

When Business Harms Human Rights: Affected Communities that are Dying to be Heard

Abstracts (Alphabetical by Author): Part I

Introduction

The Introduction explores the themes emerging from the conference discussions and from the contributions included in the volume.

Daysheelyn Brillo, *Legal Barriers in Obtaining Justice for Toxic Tort Victims of Transnational Corporations*

Almost four decades ago, thousands of Filipino banana plantation workers were exposed to a sterility-inducing nematocide used by the subsidiaries of transnational corporations (TNCs) operating in the Philippines. The corporations used this chemical even though it was already banned in the United States. Plantation workers filed several lawsuits against the nematocide manufacturers and the TNCs in both Philippine and U.S. courts. While a few of them were able to obtain out-of-court settlements, the majority remain uncompensated for the injuries they have sustained.

The chapter narrates the experience of Digong, a retired banana farmer and the legal battle of other banana farmers against these huge fruit corporations and chemical manufacturers. It first surveys the litigation history of DBCP claimants and notes the different legal strategies taken by these groups of farmers. Then the paper focuses on the legal barriers that these farmers are facing while they litigate their case before the Philippine courts.

These TNCs take advantage of the failure of the domestic legal regimes, both in the United States and the Philippines, in providing an effective judicial remedy to these farmers. The callousness of these TNCs is manifested by their refusal to recognize and appear before Philippine courts while, simultaneously, working in the United States to have litigation removed back to Philippine courts when the farmers sued them before U.S. courts. The legal maneuvers employed by these corporations mean that the farmers would have to shell out significant litigation expenses and exhaust their precious time, making it practically impossible to obtain relief for their injuries.

By having the cases referred back to the Philippines, these corporations already won half the battle. First, the Philippine judiciary has been marred by corruption and suffered inefficiency. Second, it is more difficult to impute liability on the parent corporation for the acts of its subsidiary since Philippine case law has a higher threshold before the courts to pierce the corporate veil. Third, even if the farmers win the case, the amount of damages that will be awarded would most likely be minimal since it would be based on the average compensation of a Filipino farmer.

With the current legal framework in the Philippines, the plaintiffs would be better off initiating the action before the courts of the country of origin of the parent corporation rather than before Philippine courts. The chapter concludes that the Philippines should be at the forefront in

protecting the interest of these farmers. It notes that, in theory, the Philippines has the capacity to patch these loopholes by providing a non-judicial mechanism to provide compensation of toxic tort victims of these TNCs.

Bellinda Chinowawa, *Taming the Dragon, Exploring Options for Access to Remedy For Violations by Chinese Multinational Corporations Operating In Zimbabwe*

“Let her sleep. When the dragon awakes, the world will tremble.”¹ When Napoleon Bonaparte made this statement in the 18th century, he may well have been envisioning the current global economy. Since China opened its doors to the West thirty years ago, it is now a formidable global economic player.² To a large degree, China pursues its global strategy through Multinational Corporations (MNCs), which are highly competitive and strongly supported by the state. Globally, a number of MNCs have sought to align their activities in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs). However, the fatal flaw in the design of the UNGP is that they are premised on the existence of corporations and states willing to provide a framework for access to remedy when there has been a violation. Thus, in instances where there is a breakdown in the rule of law coupled with weak home state regulation, victims are left in a remediless limbo, unable to secure recourse for abuses perpetrated against them. This is particularly true for the people of Chiadzwa, in eastern Zimbabwe. Chinese owned corporate entities have been complicit in violations committed by the Army and related state security agencies. Villages and food supplies have been burnt in order to motivate reluctant villagers to leave their ancestral homes. Extra judicial killings of villagers suspected to be mining the precious mineral abound. In the ultimate act of callousness, the government forcibly relocated villagers from their ancestral homes to a farm with inadequate infrastructure and little scope to conduct any income generating activities. Without a source of livelihood, villagers are sliding deeper into the abyss of poverty and resultant social ills including prostitution, child marriages, and an upsurge in HIV infections. This chapter narrates the experience of one family as they attempt to navigate their relationship with one MNC. It follows them as they become displaced from their home, moved to another location and struggle to try and get an adequate access to remedy for being dispossessed from their land.

