



Geneva, 1 November 2010

Dear John,

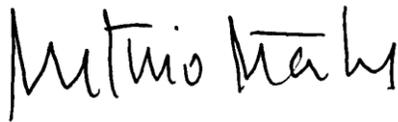
As you know, the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the OECD, that together form the most representative voice of global business, have followed your work closely and contributed to it wherever possible. We have welcomed your reports to the UN Human Rights Council over the course of your mandate and like others, have endorsed your protect, respect, remedies framework. The framework establishes a clear division of tasks in the field of business and human rights between States and companies. Your pragmatic approach has allowed for this framework to emerge through a robust and open consultation with all interested in the outcome of your work.

We greatly appreciated the opportunity to meet with you in Paris on October 5 and welcome your request to help you in the development of the Guiding Principles which will be the main content of your last report to the Human Rights Council. To that end the IOE, ICC and BIAC engaged in a consultation process with our respective members following the October 5 meeting and are pleased to submit the comments and recommendations for your consideration.

We hope that these recommendations are helpful to you in developing Guiding Principles that clearly address not only the key role of the State as the primary duty bearer of human rights in their own jurisdiction but also the corporate responsibility to respect in a way that can be sustained and built upon by all companies regardless of size or location.

The way we can develop ownership among our members is key in the success of your framework. It depends very much on how your framework will and can be implemented. For this reason, we draw your attention to the fact that business will want to avoid any possible future discrepancies or misinterpretations on the UN framework on human rights, by institutions which do not have genuine multilateral scope and preoccupations, or even by private international organizations and other stakeholder groups. Accordingly, we would favor any potential follow-up to take place at a level which reflects and ensures the level playing-field. Similarly, from our perspective it is important that recognition will be given to the fact that business, as a legal person also has human rights within the purview of the State duty to protect and that other social actors in this process retain their own responsibilities to similarly respect human rights. Business is engaged in clarifying what it accepts as its responsibility. We hope others stakeholders will do the same within their respective duties and responsibilities.

The IOE, ICC and BIAC will remain engaged in assisting your mandate to a positive and worthwhile conclusion.



Antonio PEÑALOSA
IOE Secretary-General



Jean-Guy CARRIER
ICC Acting Secretary-General



Tadahiro ASAMI
BIAC Secretary-General



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JOINT SUBMISSION TO THE SRSG ON THE GP ON BUSINESS AND HUMAN RIGHTS

The international business community appreciated the opportunity to meet with the Special Representative to the Secretary General on Business and Human Rights in Paris on October 5, and is pleased to submit the following comments for consideration in the development of the draft Guiding Principles (GPs).

I. GENERAL COMMENTS

Business supports the underlying philosophy of the Framework, which establishes a clear division of tasks between States and companies. The state duty to protect is the most important pillar of the international human rights regime. States are the primary duty bearers, and companies are not states. The approach of ‘principled pragmatism’ is also an important element of the underlying philosophy. In our view, the GPs or the commentary needs to explicitly formulate this philosophy.

For business, it is essential that the proposed measures are seen as a system, involving states as well as companies. While each leg of the framework is distinct, the obligations of states and business are mutually supportive and intrinsically linked and cannot be isolated from each other.

The GPs need to clearly distinguish the UN GPs from other important initiatives (e.g. the OECD Guidelines, Global Compact, ISO 26000, etc.), since these other initiatives have a different structure, purpose and process.

The GPs and Commentary need to explicitly address the relationship between the final GP text and the previous reports by the UN SRSG, and they should also clearly state the precise legal status of the GPs.

The GPs need to be clear as to what is meant by terms such as “Human Rights”, “State”, “business”, “companies” and “corporate”.

Therefore the GPs needs to be:

