**United Nations Special Rapporteur on extreme poverty and human rights**
**Consultation on the human rights impact of fiscal and tax policy**

**Contribution from the Centre for Research on Multinational Corporations (SOMO) in the Netherlands**

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**Background and introduction**

SOMO is an independent, not-for-profit research and network organisation working on social, ecological and economic issues related to sustainable development. Since 1973, the organisation investigates multinational corporations and the consequences of their activities for people and the environment around the world. See for more information: www.somo.nl

SOMO investigates the impact of tax avoidance by multinationals and harmful tax regimes, with a focus on the role of the Netherlands in providing international tax planning opportunities and investment protection for corporations. In this work, SOMO closely collaborates with its local partners in Africa, Asia and Latin America, the international and Dutch Tax Justice Networks and the European network Eurodad. After years of civil society pressure and negative media coverage, the Dutch government admitted in 2013 that the country is being used by internationally operating businesses to avoid tax, amongst others, using Dutch tax treaties, as well as recognising the negative impact this has for other countries' tax revenues.[1] SOMO has played an important role in this recognition by publishing numerous reports on the harmful effect of tax avoidance using Dutch holding company structures and by advocating at national and regional level for an end to tax regimes that are harmful from a public interest and human rights perspective.

SOMO's submission to the United Nations Special Rapporteur on extreme poverty and human rights is based on the following reports SOMO has written on the subject:

1. In 2007, SOMO published its first report on how the Netherlands facilitates international tax avoidance. This SOMO report investigates the extent to which the Netherlands can be regarded as a tax haven, and analyses the factors behind this, such as the unique network of bilateral treaties for the avoidance of double taxation and the special fiscal regimes for group financing operations. It estimates the number of 'mailbox companies', mostly established to route financial flows through the Netherlands purely for fiscal reasons, at almost 20,000 and found a steady increase in the number of these so-called conduit entities and the amount of assets they hold.
2. The report Should the Netherlands Sign Tax Treaties with Developing Countries? (June 2013) shows that Dutch tax treaties lead to a total annual revenue loss of € 554 million for 28 developing countries because they allow companies to use Dutch conduit entities with little or no material presence in the Netherlands to reduce corporation tax on outgoing payments from subsidiaries in the countries of operation. This conservative estimate - only losses on dividends and interest flows are included - illustrates the need for anti-abuse measures in treaties and domestic law to stop companies from 'shopping' for tax treaties to reduce their tax bill in poor countries. The report finds fundamental flaws with the current tax treaty system and

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[1] http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2013/08/30/kabinetsreactie-op-seo-rapport-overige-financiele-instellingen-en-ibfd-rapport-ontwikkelingslanden/kabinetsreactie-op-seo-rapport-overige-financiele-instellingen-en-ibfd-rapport-ontwikkelingslanden.pdf

proposes short- and long-term measures to improve the international tax system for developing countries and in the public interest.

3. SOMO's most recent research Avoiding Tax in Times of Austerity (September 2013) has shown how easy it is for a “mailbox” company to make arrangements with the tax authorities that lead to double non-taxation of income. The European Commission has announced that it plans to investigate these tax deals, currently applied by the Netherlands, Ireland and Luxembourg, for violation of EU competition rules.
4. SOMO's report Private Gain, Public Loss (July 2013) showed the risks associated with a lack of transparency: human rights violations, money laundering, corruption and other illegal business.

In this submission, SOMO focuses on the extraterritorial human rights impact of the Dutch tax and investment policy and treaties. Here lies our expertise. The important issue if the domestic impact of tax avoidance is currently not analysed by SOMO; we hope that other civil society organisations can provide the Special Rapporteur with submissions on the domestic human rights impact impact of tax planning in the Netherlands.

**Question 8: Has your government proposed or supported increased intergovernmental tax cooperation? What is its official position on tax havens? What is its official position on illicit flows of capital, e.g. measures to stop transfer pricing, proposals on country-by- country reporting, automatic exchange of information, disclosure of beneficiary ownership?**

8.1 Official position on tax havens and illicit financial flows (and the role of the Netherlands)

The Netherlands does not have an official position on tax havens neither does it maintain a list of tax havens (unlike France, for instance). The country follows the OECD’s list of un-cooperative tax havens.[2] However, in NGO reports, media and in official government statements the Netherlands has been dubbed a tax haven itself. The country has long faced criticism from the OECD,[3] the European Union[4] and the United States[5] for a fiscal regime that allows for the erosion of other countries’ tax bases through harmful tax competition and conduit structures. Recent media reports about major profitable multinational corporations paying no – or very low –corporate income tax thanks to intricate tax avoidance schemes have highlighted the role of the Netherlands in international tax avoidance.[6] Generally, there are two broad categories of tax havens. The first group consists of the typical offshore financial centre that primarily exists because it offers the lowest tax rate and financial secrecy. The

