

CORPORATE RESPONSIBILITY AND HUMAN RIGHTS

This panel was convened at 1:45 pm, Wednesday, April 9, by its moderator, James Anaya of the University of Arizona College of Law, who introduced the panelists: Jeffrey S. Collins of Chevron Corporation; Ben Juratowitch of Freshfields Bruckhaus Deringer, LLP; Sara Seck of the Faculty of Law, University of Western Ontario; and John F. Sherman III of the Shift Project.

INTRODUCTORY REMARKS BY JAMES ANAYA *

It's my pleasure to welcome all of you to this roundtable discussion on corporate responsibility and human rights. My name is Jim Anaya, and I am on the faculty of the University of Arizona College of Law in Tucson. Also, I'm just now wrapping up my second consecutive three-year term as the United Nations Special Rapporteur on the Rights of Indigenous Peoples. As many of you know, the focus of that work is to bring attention to the human rights concerns of indigenous peoples across the globe and to promote the implementation of the international standards that have been developed to protect their rights. In that capacity I've regularly come upon situations in which indigenous people's lives and well-being are being affected by the activities of transnational corporations, especially in the context of the development or extraction of natural resources within their traditional territories.

Internationally, it has become a matter of some concern that over the years indigenous peoples in many parts of the world have suffered the devastating effects of corporate activity that has encroached upon their lands, taken valuable resources, caused upheaval in the social and natural environment, and inflicted harm on those who have tried to stand up against the devastation. Indigenous peoples, of course, are not alone in suffering at the hands of profit-motivated corporate interests. Other communities that are at the margins of power have experienced environmental harms; women have faced discriminatory treatment and gender-based violence; and children have been exploited, as has the common worker.

On the other hand, corporations are central components of the social, political, and economic infrastructures of the countries in which we live and of the broader global community. They create wealth and opportunities for economic advancement, at least for some, and potentially for many more. In this context, in the minds of many they are drivers for development and for the improvement of quality of life.

No doubt what we see is that, one way or another, corporations can have deep impacts on the enjoyment of human rights. Over the last several years a number of developments have pressed corporations to move beyond minimalist notions of corporate social responsibility to embrace a commitment to act in conformity with international standards of human rights. The main development of this type in recent years is the endorsement by the UN Human Rights Council in 2012 of the Guiding Principles on Business and Human Rights, which were developed by Professor John Ruggie through a multifaceted process of information-gathering, consultation, and analysis. The Guiding Principles can be seen as tracking, and inspiring, ever greater awareness and acceptance of responsibility by corporations of their potential human rights impacts. In my own work as Special Rapporteur, I have seen a marked shift in attitudes among major corporations engaged in extractive industries about their

* James J. Lenoir Professor of Human Rights Law and Policy at the University of Arizona's James E. Rogers College of Law.

human rights obligations toward indigenous peoples, along with ever more expressions of commitment by states to respect and protect the rights of indigenous peoples.

But how far do these shifts in attitudes and express commitments go in bringing about practical results that are genuinely conducive to the enjoyment of human rights? And is the existing international legal and policy framework sufficient to the task of ensuring corporate compliance with human rights? What more is needed?

To address these and related questions we have a distinguished panel of experts, each drawing from unique experiences and backgrounds. Joining me are the following: Jeffrey Collins, Senior Counsel for International Policy at Chevron Corporation; Ben Juratowitch, Partner at Freshfields Bruckhaus Deringer; Sara Seck, of the Faculty of Law of Western University in Ontario; and John Sherman, General Counsel and Senior Advisor for the Shift Project, whose members were centrally involved in the development of the Guiding Principles on Business and Human Rights. John has graciously agreed to stand in for Rachael Davis of Shift, who is unable to be here because of a pressing matter she had to attend to today.

Our discussion this afternoon will proceed in a roundtable format. I'll pose questions to panelists, and discussion will flow from there. After the roundtable discussion among the panelists, we'll open the floor to comments and questions from the audience. So, let's get going.

