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UN FORUM SERIES – Progress depends on clarifying responsibilities

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There is still no truly comprehensive study on progress in the implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) by businesses and states, hence the purpose of this series of blogs. However, existing evidence points to a patchy landscape, with a slow pace of convergence of normative regimes and irregular patterns of implementation across the various jurisdictions and business sectors. While progress is being gradually made, there have also been many missed opportunities both at the national and the global levels.

At the global level, the distance between the "economic" agenda (e.g., trade, investment and finance) and the UNGPs has not diminished substantially since 2011 – the year when the UNGPs were unanimously endorsed by the UN Human Rights Council. For instance, no reference to the UNGPs was included in the final document of the Third International Conference on Financing for Development, nor they were mentioned in the first two drafts of the new World Bank's social and environmental safeguards.

In a report submitted to the Human Rights Council this year about the mainstreaming of the UNGPs within the UN programs and activities, the Working Group on Business and Human Rights (UNWG) recognized that "uptake across the United Nations has been slow with some notable exceptions".

Regional initiatives such as the European Commission CSR Strategy have also fallen short of incorporating the core elements of the second and third pillars of the GPs.

I draw domestic examples primarily from the Brazilian experience.

Throughout the year of 2015, Brazil signed five Cooperation and Facilitation Investment Agreements (CFIA), having as counterparts Mozambique, Angola, Mexico, Malawi and Colombia. The CFIAs contain a section on Corporate Social Responsibility.

One of its articles states that investors should "respect the human rights of those involved in the activities of the company according to the international commitments of the host state". This language is in direct conflict with the Guiding Principles, which clearly establish that businesses should guide their actions not only in accordance with national legislation but primarily in reference to the International Bill of Human Rights.

A second examples concerns the new statute for state-owned enterprises (SOEs), currently under discussion at the Brazilian Congress. The bill is part of a response to unprecedented scandals of corruption, bribery and mismanagement of SOEs in the country. These scandals not only have caused SOEs' share prices to plunge but have also exposed the nexus between human rights violations, poor corporate governance and weak accountability mechanisms.

One section of the proposed law addresses the corporate social responsibility of SOEs. Obligations include the elaboration of a sustainability report using the Global Reporting Initiative (GRI) standards and a requirement that SOEs adopt "sustainability practices adjusted to the markets in which they operate". Civil society organizations are proposing that this chapter is amended to include a stronger language that requires SOEs to adopt the three core elements of the 'responsibility to respect': the human rights policy, human rights due diligence and a grievance mechanism.

Unfortunately, both the Government and members of Parliament are fiercely resisting the idea of including human rights due diligence and reporting as obligations of SOEs.

Still at the national level, the National Action Plans produced so far are highly aspirational and lack basic elements that any credible action plan should not leave aside, such as clear assignment of roles and responsibilities, deadlines and mechanisms of enforcement and periodic measurement of progress.

It is doubtful whether the guidance prepared by the Working Group will help to overcome the current shortcomings as it fails to provide solutions to one of the main challenges for a strong NAP, which is the political disputes between the "strong" and the "weak" government agencies at the national level, where the former can be understood as those more prone to be aligned with business interests (such as ministries of industry and treasury) and the latter are those with a social or environmental mandate (such as the environmental licensing agency or the human rights department). Overall, current NAPs resemble more "letters of intent" than proper action plans.

On the business side, there has been a proliferation of initiatives of knowledge-sharing and, more concretely, companies have widely adopted human rights policies. But a long road lies ahead for the meaningful incorporation of the human rights due diligence into corporate processes and even more when the issue is remediation. Human rights reporting is still an underexplored terrain.

These examples point to a curious phenomenon, which is the fact that everyone seems to be "washing their hands" and throwing the responsibility of implementing the GPs onto the others.

- Multilateral financial institutions argue that they cannot "interfere within domestic affairs" and that it is up for the State to impose human rights obligations on businesses and oversee their conduct along the project cycle.
- Bureaucrats involved in bilateral and multilateral negotiations argue that Parliaments are the only legitimized bodies to set human rights obligations on businesses.
- Lawmakers, in turn, refuse to legislate on the issue by saying that there is not enough consensus on the level of responsibility of businesses towards human rights, and are also locked in the idea that CSR is not a matter for state regulation.
- And, last, but not least, businesses many times behave passively, arguing that they are not obliged to take any additional steps in addition to what is required by the strict letter of the law, or that they will be at a competitive disadvantage if they decide to do so.

When I asked a Brazilian officer in charge of the negotiations of the CFIAs the reason why human rights due diligence was not included in the CSR chapter, he replied that if civil society wants companies to conduct the due diligence before investing abroad, then we should lobby Congress to pass a legislation on this, because it is not for a bilateral investment agreement to establish such type of obligation.

Curiously, if one thing investment treaties exist for is exactly to establish rights that are not afforded by domestic legislation, and the "TRIPS-plus" clauses are an example of a provision within the BITs that grant investors an extra level of protection than afforded by national law.

Far from being an anecdotic example, a quick look at the current rules of investment and trade regimes and its (non-existent or weak) human rights safeguards will prove that this is the rule. For example, the EU Free Trade Agreement refers to the universal human rights standards and has provisions that admit the suspension of the agreement in situations where the States fail to fulfil their obligations towards human rights, but there is no language on the obligations of businesses towards human rights.

If, as the example of the Brazilian new bilateral treaty shows, the main actors believe that their hands are tight when the issue is to ensure full respect to human rights, then we have to admit that global governance works, but not for the protection of rights other than the property rights of the corporations.

This leads us to the question of what should be done to ensure meaningful progress beyond seeking examples of convergence, an exercise that the UNWG has devoted a lot of time. The answer is to focus on clarifying roles and responsibilities and, more importantly, to devise mechanisms for better accountability. We hope that this is addressed in the next Annual Forum on Business and Human Rights.

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