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HUMAN RIGHTS COUNCIL
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**IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251
OF 15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”****Report of the United Nations High Commissioner on Human Rights on the
sectoral consultation entitled “Human rights and the financial sector”
16 February 2007****Summary**

The present report is submitted in response to resolution 2005/69 of the Commission on Human Rights, which requested the High Commissioner on Human Rights to convene an annual sectoral consultation of senior executives and experts to consider the specific human rights issues faced by business sectors, to raise awareness and share best practice. On 16 February 2007, the High Commissioner convened a consultation on “Human rights and the financial sector”. Representatives of financial institutions from the public and private sector, non-governmental organizations and other experts participated in the consultation. The consultation considered existing initiatives and standards relevant to the financial sector, and examined ways to strengthen protection of human rights in the activities and decision-making of financial institutions. The present report summarizes the presentations and discussions from the consultation.

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Introduction

1. By its resolution 2005/69, the Commission on Human Rights requested the High Commissioner to convene annually, in cooperation with the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, a meeting with senior executives from companies and experts from a particular sector to consider, within the mandate of the Special Representative (paragraph 1 of resolution 2005/69), the specific human rights issues faced by those sectors, to raise awareness and share best practice. A first sectoral consultation on human rights and the extractive industry was convened in November 2005.¹
2. The Human Rights Council, by decision 2/102 of 6 October 2006, requested the High Commissioner for Human Rights to “continue with the fulfilment of her activities, in accordance with all previous decisions adopted by the Commission on Human Rights and to update the relevant reports and studies”.
3. On 16 February 2007, the High Commissioner convened the second sectoral consultation in Geneva on human rights and the financial sector. Participants included senior executives from financial institutions in the public and private sector, representatives from relevant non-governmental organizations (NGOs), academics and other experts. The Office of the United Nations High Commissioner for Human Rights (OHCHR) expresses its gratitude to all the participants for their involvement in the consultation.
4. The present report summarizes the presentations made by panellists in each of the sessions and the subsequent discussion. A number of issues were discussed in various sessions, and have been grouped for purposes of clarity. The annex provides a list of participants who attended the consultation.

I. OPENING STATEMENTS

5. Ibrahim Wani (Chief, Research and Right to Development Branch, OHCHR) opened the consultation on behalf of the High Commissioner. Welcoming the wide range of high-level experience and views in the room, Mr. Wani emphasized the importance of respect for diverging views. He noted that the consultation did not seek to draw a consensus on complex issues, but rather to share and record different opinions, corresponding to the wider role of the United Nations as a facilitator and convener of dialogue. Mr. Wani thanked the Finance Initiative of the United Nations Environment Programme Finance Initiative for its contribution to the planning of the consultation.
6. John Ruggie (Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises) welcomed participants, and stressed that while the consultation was convened by the High Commissioner for Human Rights, the deliberations would provide important information to him in his capacity as Special Representative. He noted that while the attention in the business and human rights arena has

¹ See report: E/CN.4/2006/92.

thus far been on so-called front line businesses, i.e. those that interact with communities directly such as the extractive industries and infrastructure, there is now a growing interest in finance because the financial sector provides the means for front line industries to operate and can be a source of leverage.

II. HUMAN RIGHTS ISSUES FOR THE FINANCIAL SECTOR

7. The second session was moderated by Daniel Taillant (Executive Director, Centro De Derechos Humanos y Ambiente, Argentina) and aimed to provide an overview of human rights issues in the financial sector.

8. As the flow of finance across national borders has increased, financial institutions (FIs) have come under increasing scrutiny for their role in operations that may cause or facilitate human rights abuses. Today, many FIs and their key stakeholders share the view that they bear responsibility for the human rights impacts of their operations.

9. While FIs face risks related to human rights in their own operations, they must also grapple with the fact that their activities can enable - or disable - human rights impacts caused by others. The involvement of FIs in large-scale projects has been criticized because of the negative impact on human rights of those projects, such as through environmental damage, forced relocation of local communities with inadequate compensation, or threats to the food supply or environment of indigenous peoples.

Panellist presentations

10. Michael Kelly (UK head Corporate Social Responsibility, KPMG) presented a study conducted by F&C Asset Management and KPMG in 2004, "Banking on human rights: confronting human rights in the financial sector". The study identified various human rights issues in the financial sector related to risk management, such as staff security and reputation risks. The study also identified business benefits related to human rights, such as reduction of litigation risk and improved stakeholder relations. The study found that there was no commonly accepted definition of human rights and no common approach to human rights across banks. Mr. Kelly said that since the report came out, there was little evidence that human rights have been systematically integrated into credit risk assessments. Nevertheless, the level of debate has increased and expanded beyond the private sector and beyond project finance. Finally, Mr. Kelly listed the types of guidance that are now needed, such as tools for business training and implementation, and identification of broad principles based on existing voluntary codes for the whole finance sector.

11. Titi Soentoro (international campaigner, NADI/Solidaritas Perempuan) shared examples of projects in Asia financed by large public and private financial institutions (FIs) that are alleged to have caused significant environmental and social harm. Protesters against these projects were allegedly harassed by State authorities, communication with affected communities was insufficient or non-existent, and there has been little or no response from the FIs involved.

