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Office of the United Nations High Commissioner for Human Rights
c/o Craig Mokhiber
Chief
Development and Economic and Social Issues Branch
OHCHR CH 1211
Geneva 10
Switzerland

Subject: Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises—Request for Inputs and Suggestions on the 2013 Forum on Business and Human Rights

Dear Mr. Mokhiber:

I write to respond to the kind invitation to send inputs and suggestions for the 2013 Forum on Business and Human Rights, which was sent via letter dated 5 March 2013, by the Office of the United Nations High Commissioner for Human Rights (OHCHR), transmitted on behalf of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. Inputs were particularly solicited on the methodology and thematic subjects for the second annual Forum on Business and Human Rights, as established by the Human Rights Council Resolution 17/4.

What follows is a brief response to the seven specific areas of input identified by the Working Group in its public materials. I write solely in my individual capacity but based on the experience acquired from my own research and my experiences. I look forward to a useful next session of the Forum on Business and Human Rights.

1. Specific topics/panels for the Forum, including names of potential speakers.

I suggest a panel discussion on the role of sovereign investing in advancing the agenda of business and human rights: sovereign wealth funds, responsible investing, and the Guiding Principles.

In addition to myself, included in the discussion might be Ola Mestad, the Chair of the Norwegian Government Pension Fund Global, Eli Ane Lund, Executive head of the Secretariat of the Norway Government Pension Fund Global, Fabio Basan, Professor Roma III and founding director Sovereign Wealth Fund Centre; Edwin Truman, author of “Sovereign Wealth Funds: Threat or Salvation?”; and Jin Liqun the Chair of the International Forum of Sovereign Wealth Funds. .

I offer three principal reasons for this suggestion.

First, sovereign investing has emerged as an important form of state engagement with its primary duty to protect human rights. The Norwegian sovereign wealth fund, in particular, has evidenced an evolution that suggests the potential for advancing international human rights frameworks, domestic law and corporate practice through the medium of its investment strategies. These are themes I explore more extensively in Larry Catá Backer, “Sovereign Investing and Markets-Based Transnational Legislative Power: The Norwegian Sovereign Wealth Fund in Global Markets” (November 18, 2012). Consortium for Peace & Ethics, No. 2012-11/11. Available at SSRN: <http://ssrn.com/abstract=2177778>. Norway has provided an architecture of governance that sits astride the borders of market and state, of public and private and of national and international. Undertaken through its sovereign wealth fund, Norway is seeking not merely to project public wealth into private global markets, but also to construct a complex rule-of-law centered framework that blends the imperatives of a state based public policy with a rules based governance system that incorporates domestic and international norms. To this Norway adds a policy-oriented use of traditional shareholder power to affect the behavior and governance of companies in which the Fund has invested. The object is not merely to maximize the welfare of the funds ultimate investors, the people of Norway (through its state apparatus), but also to use the fund to advance Norwegian public policy in the international sphere and within the domestic legal systems of other states to achieve a greater measure of inter-systemic harmonization of socially responsibly corporate governance. Private power is deployed toward the ends of public governance; public power is deployed in turn toward the ends of private governance across the global marketplace for corporate ownership; markets become sites for legislation.

Second, sovereign investing can harmonize human rights based governance regimes across the public-private divide. Sovereign investing serves as a bridge between the state’s duty to protect human rights and corporate responsibility to respect human rights. In this way, policy coherence is enhanced among public and private actors as they develop standards and norms that

guide both regulatory activity and specific approaches to business conduct. This is an important objective of the Guiding Principles that has, unfortunately, not received the attention it merits. While there has been substantial attention paid to the monitoring and remediation role of transnational corporations under the second pillar responsibility to respect, there has not been enough attention paid to the ability to generate and deepen human rights governance frameworks through these transnational enterprises. Indeed, at its international forum of Sovereign Wealth Funds, to meet in Oslo 2-3 October 2013, the members of the International Forum of Sovereign Wealth Funds will have high on their agenda a consideration of corporate governance and sovereign wealth funds, precisely the discussion within which the Guiding Principles ought to play a significant role. This was a point already emphasized by the Norwegian government in a presentation by Pål Haugerud; Director General, Asset Management Department Norwegian Ministry of Finance to the 2012 International Forum of Sovereign Wealth Funds held in Mexico City, 5-7 September 2012, “Corporate Governance; Norway’s Government Pension Fund Global” (available <http://www.ifswf.org/pst/mexico2012/norway.pdf>).

