

**Closing Governance Gaps:
Application of the U.N. “Protect, Respect, Remedy” Framework
Expert Multi-Stakeholder Consultation
20 January 2010 in Berlin**

Hosted by the German Federal Ministry for Economic Cooperation and Development (BMZ)
Organized by InWEnt - Capacity Building International, Germany

The United Nations “Protect, Respect, Remedy” framework was proposed in June 2008 by the UN Secretary-General’s Special Representative on Business and Human Rights, John Ruggie, to manage the human rights challenges posed by transnational corporations and other business enterprises. The Human Rights Council welcomed the framework, marking the first time that a UN intergovernmental body had taken a substantive policy position on the subject of business and human rights.

The Human Rights Council then extended the Special Representative’s mandate by another three years, tasking him with “operationalizing” the framework — that is, providing “practical recommendations” and “concrete guidance” to States, businesses and others on its implementation.

The UN “Protect, Respect, Remedy” framework comprises 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 in essence means to act with due diligence to avoid infringing on the rights of others; and the need for greater access by victims to effective *remedy*, judicial and non-judicial.

The expert multi-stakeholder consultation on 20 January 2010 in Berlin convened representatives from government, business, and nongovernmental organizations that have already attempted to implement or apply some aspect of the UN “Protect, Respect, Remedy” framework.

Welcoming remarks were delivered by **Ms Susanne Dorasil**, Head of Division, “Economic Policy; Financial Sector” at the German Federal Ministry for Economic Cooperation and Development (BMZ).

Professor John Ruggie, UN Secretary-General’s Special Representative on Business & Human Rights, then provided an overview of his mandate and the UN “Protect, Respect, Remedy” framework. He emphasized his commitment to an evidence-based approach since the mandate began, which would be particularly important as he responds to the Human Rights Council’s request to operationalize the framework. This would not be merely an intellectual exercise but also a practical one, with concrete proposals, to which this meeting would make an important contribution.

Ruggie then cited examples of areas in which he was developing practical recommendations, including corporate law; non-judicial grievance mechanisms; and the role of home and host governments in conflict zones.¹

Panel I: The role of the framework in developing national government policy

The first panel explored the role of the UN “Protect, Respect, Remedy” framework in developing national government policy, with panelists speaking to the application of the framework to various areas of State activity. The moderator was **Mrs Maria Cattai** of Switzerland, former Secretary-General of the International Chamber of Commerce, Member of the Board of Petroplus Holdings, and member of the Special Representative’s Leadership Group.²

The first speaker was **Mr Are-Jostein Norheim** of Norway, CSR Ambassador, Section for Economic and Commercial Affairs, Ministry of Foreign Affairs. Ambassador Norheim cited Norway’s experience of the rapid internationalization of business: Today Norway’s 30 largest companies have more than two-thirds of their employees outside of the country. In January 2009, the Norwegian government presented a white paper to its parliament on CSR, its first attempt at a comprehensive government policy, which draws extensively on the UN “Protect, Respect, Remedy” framework in outlining the responsibilities of authorities and the private sector and providing an evaluation of legal instruments, including grievance and monitoring mechanisms. Ambassador Norheim emphasized that Norway will continue to be a driving force in the ongoing work on business and human rights, including by supporting the work of the Special Representative. Ambassador Norheim also mentioned the upcoming review of the OECD Guidelines for Multinational Enterprises, in which he expected the UN framework to play a major role.

The second speaker was **Mr Roel Nieuwenkamp**, Director for Trade Policy and Globalisation for the Ministry of Economic Affairs of the Netherlands. Mr Nieuwenkamp shared the Dutch perspective on the division of responsibility for CSR policy, aligned with the three pillars of the UN framework. He cited a recent study by the Dutch government on extraterritorial legal liability, which concluded that foreign plaintiffs would have access to Dutch courts where a Dutch parent company is involved, although a Dutch judge would most likely apply the law of the country where the alleged damage has occurred. The study has generated a new dialogue about the expectations of companies. Mr Nieuwenkamp also emphasized the importance of the OECD Guidelines; and a new government goal of eventually attaining 100 percent sustainable procurement.

