EXPLORING EXTRATERRITORIALITY IN BUSINESS AND HUMAN RIGHTS:

SUMMARY NOTE OF EXPERT MEETING

Tuesday, 14 September 2010, the Mossavar-Rahmani Center for Business & Government, Harvard Kennedy School, Cambridge MA, USA

On 14 September 2010, the Special Representative of the UN Secretary-General for Business and Human Rights (SRSG), Professor John Ruggie, convened an expert meeting to explore the role and limits of extraterritoriality in the business and human rights domain, especially vis-à-vis countries in which multinational corporations are domiciled. This note summarizes the discussion's main themes - it does not necessarily represent the views of the SRSG or of any particular participant. The meeting was held under Chatham House rules. Annexes A and B set out the agenda and participants.

1. BACKGROUND

The role that States should play to ensure that companies domiciled in their territories and/or jurisdictions do not commit or contribute to human rights abuses abroad is a complex and sensitive issue. However, as the SRSG has explained, in other policy domains extraterritoriality is not simply the binary matter that it is often depicted as. It comprises a range of measures from public policies through to regulation and enforcement measures, which can be implemented through both domestic measures with extraterritorial implications as well as exercises of direct extraterritorial jurisdiction.[1] Not all of these actions are equally likely to trigger objections under all circumstances.

Thus the SRSG convened this meeting of experts holding a wide spectrum of views and from various regions of the world to further identify how to unpack this complex subject in the area of human rights, and to help distinguish what is truly problematic from measures that are entirely permissible under international law, and which would be in the best interests of all concerned to address governance gaps in the business and human rights space: the victims of corporate-related human rights abuse; host governments that may lack the capacity for dealing with these issues; companies that may face operational disruptions or protracted and unpredictable law suits; and the home country itself, whose own reputation may be on the line.

To further this discussion, participants were encouraged to identify key examples of attempts to address governance gaps in other relevant policy domains responding to transnational challenges. Drawing on these examples, the aim was then to consider governance gaps in the business and human rights domain and potential approaches to addressing them.

[1] See A/HRC/14/27, paras 46 – 50.

2. KEY THEMES

Four overarching themes emerged in the meeting: (a) that extraterritoriality indeed comprises a broad array of measures; (b) the importance of understanding various stakeholders' concerns when it comes to this complex subject; (c) the relevance of so-called "reasonableness" factors in shaping States' preferences in this area; and (d) the necessity to address the worst types of business-related human rights abuses, which otherwise would go without remedy of any kind.

(a) Range of options

Participants generally agreed with differentiating between domestic measures that have extraterritorial implications, and the exercise of direct extraterritorial jurisdiction over actors or activities abroad. While they readily acknowledged that there might be grey areas, they contended that it was important not to term such domestic measures as group reporting obligations, which have extraterritorial implications, as direct extraterritorial jurisdiction--given all of the restrictions that this classification can entail. However, they also argued that such measures should still be approached with care and with appropriate consideration for other States' interests.

It was recognized that within these categories there is a considerable range of permissible options that States may consider in encouraging companies to respect human rights abroad. Not all of these options may be equally problematic to other States and stakeholders.

A number of participants recommended further exploration of the use of public advantages in incentivizing rights-respecting corporate behavior abroad, such as export credit insurance, public procurement contracts, investor protection under bilateral investment treaties and other forms of government support. One participant argued that making such support more dependent on responsibilities, whether at home or abroad, should not be seen as encroaching on other States' sovereignty but as the home State acting more responsibly within an interconnected international system. For example, it was suggested that privileges related to export credit assistance could be made dependent on, or at least connected in some way to, assurances that the supported project will not infringe upon the internationally recognized human rights of affected individuals and communities abroad.

It was repeatedly suggested that business may be more comfortable with accepting liability for certain wrongs committed abroad through State controlled criminal or administrative regimes, rather than through private causes of action. This is because there may be a sense that the latter is potentially more broad-reaching and unpredictable, especially where it is based on imprecise norms. However, it was also argued that a preference for criminal or administrative regimes should be balanced against victims' interests in obtaining a remedy, which may not always be satisfied by criminal or administrative penalties.

Participants agreed that the question of corporate groups can further complicate matters, especially taking into account well established legal concepts such as separate legal personality. For instance, participants discussed whether and how home States should encourage companies domiciled in their jurisdiction to respect human rights throughout their enterprise, including subsidiaries and other business partners abroad. Several participants agreed that the corporate responsibility to respect rights should apply across an enterprise. But they argued that the situation is less clear cut when it comes to

imposing legal obligations on companies in relation to the actions of their subsidiaries or other business partners abroad, largely because of most jurisdictions' reluctance to pierce the corporate veil. Others noted that many domestic measures with extraterritorial implications already apply across a corporate group, such as enterprise wide reporting, and that companies already organize their affairs accordingly. Indeed such laws encourage companies to take a risk-based approach to all of their operations, which may help keep them out of trouble in the first place.

