

COMMENTS ON THE CORPORATE HUMAN RIGHTS BENCHMARK CONSULTATION'S DRAFT LIST OF INDICATORS FOR CONSULTATION

Shift appreciates the opportunity to comment on the first draft of the proposed Corporate Human Rights Benchmark (CHRB). The CHRB initiative is timely. There is an important opportunity for a human rights benchmark to help advance companies' human rights performance and both to broaden and accelerate progress in this field.

Together with Mazars, our partners in the Human Rights Reporting and Assurance Frameworks Initiative (RAFI), we have welcomed the opportunity to meet with the organisations developing the Benchmark to discuss the potential for the Benchmark to build upon and complement the UN Guiding Principles Reporting Framework. The UNGP Reporting Framework, based on two years of global consultations, provides companies with a set of key questions to address in their human rights reporting, which are comprehensively aligned to the UN Guiding Principles. They can be addressed as part of an annual, integrated, sustainability or stand-alone human rights report, or any other form of public disclosure. The Framework's Implementation Guidance further elaborates on the kinds of information that it could be relevant for a company to include in its reporting in relation to each question. In addition, the RAFI project team will soon issue a first draft of guidance for internal auditors and assurance practitioners in relation to human rights, including indicators for assessing whether company policies, processes and practices are appropriate and effective. This draft will be further developed and refined through a consultation process over the coming months.

We hope that this work to arrive at a widely-supported understanding of what constitutes meaningful information for companies' reporting on their human rights performance, and to consider how this information can appropriately be assessed by assurance practitioners, may offer a significant contribution to the CHRB's work, given that companies' own disclosure will provide a large proportion of the information underpinning the Benchmark.

We believe, moreover, that there is important potential for the UNGP Reporting Framework and the Benchmark to work in mutual support, advancing the success of both. In particular:

- where indicators under the Benchmark are aligned with the questions under the UNGP Reporting Framework, this will further support the kind of meaningful reporting called for by the Framework; and
- where companies report using the UNGP Reporting Framework, this will provide more and better disclosure that can support the evidence base for a Benchmark.

We welcome the chance to contribute to this positive dynamic and offer the following comments with that aim.

A. Alignment with the UN Guiding Principles on Business and Human Rights

We believe that it will be important that the Benchmark is aligned with, and does not undermine, the UN Guiding Principles on Business and Human Rights, which are the authoritative global standard in this field. We find that in a number of regards, the current draft would need amending to meet this objective. For example:

1. B.1.2 allows that a company would achieve Score 1 if its public statement of policy commits to respecting only two of the fundamental rights set out in the ILO core conventions. Under the UN Guiding Principles, companies should respect all internationally-recognized human rights, which are defined, *at a minimum*, as including the International Bill of Human Rights and all four fundamental rights contained in the ILO core conventions.

We also find it unhelpful to have separate indicators on respect for human rights and respect for core ILO conventions, since this implies that the workers' rights these conventions address are not themselves human rights.

2. Section D2 is based on an assessment of the severity of 'adverse events'. However, it does not appear to consider the three dimensions of severity set out in the UN Guiding Principles, namely: how grave the impact is (its scale), how many people are affected (its scope), and how hard it would be to remedy the harm (its remediability). Under the terms set out, one incident of verbal abuse would appear to be as severe an impact as an entire workforce of people in forced labour conditions. Furthermore, the Benchmark defines 5 deaths of employees as equivalent in severity to 10 or more deaths of supply chain workers or just 1 death when committed by a security provider.

We are concerned that this confuses the severity of impacts – whereby all deaths are equal – with the leverage a company may have to avoid such impacts. This appears therefore to apply a 'sphere of influence' concept to this analysis of severity. Under the UN Guiding Principles, 'influence' is *not* relevant for understanding either the severity of an impact or the nature of a company's responsibility for that impact. We believe it will be important that the Benchmark reflect this critical point.

3. The current draft methodology makes 'Human Rights Due Diligence' and 'Embedding Policy' sub-components of 'Management Systems'. This would seem to imply that the management systems addressed under 'Embedding Policy' are not part of human rights due diligence. Yet indicators under the section on 'Embedding Policy' include, for example, 'Framework for Stakeholder Engagement', 'Engaging Business Relationships' and 'Monitoring and Corrective Actions', while the section on human rights due diligence then again addresses stakeholder engagement and tracking in overlapping but distinct terms. For example:
 - a. Indicator C.1.9 says 'the company has a system to monitor the implementation of its human rights policy across its operations and follow up on corrective actions and necessary changes to policy or processes'; and indicator C.2.5 then says 'the company has a process to track...its assessment of the implementation of the human rights policies or targets or the effectiveness of the implementation of actions in response to the assessment and to integrate that information into improving actions and systems'.

