

Report from a session at the United Nations Fourth Annual Forum on Business and Human Rights: 16-18 November 2015

Multi-Stakeholder Engagement Across “Protect, Respect, Remedy”

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This report provides insights from two case study-based sessions entitled ‘Multi-Stakeholder Engagement Across All Three Pillars’ which took place on 16th and 17th November 2015 as part of the fourth annual UN Forum on Business and Human Rights. The Global Business Initiative on Human Rights (GBI) and the Business & Human Rights Resource Centre (BHRRC) have released this report in their capacity as co-organisers of the session alongside the UN Working Group on Business and Human Rights, which submitted a separate commentary on the sessions as part of its report to the UN Human Rights Council in June 2016. The purpose of the sessions was to exemplify constructive and meaningful multi-stakeholder engagement and dialogue on good practices, lessons learnt, challenges and innovations found in the complexity involved in implementation of the UN Guiding Principles on Business and Human Rights and the ‘Protect, Respect and Remedy’ Framework across all three pillars in practice. The UN Annual Forum continues to provide an ideal space for stakeholders to share progress and practices as an aid to peer learning and to establish the state of play of implementation on the ground.

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Introduction

This report provides insights from two case study-based sessions entitled 'Multi-Stakeholder Engagement Across All Three Pillars' which took place on 16th and 17th November 2015 as part of the fourth annual UN Forum on Business and Human Rights (UN Annual Forum). The Global Business Initiative on Human Rights (GBI) and the Business & Human Rights Resource Centre (BHRRC) have released this report in their capacity as co-organisers of the session alongside the UN Working Group on Business and Human Rights, which submitted a separate commentary on the sessions as part of its report to the UN Human Rights Council in June 2016.¹

The core purpose of the sessions was to consider the transformational power of approaches to business and human rights that in some way are beginning to integrate all three pillars of the UNGPs, and to inspire advocates in business, government, and civil society, to adopt this approach together, especially where salient human rights risks exist within business operations and supply chains.

The sessions sought to:

- Identify examples where all three pillars have begun to be applied together via collaboration/coordination among States, businesses and civil society – with a strong focus on delivering results 'on the ground'.
- Make use of the diverse expertise and perspectives at the UN Annual Forum to support speakers and participants to address challenges they are facing.
- Identify cross-cutting lessons, challenges, capacity needs and opportunities when seeking to deliver results at a local level via coordinated action.
- Establish how the UN Working Group and others can support better coordinated action and collaboration.
- Encourage multi-stakeholder dialogue and learning about the inter-relationship of 'protect, respect, and remedy' – both conceptually and in practice.

By way of background, since the endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011, a great deal of focus and debate has centred on how each pillar of the UN 'Protect, Respect and Remedy' Framework is being implemented in practice. Generally speaking, conferences, research, projects and dialogue address the detailed, technical implementation and challenges of delivering on the promise of each pillar. This is necessary and urgent given implementation of the UNGPs is nascent and requires policy, process and practice innovations within complex institutions.

Nonetheless, there is often less attention given to instances in which all three pillars of the UN Framework are, or need to be, applied simultaneously to bring about meaningful change. This is problematic, since lack of simultaneous action will only ever lead to partial or passing human rights protection. Neither effective State action alongside bad corporate conduct, nor good quality human rights due diligence alongside lack of access to remedy, nor strong remedial avenues without company capacity to prevent adverse impacts can deliver strong solutions to business and human rights challenges, especially the most severe and irremediable ones.

This holistic application of the UNGPs is, arguably, where their power and intrinsic value ultimately lies. As the introduction to the UNGPs notes, 'Each pillar is an essential component in an *inter-related and dynamic system* of preventative and remedial measures ...' The commentary to the General Principles reinforces this point by reminding us that 'These Guiding Principles should be understood as a coherent whole and should be read, individually *and collectively*, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.'

The UN Annual Forum continues to provide an ideal space for stakeholders to share progress and practices as an aid to peer learning and to establish the state of play of implementation on the ground. In light of the relative lack of spaces in which the UNGPs are read and considered collectively, these sessions could be seen as having been both timely and necessary to support a multi-stakeholder dialogue in which all three pillars – protect, respect and remedy – are considered in unison.

You can watch the full sessions at: <http://webtv.un.org/watch/session-i-multi-stakeholder-action-forum-on-business-and-human-rights-2015/4615868684001>

¹ As former UN SRGSS Professor Ruggie underlined in the introduction to the GPs, para 11 of A/HRC/17/31: “In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice.”

OVERVIEW

Case studies involving multi-stakeholder engagement across the three pillars of the UNGPs

Identifying Cases

In the months leading into the UN Annual Forum, the organisers conducted research to identify situations in which all three pillars of the UNGPs were being considered and acted upon. The initial research did surface a number of candidate cases, and when selecting from these the organisers focused on profiling examples that when considered together:

- Addressed diverse government ministries
- Demonstrated engagement from diverse actors including large global brands and smaller domestic suppliers; diverse ministries/agencies in home states and host states; international and local NGOs; worker organisations and community organisations; and affected individuals
- Highlighted initiatives and programmes at different stages of maturity and evolution

Note that the research and identification process was very basic. Broader and more sustained efforts are needed to identify such cases, with particular attention to where national and local government agencies have stepped into leadership roles.

CASE STUDY ONE: 2020 TEA REVITALISATION PROGRAMME – MALAWI

Malawi is one of the world's poorest countries. Sixty-two percent of Malawians live below the World Bank's extreme poverty line, and about fifty percent of all children are nutritionally stunted. The tea industry is the largest formal sector employer in Malawi, employing 50,000 workers. The aim of this five-year multi-stakeholder partnership is to achieve a competitive and profitable Malawian tea industry where workers earn a living wage and smallholders earn a living income. The programme is supported by stakeholders all along the value chain, including producers, brokers and traders, tea buyers and retailers, unions, NGOs, international donors, and government agencies.

