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***Protect, Respect and Remedy: John Ruggie's
Business & Human Rights Framework – Geneva Consultation 5-6th October***

***Side Event - “Follow the money – How companies are impacting human rights:
corruption, payments to rebels, inequitable contracts, tax avoidance, transfer-pricing”***

5-6th October 2009, Geneva

I. Purpose of summary report

This report provides a summary of the key issues discussed, and questions raised, at the side event “*Follow the money – How companies are impacting human rights: corruption, payments to rebels, inequitable contracts, tax avoidance, transfer-pricing*” which was held on 6 October 2009 at the Palais des Nations in Geneva. This side event took place alongside the two day United Nations’ Consultation on Business and Human Rights,¹ and was co-hosted by Global Witness² and the Business & Human Rights Resource Centre³.

II Overview of side event

The side event 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.* the place 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.

The meeting brought together around 50 representatives from non-governmental organisations (NGOs), academia, the legal sector, the media and the business community.

The session consisted of five presentations followed by a discussion and question and answer period. For more details on each presentation please see the website:

<http://www.business-humanrights.org/Documents/Followthemoney> .

III. Brief description of presentations

Avond W. Stells, (Independent Researcher on Southeast Asia), presented a case study from Cambodia 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 in Kampong Thom province 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 Cambodian 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. Cambodian law forbids the clearing of

¹ <http://www2.ohchr.org/english/issues/globalization/business/consultation102009.htm>

² www.globalwitness.org

³ <http://www.business-humanrights.org>



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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.

The text of the full presentation can be accessed at:

<http://www.reports-and-materials.org/Tumring-Rubber-plantation-and-illegal-logging-Stells-6-Oct-2009.doc>

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 Congo (DRC). The presentation raised questions under Pillars 1, 2 and 3 of the “*Protect, Respect and Remedy*” Framework (Framework). Key issues discussed included: what constitutes appropriate due diligence in conflict affected areas and enforceability of UN Chapter VII Sanctions, UN travel bans and asset freezes by States against violating companies.

The text of the full presentation can be accessed at:

<http://www.reports-and-materials.org/Payments-to-armed-groups-Joshi-6-Oct-2009.doc>

The following three speakers focused on the issue of tax avoidance while moving from a general overview to specific case study examples:

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 and 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 organisation’s website, on “Tax avoidance”, which includes a concise introduction to the issue, guidance materials, and links to reports about alleged abuses by companies as well as positive initiatives. Greater exposure around 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.

The text of the full presentation can be accessed at:

<http://www.reports-and-materials.org/Tax-avoidance-and-evasion-Avery-6-Oct-2009.doc>

Next, **Mauricio Lazala** (Head of Latin America & Middle East, Business & Human Rights Resource Centre), discussed the question of tax avoidance in Latin America and provided insights on the case of Chiquita in which the company admitted to making payments to a paramilitary organisation in Colombia known to commit serious human rights violations. In July 2007, a group of Colombians filed a lawsuit against Chiquita under the Alien Tort Claims Act in the US 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 it is still gathering pace.

Cases were discussed which illustrated the aggressive tactics some companies use to avoid paying a fair amount of taxes in both developing countries where they source their products and developed countries where they are headquartered. These cases also illustrated that good investigative journalism is too often lacking in relation to tax avoidance (it is lacking in many other fields of business and human rights but perhaps more so in this one).

With respect to the Chiquita case, he stated that details on that case and other human rights lawsuits against companies could be accessed at the Resource Centre's Corporate Legal Accountability Portal (<http://www.business-humanrights.org/LegalPortal/Home>). This also includes up-to-date summaries of the lawsuits, and all materials related to the cases: court pleadings and arguments, newspaper articles, and statements by the company, the US Government and the victims.

The text of the full presentation can be accessed at:

<http://www.reports-and-materials.org/Tax-avoidance-evasion-and-payments-to-armed-groups-Lazala-6-Oct-2009.doc>

The last speaker **Edmond Kangamungazi** (Economic Justice Programme Officer, Caritas Zambia) discussed the issue of tax avoidance within the context of Zambia. He highlighted that around 7 million people (64%) in Zambia live in poverty with 51% of those unable to access enough food to eat.

He suggested that with good governance and transparency the exploitation of Zambia's mineral resources could generate large revenues that could cultivate and help in sustaining growth, health care and poverty reduction. Instead, what has happened is that over the past 40 years Zambians have seen the country being robbed of millions of dollars through tax avoidance. This situation exists due to a lack of transparency and governance in the extractive industries and also inadequate democratic scrutiny.

