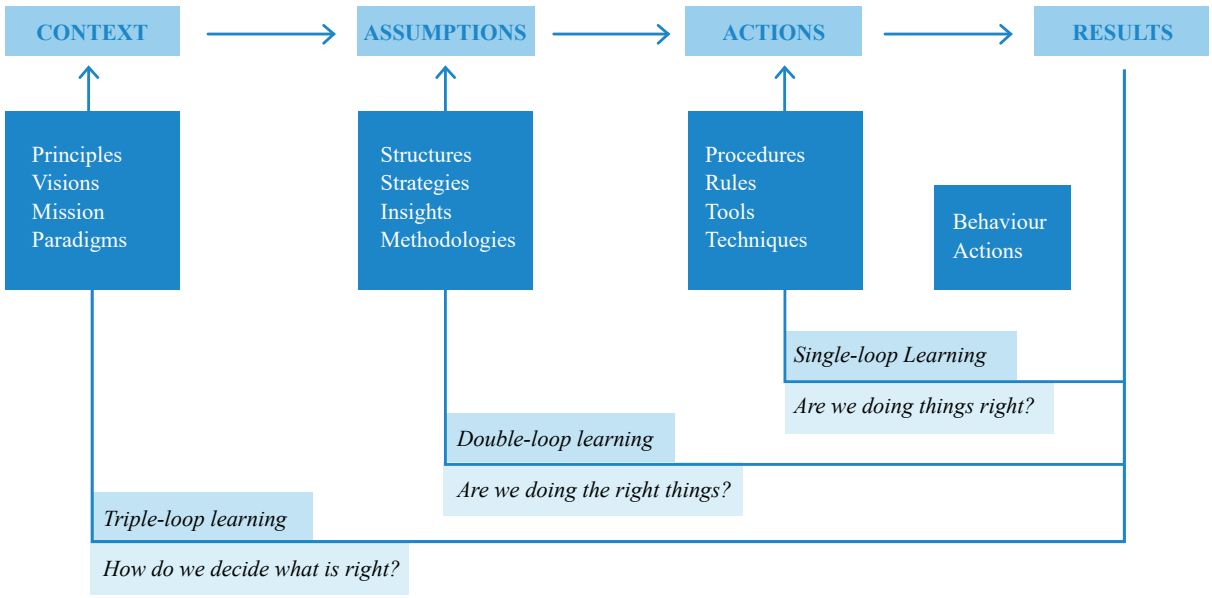
Principle 7: Foster participatory learning

Ask yourself this: "How do I create learning processes which help people go one level deeper?", "What is needed to make my MSP rationally, emotionally, and creatively engaging?"

Participatory learning lies at the very heart of any MSP. It is the process that enables different stakeholders to understand each other, to explore common concerns and ambitions, to generate new ideas, and to take joint action. Events and activities are needed throughout the lifetime of an MSP to bring stakeholders together to talk, share, analyse, make decisions, and reflect. The quality of these learning events can make the difference between a successful and a failed MSP.

166 Herman Brouwer et al. The MSP Guide, How to Design and *Facilitate Multi-Stakeholder Partnerships* (2016) www.mspguide.org/sites/default/files/case/msp_guide-2016-digital.pdf

Single, double, and triple loop learning



Choosing Tools

Methods and tools are what we use to transform our understanding and design of the MSP into practice. They will play an essential role in shaping your MSP, helping individuals to become part of a cohesive and productive group, and releasing creativity and innovation. We have included this section on tools partly because the most frequent questions we are asked are, "Do you know a good tool for situation X?" or "Can you share your toolbox with me?" But when you think about tools, remember that the tools themselves are less important than the spirit and context in which they are used. In the following, we introduce some general ideas about the tools and methodologies, followed by summaries of 60 different tools as an overview of what's available.

Ruggie, The Global Compact as Learning Network[167]

Learning Forum

The [Global Compact] GC's critics wish it were something that it is not: a regulatory arrangement, specifically a legally binding code of conduct with explicit performance criteria and independent monitoring and enforcement of company compliance. Just how does the GC propose to induce corporate change? Its core is a learning forum. Companies submit case studies of what they have done to translate their commitment to the GC principles into concrete corporate practices. This occasions a dialogue among GC participants from all sectors – the UN, labor, and civil society organizations.

The hope and expectation is that good practices will help drive out bad ones through the power of dialogue, transparency, advocacy, and competition. Why did the secretary-general choose this approach rather than pro pose a regulatory code, complete with monitoring and compliance mechanisms? (…)

Thus, there are both pragmatic and principled reasons why the GC adopted a learning model rather than regulation to induce corporate change. Nevertheless, there are certain things that such an approach cannot achieve. The fact that the GC recognizes and promotes a company's "good practice" provides no guarantee that the same

167 John Ruggie, 'The Global Compact as Learning Network', *Global Governance* 7:4 (2001) www.jstor.org/stable/pdf/27800311.pdf.

company does not engage in "bad" ones elsewhere. Indeed, it may even invite a measure of strategic behavior. Nestle's recent interest in the GC, for instance, undoubtedly reflects a desire to balance criticism on the breast milk substitute. Moreover, a learning model has no direct leverage over determined laggards. They require other means, ranging from legislation to direct social action.

In sum, the GC's strengths and weaknesses both stem from its having adopted a model that promotes learning by recognizing and rein forcing leadership. It helps create and build momentum toward its universal principles, but it is unlikely to get there by itself.

Interorganizational Networks

The Global Compact exhibits many of the defining at tributes of interorganizational networks (IONs), which should be better understood by critics and advocates alike.

- IONs are formed by autonomous organizations combining their efforts voluntarily to achieve goals they cannot reach as effectively or at all on their own. They rest on a bargain, not coercion. The GC's under lying "bargain" is that the UN provides a degree of legitimacy and helps solve coordination problems, while the companies and other social ac tors provide the capacity to produce the desired changes.
- IONs typically come into being to help their participants understand and deal with complex and ambiguous challenges. They are inherently experimental, not routine and standardized. Few challenges are more complex and ambiguous than internalizing the GC's principles into corporate management practices.
- IONs "operate" as shared conceptual systems within which the participating entities perceive, understand, and frame aspects of their behavior. But the existing actors do all the doing that needs to be done. The GC creates no new entities but is a framework for normatively coordinated behavior to produce a new collective outcome.
- IONs must be guided by a shared vision and common purpose. In the Global Compact, the secretary-general is responsible for sustaining that vision and ensuring that network values and activities are compatible with it.
- IONs are loosely coupled organizational forms, resting on non-directive horizontal organizing principles. Its participants meet when and in formats required to conduct their work.

The major advantage of the GC's network approach is its capacity to respond to the complex and rapidly changing environments that the UN seeks to affect. (…) Again, the GC's chief weakness is the same as its main strength. It is a network of autonomous actors, each with different interests and needs that intersect only partially. Criticism of the GC for partnering with business fails to appreciate the advantages of interorganizational networks. But by the same token, anyone who sees in the GC the cure for globalization's many ills does not sufficiently grasp the fragile basis of all such networks.

Utting & Zammit, UN-Business Partnerships[168]

In recent years, the United Nations has taken a lead in advocating public–private partnerships (PPPs), and various UN entities actively seek partnerships and alliances with transnational corporations and other companies. Although there has been a rapid growth of PPPs, relatively little is known about their contribution to basic UN goals associated with inclusive, equitable and sustainable development. In response to this situation, there are increasing calls for impact assessments. This article argues that such assessments need to recognize the range of ideational, institutional, economic and political factors and forces underpinning the turn to PPPs, and the very different logics and agendas involved, some of which seem quite contradictory from the perspective of equitable development and democratic governance.

168 Peter Utting & Ann Zammit, 'United Nations-Business Partnerships: Good Intentions and Contradictory Agendas', *Journal of Business Ethics* (2009) https://www.researchgate.net/publication/225347517_United_Nations-Business_Partnerships_Good_Intentions_and_Contradictory_Agendas (references omitted).

The article examines these different forces and logics, focusing on (a) the institutional turn towards ''good governance'', (b) economic contexts that relate to the very mixed ''fortunes'' of UN agencies and corporations, (c) structural determinants associated with ''corporate globalisation'' and (d) political drivers that relate to the struggle for hegemony and legitimisation. The article ends by reflecting critically on the tendency within mainstream development institutions and some strands of academic literature to highlight logics associated with good governance and pragmatism, and to disregard those associated with the strengthening of corporate interests and the neoliberal policy regime. It is argued that knowledge networks associated with the UN need to go beyond ''best practice learning'' and embrace ''critical thinking'', which has waned within UN circles since the 1980s.

The issue of policy coherence in the context of partnerships is really a question of whether partnerships are part and parcel of a model of development that has positive or perverse effects from the perspective of equitable, rights-based and sustainable development. It is also about empowerment and the extent to which PPPs reinforce the control and influence of TNCs and, if so, how they do this.

Assessing such aspects and impacts ex ante or even ex post may be extremely difficult, given the complexity of factors involved and the difficulties of isolating the relationships of partnerships to broader societal processes (…).

Over the past decade, in particular, the UN has transformed its relations with corporate interests. PPPs have emerged as one of the principle instruments of rapprochement with big business. The analysis above suggests that the idealizing of the concept of partnership and its normative content, as well as the feel-good discourse that infuses much of the mainstream literature, risk diverting attention away from various tensions and contradictions that characterize UN-BPs and that raise questions about their contribution to equitable development and democratic governance. Both the theory and practice of partnerships suggest that thinking and policy need to go beyond evidence and assumptions about ''good governance'' and pragmatism.

Some of the naivete that characterised the early phase of forging of closer relations has subsided, but institutions that might control for potential contradictions and tensions identified in this article are still quite weak. While bilateral and multilateral agencies, and entities like the UN Global Compact often identify themselves as knowledge agencies or learning forums, learning networks are often dominated by particular disciplines, institutions and individuals. The period of rapprochement between the UN and big business has coincided with the decline in ''critical thinking''. The purpose of critical thinking is not, of course, simply to criticize. Rather it facilitates a particular mode of analysis that reveals precisely the sorts of issues that are often ignored in best practice learning, namely the complexities of power relations and how these affect outcomes, and the ideologies, agendas, contradictions and trade-offs involved in partnerships. Critical thinking is useful for identifying ''blind spots'' and biases in analysis and policy agendas. (…) Such approaches, however, have waned during the contemporary era of rapprochement between the UN and big business. If the UN is to continue on its current course of forging closer relations with TNCs, the learning and institutional environment within the UN needs to evolve from one focused heavily of ''best practice learning'' to one that also embraces ''critical thinking''.

Background (Cambodia)

Sar et al, Public-Private Partnerships in Cambodia: Issues and Solution[169]

The projects via Public-Private Partnership (PPP) have been implemented in Cambodia since the decade 1993 mostly in energy sector using Build-Ope- rate-Transfer (BOT) and Build-Own-Operate (BOO) Models where the pro-curement method followed an ad-hoc arrangement, absence of clear rule and regulation as well as unclear institutional responsibility to procure, manage, and monitor these projects. Lacking rule and regulation as well as non-clear enabling PPP policy caused many disadvantages for the public sector in im-plementing PPP projects. Nearly all the projects are unsolicited proposals and have been selected by using an ad-hoc

169 Bun Eang Sar, Meyka Chea & Chanpisey Ung, 'Public-Private Partnerships in Cambodia: Issues and Solution', *Open Journal of Business and Management* (2020) https://www.researchgate.net/publication/341545169_Public-Private_Partnerships_in_Cambodia_Issues_and_Solution.

arrangement and direct negotiation. The ad-hoc procedure not only transfers many risks to the government especially in term of financial risk—unforeseen contingent liability—due to no proper reviewing on the project proposal and contract term, but also the project implementation and monitoring mechanism is unclear, and no effi-cient. However, Cambodia still considers using PPP as the best alternative option of financing on infrastructure development. This is because, on the one hand, the demand of infrastructures has been gradually increased notably in road sector while the government budget is limited, and on the other hand, PPP brings the innovation and increases the quality of infrastructure or ser-vice and provides better value-for-money. That is why, in order to success-fully prepare and manage PPP projects in the current context of economy growth, Cambodia established an enabling PPP policy, and standard opera-tion procedure (SOP), and also proposed the PPP law to govern, promote and facilitate in the manner of effectiveness, efficiency, transparency, fairness and accountability of PPP projects. This paper aimed at raising the chal-lenges of implementing PPP projects without comprehensive PPP frame-work.

Instruments (Cambodia)

Better Factories Cambodia, Annual Report[170]

The Better Factories Cambodia programme (BFC) is a partnership between the International Labour Orga¬nization (ILO) and the International Finance Corpora¬tion (IFC). This comprehensive programme is bringing together stakeholders from all levels of the garment industry to improve working conditions and respect of labour rights, and boost the competitiveness of appar¬el industries. Factories participating in Better Work are monitored and advised through factory assessments, advisory visits and training.

Better Factories Cambodia is supported by the following donors:

- Royal Government of Cambodia (RGC)
- Garment Manufacturers Association of Cambodia (GMAC)
- United States Department of Labor (USDOL)
- The Government of the Netherlands
- The Government of Australia
- The German Government

Objective 2: Strengthening institutional sustainability of the programme

A key component of each of the Better Work pro¬grammes, including BFC, is to work with national stakeholders to support the creation of a culture of compliance in the entire sector. Under this broader and long term objective the current strategic phase focusses on increased engagement with national stakeholders, especially the Government, to ensur¬ing that working conditions in Cambodian garment factories meet legal requirements. This particularly includes the formulation and implementation of an action plan between BFC and the MoLVT to gradu¬ally strengthen the MoLVT's capacity to prevent and remediate non-compliance and enforce the labour law. The ministry has indicated that it aims to have the same quality, credibility, transparency and trust as BFC and asked the programme to work hand in hand with the ministry on this. The joint action plan was developed in 2016 and some important com¬ponents have been put in motion. Priority was given to collaborate on expanding the MoLVT's capacity to undertake strategic labour compliance inspection as part of their next inspection plan (2019 – 2023). With support and collaboration from the ILO experts on strategic labour compliance, the ministry is now working through a process of developing sectoral inspection plans that target certain issues and work¬places. Two working

170 Better Factories Cambodia, Annual Report 2018 - An Industry and Compliance Review https://betterwork.org/wp-content/uploads/2018/12/BFC-Annual-Report-2018.pdf

sessions have taken place and the next one is planned for Q4 this year. During the working sessions, the different and complementary roles of the MoLVT inspection services and BFC are often discussed, where the inspection services of the Ministry have the Government's authority to inspect all workplaces and enforce the law, and where BFC as a neutral and independent programme has the mandate to assess and report on compliance with the labour law in all garment exporting factories and support factories in making improvements.

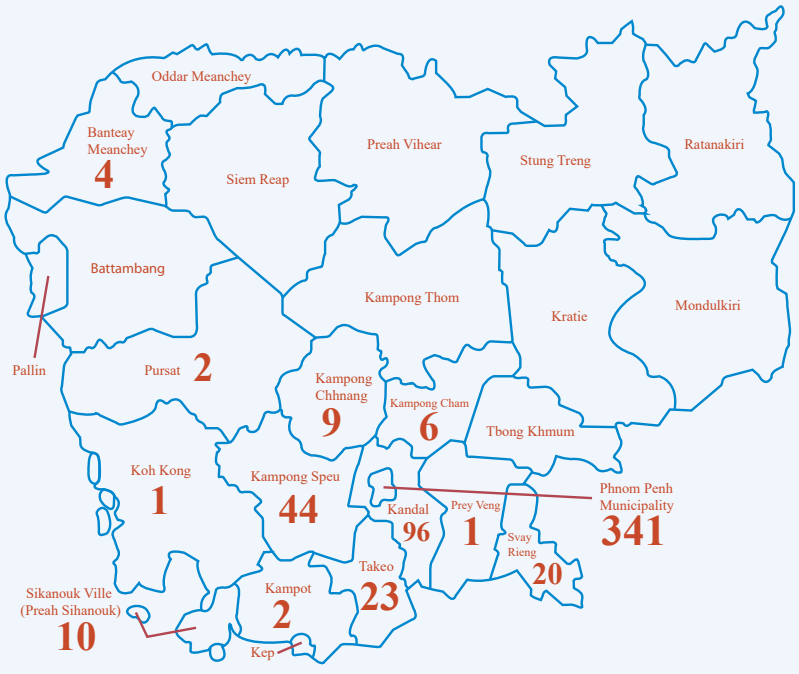
Objective 3: Creating partnerships for continuous for continuous improvement and the future of the sector

The garment sector is the engine of social and economic development in Cambodia. It is by far the biggest contributor to Cambodian's export earnings, it is also the sector that creates formal employment to a large and vulnerable group of mostly young female Cambodians with very limited formal job alternatives. These women workers not only earn income to maintain their own lives, in fact, it is estimated that income of each garment worker also supports three to four of their family members. As such, it is estimated that over 2 million Cambodians depend on the existence of the sector. With important changes in the trade environment in combination with some inherent internal weaknesses, the competitiveness of the Cambodian garment sector is under threat. BFC has used its convening role and its data to support industry stakeholders in developing a vision for future of the Cambodian garment industry. The Supreme National Economic Council (SNEC) received the Prime Minister's mandate to formulate this strategic vision and, as member of the technical team tasked with drafting the vision, BFC has supported the process through facilitating contacts and meetings with unions, brands, manufacturers and industry groups. In addition, the IFC, as partner to the BFC programme funded a large scale survey amongst factory managers and owners on the business environment and BFC brought academic experts on labour economics and one on global supply chains to provide feedback and input during the strategy formulation process.

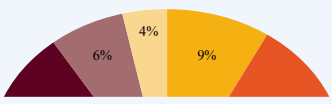
The draft strategy is being finalized and will be submitted for approval from the Government. Once approved, BFC will continue further support the implementation, including through bringing partners together in support of the strategy. (…)

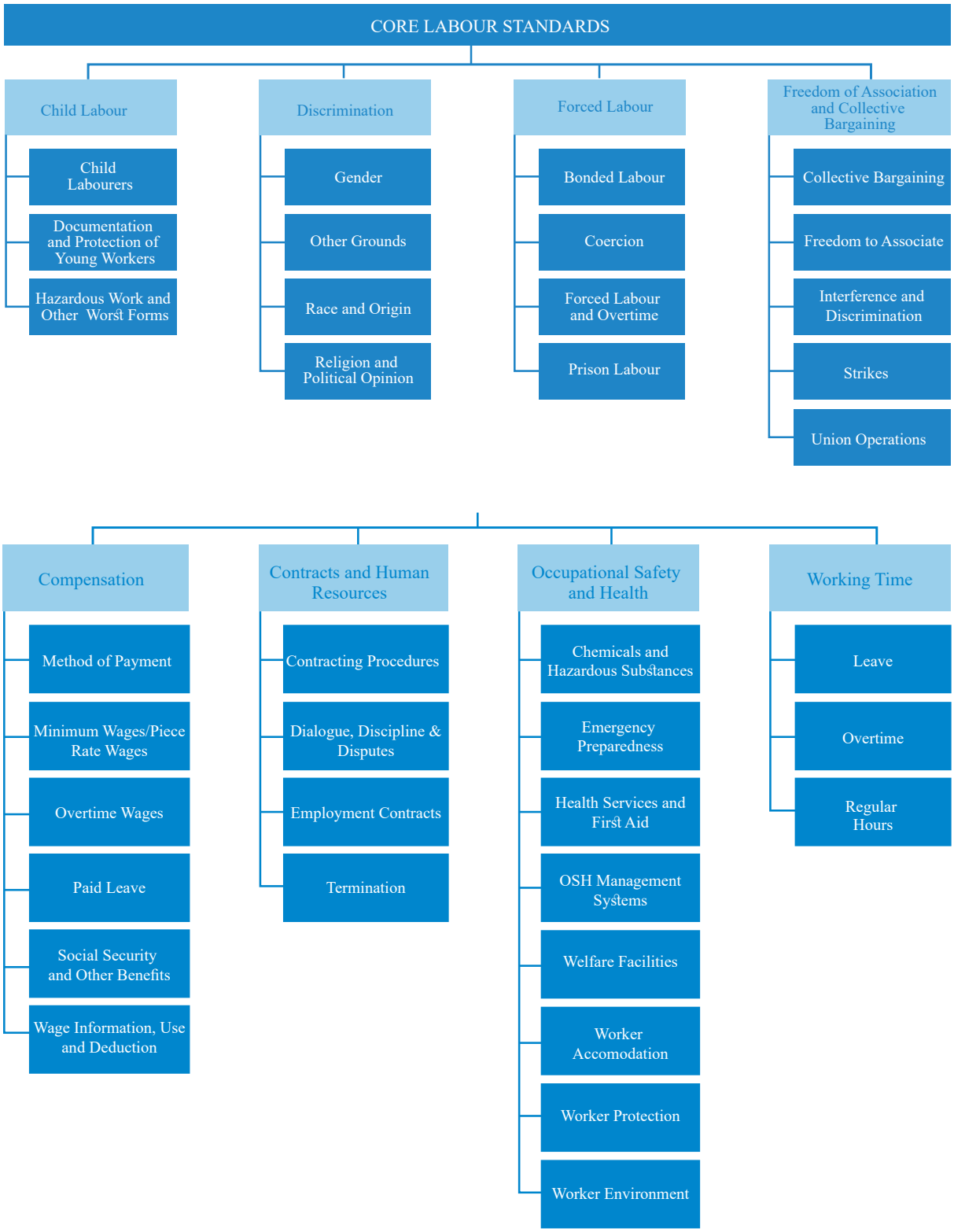
Factories under BFC'S assessment programme (by province)

FIGURE 2: FACTORIES UNDER BFC'S ASSESSMENT PROGRAMME (BY PROVINCE)



GRAPH 2: WORKERS PER FACTORY




CORE LABOUR STANDARDS
Child Labour
Child Labourers
Documentation and Protection of Young Workers
Hazardous Work and Other Worst Forms
Discrimination
Gender
Other Grounds
Race and Origin
Religion and Political Opinion
Forced Labour
Bonded Labour
Coercion
Forced Labour and Overtime
Prison Labour
Freedom of Association and Collective Bargaining
Collective Bargaining
Freedom to Associate
Interference and Discrimination
Strikes
Union Operations
Compensation
Method of Payment
Minimum Wages/Piece Rate Wages
Overtime Wages
Paid Leave
Social Security and Other Benefits
Wage Information, Use and Deduction
Contracts and Human Resources
Contracting Procedures
Dialogue, Discipline & Disputes
Employment Contracts
Termination
Occupational Safety and Health
Chemicals and Hazardous Substances
Emergency Preparedness
Health Services and First Aid
OSH Management Systems
Welfare Facilities
Worker Accomodation
Worker Protection
Worker Environment
Working Time
Leave
Overtime
Regular Hours

BFC, MoU Signed to Extend the ILO Better Factories Cambodia Programme[171]

The Memorandum of Understanding (MoU) will see the partnership between the Government of the Kingdom of Cambodia (the Ministry of Labour and Vocational Training, and the Ministry of Commerce), the Garment Manufacturers Association in Cambodia (GMAC) and International Labour Organization's Better Factories Cambodia programme extended for another three years, covering a period from January 2020 to December 2022, during which the partners have committed to improve working conditions and improving competitiveness and productivity in the textile and apparel sector and expand the coverage of the MoU to include the travel goods and bag sector of Cambodia.