- b. Indicator C.1.11 says that ‘the company has a process to identify its stakeholders and engages in regular dialogue with potentially affected stakeholders’. C.2.3 then says ‘the company has a process in place to identify and consult stakeholders on salient human rights issues’.

The distinctions to be drawn are very unclear to us, and risk seeming arbitrary or non-existent. One might infer that ‘tracking’ under human rights due diligence does not include audits of suppliers, since this is covered in the earlier section. Yet we find it unclear why audits are excluded from due diligence in this way. Meanwhile, the draft would seem to suggest that engaging with business partners is not part of human rights due diligence, albeit this is one of the major tools of leverage through which impacts can be prevented and mitigated under the UN Guiding Principles. Human rights due diligence is also portrayed as excluding the management of health and safety for reasons that were unclear to us.

As a result, these two sections seem to set up some false distinctions. They risk implying that human rights due diligence under the UN Guiding Principles is a much narrower concept than is the case. Processes that the Benchmark splits between these sections are in practice inherently intertwined and make little sense when assessed separately.

B. Supporting good human rights reporting

1. Clear alignment with questions in the UNGP Reporting Framework

As an overarching point, we believe it would be most helpful for companies if the indicators related to leadership, governance and management systems (including human rights due diligence) were clearly linked to questions in the UNGP Reporting Framework. A significant number of companies are seeking to apply the UNGP Reporting Framework in their public reporting, and this cross-referencing will help them assess which information within their reporting is relevant for the Benchmark. In addition, Indicators under section D1 on ‘Performance’ that relate to specific human rights could easily be linked to the UNGP Reporting Framework in the context of reporting on salient human rights issues.

At present we find the relationship between the selected indicators and questions in the UNGP Reporting Framework to be unclear. Questions that are carefully crafted in the Reporting Framework, based on extensive consultations, are paraphrased or changed in the language used in the Benchmark.

We agree fully that it will be important to include in the Benchmark some indicators that go beyond what is in the UNGP Reporting Framework, and section D2 is a case in point. However, where the Benchmark is addressing the same issues and basing itself specifically on information that companies would disclose, we believe it would be unfortunate if the opportunities for synergy between the Reporting Framework and the Benchmark were to be missed. This would risk creating confusion and setting up competing expectations for company reporting.

2. Approach taken to indicators on reporting/transparency

We note two types of indicator that are quite common under section E on ‘Reporting/Transparency’:

- a. indicators that overlap strongly with indicators from earlier sections and offer uncertain added value; and
- b. indicators based on data points that need to be understood in the context of broader narrative information.

a. Indicators that overlap with other sections

In practice, it appears that the information required to assess a company against the indicators in all sections of the Benchmark except for Section D2 on ‘Adverse Events’ will come from companies’ own disclosure. However, the Benchmark provides a separate section E entitled ‘Reporting/Transparency’ which contains indicators for assessing ‘how the Company reports on its human rights policies, practices and performance as well as impacts’. It is unclear why this distinction is made. For example:

- Indicator C.1.5 addresses whether a company communicates its policy commitment publicly and to employees, while C.1.6 looks at whether it is communicated to business relationships. Indicator E.1.1 under the ‘Reporting/Transparency’ section looks again at whether the policy commitment is publicly available and then whether it is communicated to external stakeholders other than business relationships. We find it unclear why the one indicator would relate only to ‘management systems’ and the other only to ‘reporting/transparency,’ and how communicating a policy commitment to external stakeholders would be differentiated from publicly communicating the commitment.
- Indicator C.1.7 addresses whether the company trains its workers on its human rights policy and more broadly on human rights, including the proportions and categories of workers trained. Indicator E.1.2 looks at whether the company reports *details on* its training of human rights workers, also including numbers and categories of those trained. We find it unclear to what extent different conclusions would be drawn in each case with regard to a benchmarking exercise, unless the point is to assess the quantity of information provided.
- Indicator C.2.2 (under ‘Human Rights Due Diligence’), looks at information the company discloses about its process(es) to assess and prioritise actual and potential human rights impacts and risks. Indicator C.2.4 looks at whether the company has a process to act on the results of its risk/impact assessments and provides details of the results of those assessments. Meanwhile, indicator E.1.3 will look at whether the company reports “details on implementing its human rights management systems”.