(b) Stakeholders' concerns

Participants highlighted the importance of understanding why various stakeholders either oppose or favor extraterritoriality. Participants suggested that business is concerned that the exercise of direct extraterritorial jurisdiction in particular may create unlevel playing fields as well as increase the risks of litigation and transaction costs. These issues are directly related to concerns regarding legal certainty and predictability, particularly where companies may be subject to conflicting standards in different jurisdictions. Some participants noted again that business may be more concerned by civil suits brought by private actors than criminal and administrative actions initiated, and generally subjected to greater oversight by, the State. It was reiterated that this may be due to the perceived unpredictability of private claims, and the perception that there is a greater likelihood of vexatious or frivolous cases with private actions.

It was argued that for victims of business-related abuse, various extraterritorial measures provide a way to hold transnational corporations accountable for human rights harm where so-called host States either lack the will or capacity to prevent and address such harm. One participant underscored that for such groups, precise legal and policy terms and rules will matter far less than receiving some form of remedy at the end of the day, regardless of where it is provided. Nevertheless, participants also highlighted that those impacted by business activities are likely to be just as concerned as other stakeholders about ensuring that home State action does not undermine efforts to develop the host State's policy, regulatory and adjudicative frameworks.

On the State side, participants reflected that home States worry that host States will deem extraterritorial action to be an interference in their domestic affairs and that it would also disadvantage home State companies. And many host States are indeed sensitive to acts that they may see as potential interference with their ability to address local issues through local mechanisms, or as negatively affecting their competitive edge.

(c) Reasonableness

In addition to ensuring that there is a recognized jurisdictional basis for exercising direct extraterritorial jurisdiction, several participants underlined the importance of States bearing in mind certain "reasonableness" factors to avoid any actual or perceived interference in the domestic affairs of other States. Of course, what factors might make an exercise of extraterritorial jurisdiction more or less reasonable is open to debate. Nevertheless, most participants agreed that the following factors provide a useful starting point.

First, multilateral measures are likely to be more acceptable than unilateral measures. They may also encourage efficiency, shared learning and capacity building for States, and level the playing field for other stakeholders. Moreover, improved consultation and cooperation between States in relation to their

unilateral measures may help avoid duplication of standards as well as promote their consistent and effective implementation.

Second, genuine legal, political and cultural differences among States mean that principles-based and outcomes-oriented approaches to standards that apply extraterritorially, or have extraterritorial implications, may be less problematic than prescriptive, rules-based approaches. They also may make business compliance with differing regulatory regimes more feasible.

Third, where there is a reasonable degree of international consensus on the wrongfulness of an activity, whether for moral, security, economic or other reasons, this can facilitate steps by States unilaterally and multilaterally to work to eliminate wrongful conduct at home and abroad. Such steps may be strengthened when States agree on common standards and enforcement methods, including for resolving competing jurisdictional claims. On this point in particular, participants agreed that harmonization of clearly delimited standards is crucial in alleviating business concerns about legal uncertainty and related transaction costs.

Importantly, several participants agreed that it is unclear under international law whether domestic measures with extraterritorial implications should be designed and implemented with "reasonableness" factors in mind. However, they also underscored that a prudent State should consider how such measures may impact on the interests of other States and stakeholders, to ensure their effectiveness and long-term legitimacy. Underlying this point is the fact that different stakeholders will disagree on "reasonableness" factors and States should do their best to understand the direct and indirect implications of their decisions on relevant stakeholders.

(d) Challenging situations

Participants agreed on the pressing need for concrete action to address existing governance gaps in relation to the worst types of business-related human rights harms. This is particularly so where they occur in areas in which the human rights regime could not possibly be expected to function, such as conflict-affected areas.

For instance, a number of participants argued that States should have policies, laws and mechanisms in place to prevent and address involvement by companies domiciled in their territory and/or jurisdiction in conduct abroad that amounts to international crimes. Others contended that this should also extend to egregious and systemic abuse of all internationally recognized rights given their potentially irremediable nature, even though they may be harder to define in some instances. There was a strong sense that any standards that were the subject of extraterritorial regulation, especially those imposing criminal penalties, should be clearly delimited. Moreover, most participants contended that there should be a clear connection between the company and the regulating State, and that in most cases nationality jurisdiction would be the most appropriate basis. For a company this would usually mean that it was domiciled in the regulating State, such as through incorporation, listing or being headquartered in the State.

Importantly, some participants argued that any limited application of direct extraterritorial jurisdiction to international crimes or egregious abuses by States should not be seen as lessening the need for companies to consider all internationally recognized human rights in meeting their corporate responsibility to respect.

There was a sense that even in these extreme situations the home State should only act where there is some form of demonstrable inability to receive redress in the host State. Participants however diverged on the exact tests that might be relevant in this regard.

