



Responsible Minerals Sector Initiative

Summary of the Dialogue Session

Business and Human Rights Beyond Ruggie

January 31, 2011

Beedie School of Business

Simon Fraser University, Vancouver, BC, Canada

*Comments on the draft Guiding Principles for the United Nations “Protect, Respect and Remedy”
Framework.*

*Submitted to the Special Representative of the United Nations Secretary General for Business and
Human Rights – John Ruggie*

FINAL REPORT

The following comments represent views expressed during the discussion by one or more of the participants. Some of the comments are compilations of statements by several participants, and others represent the views of a single participant. The views contained in the comments were not necessarily shared by all participants. No effort was made to develop a consensus of all those present, and some of the comments may appear to be at variance with others.

The comments do not represent the views of Simon Fraser University or the Segal Graduate School of Business.



Introduction

On January 27, 2011, the Responsible Mineral Sector Initiative of the Segal Graduate School of Business, Simon Fraser University, in Vancouver, British Columbia, hosted a multi-perspective dialogue on the draft “Guiding Principles for the Implementation of the U.N. ‘Protect, Respect and Remedy’ Framework”, the Report of the Special Representative of the Secretary General (SRSG, John Ruggie) on the issue of human rights and transnational corporations and other business enterprises.

The thirty seven people who participated in the two-hour discussion were based in:

- Universities (16)
- Mining Companies (8)
- Consultancies and law firms (7)
- Socially Responsible Investment Organizations (4)
- Human Rights Advocacy Organization (1)
- Export Credit Agency (1)

The discussion leaders were:

- Chair and author of summary report: Jim Cooney, Senior Associate, Canadian Business for Social Responsibility
- Simon Handelsman, Pacific Region Coordinator, Canadian Business Ethics Research Network
- Susan Joyce, Sociologist, On Common Ground Consultants
- Stephanie Bertels, Assistant Professor, Faculty of Business Administration, Simon Fraser University
- Fiona Koza, Business and Human Rights Campaigner, Amnesty International Canada
- Joseph Ringwald, Vice President, Mining, Selwyn Resources.

The sectoral reference point of the discussion was the mining industry. The participants did not systematically comment on every section of the Report, or on each of the Guiding Principles, but stated their priority concerns regarding corporate responsibilities for human rights, generally with reference to the Report.

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The sub-points connect the comments to relevant words and phrases in the Report and the Guiding Principles. The suggestions in some sub-points were stated explicitly by participants. Others were implied in the comments, and have been extrapolated. The sub-points are intended as suggestions for consideration, not as formal recommendations.

Comments that imply changes to the Report and the Guiding Principles

Prior to the publication of the draft Guiding Principles, the “Protect, Respect, Remedy” Policy Framework had already proven useful in providing guidance in a path-finding human rights assessment of a controversial mine. The Framework provided confirmation that the scope of rights that a business enterprise must respect is all rights. This is important as the assessment confirmed the inter-relationship of many rights, such that one subset of rights cannot be adequately assessed outside the context of all rights. The assessment also confirmed the importance of a periodic review of all rights, as noted in the commentary to Guiding Principle 16.

- *In the introduction to the Report, include a statement of the importance of addressing human rights issues comprehensively, and of assessing and responding to issues related to specific rights within the context of all rights.*
- *In the commentary to Guiding Principle 12, state explicitly that corporate responsibility to respect is not limited to the “minimum” contained in the International Bill of Human Rights and the eight ILO core conventions, but extends to rights contained in the U.N. Declaration on the Rights of Indigenous Peoples, and the Conventions on the Elimination of All Forms of Racial Discrimination, on the Elimination of All Forms of Discrimination against Women, and on the Rights of the Child.*

The effectiveness of the Guiding Principles is constrained by their development within the context of the United Nations, given that the governments of some member nations are deficient in protecting the rights of their citizens and impede transnational corporations that operate within their jurisdictions from respecting the rights of their citizens. Those States can be expected to ignore the Guiding Principles with respect to the State duty to protect, thereby imposing additional public expectations, if not explicit responsibilities, on business enterprises. Some business enterprises operate in remote areas of weak States, where the duty to protect is ignored, and in their own self-interest are put in the position of becoming surrogate governments, using their own resources to protect the rights of local citizens.