This approach to the assessment of companies’ reporting would seem to be in good part about how much information the company has provided in relation to matters already being assessed elsewhere in the Benchmark. As such it risks being duplicative and failing to distinguish the quality of the reporting from the quantity of the reporting.

b. Indicators that require narrative context

A number of the indicators that are included under section E on ‘Reporting/Transparency’ focus on data points that, in our opinion, tell one very little about the quality of a company’s policies, practices and performance or impacts’ when presented on their own.

For example:

- a. The number of investment agreements and contracts that include clauses on human rights does not convey whether they were implemented or helped ensure human rights were respected in practice. Supplier contracts, for example, routinely contain such clauses but whether they mean anything in practice depends on a host of other factors;
- b. The number of incidents in a company's operations or supply chain on its own tells one little about the company's efforts to respect human rights. A company may have found and reported a high number of incidents of child labour in its supply chain due to strong due diligence and/or the presence of commodities in its supply chain where child labour is endemic, and it may be engaged in multiple activities to address this problem. Equally, a company may report few if any incidents of forced labour in its supply chain, but simply because it has poor due diligence, is unaware that the phenomenon is relevant to its supply chain, or does not believe it has any responsibility to identify or address the problem.

In our experience, this kind of indicator becomes useful only when placed in a narrative context that enables its accurate interpretation, and is often misleading when provided or judged on its own. This point was underlined by a range of stakeholder groups during our two years of consultation to develop the UNGP Reporting Framework. Moreover, these indicators may be better understood as data-oriented indicators of human rights policy, process and performance, rather than indicators of good reporting/transparency.

Shift has worked with investors and analysts to devise a simple approach to assessing a company's reporting, based on the UNGP Reporting Framework, that looks not only at the quantity of information reported, but also at the type of information and how meaningful it is. We were pleased to be able to share this with the Benchmark team in draft and hope to finalize and publish it shortly. It might be of use also to the Benchmark's efforts to differentiate indicators of policy/process and performance from indicators of good reporting, and to distinguish the quantity of reporting from the quality of reporting.

C. Salient human rights issues and key sector risks

We note that the Benchmark uses the term 'salient' in a variety of different ways at present, including 'salient risks and human rights issues' and 'salient risks and impacts'. It would be ideal if the Benchmark were consistent in these references. The UNGP Reporting Framework uses the term 'salient human rights issues' and defines these, based on the UN Guiding Principles, as being those human rights that are at risk of the most severe negative impacts through a company's activities and business relationships. We believe it would be helpful if these definitions were aligned.

The Benchmark also defines certain key sector risks, being those that are "regularly regarded as potentially severe and/or likely within the sector and that companies are expected to demonstrate, through a process of human rights due diligence, how they are preventing them or why they are not relevant" (C.2.2). We agree that certain human rights risks are particularly likely within certain sectors, and that it can be useful to highlight these. We find it also very helpful that a company could explain why it is not reporting on a certain 'key sector risk' in the event that it is not in fact a salient issue for that particular company. For example, indigenous people's rights would not be a salient issue for an extractive company that has operations only in locations where there are no indigenous peoples.

Section D1 provides indicators in relation to specific human rights and then highlights the sectors for which they will be considered relevant. We find it unclear as to how this designation relates to the list of ‘key sector risks’. For example, ‘living wage’ does not appear in the list of key sector risks for extractive companies, yet extractives are listed in this section as one of the sectors for which the issue of living wages is relevant, and the strong implication is that the Benchmark would therefore expect to see the company provide information about the living wage. This could create confusion as to whether companies are expected to report on all the rights listed as relevant for their sector in addition to the key sector risks. If so, the relevance of identifying ‘key sector risks’ would be reduced. In addition, we are concerned that this risks undermining the value of a company identifying its salient human rights issues, explaining how they are determined, and focusing its reporting on those issues, as called for the UNGP Reporting Framework.

The human rights covered under section D1 appear to be almost exclusively labour-related human rights except for land use and acquisition and resettlement. It would be helpful to understand why this section is not more broadly representative of internationally-recognized human rights.

D. Care in the approach to assessing adverse events

One of the critical contributions of the Benchmark will be in combining information that is disclosed by companies themselves with credible third party information about their performance. This will be central to the added value and success of the Benchmark. It is also, and inevitably, very challenging as the providers of the Benchmark will risk becoming the arbiters of ‘truth’ in cases of disputed allegations, and of doing so from behind desks and based on information in the public domain regarding incidents that are occurring all round the world.

