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Response

Adam McBeth, Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector

Lindsay C. Nash[†]

I. INTRODUCTION

Crushed by an Anvil leaves the reader, like the Kilwa victims, feeling rather defeated. Author Adam McBeth uses the Anvil Mining example to show that existing dispute resolution mechanisms are inadequate to resolve conflicts related to increasing foreign investment by multinational enterprises. His description of each forum's refusal to provide redress offers insight into the political motivations underlying each decision, though the analysis fails to offer a solution to the forum-less victims. McBeth examines the ways that various adjudicatory bodies have declined to exercise jurisdiction, but he has not adequately addressed the question of which body *should* decide these claims.

In looking at soft law corporate accountability mechanisms, McBeth finds the Multilateral Investment Guarantee Agency's (MIGA) performance standards (the Voluntary Principles) "toothless" and ineffective, lacking clear rules, reporting requirements, and enforcement mechanisms.¹ While this conclusion may be warranted, his finding of inadequacy cannot be the end of the inquiry. This response argues that appropriate recourse may be found by looking to the entities that make this unique, transnational interaction possible. Put simply, non-state actors like the World Bank Group (WBG) play a significant role in creating the

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1. Adam McBeth, *Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 127, 165 (2008).

international alliances and disputes that necessitate the development of international law. As facilitators and beneficiaries of these interactions, these entities have a duty to ensure that the parties involved have access to international law.

Admittedly, existing soft law mechanisms *are* ineffective, largely due to the lack of effective enforcement mechanisms. However, I argue that converting voluntary behavioral standards into threshold terms of investment contracts would be an appropriate and effective way to hold multinational corporations liable for transnational activities. The WBG could allow the community to participate in enforcement by incorporating transparency and accountability into their own structure by insisting on informed, prior consent, clear guidelines of conduct, public access to records, and systems of redress that are accessible to the community. Contracts between MIGA and investors need to: (1) allow for the national government and the affected community to have input in creating social responsibility standards; and (2) make the standards threshold contractual conditions. To make these provisions effective, all parties involved, including the local community, investors, and MIGA, need reliable enforcement mechanisms. Restructuring the International Centre for Settlement of Investment Disputes (ICSID) procedure to make it accessible to the public would better protect community interest as well as investor interest and align the forum with World Bank goals of positive and sustainable development.

II. THE WORLD BANK IS THE APPROPRIATE ADJUDICATORY BODY

In the past decade, the WBG has expanded its role in arranging transactions within the extractive industry, describing their role in these investments as a transnational point person. A 2003 internal review describes the “heavy demands” placed on national governments by extractive industry investment. Governments must manage “multiple and wide-ranging impacts of oil, gas, and mining projects on the economy, the social fabric, and the environment.”² Often governments lack the capacity, resources, experience, and skills to respond to the situation and effectively negotiate with potential investors, making the WBG “potentially vitally important to these countries in providing wise counsel, technical assistance, and financial support.”³ Drawing upon intergovernmental contacts, influence, and expertise to help national governments balance divergent interests, the World Bank provides logistical support and assurances that “extractive industries projects [will] contribute to poverty alleviation and sustainable development.”⁴ MIGA provides non-economic

2. 3 EMIL SALIM, STRIKING A BETTER BALANCE: THE WORLD BANK GROUP AND EXTRACTIVE INDUSTRIES: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW 103 (2003).