The third speaker was **Ms Christine Jesseman**, Head of Programme: Research, Documentation and Policy Analysis for the South African Human Rights Commission. Ms Jesseman emphasized that

¹ All three projects are described on the Special Representative’s web portal; see <http://www.business-humanrights.org/SpecialRepPortal/Home>, “View materials by topic”.

² A description of the Leadership Group can be found at <http://www.reports-and-materials.org/Leadership-group-22-Sep-2008.pdf>.

while multinational companies are important, most businesses are not multinational -- in fact, a large portion of South Africa's economy is made up of small- to medium-sized enterprises -- and there is no substitute for strengthening national legal systems, including access to justice domestically. Ms Jesseman discussed the relevance of the UN framework to the South African Constitution and the rights and obligations of business. The Commission is currently engaging government on the review of national frameworks from a rights-based perspective; as an example, Ms Jesseman discussed the Commission's submission on the South African Department of Trade and Industry's draft Bilateral Investment Treaty Framework. She also discussed the Commission's engagements and investigations in the mining sector, with the aim of encouraging the incorporation of international best practice and human rights impact assessments into standard operating practice; as well as engagement with other regulators such as the Competition Commission for ongoing promotion and elaboration of the UN framework.

In the plenary discussion, participants commented on the challenges of establishing policy coherence in government; the issues that should be addressed in the upcoming revision of the OECD Guidelines (for example, how some National Contact Points are in a government department that promotes investment, creating a conflict of interest); the important role of entities such as state-owned enterprises, export credit agencies, and international financial institutions; and the need for governments to provide support and information to their companies operating overseas, as well as more specific CSR policies and guidance for companies generally. The topic of extraterritorial jurisdiction was a recurring theme of the discussion, with participants discussing the tension between the specter of neocolonialism and unwanted interference versus the need for complementary assistance between states.

"Everyone wants to coordinate, no one wants to be coordinated." -- Ambassador Norheim

Panel II: The role of the framework in developing company policy and practice

The second panel addressed the role of the framework in developing company policy and practice, with speakers discussing the experience of applying the framework in various industries. The moderator was **Mr Faris Natour**, Director of Research & Innovation for Business for Social Responsibility in the United States.

The first speaker was **Mr Mark Taylor**, Deputy Managing Director of the Fafo Institute for Applied International Studies in Norway. Mr Taylor shared his experience working as a consultant to Statoil on a project to integrate human rights into the company's existing risk management procedures. He described the shift needed to mainstream human rights was to include in the definition of risks to the company the risk of harms to people resulting from company activities and relationships. By including risks to stakeholders and their human rights in the universe of risks to the company, it is possible to incorporate an assessment of human rights risks into each of the company's critical 'decision gates' within the implementation of a particular project or operation of a corporate system.

(More can be read about this project in a working paper published by the Harvard Corporate Social Responsibility Initiative.³)

The second speaker was **Ms Alexandra Guaqueta**, Division Chief for Social Standards and Engagement for Cerrejón Coal in Colombia. Ms Guaqueta walked through the company's application of the Special Representative's recommendations on human rights due diligence: Establishing a human rights *statement of policy* was critical because it makes the company's respect for human rights official; *assessing impacts* is done on a decentralized basis, in some instances as part of the company's implementation of the Voluntary Principles on Security and Human Rights; the company *reports* according to the Global Reporting Initiative, and is working on indicators for the Voluntary Principles along with other stakeholders in that process. Cerrejón is also taking part in the Special Representative's aforementioned pilot project on company *grievance mechanisms*. Ms Guaqueta emphasized that while some think multinational companies can solve problems quickly, it is no small challenge to train 12,000 employees in a context where human rights are highly politicized, and to build trust with stakeholders and establish credibility and veracity without creating too much bureaucracy. The company's expectation is that the UN "Protect, Respect, Remedy" framework and the grievance mechanism will help communities understand better the different roles of States and companies on human rights issues. Very often, stakeholders expect companies to act as States and this is counterproductive for long-term institution-building.

