

Panel 8 – International Mutual Cooperation

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I want to thank the Chair for invitation to participate in this session.

We live in a globalized world economy, where every effort is to bring down barriers to the movement of capital, of products, of technologies, of debt, and even of the legal ability to establish foreign owned business enterprises. Yet we live, as South Africa said this morning, in a world fragmented by separate legal systems. This mismatch allows mischief.

This mismatch allows those with the greatest degree of mobility to prevail over those more constrained to a local place. It says one highly mobile and well capitalized party can avoid civil and administrative liability – and circumvent criminal sanctions – simply by moving a person or document outside the fragmented national legal system. It is a mismatch that is fixable, while preserving national legal principles and institutions.

Fortunately this structural mismatch is now widely acknowledged to be a problem that needs a solution.

The background paper for next month's Business and Human Rights Forum states

“Since the endorsement of the Guiding Principles, access to remedy has been regularly described as the ‘forgotten pillar’. Yes, unless victims of adverse business-related human rights impacts have access to effective remedies, the state duty to protect human rights and the corporate responsibility to respect human rights become meaningless in practice. The need to make progress in translating the third pillar of the Guiding Principles from paper to practice is perhaps *the*(sic) most burning issue on the current business and human rights agenda.”

And this year the Working Group on Business and Human Rights reported to the Human Rights Council (A/HRC/35/33) on the status of remedy outside of specific conventions under the GP. The Working Group concluded that “States are encouraged to ratify bilateral and multilateral agreements that provide a basis for cross-border cooperation and to ensure that their domestic law allows for cooperation to take place” (para 93). In the following ten paragraphs of recommendations, the report proposed that a number of other voluntary steps States can take – establish investigative and prosecutorial offices with expertise in human rights violations, designate a central authority in each country to coordinate requests for mutual assistance, and offer investigative training assistance. This system -- with a common authority in each country to send and receive requests for mutual assistance -- is similar in structure to the role of national contact points to resolve TNC conflicts based on the OECD’s Multinational Guidelines.

Certainly everyone here is more than well versed in how bureaucracies work and even more well versed in how a bureaucracy in one country works --and doesn’t work -- with bureaucracies in other countries. In this case, we have at least five different bureaucracies – the investigative police system, the prosecutors system, the administrative court system, the criminal court system – which may have federal and sub-national varieties- as well as civil plaintiffs using their own court systems. Each of these legal systems has its own quite formalized set of rules and procedures that must be followed for every step along the way.

At the moment there is an international dysfunction – and a recognition of the dysfunction -- between these systems that allows the more mobile and more financially flexible actors to avoid legal review and civil or criminal sanctions. Let’s use together scenario planning to see what it would take to connect these legal systems to each other in such a way that the bridge is effective, efficient, timely, and meaningful. To start this conversation let me present three scenarios to help us see if we can collectively design the best way to overcome the fragmentation, while maintaining respect for national legal systems.

A national investigator in a Central American country is looking at a potential human rights violation involving a TNC and needs to interview the individual who headed the local office three years earlier. This investigator reaches out to the local firm and discovers that this official has now been promoted and is based in a third country. This investigator could say I'm stuck but she decides to overcome the wall between legal systems and writes to her opposite number in the third country providing a detailed list of questions that need answers – or asks her national contact point to write to the national contact in the third country- to ask that this corporate officers be brought in for questioning. If the person who received the letter had integrity he could ask his supervisor for permission to call up the individual and ask if that person would come in voluntarily for questioning. If that person (or their corporate law office) said 'no thanks' . What can the investigator with integrity do ?

In a voluntary system, he can write back to the original investigator -- or write back thru the national contact person—saying “Thanks for your request for assistance, but sorry nothing we can do’. Alternatively, if there was a regularized, pre-agreed procedural set of steps, the second investigator could use tools in the international agreement to go to a court and seek a subpoena or equivalent authority to interview the person with the same level of protection as that person would have for any other domestic investigation. Or depending on the pre-approved rules for mutual support on matters involving human rights and TNCs, the investigator could extend an invitation to the original investigator to join him in the questioning either in person or via Skype.