[2] There are currently no countries on the OECD’s list of un-cooperative tax haven, see: http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm

[3] The OECD ranked the Netherlands as one of the top five industrialised countries that supported harmful tax competition. It identified nine potentially harmful tax practices in Dutch law, excluding holding company regimes and similar provisions: because of the “complexities raised by such regimes, including their possible interaction with tax treaties”, the Forum decided further research was needed to assess the effect of holding company structures. See OECD, ‘Towards Global Tax Co-operation. Progress in Identifying and Eliminating Harmful Tax Practices‘, available at http://www.oecd.org/dataoecd/9/61/2090192.pdf#search=%22towards%20global%20tax-cooperation%22

[4] The EU Code of Conduct Group on Business Taxation (Primarolo Group) was designed to detect measures constituting harmful tax competition, i.e. measures that “unduly affect the location of business activity in the Community by being targeted merely at non-residents and by providing them with a more favourable tax treatment than that which is generally available in the Member State”. In a 1999 report the Group identified 66 tax measures with harmful features, of which 40 were occurring in EU Member States, 15 in Dutch Law and 7 in the Netherlands Antilles.

[5] US Commerce data show that US businesses kept $118bn of income in Dutch holding companies between 2006 and 2009 (Vanessa Houlder, Megan Murphy and Jeff Gerth, ‘Tax wars: the accidental billion-dollar break‘, Financial Times, 27 September 2011, available at http://www.ft.com/cms/s/0/69703dfe-e82e-11e0-9fc7-00144feab49a.html#axzz1fTOPnukW (accessed 20 February 2013)), and US President Barack Obama famously named the Netherlands a tax haven in May 2009 (‘Netherlands surprised at Obama tax haven slur‘, NRC Handelsblad, 5 May 2009, available at http://vorige.nrc.nl/international/article2232958.ece

[6] There are many examples, but Google represents one of the highest tax savings using the Netherlands as reported in the media so far. See Jesse Drucker, ‘Dutch Sandwich saves Google billions in taxes. Internet giant uses complex structure to keep its overseas tax rate at 2.4%‘, Bloomberg Business Week, 22 October 2010, available at , http://www.msnbc.msn.com/id/39784907/ns/business-us_business/t/dutch-sandwich-saves-google-billions-taxes/#.UMpKMuTAeSo

second group consists of financial centres that combine a regular tax regime for domestic economic activities with a favourable regime for economic activities in a foreign country. They might have internationally recognised transparency and information exchange agreements in place, so they are not *per se* classified as secrecy jurisdictions. The Netherlands is a tax haven of the second type that specialises in the provision of intermediary services that facilitate inward and outward financial flows, typically from countries where real economic activities take place to low-tax offshore financial centres in order to reduce or eliminate tax payments for owners of capital.[7] These flows are enabled by a network of double taxation treaties and specific national tax regulations. The second type of financial centre complements the first, and therefore their use for corporations seeking to avoid paying taxes lies in their combination. Together, they permit firms to move profits from foreign subsidiaries to a foreign parent company or branch office through the Netherlands.

Foreign MNCs often set up financing structures that route investment through the Netherlands because the country offers a profitable fiscal climate with a reduction of tax charges on dividends, interest, royalties and capital gains income.[8] The Netherlands also offers political weight guaranteeing action will be taken when host states attempt to challenge treaty protection and a well-established infrastructure for conduit entities, such as a trust sector and qualified lawyers and accountants. The Netherlands furthermore specialises in royalty structures, offering legal recognition and good protection to patents, trademarks, copyrights, industrial designs and models.[9] Another advantage of using a Dutch conduit entity to invest in host states is the country's large investment treaty network.