3. *Id.*

4. 1 EMIL SALIM, STRIKING A BETTER BALANCE: THE WORLD BANK GROUP AND EXTRACTIVE

support through logistical support, technical advice, and the image of legitimacy underlying WBG initiatives. MIGA's extractive industry investments are aimed at stimulating economic development and reducing poverty by creating: (1) legal and fiscal frameworks to attract private mining investment, (2) social and environmental frameworks for responsible mining, and (3) reform and capacity building for government agencies and ministries.⁵ In arranging investments, the World Bank is seen as a comprehensive international body, equipped and adept at establishing stable investments in risky and potentially crisis-prone situations. This comprehensive system, including safeguards, performance standards, and a framework for dispute resolution, gives both investors and the local community a degree of reassurance that the World Bank is capable of managing the situation. Therefore, when Anvil CEO Bill Turner admitted that he did not understand the Voluntary Principles and MIGA responded by approving the contract, it seems reasonable for Anvil to conclude, as McBeth does, that the Voluntary Principles are mere "lip service."⁶ If MIGA, acting as project counsel and risk guarantor, does not consider the Voluntary Principles to merit further explanation, it follows that the contracting party would not consider them critical terms of the contract. MIGA's character as the informed expert arranging these transactions means that others will rely on this knowledge. MIGA's subsequent dismissal of their own performance standards may well be seen as a causal root of Anvil's disastrous response to a reasonably foreseeable situation.

MIGA arranges for loans and insures the project against risk, providing vital support that gives the agency substantial pre-contract leverage to make responsible corporate behavior a binding condition of the agreement. McBeth acknowledges that the WBG has "accepted the legitimacy of imposing conditions on its lending" to foster local development,⁷ but finds MIGA interest in enforcing these conditions insufficient to offer any real accountability. If, however, it is unrealistic to expect MIGA to enforce these contractual terms, one alternative might be to restructure the initial agreement to give local parties affected an interest that is actionable in WBG arbitration.

MIGA and the foreign investor act jointly to bring about this venture for mutual benefit and thus jointly bear some responsibility to the local community for the consequences of their action or project. It is difficult to deny that, but for the assistance of the World Bank, Anvil Mining would not have lent its logistical support to the Congolese military - both because World Bank involvement was integral in orchestrating the investment and because the World Bank's self-styling as such allows for investors to follow their lead in regard to international conduct. Press from Anvil Mining and

INDUSTRIES: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW 25 (2003).

5. 3 SALIM, *supra* note 2, at 104.

6. McBeth, *supra* note 1, at 161.

7. *Id.* at 160.

the WBG demonstrates that, without MIGA's support in negotiations and securing insurance for high-risk enterprises, Anvil would not have been able to secure the capital to invest in the Dikulushi mine,⁸ and describes the Anvil-MIGA relationship as "*partners in development*."⁹ Characterizing MIGA's support as "represent[ing] a very effective way of mitigating the political risk associated with operating in the DRC,"¹⁰ Anvil's public statement evidences the significant non-economic reliance on World Bank expertise underlying these partnerships. Without effective corporate responsibility built into the initial project design, the WBG risks facilitating transactions between a dangerously underinformed investor and an economically disadvantaged nation state.

III. EXISTING WORLD BANK MECHANISMS DO NOT FUNCTION TO AUGMENT CORPORATE ACCOUNTABILITY

McBeth rightly finds that existing dispute resolution mechanisms become important when corporations fail to comply with social responsibility policies and the local community has no recourse. The Anvil analysis would benefit from recognizing that publicly-advocated, unenforced investor responsibility practices actually produce a detrimental effect, as "[g]rand words are counterproductive when they create the illusion that effective action is being taken."¹¹

By publicly adopting the Voluntary Principles, MIGA and the investor convey assurances of a stronger commitment than either will assume. The WBG final report concludes that, "rather than helping to internalize social and environmental costs, the Safeguard Policies often serve the interest of extractive industry companies in acquiring 'creditworthiness' for project financing,"¹² revealing one reason why situations like the Anvil disaster are a common consequence of "socially responsible" ventures in the extractive industry. The Kilwa incident that forms the centerpiece of McBeth's Article was one of eighty-five incidents of human rights abuse related to foreign investments in the extractive industry in the DRC alone.¹³ A 2003 internal

8. See Press Release, Anvil Mining Ltd., Anvil Mining Limited Secures Political Risk Insurance from World Bank Agency for Mine in the DRC (May 4, 2005); Press Release, MIGA, MIGA Insures Copper and Silver Mine in the Democratic Republic of Congo (May 3, 2005), both available at <http://www.anvilmining.com/files/2005May04MIGAPoliticalRiskInsurance.pdf> (reporting that MIGA made the Dikulushi investment possible by providing \$13.3 million in guarantee coverage).

