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# Supply chains, access to remedy and redress: an opportunity to regulate

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## Introduction

*"We are faced with a direct confrontation between the large transnational corporations and the states. The corporations are interfering in the fundamental political, economic and military decisions of the states. Corporations are global organizations that do not depend on any state and whose activities are not controlled by, nor are they accountable to any parliament or any other institution representative of the collective interest. In short, the world's political structure is being undermined. The dealers don't have a country. The place where they may be does not constitute any kind of link; the only thing they are interested in is where they make profits. This is not something I say; these are Jefferson's words." - Salvador Allende, speech to the United Nations, 1972<sup>1</sup>*

In 1972 the late president Salvador Allende delivered a famous speech to the UN General Assembly in New York. In this speech he addressed the increasing power of multinational corporations in matters of state, throughout developing countries in general, but Chile in particular. Moreover, he questioned the accountability of big business, noting that the majority of corporations were accountable not to the people but to a small group of shareholders.

At the eve of Rio+20, 40 years later, the issue of corporate accountability has yet to be solved. Meanwhile, the role of business in global governance has increased significantly. Corporations are now present at many negotiation tables, alongside governments, civil society organisations and trade unions. Unfortunately business representatives do not tend to focus on issues of accountability, even though structural changes in legislation are needed. Instead much attention has been given to the development of voluntary corporate social responsibility (CSR) standards in the past few decades. Over recent years, these standards have expanded in both number and form. At present, international CSR standards are almost uniformly voluntary and so exist as a unique dimension of soft law.<sup>2</sup> The rather complex universe of CSR standards can be categorized according to the organisation that created them: (1) intergovernmental organization standards, derived from universal principles included in international treaties and agreements; (2) multistakeholder initiative standards; (3) industry association codes; and (4) individual company codes. Standards of the first category are relatively sparse. Three of the most prominent are:

- The conventions and declarations of the International Labour Organisation (ILO). The most relevant for business that operate internationally are the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work.
- The OECD Guidelines for Multinational Enterprises. Although the number of adhering governments to these guidelines is relatively low, the signatories include large developed economies whose corporations accounted for 70 per cent of foreign direct investment (FDI) in 2010.<sup>3</sup>
- The Guiding Principles on Business and Human Rights. In July 2011, the United Nations Human Rights Council endorsed a set of principles designed "to ensure that companies do not violate human rights in the course of their transactions and that they provide redress when infringements occur." The Guiding Principles on Business and Human Rights outline how nation states and

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<sup>1</sup> Salvador Allende, Speech to the United Nations, 4 December 1972 (excerpts), [www.rrojasdatabank.info/foh12.htm](http://www.rrojasdatabank.info/foh12.htm) (viewed on 24 April 2012).

<sup>2</sup> UNCTAD, World Investment Report 2011: Non-equity modes of international production and development, UNCTAD: Geneva, 2011.

<sup>3</sup> Ibid.

businesses should implement the UN's "Protect, Respect and Remedy" Framework in order to better manage business and human rights challenges.<sup>4</sup>

A critical challenge is to ensure that companies actually comply with these guidelines, principles and conventions. And this is what many governments around the world often fail to do. One of the main reasons for their inability or impotence is the so-called global governance gap, which is caused by the acceleration of the globalization process. Accelerated globalization has led to several forms of imbalance. First, there is the imbalance between the ever increasing pace of liberalisation and the time necessary to elaborate the international regulatory framework for these exchanges. Second, there is the imbalance between the advanced governance systems in industrialised countries, who dispose of a highly sophisticated set of economic and social regulation, and the lack of such governance in developing countries as well as at the international level. Last, there is the imbalance between the highly developed economic pillars of global governance (IMF, World Bank and WTO) and the almost embryonic state of the social and environmental pillars of such a governance system. Against this backdrop, voluntary social and environmental practices of business, going beyond companies' existing legal obligations, can play an important role in filling the governance gap in a creative and innovative way.<sup>5</sup> But there is also a need to fill the governance gap by introducing an international regulatory framework for responsible business behaviour. Self-regulation by business on the basis of good intentions is not enough.

