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*Mandate of the Special Representative of the Secretary-General
on Human Rights and Transnational Corporations and other Business Enterprises*

10TH OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY

UPDATING THE GUIDELINES FOR MULTINATIONAL ENTERPRISES DISCUSSION PAPER

Paris, June 30, 2010

1. The Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG) welcomes the decision of the 42 governments adhering to the OECD Guidelines for Multinational Enterprises to update the Guidelines, and the support for it expressed by all stakeholders groups.
2. This note identifies the main human rights elements the update should include if it is to meet its goal of ensuring “the continued role of the Guidelines as a leading international instrument for the promotion of responsible business conduct.” It also addresses related procedural provisions. The note is based on the “Protect, Respect and Remedy” Framework proposed by the SRSG and welcomed unanimously by the UN Human Rights Council in June 2008.¹ Its structure broadly follows the agreed terms of reference for the Guidelines’ update.

A. SUBSTANTIVE ISSUES

I. THE ROLE OF STATES

3. The Guidelines recognize that socially and environmentally sustainable markets and enterprises require principles and standards for responsible business conduct. While the Guidelines are recommendations addressed by governments to multinational enterprises, they should also affirm the need for states to fulfil their international obligations.
4. The first pillar of the UN “Protect, Respect and Remedy” Framework addresses the state duty to protect against business-related human rights abuse through appropriate policies, regulation and adjudication. Chapter I of the updated Guidelines (Concepts and Principles)

¹ The Council also extended the SRSG’s mandate with the twin tasks of “operationalizing” and “promoting” the Framework. For the most recent report by the SRSG, see “Further steps toward the operationalization of the ‘Protect, Respect and Remedy’ Framework,” UN document A/HRC/14/27 (9 April 2010), available at <http://198.170.85.29/Ruggie-report-2010.pdf>.

similarly should stress that states must perform their required roles, individually and collectively, to ensure that the aims of the Guidelines are met.

II. HUMAN RIGHTS

5. Current language in the Guidelines reflects neither the needs of, nor best practices by, multinational enterprises when facing challenging human rights situations. Moreover, since the last Guidelines revision considerable progress has been achieved in clarifying the business and human rights agenda, as reflected in the UN “Protect, Respect and Remedy” Framework and the strong support it enjoys from governments, business associations and enterprises, trade unions and major NGOs. This combination of factors warrants a separate human rights chapter in the updated Guidelines, replacing current Guideline 2 under General Policies. It could be free-standing or combined with the chapter on Employment and Industrial Relations. The new chapter should reflect the elements of the “corporate responsibility to respect human rights” pillar of the UN Framework, as summarized below.

Foundation

6. The corporate responsibility to respect human rights means to avoid infringing on the rights of others and addressing adverse impacts that may occur. This responsibility exists independently of States’ human rights duties. It applies to all business enterprises in all situations. The new Guidelines chapter should affirm and reinforce this principle.

Scope

7. The scope of the corporate responsibility to respect rights is defined by the actual and potential human rights impacts generated through an enterprise’s own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-state actors and state agents.

8. The concept of “corporate sphere of influence” has sometimes been invoked as a basis for determining the scope of enterprises’ human rights responsibilities, rather than their human rights impact. This is problematic. Enterprises may have influence over a broad array of actors and situations, but only in exceptional circumstances should they be held responsible for human rights harms to which they are not linked in some way. Thus, while “corporate sphere of influence” may be a useful construct for enterprises to identify opportunities for contributing to the promotion of human rights, it is of limited utility as a basis for clarifying the scope of their responsibility to respect rights. Nor do promotional endeavors offset an enterprise’s failure to respect human rights across its business activities and relationships.

Content

9. Because business enterprises can impact virtually all internationally recognized rights, the corporate responsibility to respect encompasses the entire spectrum of such rights. In practice, some rights will be more relevant than others in particular industries and circumstances, and therefore will be the focus of heightened attention. But any *ex ante* delimitation of recognized rights that aspires to universal applicability inherently will provide misleading guidance to enterprises.

