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REPORT OF THE FES PARALLEL EVENT TO THE 14TH SESSION OF THE UN HUMAN RIGHTS COUNCIL

THE "PROTECT, RESPECT AND REMEDY" FRAMEWORK DEBATE ON RECENT DEVELOPMENTS WITH JOHN G. RUGGIE, FOLLOWED BY A PANEL DEBATE ON THE UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

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On 1st June, the Friedrich-Ebert-Stiftung organized a parallel event to the 14th session of the UN Human Rights Council (HRC) on issues of human rights obligations and responsibilities concerning business activities. The parallel event was split into two separate parts: At first, Prof. Ruggie, SRSG on Business and Human Rights, held an introductory statement on the **UN "Protect, Respect and Remedy" framework** followed by questions from the audience. The second panel discussion focused on the current **Update of the OECD Guidelines for Multinational Enterprises (MNE)** and claims for the inclusion of human rights concerns, as elaborated by NGOs and trade unions, often drawing from the framework laid out by the SRSG. The objective was to debate with civil society, national delegations and human rights institutions how human rights aspects can be strengthened with the Update and what the process would entail for different geographical regions.
This report will neither refer to the persons who posed a question, nor go chronologically through the proceedings but rather sum up the different presentations, questions and answers grouped along topics.

Discussant: John G. Ruggie (Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, SRSG)
Panelists: Kristine Drew (Trade Union Advisory Council to the OECD); Victor Ricco (Centre for Human Rights and Environment, Argentina); Gerald Pachoud (Special Adviser to the SRSG)
Welcome: Britta Utz (Friedrich-Ebert-Stiftung, Berlin)
Moderation: Felix Kirchmeier (Friedrich-Ebert-Stiftung, Geneva)

I) UN "PROTECT, RESPECT AND REMEDY" FRAMEWORK

Thanking the audience for their interest and numerous presence, **Prof. Ruggie** set out several aspects of the "Protect, Respect and Remedy" framework:

Starting with the **State duty to protect human rights**, he voiced his concern about bilateral investment treaties (BITs) that contain obligations, which prevent States from enforcing human rights policies. Illustrating the problem, he referred to the example of South Africa that had been sued by European investors with regard to the Black Economic Empowerment Act. The extreme consequences of BITs, i.e. governments tying their own hands were critical human rights issues; a more balanced approach was needed. Equally important, he mentioned that States – acting as owners, investors, procurers and export promoters – were in a key position to operate as leverage point in preventing corporate-related abuses and promo-ting rights-respecting cultures.

Turning to the **corporate responsibility to respect**, he explained that the concept of due diligence was a potential game-changer for com-panies: from "naming and shaming" to "knowing and showing". He also referred to the third pillar of the framework – **access to remedy** – by highlighting that grievances, some not large in scope or no human rights issues at the beginning, might escalate by non-attention and entail violation of human rights in the end. Therefore, mechanisms that monitor situations on the ground and offer first recourse to victims were needed.

In concluding remarks, he explained that with the end of his mandate in June 2011, he would present views, recommendations and practical guidance in two forms: One was a set of **guiding principles** under each pillar of the framework. The other was presenting an **options paper** laying out the pros and cons of various ways the HRC might consider following up on the mandate. The work of the Council in this field had to continue, as some problems would not be fully resolved after six years of his mandate. Referring to the Interactive Dialogue at the HRC that day, he was pleased that the framework had been well received by States, since a broad level of support was crucial for implementation.

II) DISCUSSION

The subsequent discussion focused on the following five issues:

BITs and observation that States strive for low standards

Dealing with impacts of BITs is part of the SRSG's mandate. One participant mentioned that the NAFTA and particularly chapter 11 on the protection of foreign investors had served as model for other BITs. One problem with existing treaties and lawsuits was found to be the pattern that States were keen to lose cases to reach lower standards. The SRSG reiterated in this respect that it was important for the human rights community to develop new model BITs. In this context, the Norwegian draft model agreement could serve as an innovative example. Though it was not adopted, it is publicly available for reference.

Concept of due diligence and the role of NGOs in order to ensure good corporate performance

One participant raised doubts about the effectiveness of the due diligence concept to change corporate behavior. It was argued that business was about profit-making, hence, without public pressure and governmental control no progress would occur. Another raised the question whether the move from "naming and shaming" to "knowing and showing" would be possible without NGOs as watchdogs and whether one was not in need of both approaches. The SRSG mentioned that "naming and shaming" and "knowing and showing" were not mutually exclusive. He underlined that the concept of due diligence would give corporations the opportunity to take their fate into their own hands and that these processes were not alien to the business community. Rather, the agenda would include extending existing initiatives. All in all, reasons for corporate misconduct varied, cutting costs might be one, but also lack of understanding and experience. Data collected, e.g. on the extractive sector showed that companies are very much aware of political related risks, they now realize that taking them into account saves money. A business representative present asserted that there was a "business case" for endorsing the framework.

