



Background Paper for India's National Framework on Business and Human Rights

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By

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** This paper does not represent the views of ETI but rather, is intended to stimulate discussion.

Contents

Background Paper for India's National Framework on Business and Human Rights	7
Need for a National BHR Framework for India	8
Principles and Processes that should Underpin the Indian Framework	9
Content of the Proposed Indian Framework	10
Conclusion	12

Background Paper for India's National Framework on Business and Human Rights

Backdrop

The United Nations (UN) Guiding Principles on Business and Human Rights (GPs), which were endorsed by the Human Rights Council (HRC) in June 2011, are built on three pillars: states' duty to protect human rights, corporate responsibility to respect human rights, and access to effective remedies. All three pillars of the GPs – especially Pillar 1 and Pillar 3 – require states to take a number of measures to ensure that business enterprises do not violate human rights and that effective remedies are available in cases of violation.

The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) 'strongly encourages all states

to develop, enact and update' a national action plan (NAP) on business and human rights (BHR) as part of states' responsibility to disseminate and implement the GPs. In June 2014, the HRC passed a resolution calling upon states to develop NAPs. As of 29 February 2016, ten states have drawn up NAPs, while several others are in the process of doing so.

Against this background, this paper examines two broad questions: first, whether India needs a BHR framework at the national level to implement the GPs; second, assuming that such a framework is needed, what the content of such a framework should be and what principles should be followed to make the process transparent, inclusive and legitimate.

Need for a National BHR Framework for India

There are several reasons why the Indian government should initiate the process to put in place a national BHR framework. India has ratified a number of international human rights instruments that impose explicit or implicit obligations on the government to ensure that business enterprises operating within its territory or jurisdiction do not violate human rights. The GPs merely reiterate this international obligation. Developing a BHR framework would also be consistent with the mandate flowing from Article 51 of the Constitution, which provides that the state 'shall endeavour to ... foster respect for international law'. A national BHR framework would be useful even if a legally binding international instrument to impose human rights obligations on companies is adopted in future.

Although the Supreme Court has developed some innovative constitutional principles, these cannot ensure full protection of human rights in a free market economy where the private sector has an all-pervasive role.

The process of drafting a BHR framework would allow the government to make an assessment of the current legal-cum-policy framework so as to identify what is working and what is not in terms of ensuring that companies respect human rights. India already has a vast legal framework that applies (albeit in a patchy manner) human rights norms to companies. Instead of adopting a piecemeal approach of reviewing different segments of this legal framework (such as labour laws or environmental laws), a holistic assessment that does not ignore the human rights impact of creating an environment conducive to private investment-driven development may be preferable.

Although the Supreme Court has developed some innovative constitutional principles, these cannot ensure full protection of human rights in a free market economy where the private sector has an all-pervasive role. The BHR framework would allow an informed debate as to whether a constitutional amendment may be desirable to extend the protection of fundamental rights (FRs) against companies – similar to the constitutional position in South Africa, for example.

The Indian government has adopted a number of significant corporate social responsibility (CSR) initiatives in recent years – e.g., the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business 2011, and CSR provisions in the Companies Act 2013 and the Model Bilateral Investment Treaty (BIT) 2015. Developing a BHR framework would allow the government to build on these initiatives and encourage all types of companies to integrate respect for human rights into their business operations.

As numerous case studies have shown, if companies operating within India violate human rights, resistance from affected communities drastically slows down development projects. Conversely, Indian companies – including public sector undertakings (PSUs) – that operate overseas may be accused of violating human rights, as some of these countries may not have adequate regulatory frameworks in place to safeguard the human rights of their communities. Therefore, India needs a BHR framework not merely for companies operating within its territory but also for Indian companies operating outside India's territory through subsidiaries or joint ventures. In fact, adopting a BHR framework would be in the long-term interests of India's development agenda as well as of its companies operating locally or internationally.

