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Input of Sustainalytics on the Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework

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INPUT OF SUSTAINALYTICS ON THE GUIDING PRINCIPLES FOR THE
IMPLEMENTATION OF THE UNITED NATIONS 'PROTECT, RESPECT AND
REMEDY' FRAMEWORK
January 2011

INTRODUCTION

At the invitation of the UN Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations, Sustainalytics is pleased to provide its views on the latest draft report of the Special Representative. Sustainalytics welcomes the work of the UN Special Representative and we support the overall content of his “Protect, Respect and Remedy” framework. This framework will bring further clarity regarding the exact responsibilities that companies have with respect to human rights. We hope for, and will contribute to, a quick adoption and implementation of the framework. At the same time this document will include recommendations aimed to strengthen the overall framework and its effective implementation. As a research provider to the financial sector we are particularly interested in the applicability of the overall framework to the Responsible Investment market and our comments are tailored to this.

SPECIFIC RECOMMENDATIONS

PROVIDING CLARITY ON THE STATE DUTY TO PROTECT

Recommendation:

The wording of the recommendations directed to states (1-11) should be strengthened to diminish the possibility that these will be interpreted as ‘optional’ and / or ‘voluntary’.

Explanation:

Sustainalytics is aware of the fact that the goal of gaining broad support amongst businesses and state actors for the implementation of the framework demands a cautious and strategic approach by the UN Special Representative. At the same time we do note the strong concerns raised by main human rights NGO’s, as amongst others expressed in a recent Joint Statement by Amnesty International, HRW, the ICJ and others, that relate to the ‘optional’ or ‘voluntary’ character in which some of the recommendations directed to states are presented. Sustainalytics is of opinion that businesses need a level playing field and as much clarity from states as possible with regard to human rights. The urgency of an effective regulatory framework, containing minimum standards in all countries, and that allows states to ensure the full protection of civilians against abuses that are linked to corporate activity, should be more firmly addressed in the report.

Several recommendations directed to states, such as those on adopting and enforcing laws that require business enterprises to respect human rights, are presented, or may be interpreted, as voluntary options that a state may consider. Examples include wording such as ‘where appropriate’ or ‘should encourage’ (see for example recommendation 5 and 6 or 10 c), which may leave room for interpretation or possibly even passiveness on behalf of state authorities. We therefore think that the overall formulation of the recommendations directed to states should be strengthened where possible.

We similarly share the concerns raised by others that in many instances states may be unwilling or simply unable ('failing states') to act on their responsibility to protect. The report may expand on this in more detail. Are businesses supposed to refrain from operating in such a context or does this imply a more comprehensive due diligence effort? Is a business entity able to contribute positively to the state's ability to implement its responsibility to protect (see below on 'engagement with state authorities')?

THE FRAMEWORK AND FINANCIAL INSTITUTIONS

Recommendation:

We suggest a brief yet more explicit linkage, possibly as an exemplary element, on the specific applicability of the framework to financial institutions.

Explanation:

Reference to investors is currently addressed mainly in the context of improved reporting standards that provides information to investors on the material and other human rights-related risks. We are aware that the report does not, nor should it, address specific categories of business enterprises in detail. The report clearly states that the framework applies to all business enterprises and implicitly also to financial institutions. That said, the level of applicability of the framework to financial institutions is strongly related to the fact that these institutions are often considered to be more 'remote' from the actual human rights violations. They may provide financial support to enterprises that are associated with these violations thereby, at least in perception, playing a more indirect role. Yet this does not imply that the framework is not applicable to financial institutions, as it clearly is. To avoid a lack of clarity on this, the report could contain more explicit reference to this topic. For example, reference to this can be inserted under the following chapters:

- ✓ **The duty to protect; recommendation 5.** In recent years, a number of states have stimulated investors to adopt Responsible Investment (RI) policies. Similarly, some states have drafted legislation on certain thematic RI-subjects such as the ban in Belgium on investments in cluster munitions. Others, such as the UK government, have recommended that their financial institutions increase engagement on ESG-matters with companies of concern within in their portfolios. It is suggested to formulate a separate recommendation on stimulating and facilitating RI policies possibly by adding a new recommendation (5e). This would also provide for a distinction between the companies that are themselves involved in human rights incidents and those that provide financial support to such companies. It may also be addressed in an exemplary manner in the commentary to recommendation 5.
- ✓ **The duty to protect; recommendation 6 or 8.** It is recommended that a reference to 'state pension funds' be added here. In some countries, the policies and practices of state pension funds may conflict with the human rights obligations of the state itself. States should strive to ensure coherency in this field, just as they should with respect to export credit agencies, which are mentioned in the report. It is suggested to explicitly refer to state pension funds in the commentary for either recommendation 6 or 8, as is done with export credit agencies.
- ✓ **The corporate responsibility to respect; recommendation 12 or 13.** It could be clear from the beginning that the framework applies to financial institutions, although logically some recommendations may be more applicable than others. This issue could possibly be highlighted as an example in the explanation to recommendation 12 or 13, which expand on the applicability of human rights to the different circumstances, sizes of company, and business entities. However, as no other categories of business

entities are mentioned here, it could also be addressed at the start of the report in the introductory bullets. Possibly different business entities could be highlighted here explicitly, including examples, to indicate the broad applicability of the respective framework.