Legal status of the framework and follow-up instruments for the HRC

Asked about the different options of the HRC to follow up and his views on feasibility of a binding treaty and value of customary international law, Prof. Ruggie asserted the status of the framework as normative. He pointed out that the status the norms in the framework might reach was not under his control. Yet, the State duty to protect was a legal duty. In relation to the fact that governments might still grapple with understanding their role, the mandate seeks to give advice to governments what to do with regard to oversight of private actors. The norms in the second pillar were not legally binding, but expected to become more robust over time. The substance of the third pillar, to provide remedy, is not widely practiced yet. However, companies had not responded to consumers' views afore, but did later. Alike, with practical experience, the framework would become more robust.

Commenting on the options for the HRC to follow up, he expressed several reservations concerning a binding treaty, though he did not normatively oppose the idea. Among other things, he felt that the variety of issues in the mandate's reports was enormous and it was therefore intellectually inconceivable to include all in a single treaty. However, specific elements should take legal form.

Future work plan and engagement with the business community so far

Asked how he envisaged the future evolution of the mandate, Prof. Ruggie emphasized that the process would go on as participative as before. On the guiding principles, discussions would start this fall and he would consult with all relevant stakeholders. To facilitate communication, a website would feature drafts for comment. Looking back, cooperation with the business community had been good, as companies and business associations had been involved in discussing general ideas and practical implementation. The fact that the mandate is wide-ranging poses a challenge. The principles that would be developed would be universally relevant but would have to vary according to the different sizes and types of business.

Suggestions for further operationalizing the framework

In the course of discussion, participants made the following four suggestions with regard to the framework: First, the work of the SRSG should consider the option of a binding duty for corporations into the framework. Second, the aspect of cultural rights should be integrated into the framework, as companies do not tend to take such rights into consideration. Third, the mandate should study and analyze in greater depth the role and responsibilities of International Financial Institutions. Fourth, it was suggested that the corporate responsibility to respect could be further clarified through disclosure requirements over corporate activities pertaining to human rights.

III) PANEL DISCUSSION ON THE OECD GUIDELINES FOR MNE

For the second part, three experts were invited to share their experience and insights with regard to the OECD Guidelines for MNE and their scheduled Update.

Kirstine Drew presented TUAC's priorities on the Update of the Guidelines with regard to substance and procedural guidance and stressed that it was essential to incorporate concepts arising from the mandate of the SRSG in the Update. Considering substance, TUAC supported the inclusion of a human rights chapter while maintaining the chapter on labor rights. Also, the Guidelines should in-corporate language on decent work and/or precarious work as well as provisions on living wages. Turning to supply chain responsibility, she affirmed there was a need to remove the requirement for an investment nexus. TUAC considered it essential that the Update improved the effectiveness of the National Contact Points (NCPs). Core criteria for their performance should be expanded in line with the six principles identified by the SRSG for effective grievance mechanisms.

Victor Ricco focused on a Latin American perspective on implementing the Guidelines and highlighted the need to strengthen the instrument with regard to procedures and provisions on human rights and environmental protection. He attested a lack of confidence that local stakeholders had in the Guidelines due to experience with NCP procedures in Latin America. Nevertheless, NCP procedures (e.g. specific instance involving Shell and its Argentine subsidiary) had a value for NGOs and unions as they did involve home and host governments determining

what was considered acceptable conduct. In order to enhance the authority and credibility of NCPs Victor Ricco suggested breaches of the Guidelines should have consequences for the company in question. Furthermore, key to the Update was promotion of the Guidelines so that companies and stakeholders could bring them into actual use.

Gerald Pachoud noted the importance of the Guidelines as a unique instrument and set out points the SRSG would insist on with regard to the Update.

First, the mandate would focus on a human rights chapter and the inclusion of responsibility to protect and due diligence therein. Updating provisions on disclosure was also important. Second, due to poor performance of NCPs and in order to increase NCPs' utility, the update should consider the recommendations formulated by the SRSG for non-judicial redress mechanisms. Third, he recommended to drop the investment nexus for application, but stressed that this did not mean the Guidelines should cover all cases. In order to keep the political capital of the instrument a threshold for cases was needed.

He added that the battle for withdrawing the investment nexus might be a lost battle; nevertheless the mandate would take it on. Fifth, with regard to consequences of breaches, a link should be made to subsidies or assistance from governments to corporations. Finally, he mentioned the SRSG would send a note on his references to the OECD in June.

IV) DISCUSSION

Value of NCP mechanism for NGOs with regard to poor outcomes was discussed. Victor Ricco reiterated in this respect the need for consequences of NCP's final statements, but also stressed mediation training for NCP staff as crucial.

Several commented on different options and instruments to promote responsible business conduct, such as legally binding tribunals and the ILO MNE Declaration. The question of coherence of the international normative framework was raised and panelists were asked about the role of the ILO in the business and human rights agenda. Hereon, Gerald Pachoud and Kristine Drew acknowledged the important role of the ILO MNE Declaration, but pointed out to the value added of the Guidelines with regard to comprehensive content beyond labor rights. On tribunals, Gerald Pachoud set out that he was skeptical about such bodies moving to take up business and human rights issues. As NCPs do exist, it is crucial to discuss and improve their role.

On scope of the Guidelines and the investment nexus, one participant concurred with the statement that not all cases should be in front of NCPs; rather, it was essential to strengthen governments' oversight functions generally. It was argued that supply chain provisions were important, and, if one was losing the battle on a new interpretation of the investment nexus, the Guidelines would become irrelevant.

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