- ▶ **UNIVERSAL:** The final report needs to make it clear that the GPs are intended to be universal and apply to all countries and all companies in an impartial manner, and that they are not limited in scope to just weak governance zones or international business transactions.
- ▶ **CLEAR:** Since the GPs will have a broad audience beyond the UN Human Rights Council, they will need to be written clearly enough to avoid misinterpretation by different audiences, including by providing useful commentaries and clearly stating what is not intended where different interpretations are possible. Only the mandated UN agencies should play any role in the clarification of the meaning of the relevant instruments.
- ▶ **FLEXIBLE:** The GPs needs to avoid a “one-size fits all” approach and instead present a flexible framework that can be adapted to different countries, companies, markets and individual circumstances.
- ▶ **PRACTICAL:** The SRSG approach of “principled pragmatism” needs to be reflected in the GPs, focusing on recommendations that are practical and achievable. Such approach should respect the mandate of the International Labour Organization with regards to labour rights.
- ▶ **SIMPLE:** The GPs should be written directly for their target audiences, and the recommendations should look to use simple and commonly understood terms to explain human rights, such as “treating people with respect”.
- ▶ **STABLE:** Once adopted, the GPs need to be left unchanged for a number of years in order to allow for a period of reflection, adoption and application by States and the business community. This period should be to gather good practices and share experiences as a further means of maintaining coherence with the GPs and the purpose that underlines them.
- ▶ **EASILY ACCESSIBLE:** providing examples of good practice and reference to publications/ organizations that can assist.

II. THE STATE DUTY TO PROTECT

a) NATIONAL LEGAL FRAMEWORKS:

The GPs need to address the following issues in applying the “know and show” approach to States:

- ▶ States have an obligation to enact national legislation that protects human rights in their own jurisdiction and fully reflects their international obligations and commitments.
- ▶ States must also ensure that national laws are consistently implemented and effectively enforced. National laws must apply evenly to all actors in society, including the government itself, the public and private sectors, and society itself.
- ▶ States should be strictly discouraged from seeking to apply their laws to other countries given the great potential for legal confusion, conflicting requirements and disincentives for national action. Multilateral processes need to be given a clear priority over extraterritorial application of national law. Extraterritoriality is not an effective alternative to the states obligation to its own rights holders within its own jurisdiction.

b) ENSURING POLICY COHERENCE:

The biggest challenge relating to policy coherence is often a corollary of the failure of some States to implement and enforce their own laws, and addressing these failures need to be the highest priority. The GPs should address the following issues:

- ▶ States should not create conflicting human rights requirements in national law.
- ▶ Any GPs on international trade and investment agreements must recognize that such agreements serve a necessary and important function that it is essential to maintain.
- ▶ States should look to work through representative organizations within their societies to explore ways by which both coherence and the extension of legal protection for human rights can be best ensured.
- ▶ An emphasis on education and information exchange on the States human rights policies with its society can help identify areas of policy incoherence or gaps.
- ▶ A clear legal framework of rights is preferable to indirect attempts to protect human rights by other means.

c) DOING BUSINESS WITH BUSINESS:

The GPs should address the following issues:

- ▶ States need to develop or ensure laws that apply evenly across all stakeholders, including the government itself, State-owned enterprises, the private sector (whether large or small, domestic or foreign-owned), and the wide range of civil society organizations.
- ▶ State transactions with business should be covered by the same laws that cover private sector transactions. National laws should not discriminate or differentiate between actors or actions simply based on ownership or contracting arrangements.
- ▶ Government procurement policies need to be strictly transparent, objective, cost-effective and must not be used for protectionist purposes or purposes unrelated to ensuring the best provision of services to the State.

d) FOSTERING BUSINESS RESPECT FOR HUMAN RIGHTS:

States can best foster and encourage ongoing business respect for human rights by implementing and enforcing their own national laws. The three main barriers to effective enforcement are:

- 1) Rampant corruption, which undermines all human rights, as well as national laws and institutions;
- 2) High levels of informality in many countries that robs people of their legal rights and protections and constitute unfair competition practice vis-à-vis companies fully respecting rule of law or national regulations; and
- 3) A lack of resources and/or expertise necessary to implement their laws.

The GPs need to address the following issues:

- ▶ States need to encourage a “culture of compliance” that drives all stakeholders to both respect and comply with all national laws, including those related to human rights. One way to doing so is through education, access to information and access to advice and awareness-raising activities.
- ▶ The GPs need to recognize that corruption undermines both Human Rights protection and respect, therefore there is a need for States to reaffirm their commitments under the UN Convention Against Corruption and other relevant instruments.
- ▶ States should ensure that all people and organizations in their jurisdiction are afforded the appropriate legal status, including by providing for the acquisition of birth certificates, property titles and business licenses through clear, simple and transparent processes.

e) SUPPORTING BUSINESS RESPECT FOR HUMAN RIGHTS IN CONFLICT
– AFFECTED AREAS:

Since the primary source of human rights abuses in weak governance and/or conflict zones is the government itself or those fighting for control of the area, the only way to address these abuses is to address the government's or combatants' behavior directly.

