ОРГАНИЗАЦИЯ ОБЪЕДИНЕННЫХ НАЦИЙ **A**

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ПООЩРЕНИЕ И ЗАЩИТА ВСЕХ ПРАВ ЧЕЛОВЕКА, ГРАЖДАНСКИХ, ПОЛИТИЧЕСКИХ, ЭКОНОМИЧЕСКИХ, СОЦИАЛЬНЫХ И КУЛЬТУРНЫХ ПРАВ, ВКЛЮЧАЯ ПРАВО НА РАЗВИТИЕ

Доклад Специального представителя Генерального секретаря по вопросу о правах человека и транснациональных корпорациях и других предприятиях

Добавление[*] [**]

Резюме пяти многосторонних консультаций

[*] Представлен с опозданием.

[**] Резюме настоящего доклада распространяется на всех языках. Сам доклад, который содержится в приложении к резюме, распространяется только на том языке, на котором он был представлен.

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Резюме

Во втором полугодии 2007 года для содействия Специальному представителю Генерального секретаря по вопросу о правах человека и транснациональных корпорациях и других предприятиях в разработке концептуальной и стратегической основы диалога предпринимателей и правозащитников, а также помощи в выработке ориентиров для всех соответствующих субъектов были созваны пять международных консультаций с участием многих заинтересованных сторон.

В ходе консультаций были рассмотрены следующие вопросы: a) роль государств в эффективном регулировании и разрешении вопросов прав человека в контексте деятельности корпораций, b) предприятия и права человека в зонах конфликта: роль государств базирования, c) обязанность корпораций соблюдать права человека, d) механизмы подотчетности применительно к разрешению жалоб и споров, касающихся корпораций и прав человека, и e) повышение эффективности деятельности предприятий в области соблюдения прав человека на основе многосторонних инициатив. Все консультации созывались совместно с той или иной неправительственной организацией.

С резюме материалов всех четырех рабочих встреч и списками участников можно ознакомиться на вебсайте Специального представителя[1]. В настоящем добавлении к докладу Специального представителя 2008 года сводятся воедино резюме материалов пяти консультаций.

В ходе консультативного совещания по вопросу о роли государств в эффективном регулировании и разрешении вопросов прав человека в контексте деятельности корпораций участники рассмотрели проблемы, касающиеся подпункта 1 b) резолюции 2005/69 Комиссии по правам человека, в котором Комиссия просила Специального представителя проработать вопрос о роли государств в эффективном регулировании и определении роли транснациональных корпораций и других предприятий в отношении прав человека, в том числе на основе международного сотрудничества.

Основная цель этого совещания заключалась в выработке идей относительно правовых и политических обязанностей принимающих государств и государств базирования; в этой связи были рассмотрены семь основных тем: a) значение, источники и сфера охвата обязанности государств защищать, b) учет правозащитных аспектов в

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[1] См. http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative.

экономической политике, c) инвестиционная политика и права человека, d) торговая политика и права человека, e) государственная поддержка корпораций, осуществляющих деятельность за рубежом, в том числе по линии агентств экспортного кредитования, f) экстерриториальное регулирование, и g) согласование национальной и международной политики.

Был затронут также ряд других актуальных тем. Во-первых, большинство участников согласились с тем, что государства обязаны защищать от злоупотреблений со стороны корпораций в рамках своей юрисдикции, однако многие государства либо не совсем понимают, как выполнять эту обязанность, либо не желают ее выполнять. Во-вторых, было признано, что с юридической точки зрения вопрос об экстерриториальности этой обязанности остается спорным, однако государства базирования имеют серьезные политические основания для принятия конкретных мер в целях предотвращения за пределами своей территории злоупотреблений со стороны корпораций, штаб-квартиры которых находятся в их юрисдикции. В-третьих, по общему мнению, основным фактором, препятствующим и принимающим государствам и государствам базирования в осуществлении эффективных действий, является несогласованность национальной политики. К тому же создалось впечатление, что принимающие государства и государства базирования, возможно, опасаются оказаться в невыгодном положении с точки зрения конкурентоспособности, если они будут слишком строго регламентировать деятельность предприятий, и что в этой связи следует прилагать больше усилий для решения этих вопросов на международном уровне.

В заключение Специальный представитель отметил, что все более широко признается тот факт, что в сложившемся положении у компаний и правительств нет необходимых ориентиров и в достаточной мере не защищены ни отдельные лица, ни группы лиц. При этом он заявил, что в ходе совещания были изучены конкретные пути изменения ситуации и было найдено множество способов, которые государства могли бы применить для улучшения положения в области соблюдения корпорациями прав человека, не создавая при этом угрозы для экономических возможностей и перспектив развития.

В стремлении более тщательно проработать вопрос о роли государств в эффективном регулировании и разрешении вопросов прав человека в контексте деятельности корпораций было проведено еще одно консультативное совещание, посвященное вопросу реальной и потенциальной роли государств базирования в ситуациях, когда "их" компании осуществляют свою деятельность в зонах конфликта за рубежом.

В ходе совещания были рассмотрены три основных вопроса:

a) Какие меры принимают государства, если принимают, в настоящее время в целях предотвращения или ограничения нарушений прав человека со стороны своих корпораций, осуществляющих деятельность в зонах конфликта?

b) Что могли бы сделать государства базирования для того, чтобы предотвратить или ограничить такие злоупотребления?

c) Как государства могли бы бороться с правонарушениями, совершаемыми их корпорациями в зонах конфликта?

Участники совещания пришли к выводу о том, что государствам базирования следует играть более весомую роль в решении проблем, связанных с деятельностью предприятий и соблюдением прав человека, в зонах конфликта. Согласно общему мнению, политика и практические действия государств базирования в связи с решением этих проблем, если они вообще в них реализуются, носят ограниченный, частичный, преимущественно односторонний и ситуативный характер. Выяснилось также, что многие государства базирования не справляются с этими сложными вопросами и отстают в этом и от международных кредитных учреждений, и от ответственных предприятий. Кроме того, установлено, что многие государства базирования, если не большинство, придают гораздо более существенное значение расширению экспорта и иностранным инвестициям, нежели вопросам прав человека.

Участники согласились с тем, что государствам-участникам следует проявлять хотя бы некоторую осмотрительность, прежде чем поощрять деятельность "своих" компаний в зонах конфликта. В частности, это подразумевало бы обеспечение информированности всех сотрудников государственных учреждений, занимающихся содействием иностранным инвестициям, о положении в области прав человека в зонах конфликта, где предлагается разместить инвестиции; предоставление этими учреждениями актуальной, точной и всеобъемлющей информации по вопросам соблюдения прав человека в этих районах компаниям, чтобы последние могли принимать решения с учетом ситуации, в частности при взаимодействии с местными сторонами, обвиняемыми в злоупотреблениях; обеспечение того, чтобы агентства экспортного кредитования, прежде чем предоставлять займы компаниям, осуществляющим деятельность в зонах конфликта, требовали от них проявления должной осмотрительности в вопросах прав человека.

Участники из числа представителей корпораций и гражданского общества заявили о необходимости получения от государств базирования четких и конкретных указаний в отношении того, какая практика является приемлемой в зонах конфликтах с

правозащитной точки зрения. Было выражено общее мнение, что важным инструментом в этой связи могла бы стать система "красных флажков", а именно набор показателей, дающих основания говорить о наличии или отсутствии проблем в области соблюдения предприятиями прав человека, а также свидетельствующих о необходимости вмешательства государства базирования.

В ходе консультативного совещания по вопросам обязанности корпораций соблюдать права человека были изучены концептуальные и практические аспекты этой обязанности, в том числе меры, которые надлежит принять компаниям, чтобы обоснованно считать себя действительно соблюдающими права человека в своей деятельности и убедить в этом соответствующие заинтересованные стороны. Корпоративная обязанность соблюдать права человека по сути означает невмешательство в осуществление прав или, проще говоря, принцип "не навреди". Для реализации этого принципа могут потребоваться определенные действия со стороны компаний. При этом обязанность соблюдать права человека является общим требованием во всех ситуациях.

В интересах более предметного обсуждения обязанности корпораций соблюдать права человека были представлены два проведенных недавно исследования нарушений прав человека, предположительно совершенных корпорациями. Первое исследование было выполнено Международным советом по горнодобывающей деятельности и металлам, а второе - Управлением Верховного комиссара Организации Объединенных Наций по правам человека в порядке поддержки мандата Специального представителя. Согласно результатам обоих исследований, компании могут воздействовать и воздействуют на весь спектр прав человека. Принимая меры по обеспечению соблюдения прав человека, компаниям следует учитывать этот факт.

Участники совещания затронули также необходимость разработки комплексной аналитической концепции, которая могла бы служить для корпораций ориентиром при выработке корпоративной политики и практики управления с учетом прав человека, а также гарантией соблюдения принципа "не навреди" в их деятельности. Была предложена концепция должной осмотрительности, которую признали полезной отправной точкой для компаний, стремящихся учитывать правозащитные аспекты в своей деятельности.

Затем участники обсудили сферу охвата и содержание понятия должной осмотрительности, которую должны проявлять компании, выполняя свою обязанность по соблюдению прав человека. В центре внимания в ходе обсуждения оказалась необходимость разработать правозащитные концепции и интегрировать их в деятельность компании, а также рассмотреть возможные последствия деятельности компании путем проведения оценок воздействия компании на осуществление прав человека. Обсуждались

также мероприятия по мониторингу и контрольным проверкам, позволяющим компании отслеживать происходящие изменения, и проблемы подотчетности в контексте механизмов рассмотрения жалоб и возмещения ущерба. Участники рассмотрели также вопрос о том, как такие понятия, как сфера влияния и корпоративное соучастие, соотносятся с обязанностью корпорации соблюдать права человека.

В ходе консультативного совещания по вопросам применения механизмов подотчетности при разрешении жалоб и споров, связанных с нарушением прав человека корпорациями, основное внимание было уделено внесудебным механизмам рассмотрения жалоб, которыми могут пользоваться отдельные лица и группы лиц, чьи права ущемляются корпорациями. Обсуждались механизмы рассмотрения жалоб на уровне компании или проекта, на национальном уровне, на уровне инициатив с участием многих заинтересованных сторон и инициатив в области промышленности, а также на многостороннем уровне. Были затронуты следующие вопросы:

a) как повысить эффективность существующих внесудебных механизмов рассмотрения жалоб и устранить неувязки в их применении;

b) какой цели служат и должны служить механизмы рассмотрения жалоб на уровне компании;

c) какими принципами следует руководствоваться при создании механизмов рассмотрения жалоб на уровне компании или проекта;

d) какие институциональные нововведения могли бы частично восполнить имеющиеся в настоящее время пробелы.

В ходе обсуждения подчеркивалась важность привлечения к урегулированию наиболее серьезных споров, по возможности соответствующих должностных лиц государственных органов национального и местного уровней, а также в целом были подтверждены преимущества подходов на основе сотрудничества. Обсуждались проблемы расширения деятельности многих механизмов, причем признавалось, что механизмы многосторонних инициатив могли бы служить связующим звеном, а механизмы многосторонних институтов могли бы использоваться как рычаги управления и создавать прецеденты. Преобладало мнение о том, что механизмы должны опираться на правозащитный подход, причем механизмы рассмотрения жалоб должны применяться с учетом норм, стандартов и принципов, касающихся прав человека, независимо от того, являются ли предметом спора материально-правовые или какие-либо другие вопросы защиты прав человека.

В отношении механизмов на уровне компаний были определены следующие конкретные задачи: согласовать их с системами управления и механизмами стимулирования, решить проблему неравного распределения полномочий, обеспечить доступ, подотчетность, мобилизовать средства и провести оценку эффективности. В качестве институциональных нововведений предлагалось создать глобальный механизм с функциями омбудсмена, учреждение по вопросам предпринимательства и прав человека, информационно-справочные центры для упрощения обмена информацией о механизмах рассмотрения жалоб и открытую сеть для аналогичных целей, а также механизм подотчетности иностранных инвесторов и отдать национальные контактные центры в частные руки.

Консультативное совещание по вопросам совершенствования деятельности предприятий в отношении соблюдения прав человека на основе многосторонних инициатив проводилась после представления доклада Специального представителя в Совете по правам человека за 2007 год (A/HRC/4/35), в котором он признал многосторонние инициативы важной дополнительной составляющей традиционных процедур заключения межгосударственных договоров и разработки стандартов в рамках "мягкого права", касающихся деятельности предприятий и соблюдения прав человека.

Консультация была призвана выявить a) "положительный", если не "передовой", опыт управления многосторонними инициативами и b) критерии для поддающегося проверке и эффективного осуществления кодексов поведения для производственных систем. В отношении первой цели в качестве важных принципов управления многосторонними инициативами участники отметили четкость поставленной цели, участие соответствующих заинтересованных сторон, баланс полномочий и обязанностей заинтересованных сторон, подотчетность и наличие механизма рассмотрения жалоб. Высказывались различные мнения относительно оптимального уровня прозрачности той или иной многосторонней инициативы, однако все участники согласились с тем, что, как минимум, прозрачность процесса необходима. Что касается второй цели, то важными свойствами социального аудита и последующих мер, по мнению участников, являются качество и надежность, эффективность с точки зрения затрат. Они отметили, что на сегодняшний день многие системы социального аудита и принятия последующих мер не выявляют коренных причин нарушений прав человека и им не удается собственными силами увеличить свой потенциал настолько, чтобы изменить положение.

По мнению участников совещания, главным критерием успеха многосторонних инициатив являются реальные изменения в повседневной жизни людей, и с этой точки зрения многие из реализованных на сегодняшний день инициатив оказались неудачными.

Наиболее важными среди обсуждавшихся стратегических вопросов и проблем были два вопроса о способах достижения критической массы для изменения конъюнктуры на рынках и о взаимоотношениях между преимущественно добровольными многосторонними инициативами и сферой регулирования. Простых ответов и готовых решений для этих проблем не существует, однако, по мнению участников, учитывая, что многосторонние инициативы приобретают свойства системного воздействия, устойчивости и масштабности, следует изучить еще четыре стратегические темы: выход за пределы мониторинга; расширение участия на местном уровне; изучение стратегической и оперативной взаимной интеграции; а также уделение большего внимания реальным факторам повышения эффективности деятельности.

Annex

REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES: SUMMARY OF FIVE MULTI-STAKEHOLDER CONSULTATIONS

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I. INTRODUCTION

1. During the second half of 2007, five international multi-stakeholder consultations were convened to assist the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises in developing a conceptual and policy framework to anchor the business and human rights debate, and to help guide all relevant actors. The framework is contained in the Special Representative's report to the Human Rights Council and 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 more effective access to remedies. Each of the consultations was co-convened with a non-governmental organization.