ILO Better Factories Cambodia Programme will be extended its scope from garment and textile, to also include travel goods and bag industry. Since 2001, the Royal Government of Cambodia has linked trade with labour standards in the garment and textile sector in Cambodia in order to promote compliance with, and effective enforcement of, existing labour law, and to promote labour rights against the Cambodian labour code and internationally recognized core labour standards.

The BFC programme will continue to perform assessments on the working conditions in garment factories. Advisory and training activities on workplace improvement and productivity enhancement will continue to operate regularly on a fee for service basis. BFC will also work with the Ministry of Labour and Vocational Training on the implementation of a joint strategy and action plan with the objective to support government's capacity and ownership to uphold compliance with labour law and support remediation in the garment, footwear and travel goods and bag sectors. Furthermore, BFC will continue to work with GMAC and travel goods and bag manufacturers for the areas of joint collaboration to build factory capacity for sustained compliance and support factories in strengthening their management systems. (…)

ACT (Action, Collaboration, Transformation)[172]

[for description and information in Khmer][173]

Background

ACT (Action, Collaboration, Transformation) is a ground-breaking agreement between global brands and retailers and trade unions to transform the garment and textile industry and achieve living wages for workers through collective bargaining at industry level linked to purchasing practices.

Collective bargaining at industry level means that workers in the garment and textile industry within a country can negotiate their wages under the same conditions, regardless of the factory they work in, and the retailers and brands they produce for. Linking it to purchasing practices means that payment of the negotiated wage is supported and enabled by the terms of contracts with global brands and retailers.

ACT is the first global commitment on living wages in the sector that provides a framework through which all relevant actors, including brands and retailers, trade unions, manufacturers, and governments, can exercise their responsibility and role in achieving living wages.

ACT members have agreed the following the principles:

- A joint approach is needed where all participants in global supply chains assume their respective responsibilities in achieving freedom of association, collective bargaining and living wages.

171 Better Factories Cambodia, *The MoU Signed to Extend the ILO Better Factories Cambodia Programme Thursday* (2019) https://betterwork.org/wp-content/uploads/2020/01/MoU-signing-recemony_final.pdf.

172 ACT (Action, Collaboration, Transformation), What is ACT? (2018) https://actonlivingwages.com/fact-sheet.

173 ACT (Action, Collaboration, Transformation), https://actonlivingwages.com/country-activities/?lang=km.

- Agreement on a living wage should be reached through collective bargaining between employers and workers and their representatives, at industry level.

- Workers must be free and able to exercise their right to organize and bargain collectively in accordance with ILO Conventions.

Memorandum of understanding between ACT corporate signatories and INDUSTRIALL Global Union on establishing within global supply chains freedom of association, collective bargaining and living wages

Goals and Purpose

This Memorandum of Understanding (MoU) aims at creating a cooperation between IndustriALL Global Union and ACT (Action Collaboration Transformation) corporate signatories ("We") in order to achieve living wages for workers in the global textile and garment industry supply chains through mature industrial relations, freedom of association and collective bargaining. (…)

There are two sustainable mechanisms that we consider have the capacity to deliver freedom of association, collective bargaining and living wages to any scale, while setting a level playing field:

- *Industrywide collective agreements*

- *National minimum wage fixing enforcement mechanisms*

MSI Integrity, The Grand Experiment of Multi-Stakeholder Initiatives[174]

Our Insights

If MSIs are going to be relied upon by policymakers, businesses, donors, and CSOs as tools for closing governance gaps or achieving rights protection, then there ought to be evidence that they are fit for that purpose. Nearly three decades since the first MSIs emerged, such evidence remains scant. While MSIs often promote themselves as successful, without an understanding of their actual impacts on rights holders, they risk creating the perception that the issues and abuses associated with an industry, country, or company have been addressed—when in fact they may still be occurring.

The stakes are high. By MSIs' own claims, their standards now apply to millions of rights holders, on farms and in forests, in manufacturing plants and mining operations, worldwide from Cameroon to Cambodia, Pakistan to Peru. These are not pilot programs; they are experiments in private governance on a global scale.

Yet there are more questions than answers regarding whether, and under what conditions, MSIs' standards or certification produce positive human rights impacts. While a norm of impact measurement appears to be emerging under the leadership of ISEAL Alliance and its members, at present there is a lack of robust standards and expectations around the methodology, consistency, and frequency of assessments.

The limited evidence that is available is not particularly promising, and stands in stark contrast to MSIs' suggestions that they benefit rights holders. Governments are reporting public expenditures on infrastructure and receipts from resource extraction, but there is no understanding of whether this has strengthened civil society or otherwise led to improved government accountability. Factory workers have protective gear, but discrimination and violations of freedom of association go undetected. Improvements in crop yields and prices exist, but this has not always led to higher net household income—the metric that matters for lifting people out of poverty.

174 The Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity), *Not Fit-for-Purpose The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* (2020) https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf.

Yet, MSIs appear to be feeling more pressure to prove their worth. Unfortunately, producing graphics that demonstrate the scope and scale of an MSI's reach is more common than deep and honest reflections into whether an initiative is protecting rights or achieving its mission. This self-promotional tendency suggests that MSIs have themselves become institutions with their own agendas, selfpreservation instincts, and desires to sustain or grow. This is further emphasized by the fact that MSIs' impact studies are generally focused on whether the desired effects within the companies or sites monitored have been achieved—has child labor been reduced or are safety practices followed—rather than questioning if there have been any unintended consequences or examining the wider effects of the MSIs' intervention in a community. This narrow focus enables corporate members of MSIs to point to their participation in MSIs as achieving change, without the more critical question of whether an MSI's intervention is generally positively protecting rights holders and communities, or if it is causing any other complications or negative side-effects. This, in turn, points to the Achilles heel of MSIs: that, as institutions, they need to prove to their business members they can "deliver results" in order to sustain membership and survive as organizations. (…)

MSI Integrity, Annual Report[175]

We spent much of 2020 engaging policymakers, academics, civil society, MSIs, businesses, and the wider public on the findings and recommendations in the report. These recommendations outline a two-fold path forward.

1. Rethink the Role of MSIs: To articulate and understand the appropriate role for, and limitations of, MSIs, and to recognize that they are not a substitute for public regulation. MSIs should be recognized for what they have been equipped to do well: to be forums for building trust, experimentation, and learning. However, they should no longer be viewed as institutions that robustly ensure that their corporate members respect rights, provide access to remedy, or hold corporations accountable for abuses. Regulation at the global, national, and local levels is needed for these purposes.

2. To Challenge the Corporate Form: To recognize that the corporation is neither structurally situated nor primarily motivated to consider its human rights impacts, and that as long as corporations are primarily beholden to investor-shareholders, they will resist transformational human rights and environmental justice initiatives that jeopardize their profits or power. To us this means developing and promoting business models and policy transformations that more effectively center workers and affected communities in the ownership and governance of economic enterprises.

175 The Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity), *2020 Annual Report* (2021) https://www.msi-integrity.org/wp-content/uploads/2021/01/210126-2020-Annual-Report-FINAL.pdf.

Questions

1. What are the advantages and drawbacks of partnerships between civil society and businesses?
2. Are multistakeholder partnerships helpful for democratic governance or a threat to it?
3. Why are partnerships more common in some industries than others?
4. Do trade unions welcome partnerships to improve protection of rights in the workplace (supplier factories), and do they appreciate the efforts of NGOs advance labor rights? Is there collaboration or competition between trade unions and NGOs?
5. Should the United Nations enter into partnerships with transnational companies?
6. Can multistakeholder partnership provide more effective protection of some human rights? What is the experience and data tellimg us so far?
7. What is the role of governments – in home and host countries – in multistakeholder partnerships? Give examples of roles that different states have played.
8. Do partnerships replace the need for law and legal protections?
9. What type of resources are needed to create and operate a multistakeholder partnership? What resources can each stakeholder group contribute best?
10. Why do the UN SDGs emphasize partnerships?
11. Do you see any problems with the UN or governments supporting private-public partnerships?
12. What is the 'secret' to making a partnership work?
13. If you were working for a company, would you suggest entering into partnerships with civil society groups and/or the government? What if you worked for an NGO?

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6. ACCESS TO REMEDIES: JUDICIAL MECHANISMS

Dany Channraksmeychhoukroth, Radu Mares

Introduction

Access to remedies is a human right present in numerous international conventions. Having the opportunity to challenge a sanction or to claim a right before an independent adjudicatory body is a legal principle and mark of good governance. When it comes to corporate abuses, victims continue to face significant legal, procedural and practical barriers as they seek justice in courts of law. These challenges are clearly recognized in the UN Guiding Principles on business and human rights (UNGPs) and well documented in NGO reports and academic literature. When victims are deprived of justice in their countries they often try to access courts in home states where parent companies are headquartered. For victims that means a long legal battle as it typically takes a decade of litigation or more and the wheels of justice move slowly even in advanced legal systems. The cases against transitional companies are often very complex. The few cases that advance far enough in courts tend to be settled by companies without admission of guilt. There are therefore very few judgements finding parent companies liable to plaintiffs in other countries. The US system attracted most attention until a 2013 Supreme Court judgement (Kiobel v Shell) put the brakes on transnational litigation in the US. Cases continue to be pursued at an increasing rate in Canada, the UK and other European countries often by invoking tort law (especially the law of negligence). The UN High Commissioner for human rights and a range of European Union institutions, with the strong backing of civil society groups, have taken the lead in pushing for improved access to remedies. Although remediation is clearly demarcated in the UNGPs through Pillar 3, the latter has been labelled the 'forgotten pillar' due to the very slow progress. Soft law instruments (chapter 2) and multistakeholder initiatives (chapter 5) often have complaint mechanisms against companies, but these are mediation-only systems. As emphasized in the UNGPs, the multiple barriers to access to court make it essential to develop and use non-judicial remedies (chapter 7). Such alternative dispute resolution mechanisms could provide victims with faster remediation on any human rights issue (chapters 17, 19, 21, 25).

The Constitution of Cambodia guarantees access to remedy in articles 38 and 39. At the regional level, the ASEAN Human Rights Declaration recognizes the right of every person to an effective and enforceable remedy in article 5. Business activities have endangered several fundamental rights in Cambodia including rights to property, adequate housing, health, work, movement and others. When violations have occurred, the State must ensure that any person whose rights have been violated has access to an effective remedy by the competent judicial or administrative body or other competent authorities. Furthermore, enforcement of the granted remedy must be feasible. Practically, there are deficiencies in capacity (legal representation, time and resources) and shortcomings regarding impartiality and judicial independence.

Main Aspects

- ✓ Access to justice
- ✓ The human right to a remedy
- ✓ Barriers to remedies (substantive, procedural and practical barriers)
- ✓ Access to evidence (and burden of proof)
- ✓ Jurisdiction (prescriptive, enforcement and adjudicative jurisdiction)
- ✓ Applicable law (in transnational cases)
- ✓ Criminal and civil law remedies
- ✓ Liability (corporate and personal liability)
- ✓ Liability for actions and inactions (commission and omission)
- ✓ Structures of business organizations ('corporate veil', 'separate corporate personality')
- ✓ Links between parent company and affiliates (ownership, control, direction, autonomy)
- ✓ Duty of care of parent company (tort law, negligence law, delictual liability)
- ✓ Assumption of responsibility (subsidiary relies on parent company for advice)
- ✓ Enterprise liability (vicarious liability, 'piercing the corporate veil')
- ✓ Complicity (aiding and abetting)
- ✓ Presumption against extraterritoriality
- ✓ International cooperation (judicial assistance)
- ✓ Integrity of the courts (criticism of local legal system)
- ✓ Enforcement of a foreign judgement
- ✓ Environmental degradation

Background

UN, Guiding Principles on Business and Human Rights[176]

Principle 25: Access to remedy

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Commentary

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

176 Human Rights Council, *UN Guiding Principles on Business and Human Rights, Seventeenth Session* (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome. (…)

Principle 26: State-based judicial mechanisms

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Commentary

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, 'market-based' mechanisms (such as litigation insurance and legal fee structures), or other means;
- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

Instruments

Universal Declaration of Human Rights[177]

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

International Covenant on Economic, Social and Cultural Rights[178]

Article 2

3. Each State Party to the present Covenant undertakes:

   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

   (c) To ensure that the competent authorities shall enforce such remedies when granted.

UN, Basic Principles and Guidelines on the Right to a Remedy[179]

IX. Reparation for harm suffered

19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations (…) occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

   (a) Physical or mental harm;

   (b) Lost opportunities, including employment, education and social benefits;

177 *Universal Declaration of Human Rights* (1948) www.ohchr.org/en/udhr/pages/searchbylang.aspx.

178 *International Covenant on Economic, Social and Cultural Rights* (1966) www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

179 UN, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2006) https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement.

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. Rehabilitation should include medical and psychological care as well as legal and social services.

22. Satisfaction should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

OHCHR, Improving Accountability and Access to Remedy[180]

Cross-cutting issues

A. Structural and managerial complexity of business enterprises

21. Business enterprises can take many legal and structural forms. They may be single corporate entities (or "companies") or a group of companies working together through relationships on the basis of shared ownership, or contract, or both. The company law doctrine of "separate corporate personality" is recognized in most, if not all, jurisdictions. Under this doctrine, each company, as a separately incorporated legal entity, is treated as having a separate existence from its owners and managers. Consequently, a company (a parent company) that owns shares in another company (a subsidiary) will not generally be held legally responsible for acts, omissions or liabilities of that subsidiary merely on the basis of the shareholding.

22. This means that legal liability for the adverse human rights impacts of a subsidiary's activities may not extend beyond the subsidiary itself, unless the liability of the parent company can be established on some other basis (e.g., because of the parent company's own negligence in the way the subsidiary was managed or because of some specific legislative provision). (…)

B. Challenges particular to cross-border cases and the importance of international cooperation

25. The extent of international cooperation in cross-border cases has a crucial bearing on accountability and access to remedy in practice. States have entered into a range of bilateral and multilateral arrangements to support, facilitate and enable international cooperation with respect to legal assistance and enforcement of judgments in cross-border cases, including cases concerning business-related human rights abuses. Some of these include provisions concerning the desired or required use of jurisdiction in cross-border cases.

27. Regardless of whether formal international legal arrangements are in place, State agencies can experience a range of practical challenges that can undermine effective cooperation, including a lack of information about how to make a request to agencies in other States, a lack of opportunities for cross-border consultation and coordination, differences of approach regarding issues of privacy and the protection of sensitive information, a lack of resources needed to process requests in a timely manner and a lack of awareness of investigative standards in other States.

US, Kiobel v Shell[181]

Petitioners, Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute [ATS], alleging that respondents—certain Dutch, British, and Nigerian corporations—aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. (…)

The ATS provides, in full, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Accord¬ing to petitioners, respondents violated the law of nations by aiding and abetting the Nigerian Government in com¬mitting (1) extrajudicial killings; (2) crimes against hu¬manity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7)property destruction. (…)

180 United Nations High Commissioner for Human Rights (OHCHR), *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse* (2016) www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf

181 *Kiobel v. Royal Dutch Petroleum Co*., 133 S.Ct. 1659 (2013) (United States) https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf.

BREYER, J., concurring in judgment

Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an Amer¬ican national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in prevent¬ing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

I would interpret the statute as providing jurisdiction only where distinct American interests are at issue. (…) That re¬striction also should help to minimize international fric¬tion. Further limiting principles such as exhaustion, forum non conveniens, and comity would do the same. So would a practice of courts giving weight to the views of the Executive Branch. (…) As I have indicated, we should treat this Nation's interest in not becoming a safe harbor for violators of the most fun¬damental international norms as an important jurisdiction-related interest justifying application of the ATS in light of the statute's basic purposes – in particular that of compen¬sating those who have suffered harm at the hands of, e.g., torturers or other modern pirates.

UK, Chandler v Cape[182]

1. (…) The principal issue is whether Cape [the parent company of the company employing Chandler (the plaintiff)] owed a direct duty of care to the employees of its subsidiary to advise on, or ensure, a safe system of work for them. The respondent, Mr Chandler, has recently contracted asbestosis as a result of a short period of employment over fifty years ago with Cape Building Products Ltd ("Cape Products"). That company is no longer in existence. However, its parent company, Cape, formerly the well-known asbestos producer Cape Asbestos plc, is still in existence. [The first instance court] held that Cape was liable to Mr Chandler on the basis not of any form of vicarious liability or agency or enterprise liability, but on the basis of the common law concept of assumption of responsibility. Cape appeals against that decision.

32. The three-stage test in Caparo [applies] for determining whether a situation gives rise to a duty of care. The three ingredients are that the damage should be foreseeable, "that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other." (...)

69. I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.

70. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees.

72. (…) what is complained of is not the taking of any particular step but an omission to take steps or to give advice.

73. In the present case, Cape was clearly in the practice of issuing instructions about the products of the company, for instance, about product mixes. We know that Cape Products could not incur capital expenditure without parent company approval. Cape's board minutes show that Cape approved the separate administration of Cape Products' operations "in accordance with company policy" of Cape. There is nothing wrong in that but it suggests that the company policy of Cape on subsidiaries was that there were certain matters in respect of which they were subject to parent company direction. (…)

182 *Chandler v Cape* [2012] EWCA Civ 525 www.bailii.org/ew/cases/EWCA/Civ/2012/525.html.

74. (…) Cape was not responsible for the actual implementation of health and safety measures at Cape Products. However, as Mr Weir points out, the problem in the present case was not due to non-compliance with recognised extraction procedures. (…) the problem was systemic.

75. (…) Cape moreover had superior knowledge about the asbestos business (…) and its resources far exceeded those of Cape Products. Dr Smither was doing research into the link between asbestos dust and asbestosis and related diseases. He was also (if this label makes any difference) the group medical adviser of Cape.

77. Cape concedes that the system of work at Cape Products was defective. The judge inevitably found as a fact – and there is no appeal from this – that Cape was fully aware of the "systemic failure" which resulted from the escape of dust from a factory with no sides. Cape therefore knew that the Uxbridge asbestos business was carried on in a way which risked the health and safety of others at Uxbridge, most particularly the employees engaged in the brick making business.