COMPANY ENGAGEMENT WITH STATE AUTHORITIES

Recommendation:

We suggest a prominent recommendation on engaging with state authorities on human rights as a core element of the 'due diligence' pillar.

Explanation:

As described in the Human Rights Due Dilligence section companies are recommended to ensure that their human rights due diligence "involves meaningful engagement with potentially affected groups and other relevant stakeholders" (recommendation 16). Companies are also recommended to report to all stakeholders on this. Throughout the last decade engagement on ESG-related matters has increased dramatically. Financial institutions have established their own engagement programs or outsources this role to external service providers. Yet, Sustainalytics notes that the current engagement focus is directed to problematic businesses enterprises and, overall, companies, including investors, are still reluctant to have a dialogue on human rights with state actors. While companies are actively engaging with states on a range of ESG-related issues including the environment and labour rights, engagement on human rights is still in its early stages. Also, when engaged, they may actually raise issues that run to counter to enhancing human rights such as the coordinated lobbying efforts by the US- and EU Chamber of Commerce against improved labour legislation in China in 2006/2007.

Within the business community, discussing human rights with state authorities, with the aim to improve the overall human rights situation, is considered to be sensitive and this is likely to be related to the fear of 'becoming political' or interfering in the 'national sovereignty' of a state. Yet this attitude seems to be changing as we do note valuable examples of progressive companies engaging with state authorities on human rights. This should be strongly stimulated and the report of the UNSG provides an excellent opportunity for this. The effects of companies taking up this responsibility should not be underestimated. This element may be addressed in the report in two sections:

- ✓ **The duty to protect:** States should actively stimulate and invite companies to engage with state authorities on human rights matters alongside their dialogues with other companies and civil society. Reference to this could be added to recommendation 5 or 11 or possibly others. It may be a separate recommendation.
- ✓ **The responsibility to respect:** Companies should have policies or a policy statement in place that include a commitment to actively engaging with states on human rights-related matters. This is especially relevant to financial institutions, many of which are currently structurally engaging on human rights with other businesses. It is part of overall due diligence activities and human rights-related risk management as it lowers the risk of possible complicity allegations. Reference to this could possibly be added to recommendation 16.

MATERIALITY

Recommendation: Sustainalytics would welcome reference to material human rights-related risks in the context of implementing a due diligence approach.

Explanation: The report does not address the issue of materiality as the previous report of the UNSG did. The previous report provided for a range of examples of human rights-related risks that impact overall business returns. It would be valuable to re-insert this in the current report, possibly in the introductory section.

OTHERS ISSUES:

Recommendation page 17: The text reads: “In situations where such engagement is not possible, business enterprises should consider reasonable alternatives such as consulting credible experts resources including from civil society”. Likely mostly due to the formulation used here, this part seems to present consultations with civil society as a last resort. However consulting with experts and civil society should not be dependent on the effect of consulting with ‘potentially affected stakeholders’. Consultations with experts and civil society may take place besides consulting the most affected stakeholders such as the communities themselves. In addition, in the sum up of relevant stakeholders mentioned here, ESG research providers could be mentioned explicitly. An increasing number of companies make use of ESG-related data of research providers alongside possible consultations with civil society or other stakeholders. Again this would be particularly relevant to the financial institutions.

Recommendation page 18: The text reads: “Therefore, an appropriate level of transparency is required at.....” It is suggested to remove the word “appropriate”. This may be used to limit transparency on human rights issues and it leaves room for unnecessary subjectivity.

Recommendation: it may be reflected upon to provide a brief reference to the distinction between Civil & Political and Economic Social and Cultural rights as these consist of the two main pillars of the UN human rights framework.

Explanation: The fact that different types of human rights are interrelated and interdependent in theory is not always reflected in practice. There continues to exist a certain polarization on the matter in the current political arena and some states still consider there to be a hierarchy between the two sets of rights. As for the business community, they may easily understand their impact on civil and political rights but may have less affinity with defining social or economical issues in terms of human rights. From a strategic point of view, and to avoid future misunderstanding, it could be suggested to provide a brief reference to the fact that the framework relates to both sets of human rights.

ABOUT SUSTAINALYTICS

Sustainalytics is a global leader in sustainability research and analysis for investors and financial institutions. We provide a global perspective, underpinned by nearly 20 years of local experience and expertise in the responsible investment and traditional socially responsible investment markets. Sustainalytics was formed from the merger between AIS (Spain), Dutch Sustainability Research (Netherlands), Scoris (Germany) and Jantzi Research (Canada)

in August 2009. Sustainalytics is headquartered in Amsterdam with local offices in Toronto, Boston, Frankfurt and Madrid. Shareholders of Sustainalytics are Triodos Bank (53%), senior staff, PGGM, MeesPierson & Renewal Partners Corporation. The company currently employs more than 80 staff members with multi-disciplinary and industry expertise. Sustainalytics is a legally established company, and is incorporated in The Netherlands. Sustainalytics Holding B.V. is a Dutch registered company with Canadian and Dutch shareholders.

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