Panel II: Primary obligations of States, including extraterritorial obligations related to TNCs and other business enterprises with respect to protecting human rights

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Thank you Madam Chairperson, Ecuador, South Africa and the OHCHR for organizing and supporting this important initiative. Ladies and Gentlemen, it is an honour and privilege to be given the opportunity to contribute to this process and to address an audience of concerned states and NGOs.

First, I encourage everyone to read the ICJ’s recently published proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises.

Second, Having researched the connection between international investment law and human rights for 15 years, I am delighted that BITs and ISDS have been mentioned repeatedly as the source of a power imbalance in the international community.

It always amazes me that the same states that claim human rights interfere with their sovereignty are more than willing to sign a binding treaty – with international arbitration – on corporate ‘rights’ that directly interferes with their domestic regulatory sovereignty.

Today I have been asked to provide examples of national legislation and international instruments applicable to TNCs and other business enterprises with respect to human rights. Unfortunately, Myanmar, where I have worked for the ICJ for the last 3 years, provides more examples of problematic business and human rights regulation

Myanmar is, however, an important example. It is basically the Petri dish of Business and Human Rights. How investment affects human rights and the environment in Myanmar – which is late comer to the global economy - will demonstrate if globalization can be tamed to support sustainable development or not.

In Myanmar the drafting of new law is accompanied by support from a variety of international organizations, especially the IFC, and with the encouragement of investors and their home states. The IFC provides a draft with full protection of rights and sponsored consultation with affected parties whose interests would be protected. The process takes into account International Treaties and customary international law to ensure the highest standards are reflected in a new national law.

I would be delighted to tell you that this was the normal legal drafting process and that it applied to environmental protection or human rights law. In fact, this process was for the adoption of a new investment law, which was the priority of the previous military government and also Aung San Su Kyi’s NLD. Other laws do not enjoy such support.

The new investment law was passed last week, to the delight of investors, reflecting Myanmar’s BIT standards. Thankfully, civil society – with the assistance of the ICJ – was able to convince the government to remove automatic access to ISDS for both domestic and international investors, which had been helpfully included by the IFC and would have been unprecedented in a national law.

Meanwhile, the drafting of human rights laws has been compromised by political considerations – there is a real fear about provoking the military and ending the democratic experiment. Rushed drafts have been quickly passed through parliament with little or no public consultation or international support. Many do not even reflect the principle of legality. Often they are construed to protect the majority from the minority.

It is clear that the priority is on promoting investment. The new investment law does not mention human rights. It requires investors to follow national law. The problem is that Myanmar, like many other States, does not have adequate human rights protection – currently more than 50% of the population lacks legal tenure to the land they live on, for example. In other cases it is unwilling or unable to enforce laws. Myanmar has not ratified key human rights conventions such as the ICCPR or ICESCR, although it has recently signed the latter.

A Binding treaty must address this regulatory shortfall. Like CEDAW, the CRC or the Migrant Rights Treaty, which elaborate on existing standards to address a particular need identified by the international community, a Binding Treaty on Business and Human Rights should codify and develop the responsibility of States to protect human rights.

The binding treaty must build capacity; it should help states adopt effective legislative and administrative measures for the criminal and civil liability of corporations for human rights abuses. Certainly, crimes for which international law require the imposition of criminal sanctions should be incorporated in national corporate criminal law.

Myanmar has adopted an EIA procedure that includes social impact assessment. In the absence of human rights law, CSOs have begun attempting to find ways of addressing human rights through this mechanism. But there are no binding international standards on what constitutes appropriate regulation of corporate due diligence, public consultation, and accountability mechanisms for CSOs to measure their government’s regulation by, let alone implementation. CSOs find themselves quoting World Bank Guidelines!

A treaty needs to develop standards for national regulation of these preventative measures. States must be bound to adopt regulations and enforcement measures to ensure business enterprises fulfill their responsibilities, including adopting an approved policy or code of conduct and human rights due diligence processes. This could also be regulated extraterritorially. The regulatory process for approval of licenses and permits for some investments should include an obligation to obtain social license through fully informed community consent.

Investment protection, by contrast, has plenty of applicable standards. Myanmar is a party to a number of bilateral and regional investment treaties. It is currently negotiating an investment protection agreement with the EU. The EU IPA has been promoted as encouraging legal certainty. But Locking in bad law or non-existent standards by allowing foreign investors to potentially challenge new laws that threaten their property or profits is extremely unpopular in a country where human rights are not afforded that kind of protection. The international community demonstrates that while it is reluctant to regulate its companies extraterritorially, it is happy to negotiate protections for them, even at the expense of human rights.

The EU would do well to support a binding Business and human rights treaty to go along with their IPA. It makes sense for North American and European states to support this treaty with the highest standards possible. Let’s face it, companies from these states are held to the highest standards by active civil society and cannot compete in places where the rule of law does not exist. Myanmar’s neighboring countries do not face such restrictions and do not have the discerning glare of civil society back home upon them. It is in developed home state’s interest to level the playing field. Ideological opposition to the regulation of markets no longer makes sense.

Aside from many states’ unwillingness or inability to regulate for the protection of the environment and human rights, a binding treaty must address access to remedy. In, Myanmar, The Judiciary, despite having inherited british colonial law that recognizes corporate liabilities, lacks capacity to deal with complex cases concerning business and human rights. I will speak more about access to remedy on Friday in Panel VI, so this discussion is to be continued.

I look forward to your comments and questions.

Thank you.