78. Given Cape's state of knowledge about the Cowley Works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken. (…)

80. In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. (…)

Canada, Choc v Hudbay Minerals[183]

4. The plaintiffs are indigenous Mayan Q'eqchi' from El Estor, Guatemala. They bring three related actions against Canadian mining company, Hudbay Minerals, and its whollycontrolled subsidiaries. They allege that security personnel working for Hudbay's subsidiaries, who were allegedly under the control and supervision of Hudbay, the parent company, committed human rights abuses. The allegations of abuse include a shooting, a killing and gangrapes committed in the vicinity of the former Fenix mining project, a proposed open-pit nickel mining operation located in eastern Guatemala.

17. The defendants make several overarching arguments. Firstly, they argue that the plaintiffs are implicitly asking the Court to ignore the separate corporate personalities of Hudbay, HMI and CGN. Secondly, they argue that the negligence claim is an attempt to use the common law to impose absolute supervisory liability on parent and grandparent companies regarding the operations of their subsidiaries in foreign countries. Thirdly, they argue that even if there is a duty of care owed, the alleged conduct was not foreseeable based on the facts as pleaded in the Statement of Claim.

25. The plaintiffs submit that the primary cause of action in all three cases is negligence based on the direct actions and omissions of Hudbay, and not on share ownership or vicarious liability of the parent corporation for the actions of its subsidiary, as argued by the defendants. This direct negligence includes Hudbay/Skye's wrongdoing in its on-the-ground management of the Fenix project, and in particular, its negligent management of the Fenix security personnel who allegedly shot the plaintiffs in the Choe and Chub actions and raped the plaintiffs in the Caal action.

183 Canada, *Choc v Hudbay Minerals Inc*. Hudbay's motion to strike (2013) www.chocversushudbay.com/wp-content/uploads/2010/10/Judgment-July-22-2013-Hudbays-motion-to-strike.pdf.

27. The plaintiffs plead that Hudbay/Skye's detailed on-the-ground management and control was achieved through managers employed by Hudbay/Skye. These managers were responsible for the day-to-day operation and management of the Fenix project in Guatemala.

32. (…) Amnesty [International] made submissions with respect to international norms, authorities and standards which, it argued, support the view that a duty of care may exist in circumstances where a parent company's subsidiary is alleged to be involved in gross human rights abuses. Amnesty submits that transnational corporations can owe a duty of care to those who may be harmed by the activities of subsidiaries, particularly where the business is operating in conflict-affected or high-risk areas, such as Guatemala. Amnesty also argued that the transnational character of the dispute should not exempt the defendants from the application of established principles of tort law.

57. This test [the test for establishing a novel duty of care] [requires] that the following must be proven:

    1. that the harm complained of is a reasonably foreseeable consequence of the alleged breach;

    2. that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and,

    3. that there exist no policy reasons to negative or otherwise restrict that duty.

Foreseeability

59. The first requirement to establish a prima facie duty of care is foreseeability. (…) "the proper reasonable foreseeability analysis… requires only that the general harm, not 'its manner of incidence', be reasonably foreseeable" (…). For the purposes of the foreseeability analysis, it is enough if one could "foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable" (…)

63. The Caal pleadings state that Hudbay/Skye knew: that violence was frequently used by security personnel during forced evictions; that violence had been used at previous forced evictions that it requested; that the security personnel were unlicensed, inadequately trained and in possession of unlicensed and illegal firearms; and that, in general, there was a risk that violence and rape could occur. These pleadings make it reasonably foreseeable that requesting the forced eviction of a community using hundreds of security personnel, as Hudbay/Skye is alleged to have done, could lead to security personnel using violence, including raping the plaintiffs.

Proximity

66. The second issue (…) is whether there is a proximate relationship between the plaintiffs and the defendants in each action. Proximity means that "the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs" (…)

69. Proximity is determined by examining various factors, rather than a single unifying characteristic or test. Factors considered in defining the proximity of a relationship include, as set forth above, the "expectations, representations, reliance, and the property or other interests involved". (…) Hudbay/Skye made public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to expectations on the part of the plaintiffs. There were also a number of interests engaged, such as Hudbay/Skye's interest in developing the Fenix project, which required a "relationship with the broader community, whose efficient functioning and support are critical to the long-term success of the company in Guatemala", according to Hudbay's President and CEO. The plaintiffs' interests were clearly engaged when, according to the pleadings, the defendants initiated a mining project near the plaintiffs and requested that they be forcibly evicted.

Policy Considerations

71. [The third element of the test is] whether there are policy reasons to negative or otherwise restrict the prima facie duty of care.

72. Both parties set out policy reasons to support their respective positions. The defendants submit that if a duty of care exists, it is negated because:

- a private member's bill was introduced in federal Parliament to ensure that Canadian extractive corporations met environmental and human rights standards-it was defeated;
- a private member's bill was introduced in federal Parliament to permit foreign plaintiffs to sue in Canada for claims based on violations of international law or treaties to which Canada is a party-it was also defeated (and has since been reintroduced but has not gone past first reading);
- recognizing a duty risks exposing any Canadian company with a foreign subsidiary to a myriad of claims, many of which will likely be merit less; this, in turn, would burden an already overtaxed judicial system;
- recognizing a duty would pre-empt the efforts of the federal government over the past seven years to work with Canada's mining sector to implement corporate social responsibility principles; and
- recognizing a duty would likely impinge upon the fundamental principle of separate corporate personality entrenched in the common law and in corporate statutes.

73. The plaintiffs seek to refute the defendants' arguments and submit that there are sound policy reasons for recognizing a duty of care between a Canadian mining company and individuals harmed by security personnel at its foreign operations when there is direct control by the Canadian parent corporation, as follows:

- recognizing a duty would support efforts taken by the federal government by encouraging Canadian companies to meet the "high standards of corporate social responsibility" that are currently expected by the Canadian government;
- recognizing a duty would support the government's stated goal of reducing risks of excessive force or human rights abuse related to the deployment of private security at Canadian enterprises abroad; and
- tort law should be evolving to accord with globalization, and local communities should not have to suffer without redress when adversely impacted by the business activity of a Canadian corporation operating in their country. In the words of former Justice Ian Bitmie, "Ordinary tort doctrine would call for the losses to be allocated to the ultimate cost of the products and borne by the consumers who benefit from them, not disproportionately by the farmers and peasants of the Third World".

74. There are clearly competing policy considerations in recognizing a duty of care in the circumstances of this case. (…)

Canada, Araya v Nevsun Resources[184]

4. [The notice of civil claim]

In October 2007, Vancouver based Nevsun Resources Ltd. entered into a commercial venture with the rogue state of Eritrea to develop the Bisha gold mine in Eritrea. The mine was built using forced labour, a form of slavery, obtained from the plaintiffs and others coercively and under threat of torture by the Eritrean government and its contracting arms. (…)

184 Canada, *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 (The Supreme Court Of British Columbia) https://business-humanrights.org/sites/default/files/documents/Judge%20Abrioux%2C%20re%20Araya%20v.%20Nevsun%20Resources%20Ltd.%2C%2010-06.pdf.

5. [Nevsun's response to civil claim]

In answer to the Notice of Civil Claim as a whole… Nevsun denies the Plaintiffs' and Group Members' … allegations that subcontractors and the Eritrean military engaged in forced labour, slavery, torture or other abuses in connection with the Bisha Mine, or that Nevsun agreed to or in any way aided, abetted or approved of or condoned such conduct. At all material times, Nevsun was an indirect shareholder and the Bisha Mine was owned and operated by Bisha Mine Share Company ("BMSC"). BMSC prohibited the use of forced labour and abuses of workers at the Bisha Mine and took reasonable steps to ensure that such conduct did not occur.

43. The plaintiffs bring this action for damages against Nevsun under CIL [customary international law] as incorporated into the law of Canada for: the use of forced labour; torture; slavery; cruel, inhuman or degrading treatment; and crimes against humanity. They also seek damages under domestic British Columbia law against Nevsun for the torts of conversion, battery, unlawful confinement, negligence, conspiracy, and negligent infliction of mental distress.

They relate the tortious conduct to Nevsun specifically through the following allegations: (…)

(d) Nevsun is directly liable for condoning the above by Segen, Mereb, and the Eritrean military;

(e) Nevsun is directly liable for failing to stop these practices at its mine site and this amounts to aiding and abetting Segen's and Mereb's conduct; (…)

(g) Nevsun is vicariously liable for the conduct of Segen, Mereb and the Eritrean military at the Bisha Mine in furtherance of Nevsun's commercial objectives;

(h) Nevsun participated in a civil conspiracy with BMSC, Segen, Mereb, and the Eritrean military by entering into an unlawful agreement for the supply of forced labour to the Bisha Mine;

(i) Nevsun is negligent because it breached a duty of care it owed to the plaintiffs; (…)

[the enforcement of an eventual judgment]

306. Nevsun also says that it has agreed to attorn to the jurisdiction of the Eritrean courts. (…) the plaintiffs could apply to enforce a final judgment obtained against Nevsun in Eritrea pursuant to the common law principles governing the enforcement of foreign judgments.

307. The plaintiffs' position is that there will likely be contentious, costly, and time-consuming proceedings in British Columbia over any judgment obtained in Eritrea. Given the state of Eritrea's judicial system, any losing party could easily mount a credible challenge to the integrity of any resulting judgment.

308. They cite the example of Chevron Corporation v. Yaiguaje, 2015 SCC 42, which they say illustrates the difficulties that can arise when enforcing a judgment from a forum that is vulnerable to accusations about the absence of judicial independence and rule of law. After many years of litigation both in the United States and Ecuador, a judgment from an Ecuadorian court in the amount of $9.5 billion remains unpaid. This has generated litigation in many jurisdictions.

309. The plaintiffs submit that it is easy to envision this saga repeating itself in this case. This factor favours this Court retaining jurisdiction "where the integrity of the courts is unassailable".

African Commission on Human Rights, Shell in Nigeria[185]

2. The Communication alleges that the oil consortium [the State oil company (Nigerian National Petroleum Company (NNPC)), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC)] has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.

4. The Communication alleges that the Government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The Government has withheld from Ogoni Communities information on the dangers created by oil activities. Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland.

7. The Communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. (…)

45. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. (…)

The Commission, finds the Federal Republic of Nigeria in violation of (…) the African Charter on Human and Peoples' Rights; [and] Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

- Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;
- Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
- Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
- Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
- Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

185 *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria, African* Commission on Human and Peoples' Rights Comm. No. 155/96 (2001). http://hrlibrary.umn.edu/africa/comcases/155-96b.html.

US, Settlement Agreement, Wiwa v Shell[186]

The Plaintiffs in the Wiwa v. Shell cases are pleased to announce a settlement of their claims. The settlement will provide $15.5 million to compensate the injuries to the Plaintiffs and the deaths of their family members, and will also create a trust for the benefit of the Ogoni people, as well as pay the costs of litigation. (…) This Trust will allow for initiatives in Ogoni for educational endowments, skills development programmes, agricultural development, women's programmes, small enterprise support, and adult literacy. (…)

UK, Okpabi v Shell[187]

Lord Justice Simon:

1. The claimants in these two actions seek damages arising as a result of serious, and ongoing, pollution and environmental damage caused by leaks of oil from pipelines and associated infrastructure in and around the Niger Delta for which, they contend, the 1st defendant ('RDS') and the 2nd defendant ('SPDC') are responsible.

2. The claimants are citizens of Nigeria and inhabitants of the areas affected by the oil leaks. RDS is a company incorporated in the United Kingdom and is the parent company of the Shell group of companies ('the Shell Group'). SPDC is an exploration and production company incorporated in Nigeria, and is a subsidiary of RDS. It is the operator of a joint venture agreement (…)

3. The claims against both RDS and SPDC are based on the tort of negligence under the common law of Nigeria which, for present purposes, is to be regarded as the same as the law of England and Wales. The claim against SPDC is brought also under Nigerian statutory law. The claim against RDS is brought on the basis that RDS owed the claimants a duty of care either because it controlled the operation of pipelines and infrastructure in Nigeria from which the leaks occurred or because it had assumed a direct responsibility to protect the claimants from the environmental damage caused by the leaks.

7. [The appeal raises the question whether] RDS owed a duty of care to those affected by oil leaks from pipelines and associated infrastructure in the Rivers State of Nigeria.

10. RDS, as the ultimate holding company of the Shell Group of companies, carries out activities commensurate with this role, including holding shares in its subsidiaries and investments and setting the overall strategy and business principles for the Shell Group of companies. RDS reports on the consolidated performance of the Shell Group of companies, makes appropriate disclosures to the markets, and maintains relationships with investors. It is also responsible for approving changes to the capital and corporate structure of the Shell Group of companies.

11. RDS is a holding company. It is not an operating company. As a holding company, it does not have any employees. A limited range of corporate services are provided by individuals employed elsewhere in the Shell Group of companies from time to time seconded to RDS (...)

12. RDS does not involve itself or otherwise intervene in the operational activities of its many hundreds of subsidiaries. As a holding company, it does not have the expertise or capacity to do so (...) each operating company is autonomous, with its own properly constituted board of directors, its own management, its own business purpose, its own assets and its own employees appropriate for that purpose. Its board and management take the operational decisions necessary to run its business. Each operating company is responsible and accountable for its operational performance including its Health, Safety, Security, the Environment and Social Performance (...) compliance and performance.

186 United States, Statement of the Plaintiffs in *Wiwa v. Royal Dutch/Shell, Wiva v. Anderson, and Wiva v. SPDC* (Settlement Agreement) (8 June 2009) https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf.

187 United Kingdom, *Okpabi and Others v. Royal Dutch Shell Plc* EWCA Civ 191, (2018) www.business-humanrights.org/sites/default/files/documents/Shell%20Approved%20Judgment.pdf.

132. In my judgment, this is not a case in which the claimants can demonstrate a properly arguable case that RDS owed them a duty of care on the basis either of an assumed responsibility for devising a material policy the adequacy of which is the subject of the claim, or on the basis that it controlled or shared control of the operations which are the subject of the claim.

Sir Geoffrey Vos, Chancellor of the High Court:

195. The documents demonstrate rather what I would, from a commercial perspective, expect. They show that RDS laid down detailed policies and practices as to management, oversight and engineering which they expected their subsidiaries and joint ventures to follow. The Nigerian joint venture, operated by SPDC, was only special because it had particular problems and was particularly important from an economic perspective. The detailed policies and practices do not seem to have been tailored specifically for SPDC. Rather, they all apply across the board to all RDS subsidiaries and joint ventures, without distinction. It has already been said that it would be surprising if an international parent were to owe duties to those affected by the operations of all its subsidiaries and that there needs to be something more specific for the necessary proximity to exist. (…)

205. (…) In my judgment, the claimants fail in each of the five areas they sought to rely upon to establish proximity. So far as concerns the issue of mandatory policies, standards and manuals which applied to SPDC, these were, as I have said, of a high-level nature, even when quite specific at an engineering level. They did not indicate control; that control rested with SPDC which was responsible for its own operations. The promulgation of group standards and practices is not, in my view, enough to prove the "imposition" of mandatory design and engineering practices. There was no real evidence to show that these practices were imposed even if they were described as mandatory. There would have needed to be evidence that RDS took upon itself the enforcement of the standards, which it plainly did not. It expected SPDC to apply the standards it set. The same point applies to the suggested "imposition" of a system of supervision and oversight of the implementation of RDS's standards which were said to bear directly on the pleaded allegations of negligence. RDS said that there should be a system of supervision and oversight, but left it to SPDC to operate that system. It did not have the wherewithal to do anything else. Likewise, in relation to the supposed imposition of financial control over SPDC in respect of spending. Any parent is concerned to ensure sound financial management, but the fact that spending decisions required parental approval is not an indication that RDS controlled SPDC's operations. Finally, I do not think that the evidence supports the contention that RDS had a high level of involvement in the direction and oversight of SPDC's (day-to-day) operations. SPDC's evidence, which was not really capable of challenge, pointed in the other direction.

207. In conclusion, (…) I agree with Simon LJ that he was right to hold that the claimants' claims against RDS were bound to fail because it was not arguable that RDS owed them a duty of care. There is simply no real prospect that the claimants will succeed against RDS.

UK, Lungowe v Vedanta[188]

1. [the claimants] are Zambian citizens who live in the Chingola region of the Copperbelt Province in the Republic of Zambia. On 31 July 2015, they brought proceedings against the first and second appellants ('Vedanta' and 'KCM' respectively) alleging personal injury, damage to property and loss of income, amenity and enjoyment of land, due to alleged pollution and environmental damage caused by discharges from the Nchanga copper mine ('the Nchanga mine') since 2005.

2. The mine is owned and operated by KCM, which is a public limited company incorporated in Zambia. Vedanta, which is incorporated in this country, is a holding company for a group of base metal and mining companies, which include KCM.

188 United Kingdom, *Lungowe & Ors v Vedanta Resources Plc & Anor* [2017] EWCA Civ 1528 (13 October 2017) www.bailii.org/ew/cases/EWCA/Civ/2017/1528.html.

40. (…) KCM submit that the entire focus of this case is on Zambia. That is where the alleged torts were committed; that is where the damage occurred; that is where all the claimants live; that is where KCM are themselves domiciled; that is the law that applies. Accordingly, they say, on straightforward forum non conveniens grounds, the order permitting service out of the jurisdiction should be set aside. They submit that it makes no difference that there is a claim against Vedanta in the UK but, to the extent that it does or might matter, they maintain that the claim is an illegitimate hook being used to permit claims to be brought here which would otherwise not be heard in the United Kingdom. Further and in any event, they say that, the claimants' alternative argument – that even if the United Kingdom is not the appropriate place for the trial, the claimants would not obtain justice in Zambia – is wrong on the evidence.

The claimants say that, because there is a real issue between themselves and Vedanta, which they intend to pursue to trial in the United Kingdom, it is reasonable for this court to try that issue in the United Kingdom, so that is therefore the appropriate place for their claims against KCM. If they are wrong about that they rely on access to justice issues, and what they say is the impossibility of trying these claims in Zambia. Although Mr Hermer accepts that the mere fact of the Vedanta claim in the United Kingdom does not automatically lead to the conclusion that service out should not be set aside, he said that it 'weighed very heavily' in favour of such a conclusion.

119. The legal test provides a burden on the claimants to show that there is a real risk that substantial justice cannot be obtained in Zambia (…) [Furthermore] Comity requires that the Court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court and that is why cogent evidence is required to establish the risk. (…) This must be clearly demonstrated against an objective standard and supported by positive and cogent evidence.

123. [The judge] condensed the material and identified seven factors which, in his view, when taken together amounted to 'cogent evidence that, if these claimants pursued KCM in Zambia, they would not obtain justice' (…).

124. First, the claimants earn considerably below the national average in Zambia; and given that Zambia is one of the world's poorest countries, where most people live at subsistence levels, he could conclude that the vast majority of the claimants would not be able to afford the cost of any legal representation,

125. Secondly, in consequence of their poverty, the only way in which the claimants could ordinarily bring the present claims in Zambia would be by a Conditional Fee Agreement (CFA). However, it was common ground that CFAs were not available in Zambia and were unlawful,

126. Thirdly, there was no prospect of the claimants obtaining legal aid from the Zambian state. (…) the Legal Aid Board would not be able to provide funding for a large environmental claim on behalf of 1,800 claimants,

127. Fourthly, the prospect of ad hoc litigation funding was entirely unrealistic. (…) This is complex and expensive litigation involving over 1,800 claims. Detailed evidence is going to be necessary in respect of personal injuries, land ownership and damage to land; and expert evidence as to pollution, causation and medical consequences. On the evidence before the court, it is quite unrealistic to suppose that the lawyers would fund such large and potentially complex claims, essentially out of their own pockets, for the many years that litigation might take to resolve.

128. Fifthly, no private lawyers with relevant experience were willing and capable of taking on such claims in Zambia (…),

129. Sixthly, previous environmental litigation in Zambia had failed in respect of some or all of the claimants for various reasons. (…),

130. Seventhly, the Judge took into account what he described as KCM's likely 'obdurate' approach to litigation in Zambia, which in his view, would add enormously to the time and therefore the cost. KCM had in the past pursued 'an avowed policy of delaying so as to avoid making due payments' (…).

133. I should perhaps mention one further matter which troubled the Judge: namely, that his findings might be regarded as amounting to criticisms of the Zambian legal system. He made clear that it was no part of his function to review the Zambian legal system: only to make findings on specific issues on the evidence before him. That observation was plainly correct. I would only add one point, and it is doubtless one that the claimants' lawyers are aware of. There must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally.

Wesche and Saage-Maaß, Lessons from Jabir and Others v KiK[189]

This article is based on the authors' practical experience in developing the KiK complaint [Jabir and Others v KiK], which constitutes the first tort-based business and human rights lawsuit in Germany. It was filed [in 2015] … on behalf of four Pakistani citizens, who were injured and lost relatives in the Baldia factory fire of September 2012. This fire broke out at the Ali Enterprises garment factory in Karachi and killed more than 250 persons, injuring several dozens more.

The high number of casualties was due to a serious lack of fire and workplace safety precautions: the factory was built in violation of applicable building and fire safety standards; electrical installations were in bad condition; and it did not possess sufficient fire alarms and extinguishers, despite previous fire incidents. Most importantly, there were insufficient emergency exits, and those that did exist were locked at the time of the fire. Therefore, when the fire broke out, many workers were trapped in the basement of the factory.

