

Damiano de Felice

October 21st, 2015

## UN FORUM SERIES – How does progress look like in business and human rights?

0 comments

Estimated reading time: 5 minutes

*This post was contributed by Martijn Scheltema, partner at Pels Rijcken & Droogleever Fortuijn and professor at Erasmus University Rotterdam.*

The 2015 United Nations Forum on Business and Human Rights will focus on **tracking progress** in (effective) implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs). This represents a significant opportunity to simultaneously improve the **effectiveness** of the UNGPs with respect to two important areas: human rights due diligence and access to remedy.

My starting point is that the business and human rights community should understand that progress in the implementation of the UNGPs necessarily passes through not only enhancing due diligence and access to remedy separately, but also better connecting the two of them. This involves three steps:

1. implement thorough (operational level) **grievance mechanisms** as part of human rights due diligence processes,
2. complement grievance mechanisms with third party facilitation, and
3. provide effective escalation mechanisms for those situations when grievances are not solved through non-judicial mechanisms.

### **Better connection between due diligence and access to remedy**

Human rights due diligence and access to remedy are intimately linked with each other. For example, **due diligence** requires companies to exercise leverage vis-à-vis their business partners (such as their suppliers) to enhance their compliance with human rights, and thorough (operational level) grievance mechanisms play an important role in this respect.

Although several suppliers have some sort of (operational level) grievance mechanisms, many of these tools function rather poorly because a lack of trust from the stakeholders they are designed for, as well as because of faulty design. This is unfortunate because human rights due diligence evidently requires company to draft supply chain contracts that prescribe grievance mechanisms **meeting the requirements of UNGP 31** (such as legitimacy, accessibility and predictability).

That said, one has to be careful that the grievance mechanism is adapted to the local (complex) situation. Top-down prescription of the requirements of a grievance mechanism is not the way forward.

Interaction with (local) stakeholders is necessary to shape the mechanism.

Furthermore, in many instances (ultimate) buyers **lack sufficient information** on human rights compliance in supply chains. It is therefore important that companies require suppliers to provide aggregated data on complaints handled through the grievance mechanism to the (ultimate) buyer (e.g., once a month or once a year). This would provide a much clearer picture on the local situation.

Of course, companies have to be careful to safeguard the privacy of the complainants and the confidentiality of the specific solutions agreed upon. Providing this type of data to the ultimate buyer might discourage the use of the mechanism. Thus, the aggregated information provided to the ultimate buyer should only reveal the nature and number of the complaints (in addition to contextual information which allows to understand the meaning of this number).

This set-up would function as an early warning system. For instance, it would enable the buyer to take action if problems occur (in many instances before a non-governmental organization starts campaigning, with possible reputational damage as a consequence).

Furthermore, this information might facilitate a dialogue between the buyer and its suppliers as to whether and how the demands of the buyer (in connection with human rights compliance) can be aligned with local norms and practices. For example, the (human rights) code of conduct of the buyer might not be well adapted to the local situation/habits, and thus inadvertently worsen human rights outcomes.

### **Third party facilitation**

Many operational-level grievance mechanisms are company-based, and do not entail **independent third party facilitation**. This is one of the reasons why stakeholders (such as workers or local/indigenous

communities) do not confide in these mechanisms (if they are allowed to submit a complaint in the first place).

Lack of trust is a **common reason** not to engage.

A(n external) mechanism using an independent facilitator (with local experience and specific expertise in non-judicial dispute resolution) might generate trust from relevant stakeholders, and therefore improve accessibility to the non-judicial mechanism. By and large, using a skilled third party facilitator also enhances transparency as his/her role often entails explaining the procedure to stakeholders.

Another challenge in connection with operational grievance mechanisms is that stakeholders submitting a complaint often remain uninformed about the outcome of the mechanism. The involvement of an independent facilitator should improve disclosure in this respect as well.

### **Escalation mechanism**

Non-judicial grievance mechanisms do not work well in a legal vacuum. They perform at best when embedded within a functioning legal system. If problems occur and the buyer and supplier are not able to find a solution, or if issues with workers or local communities cannot be settled (through dialogue), an escalation mechanism is therefore necessary.

Dispute resolution in local courts might be difficult and costly, e.g., because a buyer has to litigate in many countries with different procedural and substantive rules, because of endemic corruption and/or because the (local) government might protect the interests of the supplier.

More importantly, local courts rarely deal with business and human rights issues. As such, they are often not well equipped to build

knowledge and expertise on these issues, with decisions changing from country to country.

Enforcement of foreign or local court decisions might be a challenge as well.

It is therefore important to ensure the availability of alternative dispute resolution mechanisms that (1) have a regional or global reach and (2) are able to build in-depth knowledge on business and human rights issues. This will generate trust in the mechanisms because they will be considered more predictable than diverging (decisions of) local courts.

Such mechanisms can only be found in (1) arbitration or (2) a supra-national dispute resolution body established by a treaty (national courts obviously do not have regional or global jurisdiction). While a dispute resolution body entailed in a treaty is still a remote idea (and enforcement of its decisions are likely to be problematic), arbitration might be somewhat easier to establish. For example, an important advantage of arbitration is that enforcement (and recognition) is more straightforward because most countries in the world are already parties to the [New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#).

## Conclusion

The involvement of mediators/facilitators and the inclusion of arbitral clauses in supply chain contracts (preferably with some third party rights) can help improve human rights due diligence throughout supply chains, next to existing (non-judicial) mechanisms such as National Contact Points in OECD countries and (judicial mechanisms in) national courts.

Mediation and arbitration does not only represent solutions to access to remedy problems. They are effective due diligence tools as well.

Progress in business and human rights depends on recognizing this connection.

Martijn Scheltema



*Martijn Scheltema is partner at Pels Rijcken & Droogleever Fortuijn (a the Hague-based Dutch law firm) and professor at Erasmus University Rotterdam. He has been one of the founding board members of ACCESS and currently is special advisor. He is vice chair of the Corporate Social Responsibility Committee of the International Bar association and has been counsel in defining human rights cases litigated at the Dutch Supreme Court.*

Share this:



Share

## About the author



Damiano de Felice

Posted In: Human Rights Impact Assessments | Management tools

---

## Leave a Reply

Your email address will not be published. Required fields are marked \*

Post Comment		
Name	Email	Site

Comment

- Notify me of follow-up comments by email.
- Notify me of new posts by email.

## Related Posts

Human Rights Impact Assessments

Irene Pietropaoli – Human Trafficking: What tools are available to measure and address businesses' impact?

NOVEMBER 21ST, 2014

1 

Management tools

## Valerie Michel – Reporting parameters and children’s rights

JULY 27TH, 2015

Management tools

## UN FORUM SERIES – Monitoring Compliance with the UN Guiding Principles in Conflict Zones

NOVEMBER 11TH, 2015

Management tools

## UN FORUM SERIES – Whistleblowing: A powerful tool to monitor human rights compliance

OCTOBER 20TH, 2015

1 





© LSE 2020

⌵