

8 September 2014

The Institute for Human Rights and Business welcomes the opportunity to offer comments on the OECD Guidelines on Corporate Governance of State-Owned Enterprises (the SOE Guidelines).

The Institute for Human Rights and Business (IHRB) is a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards. We work to shape policy, advance practice and strengthen accountability to ensure the activities of companies do not contribute to human rights abuses, and in fact lead to positive outcomes.

IHRB commends the OECD on the initiative to open the SOE Guidelines for public comment. This contrasts with the process for the review of the 2014 review of the OECD Corporate Governance Principles which have not been open to public comment to date. Given the interlinkages and the importance of the Corporate Governance Principles, it is important that these Principles are opened for public comment as well. IHRB participated in a discussion organized by TUAC during the Global Forum on Responsible Business Conduct focused on the relevance of the UN Guiding Principles on Business and Human Rights to both the Corporate Governance Principles and the SOE Guidelines in June 2014.¹

IHRB would be pleased to respond to any questions and to be involved in further dialogue on this subject.

A. General Comments

IHRB welcomes the SOE Guidelines in general as an important global reference point and in particular, welcomes the references in the SOE Guidelines to:

- The purpose of exercising public ownership - to achieve the best interests of the public
- Responsibilities to a wider set of stakeholders beyond just the Government and other shareholders
- Accountability and transparency
- Sustainable business and the focus on the longer-term interests of the company
- Commitment to highest ethical standards

IHRB would welcome strengthened attention in the SOE Guidelines to:

- The role of the state as owner, regulator and business in respectively protecting and respecting human rights² (please see Section B. below)
- Governments leading by example

¹ See the TUAC Roundtable on Corporate Governance, http://www.tuac.org/en/public/e-docs/00/00/0E/F6/document_doc.phtml

² We draw attention to our recent [State of Play 3: Human Rights within the Political Economies of States – Avenues for Application](#), Chapter 6.2 “States as Owners or Part-owners of Companies,” that highlights a series of issues on the interlinkages between states, SOEs and human rights issues.

- As owners or part-owners of enterprises, Governments have an important opportunity to demonstrate what best practice looks like in terms of corporate governance, social responsibility and sustainability. We believe this point has not been sufficiently emphasized in the current draft of the Guidelines.
- Coherence with other OECD instruments
 - We believe that more emphasis could be placed on SOEs acting in accordance with other, relevant OECD Guidelines and in particular the OECD Guidelines on Multinational Enterprises (MNE Guidelines) and the OECD Principles for Public Governance of Public-Private Partnerships.

B. Comments on the Integration of Human Rights into the SOE Guidelines

IHRB welcomes the reference in the draft SOE Guidelines to the UN Guiding Principles on Business and Human Rights in paragraph 148 of the Annotations. It is very useful to see a specific reference to these global principles in the document. However, at the moment, the reference is quite narrowly drawn -- i.e. as an ethical code. While the UN Guiding Principles are certainly an ethical standard, the innovation introduced by the UN Guiding Principles is in making human rights an operational consideration for Governments and businesses as a core part of the way business is conducted. This means the integration of human rights into the policy of the SOE, the risk management system, monitoring and reporting, engagement with stakeholders and any grievance or redress mechanisms.

It may be useful to provide a very brief background on the UN Guiding Principles that is well known to the OECD colleagues working on the MNE Guidelines, as the MNE Guidelines chapter on human rights is completely aligned with the UN Guiding Principles, based on a specific decision to coordinate the two instruments. The UN Guiding Principles were unanimously endorsed in the UN Human Rights Council, signalling a strong government foundation and support that is relevant to Government ownership of SOEs. The UN Guiding Principles were endorsed by leading business organisations, individual companies, trade unions, and civil society and are an authoritative global reference point, providing overarching standards and benchmarks for action and accountability.

There are a number of UN Guiding Principles that are particularly relevant to the draft SOE Guidelines³ -

- UN Guiding Principle 2 calls on States to set clear expectations that all businesses, including SOEs, respect human rights;
- UN Guiding Principle 4 on States' duty to take "additional steps" to prevent human rights abuses by SOEs;
- UN Guiding Principle 5 on State duties when they contract for business enterprises to provide services;
- UN Guiding Principle 8 on policy coherence;
- UN Guiding Principle 15 on the steps any enterprise, including an SOE, should take to respect human rights;
- UN Guiding Principles 29-31 on operational level grievance mechanisms.

The relevance of the UN Guiding Principles are explained further below. We have dealt with each section of the Guidelines and their annotations together.

³ Please see the Annex for the specific text of the relevant Guiding Principle.