The claimants allege that KiK Textilien und Non-Food GmbH ('KiK'), a German textile retailer with around 3,200 branches in Europe catering to the low-price market, incurs negligence liability in tort for not ensuring adequate fire safety precautions at the factory. Based on Pakistani substantive tort law, which in many aspects reflects the laws of the UK and incorporates UK court decisions, they argue that KiK owed them a duty of care on the basis that it had controlled factory conditions and assumed responsibility for safety management.

While KiK has publicly admitted that it purchased around 75 per cent of the factory's output and that the factory's growth was mainly due to this commercial relationship, the claimants allege that it was the factory's only customer. In addition, they allege that KiK regularly intervened in the factory's operations, including by directing and monitoring safety management. Like many companies, KiK has its own code of conduct, which forms part of its supply chain contracts, requiring suppliers to ensure safe working conditions and allowing KiK to monitor them. According to KiK's own statements, it develops correction plans, supervises their implementation and conducts on-site qualification programmes, if such monitoring reveals any shortcomings. Furthermore, employees of its corporate social responsibility, purchasing and quality assurance departments regularly visit supplier sites. (…)

Conclusions

Based on the authors' experience in the KiK case, this article has examined the feasibility of tort-based litigation against parent or buying companies for overseas human rights abuses before German courts. While the courts can exercise jurisdiction in such litigation, they will generally apply the law of the country where the abuses occurred. In some instances, this may be beneficial for the claimants, in others it may not, depending on the legal systems

189 Philipp Wesche, Miriam Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK', *Human Rights Law Review* 16:2 (2016) https://academic.oup.com/hrlr/article/16/2/370/2356211

involved. While there is no direct precedent, it seems that the German law of tort does provide a cause of action in cases where damages to life, body, property, freedom of movement or personality rights are at stake. However, this only applies where the companies effectively control the harmful operations of their subsidiaries and suppliers or where these operations concern the management of a risk created by the company itself, which was delegated negligently. In such cases, similar to UK litigation, liability may be based on a breach of a safety duty the company owed to the claimants.

In fact, the most problematic aspects of litigation are of a practical and procedural nature. Given the absence of pretrial discovery and of effective mechanisms of court-ordered disclosure, claimants encounter great difficulties in proving their cases, which are characterized through a structural asymmetry in information. Moreover, there are no collective actions, which would allow lawyers to litigate on behalf of larger groups of claimants in a cost-efficient manner, and significant shortcomings with regard to legal aid. Together with the low profitability of these complex cases, this means that lawyers have little incentive to undertake litigation.

Unless these practical and procedural barriers are reduced, tort-based proceedings against companies because of overseas human rights abuses will remain exceptional in Germany, which applies not only to cases involving subsidiaries or suppliers, but also to cases of human rights abuses directly caused by German companies. Such proceedings will only be feasible with financial, organizational and analytical pro bono support by third parties and in the form of strategic litigation in specific cases. (…)

Augenstein and Jägers, Judicial Remedies - The Issue of Jurisdiction[190]

Human rights in private litigation

The relationship between human rights and private litigation can be approached from two different perspectives. The first perspective, germane to private lawyers, asks whether and to what extent civil litigation can be used to vindicate values and interests protected by human rights, such as physical integrity, privacy, or individual property. Here, the relationship between corporate perpetrators and victims of human rights abuses is regulated by private law, and the principal aim of litigation is the award of pecuniary damages.

The second perspective, germane to public lawyers, asks what obligations international human rights law imposes on states to protect human rights in the relationship between private actors. Here, the emphasis is on state duties to prevent and redress corporate human rights abuses through domestic legislation, adjudication, and the proper administration of justice.

International human rights law and jurisdiction in private international law

To be able to enjoy the protection of their human rights in transnational tort litigations against MNCs, victims of corporate human rights abuses need to come within the human rights jurisdiction of the state concerned.

Jurisdiction in private international law determines the competence of state courts to hear private disputes involving a foreign element. In most general terms, the determining factor is whether there exists a sufficiently close nexus between the facts of the case and the forum state. In EU law, this nexus is established through the domicile of the defendant in an EU Member State. The allocation of jurisdiction in private international law serves a number of different purposes, such as protecting the legitimate interest of private parties in cross-border disputes, ensuring an economical judicial process, and avoiding conflicting judgments in different states.

190 Daniel Augenstein and Nicola Jägers, 'Judicial Remedies - The Issue of Jurisdiction', in Juan José Álvarez Rubio and Katerina Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (2017) (e-book, free download) www.taylorfrancis.com/books/e/9781351979153 (footnotes omitted).

Yet it is also an expression of the delimitation of jurisdiction in public international law that protects the state's sovereign authority over its territory and people therein against undue external interference by other states. Jurisdiction in public international law regulates states' legal competence to assert authority in matters not exclusively of domestic concern, in accordance with a recognized legal basis and subject to a standard of reasonableness. It is commonly divided into prescriptive jurisdiction (the state's authority to prescribe legal rules), enforcement jurisdiction (the state's authority to enforce legal rules), and adjudicative jurisdiction (the authority of state courts to adjudicate disputes referred to them).

This entails, as Crawford notes, that 'the starting point in this part of the law is the presumption that jurisdiction (in all its forms) is territorial, and may not be exercised extra-territorially without some specific basis in international law'. Moreover, it suggests that the competence of state courts in private international law to hear disputes involving extraterritorial corporate human rights abuses is constrained by the state's jurisdiction under public international law.

The European approach: the Brussels I Regulation

In the EU, rules on jurisdiction in civil cases are partially harmonized through Regulation (EU) No. 1215/2012 (…) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [also known as the Brussels-I Regulation](…) The cornerstone of the Brussels I Regulation is Article 4(1) which [holds] that persons domiciled in a Member State shall be sued in the courts of that Member State. For legal persons, domicile is determined by Article 63(1), where domicile is defined as the state where a company or other legal person has its statutory seat, central administration or principal place of business. (…) Consequently, in cases against corporate entities, even when the acts occurred extraterritorially, the courts of a Member State will in principle have jurisdiction over the entity that is incorporated on that Member State's territory. (…)

As the Regulation only applies to companies domiciled in the EU, it generally does not apply in tort cases against subsidiaries (…). Brussels I Regulation provides that 'if the defendant is not domiciled in a member State, the jurisdiction of the courts of each Member State shall . . . be determined by the law of that Member State'. The following considerations discuss and illustrate three jurisdictional instruments in Member States' private international law that can facilitate tort litigations for human rights abuses committed by Europe-based MNCs: forum necessitatis , the joining of defendants, and the pursuit of civil remedies through criminal jurisdiction. (…)

The most publicized case involving the joining of a foreign subsidiary in litigation against an EU-domiciled parent company is currently pending in the Netherlands [Akpan v Shell regarding oil spills in the Nigeria]. According to Dutch private international law, a Dutch court may exercise jurisdiction over a foreign subsidiary when the claims against parent and subsidiary are so closely connected as to justify the joining of defendants for reasons of process efficiency. (…) [In 2010, the first court] maintained that the mere possibility that the Dutch parent company could be held liable was sufficient to attract a foreign subsidiary to the Dutch jurisdiction. Furthermore, the court's jurisdiction over the foreign subsidiary is sustained even if the claims against the parent company eventually proved unfounded. (…) In December 2015, the Court of Appeal reinstated all claims against the Dutch parent company and SPCD, and ordered Shell to disclose documents concerning the maintenance of its oil pipelines. (…)

In a recent litigation [in the UK] with the same subject matter as the Dutch Shell case involving 15,000 claimants from Nigeria's Bodo community, the proceedings were originally issued against the Anglo-Dutch parent company Royal Dutch Shell Plc and its Nigerian subsidiary SPDC. Later on, SPDC submitted to the jurisdiction of the English court on the condition that the claimants stayed proceedings against the parent company. The court decided that SPDC could in principle be held liable for oil spills resulting from a failure to take all reasonable steps to protect its oil infrastructure in Nigeria. In January 2015 a settlement was reached according to which Shell is to pay £55 million compensation and to clean up the affected areas.

Background (Cambodia)

Business and Human Rights in ASEAN: A Baseline Study[191]

III. Is the State taking steps to prevent, investigate, punish and redress business related human rights abuses through effective policies, legislation, regulations and adjudication?

1. Are there government bodies and/or State agencies that have the responsibility to prevent, investigate, punishes and redresses business-related human rights abuses? If so, how have they done so?

There are no specific government bodies and/or State agencies responsible for preventing, investigating, punishing or providing redress for business-related human rights abuses. However, there are a number of government agencies which are empowered by law to deal with human rights or human rights related issues under their jurisdiction. For example:

- The Ministry of Labour and Vocational Training is responsible for labour issues under the Labour Law. The Labour Inspection Department is responsible for inspection the workplace. The Health and Safety Department is responsible for health related issues. The Labour Dispute Resolution Department and Arbitration Council are responsible for conciliation and arbitration on labour disputes. In 2011, the Ministry of Labour and Vocational Training suspended a license of T&P Co Ltd because of allegations of violations of migrant workers' rights before sending them to work in Malaysia.
- The Ministry of Land Management, Urban Planning and Construction is responsible for land disputes. The Mandate of the Cadastral Commission has the mission to resolve the following conflicts between possessors over unregistered land subject to possession rights: disputes occurring outside adjudication areas and disputes within adjudication areas that cannot be conciliated by the Administrative Commission.
- The Ministry of Environment is responsible for environmental protection and for overseeing environmental impact assessments before the commencement of business operations.
- Besides responsible ministries, there are number of councils and commissions or committees set up by the government to investigate specific issues. For instance, the National Sand Committee is responsible for oversight of sand licenses and assessing the impact of sand exploitation. The Anti-Corruption Unit is empowered to deal with corruption issues, etc.

Additional relevant institutions include the National Assembly Commission on Human Rights (NACHR), the Senate Commission of Human Rights (SCHR) and the governmental Cambodian Human Rights Committee (CHRC). For the previous two terms, the Senate Commission has received 397 complaints from citizens, most of which are related to land disputes. NACHR and SCHR are institutions for citizens to voice their concerns and complaints with regard to human rights violations. They are advisory bodies to the Royal Government of Cambodia. In contrast, CHRC's role is to investigate and mediate complaints relating to human rights, collect information relating to the implementation of human rights, and to organize training and disseminate information on human rights. It also responsible for preparing human rights reports for the UN.

However, these government agencies are not authorized to punish and redress business-related human rights abuses. The prosecution of offences is the sole responsibility of the Public Prosecutor and the competent courts.

In addition, it has been noticed that the sensitive issue of economic land concessions arose in Cambodia. While the objective of the concession policy is to foster economic development, it also affects the rights and livelihoods of individuals and communities. Because of the lack of formal land titles the indigenous populations and people living in rural areas are particularly vulnerable. (…)

191 Human Rights Resource Centre, *Business and Human Rights in ASEAN: A Baseline Study* (2012) https://hrrca.org/business-and-human-rights-in-asean-a-baseline-study/.

2.1. To what extent do business enterprises and company organs face liability for breaches of laws by business enterprises?

The concepts for holding business enterprises legally accountable as legal persons are found in various Cambodian Laws:

- Law on Commercial Enterprises: (…) A company has the capacity, rights and privileges of a natural person. Where a company commits an offence, any director or officer of the company who knowingly authorizes, permits or acquiesces in the commission of the offense is a party to the offence and liable to be fined.
- Labour Law: Chapter 16 of the Labour Law imposes civil and criminal sanctions on the employer, company heads, directors, managers or officers who violate provisions of the labour law.
- Criminal Code: According to the Criminal Code, a legal entity may be held criminally responsible for offenses committed on their behalf by their organs or representatives.

9. *Is the State taking steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related human rights abuses occur within their territory and/or jurisdiction those affected have access to effective remedy?*

So far, there are two known cases, where the State took legal steps to ensure human rights compliance in a business context. (…) Another case relates to the death of an environmental activist, Mr. Chut Wutty. He was killed in April 2012 while researching alleged illegal logging and land seizures in Koh Kong Province. The Prime Minister established a governmental investigation committee which led to proceedings before the Koh Kong Provincial Court. In October 2012 the Court decided that Wutty had been killed by a military officer named Rattana who had then accidentally been shot to death by the head of the logging company's security guards in an attempt to prevent further shooting. As a consequence, the Court decided to close the case on Chut Wutty's death given the murderer's death. It proceeded to sentence the head of security to two years imprisonment for the accidental killing of Rattana. (…)

9.2. What barriers to access to remedy through these State-based grievance mechanisms have been reported?

There are no governmental reports, but the UN Special Rapporteur concluded that the main problem is not a lack of a legal framework but its implementation: "The majority of the challenges I have identified in this report [...] derive from a failure to apply the domestic legal framework – that is, the laws, policies and regulations that the Government itself has developed [...]. The granting and management of economic and other land concessions in Cambodia suffer from a lack of transparency and adherence to existing laws. Much of the legal framework on these matters is relatively well developed on paper, but the challenge is with its implementation in practice."

Instruments (Cambodia)

ASEAN, Human Rights Declaration[192]

5. Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.

192 Association of South-East Asian Nations, *ASEAN Human Rights Declaration* (2013) https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

The Constitution of the Kingdom of Cambodia[193]

Article 39

Khmer citizens have the right to denounce, make complaints, or file claims for reparations of damages caused by any breach of law by state and social organizations or by staff of those organizations. The settlement of complaints and the reparations of damages are of the competence of the courts.

Cambodian Code of Civil Procedure[194]

10. Concept of individual rights

Individual rights include the right to life, personal safety, health, freedom, identity, dignity, privacy, and other personal benefits or interests.

13. Right to damages

The provisions of Article 11 (Right to prohibition) and Article 12 (Right to demand elimination of the effects of an infringing act) shall not prevent a person who has suffered an infringement of their individual rights from seeking damages for any harm suffered therefrom in accordance with the provisions regarding tortious acts.

743 Elements of general tort and burden of proof

(1) A person who intentionally or negligently infringes on the rights or benefits of another in violation of law shall be liable for the payment of damages occurring as a result.

(2) Paragraph (1) shall apply mutatis mutandis to cases where damages have occurred due to non-performance of a certain act with respect to which the actor is obligated to perform such act.

(3) Except as otherwise provided in this Code or in other laws, the person seeking damages must prove the intent or negligence of the tortious actor, the causal relationship between the actions of the tortious actor, the damages that occurred, and the damages suffered by the injured party.

747. Employer's liability

(1) A Person who uses an Employee to perform work is liable for damages caused in violation of law to another in the performance of that work by the Employee through the Employee's intent or negligence.

(2) A person charged with supervising an Employee in place of the Employer bears the same liability as the Empoyer. This shall not apply where supervision was properly performed. (…)

748. Tortious act of juridical person

(1) Should a director or other legal representative of a juristic person intentionally or negligently causes harm to another in violation of law in the exercise of such person's duties, the juristic person shall be liable for the payment of damages.

193 Cambodia, *Constitution of the Kingdom of Cambodia* (1993) https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/35789/72242/F1994980854/KHM35789.pdf.
194 Cambodia, *The Code of Civil Procedure of the Kingdom of Cambodia* (2006), https://www.jica.go.jp/project/english/cambodia/0701047/materials/index.html.

(2) A juristic person that pays damages in accordance with paragraph (1) may demand compensation from the representative who committed the tortious act.

CCHR, Business and Human Rights Handbook for Cambodia[195]

2.4 Providing access to remedy

The Guiding Principles visualize remedial mechanisms taking a variety of forms, thus ensuring maximum flexibility for users and ease of use. Certainly, the court system must be a key player. However, litigation should always be as a last resort and every attempt made to settle disputes without the need for court intervention. Therefore, it is important that alternative dispute resolution mechanisms are available that stem from both businesses and the State.

In the Cambodian context, issues with State-based judicial mechanisms are particularly pronounced as court independence and impartiality are frequently questioned, and the judiciary is often used by the political elite to suppress opposition. This issue is particularly pronounced in a country where the activities of big business and big government are so tightly involved, with the courts often arbitrarily resolving disputes in favor of businesses with State connections. Issues with the impartiality of the court system in Cambodia are particularly evident in relation to land disputes.

For those who find themselves involved in land disputes, there are five means of dispute resolution currently available. The five methods are: (…)

5. Court System: the courts have jurisdiction over disputes involving registered or titled land. If the parties are not satisfied, the case can be filed with the Court of Appeal. Dissatisfied parties of disputes submitted to the National Cadastral Commission may also file an appeal with the Court of Appeal. Courts have jurisdiction over cases of forced evictions as well as contract and inheritance disputes, irrespective of the registration status of the land. If the dispute is related to unregistered land, however, the parties must first go through the Cadastral Commission.

While it is clear that Cambodians affected by land disputes have many dispute resolution mechanisms available to them, they have proven to be largely ineffective and inaccessible, and thus for the most part, do not effectively provide access to remedy.

Inclusive Development International, Class Action Lawsuit against Mitr Phol[196]

I. The parties

The plaintiffs are two Cambodian citizens residing in Samrong District, Oddar Meanchey Province, in northwestern Cambodia. The plaintiffs represent a class of approximately 600 families who resided and cultivated arable land in the Samrong District villages of Bos, O'Bat Moan, Taman, Trapiang Veng and Ktum when the defendant commenced the activities in Cambodia that are the subject of the litigation. (…)

The defendant is Mitr Phol Sugar Corporation Limited, a privately owned group of companies domiciled in Thailand, which is controlled and owned mainly by the Vongkusolkit family through the holding company Mid-Siam Sugar Co., Ltd. The defendant engages in large-scale sugarcane cultivation, and production and distribution of sugar, with operations in Thailand, China, Australia, Laos and formerly Cambodia. (…)

195 Cambodia Center for Human Rights, *Business and Human Rights Handbook for Cambodia* (2016) https://cchrcambodia.org/admin/media/report/report/english/2016_Handbook_BHR_English.pdf.

196 Inclusive Development International, *Case Brief: Class Action Lawsuit by Cambodian Villagers Against Mitr Phol Sugar Corporation* (2 April 2018) https://www.inclusivedevelopment.net/wp-content/uploads/2018/03/Mitr-Phol-Class-Action-Case-Brief.pdf.

II. The facts

In January 2008, the Cambodian Ministry of Agriculture, Forestry and Fisheries (MAFF) granted three 70-year economic land concessions (ELCs) for industrial sugarcane production in the Samrong and Chongkal districts of Oddar Meanchey province to the three companies linked to Mitr Pohl.

The three concessions together totaled 19,736 hectares (123,350 rai) and were more or less adjoined. Cambodian Land Law Article 59 says that "Land concession areas shall not be more than 10,000 hectares" and that "the issuance of land concession titles on several places relating to surface areas that are greater than [10,000 hectaress] in favor of one specific person or several legal entities controlled by the same natural persons is prohibited." (…)

According to a letter issued in 2007 by provincial authorities, 31 villages occupying an area of 4,500 hectares in three communes were located within the boundaries of the concessions that were proposed at that time. In May 2007, the proposed land concessions were demarcated and villagers were warned to stop using the land that overlapped with the concessions. In April 2008, land clearance activities began.

Throughout 2008-2009, the plaintiffs and group members were forced to give up their land for the Angkor Sugar Company concession. Affected households lost extensive rice fields, plantation/orchard land, and grazing land as well as the associated crops that sustained their livelihoods. Crops including rice, watermelon, fruit, vegetables, maize, cassava, sweet potatoes and soybean were lost. Most affected households lost five hectares of rice fields on average. Annual market-related losses from rice crops averaged about $1,000 per family. Compensation provided for these losses was generally a plot of inferior land that was much smaller than what they lost and often already owned by others.

Common property resources, including community-managed forests, were also lost or degraded as a result of Mitr Phol's plantation development. The Angkor Sugar concession effectively reduced the size of the pending Ratanak Rukha / Rattanak Sambak Community Forest from 28,772 to 12,872 hectares, affecting the livelihoods of thousands of people in 16 villages. Extensive illegal logging of old growth, high-value timber took place within the concession.

The gravest human rights violations occurred in O'Bat Moan village, which was entirely destroyed to make way for the defendant's plantation. In April 2008, 154 homes in the village were forcibly demolished by company staff under the guidance of local authorities. Further evictions occurred in October 2009, when around 100 homes were burned to the ground by approximately 150 police, military police and hired demolition workers. Most affected families lost all of their possessions during the evictions and were left landless and homeless. Even their rice crops, which they were about to harvest, were reportedly looted by company staff and security forces, leaving them without essential food and income in the immediate aftermath of the evictions. These forced evictions were preceded by arrests and an assault on the former village chief. Two community leaders were sentenced to two years in jail on charges of 'clearing State forest,' while two others were released after serving over six months in pre-trial detention. One was pregnant at the time and gave birth during her eight months of imprisonment.

