IPIS Insights

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The 2nd Annual United Nations Forum on Business and Human Rights, Geneva 2013

IPIS

From the 2 - 4 December 2013, IPIS attended the United Nations Forum on Business and Human Rights. The Forum was established by the Human Rights Council and is under the guidance of the UN Working Group on Business and Human Rights.

Around 1,700 people registered for this year's Forum, spanning Civil Society Organisations, individuals who have been adversely affected by business activity, State delegates, and representatives from national and transnational enterprises. The Forum offered the largest annual event of its kind to feed into IPIS' knowledge on business and human rights, share information and ideas, and inspire us here at IPIS to pursue business and human rights opportunities.

The interplay between business and human rights spans many issues – from cybercrime to conflict, women to children, safety to freedom of expression. Some of the subjects discussed at the forum were longstanding dilemmas, other fresh problems, emblematic of our rapidly developing world. Below, IPIS' researchers Gabriella Wass and Anna Bulzomi offer some insights into topics at the Forum that struck them as particularly interesting.[1]

How the UN Guiding Principles are serving human rights on the ground

The UN Guiding Principles on Business and Human Rights (UNGPs) were endorsed by the Human Rights Council in 2011. In recent years they have become a key tool for advancing the business and human rights agenda.

The UNGPs take a three-pillared framework, recognising the difference between the State obligation to protect human rights, the business responsibility to respect human rights, and the need for access to effective remedy for victims. Specific advice is given to States and businesses regarding how to meet their obligations and responsibilities, and civil society can use this as a tool to hold all actors to account.

The UNGPs have proved very useful to IPIS' work. For example, IPIS and ActionAid Uganda's research series on Business, Human Rights and Uganda's Oil used the UNGPs as a skeleton around which to structure analysis of the roles of different actors in Uganda. Doing so helped to clearly delineate the different responsibilities of businesses, State and civil society. IPIS has also used the UNGPs as a key tool for capacity building in Uganda. Following IPIS' training on the UNGPs in Kampala in December 2013, participants from Uganda's oil regions reported that being equipped with an understanding of the UNGPs made them feel more confident in asserting their rights, as they would have a concrete framework to refer to.

However at the UNGP's inception, they were both praised and censured for what they had to offer. Despite their positive impacts, high-level civil society organisations pressured UN members to push for more. One criticism was that the UNGPs did not offer States advice on how to close problematic governance gaps. Further, the UNGPs only created soft law, and were clear to state that, "Nothing [in these Principles] should be read as creating new international law obligations." (see the UNGPs' General Principles). In early 2011, a joint civil society statement by organisations including Amnesty International, Human Rights Watch and the International Commission of Jurists lamented that, "In some areas the draft of the Guiding Principles takes a more regressive approach towards the human rights obligations of States and the responsibilities of non-state actors than authoritative interpretations of international human rights law and current practices."

It was notable, although not surprising, therefore, to find that a great deal of the Forum's discussion was dedicated to highlighting where the UNGPs had fallen short. Original concerns about the content of the UNGPs were echoed, accompanied by the further fear that, although some companies and States were implementing the UNGPs, they were doing so for the sake of image, rather than in the full spirit of the sanctity of human rights. Meanwhile, many participants simply felt that both companies and States were not taking any concrete measures, but were merely engaged in a fruitless conversation.

[1] Gabriella Wass contributed insights on the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) on the ground and on States' adoption of National Action Plans on business and human rights; Anna Bulzomi elaborated on the impact of foreign direct investment on human rights.

Noting the level of criticism of the UNGPs at the forum has reminded IPIS to remain cognisant of the framework's shortcomings. Although a valuable tool for our analysis and capacity building, we must also ensure that any work in which the UNGPs form the foundation also includes a fair criticism of what they do not offer.

States' adoption of National Actions Plan on Business and Human Rights

In accordance with the first pillar of the UNGPs, in order to fulfil their duty to protect human rights, a number of States have developed National Action Plans (NAPs) on Business and Human Rights. The Danish Institute for Human Rights (DIHR) and the International Corporate Accountability Roundtable (ICAR) define NAPs as including "State-level policy documents that outline a government's priorities, commitments, and proposed initiatives to address a specific policy area."