- *In Guiding Principle 12, the commentary limits the scope of corporate responsibility to a business enterprise’s own activities and those of other state or non-state entities with which it has business relationships. However, the commentary adds that this limited scope of corporate responsibility does not preclude business enterprises from undertaking additional activities to support and promote human rights, which it describes as “desirable activities”. Business enterprises generally undertake human rights activities beyond the scope of their responsibility only because of corporate self interest, most often occasioned by inadequate government presence. It is questionable whether such activities are “desirable”. This implied invitation to business enterprises to become surrogate governments needs to be circumscribed with a cautionary statement. Such activities do not offset a government’s duty to protect human rights, and should be a matter of concern to all relevant actors. If a business enterprise must act to protect rights beyond the scope of its responsibility, then it should do so only in a collective strategy of all relevant actors (U.N. agencies, the World Bank, civil society organizations, and others).*

To motivate business enterprises to respect human rights at their operations abroad, States need to do more than to “encourage” such behaviour. States should “require” business enterprises to respect human rights when operating abroad, and subject business enterprises that abuse human rights abroad to some form of sanction in their home jurisdictions. Some States have instituted legal sanctions for corporate acts of bribery and corruption in foreign jurisdictions, which may serve as a model for legal approaches to compel corporate respect for human rights. However, there are softer sanctions than criminal law that States could consider. For example States could require that business enterprises perform human rights due diligence and that business enterprises regularly monitor and report on their human rights performance, particularly in certain high risk jurisdictions. Non-compliance with such a requirement might be a fine and publication of the names of non-compliant business enterprises.

- *In Guiding Principle 2, replace “encourage” with “require”. Elaborate on the range of possible specific requirements and the sanctions available for enforcement.*
- *In the commentary to Guiding principle 2, add that States should require business enterprises operating abroad to undertake human rights due diligence*

The Guiding Principles are intended to be applied globally, and are expressed at a high level of generality. They have value in clarifying the spectrum of actions that states and business enterprises must take to prevent, mitigate or remedy human rights abuses. However, more specific guidelines are needed with respect to industrial sectors, such as mining, and with respect to jurisdictional differences in human rights conditions. For example, in a jurisdiction where the ILO core conventions relating to Freedom of Association and Right to Organize and

Right to Collective Bargaining are not protected by the State, business enterprises that operate in that jurisdictions need specific guidance on how to respect those core conventions.

- *In Guiding Principle 13, add a sub-point stating that business enterprises in the same industry should work collaboratively to translate the Guiding Principles into industry specific guidelines. This work would in most cases be undertaken by industry associations, and should engage relevant representatives of civil society and other external experts.*
- *In Guiding Principle 13, add another sub-point stating that business enterprises operating in the same jurisdiction, particularly one with significant human rights challenges, should engage with appropriate state and non-state actors to interpret the Guiding Principles with reference to the political, legal, economic, social and cultural realities of that particular jurisdiction. The objective would be to provide specific guidelines to business enterprises on appropriate strategies and actions required to fulfill their responsibility to respect human rights in that jurisdiction.*

Business enterprises can only deal effectively with human rights issues if they communicate and if possible work collaboratively with all concerned parties in civil society, especially with human rights advocacy organizations. Only through constructive engagement between business enterprises and civil society can the perspectives, the knowledge and the resources of all concerned parties be integrated in a comprehensive effort to prevent, mitigate and remedy human rights abuses. The traditional role and responsibility of civil society is to focus public attention on human rights abuses and criticize corporate actions. However, civil society organizations can contribute much more than criticism to strengthening corporate respect for human rights, and Guiding Principles are needed for a spectrum of civil society responsibilities.

- *Add a new section in the report, a set of Guiding Principles that elaborates and clarifies civil society responsibilities (which includes non-governmental organizations, churches or faith-based institutions, and academic or research institutions). A section heading for this set of Guiding Principles might be “The Civil Society Role to Promote Human Rights”.*
- *In this section, elaborate on the role of civil society organizations, not only as advocates on behalf of communities whose rights are not protected by the State or not respected by business enterprises, but as contributors of skills and competencies to corporate efforts to prevent, mitigate and remedy human rights abuses. Include a Guiding Principle related to the appropriate rules of engagement between civil society organizations and business enterprises.*
- *Add a Guiding Principle in the section on the State duty to protect that requires the State to permit civil society organizations, whether domestic or international, to engage with business enterprises for the purpose of observing and reporting on corporate human rights performance and of working collaboratively to help ensure respect for human rights.*

