



Third Annual Meeting of the International Corporate Accountability Roundtable

Washington D.C.

September 12-13, 2013

What is the International Corporate Accountability Roundtable?

The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes and defends legal frameworks to ensure corporations respect human rights in their global operations.

For more information about our work and our campaigns, visit www.accountabilityroundtable.org.

Third Annual Meeting Agenda

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| 9/12/2012 Meeting | 8:30 am – 5:15 pm | Student Conference Center, Lisner Building |
| 9/12/2012 Reception | 5:30 pm – 7:30 pm | Circle Bistro, 1 Washington Circle |
| 9/13/2012 Meeting | 9:00 am – 4:00 pm | Faculty Conference Center, Young Building |

Thursday, September 12, 2013

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| 8:30 am – 9:00 am | Welcome and Introductory Remarks, Breakfast |
| | Introductory Remarks by Amol Mehra, Director, ICAR and Ralph Steindhart, Professor of Law and International Affairs, George Washington University Law |
| 9:00 am – 11:00 am | Discussion 1: Judicial and Non-Judicial Remedy |
| | State of Play Post-Kiobel |
| | Discussion with ICAR Experts on Access to Judicial Remedy |
| | Non-Judicial Remedies |
| 11:00 am – 11:45 am | Discussion 2: Recent Legal Challenges to Corporate Accountability Frameworks |
| 11:45 am – 12:30 pm | Lunch |
| 12:30 pm – 3:00 pm | Discussion 3: International Perspectives on Corporate Accountability |
| | European Perspectives |
| | Multi-stakeholder Initiatives |
| | Burma |
| | Internet and Communications Technology |
| 3:00 pm – 3:15 pm | Coffee |
| 3:15 pm – 5:15 pm | Discussion 4 – Domestic Efforts |
| | Discussion with ICAR Experts on Government Procurement |
| | Legislative Proposals |
| 5:30 pm – 7:30 pm | Reception at Circle Bistro |
| | Welcoming Remarks by: Katie Redford, EarthRights International (ERI) |

agenda



Friday, September 13, 2013

- 9:00 am – 9:30 am **Welcome and Introductory Remarks, Breakfast**
- 9:30 am – 12:00 pm **Discussion 5: Implementation of the UN Guiding Principles and other topics for discussion**
- 12:00 pm – 1:00 pm **Lunch**
- 1:00 pm – 4:00 pm **Roundtable Session: Setting the Strategy and Building a Coordinated Movement**
- 4:00 pm **Closing Remarks and Thank You**
Remarks by Amol Mehra, ICAR

Discussion 1: Judicial and Non-Judicial Remedy

Scope of Discussion

This discussion focused on access to remedy for victims of corporate-related human rights abuses. First, it covered the recent U.S. Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*, and its implications for the use of the Alien Tort Statute (ATS) as a tool for seeking legal remedy in the U.S. federal court system. Next, ICAR experts presented the preliminary findings of the Access to Judicial Remedy Project, which provides recommendations to alleviate barriers to seeking judicial remedy in the court systems of corporate “home states,” such as in the United States, Canada, the United Kingdom and certain countries in continental Europe. Finally, the group discussed recent developments in non-judicial remedy through international mechanisms such as the Organization for Economic Cooperation and Development (OECD) and within international financial institutions.

State of Play Post-Kiobel

The first part of the discussion, State of Play Post-*Kiobel*, concerned the Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*, and the implications for victims seeking judicial remedy for human rights violations in the U.S. federal court system. Originally, the *Kiobel* case went to the Supreme Court on the question of whether corporations could be held liable for violations of international law, and thus whether the ATS applied to actions against corporations, but after hearing arguments on this topic, the Supreme Court ordered rehearing on whether the ATS applied outside the United States. This issue was argued on October 1, 2012 and decided on April 17, 2013.

