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Rapport annuel du Haut-Commissaire des Nations Unies aux droits de l'homme et rapports du Haut-Commissariat et du Secrétaire général

Promotion et protection de tous les droits de l'homme, civils, politiques, économiques, sociaux et culturels, y compris le droit au développement

Rapport de la Haut-Commissaire aux droits de l'homme sur les consultations du Haut-Commissariat concernant la mise en pratique du cadre de référence relatif à la question de l'entreprise et des droits de l'homme

Additif

Résumé des débats qui ont eu lieu dans le cadre des manifestations parallèles à la consultation du Haut-Commissariat aux droits de l'homme sur la mise en pratique du cadre de référence relatif à la question de l'entreprise et des droits de l'homme*, **

* Soumission tardive.

** Le résumé du présent rapport est distribué dans toutes les langues officielles. Le rapport, qui est joint en annexe au résumé, n'est distribué que dans la langue originale.

Résumé

Dans sa résolution 8/7, le Conseil des droits de l'homme a prié le Haut-Commissariat des Nations Unies aux droits de l'homme d'organiser, dans le cadre du Conseil, deux journées de consultations réunissant le Représentant spécial du Secrétaire général chargé de la question des droits de l'homme et des sociétés transnationales et autres entreprises (le Représentant spécial), des représentants d'entreprises et toutes les autres parties prenantes, notamment les organisations non gouvernementales et des représentants de victimes de violations commises par des entreprises, en vue d'examiner les moyens d'exploiter le «cadre de référence» relatif à l'entreprise et aux droits de l'homme, fondé sur les principes «Protéger, respecter et réparer», présenté par le Représentant spécial.

La consultation a donné lieu à des débats multipartites sur des questions thématiques liées à chacun des piliers du cadre de référence du Représentant spécial. Outre la séance officielle, pour garantir un niveau élevé d'ouverture aux divers points de vue et opinions, il a été proposé aux participants qui le souhaitaient d'organiser des manifestations parallèles qui leur permettraient d'attirer l'attention sur toute question pertinente de leur choix.

On trouvera ci-après la liste des manifestations parallèles qui ont été organisées:

- «Accords d'investissement et droits de l'homme», manifestation organisée par le Représentant spécial John Ruggie
- «Les principes directeurs de l'OCDE: instrument utile pour mettre en pratique le cadre de référence relatif à l'entreprise et aux droits de l'homme», manifestation organisée par OECD Watch
- «Global Justice: European Transnational Corporations versus Human Rights» (Justice mondiale: la question des sociétés transnationales européennes et des droits de l'homme), manifestation organisée par le Réseau bi-régional Amérique latine et Caraïbe «Enlazando alternativas» et le Tribunal populaire permanent
- *American Outrage*, film documentaire présenté par Julie Cavanaugh Bill (Western Shoshone Defense Project)
- «Follow the money: how companies are impacting human rights» (Suivez l'argent: de l'influence des entreprises sur les droits de l'homme), manifestation organisée par le Centre de ressources sur les entreprises et les droits de l'homme et Global Witness
- «National Human Rights Institutions' role in business and human rights» (Le rôle des institutions nationales des droits de l'homme face à la question de l'entreprise et des droits de l'homme), manifestation organisée par le Groupe de travail sur la question de l'entreprise et des droits de l'homme, du Comité international de coordination des institutions nationales de promotion et protection des droits de l'homme

Dans le présent additif, on trouvera la synthèse des débats qui se sont tenus dans le cadre des manifestations parallèles, fournie par les organisateurs. Dans l'ensemble, ces débats ont connu un niveau de participation élevé et permis d'évoquer des points importants et utiles à la mise en pratique du cadre de référence du Représentant spécial du Secrétaire général.

Annexe

Summary of proceedings of side events to the consultation of the Office of the High Commissioner for Human Rights on operationalizing the framework for business and human rights

Contents

I. Introduction

1. In resolution 8/7, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights to organize a two-day consultation, bringing together the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, business representatives and all relevant stakeholders, including non-governmental organizations and representatives of victims of corporate abuse, to discuss ways and means to operationalize the "Protect, Respect, Remedy" framework on business and human rights put forward by the Special Representative.

