Check Against Delivery

Remarks at OECD Investment Committee
Professor John G. Ruggie
Special Representative of the UN Secretary-General
for Business and Human Rights
Paris, 4 October 2010

I am very pleased and honored to be here with you this afternoon. I have read the Chair's proposals for updating the Guidelines carefully, and congratulate you on the progress you have already achieved in a relatively short period of time. And of course I'd like to encourage you to continue in the same vein, and at the same pace, as you bring the update to a successful conclusion.

I have the greatest respect for the fact that the Guidelines were already out there in 1976; that their standards and procedures were revised in 2000; and that you are now aligning them to reflect the past decade's evolution of business models, business needs and practices, and international standards. The relationship between my UN mandate and the OECD in this last phase has been a close one. I am particularly heartened that my work under the auspices of the UN Human Rights Council has been useful to you in relation to the addition of a human rights chapter, your proposals for responsible supply chain conduct, and your plans for procedural improvements.

Let me quickly bring you up to date on my mandate and then, if I may, offer a few remarks about the GLs update.

My mandate was created in 2005 by the then UN Commission on Human Rights, following the failure of a prior effort by a subsidiary body to draft an instrument called the Norms on Transnational Corporations and Other Business Enterprises. Essentially, this had sought to impose on companies, directly under international law, the same range of human rights duties that states have accepted for themselves under treaties they have ratified. The proposal collapsed when the Commission declined to act on it. Instead, the Secretary-General at the time, Kofi Annan, was asked to appoint a Special Representative to start afresh.

My strategic objectives are two-fold. The first is to reduce the incidence of corporate-related human rights harm to the maximum extent and in the shortest period of time possible. This means that I did not begin with some idealized design of the perfect global regulatory system. I started with the lay of the land and have sought to identify ways to improve significantly current performance by states and companies alike. This led me to conduct extensive research and to convene wide-ranging and inclusive consultations—more than forty to date, across five continents, since I began in 2005. I have listened carefully and drawn extensively on views and experiences that all stakeholders have shared with me.

My second objective is to help level the playing field. Although the number of public and private initiatives in business and human rights has increased rapidly in recent years, they have not acquired sufficient scale to reach a tipping point, to truly shift markets. One major reason has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge—be they states, businesses, affected individuals and communities, or civil society at large.

Therefore, when I was requested to make recommendations to the Human Rights Council in 2008, I made only one: that it endorse what I called a conceptual and policy framework—the Protect, Respect and Remedy framework. In itself, this would hardly resolve all outstanding business and human rights challenges. But it was my hope that it would provide a common foundation from which thinking and action by all stakeholders would generate cumulative progress over time. The Human Rights Council was unanimous in welcoming the framework, and extended my mandate another three years with the task of "operationalizing" and "promoting" it.

The framework rests on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act

with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, judicial and non-judicial.

The framework's normative contribution is not in the creation of new legal obligations but in elaborating the implications of existing standards and practices for states and businesses; integrating them into a single and coherent template; and helping us to identify where current understandings of state duties and corporate responsibilities fall short and how they should be improved.

Following a round of stakeholder consultations this month, I will prepare the concrete guidance that the Human Rights Council has requested on the framework's implementation— a set of "Guiding Principles for the implementation of the Protect, Respect and Remedy framework." This will be posted on the Internet for comments and then finalized early next year. I am also preparing an options paper for the Council on how it might most effectively follow up on my mandate when it ends in June 2011.

I understand that you have had some discussion about the phasing of our respective efforts. Should you delay your work until mine is finalized? There is no need to do so. No principle is contemplated in the Guidelines update that is not already encompassed by the 2008 Protect, Respect and Remedy framework. Some of your commentary will be more detailed than mine because you are dealing with an instrument that is adhered to by 42 states and which addresses the responsibilities of transnational corporations, whereas my mandate includes the duties of all states and the responsibilities of all types of business enterprises.

In short, there is no need for you wait until the conclusion of my mandate for you to conclude yours.

Let me quickly enumerate some additional key points to which we may want to return in discussion.

1. My mandate requires me to address a broad range of state regulatory action, including judicial measures. Yours more narrowly concerns governments providing policy guidance to companies. Nevertheless, it would be highly desirable if the updated Guidelines could remind states that they are the primary human rights duty bearers under international law—that corporate responsibility is not a substitute for effective state policies, regulation and adjudication.