- *In the introduction to the Report, paragraph 3, make explicit reference to civil society organizations as being included among the “relevant actors that can and must learn to do many things differently” and that require “operational and cultural changes” along with governments and business enterprises “to create more effective combinations of existing competencies as well as devising new ones”.*

Effective accountability mechanisms are needed to ensure compliance with the Guiding Principles, by States, business enterprises and civil society organizations. The commentary to Guiding Principle 7 prescribes “independent monitoring and accountability mechanisms” for business enterprises that provide services to the State to ensure their compliance with the corporate responsibility to respect human rights. Independent monitoring and verification of a corporate human rights performance is essential for the credibility of an accountability mechanism, and should be required of all business enterprises. There is also need for accountability mechanisms for civil society organizations that are involved in human rights issues. The relatively weak references to accountability in the commentaries to various Guiding Principles are inadequate. The Report needs to separately highlight the importance of robust accountability mechanisms.

- *In the introduction to the Report, state the importance of robust mechanisms to ensure the accountability of the State, business enterprises and civil society organizations for their actions towards ensuring that human rights are protected, respected and promoted.*
- *Add a Guiding Principle dealing with accountability mechanisms, with three sub-points related to the differentiated mechanisms required of States, business enterprises and civil society organizations.*

A criterion of proportionality needs to be defined and respected in assigning responsibility for human rights abuses. Human rights issues are politically complex and to some extent subjective. Conflicts over rights are rarely bilateral issues between a business enterprise and a community. Often human rights issues have a long history, in which many actors (governments, churches, police and military, business enterprises, and privileged elites) have shared responsibility for failures to protect or respect human rights. Experience has shown that it is very difficult to apportion responsibility for changes in the status of human rights in local communities once an industrial project has already been in operation for several years. Baseline studies of human rights conditions in advance of construction and operations are critically important for the credible application of any criterion of proportionality.

- *In the commentary to Guiding Principle 15, note that when a business enterprise becomes embroiled in a human rights issue, it does not always bear sole responsibility for that issue. In many cases, a number of actors, some in the past, incur some*

proportionate share of responsibility, and such issues need to be addressed and resolved by the collective action of many actors in a jurisdiction, and not only by the state and the business enterprise.

- *In the commentary to Guiding Principle 16, note the importance of the criterion of proportionality. Business enterprises should work with all relevant actors to develop a credible process for allocating proportionate responsibility for human rights issues and for developing effective strategies for collective approaches to addressing those issues.*
- *Add a sub-point to Guiding Principle 17 stating that responsibility for addressing certain impacts should be appropriately assigned to external actors (state or non-state) in accord with an agreed criterion of proportionality.*

Due diligence prior to construction and operations is critically important for a business enterprise to defend itself against later allegations that it has caused all human rights issues in the vicinity of its operations. Corporate best practice, as well as the requirement of many governments, is to complete environmental impact studies (EIA) and social impact studies (SIA) prior to receiving government permission for construction of an industrial project. The EIA and SIA often include extensive corporate engagement with affected communities. Undertaking a parallel human rights impact assessment (HRIA) is a new challenge for most business enterprises, and questions arise as to the possibility of integrating the HRIA with the SIA, at the very least as a matter of efficiency. The conceptual framework and terminology of the SIA and HRIA are quite distinct, but to a large extent they are simply different analytical approaches to the same information.

- *In the commentary to Guiding Principle 5, stipulate that States should expand the terms of reference that they prescribe for social impact assessments to include the terms of reference for human rights impact assessments.*
- *In the commentary to Guiding Principle 16, suggest that business enterprises should work with the State and other relevant actors to develop an efficient approach for completing the SIA and HRIA with minimal duplication of research and data collection.*

The legitimacy of allegations of corporate human rights abuses is an issue in some cases. Given that various state and non-state actors often have agendas for which issues of human rights can serve as tactical levers, business enterprises are sometimes subject to human rights allegations that have little or nothing to do with actual corporate performance. Business enterprises have difficulty in defending themselves against allegations that they know to be untrue because of public skepticism towards corporate statements. There is need for a credible and effective process for determining to what extent there is any factual substance to questionable allegations of corporate human rights abuses.