### 8.2 International tax cooperation

The Netherlands has signed 29 Tax information exchange agreements (TIEAs) (of which 25 with non-cooperative jurisdictions)[10] and 91 double taxation agreements (DTAs).[11] Details about the number of requests under the TIEAs are not published, but the Ministry of Finance, in reply to SOMO questions, informed that in 2011, the Netherlands received 423 information requests (527 answers to specific requests for information were provided, including some from the previous year. The Peer Review Report of the OECD rates the Dutch tax administration's cooperation in requests positively, but advised the Netherlands to update exchange of information provisions in old DTAs that no longer comply with international standards.[12]

### 8.3 Measures to stop transfer (mis)pricing

The Netherlands is a member of the OECD Task Force on Tax and Development, which has a sub-group on Transfer Pricing. Transfer pricing is currently the applied method of allocating profit across jurisdictions, yet developing countries face numerous problems to identify fraudulent application of the rules that are used to shift profits from their jurisdictions to low-tax jurisdictions and thereby evade or avoid tax (so-called transfer mispricing). The Netherlands is a believer in transfer pricing as the best system currently available to deal with international profit allocation and is a supporter of the OECD as the international standard setting forum in this area. SOMO and other civil society networks, however, point out that transfer pricing is too prone to abuse to be an effective profit allocation tool and has

[7] 'Onshore financial centres: Not a palm tree in sight. Some onshore jurisdictions can be laxer than the offshore sort', The Economist, 16 February 2013, available at http://www.economist.com/news/special-report/21571554-some-onshore-jurisdictions-can-be-laxer-offshore-sort-not-palm-tree-sight.

[8] For a detailed explanation of the different types of holding structures common to the Netherlands, see SOMO, 'The Netherlands: a Tax Haven?', (2006), http://somo.nl/publications-en/Publication_1397.

[9] Deloitte, 'Taxation and Investment in Netherlands 2011', http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Taxation%20and%20Investment%20Guides/2011/dttl_tax_guide_2011_Netherlands.pdf

[10] OECD website, 213, 'List of Tax Information Exchange Agreements (TIEAs): Netherlands', http://www.oecd.org/tax/transparency/taxinformationexchangeagreementstieasnetherlands.htm.

[11] Ministry of Finance, 2013, 'Verdragenoverzicht per 1 oktober 2013' [Overview of treaties as of 1 October 2013], http://www.rijksoverheid.nl/documenten-en-publicaties/circulaires/2013/07/01/verdragenoverzicht-per-1-oktober-2013.html.

[12] OECD, 2011, Global Forum on Transparency and Exchange of Information for Tax Purposes, Peer Review: The Netherlands 2011: Combined: Phase 1 + Phase 2: Legal and Regulatory Framework, http://tinyurl.com/pa9ufzp.

called for a more fundamental reform of the international tax system. This has recently been recognised by the IMF[13], which writes:

"Recognition that the international tax framework is broken is long overdue. Though the amount is hard to quantify, significant revenue can also be gained from reforming it. This is particularly important for developing countries, given their greater reliance on corporate taxation, with revenue from this taxation often coming from a handful of multinationals."

Rather than defending transfer pricing, the Dutch government should support these calls and think innovatively with the international state community and civil society organisations about alternatives, such as unitary taxation.[14]

8.4 Country-by-country reporting

The Dutch government does not require country-by-country reporting for companies and is not planning to introduce such reporting before the end of 2013. The Dutch government “support the discussion in the EU context” on whether all large companies and groups should be subject to rules on country by-country-reporting (CBCR), similar to those adopted for banks as part of the fourth Capital Requirements Directive.[15] There are mixed indications whether this support for the discussion also means support for the proposal itself. Recently, the cabinet has confirmed that it executes the parliament’s resolution to support CBCR at European level.[16] However, other documents again only state that the Netherlands supports the initiative to discuss the expansion of transparency requirements for banks included in CRD IV to other sectors. In general, the government reiterates that it generally supports enhanced transparency but also emphasises the negative economic consequences of public disclosure and a global level playing field. As such, the government does not support unilateral application of CRBC.[17] Recently, the German daily newspaper ‘*SüddeutscheZeitung*’ disclosed minutes of the Council working group meeting of 17 September 2013 where CBCR was discussed. It appeared that out of all 28 member states, only two (France and Belgium) are in clear favour of the inclusion of CBCR in the Financial Reporting package. The Dutch representative is said to have delivered a lengthy statement against CBCR.[18]

8.6 Disclosure of beneficial ownership

Beneficial owners of legal entities only have to be disclosed to the Dutch Company Register when they own 100 per cent of the legal entity. This has been criticised by, amongst others,[19] the IMF as falling short of international standards regarding the verification of the identity of beneficial owners.[20] Indeed,

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[13] IMF, Fiscal Monitor, October 2013, http://www.imf.org/external/pubs/ft/fm/2013/02/fmindex.htm

[14] Sol Picciotto, 2012, Towards unitary taxation of transnational corporations, http://www.taxjustice.net/cms/upload/pdf/Towards_Unitary_Taxation_1-1.pdf

[15] Response from the Dutch government to questionnaire, received October 2013.

