

**OFFICE OF THE HIGH COMMISSIONER FOR
HUMAN RIGHTS, IN COOPERATION WITH THE
GLOBAL COMPACT OFFICE**



**CONSULTATION ON BUSINESS AND
HUMAN RIGHTS**

**Geneva, 22 October 2004
United Nations Office Geneva**

SUMMARY OF DISCUSSIONS

INTRODUCTION

The Office of the High Commissioner for Human Rights (OHCHR), in cooperation with the Global Compact Office (GCO), held a consultation on “Business and Human Rights” on 22 October 2004.

The Consultation took place in the context of the decision of the Commission on Human Rights to request the Office of the High Commissioner to compile a report on the question of: "The responsibilities of transnational corporations and related business enterprises with regard to human rights". The High Commissioner will submit this report to the next session of the Commission on Human Rights (March/April 2005). The Commission's request to the Office – found in Commission decision E/CN.4/DEC/2004/116 - was as follows:

... to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the draft (Norms)... and identifying outstanding issues, to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers' and employees' associations, relevant international organizations and agencies, treaty monitoring bodies, and non-governmental organizations, and to submit the report to the Commission at its sixty-first session in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation.

Through the consultation, the Office of the High Commissioner for Human Rights and the Global Compact Office aimed:

- a) To consult with a wide range of stakeholders on issues relevant to the report of the High Commissioner on the responsibilities of transnational corporations and related business enterprises with regard to human rights;
- b) To contribute to the Global Compact generally and to the development of the two human rights principles of the Global Compact specifically;
- c) To assist with the consultation process requested of the Office of the High Commissioner for Human Rights by the Commission, through the convening of a multi-stakeholder meeting and through the identification of any gaps in existing business and human rights standards and initiatives.

The agenda of the Consultation was based on the questions raised by the Commission's decision, specifically: existing initiatives and standards with regard to business and human rights; the scope and legal status of those initiatives; any outstanding issues. This summary follows the themes outlined in the agenda. The agenda of the Consultation is attached as annexure one.

Mr. Chris Marsden chaired the Consultation. Three experts assisted the Chairperson, namely: Mr. Aron Cramer, Mr. Andrew Clapham and Mr. Klaus Leisinger.

The following summary of discussions sets out the main themes raised at the Consultation as a means of: first, providing a record of discussions to assist the Office of the High Commissioner in the drafting of its report; and, second, ensuring a record of discussions which could be useful for the continuing dialogue on this question in the wider context of the Global Compact principles and the on-going work of the Office of the High Commissioner for Human Rights. The summary seeks to capture the main points raised by participants but does not attempt a full record of the meeting; for this reason, with the exception of experts, the summary does not attribute ideas and comments to specific participants.

INTRODUCTION

The Deputy High Commissioner, Ms. Mehr Kahn Williams, opened the Consultation. The Deputy High Commissioner reminded the meeting of the two principles of the Global Compact, that companies should: support and respect internationally proclaimed human rights; and, make sure they are not complicit in human rights abuses. The Deputy High Commissioner highlighted that the objectives of the Consultation were modest and in this respect emphasized the importance of dialogue, respect and flexibility in the Consultation, noting that this was part of an on-going dialogue in the United Nations on the issue of business and human rights.

The Chairperson reiterated the importance of dialogue and exchange in the Consultation and the importance of steering away from prepared statements. The Chairperson also suggested combining the discussion on two agenda items, “existing initiatives and standards with regard to business and human rights” and “scope and legal status of these initiatives and standards”. There were no objections.

EXISTING INITIATIVES AND STANDARDS WITH REGARD TO BUSINESS AND HUMAN RIGHTS THEIR SCOPE AND LEGAL STATUS

Mr. Aron Cramer made a presentation on “Existing initiatives and standards with regard to business and human rights”. Rather than present a laundry list of initiatives and standards, he referred to those included in the Guide to Discussion¹ and suggested five categories to understand the increasing number of initiatives and standards on business and human rights. These five categories of initiatives and standards were as follows:

- Legally-based – including national laws, international standards, trade agreements and so on.