10. An authoritative enumeration of internationally recognized rights is provided by the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights); coupled with the eight ILO core conventions that form the basis of the Declaration on Fundamental Principles and Rights at Work. While business enterprises cannot violate these instruments as such, because they apply legally only to states, they can adversely impact the rights these instruments recognize. Moreover, those rights are the baseline benchmarks by which other social actors judge enterprises' human rights practices.

11. Depending on circumstances, enterprises may need to consider additional standards: for instance, they should take into account international humanitarian law in conflict-affected areas (which pose particular human rights challenges); and standards specific to "at-risk" or vulnerable groups (for example, indigenous peoples or children) in projects affecting them.

Due Diligence

12. The updated Guidelines should affirm that the appropriate response by business enterprises to managing the risks of infringing the rights of others is to exercise human rights due diligence. This can be a game-changer for enterprises: from "naming and shaming" to "knowing and showing." Naming and shaming is a response by external stakeholders to the failure of enterprises to respect human rights. Knowing and showing is the internalization of that respect by enterprises themselves through human rights due diligence.

13. Drawing on well-established enterprise risk management practices and combining them with what is unique to human rights, the UN Framework lays out the basic parameters of human rights due diligence. Because this process is a means for enterprises to address their responsibility to respect human rights, it must go beyond simply identifying and managing material risks to the enterprise itself, to include the risks its activities and associated relationships may pose to the rights of affected individuals and communities.

14. The complexity of due diligence processes and tools will vary with the size of the enterprise and certain other situational factors. But the same underlying principles should hold. Effective human rights due diligence should be an ongoing process, grounded in a policy commitment to respect human rights. It should include assessing the human rights impacts of the enterprise's activities and relationships; integrating these commitments and assessments into internal control, oversight and management systems; and tracking as well as reporting performance. Because a main purpose of human rights due diligence is enabling enterprises to demonstrate to themselves and to others that they respect rights, a measure of transparency and accessibility to stakeholders is required.

15. The terms of reference for the Guidelines' update indicate that it could also explore the merits of making due diligence one of the general operational principles of Chapter II (General Policies). This should be given serious consideration because it would allow enterprises to manage better all of their social and environmental risks. But if such a principle were to be adopted, the guidance should indicate clearly that human rights risk management differs from commercial, technical and even political risk management in that it involves rights-holders. Therefore, it is an inherently dialogical process that involves engagement and communication, not simply calculating probabilities.

Supply Chains

16. While all business entities, including suppliers, have the same responsibility to respect human rights, enterprises require more specific guidance on their responsibility for managing human rights challenges posed by their upstream suppliers. The SRSG has submitted a separate discussion paper to this Roundtable outlining a decision logic for enterprises, intended to contribute to the process developing such guidance.² It differentiates between spot-market transactions and ongoing relationships; is based on the nature of the ongoing relationship; and takes into account the size of the enterprise.

Operational-level Grievance Mechanisms

17. Even where an enterprise has the best internal control, oversight and management system in place, things can go wrong in complex situations and harms do occur. Some require legal recourse but many others can be satisfactorily addressed through effective non-judicial means. These include grievance mechanisms at the level of an enterprise's actual operations.

18. Operational-level grievance mechanisms perform two important functions in relation to the corporate responsibility to respect human rights. First, they make it possible for grievances to be remediated locally and directly, thereby preventing harm from being compounded and grievances from escalating. Second, they constitute an early warning system for enterprises, providing them with ongoing information about current or potential adverse human rights impacts from those impacted. By analyzing trends and patterns in complaints, enterprises can identify systemic problems and adapt their practices accordingly.

19. The Guidelines' update should encourage enterprises to develop or participate in operational-level grievance mechanisms. They could be provided directly by an enterprise, by collaborating with other entities, or by facilitating recourse to a mutually accepted external expert or body. Such mechanisms do not preclude individuals from recourse to state-based mechanisms, including the National Contact Points (NCPs) under the Guidelines, nor should they undermine trade union representation and collective bargaining agreements.