The 2013 Forum offered a chance to gain a round up of which countries were working on NAPs, and which had already released them. At the time of printing, a small number of European countries had adopted NAPs. However momentum seems to be gathering, with a much larger number of European countries in the consultation and drafting stage.

DIHR and ICAR have launched a National Action Plan Project. They have noted that, despite many governments expressing support for the UNGPs, occasionally accompanied by policy commitments and initial implementation measures, relatively little attention has been devoted to Pillar 1 (the State duty) in comparison to Pillar 2 (the businesses responsibility).

A number of risks accompany this skewed attention. One is that the State responsibility to protect human rights will be greatly overshadowed by business measures to respect human rights. Yet it is the former that creates concrete progress, and ensures that the laws governing business practice keep pace with globalisation. A second is that, while guidance for businesses on the different facets of how to respect human rights builds, States are left without practical tools to comprehensively implement their duty to protect human rights from the adverse impacts of businesses into practice.

The impact of poor attention and guidance could be that State efforts are, at best, hot air, ad hoc, or poorly aligned, and, at worst, non-existent. Moreover, from input at the Forum it was clear that NAP action is currently dominated by European countries and the USA. Yet it is in developing countries where businesses' activity incurs most harm. Strengthening human rights-positive measures in vulnerable countries is a priority.

ICAR and DIHR's project will work to hold governments to account for progress in implementing the UNGPs. The goal of the their project is to produce an NAP toolkit comprising: a model National Baseline Assessment, a model National Action Plan, and proposals for reporting and reviewing States' implementation of the UNGPs.

IPIS is looking forward to working on such issues in the coming year. In Uganda, IPIS and the Uganda Human Rights Commission are prospecting options to complete a National Baseline Assessment. Meanwhile, IPIS's capacity building workshops on business and human rights routinely include regional and international methods to hold States to account regarding their implementation of the UNGPs, for example via the UN's Universal Periodic Review process, and via shadow reports under the State Reporting Procedure of the African Commission on Human and Peoples' Rights.

Investment and Human Rights: time to turn the tide?

Investment flows are often praised for fuelling economic growth in host States, with the result that more and more transitional[2] and developing countries strive to attract foreign investors. However, the equation is not that simple: high volumes of foreign direct investment (FDI) do not automatically lead to development or to a higher standard of living (See art.11 of the ICESCR) for the people affected by the investment projects.

In particular, in the resource-rich Sub-Saharan countries where IPIS operates, the legal regime regulating foreign investment could come into friction with measures of social justice that these countries have committed to take when they entered into international human rights agreements. Over the past three years IPIS has been receiving a growing number of appeals from communities in DRC, Chad and Uganda (to name but a few countries where we are active) that hold very different views on the benefits of FDI than their governments or the investors.

While recognizing that investment is not inherently bad for human rights, we believe that the current legal and policy frameworks regulating FDI presents substantive and procedural obstacles that communities in high-risk recipient countries are ill-equipped to overcome. The UN Forum panel on *Integrating human rights in international investment policies and contracts*, chaired by Andrea Saldarriaga, also acknowledged the urgent need to address the investment-human rights nexus and the need for a multi-stakeholder effort in grappling with some of the current shortcomings.

International investment agreements and arbitral tribunals: where human rights problems start

The rationale of both the investment chapters of free trade agreement (FTAs) and the bilateral investment treaties (BITs) is to ensure that access to resources and business operations of foreign investors in host countries are unfettered, thus creating an "inviting" environment for the investor. In many developing countries, international investment agreements (IIAs)[3] are often crafted in a way that takes this assurance to the extreme, offering exceptionally favourable conditions to incoming investors. Through a web of carefully designed treaty provisions (the fair and equitable treatment standard, the expropriation clause, the stabilisation clause), IIAs expand the rights of foreign investors and – ultimately – tie the hands of the host State.