CASE STUDY TWO: THILAWA SPECIAL ECONOMIC ZONE (SEZ) – MYANMAR

Thilawa SEZ is the first SEZ to be established by the Myanmar Government, and is being developed in cooperation with the Japanese Government. Complaints had been received from community members relating to loss of and/or access to farmland, loss of livelihood opportunities, impoverishment, loss of educational opportunities, substandard housing and basic infrastructure, and loss of access to adequate clean water. The Government stated its intention that Thilawa be developed in accordance with international environmental and social safeguards. Initial steps taken through multi-stakeholder engagement have included the provision of technical assistance to the Government, organisation of stakeholder convenings; establishment of a multi-stakeholder advisory group; creation of a community-focused operational grievance mechanism; and establishment of a Resettlement Work Plan and Income Restoration Programme.

CASE STUDY THREE: KINGSLAND MULTI-STAKEHOLDER ENGAGEMENT IN THE GARMENT INDUSTRY – CAMBODIA

Cambodia has, for a number of years, been a desirable destination for apparel brands looking for cheaper suppliers. A variety of factors have contributed to labour rights-related challenges in factories in Cambodia, including: wage level issues; industrial practices restricting the right to freedom of association; fragmentation of trade unions and multi-trade union representation at garment factories; and challenges with working conditions at factories. In December 2012, H&M adopted a human rights policy based on the UNGPs. Among its policies, H&M forbids the use of undeclared production units by its suppliers. While the brands can, to some extent, control what happens at their directly contracted suppliers, sometimes these suppliers sub-contract to other suppliers which may reduce their control, as in the Kingsland case. The approach adopted in this case has incorporated the participation of the government, business and NGOs.

CASE STUDY FOUR: LABOUR RIGHTS IN FLORIDA'S TOMATO GROWING INDUSTRY – UNITED STATES

The Fair Food Program (FFP) brings together workers, consumers, growers, and retail food companies in support of fair wages, and humane labour standards in the agricultural industry. The FFP is premised on risk prevention, supply chain transparency, the verifiable and market-enforced protection of workers' rights, and a human rights-based Code of Conduct. This includes: zero tolerance for forced labour, child labour, violence and sexual assault; worker-to-worker education sessions conducted by the Coalition of Immokalee Workers (CIW) on farms; a worker-triggered complaint resolution mechanism; health and safety committees on every farm; changes in harvesting operations to improve overall wages and working conditions; and ongoing comprehensive audits of Participating Growers' operations by the Fair Food Standards Council (FFSC) to ensure compliance.

PART ONE

Headlines and Insights from the Forum sessions

The following cross-cutting headlines were developed by the organisers. As a whole they attempt to capture possible lessons/insights about the “state of play” of multi-stakeholder engagement across “Protect, Respect and Remedy” – albeit with a small sample of four cases.

The observations are as follows:

The Protect, Respect, Remedy Framework is a valuable reference point for multi-stakeholder efforts even if it is not the initial impetus for action: The initiatives discussed during the UN Annual Forum were not established to implement the UNGPs. Arguably, this is also the case for a wide range of policies, practices and projects (whether of States, business, or civil society) presented at the Forum. Nonetheless, the stakeholders presenting cases in these sessions all made it clear that the three-pillar framework and substance of the UNGPs can function as a reference point to support everyone involved to confront their duties/responsibilities, enhance thinking about ways forward and assist with further calibration of the respective roles, and expectations, of each stakeholder. This somewhat seamless link to existing – and in some instances well established – social change efforts on the ground arguably confirms that the UNGPs are not only grounded in international human rights law but also resonate with approaches to local problem solving.²

There is no one-size-fits-all formula for what or who triggers collective action: Based on the experience of the cases/efforts presented in these sessions, local multi-stakeholder efforts are initiated in response to various issues and by diverse actors. The impetus for action that involves all stakeholder groups can come from a range of issues, including: a demand for remediation/investigation from rights-holders around a standard linked to public financing; recognition that existing sustainability/development projects have ‘orphan’ human rights issues that no stakeholder wants to tackle; the failure of a business partner to respect rights or an investigation into a specific issue. Related, in the cases discussed the initial leadership came from diverse sources, such as local workers or communities, international NGO research/campaigns or as a result of corporate human rights due diligence. While this may be a function of the cases discussed, it is worth noting that none of the collective action efforts appear to have been triggered by the State.

Trusted evidence is key to overcoming stand-offs and paralysis ... but reaching a meeting of minds takes work on all sides and leadership from individuals is needed: Some of the presenters in these sessions explicitly noted that prior to the efforts they are now involved in, there was a feeling of stand-off between stakeholders and an impasse on progress. In the face of this, establishing a trusted evidence base to understand the realities on the ground appears to be key. This can unlock unhelpful perceptions which make all actors feel comfortable that they are doing their part, and someone else is the problem. The investment in creating this evidence base may often come from civil society conducting credible, neutral research and engaging with rights-holders. However, even with an evidence base, it appears it is not always easy to achieve a shared analysis of the problems and agree ways forward. In all the cases discussed, presenters expressed appreciation for how other stakeholders came to the table with a positive, patient, direct and constructive attitude when engaging with the original evidence. However, it was also noted that this was often due to the leadership, character and will of key leaders who then worked – and working – to bring along colleagues and peers.

Moving beyond platitudes about the value of government, business and civil society working together seems to require similar things even in diverse cases: The four cases discussed across the two sessions are at different stages of development. Nonetheless, it was possible to discern some key elements that underpin real action and progress. Note that the older and more mature the initiative, the stronger – or more binding and public – the elements appear to be.

Common threads included:

- **Contracting:** All parties need to engage in a written agreement that sets out shared goals and modes of working. In some instances, this may be an MOU. In others, it might be a legally binding contract.
- **Holistic and detailed action plans:** A diversity of interrelated actions and projects ranging from policy/legal changes to capacity building efforts to effective monitoring need to be planned even when targeting one human rights outcome. For each of these, detailed work setting out what each actor is expected to do is required.
- **Time and money:** One case presented set out a 10-year time horizon for success. One company representative noted that reaching internal agreement to engage and take a specific course of action inside large organisations takes time. Another presenter referenced that achieving holistic labour rights protection for one product in a finite number of farms cannot be done 'on the cheap'. In other words, addressing challenges as complex as those discussed will take substantial time and money, even in situations where there are willing actors from diverse stakeholder groups.
- **Tracking and monitoring:** Each of the presenters discussed the importance of tracking progress against action plans and goals agreed. This includes retaining an appreciation for how much more work is needed, but also recognition of tangible achievements along the way.
- **Mutual accountability and enforcement:** A challenge for any multi-stakeholder effort is ensuring that everyone is accountable, in a real sense, for delivering on their duties and responsibilities. One of the presenters from a more evolved case example articulated that binding requirements are critical to enable rights-holders to seek remedy if commitments are not met.
- **Shared learning and knowledge creation:** Several presenters noted that contracting and action plans to which diverse actors and institutions are committed can provide a framework and 'container' in which shared learning occurs, and help create new shared knowledge not previously captured by any one actor. In more established examples of collective action, this includes the ability to learn from and discuss failed efforts or sub-par outcomes.