20. The particular arrangements that enterprises should adopt will depend in part on the sectoral, political and cultural context, as well as the scale of their operations and potential impacts. The UN Framework identifies a set of principles that all non-judicial human rights-related grievance mechanisms should meet to ensure their credibility and effectiveness: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. A seventh principle specifically for operational-level mechanisms involving enterprises is that they should function through dialogue and engagement rather than by the enterprise itself acting as adjudicator. These principles are summarized in Annex I of this discussion paper. Five companies in different regions and industry sectors are testing guidance points for the principles in collaboration with the SRSG.

Managing Legal Ambiguities and Dilemmas

21. Multinational enterprises operate in diverse legal and regulatory environments, as well as in governance contexts that differ in their ability—and sometimes willingness—to

² “The Corporate Responsibility to Respect Human Rights in Supply Chains,” available at <https://www.oecd.org/dataoecd/17/50/45535896.pdf>.

enforce existing laws and regulations. Conflicting requirements and variable capacity can create uncertainty and risks for enterprises in meeting their responsibility to respect human rights. Additional guidance through the Guidelines update would be helpful.

22. Weak governance zones are one case in point. Early in his mandate, the Special Representative asked the world's largest international business associations to address this particular challenge. The updated Guidelines should incorporate their response: "All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent."³

23. The challenge is more complex where national law conflicts with international standards and where legal compliance may undermine the corporate responsibility to respect human rights. Enterprises should be encouraged in such circumstances to seek ways to respect the spirit of international standards while avoiding outright violation of the law. At the same time, they should ensure that their actions do not exacerbate abuses or the risks to those subject to the abuse.

24. Finally, since the Guidelines were last revised the web of potential corporate liability for complicity in egregious human rights abuses, such as international crimes, has expanded significantly in various national jurisdictions. But enterprises cannot know with certainty where claims might be brought against them. Nor can they know with certainty what precise standards and rules they may be held to because no two jurisdictions are identical in this respect. Rather than leaving this dilemma to chance—or to their CSR programs—enterprises should be advised to treat it as a complex legal compliance risk and act accordingly.

III. DISCLOSURE

25. The terms of reference for the Guidelines' update indicate that it should incorporate relevant disclosure standards. Transparency is an important element of the corporate responsibility to respect human rights, contributing to both accountability and institutional learning. Thus, the update provides an opportunity to highlight the importance of enterprises communicating on their significant human rights risk factors, as well as the measures taken to mitigate those risks. The form that this communication takes may vary with company size and other situational factors. It also should pay due regard to any potential risks it may pose to company staff and stakeholders, and to the legitimate requirements of commercial confidentiality.

B. PROCEDURAL PROVISIONS

I. FUNCTIONAL EQUIVALENCE

26. NCPs have the potential to serve as effective grievance mechanisms beyond the operational level. In order to realize this potential, the update should consider incorporating into the guidance for NCPs the principles for effectiveness and credibility outlined in the

³ International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, "Business proposals for effective ways of addressing dilemma situations in weak governance zones," available at <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>.

Annex to this paper: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency.

27. Applied to the NCPs, these principles are sufficiently broad to provide room for the expression of different political cultures and institutional arrangements within adhering countries. Yet they could form the basis for a common understanding among NCPs of what is expected of them; among potential users of what they, in turn, can expect from an NCP process; and how government departments in which NCPs may be housed can manage the potential conflicts among the various roles they are expected to play.

28. The SRSG's has found that the enterprises and other stakeholders participating in his grievance mechanism pilot project derive considerable benefits from the individual and collective learning experience. In the Guidelines context, he believes that all parties similarly would benefit if NCP and Working Party meetings were to become more of a learning forum. Not only would this grow the common knowledge base, but it also would reduce the likelihood of different NCPs subjecting multinational enterprises to significantly different interpretations of common standards and approaches.

II. ADMISSIBILITY CRITERIA

29. The scope of the Guidelines for Multinational Enterprises is sometimes confused with the admissibility criteria for the consideration of "specific instances" by NCPs. The Guidelines provide principles and standards addressed to all multinational enterprises, whereas the admissibility criteria for "specific instances" concern the narrower question of what types of cases NCPs may agree to examine. The update should clarify this distinction even as it re-examines the admissibility criteria.

