THE BUSINESS AND HUMAN RIGHTS

REPORTING AND ASSURANCE FRAMEWORKS INITIATIVE ("RAFI")

SUMMARY OF POINTS RAISED, WITH CLARIFICATIONS, RESPONSES AND EMERGING PRIORITIES FOR CONSULTATION

UPDATED AS OF OCTOBER 2013

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SUMMARY OF POINTS RAISED, WITH CLARIFICATIONS, RESPONSES AND EMERGING PRIORITIES FOR CONSULTATION

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In May 2013, the project team issued a discussion paper that recognized a range of challenges the project would have to tackle, with some ideas and questions on how they might be approached. It invited comments from all stakeholders during a two-month period, which was then extended for a further two months in light of the levels of interest.

Over thirty-five sets of comments were submitted in response, from individuals, organisations, and associations that collectively represent many thousands of members. Wherever those who submitted comments agreed to have them shared publicly, they are posted on the website of the Human Rights Resource Centre for ASEAN[1] and the Business and Human Rights Resource Centre.[2] The period for reactions to the discussion paper ended on 1 September, and the issues raised – both publicly and privately – will provide the foundation for consultations going forward.

In August 2013, the project team issued an initial response to comments received to date, which summarized the themes emerging; provided some preliminary responses; and highlighted priority issues for on-going consultation.[3] This paper updates that initial response document, and includes additional issues that were raised in the second half of the consultation period. In parallel, the project team has issued a Framing Document which sets out the background and process for the project.[4]

A. COMMENTS MADE REGARDING THE PROJECT IN GENERAL

The following section focuses on comments made regarding the project in general. It does not attempt to capture every comment made to date, but to reflect those themes that were repeated by more than one commentator.

1. The timeline for the project, including these first stages, is too short/too rushed

The project team is keenly aware of the need for full and broad engagement with all stakeholder groups in the development of this project and appreciates that the timeline initially indicated in the discussion paper was ambitious.

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[1] http://hrrca.org/business-and-human-rights.
[2] http://www.business-humanrights.org/Documents/RAFI.
[3] http://business-humanrights.org/media/documents/summary-of-points-raised-oct-2013.pdf.
[4] http://business-humanrights.org/media/documents/rafi-framing-document-2013.pdf.

The period for consultation on the basic concept for the project (as set out in the discussion paper) was extended to 1 September. The timeline for the remainder of the project has been revised and will ultimately be driven by the need for an inclusive consultation process that can help build a product that carries broad stakeholder support.

The project team is continuing a range of bilateral and group discussions aimed at ensuring the most adequate engagement process as the project moves forward. The proposed process for consultation and engagement has been set out in the "Project Framing Document" of September 2013. We welcome all suggestions in this regard.

2. The process needs to be driven by broad and meaningful engagement with stakeholder groups

The project team is committed to broad and meaningful engagement throughout this project with the full range of stakeholder groups. It recognizes that the discussion paper placed emphasis on the engagement process in the ASEAN region. It believes that there is considerable value in holding regular and focused consultations within ASEAN, a region from which the project has a great deal to learn.

The team also recognizes that the discussion paper did not place enough emphasis on the need for global consultations, which are crucial for these standards to benefit from the widest expertise possible and to be seen as relevant and useful in all regions. We are developing a plan for broad and inclusive engagement at the global level, in addition to specific consultations in other regions.

The project team is aware of the many challenges for this project, a good number of which have been reflected in the submissions received. The team makes no claim to having the answers to all these challenges and adopts a consultative approach towards finding them. We will continue to engage in bilateral outreach, facilitate collective discussions, share views received, disseminate reports of consultations, and continually seek inputs through on-line and other means. When the drafting process begins, the project team will develop incremental and iterative drafts based on on-going contributions, in an effort to advance towards standards that can carry broad support.

3. The UN Guiding Principles are an appropriate/inappropriate basis for reporting and assurance standards

Some submissions question whether the UN Guiding Principles are adequate as a basis for reporting and assurance standards given their level of generality and lack of detailed definitions of concepts such as human rights due diligence. Others take the view that if standards are to be developed for reporting they should not go beyond the UN Guiding Principles, which are widely accepted and carry international authority.

The project team confirms that it does not intend to exceed, rewrite, expand or dilute the UN Guiding Principles in this project. Rather, it will take them as the foundation for the proposed standards. It will be important for consultations to consider how to evidence effectively, through a reporting and assurance process, a company's implementation of the policies and processes described in the Guiding Principles. This discussion will need also to take account of any variations in the types of evidence that would be relevant and meaningful in different sectors or situations.