A majority of five justices affirmed the lower court’s dismissal of the case, but rather than dismissing based on corporate liability for violations of international law, the Court ruled that the presumption against extraterritoriality applies to the ATS. This presumption dictates that when a statute does not explicitly indicate that it applies outside the United States, it does not. The Court also said, however, that if a case “touches and concerns” the United States with sufficient force, the presumption could be overcome. The only guidance the Court gave on how to apply the “touch and concern” test, however, was to say that in this case, “mere corporate presence” was not enough to overcome the presumption. There was no explicit decision on the original question of whether corporations could be held liable at all under the ATS.

Legal Landscape post-Kiobel

ATS cases that were on hold in the lower courts pending the *Kiobel* decision have now come up for consideration. While many have been dismissed on *Kiobel* grounds, a few have moved forward. There are three cases in which the courts have found the “touch and concern” test satisfied. In *Sexual Minorities Uganda (SMUG) v. Lively*, the district court of Massachusetts found that because the Defendant was a U.S. citizen and most of the conduct underlying the offenses took place in the United States, the presumption against extraterritoriality was overcome. In this case, SMUG, an LGBTI umbrella organization located in Uganda brought suit against Scott Lively, a U.S.-based preacher, for his decade long campaign to

persecute Ugandans based on their sexual orientation. Because acts committed against the Plaintiffs took place within the United States to a substantial degree over a period of many years with infrequent trips to Uganda, the case was considered to touch and concern the United States with sufficient force to overcome the presumption against extraterritoriality. Similarly, in *Mwani v. Laden*, a suit brought by Kenyan victims and family members of the 1998 bombing outside of the American embassy in Nairobi, Kenya, the District Court of the District of Columbia found that because the terrorist attack was plotted in part within the United States, and directed at the American Embassy and its employees, the presumption against extraterritoriality was overcome. In *Ahmed v. Magan*, a suit arising from the Plaintiff's arbitrary detention and torture in Somalia, the Defendant did not raise the *Kiobel* decision in his defense, but the Southern District Court of Ohio established that even if he had, the presumption against extraterritoriality was overcome because the Defendant was a permanent resident of the United States.

In many other cases however, judges have applied the *Kiobel* decision as a categorical bar to cases going forward under the ATS. One prominent example is the case of *Al Shimari v. CACI* in the Eastern District of Virginia, in which four Iraqi citizens brought claims against CACI, a defense contractor to the U.S. military, on the grounds of abuse and torture during their detention in Abu Ghraib. CACI had provided interrogations services to the U.S. military at Abu Ghraib.

The judge dismissed the case on *Kiobel* grounds, despite the many ways in which the case could have been seen to touch and concern the United States. This case will be appealed to the Fourth Circuit. The legal landscape post-*Kiobel* remains unsettled, but advocates are learning more as cases make their way through the

federal court system. Cases that can not be brought in federal court following this decision may still be brought in state court.

Legal Tools for Corporate Accountability

Kiobel is not the end of corporate human rights litigation in the United States. Some cases will continue to go forward under the ATS, and there are other avenues for litigation against corporations for human rights abuse. Cases concerning torture, extrajudicial killing, land grabbing, arbitrary displacement, and similar offenses have been filed under state tort law (although under different names). Other statutes, such as the Trafficking Victims Protection Reauthorization Act (TVPRA), still apply to corporations for their actions abroad.

Participants agreed that eventually, there may be a need for a legislative fix to ensure state and federal courts remain open to human rights claims, even if only in specific circumstances.

The discussion established that the ATS, while limited after the *Kiobel* decision, is still a viable tool for corporate accountability in certain cases, and that other avenues for legal accountability still exist.

Discussion with ICAR Experts on the Access to Judicial Remedy Project

ICAR Experts Professor Gwynne Skinner and Andie Lambe, two of the authors of the upcoming Access to Judicial Remedy Report, led the second part of the discussion. It began with a brief introduction of the project, which seeks to provide recommendations to overcome barriers that victims of corporate related human rights abuses face in seeking judicial remedy in "corporate home states." The Expert team of authors worked through a process of consultations with human rights organizations, litigators, and government representatives from the United States, Canada, United Kingdom, France, Germany, Spain, the Netherlands, and

Switzerland to gather firsthand information on past cases and the barriers that victims have faced, as well as ideas for feasible recommendations that would alleviate such barriers.

