Institute for
Human Rights and Business

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"Launching an Update of the OECD Guidelines for Multinational Enterprises"
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Possible implications for the substantive provisions of the Guidelines

Comments by John Morrison, Executive Director, Institute for Human Rights and Business

I would like to thank you for this opportunity to participate in the 10th OECD roundtable on corporate responsibility. This year's meeting comes at an important time for the OECD Guidelines for Multinational Enterprises. And it takes place during a period of rapidly expanding activity in the arena of business and human rights. The gathering momentum is not least due to this being the final year of the mandate of Professor John Ruggie, the Special Representative of the UN Secretary-General for business and human rights.

Today, in addition to John Ruggie's groundbreaking work, a number of processes are underway all of which seek to strengthen the place of human rights in the international architecture. For example, the International Finance Corporation's revisions of its performance standards for international project finance, the Global Reporting Initiative's efforts to update the human rights indicators within its reporting frameworks, the inclusion of human rights in the soon to be finalised ISO 26000 social responsibility standard. There are also ongoing efforts aimed at better alignment between human rights and the trade and investment policies of individual countries or regional bodies such as the European Union. The updating of the OECD Guidelines is an important piece, possibly one of the central pieces in this jigsaw, not least because its framework is today the closest in offering the world an extra-territorial complaints mechanism – albeit one with little or no binding effect.

Clearly, while recognizing the current zeitgeist for better alignment, we need also to consider what will work within the terms of the Guidelines themselves; what will be effective; and, in particular, how we can achieve better outcomes – not least for those communities and individuals whose rights have been

abused and who seek effective remedy. If this is our yardstick, then it is clear we have a lot of work ahead of us this year and beyond.

I have been asked to comment on the implications of the emerging understanding of the corporate responsibility to respect human rights for the substantive provisions of the OECD Guidelines, and in particular respond to some of the comments made by the Special Representative of the UN Secretary General – today represented by Gerald Pachoud.

I will reinforce some of the messages from his presentation but also explore a few issues further.

All rights are relevant

First, in relation to clarifying the content of the Guidelines, it is important that we all agree that we are talking about all internationally recognised human rights. As the Special Representative has stressed, because business enterprises can impact virtually all internationally recognized rights, the corporate responsibility to respect encompasses the entire spectrum of such rights. Clearly, some rights will be more relevant than others in particular industries and circumstances, and therefore should continue to be the focus of heightened attention. But any attempt to limit the scope is likely to provide misleading guidance to enterprises. Let's be explicit, we are talking about the Universal Declaration, the two International Covenants and the core UN and ILO conventions.

This is what governments, employer groups, trade unions and civil society have endorsed within the context of the United Nations and elsewhere, so it would be unfortunate if the issue of cultural relativism or arguments concerning state sovereignty were to be reopened here. I call on all present to stand by commitments made within the context of the United Nations, that all human rights are relevant to business even if specific governments have not ratified or brought into national law all related provisions.

Scope

Second, the focus on 'impact' as the main organising principle for determining corporate responsibility in the area of human rights, as opposed to the concept of 'sphere of influence', makes both intuitive as well as substantive sense. What matters fundamentally (in both a legal and moral sense) is the effect that business operations may have on the victims and potential victims of human rights abuses: all other

paradigms are ancillary to this. While 'influence' is one of the ways in which a business might understand its leverage on other actors, it should not be the primary way in which we define the responsibility of a corporation in the realm of human rights.

This clarity helps greatly when we go on to consider the scope of the OECD Guidelines. We would encourage the OECD and all states party to the Guidelines to think about 'impact' when considering the economic relationships to be included in any updated Guidelines. We would agree with those who suggest that the way some states have interpreted the 'investment nexus' is too restrictive and that the impact of business is not just in the form of investments but also in the full value chain – in particular the relationships and contracts it has with key suppliers – and I would argue, as key customers. This is not to deflect from the central focus on supply chains, but we mustn't forget that product misuse has been an issue of major concern with regard to several significant instances of human rights abuses implicating corporations across a number of industries – albeit ones in which responsibility can be harder to apportion. This also calls for clearer understanding of complicity – a critical issue the SRSG has clarified, and for which now there is sufficient guidance available which should be embraced.

The critical issue is how the National Contact Points understand the scope of the Guidelines. When defining the limits of responsibility, the paradigm of 'impact' and the due diligence undertaken by companies are useful, in developing an understanding of, and plan for the associated risks. That way, the NCPs will not limited by a singular consideration such as the investment nexus.

The Institute for Human Rights and Business can also report that this understanding is not at all alien to business. Last week, at the United Nations Global Compact Leaders Summit in New York, we launched a review of the human rights due diligence methodologies currently being developed by 24 major international companies – all of whom have accepted both the centrality of 'impact' and the feasibility of conducting human rights due diligence. They have also all recognised the potential relevance of every human right to their operations. In other words, we have moved beyond 'pick and mix' approaches.