[16] Records of the Dutch Parliament, *Kamerstukken II 2012/13, 25 087 no. 48*, p. 16., available from https://zoek.officielebekendmakingen.nl/dossier/25087/kst-25087-48, and *Kamerstukken II 2012/13, 25 087, no. 38*., available from https://zoek.officielebekendmakingen.nl/dossier/25087/kst-25087-38.

[17] Frans Weekers, Junior Minister of Finance, and LiliannePloumen, Minister of Foreign Trade and Development, *Kabinetsreactie op SEO-rapport OverigeFinanciëleInstellingen en IBFD-rapport ontwikkelingslanden [Cabinet response to SEO report Other Financial Institutions and IBFD-report Developing Countries]*, letter to the Dutch parliament on August 30, 2013, available from http://tinyurl.com/pmw6zsy.

[18] Alexander Hagelüken, “Transparenz, nein danke!“, *Süddeutsche Zeitung*, 10 oktober 2013, reprinted on www.sven-giegold.de/2013/transparenz-nein-danke/. Questions have been asked in the Dutch parliament, see http://www.europa-nu.nl/id/vjdwhek5t9zk/vragen_groenlinks_sp_over_het_nederlands to which the Minister and State Secretary answered that the Netherlands, in general, supports international initiatives that aim to increase transparency. At the same time, the Netherlands takes into account the possible negative consequences of the public availability of such information. Source: Answers to parliamentary questions, see https://zoek.officielebekendmakingen.nl/ah-tk-20132014-444.html

[19] Molengraaff Instituut voor Privaatrecht Multinational en Transparantie (Utrecht: Universiteit Utrecht, 2012, unpublished) p. 38.

[20] IMF, 2011, ibid, p8. The Dutch anti-money laundering and financing of terrorism law (WWFT) obliges institutions to apply Dutch standards on customer due diligence (CDD) to branches and subsidiaries in foreign countries, but the requirements do not extend beyond CDD to other AML/CFT measures and do not apply to branches and subsidiaries in EU Member States (ibid, p. 11). Furthermore, the IMF criticizes that exemption from any form of CDD for a pre-defined list of certain institutions, saying it

ownership percentages are manipulated to avoid this registration requirement.[21] The government has announced a national register with ownership data of legal entities; however, it will not be open to the public.[22] The 2011 FATF report on the Netherlands noted that the obligation to provide information on shareholders to the tax authorities does not extend to usufructuaries (enjoying the use of but not owning assets or land)[23] and other share beneficiaries.[24] From letters to the Dutch parliament, it can be derived that the government does not see the necessity to disclose beneficial ownership information of companies, trusts and foundations to the public.[25] The government refers to the Global Forum on Transparency and Exchange of Information as the forum where discussion on these issues take place and suggests that focus is on information gathering for purposes of effective tax collection and not public accountability.

**Question 9. Has your government proposed or supported international tax policies such as a financial transactions tax? If so, please specify in which form. If not, please explain the nature of its objection. Do revenues from such taxes (if in place) go into general revenue or are they earmarked for specific sectors or programmes? If the latter, which programmes?**

Deviating from a core group of 11 European Members states, the Netherlands does not support a FTT. In response to parliamentary questions published on 18 February 2013, the State Secretary for Finance has indicated that the Netherlands will only participate in the EU financial transaction tax under the following conditions: Pension funds are excluded from the tax; the accumulation of FTT and banking tax may not be disproportionate; the proceeds of the tax flow back to the Member States.

Regarding international cooperation on tax matters, the Dutch government does not see the need for the establishment of an intergovernmental body on tax matters under the auspices of the United Nations.[26] It refers to extensive debates on this topic during ECOSOC meeting June 2011 and states that "NL acknowledges the importance of worldwide participation in tax matters. However duplication by the UN of the good work done by OECD should be avoided. Furthermore, in the field of transparency and exchange of information for tax purposes, The Global Forum on Transparency and Exchange of Information is the premier international body for ensuring the implementation of the internationally agreed standards of transparency and exchange of information on request in the tax area."[27] The Dutch government states that it supports the development of a global system for automatic exchange of information for tax purposes as part on an international convention. However, it refers to the signing and ratification of the multilateral convention on mutual assistance in tax matters, which was developed jointly by the Council of Europe and the OECD.[28]

**Question 10: Is your government party to international investment or trade agreements that curtail your country's capacity to levy taxes, or the capacity of your partner country/ies to levy taxes? Is your government party to investment contracts or concessions that restrict your**

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"raises a number of fundamental concerns about the CDD process". Although the FATF standard does allow for reduced or simplified due diligence, "this assumes some level of CDD in all circumstances. The WWFT provides for a blanket exemption from all CDD measures in Article 3 WWFT. In the circumstances provided under the WWFT, it is apparent that, in the defined set of "low-risk" circumstances, institutions are specifically exempted from the vast majority of the key elements of the CDD process." (p145).

