BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

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More than Meets the Eye

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Participatory (In)Justice and the EU Corporate Sustainability Due Diligence Directive

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Progress Towards an EU Due Diligence Law

The proposed Corporate Sustainability Due Diligence Directive (CSDDD) of the European Union (EU) is a momentous step in the journey towards 'hardening' the 'soft' obligations contained within the United Nations Guiding Principles on Business and Human Rights (UNGPs), and towards holding Transnational Corporations (TNCs) accountable for adverse impacts on human rights and the environment within the context of their operations, subsidiaries as well as their direct and indirect business partners, particularly in global south countries. The EU CSDDD drafting process has, thus far, resulted in a number of proposals, including: the EU Commission's February 2022 draft (Commission Proposal), the proposal by the Committee on Legal Affairs with Mrs. Lara Wolters as rapporteur and, most recently, the Council of the EU's Negotiating Position (Council Proposal) adopted in December 2022. As relates to the provisions detailing the participation of global south rightsholders (as part of stakeholder consultations) in due diligence processes, there are clear textual differences between the three versions, as I have argued elsewhere, and only time will tell what provisions will ultimately find their way into the final text.

Nevertheless, focusing on the Council Proposal from December 2022 this contribution offers some general observations about how the proposed directive problematically contributes to the perpetuation of a particular narrative about global south rightsholders: that they are victims in need of a saviour, rather than agency wielding rightsholders with the right to fully and actively participate in the enactment and implementation of laws that will impact them. Relatedly, a future CSDDD may also contribute to participatory injustice given the very real concerns about the democratic deficit inherent in a law that promises global application despite being wholly enacted by parliamentarians in global north countries.

Made by a Few but for the Many: Democratic Deficit in Action?

The proposed CSDDD promises to have a global reach, targeting, as it does, the operation of covered companies, their subsidiaries and business partners all around the world. The law will structure and regulate the relationship between TNCs and the global south rightsholders affected by their activities, in the context of human rights and environmental due diligence (HREDD) obligations. Yet, whether wittingly or unwittingly, a look at the processes preceding the adoption of the draft paint a clear picture of exclusion of global south stakeholders, a grave concern given the (positive) impact this law is anticipated to have on such stakeholders.

EUR-Lex, one of the official websites of the EU offers a useful definition of the term democratic deficit as, a situation where institutions and their decision-making procedures may suffer from a lack of democracy and accountability. In the case of the European Union (EU), it refers to a perceived lack of accessibility or lack of representation of the ordinary citizen with respect to the EU institutions – a sense of there being a gap between the powers of those institutions and a perceived inability of citizens to influence those institutions' decisions.

This acknowledgement of the importance of citizens being able to access institutions that make laws on their behalf and being able to influence decisions made by such institutions, is a crucial requirement for the democratic legitimacy of such laws. In parallel, this *institutional courtesy* of recognising the importance of, and actually making space for global south rightsholders to influence the EU processes of crafting a world-wide due diligence law is markedly absent. Granted, an open public consultation was held in the months preceding the adoption of the Commission Proposal. There was even a limited consultation open to (very few) global south stakeholders. Unfortunately, however, both these consultation processes were hardly a drop in the ocean in terms of the quantity and quality of consultations that should have been done with global south rightsholders. In fact, given the short timelines for the public consultations as well as the limited number of inputs received from global south stakeholders, this contribution would even go as far as to say that the open public consultation processes were clearly not targeted at the global south rightsholders that the law intends to protect. Any public consultation that genuinely intends to engage global south rightsholders, rather than being a mere window dressing strategy, must necessarily acknowledge the special conditions of these rightsholders and take steps to ensure their actual participation in the legislative process. This may include: having longer time periods for the public consultation processes; specifically targeting global south rightsholders and/or civil society and other organisations that represent them, in order to sensitise them on the possibilities available for their participation; monetary support to ensure actual participation of such rightsholders; having quotas in place requiring the consultation of certain minimum numbers of global south respondents for such processes to be deemed legitimate, etc. Without these kind of deliberate measures it is no wonder that already disenfranchised and marginalised global south rightsholders, who are in most cases too busy just trying to survive in global poverty chains, would be unable to participate in public consultation processes in far-off lands.

The EU CSDDD and Stakeholder Participation in Due Diligence Processes

To begin with, the definition section: Article 3(n) of the Council Proposal defines stakeholders as the company's employees, the employees of its subsidiaries, trade unions and workers' representatives, consumers, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business partners, including civil society organizations, national human rights and environmental institutions, and human rights and environmental defenders.

