

January 31, 2011

Via electronic mail

Professor John Ruggie
U.N. Special Representative for Business and Human Rights

Re: Guiding Principles for the Implementation of the United Nations ‘Protect, Respect, and Remedy’ Framework

Dear Professor Ruggie,

Accountability Counsel is pleased to submit the following comments on the Draft Guiding Principles for the Implementation of the United Nations ‘Protect, Respect and Remedy’ Framework (“Draft Guiding Principles”). As an organization dedicated to supporting community access to remedy through non-judicial grievance mechanisms, we have followed your mandate with great interest. We are pleased to have participated in your consultations and to have provided lessons learned from our work in communities around the world over the past several years.

At this critical juncture, accountability mechanisms of the international and regional development banks and export credit agencies have the chance to evolve into more meaningful fora for resolving disputes between affected people and businesses, and determining compliance with policies and procedures of these institutions. While the accountability mechanisms are not and should not be a substitute for judicial remedies to human rights abuses, they can provide means of addressing community concerns and an institution’s social and environmental policy violations in a relatively efficient and often effective manner. There are often serious human rights impacts that result from the failures of institutions and their clients to follow social and environmental policies. But progress will only be achieved if States support these accountability mechanisms.

Just this week, there is a threat to the integrity and independence of the first of the international financial institution (IFI) accountability mechanisms, the World Bank Inspection Panel. The World Bank Group’s General Counsel apparently just circulated a draft legal opinion passing judgment on the Panel’s decision-making, including interpretation of facts. If the World Bank Board accepts this type of improper interference, this opinion would undermine the Panel’s independence and denigrate the *only* mechanism that victims of World Bank-financed human rights abuses have to hold the Bank accountable. Because the Bank has self-decreed immunity from the reach of the rule of law through national courts, States that make up the World Bank Group must vigorously defend the Inspection Panel’s mandate to make independent decisions on

registration and eligibility of complaints and evaluation of facts that support its conclusions in their reports to the Board. States must protect the integrity of the Inspection Panel and other such non-judicial accountability mechanisms as one of many necessary steps in the discharge of their duty to respect human rights. Accountability for State facilitation of business and human rights conflicts must not be avoided when States act multilaterally.

It is in this context of the importance and urgency of your mandate that we provide the comments below, divided into general and then specific comments.

I. General Comments

In general, the Draft Guiding Principles are an important advancement toward the accountability of businesses enterprises. However, certain additions and modifications would help ensure that the Draft reflects the fundamental principles of independence, transparency, fairness, professionalism, accessibility and effectiveness.

First, the scope of the Draft Guiding Principles should be clarified such that the term “business enterprise” include private sector banks and other lending institutions to ensure there are no gaps that detract from the effectiveness of the Framework. As such, we lend our support to the January 28, 2011 comments submitted by BankTrack.

We agree with the Joint Civil Society Statement on the Draft Guiding Principles regarding the need for “clear recommendations,”¹ and that the Draft Guiding Principles should delineate precise steps needed to identify, remedy, monitor and report on implementation of action plans to redress violations.²

Criteria are necessary to ensure that *both* judicial and non-judicial mechanisms are effective and can be evaluated as necessary. The Draft Guiding Principles should include a list of criteria for judicial mechanisms similar to the criteria enumerated for non-judicial mechanisms.

The effectiveness criteria for non-judicial mechanisms in the Draft Guiding Principles should include clear instructions regarding monitoring and reporting. Monitoring and reporting on outcomes are key components to any remedial scheme to ensure that the remedy is effective. Yet, monitoring and reporting are rarely mentioned in the Draft Guiding Principles. Monitoring is only briefly referenced in Principle 29(c) without recommendations regarding a structure for a monitoring process. The Guiding Principles should mandate consultations with affected parties to ensure legitimacy in the monitoring process³ and public reporting of monitoring findings to communities and the public.⁴

¹ Amnesty International, et al., “Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights,” Jan 2011, 1 para. 4.

² *Accord* our full recommendations on this issue in Natalie Bridgeman, Esq., “Human Rights responsibilities of private sector banks: The policy required to ‘Respect’ and provide ‘Access to remedy,’” 7-17 (BankTrack 2010).

³ *Id.* at 17.

⁴ Natalie L. Bridgeman and David B. Hunter, “Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism,” 20 GEO. INT’L. ENV. L.R. 187, 225 B(f) (2008).

The Draft Guiding Principles should explicitly discuss the State's duty to remediate human rights violations as a component of the State's duty to protect.⁵ Principle 20 (Remediation) should include reference to the State's duty to protect since monitoring and reporting, particularly as carried out by external entities, are essential components of ensuring the remedy is effective. The Draft Guiding Principles should also emphasize that mechanisms implemented by business enterprises are not replacements for State-based remedies enumerated elsewhere in the Draft Guiding Principles.

II. Specific Comments

Principle 11

The discussion of Multilateral Institutions requires mention of the institutions' collective duty to respect human rights in their joint actions, not just the duty to not restrain ability of individual member States from the duty to protect human rights. Similarly, this principle requires acknowledgement of the duty of Multilateral Institutions to provide access to remedy. The State has a duty to ensure that the accountability mechanisms of Multilateral Institutions are independent, fair, transparent, professional, accessible and effective and that the State does not undermine these mechanisms. As mentioned above, and we urge that this be mentioned in the commentary here, States must ensure that the accountability mechanism policies of Multilateral Institutions follow these principles.