According to Ms. Soentoro, women in particular have been negatively impacted by these projects, their loss of livelihood and increased poverty making them more vulnerable to sexual exploitation and violence. Ms. Soentoro stated that FIs have an obligation to ensure that human rights violations committed by corporations do not happen in the projects they financially support. She recommended that human rights protection be given priority over commercial development.

12. Karyn Keenan (Programme Officer, The Halifax Initiative) said that public financial institutions are key actors in the area of human rights and transnational corporations (TNCs). Export credit agencies (ECAs) have a responsibility to regulate and adjudicate the role of TNCs with respect to human rights. As State organs, ECAs are bound by the international obligations of their State, including those concerning human rights. International financial institutions (IFIs), in particular the International Finance Corporation (IFC), are critical to international cooperation efforts in the regulation of TNCs. As intergovernmental organizations with international legal personality, IFIs are subject to international law, including those human rights that are recognized under customary law. Although they have taken preliminary steps towards addressing human rights, they are far from discharging their human rights obligations. Similarly, while one ECA has started to address responsibility for its international human rights obligations, others lag far behind. Ms. Keenan encouraged the Special Representative to focus a level of attention on these institutions commensurate with their substantial influence over the operations of TNCs and to call for leadership from public financial institutions in the fulfilment of their human rights obligations.

13. Herman Mulder (former Senior Executive Vice President, ABN AMRO, and senior advisor to the Global Compact and the World Business Council for Sustainable Development) stressed that the primary responsibility for human rights protection rests with States. Business is not responsible for State failures. However, business can play an important role in ensuring human rights and must respect human rights. While human rights are universal, business must delineate for itself the “must”, “ought to” and “can” with regard to human rights, which may differ among different businesses and situations. Business needs principles, guidance, case studies, and tools, and should actively embed human rights in its strategies, core processes and operations. Public disclosure of standards and performance by business is crucial, such as through the Global Reporting Initiative (GRI). Other multi-stakeholder initiatives are important for incorporating human rights into the values and processes of financial institutions worldwide. Mr. Mulder emphasized that while the financial sector cannot be held responsible for its clients’ actions, it is responsible for the selection of its clients and suppliers, and therefore active engagement by FIs is of the essence.

Discussion

14. The first part of the discussion focused on the degree of consensus and clarity on the human rights responsibilities of financial institutions. There was general consensus among participants that financial institutions have human rights responsibilities, but a range of opinions as to the nature of those responsibilities and their application to specific FIs. The challenge of translating international human rights standards into meaningful obligations for FIs in both the public and private sector was discussed at length, with concern expressed by some that human rights treaties and standards were being paraphrased and therefore diluted. For example, international instruments often inspire company policies, but their interpretation may be

imprecise to the point of absurdity. As another example, the IFC standards were seen as having undermined the principle that indigenous peoples should give “free, prior, and informed consent” for economic activities affecting their land or culture. Some NGO participants advised companies to seek the guidance of human rights experts and draw upon actual jurisprudence, rather than relying on their own interpretation.

15. It was suggested that public sector financial institutions such as export credit agencies (ECAs) have human rights obligations as State agents. However, this suggestion was considered by some to be an oversimplification of international law. It was also stressed that the primary mandate of ECAs is to maximize exports, although they strive to support good projects.

16. There was debate over the scope of the human rights obligations of private financial institutions. There was agreement that companies could not be put in the same position as States. It was suggested that the obligation to protect and promote human rights rests with States and does not apply to private sector operators. The State has a duty to protect citizens from violations by third parties, including private business. It was stressed that the obligations of private sector financial institutions also derive from social expectations, for example that private business will not be complicit in human rights violations.

17. Some participants suggested that when financial institutions become aware of human rights violations in their investments, they should withdraw their support from those investments. A number of participants pointed out that if FIs withdraw, they have no leverage at all to improve the human rights impact of the project. Withdrawal should be a last resort and it may lead to negative consequences, for example resettled populations not receiving adequate compensation.

18. Participants discussed the impact of the Equator Principles (the Principles). Although the Principles are limited to project finance, they have catalyzed a process inside and outside banks that is merely the beginning of an effort to embed human rights into their core processes. Some NGO representatives expressed pessimism about the perceived weakness in the Principles with regards to implementation, reporting, and their clarity and direction to financial institutions to comprehensively address human rights issues.

19. The discussion went on to consider human rights challenges faced by financial institutions, both as lenders and investors in other companies and as transnational corporations themselves. Participants mentioned that capital has increasingly shifted to emerging economies, some in situations of current or recent conflict, which means that FIs are increasingly investing in riskier markets. Transnational FIs are guests of the host Governments and must respect local customs, cultures and laws, and balance those with global standards. It was also pointed out that in such markets, local financial institutions may be weak or corrupt.

20. There was discussion about the emerging market FIs who are increasingly active. Some participants expressed concern that these new players may be lowering standards within the industry, for example through lack of transparency, and expressed the need for such players to be brought into consultations such as this one. Examples were cited of such engagement beginning, and participants discussed the importance of multi-stakeholder initiatives in this regard.