2. The consultation itself featured multi-stakeholder panel discussions about selected topics related to each of the pillars of the Special Representative's framework. In addition to the formal session, and to secure the highest degree of inclusivity and diversity of views and opinions, all participants were given the opportunity to organize side events in order to draw attention to any relevant issues of their choice.

3. The following side events were organized:

(a) "Investment agreements and human rights" organized by the Special Representative John Ruggie;

(b) "The OECD Guidelines: A tool for operationalizing the business and human rights framework?" organized by OECD Watch;

(c) "Global Justice: European Transnational Corporations versus Human Rights" by Bi-regional Network Europe-Latin America and the Caribbean Enlazando Alternativas and the Permanent People's Tribunal;

(d) *American Outrage*, a documentary shown by Julie Cavanaugh Bill, Western Shoshone Defense Project;

(e) "Follow the money: How companies are impacting human rights" organized by Business and Human Rights Resource Centre and Global Witness;

(f) "National human rights institutions' role in business and human rights" by the ICC Working Group on Business and Human Rights.

4. This addendum features summaries of the proceedings of the side events provided by the organizers themselves.

5. In general, the side events were well attended and triggered important discussions and points relevant for the operationalization of the framework of the Special Representative.

II. Investment agreements and human rights

6. To discuss the Special Representative's work on bilateral investment treaties (BITS) and host Government agreements (HGAs), three experts with very different but complementary experience shared the Panel with the Special Representative. Stéphane Brabant, a Paris-based lawyer who has 30 years of experience in extractive projects in Africa, offered his views on the relevance and importance of the Responsible Contracting project being pursued by the Special Representative. He stated that the outcome will potentially offer a practical tool to negotiators and contract drafters who rarely know the social situation on the ground or have a grasp of the human rights risks of projects. Another panellist was Dominic Ayine, a professor of international investment and trade law and

Executive Director of a non-governmental organization representing the rights of local communities in relation to mining projects in Ghana. Professor Ayine offered the audience a sample of stabilization clauses promulgated into law in Ghana in favour of investors and described the constitutional challenge to such laws. Herbert McLeod, Adviser to the President in Sierra Leone, described both the conflict of interest that is often present in the negotiation of long-term investment contracts and the difficulty of ensuring those contracts represent the public interest and the development interests of the Government.

7. The session was very well attended and there was active participation from the audience. After a short introduction by the panellists, there was a lively question and answer period in which discussions focused on a wide range of issues including corruption, transparency of contracts and the need for the international investment regime as a whole to integrate concern for human rights.

8. The Special Representative described the problem with BITS and stabilization clauses as symptomatic of the practice of Governments to tie their own hands so that fulfilling their human rights obligations is more difficult or even impossible. He said the Mandate would continue to investigate the issue of BITS and host Government agreements aiming to provide useful outputs for all parties concerned.

III. The OECD Guidelines: A tool for operationalizing the business and human rights framework

9. OECD Watch organized a side event that was aimed at exploring whether and how the OECD Guidelines could be employed to operationalize the framework for business and human rights proposed by the Special Representative, and how the framework can help improve the OECD Guidelines during the upcoming review in 2010. After a welcome and introductory comments by the chairperson, Richard Howitt (member of the European Parliament and European Parliament spokesperson on Corporate Social Responsibility), Joseph Wilde-Ramsing (OECD watch coordinator) introduced the aims of the event and provided participants with some context about the current poor functioning of the OECD Guidelines and most National Contact Points (NCPs). Rashmi Venkatestan, Samson Mokoena and Victor Ricco were then invited to provide a perspective on the experiences with the OECD Guidelines in Argentina, South Africa and India, respectively. Caroline Rees, adviser to the Special Representative, was asked to respond to these experiences and address the review of the Guidelines in the context of the Special Representative's mandate and work. Kirsty Drew of the Trade Union Advisory Committee closed the panel presentations by providing a trade union perspective. The panel presentations were followed by a lively debate during which representatives from Government (NCPs), business, labour unions, and non-governmental organizations (NGOs) from the North and the South contributed comments.