¹ The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; The Global Compact; the OECD Guidelines for Multinational Enterprises; the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights; Business Leaders' Initiative for Human Rights; WRAP – Worldwide Responsible Apparel Production (WRAP); SA 8000; Kimberley Process Certification Scheme; the Sullivan Principles; Voluntary Guidelines on Security and Human Rights for the extractive and energy sectors; Global Reporting Initiative; FTSE4Good index; Goldman Sachs Energy Environmental and Social index; the US Alien Tort Claims Act; Individual corporate codes of conduct, statements and principles – such as those of GAP, Rio Tinto, Shell General Business Principles, Nexen Code of Ethics and others; constitutional provisions and national legislation establishing the responsibilities of legal and natural persons nationally for human rights.

- *Contractually-based* – several standards and initiatives are included in contractual relationships – for example, the Voluntary Guidelines on Security and Human Rights have been included in financing contracts.
- *Voluntary initiatives* – there have been a series of voluntary procedures and certification schemes, many developed through multi-stakeholder processes such as the SA 8000.
- *Mainstream financial transaction-related* – initiatives such as the FTS4Good index designed to move markets on social issues as a means of changing the nature of business approaches through markets.
- *Tools and other initiatives* – initiatives such as methodologies for undertaking human rights impact assessments and a range of corporate, civil society, trade union and other initiatives which are less visible at times.

Mr. Andrew Clapham then made his presentation on “scope and legal status of initiatives and standards”. On the question of legal status, Mr. Clapham highlighted two issues of particular importance. The first issue concerned the question of whether an initiative or standard could give rise to binding obligations enforceable in national law. For example, some initiatives and standards, such as the Voluntary Guidelines on Security and Human Rights, can become legally enforceable when they are included as provisions in contracts with security companies. Other initiatives do not create binding legal obligations and thus do not lend themselves to legal enforceability. The second issue emphasized by Mr. Clapham concerned the legitimacy of the creators of initiatives and standards. Thus, if an initiative or standards were adopted by a government or group of governments, this could change its legal weight. Similarly, an initiative or standard developed by a representative group might have greater effectiveness and legitimacy.

On the question of scope, Mr. Clapham highlighted four dimensions.

- *Territorial coverage* - namely whether initiatives or standards follow the company in all activities universally or only in specific countries or regions;
- *Reach* - the importance of distinguishing between initiatives and standards that seek to promote human rights in the activities of business and that aim to ensure respect for human rights by business;
- *Company coverage* – some initiatives and standards limit the companies to which they apply, for example, according to size, while others do not. Some initiatives and standards also limit themselves to the sphere of influence of a company.
- *Added value* – in particular, the extent to which initiatives and standards add value to existing obligations of governments. Of significance here is the fear that some initiatives might blur obligations between States and business, thus undermining the obligations of governments.

The discussion that followed concerned a mixture of comments on the presentations and the themes of the agenda as well as observations reflecting the discussion in the following section on “outstanding issues”. Observations relevant to “outstanding issues” are included in the following section.

The Guide to Discussion listed several initiatives and standards and participants were invited to comment on that list. One participant noted that the latest revision of the OECD Guidelines on Multinational Enterprises included a reference to

human rights, but does not specify particular rights. It was suggested that, in practice, government officials were having difficulties with the human rights dimensions of the OECD Guidelines as human rights was often out of the competence of the government officials dealing with the Guidelines. Moreover, there was no explanation in the Guidelines of what the reference to human rights meant. However, this was in the competence of the Commission on Human Rights. Another participant stated that the reference to human rights in the OECD Guidelines was accompanied by other human rights related provisions in the guidelines, albeit not referred to explicitly in human rights terms.

Beyond the initiatives and standards that were listed in the Guide to Discussion, participants proposed some other initiatives and standards for inclusion in the report. One participant suggested the Framework Convention on Tobacco Control, which seeks to strengthen the accountability of one particular industry. Another participant noted the Bhopal Principles that Greenpeace was currently developing. The Extractive Industry Transparency Initiative was also mentioned, which, although it deals with corruption, was nonetheless relevant to human rights in that it aims to foster an environment conducive to the enjoyment and protection of human rights. Another participant suggested that the report could also refer to the IPOA international peace operations code of conduct, which includes provisions on private military and security companies. A business participant suggested the report could also refer to the work of the Danish Institute for Human Rights on impact assessments.

