OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS
SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL
Mandate of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises

STABILIZATION CLAUSES AND HUMAN RIGHTS

Johannesburg, South Africa, Tuesday 21 October 2008

CONSULTATION SUMMARY

I. INTRODUCTION

Sub-paragraphs (a) (b) and (e) of the initial mandate given to the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights specifically required him to consider both companies' and states' roles with respect to the business and human rights debate. Sub-paragraph (a) asked the SRSG to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights." Sub-paragraph (b) asked the SRSG to "elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation." Sub-paragraph (e) requested him to "compile a compendium of best practices of states and transnational corporations and other business enterprises..."

In addition to other projects on the nature of state roles vis-à-vis business and human rights, the SRSG has also examined factors that could constrain a state's ability in "effectively regulating and adjudicating" business related human rights abuses, including the possible impacts of trade and investment agreements in this regard. To explore the investment dimension, the SRSG in 2007 embarked on a joint-project with the International Finance Corporation (IFC) focusing on state contracts or host government agreements (HGAs) (those signed by private investors and host states for investment projects including extractive, infrastructure and services) and, in particular, the use of stabilization clauses in these agreements. Stabilization clauses are contractual clauses that aim to guarantee that domestic laws with respect to investments will remain unchanged. In essence, they either do not allow new laws to apply to investments or they provide for compensation to investors for compliance with new laws. Concerns have been raised that such clauses limit a state's ability to effectively discharge its international human rights obligations.

In deciding to embark on the joint-project on stabilization clauses, the SRSG observed that the views of stakeholders greatly differ regarding the linkages between stabilization clauses and human rights. He also observed that stakeholders from differing perspectives have had no direct joint engagement on this important aspect of HGAs.

The SRSG is deeply appreciative to the IFC for funding and managing this research. He also recognizes that the IFC's involvement reflects its ongoing interest in advising private sector clients on ways to promote investment that is consistent with principles and standards of sustainable development.

The research and its resulting report "Stabilization Clauses and Human Rights" (the "Report") examines a sample of 88 actual and model agreements. In that sample, stabilization clauses are commonly drafted in a manner that can make investors exempt from the obligation to comply with new environmental and social laws, or to provide investors with an opportunity to be compensated for complying with such laws. Within the sample this was much more likely to be the case in HGAs signed with non-OECD countries than in those signed with OECD countries.

In his 2008 report to the Human Rights Council, the SRSG proposed a conceptual and policy framework "to anchor the business and human rights debate, and to help guide all relevant actors." (A/HRC/8/5) The framework comprises three core principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedies. In June 2008 the Human Rights Council was unanimous in "welcoming" the policy framework. It extended the SRSG's mandate for another three years (A/HRC/RES/8/7), and asked him to "operationalize" the framework in order to provide concrete guidance to states and businesses. The SRSG intends to continue work on HGAs, and more broadly on investment and trade issues.

II. GOALS OF THE CONSULTATION

The joint research project with the IFC was designed specifically to stimulate multi-stakeholder engagement, including through expert consultations. It is envisaged that the consultation process will lead to the following outcomes:

- A set of further questions for the SRSG with respect to stabilization clauses and investment agreements.
- Recommendations and suggestions (including examples of existing approaches) regarding mechanisms that integrate respect for human rights and support sustainable development, while protecting investors from legitimate concerns regarding changes in law.
- Proposals for future work within the UN system, or by other international organizations and groups, in relation to stabilization clauses and human rights.

Two consultations have been convened to-date to discuss the findings as well as to develop a future agenda. The first took place in London, UK, the second in Johannesburg, South Africa. The latter, which is the subject of this report, was hosted by the Centre for Human Rights at the University of Pretoria and was supported by the IFC and the law firm of Edward Nathan Sonnenbergs.

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

In order to encourage full and frank discussion, the consultation was held under the Chatham House rule. Accordingly, set out below is a general record of the discussion, without attribution of particular statements or proposals.