Chapter I. - Rationale for State Ownership

- **Principle IA** states that the Government should develop an ownership policy, including how the Government will implement its ownership policy.
 - Suggested addition to the **Annotation Para 30**: Include a reference to the UN Guiding Principles on Business and Human Rights or to international human rights standards as a relevant consideration for the ownership policy. They are relevant for three reasons:
 - (i) in line with Guiding Principle 4, Governments should take additional steps to ensure that SOEs do not abuse human rights; one of the clearest ways to do this is through a clear statement in its ownership policy; this would then have implications for the issues that the state should monitor in its role as owner (Chapter II.)
 - (ii) SOEs “are sometimes expected to fulfill special responsibilities and obligations for social and public policy purposes” (Annotation para 28), such as the delivery of public services that are directly aligned with human rights issues - such as the right to housing or the right to water; the implications of that alignment should usefully be spelled out in policy and guidance for the SOE;
 - (ii) in line with Guiding Principle 15, all businesses should express a policy commitment to respecting human rights; including a commitment to human rights in the Government’s ownership policy would be an important prompt for the SOE itself to adopt a policy commitment to human rights.

Chapter III. - State-Owned Enterprises in the Marketplace

- IHRB draws attention to Pillar III of the UN Guiding Principles on Business and Human Rights on access to remedies which highlights the importance of providing redress to victims of corporate (including SOE) abuse of human rights. This may fit here, under **Annotation Para. 90** or more readily under **Annotation Para. 150** refers to mechanisms to report on unethical conduct. This is very useful to see this in the document. For some unethical conduct however, such as human rights abuses, a reporting mechanism will often not be sufficient. Instead the focus should be on delivering remedies. This applies to all enterprises, including SOEs. It would be useful to add a reference to actual *operational-level grievance mechanisms* and to refer to the UN Guiding Principles 29-31 on such mechanisms.

Chapter V. - Stakeholder Relations and Sustainable Business

- IHRB would welcome an **addition to the annotations** that more specifically recognizes the *SOE’s responsibility to respect the human rights* of its stakeholders.
- IHRB welcomes **Annotation Para. 149** that refers to the importance of detailed guidance, participatory approaches and board and senior management monitoring.
- Suggested addition to **Annotation Para. 145 (also Annotation Para. 165)**: Include a reference to environmental, social *and human rights* policies. We refer to the recent EU directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC As Regards Disclosure Of Non-Financial And Diversity Information By Certain Large Companies And Groups, which will require environmental,

social *and human rights* disclosure⁴ as an important indication of good practice on requiring disclosure on human rights.

- Suggested addition to **Annotation Para 152**: We welcome this paragraph's reference to elaborating on expectations, "supported by incentives and subject to appropriate reporting and performance monitoring." These are the appropriate steps to take to embed issues in the management system of an SOE. The paragraph should, however, include a more specific reference to *human rights* in line with UN Guiding Principle 2, which calls on States to set clear expectations that all businesses respect human rights. In line with UN Guiding Principle 4, it is even more important that SOEs respect human rights, as they have a connection to the state.

Chapter VI. Transparency and Disclosure

- IHRB welcomes the reference to financial and non-financial disclosure. Under **Principle VI.C.1.**, this could be made clearer by a reference to SOE performance against its policies and commitments as it is otherwise not clear that the SOE Guidelines are calling for disclosure on company performance on areas often of interest to the general public: issues of *environmental, social and human rights, anti-corruption* performance. IHRB would welcome a specific reference to disclosure on these points. Annotation paragraph 173 starts to address this but it is likely that it will be important to disclose more than KPIs to contextualize and explain the SOE's performance.
- Suggested addition to the **Annotation Para 181**: IHRB welcomes the reference to the importance of reflection on risks and internal management systems to identify, manage, control and report on risks. We would welcome a more explicit reference to operational risks, including *environmental, social and human rights risks*.
- IHRB welcomes **Annotation Para. 189** and suggest this could be strengthened by referring not just to the relations but to the key issues in those relationships; otherwise the reporting may focus just on process (i.e. number of meetings) rather than the substance of the relationship.

Chapter VII. The Responsibilities of the Board of State-Owned Enterprises

- Suggested addition to the **Annotation Para 209**: IHRB would welcome a reference to a broader basis for diversity on boards beyond the important dimension of gender, including for example, race, colour, language, religion, national or social origin, disability.

⁴ More specifically the Directive will require disclosure relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.

Annex

UN Guiding Principle 2: “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”

UN Guiding Principle 4: “States should take additional steps to protect against human rights abuses by business that are owned or controlled by the State..., including, where appropriate, by requiring human rights due diligence.”

UN Guiding Principle 5: “States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.”

UN Guiding Principle 8: “States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates...”

UN Guiding Principle 15: “In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- a) A policy commitment to meet their responsibility to respect human rights;
- b) A human rights due diligences process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”

UN Guiding Principle 29. “To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”

UN Guiding Principle 30. “Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.”

UN Guiding Principle 31. “In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.”