

Global Agreements and Protect, Respect, Remedy

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Introduction

International Framework Agreements or Global Framework Agreements have expanded in number and have evolved considerably in recent decades. Too often, they have been examined in isolation from the larger picture of multinational enterprises, not only concerning other forms of social dialogue and trade union organising, bargaining, and campaigning priorities, but also with respect to the legal, economic, competitive, and political environment in which they function, and the rapid changes in the way that they have been organising their business. To understand the value as well as the limits of Global Agreements, it is useful to put them in broader perspective.

Protect, Respect, Remedy

The Protect, Respect, Remedy Framework developed by the Special Representative of the UN Secretary-General on Business and Human Rights John Ruggie is a very useful reference for global agreements. Unlike CSR industry hype, it does not overlook, but underlines, the role of the State. Global agreements are also relevant to the responsibilities of companies to respect international human rights standards, including labour standards and to exercise “due diligence” concerning their impact on human rights. And, they can help provide “remedy”.

State duties to protect and company responsibilities to respect are both linked and separate. Governments have an obligation to protect, but poor laws and/or governance are not an excuse for corporate violation of national laws or international standards. And, the expectations of business are based on universal human rights standards and not on vague, corporate assurances or self-definition of international standards.

There are many countries that have adopted laws in conformity with international standards. The enabling rights of freedom of association and the right to organise and the right to collective bargaining, often called “trade union rights”, are best respected by companies in countries that have ratified conventions 87 and 98 and applied them, including through effective enforcement. There are other countries where trade unions are illegal or where governments impose a single union structure or in other key ways legislate and act against the respect of the human rights of workers. And, there is a third category of countries, where regardless of whether laws and enforcement are adequate, there are no barriers to companies fully respecting the rights of workers.

Two countries, in particular, where difficulties exist for the respect of global agreements are China and the United States. While one could argue that Chinese labour laws are a barrier to full respect of trade union rights, the US fits into that third category of countries where the State does not effectively force companies to respect trade union rights, but where no obstacles prevent companies from doing so if they wish.

The combination of the weakness of US labour laws and poor enforcement has contributed to create a climate and culture of corporate lawlessness on a massive scale. That does not mean that global

agreements have not been able to resolve a number of problems in the US, but only that it has often been difficult and long, and not all problems have yet been resolved.

Even when companies are determined to implement their agreements, they often face US managers who profess to see no contradiction between freedom of association and anti-union campaigns. Global agreement language has evolved because of the hostile US environment and deeply entrenched union busting with provisions in several agreements that provide greater detail as to employer conduct in basic freedom of association instances. One example of such more detailed provisions is in the agreement between ISS and UNI, which calls for unaccompanied union access to workers and the possibility of meetings, a “positive” attitude by the company on union organising, and recognition of the union “using the most expeditious process permitted under law and/or collective bargaining agreements”.

Some agreements have also called for commitments to engage in collective bargaining. This is important, in part, because, unlike freedom of association where the respect of the right only requires the employer to do nothing to influence the decision of workers as to whether they wish to be represented, the right to collective bargaining requires the employer to sit down and bargain or it ceases to be a right. One example of such language is contained in the GDF SUEZ agreement with BWI, ICEM, and PSI. It indicates that the parties to the agreement will, “promote and encourage positive and constructive industrial relations inside all GDF SUEZ companies and their business partners”.

Global agreements can lead to solutions of some specific problems in the US in a limited number of companies, but they cannot substitute for the failure of the government to protect the human rights of workers. In the midst of a vicious and deceptive campaign against a modest attempt to reform US labour laws in 2009, the Employee Free Choice Act, foreign-based multinationals, including some with framework agreements, remained in employer associations that were conducting that campaign, including the US Chamber of Commerce. They were, therefore, complicit in the preservation of human rights violations. Some argued that to break with their US counterparts would be “foreign” interference in US affairs.

