National Roundtable on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries
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Remarks at Public Session
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I am delighted to participate in this final session of the national roundtables on the Canadian extractive industries' role in developing countries. Allow me to congratulate the government and people of Canada for this extraordinary exercise in deliberative democracy, involving stakeholders from across the country and beyond.

Canada has a great deal riding on the outcome of these roundtables: home to more mining companies than any other country; and always a leader in the quest for human rights – from the seminal contribution of John Peters Humphrey in drafting the Universal Declaration of Human Rights, to the outstanding leadership of Louise Arbour, current UN High Commissioner for Human Rights. It is for good reason, therefore, that the international community looks to Canada for innovative solutions in this difficult terrain.

Among my favorite "actionable ideas" from previous roundtables is No. 5.4. I quote: "Canada should continue its ongoing financial support of the work of John Ruggie…Canada should also promote and extend diplomatic support to the outcomes of his mandate." After careful review and consideration, I find myself able wholeheartedly to endorse that recommendation! All kidding aside, the government of Canada has been supportive right from the start, for which I am deeply grateful.

Let me review quickly what the mandate is about, and then share with you some preliminary impressions of what we have learned that may relate to your own deliberations.

The United Nations has been trying to deal with the challenge of business and human rights for some years. My mandate occupies the space between two bookends that framed the prior debate.

At one end was the position that corporations cannot violate international human rights standards because they are applicable only to states. The duty of companies, on this reading, is simply to comply with national laws wherever they operate, coupled with whatever voluntary initiatives they choose to undertake.

At the other end were the so-called UN drafts Norms, which essentially sought to impose on corporations the full range of international human rights standards that states have adopted for states, with identical obligations ranging from "respecting" to "fulfilling" those rights.

The debate between the two was heated but generated little light and no movement. So the then-Human Rights Commission asked the Secretary-General to appoint a Special Representative to look at the challenges through fresh eyes and to come back with an independent assessment of the current situation as well as some workable recommendations for the future.

Specifically, I am asked:

a) To identify and clarify standards of corporate responsibility and accountability;

b) To elaborate on the role of States in effectively regulating and adjudicating business enterprises with regard to human rights,

c) To research and clarify "complicity" and "sphere of influence";

d) To develop materials and methodologies for undertaking human rights impact assessments;

e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.

I took a long look at the prior debate and concluded that neither side had it right, and that finding a compromise between them wasn't worth the trouble: the common denominator was too low to make any difference.

The only way to achieve any progress, I felt, was to reframe the issues, looking for new ways in which the various pieces of the puzzle could be assembled again.

To accomplish this aim we are conducting extensive research: on evolving legal standards and practices; on evolving principles of state responsibility, both host and home states; on what companies and industry associations are doing; and on the impact of new transnational corporate actors, including state-owned enterprises.

We are learning from the experiences of individuals and communities in the global South through multi-stakeholder consultations: in Johannesburg last March, we focused on the human rights dimensions of business operations in zones of conflict; in Bangkok last June, on how to improve working conditions in supply chains; and in Bogota this coming January, on community engagement, particularly in relation to indigenous peoples.

We are also benefiting from a series of legal workshops in which experts from around the world address the pros and cons of various legal strategies and remedies. Later this week we will be discussing in New York what the principled bases might be for attributing human rights obligations to companies under international law.

Our research and consultations are ongoing. It would be premature, therefore, to draw any definitive conclusions tonight. But let me share with you some preliminary impressions that you may find of interest in the context of your own deliberations.

First, an international legal environment is slowly emerging that will increase the exposure of companies to liability for international crimes for the simple reason that the number of venues in which such cases can be brought is increasing. The statutes are on the books already in a number of jurisdictions. They are the result of countries ratifying conventions that establish the international criminal liability of individuals, like the statute of the International Criminal Court, and incorporating their provisions into domestic criminal codes – under which natural and legal persons in many instances may be held to similar standards.

We would expect only rogue companies to be directly liable for war crimes, crimes against humanity, and similar grave offenses. But standards for corporate complicity in such crimes are evolving in parallel.

Second, our work on state responsibility indicates that the international treaty bodies have started paying closer attention to the obligation of states to ensure that private actors within their jurisdictions, including companies, do not violate human rights. With some exceptions, the treaty bodies have addressed mainly host country obligations to date, but home country obligations are beginning to be raised as well.

Extraterritoriality is a complex subject that needs to be handled with care, as it soon bumps into the norm of sovereignty. But from what we have seen, there is little in international law that prohibits home states from exercising greater oversight through, for example, parent company-based requirements for human rights impact assessments and reporting systems, especially if public funds are used to promote the overseas investment.

Third, our work on companies suggests that some are doing far more than is often recognized – individually, within industry associations, and in collaboration with other stakeholders. In the mining industry, for example, the International Council on Metals and Mining recently adopted a reporting system developed by the Global Reporting Initiative, to which they are adding an external assurance mechanism. But the ICMM includes only 15 major firms in the mining industry, and there is no comparable effort by oil and gas companies.

In our survey of the Fortune Global 500 companies, we found considerable uptake of human rights policies, social impact assessments that include human rights concerns, as well as internal and external reporting systems. But the standards applied can be quite elastic; such efforts engage but a relatively small number of companies relative to the entire universe of transnationals, let alone national firms; and their accountability mechanisms on the whole tend to be weak.