This story highlights how this family is caught in the regulatory limbo caused by failure of the Chinese government to regulate the activities of MNCs and the unwillingness of the government of Zimbabwe to provide local remedies. Ordinarily, the courts should be the first line of defence for redress where there are human rights violations. However, in the Zimbabwean context, they are staffed by judicial officers sympathetic to the reigning political order. Filing a case in the Chinese courts, along the lines of similar litigation mounted against other corporate entities in their home countries, is a herculean task due to the language limitations posed, inadequate knowledge by advocates of the Chinese legal system and a perceived indifference towards human rights issues by the Chinese government. Advocates are left feeling powerless, unable to adequately defend the cause of their clients. Thus, it becomes important to consider what access to remedy could entail where both the home and host governments and the MNCs themselves are unwilling to provide access to remedy.

¹ The Economist, Jul 17th 1997 <<http://www.economist.com/node/151617> >accessed 6 July 2017

² Teagarden, Mary B.; Cai, Dong Hong Learning from Dragons who are Learning from Us:: Developmental Lessons from China's Global Companies

Cigdem Cimrin & Yucel Demiral, *Occupational Health as A Human Right: A Case Study in a Turkish Free Trade Zone*

Foreign direct investment (FDI) brought by multinational enterprises (MNEs) has always been an important engine for Turkey in stimulating its economy. FDI is usually driven by the availability of cheap labour and the prevalence of weak environmental and labour regulations in the developing world.³ It is also accompanied by the transfer of obsolete and hazardous technologies, chemicals, processes, and waste, and associated with an increase in assembly line, workers' shift, and low-quality jobs with minimal options for advancement, and a growth of insecure, precarious employment for the less-industrialized countries (like Turkey).⁴

Workers in export processing zones (EPZs) have been particularly affected by these subdued employment standards, which were probably intentionally applied in order to attract or retain more and more FDI. Correspondingly, EPZs have been associated with high levels of machine-related accidents, dusts, noise, poor ventilation, and exposure to toxic chemicals.⁵ It has been reported that accidents, stress, and intense exposure to common hazards arise from unrealistic production quotas, productivity incentives, and inadequate controls on overtime.⁶

As a result, a growing number of workers are employed in workplace environments lacking adequate protections for their occupational health.⁷ However, in Turkey, the number of reported/compensated occupational diseases is unexpectedly low: with only around several hundred reported cases.⁸ The low numbers stems from a lack of accurate figures for occupational diseases in the Turkish job market. This, in turn, is due to widespread informal work and workplaces, weak monitoring and inspection services, and judicial and administrative barriers to compensation.

This chapter sheds light on serious human rights impacts of unhealthy employment conditions offered by MNEs and overlooked by public authorities and unions. Specifically, it tells the stories of twelve workers (6 Female: 6 Male) diagnosed with occupational diseases by Dokuz Eylul University Work and Occupational Health Outpatient Clinic (DEUOC) in Izmir, Turkey from among 105 workers admitted to DEUOC from MNEs operating in the Aegean Free Trade Zone. The authors first review OHS standards and remedies provided under the law and codes of

³ Grover A., *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, United Nations Human Rights Council 20th Session, 10 April 2012, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_33_ENG.DOCX (last visited on 3 September 2017).

⁴ Loewenson R., *Globalization and occupational health: a perspective from Southern Africa*, Bulletin of the World Health Organization, 2001, 79: 863-868.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Grover A., *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, United Nations Human Rights Council 20th Session, 10 April 2012, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_33_ENG.DOCX (last visited on 3 September 2017).

⁸ Bilir N., *Occupational Safety and Health Profile: Turkey*, International Labour Organization, ILO Office for Turkey, 2016.

conducts (CoCs) and compare it with the personal experiences of workers with occupational diseases. The authors also discuss the role of stakeholders such as unions and state agents and examine to what extent they succeed in fulfilling their duties in workers' experiences.

The authors commissioned this chapter with the aim of answering two questions at the intersection law and medicine: (1) what kind of factors in the workplace and/or work organization deteriorate workers' health and; (2) what kind of difficulties do workers diagnosed with occupational disease need to tackle after they've lost their health at a very early age? Overlying both of these issues is the relevance of human rights to occupational diseases. As such, the authors began each interview by asking a rather straight-forward question to their interviewees: *do you categorize your occupational disease as a human rights violation?*

One of the biggest challenges facing workers relates to employers terminating their employment after the workers have been diagnosed with an occupational disease. In addition, workers strongly criticized unions' passive attitudes and held those unions responsible for contributing to the victimization of workers both before and after their dismissal.