Stabilisation clauses like the one found in the *Sicomines* contract, the famous DR Congo-China "deal of the century"[4], are dangerously uncompromising; Article 14.4 of the Sicomines agreement states that "*all new legal and regulatory requirements which put [the mining joint venture and the contractor in charge of infrastructure] at a disadvantage will not be applied*"- a limitation that undermines DR Congo's right to regulate, even if regulatory changes were in the public interest.

By now, most IIAs are equipped with far-reaching clauses that have a profound impact on the host States' law and politics and risk interfering with their obligations to protect and progressively realise human rights. Another example – Uganda's leaked Production Sharing Agreement with Tullow Oil company – has similarly been discussed by IPIS with regards to its potential impact on human rights.

The general pattern is that any change in the host State's legislation – no matter the public interest dimension of the change – may trigger arbitration and will presumably oblige the state to pay a conspicuous amount in compensation for damages to the investor. In fact, chances of a human rights argument being accepted by an arbitrator are very low. In many cases, jurisdiction of the arbitral tribunals is restricted to alleged violations of the substantive rights protected by the BIT, and the large majority of BITs does not refer to human rights law provisions. Also, arbitrators are inclined to overlook

[2] Transitional is used here as 'post-conflict'. Currently, most countries covered by IPIS in our business & human rights and natural resources work qualify as transitional.

[3] With IIAs we refer to both the bilateral investment treaty (BIT), an international agreement struck between two States, and the investment contract, an agreement struck between the host/ recipient State and the foreign company that will execute/ implement the investment project.

[4] Convention de Collaboration entre la République Démocratique du Congo et la Société Sinohydro Corporation relative au développement d'un projet minier et d'un projet d'infrastructures en République Démocratique du Congo, January 2008

public interest arguments, based on the consideration that the character of State-investors disputes is predominantly private. On top of this, arbitration proceedings are shrouded in secrecy, making it virtually impossible for host State's civil society organizations to question the rationale for decisions.

Working primarily under the aegis of the World Bank's International Centre for the Settlement of Disputes (ICSID), hence totally outside of the host State's court system, arbitrators wield the power of influencing, with one single decision, huge portions of the host State's economy and society.

The power of IIAs in granting higher level of protection to investors rather than to host States and to affected communities is highlighted by the growing number of cases brought before arbitral tribunals and settled in favour of the investor.

In 2013, the UN Conference on Trade and Development (UNCTAD) reported (see p.40) that host countries have faced claims of up to USD 114 billion and awards of up to USD 867 million. Most of these cases have been brought against developing countries and have challenged 'public interest' measures, including human rights measures (e.g. regulation promoting social equity, protecting public health or imposing higher environmental standards).

Rebalancing international law

Recognising that IIAs can unduly constrain national policymaking and that most of today's IIAs are almost exclusively focused on investors' protection, UNCTAD presented a comprehensive Investment Policy Framework for Sustainable Development (IPFSD), a document that takes a fresh look at the fast-evolving investment landscape and tries to address key challenges by suggesting a set of Core Principles and exploring how to render them operational at IIA level.

The Core Principles touch upon a number of issues that cannot be underestimated when investing in least developed countries. The document also targets specific issues arising in our region of focus, Sub-Saharan Africa. For instance, Principles 5 and 6 deal with rebalancing rights and obligations of States and investors, while Principle 11 calls on better international coordination to avoid a global race to the bottom in 'sensitive sectors'. Most of these sectors pose regional challenges in Central and Southern Africa, as it is the case for investment in land, which could result in land grabs and the crowding out of local farmers by foreign investors.[5]

UNCTAD's work signals a window of opportunity for further integration of the human rights agenda in the current legal regime regulating FDI. Keeping momentum and joining forces at this time will be crucial to achieve a real rebalancing of the currently unbalanced "developing State/ foreign investor" relations.

As the interest in developing countries' natural resources does not seem to be ceasing any time soon, and flows of FDIs into Sub-Saharan Africa are at an all-time high, we should work to ensure that future IIAs are more geared towards enabling host States meet their human rights obligations.

[5] International coordination on addressing land grabs has already started, with the FAO, UNCTAD, World Bank and IFAD adoption of the Principles for Responsible Investment in Agriculture (PRAI)