On the categorization of initiatives and standards identified by Mr. Cramer, one participant suggested breaking the category of “voluntary initiatives” up into smaller categories as it would be important not to confuse certification schemes with voluntary principles and so on. The importance of recognizing the linkages between the categories was pointed out, along with the fact that the different categories can help reinforce one another. Another participant emphasized the importance of indicating the authority behind each of the initiatives and standards suggesting that the *Universal Declaration on Human Rights* and the two Covenants on human rights that make up the International Bill of Human Rights as well as the ILO Conventions had significantly greater authority in this context than other initiatives.

OUTSTANDING ISSUES

Mr. Klaus Leisinger led the discussion on “outstanding issues”. He noted that the *Universal Declaration of Human Rights* contained the most widely recognized norms on human rights and it went without saying that companies would do their best to uphold those standards. He also emphasized that States remained the primary duty bearers of human rights but that companies, nonetheless, could have a role to play in ensuring respect for those rights. In particular, an outstanding issue was what to do in the case of a government that was unwilling or unable to respect its obligations under human rights law. Mr. Leisinger also noted that the majority of business leaders did not want greater regulation.

In terms of outstanding issues, Mr. Leisinger suggested the following:

- *Verification* – while companies were permanently monitored by non-governmental organizations, what could be done to improve accountability of business, particularly those that were not complying with codes of conduct. Improving verification, according to Mr. Leisinger, was in the interests of business.
- *The meaning of complicity* – what are the boundaries of complicity? For example, if a company paid taxes to a government which used funds for human rights violations, would the company be complicit? If local laws did not protect human rights sufficiently, would the company be complicit if it exploited those gaps in local laws?
- *Indicators* – Mr. Leisinger also identified a need for indicators to measure what was expected of companies. Importantly, these indicators would sometimes differ from sector to sector. For example, indicators on torture might apply to all sectors, while indicators on health and access to treatment would be relevant specifically to the pharmaceutical industry.
- *Jurisdiction* – in particular, in what ways might a business evade the jurisdiction of a State and how might international measures be appropriate in this context.
- *The need to de-stigmatize the debate* – Mr. Leisinger noted distrust between stakeholders on this issue. He also highlighted the fact that the worst performing businesses tended to determine the picture that society had of business.

The rest of this section groups the various outstanding issues identified by participants during discussions.

The identification of the rights relevant to the activities of business and corresponding responsibilities of business in this regard

Participants discussed several approaches, some considering which rights were applicable to business activities and others examining the responsibilities of business rather than identifying specific rights. For example, an NGO participant suggested that there would be value in identifying certain core rights relevant to the activities of business (such as the prohibition on the use of slave labour) and then other rights that might be less fundamental to the activities of business. In this regard, several participants warned against classifying rights in terms of being fundamental or not as this could threaten the principle of the indivisibility of human rights. An NGO participant highlighted the importance of “sphere of influence” in determining the responsibilities of business with regard to human rights and warned against defining particular rights at stake which differ according to the business sector and the sphere of influence of the business. An academic participant suggested that all human rights were relevant to the activities of business – what was more important was the need to transpose those rights to a business setting so as to understand better the responsibilities of business. In this regard, several business participants emphasized the need to use terminology that business people can understand.

Instead of identifying particular rights relevant to the activities of business, several participants examined the responsibilities of business in relation to human rights. In this context, several participants considered a layered approach. For example, an NGO participant suggested the identification of what business “must do”, “should do” and “could do” in relation to the protection and promotion of human rights. An academic participant suggested the identification of core responsibilities of

business that might eventually have a legal basis which could run in parallel to the identification of voluntary sets of guidelines and human rights approaches to development to be promoted at the policy and advocacy level. Other participants considered the relevance of adopting the typology used to illustrate State obligations in relation to economic, social and cultural rights, namely, the obligation to respect, the obligation to protect and the obligation to fulfil human rights. One business participant said that the respect, protect and fulfil typology had been useful in explaining human rights notions to business people who were not normally used to human rights terms and concepts.