4. The project needs to take account of/dovetail with existing initiatives in the field

Many submissions point to the need for this project to take account of, and where possible dovetail with, existing initiatives, notably in the field of non-financial and integrated reporting.

It is clear that the proposed standards will be less useful and less used if they are seen as simply adding burden to existing reporting demands, or requiring parallel systems to those already in place. This said, existing reporting and assurance standards do not cover the breadth of a company's responsibility to respect human rights as defined by the Guiding Principles. This project therefore aims to add value by taking a more holistic approach to this issue.

The project team is in discussions with leading reporting organizations to identify the best ways to coordinate and collaborate, such that the frameworks developed are complementary to these other initiatives. The Project Framing Document of September 2013 provides further information on the relationships with leading reporting organizations.

Some submissions note that there are issue-specific or sector-specific initiatives that have more extensive or detailed reporting requirements than those established in the UN Guiding Principles, and which they would not wish to see diluted.[5] This project takes the UN Guiding Principles as its basis, since they constitute the authoritative global reference point for all companies in all situations. It will nevertheless be important for consultations to examine the extent to which the learning from more narrowly-focused initiatives can add value to the public, global standards proposed under this project.

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[5] For example, the principles, guidelines and framework produced by the Global Network Initiative to protect and advance freedom of expression and privacy in the ICT sector (available online at: www.globalnetworkinitaitive.org) or additionally, the OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (available online at: www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf).

The project team will seek to engage with these initiatives directly, and looks forward to including this question in the general consultations.

5. It should be made clearer that the frameworks will be non-binding

The use of the term 'standards' in the discussion paper was understood by many to mean something legally-binding. However, the project cannot and is not intended to produce anything binding – rather, it is responding to market drivers for reporting and verification that come from other organisations, including regulators, stock exchanges, investors and others.

The term 'framework' may better describe the kind of widely-accepted reference point for good practice that is envisaged, and therefore the project will henceforth refer more generally to human rights reporting and assurance frameworks, rather than standards. In addition, the project team is focused on a broad and open, consultative process that could shape non-binding frameworks that would be both meaningful for stakeholders and viable for companies and assurance providers.

6. The development of the frameworks should be done through an inter-governmental process

It is true that global standards related to human rights have traditionally been developed through an inter-governmental process. They have also traditionally addressed states. Howevr, frameworks or standards in the areas of business, including reporting and assurance/auditing, typically emerged through other kinds of process. The Guiding Principles themselves have reflected a hybrid process, developed through multi-stakeholder consultation and then endorsed by governments.

An incremental, consultative approach is intended here toward the collaborative development of reporting and assurance frameworks that can carry broad support from different stakeholder groups. It is envisaged that the frameworks will then be 'owned' by independent bodies with appropriate governance structures and the ability to develop them further over time (see point 8 below).

7. It is unclear who will own the frameworks once they have been developed

The objective is that these reporting and assurance frameworks be public and available to all. It is important therefore to discuss who will 'own' and oversee them and how their credibility will be maintained over time.

Once the frameworks are completed, it is envisaged that they should be owned and overseen by one or more independent global standards bodies – whether existing bodies or new bodies established for this purpose. Such bodies would have

responsibility for providing appropriate governance and determining any future evolution in the frameworks to reflect learning from their application. Options for future governance of the frameworks will be included in the project's consultation processes.

8. There is a need to highlight certain specific human rights that may be overlooked

Some submissions pointed to the importance of placing a focus on specific human rights issues that they deemed to be particularly important, such as those related to labor, health, the environment and disability. The reporting and assurance frameworks will follow the logic of the UN Guiding Principles in that a company's policy commitment and due diligence processes should encompass all internationally-recognized human rights. The identification of the company's salient human rights risks (i.e., those most at risk from its activities and through its business relationships) will then help inform the tailoring of a company's human rights risk management process.

In turn, it may be that it is most useful and meaningful for a company's reporting to focus on those salient areas of risk to human rights. For many companies, those are likely to include one or more of the categories of rights highlighted in submissions. This question of whether to focus reporting on a company's salient human rights risks will be a key issue for consultation with stakeholders.