Only 14 families from O'Bat Moan village received compensation in the form of a one-hectare plot of forested land in a remote area. The shelters that these families rebuilt there are rudimentary and do not provide sufficient protection against the elements. They lack access to sanitation and drinking water. Transportation is difficult to arrange, time consuming, and costly due to the remote location and poor conditions of the access road. Thus, access to health care, education and the outside community is severely limited. The closest school, for example, is 10 kilometers away. Many affected people resorted to illegal migration to Thailand after they lost their land to the sugar concessions.

The affected communities submitted multiple complaints and requests for intervention to the local and national authorities between 2007 and 2009. In response, community representatives were met with intimidation, harassment and arrest.

In 2010, after learning of Mitr Phol's ownership of these concessions, Cambodian NGOs Bridges Across Borders Cambodia and LICADHO wrote to the company's directors detailing the evidence of human rights abuses and violations of Cambodian law. No response was received.

In early 2011, the organizations submitted a complaint together with extensive documentation of abuses to the Better Sugarcane Initiative (now Bonsucro), of which Mitr Phol was a member. Rather than address the complaint, Mitr Phol withdrew its membership from Bonsucro.

On July 24, 2012, following the publication of an NGO report that exposed the abuses, the defendant issued a response to the Business and Human Rights Resource Centre that implied that the company should bear no responsibility for any human rights abuses or violations of Cambodian law that may have occurred in relation to its concessions because it relied entirely on Cambodian government assurances of propriety.

In May 2013, Cambodian NGOs Equitable Cambodia and LICADHO submitted a complaint on behalf of 602 affected families to the National Human Rights Commission of Thailand.

Following an investigation by the Thailand Human Rights Commission between 2013 and 2015, the defendant submitted a request to the Cambodian government to cancel its economic concessions in Cambodia. All three concession agreements were cancelled on August 9, 2015. It appears that the defendant closed Angkor Sugar as a company that year as well.

On March 28, 2018, a group of Cambodians who were forcibly displaced and dispossessed to make way for a sugarcane plantation owned and operated by Mitr Phol Sugar Corporation filed a class action lawsuit against the company in the Civil Courts of Bangkok, Thailand, where Mitr Phol is domiciled.

Amnesty International, Cambodian Villagers Sue Mitr Phol to Thai Court[197]

On 17 July 2020, Amnesty International submitted a third-party intervention (amicus curiae brief) to the Bangkok South Civil Court in the case of Smit Tit, Hoy Mai & Others vs. Mitr Phol Co. Ltd.1 The submission was made ahead of a crucial ruling in the landmark business and human rights case set to be announced tomorrow, 31 July.

This case is significant from a regional business and human rights perspective as it could set an important precedent by enabling cross-border accountability for human rights abuses involving corporate actors in Southeast Asia. The submission by Amnesty International seeks to assist the court by setting out relevant international legal principles and standards, including Thailand's obligations in relation to the right to remedy, access to justice, and non-discrimination in the context of transnational corporate abuses of human rights. (…)

The National Human Rights Commission of Thailand has previously investigated the land dispute at the heart of this case and found in 2015 that "[l]and management under the concessions granted to Mitr Phol Sugar Company Limited caused adverse effects and human rights violations to Cambodian people [including] forced eviction away from the villages that they had been living for a long time". The investigation also concluded that "it is Mitr Phol Company Limited's direct responsibility because the company has business [which] benefit from the concession of the land" and recommended that "Mitr Phol Sugar Company Limited should provide remedies and compensations for the damage in Bos Village, O'Bat Moan Village, Taman Village, Trapaing Veng Village and Ktum Village in Oddar Meanchey Province, the Northeastern part of Cambodia".

Tomorrow, the Bangkok South Civil Court will issue its decision in an appeal by the claimants against the first instance court's denial of class action status – a decision which constrained access to justice for the majority of the evicted Cambodian villagers. Should the appeal succeed, the Bangkok South Civil Court will hear the case on its merits as a Class Action Lawsuit (CAL).

197 Amnesty International, *Thailand: Eviction Cambodian Villagers Sue Sugar Giant Mitr Phol; Amnesty International Submits Third Party Intervention to Thai Court* (30 July 2020) https://media.business-humanrights.org/media/documents/files/documents/Public_Statement_AI.pdf.

In respect of communal claims to secure justice for forced evictions, the UN Special Rapporteur on Adequate Housing has stated: "Access to justice must … extend to both individuals and groups. Support should be available for them to participate in all stages of rights claims and in the implementation of remedies." (…)

Amnesty International, Submission in Mitr Phol Case[198]

The Right to an Effective Remedy in the Context of Class Actions

20. In the Kingdom of Thailand, class actions are enabled under a 2015 amendment to the Code of Civil Procedure (CCP). Article 222/12 of the CCP states, inter alia:

"(T)he court may allow the class action lawsuit… if the class action lawsuit would reflect more justice and more efficiency in comparison to the situation where the case is going through the ordinary civil case…"

21. Since the 2015 amendment to the CCP enabling class actions, a number of class action suits have been heard before the Thai courts on public interest and human rights grounds. It is understood that the present case is the first case in which a transnational class action suit has been filed before the Thai courts since the 2015 amendment. (…)

24. The denial of recognition of a class on the basis of language, national or social origin could amount to a violation of States' obligation to ensure access to justice in addition to a failure to ensure non-discrimination and equality before the law. (…)

25. There is no prohibition on transnational class actions or the recognition of classes of non-nationals under the CCP. Furthermore, Thailand's binding international human rights obligations require that all applicants before the courts be treated equally and without discrimination, including on the basis of nationality, race, language, or social origin. Non-discrimination and equality are overreaching principles of international human rights law and essential to the enjoyment of all human rights. (…)

CCHR, Asia's First Transboundary Class Action on Human Rights Abuses[199]

"Today's win marks a huge step forward for the plaintiffs and all the people affected by the evictions. The voices of those who have been harmed can now be heard. The court's decision shows that access to justice is possible, and that their decade-long fight has not been for nothing," said Eang Vuthy, Executive director of Equitable Cambodia.

For Thailand and the region, the decision changes the legal landscape, providing that class action legislation can be used in transboundary cases and to protect some of the region's most vulnerable people. "The importance of this legal precedent cannot be overstated," said Natalie Bugalski, Legal Director for Inclusive Development International. "This is a David vs Goliath case that will redefine access to justice for the victims of corporate abuse in Southeast Asia and beyond."

It is also a key test of corporate accountability. Mitr Phol is the biggest sugar supplier in the region and has counted some of the world's largest consumer brands, including Nestle, Coca-Cola, Pepsi, Mars Wrigley and Corbion, as past and current customers. While Coca-Cola took initial steps to investigate the allegations against Mitr Phol, it failed to use its leverage to compel the company to provide redress to the victims in Cambodia. Instead, in 2018, Coca-Cola informed Inclusive Development International that it no longer sourced sugar from Mitr Phol. It has never reported the termination of the supply relationship publicly.

198 Amnesty International, *Third Party Submission by Amnesty International to the South Bangkok Civil Court in the Case of Smin Tit, Hoy Mai and Others v Mitr Phol Co. Ltd.*, ASA 39/2753/2020 (2020) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjh08GusZ_rAhURCqYKHS1JAL8QFjABegQIARAB&url=https%3A%2F%2Fwww.amnesty.org%2Fdownload%2FDocuments%2FASA3927532020ENGLISH.pdf&usg=AOvVaw055jwMAKcuulCxPBIxl_99.

199 Cambodian Center for Human Rights (CCHR), *Thai Appeal Court Decision Paves the Way for Asia's First Transboundary Class Action on Human Rights Abuses* (31 July 2020) https://cchrcambodia.org/index_old.php?title=Thai-Appeal-Court-decision-paves-the-way-for-Asia-s-first-transboundary-class-action-on-human-rights-abuses&url=media/media.php&p=alert_detail.php&alid=80&id=5&lang=eng.

Mitr Pohl is also a member of the sugar industry's "sustainability" certification body Bonsucro, which is under scrutiny by the UK National Contact Point for the OECD (a government body that monitors the operations of British businesses overseas) for failing to hold Mitr Phol accountable for its abuses against these communities.

CCHR, Remedying Land-Related Rights Violations[200]

The purpose of this Briefing Note is to identify key issues pertaining to business human rights in Cambodia through the analysis of three land-related conflicts, and to propose recommendations in order to prevent and remedy related human rights violations. (…)

6.3. The remedies offered do not qualify as an effective remedy under human rights law

(…) Under human rights law, a remedy must be timely, and repair all aspects of the human rights violation. All victims must also be entitled to compensation for the loss of the properties, irrespective of whether or not they hold a property title. In particular, any financial compensation for forced evictions must cover all economically assessable damage, such as the loss of life or limb, or of livestock/land/tree/crops; physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services; administrative costs; resettlement and transportation losses. Where land has been taken, the victim should be compensated with land of the same quality, size and value, or better. In case of relocation, the State should provide safe and secure access to essential food, potable water and sanitation, basic shelter and housing, appropriate clothing, essential medical services, livelihood sources, fodder for livestock and access to common property resources previously depended upon, as well as education for children and childcare facilities.

Finding 7. Alternative and innovative dispute resolution mechanisms should be facilitated

In the two cases involving foreign companies, which are also the cases where the dispute has lasted the longest (more than 10 years), victims have used alternative processes to seek a resolution to the dispute. While those are not to substitute the recourses which should be put into place in Cambodia itself, they may constitute additional ways by which the victims can obtain a remedy for the land dispute.

7.1. Recourse to foreign courts

In the two cases involving foreign companies, communities are attempting to obtain a remedy by filing a civil suit in the courts where the companies are registered: Thailand, for Mitr Phol; and France, for Socfin-KCD. (…)

In the Socfin-KCD case, in July 2015, a civil liability lawsuit was started in France, against two major Socfin-KCD's shareholders, the Bolloré group and the "Compagnie du Cambodge" ('Company from Cambodia') owned by French tycoon Vincent Bolloré, on behalf of 51 plaintiffs from Bu Sra village. The plaintiffs allege human rights violations and environmental damage and request the restitution of their land as well as 65,000 euros as compensation for material and moral damages. On 10 February 2017, following a request by the two companies, the Tribunal required the plaintiff to submit a number of documents to establish that they have a legitimate claim to the land they accuse the companies of grabbing, including official documents establishing the "existence, nature, location, exact size and reference" of the land which is requested to be given back and official and notarized documents establishing property rights of each individual over the disputed land. The decision further scheduled a status conference on 29 May 2017. CCHR could not locate further information on

200 Cambodian Center for Human Rights (CCHR), *Briefing Note on Business and Human Rights - Preventing, Mitigating and Remedying Land-Related Rights Violations in the Kingdom of Cambodia: Seven Areas for Improvement* (December 2018) https://cchrcambodia.org/index_old.php?url=media/media.php&p=analysis_detail.php&anid=84&id=5.

the case, but when it met the communities, it was told that a hearing was scheduled for late 2018, where the victims would travel to France and be heard. CCHR was also informed that some community representatives withdrew from the complaint in order to join the mediation process. The Bolloré group denied having any control over Socfin-KCD's actions, which it alleged were under Socfin Group's Chief Executive Officer ('CEO'), Hubert Fabri. In light of the difficulty of holding companies responsible for activities of subsidiaries alone (referred to as the 'corporate veil'), the disbalance between an indigenous community with limited means and a multinational group worth billions of euros, and the fact that it will be challenging for the plaintiffs to provide the requisite documents, there is little chance of the lawsuit's success.

BHRRC, Strategic Lawsuits against Public Participation[201]

International instruments protect the rights to freedom of expression, association, and peaceful assembly. However, attacks against those who exercise these rights are pervasive and destructive. One type of attack is judicial harassment which is on the rise globally. In 2019 alone, Business & Human Rights Resource Centre recorded 294 instances of judicial harassment around the world, compared to only 86 cases when in 2015. Southeast Asia is second only to Central America in the number of cases recorded, with approximately half of these cases exhibiting elements of a SLAPP (Strategic Lawsuit Against Public Participation).

A business-linked SLAPP has these characteristics:

- It is a civil, criminal, or administrative lawsuit;
- It is filed against a human rights defender (HRD) exercising his/her freedoms of expression, association, and/or peaceful assembly to speak about and/or act on matters related to a business' operations;
- It has the intention of silencing or intimidating the HRD from further engaging in criticism, opposition, public participation, and similar activities.

In Southeast Asia (…) there are promising developments in the rulings of various courts in the region that should provide the necessary impetus for deeper legal reform against SLAPPs. Some courts have explicitly recognised the value of activists and protected their right to criticise prejudicial business operations. Other courts have extended protections to journalists and expert witnesses. Some courts upheld the right of the people to seek redress and remedy for harms caused by businesses. This Briefing Note highlights these cases as starting point for recommendations of deeper reform in policy and practice of governments, business, and civil society.

This Briefing Note recommends, among other things, the following:

- For governments to enact laws that protect human rights defenders, prohibit SLAPPs, and penalise businesses that file these types of cases.
- For businesses to adopt a strong policy of non-retaliation against HRDs and nontolerance for attacks against HRDs and instead create grievance mechanisms based on engagement and dialogue with all stakeholders.
- For civil society to continue documenting SLAPPs in order to understand the trends and develop both offensive and defensive strategies against it by expanding networks of support for HRDs to continue their work.

201 Business & Human Rights Resource Centre, *Strategic Lawsuits against Public Participation: Southeast Asia Cases & Recommendations for Governments, Businesses, & Civil Society* (2020) https://media.business-humanrights.org/media/documents/files/documents/SLAPPs_in_SEA_2020_Final_for_website.pdf.

Suing human rights attorneys, expert witnesses, and NGO workers

It is common for companies to sue protesting community residents and workers, but there are now many cases of suits against human rights attorneys, expert witnesses, and NGO workers who support the work of HRDs.

Expert witnesses have been sued in Indonesia and these cases are discussed in this Briefing Note. A Philippine lawyer and an NGO leader face libel and slander cases, after they joined a workers' protest where allegations were made that the company is a labor only contracting company in violation of Philippine law. These cases are still pending in court.

In Cambodia, the 2018 World Report on the Situation of Human Rights Defenders reported that activists working for environmental NGO, Mother Nature, were convicted for "violation of privacy" and "incitement to commit a felony" after they were caught filming two large vessels suspected of illegally carrying sand.

Questions

1. Should home states of TNCs open their courts to plaintiffs in other countries? What measures could home states take to increase access to effective remedy for victims?
2. What are the barriers that prevent a host state from enforcing its court judgements against foreign corporations that have violated human rights in its territory?
3. Why is it so difficult to sue parent companies in their home countries? What are the obstacles that victims face in their attempt to obtain justice?
4. How do NGOs support victims and improve their access to remedy?
5. Are the judicial mechanisms in Cambodia effective? If so, to what extent?

Further Readings

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7. ACCESS TO REMEDIES: NON-JUDICIAL MECHANISMS

Hing Vandanet, Radu Mares

Introduction

Access to remedies is a human right, a legal principle and a mark of good governance. When it comes to business and human rights, there is a high number of non-judicial mechanisms at international level. This corresponds to the high number of soft law instruments (chapter 2) and multistakeholder partnerships in CSR (chapter 5) and the corresponding dearth of hard law (chapters 1, 3, 4) and weak judicial mechanisms (chapter 6) to hold business accountable. The problem with these mechanisms is that they are overwhelmingly of the mediation-type, meaning they cannot reach binding decisions. Companies are able to disregard them completely and not even to participate in proceedings not to mention abiding by the recommendations issued. Sanctions can be in the form of de-listing from partnerships (e.g. Global Compact) or bad publicity (OECD system). The most well-known are the OECD mediation system and the World Bank's investigation and mediation system. The OECD system has overall had limited success with high variations between the 40 countries where such arrangements are in place; to some extent this track-record reflects the inherent limitations of a mediation mechanism. The World Bank system has delivered rigorous and critical assessment of how the World Bank Group has at times failed to follow its own policies, and the management at times ignores these findings of the Bank's own inspection body. The UNGPs emphasized the importance of the OECD system and of National Human Rights Institutions, an innovation of the human rights system since the 1990s. Furthermore the UNGPs identify criteria that help evaluating the design of a non-judicial remedial mechanism. Multistakeholder initiatives developed within specific sectors also have mediation mechanisms; the influence that member companies (international brands and retailers) have meant issues could be resolved quickly. Companies have also realized that having their own complaint-handling mechanisms is helpful in diffusing local tensions and an indicator if their due diligence systems work as intended or not (chapters 10-11). There is currently little but growing academic literature on non-judicial mechanisms for business and human rights.

Main Aspects

- ✓ Relation with judicial remedies (adjudication)
- ✓ Remedy as process (grievance mechanisms) and outcome (remediation)
- ✓ Functions of remediation (feedback to HRDD, early warning, reparations)
- ✓ Criteria to assess complaint mechanisms (KPI – key performance indicators)
- ✓ Assessing process and outcomes of complaint mechanisms
- ✓ Direct (individual) and indirect (systemic) effects of remedial mechanisms

- ✓ Issues (labour relations, non-discrimination, consumer protection, privacy, environmental protection, water, health)
- ✓ Mediation (e.g. OECD system)
- ✓ National human rights institutions
- ✓ Dispute resolution

Background

UN High Commissioner of Human Rights, An Interpretive Guide[202]

Remediation/remedy

Remediation and remedy refer to both the processes of providing remedy for an adverse human rights impact and the substantive outcomes that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Q: *What if an enterprise agrees that it has caused or contributed to an impact but does not agree with those affected on the appropriate remedy?*

A: If the enterprise and those affected cannot reach agreement on the appropriate remedy, it may prove necessary either to involve a neutral third party as a mediator or to turn to adjudication.

Any third-party mediator should be freely accepted by all involved. The mediator's role is to assist the parties in the search for an agreed solution and no party to mediation can be forced to accept a particular outcome. If they do agree on an outcome, the parties are free to agree also that it will be binding on them.

Adjudication does not require the parties' agreement to the outcome and is often binding. It could take place through the courts, a governmental or statutory body such as an ombudsman or a national human rights institution, or another mechanism that has jurisdiction or is agreed upon by the enterprise and those affected.

OHCHR, Improving Accountability through State-Based Non-Judicial Mechanisms[203]

6. State-based non-judicial mechanisms may take many different forms. In most jurisdictions, a range of mechanisms with a role to play in the handling of complaints and/or resolving disputes arising from business-related human rights abuses may be identified. Such mechanisms can be found at all levels of government: local, regional and national. While some have mandates relating to all human rights, many are specialized bodies that focus on specific human rights-related themes, such as labour rights, non-discrimination, consumer rights, the right to privacy, environmental rights, or the rights to water or to health. Common examples of relevant State-based non-judicial mechanisms include labour inspectorates; employment tribunals; consumer protection bodies (often tailored to different business sectors); environmental tribunals; privacy and data protection bodies; State ombudsman services; public health and safety bodies; professional standards bodies; and national human rights institutions.

202 UN Office of the High Commissioner of Human rights, The Corporate Responsibility *To Respect Human Rights - An Interpretive Guide* (2011) http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.

203 UN High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through State-Based Non-Judicial Mechanisms* (2018) http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/20.

7. In addition to the above-mentioned categories, States may innovate further to respond to specific business-related human rights risks within their jurisdictions, and in some cases have done so by establishing specialized mechanisms aimed at the protection of groups identified as being at a heightened risk of vulnerability or marginalization, such as women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities.

9. These mechanisms are also diverse in their functions and powers; for instance, some are regulatory and/or adjudicative-type mechanisms, while others provide conciliation and/or mediation services. Some have self-executing powers (for example, to compel participation, to require production of information or to enforce remedial outcomes), whereas others rely on the cooperation of the parties involved. Some have the authority to conduct investigations on their own initiative, while the procedures followed by others can only be activated by specific complaints or disputes.

10. State-based non-judicial mechanisms can be broken down into five broad categories:

    - Complaint mechanisms (1)
    - Inspectorates (2)
    - Ombudsman services (3)
    - Mediation or conciliation bodies (4)
    - Arbitration and specialized tribunals (5)

(1) Typically operated by a State-appointed, State-supported and/or State-approved body with public regulatory and enforcement responsibilities.

(2) Typically operated by a State-appointed, State-supported and/or State-approved body with public regulatory and enforcement responsibilities and a range of enforcement functions and powers, including powers of investigation and to prescribe penalties and/or remedial action. Such a mechanism may take action on its own initiative or in response to a complaint, or both. It may also have education and awareness-raising functions.

(3) Typically with a specialized mandate associated with specific interest groups, regulatory themes or commercial sectors. Such mechanisms are charged with receiving, investigating and resolving disputes between individuals and business enterprises, and frequently draw on mediation and/or conciliation techniques to do so.

(4) Similar to ombudsman services, and aimed at finding a mutually acceptable outcome rather than the apportionment of blame. Mediation and conciliation techniques are often used in the resolution of consumer, employment or environment disputes and may be the precursor to more formal processes (for example, arbitration and conciliation).