The third speaker was **Ms Maria Anne van Dijk**, Corporate Sustainability Manager for Fortis Bank in the Netherlands. Ms van Dijk shared her experience trying to create a human rights statement for the bank, explaining the Universal Declaration of Human Rights in the context of the bank's Business Principles. She worked through the challenges of language and consulted external experts over a period of six months and produced what she thought was a good statement, but didn't get enough buy-in internally; the statement was shelved when the board of directors supported it in principle but didn't see how they would assess their own compliance. Since then, she has worked to connect human rights to risk management and a broad range of departments within the company to understand its scope of responsibility, and developed lists of potentially problematic issues for the client relationship managers in sensitive industries. She shared the challenges of sometimes being the only bank in a syndicate asking human rights-related questions of a client, and of defining where their responsibility might end.

The plenary discussion included others agreeing the challenge that Ms van Dijk shared when only one company emphasizes human rights, for example with suppliers that are large and powerful and have many customers, any one of which might only represent a small percentage of their business. Some participants underscored the importance of worker empowerment and trade unions; others questioned how human rights can be integrated into a company, and whether there are situations where it should be managed distinctly from other issues. One clear outcome of the discussion was

³ See Mark B. Taylor, Luc Zandvliet & Mitra Forouhar, "Due Diligence for Human Rights: A Risk-Based Approach", CSRI Working Paper No. 53, October 2009, available at http://www.hks.harvard.edu/m-rcbg/CSRI/pub_main.html.

acknowledgment that human rights doesn't easily lend itself to quantitative analysis like other issues that in engineering-driven companies are often distilled to red-yellow-green traffic light indicators, but rather that subjectivity and judgment calls are necessary when addressing human rights. In addition, if there are structural problems such as lack of awareness and capacity, well-intentioned company actions can actually make matters worse, for example if the input of affected people doesn't inform company decision-making. Furthermore, there is often a gap between the intent and efforts of policies and impact assessments and implementation on the ground, often due to a lack of ongoing monitoring and follow-up systems.

“The ability of the company to detect potential risks is very much a function of the extent to which the company talks to people.” -- Mark Taylor

Panel III: The application of the framework to the extended enterprise

Panel III explored the application of the framework to the 'extended enterprise', meaning business structures such as supply chains and joint ventures, since those forms of business exemplify the governance gaps that can lead to corporate-related human rights abuse. The moderator was **Mr Jorge Daniel Taillant**, Strategic Advisor for the Center for Human Rights and Environment in Argentina.

The first speaker was **Mr Julian Farrel**, Head of Trade Operations in the International Trade, Investment and Development Directorate of the Department for Business, Innovation & Skills in the United Kingdom. Mr Farrel spoke about the work of the United Kingdom's National Contact Point for the OECD Guidelines for Multinational Enterprises, which had concluded eight cases since April 2008. In two of the cases in which companies were found to be in breach of the OECD Guidelines, the UN framework was used: The company Afrimex was found to have done insufficient human rights due diligence with regard to child labor and health and safety in the Democratic Republic of Congo; mining company Vedanta was found to have failed to engage the relevant indigenous peoples population in India in meaningful dialogue. In the NCP's findings, both companies were encouraged to adopt measures in keeping with the Special Representative's description of human rights due diligence. Mr Farrel highlighted that business seeks more practical guidance on how to implement human rights due diligence to demonstrate compliance, including with the OECD Guidelines; that more take-up of the Guidelines by non-OECD countries should be encouraged; and that there is sometimes a tension between international instruments like the OECD Guidelines and national law.

The second speaker was **Mr Giles Bolton**, Head of Ethical Trading Policy and Strategy for Tesco in the United Kingdom. Mr Bolton provided some context on Tesco, which is the world's fourth largest retailer with 2000-3000 suppliers in the UK alone, but is rarely more than 40 percent of a single supplier's business and might be as little as 4 percent; the company's goal is to demonstrate that everything bought from them is produced fairly. Tesco is also participating in the Special Representative's pilot project on company grievance mechanisms with its fresh fruit growers in South Africa, where 800 farmers of varying sizes provide 25 percent of the chain's fruit. Mr Bolton shared

the challenges they've found in that project, such as how to create ownership of such mechanisms and how to avoid overlap with other mechanisms such as trade unions. He recommended that the customer be brought into the debate; that the challenges of the so-called 'long tail' supply chains be recognized (i.e. where there are many layers of suppliers); and that there be more collaboration between businesses on grievance mechanisms.