Change requires broad-based, organised action involving hundreds of individuals and institutions:

Although a small nucleus of actors may initiate, direct and drive local multi-stakeholder action, making progress on specific cases requires buy-in and coordinated action from a vast amount of actors. Beyond the challenge of building commitment to new behaviours, incentives and practices, presenters also shared the need to define implementation arrangements so that each actor is clear about their role and relationship to others. Further, the eco-system of actors/institutions may lack certain capacities. For example, one presentation outlined the need for mediators to support dialogue between rights-holders, business and the State.

Putting the human rights, experiences and voices of those impacted by the issues/activities at the core of local multi-stakeholder projects is critical and possible, but not easy:

In each of the cases presented, speakers referenced the importance of direct engagement with rights-holders – whether growers, workers in the supply chain or impacted communities – into the multi-stakeholder effort. On the one hand this is about ensuring that the third pillar of the UNGPs, access to remedy, is activated into projects and processes from the beginning. On the other hand, it is about meaningful consultation with potentially affected groups, integrating the knowledge and know-how of rights-holders into the crafting of new policies, rules, standards or business practices, as set out in the second pillar of the UNGPs. At the same time, it is clear that direct engagement with rights-holders can require the support of interlocutors (especially from civil society or worker organisations) who are committed to investing resources and support to amplify key voices. A related observation is that business representatives valued engagement from rights-holders that was systematic and focused on concrete outcomes.

Business leaders engaged in multi-stakeholder action across all three pillars seem to be developing a nuanced understanding of their role and the role of others: Some of the key messages and experiences shared by those from or representing industry included the following:

- While audits and certification schemes may indicate that suppliers are meeting standards, these may not pick up the underlying systemic/structural issues. Furthermore, NGOs can play a key role in bringing these to light, and thus informing human rights due diligence.
- Business leaders should be comfortable with the ‘carrot and stick’ approach that rights groups and civil society apply. The opportunity for business leaders might be to leverage these diverse strategies / tactics to sustain the engagement of their companies and industries.
- Sometimes the company needs to use its leverage – indeed use a ‘carrot and stick’ approach - to bring stakeholders and interest groups to the table and get their buy-in to the vision of multi-stakeholder solutions that work.

The engagement of government is critical and the State has entirely unique capabilities to bring to bear to critical and urgent business and human rights challenges: Across each of the cases presented and issues discussed it was clear that – consistent with the UNGPs – government needs to be active in supporting local efforts. It is not enough to set only high-level policy aspirations and expect stakeholders to resolve issues. For example, only government can set investment policy, establish social and environmental safeguards around public financing standards, create and enforce the right legal and policy framework, and scale successful efforts. Further, the cases demonstrated that even when addressing one specific issue or a set of human rights issues at a sub-national level, diverse aspects of government must be around the table. These include different ministries, as well as local and federal departments/ leaders, and home and host State representatives. This need for diverse government representation reflects the sheer size and complexity of some of the issues that the cases presented at the UN Annual Forum are seeking to address.

The UN Annual Forum can serve as a valuable platform or individuals and organisations to present their local work and challenges: As well as seeking to offer valuable insights for participants at the Forum about the dynamics of local action across all three pillars of the UNGPs, it became clear that the Forum can serve stakeholders who may not regularly get invited to present at the UN about their issues and work. BHRRC, GBI and the UN Working Group heard that preparing for and presenting at the UN Annual Forum offers, among other things: an impetus for presenters to establish shared lessons, challenges and priorities; a rare opportunity to engage as a group with international experts and gain guidance/ideas about ways forward; and a chance to profile work in order to build support to deepen or scale projects.

² http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/45/Add.3

PART TWO

2020 Tea Revitalisation Programme – Malawi

Speakers

Sarah Roberts, Executive Director, **Ethical Tea Partnership**

Rachel Wilshaw, Ethical Trade Manager, Private Sector team, Campaigns, Policy and Influencing Team, **Oxfam GB**

Background

Malawi is one of the world's poorest countries. Sixty-two percent of Malawians live below the World Bank's extreme poverty line, and about fifty percent of all children are nutritionally stunted. The tea industry is the largest formal sector employer in Malawi, employing 50,000 workers. The aim of the 5-year Malawi 2020 multi-stakeholder partnership is to achieve a competitive and profitable Malawian tea industry where workers and smallholders earn a living wage, coupled with significant improvements in general working and living conditions of tea estate workers, especially women. The programme



is supported by stakeholders all along the tea value chain: producers, brokers and traders, tea buyers and retailers, as well as unions, NGOs, international donors, and government agencies. In total, 20 organisations committed to the programme by signing a Memorandum of Understanding (MoU) in the summer of 2015.

The impetus for this programme came from discussions that followed multi-stakeholder research undertaken in 2013 on wages in the tea industry, which had found low wages and a range of barriers to change in key tea-growing countries. It was noted that, at this stage, business found existing NGO reports on the issues of wages and women in the workplace confounding, perceiving the analysis to be too simplistic. Companies felt they were being held accountable for issues that they were not entirely responsible for. In order to bridge this perception gap, stakeholders worked together, seeking to reach a common, evidence-based understanding of the issues. Thorough evidence-based analysis of the national minimum wage demonstrated that it did not lead to workers earning enough to meet their family's basic needs. In the areas studied, tea pickers' wages were found to be the same across whole regions, whether certified or not, and in-kind benefits were found to represent a significant proportion of total benefits.