Third, a human rights oriented strategy of investment, combining elements of public law through their application to investment decisions, and private governance, through the active sharing holding program, provides a valuable space for civil society engagement. That engagement can be directed both at the state, and its efforts to domesticate the international standards of instruments such as the Guiding Principles, but also to private enterprises, by providing an important vehicle for aggregating shareholder power to advance a human rights based corporate governance structure and to monitor the rights detrimental activities of enterprises. These are themes explored at greater length in Larry Catá Backer, “From Institutional Misalignment to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation’s ‘Protect, Respect and Remedy’ and the Construction of Inter-Systemic Global Governance,” *Pacific McGeorge Global Business & Development Law Journal*, 2011. Available at SSRN: <http://ssrn.com/abstract=1922953>. Particularly interesting in this regard was a discussion given by Rintaro Tamaki, Deputy Secretary General of the Organization for Economic Cooperation and Development to the 2012 International Forum of Sovereign Wealth Funds held in Mexico City, 5-7 September 2012, on Pension Fund Financing for Green Infrastructure Initiatives (available <http://www.ifswf.org/pst/mexico2012/tamaki.pdf>).

2. Specific industry sectors to inquire on how the intersection between pillars one, two and three of the Guiding Principles (the State Duty to Protect, the Corporate Responsibility to Respect and Access to Remedy) play out in such sectors across the globe.

It has been something of a common place to focus recently on extractive industries. In part, perhaps, the focus is necessary because these enterprises operate in a sector that intersects not merely between the three pillars of the Guiding Principles, but also because they intersect with emerging guidance on weak governance zones and the problems of state owned industries in transnational economic activity. One need only consider the recent report distributed by Human Rights Watch, “Gold’s Costly Dividend: Human Rights Impacts of Papua New Guinea’s

Porgera Gold Mine” Feb. 1, 2011 (available <http://www.hrw.org/node/95776>) to get a sense of the dimensions of the problem and the challenges that lie ahead. Indeed, even after 18 months of consultation with leading civil society advocates of human rights, including those close to the Guiding Principles, the mining operations there continue to be criticized for their inability to effectively produce a vigorous compliance with the Guiding Principles and related governance standards. This was conveyed to the UNCHR recently—Mining Watch Canada, “Letter to UN Commissioner for Human Rights re: Barrick Gold's "grievance" procedure for victims of rape by security guards at the Porgera Joint Venture mine in Papua New Guinea,” March 23, 2013 and response letter dated 2 April 2013).¹

3. Regional dynamics in the implementation of the Guiding Principles, including the interaction between regional bodies and individual States and companies.

One of the most interesting developments in the elaboration of the Guiding Principles centers on implementation. That, in turn, is highly contextual in two senses. First, the Guiding Principles themselves may be read differently depending on the legal culture of the state in which the duty to protect or the responsibility to respect human rights arises. More importantly perhaps, the third pillar remedial provisions are, though altogether too heavily centered on state judicial mechanisms, themselves subject to substantial variation not merely because of distinct legal traditions in states but also because the fundamental political system of many home and host states differ in quite distinct ways. This is particularly apparent, for example, in the fundamentally different legal-culture approaches to an understanding of the mechanics and structure of remedial systems in India and China. India, like many of the states adhering to the Guiding Principles embraces a judicial and individual rights oriented approach to remedies. China, on the other hand, embraces an administrative and communal approach. These differences will have significant effects on the way on which the Guiding Principles are understood and applied, especially with respect to 3rd pillar obligations.

In a recent study, I suggested the extent to which these differences in approach may affect even the way in which fundamental international human rights norms are understood and naturalized in each state. (See Larry Catá Backer, “Privatization, the Role of Enterprises and the Implementation of Social and Economic Rights: A Comparison of Rights-Based and Administrative Approaches in India and China,” *George Washington International Law Journal* – (forthcoming 2013) available at SSRN: <http://ssrn.com/abstract=2195251> or <http://dx.doi.org/10.2139/ssrn.2195251>). From the middle of the last century, socio-economic rights have been bound up within the ideology of the state within national legal orders and through the construction of an important edifice of public international law and institutions.

¹ available http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_unhchr_on_porgera_2013-03-19.pdf and Response to Barrick Gold’s Letter of 22 March 2013, letter dated 2 April 2013, available http://www.miningwatch.ca/sites/www.miningwatch.ca/files/letter_to_un_high_commissioner_april_2_2013.pdf.