We know how to make these systems work better, but individual firms face enormous collective action problems that can only be resolved by other social actors, above all by major institutional investors and governments. The new International Finance Corporation performance standards and the corresponding measures applied by the commercial banks adhering to the Equator Principles are helpful in this regard. Ironically, few national export credit agencies match IFC standards.

In the context of the extractive sector, few multi-stakeholder initiatives address issues that are more critical than the Voluntary Principles on Security and Human Rights – they literally can be life and death issues. Now that the VPs membership rules have been rationalized I can think of no good reason why responsible Canadian extractive companies would not want to flock to this initiative and expand its reach. And I would encourage the Canadian government to consider joining up at an early opportunity to lend its support.

A similar case can be made for membership in the Extractive Industries Transparency Initiative. Bribery and corruption in transnational business transactions have been criminalized by national legislation, an OECD convention and a UN convention. Yet they remain endemic in the extractive sector and continue to impede the realization of human rights and other social objectives. Greater transparency is the key to combating them, and the EITI is a modest but important step in the right direction.

Finally, far too little creative thinking has been devoted to providing incentives for responsible corporate behavior. I can think of no major social challenge that has ever been resolved by using an all stick, no carrot strategy. One incentive that would yield quick and effective results would be legal provisions recognizing good corporate citizenship even when it breaks down, as all systems occasionally do.

Some jurisdictions have begun to take corporate culture into account when assessing legal liability. If the corporate culture actively promotes responsible behavior and the company has systems in place to ensure compliance and transparency, it will be treated more favorably by the courts than if the corporate culture is lax or worse. For example, the Australian criminal code now explicitly takes account of corporate culture; so do U.S. federal prosecution and sentencing guidelines for companies accused of fraud; and I understand that Canada may be moving in a similar direction.

I noted earlier that one of my major objectives for this mandate is to reframe the debate, to look at the issues through different lenses in the hope that doing so will suggest better strategies and results. If there is one core concept along these lines that has emerged from our work over the past 15 months it is “shared responsibility.” Let me explain.

The debate that preceded my mandate was focused almost entirely on the issue of corporate liability: whether or how far it should be stretched to cover the human rights impact of corporate behavior. Don't misunderstand me: this *is* a critical question. But by itself it is an incomplete framing of the problem at hand. Why? Because the permissive environment that allows individual blameworthy actions is created by the failure of an overall institutional system, and this systemic failure cannot be fixed with a liability model of individual responsibility alone. It also needs to be dealt with in its own right. And that involves shared responsibility – a shared responsibility among all sectors of society and one in which governments, whose job it is to represent the public interest, must play a key role.

Shared responsibility is not a substitute for individual responsibility, as the moral philosopher Iris Marion Young makes clear; nor does it get individual malfeasants off the hook. It adds a layer of responsibility that is made necessary, in Young's words, "because the injustices that call for redress are the product of the mediated actions of many, and thus because they can only be rectified through collective action." In other words, the systemic problem is not caused by individual actors alone, nor can it be solved by measures aimed only at them.

OK, Mr. Political Scientist – you may be saying – what's this got to do with the mining industry and Canada? Well, everything.

For my interim report last spring I examined 65 cases of the worst human rights abuses reported by NGOs over the previous few years. Two-thirds were in the extractive sector. What else was striking? The 65 cases took place in 27 countries, of which all but two were low-income countries; all scored low on governance and rule of law indicators; all scored high on corruption. Clearly, there is a negative symbiosis between weak governance and the worst corporate human rights abuses.

This negative symbiosis doesn't excuse bad corporate behavior, and appropriate means need to be devised to deal with it. But even good companies can get into serious trouble in weak governance zones, whether by close association with bad governments or by trying to perform surrogate governmental functions under pressure from surrounding communities and international NGOs. In short, the individual responsibility model by itself does not take us far enough; a second layer of shared responsibility needs to be added to the mix.

The same is true when we move beyond the national level. Indeed, the entire international community can be described as a weak governance zone. Markets and transnational corporate networks treat the globe as a single space of transaction flows. In contrast, governance remains anchored in territorially fixed places, with a relatively thin overlay of international law and institutions operating among them, unable on their own to redress human rights abuses, whether corporate or otherwise.

What does the concept of shared responsibility add to the equation? It suggests that, as we go about the task of inducing greater corporate social responsibility, we work simultaneously to overcome the capacity gaps and institutional failures that create the permissive environment for the actions of individual firms that cause harm. Unless we do so, the leading companies will find themselves under continued intense social pressure to make up for the shortfall; the distance between leaders and laggards will widen to the breaking point; and people in affected communities will continue to suffer the consequences.

Here is one concrete illustration of what I have in mind. When an export credit agency provides assistance for a large-footprint project in a difficult developing country context, the development assistance agency should be right there alongside, working with the host country to build its capacity to help manage the project's inevitable social and environmental impact. If the host country isn't interested in the collaboration then your risk factor as a company and as an export credit agency just skyrocketed, and you may want to recalibrate your go/no-go calculus.

In conclusion, my friends, I want to stress again how impressed I am with these Canadian roundtables. They have addressed a wide range of exceedingly important subjects and generated some first-rate actionable ideas. I look forward to seeing your final proposals – which I hope to learn from, adapt and promote through my mandate. Fixing the downside of globalization in order to render it sustainable and beneficial for all is very much a shared responsibility. I applaud you for playing your part, and performing it so well. You have my best wishes for a successful conclusion.