Within the 2013 research, wages in Malawi were found to be below the international extreme poverty line at household level, despite meeting the legal minimum wage and national poverty line. The findings of the research caused great concern but were accepted by all stakeholders. This acceptance provided a platform for a collective commitment to tackling low wages, starting with Malawi, for which European and North American markets are important.

The programme aims to deliver seven key outcomes:

1. An industry that is investing in its future and its workforce;
2. Significant improvement in wages and benefits for workers;
3. Supply chain commitment to a living wage by 2020;
4. Improvements in smallholder farming practices, yields, quality, income, and income diversification;
5. A healthier, motivated, and productive workforce, with greater opportunities for women;
6. An improved wage-setting process with greater worker representation; and
7. Sustainable energy-use and improved environment.

Malawi 2020 and the UNGPs

The UNGPs comprise 31 principles across three pillars: The State Duty to Protect; The Corporate Responsibility to Respect, and Access to Remedy. Both within each pillar and across the three pillar, the UNGPs should be considered holistically. However, for illustrative purposes, below are a few (non-exhaustive) examples of the linkages between challenges and actions presented in this case and specific principles. As noted above, although the UNGPs were not the original incentive for all cases presented, speakers acknowledged that they can be an added valuable reference point to guide multi-stakeholder efforts.

State Duty to Protect: UNGPs Operational Principle 3 (a) requires enforcement of “laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights”, and is notable in relation to Malawi regarding emerging endeavours on legal minimum wage³ and on gender equality,⁴ and with regard to the government’s prioritisation of maintenance of rural employment levels. However, wages in the tea industry in Malawi are deemed an inadequate proxy for a wage that meets the basic needs of workers and their dependents, and the 2012 Gender Equality Bill, though passed, has witnessed limited awareness and enforcement to date.⁵

Corporate Responsibility to Respect: The corporate responsibility to avoid infringing on human rights and to address adverse human rights impacts is outlined in Guiding Principle (GP) 11, and is bolstered by GP 12, referencing the ILO Core Conventions on principles of equality and decent work.¹ Companies sourcing from Malawi and certification organisations who certify Malawi tea – even those whose code includes a living wage – currently only audit to minimum wage. In relation to wages, gender inequality and issues of sexual harassment, the UNGPs clearly delineate the corporate responsibility to address such challenges independently of the state’s willingness or ability to fulfil its own duties in this regard. Under GP 13(a), companies have a responsibility not to cause or contribute to adverse human rights impacts (or address such impacts where they occur) and under GP 13 (b) the responsibility extends to those impacts to which the company is directly linked. Companies along the value chain have a responsibility to use leverage within their business relationships to prevent or mitigate human rights risks. This is demonstrated in this instance through a large number of organisations from across the value chain, (including producers, brokers and traders, tea buyers and retailers) engaging with the overall multi-stakeholder effort.

³ Article 7 of UN General Assembly, *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, *International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200 establishes the right to enjoy just and favourable conditions of work.

⁴ ILO Core Labour Standards 5 (Equal Remuneration Convention, 1951 (No.100)) and 6 (Discrimination (Employment and Occupation) Convention, 1958 (No. 111)).

⁵ Operational Principle 3 (a) further requires the government to assess adequacy of such policies and address gaps.

⁶ Note Article 22 International Covenant on Civil and Political Rights (ICCPR) United Nations General Assembly Resolution 2200A [XXI]. 16 December 1966 refers, establishing the right to freedom of association, and Article 8 of UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, *International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200 establishes the right to form and join trade unions and the right to strike.

Access to remedy: Union membership is relatively low in Malawi and there is no collective bargaining in the tea industry. This limits avenues for workers to raise issues and for grievances to be addressed. Many workers do not have access to effective grievance mechanisms and women are under-represented in decision-making roles. The initiative seeks to ensure increased access to grievance mechanisms in accordance with GPs 29 and 31 and establish collective bargaining agreements as a priority, with an additional focus on enhancing access for women.⁶

Progress

Initial steps and progression between 2013 and 2015 included:

- ETP, Oxfam, Fairtrade, Rainforest Alliance and Utz Certified supported a detailed analysis of a living wage for tea workers in Malawi which was undertaken by experts Richard and Martha Anke, who noted progress to date but concluded that current wages were just 37% of their calculated living wage benchmark.
- Dialogue with Malawian producers, tea buyers, civil society, government and development partners on the findings of two reports and the conditions necessary to support achievement of a living wage.
- Consultation with Malawi and international stakeholders on a draft 5-year roadmap.
- Nutrition analysis by Global Alliance for Health and Nutrition (GAIN) and Imani Development has resulted in a programme to improve the nutritional quality of the midday meal for tea workers.
- An industry SWOT and human resource analysis was carried out and findings discussed.
- An MOU was signed by 20 organisations outlining their commitment to 'Living Wages on Tea Plantations and Living Income on Smallholder Farms in Malawi by 2020', launched in June 2015 by the Malawian Minister of Agriculture and supply chain representatives.

To progress implementation of the MOU, Malawi 2020 signatories met in Blantyre in September 2015, agreed short, medium and long term priorities and noted a number of positive developments, including:

- A substantial rise in workers' wages from MK560 to MK850 from 1st September 2015.
- An increase in smallholder first green leaf prices from US\$0.13/kg of green leaf to US\$0.15/kg from 1st September 2015.
- Agreement was reached on a way forward to develop a collective bargaining agreement.
- The Malawi Government confirmed its continued support for the process.

Key priorities to the end of 2016 include:

- Capacity building with unions and employers on effective collective bargaining leading to negotiation of a first Collective Bargaining Agreement for the industry.
- Calculation of costings for replanting and other upgrading required to improve quality, and development of affordable financing options to support these improvements.
- Assessment of the relationship quality between buyers and suppliers which could lead to benefits for producers in the form of higher prices and better practices.
- Continuing work to improve smallholder farming practices, yields, quality, income and income diversification, linked to the Government's growth plans for the smallholder sector.
- Improving nutrition on tea estates.
- Establishing initiatives to tackle sexual harassment and gender discrimination, and to enhance grievance mechanisms.