Globalization may be changing both the focus and locus of socio-economic rights. The state, and public international organizations have been making room for the multinational corporation and global civil society. In lieu of a hierarchically arranged global system of public power managing socio-economic rights, governance fracture and polycentricity have complicated the regulatory landscape, making it sometimes harder to see where public law ends and private affairs begin. This study examines the ways in which the development of socio-economic rights has moved beyond the state in two of the most important emerging free market economies — China and India. In China, privatization is grounded in state obligation, administrative approaches and private rule systems. In India, privatization is grounded in individual rights based and civil and political rights based judicial approaches. Though both incorporate international norms, they achieve this incorporation in substantially different ways. These will serve to suggest the ways in which both privatization and corporate actors now play an increasingly important role in realizing socio-economic rights, and the way approaches to economic and social rights are fracturing at the private as well as the public law level. Indeed, within the forms of privatized frameworks for the development of economic and social rights India and China evidence the ways in which political division has now also been privatized and replicated — providing an additional space within which the tensions already quite evident in the state system’s difficulties with human rights may be replayed. The Working Group might well consider these distinctions going forward.

4. Examples of Guiding Principles implementation practice by States, business enterprises or other stakeholders on all or certain aspects of the Guiding Principles, for example, the issue of transparency measures such reporting requirements.

The NGO Shift reminds us:

Many complex human rights challenges within supply chains do not have immediate or easy solutions. Time may be required for rootcause analysis, for industry-wide collaboration, for increasing company leverage to enable action with a supplier, and for identifying appropriate and effective remediation measures. In such instances, increased transparency can be particularly beneficial, enabling a company to convey internally and externally the seriousness with which it is treating challenging issues and indicating the concrete steps it is taking in response. One company noted that they receive ‘a lot of credit from external stakeholders’ when they discuss with them their efforts to address a problem, even when the company acknowledges that it does not yet have the answers. (Shift, Respecting Human Rights Through Global Supply Chains, Shift Workshop Report No. 2, Oct. 2012, available <http://shiftproject.org/sites/default/files/%20Respecting%20Human%20Rights%20Through%20Global%20Supply%20Chains%20Report.pdf>).

Transparency remains very much a work in progress in the context of business and human rights. It might be useful to study, in that respect, the challenges and approaches of Apple, Inc., in its recently developing relationship with its downstream supply chain partner, Foxconn. See, Fair Labor Association, *Independent Investigation of Apple Supplier, Foxconn*, March 2012; available http://www.fairlabor.org/sites/default/files/documents/reports/foxconn_investigation_report.pdf. It might also be useful to consider the challenges for business and human rights in the context of transparency that is illustrated by British Petroleum in its recent efforts to mitigate the damage from its oil spill in the Gulf of Mexico in 2011. See, Larry Catá Backer, “Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts,” *Minnesota Journal International Law* 22:1-70 (2013), available at SSRN: <http://ssrn.com/abstract=2025503> or <http://dx.doi.org/10.2139/ssrn.2025503>.

5. Specific examples of strategic initiatives that can shape State and business uptake of the Guiding Principles.

It might be useful to critically review the work of the Business Leaders Initiative on Human Rights (available <http://www.blihr.org/>).

“The Business Leaders Initiative on Human Rights has been a business-led organization involving 16 of the world’s major brands during this period. The diversity of sectors and individuals involved, plus the engagement with a wide range of stakeholders has made the process a rich experience for member companies. A great deal has been learned about the importance of a progressive space for sharing, debate, learning and hard work. In developing tools and policy views in this area, we hoped to support a reduction in human rights abuses by corporations, the development of a level playing field and ultimately a way of doing business that is socially sustainable for all.”

What makes this organization particularly interesting is its focus on making effective the 2nd pillar responsibility to respect human rights, not merely as empty sloganeering, but as an institutionalized process producing governance structures that might be implemented by participating companies with the functional effect of law. “The state duty to protect human rights is central but the corporate responsibility to respect human rights is also a fundamental premise and represents a positive responsibility to act even when a government might not.” (Business Leaders Initiative on Human Rights, *Policy Report 4* (2009) available <http://www.blihr.org/Legacy/Downloads/BLIHR%20Report%202009.pdf>). It is clear that the BLIHR may be too timid, but their work points in the right direction—one worth exploring further through the Forum process.