21. To illustrate the dilemmas arising from different standards within the industry, an example was shared where some banks terminated relationships with companies investing in a particular country following a United Nations report about human rights abuses in that country but competitor banks took over the business of the banks who withdrew. It was suggested that if a transaction is economically feasible, it will find money - if not from a bank with environment, social and governance (ESG) standards, then from elsewhere. Another example concerned a client in a developing country who had already secured money from a regional bank; the bank found deficiencies in the Environment and Social Impact Assessment (ESIA) of the project but nonetheless chose to engage, since it would have no leverage if it did not participate at all. The bank had the in-country assessor on the project work with an international firm, thereby building capacity in local markets.

22. There was discussion about the risk-based approach of the financial sector to protecting and promoting human rights, with some participants wondering whether that approach delivers the desired outcomes with respect to human rights. A question was posed as to whether assessing risks to the potential financial outcome versus assessing risks to rights are fundamentally different approaches. Financial and human rights perspectives of risk were considered by some to be incompatible; an example was shared of a company that chose not to recall a dangerous product because the cost of the recall would be more than the cost of potential litigation concerning lives lost.

23. Some participants posited that the issues faced by financial institutions are not only about risk, but must be considered in a broader context of potential new markets, their entire supply chains, and their reputation among current and potential employees and consumers. It was suggested that financial institutions not be looked at in isolation, since their direct footprint is quite small, but instead in relation to their clients to understand the full scope of the potential influence and impact of the sector.

24. There was discussion about the obligations of financial institutions to respond to civil society inquiries. FIs are expected to uphold principles of transparency with regard to information and provide processes for redress, but on the latter must be careful not to subvert the role of Government. Some NGO participants shared responses to specific claims of abuses that they had received from FIs. These included: refusal to disclose any information; reliance on the partners of the FI for information; a decision to leave the investment; a positive response by the FI's environmental officers who were then trumped by the finance officers; and a reliance on the judgement of the IFC. There was a call for banks to demonstrate their commitment, including through increased transparency towards communities.

III. PROJECT FINANCE: WHAT HAVE WE LEARNED SO FAR?

25. The third session was moderated by Salil Tripathi (Senior Policy Adviser, International Alert) and aimed to review the understanding and initiatives to date regarding human rights issues specific to project finance.

26. Project finance is a particular method of funding in which the lender looks primarily to the revenues generated by a single project, both as a source of repayment and as security for the exposure. Project finance has been the focus of much discussion about human rights issues in the financial sector because of its allegedly high correlation with human rights abuses, despite the fact that it represents only a small percentage of total global lending and an even smaller percentage of the activities of the sector as a whole.

27. In June 2003, the Equator Principles (the Principles) were adopted by financial institutions as a banking industry framework for addressing environmental and social risks in project financing. Signatory institutions agree to incorporate social and environmental concerns into their internal credit risk procedures and to require borrowers to observe standards as a condition for lending. The Principles have now been adopted by over 40 institutions representing more than 80 per cent of global private project finance capacity. Following the adoption of a new version of the IFC Safeguard Policies on which the Principles are based, a revised set of Principles were released in July 2006.

Panellist presentations

28. Motoko Aizawa (Head, Policy and Standards Unit, Environmental and Social Development Department, International Finance Corporation) outlined how the International Finance Corporation (IFC) supports human rights through project finance. The IFC commits to addressing human rights in its sustainability policy framework and has an exclusion list that screens out investments in sectors such as arms and tobacco. The IFC Performance Standards identify areas of risk in environmental and social development, with specific requirements on avoiding, mitigating, minimizing or compensating for adverse impacts in areas such as labour, use of security forces, indigenous peoples and cultural property. Ms. Aizawa explained that the Performance Standards do not make borrowers directly responsible for international human rights standards, in part because these refer to State obligations. Ms. Aizawa shared an example of how the IFC would investigate labour issues: the project team uses country and sector screens to flag potential risks; questions are posed to the client using a sector-specific questionnaire, beginning a process of engagement that may include a site visit/labour audit, and will eventually lead to a corrective action plan that is included in the loan agreement and monitored, in some cases with third party verification. Ms. Aizawa said that in project finance the most critical issue is the willingness of lenders to engage with clients, ask questions, demand that problems be corrected, and offer support to the borrower to improve the situation.

29. Robert Tacon (head of risk reporting, Group Risk Management and Reporting, Standard Chartered Bank) explained that financial institutions which adopt the Equator Principles are expected to embed these principles into their organizations through policies and procedures. The Equator Principles is not an organization itself; there is no collective monitoring of FIs who have adopted the Principles by a central management body. He noted that while in most cases project finance accounts for a very small percentage of the asset base of an FI which has signed up to the Principles, such projects can account for a disproportionate level of human rights concerns. Mr. Tacon said that while FIs which have signed up to the Principles account for a significant proportion of the financing of major projects, local and regional banks are increasingly entering the market. FIs do not have expertise in environmental and social issues and therefore have to rely on external advice, which is often contradictory. For example, at what point should an FI be comfortable that the human rights issues in a project have been adequately addressed: when,

say, 80 per cent of those impacted have accepted the sponsor's proposals? He said that if FIs which have signed up to the Principles only finance projects with 100 per cent local acceptance, other projects will still go ahead financed by local or regional banks that do not follow Principles standards, potentially resulting in significantly greater risk to human rights.