The GPs should address the following issues:

- ▶ Weak States should be encouraged and provided with technical assistance and support to fulfill their duty to provide appropriate legislation and enforcement of national laws in their jurisdictions through an enhanced capacity within the Office of the High Commissioner.
- ▶ The GPs should encourage States to work through multilateral institutions to help ensure security in weak governance zones and to help establish the necessary administrative and judicial structures to improve the protection of human rights

f) MULTILATERAL INSTITUTIONS:

The GPs need to consider addressing the following issues:

- ▶ International and regional governmental organizations need to be used to assess whether their member States have adequate Human Rights laws in place and whether those laws are being evenly implemented and effectively enforced.
- ▶ Multilateral organizations should also be a source of assistance, training and capacity building for States that request help to improve their performance and seek to build a culture of compliance.
- ▶ The Office of the High Commissioner for Human Rights should be strengthened to enable the Office to work proactively with both member States on capacity building and with business on tools and information to aid in the respect of human rights and to work jointly on dilemma situations from their particular perspectives.

III. THE CORPORATE RESPONSIBILITY TO RESPECT

a) FOUNDATIONS:

The GPs should clearly recognize the interaction between the State duty to protect (implementing and enforcing human rights) and the corporate responsibility to respect (compliance, do no harm).

It would also be helpful if the GPs could provide some concrete guidance on an operational level.

It would equally be welcome that the GPs or the commentary acknowledges the manifold business initiatives already underway

Therefore, the GPs should address the following issues:

- ▶ The responsibility to respect is based on compliance, expressed as not infringing on the rights of others or “do no harm.”
- ▶ The GPs should reflect that every person and organization is responsible for their own actions, and any problems or alleged abuses should be addressed at the source to establish a sustainable solution (s).
- ▶ The GPs should clearly recognize that the responsibility to respect has limits. Normally that would be to activities under an organization’s direct control or where its direct actions are the cause of the impact.
- ▶ The reality that corporate responsibility to respect will vary depending on the specific circumstances in any given context.
- ▶ The corporate responsibility to respect should be the same for public and private corporations.

b) POLICIES AND PROCESSES:

Business policies and processes to integrate human rights throughout a company will vary according to the size, circumstances, location, sector and other factors of the business enterprise’s operations. The GPs should address the following issues:

- ▶ Companies should express their respect for human rights, although the form of that expression may vary from company to company.
- ▶ The expression should build on the company’s existing policies and processes to speed adoption and integration.
- ▶ Companies should identify what they would do in the event that abuses were found and how they would react in these situations.

c) CONDUCTING HUMAN RIGHTS DUE DILIGENCE:

In establishing the concept of due diligence, the GPs must allow for flexibility according to local circumstances, country, company size and other relevant factors. The GPs should clearly define the due diligence process and how it relates to transactional due diligence and should address the following issues:

- ▶ Assessing human rights impacts should be seen as an approach rather than a particular format or process. This is necessary to ensure it is flexible and relevant for the wide range of actors.
- ▶ Companies should track issues that are significant to its business and risk management profile.
- ▶ Companies should communicate their policies and performance to their relevant stakeholders in whatever form they deem suitable subject to appropriate protections for confidential business information. Total transparency in difficult or dilemma situations may actually be counter-productive and the appropriate level of transparency should be judged on a case by case basis.
- ▶ This is a continuous process from which companies can learn and adjust their processes.
- ▶ The UNSRSG has stated that due diligence is not an attribution system of legal liability, nor is it a guarantee against liability; it provides help to reduce the risk for companies. Due diligence cannot lead to increased liability; a company cannot expose itself to more responsibility by doing the right thing. Due diligence also involves a continuing process of change. The GPs should contain this element.
- ▶ Due diligence in special circumstances (e.g. absence of fundamental equality between men and women in certain countries or absence of free trade unions in countries) implies 'to do what you can within your power'. The GPs should also contain this element.

d) ISSUES OF SCALE AND CONTEXT:

The GPs should address the following issues:

- ▶ Companies must comply with national law, whether it is enforced or not.
- ▶ A "culture of compliance" requires effective enforcement, reasonable and appropriate regulations, information, education and support.
- ▶ The vast majority of business connections to human rights abuses result from indirect exposure to abuses caused by others, primarily governments: it needs to be recognized that companies have neither the mandate nor the ability to counter the will of governments, for instance in the case of public procurement contracts designed by governments.
- ▶ The GPs should clearly state that companies must comply with the laws in the jurisdictions in which they operate, including when national law conflicts with

international human rights standards. Companies should not be asked to decide for themselves which laws they will obey or not.