2. The consultations addressed the following issues: (1) the role of States in effectively regulating and adjudicating the activities of corporations with respect to human rights; (2) business and human rights in conflict zones: the role of home States; (3) the corporate responsibility to respect human rights; (4) accountability mechanisms for resolving corporate-related human rights complaints and disputes; and (5) improving the human rights performance of business through multi-stakeholder initiatives. Participants included Government representatives, business representatives, representatives from non-governmental organizations (NGOs), academic experts and legal practitioners, and at each workshop best efforts were made to achieve broad regional representation and gender balance.

3. Summaries of all four workshops and participants lists are available on the Special Representative's website.[1] This addendum to the 2008 report of the Special Representative combines the summaries of the five consultations. The Special Representative and his team have benefited greatly from all these discussions and wish to thank the co-conveners of each consultation, as well as the participants, for their time and contributions.

II. ROLE OF STATES IN EFFECTIVELY REGULATING AND ADJUDICATING the ACTIVITIES OF CORPORATIONS WITH RESPECT TO HUMAN RIGHTS: SUMMARY OF THE COPENHAGEN WORKSHOP

A. Background and goals of the consultation

4. Subparagraph (b) of the SRSG's mandate requires him to "elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation".

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[1] See http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative.

5. The SRSG, in Section I of his 2007 report to the Human Rights Council, documented that under international human rights law States have the duty to protect against human rights abuses by third parties, including business.[2] The role of States in regulating and adjudicating business activities with regard to human rights arises from this duty. At the same time, questions remain about the precise nature, scope and content of the duty to protect, and its full implications for States' regulatory and adjudicative functions in the business and human rights context.

6. Accordingly, the SRSG convened an expert consultation in Copenhagen on 8-9 November 2007 to help clarify some of these questions. The consultation was hosted by the Danish Ministry of Foreign Affairs and organized in cooperation with the Danish section of the International Commission of Jurists. Additional support was provided by the Canadian Department of Foreign Affairs and International Trade. The SRSG is grateful for this assistance, and for the contributions made by all participants.

7. The consultation included representatives from States, corporations and civil society as well as academics and legal practitioners. Annex 1 contains a list of participants and their affiliations.

8. In order to encourage full and frank discussion, the consultation was held under non-attribution rules. Accordingly, the following is a general record of the discussion.

9. The consultation aimed to generate key ideas concerning the legal and policy dimensions of home as well as host State duties and their implications for the SRSG's mandate, which could feed into the recommendations he is invited to submit to the Human Rights Council in 2008.

10. The SRSG explained in his opening remarks that he saw no "single silver bullet" solution to the many issues raised in his mandate, including States' roles. Accordingly the consultation would examine not only the general provisions of the State duty to protect, but also its implications for a variety of specific policy areas that may affect, positively or negatively, the ability of States to reduce the incidence of corporate-related human rights abuses.

B. Meaning, sources and scope of the duty to protect

11. Session I explored the current status of the State duty to protect against corporate human rights abuses, both within and outside a State's jurisdiction. Participants agreed that States are the primary duty bearers under international law with respect to preventing corporate abuse. However, they also noted that States often do not seem fully to understand their duties or are unwilling to fulfil them.

12. It was acknowledged that the State duty to protect is an obligation of conduct, not result. States are not automatically responsible for abuse by a corporation that is not acting under their

[2] A/HRC/4/35.

control. But they do have a responsibility to implement systems of "due diligence" to prevent, investigate, punish, and redress interference with rights by all types of corporations.

13. It was highlighted that there is often confusion as to the difference between States' primary and secondary obligations in relation to preventing corporate abuse. For example, the secondary rules of State responsibility, as described in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), may be used to attribute responsibility to a State for the "internationally wrongful" acts of a corporation at home or abroad where the corporation was exercising elements of government authority or acting under government control.[3] However, even without such a connection between the corporation and the State, the latter may be held responsible for corporate abuse through a failure to fulfil primary duties under the core human rights treaties and customary international law to protect individuals against third party abuses.

14. Participants agreed that there is still uncertainty as to the extraterritorial dimensions of the State duty to protect against corporate abuse, i.e. whether the duty extends beyond protecting individuals within a State's own jurisdiction. Nevertheless, some participants noted that many States are moving away from the belief that the use of extraterritorial regulation to hold corporations accountable for overseas abuse is illegal under jurisdictional principles of international law.

15. The discussion moved on to address the emerging web of potential corporate liability for the worst forms of human rights abuses, reflecting international standards but imposed through national courts.[4] The growing number of jurisdictions in which corporations may be held liable for both direct and complicit involvement in international crimes, including overseas violations, means that the risk environment for corporations is expanding, as are remedial options for victims.

16. In relation to human rights abuses other than crimes, one participant described a growing trend for States to adopt human rights charters and codes that impose obligations on companies that perform State functions.

17. Participants raised the issues of government capacity, funding, and political will, explaining that even the strongest legislation and regulations "in form" will be ineffective in substance without these elements. Matters of policy coherence were also discussed, such as how to ensure that relevant State agencies are working effectively together to provide protection against corporate abuse.

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[3] See http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[4] See Section II of the SRSG's 2007 report to the Human Rights Council, A/HRC/4/35.

18. Several participants noted the importance of considering corporate law when exploring the tools available to States in improving corporate behaviour. Corporations receive judicial personality through government approval, and these participants said more thought should be given to how that privilege could be made conditional on respect for human rights.

19. One participant suggested that further comparative research be conducted on the use of judicial review to make government agencies more accountable for decisions made without due consideration of human rights implications. Another participant noted that State practice might show that while judicial review is readily available, claimants may face hurdles where judges are not willing to accept that human rights are "relevant considerations" for administrative agencies.

20. Turning to guidance from international human rights mechanisms, one participant highlighted that there are several ways whereby the duty to protect is specified, including through treaties, declarations and the commentaries of human rights bodies. However, he noted that the international community is still without definitive guidance as to the precise nature and scope of the duty. He questioned how best to increase the level of specification, particularly through the United Nations human rights treaty bodies and the Human Rights Council. Another participant wondered whether an optional protocol to the Covenant on Economic, Social and Cultural Rights should expressly define the State duty to protect against corporate abuse.

21. The SRSG noted that his mapping of United Nations human rights treaty bodies' commentaries provided insights into the specification of State obligations under the duty to protect.[5] He also briefed participants on his meeting with the treaty bodies, in which he encouraged them to further develop guidance for States in this area.

C. State economic policies and human rights

22. The State duty to protect against corporate-related human rights abuses is not confined to a self-contained domain labelled "human rights". States have that duty within all policy domains. Therefore, Session II examined the considerations involved in States' balancing human rights concerns with economic and other interests when they make economic policy. Participants were asked to consider the trends in State practice with respect to balancing these interests; arguments for and against providing States with a wide margin of appreciation when engaging in such balancing; and the obligations States have or should have under international human rights law to consider human rights when entering into trade, investment, and other commercial agreements.

23. At the outset, one participant questioned whether States today in fact are adequately balancing community interests against economic interests. It was suggested that when economic interests consistently trump human rights, the result may lead to major discord between the

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[5] A/HRC/4/35, Add.1.

affected community, relevant corporations, and the State - thereby undermining the economic viability of the investment itself. One participant said that finding the right balance between economic interests and human rights is a task for the international community as a whole so as to avoid prejudicing States that choose to pay more attention to rights.

24. It was recognized that there also may be a divide between human rights doctrinalism and economic analysis that needs to be overcome. One participant pointed out that the market itself was generating innovations supportive of human rights, such as social reporting and shareholder activism. However, it was also noted that States may undermine such market mechanisms by weakening the ability of shareholders and third parties to complain about corporate conduct.

25. Another participant questioned the market's morality. He spoke of corporations undertaking projects in developing countries and leaving after depleting the available resources. He questioned whether States should require such companies to act in a more sustainable and responsible manner.

26. It was noted that Governments themselves can face reputational risks, and that such risks are leading more States to consider human rights when making economic and commercial decisions. However, because of problems in implementation, even if human rights are considered when making economic decisions it may be difficult to ensure that they remain on the policy agenda. Participants suggested that one of the issues adversely affecting implementation is policy incoherence, particularly where the economic policy arms of Governments dominate or ignore departments dealing with corporate social responsibility and human rights.

27. A State representative suggested that States should have a wide margin of appreciation when deciding how to balance economic interests with human rights, while still making sure to abide by their international obligations. It was also argued that States may have reasons for allowing their companies to invest in questionable situations abroad: they may believe that some oversight is better than none and that opposing investment might harm the local population to a greater extent.

D. Investment and human rights

28. Session III addressed concerns regarding the potential effects of host Government agreements (HGAs) and bilateral (and multilateral) investment treaties (BITs) on the willingness and ability of States to safeguard human rights. It also aimed to explore policy options for how such agreements (both private and State-to-State) could be better formulated and implemented so as to alleviate some of these concerns while still encouraging and supporting investment. In particular, participants were asked to consider how stabilization clauses in HGAs may impact State action to promote and protect rights and the ways to address such impacts.

29. The discussion started with a briefing on a joint study by the International Finance Corporation and the SRSG to identify how the use of stabilization clauses might constrain the protection of human rights in host countries. The study is the first major research effort ever undertaken to look at private investment agreements spanning a large number of industries and regions. It provides a unique opportunity to see how States and private actors may better work together to reduce any effects of such clauses on Governments' ability to protect rights.

30. One participant described the different types of stabilization clauses included in HGAs. There are "freezing clauses", which might negate any changes to relevant laws for the life of the investment or another term set out in the agreement. There are also "economic equilibrium clauses", which provide that if new laws disturb the investment's economic equilibrium there may be an apportionment of costs between the investor and the Government. It was argued that both types of clauses may disincentivize a Government from changing laws to better protect rights and pursue other social and environmental policies. Some participants were also concerned by the fact that disputes in relation to HGAs can go directly to international arbitration, bypassing host country courts, with little or no transparency as to cause, process, or outcome.

31. The link between HGAs and BITs was also explored. Participants explained that the latter generally contain rights for investors, set out State obligations, and contain a dispute settlement process which may be triggered by investors. Such agreements rarely mention human rights. One participant highlighted that a party to an HGA might be able to complain under a BIT about host State changes in laws by arguing that there has been a form of expropriation of their assets, with expropriation generally being a ground for arbitration and compensation.

32. It was argued that arbitrators for HGA or BIT disputes rarely consider the human rights impacts of their decisions. Participants said it was also difficult to discern any clear patterns from such decisions because the process is so confidential and ad hoc. However, there was some knowledge about disputes relating to water services, health legislation, and economic empowerment of historically disadvantaged groups that could provide insights into how human rights issues are raised in these forums.

33. Similar to some of the arguments made in session II, one participant questioned the traditional meaning of stability for investors, arguing that an investment is likely to be more stable where it is responsive to its social context rather than restrictive of positive change.

34. Participants considered a number of recommendations to improve the ability of States to negotiate both BITs and HGAs so as to safeguard their capacity to protect rights while still retaining certainty for investors. For instance, arbitrators could refuse to hear a dispute on its merits if the investor is clearly trying to circumvent human rights protection. Interested parties could be permitted to submit amicus briefs as to why and how arbitrators should consider human rights issues. It was also suggested that the parties to a dispute could take steps to include at least

one person on an arbitral panel with human rights knowledge. Transparency was viewed as a critical issue - it was argued that the public should be aware of the types of agreements their Governments are signing as well as the outcome of disputes. While certain business issues must be kept confidential, it was felt that there is little justification for keeping entire agreements and disputes from the public.

35. It was also suggested that model stabilization clauses could be drafted so that regulatory certainty is secured in relation to only a limited number of new laws, and to allow for more flexibility for States regarding environmental and social issues. In relation to BITs, several participants referred to the International Institute for Sustainable Development's Model International Agreement on Investment for Sustainable Development.[6]

36. In a discussion about power imbalances between host States and corporations, one participant argued that corporations do not always have the upper hand. He explained that States may be able to exert considerable influence over the scope and structure of an HGA. Thus any recommendations should bear in mind that States must also be willing to abide by their international law obligations when negotiating and implementing agreements. It was highlighted that even where States lack the resources for careful negotiation of HGAs, corporations cannot be expected to negotiate "for both sides" - more needs to be done to better equip States so that there can be an effective meeting of the minds on risk allocations. This would help to avoid bad deals on both sides. One solution could be targeted training programmes for government lawyers to increase their understanding of the risks that stabilization clauses may pose to human rights protection.

37. It was also argued that home States should consider ways to encourage corporations to think more about whether provisions in their contracts might have a negative impact on a host State's ability or willingness to safeguard rights, and how to minimize any such impacts.

38. By the end of the session there was consensus that changes in approaches are needed for a wide range of actors in this context, most obviously for States and investors but also for arbitrators, lawyers and civil society.

E. Trade and human rights

39. Session IV looked at the potential impacts the world trading system and multilateral trade agreements may have on human rights protection, and the policy options that are available to States for encouraging positive impacts and minimizing any negative impacts. For instance, participants were asked to think about how to encourage the recognition of core human rights principles throughout the trading system. They were also asked to consider the role of

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[6] See http://www.iisd.org/investment/model/ for more information.

international institutions in encouraging and facilitating States to consider human rights in their commercial relations while still safeguarding the ability of States to trade freely.

40. Similar to the disconnect already noted between broader economic policies and human rights, one participant argued that trade policymakers rarely consider human rights in their deliberations.

41. With regard to the role of the World Trade Organization (WTO), participants also argued that WTO members should pay more attention to upholding the rule of law in all areas, including in export processing zones and conflict zones.

42. The need was expressed to dispel the assumption that trade and investment laws are "harder" law than States' international human rights obligations. States operating within the trade and investment regime must still abide by their international human rights obligations. One participant called for greater transparency at the WTO to make it clearer how trade agreements may impact human rights. At the same time, several participants maintained that the WTO may not be the most appropriate forum to deal with human rights, and that it may be more effective for human rights mechanisms to increase their attention to trade issues.

43. Participants were optimistic that more could be done at the drafting stage of trade agreements to better safeguard rights. One suggestion was for trade negotiators to be informed about human rights issues. It was also noted that lessons could be learned from the labour and environmental side agreements to the North American Free Trade Agreement, intended to encourage enforcement of domestic environmental and labour laws within the participating countries.