9. It is unclear what it means for this project to be supported by the UN Working Group

The UN Working Group on Business and Human Rights has provided the following language to further clarify what this support means: "The Working Group expresses its firm support for the 'Reporting and Assurance Frameworks Initiative' and is engaging with this project as part of its mandate to promote implementation of the Guiding Principles and as part of its strategy to collaborate with stakeholders to provide further clarification on the application of the Guiding Principles.[6] The Working Group considers its participation in the Eminent Persons Group for the project as a positive step in furthering the implementation of the Guiding Principles by supporting the development of tools for companies to verify whether their processes are aligned with the Guiding Principles, and for auditors to review and verify company practices. The project was discussed during the Working Group's 5th session in Geneva in June 2013 during which the Working Group emphasised and was assured that any products resulting from the project would be free and non-proprietary, and that the development process should be transparent and engage all relevant stakeholders. The Working Group will review the

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[6] While the Working Group may choose to solicit, support or recognise external initiatives that are aligned with its mandate, this does not grant such initiatives status as official United Nations initiatives, nor does it imply an endorsement of the outcome, which the Working Group will decide independently. The Working Group is an independent expert body.

findings of the project as appropriate. The Working Group understands that the resulting standards, including the qualification of assurance providers, will be overseen by an appropriate, independent governing body, whether existing or founded for this purpose."

B.   COMMENTS MADE ON THE REPORTING FRAMEWORK

The following section describes the comments made in relation to the proposed reporting framework. It does not attempt to capture every comment made to date, but to reflect those themes that were repeated by more than one commentator. Over time, more issues will be added to this section, as they arise.

1.   The name of the Human Rights Statement/Report is not clear

A couple of submissions reflect that the use of the term 'Human Rights Statement' in the discussion paper is confusing, leading some to equate it with a company's human rights policy (or 'statement of policy' in the terms of the Guiding Principles).

The term 'Human Rights Statement' was initially chosen in order to emphasize that companies can include this type of disclosure in an annual report, in conjunction with its financial statement. However, it is clear that this term is leading to confusion, and therefore the project team proposes to replace it with 'Human Rights Report.'

2.   The independent or integrated status of the Human Rights Report is not clear

Some submissions raise questions about whether the project envisages a company issuing a self-standing report on its human rights performance, or whether it could or should be part of a broader sustainability or annual report.

The discussion paper notes that a Human Rights Report could be self-standing, part of a broader Sustainability Report or part of a company's Annual Report, and that it could contribute to, and become part of, a company's integrated report. Many, but not all, submissions highlight a preference that this not be a stand-alone report. The project team proposes that this issue be taken up in consultations.

3.   There are inherent problems in the idea of certifying companies' human rights performance

This project does not aim to develop standards for certifying that a company has fully implemented the UN Guiding Principles. Implementation is challenging and takes considerable time. Indeed, given changing operating contexts and business relationships, it is an on-going process for any large company. The project recognizes

this reality and aims therefore to develop frameworks for (a) companies to report on where they are in the journey of implementing the Guiding Principles; and (b) assurance providers to assure whether such reports are a fair representation of companies' progress in this regard.

4. The scope of the reporting standard should include all parts of a company's operations/allow more focused reporting on certain areas of a business

Many submissions raise concerns about companies choosing to report on parts of the business where they have successes, while ignoring those where they have more challenges. At the same time, other comments underline legal and resource challenges in trying to report across an entire corporation, including subsidiaries. Some suggest that a reporting focus on certain areas of the business may be essential in terms of feasibility, and could be acceptable if based on clear criteria. In particular, companies could use the reporting framework to report on their highest risk geographies, activities and business relationships; or be asked to make very clear its reasons for limiting the scope of the report.

It is clear that this project will need to find the right balance between ensuring that reporting is meaningful for readers (not least, providing a fair and representative picture of real human rights performance) and viable for companies. The project team proposes that this should be a key area for further consultations.

5. The reporting standard should avoid (a) companies 'cherry-picking' what they report; (b) inflexible assumptions about what is relevant for different companies to report.

Some submissions highlight the need for the reporting standards to avoid inflexible and false assumptions about what it is most important for companies in different sectors to report. The discussion paper noted that one of the issues the project aims to address is the tendency for many company reports to showcase social investment or philanthropic projects. While some submissions note that many companies already go well beyond such reporting, others highlight that regulators have increasingly expressed dissatisfaction with the non-financial information disclosed in annual reports.

It is clear that the project will need to grapple with the question of how reporting standards can ensure a focus on the most relevant and important information regarding a company's implementation of the UN Guiding Principles, without ignoring important differences between sectors, companies and contexts.

6. A Human Rights Report should not include information on philanthropic or social investment projects

The discussion paper suggested that a company may wish to include two types of additional information in a Human Rights Report, beyond that which is required. First, it may wish to include information that provides further public evidence of its efforts to meet its responsibility to respect human rights. Second, it may wish to include information on its philanthropic or social investment projects that are not related to the mitigation of human rights risks or impacts.