- ▶ Where national laws are in conflict with international standards, companies should be encouraged to explore ways to meet the principles of international standards while staying within the letter of the law and should not be held accountable for discrepancies between them.
- ▶ Responsibility must be based on control and due diligence: harm caused by independent parties where the company did not contribute to the impact is beyond its responsibility.

IV. GRIEVANCE MECHANISMS

a) FOUNDATIONS:

Providing access to judicial mechanisms is essential to the State duty to protect human rights and the lack of effective and efficient judicial remedies is one of the key reasons why human rights are not protected. The GPs should include:

- ▶ States should enact national laws to protect human rights, implement those laws and effectively enforce them through efficient and effective State mechanisms.
- ▶ The GPs need to recognize that the grievance mechanisms will in practice demand flexibility in application, depending on the circumstances of the case, the country and the company.

b) JUDICIAL MECHANISMS:

Business does not believe it is possible to attach a specific (either judicial or non-judicial) remedy system to the Framework or the GPs, since no one size fits all circumstances. Judicial and non-judicial remedies should function as a system, on the one hand leading to close co-operation, but on the other hand also leading to clear-cut demarcation of tasks. This element needs to be addressed in the GPs.

Grievances based on alleged violations of human rights are best addressed locally. As far as such grievances are to be addressed through non-judicial grievance mechanisms, local resolution generally allows for better understanding of the facts of the matter, and for better identification of possible solutions. Offering local redress through non-judicial means may help avoid unnecessary escalation

There are a number of critical barriers to access to judicial remedies, including: inadequate legal protections under existing legislation; inadequate courts systems; political interference in the judicial process; corruption; inadequate penalties; and informality / lack of legal status (issues such as birth certificates, property rights).

States should establish effective judicial institutions and should ensure that they are accessible (local), speedy, effective, independent, impartial and free from political influence.

c) STATE-BASED NON-JUDICIAL MECHANISMS:

Non-judicial mechanisms can be useful but should not be seen as an alternative or replacement for an effective judicial process. The GPs need to address the following issues:

- ▶ Since international state-based non-judicial mechanisms cover a very limited number of organizations, priority should be given to mechanisms that provide access to remedies at the national level and that address the gap between national law and actual practice.
- ▶ The GPs need to demonstrate a clear preference for “local solutions for local problems” wherever possible as these provide the most impact for legitimate victims of human rights abuses.
- ▶ They need also recognize that vexatious claims are prevalent and contribute to inhibiting – rather than assisting – in the goal of respecting human rights. International state-based non-judicial mechanisms should impose concrete disincentives for abuses by lobby/campaign groups.

d) COMPANY-LEVEL GRIEVANCE MECHANISMS:

The GPs should address the following issues:

- ▶ Company-level grievance mechanisms should be seen as one part of a larger stakeholder engagement process.
- ▶ Ongoing engagement and dialogue should be used to effectively address issues as they arise rather than waiting for a complaint to be lodged; prevention through stakeholder engagement should be preferred to perfecting a complaint process.
- ▶ Companies should design internal mechanisms (employee feedback, complaints) and external mechanisms with their respective target audiences in mind.
- ▶ Every organization should establish its own stakeholder engagement processes and appropriate grievance mechanisms.
- ▶ All mechanisms should be clear and available to all stakeholders.
- ▶ Companies should have training and communication and programmes in place to enhance awareness and to provide evidence of their commitments. This will enable others to understand what the company is doing and how it is walking the talk.

- ▶ It is essential that all stakeholders involved have access to a knowledge platform where experience and knowledge is shared: dilemma database, best practice transformation activities, who is who, training formats, frameworks.
- ▶ The GPs could have an appendix with an overview (governance structure) that shows the (international and local) bodies involved, their roles and responsibilities, access details and focus areas.
- ▶ The GPs could indicate more explicitly the need for the various stakeholders involved to co-create, to build partnerships and to enhance learning and info sharing.

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