A second scenario – an plaintiff's attorney in Southern Africa has five internal corporate memos from a regional HQ for a local firm . Each memo refers to various other documents that appear to be very relevant to the preparation of a civil court case against a local firm and its international managers. The plaintiff's lawyer applies to the court for an order to the local firm for copies of all the referenced documents. The local firm reports that these copies of these documents are no longer available in their local office. The plaintiff's lawyer, who also has high integrity, retains to a law firm in the country where she believes that

the documents reside and requests that this firm apply to the court to compel the production of the documents.

What is the likely reply from the judge in the court of the second country ? In a voluntary system, the magistrate is likely to say ‘what does this have to do with our laws and regulations? Why did you even put this on the court’s calendar !’ . Alternatively, if there was a regularized, pre-agreed procedural set of steps for handing international human rights claims involving TNCs and OBEs, then the local attorney could argue that the judge does have authority under that agreement to act and to order the production of the documents with all the safety and protection conditions specified in the agreement and in their domestic law.

Just one more scenario to consider. This time a court system in a European country makes a final judgement and orders the payment of 200,000 Euros from a firm, not in the EU region, that had significant control over a European firm, which took a series of illegal actions. The court writes its oppose number in other country – or uses the national contact point to write to the national contact point in the other country-- to ask that they collect the penalty. Please think thru the dialogue between the national contact point or court official with the firm involved. ‘Would you voluntarily please , pretty please, provide me 200,000 Euros that I can transfer to the original court’. Alternatively the scenario , if there were in place a pre-agreed, procedural arrangement for joint respect and mutual enforcement of court degrees, could be that the first court certifies with a high national court that the decision is a final act and transmits the inter-court request for enforcement thru their national ministry of justice to the second court for effective enforcement along with the appropriate bank transfer information.

The function of this section 8 of the Elements is precisely to lay out those pre-arranged, procedural steps. It is designed to overcome the dysfunctionality between national legal regimes that by default allow highly mobile international actors can avoid criminal, administrative, or civil review. A multilateral mutual cooperation agreement as envisaged by the Elements would set the foundation

for more effective and efficient cooperation between jurisdictions when dealing with matters on human rights and TNCs and OBE.

In the Elements paper , the first bullet sets the general principle. “States parties shall mutually cooperate to prevent, investigate, punish, and redress violations or abuses of human rights and to ensure access to justice and effective remedy for those affected by adverse human rights impacts of TNCs and OBEs under their jurisdiction” . It would seem to me that those who now acknowledge that remedy in general is not working should be quite comfortable with this general principle. Alternatively it would seem to me that those who advocate of the voluntary approach should share with us an alternative general principle or an alternative scenario that similarly overcomes the ineffective communication between legal regimes.

The second bullet in this section lays out the basic components for a pre-arranged mutual support system – (1) a speedy and proper treatment for requests of information; (2) plans to coordinate judicial activities including potential transfer of proceedings; (3) assistance for joint or coordinated cross-border investigations, the collection of evidence, access to witnesses, experts, and relevant documents; (4) protection of victims and witnesses; and (5) recognition and enforcement of foreign judgements . The third and final bullet invites Parties to conclude supplemental bilateral and regional mutual assistance agreements in this area.

Chapter 8 could be strengthened in two ways. First by creating five separate procedural sub-sections for improved international mutual assistance between national investigative systems, prosecutorial systems, administrative court systems, criminal court systems and civil court system, addressing in each section the unique operational characteristics of each system and the pre-arranged provisions for effective, timely, and obligatory assistance. Second, the section could also be strengthened by establishing a public register of all requests for mutual cooperation in order to identify patterns of violations by a given TNC and for the coordination of research by prosecutors, judges, and plaintiff’s legal advisors.

To summarize here is our challenge in this chapter. There is wide spread recognition that the current system of international remedy for victims of HR abuses involving TNCs, outside of specialized agreements, is not working. There is wide spread knowledge in the legal profession, in the political science profession and more relevantly in this room about the requirements needed one national legal system to communication and work with another countries' legal system. Each of these national legal system has its own long standing and formalized structures that must be respected and strengthened.

Mr Chairperson, if I may, I would like to invite delegations and civil society spokespersons to share their own scenarios about how an effective, timely, efficient, and obligatory mutual assistance system could work. This would make a very meaningful contribution to correct the clear mismatch between a globally managed highly mobile TNCs and OBEs and national legal authorities.