44. The Kimberley Process was cited as an example of States working to protect rights through a WTO waiver. From a different point of view, one participant suggested that more thinking is needed on the links between trade and human rights so as to avoid any adverse effects on rights from unduly restricting trade.

F. State support for companies operating abroad

45. Session V explored the various types of support, financial and otherwise, that States provide to companies operating abroad. It addressed the challenges of incorporating human rights considerations into the provision of assistance, with a particular focus on export credit agencies (ECAs).

46. The session began with a discussion of State responsibility for the acts of publicly controlled ECAs. One participant argued that under the ILC Articles, States are responsible for the international wrongful acts of such ECAs, including breaches of international human rights law. It was also contended that States could be held complicit under the ILC Articles for abuses by host States as a result of certain ECA activities - for instance, where an ECA funds a

corporation that enters into a HGA which prevents a host State from protecting rights. It was argued that to avoid such complicity, States should adopt legislation requiring ECAs to implement policies and practices to protect against interference with human rights by clients. States should then monitor compliance with such policies and establish remedies for abuses associated with ECAs. Not all participants shared this interpretation of States' legal obligations.

47. Several participants also considered that it was vital for ECAs to be transparent about their human rights policies so that clients understand exactly what is expected of them, and the public understands why a project was or was not allowed to proceed in light of human rights concerns. One participant argued that company disclosures to ECAs on the potential human rights impacts of projects should be made public so that interested parties could consider taking action if it becomes known that a corporation has misrepresented the facts and risks.

48. Some participants noted that while ECAs already may have discretion to consider environmental and social impacts of proposed projects, they are rarely expressly mandated to consider human rights concerns - for example, by requiring human rights impact assessments in addition to or part of environmental and social impact assessments.

49. One ECA representative said that some ECAs hardly know where to start on this issue. It was explained that ECAs may be quite far down the "supply chain" of policymaking when it comes to knowledge about government policy with respect to human rights. It was also suggested that any recommendations the SRSG may make vis-à-vis ECAs should be applicable to the range of projects that ECAs support, including situations where an ECA only provides a small percentage of finance or insurance for a project. Further, more thought should be given to how ECAs may better coordinate at the multilateral level, including through the OECD.

50. Several participants felt that ECAs should take more responsibility for their actions, noting that as State agents they should understand and abide by their State's human rights obligations. One participant said that ECAs should require greater due diligence, be more transparent, and hire more staff with human rights experience. Some participants also spoke of various tools that are available to ECAs wanting to learn more about human rights, including human rights impact assessment guides. One participant suggested that ECAs should require clients to follow human rights standards similar to those they respect in the home country.

51. Other participants asked why ECAs agree to insure a client without full disclosure as to the human rights risks of the project. One responded that given ECAs' mandates, it made sense that their financial risk assessments would not necessarily consider human rights unless there is financial accountability for human rights violations. An ECA representative explained that while risk assessment was certainly a priority for ECAs, they were still moving from a history of assessment based only on fiscal risk to greater consideration of social and environmental risk.

52. Responding to earlier arguments about home State complicity, a State representative said that States may not believe they should stop ECAs from supporting questionable projects abroad because they do not feel obliged to protect individuals in other jurisdictions. The SRSG acknowledged that the extraterritorial scope of the duty to protect remains controversial. However, he added that participants need not enter into that debate in order to recommend better practices for ECAs. The relevant question was whether ECAs can and should act on policy grounds to ensure that investments they support abroad do not contribute to human rights abuses, especially when the investments are made in difficult areas such as conflict zones. That said, the SRSG noted that his focus was on ECAs mitigating or reducing human rights risks abroad, not on ECAs taking steps to promote or fulfil rights.

53. The SRSG also stated that a significant challenge in business and human rights is that Governments may believe they are doing business a favour by discounting the potential for certain problematic investments to have adverse human rights effects, when in fact they are exposing companies to unnecessary risks thereby.

G. Regulatory steps to prevent corporate abuse abroad

54. Session VI considered what legal, political, or practical challenges might interfere with a State's willingness or ability to regulate the extraterritorial acts of corporations in order to safeguard rights. It also explored policy options for alleviating some of these challenges, including prescriptive regulation in encouraging better corporate practice. Participants were asked to consider arguments for and against particular situations meriting regulation with extraterritorial effect; challenges faced by victims in obtaining access to justice; and policy options in addition to regulation, including incentive schemes and support of voluntary company initiatives.

55. The discussion began with one participant introducing the concept of "human rights investment risk". He explained that the concept assessed the risk to human rights of a company investing or operating in a particular State or region. The risk would vary according to several factors, including the host State's governance capacity in the geographic area concerned, and the particular industry's propensity to abuse rights. This participant argued that the higher the human rights investment risk, the stronger the home State's interest should be in monitoring the relevant company's behaviour. Thus it is important for States to have high quality advisory functions in place so that they are able to assess this risk and act accordingly. The concept could also be incorporated when drafting investment and trade agreements.

56. Nevertheless, the participant emphasized the need to recognize the reality of foreign policy - Governments may not act to reduce a human rights investment risk if it jeopardizes "higher" political objectives. Another participant questioned whether a government decision to withdraw support for a company's overseas activities based on human rights investment risks

could harm rights to a greater extent than if the company was encouraged to work with the host Government and local communities to improve rights.

57. Turning to the use of prescriptive and adjudicative extraterritorial jurisdiction, several participants expressed the view that international law does not prohibit the use of such jurisdiction to hold corporations accountable for rights abuses overseas. One participant argued that the greatest challenge facing the effective use of adjudicative jurisdiction is access to justice for victims. One important procedural hurdle is judicial unwillingness to "pierce the corporate veil" to hold parent companies responsible for the acts of subsidiaries. Other impediments to access to justice include the cost of evidentiary collection; fee shifting issues; and the general inability or unwillingness of home State legal systems to support cases against overseas corporate abuse.

58. One participant noted that even if these challenges are overcome, victims could still lack effective access to justice if the home Government is not truly supportive of corporate accountability. It was contended that all Governments need to recognize that concepts relating to sovereignty have evolved to an extent that international law is unlikely to frown on a home State taking reasonable steps to strengthen corporate accountability for abuse in another State. Governments should keep this in mind when deciding whether to object to an action in a corporation's home State against abuse committed overseas. Another participant argued that judicial review of administrative decisions may be a powerful tool where procedural hurdles slow down or thwart more traditional civil and criminal actions.

59. Participants generally favoured greater use of prescriptive extraterritorial jurisdiction through legislation. It was suggested that legislative changes, including incentive schemes and the use of corporate law tools, might more effectively prevent corporate abuse, compared to the reactive nature of adjudication. One participant emphasized that legislators should design regulatory tools with the knowledge that corporate abuse is generally unintended. Thus, legislation addressing corporate policies, processes, and culture could be more effective than proscriptive rules. Corporate law tools were again discussed, with a focus on social reporting, fiduciary duties, and the prohibition of unfair commercial practices. Several participants mentioned that legislation could be used to help pierce the corporate veil considering that State judiciaries often seem unwilling to take innovative steps in this regard.

60. The participants also discussed self-regulation, with one arguing that while command and control tools are important, self-regulation by companies through individual and multi-stakeholder initiatives may serve to raise levels of consciousness which can also lead to effective change.

H. Strengthening domestic and international policy coherence

61. Session VII considered key issues of policy coherence in facilitating States to fulfil their duty to protect. The session considered ways to improve knowledge sharing and collaboration within Governments so that relevant departments are better equipped to deal with business and human rights issues. It also explored the ways States could work together more effectively to encourage better corporate behaviour, as well as the role international institutions could play to assist States in fulfilling their duty to protect with respect to business and human rights.

62. The discussion began with a participant comparing government decision-making processes to those featured in company supply chains: even if a State at its highest level commits to protect certain rights, such promises may not be implemented further down the "chain". Implementation problems may be due to a lack of commitment from State agencies. But it is probably more common for agencies to lack critical knowledge and resources, which may be more easily addressed.

63. Several participants referenced the Canadian Roundtables on the Extractive Industries.[7] While acknowledging that the round-table process had flaws, participants generally recommended that other States engage in similar processes because they provide an opportunity for government, business, civil society and other experts to work through key issues. One participant noted that the round tables in some cases highlighted lack of communication within government, as well as between business and the Government, on the relevance of human rights to key business interests. It seems that despite beliefs to the contrary, in some instances companies were willing to accept more guidance and even regulation on the human rights front, especially if the benefits included greater certainty and more sustainable projects. This development showed the benefit of engaging with business in policy generation.

64. Turning to international policy coherence, one participant mentioned the challenge of gathering systematic information about corporate activities, as well as differences in national priorities in how to respond collectively. Another recommended that Governments be creative when choosing appropriate regional and international forums in which to raise business and human rights issues, citing the discussion of corporate social responsibility at a recent G-8 summit.

65. In relation to international human rights mechanisms, several participants suggested that the Human Rights Council should be encouraged to use the universal periodic review process to learn more about State practices vis-à-vis business and human rights. Another appealed to civil society to provide more information to both States and human rights bodies about allegations

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[7] See http://geo.international.gc.ca/cip-pic/current_discussions/csr-roundtables-en.aspx.

regarding business abuse. Several participants discussed opportunities for further collaboration amongst United Nations human rights special procedures.

I. Summing up

66. The SRSG noted that the consultation's high level of discussion indicated how much progress had been achieved in the business and human rights debate since the beginning of the mandate. One could see an emerging community of actors who, while approaching the challenges from different perspectives, nevertheless are working to improve current practices. There is a growing recognition that the status quo provides neither sufficient guidance to companies and Governments, nor sufficient protection to individuals and communities.

67. The SRSG concluded that while international legal standards have an important role to play in this context, such instruments typically take considerable time to bring to fruition. In view of the need to achieve progress here and now, all available options must be pursued. The SRSG considered the consultation to have been extremely valuable in exploring concrete steps States can take to improve corporate respect for human rights in the short to medium term.

III. BUSINESS AND HUMAN RIGHTS IN CONFLICT ZONES: THE ROLE OF HOME STATES. SUMMARY OF THE BERLIN CONSULTATIONS

A. Background

68. The Special Representative of the United Nations Secretary-General on business and human rights (SRSG), John Ruggie, is mandated to consider, among other subjects, "the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation". Because the most egregious human rights violations, including those associated with companies, take place in conflict zones, the SRSG convened a consultation on the subject of business operations in such zones. And because the roles that the "home States" of companies could or should play has not been extensively explored in the business and human rights debate, the consultation focused on the actual or potential roles of home States when "their" companies operate in conflict zones abroad.[8] The one-day expert session was held at the Berlin Center for Civil Society on 5 November 2007, co-convened with Global Witness as part of its collaboration with the SRSG's mandate, and was funded by the Die Zeit Foundation and the Vodafone Foundation.

[8] Simply defined, home States are considered those States in which a corporation is registered or incorporated.

B. Objectives

69. The meeting addressed three core questions:

(a) What if anything do home States currently do to prevent or deter human rights abuses by their corporations operating in conflict zones?

(b) What could home States do to prevent or deter such abuses?

(c) How could States deal with wrongdoing by their companies in conflict zones?

C. Consultation conclusions

70. Overall, the meeting concluded that home States should play a bigger role in addressing business and human rights concerns in conflict areas. There was general consensus that: home State policies and practices in relation to this challenge - where they exist at all - are limited, fragmented, mostly unilateral and ad hoc.

71. Many home States seem to lag behind international lending institutions and also responsible businesses themselves in grappling with these difficult issues.[9]

72. Many if not most home States appear to assign considerably greater weight to promoting exports and foreign investments than to human rights concerns.

73. Participants agreed that home States should perform at least some level of due diligence before encouraging "their" companies to operate in conflict zones. This would include:

- Ensuring that existing laws are properly enforced
- Ensuring that officials in all government agencies promoting foreign investments are aware of the human rights situation in the conflict zones where an investment is proposed
- Ensuring that those agencies provide companies with current, accurate and comprehensive information of the local human rights context so that companies can act appropriately, particularly when engaging with local parties accused of abuses

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[9] On the latter, see International Organization of Employers, International Chamber of Commerce, and the Business and Industry Advisory Committee to the OECD submission to the SRSG's mandate, "Business and Human Rights: The Role of Business in Weak Governance Zones, Business Proposals for Effective Ways of Addressing Dilemma Situations in Weak Governance Zones" (December 2006), available at http://www.reports-and-materials.org/Letter-to-Ruggie-from-IOE-ICC-BIAC-21-Dec-2006.pdf.

- Providing meaningful advice to companies through their embassies in host countries on whether they should continue to conduct business in conflict areas or how they should manage human rights risks

- Having Export Credit Agencies require adequate human rights due diligence before providing loans to companies operating in conflict zones

- Cooperating with other Governments to ensure that investments comply with human rights standards

74. Both corporate and civil society participants expressed the need for clear and concise guidance from home States regarding what are and are not acceptable practices in conflict zones from a human rights perspective.

75. The group also reached a general consensus that a "red flags" approach would be an important guiding tool, that is, a set of indicators signalling grounds for business and human rights concerns, which would also indicate the need for home State engagement.[10]

D. Session summaries

76. Session 1 asked whether situations creating a need for home State engagement can be identified *ex ante*. Many participants noted that the definition of conflict zones is currently unclear. Thus, when identifying triggers for home State action they believed that focusing on actual situations on a case-by-case basis is more effective than relying on definitions of conflict zones drawn from international law. Doing so is particularly helpful in cases of sporadic violence that do not meet international definitions of conflict zones. One participant suggested that a case-by-case assessment of whether the home State should act would need to include an analysis of whether the local population would benefit or suffer more from the company's presence.

77. Participants generally agreed that home States should ask more questions, and to ask them earlier in the investment cycle, concerning the possible impacts of their companies in conflict zones. At minimum, the questions should include whether the investments are likely to strengthen an oppressive host State regime and thereby minimize benefits to the population; and whether companies should be permitted to participate in business ventures that plausibly could lead to their being complicit in violations of international humanitarian law, war crimes, or crimes against humanity.

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[10] One example discussed was the FAFO Red Flags paper (due for publication shortly) that identifies nine sets of serious liability risks for companies operating in high-risk zones. Depending on the situation, the existence of one or more of these red flags should raise concern within the company and also alert home States.

78. A number of participants noted that home States' reputations are also at stake, not only the reputations of companies. Participants indicated that home State embarrassment linked to corporate wrongdoing can trigger action such as in-country investigations carried out by teams appointed by home Governments. One example is the Canadian Government-commissioned report on Talisman's operations in Sudan.