2. My view of due diligence is somewhat less discretionary than yours. The commentary in the Chair's proposal "encourages" companies, and indicates steps that "may" be included. I would not want to be overly prescriptive of detailed steps either. But my view of the principle is robust. If a company does not know, and cannot show, that it respects human rights, then the claim that it respects rights is just that—a claim, not a fact. And making a claim that is not supported by facts can have bad consequences for the company and for stakeholders who rely on it being true. It is impossible for a company to know and show that it respects rights unless it has processes in place to assess and address the human rights risks of its activities and relationships. This isn't a matter of law, but of logic. Of course, the scale and complexity of these processes will vary with the size of companies and the circumstances of their operations.

3. Heightened due diligence is required in weak governance zones, in areas affected by conflict, and where the human rights of vulnerable groups may be at particular risk. In such contexts, there is a need for companies' to be aware of the implications of humanitarian law and standards for particular "at risk" groups. I welcome the efforts made in the proposed update of the Guidelines in these directions.

4. Company-level grievance mechanisms are mentioned in the commentary, but their importance to the responsibility to respect would suggest that they need to be recognized in the Guidelines themselves.

For aggrieved individuals and communities, such mechanisms are essential to providing the possibility of early response and remedy for any harm they have suffered, avoiding the delays that so often make remediation that much harder.

For companies, grievance mechanisms perform two key functions. First, they serve as early warning systems, providing companies with ongoing information about their current or potential human rights impacts from those impacted. By analyzing trends and patterns in complaints, companies can identify systemic problems and adapt their practices accordingly. Second, by making it possible at least for some grievances to be addressed directly, they may prevent their escalation into campaigns and law suits.

And for the OECD as a whole, having effective and legitimate grievance mechanisms at the company level adds the likely bonus of reducing the burden on National Contact Points.

So if ever there was a win-win-win solution—for victims, companies and NCPs—company-level grievance mechanisms are it.

Needless to say, such grievance mechanisms must not undermine legitimate trade unions and effective social dialogue mechanisms, nor impede access to other means of achieving remedy.

5. I have two comments on supply chains. First, it is worth including a reminder in the Guidelines that suppliers have the same responsibility to respect human rights as any other business enterprise. Second, in a buyer-supplier relationship it is important to be clear that the corporate responsibility to respect human rights applies irrespective of whether or not a buyer has leverage over a supplier. The responsibility to respect is determined by whether an enterprise causes or contributes to

human rights harm through its own activities or through its relationships with other parties, including suppliers. Leverage comes into play after the fact of adverse impacts is established, to determine how the buyer is able to respond. A buyer cannot exercise leverage it does not have; therefore it should find other ways to meet its responsibility to respect.

6. On procedural issues, I welcome the reference in the Chair's proposals to the criteria that non-judicial grievance mechanisms should meet to ensure their effectiveness and credibility—and this of course includes the NCPs. Permit me to add two thoughts.

   First, governments can do much more to assist one another and business enterprises through information sharing and jointly addressing real dilemma situations, such as business operations in weak governance and conflict zones. Good practices and bad experiences both should inform future conduct. The NCP mechanism would increase its utility to all stakeholders considerably by becoming a more dynamic and inter-linked learning network.

   Second, there is an oblique reference in the Chair's proposals to government follow-up to NCP negative findings. Allow me to be a little less circumspect about this key issue. As matters now stand, even where an NCP finds an egregious violation, under many current arrangements the company remains eligible to receive various forms of public advantage (such as export credit and investment insurance), without any conditions being imposed on it. Ignoring such breaches entirely may well contravene states' own obligation to encourage companies to comply with the Guidelines. And by implicitly rewarding companies that do the wrong thing it disadvantages those that play by the rules.

   Official consequences of NCP's negative findings need not be punitive. Depending on the case at hand, they could involve

the government assisting the company in developing appropriate policies and practices. But for egregious violations, or for those who refuse to collaborate with the government, surely the option of denial of public advantages must be kept on the table.

Let me stop here for now. Thank you again for your excellent work, and for the opportunity to share these thoughts with you today. I look forward to our discussion.

John G. Ruggie is the Berthold Beitz Professor in Human Rights and International Affairs at Harvard University's Kennedy School of Government and Affiliated Professor in International Legal Studies at Harvard Law School. He also serves as Special Representative of the United Nations Secretary-General for Business & Human Rights. From 1997-2001 he was UN Assistant Secretary-General for Strategic Planning, advising Secretary-General Kofi Annan on efforts at institutional renewal for which Annan and the United Nations were jointly awarded the Nobel Peace Prize in2001. Among other achievements, he was the co-architect of the UN Global Compact and he initiated the UN Millennium Development Goals.