Findings

In the United States, one of the barriers to human rights litigation included the failure of the Supreme Court to define the “touch and concern” standard in its *Kiobel* decision. In addition, jurisdictional challenges, such as the application of the *forum non conveniens* doctrine creates a barrier in state courts. *Forum non conveniens* is a doctrine that allows a court to dismiss a case based on finding that there is a more appropriate forum for it, such as the forum in which the abuse occurred. Similarly, the statute of limitations for many offenses, in state courts especially, has posed a difficulty for victims. An additional issue identified was the difficulty of holding parent corporations liable for acts of their subsidiaries due to limited liability for parent corporations. Similarly, when attempting to pierce the corporate veil, it is very difficult to prove that subsidiaries are acting as agents for the parent corporation. Although a loss in human rights cases does not always result in having to pay the opponents legal fees, the cost for most victims to bring these cases is still substantial. Another key issue in court battles is unclear legal standards. It is also still unclear what standard applies to aiding and abetting, knowledge and substantial assistance, or specific intent. Other barriers are more practical in nature, such as how to get victims visas to the United States for depositions, and whether victims can testify by video in court.

The discussion also briefly touched on barriers to human rights litigation in other regions. In Canada and in Europe, a major barrier identified in certain jurisdictions is the existence of a robust “loser pays” culture, which prevents

many cases from moving forward. Victims and allies that fear paying legal costs of the company should they lose are much less likely to bring cases in the first place. In Canada, one of the biggest barriers appears to be the application of the *forum non conveniens* doctrine.

Recommendations

The Experts then went on to discuss some of the report’s recommendations based on its initial findings. Recommendations included legislative proposals to ensure access to judicial remedy for human rights victims, including against corporations, and seeking to restrict the use of Strategic Lawsuits Against Public Participation (SLAPP), to prevent companies from targeting those bringing legal cases against them. At the state level, recommendations included extending the statute of limitations on certain offenses and changing the laws on limited liability and the implications for subsidiary actions abroad. Another was to clarify the legal standards on aiding and abetting. Lastly, a key policy recommendation was to create special visas or visa status for litigants in human rights abuse cases.

Case Studies and Other Jurisdictions

The Experts also discussed several of the case studies from the report to help highlight some of the barriers to remedy that exist. One of the first case studies discussed an action in French courts against the French corporation Amesys for its complicity in acts of torture in Libya. The company allegedly provided the Gaddafi regime with surveillance equipment and software that was used to monitor activists, who were later arrested, imprisoned, and tortured. Challenges in the case included the current security situation in Libya, language barriers, an unwillingness of some victims to be represented, and a bombing of the French embassy that led to a delay in getting the victims their visas.

A second example, also in France, was a criminal case brought by Global Witness and Greenpeace against Danish timber company DLH, which accused it of purchasing timber from Liberia during the civil war, thus funding the regime of dictator Charles Taylor. The two main impediments in the case were practical ones, namely the difficulty of translating documents, and the problem of evidence destroyed during the civil war.

The authors went on to discuss several other cases in other European countries. For example, a case study from Britain examined a British mining company accused of illegally detaining a number of protesters in Peru. The suit against the company was eventually settled out of court, but went on to cause problems locally by dividing the community opinion and response. Another case discussed involved a Swiss and German timber firm, the Danzer Group, which faced charges involving its conduct in the Democratic Republic of the Congo. The principal difficulties in the case involved the remoteness of the location in question and disputes within the community.

The discussion made clear that examining the barriers to judicial remedy in victims' home states would be its own challenge. On the issue of cases in international investment tribunals, that four of the five tribunals that exist are confidential. Therefore, it is difficult for any civil society actors to engage in the process.