A BHR framework should also help in developing a model of economic development that is both sustainable and inclusive. For avoiding social conflicts, it is critical that the sufferings as well as the fruits of the development are shared fairly and proportionally among all sections of society.

Principles and Processes that should Underpin the Indian Framework

The UNWG's Guidance on NAPs outlines four essential criteria for effective NAPs, namely that they must: (i) be founded on the GPs; (ii) respond to specific challenges of the national context; (iii) be developed and implemented through an inclusive and transparent process; and (iv) be regularly reviewed and updated. The Guidance document also recommends that states keep in mind the following five sequential phases to adopt a NAP: (i) initiation; (ii) assessment and consultation; (iii) drafting of any initial NAP; (iv) implementation; and (v) update.

It would make sense for the Indian government to follow these good practice recommendations rather than reinventing the wheel. Special attention should be paid to ensuring that the drafting process is fully transparent and inclusive, so that the views of all stakeholders – especially those who are adversely affected by corporate activities or who come from disadvantaged backgrounds – are taken into account. It would be equally important to reach out to a range of business actors at all stages of the process, but without creating the perception of a 'corporate capture of the state'. In order to ensure that the participation of various stakeholders is meaningful, consultations must be conducted in diverse parts of the country in local languages. In addition, people should be given adequate time to digest the information and provide feedback.

Developing a BHR framework would require an assessment of India's existing legal regime (operating at both domestic and international levels) and developing reform options. Instead of creating new committees to perform these tasks, the government should consider using existing institutions, such as the Law Commission of India and the National Human Rights Commission (NHRC). These institutions in turn could collaborate with law schools and business schools in India to carry out the required research.

A few additional principles should also be relevant for developing India's national BHR framework. It may be desirable to look beyond the GPs, as in certain respects they may not reflect accurately states' obligations under international human-rights law. The extraterritorial human rights obligations of states are a case in point. Another aspect relates to Pillar 1: as states have tripartite obligations under international human rights law, the duty

to protect human rights under the first pillar should not mislead us into believing that states' obligations to 'respect' and 'fulfil' human rights would not be relevant in the context of business.

Moreover, the Indian government should build on forward-looking principles – such as the strict-/absolute liability principle, the polluter pays principle and the precautionary principle – developed by the Supreme Court in holding companies accountable for breaching human rights norms. Similarly, the judicial leads on applying certain FRs against companies too should be embraced.

Since India is a federal country, it would be critical for the central government to build a broad consensus at the outset with state governments about the need for – as well as the content of – the proposed national BHR framework. It may also be desirable for states to develop their own action plans to complement the national framework. Moreover, the third tier of governance bodies (such as Gram Sabhas) should also be brought on board, so as to have a shared understanding about the future of BHR discourse in India.

The proposed framework should respond to the full range of contexts in which human rights abuses could take place:

- (i) violations by Indian companies and/or their subsidiaries;
- (ii) violations by Indian subsidiaries of foreign companies;
- (iii) violations by government agencies, including during public procurement and development projects;
- (iv) violations by PSUs;
- (v) violations in situations of complicity between government agencies and private companies;
- (vi) violations by Indian companies – both PSUs and private companies – while operating abroad;
- (vii) violations within the supply chain of any of the above types of companies; and
- (viii) violations within the informal sector. While the framework should set the broad contours of the regulatory framework for all types of companies, some flexibility should be built into the process to allow for a differential treatment of small/medium-sized enterprises and the informal sector. In other words, despite having one framework, one size should not fit all.

Content of the Proposed Indian Framework

The content of India's national BHR framework should be developed bottom-up through a process of inclusive and transparent consultation with all stakeholders, rather than being pre-defined. Nevertheless, some thematic thoughts are noted below to start the conversation.