The need to understand concepts related to responsibilities of business with regard to human rights – sphere of influence and complicity

Several participants highlighted the importance of understanding the concepts of “sphere of influence” and “complicity” as part of the process of identifying and examining the responsibilities of business with regard to human rights. Participants noted that both of these concepts were receiving increasing attention in the wider area of corporate social responsibility. Participants also noted that the concepts were specifically mentioned in the Global Compact principles.² A representative of a business and human rights initiative piloting the application of human rights standards such as the draft Norms also emphasized the significance of understanding “sphere of influence” and “complicity” to that project. Some other business participants also emphasized the need to focus on practical action, on how human rights principles and these concepts can be applied in a practical way.

Another participant distinguished the responsibilities of business in relation to suppliers based in particular on the particular influence a company has over those suppliers. For example, it might be desirable to hold a company accountable for not raising the question of respect for human rights with suppliers in contractual negotiations and so on. This would be something that could come within a business’ sphere of influence. On the other hand, the same business should not be held liable for how those suppliers might be acting in relation to human rights.

The need to identify which businesses have human rights responsibilities

The question of which businesses should have responsibilities with regard to human rights was relevant to any consideration of business and human rights. One academic participant believed that the responsibilities should apply to all businesses. A business participant suggested that bigger companies might have to carry more responsibilities in some situations.

The appropriate balance between the responsibilities of business and the obligations of government

Business, NGO and academic participants emphasized the importance of ensuring that the identification and promotion of business human rights

² The Global Compact asks companies to embrace, support and enact within their sphere of influence, the ten principles of the Compact. In relation to human rights, these are: first, that business should support and respect internationally proclaimed human rights; and second, that businesses should make sure that they are not complicit in human rights abuses.

responsibilities should not undermine States' obligations under human rights law. The primary responsibility of governments for promoting and protecting human rights was emphasized by several speakers. Many participants highlighted the fact that business could not and should not replace government and that the two should have complementary roles in protecting human rights. Several participants emphasized the importance of not letting governments "off the hook". One business participant emphasized that business is a key engine of sustainable development and the need to ensure that neither the positive contribution of business nor government is undermined. To do this, it is important to understand what are the factors that can undermine business and that can undermine governments. Another business participant suggested that the Commission should focus on strengthening the capacity of national governments to create and enforce human rights laws. Yet another business participant noted that business should not benefit from failures of the government to respect human rights, but that business cannot fill the gap of government in such cases either. They would like to see further exploration of the "boundary" question. On the other hand, an NGO participant warned against over-emphasizing the right balance between government and business responsibilities as it was abstract and could detract attention from the real issue, namely the need to determine the meaning of "complicity" in order to understand situations where a business was complicit in the abuse of human rights. The NGO participant also warned against the suggestion that the identification of the responsibilities of business with regard to human rights through an agreed framework might privatize human rights; the participant noted that the current system of voluntary codes that differed between companies could amount to a privatization of human rights.

The need to consider gaps in protection of human rights

Several participants also raised the need to consider how to protect and enforce human rights responsibilities of business where there were gaps in protection. In this context, participants highlighted jurisdictional issues. For example, one NGO participant suggested that the size and mobility of some businesses allowed them to avoid the jurisdiction of national governments. Some participants highlighted the need to consider how to promote and protect human rights in weak governance zones such as conflict areas, failed states and badly governed states. One participant noted that businesses were sometimes unaware of what was happening in their operations in weak governance zones until after a violation had occurred.

Questions of accountability

Several participants considered the degree of accountability needed to ensure the enjoyment of human rights in the activities of business. Some participants suggested that the level of accountability might differ depending on the particular responsibilities in question. For example, an NGO participant indicated that if there were an identification of what companies "must do", "should do" and "could do" to protect human rights, the latter two responsibilities would be more conducive to voluntary initiatives while the former set of responsibilities – "must do" – might require stronger accountability. Several participants suggested that it was more important to identify business responsibilities and then questions of accountability could be considered later, noting in particular that questions of accountability could polarize the debate at this stage.