The text of the full presentation can be accessed at:

<http://www.reports-and-materials.org/Tax-avoidance-and-inequitable-mine-contracts-Zambia-Kangamungazi-6-Oct-2009.doc>

IV Key discussion points (Question and Answer)

Legal vs. illegal tax avoidance

- It was expressed that whether or not creative tax avoidance was illegal was a hugely debatable issue. It was suggested by some in the audience 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 and, therefore, there may be incorrect assumptions 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.
- It was proposed that in order to have a clearer line between legal and illegal practice, there needs to be law reform, and that 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.

Lawful companies becoming targets

- 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 done in order to minimise costs on behalf of shareholders or increase a company’s share of the market in accordance with the host state’s law. It was put forward that instead, 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 make sure that tax avoidance is not aggressive, illegal and 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-recognised 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 – *ie* they should be given time to change their behaviour and that change would only happen through knowledge.

Tax avoidance and national governments

- 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 Liberian government’s complicity that corruption, tax avoidance and personal enrichment were in fact possible. In consequence, it was put forward that pressure should not only be put on companies, but also on the host government to ensure the implementation of due diligence and transparency related measures.

Payments made to illegal armed groups – legal accountability?

- It was mentioned that Global Witness’ recent report called *Faced with a gun, what can you do?*⁴ looks at the supply of minerals from the DRC and highlights that home state (*i.e.* places where companies are domiciled) action 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.

⁴http://www.globalwitness.org/media_library_detail.php/786/en/global_witness_report_faced_with_a_gun_what_can_you

- One participant asked whether or not legal remedies were available to deal with supply chain issues involving payments made to illegal armed groups. It was suggested that with respect to eastern DRC, and given that UN Chapter VII Sanctions are in place, more can be done by home states to ensure that Resolution 1857 is enforced against “entities making payments to illegal armed groups” as required by its criteria. Global Witness has lobbied the UK government on this point with respect to UK companies named in the 2008 UN Group of Experts Report and previously – the UK companies were named as sourcing minerals from *comptoirs* (local exporters) identified as pre-financing the rebel group FDLR (*Forces démocratiques pour la libération du Rwanda*).
- It was further stated that some countries which have ratified the Rome Statute have undertaken the obligation to investigate and prosecute companies for their involvement in international crimes (*i.e.* crimes against humanity or war crimes) at the national level.
- It was also noted that legal academics and civil society organisations are currently exploring whether or not payments made to rebels in the course of purchasing natural resources would constitute the war crime of pillage (*i.e.* theft linked to internal or international conflict).

Supply chain due diligence

- One participant enquired after the means to do a competent screen of the money's destination in the mineral supply chain. It was suggested that on-the-ground investigations reveal that the supply chain can be tracked and deciphered from the point of sourcing to export. With respect to tracing the mineral beyond the point of the first international industrial purchaser, it was suggested that the chain could be broken into parts, studied individually, and requirements spread among suppliers to make the due diligence process for the whole chain more tangible.
- It was stressed that in the DRC the *comptoirs* were already identified and thus, made exports easier to track. However, at the same time, in-country investigations confirmed the existence of an informal mining sector which presents additional challenges.

Company misconduct - does the “Protect, Respect and Remedy” Framework work?

- It was stated that there appears to be a conflict between corporate responsibility and corporate profit which appears endless. The panel was asked if they thought that the problems that they had presented could be addressed by the framework.
- One panellist expressed the view that that the Framework does provide space for addressing the supply chain and payment to illegal armed groups' issues. It was put forward that a greater emphasis on the situation of conflict or conflict affected areas and the actions that home states and companies operating in these areas must undertake, is urgently required. It was stressed that in such cases, voluntary measures must be supplemented by mandatory requirements to ensure that companies are doing “no harm” as prescribed by the Framework.

V. Concluding remarks

The moderator concluded the meeting by re-stating the need for corporate responsibility and proper due diligence with a view to safeguarding human rights. Companies should perhaps be bolder and ensure that human rights are preserved within their working environment, even more so if these rights are under constant violation in the locations where they are operating. In this respect, it was suggested that further work has to be done on defining what it takes and means for a company “to do no harm”.



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The moderator also re-stated the suggested need for the Framework to be more defined, especially regarding the situation of conflict zones and the role of home states in business and human rights issues.