79. Participants agreed that when home States act at all, their approaches exhibit a lack of coordination among government departments, and a lack of collaboration with other States. All participants expressed the need for greater coherence within and across States. Participants suggested that Governments will need to be persuaded to work together to define acceptable corporate and human rights benchmarks.

80. In order to introduce greater analytical refinements into the discussion, the next four sessions explored different scenarios. The first was possible "no-go" areas for business - where the human rights situation might pose such risks to the company and the home State that an investment simply should not go forward. The second depicted situations where companies knowingly contribute to conflicts that, in turn, lead to corporate-related human rights abuses.

81. The third addressed the situation where companies may do unintended harm through their operations in conflict zones. And the fourth examined how home States can facilitate and support positive contributions by companies to the respect for human rights in conflict zones.

82. Session 2 focused on whether there were circumstances so extreme that home States should advise companies against starting operations there, and advise those with existing operations to suspend them - or leave the companies to decide for themselves whether or not to continue with their investment, but without the home country providing any financial or diplomatic support. Participants felt that greater clarity was required on the no-go concept. For example, would it require divestment? Would it focus on a specific industry or region within the host country? Would it focus on doing business with specific parties who are known to commit human rights violations?

83. Participants suggested that "no-go" indicators could be taken from United Nations Chapter VII sanctions and international humanitarian law, but they indicated that other signals would also be required. It was emphasized that it may be difficult for a company to avoid complicity when operating in areas where massive human rights violations are committed. Thus, several participants argued that a "no-go" warning should always exist for areas where war crimes and crimes against humanity are taking place.

84. Other participants expressed concern over how the "no-go" concept would be applied when an area becomes a conflict zone only after a company arrives, or if the conflict becomes exacerbated by the company's presence - as has been the case with numerous investments in the extractive sector.

85. In addition, some participants expressed apprehension about "no-go" areas because of the global competition for resources from conflict areas, arguing that if one business pulls out due to human rights concerns or home State restraints, another private or State-owned enterprise that does not face similar restraints will take over. It was suggested that companies from developed States are more willing to respect human rights than those from emerging markets, thus disadvantaging the former, but others argued that this remained an unproven assumption.

86. Several participants stressed that the home State's decision in relation to a company operating in a conflict zone should not be unduly swayed by the company's philanthropic efforts if its core operations do demonstrable harm.

87. In addition, participants involved in the FAFO "Red Flags" project expressed the view that home States should become involved when company operations include or result in displaced peoples, forced labour, the handling of looted assets, material transactions with abusive security forces, the financing of crimes, and corporate complicity including by providing the means to kill. A few participants also put forward that any trade in conflict resources should also act as a red flag that could give rise to a role for home States.[11]

88. Session 3 focused on the role of home States in preventing deliberate adverse effects of domiciled companies operating in conflict zones. Participants observed that the main problem in this area related to poor enforcement of laws by host States, where the judiciary may lack capacity or will, or be subjected to political pressures. Participants agreed, therefore, that greater engagement is needed by home Governments, which have been extremely reluctant to act. For example, corporate breaches of United Nations Chapter VII sanctions are poorly enforced and infrequently punished. Some participants said that greater home State involvement might result if there were clearer international guidance as to whether States are required to protect against abuse by their citizens and corporations abroad. Indeed, the question was raised whether home States could encounter State responsibility under international law if they do not take certain preventative actions. At the very least, it should be made clearer that States are not prohibited from taking reasonable actions under international law.

89. Participants agreed that home States should take the following actions to deal with domiciled companies that deliberately cause harm: increase their own commitment and capacity to hold such corporations accountable, provide adequate resources to carry out investigations in foreign countries, and strengthen intra-State policy alignment as well as intergovernmental cooperation among States. A few participants raised the possibility of using property crimes and

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[11] Conflict resources have been defined as "natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from, or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law"; see: "The Sinews of War: Eliminating the Trade in Conflict Resources", A Briefing Document by Global Witness dated November 2006.

cases focusing on pillage and plunder as alternatives to attract Governments that may feel uncomfortable supporting “human rights actions”.

90. Session 4 focused on the role of home States in preventing unintended harm by companies in conflict zones. All participants agreed that there was an important home State role in increasing corporate awareness of the risks of doing business in conflict zones.

91. Participants also agreed that if companies do go into conflict zones, home States should act proactively by flagging their concerns. Many participants believed that informing companies of the possibility that their operations may cause harm would set the standard for operations and help companies reduce harm to human rights from the beginning. Some participants expressed the view that companies need a form of reassurance or direction from home States on how to carry out operations, including suggestions of human rights sensitive activities that could be undertaken in conflict areas. It was also suggested that home Governments are in a position to monitor human rights risks posed by companies in conflict zones and should do so.

92. Similarly, some participants suggested that home States could share information in order to create a more level playing field between more and less experienced companies. It was suggested that this could assist new companies to learn from problems already faced by more experienced companies. Other participants observed that home States could enter into dialogue with host Governments to confirm and create clear expectations regarding human rights benchmarks for their company’s operations within a conflict area. A few participants noted that this could have greater benefits for human rights since company operations in host countries are often part of joint ventures with national firms, which may hold operating control.

93. Many participants emphasized that there should be no tolerance for ignorance within a company for the human rights implications of its operations, especially after it has been warned by reputable internal or external sources.

94. Session 5 focused on the role of home States in supporting positive contributions by companies to the respect of human rights in conflict zones. Several participants stated that it was essential for companies to have their own policies and processes that respond to different types of conflict situations and the escalating problems that may be encountered during operations. But home States could provide support for such efforts.

95. To support business operations in conflict zones, some participants suggested that home States help develop clearer standards for companies. Most participants agreed that a clearly developed home State policy would make company operations more predictable and clarify expectations for businesses.

96. One participant suggested that home States also could provide advice to business on pressing dilemmas. These include what a company should do when some stakeholders want

them to divest and others want them to stay, and how a level playing field can be established for companies if civil society pressures on them vary depending on where investors are located and where the company is incorporated. These are not issues that companies can solve on their own.

97. Finally, Session 6 addressed the impact of existing initiatives aimed at supporting positive business involvement in conflict areas. Discussing the Voluntary Principles on Security and Human Rights (VPs), one participant noted that the VPs had sent the right signals to relevant audiences in conflict situations by indicating that the international community now is less permissive of corporate-related human rights violations, while also building a corporate culture that respects human rights. Participants indicated that home States could contribute to such initiatives by ensuring that the analyses of the human rights situations in conflict zones are properly conducted, accurate and up to date.

98. In addition, one participant discussed a role for home States in identifying records of host State security forces and advising on the identities of human rights abusers. Participants discussed other measures that could be used including: the ability of home States to draw upon and learn from the OECD National Contact Points in creating new complaints mechanisms specific to conflict zones, and requirements to improve disclosure laws and listing requirements for companies.

E. Next steps

99. The consultation wrapped up by suggesting the following steps for home States:

- Recognition of the unique circumstances that prevail in conflict zones, including sporadic or sustained violence, breakdown of governance, coupled with the absence of the rule of law, making it essential for home States to engage with host States and develop consistent policies regarding business and human rights
- Specific guidance for companies interacting with security forces and belligerent militia in problematic areas
- Better provision of information and advice to businesses operating in conflict zones
- Identification of simple indicators that trigger action for home States with respect to their companies operating in conflict zones
- Better policy alignment between government departments in home States, such as finance, foreign affairs, trade and international development
- Cooperation among home Governments to define minimum standards of corporate and human rights benchmarks

IV. CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

A. Background

100. The Special Representative of the United Nations Secretary-General on business and human rights (SRSG) held a series of multi-stakeholder consultations in the fall of 2007, which were intended to inform his 2008 report to the Human Rights Council. These consultations were broadly framed in terms of three baskets of issues: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need to create more effective remedies to address corporate-related human rights disputes.

101. The consultation on the corporate responsibility to respect human rights - what it means and implies for companies, both in conceptual and operational terms - took place in Geneva on 4-5 December 2007. It was convened in cooperation with *Realizing Rights: the Ethical Globalization Initiative*; co-chaired by Mrs. Mary Robinson and Sir Mark Moody Stuart; and hosted by the Office of the United Nations High Commissioner for Human Rights. The SRSG is grateful for this assistance, and for the contributions made by all participants.

102. Participants at the consultation included representatives from corporations and civil society as well as academics, legal practitioners and international organizations. A list of participants and their affiliations is appended below.

103. In order to encourage full and frank discussion, the consultation was held under non-attribution rules. Accordingly, the following is a general summary of the discussion.

B. Introduction and objectives

104. Society expects companies to respect human rights, and companies generally believe they do. However, most companies cannot make that claim with high degrees of confidence because they lack the systems to ensure it. The consultation’s aim was to explore what steps companies need to take in practice to satisfy themselves and their stakeholders that their practices indeed do respect human rights.

105. The corporate responsibility to respect human rights in essence means “non-infringement” on the enjoyment of rights - or put simply, “doing no harm”. Doing no harm may require companies to take positive steps. For example, a company that wishes to respect the right to non-discrimination in the workplace will need to adopt appropriate hiring policies and engage in employee training to be sure that the right is honoured.

106. Furthermore, companies may have additional responsibilities in particular situations - for example, if they perform governmental functions. Or they may take on additional obligations with regard to human rights voluntarily.

107. The consultation stressed that companies cannot "buy offsets" to counterbalance harm to human rights for which they are responsible, through philanthropic acts or by fulfilling rights in other areas. The responsibility to respect is a universal requirement, applicable in all situations.

C. Understanding when and how corporations may harm rights

108. In order to contextualize the discussion of the corporate responsibility to respect human rights, two recent studies of alleged corporate human rights abuses were presented. The first was conducted by the International Council on Mining and Metals (ICMM). It examined 38 allegations against mining companies in 25 countries. The most common allegations include adverse impacts of company operations on health and environment, indigenous peoples, security, and conflicts. Of the "underlying issues" that may have helped drive the allegations, economic effects were the most frequently cited, either because company activity negatively impacted the local community's economic situation or because the local economy failed to benefit. Lack of consultation also was frequently mentioned. In up to 70 per cent of the cases, both the company and another entity, usually the State, were alleged to be responsible for the abuse, raising the issue of corporate complicity - that is, when a company is held responsible for the actions of another entity with which it has relations because it contributed to and had some knowledge of those actions.

109. The second study is being carried out by the Office of the United Nations High Commissioner for Human Rights in support of the SRSG's mandate. It analyses a sample of more than 300 allegations of corporate human rights abuses from all sectors, collected by the Business and Human Rights Resource Center. Initial findings indicate that companies have been accused of having negative impacts on the full range of human rights. Most of the cases allege direct violations by a company, although some claim that the company contributed to or benefited from violations by States, the supply chain, or other third parties.

110. The two studies show that companies can and do impact the full spectrum of human rights. Therefore, the *ex ante* specification of rights for which companies might bear some responsibility is an inherently fruitless exercise; in principle, all rights can be affected. Efforts by companies to ensure respect for rights should reflect this fact.

D. Due diligence

111. The consultation then addressed the need for an overarching analytical framework that can guide corporate policies and management practices in respecting human rights and ensuring that their business operations "do no harm". The concept of "due diligence" was proposed and was found to be a useful starting point for companies as they seek to integrate respect for human rights into their practices.

112. One speaker described due diligence as understood in the United States as the steps taken by directors to discharge fiduciary duties of care and loyalty, which can include overseeing the operations of a company to ensure it is acting both legally and ethically.[12] This requires proactive conduct on the part of the company. The corporate duty of care and loyalty in the United States is one of oversight, requiring directors to take reasonable steps to identify and address risks. The corporate fiduciary duty of care also is defined by the United States Sentencing Guidelines as due diligence to ensure that companies are in compliance with both legal and ethical guidelines, which the speaker believed could include international human rights standards.

113. Another speaker indicated that in Canadian employment law due diligence means taking all reasonable steps and precautions to avoid harm. They include having written policies and procedures concerning health and safety systems, for example: instruction and training in the use of such procedures; ongoing communication; consultation regarding problems and follow-up concerning results; and effective monitoring and enforcement.

114. The concept of due diligence was also explored in the context of international investment law. One speaker noted that while bilateral investment treaties do not specify duties for the investor, international investment tribunals nevertheless have started to consider whether foreign investors have assessed risks adequately through due diligence and refrained from "unconscionable conduct". Investment tribunals have noted the relevance of human rights in a few water-related cases, which may indicate that companies will be expected to take into account the human rights situation of the country in which they invest as part of their due diligence.

115. Clearly more research is needed to establish greater clarity. But as a first cut, participants felt that the concept of due diligence offers a good starting point for companies seeking to establish that they respect rights.

E. Policy formulation

116. The next step would be for companies to adopt human rights policies or integrate human rights into existing policies. The consultation explored the lessons learned and the challenges of incorporating human rights standards into company policy areas.

117. General aspirational statements about respect for the principles of the Universal Declaration of Human Rights (UDHR), for example, need to be supplemented by specific guidance for managers with limited understanding of international human rights standards. Some participants argued for the need to articulate human rights standards in business friendly language that applies to specific areas of company policy and practice.

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[12] The International Bar Association is conducting research for the SRSG that examines how concepts of due diligence and fiduciary duties are understood in various jurisdictions.

118. Participants had different views about whether a stand-alone human rights policy was necessary. Most agreed that human rights must be integrated into existing company policies and management practices and should not be kept in a silo. Some thought it would be sufficient for companies to check their existing policies and procedures against international human rights instruments to make sure the key elements were in place. Participants also commented on the need to train employees regarding the policies to ensure they are implemented.

119. Speakers mentioned two tools that provide detailed policy guidance. The Business Leaders' Initiative for Human Rights matrix looks to the UDHR and articulates its relevance for business by policy area. And the Danish Institute for Human Right's Compliance Assessment tool allows companies to assess their policies and practices in different operational areas for compliance with human rights.

F. Human rights impact and compliance assessments

120. There is a growing realization that the assessment of human rights impacts and compliance before operations begin are a critical part of due diligence to ensure respect for human rights. Participants noted increased investor pressure on companies to use human rights impact assessments, and the ability of Governments, commercial banks, and multilateral lenders to encourage uptake in their use. The consultation considered when such assessments should be carried out and what form they should assume.

121. Participants agreed that impact assessments should be conducted as early as possible, ideally before the decision to invest has been made, so that companies can alter their decisions about location, timing, design, and costing, and thus the investment's overall viability, based on the impact assessment. Participants indicated that this sort of "pre-check", usually comprising desk research and some expert consultation, should be done in any business sector.

