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State responsibility

17.12.2018

Joëlle Trampert

Complex Complicity Scenarios in Suape Port and the Accountability of the Netherlands' Export Credit Agency

On Tuesday 27 November 2018, Ms. Joana Nabuco gave a short [presentation at the United Nations annual Business and Human Rights Forum](#) entitled 'New insights? When causation, contribution, and direct link overlap: UNGP implementation in "complex complicity" scenarios'. In order to illustrate such a scenario, Ms. Nabuco took Brazil's Suape Industrial Portuary Complex ('Suape Port') as a case study.

Suape Port is an international port in the city of Ipojuca in the state of Pernambuco. According to the port's [website](#), it is situated in a prominent position in the north-eastern region of Brazil and operates every day of the year, every hour of the day. Although Suape Port is a fast developing international trade centre and contributes significantly to the local economy, NGOs such as [Both ENDS](#) claim local communities have suffered poverty, environmental degradation, and violence due to the operations in the port. Ms. Nabuco explained that Suape Port concentrates over one hundred companies in a region inhabited by various traditional communities, who report serious human rights violations stemming from the port's expansion. Many of these companies are directly – or indirectly – linked to the reported human rights violations, but identifying their concrete duties, causal contributions to the harm and subsequent responses can be challenging.

One of the companies operational in Suape Port is the Dutch dredging company Van Oord Marine Ingenuity ('Van Oord'). Van Oord has been active in Suape Port since 1995, and two of its recent

projects included dredging the entrance to a new shipyard and deepening the access channel from the sea to the port (2011-2014). Allegedly, Van Oord's dredging activities have caused adverse environmental and human rights impacts: explosives designed to blow up sections of rocky ocean bottom and dredging waste dumped in ecologically irresponsible sites have had a destructive impact on marine and wildlife. Coral reefs, mangrove forests, and fish stocks have depleted and the local communities who live off fishing and harvesting shellfish have suffered from polluted waters and floods. Moreover, people living on the land adjacent to the site for the new shipyard have reported being forcibly evicted under threat of violence by armed security personnel. Van Oord was awarded these projects by the Suape port authority in 2011 and 2012 respectively, and received export credit insurances worth over €110 million Euros from the Export Credit Agency of the Netherlands, Atradius Dutch State Business ('ADSB'). The main question arising from this scenario, is which actors are responsible for the alleged harm, and to what extent. Ms. Nabuco remarked that actors should only be responsible to the degree of their influence, even though this may cause a barrier to victims seeking remedies. Incidentally, the Final Statement of the Dutch National Contact Point – discussed below – explicitly did not address the parties' respective degree of responsibility.

Together with Both ENDS, the NGOs/CSOs Associação Fórum Suape Espaço Socioambiental, Conectas Direitos Humanos, and Colônia de Pescadores do Município do Cabo de Santo Agostinho submitted a complaint to the Dutch National Contact Point ('NCP') on 8 June 2015 on alleged violations of the OECD Guidelines for Multinational Enterprises by Van Oord, ADSB, and the Suape port authority. The complaint against Van Oord's representative in Brazil was considered by the Brazilian NCP, as was the complaint against the Suape port authority (the latter was declared inadmissible, as it was not deemed a 'multinational enterprise' in the sense of the OECD Guidelines). The complaint against ADSB related to the provision of aforementioned export credit insurances to Van Oord for the two dredging projects. The rationale of the complaint against ADSB was that by granting Van Oord these insurances, ADSB had – as a multinational enterprise – violated its own obligations under the OECD Guidelines. The classification of ADSB as such was the first hurdle the claimants had to clear. The NCP of the Netherlands issued its Final Statement on the complaint against ADSB on 30 November 2016, holding that ADSB was indeed 'directly linked' to harmful social and environmental impacts and human rights violations, 'contributed to or caused by a business relationship', i.e. Van Oord (see Final Statement, p. 5 and 7). The NCP held that ADSB had an independent duty to use its power on such business relationships to prevent or mitigate adverse impacts resulting from the dredging activities. As such, an insurance company incurs responsibility for its own due diligence obligations ex ante, and should require its clients, i.e. companies like Van Oord, to uphold human rights. ADSB could not, however, assume responsibility for acts committed by parties with which it has no relationship, such as the Suape port authority (p. 5, continued). Neither did ADSB cause or contribute to any possible adverse impacts through its own activities (p. 7).

Note: NCPs are mentioned in the UN Guiding Principles on Business and Human Rights ('UNGPR'), referenced in the title of Nabuco's presentation. According to the commentary of article 25 of the UNGPR,

NCPs can be considered as relevant State-based grievance mechanisms.

The NCP's Final Statement is noteworthy for several reasons. First, the NCP focused on clarifying the due diligence obligations for Export Credit Agencies in the framework of the OECD Guidelines. The finding illustrates that enterprises which may be geographically and/or theoretically removed from the harmful outcome, can still be held responsible for the harm on the ground. One must note, however, that Export Credit Agencies are responsible for their own due diligence obligations, but not for the violations committed by those they facilitate. This is an interesting conclusion for the question of secondary liability. Second, this was the first time a complaint against a government-supported Export Credit Agency was declared admissible by an NCP after finding that such an agency was a 'multinational enterprise' in the sense of the OECD Guidelines. It is worth pointing out that the Dutch Ministry of Finance, as well as ADSB itself, stated that it saw the notification against ADSB as a complaint against the State of the Netherlands. ADSB acts on behalf of the State: through ADSB, the State of the Netherlands acts as an insurer and ADSB maintains the insurance policies and guarantees on behalf of and for risk of the Netherlands (see [Letter about relationship between ADSB and the Dutch State](#)). The NCP held otherwise (the reasons why can be found in the [Initial Assessment \(Dutch\)](#) of 3 December 2015, p. 3-4).

Unaddressed in the Final Statement and the [Evaluation of 3 May 2018](#) of the Dutch NCP, questions arose at the end of this 15 minute session largely relating to the issue of State responsibility. Given that the government is usually the entity granting concessions and leases for such projects, as is the case in Brazil, to what extent should it be held responsible for human rights violations at the hands of its contractors? Furthermore, [Suape Port is a State-owned enterprise](#), which raises the question if these enterprises should not have a higher degree of responsibility, precisely because they are State-owned. Lastly, the argument of the Netherlands noted above demonstrates that Export Credit Agencies such as ADSB can arguably be regarded as government agencies. What does this mean under the law of State responsibility?

This last topic enters the realm of Rethinking SLIC's project 3 – to be continued.*

State responsibility