[21] IMF, 2011, ibid.

[22] I.W. Opstelten, Dutch Minister of Security and Justice, 22.10.2013, 'BeantwoordingKamervragenmeerdan 3500 postbusbedrijven in Nederland overtreden de wet' [Answer to parliamentary questions about more than 3500 mailbox companies in The Netherlands breaking the law],http://tinyurl.com/pt9k2c3.

[23] A temporary legal right to derive profits from property owned by others.

[24] FATF, 2011, ibid.

[25] See for example: IFZ/2012/ U695, January 2013, *Beantwoordingvragen van het lid Klaver (GroenLinks) over het artikel 'Bankenactief in belastingparadijzen [Answers to questions of Member of Parliament Klaver about the article 'Banks active in tax havens']*. Available from http://tinyurl.com/pmkbwyl.

[26] Response from the Dutch government to questionnaire, received October 2013.

[27] Ibid

[28] Ibid

**government's ability to levy taxes on certain companies or sectors? What measures (if any) were taken to mitigate impacts of these limitations on your country's (or other countries') ability to raise adequate resources in order to fulfil human rights obligations?**

The Netherlands provides a large tax and investment treaty network reducing withholding taxes in countries of operation and protecting investments, allows for a number of deductible expenses (such as interest and R&D costs) and other fiscal advantages such as the participation exemption and advance tax rulings aimed at attracting international businesses,[29] whilst not applying withholding tax on outgoing payments.[30] These combined factors make the Netherlands one of the world's most important conduit havens (see our answer to 8.1 above).[31]

In June 2013, the Netherlands has 92 bilateral tax treaties.[32] Seven of these are low income countries[33], 17 are lower-middle-income countries[34] and 24 are upper-middle-income countries[35]. If one would treat upper-middle-income countries and high-income countries as equal treaty partners that are able to mitigate potentially negative effects of bilateral tax treaties, or gain from treaties through increased FDI flows, then roughly 26% of the Dutch tax treaty network can be said to be potentially damaging poor countries revenue through tax avoidance through the Netherlands. The current allocation of taxing rights in bilateral tax treaties reduces tax rates on passive income in source countries, which leads to revenue losses. Given that there is no statistical evidence that these losses in tax revenues are offset by an increase in FDI, this reduction in tax rates has serous negative effects in developing countries. There are clear signs that the Netherlands, like other jurisdictions with a large bilateral DTA network, is used for treaty shopping, leading to a reduction of tax payments by large multinational corporations. Conduit jurisdictions increase the burden of revenue loss without enlarging the invested stock of capital as they are merely used as a conduit. The Dutch government reiterates that the fiscal regime is beneficial to the Netherlands. The question remains whether these gains for the Netherlands are proportionate to the loss developing countries endure. To conform to international and national obligations regarding policy coherence for development, the Netherlands should therefore reconsider its tax policies. Recent moves by the Dutch government to introduce anti-abuse measures in treaties with developing countries are welcome but insufficient in closing the main loopholes that allow for harmful tax planning.

Bilateral investment treaties provide for legal protection for foreign investors, with the ability to sue governments in international arbitration in the event that the treaty protections are alleged to have been breached. Increasingly, human rights law arguments have, mainly as a defence by states, arisen in investor-state arbitrations.[36] MNCs incorporating in the Netherlands with head offices or mailbox

[29] For instance, the Netherlands has a fiscal unity regime providing for a tax consolidation of companies within a group and therefore to freely offsetting profits and losses among group members as well as offering advance tax rulings giving certainty on future tax positions.

[30] There is not withholding tax (WHT) on outgoing royalties and interest payments and the applicable WHT on dividends is easy to circumvent.