The clear view from submissions received is that a Human Rights Report should be focused and not include information on projects that are unrelated to the management and mitigation of human rights risks or impacts, or community engagement outcomes. The concern is that this would dilute the report's content, cause confusion and make it less useful. The project team is mindful of this view and will ensure that the project addresses it.

7. The reporting standard should include reporting on a company's salient human rights risks, appropriately defined

Many submissions agree that it will be important for a Human Rights Report to identify those human rights risks that the company has assessed as 'salient'. ('Salient human rights risks' indicates those human rights that stand out as being most at risk in relation to the company's operations, with the focus on the risk to individuals). Some commentators note a need for the reporting standard to define, or provide criteria for, 'salience' in order to avoid arbitrary judgments. This will be an important issue for the project to consider in the context of consultations.

8. It is unclear what place the concept of materiality should have in the reporting standard

Some submissions raise the concept of 'materiality' in relation to the reporting standard. This is in many regards reflected in the concept of 'salient risks', whereby those human rights most at risk from the company's operations are treated as material for reporting purposes. Some submissions indicate that any decision to limit reporting to certain parts of a business might be based on 'materiality' understood as those parts of the business with the greatest human rights risks. A recurring concern is that these concepts should be underpinned by criteria or further explanation to avoid arbitrary judgments.

The use of the term 'materiality' in the context of the reporting standard, its definition and usage will be an important issue for consultations.

9. Reporting on actual impacts and how they are addressed should have a greater focus/have a limited place in the reporting standard

Most submissions address the issue of the balance between reporting on impacts and reporting on policies and processes. The discussion paper proposes that, based on the Guiding Principles, the reporting standard would focus on the reporting of a company's policies and processes for addressing potential negative human rights impacts (i.e., human rights risks), while including also a need to report on its remediation processes for actual impacts. It suggests that companies *may* also report on how specific impacts are addressed.

Many commentators have felt strongly that reporting on actual impacts and how they are addressed should be a necessary part of a reporting standard – some suggesting that reports should offer a full account of impacts, others that it might be more limited. One concern is that without this specific information, reports may ignore the outcomes of a company's policies and processes, and therefore be too generic and meaningless. At the same time, a number of submissions indicate practical and legal limitations on the extent to which actual impacts can or should be reported by companies.

The project team included this issue in the discussion paper in recognition that it would be one of the toughest issues for developing standards that can be both meaningful and viable. This will be a central issue for continuing consultation, fully acknowledging the arguments on all sides.

C.   COMMENTS MADE ON THE ASSURANCE FRAMEWORK

The following section describes the comments made in relation to the proposed assurance framework. It does not attempt to capture every comment made to date, but to reflect those themes that were repeated by more than one commentator. Over time, more issues will be added to this section, as they arise.

1.   Parallels with the assurance of financial reporting and sustainability reporting should be handled with care

A number of submissions take exception to the statement in the Discussion Paper that "[t]he assurance review would be analogous to a financial auditor's assurance with respect to the effectiveness of the internal control systems that underlie a company's financial reporting." Many commentators underline the very different natures of financial and non-financial reporting, with the latter being far more qualitative and therefore requiring different and additional methods for the gathering and analysis of information. A number of submissions point to the closer analogy in this regard with other areas of sustainability assurance. Some express a concern that sustainability assurance is too variable in quality and see an opportunity for this project to address some of those concerns. One submission suggested that assurance in a field such as human rights would be too subjective and uncertain to be viable at all.

The discussion paper used the analogy with financial auditing as a means to distinguish between auditing of financial accounts and auditing of the internal controls (i.e. key processes) that should ensure financial risks are appropriately managed. Accordingly, the Discussion Paper proposes that the human rights assurance process focus on the company's internal controls for managing human rights risks.

The project team recognizes the limitations of this analogy and the very different nature of much of the data entailed in assuring human rights or other non-financial performance. It is clear that the ISAE3000 and AA1000AS auditing/assurance standards are important reference points for this project.

The project team also recognises the challenge of providing assurance where data is often necessarily qualitative and needs to be sought from, or checked with, many individuals outside the company itself. It is proposed that this set of issues be a subject for further discussion through the consultation process.

2. It is unclear how the assurance process would equate with or differ from social audits (factory/farm labour rights audits)

Some submissions raised parallels with 'social audits' at a factory or farm, often conducted by, or on behalf of, a buying company. These audits usually take one or two days, at most a few days, and are limited in the extent to which they are able to look at policies, processes and systems, let alone seek evidence of their effectiveness in practice.