122. These desk-based impact assessments were differentiated from assessments that include consultation with the potentially impacted individuals and communities. Some participants indicated that whether such "on-the-ground" activity was necessary would depend on sector, type of activity, or scale of the investment. Participants diverged on the practicability of disclosing the results of the impact assessment to the public, although they agreed this was in principle desirable.

123. Participants also differed on whether human rights impact assessments should be free-standing or could be integrated into existing risk management processes. It was suggested that, if they were to be integrated, it was essential to maintain a human rights perspective.

124. It was noted that several tools for human rights impact assessments are now available, including the Human Rights Compliance Assessment tool, produced by the Danish Institute for Human Rights; the Guide to Human Rights Impact Assessments (road-testing draft from

June 2007), produced by the International Finance Corporation, the International Business Leaders Forum and the United Nations Global Compact; and Human Rights Impact Assessments for Foreign Investment Projects, produced by Rights & Democracy (for use by affected communities).

G. Accountability through monitoring, auditing and assurance

125. This session considered the role of monitoring and auditing of corporate human rights policies and practices as a means of ensuring respect for rights.

126. It was agreed that monitoring and auditing are needed to raise awareness within the company about human rights issues and to help address issues of non-compliance. Auditing results can also help focus training efforts. However, some participants indicated that there is a significant difference in the quality of auditing depending on the degree of independence of the auditors.

127. It was agreed that monitoring and auditing have improved health and safety standards in the workplace, but they have not always successfully addressed issues such as freedom of association, collective bargaining, and non-discrimination. One participant suggested that the latter issues could be addressed if auditing systems were designed to enhance accountability, build worker and community capacity, and bring about structural change in how the company operates. Participants noted that these processes can be expensive, especially for mid-sized companies, but others noted that they are a necessary component of business excellence and sustainability. The particular role that unions can play on behalf of workers was highlighted.

128. The buying practices of global brands were also raised, with participants noting that they place undue pressures on factories that were at the same time held to very strict cost-constraints. Some multi-stakeholder initiatives are trying to take into account the human rights impacts caused by purchasing practices in their audits. It was suggested that this topic merited further attention.

H. Accountability through grievance mechanisms and remediation

129. When corporations adversely affect the enjoyment of human rights of individuals and communities, mechanisms need to be in place to provide remedies for grievances or harms. However, there has been little analysis of what such mechanisms should look like, particularly at the operational level in companies. This session explored what constitutes effective and credible grievance mechanisms to help ensure corporate respect for human rights.

130. One speaker suggested that grievance mechanisms can be divided in three categories. The first includes those created by the company at the level of a specific site or operation, such as a mine or factory. The second comprises mechanisms that are outside of companies but not part of the formal legal system, such as the ombudsman function of the International Finance

Corporation, the OECD National Contact Points, or complaint mechanisms of multi-stakeholder initiatives such as the Fair Labor Association. The third category consists of judicial institutions at the national and international level. All three categories are needed to ensure effective remediation.

131. The conversation mainly focused on company grievance mechanisms. The point was made that such mechanisms could be particularly effective because they were located in the physical and cultural context in which the issues arose and could enable solutions to be found more quickly. Participants agreed that operational level grievance mechanisms should most appropriately use mediation or negotiation rather than an adjudication process.

132. Several participants noted the potential for operational level grievance mechanisms to be empowering if they involved workers or communities in the process in a meaningful way, giving them information and support. Other participants expressed concern about the fairness and independence of such a process, in terms of funding and access to information. Participants agreed that safeguards and some solution to the funding conundrum were necessary so that, for example, any mediator could be seen as neutral. Participants believed that a mechanism specifically for "human rights" grievances would not be feasible or necessary, so grievance mechanisms should be able to consider complaints related to environmental problems and other harms to communities or employees.

133. Concerning the second category of grievance mechanisms, it was suggested that non-judicial mechanisms external to companies should support dialogue and mediated solutions. They could also encompass adjudication, without having the legally binding effect of a court ruling. One speaker noted the need to avoid undermining government investigation and complaint mechanisms, such as national human rights institutions. Some of these institutions already address corporate-related human rights issues, and this capacity could be strengthened and extended.

134. Finally, redress through the legal system for corporate infringements of human rights was discussed. One speaker expressed concern regarding the slowness and inaccessibility of the court system. It was agreed that courts were always needed as a backstop to other types of mechanisms, and for some types of grievances, such as those raising issues of criminal liability, they were indispensable.

I. Beyond the "sphere of influence"?

135. This session addressed the question of *when* the corporate responsibility to respect human rights applies, and *how* a company delineates the sphere within which it will be expected to take steps to do no harm. Since the launch of the United Nations Global Compact, the concept of "sphere of influence" has been commonly accepted as an analytical tool to delineate the scope of

company responsibilities, though the practical application of the concept still gives rise to confusion and disagreement.

136. Sphere of influence is not about what *rights* companies must respect, but rather about *when* and *where* companies must take steps to ensure that they respect human rights. While the concept of sphere of influence has been compared to a State's jurisdiction, within which its human rights obligations apply, a corporate sphere of influence cannot be similarly defined by geographic boundaries.

137. Two members of the SRSG's team recently published an article in *Ethical Corporation* magazine that sought to clarify the concept of corporate sphere of influence. The article argued that the concept as previously articulated lumped together too many disparate concepts, such as control, causation, physical proximity, benefit, and political influence, and thus was unable to provide crisp policy guidance to companies and stakeholders.[13]

138. Some participants suggested that just because a company may have influence or power over an entity that affects human rights does not necessarily mean that it has a *responsibility* for those human rights impacts. Participants generally agreed that factors such as control, causation, and benefit need to be part of the formula for assigning responsibility. But more uncertainty surrounded the relevance of geographic proximity and political influence.

139. If a company causes harm, or if it controls an entity causing harm, most participants agreed that the harm would fall within the company's sphere responsibility to respect human rights. Control of another entity might exist when the company has a direct contractual relationship with the entity causing the impact, or perhaps if it buys a high percentage of a supplier's output. Similarly, where a company's product is directly causing harm, and such an outcome was foreseeable, the harm may be the responsibility of the company. Some participants also found it reasonable that companies benefiting directly from the human rights violations by others might have some responsibility for the harm. However, it was unclear how direct that benefit needs to be and whether the violation would need to be supported by the company.

140. Most participants agreed that when a company has political influence over a third party that is harming rights, but the harm is neither conducted on the company's behalf nor otherwise linked to the company's activities, the company may not be responsible for that harm, although it may well face reputational risks by remaining silent.

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[13] Lehr, Amy and Beth Jenkins, Business and human rights - beyond corporate spheres of influence, *Ethical Corporation*, available at http://www.ethicalcorp.com/content.asp?ContentID=5504.

141. Participants indicated that several additional concepts may be relevant to delineating the scope of a company's responsibility to respect human rights, including knowledge, duration, and severity of the human rights impact.

142. It was suggested that the SRSG continue exploring the concept of sphere of influence and how it may become a more useful tool for companies from different sectors, including those without major physical footprints.

J. Corporate complicity

143. Many of the charges made against corporations for failing to respect human rights allege corporate complicity in human rights violations committed by others. The SRSG's mandate requests him to clarify the implications of the concept of complicity in the corporate context. The session aimed to explore both the legal and non-legal dimensions of the concept.

144. The discussion focused primarily on international criminal law definitions of complicity, which have been employed by international tribunals and domestic legal systems. The International Commission of Jurists (ICJ) presented preliminary findings from an expert panel that was established in 2005 to clarify the legal standard for corporate complicity in violations of human rights. The expert said that the preliminary findings of the panel suggest that three elements could or should qualify an act or omission as complicity: conduct that enables a violation to occur where the violation could not have occurred without that contribution; that exacerbates the violation's impact; and or that facilitates the violation. Being a silent onlooker would almost never by itself lead to a legal ruling of complicity, though in a very small number of situations where companies carry great influence over the perpetrator, such silence could be construed as a sign of approval and thus constitute support.

145. In relation to the required knowledge to establish complicity, the expert panel found that a company need not have desired that the violation occur for it to be found complicit. Rather, it simply must have had knowledge that its conduct was likely to contribute to a human rights violation - such a result must be reasonably foreseeable, although it is not clear whether the standard is actual knowledge or that the company "should have known". Participants expressed concern that the requirement of actual knowledge could lead to companies seeking to "know less" in order to avoid being found complicit. The SRSG is currently reviewing the draft report of the expert panel.

146. Participants also discussed steps a company can take to avoid allegations of complicity. Companies may be accused of complicity even where there is little chance they would be found legally liable. Therefore, many companies view the issue as part of a reputational rather than legal risk analysis. It was suggested that as part of their due diligence companies incorporate human rights clauses into their business contracts.

147. One participant suggested that when companies operate in conflict zones, stakeholders may expect the company to show that they are part of the solution by promoting and fulfilling rights to avoid being seen as complicit. Several participants responded that while companies may undertake additional responsibilities in particular cases, the corporate responsibility to respect human rights encompasses a responsibility to ensure that corporations are not complicit in acts that harm rights, and that this standard applies irrespective of any additional commitments made by a company.

K. When standards come into conflict

148. As multinational companies try to meet their responsibility to respect human rights, they may encounter situations where international human rights standards conflict with local law, or where local law to protect human rights is not enforced. The session focused on approaches that companies should consider when operating in such situations to ensure themselves and others that they are not violating rights.

149. Participants agreed that companies must take steps to ensure that they are not violating rights. Reference was made to a recent paper by the International Organisation of Employers, the International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, which states that companies "are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent".[14]

150. When a company faces not the absence of legal standards or their enforcement, but an outright conflict between national and international standards, it was suggested that the company should articulate guiding principles in support of human rights; outline the steps it is taking to deal with the conflicting standards; engage third parties for assurance and evaluation of its actions; and disclose as much of the human rights-related information about the situation as possible.

151. The company also could adopt a standardized process that includes expert consultation when considering entering a new market; create a company-wide clearinghouse of policies and approaches to dealing with human rights dilemmas, and engage with home and host Governments, alone or with other companies and stakeholders. Participants noted that when Governments do take steps to enforce their human rights obligations, companies should be supportive.

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[14] IOE, ICC, BIAC, Business and Human Rights: The Role of Government in Weak Governance Zones, Dec. 2006, para. 15, available at http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf.

L. Concluding remarks

152. The consultation focused on the question of how companies can ensure that they respect human rights. Further discussion and elaboration is needed concerning some of the difficult conceptual and operational issues the consultation addressed. Nevertheless, there was broad acceptance of the underlying premise of the consultation, that companies have a responsibility to respect human rights, and of due diligence as a useful overarching concept enabling companies to operationalize the responsibility to respect. This marks an important contribution to the work of the SRSG as he moves forward in developing a new framework for the business and human rights discourse along the lines outlined in the introduction: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need to create more effective remedies to address corporate-related human rights disputes.

V. CORPORATIONS AND HUMAN RIGHTS: ACCOUNTABILITY MECHANISMS FOR RESOLVING COMPLAINTS AND DISPUTES

153. On 19-20 November 2007, the Corporate Social Responsibility Initiative at Harvard University's Kennedy School of Government hosted a multi-stakeholder workshop as part of its project "Corporations and Human Rights: Accountability Mechanisms for Resolving Complaints and Disputes". This was the second of two such events organized in 2007, which brought together a core group of expert stakeholders to consider how to improve the effectiveness of extrajudicial grievance/dispute resolution mechanisms in the business and human rights arena. Participants included experts from NGOs, government, business, multi-stakeholder initiatives, financing institutions, lawyers, mediators, investment funds and academia.

154. Discussion was divided between two levels of non-judicial grievance mechanism: those located in institutions at the national, industry/multi-industry and international levels; those located at the operational level, specific to a corporate project or site.

155. The debate also considered how mechanisms at these two levels do and/or should relate to each other, and what new mechanisms might be needed to fill gaps or supplement the growing "system" of extrajudicial grievance processes.

156. Discussions were founded on the following starting assumptions:

- Effective judicial processes are of fundamental importance in any society to the accountability of non-State actors for the respect of human rights. They should be supported

- However, these institutions remain weak in many States, and even in societies with strong rule of law institutions many grievances do not raise clear legal issues providing a

basis for litigation; and court processes may be too long and expensive for complainants to see them as a viable avenue for remedy

- Moreover, parties often have a shared interest in addressing grievances as early as possible before they escalate to the point of litigation

- So extrajudicial mechanisms have an important, complementary role to play in the context of business and human rights, whilst they must be careful not to undermine the continuing crucial role and development of judicial processes

157. The following documents were on the table as a platform for discussions:

- "Mapping Grievance Mechanisms in the Business and Human Rights Arena" - a compendium of factual descriptions of different mechanisms from the corporate to international levels

- "Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps" - an analysis of how certain existing mechanisms from the industry level up to the international level handle grievances, with conclusions and recommendations

- "Principles for Effective Human Rights-Based Grievance Mechanisms" - draft principles for the design of rights-based grievance mechanisms at the company level

- Discussions at the workshop were conducted under the Chatham House Rule of non-attribution. This report is designed to capture the key issues and ideas that emerged

A. Session 1: Enhancing the network of extrajudicial grievance mechanisms in the business and human rights arena

158. In this session, discussion groups looked separately at the role and experience of:

(a) National-level mechanisms (National Human Rights Institutions, OECD National Contact Points, industrial relations dispute bodies etc.);

(b) Multi-stakeholder and industry initiatives (e.g. Fair Labor Association, Social Accountability International, the Voluntary Principles on Security and Human Rights, the Equator Principles etc.); and

(c) Multilateral institutional initiatives (within the World Bank Group, regional development banks etc.) as well as the links and gaps between these tiers.

National level

Role of government

159. There was broad agreement on the need for greater attention to the role of government and judiciaries in addressing disputes between companies and their stakeholders at the national level. Strong judicial systems were essential to accountability. They could also provide useful incentives for non-State actors to resolve disputes directly, without going to litigation. Equally, extrajudicial grievance processes should where possible involve those Government officials with responsibility for overseeing the relevant standards, in order to reinforce their role.

160. One of the roles identified for State institutions was to help redress imbalances in power that typically characterized conflicts between communities or workers and companies. Yet there was scepticism from some that the State could be an effective arbiter of disputes. Government was not monolithic, but represented different views and interests across departments and even individuals. In the context of disputes, a Government might variously be a convener of other actors, a defendant, a promoter of investment etc. In this context, some felt that most OECD National Contact Points carried fundamental design flaws: the often partial role of government; a resulting reticence to deliver clear findings of non-compliance; and a lack of incentives or requirements for companies to engage in the NCP process.

