

Dear EEWG Friends,

On October 5-6, 2009, a UN consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises was held in Palais des Nations, Geneva in Switzerland by the Office of the United Nations High Commissioner for Human Rights upon the request of the Human Rights Council.
<http://www2.ohchr.org/english/issues/globalization/business/consultation102009.htm>

The policy framework for business and human rights - Protect, Respect and Remedy -was unanimously passed by the Human Rights Council in June 2008. The framework comprises three core principles: “The state duty to protect against human rights abuses by third parties, including business; The corporate responsibility to respect human rights; And the need for greater access by victims to effective remedies”.

In the opening remark, John Ruggie, SRSG, described five key business and human rights challenges.

First, he opened the list with “companies can affect the entire spectrum of internationally recognized rights, not only a limited subset”, while emphasizing that the policies of states and companies should reflect the fact that “virtually all rights are relevant.”

Second, he pointed out “horizontal” legal and policy incoherence among economic and business related departments and agencies that “directly shape business practices - including trade, investment, export credit and insurance, corporate law, and securities regulation.” as well as government’s human rights agencies and obligations.

Third, he noted that “even large multinational companies lack fully fledged internal governance and management systems for conducting adequate human rights due diligence.” By describing their approach as “legalistic” focusing legal license to operate, he highlighted the fact that respecting rights should be “the very foundation of a company’s social license.”

Fourth, he explained that a “legalistic” approach that is only intended to meet legal requirements allows companies to avoid creating grievance mechanisms that would provide remedies as an early-warning system for victims, and vice versa.

Lastly, he warned of greater challenges to bring justice to victims particularly in the case of “countries with weak governance institutions: local laws either do not exist or are not enforced”, which makes the contexts that “attract marginal and illicit enterprises” to worsen

“law-free zones”.

He raised a few practical issues regarding binding standards under international law favored by human rights advocates and voluntary initiatives favored by business. While he demonstrated the necessity of treaty requirement for binding standards, he pointed out other issues such as non-acceptance of North and South for all international human rights standards, the need to prevent lowering levels of new standards, the need to create methods that will reinforce such a treaty, and the feasibility of ratification and length of negotiations considering the immediate remedial needs of victims.

He concluded his remarks by introducing several uptakes to embrace the policy framework in Norway, UK, South Africa, Sweden and OECD etc. for positive changes by emphasizing the importance of complementary roles and responsibilities for states and companies.

Though I did not attend this consultation, I had a chance to participate in the Asia Pacific regional consultation held by SRSF in New Delhi, India on February 5-6, 2009. It was the first international meeting in which I became part of a stakeholder dialogue on business and human rights. The consultation included representatives from states, corporations and civil society as well as academics and legal practitioners from 16 countries. It produced diverse exchanges of opinions about legally-binding frameworks and voluntary frameworks to improve human rights in business.

These two consultations have given me some new thoughts. I would like to share them with you. In the past, I worked within corporations and was one of the many people who have been frustrated with the superficial and cosmetic behaviors of corporations, whether in CSR or business and human rights. However, I am idealistic enough to attempt to create lasting changes through internal transformations, because I know both the strong and weak sides of corporations.

CSR and human rights are different. I realized this more clearly in New Delhi. CSR can be voluntary but human rights should be mandatory and essential in business because corporations consist of people. An acquaintance who was formerly in charge of business and human rights in National Human Rights Commission of Korea once mentioned to me that he declined to participate in a working group of a certain South Korean Sustainability Index, since human rights are just a sub part of a social dimension; perhaps this is not just a South Korean perspective. Respecting human values should be a fundamental basis for

corporate responsibility.

However, one of the points that were raised in New Delhi was, if there is a boundary, there is always something out of that boundary. Another point mentioned was that human rights problems with Internet portal companies did not exist in the past. It was said that the speed of hard law has difficulty in keeping up with fast changing globalization and development of the offline and online world communities.

That may be why a non-judicial grievance mechanism to improve access towards remedies for victims has been gaining in importance. The Korea Human Rights Foundation that I have been advising to bridge business and human rights organizations has combined twelve South Korean NGOs that advocate human rights, environment, health and labor to study the possibility of preventive and proactive mechanisms in the South Korean context in order to protect current and potential victims. In spite of doubts and opposing views, they have continued their efforts to explore new ways to help victims to search for practical solutions before grievances or disputes go to the courts.