30. Tadashi Maeda (Director General and Special Advisor for Energy and Resources, Japan Bank for International Cooperation) shared his experience introducing the 2002 environmental and social impact guidelines of the Japan Bank for International Cooperation (JBIC). The standards were developed through an intensive one-year consultation process involving stakeholders including civil society, NGOs, and academia. The standards prioritize proactive disclosure of information. For example, the results of screenings, reviews of proposals and projects and environmental impact assessments are all posted on the JBIC website. JBIC emphasizes that implementers must assume responsibility for the impact of their projects and consult with primary stakeholders, i.e. residents and local NGOs. For high-risk projects, JBIC sends out questionnaires, visits the project site to confirm the answers they have received, sometimes hires an outside consultant to review the project, and incorporates the outcomes into the loan documents. In one case the high level of site visits and engagement proved very costly, a cost that was ultimately charged to the taxpayers of Japan. Mr. Maeda discussed the challenge for export credit agencies which do not have a mandate to ensure sustainable economic development, therefore the main discussion in the current Organisation for Economic Co-operation and Development (OECD) negotiations over the "common approach" is about ensuring a level playing field. JBIC is committed to contributing to the OECD discussion and preventing a race to the bottom. He also discussed the possibility of inviting non-OECD members into these discussions with special status.

31. Sheldon Leader (research coordinator, Human Rights Centre, University of Essex) said that when putting the Equator Principles and IFC Performance Standards to work, it is important to ask what risks to these standards are potentially created by the specific features of project finance itself and what might be done to avoid those risks. A classic model of project finance is where a parent company, group of companies in a consortium, and project sponsors set up a project company or special purpose vehicle (SPV) that owns the assets of the project (e.g. a pipeline). The controlling equity in the SPV will be held by the project sponsors, and a loan is made to the SPV without recourse to parent companies. Pressures on human rights guarantees to local populations can arise from (a) insulating the parent from financial liability and focusing it on the subsidiary (SPV), e.g. inability of the SPV to meet large damages claims from local populations; (b) clauses in host Government agreements that freeze local law, opening a potential gap between the protection provided to project-affected people versus people elsewhere in the country; (c) an inclination to deal with damage to local populations via compensation after the damage has happened, rather than by slowing or stopping a project to put right any faults.

Discussion

32. The discussion focused on the issue of standards for project finance and the implementation of such standards. Many participants acknowledged the need for greater harmonization of standards that relate to human rights in project finance, both across the finance sector and with existing international human rights standards and law (see also section II above). Harmonization is crucial as the industry has changed in recent years: because of the increase of

available money and capacity, project finance is now often provided by emerging market players on their own or by large syndicates (in which an ECA might be approached in the later stages of a deal and given as little as 10 days for due diligence). The Special Representative was encouraged to recommend to relevant organizations such as the IFC and OECD that they account for how they are implementing their standards. There are currently a few discussions about coordination, for example between similar departments of different organizations and among multilateral institutions stating their intention to harmonize with the Principles.

33. There was also a discussion about the role of prescriptive standards or law in project finance. It was suggested that if the Principles had been too prescriptive they might have attracted the attention of anti-competitive lawyers; instead, they had to be a set of principles that financial institutions could aspire to and adapt to suit their own risk appetite and culture. Reference was made to the recent adoption by the Berne Union² of a set of guiding principles, which are not binding but encompass OECD and non-OECD institutions. It was also suggested that guidelines work only for the well-intentioned, so binding laws are necessary. There was debate over whether scrutiny should be directed to principles themselves, the processes and mechanisms that underpin principles, FIs that adopt them, or FIs that have not adopted them.

34. There was a great deal of discussion about the impact on human rights of stabilization clauses in “host Government agreements”³ for project finance. The original intention of such clauses was to protect companies from discriminatory actions by host Governments, namely expropriation or punitive levies and taxes, but there was now concern that such clauses supersede existing and new legislation or may stifle both the ability of host Governments to introduce new measures to protect and promote human rights and access to justice for victims of human rights abuses. It was stressed that these agreements must not be used to circumvent the local legal system. Reference was made to a “human rights undertaking” by consortium members in a pipeline project whereby the consortium agreed not to resist local laws or claims from aggrieved citizens; and whereby the stabilization clause could be overridden in the case of the need to implement obligations under human rights, environmental, labour, or health and safety obligations. It was suggested that States would not challenge stabilization clauses because (a) they are often equity holders in the project and therefore have an interest in steady revenues and (b) such a challenge would be an admission that they had made a mistake when they negotiated the clauses. Participants agreed that more discussion and guidance on appropriate stabilization clauses and host Government agreements were necessary.

35. The question arose as to whether intermediary holding companies, established for project finance investments, could interfere with the protection and promotion of human rights. Some participants suggested that such holding companies and tax havens should be scrutinized, as they

² The Berne Union is an organization of the international export credit and investment insurance industry.

³ A host Government agreement is a legal agreement between a foreign investor and the local government which is designed to reduce financial and political risks posed to investors by sudden changes in national law.

raise questions of ultimate ownership of a given project and therefore of accountability for its human rights impact. Other participants asserted that holding companies have no impact on the risk of a project.

IV. BEYOND PROJECT FINANCE

36. The fourth session, moderated by Paul Watchman (Partner, LeBoeuf, Lamb, Greene & MacRae), explored issues and initiatives in the financial sector beyond project finance, including the perspectives of asset managers, the status of some voluntary initiatives, and the activities of export credit agencies.