### **Supply chain responsibility**

Multinational corporations rely on the support of many subsidiaries and subcontractors for which they have no positive legal duty to supervise. Outsiders cannot know how these networks of subsidiaries and suppliers are managed. Moreover, it is difficult to assert causality between complex industrial operations and impacts on societies, people and the environment. If the right information is not collected, analysed and duly disclosed, it is difficult for affected people, the general public, consumers, investors or even the management of these enterprises to understand the scope and impact of corporate operations on legally protected public interests. It is equally difficult to understand the respective responsibilities of the corporate actors involved.<sup>6</sup>

Many voluntary standards in the field of CSR make reference to the responsibilities of companies for their supply chain. ISO 26000, an international standard for social responsibility, defines the supply chain as a sequence of activities or parties that provides products or services to an organisation.<sup>7</sup> The notion of supply chain responsibility can be found in some of the main intergovernmental standards as well. The OECD Guidelines for Multinational Enterprises, which were updated in 2011, encourage the business partners of corporations, including suppliers and subcontractors, to apply principles of responsible business conduct compatible with the Guidelines.<sup>8</sup> The Guiding Principles on Business and Human Rights give advice on the responsibilities of businesses for human rights violations in their

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<sup>4</sup> M. Connor, Business and Human Rights: Interview with John Ruggie, in Business Ethics, <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>, 30-10-2012 (viewed on 27 March 2012).

<sup>5</sup> P. Lamy, Preface, in Tracey Swift & Simon Zadek, Corporate Responsibility and the Competitive Advantage of Nations, The Copenhagen Centre & AccountAbility, 2002.

<sup>6</sup> F. Gregor, Principles & pathways: legal opportunities to improve Europe's corporate accountability framework, European Coalition for Corporate Justice, Brussels, 2010.

<sup>7</sup> ISO 26000:2010, Guidance on Social Responsibility, ISO, Geneva, 2010.

<sup>8</sup> OECD, OECD Guidelines for Multinational Enterprises, 2011 edition, OECD Publishing, Paris, 2011.

supply chains: “The responsibility to respect human rights requires that business enterprises seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”<sup>9</sup>

### **Impact and due diligence**

The core set of internationally recognised principles and guidelines on CSR represents an evolving global framework for supply chain responsibility. In this recently strengthened soft-law framework, two concepts play a central role: impact and due diligence. Let us have a closer look at both concepts. Impact can be a positive or negative change to a society, an economy or the environment, wholly or partially resulting from a company’s past and present decisions and activities. Due diligence is a comprehensive and proactive process whereby impact is identified, with the aim of avoiding and mitigating negative impacts.<sup>10</sup> In its new strategy for CSR, the European Union states that companies 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 (1) maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large, and (2) identifying, preventing and mitigating their possible adverse impacts.<sup>11</sup> The EU also encourages large corporations, and companies at particular risk of having adverse impact, to carry out risk-based due diligence, including through their supply chains.<sup>12</sup>

The concepts of impact and due diligence have been welcomed by the business community, especially when it comes to human rights. Professor John Ruggie, author of the Guiding Principles, has enjoyed the support of many stakeholders, including the International Chamber of Commerce and the International Organisation of Employers. Although no business has yet fully integrated concern for human rights into all aspects of its management, significant progress is being made.<sup>13</sup> However, according to the Institute for Human Rights and Business, there are still too few companies seriously engaging with human rights: “Of the millions of companies in the world, of which some 80,000 operate internationally, and the thousands that have signed up to the UN Global Compact, only a very small number – some 250 companies – have publicly stated policy positions on human rights. These 250 companies are indeed amongst the world’s largest and most influential corporate actors, but they are only a very small fraction of corporations engaged in business globally.”<sup>14</sup>

### **Access to legal remedies and redress**

When stakeholders down the supply chain are affected by the negative impacts of a corporation - be it in the area of human, labour or environmental rights - they should be able to seek redress and have access to legal remedies. Most intergovernmental standards do not include specific wording or guidance on this issue. The most serious flaw in the current intergovernmental framework is the lack of

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<sup>9</sup> John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Human Rights Council, 21 March 2011.

<sup>10</sup> ISO 26000:2010, idem.

<sup>11</sup> European Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 25 October 2011.

<sup>12</sup> Ibid.