[31] See for example: *Yahoo, Dell Swell Netherlands' $13 Trillion Tax Haven*. Jesse Drucker - Jan 23, 2013 http://www.bloomberg.com/news/2013-01-23/yahoo-dell-swell-netherlands-13-trillion-tax-haven.html

[32] Treaty overview as of 1 January 2013. All countries that have a DTT with the Netherlands are included. The selection is not based on the substantive content of the DTTs. The overview includes Kirgizstan and Turkmenistan, the treaties for which are not available in the Ministry of Foreign Affairs online treaty dabase, but which are included on the list of treaties provided by the Ministry of Finance. For a full list, see http://www.rijksoverheid.nl/onderwerpen/belastingen-internationaal/documenten-en-publicaties/circulaires/2013/01/01/verdragenoverzicht-op-het-gebied-van-directe-belastingen.html

[33] Low-income countries: Bangladesh, Ethiopia, Ghana, Kyrgyzstan, Malawi, Uganda, Zimbabwe (7).

[34] Lower-middle-income countries: Armenia Egypt Georgia India Indonesia Moldova Mongolia Morocco Nigeria Pakistan Philippines Sri Lanka Turkmenistan Ukraine Uzbekistan Vietnam Zambia (17).

[35] Upper-middle-income countries: Albania Argentina Azerbaijan Belarus Bosnia-Herzegovina Brazil Bulgaria China, Jordan Kazakhstan Latvia Lithuania Macedonia Malaysia Mexico Panama Romania Russian Federation South Africa Suriname Thailand Tunisia Turkey Venezuela (24).

[36] H. Mann, 'International investment agreements, business and human rights: key issues and opportunities' 13-14, IISD 2008.

companies can benefit from Dutch bilateral investment treaties (BITs) by making use of investor-state dispute settlement, typically through the World Bank's International Centre for the Settlement of Investment Disputes. There are currently around 95 BITs in force in the Netherlands.[37] The Netherlands has very broad definitions of investor and investment in its BITs and as such they allow mailbox companies to benefit from Dutch bilateral investment treaties by making use of the investor-state dispute settlement.[38] SOMO research has shown that MNCs investing abroad have been using Dutch BITs to sue host-country governments for over $100 billion for alleged damages to the profitability of their investments.[39] Several states, including South Africa, Canada and Belgium are involved in bringing investment treaties more in line with modern human rights law and environmental obligations. But most investment treaties, including the Dutch, are silent on the rights of stakeholders other than investors. An investment structure through the Netherlands not only allows companies to use Dutch BITs to sue host-country governments but also to put pressure on governments against legislation that could compromise profitability. As such, protection under a BIT can work preventatively by stopping progressive legislation (from a human rights perspective) from being introduced as well as retrospectively by taking governments to court when they have implemented legislation.

International investment treaties inherently limit the domestic policy space of states. The Human Rights Council, in the framework of the UN Guiding Principles on Business and Human Rights, calls on states to ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements. The Dutch government does not, however, seem to recognise that extensive investor protections enable easy circumvention of economic, social or environmental regulation and thereby negatively impact on the rights to food, education, water, health care, a reasonable standard of life, work and development. In relation to the wider policy context, there is scant recognition in the Netherlands that investor–state dispute settlement based on broad-based BIT definitions can pose a danger to policy space and the safeguarding of human rights, public goods and interests. The Dutch government claims to support companies in fulfilling their responsibility to respect human rights. But as we have seen, at the same time Dutch investment policy currently forms a barrier to the fulfilment of these intentions. SOMO thinks it is definitely possible to make a swift change for the better.

On the link between Dutch tax and investment treaties, the case of Mongolia offers an interesting example. Late 2012, Mongolia cancelled its DTAs with the Netherlands, Luxemburg, Kuwait and the United Arab Emirates because, according to the Mongolian Ministry of Finance, these jurisdictions are primarily used for tax avoidance by large extractive industry companies. The Mongolian Ministry of Finance calculated that as a result of the above-named four treaties the mining project Oyu Tolgoi alone enjoyed unintended tax savings of 45 million euro. The project is a joint venture between the Mongolian government, which owns 34% and Turquoise Hill of Canada, which owns the remaining 66%. Turquoise Hill Resources is majority owned by Rio Tinto. The tax advantages for the investors lie in lower withholding tax rates in Mongolia on outgoing payments of dividends, interest, royalties and reimbursement for technical services laid down in those treaties when compared to existing domestic rates. Apart from the details of this case, a Rio Tinto spokesman told Reuters (2013) in an email that the cancellation of the Dutch treaty will not affect Oyu Tolgoi's use of its Dutch holding company, because the firm has a separate investment agreement with Mongolia which "stabilizes" treaties that were in force in 2009. As Mongolia and the Netherlands have concluded an investment treaty with an umbrella clause, this treaty can be invoked by Rio Tinto to sue the host state for violating the stabilisation agreement.