37. Various initiatives have been launched to address the impact on human rights of various aspects of the financial sector, namely:

- United Nations Environment Programme Financial Initiative (UNEP FI)⁴ works with over 160 financial institution signatories to develop linkages between the environment, sustainability and financial performance;
- The “Who Cares Wins”⁵ initiative launched by the United Nations Global Compact convenes investment, asset management and brokerage houses to work on guidelines as to how financial analysts can better factor environmental, social, and corporate governance (ESG) issues into their work;
- The Principles for Responsible Investment⁶ were developed by a group of the world’s largest institutional investors; they are voluntary and aspirational, open to institutional investors, investment managers and professional service partners, and provide a menu of possible actions for incorporating ESG issues into mainstream investment decision-making and ownership practice;
- Ethical Indices such as FTSE4Good and the Dow Jones Sustainability Indexes list only companies that meet prescribed standards in the areas of human rights, environmental sustainability, and stakeholder engagement.

Panellist presentations

38. Adam Kanzer (General Counsel and Director of Shareholder Advocacy, Domini Social Investments) stressed that investors have a critical role to play in advancing human rights through the use of human rights criteria to select holdings, principled use of proxy voting, and direct engagement with their holdings. Corporations cannot be held accountable without information, and consistent, comparable and reliable data on human rights is generally not available. A combination of voluntary and mandatory reporting is needed, and the concept of

⁴ <http://www.unepfi.org>.

⁵ http://www.unglobalcompact.org/Issues/financial_markets/index.html.

⁶ <http://www.unpri.org>.

“materiality” must be viewed more broadly than “material to financial performance” if disclosure is to capture the true risks to stakeholders. The Principles for Responsible Investment are a very important step forward, but present two broader concerns: first, the human rights obligations of investors should not be limited by fiduciary duty, as they represent obligations to individuals other than shareholders; second, an exclusive focus on shareholder value may limit the ability of investors to address the most difficult human rights issues.

39. Andreas Missbach (Steering Committee member, BankTrack, and Private Finance Programme, Berne Declaration), stressed that financial institutions have special responsibility with regard to human rights, in view of the strategic role that financing plays for their clients. Banks can be complicit by ignoring human rights violations committed by their clients while providing financial assistance for their activities. It was submitted that the Equator Principles are not the solution, as they do not specifically address human rights issues and apply only to project finance, which is less than 5 per cent of capital raised through commercial lending and investment banking. Mr. Missbach gave examples of the human rights impact of the financing of mines, dams and arms trading. Banks should be urged to make their human rights policies more detailed, and to determine their levels of influence according to the various types of financial products and services they offer, and their relationships with clients. In many instances, operations that violate human rights cannot proceed without the support of financial institutions. It was suggested that the Special Representative could discuss the role of banks in his final report and call for a more comprehensive and transparent approach to human rights responsibilities in the banking sector.

40. David Allwood (Business Principles Adviser, Export Credits Guarantee Department (ECGD), United Kingdom) said that the Government of the United Kingdom considers that human rights are State obligations that do not fall to non-State actors. It is, however, the responsibility of States to ensure that non-State actors, including business, respect human rights. ECAs do not usually have direct contact with a project, but only with their national exporters and banks. They generally lack leverage, as a decision to withhold support from a particular export would rarely result in the overseas project to which that export was destined being changed; it would only result in that exporter losing the business to another exporter. Nevertheless, ECGD takes some actions to provide assurance that human rights are being addressed. Mr. Allwood explained that as part of its “Case Impact Analysis Process”,⁷ ECGD identifies what human rights treaties and ILO conventions have been ratified by the host country where the overseas project is located. ECGD then considers the details of the specific project and whether or not human rights abuses might be present. On this basis, ECGD decides whether further enquiries are necessary.

41. Ivo Knoepfel (Managing Director, onValues Ltd., speaking on behalf of the United Nations Global Compact) presented two private sector-led initiatives developed in collaboration with the United Nations: the Principles for Responsible Investment (PRI); and the “Who Cares Wins” (WCW) Initiative. The PRI provide a general framework for asset owners and investment managers to give appropriate consideration to environmental, social, and corporate governance (ESG) issues. The initiative goes back to 2005 when the

⁷ See www.ecgd.gov.uk.

Secretary-General of the United Nations invited a group of the world's largest pension funds to join a process to develop the Principles. The process was coordinated by the United Nations Global Compact Office and the UNEP FI. Today more than 100 asset owners and investment managers accounting for more than US\$ 5 trillion of assets have committed to the PRI. The WCW is a platform aimed at the implementation of principles such as the PRI in day-to-day business. Its goal is to advance best practice and develop tools and methodologies, focusing on enabling investment managers, financial analysts and investment brokers to integrate ESG considerations in their daily work.

Discussion

42. Discussion initially focused on the issue of the fiduciary duty of financial institutions and whether non-specialized investors who manage assets on behalf of their clients have the mandate to consider human rights issues. A socially responsible investor may include human rights in its prospectus and therefore have a legal obligation to consider related issues, but it was suggested that fiduciary duty does not impose a barrier to other kinds of investors considering human rights issues. For example, public pension funds have no such explicit mandate, but have deemed that there are no restrictions and that it is in fact appropriate to engage on labour and other human rights issues.