(5) Oversee dispute resolution processes that are adversarial and/or inquisitorial in nature. Such mechanisms often have a high degree of procedural formality. Some have investigative powers that can be used on their own initiative. They may have the power to make legally binding determinations.

Instruments

UN, Guiding Principles on Business and Human Rights[204]

Remediation

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Commentary

Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.

Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors. (…)

Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so. (…)

State-based non-judicial grievance mechanisms

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Non-State-based grievance mechanisms

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

Commentary

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multistakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach. (…)

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

204 *UN Guiding Principles on Business and Human Rights* (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

Commentary

Operational-level grievance mechanisms perform two key functions regarding the responsibility of business enterprises to respect human rights.

- First, they support the identification of adverse human rights impacts as a part of an enterprise's on-going human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. By analyzing trends and adapt their practices accordingly.
- Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating. (…)

Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.

Principle 31: Effectiveness criteria for non-judicial grievance mechanisms

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

OECD, Guidelines for Multinational Enterprises[205]

Implementation in Specific Instances [complaint procedure]

The National Contact Point [set up by each OECD member state] will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the *Guidelines*. [Upon receiving a compliant] the NCP will:

1. Make an initial assessment of whether the issues raised merit further examination and respond to the parties involved.
2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
    a) seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other nongovernmental organisations, and relevant experts;
    b) consult the NCP in the other country or countries concerned;
    c) seek the guidance of the Committee if it has doubt about the interpretation of the Guidelines in particular circumstances;
    d) offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues.
3. At the conclusion of the procedures and after consultation with the parties involved, make the results of the procedures publicly available, taking into account the need to protect sensitive business and other stakeholder information, by issuing:
    a) a statement when the NCP decides that the issues raised do not merit further consideration. The statement should at a minimum describe the issues raised and the reasons for the NCP's decision;
    b) a report when the parties have reached agreement on the issues raised. The report should at a minimum describe the issues raised, the procedures the NCP initiated in assisting the parties and when agreement was reached. Information on the content of the agreement will only be included insofar as the parties involved agree thereto;
    c) a statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. The NCP will make recommendations on the implementation of the Guidelines as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached.

OECD Watch, The State of Remedy under the OECD Guidelines[206]

In 2017, NCPs globally concluded 18 OECD Guidelines cases filed by NGOs or communities. (…) [Out of the 18 cases], just five generated some kind of positive outcome. In four of those five cases, the positive outcome was a determination or policy change - a positive step, but one that does not signify a tangible change of circumstances for the complainants. (…)

205 UN OECD, *Guidelines for Multinational Enterprises* (2011) http://www.oecd.org/daf/inv/mne/48004323.pdf.

206 OECD Watch, *The State of Remedy under the OECD Guidelines* (2018) www.oecdwatch.org/publications-en/Publication_4429/@@download/fullfile/The%20State%20of%20Remedy%20under%20the%20OECD%20Guidelines.pdf.

Former employees v. Heineken (Netherlands NCP)

The complaint alleged that Bralima, a subsidiary of Heineken, caused between 1999 and 2003 a massive, unfair, and unlawful retrenchment of employees in the Democratic Republic of Congo, and miscalculated and failed to pay a final settlement for some of the workers. The complaint asserted that Heineken, which closely cooperated with Bralima at that time, must have known and should have used its influence to prevent further damage to the former employees. The Dutch NCP accepted the case and the parties held mediation meetings in Uganda and Paris that led to an agreement. The NCP issued a final statement which stated that the parties wished to keep their agreement confidential. However, news reports published on the same day confirmed that Heineken had voluntarily paid over €1 million to the former employees. Heineken also agreed to develop a new policy and due diligence protocol for operating in conflict-affected areas. This result is enormously significant because it is one of the only OECD Guidelines cases ever to have achieved compensation for complainants as an outcome. (…)

Finance and Trade Watch Austria et al v. Andritz AG (Austria NCP)

The complainants alleged that poor design of the Mekong Delta Xayaburi dam in Laos would impede fish migration and sediment flow, causing extinction of species and impoverishment and malnourishment of downstream farm communities dependent upon sediment-enriched soils. The Austrian NCP accepted the case, and three years of mediation ensued. Some of the complainants left the process due to concerns over confidentiality restrictions, and others left feeling the process was not achieving a positive outcome. However, two complainants persisted. The parties reached an agreement and issued a joint statement in which Andritz committed to strengthen its internal corporate social responsibility, disclosure, and due diligence policies. Such outcomes do not immediately, and indeed may never, benefit the complainants. Without doubt, alterations to the dam design to mitigate foreseen impacts, or compensation for economic and human rights harms, would have been a stronger outcome. Nevertheless, policy changes do have the potential to help companies avoid repeating mistakes and prevent additional harm in the future

Sherpa et al v. Socfin Group/Socapalm (France and Belgium NCPs)

The case was initially filed in 2010 with three NCPs - the French, Belgian, and Luxembourgian - concerning allegations against the oil company SOCAPALM and four of its holding companies. The complainant Sherpa argued that SOCAPALM had caused negative human rights and environmental impacts by diminishing local communities' access to natural resources and public services, polluting the water and air, and subjecting workers to precarious work and living conditions and physical abuse from security agents. The French NCP accepted the case and took the important step of issuing a determination in 2013 finding that SOCAPALM had indeed breached the Guidelines, and that all four holding companies had too, due to their business relationship with SOCAPALM, in respect of their disclosure policies. After initial foot-dragging, the French holding company Bolloré agreed to mediation and helped develop a remediation action plan that Socapalm and its Belgian parent company Socfin also accepted. However, Socfin blocked implementation of that plan, causing the French NCP to turn to the Belgian and Luxembourgian NCPs, in 2015, for help. The Belgian NCP successfully coaxed Socfin to join several mediations in 2016, but was unable to convince it to implement the action plan. Socfin did publically commit to adopt several notable changes to its responsibility and transparency policies. But in 2017 the Belgian NCP closed the case on grounds that Socfin was unwilling to adhere to the NCP's requests and implement the agreed action plan. Therefore, the attempted agreement on a remediation plan was never ultimately realized for the case.

Jamaa Resources Initiative v. US Company (USA NCP)

The complainants alleged that a US Company's subsidiary in Kenya caused loss of livelihood for local farmers and severe environmental and health impacts when it used an economically sensitive wetland for rice cultivation, an irrigation and hydropower project, a tilapia fish aquaculture farm, and other projects. The US NCP accepted the case for mediation, but the US Company refused to participate citing ongoing legal proceedings, and the US NCP closed the case. As a result, no remedy was achieved for complainants.

Scheltema and Kwant, Alternative Approaches to Strengthen the NCP Function[207]

The National Contact Point (NCP) intervention has brought about many positive impacts such as agreements between parties (in one specific instance including payment of compensation and in other specific instances other forms of direct remedy), changes in management practices, clarification of the OECD Guidelines for Multinational Enterprises (Guidelines) and a catalyst for the use of leverage by the company involved.

That said, the NCP function also faces some challenges. These are, amongst others, significant variations in the practice of NCPs in applying the guidance for specific instances, accessibility and overly stringent interpretation of criteria "material and substantiated" resulting in a high rate of non-acceptance of specific instances for further examination, overly restrictive definitions (such as the term "multinational enterprises", "adverse impact", "business relationship"), costs for parties to participate in mediation, good faith behaviour of the parties to the specific instance, parallel proceedings, delays, insufficient use of recommendations or determinations in final statements, and lack of clear or equitable procedures. Furthermore balancing confidentiality and transparency, cooperation between NCPs, and resource constraints are identified.

ILO Committee on Freedom of Association, Compilation of Decisions[208]

(…) there are three bodies which are competent to hear complaints alleging infringements of trade union rights that are lodged with the ILO, viz. the Committee on Freedom of Association set up by the Governing Body, the Governing Body itself, and the Fact-Finding and Conciliation Commission on Freedom of Association. (…)

[The CFA] does not level charges at, or condemn, governments. (…) The mandate of the Committee consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions.(…) The Committee always takes account of national circumstances, such as the history of labour relations and the social and economic context, but the freedom of association principles apply uniformly and consistently among countries.

In cases where the governments implicated are obviously unwilling to cooperate, the Committee may recommend, as an exceptional measure, that wider publicity be given to the allegations, to the recommendations of the Governing Body and to the negative attitude of the governments concerned.

1. The Committee on Freedom of Association (CFA) is a tripartite body set up in 1951 by the Governing Body (GB) of the International Labour Organization (ILO). The CFA examines alleged infringements of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the Constitution of the International Labour Organization (Preamble), in the Declaration of Philadelphia and as expressed by 1970 ILC Resolution. (…) By membership of the International Labour Organization, each member State is bound to respect a certain number of principles, including the principles of freedom of association which have become customary rules above the Conventions [thus even if the state has not ratified the freedom of association ILO Conventions 87 and 98].

3. The conclusions issued by the CFA in specific cases are intended to guide the governments and national authorities for discussion and the action to be taken to follow-up on its recommendations (…). The object of the CFA complaint procedure is not to blame or punish anyone, but rather to engage in a constructive tripartite dialogue to promote respect for trade union rights in law and practice. When doing so, the CFA is cognizant of different national realities and legal systems.

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207 Martijn Scheltema and Constance Kwant, 'Alternative Approaches to Strengthen the NCP Function', in H. Mulder et al (eds), *OECD Guidelines for Multinational Enterprises: A Glass Half Full,* OECD (2018) http://www.oecd.org/investment/mne/OECD-Guidelines-for-MNEs-A-Glass-Half-Full.pdf (references omitted).

208 ILO Committee on Freedom of Association, *Freedom of Association - Compilation of Decisions* (2018) www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang--en/index.htm.

7. The conclusions and recommendations of the CFA [3,200 cases over 65 years by year 2016] have been developed on the basis of complaints made by organizations of workers or of employers.(…) The CFA's decisions drawn from previous conclusions compiled herein can also apply, mutatis mutandis, to organizations of employers. (…)

UN Committee on Economic, Social and Cultural Rights, General Comment No. 24[209]

39. States parties must provide appropriate means of redress to aggrieved individuals or groups and ensure corporate accountability. This should preferably take the form of ensuring access to independent and impartial judicial bodies: the Committee has underlined that "other means [of ensuring accountability] used could be rendered ineffective if they are not reinforced or complemented by judicial remedies".

Non-judicial remedies

53. While they generally should not be seen as a substitute for judicial mechanisms (which often remain indispensable for effective protection against certain violations of Covenant rights), non-judicial remedies may contribute to providing effective remedy to victims whose Covenant rights have been violated by business actors and ensuring accountability for such violations. These alternative mechanisms should be adequately coordinated with available judicial mechanisms, both in relation to the sanction and to the compensation for victims.

54. States parties should make use of a wide range of administrative and quasi-judicial mechanisms, many of which already regulate and adjudicate aspects of business activity in many States parties, such as labour inspectorates and tribunals, consumer and environmental protection agencies and financial supervision authorities. States parties should explore options for extending the mandate of these bodies or creating new ones, with the capacity to receive and resolve complaints of alleged corporate abuse of certain Covenant rights, to investigate allegations, to impose sanctions and to provide for and enforce reparations for the victims. National human rights institutions should be encouraged to establish appropriate structures within their organizations in order to monitor States' obligations with regard to business and human rights, and they could be empowered to receive claims from victims of corporate conduct.

UN, Paris Principles on National Human Rights Institutions[210]

1. A national institution shall be vested with competence to promote and protect human rights. (…)

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

209 Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* (2017) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en.

210 UN, *Principles relating to the Status of National Institutions (The Paris Principles)*, A/RES/48/134 (1993) www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx.

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

Danish Institute, Guidebook for National Human Rights Institutions[211]

Kenya National Commission on Human Rights

The Kenyan National Commission on Human Rights has used its formal powers of investigation to address alleged human rights abuses relating to a range of business sectors. For example, in 2005, the Commission undertook a public inquiry into alleged human rights abuses by salt mining companies in collusion with public authorities, in the Magarini, Malindi district. The Inquiry resulted in the publication of a special report, 'Economic interests versus social justice: Public inquiry into salt manufacturing in Magarini, Malindi District' (2006), presented to the President and National Assembly. In 2012 the Commission held follow-up meetings with local communities to identify whether the recommendations made in the Report had been implemented. Subsequently, in 2013 the Commission exercised its powers to litigate in the public interest, and filed a case against the companies in question in relation to violations of land rights and the right to a clean environment.

Human Rights Commission of Sierra Leone

The Human Rights Commission of Sierra Leone has undertaken a number of initiatives on business and human rights, including a formal investigation into mining-related human rights abuses in the Bumbuna, Tonkolili District in 2012. The investigation by the Commission consisted of a document review, oral and written statements from affected individuals and expert opinions, as well as focus group meetings and a public hearing. (…)

Prompted by the incidents leading to this investigation, as well as other reports to the Commission of business-related human rights abuses, the Commission decided to develop a Monitoring Tool, that can be used in future investigations and dialogues with companies, as well as other actors, to assess company conduct against human rights standards. Development of the Monitoring Tool has involved dialogue with government, business and civil society representatives. The finalised Monitoring Tool will include specific questions and indicators outlining the human rights laws and standards relevant to a number of business-unit functions, including human resources, environment and communities, security, government relations and procurement.

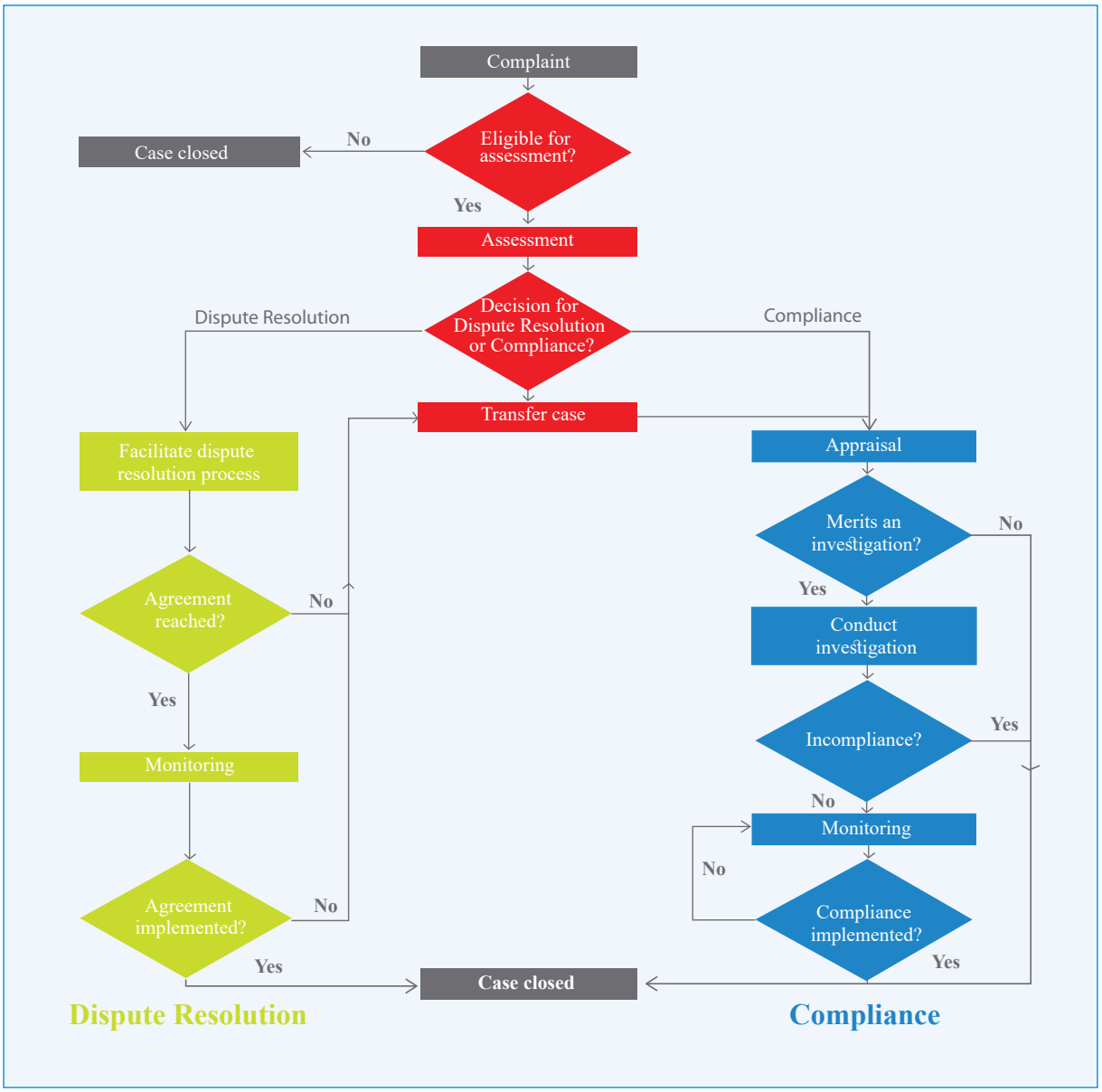
IFC, Compliance Advisor Ombudsman

The Office of the Compliance Advisor Ombudsman (CAO) was created in 1999 by the World Bank Group as the independent recourse and accountability mechanism of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) for environmental and social concerns. CAO is an independent office that reports directly to the President of the World Bank Group (the President).

211 International Coordinating Committee of National Human Rights Institutions (ICC) and Danish Institute for Human Rights, *Business And Human Rights - A Guidebook For National Human Rights Institutions* (2013) www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/bhr_guidebook_for_nhris_2013_eng.pdf.

CAO has three complementary roles:

The Complaints Process



Dispute Resolution

Approaches to dispute resolution

CAO and the relevant stakeholders may use a number of different approaches in attempting to find resolution of the issues. Each approach will be chosen in consultation with the parties, and may include:

Facilitation and information sharing: In many cases, the complaint will raise questions of fact regarding current or anticipated impacts of a project. The CAO Dispute Resolution team may be able to help complainants obtain information or clarifications that result in resolution from the perspective of complainants.

Joint fact-finding: Joint fact-finding is an approach that encourages the parties to jointly agree on the issues to be examined; the methods, resources, and people that will be used to conduct the examination; and the way that information generated from the process will be used by the parties.

Dialogue and negotiation: Where communication among parties has been limited or disrupted, the CAO Dispute Resolution team may encourage the parties to engage directly in dialogue and negotiation to address and resolve the issues raised in the complaint. The CAO Dispute Resolution team may offer training and/or expertise to assist the parties in this process.

Mediation and conciliation: Mediation involves the intervention by a neutral third party in a dispute or negotiation with the purpose of assisting the parties in voluntarily reaching their own mutually satisfying agreement. In conciliation, the third-party neutral may make recommendations to the participants in the conciliation process.

Compliance

The focus of CAO Compliance is on IFC and MIGA, not their client. (…) CAO assesses how IFC/MIGA assured itself/themselves of the performance of its business activity or advice, as well as whether the outcomes of the business activity or advice are consistent with the intent of the relevant policy provisions. In many cases, however, in assessing the performance of the project and IFC's/MIGA's implementation of measures to meet the relevant requirements, it will be necessary for CAO to review the actions of the client and verify outcomes in the field.

When conducting compliance appraisals and investigations, CAO will consider how IFC/MIGA assured itself/themselves of compliance with national law, along with other compliance investigation criteria. CAO Compliance role follows a two-step approach. The first step is a compliance appraisal. The second is a compliance investigation. (…)

The Investigation Report will be prepared by CAO Compliance team with the use of information gathered by expert panel members, as needed. The report will typically include:

- A brief description of the project.
- A description of the underlying issues that gave rise to the investigation.
- The objectives and scope of the investigation.
- The criteria against which the investigation was conducted.
- The findings of the investigation with respect to noncompliance and any adverse environmental and/or social outcomes, including the extent to which these are verifiable.

IFC, Wilmar Cases[212]

This compliance investigation relates to IFC investments in Delta Wilmar in Ukraine ("DW" or "the client"). IFC approved two loans to Delta Wilmar: one of $17.5 million in 2006 to establish a greenfield palm oil refinery in Ukraine; and a second of $45 million to expand the Ukraine refinery in 2008. DW is a joint venture, co-owned by the Wilmar Group, a large agribusiness conglomerate specializing in the production and trade of palm oil and operating in Asia, Eastern Europe, and Africa.

The Wilmar-03 complaint raises concerns about the environmental and social ("E&S") impacts of DW's supply chains in Indonesia with a focus on land issues. The complaint raises specific concerns regarding PT Asiatic Persada ("PT AP"), a company that operated an oil palm plantation in Jambi (Sumatra), and was, until 2013, owned by Wilmar International ("Wilmar" or "the parent company").