Non-Judicial Remedies

The third panel addressed the subject of remedy from a non-judicial perspective and focused mainly on developments in non-judicial remedy in international mechanisms. At the international level, there has been an explosion of cases brought using these non-judicial mechanisms. Several of the new cases are brought under the OECD Guidelines for Multinational Enterprises or through

international financial institutions. Many cases relate to the extractive sector, to human rights and the environment, and to the proper execution of due diligence. One of the major improvements in the updated OECD Guidelines is the extension of responsibility throughout supply chains. Similarly, the OECD Guidelines' provisions on tax law present potential for growth in cases brought before this mechanism.

Despite the increase in cases, there are still a number of barriers in access to non-judicial grievance remedies. Two obstacles include the locations of the mechanisms themselves, and potential conflicts of interest. For example the World Bank's Compliance Advisory Ombudsman (CAO) tackles cases of junior exploration mining companies even though it is clear that the World Bank has its own financial interests in these types of projects going forward. There have also been cases of SLAPP suits filed against complainants in the OECD Guidelines mechanism. There is a trend of challenging victim's representatives. Another issue is national contact points that are sub-par or ineffective, some of which have rejected complaints simply because they do not appear to yield a favorable outcome. Additionally, while less of a problem for victims seeking judicial remedies, there is still a problem with power and resource disparities. It is clear numerous problems remain for victims seeking remedy in non-judicial mechanisms.

Discussion 2: Recent Legal Challenges to Corporate Accountability Frameworks

Scope of Discussion

The discussion of Recent Legal Challenges to Corporate Accountability Frameworks started with a conversation on the development of standards on conflict minerals, and moved on to a discussion of efforts to increase transparency in extractive industries more generally.

Conflict Minerals and Dodd-Frank 1502

The discussion began with an overview of the origins of calls for transparency in conflict minerals extraction. The mining and exportation of coltan, gold, tin, cassiterite, and other minerals essential for the manufacturing of consumer electronics based in the Eastern Congo has funded armed groups implicated in massive human rights violations. Over the last few years, the OECD issued due diligence guidelines that provide companies with recommendations on establishing due diligence procedures to address the potential human rights abuses in supply chains of companies.

In the United States, Section 1502 of the Dodd-Frank Act, signed into law in 2010, requires companies to verify and disclose whether they source key conflict minerals used in their products from conflict zones in the Democratic Republic of Congo (DRC) and surrounding countries. The disclosure requirement is to be enforced by the Securities and Exchange Commission (SEC). Throughout the rulemaking process, industry leveled significant opposition to strong rules. When the SEC released its final rule in August 2012, the language and content alluded to the OECD guidelines as the standard for due diligence. Industry leaders quickly filed a

legal complaint over the final rule, on both administrative procedure grounds and First Amendment grounds, but the District Court for the District of Columbia ruled in favor of the SEC. The first reports will be due to the SEC in May 2014. In the Congo, legislation was recently passed that requires mining companies to comply with OECD guidelines. Many have suggested the law stems from Dodd-Frank. There is also hope that the OECD will issue guidance on timber exports soon.

Conflict Minerals in the European Union

The discussion turned to the European Union, where a legislative proposal is in development to deal with conflict minerals disclosures. Advocates want the proposal to be binding and to cover a broad geographic scope that would include more regions than the DRC. The basis of the proposal is expected to be the OECD Guidelines. The adoption of the final proposal will not come until after the next EU elections.

Call for Transparency

The Dodd-Frank Act included another disclosure provision, Section 1504, which requires extractive companies in oil, gas, and minerals to disclose payments above a certain threshold made to governments for access to said resources.

One example of where this might be applicable is Equatorial Guinea, one of Africa's biggest oil providers, but a country with rampant poverty and a massive wealth gap. Disclosures could provide insight into corruption and the roots of continued poverty. Similar to Section 1502, Section 1504 is to be implemented by the SEC.

A final rule was released in August 2012 and immediately faced a lawsuit from oil industry groups. The rule was vacated in a court judgment in July of 2013 on administrative procedure grounds, and sent back to the SEC for revision. The SEC decided to rewrite the rule rather than appeal the decision.