This is a fairly broad definition that certainly captures a wide range of stakeholders within its ambit. Subsequently, there are scattered references to the role of stakeholders in the due diligence processes outlined in Articles 5 to 11 of the draft directive. Article 5 imposes a requirement on covered companies to come up with and implement a due diligence policy. There is, however, no requirement for this to be done in cooperation with stakeholders. Article6 provides for the implementation of measures to identify actual and potential adverse impacts arising from the operations of covered companies. In this regard, Article 6(4) allows companies ***where relevant*** to 'carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts'. Thus, those most likely to be affected by the activities of companies stand the risk of being left out in the proverbial cold, depending on what the company considers to be relevant. Article 7 on the prevention of potential adverse impacts mandates the consultation of potentially affected stakeholders in the development of a prevention action plan in its sub-section (2)(a). Similarly, Article 8(3) on bringing actual adverse impacts to an end requires, *inter alia* and where relevant, the development of a corrective action plan in consultation with stakeholders in its sub-section (b). Article 9 on complaint procedures makes it possible for affected rightsholders (or those with reasonable grounds to believe they are likely to be affected) to submit complaints. As per Article 10, companies are required to monitor the implementation of their due diligence obligations and give due consideration to relevant information from stakeholders when updating their due diligence policies.

Global South Rightsholders as Stakeholders: Some TWAIL Considerations

Do these provisions on stakeholder engagement in the due diligence process do enough to make it possible for global south rightsholders to actively and fully participate in shaping outcomes that concern them? I do not think so. The proposals for a CSDDD arguably give companies too much leeway (See Odile Dua and Leonard Feld on corporate discretion under the proposed CSDDD) in determining who they should consult as stakeholders in these due diligence processes. This contribution identifies a number of troublesome aspects in this regard. Firstly, the Directive is silent on whether there should be any weighing or prioritisation of stakeholders in the consultation processes. Secondly, there are no specific reporting obligations in as far as stakeholder consultation processes are concerned. Will companies have to report on which stakeholders they consulted, and why those and not others? Will they have to give details of precisely how such stakeholder consultation processes were carried out, and whether the recommendations of stakeholders were factored into the final decisions? Thirdly, the law does not clearly stipulate whether all the stakeholders identified in the definitions should be consulted, or only some. In essence, as Céline da Graça Pires and Daniel Schönfelder brilliantly highlight, the Council Proposal does not comply with existing international standards on stakeholder engagement. Ultimately, whereas on paper it would appear that the planned directive creates spaces for global south rightsholders to consult in the due diligence process, whether and how companies actually ensure this happens is not as clear-cut.

Third World Approaches to International Law (TWAIL) is a useful analytical tool for assessing the current relationship between the global north and the global south, influenced as this is by colonial histories and continuities. One of TWAIL's core tasks is 'to attune the operation of international law to those sites and subjects that have traditionally been positioned at the receiving end of international law – usually the others of international law'. Given the power asymmetries that exist between TNCs and the global south rightsholders often affected by their actions and inactions, any law that attempts to bridge the accountability gap of such TNCs for violations of human rights and the environment must reflexively consider the people on the receiving end of such a law, and calculatedly put in place safeguards geared towards beginning to level the playing field between such people and covered companies, at least in the context of stakeholder engagement. Ultimately, this will require much more clear obligations as regards the mandatory nature of consultations with global south rightsholders, coupled with detailed requirements about the nitty-gritty of how such

consultations (see Céline da Graça Pires and Daniel Schönfelder) should be carried out in order to be legitimate. Anything less than that, as it is currently the case with the Council Proposal, is likely to be mere stakeholder consultation rhetoric shrouded under the guise of law. As TWAIL scholars have cautioned, it is very often that the 'marginalization and domination of the third world and its peoples are often framed and articulated in the liberatory goals of international law'.

Victimhood versus Agency: Some Final Reflections

The failure to adequately provide for the full, active and meaningful involvement of global south rightsholders in the processes of enacting and implementing the planned CSDDD has the (maybe unintended) effect of substituting the agency of such rightsholders for victimhood. That is to say, as it stands, the proposals set out to save these poor victims of human rights violations, without doing enough to empower them to be autonomous, independent and agency-wielding rightsholders capable of making real contributions to the due diligence processes on the basis of their lived experiences. Consequently, in order to truly benefit from the promises of a CSDDD, these rightsholders are forced to rely on the benevolence of other actors in the due diligence process. This failure to fully recognise and translate the agency of global south rightsholders into reality is problematic for two reasons: value-based and instrumental. Using these terms in a different but comparable context, Sandra Liebenberg has argued that value-based reasons for ensuring participation by rightsholders in processes that impact them is a recognition of the normative human rights based arguments for participation. These include respecting the individual dignity and autonomy of rightsholders in the context of decisions that have a profound impact on their material wellbeing. On the other hand, instrumental justifications for securing the full and meaningful participation of global south rightsholders are more concerned with enabling better quality decisions to be made by the covered companies, by ensuring that companies have at their disposal the best possible information when making decisions within the context of due diligence processes. After all, who is best placed to assist companies in identifying the fault lines in their operations other than the very persons who experience violations on the ground? Arguably, the regulatory effectiveness of a future CSDDD would be likely strengthened by the ability of agency-wielding global south rightsholders to fully and meaningfully participate in due diligence and related remediation processes (see Emma Baldi), given their unique but often overlooked insights into why and how things go wrong.

At the end of the day, this contribution urges us to temper the enthusiasm with which we approach the upcoming CSDDD and other due diligence laws like it. After all, as the above analysis has sought to illuminate, there is always more than meets the eye.

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