9. Anvil Mining Ltd., *supra* note 8 (emphasis added) (quoting Bill Turner, Anvil President and CEO).

10. *Id.*

11. David Barnhizer, *Waking from Sustainability's "Impossible Dream": The Decisionmaking Realities of Business and Government*, 18 GEO. INT'L ENVTL. L. REV. 595, 658 (2006).

12. 2 EXTRACTIVE INDUSTRIES REVIEW, WORLD BANK GROUP, STRIKING A BETTER BALANCE: THE WORLD BANK GROUP AND EXTRACTIVE INDUSTRIES: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW 25 (2003).

13. Letter from Kofi Annan, U.N. Secretary-General to Martin Belinga-Aboutou, President, U.N. Security Council, U.N. Doc. S/2002/1146 (Oct. 16, 2002).

review of extractive industry project implementation found

only 41 percent of the projects in the sample . . . had adequately supervised and reported the implementation of safeguard policies These issues are important since they account for the entire slippage in the projects' consistency with safeguards from the approval to the implementation stage.¹⁴

Anvil CEO Bill Turner's admitted poor understanding of the Safeguard Policies demonstrates that, even at the approval stage, there was little reason for either party to believe that these policies would be internalized in the implementation stage. The internal review further found that projects had inadequate "monitoring and evaluation of safeguard compliance 'on-site,' which was effectively implemented in only about 33 percent of the projects reviewed."¹⁵ This industry-wide review indicates that Safeguard Policies are not being voluntarily followed and bolsters the assertion that voluntary principles are "an impossible dream."¹⁶

Corporate non-compliance with standards of socially responsible conduct creates financial and social costs that frustrate the system and could ultimately discourage transnational investment. "This weakness in the compliance oversight and supervision system, if allowed to persist, can lead to substantial and costly failures for the borrower as well as the Bank."¹⁷ Internal review findings suggest that, even without considering social or environmental damage, corporate misconduct could present unforeseen additional costs to the contracting parties and threaten the sustainability of these fledgling enterprises. "Without some international legal standards, we will likely continue to witness both excessive claims made against [corporations] for their responsibility and counterclaims by corporate actors against such accountability."¹⁸ In the Anvil case, for example, if the Kilwa victims had litigated their claims and received damages in an Australian or Canadian court, Anvil's costs could have exceeded their net earnings for the following year.¹⁹ Without a clear code of conduct and forum choice, parties will be unable to predict or internalize potential litigation costs, leaving each party vulnerable to losing more resources than they initially expected to gain.

14. 2 SALIM, *supra* note 12, at 34.

15. *Id.*

16. Barnhizer, *supra* note 11, at 605.

17. 2 SALIM, *supra* note 12, at 34.

18. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 448 (2001).

19. See ANVIL MINING LTD., ANNUAL REPORT (2005), available at <http://www.anvilmining.com/files/2005-anvilannualreport.pdf> (reporting \$7.5 million net earnings).

IV. WORLD BANK FORUMS SHOULD ALLOW LOCAL COMMUNITIES TO
SANCTION CORPORATE MISCONDUCT

McBeth evinces little hope for soft law accountability, concluding with the dismissive, “[l]ike all safeguards, the value of safeguards imposed by MIGA and other World Bank agencies is only as great as the interests they aim to protect and the manner of their implementation and enforcement.”²⁰ Yet attempted litigation on behalf of the Kilwa victims shows substantial promise, and shortcomings in enforcement are not reason enough to dismiss World Bank forums entirely. MIGA’s failure to demand responsible corporate conduct compels the question of who *will* make corporate compliance a priority and how to give them the tools to act on this interest.