Declaring an Unequivocal Commitment to Uphold Human Rights

Any viable BHR framework must offer a vision of how a balance between human rights and development priorities would be struck. The Indian government – through its national BHR framework – should send a clear message that *all* the human rights of *everyone* matter while pursuing the development agenda. This may entail reversing the 'development first' mind-set and changing the perception that the human rights of certain sections of society matter less. The government should reiterate its commitment to uphold FRs under the Constitution, implement the tripartite duties under international human rights law, and take seriously the duty to 'protect' human rights under the GPs. The human rights expectations of businesses operating within the territory and jurisdiction of the Indian government (the latter may include extraterritorial business activities) should be clearly set out. This may, for example, be done by mandating companies to conduct due diligence under Pillar 2 of the GPs.

Establishing Coordination Committees

The proposed framework should try to minimise the lack of coherence: (i) among different central ministries; (ii) between the central government on one hand and the state governments and Gram Sabhas on the other; and (iii) between the domestic legal framework and India's international obligations. One of the tools to achieve better coherence is to rely on coordination committees where diverse views are exchanged, disagreements are resolved in an amicable manner, and a broad consensus is built.

As the BHR framework would relate to a number of ministries and departments of the Indian government, a permanent inter-ministerial committee on BHR, chaired

by the Prime Minister, should be established to achieve coherence on the levels of types (i) and (iii) described in the paragraph above. On the other hand, the Inter-State Council envisaged under Article 263 of the Constitution should be used to achieve type (ii) coherence, as most of the BHR issues should fall within the existing mandate of this council.

Reviewing the Existing Regulatory Framework

Although India already has a well-developed legal regime to capture the intersection of human rights with business, a vital aspect of the proposed BHR framework should be to undertake a review of the existing legal framework in order to improve its responsiveness to pre-empt as well as address human rights abuses by business enterprises. Based on a systematic review, a number of improvements could be made to different branches of law. For example, by revising the definition of 'state' under Article 12 of the Constitution, the jurisdiction of the Supreme Court may be extended to take cognisance of at least certain FRs by non-state actors such as companies. Alternatively, the High Court rules could be amended to allow High Courts to deal with violations of FRs by companies under Article 226 of the Constitution. A special bench may perhaps be created in each High Court to deal with such matters.

New laws may be required to encourage the disclosure of non-financial information by companies and to protect human rights defenders from persecution. In certain areas of law (such as labour rights, social security, land acquisition and environmental rights), the need may be to change patchy, outdated or cumbersome regulations into a coherent framework that relies on a mixture of obligatory and voluntary strategies to encourage compliance, and not to see state regulation necessarily as an adversarial or hierarchical process. Any such reforms must also ensure that the goal of simplifying regulations is not driven solely by a desire to create an investment-friendly environment: rather, the human rights interests of the affected communities should be at the heart of such reforms, and the principle of free, prior and informed consent should be implemented in both letter and spirit.

Paying Special Attention to Vulnerable Groups and Specific Sectors

India's BHR framework should pay special attention to the unique circumstances and experiences of vulnerable or marginalised sections of society, such as women, children, migrant workers, minorities, people with disabilities, Scheduled Castes (SCs), and Scheduled Tribes (STs). As India already has special human rights institutions to safeguard the interests of these sections of society, they should be involved in developing the BHR framework.

A related issue worth considering would be to develop sector-specific guidelines under the broad framework, as companies operating in different sectors face at least some uniquely different sets of human rights challenges, and it may not be feasible for 'one' national framework to respond to the specific needs of a diverse range of industries.

Offering Incentives and Disincentives to Business

The proposed BHR framework should outline what incentives and disincentives the government would offer to businesses to encourage them to take their human rights responsibilities seriously under both the GPs and the domestic legal framework. Apart from tax benefits, the government may establish responsible citizenship awards, create sector-specific labelling schemes, offer preferential loans to companies that embrace human rights, and integrate respect for human rights in public procurement policies.