[37] For an overview of BITs signed by the Netherlands see http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html
[38] International Centre for the Settlement of Investment Disputes, https://icsid.worldbank.org/ICSID/Index.jsp (accessed 20 February 2013).
[39]SOMO, 'Dutch Bilateral Investment Treaties. A gateway to 'treaty shopping' for investment protection by multinational companies', 2012, p. 29, available at http://somo.nl/publications-en/Publication_3708, (accessed 20 February 2013).

**Additional remarks on the impact of Dutch fiscal and investment policies and treaties on human rights**

SOMO argues that the Dutch investment climate and resulting tax planning through the use of mailbox companies raises a number of regulatory questions with regard to the human rights impact of these companies.

There are two important and inter-related human rights dimensions, namely, the direct human rights violations and the impact of tax avoidance in host states. SOMO has found that subsidiaries of Dutch extractive industry companies are responsible for or associated with serious human rights violations, ranging from environmental pollution damaging the health of local communities to militia violence, killings and displacements.

The second issue is the link between tax avoidance and human rights; a relatively new issue where the relationship between the fiscal aspect of operational activities, namely, revenue losses in host states, and human rights is more indirect than human rights violations directly generated by operational activities. Especially poor countries suffer through massive revenue losses by tax avoidance, and the extractive industry is shown to play a central role in these losses.

1. <u>Liability questions regarding mailbox companies and human rights violations</u>

The excessively high incorporation of businesses, in particular in high risk industries such as the extractive industry, carries liability risks. The large majority of MNCs have created mailbox companies in the Netherlands. They often fulfil crucial financing roles in the corporate group and have direct financing and ownership links with subsidiaries in countries of operation. A large number of MNCs incorporated in the Netherlands have been involved in human rights controversies around the world, as SOMO's research has shown. The massive scale of this incorporation should have regulatory consequences in domestic and treaty law for the Netherlands with regard to the extraterritorial dimension of incorporated businesses' human rights conduct, including fiscal conduct. The Dutch state is bound by international law to take regulatory action to stop companies incorporated in its jurisdiction to violate human rights (see Chapter 2 of SOMO's report). According to international agreements, the Dutch authorities are also required to provide access to justice for victims of these violations and tackle the prevailing impunity for MNCs.

2. <u>Tax avoidance/evasion and human rights (resource mobilisation)</u>

The link between a states' duty to mobilise maximum resources to realise human rights and its ability to deliver social programmes is increasingly recognised. A rights-based approach to economic policy requires fiscal policymakers, in the substantive sense, to design not only fiscal policy that avoids any direct violation of rights, but also a 'positive' tax regime that is specifically designed to promote economic rights of civil society. In a procedural sense, a rights-based approach to fiscal and other economic policy requires transparency, participation, and accountability. The fiscal framework must particularly be open and transparent, granting all "stakeholders," including civil society and the wider public, access to full and timely information regarding the design, implementation and impact of tax law and policy.

The same principles apply to fiscal policies of home states of businesses that have an extraterritorial impact. Tax avoidance and evasion have serious human-rights related risks that are enabled by the Dutch fiscal and investment climate. Whilst the Dutch state cannot ensure that a host state mobilise maximum resources to realise human rights, the Dutch domestic and treaty policy affects fiscal policies in host states by attracting businesses to incorporate in the Netherlands that avoid paying taxes in host states, thereby negatively impacting on tax payments and business regulation in those states. The Dutch state is therefore in a unique position to positively influence the fiscal conduct - as well as to regulate the human rights conduct - of businesses incorporated through parent companies and/or (financial) holding companies in its jurisdictions. The Maastricht Principles reiterate the obligations of states to take deliberate, concrete and targeted steps, separately and jointly, through international cooperation, to create an international enabling environment conducive to the universal fulfilment of ESCRs, including in matters relating to finance and taxation.[40] These state obligations should lead to explicit cooperation and anti-abuse articles being integrated in tax treaty law to avoid the erosion of the taxable income base in host states.