Several participants agreed that it was worth considering lessons from the anti-corruption regime, specifically the development of international agreements which in some cases permit or require States Parties to take certain measures with respect to wrongs committed at home and abroad. While participants appreciated that this would need to be subject to serious debate, they emphasized that an international agreement in the business and human rights field could oblige States, in accordance with their own legal systems, to prevent and address the worst forms of human rights harm committed or contributed to by companies domiciled in their territory and/or jurisdiction. Similar to the anti-corruption regime, it was suggested that such an instrument might help level the playing field and create more certainty for States, business and those affected by business-related human rights harm. It could provide clarity on difficult concepts such as corporate groups and aiding and abetting. It could take account of States' diverse legal and policy contexts while promoting core standards. And it could provide for technical assistance and capacity building.

Some participants were more cautious. They emphasized that an international agreement should not be seen as a quick fix because certain States may differ in their commitment to, and fulfillment of their obligations. For example, one participant noted that even though many countries have established laws to combat bribery under various international agreements, very few robustly enforce them. On the other side, even with clear rules about respecting international comity, an international instrument is unlikely to foreclose jurisdictional conflicts.

Other participants argued that an international agreement's long-term success is likely to be assisted by the right progressive steps leading up to it. For instance, in the anti-corruption regime, multilateral agreements as a whole were founded on a strong desire to level the playing field following unilateral action, and several intermediary steps such as the formulation of declarations and other soft law initiatives. Participants contended that the same steps may be beneficial in the business and human rights regime. And several participants underscored that any moves towards multilateral options should not constrain individual States from taking permissible, progressive steps at a faster pace, or set international standards to the lowest common denominator.

Finally, regardless of whether States pursue an international instrument, participants called for greater international cooperation with respect to existing measures. This would include building capacity for host States to enforce their laws and policies in the first place, and supporting multilateral soft-law initiatives such as the Voluntary Principles on Security and Human Rights and the OECD Guidelines on Multinational Enterprises.

ANNEX A - AGENDA

9.00 am - 9.30 am	**Session 1: Outlining the Challenge (SRSG, Prof John Ruggie)**
9.30 am - 11.00 am	**Session 2: Unpacking Extraterritoriality in the Business and Human Rights Domain**
11.00 am - 11.15 am	**Coffee Break**
11.15 am - 1.00 pm	**Session 3: Responding to Governance Gaps - Examples from other Policy Domains Addressing Transnational Issues**
1.00 pm - 2.00 pm	**Lunch**
2.00 pm - 3.30 pm	**Session 4: Responding to Governance Gaps – What is the Role for Extraterritoriality in the Business and Human Rights Domain?**
3.30 pm - 3.45 pm	**Coffee Break**
3.45 pm – 4.45 pm	**Session 5: Revisiting the Challenge - Conclusions**
4.45 pm – 5.00 pm	**Wrapping up (SRSG)**

ANNEX B - LIST OF ATTENDEES

Professor Hervé Ascensio	Professor of Law, University of Paris 1 Pantheon-Sorbonne School of Law (Paris)
Sandra Atler	Legal Advisor, ECPAT Sweden (Stockholm)
John Bellinger III	Partner, Arnold & Porter LLP (Washington DC)
Professor Alan Boyle	Professor of Public International Law, University of Edinburgh School of Law (Edinburgh)
Rachel Davis	Legal Advisor, SRSG's team (New York)
Martyn Day	Partner, Leigh Day & Co (London)
Professor Max Du Plessis	Associate Professor of Law, University of KwaZulu-Natal Faculty of Law (Durban)
Michael Hwang S.C.	Michael Hwang S.C. Senior Counsel and Arbitrator (Singapore)
Dr Rolf Künnemann	Secretary, Extraterritorial Obligations Consortium; Human Rights Director, FIAN International (Heidelberg)
Peter Leon	Partner, Webber Wentzel (Johannesburg)
Professor Peter Muchlinski	Professor of International Commercial Law, School of Oriental and African Studies, University of London (London)
Rachel Nicolson	Senior Associate, Allens Arthur Robinson (Melbourne)
Gerald Pachoud	Special Advisor, SRSG's team (New York)
Winand Quaedvlieg	Confederation of Netherlands Industry and Employers (The Hague)
Dr Jona Razzaque	Reader in Law, Bristol Law School, University of the West of England (Bristol)
Professor John Ruggie	UN Special Representative on Business and Human Rights (SRSG) (Boston)
Thomas Rouhette	Partner, Hogan Lovells LLP (Paris)
John Sherman	Senior Fellow, Harvard Corporate Social Responsibility Initiative (Boston)
John Trenor	Partner, WilmerHale (London)
Claus Von Wobeser	Partner, Von Wobeser & Sierra (Mexico City)
Jonathan Winer	Senior Vice President, APCO Worldwide (Washington DC)
Vanessa Zimmerman	Legal Advisor, SRSG's team (Melbourne)