Thilawa Special Economic Zone (SEZ) – Myanmar

Speakers

Vicky Bowman, Director, **Myanmar Centre for Responsible Business**

Aye Khaing Win, **Thilawa Social Development Group and displaced community member**

Than Aung, Secretary, **Thilawa SEZ Management Committee**

Takashi Yanai, President and Chief Executive Officer, **Myanmar Japan Thilawa Development Limited**

Background

The Thilawa SEZ, 23 km southeast of Yangon, is being developed in cooperation with the Japanese Government. It comprises Zone A, 400 hectares, for mainly industrial use, and a further 2000 ha area which is to be developed in phases for industrial and other uses. Zone A affected 81 households, and 68 of them were relocated in late 2013 by the Myanmar Government to a site 4.5-8 km away. Some members of the community submitted a complaint to the Japan International Cooperation Agency (JICA). Concerns raised in the complaint letter included loss of farmland and access to farmland, loss of livelihood opportunities, impoverishment, loss of educational opportunities, substandard housing and basic infrastructure, and loss of access to adequate clean water.

The legal framework for SEZs, and its relationship to other Myanmar laws, is still evolving, but the government's stated intention is that the Thilawa SEZ should be developed in accordance with international environmental and social safeguards. Thilawa SEZ Management Committee is in charge of governance of the entire SEZ, and Myanmar Japan Thilawa SEZ Development Ltd and the Myanmar Japan Thilawa Development Limited is in charge of developing Zone A specifically. Manufacturing and services investors in SEZs are offered certain tax and export privileges, superior infrastructure and a 'one-stop service centre' for permitting. Investments to date have come from Japan, China, the U.S. and Thailand in sectors that include garment and toy manufacturing, steel products, radiators, aluminium cans, packaging and waste management. The government estimates that there will be 30,000-50,000 direct employment opportunities in Zone A.

The Myanmar Japan Thilawa Development Limited comprises two consortiums. The one from Myanmar encompasses funding from TSMC and MTSH, and includes the companies Golden Land East Asia Development Ltd, Myanmar Sugar Development Public Co. Ltd., Myanmar Edible Oil Industrial Public Corporation, First Myanmar Investment Corporation Ltd., Myanmar Agricultural and General Development Public Ltd., National Development Company Group Limited., New City Development Public Company Ltd., Myanmar Technologies and Investment Corporation Ltd., and the Myanmar Argribusiness Public Corporation Ltd. The Japanese consortium includes JICA and MMS, and Mitsubishi Corporation, Marubeni Corporation and Sumitomo Corporation.

Some members of the community submitted a complaint to JICA's independent examiners in June 2014 alleging non-compliance with the 2010 JICA Guidelines for Environmental & Social Considerations. While recognising some of the concerns raised, the JICA Examiner's November 2014 report found no instances of non-compliance with JICA's Guidelines. However, it did recommend improved dialogue and communication among stakeholders and further improvements in living conditions at the relocation site.

The report's findings were criticised by the Thilawa Social Development Group, although they welcomed the recommendation for more dialogue.

The Myanmar Centre for Responsible Business convened discussions between NGOs (ERI and local/international NGOs), Thilawa communities, and the JICA Expert Team. Following the JICA Examiner's Report, these discussions have since developed into a Multi-Stakeholder Advisory Group. This advisory group aims to strengthen stakeholder coordination and advise on the resettlement aspects of implementation of the Thilawa SEZ Project. It responds to continued civil society interest and concerns about the resettlement programme and both Governments' recognition that broader stakeholder engagement will assist in making progress on the Income Restoration Programme and resolving some of the ongoing challenges that have arisen, as well as providing lessons learned for the next phase of the SEZ.

Since November 2014, ERI has worked with the communities on the design of a community-driven operational grievance mechanism (OGM) to address the impacts of the SEZ. In this OGM model, the community plays the leading role in the design and implementation of the mechanism, and will engage in negotiations with the management committee and other stakeholders to come to an agreement and establish the OGM. Where grievances fall outside of the scope of the OGM or cannot be resolved through it, the Multi Stakeholder Advisory Group may have a role to play in elevating the issues or finding solutions. During the design of the OGM, a need was identified for an interim process in order to handle existing issues until the full OGM is in place. Members of the Multi Stakeholder Advisory Group are currently negotiating the details of what this interim process will look like. This negotiation has included several meetings with all stakeholders at the table, in order to find a solution that works for all parties.



Thilawa SEZ and the UNGPs

The UNGPs comprise 31 principles across three pillars: The State Duty to Protect; The Corporate Responsibility to Respect, and Access to Remedy. Both within each pillar and across the three pillar, the UNGPs should be considered holistically. However, for illustrative purposes, below are a few (non-exhaustive) examples of the linkages between challenges and actions presented in this case and specific principles. As noted above, although the UNGPs were not the original incentive for all cases presented, speakers acknowledged that they can be an added valuable reference point to guide multi-stakeholder efforts.

State Duty to Protect: Pillar one is engaged with regards to both governments' duties to protect against adverse human rights impacts by third parties, for example with regards to the relocated community and other stakeholders impacted by the SEZ. The duty to promote respect for human rights under GP 6 can be seen in requiring international standards to be upheld in the development project. The state has a duty to safeguard certain human rights from abuse by third parties which are acknowledged to be

particularly at risk in instances of resettlement, and have the potential to significantly increase vulnerability of communities if not secured. These include the right to water⁷; right to adequate standard of living, including adequate housing⁸; right to education⁹ and health¹⁰ – all of which were alleged to have been breached in the original complaint. Due to the nature of the investment project, both governments' duties are activated under GP 9 in relation to maintaining "adequate policy space to meet their human rights obligations" within the development. This includes the duties of the Japanese government in relation to the actions of JICA in relation to supporting outward investment of domestic companies abroad (see commentary to GP 9), and that of the Myanmar government in relation to the state/business nexus (under GP 4) where the state is involved with the owner facilitating trade and providing finance. It is noted that – although their findings in relation to issues of relocation did not meet the approval all stakeholders – JICA did recommend improved dialogue and communication among stakeholders plus further improvements in living conditions at the relocation site in this regard

Corporate Responsibility to Respect: Myanmar Japan Thilawa Development Ltd is comprised of numerous companies as listed above. GP 11 and GP 12 establish the scope of the human rights responsibilities of these companies in the context of the development. Private actors within both consortiums of the development should be conducting due diligence on their actual and potential human rights impacts as prescribed in GP 17. GP 13 outlines the considerations for use of leverage to safeguard respect for human rights by the companies within their interrelationships in the development e.g., in the relationship and potential use of leverage with investor companies and their customer companies and the SEZ developer. Further, ongoing stakeholder engagement as required under GP 18 is witnessed, and the the Multi Stakeholder Advisory Group can be understood as one key mechanism to achieve this. Although this is not business-led, the MSAG provides the opportunity for stakeholder engagement.