30. Currently, NCPs consider roughly 40 percent of the complaints submitted to them to be without substantive merit or falling beyond the Guidelines' purview. A major reason for the latter is the absence of an "investment nexus"—either because the multinational involved is a buyer from, not an equity holder in, the supplier; or it is a lending institution that enabled an operating enterprise's foreign investment, but is not itself the investor.

31. Many participants in the update process consider it important to retain the link between the Guidelines and the Declaration on International Investment and Multinational Enterprises. The SRSG takes no position on this complex issue. Nevertheless, he does urge that the updated Guidelines reflect widely used if not prevalent business models that barely existed when the Guidelines were last revised—as indicated by the fact, for example, that the most rapidly growing segment in world trade in recent years has resulted from intra-firm and related-party transactions.

32. Therefore, whatever is decided about the investment nexus, the update should identify realistic admissibility criteria for "specific instances." In the context of upstream supply chains, it is sometimes suggested that numerical thresholds can be used to determine admissibility—such that a company sourcing less than "x" % of its materials from a supplier or representing less than "y" % of the enterprise's business automatically would fall beyond the Guidelines' purview. This has two major pitfalls:

- (i) Such thresholds are necessarily arbitrary when applied across different business sectors and sizes, and are unlikely to be appropriate in all circumstances;

(ii) Such thresholds risk encouraging suppliers (and enterprises) to game the system by remaining below the threshold that would require enterprises to take responsibility.

33. Further in-depth discussion of these issues is needed. But the final formula should include two considerations. The first is the nature of the relationship between the enterprise and the business entity allegedly committing the harm, generally excluding spot-market transactions but closely examining ongoing relationships. The second is sourcing where it is widely known that serious human rights abuses are associated with a particular locale, product, service, or materials—and where, therefore, it is reasonable to expect an enterprise to take steps to mitigate such abuses to which it is linked in any form, or if it cannot do so then to avoid being linked to them.

34. The role of lenders may be more complex in light of the investment nexus constraint, although broadly similar principles should be applicable. In any event, the update process will need to address the fact that the Guidelines, which are intended as “a leading international instrument,” now lag well behind the standards of other international actors in this respect, including the International Finance Corporation; as well as private sector banks, such as those participating in the Equator Principles, which track the IFC standards.

III. IMPLEMENTATION OF SPECIFIC INSTANCES

35. There are few if any official consequences of an NCP finding against an enterprise. For example, in most cases the enterprise could apply immediately for export or investment assistance from the same government. To protect the integrity of the NCP system, the update should consider ways to give weight to NCP findings. The response need not necessarily be punitive. The home government could also work with the enterprise to improve its policies and practices. But where an enterprise fails to cooperate, the default presumption should be that a negative finding will be made public, and that it could affect the enterprise’s access to certain forms of public support and services for a specified period of time.

C. NEXT STEPS

36. At the request of the Human Rights Council, the SRSG is developing a set of guiding principles for the operationalization of the “Protect, Respect; Remedy” Framework, which will be presented to the Council in June 2011. He will continue to liaise closely with the OECD on common elements between the Framework and the Guidelines’ update.

ANNEX I:

PRINCIPLES FOR EFFECTIVE NON-JUDICIAL GRIEVANCE MECHANISMS

Through a survey of existing non-judicial grievance mechanisms and an extensive consultative process around the results, the SRSG identified the following principles for the effectiveness and credibility of non-judicial grievance mechanism. Five companies in different regions and industry sectors are collaborating with the SRSG in pilot projects to test guidance points for the principles:

- **Legitimate:** by having clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;
- **Accessible:** by being publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;
- **Predictable:** by providing a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;
- **Equitable:** by ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;
- **Rights-compatible:** by ensuring that its outcomes and remedies accord with internationally recognized human rights standards;
- **Transparent:** by providing sufficient transparency of process and outcome to meet the public interest concerns at stake.
- For company-level mechanisms specifically, a seventh principle is that they should operate through dialogue and engagement rather than the enterprise itself acting as adjudicator.