<sup>13</sup> J. Morrison and D. Vermijs, The “State of Play” of Human Rights Due Diligence: anticipating the next five years, Institute for Human Rights and Business, 2011.

<sup>14</sup> Ibid.

accessible methods of resolving CSR-related disputes between people and companies. All too often, claimants seeking enforceable remedies to these problems, including the prevention of future harm, have virtually nowhere to go. The essential problem, from the perspective of potential claimants, is that the mechanisms that usually offer the highest levels of enforceability – judicial mechanisms – also involve the most barriers to would-be claimants, especially claimants who are poor, vulnerable, living in remote areas, or a combination of the three. On the other hand, the more accessible, less formal avenues frequently lack independence as dispute resolution bodies, as well as the power and means to ensure effective redress.<sup>15</sup>

Improving access to existing judicial mechanisms only solves part of the problem. A deeper problem concerns the lack of suitability of judicial mechanisms as a means of resolving many CSR-related disputes between individuals and companies. Dispute resolution through judicial mechanisms is largely adversarial, with each party responsible for the collection of evidence to support its own case, which is then presented to the courts. While this places a burden on both parties, it is frequently a burden that is disproportionately felt by the less well-resourced claimant.<sup>16</sup>

There have been some positive experiences with non-judicial mechanisms, although they have seldom led to effective redress. Two examples of such mechanisms are the complaints mechanism of the OECD Guidelines and the ombudsman at the World Bank.

In the OECD Guidelines' complaints mechanism, National Contact Points (NCPs), the bodies charged with promoting adherence to the Guidelines and handling complaints about alleged corporate misconduct, should offer their "good offices" to mediate among the parties to a complaint and, ideally, facilitate a mutually-agreed resolution to the conflict. If this is not possible, NCPs are instructed to issue a final statement detailing the facts of the case and offering recommendations to improve adherence to the Guidelines. Since 2000, NGOs from around the world have used the Guidelines' specific instance mechanism in the expectation that government involvement in corporate-community disputes would not only help resolve the problems communities and workers are faced with when corporate conduct is poor, but also clearly state the standards expected of corporations wherever they operate.<sup>17</sup>

The World Bank's compliance advisor / ombudsman aims to enhance the development impact and sustainability of projects of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), which are both member agencies of the World Bank Group. Besides overseeing reviews of the IFC's and MIGA's compliance with their own social and environmental policies and standards, the ombudsman assists IFC and MIGA in addressing complaints.<sup>18</sup>

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<sup>15</sup> Corporate Responsibility (CORE) Coalition, Protecting rights, repairing harm: how state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities, briefing paper prepared for the UN Secretary General's Special Representative on Business and Human Rights, 2010.

<sup>16</sup> Ibid.

<sup>17</sup> J. Oldenzel, J. Wilde-Ramsing and P. Feeney, 10 Years On: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct, Amsterdam, June 2010.

<sup>18</sup> C. Rees and D. Vermijs, Mapping Grievance Mechanisms in the Business and Human Rights Arena, John F. Kennedy School of Management, Harvard University, Cambridge MA, 2008.

## What is needed

The key features missing from the current intergovernmental framework for corporate accountability include accessible methods of resolving human rights and labour-related disputes between people and companies that are fit for purpose and capable of producing legally binding outcomes. But there is also a wider, organisational need for institutions specifically tasked with responding to social and environmental challenges posed by business to ensure policy coherence at domestic level.<sup>19</sup> There is an additional need for such institutions to offer guidance and support to business to enable them to integrate human rights into their management systems across all their global operations. At international level, there is the need for these institutions to contribute to greater consensus on addressing corporate harm and to assist in capacity-building processes.

Corporate accountability is an unprecedented challenge that cannot be effectively dealt with through existing methods. A truly successful process would involve the creation of binding legal mechanisms that mandate oversight of corporations. These mechanisms should also provide effective redress for victims of human and labour rights violations.

Without international regulation for corporate accountability in place, a culture of injustice will prevail. The international community needs to assess the viability of creating and implementing a binding international framework that provides effective access to remedies for victims of human and labour rights violations. Such a framework would create a level playing field across culture and context, ensuring that all businesses adhere to the same standards. This would be hugely positive for businesses worldwide, especially for the ones that have already embraced responsible business practises.