In calling for greater accountability of business, an NGO participant noted that there was fatigue and mistrust of voluntary initiatives. In particular, the participant stated that voluntary codes worked for the well-intentioned but they were not successful in making a level playing field and in protecting human rights against the actions of less well-intentioned actors. However, other participants underlined the importance of voluntary initiatives as means to gather consensus around human rights, develop expertise and a culture of compliance. At the same time, one participant noted that the burden of proof should be on the proponents of voluntary initiatives that these initiatives would sway unwilling companies and would not continue to confuse the human rights responsibilities of business.

Another issue concerned the situation where a business might be promoting human rights in one part of its operations through voluntary philanthropic measures – for example, by building a school – while another part of the business might be failing to respect human rights elsewhere. An NGO participant noted that voluntary initiatives under the current corporate social responsibility model had virtues, but were not a substitute for other enforceable approaches. A number of business participants noted that voluntary and regulatory approaches were not mutually exclusive - all had the potential to make a positive contribution.

An NGO participant illustrated how voluntary initiatives could lend themselves to greater accountability over time if they were included in business agreements. Pitting voluntary initiatives against mandatory initiatives was therefore illusory – the issue was more complex. One business participant referred to the experience of a business that had taken the Voluntary Principles on Business and Human Rights and incorporated them into a host country investment agreement, thus rendering them binding.

An NGO participant raised the issue of verification of standards and suggested the report to the Commission could examine verification systems, in particular their accessibility, speed, legitimacy, transparency, independence and the degree with which they provide remedies. A business participant underlined the important role that governments should play in any verification process. If the United Nations were involved, then it would have to be system wide and not simply replicate what other inter-governmental organizations were doing. A participant from an employer organization suggested that such questions had to be part of a wider consultative process, which was only in its infancy.

Several participants discussed an initiative that would allow victims of alleged rights abuses to post information on a website. The business in question would then be invited to respond on that website. While an NGO participant suggested that this could be a means of creating a dialogue, a business participant noted the importance of upholding the presumption of innocence. Another business participant suggested that this was a heavy handed stick which did not give the business an opportunity to rectify the problem or respond to the issue prior to any allegations being made publicly.

The value of having an agreed framework of universal human rights responsibilities of business

Participants discussed the relevance of developing or agreeing on a statement or universal human rights responsibilities of business at the international level. One participant from an employer group underlined the importance of national governments in setting out the responsibilities of business with regard to human rights. It was also suggested that the Commission on Human Rights could provide some clarity to the concepts of sphere of influence and complicity.

Several participants promoted an international statement of universal human rights responsibilities of business as a means of providing a level playing field for business in the area of human rights. A level playing field would provide the means to ensure that companies willing to respect human rights would not be at a competitive disadvantage to those companies willing to sacrifice the protection of human rights to gain market advantages. A business participant, in distinguishing between core responsibilities and other business responsibilities with regard to human rights, suggested that putting all the human rights responsibilities of business into one document could be confusing for business. Another business participant suggested that there was a need for an authoritative statement on the responsibilities of business with regard to human rights and hoped that the High Commissioner might single this out for further discussion.

A participant from an employee organization suggested that it would be too ambitious to speak of a consensus on the need for a new document; however there was a need to consider the application of the *Universal Declaration* to business activities. The participant noted that there were many initiatives and standards on labour, but that some of them did not reflect agreed international labour standards and instead tended to rephrase or limit standards. Some participants underlined that more was needed than simply a restatement of the *Universal Declaration on Human Rights* or the two International Covenants on human rights. For example, article 2(1) of the *International Covenant on Economic, Social and Cultural Rights*, which obliges States to “take steps ... to the maximum of its available resources,” would not be relevant to business – a United Nations statement on the human rights relevant to business would be able to identify those parts of international human rights treaties that were relevant to business, as well as to explain terms such as “sphere of influence” and “complicity”. An NGO participant stated that, in the absence of an international statement on human rights for business, a space existed for rogue companies to act in ways not constrained by current corporate social responsibility initiatives, particularly in the context of States that were unwilling or unable to protect human rights.