Collaborative approaches

161. One discussant reported that of the 65 cases of alleged corporate human rights abuse surveyed in the first report of the SRSG on business and human rights, 38 had related to the extractives sector. While they ranged from situations entirely within the company's control to those entirely beyond its control, a study had shown that nearly all sat in the middle, with shared responsibility. So a key question had to be how to get different actors - corporate, government and civil society - working together in the national context to address disputes.

162. Another participant noted that disputes in the extractives sector frequently related to communities' concerns that they were not benefiting from an investment. Multilateral institutions, Governments (host and donor) and companies needed to work together to align local social investment strategies and build local government capacity such that fiscal revenues were managed in a positive and participatory manner.

Cultural preferences

163. A participant from one developing country noted that their history under dictatorship had left the legal system widely discredited. The democratic government of today was therefore more interested in ombudsman approaches to dispute handling. Eighty per cent of cases going to one ombuds office had been resolved through mediation. The ombudsperson could, of course, not bind parties. A participant from another developing country noted that the adversarial win/lose

nature of lawsuits sat ill with their culture. Experience suggested they could worsen both the dispute and relations between those involved. It was better to start with grievance mechanisms at the company level, moving on to locally-based multi-stakeholder initiatives (MSIs) and then up the line from there before going to national courts.

Industry/multi-stakeholder initiative level

Risks

164. Some participants felt that multi-stakeholder initiatives were inherently sub-optimal arrangements. In a worst-case scenario, host Governments wanted them to substitute for necessary regulation; home Governments promoted them in patronizing ways; companies exploited them to enhance image and keep litigation at bay; and international NGOs wished them to fail to prove a need for global regulation, even though local NGOs often wanted the quick, local remedy they might provide.

Bridging roles

165. Others noted that while MSI and industry initiatives had their limitations, they provided an important bridging role where government-driven checks on compliance with standards were absent or deficient. Some thought they were not necessarily a temporary bridge: as national capacity expanded, their bridging role might evolve to address different needs. Another participant noted that in a post-conflict environment there was little State capacity to provide for dispute resolution and some southern Governments were naturally reluctant to take prescriptions from northern Governments and multi-stakeholder initiatives. So NGOs and companies may have no option but to step in collaboratively to build mechanisms that could address grievances.

166. One discussion group suggested that MSIs provided important platforms to advance both standards and grievance handling, but needed to move to a new level. It could be a deepening - pushing individually for higher standards and tighter accountability - or a broadening - bridging between existing MSIs or even bringing them under a single, common tent. There at least needed to be greater cross-learning between these initiatives, going beyond the limited experiment of the Jo-In project linking six MSIs in Turkey. The FLA’s grievance process was suggested by some as a best practice model.

167. Another challenge was to look at cultural transferability. The basic model of bringing actors with different interests together to find answers to common problems was relevant to different cultures. But existing MSIs and industry initiatives were largely European and American and needed to bridge to other regions.

Multilateral/international level

Leverage

168. Some thought World Bank and regional development bank grievance processes would have a declining role in light of the surge in investment from sovereign wealth funds, other emerging economy investors and private equity. As the multilateral banks became decreasingly competitive financiers, their leverage to oversee and enforce compliance with standards would equally reduce.

169. Others stressed that these institutions still retained significant strategic leverage but needed to do more to use it to achieve remedy. Whilst it was true that, for instance, World Bank grievance processes could handle only a limited number of disputes a year, the outcomes of those processes were carefully watched by many actors and often had a much wider impact and value. One participant suggested that the outcomes of World Bank grievance processes should have validity in other forums. It was positive that Equator Principle banks were buying into the International Finance Corporation's performance standards, helping them become the norm. But the same parallel in terms of compliance and remedy was yet to develop.

Awareness-raising

170. A particular challenge for multilateral/international level grievance mechanisms (though others as well) was spreading awareness about their existence and tackling the lack of capacity among local actors to access them effectively. It was suggested these institutions should take a stronger role at the local level - where many carried credibility - in building such awareness and capacity. Some suggested this challenge would be easier if the banks converged round some common principles and practices. They might also support the development of intermediate mechanisms such as ombuds functions.

Cross-cutting linkages/deficits/gaps

Understanding the options

171. One participant noted that the spirit of people the world over was to challenge the way things worked. The voice of local people was increasing, so absent relationships of trust, conflicts were inevitable. Grievance mechanisms were an opportunity to address this, but expectations had to be clear: was a mechanism going to provide a judgement on compliance or a mediated agreement to a dispute? If both were combined in one mechanism, this could create competing and incompatible expectations. Parties to a dispute needed to know all their options and what they could deliver. People chose to mediate only where they thought it better than the alternatives. So those alternatives must be known - including judicial options.

172. Various participants emphasized the need for education on the different mechanisms, to raise awareness about what was available and how it worked and could be accessed. One participant underlined the importance of consumer awareness and markets in helping raise the bar not only on standards, but also on responsible dispute handling processes. This would then create an opportunity for business to respond to consumer demand. There might be a particular role for MSIs in educating customers/consumers. Governments also had a communication role in this regard. Some participants stressed the need to address all parties in raising awareness and capacity with regard to grievance processes. Empowering workers to claim their rights without building the capacity of management to understand their roles and responsibilities and respond appropriately could raise expectations without raising the ability to meet them.

Adopting rights-based approaches

173. Various participants argued for a rights-based approach to grievance mechanisms. This would place the focus on integrating human rights norms, standards and principles into the process of grievance mechanisms, whether or not the issues in dispute raised substantive human rights. It would emphasize principles of equality, equity, accountability, empowerment and participation. It was suggested that a rights-based approach could help make grievance mechanisms both more scalable and more culturally transferable. One participant underlined the importance of making the human individual central to grievance processes - rights-based approaches could be important in this regard.

Using multiplicity to advantage

174. The benefits of a diversified, multi-layered approach to grievance handling was stressed by one participant, drawing on the precedent of the labour rights arena, where processes provided by the ILO, International Framework Agreements, national labour mediators and tribunals, multi-stakeholder initiatives and civil society processes had all contributed to providing remedy and embedding rights in different and complementary ways. The question was how to transfer this experience across to other rights issues such as economic and social rights that were less widely accepted internationally.

175. It was stressed that the key question was not necessarily which level of mechanism was more appropriate or effective, but how to get the different levels to connect or work together to maximize their impact by combining their different leverage points. MSIs had the advantage of independence from Governments but were insufficient on their own because too many Governments and consumers did not care about their work. Banks had another type of leverage and angle on grievance processes. One speaker commented that grievance mechanisms that provided an immediate local point of access for complainants were important, but there needed to be a second point of recourse if they failed, with more of an appellate, fact-finding role.

Setting out clear standards

176. A number of participants noted that extrajudicial mechanisms suffered where there was a lack of clarity as to the human rights and other standards that applied. Even some institutions with their own codes and standards left them at a level of generality that made it difficult for companies to know exactly what was expected and for complainants to know when they had a real case for complaint. Another participant argued that disputes involving indigenous peoples often raised different rights issues and needed particular attention. These communities tended to focus less on a desire for remedy through compensation and more on their right to preserve their cultural identity.

Achieving scale

177. The challenge of achieving scale was emphasized across all kinds of mechanisms. They all had limited capacity to address grievances. Some speakers stressed that the scope for grievance mechanisms to scale up correlated with their simplicity of process. Companies and others could neither execute nor engage effectively with a process that was poorly devised or excessively complex. Some participants took the view that combating scale constraints was a lesser concern than achieving legitimacy and effectiveness. Where these latter goals were achieved, the mechanisms could still provide added value, whatever scalability they offered.

Measuring effectiveness

178. The absence of means to measure the effectiveness of these mechanisms was raised repeatedly. Some argued for a common set of substantive human rights standards as a necessary starting point to measure effectiveness. Some suggested that the draft Principles for operational-level grievance mechanisms (see below) could usefully be adjusted as process standards for these other levels in the system. Measurable performance indicators could then be further developed and assessed.

B. Session II, part 1: Company-based human rights grievance mechanisms

Purposes

179. Various participants stressed the need to improve how grievances were handled at the factory/company level. The focus had for too long been on top-down systems of monitoring and auditing. Bottom-up grievance processes were key not only to empowering aggrieved parties to raise their voice but also to making them part of the solution. Since there were scale limits on what MSIs and other institutional mechanisms could offer in addressing grievances, resolving the majority at the local level was also crucial for the whole "system" to function.

180. Another discussant noted that many major companies would say they already took a transparent, accountable, consultative approach to addressing grievances and disputes. The

deficit was often in getting them to mainstream these principles into their management systems so that they were not compromised at the first serious challenge or tension in their own interests. It would help in this regard to have a set of guiding principles as a tool. The value of a grievance system was precisely in its being systematic, providing robust and predictable processes for all. Ad hoc responses to disputes were much weaker procedurally and therefore often substantively.

181. A couple of participants suggested that process benchmarks for grievance mechanisms could be important for socially responsible investors as indicators of human rights performance, and could be combined with indicators on human rights impact assessments and transparency as a much better guide to performance than the existence or content of a human rights policy alone.

Potential and limitations

182. A number of participants noted distinctions between compliance, adjudication and dispute resolution. One suggested that where a company was working to clear standards, it was well-placed to assess compliance when someone alleged a breach. But disputes may not relate to any predefined standards - they may rather reflect needs and desires. This required more innovative processes built by communities and companies together - project mechanisms more than company mechanisms. Other participants took the view that companies should not be the last word even on compliance - they were judging themselves. And a grievance might reflect human rights considerations even where specific standards were not in place or had not been agreed.

183. One participant stressed the need to use terminology carefully. The vindication of rights belonged in an adjudicative process rather than a problem-solving one. This could not be delivered at the company level but required an independent external body. However, adjudicative processes were not able to recognize the legitimate conflicting forces that were often at play in a complex problem. Another participant suggested the key question was how to articulate the relationship between the two types of process - how could one make this relationship between problem-solving and adjudication work as part of a continuum or a system.

184. It was agreed that mechanisms at this operational/project-level had to be part of a wider system, wherever possible backstopped by effective judicial mechanisms. They had value in themselves if done right, but could only be one part of the answer to the need for remedy. Most agreed they could not provide a solution where they could not deliver a fair process, and the appearance of fairness. This was the case where disputes raised questions of criminal liability. It may also be the case where the safety of individuals was at risk or in zones of bad governance or conflict (see “government role”, p. 8).

Management systems

185. It was noted that some company management systems inevitably led to more grievances by providing inappropriate reward structures to staff. For instance, they might reward high numbers of MOUs signed with communities rather than measures of the quality and inclusiveness of engagement. This encouraged hasty and questionable deals with local individuals. Another comment was that some management systems failed to hold responsible those in a company who generated grievances, e.g. an accounting department that delayed paying land compensation to locals. The Community Relations Department therefore became a fire-fighter for other departments' errors, the same grievances recurred, and there was no institutional learning. There was a case for reviewing management systems through a grievance perspective to remove such obstacles to effective stakeholder engagement.

186. One participant stressed that any grievance mechanism that did not prioritize and mainstream relationships would not work. On the company side, a single individual with the right skills could make the difference in building relations with a community. But where every complaint or disagreement was run through the legal department, relations rarely worked.

Clarity, predictability and transparency of process

187. Many participants stressed the need for any mechanism to provide clarity as to what function it could and would provide, what it could not do, and what alternatives were available. This was essential to enable informed decisions and avoid false expectations. The process offered must be timely, predictable and transparent in order to be fair. An appropriately constituted local multi-stakeholder group to oversee the mechanism and its funding was crucial for credibility.

Representation

188. Some participants noted the challenge of identifying who should be involved in a dispute resolution process and who represented what groups or interests. It was suggested that this could only be answered in the specific context. And the parties had to take responsibility for who represented them - nobody should play kingmaker. Others noted that community leaders at times failed to take account of gender, caste or other inequities, so it could be too culturally relativistic to expect that existing local leadership would be fairly representative. There was a risk of incorporating and compounding local prejudices within the process. Another participant recalled experience of communities being highly susceptible to outside influence in their choice of advice and representation, bringing in individuals with their own agendas who could hijack the process. Ideally there should be safeguards to prevent this.

C. Session II, part 2: Draft principles for effective company-based human rights grievance mechanisms

189. This session focused discussion specifically on the draft Principles developed under the project, which had been circulated to workshop participants prior to the meeting.

Viability

190. Many participants thought that the Principles - or an amended version of them - had a valuable contribution to make. They could help companies see how to incorporate appropriate grievance processes into their management systems and help socially responsible investment funds institute benchmarks of good practice for assessing companies.

191. Some participants proposed that the Principles should be presented as a tool for all stakeholders, not just companies. Communities and other affected groups could equally use them to demonstrate what they expected of companies and to help them in the joint design process. As such, they could be an empowering tool for these groups. At the same time, it was stressed that grievance mechanisms were not stakeholder engagement writ large. Rather, grievance mechanisms were a single, coherent part of a larger set of strategies for responsible engagement and risk management.

192. While some queried whether the Principles could gain purchase beyond western companies and, indeed, beyond the "usual suspects" within the West, others felt that they could also be of interest, e.g. to Chinese companies as a model of international best practice. While the Principles could be presented as rights-focused, through another lens they were about relationship-building and addressing problems before they became acute. This latter perspective may have traction beyond States that were receptive to rights terminology.

193. Various people suggested that the Principles should be cast as guidance, for risk of being seen as a set of rigid standards as against guidelines for a design process. Others noted a concern that they not be used as a tick-box exercise or manipulated such as to abuse power differentials. Some kind of quality check was needed (see "accountability", p. 9).

194. One participant noted that most disputes arose in a situation of pre-existing distrust, which made it hard to work together. Building a platform for collaboration might be a prerequisite to addressing a dispute. Another noted that this argued for having a grievance process in place from the start of an investment or project, before problems arose. Proposing a jointly-created grievance mechanism may itself help build trust.

Framing the scope of application

195. Various participants suggested that the framing of the draft Principles might be broadened in one or more of three directions: (a) from a focus on substantive human rights disputes to a

broader rights-based approach to handling any kind of dispute; (b) from a focus on specific sectors to a broader application across other sectors; (c) from the company level to other levels of grievance mechanism, including MSIs and industry initiatives and multilateral/international mechanisms.

196. There was broad support for focusing the document on rights-based approaches to handling all grievances, including but not limited to those that raised substantive human rights issues.