The potentially negative impact of tax avoidance to human rights and development is particularly pertinent in the case of so-called private sector development, whereby companies receive development-earmarked state support for businesses operations in developing countries. The Netherlands, increasingly, provides development assistance through development finance institutions, Public Private Partnerships (PPPs) and directly to companies in the form of export and investment loans subsidies. The companies are not required to report as indicated on their turnover, number of employees, subsidies received, profits and tax payments on a country by country level for all countries in which they operate.[41] There are only reporting requirements on programme activities. All companies that receive support under development assistance (including PPPs) have to comply with the OECD guidelines for multinational enterprises. However, there is a lack of clarity on control, monitoring and evaluation. The Netherlands lags behind on international best practices regarding disclosure policies, often making the argument of wanting to ease the administrative burden for companies.[42] Recently, there has been an announcement to exclude companies from the programme if they use artificial corporate structures to avoid taxes in the operating country where the state supported project takes place.[43] It is as yet unknown how this will be implemented in practice.

3. The need for transparency

Mailbox companies obscure ownership relations and liabilities through the creation of highly complex corporate structures that are not accompanied by appropriate regulation. It is currently impossible to find out what the specific responsibilities are of any of the multiple entities that constitute an MNC. The lack of transparency about ownership and control structures makes it extremely hard on law enforcement agencies and impossible for watchdogs or the wider public to attribute any responsibility for anything to the over 20.000 companies incorporated in the Netherlands. Beneficial owners and directors can be hidden behind layers of special purpose vehicles, trusts, foundations, etc. The complex structures can effectively and purposefully block efforts to uncover the nature of transactions, or to trace beneficial ownership and the origin of funds.[44]

Financial opacity not only undermines good business conduct and public control, it also facilitates capital flight. Transparency about ownership, management structures and financial flows are indispensable for citizens who are seeking remedy for human rights violations by companies. This includes corporate social responsibility as well as financial reporting, as integrated reporting by MNCs on their corporate conduct necessarily involves linking non-financial with financial information of a corporate group. The implementation of existing due diligence regimes relating to the prevention and detection of financial crimes such as money laundering and bribery (corruption) as proposed by the

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[40] De Schutter, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Etop 29, http://www2.lse.ac.uk/humanRights/articlesAndTranscripts/2012/HRQMaastricht.pdf

[41] Response from the Dutch government to questionnaire, received October 2013.

[42] Lilianne Ploumen, Dutch Minister of Foreign Trade and Development, *Wat de wereld verdient: een nieuwe agenda voor hulp, handel en investeringen [What the world deserves/earns: a new agenda for aid, trade and investment]*, April 5, 2013, available from http://tinyurl.com/ovb824k.

[43] Ibid

[44] Task Force for Financial Integrity and Economic Development, Beneficial Ownership, available at http://www.financialtaskforce.org/issues/beneficial-ownership/.

IMF, for instance, would support this goal. The Netherlands is clearly lagging behind in transparency reforms, and thereby contributes to the continued accountability gap regarding the conduct of multinational corporations incorporated in its jurisdiction.

4. Closing the human rights gap

It is increasingly argued in human rights circles that a closure of the current accountability gap requires the implementation of domestic and treaty laws that have extraterritorial impact with regard to business regulation. An international and cooperative approach to the regulation of cross-border business is already being followed in the context of anti-bribery and anti-money efforts. The OECD and IMF have also called for the implementation of existing due diligence regimes that resemble the human rights due diligence activity promoted by the Guiding Principles on Business and Human Rights, relating to the prevention and detection of these financial crimes, and its extraterritorial dimension.[45]

The observed accountability gap resulting from the international legal fragmentation of companies leaves a central role to domestic and treaty measures with extraterritorial impacts. An important precondition to close the global accountability gap in the face of human rights violations that occur as a result of business activities is not only to address the responsibility of the ultimate parent and local operating subsidiaries of a multinational group; responsibility for human rights violations and corresponding regulation should also apply to other important legal entities within the group that fulfil central functions, such as group financing activities and registered head offices which might not carry out daily management but are used by a corporation to enjoy tax benefits and investment protection.

Implementing these domestic and treaty measures is a necessary and realistic way to close the gap and prevent and ensure redress of human rights violations by MNCs in areas of weak governance. The Netherlands should implement and address the expectations it has of incorporated companies (as set out in UNGP 2) in relation to the extraterritorial human rights performance of multinationals. The Commentary to the UN Guiding Principles makes a number of valuable suggestions, from imposing requirements on locally incorporated (parent) companies to reporting on the human rights performance of the whole enterprise, and to enforcement of criminal sanctions.

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[45] De Schutter et al., 'Human Rights Due Diligence: The Role of States', 2012, http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf, p.1