The industry groups that challenged the rule also filed a First Amendment challenge. The Court did not reach this issue in its decision to vacate the rule.

Some groups have suggested that the rule does not need to be weakened, but just restructured. Opponents argue that the SEC did not complete a detailed cost-benefit analysis, that companies from countries like Russia and China are not required to make such disclosures, and that the rule violated companies' First Amendment rights by mandating political speech. Others however have suggested that there is no First Amendment right to keep secret payments to foreign governments. In the meantime, the law is still intact, and the SEC has a 270-day deadline to produce a new rule.

International Developments

Discussion then turned to similar efforts taking place elsewhere. The European Union, for example, has adopted Accounting and Transparency Directives that are similar to Section 1504 for private companies and for logging. In Canada, Prime Minister Steven Harper has suggested the country will pass legislation similar to Section 1504 in the next two years. Similar conversations have taken place in Norway, Switzerland, and Australia. There are also hopes that outreach to Chinese companies will also eventually yield results. Advocates are hopeful that as foreign markets shift towards transparency it will become increasingly difficult for companies to hide secret payments.

Extractive Industries Transparency Initiative

The discussion also covered the impact of the Extractive Industries Transparency Initiative (EITI). While the EITI relies on governments to sign up, it very much compliments and reinforces Dodd-Frank. One of the benefits of the EITI is that it covers both public and private companies, whereas Dodd-Frank covers only publicly listed companies.

Discussion 3: International Perspectives on Corporate Accountability

Scope of Discussion

The third discussion focused on international efforts on corporate accountability. It covered efforts in Europe on corporate reporting, and cooperation with National Human Rights Institutions and governments. Progress and perspectives on multi-stakeholder initiatives were also discussed, as well as recent developments and efforts in the internet and communications technology sector. Lastly, it focused on the reporting requirements for investment in Burma, and efforts to address worker rights and safety in Bangladesh.

European Perspectives

The recent European Commission proposal for Member States to require large companies to formally report information related to the environment, labor issues, social issues, and corruption would require companies to disclose their policies, the results of their policies, and risks inherent in their operations. The proposal was a positive initial attempt by the European Union on corporate responsibility issues. One proposed change is to amend the requirements on risks to include disclosure of due diligence efforts. The proposal could also be considered a mandate for the development of further guidelines to establish what the reporting would mean in practice. In June, the European Council concluded that it would invite the Commission to amend the proposal to include disclosure of tax payments on a country-by-country basis.

There is concern amongst some groups that the rule could be watered down prior to

implementation. Due to business opposition to the country-by-country requirements and language concerning risk, it has been important for European organizations to work with those large companies in favor of keeping the proposal as is. European groups have led an advocacy strategy that includes teams on the ground in specific capitals, whose job is to influence opinion. One area highlighted as a weakness, however, was in press outreach, as it has been difficult to garner press or public interest on the matter.

National Human Rights Institutions

At this point the discussion turned to the role of European National Human Rights Institutions. There were three broad areas highlighted as priorities for NHRIs. The first was to expand the monitoring capacities of NHRIs, by promoting cooperation in Europe, and in countries where European companies have operations. The second priority highlighted was the implementation of the United Nations Guiding Principles (UNGPs). Because there is some political sympathy for the UNGPs in Europe, it is important that NHRIs offer concrete input on the implementation of the principles. The United Kingdom has released its National Action Plan (NAP), which has been received with a lack of confidence in some corners. Other countries, such as Norway, will soon release their own NAPs. The final priority highlighted was non-judicial complaint and remedy mechanisms, a key one being the OECD National Contact Points (NCP). The NHRIs are pushing for a model of the NCP that would serve as a good example of how to institutionally structure these bodies.

Multi-stakeholder Initiatives

The discussion on multi-stakeholder initiatives (MSIs) focused on the role MSIs can play in corporate accountability and the lessons learned from experiences so far. It also covered key concerns on accountability, credibility, and effectiveness of MSIs generally.