197. Views differed on the Principles' applicability across wider sectors. Some felt they might be less applicable in sectors where the safety of complainants was often at stake or where disputes frequently reflected irreconcilable conflicts of interest between parties, such as a community rejecting the very presence of a company in its midst. Others suggested that it was certain kinds of grievance that could not be handled at the company level, rather than sectors themselves that were excluded. However, SMEs, SOEs and the informal sector might face particular practical challenges in implementing the Principles. Some felt there was good potential for applying the Principles to grievance mechanisms above the operational level and that this should be explored in discussion with MSIs and others. One discussion group suggested that the Principles might apply differently at different stages of a dispute or conflict, or that different types of mechanism might be needed at the different stages. This might be examined through some road-testing.

Government role

198. A common theme was the need to bring out more clearly in the draft Principles the potential role of government, while acknowledging that the document could not be too prescriptive since government in some places was a potential part of solutions and in other places an entrenched part of the problem. However, mechanisms should not ignore or undermine State responsibility with regard to the implementation of human rights.

199. A distinction was drawn between States with weak governance and States with bad governance. In the former, there were opportunities to enhance the State's role by involving relevant officials in a grievance process, even if just as observers. This could influence policies and build capacity in the medium term. In zones of bad governance characterized by systematic abuses the challenge of engaging government was greater as it required shifting their entire approach. Interestingly, some felt company/operational level mechanisms were least likely to be viable in these setting, while others felt that this was where they were most essential.

Power imbalances

200. The challenge of appropriately addressing power imbalances between the company and other stakeholders was a recurring point of discussion. There was broad agreement on the need for particular attention to redressing this disparity. One participant noted that conflict was

sometimes the only leverage communities had and it would be problematic if a local grievance mechanism neutralized that with a technical fix. Another suggested that the first Principle, requiring joint design of the grievance mechanism by all stakeholders was fundamental to addressing power imbalances as well as to building legitimacy.

Measuring effectiveness

201. Many participants stressed the importance of good Key Performance Indicators (KPIs), both from the perspective of the company and of external observers. Most felt that it was dangerous to include a KPI on the number of complaints received - a high number of complaints may well be a sign of a good mechanism that provided access and carried confidence. This should be encouraged, not discouraged in any indicators. That said, some thought that combining a quantitative measure of a decline in grievances *over time* with a qualitative survey of stakeholder satisfaction with the mechanism could be a good indicator of effectiveness. Whilst stakeholder satisfaction with outcomes might be one measure, some suggested it was even more important to test complainants' satisfaction with the process - getting this right was essential to a mechanism's credibility. Other suggested measures were a reduction in "incidents" - i.e. manifestations of a grievance outside the mechanism; a reduction in complaints taken to other mechanisms; and reduced recurrences of similar grievances.

Cultural preferences

202. It was suggested that the Principles acknowledge explicitly that local cultures may have their own dispute resolution mechanisms, cultures or approaches. It was important not only to avoid undermining local legal mechanisms, but also to work in collaboration with, or at least in a manner consistent with, local non-judicial mechanisms where possible. This reinforced the need to design any mechanism jointly with local stakeholders. Again, this was caveated by the need to place cultural specificity within overarching principles of fair process and inclusion of the vulnerable.

Accountability

203. Some flagged the risk that the Principles might be manipulated by a powerful corporate actor - whether consciously or unconsciously. It was suggested there should be an accountability mechanism for the Principles, testing whether they were being applied appropriately and in good faith.

204. Where grievances involved substantive issues of human rights, it was seen as important to involve human rights expertise to ensure that these processes did not reinterpret or undermine basic human rights standards. Not all mediated agreements would otherwise pass the test of international human rights standards. And there was a risk that the Principles might otherwise be taken to imply that implementing human rights standards was a negotiable option, which it

clearly was not. Again this was a point where Governments should ideally be guarantors. If they could not or would not take this role, other means of assurance would be needed.

Resource limits

205. A number of participants noted that the demands of applying the Principles might limit their application to large, well-resourced companies. But one group thought it might be possible to produce a version that could reasonably be implemented by smaller enterprises. At root the Principles should be the same, but how they were applied would differ according to size and resource. One participant reflected that multiple small or medium-sized enterprises such as supply factories could form a collective grievance mechanism in line with the Principles, sharing resources and reducing costs. The Principles could be particularly helpful for designing such joint approaches.

Next steps

206. Many felt it important now to do some form of road-testing and then revisit the Principles with that learning in mind. This could help test the universality of the Principles' applicability across countries and sectors as well as different rights issues. It was suggested it would also be useful to test the Principles against companies' existing practices and to develop examples of some best practices, which would help to show that the Principles were practicable and good for business.

207. One participant underlined the importance of being able to "sell" the Principles to companies. Grievance mechanisms could not be done on the cheap - they linked to the fundamental question of how a company engaged with its affected stakeholders on a day-to-day basis. The Principles document was potentially very useful for companies, but should bring out clearly and simply what concrete first steps they would need to take to move forward.

D. Session III. Institutional innovations with regard to grievance mechanisms

Global ombuds function

208. One discussant highlighted the potential added value of a global ombuds function as a higher-level grievance mechanism. It would have to carry wide legitimacy and so could not be politically-driven. It should ideally be based on a common set of standards, which experience showed was hard to achieve. Key questions that would have to be answered in its creation were:

209. Could you establish such a function without common standards - could part of its role be to lay the groundwork for their development?

- Could you establish such a function without a treaty, or would you need treaty backing for it to have authority? If so, that could take a couple of decades.

- What kind of institutional setting would help make it legitimate?
- How would it be resourced? Could you get industry to resource it? Would that compromise its integrity?
- How could you ensure it innovated rather than becoming a stale, litigious body able only to handle a couple of cases a year?

Institute for business and human rights

210. Another discussant noted that certain key initiatives in the business and human rights arena were coming to an end in the next two years, including the Business Leaders Initiative on Human Rights and the current SRSG mandate. They had produced a lot of outputs, on which future work should build. An Institute on Business and Human Rights might help take up the reins in advancing the agenda. Consultations were currently under way to explore thinking on the best role for such a body and how to build a multi-stakeholder framework for its work. One idea was that it provide a forum for stakeholders to debate human rights dilemma situations involving companies. It might also support the creation of information networks around grievance mechanisms.

Resource hubs

211. A third discussant reflected that there was a lack of information on how grievances were handled in practice, what the outcomes were and what good performance looked like. There were few qualitative or quantitative analyses in this area, of either judicial or alternative dispute resolution processes. As a result, one often ended up in rhetorical conversations about the options. Dispute cases remained very much in the private domain, as if they were something to be concealed. A resource hub or hubs might help people to share information on grievances and processes, create a space for innovation and learning among different grievance mechanisms, and take a data-driven approach to analysing the different frameworks for monitoring and evaluating performance.

Foreign investment accountability mechanism

212. One discussant presented a proposal for a Foreign Investor Accountability Mechanism (FIAM). This would focus on situations where multinational corporations had signed up to particular norms and standards but there was no mechanism to check compliance and hold them to account to communities affected by their operations. The FIAM would receive complaints of non-compliance and provide an independent investigation and public reporting. Its membership would include companies, NGOs and other stakeholders, with care to avoid it being institutionally “captured” by any one group. Its rules and procedures would be decided collectively. For companies, it would provide a risk management tool, but one that was not a

box-ticking exercise. Initiatives such as the Equator Principles or the Voluntary Principles could benefit from this kind of external mechanism.

Privatized national contact points

213. Another discussant focused on the prospect of privatizing OECD National Contact Points, as recently done by the Dutch Government. Currently, nobody really noticed the OECD Guidelines for Multinational Corporations. NGOs hardly knew they existed and companies knew but were not bound by them. In the Netherlands, ownership of the NCP had been passed to a quadripartite group whose members were from a labour union, NGO, academia and the private sector respectively. They could mediate complaints and promote the guidelines, not least as a means to dispute prevention. Furthermore, the 2007 G-8 Summit at Heiligendamm had appealed for the OECD, ILO and Global Compact to converge their efforts. Principles for effective grievance mechanisms could help support such a convergence and bring new cohesion across these mechanisms.

Linking existing mechanisms

214. One participant noted the deficit of many existing mechanisms in terms of linking up with other parts of their home institutions and with each other. The Compliance/Advisor Ombudsman of the World Bank might audit a project, but the Board of Directors had no way of checking whether its findings had been addressed when they made their decisions. In one complaint to an NCP the case had been closed based on the fact that the company had signed the Global Compact, but without any check as to what that meant in practice. The Equator Principle Banks followed the IFC's Performance Standards but not its compliance assessments, which were internal documents to the World Bank Group. These lines of communication needed to be fixed.

Supporting learning and building capacity

215. Another participant noted that there was a good amount of analysis of where companies were undermining human rights, but little on where they were helping to strengthen them. This gap could usefully be filled for positive learning purposes. Another deficit identified was in capacity-building, whether of a community, local government, company management or workers. Might there be scope for an equivalent of the Investment Climate Facility in the human rights arena to support country-level capacity-building, funded by companies, Governments, donor agencies and working with local universities or other entities? One participant noted a lack of follow-through once grievances were nominally resolved. Individuals often did not know how to access compensation funds or understand how they might best invest and use these resources. Experience showed such opportunities for development were often squandered for lack of such knowledge.

Open-source networking

216. One risk that was highlighted with regard to some of the above proposals was that they would replicate existing "ghettoes" of the usual western actors, whilst talking predominantly about problems that occurred in non-western countries. Building on the suggestion for resource hubs, a number of comments revolved around the potential for "wiki"-style/open-source networks, developing a collaborative space or architecture that broke out of current elite conversations and set a low threshold for interested actors around the world to get engaged and move the debate beyond western paradigms. Many participants felt this could be more nimble than institutionalized processes with the politics they usually carried. One participant saw this kind of development as inevitable to some degree as new technologies stimulated horizontal communications. Others saw need for impetus from existing institutions to help promote this kind of network. There was a broad sense that combining the idea of resource hubs and networks with this kind of organic/open-source approach offered one of the areas of greatest potential going forward.

E. Conclusions

217. The project leader concluded that she would:

- Prepare and circulate a report of the workshop discussions. This would aim to capture participants' main comments and ideas on meta-level mechanisms, which would provide food for continuing thought, discussion and analysis of how these mechanisms might best evolve. It would also cover comments on the draft Principles

- Revise the draft Principles in light of the comments received and circulate a new version to workshop participants prior to posting it on the CSRI and Business and Human Rights Resource Centre websites. Based on this version - which would still be a work in progress - the project would look at collaborating with various organizations to road-test and further refine the Principles in the course of 2008

- Reflect on ideas for institutional innovations to address gaps in the current multi-level architecture of grievance mechanisms. Some were already being taken forward. The project might have a role to play in supporting "virtual" resource hubs and networks working in collaboration with other institutions

218. The project would continue to be driven by broad consultations across stakeholder groups and regions, with key documents posted on the CSRI and the Business and Human Rights Resource Centre websites.

VI. IMPROVING THE HUMAN RIGHTS PERFORMANCE OF BUSINESS THROUGH MULTI-STAKEHOLDER INITIATIVES

A. Introduction

219. "Improving the Human Rights Performance of Business through Multi-Stakeholder Initiatives" was one of a series of expert consultations convened on behalf of Professor John Ruggie in his capacity as Special Representative of the Secretary-General of the United Nations (SRSG) on the subject of business and human rights. The consultation began with the premise that it is the duty of States under international law to protect against human rights abuses. Yet, irrespective of the duties of States, there are strong arguments for companies to take responsibility as well. In his 2007 report to the Human Rights Council, the SRSG identified multi-stakeholder initiatives (MSIs) as an important complement to the traditional State-based treaty-making and soft law standard-setting processes. But relatively little is known systematically about how - or indeed whether - particular features of these initiatives influence their effectiveness.

220. The consultation, convened by the Clean Clothes Campaign and hosted by the Ministry of Foreign Affairs of the Netherlands in The Hague, brought some of the leading MSIs together with representatives from business, government, and civil society to address two interrelated objectives:

- First, to identify "good", if not necessarily "best", practices in the governance of multi-stakeholder initiatives, and
- Second, to identify criteria for credible and effective implementation of supply chain codes of conduct

221. While exhibiting great diversity, MSIs generally are characterized by multi-stakeholder governance structures and activities, and by mechanisms for enforcement through mutual accountability, market leverage, and/or non-market pressures (both regulatory and non-regulatory). MSIs have emerged in response to governance gaps in which regulatory, judicial, and broader economic and political systems have failed - whether by intent or lack of capacity - adequately to protect human rights. If governance systems all worked the way they are supposed to, many participants felt, MSIs would be a much less important feature of the human rights landscape.

222. In some areas, MSIs may become new modes of governance, changing the traditional roles and relationships of the State and other actors. But even if MSIs are only transitional phenomena on a historical timescale, it is important to determine how to make best use of them in building a sustainable system for the protection and realization of human rights.

223. The consultation was structured around four primary topics:

- MSI Governance
- The Role of Governments in MSIs
- Monitoring and Auditing
- Remediation

224. Throughout the discussion, participants highlighted successes and failures MSIs have had to date, as well as the opportunities and challenges they face going forward. For the purposes of this summary report, those successes, opportunities, and challenges are drawn out and summarized at the end of the document.

B. Governance of multi-stakeholder initiatives

225. There was broad agreement that credible MSIs shared at least the following six features:

Clarity of purpose

226. Participants felt it essential for MSIs to define clearly the scope of their mission, based on an accurate problem definition. The MSI's value proposition in relation to the problem it is intended to redress should be easy to identify and articulate.

227. Some participants felt that a narrow focus was a success factor. For example, the Voluntary Principles on Security and Human Rights (VPs) are not addressed to the full range of human rights challenges, but to the policies and practices of security forces guarding company assets. Similarly, the Ethical Industries Transparency Initiative (EITI) alone will not solve the resource curse. A narrow focus helps manage expectations and prevents unsustainable mission-creep.

228. Others noted that an MSI's problem definition must also be framed to attract relevant stakeholders, and communicated so as to generate a shared understanding among them. For instance, one MSI faced the misperception by a local government that its objective was in effect to create a monopoly amongst the companies involved. Another was accused of threatening the reputation of the host country. In a slightly different example, Chinese firms may be reluctant to join MSIs that frame their goals explicitly in terms of "human rights" - and yet they are not necessarily averse to components of human rights, disaggregated and framed in ways that are not considered threatening to the country's political system.