III. CONSULTATION SUMMARY

A. INTRODUCTION

Special Adviser to the SRSG, Gerald Pachoud, opened the consultation by highlighting that the SRSG's mandate had been created in response to a difficult impasse that had developed among governments, company representatives and civil society organizations regarding business and human rights issues. With the Council's endorsement of the SRSG's "protect, respect, and remedy" framework, the agenda clearly was moving forward. Mr. Pachoud discussed how the SRSG's work on stabilization clauses in investment agreements fits into the framework.

The first principle of the framework is the state duty to protect from abuses by third parties, including corporations. It is often stressed that governments are the most appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. But in the area of business and human rights, the SRSG questions whether governments have got the balance right. Research and consultations indicate that most governments take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual and (typically weak) institutional box.

Typically, human rights concerns are kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, securities regulation, and corporate governance. The human rights policies of states in relation to business need to be pushed beyond their narrow institutional confines. Governments need to ensure that human rights compliance becomes part of defining an ethical corporate culture. And they need to consider human rights impacts when they sign trade agreements and investment treaties, and when governments provide export credit or investment guarantees for overseas projects in contexts where the risk of human rights challenges is known to be high.

The framework's second principle is the corporate responsibility to respect human rights—meaning, in essence, to act with due diligence to avoid infringing on the rights of others. What is required, therefore, is a due diligence process whereby companies become aware of, prevent, and address adverse human rights impacts on an ongoing basis throughout the life of the operation. The only reliable way for companies to generate awareness and develop satisfactory mitigation measures is to engage their workers and affected communities in this process. The responsibility to respect exists even where laws are absent or not enforced because it is also a social responsibility, recognized as such by virtually every voluntary business initiative, soft law instruments such as the ILO Tripartite Declaration and the OECD Guidelines on Multi-national Enterprises, and the UN Global Compact. The corporate responsibility to respect human rights is the baseline expectation for all companies in all situations.

For the substantive content of due diligence companies should look, at a minimum, to the international bill of human rights—the Universal Declaration and the two Covenants—as well as the core conventions of the ILO, because the principles they embody are the most universally agreed upon by the system of public governance. If companies operate in conflict zones, they will also need to consider international humanitarian law to avoid situations where they could be accused of complicity, or worse.

Access to remedy is the third principle. Even where institutions operate optimally, disputes over adverse human rights impacts of companies are likely to occur, and victims will seek redress. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped—from the company level up through national and international spheres.

As noted above, the issue of stabilization clauses is relevant to all three framework principles, but has particular significance for the state duty to protect, and has been explored mainly through that lens. HGAs and stabilization clauses are largely developed in isolation from states' obligations relative to human rights. The SRSG underscored that such instruments are directly relevant to his mandate: first and foremost because fulfilling the state duty to protect against human rights abuses requires that states do not negate their ability to regulate and adjudicate actions by third parties, including corporations, as a result of other commitments. Investor rights must be protected from arbitrary and discriminatory acts. But at the same time, ways must be found to ensure a mutually supportive relationship between these two critical policy objectives. Stabilization clauses are also directly relevant to the company responsibility to respect, as companies should ensure the agreements they negotiate are not drafted in a way that can interfere with the enjoyment of rights and the state's ability to protect against abuse.

B. DISCUSSION OF THE REPORT AND ITS KEY FINDINGS

Some key findings of the Report were presented and participants were given the opportunity to comment on these findings and the Report in general.

The discussion focused on the two very distinct sets of data between contracts with non-OECD v OECD host states, particularly host states in Sub-Saharan Africa. While it OECD contracts in the study rarely offered stabilization for anything beyond discriminatory and arbitrary new laws, a majority of contracts in Sub-Saharan Africa stabilized all social and environmental laws (providing exemptions or compensation to investors for compliance), even if implicitly.

Participants were not surprised that the broadest stabilization clauses were found in Sub-Saharan Africa. However two participants, with experience in contracts in the region, said that they have not seen clauses similar to the full-freezing clauses (freezing all domestic law with respect to the investment) found in the study. Other participants said stabilization had traditionally been geared towards stabilizing fiscal, customs and royalties issues in central and west Africa. The freezing clauses were viewed as something big companies did 20 years ago.