The third speaker was **Ms Jenny Chan** of Students & Scholars Against Corporate Misbehavior (SACOM) in Hong Kong. Ms Chan explained that SACOM has traditionally used 'naming and shaming' techniques to promote corporate accountability, but recently took part in the HP Labor Rights Training Program (without receiving any funding from the company). SACOM's work is focused in China, where there are long supply chains, 200 million migrant workers, the younger generation of which has been increasingly active in defining fair working conditions -- and in doing so is facing fear and intimidation, which makes the role of NGOs like SACOM critical. HP's Labor Rights Training Program aims to raise worker awareness, for example by improving grievance mechanisms in HP's direct suppliers, and using innovative techniques like collective brainstorming and role play. She stressed that workers often have weak or no representation, which needs to be rectified, and that local governments must strengthen enforcement of their own laws -- and that collaboration between local governments and factories should be more common than it currently is.

The plenary discussion repeatedly turned back to the generally underemphasized roles of customers and workers; and of the frequent focus in the business and human rights debate of multinational companies and national governments, when in fact national companies and local laws are as if not more important. One participant, questioning the commercial imperative of addressing human rights deep into the supply chain, asked whether if a tree falls in the forest and your customers don't know, does it matter; to which another responded that yes, because ten years later there's still a gap in the skyline. The effectiveness of Global Framework Agreements was mentioned, as was the importance of a company educating its workers no matter where they reside, and of transparency in publicizing information about working conditions.

*"Social inclusion of informed workers hold the greatest promise for change."
-- Jenny Chan*

Plenary discussion: Themes and implications for operationalizing the UN Framework

The final session elicited themes of the day and suggested takeaways for the Special Representative, with three designated participants preparing reflections to initiate the plenary discussion: **Mr Peter Muchlinski**, School of Oriental and African Studies at the University of London; **Mr Honoré Ndoumbe Nkotto**, Coordinator of FOCARFE in Cameroon; and **Mr Liu Kaiming**, Executive Director of the Institute of Contemporary Observation in China. The session was moderated by His Excellency **Mr Martin Ihoeghian Uhomobhi**, Permanent Representative of Nigeria to the United Nations in Geneva.

The wide-ranging plenary discussion included a few participants suggesting that a fourth pillar of “Prevent” be added to the framework; the Special Representative replied that preventative measures are already explicitly integrated into all three pillars. The importance of creating the right corporate cultures and incentives was discussed, for example so that companies cannot decide that it is better to commit violations and pay any resultant fines than to prevent violations in the first place. The importance of capacity building for all parties -- for countries by the UN, for employees within a company, for workers by trade unions -- was emphasized repeatedly. There was a concern that human rights might be privatized and bureaucratized; and a parallel was drawn to the financial sector bailouts, in which profits have been privatized while the damages have been absorbed by external stakeholders.

The discussion led back to the original rationale behind the Special Representative’s mandate, namely the fact that markets have internationalized while governments have remained by definition bound by their borders, and that governance gaps arise in light of this absence of a robust system of global governance, which enables human rights abuses.

In concluding, the Special Representative said that he is both ambitious and optimistic regarding the mandate, while remaining aware of the complexities inherent in the business and human rights agenda. He emphasized that his main goal is to lay as solid a foundation as possible for all relevant actors so that a common basis exists upon which to build, and that many of the issues discussed over the course of the day won’t be resolved immediately.

He also reviewed some of the elements of the state duty to protect: the need for states to not undermine their own ability to fulfill their duties; the importance of considering their own human rights commitments when doing business with business; and the need for clarity on what company directors are permitted to do with respect to human rights under corporate law. Regarding the corporate responsibility to respect, he emphasized that the term ‘responsibility’ was chosen deliberately, since the responsibility to respect is not currently a legal duty under international law, although elements of the corporate responsibility to respect are reflected in various national laws. He expressed regret at his one-time use of the phrase ‘do no harm’ with regard to the corporate responsibility to respect, which was misunderstood by some to mean a passive responsibility, whereas affirmative acts are required to meet the responsibility; and he emphasized that because the purpose of human rights due diligence is to demonstrate that a company is meeting its responsibility to respect human rights, a degree of transparency and meaningful engagement with affected individuals and communities is an intrinsic component of the process. Finally, he indicated that his final submission to the Human Rights Council in 2011 will consist of guiding principles and commentary.

Mr Michael Grewe of BMZ closed the day by thanking participants for their engagement.