The CAO, various NGOs, and governments have recognized that the World Bank bears some responsibility for damage resulting from their projects.²¹ By incorporating local actors and the Voluntary Principles as integral parts of the contract, the WBG could, at minimum, design the contract so that it is clear that the investor has a duty to comply with social responsibility standards. Corporate failure to voluntarily apply the policies indicates that effective implementation requires explicit and binding codes of conduct. Without imposing “real law” and monetary consequences, corporate actors will not be sufficiently motivated to take necessary steps to ensure successful social responsibility enterprises.²² Traditionally, liability is viewed as emanating from the loci of injury. In the case of Anvil Mining, however, the local employees most directly involved in the disaster were far removed from Anvil’s corporate office that knew (or should have known) of the responsibility to comport with the Voluntary Principles. Concretizing socially responsible practices as threshold terms would alert corporate officers at the highest level of decision-making that liability may be assessed from the top-down.

The multi-tiered structure of multinational corporations places many levels of separation between the decision to act and the actor, making it difficult to assign liability. In order to retain the deterrent effect of liability rules, transnational litigation will need to consider a conception of corporate harm that is located at the site of ultimate decision-making as opposed to the site where the injury is felt. Research has demonstrated compelling economic justification for focusing liability for corporate irresponsibility upon individuals with the greatest monitoring ability.²³ Top-centric liability schemes have resulted in cost minimizing behavior in both business entities and bureaucracies,²⁴ suggesting that a stronger threat

20. McBeth, *supra* note 162.

21. *Id.* at 159.

22. Barnhizer, *supra* note 11, at 659.

23. Eric A. Posner & Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility Under International Law*, 9 AM. L. & ECON. REV. 72, 82 (2007).

24. *Id.* at 89.

of liability may provide the necessary incentive for successfully avoiding complicity in human rights abuses. Assessing fault from the top down would incentivize decision-makers at the highest level of the company to impose a trickle-down chain of compliance with duties to monitor and safeguard.

Including compliance with the Voluntary Principles as a covenant in a MIGA contract sets the groundwork for enforcement, but, as McBeth points out, "such a sanction is only as effective as the enthusiasm of MIGA to enforce it."²⁵ MIGA may have little incentive to bring suit against delinquent corporations, but their responsibility to foster positive development should, at minimum, require them to enable local actors to sanction misconduct. Investigatory bodies have repeatedly called for increased local involvement at the project outset and more effective safeguards to ensure responsible corporate conduct. Incorporating local community and government participation into the initial project design would better inform all parties to the agreement about the scope and potential pitfalls of the venture. Local actors would be able to provide cultural, geographical, and political context that would help MIGA and the corporation create realistic project plans that are less likely to frustrate cultural or political sensitivities.

Models to encourage community participation at the project outset have become increasingly accepted, but are rendered ineffective when the agreed-upon standards are not practiced. Host nations cannot be relied on to protect community interest, as prosecuting human rights violations may conflict with government interest in encouraging investment or reveal their own complicity breaching socially responsible standards.²⁶ If the role of the corporate actor were an explicit contract term, local community and government would be able to reference the written agreement when seeking arbitration.

Even if the terms of MIGA-investor contracts were expanded to accommodate third-party claims however, existing arbitration procedure renders the forum inaccessible to the public. The adjudicatory body of the World Bank Group, ICSID, arbitrates legal disputes arising from international investments between bodies of member states. ICSID is well-adapted for transnational business, as its decisions are binding on domestic national courts of all member countries, a pre-condition of ICSID membership that removes difficulties associated with personal jurisdiction or executing judgments. Another precondition of ICSID membership is that states must consent to ICSID judgment as an "exclusive remedy," which decreases the diplomatic difficulties associated with concurrent litigation or judgments. In Anvil's case, for example, an ICSID arbitration would resolve the Australian court's reluctance to rule in contradiction to