A key question for many organizations is how to establish accountability in MSIs, particularly when many MSIs are based on voluntary programs. This arises in part from the perceived failure of the Voluntary Principles, and concerns on how to deal with MSIs in light of this. A real danger is the risk that MSIs will focus on process and structure rather than the direct impact on lives and human rights. In an effective MSI, governance and accountability mechanisms need to be established first. In MSIs, the measure of progress is whether or not companies are actually improving in the areas they have committed to and if affected communities benefit.

An example of national, local or effected communities holding MSIs accountable is in the case of worker-prepared reports in Bangladesh and their applicability to MSI efforts on Bangladeshi labor standards. Participants stressed the importance of effected community participation in MSIs to help hold corporations accountable and ensure that on the ground change occurs. The International Code of Conduct for Private Security Providers is an example of where an MSI could provide an accountability mechanism to governments and corporations by linking national standards initiatives to the mechanisms itself.

There is a danger that some companies will use voluntary initiatives and MSIs as a safe harbor to say they are taking action, rather than face more regulation or legislative action. This danger proves the importance of government

and civil society involvement in MSIs to ensure real accountability, as MSIs are not a substitute for good public policy and enforcement.

One participant noted three tests to use when contemplating when civil society should engage with an MSI. First, does the MSI establish real accountability mechanisms? Second, does it engage with locally affected people? Third, are there points of intersection where the MSI and regulation can be integrated? So long as MSIs exist, there will be an obligation on the part of civil society to push them to be the most effective they can be, advocating on behalf of effected communities in these processes. When MSIs are ineffective however, there is an obligation to push for effective regulation.

It requires enormous effort on the part of organizations that want to engage with MSIs. Before engaging, organizations need to discuss the extent to which initiatives are explicitly linked to policy goals. Another key point of the discussion was how funders of civil society and proponents of MSIs need to focus more on engaging local communities, beyond capacity building. Furthermore, it is necessary for civil society actors to work together as a strong voice in MSIs and similar processes in order to push their policy goals forward, and to avoid being overpowered by companies. While there will always be challenges for groups engaging with MSIs, it appears that some have made real progress, especially when it comes to extractive industries.

Myanmar (Burma) and Responsible Reporting

The discussion on Myanmar (Burma) centered largely on the achievements of civil society and institutional investors thus far, as well as the key challenges ahead in expanding the successes into something sustainable.

It was highlighted that Myanmar, as a relatively new economy to investors, is a laboratory for the implementation of the UNGPs. It is believed that if the UNGPs can be successful in a country with ongoing conflicts, and a lack of rule of law, they could be successful anywhere. Likewise, a failure in Myanmar could be demonstrative for other countries, and could point out the gaps in coverage of the UNGPs.

Though the United States has lifted its sanctions, they have implemented Responsible Investment Reporting Requirements, which are required for the general license needed for U.S. investors to engage in Burma. They require companies to disclose their corporate policies and practices in areas of workers' rights, environmental rights, and due diligence efforts undertaken. In general, the reporting requirements are a positive development, and saw investors and civil society working collaboratively. There are still concerns regarding the \$500,000 threshold for investment reporting, and for what companies can keep confidential.

The first round of reports was due on July 1, 2013 and only five companies filed reports. None of these were well-known companies that have made investments in Myanmar. In response to the first reports, a number of NGOs came together to raise concerns on the limitations of the reports, namely the loophole for passive investors, and the lack of a requirement to disclose local business partners. Some institutional investors have observed the NGO response, and want to build on it by challenging the idea of a passive investor. They also wish to publicize the companies that have yet to file a report, and call on all companies, whether required to file reports or not, to do so. Civil society actors are also trying to change the mindset in Myanmar that American investment is necessarily better than Chinese or

otherwise, and have the Burmese focus on the actual measures of respect for human rights.

Key achievements are that the reporting requirements set a precedent as a new transparency and disclosure regime and that civil society and institutional investors have worked closely together on these requirements. Some of the continuing challenges are that the requirements are limited to U.S. companies; the only compliance requirement of companies is to file a report, without focus on the accuracy of the report; the burden placed on civil society; the amount of capacity required for groups in Myanmar with little exposure to investment to monitor these reports; and that due diligence from some companies might come too late, after damages from investments have already occurred.