CAO Complaints Regarding Wilmar

CAO Case	Wilmar-01/ West Kalimantan	Wilmar-02/ Sumatra	Wilmar-03/ Jambi
Date of Complaint	7/18/2007	12/19/2008	11/9/2011
Concerns	- Illegal use of fire to clear lands. - Clearance of primary forests. - Clearance of areas of high conservation value. - Take over of indigenous peoples' customary lands without due process. - Failure to carry out free, prior and informed consultations with indigenous peoples leading to broad community support. - Failure to negotiate with communities or abide by negotiated agreements. - Failure to establish agreed areas of smallholdings. - Social conflicts triggering repressive actions by companies and security forces. - Failure to carry out or wait for approval of legally required environmental impact assessments. - Clearance of tropical peat and forests without legally required permits.	Similar to Wilmar-1, with additional mention of land conflict between communities and a number of Wilmar subsidiaries as the result of non-compliance with PS5.	- Social conflicts triggering repressive actions by companies and security forces. - Imposing a settlement on the communities that is viewed both contrary to IFC Performance Standards and with the use of coercive measures. - Serious human rights abuses and forced evictions of local community members by PT AP staff and PT AP contracted Mobile Police Brigade (BRIMOB). - Clearance and planting of estates without paying compensation for lands and other properties so taken. - Land acquisition and dispute resolution problems in Wilmar's other subsidiaries.

212 IFC Compliance Advisor Ombudsman, *Compliance Investigation: IFC Investment in Delta-Wilmar – Complaint No. 3* (2016) www.cao-ombudsman.org/cases/document-links/documents/CAOFinalComplianceInvestigationReportWilmar3-ENG.pdf.

6. Conclusion

Conclusions are presented as answers to the questions formulated in the Terms of Reference for this compliance investigation.

Question 1: Did IFC adequately assure itself that the environmental and social CODs [conditions of disbursement] of its loans to DW were in fact met prior to disbursement in January 2010?

IFC did not assure itself that the E&S [environmental and social] CODs were met prior to the 2010 disbursement of its loans to the client. IFC did not ensure that a supply chain risk analysis as required by PS1 [IFC Performance Standard 1] was conducted prior to disbursement, and instead sought to address supply chain issues with the parent company on a voluntary basis. This decision was inconsistent with IFC's E&S policies. (…)

Question 3: Did IFC adequately assure itself that DW conducted a supply chain analysis in accordance with the requirements of Performance Standard 1?

IFC did not require DW to conduct a supply chain analysis, despite the advances made at a strategic level on supply chain issues, and despite specific information about Wilmar's Indonesia supply chain risks which emerged from: (a) the Consultant Review of the parent company's Indonesia plantations; and (b) the Wilmar-03 complaint to CAO. (…)

Question 6: Did IFC respond adequately to the issues raised by the Wilmar-03 complaint in the context of DW's E&S obligations to IFC?

The IFC project team responsible for day-to-day supervision of the DW loans were not familiar with the issues raised by the Wilmar-03 complaint and did not respond to assist their client to address the issues raised.

5.4. Underlying Causes of Non-Compliance

CAO's Terms of Reference for this compliance investigation provide that its scope should include "developing an understanding of the immediate and underlying causes for any noncompliance identified by the CAO." As outlined above, CAO finds that IFC did not correctly apply the supply chain requirements of PS1 to its supervision of the DW loans. (…) Five interrelated causes for this non-compliance are identified:

1. Persistent belief that the agreements governing the investments did not require DW to take any action to address supply chain issues: IFC did not engage the client to undertake a supply chain analysis as required by PS1. (...) The project team's interpretation of PS1 suggested that a lack of control and influence over a supply chain would excuse the client from the requirement to analyze or mitigate its supply chain risks. (…)

2. Preference for addressing the Indonesia palm oil supply chain issues with the parent company on a voluntary basis and outside of the E&S requirements of the DW loans: (…). IFC staff with direct knowledge of the project explained to CAO that there were concerns that a more compliance based approach could be counter-productive. Rather, management sought to maintain a good relationship with the parent company, as a potentially important partner for IFC's future engagement in the sector. (…)

4. Insufficient understanding of palm oil supply chain issues in general, and of Wilmar's supply chain in particular: (…) CAO also notes that IFC continued to rely significantly on the parent company's membership of RSPO [Round Table on Sustainable Palm Oil], and its participation in the RSPO certification process as a supply chain risk management measure. CAO notes IFC's view that Wilmar International's engagement with the RSPO provided considerable comfort that it was working to improve the E&S performance of its Indonesia plantations. (…) Although undertaking RSPO certification of Wilmar plantations could have contributed to risk reduction, it should not have been seen as a substitute for the supply chain analysis and risk management measures required by PS1.

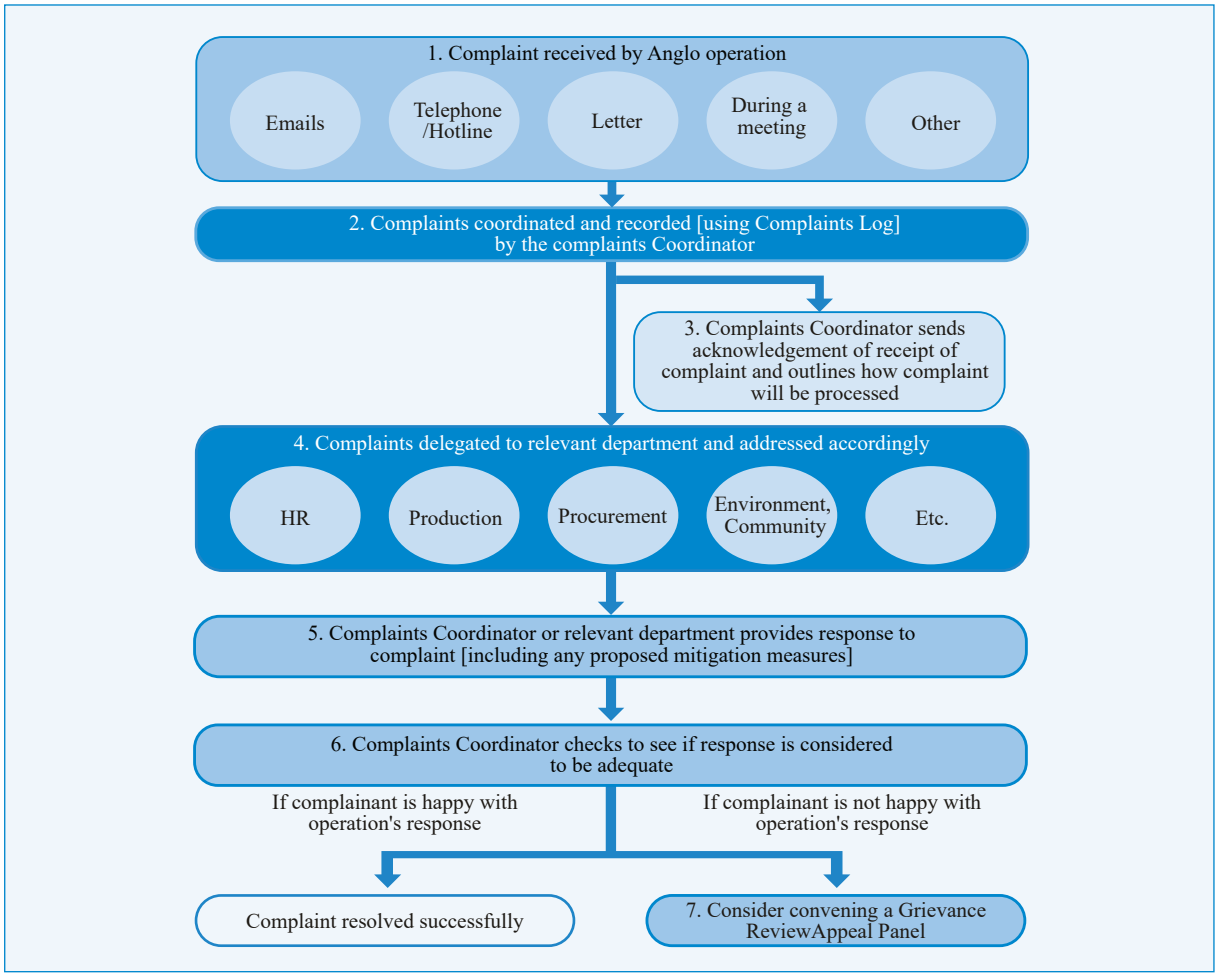
FLA, Third Party Complaint Process[213]

FLA's Third Party Complaint procedure was established as a means for any person, group or organization to report serious violations of workers' rights in facilities used by any company that has committed to FLA labor standards. (…) This process is an added precaution and is not intended to replace or undermine existing internal grievance channels in factories, or legal remedies available at the country level. Rather, the complaint procedure is intended as a tool of last resort when other channels have failed to protect workers' rights. (…)

When a complaint is lodged, FLA first verifies whether the factory in question produces for any participating companies or university licensees, and whether the complaint contains specific and verifiable allegations of noncompliance with FLA's Workplace Code of Conduct. FLA also considers whether local dispute resolution mechanisms were used to resolve the issues and what results they achieved. If the complaint meets the above criteria, FLA accepts the complaint for review and contacts participating companies sourcing from the factory in question. The FLA-affiliated company has 45 days to conduct an assessment and develop a remediation plan. If warranted, the FLA may intervene by engaging a third party to investigate the allegations and recommend corrective action to the affiliated company. The company is then required to develop a plan to address any noncompliance issues.

ICMM, Handling and Resolving Local Level Grievances[214]

Example of a complaints procedure illustrated in Anglo American's tool



213 Fair Labor Association, *Third Party Complaint Process* www.fairlabor.org/third-party-complaint-process.

214 ICMM, Human *Rights in the Mining & Metals Industry, Handling and Resolving Local Level Concerns & Grievances* (2009) www.icmm.com/website/publications/pdfs/social-and-economic-development/691.pdf

Zagelmeyer, Non-State Based Non-Judicial Grievance Mechanisms[215]

In his reflection on the research around the UNGPs, Ruggie explicitly states that the "most underdeveloped component of remedial systems in the business and human rights domain is grievance mechanisms at company's operational level." While the statement referred to the practical and factor phenomenon of NSBGM, it holds also true with respect to a relative lack of treatment in the theoretical, conceptual, analytical and empirical academic literature. (…)

We undertook a comprehensive and systematic review of the available literature, drawing on university libraries, academic journal archives, the internet and the grey literature of the 'owners' of grievance mechanisms, such as NGOs, trade unions, and companies. (…)

Although there is a substantial amount of case-based literature available on the different types of NSBGM, there is a dearth of information on processes, outcomes and the performance of grievance mechanisms. Especially companies appear to shield off requests for information by referring to the necessity to treat this information as confidential or to non-disclosure agreements. Some companies publish selective information online, while other organisations, for example the international development finance institutions, make their case registers available online. (…)

After an initial literature review, it was decided to divide the description and analysis of NSBGM according to the following four categories:

1) company and corporate level grievance mechanisms (CCGMs) (…);

2) grievance mechanisms of international development finance institutions (IDFIs);

3) grievance mechanisms related to international framework agreements (IFAs) concluded by multinational companies and trade unions;

4) multi-actor initiatives.

Table 1 below shows the criteria we developed as we analysed the NSBGM based on desk research (…):

1. *General information,* including the history of and the background to establishing the grievance mechanism;

2. *Design features of the grievance mechanism*, including information on the initiative to establish and ownership of the grievance mechanism and accessibility by design;

3. *Coverage,* with respect to the characteristics of the duty bearer and the rights holders as well as the covered human rights issues, temporal issues and whether cross-border cases could be covered potentially;

4. *Processes*, including filing a grievance, retrieving and processing information, and the respective decision-making processes;

5. *Outcomes,* which include the type and character of remedy, the transformative, learning related character for management, enforceability and transparency;

215 Stefan Zagelmeyer et al., *Non-State Based Non-Judicial Grievance Mechanisms (NSBGM): An Exploratory Analysis* (2018) www.ohchr.org/Documents/Issues/Business/ARP/ManchesterStudy.pdf.

6. *Evaluation*, which includes the relevance and impact of the grievance mechanisms for victims; the usefulness as determined by internal performance indicators to the owners of the mechanism; and an evaluation of the usefulness of the mechanism as part of providing access to remedy more generally;

7. *Linkages to other grievance mechanisms*

Issues where clarification appears to be needed: (...)

KPIs needed: Related to this question of framing NSBGM, key performance indicators (KPIs) are still needed to assess whether NSBGM are fulfilling their intended role as described under the UNGPs, which incorporates also the perspective of those seeking access to remedy. Currently there are no authoritative or widely used KPIs that help determine the effectiveness of an offered NSBGM. Building understanding and then consensus around what these KPIs should be would facilitate 1) companies in understanding what is working and what is not; 2) public institutions and civil actors in monitoring and valuing the performance of companies. For example, could the number of cases as measured over a period of years be an indicator, in part, as to the GM's effectiveness?

The UNGPs envision that NSBGMs, while providing companies with the feedback loop they need and early warning system, can also help fill the 'access to remedy' gaps that we find among state-based mechanisms. NSBGMs can be flexible with how they formulate remedy - more akin to what international human rights standards would recognise as remedy, and they can work across borders seamlessly. (…)

Miller-Dawkins, Beyond Effectiveness Criteria[216]

[The effects of non-judicial mechanisms (NJM)] are grouped into two broad categories: (i) 'individual remedy' (predominantly through problem-solving and mediated settlement), and (ii) 'other' (incorporating normative and systemic effects).]

Individual remedy

Individual remedy is understood as redress for specific individuals in a particular case in response to a human rights violation. (…)

Other effects

Beyond the results of formal mediations or settlements, the relationships formed between stakeholders, evidence gained, public exposure of practices, and experience gained in a non-judicial redress mechanism process can contribute to other kinds of positive effects. This includes empowering communities or worker's groups; influencing other decision-makers to precipitate a change in policy; drawing public attention to a problem; and shifting power dynamics between companies and communities or workers. Engaging with non-judicial redress mechanisms can also have negative effects. This includes reinforcing existing power dynamics and further disenfranchising workers or communities; entrenching existing business positions and practices (e.g., allowing a project to go ahead) which can lead to perverse responses (e.g. withdrawal of orders rather than helping a supplier fix a problem); and taking significant resources and time away from other organising strategies. (…)

The long term effects of engaging with non-judicial redress mechanisms can be subtle. It includes empowering communities and shifting the power dynamics (even slightly) which can contribute to different outcomes regardless of more short term access to redress. However, these kinds of effects are, by their nature, uncertain and rely heavily on arduous work by communities and their allies. These kinds of shifts in power were more visible in our case studies in the garments industry where workers are progressively empowered over time, especially through the long-term foundation of union and worker organising. In tea plantations and stone quarries, we did not find the same effects on the longer-term power of the workers from engaging with a NJM. (…)

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216 May Miller-Dawkins et al., *Beyond Effectiveness Criteria: The possibilities and limits of transnational non-judicial redress mechanisms* (2016) http://corporateaccountabilityresearch.net/njm-report-i-beyond-the-uns-effectiveness-criteria.

Background (Cambodia)

ASEAN, Overview of Cambodian Alternative Dispute Resolution System[217]

The solution of conflict outside the judicial system, which is known as an Alternative Dispute Resolution (ADR) is not new in Cambodia. Cambodian people have long been solving their disputes outside the Court. In principle, and according to current practice, dispute resolution outside the Court in Cambodia is conducted based on the following methods:

Negotiation is the most common form of ADR in Cambodia that parties use to resolve disputes directly without assistance of a third party through compromise. Negotiation is allowed under Cambodian Law, for example, Article 20 of the (…) Cambodian Investment Law when investment disputes happen.

Conciliation or mediation is part of Cambodian Culture and Legal system. Conciliation is traditionally conducted by the third party, namely a monk, an Achar (knowledgeable expert) or a (prominent) person the parties trust, and a King and formally it is conducted by a public officer appointed by the Government and the Judge. In practice, a settlement of disputes through the conciliation is conducted in daily life and people never think of criminal or civil cases. If it is not severe enough harm their interests they prefer compromise instead of bringing cases to the authorities or the Courts. According to the Cambodian legal framework, conciliation is permitted and found in various laws (...)

There are two arbitration which are labor arbitration and commercial arbitration:

Labor Arbitration is regulated under Chapter 12 of Labor Law and Prakas of the Ministry in charge of Labor – see Cambodian Labor Law, Art 309 (1997), and Prakas 099 on Arbitration Council dated 21 April 2004. Cambodian labor arbitration body is known as the Arbitration Council is a tripartite system composed of arbitrators from three lists, the employer's list, the employee's list and the government's list or neutral list. The Arbitration Council has handled 2684 cases from 2003-2017 (July) according to the statistics recorded by the Secretariat of Arbitration Council. The Labor Arbitration is compulsory but the arbitral award in non-binding. The binding award can happen only when parties agree to choose binding or when there is no opposition of the arbitral award after eight days (12). The enforcement of binding arbitral award is made via the Compulsory Execution under the Code of Civil Procedures (...)

CCHR, Cambodia: An Overview of the Land Situation[218]

No end in sight: no dispute resolution mechanisms: There are five conflict resolution mechanisms in existence in Cambodia: the Commune Councils, the Administrative Committees, the Cadastral Commission, the National Authority for Land Conflict Resolution, and the judiciary. The Administrative Committees operate when there is a dispute arising during the land registration process but has no power to make binding decisions. If the Administrative Committee does not manage to settle the dispute, the conflict goes to the Cadastral Commission, which can only hear disputes related to unregistered land. In those cases, if a land dispute arises, it has to go first through the District Cadastral Commission, then the Provincial Cadastral Commission and finally the National Cadastral Commission as a last resort. In case of dissatisfaction with the decision of the National Cadastral Commission, an appeal must be lodged within the court system. Disputes related to registered land must be heard by the judiciary directly. Finally, in 2006, the National Authority on Land Dispute Resolution was established by a Royal Decree. Unfortunately, its role, mandate, and functioning remain unclear and very little information about proceedings are available to the public.

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217 Council of ASEAN Chief Justices, *ASEAN Judiciaries Portal: the Gateway to ASEAN Legal Systems*, https://cacj-ajp.org/web/cambodia/dispute-resolution-processes.

218 CCHR, *Cambodia: Land in Conflict - An Overview of the Land Situation* (2013) https://cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20%20Cambodia%20Land%20in%20Conflict%20An%20Overview%20of%20the%20Land%20Situation%20ENG.

Instruments (Cambodia)

Law on Investment[219]

Article 20

Any dispute relating to a promoted investment established in the Kingdom by a Cambodian or a foreign national concerning its rights and obligations set forth in the Law shall be settled amicably as far as possible through consultation between the parties in dispute. Should the parties failed to reach an amicable settlement within two months from the date of the first written request to enter such consultations, the dispute shall be brought by either party for:

- conciliation before the Council which shall provide its opinion or
- refer the matter to the court of the Kingdom of Cambodia, or
- refer to any international rules to settle the disputes as agreed by both parties.

Labour Law[220]

Chapter XII: Settlement of Labor Disputes

Section 1: Individual disputes

Article 300: An individual dispute is one that arises between the employer and one or more workers or apprentices individually, and relates to the interpretation or enforcement of the terms of a labor contract or apprenticeship contract, or the provisions of a collective agreement as well as regulations or laws in effect. Prior to any judicial action, an individual dispute can be referred for a preliminary conciliation, at the initiative of one of the parties, to the Labor Inspector of his province or municipality.

Article 301: On receipt of the complaint, the Labor Inspector shall inquire of both parties to elicit the subject of the dispute and then shall attempt to conciliate the parties on the basis of relevant laws, regulations, or collective agreements, or the individual labor contract. To this effect, the Labor Inspector shall set a hearing that is to take place within three weeks at the latest upon receipt of the complaint. The parties can be assisted or represented at the hearing. The results of the conciliation shall be contained in an official report written by the Labor Inspector, stating whether there was agreement or non-conciliation. The report shall be signed by the Labor Inspector and by the parties, who receive a certified copy. An agreement made before the Labor Inspector is enforceable by law. In case of non-conciliation, the interested party can file a complaint in a court of competent jurisdiction within two months, otherwise the litigation will be lapsed.

Section 2: Collective disputes (Art 302 – 317)

Article 302: A collective labor dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peacefulness.

219 Cambodia, *Law on the Investment of the Kingdom of Cambodia* (1994) https://www.wto.org/english/thewto_e/acc_e/khm_e/WTACCKHM3A3_LEG_45.pdf.
220 Cambodia, Labour Law (1997) http://www.ilo.org/dyn/travail/docs/701/labour.

Prakas on Arbitration Council[221]

Clause 24 The arbitration panel has the power to obtain information on the economic situation of the enterprises and the social situation of the employees involved in the dispute. It may conduct any inquiry with respect to enterprises or professional organisations and require the parties to present any document or economic, accounting, statistical, financial or administrative information that might be useful for the accomplishment of its mission. The arbitration panel may also solicit the assistance of experts.