Involvement of relevant stakeholders

229. "Relevant stakeholders" include, first and foremost, those with the power to address the problem defined. There is usually a challenge of getting the right mix of stakeholders, as the problem is often systemic, involving a wide range of actors across sectors and geographies. If the problem is defined broadly, a very high number of stakeholders will be implicated; if it is

defined more narrowly, fewer will be. Collective power to fix the problem is also a function of sufficient seniority among the individuals involved, helping to ensure that organizational commitments and resources are available to follow through. There are also questions about who represents the victims or potential victims, and how to be sure that they are represented effectively.

230. Despite the systemic nature of most of the problems MSIs have been created to solve, there may be credibility reasons NOT to include certain stakeholders - for example, a corrupt Government. Often this decision is far from clear-cut. For most MSIs, the challenge is in deciding how wide to spread their wings. Is it more effective to be inclusive or like-minded? Is it better to let currently underperforming companies and other actors into the tent and then encourage them to improve from within? Or is it better to set barriers to entry and encourage them to improve in order to join? Similarly, is it credible for a group of companies to take an initiative on their own, while simply communicating externally with non-governmental organizations (NGOs) and other parties? Some say that it is not, while others say there is no need for companies acting collectively to dress up as an MSI, depending on the group's objectives and their performance in achieving them. Finally, the issue was raised about the legitimacy of stakeholders participating in MSIs when they are on record as opposing voluntary initiatives as a viable solution to human rights challenges, thereby possibly being in a position to create the self-fulfilling prophecy that voluntarism cannot work. Many of these questions remain unresolved.

Appropriate balance of power and responsibility

231. In addition to involving all relevant stakeholders, it is important to engage them in meaningful ways. This is a function of timing as well as their role in the governance and day-to-day operations of the MSI. On timing, many participants felt that all stakeholders should be involved as early as possible - i.e. at the "creation" stage of the MSI. On governance, many participants felt it was important to distribute decision-making power widely, though others said this should be considered on a case-by-case basis rather than being considered a foundational principle, cautioning that broadly-shared decision-making power could actually be counterproductive in some cases, depending on the MSI's objectives. On day-to-day operations, many participants felt that the role of local stakeholders in particular should be clarified, strengthened, and made more integral to the MSI's work - that local stakeholders' roles should go "beyond consultation".

Accountability

232. Most MSIs require a clear commitment from members, at least those in the corporate sector. Participants in the consultation emphasized that the decision to make such commitment by joining an MSI was voluntary, but that once made, compliance was mandatory. To be

credible, an MSI must have effective sanctions for non-compliance, based on a robust system for monitoring and measuring performance. Some initiatives require a probationary period (as in the International Council of Toy Industries' CARE programme, for example, which also requires members to hire social compliance officers during that period). Sanctions may include suspension or even expulsion. Participants had mixed views on the effectiveness of these sanctions.

Grievance mechanism

233. Participants felt that grievance mechanisms were important. They stressed that access by victims was critical not only to the effectiveness of any grievance mechanism, but also to the credibility of the MSI - whether it hosts the mechanism itself or mandates participating companies to host their own. Participants noted that MSIs that encourage complaints must be prepared to support those who incur legal or other forms of retaliation for making them.

Transparency

234. Participants had mixed views as to the optimal level of transparency for an MSI. However, there seemed to be consensus on *process* transparency as a minimum. It was felt that whether or not *content* transparency was desirable seemed to be a function of timing, consent of the parties, security risk to the victim, and other factors. One participant defined transparency not as 100 per cent disclosure, but rather as "a systematic way for information to flow".

235. There was broad agreement on these good governance principles. One participant also suggested that having a secretariat seems to be a success factor - some structure that can act on the MSI's behalf. However, it was unclear whether/to what extent each of these governance principles actually contributes to operational effectiveness on the ground and improvements in people's lives. The SRSG noted that there has been a tendency to define "effectiveness" in terms of institutional inputs, such as the way initiatives are structured, who gets to participate, their level of transparency, and so on. While such features may enhance MSIs' short-term social legitimacy and credibility, they do not necessarily translate into longer term effectiveness in solving the specific problems they are intended to address. Indeed, participants gave several examples of MSIs being increasingly overburdened by top-heavy governance structures that actually impede their ability to fulfil their core mission.

C. The role of Governments in multi-stakeholder initiatives

236. Participants had mixed views as to whether Governments should have roles in MSI governance. The consensus answer seemed to be "it depends" on the tasks at hand. It would make little sense to have a Kimberley Process or an EITI without government participation; the same may be true of the Voluntary Principles. But government participation can pose risks if it means other stakeholders will not speak freely, or if it compromises the perception of objectivity,

neutrality, and independence of action which is so important to many MSIs. Lack of government participation can also pose risks, for example to the financial or political sustainability of the effort or its ability to get to the heart of the problem, particularly where it is clear that lack of strong State governance led to the initiative's creation in the first place.

237. The consultation identified a number of ways Governments can support MSIs, in addition to or instead of becoming actively involved in MSI governance through Board membership or other means. Beyond funding, which was agreed NOT to be the most important contribution Governments could make, these include:

- Convening and facilitating
- Endorsing
- Home government diplomacy with host Governments
- Promoting and mainstreaming the learning from MSIs across industry sectors
- Educating consumers to help generate demand for responsible goods and services
- Aligning their roles in MSIs with other levers of corporate social responsibility (CSR)

238. Participants spent a considerable amount of time on this last form of support. Consultation participants agreed that the distinction between "voluntary" and "mandatory" was somewhat artificial; there is in fact a broad spectrum of ways Governments can incentivize participation in MSIs. Governments already, to some extent, use levers like export credit agencies, export promotion instruments, public procurement requirements, domestic credit facilities, trade and investment agreements, and government pension funds to promote socially responsible behaviour by companies. Governments could use these levers more explicitly - and more systematically, and on a larger scale - to ensure corporate respect for human rights, e.g. through participation in MSIs. This would require interdepartmental coordination among agencies directly responsible for MSI participation or relations (if any), and agencies responsible for these various levers, such as ministries of development, foreign affairs, treasury, and trade, as well as embassies and diplomatic academies.

D. Monitoring and auditing

239. Participants felt that the social auditing model has been effective in identifying health and safety-type problems, but generally ineffective in identifying more fundamental, rights-based issues such as freedom of association, discrimination, harassment, and physical abuse. Social auditing models that do go beyond how to fix a blocked fire exit to these more fundamental issues - e.g. through collaboration with civil society groups - are difficult to scale for a variety of reasons. Participants seemed to agree that to address fundamental human rights issues at scale,

social auditing and follow-up need to change dramatically. Among the challenges identified were quality and credibility; cost; and effectiveness.

Quality and credibility

240. Suggestions for improvement included hiring auditors through a multi-stakeholder committee; requiring auditors to go through an apprenticeship phase; continuous human rights learning and training for auditors; and periodic review of compliance criteria, drawing on international standards, local law, and auditors' experience.

Cost

241. Participants suggested that some redistribution of the cost of compliance and certification among suppliers and buyers up and/or down the value chain might be feasible in cases where certification actually adds value in the marketplace. Currently, costs are largely borne by suppliers without significant cost-sharing by buyers, even in the form of higher prices.

Effectiveness

242. Among the many possible indicators of effectiveness one could use to evaluate social monitoring and auditing, the most important was effectiveness in catalyzing sustainable, systemic change in the context of the problem an MSI has been developed to address.

243. Participants suggested that social monitoring and auditing were limited in their ability to catalyze such change for a number of reasons, notably:

244. **They often fail to uncover the root causes of human rights violations.** To remedy a problem, we need to know why it is occurring. Participants suggested that needs and risk assessments could be useful supplements - or even substitutes - for social audits, providing the information MSIs need to identify not only problems but also potential solutions.

- **They do not, in and of themselves, build the capacity required for change.** Several participants' experience indicates that explicitly linking capacity-building to monitoring and auditing greatly enhanced impact. With capacity-building, might monitoring and auditing be things we have to do only in the short term? Will workers eventually be able to identify and escalate issues on their own, and will managers eventually respond out of their own initiative? The importance of capacity-building is explored further below.

E. Remediation

245. Participants felt that to date, MSIs have had different degrees of success remediating abuses in different categories of rights. MSIs have had good success remediating problems of occupational health and safety, such as poor cleanliness and lighting. In contrast, they have had little success remediating abuse of employer-employee relationship-related rights, such as

violations related to wages, overtime, and social security. With respect to freedom of association and collective bargaining participants seemed to agree that MSIs have had even less success.

246. Freedom of association and collective bargaining were described as enabling rights, needed to sustain any changes MSIs are able to make in the realization of other rights. MSIs' lack of success in this enabling category raised a key question: can remediation fix systemic problems or is it best suited for dealing with isolated incidents? Participants were unanimous that change has to be systemic, not piecemeal or one-off. They suggested that a "long fix" - as opposed to a "quick fix" - was required. Elements of a "long fix" would include:

- **Empowering workers**, for example through education and awareness-raising, formation and capacity-building of workers' committees

- **Building the capacity of suppliers**, for example through awareness and training for supervisors and managers. Some participants suggested that basic business process improvements - e.g. in scheduling, production planning, costing, and human resources management - could also help prevent violations of rights, either directly (by eliminating inefficiencies that lead to, for example, forced overtime) or indirectly (by providing MSIs with a "hook" on which to build relationships of trust). Other participants suggested that many suppliers were efficient and sophisticated enough already that such improvements were unlikely to be effective channels for further protection of rights

- **Changing buyer's policies and practices**, such as late confirmation of orders

- **Building the capacity of States**, e.g. labour inspectorates

247. As discussed above, remediation is a response to non-compliance with a human or labour rights code or standard by a company. The objective is to achieve compliance with that code or standard. The term "remediation" or "remedy" can also be used to refer to efforts to redress past wrongs to victims through compensation, apology, or other means, which may or may not include compliance with a particular code or standard. Participants in the consultation agreed that these two types of remediation - remediation to come into compliance and remediation to redress past wrongs to victims - required different mechanisms, though changing corporate behaviour to prevent future wrongs could and possibly should be part of both types.

248. With respect to remediation that seeks some form of redress for the victim, participants felt that dialogue-based alternative dispute resolution (ADR) mechanisms can be effective in some circumstances. At the same time, given that international human rights law requires States to ensure victims' rights to an effective remedy, participants asked how MSIs that sponsor ADR-based access to justice mechanisms should engage the national justice systems of home and host countries. Here again the answer was generally "it depends", but participants agreed on the baseline need to ensure that what is offered is consistent with human rights standards, and to

consider how that might strengthen and feed into national justice systems rather than provide only one-off solutions.

F. Successes

Issue validation

249. In the mid-1990s, human rights issues had little currency within the market system. There was general consensus amongst the participants that in varying degrees, MSIs since then have changed thinking and practice in global supply chains in most industries around the world. In 1992, for instance, it would have been highly unlikely for a company to take responsibility for human rights impacts on any workers it did not employ directly. Today it is commonplace for high-profile brands to take increasing responsibility for such actors.

Convening and mobilization

250. MSIs have succeeded in establishing the space and the precedent for stakeholders across sectors - in business, government, and civil society - to discuss and take action on problems in which they are all implicated. This reflects a notion of shared responsibility more appropriate than unilateral action to the complex nature of human rights issues. Participants stressed that MSIs' multi-stakeholder nature was more than just a process - it was a critical part of their impact on the ground.

Leadership quality

251. Through the process of engagement, MSIs have contributed to developing a class of leadership companies in a wide range of sectors. At the individual level, MSIs have helped to create and give outlet to a generation of boundary spanners working with one foot inside their organizations and one foot outside, translating across stakeholders and working to gain the traction internally to make change.

G. Opportunities and challenges ahead

252. Despite these achievements, consultation participants felt that the most important measure of success was on-the-ground change in people's daily lives, and that here MSIs have thus far fallen short. Is it a question of implementation? Or, as one participant suggested, does it reflect "a basic inevitability about our mission"? MSIs have been set up to deliver public goods. Can they ever do that as effectively or as legitimately as the public agencies which exist to perform that role?

253. One speaker expressed the opinion that today's MSIs are facing a mainstreaming period in their historical development, with two important implications. First, they must develop sustainable revenue models appropriate to their long-term goals. Second, they must move from

largely tactical to strategic approaches. Today's MSIs must think about the "end game" and engage in dynamic innovation and continuous self-reinvention to ensure they are fit for purpose.

254. Two of the most important strategic questions and challenges identified throughout the consultation were critical mass and the relationship of largely voluntary MSIs to the sphere of regulation.

Critical mass

255. Do MSIs really shift markets or only small niche areas within markets? There are very few MSIs that have even approached critical mass. Those that have generally work in industries where production is concentrated in a relatively small number of countries and/or companies, dominated by premium or high-profile brands with valuable reputations to protect. There are three categories of new players most MSIs must urgently seek to include if they are to achieve the kind of scale required to change entire systems or markets:

- Emerging market companies (and countries)
- Value brands
- Small and medium enterprises

256. Serious questions were voiced as to whether the kinds of levers MSIs traditionally use - such as public campaigns, ethical consumption, and elaborate civic engagement mechanisms - will work for these categories of players. Several participants suggested that the pressure for more "commodified" approaches was likely to increase, and would be reinforced by the introduction of ISO26,000, a "guidance" on social responsibility. One lever that was proposed was making MSI participation a condition of industry association membership, as ICTI has done in the toy industry.

Relationship to regulation

257. Critics often portray MSIs and voluntary standards generally as providing alternatives to or even means of escaping binding regulation. For most MSIs, however, the regulatory interface is much more complex. Some seek eventual public policy integration as a way of achieving scale, bringing in smaller firms, producers of commodities and other unbranded products, and companies and Governments from emerging markets which do not have other incentives to join. For others, the whole point is to get Governments to implement regulation they already have on the books.

258. Participants predicted that MSIs would need to focus more explicitly on their relationships to regulation in the future, for a variety of reasons. First, many leadership companies actually prefer regulatory solutions in some areas, where "level playing fields" are business-critical.

Second, MSIs are proving to be interesting platforms for joint policy advocacy. And third, to the extent that MSIs begin to shift entire markets, they are more likely to come under scrutiny from regulators at the national and international levels on competition and trade policy grounds.

259. While participants agreed that different MSIs would necessarily have different "end games", they also felt that MSIs share an opportunity to use their experience to feed into smart regulation in the areas in which they work.

H. Conclusion

260. There are no easy answers or ready-made solutions to the challenges MSIs face in the current mainstreaming phase of their historical development. Yet participants felt that there were four strategic themes worth exploring further, as MSIs move forward toward systemic impact, sustainability, and scale: **going beyond monitoring, increasing local ownership, exploring strategic and operational integration with one another,** and **paying greater attention to actual drivers of operational effectiveness.**