Accountability Counsel advocates against the "sequencing" of accountability mechanisms because the principles of independence, fairness, accessibility and effectiveness are compromised when affected people are required to proceed through a dispute resolution phase of an accountability mechanism prior to the accountability mechanism's initiation of a compliance audit. This problem is exemplified in the World Bank Group's Compliance Advisor/Ombudsman process in which victims of human rights abuses at the hands of the World Bank Group's private sector institutions cannot directly initiate an independent compliance audit to help redress the harm caused by those institutions. They must first go through a dispute resolution process run by a Vice President that reports to the World Bank President and only after that will an audit be considered in the CAO's discretion.

In the commentary that mentions the need for "greater policy coherence," there should also be the explicit mention of the IFC Performance Standards. During the current review of those standards, the IFC has resisted explicit acknowledgement of the IFC duty to respect human rights despite well-documented instances of IFC's role in human rights abuses.⁶ The IFC's current position on human rights undermines the Protect, Respect and Remedy Framework and is contrary to law.

⁵ Amnesty International, et al., 2 § 2

⁶ See e.g., Accountability Counsel's work on behalf of two indigenous Shipibo villages in Peru to hold the IFC accountable for human rights abuses that involved 5 oil spills in a 15-month period and use of forced labor and intentional exposure of workers to toxic chemicals to clean up one of the spills. See www.accountabilitycounsel.org.

Principle 12

In agreement with the Joint Civil Society Statement,⁷ the Draft Guiding Principles should provide more explicit guidance regarding specific human rights legal instruments relevant to the responsibilities of business enterprises, including financial institutions. An example of a relevant instrument that should be mentioned in 12(a) is the UN Declaration on the Rights of Indigenous Peoples, which recognizes indigenous peoples' right to self-determination, including but not limited to the right to free, prior, and informed consent with regard to all activities potentially affecting their communities.

Principle 15

This Principle is the key to making the Framework have traction on the ground. We recommend adding, after the first sentence, another sentence as follows: "Human Rights due diligence practices should be incentivized throughout the corporate structure so that merely "checking a box" is avoided, whereas meaningful engagement in the due diligence practice is rewarded." All too often, even the best of policies go unimplemented because of failure to provide proper incentives.

According to the Commentary, in some situations it is "impossible to conduct human rights due diligence." This wording creates a troubling gap in accountability, potentially enabling business enterprises to evade the principles of this Framework. Instead, we recommend the term "difficult" not "impossible," and agree with the proposal to prioritize and scale the type of human rights due diligence activity needed based on the type of risk.⁸

In the second to last paragraph of the commentary to Principle 15, we recommend the following edit: "conducting appropriate human rights due diligence should help business enterprises address the risk of ~~legal claims against them~~ human rights abuses by showing that they took every reasonable step to avoid involvement with an alleged ~~human rights~~ abuse." If the goal of due diligence is only to avoid legal claims, human rights are insufficiently protected and possibly even exacerbated.

Principle 17

Effectively integrating impact assessments to prevent or mitigate human rights impacts requires a prong (c). Businesses enterprises should have a procedure for making decisions to avoid entering or continuing with a business activity if there are inappropriate levels of risk or if impacts cannot be avoided. For human rights impact assessments to be meaningful, such decisions should be independent of outside pressures, financial, political or otherwise.

In the commentary to Principle 17, we suggest the following edit: "Where a business enterprise identifies that it has contributed through its own actions or decisions to acts by a

⁷ Amnesty International, et al., 2 § 4.

⁸ *Accord* our full recommendations on this issue in Natalie Bridgeman, Esq., "Human Rights responsibilities of private sector banks: The policy required to 'Respect' and provide 'Access to remedy,'" 7-17 (BankTrack 2010).

supplier that harm human rights, it should take steps **[to cease,]** avoid or mitigate the continuation of those contributions.” Stopping the activity should be the first response to such a finding in an impact assessment.

Principle 20

We recommend the following similar edit to Principle 20: “Where business enterprises identify that they have been responsible for adverse impacts, they should provide for or cooperate in their **[immediate cessation]** or remediation through legitimate processes.”

In the Commentary, we recommend adding the following edit: “Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires that it should help ensure that the impact **[cease and]** can be remediated.”

Principle 23

In the Commentary to Principle 23, we agree with the description of an accountability framework and offer the following edit to the last paragraph: “State-based judicial and non-judicial mechanisms should form the foundation of a wider system of remedy for business-related human rights abuse. Within such a system, operational-level grievance mechanisms can provide early-stage recourse and possible resolution. State and operational-level mechanisms, in turn, ~~can~~ **[must]** be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights mechanisms.”

Principle 24

The Commentary listing “[p]ractical and procedural barriers to accessing judicial remedy...” should explicitly state that: (1) claimants may not be aware of existing legal rights or remedies, and (2) language may be another barrier to accessibility, particularly in instances in which affected communities do not speak the national language.

Principle 29

This Principle should include “independence” as an effectiveness criterion to emphasize the importance of freedom from outside “economic or political pressures” for non-judicial grievance mechanisms. As seen in the recent challenge to the World Bank Inspection Panel by the General Counsel, this is a current and critical issue.

We thank you and your team for the opportunity to comment and for your deep commitment to formulating a framework based on meaningful principles and practical implementation strategies.

Sincerely,

A handwritten signature in purple ink that reads "Natalie Bridgeman Fields". The signature is fluid and cursive, with the first name being the most prominent.

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