43. The concept of materiality of human rights issues was highlighted. It was suggested that from an investor perspective, human rights was unlikely to comprise a significant risk variable in a large diversified public Western company, as opposed to a project-specific company in the developing world. There was uncertainty among some participants about what enhanced analysis on human rights issues would yield, although examples were shared of research that showed links between human rights issues and financial performance.⁸ It was further suggested that human rights issues could be considered indicators of the quality of management, i.e. a good record on the environment and diversity indicates a strong management team. However, examining human rights issues at the company level could have limited impact, as many investors now hold broad market indices and therefore do not consider the specific record of individual companies. There was a warning against reducing everything to financial metrics, since it could lead to companies worrying more about other issues such as climate change than about human rights.

44. The role of rating agencies in human rights, for example with respect to the materiality issue, was highlighted, and reference was made to some rating agencies that are exploring ESG issues.

45. It was suggested that it is difficult to screen stocks on human rights criteria due to lack of data, which means that such issues are addressed more through engagement. Companies can be influenced in many ways, for example proxy holding, and leverage is dynamic, i.e. a company may be encouraged to meet higher standards at one point in time, but investors can always sell their shares at a later date. Some parts of the investor community do not screen companies but

⁸ See e.g. srstudies.org, Marc Orlitzky, Frank L. Schmidt and Sara L. Rynes "Corporate social and financial performance: a meta-analysis", *Organization Studies*, 24, 2003.

do incorporate ESG issues into their research and evaluation, and use their influence as a bondholder or shareholder to encourage companies to have appropriate policies and implementation systems. In this context questions were raised about what impact investors could achieve with regard to human rights since they are two or three steps removed from the project, while lenders were closer but still not responsible for implementing the business. With respect to due diligence carried out by export credit agencies (ECAs), it was noted that every case is handled individually, and that ECAs are unlikely to turn a project down on human rights grounds, preferring instead to engage and seek improvements.

46. Some participants asserted that existing voluntary initiatives could be improved or deepened to reflect a stronger commitment to international standards, while others stressed the need to broaden membership to emerging markets or to companies that do not have human rights policies. It was suggested that there is no contradiction between broadening and deepening, and that the goal is to see meaningful standards at as many banks as possible; Equator Principles banks will still be criticized if they are involved in problematic projects, as will financial institutions that do not have any human rights standards.

47. There was a discussion about confidentiality: While many participants hoped for greater transparency, participants from financial institutions in both the public and private sector argued that they often cannot disclose details of client transactions, including whether such transactions have negative or positive human rights impacts.

V. HUMAN RIGHTS STANDARDS AND DECISION-MAKING

48. The fifth session was moderated by John Ruggie (Special Representative of the Secretary-General for human rights and transnational corporations and other business enterprises). The session aimed to identify the prospects for enhancing the role of human rights in the activities of the financial sector.

Panellist presentations

49. Samuel Nguiffo (Director, Center for Environment and Development, Cameroon) said that while human rights abuses may occur as a result of company activities, there is often reluctance by transnational companies (TNCs) and the financial sector to address human rights as a matter of obligation. The existing sets of principles and initiatives in relation to the financial sector constitute a positive step, but they need to be improved because of their limitations in terms of material scope (they do not cover all human rights), applicability and reach (not all companies are bound by them), and nature (they are voluntary as opposed to mandatory). The increasing importance of financial institutions from emerging economies, with no or few such standards, creates a risk of a race to the bottom. A shift from voluntary to mandatory rules seems necessary. It would require the following: independent monitoring of the implementation of existing schemes, with publication of results; means of redress for violations of rights; improved access to justice for potential victims of the activities of TNCs in host countries, including the prevention of restrictions to access to justice as side-effects of host Government agreements; and the strengthening of human rights protection by States from abuses by private actors.

50. Chris Bray (Head of Environmental Risk Policy, Barclays) discussed Barclays approach to human rights. Barclays is a member of the Business Leaders' Initiative on Human Rights, which gathers companies from a variety of sectors to explore how to integrate human rights issues into business decision-making. Issues addressed include managing workforces in different countries and managing human rights in supply chains. Barclays developed a group statement on human rights in 2004; although not a policy, it is reflected in a range of other group policies. Mr. Bray shared the origins of the new human rights work programme of the UNEP Finance Initiative: in April 2006, financial institutions convened to discuss business drivers behind human rights and how those drivers were reflected in different organizations. The FIs agreed the need to establish a common understanding of human rights - not to recreate information in the public domain, but to examine the components of human rights: where the boundaries are for FIs; which issues are material and where they have impact; and to break down the issues into a practical format, so a front-line FI officer facing client meetings will be equipped with laymen's terms for human rights considerations in different industries. The guidance will be supplemented by a CEO briefing designed to inform and promote support from the senior management of financial institutions.

51. Peter Frankental (Economic Relations Strategy Adviser, Amnesty International - International Secretariat) stated that many financial institutions have shown willingness to address human rights issues when there is a regulatory requirement or a clear business case, or when steps can be taken that will not affect profitability. The human rights community, on the other hand, expects companies to respect human rights and avoid complicity even when there are no such requirements. Given this point of departure, what are the prospects for convergence? Mr. Frankental stated that the IFC Performance Standards and the Equator Principles are a step in the right direction, and that next steps should be to align these standards more closely with international human rights law and address their ambiguities. He suggested that human rights impact assessments (HRIAs) can help bridge the gap between good intentions and practice, provided they address all human rights contained in the International Bill of Rights, ILO conventions and other relevant instruments. They should be conducted at the feasibility stage of a project and inform the decision as to whether to invest, as well as the design of the project throughout its lifecycle, and their findings and recommendations should be embodied in a management plan that is monitored by an independent, competent body.