Chapter 5: Arbitral Award

Clause 40 Each of the parties may lodge an opposition to the arbitral award by informing the Minister of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation by registered letter or any other reliable means, within eight calendar days of notification. If the last day of this period is not a working day for civil government officials then the period shall be extended to include the next working day. If either party to a dispute lodges such an opposition within the specified timeframe, the award shall be unenforceable. In this case, if the dispute is about a right relating to the application of a rule of law (for example, a provision of the Labour Law, of a collective bargaining agreement, or an arbitral award that takes the place of the collective bargaining agreement) the disputant party may bring the case before the court of competent jurisdiction for final resolution.

Clause 47 (Enforcement of the Award) A party can only avoid the recognition and enforcement of a final and binding award if that party provides to the court proof that the award of the Arbitration Council was unjust on the grounds that:

A. that party was not properly involved in the selection of arbitrators or was not given proper notice of the arbitral proceedings or was unfairly prevented from making a full presentation of his case;

B. there was non-compliance with procedures indicated in the Labour Law or this Prakas in connection with the making of the award; or

C. the Arbitration Council rendered an award which went beyond the power given to it by the Labour Law and this Prakas.

Law on Management and Administration[222]

Section 6: Solution of Local Conflicts

Article 89: The council shall take appropriate actions to solve local conflicts within its jurisdiction.

Article 90: Local conflict is a private conflict between citizens in the jurisdiction of the same or different councils.

Article 91: Solution to conflict shall be based on written complaints of both or any parties to the conflict submitted to the council, where the party or parties permanently reside(s) in the jurisdiction of that council.

Article 92: The council shall mediate to solve local conflict to reach a solution that is acceptable by all parties to the conflict.

In event that any party to the conflict does not accept the proposed solution, the council shall advise the party on legal procedures for continuing to solve the conflict.

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221 Cambodia, *Prakas on the Arbitration Council,* No. 99 MOSALVY (2004) http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=82037.

222 Cambodia, *Law on Administrative Management of the Capital, Provinces, Municipalities, Districts and Khans, Royal Kram* No. NS/RKM/0508/017 (2008) http://seaknowledgebank.net/e-library/cambodia-law-administrative-management-capital-provinces-municipalities-districts-and.

Sub-Decree on the Cadastral Commission[223]

Chapter 4: District/Khan Level Conciliation

Article 7: The Ministry of Land Management and Urban Planning and Construction (MLMUPC) shall determine the complaint form. The District/Khan Cadastral Commission (DKCC) shall register and open a file for all disputes submitted to it. The DKCC shall explain the procedure to the parties in conflict and inquire if they accept to resolve through conciliation following these procedures or not.

Article 8: The DKCC shall investigate the dispute. The investigation includes specifying the location of the disputed parcel and parties concerned with the object of the dispute and collecting available documents, witness statements and information related to the disputed parcel. The DKCC shall make and certify copies of any document to be kept in the file and return the originals to the parties in conflict. The DKCC shall make and enter this investigation documentation in the dispute file.

Article 9: The DKCC shall conciliate the disputes other than those specified in article 10. The conciliation shall be conducted according to the guidelines on conciliation provided by the Ministry of Land Management, Urban Planning and Construction.

Article 10: After the investigation, the DKCC shall submit the dispute file to the PMCC if the Chief determines, by the Chief's own initiative or at the request of both parties, that it is impossible that an equitable resolution can be reached at the District/Khan level for the following reasons: (1) One person claims several parcels that are also claimed by small possessors; (2) One of the parties is a high-ranking authority; (3) There is a conflict of interest with the Chief of the DKCC; (4) The dispute involves State public land;

Article 11: If a settlement is reached through the unanimous agreement among the parties in dispute the DKCC shall report to the PMCC and shall submit a copy to the District/Khan Office of Land Management, Urban Planning, Construction and Land Administration so that it begins the process of conducting the registration procedure of the parcel over which the dispute had been resolved already. If a settlement cannot be reached the DKCC shall submit the dispute together with a written report of the conciliation to the Provincial/Municipal Cadastral Commission (PMCC).

Arbitration Council, Responsibilities on Workplace Safety Measures[224]

In this case, the workers of Can Sport Shoes Co., Ltd. (the "Claimants") brought four claims against the respondent Can Sport Shoes Co., Ltd. (the "Employer") demanding improvement of four working conditions.

Of the four claims in this case, one was settled by mutual agreement during the arbitration process and the Arbitration Council considered only the three remaining claims. This case note will examine one claim regarding the Employer's management prerogative where workers were required to wear covered sandals with a strap to ensure their safety and prevent work-related accidents at the workplace.

The Employer's enterprise practice was to require the workers to wear covered sandals with a strap to ensure their safety and prevent them from such work related-accidents such as slipping, objects falling on legs and toes, electrical shocks, etc. The workers were required to purchase the sandals at their own expense. The Claimants argued that they could not afford the sandals, reasoning that they were not only expensive, but also easily damaged as the straps broke off. Further, as it was the Employer's requirement, the Employer should be responsible for purchasing and providing the sandals for the workers, and that if the Employer refused to do so, the workers demanded the Employer allow them to wear sandals without a strap.

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223 Cambodia, *Sub-Decree on Organization and Functioning of the Cadastral Commission,* No. 47 ANK.BK (2002) https://www.sithi.org/admin/upload/law/Sub-decree%20No%2047%20on%20the%20Organization%20and%20Functionning%20of%20the%20Cadastral%20Commission%20(2002).ENG.pdf.

224 Arbitration Council, *Responsibilities on Workplace Safety Measures* (2018) https://www.arbitrationcouncil.org/responsibilities-on-workplace-safety-measures/.

The Arbitration Council's consideration and subsequent view that the supervision and direction of the workers to wear covered sandals with a strap at the workplace was not made in accordance with the law, and was unreasonable because the Employer failed to prove it was a necessary measure to improve worker safety and protect them from work-related accidents.

The Arbitration Council was of the opinion that to protect the safety of the workers at the workplace, the Employer should have taken other proper measures in line with the provisions of the Labour Law rather than require the workers to wear covered sandals with a strap.

Pursuant to Article 34, Point D, of Prakas No. 099 on the Arbitration Council, dated 21 April 2004, the Arbitration Panel has the power and authority to order immediate cessation of any illegal conduct.

This case highlighted that the Employer has the right and power to supervise and direct the enterprise or establishment; however, this supervision and direction must be made in accordance with the law and be reasonable. In this respect, the Labour Law clearly states that it is the Employer's burden and obligation to introduce measures to ensure worker safety and protect them from work-related accidents. The supervision and direction of the measures shall respond to actual situations and safety needs with regard to working conditions, as well as production lines of the Employer. The Employer's failure to provide sufficient evidence to add weight to its demand meant the Arbitration Council could not make a decision as demanded by the Employer. Moreover, the burden of the cost of the sandals shouldn't fall on the workers in order for the Employer to meet its responsibility to take measures to protect the safety and prevent work-related accidents, which are the obligation of the Employer.

Universal Periodic Review, State Report[225]

The RGC continues to solve land disputes more effectively and fairly based on existing laws and regulations by using both mechanisms inside and outside the A/HRC/WG.6/32/KHM/1 19 court system. For the long-term goal, the royal government will speed up the allocation of social land concession to people who are landless by using land stock withheld from inactive companies, and state's land remained from locations under directive no. 01 and land remained from mine clearance. The RGC continues to postpone economic land concession program or permanent rental of land in order to strengthen the management of such lands in accordance with laws, regulations and contracts.

Royal Government of Cambodia, UPR: Compilation on Cambodia[226]

The United Nations country team stressed that Cambodia had experienced significant deforestation and forest degradation in recent years, the main causes of which included conversion to commercial agriculture, mining, economic and social land concessions, legal and illegal settlements and farmland, large-scale infrastructure and hydropower development, road construction, legal and illegal logging, fuelwood harvesting and forest fires. The Special Rapporteur on the situation of human rights in Cambodia highlighted issues with resettlement and compensation packages offered to persons and communities displaced by land concessions, including the adequacy of compensation and the appropriateness of relocation sites. She stressed that more needed to be done to ensure that compensation packages were fully understood by potential recipients and that all land disputes were resolved through a process free from threats, violence and intimidation. The United Nations country team indicated that business enterprises continued to have an important role in promoting the economic growth of Cambodia, which could affect the enjoyment of human rights, such as land and housing rights, rights in the workplace and gender equality, among other rights. That highlighted the Government's role to protect human rights.

225 Royal Government of Cambodia, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Cambodia,* Universal Periodic Review (2018) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/341/00/PDF/G1834100.pdf?OpenElement.

226 OHCHR, *Working Group on the Universal Periodic Review: Compilation on Cambodia Report of the Office of the United Nations High Commissioners for Human Rights* (2019) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/337/25/PDF/G1833725.pdf?OpenElement.

OHCHR, UPR: Summary of Stakeholders' Submissions[227]

Noted that thousands of families across four Cambodian provinces (Koh Kong, Kampong Speu, Oddar Meanchey, and Preah Vihear) still awaited proper redress for their loss of land, homes, livelihoods, and other harm suffered as a result of the massive expansion of the Cambodian sugar industry. It noted with concern that community representatives advocating for adequate redress and effective remedies for their communities have faced intimidation, imprisonment, and violence, and have been coerced into accepting inadequate compensation for their losses. It recommended that Cambodia ensure that communities receive adequate compensation for their loss of land and other damages, and when possible, be allowed to return to their original lands and rebuild their homes.

IFC, CAO Ombudsman: Complaint Regarding HAGL[228]

In February 2014, CAO received a complaint from local members of fifteen villages in the Cambodian Ratanakiri Province ("Complainants") with the support and assistance of five Cambodian NGOs. The complaint raises concerns about Hoang Anh Gia Lai's (HAGL) Cambodia operations' impacts on seventeen local villages, including impacts on water sources and fish resources, loss of land, lack of compensation, lack of information disclosure and engagement with the people, threat to spiritual, cultural and indigenous practices amongst other issues. CAO determined that the complaint met its three eligibility criteria, as per its Operational Guidelines, and began an assessment of the complaint. During the assessment process, the Complainants and HAGL have agreed to engage in a voluntary dispute resolution process facilitated by CAO. This Assessment Report provides an overview of the assessment process, including a description of the project, the complaint, the assessment methodology, and next steps.

The purpose of this CAO assessment is to clarify the issues and concerns raised by the Complainants, to gather information on how other stakeholders see the situation, and to determine whether the Complainants and HAGL would like to pursue a voluntary dispute resolution process under the auspices of CAO Dispute Resolution or if the complaint should be transferred to CAO Compliance for appraisal of IFC's performance (see Annex A for CAO's complaint handling process). The CAO does not gather information to make a judgment on the merits of the complaint during its assessment.

During CAO's assessment, community members highlighted the following areas of concern:

- Impacts on communities' lands
- Loss of identify and culture
- Additional impacts on community livelihoods
- Conduct of Company workers
- Lack of Trust
- Company's perspective
- Areas of agreement

In January of 2019, HAGL informed CAO of its decision to withdraw from the CAO-convened dispute resolution process, and to instead seek the support of the government for resolution of the communities' outstanding concerns. In October 2019, HAGL indicated an interest in re-engaging in dialogue. In December 2019, CAO met separately with HAGL and the complainants, and both confirmed their commitment to resolving outstanding issues in dispute through a CAO-convened dispute resolution process. In February 2020, CAO released a progress report which provides an overview of the dispute resolution process and outlines the efforts made to date by the parties. The report is available in English and Khmer.

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227 Human Right Council, *Summary of Stakeholders' Submissions on Cambodia, Report of the Office of the United Nations High Commissioner for Human Rights* (2018) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/333/54/PDF/G1833354.pdf?OpenElement.

228 Compliance Advisor Ombudsman (CAO), CAO *Assessment Report: Complaint Regarding IFC's VEIL II Project* (20926) (May 2014) http://www.cao-ombudsman.org/cases/document-links/documents/VEILII-01FinalAssessmentReportMay2014.pdf; for additional documents relating to the case, see also http://www.cao-ombudsman.org/cases/document-links/links-212.aspx.

UK NCP, Compaint against Bonsucro in Mitr Phol Case[229]

This Specific Instance outlines breaches of the OECD Guidelines for Multinational Enterprises by Bonsucro Ltd, a UK-registered non-profit company and multi-stakeholder initiative for the sugar industry. The complainants are Inclusive Development International (IDI), Equitable Cambodia (EC) and the Cambodian League for the Promotion and Defense of Human Rights (LICADHO) on behalf of approximately 3000 affected people from the five villages (…). This specific instance concerns the failure of Bonsucro to comply with the OECD Guidelines vis-à-vis its business relationship with one of its members, Thai company Mitr Phol Group, Asia's largest sugar producer, which is responsible for forced evictions and other human rights violations in Oddar Meanchey. (…)

Bonsucro claims to be "a multi-stakeholder organization that exists to promote sustainable sugarcane production around the world," with a mission "to ensure that responsible sugarcane production creates lasting value for the people, communities, businesses, economies and eco-systems in all cane-growing regions."5 By design, Bonsucro confers a public stamp of approval on its members, who, by joining the initiative, commit to, inter alia, uphold the law and respect human rights in the production of sugarcane. Bonsucro conferred this public prestige on Mitr Phol by, not only awarding it membership, but by doubling down on its public endorsement of the company's social and environmental performance by bestowing it with a Sustainability Award. The week the present complaint was filed, Bonsucro was set to showcase Mitr Phol as a "leading member" at its annual "Bonsucro Global Week."6 All of this is deeply offensive to the Cambodian communities who have suffered so greatly as a result of Mitr Phol's human rights violations. (…)

Request for United Kingdom NCP assistance

On behalf of the approximately 711 affected families from the villages of O'Bat Moan, Khtum, Taman, Bos and Trapaing Veng, IDI and EC request the UK NCP to offer its good offices to resolve this dispute with the Respondents consequent to their failure to comply with OECD Guidelines.

The complainants have undertaken efforts to engage with Bonuscro, including via its own grievance mechanism, since 2011. These efforts have not resulted in remediation for the complainants due to the ineffectiveness of Bonsucro's grievance mechanism.

The communities we represent recognize that Bonsucro is a multi-stakeholder initiative and not directly responsible for the forced evictions and harms they suffered. However, as explained above, as the sugar industry's leading multi-stakeholder initiative, Bonsucro bears a special responsibility in relation to this matter.

We therefore request that the UK NCP investigate this complaint and make specific recommendations to bring Bonsucro into compliance with the OECD Guidelines with respect to the Mitr Phol case in particular, and more generally with respect to its Code of Conduct, Production Standard, due diligence processes for accepting new members, and grievance mechanism.

CCHR, The Failure of Land Dispute Resolution Mechanism[230]

The gap between the theory and practice of dispute resolution mechanisms. In practice, the use and implementation of the mechanisms described above remain limited due to a number of factors. First, the wide range of dispute resolution bodies and the lack of clarity over the jurisdiction of each mechanism have been cited as sources of confusion for potential complainants. Other deterring factors include poor access to dispute resolution mechanisms by impacted individuals and communities, time-consuming administrative and procedural burdens, and financial costs associated with submitting a complaint. In addition, complainants have reported that decisions

229 UK National Contact Point (NCP) for the OECD *Guidelines, Specific Instance against Bonsucro Ltd, Concerning Its Conduct in Relation to Its Member, Mitr Phol Group* (11 March 2019) https://complaints.oecdwatch.org/cases/Case_534/1788/at_download/file.

230 Cambodian Centre for Human Rights (CCHR), *The Failure of Land Dispute Resolution Mechanism*, Briefing Note (2014) https://cchrcambodia.org/admin/media/analysis/analysis/english/2014_07_28_CCHR_Briefing_Note_The_Failure%20of_Land_Dispute_Resolution_Mechanisms_(ENG).pdf.

issued by existing dispute resolution bodies are inconsistent and subject to political pressures. Further, one study commissioned by the World Bank Centre for Advance Study and GTZ found that Cadastral Commissions have a better record of resolving conflicts over small parcels of land, but struggle to resolve complex cases, particularly those involving multiple parties and parties with connections to the government or the military. The same report implies that while cases may fall under the jurisdiction of the Cadastral Commissions, weaker parties may not file cases due to lack of faith in the process and outcome. This study also reports that 27% of all parties surveyed reported that informal fees or gifts changed hands in relation to their case before the [Cadastral Commission]. Another World Bank study further found that people involved in land disputes avoid filing complaints because "formal institutions of justice such as the Cadastral Commissions or the courts were perceived as costly, time consuming and biased toward the rich.

Thuon, Case Study of Vietnamese Investment in Cambodia[231]

Land grabbing in poor countries by transnational corporations has been increasing, causing great concern over human rights violations in countries where states often lack the ability or will to regulate the conduct of foreign owned companies. Civil society organizations have played a significant role in attempts to hold companies from Organization for Economic Co-operation and Development (OECD) countries accountable for human rights violations by their subsidiaries in poor countries. However, civil society pressure for accountability from companies whose home base is in non-OECD, middle income, countries is rare. This paper explores the human rights impacts of the Cambodian operations of Vietnam's Hoang Anh Gia Lai (HAGL) company, and how affected communities and NGOs in Cambodia have tried to hold HAGL accountable for its wrongdoing through approaching the Office of the Compliance Advisor Ombudsman of the International Finance Corporation. This is an initial attempt to examine how civil society and affected communities have challenged a Vietnamese company with no prior record of engaging with players from outside its home territory about the human rights impacts of its investments in Cambodia. The Office of the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC) has a problem-solving function, which mediates conflicts between affected communities and clients of the IFC, and a compliance review function (Compliance Advisor Ombudsman, 2015). Where TNCs have business relationships with international finance institutions that have safeguard policies and grievance mechanisms to ensure compliance with existing policies, there is space for CSOs to demand corporate accountability. Where an MDB is identified as an investor or financier, IAMs such as the CAO provide an avenue for affected people to lodge complaints and have their claims adjudicated. However, the CAO's problem-solving process through mediation is conducted on a voluntary basis. Although not all investors are responsive to CSO campaigns, complementary advocacy strategies such as lobbying with a range of investors is important for trying to keep HAGL engaging in the process in good faith. Because the CAO mediation process has not yet been concluded, it remains to be seen whether this is an effective mechanism for gaining redress.

Martin, Business and Human Rights in ASEAN: Cambodia[232]

The International Organisation for Standardisation and its International Guidance Standard on Organization Social Responsibility or better known as ISO 26000, is popular amongst the ASEAN countries. The ISO 26000 "helps clarify what social responsibility is, helps businesses and organizations translate principles into effective actions and shares best practices relating to social responsibility. The success of the ISO 26000 within the context of ASEAN could be explained by the fact that, being a private initiative, it is not comprised of a remedy framework, not even a non-judicial mechanism such as a mediation or arbitration mechanism. Those mechanisms, however, are part of the recent improvement of workers' rights in Cambodia.

231 Ratha Thuon, 'Holding Corporations from Middle Countries Accountable for Human Rights Violations: A Case Study of the Vietnamese Company Invest in Cambodia', *Globalizations*, 17:4 (2015), pages 698-713, https://www.tandfonline.com/doi/pdf/10.1080/14747731.2017.1370897?needAccess=true.

232 Celine Martin, Business and Human Rights in ASEAN: Case Study of Cambodia, European, International and Comparative Law Center (undated) https://www.academia.edu/13889632/Business_and_Human_Rights_in_ASEAN_Case_study_of_Cambodia.

Questions

1. What are the most effective international non-judicial mechanisms?
2. What are the non-judicial mechanisms for conflict resolution in Cambodia?
3. How legitimate are these non-judicial mechanisms and how do you assess their effectiveness?
4. Do Cambodian non-judicial mechanisms meet the criteria of the UNGPs?
5. Should an NGO trying to support victims spend its scarce resources on using non-judicial mechanisms or it is better to concentrate all resources on judicial mechanisms?
6. Can a complaint mechanism set up by a company ever deliver justice to victims?
7. In what industries can we find non-judicial mechanisms and why not in all industries?

Further Readings

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- Steven L.B. Jensen, *Lessons From Research On National Human Rights Institutions – A Desk Review on findings related to NHRI Effectiveness* (2018) www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/research/workingpaper_lessons_research_nhris_web_2018.pdf.
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Useful Websites:

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2. The National Commercial Arbitration Center of Cambodia, https://app.glueup.com/org/ncac/about/.
3. Compliance Advisor Ombudsman (CAO), http://www.cao-ombudsman.org/

The compendium is an aid for lecturers to prepare classes and seminars on business and human rights in Cambodia. Teachers from several academic disciplines – law, management, political science, social science, and media – will find carefully selected materials and numerous aspects on which to build a rewarding classroom experience. The compendium has three parts. Part I covers the policy frameworks for 'human rights and business'. Part II is a deep dive into the systems companies set up to ensure responsible business conduct. Part III further contextualizes what the corporate responsibility entails regarding specific human rights.

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