State responsibility for modern slavery - States funding modern slavery through export credit agencies

The project: uncovering and bridging a gap

Modern slavery, an umbrella term for human trafficking, slavery, servitude, forced or compulsory labour and child labour, is one of the prevailing challenges for the international community, with 40.3 million people in modern slavery on any given day in 2016.[1] States committed to fight against it in the 2030 Sustainable Development Agenda (SDG 8).

The efforts of States against modern slavery are mainly focused on their responsibility to 'prevent, protect and punish' offences committed by non-state actors. This project[2] goes beyond that approach by focusing on the involvement of the State in the commission of the offence through State policy (direct) or through the actions or omissions of a State organ or official (indirect). It presents proposals that will contribute to strengthening the efforts of the international community in tackling modern slavery, by unfolding the potential of State responsibility to offer an avenue for accountability as well as a tool for resolution of disputes between States.

Fact patterns

By supporting the economic activity and investment of national companies overseas, States could be funding projects tainted by modern slavery through the loans, insurance and guarantees executed by national export credit agencies (ECAs). Given the high risks associated to these operations,[3] the need for human rights and social impact assessment has been acknowledged in the 2012 OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence ("the OECD Common Approaches"). They were amended in 2016 to explicitly include human trafficking, forced labour and child labour as potential social impacts of projects.[4]

Connections with modern slavery are within the possible impacts of the support provided by States and their ECAs to private investors. Companies receiving this support from their home institutions may engage in investments or economic activity tainted by slavery, forced labour, child labour or human trafficking. In these circumstances, the State may incur international responsibility for breaching its obligations under international law.

In line with the OECD Common Approaches, States are increasingly regulating ECAs' obligation to assess the social impact of the projects they fund and some States and ECAs are actively looking for

[1] Global Estimate of Modern Slavery, September 2017; ILO, Walk Free Foundation.

[2] The project "State responsibility for modern slavery: uncovering and bridging the gap" has been developed by Dr Philippa Webb and Dr Rosana Garciandia (King's College London) in cooperation with the United Nations University, with the support of the British Academy Scheme Tackling the UK International Challenges 2017. The views expressed are the authors' own and not attributable to the UNU or the British Academy.

[3] Sant'Anna, M., "Enabling Risky Business: Human Rights and the Role of Officially Supported Trade Finance and Investment Guarantees", International Institute for Sustainable Development, 2013; Klasen, A., "The Role of Export Credit Agencies in Global Trade", Global Policy, Vol. 2, Issue 2, May 2011.

[4] OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, 2016, TAD/ECG (2016)3, Para 10.

support to ensure the correct functioning of those assessments.[5] Nevertheless, those examples are still a minority and there are circumstances in which impact assessments do not guarantee modern slavery-free investments and exports. In those cases, a State could be facilitating with its public funds modern slavery offences committed by another State (aid or assistance – Article 16 ARSIWA) or by a private company (duty of non-participation in human rights violations by non-state actors).[6]

Recommendations for strengthening efforts against modern slavery

States are encouraged to:

i. Implement enhanced monitoring and human rights due diligence in accordance with the UN Guiding Principles on Business and Human Rights and the OECD Common Approaches, particularly concerning Export Credit Agencies.

ii. Invoke the responsibility of another State for failing to investigate and prosecute with due diligence any cases where the ECA or its officials may have knowingly engaged with entities tainted by modern slavery, consciously concealing information to the State (Article 4 ARSIWA).
State responsibility may be invoked through diplomatic protection by the State whose nationals are victims of modern slavery (Article 42 ARSIWA), or by other States based on *erga omnes* or *erga omnes partes* obligations (Article 48 ARSIWA).

iii. Invoke the international responsibility of other States, if they facilitate the commission of modern slavery offences by non-state actors through their ECA (Articles 4, 5 or 8 ARSIWA).
If the wrongful act constitutes a serious breach of an obligation, States have a positive duty to cooperate in order to bring to an end such breach. They also have the obligations not to recognize the situation created by the internationally wrongful act and not to render aid or assistance in maintaining that situation (Article 41 ARSIWA).

iv. Invoke the international responsibility of a State for aiding or assisting another State in the commission of an internationally wrongful act (Article 16 ARSIWA)

v. Consider adopting countermeasures (Article 49 ARSIWA) against another State, if the latter commits an internationally wrongful act by engaging in modern slavery. Examples of possible countermeasures include asset freezes, import restrictions or travel bans.

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[5] Shift, *Integrating Human Rights Due Diligence: A Review of Atradius DSB's Environmental & Social Policy and Procedure*, November 2017.
[6] Jackson, M., "State Complicity, Non-State Actors and Attribution", in *Complicity in International Law,* Oxford University Press, 2015.