More interesting still is the related Global Business Initiative on Human Rights. From their perspective, the “underlying vision is a global community of corporations from all sectors *knowing and showing* that they respect the dignity and rights of the people they impact and interact with. From a business perspective this supports an enhanced approach to global leadership and risk management, and can provide access to markets, customers and capital.” (Global Business Initiative on Human Rights, *Advancing Human Rights In A Business Context Around The World*, available <http://www.global-business-initiative.org/>). But this translate into efforts to incorporate the Guiding Principles into the corporate practice of member enterprises and to a project of capacity building down the supply chain. Yet this project remains sealed off—described as a self contained “safe space” for business, a space that might be safe yet segregated is unlikely to develop the networked connection necessary to create policy coherence across all stakeholders seeking to deepen commitment to the Guiding principles. The responsibility to respect human rights thus appears to be successfully building governance structures within global enterprises, but these remain disconnected from other efforts, especially those of public bodies. The resulting dissonances between public and private regulatory systems might produce a discordant polycentricity that will weaken the effectiveness of global efforts to construct structures of business and human rights.

On the public side, it might be useful to support the Working Group for an ASEAN Human Rights Mechanism (available <http://www.aseanhrmech.org/>). Their workshops and consultation on business and human rights seem promising (“Last December 11-12, 2012, the Working Group for an ASEAN Human Rights Mechanism, in partnership with the Philippine Representative to the ASEAN Intergovernmental Commission on Human Rights (AICHR), in collaboration with UNWOMEN, and supported by the Canadian International Development Agency and the Friedrich Naumann Foundation, conducted the Regional Workshop and Consultation on Business and Human Rights at the Bayview Hotel, in Singapore.” Ibid available <http://www.aseanhrmech.org/news/regional-workshop-consultation-business.html>). It is hardly enough to build capacity in the developed states and their civil society organizations. More substantial penetration of developing states, especially those where middle tier supply chain enterprises operate appears essential. Even more essential is for those efforts to avoid the sense of a top down (North to South) conversation. Rather, these interventions ought to build capacity and autonomy in these public sector organizations to help build compliance capacity focused on the state duty to protect. The outreach to an organization whose objective is to establish an intergovernmental human rights commission for ASEAN seems to illustrate a strategic initiative worth cultivating.

6. Modalities that may be conducive to engaging key stakeholders and promoting multi-stakeholder dialogue at the Forum.

I can offer little here but the experiences gained during my service at the head of a large multi-unit organization of university faculty, where there was a substantial concern about

engagement. The principal lesson learned from that experience was that transparency can sometimes serve as effectively to stymie engagement as to enhance it. Engagement is not served by passive interaction where key stakeholders are collected for the purpose of conveying information, ideas and programs, which are expected to be both grateful for the information and to absorb and convey its essence to their own organizations. Usually nothing of the sort occurs. Stakeholders engage best by participating, both in discussion and in efforts to advance programs of business and human rights. Engagement requires both a willingness to share information before decisions are made and to be willing to consider and respond to information received in the process of dialogue. To that end, perhaps, at least some of the program ought to be devoted to facilitated discussion around key themes where there is little management of discussion to a pre-determined set of conclusions. Like wise, brainstorming sessions around particular problems might also be a useful method of engagement—one that might provide the Working Group with new and promising approaches to deepening

7. How to enhance the geographical balance and participation by key stakeholders from all regions, including business enterprises and affected individuals and communities.

My response here is brief but pointed. There are essentially three distinct ways in which the Working Group may enhance geographical balance and participation by stakeholders:

1. Subsidize the participation of traditionally marginalized participants in the activities of the Working Group. This largely requires the identification of marginalized participants and the commitment to provide financial support to civil society and middle and lower level supply chain enterprises to participate directly in the work of the Working Group and those of related public and civil society actors.
2. Move the proceedings and operations of the Working Group to those places where outreach is necessary. This may require the development of a deep and institutionalized set of for a in a variety of places outside of Geneva. The Working Group may find that it may be possible to develop an architecture for this approach by developing relationships with national Human Rights Commissions.
3. Develop technology driven real time mechanisms for participation. The object is to deepen the engagement of traditionally marginalized participants to broaden communication and change the focus of discussion from one centered on the desires of developed states and their civil society partners to more broadly reflect global opinion and agendas.

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I have presented some perhaps ambitious suggestions for use by the Working Group. I hope that some may be found useful. I appreciate the opportunity to convey these thoughts and am looking forward to contributing to the advancement of this very worthwhile project. Significant institutional engagement in that development will serve as the most important effort by the United Nations to advance its business and human rights agenda.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Backer". The signature is stylized with a large, looped initial "L" and a long horizontal stroke extending to the right.

Larry Catá Backer