- *In the introduction to Report, discuss the issue of legitimacy and the need for a credible institutional mechanism to confirm whether or not there is substance to a human rights complaint against a business enterprise.*
- *In the proposed additional section on Civil Society Organizations, add a Guiding Principle related to accountability in the performance of human rights advocacy organizations when making allegations about corporate human rights abuses.*

Many business enterprises, particularly in the mining industry, have adopted sustainable development as the policy framework for corporate objectives and norms related to issues of health, safety, environment and community. When corporate human rights responsibilities are incorporated into a comprehensive policy framework, as business enterprises are inclined to do for the sake of policy coherence, the human rights concepts and objectives permeate the business enterprise, apply to all functional units and become a factor in operational plans and actions.

- *In the commentary to Guiding Principle 13, state the desirability of integrating corporate human rights commitments with corporate policies on Health, Safety, Environment and Community Policies, or more comprehensively as part of a corporate sustainable development framework.*

Given the role of the corporate Board in risk oversight and in setting strategy, it is essential that the Board take responsibility for human rights issues. This is an important aspect of mainstreaming human rights within companies. In many business enterprises, the level of human rights awareness and expertise among board members is deficient and needs to be improved.

- *In the commentary to Guiding principle 14, state the importance of Board involvement in ensuring that the business enterprise meets its human rights responsibilities. Note also the need to ensure that expertise related to human rights is represented on the Board.*

For business enterprises that trade on stock exchanges, a significant driver of corporate priorities and performance is the financial market. Currently, the human rights performance of a business enterprise has virtually no impact on its share price. The socially responsible investors who are concerned about corporate human rights performance represent a relatively small percentage of all investors and do not generally move share prices. The financial market could be made a more effective driver of corporate responsibility in respecting human rights if the materiality of actual or potential human rights issues were more clearly defined in the disclosure requirements of stock exchanges, and then only if those requirements are strictly enforced. Also, the incentive for business enterprises to respect human rights would probably

be greater if more investment institutions understood their fiduciary duty to include the responsibility to consider corporate human rights performance before investing in a business enterprise.

- *Add a sub-point to Guideline 5 that indicates the importance of appropriately regulated financial markets as a driver of corporate human rights performance.*
- *In the commentary to Guideline 5, suggest that States should review the concept of fiduciary duty in the context of corporate human rights responsibilities.*

In the business world, what cannot be measured does not get done. For business enterprises to comply with their human rights commitments, and effectively respond to human rights issues, well defined benchmarks of progress are needed. Without human rights benchmarks corporate performance cannot be measured, and incentives related to remuneration are infeasible. Corporate impacts on local communities related to environment, health, infrastructure, education and so forth can be quantitatively measured. Some form of quantitative measurement is equally needed for corporate impacts on human rights.

- *In the commentary to Guiding principle 5, add that States should provide or support the development of tools for measuring the effectiveness of corporate actions in dealing with human rights issues.*

Business enterprises must not erect barriers to remediation. This point seems obvious, but it is not stated explicitly in the Guiding Principles.

- *In Guiding Principle 27, add that business enterprises should in no case erect barriers to remediation or indirectly participate in impeding access to remediation.*

Operationalizing the Guiding Principles

The next challenge will be to operationalize the Guiding Principles. It is possible that a “Ruggie Brand” is being created, and that eventually business enterprises will seek independent certification that they are in full compliance with the Guiding Principles. In some sectors, such as mining, such a brand could provide a competitive advantage.

There is a risk that the growing focus on rights, which SRSB’s Report and the Guiding Principles reinforce, will make some challenging situations even more difficult for business enterprises and others to resolve. The work of the SRSB is a recasting in the language of rights many issues

that have hitherto been addressed within the context of sustainability and corporate social responsibility. This is undoubtedly a more forceful framing of the issues, for rights bespeak power, but it causes concern. Every conversation about “rights” inevitably evokes defensive and offensive postures. Corporate legal teams mount their defense; advocacy groups sense the potential for an offensive; political actors and governments align according to their particular circumstances, either to seize the opportunity, or diffuse and deflect the issue. When an aspiration or demand is expressed in terms of rights, it escalates the intensity of the debate. Mediation of disputes becomes problematic because the language of rights bristles at the language of trade-offs. Also, regulatory efforts and enforcement can get tangled up in challenges around rights. So the rights based approach to reconciling differences, whether related to entitlements or expectations, needs to be understood in the spectrum of possible approaches to achieving harmony and justice. We need to develop workable and credible approaches and practices to implement the Guiding Principles, so that rights will be turned into results, not frustrated by internal and external debates over words, with spill-over effects on the implementation of actions within the framework of corporate social responsibility and sustainability.