Internet and Communications Technology

The discussion on internet and communications technology (ICT) covered a broad spectrum of issues, including the large expanse of human rights issues that the ICT sector touches, and the challenges for the future to address these.

The discussion began with a few examples to highlight the broad spectrum that the ICT-human rights field covers. For example, Vietnam recently passed a law that makes it illegal to discuss current events in online forums. In Peru, a proposed cybercrime bill would strip the right of secrecy in communications from the constitution.

A prominent recent point of discussion in the United States has been the National Security Agency (NSA) surveillance scandal. The implications are that state surveillance of communications is occurring at an unprecedented level as many companies have been compelled by law to cooperate, and even

worse, many are actively earning a profit on this human rights abuse.

The Foreign Intelligence Surveillance Act (FISA) states that Americans cannot be targeted by state surveillance. However, the NSA collects information in such an indiscriminate way that the no-targeting of Americans requirement is not technically violated. Additionally, the language in FISA on information collection is defined as the analysis of information, not the capture of it.

Prior to the revelation of the NSA scandal, many companies were improving their disclosure of government information requests through transparency reports. These reports provide the number of information requests made by governments, but not the number of individuals whose information was requested. Companies have been working together to push for the ability to provide more robust public reports of the information they have been compelled to provide to the government. However, the government has put restrictions on what companies may make public.

Another area of concern is the gray area in which contractors reside in the intelligence gathering process. Many companies have immunity for their actions, or legal defenses that blur the line between the government and these contractors. When considered with the jurisdictional complexity of transnational actions in the ICT sector, to hold contractors accountable for actions becomes extremely difficult, and requires that civil society organizations work together to harness their technical and legal expertise in what is an increasingly complex arena.

ICT companies need to form a coalition that would push for and produce common reporting standards. Coalition membership should allow

for civil society participation to create the highest level transparency and effectiveness. Companies and civil society groups in the ICT sector should also educate legislators. This would allow companies to bring their complaints on their inability to disclose information to Congress.

Bangladesh

The discussion on Bangladesh focused on improvements to worker safety, and the areas of concern that require more action going forward.

Following the Rana Plaza disaster in Bangladesh in April, which killed over 1,000 workers, some progress was made in the form of a worker safety accord that was signed onto by ninety-one companies, mostly European. Retailers, factory owners, and civil society have come together to discuss the relationship of subcontracting practices, government regulations, the role of western governments and international organizations, and the dangers posed by pseudo-regulatory groups.

Companies should not cease operations in Bangladesh, as such a move would reverse the benefits economic growth has brought to the country. Additionally, commitments by companies to stay and work with regulatory efforts are important going forward. The most encouraging development appears to be the organization of workers in Bangladesh in a way they previously did not or could not. Bangladeshi workers are now able to represent themselves and advocate for their own safety. Their voices should be strongly heard in any process that will address regulatory efforts.

Discussion 4: Domestic Efforts

Scope of Discussion

The last discussion focused on the ICAR Government Procurement Project, which proposes human rights due diligence requirements in government procurement and contracting. This discussion also addressed efforts to reform procurement to more effectively deal with trafficking in supply chains. The discussion also covered issues on beneficial ownership of shell companies, and their role in obscuring responsibility for actions and crimes.

Discussion with ICAR Experts on Government Procurement

The discussion on ICAR's Government Procurement Project, a direct result of ICAR's previous Human Rights Due Diligence report, was led by three ICAR Experts, who are authors of the report: Professor Robert Stumberg, Professor Anita Ramasastry, and Bama Athreya. The goals of the Government Procurement Project are (1) to reform the way the government purchases goods and services by requiring human rights due diligence by contractors and (2) to illustrate how government can influence companies by tying a tangible benefit and incentive to compliance with human rights due diligence requirements in contracts. The Government Procurement Project is a domestically focused effort, but it aligns with other efforts in Europe, Norway in particular, to look at the government as a market participant.