* * *

The UN Guiding Principles on Business and Human Rights are structured around three so-called "pillars": (1) the duty of states to respect and protect human rights; (2) the independent responsibility of corporations regarding respect for human rights; and (3) the need for adequate remedies.

1. As to the first pillar—the state duty to protect human rights against corporate activity—what are some of the tensions inherent in the fulfillment of this duty in relation to other state interests, for example, the interests that developing states have in attracting foreign investment or state obligations under investment treaties? This question goes to Ben.

2. The second pillar of the Guiding Principles is the corporate responsibility to respect, which is posited as a responsibility that is independent of the state duty to protect and of the requirements that states have under domestic law. This responsibility is deemed to be not a legal one under international law, but rather "a global standard of expected conduct for all business enterprises." To what extent do transnational business enterprises buy into and make operational this idea of an independent responsibility to respect human rights? What are the difficulties they have in doing so? These questions go to Jeff.

3. What specifically are the human rights that companies are to respect? Are they only those rights recognized by the states in which they operate? What about special regimes like indigenous rights and environmental rights? These questions go to Sara.

4. How are corporate lawyers to advise their clients when a human rights standard is ill-defined or contested by the states within which they operate? More generally, what are some of the issues and challenges lawyers face in counseling companies to respect human rights in accordance with international standards? These questions go to John and Sara.

5. What kind of new models of business and community partnership can be conducive to implementing the corporate responsibility to respect human rights? Are profit-sharing or joint venture models appropriate in some circumstances? These questions go to Jeff.

6. The Guiding Principles identify the state duty to protect as a duty under international law deriving from states' human rights obligations. What is or should be the jurisdictional

scope of this legal duty to protect against the activities abroad of companies domiciled in the state? To what extent, if any, are home states *required* under international law to exercise jurisdiction to protect against human rights abuses of their companies abroad? To what extent *may* they do so? What are some of the trends we see in states' regulation of the activities of companies abroad? To what extent are any developments in this regard showing improvement in human rights conditions? These questions go to Sara.

7. A number of NGOs and a few states are advocating for a binding international instrument on corporate responsibility. Is such an instrument desirable? And how would such an instrument be structured to achieve legally binding human rights obligations for companies? These questions will be put to the entire roundtable, and all will be invited to offer a view along with any concluding remarks.

RESOLUTION OF DISPUTES INVOLVING THE RIGHTS OF INDIGENOUS PEOPLES AND EXTRACTION OF NATURAL RESOURCES BY FOREIGN INVESTORS

*By Ben Juratowitch**

The question put to me concerns a perceived tension between the state duty to protect human rights, specifically the rights of indigenous peoples, and other state obligations such as those owed to foreign investors under investment treaties. James Anaya's final thematic report as Special Rapporteur on the Rights of Indigenous Peoples noted that there are extractive projects that are in the interests of indigenous peoples in the area with the relevant natural resource, and also of non-indigenous investors.¹ That observation prompts me to remark that there is no inherent tension between rules of international law protecting the rights of indigenous peoples and rules of international law protecting foreign investment. The core substantive rules associated with most treaties concerning the protection of foreign investment include:

1. a prohibition on expropriation unless it is for a public purpose, non-discriminatory, and accompanied by the payment of appropriate compensation;
2. a prohibition on treating a foreign investor less favorably than a domestic investor or than an investor from a third state; and
3. that foreign investors must receive fair and equitable treatment.

The rights of indigenous peoples under international law relevant to the extraction of natural resources produce a longer list, but we could for discussion purposes perhaps summarize them as including:

1. the right to be consulted, in support of the protection of rights concerning:
 - a. the environment, and
 - b. a particular way of life,
2. and insofar as extractive activities are to take place on indigenous lands then,
 - a. the importance of free, informed and meaningful consent to the project.

* Co-Head of the Public International Law Group of Freshfields Bruckhaus Deringer; Visiting Fellow at the London School of Economics; Lecturer at the University of Paris V.

¹ James Anaya, Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples, paras. 2, 8, 80, delivered to the Human Rights Council, U.N. Doc. A/HRC/24/41 (July 1, 2013).