Clearly the organizations developing the Benchmark are aware of these challenges and of the need to find ways to address them. At present, the draft of Section D2 on Adverse Events raises a few questions, and it would be useful to better understand the proposed approach that will be adopted. For example, it would be helpful to understand:

1. how the providers of the Benchmark will judge what kind of information is sufficient to “substantiate” allegations, including how it will assess the credibility of sources and balance competing statements of the facts, particularly when these are the subject of formal investigations or court cases;
2. what the relevance of the “legal/regulatory framework” will be in judging allegations;
3. what reasons will be considered “reasonable” in the case of refusal to recognise or bargain with a union;
4. how it can be judged whether deaths or injuries were only avoided by chance in a certain situation.

E. The feasibility and possible consequences of certain indicators

Some of the indicators raise questions for us regarding their feasibility from a very practical standpoint. In some instances, we are concerned they would risk driving the wrong kinds of corporate behaviour. For example:

1. Under A.3.1, being a member of an MSI is sufficient to get a Score 1. However, we know that in practice some companies join an MSI simply for a form of cover, while others join them to assist with human rights due diligence, and others join to become leaders and innovators. We are concerned that this indicator may encourage more companies to join for show rather than for improved human rights risk management.
2. Under C.1.7, score 2 requires that all workers are trained broadly and on a continuing basis on human rights and that relevant workers among the company's 'business relationships' are also trained. This could therefore encompass hundreds of thousands of individuals, including workers for which the company is not the employer and may not be able to dictate training, such as workers of a joint venture partner or a government customer. We find the feasibility of this to be questionable and are concerned that it may incentivize superficial, 'one-size-fits-all' training programs in order to increase the numbers that can be claimed to have been 'trained'.

At the same time, the sectoral specifications for this indicator imply that in fact Score 2 is not for all workers, since for extractives it specifies certain types of worker – security personnel and those responsible for community relations policies. We found this confusing and more precision may be helpful here.

3. Under C.1.9, to achieve Score 2, an apparel or agriculture company would have to be auditing and monitoring more than two-thirds of its suppliers every year. For many companies this would mean tens of thousands of audits every year that then have to be analysed and lead to follow up action. The general trend within these sectors has been to recognise that while audits can – where the audit protocols are good and the auditors are skilled – provide some useful metrics of performance, they almost never lead to sustained improvements in practices beyond the area of health and safety. We have found that leading companies are therefore looking beyond audit and spending more resources on activities than can bring sustainable improvements in respect for the human rights of workers. We are concerned that this indicator would risk pushing the dynamic substantially in the opposite direction and we would strongly recommend changing it.
4. Under D.1.12, Score 1 requires that the company can show it has calculated living wages in the countries where it operates and commits to paying no less. It is unclear to us whether this requires that the company actually pay a living wage in practice. This indicator could also be finessed to reflect some of the leading work being done at present to understand what it means to calculate a living wage and to find methods to move payments to that level while avoiding unintended consequences, including other negative human rights impacts.

5. Under D.1.13 on land use, the provisions seem to presume that the acquisition, leasing or usage of land is being conducted between the company and the customary land and resource owners and users. It is unclear to us how this indicator will apply in the common situation where the government or a domestic company has 'acquired' the land contrary to human rights standards and is then leasing or selling it onwards to the company. The steps needed to identify and address any abuses of the rights of original land owners or users may be notably more complicated than this indicator allows for.

Conclusion

The development of a Benchmark for the whole realm of business and human rights is inevitably challenging. We commend the organisations advancing the CHRB for taking this step. It is an exercise well worth pursuing and with many benefits to gain for the advancement of respect for human rights, the positive recognition of those companies dedicating sincere efforts to progress, and increased exposure and pressure on those companies that are yet to do so.

The above comments are intended to highlight some of the inevitable challenges that arise, and are offered to contribute to the broader conversation with all stakeholders who will be helping the CHRB to advance. Perhaps, above all, they highlight the need for adequate time to get this right. Other initiatives that have developed successful benchmarks in relation to human rights issues, such as the Access to Medicines Index and more recent initiatives such as Ranking Digital Rights, have begun with a small number of indicators and companies and done extensive testing over many months. They have been addressing small areas of human rights in relation to single sectors. This initiative, with its broader ambitions, will likely require even more caution, time and testing. However, these investments will certainly lead to enormous benefits in the final product, its credibility and its power to achieve the objective of driving real improvements in company performance.

Shift looks forward to continuing to contribute to the stakeholder consultations. Together with Mazars, we would welcome the chance to explore how the Benchmark could better align with the UNGP Reporting Framework to achieve a mutually-supporting dynamic.

We look forward to many more stimulating conversations as this important initiative progresses.