The study shows that workers' access to compensation through judicial or administrative means is also problematic. Specifically, the authors questioned whether workers employed any company-level grievance mechanisms to seek remedies for their cases. Workers' responses were upsetting as all but one had never heard of such mechanisms and none of them was aware of CoCs of their organisations.

Michael Clemens & Maria Isabel Cubides, *A Tale of Two Communities: Mine Closures in South Africa*

This chapter examines mining closures in South Africa and their impact on nearby communities. Specifically, the chapter highlights, through a comparative analysis, the long-term impacts of mining activities on women from surrounding communities, particularly where the mining operation is abandoned by the operating entity rather than properly closed under the terms of South African mining law. Comparing two cases where the same company, DRDGold Limited, generated severe impacts in surrounding communities as a result of the abrupt and improper closure of the mining operations allows us to identify the dimension of these problems and the importance of adopting a differential approach to find remedies that effectively redress the impacts of corporate activities.

The chapter is driven by the narrative of one of the women who lives and survives in the DRD Roodeport community, located in the heart of Johannesburg. This woman relies on commercial sex transactions at great risk to her personal safety. Due to the dearth of economic opportunities in the area after the mine closed 10 years ago, the chapter will depict the critical situation surrounding communities face. Women remain particularly vulnerable, and a significant commercial sex trade has developed due to a lack of alternative economic opportunities. HIV/AIDS is purportedly rampant, but access to medical facilities, including life-saving antiretrovirals, is severely limited.

Furthermore, this chapter will offer the perspective of the Blyvooruitzicht Mining Village – which surrounds one of the world's largest and most profitable mining concerns that suddenly closed in 2013, (Today, all residents face problems of regular access to water and electricity, and 60% report not having enough money to buy food and being unable to support their children.) This chapter will narrate the experience of this community in their fight for redress, with the support of community organizations.

Combining these two narratives, the comparative analysis aims, firstly, at underlining the dimension of repeated improper mine closure to demonstrate how abuses from a unique corporate actor can have a widespread impact on a multiplicity of communities. Secondly, using this as a basis for analysis of the implementation of UN Guiding Principles by mining companies in South Africa, the chapter explores options for remedy for the women of the DRD Roodeport community, many of whom are former mine workers and/or relatives of former mine workers and who today are facing a struggle for survival, despite mine closure regulation meant to ensure the flourishing of mining communities post-closure. The Blyvoorzicht case will give an encouraging perspective of access to remedy in such cases. And conversely, the Roodeport case will give a snapshot on how circumstances can greatly exacerbate if negative impacts of mining activities are not rapidly and effectively addressed.

Finally, the chapter concludes that, as the gold mining industry enters its twilight years in South Africa, the experience of these individuals is a template for the scores of other mining communities; the chapter highlights the risk that the next decade will produce similar crises on a much wider scale.

Rajiv Mahler, “*Atingidos*, “or “*The Affected*”

This chapter will cover the life stories of “Atingidos,” or those “Affected” by the Bento Rodrigues dam disaster, owned by Samarco mining company in South Eastern Brazil. Samarco is a joint venture by the world’s largest mining company BHP Billiton (headquartered in Australia) and Vale, one the largest mining companies in the world (headquartered in Brazil).

The Bento Rodrigues dam disaster occurred on 5 November 2015, when a tailings dam in Bento Rodrigues, Brazil, a village located within the municipality of Mariana, broke causing flooding and at least 17 deaths. This incident has been described as the worst environmental disaster in Brazil's history. The company denies responsibility for the collapse of the dam despite a report in 2013 from the Brazilian authorities stating structural weakness in the dam.

The chapter provides the Antingidos’ perceptions of the dam collapse in relation to how their lives and relations with Samarco and relevant authorities evolved from pre-dam collapse to post dam disaster. The chapter also focuses on community perceptions of Samarco’s Corporate Social Responsibility, respect for human rights, and community relations; and a United Nations Working Group on and Business Human Rights visit to the community in December 2015 just after the dam disaster. Overall, this chapter provides readers with an insight into how top-down CSR and human rights related corporate policies are perceived by beneficiaries or in this case by those affected. Key issues highlighted include power asymmetries between community and

corporation and the importance of the independent State actor of the Public Prosecution office, who our interviewee describes as the community's "guardian angel."