Access to Remedy: All parties – states and companies – involved are required to ensure access to effective remedy in the case of adverse human rights impacts. In this regard, work by ERI to lead on building a community-driven grievance mechanism, is notable. GP 29 notes the requirement for business to participate in effective operational-level grievance mechanisms with those whose human rights they may adversely impact. Within the SEZ development, remedy is further being addressed through multiple formats, including the use of the JICA Examiner Mechanism and working towards the Income Restoration Programme.¹¹

⁷ Resolution 64/292: The human right to water and sanitation. United Nations. August 2010.

⁸ Article 11 ICESCR.

⁹ Articles 13 and 14 ICESCR.

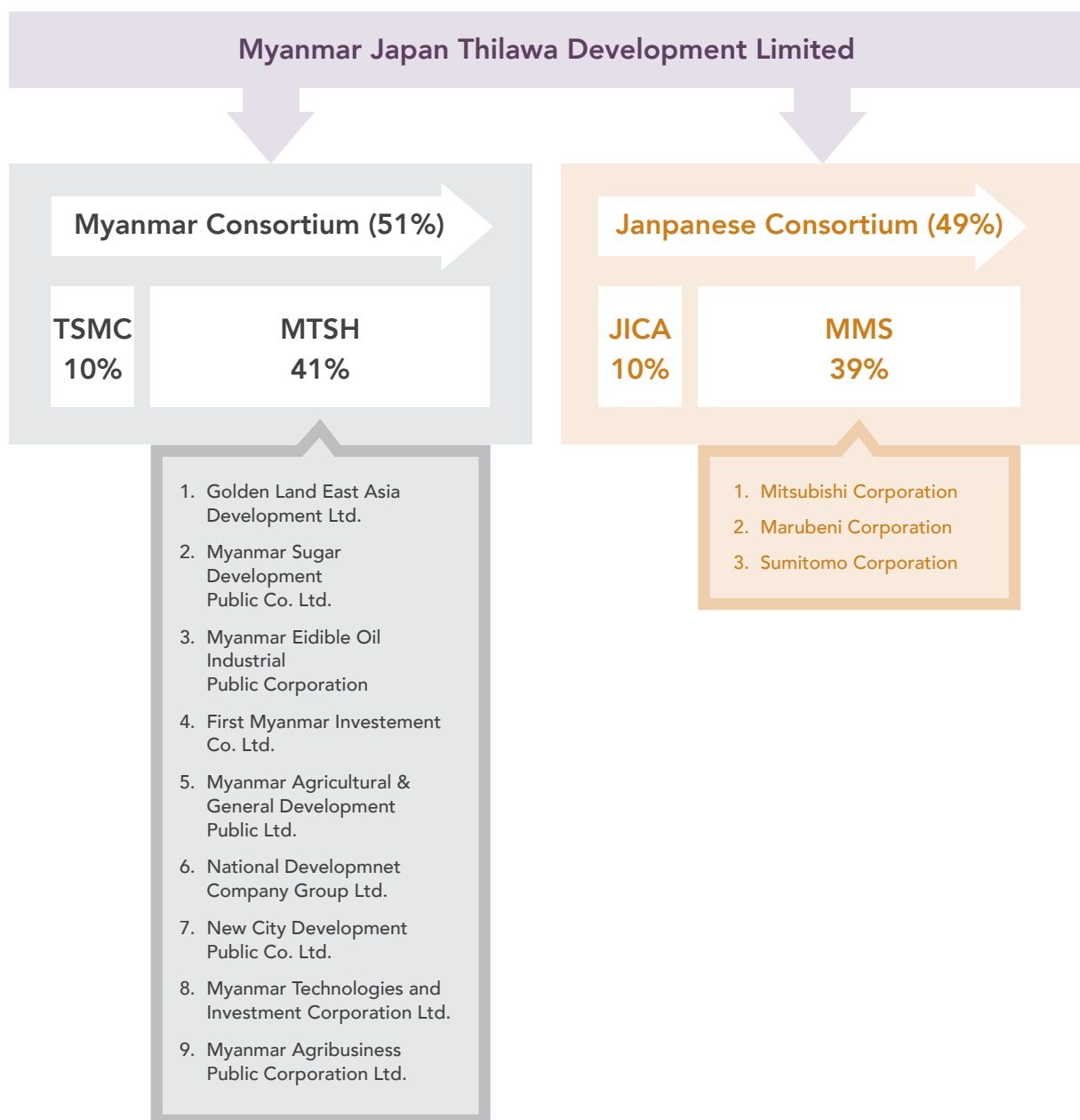
¹⁰ Article 12 ICESCR.

¹¹ If examined within the context of the UNGPs, these would be subject to reaching the effectiveness criteria for non-judicial grievance mechanisms presented in GP 31, requiring that ensuring effectiveness requires such mechanisms to be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue with stakeholders.

Progress

Following issue of the recommendations, initial responses include:

- Technical assistance from a JICA Expert Team being provided in 2013 to the Myanmar Government.
- MCRB convened discussions between stakeholders – these discussions have since developed into the MSAG.
- Since November 2014, ERI has worked with the communities on the design of a community-driven operational grievance mechanism to address the impacts of the SEZ.
- Technical assistance from a JICA Expert Team was provided in 2013 to the Myanmar Government to develop the Resettlement Work Plan and the Income Restoration Programme.
- In late 2014 additional IRP support has been accelerated, in consultation with MJTD, and Shwe Maw Won (a local CSO), supported by the JICA Expert Team.



