

Legal liability

1. My contribution to discussion based experience in MNC litigation. But such litigation has limitations, and only feasible in certain places and in certain circumstances. So a legally binding treaty which enhances the objectives of redress for victims and deterrence/prevention is desirable.

2. I should preface my comments by saying I agree that a “damages and sue” model is insufficient in itself and that realistic preventive provisions are necessary.

2. Agree that HR violations to be covered needs to include: the environment, health and safety, workers rights; corporate complicity in HR violation by states

3. Approaching this from a practical rather than theoretical perspective I am more interested on those provisions that are likely to make a meaningful difference.

4. With regard to criminal liability for HR violations, enforcement of regulations depends on (a) adequately resourced and motivated regulators. Problematic, practically especially when detailed investigations required to prove establish liability. Unless, this is to relegated to a tick-box checking exercise how realistic is it for a regulator to prove that an MNC failed to take adequate steps to prevent HR abuse within its supply chain? (b) inadequate criminal sanctions to constitute deterrence (c) overcoming criminal standard

6. Suggest that key focus should be on states responsibility to provide for civil liability in MNC home states and MNC parent co. Home states and parent cos because of (a) scale and impact of operations (b) the ability of parent to influence (d) effective access to j more likely in MNC home state (e) fact that it is MNC parent that will be subject to home state jurisdiction

7. Action in the MNC home state requires the exercise of extraterritorial jurisdiction. Two consequences
 - (a) FNC (Cape plc) No longer a major issue in EU but significant barrier in other mnc home state. Effective liability provisions must prohibit FNC in HR cases.

(b) joinder of local operating companies (Vedanta)

8. Assigning liability to MNC parent has added complication of having to overcome corporate veil hurdle.

9. Imposition of HRDD duty as per UNGPs would broadly equate to the common law duty of care principle developing under UK law over past 25 years. No reference to such a DDD in the Elements

9. But imposing liability on an MNC parent; through DDD or otherwise - will depend on detailed analysis of nature of business relationship between parent and subsids/supply chain. This will depend on proper access to internal corporate documents.

10. In this regard, critical to note that MNCs will have armies of the top lawyers arguing that they have done nothing wrong. Provisions for legal liability will have no practical relevance unless effective access to justice mechanisms are in place. Discussing in detail in next session but point is that for this to be of real value, as well as a route to legal liability victims need laws that enable: access to a court with jurisdiction, access to documents and a host of other things, including lawyers willing and able to represent them.