It was noted by participants that irrespective of the findings on stabilization, newer contracts, as opposed to those drafted during the 1980s and 1990s, have more provisions geared towards

managing the social and environmental impacts of investments, such as requirements for impact studies.

C. BALANCING INVESTOR RIGHTS WITH ADEQUATE POLICY SPACE

The roundtable discussions throughout the day focused on a number of themes, the main one being how to balance investor rights with the need for governments to have adequate policy space to fulfill their duty to protect. The following summarizes the discussion:

- There seemed to be a consensus that there is a legitimate need for tool(s) to boost investor confidence that governments will not engage in rent-seeking behavior or take other actions to unfairly exploit changed circumstances or disadvantage particular investors.

- When the issue of model stabilization clauses was raised, a few participants questioned whether such models would be appropriate for developing countries, which should be able to make decisions based on their own development needs. There was a suggestion that stabilization clause models should be staggered in form, perhaps depending on the country's development. The developing country could pick and choose what they need for their level of growth.

- One participant said that investor due diligence should include negotiating in good faith. It was suggested that the principle of "good faith" would eliminate some things from contracts like stabilization for foreseeable changes in law. This comment referred to the evidence in the report that some stabilization clauses seek to exempt investors from laws that are already passed but not yet in force or are otherwise foreseeable with standard due diligence. However, participants also accepted that this in some jurisdictions due diligence is a less effective tool for predicting legislative changes.

- Participants recognized that one of the challenges of changing current practice is the different bargaining positions of investors and states. As one participant suggested, investors view the negotiation of contracts as a purely commercial venture. Governments on the other hand see it partly as commercial but also within a political context. In the case of Africa, on participant indicated, there are tremendous infrastructure problems, and lack of regulation is a big problem for governments and investors alike. Additionally, a lack of trust between parties leads to fear bad faith behaviour and raises the interest in broad stabilization clauses.

- One participant opined that the key to fair contracting is not about balancing interests, but making it possible for both parties to represent their own interests in an equal manner in a negotiation. This would ideally include the government representing the interest of its population in realizing rights as well as its own interest in fulfilling its human rights obligations. However, many participants recognized that governments are hindered in negotiations because they respond to immediate political interests and needs. Furthermore, a few participants suggested governments do not appear to explicitly represent their obligations under human rights treaties or the interests of the population when negotiating deals.

Ideas for improving practice

The participants offered a range of ideas to encourage stabilization practices more likely to safeguard, rather than obstruct, the state duty to protect:

- To guard against highly one-sided deals, it was suggested that transparency and public oversight can help. To enhance transparency, certain clauses could be set out in the public domain or indeed passed into law, which also has the effect of limiting the range of clauses open for negotiation with investors. Making clauses public might limit what the government offers, assuming governments would be reluctant to make certain types of offers to investors in the public eye. However, if the implications of clauses are not widely appreciated, then public oversight might be less effective. Additionally, states may view stabilization as so integral to attracting investment, that they are proud to make such offers even with public oversight.

- According to a few participants, defining risks or carving out laws not appropriate for stabilization would be possible. A charter of good manners, principles or conduct could help companies and governments to work towards eliminating ad hoc negotiation of stabilization on environmental and social issues and define parameters of negotiation. For example, such a charter could recommend **against** companies asking for most favored company status, and **for** a promise from the government that it will not offer such to any investor. It was suggested that this type of charter would serve as a useful basic point of reference for lawyers from both sides. The charter could also illustrate and educate about how to avoid conflicts between human rights and stabilization clauses, for example. The charter could come from a regional intergovernmental organization or UNCITRAL.

- As stated above, some participants expressed concern about models serving as a template appropriate for all countries. However other participants mentioned that ECOWAS (the Economic Community of West African States), the OECD, UNCITRAL or another intergovernmental forum could come up with a set of model clauses. The models could keep the stabilization clause on an economic and commercial plane without jeopardizing social and environmental issues.