Legal dilemmas

Third, on the issue of legal dilemmas – we would agree with much of what Gerald has said. Recognising the complexity of interplay between NCPs and the criminal and civil legal regimes of specific states, it is necessary to apply some universal process principles. We mustn't see the potential clash between

national laws and international human rights standards as an issue only concerning some specific non-OECD member states. Indeed, it is an issue that occurs universally and therefore should be anticipated routinely. It is true that there is continuing gender inequality in many parts of the world, resulting in women's rights not being respected. Likewise, there are serious concerns over freedoms of expression, privacy and freedom of association in a number of countries, including rising global powers such as China. But even within the OECD there is need for a level playing field in human rights terms. In North America, for example, domestic labour laws continue to offer less protection than some ILO Core Conventions. Europe maintains restrictions on freedom of expression and its treatment of asylum seekers and migrant workers is far from exemplary.

This is not to point fingers, but to state that the legal dilemmas faced by business in human rights terms are not restricted to specific geographies. Depending on their core business, companies should anticipate some of these dilemmas when they do their own due diligence. Obviously, they are required to follow local law – but experiences of companies suggest that parallel means can be developed in many cases to get as close to the spirit of international standards as possible. Multi-stakeholder initiatives play a key role in helping to define what such parallel approaches might mean in practice. NCPs should expect companies to anticipate some of these legal dilemmas, not hide behind the excuse of obeying local laws blindly and to the exclusion of any corrective or mitigating actions.

NCPs should also have higher expectations of companies when they operate in so-called 'weak governance zones'. Here, baseline due diligence – by which we mean adopting a human rights policy; assessing the company's impacts on human rights; integrating human rights into management procedures; and tracking and reporting on performance - might not be enough. NCPs should expect companies to engage in 'enhanced' due diligence – extra steps to identify additional risks and potential impacts. There are perhaps four contexts in which this extra diligence might be expected: (i) situations of operating in armed conflict, including in crisis-prone regions on the brink of conflict, and during post-conflict reconstruction; (ii) acute environmental degradation or post-environmental disaster – such as Haiti; (iii) systemic poverty and associated vulnerability, and (iv) cases of rampant corruption.

Taking the first example, that of conflict, there are already a number of performance standards that NCPs can use when setting their expectations about how business should behave in conflict environments. These are drawn from international humanitarian law and international criminal law and are manifest in guidance such as the 'Red Flags', the Voluntary Principles on Security and Human Rights or the business

code of conduct relation to the 'Montreux Document' on Private Military Companies, and the OECD's own guidance for multinationals in weak governance zones.

In acute situations, such as conflict, business already has direct international legal responsibilities, which states need to enforce, primarily through legal mechanisms. A case involving an international crime, such as the use of forced labour, or forced displacement, should not have to be dealt with by an NCP, and other legal remedies have to be available. But grey areas arise when we think about incidents of alleged beneficial or silent complicity – possibly through the supply chain, which might not reach any threshold of criminal responsibility. The interplay between legal and non-legal approaches must be monitored by each NCP nationally, but the assumption must be that both approaches have a role to play – depending on the nature and severity of the abuse perpetrated. Decisions to freeze existing NCP investigations due to legal action should, if at all possible, be made by consent from all parties but it is ultimately a decision for each state to make, bearing in mind its own obligation to protect people from human rights abuses resulting from the actions of non-state actors, such as business.

Procedural issues and outcomes

My final set of comments relate to the way the OECD Guidelines are implemented and in particular the role of NCPs when disputes emerge. So lets start here with the desired end in mind. What are the outcomes we hope for over the next 10 years? Clearly, we want more effective mediation, and NCPs should indeed build on some of the good results achieved in this area. But aren't we also looking for more in cases where mediation is not enough or is impossible to achieve?

Cases such as those relating to Vedanta or Afrimex suggest that something more is needed, not just mediation, when the NCP makes statements about "responsibility". It is true that on their own such statements do not have legal effect, nor have such statements led to measurable changes in corporate behaviour in those two instances. But the fact that some NCPs are now willing to make such strong statements increases the chances of better outcomes in future.

Professor Ruggie is right to raise the question in his 2010 report as to what states themselves can do, if they make such such statements, and if legal proceedings are not appropriate or available. It is odd, to say the least, if the same, or other OECD governments, do not take such statements into consideration when granting export credit or providing investment assistance to the same companies. We hope to see

more Parliaments follow the lead of the Netherlands in resolving that governments withhold state assistance from companies found responsible by NCPs, but where no adequate remedy has yet been forthcoming.

If NCPs are going to have a role in both settling disputes, and more frequently, we hope, in making public statements of responsibility, then the associated guidance around what the necessary thresholds are, is an important issue. The rights-based principles issued by Professor Ruggie in 2008 in relation to access to effective remedies - legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency – are extremely relevant to the Guidelines and to NCPs whether in a mediation role or as a decision-maker.

Conclusion

In conclusion then, we believe that the 'Protect, Respect, Remedy' framework endorsed by the United Nations Human Rights Council provides an excellent basis for an update of the Guidelines. There is also a window of opportunity here for the OECD. None of us can be sure if this opportunity will arise again and the Institute for Human Rights and Business urges everyone in this room to be brave in their leadership and concrete in their actions. There will come a day, perhaps in the not too distant future, when the opportunity for a leveller playing field in relation to human rights and business might be closed again. At its heart, human rights is social sustainability – creating more just and sustainable communities which are good for people as well as being good for responsible business. Social sustainability requires us all to be more accountable to each other, and in this rubric – the OECD Guidelines play an important role.

Thank you for your attention. I look forward to our discussions.