Participants referred to the draft Norms of the Sub-Commission on the Promotion and Protection of Human Rights. One participant from an employer organization stated that the draft Norms were “tainted”, unwanted and legally incorrect. However, several other participants from both NGOs and business noted that, while not perfect, they contained “useful elements” as the Commission on Human Rights had itself identified. Consequently, it could be helpful to identify those “useful elements” and possibly to refine the draft. An NGO participant suggested that if the draft Norms were ignored, any attempt to identify a common framework on business and human rights would result in more or less the same statement (leaving aside some of the language used and the implementation

provisions). However, a business participant warned against identifying any one initiative as a starting point for such an exercise which could be going down a “blind alley”. An NGO participant suggested that ignoring the draft Norms as a relevant initiative would set the discussion on business and human rights back in time. A participant from an employee organization noted that not all the rights in the *Universal Declaration of Human Rights* were included in the Norms and suggested that the Universal Declaration was a more appropriate starting point.

The need for tools to assist in ensuring respect for human rights in business activities

Several participants noted the need to explain the human rights responsibilities of business to businesses in practical terms. Participants suggested some ways to do so, including through the elaboration of universal human rights principles for business as well as through the development of tools. As an example, some participants referred to human rights impact assessment tools. A business participant suggested that checklists on human rights concerns could be prepared and then tested at the local level. Another business participant noted that any work at the international level on the question of business and human rights should not undermine the contribution of business or undermine business structure. An NGO participant emphasized the need for indicators and benchmarks to measure what businesses were and were not doing.

A business participant suggested that tools for implementing and applying standards were important in understanding what those standards really meant in practice. In this way, standards could be reworked in light of experience. A participant from an inter-governmental organization noted the importance of tools - such as human rights primers for management, training modules, impact assessment methodologies, human rights modeling exercises - as a means of capacity building in companies.

The importance of consultation

Participants underlined the importance of the participation of stakeholders in any process that the Commission on Human Rights would undertake in this area. Participants referred specifically to the importance of including business, trade unions, indigenous peoples, the informal sector and victims of human rights violations. Participants also emphasized the need to include people and businesses from developing countries.

Follow-up to the report of the High Commissioner

While the question of follow-up was not included in the agenda, the Chairperson opened the floor for suggestions of possible ways forward after the 2005 session of the Commission on Human Rights. These included the following, which received varying degrees of support:

- The importance of continued discussion and consultation with all stakeholders. In this regard, both business and NGO participants emphasized the need to increase participation of people and businesses from developing countries;

- Further discussion on an agreed framework that identifies the responsibilities of business with regard to human rights;
- The need for expertise and independence in any follow-up that can identify policy options. This could be through the High Commissioner, the appointment of an advisor by the High Commissioner, an expert appointed by the Commission or a Commission working group of experts to consider the issue;
- The development of tools such as human rights impact assessment methodologies, management primers, training modules that could assist businesses to promote and protect human rights in their activities;
- The importance of building consensus on the question of business and human rights and avoiding any early push for agreement on more difficult issues.

**OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
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CONSULTATION ON BUSINESS AND HUMAN RIGHTS - 22 OCTOBER

AGENDA

8:00 (onwards) – Accreditation (Villa des Feuillantines – outside the UN compound)

10:00 – 10:30 – *Introduction*

Welcome – Deputy High Commissioner for Human Rights

Comments by the Chairperson – Mr. Chris Marsden

10:30 – 11:30 – *Existing initiatives and standards on business and human rights*

Presentation – Mr. Aron Cramer

The consultation will attempt to identify those existing initiatives and standards on business and human rights that are most relevant to the report of the High Commissioner on “Responsibilities of transnational corporations and related business enterprises with regard to human rights”.

Discussion

11:30-12:00 – *Break*

12:00 – 13:00- *Scope and legal status of existing initiatives and standards*

Presentation – Mr. Andrew Clapham

The consultation will attempt to identify some objective criteria to compare the existing initiatives and standards identified in the previous section from a human rights perspective.

Discussion

13:00 – 14:30 - LUNCH

14:30-15:30 – *Outstanding issues*

Presentation – Mr. Klaus Leisinger

What human rights are relevant to the activities of business and what are the responsibilities of business in this regard?

Discussion

15:30 – 15:45 – *Break*

15:45 – 16:45 – *Outstanding issues (cont.)*

What is the most appropriate way to ensure respect for human rights standards by business – and in particular what might be the value of having a statement of universal human rights responsibilities of business?

Discussion continues

16:45 – 17:00 – *Closing*