There is a fundamental misalignment between business enterprises and people who are impoverished and vulnerable. Corporate power overwhelms fragile communities, even when business enterprises have the best of intentions. The challenge is to strengthen the ability of the weak to operate on a level playing field with the strong. Only then can fair exchanges be made and equitable agreements reached. Rights endow the under-resourced with a trump card, which weakens the hand of business enterprises. But without supportive resources, both of finance and of expertise, even the rights card may not win the game against business enterprises. So operationalizing the Guiding Principles will require that adequate resources be placed in the hands of those who demand that business enterprises respect their rights.

It is highly problematic for the Guiding Principles to purport to assign universal human rights responsibilities to business enterprises when there is no universal standard of application for these international human rights standards, even among those States which have signed onto these standards. There are differences in interpretations, application, protections and remedies both among States and even within States (for example, within a federal system). In the United States, for example, many State governments have prohibited employment practices that discriminate in favour of minorities i.e. vulnerable populations. In the absence of clear definitions, should business enterprises on their own interpret what these standards mean? This is the proper role of the State.

The Guiding Principles need to be very cautious in countenancing the possibility of unilateral extra-territorial regulation, particularly as many of the human rights standards to be applied are not clearly defined legal obligations but clearly defined aspirations. The SRSB should clearly identify that the application of extra-territoriality of international human rights obligations should generally be decided in bi-lateral or multi-lateral forums. There may be a sub-category of States, where conflict is present or where the government ignores its duty to protect, where the unilateral imposition of extra-territorial regulations compelling business enterprises to respect rights in such States may be justifiable. However, there are no criteria for deciding such States. Moreover, such actions may spark reactions. For example, the U.S. disapproved of actions and the internal policies of the Cuban government in the 1960's and attempted to regulate the activities of Canadian subsidiaries of American companies to prevent them trading with Cuba. Canadian disapproval of this attempt to unilaterally assert U.S. law in Canadian jurisdictions resulted in Canada passing blocking legislation under the *Foreign Extraterritorial Measures Act* requiring Canadian subsidiaries of American companies to disregard instructions not to trade with Cuba.

The preamble to the Universal Declaration of Human Rights states that “every individual and every organ of society....shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.” If business enterprises are to be considered “organs of society”, the preamble asserts a responsibility that goes beyond the responsibility to respect. Is the “Protect, Respect, Remedy” Framework a step backward from the vision in the Universal Declaration?

The pre-eminent human rights concern of business enterprises is to understand their responsibilities when operating in oppressive states or in zones of conflict. This issue receives mention in the Report, but it should be a central focus. The Guiding Principles may provide adequate guidance for business enterprises operating in mid-tier states around the world, and even in impoverished but relatively stable states. They provide inadequate guidance for the more extreme circumstances that pose the greatest human rights challenges. The SRSB needs to be bolder and more assertive in this regard.

Considerable scope exists for joint international or regional agreements on detailed guidelines related to ensuring corporate respect for specific rights. One can cite the example of the Voluntary Principles on Security and Human Rights. Similar bilateral or multilateral initiatives

could be undertaken regarding other rights. The member nations of the OECD could amend the Guidelines for Multinational Enterprises by adding concrete guidance related to respecting certain specified human rights.

Conclusion

The Report and Guiding Principles are a definite step forward in providing detailed guidance to business enterprises that face complex and demanding human rights challenges. They provide a conceptual framework for relating human rights issues to appropriate responses, not only actions required of business enterprises but also actions required of governments. They stimulate thinking, and they will stimulate engagement between business and government on human rights issues, by providing a starting point and a terminology for the discussion. They point the direction in which the roles and responsibilities related to human rights will have clearer boundaries both for governments and for business enterprises, and eventually for other actors in society.