- Some participants thought that for companies with a CSR culture, simply raising awareness of the problem of stabilizing social and environmental rules may help to positively influence the narrowing of stabilization clauses.

D. PROPOSALS FOR NEXT STEPS:

Participants made the following proposals for next steps for the SRSG under his new mandate regarding the link between host government agreements and the protection of human rights.

1. CONTINUE TO RAISE AWARENESS AND FOSTER DISCUSSION:

- Finalize the stabilization paper consultation draft adding in reference to cases before the OECD and other claims on stabilization as well as wisdom gathered from interviews and consultations.

- Present the report to industry groups and foster further discussion.

2. MOVE TOWARDS SOLUTIONS:

- Identify an appropriate intergovernmental forum to raise these issues, bearing in mind the need for interested IGOs and NGOs to engage.

- Ensure the focus is not just on stabilization but looks towards improving the fairness of contracts on a whole—while viewing stabilization as part of the entire investment deal.

- Keep in mind negotiating capacity and how to create more capacity on the part of host states.

IV. Next Steps

The Johannesburg consultation was important not only for confirming what was learned in London, but for offering a particular set of views based on experiences in Africa. It is not envisioned that further consultations in the style of either London or Johannesburg will take place. Instead the SRSG is now considering key learnings and next steps – inputs from both consultations will inform his choices in this regard. The Stabilization Report will be finalized in the first quarter of 2009 integrating the consultation comments and learning.

ANNEX 1 - CONSULTATION PARTICIPANTS

Ms. Louise Chatillon, Fasken Martineau

Ms. Terri Hathaway, International Rivers Network

Ms. Christine Jesseman, South African Human Rights Commission

Mr. Eric Le Grange, Edward Nathan Sonnenbergs

Ms. Susan Maples, Revenue Watch Institute and Columbia Law School

Mr. Michael Mobili, Democratic Republic of Congo Ministry of Mines

Ms. Caroline Nicholas, UNCITRAL

Dr. Achieng Ojwang, National Business Initiative

Ms. Abiola Okpechi, Business and Human Rights Resource Center

Mr. Gerald Pachoud, Special Adviser to the SRSG

Professor Peter Rosenblum, Columbia Law school

Ms. Andrea Shemberg, Legal Adviser to the SRSG

Ms. Tamlyn Stewart, Business Times

Ms. Ashwani Sukthankar, International Commission for Labour Rights

Ms. Yvonne Themba, Shanduka

Mr. Charles Valkin, Bowman Gilfillan

ANNEX 2 – AGENDA

9:00 - 9:30 **Registration**

9:30 – 10:00 **Welcome, Setting the context and introduction to the day**

Gerald Pachoud, Special Advisor to John Ruggie, Special Representative of the Secretary General on Business and Human Rights

10:00 – 11:30 **Presentation of the Research/ Questions & Answers**

Andrea Shemberg, Legal Advisor to the SRSG and author of the Report on Stabilization Clauses and Human Rights

11:30-11:45 **Tea & Coffee**

11:45 - 13:15 **Roundtable Discussion – Stabilization, what it serves and does it pose risks to the state's ability to protect human rights?**

(i) Why do investors ask for stabilization clauses;
(ii) Why do governments agree to stabilization clauses; and
(iii) Do these arrangements pose risks outside the project.

13:15 - 14:15 **Lunch-**Lunch will be provided to participants

14:15 – 15:45 **Roundtable Discussion- Changing practice? Balancing interests?**

(i)How can the various interests be balanced with the state duty to protect – and what does best practice look like?

(ii)What opportunities are there to shape practice in future, and which actors can help to improve practice?

15:45 - 16:00 **Tea & Coffee**

16:00 – 17:00 **Roundtable Discussion – Next Steps** *Developing recommendations for future steps that might be taken to build on the Stabilization Report and the day's discussion;*

(i) What should the SRSG do in this mandate regarding stabilization?
(ii) *What should other institutions do?*

17:00 – 17:30 **Moderator's Closing Remarks**

- *Summary of the day's progress*