10. The focus of most of the plenary discussion was the current poor functioning of the OECD Guidelines and the vast majority of NCPs. The general consensus was that the Guidelines in their current form and as they currently function cannot contribute much to the operationalization of the Ruggie framework as they are largely ineffective in their role as a remedy mechanism. It was mentioned that of the more than 200 complaints filed by NGOs and unions, only a handful had been successfully resolved through the NCP-specific instance process. The reasons for the ineffectiveness and poor functioning of the OECD Guidelines were identified as follows:

- The Guidelines are weak on supply chain responsibility.

- The lack of consequences attached to violations of the OECD Guidelines or a company's refusal to take part in the specific instance procedure and NCPs' general lack of "teeth".
- The NCPs are often not independent. For instance, they are housed at economic affairs ministries, which are also charged with promoting business interests, leading to a potential conflict of interest at NCPs.
- The NCPs differ greatly in their functioning. For instance, there are significant differences in the way NCPs deal with "parallel legal proceedings" in their decision as to whether to handle a complaint. There is thus a lack of "functional equivalence".
- NCP experience an inherent tension between transparency and confidentiality. The Guidelines need to be clarified with regard to transparency obligations of NCPs.
- The Guidelines can only be used in OECD and adhering countries or in cases of violations committed by companies based in OECD and adhering countries.
- The reference to human rights in the Guidelines is very general. This may be regarded as a strength (i.e. wide coverage) or a weakness (i.e. vague).
- Companies do not perceive NCPs as an authority and often do not engage seriously in the complaint procedure.

11. It was mentioned that some or all of these issues could be addressed in the upcoming review of the OECD Guidelines in 2010. Possible improvements to the Guidelines that were mentioned at the events included:

- NCPs should work more proactively and should be allowed to attach consequences to non-compliance with the Guidelines or refusal to engage in NCP-facilitated mediation.
- The "mediating" role of NCPs should be improved. NCPs should have access to external mediators if they lack these skills in-house.
- The Guidelines should be better aligned with the needs of complainants/victims in the South. Representatives of Southern groups should be included and actively consulted in the Guidelines review process.
- The Guidelines should provide more clarity on the responsibility of governments. At this point it is very unclear how the Guidelines should be used in the case of State (co-)ownership of a company against which a complaint is filed.
- The fact that the Guidelines are not binding should not imply they are without consequences. Governments should provide companies with incentives to comply with the Guidelines (e.g. attach conditions to export credit guarantees, participation in trade missions, etc.).
- The Special Representative's team should be involved in the review of the Guidelines.
- Revised Guidelines should explicitly mention "living wages" and "contract work".
- NCPs should be regularly evaluated through a peer-review system, in which stakeholders should also be involved.

IV. Global Justice: European transnational corporations versus human rights

12. No summary was provided by the organizers of this event.

V. *American Outrage*

13. This side event was organized by Julie Cavanaugh-Bill from the Western Shoshone Defense Project in the United States of America and involved showing a documentary film. The film depicts the story of the Western Shoshone struggle with human rights and the impacts of large-scale mining operations. The story is based on the lives of Mary and Carrie Dann, Western Shoshone sisters who have taken their struggle for indigenous rights in the United States to the United States Supreme Court and beyond. The film includes award-winning footage of events leading to the 2006 Committee on the Elimination of Racial Discrimination Urgent Action Decision, interviews with Committee members, the 2006 Permanent Forum on Indigenous Populations and reflections on the impact of transnational corporations on the ongoing human rights violations.

VI. Follow the money: how companies are impacting human rights

14. The event was organized jointly by the Business and Human Rights Resource Centre and Global Witness. It focused on how the flow of money (or rather non-flow of money in the tax-related cases) can undermine human rights in host States (i.e. where a foreign company carries out operations) through: corruption and lack of transparency; payments to rebels; inequitable concession contracts; tax avoidance/evasion; and transfer pricing. These issues were identified by the co-hosts as deserving greater attention by governments, companies and civil society when it comes to policy and law-making. It was felt that these topics have been at best peripheral to the human rights and business' debate thus far.