Kingsland Multi-stakeholder Engagement – Cambodia

Speakers

An Nan, Field Representative, **Workers Rights Consortium and the Arbitration Council of Cambodia**

Lars Åke Bergqvist, Global CSR Coordinator, **H&M**

Susan Hayter, Senior Specialist – Labour Relations, **ILO**

Background

In December 2012 H&M adopted a human rights policy, based on the UNGPs. Among its policies, H&M forbids the use of undeclared production units by its suppliers. In spring 2012, H&M placed an order with a supplier, which subcontracted the work to Kingsland without informing H&M, in breach of H&M's policies. The order was finished and shipped in June 2012, but in September and October Kingsland suspended production and illegally laid off 200 workers. Kingsland failed to pay compensation during the period of suspended production. When it subsequently closed permanently, it failed to pay outstanding wages and legal severance pay, triggering worker protests, including strikes, blocking of the factory gate, and temporary blocking of the main road and of machines in the factory for four months. Additional local and international advocacy action was taken at this time. A Cambodian NGO, the Community Legal Education Centre (CLEC), informed H&M of the situation at Kingsland and former Kingsland workers, CLEC and the Workers' Rights Consortium in Cambodia sent letters to H&M requesting that the company compensate the 200 workers, after proving that Kingsland indeed produced garments for H&M via its direct suppliers. H&M also received external questions from media outlets.

H&M reviewed its responsibility from a human rights perspective, and contacted human rights experts to elicit advice. The company then contacted its supplier, which was willing to contribute to workers' compensation. A stakeholder meeting was then organised in March 2013, involving Better Factories Cambodia (BFC) and the American Center for International Labor Solidarity (ACILS), while at the same time, workers protested outside H&M offices, the Swedish Embassy in Phnom Penh and outside the Kingsland factory. These protests included hunger strikes by some former Kingsland workers.

The stakeholder meeting concluded that factory assets and contributions from the suppliers would cover the workers' compensation. A committee was formed with government representatives to work out the details. The former workers received compensation in mid-March. H&M then met with the Cambodian Government to address the lack of social security systems.

The Kingsland case and the UNGPs

The UNGPs comprise 31 principles across three pillars: The State Duty to Protect; The Corporate Responsibility to Respect, and Access to Remedy. Both within each pillar and across the three pillar, the UNGPs should be considered holistically. However, for illustrative purposes, below are a few (non-exhaustive) examples of the linkages between challenges and actions presented in this case and specific principles. As noted above, although the UNGPs were not the original incentive for all cases presented, speakers acknowledged that they can be an added valuable reference point to guide multi-stakeholder efforts.

State Duty to Protect: The Cambodian government has a duty to manage its own labour laws and to educate and build capacity. In the present case the focus has been on remedying an existing adverse impact, engaging with H&M in relation to appropriate remedy under its established duty in GP 25 to ensure effective remedy to redress abuse, and in relation to its duty to address the lack of social security provision.¹²

Corporate Responsibility to Respect: H&M's adoption of a human rights policy and policies related to its business relationships is consistent with the requirements of policy commitment at GP 16. H&M accepted that its business relationship with Kingsland enlivened its responsibility by creating a direct linkage between its products and human rights harms, despite the provisions regarding undisclosed production units in its direct supplier contracts. This responsibility arises under GP 13(b) in relation to the need to mitigate adverse human rights impacts directly linked to H&M via its relationship with Kingsland.

Access to Remedy: H&M's engagement with the Cambodian government was important in ensuring impartial and appropriate compensation was provided, as outlined in GP 25, and the government's involvement in this process could be considered to align with GP 28 on facilitating access to grievance mechanisms to ensure effective and adequate remediation. The actions of the Workers Rights Consortium and the Arbitration Council of Cambodia in reaching out to H&M further enhanced access to remedy of the former Kingsland workers.



Progress

One important lesson learnt by H&M, and applicable to other companies, was that when big brands play the role of facilitators in remediation, early engagement with stakeholders is key. In the Kingsland case, by taking an active role, H&M was perceived to be more responsible than other brands. Its proactive approach may also have contributed to minimising the protests and disruption. Proactively identifying local stakeholders and establishing and maintaining dialogue is not only positive, but necessary. Also, engaging with the government was imperative in this case.

Preventive actions taken by H&M after the Kingsland case:

- Organising a workshop with all suppliers in Cambodia concerning H&M's policy of using subcontractors.
- Establishing a whistleblowing system. Lists of all factories in Cambodia have been distributed to the trade unions so their members that produce H&M garments that are not on the list can report this back to H&M.

¹² See Article 9 ICECR (1966) on the right to social security, including social insurance.

Labour rights in Florida's Tomato Growing Industry – United States

Speakers

Greg Asbed, Co-Founder of the **Coalition of Immokalee Workers**

Miguel Rios, Agricultural Enforcement Coordinator for the Southeast Region of the **U.S. Wage and Hour Division of the Department of Labor**

Cheryl Queen, VP Communications, **Compass Group**

Background

In the early 1990's, farmworkers united to build a foundation of community organisation which sought to address human rights issues such as forced labour, sexual harassment, workplace violence, human trafficking, retaliation, and wage theft in South Florida's tomato fields. From this movement the Coalition of Immokalee Workers (CIW) was established. After many years of fighting for better working conditions by means of activism and protests, the CIW recognised that, to truly address inequities and abuses, they would need to gain the attention of those at the top of the industry, who were leveraging their volume purchasing power to demand ever-lower prices, which had resulted in the downward pressure that had ultimately created the conditions under which they worked.

Many sectors of U.S. agricultural industry are reliant on immigrant labour. Cultural differences can create separate, but coexisting, worlds in which acceptable minimum standards are truncated, leaving workers permanently at the bottom rung of the ladder and vulnerable. In such circumstances, poverty and humiliation may become the norm, and modern-day slavery and sexual violence can become prevalent.

In 2001, the CIW established the Campaign for Fair Food which affirmed the human rights of tomato workers and sought to improve their working conditions. The Fair Food Program (FFP), established across more than 90% of the Florida tomato industry in 2011, emerged from this campaign. Overseen by the Fair Food Standards Council (FFSC), the FFP enlists the resources of participating food industry leaders to improve farmworker wages and harnesses their demand to reward growers who respect their workers' rights. It brings together workers, consumers, growers, and retail food companies in support of fair wages, and humane labour standards in the agricultural industry.