25. McBeth, *supra* note 1, at 162.

26. Ratner, *supra* note 18, at 461.

the Congolese Court.²⁷ Furthermore, this ICSID decision would be enforceable in either the Congo or Australia.²⁸

Existing ICSID procedure would preclude suit by Anvil victims and should be made accessible to a wider range of parties to MIGA investments. ICSID arbitration is available only to the contracting parties and requires a substantial up-front fee.²⁹ Member governments have, on occasion, invoked ICSID arbitration to remedy human rights abuses, but when national and community interests diverge (as in this case), citizens are left without recourse. The cost of ICSID proceedings, borne by the disputing parties, would be prohibitively expensive to most private citizens, and will have to be reassessed in order to offer real access to ICSID. Initial requests for arbitration cost U.S. \$ 25,000, which is far from the total costs of the proceeding, and forecloses claims from most private individuals and many poorer governments.³⁰ The forum's non-disclosure policy pertaining to written opinions, arbitral awards, and third party presence at hearings presents yet another barrier to community participation. Recent requests for citizen participation in investor-state arbitration have been denied.³¹ A 2004 discussion paper released by the ICSID Secretariat claims to have improved transparency by publishing awards, "or at least their key legal holdings."³² Nonetheless, human rights groups criticize ICSID for deferring to the non-disclosure preferences of private parties, even when the dispute has far-reaching implications for social or environmental welfare of the local community.³³

If the MIGA is to align with its own standards of social responsibility, dispute resolution proceedings need to be available to the public and transparent. Opening ICSID as a public forum would be more resonant with WBG's development goals and would subject corporations to public scrutiny, allowing the international community to condition consumer choice on socially responsible behavior. If the World Bank posits itself as committed to sustainable development and continues to orchestrate multinational economic relationships, it must take steps to allow the parties to engage as equals.

27. McBeth, *supra* note 1, at 147-48.

28. This decision may not be enforceable in Canada, which has signed but not ratified the ICSID Covenant. See ICSID, List of Contracting States and other Signatories of the Convention, ICSID/3 (Nov. 4, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

29. ICSID, SCHEDULE OF FEES 1 (2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet> (follow hyperlink for "Schedule of Fees"; the follow hyperlink "PDF").

30. U.N. Conference on Trade and Dev., Aug. 30, 2005, *Latest Developments in Investor-State Dispute Settlement*, 8, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/2 (2005).

31. SARAH ANDERSON & SARA GRUSKY, INST. FOR POL'Y STUD., CHALLENGING CORPORATE INVESTOR RULE 18 (2007), available at <http://www.ips-dc.org/reports/#139> (describing denial of community participation in Betchel v. Bolivia).

32. ICSID, POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION DISCUSSION PAPER 8 (2004).

33. ANDERSON & GRUSKY, *supra* note 31, at 8.

V. CONCLUSION

Using the Anvil case study to look at existing forums to see which, if any, may agree to adjudicate seems a bit beside the point, as each new case would require another searching and costly forum search. *Crushed by an Anvil's* description of the various fora brings to light commonalities within the policy concerns of various national courts and ultimately demonstrates the need for an independent adjudicator. The Article's conclusion that existing independent arbitration mechanisms are inadequate is not a satisfactory conclusion, but may provide the context to explore solutions to the Anvil problem. Given that, in the past two decades, the development of international law has been increasingly informed by the activity of non-state entities,³⁴ it seems that the dispute resolution mechanisms used by these same entities is a likely starting point for a broader transnational adjudication system. ICSID has the potential to be an effective tool to protect communities affected by EI investment, but it must relinquish some investor-focused procedure to offer truly accessible arbitration.

34. E.g., Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL'Y. 309 (2004) (discussing different efforts to theorize the place of multinational corporations in the international order).