15. Avond W. Stells (independent researcher on South-East Asia) presented a case study on the effects of mass corruption on the human rights (for example, rights to life, liberty and security of person) of villagers who rely on resin trees for their livelihoods. The presentation focused on the continued issuing of permits for "plantation developments" — which in effect resulted in the logging of trees used for resin tapping by locals both in and around the plantation area — despite the Government's suspension of logging concessions which was implemented in January 2002. It was stated that, in practice, the "plantation developments" provided a disguise for log-clearing operations in the area, and that this has resulted in the eradication of the forest and resin trees used by resident villagers for their survival. National law forbids the clearing of resin trees; however, when affected villagers have tried to claim their legal rights in relation to these trees, they have been physically threatened by people affiliated with the companies involved, who are often protected by the Government.

16. The second speaker, Seema Joshi (Legal Advisor, Ending Impunity, Global Witness), discussed payments made to rebels in the mineral supply chain in eastern Democratic Republic of the Congo. The presentation raised questions under Pillars 1, 2 and 3 of the "Protect, Respect and Remedy" Framework. Key issues discussed included: what constitutes appropriate due diligence in conflict-affected areas and enforceability of sanctions imposed under Chapter VII, of the United Nations Charter, United Nations travel bans and asset freezes by States against violating companies.

17. Christopher Avery (Director, Business & Human Rights Resource Centre), introduced the issue of tax avoidance, its complexity and growing relevance to the business and human rights discourse/debate. The mandate of the Business & Human Rights Centre is to draw attention to a broad range of issues and perspectives relevant to how business is impacting human rights, both positively and negatively. He discussed the recent launch of a new section on the organization's website, on "Tax avoidance", which includes a concise introduction to the issue, guidance materials, and links to reports about alleged abuses by companies and positive initiatives. Greater exposure of these issues was stated to be required because aggressive tax avoidance and illegal tax evasion by companies has a clear impact on human rights: if a government is starved of tax revenues, it cannot deliver to its people on development, health, education, housing, access to water and other human rights.

18. Next, Mauricio Lazala (Head of Latin America and the Middle East, Business & Human Rights Resource Centre), discussed the question of tax avoidance in Latin America and provided insights into the case in which the company admitted to making payments to a paramilitary organization known to commit serious human rights violations. In July 2007, a group of civilian nationals filed a lawsuit against the company under the Alien Tort Claims Act in the United States federal court claiming that these payments made the company complicit in atrocities. With respect to tax avoidance, it was put forward that companies may use questionable accounting methods and fiscal tax havens to avoid paying a fair share of taxes. He stated that although tax havens have existed for decades, the flight of capital took off with the removal of exchange controls and the development of information technology in the late 1990s and is still gathering pace.

19. The last speaker Edmond Kangamungazi (Economic Justice Programme Officer, Caritas Zambia) discussed the issue of tax avoidance within a particular national context. He pointed out that around 7 million people (64 per cent) in the country live in poverty, with 51 per cent of those unable to access enough food to eat. He suggested that with good governance and transparency the exploitation of the mineral resources could generate large revenues that could encourage and assist in sustaining growth, health care and poverty reduction. Instead, over the past 40 years the country has allegedly been robbed of millions of dollars through tax avoidance. This is a result of a lack of transparency and governance in the extractive industries and also inadequate democratic scrutiny.

20. The points in the following paragraphs were discussed at the meeting.

A. Legal v. illegal tax avoidance

21. It was suggested by some participants that the problem is that, in many countries, there is insufficient data (numbers and figures) available to properly assess the relationship between tax avoidance and the inability of the Government to address human rights and development. Incorrect assumptions may therefore be made. Others disagreed and commented that they believe the relationship is clear and direct. A number of people commented on the need for financial transparency, accountability and accurate data.

22. It was proposed that in order to establish a clearer line between legal and illegal practice, law reform is needed, and current legal loopholes between international, national and local jurisdictions need to be addressed, which requires coordination within the international community. It was suggested that the lack of coordination and regulation has also resulted in blatant malpractice and a scenario where a company owns a network of subsidiaries which are all answerable to different jurisdictional and financial requirements, depending on where they are operating.