FFP and the UN Guiding Principles

The UNGPs comprise 31 principles across three pillars: The State Duty to Protect; The Corporate Responsibility to Respect, and Access to Remedy. Both within each pillar and across the three pillar, the UNGPs should be considered holistically. However, for illustrative purposes, below are a few (non-exhaustive) examples of the linkages between challenges and actions presented in this case and specific principles. As noted above, although the UNGPs were not the original incentive for all cases presented, speakers acknowledged that they can be an added valuable reference point to guide multi-stakeholder efforts.

State Duty to Protect: The state's duty to protect the workers from adverse human rights impacts is established under GP 1. This includes a duty to protect against human rights abuse by business enterprises and taking appropriate steps to ensure operationalisation of the duty. GP 3 defines the regulatory and policy function of the state and its duties therein to ensure business adherence. Their protection is operationally enabled through effective enforcement by the Department of Labor, due

to its enhanced ability to investigate allegations of violations and abuse via the reporting mechanisms established by the FFP.

Corporate responsibility to respect: The companies' responsibility to respect workers' rights¹³ is clear under GP 11, encompassing the responsibility to respect the human rights of others and address adverse impacts with which they are involved, and GP 12, defining the scope of those rights as, at a minimum, those expressed in the International Bill of Human Rights and the principles of the ILO Declaration on Fundamental Principles and Rights at Work. The FFP requires supply chain due diligence as outlined in GP 17, which states the requirements for conducting due diligence including assessing, acting on findings, tracking responses and communicating how they address the impact. The responsibility includes to avoid causing, contributing to or being directly linked to adverse human rights impacts, including effective use of leverage throughout the value chain as outlined in GP 13. This is bolstered in practice by market consequences for violations or non-compliance.

Access to Remedy: The FFP's worker-triggered complaint resolution mechanism is designed to initiate investigation and the development of corrective action plans. If necessary, complaints may result in suspension of a farm's Participating Grower status, and thus its ability to sell to Participating Buyers. This complaints mechanism appears well aligned to the criteria for non-judicial grievance mechanisms set out in GP 31, including by its creation through a process of consultation with affected stakeholders, as required by GP 31(h). GP 30 outlines the criteria and need to establish effective grievance mechanisms in multi-stakeholder initiatives or collaborations which are based on human rights-related standards, and so is applicable here also.



Progress

The programme is premised on risk prevention, supply chain transparency, and the verifiable, market-enforced protection of workers' rights. It also established a human rights-based Fair Food Code of Conduct, which incorporates zero tolerance for forced labour, child labour, violence, and sexual assault; worker-to-worker education sessions conducted by CIW on farms; a worker-triggered complaint resolution mechanism incorporating investigation, corrective action plans and severe market implications for breach; health and safety committees on every farm to give workers a structured voice; concrete changes in harvesting operations to improve overall wages and working conditions; and ongoing comprehensive audits of Participating Growers' operations by the FFSC to ensure compliance with each element of the programme.

¹³ This includes, but is not restricted to, the right to work under Article 6 ICESCR; the right to enjoy just and favourable working conditions under Article 7 ICESCR; the right to form and join trade unions under Article 8 ICESCR, Article 22 ICCPR and ILO core labour standard on Freedom of Association and Protection of the Right to Organise Convention, 1949 (No.87); the right to social security under Article 9 ICESCR.

In the example of the Compass Group's engagement with the FFP, the multi-stakeholder approach taken to implement the programme included a Compass meeting with workers and buyers to discuss the issues face-to-face. The company also convened a meeting with supply chain representatives and CIW. It approached implementation throughout the supply chain utilising a subtle 'carrot and stick' approach to lead suppliers up to compliance.

Remarks from the UN Working Group on Business and Human Rights

“ Last year the UN Working Group, GBI and BHRRC came together to convene a similar panel, looking at human rights and business through the lens of specific cases. When the Working Group wrote up the report on the experiences from the Forum, it actually recommended to the Human Rights Council that we take the formula from that session and make sure that it was a standard formula that we carried through to all the other UN Forums in the future. The formula itself really hit to the core of what the annual Forum is supposed to be about: it's about bringing the perspectives of the different actors on the ground around these specific cases and understanding them that way.

The cases played out over the full range of the Guiding Principles, so we got to see the different activities around the preventative actions and the due diligence actions that were taken by the company, but also going into the remedy space – so after those negative impacts unfolded, what was happening then to remedy them. Also from the panel last year we got the good practice, so the things that are worth repeating. We also got the real honest tough aspects too, that you wouldn't necessarily want to repeat, and even the different interpretations as it played out – so where the company had a very different interpretation than the NGOs did on the very same case study.

So this year, building on last years' experience, we hope you enjoy the perspective of actually seeing specific cases on business and human rights challenges being unpacked by the very players who are taking part in them. You get to see the perspective from the government, from the communities affected and from the businesses. We hope as well that you start to look at how the Guiding Principles play that role in helping these cases play out, and also in terms of looking at the three pillar approach.

Margaret Jungk

Former Chair, UN Working Group on Business and Human Rights

“ The Guiding Principles propose a holistic approach between the three pillars – each pillar is an integral component in an interrelated and dynamic system of preventive and remedial measures. On the high level – the global business associations, the global institutions around the world, the UN system, we are in agreement that the GPs need to be rolled out. The need for human rights due diligence is fully accepted; the need for access remedy when things go wrong is also widely accepted; and so is the need for effective stakeholder engagement.

We have reached a certain level of critical mass both at the government level and also the corporate level. This allows us to learn, to be able to draw certain conclusions or identify gaps where further developments or exploration are needed. So we welcome very much jointly organising this session to highlight cases in which collaboration happens between different stakeholders, demonstrating that is something that is possible. Very often people don't think it is possible to sit in the same room or at the same table to look for a compromise that is acceptable enough for the different players or participants – especially the most vulnerable - and so that's why the Working Group very much welcomes this session. These cases provide a fantastic opportunity to learn and explore further developments

Dante Pesce

Chair of the UN Working Group on Business and Human Rights



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