In terms of disincentives, a range of civil, criminal and administrative sanctions should be contemplated against both companies and their executives found to be involved in human rights violations. The government should also create an environment in which 'social sanctions' can become effective. This could, for example, be done by requiring companies to disclose non-financial information. Companies could also be obliged to include on their websites information about past sanctions imposed on them for breaching human rights.

Strengthening Redress Mechanisms

As it is inevitable that some business enterprises might not respond to (dis)incentives, the government should provide a range of mechanisms that could be used by victims of corporate human rights abuses to seek access to justice. The first priority should be to reform the existing judicial as well as non-judicial mechanisms in order to make them

more accessible, and more capable of dealing with private-sector violations of human rights. Such reforms may mean relaxing the constitutional or statutory provisions that deal with the jurisdiction of the Supreme Court, the High Courts and the NHRC; consolidating courts that deal with labour disputes (e.g., Labour Courts and Labour Tribunals); and showing greater respect to determinations made by the National Green Tribunal (NGT) and Gram Panchayats.

Furthermore, the government should lay out the plan to support the development of non-state, non-judicial remedial mechanisms. These mechanisms should not

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be in lieu of – but rather in addition to – state-based judicial remedies. The potential of arbitration, mediation and conciliation should be harnessed to resolve BHR disputes, with due regard paid to the effectiveness criteria stipulated by the GPs. The role of civil society organisations (CSOs) may perhaps be institutionalised to fix the power asymmetry between companies and victims while using non-judicial grievance mechanisms, whether involving only companies or multiple stakeholders.

Removing Barriers in Access to Remedy

The GPs identify a number of substantive, procedural and practical barriers that undermine access to judicial remedies. The proposed BHR framework should outline specific measures to be taken to reduce each of these barriers. For example, the Indian government should consider ways to overcome difficulties posed by the corporate law principles of limited liability and separate personality. Recognising a direct duty of care or imposing a due diligence requirement on parent companies may be an option to consider, so that victims could hold a parent company accountable in appropriate cases. While the

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presence of class action and the well-developed system of public interest litigation (PIL) enable easier access to courts in cases involving a large number of victims, ways should be found to reduce the obstacles posed by the cost of litigation and endemic delays.

Building the Capacity of Various Stakeholders

The BHR framework for a developing country such as India should also list measures aimed at building the capacity of various stakeholders. Both government officials and corporate executives would benefit from training

workshops on how to resolve human-rights dilemmas and how to integrate the findings of human rights impact assessments into their decisions. The help of law schools and business schools should be solicited on this front. Communities adversely affected by corporate activities would also benefit from information-sharing about their legal rights and the remedies available to seek relief in cases of human rights violation. The relevant government departments could collaborate with CSOs and law students in empowering communities – a collaboration that would allow all participants to gain insights from the process.

Regular Monitoring and Periodic Update of the Framework

To avoid becoming merely a 'planning' document containing noble aspirational goals, the Indian BHR framework should not only identify concrete measures by which declared goals would be implemented, but also specify processes to monitor the efficacy of implementation and suggest ways of improvements. In addition, as BHR issues are dynamic in nature, any framework dealing with such issues must be revised and updated in line with changing needs. Putting in place a system of periodic review of the adopted framework (to take place every three to five years) may thus be desirable.

Conclusion

The GPs provide the Indian government an opportunity to assess its laws and policies that have a bearing on BHR and consider taking appropriate remedial steps. Doing so would ensure that India's path of economic development is not only sustainable and inclusive but also free from social conflicts. Developing a coherent BHR framework in a transparent and consultative

manner is one key tool that should assist in achieving this goal. The presence of a stable politico-economic system, vibrant democracy, free media, robust civil society, independent judiciary and the rule of law means that India already has the basic ingredients necessary to develop and sustain a BHR framework at national level.

The Ethical Trading Initiative (ETI) is a leading alliance of companies, trade unions and NGOs that promotes respect for workers' rights around the globe. Our vision is a world where all workers are free from exploitation and discrimination, and enjoy conditions of freedom, security and equity.

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