However perfect systems for due diligence, prevention or remedies may be, human rights problems can happen in any situation and in companies of any size. The UN estimates that there are over 80,000 multinational corporations in the world. More than 1,000 corporations register their sustainability reports to GRI Secretariat in 2008. Publishing sustainability reports does not mean that they are good corporations, but at least they disclose information that is available to all internal and external stakeholders, which enables them to raise issues. Fortune 500 corporations are the usual subjects for various kinds of comparisons.

In September, 2009, I had a chance to observe a meeting between a South Korean human rights NGO and a delegation of Vietnamese union representatives. The head of the delegation said that practices of large corporations are fairly good. He said that they came to ask for help to solve the malpractices of small and medium sized factory owners. He emphasized that there is no way to put them in jail because they avoid prosecution by going out of country leaving all responsibilities unsolved. In New Delhi, problematic issues related with small and medium enterprises (SMEs) were hotly discussed. SRSR also asked further for more help from consultation participants on how to deal with human rights issues regarding SMEs.

No matter how narrow the mesh of legally binding frameworks may be, non-complying

companies can find ways to avoid them. Debates about legally-binding frameworks vs voluntary frameworks may need to be segmented and diversified. I agree with the view of many other people that no voluntary business actions can substitute for legally binding frameworks. While acknowledging the complementary roles of voluntary and legally binding approaches, more attention should be paid to eliminating the uncontrolled wrongdoings of laggards off the radar, narrowing the gap between existing institutionalized human rights requirements and actual business practices, and improving internal transformations within corporations that make lasting changes with strong impacts.

John Ruggie mentioned the difficulty of seeing “how the identification of best practices could get markets to a tipping point unless it involved some authoritative mechanism for determining what constitutes ‘best’ and was coupled with some means of dealing with those who act otherwise.”

In my opinion, external pressures and pushes from the interests of shareholders only can not drive corporations to act. Corporations do not act to be seen by others. They may have many reasons to fulfill effective due diligence in order to satisfy various stakeholders. Once corporations realize pros and cons in doing so, they can change with great efficiency and effectiveness not only to achieve self interests, but also to play important roles within their "sphere of influence" - the workplace, supply chains, marketplace, the community and governance.

I found three rules of epidemics, mentioned in “The Tipping Point” by Malcolm Gladwell, could usefully be applied to improve business and human rights as well as further the New Principles for Corporate Design that Corporation 20/20 has been advocating.

First is “The Law of the Few” factor. We cannot say all corporations are good by seeing a few good business practices. Equally, I think some bad business practices should not make us underestimate the good will of corporations. Many corporations manage their global supply chains proactively to address social and environmental issues related with laggard companies. Certainly, we know there are North-South debates from exporting the North’s agenda to the South. However, if corporations use their strong buying power to apply pressure to SMEs, this pressure may work. Many good examples show us potential of “The Law of the Few” factor. Of course, EEWG and Corporation 20/20 can act as Connectors, Mavens and Salespeople to spread the New Principles for Corporate Design.

Second is the “Stickiness” factor. How we can make important messages about business and human rights memorable for business people? Even voluntary approaches take time but we know that the power of volunteering is able to make a valuable and lasting impact. Fifteen business participants who attended the recent Business Roundtable on UN Global Compact Human Rights Principles in Seoul, South Korea, came voluntarily even though one might not have expected them to do so. One corporation had human rights issues known widely to the South Korean media in the past. Another came from an industry that is vulnerable to occupational health and safety problems. They all came voluntarily and expressed their concerns and dilemmas. We must continue these voluntary efforts in order to increase the “stickiness” of human values in the minds of business people so that they, in turn, can influence their colleagues, bosses and subordinates.

Last is “The Power of Context” or “Broken Window” theory. The book says, “You don’t have to solve the big problems to solve crime” and “What really matters is little things.” Not everyone might believe how greatly the removal of graffiti on walls contributes to a sharp decrease in crime. However, like the author, I strongly believe that creating an environment that judicially shames laggards and gives merit to committed companies for positive changes will pay off in our efforts to spread good practices.

Gladwell’s book also described how the success of “Blue’s Clues” beyond the fame of “Sesame Street” was attained by giving a “Sense of affirmation and self-worth” to TV audiences. They felt that they were participating in something, not as bystanders, but as leading players.

There is an East Asian proverb that “One who has tied a knot must untie it”. Namely, it means that we must solve the problems that we ourselves create.

I want to remain hopeful, believing in the power of self-awakening and transformation of business people. I might be frustrated more than when I worked from within. We might not have patience to stand back, or to wait, when we think of the direct or indirect victims of irresponsible business practices. However, together we can try every possible way until our hope can be answered.