The discussion paper envisages an assurance process focused on assuring whether a company's report on its alignment with the UN Guiding Principles is a fair representation of its progress on the journey of implementation, in accordance with the reporting standard. The proposed assurance process would focus on internal controls and risk management processes and their effectiveness in achieving respect for human rights in practice.

3. It is unclear how the assurance process would equate with or differ from certification processes

A number of submissions refer to 'certification' with regard to the assurance process. The project does not envisage that the assurance process itself would lead to a 'certification.' It envisages assuring a company's report on its alignment with the UN Guiding Principles. The assurance process would therefore not look at whether the company has perfectly implemented the Guiding Principles, but whether its public report is a fair representation of where it stands on its journey towards implementation.

4. The assurance standard should/should not be limited to providing 'reasonable assurance' as against 'limited assurance'

The discussion paper proposed that the assurance standard should require 'reasonable assurance' of a company's report – a higher standard of assurance than the 'limited assurance' that is typical in current sustainability reporting.

While some submissions have supported this approach, many have raised concerns given the qualitative and somewhat subjective nature of relevant data for assuring human rights performance. A number of submissions have commented that human rights assurance at a level of 'reasonable assurance' would be difficult, if not impossible, given the level of certainty an assurance provider would be required to reach. One submission has suggested a new, tailored level of assurance might be defined for this field to fit the needs.

The project team recognizes that this is a very complex issue in practice and that while reasonable assurance may be preferable in principle, it may not be – or not always be – workable in practice. This is one of many areas where piloting of the envisaged standards at a later stage in the project will provide important learning. In the meantime, it is proposed that this be an issue for further consultation to understand fully the opportunities and limitations.

5. The competence, independence and professionalism of assurance providers will be essential to meaningful assurance in this field

Almost all submissions raise the issue of the competence, independence and/or professionalism of assurance providers. Some raise concerns that the field of sustainability assurance shows too much variability in standards of practice, and see an opportunity for this project to reduce that. Many underline the importance of thorough expertise in the relevant sector, context and human rights. A number of comments highlight that the human rights focus will require assurance providers to enhance their knowledge and skills, and/or to work with others who have specific expertise. A number note the importance of training and certification for assurance providers to ensure appropriate knowledge of human rights.

The discussion paper echoes many of these challenges. It raises both the issue of general professional competence regarding the assurance process and specific competence in the field of human rights, as well as the sector and jurisdiction(s) involved. It is clear that the assurance standard will need to address these questions in detail to meet the concerns raised.

6. Certification of assurance providers

The project does not propose certification of assurance providers, but a standard for their conduct in providing assurance in this field. This might then be used by a standards body to oversee the practice of assurance and/or accredit assurance providers. It would likely also mean that professional firms that provide assurance in

this field have to submit for review their expertise and methodology to their local regulator. These potential developments can be further discussed in consultations.

7. Materiality

Some submissions address the various types of materiality raised in the discussion paper in relation to the proposed assurance standard: Scoping Materiality, Material Weakness and Material Omission or Misstatement. A number of questions and suggestions are made in this regard. The project team will collate these and other comments on materiality in the assurance process as they are submitted, for further consultation.

8. Evidence for assurance must include evidence from external third parties, including affected stakeholders

A number of submissions welcome, or echo, the emphasis placed in the discussion paper on the need for any assurance provider not to rely on company documents and internal interviews alone, but to triangulate information with third parties, including affected stakeholders, to understand their perspective and identify gaps. Some commentators suggest that the standard should make clear the extent of external engagement needed and how it should be planned and conducted.

The project team recognizes the need to build more clarity in this regard through the consultation process.

D. CONCLUSION

This document has sought to summarize some of the key themes emerging from comments on the Discussion Paper, provide some clarifications and initial responses, and highlight key areas for on-going discussion. It is not an exhaustive list of all comments received, in particular of those many comments that were in agreement with the content of the Discussion Paper.

The project team is extremely grateful to all stakeholders who have taken the time to provide comments, feedback and information on human rights reporting and assurance; and looks forward to engaging further with a wide range of individuals and organizations. The Framing Document dated October 2013 describes further the proposed process for advancing broad and open consultation and collaboration as the project enters its substantive phase.[7] Please feel free to contact Anna Triponel at Shift (anna.triponel@shiftproject.org) or Bahtiar Manurung at Mazars (bahtiar@mazars.co.id) with further comments and suggestions for consultation and engagement on this project moving forward.

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[7] http://business-humanrights.org/media/documents/rafi-framing-document-2013.pdf.