52. Paul Clements-Hunt (head of the secretariat, UNEP Finance Initiative) stated that human rights must be embedded in the "DNA" of a financial institution at every level. Materiality in financial terms is key, and it is critical to focus attention where pools of capital are concentrated. Launching the Principles for Responsible Investment (PRI) at the New York Stock Exchange was an important signal to the market. FIs that have endorsed the PRI now represent \$6 trillion in assets and 150 institutions in 22 countries; the next phase of the initiative will focus on performance, monitoring, metrics, and governance. The second concentrated pool of capital is the private banking community servicing ultra-high net worth individuals, which by 2010 will control 50 per cent of the world's assets or US\$ 44 trillion; only 2 to 5 per cent of their capital is currently managed on an ethical basis. Mr. Clements-Hunt cited the case of a company having paid to settle a claim for environmental damage but publicly claiming "the strong support of its bankers". Mr. Clements-Hunt concluded by stating that voluntary initiatives can be used to create a framework of understanding to promote best practice with respect to human rights.

Discussion

53. Participants discussed initiatives and tools that could strengthen human rights protection and the implementation of voluntary standards, such as accountability and monitoring mechanisms. Specific actions by financial institutions were suggested, including ex ante assessments of their investments; ongoing independent monitoring of the human rights impact of their investments; and means of compliance and redress where investments do not uphold human rights standards. Investigatory and sanctioning powers on the part of ombudsmen or monitoring units within a company were considered important, for example in reconciling community claims that damage occurred because of a company's presence with company claims that the damage pre-dated them, particularly in the absence of baseline information. Reference was made to the Extractive Industries Review of the World Bank Group. Although the human rights recommendations were not accepted by the Bank, it was suggested that the Bank's extractive industries clients should be required to adopt and demonstrate compliance with human rights standards.

54. Reporting and monitoring requirements were also discussed. It was suggested that the reason the Equator Principles do not have a secretariat or public help desk is because no bank wants to be responsible for decisions by other banks; therefore the "teeth" in the Principles are in the annual reporting requirements. Some NGOs considered the mechanisms of the Principles insufficient with respect to accountability. Emphasizing the importance of indicators to measure performance, the Global Reporting Initiative (GRI) was recommended as a good starting point for companies wishing to report on their performance. The GRI arose from an intensive multi-stakeholder process of identifying how organizations could measure their performance with respect to all human rights. It was suggested that if an organization is reporting to that level of detail on human rights, it is likely to be working towards better human rights performance.

55. A number of participants cited the lack of human rights expertise in financial institutions and the need for outside monitoring and assessments with regard to human rights. Some questioned whether a normative framework would compensate for that lack of expertise, while others noted that such a framework would be subject to interpretation.

56. Human rights impact assessments (HRIAs) were discussed as a potential point of convergence. Reference was made to the forthcoming IFC HRIA tool, which outlines elements similar to the steps of an Environmental Social Impact Assessment (ESIA) but integrates the scope of the review with country risks and context analysis. The IFC tool is to be flexible, although some participants wished to see a comprehensive HRIA as a mandatory inclusion in an action plan or contractual obligation. It was suggested that a commitment to undertake HRIAs could be seen as refining current commitments to undertaking ESIA's. One question raised was whether ESIA's and labour audits can address human rights issues, or whether there should be a complete assessment package under a human rights label.

57. The sector was urged not to start from scratch to develop frameworks and tools, but rather to work with recognized international standards, referring to the previous discussion on the danger of translating and thereby lowering standards (see section II above). There was a need to ensure that corporate initiatives would add value and not detract from what is already in existence. Reassurance was given that initiatives would not detract but rather try to decant that information to create mechanisms for financial institutions to implement in their own way.

58. Participants discussed the draft “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights”.⁹ One NGO participant stressed that the norms served three purposes at the time of their creation. The first was to help companies identify gaps in human rights policies and understand the implications of international standards for their own responsibilities: prior to the draft norms, companies would be referred only to the Universal Declaration on Human Rights. The norms offer a better framework, notwithstanding debates around some of their principles. The second purpose was to create a higher level of debate and concern over business and human rights. Thirdly, the draft norms were meant to be the basis for an enforcement mechanism for direct application to companies, perhaps 20 years from now, as a result of a binding instrument on corporate accountability. It was noted that the draft norms were not intended to be a framework for measuring impact or performance; in that respect the draft norms failed but the debate would clearly continue. It was suggested that the norms could serve as a framework for HRIAs and the human rights policies of companies.

59. The obligations and role of States were also discussed at length. Some participants questioned the focus on increasing voluntary standards for corporations, while the focus should be on State obligations. It was suggested that the right to justice not be privatized, and that participants focus these discussions on helping Governments to better fulfil their obligations - to keep repeating that government capacity is weak may only reinforce the problem. All efforts should support the long-term goal of building government capacity, not creating parallel systems, while addressing short-term issues. There was a need to strengthen the human rights architecture at all levels of the United Nations system, a process that companies can support as advocates.

