

Commentary on the Discussion Paper: Accommodating Right to Environment

“Developing Global Standards for the Reporting and Assurance of Company Alignment with the UN Guiding Principles on Business and Human Rights”

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This commentary is made in relation to the consultation meeting held in Jakarta, June 3rd 2013, in the context of Indonesia legal system specifically from the perspective of right to environment as a part of human rights.

As stated in the discussion paper, the Project seeks to create an effective, independent, and widely respected process for reporting on and assuring a company’s human rights policies and processes. This article will submit out concerns regarding Annex B on the proposed elements for inclusion in the Reporting and Assurance Standards, especially on the issue of human rights to environment and the complexity in putting the concepts elaborated in the Annex B into practice.

Human Rights to Environment as an Inseparable Part of the Human Rights Statement

ICEL is fully aware that the relationship between human rights, business, and the environment is highly dependent yet complex and multi-faceted. As various cases have shown that the destruction of the environment are often triggering human right violations and the general concept of the right to environment has been widely accepted, the debate regarding the definition and scope of human rights to environment itself has not shown uniformity of acceptance either in the concept, moreover in practice. On the other hand, it is very important for all stakeholders to keep the debate alive, and creating more practices which can contribute to more focused approach to the right to environment as a part of human rights. This project has a strategic role in creating both concept and practice of the right – but how to put right to environment in the context of the other more settled, widely accepted “human rights” criterion as defined in the discussion paper remains a question.

Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights as one of the legal basis of this initiative provides recognition of the right to environment, as reflected in Principle 12 and Principle 14. Principle 12 calls Companies to respect human rights, including “right to adequate food and drinking water, the highest attainable standard of physical and mental health [...] and refrain from actions which obstruct or impede the realization of those rights”. Moreover, Principle 14¹ emphasize Companies’ obligation to protect the environment in an independent section, showing the importance of such matter, and includes compliance with “national laws, regulations, administrative practices, and policies relating to the preservation of the environment” as one of the aligning conduct to enable fulfillment of human rights. These recognitions show us that in the framework of corporate conduct and human rights, protection to environment and/or human rights which are highly connected to the protection of the environment.

¹ Principle 14 of the Draft Norms states “Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices, and policies relating to the preservation of the environment of the countries in which they operate as well as in accordance with relevant international agreements, principles, objectives, responsibilities, and standards with regard to the environment as well as human rights, public health and safety, bioethics, and the precautionary principle; and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development”

A popular approach as documented by Dinah Shelton sees the substantive right to environment as “the right to have an environment which can be enjoyed in the present time to be protected, kept, from the significance degradation of its condition; and in some circumstances can also covers improvement of condition”² The definition has been interpreted broadly – thus applying the severity of human rights impact test is quite a challenge in terms of right to environment.

For example, in terms of river pollution where there is one polluter with significant amount of dump while there are other companies dumping their waste to the water as well. The first issue the complex scope of the right *per se* and its relationship to the other basic rights.³ As we know, referring to the function of a river, there are number of human rights which can possibly be violated, including right to food and right to water, as well as the right to sound and healthy environment *per se*. The second issue is it is difficult to measure the severity referring to the function of the scale, scope, and whether it can be remediated since a river covers large area from its upstream to downstream, considering the accumulation of conduct of different actors can cause a severe cumulative effect while individual actions might not violate the standards.

Company Disclosure Requirement: Linking Environmental Compliance with Human Rights Violation

A practical approach in addressing this issue is to separate human right to environment *per se* with the other substantive rights derived from the significance derogation of environmental condition. However, the two approaches require additional analysis both on the reporting and the assurance standards:

- (1) For the “right to environment *per se*” – It is important to thoroughly elaborate the environmental efforts the company has made and describe whether the environmental conditions are considered “has been protected, kept, without significance derogation of its conditions”. It is also important to pay attention in the awareness of the impacted community that certain degree of “right to environment” violation has been occurring, and the fact that choosing this right in the reporting and assurance scheme will raise an issue of the definition limitation. The other important factor to be considered is the international recognition of the right itself, in which debate still arises in some extent in interpreting its recognition in the ICESCR.⁴
- (2) For the other substantive rights derived from the significance derogation of environmental condition – The emphasize of the “severe impact” shall be focused to the substantive rights itself, i.e. right to food or right to health, but the considerations on the link and causality of the damage the Companies brought to the environment must not be unaddressed in the Report and Assurance scheme. However, the Assurance process should be really careful in performing objective consideration on the scientific evidence used by

² Alexandre Kiss and Dinah Shelton, *International Environmental Law, 6th Edition*, (New York: Transnational Publishers, 2004), pp. 25.

³ The Draft Declaration of Principles on Human Rights and the Environment recognizes 27 principles which are separated into 4 general principles regarding right to environment, 10 substantive rights with reference to ICCPR and ICESCR, 6 procedural principles, 4 articles which specifically address regarding states and individuals and other legal subjects regarding these rights, and 3 special consideration. See: Fatma Zorah Ksentini, *The Final Report of the UN Special Rapporteur on Human Rights and the Environment*, UN Doc. No: E/CN.4/Sub.2/1994/9.

⁴ As the textual interpretation of Article 12 (a) of ICESCR originally refers to “right to health” and the formulation of the language is “the right to the highest attainable standards of living condition”. See: United Nations, *International Covenant on Economic, Social, and Cultural Rights*, adopted by UNGA in New York at December 16th, 1966, enter into force at January 3, 1976.

the Companies and in translating the scientific evidence into the legal evidence in terms of human rights performance.

Limitation of Aspects: Targeting the Most Risky Business to the Environment

The Discussion Paper suggests that Companies could also choose to focus its reporting on one or several of the areas in which adverse impacts to human rights may occur. The Interpretative Guide of the Corporate Responsibility to Respect Human Rights suggest interpretation for Guiding Principles 18 which provides that companies “should identify and assess any actual or potential human rights impacts with which they may be involved either through their own activities or as a result of their business relationships”. It stated that the particular focus should be on those risks that are most “salient” with regard to their own operations, relationships and operating context.⁵

However, it has been generally accepted that environmental conditions is the basic requirement for the fulfillment of various basic rights. Thus, in our opinion, in reporting its human rights performance, it is important for the companies to elaborate its environmental performance to the fulfillment of the human rights derived from it. Referring to that, the following question will be “determining the business sector which might have adverse impact to the environment”.

The second question can be answered by seeing the administrative requirement implying which business sectors are considered as “risky to the environment”. The obligation to obtain Environmental Permit for “any business and/or activity which are required to obtain Environmental Impact Assessment (“EIA”) or Environmental Monitoring & Management Efforts Report (“UKL-UPL”)” can be indicators on determining the business sectors subject to provision of elaboration on the right to environment.⁶

⁵ See the UN Office of the High Commissioner of Human Rights, *the Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2011) at pp. 8 and 28.

⁶ Government Regulation no. 27 of 2012 regarding Environmental Permit, Art. 2 and Art. 3.