



Draft IPIECA comments on second draft of CHRB methodology

February 2016

IPIECA would like to thank the Corporate Human Rights Benchmark (CHRB) for the invitation to comment on the second iteration of the initiative's methodology.

We share the CHRB's objective of driving better corporate human rights performance and recognize that considerable work has been undertaken to adapt the benchmark methodology in the light of previous consultation. We commend the co-designers on the efforts made to engage in a constructive spirit with industry and other interested parties. The February draft testifies to the CHRB's efforts to make substantive changes in response to dialogue and many of the improvements which have been made are welcome. Nevertheless, some concerns remain as regards to the relationship between the benchmark's methodology for assessment and the expectations set out in the UNGPs. We have industry concerns relating to a number of particular issues, laid out in further detail below:

- Design
- Reporting and scoring process
- 5% threshold for JV participation regarding serious allegations
- Serious allegations
 - o Source material
 - o Confidentiality
 - o Leverage
- Indicators

Design

The framework paper explains the CHRB, "will utilise the UN Guiding Principles on Business and Human Rights as a foundation, and will complement these with additional human rights sector or issue principles and guidance." While we appreciate efforts to improve alignment with the UNGPs in the second draft of the methodology, based on the simplistic 1-2 scoring scale categorization of indicators, it remains unclear how the benchmark's current design incorporates the UNGPs, whether as a baseline/minimum expectation or as a positive level of achievement.

We suggest that an appropriate design would explicitly map to the UNGPs throughout and allow a company that demonstrates alignment to the UNGPs to be scored positively against the benchmark's criteria, e.g. receives a "good." If a company goes above and beyond the prescriptions of the UNGPs, that should be communicated as "better than good", e.g. the company receives an "excellent." To do otherwise would de facto penalize companies for not doing more than what the UNGPs set out.

While the conceptual framework is clearer in the February draft, some indicators include stretching criteria for score 2 which push the limits of what the UNGPs expect in terms of company commitment and human rights performance. Score 2 thresholds in some places may be considered to push companies beyond what could reasonably be said to be the UNGPs' expectations.

We refer you to commentary under the 2nd foundational principle for business in the UNGPs (emphasis added):

“An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. *These are the benchmarks against which other social actors assess the human rights impacts of business enterprises.*”

Reporting and scoring process

The Framework paper says the CHRB, “will use information in the public domain to benchmark companies... [t]he Benchmark will request companies to submit information into a public portal but will also use a wide range of information in the public domain from and about companies.”

However, many of the KPIs are somewhat or highly subjective (e.g. A.1.7. Commitment to remedy; B.1.1. Responsibility and resources for day-to-day human rights function), so there is room for varying interpretations of achievement by the scoring body versus what a company represents through reporting.

Additionally, some information may not be available to the scoring body unless disclosed by the company (e.g. B.1.7. Engaging business relationships - “Score 2: The Company also describes how the human rights performance of business relationships interacts with decisions to renew, expand or terminate business relationships.”), but the scoring methodology doesn’t allow for an accounting of missing information, so companies stand to be unfairly penalized for non- or partial disclosure.

5% threshold for JV participation

We understand that the 5% threshold proposed by the CHRB now cuts across all sectors involved in the Benchmark. However, we are of the view that this low threshold may not be realistic at this time. It presupposes that such a minority interest holder always has leverage over the JV regarding human rights performance. Further, setting this threshold appears to go beyond the parameter of the “Leverage” concept in the UNGPs.

In our estimation, it’s also currently unrealistic to expect that extractive companies would provide significant public disclosure of human rights performance for joint ventures where they have neither a controlling interest nor an operating role, so the mainstreaming of a 5% equity threshold for consideration of joint ventures throughout the assessment themes is challenging. The methodology should state explicitly what the rationale is for benchmarking companies’ disclosures relating to the human rights policies and performance of entities in which they may have a very small stake (5% equity interest) and over which it may have very little influence. This low threshold also presents significant methodological complications, in relation to the assessment of company responses to “serious allegations” (see also below).

Serious allegations

We have concerns around the “Level 2” classification of Allegations which do not require very specific detail and concrete thresholds to qualify as an Allegation (compared with the Level 1 classification of Allegations). It is unclear from the current draft how a Level 2 allegation – if it is to pass the severity test for consideration as a serious allegation – could be “less severe”.

We are of the view that under all circumstances, allegations that would be referenced in this Benchmark should be reasonably substantiated, detailed, concrete and factual; otherwise there will still be some leeway for general, unsubstantiated and possibly unfounded allegations against Companies, hence a subjective assessment.

The text as it stands suggests internal inconsistency in the methodology for identifying severe adverse impacts: if it is the intention that Level 2 allegations will be subject to a secondary determination as to their severity relative to Level 1 allegations, the methodology should set out the criteria by reference to which that secondary determination is to be made.

Source material

Greater clarity and rigour in the identification of “serious allegations” – ensuring that serious allegations are drawn from serious sources, in short – would help build confidence in benchmarked companies. There is a lack of methodological detail in this section which makes it difficult to assess the degree to which the CHRB has managed to balance the need to access a wide range of source material to capture allegations at a global scale with the imperative of constructing a credible and fair process for vetting allegations. The treatment of social media material remains a particular concern, and more detail would be welcome on this particular point.

Confidentiality

The methodology at E1.1 now recognizes that, under two sets of specific circumstances (on-going judicial processes and if it could have an adverse impact on affected people), detailed public disclosure of a response should not be required for a score of 2. This is a welcome recognition of the importance of confidentiality in these circumstances. Further clarification would be welcome, however, on how benchmark researchers will score this section in broader circumstances where confidentiality considerations may affect detailed public disclosure. For example, where a relevant regulator is considering whether to instigate judicial proceedings but has not yet decided whether to do so or where disclosure of detailed information may breach contractual obligations to affected people or commercial partners (the latter of which may fundamentally undermine the ability of the company being assessed to use its leverage to address the substance of the allegation).

It is also unclear whether or not protections for non-disclosure of details relating to an allegation in the circumstances identified in E.1.1. will also be extended to Level 2 allegations and indicator E.2.1.

Leverage

We also have concerns relating to the treatment of leverage in the “serious allegations” section, which currently fails to specify how differential levels of leverage are reflected in the scoring schema to be applied to company responses. The new scoring schema correctly identifies leverage as a crucial concept in determining, from the company’s perspective, what an appropriate response to a given adverse impact ought to be. Indeed, the range of possible responses to any given alleged impact is likely to be constrained by the availability of leverage over business partners. This is an issue of particular importance in the oil and gas industry where – as distinct from the apparel, food, beverage and agriculture industries – partners are often State-owned entities.

This section would benefit from greater clarity on how the benchmark’s expectations as regards company’s responses to an allegation to which it is tied by a commercial relationship are related in concrete terms to determinations of that company’s leverage within that relationship. The methodology currently provides no guidance as to how the benchmark will determine if a company’s response merits a score 1 or 2 in light of its leverage – proven or supposed. The scope for subjective judgments on the part of benchmark researchers appears, in this aspect of the assessment methodology, to be considerable.

INDICATORS

D. PERFORMANCE: COMPANY HUMAN RIGHTS PRACTICES. EX D.1.1. Living wage in the company’s own operations, AP D.2.1 Living wage (in the supply chain), AG D.3.1 Living wage: These indicators seem to go beyond established definitions of human rights. By what definition do the authors justify their inclusion?