One foundational principle of the Government Procurement Project is the belief that government should not use taxpayer dollars to procure items produced in places with violations of labor standards or other human rights. Additionally, companies that behave

ethically should be rewarded. This requires delving into the laws governing the procurement system.

The Federal Acquisition Regulation (FAR) is a complex set of laws that codifies, synthesizes, and organizes laws from multiple sources – Congress, Executive Orders, treaties, and trade agreements. Currently, the FAR enables the United States government to create and participate in a market that violates human rights. This must change.

The current procurement landscape includes a number of relatively recent changes by the Executive Branch to amend how federal procurement is conducted. These changes include executive orders and policies on child labor, trafficking, anti-discrimination, and environmental sustainability. The approach has been relatively ad hoc, adding certain requirements into the FAR one at a time. The Government Procurement Project will aim for broader change.

The FAR establishes procurement as a process, by inviting bids for needs, evaluating bids, making a decision to develop enforceable contract provisions, and enforcing and forcing companies to comply with the contract. At the contract level, the law can be adjusted to include legal obligations and accountability provisions for human rights due diligence.

Under the current law, contracts must be awarded to the lowest responsible bidder. If a contract is merely for goods at a fixed price, price is the only criteria apart from responsibility. The definition of "responsibility" is the ability to deliver the goods or perform the

service, and includes some language on business integrity and ethics. To award a contract to someone other than the lowest bidder in service contracts, an agency must have specific evaluation factors that are met or not met, which, as the Government Procurement Project will advocate for, should include human rights evaluation factors.

It will be difficult to determine the specific language for contracts, and the standards of evidence to be used for debarring or suspending a contractor. Another challenge will be to ensure that government agencies cooperate and share information about contractors that have previously violated contract terms or committed fraud.

The labor movement has advocated on “Sweat Free” procurement policies in the past, and it pushed many states and cities to implement responsible standards for garment purchases amongst other products. This can serve as a helpful precedent to build the movement on procurement reform.

Legislative Proposals

The discussion on legislative proposals on trafficking addressed pieces of legislation currently being developed that would build on past policies and regulations already implemented.

The Business Transparency on Slavery and Trafficking Act was introduced in Congress in the last session, but did not pass. ICAR members are working to ensure the legislation is reintroduced this year.

The proposed law also deals with issues of complicity, building norms that push accountability further up the supply chain. The idea is to create a “race to the top” among businesses. The law would have global reach,

specifically dealing with labor recruitment, subcontracting issues, and sexual exploitation of children.

Phantom Firms

The last discussion covered so-called “phantom firms,” companies owned by anonymous shell companies, which use the firms to hide beneficial ownership, or the people who ultimately control the firm and benefit from its actions.

Many phantom firms are used for nefarious purposes including undermining competitive bidding processes, to hide campaign contributions, and to obscure the trail of money in order to break the link between a crime, the act taking place, and the people benefitting from it. These crimes can include human trafficking, drug trafficking, and support for terrorist groups. The key question of liability and responsibility for the crimes is difficult to answer without addressing beneficial ownership issues.

There has been some international and domestic action on the issue. For instance, the EITI standards have established that companies must disclose the beneficiaries of shell company actions. The G8 has also taken an interest, largely to prevent tax evasion. In July, the G8 published an action plan to abolish anonymous shell companies, though the initial reviews are not positive. In Switzerland, a financial stability board has created voluntary standards for companies engaging in international financial transactions. In the United States, Representative Carolyn Maloney (D-NY) plans to introduce the Corporate Transparency and Law Enforcement Assistance Act. The European Union is working on a new Money Laundering Directive. There are other efforts across the different sectors to deal with beneficial ownership and phantom firms, but many challenges still exist.

Discussion 5: Implementation of the United Nations Guiding Principles and Other Topics for Discussion

Closed session.

Final Roundtable Session: Continuing our Coordinated Movement

Closed session.

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