US companies, on the other hand, have had no similar compunction about interference when they have opposed positive changes in labour law elsewhere in the world, including in such places as China, Georgia, and Romania.

On due diligence, the Ruggie Guiding Principles state, *“In order to identify, prevent and mitigate adverse human rights impacts, and to account for their performance, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking as well as communicating their performance”*. Often, when there is good communication between a company and a GUF, the GUF provides an independent source of information about what is happening inside the company and, to some extent, with business partners. If the relationship functions well, it can be an important contributor to carrying out due diligence.

“Remedy” applies to state and non-state actors when there are abuses. It includes grievance mechanisms. Global agreements are, in fact, largely used to resolve problems and comfortably fit into the Ruggie Framework.

However, Global Union representatives, in a consultation with John Ruggie in October of 2010 and in a written submission at the end of January of 2011 warned that phony grievance procedures for employees could be abused and used to undermine trade unions. The text of the commentary of the Guiding Principles that refers to this problem states, *“Operational-level grievance mechanisms should not be used to undermine the role of legitimate trade unions in addressing labor-related disputes, or to preclude access to judicial or non-judicial grievance mechanisms”*. Business organisations argued against that provision, but it remained, unchanged, in the text as submitted to the Human Rights Council on 31 May 2011.

The Ruggie Framework was used as a basis of the new Human Rights chapter of the 2011 update of the OECD Guidelines for Multinational Enterprises and it shaped the formulation of new provisions on due diligence and the application of the Guidelines to business partners. The updated Guidelines also adapted and incorporated Ruggie’s principles for the effective operation of a non-judicial grievance mechanism into the rules governing the operation of National Contact Points (NCOs). During the same period, ISO 26000 on CSR was finalised and new standards for the International Finance Corporation of the World Bank were developed. Both took on board the Framework. A number of global agreements include references to the OECD Guidelines. Some state that they are considered to be part of the agreements, so the changes may serve to broaden the scope of such agreements as well.

One of the frontiers of global agreements is the question of business partners, in other words, how to apply the agreement to enterprises that perform work for the MNE. There are a few agreements that have specific references to business partners and some references to the employment relationship or to “precarious work”. There are, however, discussions on this matter taking place with a number of companies. The recent agreement with GDF SUEZ (December of 2010) includes one of the most far-reaching clauses, as follows:

“GDF SUEZ recognizes the importance of secure employment for both the individual and for society through a preference for permanent, open-ended and direct employment. GDF SUEZ and all sub-contractors shall take full responsibility for all work being performed under the appropriate legal framework and, in particular, shall not seek to avoid obligations of the employer to dependent workers by disguising what would otherwise be an employment relationship or through the excessive use of temporary or agency labour... Companies will ensure that workers are not classified as self-employed when working under conditions of direct employment (bogus self-employment). GDF SUEZ expects its partners to apply comparable principles and regards this to be an important basis for a lasting business relationship”.

CSR and Global Agreements

A study that is being carried out by the Free University of Berlin on global agreements indicates that GUFs tend to see them as being part of industrial relations and that signatory companies

tend to consider them as part of corporate social responsibility. That is also beginning to change and the Ruggie Framework is relevant in this area as well. Respecting rights as an obligation links more closely with industrial relations than it does with making a “business case” for doing the right thing. An industrial relations approach is also more realistic and pragmatic.

CSR is about reputational risk and has roots in public relations. It is about proving virtue. Global agreements, at least as understood by trade unions, have their roots in industrial relations. The assumption at the global level, as at national level, is that conflicts and problems will arise. The purpose of the agreements is neither to prove or deny virtue nor to enhance or jeopardise reputations. It is simply to ensure that rights are protected and that an orderly process is developed to resolve conflict. The real world of the workplace can never be an unending series of “win-win” situations. It is rather a process of vigilance, problem solving and, at times, positive joint action. Global agreements are a form of global union recognition that provides common principles and mechanisms that can be applied to real life situations.