B. Lawful companies becoming targets: legal v. illegal tax avoidance

23. One participant expressed a concern that companies might be targeted for lawful tax avoidance. “Isn’t it the wrong battle?” It was suggested that such practices are not necessarily immoral, but are carried out in order to minimize costs on behalf of shareholders or to increase a company’s share of the market in accordance with the host State’s laws. It was proposed that there should be increased pressure on host Governments by the international community. Therefore, the question should be: how can we help and encourage States to ensure that tax avoidance is not aggressive, illegal or unfair? Others, including a panel member, agreed on the need for pressure on governments to deter tax avoidance through improved laws and enforcement, but argued that in the meantime it was not acceptable for companies to undermine internationally-recognized human rights by arguing that they are acting legally under national tax laws. It was suggested that we must strive to attain a situation where it is simpler for a company to pay taxes according to the law than to employ lawyers and accounting firms to find a legal loophole. The same participant also felt that before making them liable, companies have to be made aware of the impact they are having on human rights issues – i.e. they should be given time to change their behaviour and that change would only happen through knowledge.

C. Tax avoidance and national Governments

24. It was suggested that infrastructure or concession agreements reached between host Governments and foreign companies that include provisions granting tax holidays or allowing for tax avoidance have the effect of distorting economic competition by local companies which often do not benefit from these same types of provisions. It was asked if it would be necessary to exclude the extractive industry or have more regulations for that industry because of its blatant refusal to pay taxes or generous tax holidays being granted in some countries. A panel member spoke about the example of the timber industry in Liberia where substantial sums of Government revenue were embezzled and transferred to offshore accounts. It was suggested that the closing of such accounts or even the closing of loopholes in Liberian laws would not suffice to implement due diligence and good transparency. It was suggested that it was the Liberian authorities who allowed foreign companies to operate in such a way – that it was due to the complicity of the Government of Liberia that corruption, tax avoidance and personal enrichment were in fact possible. In consequence, it was put forward that pressure should be put not only on companies, but also on the host Government to ensure the implementation of due diligence- and transparency-related measures.

D. Payments made to illegal armed groups – legal accountability

25. It was mentioned that Global Witness’ recent report entitled “Faced with a gun, what can you do?” looks at the supply of minerals from the Democratic Republic of the Congo and stresses that action by home States (i.e. where companies are domiciled) is urgently required at both the national and international level to stop international mineral companies from trading with companies that are making payments to illegal armed groups.

VII. National human rights institutions’ role in business and human rights

26. This side event, organized by the International Coordinating Committee of National Human Rights Institutions (ICC) in collaboration with OHCHR, aimed at discussing the

roles, experiences and potential activities of national human rights institutions (NHRIs) in relation to human rights and business. Approximately 30 representatives from NHRIs, NGOs and Member States met at a side event in Geneva during the OHCHR consultations on operationalizing the three-pillar framework presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

27. Jennifer Lynch, chair of the ICC and Chief Commissioner of the Canadian National Human Rights Commission, thanked the speakers and the participants for their attendance at the event. She mentioned the creation of a Working Group within the ICC on Human Rights and business, which is composed of NHRI representatives from each region and highlighted the work of this thematic group.

28. Jonas Christoffersen, Director, Danish Institute for Human Rights, mentioned the importance of the side event for gathering ideas and feedback for the work of the Working Group and highlighted the increasing importance of human rights and business on the agenda of NHRIs.

29. Omar Cabezas Lacayo, Procurador para la Defensa de los Derechos Humanos of Nicaragua explained how the increasing number of corporate actors has had an impact on human rights. He gave an overview of this situation, referring specifically to the Latin American problems.

30. Myriam Montrat, member of the Canadian Human Rights Commission, described the "Maturity Model" that has been developed by the Canadian Human Rights Commission to help prevent cases of business-related grievances.

31. Jody Kollapen, Former Chair of the South African Human Rights Commission, focused his intervention on activities NHRIs may undertake and use their mandates under the Paris Principles to address grievances resulting from business activities.

32. Claire Charters from the Aotearoa Indigenous Rights Trust and University of Wellington, New Zealand, explained how indigenous peoples may be affected by the human rights violations of corporate actors. She stressed the essential role that NHRIs can play by enforcing their rights and providing pragmatic guidance to the State and to the indigenous communities on this issue.

33. Allan Miller, Chair of the Scottish Human Rights Commission, referred to the role of NHRIs dealing with human rights and business. He highlighted the need to promote respect for human rights in the corporate sector — the second pillar of the Special Representative's framework — for instance through human rights education and raising public awareness.