In his recommendations on the follow-up of his mandate as special representative on business and human rights, John Ruggie suggests that consistency in legal protection in the area of human rights could best be enhanced through a multilateral approach. Moreover, Ruggie says that: “Any such effort should help clarify standards relating to appropriate investigation, punishment and redress where business enterprises cause or contribute to such abuses, as well as what constitutes effective, proportionate and dissuasive sanctions. It could also address when the extension of jurisdiction abroad may be appropriate, and the acceptable bases for the exercise of such jurisdiction. It could also foster international cooperation, including in resolving jurisdictional disputes and providing for technical assistance.”<sup>20</sup> He also mentions the possibility of initiating an intergovernmental process of drafting a new international legal instrument to address the specific challenges posed by this protection gap. He sees the UN Convention against Corruption as an appropriate precedent and model for such an effort.<sup>21</sup>

A convention on corporate accountability is indeed a good way to start addressing the global governance gap in the field of corporate accountability. Developing a convention on transparency and

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<sup>19</sup> See J. Ruggie, Towards operationalizing 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/11/13, 22 April 2009, copy available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf> (viewed on 28 April 2012).

<sup>20</sup> J. Ruggie, Recommendations on follow-up to the mandate, Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 11 February 2011.

<sup>21</sup> Ibid.



corporate accountability would be consistent with the call for greater corporate transparency in paragraph 24 of the Rio+20 Zero Draft: “We call for a global policy framework requiring all listed and large private companies to consider sustainability issues and to integrate sustainability information within the reporting cycle.”<sup>22</sup> This paragraph should be amended so that it reflects demands for a convention: “We call for the UN General Assembly to establish an Intergovernmental Negotiating Committee for a United Nations Convention on the creation of a global policy framework which requires all listed and large private companies to implement sustainability into their management and throughout their supply chains, and to integrate sustainability information within the reporting cycle.”<sup>23</sup>

To make sure that that companies apply due diligence and that victims of negative corporate impacts have effective access to remedies, the drafters of a future convention should consider a UN function that:

- is given investigative and monitoring power. The follow-up mechanism should be in a position to analyse cases, to undertake its own investigations, to make country visits and to monitor performance of States and companies.
- can receive complaints both against States and individual companies from victims of human rights abuses and to propose remedies. This grievance mechanism should be able to investigate complaints and allow victims and/or their representatives to sue for remedies. The mechanism should have the power to decide on remedies and to monitor whether the remedies have been implemented.
- is provided with the power to make recommendations to States and companies, to review the fulfilment of these recommendations and to regularly report to the UN General Assembly.<sup>24</sup>

It would be wise to look back in time for guidance. After Allende’s speech to the General Assembly in 1972 and the coup d’état in Chile, the UN created a Commission on Transnational Corporations and the UN Centre on Transnational Corporations (UNCTC). One of the initial objectives of the UNCTC was to formulate a Code of Conduct on Transnational Corporations. In the 1980s, the focus of attention increasingly changed towards the positive impacts of Foreign Direct Investment and large companies on development. This change in attitude towards corporations contributed to the stalling of the Code negotiations in the Commission on Transnational Corporations. As part of the reorganization of the economic sector of the UN, the UNCTC was dissolved in 1993 and the Programme on corporations was transferred to UNCTAD. A convention on corporate accountability should definitely build on the work developed by the UNCTC so many years ago, not only on the more recent soft-law standards, such as the Guiding Principles and the OECD Guidelines.

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<sup>22</sup> United Nations, The future we want - Zero draft of the outcome document, 10 January 2012, <http://www.uncsd2012.org/rio20/index.php?page=view&type=12&nr=324&menu=23> (viewed on 29 April 2012).

<sup>23</sup> See also: G. Ferroni, Corporate Social Responsibility and Rio+20: Time to leap forward!, discussion paper, March 2012.

<sup>24</sup> Cf. CIDSE, Protect, Respect and Remedy: Keys for implementation and follow-up of the mandate, October 2010, <http://www.cidse.org/content/publications/business-a-human-rights/bahr-in-the-united-nations/protect-respect-remedy-framework.html> (viewed on 29 April 2012).

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