As employer attitudes change concerning the nature of global agreements, they will begin to shed the remnants of CSR mentality. Agreements will no longer be considered something that can be held up like codes of conduct or sustainability reports to ward off public reproach in the same way that a cross and garlic might keep Dracula away. One can already see some companies beginning to realise the value of the relationship with GUFs and of agreements. There is some evolution towards positive action and co-operation.

That was already a feature of the original Danone (then BSN) agreements with the IUF that were focused both on rights and on improving the company in ways that were beneficial to workers. The ArcelorMittal agreement with the IMF focuses on occupational health and safety. They have formed a Global Joint Health and Safety Committee that oversees the agreement and acts “hands on” with visits to facilities and concrete improvements in conditions and practices. Over time, it is very possible that, instead of one agreement, there will be specific, focused agreements with many companies that reflect joint, positive measures to be taken inside companies.

Another area where there seems to be room for improvement is in the understanding and use of agreements at national level. The same Free University of Berlin study shows that awareness of agreements varies significantly. On the management side, particularly in the US and other difficult countries, problems might be resolved more easily if contents of agreements are thoroughly explained to management and signals are loud and clear that managers are expected to respect agreements.

“Voluntary” versus legally binding

At an OECD Forum in May 2011, John Ruggie was asked if he considered the OECD Guidelines to be “voluntary”. He responded that the differences between voluntary and binding were beginning to become blurred. He said that the contents of the Guidelines were not voluntary – they were agreed by governments, not by companies and that the human rights standards that had been added were also agreed by governments and were not determined by companies. The application of the Guidelines was determined by NCPs and not by companies, and, to the extent

that they would be linked to export credits or other government incentives, they would take on a more binding character. In other words, they were not legally binding, but they were not voluntary either.

As soft law instruments become more linked and coherent and as due diligence becomes more common in the social area, the nature and role of voluntary global agreements may change. Even though the vast majority of MNEs have not signed agreements, they are an element in the global rights architecture. If corporate behaviour becomes more subject to scrutiny based on universal values and standards and if anti-social behaviour begins to be more effectively limited at the global level, the appeal of and interest in global agreements might increase.

Just as is true at the national level, bargained agreements are, by their nature, flexible. They reflect experience with specific enterprises and sectors. They represent an institutional, mutual recognition that incorporates the idea of balance of power and, even though they are not legally binding, they are agreed, which gives them a fundamentally different character than unilateral declarations. Therefore, in the long run, global agreements are likely to become more important to companies, but also to policy makers. Among other reasons, they are one way to make principles more binding in the absence of an effective global legal framework. And, as global rules develop, they provide the “private”, but compatible space to make such rules workable and applicable.

Processes for oversight and evaluation of global agreements have been becoming more rigorous and most GUFs have developed clear policies as to contents and implementation and approval including, in some cases, model agreements to be used as guidance when they are negotiated. Agreements are seen increasingly as part of organising strategies and as important for building organisations (or at least networks) inside companies.

If one considers global agreements as a form of industrial relations, a missing element is sectoral bargaining. It is also missing at national level in many countries. The one exception is an agreement between an association of shipowners/shipmanagers with the ITF. But it is not a framework agreement, but rather a global collective bargaining agreement that includes detailed provisions on wages, hours and working conditions. It has been constructed, not in isolation, but part of a process which has involved the negotiation and adoption of the ILO consolidated maritime convention, relations with State regulatory authorities and others. It also reflects a very long tradition of social dialogue in the industry. The ITF is engaging in global dialogue in other transport sectors as well, but without yet achieving similar agreements because of the different nature of other transport sectors.

Global agreements are not a miracle solution for the problems of the world’s workers nor are they an alternative to global governance or even to global coherence. But, related to those larger processes, they have a unique contribution to make as a direct voice of workers and as an element to strengthen democracy.