60. It was suggested that there should be more focus on the role of financial institutions in promoting greater enjoyment of human rights through banking and lending, for example in developing microfinance and lending and deposit activity for poor customers, and establishing property rights so that poor people would have collateral for loans.

61. Reference was made to the intent of multi-stakeholder initiatives in raising awareness of human rights beyond those engaged in project finance. For example, most of the 160 members of UNEP FI will never be involved in project finance, but they have made a commitment and wish to take action to improve their human rights performance, which is what UNEP FI aims to support. A newly established Justice and Human Rights Trust Fund at the World Bank was also discussed in this regard.

62. Participants came back to the importance of exploring synergies and bridging existing initiatives. There was a suggestion that there could be collaboration between OECD and the Berne Union for instance, while others discouraged sole focus on OECD because of the importance of non-OECD players and the private sector.

⁹ E/CN.4/Sub.2/2003/12/Rev.2.

VI. CONCLUDING REMARKS

63. The Special Representative noted the impact of the deepening and expansion of capital markets and the complexity of human rights issues that have arisen thereby. One result is that financial institutions have emerged at the forefront of debate over human rights and the role of the private sector. The Special Representative said if the Human Rights Council agreed to extend his mandate by one year, he would continue to study private and public financial institutions, including export credit agencies. He highlighted the fact that he has submitted a report to the Human Rights Council specifically on human rights impact assessments, and summarized his view on HRIAs by suggesting that ESIAAs have an “inside-out” perspective in which a company tried to figure out its impacts, whereas an HRIA starts with the rights of people and communities and relates these to proposed corporate activity. But at this point, he suggested, the distinction is largely hypothetical, as almost no companies have conducted fully fledged HRIAs and only one has made public even a summary of such an assessment. Very little is known about how these work on the ground. He also stressed the importance of moving past the voluntary vs. mandatory debate, and instead continuing to examine the nature of the commitments that companies make and holding them to account for those commitments. On an operational basis, the concept of corporate spheres of influence cannot be disentangled from State duties, because the corporate sphere expands by default when States fail to fulfil their duties, potentially leading to strategic gaming by States, which we must resist. This critical nexus requires greater attention, he concluded. Finally, the Special Representative suggested that if his mandate is extended, he would return to many of the participants for recommendations and support.

64. Ibrahim Wani thanked all participants on behalf of the High Commissioner, and closed the consultation.

Annex

LIST OF PARTICIPANTS

Panellists

Motoko Aizawa (International Finance Corporation); David Allwood (UK Export Credits Guarantee Department); Chris Bray (Barclays); Paul Clements-Hunt (UNEP Finance Initiative); Peter Frankental (Amnesty International - International Secretariat); Adam Kanzer (Domini Social Investments); Karyn Keenan (The Halifax Initiative); Michael Kelly (KPMG); Ivo Knoepfel (onValues Ltd/United Nations Global Compact); Sheldon Leader (University of Essex); Andreas Missbach (BankTrack/Berne Declaration); Herman Mulder (former Senior Executive Vice President, ABN AMRO); Samuel Nguiffo (Center for Environment and Development, Cameroon); John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises); Titi Soentoro (NADI/Solidaritas Perempuan); Robert Tacon (Standard Chartered Bank); Daniel Taillant (Centro De Derechos Humanos y Ambiente); Salil Tripathi (International Alert); Paul Watchman (LeBoeuf, Lamb, Greene & MacRae).

Private sector

Manuel Adamini (Fortis); Carlos Alonso (BBVA Group); Liselotte Arni (UBS); Philippa Birtwell (Barclays); Bruno Bischoff (Crédit Suisse); Richard Burrett (ABN-AMRO); Christophe de Courten (UBS); Kathryn Dovey (TwentyFifty Ltd.); Françoise Rost van Tonningen (Rabobank); Silvia Scopelliti (Intesa Sanpaolo); Shelley Aggarwal (KPMG); Valerie Smith (Citigroup); Rory Sullivan (Insight); Maria Anne Van Dijk (Fortis); Jehanne de Walque (Dexia Asset Management); Brent Wilton (International Organization of Employers).

Export Credit Agencies

Rosemarie Boyle (EDC - Canada); Lars Kolte (Eksport Kredit Fonden - Denmark); Berit Lindholdt Lauridsen (Eksport Kredit Fonden - Denmark); Tadashi Maeda (JBIC - Japan).

International and intergovernmental organizations

Marie-France Houde (OECD); Kiki Lawal (UNEP Finance Initiative); Natalie Ryan (UNEP Finance Initiative).

Non-governmental organizations and independent experts

Lucy Baker (The Bretton Woods Project); Jem Bendell (WWF UK); Roderick Dunnett (independent); Tricia Feeney (RAID-UK); Steve Herz (Bank Information Center); Leah Hctor (International Commission of Jurists); Christy Hoffman (UNI Property Services Global Union); Anthony MacDonald (independent); Lisa Misol (Human Rights Watch); Andrew Newton (Ethical Corporation magazine); Antonio Tricarico (Campaign to reform the World Bank); Elizabeth Umlas (KLD Research & Analytics, Inc.).
